The Evaluation of Concentrations Under the Merger Control Regulation: The Nature of the Beast

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Abstract

Part I of this Article examines whether, in evaluating a concentration, the Commission of the European Communities is permitted to take into account factors, such as industrial or social policy, that are not, strictly speaking, related to competition law. Part II explores whether “dominant position” has the same meaning under the Regulation No. 4064/89 as under Article 86 of the Treaty Establishing the European Economic Community and, in particular, whether the Regulation also applies to concentrations that create, or further narrow, interdependent oligopolies. Part III examines whether the Commission is required to prohibit or modify every concentration that creates or strengthens a dominant position, or whether it is required to do so only when a further evaluation indicates that the concentration will result in effective competition being substantially impeded in all or a substantial part of the common market. The Article concludes with some reflections on market definitions, customer dependence and vertical concentrations.
THE EVALUATION OF CONCENTRATIONS UNDER THE MERGER CONTROL REGULATION: THE NATURE OF THE BEAST†

James S. Venit*

INTRODUCTION

Council Regulation No. 4064/89 (the "Merger Control Regulation" or the "Regulation")¹ entered into force on September 21, 1990. At the time this Article was written the Regulation's substantive test had not yet been applied. This Article's discussion of three issues raised by the Regulation's substantive test must, perforce, be speculative. Part I examines whether, in evaluating a concentration, the Commission of the European Communities (the "Commission") is permitted or required to take into account factors, such as industrial or social policy, that are not, strictly speaking, related to competition law. Part II explores whether "dominant position" has the same meaning under the Regulation as under Article 86 of the Treaty Establishing the European Economic Community (the "EEC Treaty" or the "Treaty")² and, in particular, whether the Regulation also applies to concentrations that create, or further narrow, interdependent oligopolies. Part III examines whether the Commission is required to prohibit or modify every concentration that creates or strengthens a dominant position, or whether it is required to do so only when a further evaluation indicates that the concentration will result in effective competition being substantially impeded in all or a substantial part of the common market. This Article concludes


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with some reflections on market definition, customer dependence and vertical concentrations.

In addressing these issues, it is useful to bear in mind the complex jurisprudential situation created by the Regulation. On the one hand, the Regulation is a new legal instrument, based primarily on Article 235 of the EEC Treaty, designed to deal with the lasting structural changes effected by mergers, acquisitions and other concentrations which raise issues that differ significantly from the issues raised by abusive conduct under Article 86. On the other hand, the Regulation employs terms, such as "dominant position," that are found in the Treaty. These terms have acquired a meaning in the jurisprudence of the Court of Justice of the European Communities (the "Court"), and their meaning will, as a result of the inevitable evolution of case law, continue to develop, and indeed, may well be influenced by the Regulation. The inherent tension that results from the implicit incorporation of case law, primarily applied to control abusive conduct, in a statute whose concern with competitive structure expands the scope of the EEC Treaty from which that case law takes its point of departure, inevitably colors and complicates an analysis of the substantive provisions of the Regulation.

I. THE SUBSTANTIVE TEST: COMPETITION LAW OR OTHER CONCERNS

A. The Assessment of Compatibility

The last two published drafts of the Regulation, which

3. Id. art. 235. Recitals 6-8 of the Merger Control Regulation state that in light of the shortcomings of Articles 85 and 86, there is a need for "a new legal instrument," "principally based on Article 235," to provide for the effective control of concentrations. Merger Control Regulation, supra note 1, recitals 6-8, O.J. L 257/13, at 14. The Regulation does not specify to what extent Articles 85 and 86 apply to concentrations and thus leaves open the question of the extent to which the Regulation is based on Article 87 rather than Article 235. In light of the first paragraph of article 3(2), which excludes situations of the type treated in British American Tobacco Co. v. Commission, Joined Cases 142 & 156/84, 1987 E.C.R. 4487, Common Mkt. Rep. (CCH) ¶ 14,405, from the scope of the Regulation, and recitals 24 and 25, it would appear that the only situations in respect of which the Regulation's basis resides in Article 87 are the situations envisaged in Europemballage Corp. v. Commission, Case 6/72, 1973 E.C.R. 215, Common Mkt. Rep. (CCH) ¶ 8171, and joint bids of the kind that would be covered by recital 24. Merger Control Regulation, supra note 1, recitals 24 & 25, art. 3(2), O.J. L 257/13, at 15-16, 17.

adopted a two-step approach analogous to the analysis under Articles 85(1) and 85(3),\(^5\) would have permitted the Commission to authorize concentrations that strengthened or created a dominant position where certain criteria similar, but not identical, to those in Article 85(3) were fulfilled.\(^6\)

In contrast to these drafts, the Regulation provides for an apparently unified appraisal of compatibility which, in a single analysis, seeks to assess the existence of dominance and to evaluate its effects. According to the Commission's statements read into the Council of Ministers (the "Council") minutes of December 21, 1989, under the Regulation as finally adopted, a determination of compatibility is merely the opposite of a determination of incompatibility, rather than a derogation from it.\(^7\)

The decision to abandon the derogation approach employed in the final two published drafts is related to two issues. The first, which has to do with the interrelationship between European Economic Community ("Community") and national law, has, insofar as concerns the application of competition law to concentrations with a Community dimension, been resolved by article 22(1) of the Regulation.\(^8\) The second issue, discussed below, relates to the substantive evaluation of concentrations and the Commission's discretion to approve concentrations that create or strengthen dominant positions.

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5. EEC Treaty, supra note 2, art. 85.

6. For a detailed discussion of the requirements of Article 85, see infra note 8.

7. Declarations, printed in COMM'N, NINETEENTH REPORT ON COMPETITION POLICY annex, 265-68 (1990) [hereinafter Declarations].

8. Merger Control Regulation, supra note 1, art. 22(1), O.J. L 257/13, at 24. During the negotiations that preceded the issuance of the last two published drafts, it was unclear whether the Member States would agree to a regulation giving, in so many words, the Commission exclusive jurisdiction over concentrations with a Community dimension. It appears that, at this stage of the negotiations, the Commission concluded that it would be preferable to apply an approach similar to that under Article 85(1) and 85(3) in the hope that this parallelism would strengthen the argument that Community law took precedence over national law. Under this approach, the approval of a concentration would not be tantamount to a negative clearance. Rather, it would constitute an affirmative decision, within the meaning of Wilhelm v. Bundeskartellamt, Case 14/68, 1969 E.C.R. 1, Common Mkt. Rep. (CCH) ¶ 8056, thus, as in the case of an exemption under Article 85(3), precluding Member States from taking action that would deprive that derogation of its effects. This issue has been rendered moot by the inclusion of article 22(1) in the Regulation. See Merger Control Regulation, supra note 1, art. 22(1), O.J. L 257/13, at 24.
1. Standard of Review

Major conceptual difficulties are posed by the notion of granting a derogation on competition law grounds to a concentration that would create or strengthen a dominant position. The "exemption" model proposed in the last two published drafts of the Merger Control Regulation tended to suggest that the evaluation of concentrations would not be limited to competition related grounds, but might also involve a balancing of industrial policy and similar "non-competition" considerations, even though one of the criteria for approval was that competition not be eliminated to a substantial degree. In contrast, the one-step approach under which approval and disapproval are merely the opposite sides of the same coin would appear, as a structural matter, to reduce the scope for such an approach. Indeed, to the extent that the relevant test is limited to whether the concentration creates or strengthens a dominant position that leads to a substantial impediment to competition, such an approach would serve to eliminate altogether a two-step approach.

The issue of whether the assessment of concentrations should be based solely on competition grounds, or whether it should also take into account other considerations such as industrial and social policy, was the subject of considerable debate within the Council. Germany and the United Kingdom strongly supported the Commission's view that no criteria other than competition law criteria should be considered, in opposition to the more dirigiste, industrial policy approach urged by, inter alia, France.9

Examination of the criteria set forth in article 2(1)(a) and (b) of the Merger Control Regulation10 suggests that the Regulation has resolved this debate in favor of a substantive test

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10. Merger Control Regulation, supra note 1, art. 2(1)(a)-(b), O.J. L 257/13, at 16. Article 2(1)(a), which states that the appraisal shall take into account "the need to preserve and develop effective competition within the common market," defines the standard against which the analysis of compatibility is to be made and, in so doing, appears to rely solely on competition law criteria. Id. art. 2(1)(a). Article 2(1)(b) then sets forth most of the analytic factors that the Commission and the Court would normally consider in evaluating whether or not a dominant position exists, which include the market position of the undertakings concerned, their economic and finan-
that is based on competition law considerations. However, an exception to this approach, whose importance is difficult to assess, has been acknowledged in the Regulation's thirteenth recital.¹¹

2. Technical and Economic Progress

Article 2(1)(b) contains one criterion—"the development of technical and economic progress"—that evokes industrial policy concerns. This criterion, which is reminiscent of Article 85(3),¹² is subject to the requirement that the development of such progress be to consumers' advantage and not form "an obstacle to competition."¹³ This provision is similar, in effect, to the approach taken in the last published draft of the Regulation. Its inclusion, and, conceivably, the reference to the interests of consumers which precedes it, imply both an efficiency defense and a balancing approach such as might be found under Article 85(3). Whether this means that a greater negative impact on competitive structure will be required where there are some efficiency benefits to a concentration is a subject for speculation. Given the dual requirements, however, that the contribution to technical and economic progress be to consumers' advantage and that there be no obstacle to competition, the technical and economic progress "defense" would appear to be subject to overriding competition law concerns. As a result, it would appear that this part of article 2(1)(b) of the Regulation does not create a serious possibility of a derogation from the prohibition set forth in article 2(3). The reasons for this conclusion are two-fold.

First, presumably it would be difficult to conclude that the development of technical or economic progress resulting from the concentration would be to the consumers' advantage if the concentrated entity had the ability to raise price or reduce official power, the opportunities available to suppliers and users, their access to supplies and markets, barriers to entry, and supply and demand trends. Id. art. 2(1)(b).

¹¹. Id. recital 13, O.J. L 257/13, at 15.
¹². See EEC Treaty, supra note 2, art. 85. Declaration 2(d) provides "[t]he Commission considers that the concept of technical and economic progress must be understood in the light of the principles enshrined in Article 85(3) of the Treaty, as interpreted by the case-law of the Court of Justice." Declarations, supra note 7, 2(d), at 266.
¹³. See Merger Control Regulation, supra note 1, art. 2(1)(b), O.J. L 257/13, at 16.
put. If this assumption is correct, the consumer benefit requirement establishes an effective competition-based limitation on any efficiency or technical progress defense.\textsuperscript{14}

Second, the requirement that the concentration not constitute an "obstacle to competition" suggests that the threshold for "disapproval" under the "balancing" test introduced by the last phrase of article 2(1)(b) has been set at a lower level than the threshold for prohibition under articles 2(2) and (3).\textsuperscript{15} If this is the case, a technical and economic progress "defense" will be subject to, and have to pass, a stricter standard of competition law review under article 2(1)(b) than that imposed by article 2(3) before it can be considered as one of the factors favoring approval of the concentration.

3. The "Spanish" Clause

The only apparent exception to the strict adherence to competition law criteria is the reference, in the Merger Control Regulation's thirteenth recital, to the fundamental objectives of Article 2 of the EEC Treaty,\textsuperscript{16} including the need to strengthen the economic and social cohesion of the Community. The inclusion of this recital, apparently at the insistence of Spain, suggests that the operative provisions of the Merger Control Regulation are to be interpreted and applied in light of additional factors insofar as concentrations involve less well-

\textsuperscript{14} See Address by Sir Leon Brittan, Centre for Policy Studies, Brussels (Sept. 24, 1990) (quoted in part in Comm'n Press Release, IP (90) 751 (Sept. 24, 1990)) [hereinafter Lord Brittan Address]. The Commissioner, discussing the reference to technical and economic progress in article 2(1)(b), stated:

I do not see how a dominant position which impedes competition could give rise to technical or economic progress of the sort which competition policy could endorse. There may be some short-term technical progress available to a monopolist, but it would not last for long when one considers the well known debilitating effect of monopoly. As for economic progress, apart from monopoly rents which would accrue, there would be no progress at all.

\textit{Id.}

\textsuperscript{15} Merger Control Regulation, \textit{supra} note 1, art. 2(2)-(3), O.J. L 257/13, at 17.

\textsuperscript{16} EEC Treaty, \textit{supra} note 2, art. 2. Article 2 of the EEC Treaty provides that [t]he 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.

\textit{Id.; see Hawk, \textit{supra} note 9, at 212.}
developed Member States or the less well-developed regions of otherwise relatively well-developed Member States. The Commission has reinforced this impression by a specific reference to this provision in the declarations:

The Commission states that among the factors to be taken into consideration for the purpose of establishing the compatibility or incompatibility of a concentration—factors as referred to in Article 2(1) and explained in recital 13—account should be taken in particular of the competitiveness of undertakings located in regions which are greatly in need of restructuring owing *inter alia* to slow development.\(^7\)

The Commission’s interpretation of recital 13 suggests that: (i) it views the reference to economic and social cohesion in terms of the competitiveness of undertakings in regions of the Community, including less developed ones, in which restructuring is necessary; and (ii) consistent with the values set forth in Article 2 of the EEC Treaty, it may be prepared to place greater emphasis on the need for undertakings in those regions to reach competitive parity with undertakings in other areas of the Community. The latter implies that the Commission may accept a “restructuring” or “competitiveness” defense in the case of less developed regions, even though it appears to have rejected such a defense as concerns the competitiveness of Community firms *vis-à-vis* their non-Community rivals.\(^8\)

How large the “Pandora’s box” suggested by the thirteenth recital and the Commission’s declaration actually remains to be determined. The Court has indicated that recitals are relevant to the interpretation of a regulation’s substantive provisions.\(^9\) However, recitals cannot override the operative terms of the Merger Control Regulation. Thus, it may be that the tests in articles 2(2) and (3) limit the potential impact of the thirteenth recital. Under this approach, the reference to “economic progress” in article 2(1)(b) arguably will be subject to the requirement that this latter consideration only be given

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weight provided the concentration in question is in the interests of consumers and does not create an obstacle to competition. As a result, it may be that the requirements of article 2(1)(b) trump the thirteenth recital, at least insofar as "economic progress" is concerned. This would still leave undressed social (and perhaps economic) cohesion, however, as well as the values of "harmonious" development and improvement in standards of living referred to in Article 2 of the EEC Treaty. The possibility thus remains that, notwithstanding the terms of article 2(1)(a) and (b), there may be some room for balancing competition and the concerns addressed by Articles 2 and 130a.

The outcome of this apparent clash of values is difficult to ascertain. Given the questionable social benefits that are to be derived from monopolies, the need for economic and social cohesion could be interpreted as itself requiring that there be workable competition throughout the entire common market, thus in effect mandating the application of the same competition analysis in all cases. However, the Commission's decision to make the thirteenth recital the subject of a declaration suggests that the Commission may not share this limited interpretation and that it may seek to give weight to the thirteenth recital by allowing dominant firms to be created or strengthened in less well-developed regions where, implicitly, these firms will not be subjected to competition from firms located elsewhere in the Community. Some of these issues may be avoided or disguised by taking a long-term view of the relevant geographic market. It would appear, however, that the thirteenth recital and the Commission's declaration permit considerations other than those of competition law to apply in cases where a concentration, although having adverse local effects on competitive structure, would raise the level of competitiveness of the concentrated entity to the level existing in other geographic markets in the Community.

Mention of something as provocative as a Pandora's box requires some qualification. Because merger policy relates to the very structure of industrial organization, it is invariably linked to policy judgments whose implications either go beyond competition law or at least confront the latter with diffi-

20. EEC Treaty, supra note 2, arts. 2 & 130a.
cult policy choices. This is particularly so in the case of a community of sovereign nations, at different stages of development, seeking to integrate their economic activities by creating an internal market. These considerations give rise to important issues both at the technical level of the application of the Merger Control Regulation—particularly in reference to the definition of geographic markets—and at the level of policy concerning, for example, the need to meet international competition or accelerate restructuring in less developed regions. It would thus be naive to think that merger cases will not raise important policy issues and in this sense be "political."

In contrast to the United Kingdom, where mergers are ultimately judged on a broader standard of the "public interest," and Germany, where the Minister of Economics may override the prohibition of the Federal Cartel Office for reasons of industrial policy, the Merger Control Regulation does not provide for any institutional mechanism for overriding the Commission's application of the Regulation's competition standards. Thus, whatever "political" balancing, if any, that is permitted under the Regulation must either take place within the framework of its technical analysis or be relegated to the decision-making process of the Commission as a collegial body. If such balancing does occur at the level of technical analysis or at the level of the Commission, the situation will be far different from that, for example, in Germany, where the greater transparency of the system results in the "political" nature of a decision by the Minister of Economics to override a prohibition order of the Federal Cartel Office being recognized for what it is.

II. DOES "DOMINANT POSITION" HAVE THE SAME MEANING UNDER THE REGULATION AS UNDER ARTICLE 86 OF THE EEC TREATY?

A. The Meaning of Dominance

The principal problem with the Court's definitions of dominance, aside from the general difficulty of capturing an elusive concept in words, is that the Court's definitions are not clearly correlated to market share. Given the likelihood that in merger cases, greater importance may be attached to market share both in itself and relative to that of other market partici-
pants, this significant deficiency may limit the utility of Article 86 as a guide to the application of the Merger Control Regulation's substantive test, although it may be that this lack of correlation is necessary because the market share with which dominance is achieved may vary considerably depending on the nature and structure of the market concerned.

The most commonly accepted definitions of dominance are set forth by the Court in United Brands Co. v. Commission, Hoffmann-La Roche & Co. v. Commission, and N.V. Nederlandsche Banden-Industrie Michelin v. Commission. They emphasize the ability of the dominant company to hinder the maintenance of effective competition given its ability to act independently of competitors, customers and consumers.

These definitions arose in abuse cases and derive from the definition advanced by the Commission in Continental Can, a merger case involving a "structural" abuse. In that case, the Commission sought to define dominance:

Enterprises hold a monopoly when they have the possibility of independent conduct which puts them in a position to act without paying attention to rivals, suppliers or purchasers; it is the same, by reason of their share of the market, or their share of the market in conjunction particularly with technical knowledge, raw materials, or capital, they have the chance of determining prices or controlling production or distribution for a significant part of the market of the products in question; this chance does not necessarily arise from a total domination allowing the enterprises concerned to eliminate any independent action on the part of their economic partners, but it is enough, overall, that it is strong enough to grant these enterprises a global independence of conduct, even if there are variations in the intensity of their influence in the different sections of the market.

The Commission's definition of, and the Court's approach

25. Id. at ¶ 35.
to, dominance is characterized in subsequent cases by a two-fold analysis: (i) identification of the factors—in Continental Can, market share, technical knowledge, access to raw materials and capital—which may be indicative of dominance; and (ii) an attempted definition of dominance as a concept—in Continental Can, by reference to independence from competitors, purchasers and suppliers and “the power to determine price or control production or distribution for a significant part of the products concerned.”

The Court’s approach in United Brands, Hoffmann-La Roche, and Michelin has emphasized the ability of a dominant company to hinder the development of effective competition given its power to behave independently vis-à-vis competitors, customers and consumers. The Court has refined this notion, no doubt to take into account less extreme situations than monopoly or near monopoly, by suggesting that dominance need not be characterized by the total absence of competition. Thus, the Court has also defined dominance as the power to exercise “an appreciable influence on the conditions under which that competition will develop” and has taken the view that dominance may occur even where “lively competition exists.” Perhaps more importantly, the Court has added contour to the

26. Id. Not surprisingly, the Commission has sometimes defined dominance to fit the facts. Thus, in ABG Oil, O.J. L 117/1 (1977), Common Mkt. Rep. (CCH) ¶ 9944, in which the abuse arose out of the oil shortage triggered by a decrease in supplies from the OPEC producers, the Commission understandably dropped the reference to independence from suppliers from its formulation of dominance. Id.

More recently, in ECS/Akzo, O.J. L 374/1 (1985), Common Mkt. Rep. (CCH) ¶ 10,748, the Commission sought to distance itself from the view that the definition of dominance is immutable and has defined it in a way that de-emphasizes the independence of the dominant company in respect of pricing and other competitive decisions by focusing on the ability to exclude effective competition. Id.

It is not clear whether the Commission was seeking in this part of its decision to broaden the definition of dominance to take in a form of abuse, predatory pricing, whose very existence, if misunderstood, could call into question the power of the dominant company to ignore competitors when determining its prices. However, in addition to reaffirming the fact that dominance may be defined somewhat differently depending on the type of abuse with which it is confronted, the formulation in Akzo shifts the focus from the independence “of the dominant company” to the latter’s ability to eliminate rivals or raise barriers to entry. Id.


28. Id. The Court went on to state that the dominant undertaking will “in any case” be able to act “largely in disregard” of competition from its rivals “so long as such conduct does not operate to its detriment.” Id.
definitional exercise, without quite pinning down dominance, by stating that the inability to resist competitive pressure on prices will "normally" exclude a finding of dominance but that the absence of supra-competitive or abusive pricing does not.

The Merger Control Regulation follows the Commission's and the Court's approach concerning the factors that may be indicative of dominance. It makes no attempt, however, to encapsulate that concept in words, other than through references to the need to preserve and develop effective competition. The avoidance of any attempt at definition, and the consequential omission of any reference to "independence," may be viewed as a recognition of the structural rather than the behavioral foundations of the Merger Control Regulation.

The omission of the reference to the ability to act independently may not, however, be all that significant in the case of single company dominance. Where single company dominance exists, the ability to pursue a course of conduct insulated from competitive pressures, or at least to determine the condi-

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29. Id. at 532, ¶ 71.
30. N.V. Nederlandsche Banden-Industrie Michelin v. Commission, Case 322/81, 1983 E.C.R. 3461, 3511-12, ¶ 59, Common Mkt. Rep. (CCH) ¶ 14,031, at 14,494-95. In a 1986 study produced for the Commission, Francis Fishwick identified the following elements on the basis of the Court's Article 86 jurisprudence as the key features of dominance:
- ability of the dominant company to influence the market by its own conduct, unimpeded by competitors;
- dependence of other companies for survival on the dominant enterprise;
- economic and financial power which gives the dominant enterprise advantages in any competitive battle.
31. For a comparison of the Commission's treatment of independence in two recent cases, see Rhone Poulenc/Monsanto, Comm'n Press Release, IP (89) 579 (July 25, 1989) and Metaleurop, O.J. L 179/41 (1990), ¶ 18, Common Mkt Rep. (CCH) [1990] 2 CEC 2,033. In Rhone Poulenc, the Commission cited a variety of factors (the absence of barriers to entry and of brand loyalty, the existence of considerable overcapacity, and the prevalence of imports from third countries which exerted considerable pressure on price) that would restrain the commercial independence of Rhone Poulenc. Rhone Poulenc/Monsanto, Comm'n Press Release, IP (89) 579 (July 25, 1989). In Metaleurop, the Commission, trying out a style of analysis that may be used under the Merger Control Regulation, avoided any direct reference to independence of conduct, referring instead to "the maintenance of effective competition" and the inability of Metaleurop to have a "decisive influence on the formation of prices," although independence is implicitly present in the latter consideration. Metaleurop, supra, O.J. L 179/41, at 43.
tions under which competition will take place, will presumably vary with the extent to which competitive structure has been weakened. Additionally, this ability may well manifest itself in the ability to raise prices. Rather, the omission of any reference to independence may be of primary importance for the treatment of oligopolistic interdependence. In this context, the definition of dominance under the Merger Control Regulation may differ substantially from that under Article 86, under which the concept of collective dominance has heretofore played only a limited role.

B. Application of the Regulation to Concentrations That Create Market Shares in the Twenty-Five to Forty Percent Range; Collective Dominance

Leaving aside the issue of the level at which the thresholds for determining whether a concentration has a Community dimension have initially been set, the potential scope of the Commission’s ability to use merger control as an effective means of preserving competitive structures is significantly limited by two factors. First, the Court has never found dominance to exist with a market share below forty percent.32 Second, in contrast to merger control statutes that create a presumption of dominance at market shares as low as twenty or thirty-three and one third percent and apply a concept of joint dominance, the Merger Control Regulation makes no explicit reference to joint dominance. In practice, the only concentrations at risk under the Regulation therefore may be those involving a party that was already the market leader with a market share of forty percent or more, or those that create a new market leader with such a market share.

The first problem may be resolved by lowering the threshold at which dominance is found to exist to the twenty-five to

32. See United Brands Co. v. Commission, Case 27/76, 1978 E.C.R. 207, 277, ¶ 108, at 282, Common Mkt. Rep. (CCH) ¶ 8429, at 7710, in which the Court stated that United Brands' market share was always more than forty percent. Id.

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forty percent range, or by defining a market narrowly, thus increasing the likelihood of a party's being found to hold a market share of forty percent or more. However, neither of these approaches would enable the Commission to prohibit a concentration where the concentrated entity was not the market leader. The latter possibility would require reliance on a theory of collective dominance.

1. Existence of Single Company Dominance with Market Shares in the Twenty-Five to Forty Percent Range

In Hoffmann-LaRoche, the Court expressly stated that "a substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets." The Court has never categorically ruled out the possibility of dominance in the twenty-five to forty percent range, and in certain markets, dominance could occur with market shares below the forty percent range. A concentration establishing a market share in the twenty-five to forty percent range, or, as the Merger Control Regulation's fifteenth recital suggests, even in lower ranges, could therefore give rise to a dominant position.

34. See Metro SB-Großmärkte v. Commission, Case 75/84, 1986 E.C.R. 9021, Common Mkt. Rep. (CCH) ¶ 14,326 (holding that SABA, German market leader with ten percent market share in market for highly interchangeable products was not dominant); see also Alsatel v. Novasam SA, Case 247/86, 1988 E.C.R. 5297, Common Mkt. Rep. (CCH) [1990] 1 CEC 248 (Commission took view that Alsatel, which had a thirty-three percent market share in Alsace, was not dominant in light of fact that French PTT had equivalent market share there). The Commission has warned that dominance cannot be ruled out in the twenty to forty percent range. See COMM'N, TENTH REPORT ON COMPETITION POLICY ¶ 150 n.4 (1981).
35. Merger Control Regulation, supra note 1, recital 15, O.J. L 257/14, at 15. The fifteenth recital states that a concentration will benefit from a presumption of compatibility where the aggregate market share of the parties does not exceed twenty five percent, thus leaving open the possibility that single company dominance may be deemed to exist where the concentrated entity's market share is in the twenty-five to forty percent range. Id. Indeed, the fifteenth recital would also leave open the possibility that in markets characterized by unusual structures of supply and demand, dominance might be found even below twenty five percent. Id. As Lever has observed, the reassurance provided by the fifteenth recital is hardly that. Lever, supra note 18.
2. Collective Dominance

In its discussion of a 1986 study on the concept of shared dominance and its relevance to competition policy, the Commission stated that one of the principal objectives behind the then-proposed merger regulation was to prevent the creation of situations that would result in stable collusion between oligopolists. The study concluded that the two essential features of such shared dominance were:

(i) a concentrated market in which a small number of enterprises account for most of the turnover without any single enterprise holding a dominant position; and
(ii) a high degree of interdependence concerning the decision-making processes of these enterprises.

With regard to the latter, the study noted that the reduction of competition in a tight oligopoly does not necessarily lead to the appearance of tacit collusion. The latter "may, however, arise from the fact that members of the oligopoly become aware of their interdependence and of the probably unfavourable consequences of adopting a competitive attitude." Even prior to the adoption of the Merger Control Regulation, therefore, the Commission may have begun to reflect on the possibility that a merger control regulation might be used to attack mergers in concentrated markets, even where the concentration did not create or strengthen an individual dominant position. Additionally, it may have envisioned reliance on a theory of collective dominance to do so, even where there was no prior history of collusion.

Reliance on a theory of collective dominance to extend the application of the Merger Control Regulation to narrow oligopolies would represent a major development in Community law. It is therefore worth examining the concept of collective dominance under Community law and other legal systems. However, when doing so it should be borne in mind that, until

38. Id. ¶ 331.
now, collective dominance has only been considered under Community law from the perspective of Articles 85 and 86 of the EEC Treaty. Given the Merger Control Regulation's reliance on Article 235 and the requirements of effective structural control inherent in merger regulation, the past dialogue between the Commission and the Court concerning the concept of collective dominance may not be decisive for the resolution of the status of collective dominance under the Regulation.

a. The Concept of Collective Dominance in Other Legal Systems

Although not a well-developed concept under Community law, the concept of collective or joint dominance is recognized by other legal systems. Thus, the O.E.C.D. Glossary of Terms Relating to Restrictive Business Practices defines a dominating position as "[t]he position occupied either (a) by a single enterprise, or (b) by a group of enterprises, between which no effective competition exists, which does not encounter effective competition in a market." 40

The U.K. Fair Trading Act 1973 defines collective dominance as existing where:

(c) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by one and the same group consisting of two or more such persons [(not being an interconnected group of bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description, whether or not they themselves are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers], or are supplied to members of one and the same group consisting of two or more such persons. 41

In Germany, section 22 of the Gesetz gegen Wettbewerb-

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sbeschrankungen (the "GWB")\textsuperscript{42} provides that:

(1) An enterprise is market dominating within the meaning of [the GWB] insofar as, in its capacity as a supplier or purchaser of a certain type of goods or commercial services,

1. It has no competitor or is not exposed to any substantial competition, or . . .

(2) Two or more enterprises shall also be deemed market dominating insofar as, in regard to a certain type of goods or commercial services, no substantial competition exists between them, for factual reasons, either in general, or in specific markets, and they jointly meet the requirements of subsection (1).\textsuperscript{43}

Section 22(3) of the GWB provides for a rebuttable presumption of dominance:

(3) It shall be presumed that

1. an enterprise is market dominating within the meaning of subsection (1), if it has a market share of at least one-third for a certain type of goods or commercial services; this presumption shall not apply when the enterprise recorded a turnover of less than DM 250 million in the last completed business year;

2. the conditions specified in subsection (2) are met if, in regard to a certain type of goods or commercial services,

   a) three or [fewer] enterprises have a combined market share of 50\% or over, or

   b) five or [fewer] enterprises have a combined market share of two-thirds or over; this presumption shall not apply, insofar as enterprises are concerned which recorded turnovers of less than DM 100 million in the last completed business year . . . \textsuperscript{44}

Although the U.K. statute refers to the possibility of collective dominance arising out of a collusive agreement, and although it is formulated by reference to conduct rather than structure, the reference to involuntary action suggests that the statute would also apply to unconscious parallelism. For its part, the GWB takes a purely structural approach, specifying two types of narrow oligopolies—three company and five com-

\textsuperscript{42} July 27, 1957, Bundesgesetzblatt, Teil 1 [BGBl.I], S.1081, as amended Dec. 22, 1989, BGBl.I, S.2486 (Ger.).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
pany—which, if specified joint market share thresholds are satisfied, give rise to a presumption of joint market power.

Community law has tended to rely on either customer dependency or collusive conduct as the basis for a finding of joint dominance, rather than on structural presumptions based on objective factors such as market share. However, passages from the Sixteenth Report on Competition indicate that, in the context of merger control, the Commission’s approach may be a structural one.

b. The Concept of Collective Dominance in Community Law

i. The Commission’s View

Insofar as Article 86 is concerned, the theory of collective dominance finds its basis in that Article’s laconic reference to the abuse of a dominant position by one or more companies holding such a position in all or a substantial part of the European common market. The Commission first made reference to the theory of joint dominance in 1973 in the so-called Sugar Cases. In the Sugar cases, the Commission treated as jointly dominant two Dutch producers who had allegedly coordinated their marketing activities. The validity of the Commission’s basing joint dominance on the existence of collusion was not addressed by the Court, which found that the concerted practices had not been adequately established.

In the ABC Oil Case, the Commission, relying on a theory of customer dependence in a situation of scarcity, concluded that each of the suppliers of motor spirit held a dominant position vis-à-vis one of their traditional customers. However, not all the companies had adopted the same behavior vis-à-vis the customer, ABG. The Commission’s case was therefore directed only at the alleged individual abuse by the supplier, British Petroleum, which substantially reduced its supplies to

46. COMM’N, SIXTEENTH REPORT ON COMPETITION POLICY ¶¶ 39 & 331-33 (1986).
50. Id. O.J. L 117/1, at 9, Common Mkt. Rep. (CCH) ¶ 9944.
ABG, to a greater degree than in the case of its other customers.

More recently, in *Magill TV Guide*,\(^1\) three television networks sued to enforce their copyrights to prevent Magill from publishing a comprehensive weekly containing the three networks' program listings.\(^2\) The networks arguably held a collective dominant position in light of their *de facto* and *de jure* monopoly over their weekly program listings. Nevertheless, perhaps because the Commission's case was already burdened with sufficient difficulties related to the copyrights held by the three networks, or perhaps because there was no evidence of collusion between the three companies, the Commission's case was based on a theory of individual abuse by each of the three companies rather than abuse of their collective dominant position.\(^3\)

The Commission has elaborated a theory of collective dominance most fully in its *Italian Flat Glass*\(^4\) decision. In that case, the Commission relied on the theory of collective dominance arising out of collusion, and accused three members of a narrow oligopoly who had allegedly engaged in a price fixing and quota cartel of having thereby also abused a collectively held dominant position.\(^5\) Under the Commission's theory, the three Italian flat glass producers concerned, Fabbrica Pisani ("FP"), Societa Italina Vetro-SIV ("SIV"), and Vernante Pennitalia ("VP"), as a result of their collusive behavior and agreements, "presented themselves on their market as a single entity and not as individuals."\(^6\) Consequently, the three producers collectively enjoyed a degree of independence from competitive pressures that enabled them to impede effective competition. Because the theory of joint dominance relied on

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52. Id. ¶ 20, O.J. L 78/43, at 49.
53. Id. ¶ 22, O.J. L 78/43, at 49.
55. Since the Commission's case under Article 86 was dependent on and did not strengthen its Article 85 case and since the Commission did not impose fines for the additional violation of Article 86, its decision to raise the issue of joint dominance would appear to be more theoretical or tactical than anything else. The interpretation that the Commission may have been focusing on merger control is reinforced by the fact that the United Kingdom has taken the unusual step of intervening in the case, which does not involve any U.K. companies, to challenge the Commission's decision in respect of Article 86.
56. Flat Glass, ¶ 79, O.J. L 33/44, at 66.
by the Commission is based on pre-existing collusion, it involves a kind of circularity in that the collusive phenomena violative of Article 85(1) constitute both the source of the collectively held dominant position and the abuse.

The Commission has also recently referred to the theory of joint dominance in *Alsatel v. Novasam SA*.\(^{57}\) *Alsatel* involved a national court reference concerning whether contractual conditions specifying the duration, cost, and obligations accepted by lessees of terminal equipment, and imposed by one of the private French regional telephone installation companies, violated Article 86. In its submissions to the Court, the Commission asserted that the Court has "expressly accepted" in the *Sugar Cases*\(^{58}\) and *Deutsche Grammophon v. Metro-SB-GromBärkte*\(^{59}\) that a collective dominant position could exist between the members of the same group or as a result of collusion between independent companies. The Commission went farther than it had gone in *Italian Flat Glass* and based its theory of joint dominance on the existence of parallelism of conduct.\(^{60}\) The Court did not address the issue of dominance, taking the view that it did not have the authority in an Article 177 reference to consider issues under Article 85 that posed questions exclusively under Article 86.

ii. The Court's Approach

The Court of Justice has not been particularly supportive of the Commission's attempts, insofar as Article 86 is concerned, to formulate a theory of collective dominance based on collusion, dependence, or conscious parallelism. In *Hoffmann-La Roche*, the Court, in the context of Article 86, appeared to

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60. Alsatel v. Novasam SA, Case 247/86, 1988 E.C.R. 5297, Common Mkt. Rep. (CCH) [1990] 1 CEC 248 (report for hearing). The Commission alleged that Alsatel's behavior could also result in a violation of Article 85 if, as a result of a concerted practice between them, the various regional leasing and installation companies all employed the same contractual terms without any technical necessity for their doing so. Although its argumentation is somewhat fragmentary, the Commission sought to distinguish between an abuse of a collective dominant position under Article 86, which could be based on the mere existence of non-collusive, parallel behavior, and a violation of Article 85(1), which would require a concerted practice. *Id.*
reject a theory of joint dominance based on conscious parallelism. The Court stated that:

A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally.\(^{61}\)

In other cases, which are of less relevance to the application of the Merger Control Regulation to oligopolies, the Court has sought to maintain the distinction between Articles 85 and 86. In Züchner v. Bayerische Vereinsbank,\(^{62}\) an Article 177 reference concerning an alleged concerted practice among German banks to debit a uniform service charge on certain transactions, the Court distinguished between Article 85, which deals with concerted practices, and Article 86, which deals with the abuse of a dominant position. The Court held that Article 86 does not apply to concerted practices. The same distinction was drawn by the Court in Bodson v. S.A. Pompes Funèbres des Régions Libérées,\(^{63}\) in which the Court again emphasized the distinction between Article 85, applicable to concerted practices and agreements between independent companies, and Article 86, which could apply to anticompetitive behavior by companies belonging to the same group.

In Ahmed Saeed v. Zentrale,\(^{64}\) the Court slightly modified its view and did indicate that both Articles 85 and 86 may apply concurrently to a price fixing arrangement. However, in doing so the Court stated that this would be the case where the dominant company succeeds in imposing its pricing policy on its non-dominant competitors.\(^{65}\) This approach would not be broad enough to apply to a price fixing cartel among members


The Court’s pronouncements in Bodson are perhaps most significant because they tend to breathe some life into the intra-group conspiracy theory by making it clear that the requirement of control by the parent over its subsidiaries is a real one which should be verified.


\(^{65}\) Id. ¶ 46.
of a narrow oligopoly, such as that alleged in *Italian Flat Glass*, where no single company is dominant.\(^6\)

*Alsatel* suggests that the Commission may, in the past, have been motivated by a desire to develop a theory which would enable it to attack, under Article 86, anti-competitive pricing strategies absent any proof of collusion. The Commission's debate with the Court over collective dominance in the context of Articles 85 and 86, however, was probably also intended to develop the legal and theoretical basis for expanding the scope of Article 86 as an instrument for merger control, in the event the Council refused to adopt a regulation.

The United Kingdom has intervened in the *Italian Flat Glass* case specifically for the purpose of contesting the Commission's views on collective dominance. It is therefore likely that the Court of First Instance, and perhaps ultimately the Court of Justice, will be required to pronounce on the Commission's approach to joint dominance in the context of Articles 85 and 86. However, given the adoption of the Merger Control Regulation and its reliance on Article 235, neither the Court's resolution of *Italian Flat Glass*, which involved the application of Articles 85 and 86 to the same behavior, nor the Court's approach in earlier cases will necessarily resolve whether the Regulation can be used to prohibit the creation or narrowing of a tight oligopoly.

**C. Legal Basis for the Applicability of the Regulation to Narrow Oligopolies**

Even though the Merger Control Regulation, in contrast to Article 86, makes no reference to joint dominance, it would appear that a legal basis may exist for the potential applicability of the Regulation to narrow oligopolies. Article 2(1) requires that the Commission take into account the need to preserve and maintain effective competition. Since there is arguably little room for price competition in certain narrow oligopolies, the Regulation, and ultimately Article 3(f) of the Treaty,\(^7\) could provide a basis for prohibiting concentrations in such oligopolistic markets. Moreover, to the extent that the interdependent pricing decisions of oligopolists are likely to

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\(^{66}\) See *supra* notes 52-55 and accompanying text.

\(^{67}\) EEC Treaty, *supra* note 2, art. 3(f).
lead to supra-competitive prices, a case can be made for the application of the Merger Control Regulation to concentrations that create or further reduce narrow oligopolies.

The Court's judgment in Hoffmann-La Roche, apparently rejecting the notion that Article 86 applies to oligopolistic interdependence, and its judgment in Ahmed Saeed need not necessarily be regarded as dispositive. First, even if the Court were to hold that Article 86 does not apply to collective dominance, or does not apply to the non-collusive interdependent conduct of oligopolists, the ruling would not necessarily affect the scope of the Merger Control Regulation since it is based on Article 235. Second, the Court's dictum in Hoffmann-La Roche, indicating that oligopolistic interdependence does not give rise to a dominant position, was uttered in the context of a case dealing with abuse and thus may not be relevant to the Merger Control Regulation's structural concerns. Third, the Court's pronouncement in Hoffmann-La Roche can be interpreted as an attempt to create a kind of parity between Articles 85 and 86 by providing a basis for a holding that mere conscious parallelism without some evidence of active collusion should not be deemed to violate either Article 85(1) or Article 86. Such

68. This is also likely to happen in the case of a monopolist's pricing. Gyselen, Abuse of Monopoly Power Within the Meaning of Article 86 of the EEC Treaty: Recent Developments, in 1989 FORDHAM CORP. L. INST. 597 (B. Hawk ed. 1990).

69. EEC Treaty, supra note 2, art. 85(1). As it presently stands, Community law distinguishes between legal, conscious parallelism where there are no contacts or exchanges of information and where the behavior of the parties concerned is consistent with economic theory, and illegal parallel pricing behavior where there have been information exchanges, including the publication of prices, or other contacts or where the behavior in question is not rationally explicable by economic theory. Thus, although in Imperial Chemicals Industries, Ltd. v. Commission, Case 48/69, 1972 E.C.R. 619, 655, ¶ 64, Common Mkt. Rep. (CCH) ¶ 8161, at 8020-22, in which there were contacts, the Court appeared to define a concerted practice broadly enough to include conscious parallelism, in the Sugar Cases, the Court relied heavily on the question of whether there has been contact between competitors in distinguishing between permissible parallel conduct and prohibited concerted practices, stating that

[although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.
an approach would not exclude use of the Merger Control Regulation to limit the negative effects of narrow oligopolies. Indeed, the determination that Articles 85 and 86 should not apply to non-collusive parallelism would arguably create the need for a structural approach to the problem, which can be provided under the Merger Control Regulation. Arguably, a structural approach is also appropriate since it would not be justifiable to sanction, under Articles 85 and 86, the non-collusive behavior of oligopolists who are only responding intelligently to market conditions.70

As a result, it would appear that the Court's jurisprudence under Article 86 does not necessarily constitute an obstacle to the application of the Regulation to narrow oligopolies. Indeed, it may provide a rationale for the application of the Regulation to interdependent oligopolies.

D. Situations in Which the Regulation May Be Applied to Oligopolies

Not all narrow oligopolies will invariably give rise to the kind of interdependence that eliminates or severely reduces price competition. Rather, certain conditions presumably would need to be met before the Merger Control Regulation should be applied to narrow oligopolies. There is probably general agreement71 that tacit collusion and conscious or un-

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Similarly, in Woodpulp, O.J. L 85/1 (1985) ¶ 85, Common Mkt. Rep. (CCH) ¶ 10,654, the Commission has relied to a significant degree both on economic arguments to the effect that the parallel behavior in question could not be explained by market conditions and on information exchanges consisting, inter alia, of the advance publication in the trade press of prices. Id.

70. E. KANTZENBACH & J. KRUSE, supra note 36. In their study, Kantzenbach and Kruse conclude:

Damit ist die Verhaltenskontrolle an der Grenze dessen, was den Unternehmen allenfalls noch zum Vorwurf gemacht und sanktioniert werden kann. Implizite Kollusion, insbesondere das bewusste Parallelverhalten, setzen keinerlei Abstimmung der Partner voraus. Die Verhaltensweise folgt ausschließlich aus der Erkenntnis der oligopolistischen Interdependenz und ist für die Unternehmen unter bestimmten Umständen die einzig rationale Konsequenz daraus. Eine Sanktionierung dieses Verhaltens würde einer Verpflichtung der Unternehmen zur Ignoranz oder zur Irrationalität gleichkommen und wäre schon deshalb wenig erfolgsversprechend. Eine Ausdehnung der Verhaltenskontrolle auf implizite Kollusion kommt deshalb nicht in Betracht.

Id. at 133.

71. Id. at 65-66; see Flint, supra note 39, at 77. Flint notes that parallelism of
conscious parallelism are most likely to occur in markets characterized by the following conditions:

- a limited number of participants in a stagnant, “mature” market;
- a standardized, commodity-like product, or a product based on standardized inputs or some other factor yielding similar and transparent cost structures;
- pricing transparency;
- substantial barriers to entry; and
- inelasticity of demand and inability of the oligopolists to shift production to other products.

According to the Commission’s 1986 study, merger control could be used in the markets which have or which would, as a result of a concentration, acquire the above-mentioned characteristics. Merger control could thus avoid the anticompetitive but non-collusive effects of narrow oligopolies by:

- prohibiting the creation of joint dominance by means of concentration, in particular by horizontal mergers;
- prohibiting the acquisition of “fringe” firms that create some possibility of competition by members of the market dominating oligopoly; and
- keeping open the possibility of effective competition from “newcomers” by preventing the creation or heightening of entry barriers through concentrations, including vertical and conglomerate mergers.

Application of the Merger Control Regulation to narrow oligopolies will not prevent the creation of anticompetitive behavior is likely to be the inevitable outcome of a market structure in which a great deal of market power is concentrated in relatively few hands, entry barriers towards new sellers are high, and where the product in question is relatively standardized. Id. The parallelism will also depend to a certain degree on a reasonably steady demand industry-wide, although the product itself will be highly sensitive to any price alteration by an individual seller. Id.

Most of these factors are identified by Kantzenbach and Kruse, although they take a different view of the effects of overcapacity which they believe decrease the likelihood of collusion. E. KANTZENBACH & J. KRUSE, supra note 36, at 65-66.

73. See E. KANTZENBACH & J. KRUSE, supra note 36, at 136-38. Conglomerate merger theories are currently out of favor in the United States. Thus, the reference to the possible prohibition of vertical or conglomerate mergers, which is one of the principal ways by which oligopolists compete with each other, may be questionable. Should the Commission bring such cases, they will no doubt prove controversial.
market structures that arise out of the organic growth of competitors in certain markets. It may, however, enable the Commission to reach problems that have heretofore been outside the scope of its powers. Such an approach would be consistent with the models provided by other competition laws, including those in the United States, the United Kingdom, and Germany, and could have wide-reaching effects.74

III. THE NATURE OF THE ANALYSIS UNDER ARTICLE 2: MUST ALL CONCENTRATIONS THAT CREATE OR STRENGTHEN A DOMINANT POSITION BE PROHIBITED?

The analysis under article 2 requires the Commission to take into account the factors listed in articles 2(1)(a) and (b) in order to determine whether the concentration has given rise to or strengthened a dominant position, as a result of which competition will be significantly impeded in all or a substantial part of the common market. Leaving aside the issues raised by the thirteenth recital, it would appear from the factors listed in articles 2(1)(a) and (b) that the analysis under the Merger Control Regulation will involve three steps. First, the relevant product and geographic markets must be defined. Second, a determination will have to be made as to whether, in light of actual or potential competition within and from outside the Community and the factors listed in article 2(1)(b), the concentration would give rise to or strengthen a dominant position. Lastly, it will be necessary to ascertain whether that dominant

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74. The level of control that should be applied to oligopolies depends in part on whether an antitrust authority should attach primary importance to price competition or whether other forms of competition (advertising, product innovation, service, or increased efficiency in production methods that permits price reductions) would be sufficient to ensure consumer welfare.

The significance for consumer welfare of non-price competition is a controversial issue and will, in any event, vary depending on the market. Competition authorities have, on occasion, concluded that in some circumstances the often intense competition concerning advertising and product innovation is no substitute for price competition and indeed has the effect of maintaining high prices by acting as a barrier to entry, American Tobacco Co. v. United States, 328 U.S. 781 (1946), or by itself increasing costs and, as a result, prices. See Monopolies Commission, A Report on the Supply of Household Detergents (London 1966), cited in Flint, supra note 39, at 52. In such cases, it would appear that the residual non-price competition exposes consumers to the same or similar risks of price and other forms of exploitation by the oligopolists as would be the case if they were confronted by a monopolist.
position would significantly impede effective competition in all or a substantial part of the common market.\textsuperscript{75}

The foregoing conclusion is based on two assumptions. First, the reference to technical and economic progress in article 2(1)(b) does not permit the Commission to engage in a balancing of positive and negative factors, or to allow a concentration that would create or strengthen a dominant position on the ground that it hinders technical or economic progress.\textsuperscript{76}

The second assumption is that the reference in articles 2(2) and (3) to effective competition being significantly impeded in the common market means that: (i) at the very least, the Merger Control Regulation includes an appreciability test that would require the Commission to examine whether a pre-existing dominant position has been appreciably strengthened; and (ii) the Regulation goes even further to involve an additional determination as to whether the dominant position that has been created or strengthened is likely to impede significantly the development of effective competition in the future.\textsuperscript{77}

Under this latter interpretation, a finding that a dominant position has been created or strengthened in more than a \textit{de minimis} fashion by the concentration would be insufficient for a determination that the concentration should be prohibited or modified. Rather, it would be necessary to conclude further that this dominant position would act as a significant impediment to the preservation or development of effective competition. Under this approach, the Commission would be required to make a considerably more complex determination concerning the long-term adverse structural effects of the dominant position that has been created or strengthened.\textsuperscript{78}

\textsuperscript{75. See Merger Control Regulation, supra note 1, art. 2(1)(a) & (b), O.J. L 257/13, at 16.}

\textsuperscript{76. See supra notes 4-20 and accompanying text.}

\textsuperscript{77. See infra notes 78-81 and accompanying text.}

\textsuperscript{78. This latter interpretation of the significance of the "additional language" in article 2(2) and (3) is not without its difficulties given the Court’s equation, in cases involving abuse, of dominance with an absence of effective competition. This suggests that the words following "as a result of which" merely define the term "dominant position" as established by the Court’s jurisprudence without adding any qualification or test. Nevertheless, merger analysis is predictive and involves an assessment, \textit{inter alia}, of contestability, the likelihood of market entry in the future, and market developments which may require that less importance be attached to the market share that may be attained as a result of a concentration. For its part, the Com-}
Like the Court in Continental Can, articles 2(2) and (3) focus on the effects of the creation or strengthening of the dominant position and not on the dominant position itself. This difference in focus, the nature of the compatibility analysis under articles 2(1)(a) and (b), and the practical necessity of a flexible approach, reinforce the conclusion that a per se approach, under which all concentrations giving rise to or strengthening dominant positions would be automatically deemed to result in a significant impediment to effective competition, may not be intended by the Merger Control Regulation.

As a result, the significant impediment of competition referred to in article 2(3) may not be synonymous with dominance in every case, although it is likely to be where large market shares exist and are sustainable. Such an approach should provide the Commission with a certain degree of flexibility, beyond that which can be achieved through market definition, by providing for an assessment, in light of the factors listed in article 2(1)(b), of whether dominance exists or has been appreciably strengthened. Such flexibility may be desirable because the assessment of compatibility involves an uncertain

mission appears to have accepted this approach. See Lord Brittan Address, supra note 14. Commissioner Sir Brittan stated that

just as under Article 86 the analysis goes on to consider the abuse of the dominant position, here too dominant position is not the end of the matter and we have to consider the impediment to competition which the dominant position may create . . . . The addition of the impediment to competition test reminds us that market dominance is a dynamic concept which must be considered over a certain period of time. It is the impact of the dominant position on competition and on the ability of companies to contest or enter a particular market which concerns us. Relatively high market shares, together with other factors which suggest dominance may not in themselves necessarily be decisive considerations if the market under examination is genuinely open to competition. Nevertheless, I accept the general prejudice of competition policy that high market shares, maintained over a period of time, suggest that a market is not contestable, even if this is not to be regarded as an irrebuttable presumption.

Id.


prediction as to how markets and undertakings will perform and behave. It may also be preferable to prohibition or divestiture in hard cases given the possibility that Article 86 may subsequently be applied should the concentrated undertaking seek to abuse its market position.81

IV. CONCENTRATION ANALYSIS AND POLICY UNDER THE REGULATION

A. Factors That Will Be Taken into Consideration in Assessing Dominance and Compatibility

Article 2(1)(a) and (b) lists the essential factors that will be taken into account for the purpose of evaluating concentrations. It does not, however, explain how these factors will be applied. The following discussion briefly reviews past application of the factors and some of the problems that have arisen with regard to them.

1. Market Definition Under the Regulation

To determine whether a concentration should be prohibited or permitted, the Commission needs to form a view as to whether dominance exists or has been strengthened. In order to do so, it will, as under Article 86, need to define the relevant product and geographic markets.

The Commission's approach to market analysis under Article 86 has been criticized as being goal-oriented because it defines the market from the perspective of the abuse.82 Under the Regulation, the structural concerns central to concentra-

81. Although there may be some danger in relying on pre-Regulation cases decided under Article 86, the foregoing interpretation is to some extent supported by the Commission's own prior administrative practice in several cases. See, e.g., Comm'n, Eighth Report on Competition Policy ¶¶ 146-48 (1978) (KSH/AVEBE and Michelin/Actoe); Comm'n, Tenth Report on Competition Policy ¶¶ 152-56 (1980) (Michelin/Kléber-Colombes and BSN-Gervais-Danone/Pilkington); Comm'n, Twelfth Report on Competition Policy ¶¶ 104-06 (1982) (initial assessment of the British Sugar/Berisford acquisition); Comm'n, Eighteenth Report on Competition Policy ¶ 81 (1989) (British Airways/British Caledonian). In these cases the Commission either has not opposed concentrations that strengthened or created dominant positions or has taken the view that although pre-existing dominant positions may have been strengthened to some extent, it was not necessary to prohibit the concentration.

tion analysis are referred to explicitly in and are the central features of article 2(1)(a) and (b). These concerns suggest that the analysis under the Merger Control Regulation should be more objective because the goal under the Regulation is to assess the impact of the concentration on the market in which it occurs, rather than to define a market in order to prohibit an abuse.

a. The Relevant Product Market

i. Demand-Side Substitution

Under Article 85, the relevant product market has been defined in terms of the substitutability of goods viewed from the consumer's perspective. In *Eurofix-Banco v. Hilti*, the Commission suggested a practical resolution to the difficulties in applying the concept of demand-side substitutability by relying on the existence, or non-existence, of cross-elasticity of demand. A similar approach was followed in *Tetra Pak I (BTG license)*. Arguably, the test of cross-elasticity of demand provides a satisfactory way of implementing the demand-side substitution test. This approach has been deemed to be an appropriate one even by those who oppose the notion of taking supply-side substitutability into account for purposes of defining the relevant product market.

ii. Supply-Side Substitution

The Commission's decision in *Continental Can* was reversed because the Commission had failed, when attempting to define the relevant product market, to take into account supply-side substitutability. Similarly, in *N.V. Nederlandsche Banden-Indus-

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85. Id. ¶ 60 O.J. L 65/19, at 32.
87. Fishwick and the German Monopolies Commission have both accepted the U.S. Justice Department approach under which Product B will be a substitute for Product A if B's existence will prevent a five percent rise in the relative price of A because within one year of such price rise a substantial proportion of demand would be shifted from A to B. See F. Fishwick, supra note 30, at 38.
88. Europenballage Corp. v. Commission, Case 6/72, 1973 E.C.R. 215, ¶ 34,
trie Michelin v. Commission, in the context of a discussion of the need to define the relevant market, the Court stated that:

For this purpose, therefore, an examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.

The Court also noted that there was no elasticity of supply between tires for heavy vehicles and automobile tires, given the significant difference in production techniques and in the plant tools required for their manufacture.

Despite these clear indications that supply-side substitutability should be considered in defining the relevant product market, the Commission has, except in Tetra Pak and Hilti, generally tended to rely exclusively on demand-side substitutability as the sole criterion for defining the relevant product market, while taking supply-side substitutability into account only for the purpose of determining whether the market power of the company in question is subject to limitation by the potential competition that may result from supply-side substitution. This approach has been defended on the grounds that supply-side substitution should not be considered for the

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90. Id. at ¶ 37, Common Mkt. Rep. (CCH) ¶ 14,031, at 14,515.
91. Id. at ¶ 41, Common Mkt. Rep. (CCH) ¶ 14,031, at 14,515-16.
92. See BPB Industries plc, O.J. L 10/50 (1989). In that case, the Commission took the view that there was no need to take into account the competition offered by wet plasterboard for purposes of defining the relevant product market. Rather, the Commission stated that any competitive pressure from other products could be adequately taken into account when considering whether a dominant position exists. It would appear that the Commission may seek to apply this approach under the Merger Control Regulation. In particular, the notification form to be used under the Regulation defines the relevant product market as follows: "A relevant product market comprises all those products and services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' [sic] characteristics, their prices and their intended use." Form Relating to the Notification of a Concentration Pursuant to Council Regulation (EEC) No. 4064/89, § 5, O.J. L 219/5, at 15 (1990), Common Mkt. Rep. ¶ 2,840, at 2097-16 [hereinafter Notification Form]. Moreover, section 5 of the form does not request any information concerning supply-side substitution.
purpose of determining the relevant product market and calculating market share, because it represents only a form of potential competition. Like the ease or difficulty of market entry, this competition is more logically analyzed for its effects on limiting the market power of a dominant company. According to this argument, the logical consequence of a focus on supply-side substitution is that foreign imports should also be taken into account. Worldwide sales and capacities therefore would have to be included when calculating market share.\footnote{See F. Fishwick, supra note 30, at 36. Since the Merger Control Regulation requires the definition of the relevant market in terms of the common market and provides for consideration of both potential and foreign competition in the assessment of dominance in article 2(l)(a), the problem of inclusion of foreign competition in the definition of the relevant market should not in theory arise.}

The Commission has relied on cross-elasticity of supply in only two cases: Hilti and Tetra Pak.\footnote{Eurofix-Bauco v. Hilti, O.J. L 65/19 (1988); Tetra Pak I (BTG license), O.J. L 272/27 (1988).} In Tetra Pak, the Commission took the view that analysis of cross-elasticity of both demand and supply was ideally suited to the definition of the relevant market. The Commission stated that

\begin{quote}
[t]he test of price elasticity synthesizes the many factors that determine the extent of a relevant market (e.g., physically or technically substitutable products, consumer preferences, ease of new firms or products to enter market, etc.). If a producer or a group of producers dominate(s) a relevant market so defined, they may be said to enjoy[sic] economic power unfettered by the threat of real or effective competition. The Court has always stressed that it is the degree to which economic freedom may be enjoyed that determines dominance. The test of price elasticity, is in the circumstances of this case therefore, a pertinent one for the rules of competition since it is closely and logically linked to de-
\end{quote}
terminating whether dominance exists.95

The strength of this argument lies in its assertion that the test of price elasticity takes into account the factors that determine the extent of a relevant market. The test considers these factors because they define the ability of the "dominant" company to remain insensitive to price-based competition, which has been identified by the Court as an indispensable indicium of dominance.96 However, the passage also illustrates a tendency to treat the definition of the relevant product market and the determination as to whether dominance exists in a single determination, rather than in two sequential analytic steps.

As a logical matter, it appears that before dominance can be assessed, the market in which the allegedly dominant company operates must be defined. Similarly, both demand and supply-side substitution would appear to be relevant to the definition of the product market. In theory, consideration of supply-side substitution need not lead to results different from those that would be reached by considering supply-side substitution solely to determine whether market power is limited by the threat of potential competition. However, in practice there may be a difference in the two approaches. If cross-elasticities of supply are taken into account in defining the relevant market, greater weight may be given to market share in the assessment of dominance. This may occur even though market share will normally be lower as a result of the inclusion of supply-side substitution. If cross-elasticities of supply are examined only for the purpose of determining whether there are checks on the market power of a company with large market shares, there may be a greater risk that the concentration will be prohibited, since focus on the large market share may outweigh the possibility of supply-side substitution.

Another important difference is that consideration of cross-elasticities of supply places greater emphasis on efficiencies and organization at the level of production. Arguably, this approach may provide a longer term perspective on markets and their development. In contrast, demand-side analysis may place a greater emphasis on the interests of consumers. How-

ever, demand-side analysis may also produce a short-term analysis that ignores productive efficiencies. The appropriateness of each test may not, of course, vary from case to case, or industry to industry.

b. The Relevant Geographic Market

The Commission appears to adopt a different approach to the definition of the relevant geographic market under Article 86 than under Article 85. In the context of Article 85 and, in particular, its Notice on Agreements of Minor Importance, the Commission has stressed the existence of objective barriers to entry—such as transport costs, tariffs, and differing technical standards that cannot be overcome with reasonable effort and expense—as the key to defining the relevant geographic market.

In Article 86 cases, at least those involving consumer products, the Commission has tended to place greater emphasis on subjective criteria that are likely to result in the definition of narrower geographic markets. This approach is also reflected in article 9(7) of the Merger Control Regulation. That article refers to consumer preferences, the existence of homogenous conditions of competition that differ from those in neighbouring areas, appreciable differences in the undertakings’ market shares, and substantial price differences as compared to neighbouring areas.


98. Merger Control Regulation, supra note 1, art. 9(7), O.J. L 257/13, at 20, Common Mkt. Rep. (CCH) ¶ 2839, at 2095-12.

99. Id. The same approach is reflected in the notification form in which the relevant geographic market is defined as comprising the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings’ market shares between neighbouring areas of substantial price differences.

Notification Form, supra note 92, § 5, O.J. L 219/5, at 15, Common Mkt. Rep. (CCH) ¶ 2840, at 2097-16.
The relevance of article 9(7) to defining the geographic market at the Community level is, however, questionable, although its criteria derive from those applied by the Commission and the Court in previous cases. They place an emphasis, however, on local peculiarities that seems to go far beyond the Court’s approach in *United Brands Co. v. Commission*,¹⁰⁰ in which the Court relied primarily on the existence of different governmental regulatory schemes to exclude certain Member States from the relevant market. They also appear to be inconsistent with the Court’s approach to the definition of the relevant geographic market in recent cases, such as *Bodson*¹⁰¹ and *Alsatel*,¹⁰² as well as the Commission’s analysis in *Tetra Pak*¹⁰³ and *Hilti*.¹⁰⁴

The criteria referred to in article 9(7) tend to emphasize local conditions, whose importance may be decreasing in an increasingly integrated common market. Indeed, the criteria appear to have been included for the specific purpose of defining narrow, local markets. In so doing, they reflect an approach to geographic market definition that has been proposed as the appropriate one in a study prepared for the Com-

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¹⁰². Alsatel v. Novasam SA, Case 247/86, 1988 E.C.R. 5987, Common Mkt. Rep. (CCH) [1990] 1 CEC 248. The Court’s judgment in *Alsatel* is of particular interest in this regard. In defining the relevant geographic market the Court ignored both local market conditions and customer dependence. Rather, the Court took the view that France was the relevant geographic market because authorizations granted to companies that rented out, installed, maintained, and serviced telephone equipment were valid throughout France. The fact that Alsatel did the vast majority of its business in Alsace-Lorraine was not, in the Court’s view, dispositive. Similarly, the Court rejected the Commission’s argument that, given the importance of the provision of maintenance services, competition between installers was essentially local or regional in nature. *Id.* at 6010, Common Mkt. Rep. (CCH) [1990] 2 CEC at 264.
¹⁰³. O.J. L 272/27 (1988), ¶ 29. The Community was defined as the relevant geographic market despite the fact that preferences as between UHT and fresh milk and for different kinds of packaging existed in different Member States. Similarly in *United Brands Co. v. Commission*, Case 27/76, 1978 E.C.R. 207, Common Mkt. Rep. (CCH) ¶ 8429, Germany and Ireland were included in the relevant geographic market although consumption habits differed widely in those two Member States. *Id.* at 274, ¶ 42. The Commission reached this result because it focused on supply-side considerations which, arguably, are the key economic indicators, at least in a market in which production is dependent on technology and the abuse in question related to an exclusive technology license. *Id.* at 275-76.
mission. According to this study, transport costs are of less significance in the Community than legal, institutional and cultural barriers. Thus, under the suggested approach, the existence of either transferability of demand between areas, transferability of supply combined with perfect competition in supply, or transferability of supply combined with identical demand-price relationships in each area, would be sufficient indication of the existence of a single geographic market.

However, as with article 9(7), the initial factors proposed for evaluating the existence of one or more of the foregoing conditions would be:

- current sales, thus excluding cross-elasticity of supply;
- homogeneity of market shares;
- price differences; and
- correlation of price changes in different areas, subject to adjustment as concerns currency exchange fluctuations.

The emphasis on transferability of demand would result in considerable importance being attached to brand loyalties, absence of adequate information, and linguistic or cultural factors. Moreover, this emphasis would be prone to lead to the definition of narrow geographic markets in the case of consumer goods, as opposed to unbranded intermediate products.

The tendency to define geographic markets narrowly, at least in the case of branded consumer goods, is best exemplified by the Philip Morris and Douwe Egberts cases. In both
cases, the Commission focused on brand loyalty and the presence of certain brands in only some Member States, while ignoring pricing levels, sources of supply, transport costs, and location of production facilities. The very different result in the Siemens/Nixdorf case, however, suggests that the Commission’s proposed narrow approach to geographic market definition may be limited to consumer goods cases. This tendency toward narrow definition of the relevant geographic market raises a number of issues of both a technical and policy nature. Three technical issues may be identified.

First, the emphasis on homogeneity of market share, similarity of pricing, and brand loyalty is historically oriented. It thus overlooks the possibility of market entry. In addition, it tends to emphasize subjective factors such as consumer preferences and tastes, which are susceptible to modification and do not necessarily constitute a lasting structural or legal barrier to entry unless advertising and other costs are so significant as to deter entry.

Second, the emphasis on final price levels is inconsistent with the Court’s approach in United Brands and could actually eliminate geographic price discrimination as an abuse. Furthermore, it may not attach sufficient weight to patterns of supply, the role played by importers and wholesalers, and the possibility that concentrations that result in economies of scale may have the effect of ultimately harmonizing price levels.

Third, the existence of a “separate” geographic market age’s cellophane wrapper, thus making parallel imports difficult. It is noteworthy that the importance attached to both common pricing levels and consumer tastes and loyalties is significantly at odds with the Court’s approach in United Brands, in which there were significant pricing disparities and different consumption habits, even in the Member States deemed by the Court to comprise the relevant geographic market. United Brands Co. v. Commission, Case 27/76, 1978 E.C.R. 207, 273-76, ¶¶ 36-37, Common Mkt. Rep. (CCH) ¶ 8429, at 7729-7732.

109. See European Report, July 27, 1990, No. 1607, at 12. According to the press reports, DG-IV had concluded that the proposed acquisition by Douwe Egberts of its principal competitor in the Dutch and Belgian coffee markets, Van Nelle, would abusively strengthen Douwe Egberts’ market position in Belgium. The Commission’s proposed decision has reportedly been blocked at the Cabinet level by opposition from Commissioner Andriessen.

110. Comm’ns Press Release, IP (90) 378 (May 11, 1990). In Siemens/Nixdorf, the Commission permitted the acquisition to go ahead on the theory that although there would be large market shares in certain product sectors within Germany there was sufficient competitive pressure to avoid any long term adverse effects. Id.
may not be relevant to the assessment of market power. The ‘‘separate’’ market may be contestable, but outside suppliers may not yet have entered because there is no advantage to doing so. For example, price levels in the separate market may not be high enough to attract market entry. If this assumption is correct, customer or brand loyalty does not mean the absence of cross-elasticity of supply or demand. Rather, it may only be a sign that prices in the ‘‘dominant’’ market are more or less in line with those elsewhere. Only a demonstration that a significant and lasting change in price would not have the effect of encouraging consumers to switch brands, or encouraging suppliers to enter the market, would provide convincing evidence that the area in question constitutes a distinct geographic market.

The policy concerns that arise as a result of the gap between the reality and the goal of creating a unified common market, and that may result in the Commission being confronted with some of its most difficult policy choices under the Merger Control Regulation, may be summarized as follows.

First, assuming that transactions that affect only a single Member State would have a ‘‘Community dimension’’ within the meaning of the Merger Control Regulation, a definition of narrow geographic markets may lead certain Member States to question whether a Community regulation is required to control national concentrations that might just as easily be left to the national authorities. This factor could significantly affect the Council’s reaction to the Commission’s eventual proposals to lower the Merger Control Regulation’s thresholds.

Second, if the Commission focuses only on the national effects of concentrations by defining geographic markets narrowly, it may block concentrations that are necessary to enable companies from the same Member State or region to achieve sufficient efficiencies of scale or economic strength to expand their activities to other Member States. Such an approach could defeat the market integration rationale that arguably underlies the EEC Treaty.

It has been said that the exclusion of merger control from the EEC Treaty was based on the view that concentration would be an important means of accomplishing the integration
of the internal Community market. As the Commission's 1992 program began to experience success, the argument offered in favor of merger control at the Community level was that such control was necessary and appropriate for efficient control of multi-jurisdictional transactions, and would ensure that decisions were made on the basis of a broad, Community-wide perspective. It was assumed that a Community perspective would be more favorable to the concentration than a narrow national one. Recent developments suggest that the Commission is not prepared to accept local concentrations of market power that have significant anticompetitive effects.

This response can hardly be regarded as surprising. However, given the tension between the existing situation and the aspiration to create a common market, it suggests that the issue of geographic market definition will be one of the most difficult policy issues to be faced by the Commission and the Court in applying the Merger Control Regulation. Definition of the relevant geographic market will not involve a mere technical exercise. Rather, it will be one of the arenas in which fundamental decisions are made about the nature of Community markets and the manner in which they should develop.

c. Vertical Dependence

Vertical dependence has played a key role in a number of important Article 86 cases in which the definition of the relevant market and the calculation of market shares was irrelevant. These cases are potentially relevant to concentration control centers on two issues. The first is whether the Commission should assess concentrations on the basis of their effects on a single or small class of dependent customers. The


second is whether greater attention should be paid to the vertical effects of concentrations, or whether concentrations should be analyzed primarily in light of their horizontal effects.

d. Single Customer Dependence

Except in certain unusual situations where the customer in question is also a competitor, and the number of competitors is limited, it would arguably not be appropriate to allow the dependence of a single customer or a small number of customers to determine the outcome of a merger case. The possibility of exceptions to this rule is, however, suggested by a recent case in which the Commission intervened to ensure that a competitor would retain access to a vital input for its business. In this case, Stenna UK Limited ("Stenna") had acquired Houlder Offshore Limited and, in the process, gained control over two diving support vessels that had previously been used by Comex, a competitor of Stenna. Following the Commission's intervention, Stenna agreed to hire out one of the vessels to Comex for two years. In the Commission's view, it thus guarantees Comex the necessary access to an essential input for its subsea diving services.

e. Vertical Integration and Horizontal Effects

In *Hugin/Liptons*, Hugin ranked fourth in the U.K. market. It had only a thirteen percent U.K. market share for cash registers, behind National Cash Register Corporation ("NCR") with about forty percent, Sweda with eighteen percent, and Gross with sixteen percent. The decision by Hugin to integrate vertically the distribution of its cash registers may have been a necessary response, required to enable it to compete with a far stronger and perhaps dominant competitor, NCR. The Commission's determination that Hugin had abused its dominant position by refusing to supply spare parts to Liptons has been criticized on the grounds that it focused on the narrow vertical relationship between Hugin and Liptons, overlooking (i) the broader implications of Hugin's decision to integrate vertically on the market for the supply of

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115. See F. Fishwick, supra note 30, at 115.
cash registers; (ii) the fact that, although Liptons might be eliminated from the market for repair of Hugin's cash registers, Liptons would not be eliminated from the repair business altogether; and (iii) the absence of any significant negative effect on consumers. In other words, the Commission's decision protected a competitor in the downstream market for service and repairs, rather than protecting competition in the horizontal market for the supply of cash registers, in a case in which the supplier lacked market power and faced considerable competition from more powerful suppliers.

In cases of vertical integration by merger or acquisition, paramount importance perhaps should be attached to the effects on competition on the horizontal level, and to the ultimate interests of consumers. Similarly, it may be appropriate to place less weight on the consequences for other companies in the vertical chain, which may be part of the normal competitive process.

f. Actual or Potential Competition Outside the Community and Meeting International Competition

The Commission must consider actual or potential competition from outside the Community in assessing a concentration, inasmuch as potential market entry is relevant to assessing dominance. Additionally, it appears from the Commission's declarations that the existence of competition from outside the Community may be relevant for determining the scope of the geographic market. It is unclear, however, whether the reference in article 2(1)(a) to "competition from undertakings located" outside the Community is intended to permit the Commission to consider the need of Community undertakings to increase their competitiveness in order to meet international competition on markets within or

116. See Fox, supra note 82, at 402-03.
117. Id. at 403. The Commission's approach in Hugin/Liptons has been endorsed by Fishwick, not on the grounds that Liptons was dependent on Hugin, but rather because, given the low ratio of after-sales service to the price of a new cash register, Hugin would have been in a position to exploit its dominant position in the supply of its spare parts with little or no effect on the consumer's choice of new cash registers. F. Fishwick, supra note 30, at 120.
118. See F. Fishwick, supra note 30, at 121.
119. Declarations, supra note 7, at 265.
120. Merger Control Regulation, supra note 1, O.J. L 257/13, at 16.
outside the Community when evaluating the effects of a concentration in the Community. Article 2(1)(a) requires the Commission to focus only on the effects of the concentration in the Community. Consideration of the ability of Community undertakings to compete on world markets may not be relevant unless it can be shown that, absent the concentration in question, Community undertakings will face the risk of being dominated by a foreign rival within the Community. On the other hand, actual or potential competition in the Community from foreign firms may well be relevant to the determination of whether the concentration is compatible or incompatible with the common market. As competition becomes increasingly globalized, the need to meet global competition may become important and it is likely to be one of the key policy issues confronted by the Commission in applying the Merger Control Regulation.

CONCLUDING UNSCIENTIFIC POSTSCRIPT

The substantive test provided for under the Merger Control Regulation has been criticized as being ambiguous and vague. While it is certainly true that a considerable amount of the Commission's effort went into resolving jurisdictional and fundamental policy issues, and while article 2 is less specific than either the U.K. Restrictive Trade Practices Act 1977 or article 22 of the GWB, it is not noticeably less specific than section 7 of the Clayton Act.

Rather, any greater clarity of U.S. law derives not from the formulation of the statutes but rather from the existence of the guidelines which have been issued from time-to-time, setting forth the basic enforcement parameters that would otherwise be shrouded in interpretive ambiguity. It took considerable time, however, before interpretive guidelines were issued in the United States. It is therefore probably unfair to expect the Commission to issue such guidelines in the absence of concrete experience in applying the Merger Control Regulation. Rather, it is to be expected that Commission policy and the

121. Declarations, supra note 7, 2(d), at 266.
122. Id.
123. See Hawk, supra note 9, at 213.
meaning of the Regulation will only become clear as a result of individual cases. At some point, it will be necessary to reconcile the contradictions and to provide guidance as to the Commission's policy objectives. Until then the answer to many of the questions raised by the Regulation will unfold slowly, and no doubt somewhat unsystematically, in the context of specific cases.