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COMMENT

THE EUROPEAN COMMUNITIES' MERGERS & ACQUISITIONS REGULATION: TWO-YEAR REVIEW

Since 1985,[1] the European Communities (EC)[2] has exper-

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[1] On July 14, 1985, the Commission of the European Communities published the White Paper, which set forth a detailed timetable for legislative proposals to be adopted by the Council of Ministers to achieve the EC objective of an integrated European Market by 1992. COMPLETING THE INTERNAL MARKET, WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL, (COM 85) 310 Final at 3 (1985). By April 7, 1990, the Commission had submitted 282 proposals to the Council. To date, 147 proposals have been adopted, and the remainder await Council consideration. LeBoeuf, Lamb, Leiby & MacRae, *Countdown 1992*, BUS. J. (June 1990).

[2] The European Communities (EC) was established under the Treaty of Rome, Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, *reprinted in* 1 Common Mkt. Rep. (CCH) 161 (1973) [herinafter Treaty of Rome], to strengthen the nations of Europe weakened by World War II. OFFICE OF PRESS AND PUBLIC AFFAIRS, DELEGATION OF THE COMMISSION OF THE EUROPEAN COMMUNITIES WASHINGTON, D.C., THE EC IN THE UNITED STATES. Article 2 states:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic ativities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

The Treaty incorporates three communities: the European Coal and Steel Community (ECSC) established on July 23, 1952, as well as the European Economic Community (EEC), and the European Atomic Energy Community (Euratom), both established in 1957. The EC is now comprised of 12 Member States: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, and the United Kingdom. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES (LUXEMBOURG), EUROPE WITHOUT FRONTIERS—COMPLETING THE INTERNAL MARKET No. 3/1989, at 6 (1989). The common institutions and policies are shared by 345,000,000 people. Statistical Office of the European Communities, RAPID REPORTS POPULATION AND SOCIAL CONDITIONS (EUROSTAT 4) (1990). The EC is governed by four institutions: The Commission, the Counsel of Ministers, the European Parliament, and the Court of Justice. The Commission is responsible for administration and proposing legislation within the community. The Council of Ministers is the decision-making body and enacts legislation from Commission proposals. The European Parliament is elected by the citizens of the 12 EC Member States and has final approval over the EC budget. Its participation in the

ienced a surge in the number of mergers and acquisitions (M & A) among EC Member States.[3] Among the top 1,000 EC companies,[4] M & A activity rose from 227 transactions in 1985-86 to 492 transactions in 1988-89.[5] The total disclosed figure[6] of all cross-border acquisitions of European companies in 1990, including those of American and Japanese buyers, was approximately forty-eight billion ECUs,[7] or approximately sixty-two billion U.S. dollars.[8] The total amount of expenditures by U.S. firms on European cross-border aquisitions was approximately ninety-two billion ECUs, or twelve billion U.S. dollars.[9]

The surge of M & A activity in Europe has been attributed to the 1992 "internal market" program objective of the EC,[10] and has affected United States-European economic relations.[11]

EC decision-making process was recently increased. The Court of Justice is the EC "Supreme Court." It interprets EC law. Its rulings are binding. Emile, Noël, WORKING TOGETHER-The institutions of the European Community (1988). *See generally* I THE EUROPA WORLD Y.B. 1990 at 136-54 (1990).

[3] *1,000-Day Countdown Begins for 1992 as the Single Market Takes Shape*, EUROPEAN COMMUNITY NEWS, No. 16/90, Apr. 6, 1990.

[4] *Id.* at 2.

[5] *Id.*; *see generally* Richard Waters, *International Mergers & Acquisitions*, FIN. TIMES, Nov. 18, 1991, at 23, col. 1.

[6] "Disclosed figure" are those figures released by companies. The figures do not reflect exact amounts for strategic purposes. Telephone Interview with Arnd Frohlich, Deal Controller, *World Deal Review* (June 30, 1992).

[7] The ECU is the European Currency Unit, which functions in the European Monetary System (EMS), established in March 1979, (1) to achieve internal and external stability in Europe, (2) to provide improved economic cooperation and growth among Member States, and (3) to alleviate global monetary imbalances by spreading the impact of excessive external monetary imbalances over all participant currencies. Commission of European Communities, Directorate-General Economic and Financial Affairs, D-G Information, Communication, & Culture, Belgium: *The EMS: Ten Years of Progress in European Monetary Co-operation*, 1990. The ECU has three primary functions: (1) it is a common denominator for the exchange rates and intervention mechanisms; (2) it is the basis for the "divergence indicator" (i.e., the central banks will intervene should a participant currency appreciate or depreciate more than 2.25%); and (3) it is used as a reserve instrument, as a denominator in the EMS credit mechanism, and as a means of settlement for EC institutions. Ralph J. Mehnert, *The ECU "For Beginners"*, EUROPE Apr. 1989, at 20; *see also* COMMITTEE FOR THE STUDY OF ECONOMIC AND MONETARY UNION, REPORT ON ECONOMIC AND MONETARY UNION IN THE EUROPEAN COMMUNITY (1989).

[8] Mark Dixon, *World Deal Review* 10-14 (Mark Dixon ed. & co.) (1991) (This figure is an approximation for 1989 based on 1 ECU = U.S. $1.28.) Telephone Interview with Arnd Frolich, Deal Controller, *World Deal Review* (June 30, 1992).

[9] *Id.*

[10] For a detailed definition of internal market objective, see *supra* note 2.

[11] The EC is the largest United States trading partner with two-way trade totaling

This is primarily because the surge of M & A activity has led to a major restructuring of the European industrial landscape, allowing Europe to secure a strong competitive position in the world market.[12] Consequently, this has created unique business opportunities both for American businesses already present in Europe and for the growing number of American businesses entering the international market.[13]

The EC's response to this surge of merger activity began in the 1970s with the EC Commission's increased awareness of the necessity for an efficient competition policy as a means to provide "optimal allocation of resources and . . . to create the best possible climate for fostering innovation and technical progress in the unified market."[14] A Community-wide merger policy was viewed as the means toward this end.[15] Three significant factors supported that view. First, the possibility that mergers with monopolistic characteristics, resulting from the increase in merger activity, posed a threat of damaging individual Member State's competition activity and the overall functioning of the internal market.[16] Second, the scope of the Commission's role in overseeing merger activity under existing antitrust law, governed by Articles 85 and 86 of the Treaty of Rome, was undefined.[17] Third, the Commission's power to prevent mergers that threatened the Community was nonexistent under these articles.[18] The lack of uniformity between the national laws of individual EC Member States and that of EC law created legal uncertainty for the parties engaging in merger activity.[19]

$161 billion in 1988. Companies within the EC and the United States are the largest investors in each other's economies. The European Community J.Com., Jan. 12, 1990.

[12] Guy de Jonquieres, *A New Landscape Takes Shape*, FIN. TIMES, Jan. 11, 1989, at 20, col. 3.

[13] *U.S. Firms Seek Foothold in Changing Europe*, J. OF COM. June 21, 1989, at 5A, col. 2.

[14] OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES (LUXEMBOURG), EEC COMPETITION POLICY IN THE SINGLE MARKET, No. 1/1989, at 6 (1989).

[15] *Id.* at 7.

[16] *Policing EC Mergers*, FIN. TIMES, Apr. 12, 1989, at 20, col. 1.

[17] Treaty of Rome, *supra* note 2, at arts. 85 & 86. For the full text of these two Articles, see *infra* note 54.

[18] AUDREY WINTER, EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE 169-73 (1989).

[19] Address by the Right Honourable Sir Leon Brittan, Vice President of the Commission of the European Communities responsible for Competition Policy and Financial Institutions to the EC Chambers of Commerce, New York (Mar. 26, 1990).

In 1973, the Commission responded to its competition policy deficiencies by submitting to the Council of Ministers the first of four proposals for the adoption of a new European level merger regulation.[20] The objective behind these proposals was to provide the EC Commission greater control over merger activity and to demarcate spheres of responsibility between the Commission and Member States. This would confer upon one authority the exclusive power to approve or to block a concentration,[21] a concept referred to as a "one-stop" merger control policy.[22] The policy would eliminate the inefficient two-tier level of government scrutiny required before undertakings[23] enter into a transaction.[24]

These new proposals were met with resistance from Member States who were hesitant to relinquish jurisdiction over merger activity that was afforded them by their own domestic competition laws.[25] These domestic laws allowed Member States to exercise merger control based on social and regional policy considerations and to make determinations in light of their own national interests.[26] The conflicting political and economic objectives of various Member States had hampered the Commission's efforts to secure the Regulation's adoption.[27] The Commission attempted to expand its control over mergers through two European Court of Justice cases, *Europemballage Corporation and Continental Can Company v. EC Commission* ("CONTINENTAL

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[20] Proposal for a Council Regulation on the Control of Concentration between Undertakings, 16 O.J. EUR. COMM. (No. C 92) 1 (1973).

[21] *Id.* A "concentration" is an EC term of art comparable to "merger." Patrick Thieffry, et al. *The Notification of Mergers Under the New EEC Merger Control Regulation*, 25 INT'L LAW. 615 (1991). For a definition under the Regulation, see *infra* note 99.

[22] William Lee, *EC 'Victory' On Merger Controls*, FIN. TIMES, Jan. 4, 1990, at 7, col. 5.

[23] An "undertaking" is an EC term of art comparable with "company." Thieffry, *supra* note 21. For a definition under the Regulation, see *infra* note 100.

[24] Lee, *supra* note 24.

[25] *Id.*

[26] European Commission, Press Release, IP (90) 156, Feb. 23, 1990; Steve Lohr, *Talking Deals: Guide to Future in Bid for Plessey*, N.Y. TIMES, Dec. 1, 1989, at D2, col. 1. *See also*, Nancy Miller, *US Executives Scan European Landscape For Takeover Targets*, J. OF COM., Apr. 10, 1989, at 2, col. 1; Dawkins, *EC Merger Control Takes Shape*, FIN. TIMES, Feb. 6, 1989, at 4, col. 5.

[27] Europe, Press Release, Internal Market Council: *Differences Subsist Concerning the Regulation on "Merger Controls"*, No. 5092, Sept. 18-19, 1989.

CAN")[28] and the landmark case *British American Tobacco Co. LTD. & R.J. Reynolds Industries Inc. v. Commission* ("*Phillip Morris*"),[29] under articles 85 and 86 respectively. Ultimately, it was this attempt, despite the uncertainty surrounding these Articles' true scope, that prompted the Member States to confer formal merger control to the Commission.[30]

On December 21, 1989, after sixteen years of negotiations and after three amended Council proposals, the Council of Ministers of the EC adopted the Merger Regulation to control M & A activity.[31] The Regulation, formally known as the Council Regulation on the Control of Concentrations by Undertakings, came into effect on September 21, 1990.[32] The Regulation's main feature is that it confers formal merger control on the Community through a system of one-stop merger control. This allows the Commission to exercise exclusive jurisdiction over mergers whose size and nature, which are determined by a threshold demarcation system, make them of European-wide significance.[33] However, important qualifications to this basic demarcation exist within the Regulation. They reflect the conflicting objectives expressed by Member States during the negotiations process and illustrate the compromises of the Member States and the Commission.[34] Because of these qualifications the Regulation has been criticized for failing to achieve a system of one-stop merger control.[35] As Commission case law decisions have been rendered within nearly the first two years of the Regulation's implementation, Member States have invoked these exceptions.[36]

Such action by the Member States demonstrates that the

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[28] Case 6/72, 1973 E.C.R. 215, Common Market Reporter (CCH) p. 8302, at 9481 [hereinafter *Continental Can*].

[29] Joined Cases 142 and 156/84, 1987 E.C.R. 115, Common Mkt. Rptr. (CCH) p. 30 [hereinafter Philip Morris].

[30] Winter, *supra* note 18, at 174-75.

[31] European Commission, Press Release, IP (89) 1007, Dec. 21, 1989; Council Regulation No. 4064/89, 33 O.J. EUR. COMM. (No. L395) 1 (1989).

[32] *Id.*

[33] *Id.*

[34] Lee, *supra* note 22.

[35] Rice & Guy de Jonquieres, *Uncharted obstacle course towards one-stop control system*, FIN. TIMES, Sept. 21, 1990, at 4, col. 1.

[36] Andrew Hill & Peter Bruce, *Brussels Imposes Strict Conditions on Mergers*, FIN. TIMES, Apr. 13, 1991, at 22, col. 1.

conflicting social, political, and economic objectives of each individual Member State which existed prior to the adoption of the Merger Regulation continue to play a role in attempting to curtail the decision-making authority of the Commission under the Merger Regulation.

Part I of this comment focuses on the history of EC competition law and of the legal and political constraints which led to and molded the new Merger Regulation. Part II discusses the significant features of the Regulation in light of the implementing regulations issued by the Commission on July 25, 1990. Part III highlights the exceptions to the Regulation that are said to make it fail as a one-stop merger control. Part IV looks at how the legal and political constraints which molded the regulation have influenced the Commission's case law after nearly two years of its implementation. Part V concludes that the exceptions under the Merger Regulation invoked by the Member States reflect their diverse social, political and economic interests and demonstrate the friction between Commission advocates of competition policy and promoters of industrial and internal market policy. Despite such pressures from Member States the Commission must continue to make each determination on a competition basis. Only upon review of case law determined solely on competition grounds can a precedent be set that will provide consistency and clarity for future application of the merger rules in the EC under the Merger Regulation.

I. The EEC Merger Regulation: Historical Background

On March 25, 1957, the Treaty of Rome,[37] which established the European Communities, was signed. This treaty was comprised of three separate treaties: (1) The European Coal and Steel Community (ECSC),[38] established in 1951, (2) the European Economic Community (EEC),[39] established in 1957, and (3) the European Atomic Energy Community (Euratom),[40] also

[37] Treaty of Rome, *supra* note 2.

[38] Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

[39] Treat Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 13 [hereinafter EEC Treaty].

[40] Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169 [hereinafter Euratom].

established in 1957.[41] The Treaty of Rome's overall objective was to strengthen Europe, weakened by World War II, through a purely economic focus achieved by integration of European nations.[42] The specific objective of the EEC Treaty, as set out in Article 2 of the treaty, was to eliminate restrictive practices among Member States which impede competition or the completion of the internal market objective.[43]

Traditionally, EC competition law, what United States lawyers refer to as antitrust law, was governed by Articles 85 and 86 of the Treaty of Rome.[44] The EC Commission historically played a significant role in the area of competition law. As the Commission became increasingly aware of the significance of attaining an efficient competition policy, to achieve the common market objective,[45] the Commission sought to vet in advance or, if necessary, to block certain large-scale mergers.[46] A community-wide merger policy was viewed as a means to that end.[47] There were three significant factors that contributed to the Commission's view. The first factor was the increase of merger and acquisition activity in the EEC. The Commission welcomed this phemenomenon. Thus, it allowed enterprises to compete on a global scale because it viewed European level mergers as a means of enhancing production and contributing to the competitive framework of the market.[48] However, the Commission feared

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[41] Treaty of Rome, *supra* note 2, art. 1.

[42] Office of Official Publication of the European Communities, Luxembourg: *Europe Without Frontiers-Completing the Internal Market* No. 4/1989 at 9 (1989).

[43] A. Winter, R. Sloan, G. Lehner, V. Ruiz, *Europe Without Frontiers: A Lawyer's Guide*, Corporate Law Series (BNA ed. 1989). Article 2 states:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

[44] *Id.*

[45] Office of Official Publication of the European Communities, Luxembourg: *EEC Competition Policy in the Single Market* No. 1/1989 at 7 (1989).

[46] W. Dawkins, *EC Merger Control Take Shape*, FIN. TIMES, Feb. 6, 1989, at 4, col. 5.

[47] *See supra* note 43.

[48] The Commission sponsored a report to show the effect of its competition policy in the internal market. Tommaso Padoa-Schioppa et al., *Efficiency, Stability and Equity: a Strategy for the Evolution of the Economic System of the European Community*, Oxford University Press, 1987.

that the increase in merger activity would result in excessive cartelization or in mergers that were monopolistic in nature created by companies who would pursue size over sound business logic.[49] In turn, this would have a damaging effect on individual Member States' competition activity and consequently have adverse results for the functioning of the single market.[50] Therefore, the Commission attempted to attain the authority to intervene more actively to vet in advance and, if it chose, to block large-scale mergers that could distort or restrict competition within the common market.[51] "It is competition, above all else, which fuels the engine of economic progress and our present and future prosperity rests on the maintenance and improvement of the competitive environment in which we operate."[52]

The second factor which contributed to the Commission's decision to increase its role in merger activity, was the undefined scope of power given to the Commission to exercise merger control. Articles 85 and 86 of the Treaty of Rome, the articles which govern antitrust activity,[53] do not confer the Commission with formal merger control authority. These articles also do not provide the Commission with the power to block large-scale mergers that might threaten the internal market objective.[54] Article 85 prohibits anti-competitive agreements, decisions, and concerted pratices between enterprises that will remain independent enti-

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[49] *Supra* note 18.

[50] *Id.*

[51] *Id.*

[52] Address by the Right Honorable Sir Leon Brittan, Vice-President of the Commission of the European Communities responsible for Competition Policy and Financial Institutions to the EC Chambers of Commerce, New York (May 25, 1990).

[53] Treaty of Rome, *supra* note 2, at arts. 85 & 86. Article 85(1) states in pertinent part:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by undertakings of enterprises 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 whithin the common market . . . .

Article 86 provides in pertinent part:

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

[54] A. Winter, R. Sloane, G. Lehner, V. Ruiz, *supra* note 44 at 169-173. *See also*, Office of Official Publication of the European Communities, Luxembourg: *EEC Competition Policy in the Single Market* No. 1/1989 at 13, (1989).

ties.[55] Article 85 has been routinely applied to joint ventures, not mergers. A joint venture occurs when an enterprise is subject to joint control by two or more undertakings that remain independent entities.[56] A merger, on the other hand, occurs when an entity takes control over another to form a single economic unit.[57] Article 86 deals with companies that enjoy a dominant position within the common market or in a substantial part of that market, and prohibits any abuse of such dominant position as incompatible with the common market.[58] Therefore, Article 86 does not provide the Commission with the means to prevent monopolistic or oligopolistic situations, but does provide the means to prevent any abuse of that status.[59] Thus, because Articles 85 and 86 did not confer formal merger control powers on the Commission, they could not provide a comprehensive code for merger control.

The third factor which contributed to the Commission's position for the need for a merger regulation was the lack of legal certainty created by non-uniform antitrust laws existing among individual Member States and EC community law.[60] For example, while some Member States such as Germany and Britain have sophisticated competition rules, others, such as Italy,[61] have no national laws on antitrust activity.[62] Consequently, mergers were subject to a variety of national and community rules that were applied in an arbitrary fashion, dependent on industrial policy concerns. These concerns included regional or social policy considerations that would benefit national interests and were not based on strict competition.[63] The result was that a merger could be subject to parallel proceedings and double sanc-

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Address by the Right Honorable Sir Leon Brittan, Vice-President of the Commission of the European Communities responsible for Competition Policy and Financial Institutions to the EC Chambers of Commerce, New York (March 26, 1990).

[61] As of October 10th, 1991 Italy adopted its own national merger regulation which is modeled on the EC merger regulation.

[62] Barry E. Hawk, *Europe's Try For a One-Stop Merger*, N.Y. TIMES, May 6, 1990, at sec. 3, p. 13, col. 2.

[63] *Id.*

tions under national laws and EC Community law under Articles 85 and 86.[64] This two-tier level of merger scrutiny caused uncertainty and led many enterprises to seek advice and clearance from both national and EC competition authorities.[65] The delay and expense of parallel investigations in an area where business needed quick decisions based on well-defined rules made this competition policy inefficient.[66] The Commission sought to acquire more control of its merger policy because of the increase in merger activity and the Commission's undefined role under Articles 85 and 86.

In 1973, the Commission responded to the deficiences of its competition policy by submitting a proposal for new legislative powers on the control of mergers to the Council of Ministers.[67] Follow up amendments were submitted in 1981,[68] 1984,[69] 1986,[70] 1988,[71] and 1989.[72] In general, the proposals met with favorable responses from the European Parliament, but failed to make any progress within the Council of Ministers. This was because several features of the regulation conflicted with the individual demands of various Member States[73] resulting in the failure of the Council to adopt the 1989 proposal.[74] Three of the main conflicts were: the threshold amount, rational review of a merger already reviewed by the Commission, and the potential latitude available to the Commission to determine the criteria by which mergers should be judged.

First, a threshold level demarcation system was proposed by the Commission as the means to delineate the size of mergers to be policed by the Commission and those left to national authori-

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[64] *Supra* note 61.

[65] *Id.*

[66] *Id.*

[67] Proposal for a Council Regulation on the Control of Concentrations between Undertakings, 16 O.J. EUR. COMM. (No. C/92) 1 (1973).

[68] Proposal, 24 O.J. EUR. COMM. (No. C36) 3 (1981).

[69] Proposal, 27 O.J. EUR. COMM. (No. C51) 8 (1984).

[70] Proposal, 29 O.J. EUR. COMM. (No. C324) 5 (1986).

[71] Proposal, 31 O.J. EUR. COMM. (No. C130) 4 (1988).

[72] Proposal, 33 O.J. EUR. COMM. (No. C22) 14 (1989).

[73] Europe, Press Release, Internal Market Council: *Differences Subsist Concerning the Regulation on "Merger Controls"*. No. 5092. Sept. 18-19, 1989.

[74] *See* Andrew Fisher, *Merger policy talks please German cartel-busters*, FIN. TIMES, Jan. 9, 1989, at 3, col. 3; Jonathan Kapstein et al., *Writing the New Rules for Europe's Merger Game*, BUSINESS WEEK, February 6, 1989, at 48.

ties.[75] The amount was set at five billion ECUs. Consequently, the Commission would retain jurisdiction only over mergers with a worldwide turnover of more than five billion ECUs. Controversy arose among individual Member States on the amount.[76] Member States with highly evolved national competition laws (such as the United Kingdom, West Germany and France) pressed for a high threshold level of five billion ECUs which would, in effect, decrease the number of mergers that would fall under the Commission's jurisdiction and would result in more mergers subject to national review.[77] On the other hand, Member States with little or no formal merger control laws of their own (such as Italy,[78] Portugal, Spain and the Benelux countries) were willing to cede jurisdiction to the Commission and opted for a lower threshold level of two billion ECUs.[79] This lower figure would increase the number of mergers subject to the Commission's review.[80]

Second, the Member States took issue with national review of a merger already reviewed by the Commission. The Federal Republic of Germany adamantly maintained the position that national authorities should be allowed to review a merger that fell under the Commission's jurisdiction.[81] This position stemmed from the reluctance of Member States with their own sophisticated national merger laws, to yield control of national sovereignty to the Commission. The Commission, however, maintained that to allow such a demand would in effect frustrate the purpose of a one-stop merger concept, which was designed to eliminate the two-tier level of merger review between the Commission and Member States.[82]

Third, the Member States objected to the potential latitude available to the Commission to determine the criteria by which mergers should be judged: The United Kingdom insisted that

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[75] *Id.*
[76] *Id.*
[77] *Supra* note 63.
[78] *Supra* note 62.
[79] *Id.*
[80] *Supra* note 18.
[81] *Supra* note 74.
[82] *Id.*

competition should be the sole criteria for Commission rulings.[83] However, Southern EC members, to wit, France and Italy, wanted to include reference to wider market considerations such as regional policy and social factors that would take into account individual national industrial policy objectives.[84]

These conflicts hampered the adoption of the proposal submitted to the Council. In addition, they caused the Commission to seek expansion of its authority under Articles 85 and 86 of the Treaty of Rome, despite the uncertainty surrounding the true scope of these articles, in two significant cases, *Europemballage Corp. v. EC Commission & Continental Can Comp.* ("*Continental Can*")[85] and *British American Tobacco Co. & R.J. Reynolds Industrial v. Commission* ("*Philip Morris*").[86]

In the *Continental Can* decision of December 1971, the Commission considered whether a merger between two companies could be considered a breach under Article 86.[87] The Commission held that if a company that is in a dominant position acquires another company and thereby stengthens its market position, the acquisition violates Article 86 as an abuse of a dominant position.[88] In 1973, the European Court of Justice upheld the Commission's decision, confirming that if the result of the acquisition by a dominant company is the reduction of competition, the acquisition is an "abuse" of a dominant position.[89]

The Commission also attempted to utilize Article 85, traditionally applied only to joint ventures, as a means of monitoring mergers.[90] In the *Philip Morris* case of 1987, the Commission held that even the acqisition of a minority stake, may, under certain circumstances, adversely affect competition within the Common Market.[91]

Neither Articles 85 nor 86, despite the extensions established in these two cases, provided a complete or comprehensive

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[83] *Id.*
[84] *Id.*
[85] Case 6/72, 1973 E.C.R. 215, Common Market Reporter (CCH) 9481 (1973).
[86] Joined cases 142 and 15/84, 1987 E.C.R. 115, Common Market Reporter (CCH) 30 (1987).
[87] *Supra* note 85.
[88] *Id.*
[89] *Id.*
[90] *Supra* note 86.
[91] *Id.*

code for merger control.[92] In retrospect, the greatest significance of these judgments lies in the pressure they brought to bear on the Member States, to whom it became apparent that a formal merger control regulation was preferable to the uncertain application under Articles 85 and 86.

The *Philip Morris* case was decided on November 17, 1987 and it was the catalyst which ultimately led to the adoption of the Regulation. The Commission's existing proposal was amended and once more resubmitted to the Council with the Commission stating its objective for the adoption by the end of 1988. Although this proved to be overly optimistic, it spurred intensive discussion up until December 21, 1989 when, after sixteen years of negotiations, the EC's new merger regulation was adopted.[93]

II. The EEC Merger Regulation

On December 21, 1989, after sixteen years of deadlock, the Council of Ministers adopted the Commission's proposal governing the control of M & A and created Council Regulation No. 4064/89.[94]

A. *The Purpose of the Regulation*

The purpose of the Regulation is to create a one-stop merger control system. This may be achieved by demarcating the spheres of responsibility between the Commission and the Member States. The authority to retain the exclusive power to approve or block an undertaking from engaging in a large concentration would be delegated to the Commission. However, national authorities would apply their own national merger control laws[95] when smaller concentrations are attempted.

Under Article 3 of the Regulation, concentration refers to full mergers, partial mergers, acquisitions and certain joint ven-

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[92] A. Winter, et al., *supra* note 44, at 169-173.

[93] European Commission Press Memo: *The Proposal Concerning Mergers and Aquisitions*, No. 3, Dec. 21, 1989.

[94] Council Regulation 4064/89 EEC on the Control of Concentration Between Untertakings. 33 O.J. EUR. COMM. (No. L395) 1 (1989).

[95] *Id.*

tures.[96] A "concentration" occurs when "(i) two or more [undertakings] merge or (ii) one or more persons acquire, by any means, control of the whole or part of one or more other [undertakings]."[97] Undertaking refers to any individual, group of individuals, or legal entity.[98] When a majority of voting shares is acquired by an undertaking, control is said to exist.[99] Control may also exist at or below fifty percent of the voting capital if, for example, the rest of the shares remain widely dispersed. Additionally, control may be obtained by the purchase of assets, the creation of contractual relationships, or any other means whereby the possibilty of exercising influence over the decision-making of an undertaking exists.[100]

B. *The Scope of the Regulation*

The Regulation delineates its jurisdictional scope by defining the category of applications to concentrations which have a "Community dimension".[101] The term "Community dimension" is defined by three criteria:

> (i) aggregate worldwide sales of the parties exceeds 5 billion ECU[s] ($6 billion), and (ii) each of at least two parties to the transaction has sales within the EC greater than 250 million ECU[s] ($300 million), unless (iii) each of the parties has more than two-thirds of its Community sales within the same [M]ember [S]tates.[102]

The Community dimension threshold has been set at five billion ECUs.[103] This is a relatively high threshold since the Commission only retains jurisdiction over concentrations that would create an undertaking with a worldwide turnover of more than five billion ECUs. With the five billion ECU threshold, an estimated forty to fifty deals a year will be subject to the Regulation. In comparison, the two billion ECUs threshold would

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[96] ABA Seminar: *EEC Merger Regulation Draft Implementing Regulations and Guidelines*, Waldorf Astoria, New York, May 7, 1990.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Lee, *supra* note 24.

have subjected an estimated 150 concentrations to Commission scrutiny.[104] This issue was intensely debated during negotiations among Member States.[105] Member States with existing domestic merger control provisions were requesting higher limits. These higher limits would decrease the number of mergers that fall under Community level jurisdiction and increase the number of transactions under national control. By contrast, countries which had no domestic merger control legislation desired greater Commission responsibility.[106]

The position which has been adopted reflects a compromise between the Commission and the Member States. The Regulation provides for a revision of the threshold level by the end of 1993.[107] The Commission has already expressed its intention that the threshold be lowered to the level of two billion ECUs, with this and all future thresholds being subject to review based on the Commission's application of the Regulation.[108] Future threshold amounts shall be determined by the Council of Ministers. In contrast to the unanimous decision which was required for the adoption of the Regulation, only a qualified majority is necessary for future changes in the threshold amount.[109]

C. *Procedures of the Commission under the Regulation*

The Commission adopted implementing regulations nine months prior to the date on which the Regulation was to go into effect, September 21, 1990, in order to ensure smooth introduction and operation of the Regulation.[110] The following summarizes the most significant portions of the Regulation in light of these guidelines.

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[104] *Id.*

[105] *Supra* note 29.

[106] *Id.*

[107] *Supra* note 95.

[108] *Supra* note 94.

[109] *Id.*

[110] Commission Regulation No. 2367/90, On Notifications, Time-limits and hearings provided for in Council Regulation (EEC) No. 4064/89; 34 O.J. EUR. COMM. (No. L219) (1990), Aug. 14, 1990.

1. *Notification*

Once a transaction is determined to be of Community dimension and therefore subject to the Regulation, the enterprise must notify the Commission (Article 4).[111] The party acquiring a controlling interest is required to submit notification on a prescribed form.[112] In cases of joint control, the parties must file jointly, appoint a joint representative, and specify an address for service in Brussels.[113]

The notification forms were circulated by the Commission at the end of May 1990.[114] Businesspersons and lawyers responded with hostility because they believed the form was complicated, inflexible, and requested a quantity of information not easily accessible.[115] As a result, a simplified and less burdensome form was created.[116] In creating this new form, the Commission attempted to strike a balance between its interest in obtaining full information regarding a proposed concentration, and the interest of industry in avoiding such burdensome disclosure procedures.[117] Thus the new form has not only been simplified but now permits companies to ignore entire sections if they can prove such sections are irrelevant to their proposed concentration.[118]

2. *Timing*

Time limits are important. Under Article 4(1) the Regulation requires that notification be made within one week after either the conclusion of the agreement, the announcement of the public bid, or the acquisition of the controlling interest that gives rise to the concentration.[119] After notification, the Commission is required within one month to notify the undertakings whether or not their proposed concentration falls under the Reg-

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[111] *Supra* note 98.
[112] *Id.*
[113] *Id.*
[114] *Supra* note 112; European Commission Press Release IPn (90) 645 July 25, 1990.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*

ulation.[120] If the proposed concentration falls under the Regulation, and the undertakings have been timely notified, the Commission is then required, within four months, to decide whether or not the proposed concentration actually violates the Regulation.[121] If the Commission does not comply with the above-specified time limits, the undertakings will not be bound by the Regulation.[122]

D. *Criteria for Commission's Appraisal*

The criteria for the Commission's evaluation of the proposed concentrations was intensely debated among Member States.[123] Several Member States, most notably West Germany and the United Kingdom,[124] were insistent that the Commission judge a merger solely on competition grounds.[125] Other Member States, Spain, Portugal and France,[126] preferred that the Commission include regional and social factors in making a determination.[127]

The position adopted by the Commission was that only competition effects would be considered in evaluating proposed concentrations.[128] Concentrations with a Community dimension are incompatible with the Common Market when they create "a dominant position as a result of which the maintenance or development of effective competition would be significantly impeded in the Common Market or in a substantial part of it" (Articles 2(2) and (3)).[129] The Regulation sets forth specific criteria by which the Commission is to determine the compatibility of a concentration with the common market.[130] The Commission will take into account a variety of considerations. These include the structure of the market, the actual or potential competition from

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[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Supra* note 29.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Supra* note 98.
[129] Lee, *supra* note 24.
[130] *Supra* note 98.

undertakings located within or outside the Community, the market position of the parties involved, barriers to entry into the market, the interests of the consumer, and the effects on technical and economic progress.[131] These considerations give the Commission great deal of discretion in evaluating the competitive impact of a concentration.[132]

Thus, although the Commission claims to base its determination solely on competitive factors, its textual inclusion of "technical and economic progress" as considerations, in reality, allows the Commission to consider other factors.[133]

III. ONE STOP MERGER

The Regulation's most significant feature is to bestow formal merger control on the Commission. It does this by granting exclusive jurisdiction above a defined threshold to the Commission and below this threshold to the Member States.[134] This subjects a transaction to either the Commission's Merger Control Regulation or to national law, but not to both.[135] This is the "one-stop shopping" concept.[136] However, the negotiating process over the proposals submitted to the Council has resulted in the erosion of this intentional demarcation of power between the Commission and Member States. The Regulation contains three exceptions to the principle of one-stop merger control.[137] The first exception permits Member States intervention with respect to a distinct market, the second permits Member States intervention on the basis of their "legitimate interests", and the third permits Commission intervention under the threshold at the invitation of a Member State.[138]

[131] Lee, *supra* note 24.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] European Commission Press Memo, *The Proposal Concerning Merger and Aquisitions*, No. 3, Dec. 21, 1989.

[136] European Commission, Press Release, IP (90) 156, Feb. 23, 1990.

[137] Sir Leon Brittan, *Misplaced Doubts on EC Mergers*, FIN. TIMES, Oct. 11, 1990, at 34, col. 1.

[138] *Id.*

1. *The German Clause*

The first exception is found under Article 9 of the Regulation.[139] It is referred to as the "German Clause"[140] because it was formed at the insistance of West Germany[141] which wanted its national offices to investigate mergers that might threaten local markets.[142] Under this provision, the Commission has the option either to address the case itself or to refer the case to the competant authority of the Member State.[143] The Commission may authorize this national authority to investigate a merger above the threshold, upon a Member State's request, based on the fact that the transaction threatens to create or to strengthen a dominant position in a distinct market.[144] If the Commission concludes that a distinct market does not exist in the Member State, it will render its decision accordingly. The Member State whose petition is overruled has the right to judicial review by the European Court of Justice in Luxembourg.[145]

2. *Legitimate Interest*

The second exception is found under Article 21 of the Regulation.[146] It is referred to as the "public or legitimate interest" exception because it allows Member States to intervene in concentrations of Community dimension on three grounds of legitimate interest.[147] The first is "public security."[148] The Commission recognized that Member States, under Article 223 of the Treaty of Rome, have a wide scope of reserved powers regarding questions of national security.[149] The second specified ground is "plurality of the media."[150] The Commission recognized that

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139 *Id.*
140 *Id.*
141 Europe, Press Release, INTERNAL MARKET COUNCIL: DIFFERENCES SUBSIST CONCERNING THE REGULATION ON MERGER CONTROLS, No. 5092, Sept. 18-19, 1990.
142 *Id.*
143 *Id.*
144 Brittan, *supra* note 137.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*

Member States have a legitimate concern in preserving plurality of media ownership.[151] The third is "prudential rules."[152] The Commission recognized Member States' interests in rules applying to the surveillance of financial institutions such as banks, stockbrokerage firms and insurance companies.[153] If a Member State wishes to rely on grounds other than those listed above, it must first inform the Commission.[154] The limit to the "legitimate interest" exception is that a Member State may not seek to protect an interest related to competition.[155] This prevents a Member State from intervening on industrial policy considerations such as regional or social concerns.[156] Furthermore, only cases in which the Commission concludes a concentration is incompatible with the Common Market can give rise to a Member State's claim of incompatibility on "legitimate interest" grounds.[157]

3. *The Dutch Clause*

The third exception to the one-stop merger rule is found under Article 22 of the Regulation.[158] It is referred to as the "Dutch Clause"[159] because it was formulated upon the insistance of Member States with limited or inexistent national merger control laws—states preferring a low threshold.[160] These states included the Benelux States,[161] Italy,[162] Portugal, and Spain.[163] Under this provision a Member State may request that the Commission intervene in a concentration which lacks a Community dimension—one which threatens to create or strengthen a "dominant position" that would significantly impede competi-

[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Barry E. Hawk, *Europe's Try for a One-stop Merger*, N.Y. TIMES, May 6, 1990, at sec. 3 p. 13, col. 2.
[161] *Id.*
[162] *Supra* note 62.
[163] Hawk, *supra* note 162.

tion within the territory of that Member State.[164] The Commission must respond to these Member States within one month of their application for review.[165] The Commission's procedure in such cases will be the same as its investigation of concentrations above the threshold level.[166]

Criticisms of the Regulation for failure to achieve its principle goal of a one-stop merger control system has been founded on the above exceptions. It is claimed that allowing a Member State review of mergers with Community dimension on the basis that the merger threatens a distinct market will lead to inconsistency in Community decisions.[167] This is not consistent with the express idea that the Regulation is to be the sole source of mergers with Community dimension.[168] Additionally, to allow a Member State to pursue a "legitimate interest" exception permits an inquiry to be conducted parallel to a Commission investigation.[169] This defeats the concept of allocating one sovereignty for merger review.[170] Finally, to allow the referral of a concentration without a Community dimension to the Commission subjects the merger to multiple control.[171] Again, this frustrates the principle of a one-stop merger control.[172]

In an effort to allay the confusion and uncertainty raised by the suggestions of loopholes within the Regulation, Sir Leon Brittan, Vice President of the Commission's Competition Policy, made clarifying comments in the Financial Times in its International Capital Markets section on October 11, 1990.[173] He represented the Commission's view that these exceptions are narrowly circumscribed and do not constitute Regulation loopholes.[174] First, the "distinct market" within its borders is not a loophole because the Commission has two options which it may exercise

[164] Brittan, *supra* note 137.

[165] *Id.*

[166] *Id.*

[167] Prof. Avv. Giorgio Bernini, Address at the Fordham Corporate Law Institute (Oct. 10, 1990).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] Brittan, *supra* note 137.

[174] *Id.*

with regard to the application of national laws:[175] (1) it may agree a threat exists to competition, in which case it would review the case under the Regulation without referral to national authorities;[176] or (2) it may find no threat exists based on a finding that a relevant market is nonexistent in the national territory.[177] In this second situation, the Commission would inform the Member State of the rejected application. This decision would be final, subject solely to judicial review by the European Court of Justice.[178] The second exception which allows intervention by a Member State for public or legitimate interest is not a loophole to the Regulation's jurisdiction.[179] It is necessary to allow the Member State some action because a merger may have undesirable characteristics that affect a national market. This action is not an exercise of competition law,[180] and does not give the Member State authority to stop any merger of which it may disapprove.[181] This exception effectuates a communication between the Commission and the Member State to make a claim of public interest that is still governed under the Commission's jurisdiction.[182] The third and final exception to the general principle of one-stop merger control, which allows a Member State intervention based on a regional or national competition problem, is not a loophole to the Regulation's underlying principle of single sovereignty to merger review.[183] This exception does not create double jeopardy or multiple jurisdiction.[184] It extends the communication between the Commission and the Member State to include cooperation between the two, and permits the Member State to act as an advisory committee to the Commission where the Member State's views in the area of competition may be expressed.[185]

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175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 Brittan, *supra* note 137.

IV. The Year in Review

Since the Merger Regulation came into force on September 21, 1990, the EC Commission has examined, approved, or denied ninety-one proposed mergers as of June 1, 1992.[186]

Doubts of the EC Merger Control Task Force's ability to review mergers under the Regulation's time constraints have proved to be unfounded.[187] Under the Merger Regulation the task force has a month from the time it is notified within which to decide whether to clear a merger or to begin proceedings for further inquiry, which may take a maximum of four months.[188] To date, the task force's performance scrutinizing deals has spurred only praise by trade and legal experts.[189] However, some skeptics point out that the lowering of the threshold demarcation level as expected in 1993 will increase the Commission's case load from about sixty notifications a year to 350-400, raising the same doubts as to whether the task force will be able to deal with these increased caseload numbers.[190]

Although the task force has managed to do an excellent job with little controversy, the same cannot be said for the Merger Regulation's case law which has come forth within the first year and a half of the Regulation's implementation.[191]

The friction between Commission advocates of competition policy and promoters of industrial and internal market policy which was prevalent during the adoption years of the Regulation reappeared when the Commission first exercised its right of denial of a proposed merger under the new Merger Regulation in

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[186] Commission of the European Communities, Christopher Matthews, Press officer, approximate count as of June 1, 1992.

[187] Andrew Hill, *Brussels allows Tetra Pak link-up*, FIN. TIMES, May 24, 1991, at 23, col. 1; Andrew Hill & John Thornhill, *Packaging Crusader Wraps up Merger Deal*, FIN. TIMES, May 24, at 23, col. 4.

[188] *Supra* note 122.

[189] Michael S. Lelyveld, *EC Speeds Mergers but Doubts Remain*, J. OF COM., March 1991 at 1A.

[190] *Id.*

[191] Brian Love, *EC Approval of Midland Bid Shows Trouble of Merger Control*, REUTER PRESS RELEASE, May 21, 1992.; Keith M. Rockwell, *Cambridge Professor Slams EC For Inadequate Merger Guidelines*, J. OF COM., Jan. 10, 1992, at 2, col. 1.; Andrew Hill & Paul Betts, *Year-old Watchdog Bares its Fangs*, FIN. TIMES, Oct. 4, 1991, at 20, col. 1.; *Commissioners Call for Bigger say over Mergers*, FIN. TIMES, Oct. 15, 1991, at 5, col. 2.

the *Aerospatiale-Alena/de Havilland v. EC Commission* case.[192] In *de Havilland*,[193] the EC Commission turned down the proposed takeover of de Havilland, the financially troubled Canadian aircraft manufacturer (and subsidiary of Boeing) by ART, a joint venture between Aerospatiale of France and Alenia of Italy.[194] The Commission reasoned that the proposed merger would have given de Havilland and ATR fifty percent of the world market and sixty percent of the EC market for commuter aircraft. Commission analysis indicated that smaller competitors in this market would not have been able to challenge ATR/de Havilland either individually or collectively, considering the industry's current excess capacity, high investment costs, and market uncertainty.[195]

France and Italy raised objections to the Commission's decision. They argued that the Commission should base its decision on industrial policy considerations and not solely competition grounds.[196]

Since *de Havilland*, other Member States have also voiced their concern of the Commision's new decision-making authority under the Regulation. For example, German competition officials sought to review the proposed car battery merger between Germany's Robert Bosch and Varta. They invoked an Article 9 exception of the Regulation which would give them review authority of the proposed concentration on the grounds that the deal affects a "distinct market" within a Member State.[197] The Commission refused to relinquish control of the inquiry to the Bundeskartellamt (the German Federal Cartel Office).[198] The Commission retained sole jurisdiction over the proposed concentration because it believed that this deal would give the parties a

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[192] Andrew Hill & William Dawkins, *Brussels Attacked Over Merger Policy*, FIN. TIMES, Oct. 8, 1991, at 5, col 1.

[193] Commission Decision Declaring the Incompatibility with the Common Market of a Concentration, Aerospatiale-Alenia/de Havilland v. EC Commission, Case No. IV/ M.053 34 O.J. Eur. Comm. (No. L334) 42 (1991).

[194] European Commission, Press Release, IP(91) 896, Oct. 2, 1991.

[195] *Id.*

[196] Andrew Hill & William Dawkins, *Brussels Attacked Over Merger Policy*, FIN. TIMES, Oct. 8, 1991, at 5, col 1.

[197] Andrew Hill & Peter Bruce, *Brussels Imposes Strict Conditions on Mergers*, FIN. TIMES, Apr. 13, 1991, at 22, col. 1.

[198] *Id.*

large share of the replacement market for starter batteries in Germany and Spain.[199] On January 24, 1992 the U.K. government followed Germany in invoking Article 9's "distinct market" exception, requesting for the first time through Mr. Peter Lilley, Britain's Trade and Industry Secretary, to allow the U.K. Office of Fair Trading to review the proposed joint-venture of Steetley (a clay roof-tile and concrete products business) with Tarmac (a building materials group).[200] This time the Commission agreed and referred the Steetley Tarmac joint-venture back to the United Kingdom.[201] The Commission reasoned that, unlike the German Bosch & Varta deal where German and Spanish markets were involved, here the concentration fell under the Article 9 exception affecting a "distinct market" within a Member State, because here the markets were exclusively regional ones.[202]

The Member States' willingness to invoke the Merger Regulations exceptions demonstrates a resurgence of voicing their desire to have decisions made on policy grounds as they did before the Merger Regulation was adopted. These attacks also highlight the Member States' concern to curb the Commission's jurisdiction over merger review. Some leading antitrust officials such as Sir Sydney Lipworth, Chairman of the U.K. Monopolies & Mergers Commission, and Rolph Geberth, head of competition policy at the German Economics Ministry, believe that the EC Commission is too susceptible to political influences to be the ultimate arbiter of large EC mergers in an area where objectivity in decision-making must be exercised.[203] They have gone as far as to suggest, particularly after such controversial decisions, removal of the jurisdiction over mergers and acquisitions out of the Commission's hands and the creation of an independent mergers authority.[204]

Sir Leon Brittan on previous occassions has defended the

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[199] *Id.*

[200] European Commission, Press Release, IP(92)45, Jan. 24, 1992.

[201] Andrew Hill & Andrew Taylor, *Brussels Refers Steetley Deal Back to UK*, FIN. TIMES, Feb. 13, 1992 at 5, col 1.

[202] *Id.*

[203] Brian Love, *Top Cartel Officials Urge Independent EC Merger Control*, REUTERS PRESS RELEASE, June 16, 1992.

[204] *Id.*

EC's Merger Regulation and has expressed grave reservations about the need for an independent European Mergers Authority.[205] At a Symposium of the Forschungsinstitut Wirtschaftsverfassung und Wettbewerb (Research Institute for Economic Affairs and Competition) in Innsbruck, Austria, Sir Leon stated that to date the Commission has resisted all political pressures and has pursued a policy loyal to the Regulation and to the concept of maintaining effective competition within its jurisdiction.[206] Based on this performance, Sir Leon believes the case for change has not yet been demonstrated.[207]

Furthermore, Sir Leon noted that the issues at stake in a merger decision are not simply technical ones. There will always remain an important element of judgment.[208] Therefore, pressures would exist for an independent Mergers Authority just as they do for the Commission at present.[209] The members of an authority would be chosen from the Member States (like the Commission's Merger Task Force) and would be subject to the same national pressure as Commission members, thus frustrating the purpose of creating it.[210]

Sir Leon also pointed out that even the most enthusiastic protagonists of a Merger Authority do not suggest that such an authority should have the last word, and used Germany as an example.[211] Even the German competition authority, the extremely independent Bundeskartellamt, can be overruled.[212] While this may not be a problem in Germany, where commitment to competition policy has been a reason for its post-war prosperity, there is not a comparable commitment to competition policy in the EC-at-large.[213]

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[205] *Id.*

[206] Address by the Right Honorable Sir Leon Brittan, Vice President of the Commission of the European Communities responsible for Competition Policy and Financial Institutions to the Forschungsinstitut Wirtschaftsverfassung und Wettberwerb in Innsbruck, Austria, "Do We Need a European Mergers Authority?", May 3, 1992.; *Brittan Defends EC Merger Regulation*, EUROCOM Commission of the European Communities, New York, N.Y., March 1992, at 2.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

In terms of practical difficulties, Sir Leon stated that it took sixteen years to achieve the current Merger Regulation: How long would it take to reach a decision on an alternative method?[214] And how long would it take to resolve the mundane question of where that seat of any new authority should be?[215] The European Environmental Agency, for example, has been held up for almost two years on such an issue.[216]

V. Conclusion

The internal market objective of the EC has spurred M&A activity within the Community. The EC's Merger Regulation seeks to remove uncertainties in merger control that have existed both within the Community Law and the laws of Member States. The Regulation bestows formal merger control to the Commission. This control was non-existent under Community antitrust law governed by Articles 85 and 86 of the Treaty of Rome. The purpose of the Regulation is to create one-stop merger control. This is to be achieved by demarcating the spheres of responsibility between large-scale mergers, of a European dimension, reserved for Commission review, and small-scale mergers reserved for national review. However, there are exceptions to the delineation of the Commission's jurisdictional scope. These exceptions lead to overlapping of the Commission's and the Member States' roles in merger review under specific circumstances. Critics assert these exceptions could frustrate the Regulation's main purpose: the creation of a one-stop merger control policy. As the Commission's decisions have come forth within the first year and a half, these exceptions have in fact been invoked by individual Member States. The Member States have begun voicing the very same reservations and concerns which they expressed before the Regulation's adoption that relate to the retention of jurisdiction over proposed mergers with strong social and industrial policy interests. Leading antitrust officials have expressed a desire for a new authoritative body to review concentrations. This demonstrates the growing debate both within and outside the Commission between Commission

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[214] *Id.*
[215] *Id.*
[216] *Id.*

advocates of competition policy and promoters of industrial and internal market policy.

Since the Regulation has been in operation there has been an in-depth investigation of only eight of the approximately ninety-two proposed concentrations of which the Commission has been notified. To date the Commission has only blocked the *de Havilland* takeover. In addition, no Commission decision has been appealed to the European Court of Justice (ECJ). This is significant because it means that the ECJ has not yet ruled on any interpretations of the Commission case law under the Merger Regulation. Such an objective review of EC merger policy would help to make it more transparent and predictable. In light of these considerations it is important to realize that the Commission's task has just begun in setting precedent and providing greater legal certainty. It is essential for the Commission to continue obtaining concrete experience which comes through the actual review of proposed mergers that fall under the Regulation. The Commission task force to date has performed with fairness and pragmatism. The Commission must continue the close consultation which does exist between the Commission and the national authorities to obtain an understanding between the interests of Commission advocates of pure competition policy and promoters of industrial and internal market policy. Only by consistent application of the Merger Regulation on competition grounds with light consideration of social and industrial policies can the Commission hope to succeed in setting a precedent and create consistency and greater clarity for legal and business entities.

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