THE EUROPEAN UNION REGULATION ON "CONCENTRATIONS" AND UNITED STATES MERGER LAWS

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I. INTRODUCTION

A. *Foundations of EU and United States Antitrust Laws*

Antitrust laws of the United States and the European Union (EU)[1] have fundamentally different goals. Over the last fifteen years, United States antitrust law has been transformed from a regime of strict regulation to a system of relaxed jurisprudential rule and administrative enforcement. This essay explores whether this United States "revolution"[2] has any implications for the development of EU antitrust law.

EU antitrust law, based on Articles 85 and 86 of the Treaty of Rome (Treaty),[3] was directly influenced by United States antitrust law.[4] Europeans relied on the vast United States experience in antitrust, dating from the 1890 enactment of the Sherman Act,[5] as a foundation upon which to build a European economic theory.[6]

United States and EU rules and interpretations of the systems diverge, however, due to their differing purposes. First, the EU's fundamental objective is market integration whereas the American

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1. All references herein after the enactment of the Maastricht Treaty in November 1993 will be to the European Union. All references prior to the Maastricht Treaty will be to the European Community.

2. Barry E. Hawk, *La révolution antitrust américaine: une leçon pour la Communauté économique européene?*, 25 Rev. trim dr. europ. 5, 12 (1989).

3. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 3.

4. Hawk, *supra* note 2, at 5-6.

5. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988).

6. Hawk, *supra* note 2, at 6.

objective is pure competition.[7] Market integration requires more stringent rules concerning territorial restrictions than does pure competition. Second, the EU definition of "competition" includes some social and political values, which play a less important role in a United States antitrust analysis.[8] Furthermore, several differences exist in the rationale behind and interpretation of the two systems. The United States antitrust revolution accentuates these differences.[9] The last distinguishing factor between the two schemes is the enforcement mechanism.[10] In the EU, antitrust enforcement is centralized in the hands of the Commission, relegating the member states to an essentially consultative role.[11] In contrast, both private parties and executive agencies can play an important role in antitrust enforcement in the United States.[12] Excluding mergers, private parties are entitled to bring an action in the United States.[13] The United States and EU systems will be considered more extensively in the subsequent discussion of mergers.

B. Development

At its inception, the Treaty of Rome lacked any merger provisions.[14] The Treaty's authors tried to introduce merger restrictions in the final text but lacked political consensus on common policies, criteria, and procedures.[15] Paradoxically, the European Coal and Steel Community (E.C.S.C.), a precursor to the European Community, had included merger provisions obliging companies to notify the E.C.S.C. Commission and other E.C.S.C. institutions prior to their agreement.[16] The Treaty's lack of merger provisions, however, required the Commission to base its merger practice on the general competition

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Hawk, *supra* note 2, at 17.

12. *Id.*

13. *Id.*

14. Ethan Schwartz, Comment, *Politics as Usual: The History of European Merger Control*, 18 YALE J. INT'L L. 607, 613 n.33 (1993).

15. *Id.*

16. TREATY INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY] art. 66(1).

Articles 85 and 86.[17] A controversy over the purposes of the competition articles soon developed. A more detailed discussion of this topic will follow.

To fill this gap, European authorities enacted the EC Regulation on the Control of Concentrations between Undertakings (Merger Regulation).[18] Intense discussions had begun with the Commission's proposal of a merger regulation to the Council in 1973.[19] Sixteen years later the final text, adopted on December 21, 1989, came into effect, on September 1, 1990.[20] Prior to this draft, the EC Commission had issued a 1966 memorandum on mergers (Memorandum of 1966) declaring that "it is not possible to apply Article 85 to agreements whose purpose is the acquisition of total or partial ownership of enterprises or the reorganization of the ownership of enterprises ([through] merger, acquisition of holdings, purchase of part of the assets)."[21] The memorandum proposed the use of Article 86 to control concentrations that created a monopoly.[22] Several doctrinal critics wanted to use Article 85 as a source for merger control.[23] The EC Commission, however, responded that an Article 85(3) exemption would be an easy means of evading Article 85(1)'s prohibition and would be inconsistent with genuine control of concentrations in the European Community.[24] The European Court of Justice, however, applied Articles 85 and 86 to mergers until 1989, necessitating a response from the EC Commission.[25] Thus, negotiations began for a specific merger regulation -- negotiations which one commentator has called "a political logjam."[26]

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17. Schwartz, *supra* note 14, at 621. *See* Derek Ridyard, *An Economic Perspective of the EC Merger Regulation*, 11 EUR. COMPETITION L. REV. 247 (1990).

18. Council Regulation (EEC) No. 4064/89 of 21 December 1989 on Control of Concentration between Undertakings, 1989 O.J. (L 395) 1, 1990 O.J. (L 257) 13 (corrected version) [hereinafter Merger Regulation].

19. Draft Regulation of the EC Council Concerning Control of Concentrations between Undertakings, COM(73)1210 final, *reprinted in* 12 C.M.L.R. D205, D207 (1973).

20. *Id.*

21. Memorandum on the Problem of Concentrations in the Common Market, Competition Series, No. 3, 1966, ¶ 58 [hereinafter Memorandum of 1966].

22. Schwartz, *supra* note 14, at 614.

23. *Id.* at 615.

24. *Id.*

25. *See* Case 6/72, Europemballage Corp. and Continental Can Co., Inc. v. Commission, 1973 E.C.R. 215, [1973] C.M.L.R. 199 (1973) [hereinafter *Continental Can*].

26. Schwartz, *supra* note 14, at 623.

The 1973 proposal became the focus of rancorous discussion. Despite the European Parliament's endorsement, the proposed merger regulation failed in the Council.[27] Partisans of pure competition policy in merger control, namely, Germany and Denmark, opposed supporters of industrial policy and social or regional goals, such as France, the United Kingdom, Italy and Ireland.[28] At first, many member states did not want to cede any authority to the EC Commission. Consequently, the Council rejected the Commission's merger draft.[29] After this failure, the EC Commission took eight years to submit a new draft to the Council.[30] In 1981, changes to the former proposal focused on increasing the thresholds and turnovers of companies necessary to invoke merger control.[31] Once again, the member states' disagreements resulted in the death of the proposed merger regulation before the Council. Lacking any substantive modifications, a third proposal in February 1984 was also quickly defeated.[32]

Dissenters focused on the member states' ability to intervene in their own economies.[33] Hence, granting authority to the EC Commission would have partially stripped the member states of their sovereignty. In France, throughout its history, the state has played an active and important role in the management of its industry. This "dirigiste economic policy"[34] changed only slightly in the 1980's with more apparent free-market ideology and privatisations. Nevertheless, French authorities continue to be very active in industrial policy-making, and are reluctant to cede too much power to the EC Commission.[35] All member states similarly would like to use domestic merger controls to intervene in domestic industries.[36] Such varied intervention, however, runs counter to the notion of a unified European merger control.

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27. *Id.*

28. *Id.* at 624.

29. *Id.*

30. *Id.*

31. Schwartz, *supra* note 14, at 624-25.

32. *Id.* at 625.

33. *Id.* at 625-26.

34. *Id.* at 628 (citing Peter A. Hall, *The State and the Market*, *in* DEVELOPMENTS IN FRENCH POLITICS, 171-73 (Peter A. Hall et al. eds., 1991)).

35. Schwartz, *supra* note 14, at 634.

36. *Id.* at 627.

C. *EU and United States Antitrust Regulations*

The 1985 White Paper,[37] signed in February 1986, launched a new era of EC antitrust regulation which culminated in the Single European Act[38] intended to create a single market by facilitating the harmonization of laws of member states. This single liberal market promised to eliminate trade barriers within the Community.[39] Embarking on this path, member states would relinquish their respective policies to adopt a single text on mergers.[40] In 1988, a new draft, presented by Commissioner Peter D. Sutherland, included provisions concerning pure competition and industrial policy.[41] After several amendments and further conflicts between member states, Sutherland's successor, Sir Leon Brittan of Great Britain, proposed a second draft in 1989.[42] Additionally, France assumed the EC Presidency in July 1989 with the firm resolve to obtain a merger agreement, however flawed.[43] To satisfy individual member states, a political compromise was ironed out on December 21, 1989.[44] The appearance of unity lent by the compromise did not hide the fundamental disparities of the self-interested policy positions. The apparent gaps in the Merger Regulation are the legacy of this conflict, gaps that the European Court of Justice will have to address.

European merger practice could profit from the United States' experience. The United States adopted Sections 1 and 2 of the Sherman Act to thwart the excessive economic and political power concentrated by oil, steel and other monopolies.[45] Nevertheless, the Sherman Act provisions did not become the central basis of merger control. In 1914, in accordance with President Wilson's reforms, Congress enacted the

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37. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final.

38. Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1005, 25 I.L.M. 506; Schwartz, *supra* note 14, at 639.

39. Schwartz, *supra* note 14, at 639.

40. *Id.*

41. Amended Proposal for a Council Regulation on the Control between Undertakings, COMMON MARKET LAW REPORTS, ANTITRUST SUPPLEMENT (1988), 4 C.M.L.R. 472 (1988).

42. Schwartz, *supra* note 14, at 650.

43. *Id.* at 651-52.

44. *Id.* at 653.

45. 15 U.S.C. §§ 1-2.

Clayton Act[46] and the Federal Trade Commission (F.T.C.) Act[47] to address antitrust mergers and joint ventures. The Clayton Act was the congressional response to the rule-of-reason analysis of *United States v. Standard Oil*.[48] In *Standard Oil*, the United States Supreme Court decided that "proof of reasonableness would be admitted in defense of mergers charged with violating the Sherman Act."[49] To attain enforceability, two weapons were later added to the arsenal: the Celler-Kefauver Act of 1950[50] fortified Section 7 of the Clayton Act and extended its scope to acquisitions of corporate assets and shares of capital or stock; and the Hart-Scott-Rodino Antitrust Improvements Act (H.S.R.) of 1976[51] applied specific thresholds requiring pre-notification of the merger to both the F.T.C. and the Department of Justice. These agencies must then authorize the companies involved to proceed with the merger.[52]

To provide more juridical security to expanding corporations, the Department of Justice first formulated merger guidelines in 1968 and continued this practice until 1992.[53] These guidelines are not binding on the courts; however, they reveal the agencies' enforcement intentions.[54] Additionally, the F.T.C. issues statements concerning mergers which also contain cases and secondary sources to be used as guidelines.[55]

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46. 15 U.S.C. §§ 12-14 (1988).

47. 15 U.S.C. §§ 44-58 (1988).

48. United States v. Standard Oil Co., 221 U.S. 1, 58 (1911).

49. Margarida Afonso, *A Catalogue of Merger Defenses Under European and United States Antitrust Law*, 33 HARV. INT'L L.J. 1, 41 (1992).

50. Celler-Kefauver Act of December 29, 1950, ch. 1184, 65 Stat. 1125 (codified as amended at 15 U.S.C. § 18 (1988)).

51. Hart-Scott-Rodino Act of 1975, 15 U.S.C. § 18(a) (1988) [hereinafter Hart-Scott-Rodino Act].

52. *Id.*

53. U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMMISSION HORIZONTAL MERGER GUIDELINES (1992) (Statement Accompanying Release of Revised Merger Guidelines, Apr. 2, 1992) [hereinafter 1992 Merger Guidelines].

54. *See* Phillip Areeda, *Justice's Merger Guidelines: The General Theory*, 71 CAL. L. REV. 303 (1983).

55. *See, e.g.*, *FTC Statement Concerning Horizontal Mergers*, 2 Trade Reg. Rep. (CCH) ¶ 13,200 (1982).

D. Modern Context

Mergers are particularly important in both the United States and the European Union. According to the Twenty-second Report on Competition Policy made by the EC Commission in Brussels on May 5, 1993, 871 mergers occurred in the Community market for the period 1991-92.[56] Moreover, the trend of rapid development of international relations and business activities will surely increase the watchdog responsibilities of the agencies concerned.[57] In the United States, more than 1,800 mergers were submitted to the Department of Justice in 1991, 340 involving foreign nations and 160 concerning the European Community.[58] These statistics demonstrate the significant activity necessary for companies to maintain a high international market share. This high level of activity is a red flag to the merger evaluation entities in both the EU and the United States. Consequently, mergers of multinational firms would easily violate United States or EU antitrust laws. Strict antitrust rules will monitor the creation or strengthening of a dominant position, barriers to entry, the imposition of discriminatory restrictions on other competitors, and several other economic factors that maintain fair competition in the markets.[59] The United States and the EU must assist each other to achieve efficient control by providing company data and echoing each other's monitoring of anti-competitive conduct.

This article compares substantive EU merger control to United States merger rules, EU enforcement practices to those of the United States, and rules deriving from the agreement between the United States and the EU regarding the application of their competition laws.

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56. COMMISSION OF THE EUROPEAN COMMUNITIES, XXIID REPORT ON COMPETITION POLICY: 1992, app. 1, at 46 (1993).

57. *Id.*

58. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 543 (113th ed. 1993). *See also* 27 MERGERS AND ACQUISITIONS ALMANAC, no. 6, at 46, 51-52, 60 (May/June 1993).

59. *See* Frank L. Fine, *The Substantive Test of the EEC Merger Control Regulation: The First Two Years*, 61 ANTITRUST L.J. 699 (1993). *See also* Howard Adler, Jr., *Application of the U.S. Antitrust Laws to Mergers and Joint Ventures Involving Foreign Firms*, 3 EUR. BUS. L. REV. pt. 1 135, 170 (1992). *Cf.* Edward F. Glynn, Jr., *An American Enforcer Looks at the EEC Merger Proposal (The EEC Merger Regulation)*, 59 ANTITRUST L.J. 237, 239 (1990).

II. THE SUBSTANTIVE SCOPE OF EU MERGER CONTROL AS COMPARED TO UNITED STATES MERGER RULES

A. *The First Step of EU Control Prior to the Merger Regulation: Controversial Application of Articles 85 and 86*

Article 3 of the Treaty of Rome requires that the EU Common Market establish "a system ensuring that competition shall not be distorted in the Common Market."[60] Control of competition and of the free-market was exercised largely through Articles 85 and 86 due to a lack of any specific concentration provision.[61] Article 85 of the Treaty of Rome prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market."[62] Article 86 prohibits "any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it...insofar as it may affect trade between member states."[63] As noted previously, the Memorandum of 1966 rejected the application of Article 85 to control merger transactions and concluded that Article 86 could be used to forbid a concentration that would monopolize the market.[64]

The *Continental Can* decision issued by the European Court of Justice in 1973 was influenced by the EC Commission's use of Article 86 in the Memorandum of 1966.[65] The Court applied Article 86 to the merger-acquisition, holding that even if the Article covers different types of abusive practices, the merger abused a dominant position, thereby strengthening the market power of the dominant firm.[66] Article 86 prohibits such activity. The Court, however, applied Article 86 such that the merger would be prohibited only "if practically all competition is

60. EEC TREATY art. 3.

61. *Id.* arts. 85, 86.

62. *Id.* art. 85.

63. *Id.* art. 86.

64. Memorandum of 1966, *supra* note 21, at 614.

65. *Continental Can*, 1973 E.C.R. at 202.

66. The European Court of Justice explained in *Continental Can* that "abuse may occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, *i.e.*, that only the undertakings remain in the market whose behaviour depends on the dominant one." *Id.* ¶ 26.

eliminated."[67] In *Hoffman-LaRoche*,[68] the Court extended its interpretation of the abuse of market power, stating that "the abuse relates to the behaviour of the undertaking which influences the structure of the EC market in order to weaken its degree of competition." Under Article 86, the concept of dominant position involves "the power to prevent effective competition and to behave independently."[69] These elements, in addition to other economic factors, have been used to prohibit mergers in the European Union.[70]

The European Court of Justice has also used Article 85 to control mergers. This application by the Court, however, has resulted in significant criticism. In its 1987 *Philip Morris*[71] decision, the Court held that Philip Morris' acquisition of 20.8 percent of the shares of its competitor, Rothmans International, was invalid under Article 85(1).[72] The rule evolved such that Article 85 nullifies mergers that open the door to conspiracy or other cooperative behaviors between competitors.[73] The acquisition by Philip Morris could have influenced the commercial conduct of the companies concerned so as to distort competition.[74] This controversy arose because Article 85 prohibits practices only if an "agreement" exists between firms and such agreement involves companies that remain independent in the market.[75] To the contrary, a merger implies that the companies would integrate into a single economic entity; thus, the merging firm would no longer be independent.[76] Thus, Article 85 literally interpreted may not control mergers. Article 86, however, may be suitable if the result of the integration is a reinforcement of the market position of a dominant firm.

Another problem concerning the application of Article 85 to merger control is the possible exemptions of paragraph 3 relating to

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67. *Id.* ¶ 29.

68. Case 85/76, Hoffman-LaRoche & Co. v. Commission, 1979 E.C.R. 461 (1979).

69. *See generally* BARRY E. HAWK, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 796-827 (Supp. 1990).

70. Afonso, *supra* note 49, at 6.

71. *Id.* at 10 (citing Joined Cases 142 & 156/84, British-American Tobacco Co. & R.J. Reynolds v. Commission, 1987 E.C.R. 4487 (1987)).

72. *Id.* at 10 n.42.

73. *Id.* at 10; Schwartz, *supra* note 14, at 642.

74. Afonso, *supra* note 49, at 10 n.42.

75. *Id.* at 10; Schwartz, *supra* note 14, at 642.

76. Schwartz, *supra* note 14, at 642.

merger activity that, in spite of creating a monopolistic situation, contribute to the overall good of the European Union.[77] Paragraph 3 does not address mergers involving transferred shares and asset ownership. Therefore, the EU Commission should screen-out mergers that do not invoke Article 85(3).

Theoretically, the Merger Regulation rejects the application of Articles 85 and 86.[78] However, it cannot prevail over and modify Articles 85 and 86 since they are primary, and therefore superior, sources of European Community law.[79] Now that the EU has a specific and detailed merger structure, the interpretation of each testing criteria may be more directly influenced by the United States model.

B. *Evaluating Concentrations in the EU and the United States*

1. Merger and "Concentration" Defined

Generally, the term "merger" is employed when one company, a bidder, takes control of a second company, the target.[80] Article 3 of the Merger Regulation defines "concentration," on the other hand, as two separate undertakings merging into a single body, with one of them acquiring direct or indirect control of the whole or part of another.[81] A merger analysis focuses on the question of market power or deadweight loss.[82] Consequently, it is necessary to define the relevant market in order to calculate the market shares of the merging firms and to evaluate the competitors' influence.[83] Based on this information, United States or EU agencies will decide whether the resulting increase in concentration attains a high enough level to conclude that the merger will significantly increase market power.[84] If this excessive increase is proven, and harm

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77. EEC TREATY art. 85(3).

78. Jean-Luc Dechery, *Le règlement communautaire sur le contrôle des concentrations*, 26 Rev. trim. dr. europ. 307, 321 (1990).

79. Schwartz, *supra* note 14, at 658.

80. *See* Adler, *supra* note 59, at 135 (regarding different types of mergers).

81. Merger Regulation, *supra* note 18, art. 3.

82. William M. Landes, *Harm to Competition: Cartels, Mergers and Joint Ventures*, *in* COLLABORATIONS AMONG COMPETITORS ANTITRUST POLICY AND ECONOMICS §§ 23, 27 (Eleonor M. Fox & James T. Halverson eds., 1991).

83. *See* Fine, *supra* note 59, at 703. *See also* Adler, *supra* note 59, at 168-170.

84. 1992 Merger Guidelines, *supra* note 53, § 0.2. *See* Fine, *supra* note 59, at 703.

to the competition established, then the merger will be challenged.[85] To declare a merger incompatible with the Common Market, the EU Commission must answer one question: Does the merger "create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it?"[86]

In the United States, on the other hand, Section 7 of the Clayton Act provides that a merger is unlawful when the effect of the acquisition of stock or assets of a corporation substantially lessens competition, or tends to create a monopoly.[87] The Department of Justice will determine the concentration and the increase in concentration caused by the merger.[88]

2. Determining the Compatibility of a Merger with United States and EU Antitrust Laws

In all merger controls, the United States Department of Justice and its counterpart in the EU, the Directorate-General IV (DG IV), are required to analyze both the product market and the geographic market to determine the economic impact of the merger on the competing industries.[89] The relevant product market is similarly defined in both the United States and the European Union "to include all market power-inhibiting substitute products."[90] Both systems investigate whether sufficient product substitutes exist to provide consumers with alternatives.[91] This is done by scrutinizing the potential effects on the relevant market if a hypothetical monopolist were to impose a "small but significant and non-transitory increase in price."[92] If it would be unprofitable for the hypothetical monopolist to impose such an increase, given the availability of substitute products, the appropriate agency will

85. *Id.*

86. Merger Regulation, *supra* note 18, art. 2(3).

87. 15 U.S.C. § 18.

88. Adler, *supra* note 59, at 168.

89. *Id.* *See* Fine, *supra* note 59, at 703.

90. Adler, *supra* note 59, at 168.

91. Fine, *supra* note 59, at 703 (citing Case IV/M 053, Aérospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 42, ¶ 10).

92. 1992 Merger Guidelines, *supra* note 53, § 1.11.

add the next-best substitute for the product.[93] The agency then asks the same question for the hypothetical monopolist of the expanded product group.[94] This process continues until a group of products is identified such that it would be profitable for a hypothetical monopolist to impose a small but significant and non-transitory increase.[95]

The EU Commission's application of the product market test utilizes concepts previously established in cases concerning Articles 85 and 86. In the *de Havilland*[96] decision, for example, the EC Commission declared that the relevant product market "comprises all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices, and their intended use."

The EU and United States agencies' definition of the relevant geographic market may be based upon a specific area which can be expansive (*i.e.*, global) or severely restrictive (*i.e.*, a single town).[97] Paralleling the procedure of the product market test, the definition of the relevant geographic market involves an identification of the zone in which the previous locations of the merging firms functioned and an examination of "what would happen if a hypothetical monopolist of the relevant product imposed at least a small but significant increase in price."[98] Using this test, other companies selling the same product at approximately the same price, but located elsewhere, would be considered competitors.[99] Thus, the geographic area is expanded to include these firms.

Regulation 2367/90, Section 5 of Annex I defines the relevant geographic market as "compris[ing] the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in those areas."[100] In other words,

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93. Adler, *supra* note 59, at 169.

94. *Id.*

95. *Id.*

96. Case IV/M 053, Aérospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 42, ¶ 10.

97. United States v. Waste Management, 743 F.2d 976 (2d Cir. 1984).

98. 1992 Merger Guidelines, *supra* note 53, § 1.21.

99. Adler, *supra* note 59, at 169.

100. Commission Regulation 2367/90 of 25 July 1990 on the Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89 on the Control of Concentrations between Undertakings, 1990 O.J. (L 219) 5 [hereinafter 1990 Regulation].

companies could become competitors of the merging firms if they have the ability to alter their production to fit within the product category involved.

The EU and the United States rely on many factors when determining concentration and increases in concentration in the relevant market. These factors, however, may have a different priority in the EU's determination of merger compatibility as compared to the United States' analysis. Firm market shares, for example, are a significant element in the analysis of concentration, yet one to which disparate priorities are attached.[101] Given the wide array of other factors to consider, however, the EU Commission will also examine the effects of the concentration.[102] Therefore, the market share factor is not the sole indicium of dominance. In accordance with the jurisprudence of Article 86,[103] the EU Commission has divided the market share element into three levels: absolute market share level (greater than forty-five to fifty percent); relative market share level (between twenty-five percent and forty-five to fifty percent); and de minimis market share level (less than twenty-five percent).[104]

In *Alcatel/Telettra*,[105] the EC Commission stated that "a very high market share in any market could indicate that a dominant position exists." Moreover, the EC Commission in *de Havilland* decided that a high market share could indicate the existence of a dominant position only where the market share persists over time.[106] Even though this element would provoke suspicion, the EU Commission must take into account additional factors that reflect the structure of the market and the potential for continued fair competition.[107]

When the EU Commission considers the relative market share, it is often to demonstrate the existence of gaps between the market share of the dominant firm and its competitors.[108] This element could be

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101. Fine, *supra* note 59, at 705.

102. *Id.*

103. *See, e.g.*, Case 62/86, AKZO Chemie v. Commission, Judgment of July 3, 1991 (unpublished), *cited in* 1991 O.J. (C 201) 8; *Hoffman LaRoche*, 1979 E.C.R. 461; Case 40/73, Case 85/76 'Suiker Unie' and Others v. Commission, 1975 E.C.R. 1663, 1 C.L.M.R. 295 (1976).

104. Fine, *supra* note 59, at 707-711.

105. Case IV/M, 042, Alcatel/Telettra, 1991 O.J. (L 122) 48.

106. *de Havilland*, 1991 O.J. (L 334) ¶ 53.

107. Fine, *supra* note 59, at 707.

108. *Id.* at 709.

particularly important in a case in which the dominant firm cannot act independently of its competitors and its customers. In the *Renault/Volvo*[109] decision, for example, the EC Commission calculated that the combined market share of the new company would comprise approximately fifty percent of the French truck market, but appreciated that the merging firms would face prominent competitors such as Mercedes and Iveco.[110] Therefore, even though Renault/Volvo would control fifty percent of the market share, the merger would not substantially reduce competition.[111]

According to recital 15 of the Preamble to the Merger Regulation, compatibility exists when "the market share of the undertakings concerned does not exceed [twenty-five] percent either in the Common Market or in a substantial part of it."[112] The EC Commission has established a presumption that dominance does not exist in this situation.[113] If, however, the determination of dominance occurs in an oligopolistic market, the EU Commission could apply the concept of joint dominance and apprehend the merger.[114] In *Nestlé/Perrier*, the sole instance in which joint dominance was found to exist, the EC Commission stated that "oligopolistic dominance may significantly impede effective competition under certain market structure conditions."[115]

Despite the market share factor's importance, the Merger Regulation is silent concerning its measurement.[116] In addition, Regulation 2367/90 provides no direction on how to quantify this element.[117] It merely states that market shares for competitors must be provided in value terms (using the turnover result per year) or, "where appropriate," in volume terms.[118] In each case, depending upon the

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109. Renault/Volvo, slip op. (Eur. Comm'n Nov. 7, 1990), *cited in* 1990 O.J. (C 281) 2, 4 C.M.L.R. 906 (1990).

110. *Id.* ¶¶ 13-14.

111. Fine, *supra* note 59, at 709.

112. *Id.* at 711.

113. *See, e.g.*, Fiat Geotech/Ford New Holland, slip op. (Eur. Comm'n Feb. 8, 1991) ¶ 18, *cited in* 1991 O.J. (C 118) 14, [1991] 4 C.M.L.R. 330 (1991).

114. Sir Leon Brittan, Competition, Policy, and Mergers, at 12, Centre for European Studies, Brussels, Belgium (Oct. 28, 1991).

115. Case IV/M 190, Nestlé/Perrier, 1992 O.J. (L 356) 1.

116. Fine, *supra* note 59, at 711.

117. 1990 Regulation, *supra* note 100, annex I, § 5, ¶ 5.5.

118. *Id.* annex I, § 5, ¶¶ 5.6, 5.8.

circumstances, the EU Commission will choose the more appropriate measurement.[119] For example, in *Nestlé/Perrier*, the EC Commission used market shares in value terms estimating they better represented the parties' economic power.[120]

In the United States, the test for market concentration is primarily represented by the Herfindahl-Hirschman Index (HHI or Index) included in the 1992 Merger Guidelines.[121] The Index includes firms' that manufacture or sell the same products and/or substitutes in the same geographic market in the event of a price increase.[122] The HHI is calculated by summing the squares of the percentage market shares of the respective manufacturers.[123] Three enforcement categories based on the post-merger HHI exist. The "unconcentrated" threshold occurs when the HHI is below 1000, the "moderately concentrated" category corresponds to an HHI between 1000 and 1800, and the "highly concentrated" level is reached when the HHI is above 1800.[124] The Merger Guidelines will never trigger a challenge of a merger where the HHI falls under 1000.[125] For other concentrations, the Department of Justice will not challenge the merger if the increment between pre-merger and post-mergers is below tolerated standards: *i.e.*, under one hundred for "moderately concentrated," and under fifty for "highly concentrated" markets.[126] The Department of Justice will also consider economic factors included in Sections 2-5 of the Merger Guidelines.[127]

In *In re Echlin Manufacturing Co.*,[128] the Federal Trade Commission determined that a merger did not violate United States antitrust law despite the fact that the HHI thresholds were exceeded.[129] In this case, the post-merger HHI was approximately 3000 and the concentration increase approximately 750 points.[130] Nevertheless, other

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119. *Id.*

120. *Nestlé/Perrier*, 1992 O.J. (L 356) ¶ 40.

121. 1992 Merger Guidelines, *supra* note 53, § 1.51.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. 1992 Merger Guidelines, *supra* note 53, § 1.51.

127. *Id.* §§ 2-5.

128. 105 F.T.C. 410 (1985).

129. *Id.*

130. *Id.*

factors, such as the ease of entry into the relevant market, were weighed to offset this increase.[131]

Assuming the substantive goals of the EU and the United States are the same, each uses the concentration levels for different purposes.[132] In the United States, the HHI is essentially a device to demonstrate the probable effects of the challenged merger.[133] On the other hand, the EU turnover thresholds, which calculate the Community dimension of the proposed merger, are employed to determine jurisdiction over the merger between the member states and the EU Commission.[134]

European Union and United States regulations, respectively, measure additional factors of dominance that reflect the structure of the dominant firm and the advantages that could derive from a merger in the relevant market.[135] If, for example, the result of the new concentration would be to give the merging firms a technological advantage over their competitors, then competition could be threatened. In *Du Pont/ICI*,[136] the EU Commission found that Du Pont's acquisition of ICI, in the particularly sensitive nylon carpet fiber industry, would give Du Pont a great technological lead. This, in turn, would strengthen the loyalty of its existing customers and increase the possibility of independent action in the market rendering an impermissible result under the Merger Regulation.[137] These factors are explained in more detail in the United States Merger Guidelines; however, a result similar to that in *Du Pont/ICI* would likely have been found.[138]

Another important factor used by the EU and United States administrative agencies is "the market related barriers to entry."[139] The EU Commission determines whether legal or technical barriers exist that would impede entry into the market.[140] The legal barriers may involve important intellectual property rights, member states' regulations, or the

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131. *Id.*

132. Sabrina Haake, *Antitrust in the United States and European Community: Toward a Bilateral Agreement*, 2 IND. INT'L & COMP. L. REV. 473, 501 (1992).

133. *Id.* at 502.

134. *Id.*

135. 1992 Merger Guidelines, *supra* note 53, § 2.11; Fine, *supra* note 59, at 713.

136. Case IV/M 214, Du Pont/ICI, 1993 O.J. (L 7) 13.

137. Fine, *supra* note 59, at 713.

138. 1992 Merger Guidelines, *supra* note 53, § 2.11.

139. Fine, *supra* note 59, at 719.

140. *Id.*

lack of a right of establishment.[141] The technical barriers indicate a dominant position resulting from a merger with which the merging firms' superior knowledge and expertise allow them to close the market.[142] In *Tetra Pak/Alfa-Laval*,[143] for example, Tetra Pak's acquisition of Alfa-Laval and its "considerable specialized know-how" in the aseptic carton filling machines market created a dominant position incompatible with the EC market.[144]

In the United States, Section 3.0 of the 1992 Merger Guidelines states that a "merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants after the merger, either collectively or unilaterally, could not profitably maintain a price increase above premerger levels."[145] This defense will likely succeed if it "would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern."[146] Reasoning *a contrario*, a merger that precludes new entrants into a market will likely be challenged by the Department of Justice.

Additional economic factors, such as pressure exerted on prices or cross elasticity of product and demand, are analyzed by the agencies concerned.[147] Typically, questions in these areas include: What would happen if the existing producers attempted to increase prices of the relevant goods? How would consumers react? Are there other substitutable products or services?[148] These factors are evaluated on a case-by-case basis; thus, the determination of whether a given merger will run afoul of merger laws is fact-specific.[149]

In addition to the pure competition factors, the EU Commission may take into account the development of technical and economic progress when determining whether concentrations are compatible with the Common Market, "provided that it is to the consumer's advantage and

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141. *See, e.g.*, Case IV/M 126, Accor/Wagons-Lits, 1992 O.J. (L 204) 1; *Alcatel/Telettra*, 1991 O.J. (L 122) 48; Case IV/M 068, Tetra Pak/Alfa Laval, 1991 O.J. (L 290) 35.

142. Fine, *supra* note 59, at 720.

143. *Tetra Pak*, 1991 O.J. (L 290) ¶¶ 3.4.

144. *Id.*

145. 1992 Merger Guidelines, *supra* note 53, § 3.0.

146. *Id.*

147. Fine, *supra* note 59, at 721.

148. *Id.*

149. *See id.*

does not form an obstacle to competition."[150] Article (2)(1)(b) of the Merger Regulation demonstrates the political compromise that occurred during negotiations of the text.[151] Despite its ambiguity, the technical and economic factor plays the same role as Article 85(3) of the Treaty of Rome concerning exemptions.[152] At best, it could be a United States "rule-of-reason."[153] This element of Article (2)(1)(b) of the Merger Regulation has been criticized because it is deferential to the southern member states that foresee a development of industrial policy.[154] Nevertheless, a concession to these states was necessary to obtain the Council's unanimous approval.[155] The EC Commission, in one of its rare decisions applying this technical and economic progress criterion, did not clarify the concept because the concentrations at issue strongly impeded competition.[156]

III. PROCEDURAL AND ENFORCEMENT ISSUES IN EU AND UNITED STATES MERGER LAWS

A. *The Community Dimension: Resolving Jurisdictional Issues Among the EU Commission and the Member States*

The EU Commission exercises its exclusive jurisdiction only over concentrations which have a "Community dimension."[157] Those particularly affected by the Merger Regulation, however, are mergers of substantial size whose effects span more than one member state.[158] Pursuant to Article 1(2) of the Merger Regulation, a concentration has a Community dimension when the aggregate worldwide turnover of the companies involved is more than five billion European currency units (ECU) (approximately six billion United States dollars) and the aggregate Community-wide turnover for a least two companies involved is more

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150. Merger Regulation, *supra* note 18, art. 2(1)(b).

151. Afonso, *supra* note 49, at 31-32.

152. Dechery, *supra* note 78, at 320; Schwartz, *supra* note 14, at 655.

153. Dechery, *supra* note 78, at 320.

154. Afonso, *supra* note 49, at 31-32.

155. *Id.*

156. *de Havilland*, 1991 O.J. (L 334) ¶¶ 65-69 (concentration averaged 70%); *Accor/Wagons-Lits*, 1992 O.J. (L 204) ¶ 25.

157. Merger Regulation, *supra* note 18, art. 21(2).

158. *Id.* art. 1(2) (defining scope of Merger Regulation).

than 250 million ECU (approximately 290 million United States dollars).[159] A concentration will not have a Community dimension if each of the participants achieves at least two-thirds of its Community turnover in the same member state.[160]

Special turnover amounts and methods of calculation are reserved for insurance companies and banks in Article 5(3) of the Merger Regulation.[161] Before the end of the first four years of the enactment of the Merger Regulation, *i.e.*, before 1994, these thresholds will have been revised downward.[162] Thus, the quantitative threshold will have answered the procedural question concerning who has jurisdiction over any merger, the EU Commission or the member states.[163]

In reaction to political pressure, two exceptions to the exclusive competence of the EU Commission were introduced in the Merger Regulation.[164] These exceptions permit member states to assert jurisdiction over a merger.[165] The first exception to exclusive competence, found in Article 9 of the Merger Regulation, provides for regional competition protection based on geographic market determination.[166] This provision, also called the "German clause," entitles a member state to demand that the EU Commission allow national competition agencies to control and analyze a concentration of Community dimension.[167] To invoke this clause, the member state must demonstrate that the merger would impede competition in a distinct market in its territory.[168] The claim is then analyzed by the EU Commission according to the factors contained in Article 9(7) prior to its final decision to accept or reject this member state demand.[169] These factors include: the nature and characteristics of the products or services concerned; the existence of entry barriers; consumer preferences; and

159. *Id.*

160. *Id.*

161. Merger Regulation, *supra* note 18, art. 5(3).

162. *Id.* art. 1(3).

163. Haake, *supra* note 132, at 502.

164. Schwartz, *supra* note 14, at 657.

165. Merger Regulation, *supra* note 18, arts. 9, 21(3).

166. Schwartz, *supra* note 14, at 657 n.370.

167. *Id.* art. 9.

168. *Id.* art. 9(2).

169. Merger Regulation, *supra* note 18, art. 9(7).

substantial price differences.[170] This procedure is exceptional and will be modified in 1994.[171] The revision may require member states to give serious reasons for asserting jurisdiction.

The second exception is contained in Article 21(3) of the Merger Regulation.[172] The "British clause" allows a member state to assert jurisdiction over a merger under its domestic law after an EU Commission decision is rendered, if doing so would protect "legitimate national interests."[173] The member state's broad assertion may include "public security, plurality of the media and prudential rules for financial institutions."[174] This non-exclusive list has created a gap in the Merger Regulation, thereby permitting social, economic, technological and regional criteria to enter the merger analysis.[175]

A member state's ultimate opportunity to check and analyze a concentration arises if the thresholds of Article 1(2) are not reached.[176] In this case, a member state may control concentrations by applying its own domestic antitrust rules. Should a member state lack domestic merger laws, the "Dutch Clause" contained in Article 22(3)-(6) of the Regulation may be invoked.[177] The provisions permit the member state to forward the merger to the EU Commission.[178] The Commission will then exercise its jurisdiction despite the failure of the threshold Community dimension test and will act only if this concentration "affects trade between member states."[179] It remains to be determined whether Articles 85 and 86 could be applied below the EU thresholds either by the member states that have no merger legislation or by the EU Commission itself under Article 22(3).

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170. *Id.* In French, this clause is called *le renvoi.* Dechery, *supra* note 78, at 324.

171. *Id.*

172. Merger Regulation, *supra* note 18, art. 21(3).

173. *Id.*

174. *Id.*

175. Schwartz, *supra* note 14, at 658.

176. Due to the high thresholds of the Merger Regulation, this could happen quite frequently.

177. Merger Regulation, *supra* note 18, arts. 22(3)-22(6).

178. *Id.*

179. *Id.* art. 22(3).

B. Merger Procedures in the EU and the United States: An Overview

The Merger Regulation requires undertakings involved in a concentration of Community dimension to notify the EU Commission within one week of their decision to merge.[180] Upon notification, the merger's realization is suspended for three weeks.[181] The EU Commission then has one month to decide either to formally investigate the merger, to authorize the merger, or to deny the merger (First Phase).[182] If the EU Commission chooses to investigate the matter more thoroughly, it must give its final decision after four months of inquiry (Second Phase).[183] During this four-month delay, the companies involved may request that the EU Commission change part of the merger agreement or settle problematic issues in order to avoid a potential denial by the Commission.[184]

During the inquiry, the EU Commission has broad investigatory and enforcement powers.[185] In addition, the EU Commission can impose fines and/or periodic penalty payments on the merging firms.[186] These powers are identical to the coercive powers it exercises when applying Articles 85 and 86.[187] Furthermore, if a merger was illegally realized, the EU Commission can require the companies to dissolve the merger, to stop the common control of the new entity, or to apply any other means that it deems appropriate in order to restore effective competition.[188] In the event the EU Commission fails to make a decision within the time limits imposed by the Merger Regulation, the merger shall be declared compatible with the Common Market.[189] Any

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180. *Id.* art. 4(1).

181. *Id.* art. 10.

182. Merger Regulation, *supra* note 18, art. 7(1).

183. *Id.* art. 10(3).

184. Helmut Bergmann, *Settlements in EC Merger Control Proceedings: A Summary of EC Enforcement Practice and a Comparison with the United States*, 62 ANTITRUST L.J. 47, 50 (1993).

185. Merger Regulation, *supra* note 18, arts. 11, 13.

186. *Id.* arts. 14, 15.

187. *See* Council Regulation 17/62, 1962 J.O. 13/204 O.J. 1959-62, 87.

188. Merger Regulation, *supra* note 18, art. 8(4).

189. *Id.* art. 10(6).

final EU Commission decision can be challenged before the European Court of Justice.[190]

The United States merger procedure is detailed in the Hart-Scott-Rodino Antitrust Improvement Act of 1975.[191] The H.S.R. requires that both the Federal Trade Commission and the Department of Justice be notified of any assets valued above specific thresholds prior to the completion of the merger.[192] These mergers cannot be completed pending the expiration of a statutory thirty-day waiting period.[193] The waiting period is intended to enable the responsible enforcement agency to determine whether the transaction should be challenged as unlawfully anti-competitive.[194] If the parties believe a risk that their merger would threaten competition exists, they may use "back out" language in their reports. Such language permits withdrawal from the merger without sanction should the competent authority decide to initiate an enforcement action.[195] The H.S.R. also requires the parties seeking the merger to provide the competent authority with detailed information concerning such issues as their revenues, market shares, and relevant competition in the market, as does the EU Merger Regulation.[196]

Both the United States and the EU protect the confidentiality of any corporate information received.[197] The United States prohibits divulgence of premerger notification filings to the public unless it is relevant to other administrative or judicial actions.[198] The EU's secrecy rules, on the other hand, permit the use of this confidential information only for purposes related to the investigation.[199] Before the EU Commission publishes the merger notification, it considers the legitimate confidential concerns of the undertakings involved in releasing information to the public.[200]

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190. *Id.* art. 16.

191. Hart-Scott-Rodino Act, *supra* note 51, § 18(a).

192. Adler, *supra* note 59, at 139.

193. Hart-Scott-Rodino Act, *supra* note 51, § 18(a).

194. Adler, *supra* note 59, at 139-40.

195. *Id.* at 140.

196. *Id.*

197. Haake, *supra* note 132, at 508.

198. *Id.*

199. *Id.*

200. *Id.*

C. *Settlement Practice in EU and United States Merger Controls*

Merger negotiations have developed as a viable option to resolve disputes over a merger agreement. Negotiating a settlement with antitrust enforcement agencies often represents the best option to avoid a denial of the merger when taking into account the financial and economic importance of the merger to the parties involved. Additionally, settlement avoids any negative publicity.[201] Even though the EU merger settlement practice has existed for only three years subsequent to the Merger Regulation, negotiation resolutions are similar to those obtained in the United States.[202] The bargained-for outcomes may include partial divestments and conclusions of licensing agreements.[203] This practice has been called "regulation by bargaining," because it "concentrates on the non-formal regulation that occurs within the interstices of the structured regulatory scheme."[204]

1. EU Settlement Practice as Compared to United States Consent Decrees

Negotiation and settlement can arise at any time between the undertakings and the EU Commission.[205] During these negotiations, the EU Commission has greater power relative to United States antitrust agencies because it can prevent a merger without judicial enforcement.[206] If the EU Commission, during its four-month inquiry, identifies some questionable elements of the merger, it can arrest the merger by issuing a statement of objection.[207] In response, the parties may try to convince the EU Commission of the legality of the merger and of the non-distorted competitive result.[208] In general, the parties will be motivated to settle their dispute with the EU Commission. If an

201. Bergmann, *supra* note 184, at 51; Allen Boyer, *Form as Substance: A Comparison of Antitrust Regulation by Consent Decrees in the U.S.A., Reports of the Monopolies and Mergers Commission in the U.K., and Grants of Clearance by the European Commission*, 32 INT'L & COMP. L.Q. 904, 905 (1983).

202. Bergmann, *supra* note 184, at 47-48 n.3.

203. *Id.* at 48.

204. Boyer, *supra* note 201, at 904.

205. Bergmann, *supra* note 184, at 50.

206. *Id.*

207. *Id.*

208. Merger Regulation, *supra* note 18, art. 18.

agreement is reached between the companies involved and the EU Commission, the Commission will render a final and formal decision.[209] This decision explains and approves the merger, and defines any elements of the merger agreement the parties will have to amend.[210]

Pursuant to Article 8 of the Merger Regulation, settlements should be realized in the Second Phase of the procedure.[211] On five separate occasions, however, the EU Commission negotiated a settlement prior to the end of the First Phase.[212] These settlements were negotiated in the interest of consummating the transaction quickly so as not to suffer costly delays in the proceedings and to avoid negative publicity at the opening of a Second Phase.[213]

In the past three years, the EU Commission has rendered four partial divestiture decisions to eliminate the anti-competitive effects of future mergers.[214] In the *Accor/Wagons-Lits*[215] settlement, the EC Commission accepted the French company's offer to sell portions of Wagons-Lits which had competed with its preexisting business in the highway catering sector in France.[216] This sale eliminated the increase of Accor's share in the relevant market and, as a consequence, eradicated the antitrust concern.[217] In *Magneti Marelli/CEAc*,[218] Fiat announced that it intended to acquire a majority interest in the stock of CEAc.[219] The EC Commission issued a statement of objection, having determined that the merger would significantly increase Fiat's market share and would give Fiat a dominant position in the French car-battery market.[220] Shortly thereafter, a settlement was reached, and Fiat reduced its controlling interest in its competitor to a minority interest.[221] The

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209. Bergmann, *supra* note 184, at 50. The EU Commission has generally imposed time limits for the parties to satisfy the conditions of the agreement. *Id.* at 50 n.15.

210. *Id.* at 51 n.17.

211. Merger Regulation, *supra* note 18, art. 8.

212. Bergmann, *supra* note 184, at 51.

213. *Id.*

214. *Id.* at 56.

215. *Accor/Wagons-Lits*, 1992 O.J. (L 204) 1.

216. Bergmann, *supra* note 184, at 57 n.54.

217. *Id.*

218. Case IV/M 043, Magneti Marelli/CEAc, 1991 O.J. (L 222) 38.

219. Bergmann, *supra* note 184, at 57.

220. *Id.*

221. *Magneti Marelli/CEAc*, 1991 O.J. (L 222) 38.

complexity of this case, abridged here for reasons of clarity, demonstrates the "flexibility" the EU Commission has developed in an effort to achieve fair competition in the EU market.

The most important settlement case was decided in 1992. In *Nestlé/Perrier*, Nestlé intended to acquire a controlling interest in Perrier, thereby giving it a dominant position in the French bottled water market.[222] To avoid an anti-competitive effect, the EU Commission required Nestlé to sell part of its assets to an approved buyer, creating a third competitor in the relevant market.[223] In fact, the EU enforcement agency wanted a guarantee that the "new market entrant would be a viable competitor to the only two strong French water companies," including Nestlé/Perrier.[224] A settlement was reached, denying Perrier the right to buy any share in the relevant market for ten years.[225]

In May 1993, a partial divestment settlement was rendered in *KNP/BT/VRG*.[226] The merger of three Dutch printing press service companies was challenged, and the EC Commission required the undertakings involved to end their relationships with one of two important suppliers and to divest other assets.[227] Once these conditions were met, the merger was accepted.[228]

Settlement solutions can also be found through means less important than partial divestiture. For instance, merging companies might have to lease or license key assets or important patent technology, or change suppliers.[229] In *Du Pont/ICI*, for example, the EU Commission imposed conditions to reduce the market power of the undertakings involved, to control their future conduct, and to assure the independent actions of third parties.[230]

The United States, on the other hand, attains negotiation resolutions through consent decrees. A consent decree is "a compromise

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222. *Nestlé/Perrier*, 1992 O.J. (L 356) 1.

223. Bergmann, *supra* note 184, at 59 n.46.

224. *Id.* at 61.

225. *Id.* at 59.

226. Case IV/M, KNP/BT/VRG, EC Commission Decision of May 4, 1993 (unpublished).

227. Bergmann, *supra* note 184, at 60.

228. *Id.*

229. *Id.* at 68.

230. *Du Pont*, 1993 O.J. (L 7) 13.

settlement of an antitrust suit."[231] The Department of Justice and the companies involved negotiate a compromise.[232] The resulting consent decree "is later ratified as an order of the federal court."[233] The legal nature of this compromise is therefore quasi-contractual, quasi-judicial.[234] The consent decree obliges the undertaking defendant to change or refrain from certain activities.[235] In return, litigation is averted.

Specific procedural rules contained in the Tunney Act[236] govern consent decrees. Publication of the Department of Justice's proposal in the Federal Register is mandatory.[237] This publication includes a "competitive impact statement" explaining any alternative solutions.[238] An interested party may submit comments concerning the decree and demand to participate in the court's consideration of the settlement.[239] Contrary to practice of the EU, United States agencies can analyze a merger under Section 7 of the Clayton Act even if no premerger filing under the H.S.R. has been completed.[240]

United States consent decrees, similar to EU merger settlements, often require companies to divest assets in order to reduce their power in the relevant market.[241] Occasionally, United States antitrust agencies compel an assurance from the acquiring company that it will continue the business as an independent, autonomous competitor.[242] The EU has not yet used such a provision.[243] Substantively, the United States practice of consent decrees appears to be similar to EU Commission decisions.[244]

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231. Boyer, *supra* note 201, at 905.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. 15 U.S.C. § 16 (1988).

237. Bergmann, *supra* note 184, at 52.

238. 15 U.S.C. § 16.

239. Bergmann, *supra* note 184, at 53.

240. *Id.* at 54.

241. *E.g.*, United States v. Pacific Dunlop Holdings Inc., 1990-1 Trade Cas. (CCH) ¶ 69,087 (E.D. Pa. 1990).

242. Bergmann, *supra* note 184, at 62.

243. *Id.*

244. *Id.*

For example, in the *Pilkington Brothers*[245] consent decree, the F.T.C. required that Pilkington Brothers, an acquiring company in float glass concerns, preserve part of its business and divest some interests acquired from its competitors.[246] Thus, the goal of the F.T.C. in the *Pilkington* decision seemed to be the same as that of the EC Commission in *Magneti Marelli/CEAc*.[247]

2. Enforcement of EU Settlements and United States Consent Decrees

Administrative agencies of the EU and the United States must control the application of settlement agreements. To that end, monitoring measures are applied.[248] Under Articles 11 and 13 of the Merger Regulation, the EU Commission has broad investigative powers.[249] When a settlement is breached or when divestiture fails, the EU Commission can abrogate its prior positive decision and impose fines on the concerned companies.[250] In *Nestlé/Perrier*, for example, the EU Commission explicitly stated that its decision was revokable within a specified period if obligations were not fulfilled.[251] In contrast, many United States consent decrees include a "visitorial clause"[252] giving antitrust enforcement agencies the right to send representatives to the corporate premises to inspect records and correspondence related to the decree.[253]

Despite the differences between the EU and the United States concerning procedural and enforcement issues, the purpose of each system is to challenge all mergers that could threaten competition in the relevant market.[254] Due to the internationalization of the world's economy and the increase of merger transactions requiring complex analysis, antitrust agencies have had difficulty acquiring world-wide data.

245. 103 F.T.C. 707 (1984).

246. Bergmann, *supra* note 184, at 62 n.52.

247. *Id.* at 62.

248. *Id.* at 87.

249. Merger Regulation, *supra* note 18, arts. 11, 13.

250. *Id.* arts. 8(5)(b), 14(2)(a).

251. *Nestlé/Perrier*, 1992 O.J. (L 356) 1.

252. Bergmann, *supra* note 184, at 87.

253. *Id.*

254. Haake, *supra* note 132, at 503.

Although a merger involving a joint decision by the EU Commission and a United States agency has not yet occurred, such a situation might arise given the parallel development of EU-United States relations, in which such information would prove invaluable.[255]

D. *Extraterritoriality of Merger Rules Resulting in the United States-European Union Agreement of 1991*

The globalization of world business has required an extraterritorial application of merger laws by both the EU Commission and United States agencies. Recent merger analysis has involved foreign companies,[256] and antitrust rules have been applied abroad against foreign defendants.[257] This extraterritoriality has been recognized by both the EU Commission and United States antitrust enforcement agencies.[258] In addition, both the EU and the United States have imposed extraterritorial sanctions upon companies in violation of their respective antitrust merger laws.[259]

Historically, the first attempt to create world-wide cooperation on policing international mergers was a draft convention on the control of international cartels submitted to the Council of Europe in 1951.[260] This effort failed in part due to simultaneous negotiations of the Treaty of Rome.[261] After several recommendations from the Organization for Economic Cooperation and Development (O.E.C.D.)[262] and the conclusion of four other bilateral agreements,[263] no specific text was enacted between the United States and the EC concerning an enforcement mechanism in the antitrust/merger field.[264]

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255. Bergmann, *supra* note 184, at 54.

256. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Ahlstrom v. Commission, 1988 E.C.R. 5193, 5243.

257. *Id.*

258. *Id.*

259. *Id.*

260. Allard D. Ham, *International Cooperation in the Antitrust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities*, 30 COMMON MKT. L. REV. 571, 573 (1993).

261. *Id.*

262. *Id.* at 574-575.

263. *Id.* at 575.

264. *Id.* No significant conflicts had previously arisen between the EU and the United States. Today, however, cooperative enforcement is indispensable.

The signing of the agreement between the United States and the EU (Agreement) on September 23, 1991, established an international enforcement mechanism.[265] Sir Leon Brittan acknowledged that "[f]acing up to the challenges of our interdependent world, and recognizing that both countries share a commitment to protect competition in their markets, the aim is to provide for rapid consultations procedures and dispute avoidance mechanism in competition matters."[266] The purpose of the Agreement is to advance the cooperation between EU and United States antitrust authorities.[267] Additionally, it will improve the coordination between each agency's actions, thereby reducing the number of discrepancies between their respective procedures.[268]

According to Article II of the Agreement, the parties involved shall notify each other "whenever [their] competition authorities become aware that their enforcement activities may affect important interests of the other Party."[269] This notification procedure distinguishes between enforcement actions relating to anti-competitive practices and enforcement actions relating to mergers and acquisitions.[270] Moreover, the parties agree to exchange data to facilitate enforcement of their respective antitrust rules and to promote better understanding of their economic incentives.[271]

Article III provides that, at least twice a year, United States and EU officials will meet to discuss mutual matters and to share information.[272] Such coordination will prevent duplication in investigations. In this manner, agencies' actions will be more efficient. Therefore, "if a Party believes that anti-competitive activities carried out in the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement

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265. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (1991) 30 I.L.M. 1487 [hereinafter Agreement].

266. Sir Leon Brittan, Jurisdictional Issues in EEC Competition Law, Hirsch Lauterpacht Lectures, at 23-24 (Cambridge, Grotius 1991).

267. Agreement, *supra* note 265, pmbl..

268. *Id.*

269. *Id.* art. II(1).

270. Ham, *supra* note 260, at 585.

271. *Id.* at 587.

272. Agreement, *supra* note 265, art. III.

activities."[273] In addition, confidentiality will be fully respected, and neither party will be required to provide information to the other party if the domestic law of the party possessing the information prohibits such disclosure.[274]

In general, the Agreement will be helpful to minimize points of conflict between the United States and the European Union. Nevertheless, its effectiveness could be limited in the United States because it has no binding effect on United States courts.[275] Two years after the effective date of the Agreement it will be reviewed by the two signatories to address any problems concerning enforcement of the Agreement.[276]

IV. Conclusion

Despite differences in the European Union's and the United States' exercise of merger control, the spirit of the laws are similar: to prohibit mergers that, according to their market influence and market power, could potentially threaten United States or impede EU free competition. Gaps in the interpretation of several elements of the Merger Regulation have not been caused solely by the newness of the EU merger regime. Political compromises created controversies at the outset. These gaps were anticipated, however, and it was intended that the Merger Regulation would be modified in 1994. The likely changes will concern thresholds which are considered too high, as well as Articles 9 and 22(3). United States and EU cooperation in the area of antitrust must proceed in the same direction, and similar factors must be applied to develop the effectiveness of the United States-European Union Agreement of 1991 in order for their respective laws to positively influence each other.

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273. *Id.* art. V.

274. *Id.* art. VIII.

275. Ham, *supra* note 260, at 597.

276. *Id.*