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European Merger Control: The Emerging Administrative Practice of the EC Commission

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Abstract

This Article examines the European Community Council Regulation No. 4064/89 which entered into force in September 1990. The focus of the Commission's activity has been on the definition of a concentration pursuant to article 3 and on the substantive appraisal of concentrations pursuant to article 2. On the basis of the decisions issued within the period under examination, it is possible to discern an emerging administrative practice. Additionally, initial developments of interest are apparent in other areas, such as the notification requirement, thresholds and various procedural matters.

EUROPEAN MERGER CONTROL: THE EMERGING ADMINISTRATIVE PRACTICE OF THE EC COMMISSION

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INTRODUCTION

The European Community (the "EC") Council Regulation No. 4064/89 (the "Merger Regulation")[1] entered into force in September 1990. As of November 1991, sixty-five concentrations had been notified to the Commission. More than fifty proceedings have been completed. In four cases, the Merger Regulation was ruled inapplicable pursuant to article 6(1)(a).[2] The great majority of the concentrations were "cleared" after one month as a result of a non-opposition decision pursuant to article 6(1)(b). In five cases, the Commission initially raised serious doubts and decided to open the four-month review procedure under article 6(1)(c). Subsequently, four concentrations were declared compatible with the Common Market under article 8(2), with some cases being subject to obligations. By the end of November 1991, one concentration had been prohibited pursuant to article 8(3) in conjunction with article 2(3). Of these, U.S. firms were involved in ten cases and Japanese firms in four.[3]

1. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990) [hereinafter Merger Regulation].

2. Articles without references refer to the Merger Regulation.

3. Decisions of the Commission under article 8 are published in their entirety, including the grounds for decision, in the Official Journal of the European Communities. So far five decisions have been published: Aérospatiale-Alenia/de Havilland, O.J. L 334/42 (1991); Varta/Bosch, O.J. L 320/26 (1991); Tetra Pak/Alfa-Laval, O.J. L 290/35 (1991); Magneti Marelli/CEAc, O.J. L 222/38 (1991), Common Mkt. Rep.

The focus of the Commission's activity has been on the definition of a concentration pursuant to article 3 and on the substantive appraisal of concentrations pursuant to article 2. On the basis of the decisions issued within the period under examination, it is possible to discern an emerging administrative practice. Additionally, initial developments of interest are apparent in other areas, such as the notification requirement, thresholds and various procedural matters.

I. *SCOPE OF APPLICATION*

A. *Concentrations with a Community Dimension*

The constitutive element of "Community dimension" in article 1(2) is, in practice, straightforward.[4] In the case of the notification of a joint venture, it is sufficient if each of at least two parent companies realize an aggregate Community-wide turnover of more than 250 million ECU. Whether the joint venture achieves this threshold is immaterial.[5] A concentration may still have Community-wide significance if one of the undertakings concerned realizes two-thirds of its Community-wide turnover in one Member State.[6]

Under article 5(1)(2), the definition of Community-wide turnover and turnover in a Member State is based on the domicile of the recipient of the goods or services. Thus imports to the EC from non-Member States qualify, whereas exports from the EC to non-Member States do not.[7]

(CCH) [1991] 2 CEC 2146; Alcatel/Telettra, O.J. L 122/48 (1991), [1991] 4 C.M.L.R. 778.

Decisions under article 6(1)(a) and (b) are merely announced by a brief notice in the Official Journal, Series C. Parties showing sufficient interest may request a copy of these decisions, including the grounds for decision, from the Commission.

4. *See* Barry E. Hawk, *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, 59 ANTITRUST L.J. 195 (1990).

5. *See* Dräger/IBM/HMP, slip op. ¶ 3 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817; Baxter/Nestlé/Salvia, slip op. ¶ 4 (Eur. Comm'n Feb. 6, 1991), *cited in* O.J. C 37/11 (1991), [1991] 4 C.M.L.R. 245.

6. *Cf.* Nissan/R. Nissan, slip op. ¶ 3 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 181/21 (1991), [1991] 4 C.M.L.R. 581; Mitsubishi/UCAR, slip op. ¶ 3 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

7. *See* Hans-Jörg Niemeyer, *Die Europäische Fusionskontrollverordnung*, *in* SONDERVERÖFFENTLICHUNGEN ZUM RECHT DER INTERNATIONALEN WIRTSCHAFT 12 (1991).

B. *Calculation of Turnover*

Under article 5(1), turnover is calculated on the basis of the preceding complete financial year based on the notification date. If at the time of notification such figures are not yet available, the Commission utilizes the figures for the previous financial year.[8] Turnover must be stated in ECU and calculated according to the average exchange rate for the year under Form CO Relating to the Notification of a Concentration Pursuant to Council Regulation No. 4064/89 ("Form CO").[9] The Commission also accepts year-end exchange rates.

With regard to the acquisition of shares in companies, to assess Community dimension the turnover of the acquiror and of the acquired company must be added together.[10] The seller's turnover is not included. An asset acquisition, the acquisition of a part or parts of an undertaking, is subject to the same rule. The sole basis is therefore the turnover of the operation or the asset sold, and not the aggregate turnover of the seller. The basis has been expressly stated by the Commission with reference to article 5(2).[11] In the case of a formation of a joint venture, the entire turnover of the parent companies and the joint venture must be added together.[12]

Under article 5(4) of the Merger Regulation, calculation of aggregate turnover must take into account not just the turnover of the parties, but also that of undertakings affiliated with them. This calculation applies to all group companies that control or are controlled by the undertaking concerned. Such control does not require, however, an absolute majority of the capital or voting rights. Thus, for example, a share of 43.7 percent is sufficient, provided that remaining shares are widely dispersed and all board members were appointed by the share-

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8. *See* ASKO/Jacobs/Adia, slip op. ¶ 5 (Eur. Comm'n May 16, 1991) (providing for notification in April), *cited in* O.J. C 132/13 (1991); Fiat Geotech/Ford New Holland, slip op. ¶¶ 5-6 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

9. Form CO Relating to the Notification of a Concentration Pursuant to Council Regulation No. 4064/89, § D, O.J. L 219/11, at 12 (1990) [hereinafter Form CO].

10. *Cf.* Otto/Grattan, slip op. ¶¶ 3-4 (Eur. Comm'n Mar. 21, 1991), *cited in* O.J. C 93/6 (1991).

11. Promodes/Dirsa, slip op. ¶ 4 (Eur. Comm'n Dec. 17, 1990), *cited in* O.J. C 321/16 (1990), [1991] 4 C.M.L.R. 8.

12. *Cf.* Varta/Bosch, O.J. L 320/26, at 27, ¶ 6 (1991).

holder.[13] On the other hand, control of 45.19 percent of voting rights as occurred at the last general meeting is insufficient evidence of the power to appoint over half the members of a supervisory board.[14] Consequently, such power presupposes at least a simple majority of the general meeting.[15]

The Commission views article 5(3) simply as a special method for calculating turnover, not as a special threshold clause applicable to insurance companies and banks.[16] Therefore, the general rules of article 5, in particular the affiliation clause, are also applicable to these undertakings. In the Commission's view, the assessment of turnover in the case of insurance undertakings must include not only gross premiums, but also turnover from the real property transactions of their subsidiaries that have been financed through the premium payments of the insured.[17]

II. *DEFINITION OF CONCENTRATION*

A. *Merger*

In addition to the formal merger,[18] in which two previously independent undertakings merge, a merger also covers an "economic merger" under article 3(1)(a).[19] An economic merger is a concentration that occurs between two undertakings without the establishment of a parent and subsidiary rela-

13. *E.g.*, Eridania/ISI, slip op. ¶ 6 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663.

14. Arjomari-Prioux SA/Wiggins Teape Appleton plc, slip op. ¶¶ 5-7 (Eur. Comm'n Dec. 12, 1990), *cited in* O.J. C 321/16 (1990), [1991] 4 C.M.L.R. 854.

15. *Id.*

16. *Cf.* KELT/American Express, slip op. ¶ 4 (Eur. Comm'n Aug. 20, 1991) (banks), *cited in* O.J. C 223/38 (1991), [1991] 4 C.M.L.R. 740; Kyowa/Saitama Banks, slip op. ¶ 4 (Eur. Comm'n Mar. 7, 1991) (banks), *cited in* O.J. C 66/13 (1991), [1991] 4 C.M.L.R. 331; BNP/Dresdner Bank, slip op. ¶ 4 (Eur. Comm'n Feb. 4, 1991) (banks), *cited in* O.J. C 34/20 (1991); Groupe AG/Amev, slip op. ¶¶ 4-5 (Eur. Comm'n Nov. 21, 1990) (insurance companies), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

17. Groupe AG/Amev, slip op. ¶ 3 (Eur. Comm'n Nov. 21, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

18. *See, e.g.*, Kyowa/Saitama Banks, slip op. ¶ 3 (Eur. Comm'n Mar. 7, 1991), *cited in* O.J. C 66/13 (1991), [1991] 4 C.M.L.R. 331.

19. *Cf.* Commission Notice Regarding Concentrative and Cooperative Operations under Council Regulation No. 4064/89, O.J. L 395/1 (1989), on the Control of Concentrations Between Undertakings, O.J. C 203/10, at 14, ¶ 40 (1990) [hereinafter Merger Guidelines].

tionship in the form of a combined group.[20] This merger can be created through cross-shareholdings and requires that undertakings establish a "single economic entity."

In the *Renault/Volvo*[21] decision, the Commission effectively recognized an economic merger subject to the following conditions. First, the undertakings acquire cross-shareholdings of 45 percent, resulting in an almost equal sharing of profits and losses. Second, they set up a joint committee that can make binding decisions. Third, they integrate the main operations of the previously autonomous undertakings. In the Commission's view, this constitutes de facto joint control and irreversible reciprocal dependency.[22]

B. *Acquisition of Control*

The acquisition of control, defined in articles 3(1)(b) and 3(3) as the ability to acquire a decisive influence on the operations of an undertaking, also constitutes a concentration. A decisive influence does not necessarily require possession of a majority of the capital or voting rights. In exceptional cases, however, it can be exercised through a minority interest,[23] such as in the acquisition of 39 percent of the shares.[24] The remainder of the shares must be widely dispersed and the major shareholder must hold the majority at the general meeting.[25]

In the Commission's view, the transition from joint control to sole control and vice-versa constitutes acquisition of control because such modifications affect the "quality" of the controlling influence.[26] The manner in which the control is ex-

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20. *See id.* ¶ 41; *cf.* COMMISSION SEVENTH REPORT ON COMPETITION POLICY ¶ 29 (1978).

21. Slip op. (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

22. *See id.* ¶ 5.

23. *See* Elf/Ertoil, slip op. ¶¶ 7, 11 (Eur. Comm'n Apr. 29, 1991) (denying decisive influence with 20.5 percent), *cited in* O.J. C 124/13 (1991).

24. *See* John Cook & Trevor Soames, *EEC Merger Regulation: A Practical View*, 19 INT'L BUS. LAW. 330 (1991).

25. Arjomari-Prioux SA/Wiggins Teape Appleton plc, slip op. ¶ 4 (Eur. Comm'n Dec. 12, 1990) (describing instance where 107,000 shareholders held remaining shares, but only three shareholders each held over 3 percent of total equity), *cited in* O.J. C 321/16 (1990), [1991] 4 C.M.L.R. 854.

26. *See* Eridania/ISI, slip op. ¶ 4 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; Péchiney/Usinor-Sacilor, slip op. ¶ 3 (Eur.

ercised is immaterial; control can be created, for example, through an exclusive purchasing agreement between a producer and its supplier, provided that the supplier is bound exclusively to the producer.[27]

C. *Joint Ventures*

The majority of notifications has related to joint ventures. The Commission has ruled that only a very small number of the joint ventures notified were cooperative joint ventures and therefore not concentrations under article 3. This is a surprising development, given the particularly strict constitutive requirements for a concentrative joint venture in the Commission's Notice Regarding the Concentrative and Cooperative Operations under Council Regulation No. 4064/89 (the "Merger Guidelines").[28]

1. Joint Control

Under article 3(2), a joint venture must be controlled jointly by at least two parent companies. The basis for such joint control is immaterial. Joint control always exists where there is equal shareholding with equal voting rights, and it need not be established by express agreement.[29]

Where there are no equal voting rights, such as, for example, where one company holds only 26 percent of a venture's votes,[30] such joint control must be based on the factual and

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Comm'n June 24, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; ASKO/Omni, slip op. ¶ 5 (Eur. Comm'n Feb. 21, 1991), *cited in* O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330; ICI/Tioxide, slip op. ¶¶ 1-4 (Eur. Comm'n Nov. 28, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

27. *See* RVI/VBC/Heuliez, slip op. ¶¶ 4-5 (Eur. Comm'n June 3, 1991) (controlling influence was based both on exclusive purchasing agreement and on interest of 9 percent in supplier undertaking), *cited in* O.J. C 149/15 (1991).

28. Merger Guidelines, *supra* note 19, O.J. C 203/10 (1990).

29. *See* Dräger/IBM/HMP, slip op. ¶ 4 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817; ASKO/Omni, slip op. ¶ 3 (Eur. Comm'n Feb. 21, 1991), *cited in* O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330; Mitsubishi/UCAR, slip op. ¶ 5 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245; Groupe AG/Amev, slip op. ¶ 1 (Eur. Comm'n Nov. 21, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

30. *See* Lyonnaise des Eaux Dumez SA/Hans Brochier GmbH & Co. KG, slip op. ¶ 4 (Eur. Comm'n July 11, 1991), *cited in* O.J. C 188/20 (1991), [1991] 4 C.M.L.R. 663; Conagra/IDEA, slip op. ¶¶ 5, 10 (Eur. Comm'n May 30, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580.

legal circumstances. The Commission's criterion is based on whether the minority company is accorded rights beyond the normal protection of a minority shareholder's interests in the EC Member States, so that important decisions are subject to the shareholder's consent.[31] The minority shareholder's influence can be secured if the shareholder is entitled to appoint half of the members of the managing bodies.[32] The criterion otherwise will be whether the shareholder, for example, can block strategically important decisions, budget approvals, authorization of major investments, or decisions on profit allocation.[33]

2. Concentrative Joint Ventures

The application of the Merger Regulation to a joint venture is subject to a positive and a negative "condition" pursuant to subparagraph 2 of article 3(2), in conjunction with paragraph 15 of the Merger Guidelines.[34]

a. Positive Condition

The joint venture must perform all the functions of an au-

31. *See* Elf/Enterprise, slip op. ¶ 4 (Eur. Comm'n July 24, 1991), *cited in* O.J. C 203/14 (1991); Lyonnaise des Eaux Dumez SA/Hans Brochier GmbH & Co. KG, slip op. ¶ 4 (Eur. Comm'n July 11, 1991), *cited in* O.J. C 188/20 (1991), [1991] 4 C.M.L.R. 663; Péchiney/Usinor-Sacilor, slip op. ¶ 7 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; Conagra/IDEA, slip op. ¶ 6 (Eur. Comm'n May 30, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; *see also* Eridania/ISI, slip op. ¶ 5 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; Usinor/ASD, slip op. ¶ 4 (Eur. Comm'n Apr. 29, 1991), *cited in* O.J. C 193/34 (1991), [1991] 4 C.M.L.R. 663.

32. Apollinaris/Schweppes, slip op. ¶ 6 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 203/14 (1991); Péchiney/Usinor-Sacilor, slip op. ¶ 7 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; Aérospatiale/MBB, slip op. ¶ 1 (Eur. Comm'n Feb. 25, 1991), *cited in* O.J. C 59/13 (1991); BNP/Dresdner Bank, slip op. ¶ 3 (Eur. Comm'n Feb. 4, 1991), *cited in* O.J. C 34/20 (1991); Mitsubishi/UCAR, slip op. ¶ 5 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

33. Elf/Enterprise, slip op. ¶ 4 (Eur. Comm'n July 24, 1991) (veto right), *cited in* O.J. C 203/14 (1991); Lyonnaise des Eaux Dumez SA/Hans Brochier GmbH & Co. KG, slip op. ¶ 4 (Eur. Comm'n July 11, 1991), *cited in* O.J. C 188/20 (1991), [1991] 4 C.M.L.R. 663; Conagra/IDEA, slip op. ¶¶ 6, 11 (Eur. Comm'n May 30, 1991), *cited in* O.J. C 175/18 (1991); Aérospatiale/MBB, slip op. ¶ 1 (Eur. Comm'n Feb. 25, 1991), *cited in* O.J. C 59/13 (1991); ASKO/Omni, slip op. ¶ 3 (Eur. Comm'n Feb. 21, 1991), *cited in* O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330; *see* Varta/Bosch, O.J. L 320/26, at 26, ¶ 3 (1991).

34. *See* Merger Guidelines, *supra* note 19, O.J. C 203/10, at 11, ¶ 15 (1990).

tonomous economic entity on a lasting basis. This is always the case if the parent companies invest their business assets in the joint venture and continue to exist solely as pure financial holding companies.[35] It is also sufficient if the parent companies integrate specific operations in the joint venture, such as product-related research and development ("R & D"), production facilities, and sales and marketing departments. In addition, the employees of the parent companies in these operations must be employed in the joint venture, and all important contracts, official approval, and patents or trademarks must be assigned or licensed on a lasting basis to the joint venture.[36] It is immaterial whether the joint venture sells a portion of its products through the distribution network of a parent company, and the latter operates only as agent of the joint venture.[37] Nor does it matter whether the parent companies continue, to a limited extent, their research activities independently of each other.[38]

On the other hand, no autonomous economic entity will exist if the joint venture merely distributes the products of the parent companies,[39] or if the parent companies merely spin off part of their operations and do not assign their patents and know-how to the joint venture. A mere grant of an exclusive licence subject to termination at any time, or the sale of the products of the joint venture under the trademark of the parent companies, will not constitute an autonomous economic

35. Groupe AG/Amev, slip op. ¶ 1 (Eur. Comm'n Nov. 21, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

36. Varta/Bosch, O.J. L 320/26, at 27, ¶ 5 (1991); Dräger/IBM/HMP, slip op. ¶ 7 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817; Péchiney/Usinor-Sacilor, slip op. ¶ 8 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; Elf/BC/Cepsa, slip op. ¶ 6 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; Sanofi/Sterling Drug, slip op. ¶ 7 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Aérospatiale/MBB, slip op. ¶ 3 (Eur. Comm'n Feb. 25, 1991), *cited in* O.J. C 59/13 (1991); BNP/Dresdner Bank, slip op. ¶ 5 (Eur. Comm'n Feb. 4, 1991), *cited in* O.J. C 34/20 (1991); Mitsubishi/UCAR, slip op. ¶ 5 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991).

37. Varta/Bosch, O.J. L 320/26, at 27, ¶ 5 (1991); Mitsubishi/UCAR, slip op. ¶ 8 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

38. Sanofi/Sterling Drug, slip op. ¶ 7 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

39. Baxter/Nestlé/Salvia, slip op. ¶¶ 6, 8 (Eur. Comm'n Feb. 6, 1991), *cited in* O.J. C 37/11 (1991), [1991] 4 C.M.L.R. 245.

venture.[40] As a rule, in such cases no lasting pooling of the parent companies' operations in the joint venture exists.

b. Negative Condition

Moreover, a joint venture must not involve any coordination of competitive behaviour, whether it be between the parent companies or among them and the joint venture. In its Merger Guidelines, the Commission required that "all the parent companies withdraw entirely and permanently from the [joint venture's] market and do not operate in markets neighbouring those of the [joint venture]."[41] In practice, however, the Commission no longer fully adheres to this complete withdrawal requirement. Thus no adverse effect exists if a parent company continues to operate in the joint venture's market outside the EC,[42] acts as the joint venture's commission agent in the EC or in non-Member States,[43] continues research and development to a limited extent in the area of operation of the joint venture,[44] or continues to operate on a very small scale in the joint venture's "home market," where the joint venture is one of the market leaders.[45]

In a further step, if the parent companies have withdrawn, the Commission examines whether there remains a danger of reentry into the joint venture's market. In the Commission's view, a non-competition clause is evidence that there is no such intention.[46] If the parent companies continue to operate in a neighbouring, upstream or downstream market, there exists

40. *Id.* ¶ 6.

41. Merger Guidelines, *supra* note 19, O.J. C 203/10, at 12, ¶ 20 (1990).

42. Sanofi/Sterling Drug, slip op. ¶ 9 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Mitsubishi/UCAR, slip op. ¶ 8 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

43. Varta/Bosch, O.J. L 320/26, at 27, ¶ 5 (1991); Mitsubishi/UCAR, slip op. ¶ 8 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

44. Sanofi/Sterling Drug, slip op. ¶ 7 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

45. Elf/BC/Cepsa, slip op. ¶ 6 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; Mitsubishi/UCAR, slip op. ¶ 8 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

46. Dräger/IBM/HMP, slip op. ¶ 9 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817; Conagra/IDEA, slip op. ¶ 15 (Eur. Comm'n May 30, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; ASKO/Omni, slip op. ¶ 4 (Eur. Comm'n Feb. 21, 1991), *cited in* O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330; Mitsubishi/UCAR, slip op. ¶ 8 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

no basis for presuming reentry.[47] Moreover, the financial strength or technical and organizational know-how of one or more parent companies is not a sufficient basis to establish potential competition with the joint venture.[48] Thus in order to substantiate a reentry presumption, objective and commercially reasonable motives must be demonstrated.[49]

Where at least one parent company remains in the same product market as the joint venture or in a neighbouring geographic market, coordinated competitive behaviour is indicated.[50] In such cases, the parent companies regularly use the joint venture as an instrument for the coordination of their market behaviour.[51] In the Commission's view, a division of markets and products is very likely, even if such an intention is not expressly agreed to by the parties.[52]

III. *PROCEDURE*

A. *Premerger Notification*

Article 4(1) provides that a concentration with a Community dimension must be notified to the Commission within one week after the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The "agreement" within the meaning of article 4(1) must be legally binding on the parties. A legally binding agreement exists if the parties can no longer withdraw unilaterally from the agreement and if it is intended to create a "relationship" upon which each party can rely.[53] It is immaterial whether the agreement is concluded subject to the consent of the shareholders

47. *See* Varta/Bosch, O.J. L 320/26, at 27, ¶ 5 (1991).

48. Dräger/IBM/HMP, slip op. ¶ 9 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817.

49. *Id.* ¶ 10; Apollinaris/Schweppes, slip op. ¶ 7 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 203/14 (1991); Baxter/Nestlé/Salvia, slip op. ¶ 8 (Eur. Comm'n Feb. 6, 1991), *cited in* O.J. C 37/11 (1991), [1991] 4 C.M.L.R. 245.

50. Elf/Enterprise, slip op. ¶ 6 (Eur. Comm'n July 24, 1991), *cited in* O.J. C 203/14 (1991); Apollinaris/Schweppes, slip op. ¶ 8 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 203/14 (1991); Baxter/Nestlé/Salvia, slip op. ¶¶ 6, 9 (Eur. Comm'n Feb. 6, 1991), *cited in* O.J. C 37/11 (1991), [1991] 4 C.M.L.R. 245.

51. Elf/Enterprise, slip op. ¶ 6 (Eur. Comm'n July 24, 1991), *cited in* O.J. C 203/14 (1991).

52. ICI/Tioxide, slip op. ¶ 6 (Eur. Comm'n Nov. 28, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

53. *Id.*

or the authorization of the EC Commission. If, however, an official authorization necessary for the agreement to be valid is lacking, no agreement within the meaning of article 4(1) exists.[54]

An agreement providing for an option to acquire a majority shareholding does not in itself trigger the notification requirement. The decisive factor is the exercise of the option.[55] The announcement of a public bid triggers the notification requirement even if the offer was rejected by the board of the target company.[56] The Commission also has held that an undertaking that acquires a minority interest, and thereby triggers the requirement under the U.K.'s "City Takeover Code" to issue a public takeover bid for the majority of shares, causes the notification period to begin to run only as of the announcement of such public bid.[57]

Where the Commission finds that a notified operation does not fall within the scope of application of the Merger Regulation, it can treat, pursuant to article 5(1) of Commission Regulation No. 2367/90,[58] the notification as an application for negative clearance or as a notification of an exemption pursuant to Regulation No. 17/62.[59] The parties, however, must request such an inquiry.

B. *Other Points of Procedure*

Article 7(1) provides that prior to notification and within the first three weeks following the notification the concentra-

54. *See* BNP/Dresdner Bank, slip op. ¶ 2 (Eur. Comm'n Feb. 4, 1991), *cited in* O.J. C 34/20 (1991).

55. Elf/Ertoil, slip op. ¶ 1 (Eur. Comm'n Apr. 29, 1991), *cited in* O.J. C 124/13 (1991); *see* Elf/BC/Cepsa, slip op. ¶¶ 1, 4 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580.

56. AT&T/NCR, slip op. ¶ 1 (Eur. Comm'n Jan. 18, 1991), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330; Commission Press Release, IP (91) 48 (Jan. 21, 1991); *see* Usinor/ASD, slip op. ¶ 1 (Eur. Comm'n Apr. 29, 1991), *cited in* O.J. C 193/34 (1991), [1991] 4 C.M.L.R. 663.

57. La Redoute/Empire, slip op. ¶ 3 (Eur. Comm'n Apr. 25, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

58. Commission Regulation No. 2367/90, O.J. L 219/5 (1990).

59. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87; *see* Form CO, *supra* note 9, § 7(2), O.J. L 219/11, at 18 (1990); *see also* Elf/Enterprise, slip op. ¶ 8 (Eur. Comm'n July 24, 1991), *cited in* O.J. C 203/14 (1991); Apollinaris/Schweppes, slip op. ¶ 10 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 203/14 (1991).

tion shall not be put into effect. Despite serious doubts as to the compatibility of the concentration, the Commission will not extend the suspension of a concentration if the parties conclude that the agreement is subject to the suspensive condition of authorization under the Merger Regulation. Only in the *Tetra Pak/Alfa-Laval* decision has the Commission ruled in favor of an extension of the three-week suspension order pursuant to article 7(2).[60] This ruling, however, was lifted before the final decision was issued.[61] The Commission can, pursuant to article 7(4), issue an exemption from suspension if an undertaking has been acquired for the purpose of restructuring and the restructuring operation is commenced immediately.[62]

Thus far there has been only one case in which a Member State, the Federal Republic of Germany, has sent a notice to the Commission under article 9(2). The Commission, however, dealt with the case itself and did not refer the case to the competent national authority, the Federal Cartel Office, pursuant to article 9(3).[63]

After being informed of the Commission's objections, the parties to the concentration have the right of access to the file.[64] The Commission, however, may refuse access to information obtained from competitors, customers or suppliers that contains business secrets. The same policy applies to access to the correspondence between the Commission and the Member States. This practice leads to the question of whether the Commission can base a prohibition decision under article 8(3) on such correspondence and information, or whether the Commission is barred from taking such information into account in its assessment.[65]

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60. Tetra Pak/Alfa-Laval, O.J. L 290/35 (1991).

61. Commission Press Release, IP (91) 698 (July 22, 1991); Commission Press Release, IP (91) 455 (June 23, 1991); Commission Press Release, IP (91) 220 (Mar. 23, 1991).

62. KELT/American Express, slip op. ¶ 7 (Eur. Comm'n Aug. 20, 1991), *cited in* O.J. C 223/38 (1991), [1991] 4 C.M.L.R. 740.

63. Commission Press Release, IP (91) 304 (Dec. 4, 1991). For further details with respect to article 9 of the Merger Regulation, see John Cook & Chris Kerse, *EEC Merger Control*, *in* EUROPEAN COMPETITION LAW MONOGRAPHS 128 (1991).

64. Merger Regulation, *supra* note 1, art. 18(3), O.J. L 257/13, at 23 (1990); *see* Commission Regulation No. 2367/90, art. 12(3), O.J. L 219/5, at 8 (1990).

65. *See* NV Nederlandsche Banden-Industrie Michelin v. Commission, Case 322/81, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282; Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v. Commission, Case 107/82, [1983] E.C.R. 3151, 3192, [1984]

Pursuant to article 18(4), in conjunction with article 15 of Regulation No. 2367/90, third parties can be heard by the Commission if they can demonstrate a sufficient interest. In practice, such third party undertakings are invited to attend the oral hearing of the parties. The Commission informs them in advance in writing of the nature and subject matter of the procedure.[66] This information is limited to the sending of the Commission's press notice relating to the initiation of the proceeding. A copy of the statement of objections is not provided to third persons and they are not given access to the files.

IV. *APPRAISAL OF THE CONCENTRATION*

Concentrations with a "Community dimension" must be assessed as to their compatibility with the Common Market under article 2(1). The central criterion for the assessment, discussed in article 2(2) and 2(3), is the creation or strengthening of a dominant position that would result in a significant impediment of effective competition in the Common Market or in a substantial part of it.

In its decisions, the Commission employs a two-step analysis to determine whether an undertaking that is involved in a concentration creates or strengthens a dominant position. First, the Commission defines the "relevant markets" affected by the concentration in terms of product and geographical markets. Second, it examines the implications of the concentration for these markets.

A. *The Relevant Product Market*

1. Test of Demand Substitutability

The Commission defines the relevant product market primarily on the basis of the "test of demand substitutability." According to this test, a relevant product market comprises all those products or product groups and/or services which are regarded by the consumer as interchangeable or substitutable by reason of their characteristics, prices and intended use.[67]

3 C.M.L.R. 325, 390; Hoffmann-La Roche & Co. AG v. Commission, Case 85/76, [1979] E.C.R. 461, 510-14, [1979] 3 C.M.L.R. 211, 267-70.

66. Commission Regulation No. 2367/90, art. 15(1), O.J. L 219/5, at 9 (1990).

67. *See* Form CO, *supra* note 9, § 5, O.J. L 219/11, at 15 (1990); *see also* Digital/Kienzle, slip op. ¶ 11 (Eur. Comm'n Feb. 22, 1991), *cited in* O.J. C 56/16 (1991),

In practice, the most significant criterion for interchangeability and substitutability is the intended use of the product. Characteristics and price are relevant only to the extent that they affect the intended use. If the main areas of use of a product of groups of products are the same, they are interchangeable.[68] A lack of interchangeability in marginal areas or in exceptional cases is immaterial. Where the product is not substitutable in a majority of cases, it is considered to represent a market of its own.[69]

If the intended use is identical, the heterogeneous nature of the products is immaterial. If, for example, drugs have the same therapeutic qualities, they will belong to the same market notwithstanding differing chemical composition.[70] However, the differing, often technical, nature of a product can affect the intended use. Thus, technical configurations among various product groups and undertakings' different marketing methods argue against interchangeability. In *Renault/Volvo*, for example, the different capabilities of trucks that weigh between five and sixteen tons and trucks that weigh more than sixteen tons provides an obvious example.[71] In such cases, the "technical frontier" will correspond to a "commercial frontier."[72]

An identical product can belong to more than one distinct market if it serves more intended uses, is supplied to different consumer groups or is packaged in different sizes. In such cases, the Commission takes into account, in particular, that the supplier must adapt to the differing requirements of the consumers. It considers quantities supplied, prices, customer specifications, and distribution routes. Thus, for example, the Commission has distinguished separate product markets for starter batteries for initial equipment of new vehicles that are

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[1991] 4 C.M.L.R. 330; Fiat Geotech/Ford New Holland, slip op. ¶ 11 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

68. *Cf.* AT&T/NCR, slip op. ¶ 16 (Eur. Comm'n Jan. 18, 1991) (stating software operating systems usually not substitutable), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330.

69. Eridania/ISI, slip op. (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; VIAG/Continental Can, slip op. ¶¶ 6, 12, 14 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

70. Sanofi/Sterling Drug, slip op. ¶ 12 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

71. Renault/Volvo, slip op. ¶ 10 (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

72. *Id.*

distinct from the replacement and retail markets.[73]

The existence of large price differences between different product groups that in principle are interchangeable may indicate a lack of actual interchangeability. For example, products such as small and medium size computers, and the packaging material of metal, glass or plastics may lack such actual interchangeability.[74]

2. Test of Supply Substitutability

The Commission also may define the relevant product market on the basis of supply substitutability. Based on the European Court of Justice decision in *Europemballage Corp. and Continental Can Co. v. Commission*,[75] the Commission defines suppliers collectively as a market group which through simple adjustment of the production machines and without extra costs can switch to the production of another product.[76] The possibility of "simple production adjustment" indicates a substitutability of various products, and the existence, therefore, of potential competition.[77] Finally, the use of different raw materials, which create varying high production costs for suppliers, provides an argument against interchangeability and the assigning of products to a single market.[78]

B. *The Relevant Geographic Market*

The definition of the relevant geographic market is of pri-

73. *See* Varta/Bosch, O.J. L 320/26, at 27, ¶ 12 (1991); Magneti Marelli/CEAc, O.J. L 222/38, at 39, ¶¶ 8-10 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2147; *see also* Eridania/ISI, slip op. ¶ 16 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; Digital/Kienzle, slip op. ¶ 10 (Eur. Comm'n Feb. 22, 1991), *cited in* O.J. C 56/16 (1991), [1991] 4 C.M.L.R. 330. In the information processing systems sector, the Commission also clearly differentiates between the original equipment market and the replacement market. AT&T/NCR, slip op. ¶ 15 (Eur. Comm'n Jan. 18, 1991), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330.

74. VIAG/Continental Can, slip op. ¶ 12 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Otto/Grattan, slip op. ¶ 13 (Eur. Comm'n Mar. 21, 1991), *cited in* O.J. C 93/6 (1991); Digital/Kienzle, slip op. ¶ 10 (Eur. Comm'n Feb. 22, 1991), *cited in* O.J. C 56/16 (1991), [1991] 4 C.M.L.R. 330.

75. Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199.

76. VIAG/Continental Can, slip op. ¶¶ 13, 44 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

77. *See id.* ¶¶ 13-14; *see also* GLEISS & HIRSCH, COMMON MARKET CARTEL LAW 322-23 (Alfred Gleiss trans., 3d ed. 1981).

78. VIAG/Continental Can, slip op. ¶ 13 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

mary significance in EC merger control and can be decisive for the appraisal of a concentration. The parties to a concentration, as "national champions," frequently may have high market shares in their home country but relatively low market shares in the EC as a whole. If the relevant geographic market is restricted to the territory of the relevant Member State, the danger of prohibition is significantly greater than if a Community-wide market is assumed.

Nonetheless, as a result of existing structures and a competitive situation, a national market may still exist in a single Member State while these conditions cease to exist in the remaining Member States.[79] There is also the possibility that more than one Member State or parts of a Member State together may form a relevant geographic market, such as Germany, the Benelux countries, and northern France.[80]

The relevant geographical market is restricted to the territory of the EC. Under article 2, the Commission merely must assess whether the concentration creates or strengthens a market-dominating position in the Common Market or in a substantial part of it. From an economic point of view, the assessment does not exclude the possibility that for a specific product the relevant market may be the world market. Competitive pressure from outside the Community must then be considered when assessing the market-dominating position.[81] A question central to the definition of the geographic market is whether a Community-wide market is to be assumed or whether the relevant market must be restricted to a part thereof, usually a Member State. The geographic market consequently will depend on the competitive conditions in the relevant geographical areas and Member States. According to

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79. Fiat Geotech/Ford New Holland, slip op. ¶ 24 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

80. Eridania/ISI, slip op. ¶ 25 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; VIAG/Continental Can, slip op. ¶ 15 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

81. Aérospatiale-Alenia/de Havilland, O.J. L 334/42, at 47, ¶ 20 (1991) ("The commuter markets from an economic point of view are considered to be world markets. There are no tangible barriers to the importation of these aircraft into the Community and there are negligible costs of transportation."); *see* Aérospatiale/MBB, slip op. ¶ 18 (Eur. Comm'n Feb. 25, 1991), *cited in* O.J. C 59/13 (1991); *see also* Elf/Occidental, slip op. ¶¶ 8, 11 (Eur. Comm'n June 13, 1991), *cited in* O.J. C 160/20 (1991).

the *Varta/Bosch*[82] decision, there are two indicators of appreciable differences in the competitive conditions within the EC. First, there are substantially differing market shares of the undertakings in the different Member States.[83] Second, substantial price differences exist.[84] Therefore, these markets are separate geographical and, frequently, national markets.

If such differences are found to exist, the Commission establishes their causes by means of a comparison of the market structure that includes the nature and characteristics of the product, buyer preferences, the structure of supply and demand, and barriers to market entry. It then proceeds to make an overall evaluation. The Commission clearly applies the criteria of article 9(7) regarding the geographical reference market and the definition of the relevant geographic market in section 5 of Form CO.[85]

1. Market Share and Price Differences

The Commission will find substantial market share differences if the national producers hold the largest market shares in their "home market." In addition, national producers must hold significantly higher market shares at home than in the foreign markets.[86] To establish price differences between various areas of the EC, the Commission compares the sales prices of the producers or suppliers for the same product. The decisive factor is the effective net price for re-sellers or end-purchasers, not the producers' price lists.[87] Price differences of 100 per-

82. O.J. L 320/26 (1991).
83. *Id.* at 28, ¶ 18.
84. *Id.*
85. Form CO, *supra* note 9, § 5, O.J. L 219/11, at 15 (1990) ("The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in those areas."); *see* Varta/Bosch, O.J. L 320/26, at 28, ¶ 17 (1991); Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.
86. Aérospatiale/MBB, slip op. ¶ 12 (Eur. Comm'n Feb. 25, 1991), *cited in* O.J. C 59/13 (1991); *see* Varta/Bosch, O.J. L 320/26, at 28, ¶ 18 (1991); Magneti Marelli/ CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.
87. Fiat Geotech/Ford New Holland, slip op. (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

cent are considered substantial.[88] The Commission also takes into account the fact that suppliers determine sale prices differently from country to country.[89] The absence of large price differences between the various Member States and no national variation in the price policy of undertakings indicates that sufficiently homogeneous competitive conditions exist in the EC.[90]

2. Nature and Characteristics of the Goods and Services

If the nature and characteristics of the product restrict its mobility, the relevant geographic market may be narrower than the overall territory of the Common Market. This may be the case if different product lines are offered among the different Member States, if discrepancies of quality exist,[91] if different local specification is required,[92] or if high transport costs make delivery over long distances unfeasible.[93] If on the other hand homogeneous products whose transport does not entail high costs are involved, as a rule a national market will not be justified.

3. Buyer Preferences

In particular, national buying preferences, or preferences for national markets and different brands in various Member

88. Magneti Marelli/CEAc, O.J. L. 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.

89. *Id.*; *see* La Redoute/Empire, slip op. ¶ 12 (Eur. Comm'n Apr. 25, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Otto/Grattan, slip op. ¶ 11 (Eur. Comm'n Mar. 21, 1991), *cited in* O.J. C 93/6 (1991).

90. Eridania/ISI, slip op. ¶ 21 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; Mitsubishi/UCAR, slip op. ¶ 10 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245; ICI/Tioxide, slip op. ¶ 12 (Eur. Comm'n Nov. 28, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

91. *See, e.g.*, Varta/Bosch, O.J. L 320/26, at 28, ¶¶ 20, 21 (1991).

92. *See, e.g.*, Renault/Volvo, slip op. ¶ 17 (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

93. VIAG/Continental Can, slip op. ¶ 16 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991); *see* KELT/American Express, slip op. ¶ 9 (Eur. Comm'n Aug. 20, 1991), *cited in* O.J. C 223/38 (1991), [1991] 4 C.M.L.R. 740; Elf/BC/Cepsa, slip op. ¶ 13 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; Elf/Occidental, slip op. ¶¶ 8, 11 (Eur. Comm'n June 13, 1991), *cited in* O.J. C 160/20 (1991); Usinor/ASD, slip op. ¶ 8 (Eur. Comm'n Apr. 29, 1991), *cited in* O.J. C 193/34 (1991).

States, may suggest a narrow market definition.[94] In the food distribution sector, for example, the existence of local markets is assumed because consumers only seek food outlets in their local areas.[95] As a rule, however, the geographic market will comprise the territory of the Community. Thus, a Community-wide market will exist when the customers of a product are experienced industrial undertakings that purchase from suppliers from various states and with no significant preferences for national products.[96]

4. Structure of Supply and Demand

The fact that the concentration of supply varies considerably from one Member State to another can be a significant factor. In the *Varta/Bosch* decision, the Commission argued that the greater the concentration of supply in one market the more difficult it will be for actual or potential competitors to increase their market shares or to penetrate a market.[97] If, on the other hand, all the important producers are present in all major Member States, a balanced supply structure in the Community will prevail.[98]

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94. Renault/Volvo, slip op. ¶ 17 (Eur. Comm'n Nov. 7, 1990) ("[The bus] market is still characterized by strong national buying preferences which constitute a high barrier of entry for competitors from other Member States. In addition, there are local specification requirements which can considerably impede transferability of supply."), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906; *see* Varta/Bosch, O.J. L 320/26, at 28, ¶ 17 (1991); Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49; Elf/BC/Cepsa, slip op. ¶ 13 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; Cargill/Unilever, slip op. ¶ 3(1)(b) (Eur. Comm'n Dec. 20, 1990), *cited in* O.J. C 327/14 (1990).

95. Promodes/Dirsa, slip op. ¶ 8 (Eur. Comm'n Dec. 17, 1990), *cited in* O.J. C 321/16 (1990).

96. Péchiney/Usinor-Sacilor, slip op. ¶ 12 (Eur. Comm'n June 24, 1991) ("[M]ême si l'on constate que les principaux utilisateurs—les constructeurs d'automobiles—s'approvisionnent pour une part importante auprès de fournisseurs localisés près de leurs sites de production, leur dimension européenne et la recherche d'une politique de diversification de leurs achats les amènent à s'approvisionner auprès d'entreprises situées dans divers pays de la Communauté européenne."), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; AT&T/NCR, slip op. ¶ 13 (Eur. Comm'n Jan. 28, 1991), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330; Mitsubishi/UCAR, slip op. ¶ 10 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

97. Varta/Bosch, O.J. L 320/26, at 30, ¶ 31 (1991); *see* Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.

98. *See, e.g.*, AT&T/NCR, slip op. ¶ 6 (Eur. Comm'n Jan. 18, 1991) ("PCs and

Differences in the structure of demand are important indicators of differing competitive conditions. Differences in the segmentation, significance and nature of the distribution channels can be significant.[99] For example, whether distribution occurs by means of independent dealers, commercial agents or commission agents as opposed to direct distribution will entail competitive differences.[100]

5. Barriers to Entry

Market-related barriers to entry can result from state intervention when state monopolies which are customers only consider domestic suppliers for their procurement.[101] Barriers also can result from a state-regulated monopoly system, as in the case of oil products, that prescribes reference quotas for domestic suppliers and that permits the import of the monopoly product only on a very restricted scale.[102]

In the services area, barriers to market entry exist if freedom to establish and provide cross-border services has not been fully effective as a result of differing supervisory and control regulations.[103] Customs duties, quotas, the prohibition of trademarks, or the statutory restriction of the distribution of a product through specific distribution channels can restrict entry to national markets. In addition, non-tariff barriers such as type approvals, different product standards, or state price fixing in individual Member States may create market entry barri-

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small multi-use computers are to be considered on a Community-wide level. All major manufacturers are represented in all Member States, and there are no price differences of major significance between the Member States."), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330.

99. Varta/Bosch, O.J. L 320/26, at 29, ¶ 28 (1991).

100. *Id.* ¶ 29; *see* Magneti Marelli/CEAc, O.J. L 222/38, at 39, ¶ 11 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148; La Redoute/Empire, slip op. ¶ 13 (Eur. Comm'n Apr. 25, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

101. *See, e.g.*, Alcatel/Telettra, O.J. L 122/48, at 52, ¶ 30 (1991), [1991] 4 C.M.L.R. 778, 785. A different situation applies if undertakings from all Member States participate in a public tender for a major project. Lyonnaise des Eaux Dumez SA/Hans Brochier GmbH & Co. KG, slip op. ¶ 9 (Eur. Comm'n July 11, 1991), *cited in* O.J. C 188/20 (1991), [1991] 4 C.M.L.R. 663.

102. Elf/Ertoil, slip op. ¶ 14 (Eur. Comm'n Apr. 29, 1991), *cited in* O.J. C 124/13 (1991); *see* BP/Petromed, slip op. ¶ 6 (Eur. Comm'n July 29, 1991), *cited in* O.J. C 208/24 (1991), [1991] 4 C.M.L.R. 817; Elf/BC/Cepsa, slip op. ¶ 11 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580.

103. For the insurance sector, see Groupe AG/Amev, slip op. ¶ 12 (Eur. Comm'n Nov. 21, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

ers.[104] In such cases, the national territory may have to be considered the relevant geographic market. A national market, however, will only be justified if such barriers cannot be overcome at an acceptable cost.

Finally, the Commission affirms the existence of the national market if there are "economic" barriers to market entry, despite the absence of any specific legal barriers in the EC. Examples of economic barriers include high supply concentrations,[105] the absence of European-wide brand names,[106] significant differences in market development such as saturated as opposed to growing markets,[107] and the effects of linguistic differences or additional costs and delays in international dispatch that render cross-border deliveries economically and practically unfeasible.[108] Market barriers also result from close contractual relations between supplier and customer, such as just-in-time delivery,[109] or a tight distribution network maintained by undertakings in their home market in the case of technically sophisticated products that require a rapid after-sales service.[110] An economic barrier can also be created by vertical integration as a result of the minority shareholdings a customer may hold in his suppliers.[111] The Commission measures the existence of economic barriers to market entry in terms of, among other things, the scale of actual imports and

104. Elf/BC/Cepsa, slip op. ¶ 14 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; *see* Varta/Bosch, O.J. L 320/26, at 30, ¶ 31 (1991); Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49; Alcatel/Telettra, O.J. L 122/48, at 52, ¶ 29 (1991), [1991] 4 C.M.L.R. 778, 785; Eridania/ISI, slip op. ¶ 20 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991); Sanofi/Sterling Drug, slip op. ¶ 17 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Fiat Geotech/Ford New Holland, slip op. ¶ 20 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

105. Varta/Bosch, O.J. L 320/26, at 30, ¶ 31 (1991).

106. Sanofi/Sterling Drug, slip op. ¶ 19 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

107. La Redoute/Empire, slip op. ¶ 12 (Eur. Comm'n Apr. 25, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

108. Otto/Grattan, slip op. ¶ 11 (Eur. Comm'n Mar. 21, 1991), *cited in* O.J. C 93/6 (1991).

109. VIAG/Continental Can, slip op. ¶ 15 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

110. Fiat Geotech/Ford New Holland, slip op. ¶¶ 20, 24 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

111. Alcatel/Telettra, O.J. L 122/48, at 52, ¶ 34 (1991), [1991] 4 C.M.L.R. 778, 786.

cross-border deliveries.[112]

6. Future Market Development

In defining the relevant geographic market, the Commission considers not only present competitive conditions, but also the likely development of the market. Here the correct criterion is economic reality, not "wishful thinking."[113] The objective of completing the internal market as of December 31, 1992[114] does not of itself mean that as of 1993 national markets will cease to exist. On the other hand, the economic coalescence of national markets and the disappearance of obstacles to trade in the context of the internal market must be taken into account in defining the geographic market. While presently there are still signs of national markets, the Commission must examine on a dynamic basis whether these markets are transforming into EC-wide markets. This must include, for example, whether state monopolies are liberalised,[115] whether different technical standards are harmonised,[116] whether undertakings increasingly diversify their operations on an international level,[117] and therefore, that the legal and economic barriers that once isolated national markets and prevented free cross-border competition will disappear. These changes will enable undertakings to offer their goods on a cross-border basis and will justify the assumption of a European Community

112. Varta/Bosch, O.J. L 320/26, at 32, ¶ 43 (1991); *see* Eridania/ISI, slip op. ¶ 21 (Eur. Comm'n July 30, 1991) (commenting on scale of imports), *cited in* O.J. C 204/12 (1991).

113. Claus-Dieter Ehlermann, *Die Europäische Fusionkontrolle—Erste Erfahrungen*, 1991 WIRTSCHAFT UND WETTBEWERB (WuW) 535, 541.

114. *See* Single European Act, art. 13, O.J. L 169/1 (1987) (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 8(a), 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958)).

115. BP/Petromed, slip op. ¶ 9 (Eur. Comm'n July 29, 1991) (discussing recent entry of Elf Aquitaine into capital of Spanish oil refining monopoly), *cited in* O.J. C 208/24 (1991), [1991] 4 C.M.L.R. 817; Elf/BC/Cepsa, slip op. ¶ 12 (Eur. Comm'n June 18, 1991) ("L'imminente échéance de la période d'adaptation du monopole pétrolier espagnol, prévue dans l'Acte d'Adhésion pour le 1.1.1992, n'est pas de nature à avoir une incidence prévisible à court et à moyen terme . . . ."), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580.

116. *See* Alcatel/Telettra, O.J. L 122/48, at 52, ¶ 31 (1991), [1991] 4 C.M.L.R. 778, 786 (stating that replacement of analogic technology by digital will erode some technical barriers in medium to long term).

117. Péchiney/Usinor-Sacilor, slip op. ¶ 12 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580.

market. In this context, the Commission is not primarily concerned with the theoretical possibility of competition. In the Commission's opinion, of greater importance with regard to transitional markets is whether these markets will become a single Community-wide market in the near future as a result of actual market conditions.[118]

C. *Creation or Strengthening of a Market Dominating Position*

Within the framework used by the Commission to appraise whether a concentration is compatible with the Common Market, the Commission must examine the future effects of the concentration. This requires that the Commission under article 2(2) and (3) forecast whether the concentration will create or strengthen a dominant position in the relevant markets.

Article 2(1) lists a number of market and undertaking related criteria to be considered by the Commission in determining its forecast. The most important of these is the market position of the undertakings participating in the concentration. Market position is always the subject matter of the examination. The remaining factors are used by the Commission in its assessment only if relevant in the individual case. Interestingly, the Commission has not yet once referred to the criteria of "development of technical and economic progress" that was so controversial prior to the Merger Regulation's entry into force.[119]

1. Market Position

The current market position of an undertaking is indicated primarily by its market share. Market share is therefore highly

118. *See* BP/Petromed, slip op. ¶ 10 (Eur. Comm'n July 29, 1991), *cited in* O.J. C 208/24 (1991), [1991] 4 C.M.L.R. 817; Elf/BC/Cepsa, slip op. ¶ 12 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; *see also* Alcatel/Telettra, O.J. L 122/48, at 52, ¶ 30 (1991), [1991] 4 C.M.L.R. 778, 786; Fiat Geotech/Ford New Holland, slip op. ¶ 22 (Eur. Comm'n Feb. 8, 1991) ("Nell'insieme questi fattori indicano in genere che mentre i mercati nazionali con tutta probabilità non sono ancora interamente scomparsi, specialmente in alcuni Stati membri . . . la loro importanza relativa rispetto ad un emergente mercato comunitario è in fase di declino."), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330; Ehlermann, *supra* note 113, at 541.

119. On this criterion, see Niemeyer, *supra* note 7, at 25, and Cook & Kerse, *supra* note 63, at 78.

significant. The Commission determines the market volume and the market share of undertakings not by quantity or number of units but by value.[120] The basis for the calculation of market volume and market share is sales in the geographically relevant market less exports plus imports.[121] The market shares of the undertakings, and of their group companies, must be added.

The Merger Regulation does not provide any thresholds beyond which market domination is presumed to apply. Substantial market shares, however, will indicate market control. The higher such shares, the more carefully the Commission examines the concentration, although market share clearly is not the sole decisive factor. The Commission has never established or denied the presence of a dominant position solely on the basis of a specific market share, and it has always investigated further aspects. Thus, very high market shares, such as those over 70 percent, indicate the presence of market-dominating positions or represent a basis for such a presumption.[122] In an individual case, however, the presumption can be rebutted.[123] It is questionable whether this practice can be maintained after the European Court of Justice's ruling in *AKZO Chemie BV v. Commission.*[124] Under *AKZO*, a market share of 50 percent automatically establishes market domination.[125] In the Commission's view, a dominant position already can apply in the case of market shares of 40 percent and above, provided that the market share gap *vis-à-vis* the next largest competitor is considerable and additional factors indicate market

120. Fiat Geotech/Ford New Holland, slip op. ¶¶ 17, 23 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

121. Form CO, *supra* note 9, § 5, O.J. L 219/11, at 15 (1990).

122. *See, e.g.*, Alcatel/Telettra, O.J. L 122/48, at 53, ¶ 37 (1991), [1991] 4 C.M.L.R. 778, 787 (up to 83 percent market share); Sanofi/Sterling Drug, slip op. ¶ 24 (Eur. Comm'n June 10, 1991) (up to 74 percent share), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Renault/Volvo, slip op. ¶ 18 (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990) (69.7 percent share); *see also* Hoffmann-La Roche & Co. AG v. Commission, Case 85/76, [1979] E.C.R. 461, 521, [1979] 3 C.M.L.R. 211, 275.

123. Alcatel/Telettra, O.J. L 122/48, at 53, ¶ 37 (1991), [1991] 4 C.M.L.R. 778, 787 (83 percent market share); Sanofi/Sterling Drug, slip op. ¶ 24 (Eur. Comm'n June 10, 1991) (up to 74 percent share), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Renault/Volvo, slip op. ¶ 18 (Eur. Comm'n Nov. 7, 1990) (69.7 percent share), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

124. Case C-62/86, slip op. ¶ 60 (Eur. Ct. J. July 3, 1991) (not yet reported).

125. *See id.*

domination.[126]

In *Aérospatiale-Alenia/de Havilland*,[127] the first prohibition decision under the Merger Regulation, the Commission found that the proposed merger between two aircraft producers, ATR, the joint venture between Aérospatiale of France and Alenia of Italy, and de Havilland of Canada would give the producers 66 percent of the EC market for turbo-prop commuter aircraft and 50 percent of the world market for turbo-prop commuter aircraft, thus creating a dominant market position.[128]

The Commission declared the proposed venture incompatible with the Common Market.[129] The Commission based its analysis on the fact that ATR/de Havilland's combined market share would have been between two and three times higher than that of the nearest remaining competitor, and that substantially smaller competitors in this market would not have been able to challenge their position.[130]

On the other hand, the Commission has declined to find a dominant position where market shares have been between 40 and 60 percent,[131] on the basis of intense price competition[132]

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126. *See* Varta/Bosch, O.J. L 320/26, at 30, ¶ 32 (1991); Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49; Sanofi/Sterling Drug, slip op. ¶ 24 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Mitsubishi/UCAR, slip op. ¶ 13 (Eur. Comm'n Jan. 4, 1991), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245.

127. O.J. L 334/42, at 49, ¶ 25 n.1 (1991).

128. *Id.* ¶ 26 ("ATR and [de Havilland] after a merger would obtain worldwide a share of about 50% of the overall commuter market and about 65% in the Community.").

129. *Id.* art. 1, at 61.

130. *Id.* at 49-50, 54, 56, ¶¶ 25, 29, 42, 51; *see* Commission Press Release, IP (91) 896 (Oct. 2, 1991).

131. Varta/Bosch, O.J. L 320/26, at 30, ¶ 32 (1991) (44 percent); Eridania/ISI, slip op. ¶¶ 26, 28 (Eur. Comm'n July 30, 1991) (over 50 percent), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; Lyonnaise des Eaux Dumez SA/Hans Brochier GmbH & Co. KG, slip op. ¶ 16 (Eur. Comm'n July 11, 1991) (50 percent), *cited in* O.J. C 188/20 (1991), [1991] 4 C.M.L.R. 663; Elf/BC/Cepsa, slip op. ¶¶ 15, 18 (Eur. Comm'n June 18, 1991) (42 percent), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; Sanofi/Sterling Drug, slip op. ¶ 24 (Eur. Comm'n June 10, 1991) (between 45 and 74 percent), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Fiat Geotech/Ford New Holland, slip op. ¶ 27 (Eur. Comm'n Feb. 8, 1991) (58 percent of Italian market), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330; Mitsubishi/UCAR, slip op. ¶¶ 12, 13 (Eur. Comm'n Jan. 4, 1991) (40 percent), *cited in* O.J. C 5/7 (1991), [1991] 4 C.M.L.R. 245; Renault/Volvo, slip op. ¶¶ 12-13 (Eur. Comm'n Nov. 7,

or a decline in demand or sales in the market concerned.[133] In cases of market shares under 40 percent, the Commission declined to find a market-dominating position in the presence of financially powerful competitors with similarly high shares and large production capacities or low degrees of concentration in the market concerned.[134] As to the "compatibility presumption" in recital 15 of the Merger Regulation,[135] the Commission thus far has deemed that mergers with a combined market share of less than 25 percent *a priori* are compatible with the Common Market.[136]

The significance of market shares also depends on their development. Market share losses, even in the case of relatively high market shares, indicate effective competition.[137] This applies *a fortiori* if the losses were strongest just before the concentration.[138] The current phase of the market also affects the significance of the market shares. High market shares during an expansion phase are not exceptional, and they do not necessarily indicate market power, particularly if a change of market leadership, or ongoing market share fluctuations and competitive innovation, are taking place.[139] On the other hand, during a stagnation phase market share in conjunction

1990) (for the intermediate range of trucks, 54 percent in France), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

132. *E.g.*, Eridania/ISI, slip op. ¶ 16 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663; Renault/Volvo, slip op. ¶ 14 (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

133. Fiat Geotech/Ford New Holland, slip op. ¶ 18 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

134. *See id.* ¶ 23 (34 percent); *see also* Elf/BC/Cepsa, slip op. ¶ 15 (Eur. Comm'n June 18, 1991) (between 20 and 40 percent), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; Digital/Kienzle, slip op. ¶ 19 (Eur. Comm'n Feb. 22, 1991) (22 percent), *cited in* O.J. C 56/16 (1991), [1991] 4 C.M.L.R. 330; Cargill/Unilever, slip op. ¶ 3 (Eur. Comm'n Dec. 20, 1990) (26 percent or less in each of several markets), *cited in* O.J. C 327/14 (1990).

135. Merger Regulation, *supra* note 1, recital 15, O.J. L 257/13, at 15 (1990).

136. *See* Renault/Volvo, slip op. ¶¶ 12-14 (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

137. *See* Fiat Geotech/Ford New Holland, slip op. ¶¶ 18, 28 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

138. *See id.* ¶ 28.

139. *See* VIAG/Continental Can, slip op. ¶ 38 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Digital/Kienzle, slip op. ¶ 20 (Eur. Comm'n Feb. 22, 1991), *cited in* O.J. C 56/16 (1991), [1991] 4 C.M.L.R. 330; AT&T/NCR, slip op. ¶ 15 (Eur. Comm'n Jan. 18, 1991), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330.

with low price competition may carry greater significance.[140]

In the case of horizontal concentrations, for the purposes of its forecast, the Commission adds together the market shares of the parties and compares them with those of the remaining competitors.[141] In principle, therefore, the market share of the parties to the concentration corresponds to the sum of the market shares previously realized by them. Negative reactions, however, must be taken into account where customers may be likely to modify their purchasing behaviour by changing to competitors in order to avoid becoming dependent on the new undertaking.[142]

2. The Other Relevant Factors in Article 2(1)

a. Economic and Financial Power

Economic and financial power can be an indicator of market power. The Commission's decisions thus far are not clear as to how this criterion is to be established and measured. The Commission apparently bases economic and financial power on turnover. It attributes particular importance to financial power: high-level financial power, in conjunction with high market shares, can create significant competitive advantages and result in market dominance. A competitive advantage may occur, for example, if operation in the market requires a high level of investment and if after the merger one undertaking can gain access to the considerable financial resources of the other.[143]

In the case of joint ventures, the Commission takes into account the financial power not only of the joint venture but also of the parent companies.[144] Financial power can indicate market power only if the parties to the concentration exceed the financial power of their competitors. If the competitors

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140. *See* Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.

141. *See id.* at ¶ 15, Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148; *see also* Varta/Bosch, O.J. L 320/26, at 30, ¶ 32 (1991); Eridania/ISI, slip op. ¶ 26 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663.

142. Alcatel/Telettra, O.J. L 122/48, at 53, ¶ 40 (1991), [1991] 4 C.M.L.R. 778, 787.

143. *See* Matsushita/MCA, slip op. ¶ 5 (Eur. Comm'n Jan. 10, 1991), *cited in* O.J. C 12/15 (1991); *see also* Varta/Bosch, O.J. L 320/26, at 30, 33, ¶¶ 32, 58 (1991).

144. *See* Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.

also possess economic and financial power, however, despite the presence of high market shares a market dominance generally will be precluded.[145]

b. Access to Supplies or Markets

A merger that establishes a vertical relationship between an undertaking and its supplier or its customer can procure significant advantages *vis-à-vis* competitors, and thus result in a strengthening of the market position.[146] An undertaking may procure an advantage, for example, if it gains improved access to raw materials by virtue of a vertical concentration[147] or if it enhances its sales or distribution possibilities through a concentration with its distributors that formerly was linked only by contract.[148] An undertaking's strengthened market position is always subject to the finding that the vertical integration renders access to upstream or downstream markets more difficult for non-integrated competitors or that it precludes them from those markets by means of the "foreclosure effect."[149]

Foreclosure effects can lead to the creation of a dominant position if the undertaking already held a strong market position prior to the concentration.[150] Such effects can arise where, for example, significant cost advantages over competi-

145. *Compare* Varta/Bosch, O.J. L 320/26, at 30, ¶ 32 (1991) *with* Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49. *See also* Matsushita/MCA, slip op. ¶ 9 (Eur. Comm'n Jan. 10, 1991), *cited in* O.J. C 12/15 (1991).

146. AT&T/NCR, slip op. ¶ 16 (Eur. Comm'n Jan. 18, 1991), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330; ICI/Tioxide, slip op. ¶¶ 13, 15 (Eur. Comm'n Nov. 28, 1990), *cited in* O.J. C 304/27 (1991), [1991] 4 C.M.L.R. 8.

147. VIAG/Continental Can, slip op. ¶ 41 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; *see* Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.

148. Nissan/R. Nissan, slip op. ¶ 4 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 181/21 (1991), [1991] 4 C.M.L.R. 581; Usinor/ASD, slip op. ¶ 14 (Eur. Comm'n Apr. 29, 1991), *cited in* O.J. C 193/34 (1991), [1991] 4 C.M.L.R. 663.

149. VIAG/Continental Can, slip op. ¶¶ 42, 51 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Usinor/ASD, slip op. ¶ 17 (Eur. Comm'n Apr. 29, 1991), *cited in* O.J. C 193/34 (1991), [1991] 4 C.M.L.R. 663; AT&T/NCR, slip op. ¶ 17 (Eur. Comm'n Jan. 28, 1991), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330; ICI/Tioxide, slip op. ¶ 18 (Eur. Comm'n Nov. 28, 1990), *cited in* O.J. C 304/27 (1991), [1991] 4 C.M.L.R. 8.

150. VIAG/Continental Can, slip op. ¶ 41 (Eur. Comm'n June 6, 1991) (leading firm), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; AT&T/NCR, slip op. ¶ 17 (Eur. Comm'n Jan. 18, 1991) (strengthening of already strong market position), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330.

tors arise as a result of enhanced access to raw materials.[151]

c. Barriers to Entry

With regard to "legal or other barriers to entry," obstacles must be assessed in relation to undertakings that cannot operate in a market or those that can do so but only with difficulty. Entry barriers determine the significance of potential competition in a relevant market. In principle, high market barriers reduce potential competition, and low or no barriers to entry render competition probable.[152] Regulatory or legal barriers to entry may include a state monopoly, differing national standards and protection rights, a quota regime,[153] import restrictions for Japanese cars,[154] or long-standing exclusive distribution systems.[155] The vertical integration of undertakings, a national purchasing policy of an important customer,[156] or the so-called "lock-in" effect, which concerns economic and technical constraints that tend to prevent customers from switching from one manufacturer to another, represent other forms of entry barriers.[157]

d. Actual or Potential Competition from Inside or Outside the European Community

Article 2(1)(a) directs the Commission to consider competition from outside the Community in assessing the effect of a concentration. If the Commission finds that on economic grounds the relevant geographic market is the world market, it must consider the competitive pressures from outside the Community to assess the dominance of Community undertak-

151. *See* ICI/Tioxide, slip op. ¶ 18 (Eur. Comm'n Nov. 28, 1990), *cited in* O.J. C 304/27 (1990), [1991] 4 C.M.L.R. 8.

152. *See* Digital/Kienzle, slip op. ¶ 21 (Eur. Comm'n Feb. 22, 1991), *cited in* O.J. C 56/16 (1991), [1991] 4 C.M.L.R. 330.

153. *See* Alcatel/Telettra, O.J. L 122/48, at 53, ¶ 38 (1991), [1991] 4 C.M.L.R. 778, 787; *see also* Eridania/ISI, slip op. ¶ 26 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663.

154. Nissan/R. Nissan, slip op. ¶ 4(c) (Eur. Comm'n June 28, 1991), *cited in* O.J. C 181/21 (1991), [1991] 4 C.M.L.R. 581.

155. Fiat Geotech/Ford New Holland, slip op. ¶ 25 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R 330.

156. Alcatel/Telettra, O.J. L 122/48, at 53-54, ¶¶ 39, 44 (1991), [1991] 4 C.M.L.R. 778, 787.

157. *See* Aérospatiale-Alenia/de Havilland, O.J. L 334/42, at 52, ¶ 33 (1991).

ings.[158] As a result of the absence of significant legal or other entry barriers into Community markets, potential competition from undertakings outside the EC must be considered when market entry is probable. Competitive pressure from outside the EC can prevent a dominant market position even in the case of high market shares.[159] The Commission, however, does not investigate the competitive effects of a merger on markets outside the EC.[160]

e. Purchasing Power

The purchasing power of an undertaking's customers plays an important role in appraising an undertaking's market dominance. A competitive counterbalance to the market strength of suppliers occurs when only a few customers represent the major part of the purchasing volume in the relevant market, resulting in substantial price pressure on suppliers, even if customers possess high market shares themselves.[161] Purchasing power is reflected in such strategies as the playing-off of suppliers against each other, that is, "dual or triple sourcing," the power of customers to determine product quality, size, and timing of deliveries, such as do car manufacturers *vis-à-vis* their suppliers, or the dependence of a supplier on a few financially strong purchasers.[162]

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158. Aérospatiale/MBB, slip op. ¶ 18 (Eur. Comm'n Feb. 25, 1991) ("Given the absence of barriers to market entry and the mutual penetration of the markets between the EC, the USA and the rest of the world, the civil helicopter market is from an economic point of view a world market. The competitive pressure from outside the Community has, therefore, to be considered in the assessment of whether the proposed concentration could lead to the creation or strengthening of a dominant position which would significantly impede effective competition in the common market."), *cited in* O.J. C 59/13 (1991).

159. *Id.*; *see also* Alcatel/Telettra, O.J. L 122/48, at 53-54, ¶ 43 (1991), [1991] 4 C.M.L.R. 778, 788-89.

160. BNP/Dresdner Bank, slip op. ¶ 7 (Eur. Comm'n Feb. 4, 1991), *cited in* O.J. C 34/20 (1991).

161. VIAG/Continental Can, slip op. ¶ 41 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

162. Péchiney/Usinor-Sacilor, slip op. ¶ 14 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; VIAG/Continental Can, slip op. ¶ 38 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Renault/Volvo, slip op. ¶ 14 (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906.

3. Summary

Thus far, the Commission decisions have always assessed all of the relevant business and market-related aspects in a concluding summary to determine whether the concentration creates or strengthens a market-dominating position of a new entity or a party participating in a concentration.[163] The Commission has never based compatibility on any single criterion of article 2(1).[164] In particular, the Commission has emphasized high market shares, financial power and barriers to entry. Additional aspects considered are those related to the individual case. Market power is indicated, for example, if the market shares of the next largest competitors are substantially lower or where there exists higher production capacity,[165] low price competition,[166] or synergy effects relating to research, development and production.[167]

Aspects that provide arguments against market dominance include higher market shares of competitors,[168] high imports,[169] innovation competition[170] and, in particular, intense price competition.[171] The Commission must rule that the concentration is compatible with the Common Market when the analysis of the factors in article 2(1) does not permit a definite conclusion as to the existence of a market-dominating position. Thus, "*Non Liquet*" cases may not be detrimental to the parties to a concentration.[172]

In its substantive merger analysis, the Commission distinguishes between the "horizontal," "vertical" and "conglomer-

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163. *E.g.*, Varta/Bosch, O.J. L 320/26, at 33, ¶ 58 (1991).

164. *See id.* at 30, ¶ 32; *see also* Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.

165. *See* Varta/Bosch, O.J. L 320/26, at 30, ¶ 32 (1991).

166. *See* Magneti Marelli/CEAc, O.J. L 222/38, at 40, ¶ 16 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2148-49.

167. VIAG/Continental Can, slip op. ¶ 36 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1990), [1991] 4 C.M.L.R. 739.

168. *See* Elf/BC/Cepsa, slip op. ¶ 15 (Eur. Comm'n June 18, 1991), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580.

169. *Id.* ¶ 18.

170. *See* VIAG/Continental Can, slip op. ¶ 38 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

171. *See* Renault/Volvo, slip op. ¶ 18 (Eur. Comm'n Nov. 7, 1990), *cited in* O.J. C 281/2 (1990), [1990] 4 C.M.L.R. 906; *see also* Eridania/ISI, slip op. ¶ 26 (Eur. Comm'n July 30, 1991), *cited in* O.J. C 204/12 (1991), [1991] 4 C.M.L.R. 663.

172. *See, e.g.*, Varta/Bosch, O.J. L 320/26, at 33, ¶ 62 (1991).

ate" aspects of a concentration. The competitive danger of horizontal concentration derives primarily from the addition of the parties' market shares.[173] In the case of a vertical concentration, the creation or strengthening of a market-dominating position can result from improved access to downstream or upstream markets or from the reinforcement of barriers to entry.

Conglomerate concentrations, i.e., concentrations of undertakings that operate neither on the same product market nor in the same upstream or downstream markets, also can have an adverse effect on competition. The Commission examines the conglomerate aspects of a merger only where the parties concerned have shares of over 25 percent in one market. When this threshold is exceeded, undertakings are obligated, pursuant to section 5 of Form CO, to provide market data on their conglomerate aspects.[174] The effects of conglomerate concentration can be particularly adverse for competition the more the parties' operational areas are closely related.[175] Factors such as the flow of technical or commercial know-how, the financial strength of a party to a concentration, economies of scale, synergy effects in the area of research and development, and expansion of the range offered can increase the market power of a party to a concentration.[176]

D. *Oligopoly*

The concept of joint market dominance is not specifically mentioned in the Merger Regulation. However, the Commission obviously assumes that the creation or strengthening of a market-dominating position by more than one undertaking can result in incompatibility with the Common Market.[177] In

173. *See* Alcatel/Telettra, O.J. L 122/48, at 53, ¶ 37 (1991), [1991] 4 C.M.L.R. 778, 787.

174. ASKO/Omni, slip op. ¶ 11 (Eur. Comm'n Feb. 21, 1991), *cited in* O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330; *see* Form CO, *supra* note 9, § 5, O.J. L 219/11, at 15 (1990).

175. AT&T/NCR, slip op. ¶¶ 23, 28 (Eur. Comm'n Jan. 18, 1991), *cited in* O.J. C 16/20 (1991), [1991] 4 C.M.L.R. 330.

176. *Id.* ¶ 27; *see* VIAG/Continental Can, slip op. ¶ 36 (Eur. Comm'n June 6, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739.

177. *E.g.*, Varta/Bosch, O.J. L 320/26, at 30, ¶ 32 (1991) (stating that existence of equally strong competition could lead to alignment of behavior of both competitors); *see also* Cook & Kerse, *supra* note 63, at 80; Martin Schödermeier, *Collective Dominance Revisited: An Analysis of the EC Commission's New Concepts of Oligopoly Control*, 11 EUR. COMPETITION L. REV. 28 (1990). *See generally* James S. Venit, *The Evaluation of*

Varta/Bosch,[178] the Commission did not exclude the possibility of joint market dominance in the event that the concentration results in the creation of two equally strong competitors with market shares of approximately 80 percent, and the existence of these two equally strong competitors could lead to an alignment of their behaviour.[179] The meaning of an "alignment of the behaviour of competitors" is far from clear. In contrast to a German merger control situation under section 23(a)(2) of the Act Against Restraints on Competition,[180] the Commission does not have a statutory presumption with regard to the existence of collective market dominance. The Commission therefore must prove that a behavioral alignment can be expected in the future between the members of the oligopoly. This obviously creates major problems for the Commission. Thus far, it has considered the possibility of joint market dominance in only one case.[181] In other cases, the Commission has not even mentioned the issue of joint market dominance, although it would have seemed appropriate based on the examination of the given market structure.[182] The future importance of joint market dominance in European merger control will therefore be insignificant.

E. *Ancillary Restraints*

Recital 25 of the Merger Regulation states that the regulation applies where the undertakings concerned accept restrictions that are directly related and necessary to the implementa-

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Concentrations Under the Merger Control Regulation: The Nature of the Beast, 14 FORDHAM INT'L L.J. 412, 435-37 (1990-1991).

178. O.J. L 320/26 (1991).

179. *Id.* at 30, ¶ 32.

180. Act Against Restraints of Competition of July 27, 1957 (Legal Gazette I, at 1081), *amended by* Fifth Act to Amend the Act Against Restraints of Competition of December 22, 1989 (Legal Gazette I, at 2486) (Gesetz gegen Wettbewerbsbeschränkungen vom 27. Juli 1957 (BGBl. I S. 1081) unter Berücksichtigung des Fünften Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen vom 22. Dezember 1989 (BGBl. I S. 2486)).

181. Varta/Bosch, O.J. L 320/26, at 30, ¶ 32 (1991).

182. *See, e.g.*, Elf/BC/Cepsa, slip op. ¶ 20 (Eur. Comm'n June 18, 1991) (two undertakings with joint market shares of 86 percent), *cited in* O.J. C 172/8 (1991), [1991] 4 C.M.L.R. 580; VIAG/Continental Can, slip op. ¶ 37 (Eur. Comm'n June 6, 1991) (two undertakings with joint market shares of 76 percent), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Digital/Kienzle, slip op. ¶ 19 (Eur. Comm'n Feb. 22, 1991) (three undertakings with joint market shares of 80 percent), *cited in* O.J. C 56/16 (1991), [1991] 4 C.M.L.R. 330.

tion of the concentration.[183] The details regarding the assessment of these restrictions, known as ancillary restraints, have been published in a Commission notice.[184] Article 8(2)(2) of the Merger Regulation requires that a decision of compatibility also cover such restrictions.

A non-competition clause in cases of the transfer of an undertaking is justified provided that it is limited to the products and services that have been transferred. In geographic terms, such a clause must be limited to the area where the vendor established the products prior to the transfer. The duration of the non-competition clause as a rule may not exceed five years from conclusion of the agreement.[185]

Non-competition clauses imposed on parent companies *vis-à-vis* the joint venture can be recognized as ancillary since the parent companies achieve permanent withdrawal from the joint venture's market. Such non-competition clauses can constitute an obligation on the parent company not to operate except only through the joint venture or to have the joint venture manufacture products as exclusive supplier. Such clauses also can bar parent companies from acquiring competitors of the joint venture.[186]

The Commission also has permitted an exclusive licence that grants the acquiror the right to use a trademark or the

183. Merger Regulation, *supra* note 1, recital 25, O.J. L 257/13, at 16 (1990).

184. Commission Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203/5 (1990) [hereinafter Commission Notice].

185. ICL/Nokia Data, slip op. ¶ 6 (Eur. Comm'n July 17, 1991) (one year), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817; VIAG/Continental Can, slip op. ¶ 52 (Eur. Comm'n June 10, 1991) (three years), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; Digital/Kienzle, slip op. ¶ 6 (Eur. Comm'n Feb. 22, 1991) ("limited" but exact time limit not specified), *cited in* O.J. C 56/16 (1991), [1991] 4 C.M.L.R. 330; ASKO/Omni, slip op. ¶ 6 (Eur. Comm'n Feb. 21, 1991), *cited in* O.J. C 51/12 (1991), [1991] 4 C.M.L.R. 330; Fiat Geotech/Ford New Holland, slip op. ¶ 7 (Eur. Comm'n Feb. 8, 1991) (four years), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

186. *See* Dräger/IBM/HMP, slip op. ¶¶ 12, 20 (Eur. Comm'n June 28, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817; Péchiney/Usinor-Sacilor, slip op. ¶ 16 (Eur. Comm'n June 24, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; Sanofi/Sterling Drug, slip op. ¶ 25 (Eur. Comm'n June 10, 1991), *cited in* O.J. C 156/10 (1991), [1991] 4 C.M.L.R. 739; RVI/VBC/Heuliez, slip op. ¶ 7 (Eur. Comm'n June 3, 1991), *cited in* O.J. C 149/15 (1991); Conagra/IDEA, slip op. ¶ 15 (Eur. Comm'n May 30, 1991), *cited in* O.J. C 175/18 (1991), [1991] 4 C.M.L.R. 580; ASKO/Jacobs/Adia, slip op. ¶ 4 (Eur. Comm'n May 16, 1991), *cited in* O.J. C 132/13 (1991).

vendor's trading name for the products of the business area to be transferred for a period of ten years.[187] Here, the Commission goes beyond the scope of its Notice Regarding Restrictions Ancillary to Concentrations, which generally permits only non-exclusive licenses for the exploitation of intellectual property rights or trading names.[188]

Finally, reciprocal supply agreements[189] or specific services previously rendered by the undertaking which have been transferred to the vendor can be retained for a transitional period. However, retention must be the only way of ensuring the continuation of the vendor's operation. Moreover, an acceptable ancillary restraint is an obligation for the vendor to continue rendering all services previously rendered to the transferred undertaking to the acquiror for a transitional period of four years.[190]

F. *Obligations and Conditions*

The Commission can attach obligations and conditions to its decision, giving conditional clearance to a concentration. These requirements are "intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modify the original concentration plan" pursuant to article 8(2)(2).[191] The Commission has imposed the following obligations: removal of a vertical link between a purchaser and a supplier,[192] reduction of a majority interest to reduce the market shares of the entity created by the concentration,[193] and termination of a license agreement between a party to the concentration and its competitor as well as a waiver of equal representation on the

187. *See* Fiat Geotech/Ford New Holland, slip op. ¶ 7 (Eur. Comm'n Feb. 8, 1991), *cited in* O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

188. Commission Notice, *supra* note 184, O.J. C 203/5, at 7, ¶¶ 3(B)(2), 3(B)(4) (1990).

189. *See* ICL/Nokia Data, slip op. ¶¶ 6, 16 (Eur. Comm'n July 17, 1991), *cited in* O.J. C 236/6 (1991), [1991] 4 C.M.L.R. 817.

190. *See* Otto/Grattan, slip op. ¶ 5 (Eur. Comm'n Mar. 21, 1991), *cited in* O.J. C 93/6 (1991).

191. Merger Regulation, *supra* note 1, art. 8(2), O.J. L 257/13, at 19 (1990).

192. Alcatel/Telettra, O.J. L 122/48, at 54, ¶ 45 (1991), [1991] 4 C.M.L.R. 778, 789.

193. Magneti Marelli/CEAc, O.J. L 222/38, at 41, ¶ 20 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146, 2149-50.

management and supervisory boards of these two undertakings.[194] In one case the Commission made its obligations subject to a "binding commitment" on the part of an undertaking not party to the concentration.[195]

CONCLUSION

Cross-border concentrations with a European Community dimension now fall under one-stop merger control. Thus, such concentrations are no longer subject to a variety of often inconsistent national antitrust regulations and several national antitrust authorities.

First impressions of the Commission's practice are positive. The Merger Task Force members are ready and willing to discuss proposed concentrations in informal meetings with the companies concerned, e.g., to determine whether a joint venture is concentrative or whether the concentration would be compatible with the Common Market. The members of the Merger Task Force, however, may not give binding evaluations on the proposed concentration because decision-making powers lie with the Commission. Only the Commission can make decisions as to the compatibility of concentrations under the Merger Regulation. These decisions are made by a unitary institution comprised of a collegiate body of seventeen Commissioners who decide by simple majority.

In its decisions, the Commission has evidently based its analysis on "economic" criteria, without regard to any industrial policy arguments. Nonetheless, the Commission has sometimes been affected in its assessment of compatibility by the political pressure and influence exerted on commissioners by Member States.

The current system of turnover thresholds may result in large transactions falling outside the scope of the Merger Regulation if all the companies concerned achieve more than two-thirds of their turnover in the same Member State. Very small concentrative joint ventures, however, may fall within the regulation's scope since the turnover of the parent companies must be considered regardless of the significance of the joint venture. Due to the current high thresholds, many transactions

194. Varta/Bosch, O.J. L 320/26, at 33-34, ¶ 63 (1991).
195. Alcatel/Telettra, Commission Press Release, IP (91) 303 (Apr. 12, 1991).

without a Community dimension are often subject to stricter standards, as is the case with German national antitrust law. This will change, however, because turnover thresholds most likely will be lowered by 1994.

With regard to the Commission's assessment of the compatibility of a concentration, the first decisions indicate that even very high market shares often do not trigger a dominant position. The question of whether a concentration may be prohibited on the basis of the creation or strengthening of a joint market-dominating position, or oligopoly, is now more urgent. The future relevance of the Merger Regulation thus depends on the use of joint dominance as a criterion to assess concentrations. Absent the possibility of such a criterion, the Merger Regulation's importance will be minimal.