

## The December 1989 European Community Merger Control Regulation: A Non-EC Perspective

Paul D. Callister

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

---

### Recommended Citation

Callister, Paul D. (1991) "The December 1989 European Community Merger Control Regulation: A Non-EC Perspective," *Cornell International Law Journal*: Vol. 24: Iss. 1, Article 5.

Available at: <http://scholarship.law.cornell.edu/cilj/vol24/iss1/5>

This Note is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# The December 1989 European Community Merger Control Regulation: A Non-EC Perspective

## Introduction

On December 21, 1989, the Council of the European Communities passed a merger control regulation requiring mergers<sup>1</sup> to be approved by the European Commission.<sup>2</sup> The European Community considered unified merger control an essential component of the 1992 Common Market integration.<sup>3</sup> While creating exciting opportunities for mergers within Europe, the EC plan will affect mergers worldwide.

The merger control regulation (the "Regulation") will affect non-European firms in three ways. First, it will simplify mergers with European firms by requiring approval from only one European authority, the EC Commission.<sup>4</sup> Second, the new Regulation has international anti-trust implications affecting mergers and other transactions worldwide.

---

1. Here "mergers" is used in the broadest sense of the term and includes the following transactions: statutory mergers, asset sales, stock purchases, share exchanges, tender offers, and joint ventures.

2. *European Antitrust Agreement*, N.Y. Times, Dec. 21, 1989, at D1, col. 3. The European Commission is the principal executive branch of the European Community. The new regulation went into effect on September 21, 1990. *Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings*, 32 O.J. EUR. COMM. (No. L 395) art. 25, § 1, at 12 (1989) [hereinafter *Regulation*].

3. *EC Nearing Accord on Merger Controls*, Wall St. J., Nov. 24, 1989, at C10, col. 6; see also Hawk, *The Proposed Revisions to the Justice Department's Antitrust Guidelines for International Operations and Recent Developments in EEC Competition Law*, 57 ANTITRUST L.J. 299, 308 (1988).

The European Community is working to abolish all barriers to trade within the EC by 1992. The goal is to promote the free flow of goods and capital across the borders of the various member states. One of the key components of this plan has been the harmonization of merger control to best facilitate the free flow of capital as well as promote the restructuring of Europe's corporate environment to better suit the needs of the Common Market. See *id.* See also generally Bertrand, *Scrambling for 1992*, BUS. MARKETING, Feb. 1989, at 49; Kirkland, *Outsider's Guide to Europe in 1992*, FORTUNE, Oct. 24, 1988, at 121; Kirkland, *Busting the Myth of "1992,"* 10 BEST OF BUS. Q. 76 (1988); Lamoriello, *Completing the Internal Market by 1992: The EC's Legislative Program for Business*, BUS. AM., Aug. 1, 1988, at 4.

4. As shall be discussed, the merger must be rather large to fall within the scope of the new statute. See *infra* notes 26-32 and accompanying text. "Turnover" is similar to the American concept of "revenue."

Thus, multinational firms will have to look increasingly to Europe for approval of their consolidation efforts, regardless of where they implement the merger transaction. Third, the new Regulation is designed to facilitate the growth of European multinationals and enhance the ability of European firms to compete in international markets, including non-European markets. Non-EC firms can expect an increase in the size and competitiveness of European firms, whose growth the European Commission will favor and encourage. This Note will explore each of these three effects and conclude that while the new Regulation may not threaten non-European multinationals with "fortress Europe," greater European influence and competitiveness will accompany the benefits of simplified access to European merger markets.

To demonstrate the accessibility of European merger markets, this Note will first present a brief history of EC merger control. In Section II, this Note will explain and evaluate the filing requirements and criteria for approval under the new Regulation. In Section III, this Note will discuss the international antitrust implications arising from the Regulation's extraterritorial application, its competition policy,<sup>5</sup> and its effect on business transactions. In the final section, this Note will explore the EC's intent and ability to use the new Regulation to enhance the competitiveness of its own firms in international markets.

## I. A Brief History of European Merger Control

The new Regulation was initially considered in 1973 after the Commission first took steps in *Continental Can*<sup>6</sup> to control mergers through Article 86 of the Treaty of Rome.<sup>7</sup> Article 86 prevents a firm from abusing its dominant position in the marketplace.<sup>8</sup> In *Continental Can*, the European Court of Justice<sup>9</sup> held that a merger that "strengthens" the dominant market position of a firm is an "abuse of dominant position" under Article 86.<sup>10</sup> The troubling aspect of *Continental Can* was that the Com-

---

5. "Competition policy" refers to the standards that the EC uses to protect the free market environment which is theoretically necessary for the health of industry and commerce.

6. *Europemballage and Continental Can v. Commission*, 1973 E. Comm. Ct. J. Rep. 215, 12 COMMON MKT. L.R. 199 (1973) [hereinafter *Continental Can*].

7. See D. GOYDER, *EEC COMPETITION LAW* 323 (1988) (discussing the 1973 draft).

The Treaty of Rome established the EC. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 86, 298 U.N.T.S. 3, at 48-49 [hereinafter Treaty].

8. Treaty, *supra* note 7, at art. 86.

9. The European Court of Justice is an EC court that typically has authority to review Commission decisions. This court has express authority to review Commission decisions under the new Regulation. See *infra* notes 163-70 and accompanying text.

10. *Continental Can*, 1973 E. Comm. Ct. J. Rep. 215; see also Schmitt, *Multinational Corporations and Merger Control in Community Antitrust Law*, in *EUROPEAN MERGER CONTROL* 169, 174 (K. Hopt ed. 1982).

mission voided a merger only after it occurred.<sup>11</sup> In addition, Article 86 was severely limited in merger control applications because the Commission could only apply it to firms that already held a dominant market position.<sup>12</sup> To meet such concerns, a series of merger control regulation drafts was promulgated.<sup>13</sup> But efforts to draft a regulation stalled because Germany and England fiercely opposed the proposed regulation.<sup>14</sup>

Momentum for the proposed regulation resumed in 1987 when the Commission succeeded in applying Article 85<sup>15</sup> to stock acquisitions.<sup>16</sup> In contrast to Article 86, which regulates abuses of dominant market position, Article 85 prohibits agreements that restrict, prevent, or distort competition within the Common Market.<sup>17</sup> In 1966, the Commission had concluded that Article 85 would not apply to mergers,<sup>18</sup> but the result in *Philip Morris*, which applied Article 85 to stock acquisitions, showed that the Commission had reversed its earlier position.<sup>19</sup> Within one month after *Philip Morris*, the EC Member States moved substantially forward with another merger regulation proposal.<sup>20</sup>

Due to Commission threats to further apply Articles 85 and 86 of the Treaty of Rome as a makeshift merger regulation, the various Member States acquiesced to the inevitable adoption of a new merger control regulation.<sup>21</sup> Member States recognized Articles 85 and 86 as inadequate because, *inter alia*, the Commission could regulate mergers only by dismantling them after they had occurred.<sup>22</sup> On December 21, 1989, the EC Member States unanimously approved the new Regulation,<sup>23</sup> which the Commission began enforcing on September 21, 1990.<sup>24</sup>

---

11. Banks, *Mergers and Partial Mergers Under EEC Law*, 11 *FORDHAM INT'L L.J.* 266, 274 (1988).

12. Hawk, *supra* note 3, at 309.

13. *Commission Proposal for a Regulation (EEC) of the Council on the Control of Concentrations Between Undertakings*, 16 *O.J. EUR. COMM.* (No. C 92) 1 (1973), amended by 25 *O.J. EUR. COMM.* (No. C 36) 3 (1982), 27 *O.J. EUR. COMM.* (No. C 51) 8 (1984), 31 *O.J. EUR. COMM.* (No. C 130) 4 (1988), and 32 *O.J. EUR. COMM.* (No. C 22) 14 (1989).

14. *See European Antitrust Agreement*, *supra* note 2.

15. Treaty, *supra* note 7, at art. 85.

16. *British Am. Tobacco (and Philip Morris) v. Commission*, 1987 E. Comm. Ct. J. Rep. 4487, Common Mkt. Rep. (CCH) ¶ 14,405 (1987) [hereinafter *Philip Morris*]; *see also* Hawk, *supra* note 3, at 310-11.

17. *See generally* Treaty, *supra* note 7, at art. 85.

18. Banks, *supra* note 11, at 257-60.

19. *Philip Morris*, 1987 E. Comm. Ct. J. Rep. 4487.

20. Hawk, *supra* note 3, at 311.

21. *Id.* at 310; *Commission Prepared to Withdraw Merger Control Proposal*, Common Mkt. Rep. (CCH) ¶ 10,926 (1987); Fine, *EC Merger Control in the 1990s: An Overview of the Draft Regulation*, 9 *Nw. J. INT'L L. & Bus.* 513, 514-15 (1989). *See generally* Banks, *supra* note 11, at 272-74.

22. Banks, *supra* note 11, at 274 (Banks also lists other reasons for inadequacy).

23. *European Antitrust Agreement*, *supra* note 2, at D1.

24. *Regulation*, *supra* note 2, at art. 25, § 1.

## II. Overview of the New Merger Regulation

The major benefits of the new Regulation result from greater simplicity in European merger control. The new Regulation will allow non-EC<sup>25</sup> firms to merge with approval from only one European body, the EC Commission. If the specified threshold requirements of the Regulation are met, the merging firms are not required to gain approval from the various Member States. With approval being granted in advance of the merger, the risk of a costly order to divest is minimized.

The new Regulation also offers non-European firms the benefits of simplified access to European markets through merger transactions. Non-European firms can purchase European manufacturing, marketing, distribution, and service firms or subsidiaries with sole approval of the EC Commission. Acquiring firms no longer need to gain approval from numerous countries to assemble a transaction that involves firms from more than one Member State. Instead of structuring deals that target products or markets of individual Member States, non-EC firms can now structure deals with the whole of Europe in mind.

As this Note shall explain, only firms engaged in large transactions will reap the benefits of the new Regulation. Firms must meet threshold requirements of size (in terms of European Community currency) to qualify for review under the Regulation. Also, parties to a merger applying for Commission approval must be compatible with Community anti-trust policy which includes consideration of the economic interests of the Community.

Non-European business executives should temper enthusiasm for the Regulation with the realization that approval of mergers by the Commission will have a political component and will be subject to possible delay through judicial review. Because of the Regulation's underlying policy objectives, the possibility for discrimination against non-Europeans does exist. In approving mergers, the Commission must consider the competitiveness of European firms not only within Europe but in markets around the world. Indeed, the growth of European industry and its ability to compete in international markets is a stated policy objective of the new Regulation. Such policy objectives may work against non-EC firms.

### A. Threshold Requirements for Filing with the Commission

As of September 21, 1990, parties to mergers that satisfy threshold size-requirements must file for approval with the EC.<sup>26</sup> The merger Regulation applies to "all concentrations<sup>27</sup> having a community dimension."<sup>28</sup> The criterion of "community dimension" is met when (1) the aggregate

---

25. "Non-EC firm" is used to refer to firms from countries that are not members of the EC.

26. *Regulation*, *supra* note 2, at art. 25, § 1.

27. *Id.* at art. 3, §§ 1-2 ("Concentrations" include mergers, asset sales, stock purchases, share exchanges, tender offers, and in some cases, joint ventures).

28. *Id.* at art. 1, § 1.

worldwide turnover of all the undertakings<sup>29</sup> concerned is more than five billion ECU (about \$6.8 billion), and (2) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 250 million ECU (about \$341 million).<sup>30</sup> The Regulation does not apply, however, where "each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."<sup>31</sup> In 1994 the Commission will review the five billion ECU threshold and decide whether to lower it to two billion ECU (about \$2.7 billion).<sup>32</sup>

While the threshold levels are relatively high, the rules for calculation of turnover place more mergers within the scope of the Regulation than one might expect. The calculation of the turnover thresholds involves more firms than simply the actual parties to the transactions: it also includes turnover of the controlling and controlled entities of the parties.

Turnover is calculated by adding together all "amounts derived by the undertakings concerned in the preceding financial years 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."<sup>33</sup> As mentioned, firms that are essentially controlled by or control the merging entities are also included in the turnover calculation.<sup>34</sup> Likewise, the

29. "Undertakings" are the European equivalent of "firms" in American corporate and partnership law.

30. *Regulation, supra* note 2, at art. 1, § 2.

31. *Id.*

32. *European Antitrust Agreement, supra* note 2, at D2. It is interesting that the phrase "concentration having a Community dimension" is defined in terms of turnover and not competition within the EC. "The duty to notify and suspend implementation [of the merger] applies even if the merger has no anti-competitive effects." Korah & Lasok, *Philip Morris and its Aftermath—Merger Control?*, 25 COMMON MKT. L. REV. 333, 365 (1988). The turnover threshold requirement results in notification for only large mergers. *See id.* The policy considerations of the EC will be discussed later in this Note. *See infra* notes 219-21 and accompanying text.

The merger control Regulation also covers banks and insurance companies, although turnover is calculated differently. For banks, "revenues [turnover] would be regarded as about one-tenth of their assets, so that a bank merger would be reviewed if the resulting bank's assets came to more than about 50 billion ECU's, or \$68 billion." *European Antitrust Agreement, supra* note 2, at D2; *see also Regulation, supra* note 2, at art. 5, § 3(a). The requirement for "community-wide turnover" is calculated in a similar manner. *See id.* For insurance companies, turnover is calculated using "the value of gross premiums." *Id.* at art. 5, § 3(b).

33. *Regulation, supra* note 2, at art. 5, § 1 (turnover derived from internal operations within a group shall not be included in this calculation).

34. The inclusion of turnover from the various entities associated with the merger is determined as follows: "[W]here the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers." *Id.* at art. 5, § 2 (emphasis added). Any firm affiliated with the merging parties shall be included in the calculation of turnover if (1) half of its capital or business assets are owned by one of the merging parties, (2) at least half of its voting rights are owned by one of the merging parties,

turnover of any other undertakings controlled by the firms that essentially control the merging entities is also included in the turnover calculation.<sup>35</sup> Because the Regulation addresses control through “indirect” means other than actual ownership — for example, the ability to appoint over half of the board — controlling corporations which are removed from the merging entities through a chain of parent-subsidiary relationships may still be included in the calculation.<sup>36</sup> Thus, under the Regulation, the controlling and controlled entities of the merging parties are identified and included in the turnover calculation, no matter how far removed from the merging entities.

There is, however, an important exception for calculation of the turnover of the selling firm: where only part of a firm is sold, only the turnover of that part is included in the calculation.<sup>37</sup> Thus, in an asset sale or other transaction that can be characterized as a sale, the seller’s turnover includes only those parts of the firm actually being sold.<sup>38</sup> On the other hand, the exception for sellers does not apply to statutory mergers or joint ventures.<sup>39</sup>

The “seller’s exception” is significant because it means that the structure of a transaction may determine if it meets merger Regulation threshold requirements. For instance, if A corporation merges its subsidiary B corporation with C corporation in such a way as to avoid the appearance of a sale, then the turnover of A, B, and C will be included in the calculation under the Regulation.<sup>40</sup> But if A sells its subsidiary, B, to C, then only the turnover of B and C is used in the threshold calculation.<sup>41</sup> If the aggregate turnover of B and C falls below the Regulation’s threshold requirements, then the Commission will have no jurisdiction

(3) any of the merging parties has the power to appoint at least half of the members of the affiliated firm’s board of directors, board of managers or other bodies representing the firm, or (4) any of the merging parties has the right to manage its affairs. *Id.* at art. 5, § 4(b). Furthermore, if any of the affiliated companies have, either directly or indirectly, the ownership, voting, management rights or powers listed in (1) through (4), above, over any of the merging parties, then they are included in the turnover calculation, *together with any other firms* over which they, directly or indirectly, have any of the powers listed in (1) through (4). *Id.* at art. 5, § 4(d).

35. Obviously, control sometimes exists with less than half ownership of all outstanding voting common stock. But given the comprehensiveness of the Regulation, it is unlikely that any firm having effective control or being effectively controlled by one of the merging parties will escape the language of the Regulation.

36. See *Regulation, supra* note 2, at art. 5, § 4(b). For example, suppose A owns 60 percent of B, B owns 60 percent of C, and C merges with D. A’s turnover is included because A has the power to appoint over half of C’s board, to exercise over half of the voting rights in C, and to effectively manage C’s affairs. See *id.*

37. Compare *id.* at art. 5, § 2, with *id.* at art. 5, § 4.

38. “Parts” of a firm being sold do not have to be legal entities for purposes of the Regulation. *Id.* at art. 5, § 2.

39. Joint ventures are also covered by the Regulation. See *infra* notes 241-49 and accompanying text.

40. *Regulation, supra* note 2, at art. 5, § 4; see also *supra* note 33 and accompanying text.

41. *Regulation, supra* note 2, at art. 5, § 2.

over the transaction. Hence, the structure of a transaction becomes crucial for jurisdictional purposes.

The "seller's exception" effectively excludes the turnover of the parent corporation from the threshold calculation in an actual sale, as in an asset sale, but includes the parent's turnover when the parent corporation does not relinquish all of its ownership rights in the transaction. While asset sale transactions may seem superior for successorship liability reasons, the EC merger Regulation favors transactions other than sales for jurisdictional purposes. As this Note argues, EC jurisdiction benefits companies by eliminating the prerogative of national authorities to review a transaction and by allowing pre-approval of mergers.<sup>42</sup> Thus, in some instances, realization of the benefits of the new Regulation will depend on how the deal is structured.

The net result of the Regulation's rules for turnover calculation is that the five billion ECU and 250 million ECU thresholds are met more easily than might be expected. Calculating these thresholds is critical for firms who wish to know whether they must file with the EC.<sup>43</sup> Executives should not think their firms cannot qualify for approval under the EC simply because a merger is between one of their low earning subdivisions and another firm. Likewise, the threshold requirements should not fool executives into thinking that their firms do not have to file with the EC for approval because a transaction only involves one of their firm's subdivisions. While the threshold requirements are high, they can be easily met when a large firm is involved in a merger transaction.

Another major exception to the threshold requirements should be noted. Member States may refer mergers to the Commission that are below the threshold requirements and that threaten to have a significant adverse effect in a Member State.<sup>44</sup> This exception allows Member States — such as Italy, which has no antitrust agencies — to use the Regulation to protect their own markets.<sup>45</sup> Parties to mergers in countries that are free of merger controls should be aware that they may fall under EC regulation regardless of the size of the transaction.

## B. Filing Requirements

The purpose of the filing requirement is to allow the Commission to identify transactions that may have a negative impact on competition within the Common Market. After firms file with the EC, the Commission conducts an initial review to assess whether the proposed merger or other transaction is compatible with Community competition policy. EC approval may take up to four months, but the Commission may approve many transactions within one month after filing.<sup>46</sup>

---

42. See *supra* note 25 and accompanying text.

43. See *supra* notes 26-32 and accompanying text.

44. *Regulation, supra* note 2, at art. 22, § 3.

45. Ferry & Vig, *New EC Control Regulation Has Important Antitrust Ramifications*, NAT'L L. J., Feb. 26, 1990, at 32, col. 2.

46. *Regulation, supra* note 2, at art. 10, §§ 1-2.



### 1. Mandatory Filing

Whenever merging parties meet the threshold requirements<sup>47</sup> and fall into the jurisdictional scope of the Regulation,<sup>48</sup> they must file with the Commission.<sup>49</sup> Parties must notify the Commission within "one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest."<sup>50</sup> In a merger, both parties must file.<sup>51</sup> In an acquisition, whether an asset purchase, tender offer, or stock acquisition, only the purchasing party has to file.<sup>52</sup> Without exception, notification must occur prior to the merger's implementation.<sup>53</sup>

Parties to a merger should not think they do not have to file simply because their transaction will have no anti-competitive effects in the Common Market. "[T]he test of whether a duty to notify arises is different from that of whether the merger is in fact anti-competitive."<sup>54</sup> The threshold and jurisdictional requirements of the Regulation are designed to identify mergers with a "Community dimension" regardless of their effect on competition.<sup>55</sup>

### 2. Suspension of the Transaction

Firms that are required to notify the Commission are also required to suspend implementation of the merger until three weeks after notification.<sup>56</sup> The Commission has one month from the day it receives notification to implement proceedings<sup>57</sup> based on whether the merger falls within the threshold requirements and geographic scope of the Regulation and whether the merger "raise[s] serious doubts as to its compatibility with the [C]ommon [M]arket."<sup>58</sup> For mergers that raise serious doubts about compatibility with competition policy, the Commission must make its decision within four months.<sup>59</sup> Once the Commission has initiated proceedings, it may suspend implementation of the merger

47. See *supra* notes 26-32 and accompanying text.

48. See *infra* notes 190-218 and accompanying text.

49. Regulation, *supra* note 2, at art. 4, § 1; see also Fine, *supra* note 21, at 520.

An important exception to this requirement is that banks and insurance companies that hold stock on a temporary basis are not required to file with the Commission as long as they do not exercise their voting rights. See Regulation, *supra* note 2, at art. 3, § 5(a).

50. Regulation, *supra* note 2, at art. 4, § 1.

51. Compare *id.* at art. 4, § 2, with *id.* at art. 3, § 1(a).

52. Compare *id.* at art. 4, § 2, with *id.* at art. 3, § 1(b).

53. *Id.* at art. 7, § 1.

54. Fine, *supra* note 21, at 520. Even mergers that satisfy the 25 percent market share presumption of compatibility are not exempt from the notification requirement. *Id.* See *infra* notes 81-83 and accompanying text.

55. See Fine, *supra* note 21, at 520.

56. Regulation, *supra* note 2, at art. 7, § 1.

57. *Id.* at art. 10, § 1. The period of time may be increased to six weeks at the request of an EC member state. *Id.* at art. 9, § 2; see also *infra* notes 123-28 and accompanying text.

58. Regulation, *supra* note 2, at art. 6, § 1.

59. *Id.* at art. 10, §§ 2-3.

until it makes its final decision approving the merger.<sup>60</sup> Unless the parties fail to provide the Commission with the requisite information,<sup>61</sup> the longest time needed for Commission approval is four months.<sup>62</sup> If the Commission fails to take any action within the Regulation's time deadlines, the merger is automatically deemed compatible.<sup>63</sup> To prevent serious damage to any of the merging parties, the Commission may waive the requirement of suspension.<sup>64</sup> The Commission, however, may condition the waiver upon the parties' preservation of effective competition.<sup>65</sup>

### 3. Penalties

Violators of EC rules are subject to fines and penalties. For "intentionally or negligently" implementing a concentration without approval or without notice to the Commission, the undertakings concerned—those firms used in the calculation of turnover as discussed above—can be fined up to ten percent of their aggregate turnover.<sup>66</sup> For example, the Commission could apparently fine the merging firms up to ten percent of their turnover plus ten percent of the turnover of all firms that they either control or that control them.<sup>67</sup> The "gravity of the infringement"<sup>68</sup> and "size of the fine . . . depends on whether the party or parties *deliberately or negligently* failed to consider that the merger had a

---

60. *Id.* at art. 7, § 2. An exception to the suspension requirement is granted for public takeovers. Implementation of a public takeover is allowed to proceed if the acquiring parties have notified the Commission by the date the bid is announced and "provided that the acquirer does not exercise the voting rights attached to the securities in question" until the Commission approves the transaction. *Id.* at art. 7, § 3.

Securities transactions on regulated public exchanges are also granted an exception that makes them valid during the period of suspension "unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention" of the suspension provisions. *Id.* at art. 7, § 5.

61. *Id.* at art. 10, § 4. If the Commission has had to request information or order an investigation pursuant to the Regulation's Articles 11 and 12, the Commission may suspend the time period deadlines for its decision. *Id.* In such cases, the transaction may also be suspended because the Commission has not reached its final decision and, at its own discretion, decides to protect its ability to declare the transaction incompatible with the Common Market and to require the transaction's cessation. *Id.* at art. 7, § 2. This exception may seriously undermine the time tables imposed upon the Commission and is a threat to the financing necessary for merger transactions.

62. However, "[w]here the Court of Justice giv [sic] a judgment which annuls the whole or part of a Commission decision . . . , the [time] periods laid down . . . shall start again from the date of the judgment." *Id.* at art. 10, § 6.

63. *Id.*

64. *Id.* at art. 7, § 4.

65. *Id.* Further suspensions are permitted if the undertakings fail to supply the necessary information. *Id.* at art. 10, § 4.

66. *Id.* at art. 14, § 2. In earlier drafts of the Regulation, there was some controversy about whether the ten percent limitation applied to penalties imposed for failure to notify the Commission. Under the new Regulation, there is no ten percent ceiling for failure to notify the Commission. *Id.* at art. 14, § 1(a). There is, however, a 50,000 ECU ceiling for such a fine. *Id.*

67. *Id.* at art. 5 (on calculation of turnover).

68. *Id.* at art. 14, § 3.

Community dimension."<sup>69</sup> In addition, the Commission may impose fines for supplying "incorrect or misleading information in a notification,"<sup>70</sup> for failing to supply information pursuant to a request,<sup>71</sup> and for failure to produce books and business records in complete form.<sup>72</sup>

### C. EC Competition Policy Compatibility Standards

Under the new Regulation, mergers and other transactions are approved based upon their compatibility with EC competition policy. EC competition policy is defined largely through the concept of "dominant position." The Commission's standard for approving a particular transaction is stated as follows: "A concentration which creates or strengthens 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 incompatible with the common market."<sup>73</sup>

The Regulation allows no exceptions for approval in failing to meet these criteria; however, it does list a series of factors that the Commission must consider when applying the above standard. In making its appraisal the Commission shall take into account:

- (a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
- (b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests 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.<sup>74</sup>

The Commission's method of approving "compatible" transactions must be analyzed in three parts: (1) the concept of dominant position in

69. Fine, *supra* note 21, at 520 (emphasis added).

70. Regulation, *supra* note 2, at art. 14, § 1(b).

71. *Id.* at art. 14, § 1(c)-(d). The Commission has investigative powers, including the power to request information, under Articles 11, 12 and 13 of the Regulation.

72. *Id.* at art. 14, § 1(d). Penalties between 1,000 ECU and 50,000 ECU may be assessed. *Id.* at art. 14, § 1. The Commission has investigative powers to examine books, demand oral explanations on the spot, demand copies of records, and "enter any premises, land and means of transport of undertakings." *Id.* at art. 13, § 1(d). If a firm refuses to allow the Commission to exercise these investigative powers or fails to expeditiously supply requested information, the firm may be fined up to 25,000 ECU for each day that it delays. *Id.* at art. 15, § 1. The Commission can also impose fines of up to 100,000 ECU for each day's failure to comply with the Commission's ultimate decision regarding the merger. *Id.* at art. 15, § 2. The Court of Justice has unlimited jurisdiction to reduce or increase fines or penalties. *Id.* at art. 16.

73. *Id.* at art. 2, § 3. For the affirmative but almost identically worded standard, see *id.* at art. 2, § 2.

74. *Id.* at art. 2, § 1.

terms of its technical and traditional meaning for previous EC competition policy under Article 86; (2) the Regulation's requirement that transactions not be approved if they would result in competition being "significantly impeded in the common market;"<sup>75</sup> and (3) the role that the factors mentioned above will play in the Commission's determination of compatibility.

### 1. *Dominant Position*

An important objective of the merger Regulation is to protect competition within the Common Market. The Commission attempts to identify the creation, strengthening, or abuse of a monopoly or "dominant position." This concept of "dominant position" is crucial to an understanding of the merger Regulation's competition policy. Under the Regulation, "[a] concentration which creates or strengthens 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 incompatible with the common market."<sup>76</sup> The concept of "dominant position" explicitly limits the accumulation of monopoly power. The European Court of Justice defines dominant position as "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, its customers and ultimately of the consumers."<sup>77</sup> The underlying axiom of this definition is independence from normal competitive market forces.

The Commission assesses "dominance" under Article 86 based on guidelines set down by the European Court of Justice in *United Brands*<sup>78</sup> and *Hoffmann-La Roche*.<sup>79</sup> Prior to the adoption of the merger Regulation, Article 86 of the Treaty of Rome governed mergers. "Dominant position" was composed of three components under Article 86: (a) market share, (b) product market, and (c) geographic market.<sup>80</sup> Because the new Regulation expressly incorporates the term "dominant position" in

---

75. *Id.* at art. 2, § 3.

76. *Id.*

77. *Hoffmann-La Roche & Co. v. Commission*, 1979 E. Comm. Ct. J. Rep. 461, 520, ¶ 38, Common Mkt. Rep. (CCH) ¶ 8527 (1979) [hereinafter *Hoffmann-La Roche*]; see also Schmitt, *supra* note 10, at 175. Note that "dominant position" is defined here as it has been used to apply Article 86, and the same definitions and principles will likely apply to the new Regulation. Lending support to this hypothesis is the argument that the merger control Regulation was not drafted in a vacuum but in the context of the previous merger controls developed under Article 86. The concept of dominant position was not idle drafting but was one of the final alterations to the drafts preceding the final draft. Compare *Proposal for a Merger Control Regulation*, 32 O.J. EUR. COMM. (No. C 22) 14, art. 2, § 2, (1989), Common Mkt. Rep. (CCH) ¶ 60,040 (1989) [hereinafter *Proposal*], with *Regulation*, *supra* note 2, at art. 2, §§ 2-3.

78. *United Brands Co. v. Commission*, 1978 E. Comm. Ct. J. Rep. 207, Common Mkt. Rep. (CCH) ¶ 8429 (1978) [hereinafter *United Brands*].

79. *Hoffmann-La Roche*, 1979 E. Comm. Ct. J. Rep. 461; see also Schmitt, *supra* note 10, at 175.

80. See Schmitt, *supra* note 10, at 176-78.

its antitrust test, it is likely that market share, product market, and geographic market will be components of the Commission's analysis under the new Regulation.

#### a. Market Share

The merger control Regulation contains a rebuttable presumption that anything below a twenty-five percent market share is compatible with the Community's competition policy.<sup>81</sup> The presumption most likely applies to each product made by the merging firms.<sup>82</sup> The smaller the market share, the less likely the Commission will overturn a presumption of compatibility. "[A]s the relevant market shares decline, so the additional factors [needed to show market dominance] gain in importance: there must be more of them, and they must be more conclusive."<sup>83</sup>

Exactly what is an acceptable market share is open to debate and varies on a case by case basis. Factors that the Commission may use to assess the acceptability of a large market share or to overcome the presumption of compatibility include the following:

barriers to entry; the strategic and economic potency of the undertaking in question; its ability to resist competition from other undertakings should it emerge; the fluidity of the product market in question, in terms of changing demand (an undertaking might have a high market in a product but demand for that product might be ephemeral in nature) and the rate of cross-over in the industry concerned.<sup>84</sup>

Generally, market shares of eighty percent or more are evidence of dominance,<sup>85</sup> but the difficulty in accurately assessing the relevant product market and the possibility "that an undertaking might have a market share of 80 percent and yet economically not be in a dominant position"<sup>86</sup> has prevented a threshold presumption of incompatibility from being established.<sup>87</sup>

The calculation of market share in and of itself is quite problematic. For instance, in one investigation, the market share of vitamin B-12 was vigorously disputed. The drug manufacturer argued that the Commission should define the market in terms of the 100 diseases that vitamin B-12 treats. The drug manufacturer further argued that under this anal-

81. *Regulation*, *supra* note 2, preamble.

82. See Korah & Lasok, *supra* note 32, at 362 (discussing the 20 percent presumption of an earlier draft). For a discussion of product markets, see *infra* notes 90-101 and accompanying text.

83. Schmitt, *supra* note 10, at 176.

84. J. Weiler, *Discussion Report: Colloquium on Multinational Corporations in European Corporate and Antitrust Laws, 28-31 May 1980 at the European University Institute in Florence*, in EUROPEAN MERGER CONTROL 189, 207 (K. Hopt ed. 1982). The factors that Weiler discusses, as related to market share, are similar to the list of factors adopted by the Community for the purpose of evaluating mergers against competition policy. See *Regulation*, *supra* note 2, at art. 2, § 1(a)-(b).

85. Schmitt, *supra* note 10, at 175.

86. Weiler, *supra* note 84, at 207.

87. See *id.*

ysis it had less than one percent of the market. The German Cartel Office, which is responsible for antitrust violations in Germany and whose rulings were being challenged before the EC, defined the market share of B-12 in terms of only three diseases and thereby argued that the manufacturer had a monopoly market share.<sup>88</sup> Such disputes have persuaded the Commission, when applying Article 85, to analyze market share in relation to the actual product that is threatened by monopoly control.<sup>89</sup> The Commission will probably use similar guidelines when applying the merger control Regulation.

#### b. Product Market

While "market share" is concerned with determining what percentage of the market a firm may control without adversely affecting competition, "product market" is a criterion used to determine the relevant market requiring analysis. "Product market" is thus one of the defining parameters of "market share."

The EC carefully scrutinizes product market. Compatibility with EC markets under Article 86 has depended on "the peculiar features of the relevant industry, and particularly to the fact that each [product] constitutes a separate market."<sup>90</sup> The fact that a firm may dominate the general market for the type of product in question is irrelevant if the firm controls only a modest portion of the specific relevant market as defined by the Commission.<sup>91</sup>

In defining a product market, the actual uses of a product, rather than technical names, are determinative. For instance, in the vitamin B-12 case,<sup>92</sup> the relevant product market in terms of vitamin B-12 uses was the determinative issue in the dispute. Fairness of competition within narrowly defined product markets is what the Commission is seeking to protect with the new Regulation. "The concept of the relevant market implies that there can be effective competition between the products which form part of [the market] and this presupposes that there is sufficient degree of *interchangeability* between all the products forming part of the same market."<sup>93</sup> "Interchangeability" between products is the crucial aspect in determining the range of products over which the Commission will calculate market share.

In some instances, the EC may assess only a very specific market. For example, in *Continental Can*,<sup>94</sup> the European Court of Justice annulled a Commission decision because it felt the distinction between

---

88. See *Hoffmann-La Roche*, 1979 E. Comm. Ct. J. Rep. 461.

89. See *infra* notes 90-96 and accompanying text.

90. Schmitt, *supra* note 10, at 176.

91. In *Hoffmann-La Roche*, 1979 E. Comm. Ct. J. Rep. 461, the Court of Justice disregarded the fact that Roche was the world's largest vitamin manufacturer and only considered Roche's market share for B-12 vitamins. Schmitt, *supra* note 10, at 176.

92. See *supra* note 88 and accompanying text.

93. Schmitt, *supra* note 10, at 176 (emphasis added).

94. *Continental Can*, 1973 E. Comm. Ct. J. Rep. 215.

markets for various canned containers had not been sufficiently defined.<sup>95</sup> The Court of Justice was concerned about possible differences among markets for “light containers for canned meat products . . . , light containers for canned seafood . . . , [and] metal closures for the food packing industry other than crown corks.”<sup>96</sup> The Court of Justice thus held the Commission to a strict standard in showing the appropriateness of its product market definitions. As demonstrated here and in the vitamin B example above, defining the relevant product market may significantly affect whether the Commission or the Court of Justice will find a merger compatible with the Common Market.

Because the Commission’s assessment of a merger’s anti-competitive effects must be made within four months of the filing date<sup>97</sup> — and in many cases even sooner<sup>98</sup> — parties to a merger should prepare in advance to argue for the most favorable product market definition.<sup>99</sup> Parties should compile favorable data on product uses and product markets from the outset of the transaction. The Commission may delay authorization of a merger if the parties fail to supply requested information.<sup>100</sup>

If possible, parties should structure a transaction so the Commission will be increasingly likely to define a product market in a way favorable to the transaction. For example, if an American software manufacturer specializing in word processing wishes to acquire the marketing and distribution divisions of a Dutch high-technology firm, the American firm may want to avoid acquiring the rights to any of the Dutch firm’s word processing products. This strategy is more likely to result in the Commission finding a favorable product market status for the American firm.<sup>101</sup>

### c. Geographic Market

When the relevant product market covers the entire Community, Article 86 is likely to apply. But when a relevant market covers only a part of the Community, the application of any test for compatibility, including application of the new merger Regulation, becomes more difficult.<sup>102</sup> The relevant market must be defined in geographic terms before the Commission can find a concentration to be incompatible.

The Court of Justice defined a single geographic market as “an area where the objective conditions of competition applying to the product in

95. Schmitt, *supra* note 10, at 176-77.

96. *Id.*

97. Regulation, *supra* note 2, at art. 10, § 2.

98. *Id.*

99. The parties may state their views at hearings before the Commission. *Id.* at art. 18, §§ 1, 3.

100. *Id.* at art. 10, § 4.

101. The definition of a geographic market may also be important in determining whether the Commission will transfer jurisdiction to an appropriate Member State. See *infra* notes 102-07 and accompanying text.

102. See Schmitt, *supra* note 10, at 177.

question must be the same for all traders.”<sup>103</sup> Differences in tariffs between countries do not create different geographical markets,<sup>104</sup> but factors such as marketing strategy from a single sales center or national market organizations are relevant.<sup>105</sup> Under Article 86, the Commission currently must find abuse of a dominant position within a single geographic market of “a substantial part of the common market.”<sup>106</sup> Abuse of a dominant position within a geographic market that is only local in character will not warrant intervention by the Commission under Article 86.<sup>107</sup> Thus, to apply Article 86 the Commission must find: (1) abuse of a dominant position, (2) under roughly equal conditions for competition, (3) for a relevant product market, and (4) in a market that is a “substantial part of the common market.” Because the merger Regulation adopts the language of “dominant position,” it is likely the Commission will apply similar requirements to the merger Regulation.

d. “Strengthening or Creating a Dominant Position”

In some respects, the new merger Regulation creates a more stringent standard than Article 86. Article 86 was applied to mergers based on “abuse” of a dominant position.<sup>108</sup> Furthermore, Article 86 was limited because it required that one merging party already dominate the market prior to the transaction and that the merger result in “a significant lessening of competition.”<sup>109</sup> In contrast, the new merger control Regulation applies to the “strengthening” or “creating” of a dominant position that could significantly impede the development or maintenance of competition.<sup>110</sup> Actual “abuse” of market position is not necessary under the new Regulation. The Regulation requires only that the “creating” or “strengthening” of a situation could potentially lead to “abuse.” Any merger could fall under the merger Regulation’s definition of incompatibility if it “creates” a dominant position, even if none of the parties have a dominant position. This is a lower threshold for finding incompatibility than under Article 86.

---

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. The peculiarities of the effects of dominant position on a local market are also explicitly addressed by the new Regulation. *Regulation, supra* note 2, at art. 9. The Commission may grant national authorities the prerogative to review mergers adversely affecting local markets even though the Commission would otherwise have exclusive jurisdiction. *See id.* at art. 9, § 3; *see also infra* notes 123-28 and accompanying text.

108. Schmitt, *supra* note 10, at 178.

109. Hawk, *supra* note 3, at 309.

110. Under *Continental Can*, abuse under Article 86 may occur through the “strengthening” of a dominant position. *Continental Can*, 1973 E. Comm. Ct. J. Rep. 215; *see also* Schmitt, *supra* note 10, at 178.



## 2. *Impeding Effective Competition*

The new Regulation rejects any transaction "which creates or strengthens a dominant position as a result of which *effective competition would be significantly impeded in the common market.*"<sup>111</sup> Previous drafts of the Regulation omitted the word "significantly."<sup>112</sup> "Significantly," as a term of construction, is ambiguous. Through construction of this term, the adopted Regulation appears to give the Commission some flexibility in permitting mergers or other transactions which marginally inhibit competition. But the list of factors in Article 2, Section 1 of the Regulation, provides the Commission with some guidance as to the meaning of "significantly impeded." Ultimately, these factors will be decisive in any Commission decision approving or disapproving a transaction.

## 3. *Factors Considered by the Commission*

The Commission considers the following factors when determining if a transaction "significantly" impedes competition:

- (a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
- (b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests 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.<sup>113</sup>

The above factors can be divided into two types. First, some of the factors address typical concerns of unrestrained competition. Such factors assist the Commission in determining "dominant position."<sup>114</sup> Second, some of the factors address national concerns other than freedom of competition.

The first category of factors addresses free market concerns related to the EC's traditional conception of "dominant position,"<sup>115</sup> including supply and demand, barriers for new enterprises entering the market, and "the structure of all the markets concerned and the actual or potential competition from undertakings *either within or without the Community . . .*"<sup>116</sup> This language requires the Commission to consider international competition in markets other than the EC. Community officials

---

111. *Regulation, supra* note 2, at art. 2, § 3 (emphasis added).

112. *See, e.g., Proposal, supra* note 77, at art. 2, § 2.

113. *Regulation, supra* note 2, at art. 2, § 1.

114. *See supra* notes 76-110 and accompanying text.

115. *Id.*

116. *Regulation, supra* note 2, at art. 2, § 1 (emphasis added).

have indicated that they would consider a transaction's effect on "actual and potential competition, both *inside and outside* the community."<sup>117</sup> Thus, the Commission could reject a merger if the parties held dominant positions in non-EC markets, even if the merger was acceptable within the bounds of Europe.<sup>118</sup> This "international" criterion could profoundly impact non-EC firms, especially international conglomerates who find themselves barred from mergers in Europe because of their market dominance elsewhere in the world. Through this "international" criterion, the EC could exert considerable influence in favor of EC firms in non-European markets.<sup>119</sup>

The second category of factors addresses national concerns other than freedom of competition, such as "the development of technical and economic progress."<sup>120</sup> For instance, the Commission may approve a joint venture that restrains competition if it will provide technological benefits to the entire Community that far outweigh damage caused by the restraint of competition. The Commission's consideration of "technical and economic progress" is, however, strictly modified by the language requiring that the transaction "is to consumers [sic] advantage and *does not form an obstacle to competition.*"<sup>121</sup> Unlike earlier drafts of the Regulation, "technical and economic progress" is not an exception which trumps Community competition policy;<sup>122</sup> instead, it is merely one of many factors considered in a general policy of unrestrained competition.

An interesting question is whether the Regulation's language concerning "obstacle[s] to competition" will prevent all transactions that even marginally hinder competition. If the Commission or the Court of Justice interprets this language in such a restrictive way, then the factors discussed above may become meaningless. In light of the language in Article 2, however, Sections 2 and 3 prohibit concentrations only if they "significantly impede" competition, and the Commission and the Court of Justice may interpret "obstacle to competition" flexibly to permit minimal restraints of competition if other Community interests are served.

#### 4. *Summary of the Commission's Competition Policy under the Regulation*

The Regulation's competition policy prohibits a firm from creating or strengthening a "dominant position" that significantly impedes competition. Considerations in interpreting this standard include the EC's traditional interpretation of "dominant position" under Article 86 and the factors listed in the Regulation under Article 2, Section 1. These

---

117. *European Antitrust Agreement*, *supra* note 2, at D2 (emphasis added).

118. The Commission is required to study other international markets and suggest ways that Member States could gain fairer treatment in those markets. *See infra* notes 256-62 and accompanying text.

119. *See infra* note 262 and accompanying text.

120. *Regulation*, *supra* note 2, at art. 2, § 1(b).

121. *Id.* (emphasis added).

122. *See, e.g., Proposal*, *supra* note 77, at art. 2, § 3.

factors include competition in international markets other than the EC and national interests other than unrestrained competition, such as the "technical and economic" advancement of the Community. The Commission and the Court of Justice must balance these factors when interpreting and applying EC competition policy.

#### D. Regulation of Mergers by the Various Member States

One major benefit of the new Regulation is that parties to a merger only need to seek approval from one European authority, the EC Commission. This necessitates that the EC have exclusive jurisdiction over approval of mergers with a European dimension. Such simplification of jurisdiction, however, is not without its exceptions and complications.

##### 1. Application of National Law

Although EC Member States may normally apply neither the merger Regulation<sup>123</sup> nor their own antitrust legislation to mergers of Community dimension,<sup>124</sup> the Commission may grant Member States permission to take limited measures<sup>125</sup> to protect their markets.<sup>126</sup> The Commission may give such authorization when a national market is affected at the local level and has all of the characteristics — based on strict criteria — of a local rather than Community-wide market.<sup>127</sup> The Commission's decision on the application of national law is reviewable by the Court of Justice.<sup>128</sup>

While Member States may not apply their national antitrust law to mergers with a Community dimension,<sup>129</sup> they may take measures compatible with Community law to "protect legitimate interests other than those taken into consideration by [the] Regulation."<sup>130</sup> Such interests include public security, prudential rules for financial institutions, and plurality ownership of the media.<sup>131</sup> Thus, the new Regulation only preempts national antitrust law that governs the approval of mergers. An important question is whether Member States can disallow mergers approved by the Commission through application of law other than national antitrust law.<sup>132</sup> Such a fiat would be undesirable because the finality of Commission approval of any particular merger would become uncertain. In any case, Member States cannot authorize mergers that

123. *Id.* at art. 21, § 1.

124. *Id.* at art. 21, § 2.

125. *Id.* at art. 9, § 8.

126. Compare *id.* at art. 21, § 2, with *id.* at art. 9, §§ 1-3.

127. *Id.* at art. 9, §§ 3, 7. This type of intervention is authorized on a case-by-case basis. But where two-thirds of the revenue of each merging company comes from the same Member State, the merger does not fall within the merger Regulation and is reviewed only by national authorities. *Id.* at art. 1, § 2.

128. *Id.* at art. 9, § 9.

129. *Id.* at art. 21, § 2.

130. *Id.* at art. 21, § 3.

131. *Id.*

132. *Id.* at art. 21; see also Ferry & Vig, *supra* note 45, at 32, col. 3.

the EC would otherwise prohibit.<sup>133</sup>

## 2. *Private Actions and the Application of Articles 85 and 86*

The Commission may not apply Articles 85 and 86 to mergers falling within the scope of the new Regulation.<sup>134</sup> It is unclear whether the Regulation bans private actions.<sup>135</sup> Private actions, however, have "not

133. See *Regulation*, *supra* note 2, at art. 21, § 1.

134. Fine, *supra* note 21, at 523; see *Regulation*, *supra* note 2, at art. 22, § 2 (disallowing the Commission the use of Regulation 17, the enforcement mechanism of Articles 85 and 86).

135. Compare Fine, *supra* note 21, at 523 (citing a draft similar to the adopted version) with *Regulation*, *supra* note 2, at art. 22.

Fine and Hawk disagree as to whether the Regulation expressly allows private actions. While Fine argues that the Regulation is unclear, Hawk maintains that under certain circumstances private actions are sanctioned by the Regulation. Although Fine and Hawk cite different versions of the Regulation's amended drafts, the language in each draft is identical to the current Regulation. Compare *Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings*, 29 O.J. EUR. COMM. (No. C. 22) 14 (1989) [hereinafter Fine's Draft], with *Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings*, 31 O.J. EUR. COMM. (No. C 130) 4, art. 22 (1988) [hereinafter Hawk's Draft], and *Regulation*, *supra* note 2. Instead of arguing as Fine does that it is unclear whether private actions will be prohibited, Hawk argues:

The draft provides that national competition laws (and the application of Articles 85 and 86 in private actions before member state courts) are preempted where the Commission has authorized a merger covered by the Regulation. National competition laws (and Articles 85 and 86 in private actions) are not preempted where the Commission either informs the parties that it will not challenge or fails to challenge within the requisite period. Thus Articles 85 and 86 may sometimes permit private parties (such as targets of hostile takeover) to request member state courts to block mergers.

Hawk, *supra* note 3, at 312. Hawk thus concludes that private actions under Article 85 and 86 are not preempted where the Commission does not "challenge" the merger.

Hawk's analysis may be flawed in two respects. First, Hawk's arguments depend upon his interpretation of the Regulation's Article 22 (Article 21 in Hawk's draft). Article 22 forbids the application of EC Regulation No. 17 to both mergers within the Regulation's "scope" or to "concentrations as defined in Article 3." Compare Fine's Draft, art. 21, with Hawk's Draft, art. 21, and *Regulation*, *supra* note 2, at art. 22. Regulation 17 is the enforcement mechanism for Article 85 and 86. Hawk also assumes in the above passage that the "scope" of the merger Regulation includes only those mergers challenged by the Commission. See Hawk, *supra* note 3, at 312. Hawk's argument thus suggests that actions under Articles 85 and 86 are permissible because Article 22 only prohibits actions against mergers that the Commission has "challenged." But Hawk's interpretation of the term "scope" may be incorrect. The Regulation, including Hawk's Draft, initially defines "scope" in terms of "Community dimension." Compare Hawk's Draft, art. 1, with Fine's Draft, art. 1, and *Regulation*, *supra* note 2, at art. 22. Under this analysis, any merger with a "Community dimension" would be protected from action under Article 22.

Second, Hawk is incorrect in assuming that Regulation 17 applies to private actions. Fine points out that Regulation 17 "only applies in a *Commission investigation*." Fine, *supra* note 21, at 523 (emphasis added). "Whether Regulation 17 would prevent the use of Article 85 and 86 in *private actions* in the national courts is unclear." *Id.* Thus, even though a merger may have "Community dimension," private actions may not be barred under the merger Regulation. This is significant because it means that a merger approved by the Commission may still be subject to suit under Articles 85 and 86 in EC Member State courts.

yet play[ed] a large role in the EC."<sup>136</sup> One commentator has stated that private actions are infrequent because litigation costs are not adequately compensated in relation to the risks associated with an uncertain outcome.<sup>137</sup> "[P]rivate actions for damages, although theoretically possible, are few, because of the absence of the lawyer incentives [as] in the United States: treble damages, attorney's fees, and costs for prevailing plaintiffs, contingency fees, and class actions."<sup>138</sup> It is questionable whether this will remain the case in light of increased merger activity in Europe.<sup>139</sup>

#### E. Evaluation of "Benefits" for Non-EC Firms: Do the Burdens Outweigh the Benefits?

The chief benefits under the Regulation are (1) a simplified application process through exclusive Regulation by the EC Commission, (2) pre-implementation approval of mergers when appropriate,<sup>140</sup> and (3) a prescribed time limit for the Commission's decision.<sup>141</sup> Non-EC firms seeking the benefits of the new Regulation, however, may encounter four serious drawbacks. First, evaluation of mergers under the Regulation combines traditional competition policy concerns with economic and technical objectives. Second, the politics of the various Member States may influence Commission decisions. Third, even favorable decisions are subject to review and, consequently, the finality of a Commission decision is uncertain. Fourth, the Commission could conceivably discriminate against non-EC firms.

##### 1. Problems with Multiple Policies

One commentator criticized the requirement in the initial draft of the merger Regulation<sup>142</sup> that the Commission evaluate mergers using a

---

Notably, there are many European markets which firms can "dominate" without falling within the scope of the merger Regulation. See Korah & Lasok, *supra* note 32, at 366. Consequently, EC Member State courts may frequently find it necessary to allow private actions under Articles 85 and 86.

136. Hawk, *supra* note 3, at 308.

137. See *id.*

138. *Id.*

139. See *Europe's Buyout Bulge*, N.Y. Times, Nov. 5, 1989, at F1, col. 2.

In the landmark case of *Philip Morris*, 1987 E. Comm. Ct. J. Rep. 4487, the suit was brought before the Commission not by the participants in the shareholders' acquisition, but by two other companies whose offers for equity purchases had been rejected. See Korah & Lasok, *supra* note 32, at 333-34. Thus, private suits occur in the EC despite the lack of "lawyer incentives."

While the financial incentives for private actions are not as great as in the United States, such actions may serve as a defensive tactic for hostile acquisitions because they delay the finality of any Commission decision. Ferry & Vig, *supra* note 45, at 32, col. 4.

140. See *Regulation*, *supra* note 2, at art. 7, §§ 1-4.

141. *Id.* at art. 10, §§ 1-3.

142. *Commission Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings*, 16 O.J. EUR. COMM. (No. C 92) (1973) 1 (This is the original proposal submitted by the Commission on 20 July 1973).

mixture of both competition and "industrial" policy.<sup>143</sup> The problem with this mixture of policies is that each policy is ideally served by a different evaluative process.

"Industrial" policy consists of technological and economic objectives that are distinct from traditional competition policy concerns.<sup>144</sup> In contrast to industrial policy, the purpose of traditional EC competition policy is "to attack market practices and structures which limit existing, or potential competition in a substantial way," not "to ensure a better regional allocation of activities or to safeguard employment."<sup>145</sup>

Critics of the initial proposal for merger control recommended that assessing the structure of competition within a market should be a separate task from promoting other Community policy objectives.<sup>146</sup> The need for this separation stems from the fear that political input from the various Member States, which is needed when articulating Community economic and technological objectives, would only erode traditional competition policy values, such as unrestrained competition.<sup>147</sup> Furthermore, the Commission is considered too "technocratic" to properly articulate economic and technological objectives for the entire Community; a more democratic process should define these objectives.<sup>148</sup>

If this distinction [in the evaluative process] is not made, and if . . . the Commission is to resolve within itself the confrontation between the costs and the benefits of the transaction, the technocratic arbitrage to which this would give rise would dilute the efficacy of competition policy and lead to the democratic processes being set aside in favour of internal compromises involving politicians, senior officials and representatives of the private sector.<sup>149</sup>

These criticisms are largely ignored in the new merger control Regulation.<sup>150</sup> Under the adopted Regulation, the Commission must consider "industrial" policy in conjunction with competition policy.<sup>151</sup> Decisions concerning traditional competition policy concerns such as free competition, as well as economic and technical objectives, require input from Community leaders.<sup>152</sup> The lack of procedural separation between evaluative criteria may subject non-EC firms to the influences of political compromise and bureaucratic decision-making. Such influ-

---

143. A. Jacquemin, *Concentration and Mergers in the E.E.C.: Towards a System of Control in EUROPEAN MERGER CONTROL* 155, 167 (K. Hopt ed. 1982); *see also* Weiler, *supra* note 84, at 208-09.

144. *See supra* notes 113-22 and accompanying text.

145. Jacquemin, *supra* note 143, at 167.

146. *Id.*

147. *See id.*

148. *Id.*

149. *See id.*

150. The author of the above criticism also advocates that the Commission should produce written decisions. *See id.* The adopted Regulation incorporates this suggestion. *See Regulation, supra* note 2, at art. 19, §§ 6-7.

151. *See Regulation, supra* note 2, at art. 2, § 1; *see also supra* notes 113-22 and accompanying text.

152. *See Regulation, supra* note 2, at art. 19, §§ 3-4.

ences will increase the unpredictability of Commission decisions and hence heighten the risk to non-EC firms of falling under EC jurisdiction.<sup>153</sup> Thus, the Regulation's lack of separation between review considering "industrial policy" and review considering traditional competition policy deserves criticism.<sup>154</sup>

### 2. Political Components of Commission Decisions

Exactly how the Commission's decisions will be influenced by political input from various Member States should be considered. During the four months when the Commission considers the compatibility of the merger with competition policy,<sup>155</sup> the Commission must remain "in close and constant liaison" with the various Member States.<sup>156</sup> The Commission must give affected Member States the "opportunity to make known their views at every stage of the procedure."<sup>157</sup> In addition, the Commission must consult an advisory committee composed of officials of the various Member States<sup>158</sup> before declaring a merger incompatible with competition policy.<sup>159</sup> The Commission must "take the utmost account of the opinion delivered by the Committee"<sup>160</sup> and inform the Committee of how it evaluated the Committee's opinion.<sup>161</sup> This mechanism creates a basis for review by the Court of Justice.<sup>162</sup>

### 3. Judicial Review

The Commission's decisions are reviewable by the Court of Justice.<sup>163</sup> Judicial review threatens finality because Commission decisions on either the merger's compatibility with competition policy or other EC social, technological, and economic objectives are not necessarily final. Criticism has been levied at this aspect of the Regulation. Critics argue that the Court's opinion is not necessarily superior to the Commission's.<sup>164</sup> But such criticism may be unwarranted. The Court of Justice has historically utilized judges who were well-versed in economics.<sup>165</sup>

153. The last draft of the Regulation prior to the adopted version would have implemented distinct procedures for evaluating mergers under traditional competition policy and assessing them against technological and economic objectives. *See* Proposal, *supra* note 77, at art. 2, §§ 2-3.

154. *See* Jacquemin, *supra* note 143, at 167.

155. *Regulation, supra* note 2, at art. 10.

156. *Id.* at art. 19, § 2.

157. *Id.*

158. *Id.* at art. 19, § 4.

159. *Id.* at art. 19, § 3. Note that the Advisory Committee must also be consulted for fines and penalties and when considering the revocation of an earlier decision to approve a merger. *Compare id., with id.* at art. 8, § 5, and arts. 14-15.

160. *Id.* at art. 19, § 6. Also note that the Advisory Committee must deliver its opinion in writing. *Id.*

161. *Id.*

162. *Id.* at art. 21, § 1.

163. *Id.* at art. 21, § 1. The Court of Justice also has authority to review fines and penalties fixed by the Commission. *Id.* at art. 16.

164. Weiler, *supra* note 84, at 206.

165. *See id.* at 205.

Furthermore, “[t]he European Court of Justice can re-evaluate the factual economic appreciation of the situation and not merely the legal consequences that follow from a given factual set up.”<sup>166</sup> The Court’s ability to review economic questions of fact suggests that it is capable of the rigorous economic analysis needed for evaluating mergers. Such powers of review, however, may only complicate and further delay the appellate process.<sup>167</sup>

The EC recently created a lower EC court of “first instance.”<sup>168</sup> It is uncertain how this new court will affect the review process for mergers.<sup>169</sup> Adding another step of appeal above the Commission, however, further undermines the finality needed in the financing of merger operations. Combined with the jurisdiction of the Court of Justice to review questions of fact as well as law, the appellate process could become quite cumbersome. But the added complexity resulting from judicial review may be offset by the lack of enticements to litigate.<sup>170</sup>

#### 4. Discrimination Against Firms from Non-EC Countries

Firms from non-EC countries are concerned that the Commission may treat them unfairly.<sup>171</sup> The question of discrimination should be addressed in terms of (1) the potential for discrimination and (2) the policy rationales that would promote discriminatory rulings.

##### a. The Potential for Discrimination

The Commission could potentially discriminate against firms from non-EC countries in several ways. First, the Commission could scrutinize non-European firms under its competition policy more strictly than EC firms. Since competition policy is derived from flexible components

---

166. *Id.*

167. Weiler argues that a separation of roles for the Commission and the various Member States as well as a separation of competition policy and “political” decisions would allow a better basis for judicial review. *Id.*; see also *supra* notes 146-49 and accompanying text.

168. *Council Decision (EEC) of 24 October 1988 on establishing a Court of First Instance of the European Communities*, 31 O.J. EUR. COMM. (No. L319) 1 (1988), amended by 32 O.J. EUR. COMM. (No. C215) 1 (1989).

169. Hawk describes the new court as similar to an intermediate U.S. court:

The new court will operate as an intermediate court between the Commission and the Court of Justice. Its jurisdiction will include review of Commission actions in competition matters and perhaps trade cases as well. The new court will have the effect of bringing EEC competition proceedings more into line with U.S. litigation practices, for example greater use of economic evidence and arguments.

Hawk, *supra* note 3, at 313.

170. See *supra* notes 134-39 and accompanying text.

171. See Rivers & Vest, *Making Deals in Post-1992 Europe*, EUROPE, Oct. 1989, at 18, 46. See generally Rosenbaum, *Fortress or Facade?*, INDUSTRY WK., Feb. 6, 1989, at 54; Buchanan, *Inside the Fortress: Europe after 1992*, ELECTRONIC BUS., Oct. 15, 1988, at 38; McClenahan, *Europe 1992: The Challenge to the U.S.*, INDUSTRY WK., Apr. 3, 1989, at 78; Weinberger, *The Common Market—Friend or Foe?*, FORBES, Mar. 6, 1989, at 31; Kirkland, *Outsider's Guide to Europe in 1992*, FORTUNE, Oct. 24, 1988, at 121.



such as market share, product market, and geographic market,<sup>172</sup> the Commission could analyze each of these components in a way unfavorable to non-Europeans. For example, the Commission could interpret product market broadly or narrowly, thus allowing the greatest possibility of finding that the merger would create a position of "dominance." The tolerable market share for dominance depends completely on the Commission's interpretation. Likewise, geographic market also allows some flexibility in interpretation. Hopefully, the Commission will be impartial and consistent in its interpretation of the components of competition policy.

In addition, the approval of mergers as an exception to competition policy requires the Commission to accept political input.<sup>173</sup> Political pressure may deter the Commission from finding in favor of non-European parties. Such pressure may also lead the Commission to refer non-EC firms to EC Member States for the application of national law,<sup>174</sup> thus creating a two-tier system of review for non-EC firms.<sup>175</sup> The extra-national review process would not only cause more mergers to be rejected or subjected to stipulations, but it would also impede efforts to obtain financing.

Pressure to apply national law can come from many sources. First, EC Member States may pressure the Commission to allow the application of national law.<sup>176</sup> Such pressure is possible because of the requirement that the Commission maintain a "constant liaison" with relevant Member States.<sup>177</sup> Second, third parties affected by a merger who show a "legitimate interest" are entitled to apply to the Commission for a hearing.<sup>178</sup> Third, Commission decisions are reviewable by the Court of Justice.<sup>179</sup> Thus, in applying the Regulation, the potential for discrimination does exist. This Note is intended to demonstrate that flexible, politically sensitive areas of the Regulation would permit discrimination against non-European firms.

#### b. Policy Rationales that Could Result in Discrimination

There are several policy objectives incorporated into the Regulation which could promote discrimination against non-European firms. These policy objectives stem from concerns about unequal access to non-EC

172. See *supra* notes 76-107.

173. Compare *Regulation, supra* note 2, at art. 2, § 2, with *Regulation*, at art. 8, § 2 and *Regulation*, at art. 19, §§ 3, 6.

174. See *supra* notes 123-33 and accompanying text.

175. See *Regulation, supra* note 2, at art. 9, §§ 2-3. Even though the EC can refer mergers to Member States, Member States may only take the measures "strictly necessary to safeguard or restore effective competition . . ." *Id.* at art. 9, § 8.

176. See *supra* notes 123-33 and accompanying text (discussing application of national law).

177. See *Regulation, supra* note 2, at art. 19, § 2.

178. *Id.* at art. 18, § 4.

179. *Id.* at art. 21, § 1.

markets and the economic and technological objectives of competition policy.

First, the Commission has an express obligation to consider the competitiveness of European firms in international markets when determining the impact of a merger on European markets.<sup>180</sup> Fairness in terms of market share must be viewed in global terms, not just in relation to EC markets. The Commission's promotion of fair play on a global scale may appear to be a discriminatory denial of a merger within the Common Market. Furthermore, the Commission may discriminate against non-EC multinationals by rigorously assessing the access other EC firms have to non-Community markets enjoyed by the non-EC multinationals.<sup>181</sup>

The Commission may also discriminate against non-EC firms on the basis of Community economic and technical objectives comprising competition policy.<sup>182</sup> Even in addressing such objectives, the Commission must consider international competition.<sup>183</sup> For example, the EC has decided to pursue certain social objectives in its company law: it has proposed worker representation on the board of any firm incorporated under EC company law.<sup>184</sup> Firms incorporated under the EC<sup>185</sup> as well as firms incorporated in nations with similar requirements may protest that it is unfair to compete with firms that are not required to have worker representation (such as U.S. firms). Under the new merger Regulation, the Commission could approve a merger as compatible with the Community's competition policy<sup>186</sup> but attach "conditions and obligations" to ensure effective competition.<sup>187</sup> Theoretically, in order to ensure fairness in competition, the Commission could approve a merger on the condition that the new entity allow worker representation on its board. Because affected parties can be heard before the Commission,<sup>188</sup> it is feasible that competing European industries with worker representation on their boards will petition the Commission for such a stipulation. Non-European firms forced to comply with the stipulation could be at a disadvantage domestically because of a lack of similar labor requirements in their native countries.

### III. International Antitrust Implications of the New Regulation

The new Regulation has antitrust implications reaching far beyond Europe's boundaries. The antitrust implications stem from the fact that

---

180. *Id.* at art. 2, § 1(b).

181. *See supra* notes 115-19 and accompanying text.

182. *See Regulation, supra* note 2, at art. 2, § 1(b).

183. *Id.* at art. 2, § 1.

184. Rivers & Vest, *supra* note 171, at 46.

185. Firms may incorporate under the EC. *Amended Proposal for Fifth Directive*, 26 O.J. EUR. COMM. (No. C 240) 2 (1983), Common Mkt. Rep. (CCH) ¶ 1401 (1983). The ramifications of incorporation under the EC are beyond the scope of this Note.

186. *Compare Regulation, supra* note 2, at art. 8, § 2, with *Regulation*, at art. 2, § 1.

187. *Id.* at art. 8, § 2.

188. *Id.* at art. 18, § 1.

the Regulation affects multinationals in a wide array of transactions, including statutory mergers, asset sales, tender offers, minority share acquisitions, and joint ventures.<sup>189</sup>

#### A. Jurisdictional Scope: Implications for non-EC Firms

The jurisdictional scope of the new Regulation will have substantial anti-trust effects on non-EC firms. Notwithstanding the turnover requirements,<sup>190</sup> the merger Regulation has an additional geographic jurisdictional test. The geographic test, along with an EC jurisdictional doctrine known as the "economic entity" theory,<sup>191</sup> works to extend the Regulation's antitrust policies beyond the Common Market.

##### 1. Fundamental Geographic Tests for Jurisdiction: "Substantial Operations"

A merger meets the geographic jurisdictional requirements of the Regulation in three ways. First, a merger has Community dimension and is thus within the Regulation's jurisdiction if at least two of the undertakings affecting the merger have their "sole or main fields of activity" in different Member States.<sup>192</sup> Second, even if both parties to a merger "act mainly in one and the same Member State," the merger would nonetheless have a Community dimension if "at least one of them has substantial operations in at least one other Member State . . . ."<sup>193</sup> Third, parties "which do not have their principal field of activities in the Community" fall within the scope of the Regulation if the parties have "substantial operations" in the Common Market.<sup>194</sup>

There are justifiable concerns about each of the three tests. Under the first test, the phrase "sole or main fields of activity" has not been defined in the Regulation. Experts have predicted its probable definition:

The Member State of incorporation will probably be irrelevant . . . . The Commission probably will employ a test akin to the "nerve center" test used in the United States. Under this test, the Commission would look to the Member State containing the greatest concentration of the firm's administrative, sales and manufacturing facilities.<sup>195</sup>

Even if this "nerve center" test is adopted, the application of the "sole or main field of Community activities" test does not provide parties to a

189. See *infra* notes 226-49 and accompanying text.

190. See *supra* notes 33-36 and accompanying text.

191. According to the theory, the anti-competitive behavior of a subsidiary can be attributed to its parent. See *infra* note 203 and accompanying text.

192. Fine, *supra* note 21, at 515; see also Regulation, *supra* note 2, preamble.

193. Regulation, *supra* note 2, preamble.

194. *Id.*

195. Fine, *supra* note 21, at 515-16 (discussing the definition of "principal field of activity," which is essentially the same as "sole or main field of activity"). Fine argues that the geographic test, even assuming the adoption of the nerve center test, is currently unworkable because of an absence of guidelines for firms that have split their administration, sales, and manufacturing facilities into locations in two or more Member States. *Id.* at 517.

potential merger with a concrete rule as to whether they must file with the Commission or with individual Member States. Squabbles over jurisdiction could prove costly to parties needing to swiftly implement a transaction.

In the second test, the meaning of the phrase "substantial operations" is indefinite. This term replaced the language of an earlier draft that allowed jurisdiction if the proposed transaction would have an "effect" in the Common Market (the "effects doctrine").<sup>196</sup> "Substantial operations" seems to be a step away from the extreme form of jurisdiction that would have been granted by the effects doctrine, at least in its most pure form. It is unclear just how far the EC has moved from the pure effects doctrine. The ambiguity of this language in the new Regulation could grant the Commission and the Court of Justice great flexibility to determine the extent of their own jurisdiction over non-EC firms.

The phrase "substantial operations" could accommodate a qualified version of effects doctrine. In *Re Wood Pulp Cartel*, the European Court rejected a "pure effects" theory. The Court found, however, that "non-EC companies, having no agents, offices or subsidiary [sic] in the community, could be subject to Community jurisdiction where the agreement or transaction is *implemented* in the Community."<sup>197</sup> The European Court of Justice has thus drawn a distinction between a transaction that is "implemented" in the EC and a transaction that merely has some effect upon European markets. "Implemented" connotes something more than mere effect, such as an active presence in the Common Market. The distinction, although unclear, may be more akin to the "substantial operations" test now found in the Regulation.

The effects doctrine as modified under *Wood Pulp* did not require that the firms involved have agents, offices or subsidiaries<sup>198</sup> in the EC for the Court to find jurisdiction. An important issue under the new Regulation is whether the Commission must determine that the parties have "agents, offices or subsidiaries" to acquire jurisdiction. For instance, jurisdiction could be granted merely because a party transacts substantial business with EC firms. It is questionable whether "substantial operations" is satisfied by the physical presence of the firm or its agents, or whether it simply requires that the firms involved have significant business relationships with the EC. The answer to these questions ultimately depends upon whether the Commission and the Court of Justice are willing to limit their own jurisdiction since they have been given the discretion to resolve the issue through the ambiguous nature of the term "substantial operations."

---

196. See, e.g., Proposal, *supra* note 77, preamble.

197. *Re Wood Pulp Cartel: A Ahlström OY v. EC Comm'n*, 1988 E. Comm. Ct. J. Rep. 5193, 4 Common Mkt. L.R. 901, 940-41 (1988) (emphasis added) [hereinafter *Wood Pulp*]; see also Fine, *supra* note 21, at 517.

198. *Wood Pulp*, 1988 E. Comm. Ct. J. Rep. at 5193.

Regardless of the definition of "substantial operations," it is qualified as a jurisdictional test by the Regulation's threshold requirements.<sup>199</sup> The 250 million ECU threshold requirement stipulates that the "Community-wide" turnover of "each of at least two" of the participating firms be over 250 million ECU.<sup>200</sup> Thus, a merger does not fall within the Regulation unless it has some substantial effect within the Community.<sup>201</sup> Unless *Wood Pulp* has some relevance in the sense of imposing a qualified effects doctrine, the only significant meaning of the "substantial operations" test may be equated with the 250 million ECU threshold requirement.<sup>202</sup>

## 2. The "Single Economic Entity" Theory

Akin to the effects doctrine is the theory of "single economic entity." This theory extends the reach of the Regulation's jurisdictional language and, consequently, the Regulation's antitrust implications for the global market. "By this theory, the anti-competitive conduct of an EC subsidiary can be imputed to *its non-EC parent* where the latter in fact controls the subsidiary."<sup>203</sup> This theory has been affirmed by the European Court of Justice, most notably in *Continental Can*.<sup>204</sup>

For example, if an American firm wishes to buy a German firm through a French subsidiary, under the economic entity theory the transaction would fall within the jurisdiction of the merger Regulation because the theory attributes the subsidiary's conduct to the American firm.<sup>205</sup> More problematic is the case where an American firm uses its German subsidiary to purchase a German firm. At first it would seem that the EC does not have jurisdiction since both firms involved are German, but if the economic entity theory is applied and if the American firm has substantial operations in any other EC country besides Germany, the EC has jurisdiction.<sup>206</sup> The rationale is that the German subsidiary's conduct is attributable to the American firm. Because the

199. See *supra* notes 26-32 and accompanying text.

200. *Regulation, supra* note 2, at art. 1, § 2(b).

201. Namely, a Community-wide aggregate turnover of 500 million ECU.

202. It is possible that 250 million ECU in sales could be done through "middlemen" who in turn sell to EC countries. But given the large size of this threshold amount, this scenario is unlikely. Furthermore, the Commission and Court of Justice may interpret "substantial operations" to include business relationships or even complex schemes of distribution, thus retaining jurisdiction over firms utilizing middlemen for marketing their products in the EC.

203. Fine, *supra* note 21, at 517 (emphasis added).

204. *Continental Can*, 1973 E. Comm. Ct. J. Rep. 215; see Fine, *supra* note 21, at 517 n.25; Schmitt, *supra* note 10, at 172-73.

205. Fine, *supra* note 21, at 517. Fine presents many excellent examples of the jurisdictional requirements of an earlier draft of the merger Regulation that are in harmony with the adopted Regulation. *Id.* Fine also points out that jurisdiction is satisfied by the geographic criteria of the Regulation. *Id.* This is because the "sole or main fields of activity" of one of the merging party's subsidiaries is in an EC country other than Germany. See *Regulation, supra* note 2, preamble. The ensuing examples were all originally presented by Fine. Fine, *supra* note 21, at 517-19.

206. Fine, *supra* note 21, at 517-18.

American firm is active in EC countries other than Germany, the EC rather than Germany has jurisdiction.<sup>207</sup>

Still more problematic is the situation where an American firm, having no subsidiaries in any EC country, purchases a German firm directly. Although the American firm may have its facilities in an EC country, the economic entity theory will probably not apply since no subsidiaries are involved;<sup>208</sup> however, jurisdiction might be found under the "substantial operations test."<sup>209</sup> The question is to what extent the Commission will apply the economic entity theory.<sup>210</sup>

### 3. *The Economic Entity Theory in Instances of Less than 100 Percent Ownership*

Not only does the economic entity theory affect parent-subsidiary relationships of 100 percent ownership, but it also permits the Commission to find a "single economic entity" where one firm has substantially less than complete ownership in another firm. In analyzing the effects of investment under the economic entity theory, control is the essential element: the Commission will find a single "economic entity" where there is a relationship of control.<sup>211</sup> While control is obvious in parent-subsidiary relationships involving 100 percent ownership, control is less apparent in contractual agreements or minority share interests. Factors evidencing control include the following: (a) ownership or rights to use all or part of the assets of an undertaking; and (b) rights or contracts which confer decisive influence on the composition, voting, or decisions of the organs of an undertaking.<sup>212</sup> The Regulation's definition of control is very broad. Ownership rights, voting rights, contract rights, and management rights all evidence control.

The purchase of a majority of the stock or voting rights of a firm is not required for the Commission to find control. In *Philip Morris*, the European Court made it clear that the "acquisition of a *minority shareholding* in a competing company may constitute an infringement of Articles 85 and 86 of the Treaty [of Rome]."<sup>213</sup> The actual test of *Philip Morris* is that control exists when the acquisition "distorts competition" in the market of the buying and selling firms<sup>214</sup> or "the investing company obtains legal or *de facto* control."<sup>215</sup> Even an agreement that "provides for commercial co-operation between the companies or creates a struc-

207. *Regulation*, *supra* note 2, preamble (necessity of one of the merging parties having substantial operations in another Member State); *id.* at art. 21, § 2 (Member State's legislation does not apply).

208. *See id.*

209. *See supra* notes 196-202 and accompanying text.

210. *See Fine*, *supra* note 21, at 517-18.

211. *Instituto Chemioterapico Italiano SpA v. Commission*, 1974 E. Comm. Ct. J. Rep. 223; *see also* *Schmitt*, *supra* note 10, at 174; and *Fine*, *supra* note 21, at 517.

212. *Regulation*, *supra* note 2, at art. 3, § 3.

213. *Philip Morris*, 1987 E. Comm. Ct. J. Rep. at 4575. *See generally* *Banks*, *supra* note 11, at 303-09.

214. *Philip Morris*, 1987 E. Comm. Ct. J. Rep. at 4577, at paragraph 37.

215. *Id.*

ture likely to be used for such co-operation" is conclusive evidence of control.<sup>216</sup> The *Philip Morris* definition of control has been used when applying Article 85 to mergers. Because the new merger Regulation allows for control through shareholding in other firms,<sup>217</sup> it is likely that the Commission will use the *Philip Morris* principle when applying the economic entity theory to minority shareholders.<sup>218</sup>

## B. The Regulation of Multinationals

The competition policy of the merger Regulation targets multinationals. One EC Commission spokesman stated, "The message is that any multinational that has substantial interests in Europe or is thinking of acquiring substantial interests in Europe will have to look to the commission in Brussels for agreement on its proposed merger."<sup>219</sup> With the new merger Regulation, the EC can actively police large multinationals and implement antitrust policy on a global scale. Multinationals by their very nature fall more readily within the merger Regulation's scope and policies. For instance, "[m]ultinationals with a wide range of products are more likely to acquire a market share of 20 to 25 percent of the common market in a particular product through a merger."<sup>220</sup> An unacceptable market share of only one product in any geographic market of Community dimension may jeopardize a merger.<sup>221</sup> Because of the wide range of products and services produced by multinationals, it is more likely for the Commission to assess multinationals unfavorably under the merger control Regulation.

In many ways, the "substantial operations" test best demonstrates the potential use of the merger control Regulation as an international antitrust weapon. Prior to *Wood Pulp*<sup>222</sup> — which adopted the effects theory — a European authority argued that the EC would not utilize the effects doctrine in merger control because the international antitrust ramifications would be too broad.

Indeed from an economic political point of view a fully fledged adoption of the effects theory would be extremely doubtful, perhaps dangerous: should for example, the existence of a cartel of major Japanese exporters to the Common Market really be tackled on a strict legal antitrust basis, or is it not rather a question of Japanese commercial policy which should be and can only effectively be tackled at the political level? It is perhaps with this in mind that in the Community's proposed merger Regulation a point of contact with the Community is always insisted upon.<sup>223</sup>

---

216. *Id.*

217. See Regulation, *supra* note 2, at art. 3, § 3; see also *id.* at art. 3, § 1(b).

218. So far *Philip Morris* has only been applied to horizontal mergers, but it may be extended further. Korah & Lasok, *supra* note 32, at 367.

219. *European Antitrust Agreement*, *supra* note 2, at D2.

220. Schmitt, *supra* note 10, at 185. The presumption is in favor of the merger below a 25 percent market share. Regulation, *supra* note 2, preamble; see *supra* notes 81-82 and accompanying text.

221. See *Hoffmann-La Roche*, 1979 E. Comm. Ct. J. Rep. at 461.

222. *Wood Pulp*, 1988 E. Comm. Ct. J. Rep. 193.

223. Weiler, *supra* note 84, at 208.

Even though the EC has not expressly adopted the effects doctrine, the vagueness of the “substantial operations” test raises two questions: (1) Will the EC use the merger Regulation for international trust-busting; and (2) Should the EC use the Regulation for such a purpose?

As evidence of its potential trust-busting powers, the Commission may both approve mergers under the Regulation and stipulate the conditions for such approval.<sup>224</sup> The authority to conditionally approve mergers is a powerful tool for the implementation of EC policy. Firms rejecting EC stipulations may opt to abandon European operations.<sup>225</sup> Using access to its own markets as an incentive, the EC has leverage to implement its own antitrust policies and promote its own conception of fairness in international markets.

### C. Deals Affected Other than Traditional Mergers

#### 1. *Asset Sales*

Along with statutory mergers, asset sales are regulated by the EC merger Regulation. The Regulation’s definition of “concentration”<sup>226</sup> includes not only mergers, but also share purchases and asset sales.<sup>227</sup> “A concentration shall be deemed to arise where . . . one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.”<sup>228</sup> Acquisition of “control” is the determinative test of this definition. This language is designed to encompass a broad array of transactions, thus making it very difficult to structure a transaction that avoids the EC Regulation.

Under the Regulation, control of “parts” of an undertaking will ensnare asset lockups<sup>229</sup> if the transaction meets the threshold requirements. In calculating threshold turnover, however, “only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.”<sup>230</sup> Thus, in asset sales where only a part of a firm is sold, the seller’s turnover is limited to the part or parts being sold.<sup>231</sup>

224. *Regulation, supra* note 2, at art. 8, § 2.

225. *See Rivers & Vest, supra* note 171, at 46 (arguing the pressure to divest is a real threat).

226. The Regulation speaks of “concentrations” instead of “mergers.” This is a better term than “mergers,” since “merger” may be narrowly defined as a statutory merger or broadly defined to include tender offers, asset sales, and share exchanges.

227. *Regulation, supra* note 2, at art. 3, § 1.

228. *Id.* at art. 3, § 1(b).

229. Asset lockups are options to purchase key “parts” of a firm. Selling firms grant lockups to third parties in order to make their firms less attractive to hostile bidders in a takeover acquisition. Lockups are also used to induce new parties to enter a bidding contest for a firm.

230. *Regulation, supra* note 2, at art. 5, § 2.

231. The normal rules for inclusion in the turnover calculation, however, apply for the buyer. *See supra* notes 37-42 and accompanying text.



## 2. Takeover Bids and Stock Acquisitions

Under the merger Regulation's definition of concentration, it will apply to both friendly and hostile takeovers.<sup>232</sup> Takeover bids are the subject of an EC directive<sup>233</sup> adopted by the Commission in December of 1988.<sup>234</sup> The takeover directive governs the actual bidding process and is aimed at fairness and protection of shareholders.<sup>235</sup> In contrast, the new merger Regulation administers competition policy, ensuring that markets are free from monopolies created by hostile tender offers.<sup>236</sup>

As discussed above, the Commission has applied Article 85 to the acquisition of minority shareholdings.<sup>237</sup> The crucial test is not the percentage of ownership acquired, but whether the acquisition has the effect of "distorting competition."<sup>238</sup> When distortion of competition results from an investing firm obtaining "legal or de facto control," the Commission may apply Article 85.<sup>239</sup> Since the Commission has

232. See Regulation, *supra* note 2, at art. 3, § 1; see also Fine, *supra* note 21, at 515. A concentration results when a firm acquires control over a division of a company. *Id.*

233. Proposal for a Thirteenth Company Law Directive: Take-over and Other General Bids, [Transfer Binder] Common Mkt. Rep. (CCH) ¶ 60,200.

234. *Id.* at ¶ 60,125. The Commission adopted the proposal, but it still has to be adopted by the Council by a qualified majority. *Id.* at ¶¶ 60,125, 60,170. The various Member States will have to modify their own legislation to comply with the EC plan. See Basaldúa, *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).

235. Basaldúa, *supra* note 234, at 488. The takeover regulation does not cover all aspects of takeovers. *Id.* at 500.

236. *Id.* In addition to the takeover directive, which deals with the mechanics of bidding, and the merger Regulation, several other regulations affect hostile takeovers. An adopted Directive addresses disclosure of major shareholdings. See 31 O.J. EUR. COMM. (No. L 348) 62 (1988); see also Basaldúa, *supra* note 234, at 500. The Commission has also not yet addressed, although it is planning to, permissible defense measures for corporations subject to hostile takeovers. *Id.* The steady development of regulations for takeovers has evolved as part of the EC's plan to implement its company law. See R. BUXBAUM & K. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE: CORPORATE AND CAPITAL MARKET LAW HARMONIZATION POLICY IN EUROPE AND THE U.S.A. 232 (1988).

237. *Philip Morris*, 1987 E. Comm. Ct. J. Rep. 4487.

238. See *id.* at 4577; see *supra* notes 218-19 and accompanying text.

239. *Philip Morris*, 1987 E. Comm. Ct. J. Rep. at 4577. In affirming the Commission's decision in *Philip Morris*, the Court of Justice declared that Article 85 applies to stock acquisitions when any one of the following conditions is met:

- 1) the shareholding results in legal or de facto control; 2) the agreement gives the acquiror the possibility of reinforcing its position later; 3) the agreement provides for commercial cooperation; 4) the shareholding requires the firms to take into consideration the other's interest when determining commercial policy. Hawk, *supra* note 3, at 310-11. From this list, it is clear that a finding of 51% control is not necessary for the Commission to apply Article 85.

In *Philip Morris* both the Commission and the Court of Justice found "that the 24.9 percent voting rights and restrictions on future transfers of stock did not meet any of these [the above] conditions, at least where the Commission imposed protective measures." *Id.* at 311 (emphasis added). Thus, in at least one case, one firm's acquisition of 24.9% of the voting rights of another firm did not result in the Commission disallowing the transaction under Article 85. Under the new Regulation, the Commission

applied Article 85 to minority shareholder acquisitions, the Commission may apply the merger control Regulation to shareholder purchases through use of the "economic entity" theory.<sup>240</sup> Such application of the "economic entity" theory raises concerns for undertakings which invest in the stock of other firms that share similar EC markets.

---

will exhibit a similar degree of tolerance dependant upon the facts and circumstances of the actual case.

The facts of *Philip Morris* illuminate how the Court of Justice might treat minority shareholding acquisition agreements under the new Regulation. In *Philip Morris*, the original agreement that was challenged before the Commission allowed Philip Morris to buy half of Rothmans Tobacco Holdings from another firm, Rembrandt Group Limited. Rothmans Tobacco Holdings owned roughly half of a competitor of Morris, Rothmans International. The merits of the case, however, were decided based upon a second agreement between Philip Morris and Rembrandt.

In the later agreement, Philip Morris owned just under 25% of the voting rights and 30.8% of the equity of Rothmans International. In addition, a "poison pill" plan prevented any other competitor from acquiring influence in Rothmans by purchasing shares from either Morris or Rembrandt. Korah & Lasok, *supra* note 32, at 333-35. It was this later agreement, with a lesser shareholding and an accompanying poison pill, that both the Court and Commission validated. The Court refused to strike down the agreement under Article 85 because of "the fact that the companies in question had 'remained independent after the entry into force of the agreements.'" Banks, *supra* note 11, at 307 (emphasis in original). See generally *id.* at 304-05. The Court even found it unlikely that the two firms would forebear from competing with each other. *Id.* at 305.

Thus, the preservation of competition is the crucial factor that the Court of Justice and the Commission will look to in assessing the validity of minority shareholding acquisitions. Similar principles will guide the new merger Regulation in its application.

240. Banks argues that *Philip Morris* does not apply to merger agreements. Banks, *supra* note 11, at 308. It might therefore be argued that the principles of *Philip Morris* do not apply to the merger control regulation. But it should be remembered that Banks analyzes the application of Article 85 to minority shareholder purchases and not how the "economic entity theory" allows the new Regulation to reach such purchases. Because of the "economic entity theory," assessments of control and the principles of *Philip Morris* are relevant. For discussion of the economic entity theory, see *supra* notes 203-18 and accompanying text.

While a 51% control requirement is sometimes applied in the calculation of turnover, see *Regulation, supra* note 2, at art. 5, § 4(b); and *supra* notes 33-43 and accompanying text, no such similar requirement is imposed upon the jurisdictional scope of the Regulation. See *Regulation, supra* note 2, at art. 3. Thus, minority shareholding acquisitions are not barred from the Regulation's jurisdiction by any threshold ownership test. See *id.* In addition, the turnover of the party acquiring a minority shareholding interest will not escape the turnover calculation. See *id.* at art. 5, § 4(a). The only time the 51% test applies is in the calculation of turnover as it relates to subsidiaries of the transacting parties. Compare *id., with id.* at art. 5, § 4(b).

While a 51% ownership test is not determinative, control determines whether a transaction falls within the scope of the Regulation. Compare *id.* at art. 1, § 1, *with id.* at art. 3, § 1(b). The merger control Regulation states that control consists of "rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking." *Id.* at art. 3, § 3(b). Under this definition control may be acquired, in certain circumstances, by the acquisition of a minority shareholding.

### 3. Joint Ventures and Partial Mergers

Joint ventures also fall within the scope of the merger control Regulation. The Regulation applies to joint ventures that have "all the functions of . . . autonomous economic entit[ies],"<sup>241</sup> its purpose being not to effect the "coordination of the competitive behavior" of the parties.<sup>242</sup> In essence, parties to a joint venture must continue to compete and must not allow the joint venture to function as an independent entity. "Partial mergers, or joint ventures in which the parties cease competing with respect to the products concerned, would be subject to the . . . Regulation."<sup>243</sup> Consequently, joint ventures that affect competition or function as independent entities must meet the merger Regulation's requirements.<sup>244</sup>

The Commission's exact definition of a joint venture is somewhat tenuous.<sup>245</sup> The Commission has contented itself with saying simply that a joint venture is "generally defined as an enterprise subject to joint control by two or more undertakings which are economically independent of each other."<sup>246</sup> The Commission has included within this definition joint buying agencies, joint selling agencies, and joint R&D companies, as well as more separate entities with independent economic lives of their own. The possible arrangements under the umbrella of "joint venture" cover a broad range. However, one common feature is that their creation results from a pooling of resources by the parent companies. Structurally, therefore, they may be regarded as mergers or, since only a part of the parents' resources are merged, what are frequently called in the EC "partial mergers."<sup>247</sup> The breadth of the Commission's definition of "joint venture" should function as a warning to

241. Regulation, *supra* note 2, at art. 3, § 2.

242. *Id.*

243. Fine, *supra* note 21, at 515 (Fine is discussing a proposed draft regulation, but the same analysis applies to the adopted version). See Fine's Draft, *supra* note 135. Concerning the singleness of policy between joint ventures and mergers, the Economic and Social Committee of the EC has stated:

Supervision of mergers is linked to that of joint ventures, for which a clear definition is required. The forthcoming guidelines should be in line with the Commission's stance on merger supervision, the aim being once again to enhance the legal certainty of the environment in which firms must compete.

Parameters should in any event be fixed with due regard to competition from outside the Community covering a wide variety of considerations such as the number of operators, the level of output and advanced technology, synergy and economies of scale.

COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH REPORT ON COMPETITION POLICY 268, ¶ 2.6 (1988).

244. Schmitt, *supra* note 10, at 183.

245. The Court of Justice had not been asked to review any of the Commission's decisions on joint ventures. Banks, *supra* note 11, at 286.

246. COMMISSION FOURTH REPORT ON COMPETITION POLICY ¶ 37 (1975); COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY ¶ 53 (1984) (original footnote renumbered).

247. Banks, *supra* note 11, at 287. For a discussion of the Commission's regulation of joint ventures and partial mergers under Articles 85 and 86 of the Treaty of Rome, see *id.* at 286-309.

firms entering joint ventures. Such firms could unwittingly create an obligation to file with the Commission. Combined with the Regulation's application to non-EC firms, the regulation of joint ventures under a very broad definition has quite troubling international antitrust implications.

Prior to the enactment of the new Regulation, the Commission applied Article 85 to joint ventures by considering the following factors:

1. Will the establishment of the joint venture lead to a reduction in the number of competitors on that market? Or to a diminution of competitive enthusiasm? . . .
2. Will there be a reduction of competition on the other markets as a result of the parents' cooperation in the joint venture? . . .
3. Will entry barriers [for new competitors] be raised?

. . .

These questions enable the Commission to examine, again, whether the parent companies would have entered the market in absence of the joint venture, whether the benefits of the joint venture could not be achieved by some other arrangement that is regarded as less likely to prejudice patterns of competition, and whether—in view of the number of firms, competing technologies, and so on—the market strength of the joint venture is likely to be excessive.<sup>248</sup>

The anti-competitive effects of a joint venture were carefully scrutinized under Article 85. The new Regulation does not reveal in detail the factors the Commission will assess in determining a joint venture's validity. The Commission will probably consider the same factors when applying the new merger Regulation to joint ventures that it used in the application of Article 85 to such agreements.<sup>249</sup>

#### D. Summary of International Antitrust Implications

The Regulation's authority over a broad range of transactions, its broad geographic reach, and its targeting of multinationals gives the Regulation international significance as an antitrust weapon. The Regulation is not designed merely to regulate mergers within Europe. First, the Regulation covers transactions that fall outside of the broadest definition of the term "merger." It not only affects mergers, asset sales, and tender offers, but also minority share purchases and joint ventures. Secondly, the Regulation extends far beyond Europe. Firms merging anywhere in the world will fall within the scope of the Regulation if the merger is

---

248. *Id.* at 299-300.

249. Such factors will be considered in light of the Regulation's criteria for determining if a concentration is compatible with Community competition policy. *See Regulation, supra* note 2, at art. 2, § 1.

The Commission's application of Article 85 to joint ventures has been criticized as too harsh. Banks, *supra* note 11, at 301. Indeed, the Commission has indicated that too many joint ventures have been banned under Article 85, and that the "pro-competitive nature" of joint ventures should be emphasized. *Id.* at 302. The problem seems to be that Article 85 was ill-suited for joint ventures. *See id.* at 300-02. Hopefully, the merger control Regulation will not run into similar difficulties.

sufficiently large and if the merging parties have "substantial operations" in the Common Market. Third, the Regulation is designed to snare an important class of multinational players, the multinational corporation. Under the most extreme application, the EC could use the Regulation to dismantle cartels or at least decrease their influence and to regulate the competitiveness of large corporate multinationals. Thus, the Regulation has implications far beyond the mere simplification of mergers and acquisitions within Europe.

#### IV. European Competitiveness

Besides simplifying access to European merger markets and creating global antitrust implications, the new Regulation will affect firms from non-EC countries in one other significant way — it will promote European competitiveness in the international arena. The Regulation will facilitate the competitiveness of European firms in two ways: (1) European firms will more easily grow to the size of international conglomerates, and (2) the Regulation will exert indirect pressure for European access to international markets.

##### A. Promoting the Growth of Firms from EC Member States

Under Article 2 of the merger Regulation, the Commission may authorize a merger, even if it somewhat restrains competition, if the merger promotes European technological or economic progress<sup>250</sup> and is otherwise beneficial for the "the structure of all the markets concerned,"<sup>251</sup> including the "demand trends for the relevant goods and services, [and] the interest of the intermediate and ultimate consumers."<sup>252</sup> Through these requirements EC drafters have provided for the growth and stimulation of European firms.

The goal of encouraging growth of Common Market industry is even more significant in light of the current restructuring of Europe's corporate climate through a wave of mergers and consolidations.<sup>253</sup> These transactions are motivated by the anticipated benefits of Europe's plans for economic integration by 1992. The new Regulation is both a product of these restructuring intentions and a tool for the realization of such objectives.<sup>254</sup> As evidence of the use of mergers to increase the competitiveness of European firms, one authority stated:

---

250. *Regulation, supra* note 2, at art. 2, § 1(b). The flexibility which permits minor restraints of competition is found in the Regulation's language about significant impediments to competition, *id.* at art. 2, §§ 2-3, and the Regulation's host of factors that are to be considered when evaluating a transaction for compatibility. *Id.* at art. 2, § 1; *see also supra* notes 113-22 and accompanying text.

251. *Regulation, supra* note 2, at art. 2, § 1(a).

252. *Id.* at art. 2, § 1(b).

253. *See generally* Spellman, *1992 Prompts Unprecedented Wave of Mergers*, EUROPE, Dec. 1988, at 26; Kirkland, *Merger Mania Is Sweeping Europe*, FORTUNE, Dec. 19, 1988, at 157; *Europe's Buyout Bulge*, N.Y. Times, Nov. 5, 1989, at F1, col. 2.

254. *See* Rivers & Vest, *supra* note 171; *see also* *European Antitrust Agreement, supra* note 2, at D1.

This new merger authority will certainly see the necessity of stopping abusive mergers, but equally important, *it will seek to permit mergers that are of a Pan-European interest* . . . . For certain European industries to grow to the level of the United States and Japan, Europe must have a more enlightened merger policy.<sup>255</sup>

With the new merger Regulation, the EC hopes to increase opportunities for its own firms.

## B. Promoting International Fairness

Not only does the EC hope to promote mergers that will benefit the Common Market within its own borders, but it also hopes to use the Regulation to promote fairness for European firms in other international markets. For example, prior to the adoption of the final version of the Regulation, the EC Committee of Permanent Representatives (COREPER) "was instructed to investigate the conditions in which the Community could realise its desire to ensure that Community enterprises should have better access to acquisitions in the international market."<sup>256</sup> By ordering COREPER to make this investigation, the Commission was studying ways to draft the Regulation so that it could be used to promote European interests in markets outside of the EC.

Thus, the new Regulation was drafted to promote the interests of EC firms in international markets. Under Article 24 of the Regulation, "Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations . . . in a non-member country."<sup>257</sup> In addition, the Commission must submit regular reports to the Council of Ministers on the treatment of EC firms in non-EC countries.<sup>258</sup> The Commission also has authority to submit proposals to the Council that will rectify any unfair treatment abroad.<sup>259</sup> Fairness for EC firms in all international markets is a significant policy objective of the new Regulation.

The Regulation's competition policy will be affected by the EC's concern with international fairness for European firms. The Commission evaluates mergers against competition policy criteria of "actual and potential competition, both inside and *outside the community*."<sup>260</sup> The policy behind the Regulation's evaluative criteria is a commitment to promoting fairness for European firms on an international scale.<sup>261</sup>

---

255. *European Antitrust Agreement*, *supra* note 2, at D1 (emphasis added). It should not be thought that the merger Regulation is concerned only with European performance in the global theater. The merger Regulation operates as an antitrust device at a strictly European level while at the same time "breaking down . . . national economic boundaries" within Europe. Weiler, *supra* note 84, at 204-05.

256. *Council Makes Some Progress on Merger Control Regulation*, [Transfer Binder] Common Mkt. Rep. (CCH) ¶ 95,283 (Nov. 1989).

257. *Regulation*, *supra* note 2, at art. 24, § 1.

258. *Id.* at art. 24, § 2.

259. *Id.* at art. 24, § 3.

260. *European Antitrust Agreement*, *supra* note 2, at D2 (emphasis added); *see also Regulation*, *supra* note 2, at art. 2, § 1(a).

261. *See supra* notes 256-62 and accompanying text.

The Commission has some leverage in promoting its own conception of fairness. Under the Regulation, a merger could be permitted on the condition that it meets stipulations that would promote fairness of competition for EC firms.<sup>262</sup> For example, the Commission could permit an American firm to acquire a European company provided that the American firm stop abusing its dominant market position in Latin America. The Commission's evaluation of non-EC markets indirectly creates pressure for European access to international markets. Non-EC firms could be forced to either compete more fairly outside the EC or to divest their interests in the EC and forego possible merger ventures.

### C. Summary of Effects on European Competitiveness

The new Regulation will affect firms from non-EC countries by promoting fairness for European firms in all international markets and by encouraging the growth of European conglomerates. The new Regulation creates the format for a restructuring of the European corporate environment and could potentially contribute to the reshaping of the entire international corporate community. The impact of this Regulation on European competitiveness should not be underestimated.

### Conclusion

The new EC merger Regulation is not simply an inter-European Regulation. It will affect non-EC companies, not only by providing business opportunities in Europe, but by requiring large firms to constantly consider the EC ramifications of mergers, asset sales, tender offers, joint ventures, and other similar transactions implemented anywhere in the world. The scope of the Regulation's application prompts the question: to what extent will the EC use the Regulation as an international anti-trust weapon? Europe has a stated interest in promoting the growth of its own multinationals and is keenly aware of the need to use the merger Regulation to ensure market structures favorable to EC firms, not only in Europe, but in other international markets as well. The new Regulation gives the EC leverage to pressure non-EC firms into creating favorable market structures abroad in exchange for access to EC merger markets. The new Regulation is a major development in international antitrust law, with potentially real, historical significance.

*Paul D. Callister*

---

<sup>262</sup> See *Regulation*, *supra* note 2, at art. 8, § 2. The Court of Justice may review these stipulations. *Id.* at art. 21, § 1.