

THE EUROPEAN COMMUNITY MERGER REGULATION: QUESTIONS ANSWERED, UNCERTAINTIES REMAIN

Timothy J. Dorsey*

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 concentrations⁶ and, based on the analyses of these

* Associate, Vinson & Elkins, L.L.P., Houston, Texas. B.S.F.S., Georgetown University, 1988; J.D., Tulane University School of Law, 1993. The author would like to thank Professor Suman Naresh of Tulane Law School for his valuable assistance on this Article, and Professor Shael Herman of Tulane Law School for his enthusiasm and support.

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

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 BRITAN, 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

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

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

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.

17.

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

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.

-- 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

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 [did] 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

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 grounds⁴⁰—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

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.

RIITTER 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

is directed to consider "the development of technical and economic progress" in its substantive assessment.⁴³

In part as a result of these compromises on the issues of jurisdiction⁴⁴ and industrial policy, there was concern at the time of adoption that the Merger "Regulation [was] likely to result in increased legal uncertainties, in more transactions being investigated and challenged, and perhaps in longer delays in consummating transactions."⁴⁵ The decisions reached to date under the Merger Regulation, including the four decisions analyzed in this Article, demonstrate that the *general* and *specific* concerns in existence at the time of adoption of the Merger Regulation have not turned out to be significant. Some new *general* and *specific* questions have arisen, however, based upon the Commission's analyses in these decisions, and others will arise if the Merger Regulation's thresholds are lowered pursuant to the Commission's review of the Merger Regulation in 1996. After outlining the procedures and substantive criteria of the Merger Regulation and analyzing four Commission decisions reached pursuant to the Merger Regulation, this Article concludes by highlighting the *general* and *specific* lessons learned in these decisions and by raising *general* and *specific* questions that remain to be answered by the Commission.

II. SUBSTANTIVE REVIEW OF A NOTIFIED CONCENTRATION

A. *Compatibility with the Common Market and the Dominant Position Analysis*

The Commission reviews a proposed concentration to determine whether or not it is compatible with the common market.⁴⁶ If a concentration "does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it," it is compatible with the common market.⁴⁷ If a concentration "does create or

these noncompetition goals, particularly when reviewing concentrations involving less-developed regions of the Community." Collins, *supra* note 6, at 287.

43. Merger Regulation, *supra* note 1, art. 2(1)(b), at 16.

44. For an in-depth analysis of the division of power between Member States and the European Community in the area of competition law and under the Merger Regulation, see Jacques H.J. Bourgeois & Bernd Langeheine, *Jurisdictional Issues: EEC Merger Regulation, Member State Laws and Articles 85-86*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 583, 590-603.

45. 2 HAWK, *supra* note 26, at 911 (Supp. 1990).

46. Merger Regulation, *supra* note 1, art. 2(1), at 16.

47. Merger Regulation, *supra* note 1, art. 2(2), at 17. The term "dominant position" under article 86 "relates to a position of economic strength enjoyed by an undertaking which enable it to prevent effective competition being maintained on the

strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it," it is incompatible with the common market.⁴⁸ Upon review of a notified concentration, the Commission can reach one of the following three decisions: (i) the notified concentration does not fall within the scope of the Merger Regulation;⁴⁹ (ii) the notified concentration falls within the scope of the Merger Regulation, but fails to raise any serious doubts as to its compatibility with the common market;⁵⁰ or (iii) the notified concentration falls within the scope of the Merger Regulation, raises serious doubts as to its compatibility with the common market, and merits an in-depth investigation.⁵¹ Pursuant to any in-depth investigation, the Commission can reach one of the following three decisions: (i) the notified concentration does not create or strengthen a dominant position which would impede effective competition in the common market and, as a result, is compatible with the common market;⁵² (ii) the notified concentration does not create a dominant position with anticompetitive effects because of modifications made to the notified concentration and is, as a result, compatible with the common market;⁵³ or (iii) the notified concentration creates a dominant position which would negatively affect competition on the common market and is, as a result, incompatible with the common market.⁵⁴

relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers." See Case 85/76, *Hoffman-LaRoche v. Commission*, 1979 E.C.R. 461, 520. For a more detailed description of the meaning of dominant position under article 86, see 2 HAWK, *supra* note 26, at 796-825 (Supp. 1990).

The term "dominant position," as it is used under the Merger Regulation, according to the Commission, can also be used to prohibit oligopolies under the concept of "collective dominance." See *Brittan Reflects on First Year*, *supra* note 21, at 4. The application of the Merger Regulation to oligopolies is discussed in the analysis of the Nestlé/Perrier decision. See *infra* Part III(E).

48. Merger Regulation, *supra* note 1, art. 2(3), at 17.

49. *Id.*, art. 6(1)(a), at 19. For example, the Regulation does not apply to a concentration which does not reach the specified turnover thresholds. For a discussion of how to calculate turnover in different types of notified concentrations, see Mario Siragusa & Romano Subiotta, *Le Contrôle des Opérations de Concentration Entre Entreprises au Niveau Européen: Une Première Analyse Pratique*, 28 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 51, 64-71 (1992); see also Hans-Jorg Niemeyer, *European Merger Control: The Emerging Administrative Practice of the EC Commission*, 15 FORDHAM INT'L L. J. 398, 401-02 (1991-92); Dietrich Kleeman, *First Year of Enforcement Under the EEC Merger Regulation: A Commission View*, in EC AND US COMPETITION LAW AND POLICY, *supra* note 15, at 623, 634-37.

50. Merger Regulation, *supra* note 1, art 6(1)(b), at 19.

51. *Id.*, art. 6(1)(c), at 19.

52. *Id.*, art. 8(2), at 19.

53. *Id.*

54. *Id.*, art. 8(3), at 19.

B. *Specific Factors for the Commission to Take Into Account When Assessing the Compatibility With the Common Market of a Notified Concentration*

The Merger Regulation lists several factors for the Commission to consider when determining the compatibility with the common market of a notified concentration.⁵⁵ Article 2 lists the following criteria:

1. The need to preserve and develop effective competition;
2. Actual or potential competition from within the EC or worldwide;
3. Market position of the undertakings and their economic and financial power;
4. Access of suppliers and users to supplies and markets;
5. Legal or other barriers to entry;
6. Supply and demand trends for the relevant goods;
7. The interests of the intermediate and ultimate consumers; and
8. The development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

Furthermore, the Preamble to the Merger Regulation suggests additional considerations, including the fundamental objectives listed in Article 2 of the EEC Treaty⁵⁶ and the strengthening of economic and social cohesion.⁵⁷ The Preamble also establishes a presumption that any concentration which results in a market share of 25% or below is compatible with the common market.⁵⁸

C. *Three-Step Assessment of Compatibility*

The criteria of review are analyzed within the confines of a three-step assessment.⁵⁹

55. These factors are used both when determining whether an in-depth investigation is required and when such an investigation is undertaken.

56. "The Community shall have as its task . . . to promote . . . a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it." EC TREATY art. 2.

57. Merger Regulation, *supra* note 1, recital 13, at 15. See *supra* text accompanying notes 38-43 for a description of the so-called "Spanish clause."

58. *Id.* recital 15, at 15.

59. James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 519, 545. Sir Leon Brittan has referred to a two-step assessment with stage two consisting of two sub-steps. *Brittan Reflects on First Year*, *supra* note 21, at 3.

1. Relevant Product and Geographic Markets

The Commission first defines the relevant product and geographic markets on which the concentration competes.⁶⁰ The Merger Regulation, however, does not expressly indicate how to define the relevant product and geographic markets.⁶¹ Form CO, which the parties must submit when notifying the Commission of a proposed concentration, defines the relevant product market as follows:

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

A relevant product market may in some cases be composed of a number of individual product groups. An individual product group is a product or small group of products which present largely identical physical or technical characteristics and are fully interchangeable. The difference between products within the group will be small and usually only a matter of brand and/or image. The product market will usually be the classification used by the undertaking in its marketing operations.⁶²

Form CO defines the relevant geographic market as follows:

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because,

60. James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 519, 545, 548-57; Brittan *Reflects on First Year*, *supra* note 21, at 2-3.

61. When the Merger Regulation was first released, several commentators pointed to the lack of express rules for defining relevant product and geographic markets as a key weakness of the Merger Regulation. See, e.g., Hawk, *supra* note 8, at 213; *Comments of the American Bar Association*, *supra* note 6, at 248, 260.

62. Form CO Relating to the Notification of a Concentration Pursuant to Council Regulation (EEC) No. 4064/89, 1990 O.J. (L 219) 11, 15 (Annex 1 to Commission Regulation No. 2367/90, 1990 O.J. (L 219) 5) [hereinafter Form CO]. For a description of the methods used by courts, the Justice Department, and the FTC to define product markets under U.S. antitrust law, see 1 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 282-93 (3d ed. 1992). In general, courts have looked at "whether a product (and a geographic area) are sufficiently distinct that a firm . . . could profitably maintain prices above competitive levels, in light of the likely supply and demand substitution responses of consumers and other producers." *Id.* at 290-91.

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, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings' market shares between neighbouring areas or substantial price differences.⁶³

Because the result of step two of the assessment—the dominant position determination—necessarily depends on which products and which geographic market are being assessed, a favorable (*i.e.*, a wide) definition of the relevant markets becomes crucial to the chances for approval.⁶⁴ An important aspect of the analysis of the four decisions in part III concerns the Commission's method for defining the relevant product and geographic markets.⁶⁵

2. Dominant Position Assessment

The Commission next assesses the economic power of the undertakings to determine whether the concentration creates or strengthens a dominant position within the relevant product and geographic markets.⁶⁶ The first phase of this assessment involves a calculation of both the absolute and relative market shares of the notified concentration.⁶⁷ Any concentration resulting in an absolute

63. Form CO, *supra* note 62, at 15. As is demonstrated in the four decisions analyzed below, under the Merger Regulation the Commission generally defines the relevant geographic market as a Member State, as the European Community, or as the world. For a review of the methods used by courts, the Justice Department and the FTC to define geographic markets under U.S. antitrust law, see 1 ABA ANTITRUST SECTION, *supra* note 62, at 293-98.

64. A definition of the relevant markets which results in a notified concentration having a market share of 30% is more favorable, for purposes of the dominant position assessment under the Merger Regulation, than a definition which leads to a 70% market share. The analysis of the ATR/de Havilland decision demonstrates the importance of the definition of the relevant product market. See *infra* Part III(D)(1)(a)(i).

65. For a further discussion of the different criteria which can be used to define the relevant product and geographic markets under the Merger Regulation, see James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 519, 548-557; Niemeyer, *supra* note 49, at 411-21.

66. Brittan *Reflects on First Year*, *supra* note 21, at 3.

67. DOWNES & ELLISON, *supra* note 9, at 91. The absolute market share calculation reflects a notified concentration's overall market share in the relevant product and geographic markets. The relative market share compares the notified concentration's absolute market share to the absolute market share of competitors "to assess whether the new undertaking is likely to occupy a pre-eminent position." JOHN COOK & CHRIS KERSE, EEC MERGER CONTROL 72 (1991). For example, in the Magnetti Marelli/CEAc decision, *infra* note 131, the Commission noted that the concentration created an absolute market

market share below 25% in the relevant markets is presumptively compatible with the common market.⁶⁸ If a concentration has a substantial absolute market share, but one which is not high enough by itself to indicate the creation of a dominant position, a high relative market share may be used as supporting evidence of a dominant position.⁶⁹

The second phase of the dominant position assessment examines several of the criteria specified in article 2(1)(a) and (b) of the Merger Regulation⁷⁰ to determine the correlation between a concentration's market share and its economic power.⁷¹ Relying on the concept that high costs of entry into the relevant markets hinder the development of effective competition, the Commission considers the legal and factual barriers to entry.⁷² The assessment of the barriers to entry includes consideration of the existence of actual or potential competition⁷³ and the access of other companies to supplies and

share of 60% and that the next largest company possessed a market share of only 20%, thereby creating a gap of approximately 40%. See *infra* text accompanying notes 144-45.

Thus, it appears that a concentration with a market share of approximately 60% can be susceptible to heightened scrutiny under the Merger Regulation in two ways: first, if, as in the Magnetti Marelli/CEAc decision, the next largest competitor has a relatively small market share, the Commission can point to the strong relative market share as evidence of a dominant position; second, if, as in the Nestle/Perrier decision, the next largest competitor possessed a more substantial market share, the Commission could argue that the concentration creates or strengthens an oligopoly which the Merger Regulation prohibits under the concept of collective dominance. For a discussion of this concept, see *infra* notes 296-97 and accompanying text.

68. Merger Regulation, *supra* note 1, recital 15, at 15.

69. DOWNES & ELLISON, *supra* note 9, at 91. As noted above, the Merger Regulation expressly states that a concentration with an absolute market share below 25% is presumptively compatible with the common market. The Merger Regulation does not indicate, however, any absolute market share (or ceiling) at which a concentration is presumptively incompatible with the common market. Thus, whether an absolute market share is high enough by itself to indicate the creation of a dominant position depends on the particular facts of each notified concentration—including the relative market shares involved.

70. See *supra* Part II(B).

71. Brittan *Reflects on First Year*, *supra* note 21, at 3.

72. DOWNES & ELLISON, *supra* note 9, at 93.

73. *Id.* at 90-91. For a brief discussion of potential competition, see RITTER ET AL., *supra* note 8, at 368. It is interesting to consider whether the Commission will apply the doctrine of perceived potential entry and the doctrine of actual potential entry—two doctrines constituting subsets of the doctrine of potential competition under American antitrust laws. Under the doctrine of perceived potential entry, the elimination of a perceived potential entrant through its acquisition by a corporation active in the relevant market may violate the Clayton Act's proscription against anticompetitive mergers. Under the doctrine of actual potential entry, an acquisition of a large corporation active in the relevant market by a large corporation which was otherwise expected to enter the relevant (and concentrated) market either (i) through its own internal expansion or (ii) through the acquisition of a company lacking a significant market share may violate the Clayton Act.

markets.⁷⁴ In addition, the Commission looks at the supply and demand trends of the relevant markets to ensure that it takes into account how the market itself might change over time.⁷⁵ The review of actual decisions in part IV includes an analysis of how the barriers to entry and the supply and demand trends play into the assessment of dominance.

3. Significant Impediment to Effective Competition

If the Commission finds that a dominant position is created or strengthened by a concentration, it does not automatically prohibit it; rather the Commission must decide whether the dominant position would significantly impede effective competition.⁷⁶ The significant impediment test provides further flexibility to the Commission in determining the compatibility with the common market of a notified concentration:

. . . additional flexibility would be possible if the Regulation did not require *per se* condemnation of every concentration that creates or strengthens a dominant position. Such flexibility may be desirable because the assessment of compatibility involves a prediction as to how markets and undertakings will behave. A requirement that a concentration be prohibited on the basis of a determination that dominance exists or has been strengthened would overlook that there may be degrees of dominance, and, in hard cases, may place too much of a burden on an analysis that has significant elements of uncertainty.⁷⁷

Thus, the Commission applies a significant impediment test to assess whether the creation or strengthening of a dominant position actually has an impact upon the relevant markets.⁷⁸ A certain amount of market

For a comprehensive discussion of these doctrines and a listing of relevant cases, see Ernest H. Schopler, *Doctrine of Potential Competition as Basis for Finding Violation of § 7 of Clayton Act (15 USCS § 18)*, 44 A.L.R. FED. 412 (1979 & Supp. 1992). See also 1 ABA ANTITRUST SECTION, *supra* note 62, at 324-29 (noting that the Supreme Court has approved of the doctrine of perceived potential entry, but has reserved judgment on the doctrine of actual potential entry).

74. DOWNES & ELLISON, *supra* note 9, at 92-93. The Commission is primarily concerned here with the creation of vertical links between buyers and their suppliers which could restrict other suppliers' ability to access the relevant markets.

75. *Id.* at 95.

76. CCH Commentary, *supra* note 12, at 2099-9.

77. Venit, *supra* note 35, at 25-26.

78. See Bernd Langeheine, *Substantive Review Under the EEC Merger Regulation*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 481, 485-87.

disturbance needs to be foreseen before a concentration creating or strengthening a dominant position becomes incompatible under article 2(3).⁷⁹ Sir Leon Brittan, the commissioner in charge of the Competition Directorate until early 1993, sees the "significant impediment" test as a new area for the Commission and the Court of Justice:

A dominant position as such is not prohibited. You may ask whether a dominant position without the effect of impeding competition is at all conceivable. I think that in most cases it is not. However, the dynamic factor of time is important here. A short-lived market share of some size in a market with no or low barriers to entry is not really a threat to competition at all. The Court of Justice has traditionally defined dominance in Article 86 cases in terms of independence or the ability to act with scant regard to competitive pressures. This is not quite the same as impeding competition and I expect a new line of case law to develop.⁸⁰

Although, the Regulation does not expressly list factors for application in the significant impediment test, it is likely that the dominant position criteria in article 2(1) remain relevant in this context. Specifically, the barriers to entry and the existence of potential competition likely represent important considerations.⁸¹ The ATR/de Havilland decision provided some insight into the factors considered as part of the significant impediment test.⁸²

III. DECISIONS REACHED UNDER THE MERGER REGULATION

A. Introduction

The application of the criteria for review is illustrated by the following four cases in which the Commission initiated in-depth proceedings based on its determination that the notified concentrations raised serious concerns as to their compatibility with the common market.⁸³ In three of the four cases, Alcatel/Telettra,⁸⁴ Magnetti

79. See Bernd Langeheine, *Substantive Review Under the EEC Merger Regulation*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 486.

80. SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 36-37 (1991) (Hersch Lauterpacht Memorial Lectures) [hereinafter COMPETITION POLICY AND MERGER CONTROL SPEECH].

81. *Id.*; Langeheine, *supra* note 78, at 487 (citing Sir Leon Brittan, *The Law and Policy of Merger Control in the EEC*, EUROPEAN L. REV. 351, 354 (1990)).

82. See *infra* Part III(D)(1)(c).

83. It should be noted that most cases do not require in-depth consideration and are quickly declared compatible. See *Chronological List of Decisions*, *supra* note 4.

Marelli/CEAc,⁸⁵ and Nestle/Perrier,⁸⁶ the Commission declared the notified concentrations compatible with the common market after conditions were imposed. The other case, ATR/de Havilland,⁸⁷ resulted in the Commission's only finding of incompatibility during the first two years of the Merger Regulation.

B. *Alcatel/Telettra*⁸⁸

Fiat and Alcatel Alsthom entered into a complex business agreement comprising this concentration and the four following elements. First, Magnetti Marelli, a subsidiary of Fiat, gained a controlling interest in CEAc, the battery-making subsidiary of Alcatel Alsthom. Second, Fiat and Alcatel Alsthom exchanged minority shareholdings with Fiat acquiring 6% of Alcatel Alsthom and Alcatel Alsthom acquiring 3% of Fiat. Third, GEC-Alsthom, a company jointly controlled by GEC and Alcatel Alsthom, gained a controlling interest in Fiat Ferroviaria, a railroad equipment subsidiary of Fiat. Fourth, Fiat and Alcatel Alsthom created a holding company for cooperation in research and development.

In the concentration at issue in this decision, Alcatel NV, a telecommunications systems and equipment supplier 70% owned by Alcatel Alsthom, acquired a 69.2% controlling interest in Telettra SpA ("Telettra") from Fiat SpA, a subsidiary of Fiat. Fiat SpA maintained a 25.4% interest in Telettra. Telefonica, the Spanish telecommunications operator, owned the remaining 5.4% interest in Telettra. In addition, Telefonica owned a 21% interest in Alcatel Standard Electrica SA, a subsidiary of Alcatel, and a 10% interest in Telettra Española SA, a subsidiary of Telettra.

1. Three-Step Assessment
 - a. *Relevant Product and Geographic Markets*
 - i. Product Market

Both Alcatel NV and Telettra are mainly suppliers of telecommunications systems and equipment. The Commission decided that four individual product groups within the telecommunications systems and equipment market were affected by the concentration: (i)

84. See *infra* Part III(B).

85. See *infra* Part III(C).

86. See *infra* Part III(E).

87. See *infra* Part III(D).

88. Commission Decision 91/251, 1991 O.J. (L 122) 48 [hereinafter *Alcatel/Telettra Decision*]. This decision came pursuant to the first in-depth inquiry under the Merger Regulation.

public switching; (ii) line transmission systems; (iii) microwave systems; and (iv) private switching.⁸⁹ Each of these groups represents a relevant product market for purposes of the assessment carried out by the Commission. Other individual product groups which fell within the telecommunications systems and equipment market, but which were not affected by this concentration, included radiotelephony, subsets, earth stations, and telecommunications cables.⁹⁰

ii. Geographic Market

The Commission pointed out that the relevant geographic market was neither worldwide nor Community-wide. Rather, telecommunications markets have traditionally been, and to a large extent remain, divided by national boundaries.⁹¹ The two main reasons for the lack of integration were (i) the dominance over the public network exercised by national authorities which tended to favor domestic suppliers; and (ii) the existence of various national technical standards.⁹² Several directives have been issued designed to decentralize the provision of telecommunications services, to liberalize procurement policies of public bodies, and to harmonize technical standards.⁹³ However, because the pace of liberalization differed from Member State to Member State,⁹⁴ the Commission decided that only a national market could have qualified as a relevant geographic market at the time of the decision. Because the Commission concluded that the concentration potentially impacted only the line transmission and microwave transmission equipment markets in Spain,⁹⁵ the Commission decided to examine the characteristics of the telecommunications market in Spain to see if Spain qualified as a relevant geographic market.

The Spanish market is dominated by the public network operator, Telefonica.⁹⁶ Because of the central role of Telefonica in the

89. Alcatel/Telettra Decision, *supra* note 88, at 49.

90. *Id.*

91. *Id.* at 52.

92. *Id.* at 49-50, 52.

93. *See, e.g.*, Council Directive 90/531, 1990 O.J. (L 297) 1 (public procurement); Council Directive 90/387, 1990 O.J. (L 192) 1 (open network provisions for telecommunications services); Commission Directive 90/388, 1990 O.J. (L 192) 10 (competition in telecommunications services); Commission Directive 88/301, 1988 O.J. (L 131) 73 (competition in telecommunications terminal equipment).

94. For example, while most Member States have to implement the public procurement directive by 1993, Spain has until 1996, and Greece and Portugal until 1998, to liberalize their public procurement policies.

95. Alcatel/Telettra Decision, *supra* note 88, at 52.

96. Telefonica represented the only purchaser of public switches in Spain and bought 90% of the line transmission equipment and 60% of the microwave transmission equipment in Spain. *Id.* at 49.

Spanish market, the Commission questioned Telefonica directly on its purchasing policies. Telefonica has traditionally procured its equipment from companies with an industrial presence in Spain. Telefonica assured the Commission, however, that insofar as the procurement of transmission equipment was concerned, industrial presence was no longer necessary and that between 1991 and 1995 it was planning to purchase transmission equipment from some new suppliers.⁹⁷ Nevertheless, the Commission considered it significant that Spain had no legal obligation to comply with the EC procurement directive until 1996, thereby enabling Telefonica to favor domestically based suppliers.⁹⁸ Furthermore, the Commission noted that Telefonica possessed minority shareholdings in equipment suppliers, including Alcatel and Telettra,⁹⁹ and that until these vertical links were severed, new suppliers remained disadvantaged in the Spanish market.¹⁰⁰ Thus, despite the evolution of European telecommunications markets away from monopolistic service providers and towards more liberalized procurement policies, the Commission decided that the structure of the Spanish market at the time of the decision—Telefonica's dominance and its vertical relationship with suppliers, as well as the non-applicability of the procurement directive until 1996—justified defining Spain as a separate relevant geographic market for purposes of assessing the Alcatel/Telettra concentration.¹⁰¹

b. *Dominant Position Assessment*

i. *Market Share*

The Commission briefly considered the concentration's impact upon market shares on both the public and private switching product markets.¹⁰² The concentration would have created a company with a 21% market share in public switching in Italy.¹⁰³ However, the Commission did not consider Italy a relevant geographic market because of the minimal impact of the concentration in Italy. Even if Italy were a relevant geographic market, the concentration would not have created a dominant position given Italtel's 50% market share in

97. Alcatel/Telettra Decision, *supra* note 88, at 50.

98. *Id.* at 52.

99. As noted above, Telefonica owned 21% of the shares of Alcatel Standard Electrica SA, a subsidiary of Alcatel, 10% of the shares of Telettra Español SA, a subsidiary of Telettra, and 5.4% of the shares of Telettra itself. *Id.* at 51.

100. *Id.* at 52.

101. *Id.*

102. *Id.* at 52-53.

103. *Id.* at 52. The calculations in this decision were based on 1989 sales figures.

public switching.¹⁰⁴ The Commission found that Telettra did not maintain a sufficient presence in the private switching market in any Member State to warrant any market share calculation.¹⁰⁵

The Commission focused its market share calculation on the line transmission equipment and microwave transmission equipment markets in Spain. Based on 1989 sales figures, Alcatel possessed a 40% share and Telettra a 41% share of the line transmission equipment market, and Alcatel had an 18% share and Telettra a 65% share of the microwave equipment market.¹⁰⁶ Thus, the combined market share in these two markets reached approximately 80%. Given these extremely high market shares, the second phase of the dominant position analysis became crucial in this decision.

ii. Barriers to Entry/Supply and Demand Trends

Despite the concentration's creation of a company with approximately 80% market share in the line transmission equipment and microwave equipment markets in Spain, the Commission pointed to other specific factors which weakened the correlation between the market share attained by the concentration and the economic power of the new undertaking. First, the Commission noted that the individual market shares of Alcatel and Telettra were earned as a result of Telefonica's choice of these companies as its main suppliers while they were in competition.¹⁰⁷ Thus, Telefonica's monopolistic buying power created these large market shares and could alter them. Indeed, now that Alcatel and Telettra no longer were competing, their combined market share would not likely have reached the aggregate of their individual market shares as Telefonica maintained and expanded its diversified purchasing policy.¹⁰⁸ Telefonica indicated its plan to make its bidding process more transparent, to provide technical approval of products from new or potential suppliers, and to open up its market to new suppliers.¹⁰⁹

Second, the Commission focused upon actual or potential barriers to entry.¹¹⁰ The Commission analyzed whether actual or potential competitors existed to take advantage of Telefonica's plan to diversify. Two actual competitors could have delivered additional

104. Alcatel/Telettra Decision, *supra* note 88, at 52. The Commission did not consider whether the 71% combined market share between Italtel and Alcatel/Telettra constituted an oligopoly to which it could have applied the Merger Regulation.

105. *Id.* at 53.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 50.

110. *Id.* at 53.

supply immediately. AT&T could have delivered any of the relevant transmission products.¹¹¹ L.M. Ericsson, though not a manufacturer of every product in the two transmission markets, could have delivered a wide range of digital products which were increasingly in demand.¹¹² Potential competitors existed as well. Siemens, for example, had the capability to increase its presence in the Spanish market.¹¹³ Telefonica indicated its willingness to establish contacts with new suppliers.¹¹⁴

Third, the Commission considered whether technical barriers to entry prohibited effective competition. Specifically, the Commission concluded that as far as European suppliers were concerned the cost of adaptation to standards did not erect a significant barrier nor did the existence of proprietary intellectual property rights.¹¹⁵ The risk of technical barriers continued to decrease as the harmonization of standards proceeded. Indeed, as standards become increasingly uniform, non-European telecommunications companies, for example Northern Telecom and Fujitsu, are expected to adapt their products and to enter the European market.¹¹⁶

Fourth, the Commission focused on the vertical links between Telefonica and its suppliers. It determined Telefonica's holdings in Alcatel and Telettra¹¹⁷ could have constituted a barrier to entry for other competitors.¹¹⁸ This barrier to entry, when combined with the high market shares, could have resulted in the finding by the Commission of a dominant position. If a dominant position had been found, the parties would have had a difficult time convincing the Commission that there would have been no significant impediment to competition given the high market share and no evidence that this market share was short-lived.¹¹⁹ For this reason, Alcatel agreed with the Commission that approval would have to be conditioned upon steps to cut the vertical links with Telefonica. These conditions are outlined below.¹²⁰

Fifth, the Commission looked at the supply and demand trends of the relevant markets. As noted above, on the supply side several

111. Alcatel/Telettra Decision, *supra* note 88, at 53.

112. *Id.*

113. *Id.*

114. *Id.* at 50.

115. *Id.*

116. *Id.* at 54.

117. See *supra* text accompanying note 99.

118. Alcatel/Telettra Decision, *supra* note 88, at 54.

119. See *supra* text accompanying note 80 for Sir Leon Brittan's comments on the "significant impediment" test (noting that in most cases a dominant position has the effect of impeding competition). Given these comments, it is my opinion that a dominant position finding establishes a rebuttable presumption of incompatibility. Any such rebuttal would have to be made as part of the "significant impediment" test.

120. See *infra* Part III(B)(2).

actual and potential competitors had the capability to provide the necessary equipment. As far as demand was concerned, Spain was investing heavily in its telecommunications infrastructure and represented the fastest growing market for telecommunications systems and equipment.¹²¹ Thus, the actual and potential competitors had the incentive to increase their presence in Spain.

c. *Significant Impediment Test*

Given the low barriers to entry once the conditions listed below were implemented, and the favorable supply and demand trends, the Commission decided that the concentration did not create or strengthen a dominant position despite the high market shares. Thus, it was not necessary to undertake the significant impediment test.

2. Decision and Lessons

The Alcatel/Telettra concentration was approved subject to Telefonica's assurances concerning its continued diversification of its supplier base, its openness to new suppliers, its clarification of technical approval procedures, and its willingness to exclude industrial presence in Spain as a decisive factor in choosing a supplier.¹²² In addition, the Commission imposed four legal obligations on Alcatel designed to eliminate the vertical links between Telefonica on the one hand and Alcatel and Telettra on the other. First, Alcatel had to acquire Telefonica's 5.4% interest in Telettra upon the implementation of the concentration.¹²³ Second, Alcatel had to exercise its call option to acquire Telefonica's 10% interest in Telettra Española SA as soon as possible and within one year of the concentration.¹²⁴ Third, Alcatel was required to initiate good-faith negotiations with Telefonica to acquire Telefonica's 21% interest in Alcatel Standard Electrica SA within one week of the signing of the agreement with Fiat to acquire Telettra.¹²⁵ Fourth, Alcatel promised not to sell any interest in any of its companies doing business in the Community to Telefonica without approval or waiver from the Commission or until Spain had implemented the procurement directive by January 1, 1996 at the latest.¹²⁶ Alcatel undertook to keep the Commission informed of its efforts to comply with these conditions.¹²⁷

121. Alcatel/Telettra Decision, *supra* note 88, at 50.

122. *Id.*

123. *Id.* at 54.

124. *Id.*

125. *Id.*

126. *Id.* at 55.

127. If the undertakings intentionally or negligently fail to comply with any condition imposed as part of the decision to allow their notified concentration to

Several lessons can be learned from the Alcatel/Telettra decision. First, this decision emphasized the flexibility the Commission has, or sees itself as having, under the Merger Regulation. The Commission approved this concentration subject to conditions even though an 80% market share was "normally unacceptable."¹²⁸

Second, the decision demonstrated the importance of the cooperation of a monopolistic purchaser to the chances for approval of a concentration between two of its suppliers. If Telefonica had not been willing to give the Commission any definite assurances, the Commission might not have approved the concentration. It is foreseeable that in some future circumstances a monopolistic buyer might have different interests at stake than those of its suppliers that are seeking approval for a notified concentration. For example, if Telefonica had disagreed with the Commission's analysis and believed that the concentration could have resulted in higher prices from its suppliers, it would not have been as willing to take the steps required by the Commission in this case. If such a situation had arisen in this case, Telefonica would effectively have had a veto right.

Third, this decision demonstrated the significance of the relevant geographic market determination. If the European telecommunications markets had been liberalized sufficiently by the time of this decision to define the relevant geographic market as the whole Community, the concentration would have been approved immediately given the number of different suppliers in the EC market as a whole and Telettra's limited presence outside of Spain and Italy. However, because the Commission decided that the telecommunications market was still fragmented along national lines, its assessment focused only on Spain where the concentration created substantial market shares in the line transmission and microwave equipment markets. In the future, as the telecommunications market becomes increasingly liberalized, the relevant geographic market for a concentration in the telecommunications industry should arguably extend beyond national boundaries to include the whole European Community. It remains unclear when the liberalization process in the European telecommunications field will have proceeded sufficiently to justify a decision on the part of the Commission to define the whole Community as the relevant geographic market. The Commission will most likely decide on a case-by-case basis how far liberalization has proceeded and how the telecommunications market is actually

proceed, the Commission can impose fines not exceeding 10% of the aggregate turnover of the undertakings. Merger Regulation, *supra* note 1, art. 14(2), at 22.

128. See *Commission Imposes Conditions on Alcatel/Telettra Merger*, Common Mkt. Rep. (CCH) +P 95,825, at 52,133 (May 1991).

functioning at the time of the particular decision. In my opinion, however, it seems contradictory to make the dominant position and significant impediment assessments—steps two and three of the three-step process—based upon predictions as to *future* economic power and *future* market disturbances on a relevant geographic market determined by conditions *in the present*. In my view, the European Community directives legally obligating the liberalization of telecommunications services and procurement justify defining the relevant geographic market as the Community as a whole because this concentration will be competing under those liberalized conditions by 1996 at the latest.¹²⁹ If the Commission had agreed, it would likely have approved the concentration without conditions mainly because the market share calculations would have been lower.

Fourth, while market share represented a necessary consideration, the Commission also stressed the importance of barriers to entry, the existence of actual and potential competition, the creation of vertical links between buyers and suppliers, and the supply and demand trends in the relevant market in its assessment of a dominant position. Here, the Commission focused its dominant position analysis on factors 2-6 which target the structural characteristics of the relevant markets as the key indicators of the potential for the creation or strengthening of a dominant position. The Commission did not explicitly focus upon factors 7 and 8 or any of the factors listed in the Preamble which leave open the possibility of considering non-economic criteria.¹³⁰

C. *Magnetti Marelli/CEAc*¹³¹

This concentration, which was part of the business agreement between Alcatel Alsthom and Fiat described above in the analysis of the Alcatel/Telettra decision, involved the acquisition by Sicind, a wholly-owned subsidiary of Fiat, from Samag, a wholly-owned subsidiary of Alcatel Alsthom, of a 50.1% shareholding in the battery producer, Compagnie Europeenne d'Accumulateurs (CEAc), a French battery manufacturer. Samag owned 98.4% of CEAc. Magnetti Marelli, an automotive parts subsidiary of Fiat, would control CEAc. At the time the concentration was notified, Magnetti Marelli owned 75% of Compagnie Francaise d'Electrochimie (CFEC), another French battery manufacturer.

129. See *supra* notes 93-94 and accompanying text.

130. For a list of the eight factors for the Commission to consider when assessing a concentration's compatibility with the common market, see *supra* Part II(B).

131. Commission Decision 91/403, 1991 O.J. (L 222) 38 [hereinafter *Magnetti Marelli/CEAc Decision*].

1. Three-Step Assessment

- a. *Relevant Product and Geographic Markets*

- i. Product Market

The Commission relied on the submission of the parties to conclude that the concentration impacted the lead batteries product market. This product market consisted of four product groups, each representing a relevant product market: (i) the traction battery market; (ii) the stationary battery market; (iii) the original equipment market for starter batteries; and (iv) the replacement market for starter batteries.¹³² The Commission explained the difference between the traction battery market and the stationary battery market on the one hand, and the original equipment market for starter batteries and the replacement market for starter batteries on the other hand.¹³³ These differences provide some insight into the criteria used by the Commission to define individual product groups.

The distinction between the traction batteries and the stationary batteries rested upon the difference in the products and their functions. Indeed, the Commission distinguished these batteries based on the different manufacturing technologies, the distinct applications, and differing customers.¹³⁴ However, the distinction between the original equipment and the replacement markets for starter batteries did not rest upon the same product-specific factors. The Commission distinguished these product markets based on the different conditions of competition.¹³⁵ Specifically, in comparison to the replacement market, “[s]upply to the OE market requires high technical capacity, intense research and development, 100% reliability [sic] of the products, just-in-time delivery and supply certification granted by the car manufacturers.”¹³⁶

- ii. Geographic Market

After its initial review, the Commission decided that the notified concentration affected the stationary battery market, the original equipment market for starter batteries, and the replacement market for starter batteries in France and Italy.¹³⁷ The traction batteries market was only affected in Italy. The in-depth proceedings resulted in a finding that the concentration raised serious concerns only in the

132. Magnetti Marelli/CEAc Decision, *supra* note 131, at 39.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

replacement market for starter batteries in France and Italy.¹³⁸ Later in the proceedings, the Commission dropped its objections related to the replacement market for starter batteries in Italy because of the existence of competitors in this market and because the notified concentration would have led to a minimal increase in market share.¹³⁹ Thus, the decision described the competitive conditions which justified defining France as a separate relevant geographic market.

First, prices in the replacement market for starter batteries differed in France from those in other Member States.¹⁴⁰ Second, the market shares of manufacturers differed appreciably from Member State to Member State.¹⁴¹ The Commission suggested four reasons for these differences in competitive conditions among Member States in the replacement market for starter batteries: (i) differences in vehicles and in service needs in each Member State; (ii) consumer preferences for recognized brands; (iii) differences in distribution channels which made it costly to establish a presence in a new Member State; and (iv) the varying concentration of supply from one Member State to another; a high concentration of supply in one or a few companies erected a significant barrier to any competitors wanting to increase their market share.

The Commission, as is consistent with the definition of the relevant geographic market in the Form CO,¹⁴² focused upon the conditions of competition in defining the relevant geographic market. In concluding that France represented a separate relevant geographic market, the Commission gave weight to several of the factors explicitly mentioned in the Form CO, including "the existence of high barriers to entry or consumer preferences, appreciable differences between neighbouring areas or substantial price differences."¹⁴³

b. *Dominant Position Assessment*

i. *Market Share*

The Commission looked at three aspects of market share: (i) absolute market share; (ii) relative market share; and (iii) economic and financial power of the new company. The Magnetti Marelli/CEAc concentration created an absolute market share of approximately 60% in

138. Magnetti Marelli/CEAc Decision, *supra* note 131, at 39.

139. *Id.* at 40.

140. *Id.*

141. The Commission noted, for example, that CEAc's market share in France exceeded 40%, but fell below 5% in Germany. *Id.*

142. *See supra* notes 62-63.

143. *See supra* text accompanying note 62.

the replacement market for starter batteries in France.¹⁴⁴ The relative market share was classified as substantial in that the next biggest competitor would have possessed only a 20% market share, thus creating a gap of 40%.¹⁴⁵ The Commission stated that the financial strength of both the newly created company and its parent companies, including Fiat, had to factor into the calculation of the financial power created by the concentration. The Commission believed that the financial power of the concentration would have been significant. In addition, the concentration would have enjoyed favorable access to the lead market.

ii. Barriers to Entry/Supply and Demand Trends

As the Commission noted in its assessment of the relevant geographic market, the market shares of battery manufacturers differed significantly from Member State to Member State.¹⁴⁶ Given the low likelihood of price competition in the replacement market for starter batteries,¹⁴⁷ and the existence of substantial differences in Member State markets, the main potential competitors of Magnetti Marelli/CEAc had little incentive to seek to enter the French market. Indeed, the Commission noted that "the main competitors having strong positions on their respective national markets would be tempted to refrain from competing, in particular since price competition is unreasonable on a mature market on which little production capacity is available."¹⁴⁸ In addition, the Commission noted that a powerful buyer, such as Telefonica in the Alcatel/Telettra concentration, was not present in this market to offset the financial power of the new company.

Given the structural barriers to entry and the unfavorable supply and demand trends,¹⁴⁹ the Commission released a statement of objections that concluded that the Magnetti Marelli/CEAc concentration would have created a dominant position in the replacement market for starter batteries in France. The parties were granted a hearing pursuant

144. See *supra* text accompanying note 62. The Commission included Fiat's 75% shareholding in CFEC in the absolute market share calculation. CFEC held 18% of the market for replacement batteries in France. See *Commission Approves Battery Merger, Subject to Undertakings*, Common Mkt. Rep. (CCH) +P 95,918, at 52,219 (June 1991).

67. 145. Magnetti Marelli/CEAc Decision, *supra* note 131, at 40. See *supra* note

146. See *supra* Part III(C)(1)(a)(ii).

147. Magnetti Marelli/CEAc Decision, *supra* note 131, at 40.

148. *Id.*

149. As an example of an unfavorable supply trend, concentration of supply in the replacement market for starter batteries differed drastically from one Member State to the next. The more supply is concentrated in a market, the more burdensome it becomes for competitors to increase their market shares or attempt to penetrate the market. Magnetti Marelli/CEAc Decision, *id.* at 40.

to article 18(1) of the Merger Regulation where they informed the Commission of their disagreement with the Commission's objections.¹⁵⁰ However, the Advisory Committee¹⁵¹ subsequently agreed with the Commission's assessment and the Commission was prepared to reject the notified concentration until Fiat "independently decided to amend the strategy underlying its establishment in France."¹⁵²

c. *Significant Impediment Test*

The Commission did not specifically spell out which factors it considered in reaching its pre-modification decision to declare the concentration incompatible with the common market, because the modifications led to a reversal the decision. As noted above,¹⁵³ the significant impediment test provides flexibility for the Commission in close cases in which the dynamic factor of time is significant. Here, the competitive conditions were so different in France than in other Member States that the dominant position was unlikely to be temporary. Furthermore, these different competitive conditions in the replacement market for starter batteries were not evolving as differences in vehicle fleets, consumer preferences, distribution channels, and large concentrations of supply, remained important characteristics of this market. Thus, this decision did not result from a close case requiring flexibility beyond the dominant position determination.

2. Decision and Lessons

The Commission decided ultimately that the concentration was compatible with the common market subject to two specific conditions. First, Fiat agreed to reduce Magnetti Marelli's holding in CFEC from 75% to 10% and to seek approval from the Commission if it desired in

150. Magnetti Marelli/CEAc Decision, *supra* note 131, at 40.

151. See Merger Regulation, *supra* note 1, art. 19(3)-(7), at 23-24 for the make-up and role of the Advisory Committee. Before the Commission reaches a final decision on a notified concentration, the Advisory Committee must be consulted. *Id.* art 19(3), at 23. The Committee must prepare an opinion on the Commission's draft decision, and the Commission is required to "take the utmost account" of this opinion. *Id.* art 19(6), at 24. In addition, the Committee can recommend publication of opinions after taking into account business secrets and the interests of the undertakings involved. See DOWNES & ELLISON, *supra* note 9, at 125-26.

152. Magnetti Marelli/CEAc Decision, *supra* note 131, at 40. This case provides an example of the informal contact maintained between the parties and the Commission during the decision-making process. Such contacts can speed up the review process and make known to the parties early any concerns of the Commission. See *Brussels' New Merger Control Task Force Is Tough and Ready*, M&A EUROPE, May-June 1991, at 16 [hereinafter M&A EUROPE].

153. See *supra* Part II(C)(3).

the future to increase its holding.¹⁵⁴ Second, Fiat volunteered to limit Magnetti Marelli's representation on CFEC's supervisory bodies to one person. CFEC enjoyed a solid reputation and maintained the second largest market share behind CEAc in the French starter battery market. Indeed, a majority of Magnetti Marelli's market share in the French starter battery market at the time of the decision was accounted for by CFEC's activity.¹⁵⁵

By reducing its shareholding in CFEC, Magnetti Marelli did not gain control of the two largest companies in the French starter battery market. Thus, both the absolute and the relative market shares created by this transaction decrease. Furthermore, the two companies with the largest presence on the French starter market did not have access to the same distribution channels.¹⁵⁶ Finally, Magnetti Marelli was prevented from owning the two most well known French battery brands.¹⁵⁷

Several lessons may be learned from the Magnetti Marelli/CEAc decision. First, distinguishing among products for the purpose of defining the relevant product markets involved more than a look at the characteristics and interchangeability of the products themselves. The Commission based its distinction between the original equipment market for starter batteries and the replacement market for starter batteries "not so much on a difference in the product itself or in the function of the product, but on the fact that the conditions of competition in the replacement market differ significantly from those in the market for original equipment."¹⁵⁸ Because the method for defining the relevant product market is not spelled out in the Merger Regulation, the Commission maintains a degree of flexibility to choose the factors it considers relevant in defining the relevant product market. The only apparent constraint on the Commission in this decision was its willingness to consider industry's classification of product markets.¹⁵⁹

Second, this decision provides insight into the role of three different calculations within the market share determination: absolute market share, relative market share, and financial power. Specifically,

154. Magnetti Marelli/CEAc Decision, *supra* note 131, at 40. As noted above, CFEC was one of the major French battery manufacturers at the time of the decision. *Id.*

155. *Id.* at 41.

156. *Id.*

157. *Id.*

158. *Id.* at 39.

159. In this decision, the Commission noted that "the existence of two separate markets for starter batteries is generally accepted in the industry." Magnetti Marelli/CEAc Decision, *supra* note 131, at 39. In addition, the Form CO states that "the product market will usually be the classification used by the undertaking in its marketing operation." See *supra* note 62 and accompanying text.

the Commission reconfirmed that a high absolute share by itself does not provide sufficient grounds to conclude that a dominant position has been established. However, a high absolute market share combined with a high relative market share creates a significant concern. Thus, although the absolute market share in this case was substantially less than the absolute market share created in the Alcatel/Telettra concentration, the Magnetti Marelli/CEAc concentration raised an equally serious or greater level of concern on the part of the Commission. In addition, the fact that these high market shares belonged to a company whose parent had substantial financial power caused the Commission even greater concern. The Commission did not limit its consideration of financial power to that of Magnetti Marelli and CEAc, rather it also took account of the strong financial position of Fiat, the acquiring parent. Fiat and any other conglomerate participating in a transaction subject to review under the Merger Regulation will always encounter heightened scrutiny in this phase of the dominant position assessment.

Third, the Commission, as in the Alcatel/Telettra decision, considered whether the relevant markets were dominated by one or a few strong purchasers. When this is so, high market shares become less significant as strong buyers, by diversifying their purchasing policy, are able to impose competitive discipline on the new company. Because no such buyers existed in this case, the high absolute and relative market shares were not offset.

Finally, this decision reflects the Commission's concern for maintaining effective, actual competition in the relevant markets. The reduction in Fiat's holding in CFEC represented a significant change because it ensured that a strong, independent competitor remained on the French battery market. The conditions to competition were such in the replacement market for starter batteries that the likelihood of *potential* competition arriving from other countries was low, making the need for *actual* competition even greater. The Commission was troubled by a concentration involving the two companies with the largest market shares in the relevant geographic market not only because the absolute and relative market shares were likely to be substantial, but also because the likelihood of effective competition diminished greatly.

D. *ATR/de Havilland*¹⁶⁰

This concentration consisted of the joint acquisition by Aérospatiale SNI (Aérospatiale), a French aerospace company, and Alenia-Aeritalia e Selenia SpA (Alenia), an Italian aerospace company

160. Commission Decision 91/619, 1991 O.J. (L 334) 42 [hereinafter *ATR/de Havilland Decision*].

which was part of the Finmeccanica group, of de Havilland, a Canadian division of Boeing. At the time of notification of the concentration, Aérospatiale and Alenia controlled ATR, which designs, builds, and sells regional transport aircraft. De Havilland built two types of regional turbo-prop aircraft.

1. Three-Step Assessment
 - a. *Relevant Product and Geographic Markets*
 - i. Product Market

The principal issue considered by the Commission in its relevant product market determination was the lack of substitutability of the different aircraft across the different relevant product markets. First, the Commission distinguished the regional turbo-prop aircraft market from regional and medium-haul jet aircraft because the differences in operating costs and the disparities in distances flown made it unlikely that one of these jets could have easily substituted for a turbo-prop aircraft.¹⁶¹

Second, the Commission, after having determined that regional turbo-prop aircraft differed also from turbo-prop aircraft with fewer than 20 seats, given the different certification requirements, inferior levels of comfort, and frequent use for non-commercial purposes of the latter,¹⁶² divided the regional turbo-prop market into three relevant product markets: (i) 20-39 seaters; (ii) 40-59 seaters; and (iii) 60 and over seaters.¹⁶³ The Commission believed that this "segmentation . . . shows the groups of aircraft which are usually evaluated against each other by airlines."¹⁶⁴

The parties vehemently disagreed with this division of the regional turbo-prop market into three product markets and put forward several counter-arguments. First, the parties claimed that all 20-70 seaters constituted one relevant product market and that any further division rested on arbitrary criteria.¹⁶⁵ The Commission rejected this suggestion because its investigation showed that a general consensus

161. ATR/de Havilland Decision, *supra* note 160, at 43.

162. *Id.* at 44.

163. *Id.*

164. *Id.* at 45.

165. *Aérospatiale Contests the European Commission's Competence in the De Havilland Affair As, in its Opinion, the Dimensions of the Operation Are Below the Community Threshold*, EUROPE, Oct. 12, 1991, at 13 [hereinafter *Aérospatiale Contests*]. In their original notification of the proposed concentration, the parties suggested two relevant product markets, 20-50 seaters and 51-70 seaters. The parties later modified this position and asserted that all 20-70 seaters constituted one relevant market. ATR/de Havilland Decision, *supra* note 160, at 45.

existed among competitors in the market that the relevant product markets defined by the Commission were accurate.¹⁶⁶ Furthermore, a 20-39 seater could only with difficulty have been "stretched" to substitute for a 40-59 seater and it was extremely costly to change a 20-39 seater production facility into a 40-59 seater facility.¹⁶⁷

Second, the parties pointed out that buyers took into account other factors beyond seat capacity when purchasing aircraft, such as technical capabilities and operating costs.¹⁶⁸ The Commission, however, concluded that seat capacity was the first factor considered by buyers and that other factors were only subsequently considered when deciding which aircraft to purchase among those available in the seat capacity required.¹⁶⁹

Third, the parties pointed to eight examples of competition between 40-59 seaters and 20-39 seaters to prove substitutability between these arbitrary markets. The Commission stated that in some cases airlines with flying routes of an average passenger capacity between 20-39 bought a 40-59 seater if during peak flight times passenger capacity could be expected to exceed thirty-nine. However, the Commission saw this situation as an exception and pointed out that no cross-substitutability existed; the 20-39 seaters could not substitute for 40-59 seaters on higher capacity routes.¹⁷⁰

Fourth, the parties believed that small aircraft could be substituted for larger aircraft if more flights were scheduled along a given route.¹⁷¹ The Commission disagreed with this argument because, according to the figures it received, flying twice as many flights with an aircraft half as large would have resulted in higher operating costs.¹⁷² In addition, finding twice as many flying slots at favorable times was unlikely, especially in the European Community.¹⁷³ Therefore, the Commission maintained its position that the regional turbo-prop market consisted of three distinct relevant product markets based upon the seat capacities described above.¹⁷⁴

166. Once again, parties not involved in the concentration can play an important role in the Commission's decision. In the Alcatel/Telettra decision, it was noted above that Telefonica effectively had a veto power. Here, the competitors did not effectively have a veto power, nonetheless given the importance of the relevant product market determination in this decision, the competitors' input was significant.

167. ATR/de Havilland Decision, *supra* note 160, at 45.

168. *Id.* at 45.

169. *Id.* at 45-46.

170. *Id.* at 46.

171. ATR/de Havilland Decision, *supra* note 160, at 46.

172. *Id.*

173. *Id.* at 47.

174. See *supra* text accompanying note 163.

ii. Geographic Market

The Commission decided that the world market, excluding China, Eastern Europe, and the former Soviet Union, represented the relevant geographic market.¹⁷⁵ Import barriers into the Community were virtually nonexistent and costs of transportation were low. European manufacturers competed in North America and in the Pacific Rim and de Havilland maintained a significant presence in Europe.¹⁷⁶ The Commission noted that Eastern Europe may in the future be included in the relevant geographic market, but at this time the aircraft from North America and Western Europe were too sophisticated and expensive.¹⁷⁷ The decision to define the relevant geographic market as the whole world resulted in a much broader dominant position assessment than in the Alcatel/Telettra and Magnetti Marelli/CEAc decisions which involved national markets. Although one would have expected that the creation or strengthening of a dominant position would have been more difficult on the world market—as compared to the European Community or a Member State market—given, for example, the number of competitors available and the variety of consumer preferences, this turned out not to be the case.

b. *Dominant Position Assessment*

i. Market Share

Upon the suggestion of the parties, the Commission calculated market share based upon all deliveries to date and all soon-to-be-delivered orders for aircraft currently manufactured.¹⁷⁸ Aircraft no longer produced, but in limited cases still used, were not considered because “[i]t is meaningless to analyze market shares for the former generation of products in assessing the market power of the manufacturers now and in the future.”¹⁷⁹ The new company would have possessed a 64% world market share and a 72% Community market share in the 40-59 seat market, and maintained ATR’s current 76% world market share and 74% Community market share in the 60 and over seat market.¹⁸⁰ The Commission estimated that the market

175. ATR/de Havilland Decision, *supra* note 160, at 47.

176. *Id.*

177. *Id.*

178. *Id.*

179. ATR/de Havilland Decision, *supra* note 160, at 48. The Commission also decided not to count options in its market share calculations because of the difficulty involved in predicting what percentage of options would be exercised.

180. *Id.* at 48-49.

share for the complete 20-70 seat market would have equalled 50% worldwide and 65% in the Community.¹⁸¹

The market shares in the 20-39 seat market would not have been affected by the concentration as ATR did not compete in that market. De Havilland maintained a 25% world market share and a 21% Community market share in the 20-39 seat market.¹⁸² However, the low market shares in this market could not be used to argue persuasively against the finding of a dominant position because airlines were purchasing fewer and fewer of these aircraft. Indeed, 84% of the turbo-prop aircraft ordered in the Community involved aircraft in the 40-59 seat and 60 and above seat markets.¹⁸³

The Commission focused more seriously upon the effect of the notified concentration on the 40-59 seat market. The new company would have raised ATR's absolute world market share from 45% to 64%. The relative world market share would also have risen substantially as the closest competitor, Fokker, possessed a 22% market share.¹⁸⁴ The third largest company in the 40-59 seat market was de Havilland which, of course, would no longer have existed as a separate competitor after the concentration. Thus, Saab and Casa would have represented the next largest competitors with only 7% world market shares.¹⁸⁵

In the 60 and over seat market the new company would have maintained ATR's current 76% world market share and 74% Community market share. Given the trend in the Community toward the purchase of larger aircraft and the concentration's creation of high market shares in the 40-59 seat market, ATR's high market shares in the 60 and over seat market became more problematic than before the concentration.

In contrast to the Alcatel/Telettra concentration, where the diversified purchasing policy of Telefonica led the Commission to conclude that the actual market share of the concentration would not have reached the aggregate of the individual market shares of the two companies,¹⁸⁶ the actual market shares created by an ATR/de Havilland concentration would likely have exceeded the aggregate of the individual market shares of the two companies. For example, given the

181. The Commission provided three alternative methods of market share calculation, all of which resulted in world market shares between 44%-47% and Community market shares between 64%-66%. *Id.* at 49 n.1.

182. *Id.* at 48.

183. *Id.* at 50.

184. *Id.*

185. *Id.* at 48.

186. *See supra* text accompanying notes 107-08.

large market shares in the 40-59 seat and 60 and over seat markets, the new company could more easily have offered advantageous pricing and financing options to its customers.¹⁸⁷ Furthermore, the new company could have offered a more diverse selection as de Havilland manufactured aircraft in the 20-39 seat market, both de Havilland and ATR offered aircraft in the 40-59 seat market, and ATR possessed a strong position in the 60 and over seat market. Thus, the new company could have offered bargain prices for a 20-39 seat aircraft in return for the purchase of a 60 and over seat aircraft where demand was steadily increasing.¹⁸⁸

In sum, the market share figures raised serious concerns. Nevertheless, the market shares obtained by this proposed concentration did not reach those obtained in the Alcatel/Telettra concentration and were similar to those obtained in the Magnetti Marelli/CEAc concentration. However, the second part of the dominant position analysis resulted in further concerns which were not as easily remedied by the imposition of conditions.

ii. Barriers to Entry/Supply and Demand Trends

In this phase of the dominant position assessment, the Commission focused on five factors: (i) the effect of eliminating de Havilland as a competitor; (ii) the wide range of products offered by the new company; (iii) the large customer base of the new company; (iv) the existence of actual and potential competition; and (v) the position and strength of the customers of regional turbo-prop aircraft.

187. ATR/de Havilland Decision, *supra* note 160, at 50.

188. *Id.* Note that the Commission was considering how the new company might have been able to abuse its dominant position given the structural realities of the market. Thus, the behavioral factors, which are considered under article 86 when determining whether abuse of the dominant position has occurred, may remain relevant; if this is the case, structural market factors do not constitute the sole criteria in assessing a notified concentration's ability to create or to strengthen a dominant position. Thus, an undertaking involved in a notified concentration may be able to argue in the proper circumstances that, while the structural factors of the relevant markets could lead to a finding of a dominant position, the likelihood of its abusing the position are minimal given, for example, its past behavior.

Two commentators disagree with this point:

Under article 86 a distortion of competition would attract Commission intervention only if it amounted to an abuse of the dominant position; under [the Merger] Regulation . . . to impede competition significantly will result in intervention whether that effect results from abusive behavior or simply from the size of the concentration relative to the rest of the market. As a result, under the Regulation, the option of good behavior, which would avoid Commission intervention under article 86, will not avail if the prohibited effect (the impeding of effective competition) is in fact present or likely to result.

DOWNES & ELLISON, *supra* note 9, at 84 (footnote omitted).

First, the Commission pointed out that de Havilland was the third largest manufacturer in the 40-59 seat market and was gaining on the number two company, Fokker.¹⁸⁹ Furthermore, de Havilland was in the process of developing an aircraft in the 60 and over seat market where ATR alone already enjoyed a 76% world market share. If the concentration were to proceed and de Havilland were to build such an aircraft, the market share of the new company would have exceeded 76% in the 60 and over seat market.¹⁹⁰ The parties responded that Boeing might eventually have phased out production at de Havilland, thus eliminating competition from de Havilland with or without Commission approval of this concentration.¹⁹¹ The Commission disagreed with the parties' response given the favorable business prospects for de Havilland. In responding to the parties' assertion, the Commission stated that "[w]ithout prejudice to whether such a consideration is relevant pursuant to Article 2 of the Merger Regulation, the Commission considers that such elimination is not probable."¹⁹² This statement demonstrates that the Commission has the flexibility to decide which circumstances implicate the factors in article 2.¹⁹³

Second, the Commission was worried that the acquisition of de Havilland by ATR would have established the only company which could have offered aircraft in all three product markets.¹⁹⁴ The ability to offer the whole range of aircraft to its customers would have provided ATR/de Havilland with, in the Commission's view, an unfair advantage because (i) customers could have negotiated lower prices for a 30 seater in return for the purchase of a 60 seater, (ii) ATR/de Havilland could have reduced prices once it benefitted from the overlap in ATR's and de Havilland's parts stock,¹⁹⁵ and (iii) customers would have preferred to buy from one manufacturer in order to avoid the fixed

189. ATR/de Havilland Decision, *supra* note 160, at 50.

190. *Id.* at 50-51.

191. *Id.* at 51.

192. *Id.*

193. Consideration of the argument—that the elimination of the competitive effect of one of the undertakings, as a result of the notified concentration, should not be factored into the Commission's assessment because it likely will be out of business in the near future if the concentration does not go forward—could arguably be justified under factor 2 of article 2: "actual or potential competition from within the EC or worldwide." The point is, however, that the Commission has some flexibility to define the scope of each of the factors listed in article 2.

194. ATR/de Havilland Decision, *supra* note 160, at 51.

195. The Commission estimated that a "30% commonality of spare parts between ATR and de Havilland" at the time of the decision could be easily increased, which would result in major cost-savings for their customers. ATR/de Havilland Decision, *supra* note 160, at 51. This cost savings is another factor that would lock customers into their products.

costs associated with each different make of aircraft, for example, training pilots and mechanics and maintaining parts stock.¹⁹⁶

Third, the Commission focused on another competitive advantage which would have resulted from this acquisition: the broadening of ATR's customer base.¹⁹⁷ The number of ATR customers would have increased from forty-four to at least eighty and the largest competitors, Saab and Fokker, would only have delivered to twenty-seven and twenty customers, respectively.¹⁹⁸ The Commission stressed the importance of the customer base to the assessment of the economic power of ATR/de Havilland because aircraft buyers often experienced a "lock-in effect" once they made their first purchasing choice. Given the high fixed costs associated with training, maintenance, and parts procurement, customers tended to buy aircraft in different product markets from the same manufacturer when possible.¹⁹⁹ Therefore, the ATR/de Havilland concentration would at least have maintained ATR's present customer base and would likely have expanded this base by giving it the ability to offer aircraft in all product markets.

Fourth, the Commission looked at the market position of six actual competitors.²⁰⁰ Fokker, which would have represented the largest competitor of ATR/de Havilland in the 40-59 seat market, would have been negatively affected by the acquisition because it had not yet established a large customer base for its 40-59 seat aircraft, the Fokker 50, and it did not enjoy the same financial power as ATR. Given the competitive advantages created by the concentration, Fokker would have found it difficult to broaden its product and customer bases.²⁰¹ Casa, which planned to increase its presence in the civil aircraft market, would not likely have succeeded in the face of ATR/de Havilland's market share.²⁰² Embraer, a Brazilian aircraft manufacturer, would have faced difficulties expanding its product offering beyond the 20-39 seat market even if the concentration were prohibited, if the concentration were allowed to proceed, it would have faced even greater difficulties.²⁰³ British Aerospace had the financial

196. ATR/de Havilland Decision, *supra* note 160, at 51. The Commission pointed out that "[i]n practice the advantages of having complete coverage of the market are only present where airlines have or intend to have a fleet consisting of aircraft in different product markets." The Commission concluded, based on figures supplied by Fokker, that a majority of customers which purchased 40 and over seaters also bought 30 seaters. *Id.* at 52.

197. *Id.* at 52.

198. *Id.*

199. *Id.*

200. *Id.* at 52-54.

201. *Id.* at 53.

202. *Id.*

203. *Id.*

resources to try to increase its presence in the turbo-prop aircraft market. It possessed 2% of the 20-39 seat world market and 24% of the 60 and over seat market.²⁰⁴ However, the Commission concluded that British Aerospace would not have focused its resources on the turbo-prop market if the concentration had proceeded because of its small presence in the 20-39 seat market, its absence from the 40-59 seat market, and the heightened problems it would have experienced competing on the 60 and over market.²⁰⁵ Saab provided healthy competition on the 20-39 seat market and was building a 50 seater which could have competed with ATR/de Havilland.²⁰⁶ However, the Commission decided that the Saab 50 seater would only marginally have competed with ATR/de Havilland as "most customers would not be willing to pay a premium for the plane. This implies that this plane, given its technical and cost characteristics, will occupy a niche market which will not compete directly in the market for 40- to 59-seat commuters."²⁰⁷ Dornier, which was part of the Deutsche Aerospace group (DASA), could have become an effective competitor on the 20-39 seat market. However, DASA and ATR planned to form a joint venture which would have marketed regional aircraft.²⁰⁸ If this joint venture proceeded, Dornier could not be considered a true competitor of ATR/de Havilland.

The Commission concluded that there could be post-concentration competition from actual competitors in the 20-39 seat market. In the 40-59 seat and 60 and over seat markets "it is questionable whether the other existing competitors could provide effective competition in the medium to long term."²⁰⁹

Fifth, the Commission found it important to consider the bargaining position of customers, in order to determine ATR/de Havilland's ability to act independently of its customers.²¹⁰ For established customers the "lock-in effect" would have limited their bargaining power.²¹¹ For new customers or for established customers completely replacing their fleets, the "lock-in effect" posed no concern, but the elimination of de Havilland as a competitor reduced their bargaining power.²¹² Furthermore, leasing companies, which provide new market entrants with "a significant means of market entry given the

204. ATR/de Havilland Decision, *supra* note 160, at 48.

205. *Id.* at 53-54.

206. *Id.* at 54.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 54-56.

211. *Id.* at 54.

212. *Id.* at 55.

high capital cost of aircraft and the risk of failure," would have limited bargaining power as they must purchase popular aircraft.²¹³

Thus, ATR/de Havilland's substantial absolute and relative market shares, its broad customer base combined with the "lock-in effect," its ability to offer aircraft from all three product markets, the weak position of its competitors, and the poor bargaining position of its customers led to the conclusion that ATR/de Havilland "could act to a significant extent independently of its competitors and customers, and thus have a dominant position on the commuter markets as defined."²¹⁴ Even if the relevant product market had been defined as all 20-70 seaters, the high absolute and relative market shares, the fact that ATR/de Havilland would have possessed its highest market shares in the 40-59 seat market and 60 and over market where demand was increasing, the broadening of the customer base, and the coverage of the complete product range would have led to the same finding of a dominant position.

c. *Significant Impediment Test*

This decision presented the first opportunity for the Commission to specify the factors it considered relevant in the significant impediment test.²¹⁵ The Commission stated that a concentration which creates or strengthens a dominant position may nevertheless be compatible with the common market if the dominant position is temporary and likely to be diminished quickly by new market entry.²¹⁶ The Commission, therefore, focused mainly on the potential for quick, new market entry by competitors. In addition, the Commission set forth two other factors as part of the significant impediment test: (i) the ability of the proposed concentration to

213. ATR/de Havilland Decision, *supra* note 160, at 55.

214. *Id.* at 56.

215. The significant impediment test, the third step of the Commission's three-step assessment under the Merger Regulation, is only carried out if the Commission determines under the second step of the assessment that a notified concentration would create or strengthen a dominant position. In the Alcatel/Telettra and Magnetti Marelli/CEAc decisions, the parties agreed to conditions which convinced the Commission that a dominant position would not be created or strengthened on the relevant markets. Therefore, the significant impediment test did not need to be carried out in those cases.

216. ATR/de Havilland Decision, *supra* note 160, at 56. The Commission does not find these factors expressly listed anywhere in the Merger Regulation. Rather, it states that if such factors—the temporary nature of the dominant position and the likelihood of quick, new market entry—were present, the dominant position would not significantly impede "effective competition" as that concept is defined under article 2(3). Article 2(3) states that "[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market . . . shall be declared incompatible with the common market." Merger Regulation, *supra* note 1, art. 2(3), at 17.

contribute to the development of technical and economic progress; and (ii) the market disturbances potentially caused by the concentration.

First, in carrying out the significant impediment test, the Commission stated that a concentration creating a dominant position may nevertheless be compatible with the common market "if there exists strong evidence that this position is only temporary and would be quickly eroded because of high probability of strong market entry."²¹⁷ The potential for market entry depended upon demand trends as well as time and cost considerations. A high level of demand could be expected through the mid-1990s at which time demand was expected to decrease and thereafter stabilize.²¹⁸ The time and cost factors for entering the market from scratch presented significant hurdles. Evidence indicated that the design, development, manufacture, and delivery of an aircraft required six to seven years.²¹⁹ Furthermore, the fixed and sunk costs associated with this process presented potential entrants with substantial risks.²²⁰ Given these demand trends and time and cost requirements, the Commission concluded that the potential for quick and strong market entry remained minimal:

It follows from the above that a new entrant into the market would face high risk. Furthermore, given the time necessary to develop a new aircraft and the foreseeable development of the market as described above, a new manufacturer may come too late into the market to catch the expected period of relatively high demand. Any new market entry at this stage could only come when the market would have declined from current levels and have stabilized. It is therefore doubtful whether a break-even level of sales could be achieved by a new entrant since even existing competitors are not yet at break-even point in their product cycles.²²¹

None of the companies on the list of potential new entrants suggested by the parties seemed likely to enter with any strength or quickly

217. ATR/de Havilland Decision, *supra* note 160, at 56.

218. *Id.* at 59.

219. The Commission estimated that it takes two or three years of marketing research related to technological changes and market demand to decide which type of plane to develop. In addition, an estimated four year span elapses between research and development and production and delivery. *Id.*

220. For example, high sunk initial costs result from the initial investment needed to develop regional aircraft as well as "delays in designing, testing, and gaining regulatory approval to sell the aircraft." *Id.* In addition, even beyond the initial costs, other costs could arise if technological changes require changes in the design and production of the aircraft.

221. ATR/de Havilland Decision, *supra* note 160, at 59.

enough to ensure competition in the near future for ATR/de Havilland.²²²

Second, the Commission considered the eighth factor listed in article 2(1)—the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition—as part of its significant impediment test. The Commission, however, did not use this factor to consider typical “industrial policy” criteria.²²³ Instead (and more narrowly) it concentrated upon the cost savings associated with the concentration. The Commission did not believe, however, that cost savings would arise purely as a result of this concentration, and took the view that the overall cost savings would involve only 0.5% of the concentration's combined turnover.²²⁴ More important, even if the concentration would have resulted in more substantial cost savings, the Commission would nevertheless have prohibited it because the progress would not have benefitted consumers whose choices would have been significantly reduced by the concentration.²²⁵ Therefore, not only did the Commission use the “technical and economic progress” factor to consider cost savings rather than traditional industrial policy criteria, but also it stressed that any technical and economic progress resulting from the concentration, even if industrial policy criteria were used under this factor, must be to the benefit of consumers. In addition, considering this factor as part of the significant impediment test, rather than as part of the dominant position assessment, reduced its significance because only in rare cases will the significant impediment test rebut the presumption of incompatibility accompanying the finding of a dominant position.²²⁶

Third, the Commission looked for evidence of market disturbances caused by the concentration. Given the competitive

222. The parties mentioned ACAW, a Czechoslovakian aircraft manufacturer, IPTN, an Indonesian company, and the Ilyushin 114, an aircraft built for Aeroflot and other customers from the former East Bloc. The Commission also considered the low likelihood of entry into the market by McDonnell Douglas, Lockheed, and any Japanese manufacturers, and of re-entry into the market by Boeing. ATR/de Havilland Decision, *supra* note 160, at 57-58.

223. See *supra* text accompanying notes 38-43 for a discussion of the concerns at the time of adoption of the Merger Regulation related to the use by the Commission of industrial policy factors. An example of an industrial policy factor is whether a notified concentration would create a European company which could compete effectively against non-European companies as a result, for example, of technological progress aided by a large research and development budget.

224. ATR/de Havilland Decision, *supra* note 160, at 59. Cost savings would have resulted from “rationalizing parts procurement, marketing and product support.” *Id.*

225. *Id.* at 60.

226. See *supra* note 119 for the argument that a concentration which creates or strengthens a dominant position in most cases significantly impedes competition, and thus is presumed to be incompatible with the common market.

advantages that would have resulted from the concentration, the Commission agreed with British Aerospace and Fokker that ATR/de Havilland would likely have pursued a price cutting strategy designed to drive competitors out of the market.²²⁷ Both British Aerospace and Fokker claimed that such a price war would have forced them out of the market completely, which in turn would have had negative effects upon their jet manufacturing capability.²²⁸ The concentration would likely have resulted in the creation of a monopoly which could have raised prices without suffering any competitive consequences. Thus, one market disturbance that concerned the Commission was the potential for a company holding a dominant position to create a monopoly through predatory pricing.²²⁹

In sum, the significant impediment test resulted in the determination that the dominant position created by the acquisition by ATR of de Havilland was not temporary and would have significantly impeded competition.

2. Decision and Lessons

ATR was not allowed to proceed with the acquisition of de Havilland. This decision was the first, and is so far the only, rejection of a notified concentration under the Merger Regulation.

This decision teaches several important lessons. First, it shows the Commission's willingness to declare a notified concentration incompatible with the common market despite persistent pressure to approve the concentration. Indeed, the negative decision was reached in this case despite the approval of the deal by the Canadian antitrust department and support from the Community Commissioners responsible for industrial policy and transport matters.²³⁰

227. ATR/de Havilland Decision, *supra* note 160, at 60.

228. *Id.*

229. The Commission also pointed to the possibility that market disturbances would be felt in a different market; the 100-seat jet market. Because there was an interdependency between the production of the 100-seat jet and the commuter planes affected by this concentration, both British Aerospace and Fokker were able to spread fixed costs over both markets. Therefore, if these two companies were driven out of the commuter aircraft market by predatory pricing, their ability to compete in the 100-seat jet market would have been seriously impaired.

230. See *Aérospatiale Contests*, *supra* note 165; see also *The European Centre of Public Enterprises Expresses its Serious Concern Over Certain Trends in Community Industrial Policy*, EUROPE, Oct. 23, 1991, at 13 (stating that the ATR/de Havilland decision "form[s] an obstacle to the necessary formation of European groups of world size and to the proper functioning of the major . . . transport . . . infrastructure networks which are vital for the economic development of Europe").

Second, the decision highlights the uncertainty concerning the method for defining the relevant product market. This decision provided an example of the significance of this definition. If the whole 20-70 seat market had been considered one relevant product market, the concentration's absolute world market share (50%) would have been lower than that calculated separately in the 40-59 seat market (64%) and in the 60 and over seat market (76%).²³¹ Although the Commission claimed that it would still have reached the same result, a rejection based on a 50% absolute world market share would have required more substantial justification, especially after considering that the Commission approved the Alcatel/Telettra concentration despite an 80% absolute market share in Spain. The lack of specific criteria in the Merger Regulation for defining the relevant product market gave the Commission wide discretion to look at the factors it and the industry generally considered important. While such flexibility may be needed to respond to unusual circumstances, the uncertainty over the method of defining the relevant product market diminishes the predictability of the Commission's review under the Merger Regulation.²³²

Third, this decision reaffirmed that market share by itself could not decide the issue of dominant position. Other factors, such as relative market share, financial power of the companies, barriers to entry, and supply and demand trends must all be considered in conjunction with market share to carry out the dominant position assessment. Although these factors mainly deal with the structural characteristics of the relevant markets, the Commission also considered behavioral factors by looking at the concentration's ability to abuse its dominant position.²³³

Fourth, this decision demonstrated the speculative nature of the Commission's assessment under the Merger Regulation. It has been argued, for example, that Eastern European and Pacific Rim manufacturers would have competed effectively in the commuter market in the near future.²³⁴ Of course, such speculation can be

231. The decision also demonstrates the uncertainty concerning the proper method for calculating market shares. The Commission provides several alternatives to the method it eventually uses. See ATR/de Havilland Decision, *supra* note 160, at 49 n.1.

232. Predictability is one of the primary goals of the Merger Regulation. See *supra* note 19 and accompanying text. In this decision, the relevant product market determination was highly controversial and, as a result, was a major focus of this decision. It should be noted, however, that the same uncertainty exists with regard to the geographic market determination as guidelines for such a determination are also not expressly provided in the Merger Regulation. For an analysis of the uncertainty involved in the relevant geographic market determination in the Alcatel/Telettra decision, see *supra* Part III(B)(2).

233. See *supra* note 188 and accompanying text.

234. *Aérospatiale Contests*, *supra* note 165. Indeed, Aérospatiale argued that its true market share would have been closer to 25% than 70%.

expected when a decision under the Merger Regulation is required prior to the operation of a concentration, but the speculative nature of the decisions limits the ability of the Commission to establish a predictable regime under the Merger Regulation.

Fifth, this decision and its aftermath demonstrated the controversy which can surround a finding of incompatibility. Charges were levied against Sir Leon Brittan, an Englishman, that he was trying to protect British Aerospace at the expense of Italian and French manufacturers.²³⁵ More important, the Competition Directorate's review of this concentration has been deemed overly legalistic and unconcerned with the positive effects of the concentration, for example, the strengthening of the competitiveness of the European aircraft industry vis-a-vis the United States and Asia.²³⁶

Indeed, the incompatibility finding led to a European Parliament resolution to amend the Merger Regulation to take into account the industrial, social, regional, and environmental impacts of a concentration.²³⁷ Another proposal called for greater coordination between the directorate responsible for industrial policy and the Competition Directorate on cases decided under the Merger Regulation.²³⁸ A third proposal called for the establishment of an agency independent from the Commission to oversee the Merger Regulation.²³⁹ None of these proposals was ever adopted.

235. *Criticism in France of the Commission's Decision Banning The Acquisition of De Havilland by Aérospatiale/Selenia*, EUROPE, Oct. 5, 1991, at 12 [hereinafter *Criticism in France*]. Commission members are required to remain independent from the governments of the Member States:

1. The Commission shall consist of seventeen members, who shall be chosen on the grounds of their general competence and whose independence is beyond doubt.

The members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties.

In the performance of these duties, they shall neither seek nor take instructions from any Government or from any other body. They shall refrain from any action incompatible with their duties.

Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks.

EC TREATY art. 57.

236. *Criticism in France*, *supra* note 235.

237. *Following the De Havilland Affair, The European Parliament Calls for a Revision of EEC Regulation on Prior Control of Mergers*, EUROPE, Oct. 12, 1991, at 11.

238. *Id.*

239. *Id.* Sir Leon Brittan persuasively argued against the establishment of an independent merger authority:

The real objections are more fundamental, and not merely practical ones. The issues at stake in a merger decision can never be

E. *Nestle/Perrier*²⁴⁰

Nestle SA, a publicly held Swiss company involved in a variety of food and nonfood businesses, made a public bid for 100% of the shares of Source Perrier SA, a French mineral water company, through Demilac, a joint subsidiary of Nestle and Banque Indosuez. Nestle indicated in its notification that it planned to exercise its option to purchase the shares of Banque Indosuez in Demilac, thereby gaining control over all of the shares of Perrier. Perrier owned several well known brands, including Perrier, Volvic, Vichy, Saint-Yorre, and Contrex. In a side agreement, Nestle agreed to sell Perrier's Volvic brand to BSN, a French food company which represented the only other major participant in the French source water market with its ownership of the Evian brand, if the acquisition of Perrier's shares succeeded.

simply technical ones. Important as the application of professional expertise will always be, there will always remain an important element of judgment. In those circumstances the opportunity for political pressures will exist if there were an independent Mergers Authority, just as it does in the case of the European Commission. The members of the Authority are bound to be chosen from the Members States of the Community and they would be subject to the same national and other pressures as Members of the Commission.

But for me the most fundamental objection to the proposal is a different one. Not even the most enthusiastic protagonists of this proposal suggest that a Mergers Authority should have the last word. After all, even the Bundeskartellamt can be overruled by the Minister. Consequently what has usually been suggested is that the European Mergers Authority should make its recommendation, on the basis of the principles of competition, but another body, whether the Commission or the Council of Ministers, should have the ultimate power to overrule the Authority.

If you give a body such as the Commission or Council the right to take the final decision, it is bound to want to exercise that right and to feel free to bring to bear considerations other than those of competition Allowing the Commission or Council to override the Competition Authority would be to legitimise the application of political factors when it comes to making the final decision.

Sir Leon Brittan, *Do We Need A European Mergers Authority?*, Address Before the Research Institute for Economical Affairs and Competition (May 5, 1992), excerpts available in LEXIS, Europe Library, Rapid File.

240. Commission Decision 92/553, 1992 O.J. (L 356) 1 [hereinafter Nestle/Perrier Decision].

1. Three-Step Assessment
 - a. *Relevant Product and Geographic Markets*
 - i. Product Market

The Commission determined that the relevant product market was the bottled source water market which consisted of both mineral water and spring water.²⁴¹ The Commission distinguished the bottled source water market from the soft drink market based on demand and supply factors.

The Commission began by focusing upon four demand-related considerations.²⁴² First, consumers often purchased bottled source water, in contrast to soft drinks, for its positive health qualities.²⁴³ The Commission supported its analysis by pointing out that Nestle, Perrier, and BSN used these positive health qualities as a marketing point. Second, bottled source water tasted differently and served different purposes than soft drinks.²⁴⁴ For example, soft drinks, which are full of sugar and artificial flavors, are generally drunk occasionally and in small quantities. By contrast, source water is purchased for regular consumption in large amounts "to fulfil a basic alimentary need."²⁴⁵ Third, demand would not have shifted from source water to soft drinks if a significant price increase had occurred.²⁴⁶ Not only was there a substantial absolute price difference between bottled source water and soft drinks, but also the role of prices in deciding whether to buy water or soft drinks was minimized by brand loyalty and, as noted above, the different purposes served by each kind of drink.²⁴⁷ In addition, prices in each market have not historically followed a similar course. Thus, producers in both markets did not take account of the substitutability of source water and soft drinks when making their pricing decisions.²⁴⁸ Fourth, retailers treated bottled water and soft drinks differently largely because consumers did so.²⁴⁹ Thus, even if prices changed to a substantial degree in the source water market, retailers would nevertheless have sold both source water and soft drinks.

241. Nestle/Perrier Decision, *supra* note 240, at 2-7.

242. *Id.* at 2-5.

243. *Id.* at 2-3.

244. *Id.* at 3.

245. *Id.* The Commission noted that in France in 1990 the per capita consumption of bottled water was 104.8 liters, whereas the per capita consumption of "carbonates" was only 29.9 liters.

246. *Id.* at 4.

247. *Id.*

248. *Id.*

249. *Id.* at 4-5.

The Commission then considered three supply-related factors.²⁵⁰ First, production and marketing were carried out differently.²⁵¹ The bottled source water market is much more heavily regulated. For example, bottled source water must be bottled at the source, whereas soft drink companies can locate their plants based on economic considerations.²⁵² The bottle-at-the-source requirement also limited the ability of a producers to enter cost-saving bottling and distribution agreements with independent companies (a practice common in the soft drink industry).²⁵³ In part as a result of these different methods of production and marketing, companies have found it difficult to penetrate both markets in France.²⁵⁴ Second, the different pricing policies in each market demonstrated the existence of different competition environments.²⁵⁵ Third, the different regulatory requirements on production and marketing prevented soft drink companies from using excess capacity to produce bottled source water.²⁵⁶ Thus, the "considerations of supply-side substitutability cannot lead in the present case to a different view of the relevant product market."²⁵⁷

ii. Geographic Market

Over Nestle's objection,²⁵⁸ the Commission defined the relevant geographic market for bottled source water as France, Perrier's home country, rather than the European Community (or Belgium and Germany) where a large amount of French bottled water is sold, for three reasons. First, the competitive environment differed in each Member State.²⁵⁹ For example, demand for bottled source water in several Member States was virtually nonexistent, whereas in other Member States consumers purchased sparkling waters in significant

250. Nestle/Perrier Decision, *supra* note 240, at 4-7.

251. *Id.* at 5.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 5-6.

256. *Id.* at 6.

257. *Id.* at 7.

258. Although it acknowledged that the conditions of competition differed in Belgium and Germany, Nestle argued that the relevant geographic market should have included all of Belgium and parts of Germany because of the threat of parallel imports. *Id.* Under this theory, if prices were to increase in France, an independent company in Belgium or Germany could purchase Nestle's source water and reexport it to France. Nestle claimed that the this threat restrained its ability to raise prices without harmful competitive effects. The Commission rejected this argument. *See infra* text accompanying notes 264-67.

259. Nestle/Perrier Decision, *supra* note 240, at 8-9.

quantities.²⁶⁰ Bottled source water was consumed in large quantities in France.²⁶¹ Furthermore, the amount of bottled source water exported across national boundaries was minimal largely because transportation costs were too high given the volume of water.²⁶² Finally, suppliers and distributors remained fragmented in the Member States that could potentially develop a major market participant. Such fragmentation "hinder[ed] the possibilities of suppliers of bottled water in these Member States to develop a large national home base allowing them to envisage expansion in other markets."²⁶³

Second, parallel importation from Germany or Belgium was not likely given the price differences and the different forms of packaging.²⁶⁴ Specifically, the price for a bottle of Nestle's Vittel in France was 40% less than the same bottle in Belgium and 18% less than in Germany.²⁶⁵ As a result, an independent company that purchased Vittel in Belgium or Germany for reexport to France would have had to pay more than the sales price in France. In addition, the reexporter would have had to incur additional transportation and repackaging costs.²⁶⁶ Furthermore, these reexporters would not have had access to any volume discounts from Nestle. Thus, because of these price, cost, and packaging differences, even the *threat* of parallel importation, or for that matter, the direct export of bottled source water from Belgium or Germany, did not exist and therefore did not affect the competitive behavior of the French producers.²⁶⁷

Third, strong barriers to entry prevented market entry in response to price increases on the French market.²⁶⁸ As noted above, high transportation costs were considered prohibitive as bottled source water must be bottled and shipped from the source. Even companies that owned sources near the French border had other transportation-related disadvantages.²⁶⁹ Furthermore, given the number of well known French brands, retailers were reluctant to provide shelf space to new brands. The expensive advertising campaigns of French

260. Nestle/Perrier Decision, *supra* note 240, at 8.

261. *See supra* note 245.

262. Nestle/Perrier Decision, *supra* note 240, at 8.

263. *Id.*

264. *Id.* at 9. *See supra* note 258 for the meaning of parallel importation.

265. *Id.*

266. *Id.* The Commission noted that Germans package their water in glass, whereas the French use plastic. Not only is the cost of transporting glass quite high, but also French consumers are not in the habit of buying water in glass containers.

267. *Id.*

268. *Id.* at 9-10.

269. *Id.* at 10. The Commission noted, for example, that French producers had sufficient volume to transport water by train. Transportation by train is cheaper than by truck, and non-French companies with sources near France would have had to generate much more volume and invest large sums of money to distribute water by train.

producers resulted in significant brand loyalty; a new entrant would have had to invest large amounts of money to gain similar recognition in order to generate consumer loyalty and improve access to shelf space.²⁷⁰ Finally, the high level of concentration on the French market was considered a barrier to entry because the existing companies could work together to prevent potential competitors from successfully entering the market.²⁷¹ The actual failure of companies which have attempted to enter the market over the past five years provided additional evidence that the barriers to entry remained high.

Neither the relevant product market determination nor the relevant geographic market determination raised much controversy in this decision. Instead, the true controversy arose in relation to the dominant position assessment.

b. *Dominant Position Assessment*

i. Market Share

The Commission calculated market share based on more than the size of the undertakings involved in the notified concentration. The Commission factored in the market share of the only other remaining supplier of bottled water on the French market, BSN, in conjunction with the market share of the concentration. As noted above, the Commission believed that the high concentration among Nestle, Perrier, and BSN promoted concerted actions by these companies to prevent new market entry. In terms of value, as opposed to volume, Nestle/Perrier and BSN controlled 82.3% of the French bottled source water market; local producers would have controlled the remaining 17.7%.²⁷² Thus, the effect of the concentration, as notified, would have been to decrease from three to two the number of companies controlling 82.3% of the market. Furthermore, Nestle and BSN would have been well positioned to maintain or increase their market share given the excess capacities they would have acquired through the concentration and the sale of Volvic to BSN.²⁷³

270. Nestle/Perrier Decision, *supra* note 240, at 10. The Commission pointed out that the French producers offered a variety of brands, thus increasing the risk of failure that a new entrant would have to undertake in attempting to penetrate the market.

271. *Id.* at 10, 22.

272. *Id.* at 11-13. The Commission further noted that, given the trends over the past five years, these percentages were likely to remain consistent in the future.

273. *Id.* at 14.

ii. Barriers to Entry/Supply and Demand Trends

In addition to the barriers to entry discussed in the analysis of the relevant geographic market determination—high transportation costs, high brand awareness as a result of advertising, and the concentration on the French market—the Commission pointed to four other supply and demand factors that prevented effective competition. First, the French market was already highly concentrated before this concentration, thereby making anticompetitive concerted action among existing companies easier.²⁷⁴ Since 1987, for example, parallel price increases have been the norm; when one producer raised prices, usually Perrier, the others followed shortly thereafter. Such price increases were possible, first, because the pricing decisions of these three national companies have not been affected by local producers (of mineral water),²⁷⁵ and, second, because the companies shared price information through industry associations and overlapping customers.²⁷⁶ Indeed, the prices charged at the time of notification were very high when compared both to local spring waters and to production costs.²⁷⁷ In addition, because manufacturing processes were so similar as a result of governmental regulation, the national companies had similar cost structures. As a result, there was less incentive for these companies to compete against each other directly.²⁷⁸ Thus, these pricing and cost factors demonstrated the existence of an oligopolistic market structure even before the notification of this concentration.

Second, the strength of the competitors—the local mineral water producers—did not present competitive restraints.²⁷⁹ In particular, “the three suppliers themselves consider that it is still profitable to increase their prices and that the pressure from local waters is not such as to prevent them either from maintaining the present high prices, or even from increasing them.”²⁸⁰ In addition, structural factors prevented local companies from competing effectively. For example, the largest of the local companies controlled at most 5% of the market, and none had the financial strength of the three national companies.²⁸¹ Local water producers were not positioned to sink the investment necessary to compete with the national brands. The local

274. Nestle/Perrier Decision, *supra* note 240, at 14.

275. *Id.* at 15-17. The Commission again stressed the power of advertising: “The three national suppliers have created an extremely high consumer fidelity through long standing and strong publicity campaigns for national mineral waters.” *Id.* at 15.

276. *Id.* at 15.

277. *Id.*

278. *Id.*

279. *Id.* at 15-18.

280. *Id.* at 17.

281. *Id.*

companies could not have competed given the number of sources, the brand awareness, and the distribution systems of the national companies, and thus could not be considered a competitive counterweight.²⁸²

Third, in some circumstances a high concentration among purchasers (retailers) can act as a competitive counterweight to producers.²⁸³ In the French bottled source water market, however, even though the top ten retailers purchased approximately 70% of Nestle, Perrier, and BSN's turnover, none of them individually accounted for over 15% of the turnover.²⁸⁴ Therefore, the Commission

concluded . . . that the buying power of retailers and wholesalers would not be sufficient to constrain significantly the market power of the two remaining national water suppliers after the merger. The merger would increase the portfolio of major well-known brands in the hands of Nestle and BSN which must be on the shelves of each big retail store. The merger would also reduce the choice of the retailers from three to two sources of supply and would thus increase their dependency on the two major suppliers on the market.²⁸⁵

Fourth, quick and significant potential competition, whether from new entrants or from local suppliers, was unlikely.²⁸⁶ In addition to the high barriers to entry discussed previously, several other factors specific to the French water market rendered new entry difficult. For example, demand for bottled source water in France was expected to grow less quickly in comparison with the rest of the Community.²⁸⁷ Given the number of existing and well-established brands in France, new entrants would have had to offer large rebates to convince retailers

282. Nestle/Perrier Decision, *supra* note 240, at 18. The Commission further noted that if the concentration proceeded as notified, Nestle would have owned several local springs and could have used its wide range of sources as a marketing advantage over the local suppliers.

283. *Id.* at 18-19.

284. *Id.* at 18. In other competition cases in which buying power was an important factor, "the products involved were generally intermediary products or products where long-term contracts or cooperation agreements for development of the products were involved which can create a more balanced seller-buyer relationship, provided the buyers are sufficiently concentrated." *Id.* at 19.

285. *Id.* at 20.

286. *Id.* at 21.

287. *Id.* at 21.

to sell a new brand.²⁸⁸ In addition, not only was the potential for developing significant new sources in France minimal, but also the effect of the acquisition of Perrier and the sale of Volvic to BSN would have been to cut off the two main opportunities for major new market entry.²⁸⁹ Finally, past attempts of foreign companies to penetrate the French market had either failed or resulted in a presence which could not have affected the competitive decisions of the three national suppliers.²⁹⁰

c. *Significant Impediment Test*

The Commission did not carry out the significant impediment test in any detail because the parties agreed to the conditions outlined below. However, the Commission summarized all of its findings and concluded that no evidence existed that the duopolistic dominant position that would have been created by this concentration would only have lasted for a short time.²⁹¹

2. Decisions and Lessons

The Nestle/Perrier concentration was approved subject to several conditions.²⁹² First, Nestle had to sell four brands—Vichy, Saint Yorre, Thonon, and Pierval—and several unnamed sources of water to a single buyer. These brands and sources produce three billion liters of water annually, representing approximately 20% of the relevant product in France. Second, Nestle was prevented from providing recent information on its sales volume to professional associations which would have given such information to competitors.

288. Nestle/Perrier Decision, *supra* note 240, at 21. The Commission noted that the rebates offered by the national brands tended to bind retailers to the whole range of brands of each producer. Again, in connection with its discussion on access to retailers, the Commission stressed the effect on new entry of the massive advertising campaigns of the three national suppliers. *Id.* Because advertising represented a necessary cost to penetrate the French market, but a cost which was not recoverable in case of failure, new entrants faced the possibility of losing all of this initial investment, and, as a result, were not likely to take the risk in the first place.

289. *Id.* at 22.

290. *Id.* at 22-23.

291.

Given the high market shares and capacities of Nestle and BSN after the merger and the sale of Volvic to BSN, the insufficient competitive counterweight from local mineral and spring waters, the increased dependency of retailers and wholesalers on the portfolio of brands of Nestle and BSN, the absence of effective price-constraining potential competition from newcomers ..., the Commission must conclude that the proposed merger . . . would create a duopolistic dominant position which would significantly impede competition on the French bottled water market.

Id.

292. *Id.* at 29-31.

Third, Nestle had to keep all of assets of Perrier separate from its own until the above sale was completed and ensure that separate books were maintained. Fourth, Nestle was required to refrain from making any structural changes to Perrier without Commission approval.²⁹³ Fifth, the Commission, in order to establish a third power on the French market, had to approve the buyer of the water which was required to be sold under the first condition.²⁹⁴ Sixth, Nestle was prohibited for ten years from buying back the sources it must sell pursuant to this agreement. Seventh, Nestle was required to inform the Commission if it acquires within five years any French bottled water company with a market share of over 5%. Eighth, the transfer of Volvic from Nestle to BSN was not allowed to proceed until Nestle had sold the aforementioned sources to the third party.²⁹⁵

The crucial lesson arising out of the Nestle/Perrier decision is that the Commission believes it can apply the concept of "collective dominance" under the Merger Regulation to prohibit concentrations which create or strengthen oligopolies. Under the concept of collective dominance as it has developed under article 86, the Commission argues that, as a result of structural link-ups or of agreements and concentrated practices which create such structural link-ups, oligopolistic actors may present themselves as a single entity, and as a result may have a dominant position which is shown to be abused if evidence of price parallelism or collusion is found.²⁹⁶ In the Nestle/Perrier decision, the

293. Such structural changes include "the sale of a trademark or brand, the sale of a business unit, the closing of a manufacturing unit, or any disposal of similar major assets." Nestle/Perrier Decision, *supra* note 240, at 29. In addition, during the time that Perrier's assets were kept separate, Perrier management was not allowed to transfer certain proprietary information to any member of the Nestle group. *Id.* at 30.

294. The Commission approved the sale of this water to the French firm Castel. See *EC Approves Nestle Water Brand Sell-Offs*, The Reuter European Business Report, June 11, 1993, available in LEXIS, Europe Library, Rapid File.

295. The Commission agreed to discuss with BSN the idea of having a representative in Volvic immediately in order to ensure that Nestle did not diminish the value of Volvic's assets. See Press Release, *Commission Gives Go-Ahead, With Conditions, to Nestle-Perrier Merger*, July 23, 1992, available in LEXIS, Europe Library, Rapid File.

296. For an analysis of the Commission's varied application of the "collective dominance" concept in two article 86 cases, see Martin Schoedermeier, *Collective Dominance Revisited: An Analysis of the EC Commission's New Concepts of Oligopoly Control*, 1990 EUR. COMPETITION L. REV. 28; see also James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 519, 536-40 (outlining the concept of collective dominance in EC law). For the Commission's argument that article 86 applies to collusive practices of independent undertakings under the collective dominance concept, see *Societa Italiano Vetro SpA & Ors v. Commission of the European Communities*, 1992 CEC (CCH) 33, 111-12 [hereinafter Italian Flat Glass Case]. The ECJ's decision in the Italian Flat Glass Case, while rejecting the application of a collective dominance theory under the particular circumstances of the case, indicates the court's willingness to accept such a concept in the future. See *id.* recital 366, at 114;

Commission believed that the concentration as originally notified would have resulted in a market structure that could have reinforced price parallelism or collusion on the French market. The Commission's use of the collective dominance concept was entirely foreseeable,²⁹⁷ but has nonetheless been seriously criticized. For example, one commentator believes that the Commission did not follow the express language of the Merger Regulation²⁹⁸ and "question[s] whether the Commission's mere wishes should be permitted to expand, without further ado, the powers which member states have given it to review

see also Italian Glass Firms Win "Joint Dominance" Case, EUROWATCH, Apr. 3, 1992, available in LEXIS, Europe Library, Rapid File. It is interesting to note that despite the fact that the Italian Flat Glass Case did not implicate any parties from the United Kingdom, the United Kingdom nonetheless filed a brief with the ECJ expressing its strong opposition to the use of collective dominance under article 86. The United Kingdom did not want the case to establish a precedent for the use of the collective dominance concept under article 86, including for merger control purposes, except in the most limited of circumstances. *See Italian Flat Glass Case*, *supra* recitals 341-45, at 109-10.

The Commission's definition and use of the term "collective dominance" under article 86, however, does not necessarily control the meaning of the same term under the Merger Regulation. Venit, *supra* note at 34 ("Given the Regulation's reliance on article 235 and the requirements of effective structural control inherent in merger regulation, the dialogue between the Commission and the Court concerning the concept of collective dominance . . . is probably not decisive for the resolution of the status of collective dominance under the Regulation."); *see also* Margarida Afonso, *A Catalogue of Merger Defenses Under European and United States Antitrust Law*, 33 HARV. INT'L L.J. 1, 13 (1992) ("Since the Regulation is calculatedly based on the catch-all article 235, it may cover situations beyond the concept of dominant position within the meaning of Article 86.").

297. *See, e.g., Brittan Reflects on First Year*, *supra* note 21, at 4; James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, in INTERNATIONAL MERGERS AND JOINT VENTURES, *supra* note 6, at 519, 533 ("In 1986 the Commission . . . stated that one of the principal objectives behind the then proposed merger regulation was to prevent the creation of situations which will result in stable collusion between oligopolists.") (citing COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTEENTH REPORT ON COMPETITION POLICY +p+p 331-33 (1987)).

In addition, the Commission considered using the collective dominance concept in prior Merger Regulation cases. *See, e.g.,* Commission Decision 91/595, 1991 O.J. (L 320) 26, 30 (Varta/Bosch Decision); *see also* 2 HAWK, *supra* note 26, at 964.1-964.3 (Supp. 1992) (discussing three pre-Nestle/Perrier cases which indicated the Commission's belief that collective dominance could be used under the Merger Regulation: Alcatel/AEG Kabel, Henkel/Nobel, and EMI/Virgin Music).

298. Whereas article 86 prohibits "any abuse by one or more undertakings of a dominant position," *see supra* note 8, the Merger Regulation makes no reference to the concept of collective dominance and only prohibits "[a] concentration which creates or strengthens a dominant position." Merger Regulation, *supra* note 1, art. 2(3), at 17. "[A] dominant position must be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally." Romano Subiotto, *Commission's "Worrying Step" on Oligopolies*, FINANCIAL TIMES, Sept. 10, 1992, at 17 (letter to the editor).

concentrations with a Community dimension."²⁹⁹ The Commission argued that it could not carry out its duties under article 3(f) of the Treaty of Rome, which calls for "the institution of a system ensuring that competition in the common market is not distorted,"³⁰⁰ if two firms, by means of their collective actions, could do what one firm cannot—impede effective competition and hinder the functioning of the common market.³⁰¹ Significantly, the Commission asserts that "[i]n the absence of explicit exclusion of oligopolistic dominance by article 2(3) it cannot be assumed that the legislator intended to permit the impediment of effective competition by two or more undertakings."³⁰² Furthermore, the Commission points out that all of the Members States with developed merger control systems can prohibit oligopolistic dominance.³⁰³

Several questions are raised by the Commission's use of the collective dominance concept in the Nestle/Perrier case. First, it remains unclear what standards the Commission uses to determine whether a concentration, which creates or strengthens an oligopolistic market, is compatible or incompatible with the common market.³⁰⁴ Indeed, Sir Colin Overby, head of the Commission's Merger Task Force at the time of this decision, "pointed out that there are certain sectors where a duopoly would still guarantee effective competition, and where as a result the Commission would not intervene."³⁰⁵ Sir Colin and the Commission itself have not identified which sectors these might be or what factors differentiate these sectors from other sectors. The Nestle/Perrier decision does not indicate what factors might make an oligopoly nonetheless compatible with the common market.

299. Subiotto, *supra* note 298.

300. EC TREATY art. 3(f).

301. Nestle/Perrier Decision, *supra* note 240, at 24.

302. *Id.* This statement is significant because it demonstrates that the Commission believes that it can freely interpret any provision which does not contain an explicit definition.

303. *Id.* at 24-25. The Commission found it hard to believe that "[t]he Merger Regulation would not only have transferred the national merger control powers to the Community but those Member States which had a system with oligopolistic dominance control would at the same time have abandoned such control altogether without any substitute for it at Community level." *Id.* at 25.

304. In my opinion, the presumption that a concentration which creates or strengthens a dominant position significantly impedes competition and is, as a result, incompatible with the common market under the significant impediment test, *see supra* notes 226 and 119 and accompanying text, should not as easily apply to a concentration which creates or strengthens an oligopolistic market. In an oligopoly, the concentration does not have the same level of control over how a market operates as does a concentration which creates or strengthens a traditional article 86 dominant position. The concentration's ability to significantly impede competition depends on the formal or informal cooperation of other companies belonging to the oligopoly; companies which are not necessarily controlled by the concentration.

305. Nestle/Perrier Decision, *supra* note 240.

Second, it is unclear how significant a precedent the Nestle/Perrier decision represents. In this case, the Commission prohibited a duopoly which would have controlled 82% of the market share on a market which had no other significant competitors. In addition, the relevant market showed pre-existing signs of oligopolistic abuse as parallel price increases had regularly occurred among major brands during the preceding five years.³⁰⁶ Undertakings involved in notified concentrations investigated in the future under the concept of collective dominance may be able to distinguish their markets from the Nestle/Perrier market on the grounds, for example, that their markets are less concentrated and have four or five major actors instead of two, or that there is no evidence of pre-existing anticompetitive conduct on their markets. The problem is, however, that the parties cannot know if these arguments are persuasive because the standards to be used in the collective dominance analysis are not expressed in the Merger Regulation, and have not so far been explained by the Commission.

Third, along the same lines, it is unclear why the final result of the conditions agreed upon in this decision, an oligopoly in which the three leading producers—Nestle, BSN, and Castel, the company which purchased the brands and sources pursuant to this decision—still control approximately 87% of the market, is acceptable under a collective dominance analysis.³⁰⁷ The Commission's acceptance of the three-member oligopoly in this decision should provide industries which are worried about the extension of the Merger Regulation to oligopolies—those, such as the oil industry, with limited numbers of competitors (but more than two) and high capital costs—with an argument against the use of the collective dominance concept in their particular cases.

306. The Commission, however, stressed that it was not asserting that an oligopolistic dominance existed before the concentration. Instead, it merely found that price competition was weak and market concentration was high, and, as a result, that additional scrutiny of the concentration was required. Nestle/Perrier Decision, *supra* note 241, at 25.

307. The Commission argued that:

[t]he reduction from three to two suppliers (duopoly) is not a mere cosmetic change in the market structure. The concentration would lead to the elimination of a major operator who has the biggest capacity reserves and sales volumes in the market. Perrier sources and brands would be divided between the two remaining suppliers. In addition, the reduction from three to only two national suppliers would make anticompetitive parallel behavior leading to collective abuses much easier.

Id. at 25-26.

IV. QUESTIONS ANSWERED, UNCERTAINTIES REMAIN

The decisions reached during the first two years of the Merger Regulation, including the four analyzed in this Article, teach important lessons and raise uncertainties regarding both (i) the *general* role of the Merger Regulation in dividing jurisdiction over the review of concentrations between the European Community and the Member States and (ii) the *specific* substantive criteria used by the Commission under the Merger Regulation.³⁰⁸

A. *General Lessons and Uncertainties*

As noted above, the major *general* disagreement at the time of adoption of the Merger Regulation concerned the thresholds at which the Commission obtained exclusive jurisdiction to review concentrations. The final compromise set the thresholds at relatively high levels compared to earlier proposals, and added the German clause and the legitimate interest exception—both of which called into question the ability of the Merger Regulation to define clearly the exclusive jurisdiction of the Commission and the Member States over concentrations.³⁰⁹

The decisions reached during the first two years dispel this concern. These decisions demonstrate that the German clause and the legitimate interest exception have not interfered with the Commission's ability to handle the review of concentrations meeting the Merger Regulation's thresholds. Indeed, Member States requested referrals under the German clause in only four notified concentrations during the first two years of the Merger Regulation; the Commission decided not to refer three of these concentrations and to refer part of one of the concentrations.³¹⁰ None of the four decisions analyzed in this Article had requests for referral under the German clause. In addition, the legitimate interest clause played no role during the first two years.

308. See *supra* Part I(B) for the discussion on the *general* and *specific* categories of disagreements.

309. A clear division of jurisdiction between Member States and the Commission (so-called "one-stop shopping") was one of the primary goals of the Merger Regulation. See *supra* note 19. The Dutch clause was also part of the compromise, but because it allows Member States to request the Commission to review a case which otherwise does not meet the thresholds, it does not challenge the Commission's ability to maintain its exclusive jurisdiction over concentrations meeting the thresholds. The following analysis focuses instead on the two compromises which potentially weaken the Commission's exclusive jurisdiction: the German clause and the legitimate interest exception.

310. See Tarmac/Steetley, Case No. IV/M180. The final decision in this case is printed at 1992 O.J. (C50) 25. It is within the discretion of the Commission to determine whether to refer a case to the requesting Member State under the German clause. Merger Regulation, *supra* note 1, art. 9(3), at 20.

The Commission's ability to avoid jurisdictional clashes with Member State authorities based on the German clause and the legitimate interest exception will be challenged, however, if the thresholds are lowered pursuant to the review of the Merger Regulation in 1996.³¹¹ For example, if the worldwide threshold were lowered to ECU two billion, not only would the Commission receive a significantly higher number of notifications, but also it would review smaller concentrations which would arguably raise graver anticompetitive concerns,³¹² and which would more likely raise concerns limited to one national market or a part thereof—thereby increasing the potential for referral requests by Member States under the German clause. In sum, on the one hand, the decisions reached during the first two years, including the four analyzed in this Article, demonstrate that the concern which existed at the time of adoption of the Merger Regulation about its ability to define clearly the exclusive jurisdiction of the Commission over the review of concentrations meeting its thresholds was largely misplaced. On the other hand, the future remains unclear as the lowering of the thresholds would present new challenges.

Whereas the *general* concern related to the division of jurisdiction between the Member States and the Commission—a concern which existed at the time of adoption of the Merger Regulation—has not turned out to be too significant, a different *general* jurisdictional issue has become important, namely, whether the Merger Regulation can apply to concentrations which create or strengthen an oligopoly.³¹³ The Commission's decision that it can does not affect the jurisdiction of the Member States and the Commission in the sense that review by the Commission will still only occur if the concentration meets the thresholds, but it increases the Commission's authority to prohibit, or to impose conditions upon, concentrations which meet the thresholds. It is far from clear from the language of the Merger Regulation that the Member States intended to provide such authority to the Commission.³¹⁴ The frequency with which the Commission uses

311. See *supra* note 6.

312. See *supra* notes 32-33 and accompanying text.

313. The question whether the term "dominant position" includes collective dominance (and therefore that the Merger Regulation can be applied to concentrations creating or strengthening oligopolies) can also be seen as a *specific* question—one which deals with the interpretation of the language of the Merger Regulation.

314. Decisions of the Commission are subject to ECJ review. Merger Regulation, *supra* note 1, art. 21(1), at 24. No Commission decisions under the Merger Regulation were appealed during the first two years. Given cost and time considerations, undertakings remain reluctant to appeal to the ECJ. As a result, the ECJ has limited opportunity to rule on Commission interpretations of the Merger Regulation. Thus, Commission decisions on its own authority under the Merger Regulation go largely unchecked. Of course, Member States could require agreement by the Commission on contentious issues as part of an agreement to lower the thresholds.

this authority is the major jurisdictional uncertainty to be clarified over the next few years.

B. *Specific Lessons and Uncertainties*

As noted earlier in the Article,³¹⁵ the major *specific* disagreement at the time of adoption of the Merger Regulation concerned the role of industrial policy criteria, as opposed to purely competition-based criteria, in the review of notified concentrations by the Commission. Germany and the United Kingdom, for example, feared that the Commission would disregard anticompetitive effects of a concentration to encourage the development of "European champions."³¹⁶ One lesson arising out of the four decisions analyzed above is that industrial policy has played virtually no role to date. Indeed, in Alcatel/Telettra, Magnetti Marelli/CEAc, and Nestle/Perrier, the Commission did not consider industrial policy criteria, but focused instead on factors 2-7 of Article 2 of the Merger Regulation—the competition-based criteria—in its dominant position assessment.³¹⁷ In the ATR/de Havilland decision, the Commission considered "technical and economic progress"—arguably an industrial policy criterion—to consider the rationalization brought about by a concentration, rather than to consider how such a concentration might promote the ability of a European company to compete against the rest of the world. The Commission further weakened the use of this criterion as an industrial policy tool by implementing it into the third step of the analysis under the Merger Regulation, the significant impediment test, which often is not reached because a dominant position finding in step two of the analysis is rare. Of course, the reaction to the ATR/de Havilland decision³¹⁸ demonstrates that there is still support within some parts the Commission for the use of industrial policy criteria; however, the Competition Directorate has to date focused primarily upon competition-based criteria.

The decisions analyzed above demonstrate other uncertainties that have arisen since the adoption of the Merger Regulation. Specifically, where the Merger Regulation is not explicit in its language, the Commission sees itself as having substantial flexibility in determining the meaning of the Merger Regulation. For example, the

315. See *supra* text accompanying notes 38-43.

316. This author does not take the position that industrial policy criteria are necessarily irrelevant to the assessment of a concentration, rather I believe that the use of such criteria can only lead to increased uncertainty as a wide range of purely political considerations would arise under the Merger Regulation. As noted earlier, one goal of the Merger Regulation is to increase predictability in the Commission's control of concentrations.

317. See *supra* Part II(B).

318. See *supra* notes 235-39 and accompanying text.

Commission has demonstrated its willingness to consider a wide range of factors in its relevant product and geographic market determinations, often inciting strong disagreements from the parties involved.³¹⁹ Because the Merger Regulation does not expressly list the factors to be considered in the relevant market determinations, the Commission maintains a degree of flexibility in each case. Guidelines outlining the key elements which define a relevant product and geographic market would make the Merger Regulation assessment more transparent and predictable. In addition, the Commission's interpretation of the term "dominant position" to include collective dominance, and as a result to apply the Merger Regulation to oligopolies, also demonstrates that the Commission perceives itself as having wide substantial flexibility to interpret the meaning of the Merger Regulation.³²⁰

V. CONCLUSION

The Merger Regulation has generally worked well during its first two years in existence.³²¹ Many of the concerns which existed at the time of adoption of the Merger Regulation have not come about as predicted. The Commission has rejected only one notified concentration, preferring instead to impose conditions on

319. See, e.g., *supra* text accompanying notes 89-101, 132-43, and 161-78.

320. See *supra* note 303 and accompanying text. As one article suggests: "What is clear from the growing debate, both within and outside the Commission, is that EC merger policy is advancing into uncharted territory, where the guidelines may be defined largely by the success of Brussels' efforts to test the limits of its powers." Guy de Jonquieres & Andrew Hill, *Source of Change for Mergers*, FINANCIAL TIMES, July 23, 1992, at 16.

321. The Center for Economic Policy Research (CEPR), in an independent review of the Merger Regulation, raised the following criticisms:

(1) the analysis presented by the Commission is often based on judgments that are sketchily presented, and appeal to a variety of factors, the weight accorded to which varies from case to case in an insufficiently systematic manner;

(2) the Commission has been extremely accommodating in its interpretation of jurisdiction to the wishes of firms to be treated under the Merger Regulation instead of under article 85 and 86 procedures or by national authorities;

(3) the Commission's market definitions are based on a procedure that will tend to result in excessively narrow definitions. One result of this is that more cases than necessary appear to raise concerns about dominance, which leads the Commission often to appeal to countervailing considerations in a sometimes arbitrary manner;

(4) the conditions that have been attached to certain decisions sometimes appear cosmetic and of doubtful effectiveness, particularly since they often presuppose the willing cooperation of the firm upon which they have to be imposed.

CEPR Brings Out Publication on European Merger Control, Agence Europe, June 11, 1993, available in LEXIS, Europe Library, Rapid File.

concentrations. In my opinion, the use of conditional approvals will remain the preferred method for addressing dominant position findings in the future. Thus, companies should not be dissuaded from entering a transaction that would require review under the Merger Regulation. Indeed, given the strict time limits placed on the Commission by the Merger Regulation and the exclusive nature of the Commission's review of concentrations, companies may even have an incentive to structure a transaction so as to fall within the Merger Regulation.

New challenges lie ahead, however. For example, leadership changes have occurred within the Commission, as Karel Van Miert replaced Sir Leon Brittan in early 1993 as the Commissioner in charge of the Competition Directorate. New views may lead to different interpretations of the language of the Merger Regulation. In addition, the Commission needs to define more clearly the factors which make a concentration which creates or strengthens an oligopoly compatible or incompatible with the common market. Finally, if the thresholds are lowered in the future, the Commission will receive a larger number of cases, and these cases will involve more strategic, horizontal concentrations presenting the Commission with new antitrust issues.³²²

322. See *supra* note 6.

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