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## Merger Control in the European Community: The EC Regulation "On the Control of Concentrations Between Undertakings" and Implementing Guidelines

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# Merger Control in the European Community: The EC Regulation "On The Control Of Concentrations Between Undertakings" and Implementing Guidelines

*Terence P. Stewart\* & Delphine A. Abellard\*\**

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## I. INTRODUCTION

The European Community (EC) is currently adopting comprehensive new legislation within the framework of its internal market program, which is expected to transform the way business is conducted in the EC.<sup>1</sup> By December 1992, the Community should be well on its way to becoming an integrated economy,<sup>2</sup> with about 320 million consumers. Not surprisingly, the number of mergers and acquisitions in the EC across national boundaries is increasing in response to the prospects of a larger

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<sup>1</sup> *The Single European Act* [hereinafter *the Single Act*], 30 O.J. EUR. COMM. (No. L 169) 1 (1987), which was signed in February 1986 and which entered into force in July 1987, amends and complements the Two Treaties of Rome creating the European Economic Community and the European Atomic Energy Community (Euratom), March 25, 1957, 298 U.N.T.S. 11 and 298 U.N.T.S. 169 (entered into force Jan. 1, 1958), and the Treaty of Paris setting up the European Coal and Steel Community (ECSC), April 18, 1951, 261 U.N.T.S. 140 (entered into force July 23, 1952). *The Single Act* spells out certain objectives of the Community including: completion of the European internal market and the creation by 1992 of a great area without frontiers; technological development; progress towards economic and monetary union. *The Single Act* also includes measures to improve the workings of the Community's institutions and to institutionalize cooperation among Member States in the field of foreign policy. See Lonbay, *The Single European Act*, 11 B.C. INT'L. & COMP. L. REV. 31 (1988); Usher, *The Institutions of the European Communities after the Single European Act*, 19 BRACKTON L.J. 64 (1987); Campbell, *The Single European Act and its Implications*, 35 INT'L. & COMP. L.Q. 932 (1986); Berman, *The Single European Act: A New Constitution for the Community*, 27 Colum. J. Transnat'l L. 529 (1989).

<sup>2</sup> For a detailed study of the 1992 Single Market project, see HAFBAUER, *EUROPE 1992: AN AMERICAN PERSPECTIVE* (1990); see also Jones, *Putting '1992' in Perspective*, 9 NW. J. INT'L L. & BUS. 463 (1989).

consumer base and greater market opportunities.<sup>3</sup> The new EC Regulation "On the Control of Concentrations Between Undertakings"<sup>4</sup> is one element of the EC's ambitious program<sup>5</sup>. It represents the European Community's first attempt to establish a trans-national systematic merger control system and is intended to become the cornerstone of the EC's competition policy.

The Regulation gives the European Commission the jurisdiction to scrutinize mergers and joint ventures of a "Community dimension". The Commission is to follow the Regulation's criteria to determine whether the proposed action creates or strengthens a "dominant position" and thereby impedes competition in the EC. Companies planning mergers or joint ventures are required to notify the Commission of planned actions and get clearance. The new Regulation has been the subject of several commentaries since its adoption by the Council of the European Communities on December 21, 1989.<sup>6</sup>

The Commission has since published important Guidelines on how

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<sup>3</sup> Recent surveys have traced the sharp increase in European cross-border mergers and acquisitions. In 1989, Peat Marwick for example reported that the number of such deals in Europe rose to 1,314 from 847, with a respective increase in value to \$50 billion from \$31.6 billion. Wall St. J., Jan. 29, 1990, at A5.

In sharp contrast to the rise of activity in Europe, merger and acquisition activity in the United States has significantly decreased. "Figures from IDD Information Services show the value of United States M&A [Mergers and Acquisitions] activity dropping 43.3 per cent to \$112.4bn from 198.3bn in the first half of the year. . . . The dollar value of European deals rose to \$66.1bn from \$55.6bn, while the number of deals rose 22.7 per cent to 2,184." Fin. Times, July 3, 1990, at 22, col. 1."

<sup>4</sup> Council Regulation No. 4064/89 on the Control of Concentrations Between Undertakings (hereinafter "the Regulation"), 32 O.J. Eur. Comm. (No. L 395) 1 (1989). Because of errors in the various language versions of the Regulation as originally published, a corrected version of the Merger Control Regulation was published. 33 O.J. Eur. Comm. (No. L 257) 13 (1990). The Changes in the English version are mostly of minor significance.

<sup>5</sup> The European directive on takeovers and the European Company Law project also provide an important contribution to the development of a legal framework for businesses in the EC. The aim of the so-called Thirteenth Company Law Directive is to govern the way European takeovers are conducted. *Commission Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and other General Bids*, 32 O.J. EUR. COMM. (No. C 64) 8 (1989); see also Basaldua, *Towards the Harmonization of EC-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law*, 9 NW. J. INT'L L. & BUS. 487 (1989); *Common Rules for Takeovers in the EC Begin to Take Shape*, Fin. Times, Jan. 24, 1990, at 2; Richardson, *Removing Barriers to Company Takeovers*, EIU EUROPEAN TRENDS No. 1, at 67 (1990). For the European Company project, see *Statute for the European Company: Commission Memorandum to Parliament, the Council and the Two Sides of Industry*, BULL. EUR. COMM. Supp. 3/88, at 20. See also Carreau and Lee, *Towards a European Company Law*, 9 NW. J. INT'L L. & BUS. 501 (1989).

<sup>6</sup> See e.g. Jacquemin, *Horizontal Concentration and European Merger Policy*, 34 EUR. ECON. REV. 539-550; Fine *EC Merger Control in the 1990s: An Overview of the Draft Regulations*, 9 NW. J. INTL. L. & BUS. 513 (1989).

the regulation will be implemented.<sup>7</sup> The Regulation on Notifications outlines the Commission's review procedure for a proposed concentration. Most critical, a form to be used by companies to notify the Commission of a Concentration is provided as an Annex to the Regulation on Notifications. The Notice regarding Ancillary Restraints defines which concentration related restrictions will be assessed under the merger control provisions. And the Notice Regarding Concentrative and Cooperative Operations defines joint ventures which will be considered "concentrations" and therefore reviewed under the new Regulation. Much like the United States Department of Justice Guidelines on United States merger control,<sup>8</sup> the EC Commission Notices do not have the effect of law but rather articulate the principles the administering authorities will use in applying the Regulation.<sup>9</sup> In any event, these Guidelines promise to play a crucial role in the development of the EC's merger control system.

On September 21, 1990, the Regulation entered into force. It is directly applicable in the Member States<sup>10</sup> and affects foreign and Euro-

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<sup>7</sup> *Commission Regulation (EEC) No 2367/90 of 25 July 1990 on the Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings*, [hereinafter "Regulation on Notifications"], 33 O.J. EUR. COMM. (No L 219) 5 (1990); *Commission Notice Regarding Restrictions Ancillary to Concentrations*, [hereinafter "Notice Regarding Ancillary Restraints"], 33 O.J. EUR. COMM. (No C 203) 5 (1990); *Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings*, [hereinafter "Notice Regarding Concentrative and Cooperative Operations"], 33 O.J. EUR. COMM. 10 (No. C 203) (1990).

<sup>8</sup> In 1968, the U.S. Department of Justice issued merger guidelines indicating the standards used to determine whether to challenge a merger. 1968 United States Department of Justice Merger Guidelines, reprinted in 2 Trade Reg. Rep. (CCH) para. 4510. New guidelines were published in 1982. 1982 U.S. Dep't of Justice Merger Guidelines, 47 Fed. Reg. 28,493 (1982), reprinted in 2 Trade Reg. Rep. (CCH) para 4501. The Department of Justice refined and clarified the guidelines in revisions issued in 1984. 1984 United States Department of Justice Merger Guidelines, 49 Fed. Reg. 26,823 (1984), reprinted in *The Department of Justice Manual*, 1990-1 Supp., vol. 6, at 7-2A.100 (Prentice Hall, 1990) [hereinafter "1984 US Merger Guidelines"]. For a detailed analysis of the United States merger guidelines, see Salop and Simons, *A Practical Guide to Merger Analysis*, 29 ANTITRUST BULL. 663 (1984).

<sup>9</sup> For a discussion of the importance of the U.S. Department of Justice Guidelines, see Cohen & Sullivan, *The Herfindahl-Hirschman Index and the New Anti-Trust Merger Guidelines: Concentrating on Concentration*, 62 TEX. L. REV. 453, 453-458 (1983).

<sup>10</sup> Article 198 of the EEC Treaty defines four instruments which the Community institutions can use to establish law or policy:

- (i) regulations which are laws directly applicable and binding in the Member States;
- (ii) directives, which are addressed to Member States and which lay down the results to be achieved, but leave the Member States free to choose form and methods. Directives are often used for long-term goals and politically sensitive issues;
- (iii) decisions, which are binding on those to whom they are addressed, Member State, legal entity, or private person. In the competition field, decisions issued by the Commission can have a far-reaching impact on the behavior of companies;
- (iv) recommendations and opinions, which have no binding force.

pean companies alike. United States companies are already subject to the EC's jurisdictional "long-arm"; a European Court of Justice decision held that non-EC firms violate EC antitrust rules when their conduct has an anti-competitive effect in the European Community.<sup>11</sup> Moreover, United States companies have significant and established interests in the future single market. In 1988, United States acquisitions in Europe nearly tripled compared with 1987. In 1989, United States corporations were involved in a total of 182 deals and spent ECU 13.8 billion (\$16.6 billion) in European cross-border mergers and acquisitions.<sup>12</sup> For the same period, French firms spent ECU 9.7 billion, while West German firm spent ECU 6.7 billion.<sup>13</sup>

This article shall examine the Regulation's practical applications and discuss its impact on business. At the outset, the article notes several principles necessary to an effective merger control system. These principles are referred to throughout the analysis, and indicate areas of strength and weakness in the new Regulation. In addition to attempting a comprehensive analysis of the new European regulation, the article makes reference to United States merger control experience where comparisons prove instructive. In the conclusion, the authors suggest that where the new regulation falls short of some of these principles, the effectiveness of the regulatory structure is undermined and its usefulness as a guide for businesses and administrators is sacrificed.

More specifically, the article begins by reviewing the goals of the

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EC Commission, *EEC Competition Policy in the Single Market*, 11 (1989).

<sup>11</sup> *Ahlstrom Osakeyhtio v. Commission des Communautés Européennes*, 31 O.J. EUR. COMM. (No. C 281) 16, 17 (1988); *Common Mkt. Rep. (CCH)* para. 18,596 (1988). This case is also known as the "Wood Pulp" case. Most of the companies taking part in the concerted practice held unlawful by the Commission had no subsidiaries in the EC. The Commission, nonetheless imposed fines on them ranging from ECU 50,000 to ECU 250,000. The Court rejected the argument that the practice was outside the territorial scope of Article 85 of the EC Treaty. It held that the decisive factor in deciding whether the Commission had jurisdiction was where the restrictive practice was implemented. The Court found that the delivery of wood pulp at concerted prices occurred in the European Community and thus, anticompetitive behavior of the pulp producers took place within the Community. The Court further found that the location of the companies was immaterial since Article 85 applies to any activity which takes place within the Community. For a detailed analysis of the "Wood Pulp" decision, see *Christoforou & Rockwell, European Economic Community Law: The Territorial Scope of Application of EEC Antitrust Law - the Wood Pulp Judgment, joined cases 89, 104, 114, 116, 117 and 125-29/85, European Court of Justice, 27 September 1988*, 30 HARV. INT'L L. J. 195 (1989).

<sup>12</sup> *U.S. Companies Step up European Investment*, J. Comm., Mar. 14, 1990 at 1A, col 3. Although the pace of acquisitions by American companies in Europe slowed during the first quarter of 1990, this can be viewed as a natural slowing after the important activity of 1989. See *Mergers up in Europe as Barriers Fall*, N.Y. Times, July 5, 1990, at D1, Col. 5. In the first quarter of 1990, American companies were involved in 37 deals, representing a total reported value of \$747.8 million, compared with 53 deals in the fourth quarter of 1989, with a reported value of \$4.2 billion.

<sup>13</sup> *Id.*

new Regulation and the general principles, based on the search for more legal certainty, upon which the new Regulation relies (Section I). These principles will serve as a yardstick throughout the analysis which follows. The second section underscores the need for merger control at the EC level, by reviewing the trend in recent merger activity (Section II). The third section describes the problematic treatment of mergers and acquisitions prior to the new Regulation (Section III). The sections which follow pertain directly to the new Regulation, i.e., its area of application (Section IV); the distribution of jurisdiction between the Commission and Member States (Section V); the procedure of review by the Commission (Section VI); and the appraisal of concentrations under the new Regulation (section VII). Legal difficulties raised by the new mechanism will be examined throughout. Finally, the impact of the regulation and the practical problems concerning its implementation will be assessed (Section VIII).

## II. PRINCIPLES OF EVALUATION

### A. Legal Certainty

Although 1992 has stirred interest for mergers and acquisitions among the business community, the new opportunities raise serious considerations. The Regulation, much like any law which imposes liability, may subject a business to litigation expenses, fines and sanctions, not to mention loss of financial and other resources. Thus before committing significant resources to a proposed venture, a business needs to determine with some degree of certainty that its venture will be legally viable.<sup>14</sup> Furthermore, uncertainty may lead to unreasonable antitrust fears and discourage businesses from engaging in conduct which may improve efficiency and heighten competition. Thus, certainty is not only a foremost concern for businesses, but is also a concern for lawmakers and administrators who seek to promote efficient and competitive business behavior.

Legal certainty in antitrust regulation has traditionally been a major concern. Courts and administrators in the EC and United States have long discussed the need for certainty,<sup>15</sup> and the U.S. Department of Justice reiterated this concern in its 1982 and 1984 Merger Guidelines:

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<sup>14</sup> For a discussion of legal certainty under the existing U.S. and EC clearance procedures, see McCullough, *The Continuing Search for Legal Certainty: Suggestions for Improving U.S. and EEC Antitrust Clearance Procedures*, 6 NW. J. INT'L L. & BUS. 803 (1984).

<sup>15</sup> For a discussion of certainty concerns in the United States, see Baker, *Antitrust in the Sunshine*, 21 ST. LOUIS U.L.J. 347, 348 (1977) ("To facilitate an understanding of what conduct is and is not acceptable should be a major goal of an enforcement agency."). In the EC, see C. Kerse, *EEC ANTITRUST PROCEDURES* 212 (1981) ("The principle of legal certainty . . . has an established place as a part of the general principles of Community law.").



“[b]y stating its policy as simply and clearly as possible, the Department hopes to reduce the uncertainty associated with the antitrust laws of this area.”<sup>16</sup> Furthermore, the means to achieve greater certainty has been a continuing source of tension in the United States system.<sup>17</sup>

### B. The New Regulation's Key Principles

The Commission announced several “key principles” when it published the new Regulation in 1989.<sup>18</sup> These principles stem from its desire for improved legal certainty. The Regulation seeks to enhance certainty in three areas: the jurisdiction to review mergers, the definition of rules under which mergers are to be evaluated, and the Commission clearance procedures.<sup>19</sup>

First, the Regulation aims to remove the uncertainty which results from the dual jurisdiction. In the past, both the Commission and the Member States' authorities could find themselves competing for the jurisdiction over proposed mergers and joint ventures. The new Regulation identifies one authority with exclusive power to approve or block a proposed concentration.<sup>20</sup> To achieve this end, the EC lawmakers attempt to establish a clear distinction between mergers with “a Community dimension,” where the Commission will have the power to intervene, and mergers whose impact is in the territory of one Member State, where that Member State's national authority will retain jurisdiction.<sup>21</sup>

Second, EC lawmakers attempt to define clear rules under which mergers would be evaluated. The litmus test is whether the merger creates or strengthens a “dominant position” and thereby impedes competition in the European Community.<sup>22</sup>

Third, the new Regulation seeks to enhance certainty up front by requiring firms to notify the Commission before the merger occurs.<sup>23</sup> In addition, it imposes strict time limits on the Commission to respond to notifications, thus reducing the period of uncertainty and accompanying expense.

In sum, the new regulation attempts to establish a “one-stop” proce-

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<sup>16</sup> 1984 US Merger Guidelines, *supra* note 10, at 7-30.

<sup>17</sup> See Thirty-Second Annual Meeting of the ABA Section of Antitrust Law, *Introductory Remarks by Phillip A. Proger*, 53 ANTITRUST L.J. 323 (1984), 323 citing *Report of the Attorney General's National Committee to Study Antitrust Laws* (1955).

<sup>18</sup> See EC BULL. Dec. 1989, at 41.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Article 2 of the Regulation.

<sup>23</sup> See Article 4 of the Regulation.

ture to address concerns of certainty.<sup>24</sup> Under this procedure, there would be one administering authority reviewing mergers under a single body of rules.<sup>25</sup>

Before examining the Regulation in terms of these principles it is necessary to understand the circumstances surrounding its creation.

### III. INCREASED MERGER ACTIVITY IN THE EUROPEAN COMMUNITY.

#### A. Costs and benefits of mergers from the firm's point of view

As 1992 and the prospect of a European economic unification approaches, businesses are looking for the best way to take advantage of the single market of 320 million consumers.<sup>26</sup> It is particularly important in global industries for firms to sell to the European Community whose consumers may be considered "advanced and sophisticated buyers."<sup>27</sup> Firms wishing to expand must choose between internal growth or external growth by merger or acquisition. Through a merger or acquisition, a firm can obtain assets that are already in place and this may provide a faster return on investment than entering the market through internal growth.<sup>28</sup> Mergers and acquisitions enable firms to immediately enter

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<sup>24</sup> EC Competition Commissioner Sir Leon Brittan stated, "it's a one-stop shop that we are offering to business." 1992-The External Impact of European Unification, April 7, 1989, vol. 1, no. 1, at 12. See also Fine, *supra* note 6, at 523.

<sup>25</sup> Nat'l L.J., Feb. 26, 1990, col.1, at 31.

<sup>26</sup> This market could even be larger if the EC accepts more members in the future. The applications of Malta and Cyprus are presently being considered. Turkey and Austria are possible candidates, although the issue of the neutrality of Austria would first have to be solved (Ireland too has a neutral status and belongs to the EC). Applications from EFTA countries and Eastern Europe are expected in the next few years. Moreover, EFTA is increasingly adopting the same standards as the EC, and there are some talks about a European Economic area that would constitute a free trade zone between the EEC and EFTA. This would represent a market of 380 million people. Furthermore, it is not inconceivable that Eastern European countries become associated to the European Economic Community in the near future. For a discussion of the Malta and Cyprus applications, see *EC Enlargement, Mediterranean Minnows*, THE ECONOMIST, July 21, 1990, at 50. For a discussion of the European Economic Space between the EEC and EFTA, see *Finland Out in the Cold*, THE ECONOMIST, Sept. 8, 1990, at 58. The term European Space has been replaced by European Economic Area (EEA). See *Sweden and Norway, Push and Pull*, THE ECONOMIST Nov. 3, 1990, at 62.

<sup>27</sup> M. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 607 (1990).

To sustain competitive advantage in global industries, a firm must sell to all significant country markets. Particularly important are nations that contain advanced and demanding buyers. All of the most advanced and sophisticated buyers are rarely located at home, even under the best circumstances. Identifying sophisticated buyers in other nations will help the firm understand the most important new needs and create pressures that stimulate rapid progress in products and services. Nations with sophisticated buyers may well be where leading international competitors are based, making it all the more challenging to penetrate them.

<sup>28</sup> Horizontal Mergers and Competition Policy in the European Community, EUR. ECON. No. 40 (May 1989), Commission of the EC, Directorate-General for Economic and Financial Affairs, [hereinafter "Horizontal Mergers and Competition Policy in the EC"] at 14.

into new geographical and product markets and thereby exploit the advantage of being first in place. Flexibility is another benefit. Entry into a new product or geographical market is less risky by acquisition of an existing company than by internal growth.<sup>29</sup> Exit is also easier since it is quicker to sell a financial stake than to dispose of fixed assets.<sup>30</sup> Furthermore, acquisition of a competitor increases the acquirer's market share and enlarges its market without creating excess capacity.<sup>31</sup>

Economies of scale is another significant benefit attributed to mergers. Firms may attain the optimum efficient scale through mergers and acquisitions. They can maximize the benefits of the division of labor, spread fixed costs over large volumes of output and combine the factors of production in a more efficient manner.<sup>32</sup> Reduction in transaction costs amounts to further economies of scale. Where asymmetric access to information or to specific assets and human resources exists, it may be cheaper to merge with a firm that already possesses the required information, assets, brands, distribution networks or management than to obtain these resources through the market.<sup>33</sup> Firms may also benefit from "scope economies" by extending their product range. "Scope economies" posit that the cost of producing two products together is lower than the sum of the cost of producing them separately.<sup>34</sup> Above all, mergers and acquisitions provide firms with the size and means necessary to finance research and development and thereby lead to technological progress.<sup>35</sup>

The possible drawbacks of mergers and acquisitions are akin to those typically associated with large organizations. Poor communica-

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<sup>29</sup> *Id.* at 15.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 14.

<sup>32</sup> *Id.* at 17.

<sup>33</sup> *Id.* at 20.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> Adams and Brock, *The Bigness Mystique and the Merger Policy Debate: An International Perspective*, 9 NW. J. INT'L. L. & BUS. 1 at 5-7 (1988); see also J. Shumpeter, *Capitalism, Socialism, and Democracy* at 81-106 (1942).

As soon as we go into details and inquire into the individual items in which progress was most conspicuous, the trail leads not to the doors of those firms that work under conditions of comparatively free competition but precisely to the doors of the large concerns - which, as in the case of agriculture machinery, also account for much of the progress in the competitive sector - and a shocking suspicion dawns upon us that big business may have had more to do with creating that standard of life than with keeping it down." *Id.* at 82.

Thus it is not sufficient to argue that because perfect competition is impossible under modern industrial conditions - or because it always has been impossible - the large-scale establishment or unit of control must be accepted as a necessary evil inseparable from the economic progress which it is prevented from sabotaging by the forces inherent in its productive apparatus. What we have got to accept is that it has come to be the most powerful engine of that progress and in particular of the long-run expansion of total output. . . *Id.* at 106.

tion, failure to cut out costly duplication, and insufficient coordination may restrict flexibility.<sup>36</sup> Some studies suggest that there are no gains in profitability and growth from mergers.<sup>37</sup> Reasons for failure of mergers and acquisitions include paying too high a price for an acquisition, overestimating the potential of the acquired business and inadequately managing the process of integration after the acquisition.<sup>38</sup> Some who warn against the rush for cooperation between competitors in Europe argue that although the short-term effects may look favorable (lower overhead costs and less duplicated efforts combined with less competition), in the long run dominant firms may not innovate and update because of the lack of competing local rivals and problems of coordination.<sup>39</sup> Studies by the European Commission have concluded that mergers and acquisitions are not a panacea to improve competitiveness and that the general presumption in favor of horizontal mergers is not justified.<sup>40</sup>

The above arguments deal with the threat to competition created by an increasing merger activity and should be kept in mind when evaluating the new merger Regulation. From an United States firm's perspective however, mergers and acquisitions remain an attractive way to take advantage of the European Market. The negative results from empirical research on the success of mergers in Europe do not take into account the dynamic market conditions that are now being created by the 1992 program.<sup>41</sup> Furthermore, there is an important distinction between defensive mergers of companies which formerly competed in the same market, and mergers designed to gain access to new markets.<sup>42</sup>

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<sup>36</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 20.

<sup>37</sup> See Adams & Brock, *supra* note 35. Adams and Brock demonstrate that the creation of European industrial giants through mergers and acquisitions during the 1960s and 1970s did not improve efficiencies. They also compare the European experience to the superior efficiency-creating effect of the deconcentration that took place in Japan. See also Schmidt, *The Bigness Mystique and the Merger Policy Debate: A Comment from West Germany*, 9 NW. J. INT'L L. & BUS. 618 (1989); Saxonhouse, *Japan and the Bigness Mystique*, 9 NW. J. INT'L. & BUS. 612 (1989). For studies questioning the enhanced efficiency from mergers from an American point of view, see Herman & Lowenstein, THE EFFICIENCY EFFECTS OF HOSTILE TAKEOVERS: AN EMPIRICAL STUDY, WORKING PAPER NO. 20 (Jan. 1986) (available at Center for L. & Econ. Stud., Colum. Univ. Sch. of L.); Ravenscraft & Scherer, Mergers and Managerial Performance (Jan. 1986) (Federal Trade Comm'n Working Paper No. 137); Ravenscraft & Scherer, The Profitability of Mergers (Jan. 1986) (Federal Trade Comm Working Paper No. 136); Mueller, *Mergers and Market Share*, 67 REV. ECON. & STATS 259 (1985); *Diversification Blues*, MERGERS & ACQUISITIONS, May-June 1987, at 13-14.

<sup>38</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 22.

<sup>39</sup> Porter, *Europe's Companies After 1992, Don't Collaborate, Compete*, THE ECONOMIST, June 9, 1990 at 17.

<sup>40</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 22.

<sup>41</sup> *Id.*

<sup>42</sup> As Professor Michael Porter of the Harvard Business School explains: "...expanding internationally is more important than dominating the home market. Mergers giving access to foreign

One of the major concerns of non-EC companies "is that they will be discriminated against in gaining access to the EC market after 1992".<sup>43</sup> However, EC officials have consistently stated that a unified EC market implies increased competition from both EC companies and non-EC companies.<sup>44</sup> By establishing a presence in the EC now, non-EC companies can benefit from equal treatment and equal opportunity within the EC.<sup>45</sup> Article 52 of the Treaty of Rome grants nationals of EC countries a right of establishment in other EC countries.<sup>46</sup> Two requirements must be satisfied to benefit from the Treaty's right of establishment: the company must be formed under the law of a Member State, and it must have its registered office, central administration or principal place of business within the EC.<sup>47</sup> The Treaty of Rome also provides that nationals of EC Member States shall have equal investment opportunities in each others' countries.<sup>48</sup> However, the qualification of "EC

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markets are far better for dynamism than combining with leading domestic competitors. St-Gobain's purchase of a British glass distributor, for instance, is more likely to enhance competitive advantage than is Siemens's takeover of its computer-making rival Nixdorf." Porter, *supra* note 39, at 19. For example, in the first quarter of 1990, McGraw-Hill Inc. Standard & Poor's Ratings Group bought financial rating services in Britain and France. The group's President, Leo O'Neill declared, "the most efficient way to establish a business abroad is to buy companies there." *Mergers up in Europe as Barriers Fall*, N.Y. Times, Jul. 5, 1990, at D1, col. 5.

<sup>43</sup> Heleniak & Farrell, *Developments in the Law of Mergers and Acquisitions: Cross-border Transactions*, 2 20TH ANN. INST. SEC. REG. 143 (1988) at 203.

<sup>44</sup> *Id.* at 205-206.

<sup>45</sup> *Id.* at 203.

<sup>46</sup> Article 52 of the Treaty of Rome states:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

<sup>47</sup> Article 58 of the Treaty of Rome states:

"Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

<sup>48</sup> Article 221 of the Treaty of Rome states:

Within three years of the entry into force of this Treaty, Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 58, without prejudice to the application of the other provisions of this Treaty.

company" is not restricted by any condition of actual control or nationality of shareholders or management.<sup>49</sup> Thus, EC companies wholly owned by non-EC companies are included under the establishment provision of the Treaty of Rome.<sup>50</sup> Non-EC-based companies as well as EC-based companies will continue to use mergers and acquisitions as part of their overall strategy to improve their position within the "Single Market." Effective use of these options requires an awareness of the different laws and regulations, whether at the national or at the Community level, that govern the different aspects of mergers and acquisitions.<sup>51</sup>

### B. Forms of merger or cooperation between firms.

External growth can be sought in several ways among which are full "legal mergers", takeovers, and joint ventures. They all involve some sort of economic cooperation.<sup>52</sup> The choice of a particular technique depends on criteria such as the speed, the degree of flexibility and reversibility of the operation.<sup>53</sup> In a "legal merger", the assets and liabilities of two or more companies are transferred to a single newly-formed or existing company.<sup>54</sup> The acquired companies disappear into a new company without a liquidation procedure, and their shareholders receive shares in the acquiring or newly-formed company.<sup>55</sup> Compared to alternative forms, a legal merger leads to a more thorough integration of the companies and is reversible only at high cost.<sup>56</sup> Until a framework of European legal rules is completed, intra-European mergers must be carried out under national company laws.

In a takeover situation, the acquiring company acquires a sufficient number of shares to obtain control of another company. Takeovers may

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<sup>49</sup> Heleniak & Farrell, *supra* note 43, at 204. However, this interpretation is controversial and some argue that actual control should be taken into consideration in this context.

<sup>50</sup> Investment regulations of the Member States have in fact restricted this possibility and the decision of whether or not to allow the establishment of a branch by a foreign company is currently in the discretion of national authorities. Heleniak & Farrell, *supra* note 43, at 204. However, the importance of E.C. laws is increasing significantly and can be expected to supplant some of the national restrictions.

<sup>51</sup> For a description of the information publicly available about a target, the scope for the target to frustrate or delay the acquirer's action and the regulation of takeover activities in the EC countries, see, MacLachlan & Mackesy, *Acquisitions of Companies in Europe-Practicability, Disclosure, and Regulation: an Overview*, 23 INT'L L. 373 (1989).

<sup>52</sup> However, for purpose of the Regulation, joint ventures are not considered to result in a "concentration" when their object or effect is the coordination of the conduct of companies which remain independent. The Regulation, art. 3 para. 2. See *infra* notes 135-210 and accompanying text.

<sup>53</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 28, at 16.

<sup>54</sup> *Id.* at 14.

<sup>55</sup> Basaldua, *supra* note 7, at 488.

<sup>56</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 14.

involve purchasing shares from other companies, buying up shares on the stock market or public takeover bids. Unlike "legal mergers", the companies whose shares are acquired remain in existence.<sup>57</sup>

Economic cooperation between firms can also take the form of contractual arrangements under which separate firms work together on a project, as separate legal entities.<sup>58</sup> Such arrangements are highly flexible and easily reversible. A joint venture is another form of a cooperative agreement, whereby two or more companies combine to create a new legal entity. For the purpose of competition policy, joint ventures may present the same risks as mergers.<sup>59</sup> Thus, the new Regulation provisions on mergers control include certain joint ventures within its scope.<sup>60</sup>

The number of mergers in the EC has sharply increased in recent years. The total number of mergers and acquisitions of majority holdings involving at least one of the top 1,000 EC firms has been steadily increasing since 1984.<sup>61</sup> Such mergers have grown from 296 in 1985/86 to 415 in 1986/87 to 558 in 1987/88.<sup>62</sup> A breakdown of these figures shows that mergers of firms from the same Member State increased from 188 in

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<sup>57</sup> Basaldua, *supra* note 7, at 488.

<sup>58</sup> A European legal framework is now available for such cooperation arrangements. The European Economic Interest Grouping ("EEIG") was created on July 25, 1985 and became effective on July 1, 1989. 28 O.J. EUR. COMM. (No. L 199) 1 (1985). A total of five EEIGs were registered in 1989. Commission of the EC, 23rd General Report of the Activities of the European Communities (1989) at 121. See also Carreau & Lee, *supra* note 7.

<sup>59</sup> See the 1977 "De Laval-Stork" decision, *Commission Decision of 25 July 1977 relating to a proceeding under Article 85 of the EEC Treaty*, 20 O.J. EUR. COMM. (No. L 215) 11 (1977). The Commission found that a joint venture could have the same economic effects as a partial merger where the partners put their existing production facilities or marketing organizations into the joint venture and ceased to be actual or potential competitors. In that case, the Commission found that Article 85(1) was applicable to the joint venture, but found that under Article 85(3) it was exempt from the Article 85 prohibition. See *infra* notes 74, 82-94 and accompanying text.

<sup>60</sup> See *infra* notes 142-188 and accompanying text.

<sup>61</sup> The EC Commission publishes in its annual Report on Competition Policy an analysis of mergers, acquisitions and joint ventures involving Community-scale firms. The analysis is based on data gathered from the specialist press on operations involving at least one of the 1,000 largest firms in the EC, according to their financial data. The data is divided in three categories: (i) mergers, including both takeovers and voluntary amalgamation, and acquisition of majority holdings in companies; (ii) acquisitions of minority holdings; and (iii) industrial and commercial joint ventures. COMMISSION OF THE EUROPEAN COMMUNITY, 16TH REPORT ON COMPETITION POLICY 216 (1987). The data is further broken down in: national operations, *i.e.* mergers of firms from the same Member State; Community operations, *i.e.* mergers from different Member States; international operations, *i.e.* mergers of firms from Member States and third countries that have an effect on the Community market. COMMISSION OF THE EUROPEAN COMMUNITY, 18TH REPORT ON COMPETITION POLICY 234 (1989).

<sup>62</sup> For 1985/86, see 16TH REPORT ON COMPETITION, *supra* note 64, at 217 (1987). The reference period is June 1985 to May 1986. *Id.* at 216. For 1986/87, COMMISSION OF THE EUROPEAN COMMUNITY, 17TH REPORT OF COMPETITION POLICY 228 (1988). For 1987/88, see COMMISSION OF THE EUROPEAN COMMUNITY, 18TH REPORT ON COMPETITION POLICY 234 (1989).

1985/86, to 290 in 1986/87, to 321 in 1987/88. For the respective time periods, mergers of firms from different Member States in the EC went from 65, to 90, to 146 and mergers of firms from Member States and third countries with effect on the Community market went from 43, to 35, to 91. In 1987/88, the increase in merger cases in the industrial sector (excluding services) was accounted for entirely by international<sup>63</sup> (+241%) and Community operations<sup>64</sup> (+48%).<sup>65</sup> A significant number of cases involved combined revenues exceeding ECU 5,000 million (108 cases) and ECU 10,000 million (60 cases).<sup>66</sup> The number of joint ventures (including national, Community and international) has shown similar increases. There were 102 joint ventures in 1985/86, 121 in 1986/87, and 164 in 1987/88.<sup>67</sup> For joint ventures in the industrial sector involving extra-Community firms in 1987/88, the United States came first with 16 operations out of a total of 35 cases, followed by Japan with 5 cases.<sup>68</sup>

Interestingly enough the motivation behind mergers changed in 1987/88. The predominant motivation for mergers became the reinforcement of market position in light of the emerging single market.<sup>69</sup> For the same period, the primary motivation behind joint ventures was research and development.<sup>70</sup> The EC Commission indicates that the strong increase in Community and international operations shows that companies from the EC and other countries are preparing for 1992.<sup>71</sup> However the Commission warns that the anticipated economic benefits from the single market would be severely restricted if merger activity during the adjustment period increases monopoly power.<sup>72</sup>

Regulation of mergers and acquisitions at the European level was necessary in this context of growing activity. Regulation was also needed because control of mergers prior to the new regulations proved to be unsatisfactory.<sup>73</sup>

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<sup>63</sup> Such as defined *supra* note 61.

<sup>64</sup> Such as defined *supra* note 61.

<sup>65</sup> 18th REPORT ON COMPETITION POLICY, *supra* note 61, at 235.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 234.

<sup>68</sup> *Id.* at 239.

<sup>69</sup> *Id.* at 240.

<sup>70</sup> *Id.* at 241.

<sup>71</sup> *Id.* at 245.

<sup>72</sup> *Id.*

<sup>73</sup> The new Regulation does not cover every situation. Thus the "old" system, described *infra* in Section III, is still applicable to mergers that do not have a "European dimension".



#### IV. THE CONTROL OF MERGERS IN THE EC PRIOR TO THE NEW REGULATION

Prior to the Regulation adopted in December 1989, the European Community merger law was derived from two sources: (1) national merger laws; and (2) Community law contained in Articles 85<sup>74</sup> and 86<sup>75</sup> of the Treaty of Rome.

##### A. National Merger Laws

Several Member States already possessed their own systems of merger control prior to the adoption of the EC Regulation.<sup>76</sup> Nonethe-

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<sup>74</sup> Article 85 provides:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to the Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>75</sup> Article 86 states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>76</sup> See generally, MacLachlan and Mackesy, *supra* note 54, at 380-382. The most developed systems of merger control are in the U.K., Germany and France. In Spain, a 1963 regulation permitting the government to intervene to control agreements that restrict free competition is not used

less, the national laws of the EC member States that are in place have noteworthy differences. It is interesting to note that Germany is the only EC Member State that uses a test similar to that established in the new EC regulation, namely whether a particular merger "creates or strengthens a dominant position." However, it cannot be predicted whether the EC Commission will interpret and enforce this statutory standard in the same manner as the German Federal Cartel Office. Furthermore, the standard of review under German law is not entirely similar to that under the EC regulation. German merger control can also be compared to that of the United States, in that it tries to establish a balance between the anticompetitive effects of a merger and its possible procompetitive effects.<sup>77</sup> Yet since the early 1970s, the merger control policies of the two countries have diverged in their approaches to achieve greater business efficiency.<sup>78</sup> Under French law, important mergers are controlled by the Ministry of the Economy, and the Competition Council.<sup>79</sup> The Competition Council is required to determine whether "the concentration makes a great enough contribution to economic progress to offset damage to

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today. Belgian laws controlling the abuse of economic power are not aimed at controlling mergers. *Id.* Italy, which until recently did not have such a regulation, adopted a merger control law in September 1990 largely based on the EC Regulation.

<sup>77</sup> The German merger control law, is encompassed in the Restraints of Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*) of July 27, 1957, 1957 BGBL.I 1081 (effective January 1, 1958). It was amended several times: Amendment to the Restraints of Competition Act of August 3, 1973, 1973 BGBL.I 917; Act of September 24, 1980, 1980 BGBL.I 1761; Act of October 22, 1987, 1987 BGBL.I. 2294; Act of December 22, 1989, 1989 BGBL.I 2486 1990 BGBL.I 235.

<sup>78</sup> Ponsoldt and Westerhausen, *Competition and/or Efficiency: a Review of West German Antimerger Law as a Model for the Proposed Treatment of Efficiency Promotion under Section 7 of the Clayton Act*, 9 NW. J. INT'L L. & BUS. 296 (1988) at 300. This article shows that faced with difficult economic conditions and increased competition from abroad, Germany and the United States adopted different policies. Germany's merger control policy kept putting the emphasis on the necessity to have economic competition between numerous firms. In contrast, the United States' policy has shifted towards a less interventionist attitude.

<sup>79</sup> Ordinance No. 86-1243 of December 1, 1986, reprinted in Bermann, De Vries and Galston, *French Law, Constitution and Selective Legislation* (Release No. 8, 1989) 5-48, Title V On Economic Concentration. Article 38 indicates that the Minister of the Economy may submit to the Competition Council for its opinion concentrations that reach a certain threshold (25 percent market share or 7 billion francs of sales) and that are likely to injure competition "particularly by creation or reinforcement of a dominant position." Article 40 states that companies can choose to notify the Minister of Economic Affairs of a concentration. If they choose to do so, the failure of the Minister to refer the merger to the Competition Council within two months amounts to tacit approval. If the merging companies do not notify, the Minister can refer the merger to the Council at any time. The Council can then oppose the merger or subject it to special conditions.

Article 42 states:

The Minister of the Economy and the minister responsible for the economic sector concerned may, subsequent to the opinion of the Competition Council, by a reasoned order fixing a time-limit, order the enterprises either not to carry out the scheme of concentration or to restore the status quo ante, or to modify or complete the operation or to take any measure appropriate to assure or reestablish sufficient competition. *Id.* at 5-76, 5-77.

competition.”<sup>80</sup> Merger Control in the United Kingdom involves the Department of Trade and Industry, policy maker and executive, the Office of Fair Trading, which advises the Secretary of State for Trade and Industry on the decision whether to allow a merger or to require a more detailed investigation. The Monopolies and Mergers Commission (MMC) is an independent body which investigates certain mergers referred to it by the Department of Trade and Industry. The MMC uses the “public interest” test to determine whether a merger should be allowed.<sup>81</sup> If the MMC finds that the merger is not against the public interest, the merger can proceed. However, if the MMC finds the merger against public interest, the Secretary of State for Trade and Industry can still allow it or can impose conditions for the merger to proceed.

In addition, prior to the new regulation, national courts of the Member States were often requested to apply Articles 85 and 86 of the Treaty of Rome in unfriendly takeover situations.

#### B. Application of Articles 85 and 86 of the Treaty of Rome to Merger Control

The Treaty of Rome did not expressly empower the Commission to control mergers. Nonetheless, Article 85<sup>82</sup> of the treaty which controls anti-competitive agreements and concerted practices, and Article 86<sup>83</sup> which prohibits the abuse of a dominant position, were (and still are to a certain extent, as discussed in section VIII A of this article) applied to certain mergers prior to the new regulation.<sup>84</sup>

In the *Continental Can* decision,<sup>85</sup> the Commission maintained that Article 86 was applicable, because the merger strengthened the dominant enterprise to such a degree that actual or potential competition was eliminated. Although the European Court of Justice set aside the Commission’s decision because of deficient findings of facts,<sup>86</sup> it established the principle that a dominant company commits an abuse of its dominant position when acquiring a competitor, because it reinforces its dominance.<sup>87</sup> However, Article 86’s applicability in the merger area is limited

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<sup>80</sup> Article 41 of Ordinance No. 86-1243; see *supra* note 79.

<sup>81</sup> See Fair Trading Act of 1973, reprinted in 47 HALSBURY’S STATUTES (Fourth Ed. 1988) 125. See also MacLachlan and Mackesy, *supra* note 54, at 381.

<sup>82</sup> See *supra* note 74.

<sup>83</sup> See *supra* note 75.

<sup>84</sup> For description of the development of Articles 85 and 86 of the Treaty of Rome from the drafting of the Treaty to the situation prior to the adoption of the new Regulation, see, Banks, *Mergers and Partial Mergers under EEC Law*, 11 FORDHAM INT’L L. J. 255 (1988).

<sup>85</sup> O.J. Eur. Comm. (No. L7) 25 (1972).

<sup>86</sup> *Europemballage Corp. v. Commission & Continental Can Co.*, 1 Eur. Ct. Rep. 215 (1973).

<sup>87</sup> *Id.* at 245.

because it can only be used where one of the merging firms has a dominant position before the merger and increases its position with the merger. Thus, mergers that fall under the prohibition of Article 86 are those which place the dominant firm in a top rank, particularly in terms of market share.<sup>88</sup>

It was long believed that Article 85 did not apply to mergers.<sup>89</sup> However, in 1987, the European Court of Justice upheld Article 85's application to a merger in the *Philip Morris* case.<sup>90</sup> The Court upheld the Commission's position that in certain circumstances, the acquisition of shares in a competing company would fall under Article 85's prohibition. The Court, however, rejected the argument that the acquisition of a shareholding in a competitor had necessarily a restrictive effect on competition. The Court indicated that the key test for determining whether the transaction fell under Article 85, was the influence which the acquisition would have on the companies' conduct. The Court did not say whether Article 85 would apply to the acquisition of a majority stake or a straight buy-out of a competing company.<sup>91</sup> It is unclear how far Article 85's application will be expanded in the field of mergers and acquisitions.

In August 1988, the Commission set a precedent by intervening for the first time before the completion of a takeover in the *Irish Distillers Group* case.<sup>92</sup> The Commission ruled that a United Kingdom beverage consortium led by Grand Metropolitan PLC, violated Article 85 by agreeing to buy Irish Distillers Group at a potentially artificial price and by agreeing to divide the beverage market by apportioning the brand names among the members of the consortium. The Commission based its decision on the existence of a collusive practice under Article 85.

Because of the increasing intervention of the Commission in concentration cases under Articles 85 and 86, it became apparent that Member States should adopt a formal control regulation at the European level.<sup>93</sup> It was thought that companies would benefit from having only one set of

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<sup>88</sup> Gleiss, COMMON MARKET CARTEL LAW 369 (1978).

<sup>89</sup> *Id.* at 363-364; COMMISSION OF THE EUROPEAN COMMUNITY, THE PROBLEM OF INDUSTRIAL CONCENTRATION IN THE COMMON MARKET 33-36 (1966); COMMISSION OF THE EUROPEAN COMMUNITY 17TH REPORT ON COMPETITION POLICY 31, point 29-32 (1978).

<sup>90</sup> British-American Tobacco Company and R.J. Reynolds Industries v. Commission, 30 O.J. EUR. COMM. (No. C 329) 4 (1987), 10 Eur. Ct. Rep. 4566 (1987). See also, Calkoen & Feenstra, *Acquisition of Shares in other Companies and EEC Competition Policy: The Philip Morris Decision*, 16 INT'L BUS. LAW. 167 (1988).

<sup>91</sup> Commission Of The European Community, XXIst General Report On The Activities Of The European Communities 365 (1987).

<sup>92</sup> *Irish Distillers Group v. G&C Brands Ltd.*, 4 Common Mkt. Rep. 840 (1988); see also Lee, *M&A Activity Booming in Europe*, Nat'l L.J., May 15, 1989, at S4.

<sup>93</sup> Fine, *supra* note 6.

Community merger laws. Moreover, neither Article 85 nor 86 provide a satisfactory code for the control of mergers. One of the goals of the new Regulation was to remedy these problems. Among the major shortcomings of applying the Treaty Articles are: (a) the fact that efficiency benefits of concentrations can only be taken into consideration under Article 85 but not under Article 86; (b) the uncertainty of the informal clearance procedure, and (c) the lengthy process.<sup>94</sup>

1. *Efficiency benefits of concentrations can only be taken into consideration under Article 85, not under Article 86*

Article 85 sets forth the general rule that prohibits restrictive practices which affect Community trade. However, Article 85(3) creates an important exception to that rule. The prohibition of Article 85 can be declared inapplicable by the Commission (and not by the national courts) if the harmful effects of a restrictive agreement or practice are sufficiently counterbalanced by a number of beneficial elements. Article 85(3) lists four conditions which must all be met before an exemption can be granted by the Commission:<sup>95</sup>

- (i) the agreement must contribute to an improvement in production or distribution, or economic progress. There must be a clear objective advantage involved, such as a reduction of costs or an increase of production capacity;
- (ii) a fair share of the resulting benefits must be allowed to consumers. This might take the form of lower prices or an improvement in the quality of the goods or services;
- (iii) only restrictions of competition which are indispensable in order to achieve the beneficial results will be allowed;
- (iv) competition exists with respect to a substantial part of the goods or services in question.<sup>96</sup>

Thus, Article 85(3) provides an exemption for transactions, which although found to be anti-competitive, improve production or distribution, or promote technical or economic progress in the European Community. These are known as "efficiency benefits" under United States antitrust law terminology. Yet, such exemption does not exist for transactions found to violate Article 86.<sup>97</sup>

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<sup>94</sup> As explained *infra* Section VIII A of this article, these Articles still apply to mergers that do not have a "Community dimension" as defined by the new Regulation. Thus, problems mentioned below potentially remain for these types of mergers.

<sup>95</sup> Article 85(3), *see supra* note 74.

<sup>96</sup> EC COMMISSION, EEC COMPETITION POLICY IN THE SINGLE MARKET 19 (1989).

<sup>97</sup> Lee, *supra* note 92.

## 2. *Uncertainty of the Informal Clearance Procedure*

Articles 85 and 86 do not require the pre-notification of a merger, nor provide for formal clearance procedures, nor grant the Commission the authority to block a deal.<sup>98</sup> The Council of Ministers adopted Regulation 17,<sup>99</sup> which has been described as “the enforcement arm” of Articles 85 and 86.<sup>100</sup> That regulation established the procedure to obtain an exemption under Article 85(3) and created the negative clearance procedure.<sup>101</sup>

Another type of clearance is the so-called “comfort letter.”<sup>102</sup> It enables parties, in straightforward cases, to obtain informal clearance from the competition directorate of the Commission known as the “DG IV” (Directorate General IV).<sup>103</sup> Interviews take place with a member of the DG IV’s staff, and if there is no problem, the staff member recommends to the Director General of the DG IV that no action be taken.<sup>104</sup> Parties can obtain a “comfort letter”, which states that the Commission is unlikely to object to the proposal based on the facts available to it. However, a “comfort letter” is not legally binding on the Commission.<sup>105</sup>

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<sup>98</sup> Articles 85 and 86 of the Treaty of Rome, *see supra* notes 77, 78; *see also Lee, supra* note 94.

<sup>99</sup> Regulation 17/62, O.J. EUR. COMM. 204/62; O/J. (special Edition 1959-62), at 57 (came into force on March 13, 1962).

<sup>100</sup> Fine, *supra* note 8, at 523.

<sup>101</sup> McCullough, *supra* note 16, at 844.

<sup>102</sup> *Id.*

<sup>103</sup> The Directorate General for Competition (DG-IV) is responsible for implementation of the rules of competition under the EEC Treaty and the ECSC Treaty. It is organized into five departments. Directorate A is responsible for the formulation of general competition policy, legislative initiatives, and relations with other EC and international institutions such as the Organization for Economic Cooperation and Development (OECD). Directorate B is responsible for investigating and prosecuting cases under Articles 85 and 86 of the EEC Treaty with respect to the following sectors: (a) mechanical and electrical engineering, electronics, automobile, and telecommunications; (b) textiles, clothing, and manufacturing industries; and (c) distribution-based businesses, banking, insurance, and the media (radio, television, press). Directorate C is responsible for investigating and prosecuting cases under Articles 85 and 86 with respect to: (a) energy, chemicals, and agricultural and food products; and (b) non-ferrous metals, non-metallic mineral products, wood, paper, and construction, as well as cases pursuant to the rules of competition of the ECSC Treaty relating to steel and coal, and transport. Directorate D coordinates the activities of Directorates B and C, and reviews their cases from a non-sectoral perspective. It is composed of four divisions, each focused on a different type of business practice: (a) horizontal restrictive practices and abuses of dominant position; (b) mergers, joint ventures, and cooperation agreements; (c) industrial and intellectual property rights; and (d) distribution agreements. Directorate E is responsible for industrial aid policies. *See WINTER, SLOAN, LEHNER, AND RUIZ, EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE*, 167 (1989).

<sup>104</sup> Lee, *supra* note 94.

<sup>105</sup> EC COMMISSION, *EEC COMPETITION POLICY IN THE SINGLE MARKET* 55 (1989). The Commission recently instituted the practice of publishing a notice of its intention to issue an administrative letter (or “comfort letter”) in certain cases, allowing parties to react before it takes further

### 3. Lengthy process

Informal clearance procedures usually take one month.<sup>106</sup> If the Commission has reservations, or the target company or a third party files a complaint with the Commission, formal notification has to be made in order to obtain either a "negative clearance" or an exemption under Article 85(3).<sup>107</sup> The Commission is not constrained to render a decision within any time frame and this process takes several months. Sometimes an investigation may take more than one year.<sup>108</sup>

#### C. Evolution of the New Regulation and Implementing Guidelines

In response to the problems under the existing system, the Commission submitted the first proposal for a European regulation on the control of mergers in 1973.<sup>109</sup> However, because adoption required unanimous approval, opposition by several member states delayed the process.<sup>110</sup> After much compromise and several additional amendments,<sup>111</sup> the Council of Ministers of the European Community finally adopted an

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steps. This enhances the value of such administrative letters. *Id.* See also McCullough, *supra* note 16, at 868.

<sup>106</sup> Lee, *supra* note 92.

<sup>107</sup> Agreements between enterprises may be submitted to the Commission to seek a decision that the agreement does not violate Article 85(1) at all (this is a negative clearance) or that the agreement does fall under Article 85(1) but meets the conditions for exemption under Article 85(3). "Although the correct terminology is 'application for negative clearance' and 'notification for exemption', the term 'notification' is used for both possibilities. In fact, applicants will normally submit one notification to the Commission seeking negative clearance or, in the alternative, individual exemption." EC COMMISSION, EEC COMPETITION POLICY IN THE SINGLE MARKET 45. No fines may be imposed for the period from the moment of notification until the Commission reaches a decision. When an agreement meets the four requirements of Article 85(3), described *supra* note 74, an exemption can be granted, either on an individual basis or by mean of a group exemption. Notification is not required for agreements that fulfill the conditions contained in so-called group-exemption regulations, which exist with respect to certain categories of agreements (e.g. R&D agreements, franchising agreements, know-how licensing agreements). See *id.* at 19-20.

<sup>108</sup> McCullough, *supra* note 16, at 870.

<sup>109</sup> *Proposal for a Regulation of the Council on the Control of Concentrations Between Undertakings*, 16 O.J. EUR. COMM. (No. C92) 1 (1973).

<sup>110</sup> 1992: *The External Impact of European Unification*, April 7, 1989, vol. 1, no. 1, at 1 (BNA Bi-weekly). The United Kingdom was among the nations opposing the regulation's adoption, and sought to minimize the number of mergers subject to Commission intervention by fixing the impact threshold at a very high level. *Id.*

<sup>111</sup> Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings, 25 O.J. EUR. COMM. (No. C 36) 3 (1982); *Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings*, 27 O.J. EUR. COMM. (No. C 51) 8 (1984); *Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings*, 29 O.J. EUR. COMM. (No. C 324) 5 (1986); *Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings*, 32 O.J. EUR. COMM. (No. C 22) 14 (1989); See also, Potter, *Centralized European Merger Regulation: a Viable Alternative*, 26 VA. J. INT'L. L. 219, 239-249 (1985), (explaining the reasons for the proposed regulations' failure to gain approval).

amended proposal on December 21, 1989.<sup>112</sup> The new Regulation became effective September 21, 1990.<sup>113</sup>

The Commission drew up guidelines in advance of the Regulation's effective date to provide important information on the Regulation's likely application. Draft guidelines were made available to the business community during the past year, and the final Guidelines were published on August 14, 1990.<sup>114</sup>

## V. SCOPE OF THE REGULATION ON MERGER CONTROL IN LIGHT OF THE IMPLEMENTING GUIDELINES

### A. Overview of the Key Issues

Several key issues outline the scope of the new Regulation. A quantitative threshold must be met in order for a proposed merger to qualify for consideration under the new Regulation. Once this quantitative threshold is met, the treatment of the proposed merger hinges on whether it can be deemed a "concentration". The sections which follow focus on these two major issues and also outline the distinction between joint ventures that are within the scope of the Regulation and joint ventures that are not.

### B. Quantitative threshold

The Regulation confers jurisdiction on the Commission to determine whether certain proposed mergers which exceed a specified threshold are compatible with the common market.<sup>115</sup> Only concentrations considered to have a "Community dimension", are subject to the Commission's review. The threshold for a concentration to have a "Community dimension" is currently set as follows:<sup>116</sup>

(a) the aggregate worldwide turnover<sup>117</sup> of all the parties concerned taken together must be more than 5,000 million ECU<sup>118</sup> and

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<sup>112</sup> For a description of the law-making process in the EC before and after the Single European Act, see Crijns, *Some Aspects of the Decision-Making Process in the European Communities*, 5 NW. J. INT'L. L. & BUS. 902 (1983); Lonbay, *supra* note 3, at 59-61; Usher, *supra* note 3, at 64.

<sup>113</sup> The Regulation, art. 25.

<sup>114</sup> See *supra* note 9.

<sup>115</sup> The Regulation Article 1(2).

<sup>116</sup> The Regulation Article 1(2).

<sup>117</sup> "Aggregate turnover" is defined to "comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover." The Regulation, art. 5.

<sup>118</sup> ECU 5 billion is currently about \$6.95 billion at the Nov. 14, 1990 exchange rate.



(b) the aggregate Community-wide turnover<sup>119</sup> of each of at least two of the parties concerned must be more than 250 million ECU.<sup>120</sup> Even if the initial quantitative threshold is met, the regulation will not apply if each of the parties concerned achieves more than two-thirds of its aggregate Community-wide turnover within only one Member State.<sup>121</sup> In this case, the concentration is considered to be essentially national and the national law of the concerned Member State is applicable. The regulation provides for the threshold to be revised by the Council which must vote as a qualified majority on the Commission's proposed revisions by the end of 1993.<sup>122</sup>

Because the quantitative threshold would directly affect the reach of Community law vis-a-vis Member State autonomy,<sup>123</sup> Member States had difficulty in reaching agreement.<sup>124</sup> The Commission would have preferred a threshold lower than the final 5 billion ECU figure.<sup>125</sup> West Germany and the United Kingdom proposed a 10 billion ECU threshold; they reasoned that a lower threshold would encompass too many transactions and overload the Commission.<sup>126</sup> The threshold finally adopted was a compromise between various Member States and the Commission's previously proposed 1 billion ECU,<sup>127</sup> The 1 billion ECU threshold would have reached 150 mergers per year.<sup>128</sup> The 5 billion figure is viewed by many as too high because it leaves numerous concentrations in the jurisdiction of Member States.<sup>129</sup> The adopted threshold is expected to reach between 30 and 50 mergers a year.<sup>130</sup> At the end of the review period, a decrease in the threshold to 2 billion ECU is expected, and this will reach an estimated 80 transactions per year (at current levels).<sup>131</sup>

Article 5 of the Regulation describes the methodology to calculate

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<sup>119</sup> See note 117.

<sup>120</sup> The Regulation, art. 1(2).

<sup>121</sup> This provision is commonly referred to as the "national two-thirds exception." Nat'l L. J., Feb. 26, 1990, col. 1, at 31.

<sup>122</sup> The Regulation, art. 1(3).

<sup>123</sup> For example, a threshold of ECU 1 billion would mean that 90 percent of all sectors would be covered by Community law, while a ECU 2 billion threshold would cover only 85 percent. 1992: *The External Impact of European Unification*, supra note 112, at 12.

<sup>124</sup> Lee, supra note 94.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Amended Proposal for a Council Regulation on the Control of Concentrations between Undertakings, 32 O.J. EUR. COMM. (No. C 22) 14 (1989).

<sup>128</sup> Lee, supra note 94.

<sup>129</sup> *EC Practitioners Question Ability to Deliver Effective Merger Review*, 58 Antitrust & Trade Reg. Rep. (BNA) No. 58, at 53 (1990). A former director in the commission's Directorate General IV stated: "While its threshold is extremely high, the merger regulation represents a start."

<sup>130</sup> *Id.*

<sup>131</sup> Lee, supra note 94.

revenue.<sup>132</sup> The aggregate revenue does not include sales rebates, value added taxes, and other revenue taxes.<sup>133</sup> Also, sales between subsidiaries or companies related through one of the following ways, should not be taken into account when calculating aggregate revenue of the group: ownership by one company of more than half of the capital or assets of the other; power by one company to exercise more than half of the voting rights of the other; power of one company to appoint more than half the members of the board of the other; right of one company to manage the affairs of the other.<sup>134</sup>

Special rules are provided for assessing the revenues of banks, other financial institutions and insurance companies.<sup>135</sup> This highly complex methodology may lead to some uncertainty in determining which transactions fall within the scope of the new regulation.

### C. Meaning of the term "concentration"

The new Regulation applies "to all concentrations with a Community dimension."<sup>136</sup> The term "concentration" is broadly defined in Article 3 as encompassing mergers and acquisition of "direct or indirect control of the whole or parts" of one or more companies, "whether by purchase of securities or assets, by contract or by any other means."<sup>137</sup> This definition covers all the forms of cooperation described earlier in this paper.<sup>138</sup> Particularly, the Regulation includes friendly and hostile takeover bids,<sup>139</sup> and certain joint ventures.<sup>140</sup>

Whether joint ventures constitute "concentrations" is an important question in determining the scope of the regulation. Joint ventures are

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<sup>132</sup> A detailed description of this complex methodology is beyond the scope of this article. We will limit ourselves to some general indications. The Commission published a form to be used by companies to notify the Commission of a concentration with a Community dimension. See *Form CO Relating to the Notification of a Concentration pursuant to Council Regulation (EEC) No. 4064/89*, [hereinafter "Form CO"], 33 O.J. EUR. COMM. (No L 219) 11, published as annex I to the Regulation on Notifications, *supra* note 9. The form provides examples on how to calculate worldwide turnover for credit and other financial institutions, for insurance companies, and for joint ventures. *Id.* at 19-22.

<sup>133</sup> The Regulation, art. 5(1).

<sup>134</sup> The Regulation, art. 5(4)(a).

<sup>135</sup> The Regulation, art. 5(3). See also, *Form CO*, *supra* note 133, at 19-21.

<sup>136</sup> The Regulation, art. 5(1).

<sup>137</sup> The Regulation, art. 3(1)(b).

<sup>138</sup> See *supra* notes 52-58 and accompanying text.

<sup>139</sup> *Fine*, *supra* note 6, at 515.

<sup>140</sup> Article 3(2) of the Regulation states: "The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b)."

frequently used for cross-frontier cooperation in the EC.<sup>141</sup> The new Regulation on merger control covers joint ventures only to a limited extent. This is viewed as one of the weaknesses of the Regulation.<sup>142</sup> Briefly stated, if a joint venture's effects are close to those of a merger, it is covered by the Regulation. By contrast, the new Regulation does not cover operations that coordinate the activities of companies which remain independent. Such operations are considered like cartel agreements and remain to be assessed under Articles 85 and 86 of the Treaty of Rome. The Commission published a notice to clarify the distinction between "concentrative" and "cooperative" operations<sup>143</sup> that is intended to define which joint ventures will be assessed under the new Regulation.

### 1. *Cooperative v. Concentrative Joint Ventures.*

Only "concentrative joint ventures" are covered under the new Regulation.<sup>144</sup> "Concentrative joint ventures" are designed to function as (i)

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<sup>141</sup> EC Economic and Social Committee, *Opinion on the Implementing Provisions for a European Regulation on the Control of Concentrations between Undertakings*, [hereinafter *Opinion of the ESC on the Implementing Provisions*] 33 O.J. EUR. COMM. (No. C 225) 60, at 63. "Pending the adoption of further laws for different forms of Community-wide companies such as the European company, the joint venture organized under national company law is an established vehicle for cross-frontier cooperation in areas ranging from Community R&D to marketing." *Id.* The Economic and Social Committee is a consultative body whose opinion must be sought in many cases before a Commission proposal can be adopted by the Council, during the law making process of the EC. It is composed of 189 members who represent employers, trade unions and other interested groups such as farmers and consumers. The Opinion of the ESC on the Implementing Provisions represents the opinion of the business community. We will also refer in this article to the position of the American Chamber of Commerce in Belgium, whose position papers are more detailed. "The EC Committee of the American Chamber of Commerce in Belgium is the key organization in Europe representing the views of European companies of American parentage. As such it represents some of the earliest and most committed business supporters of the European ideal and, in particular, of the Single Market concept." The EC Committee of the American Chamber of Commerce in Belgium, *EC Committee Position Paper Regarding Revised Draft Commission Notice on the Distinction between Concentrative and Cooperative Operations under the Merger Control Regulation*, June 29, 1990. [hereinafter *EC Committee Position Paper on Draft Notice*]. The EC Committee of the American Chamber of Commerce in Belgium has been one of the most active organizations trying to influence the EC Commission drafting of the guidelines on the application of the new Regulation. Even if the Chamber provides a particular perspective, the authors believe that its views are useful in identifying potential problems for all businesses in the EC.

<sup>142</sup> Opinion of the ESC on the Implementing Provisions, *supra* note 142, at 63. The Economic and Social Committee indicates that that weakness "will be remedied only in part by a Commission notice." *Id.*

<sup>143</sup> *Notice Regarding Concentrative and Cooperative Operations*, *supra* note 7. The Notice indicates, general principles that "will be followed and further developed by the Commission's practice in individual cases." *Id.* at para. 4. The notice does not provide a definitive answer to all conceivable situations. Furthermore, the Notice "is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities." *Id.* at para. 5.

<sup>144</sup> The Regulation, art. 3(2).

autonomous economic entities, and (ii) do not involve coordination of competitive behavior between the parent companies themselves, or between the parent and the joint venture.<sup>145</sup> On the other hand, "cooperative joint ventures" are still subject to Articles 85 and 86 of the Treaty of Rome and their implementing regulations.<sup>146</sup> "Cooperative joint ventures" involve the coordination of the competitive behavior of the parent companies and the joint venture.<sup>147</sup>

a. Definition of a Joint Venture under the New Regulation

First, a joint venture must be an undertaking, i.e., "an organized assembly of human and material resources, intended to pursue a defined economic purpose on a long-term basis."<sup>148</sup> Furthermore, the undertaking must be jointly controlled. Joint control exists in every case where the parent companies must agree on decisions concerning the joint venture's activities.<sup>149</sup> No joint control exists where one of the parents can decide alone, which is presumed to be the case when one company "owns more than half of the capital or assets of the undertaking, has the right to appoint more than half of the managing or supervisory bodies, controls more than half of the votes in one of those bodies, or has the sole right to manage the company's business."<sup>150</sup> If one of the parent's holdings is, by its nature or its extent, insufficient to establish sole control, and if there is no joint control together with third parties, then there is no concentration within the meaning of the Regulation.<sup>151</sup> It has been suggested by the American Chamber of Commerce in Belgium<sup>152</sup> that the Notice should specify that the provisions giving the minority shareholders a veto limited to matters important for the protection of their investment<sup>153</sup> do

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<sup>145</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 142, Article II(B).

<sup>146</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 142, at para. 1. The applicable Regulations are: *Regulation No. 17*, O.J. EUR. COMM. No. 13, 21.2.62, at 204/62; or *Regulation (EEC) No. 1017/68*, O.J. EUR. COMM. (no.L 175), 23.7.68, at 1; *No. 4056/86*, O.J. EUR. COMM. (No.L 378), 31.12.86 at 4; or *No. 3975/87*, O.J. (No. L 374), 31.12.87 at 1. For an analysis of the treatment of research and development joint ventures under Article 85 of the Treaty of Rome, see Zwart, *Innovate, Integrate, and Cooperate: Antitrust Changes and Challenges in the United States and the European Economic Community*, 1989 UTAH L. REV. 63, 79-87, 91-95, 100-101 (1989).

<sup>147</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 6.

<sup>148</sup> *Id.* at para. 8.

<sup>149</sup> *Id.* at para. 11.

<sup>150</sup> *Id.* at para. 12.

<sup>151</sup> *Id.* at para. 14.

<sup>152</sup> See *supra* note 141.

<sup>153</sup> For example, amendment of the by-laws; capital changes; sale of substantial part of assets; major changes in lines of activity; borrowing exceeding specified limits; and, selection of key managers.

not "tilt the balance towards joint control."<sup>154</sup> The Position Paper notes that joint control should exist only if the minority shareholders' veto extends to decisions regarding commercial activities of the undertaking.<sup>155</sup>

b. Conditions for a Joint Venture to be covered by the New  
Regulation

Once an undertaking is established to be a joint venture, it must fulfill the following two conditions to be reviewed under the new Regulations.

i. *The joint venture must perform all the functions of an autonomous economic entity on a lasting basis*

This condition reflects the idea that the creation of the joint venture must result in a real structural change in the market. Such permanent structural change is considered to be more beneficial than cartel-type agreements between firms and therefore deserve a different treatment. Joint ventures that take on only specific and partial responsibilities from their parent are merely auxiliaries to the parent companies and are not considered to be concentrations.<sup>156</sup> In order to be covered by the new Regulation, the joint venture must be intended to and able to carry on its activity for an unlimited or, at least, long term period.<sup>157</sup> The Commission will look at the agreed or expected life of the joint venture and more importantly, at the nature and quantity of human and material resources of the joint venture.<sup>158</sup> If the parties can ensure the joint venture's existence and independence in the long term, the joint venture will be considered to have a lasting basis and fulfill one of the conditions to be scrutinized under the new Regulation and not under Article 85 and 86 of the Treaty of Rome. It can be assumed that escape clauses permitting termination of the joint venture under defined circumstances, such as *force majeure*, commercial failure, deadlock of the shareholders, or the acquisition of one parent by competitors of the other are not incompatible with the long term nature of a joint venture.<sup>159</sup>

A decisive factor in the Commission's assessment of the autonomous character of the joint venture is whether it is in a position to exercise its own commercial policy.<sup>160</sup> However, the Commission will not challenge

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<sup>154</sup> EC Committee Position Paper on Draft Commission Notice, *supra* note 151, at Point 1.

<sup>155</sup> *Id.*

<sup>156</sup> *Notice Regarding Concentrative and Cooperative Operations*, *supra* note 143, para. 16.

<sup>157</sup> *Id.* at para. 17.

<sup>158</sup> *Id.*

<sup>159</sup> EC Committee Position Paper on Draft Notice, *supra* note 143, at Point 2.

<sup>160</sup> *Notice Regarding Concentrative and Cooperative Operations*, *supra* note 143, at para. 18.

a joint venture's independence "merely because the parent companies reserve to themselves the right to take certain decisions that are important for the development of the JV [joint venture], namely those concerning the alterations of the objects of the company, increases or reductions of capital, or the application of profits."<sup>161</sup>

ii. *The joint venture must not be accompanied by any coordination of the competitive behavior of the companies involved.*

For a joint venture to be considered concentrative within the meaning of the new Regulation,<sup>162</sup> coordination either between the parent companies or between the parent companies and the joint venture cannot be the reason for the establishment of the joint venture, nor may it be the consequence of the joint venture's activities.<sup>163</sup> The Commission nonetheless recognizes that joint ventures generally are a vehicle for parent companies to pursue common or mutually complementary interests and that such concordance of interests is an essential feature of a joint venture, whether it is cooperative or concentrative.<sup>164</sup> The Commission's Notice, however, suggests that if the cooperation goes beyond a certain level, the joint venture will be considered cooperative and will not be covered by the new Regulation.<sup>165</sup> The membership of the joint venture's managing and supervisory bodies is an important factor to be considered by the Commission.<sup>166</sup> The Commission indicates that "[c]ommon membership of the JV's and the parent companies' decision-making bodies may be an obstacle to the development of the JV's autonomous commercial policy."<sup>167</sup>

The Commission stated that the decisive factor to determine the difference between concentrative joint ventures, subject to the new Regulation, and cooperative joint ventures, subject to scrutiny under Article 85 and 86 of the Treaty of Rome,<sup>168</sup> is not the legal form of the relationship of the parent companies between themselves and with the joint venture, but the actual and potential effects of the establishment and operation of

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<sup>161</sup> *Id.* at para. 19.

<sup>162</sup> Article 3(2), sub-paragraph 2 of the Regulation.

<sup>163</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 144, at 12 para. 20.

<sup>164</sup> *Id.* at para. 21.

<sup>165</sup> *Id.* at para. 22. "[T]he risk of coordination will be relatively small where the parents limit the influence they exercise to the JV's strategic decisions, such as those concerning the future direction of investment, and when they express their financial, rather than their market-oriented, interests."  
*Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Supra* notes 77 and 78.

the joint venture on market relationships.<sup>169</sup>

c. Particular Situations

The Commission identified four different situations in the Notice Regarding Concentrative and Cooperative Operations, each corresponding to a presumption of either concentrative or cooperative behavior, and one situation corresponding to a grey area.<sup>170</sup>

i. *Joint ventures that take over pre-existing activities of the parent companies.*

These joint ventures are presumed to be concentrative, since there is normally no risk of coordination where the parent companies transfer all their activities to the joint venture and withdraw from the joint venture's market.<sup>171</sup> When the parent companies transfer their entire business assets to the joint venture, and thus act only as holding companies, the Commission views the operation as a complete merger from an economic point of view.<sup>172</sup> Some members of the business community<sup>173</sup> recommended that it be stated explicitly that only one of the two parents has to withdraw irreversibly and permanently from the market for the joint venture to be presumed concentrative.<sup>174</sup> For example, the formation of a joint venture between a purchaser and a seller might be a first step towards a subsequent complete acquisition by the purchaser. In such situation, the purchaser does not irreversibly and permanently withdraw from the market, but the transaction constitutes a concentration and should be reviewed from the outset under the new Regulation.<sup>175</sup>

The Commission's draft notice further indicates that when the joint venture takes on only some of the activities of the parent companies, it can also amount to a concentration.<sup>176</sup> However, for the joint venture to fall under the new Regulation, its establishment and operation "must not lead to a coordination of the parent companies' competitive behaviour in relation to other activities which they retain."<sup>177</sup> To determine whether the parents have withdrawn from the joint venture's market, the commis-

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<sup>169</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 144 at para. 23.

<sup>170</sup> *Id.* at para. 24 to 36.

<sup>171</sup> *Id.* at para. 25.

<sup>172</sup> *Id.* at para. 26.

<sup>173</sup> The article's references to the "business community" are generally those interests expressed by the American Chamber of Commerce in Belgium, since it is one of the main lobbying groups in the EC. *See supra* note 141.

<sup>174</sup> EC Committee Position Paper on the Draft Notice, *supra* note 142, at point 5.

<sup>175</sup> *Id.*

<sup>176</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 144, at para. 27.

<sup>177</sup> *Id.*

sion will examine whether they are actual or potential competitors of the joint venture. The business community criticized the fact that the Notice suggests that the presence of one or more of the parent companies in an upstream or downstream market or a neighboring market precludes the application of the Regulation<sup>178</sup>

Finally, the Commission will review joint ventures, whose parent companies remain permanently active on the joint venture's market, but where the parent companies geographic markets are so widely separated or present structures so different that competitive interaction may be excluded.<sup>179</sup> This point is of particular interest to United States companies setting up joint ventures in the EC. If the parent companies' markets and the joint venture's markets are in adjacent territories of the Community, there is a presumption of coordination of competitive behavior between the parent companies and the joint venture.<sup>180</sup>

*ii. Joint ventures that undertake new activities on behalf of the parent companies.*

The Commission indicated that normally no risk of coordination exists where the joint venture operates in a product or service market which the parent companies individually have not entered and will not enter in the foreseeable future.<sup>181</sup> The Commission notes however that this assessment is only true if the joint venture's market "is neither upstream nor downstream of, nor neighbouring, that of the parent companies."<sup>182</sup> In the case of joint ventures that incorporate pre-existing activities of the parent company,<sup>183</sup> the American Chamber of Commerce in Belgium is concerned that the presence of parent companies in related markets will inevitably lead to the qualification of a "cooperative joint venture."<sup>184</sup>

*iii. Joint ventures that enter the parent companies' market.*

The Commission indicated that in this case, there is a presumption of coordination of competitive behavior between the parent companies or between the parent companies and the joint venture.<sup>185</sup> As long as this

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<sup>178</sup> EC Committee Position Paper on the Draft Notice, *supra* note 142, at point 5. The American Chamber of Commerce in Brussels suggests that the presence of the parents on related markets should not in all circumstances preclude the application of the Regulation. *Id.*

<sup>179</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 144, at para. 29.

<sup>180</sup> *Id.* at para. 30.

<sup>181</sup> *Id.* at paras. 31 to 32.

<sup>182</sup> *Id.* at para. 31.

<sup>183</sup> *Id.*

<sup>184</sup> EC Committee Position Paper on the Draft Notice, *supra* note 142, at point 6.

<sup>185</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 33.



presumption is not rebutted, the Commission will consider that the establishment of the joint venture does not fall under Article 3(2), subparagraph 2 of the new Regulation.<sup>186</sup>

*iv. Joint ventures that operate in upstream, downstream or neighboring markets.*

Here again, the Commission seems to set a presumption that if the joint venture is operating in a market that is vertically or horizontally close to that of the parent companies, and when they are competitors, it is a cooperative joint venture.<sup>187</sup> The American Chamber of Commerce expressed its concern that this "seemingly irrebuttable presumption" is unwarranted and that such an approach risks making the category of concentrative joint ventures obsolete.<sup>188</sup> The American Chamber of Commerce also disagrees with the concept that a supply or procurement agreement between a parent and the joint venture for a substantial part of the sales or the purchases of the joint venture should preclude the application of the Regulation,<sup>189</sup> in the absence of other circumstances pointing to coordination of competitive behavior.<sup>190</sup>

*2. Acquisition of Minority Shareholdings*

"The taking of a minority shareholding in an undertaking can be considered a concentration in the meaning of Article 3(1)(b) of the Regulation if the new shareholder acquires the possibility of exercising a decisive influence on the undertaking's activity".<sup>191</sup>

The remainder of the Notice section is confusing since it mostly analyzes situations that fall under Articles 85 and 86 of the Treaty of Rome.<sup>192</sup> The EC Committee of the American Chamber of Commerce objects strongly to the statement that a non-controlling shareholding in a competitor without more must be presumed to lead to a coordination of competitive behavior.<sup>193</sup>

*3. Cross-Shareholding.*

"In order to bring their autonomous and hitherto separate undertakings or groups together, company owners often cause them to exchange share-

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at para. 34.

<sup>188</sup> *EC Committee Position Paper on the Draft Notice, supra* note 141, point 7 and 8.

<sup>189</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 35.

<sup>190</sup> *EC Committee Position Paper on the Draft Notice, supra* note 141, at point 8.

<sup>191</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 37.

<sup>192</sup> *Id.*

<sup>193</sup> *EC Committee Position Paper on the Draft Notice, supra* note 141, at point 9.

holdings in each other. Such reciprocal influences can serve to establish or to secure industrial or commercial cooperation between the undertakings or groups. But they may also result in establishing a 'single economic entity.' In the first case, the coordination of competitive behavior between independent undertakings is predominant; in the second, the result may be a concentration".<sup>194</sup>

The Commission recognizes that the Regulation concerns not only legal, but also economic concentrations. The Commission believes that two or more companies can merge economically without establishing a parent-subsidiary relationship and without losing their legal personality.<sup>195</sup> In the case of an economic concentration, the Commission will consider the operation to be within the scope of the Regulation if the undertakings or groups concerned "are not only subject to a permanent, single economic management, but are also amalgamated into a genuine economic unit, characterized internally by profit and loss compensation between the various undertakings within the groups and externally by joint liability."<sup>196</sup>

#### 4. *Representation on Controlling Bodies of other Undertakings.*

The Commission's analysis of common membership of managing or supervisory boards will take into account the same principles as in cross-shareholdings.<sup>197</sup> Whether common membership of the respective boards is a means of coordinating the competitive behavior of the undertakings concerned, or of concentrating the companies in the meaning of the Regulation will depend on the circumstances of the case.<sup>198</sup> The economic link between the shareholding and the personal connection will be an important factor in the analysis.<sup>199</sup> The Commission indicated that a majority of seats on the managing or supervisory board of a company creates a presumption of control of that company.<sup>200</sup> This presumption is reasonable. However, the Commission also established a "virtual presumption"<sup>201</sup> that a minority of seats implies influence on the commercial policy of the company, "which may further entail a coordination of behavior."<sup>202</sup> Such a presumption is questionable because financial reasons may justify this kind of arrangement e.g., anti-takeover measures

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<sup>194</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 40.

<sup>195</sup> *Id.* at para. 41.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at para. 42.

<sup>198</sup> *Id.* at para. 44.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at para. 45.

<sup>201</sup> *EC Committee Position Paper on the Draft Notice*, *supra* note 141, at point 11.

<sup>202</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 45.

and not commercial policy.<sup>203</sup>

### 5. *Transfer of Assets or Shares.*

Asset transfers fall under Article 3(1)(b) of the Regulation solely if the acquirer gains "control of the whole or parts of one or more undertakings."<sup>204</sup> On the other hand, when the transfer of assets is linked with an agreement to coordinate the competitive behavior of the companies concerned or is accompanied by such a coordination, it must be examined according to Article 85 and 86 and their implementing regulations.<sup>205</sup> The Commission however draws a distinction between unilateral and reciprocal arrangements. For unilateral arrangements, it establishes a presumption that the Regulation is applicable. A reciprocal acquisition of assets or shares, on the other hand, is viewed as accompanying an agreement between the companies concerned about their investment, production or sales, and therefore indicative of coordination of their competitive behavior.<sup>206</sup> This presumption has been criticized for not taking into account the fact that an exchange of assets may follow, for example, from the uncoordinated wish of each company to acquire specified facilities of the other which results in a negotiated swap.<sup>207</sup>

### 6. *Joint Acquisition of an Undertaking with a view to its Division.*

When several undertakings jointly acquire another, the Commission will apply the principles established for the assessment of a joint venture,<sup>208</sup> if the period of joint control "goes beyond the very short term."<sup>209</sup> In this case, the Regulation will be applicable if the joint venture is found to be concentrative. If the sole object of the agreement is to agree to divide up assets of the acquired company and this agreement is made effective immediately after acquisition, then the Regulation applies.<sup>210</sup>

It can be seen from this analysis that the guidelines on the scope of the Regulation are disappointingly restrictive for much likely joint venture activity. Moreover, the Regulation and Guidelines leave many ques-

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<sup>203</sup> *EC Committee Position Paper on the Draft Notice*, *supra* note 141, at point 11.

<sup>204</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 46.

<sup>205</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 46. For the regulations implementing Articles 85 and 86, *see supra* note 145.

<sup>206</sup> *Id.* at para. 47.

<sup>207</sup> *EC Committee Position Paper on the Draft Notice*, *supra* note 142, at point 12. According to the American Chamber of Commerce in Belgium, in this context "[i]t is surely wrong under the Regulation to presume an anti-competitive purpose without supporting evidence." *Id.*

<sup>208</sup> *See supra* notes 156-169 and accompanying text.

<sup>209</sup> Notice Regarding Concentrative and Cooperative Operations, *supra* note 7, at para. 48.

<sup>210</sup> *Id.*

tions unresolved. In particular, the distinction between joint ventures treated under the new Regulation and those treated under Articles 85 and 86 remains unclear, and will result in substantial uncertainty until eventual clarification by the European Court of Justice.

## VI. COMPETENCE (OR JURISDICTION) TO REVIEW CONCENTRATIONS

In principle, the Regulation provides that the Commission will have exclusive jurisdiction for mergers with a Community dimension<sup>211</sup> (these concentrations have been defined by the quantitative threshold discussed above),<sup>212</sup> while the Member States will have jurisdiction for other mergers. Thus, in principle, Member States may not apply their national legislation on competition to concentrations with a "Community dimension." However, the Regulation contains numerous exceptions to this principle.

The many exceptions to the exclusive competence of the Commission are the result of compromise between Member States. For most Member States, the thought of giving the Commission exclusive jurisdiction over mergers amounted to relinquishing part of their sovereignty.<sup>213</sup> Thus, some of the exceptions were viewed as safeguard clauses.

1. As noted above,<sup>214</sup> a transaction will be excluded from the Commission's competence if each of the firms involved derives more than two-thirds of its EC revenues within one and the same Member State.<sup>215</sup>

2. In response to pressure from the West German government,<sup>216</sup> it was agreed that when a merger might lead to overconcentration in a "distinct" market in a single Member State, that State may be permitted to apply its national laws to a concentration with Community dimen-

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<sup>211</sup> The Regulation, art. 21(2).

<sup>212</sup> See *supra* notes 115-135 and accompanying text.

<sup>213</sup> States within the United States had similar sovereignty concerns at the beginning of the United States antitrust regulation era. The law in the United States has developed such that antitrust control occurs at the federal level, but states can adopt legislation which is not inconsistent. See *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117 (1978); *Shell Oil Co. v. Gov. of Maryland* 439 U.S. 884; and *Continental Oil Co. v. Gov. of Maryland* 439 U.S. 884. Jurisdiction under United States antitrust statutes is based on the "effect on commerce" theory. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 *reh'g denied* 423 U.S. 886 (1975). Under the theory, activities which "are wholly local in nature, yet substantially affect interstate commerce" fall within the jurisdiction of the federal laws. See *United States v. Aguafredda*, 834 F.2d 915, *cert. denied* *Augustino v. U.S.*, 108 S. Ct. 1278 (1987).

<sup>214</sup> See *supra* notes 115-135 and accompanying text.

<sup>215</sup> The Regulation, art. 1(2).

<sup>216</sup> This provision reflects the so-called "German Clause". *Merger Control in the European Community*, *Fin. Times*, Jan. 1990.

sion.<sup>217</sup> Some believe this concession has been framed in such restrictive terms that it can be expected to have a limited application.<sup>218</sup> A “distinct” market in the relevant products or services is a market in which the conditions of competition are sufficiently homogeneous, and where the market can be distinguished from neighboring markets with different competitive conditions.<sup>219</sup> Difficulties relating to the determination of the distinct market are likely to arise.

3. Article 21(3) of the Regulation reserves to the Member States the possibility of protecting certain “legitimate interests” other than competition related matters in concentrations with Community dimension. The regulation gives the following examples of such “legitimate interests”: public security, plurality of the media and prudential rules (meaning the rules of prudential supervision applied for the surveillance of financial institutions).<sup>220</sup>

4. Upon the Commission’s request, a Member State “shall” undertake an investigation of a transaction found to have a “Community dimension”, on the Commission’s behalf.<sup>221</sup> This amounts to a power given to the Commission to use the Member States staff to supplement its own resources.

5. Finally, the Regulation allows a State to refer to the Commission matters otherwise reserved to the Member States. Specifically, the Commission may intervene in mergers below the threshold at the invitation of a Member State.<sup>222</sup> This provision was designed for the Member States that do not have their own antitrust laws.<sup>223</sup>

The determination of the competence to control concentrations remains a source of uncertainty. Particularly, there might be a risk of parallel investigations by the Commission and national authorities. A “legitimate interest” investigation<sup>224</sup> by a Member State may run in parallel with inquiries by the Commission. However, a Member State cannot in that case authorize a concentration that has been blocked by the Commission. Thus, if the Commission’s proceeding ends by a decision that the concentration is incompatible with the common market, the Member State’s procedure becomes redundant. Only in cases where the Commission reaches a decision allowing the concentration may the Member

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<sup>217</sup> The Regulation, art. 9.

<sup>218</sup> Internal Markets, EIU EUROPEAN TRENDS No. 1, 14 (1990).

<sup>219</sup> The Regulation, art. 9(7).

<sup>220</sup> The Regulation, art. 21(3), subpara. 2.

<sup>221</sup> The Regulation, art. 12.

<sup>222</sup> The Regulation, art. 22(3).

<sup>223</sup> See *supra* notes 76-81 and accompanying text.

<sup>224</sup> The Regulation, art. 21(3).

State's procedure be effective. In cases where the Commission has permitted a Member State to apply its own law under the distinct market procedure, nothing precludes the Commission from conducting its own parallel investigation.<sup>225</sup>

Another example of grey area in the respective jurisdiction of the Commission and Member States is the Commission's intervention at the request of a Member State. Under Article 22(3), the Commission may only intervene in a concentration under the threshold, if trade between Member States is affected by that concentration.<sup>226</sup> Article 22 (3) can be used to prevent dominant positions which impede competition *within the territory of a Member State*. However, the regulation does not provide any specific test to assess whether a concentration impedes competition within a Member State. Thus, the Commission must apply the test of *compatibility with the common market*, which may lead to some difficulty in this context. Moreover, the Commission's intervention at the request of a Member State, is an exception to the principle that Member States are competent over all concentrations which do not have Community dimension. In practice, that the Commission can only intervene in concentrations which have an effect on trade between Member States may create problems since the Commission's action will consequently have some impact on Member States, other than the one that requested the Commission's intervention.

The Commission has issued a statement on Article 22, saying that a concentration will not be considered as having a significant effect on trade between Member States if the parties have combined worldwide revenues of less than 2 billion ECU, or if one of the parties has a Community turnover of less than 100 million ECU, or if two-thirds of the Community-wide turnover of each party is in the same Member State. Therefore, as a practical matter, the Commission's intervention under Article 22 (3) will be limited to concentrations between 2 and 5 billion ECU where Community turnover for each company is at least 100 million ECU.

A request by a Member State for the Commission's intervention must be made "within one month at the most of the date on which the

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<sup>225</sup> The Regulation, art. 9.

<sup>226</sup> Article 22(3) of the Regulation states:

If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which affective competition would be significantly impeded within the territory of the Member State concerned it may, *insofar as the concentration affects trade between Member States*, [emphasis added] adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4). The Regulation, art. 22(3).

concentration was made known to the Member State or effected.”<sup>227</sup> A Member State may use the Article 22 procedure in cases where the Commission received notice under the new Regulation (parties may provide notice because they are uncertain whether the proposed actions have a “community dimension”). The one month time limit may force a Member State desiring such intervention to request such intervention before the Commission has determined whether the concentration has a “Community dimension”. Failure to meet the 1 month time limit would foreclose a member state from seeking Commission intervention if after the expiration period the Commission found that no “community dimension” existed.

Parties may be fined for failing to notify the Commission of a concentration with a “Community dimension”.<sup>228</sup> Thus parties seeking to avoid the penalties may choose to notify the Commission on borderline cases; areas of uncertainty include questions concerning the quantitative thresholds and geographic requirements, and whether transactions will be classified as concentrations.

#### VII. PROCEDURE OF REVIEW BY THE COMMISSION

Basically, the Regulation requires firms falling within its scope to notify the Commission prior to the merger, and requires the Commission to respond accordingly within strict time limits. The following chart summarizes the main steps of the procedure under the new regulation:

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<sup>227</sup> The Regulation, art. 22(4).

<sup>228</sup> According to Article 14 of the Regulation, the Commission may impose fines of from ECU 1,000 to 50,000 to undertakings that intentionally or negligently omit to notify a concentration.

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<u>Stage of the process</u>	<u>Time period</u>	<u>Possible outcomes</u>
Notification by the parties to the concentration Art. 4 and 7	One week max. after conclusion of the agreement, announcement of the bid or acquisition of control.	Suspension of the concentration for at least 3 weeks from notification.
Examination of notification by the Commission Art. 6	one month max. after notification. + 6 weeks if requested by a Member State	<ol style="list-style-type: none"> <li>1. Concentration not in scope of Reg.: approved.</li> <li>2. In scope, does not harm competition decision of compatibility.</li> <li>3. In scope, harms competition Initiation of proceedings.</li> </ol>
Hearings, investigations, request for information Art. 11, 13 Consultation with Member States.		
Final decision Art. 8 and 10(2) to 10(6)	Four months from the initiation of proceedings	<ol style="list-style-type: none"> <li>1. Decision of compatibility: The concentration is approved.</li> <li>2. Decision of incompatibility The concentration is blocked</li> </ol>

The new regulation thus imposes a "report and wait" requirement similar to the one in the Hart-Scott-Rodino Antitrust Improvement Act of 1976, in United States law.<sup>229</sup> Companies are required to notify concentrations to the Commission no more than one week "after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest."<sup>230</sup> The concentration may not be completed until a three week waiting period has lapsed following the notification.<sup>231</sup> However, the Commission may decide on its own initiative to continue the suspension of a concentration thereafter.<sup>232</sup> The waiting

<sup>229</sup> Pub. L. No. 94-435, 90 Stat. 1383 (1976). See Lee, *supra*, note 94.

<sup>230</sup> The Regulation, art. 4(1).

<sup>231</sup> The Regulation, art. 7(1).

<sup>232</sup> The Regulation, art. 7(2).



period is viewed as being too long, and has been labeled a "deal killer".<sup>233</sup> With regard to that criticism it should be noted that the Commission can waive the suspension in cases where delay may cause serious damage to the parties or to a third party.<sup>234</sup> There is also a special provision for public bids, allowing them to proceed subject to certain safeguards.<sup>235</sup>

If the Commission determines that the transaction may have a potentially adverse impact on competition in the EC, it may take an additional four months from the date of initiation of proceedings to decide whether to clear or block the deal.<sup>236</sup> The period of four months may be extended in certain circumstances where the Commission did not obtain necessary information.<sup>237</sup> As a result, decisions on controversial concentrations may take up to five months.

In August 1990, the Commission published a Regulation providing guidelines on the notification, time limits and hearings.<sup>238</sup> This Regulation creates the administrative framework for examining concentrations; the period starts with the notice of concentration and runs through the final Commission's decision.<sup>239</sup> A form for the notification of concentrations to the Commission is provided as an annex to the Regulation on Notifications.<sup>240</sup> The questionnaire's requirements are stringent and some required data may be unobtainable.<sup>241</sup> The Regulation on Notifica-

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<sup>233</sup> Lee, *supra* note 94.

<sup>234</sup> The Regulation, art. 7(4).

<sup>235</sup> Article 7 (3) of the Regulation states: "Paragraph 1 and 2 shall not impede the implementation of a public bid which has been notified to the Commission in accordance with Article 4 (1) by the date of its announcement, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to paragraph 4." The Regulation, art. 7(3).

<sup>236</sup> The Regulation, art. 10(3).

<sup>237</sup> The Regulation, art. 10(4).

<sup>238</sup> Regulation on Notifications, *supra* note 9.

<sup>239</sup> *Opinion of the ESC on the Implementing Provisions*, *supra* note 141, at 62.

<sup>240</sup> The so-called "Form CO," *supra* note 132.

<sup>241</sup> *Opinion of the ESC on the Implementing Provisions*, *supra* note 141, at 61-62. "A deluge of information, lack of flexibility and backlogs in the processing of numerical data would be the inevitable consequence. The Committee therefore appeals to the Commission to design more manageable and appropriate procedures acceptable to all concerned." *Id.* at 61. For example the ESC criticizes the request for reports, studies and surveys which were made in preparation for the concentration. As the ESC indicates, the Commission is asking for information that was compiled for reasons other than to be examined by competition authorities. "It would seem from the outset that these texts will provide competition law experts with little information. The disadvantages for the parties concerned are, however, clear, for there is no way that widely circulated sensitive data could be kept secret. Moreover, a careful drafting of the questionnaire should lead to the Commission having the facts it needs to examine a merger." *Id.* at 61-62. Information required by Form CO includes: information on the parties to the concentration; information on the concentration, e.g., description of the nature of the concentration, economic sectors involved, economic and financial details on the planned operation; information on ownership and control of the companies party to the concentration and on

tions requires that twenty copies of each notification and fifteen copies of the supporting documents be submitted to the Commission.<sup>242</sup> Incorrect or misleading information marks the notification as incomplete<sup>243</sup> and will postpone the start of the Commission's examination of notification.<sup>244</sup>

If the Commission finds the notification incomplete it will inform the notifying party "without delay."<sup>245</sup> The Commission will fix an appropriate time limit for the completion of the information.<sup>246</sup> The business community has criticized this provision as adding a penalty not provided for in the Regulation.<sup>247</sup> They argue that parties will make best efforts to complete their files because it is in their interest to avoid postponing the time from which the deadlines begin to run.<sup>248</sup>

If the Commission finds that the notified operation does not constitute a concentration in the scope of the Regulation on merger control, it may, if requested to do so by the notifying parties, treat the notification as an application for negative clearance under Articles 85 and 86 of the Treaty of Rome,<sup>249</sup> or as a notification to obtain an exemption under Article 85(3).<sup>250</sup> In cases where notifications are conversed, the Commission may require additional information in order to assess the operation

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their ownership and control of other companies, personal and financial links with other companies which are active in the market affected by the proposed operation, including market share, sales and pricing data for the previous three years; information on the general condition in the affected markets, including historical data on market entry, distribution and service system, and the competitive environment; an assessment of the impact of the proposed concentration on consumers and on the development of technical progress. See Form CO, *supra* note 132.

<sup>242</sup> Article 2 (2) of the Regulation on Notification, *supra* note 9. Regulation on Notifications, *supra* note 7, Art. 2(2). This requirement has been questioned by the business community which noted that traditionally only 13 copies have been supplied in competition cases, one for the Commission and one for each member State. *EC Committee Position Paper on the Proposed Commission Regulation on Notification, Time Limits and Hearings Provided for in Regulation No. 4064/89 on the Control of Concentration* (Reference IV/156/90 EN), May 10, 1990, points 8, 9 (Hereinafter *EC Committee Position Paper on Proposed Regulation on Notifications*).

<sup>243</sup> Regulation on Notifications, *supra* note 7, art. 3(3).

<sup>244</sup> Regulation on Notifications, *supra* note 7, Art. 9.

<sup>245</sup> Regulation on Notifications, *supra* note 7, art. 4(2). The original draft mentioned "as soon as possible". This requirement was strongly criticized by the American Chamber of Commerce in Belgium. See *EC Committee Position Paper on Proposed Regulation on Notifications*, *supra* note 243, point 10. The term "as soon as possible" has been changed to "without delay" in response to the concern of the business community.

<sup>246</sup> *Id.*

<sup>247</sup> *EC Committee Position Paper on the Proposed Regulation on Notifications*, *supra* note 242, point 10.

<sup>248</sup> *Id.*

<sup>249</sup> Regulation No. 17, *supra* note 101, art. 2, at 204/62.

<sup>250</sup> Regulation on Notification, *supra* note 7, art. 5. Exemption under Reg. No. 17/62, *supra* note 101, art. 4.

under Articles 85 and 86.<sup>251</sup> The Regulation on Notifications allows parties to request private hearings<sup>252</sup> if they show a legitimate interest, or if the Commission proposes to impose a fine or penalty on them.<sup>253</sup>

The Regulation on Notifications sheds some light on the procedural requirements accompanying the Regulation on merger control. As far as legal certainty is concerned, the Regulation on Notifications establishes precise rules for calculating the time limits imposed upon the parties to mergers and the Commission. Thus, the Regulation remedies the problems arising from the lengthy procedure under Articles 85 and 86. In addition, flexibility is provided by the possibility of conversion of notifications. On the other hand, it is particularly noteworthy that the Commission will have the power to suspend the time limits for each step of the process, as a penalty on non-cooperative parties.

#### VIII. APPRAISAL OF CONCENTRATIONS UNDER THE NEW REGULATION

The Commission must assess whether the concentration is compatible with the common market. The Regulation defines this requirement as follows: "A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market."<sup>254</sup> If such a dominant position is created or strengthened, the concentration is incompatible with the common market.<sup>255</sup> This provision is reminiscent of Article 86 language prohibiting the abuse of a dominant position.<sup>256</sup> However, the prohibition of Article 86 only applies to mergers that strengthen an already dominant position.<sup>257</sup> Thus, the creation of a dominant position falls outside the prohibition of Article 86, but is covered by the new Regulation.<sup>258</sup>

In order to assess whether a dominant position is created or strengthened by a proposed merger, the Commission will undertake a similar analysis to that required under Article 86.<sup>259</sup> The Regulation

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<sup>251</sup> Regulation on Notifications, *supra* note 7, Art. 5(7).

<sup>252</sup> Regulation on Notification, *supra* note 7, art. 13.

<sup>253</sup> Regulation on Notification, *supra* note 7, art. 14(4).

<sup>254</sup> The Regulation, art. 2(2).

<sup>255</sup> The Regulation, art. 2(3).

<sup>256</sup> See *supra* note 78.

<sup>257</sup> *Europemballage and Continental Can Co. v. Commission*, see *supra* note 88.

<sup>258</sup> Price, *The EEC and Cross Border Mergers*, THE SOLICITORS JOURNAL, Oct. 14, 1988, at 1412.

<sup>259</sup> *Id.* The Regulation does not clearly define the concept of dominant position. The European Court of Justice has defined that term in several cases involving Article 86's prohibition of a dominant position as follows:

lists a set of criteria to be taken into account when appraising concentrations.<sup>260</sup> The May 1989 Commission report on "Horizontal Mergers and Competition Policy in the European Community" gives some indication as to how the Commission is likely to apply the standards set by the new Regulation.<sup>261</sup> This report was prepared in anticipation of the new Regulation's adoption. It suggests that the Commission will apply the new standards in light of the precedent from the Commission's and European Court of Justice's application of Article 86 "abuse of dominant position" standard.<sup>262</sup> The notification form that companies subject to the new Regulation will have to submit to the Commission also indicates factors that the Commission deems important when appraising concentrations.<sup>263</sup> Finally, the American experience under the U.S. Department of Justice Merger Guidelines provides some sense of how economic criteria are applied in merger control.<sup>264</sup>

Merger control's primary goal is to determine which mergers should be allowed given the trade-off between the efficiency gains that may be produced (particularly in the form of cost reduction), and the increase in monopoly power<sup>265</sup> which may cause higher prices.<sup>266</sup> According to the EC Commission, such a judgment must be based on general indicators. Factors indicating monopoly power are: a high market share with a "scattered competitive fringe",<sup>267</sup> low import penetration and high entry

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A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors and ultimately of the consumers.

See *Michelin v. Commission*, (1975) E. Comm. Ct. J. Rep. 3461, 3503; *Hoffman-LaRoche v. Commission*, (1979) E. Comm. Ct. J. Rep. 461, 520; *United Brands v. Commission*, (1978) E. Comm. Ct. J. Rep. 207, 277.

<sup>260</sup> The Commission shall take into account:

the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supply or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interest of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition. See The Regulation, art. 2(1)(b).

<sup>261</sup> See *supra* note 28.

<sup>262</sup> Horizontal Merger and Competition Policy in the EC, *supra* note 31, at 46 and 47, citing Article 86 cases.

<sup>263</sup> "Form CO," *supra* note 132.

<sup>264</sup> Horizontal Mergers and Competition Policy in the EC, *supra* note 31, at 46, citing the United States Antitrust Division's approach to the definition of market and measure of concentration, US Department of Justice, *Merger Guidelines*, June 14, 1982. See 1984 Merger Guidelines, *supra* note 10.

<sup>265</sup> Market power or monopoly power refer to the same phenomenon, *i.e.* the ability to price above the competitive level. T. Krattenmaker, R. Lande, S. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEORGETOWN L. J. 24, 263 (1987).

<sup>266</sup> Horizontal Mergers and Competition Policy in the EC, *supra* note 28, at 18.

<sup>267</sup> *Id.* at 19.

barriers, inelastic or stagnating demand, and a differentiated product.<sup>268</sup> Factors that indicate efficiency benefits from a merger include: large-scale economies and learning effects, substantial excess capacity, and a high capital intensity and technology content.<sup>269</sup>

The Commission's analysis of concentrations, is likely to focus on the following elements: 1) market definition and measure of concentration; 2) assessment of ease of entry; 3) assessment of efficiency benefits from the merger.<sup>270</sup> The analysis will also include restrictions ancillary to the concentration being reviewed by the Commission.<sup>271</sup>

#### A. Market Definition and Measure of Concentration

In order to assess the competitive impact of a given merger, the Commission will first have to define the relevant market. The form for notification states that "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."<sup>272</sup> The form further indicates that a relevant product market may be composed of a number of individual product groups.<sup>273</sup> A theoretical way to measure interchangeability is to calculate the crosselasticity of demand.<sup>274</sup> A positive and high cross-elasticity indicates that the products are interchangeable.<sup>275</sup> In practice this type of calculation is replaced by an analysis of the various products to determine whether they are really interchangeable.<sup>276</sup> Cases decided under Article 86 give some indication of how markets are defined. For example, in *Hoffman-La Roche* (1979),<sup>277</sup> the European Court of Justice decided that each group of vitamins formed a separate market because of their specific metabolizing functions. The notification form states that the product market will usually be the classification used by the company

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 46.

<sup>271</sup> See *infra* notes 341-349 and accompanying text.

<sup>272</sup> "Form CO," *supra* note 133, § 5.

<sup>273</sup> "An individual product group is a product or small group of products which present largely identical physical or technical characteristics and are fully interchangeable. The difference between products within the group will be small and usually only a matter of brand and/or image." "Form CO," *supra* note 133, § 5.

<sup>274</sup> The price elasticity of demand indicates the change in quantity demanded resulting from a change in price. It is defined as the percentage change in -quantity demanded divided by the percentage change in price. E. MANSFIELD, *PRINCIPLES OF MICROECONOMICS* 85 (1989).

<sup>275</sup> Horizontal Mergers and Competition in the EC, *supra* note 31, at 46.

<sup>276</sup> *Id.*

<sup>277</sup> *Hoffman La-Roche*, *supra* note 259.

for marketing.<sup>278</sup>

The Commission seems to reject the U.S. Department of Justice approach to the question of market definition, which refers to the concept of potential substitution.<sup>279</sup> According to the 1984 United States Merger Guidelines, a market is defined as a group of products such that a hypothetical monopolist "could profitably impose a 'small but significant and nontransitory' increase in price."<sup>280</sup> The Commission objects to the use of potential competition.<sup>281</sup> The Commission believes that evaluating the intensity of potential competition is too subjective.<sup>282</sup> Moreover, according to the Commission, under the potential competition method, if current prices already reflect monopoly power an existing dominant position would not be identified.<sup>283</sup> Thus, the Commission is unlikely to rely exclusively on a quantitative test and will take into account the particularity of each case.<sup>284</sup> "Opportunities available to suppliers and users"<sup>285</sup> will be a key element in defining the relevant market.<sup>286</sup>

The Commission recommended that when defining the geographic market criteria such as transportation costs, perishability of the goods, local or regional differences and consumption habits be taken into account.<sup>287</sup> Competition from foreign firms will also be an important criteria in defining the relevant geographic market.<sup>288</sup> In Article 86 cases, the

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<sup>278</sup> "Form CO," *supra* note 133, § 5.

<sup>279</sup> 1984 U.S. Merger Guidelines, *supra* note 10.

<sup>280</sup> 1984 U.S. Merger Guidelines, *supra* note 10, § 2.11. The method used by the Department of Justice is further described as follows: "Specifically, the Department will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed a "small but significant and nontransitory" [defined in the Guidelines as a price increase of five percent lasting one year] increase in price. If the price increase would cause so many buyers to shift to other products that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Department will add to the product group the product that is the next-best substitute for the merging firm's product and ask the same question again. This process will continue until a group of products is identified for which a hypothetical monopolist could profitably impose a "small but significant and nontransitory" increase in price. The Department will consider the relevant product market to be the smallest group of products that satisfies this test."

<sup>281</sup> *Horizontal Mergers and Competition in the EC*, *supra* note 31, at 47.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> The Commission report states:

This suggests that in defining the relevant market for antitrust purposes we should be wary of relying exclusively on quantitative or mechanical tests which inevitably involve a degree of arbitrariness, and should include qualitative analyses that take into account the special features of each case.

*Horizontal Merger and Competition Policy in the EC*, *supra* note 31, at 47.

<sup>285</sup> The Regulation, art. 2(1)(b).

<sup>286</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 49.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

Commission and the Court of Justice have regularly looked at imports and potential competition from abroad when defining the geographic market.<sup>289</sup>

Once the relevant market is defined, the Commission must calculate the market's degree of concentration and then estimate the possible impact of the merger.<sup>290</sup> The Regulation indicates that in making its appraisal, the Commission must take into account the market position of the parties.<sup>291</sup> This can be assessed by determining the combined market share of the parties after the merger. Concentration can be measured through using the market share of the firms concerned or through using the distribution of the market shares of all firms.

The United States merger guidelines uses the Herfindahl-Hirshman index<sup>292</sup> to determine the threshold at which a merger is considered dangerous for competition.<sup>293</sup> The European Commission mentions the United States approach in its report and indicates that the use of this index in the European context would require consideration of the degree of openness to international trade. According to the Commission, "a possible approach would be to calculate market shares excluding exports out of the relevant geographic market (national or Community) and including imports into the market."<sup>294</sup> In cases applying Article 86, the EC Commission and the Court of Justice have used the market share of the firm concerned.<sup>295</sup> However, this approach has been criticized and is

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<sup>289</sup> See e.g. *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission of the Eur. Com.*, 1974 Eur. Ct. Rep. 223, 1974 Common Mkt. L.R. 309, and *Hoffman-La Roche (1979)*, *supra* note 275, where the Court held that the relevant market was the world market.

<sup>290</sup> *Horizontal Merger and Competition Policy in the EC*, *supra* note 31, at 46.

<sup>291</sup> The Regulation, art. 2(2)(b).

<sup>292</sup> 1984 U.S. Merger Guidelines, *supra* note 10, states:

As an aid to the interpretation of market data, the Department will use the Herfindahl-Hirshman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms included in the market. . .

The 1984 Guidelines offers an example of how to calculate the HHI:

A market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent respectively has an HHI of 2600.  $(30 \times 30) + (30 \times 30) + (20 \times 20) + (20 \times 20) = 2,600$ .

The HHI ranges from 10,000 in the case of a pure monopoly (100x100) to a number approaching zero, in the case of an atomistic market.

<sup>293</sup> § 3.11 of the 1984 US Merger Guidelines, *supra* note 10, lays down the general standard for horizontal mergers as follows:

(a) if the post-merger HHI is below 1000, the market is considered unconcentrated and the Department is unlikely to challenge the merger.

(b) if the post-merger HHI is between 1000 and 1800, the Department is likely to challenge a merger producing an increase of the HHI of more than 100.

(c) if the post-merger HHI is above 1800, the Department is likely to challenge a merger producing an increase of the HHI of more than 50.

<sup>294</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 48.

<sup>295</sup> The European Court of Justice in *Hoffman-La Roche (1979)*, *supra* note 275, held that bar-

unlikely to be used in implementing the new merger Regulation.<sup>296</sup>

The Commission's report states that concentration ratios or market share data alone are insufficient to prove the existence of monopoly power.<sup>297</sup> Thus it will consider other factors such as the elasticity of demand and entry conditions.<sup>298</sup> The Commission has suggested that high concentration or market share should only be indicators triggering an investigation.<sup>299</sup> According to the Commission's report, "the investigation itself should focus on the conduct, namely whether a merger is liable to affect the interests of consumers directly or indirectly through a substantial change in market structure."<sup>300</sup>

The preamble to the Regulation establishes a presumption known as the "safe harbor" provision. This provision states that a concentration will be compatible with the common market where the joint market share of the parties "does not exceed 25 percent either in the common market or in a substantial part of it."<sup>301</sup> A relatively "high" share of a market creates a presumption of a dominant position but a range of other criteria will be taken into consideration as well. Notifying companies are required to provide lengthy information on each "affected relevant product market."<sup>302</sup> The notifying companies must provide an estimate of the value of the market, the revenues of each party to the concentration, an estimate of their market share, and an estimate of the market share of all

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ring exceptional circumstances, a large market share is sufficient evidence by itself of a dominant position.

<sup>296</sup> *Horizontal Mergers and Concentration Policy in the EC*, *supra* note 31, at 48.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*; see also "Form Co", *supra* note 133 (requesting that information).

<sup>299</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 48.

<sup>300</sup> *Id.*

<sup>301</sup> The 15th "Whereas" of the preamble of the Regulation reads as follows:

Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.

The Regulation, *supra* note 6, at 2.

<sup>302</sup> The "Form CO" defines "affected markets" as follows:

Affected markets consist of relevant product markets or individual product groups, in the Common Market or a Member State or, where different, in any relevant market where:

(a) two or more of the parties (including undertakings belonging to the same group as defined in Section 3) are engaged in business activities in the same product market or individual product group and where the concentration will lead to a combined market share of 10% or more. These are horizontal relationships; or

(b) any of the parties (including undertakings belonging to the same group as defined in Section 3) is engaged in business activities in a product market which is upstream or downstream of a product market or individual product group in which any other party is engaged and any of their market shares is 10% or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties concerned. These are vertical relationships.

See "Form CO," *supra* note 133, § 5.



competitors having at least 10 per cent of the geographic market under consideration.<sup>303</sup>

### B. Ease of Entry

A firm may exercise market power for a significant period of time only if barriers to entry exist.<sup>304</sup> Thus, the Commission will assess the relative ease of entry to the market.<sup>305</sup> Some of the criteria mentioned in the Regulation are useful to assess ease of entry.<sup>306</sup> The parties' economic and financial power are relevant factors that may prevent entry.<sup>307</sup> Also, access of the parties engaged in the proposed concentration to supplies or markets are important factors in the identification of entry barriers.<sup>308</sup> The Regulation also mentions legal and other barriers to entry<sup>309</sup>, and supply and demand trends for the relevant goods and services as factors to be analyzed.<sup>310</sup>

The notification form requires companies to provide "a forecast of the evolution of demand on the affected markets"<sup>311</sup> and information on the competitive environment.<sup>312</sup> Such information gives some indication of a greater or lesser pressure on competition.<sup>313</sup> If market demand is growing, an entrant firm is more likely to reach the minimum viable

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<sup>303</sup> "Form CO," *supra* note 133, § 5, at 15. Moreover, such information must be provided for the last three financial years: a) with respect to the Community as a whole, b) individually for each Member State where the parties do business, and c) where different, for any relevant geographic market. Section c refers to the "distinct market" provision of the Regulation.

<sup>304</sup> Salop & Simons, *supra* note 10, at 679. For a discussion of barriers to entry in United States law, see also Ordover & Wall, *Proving Entry Barriers: a Practical Guide to the Economics of New Entry*, ANTITRUST, Winter 1988, at 12. (The economic analysis is applicable in European law as well).

<sup>305</sup> Ease of entry is also a factor in United States merger control. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 120 n. 15 (1986) (it is "important to examine the barriers to entry into the market, because 'without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.'") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986); see also *United States v. Waste Management*, 743 F.2d 976, 982 (2d Cir. 1984) (United States merger guidelines recognize not only that ease of entry is a relevant factor in merger control, but that it may override all other factors). For an economic analysis of the ease of entry issues, see Salop, *Measuring Ease of Entry*, 31 ANTITRUST BULL. 551 (1986). (This article mentions the U.S. Department of Justice approach, however the economic concepts are applicable to European antitrust law as well).

<sup>306</sup> The Regulation, art. 2(1)(b) *supra* note 6, at 3.

<sup>307</sup> Horizontal Mergers and Competition Policy in the EC, *supra* note 31, at 49.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* (Legal barriers are, for example, regulations of certain activities; "other barriers" are *de facto* barriers.).

<sup>310</sup> The Regulation, art. 2(1)(b) *supra* note 6, at 3.

<sup>311</sup> "Form CO," *supra* note 133, § 5.3, at 16.

<sup>312</sup> *Id.* § 6.10 at 18.

<sup>313</sup> Horizontal Mergers and Competition Policy in the EC, *supra* note 31, at 50.

scale,<sup>314</sup> without causing a substantial price response in the market.<sup>315</sup> Furthermore, growing demand makes it more attractive for firms to enter the market.<sup>316</sup> The notifying firms must also provide "an estimate of the value and source of imports to the relevant geographic market" and then estimate the extent to which these imports are affected by any tariff or non-tariff barriers to trade.<sup>317</sup> The Commission may use this information to determine whether foreign firms are potential entrants. Easy access for foreign firms would make it difficult for a domestic firm to raise its price above the competitive level.

The Commission will also consider whether substantial entry has occurred in the past and whether it is likely to occur in the future.<sup>318</sup> Moreover, the Commission will analyse the various factors influencing market entry.<sup>319</sup> Cost of entry is an important factor in this analysis.<sup>320</sup> Finally the Commission will consider the importance of research and development (R&D) in the relevant market.<sup>321</sup> If R&D is crucial to the firm's ability to compete over the long term, potential entrants will be reluctant as time is needed to develop R&D facilities and personnel.<sup>322</sup> Finally, patents may completely block entry, or if they can be acquired, impose higher costs on entrants.<sup>323</sup>

The factors used by the EC Commission in analyzing ease of entry will not differ much from the ones used by the U.S. Department of Justice. It seems, however, that the Commission will give great consideration as to whether the market affected by the proposed merger is open to international competition. It is noteworthy that the notification form requires the parties to provide a comparison of prices charged by the group to which they belong, in each of the Member States, as well as a comparison of price levels between the European Community and its major trading partners, *e.g.* the United States, Japan, and EFTA countries.<sup>324</sup>

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<sup>314</sup> The minimum viable scale (MVS) is a measure of scale economies. It measures the break-even scale of production. "The MVS is defined as the minimum production level a hypothetical entrant must achieve in order to be a viable competitor.[sic] (*i.e.*, earn 'normal' returns in the industry) at some specified level of product prices." Salop and Simons, *supra* note 10, at 684.

<sup>315</sup> Salop and Simons, *supra* note 10, at 686.

<sup>316</sup> *Id.* at 689. When demand is stagnant or declining, large scale entry will create excess capacity and cause prices to go down. This in turn will lower future profits and retard entry.

<sup>317</sup> "Form CO," *supra* note 133, §§ 5.8, 5.10.

<sup>318</sup> *Id.* §§ 6.1, 6.2, and 6.3., at 16.

<sup>319</sup> *Id.* § 6.4, at 17.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* § 6.6, at 17.

<sup>322</sup> Salop and Simons, *supra* note 10, at 683.

<sup>323</sup> *Id.*

<sup>324</sup> "Form CO", *supra* note 133, § 5.7, at 16.

### C. Efficiency benefits

“Efficiency benefits” are among the criteria the Commission will use to appraise concentrations under the new Regulation. Article 2(1)(b) of the Regulation directs the Commission to take into account “the development of technical and economic progress provided that it is to Consumer advantage and does not form an obstacle to Competition.”<sup>325</sup> In the United States, the weight that should be given to the “efficiency benefit” criterion has been a source of great controversy.<sup>326</sup> The European Commission will also face this issue and have to decide when efficiency-creating concentrations should be allowed, even though they otherwise create or strengthen a dominant position. The Commission’s Report acknowledges that mergers may enhance efficiencies, particularly in technology-intensive European industries which are currently in a weak position.<sup>327</sup> The report notes that a lot of European firms are smaller than their American and Japanese rivals, thus preventing them from taking full advantage of economies of scale.

Some commentators justifiably thought that the new EC Regulation adopted a broad interpretation of the efficiency concept and provided a

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<sup>325</sup> The Regulation, art. 2(1)(b). See also *Horizontal Mergers and Competition Policy in the European Community*, *supra* note 31, at 52. (The Commission’s report indicates the importance of the efficiency issue).

<sup>326</sup> Some commentators have argued that consideration of factors such as efficiency benefits reduce predictability and certainty. See, *Introductory Remarks of Phillip A. Proger*, *supra* note 19, at 323-24 (reviewing the shift from strict use of structural factors in merger analysis to include non-structural factors); Bork, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960) (advocating a “clear and simple” approach to merger analysis). Traditionally, in United States law, efficiency was considered only in certain circumstances. In *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963), the Supreme Court used a strict structural analysis, considering only the combined merged firm’s market share and the overall market concentration; other evidence could only be used to rebut the presumption created by the structural evidence. Eleven years later, in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Court rejected the presumption of the structural evidence, and recognized that other factors were relevant.

The 1984 US Merger Guidelines, symbolize increasing willingness under U.S. law to consider factors such as “efficiency benefits.” The Guidelines specifically state that the Department will be able to consider any efficiency in any case. See Baker, *The 1984 Justice Department Guidelines*, 53 ANTITRUST L.J. 327, 332-333. In recent U.S. joint venture history, the FTC has taken a broad view by approving the controversial General Motors-Toyota joint venture agreement. 46 Antitrust & Trade Reg. Rep. (BNA) 48. The FTC weighed the “potential efficiency benefits” against “antitrust concerns,” and determined that “the continued competition between the companies will dwarf the limited area of cooperation.” *Id.* at 54. The parties to the joint venture were the United State’s largest and Japan’s largest automobile manufacturers, number one and number three respectively in the world automobile manufacturing market. *Id.* For a general discussion of efficiency considerations, see Ponsoldt and Westerhausen, *supra* note 81, at 301-307.

<sup>327</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 52.

strong efficiency defense.<sup>328</sup> However, the idea of an efficiency defense has been rejected by Sir Leon Brittan, the Commissioner responsible for competition policy.<sup>329</sup> This seems to indicate that once a dominant position which significantly impedes competition has been found efficiency benefits cannot be considered as a defense.<sup>330</sup> The “development of technical and economic progress” provided for in Article 2 should thus be taken into account with the other criteria when determining whether the concentration creates or strengthens a dominant position which significantly impedes competition in the Common Market.

Article 2(1)(b) indicates that the development of technical and economic progress should be considered only to the extent that “it is to consumers’ advantage and does not form an obstacle to competition.”<sup>331</sup> The May 1989 report places the burden upon the parties in the concentration to prove that there are efficiency gains and that they could not be attained by any other alternative.<sup>332</sup> Interestingly, the May 1989 report states that the Commission is likely to require more than general statements about the possibilities of rationalization or synergies.<sup>333</sup>

Whether technical and economic progress is considered as a defense to a decision of incompatibility or as one criterion in the overall appraisal, it is clearly not competition-related. During the negotiations, Member States, such as Germany and the U.K., insisted that the appraisal of concentrations only be based on competition-related criteria. On the other hand, States such as Spain, Portugal, and Italy demanded that industrial policy considerations be also taken into account.<sup>334</sup> As a

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<sup>328</sup> See *ABA Spring Meeting Probes of FTC, State & Foreign Enforcement Trends*, 56 *Antitrust & Trade Reg. Rep. (BNA) No. 1911*, at 559 (April 13, 1989). (Opinion of F. Glynn, Jr., Assistant Director of International Antitrust in the FTC’s Bureau of Competition).

<sup>329</sup> *The Principles and Practice of Merger Policy in the European Community*, Address of the Right Honourable Sir Leon Brittan, Center for European Policy Studies, Brussels September 24, 1990.

<sup>330</sup> Discussion of EC Merger Control Regulation by commentators during 1990 Fordham Corporate Law Institute, *International Mergers and Joint Ventures*, New York, October 18-19, 1990.

<sup>331</sup> The Regulation, art. 2(1)(b), *supra* note 6, at 3.

<sup>332</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 52. The standard implemented by the U.S. Department of Justice is similar but might be more stringent. The 1984 US Merger Guidelines states in Section 3.5:

Some mergers that the Department otherwise might challenge may be reasonably necessary to achieve significant net efficiencies. If the parties to the merger establish by clear and convincing evidence that a merger will achieve such efficiencies, the Department will consider those efficiencies in deciding whether to challenge the merger. . . . In addition, the Department will reject claims of efficiencies if equivalent or comparable savings can reasonably be achieved by the parties through other means.

1984 U.S. Merger Guidelines, *supra* note 10, § 3.5.

<sup>333</sup> *Horizontal Mergers and Competition Policy in the EC*, *supra* note 31, at 52.

<sup>334</sup> Thieffry, *The New EC Merger Control Regulation*, 24 *INTL L.* 543 (1990). Member States of the European Community have different views about the role of merger control as part of their

result of compromise, the regulation's preamble mentions industrial policy considerations.<sup>335</sup> Some are concerned that the reference to development of technical and economic progress in Article 2 of the Regulation, might be used to interpret the merger control Regulation as a tool for industrial policy.<sup>336</sup> This concern seems justified in view of the amendment of the EEC Treaty by the Single European Act, to include a provision on EC industrial policy.<sup>337</sup> Moreover, the Regulation indicates that the commission shall take into account "the structure of all the markets concerned and the actual potential competition from undertakings located either within or without the community."<sup>338</sup> Thus, the Commission is required to take international competition into account. Some are worrying that the Commission might use the Regulation as a means of creating "European champions" able to compete with non-community companies. Commissioner Sir Leon Brittan denies having such an intention and has repeatedly stressed that competition will be the only grounds for deciding whether or not to block a merger.<sup>339</sup> However, the distinction between competition policy rationale and other motivations is difficult to make. By requiring the Commission to consider industrial and regional policy as well as competition considerations, this aspect of the new merger Regulation will make it more difficult for the Commission to resist political pressure.<sup>340</sup>

#### D. Restrictions Ancillary to Concentrations

The preamble to the Regulation indicates that the new Regulation is

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policy. Countries in which state intervention is traditional have used merger control in implementing their industrial policy; while other countries have adopted a less-interventionist approach.

<sup>335</sup> The 13th "Whereas" of the preamble of the Regulation states:

"Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to preserve and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty [of Rome], including that of strengthening the Community's economic and social cohesion. . ."

The Regulation, *supra* note 6, at 3.

<sup>336</sup> See *Fin. Times*, Mar. 26, 1990, at 19, col. 1.

<sup>337</sup> The New Article 130.f. of the EEC Treaty as added by the Single European Act, *supra* note 3, states: "The Community's aim shall be to strengthen the scientific and technological basis of European industry and encourage it to become more competitive at the international level."

<sup>338</sup> The Regulation, art. 2 (1)(a), *supra* note 6, at 3.

<sup>339</sup> *Fin. Times*, Mar. 26, 1990, at 19, col.1.

<sup>340</sup> EC Practitioners Question Ability to Deliver Effective Merger Review, *supra* note 130, at 53. The Commission's Merger Task Force will undertake the analysis of notified concentrations. However, the Commissioners will make the final decision to allow or block a merger. Commission decisions are taken on a collegial basis. Although the Commissioners act in the interest of the Community and do not receive instructions from any National Government, they may have different views about the industrial policy issue.

not rendered inapplicable when the companies party to the merger, acquisition or joint venture accept restrictions which are directly related and necessary to the implementation of the concentration.<sup>341</sup> Moreover, Article 8(2) of the Regulation indicates that Commission decisions holding the concentration compatible with the common market will “also cover restrictions directly related and necessary to the implementation of the concentration”.<sup>342</sup> The purpose of this provision is to avoid parallel Commission proceedings which would occur by the Commission assessing the concentration under the new Regulation on one hand, and applying Articles 85 and 86 to the restrictions ancillary to the concentration, on the other hand. The Commission published guidelines which define the notion of “restrictions directly related and necessary to the implementation of the concentration” and which describe how they will be evaluated.<sup>343</sup> The new Regulation requires that these restrictions be assessed in relation to the concentration. Although they would have been prohibited under Article 85 and 86 if they were considered in isolation or in a different economic context, these restrictions may be allowed when reviewed in relation to the concentration. In the context of the transfer of a company, such ancillary restrictions include non-competition clauses imposed upon the seller, licenses of industrial and commercial property rights and know-how, and purchase and supply agreements.<sup>344</sup> The guidelines also cover ancillary restrictions in the case of joint acquisitions and in the case of concentrative joint ventures.<sup>345</sup>

Generally, for a particular restriction to be considered in relation with the concentration under the new Regulation, it must be ancillary to the implementation of the concentration, *i.e.* “subordinate to the main object of the concentration.”<sup>346</sup> If this condition is fulfilled, the restrictions are considered “directly related” to the concentration. The test to determine if the restrictions are “necessary to the implementation of the concentration” is whether the concentration could be implemented in their absence.<sup>347</sup> The Commission will take into account the duration of

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<sup>341</sup> The 25th “Whereas” of the preamble to the Regulation states:

Whereas the application of this Regulation is not excluded where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration, . . .”

The Regulation, *supra* note 6, at 3.

<sup>342</sup> The Regulation, art. 8(2), *supra* note 6, at 6.

<sup>343</sup> Notice Regarding Ancillary Restrictions, *supra* note 9, at 5.

<sup>344</sup> Notice Regarding Ancillary Restrictions, *supra* note 9, § III, at 6.

<sup>345</sup> *Id.*, §§ IV and V. For a description of concentrative joint ventures, see Section V (C) (1) of this article.

<sup>346</sup> *Id.* Section II(4).

<sup>347</sup> *Id.* Section II(5).

the restriction, as well as its nature and geographic field of application.<sup>348</sup> The restrictions should not exceed the reasonable requirements necessary to implement the concentration.<sup>349</sup> The Commission also suggests that the restriction adopted should be the alternative least restrictive to competition.<sup>350</sup>

## IX. LEGAL AND PRACTICAL DIFFICULTIES IN THE IMPLEMENTATION OF THE NEW REGULATION

### A. Residual jurisdiction under Articles 85 and 86

In general, a regulation cannot modify or restrict the provisions of the Treaty of Rome. Therefore, the new regulation on the control of concentrations cannot undo the broad interpretations of Articles 85 and 86 set forth in *Philip Morris*<sup>351</sup> and *Continental Can*.<sup>352</sup> In other words, Articles 85 and 86 will still apply to those concentrations which do not fall within the scope of the new merger Regulation but may be characterized as either maintaining restrictive practices between undertakings or abusing a dominant position. If a merger is within the scope of the Regulation,<sup>353</sup> however, the Commission is not permitted to apply Articles 85 and 85 of the EEC Treaty.<sup>354</sup> It remains to be seen whether Articles 85 and 86 will be used in private actions in national courts.<sup>355</sup>

Member States and the EEC authorities currently have parallel jurisdiction with regard to the application of Articles 85 and 86 of the EEC Treaty.<sup>356</sup> In *Wilhelm v. Bundeskartellamt*,<sup>357</sup> the Court of Justice ruled that national authorities could apply their national laws to some restrictive practices, while the Commission was examining such practices. In the *Perfume* cases,<sup>358</sup> the Court confirmed that national authorities may

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<sup>348</sup> *Id.* Section II(6).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *British Am. Tobacco Co. Ltd. & R.J. Reynolds Indus. Inc. v. Commission*, *supra* note 90.

<sup>352</sup> *Europemballage Corp. & Commission & Continental Can Co. v. Commission*, 1973 E. Comm. Ct. J. Rep. 215, 12 Common Mkt. L. R. 199.

<sup>353</sup> Such as defined *infra* Section V of this article.

<sup>354</sup> Article 22 (1) of the Regulation states: "This Regulation alone shall apply to concentrations as defined in Article 3."

The Regulation, *supra* note 6, at 11.

Article 22 (2) of the Regulation indicates that Regulation No. 17, *supra* note 101, implementing Articles 85 and 86 shall not apply to concentrations covered by the new Regulation. *Id.*

<sup>355</sup> *Fine*, *supra* note 6, at 523.

<sup>356</sup> Verstryngne, *The Relationship between National and Community Antitrust Law: an Overview of the Perfumes Cases*, 3 NW. J. INT'L. & BUS. 358, 368 (1981).

<sup>357</sup> *Wilhelm v. Bundeskartellamt*, [1969] E. Comm. Ct. J. Rep. 1, [1969] Comm. Mkt. L. R. 100.

<sup>358</sup> *Procureur de la Republique v. Bruno Giry and Guerlain S.A. and Others*, [1980] E. Comm. Ct. J. Rep. 2327, [1981] Comm. Mkt. L. R. 99.

take action regarding situations which are also within the Commission's jurisdiction. Under European law, the competition rules of the Treaty of Rome are directly applicable in the Member States, without the enactment of a national law.<sup>359</sup> Thus national courts of the Member States are required to apply Articles 85 and 86.<sup>360</sup> Therefore, a private litigant could assert the direct applicability of Article 86 to a concentration, based on the authority of the *Continental Can* case.<sup>361</sup>

In the case of concentrations with Community dimension, it is likely that a national court would be reluctant to grant an injunction to prevent the concentration, because the Commission would clearly have jurisdiction. However, this legal point is uncertain and may give rise to litigation at the European Court of Justice level. In the case of a concentration that lacks Community dimension, a litigant in a national court could raise Article 86 of the Treaty of Rome. The application of Article 86 by the national court would be contrary to the intended distribution of competence under the new Regulation. One approach to this conflict has been suggested by the English court, which in the *Plessey v. GEC/Siemens* case refused to grant an injunction when the Commission was already involved.<sup>362</sup>

Articles 85 and 86 will still apply to those practices not encompassed by the term "concentration" as defined in Article 3. For example,

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<sup>359</sup> In order to ensure uniformity in the interpretation and application of Community law, Article 177 of the Treaty of Rome, gives jurisdiction to the European Court of Justice to make preliminary rulings on the interpretation of the EEC Treaty as well as on regulations, decisions and directives of the Community institutions. As a result of cases brought before it under Article 177, the European Court of Justice has expressly formulated two fundamental principles of Community law. First, in *van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] E. Comm. Ct. J. Rep. 1, [1963] Comm. Mkt. L.R. 105 (reference for preliminary ruling), the Court established that provisions of the Treaty as well as acts by the Community institutions have direct effect, (*i.e.*, can create rights for private persons that national courts are bound to protect). Second, the Court developed in *Costa v. ENEL*, [1964] E. Comm. Ct. J. Rep. 585, [1964] Comm. Mkt. L.R. 425 (reference for preliminary ruling), the fundamental principle that Community law prevails over conflicting national law. See Stuart, *The Court of Justice of the European Communities: the Scope of its Jurisdiction and the Evolution of its Case Law under the EEC Treaty*, 3 NW. J. INT'L. & BUS. 415, 421-427 (1981).

<sup>360</sup> The Court of Justice has repeatedly held that because of the direct applicability of Articles 85 and 86 in Member States, national courts should apply these competition rules. See, e.g., *Belgische Radio en Televisie and Societe belge des auteurs, compositeurs et editeurs v. SV Sabam and NV Fonior*, [1974] E. Comm. Ct. J. Rep. 51; [1974] 2 Comm. Mkt. L.R. 238, stating that the prohibitions of Article 85(1) and 86 create direct rights for individuals, which the national courts must protect.

<sup>361</sup> *Supra* note 86.

<sup>362</sup> *The Plessey Co. v. the General Electric Co., Siemens*, [1990] ECC 384 (1988). The English High Court, Chancery division, refused to grant injunctions to either party in the attempted takeover of Plessey by the Siemens-GEC consortium, when the bid had been referred to the EC Commission under article 85, but before the Commission had decided upon it.



Article 3(2) of the Regulation excludes certain joint ventures, in which the parties remain independent and only coordinate their behavior (in practice, cartels), in contrast to joint ventures "performing on a lasting basis all the functions of an autonomous economic entity."<sup>363</sup> The Commission's control of those joint ventures not within the scope of the Regulation is not limited by any quantitative threshold. These cartels could also be subject to investigations by the national authorities of Member States. As a result, companies may have to notify both the Commission and the national authorities because it is difficult to determine what constitutes a joint venture in the scope of the regulation and what does not.<sup>364</sup>

### B. Increased Litigation

The Regulation gives unlimited jurisdiction to the European Court of Justice to review decisions "whereby the Commission has fixed a fine or periodic penalty payments."<sup>365</sup> Furthermore, under Article 173 of the Treaty of Rome, the European Court of Justice is competent to review any decision of the Commission on appeal.<sup>366</sup> Appeal may thus be taken against Commission's decisions at the various stages of the procedure. It has been argued that appealing a Commission decision will be a good defensive block to mergers or acquisitions.<sup>367</sup>

Some of the cases will be reviewed by the newly established Court of First Instance.<sup>368</sup> The Court of First Instance has jurisdiction over cases

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<sup>363</sup> See *supra* Section V (C)(1) of this article.

<sup>364</sup> *Id.*

<sup>365</sup> The Regulation, art. 16, *supra* note 6, at 10.

<sup>366</sup> Article 173 of the Treaty of Rome states:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

<sup>367</sup> EC Practitioners Question Ability to Deliver Effective Merger Review, *supra* note 130.

<sup>368</sup> In the Single European Act, *supra* note 3, Member States agreed that a Court should be established to judge at first instance certain actions brought by legal and natural persons. Under the Act the Court of Justice retained jurisdiction on cases brought by Member States or by Community institutions, as well as the jurisdiction to make preliminary rulings under Article 177 of the EEC Treaty. Slyn, *Court of First Instance of the European Communities*, 9 NW. J. INT'L. L. & BUS. 542, 544 (1989). Council Decision of 24 October establishing a Court of First Instance of the European Communities, 31 O.J. EUR. COMM. (No. L 319) 1 (1988).

brought by natural and legal persons against the Commission, relating to the implementation of competition rules.<sup>369</sup> Such cases will be subject to a right of appeal to the European Court of Justice on points of law only.<sup>370</sup> Other cases, including appeals by Member States against a decision as to the existence of a distinct market in a Member State<sup>371</sup> or on the admissibility of a legitimate interest,<sup>372</sup> will be appealed directly to the Court of Justice. The Court will certainly follow the precedents set under Articles 85 and 86. Under previous jurisprudence, the Court has been reluctant to review the merits of economic decisions taken by the Commission. However, the Court is expected to have a large influence in the determination of the respective jurisdiction areas of the Commission and Member States.

### C. Lack of Manpower and Time Constraint.

About 50 concentration cases are anticipated per year and each case will require a team of at least four specialists.<sup>373</sup> The Commission had to expand in order to fulfill its new mission. A special Merger Task Force was created. It includes 48 members who come from other areas of the Commission and national agencies.<sup>374</sup> The team has been criticized for its "apparent remoteness from the business community."<sup>375</sup> As far as new staff is concerned, the Commission's applicant pool is probably limited to nationals of the three Member States which have experienced people in competition matters: the UK, the Federal Republic of Germany and France.<sup>376</sup> However, the Commission may experience difficulties in attracting key people from industry.<sup>377</sup> The expected decrease in the quantitative threshold should bring the number of mergers to be reviewed to 80. Expanding to the level required will be expensive and it is not clear whether the necessary resources will be available.

Competition lawyers in London and Brussels are questioning the ability of the EC Commission to deliver an effective merger review.<sup>378</sup> Due to the complex consultative procedures provided by the Regulation

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<sup>369</sup> Slynn, *supra* note 368, at 545.

<sup>370</sup> *Id.*

<sup>371</sup> The Regulation, art. 9. *supra* note 6, at 7; *see infra* Section VI of this article "Competence to Review Concentrations," at —.

<sup>372</sup> The Regulation, art. 21(3), *supra* note 6, at 11; *see infra* Section V of this article *Competence to Review Concentrations*, at —.

<sup>373</sup> EC Practitioners Question Ability to Deliver Effective Merger Review, *supra* note 130.

<sup>374</sup> *Task Force Set to Police the Eurotakeovers*, THE EUROPEAN, September 14-16, at 21, col. 1.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

the time scales for the Commission to review concentrations and issue decisions may be unrealistic. The Commission has received notifications.<sup>379</sup> Future decisions from the Commission will hopefully provide more guidance on the Commission's ability to fulfill its new mission.

## XI. CONCLUSION

The new Regulation is designed to fill the present void in merger control which existed until September 1990. However, the Regulation and long-awaited EC Merger Control Guidelines raise serious concerns about the new system's ability to meet businesses' and administrators' expectations and understandable desires for certainty. Partly due to the vast differences in merger control experience of the various Member States, the new Regulation and Guidelines have compromised several of the principles they set out to follow.

The Commission intended to offer businesses a "one-stop" system. However, the scope of the Regulation fails to cover a large part of the current activity in a comprehensive manner. First, the efforts to abolish jurisdictional uncertainty have not been successful. The exceptions to the Commission's jurisdiction are numerous. As the standards of merger control still vary widely among Member States, problems such as parallel litigation and forum shopping will persist. Second, although definitional uncertainty has been reduced from the inadequate provisions of Articles 85 and 86, the Regulation's rules and the Guidelines still require clarification. Efforts to deal with the ambiguities will result in litigation ex-

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<sup>379</sup> The first notification concerned the Renault-Volvo deal. 33 O.J. Eur. Comm. (No. C 254) 3 (1990). The Commission declared that concentration compatible with the Common Market on November 6, 1990. 33 O.J. Eur. Comm. (No. C 281) 3 (1990). For other notifications *see e.g.* notification of the constitution of joint ventures between NV Aneve, the third largest Dutch insurer, and Compagnie Financiere et de Reassurance du Groupe AG SA, the leading Belgian insurance company. 33 O.J. Eur. Comm. (No. C 268) 8 (1990). The Commission has announced that it will not oppose the plan. Comm. Press Release IP (90) 941, Nov. 22, 1990; Notification of a proposed concentration by which Imperial Chemical Industries, a leading manufacturer of chemical and related products acquires from Cookson Group a 50% holding in Tioxide Group, which produces titanium pigments and related chemical products, 33 O.J. Eur. Comm. (No. C 278) 15 (1990); notification of the acquisition by Diasa, controlled by Promodes, of Dirsas, both companies being in the retail distribution of foodstuffs; notification of the acquisition by Cargill PLC of the United Agriculture Merchants Limited PLC from Unilever PLC, 33 O.J. Eur. Comm. (No. C 293) 8 (1990). On December 20, 1990, The Commission decided not to oppose the notified concentration, 33 O.J. Eur. Comm. (No. C 327) 14 (1990); notification of the acquisition by Matsushita of MCA, 33 O.J. Eur. Comm. (No. C 307) 2 (1990); notification of the acquisition by AT&T of NCR, 33 O.J. Eur. Comm. (No. C 310) 23 (1990); notification of a "strategic alliance" between Fiat and Compagnie Generale d'Electricite, 33 O.J. Eur. Comm. (No. C 315) 13 (1990); *see also* EUROPE, November 1990, at 43, col. 2; notification of the acquisition by Sicind SpA controlled by the group FIAT of 50.1% of the capital of CEAC from the Compagnie Generale d'Electricite, 33 O.J. Eur. Comm. (No. C 315) 14 (1990).

pense and delay. Third, although the Regulation has made significant headway in reducing procedural uncertainty, administrative feasibility remains to be seen.

While the new Regulation and implementing Guidelines will continue to present merging businesses with a fair amount of uncertainty, they are nonetheless a step in the development of a comprehensive merger control system within the European Community. Further modifications in the Regulation and Guidelines will likely occur as the system develops. For example, the quantitative threshold is expected to be lowered by 1993.<sup>380</sup> Furthermore, if the United States experience is any indication, the perceived need for dual systems will over time be reduced as the primacy of Community control over competition becomes further established and the Community becomes increasingly integrated commercially.

In the interim, certain businesses stand to gain from a system that promises unified controls and a reduction of uncertainty in selected areas. One such benefit should be the reduced uncertainty of multiple proceedings that the new clearance procedure will provide. The clearance procedure should also prevent the possibility of the Commission stepping in once a merger has been consummated.<sup>381</sup> As the European merger system develops over the coming years, the business community should stress the need for greater certainty in Community coverage procedures and guidelines. This first effort, which has survived nearly twenty years, will be a success only if it is followed up with practical modifications over the next few years.

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<sup>380</sup> The threshold is expected to be lowered to ECU 2 billion after December 31, 1992. See 1992: *The External Impact of European Unification*, *supra* note 112.

<sup>381</sup> An example of the Commission's present power to step in after the fact is illustrated by the Douwe Egberts - Van Nelle takeover. In July 1990, the Commission decided that the takeover in February 1989 by Douwe Egberts, the leading Dutch tobacco, coffee and toiletries company, of its biggest Benelux rival in coffee, Van Nelle, was illegal. Douwe Egberts is owned by Sara Lee, the large American food company. *Brussels to Act Against Dutch Coffee Merger*, *Fin. Times*, Jul. 25, 1990 at 1, col 7-8.