THE EUROPEAN COMMUNITY MERGER REGULATION: QUESTIONS ANSWERED, UNCERTAINTIES REMAIN

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On December 21, 1989, the European Community adopted a Regulation on the control of concentrations between undertakings ("Merger Regulation").[1] The Merger Regulation entered into force on September 21, 1990.[2] The Commission of the European Communities ("Commission"), which has been given exclusive competence to apply the Merger Regulation,[3] made 111 final decisions pursuant to the Merger Regulation during its first two years in operation.[4] Of these 111 final decisions, eight required in-depth investigations by the Commission.[5] The purpose of this Article is to analyze four decisions of the Commission under the Merger Regulation to determine the key substantive criteria and procedures used by the Commission in its review of notified concentrations[6] and, based on the analyses of these

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1. Council Regulation No. 4064/89, 1990 O.J. (L 257) 13 [hereinafter Merger Regulation]; *see also* Commission Regulation No. 2367/90, 1990 O.J. (L 219) 5 (outlining the notifications, time limits and hearings provided for in the Merger Regulation); Commission Notice 90/C 203/06, 1990 O.J. (C 203) 10 (clarifying the applicability of the Merger Regulation to certain joint ventures); Commission Notice 90/C 203/05, 1990 O.J. (C 203) 5 (describing the Commission's authority under the Merger Regulation to review restrictions ancillary to a merger proposal as part of its review of the merger).

2. Merger Regulation, *supra* note 1, art. 25(1), at 25.

3. *Id.* recital 26, at 16.

4. *See* Commission of the European Communities, *Chronological List of Decisions Taken Between 21/09/90 and 07/10/92* (on file with author) [hereinafter *Chronological List of Decisions*].

5. See *infra* text accompanying notes 49-54 for the different final decisions which can be reached under the Merger Regulation.

6. The Merger Regulation applies to any "concentration"—a term defined in article three more broadly than the term "merger"—with a "Community dimension." A concentration acquires a Community dimension when the "combined aggregate worldwide turnover of all undertakings concerned is more than ECU 5,000 million and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million" with an exception when more than two-thirds of the aggregate Community-wide turnover occurs in one Member State. Merger Regulation, *supra* note 1, art. 1(2), at 16. The Merger Regulation applies equally to companies headquartered outside the European Community which satisfy these thresholds. *See, e.g.*, Commission Notification of Dec. 12, 1990 Pursuant to Article 4 of Council Regulation 4064/89 (Case No. IV/M050 - AT&T/NCR).

decisions, to discuss the lessons learned and the key issues which remain to be resolved under the Merger Regulation.

Part I of this Article provides a brief historical background to the control of mergers in the European Community and suggests certain rationales underlying the Merger Regulation. In addition, it focuses upon the major disagreements which arose during the negotiation of the Merger Regulation and describes the compromises necessitated by these disagreements. Part II outlines the substantive review criteria and the three-step procedure employed by the Commission in assessing a

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The Merger Regulation thus uses a "size of party" test, rather than a "size of transaction" test, to determine whether a concentration has a Community dimension. *See Comments of the American Bar Association Section of Antitrust Law With Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings*, 59 ANTITRUST L.J. 245, 252 (1990) [hereinafter *Comments of the American Bar Association*]. By contrast, in the United States under the Hart-Scott-Rodino Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976), "mergers and acquisitions are reportable if they meet each of two tests: (1) the size-of-person test and (2) the size of transaction test." *Comments of the American Bar Association*, *supra* at 252 n.5. The "size of transaction" test, rather than focusing on the turnover of the undertakings, calculates the value of the assets to be acquired in the specific transaction. For example, under the Hart-Scott-Rodino Act, "[i]n the case of asset acquisitions, the size-of-transaction test is met whenever the assets to be acquired are valued in excess of $15 million." *Id.* Use of the "size-of-party" test instead of the "size-of-transaction" test (by itself or in conjunction with a "size-of- party" test) to determine whether a concentration has a Community dimension and, as a result, whether the Merger Regulation applies, has been criticized because:

> (1) the size of the transaction is far more relevant to an assessment of the competitive effects of a merger than the size of the parties; (2) by focusing on turnover alone, the Regulation creates a substantial bias in favor of control of transactions involving higher turnover, low margin businesses; and (3) a size of parties test may distort the market for corporate control by singling out very large firms (in terms of turnover) as subject to merger control under the Regulation.

Id. at 247, 252-53.

The turnover thresholds were required to be reviewed by the end of 1993. Merger Regulation, *supra* note 1, art. 1(3), at 16. In a report drafted pursuant to this review, the Commission recommended that the current thresholds be maintained until 1996. *Commission Recommends the Council to Make No Change in E.C. Merger Rules for the Present*, Reuters, July 28, 1993, *available in* WESTLAW, Int-News Library. The report concluded that further experience implementing the Merger Regulation under the current threshold will strengthen support for lower thresholds in the future, and inform the Commission of other possible improvements. *Id.* Originally, this review was expected to result in a lowering of these thresholds, and thus to increase the scope and significance of the Merger Regulation. Dr. Martin Heidenhain, *Control of Concentrations Without Community Dimension According to Article 22(2) to (5) Council Regulation 4064/89, in* INTERNATIONAL MERGERS AND JOINT VENTURES 413, 414 (Barry E. Hawk ed., 1991) (1990 proceedings of the Fordham Corporate Law Institute). Specifically, it was argued that lowering the thresholds not only would have increased the number of notified concentrations, but also would have increased the proportion of strategic, horizontal acquisitions raising significant competitive concerns. Wayne D. Collins, *The Coming Age of EC Competition Policy*, 17 YALE J. INT'L L. 249, 280-81 (1992) (reviewing SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET (1991)).

notified concentration. This part raises some of the uncertainties in the substantive assessment under the Merger Regulation. Part III analyzes four decisions reached by the Commission during the first two years of the Merger Regulation. This part highlights the key factors used by the Commission in each decision. Based on these decisions, part IV analyzes the significance of the compromises included in the Merger Regulation and summarizes the lessons learned and the uncertainties that remain under the Merger Regulation.

I. MERGER CONTROL IN THE EUROPEAN COMMUNITY AND THE ADOPTION OF THE MERGER REGULATION

A. *Merger Control Before the Merger Regulation*

The Treaty of Rome, which established the European Economic Community, does not contain any provisions expressly granting the European Community authority to regulate mergers.[7] The Commission has instead relied primarily upon article 86 of the Treaty of Rome and, more recently, article 85 to develop a European merger control procedure and policy.[8] The Commission's use of article 86 to review

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7. D.M. RAYBOULD & ALISON FIRTH, COMPARATIVE LAW OF MONOPOLIES 333 (1991).

8. 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." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EC TREATY] art. 86.

The European Court of Justice ("ECJ") validated the use of article 86 as an instrument for merger control in 1973. *See* Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215. For a discussion of the application of article 86 to mergers, see MERGER CONTROL IN THE EEC 231-40 (1988).

Article 85 prohibits and voids private agreements which restrict competition among Member States. Joel Davidow, *Competition Policy, Merger Control and the European Community's 1992 Program*, COLUM. J. TRANSNAT'L L. 11, 12 (1991). The ECJ has affirmed the Commission's application of article 85 to review certain share transactions for the acquisition by one company of a minority shareholding in a competitor. *See* Case 142 & 156/84 British American Tobacco Co. and R.J. Reynolds Industries Inc. v. Commission, 1987 E.C.R. 4487. Before this case, the Commission had been of the opinion that article 85 did not apply to mergers. *See* Barry E. Hawk, *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, 59 ANTITRUST L.J. 195, 196 (1990) (discussing the Commission's 1966 Memorandum on Concentrations).

The Merger Regulation arguably eliminates the Commission's ability to apply articles 85 and 86 to any concentration, whether or not covered by the Merger Regulation. Collins, *supra* note 6, at 281. It does so by expressly revoking the applicability of Regulation 17, which provided the Commission with its authority to enforce articles 85 and 86, to all concentrations. *Id.*; *See* Merger Regulation, *supra* note 1, art. 22(2), at 24. However, the Commission has reserved the right to review certain concentrations under articles 85 and 86 by means of the enforcement authority found in article 89. *See* Collins, *supra* note 6, at 281 n.108; *see also Statements of the Commission and the Council Relating to the Merger Control Regulation*, BULLETIN OF

mergers raises several fundamental problems.[9] First, article 86 provides no authority for the Commission to require pre-merger notification.[10] Thus, the Commission review takes place after the merger occurs which makes it more burdensome and costly to require divestiture and presumably stifles beneficial merger activity by creating uncertainty as to the legality of a merger.[11] Second, a merger reviewed under article 86 often requires approval from both national and EC antitrust authorities.[12] This factor, when combined with the lack of any specific time constraints on reaching a decision, also leads to uncertainty and delay that can stifle beneficial merger activity.[13] Third, the major substantive obstacle to the effectiveness of article 86 is the requirement that a merging company previously enjoy a dominant position—only the strengthening of a pre-existing dominant position can constitute "abuse" under article 86.[14] Mergers between two

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THE EUROPEAN COMMUNITIES, Supp. 2/90, at 23, *reprinted in*, LENNART RITTER ET AL., EEC COMPETITION LAW app. 21a, at 893-97 (1991).

9. Indeed, Recital 6 to the Merger Regulation asserts that articles 85 and 86 have not provided adequate authority to the Commission to protect against uncompetitive mergers: "Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisioned in the Treaty."

For a summary of problems in using article 86 for merger control, see T. ANTONY DOWNES & JULIAN ELLISON, THE LEGAL CONTROL OF MERGERS IN THE EUROPEAN COMMUNITIES 7-9 (1991).

10. Collins, *supra* note 6, at 276.

11. Paul D. Callister, *The December 1989 European Community Merger Control Regulation: A Non-EC Perspective*, 24 CORNELL INT'L L.J. 97, 98-99 (1991).

12. *CCH Commentary: Community-Wide Merger Control (Regulation No. 4064/89)*, Common Mkt. Rep. (CCH) +P 2843, at 2099-2 (Nov. 1990) [hereinafter *CCH Commentary*]. Under the concept of concurrent jurisdiction, national laws can be applied concurrently with Community law as long as Community law governs when there is a conflict. MERGER CONTROL IN THE EEC 240-41 (1988) (citing Case 14/68, Walt Wilhelm v. Bundeskartellamt, 1969 E.C.R. 1 as the original case establishing the concept of concurrent jurisdiction). Such a concept takes account of the different policy considerations of national governments and the European Community. If a conflict arises, the consequence is as follows:

> If the Commission takes the view that a merger infringes Article 86, this will override a national approval of the merger, because the Community ruling must be given supremacy over the national one on the basis of the *Walt Wilhelm* principle. However, this does not appear to work the other way around. That is, if the Commission decides . . . not to apply Article 86, it would still be open for a national cartel authority to prohibit it if a violation of national merger control law is established.

Id. at 241.

13. *CCH Commentary*, *supra* note 12, at 2099-3.

14. DOWNES & ELLISON, *supra* note 9, at 7; Karen Banks, *Mergers and Partial Mergers Under EEC Law*, 11 FORDHAM INT'L L.J. 255, 273 (1987); Barry E. Hawk, *The Proposed Revisions to the Justice Department's Antitrust Guidelines for International Operations and Recent Developments in EEC Competition Law*, 57 ANTITRUST L. J. 299, 309 (1988).

companies that do not individually enjoy a dominant position, but which, when merged, create a firm with a dominant position, cannot be prohibited under article 86.

The initiation of the "EC 1992" market-integration program provided momentum for finalizing a more effective European merger control system.[15] The Merger Regulation itself asserts that a more effective merger control "system is essential for the achievement of the internal market by 1992 and its further development."[16] While some writers question the relationship between stronger antitrust enforcement and further market integration,[17] the Commission argues that it must ensure that mergers "do not in the long run jeopardize the competition process, which lies at the heart of the common market and is essential in securing all the benefits linked with the single market."[18] Thus, the

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15. The original proposal for the Merger Regulation was drafted in 1973, but effective action was not taken until 1985 when the White Paper was released. *See* Completing the Internal Market: White Paper from the Commission to the European Council, Com(85)310 final at 39 (arguing that "a strong competition policy will play a fundamental role in maintaining and strengthening the internal market") [hereinafter White Paper]. In the White Paper, the Commission spelled out for the Council the details and timetable for the achievement of a single internal market for the European Community (the so-called "EC 1992" program).

Four other developments in the late 1980s also provided momentum for establishing a more effective merger control system under the Merger Regulation. First, the number of EC cross-border concentrations rose rapidly. Collins, *supra* note 6, at 277-78. Second, several Member States developed comprehensive national merger control systems and others were beginning to do the same. *Id.* at 278. The prospect of Member State authorities applying different substantive competition criteria highlighted the need for a consistent EC-wide policy and one-stop shopping. Third, the Commission expanded its authority to review mergers through the use of article 85. *Id.* & n.90; Callister, *supra* note 11, at 99. "The prospect of aggressive merger enforcement not anchored to specific procedures or substantive standards . . . gave renewed impetus to adoption of a merger regulation." Eleanor M. Fox, *Merger Control in the EEC—Towards a European Merger Jurisprudence, in* EC AND U.S. COMPETITION LAW AND POLICY 709, 713 (Barry E. Hawk, ed., 1992) (1991 proceedings of the Fordham Corporate Law Institute). Fourth, the Commission started to review concentrations more stringently under articles 85 and 86. Collins, *supra* note 6, at 278; Callister, *supra* note 11, at 99.

16. Merger Regulation, *supra* note 1, recital 2, at 14.

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> No consistent relationship exists between strengthened antitrust enforcement and the integration of nation-states into a common market. Only certain of the antitrust offenses prohibited by Article 85 of the EC Treaty—horizontal or vertical divisions of markets along national boundaries—must be prohibited for integration purposes. The application of EC antitrust law to prevent local or Community-wide price fixing, abuse of a dominant position or even certain mergers is more readily justified on the ground that such law is good policy for free market governments than it is on any claim that it 'perfects' the EC common market.

Davidow, *supra* note 8, at 13.

18. *See Community Merger Control Law*, BULLETIN OF THE EUROPEAN COMMUNITIES, Supp. 2/90, at 7.

Merger Regulation responds to the weaknesses inherent in the EC's merger control system developed primarily under article 86, and to a lesser extent under article 85, and seeks to provide a more certain, predictable, and efficient system in large part to promote the EC 1992 program.[19]

In addition, a system for reviewing concentrations centralized under the Commission offers practical advantages over national enforcement of diverse antitrust laws. Given the size of the undertakings involved in concentrations reviewed by the Commission,[20] focusing on the effects of such a concentration only within the boundaries of one Member State does not properly take account of the truly transnational effects of most large-scale concentrations.[21] Furthermore, an accurate review of the competitive effects of a concentration requires detailed consideration of the availability of potential competitors and of the existence of substitutes for the product in question; limiting the review of a concentration to a Member State's antitrust enforcement authority, which only analyzes the effects of the concentration on its own market, renders a fair and accurate decision from a European Community perspective quite difficult.[22] Moreover, given the trend toward the globalization of markets, contact with non-EC antitrust authorities becomes increasingly necessary to avoid conflicts. A central body stands in a better position than does each individual Member State to maintain regular contact and to pursue consistent policies.[23]

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19. *See, e.g.*, DOWNES & ELLISON, *supra* note 9, at 69 (describing the three principles upon which the Merger Regulation is founded as the principle of prior control, the principle of predictability, and the principle of speed). *See also* Jean-Bernard Blaise, *Concurrence: Contrôle des Opérations de Concentration*, 26 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 743, 746 (1990) (asserting that the two primary concerns of the Merger Regulation are (i) efficiency and certainty, and (ii) a clear division of authority between the Commission and Member States).

20. *See supra* note 6 for the turnover thresholds required for a proposed concentration to qualify for review under the Merger Regulation.

21. *Brittan Reflects on First Year of Merger Control*, Common Mkt. Rep. (CCH), Nov. 14, 1991, at 1 [hereinafter *Brittan Reflects on First Year*].

22. *Id.*

23. *Id.* at 2. For an example of the EC's coordination with non-EC antitrust bodies, see *EC and US Sign Anti-Trust Cooperation Agreement*, Common Mkt. Rep. (CCH) +P 96,079, at 52,397 (Oct. 1991).

> The purpose of the agreement is to promote cooperation and coordination between the competition authorities of the United States and the European Community, in order to lessen the possibility or impact of differences between the parties in the application of their competition laws.
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> -- Under the terms of the agreement, each party shall notify the other when it becomes aware that its enforcement activities may affect important interests of the other. Such enforcement will include action against anti-competitive practices and the vetting of mergers and acquisitions.

B. *Negotiation and Adoption of the Merger Regulation*

The original draft of the Merger Regulation was completed in 1973.[24] "The history of the Regulation clearly indicates a sharp divergence of opinions between the Commission and the Member States as well as among the Member States themselves. A unifying element seems to have been a marked opposition to the proposed Regulation, though inspired by different reasons."[25] For example, two of the early disputes concerned, first, whether the Merger Regulation should contain compulsory prior notification and, second, whether certain industrial sectors should be exempted from coverage by the Merger Regulation.[26] The more recent disagreements can be broken down into two categories: *general* and *specific*. Under such a division, *general* disagreements relate to the division of jurisdiction between the Community and the Member States concerning the review of concentrations, whereas *specific* disagreements relate to the substantive criteria for review and the implementation of the specific language of the Merger Regulation.

> -- The parties agree to share information in order to help in the application of their respective competition laws, or to promote better understanding of economic conditions relevant to their enforcement decisions. Officials will meet at least twice a year to exchange information and to discuss potential policy changes and other matters of mutual interest.

Press Release IP 848, *European Commission and United States Government Sign Anti-Trust Agreement*, Sept. 23, 1991, *available in* LEXIS, European Library, Rapid File. France challenged the legality of this agreement in front of the ECJ claiming that the agreement required approval of the Council under Article 228 of the Treaty of Rome. Under Article 228, the Council must approve most agreements between the European Community and third countries. The Commission argues that it has the competence to sign the agreement without Council approval under articles 85 and 86. The agreement remains valid pending a decision in this case. *See France Mounts Challenge to EEC-US Anti-Trust Agreement*, EUROPE, Jan. 11, 1992, at 4.

24 . *See* Proposal for a Regulation (EEC) of the Council on the control of concentrations between undertakings, 1973 O.J. (C 92) 1 [hereinafter Proposal]. For a brief chronology of the negotiations held between the introduction of the Proposal in 1973 and the date of adoption of the Merger Regulation in 1989, see Jean-Luc Dechery, *Le Reglement Communautaire Sur Le Contrôle Des Concentrations*, 26 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 307, 307-15 (1990). Several other draft proposals were released between 1973 and 1989. *See* 1989 O.J. (C 22) 14; 1988 O.J. (C 130) 4; 1986 O.J. (C 324) 5; 1984 O.J. (C 51) 8; 1982 O.J. (C 36) 3.

25. Giorgio Bernini, *Jurisdictional Issues: EEC Merger Regulation, Member State Laws and Articles 85-86, in* INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 611, 614.

26. DOWNES & ELLISON, *supra* note 9, at 32; 2 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 911 (2d ed. Supp. 1992). *See, e.g.*, Proposal, *supra* note 24, art. 4, at 3-4 (spelling out concentrations which required prior notification and which did not under the 1973 draft proposal). In its final form, the Merger Regulation requires prior notification of all concentrations which fall within its scope.

The major *general* disagreement concerned the proper turnover thresholds beyond which the Community would obtain exclusive jurisdiction over notified concentrations.[27] Member States, such as Italy and the Netherlands, which wanted to extend the Commission's powers argued for low thresholds, whereas Member States, such as the United Kingdom and Germany, with well-developed antitrust laws and authorities—and a heightened distrust of the Commission's ability to reach decisions efficiently and based upon competition-based criteria—wanted higher thresholds.[28] In the 1973 proposal, the threshold at which a concentration could have a Community dimension was set at 200 million ECU.[29] By 1988, the threshold had been changed and required that "(1) the aggregate worldwide turnover of all the firms concerned exceeded 1 billion ECU; (2) the firm acquired had a turnover exceeding 50 million ECU; and (3) the proportion of the aggregate worldwide turnover of each of the undertakings concerned did not within a single Member State exceed three quarters of the total."[30] The final version of the Merger Regulation sets two thresholds: (1) an aggregate worldwide turnover of all the undertakings concerned of 5 billion ECU; and (2) an aggregate Community-wide turnover of at least two of the undertakings concerned of 250 million ECU, unless each of the undertakings concerned has over two-thirds of its Community-wide turnover within one and the same Member State.[31] Thus, in comparison with the 1973 and 1988 proposals, the thresholds agreed upon in the Merger Regulation are a concession to the United Kingdom and Germany—Member States which argued for high thresholds—and diminish the Commission's jurisdiction over concentrations. As a result, national competition authorities continue to review a substantial

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27. *See supra* note 6 (discussing the Merger Regulation's use of thresholds based upon a "size-of-party" test, *i.e.*, calculating the aggregate turnover of the undertakings involved in the concentration, to determine whether a concentration has a Community dimension).

28. DOWNES & ELLISON, *supra* note 9, at 32-33; Giorgio Bernini, *Jurisdictional Issues: EEC Merger Regulation, Member State Laws and Articles 85-86, in* INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 611, 614-15. For a brief analysis of the control of concentrations in the Germany and the United Kingdom, respectively, see Kurt E. Markert, *Merger Control in Germany: Substantive Aspects, in* INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 149; Sir Sydney Lipworth, *Merger Control in the United Kingdom, in* INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 205.

29. Proposal, *supra* note 24, art. 1, at 2. In addition, the 1973 proposal did not apply if "the goods or services concerned by the concentration d[id] not account in any Member State for more than 25% of the turnover in identical goods or services or in goods or services which, by reason of their characteristics, their price and the use for which they are intended, may be regarded as similar by the consumer." *Id.* at 2-3.

30. Davidow, *supra* note 8, at 27 n.81 (citing COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 50 (1989)).

31. Merger Regulation, *supra* note 1, art. 1(2), at 16. *See supra* note 6.

number of concentrations with cross-border effects.[32] Indeed, "the Merger Regulation is . . . applied most often to huge conglomerate transactions, which are much less likely to be anticompetitive as a whole than narrower, strategic horizontal or vertical acquisitions."[33]

Several compromises accompanied the agreement on the thresholds. First, as noted above,[34] the thresholds were required to be reviewed at the end of 1993. Second, because Germany was not satisfied with the protection provided by the higher thresholds and wanted to maintain jurisdiction over some large concentrations, the Merger Regulation includes the so-called "German clause," which allows a Member State to request referral of such a concentration to its national competition authority if the concentration threatens competition on its market or a part of it.[35] Third, at the insistence of Member States which wanted lower thresholds, the Merger Regulation includes the so-called "Dutch clause," which allows a Member State to request that the Commission review concentrations which do not meet the thresholds.[36] Fourth, the "legitimate interest" exception permits a Member State to implement "appropriate measures to protect legitimate national interests."[37]

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32. "The vast majority of mergers taking place within the Community will fall below the 5 billion ECU threshold and hence be subject to national control . . . . [I]n 1988 there would have been 10 mergers with a Community dimension in the United Kingdom, and of about 300 found to qualify for investigation under the Fair Trading Act 1989 only some 7 would have so qualified." William Elland, *The Merger Control Regulation and its Effect on National Merger Controls and the Residual Application of Articles 85 and 86*, 1991 EUR. COMPETITION L. REV. 19, 20.

33. Collins, *supra* note 6, at 280 (citing VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 213 (4th ed. 1990) for the proposition that "roughly half of the gross Community product is produced in industries in which there are no two firms with aggregate turnover of five billion ECU or more." *Id.* n.100).

34. *See supra* note 6.

35. Merger Regulation, *supra* note 1, art. 9, at 20. For a discussion of the operation of the German clause, see DOWNES & ELLISON, *supra* note 9, at 79-83. *See also* James S. Venit, *The "Merger" Control Regulation: Europe Comes of Age . . . Or Caliban's Dinner*, 27 COMMON MKT. L. REV. 7, 9 n.14 (outlining debate whether the German clause, which represents an exception to the Commission's exclusive jurisdiction over concentrations meeting the Merger Regulation's thresholds, "applies to the territory of the entire Member State or only a distinct local market within a Member State"). The German clause was also required to be reviewed at the end of 1993. Merger Regulation, *supra* note 1, art. 9(10), at 20.

36. Merger Regulation, *supra* note 1, art. 22(3)-(6), at 24. *See* DOWNES & ELLISON, *supra* note 9, at 63-65. The "Dutch clause" was temporary and remained effective until the thresholds were reviewed in 1993. *Id.* at 64 & n.104.

37. Merger Regulation, *supra* note 1, art. 21(3), at 24. The Merger Regulation specifies "[p]ublic security, plurality of the media and prudential rules" as legitimate interests. All other interests must receive clearance from the Commission. *Id.*

> The "appropriate measures" that a member state may take can only consist of the *prohibition* of a merger that the Commission may otherwise have authorized or of subjecting the merger to additional

The major *specific* disagreement during the negotiations preceding adoption of the Merger Regulation related to the role of competition-based criteria, as opposed to industrial policy criteria, in the substantive review of concentrations. The United Kingdom and Germany argued that only competition-based criteria should be allowed under the Merger Regulation, whereas France, Portugal, and Spain favored the consideration of industrial, regional, and social policy factors.[38] For example, because they only recently entered the European Community and their economies are not as strong as those in most of the other Member States, Spain and Portugal believe that the Commission should take account of the positive effects on employment and economic development that a concentration might have on their markets. The 1973 draft proposal did not include any references to industrial or social policy; however, it allowed the Commission to approve anticompetitive concentrations if they "[we]re indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community."[39] Neither this exemption clause nor article 2(4) of the 1988 proposal—which would have permitted the Commission to approve otherwise objectionable concentrations on several public policy grounds[40]—appears in the final version of the Merger Regulation. In part because of the elimination of these provisions and the inclusion in article 2 of mainly competition-based criteria for review of concentrations,[41] the final version of the Merger Regulation—as a concession to France, Spain, and Portugal—includes the so-called "Spanish clause." This clause calls upon the Commission to "place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a."[42] In addition, the Commission

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> conditions and requirements; "appropriate measures" do *not* include the right to authorize a merger that the Commission has prohibited. Where alternatives exist, the member state must choose the measure which is objectively the least restrictive to achieve the end pursued.

RITTER ET AL., *supra* note 8, at 357.

38. *See* Hawk, *supra* note 8, at 212-13.

39. Proposal, *supra* note 24, art. 1(3), at 3.

40. 1988 O.J. (C 130) 4, 6. Article 2(4) of the 1988 proposal, for example, required the Commission to factor in technical and economic progress, and international competition. *See* Earl R. Beeman, *The EEC Merger Regulation: Preparing For a Common European Market*, 19 PEPPERDINE L. REV. 589, 601-02 (1992) (arguing that "[t]he elimination of Article 2(4) represents a move towards a competition-based merger policy that the Member States, as well as the Commission, should recognize").

41. *See infra* Part II(B) for the criteria listed in article 2.

42. Merger Regulation, *supra* note 1, recital 13, at 15. The concept of "economic and social cohesion" in Community parlance generally refers to requests from the poorer Member States, such as Spain, Portugal, Ireland, and Greece for additional regional aid from the European Community. In the context of the Merger Regulation, the concept "suggests that the Merger Regulation's interpretation should be informed by