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The EEC Merger Regulation: Preparing for a Common European Market

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I. INTRODUCTION

By January 1, 1993, the European economic revolution, which began in 1957 with the signing of the Treaty of Rome ("Treaty"), will be complete.[1] On that date, the individual markets of twelve European countries[2] will be transformed into the single, unified Common Market, known as the European Economic Community ("EEC"), coextensive with the boundaries of these twelve signatories ("Member States") to the Treaty. The elimination of the economic barriers dividing these Member States requires the removal of certain legal barriers and the establishment of a single legal and regulatory regime to oversee the operation of the Common Market. In preparation for 1993, the EEC has promulgated a number of regulations, pursuant to the spirit and letter of the Treaty, in order to establish consistent policies which are so vital to the success of this economic experiment.[3]

On September 21, 1990, the EEC took a substantial step towards achieving regulatory consistency. On that date, a regulation promulgated by the Commission of the European Communities ("EC Commission")[4] went into effect. This regulation requires all mergers, acquisitions and joint ventures involving business organizations above

1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY March 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY]. Article 8a of this treaty, which establishes the December 31, 1992 deadline for complete integration of the European Community, was added by the Single European Act. Single European Act, 1987 O.J. (L169) 1. For a discussion of how this transformation directly affects European merger policy, see *infra* notes 9-13.

2. The EC now consists of twelve European nations: Belgium, Luxembourg, Denmark, France, Germany (which will include what was once East Germany), Greece, Ireland, Italy, the Netherlands, Portugal, Spain, and the United Kingdom. Kurt E. Markert, *German Antitrust Law and the Internationalization of Markets*, 64 CHI.-KENT L. REV. 897, 897 (1988).

3. There are four categories of legislation generated by the EC governing bodies: Regulations, Directives, Decisions, Recommendations, and Opinions. *Towards 1992*, 2 Doing Business in Europe (CCH) ¶ 99-100(1990). "[Regulations] are directly applicable in all Member States, with binding legal effect without the need for confirmation by national parliaments." *Id.*

4. For a discussion of the EC institutions and their roles, see *infra* note 12.

a certain size to obtain Commission approval before becoming final.[5]

The EEC Merger Regulation is significant for two reasons. First, the Commission intends to use the Regulation to police international mergers and acquisitions within the EEC.[6] These transactions are growing in number as firms attempt to expand by combining in anticipation of a large Common Market in 1993.[7] Second, the Regulation will further the goal of consistency in merger policy, as the Community attempts to circumvent the confusing and inconsistent multitude of national merger enforcement laws presently existing within the Member States.[8]

The second part of this Comment recaps the short history of the EEC since its inception in 1957, traces the development of the Merger Regulation, and outlines the terms of the final version of the Regulation as implemented. The third part of this Comment analyzes many of the criticisms of the Regulation and suggests changes that would effectively address many of these criticisms. The final part of this Comment discusses the anticipated impact that the Regulation will have on European competition law and provides some guidelines for American lawyers who expect to encounter the Regulation on behalf of their clients. In addition, this section examines the initial results of the regulation in operation. This Comment concludes that the success of the Regulation requires (1) that jurisdiction to clear and review Community-wide mergers and acquisitions be vested solely in the EC Commission, and (2) that the Regulation's provisions guide the Commission in adopting a merger policy that adheres to the spirit of the Treaty of Rome.

II. BACKGROUND

A. *EC Regulation of Mergers and Acquisitions Since 1957*

The development of a unified European merger policy began in 1957,[9] when six European countries signed the Treaty of Rome.[10]

5. *See* Council Regulation 4064/89, On the Control of Concentrations Between Undertakings, 1989 O.J. (L 395)1.

6. *See* Paul D. Callister, Note, *The December 1989 European Community Merger Control Regulation: A non-EC Perspective*, 24 CORNELL INT'L L.J. 97, 97 (1991) ("[T]he new Regulation has international antitrust implications affecting mergers and other transactions worldwide.").

7. "The total number of mergers in the European Community increased by 26 percent from June 1989 to May 1990 over the previous year . . . . There were twice as many acquisitions of EC firms by firms outside the EC compared to the preceding year . . . ." *Mergers Continue Upward Trend, EC Commission Notes in Annual Report*, [Jan.-June] Sec. Reg. & L. Rep. (BNA), at 1005 (June 28, 1991).

8. *See infra* note 74 and accompanying text.

9. EEC TREATY. Prior to this time, those persons schooled in the European tradition of laissez-faire government viewed merger regulation, and antitrust regulation in general, as a uniquely American legal phenomenon. MILTON HANDLER ET AL., TRADE REGULATION 21 (3d ed. 1990). In fact, the only semblance of European antitrust legis-

The Treaty established the EEC, a unified European common market within the boundaries of the Member States,[11] and created the institutions authorized to carry out the spirit and the letter of the Treaty.[12] The general goal of these institutions is to establish and implement policies conducive to the successful integration of the European markets into a single competitive market.[13]

In response to the increasing concentration of market share and the growing number of restrictive trade practices in all industrial sectors throughout post-war Europe,[14] the EC Commission attempted to

lation existed exclusively in Germany, where it had been imposed by United States authorities after World War II. *See infra* note 46.

10. EEC TREATY. The original members of the EC were the United Kingdom, West Germany, France, Italy, Luxembourg, and the Netherlands. *Id.* For a discussion of the growth of membership within the EC, see 1 HANS SMIT & PETER HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY P-8 to P-25 (8th ed. 1991).

11. EEC TREATY, arts. 1-2.

12. There are four institutions that govern the EC. EEC TREATY, art. 4(1). The Council of Ministers, which consists of the Member States' foreign ministers, is the legislative branch of the EC. *Id.* at art. 145. Administrative/executive functions are carried out by the Commission of the European Communities ("EC Commission"), which is headquartered in Brussels, Belgium. *Id.* at art. 155. The Court of Justice, located in Luxembourg, is the EEC's Judicial branch. *Id.* at art. 164. The court reviews the EC Commission's formal decisions and determines questions of EC law referred to it by the national courts of Member States. *Id.* In order to expedite the judicial process in the EC, the Council of Ministers recently created the Chamber of First Instance, which has original jurisdiction. 1989 O.J. (C 215)1. Finally, the Assembly, also known as the European Parliament and located in Strasbourg, France, plays a limited legislative role and often provides input into the Council's drafting of competition regulations. EEC TREATY, art. 137.

13. Two general goals permeate the Treaty. The first goal is the integration of the Member States' individual economies, including the elimination of protectionist policies by Member States. EEC TREATY, arts. 9, 12. This also includes restrictive practices by individual business enterprises, or undertakings, which would interfere with integration. *Id.* at arts. 85-86. The second goal, which defines the purpose of the first goal, is the promotion of economic competition. *Id.* at art. 3(f). Although the establishment of this goal represents a victory for European proponents of a free market system over advocates of a planned economy, the latter perspective has had an influence on the direction of EEC competition policy. BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST—A COMPARATIVE GUIDE 423-24 (1979). The ultimate goal of the EEC is to eliminate all barriers to trade, such as tariffs, among the member States. EEC TREATY, art. 3(a)-(c). The EEC also attempts to promote trade on the international level as a single economic unit. *Id.* at arts. 5-6.

The EC Commission negotiates at GATT (General Agreement on Tariffs and Trade) conferences and, in the absence of special arrangements, non-members are subject to a common external tariff imposed by the EEC. MOYES E. LEECH, THE INTERNATIONAL LEGAL SYSTEM 1140-41 (3d ed. 1988). This Common Market is the West's largest trading entity in terms of geographic size and population, with over 300 million people. *Towards 1992*, 2 Doing Business in Europe (CCH), ¶ 102-700 (1990).

14. From June 1989 to May 1990, the chemical industry had the most mergers

gain control over this potentially anticompetitive phenomenon by articulating a consistent merger policy under the terms of the Treaty.[15] Until the Merger Regulation became effective, EEC merger policy had been based exclusively on Articles 85 and 86 of the Treaty.[16]

1. The Use of Articles 85 and 86 to Enforce EEC Merger Policy

Article 85, the European counterpart to Section 1 of the Sherman Act,[17] prohibits "as incompatible with the Common Market: all agreements between undertakings [entities engaged in commercial activity] . . . and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market . . . ."[18] Article 85 is much more specific than Section 1, however, in that it expressly includes an enumerated list of prohibited business arrangements,[19] and expressly excludes from its application agreements "which contribute to improving the production of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting economic benefit . . . ."[20]

Article 86, which is roughly analogous to Section 2 of the Sherman

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with 148, followed by the food industries, with 102 mergers, and the paper printing industries with 79 mergers. *Mergers Continue Upward Trend, EC Commission Notes in Annual Report*, [Jan.-June] Sec. Reg. & L. Rep. (BNA), at 1006 (June 28, 1991). The percentage increases in these industries were 38, 34, and 29, respectively. *Id.* Although these trends can be attributed to the anticipated Common Market, they are also due in part to the post-war increase in trading volume on an international level. Fielding, *Foreword* to DAVID L. PERROTT & ISTVAN POGANY, CURRENT ISSUES IN INTERNATIONAL BUSINESS LAW, at vii (1988)[hereinafter Fielding, CURRENT ISSUES].

15. *See infra* notes 78-87 and accompanying text.

16. *See infra* notes 32-38 and accompanying text.

17. 15 U.S.C. § 1 (1988). Section 1 of the Sherman Act states, in pertinent part, that "[e]very contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

18. EEC TREATY, art. 85. An "undertaking" has been defined as "[a]ny natural or legal person engaged in activities of an economic nature." 16(G) J. O. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 60.04 [2] (1989).

19. In particular, Article 85(1) expressly prohibits concerted practices which fix prices, restrict output, divide markets, in addition to concerted refusals to deal and tying arrangements. EEC TREATY art. 85. United States courts have had to construe most of these prohibited practices from the broad language of Section 1 of the Sherman Act. *See, e.g.*, United States v. Topco Associates, Inc., 405 U.S. 596 (1972)(market division); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959)(concerted refusals to deal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (price-fixing), *reh'g denied*, 310 U.S. 658 (1940).

20. EEC TREATY, art. 85(3). This exclusion, which is limited only to those restrictions that are "indispensable to the attainment of these objectives," precluded a debate similar to that which has continued in the United States over whether Section 1 of the Sherman Act should be construed as a per se rule of illegality. *Id.* Article 85 mandates a rule of reason, which is the alternative to the per se rule in the United States.

Act,[21] prohibits "[a]ny abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it" to the extent it affects trade among Member States.[22] Like Article 85, Article 86 expressly provides a list of prohibited business arrangements.[23] However, only firms having a "dominant position within the Common Market or a substantial part of it" are subject to the prohibitions of Article 86.[24] "Dominant position" has been construed by the Court of Justice in much the same way that United States courts have construed "monopoly power" under Section 2 of the Sherman Act.[25] A firm has a "dominant position" under Article 86 when it can "behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers" and has an "appreciable influence on the conditions under which . . . competition will develop, and in any case to act largely in disregard of it."[26] A firm "abuses" its dominant position when its behavior "influence[s] the structure of a market" in an anticompetitive manner.[27]

In 1966, the EC Commission took the position that Article 85 does not apply to mergers.[28] The Commission's decision reflected the tendency that existed in the Common Market at that time of allowing,

21. 15 U.S.C. § 2 (1988). Section 2 of the Sherman Act states, in pertinent part: "every person shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.*

22. EEC TREATY, art. 86.

23. Specifically, Article 86 prohibits undertakings with a dominant market position from imposing predatory pricing and other unfair trading terms, production limitations injurious to consumers, price discrimination, and tying arrangements. *Id.*

24. *Id.*

25. *See* United States v. E.I. duPont, 351 U.S. 377 (1956) (holding that monopoly power is the power to control prices or exclude competition in the relevant market).

26. Case 85/76, Hoffman-La Roche & Co. AG v. Commission, 1979 E.C.R. 461, 3 C.M.L.R. 211 (1980). In *Hoffman-La Roche*, the Court found that Hoffman-La Roche, a manufacturer of bulk vitamins, held a "dominant position" that allowed it to maintain agreements with its customers " 'which contain an obligation upon purchasers, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements exclusively, or in preference, from Hoffman-La Roche.' " *Id.* at 464 (quoting Commission, 1976 O.J. (L 223) 27). The Court stated that Hoffman-La Roche's dominant position resulted from, among other things: a market share ranging from 95% for vitamins B6 and H to 47% for vitamin A; the fact that Hoffman-La Roche was the world's leading manufacturer of all vitamins; and high barriers to entry in the industry due to the long-term large investments required to enter the market. *Id.* at 479.

27. *Id.* at 475.

28. 1 J.O. VON KALINOWSKI, WORLD LAW OF COMPETITION (Unit B-European Economic Community) § 7.02 (1982) [hereinafter WORLD LAW OF COMPETITION] (citing *La probleme de la concentration dans le marché commun, etude CEE, Serie Concurrence No. 3* (1966)). This construction of Article 85 is consistent with the general non-applicability of Section 1 of the Sherman Act to United States mergers.

and even encouraging, mergers in the hope of creating enterprises sufficiently large to effectively compete in international markets.[29] The decision, however, suggested that Article 86 could be applied to mergers where an abuse of a dominant position resulted.[30]

For many years after its 1966 decision, the Commission utilized Article 86 to examine the compatibility of mergers with the Common Market. In 1973, the Court of Justice sustained the Commission's application of Article 86 to mergers.[31] However, the Court failed to discuss whether abuse of a dominant position arises from the merger itself, or whether there has to be a further showing of an affirmative threat to competition posed by the merger. The Commission has since indicated that the latter is required.[32]

In 1981, the Commission changed its earlier position with regard to the applicability of Article 85 to mergers and acquisitions when it challenged an agreement between Philip Morris and Rembrandt Group Ltd., the parent of a company owning a controlling interest in a competing tobacco products manufacturer.[33] Under the agreement, Philip Morris would purchase half of Rembrandt Group's ownership in its subsidiary, Rothmans Holdings, which itself owned 61.6% of Rothman International, Philip Morris' competitor.[34] After the Commission objected to this agreement, the parties negotiated a revised agreement, whereby Philip Morris purchased half of Rembrandt Group's 61.6% interest in Rothman International, but only took a 24.9% voting interest in the competitor.[35] The Commission did not object to this new agreement, but some of Philip Morris' other competitors, including British American Tobacco, challenged the agreement in the Court of Justice.[36] The Court of Justice upheld the Commission's approval of the revised agreement, and held that,

29. Antitrust & Trade Reg. Rep. (BNA) No. 207, at A-3 (1965)(remarks of von der Groeben, Commissioner of the Economic Community in Charge of Antitrust Affairs); Memorandum of the Commission of the European Economic Community to the Governments of the Member States, Common Mkt. Rep. (CCH), No. 26, part 1 at 9 (1965).

30. WORLD LAW OF COMPETITION, *supra* note 28, § 7.02.

31. In Europemballage Corp. v. EEC Commission, 1973 E.C.R. 215, the Court of Justice held that Article 3(f) of the Treaty of Rome, which provides for "the establishment of a system insuring that competition in the Common Market is not distorted," allows the Commission to review mergers under the terms of Article 86.

32. Barry E. Hawk, *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, 59 ANTITRUST L.J. 195, 197 n.10 (1990) [hereinafter Hawk, *EEC Merger Regulation*].

33. *See* British-American Tobacco v. EEC Commission, 1987 E.C.R. 4487. The Commission's reversal probably came in response to the limitations of Article 86, as well as the slow progress that the Merger Regulation, which had been introduced by the Commission in 1973, had been making toward implementation. Hawk, *EEC Merger Regulation*, *supra* note 32, at 198. *See also infra* notes 80-84 and accompanying text.

34. *British-American Tobacco*, 1987 E.C.R. 4489.

35. *Id.*

36. *Id.*

under certain conditions, Article 85 applies to minority share acquisitions between undertakings that remain independent.[37] Following the court's decision, the Commission employed Article 85 to challenge acquisitions of minority shareholdings in a competitor, as well as joint bids for a competitor.[38]

Although Articles 85 and 86 were not specifically intended to apply to merger enforcement, the conspicuous absence of any other provisions in the Treaty of Rome addressing merger enforcement forced the Commission to place heavy reliance on Articles 85 and 86 to establish a consistent merger policy. However, the language of Articles 85 and 86 made them unwieldy weapons of limited effectiveness for merger control by the Commission. For example, Article 86 is applicable only if at least one of the parties has a "dominant position" prior to the transaction.[39] Further, Article 85, as presently construed, only applies to (1) acquisitions of minority shareholdings where one of the conditions stated in *British-American Tobacco* is met; (2) "joint acquisition of shares of a third firm"; and (3) acquisitions where the seller retains a minority shareholding interest or continued participation in the management of the company.[40]

2. Merger Enforcement in the Member States

In addition to Community-wide merger regulation by the Commission, many of the member States have developed their own laws that govern mergers occurring within their boundaries. Germany, France and the United Kingdom have the most developed merger enforcement regulations,[41] but other countries have recently enacted their

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37. *Id.* at 4491. The court concluded that Article 85 applies to such agreements when the shareholding agreement: (1) "results in legal or de facto control"; (2) "gives the acquiror the possibility of later reinforcing its position"; (3) "provides for commercial cooperation"; or (4) "requires the firms to take into consideration the other's interest when determining commercial policy." Hawk, *supra* note 32, at 199.

38. In 1989, the Commission challenged a proposed acquisition by Danish Fur Sales of a 35% stake in Hudson's Bay and Annings, its largest Community competitor. *New Developments*, 4 Common Mkt. Rep. (CCH) ¶95,031 (Jan. 3, 1989). Because of the challenge, the proposed acquisition was abandoned. *Id.* In addition, the Commission challenged joint bids in Plessey v. GEC/Siemens, and Argyll Group PLC v. Distillers Co. PLC. *See* Hawk, *EEC Merger Regulation*, *supra* note 32, at 199 & n.20.

39. *See supra* note 26 and accompanying text.

40. Hawk, *EEC Merger Regulation*, *supra* note 32, at 200. Article 85 does not apply to public bids (tender offers), total mergers, passive investments, simple purchases of business assets, or acquisitions of minority shareholdings in a noncompetitor. *Id.* The limited applicability of Article 85 is probably the result of this limited interpretation of its scope.

41. *See infra* notes 47-70 and accompanying text.

own laws for the regulation of mergers within their boundaries.[42] Because most of the European merger regulation has taken place in the context of highly internationalized markets,[43] the national laws defining the standard of merger review generally require the reviewing bodies to consider both the internal and external competitive effects of a merger.[44] However, these national merger laws are endemic and usually reflect national economic goals and protectionist policies, which often stray from competition-based principles.[45]

Germany has the distinction of being the first European nation to have regulations governing mergers within its boundaries.[46] In 1957, Germany replaced the interim antitrust laws implemented by post-war occupational forces with the Act Against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkngen, hereinafter "GWB"),[47] which created the powerful Federal Cartel Office. Under the GWB, mergers are subject to government control where the combined sales of the participating firms exceed DM 500 million.[48] The GWB defines "mergers" broadly, avoiding the limitations that exist under Article 85.[49]

When proposed mergers meet GWB thresholds, notice must be given to the Cartel Authority (Bundeskartellamt), Germany's antitrust agency within the Federal Cartel Office.[50] The Cartel Authority can then conduct an investigation to determine whether "a market dominating position will be created or strengthened as a result of the merger."[51] A merger, although large enough to require notification, will be approved if "the participating enterprises prove

42. *See infra* notes 71-73 and accompanying text.

43. Fielding, CURRENT ISSUES, *supra* note 14, at i-vii.

44. *See infra* notes 53, 57 & 70 and accompanying text.

45. Many of the national merger laws have been criticized for being protectionist, in violation of the goal of the Treaty of Rome. Hawk, *EEC Merger Regulation*, *supra* note 32, at 232. In addition, merger enforcement under these laws has frequently been discriminatory when United States firms are involved. *Id.*

46. HANDLER ET AL., *supra* note 9, at 21-22. For a discussion of the evolution of post-WWII development of German antitrust laws, see 2 J. O. VON KALINOWSKI, WORLD LAW OF COMPETITION § 1.03[1] (Unit B-Western Europe)(1982).

47. Gesetz 2 gegen Wettbewerbsbeschränkngen [Act Against Restraints of Competition], July 27, 1957, BGB1. I, 1081 [hereinafter GWB].

48. *Id.* § 24(8) No. 1 GWB.

49. *Id.* § 23 Nos. 1-5 GWB . A "merger" under GWB includes the acquisition of all or a substantial part of the assets of another firm; the acquisition of shares of another firm which equals or exceeds 25% of the firm's capital or 59% of its voting rights; an agreement which forms or enlarges a combine ("Konzern") or by which an enterprise operates for another enterprise; an interlocking directorate; and "every other combination or enterprises through which one or more enterprises can directly or indirectly exercise a significant influence on another enterprise." *Id.*

50. *Id.* § 23 GWB. Premerger notification is required if one of the parties (including controlled affiliates) had worldwide sales revenues of at least DM 2 billion in the preceding fiscal year or if two of the parties (including controlled affiliates) each had worldwide sales revenues of at least DM 1 billion in the preceding fiscal year. *Id.*

51. *Id.* § 24(1), (2) GWB.

that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of market domination."[52] Any improvement in Germany's export trade as a result of a proposed merger will be considered a factor that weighs against a loss of competition in the domestic market.[53]

In France, the 1986 competition Ordinance ("Ordinance") authorizes the French Minister of Economics and Finance to refer certain transactions to the French Competition Council for further investigation of their effects on competition.[54] A merger which may have anticompetitive effects will be permitted if its "contribution to economic progress" outweighs its anticompetitive effects, "taking into consideration the competitiveness of the firms in question in the light of international competition."[55] France does not have a mandatory premerger notification requirement, although notification is recommended if the merger is likely to be questioned by the Minister.[56] Thus, any action taken by the Council or Minister will occur after the merger has been consummated.

France actively examines social and political factors, more so than Germany or the United Kingdom, when examining a merger under the Ordinance.[57] In making its determination, the Council may consider factors such as "local employment, the maintenance of French ownership of a company, increases in manufacturing efficiency and capacity within France, and increases in research and development budgets."[58] The Council's decision, however, is not binding on the Minister, who makes the final decision regarding appropriate reme-

52. *Id.*

53. *Id.* § 24(3) GWB.

54. *See* X.A. de Mello, *French Merger Law and Policy in the Wake of EEC Regulation—A French View*, 1988 FORDHAM CORP. LAW INSTIT. 29-9 (B. Hawk ed., 1989)(citing Articles 38-44 of the Ordonnance of December 1, 1986). The Minister many refer transactions where the total French sales of all parties are at least Fr 7 billion or where the parties and their affiliates have in the aggregate made over 25% of the sales, purchases, or other transactions on a national market of goods, products, or services substitutable for each other, or in a substantial part of such a market. *Id.*

55. *Id.*

56. *Id.* Notification must be made within three months after completion of the merger. *Id.* Upon notification, the Minister may refer the transaction to the Council for further investigation, declare that he does not object to the merger, or remain silent, in which case the merger will be automatically cleared after a two month waiting period. *Id.*

57. *See* Hawk, *EEC Merger Regulation*, *supra* note 32, at 230.

58. *Id.*

dies, such as divestiture.[59]

In the United Kingdom, the Fair Trading Act of 1973[60] authorizes the Secretary of State for Trade and Industry, acting on the advice of the Office of Fair Trading, to investigate and refer to the Monopolies and Merger Commission (hereinafter "MMC") mergers[61] that attain at least a twenty-five percent market share[62] or involve an acquisition of gross assets of at least £5 million.[63] The Secretary of State has six months to refer a merger that meets or exceeds these threshold levels to the MMC for investigation, and the MMC has up to five years to conduct its investigation.[64] Because the MMC has no executive power, it can only recommend to the Secretary of State action against an anticompetitive merger.[65]

Like France, the United Kingdom has never adopted a mandatory premerger notification requirement.[66] However, the United Kingdom recommends notification where the proposed merger exceeds the review thresholds.[67] In fact, if the Office of Fair Trading investigates an unreported merger that qualifies for review, it will consider the failure to notify.[68]

Although the Office of Fair Trading bases its merger review primarily upon competition criteria, it may also consider noncompetition factors, with the determination reflecting whether the merger "operates or may be expected to operate against the public interest."[69] The Office of Fair Trading generally views mergers favorably, with the exception of sizable mergers, in an effort to decrease the

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59. *See* F. Jenny, *French Competition Policy in Perspective*, 1987 CORPORATE LAW INSTITUTE: NORTH AMERICAN AND COMMON MARKET ANTITRUST AND TRADE LAWS 314-15 (B. Hawk ed., 1988).

60. Fair Trading Act of 1973, *reprinted in* 3 OECD, GUIDE TO LEGISLATION OF RESTRICTIVE BUSINESS PRACTICES (1979) [hereinafter Fair Trading Act].

61. Under the Fair Trading Act, a merger occurs when "two or more enterprises cease to be distinct." *Id.* § 64(1).

62. *Id.* § 65(1)(a).

63. *Id.* § 65(1)(b).

64. *Id.* § 69(1).

65. Hawk, *EEC Merger Regulation*, *supra* note 32, at 229.

66. *Id.* at 229 n.107.

67. *Id.*

68. *See id.* On April 1, 1990, the United Kingdom implemented a voluntary premerger review procedure, which allows parties to file a standard "Merger Notice" with the Office of Fair Trading. *Id.* Upon notification, the merger will receive immunity from reference to the Monopolies and Merger Commission, subject to limited exceptions, if the Office does not refer the proposed merger to the Commission within 20 working days of notification. *Id.*

69. Fair Trading Act, *supra* note 60, § 72. The factors that the Office of Fair Trading and the Commission on Monopolies and Merger consider in determining whether a merger "operates or may operate against the public interest" include competition, use of resources, balance of payments, conflict between businesses, interests of the bidding company, prospects of the target company if the merger does not go through, employment, and regional aspects. *Id.* § 84. The definition of "public interest" also includes "the desirability . . . of maintaining and promoting competitive activity in markets

number of small inefficient enterprises in most British industries.[70]

More recently, other European countries have begun to implement national merger enforcement regulations. For instance, Portugal and Spain have adopted regulations which emphasize competition considerations.[71] In contrast, recently created merger regulations in Ireland take into account both competition and noncompetition criteria.[72] In 1990, Italy approved a proposed merger law that largely emulates the EEC Merger Regulation's premerger notification procedure and substantive standards of review.[73]

Combined with the impracticality of applying Articles 85 and 86 on a Community level, this complex maze of national merger regulation, which has proven to be both redundant and contradictory,[74] illustrates the preference for a uniform merger policy for the Common Market. A uniform merger policy has become a necessity in light of the trend toward internationalization of mergers and acquisitions within the EEC.

B. *Development of the EEC Merger Regulation*

The Merger Regulation began in 1973 as a proposal designed to achieve two goals. First, the Regulation would add some uniformity

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outside the United Kingdom on the part of producers of goods, and suppliers of goods and services in the United Kingdom." *Id.*

70. *See generally* OECD, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, UNITED KINGDOM § 3.2 at 25-27 (1973)(summary of proposed acquisition activities of the Glaxco Group Ltd. by either Beecham Group Ltd. or the Boots Co., Ltd.).

71. For a discussion of Spanish merger legislation, see 16(G) VON KALINOWSKI, *supra* note 18, § 63.02 [14]. The Restrictive Practices Register requires notification of a merger within one month if the merger results in more than 30% market share. *Id.* However, failure to notify results only in monetary penalties against the merging parties, not nullification of the merger. *Id.*

72. *Id.* § 63.02 [9] (citing the Mergers, Takeovers and Monopolies Control Act of June 1978). The Act applies if each of the merging entities maintains in excess of either £ 1,250,000 in assets or £ 2,500,000 in turnover in the previous year. *Id.* The merging parties must notify the Minister for Industry and Commerce, who may refer the case to the Examiner of Restrictive Practices. *Id.*

73. *See* Italy Enacts First Statute to Establish Antitrust Regime, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA), at 518 (Oct. 4, 1990). The new Italian Antitrust Authority requires premerger notification of a proposed merger, acquisition, takeover, or joint venture, where the involved companies have a combined turnover of at least $450 million in Italy or where any one of the firms being acquired exceeds $45 million in Italian turnover. *Id.*

74. "Parties to many cross-border transactions must dodge through a thicket of overlapping and sometimes inconsistent notification requirements, waiting periods, substantive review standards, and negotiations with antitrust authorities in various countries." Hawk, *EEC Merger Regulation*, *supra* note 32, at 232.

to the regulation of mergers within the Community.[75] Second, the Regulation would address the inadequacies of Articles 85 and 86 as a means of merger control.[76] Due to the emergence of mergers and acquisitions as the primary means for companies to compete both internationally and within the post-1993 European market,[77] the EC Commission perceived these two goals as prerequisites to a successful integration of the EEC markets.[78]

1. The Evolution of the Draft Merger Regulation

On October 31, 1973, the Commission published the first draft regulation on merger control.[79] The numerous legal and political obstacles facing the draft regulation[80] indefinitely delayed approval by the Council of Ministers.[81] Frustrated by the delay, the Commission increased its merger control activity, relying upon the tenuous interpretations of Articles 85 and 86.[82] Eventually, the Member States' resistance to the draft regulation became overshadowed by the realization that the case-by-case evolution of Article 85 and 86 would forestall a consistent and uniform merger control policy.[83] In addition, the imminent arrival of 1993 and the prospect of entering 1993 with-

75. *See* Callister, *supra* note 6, at 97 & n.3. "Article 3 of the [proposed] regulation gives to the Commission, subject to review by the Court of Justice, sole power to make decisions prohibiting a merger or exempting in it under Art. 1, para. 3." WORLD LAW OF COMPETITION, *supra* note 28, § 7.02 n.8.

76. *See supra* notes 39-40 and accompanying text.

77. *See supra* note 14 and accompanying text. *See* Callister, *supra* note 6, at 132.

78. *See* Hawk, *EEC Merger Regulation*, *supra* note 32, at 197. In light of increasing cross-border merger activity, the Commission perceived a real danger in the "benign neglect" that had characterized the Member States' approach to merger enforcement, as reflected in the absence of any merger control provisions in the Treaty of Rome. *See id.* at 196.

79. Commission Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings, 1973 O. J. (C92)1.

80. The debate over the draft regulation centered on the supremacy of Community law over the Member States' national legislation. *See* Markert, *supra* note 2, at 922. In 1969, the Court of Justice had indicated that Community merger law would take precedence over national legislation, stating that Community and national antitrust law would apply concurrently, but that the application of national law cannot "jeopardize the uniform application throughout the Common Market of the Community cartel rules or the full effect of the measures taken under such rules." Case 14/68, Wilhelm v. Bundeskartellamt, [1967-70 Transfer Binder] Common Mkt. Rep. (CCH) ¶8057, at 7856 (1969). However, this inconclusive decision did not quell the reluctance of Member States to relinquish power to the EEC. "The Commission's attempt to attribute to the planned regulation such a sweeping preempting force vis-à-vis the national merger control laws of the member states, thereby excluding even the application of a national law notification requirement, has led to critical reactions . . . not only in the legal literature, but also politically." Markert, *supra* note 2, at 928-29.

81. Under Article 235 of the Treaty of Rome, which is the legal basis for the Merger Regulation, approval by the Council of Ministers must be unanimous. EEC TREATY, art. 235.

82. Hawk, *EEC Merger Regulation*, *supra* note 32, at 198.

83. *Id.* at 200-01. "The Commission successfully used its threat to challenge more acquisitions under Articles 85 and 86 and to force Council action on the proposed

out an established merger policy forced the Member States, through the Council, to work with the Commission in finalizing a merger regulation.[84]

In December of 1987, one month after the Court of Justice upheld the Commission's application of Article 85 to mergers,[85] the Council of Ministers and the EC Commission agreed in principle to an amended proposal for exclusive Community merger regulation.[86] Two years later, the Council issued the final draft of the Merger Regulation,[87] sixteen years after the Commission had published the first draft.

2. Significant Changes in the Draft Merger Regulation

The changes in the Regulation that occurred over the years of negotiation are too numerous to set forth in full.[88] However, a few stand out as significant pieces of legislative history that may be valuable in predicting the Commission's future course of action. The first important change was the deletion of Article 2(4) from the final draft.[89] Article 2(4) would have authorized the Commission to clear anticompetitive mergers on public policy grounds. Such a provision, based on non-competition factors, would have subjected parties to the

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Merger Regulation." *Id.* *See also* John E. Ferry, *The Future of Merger Control in the EEC*, 2 ANTITRUST 12 (1988).

84. *See UK, German Postures on EC Merger Control Can Lead to Two-Tiered Review of Mergers*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 937 (June 29, 1989)("The momentum of 1992 had 'brought to a head' the 16-year-old debate on merger control"). It has also been suggested that, in addition to realizing the need to oversee the growth of merger activity, the Council wanted to protect European markets against acquisitions by firms outside of the EEC. Patrick E. Thieffry, *The European Integration and Transnational Disputes*, 388 PRAC. L. INST. 153, 158 (1990). Not only is this contrary to the stated goals of both the Merger Regulation and the Treaty of Rome, see *supra* note 13, it is also unlikely that the Commission will use the Regulation in this manner.

85. Joined cases nos. 142 and 156184, British-American Tobacco v. Commission, [1987-88 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,405 (1987).

86. Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings, 1988 O.J. (C 130)4.

87. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1.

88. *Compare* Commission Proposal for a Regulation (EEC) of the Council on the Control of Concentrations Between Undertakings, 1973 O.J. (C 92) 1, *with* Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings, 1988 O.J. (C 130) 4 *and* Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1.

89. *Compare* Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings, 1988 O.J. (C 130) 4 *with* Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1.

vagaries of European politics and exposed the Commission to political pressure exerted by Member States still maintaining protectionist economic policies. The elimination of Article 2(4) represents a move towards a competition-based merger policy that the Member States, as well as the Commission, should recognize.[90]

The "Dutch Clause"[91] and the "German Clause"[92] were added to the Regulation in response to the concerns of Member States with either very weak or very strong national merger control regulations.[93] The "Dutch Clause" allows a Member State to request Commission review of a merger that does not fall within the Regulation because it lacks "Community dimension" but "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of that Member State."[94] This provision allows those Member States without established national merger laws to avail themselves of the Commission's services in implementing national merger control.[95]

The "German Clause," on the other hand, permits those Member States with strong merger control legislation to retain power over mergers that affect markets within their boundaries.[96] Under this

90. For an assessment of how the Commission has implemented a competition-based policy under the Regulation, see *infra* note 266 and accompanying text. The role that noncompetition criteria plays in the Member States' merger laws varies. The United Kingdom and Germany consider only competition-based factors, while France, Spain and Portugal consider both competition and noncompetition factors. *See infra* notes 45-74 and accompanying text. *See also* Hawk, *supra* note 32, at 228.

91. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 22, 1989 O.J. (L 395) 11-12.

92. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 9, 1989 O.J. (L 395) 7.

93. *See infra* notes 95-96 and accompanying text.

94. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 9, 1989 O.J. (L 395) 11-12. For a discussion of how the Court of Justice has interpreted "dominant position," see *infra* note 26 and accompanying text. *See also infra* note 162 and accompanying text.

95. *Borrie Offers Assessment of EC Policies on Merger Control, UK Enforcement Trends*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 134 (July 27, 1989). Member States with notably little merger control regulation include Belgium, Denmark, Greece, Italy, Luxembourg, and the Netherlands. Hawk, *EEC Merger Regulation*, *supra* note 32, at 227. These countries had advocated broader Commission jurisdiction, in terms of a lower threshold for invocation of the Regulation. *Id.* Within four years of the Regulation's adoption, the Council of Ministers will review the threshold and is expected to lower it. *EC Practitioners Advise Colleagues on Pitfalls of Merger Control Regulation*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA), at 673 (May 9, 1991). At that time the "Dutch Clause" will no longer be effective. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, arts. 1(3), 22(6), 1989 O.J. (L 395) 3, 12.

96. Within the EEC, France, Germany and the United Kingdom have the strongest merger control legislation. Hawk, *supra* note 32, at 228. The German Clause (Article 9) was included in the Regulation at the insistence of Germany, which wanted to preserve the control of its merger authorities over concentrations that threatened local markets. *EC Council of Ministers Adopts Regulation to Control Acquisitions*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 22 (Jan. 4 1990).

provision, a Member State, within three weeks of notification, may inform the Commission that the proposed transaction threatens competition in a "distinct market" within the boundaries of that Member State.[97] If the Commission determines that there is in fact a "distinct market" within the Member State, it may review the transaction itself or refer the proposal to the Member State, which may then apply its own national merger laws.[98]

Through periods of both dormancy and intense negotiation, the Regulation has evolved into a compromise reflecting the concerns and influences of all of the Member States.[99] For companies planning to implement a merger in Europe, the Regulation provides an alternative to the latticework of national regulation and the uncertain application of Articles 85 and 86.[100] For the Commission, the Regulation relieves it from having to apply the strained interpretations of those Articles. Yet, the Regulation is not the final word on EEC merger policy. Rather, it is a mere framework for the development of European merger policy, and on a larger scale, European competition policy.

C. An Overview of the Regulation

The Regulation consists of a preamble and twenty-five articles which govern every aspect of the premerger notification procedure, from the scope of the Regulation's coverage to the protection of the merging parties' business secrets.[101] Although the articles appear to be very specific, there are a number of analytical difficulties underlying the language contained in the provisions. The following analysis illustrates some of these difficulties and presents the articles in a format which will be useful for applying the Regulation to actual merger situations.

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97. Council Regulation 4064/89 on the Control of Concentration Between Undertakings, 1989 O.J. (L 395) 7. *See also infra* note 159 and accompanying text.

98. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 9(3), 1989 O.J. (L 395) 7.

99. "The adoption of the new Merger Regulation by the Council of Ministers represents a long sought after victory by the Commission in its efforts to strengthen and centralize merger control in the EEC." Hawk, *EEC Merger Regulation*, *supra* note 32, at 232.

100. *See supra* notes 17-40, 74 and accompanying text.

101. *See generally* Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1-12.

1. The Merger Regulation's Preamble

The thirty-one declarations within the Regulation's preamble express the intent of the Council of Ministers regarding the role of the merger vetting process in "the achievement of the aims of the Treaty establishing the European Economic Community."[102] Most of the declarations summarize the contours of the Regulation regarding scope, jurisdiction and procedure, while others explain the general goals of the Treaty of Rome as applied to mergers and acquisitions.[103] In the preamble, the Council also specifies the legal basis of the Regulation under the Treaty.[104] Because the Regulation encompasses a wider variety of mergers than do Articles 85 and 86 of the Treaty of Rome,[105] the Council principally based the legality of the Regulation upon Articles 3(f) and 235, and not solely upon Article 87, of the Treaty.[106]

2. The Scope of the Merger Regulation

Collectively, the Articles that define the scope of the Regulation indicate that the regulation only governs "large multi-country transactions involving very large firms."[107] In order for the Regulation to apply, a merger must fall within the definition of a "concentration" under Article 3(1).[108] A concentration arises where: (1) "two or more previously independent undertakings merge"; or (2) "one or more undertakings," or "one or more persons already controlling at least one undertaking 'acquires' direct or indirect control of the whole or parts of one or more other undertakings."[109] "Control" may be acquired by the "purchase of securities or assets, by contract

102. *Id.* at 1. The Regulation's preamble also recognizes the importance of "economic and social cohesion" to the success of the Community, as stated in the Treaty of Rome and the necessity of "legal certainty [to] the validity of transactions" within the Community. *Id.* at 1-2. The EC Commission uses the term "cohesion" "to describe the EC's commitment to making sure that poorer EC countries do not get left behind economically by creation of the single market." *Mergers Continue Upward Trend, EC Commission Notes in Annual Report*, [Jan.-June] Sec. Reg. & L. Rep. (BNA), at 1005 (June 28, 1991).

103. *See* Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1-3.

104. *Id.*

105. *See supra* notes 39-40 and accompanying text.

106. Council Regulation 4064/89 on the Control of Concentration Between Undertakings, 1989 O.J. (L 395) 1. Article 235 of the Treaty empowers the Council of Ministers to take appropriate measures necessary to achieve Community objectives where the Treaty has not provided the necessary powers, EEC TREATY, art. 235, while Article 3(f) calls for "the institution of a system ensuring that competition in the Common Market is not distorted." *Id.* Article 87 empowers the Commission and the Council to implement the competition rules in Articles 85 and 86. *Id.* at art. 87.

107. Hawk, *EEC Merger Regulation*, *supra* note 32, at 201.

108. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 3(1), 1989 O.J. (L 395)4.

109. *Id.*

or by any other means" that "confer the possibility of exercising decisive influence on an undertaking . . . ."[110] Although the Regulation specifies how a person or undertaking gains "control," it does not elaborate on its definition of "decisive influence."[111]

In addition to being a "concentration," the merger must have a "Community dimension" in order for the Regulation to apply.[112] "Community dimension" is defined in terms of certain threshold levels above which all proposed mergers are required to comply with the Regulation's provisions.[113] A proposed merger has a Community dimension where the aggregate worldwide turnover of the parties is greater than five billion ECU (approximately $6.5 billion), and the aggregate Community-wide turnover of at least two of the parties is greater than ECU 250 million, unless each of the parties concerned achieves more than two-thirds of its aggregate Community turnover within the same Member State.[114]

The Regulation defines "aggregate turnover" as an undertaking's net sales in the preceding financial year, excluding: (1) sales of products and services that do not constitute the undertaking's "ordinary activities"; (2) any taxes "directly related to turnover," including value added taxes; and (3) intrafirm sales and transfers.[115] If the merger consists of an acquisition of only a part of one undertaking by another (such as the acquisition of only some of the assets of an undertaking or the acquisition of all of the stock of a subsidiary of an undertaking), the aggregate turnover of the acquired undertaking is limited to the sales relating to the acquired part.[116] Where the un-

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110. *Id.* art. 3(3), at 4. Financial institutions, such as banks and insurance companies, which acquire shares for resale do not fall within the definition of a "concentration," as long as they do not exercise the voting rights of those securities, or exercise them only with the purpose of preparing them for resale, in whole or in part, and actually do resell them within one year. *Id.* art. 3(5)(a), at 4.

111. *See infra* notes 186-89 and accompanying text.

112. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 1(1), 1989 O.J. (L 395) 3.

113. *Id.* art 1(2), at 3. Even if the undertakings proposing a merger are based outside the Community, the Regulation will apply if they meet the threshold levels, since the threshold levels are based upon "products sold and services provided to undertakings or consumers." *Id.* art. 5(1), at 5.

114. *Id.* art. 1(2), at 3. Setting these threshold levels was one of the last barriers to approval of the Regulation by the Council of Ministers, and will be reviewed by the Council sometime before December 21, 1993. *Id.* art. 1(3), at 3.

115. *Id.* arts. 5(1), 5(4), at 5. The aggregate turnover of an undertaking also includes the net sales of any undertakings controlling or being controlled, either directly or indirectly, by the undertaking. *Id.* art. 5(4), at 5.

116. *Id.* arts. 5(2), at 5. However, if two or more parts of an undertaking's business are sold to the same acquiring undertaking within a two-year period, the acquisitions

dertakings involved in the concentration are participating in a joint venture, aggregate turnover does not include sales of products or services between the undertakings and their joint venture.[117] The net sales of the joint venture to third parties will be apportioned equally among the undertakings involved in the concentration.[118]

The Regulation provides a separate definition of "Community dimension" for financial institutions. A concentration of financial institutions achieves a Community dimension where the institutions' aggregate assets exceed ECU 5 billion and the assets of at least two of the institutions exceed ECU 250 million when multiplied by the percentage of the institutions' loans and advances made to Community residents.[119] The thresholds of insurance companies are measured by the value of gross premiums received and receivable worldwide, as well as from Community residents.[120]

3. Notification to the EC Commission

If a proposed merger meets both the "concentration" and "Community dimension" definitions, the proponents of the proposed merger must notify the EC Commission within one week after "the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest," whichever occurs first.[121] Except for public bids, the concentration cannot be put into effect "either before its notification or within the first three weeks following its notification."[122] If the concentration involves a merger or ac-

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of those parts will be considered a single transaction occurring on the date of the most recent transaction. *Id.*

117. *Id.* art. 5(5)(a), at 5.

118. *Id.* art. 5(5)(b), at 5-6.

119. *Id.* art. 5(3)(a), at 5. These numbers are reached by applying one-tenth of the limitation amount found in art. 1(2)(a) and art. 1(2)(b), multiplied by the ratio between loans and advances.

120. *Id.* art. 5(3)(b), at 5.

121. *Id.* art. 4(1), at 4. The Commission may impose fines of between ECU 1,000 and ECU 25,000 for failing to file a timely notification with the Commission. *Id.* art. 14(1), (2), at 9. ECU 25,000 represents a cap of 10% of aggregate turnover calculated in art. 5.

122. *Id.* art. 7(1), at 6. The Commission may, however, extend this waiting period or take other interim measures if, upon initial investigation, it determines that such measures are necessary to "ensure the full effectiveness of any decision taken later." *Id.* art. 7(2), at 6. On the other hand, the Commission may also shorten this waiting period, upon application of the parties, "in order to prevent serious damage to one or more of the undertakings concerned by a concentration or to a third party." *Id.* art. 7(4), at 6. Upon notification, public bids may be completed prior to the expiration of the waiting period, as long as the offeree does not exercise any voting rights attached to the acquired securities. *Id.* art. 7(3), at 6. Upon application to the Commission, however, the offeree may exercise these rights in order to maintain the full value of the investment. *Id.* Where a concentration has been completed prior to a Commission decision, the Commission may order divestiture or any other remedial measures, including fines of up to 10% of the undertakings' aggregate annual turnover and/or up to ECU 100,000 per day. *Id.* at arts. 8(4), 14(2) & 15(2)(b), at 6-7, 9, and 9-10 respectively.

quisition of joint control, the parties to the concentration are required to file a joint notification with the Commission.[123] Otherwise, the acquiring party is solely required to file the notification.[124]

Notification is satisfied by submission of the Notification Form.[125] The Notification Form consists of eight sections which request an extensive amount of data regarding the involved undertakings, the proposed merger, and the market(s) in which they operate.[126] The first four sections request general background information of the undertakings proposing the concentration.[127]

Sections 5 through 7 solicit detailed information on the relevant markets, the effect of the transaction on those markets, and the effect on the Community as a whole.[128] Section 5 asks for specific market information, including a definition of the relevant product markets, as defined by the demand-substitution test,[129] and any markets which will be directly or indirectly affected by the concentration.[130]

The Commission's remedial powers over foreign firms could raise jurisdictional and comity problems.

123. *Id.* at art. 4(2), at 4-5. Parties required to submit a joint notification must appoint a joint representative and provide a Brussels address for service of process. Hawk, *EEC Merger Regulation*, *supra* note 32, at 215.

124. Council Regulation 4064/89 on the Control of Concentrations Betweeen Undertakings, art. 4(2), 1989 O.J. (L 395) 5. A party making a tender offer, for example, would be solely required to notify the Commission.

125. For the text of the Notification Form, see Council Regulation 2367/90 on the Notifications, Time Limits, and Hearings Provided for in Council Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, Annex 1, 1990 O.J. (L 219) 11-18.

126. The first seven sections pertain to substantive information, *Id.* at 13-18, while the eighth section requires the notifying parties to submit a signed declaration verifying the information provided. *Id.* at 18. The Commission will not consider a notification to be complete until the filing parties have fully complied with the requests in the Notification Form, or have substantially complied and have given "good reasons" for their inability to fully comply. *See* Hawk, *EEC Merger Regulation*, *supra* note 32, at 235.

127. Council Regulation 2367/90 on the Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, Annex 1, 1990 O.J. (L 219) 13-14.

128. *Id.* at 15-18.

129. The parties must describe the products and services included in each product market and must justify the inclusion of those products and services and the exclusion of others. *Id.* at 15-16.

130. *Id.* The affected markets may be of any geographic size within the Community (including the Community as a whole or any of its Member States) that can be appropriately considered a distinct market. *Id.* at 15. For each of these affected markets, the notifying parties are required to supply detailed information covering the last three years, including the size of the market, the turnover of each of the parties within those markets, the market shares of each of the parties and those of their competitors

Section 6 requires the undertakings to estimate and categorize the total costs of entry for a "significant viable competitor" into each affected market, including the amount of excess capacity, the existence and details of cooperative agreements and the degree of vertical integration of the parties.[131] This section also requires parties to give a detailed description of the barriers to entry into each affected market, any significant entries into those markets in the last five years, and the "course of technological development . . . over an appropriate time period" in each affected market.[132] Further, this section requires information on the growth phases as well as the supply and demand structures of each affected market.[133]

Finally, Section 7 requests a general description of the anticipated effect of the transaction on "the fundamental objectives of the European Community, including the strengthening of the Community's economic and social cohesion."[134] This description must allow the Commission to assess the competitive environment, as well as the effect on the welfare of consumers and technological progress.[135]

The parties must also include any documents created in anticipation of the proposed concentration.[136] This documentary supplementation must include any reports prepared by or for the parties for the purpose of evaluating the competitive effect of the proposed transaction.[137]

4. The Commission's Review of Notified Regulations

Upon notification, the Commission will examine concentrations "with a view to establishing whether or not they are compatible with the common market."[138] The Commission can approve only those concentrations that do not "create or strengthen a dominant position as a result of which the maintenance or development of effective

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(with at least ten percent market share) within those markets, the history of price changes by the parties, the quantity of imports into and exports out of the Common Market of products within those markets, and the existence of tariff restrictions on those imports and exports. *Id.* at 15-16.

131. *Id.* at 17.

132. *Id.*

133. *Id.*

134. *Id.* at 18.

135. *Id.*

136. *Id.* at 11-12.

137. *Id.*

138. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 2(1), 1989 O.J. (L 395) 3. The Regulation lists a number of factors to be considered in determining the acceptability of the concentration. *Id.* These factors emphasize market structure; the market power of the involved undertakings; the opportunities of access available to suppliers and consumers; any barriers to entry, supply and demand trends in the involved markets; competitive technical and economic developments; and actual or potential competition form the involved undertakings, both within and without the Community. *Id.*

competition would be significantly impeded in the common market or in a substantial part of it."[139]

The Commission has one month from receipt of the notification to determine whether it wishes to initiate a formal investigation of the concentration.[140] If the Commission determines in a recorded decision that a notified concentration does not fall within the scope of the Regulation,[141] or that the concentration "does not raise serious doubts as to its compatibility with the common market,"[142] the Commission must notify the involved undertakings and Member States of its determination "without delay."[143] A concentration will be presumed compatible with the Common Market (and therefore cleared) if the combined market share of the undertakings concerned "does not exceed 25% either in the common market or in a substantial part of it."[144]

If, on the other hand, the Commission decides that the concentration "raises serious doubts as to its compatibility with the common market," it will initiate further investigation of the concentration.[145] These proceedings must be completed and a decision announced within four months of its decision to initiate a formal investigation.[146] The Commission may revoke a prior clearance of a concentration where "the declaration of compatibility is based on incorrect information for which one of the undertakings concerned is responsible," or where one of the conditions of its decision has not been met.[147]

139. *Id.* art. 2(3), at 3-4. The Commission must also consider the views of management, workers's representatives and third parties "showing a legitimate interest," and give them an opportunity to be heard. *Id.* at 2.

140. *Id.* art. 10(1), at 8. If, within three weeks of notification, a Member State requests referral of the transaction to its authorities for investigation of the competitive effects of the concentration in a "distinct market" within that Member State, see *infra* notes 142-43 and accompanying text, this period is extended to six weeks. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 9(2), 1989 O.J. (L 395) 7.

141. *Id.* art. 6(1)(a), at 6.

142. *Id.* art. 6(1)(b), at 6.

143. *Id.* art. 6(2), at 6.

144. *Id.* art. 6(2), at 2.

145. *Id.* art. 6(1)(c), at 6.

146. *Id.* arts. 10(2), 10(3), at 8. This is an outside deadline and the Commission must clear concentration as soon as it appears that any serious doubts are removed, "particularly as a result of modification made by the undertakings concerned." *Id.* art. 10(2), at 8. However, the four month time period may be extended indefinitely where one of the parties has caused the investigation to be delayed. *Id.* art. 10(4), at 8.

147. *Id.* art. 8(5), at 7. The Commission may also impose fines of up to 10% of the undertakings's aggregate annual turnover and/or up to ECU 100,000 per day for failing to comply with a conditional clearance. *Id.* arts. 14(2), 15(2)(b), at 9-10.

5. The Commission's Investigatory Powers

Under the Regulation, the Commission has almost unlimited investigatory powers.[148] The Commission may request any "necessary information" from Member States, the involved undertakings, or, apparently, any third party;[149] the Commission may also demand access to any business records, employees, or operations of undertakings.[150] The Commission is required to notify the authorities of the Member States in which the targets of discovery reside of any discovery requests and demands,[151] and must include the "legal basis and the purpose of any request" for information.[152] The Commission may fine a party that fails to fully comply with the Commission's requests and demands.[153] Any party that has been served with a discovery request or demand, or has been fined for failing to comply, may appeal the Commission's decision to the Court of Justice.[154]

The Regulation provides for the protection of legitimate "business secrets" of the parties being investigated by the Commission.[155] However, the implementation of these protections is largely left to the Commission's discretion. Where a joint notification is required, the parties may submit competitively sensitive business secrets under separate cover and refer to them in the Notification Form as an "annex."[156]

6. The Merger Regulation's Jurisdictional Provisions

The jurisdictional provisions of the regulation are designed to partially eliminate the "maze of inconsistent national controls that have been used by some Member States to advance protectionist-like policies."[157] The Regulation supplants Articles 85 and 86[158] and provides the Commission with exclusive jurisdiction to review transactions

148. *Id.* arts. 13(2), 13(3), at 8-9. Presumably, these powers apply to parties located outside of the Community. However, enforcement of these powers outside the Community may be more difficult. In these cases, the Commission may be compelled to exercise its power to prevent foreign mergers within the Community in order to compel compliance by foreign firms.

149. *Id.* at art. 11(1), at 8.

150. *Id.* art. 13(1), at 8-9.

151. *Id.* arts. 11(2), 13(2), at 8, 9.

152. *Id.* at arts. 11(3), at 8.

153. *Id.* arts. 14, 15, at 9-10. The Commission may impose fines of between ECU 1,000 and ECU 50,000, and/or cumulative daily fines of up to ECU 25,000, for intentionally or negligently supplying incorrect or misleading information or refusing to submit to an investigation ordered by the Commission. *Id.* arts. 14(1), 15(1), at 9.

154. *Id.* arts. 11(5), 13(3), at 8, 9.

155. *Id.* arts. 4(3), 20(2), at 5, 11.

156. Hawk, *EEC Merger Regulation*, *supra* note 32, at 235. *See also EC Commission Approves Implementing Merger Rules*, [July-Dec.] Daily Rep. for Executives (BNA), at 144 (July 26, 1990) (discussing the submission of confidential information to the Commission and the treatment of such information by the Commission).

157. Hawk, *EEC Merger Regulation*, *supra* note 32, at 224. The Regulation provides

which meet the Regulation definitions and thresholds.[159] However, the jurisdictional issues regarding those proposed mergers falling outside of the Regulation remain complex. Such transactions are subject to challenge by Member States that request a review of the transaction, or by private parties and Member States in national courts under both Articles 85 and 86 and the national merger enforcement laws.

Even if a proposed transaction falls within the Regulation, a Member State may still intervene where the transaction "threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded in a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not."[160] Intervention by the Member State is also warranted where the transaction threatens "legitimate interests" not previously considered by the Commission, so long as the interests are compatible with the principles of the Treaty of Rome and its provisions.[161]

the exclusive standard of any review by the Commission. Council Regulation 4067/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395)1.

158. Council Regulation 4067/89 on the Control of Concentrations Between Undertakings, 1989 O. J. (L395) 1.

159. "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension." *Id.* art. 21(2), at 11. The Commission's decisions, however, will be subject to review by the Court of Justice. *Id.* arts. 16, 21(1), at 10, 11.

160. *Id.* arts. 9, 21, at 7, 11. This exception, known as the "German Clause," allows a Member State, within three weeks of receiving a copy of the notification, to inform the Commission of a perceived threat within one of its distinct markets. *Id.* art. 9(2), at 7. Factors relevant to the determination of a "distinct market" include entry barriers, consumers' preferences, the parties' market shares, and product substitutability. *Id.* art. 9(7), at 7.

If the Commission determines that there is indeed a distinct market and that a threat exists, it may either refer the case to the Member State or examine the Member State's concerns itself. *Id.* art. 9(3), at 7. Otherwise, the Commission will proceed with its investigation. *Id.* A Member State, receiving a case referral, has four months to make its findings. *Id.* art 9(6), at 7. Any remedial measures taken by the Commission or the Member State must be limited to those which are "strictly necessary to safeguard or restore effective competition" in the threatened market. *Id.* arts. 9(8), 22(5), at 7, 11-12. The "German Clause" will be reviewed by the Council of Ministers within four years of the Regulation's implementation. *Id.* art. 9(10), at 7.

161. *Id.* art. 21(3), at 11; *see* EEC TREATY; SMIT & HERZOG, *supra* note 10. The Regulation defines "legitimate interests" as "[p]ublic security, plurality of the media and rules of caution," as well as any other legitimate interest claimed by a Member State which is considered by the Commission to be compatible with the "general principles and other provisions of Community law." Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 21(3), 1989 O.J. (L 395) 11. A Commission decision regarding the latter definition of legitimate interest must by made within one month of a Member State's request. *Id.* Presumably, the Regulation's definition

If a transaction does not meet the Regulation's definition of "concentration" or its "Community dimension" threshold, it is subject to three distinct legal challenges, depending upon which standard is not met. The first challenge emanates from the Regulation itself, which authorizes Member States to request the Commission to review a proposed transaction which meets the Regulation's "concentration" definition, but has no "Community dimension."[162] The Commission may review such a concentration if it determines that the concentration "creates or strengthens a dominant position as a result of which effective competition would by significantly impeded within the territory" of the concerned Member State.[163] Furthermore, it may declare the concentration incompatible with the Common Market (or conditionally compatible) to the extent that the concentration affects trade between Member States.[164] This challenge is not available where the transaction does not meet the Regulation's definition of "concentration," in which case the Commission will not review the transaction, regardless of its size, and will render a decision to that effect.[165]

The other two legal challenges may be asserted when the transaction fails either the "concentration" definition or the "Community dimension" threshold.[166] In the absence of Commission jurisdiction, Member States which have merger enforcement laws may contest a

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of "public interest" incorporates Article 223 of the Treaty of Rome, which authorizes a Member State to take such measures as are "necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions, and war material," although the Regulation's definition is probably broader. EEC TREATY, art. 223. Unlike the "German Clause," this exception does not limit a Member State's remedial measures to those "strictly necessary" to protect their "legitimate interests," and allows it to take any "appropriate measures" necessary to protect those interests. *Compare* Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 21(3), at 11, *and id.* art. 9(2), at 7.

162. *Id.* art. 22, at 11-12. A request by a Member State must be made within one month after receipt of a copy of the notification. *Id.* art. 22(4), at 11. Like the "German Clause," this provision, known as the "Dutch Clause," limits remedies to those "strictly necessary to maintain or restore effective competition" within the concerned Member State's territory. *Id.* art. 22(5), at 11-12. The Commission intends to consider Member State's requests under this provision only if the undertakings' aggregate worldwide turnover is more than two billion ECU or the aggregate Community-wide turnover of at least two of the undertakings is more than 100 million ECU, limiting this provision to large transactions. Hawk, *EEC Merger Regulation, supra* note 32, at 227. Under the "Dutch Clause," the Commission will apply the Regulation's substantive standards, and not those of Articles 85 and 86. *Brittan Still Wants treaty with U.S., Clarifies Misconceptions with Merger Rule*, [Aug.-Dec.] Antitrust & Trade Reg. Rep. (BNA), at 517 (Oct. 4, 1990).

The "Dutch Clause" will continue in effect only until the thresholds have been reviewed by the Council within four years. Council Regulation No. 4064/89, on the Control of Concentrations Between Undertakings, art. 22(6), 1989 O. J. (L 395) 12.

163. *Id.* art. 22(3), at 11.

164. *Id.*

165. *Id.* art. 6(1)(a), at 6.

166. *Id.*

proposed merger in their national courts.[167] In addition, under Articles 85 and 86, private parties may also challenge a transaction which does not fall within the Regulation, just as they could have prior to its enactment.[168]

Recognizing that the Treaty of Rome is merely a "general framework of the achievement of the fundamental objectives" of the EEC,[169] the Regulation provides some substance to this framework by providing a uniform, Community-wide set of merger standards. The goal of the Regulation (and other similar EEC regulations) is to create "social and economic cohesion,"[170] which is necessary for the successful "dismantling of internal frontiers."[171] However, it is important to remember that the Regulation is itself merely a complex framework for the establishment of a Community-wide merger policy. The substance will develop as the Commission reviews proposed mergers under this Regulation.

III. ANALYSIS

A. *Critique of the EEC Merger Regulation*

The EEC Merger Regulation has evoked considerable discussion during its sixteen years of development, as well as considerable response to its provisions at the time of implementation. Commentary originates from both sides of the Atlantic and addresses issues ranging from the propriety of exclusive Community-wide merger control to the specific provisions of the Regulation. Most experts agree that EEC merger enforcement is a necessary step toward realizing a truly unified Common Market that will improve the economic condition of Europe and enhance the competitiveness of the EEC on a global scale.[172] However, the Regulation does currently suffer from shortcomings that, if not remedied, could jeopardize the EEC's goal of successful economic unification.

167. *Id.* at 1.

168. Prior to enactment of the Regulation, the Commission could make a challenge in national courts under Articles 85 and 86. However, since the Regulation is intended to be the exclusive means of Commission review, *id.*, the Commission does not intend to apply Articles 85 and 86 to transactions falling outside of the Regulation. Hawk, *EEC Merger Regulation*, *supra* note 32, at 231.

169. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395)2.

170. *Id.*

171. *Id.*

172. *See, e.g.*, Callister, *supra* 6, at 97.

1. The Continuing Debate Over the Merger Regulation

Despite the EC Commission's advocacy of a uniform merger control regime, the prudence of EEC legislation in this area was never assumed. While the prevailing sentiment favored Community-wide regulation,[173] a number of officials from Member States that had extensive merger legislation already in place voiced opposition to the Commission's efforts.[174] Originally, this opposition had been successful in blocking approval of the Merger Regulation by the Council of Ministers. However, once it became apparent that, without the Regulation, the Commission would review concentrations using the inadequate tools of Articles 85 and 86,[175] the arguments against the Regulation became overshadowed by concern that the EEC would enter 1993 without an effective means of preventing the emergence of market-dominating firms within the EEC.

Even after the adoption of the Regulation by the Council, many national authorities have persisted in complicating an expeditious implementation of the Regulation. British authorities, not confident of the Commission's willingness to apply purely competitive criteria, have advocated the creation of another regulatory body, independent of the EC Commission, to review mergers.[176] In addition, these officials, doubting the ability of the Commission to competently review mergers in an expeditious manner, have suggested that the Commission solicit help from national authorities.[177]

With the Regulation now in force, the current discussion focuses in part on specific terms within the Regulation. The threshold levels that presently determine the scope of the Regulation are the result of

173. *Comments of the American Bar Association Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings*, 59 ANTITRUST L.J. 245, 254 (1990).

174. "Over-stretched 'exclusivity' models in favor of community law as are presently envisaged by many, including the EC Commission, can under present conditions, only create an unreasonable risk of reducing effective merger control in Europe rather than reinforcing it." Markert, *supra* note 2, at 926. "A one-stop shop for merger control at the European Community level 'was not achievable . . . .' " *UK Enforcement Official Sketches Chances for Success in EC Merger Control*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 323 (Mar. 1, 1990)(quoting Sir Gordon Borrie, Director General of the UK's Office of Fair Trading).

175. *See supra* notes 80-86 and accompanying text.

176. *See UK Group Studies EC Commission, Pushes for Independent Cartel Agency*, [Aug.-Dec.] Antitrust & Trade Reg. Rep. (BNA), at 469 (Sept. 27, 1990). The United Kingdom intends to present a proposal of the creation of an independent European Cartel Office when the Regulation is reviewed four years after its adoption. *Id.*

177. *UK Agency Offers EC Commission Helping Hand in Reviewing Mergers*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 228 (Feb. 8, 1990). Interested national authorities will undoubtedly invoke Article 19 of the Regulation, which requires the Commission to work in "constant and close" liaison with antitrust officials of the Member States. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 19(2), 1989 O.J. (L 395)10. *See also* Callister, *supra* note 6, at 20.

compromise. Therefore, most commentators espouse the view that the thresholds should be set at a different level, with some advocating a higher figure and others pressing for a lower figure.[178] In fact, the American Bar Association has suggested that the threshold level be based on the size of the transaction, as is the threshold level under the Hart-Scott-Rodino Act,[179] rather than the size of the parties.[180]

2. The Merger Regulation's Threshold Levels

At the currently high levels of the Regulation's thresholds, there are many small mergers and small parties that will not achieve these levels and therefore will not be covered by the Regulation. Although this will result in smaller mergers that may have anticompetitive effects in spite of their size, it will also mean that those parties who would benefit most from the convenience and low cost of exclusive Community-wide merger control will remain exposed to the burdensome panoply of national merger enforcement.

Of course, the national authorities who have opposed the relinquishment of merger control to the EEC have opposed the threshold levels on the ground that they are too low, given the limited resources and personnel of the Commission.[181] Formation of a fifty-one member Commission staff to review mergers was based upon an

178. "The dispute between the Commission and the Member States about the size of the thresholds concerns the allocation of merger control power between the Community and the Member States." *Comments of the American Bar Association Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings*, 59 ANTITRUST L.J. 245, 253 (1990).

179. *Id.* at 247; 16 C.F.R. § 802.20 (1990).

180. *Comments of the American Bar Association Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings*, 59 ANTITRUST L.J. 245, 252-53 (1990). In addition, the threshold's emphasis on turnover favors control of mergers involving high turnover, low margin firms and limits control of low turnover, high margin firms. *Id.* at 252.

181. "I [have] favored much higher thresholds, to avoid the Commission taking on too many cases too quickly while building up their resources." *UK Agency Offers EC Commission Helping Hand in Reviewing Mergers*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 229 (Feb. 8, 1990) (quoting Sydney Lipworth, Chairman of the UK Monopolies and Mergers Commission). At current threshold levels, the Commission has estimated that only about 40 to 50 transactions, not including those proposed by non-EEC parties, will be subject to the Regulation. *EC Council of Ministers Adopts Regulation to Control Acquisitions*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 22 (Jan. 4, 1990). Not only has the quantity of staffing been called into question, the experience of the Commission's staff members in reviewing mergers does not match that of national authorities in Member States where premerger notification has been in place for years. *UK Agency Offers EC Commission a Helping Hand in Reviewing Mergers*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 228 (Feb. 8, 1990).

estimate of thirty notifications per year at the current threshold levels.[182] However, this number of staff members may indeed by insufficient to handle both EEC and non-EEC transactions, which are predicted to total up to 200 per year.[183] Further, the Commission staff, in light of the short deadlines imposed by the Regulation and the amount of information that will be provided in the Notification Forms, may not be able to review transactions in a thorough and fair manner.[184]

3. The Merger Regulation's Unresolved Ambiguities

Although the Regulation's provisions are quite specific both procedurally and substantively, they nevertheless contain many ambiguities that undoubtedly will create uncertainty in the Commission's review of mergers and acquisitions.[185] For instance, Article 3(3) adopts a de facto standard of control for determining whether a transaction triggers the Regulation.[186] A transaction that "confer[s] the possibility of decisive influence on an undertaking" meets the control standard under this provision.[187] Since "decisive influence" calls for a subjective evaluation judgment, the Commission's determination of control will not be a ministerial fiction. Therefore, it will require a convincing analysis in many cases, especially those involving joint ventures and acquisitions of minority shareholdings.[188] Con-

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182. *EC Commission Approves Implementing Merger Rules*, [July-Dec.] Daily Rep. for Executives (BNA), at 144 (July 26, 1990). The Commission's estimate of annual notifications was later revised to 60 notifications per year. *Mergers Continue Upward Trend, EC Commission Notes in Annual Report*, [Jan.-June] Sec. Reg. & L. Rep. (BNA), at 1007 (June 28, 1991).

183. *See Commission Approves Notification Rules for New Merger Regulation Effective Sept. 21*, Int'l Trade Rep. (BNA) at 1196 (Aug. 1, 1990).

184. *See UK Agency Offers EC Commission Helping Hand in Reviewing Mergers*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 228 (Feb. 8, 1990).

185. "The Regulation's assessment criteria to examine mergers are highly ambiguous in a number of respects. Consistent predictable application of the criteria cannot be expected unless a number of rather fundamental issues are addressed." Harry M. Reasoner, *Comments of the American Bar Association Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings*, 59 ANTITRUST L.J. 245, 247 (1990).

186. *See supra* notes 69-70 and accompanying text. *Compare* 16 C.F.R. § 801.1 (1991) (defining control as at least 50% ownership under the Hart-Scott-Rodino Act).

187. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 3(3), 1989 O.J. (L 395) 4.

188. Article 3 appears to distinguish between "concentrative" and "cooperative" joint ventures in its exclusion from coverage of "operation[s] . . . which have as [their] object or effect the coordination of the competitive behavior of [independent] undertakings." *Id.* art. 3 at 4. Under this clause "concentrative" joint ventures would seem to be within the Regulation, while "cooperative" joint ventures would be excluded. The Commission has attempted to clarify the distinction. *See* Commission Notice Regarding the Concentrative and Cooperative Operations Under Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (C 196)10. However, the Commission has yet to provide which joint ventures are included within the Regulation's purview, and this remains a subject of

sequently, companies may find it difficult to know whether they are subject to notification.[189]

Article 9, which allows the Commission to refer notified mergers to authorities of a Member State where the merger threatens to impede competition in a "distinct market" within that Member State,[190] is also highly ambiguous, given the absence of any guidelines within the Regulation for determining the definition of "market." Although this exception is intended to apply in limited circumstances, the Commission may be able to circumvent its simplistic language by expanding its scope unduly if the number of notifications exceeds the Commission's resources.[191]

4. The Merger Regulation's Burdensome Notification Form

Presently, the most common criticism of the Regulation comes from the many business persons and attorneys, faced with the task of completing the Notification Form.[192] Many of these persons perceive the Form to be unduly burdensome, especially in light of the one week filing deadline.[193] Although the Commission stated that the Form balances "the Commission's need for full information at the beginning of a case and the requirement that the burden placed on industry should be as light as possible,"[194] the amount and nature of information required by the From presently fulfills neither of these

confusion. *See Mergers Continue Upward Trend, EC Commission Notes in Annual Report*, [Jan.-June] Sec. Reg. & L. Rep. (BNA), at 1008 (June 28, 1991).

189. "Parties should not be required to expend money to discover whether to notify the Commission concerning a proposed transaction . . . ." *Fordham Conference Explores Regulation of International Mergers, Joint Ventures*, [Aug.-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1490, at 689 (Nov. 8, 1990).

190. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 9, 1989 O.J. (L 395) 7.

191. *See MMC Official Favors Creation of Separate EEC Mergers Agency*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 978 (June 21, 1990) (European Commission claims it will use Article 9 sparingly, but difficulties prompting a change may occur).

192. For a discussion of the contents of the Notification Form, see *supra* notes 125-37 and accompanying text. "[T]he draft of the notification form released for comment 'received enormous critical acclaim,' but 'unfortunately, it was all critical.' The Form was revised to ease the burden on industry, but critics still argued that the form would saddle merging parties with too much paperwork . . . ." *ABA Section Probes Developments in EC Competition Law and Policy*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 60, at 898 (June 27, 1991) (quoting Christopher Jones of the Commission's Merger Task Force).

193. Most of the critics of the Notification Form are American practitioners who are accustomed to the more cursory initial filing required for premerger notification under the Hart-Scott-Rodino Act. *See* 16 C.F.R. app. § 803 (1991).

194. *EC Commission Approves Notification Rules for New Merger Regulation Ef-*

interests. In addition to being costly and time-consuming for the parties to compile,[195] even with only substantial compliance,[196] the information received by the Commission will consume a large percentage of the Commission staff's time. Much of this time will be spent sifting through superfluous information, rather than analyzing the relevant information.

The Regulation provides for the confidentiality of parties' "business secrets" which may be required to complete the Notification Form.[197] These general provisions allow the Commission to determine the extent of confidentiality by defining what constitutes a "business secret." How the Commission frames this definition will become very important in cases of joint notification. In these cases, a limited scope of confidentiality may result in the exchange of such sensitive information between parties, which would constitute a violation of the Sherman Act under United States antitrust law.[198] This inherent conflict between joint notification and the Sherman Act could create a possibly insurmountable dilemma for United States firms that will be subject to the Regulation.

It took sixteen years for the Commission to convince the Member States that Community-wide merger control is feasible and desirable. Many of the Regulation's shortcomings represent areas where tensions between the Commission and the Member States still exist. In order to prevent these tensions from jeopardizing the operational success of the Regulation, these criticisms must be addressed in the near future. The Commission's ability to deal with these issues will reflect upon its political will, in terms of convincing the Member states to subjugate their national sovereignty to the interests of the EEC.

B. *Addressing the Regulation's Flaws*

The Commission must deal with these fundamental problems existing within the Regulation because their underlying tensions are not likely to simply disappear. Undoubtedly, the Commission will entertain many suggestions for improving the Regulation, some ema-

fective Sept. 21, Int'l Trade Rep. (BNA) No. 7, at 1196 (Aug. 1, 1990) (quoting Commission press release).

195. *See infra* note 229 and accompanying text. For many smaller mergers subject to the Regulation, the cost of completing the Form may tilt the cost/benefit analysis against the transaction.

196. *See supra* note 126.

197. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, arts. 4(3), 20(2), 1989 O.J. (L 395) 5, 11. *See also supra* note 154 and accompanying text.

198. *See* American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)(exchange of price information); Eastern States Retail Lumber Dealers Assoc., 234 U.S. 600 (1914) (exchange of non-price information).

nating from self-interest and others reflecting a sincere desire to see merger control contribute to the success of the EEC. The following suggestions, free from self-interest, are respectfully submitted as improvements which will augment the effectiveness of the Regulation, from the perspectives of both business and government.

1. Tightening the Merger Regulation's Ambiguities

The Regulation's unresolved ambiguities give the Commission wide latitude in determining the direction of EC merger control. While they may expose the Commission to external pressures,[199] the Commission should remember that, just as a corporation's directors have a duty to the corporation and all of the shareholders, *it* has a duty to the EEC and all of the Member States. For instance, the loose definition of "control" provided by Article 3(3) will give rise to arguments in favor of limiting the Regulation's scope by defining "decisive influence" as "unilateral influence," the highest possible standard of control that could exist.[200] However, a preferable definition of a preponderance of influence already exists in Article 5(4),[201] and the Commission should adopt this provision as the definition of "decisive influence." This action would provide a sufficiently broad standard of control, using language that the Member States have already adopted, and would avoid the risk of having to formulate a *sui generis* definition which the Member States may or may not accept.

The "German clause,"[202] and to a lesser extent the "legitimate interests" exception,[203] constitute another source of pressure on the Commission to limit the scope of the Regulation's exclusive jurisdiction. These provisions are contrary to the Regulation's purpose of providing companies with an alternative to the web of Member State

199. Callister, *supra* note 6, at 116. "[T]he politics of the various Member States may influence Commission decisions." *Id.*

200. *See* Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 3(3), 1989 O.J. (L 395) 4.

201. *Id.* art. 5(4), at 5. Article 5(4), which deals with the calculation of turnover, requires parties to include the turnover of their subsidiaries, if:

> the undertaking concerned, directly or indirectly;—owns more than half the capital or business assets, or —has the power to exercise more than half the voting rights, or —has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or —has the right to manage the undertakings' affairs . . . .

Id. at art. 5(4)(b), at 5.

202. *Id.* art. 9, at 7.

203. *Id.* art. 21(3), at 11.

merger enforcement.[204] Thus, any expansion of these exceptions may create doubt and uncertainty as to the significance of the Regulation. While these exceptions were necessary to gain Member State acceptance, the Commission must maintain its resolve to apply these provisions in only the most extreme situations.

2. Setting the Merger Regulation's Threshold Levels

Many scholars expect that the Commission will overcome a number of the problems with the current threshold levels when it reviews, and most likely lowers, these levels in 1993.[205] Lower threshold levels will broaden the scope of the Regulation, subjecting smaller mergers to the notification requirement, while offering the expected convenience of uniform EEC merger enforcement to the parties behind those mergers. Before the Commission can expect to obtain the approval of Member States for these lower thresholds, however, the Commission staff must earn the confidence of the Member States which it now lacks.[206] Ideally, when the Commission reviews the thresholds in 1993, the staff will have become an experienced, competent merger enforcement authority. However, if the staff appears overwhelmed by the number of notifications or is unable to establish a consistent policy, then the threshold levels are likely to increase rather than decrease, in order to reduce the number of mergers that the Regulation covers, and therefore reduce the number of mergers requiring review by the Commission's staff.

If the Commission lowers the threshold levels, it will need to increase the staff size, drawing from a pool of experts representing the various EEC countries, as it did for the present staff.[207] The Commission will need to ensure that these new staff members exchange their national identities for an EEC identity, as it will not be able to withstand nationalistic pressures if these pressures exist internally.[208]

3. The Merger Regulation's Deadlines and Notification Form

Although the Regulation authorizes the Commission to extend the

204. *See supra* notes 194-98 and accompanying text.

205. Hawk, *EEC Merger Regulation*, *supra* note 32, at 209 n.37.

206. If the Commission lowers merger thresholds, some have predicted that the Commission could receive as many as 300 notifications per year. *EC Practitioners Advise Colleagues on Pitfalls of Merger Regulation*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 673 (May 9, 1991).

207. Half of the Commission's merger control division staff come from national merger authorities. *EC Commission Approves Implementing Merger Rules*, [July-Dec.] Daily Rep. for Executives (BNA), at 144 (July 26, 1990).

208. The fact that the Commission is dependent upon the Member States for its personnel requirements puts a premium on cooperation with the Member States without succumbing to their nationalistic pressures.

deadlines set forth in the Regulation's provisions in certain instances,[209] the Commission staff must resist the temptation to do so whenever possible. Consistent failure to meet deadlines will verify the Member States' concerns and make them less willing to confer exclusive merger control powers upon the Commission.

Similarly, the amount of information required by the Notification Form must be reduced.[210] Currently, the Notification Form is unduly demanding of the parties and the Commission's resources. As the Commission becomes more accustomed to the kinds of information that are relevant to its review, it should streamline the Form by eliminating those portions that request information which the Commission staff does not usually consider in its initial review of notifications. If the staff finds that such information is necessary in certain cases, it may request the information pursuant to its investigatory powers.

4. Gaining Confidence in the Commission Staff

In addition to gaining the confidence of the Member States, the staff will need to gain the confidence of the parties involved in a notified merger, regarding the confidentiality of business secrets that the parties divulge to the Commission pursuant to the Notification Form.[211] Given the broad investigatory powers of the Commission, fairness dictates that the Commission be receptive to the confidentiality concerns of the parties.[212] By upholding the confidentiality clause in the Regulation, the Commission will encourage firms to be cooperative in its investigations.

209. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 10(4), 1989 O.J. (L 393) 8.

210. The Commission will review the notification Form after 12 months of the Regulation's operation. *EC Commission Revises Notification Form to Ease Burdens of Merger Regulation*, [Aug.-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1477, at 187 (Aug. 2, 1990).

211. *See supra* notes 155-56 and accompanying text. In fact, the Commission should consider adopting the approach taken by the Hart-Scott-Rodino Act to gain more confidence of the divulging parties. Under this Act, rather than confidentiality being an exception, all information submitted by the parties is confidential, unless it is relevant to a judicial or administrative proceeding. Clayton Act, § 7A(h), 15 U.S.C. § 18a(h) (1988).

212. Because of the number of people at the Commission who will have access to confidential business records, some persons have suggested that the Commission delegate confidentiality decisions to the Commissioner for Competition. Hawk, *EEC Merger Regulation*, *supra* note 32, at 221 n.84. However, this solution assures that the Commission staff will be unable to make independent decisions concerning confidentiality. There is no reason why staff mergers will not be able to adequately address the parties' confidentiality concerns.

Eventually, two factors will determine the evolution of the Regulation and its role in the EEC. First, remembering that the regulation is a child of negotiation, the pressure for changes in the Regulation will probably come from those EEC countries that choose to exert economic and political influence upon the Commission. The Commission's ability to withstand this pressure and independently forge a consistent competition policy regarding mergers and acquisitions will determine the direction and success of EEC merger control. Second, the operational successes and failures of the Regulation will give the Commission a degree of hindsight which will allow it to refine the provisions of the Regulation.[213] Hopefully, the Commission and its staff will be able to utilize the experience that it gains in a manner beneficial to the cohesion of the Common Market.

IV. IMPACT

A. *European Competition Law Under the EEC Merger Regulation: An Emphasis on Competition*

As with any other new body of law, pre-merger notification under the Regulation will assume characteristics of its own, which will play a major role in cutting the competitive path taken by the Common Market. The Regulation is unique among recent legal developments because this formation will occur within, and impact, a similarly experimental structure — the post-1992 European economic market.

The proposed draft Regulation would have allowed the Commission to authorize a potentially anticompetitive merger which nevertheless improves "production and distribution" or promotes "technical or economic progress."[214] This exemption evoked considerable discussion concerning the possible emergence of "European champions"[215] under EEC merger enforcement. The Commission eliminated this authorization because of the concern over internal competition in European markets which these companies dominate, and the possibility of having to protect these "champions" when they begin to fail[216] to the detriment of external competition in these mar-

213. *See infra* notes 215-18 and accompanying text (discussing the Commission's attempt to avoid European mega-firms).

214. *See supra* note 88 and accompanying text (concerning the anticompetitive merger change in the draft merger regulation).

215. "European champions" are European-based mega-firms that, although internally anticompetitive, would influence, and sometimes dominate, markets internationally.

216. "Most champions of the kind that engaged in tournaments in the Middle Ages fell off their horses because their armor was so heavy that they couldn't effectively fight in it. I suppose the analogy is well taken." *Mergers Continue Upward Trend, EC Commission Notes in Annual Report,* [Jan.-June] Sec. Reg. & L. Rep. (BNA) No. 25, at 1005 (June 28, 1991) (quoting EC Competition Commissioner Leon Brittan).

kets.[217] The elimination of this exemption indicates that the future of EEC competition under the Regulation will focus on internally competitive European markets, rather than predation of markets by European mega-firms on an international level.

B. A Practical Guide for American Lawyers

Because the Regulation is still in its infancy, American lawyers, especially those not extremely well-versed in the idiosyncrasies of the European legal system, should rely on the actual terms of the Treaty of Rome and the Merger Regulation. In addition, these lawyers should carefully examine the language of the relevant Court of Justice opinions.[218] Until American lawyers gain experience with the administration of the Regulation by the Commission, these opinions constitute the only solid sources for predicting the actions of the Commission.[219] Presently, however, those faced with encountering the new European regulatory scheme should consider the following observations.

1. Double Enforcement Under the Merger Regulation and the Hart-Scott-Rodino Act

First, it is important to remember that European merger law, whether national or procedural, differs substantially from United States merger legislation. In the United States, the Hart-Scott-Rondino Act ("HSR") requires that mergers valued in excess of $15 million must be notified to the FTC and the Antitrust Division of the Justice Department.[220] Whereas the HSR notification threshold is based upon the size of the transaction, the Merger Regulation thresholds focus upon the size of the parties themselves.

As a result, mergers involving multinational companies will require a two-step analysis when determining whether, and to whom,

217. *See UK Enforcement Official Sketches Chances for Success in EC Merger Control*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA), at 323 (March 1, 1990).

218. *See supra* notes 26, 31, 33, 80, and accompanying text.

219. With all of its imperfections, United States merger law has evolved to the point where lawyers may rely on precedent in analyzing a client's merger proposal. Such precedent does not yet exist under the Merger Regulation, and "for the foreseeable future at least, specialists will frequently be unable to advise their clients with any confidence as to whether their transactions will be found lawful." Ronald W. Davis, *Corporate M&A Strategy and The New EEC Merger Control Program*, 5 ANTITRUST L.J. 13, 16 (1990).

220. Clayton Act, § 7A, 15 U.S.C. § 18a (1988); 16 C.F.R. § 802.20 (1990). Section 7 of the Clayton Act provides the substantive standard for determining the legality of a merger.

notification is required. The size of the merger will be relevant to HSR notification requirements, while the size of the parties, in terms of business within the EEC, will be relevant to Merger Regulation requirements.[221] Because the regulations emphasize different aspects of a transaction, notification under one regulation does not have any bearing upon whether notification is required under the other. Thus, for example, a small merger that does not require notification under HSR may require notification under the Merger Regulation if the parties do a large amount of business within the Community, regardless of the effect of the transaction itself on the Common Market. Likewise, a large merger, with respect to the size of the involved parties, that requires notification under HSR may not require notification under the Merger Regulation if those parties are small, even if the merger substantially affects the parties's European operations.

In terms of extraterritorial coverage, the Merger Regulation is broader then HSR.[222] While HSR is less inclusive when mergers involve "foreign persons" and assets located outside the United States,[223] the Merger Regulation thresholds apply equally, regardless of where the parties or their assets are located, and the ECU turnover threshold may be met by sales of products imported into the EEC.[224] As a result, transactions involving parties who have never even seen European shores but who each ship ECU 250 million, or together ship ECU 5 billion in goods to Europe will fall within the Merger Regulation.[225] Thus, any merger proposal must take into consideration the possibility that the involved parties may do enough aggregate business with or within the EEC to require notification under the Regulation, even if the merger has no effect upon parties' European operations.[226]

221. Council Regulation 4064/89 on the Control of Concentration Between Undertakings, art. 1(2), 1989 O.J. (L 395) 3.

222. Arguably, the legal basis for the Regulation's extraterritoriality originates in Case 89/85, A. Ahlstrom Osakeyhtio v. Commission, 1988 E.C.R., [1987-88 Transfer Binder] Common Mkt. Rep. (CCH) ¶14,491 (Sept. 27, 1988), where the Court of Justice held that Article 85 applies to agreements between or among non-EEC firms which are implemented within the EEC. Merger Regulation coverage will probably become even broader in 1993, when the Council of Ministers reviews the threshold levels. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 1(3), 1989 O.J. (L 395) 3. At that time, they are expected to be lowered. *EC Practitioners Advise Colleagues on Pitfalls of Merger Control Regulation*, [Jan-June] Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 673 (May 9, 1991).

223. HSR provides an exemption, in certain instances, for acquisitions by foreign persons. *See* 16 C.F.R. § 802.51 (1990).

224. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 5(1), 1989 O.J. (L 395) 5.

225. *Id.* art. 1 (2)(a) & (b). Implicit in the Regulation is the realization that any company that sells even a fraction of this amount within the EEC will probably maintain local headquarters and production facilities within the EEC.

226. "The net of the European Community's merger control regulation is wide enough to snare a merger between two non-EC enterprises if they both have opera-

2. The Advantages and Disadvantages of Merger Regulation Coverage

For some mergers, Merger Regulation coverage may be attractive, while for others, it may not. If a merger affects markets within a number of Member States, the exclusive jurisdiction of the Regulation, if applicable, can present a desirable alternative to duplicative review under the Member States' national legislation. Further, although the Regulation was created to resolve the shortcomings of Articles 85 and 86, the substantive standard of review under the Regulation remains essentially the same.

However, the Regulation's Notification Form is quite extensive[227] and may be burdensome in light of the one week filing deadline. This is especially true where information concerning the parties is inaccessible until after a merger agreement is finalized.[228] Because of this onerous deadline, parties negotiating a merger subject to the Regulation should start compiling information for use in the Form as early as possible, much earlier than in a United States transaction.[229] In addition, parties should informally notify the Commission before formal notification to get a feel for the Commission's predisposi-

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tions in the EC. . . ." *EC Practitioners Advise Colleagues on Pitfalls of Merger Control Regulation*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 673 (May 9, 1991). *See also* Callister, *supra* note 6, at 121 ("The new Regulation has antitrust implications reaching far beyond Europe's boundaries."). For an analysis of the first proposed merger between two non-EC companies to be reviewed by the Commission under the Regulation, see *infra* notes 262, 268 and accompanying text.

227. *See supra* notes 125-27 and accompanying text. The information required by the Notification Form is comparable to the information that would be requested by a "second request" under HSR. *See* Clayton Act, § 7A(e)(1), 15 U.S.C. § 18a(e)(1).

228. It is estimated that the legal expenses incurred in the preparation of the Notification Form will run into the hundreds of thousands of dollars. *See The EEC Merger Regulation: Comments of the American Bar Association Section of Antitrust Law with Respect to the Draft Form Notification of a Concentration*, 59 ANTITRUST L.J. 263 (1990). The Form requires more extensive information than does the comparable HSR form, and compliance with the "Information on Affected Markets" section of the Form, in particular, is expected to be difficult. Davis, *supra* note 220, at 18 n.16 (1990). Familiarity with the inquiries made by the FTC and Justice Department during HSR investigations, which focus on elasticity of supply and demand in the affected markets, allows parties to avoid compiling useless information. Ideally, familiarity with the Commission's use of information will make notification under the Regulation similarly efficient over time. For now, however, "[s]ophisticated merger law counselors will have to guess which way that exercise will turn out." Edward F. Glynn, Jr., *The EEC Merger Regulation: An American Enforcer Looks at the EEC Merger Proposal*, 59 ANTITRUST L.J. 237, 239 (1990).

229. The short deadline may in fact assist smaller companies competing with large firms in an acquisition subject to the Regulation, since it may, in some instances, be impossible for the latter to notify the deal on time.

tion.[230] If the Commission manifests a strong negative reaction towards the merger, the parties can revise the proposal to address the Commission's concerns or abandon the transaction altogether, thus avoiding the expense of preparing a futile Notification Form.

3. Dealing with a Commission Investigation

If the Commission decides to investigate a merger, it is important to realize the broad powers that the Commission has in conducting its investigation.[231] Not only can the Commission request information and business records from both the involved companies and third parties,[232] it can also "enter any premises, lands and means of transport" on a moment's notice and "ask for oral explanations on the spot."[233] In case of such a "raid," employees must know how to respond to questions so as not to damage the chances for clearance. Thus, it is crucial that employees on all levels be fully apprised of the "party line" adopted by the strategists behind the proposed transaction.

4. The Merger Regulation Versus the Justice Department Merger Guidelines

In reviewing the legality of a merger under the Regulation's substantive standards, the Commission utilizes many of the same competition-based factors used by the United States Justice Department under its Merger Guidelines. These factors include barriers to entry, upstream and downstream effects, and supply and demand trends within affected markets.[234] Unlike the Merger Guidelines, however, the Regulation does not address the market power, in terms of market share, of other firms within the affected markets.

Even though "dominant position" has been interpreted in the context of Article 86 to take into account the market shares of other companies,[235] this interpretation analyzes competing market shares

230. *See EC Practitioners Advise Colleagues on Pitfalls of Merger Control Regulation*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 673 (May 9, 1991). Such informal contact with the Commission will also allow the Commission "to act within the periods provided by the regulation." *Id.*

231. *See supra* notes 145-53 and accompanying text.

232. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, arts. 11, 13, 1989 O.J. (L 395) 8-9.

233. *Id.* art. 13(1), at 8-9.

234. *Compare id.* art. 2(1), at 3, *with* Department of Justice Merger Guidelines and Statement Accompanying Release 24-5, 27-8 (June 14, 1984), *reprinted in* 16 J.O. VON KALINOWSKI app. C-1 (1988), *and* Department of Justice Vertical Restraints Guidelines § 3 (Jan. 23, 1985), *reprinted in* 16 J.O. VON KALINOWSKI app. C-1 (1988).

235. *See* case 85/76, Hoffman-La Roche & Co. AG v. Commission, 1979 E.C.R. 461, 3 C.M.L.R. 211 (1980). In *Hoffman-La Roche*, the court stated that "the relationship between the market shares of the undertaking concerned and of its competitors, espe-

in a way opposite to that of the Justice Department's analysis.[236] While a large firm competing in a market with a number of small firms would probably pass Justice Department muster, it would raise serious "dominance" concerns under European antitrust law. On the other hand, while a "dominant position" would probably not be found in a European market composed of a few large firms (an oligopoly), such a market structure in the United States would probably raise the ire of the Justice Department.

5. The Opportunities for Third Parties

Third parties who stand to be adversely affected by a merger may avail themselves of certain strategic possibilities under the European regulatory regime.[237] If a merger falls within the Regulation, all parties concerned are essentially at the mercy of the Commission's determination.[238] However, those who object to a merger that escapes the notification requirement have opportunities that do not exist in the United States.[239] Private actions challenging such mergers in a national court under Article 85 are available, just as they were prior to the Regulation's enactment.[240] In addition, parties may lobby a

cially those of the next largest," is a relevant factor in determining whether a "dominant position" exists under Article 86. *Id.*

236. The Justice Department utilizes the Herfindahl-Hirschman Index ("HHI") in determining whether a post-merger firm has attained an unacceptable level of market power. Department of Justice Merger Guidelines and Statement Accompanying Release 24-5, 27-8 (June 14, 1984), *reprinted in* 16 J.O. VON KALINOWSKI app. C-1 (1988). "The HHI is calculated by summing the squares of the individual market shares of all the firms included in the market . . . ." *Id.* Generally, the Justice Department will investigate mergers that result in an HHI of 1800 or higher and will not investigate mergers that result in an HHI of 1,000 or lower. *Id.* Those mergers that create an HHI of between 1,000 and 1,800 will be investigated if the merger has raised the HHI by 100 points or more. *Id.*

237. The Regulation gives management groups and workers' representatives within the involved parties the opportunity to be heard. This right consists of the right to intervene, and presumably the right to appeal an objectionable Commission decision to the Court of Justice. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 18, 1989 O.J. (L 395) 10.

238. However, parties in opposition to a merger should utilize their "opportunity to be heard" by providing the Commission with market information that they perceive to be relevant and making economic arguments based upon this information. *Id.*

239. These "victims" will usually be targets of hostile takeovers, defeated competing bidders, or third party competitors. In the United States, third parties do not have standing to challenge a merger or acquisition in court unless they can show "antitrust injury," a difficult test to meet. *See generally* Atlantic Richfield Co. v. USA Petroleum, Co., 495 U.S. 1097 (1990). However, there is no such requirement in European antitrust law.

240. *See supra* note 169 and accompanying text.

Member State that has a market affected by the merger to request Commission intervention under the "Dutch Clause."[241]

6. Strategic Considerations

Firms that encounter the EC Commission and the premerger notification process must also consider the possibility that they may become involved in future transactions that require notification. Because the notification procedure is a human process, the Commission staff members are likely to remember those persons who present problems in complying with the Regulation's requirements. Thus, corporate counsel should place a premium on creating and maintaining a cordial relationship with the Commission. This means notifying when in doubt on an issue, providing accurate information, cooperating with Commission investigatory requests, and meeting the Regulation's deadlines whenever possible.[242] The conduct of the involved parties is not only likely to reflect upon the Commission's expectations of the parties' post-merger conduct, but it may also influence the Commission's potentially conclusory and empirical determinations in future notified transactions involving the same parties. Although the Regulation emphasizes competition-based factors, counselors and their clients should not lose sight of its political genesis.[243]

7. Contrasting American and European Merger Enforcement

The new EEC premerger notification procedure resembles the United States procedure under the Clayton and HSR Acts in many ways. However, they are not analogous. The jurisdictional quirks of the European system should deter a prudent American attorney from trying to superimpose the United States federal system upon the EEC.[244] While companies need only concern themselves with state and federal law in the United States, they must contend with three sets of merger law in the EEC: national legislation of the Member States, Articles 85 and 86, and the Merger Regulation.[245] The Euro-

241. For the right of interested third parties to be heard, see Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 18, 1989 O.J. (L 395) 10.

242. *See EC Practitioners Advise Colleagues on Pitfalls of Merger Control Regulation*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 673-74 (May 9, 1991).

243. The possibility of future notifications also entails strategic considerations. For example, a geographic and/or product market characterization by the parties in one notification may not be the characterization that they would desire in future notifications. Since the Commission is likely to take note of inconsistencies in the parties' prior notifications, parties should contemplate the information that they will want to provide in future notifications in order to avoid prejudicing those transactions.

244. *See infra* notes 276-86 and accompanying text.

245. *See supra* notes 157-66 and accompanying text. Despite the acceptance of the Merger Regulation's exclusive jurisdiction in principle, some of the Member States' of-

pean situation is further complicated by the absence of an equivalent to the United States Constitution's Commerce Clause,[246] which allocates authority between state and federal antitrust law.[247]

The general approaches of the Merger Regulation and HSR also differ. For instance, all transactions notified under the Regulation must include information that would be required only by a "second request" under HSR.[248] In addition, all transactions which the EC Commission decides to formally investigate must undergo a process similar to an FTC adjudication.[249] However, the Commission's investigation must be concluded within four months,[250] whereas an FTC adjudication could take years. The simplified but extensive and demanding premerger notification procedure under the Regulation reflects the intent of the Commission to make European merger vetting a more accelerated and commonplace process than that which exists in the United States. With this in mind, American lawyers with corporate clients who do business in the EEC and plan to transact a merger that affects the Common market will need learn, prior to closing any deals, the provisions of the new Merger Regulation and the role that it will play within the EEC.

C. *Initial Results of the Regulation in Operation*

Since the Merger Regulation took effect on September 21, 1990, the EC Commission has been notified of a number of proposed mergers that fall within the purview of the Regulation's provisions.[251] Although the Regulation is still in its infancy, the Commission's deci-

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ficials have advocated a two-tiered system for merger review. *See UK, German Postures on EC Merger Can Lead to Two-Tiered Review of Mergers*, [Jan.-July] Antitrust & Trade Reg. Rep. (BNA) No. 56, at 937 (June 29, 1989).

246. U.S. CONST. art. I, § 8, cl.3.

247. For a discussion of the jurisdictional problems from this absence, see *infra* notes 262-73 and accompanying text.

248. *See supra* note 228.

249. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 6(1)(c), 1989 O.J. (L 395) 6.

250. *Id.* art. 10(3), at 8.

251. Of the 40 mergers that were notified to the Commission in the first nine months of the Regulation's operation, 28 decisions were issued, two of which held that the notified mergers were not covered by the Regulation, and 22 of which were cleared by the Commission. *ABA Section Probes Developments in EC Competition Law and Policy*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 260 at 898 (June 27, 1991). The other four proposed mergers were subjected to formal proceedings by the Commission. *Id.* During this nine-month period, the Commission also issued over 100 Regulation clarifications. *Id.*

sions regarding these proposed mergers provide a prelude to the direction of EEC merger policy.

1. The First Notification and Clearance Under the Merger Regulation

On November 7, 1990, the Commission gave its approval to a "minority cross-shareholding" agreement between French vehicle manufacturer Renault and its Swedish counterpart, Volvo, which had been notified one month earlier.[252] Although the entities were expected to remain independent,[253] their combined sales, in excess of $50 billion, made them Europe's fourth largest industrial entity.[254] Significantly, the merger constituted the first deal to be notified to and approved by the Commission pursuant to the Regulation. The Commission determined that the portion of the merger that fell within the Regulation "does not create or strengthen a dominant position in any of these markets as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it," and therefore cleared the merger without requiring a formal investigation under the Regulation.[255]

2. The First Clearance of a Joint Venture

The Commission cleared the first notification of a proposed joint venture on January 7, 1991.[256] The joint venture program between Mitsubishi of Japan and Union Carbide of the United States involved a purchase of 50 percent of Union Carbide's carbon manufacturing division by Mitsubishi.[257] The Commission did not oppose the joint venture because the "concentration does not have any significant impact in the Community," and because neither Union Carbide nor Mitsubishi intended to compete in the carbon production market.[258] This notification precedentially involved two undertakings based

252. *EC Commission Will Weigh Impact of Acquisition in Paper Industry,* [Aug.-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1492, at 792 (Nov. 22, 1990).

253. The Commission did note that any further integration of the companies would require further clearance. *Id.*

254. *Id.* Their aggregate output of heavy commercial vehicles ranked first in the world, while production of all vehicles was seventh in the world. *Automakers Make First Filing Under EC's New Merger Regime,* [Aug.-Dec.] 59 Antitrust & Trade Reg. Rep. (BNA) No. 1487, at 584 (Oct. 18, 1990). The companies designed the merger to alleviate deficiencies in sales, operation profits and cash flow, and to achieve economies of scale in the areas of research and development and raw materials purchases. *Id.*

255. *EC Commission Clears First Deal Notified Under Merger Regulation,* [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1492, at 89 (Jan. 17, 1991).

256. *EC Commission Clears First Joint Venture Notified Under Merger Control Regulation,* [Jan.-June] 60 Antitrust & Trade Reg. Rep. (BNA) No. 1449, at 89 (Jan. 17, 1991).

257. The stated purpose of the joint venture was to "increase market share in the carbon and graphite products sector." *Id.*

258. *Id.*

outside the EEC.[259]

3. Other Initial Clearances

Other early Commission clearances under the Regulation included the acquisition of Carimi, an Italian steel distributor, by Usinor-Sacilor, a French steel products producer.[260] Although Usinor-Sacilor produced the most steel products of any company within the EEC at the time of the merger,[261] the Commission cleared the proposed acquisition because other steel distributors would likely meet Usinor-Sacilor's entry into the Italian market with tough competition.[262] In addition, the Commission announced its clearance of the AT&T/NCR and Matsushita/MCA takeovers after concluding that they would not create or strengthen dominant positions that would significantly impede competition within the EEC.[263]

4. The First intensive Investigation Under the Merger Regulation

The Commission did not undertake any detailed investigations of notified mergers until January 21, 1991, when it announced that it would conduct an in-depth review of a complex assets exchange proposal between Alcatel, a French electronics company that manufactures batteries, and Telettra, an Italian telecommunications company

259. *Id.*

260. *Id.* The Commission later approved, without undertaking a formal investigation, Usinor-Sacilor's acquisition of 40% of Associated Steel Distributors, a British distributor of steel products. *EC Commission Clears First Transaction in Steel Sector Under Merger Regulation*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 677 (May 9, 1991).

261. *Id.*

262. *Id.*

263. *EC Commission Clears AT&T/NCR and Matsushita/MCA Acquisitions*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1505, at 325-26 (Feb. 28, 1991). The AT&T/NCR takeover involved AT&T's contested stock acquisition of NCR, the world's twelfth largest information service company. The Commission had been concerned about AT&T control of the "UNIX" operating system software, which runs the workstations manufactured by NCR. *Id.* at 325. In the highly-publicized Matsushita/MCA takeover, the Commission concentrated on the relationship between Matsushita's manufacture of video and audio equipment and MCA's production of video and audio recordings. *Id.* at 326. However, the Commission cleared the takeover because an adequate number of competing producers of video and audio recordings made it unlikely that Matsushita would obtain a dominant position at the expense of competition within the EEC. *Id.* In both takeovers, however, the Commission noted that it would pay close attention to the maintenance of competitive conditions in the EEC markets affected by the acquisitions. *Id.* at 325-26.

owned by Fiat.[264] The Commission decided to open formal proceedings because of its concern that the merger would result in high market shares in both the Spanish market for transmission equipment and the French market for batteries.[265]

5. Evaluation of the Commission's Initial Merger Reviews

Although the Commission's decisions provide only a scant indication of the future of EEC merger control as 1993 approaches, there are some noteworthy aspects which companies and their attorneys should consider in planning European business strategy. First, the Commission has yet to mention any non-competition factors in its decisions. This may be due to the absence of any significant social or political implications arising from these transactions. More likely, however, it probably indicates a commitment on the part of the Commission to remain faithful to the competition-oriented language of the Regulation.[266]

Another important element of some of these decisions is the emphasis on the limited effect of clearance.[267] In the Volvo/Renault transaction, for instance, the Commission reminded the parties that their partial integration would require further approval before it would allow any further integration.[268] Similarly, the Commission emphasized that it conditioned clearance of the AT&T/NCR and

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264. *EC Commission Begins First Intense Probe of Deal Under Merger Control Regulation*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1501, at 168 (Jan. 31, 1991). Notification was made on December 10, 1990. *Id.*

265. *Id.*

266. "Concerns about the 'political dimension' of the merger regulation regime also appear not to have materialized because the decisions clearly indicate that they are being made on competition—and not political or nationalistic—grounds . . . ." *ABA Section Probes Developments in EC Competition Law and Policy*, [Jan.-June] 60 Antitrust & Trade Reg. Rep. (BNA) No. 1522, at 898 (June 27, 1991). *See also EC Practitioners Advise Colleagues on Pitfalls of Merger Control Regulation*, [Jan.-June] 60 Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 673 (May 9, 1991) (noting that the Commission had yet to prohibit an "extraterritorial merger on the basis of anticompetitive effects in the Community"). Given the presence of American and Japanese companies in these initial notifications, the Commission probably had the opportunity to consider social and political factors, such as the protection of European jobs and European-owned companies.

267. "Since the mandate of the Commission [under the Merger Regulation] is broader than that of the Justice Department [under the Hart-Scott-Rodino Act], it can take into account a broader range of policy considerations and is 'imposing a lot of interesting conditions on mergers' cleared after scrutiny." *ABA Section Probes Developments in EC Competition Law and Policy*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1522, at 898 (June 27, 1991) (remarks at American Bar Association Antitrust Section June 17-18, 1991, meeting).

On a broader scale, one commentator suggested the Commission may use conditional clearance as a tool to "implement its own antitrust policies and promote its own conception of fairness in international markets." Callister, *supra* note 6, at 127.

268. *EC Commission Clears First Deal Notified Under Merger Regulation*, [Aug.-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1492, at 789 (Nov. 22, 1990).

Matsushita/MCA takeovers upon the maintenance of competitive conditions within the EEC in the affected industries.[269] The Commission's message seems to be that a merger's clearance does not give the parties a license to abuse the advantages obtained by the transaction. Also, it does not enable them to carry out any covert plans, which the Commission may have overlooked in its investigation, that will adversely affect competition within the EEC.[270]

Finally, the Commission seems to acknowledge the validity, and even necessity, of meeting the enormous Common Market with concentrations in economic power. In the Mitsubishi/Union Carbide joint venture, the Commission accepted the validity of the parties' ostensible intention to increase market share in the carbon and graphite markets.[271] In addition, the Commission recognized the need for companies to attain economies of scale, even in purchasing power, in the Renault/Volvo merger.[272]

Since it is unlikely that firms (especially smaller firms) will be able

269. *EC Commission Clears AT&T/NCR and Matsushita/MCA Acquisitions*, [Jan-June] Antitrust & Trade Reg. Rep. (BNA) No. 1505, at 325-26 (Feb. 28, 1991). The Commission has also indicated that it intends "to monitor closely future developments in the [automobile] industry to see that competitive conditions 'are safeguarded,'" after clearing the acquisition of Ford New Holland by Italian automaker Fiat on May 2, 1991. *Fiat and Ford are Expected to Move Soon After Winning Clearance By EC*, [Jan.-June] 60 Antitrust & Trade Reg. Rep. (BNA), at 678 (May 9, 1991).

270. It is unlikely that the Regulation contemplates post-clearance jurisdiction (beyond violations of conditional clearance under Article 8(5)(b)) in cases where the competitive conditions of an affected market subsequently change, since the Commission's statements probably do not raise to the level of a conditional clearance. Article 8(4), which authorizes remedial measures "[w]here a concentration has already been implemented," probably refers to mergers which have been consummated before the Commission has rendered a decision. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, art. 8(4), 1989 O.J. (L 395) 6-7.

If the competition conditions do change in a market affected by a merger which has already been cleared, the Commission may be precluded from attempting to alter a merger which it has already cleared. Most likely, the Commission will restrict its clearances of mergers affecting markets that have become less competitive because of mergers which were previously approved. Of course, this does create an inequity in favor of the mergers which were earlier cleared. *See id.*

271. *EC Commission Clears First Joint Venture Notified Under Merger Control Regulation*, [Jan.-June] 60 Antitrust & Trade Reg. Rep. (BNA) No. 1499, at 89 (Jan. 17, 1991). In another notified merger, the Commission decided to review a proposal whereby France's Arjomari-Prioux SA and Britain's Wiggins Teape Appleton agreed to merge, creating the largest paper manufacturing operation in Europe. *EC Commission Will Weigh Impact of Acquisition in Paper Industry*, [Aug.-Dec.] 59 Antitrust & Trade Reg. Rep. (BNA) No. 1492, at 792 (Nov. 22, 1990). Rather boldly, one company official stated that the merger would "establish an extremely powerful merchandising and distribution network" in Europe, as well as "achieve economies of scale." *Id.*

272. *Automakers Make First Filing Under EC's New Regime*, [Aug.-Dec.] 59 Antitrust & Trade Reg. Rep. (BNA) No. 1487, at 584 (Oct. 18, 1990).

to satisfy, through internal expansion, the additional demand created by the unification of the European markets, the Commission can expect a growing number of notified mergers, even after 1993.[273] By itself, this trend should not negatively reflect on the validity of any individual merger. The Regulation's brief history appears to vindicate the Regulation's purpose, which is to expedite, rather than deter, desirable mergers while preventing anticompetitive mergers.[274]

V. CONCLUSION

A. *Federalism and the Common Challenge*

While this article has focused on the differences between United States and EEC merger control procedures, antitrust authorities in both the United States and the EEC face a similar challenge to their merger enforcement regimes. Although United States antitrust law has emerged in an established federalist system whereby the states give deference to the federal government in matters affecting interstate commerce,[275] the federal government's anemic response to the most recent wave of mergers and acquisitions has brought about increased state antitrust enforcement.[276] As for the EEC, the Merger Regulation has emerged in an environment where the Member States have never willingly deferred to the EEC.[277]

1. United States Antitrust Enforcement Trends

Traditionally, U. S. states have left the bulk of antitrust enforcement to the federal government for primarily two reasons. First, the Commerce Clause has a broad interpretation. Second, the federal government has greater resources and expertise.[278] However, the concurrent onset of federal antitrust deregulation and increased merger activity in the 1980's has pressured popularly elected State

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273. Callister, *supra* note 6, at 132.

274. The Commission's view toward mergers was aptly expressed by a Commission official prior to the implementation of the Regulation. He stated that "[i]t is not a sin to merger, but it is a sin to abuse a dominant position." *EC Commission Approves Notification Rules for New Merger Regulation Effective Sept. 21*, [Aug.-Dec.] 59 Int'l Trade Rep. (BNA), at 1196 (Aug. 1, 1990).

275. *See infra* notes 277-84 and accompanying text.

276. *See* Stephen M. Axinn & Mark A. Glick, *Dual Enforcement of Merger Law in the EEC: Lessons from the American Experience*, in 1989 FORDHAM CORPORATE LAW INSTITUTE: 1992 & EEC/U.S. COMPETITION AND TRADE LAW 547 (B. Hawk ed., 1990).

277. "When the merger regulation was adopted, . . . practitioners predicted a 'sort of guerilla warfare' as Commission and national authorities squabbled over jurisdiction to review certain mergers." *EC Practitioners Advise Colleagues on Pitfalls of Merger Control Regulation*, [Jan.-June] 60 Antitrust & Trade Reg. Rep. (BNA) No. 1515, at 673 (May 9, 1991).

278. Axinn & Glick, *supra* note 277, at 566. This domination by the federal government has also allowed Congress to pass antitrust legislation without the need to preempt concurrent state law. *Id.* at 551.

Attorneys General to increase state antitrust enforcement.[279] The prospect of facing a multitude of state and federal antitrust laws has raised concern that the added cost and legal uncertainty of mergers and acquisitions will prevent competitively desirable mergers from being consummated.[280] Fortunately, the long-standing national identity and coordination between states and the federal government is likely to outlive the current cycle of merger activity. This should occur despite the recent policies of the federal government, and without any permanent damage to the United States antitrust enforcement structure or the United States economy.

2. European Antitrust Enforcement trends

On the other hand, European national and EEC antitrust legislation has not been incorporated into such an established federalist structure. This explains why the Commission has demanded exclusive jurisdiction rather than a federalist jurisdictional structure. Although the Treaty of Rome contains specific provisions for the supremacy of EEC law over national law,[281] the Member States have not usually been willing to relinquish power to the EEC.[282] In terms of merger enforcement, this power struggle has created the same concern that exists regarding United States mergers and acquisitions,[283] even with the Merger Regulation in place. Furthermore, the EEC lacks a tradition of Community identity, which has been hindered by the Member States' reluctance to subordinate their sovereignty.[284] As a result, the EEC does not have a proven federalist framework of cooperation and deference where parallel enforcement of supra-national mergers is likely to succeed.[285]

If the Commission adopts the recent deregulatory policy of the

279. *Id.* at 566.

280. *Id.* at 567. *See also ABA Section Probes Developments in EC Competition Law and Policy*, [Jan.-June] 60 Antitrust & Trade Reg. Rep. (BNA) No. 1522, at 897 (June 27, 1991). "'As Europe moves towards a more unitary competition policy, the U.S. commences Balkanization of its own policy. As Europe moves forward, the U.S. moves backward.'" *Id.* (quoting former Federal Trade Commissioner Terry Calvini).

281. Article 87(2)(e) authorizes the Council to implement regulations and directives defining the relationship between EEC and Member States antitrust legislation. EEC TREATY, art. 87(2)(e). Article 235 authorizes the Council to take any measures which further Community objectives. *Id.* art. 235. In addition, the Court of Justice has held that these articles give EEC law precedence over nation law. *See* Case 14/68, Wilhelm v. Bundeskartellamt, 1969 E.C.R. 1, 14.

282. *See* Axinn & Glick, *supra* note 277, at 558-59.

283. *Id.* at 547.

284. *Id.* at 549, 570.

285. *Id.* at 569-70.

United States federal government during a period of heightened merger activity, the present jurisdictional structure is unlikely to withstand the pressures created by increased national enforcement.[286] Thus, any hope of a consistent merger policy within the EEC will be realized only if the Member States relinquish the present multi-tiered merger enforcement system[287] and provide the EEC with truly exclusive jurisdiction over all cross-border mergers and acquisitions.

B. Prognosis for EEC Competition Policy Under the Regulation

Although the Regulation is not perfect, it provides a strong foundation upon which to build a European merger policy that will contribute to the economic and social cohesion of the EEC. In addition, the Regulation significantly improves the procedural and substantive administration of antitrust law by the EEC institutions.

However, the Regulation is only a framework. Thus, its success, and its contribution to the success of the EEC, will depend upon how well the Commission can walk the fine line between external pressure from the Member States and the individual proponents of merger proposals, and excessive reliance on the literal language of the Regulation itself. Like a blueprint, the Regulation provisions should guide the Commission in developing a merger policy that adheres to the spirit of the Treaty of Rome.

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286. " 'While the number of direct clashes between national and Community authorities may be few, such double control will run counter to the logic of the Single Market. Industrial adaptation, it seems, will take place in a climate of uncertainty.' " *UK, German Postures on EC Merger Control Can Lead to Two-Tiered Review of Mergers*, [Jan.-July] 60 Antitrust & Trade Reg. Rep. (BNA) No. 56, at 937 (June 29, 1989) (quoting Royal Institute of International Affairs discussion paper).

287. *See supra* notes 156-66 and accompanying text.