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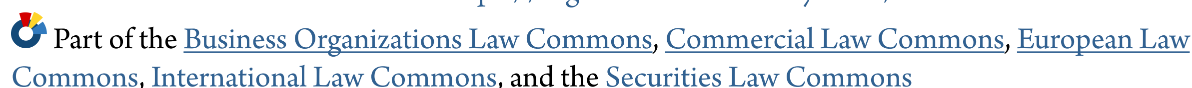
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The EEC Merger Regulation and its Impact on Non-EEC Businesses

*Alec Burnside**
*Carl Meyntjens***

I. Introduction

On December 21, 1989 the Council of Ministers of the European Communities adopted the long awaited Merger Control Regulation,[1] which transfers to the European Commission (Commission) the responsibility for reviewing most large European mergers or concentrations.[2] The Regulation represents a significant shift in the balance of power between the Commission and the domestic authorities of the twelve member states. Formally known as the "Council Regulation on the control of concentrations by undertakings,"[3] the Regulation became effective on September 21, 1990.[4]

The adoption of the Regulation is a substantial contribution to the campaign to complete the single European market by the end of 1992. Although the Regulation was first proposed in 1973, many years before the now famous 1985 White Paper[5] that launched the Single Market campaign, the Regulation takes its place politically and economically in the range of new measures that together seek to make the integration of European markets

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1. *Merger Control (Antitrust) Regulation 1989*, 33 O.J. Eur. Comm. (No. L 257) 14, [1990 Antitrust Supp.] 4 Comm. Mkt. L.R. 859, 860 (1990) ("Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings") [hereinafter cited as Regulation].

2. The term "concentration", as used in the Regulation, is a new term of art, borrowed from the French and German, with a much broader meaning than the colloquial term "merger." Regulation, *supra* note 1, art. 3 defines "concentration" as full mergers, partial mergers (such as certain joint ventures) and other acquisitions of control.

3. *See supra* note 1.

4. Regulation, *supra* note 1, art. 25; [1990 Antitrust Supp.] 4 Comm. Mkt. L.R. at 859, 881.

5. Commission's White Paper on the Completion of the Internal Market, COM(85)310 (published in the Document Series, Office for Official Publications, Luxembourg).

a reality. In a unified Europe, major cross-border concentrations need to be approved on the basis of uniform and non-discriminatory European Economic Community (EEC) law rather than under national law, especially since the national laws of the twelve member states are far from homogeneous. The Regulation therefore confers formal powers of "merger control"[6] on the Commission for large scale mergers of EEC-wide importance and leaves the review of other mergers within the realm of the national competition law authorities of the twelve member states.[7]

The Regulation is only concerned with the long-term public interest and not with procedural rules under which a merger or takeover is implemented. Other legislation regarding procedural rules is under discussion. A debate has recently begun over the need to create a "level playing field" for mergers and acquisitions in the EEC. The gist of this debate is that national rules and customs impede the process of industrial restructuring in Europe and that businesses in many countries are effectively sheltered from foreign takeover. The discussion of creation of a level playing field is left for a separate article; suffice it to note that such legislative changes are still awaiting formulation and that it will be some years before they mature into law. In any event, the debate has already revealed that many of the obstacles are not regulatory but cultural in character, and hence not readily susceptible to legislative change.[8]

The new merger control rules are contained in a regulation and not a directive, the form of legislation used for many other current legislative initiatives in the EEC. A regulation is directly applicable law in each member state without the need for do-

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6. Under the regulation, the term "merger control," means a public interest evaluation of a merger's long-term implications. *See infra* notes 73-95 and accompanying text. In the United States, this long-term public interest evaluation is a task undertaken by the Federal Trade Commission, the Antitrust Division of the Department of Justice, and the courts. *See* 15 U.S.C. § 18a (1988) (codifying the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390).

7. *See infra* notes 43, 58-65 and accompanying text.

8. *See, e.g.*, COOPERS & LYBRAND, BARRIERS TO TAKEOVERS IN THE EUROPEAN COMMUNITY (ISBN 0 11 515213 X, 1989); DEPARTMENT FOR TRADE & INDUSTRY, BARRIERS TO TAKEOVERS IN THE EUROPEAN COMMUNITY (1990) (Consultative document based on the Coopers & Lybrand study); *cf.* Communication from the Commission to the Council of the European Communities re: "Obstacles to takeover and other general bids" (May 10, 1990) (proposing a number of changes to national law but not addressing wider issues). A report prepared for the Commission by Booz-Allen was not available at the time of writing.

mestic implementation,[9] i.e. it is "self-executing" in the American sense.

Part II of this article describes various legal and historical background matters relevant to understanding the Regulation. In part III, the article provides a detailed outline of the Regulation. Part IV examines the Regulation's impact on non-EEC businesses and looks briefly at the proposal recently launched by the European Commissioner for Competition that the EEC and U.S. should negotiate an agreement on anti-trust issues. Finally, part V concludes by briefly summarizing the Regulation's implications for both non-EEC and EEC businesses (undertakings).

II. Legal and Historical Background of the Regulation

A. *Powers to Regulate Merger Under the Treaty of Rome*

The Treaty of Rome by which the EEC was established, in clear contrast to the Treaty of Paris[10] establishing the European Coal and Steel Community, does not contain express merger control provisions. Such provisions were, it seems, intentionally omitted. The Treaty of Rome's principal competition law rules are contained in articles 85 and 86.

Article 85[11] concerns agreements or concerted practices be-

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9. *See* Treaty Establishing the European Community, *signed* March 25, 1957, 298 U.N.T.S. 3 (effective Jan. 1, 1958) [hereinafter cited as Treaty of Rome]. An English translation is located at 1 Common Mkt. Rep. (CCH) para. 151 (1971). Article 189 states: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

10. Treaty Establishing the European Coal and Steel Community, *signed* April 18, 1951 (effective July 23, 1952) *reprinted in* B. Rudden & D. Wyatt, Basic Community Laws 3-18 (2d ed. 1986).

11. Treaty of Rome, *supra* note 9, art. 85 reads as follows:

> (1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature

tween undertakings, such as price-fixing or market sharing agreements which restrict competition and affect trade between the member states of the EEC. Such agreements are "prohibited" and "void" unless granted exemption by the Commission on the ground that the agreement offers benefits which outweigh its anti-competitive detriments.[12]

Article 86 prohibits the "abuse . . . of a dominant position" by one (or more) undertakings.[13] "Dominant" means having such a large market share that the undertaking can act without regard to its competitors or customers.[14] It is not illegal under article 86 to hold a dominant position, but only to abuse such a position by conduct such as excessive pricing, predatory pricing,

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or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decisions or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a)impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b)afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

12. *Id.*

13. Treaty of Rome, *supra* note 9, art. 86 states:

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

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production market or technical development to the prejudice of customers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

14. *See, e.g.*, Michelin v. Commission, 1983 E. COMM. CT. J. REP. 3461, 3503 para. 30 (case 322/81).

refusal to supply, and discrimination between customers without objective justification.[15]

Although articles 85 and 86 are, by their literal terms, capable of being extended to certain types of mergers, this was not their intended function. Articles 85 and 86 were merely meant to regulate the commercial activities of companies and not mergers,[16] which concern the structure of the companies involved.

The Commission recognized that merger control was not among the EEC's existing functions as illustrated by its 1966 Memorandum on the concentration of enterprises in the common market.[17] In this memorandum, the Commission examined the extent to which mergers could be controlled by articles 85 and 86. The Commission concluded that article 85 was concerned only with cartel-type agreements between independent undertakings and not with agreements "whose purpose is the acquisition of total or partial ownership of undertakings."[18] In addition, the Commission did acknowledge a certain (albeit very limited) scope for applying article 86 to concentrations—namely when the effect of a concentration is the monopolization of a market.

B. The Commission's Change of Attitude and the Continental Can *Case*

Initially the Commission respected the spirit of the EEC's founding fathers and recognized the omission of merger control powers from the Treaty. However, by the early 1970s, the Commission came to regret their lack of merger control authority and began work on a draft Merger Control Regulation. The Regulation was first proposed to the Council of Ministers in 1973. However, the member states, especially the United Kingdom and Germany, which have well-developed rules of their own, regarded control over mergers as very important politically and blocked the proposal. The member states' refusal to pass the new law led the Commission to look anew at article 85 and to re-

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15. *See supra* note 13.

16. Treaty of Rome, *supra* note 9, arts. 85-86; Memorandum on the Problem of Concentration in the Common Market, Competition Series, Study No. 3, Brussels 1966, *reprinted in* COMMON MKT. REP. (CCH) 26 (March 17, 1966).

17. *See* Memorandum on the Problem of Concentration in the Common Market, *supra* note 16.

18. *Id.* at para. 58.

examine the possibilities it might offer for the control of mergers.

Continental Can,[19] provided the Commission with an opportunity to apply article 86 to a merger. In *Continental Can*, an international metal-packaging company based in New York, the Continental Can Company, agreed to purchase a controlling interest in its Dutch licensee. Since Continental Can had already acquired control of a German packaging manufacturer the year before, the Commission decided that it already enjoyed a dominant position in a substantial part of the common market and that the proposed acquisition of a competitor was an abuse of that dominant position. (The consequence of the acquisition would have been the virtual elimination of competition in the markets for light packaging of preserved meat and fish and for metal caps on glass jars). This prohibition was appealed to the European Court of Justice (ECJ) in Luxembourg. The ECJ upheld the Commission's new principle and authority under article 86, although it overruled the decision on the facts.[20]

The Court stated that abuse may occur "if an undertaking in a dominant position strengthens that dominant position so that the degree of control achieved substantially obstructs competition, *i.e.*, so that the only undertakings left in the market are those which are dependent on the dominant undertaking with regard to their market behaviour."[21]

However, in the years that followed, it turned out that the *Continental Can* principle was of limited application and had little practical impact. Indeed the inadequacies of article 86 as a merger control provision are obvious. There is no power over the creation of a dominant position, but only over an increase in pre-existing dominance; no power to authorize mergers caught by article 86 but desirable for other reasons; and no power to prevent mergers, but only to unscramble them after the event. The threat of Commission intervention under article 86 led to the abandonment of planned mergers in a few sporadic instances.[22] However, article 86 is incapable of application in a

19. Re Continental Can Co., 15 O.J. EUR. COMM. (No. L 7) 25, [1972] COMM. MKT. L.R. D11 (Dec. 9, 1971).

20. Europemballage Corp. v. E.C. Commission, 12 COMM. MKT. L.R. 199 (1973) (case 6/72).

21. *Id.* at 225.

22. *See, e.g.*, *Pilkerton/BSN-Gervais-Danone*, *reported in* EC COMMISSION TENTH REPORT ON COMPETITION POLICY, point 152 (1980); *Amocon Corp./Fortia A.B. & Wright Scientific Ltd.*, *reported in* EC COMMISSION ELEVENTH REPORT ON COMPETITION POLICY,

systematic and coherent way as an instrument of merger control, and the Commission has never attempted to apply it as such.

The 1973 proposal[23] for a merger regulation put forward by the Commission contemporaneously with the *Continental Can* affair, made no headway in the Council of Ministers, despite being proposed subsequently in 1982, 1984, and 1986.[24] Thus, the Commission continued to seek to expand the merger regulation authority it already possessed under articles 85 and 86.

C. Philip Morris: *Catalyst for the Adoption of the Regulation*

In *Philip Morris*,[25] the ECJ's interpretation of article 85 created much greater potential for the Commission to control mergers than the earlier extension of article 86 in *Continental Can*.

In *Philip Morris* the Commission received a complaint from the British American Tobacco Co. and R. J. Reynolds, Inc. about an agreement between Philip Morris, Inc. and Rembrandt Group Ltd. This agreement gave Philip Morris 50-50 joint control with Rembrandt over a Rembrandt subsidiary, Rothmans International, as well as certain ancillary rights of first refusal on future sales of Rothmans shares. Following Commission intervention, the agreement was modified and Philip Morris's influence over Rothmans was substantially reduced. The Commission then closed its files, concluding that neither article 85 nor article 86 was infringed. The original complainants challenged this finding in the ECJ. The Court upheld the Commission's decision but in doing so passed comment on the application of article 85 to mergers.

The ECJ, fully conscious of the political ramifications of its judgment, framed its ruling in such a way as to permit both a narrow and a wide interpretation. The judgment may be read as limiting the application of article 85 to partial mergers (for ex-

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point 112 (1981).

23. Draft Regulation of the E.C. Council concerning control of concentrations between undertakings, 16 O.J. EUR. COMM. (No. C 92) 1 (1973), [1973] COMM. MKT. L.R. D205.

24. 25 O.J. EUR. COMM. (No. C 36) 3 (1982), 27 O.J. EUR. COMM. (No. C 51) 2 (1984), 29 O.J. EUR. COMM. (No. C 324) 5 (1986).

25. British American Tobacco Co. v. E.C. Commission, [1988 Antitrust Supp.] 4 COMM. MKT. L.R. 24 (Nov. 17, 1987) (cases 142/84 and 156/84), *aff'g*, Re the agreements between Philip Morris Inc. and Rembrandt Group Ltd., [1984] 2 COMM. MKT. L.R. 40 (March 22, 1984).

ample, minority shareholdings held by one competitor in another). However, the judgment may also be broadly applied, and this broad reading was inevitably adopted by the Commission. In a press release of November 18, 1987, the Commissioner for Competition, Peter Sutherland, welcomed the judgment as an "unambiguous confirmation that articles 85 and 86 apply to transactions relating to changes in corporate ownership."[26] Although the scope of the principle established by the *Philip Morris* case is uncertain, it is clear that article 85 is capable of being applied to at least some mergers. The Commission played on this uncertainty to coerce the Council of Ministers into adopting the proposed Merger Control Regulation. By threatening to review mergers through application of *Philip Morris* in a few highly visible interventions, the Commission successfully focussed attention on its proposed regulation as the lesser of two evils. Therefore, the greatest significance of *Philip Morris* and, albeit to a lesser extent, of *Continental Can*, lies in the pressure they exerted on the member states to accept the formal Merger Control Regulation over the uncertain prospects for merger control under article 85 and 86.

D. *The Commission's Involvement in Mergers Since* Philip Morris

The uncertainty over the Commission's merger control powers under articles 85 and 86 may be illustrated by the following cases: *British Airways/British Caledonian*,[27] *GC & C Brands/Irish Distiller*,[28] and *Minorco/Consolidated Gold Fields*.[29]

In *British Airways/British Caledonian*, an agreed takeover bid, the Commission instituted its own investigation following the report of the British Monopolies and Mergers Commission (MMC) which had approved the merger, subject to certain undertakings promised by British Airways. The Commission obtained additional concessions from British Airways designed to safeguard competition in the civil aviation industry. These concessions limited British Airways' attempts to recover certain operating licenses within Europe which had been held by British

26. Commission Press Release IP (87)497 (Nov. 18, 1987).

27. Re the Merger of British Airways and British Caledonian, [1988 Antitrust Supp.] 4 COMM. MKT. L.R. 258, Commission Press Release IP (88)131 (March 10, 1988).

28. Commission Press Release IP (88)512 (Aug. 17, 1988).

29. Commission Press Release IP (89)85 (Feb. 17, 1989).

Caledonian, reduced its slot allocation at Gatwick Airport and prevented British Airways from transferring flights from Gatwick to Heathrow.[30]

GC & C Brands/Irish Distillers was the Commission's most effective intervention of all. GC & C Brands was a consortium comprising Grand Metropolitan, Allied Lyons and Guinness. This consortium launched a hostile public bid for Irish Distillers, which lodged a complaint with the Commission alleging that the formation of the consortium represented collusion between three competitors, resulting in the elimination of other potential bids and distorting competition contrary to article 85.[31] Irish Distillers further alleged breach of article 86 under *Continental Can* principles through the extension of the bidders' existing dominant position on the EEC's whisky market. Irish Distillers finally alleged that the planned joint production and share out of Irish Distillers' brands would constitute market-sharing contrary to article 85. The Commission acted upon the complaint and served a formal Statement of Objections on GC & C Brands. This intervention came only days before the second closing date of the offer and threatened that the Commission would take interim measures to prevent any further purchase by GC & C Brands of shares in Irish Distillers.

The Commission's intervention caused the consortium to collapse, with Grand Metropolitan buying out its former partners. The three original consortium members agreed with the Commission to forego further agreements regarding bids for Irish Distillers' production or distribution of Irish Distillers' products. Moreover, if one consortium member successfully bid for Irish Distillers, it could not make any resale of Irish Distillers or of its assets to one of the other consortium members during a four month period. (In the end, the sole bid by Grand Metropolitan through the wholly-owned vehicle of GC & C Brands was defeated by a counter-offer made by Pernod, a French company).

In *Minorco/Consolidated Gold Fields*, a hostile public bid, the Commission received a complaint from Gold Fields together with a request for adoption of interim measures.[32] However, the interim Commission action became unnecessary when the bid

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30. [1988 Antitrust Supp.] 4 COMM. MKT. L.R. at 259-60.
31. Commission Press Release IP (88)512.
32. Commission Press Release IP (89)85.

was referred to the British MMC, causing the bid to lapse. Following the MMC's report in favor of the bid, the Commission resumed its own examination. But following receipt of certain formal assurances from Minorco concerning the resale of some of Gold Field's assets, the complaint was rejected.

The noteworthy common feature of these three cases is that the Commission exploited opportunities and was eager to help complainants so as to strengthen its bargaining position over the new Regulation. The legal basis for the Commission's interventions was not tested in any of the cases; each was settled informally. Only Commission press releases communicated the resolution of these cases to the outside world.

E. *Adoption of the Regulation*

Thus, the uncertainty as to the Commission's merger control powers created by *Philip Morris* and *Continental Can* was magnified by the Commission's subsequent interventions. Together with "1992" enthusiasm, this provided the Commission with the perfect platform on which to re-launch its proposal for a merger control regulation.

The Commission's 1986 proposal was amended and resubmitted to the Council of Ministers in early 1988, only months after the *Philip Morris* judgment.[33] At that time the Commission declared its ambition of having the Regulation adopted by the end of 1988,[34] but this timetable proved to be overly optimistic. Intensive discussions and significant alterations of the proposal continued until the very meeting at which the Council adopted the Regulation on December 21, 1989.[35] A series of declarations and statements accompanying the text of the Regulation, some issued jointly by the Commission and Council of Ministers and others by one or the other of them, provide a commentary on the more difficult provisions of the Regulation

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33. *Draft Merger Control (Antitrust) Regulation*, 31 O.J. EUR. COMM. (No. C 130) 4, [1988 Antitrust Supp.] 4 COMM. MKT. L.R. 472, 475 (March 9, 1988) ("Amended proposal for a Council Regulation on the control of concentrations between undertakings").

34. See the Commission's explanatory memorandum submitted to the Council of Ministers to accompany the amended proposal, [1988 Antitrust Supp.] 4 COMM. MKT. L.R. 472, 475 ("The Council presidency has put the work on establishing Community-level merger control high on its list of priorities with a view to adoption of a merger control during 1988.").

35. *See supra* notes 1-4 and accompanying text.

and supplement the text of the Regulation when it contains unresolved tensions.[36]

III. The Mechanism of the Regulation

This part of the article explains the mechanism of the Regulation, without referring to its specific significance for non-EEC businesses; that is dealt with in part IV of the article. The following is a summary of the Regulation.

1. In article 1, the Regulation defines a category of concentrations whose size (measured in terms of worldwide and EEC-wide turnover[37]) and geographical spread makes them of European-wide concern rather than purely national concern. Such concentrations are referred to as "*concentrations with a Community dimension.*"[38]
2. Since September 21, 1990, undertakings forming such concentrations must give notice to the Commission before they are put into effect. Moreover, implementation of the arrangements must be suspended for three weeks.[39]
3. The Commission must then decide within set time limits[40] whether the proposed concentration would be "compatible with the Common Market."[41] Only compatible concentrations are allowed to proceed. The *test of compatibility* is whether the concentration would "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."[42]

A. *The Purpose of the Regulation*

From the outset, the purpose of the Regulation was to establish a clear-cut division between large mergers of a European dimension (concentrations with "Community dimensions") to be scrutinized by the Commission and other mergers which would

36. Merger Control (Antitrust) Regulation, [1990 Antitrust Supp.] 4 Comm. Mkt. L.R. 314 ("Accompanying statements entered in the minutes of the E.C. Council"). This report of the declaration contained a number of inaccuracies; for the definitive text, see EC Commission Nineteenth Report on Competition Policy 265 (1990).

37. Turnover is defined as "products sold and services provided to undertakings or consumers, in the Community." Regulation, *supra* note 1, art. 5(1).

38. Regulation, *supra* note 1, art. 1 (emphasis added).

39. Regulation, *supra* note 1, art. 7.

40. *See* Regulation, *supra* note 1, art. 10.

41. Regulation, *supra* note 1, art. 2(1).

42. Regulation, *supra* note 1, art. 2(2)-(3).

continue to be reviewed only by the national authorities of the member states.[43] This division is brought about by the thresholds of Community dimension set out in the Regulation. Above these thresholds, the Commission has jurisdiction; under the thresholds, the authorities of the member states have jurisdiction. This has become popularly known as the principle of "one-stop" control.

However the Regulation contains the following three exceptions to the principle of one-stop control. First, a member state can seek to intervene to protect a "distinct market" in its territory and apply its national merger controls to a concentration with Community dimension.[44] This procedure was included at the insistence of West Germany and is therefore sometimes known as the German Clause.

Second, a member state can intervene on the basis of "legitimate interests" other than those protected by the Regulation, such as public security, plurality of the media, and rules of prudential supervision.[45] Finally, the Commission can intervene below the Community dimension thresholds at the invitation of a member state.[46]

The first two exceptions to the rule allow member states to control concentrations despite their Community dimension, whereas the final departure from the rule allows the Commission to intervene in concentrations not having a Community dimension.

The demarcation of powers under the Regulation is further blurred by the ECJ's extended interpretation of articles 85 and 86 of the Treaty of Rome in *Philip Morris* and *Continental Can*.[47] As explained above, these cases provided the ultimate catalyst for the adoption of the Merger Regulation, and their importance should not be underestimated. But now that the Regulation has been adopted, the *Philip Morris* and *Continental Can* precedents should have outlived their usefulness. The difficulty is that a regulation cannot modify or restrict the Treaty of Rome. The extended interpretation of articles 85 and 86 cannot be undone, and some concentrations will therefore

43. Regulation, *supra* note 1, art. 1(1)-(2).
44. Regulation, *supra* note 1, art. 9.
45. Regulation, *supra* note 1, art. 21(3).
46. *See* Regulation, *supra* note 1, art. 22(3).
47. *See supra* notes 19-32 and accompanying text.

continue to be caught by articles 85 and 86.[48] The problem of the residual effect of articles 85 and 86 is most acute when applied to concentrations which fall below the Community dimension thresholds of the Regulation and therefore ought to be reviewed by the national authorities of the member states instead of the Commission. Under such circumstances, there is a risk that the old *Philip Morris* and *Continental Can* precedents will undermine the demarcation of authority intended by the Commission and Council of Ministers.

In short, the purpose of the Regulation is the principle of one-stop control. With clear demarcation between the areas of competence of the different regulatory authorities, companies intending to merge should have greater legal security knowing that their merger will only have to pass one hurdle. However, given the three exceptions contained in the regulation itself and the problem of the residual effect of articles 85 and 86, the objective of one-stop control will often be defeated in practice. Under the Regulation, as before, parties will often find themselves having to submit their arguments simultaneously or successively to the Commission and to one or more member states, to say nothing, moreover, of any non-EEC authority.

B. *The Scope of the Regulation*

As observed above, the Regulation defines a category of "concentrations with a Community dimension" as a means of delineating its scope.[49] Any operation which constitutes a "concentration" and which has "Community dimension" falls within the Regulation and is subject to the rule of mandatory notification before it is put into effect. Therefore, in order to know whether the Regulation applies, two questions must be answered: (1) Is there a "concentration"? and (2) If so, does it have a "Community dimension"?

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48. The Regulation excludes concentrations from the implementing rules normally used in applying articles 85 and 85. *See* Regulation, *supra* note 1, art. 22. This prevents agreements which are prohibited under article 85(1) from being automatically invalidated under article 85(2). However, exclusion from the implementing rules does not deprive article 86 of direct effect, which may be a source of considerable legal difficulty in the future. Moreover, the problem of the rudimentary implementing rules contained in articles 88 and 89 of the Treaty of Rome also remains.

49. Regulation, *supra* note 1, art. 1.

1. Is there a concentration?

The term "concentration" is broadly defined to include all operations resulting directly or indirectly in the acquisition of control.[50] The form of the transaction leading to this result is immaterial. For example, concentrations may occur by fusion, by purchase of shares or of assets, under the terms of a contract or through a significant level of board representation. The essential question is one of "control." A concentration occurs where there is a change in the control of a business or "undertaking."

Article 3(3) of the Regulation states that "control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking."[51]

The Regulation specifies two ways in which this possibility of "decisive influence" may arise: (1) through ownership of or the right to use the assets of another undertaking or (2) by virtue of "rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."[52]

Special provision is made in article 3(2) for the application of the Regulation to joint ventures. The Regulation distinguishes between "concentrative" and "co-operative" ventures, with only concentrative joint ventures failing within the Regulation.[53] Because many non-EEC companies have preferred joint ventures to acquisitions as a means of penetrating the European Market, this distinction may be very significant.

Article 3(5) creates limited exceptions for temporary shareholders, financial holding companies, and liquidators. No concentration arises where a bank, insurance company, or other financial institution holds securities temporarily for the purpose of reselling them, as long as such a resale takes place within one year of the date of acquisition or the Commission expressly permits a longer resale period.[54] In addition, limitations on use of the voting rights attached to the securities apply during the period the financial institution holds the securities.[55] This tempo-

50. *See* Regulation, *supra* note 1, art. 3(1).
51. Regulation, *supra* note 1, art. 3(3).
52. *Id.*
53. Regulation, *supra* note 1, art. 3(2).
54. Regulation, *supra* note 1, art. 3(5)(a).
55. *Id.*

rary shareholders exception is intended to assist financial institutions who acquired shares in the process of underwriting. Acquisitions by certain financial holding companies do not constitute concentrations, provided that the voting rights of the shares held are exercised only to maintain the value of the investment and not to determine the competitive conduct of the undertaking concerned.[56] Finally, no concentration occurs where a liquidator or other comparable officer obtains control of an undertaking.[57]

2. Does the concentration have Community dimension?

Once it has been established that the operation constitutes a concentration in terms of the Regulation, the next question is whether it has Community dimension. The concept of Community dimension sets the dividing line between concentrations to be scrutinized by the Commission and those which remain within the jurisdiction of the national authorities of the member states. As mentioned above, however, the Commission may obtain jurisdiction over a concentration lacking Community dimension at the invitation of a member state.[58]

Community dimension is defined in terms of tests based on turnover and geography.[59] The turnover[60] test identifies concentrations exceeding a certain size, while the geographical test achieves a further selection by separating out concentrations whose cross-border implications make them of European rather than national concern.[61] The Community dimension concept is therefore both quantitative and qualitative.

The test of geography is straightforward; a concentration does not have Community dimension if all the undertakings concerned achieve more than two thirds of their Community turno-

56. *Id.*

57. Regulation, *supra* note 1, art. 3(5)(b).

58. *See supra* note 46 accompanying text.

59. *See* Regulation, *supra* note 1, art. 1.

60. Turnover is defined as goods and services sold to businesses or consumers in the EEC. *See supra* note 37. The turnover of the entire group of undertakings is taken into account, and the Regulation, *supra* note 1, art. 5, contains a detailed description of how that turnover is to be calculated. Article 5 further provides special rules for assessing the turnover of banks, other financial institutions, and insurance undertakings. If only part of a business is to be involved in a merger, only that part's turnover is taken into account. Turnover is calculated on a financial year basis. *See* art. 5(1).

61. *See* Regulation, *supra* note 1, art. 1.

ver in the same member state.[62] The effect of this test is to reserve to national merger authorities the right to rule on mergers which are mostly concerned with their national market.

The turnover test is more difficult to state; it contains two limbs. The first limb relates to worldwide turnover and the second to turnover within the EEC. The turnover test is satisfied where: (1) the aggregate worldwide turnover of all the undertakings concerned is more than 5,000,000,000 ECUs;[63] *and* (2) the Community-wide turnover of each of at least two of the undertakings concerned is more than 250,000,000 ECUs.[64]

Worldwide turnover is used to reflect the strength of the merging parties on world markets. The Community-wide turnover test is used as a counter-balance and serves to exclude two types of concentration from the scope of the Regulation. First, it excludes concentrations if the undertakings involved are beneath a certain size. Second, the Community-wide turnover test excludes concentrations which are large enough in terms of size, but which primarily involve turnover outside the EEC.

The thresholds at which a Community dimension exists were fiercely debated in the negotiations on the Regulation. The lower the thresholds, the greater the loss of national sovereignty; thus, it is not surprising that much of the political debate concerned the thresholds. In the Commission's eyes, the present thresholds are no more than an interim stage, and the Regulation provides for them to be reviewed by the end of 1993, at which time the Commission hopes to see them lowered to a worldwide test of 2,000,000,000 ECUs and a Community-wide test of 100,000 ECUs.[65]

C. *Procedures of the European Commission*

The Regulation requires that all concentrations with Community dimension be reported to the Commission within one week after the event which gives rise to a concentration.[66] This

62. Regulation, *supra* note 1, art. 1(2).

63. An ECU is currently worth approximately U.S. $1.40. However, the conversion is to be undertaken at the average rate prevailing for the year in question. The average exchange rate for calendar year 1989 was 1 ECU = U.S. $1.10.

64. Regulation, *supra* note 1, art. 1(2)(a)-(b).

65. Regulation, *supra* note 1, art. 1(3) and the Commission statement on art. 1, [1990 Antitrust Supp.] 4 COMM. MKT. L. R. at 286, 295, 314. Part IV of this article contains some examples of the application of the Community dimension tests. *See infra* notes 101-02 and accompanying text.

66. Regulation, *supra* note 1, art. 4.

event might be the conclusion of an agreement, the announcement of a public bid, or the acquisition of a controlling interest, whichever is the earliest. Failure to notify, either intentionally or through negligence, may be punished by fines of from 1,000 ECUs to 50,000 ECUs.[67]

The obligation of prior notification is linked with an obligation of suspension; a concentration may not be put into effect for a period of three weeks following notification.[68] During this time, the Commission may decide to extend the suspension.[69] In the absence of such an extension ruling, the concentration may be effected. No doubt, however, most companies will await the outcome of the full procedure because implementation at this stage would be at the risk of the Commission subsequently reaching an adverse decision. The Commission may impose fines of up to ten percent of the aggregate turnover of the undertakings concerned when a concentration is implemented without its permission.[70]

There are two exceptions to the suspension rule. First, the Commission may grant a waiver "in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party."[71] The second exception is that public takeover bids may be implemented if the Commission has received notice and the acquirer only exercises the voting rights attached to the shares "to maintain the full value" of the securities.[72] The bid may thus proceed, but at the bidder's peril in the event that the Commission later refuses authorization.

The Commission's inquiry into a reported merger proceeds in two main stages. In the first stage, the Commission must make two determinations within a one-month period. The Commission must first verify that a merger notification does indeed disclose a concentration with Community dimension.[73] This first step serves to confirm the Commission's jurisdiction. In principle, the Commission should rule as early as possible on this preliminary jurisdictional question, although it may not officially reach a conclusion until the end of the initial month-long exami-

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67. Regulation, *supra* note 1, art. 14(1)(a).
68. Regulation, *supra* note 1, art. 7(1). *See supra* note 39 and accompanying text.
69. Regulation, *supra* note 1, art. 7(2).
70. Regulation, *supra* note 1, art. 14(2).
71. Regulation, *supra* note 1, art. 7(4).
72. Regulation, *supra* note 1, art. 7(3).
73. Regulation, *supra* note 1, art. 6(1)(a). See *supra* notes 59-65 for the discussion of Community dimension.

nation period.[74] The Commission must also decide whether the concentration raises any "*serious doubts* as to its compatibility with the Common Market."[75] Only if these serious doubts are raised will the Commission then open formal proceedings and conduct a full investigation.[76]

As stated above, the Commission has only one month after notification to verify a concentration with Community dimension and to make an initial determination that the concentration raises "serious doubts" concerning compatibility with the common market.[77] This one-month period begins on the day following receipt of the notification[78] and ends with a decision to initiate further proceedings concerning compatibility, to allow the concentration, or that the Commission has no jurisdiction under the Regulation.[79] The one-month period may be extended if the information supplied in the notification is incomplete and is increased to six weeks if the Commission receives a request from a member state to intervene under the "distinct market" procedure.[80]

If the Commission finds that no serious doubts are raised, it makes a formal decision not to oppose the concentration and declares that the concentration is compatible with the common market, eliminating the need for the second stage of proceedings. However, if the Commission determines that serious doubts are raised, it makes a formal decision to initiate proceedings and then has a further four months to issue a final ruling on whether the concentration is compatible or incompatible with the common market.[81] Generally, the final ruling must be issued within four months of the formal finding of "serious doubt," but the

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74. Once it has determined whether the reported concentration falls within the Regulation, the Commission must publish an announcement in the *Official Journal of the European Community* that it has received a notification of a planned concentration. Regulation, *supra* note 1, art. 4(3). This announcement must include the parties names, the nature of the concentration, and the economic sectors involved.

75. Regulation, *supra* note 1, art. 6(1)(b)-(c) (emphasis added). See *infra* notes 96-101 for a discussion of the test of compatibility.

76. Regulation, *supra* note 1, art. 6(1)(c).

77. Regulation, *supra* note 1, arts. 6(1), 10(1).

78. Regulation, *supra* note 1, art. 10(1).

79. Regulation, *supra* note 1, art. 6(1).

80. Regulation, *supra* note 1, art. 10(1). See *supra* note 44 and accompanying text for a brief discussion of the "distinct market" procedure.

81. Regulation, *supra* note 1, art. 10(3)-(4). In any case where the Commission has serious doubts and thus opens formal proceedings, it must publish the main contents of its decision in the *Official Journal of the European Community*. Art. 20.

period may be extended in specified circumstances where the undertakings involved have failed to provide the Commission with the necessary information.

In short, a decision from the Commission concerning an uncontroversial concentration may at best be obtained within one month after the notification. In difficult cases, the final decision timetable may run to five months.

D. *Powers of the European Commission*

The Regulation provides the Commission with both investigatory and enforcement powers, including the power to obtain information when it is not supplied voluntarily,[82] to order "on the spot"[83] investigations to be carried out by the national competition authorities or by the Commission itself,[84] to make its authorization of a transaction conditional,[85] to impose fines and periodic penalty payments for various reasons,[86] to order the divestiture if an "incompatible" concentration has already been implemented,[87] or other corrective action.[88] The powers to obtain information and to investigate may be exercised against any undertaking, whether or not it is involved in the concentration, or against associations of undertakings.[89]

E. *The Test of Compatibility*

The Commission's appraisal of compatibility with the common market is at the very heart of the Regulation. The Regulation was adopted to give the Commission the power to rule on this issue. The Regulation sets out the test for compatibility, and a series of criteria to be taken into account in applying the test.

The substantive test of compatibility is whether concentrations "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."[90] If such a

82. Regulation, *supra* note 1, art. 11.
83. Regulation, *supra* note 1, art. 13(1)(c).
84. Regulation, *supra* note 1, arts. 12-13.
85. Regulation, *supra* note 1, art. 8(2).
86. Regulation, *supra* note 1, art. 14-15.
87. Regulation, *supra* note 1, art. 8(4).
88. *Id.*
89. *See* Regulation, *supra* note 1, art. 13.
90. Regulation, *supra* note 1, art. 2(2); *see also* art. 2(3).

dominant position is created or strengthened, the concentration is incompatible with the common market and will be blocked. Although at first sight this test resembles the *Continental Can* rule, the test under the Regulation is considerably broader because it does not require a dominant position as a pre-existing condition.

The Regulation lists a series of criteria to be taken into account in assessing the question of compatibility.[91] The combined market share which the merged undertakings would enjoy is probably the most important of these criteria. The Regulation preamble states a presumption that concentrations are compatible with the common market if the joint market share does not exceed twenty-five percent in the common market or in a substantial part of it.[92] In other words, a combined market share of twenty-five percent in a substantial part of the EEC is the point above which further analysis of the effects on competition becomes necessary. Apart from market share, the Commission is required to consider many other factors, including the structure of the markets concerned, the actual and potential competition from other undertakings within or outside the Community, the nature of supply and demand in the relevant market, the market position of the parties, the freedom of choice of third parties, legal or practical barriers to trade, and the advancement of technology and the economy (provided that it is to the advantage of consumers and does not form an obstacle to competition).[93]

Apart from the reference to technical and economic progress, the criteria are all competition related. Some member states, notably West Germany and the UK, were insistent that European merger control should serve only as an instrument of competition policy and not industrial policy. Other member states, notably Spain, Portugal and Italy, advocated the inclusion of industrial policy considerations, drawing on the references in the Treaty of Rome to economic and social cohesion and to regional development.[94] Although the Regulation mandates consideration of competition policy in the formal list of criteria, express acknowledgement of industrial policy considerations appears only in Recital 13 to the Regulation; the reference

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91. Regulation, *supra* note 1, art. 2(1).

92. Regulation, *supra* note 1, recital 15.

93. Regulation, *supra* note 1, art. 2(1).

94. Treaty of Rome, *supra* note 9, art. 130a (as amended by the Single European Act, BULL. E.C., Supp. Feb. 1986).

to technical and economic progress gives at best a vague reflection of industrial policy considerations.[95] Thus, the extent to which the Commission may consider industrial policy in determining compatibility with the common market is unclear.

The political tension of the negotiations is therefore left partially unresolved, with the result that the Commission will have an extra degree of discretion in its application of the compatibility test. The borderline of competition policy and industrial policy is in any event an uncertain one, and industrial policy considerations can easily be taken into account behind a veil of competition concerns.

IV. The Merger Regulation and Non-EEC Businesses

A. *Non-EEC Mergers Within the Scope of the Regulation*

The Community dimension test, discussed in part III above,[96] does not require any physical presence in the EEC. The undertaking concerned need only have turnover[97] in the EEC. Hence, the mere fact that an undertaking is situated completely outside the Community does not imply that its concentrations will always lack Community dimension. The issue is how much turnover it has in the EEC.

Additionally, a concentration does not have to take place within the EEC to be within the scope of the Regulation. Once the test of Community dimension is met, the Regulation applies. Therefore, the Regulation is potentially extra-territorial in effect and applies equally to transactions taking place both inside and outside the EEC when at least two of the parties have a relatively modest level[98] of turnover within the EEC. However, the "two-thirds" geographical test might exclude some foreign mergers otherwise caught by the turnover test if the undertakings' EEC turnover occurs predominantly in the same member state.[99]

Finally, even if the threshold tests of Community dimension are not satisfied, a member state may nevertheless invite the

95. *See* Regulation, *supra* note 1, recital 13, [1990 Antitrust Supp.] 4 Comm. Mkt. L.R. at 861.

96. *See supra* notes 58-65 and accompanying text.

97. *See supra* notes 37, 60.

98. *See* Regulation, *supra* note 1, art. 1(2)(b). Each of the two undertakings must have a turnover of 250,000,000 ECUs in the EEC.

99. *See* Regulation, *supra* note 1, art. 1(2); *see supra* note 62 and accompanying text.

Commission to intervene.[100] This procedure could be applied to concentrations occurring outside the EEC, where the turnover within the EEC is too low to satisfy the Community turnover limb of the Community dimension test.

To illustrate how Community dimension thresholds should work in practice when applied to concentrations with a non-EEC undertaking, three examples of foreign mergers are provided. The turnover figures have been chosen to demonstrate the effect of the threshold requirements and are not necessarily realistic combinations.

Example 1. Merger between companies A and B

	Worldwide turnover	Community-wide turnover
Company A	4,000 million ECUs	350 million ECUs
Company B	2,000 million ECUs	310 million ECUs

Company A has two-thirds of its Community-wide business in Germany. Company B's Community-wide turnover is spread evenly between a number of EEC countries.

In this example, both the first turnover requirement (total worldwide turnover of 5,000 million ECUs) and the second turnover requirement (at least two undertakings have a Community-wide turnover exceeding 250 million ECUs) are met.[101] The geography test is also satisfied because only one, and not each, of the companies concerned achieves more than two-thirds of its Community-wide turnover in one member state (Germany).[102]

Thus, this merger satisfies the Community dimension thresholds, and falls within the scope of the Regulation.

Example 2. Merger between companies C and D

	Worldwide turnover	Community-wide turnover
Company C	3,000 million ECUs	500 million ECUs
Company D	3,000 million ECUs	400 million ECUs

Company A does 70% of its Community-wide business in Italy; Company B does 75% of its Community-wide business in Italy.

Again, both the first turnover requirement (total worldwide turnover of 5,000 million ECUs) and second turnover require-

100. *See supra* notes 46, 58 and accompanying text.
101. *See supra* notes 63-65 and accompanying text.
102. *See supra* note 62 and accompanying text.

ment (at least two companies with Community-wide turnover of more than 250 million ECUs) are satisfied. However, *each* of the companies achieves more than two-thirds of its Community-wide turnover in one and the same EEC country (Italy).

Thus, despite meeting the turnover requirements, this merger still falls outside the scope of the Regulation under the geography test.

Example 3. Merger between companies E, F and G

	Worldwide turnover	Community-wide turnover
Company E	3,000 million ECUs	260 million ECUs
Company F	1,500 million ECUs	90 million ECUs
Company G	1,000 million ECUs	50 million ECUs

In this example the first turnover requirement is met (total worldwide turnover of 5,000 million ECUs), but the second requirement is not satisfied because only one of the companies has a Community-wide turnover exceeding 250 million ECUs. There is no need to check if the geography requirement is met, because the merger does not meet both of the two turnover requirements and therefore falls outside the scope of the Regulation.

B. *Practical Implications for Non-EEC Mergers*

Because the Regulation is capable of extra territorial application to foreign mergers, the mandatory rules of advance notification and suspension may govern foreign mergers. Violation of these rules could lead to substantial fines. In addition, the time required for the Commission to complete its investigation[103] must now be taken into account when implementing a foreign concentration.

Aside from these procedural issues, the substantive application of the Regulation to such concentrations may be of even greater concern. How will the Commission treat concentrations taking place outside the EEC which nevertheless have Community dimension? Will the Commission seek to apply the Regulation with extra-territorial effect or not? The Commission's view seems to be that regulation of any foreign concentration with Community dimension is justified because it follows from a finding of "Community dimension" that the affair is of real concern

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103. *See supra* notes 73-81 and accompanying text.

to the EEC. The constraints of enforceability may nevertheless limit the Commission in practice to action within the Community (e.g., action against EEC subsidiaries or branches of the merging undertakings). The Commission is also likely to show some restraint when evaluating foreign concentrations in accordance with international principles of comity. Moreover, the Commission's practice may be affected by the law on the extraterritorial application of articles 85 and 86.[104]

Perhaps the European Commission should follow the practice described in the U.S. Department of Justice's "Antitrust Enforcement Guidelines for International Operations" which state as follows:

> The U.S. antitrust laws represent a fundamental and important national policy that generally must be protected when U.S. commerce is significantly affected, even when doing so would require bringing an enforcement action against conduct or transactions that occur outside the United States. Nevertheless, enforcing the U.S. antitrust laws with respect to such conduct or transactions can sometimes conflict with the legitimate interests of other nations. Therefore, as a matter of comity and in the exercise of its prosecutorial discretion, the Department would consider such interests in deciding whether to challenge the transaction. . . .
>
> This does not mean, however, that the Department would never challenge a merger between foreign firms that would have a substantial anticompetitive effect in the United States. [This might be the case, eg. if either of the companies] . . . had production facilities or substantial distribution assets used to produce or distribute [their product] located in the United States. . . . The Department would likely challenge the merger if it concluded after reviewing such information that the merger would likely result in reduced output and higher prices to U.S. consumers without offsetting efficiency benefits.[105]

Clearly on this basis the Commission should not feel inhibited from intervening in certain non-EEC mergers. Such problems will no doubt be resolved on a case-by-case basis, taking into account political and other relevant factors.

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104. Re Wood Pulp Cartel: Ahlstrom Oy v E.C. Commission, [1988 Antitrust Supp.] 4 COMM. MKT. 901 (Sept. 27, 1988).

105. U.S. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 127-29 (Department of Justice Publication, Nov. 10, 1988).

C. *Foreign Acquisitions in the EEC*

Under this heading, three topics will be discussed: the question of reciprocity, the treatment of joint ventures by the Regulation, and the proposal for an EEC/U.S. treaty on competition matters.

1. *Reciprocity*

Article 24 of the Regulation deals with the problem of reciprocity under the heading "Relations with non-member countries."[106] Paragraph 1 of article 24 requires that member states inform the Commission of any general difficulties encountered by their undertakings with concentrations in non-member countries. Paragraph 2 then requires the Commission to report periodically, together with any recommendations, on the treatment accorded to Community undertakings wanting to enter into concentrations outside the Community.

Moreover, if, on the basis of these reports or other information, it appears to the Commission "that a nonmember country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit [separate] proposals to the Council."[107] The purpose of these proposals is to obtain a mandate for negotiation in order to obtain comparable treatment in that state for EEC undertakings.[108]

The significance of article 24 should not be exaggerated, as the article only effects international relations and has no impact on undertakings. It was added to the Regulation at the request of the French government, which wanted to make reciprocal treatment a criterion for the appraisal of concentrations involving non-EEC countries. However, reciprocity was never adopted as a substantive criterion. Therefore, article 24, which is modeled on the reciprocity provisions of the second banking directive, is of political rather than of legal concern.

106. Regulation, *supra* note 1, art. 24.

107. Regulation, *supra* note 1, art. 24(3).

108. *See id.*

2. *The regulation and joint ventures*

The Regulation makes specific provision for the application of the Regulation to certain joint ventures.[109] These provisions warrant discussion because many non-EEC companies have chosen joint ventures as a means of penetrating the European market. The Regulation creates a distinction between two types of joint ventures: (1) the concentrative joint venture (i.e. one which performs "on a lasting basis all the functions of an autonomous economic entity"), which comes under the Regulation, and (2) the cooperative joint venture (i.e. one "which has as its object or effect the coordination of the competitive behavior of undertakings which remain independent") which continues to be governed only by articles 85 and 86 of the Treaty of Rome.[110]

Unfortunately, this distinction remains somewhat vague and uncertain. It may therefore be advisable to give the Commission notice of almost all joint ventures, at least until the proper interpretation of article 3(2) is established. The Commission has recently published a set of joint venture guidelines as a "notice" in the *Official Journal of the European Community* which are intended to eliminate some of the existing uncertainties.

In the draft version of these guidelines, the Commission lists the two main characteristics of a concentrative joint venture.[111] First, the joint venture must be an independent economic entity, i.e., a complete undertaking established on a long term basis and exercising an independent commercial policy. To be considered a complete undertaking a joint venture must (1) exercise all the functions of a normal undertaking and not just some of them, such as research and development or purchasing or production, and (2) act as an independent supplier and buyer on the market. Whether the requirement of a long term basis is met depends on the time agreed by the parent companies, as well as on the human and material resources of the joint venture; the nature and quantity of the human and material re-

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109. Regulation, *supra* note 1, art. 3(2).

110. *Id.*

111. The final version of the joint venture guidelines was published after this article was written. *See* 33 O.J. EUR. COMM. (No. C 203) 10, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. 721 (August 14, 1990). However, the following discussion of the draft version is equally applicable to the final version because the two main characteristics of a concentrative joint venture as defined in the final version closely parallel the draft version. Further discussion of the joint venture guidelines is provided in the postscript. *See infra* notes 134-37 and accompanying text.

sources must ensure the joint venture's existence and independence in the future. Independent commercial policy means that, within the limits of its corporate objects, the joint venture plans, decides, and acts independently.

The second main characteristic of a concentrative joint venture is the absence of coordination of competitive behavior. This means that the joint venture must not be accompanied by any coordination of the competitive behavior of undertakings that remain independent of each other. There must be an absence of coordination between any of the parent companies as well as between any of the parents and the joint venture.

3. *An EEC/U.S. treaty on competition matters*

Speaking to the EEC Chamber of Commerce in New York in March of 1990, Sir Leon Brittan drew attention to the possibility that conflicts of jurisdiction would arise between European merger control under the new Regulation and U.S. merger control. To avoid what he termed "an unseemly and damaging dispute" that might result in cases of sufficient importance, he proposed that consideration be given to the "desirability of a treaty or less formal agreement" between the Community and the U.S.[112] He stated:

> Such an agreement would provide for information gathering and exchange and would lay down a detailed procedure for consultations on cases and issues of common interest. It might even contain an arbitration clause, although the political difficulties of getting that agreed should not be underestimated.[113]

This idea is being pursued actively within the Commission, but at the time of writing no further progress has been reported. Sir Leon may have had in mind a case such as *Minorco/Consolidated Gold Fields*, one of the Commission's interventions discussed above.[114] That takeover was eventually frustrated in the

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112. Speech by Sir Leon Brittan, EEC Chamber of Commerce Meeting, in New York City, Commission Press Release IP (90)241; [1990 Antitrust Supp.] 4 COMM. MKT. L.R. 324 (March 26, 1990).

113. *Id.* at 324.

114. *See supra* notes 31, 35 and accompanying text.

U.S. courts,[115] even though it had received the Commission's blessing, together with that of the UK's MMC.[116]

D. *Potential Protectionist Uses of the Regulation*

The Commission's treatment of purely European mergers also has potential to create friction between the EEC and foreign nations. As briefly discussed above, the Regulation states that, when appraising the compatibility of a merger with the common market, the Commission shall take into account—among other things—"the structure *of all the markets concerned* and the actual or potential competition from undertakings (businesses) located either within or *without* the Community."[117] Here industrial rather than competition policy reasons could lead the Commission to use the Regulation as a protectionist device, i.e., authorizing and promoting intra-EEC mergers which create strong European companies, and discriminating against non-European would-be purchasers. In other words, when appraising a proposed merger of European competitors, the Commission could have regard to the existence of significant non-EEC companies that compete in the same market and consequently authorize the intra-European merger which would create a single stronger European company, better able to challenge its non-EEC rivals.

V. Conclusion

The Merger Control Regulation is of crucial importance for those non-EEC companies wanting to merge with or acquire a European business. The Regulation will apply not only to full mergers but also to certain joint ventures; this is important because many non-EEC companies have preferred joint ventures to acquisitions as a means of penetrating the European market.

The Regulation will apply equally to transactions taking place in the EEC and to transactions taking place outside it if the parties both have a relatively modest level of turnover within the EEC. This could mean, for example, that non-EEC

115. *See* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989), *aff'g in part sub nom.*, Consolidated Gold Fields PLC v. Anglo American Corp. of South Africa, 698 F. Supp. 487 (S.D.N.Y. 1988), *cert. denied*, 110 S. Ct. 29 (1989).

116. *See* Commission Press Release IP (88)512 (Aug. 17, 1988).

117. Regulation, *supra* note 1, art. 2(1)(a) (emphasis added); *see supra* notes 91-105 and accompanying text.

companies which have established themselves within the EEC through new direct investment will find themselves subject to the Regulation in their dealings outside the EEC. Non-EEC undertakings should also be aware that the Regulation also has potential to be used for protectionist purposes.

For Europeans, the Regulation is even more momentous. The grant of formal merger control powers to the European Commission under the new merger Regulation is a significant stage in the process of European integration. The success of the current "1992" campaign, which lies not only in the legislative changes but also in a new commercial perception of Europe, has led to a rapid increase in the number of corporate reorganizations within the EEC. The Commission now has at its disposal an instrument specifically designed for reviewing such mergers, in place of the unsatisfactory and ineffective powers which it previously used to tackle that task.

Unfortunately, the complex legal background created by the inchoate powers under the Treaty of Rome, together with the very considerable political pressures that were brought to bear during the negotiations, have produced a Regulation which is in many ways flawed and unclear. The adoption of the Regulation may mark the end of a seventeen year campaign by the Commission, but it also marks the beginning of interesting times to come.

VI. Postscript

In the months that have passed since this article was submitted for publication, there have been a number of developments; most notably, the Regulation became effective on September 21, 1990. Since then the Commission has issued a number of decisions, some of which reveal far-reaching interpretations of the Regulation. In addition, the Commission adopted the implementing rules required for the routine administration of cases under the Regulation and two guidance notices before the Regulation became effective. These and other developments are briefly reviewed in the following pages.

A. *The Implementing Regulation*

The Merger Regulation was adopted by the EEC's Council of Ministers, but article 23 delegated the power to adopt implementing provisions to the Commission. The Commission has

now adopted a regulation[118] containing detailed rules on how notifications should be made, the running of time limits, and the organization of hearings. The rules on notification are the most significant; the other rules, although of practical importance, are relatively technical.

Notifications are to be submitted by completing a "form CO" which is appended to the implementing regulation.[119] Strictly speaking, "form" is a misnomer because the document is a questionnaire, prescribing the information that must be submitted. The requirements of the form are given the force of law by the implementing regulation which further states that the information required "must be correct and complete."[120] Notifications that are "incomplete in a material respect" are ineffective and do not trigger the running of the time limits under the Regulation.[121] The three-week suspension period[122] and one-month or five-month inquiry period[123] only begin to run once the missing information has been supplied.

Form CO imposes a significant burden on entities. The strategy adopted by the Commission, reflected in the nature of the form, is to require submission of a complete case from the outset; the alternative would have been to impose a relatively modest information requirement at the time of initial notification, with a more detailed information request to follow a month later in those cases raising "serious doubts."[124] Such two-step information gathering characterizes U.S. merger control under which the burdensome requirements of the so-called "Second Request" are reserved for the difficult cases filtered out after initial review.[125] Merger control in the United Kingdom follows the same pattern, with initial review by the Office of Fair Trading followed by detailed scrutiny before the MMC only in selected difficult cases.[126] The Commission took the view, however, that it would only be able to meet the strict time limits imposed by the

118. Commission Regulation 2367/90, 33 O.J. EUR. COMM. (No. L 219) 5, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. 683 (1990).

119. *Id.*, art. 2(1). To examine form CO, see *id.* at 11, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. at 694.

120. Commission Regulation 2367/90, *supra* note 118, art. 3(1).

121. Commission Regulation 2367/90, *supra* note 118, art. 4(2).

122. *See supra* notes 68-72 and accompanying text.

123. *See supra* notes 73-81 and accompanying text.

124. *See supra* notes 75-81 and accompanying text.

125. *See* 18 U.S.C. § 18a (1988).

126. *See* Fair Trading Act of 1973 (as amended by the Companies Act of 1989).

Regulation by insisting on submission of a full factual case from the outset.

In requiring full information at the outset, the Commission seems to have been influenced by German merger control law (as indeed it was in many aspects of the drafting of the Regulation). Notifications to the Bundeskartellamt (the German Federal Cartel Office in Berlin) also require submission of all information from the outset.[127] However, an important difference exists between the EEC and German systems. Notifications under the EEC Regulation must be submitted within one week of a triggering event—the signature of an agreement, the announcement of a public bid, or an acquisition of control.[128] The German system is more relaxed; there is no time limit for submission of notification, but merely a rule that concentrations may not be implemented until clearance has been obtained. Thus, the Commission's strategy of demanding full information from the outset is significantly more burdensome than the German notification requirement. Companies are likely to experience some difficulty in compiling the full information required within the one-week time limit unless they have made careful advance preparations.

However, the full burden of form CO may be mitigated because two exceptions exist from the form's strict requirements—(1) an "inability to answer" exception and (2) a waiver.[129] The scope of the inability exception is uncertain; the only recognized example is the likely inability of a bidder to supply detailed information about the target of a hostile bid.[130] Other forms of alleged inability, such as disproportionate expense or undue delay, may be challenged or disputed. The safer course in such circumstances is reliance on the second exception, waiver.

The Commission may grant waivers to "dispense with the obligation to provide any particular information requested by form CO where the Commission considers that such information is not necessary for the examination of the case."[131] Application

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127. *See* Gesetz gegan Wettbewerbsbeschraenkungen ("GWB") (law against restraints on competition). This law was amended in 1989.

128. *See supra* notes 66-67 and accompanying text.

129. *See* Commission Regulation 2367/90, 33 O.J. Eur. Comm. (No. L 219) 5, 11, [1990 Antitrust Supp.] 4 Comm. Mkt. L.R. 683, 694 (1990) (form CO, sec. A. Introduction, para. (a)).

130. *Id.* (form CO, sec. A. Introduction, para. (b)).

131. Commission Regulation 2367/90, *supra* note 118, art. 4(3).

for a waiver necessitates advance consultation with the Commission. Thus, in many cases, companies will approach the Commission in confidence prior to public announcement of the merger proposal. The role of the waiver in the administration of the Regulation has rapidly assumed an expansive importance, with the Commission actively encouraging companies to consult with it as early as possible. Thus, despite the rigors of form CO, it will often be possible to lessen the information gathering burden by negotiating with the Commission in each individual case.

B. *The Task Force*

The Commission has also formed a special unit of officials to administer the Regulation. Referred to as the Task Force, it is part of the Commission's Directorate General IV, which has responsibility for competition matters generally. When the Regulation was adopted, the Commission requested that the Council authorize recruitment of additional staff to assist with the new merger control responsibilities.[132] Extra officials have now been appointed, in part by recruiting civil servants with merger control experience from national competition authorities. The Task Force contains a preponderance of lawyers, supplemented by economists and accountants, and has already developed a hands-on merger control approach designed to facilitate the making and review of notifications. In addition to the formally notified cases,[133] the Task Force has received a far larger number of informal approaches through which the parties seek an indication of the Commission's likely attitude toward a proposed merger or clarification of uncertainties in the application of the Regulation to their particular circumstances. Further, such informal approaches are often designed to obtain waivers of part of the information requirements as discussed above.

C. *Joint Ventures and Other Links Between Undertakings*

In addition to adopting the implementing regulation, the Commission finalized the draft guidance notice on joint ventures described in part IV of this article.[134] The notice[135] follows the

132. Merger Control (Antitrust) Regulation, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. 314, 319-20 ("STATEMENTS ON THE STAFFING IMPLICATIONS OF THE REGULATION"); *see also supra* note 36 and accompanying text.

133. *See supra* notes 66-67 and accompanying text.

134. *See supra* note 111 and accompanying text.

main thrust of the draft version. After defining joint venture, the notice sets forth two conditions to be satisfied before the joint venture is considered concentrative. First, the joint venture must be an autonomous economic entity, and second, it must not lead to any coordination of competitive behavior either between the parents or between a parent and the joint venture.

The notice is far too complex for any worthwhile exposition of its contents to be attempted in this postscript. Suffice it to say that the notice prescribes a sophisticated economic analysis to be applied to the factual circumstances of any proposed joint venture. This complexity only serves to highlight the unsatisfactory nature of the "Concentrative/Cooperative" distinction contained in the Regulation (which derives from German structural/behavioral theory). The purpose of the joint venture guidance is to help determine whether a joint venture is to be reviewed under the Regulation or under articles 85 and 86 of the Treaty of Rome. Thus, the notice's function is to define the extent of jurisdiction under the Regulation, not to determine the substantive outcome. The sophistication of the economic analysis required under the joint venture notice belies this intended jurisdictional role. The resulting lack of clarity in the notice is regrettable because the classification of a joint venture as concentrative or cooperative has fundamental implications both for the applicable review procedure and the substantive test to be applied in the course of that review.[136] Given the troublesome nature of the concentrative/cooperative distinction, perhaps the complexity of the guidance was unavoidable. With the present guidance, however, those intending joint ventures will almost inevitably need to enter into informal discussions with the Task Force to obtain guidance on the likely classification of their plans.

The joint venture notice also classifies various "other links between undertakings"—minority shareholdings, cross shareholding, representation on the board of other undertakings, transfers of businesses or parts of businesses (including reciprocal transfers), and joint acquisitions.[137] Depending on the cir-

135. 33 O.J. EUR. COMM. (No. C 203) 10, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. 721 (1990) ("Commission notice of 14 August 1990 regarding the concentrative and cooperative situations under the Merger Control (Antitrust) Regulation").

136. *See* Regulation, *supra* note 1, art. 3(2).

137. 33 O.J. EUR. COMM. (No. C 203) 10, paras. 37-48, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. at 729-31 (Section III).

cumstances, each of these links between undertakings may be classified as a concentration reviewable under the Regulation, or they instead may fall outside the scope of the Regulation and be reviewed under article 85 of the Treaty of Rome.

D. *Ancillary Restrictions*

In a second Commission notice,[138] the Commission has provided guidance on contractual restrictions that limit a concentration'sfreedom in the market, such as non-competition clauses, which are often included in merger agreements. In accordance with recital 25 of the Regulation, a merger clearance simultaneously authorizes those contractual restrictions which are "directly related and necessary to the implementation of the concentration."[139] Restrictions satisfying the "directly related and necessary" test are referred to as "ancillary restrictions."[140] The notice reviews (1) non-competition clauses, such as those typically imposed on the vendor of a business or on joint venture parents, (2) intellectual property licenses, and (3) purchase/supply agreements, although these three categories are not exhaustive.

The ancillary restrictions notice applies the following principles to determine whether a restriction qualifies as ancillary and necessary, although it also states that the Commission will take normal business practices into account. First, a restriction must not be to the detriment of third parties. Second, ancillary restrictions must be subordinate to the main object of the concentration. Third, a restriction is necessary only if the concentration could not be implemented without it or could only be implemented "under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success."[141] Finally, a "rule of proportionality" is applied in reviewing whether a restriction is ancillary and necessary: where alternative restrictions are feasible, parties

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138. 33 O.J. EUR. COMM. (No. C 203) 5, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. 714 (1990) ("Commission notice of 14 August 1990 regarding . . . restrictions directly related and necessary to the implementation of concentrations").

139. Regulation, *supra* note 1, recital 25, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. at 863.

140. 33 O.J. EUR. COMM. (No. C 203) at 5, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. at 714 (sec. I, para. 1).

141. *Id.* at 6, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. at 715 (sec. II, para. 5).

must choose the one which is objectively the least restrictive of competition.[142]

E. *Cases Decided under the Regulation*

By mid-February 1991, the Commission had published announcements[143] of the receipt of nineteen notifications. Clearance had been announced in nine of these cases after the initial one-month review, indicating that none of these nine merger proposals gave rise to "serious doubts."[144] Two cases did give rise to such doubts, and the Commission announced that it had begun the second stage review of those notifications. In one other case, the Commission decided that it lacked jurisdiction to review the notification because the concentration lacked Community dimension.[145]

Several of these decisions merit comment. Two decisions, *ICI/Tioxide* and *Arjomari/Wiggins Teape Appleton*, stand out in terms of legal interest because they announce far-reaching interpretations of the Regulation. Other cases are important because they illustrate the Regulation's extra-territorial effect.

1. ICI/Tioxide*: expanding the concept of decisive influence*

In *ICI/Tioxide*, the Commission concluded that it had jurisdiction under the Regulation to review a buy-out of Tioxide, an existing 50/50 joint venture between ICI and Cookson. ICI proposed to buy out Cookson's interest to obtain 100% control of Tioxide. On its face, this buy-out did not appear to amount to a concentration because ICI already had control or "decisive influence"[146] over Trioxide. ICI would be *increasing* its control over Trioxide by bringing it into 100% ownership, but the Regulation does not appear to confer any power to review such increases in control.[147] The Commission's justification for its assertion of jurisdiction was that the transaction would result in a change in the quality of the decisive influence exercised. The Commission did not tie this justification to any specific provision in the regu-

142. *Id.* at 6, [1990 Antitrust Supp.] 4 COMM. MKT. L.R. at 715-16 (sec. II, para. 6).
143. *See supra* note 74.
144. *See supra* notes 73-81 and accompanying text.
145. *See supra* notes 73-74 and accompanying text.
146. *See supra* notes 49-52 and accompanying text.
147. *See* Regulation, *supra* note 1, art. 3.

lation beyond stating that the transaction would result in a permanent change in the structure of the joint venture company.

ICI/Tioxide is problematic because the extent of the enunciated "change in quality of decisive influence" principle remains unclear. With the benefit of hindsight, it may be readily conceded that the Commission ought to have the power to review increases in control—as is possible under U.K.[148] and German[149] merger control laws. Nevertheless, such powers are not expressly granted in the Regulation. Unfortunately, the Commission's decision will not be tested before the European Court because the Commission cleared the buy-out, depriving the parties of any further commercial interest in the case. Thus, it remains unclear whether the interpretation would be upheld. Moreover, the extent of increase in control that will necessitate notification to the Commission also remains uncertain.

2. Arjomari/Wiggins Teape Appleton: *extending the Commission's jurisdiction*

Arjomari/Wiggins Teape Appleton also augmented the concept of decisive influence under the Regulation. At issue was a 39% holding which Arjomari was to acquire in Wiggins Teape Appleton. The Commission noted that the remaining shares in Wiggins Teape Appleton, a listed company, were highly fragmented, with no other shareholding having over 4%. The Commission ruled that under these circumstances the 39% shareholding would confer decisive influence. This finding, although not surprising, offers the first firm guidance on the meaning of the "decisive influence" test.

On a separate issue, however, the Commission's *Arjomari/Wiggins Teape Appleton* decision may have raised more questions than it answered. In assessing the existence of Community dimension,[150] the Commission examined the group of companies whose turnover must be taken into account.[151] The Regulation contains a complex definition of the companies comprising the relevant group.[152] At the risk of considerable over-simplification, the regulation requires the inclusion of any companies controlled

148. *See supra* note 9 and accompanying text.
149. *See supra* note 10 and accompanying text.
150. *See supra* notes 58-65 and accompanying text.
151. *See supra* note 60 and accompanying text.
152. *See* regulation, *supra* note 1, art. 5(4).

by one of the merging parties or having control over one of the merging parties. At issue in the case was whether Arjomari was controlled by a minority shareholder because the minority shareholder had "the power to appoint more than half the members" of the board of directors.[153]

The Commission concluded that the minority shareholder did not possess the power to elect more than half of the board and thus did not have to be included in the calculation of turnover. Without the minority shareholder, the combined turnover of Arjomari and Wiggins Teape Appleton was less than the 5,000,000,000 ECU threshold, and the Commission accordingly declined jurisdiction. However, in reaching this decision, the Commission enunciated an important and far-reaching interpretation of the phrase "the power to appoint more than half the members." According to the Commission, the power to appoint more than half the board members need not be a strict legal power (e.g., conferred by contract or derived from a shareholding exceeding 50%). In the Commission's view, the power may exist de facto—if in reality the minority shareholder was in a position to exercise more than half the votes present or represented at the last general meeting.

This decision, like that of *ICI/Tioxide*, introduces considerable uncertainty into the regulation. The purpose of the Community dimension threshold is to provide a ready means of separating out those concentrations subject to Commission review under the regulation from those falling to the national merger control authorities. Application of those thresholds was intended to be accomplished by reference to a company's most recent annual accounts. This ready means of classifying concentrations will be frustrated if the Commission persists with its interpretation because the group defined for accounting purposes will often differ from the group defined under the Commission's interpretation of the Regulation. Moreover, in many cases, it will not be clear whether a minority shareholding has the de facto control described by the Commission. This de facto control will depend on the distribution of other shareholdings and often on an analysis of recent voting practices and changes in shareholders. Finally, the Commission's interpretation can only increase the number of cases found to have Community dimension, in-

153. *See* regulation, *supra* note 1, art. 5(4)(b).

creasing the number of cases over which the Commission has jurisdiction.

3. *Extra-territorial cases*

Three of the Commission's decisions to date may loosely be termed "extra-territorial."[154] In *AT&T/NCR*, *MCA/Mitsubishi*, and *Mitsubishi/Union Carbide*, the concentration in question was to take place outside the EEC and was between non-EEC companies whose turnover nevertheless satisfied the various Community dimension thresholds. Both *AT&T/NCR* and *MCA/Mitsubishi* were public offers taking place in the U.S. Because the Commission did not entertain serious doubts about any of the three cases, no question of prohibition arose, and therefore no issues of comity or enforceability had to be addressed.

F. *The level playing field*

As mentioned above, a debate has recently been launched in the Community over the abolition of national rules that impede the process of industrial restructuring.[155] The Booz-Allen report[156] is now available, although it has not been published. In any event, the Booz-Allen conclusions are in line with those of the Coopers & Lybrand study. The Commission has now taken the first steps toward overcoming some of the obstacles identified, albeit rather modest ones in view of the scale of the difficulties identified in the two reports. The Commission's proposals take the form of amendments to an existing directive and a pending proposed directive.[157] The amendments are designed to force companies to abandon protective mechanisms, such as unequal voting rights for shareholders, and limit their ability to acquire their own shares. These proposals, useful as they may be if implemented, represent only small steps toward a distant goal. In any event, they must first be negotiated and agreed upon by the Council of Ministers and then translated into national law, a process likely to take at least three to four years.

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154. *See supra* notes 96-105 and accompanying text.

155. *See supra* note 8 and accompanying text.

156. *See supra* note 8.

157. *See* 33 O.J. EUR. COMM. (No. C 8) 5 (1990) (proposed amendments to the existing Second Company Law directive); 33 O.J. EUR. COMM. (No. C 7) 4 (1990) (proposed amendments to the proposed Fifth Company Law directive).

G. EEC/U.S. Antitrust Treaty

Commissioner Sir Leon Brittan's proposal[158] is understood to have resulted in EEC-U.S. discussion, although no progress has been officially reported. It seems that any cooperation is likely to be at the executive level, falling well short of a formal treaty which would require political and then legislative approval on both sides of the Atlantic and would undoubtedly be contentious. Executive cooperation already exists to some extent and can more readily be extended. However, legal difficulties will arise, most notably in relation to the sharing of information because the Commission is bound by duties of professional secrecy.[159]

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158. *See supra* notes 112-13 and accompanying text.

159. Regulation, *supra* note 1, art. 17(2) (permitting disclosure only to competent authorities of EEC member states, but not to authorities of non-EEC countries).