TRACING THE EXTRATERRITORIAL APPLICATION AND ENFORCEMENT OF EUROPEAN UNION COMPETITION POLICY CONCERNING TRANSNATIONAL MERGERS

I. INTRODUCTION 254

II. APPLICATION OF ARTICLES 85 AND 86 UNDER THE MEMORANDUM OF 1966 255
- A. *Application of Article 85 Under the Memorandum of 1966* 256
- B. *Application of Article 86 Under the Memorandum of 1966* 259
- C. *Article 86 and* Continental Can 260

III. THE MERGER REGULATION 264
- A. *Concentration and Joint Venture: Cooperative Versus Concentrative* 264
- B. *The Commission's Jurisdiction and "Community Dimension"* 267
- C. *The Compatibility Test Under the Merger Regulation* 270
- D. *Dominant Position* 271
- E. *Procedure Under the Merger Regulation* 277
- F. *Notification to the Commission* 278

IV. THE INTERNATIONAL IMPLICATIONS OF THE MERGER REGULATION 279
- A. *The Single Enterprise Doctrine* 279
- B. *The Effects Doctrine* 280

V. THE UNITED STATES-EUROPEAN UNION AGREEMENT OF 1991 282

VI. CONCLUSION 285

I. INTRODUCTION

With the ratification of the Single European Act (SEA) in 1986 came the promise of an integrated common market under the auspices of the European Economic Community (EEC). The pending economic integration posed unprecedented problems, including the restructuring of the Common Market. New regulations were necessary not only to ensure the proper functioning of an integrated market, but also to regulate the growing number of mergers between firms of the various member states.

Initially, the European Commission attempted to control mergers through the application of Articles 85 and 86 of the Treaty of Rome.[1] Article 85 prohibits agreements, decisions or concerted practices, the object or effect of which is to prevent, restrict or distort competition. Under Article 86, undertakings possessing a dominant position in the Common Market and abusing this position thereby affecting trade between member states, are likewise prohibited.

Application of Articles 85 and 86 failed to create a viable, comprehensive merger control regime. In response, the Council of Ministers adopted Council Regulation 4064/89 on the Control of Concentrations between Undertakings (Merger Regulation) in December 1989.[2] This agreement came into effect in September of 1990 and granted the Commission power to review Community concentrations.[3]

The proliferation of multinational corporations (MNCs) and the increase in the number of transnational mergers caused the jurisdictional reach of the Merger Regulation to extend beyond mergers occurring exclusively within Community borders. Inevitably, the extraterritorial reach of European Merger Regulation conflicted with that of the United States.

The United States possesses its own merger enforcement policies, as embodied in the 1992 Merger Guidelines.[4] The European

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1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 85-86.

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

3. *See* EEC TREATY art. 3(1) (providing that concentrations can arise from mergers or by acquisition of assets in one or more undertakings by one or more persons that already controlling undertaking).

4. 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].

Commission, the United States Department of Justice (DOJ), and the Federal Trade Commission (FTC), giving extraterritorial effect to their antitrust policies, often seek to apply their respective merger laws to the same parties. In order to alleviate both the ensuing jurisdictional conflict and the impediments such conflicts impose upon international trade, the EU and the United States attempted to coordinate their antitrust enforcement policies by entering into the 1991 United States-European Union Agreement on the Application of their Competition Laws. After examining the development of the EU merger regime, this comment will conclude that the 1991 Agreement provides two of the world's largest antitrust jurisdictions with a viable means of transnational merger enforcement.

II. APPLICATION OF ARTICLES 85 AND 86 UNDER THE MEMORANDUM OF 1966

The Commission initially attempted to regulate competition at the Community level by applying Articles 85 and 86 of the Treaty of Rome. To further this end, the Commission issued the Memorandum of 1966 addressing concentrations within the Community.[5] The Commission's purpose in issuing the Memorandum was two-fold: First, to aid EEC firms in adapting to the broader market that was envisioned under the unification of the Common Market;[6] and second, to ensure that the development of such a regulatory scheme would enable European firms to compete with firms outside the EEC.[7] The Commission added that this encouragement must be implemented to protect small and medium-sized firms from abuse by dominant firms.[8] Thus, the Commission encouraged further growth and concentration of European firms and at the same time sought to ensure that the concentration of undertakings was regulated to promote a competitive economy. The Commission was required to investigate concentrations to assure compliance with these goals.[9]

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

6. More specifically, the Commission warned that "mergers may prevent competition or unduly restrict the freedom of choice and of activity available to consumers, suppliers and purchasers." *Id.* preface.

7. *Id.*

8. *Id.* Part I(C), ¶ 1.

9. *Id.* Part I(C), ¶ 3.

A. *Application of Article 85 Under the Memorandum of 1966*

According to the Memorandum of 1966, any agreement, decision or concerted practice that has as its object or effect the restriction or distortion of competition violates Article 85 and is automatically void.[10] Article 85(3), however, provides an exception to this prohibition. Under Article 85(3), agreements, decisions or concerted practices that improve the production or distribution of goods or serve to promote technical or economic progress are permissible if they provide consumers a "fair share" of the benefit, are not indispensable to the attainment of these objectives, and do not eliminate competition in a substantial part of the market for the products in question.[11]

In the Memorandum of 1966, the Commission concluded that Article 85 could be applied to concentrations because no distinction is

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10. EEC TREATY art. 85(2). More specifically, Article 85(1) prohibits:

> [A]ll 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.

Id. art. 85(2).

11. *Id.* art. 85(3). Article 85(3) provides that:

> The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> — any agreement or category of agreements between undertakings;
> — any decision or category of decisions by associations of undertakings;
> — any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objections;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Id. See *infra* note 27, for examples illustrating the current application of Article 85(3) granting exemptions to joint ventures.

drawn between cartels and concentrations.[12] If it were applied to concentrations, however, "either too few cartels or too many concentrations would be caught by the ban of Article 85."[13] Consequently, its application would both inhibit competition and hinder the growth of a healthy economy. Application of Article 85(3) to mergers also would prove to be inadequate because the assessment required for an exemption cannot reliably be performed a priori.[14] Thus, according to the Commission, the ultimate effect of concentrations would be difficult to discern under Article 85(3). The Commission therefore believed that Article 85 should not apply to the regulation of concentrations because a per se prohibition with an extremely narrow exemption was inappropriate for concentrations.[15] Despite the Commission's strong language regarding the unsuitable application of Article 85 to mergers, this view was partially abandoned after the European Court of Justice's (ECJ) decision in the *Philip Morris*.[16]

In *Philip Morris*, the ECJ rejected the Commission's conclusion in the Memorandum of 1966 regarding the inapplicability of Article 85 to merger control.[17] The ECJ applied Article 85 and upheld the Commission's findings that the "1984 Agreements" between major players in the Common Market's cigarette market did not violate Article

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12. Memorandum of 1966, *supra* note 5, Part III(C), ¶ 5.

13. *Id.* Part III(C), ¶ 7. For example, the Commission pointed to the fact that Community legislation provides for a per se prohibition of cartels, even those that do not produce an impermissible amount of market power. *Id.* In addition, the Memorandum of 1966 notes that what may, in effect, constitute an impermissible concentration may be able to escape application of Article 85(1) because the agreement at issue may not be of the kind contemplated by Article 85(1). *Id.* Part III(C), ¶ 13. More specifically, Article 85 would not provide for adequate protection against mergers because it would not reach the most important types of concentrations – namely, a company's acquisition of holdings or participation in other companies, the total or partial acquisition of the capital assets of other companies, and the merger of 2 or more legally independent companies into a new company. *Id.* Part III(C), ¶ 14.

14. *Id.* Part III(C), ¶ 8.

15. JOHN COOK, EEC MERGER CONTROL: REGULATION 4064/89, 2 (1991).

16. Joined Cases 142/84 & 156/84, British-American Tobacco Co., Ltd. & R.J. Reynolds v. Commission, 1987 E.C.R. 4487 (1987) [hereinafter *Philip Morris*].

17. *Id.* ¶ 30. The ECJ stated that the main issue concerned not only whether Article 85 had been infringed upon in the 1984 Agreements but also whether Article 86 had been violated.

85(1) on the ground that these agreements lacked any anti-competitive object or effect.[18]

The Commission characterized the cigarette market as an oligopolistic and stagnant market in which minimal price competition and high entry barriers existed, because the undertakings operating in the market directed considerable resources toward research and advertising.[19] Based on the Commission's description of the cigarette market, the ECJ concluded that "any attempted takeover and any agreement likely to promote commercial co-operation between two or more of those dominant companies is liable to result in restriction of competition."[20]

Under Article 85, however, to prove that an infringement exists, the Commission must show not only that an agreement providing for a takeover "is liable to result in a restriction of competition,"[21] but also that "the agreement has the object or effect of influencing the competitive behaviour of the companies on the relevant market."[22] When determining whether a proscribed object or effect existed, account was taken of voting share percentages, the companies' respective interests in profitability and increasing market share, and the possibility of an exchange of information producing an anticompetitive effect.[23] Based on these criteria, the Commission concluded that Philip Morris' acquisition of a minority of the voting rights in Rothmans did not automatically constitute control of Rothmans or change the competitive position of the Community cigarette market. Thus, the object or effect necessary to trigger Article 85(1) was lacking.[24]

Recognizing the Commission's intent to continue following developments between the parties closely, the ECJ upheld the Commission's decision.[25] In addition, the ECJ held that Article 85 was

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18. *Id.* ¶ 1. Under the 1984 Agreements, Philip Morris, in response to the Commission's objections to a set of previous agreements, relinquished its 50% share of equity in Rothmans Tobacco in exchange for 30.8% in Rothmans International shares and 24.9% in Rothmans International votes. At the same time, Rembrandt, another major player in the cigarette market, held 30.8% of the shares and 43.6% of the votes in Rothmans International. *Id.*

19. *Id.* ¶ 43.

20. *Id.* ¶ 44.

21. *Philip Morris*, 1987 E.C.R. at 4487, ¶ 44.

22. *Id.* ¶ 45.

23. *Id.* ¶¶ 49, 53.

24. *Id.*

25. *Id.* ¶ 59.

also applicable to the acquisition of shares in competing undertakings when such acquisition "serve[s] as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market in which they carry on business."[26]

Although the Commission generally applies only the Merger Regulation to effectuate merger control, Article 85 remains a viable aspect of EC merger policy. For example, cooperative joint ventures, discussed later in detail, still fall within the scope of Article 85. In addition, Article 85(3) is still employed to grant exemptions to joint ventures that violate Article 85(1).[27]

B. Application of Article 86 Under the Memorandum of 1966

The Commission began utilizing Article 86 to control mergers upon issuance of the Memorandum of 1966.[28] Article 86 prohibits the abuse of a dominant market position and enumerates situations giving rise to such abuse.[29] Article 86 is applied when: "(a) one or more

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26. *Philip Morris*, 1987 E.C.R. at 4487, ¶ 37.

27. Even after adoption of the Merger Regulation, the Commission continues to use Article 85(3) to grant clearance for certain joint ventures. *See, e.g.*, Case IV/33 031, Fiat/Hitachi, 1992 O.J. (L 20) 10 (evidencing joint venture exempt from Art. 85(1) through Art. 85(3)).

For more on the application of Article 85(3) after adoption of the Merger Regulation, see also Scholler Lebensmittel GmbH & Co. KG, 1992 O.J. (L 183) 1; Joined Cases IV/33 440 & IV/33 486, Warner-Lambert/Gillette and BIC/Gillette, 1992 O.J. (L 116) 21; Case IV/30 717-A, Eurochèque: Helsinki Agreement, 1992 O.J. (L 95) 50; Case IV/31 553, Case IV/34 072, Langnese-Iglo GmbH, 1991 O.J. (L 183) 19.

28. EEC TREATY art. 86. Article 86 elaborates upon Article 85, providing

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

Id.

29. *Id.* Under Article 86:

> Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;

enterprises occupy a dominant position within the EC or within a substantial part thereof; (b) the dominant position is being improperly exploited; and (c) the abuse may affect trade between [m]ember [s]tates."[30] The Commission noted that a dominant position exists when a firm dominates a particular market by virtue of its economic power or its ability to substantially and foreseeably influence the market.[31]

Unfortunately, the Commission failed to specify the degree of impermissible market dominance, believing that the issue would be better evaluated on a case-by-case basis.[32] The Commission did, however, offer certain factors to be taken into account when assessing a market-dominating position: the relevant market in terms of product(s), geographic area, and time;[33] and the jeopardization of the purchasers', suppliers', and ultimate consumers' freedom of choice.[34] In short, the Commission concluded that Article 86 is violated when one dominant undertaking in the Community, or a substantial part of it, acquires a competitor, even if the ability to make that acquisition was not attributable to, or dependent upon the existing dominance.[35]

C. *Article 86 and* Continental Can

In *Continental Can*, the Commission brought proceedings pursuant to Article 86 against Continental Can, an American manufacturer of metal containers.[36] The Commission determined that Continental Can possessed a dominant position in the German market and, consequently,

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> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usages, have no connection with the subject of such contracts.

Id.

30. Memorandum of 1966, *supra* note 5, Part III(D), ¶ 20.

31. *Id.* Part III(D), ¶ 22.

32. *Id.* Part III(D), ¶ 23.

33. *Id.*

34. *Id.* Part III(D), ¶ 27.

35. COOK, *supra* note 15, at 2.

36. Case 6/72, Europemballage Corp. and Continental Can Co., Inc. v. Commission, 1973 E.C.R. 215, 216, [1973] C.M.L.R. 199 (1973) [hereinafter *Continental Can*].

in a substantial portion of the Common Market, by virtue of its ownership of SLW, a subsidiary of Continental Can located in Brunswick.[37] The Commission held that Continental Can had abused its dominant position when its subsidiary, Europemballage Corporation, acquired a majority interest in a Dutch corporation, TDV, thereby eliminating competition in the relevant product market.[38]

The ECJ disagreed and annulled the Commission's decision. Although Article 86 was applicable to mergers, the ECJ held that Continental Can had not violated Article 86 because the Commission had failed to prove an abuse of a dominant position had, in fact, occurred.[39] Furthermore, the ECJ found the Commission's definition of dominance erroneous, its conception of abuse of such position applied incorrectly, and its definition of the relevant market inadequate.[40]

The Commission's determination that Continental Can possessed a dominant position was based solely on market share. According to the ECJ, however, "even supposing that this element were correctly calculated it does not suffice to prove the existence of a dominant position."[41] The ECJ held that the existence of a dominant position is not necessarily linked with the share of the market held by the undertaking but with other factors liable to arise in that market from time to time.[42] To establish the existence of a dominant position, the relevant market must be defined. This definition, according to the ECJ, includes not only the production of the goods in question but also the competition of alternative products.[43] In *Continental Can*, the ECJ found that the Commission had not appropriately defined the relevant market because it failed to show how the three markets in question differed from the general market for light metal containers.[44] In order to delineate a relevant market from a larger market, the Commission should have looked to potential competition as it relates to the characteristics of

37. *Id.*

38. *Id.*

39. *Id.* at 248.

40. *Id.* at 223.

41. *Continental Can*, 1973 E.C.R. at 223–224.

42. *Id.* at 224. The ECJ justified its conclusion by pointing to the "increased dynamism of technology and of present-day markets" making the maintenance of a dominant position less likely. *Id.*

43. *Id.*

44. *Id.* at 246.

production and the likelihood that producers of similar goods could manufacture substitutes.[45]

The ECJ also held that no question of abuse arises when the concentration has been made possible without pressure by an offer made to the shareholders to purchase their shares at favorable prices.[46] The ECJ opined that abuse occurs when a dominant position is strengthened in a manner substantially fettering competition, leaving only undertakings in the market whose behavior depends on the dominant firm.[47]

Article 86 additionally requires a causal link between the dominant position and the abuse.[48] The ECJ concluded that such a link was lacking in *Continental Can* because Continental Can could have bought the TDV shares without controlling SLW and because it would have been impossible for Continental Can to abuse a dominant position in the Commission-defined market.[49] Thus, not only did Continental Can not abuse its dominant position but also the dominance occurred in a market other than that defined by the Commission.[50] Therefore, because the Commission failed to establish the existence and abuse of a dominant position, the ECJ ordered the Commission's decision annulled.

The ECJ's definitions of dominant position and abuse of a dominant position in *Continental Can* were approved and explained in the Commission's tenth annual Report on Competition Policy (Tenth Report).[51] In the Tenth Report, the Commission "clarified its policy

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45. *Id.* More specifically, under *Continental Can*, the Commission should have considered both supply- and demand-side substitutes; that is, the Commission should have considered both the ease with which suppliers from other market sectors could adapt their containers to compete with Continental Can and the feasibility of customers using other products to fulfill the same purpose as the containers produced by Continental Can. *Continental Can*, 1973 E.C.R. at 247.

46. *Id.* Thus, for Continental Can to have abused its alleged dominant position, it must have "used the allegedly dominant position of SLW in the Federal Republic of Germany with a view to purchasing the shares for TDV in the Netherlands." *Id.* at 225.

47. *Id.* at 244.

48. *Id.* at 225.

49. *Id.*

50. *Continental Can*, 1973 E.C.R. at 225. The purchase of TDV shares occurred neither on the market in which Continental Can had a dominant position nor on the German market in other competing products. *Id.*

51. COMMISSION OF THE EUROPEAN COMMUNITIES, XTH REPORT ON COMPETITION POLICY: 1980, pt. 1 (1980) [hereinafter XTH REPORT].

with respect to both dominant position and its abuse of merger cases."[52] The Commission stated that although firms possessing forty to forty-five percent of the share in a given market are likely to occupy a dominant position in that market,[53] possession of such a market share was not conclusive evidence of a dominant position.[54]

The Commission clarified the ECJ's position on abuse of a dominant position by stating that:

> [s]trengthening by means of merger is likely to constitute an abuse if any distortion of the resulting market structure interferes with the maintenance of remaining competition (which has already been weakened by the very existence of this dominant position) or its development. Such an effect depends, in particular, on the change in the relative market strength of the participants after the merger, *i.e.*, the position of the new unit in relation to remaining competitors.[55]

Thus, according to the Commission, mergers are impermissible under Article 86 when changes in market structure would interfere with competition, as measured by changes in the relative market strength of the merging enterprises.

After *Continental Can* and its progeny, it was apparent that the application of Article 86 to merger control was no longer a sufficient means of regulation because this strategy failed to provide meaningful thresholds for mergers which would fall within its scope, and also failed to adequately define dominance and abuse of a dominant position.[56] Additionally, because Article 86 only applies to firms possessing a preexisting dominant position, many impermissible mergers would evade its scope. Furthermore, application of Article 85 was similarly inadequate

52. FRANK L. FINE, MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC 32 (1989).

53. XTH REPORT, *supra* note 51, pt. 150.

54. *Id.* For example, the Commission pointed out that firms with 20-40% market share may still occupy a dominant position when "there are large gaps between the position of the firm concerned and those of its closest competitors and also other factors likely to place it at an advantage as regards competition." *Id.*

55. *Id.*

56. FINE, *supra* note 52, at 37, 38.

due to its application only to agreements.[57] Thus, neither Article 85 nor 86 was procedurally or substantively equipped to deal with the complexities of mergers.[58] In response to these problems, the Council issued the Merger Regulation.

III. THE MERGER REGULATION

A. *Concentration and Joint Venture: Cooperative Versus Concentrative*

Concentrations arise when two undertakings merge or when persons controlling one undertaking control parts or the whole of another.[59] Not all joint efforts, however, will be considered concentrations within the meaning of the Merger Regulation. The Merger Regulation distinguishes between concentrative and coordinative joint ventures (JVs).[60] Concentrative JVs are prohibited by the Merger Regulation, while JVs that are merely coordinative are not.[61] JVs are coordinative when the activities between two undertakings can be

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57. Marc Dassesse, *Selected Aspects of European Economic Community Law on Investments and Acquisitions in Europe*, 25 INT'L LAW. 375 (1991).

58. FINE, *supra* note 52, at 39.

59. Merger Regulation, *supra* note 2, art. 3(1). Article 3(1) provides that a concentration exists when:

> (a) two or more previously independent undertakings merge, or
> (b) one or more persons already controlling at least one undertaking, or one or more undertakings...acquire, whether by purchase of securities or assets, by contract, or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

Id. *See* Case IV/M 092, Re the Concentration between Renault, Volvo Bus and Heuliez, 5 C.M.L.R. M63, ¶ 4 (1992) (holding Art. 3(1)(b) was implicated because if joint takeover of subsidiary was allowed, Renault would increase shares in subsidiary from 49% to 75%) [hereinafter *Renault/Volvo/Heuliez*]. *See also* Case IV/M 024, Re the Concentrations between Mitsubishi Corporation and Union Carbide Corporation, 4 C.M.L.R. M50, ¶ 4 (1992) (holding Art. 3(1) would be violated because Mitsubishi was to purchase 50% interest in Union Carbide's carbon business) [hereinafter *Mitsubishi/Union Carbide*].

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

61. *Id.*

characterized as coordinated yet independent.[62] Concentrative joint ventures perform the functions of an autonomous economic entity on a lasting basis.[63] More specifically, joint ventures are concentrative when persons or undertakings acquire control by holding rights or having the power to exercise rights pursuant to a contract.[64]

Cooperative and concentrative joint ventures were clarified in the Commission Notice Regarding the Concentrative and Cooperative Operation under Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings (1990 Guidelines).[65] Pursuant to the 1990 Guidelines, JVs falling under the Merger Regulation are undertakings controlled by parent companies.[66] The 1990 Guidelines list several factors to be considered when determining whether control of a JV by parent undertakings is a

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62. *Id.* Article 3(2) provides that "[a]n operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration." *Id.* *See* Case IV/M 088, Enterprise Oil/Société Nationale Elf Acquitaine, 5 C.M.L.R. M66, ¶ 6 (1992) (holding joint venture was cooperative because both parent companies would compete in same market in which joint venture was to occur). *See also* Case IV/M 058, Baxter International/Nestlé SA, 5 C.M.L.R. M33, ¶¶ 5, 6 (1992) (holding joint venture was cooperative and not concentrative because parent companies did not completely withdraw from product market but kept joint venture dependent on parent's R&D, technology, manufacturing and trademarks and because ventures could withdraw from endeavor to return to their prior position).

63. Merger Regulation, *supra* note 2, art. 3(2). Concentrative joint ventures are those which "perform on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture." *Id.*

64. *Id.* art. 4. Under Article 4(a) and (b):

> [f]or the purposes of this Regulation, control shall be constituted by rights, contract or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the undertaking.

Id. Credit, financial, or insurance institutions "the normal activities of which include transactions and dealing in securities for their own account or for the account of others," are not generally considered to be concentrations. *Id.*

65. 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. (L 203) 6 [hereinafter 1990 Guidelines].

66. *Id.* ¶ 7.

concentration falling under the Merger Regulation.[67] These factors are based on contractual or other legal rights, such as: ownership or rights to use the JV's assets; influence over the composition; voting or decisions of the managing or supervisory bodies of the JV; voting rights in the managing or supervisory bodies of the JV; and contracts concerning the operation of the JV's business.[68] The most important factors, however, are the actual and potential effects of the joint venture on market relationships.[69] Concentrations, however, do not automatically violate

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67. *Id.* When more than 2 controlling undertakings exist which could effectively form voting coalitions and thus exercise control over the company, joint control can be inferred based on the particulars of the case. *Id.* ¶ 13. Such an inference may exist when a "convergence of economic interests" exists. *Id.*

68. *Id.* ¶ 10. According to the 1990 Regulation, joint control may be provided in the articles of incorporation or may be established after incorporation by virtue of a contractual right. 1990 Regulation, *supra* note 65, ¶ 11, 13. For an example of formation of joint venture that possessed the requisite control based on voting rights, see *Enterprise Oil/Société Elf Acquitaine*, 5 C.M.L.R. M66.

Both positive and negative conditions must be present in order to find that a concentrative joint venture exists. 1990 Regulation, *supra* note 65, ¶¶ 15-24. Positive conditions include the ability JV's to act as an independent supplier and buyer, the presence of the intention JV's to carry on its activity for an unlimited duration, and the ability JV's to form its own commercial policies. Negative conditions include the object or effect of coordinated competitive behavior, an understanding between the parent companies that they are going to pursue common interests, and, as a general rule, the parent company's activity in neighboring or up or downstream markets is present. *Id.* Situations in which such impermissible coordination occurs include those in which a JV takes over activities of the parent companies, enters the market of the parent companies, or enters markets which are neighboring, upstream, or downstream from that of the parent companies. *Id.* On the other hand, according to the 1990 Regulation, joint control is absent when one parent company can make unilateral decisions on the venture's commercial activities. *Id.* ¶ 12. The 1990 Regulation provides that absence of control exists when one company owns more than half of the JV's assets, can appoint more than half of the company's managers, controls more than half of the votes in any of the company's bodies, or possesses the sole right of management of the company. *Id.* ¶ 13.

69. 1990 Regulation, *supra* note 65, ¶ 23. According to the 1990 Regulation:

> [t]he dividing line between the concordance of interests in a JV and a coordination of competitive behaviour that is incompatible with the notion of concentration cannot be laid down for all conceivable kinds of cases . . the decisive factor is not the legal form of the relationship between the parent companies or between them and the JV. The direct or indirect, actual or potential effects of the establishment and operation of the JV on market relationships, have determinant importance.

Id.

the Merger Regulation when the undertakings operate in different markets and the JV is ancillary to the undertakings' agreement.[70]

For example, in *Omni Holding AG/ASKO Deutsche Daufhaus AG*,[71] the Commission found that a concentrative joint venture existed: first, when two non-competing firms each bought forty-eight percent shares in a subsidiary that operated in a market different from that of the acquiring firms; and second, when an agreement existed that provided that changes in the by-laws of the subsidiary must be approved by a two-thirds majority of the subsidiary's board of directors, that each parent was allotted fifty percent of the subsidiary's board seats, and that a simple majority was required for all supervisory board decisions. The Commission cleared the merger, however, because the combined entity would become the fourth largest competitor in the relevant markets, would not erect extra barriers to entry, and would not give the merged undertaking an impermissible degree of purchasing power, and the agreement between the parents and the joint venture was merely ancillary to the agreement's formation.[72]

B. *The Commission's Jurisdiction and "Community Dimension"*

The EC Commission is empowered to regulate only those concentrations that are of a "Community dimension."[73] A concentration must have a combined worldwide turnover of more than ECU five billion and each undertaking must have an aggregate Community turnover of at least ECU 250 million to rise to the level of Community dimension.[74]

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70. Case IV/M 065, Omni Holding AG/ASKO Deutsche, 5 C.M.L.R. M33 (1992). For other examples of ancillary restraints, see Case IV/M 010, Conagra France/Idea Industrie SA, 5 C.M.L.R. M19, ¶ 15 (1992); Case IV/M 070, Otto Versand/Grattan, 5 C.M.L.R. M49, ¶¶ 5, 6 (1992); *Renault/Volvo/Heuliez*, 5 C.M.L.R. M63, ¶ 7.

71. *Omni Holding*, 5 C.M.L.R. ¶¶ 3, 4, 5, 12.

72. *Id.* ¶¶ 5, 17-21.

73. *Id.* See *infra* note 94 for treatment of mergers that do not fall under the Merger Regulation.

74. Merger Regulation, *supra* note 2, art. 1(2). Article 1(2) specifically provides that

> (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million; and
> (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Proposed mergers that would exceed such thresholds, however, do not fall under the Community's jurisdiction if more than two-thirds of the ag'gregate Community-wide turnover occurs within one member state.[75]

To calculate aggregate Community-wide turnover, the Commission looks to annual product or service sales from the proceeding year minus sales rebates, Value Added Tax, and other taxes.[76] Calculation of the aggregate Community-wide turnover does not include the sale of products or services between undertakings.[77] The aggregate turnover of the undertaking concerned is then added to the turnover of other undertakings with which the original has a particular connection.[78] Such connections include:

> (i) undertakings in which the undertaking concerned directly or indirectly.

Id. Because the ECU 5 billion threshold is high, the Merger Regulation normally applies to larger mergers. Joel Davidow, *Competition Policy, Merger Control and the European Community's 1992 Program*, COLUM. J. TRANSNAT'L L. 11, 29 (1991). Mergers falling below these thresholds that adversely affect trade between Member States and create or strengthen a dominant position may still be dealt with by the Commission under the Merger Regulation if the Member State so requests. EEC TREATY art. 22(3). Where the merger falls below the thresholds and the Member State does not request that the Commission apply the Merger Regulation to the concentration at issue, the Member State may still seek to enforce its competition laws on the concentration. Merger Regulation, *supra* note 2, art. 9.

75. Merger Regulation, *supra* note 2, art. 1(2).

76. *Id.* art. 5(1). Article 5(l) provides that:

> [a]ggregate turnover within the meaning of Article 1 shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Id.

77. *Id.* According to some experts, because "few companies . . . yet maintain their accounts or accounting records in a form which immediately suits the turnover criteria in the Regulation . . . the practical difficulties of ascertaining accurate turnover figures should not be underestimated." COOK, *supra* note 15, at 46.

78. Merger Regulation, *supra* note 2, art. 5(4).

> — 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;
>
> (ii) subsidiary undertakings — undertakings having the rights or powers listed in (i) above, in the undertakings concerned;
>
> (iii) parent undertakings — undertakings in which a "parent" undertaking in (ii) above has the rights or powers listed in (i) above; and
>
> (iv) collateral undertakings -- undertakings in which two or more other undertakings, being the undertaking concerned itself, or any undertakings within (i) to (iii) above jointly have rights or powers of ownership or control mentioned in (i) above.[79]

Article 5(2), providing an exception to Article 5(4), allows only the vendor's turnover to be taken into account when the concentration consists of the acquisition of portions of one or a number of undertakings. In such a case, only the portions that are the subject of the transaction are taken into account.[80] The Community is divested of jurisdiction over concentrations of a "Community Dimension," however, when more than two-thirds of the Community-wide turnover occurs within one member state.[81] The member state generally resolves any complaints.[82]

The Commission addressed the problem of assessing the Community dimension in a merger between two non-EC firms in *Delta Airlines/Pan Am.*[83] Three methods of allocating turnover for non-EC airlines that carried passengers between the Community and the United States exist: attributing the revenues from transatlantic flights to the

79. *Id.*

80. *Id.* art. 5(2).

81. *Id.* art. 2(1).

82. *Id.*

83. Case IV/M 130, Delta Airlines Inc./Pan Am Corporation Co., 5 C.M.L.R. M56 (1992).

point of destination outside the United States; equally dividing the revenues between the country of origin and of destination, or attributing the revenues to the country in which the ticket was issued.[84] The Commission did not determine which alternative was applicable because the turnover threshold would have been surpassed regardless of the method chosen.[85]

The two-thirds rule was further clarified with useful examples in the 1990 Regulation.[86] When applying the two-thirds rule, a proposed concentration must calculate consolidated profit and loss accounts with regard to the sales revenues worldwide, sales within the Community, and sales within the particular member state, for both undertakings.[87] According to some commentators, the two-thirds rule permits concentrations to avoid the Merger Regulation by reason of their purely domestic nature, although the incidence of cross-border mergers is likely to increase as the Single European Market becomes increasingly integrated.[88]

C. *The Compatibility Test Under the Merger Regulation*

Article 2(3) of the Merger Regulation, using language similar to that of Article 86 of the Treaty of Rome, provides that when a concentration "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the

84. *Id.* ¶ 9.

85. *Id.*

86. 1990 Guidelines, *supra* note 65. First, assuming that a proposed undertaking between Undertaking A and Undertaking B exists when Undertaking A has a Community-wide turnover of ECU 8 billion and Undertaking B's turnover is ECU 400 million and A has an ECU 6 billion turnover in a given member state while B has an ECU 200 million turnover in that state, A achieves more than two-thirds (75%) of its Community-wide turnover in the member state. Despite this fact, the concentration would fall under the scope of the 1990 Guidelines because B achieves less than two-thirds (50%) of its Community-wide turnover in the member state. *Id.* Guidance Note IV on the Application of the Two-Thirds Rule, art. 1, ¶ 3.

Second, when both achieve more than two-thirds of their Community-wide turnover in the same member state, the concentration would not fall under the 1990 Guidelines. If, however, B achieves its two-thirds in a state different from the one in which A achieves its two-thirds, the proposed concentration would fall under the 1990 Guidelines. *Id.* *See Mitsubishi/Union Carbide*, 4 C.M.L.R. M50.

87. 1990 Guidelines, *supra* note 65, Guidance Note IV on the Application of the Two-Thirds Rule, art. 1.

88. COOK, *supra* note 15, at 44.

common market or in a substantial part of it,[89] the Commission must declare it incompatible with the Common Market.[90] As part of the compatibility test, the Commission will take into account: 1) the need to maintain and develop effective competition; 2) the structure of the market; 3) actual or potential competition of undertakings found both inside and outside the Community; 4) the market position and the economic power of the undertaking; 5) possible alternatives available to suppliers and users; 6) access to markets; 7) entry barriers; 8) consumer interests; and 9) technological and economic development benefits to consumers that do not impede competition.[90] Finally, Recital 15 provides that when the combined market share of the undertakings concerned is less than twenty-five percent, a merger is presumed compatible with the Common Market.[91] Despite the specification of factors to be considered, the Merger Regulation fails to provide criteria with which to analyze the creation or strengthening of a dominant position which substantially impedes trade in all or part of the Common Market. Subsequent enactments and decisions by the Commission and the ECJ remove some of these ambiguities with regard to the definition and analysis of dominant position.

D. Dominant Position

When analyzing dominant position, the Commission has looked to market share, the size and importance of remaining competitors, entry barriers, imperfect substitutes, and buying power.[92] The relative importance of each factor varies from case to case;[93] however, market share is consistently the most important factor as large market shares are in themselves evidence of the existence of a dominant position.[94]

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

90. *Id.* art. 2(1).

91. *Id.* at Recital 15. *See, e.g.*, Case IV/M 027, *Promodes/Distribuciones SA*, 5 C.M.L.R. M25 (1992).

92. CHRISTOPHER JONES & ENRIQUE GONZALES-DIAZ, THE EEC MERGER REGULATION 132-49 (1992).

93. *Id. See Mitsubishi/Union Carbide*, 4 C.M.L.R. M50 (holding although company had 35-40% market share and possessed dominant position, entry barriers and stage of market development must still be taken into account).

94. Case 85/76, Hoffmann-LaRoche & Co. v. Commission, 1979 E.C.R. 461 (1979), ¶ 71. Most cases look primarily to market power as did *Hoffmann-LaRoche*. The Commission and the ECJ, however, will take other factors into account. *See Mitsubishi/Union Carbide Corporation*, 4 C.M.L.R. M50.

To determine market share, the Commission must first determine the affected markets. Affected markets are those in which the combined market share of the undertakings in question exceeds ten percent.[95] The Community defined relevant product market, in *Aérospatiale-Alénia*,[96] as one "compris[ing] in particular all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices, and intended use."[97] As a general rule, none of the above factors, singly, will produce a definition of the relevant product market. Nevertheless, factors such as price and end

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For additional cases that take other factors beyond market share into account and that did not clear the proposed merger, see *Magneti Marelli/CEAc*, 1991 O.J. (L 222) 38; *Varta Batterie AG/Robert Bosch GmbH*, 5 C.M.L.R. M1.

For cases that cleared the merger based on factors other than market share see Case IV/M 080, La Redoute Catalogue SA/Empire Stores Group plc, 5 C.M.L.R. M39 (1992) (holding merger does not fall under Merger Regulation where 2 undertakings are in overlapping activities in market, when increase in power due to merger is minimal, and no extra barriers to market entry would be erected); Case IV/M 026, Cargill/United Agricultural Merchanting Limited, 4 C.M.L.R. M55 (1991) (holding although merger would give undertakings 26% of market in one affected product market and 12% in other product markets, undertakings did not possess dominant position because of low concentration in market, consumer choice between 8-10 dealers and low entry barriers).

95. Form CO Relating to the Notification of a Concentration Pursuant to Council Regulation 4064/89, Regulation 2367/90, 1990 O.J. (L 219) 5, § 5 [hereinafter Form CO]. According to Form CO, affected markets are those:

> consist[ing] of relevant product markets or individual product groups, in the Common Market or a Member State or, where different, in any relevant geographic market where:
>
> > (a) two or more of the parties . . . are engaged in business activities in the same product market or individual product group and where the concentration will lead to a combined market share of 10% or more. These are horizontal relationships; or
> >
> > (b) any of the parties is engaged in business activities in a product market which is upstream or downstream of a product market or individual product group in which any other party is engaged and any of their market shares is 10% or more, regardless of whether or not any existing supplier/consumer relationship between the parties concerned. These are vertical relationships.

Id.

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

97. *Id.*

use[98] often take precedence over other factors such as consumer preference.

Relevant markets are also defined in terms of actual and potential geographic markets. A geographic market includes the region in which the goods or services are supplied and in which competitive conditions are fairly homogeneous.[99] When assessing geographic markets, the Commission looks to the nature and characteristics of the market,[100] including barriers to market penetration, differing local specification requirements, national procurement policies, cross-border import, distribution and marketing infrastructure, transport costs, language, consumer preference, potential competition, price differences, large market share differences, perceptions of consumers, and homogeneous conditions of competition.[101]

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98. *See, e.g.*, Case IV/M 017, *Aerospatiale/MBB*, 1991 O.J. (C 59) 13, 4 C.M.L.R. M70 (1992) (holding that civilian and military helicopters formed 2 different relevant product markets because of end use – different characteristics, structure of demand and conditions of competition).

See also Varta Batterie AG/Robert Bosch GmbH, 5 C.M.L.R. M1 (holding different product markets were established based on manufacturers having to adapt commercial and entrepreneurial policies to different conditions of competition).

99. Form CO, *supra* note 95, § 5. § 5 provides that a relevant geographic market:

> comprises the area in which the undertakings concerned are involved in the supply 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. Factors relevant to the assessment of the relevant geographic market include the nature and characteristics of the products or services concerned.

Id.

100. *Id.*

101. JONES & GONZALEZ-DIAZ, *supra* note 92, at 118-28. *See Cargill/United Agricultural Merchanting Limited*, 4 C.M.L.R. M55 (assessing geographic market in agricultural merchanting sector).

General trends in defining the relevant geographic markets include: 1) the likelihoods that high-technology products that were developed fairly recently and that were neither "manufactured nor marketed on national lines" with high R&D costs "will often mean that supply is concentrated in a few companies and exported worldwide" and likely to be defined as Community or worldwide; 2) markets of consumer products that were "developed in national lines over a long period" will usually be defined according to consumer preference and lack of import/distribution structure, which, to date has meant a nationally-defined market; 3) industries such as banking and insurance, which are subject to regulator barriers are usually defined nationally; 4) service markets will usually

After having established the relevant product and geographic markets, and the shares of those markets possessed by the enterprise in question, the Commission evaluates the enterprise's dominance based on its freedom to act within that market.[102] This analysis assesses the competition's ability to constrain the firm possessing the high market share's freedom to act.[103] Thus, it is virtually impossible to provide any meaningful guidelines concerning which market shares constitute dominance.[104] Commission and ECJ decisions supply hints, however, to market share percentages considered dominant positions. When a concentration possesses less than twenty-five percent of the relevant market share, such a share is presumed compatible with the common market.[105] When a concentration is between twenty-five and thirty-nine percent, a finding of firm dominance is unlikely since the Commission has never identified a dominant position is this category.[106] When a concentration is between forty and sixty-nine percent, a finding of dominance will depend on the analysis of the importance of actual and potential competitors of merging firms.[107] When a concentration is above seventy percent, a strong indication of dominance is presumed, as evidenced by the Commission's statement in the ninth annual Competition Report that an "[eighty] percent share...[is] the appropriate cut-off."[108]

In addition to the nature of the relevant market, the Commission considers the maturity of the market, the length of time the undertaking has possessed a high market share, and factors that may reduce the

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be defined locally, and 5) the larger the purchasers of the product in question, the more likely that demand will itself look for supply wider than national borders. JONES & GONZALEZ-DIAZ, *supra* note 92, at 128-129. In addition, where competition conditions for a particular product vary significantly according to the Member State, the relevant geographic market is likely to be defined by a Member State's borders.

See also Magneti Marelli/CEAc, 1991 O.J. (L 222) 38 (holding relevant geographic market was that of Member State because manufacturers are able to charge different prices and market share varies significantly according to Member State borders).

102. JONES & GONZALEZ-DIAZ, *supra* note 92, at 133.

103. *Id.*

104. *Id.*

105. Merger Regulation, *supra* note 2, pmbl.

106. JONES & GONZALEZ-DIAZ, *supra* note 92, at 133.

107. *Id.* at 134.

108. COMMISSION OF THE EUROPEAN COMMUNITIES, IXTH REPORT ON COMPETITION POLICY 1979, ¶ 22 (1979).

likelihood that market power will result from high market shares.[109] When the market is mature, a high market share is more likely to confer market power than it would be in a market subject to innovation and rapid change.[110] Accordingly, the Commission has found that "high market shares on high growth markets involving modern technology are not extraordinary, and they do not necessarily indicate market power...[especially when] there has been constant change...of market leadership."[111] If an undertaking has occupied a high fluctuating market share, however, the undertaking is likely to lack market dominance.[112] In addition, if one enterprise mergers with another that is failing, the addition of market share may not represent the power actually resulting from the merger.[113]

When firms can compete with the enterprise holding a dominant position, the Commission will determine that such a high market share is permissible under the Merger Regulation. Accordingly, in *Tetra-Pak/Alfa-Laval*,[114] the Commission stated that "in certain rare circumstances even such a high market share [ninety percent] may not necessarily result in dominance. In particular, if sufficiently active competitors are present on the market, the company with the large market share may be prevented from acting to an appreciable extent independently of the pressures typical of a competitive market."[115]

The Commission, when examining a merger for dominance, will also look to the size and resources of competitive firms as they relate to spare capacity. In *Hoffmann-LaRoche*,[116] the court stated that unused manufacturing capacity must be taken into account when calculating potential competition between established firms. Accordingly, in *Aérospatiale/MBB*,[117] no dominance was found despite the fact that the merging companies would possess a fifty percent EC market share, because the competitive potential of United States manufacturers resulting from their considerable presence in the European civil and military

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109. JONES & GONZALEZ-DIAZ, *supra* note 92, at 133.

110. *Id.*

111. *Id.*

112. *Id.* at 134.

113. *Id.* at 135.

114. JONES & GONZALEZ-DIAZ, *supra* note 92, at 135.

115. *Id.*

116. *Hoffmann-LaRoche*, 1979 E.C.R. ¶ 48.

117. *Aérospatiale/MBB*, 1991 O.J. (C 59) ¶ 22.

helicopter market sufficiently guarantees that the new entity AS/MBB will not be able to behave independently of its competitors and customers.

Finally, commercial or technical advantages over competitors is often a determining factor in merger regulation. For example, in *Hoffmann-LaRoche*, the ECJ found that when a firm offers a range of products greatly exceeding that offered by its competitors, and when that firm holds a high share of the relevant market it has the ability to employ sales and pricing strategies without relying on the conditions of competition in the market to the same extent as other manufacturers.[118] In addition, whether a firm possesses technical advantages over competitors because secret technology or patents may be factors used to establish the firm's dominance.[119]

The degree to which entry barriers may affect a finding of enterprise dominance is often determined by factors such as the demand for products supplied by new entrants into the market, risk levels, and technical barriers to entry.[120] A concentration that leads to the creation of a dominant position, however, may be compatible with the Common Market if strong evidence exists that the position is only temporary and would be quickly eroded because of the high probability of strong market entry.[121] Other barriers considered in the Commission's assessment of dominance include marketing and distribution facilities, market structure organized according to long-term exclusive purchasing agreements with existing manufacturers, ownership of scarce raw materials necessary for entry by existing vertically integrated firms, degree of capital necessary to operate, and consumer preference (brand loyalty).[122] Finally, the Commission may review the entry barriers prior to the concentration's formation to establish the likelihood of future entry and the expectations of manufacturers and customers.[123]

Imperfect substitutes or products narrowly excluded from the definition of the relevant product market can often be used to restrain the

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118. *Hoffmann-LaRoche*, 1979 E.C.R. ¶ 21.

119. Case IV/32 043, Elopak v. Tetra Pak, 1988 O.J. (L 272) 27, ¶ 44, 4 C.M.L.R. 47 (1990).

120. JONES & GONZALEZ-DIAZ, *supra* note 92, at 144. *See La Redoute/Empire*, 8 C.M.L.R. ¶ 20 (holding when undertakings proposing concentration do not create or strengthen dominant position no significant entry barriers are erected).

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

122. JONES & GONZALEZ-DIAZ, *supra* note 92, at 146-47.

123. *Id.* at 147-48.

overall market power of a dominant firm.[124] Thus, the Commission will consider imperfect substitutions in its assessment of market power. For example, in *Sanofi/Sterling*,[125] the Commission held that a firm did not occupy a dominant position, in part because "some degree of substitution from alternative products not included in the operational market definition" exists in all cases.

The buying power of a concentration's potential or actual consumers can also limit a dominant firm's ability to act unilaterally. Substantial customers may encourage both product and geographic entry by other suppliers.[126] Accordingly, buying power was a central factor leading to the *Alcatel/Telettra* Court's decision that entry into Spain's telecommunications market could easily occur if Telefonica bought from an alternate supplier.[127]

E. *Procedure Under the Merger Regulation*

Implementation of the Merger Regulation entails the application of a complex procedure. The Commission, after establishing that a concentration falls within the ambit of the Merger Regulation, can initiate proceedings if the concentration's compatibility with the Common Market is in serious doubt.[128] The Commission also has been granted authority to suspend concentrations in whole or in part until it makes a final decision.[129] The Commission "may attach to its decision conditions and obligations intended to ensure that the undertaking concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to modifying the original concentration plan."[130] When undertakings do not notify the Commission of their intention to merge or to acquire shares in another undertaking, the Commission may require the already-merged undertakings or assets to be separated or joint control to cease or any other appropriate action to restore conditions of effective competition.[131] In the alternative, the Commission may either address

124. *Id.* at 148.

125. Case IV/M 072, Sanofi/Sterling, 1991 O.J. (C 156) 10, 4 C.M.L.R. 739 (1991).

126. JONES & GONZALEZ-DIAZ, *supra* note 92, at 149.

127. *Alcatel/Telettra*, 1991 O.J. (L 122) ¶ 40.

128. Merger Regulation, *supra* note 2, art. 6(1)(b), (c).

129. *Id.* art. 7(2).

130. *Id.* art. 8(2).

131. *Id.*

the case itself or refer the case to the authorities of a member state.[132]

The Commission may request information from Governments, authorities of member states, and from undertakings or associations of undertakings.[133] The Commission may also impose fines ranging from ECU 1,000 to 50,000.[134] These fines attach to undertakings that: 1) fail to notify the Commission of agreements with Community dimensions; 2) supply incorrect information; 3) supply incomplete business records; or 4) refuse to submit to an investigation by the Commission.[135] The fines, however, cannot exceed ten percent of the aggregate turnover of the undertakings.[136] Finally, the Commission may impose fines up to ECU 25,000 per day of delay upon any undertaking that fails to supply complete information or fails to submit to investigation. Fines of up to ECU 100,000 per day of delay may also be issued to compel concentrations to comply with Articles 7 and 8 of the Merger Regulation.

Despite this significant grant of authority, the Merger Regulation imposes some limits on the Commission.[137] For example, the ECJ has unlimited jurisdiction to review fines imposed by the Commission. In addition, jurisdiction taken by the Commission is subject to review by the ECJ.[138]

F. *Notification to the Commission*

In the case of a merger, the parties must jointly notify the Commission. In the case of the acquisition of a controlling interest in an undertaking by another, the acquirer must complete the notification.[139] As part of the notification process, Section 5 of Form CO issued by the Commission requires that the notifying party provide information concerning the product market, the relevant geographic market, and affected markets.

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132. *Id.* art. 9(3).

133. Merger Regulation, *supra* note 2, art. 11(1).

134. *Id.* art. 14(1).

135. *Id.* art. 14(1)(a)-(d).

136. *Id.* art. 14(2).

137. *Id.*

138. Merger Regulation, *supra* note 2, art. 16.

139. Form CO, *supra* note 95.

In addition to the information regarding affected markets, the notifying party must also satisfy general conditions of affected markets under Section 6 of the Merger Regulation. Section 6 requires: 1) information regarding the record of market entry over the previous five years; 2) information regarding factors influencing market entry, such as the total costs of entry from both a geographical and product viewpoint; 3) the nature of vertical integration of each of the parties; 4) an account of the importance of research and development; 5) the distribution and services networks that exist in the affected markets; 6) the competitive environment (including the names of the five largest suppliers, customers, and the structure of supply and demand); 7) the extent of the cooperative agreements (horizontal and vertical); 8) the names of trade associations, and 9) the worldwide context of the proposed concentration indicating the position of the parties in this market.[140]

IV. THE INTERNATIONAL IMPLICATIONS OF THE MERGER REGULATION

A. *The Single Enterprise Doctrine*

Under the Single Enterprise doctrine used to support the extraterritorial effect of EC competition law, the Commission has imputed the liability of an EC subsidiary to the non-EC parent company. The Single Enterprise doctrine imputes violations of EC competition policy to a non-EC undertaking when the company is based in the Community or is a non-Community company that has a branch in the Community, the non-Community company controls the Community company in such a way as to act as a single economic unit, and the non-Community company's control causes the Community company to engage in impermissible conduct.[141] In order for the Commission or the ECJ to exercise jurisdiction over non-Community firms, the non-Community firm must have a "presence" in the Community.[142]

The Single Enterprise doctrine was first expounded in *Imperial Chemical Ltd. v. Commission (Dyestuffs Case)*, in which the Commission held that various dyestuffs producers, including both EEC and non-EEC producers, had instituted uniform price increases, in violation of Article

140. Merger Regulation, *supra* note 2, art. 6. For more on notification and its accompanying procedure, see Règlement de la Commission, 1993 J.O. (L 336) 1, app. 5.

141. Case 48/69, Imperial Chemical Industries Ltd. v. Commission, 1972 E.C.R. 619, 662 (1972).

142. *Id.*

85(1). One such producer located outside the EEC was Imperial Chemical Industries, Ltd. (ICI) of the United Kingdom.[143] The ECJ held that the Commission had jurisdiction over ICI. ICI had used its power as the parent company to control its subsidiaries within the Community and to implement ICI's decisions. Thus, the susidiary's conduct that violated Article 85 could be imputed to the parent, even if the parent was located outside the Community. When a subsidiary has a separate personality, if it does not independently determine its conduct in the market but instead follows instructions issued by the parent company, the subsidiary's acts can be imputed to the parent acting as a single economic entity.[144]

In *Istituto Chemioterapice Italiano v. Commission (Commercial Solvents)*,[145] the *Dyestuffs* decision was taken one step further. In *Commercial Solvents*, the EEC company at issue was not wholly-owned by Commercial Solvents, a United States corporation. The ECJ held, however, that its conduct could still be imputed to *Commercial Solvents* because it controlled the EEC company's relations with other EEC corporations. Again, the actions of the EEC corporation could be imputed to the non-EEC corporation as a result of functioning as a single economic unit.[146]

B. The Effects Doctrine

In addition to the Single Enterprise doctrine, the Community may exercise jurisdiction over non-Community firms by virtue of the Effects doctrine,[147] whereby the Community can exercise jurisdiction over non-Community corporations when agreements affect trade among the member states, even if the agreements are not formed within the Community.[148] In *Åhlström Osakeyhtiö v. Commission (Wood Pulp)*,[149] the ECJ held that although many of the producers involved

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143. ICI was considered to be outside of the EEC's jurisdiction because the United Kingdom had not yet joined the Community.

144. *Imperial Chemical*, 1972 E.C.R. at 662.

145. Joined Cases 6/73 & 7/73, Istituto Chemioterapice Italiano v. Commission, 1974 E.C.R. 223 [hereinafter *Commercial Solvents*].

146. *Id.* at 343 n. 490.

147. FINE, *supra* note 52, at 99-100.

148. Joined Cases 89, 104, 114, 116, 117 & 125-129/85, Åhlström Osakeyhtiö v. Commission, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988) [hereinafter *Wood Pulp*]

149. *Id.*

were located outside the Community, their concerted conduct qualified as competition within the Common Market. The ECJ found that the agreement possessed Article 85's requisite object and effect of distorting competition because non-Community producers agreed to sell "directly to purchasers established in the Community and engage[d] in price competition in order to win orders from those customers."[150] The ECJ noted that "[i]f the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions."[151] Consequently, the ECJ concluded, "[t]he decisive factor is therefore the place where it is implemented."[152] In addition, the Effects doctrine may be triggered by potential as well as by actual effects. The potential effect, however, cannot be de minimis.[153]

Rather than adopt an unconditional Effects doctrine, the ECJ has, by adopting the de minimis standard, incorporated aspects of the principle of territoriality. Under the Community's Effects doctrine, two United States multinationals, possessing the requisite effect as described above, can still be hailed into Community courts pursuant to the Merger Regulation. Almost all mergers with and between non-EC firms of which the Commission has been notified, however, have been approved.[154] Hence, no real jurisdictional conflicts with the United States have yet occurred. According to Sir Leon Brittan, the former Vice President of the Commission, however, "any concentration....wherever located, must be notified if it meets the threshold requirements;...if mergers which are liable to have a significant impact on the competitive structure of [the EC] market are implemented in [EC] territory, [the EU's jurisdiction] will

150. *Id.*

151. *Id.*

152. *Id.*

153. Case 5/69, Völk v. Vervaecke, 1969 E.C.R. 295; Joined Cases 56/64 & 58/64, Consten & Grundig v. Commission, 1966 E.C.R. 299, 341 (holding agreements "capable of constituting a threat, either direct or indirect, actual or potential" can produce requisite effect under Art. 85).

154. *See, e.g.*, Case IV/M 069, Kyowa Bank/Saitama Bank, 4 C.M.L.R. M105 (1992); Case IV/M 099, Nissan Europe/Richard Nissan, 5 C.M.L.R. M46 (1992); *Delta/Pan Am*, 5 C.M.L.R. M56. *See also* Case IV/M 050/91, AT&T/NCR, 4 C.M.L.R. M41 (1992); Case IV/M 037/91, Matsushita/MCA, 4 C.M.L.R. M36 (1992).

be engaged and [the EC] shall exercise it to safeguard competition in the Community market."[155]

V. THE UNITED STATES-EUROPEAN UNION AGREEMENT OF 1991

In the United States, as in the Community, the courts exercise extraterritorial jurisdiction based on an Effects doctrine even when conduct occurs outside United States borders.[156] Thus, although the EC and the United States were fortunate prior to 1991, conflict due to the extraterritorial application of merger law is inevitable.[157] In fact, 160 of the 1500 of the mergers that were notified to the United States government in 1990 dealt with firms located in the EC.[158] In order to smooth these conflicts, the Community and the United States entered into the United States-European Union Agreement on the Application of their Competition Laws (U.S.-EU Agreement or Agreement).[159]

In the U.S.-EU Agreement, the parties recognized that individual governments, enforcing their antitrust policies unilaterally, were being "undercut" in their attempts to enforce their competition laws by: "1) the internationalization of production in which parts for one product are made by a host of different nations; 2) cross-border flows of information, money, and technology; and 3) the rise of transnational enterprises that have several headquarters and in which responsibilities are in various places."[160] In fact, the Agreement expressly recognized that the economies of the EC and the United States were becoming more interrelated and that the efficient operation of markets depended upon

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155. Sir Leon Brittan, Speech Before the EC Chamber of Commerce in New York (Mar. 26, 1990) at 14-15 *in* Marc Dassesse, *Selected Aspects of European Economic Community Law on Investments and Acquisitions in Europe*, 25 INT'L LAW. 375 (1991) [hereinafter Speech by Sir Leon Brittan].

156. *See, e.g.*, United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945); Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco), 449 U.S. 244 (1991); Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993); Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733 (2d Cir. 1994).

157. *Sterling Drug*, 14 F.3d at 733.

158. *U.S., EC Commission Forge Antitrust Cooperation Accord*, [July-Dec.] 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 375 (Sept. 26, 1991).

159. 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 (1991) [hereinafter U.S.-EU Agreement].

160. *Conferees Address Harmonization of U.S., EC Competition Regimes*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1635, at 499 (Oct. 14, 1993).

both regions coordinating their activities.[161] Accordingly, the U.S.-EU Agreement was designed to facilitate cooperative and coordinated enforcement.[162]

Article II of the Agreement, concerning notification, requires each signatory to notify the other whenever its competition authorities become aware that their enforcement activities may affect the other's interests.[163] Enforcement activities for which notification may be appropriate include: 1) enforcement activities that are "relevant" to those of other signatories; 2) anticompetitive activities, the significant part of which occur in the territory of another signatory; and 3) mergers or acquisitions in which one or more of the parties, or a controlling company of one of the parties to the transaction, is incorporated under the laws of the other signatory.[164] Signatories are to share information that would ensure effective application and lucid understanding of the relevant competition laws.[165] Such information includes enforcement activities and priorities as well as policy changes and theories.[166]

Signatories are to aid the other party's enforcement authorities, when such assistance does not go beyond the scope of the other party's laws or enforcement resources.[167] In addition, when both parties affected have an interest in pursuing enforcement, they may coordinate their enforcement activities taking into account a more efficient use of

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161. U.S.-EU Agreement, *supra* note 158.

162. *Id.* pmbl., § 5. *See id.* art. IV.

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

164. *Id.* art. II(2). The relevant laws may be those of the other signatory as well as, if appropriate, the laws of its states or member states. 164. *Id.* art II(2). Also, when mergers or acquisitions are at issue, notification is to be made to the United States and the EC according to different criteria. *Id.* art. II(3). United States notification is to be made "not later than the time its competition authorities request, pursuant to 15 U.S.C. § 18a(e), additional information or documentary material concerning the proposed transaction, when its competition authorities decide to file a complaint challenging the transaction, and where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account." *Id.* art. II(3)(a). As for the EC, notification shall be made when notice is published in the Official Journal pursuant to the Merger Regulation or Article 66 of the ECSC Treaty, when proceedings are initiated pursuant to Article 6(1)(b) of the Merger Regulation, and far enough in advance of the decision so that the other party's interest be taken into account. *Id.* art. II(3)(b).

165. *Id.* art. III(1).

166. U.S.-EU Agreement, *supra* note 159, art. III(2).

167. *Id.* art. IV(1).

enforcement resources, the parties' ability to obtain information needed to enforce competition laws, the effect of such coordination on the ability of officials to enforce competition policy, and the reduction in costs of enforcement.[168] Either party may, however, at any time, choose to limit or terminate its enforcement coordination.[169]

When one party believes that anticompetitive behavior occurring in the territory of another violates the first party's competition laws and adversely affects its interests, both parties' interests are implicated.[170] In this situation, one party may request the other to initiate proceedings.[171] The notified party then has discretion whether to comply with the request based on an evaluation of its enforcement laws and sovereign interests.[172] The country whose request has been refused remains free to take appropriate action under its own laws.[173]

To avoid conflicts of enforcement activity, the Agreement adopts a negative comity principle. The Agreement lists factors to be considered when assessing the appropriate accommodation of competing interests. Such factors include: 1) the significance of the alleged anticompetitive conduct to consumers, suppliers, or competition; 2) the presence of intent on behalf of the alleged infringing firms to affect consumers, suppliers, or competitors within the enforcing party's territories; 3) the significance of the effects of the anticompetitive conduct; 4) the existence of reasonable expectations that would be furthered by enforcement activities; 5) the degree of consistency between the respective enforcement laws; and 6) the extent to which enforcement activities of the respective countries regarding the same persons may be affected.[174]

Neither party is required to release the requested information if its laws would be violated by doing so or if providing the information would be contrary to that party's interests. The party receiving the information is required to ensure that confidentiality is maintained, if so requested.[175]

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

169. *Id.* art. IV(4).

170. *Id.* art. V(1),(2).

171. U.S.-EU Agreement, *supra* note 159, art. V(2).

172. *Id.* art. V(3).

173. *Id.*

174. *Id.* art. VI.

175. *Id.* art. VIII(1),(2).

Finally, officials from the United States and the EC are to meet twice a year to "exchange data on enforcement activities and policies...and to determine whether their interests could be better served through closer communication."[176] Accordingly, representatives from both the United States and the EC met in 1993 to discuss potential policy changes, differing notification procedures, and additional areas for cooperation.[177]

The 1991 Agreement is unique because it is "the first with a specific provision under which the U[nited] S[tates] can ask authorities to proceed under foreign law against a potential restraint of trade in the other nation that could hurt U[nited] S[tates] interests."[178] Furthermore, the Agreement marks a break from previous understandings and formalizes the concepts of positive and negative comity.

VI. CONCLUSION

EC merger regulation is a recent development that, at its inception, sought to organize and unify the economic structures of the member states into a common market. Indeed, such unification of both economic policy and of merger regulation has been possible not only because of the establishment of the supremacy of EC law over that of the member states but also because merger regulation is implemented by a single body, the European Commission. The Community, by vesting the Commission with the sole power to review mergers, has demonstrated its faith in the abilities of the Commission to implement a detailed yet open-ended merger policy. The Commission, exercising what was originally an overwhelming degree of discretion, has accumulated experience and formulated a more precise and comprehensive merger regulation policy. Accordingly, the Merger Regulation and its progeny, although outlining basic rules and procedures to be followed by the Commission, offer few specific definitions and numerical limitations. The Merger Regulation, along with the 1990 Regulation, Form CO, and case law, however, have created a body of merger regulation that remains a viable aspect of the European Union's economic policy.

With the proliferation of multinational corporations came the need for cooperation in transnational merger enforcement. Accordingly, the United States entered into various coordinative antitrust agreements,

176. U.S.-EU Agreement, *supra* note 159, art. XI.

177. *U.S., EC Commission Forge Antitrust Cooperation Accord*, *supra* note 158.

178. *Id.*

including its 1991 Agreement with the EU. The inception of the U.S.-EU Agreement is significant not only because it is the first United States antitrust cooperation agreement that formally recognizes a signatory's right to make a request for enforcement that obligates the recipient of such a request to consider, and, if possible, to act favorably upon the request,[179] but also because it provides for the coordination of international antitrust rules that are likely to facilitate enforcement of competition policies on transnational mergers. In fact, coordination has been facilitated. In the year prior to the U.S.-EU Agreement, the United States had received two and sent four pre-merger notifications to the Commission.[180] After signing the Agreement the United States sent thirty-seven and received fifteen notifications.[181]

Although the Agreement is indeed extraordinary in its potential ramifications, limitations on the extraterritorial effect of domestic antitrust enforcement remain. For example, under the Agreement, signatories can deny requests made by other parties. Furthermore, although the Commission has reviewed mergers between only non-EEC firms, the effects of which were felt on the Common Market, it had found no violations as of 1992. These and other potential problems in the application of the Community's Merger Regulation to non-Community mergers have yet to be addressed.

Further convergence of EU and United States competition policies is likely, especially in light of the globalization of the world market.[182] In fact, many experts agree that the U.S.-EU Agreement will lead to increased competition policy harmonization.[183] More specifically, the Agreement will lead to more consistency in issues such as defining relevant products and geographic markets and will make it more difficult for firms to offer inconsistent facts and/or legal theories to the parties to

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179. U.S.-EU Agreement, *supra* note 159, pmbl., ¶ 6.

180. *Use of U.S. Antitrust Law Abroad is Debated by Panel at Joint Symposium*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1600, at 123 (Feb. 4, 1993) [hereinafter *Use of U.S. Antitrust Law Abroad*].

181. *Id.*

182. This is the case despite the fact that: 1) the Commission's ability to gather information is more limited than in the United States because in the EC, information is collected on a voluntary basis, 2) the EC has weak discovery rules; and 3) the EC is less prone to sudden policy changes. *Conferees Address Harmonization of United States, EC Competition Regimes*, *supra* note 160 (Auke Haagsma, Head of the Directorate-General IV for Competition Policy at the European Community Commission).

183. *Use of U.S. Antitrust Law Abroad*, *supra* note 180.

justify transnational business transactions.[184] With EU membership likely to extend to Central and Eastern Europe, coordination and organization will become even more essential.

LISA A. BARBOT

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184. *Id.*