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MERGER CONTROL IN THE UNITED STATES AND EUROPEAN UNION: HOW SHOULD THE UNITED STATES' EXPERIENCE INFLUENCE THE ENFORCEMENT OF THE COUNCIL MERGER REGULATION?

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Table of Contents

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To the Catholic University of Leuven

I. INTRODUCTION

The theme of this article is two-fold. First, it aims at providing a general understanding of the functioning of both the United States ("U.S.") and the European Union ("EU") merger control systems.[1] This is done through a comparative analysis. Second, this article analyzes what influence U.S. merger control has had on the European system since 1990 after the Regulation on the Control of Concentrations Between Undertakings[2] ("Merger Regulation"), adopted by the Council of the European Communities ("the Council"), became effective. Finally, in light of these two points, the article focuses on the question as to what influence the U.S. system should have over its European counterpart in order to fill potential legal uncertainty gaps in the EU merger control system.

This article expands upon six pertinent topics. Part II discusses whether the EU merger control system might be seen as an instrument of industrial policy or whether it should be seen exclusively as an instrument of competition policy. Part III makes a succinct reference to the evolution of merger control in the EU. Part IV of the article defines the notion of concentration in light of the Merger Regulation and the notices issued by the Commission of the European Communities ("the Commission").[3] Part V analyzes the

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1. For the purpose of this article, I use the term "merger" in its broadest sense. This term refers not only to the consolidation of previously separated companies into common ownership and control but also to the purchase by one company of some or all of the shares and/or assets of another. Therefore, "merger" has a broader meaning under antitrust law than in corporate law.

2. Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, *as amended by* 1990 O.J. (L 257) 14 [hereinafter Merger Regulation].

3. Commission Notice on the Notion of a Concentration Under the Council Regulation 4064/89 (EEC) of 21 December 1989 on the Control of Concentrations Between Undertakings, 1994 O.J. (C 385) 5 [hereinafter Notice on the Notion of a Concentration]; Commission Notice on

concepts of relevant product market and relevant geographic market from a comparative perspective. It concludes that unlike the U.S. merger control system, the EU lacks a structured instrument. Part VI discusses the concept of dominant position in the U.S. and in the EU merger systems. Finally, in Part VII, a reference is made to the main differences between the two merger enforcement procedures.

II. EU MERGER CONTROL: A BATTLE FIELD BETWEEN INDUSTRIAL AND COMPETITION POLICIES

A. *The U.S. Scenario*

One could argue that the EU merger policy, as compared to U.S. merger control, is still in its infancy. In the U.S., the first antitrust movement began more than one hundred years ago and resulted in the passage of the Sherman Act,[4] the most important antitrust instrument in the U.S.[5] Enacted in 1890, it sought to protect consumers from the high prices and decreases in production caused by monopolies and cartels.

From the outset, the goals of antitrust law were the subject of considerable debate. The most heated discussion arose between economists representing the Chicago School and those representing the Harvard School, or the populists.[6] The Chicago School espoused a neoclassical economic approach towards mergers, holding that efficiency should be the exclusive goal of antitrust laws.[7] Therefore, the Chicago school believed that the main criterion of the merger's compatibility with antitrust law is whether the merger produces economies of scale, achieving lower prices and increasing consumer welfare.[8] Nonefficiency values, which include, *inter alia*, the protection of small businesses, concerns about accumulation of economic or political power, and encouragement of morality or fairness in business practice, should not be considered in the assessment of this compatibility.[9]

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the Distinction Between Concentrative and Cooperative Joint Ventures Under Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1994 O.J. (C 385) 1 [hereinafter Notice on the Distinction].

4. Sherman Antitrust Act, Pub. L. No. 103-325, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

5. For a detailed analysis of the early antitrust law in the U.S., see Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 69 TEX. L. REV. 105 (1989).

6. For a discussion of the two schools' main features, see Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

7. *See* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 46 (1985).

8. *See id.*

9. *See id.* at 41.

Conversely, the Harvard School suggested that nonefficiency values should be considered in assessing a merger.[10] Further, according to the Harvard School, oligopolies and high entry barriers present an inherent danger to the consumer welfare because they inevitably lead to price increases and reductions of output; therefore, the government should control the market structure.[11]

The social-oriented approach of the Harvard School had a critical influence in the drafting process of the main U.S. antitrust statutes.[12] Following the passage of the Sherman Act, the Federal Trade Commission Act[13] and the Clayton Act were enacted in 1914.[14] The legislative history of the Robinson-Patman Act of 1936[15] and the Celler-Kefauver Amendments[16] to the antimerger provisions of the Clayton Act in 1950 also showed the will of Congress to protect small businesses from larger competitors producing more output at lower costs, irrespective of whether such protection may lead to a lower total output.[17]

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10. *See id.*

11. *See* James T. Halverson, *EC Merger Control: Competition Policy or Industrial Policy? Views of a U.S. Practitioner*, *in* LEGAL ISSUES IN EUROPEAN INTEGRATION 51 (1992).

12. *See* Hovenkamp, *supra* note 5, at 113-14.

13. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1994)).

14. Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1994)).

15. Robinson-Patman Price Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13, 13a, 13b, 21a (1994)).

16. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18 (1994)).

17. Section 7 of the Clayton Act, 15 U.S.C. § 18 (1994), is the main U.S. antitrust provision dealing with mergers. Before the passage of the Clayton Act in 1914, mergers were challenged under the Sherman Act, *id.* §§ 1-7 (1994)), although it was enacted to deal with cartels, monopolies, and attempts of monopolization. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States; or with foreign nations . . . ." *Id.* § 1. Since the very inception of antitrust law, the U.S. Supreme Court made clear that all mergers between directly competing companies constituted a combination in restraint of trade contrary to section 1. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 197 (1904). This early approach towards mergers (especially towards railroad mergers) was changed by the subsequent case law. In *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), the Court limited the *Northern Securities*' holding and explained that the Sherman Act may be applicable only to mergers that are "*unreasonably* restrictive of competitive conditions." *Id.* at 58 (emphasis added).

The Sherman Act never had much impact against mergers which might impair competition. In *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), the acquisition by one steel manufacturer of its largest competitor leading to control of 24% of the market was not considered an unreasonable restraint of trade. *Id.* By adopting such a decision, the Court made evident that the Sherman Act did not forbid a merger unless the merging companies were on the verge of obtaining substantial monopoly power. Therefore, the application of the rule of reason in practice meant that only mergers which were designed to create a monopoly and apparently succeeded in doing so were prohibited under the Sherman Act.

In the 1960s, the populist theory was particularly powerful and influential. The application of this approach to mergers meant that the courts condemned mergers because they created certain efficiencies.[18] Thus in *Brown Shoe Co. v. United States,* the U.S. Supreme Court held that a horizontal merger between competing retailers of shoes was illegal because the postmerger company would be able to undersell its competitors.[19] In its reasoning, the Court stated that Congress, in enacting the Clayton Act, desired "to promote competition through the protection of viable, small, locally owned businesses."[20] The creation of a large company with lower costs would frustrate this goal.[21] This and other decisions drew much criticism from those who accused the courts of protecting small competitors at the expense of consumers.

In the 1970s, the questionable reasoning that mergers should be condemned because they create efficiency was abandoned, and the antitrust thesis of the Chicago School theorists began to be recognized by different U.S. administrations. Thus under the Reagan Administration, the antitrust laws were directed solely towards the

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Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or person, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 2 (1994). This prohibition applies only to deliberate acquisition and maintenance of monopoly power. *See* Howard Adler, Jr., *Application of United States Antitrust Laws to Mergers and Joint Ventures Involving Foreign Firms,* 3 EUR. BUS. L. REV. 135, 135 (1992) (citing American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946)). This limitation implies that "[a]chievement of monopoly power solely through 'superior product, business acumen or historic accident' is not condemned." *Id.* (quoting United States v. Grinnell Corp., 384 U.S. 563, 57-71 (1966)).

The Clayton Act did not have a significant impact on mergers because it only forbade the acquisition of shares. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 312-15 (1962). Therefore, in order to prevent the application of the Clayton Act, the acquiring party only had to buy the assets of the acquired company. *See id.* This is the reason why in the *Columbia Steel* case the acquiring company bought the assets of the other steel producer and why this acquisition was tested under section 1 of the Sherman Act. *Columbia Steel Co.,* 334 U.S. at 495-98. This decision triggered Congress in 1950 to amend section 7 of the Clayton Act in order to close the assets acquisition loophole. *See id.* at 315. After the amendment, section 7 reads as follows:

> No person engaged in commerce or in any activity affecting commerce shall acquire directly or indirectly, the whole or any part of the stock or . . . assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
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> . . . .
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> This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.

15 U.S.C. § 18 (1994).

18. *See* HOVENKAMP, *supra* note 7, at 295-96.
19. *Brown Shoe Co.,* 370 U.S. at 345-46.
20. *Id.* at 344.
21. *See* HOVENKAMP, *supra* note 7, at 296.

goal of improving economic efficiency. While the Chicago School's approach towards efficiency has been criticized,[22] this approach was endorsed by two federal antitrust enforcement agencies ("the Agencies"), i.e., the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ").[23]

B. The EU Scenario

In the European arena, since 1989 when the Merger Regulation was adopted, a similar debate has taken place between advocates of the "industrial policy" approach and defenders of the "competition policy" approach. The question debated is whether the substantive standard used to assess the compatibility of mergers with EU antitrust laws focuses solely on effective competition or whether public interest must be considered as well.

The Merger Regulation clearly states: "A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."[24] This language seems to indicate that the evaluation of whether mergers are compatible with the common market is based exclusively on competition concerns, so that any industrial policy concerns are not taken into account. All concentrations which create or strengthen a dominant position, thereby impeding effective competition, would be prohibited. Nonetheless, Article 2(1) lists factors and considerations that the Commission must take into account in determining a merger's compatibility with the common market.

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22. As Halverson pointed out:

> Many scholars, practitioners and jurists, however, disagree with the neo-classical economic analysis of the Chicago School. Critics assail the Chicago School's seeming obsession with efficiency as not in tune with antitrust policy-making in the real world. Antitrust policy making, it is argued, is a complex endeavor motivated by numerous competing values, and is thus not suited to the static neo-classical market efficiency model of the Chicago School.

Halverson, *supra* note 11, at 51.

23. Thus this endorsement was manifested when the Agencies issued the guidelines on mergers in 1982 and 1984. U.S. Dep't of Justice & Federal Trade Comm'n, Merger Guidelines, 47 Fed. Reg. 38,493 (June 14, 1982); U.S. Dep't of Justice & Federal Trade Comm'n, Merger Guidelines, 49 Fed. Reg. 26,823 (June 14, 1984) [hereinafter 1984 Guidelines]. The 1982 and 1984 Guidelines relaxed the enforcement of merger antitrust provisions. The last version of these guidelines was issued by the Agencies in April 1992. U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Apr. 2, 1992) [hereinafter 1992 Guidelines].

24. Merger Regulation, *supra* note 2, art. 2(3).

The primary factor to consider is the need to maintain and develop effective competition within the common market.[25] This includes the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the EC.[26] Under Article 2(1) of the Merger Regulation, among other factors are the following:

> the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and *does not form an obstacle to competition*.[27]

Some governments and scholars have viewed these provisions of Article 2 as an open door for introducing considerations other than those typically associated with competition policy.[28] This is especially evident in conjunction with Recital 13, which states that the Commission, in considering the need to maintain and develop effective competition, must take into account the strengthening of the EC's "economic and social cohesion."[29] Despite initial fears,[30] the past enforcement of the Merger Regulation shows that the Commission has not taken into account industrial policy concerns; nor has it endorsed the "technical and economic progress" defense.[31] In

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25. *See id.* art. 2(1)(a).

26. *See id.*

27. *Id.* art. 2(1)(b) (emphasis added).

28. *See* James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, *in* 1990 FORDHAM CORP. L. INST. 523, 524-25 (Barry E. Hawk ed., 1991).

29. Merger Regulation, *supra* note 2, rec. 13. This recital is known as the "Spanish clause" because it was introduced at the initiative of Spain.

30. Some scholars immediately stressed that the wording of the Merger Regulation made those fears unfounded. *See, e.g.*, Venit, *supra* note 28, at 523. Although the criterion of "the development of technical and economic progress" evokes industrial policy concerns, Article 2(1)(b) makes the application of this criterion subject to the requirement that the development of such progress be "to consumers' advantage" and not "form an obstacle to competition." Merger Regulation, *supra* note 2, art. 2(1)(b). As far as the Recital 13 is concerned, the case law of the European Court of Justice ("E.C.J.") makes clear that the recitals of regulations are relevant to the interpretation of their substantial provisions. However, recitals cannot override the operative terms of the Regulation. This would mean that the clear prohibition set out by Article 2(3) would limit, to a great extent, the possible impact of this recital in the enforcement of the regulation.

31. The Commission officials soon allayed the fears of those who saw the Merger Regulation as a potential industrial policy instrument. Sir Leon Brittain, then Competition Commissioner, affirmed that he did not see how a dominant position which impedes competition could give rise to technical or economic progress of the sort which competition policy could endorse. *See* Leon Brittain, Speech in the Centre for Policy Studies, Brussels (Sept. 24, 1990), *in* 1990

this regard, the Commission's decision in *Aeroespatiale-Alenia/De Havilland,* where the notorious merger of aircraft manufacturers was blocked,[32] is illustrative. This decision has been viewed by commentators as a triumph of the competition-policy approach over the industrial-policy approach.[33]

The *De Havilland* case involved the acquisition of De Havilland, a Canadian subsidiary of Boeing, by Avions de Transport Regional ("ATR"), a joint venture established by Aeroespatiale SNI and Alenia-Aeritalia.[34] ATR was the world's leading producer of turboprop and commuter aircraft, and De Havilland was the world's second largest producer.[35] The Commission found that the proposed concentration would lead to a situation where the combined entity of ATR/De Havilland could operate independently of its competitors and customers, thereby creating a dominant position in the world commuter aircraft market.[36] This dominant position was not considered temporary by the Commission and would have significantly impeded competition.[37]

Before reaching this conclusion, the Commission examined the argument put forward by the parties as to the possible contribution of the merger to the development of technical and economic progress. The Commission, however, did not identify any contribution to the development of technical and economic progress within the meaning of Article 2(1)(b) of the Merger Regulation.[38] The Commission also denied that such progress, if it did exist, would be to the consumer's advantage.[39]

The importance of the *De Havilland* decision was that the main criterion used in assessment of whether or not a concentration is compatible with the Merger Regulation was based on competition

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INFORMATION POUR LA PRESS 751. Therefore, he argued that the substantive standard rested on competition policy alone:

> Let me stress that no words plucked from the regulation can give rise to a defense against the finding that there is a dominant position as a result of which competition is significantly impeded. If that is the finding, then the merger may not proceed. If on the other hand, no dominant position is found to exist as a result of which competition is impeded, then the merger may proceed without further ado. The Regulation amounts to no more than that.

Id.

32. Aerospatiale-Alenia/De Havilland, 1991 O.J. (L 334) 42.

33. *See, e.g.,* Eleanor M. Fox, *Merger Control in the EEC—Towards a European Merger Jurisprudence, in* 1991 FORDHAM CORP. L. INST. 709 (Barry E. Hawk ed., 1992).

34. *De Havilland,* 1991 O.J. (L 334) ¶ 1.

35. *See id.* ¶ 7.

36. *See id.* ¶ 72.

37. *See id.*

38. *See id.* ¶ 69.

39. *See id.*

policy. Therefore, matters of public interest, such as regional, structural, or employment policies, are not considered by the Commission when it examines mergers. Despite protests following the *De Havilland* decision, the Commission has confirmed its fairly restrictive approach towards the "technical and economic progress" defense.[40] In fact, the Commission has subsequently issued several similar decisions dismissing this defense which was advanced by the merging companies.[41] In these decisions, the Commission declared that the mergers in question were incompatible with the principles of the common market.[42]

A comparison reveals that under EU law, like under U.S. antitrust law, the substantive standard employed to appraise concentrations has competition policy as its basis. The major difference is that one of the express criteria of the Merger Regulation used to assess the proposed concentration is whether the technical and economic progress is enhanced by the proposed merger. Nevertheless, the Commission's decisions show that the "efficiency defense" is not available where the merger creates or strengthens a dominant position.[43] Thus despite the Merger Regulation's reference to consumers' interests,[44] in practice, these interests are rarely taken into account. Contrarily, merger policy in the U.S. is more oriented towards consumer welfare.

While the wording of the Merger Regulation does not leave much room for public interest concerns, it might be possible, through a teleological interpretation of the Merger Regulation, to assess mergers in light of industrial policy concerns. Further, in the

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40. The French Prime Minister threatened to take the case to the E.C.J. *See* Fox, *supra* note 33, at 710. Italian officials joined the French plea and Mr. Martin Bangemann, EC Industry Commissioner, wrote to Mr. Jacques Delors, the Commission President at that time, suggesting that in the future the Commission competition directorate should get the approval of the respective industrial policy department concerned before approving or rejecting a merger. *See id.* Moreover, the European Parliament held a debate on the proposed merger and reluctantly adopted a resolution on it. *See id.*

41. *See* MSG Media Service, 1994 O.J. (L 364) 1; Nordic Satellite Distribution, 1996 O.J. (L 53) 20; Holland Media Group (Sep. 20, 1995) (unreported).

42. The fact that the three mergers were going to take place in the telecommunications sector seems to indicate that the Commission is becoming increasingly concerned with preventing telecommunication or media groups from attaining high concentration levels in this sector.

43. Some scholars believe that Article 2 of the Merger Regulation may not even allow the acceptance of an "efficiency defense." *See, e.g.*, CHRISTOPHER JONES & F. ENRIQUE GONZÁLEZ-DÍAZ, THE EEC MERGER REGULATION 136 (1992); *see also* Margarida Afonso, *A Catalogue of Merger Defenses Under European and United States Antitrust Law*, 33 HARV. INT'L L.J. 62 (1992). The "failing company defense" was accepted for the first time by the Commission in *Kali/MdK/Treuhaud*, 1993 O.J (L 186) 738.

44. *See* Merger Regulation, *supra* note 2, art. 2(3).

future, the Commission should take into account factors unrelated to competition policy for two reasons.

First, it would bring the Merger Regulation into harmony with Treaty Establishing the European Community ("EC Treaty").[45] While allowing consumers a fair share of the resulting benefit, this treaty provides for the exemption of an agreement which has some anticompetitive effects if the agreement contributes to improving the production or distribution of goods or if it promotes technical or economic progress.[46]

Second, the long-standing European tradition of protecting small and medium-sized businesses must be balanced with the need to create "European Champions," capable of competing with U.S. and Japanese multinationals.[47] In this regard, one of the most potent

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45. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992) (originally enacted as TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, *amended by* SINGLE EUROPEAN ACT, O.J. 1987 (L 169) 1, and TREATY ON EUROPEAN UNION, Feb. 7, 1992 O.J. (C 224) 1, [hereinafter EC TREATY]. In February 1992, the European Economic Community was renamed to European Community, and the word "Economic" was deleted from the treaty's title. This change reflects "the broadening ambit of the [EC] Treaty from the purely economic sphere into matters of social and monetary concerns." BELLAMY & CHILD, COMMON MARKET LAW OF COMPETITION 4 (Vivien Rose ed., 4th ed. 1991).

46. *See* EC TREATY art. 85(3). This approach would bring into harmony the enforcement of the Merger Regulation with at least three of the most important member states merger control systems: France, United Kingdom, and Germany. Thus the French Law of July 19, 1977, amended by the Ordinance of December 1, 1986, allows for decisions based on political considerations. CODE DE COMMERCE art. 674 (Fr.).

In Germany, the 1973 Law Against Restraints of Competition provides in section 24, paragraph 1, for the acceptance of a merger, even if it creates or strengthens a position of market dominance, if the companies involved prove that the merger will also result in improvements to competitive conditions and that such improvements outweigh the detrimental effects of the market domination. Gesetz gegen Wettbewerbsbeschänkungen § 24(1), BUNDESGESETZBLATT, Teil I [BGBl. I], 235 (F.R.G.) [hereinafter Law Against Restraints of Competition]. The German merger system provides for the possibility of clearing mergers on grounds, such as the preservation of jobs, which would never be accepted by U.S. merger law. *See* G. VAN R. LETT ET AL., MERGER CONTROL IN THE EEC 41 (1993); *see also* Halverson, *supra* note 11, at 58.

In the United Kingdom, the Monopolies and Merger Commission must take into account, in assessing mergers, a wide range of public interest concerns. *See* Fair Trading Act, 1973, § 84 (Eng.). Some of the public interest relates to concerns over employment or maintenance and promotion of competitive activity in markets outside the United Kingdom; concerns which are not the types of concerns which would be considered in a strict efficiency oriented regime. *See* LETT ET AL., *supra*, at 192-93; Halverson, *supra* note 11, at 59. The merger control systems of France, Germany, and the United Kingdom allow for noncompetition concerns to play a greater role in assessing mergers than in both the U.S. and EU merger control systems.

47. *But see* Fox, *supra* note 33, at 749. According to Fox, neither saving jobs or keeping capital in the nation or in the Community, nor creating European champions must be part of the economic and technical progress defense. *Id.* Only efficiencies related to market integration and progressiveness should be accepted provided that a fair share of the benefits would likely to be passed on to consumers. Progressiveness means those situations in which a merger introduces new efficiencies into a market inducing its competitors to respond more agressively in order to achieve the same or similar benefits. *See id.* Indeed, Fox's approach is closer to the efficiency defence as drafted in the DOJ's 1992 Guidelines.

criticisms against the *De Havilland* decision is that it contravenes the interest of the European aerospace industry, weakening the industry in world competition.

III. THE EVOLUTION OF MERGER CONTROL IN THE EU

A. *Overview*

One of the main sources of EU competition law is Articles 85 and 86 of the EC Treaty,[48] also known as the Treaty of Rome. Adopted in 1957, it was reenacted in February 1992 in Maastricht. The EC Treaty does not contain any provision dealing with mergers. Neither Article 85 prohibiting agreements which distort competition, nor Article 86, which prohibits one or more companies that are dominant from abusing a dominant position, addresses the problem of concentrations. When the EC Treaty was signed, mergers were not a problem for the nations forming the European Economic Community. On the contrary, mergers were considered an important means of integrating the different markets and economies of the member states.

B. *Use of Articles 85 and 86 as Merger Control Mechanisms*

Prior to the enactment of the Merger Regulation, the EU was in a situation similar to the U.S. prior to the passage of the Clayton Act. The merger cases were brought under Articles 85 and 86 of the EC Treaty, which had not been drafted to address this specific problem.

Activities prohibited by the EC Treaty as incompatible with the common market are limited to the following:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which . . . have no connection with the subject of such contracts.[49]

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48. For a detailed comment on Articles 85 and 86 as instruments of merger control, see BELLAMY & CHILD, *supra* note 45, at 38-220.

49. EC TREATY art. 86.

Absent provisions specifically addressing merger control, the application of the EC Treaty to merger cases was far from being effective. The first merger case to come before the Court of Justice of the European Communities ("E.C.J.") was *Continental Can Co. v. Commission*,[50] which was brought under Article 86 in 1973. Therein, Continental Can, a U.S. company, acquired 86% of the shares in Schmalbach-Lubeca-Werke AG ("SLW"), a German Company.[51] In turn, SLW, with the financial help of its parent company, acquired 91% of the shares of the Dutch Company Thomassen & Drijver-Verblifa ("TDV").[52] SLW was the largest German producer of packaging and metal closures, and TDV was a leading manufacturer of packing material in the Benelux.[53]

The Commission found that Continental Can violated Article 86 of the EC Treaty by abusing its dominant position, which it held before the acquisition, in the markets for meat and fish products, metal containers for meat, and metal closures for glass jars.[54] According to the Commission, the abuse consisted of Continental Can's having acquired, through its subsidiary SLW, 80% of the shares of TDV.[55]

Continental Can applied to the E.C.J., arguing that Article 86 could not be used to introduce merger control for the undertakings concerned because this transaction did not give rise to an abuse prohibited by Article 86.[56] Therefore, application of Article 86 would run contrary to the intent of the EC Treaty's drafters.[57] The E.C.J. dismissed this argument, interpreting Article 86 in conjunction with Article 3(f), which states that competition in the common market may not be distorted.[58] The court held that the attainment of this objective would not be possible if the restraint of competition, that is prohibited if it is the result of behavior falling under Article 85 of the EC Treaty, would become permissible under Article 86 of the EC Treaty.[59] The court reasoned that a restraint of competition is permissible if such behavior succeeds under the influence of a

50. Case 6/72, Continental Can Co. v. Commission, 1973 E.C.R. 215.
51. *See id.* at 218.
52. *See id.* at 219.
53. *See id.* at 219-220.
54. *See id.* at 220.
55. *See id.*
56. *See id.* at 223-25.
57. *See id.* at 225-27.
58. *See id.* at 242-45.
59. *See id.* at 244-45.

dominant undertaking and results in the merger of the undertakings concerned.[60]

Thus in *Continental Can*, the E.C.J. established the basic rule that acquisitions may be prohibited under Article 86 of the EC Treaty, even though they differ from the abuses enumerated in this article. According to the court, "[t]he list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the [EC] Treaty.[61]

In 1973, the Commission required the Council to adopt a coherent merger control system. The first draft of the Merger Regulation proposed by the Commission in 1973 was modified several times, but each change failed to overcome the political deadlock. As a result, the response of the Commission to this political paralysis did not come until 1987 when the Commission earned the E.C.J.'s support in using Article 85 as an instrument of merger control.

The ground-breaking cases were *British American Tobacco Co.* and *Reynolds Industries*, which were jointly considered by the Commission.[62] Therein, Philip Morris undertook to buy stock from Rothmans Tobacco, Ltd. ("Rothmans"), a competing cigarette manufacturer.[63] The acquisition agreement gave Philip Morris 31% of interest in Rothmans and 24.9% of the voting rights.[64] Thus the deal established a link between Philip Morris and Rothmans, previously independent competitors. The Commission commenced proceedings against Philip Morris but settled the action when Philip Morris agreed to reduce its voting rights in Rothmans to below 25%.[65] Despite the settlement, competitors of Philip Morris and of Rothmans still brought an action before the E.C.J.[66]

In this case, the court found that because Philip Morris lacked control over Rothmans, there was no violation of competition law.[67] Further, the court determined that the passive investment was lawful under Article 85 of the EC Treaty.[68] The importance of this judgment lies in the E.C.J.'s reasoning that an agreement for the

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60. *See id.* at 244.

61. *Id.* at 245. The Commission lost this case on the merits because, according to the E.C.J., it did not correctly analyze the supply side substitutability of the products concerned and, therefore, the dominant position of Continental Can had not been proven at all. *See id.*

62. Joined Cases 142 & 156/84, British Am. Tobacco Co., Reynolds Indus. v. Commission, 1987 E.C.R. 4487.

63. *See id.* at 4493. Rothmans Tobacco, Ltd., was a United Kingdom subsidiary of Rembrandt Group, Ltd., a South African investment company. *See id.* at 4492.

64. *See id.* at 4494.

65. *See id.* at 4495, 4497.

66. *See id.* at 4505.

67. *See id.* at 4582-84.

68. *See id.*

acquisition by one company of stock of another, where the two remain independent, was properly analyzed under Article 85 of the EC Treaty.[69]

There was a general consensus that Articles 85 and 86 of the EC Treaty did not offer a sufficient degree of merger control. This view was supported by several weaknesses of these articles.[70] The unsuitability of Article 85 and Article 86 as mechanisms of merger control, and the fears that the Commission would apply both articles in an uncoordinated and unpredictable way, pushed member states to agree on the adoption of the Merger Regulation in September 1990.[71]

IV. THE NOTION OF CONCENTRATION UNDER THE EU MERGER REGULATION

A. *Definition of Concentration*

Article 3 of the Merger Regulation defines a concentration as a situation where:

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69. *See id.*

70. *See, e.g.*, Afonso, *supra* note 43, at 11-12. These weaknesses may be summarized as follows:

- Article 86 could only be applied in cases where the merger strengthened existing dominance, not when the merger created new dominance. As a result, a company holding 75% of the market which merged with the holder of 5% of the market would be caught whereas a 45%-market-holder merging with its rival, also holding 45%, would not be caught.
- Article 86, unlike Article 85, does not provide exemptions for its prohibitions. *See* EC TREATY art. 85(3).
- According to the E.C.J. in *British American Tobacco Co.*, Article 85 does not apply if the acquiring company obtains full control of the target company. *British Am. Tobacco Co.*, 1987 E.C.R at 4582-84. It appears, however, that an agreement whereby more than 50% or even 100% of the shares are sold to the acquiring company might fall under Article 85.
- It is unclear whether Article 85 applies to a hostile takeover because this is a situation where the companies are not in agreement. Even considering that the cumulative result of all the individual transactions might have been the influence over the commercial conduct of the target, if the sellers had not been undertaking this, Article 85 would not have been applicable. *See* STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW: THE ESSENTIAL GUIDE TO THE LEGAL WORKING OF THE EUROPEAN COMMUNITY 713-14 (1993).
- The temporary nature of the exemptions granted to agreements under Article 85(3) was not appropriate for the transfer of ownerships.
- Finally, unlike the present Merger Regulation, Regulation 17, which implemented Articles 85 and 86, did not provide for a priori control of mergers, although this difficulty was circumvented by the informal practice of advance notifications by companies of proposed deals for the Commission's consideration. *See* Afonso, *supra* note 43, at 11-12.

71. *See* DAN G. GOYDER, EC COMPETITION LAW 191 (2d ed. 1993).

> (a) two or more previously independent undertakings merge, or
> (b) one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.[72]

Seeking to improve the level of certainty of the decisions made under the Merger Regulation, the Commission has recently issued the Notice on the Notion of a Concentration Under Council Regulation No. 4064/89[73] providing guidance on how the Commission should interpret the notion of concentration under Article 3 of the Merger Regulation. This notice reminds us that Article 3 of the Merger Regulation distinguishes between two categories of concentrations: (i) "those arising from a *merger* between previously independent undertakings"; and (ii) "those arising from *acquisition* of control."[74]

1. *Merger*

The Notice on the Notion of Undertaking explains that a merger between previously independent undertakings takes place in two situations. The first situation occurs when two or more independent undertakings amalgamate into a new undertaking, so that both lose their previous legal identities or when an undertaking is absorbed by another, the latter retaining its legal identity and the former ceasing to exist as a legal entity.[75] The second situation occurs when in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit.[76] This may occur where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management. If this leads to a de facto amalgamation of the undertakings concerned into a genuine economic unit, the operation is considered to be a merger.[77]

2. *Acquisition of Control*

Article 3(3) of the Merger Regulation defines control as the possibility of exercising "decisive influence" over other undertak-

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72. Merger Regulation, *supra* note 2, art. 3(1).
73. Notice on the Notion of a Concentration, *supra* note 3.
74. *Id.* ¶ 5 (emphasis added).
75. *See id.* ¶ 7.
76. *See id.*
77. *See id.*

ings. The concept of control under Article 3(3) of the Merger Regulation, where it is used for the purpose of determining the existence of a concentration, and the concept of control under Article 5(4) of the Merger Regulation, where it is utilized to calculate the turnover, seem to be different. As acknowledged by the Commission, the notion of control under Article 5(4) has been interpreted by the Commission very broadly and includes situations where a de facto control exists, although Article 5(4) does not expressly address this type of control.[78]

The Commission tends not to differentiate between the notion of control to assess whether or not the concentration exists and the notion of control to calculate the turnover. This tendency is consistent with the spirit of the Merger Regulation. Different definitions of control could lead to a situation in which a party concerned would be deemed part of a concentration because of the party's decisive influence (for instance, a de facto power to appoint more than half of the board members). However, because the means to exercise this influence do not correspond to the requirements of Article 5(4), the turnover of this party would not be taken into account to determine if the operation has a Community dimension.[79] This result would be contrary to the Merger Regulation's "basic rationale which is to provide a check on expansion and economic growth by way of a merger or acquisition."[80]

The Notice on the Notion of a Concentration makes a distinction between sole control and joint control.[81] "Sole control is normally acquired on a legal basis when an undertaking acquires a majority of the voting rights of a company."[82] An acquisition without a majority of the voting rights does not normally confer control, even if it involves the purchase of a majority of the share capital.[83] Sole

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78. *See* Commission Notice on Calculation of Turnover Under Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1994 O.J. (C 385) 21, ¶ 42 [hereinafter Notice on Calculation of Turnover].

> Since the aim of this provision [i.e, Article 5(4)] is simply to identify the companies belonging to the existing groups for the purposes of turnover calculation, the test of having the right to manage the undertaking's affairs in Article 5(4) is somewhat different to the test of control set out in Article 3(3), which refers to the acquisition of control carried out by means of a transaction subject to examination. Whereas the former is simpler and easier to prove on the basis of factual evidence, the latter is more demanding because in the absence of an acquisition of control, no acquisition arises.

Id.

79. For a discussion of the notion of Community dimension, see *infra* Part IV.B.

80. PIERRE BOS ET AL., CONCENTRATION CONTROL IN THE EUROPEAN COMMUNITY 133 (1992).

81. Notice on the Notion of a Concentration, *supra* note 3, ¶ 13.

82. *Id.*

83. *See id.*

control may also be acquired "in the case of a 'qualified minority,'" which can be established on a de jure and/or de facto basis.[84] A de jure basis refers to a situation where specific rights are attached to the minority shareholdings.[85] A de facto basis refers to a situation where the shareholder achieves a majority in the shareholders meeting because the remaining shares are widely dispersed, so that not all the smaller shareholders may be present or represented at the shareholders meeting.[86] "Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy."[87]

With regard to joint control, it exists "where two or more undertakings or persons have the ability to exercise decisive influence over another undertaking."[88] While such a control occurs in several different situations, it usually exists "where there are only two parent companies which share equally the voting rights to the joint venture" or "where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture."[89]

Joint control may also exist "where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies."[90] In such a situation, minority shareholders acquire additional rights enabling them to veto decisions which are "essential for the strategic commercial behavior of the joint venture."[91] These veto rights exceed the scope of the veto rights normally accorded to minority shareholders and may include rights to decide questions relating to budget, business plan, major investments, or appointment of senior management.[92]

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84. *Id.* ¶ 14.

85. *See id.* An example of these rights is "preferential shares leading to a majority of the voting rights or other rights enabling the minority shareholder to determine the strategic commercial behavior of the target company, such as the power to appoint the supervisory board or the administrative board." *Id.*

86. *See id.*

87. *Id.*

88. *Id.* ¶ 19. The Commission defines "decisive influence" as "the power to block actions which determine the strategic commercial behavior of an undertaking." *Id.*

89. *Id.* ¶ 20.

90. *Id.* ¶ 21.

91. *Id.*

92. *See id.* ¶¶ 22-23.

B. *Definition of Concentration with a Community Dimension*

The Merger Regulation is not necessarily applicable to any concentration; however, it does apply to all concentrations with a Community dimension. Under the Merger Regulation,

> a concentration has a Community dimension where:
>
> (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[93]

Since one of the main factors used in assessing a Community dimension is the undertakings' turnover, the Merger Regulation sets out the criteria for this calculation.[94] Thus Article 5(4) states that the aggregate turnover of an undertaking concerned within the meaning of Article 1(2)

> shall be calculated by adding together the respective turnovers of the following:
>
> (a) the undertaking concerned;
>
> (b) those undertakings in which the undertaking concerned, directly or indirectly: owns more than half the capital or business assets, or has the power to exercise more than half the voting rights, or has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or has the right to manage the undertakings' affairs;
>
> (c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);
>
> (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
>
> (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or power listed in (b).[95]

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

94. To overcome some procedural and practical questions which had caused difficulty in connection with calculation of turnover, the Commission issued an explanatory notice dealing with the issue. *See* Notice on Calculation of Turnover, *supra* note 78.

95. Merger Regulation, *supra* note 2, art. 5(4).

Therefore, the turnover of the undertaking (or undertakings) concerned must be added to the turnover of its subsidiaries, its parents, and subsidiaries of the parents. The problem is that Article 5(4) of the Merger Regulation does not clearly state if the rights listed in subparagraph (b) of this article may be exercised both *individually* and *jointly*. This seemingly small nuance is extremely important for practitioners in order to advise clients. Does this article mean that the turnover of a parent company within the meaning of subparagraph (c) will only be taken into account if it *individually* exercises one or more of the powers listed in subparagraph (b) or does it mean that such a turnover will be also taken into account when it exercises those rights *jointly* with another parent company?

Neither the E.C.J. nor the Court of First Instance has determined yet which of the two interpretations will be given to Article 5(4). However, the Commission in its Notice on Calculation of Turnover has interpreted this article as referring not only to companies exercising individually the rights listed in Article 5(4)(b) but also to companies exercising jointly those rights.[96]

Further, pursuant to Article 21 of the Merger Regulation, "[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension."[97] Therefore, the guiding principle is that concentrations with a Community dimension fall under the sole jurisdiction of the Commission whereas member states can continue to apply their national competition law to concentrations below the Community dimension threshold.

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96. Notice on Calculation of Turnover, *supra* note 78, ¶ 38(3). Most of the commentators have offered a similar interpretation of Article 5(4). *See, e.g.*, JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 30; *see also* C.J. COOK & C.S. KERSE, EEC MERGER CONTROL: REGULATION 4064/89, at 51 (1991). *But see* Mario Siragusa & Romano Subiotto, *The EEC Merger Control Regulation: The Commission's Evolving Case Law*, 28 COMMON MKT. L. REV. 877, 900 (1991).

97. Merger Regulation, *supra* note 2, art. 21(2). This "one-stop concentration control" has two main exceptions. First, member states are allowed to "take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law." *Id.* art. 21(3). Article 21(3) deems "[p]ublic security, plurality of the media and prudential rules" as legitimate interests. *Id.* This article further provides that "[a]ny other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law . . . ." *Id.*

Second, Article 9, also known as the "German clause," authorizes the Commission to refer a case involving a concentration with a Community dimension back to the relevant national authorities if the proposed concentration "threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not." *Id.* art. 9(2).

The Merger Regulation only grants the Commission jurisdiction over the matters listed in the Merger Regulation.[98] It appears, however, that it does not give the Commission the exclusive power to interpret the Merger Regulation. Rather, depending on whether or not a concentration has a Community dimension, provisions of the Merger Regulation may be interpreted by either a national authority or the Commission.

C. The Distinction Between Concentrative and Cooperative Joint Ventures

The Merger Regulation draws a distinction between those cooperative joint ventures and concentrative joint ventures.[99] A cooperative joint venture is one having as its object or effect "the coordination of the competitive behavior of undertakings which remain independent . . . ."[100] Under the Merger Regulation, a cooperative joint venture is not deemed to be a concentration and, therefore, is challengeable under Article 85 of the EC Treaty.[101] A concentrative joint venture performs, on a lasting basis, all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behavior of the parties with respect to each other and with respect to the joint venture.[102] A concentrative joint venture must be dealt with under the Merger Regulation.[103]

The question arises as to whether or not the distinction between cooperative and concentrative joint ventures should be replaced by a bright-line shareholding test.[104] In order to answer this question, one should consider the basic reasoning underlying the distinction. The principal rationale seems to be that concentrations resulting in permanent structural market change are considered more likely to produce benefits (for instance, economies of scale) than those resulting from commercial cooperation between independent companies and that, therefore, a cooperative joint venture can be adequately regulated only under the more strict regime of Article 85 of the EC Treaty.[105]

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98. *Id.* art. 21(1). "Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take [sic] the decisions provided for in this Regulation." *Id.*

99. *Id.* art. 3(2).

100. *Id.*

101. *Id.*

102. *See* Notice on the Distinction, *supra* note 3, ¶ 6.

103. *Id.*

104. *See* Barry E. Hawk & Henry L. Huser, *A Bright Line Shareholding Test to End the Nightmare Under the EEC Merger Regulation*, 30 COMMON MKT. L. REV. 1155, 1173-83 (1993).

105. With this regard, the Commission stated:

However, this rationale is flawed. The distinction between cooperative and concentrative joint ventures leads to a different treatment of economically similar transactions. The reason for such a treatment is that, contrary to what has been said by the Commission, in comparison to full mergers and acquisitions involving the same parties, most joint ventures, especially cooperative joint ventures, create lower risks of competitive harm.[106] This is because joint ventures may preserve some degree of competition and are more likely to break up at some later date, maintaining or reintroducing the parent companies as independent competitors in the joint venture market.[107] Moreover, joint ventures are often as likely to involve some degree of functional integration of economic resources resulting in economies of scale and other efficiencies as full mergers and acquisitions.[108]

In 1994, the Commission issued the Notice on the Distinction Between Concentrative and Cooperative Joint Ventures Under Council Regulation 4064/89 ("Notice on the Distinction"),[109] which replaced the notice on the same subject adopted in 1990.[110] The new Notice on the Distinction has attempted to close the uncertainty gap

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> The structural changes brought about by concentrations frequently reflect a dynamic process of restructuring in the markets concerned. They are permitted under the Merger Regulation unless they result in a serious damage to the structure of competition by creating or strengthening a dominant position.
>
> In this respect concentrations are to be contrasted with arrangements between independent undertakings whereby they co-ordinate their competitive behaviour. The latter do not, in principle, involve a lasting change in structure of undertakings. It is therefore appropriate to submit such arrangements to the prohibition laid down in Article 85(1) [of the EEC Treaty] ....

Notice on the Distinction, *supra* note 3, ¶ 6.

106. *See* Hawk & Huser, *supra* note 104, at 1158.

107. *See id.* at 1158-59.

108. *See id.* at 1160.

109. Notice on the Distinction, *supra* note 3.

110. Commission Notice of 14 August 1990 Regarding Interpretation of Concentrative and Cooperative Situations Under the Merger Control (Antitrust) Regulation 1989, 1990 O.J. (C 203) 10, *reprinted in* [1990] 4 C.M.L.R. 721. The wording of the new notice, unlike that of the 1990 Notice on the Distinction, reflects the will of the Commission to create as many joint ventures as possible fall under the Merger Regulation. Indeed, the Commission, in drafting its new notice, was fully aware that some of its decisions stating that the transaction in which one of the parent companies withdraws from the joint venture market will be deemed concentrative, were in clear contradiction with the 1990 Notice. *Id.* ¶ 33 ("Where the parent companies, or one of them, remain active on the joint venture market or remain potential competitors of the joint venture, a coordination of competitive behavior between the parent companies or between them and the joint venture must be presumed."). Therefore, one of the most important novelties of the 1994 Notice on the Distinction is the express recognition of what the Commission had already acknowledged in some of its decisions. *See e.g.*, Aegon/Scottish Equitable, 1993 O.J. (C 181) 4 ("Coordination can normally be excluded where the parent companies are not active in the market of the joint venture or transfer to the joint venture all their activities in this market or where only one parent company remains active in the joint ventures market....").

created by that distinction reflecting the practice of the Commission in assessing the concentrative or cooperative character of a joint venture. However, the attempt has proven unsuccessful, and the distinction remains artificial and unfeasible. Being time-consuming at both private and public levels,[111] it involves high costs and creates legal uncertainty. The impracticality of this distinction is especially evident in comparison with the U.S. merger control system, where such a distinction does not exist.

D. *Comparison with the U.S. Approach*

U.S. antitrust law distinguishes among business consolidations (mergers *stricto sensu*), acquisitions, and joint ventures. Section 7 of the Clayton Act prohibits any merger, stock acquisition (including minority acquisition), or asset acquisition in which the effect of the transaction "may be substantially to lessen competition or to tend to create a monopoly."[112]

The use of the verb *"may"* indicates that the Agencies or a private plaintiff do not have to prove that a merger *will* have an adverse effect; it is sufficient to show that a merger is likely to do so.[113] Moreover, the prohibition applies not only to stock and asset

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111. *See* Hawk & Huser, *supra* note 104, at 1162.

112. 15 U.S.C. § 18 (1994).

113. The Hart-Scott-Rodino Act imposes premerger notification and waiting period requirements to those transactions which meet the conditions provided therein. Hart-Scott-Rodino Antitrust Improvement Act, Pub. L. No. 94-435, 90 Stat. 1381 (1976) (codified at 15 U.S.C. §§ 15c, 15h, 18a, 66 (1994)). Except for the exemptions provided for in this act, the requirements apply if:

> (1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;
> (2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; (B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; or (C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more; and
> (3) as a result of such acquisition, the acquiring person would hold—(A) 15 per centum or more of the voting securities or assets of the acquired person, or (B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

15 U.S.C § 18a(a) (1994).

According to the Hart-Scott-Rodino Act, once the notification has been filed, the parties must wait thirty days before consummating the transaction or fifteen days in the case of cash tender offers. The waiting period can be extended for an additional twenty days or ten days for cash tender offers. *See id.* § 18a(b)(1)(B). This time can be extended again in order to file supplemental information requested by the Agencies. *See id.* § 18a(e). It is noteworthy that the acquisitions involving corporations but also to similar transactions involving any other person subject to FTC jurisdiction.[114] This provision, like its counterpart in the Merger Regulation, i.e., Article 2(3), is directed against the "perceived evil" in its incipiency rather than at penalizing or prohibiting established abuses.[115]

Section 7 applies to the acquisition by a U.S. company of a foreign company, acquisition by a foreign corporation of a U.S. company, and acquisition by a foreign corporation of another foreign corporation if either party has significant operations in the states.[116] A foreign company acquiring another foreign company may be subject to U.S. premerger notification requirements "if the two have aggregate net sales or assets in the United States of $110 million."[117] This requirement may also apply to a foreign company which acquires an enterprise with U.S. assets in excess of $15 million.[118] Further, a foreign company generating sales in excess of $25 million may be subject to premerger notification if it seeks to merge with a U.S. company.[119]

Corporate joint ventures may be challenged under section 7 if their effect is to "substantially lessen competition" or if they "tend to create a monopoly."[120] The leading merger case dealing with a joint venture is *United States v. Penn-Olin Chemical Co.*,[121] where the Supreme Court developed the test for determining whether a joint venture is in violation of section 7.[122] According to the Court, what should be examined is whether given the level of concentration of the market and the power of the parent company in the market, the joint venture threatens to eliminate actual competition among the companies or discourages the joint venture from entering a new market.[123] Essentially, the test is whether the venturers would have entered the market in which the joint venture will operate.

Agencies may still challenge a transaction under section 7 of the Clayton Act, even if no premerger notification requirements existed under section 7A. *See* Helmut Bergmann, *Settlements in EC Merger Control Proceedings: A Summary of EC Enforcement Practice and a Comparison with the United States*, 62 ANTITRUST 47, 47-48 (1993).

114. *See* United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir. 1990) (finding that a merger between two nonprofit making associations was not subject to section 7 of the Clayton Act because nonprofit associations are not subject to the jurisdiction of the FTC).

115. *See* D.M. RAYBOULD & ALLISON FIRTH, COMPARATIVE LAW OF MONOPOLIES 135 (1991).

116. *See* Donald I. Baker, *The Anti-trust Merger Maze in the United States*, [1993] 3 EUR. COMPETITION L. REV. 126, 126.

117. *See id.*

118. *See id.*

119. *See id.*

120. 15 U.S.C. § 18 (1994).

121. 378 U.S. 158 (1964).

122. *Id.* at 158-59.

123. *See id.* at 173-74.

This test was applied by the Eighth Circuit Court in *Yamaha Motor Co. v. FTC.*[124] Therein, Brunswick, a U.S. manufacturer, and Yamaha, a Japanese manufacturer, established a joint venture to develop and produce a new line of outboard motors.[125] The venture agreement gave both Yamaha and Brunswick the exclusive right to market the joint venture products in Japan and in the U.S.[126] It was proven that Yamaha was about to enter the U.S. market and that the agreement made the Japanese abandon those plans.[127] The Eighth Circuit ruled that the joint venture violated the Clayton Act by eliminating actual potential entry by Yamaha into the U.S. motor market.[128] The court took into account the highly concentrated market in which the joint venture had been set up and the fact that one of the parent companies held a dominant position in the U.S. market.[129]

Unlike the Merger Regulation, the U.S. merger control system does not distinguish between cooperative and concentrative joint ventures. Had it been otherwise and had EU antitrust law been applicable to the *Yamaha* case, the Brunswick/Yamaha joint venture would have been qualified as a cooperative joint venture, so that the case would have been analyzed under Article 85 of the EC Treaty, not under the Merger Regulation. The U.S. approach is more feasible than that adopted in the EU. Thus U.S. law firms, in-house legal departments, and federal enforcement Agencies typically delegate Hart-Scott-Rodino notification[130] issues to a few specialists while other attorneys focus on substantive aspects of a merger.[131] In marked contrast to the EU merger control system, even those attorneys who handle both procedural and substantive issues in the same transaction usually spend only a fraction of their time and resources on procedural work.[132]

For these reasons, the Commission should adopt a bright-line shareholding test, which would eliminate the present distinction. The proposal made by professors Hawk and Huser in 1993 provides a good guideline for the Commission.[133] According to these scholars, if a transaction involves an acquisition of the voting stock of any

124. 657 F.2d 971 (8th Cir. 1981).
125. *See id.* at 973.
126. *See id.* at 974.
127. *See id.*
128. *See id.* at 971.
129. *See id.* at 977-78.
130. *See* 15 U.S.C. 18a (1994).
131. *See* Hawk & Huser, *supra* note 104, at 1162 n.20.
132. *See id.*
133. *Id.* at 1173.

entity, and if the acquiring entity holds more than 25% of the total outstanding voting stock, then such a transaction should be presumed to be a concentration.[134] The 25% threshold is in harmony with the control threshold employed under merger control laws of the majority of EU member states,[135] as well as with the Commission's sole and joint control decisions under the Merger Regulation, which try to detect concentrations in the range of 10-25%.[136] A transaction is also a concentration if there is an acquisition by one entity of all or substantially all the tangible or intangible assets of another company, or if there is a legal merger (or merger *stricto sensu*) between entities.

The adoption of this bright-line shareholding test has the advantage of not requiring an amendment of the Merger Regulation. The Merger Regulation merely states that control is constituted by a "decisive influence"[137] and that a concentrative joint venture is autonomous from its parent and does not involve "coordination of competitive behavior."[138] However, the Merger Regulation does not explain what criteria are used in assessing when these conditions are satisfied.[139]

V. DEFINITION OF THE RELEVANT MARKET

A. *When the Enforcement Agencies Become Fortune-Tellers*

The definition of the relevant market is no doubt one of the most difficult parts of the merger analysis regardless of the concrete merger system to which it refers. The Commission, when assessing whether or not a proposed merger "creates or strengthens a dominant position,"[140] and the Agencies, when determining whether the effect of the acquisition "may be substantially to lessen competition

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134. *See id.* When computing the amount of voting stock, the voting stock already held by the acquiring party could be added to the new voting stock. Merger control, as it happens in Germany, would be applicable to the successive acquisitions of voting stock each time the threshold of 25%, 50%, and above 50% of voting stocks is realized. *See* Law Against Restraints of Competition § 23(2) n.2, BGBl. I, 235 (F.R.G.).

135. *See id.*; Fair Trading Act, 1973, §§ 64, 65(1) (Eng.); Ordonnance relative à la liberté des prix et de la concurrence § 39 (Fr.). The German provision even goes further than our proposal and declares that an acquisition is deemed to be a merger if either 25% or more of the shares or 25% or more of the voting rights are acquired. *See* Law Against Restraints of Competition § 23(2) n.2, BGBl. I, 235 (F.R.G.).

136. *See* Hawk & Huser, *supra* note 104, at 1174.

137. Merger Regulation, *supra* note 2, art. 3(3).

138. *Id.* art. 3(2).

139. *See* Hawk & Huser, *supra* note 104, at 1182.

140. Merger Regulation, *supra* note 2, art. 2(3).

or tend to create a monopoly,"[141] must define properly the product and geographic market in which the proposed merger will take place.

In addition, market definition in the merger context is always more imprecise than under Article 86 of the EC Treaty or its counterpart, section 2 of the Sherman Act.[142] Under the Sherman Act, the Agencies should determine whether an undertaking actually abuses its dominant position or attempts to "monopolize any part of the trade or commerce among the several States or with foreign nations . . . ."[143] On the other hand, under section 7 of the Clayton Act, assessing the effects of a merger on competition is a matter of prediction.[144] Thus the Agencies are not faced with the problem of proving that a merger has adversely affected the market; rather it has to show the likelihood of such outcome. The result of this approach is that the definition of market under section 7 of the Clayton Act is broader than under Article 86 of the EC Treaty or section 2 of the Sherman Act.[145] Trying to discern the relevant product and geographic markets, the Commission and the Agencies use different appraisal criteria.

B. *Definition of the Relevant Product Market*

1. *The Commission's Merger Control Policy*

The Merger Regulation does not offer a clear guideline as to how the relevant market must be defined when assessing the compatibility of a proposed merger with the common market. Relevant product markets are only mentioned in section 5 of Merger Notification Form CO,[146] which states: "A relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[147]

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141. 15 U.S.C. § 18 (1994).

142. *Id.* § 2.

143. *Id.*; *see also* Frank M. Hellemans, *Substantive Appraisal of Horizontal Mergers Under EEC Regulation 4064/89: An Inquiry into the Commission's First Year Decisions*, 13 NW. J. INT'L L. & BUS. 613, 620 (1993).

144. 15 U.S.C. § 18 (1994); *see also* Hellemans, *supra* note 143, at 620.

145. *See* Hellemans, *supra* note 143, at 620.

146. Form CO Relating to the Notification of a Concentration Pursuant to Regulation 4064/89, Commission Regulation (EEC) No. 3384/94 of 21 December 1994 on the Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1994 O.J. (L 377) 1, Annex. Form CO lays down the data required for the notification of a concentration.

147. *Id.* § 5.

Therefore, under the Merger Regulation, as in the U.S. merger control system, demand side substitutability has been the determining factor in the definition of relevant market.[148] What is surprising for the EU system, from a U.S. point of view, is that these general principles stated in section 5 of Form CO have not been developed further by the Commission through explanatory notices. This is a regrettable situation, especially from the prospective of European practitioners, because unlike their U.S. colleagues, they do not have clear guidelines to rely on when advising clients whether or not to merge. However, when measuring the degree of substitutability between products or services, the Commission has used other criteria, which are discussed below.

(i) Physical Characteristics of the Product and Intended End Use

Most of the Commission's decisions start the definition of relevant product market by analyzing physical characteristics of the product and intended end use. If physical differences between two products are so significant that these products cannot be used for the same end use, then they will not be considered to be substitutable. In *Renault/Volvo*, the Commission dealt with the reciprocal acquisition by the two companies of 45% shareholdings in each other's bus and truck businesses.[149] The Commission noted that the truck market was subdivided into three submarkets: (i) trucks below five tons (ii) trucks between five and sixteen tons; and (iii) trucks above sixteen tons.[150] The parties' view that the demand for trucks above five tons composed a single market was dismissed by the Commission because the technical configurations of the trucks of five to sixteen tons (the intermediate range) and those of the trucks above sixteen tons (the upper range) were very different.[151] The main mechanical characteristics of the trucks, such as the type of engine, the number of axles, and the type of trailer, varied.[152] The technical aspects of the upper range were more sophisticated because the requirements of durability and operating costs were greater than those for the intermediate range.[153] Trucks above sixteen tons were used in long haul, construction, and long-distance distribution

148. In the U.S., market definition focuses solely on demand substitution (i.e., possible consumer responses). Supply substitution factors, i.e., possible production responses, are also to be taken into account by the 1992 Guidelines. 1992 Guidelines, *supra* note 23, § 1.

149. Renault/Volvo, 1990 O.J. (L 281) 2.

150. *See id.* ¶ 9.

151. *See id.* ¶ 10.

152. *See id.*

153. *See id.*

traffic.[154] Furthermore, marketing conditions of trucks were influenced by these technical differences.[155]

This criterion alone will rarely suffice to establish a product market definition because products with very different characteristics and uses may constitute an alternative choice for consumers whereas similar products may be demanded for very different reasons. Thus it would be possible to say that bottled spring water is in demand because consumers think that it is a healthy product, but other soft drinks are bought to quench consumers' thirst, although spring water and soft drinks may be considered to be similar products.[156]

By the same token, if the product market analysis were based solely upon products' physical characteristics or intended end use, the Commission would not differentiate markets on the basis of different distribution channels as it has already done in some of its decisions;[157] nor would it distinguish between "manufacture brand" and "store brand" markets.[158]

Further, in many cases, the use of this sole criteria would be inappropriate for another reason. As the Commission stated in *McCormick/CPC/Rabobank/Ostmann*,[159] a case involving a merger between suppliers of dried spices: "[A] strict view of demand substitution from the perspective of the end consumer could lead to the argument that each individual spice represents different characteristics, prices and end use. Such a narrow approach would not allow a

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154. *See id.*

155. *See id.*

156. *See* Nestlé/Perrier, 1992 O.J. (L 356) 1, ¶ 10.

157. *See, e.g.*, Orkla/Volvo, 1996 O.J. (L 66) 17 (finding that retail sale of beer constituted a separate relevant market); Unilever France/Ortiz-Milko, 1994 O.J. (C 109) 13 (distinguishing between take-home, catering, and impulse markets for ice cream and sorbet products); Promodes/BRMC, 1992 O.J. (C 232) 14 (distinguishing among small specialized businesses, small supermarkets, medium-size supermarkets, and large supermarkets). For example, in *La Redoute/Empire*, the Commission decided that the relevant product market was mail order retailing of non-food products, not the retail sector as a whole. La Redoute/Empire, 1991 O.J. (C 156) 10, ¶ 11. The Commission explained that mail order retailing contains a number of characteristics which distinguish it from other forms of retailing. *See id.* Thus consumers make their choice at home, and not in the presence of the seller; goods are delivered to a consumer's residence and may be returned at a seller's expense; certain consumers, for example disabled individuals, have no alternatives to home shopping; prices of mail order companies are subject to a number of restraints (for example, they have to be fixed prior to publication of a catalogue and for the entire life span of a catalogue). *See id.*

158. With this regard, however, the Commission's decisions have been somewhat inconsistent. *Compare* Kimberly-Clark/Scott Paper, 1996 O.J. (L 133) 1 (finding that manufacturer brand and store brand products belonged to different markets) *with* Procter & Gamble/V.P. Schickedanz, 1994 O.J. (L 354) 32 (suggesting that manufacturer brand feminine sanitary towels and store brand sanitary towels could belong to separate markets).

159. 1994 O.J. (C 23) 13.

proper analysis of the conditions of competition in this market."[160] In this case, the Commission found that all herbs and dried spices supplied to food retailers for eventual household consumption constituted the relevant market, mainly because suppliers offered and distributors demanded a full line of range of herbs and spices, not individual spices from different suppliers.[161]

In conclusion, the main risk in assessing substitution solely on the basis of the product's characteristics or intended use is that, on one hand, it involves subjective considerations and, on the other hand, it may lead to narrow definitions of the relevant market which may not reflect real conditions of competition in the market. Therefore, it is necessary to confront the relevant market analysis with an examination of further factors.[162]

(ii) Consumer Preferences

To establish substitution, product characteristics and end use have to be examined along with consumer preferences. Certain products may be substitutable in terms of both physical characteristics and end use and have similar prices. However, because of consumer preference for one specific type of product (or the way in which it is presented or advertised), these products may not necessarily be deemed substitutable.[163] For instance, in *Nestlé/Perrier*, to exclude soft drinks from the relevant supermarket, the Commission took into account the motivation of final consumers to purchase bottled spring water.[164] Accordingly, the Commission pointed out that bottled spring water, particularly in France, was bought and regularly consumed because of its image as a natural product and its association with purity, cleanliness, absence of contamination, and a healthy style of life.[165] In order to reach that conclusion, the Commission took three factors into account: (i) preferences of final consumers; (ii) purchasing patterns of final consumers (spring water is bought regularly by final consumers for daily use in large quantities whereas soft drinks are consumed more occasionally); and (iii) level of per capita consumption, which was much higher for bottled spring water than for soft drinks.[166]

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160. *Id.* ¶ 25.
161. *See id.* ¶ 26.
162. *See* Juan Briones Alonso, *Market Definition in the Community's Merger Control Policy*, [1994] 4 EUR. COMPETITION L. REV. 195, 198.
163. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 113.
164. Nestlé/Perrier, 1992 O.J. (L 356) 1.
165. *See id.* ¶ 10.
166. *See id.* ¶ 10-12.

Consumer preferences were also taken into account by the Commission in *Allied Lyons/HWE-Pedro Domecq*.[167] Therein, the Commission found that sherry (a premium wine produced in the Jerez region of Spain) and sherry-style wines, such as British sherry, did not belong to the same market.[168] Although the sales of sherry decreased in the United Kingdom and Ireland, sherry kept a loyal base of consumers who were not willing to switch to sherry-style wines.[169]

In short, the problem with consumer preferences is that they change over time and are difficult to assess.

(iii) Barriers and Costs Associated with Switching Consumption to Potential Substitutes

When the clients of the merging parties are companies, not individual consumers, the Commission usually considers barriers and costs associated with switching consumption to potential substitutes. In *Eridania/ISI*, the Commission found that isoglucose and sugar were not in the same relevant market because the production quota for isoglucose established under the Common Agricultural Policy legally impeded an expansion of isoglucose production to meet any additional demand arising from a change in sugar prices.[170] Similarly, in *Tetrapak/Alfa-Laval*, the Commission examined the concentration between two suppliers of packaging machines.[171] In this decision, the Commission found that aseptic carton packaging machines and non-aseptic packaging machines did not belong to the same relevant market because distributors of the final product needed different refrigerating equipment to purchase each type of machine.[172]

The *Du Pont/ICI* case involved a concentration between two manufacturers of nylon fibers sold to carpet manufacturers.[173] Therein, the Commission ruled that carpet manufacturers would incur higher production costs and higher storage costs and lose sales of carpets in specific market segments if they were to substitute their nylon-based processes with the polypropylene-based processes.[174]

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167. 1994 O.J. (C 126) 10.
168. *See id.*
169. *See id.* ¶ 16.
170. Eridania/ISI, 1991 O.J. (C 204) 12.
171. Tetrapak/Alfa-Laval, 1991 O.J. (L 290) 35.
172. *See id.* ¶ 2(2).
173. Du Pont/ICI, 1993 O. J. (L 7) 13.
174. *See id.; see also* Alonso, *supra* note 162, at 200.

The same reasoning was followed by the Commission in *Crown Cork & Seal/Carnaud Metalbox*,[175] a case which involved a merger between two major packaging manufacturers. Contrary to what the parties concerned intended, the Commission concluded that there was a distinct relevant product market for tinplate aerosol cans and aluminum aerosol cans.[176] One of the justifications for this conclusion was that according to the information gathered by the commission, no tinplate aerosol can user had ever switched to aluminum cans in the past.[177]

(iv) Price Difference

If two products have significantly different prices, they are unlikely to belong to the same relevant product market.[178] The Commission analyzed this factor in *Nestlé/Perrier* in order to distinguish between the bottled spring water market and the soft drink market.[179] The Commission found that in France prices of soft drinks are, as a rule, much higher than those of bottled spring water, the price ratio being three to two.[180] This price ratio is "of such a magnitude that an appreciable nontransitory increase in the price of spring water, would not lead to a significant shift of demand from spring water to soft drinks for reasons of price only."[181]

(v) Price Evolution

Price evolution was examined as well in the *Nestlé/Perrier* decision.[182] The Commission noted that manufacturer's prices of spring water and soft drinks evolved differently.[183] National suppliers of spring water had substantially increased their prices in spite of the decreasing trend of soft drink prices during the same period.[184] In their pricing policies, manufacturers in both sectors ignored

175. 1996 O.J. (L 75) 38.
176. *See id.* ¶ 14.
177. *See id.*
178. *See* Kepola/Kymmene, 1995 O.J. (C 318) 3; Allied Lyons/HWE-Pedro Domecq, 1994 O.J. (C 126) 10. *But see* Eridania/ISI, 1991 O.J. (C 204) 12. In *Eridania*, price differences between sugar for human consumption and industrial consumption did not impede the Commission to consider both products as belonging to the same relevant market. *Id.*
179. 1992 O.J. (L 356) 1.
180. *See id.* ¶ 13.
181. *Id.* Price differences were also taken into account in the following cases: Du Pont/ICI, 1993 O.J. (L 7) 13; Digital/Kienzle, 1991 O.J. (L 55) 16; Aerospatiale-Alenia/De Havilland, 1991 O.J. (L 334) 42.
182. *Nestlé*, 1992 O.J. (L 356) 1; *see also* Crown Cork & Seal/Carnaud Metalbox, 1996 O.J. (L 75) 38, ¶ 24.
183. *Nestlé*, 1992 O.J. (L 356) 1, ¶ 13.
184. *See id.*

possible substitution by consumers.[185] Accordingly, this price evolution indicates that even strong and sustained reductions of soft drink prices would not force spring water suppliers to reduce prices of spring water; nor would it affect their ability to increase these prices.[186]

(vi) Price Elasticity of Demand

While the U.S. Agencies commonly base their relevant market product considerations on price elasticity of demand, the Commission has directly considered this factor only several times.[187] In *Tetra Pak/Alfa-Alval,* in assessing the relevant product market for machines used for the packaging of liquid foods in cartons under aseptic conditions, the Commission took into account not only the "conventional" criteria already used in its other decisions but also referred directly to the price elasticity of demand by examining how consumers would react to "a small but significant price rise."[188] The Commission's inquiries indicated that the price elasticity of demand between aseptic and non-aseptic packaging was very low.[189]

(vii) Conditions of Competition

Certain decisions of the Commission have distinguished product markets on the basis of the existence of different conditions of competition. Perhaps one of the best-known cases in that respect is *Aerospatiale/MBB,* which involved the merger of Aerospatiale, a French company, and Messerschmidt-Bolkow-Blohm GmbH (MBB), a German company.[190] This merger affected both the civil and military helicopter markets.[191] Considering the legality of the merger, the Commission recognized the existence of strong links between helicopter activities in the military and civil sectors.[192] On the other hand, it found essential differences between the two sectors with regard to the product characteristics, the structure of demand, and the conditions of competition.[193] As far as the conditions of competition were concerned, demand in the military

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185. *See id.*
186. *See id.*
187. *See, e.g., Crown Cork & Seal,* 1996 O.J. (L 75) ¶ 22; Procter & Gamble/VP Schickedank, 1994 O.J. (L 354) 32, ¶¶ 54-61.
188. Tetra Pak/Alfa-Alval, 1991 O.J. (L 290) 35, ¶ 2(1)(ii).
189. *See id.* ¶ 2(1)(v).
190. Aerospatiale/MBB, 1991 O.J. (C 59) 13.
191. *See id.* ¶ 5.
192. *See id.* ¶ 6.
193. *See id.* ¶ 9.

sector, was purely national[194] whereas the civil helicopter markets were generally open for worldwide competition, and the barriers to entry were considered low.[195] Accordingly, the two helicopter sectors constituted different relevant product markets.[196]

The differentiation of markets on the basis of the different conditions of competition has played an important role in cases dealing with motor vehicle components. In electric-battery cases—*Magneti Marelli/CEAc*[197] and *Varta/Bosch*[198]—the market for starter batteries was divided between those sold as original equipment and those sold as replacement batteries. The Commission found that the distinction between the original equipment market, in which the product was sold to motor vehicle manufacturers, and the replacement market was based not so much on differences in the products or in the function of the products but on the fact that the conditions of competition in the replacement market differed significantly from those in the market for original equipment.[199] Thus the original equipment market was characterized as having higher buying power, and the batteries sold to that market tended to have more advanced technical characteristics.[200]

Similar reasoning can be found in the *Manesmann/Boge* decision, which concerned a merger of two German shock-absorber producers.[201] Therein, the division between the original equipment market and the replacement market was related to differences in the prices charged to the different customers.[202]

(viii) Supply Side Substitutability

In several cases, the Commission has applied both demand and supply side substitutability tests.[203] Supply side substitutability is defined as the possibility for manufacturers of a given product that is not part of the relevant market to switch production to products which are considered as belonging to the relevant market, in a short period of time and without incurring additional expenses or risks.[204]

194. *See id.* ¶ 12.
195. *See id.* ¶ 20.
196. *See id.* ¶ 9.
197. 1991 O.J. (L 222) 38.
198. 1991 O.J. (L 320) 26.
199. *See id.* ¶¶ 12-13.
200. *Magneti Marelli,* 1991 O.J. (L 222) ¶¶ 8-10.
201. Manesmann/Boge, 1991 O.J. (C 265) 8.
202. *See id.*
203. *See, e.g.,* Kepola/Kymmene, 1995 O.J. (C 318) 3, ¶¶ 9-12, Electrolux/AEG, 1994 O.J. (C 187) 14, ¶¶ 9-11.
204. *See* Briones, *supra* note 139, at 205.

In *Torras/Sarrió*, a case dealing with the acquisition by Grupo Torras of certain paper assets of Sarrió SA, which reinforced its already leading market position in Spain and Portugal, the Commission recognized that coated paper manufacturers could switch production from one paper to another paper of different quality within one day.[205]

The possibility of enlarging the relevant product market through the supply side substitutability test was not, however, recognized by the Commission in *Nestlé/Perrier* or in *De Havilland*. In *Nestlé/Perrier*, the Commission explicitly indicated that the technical possibility of manufacturing the relevant product was not enough to enlarge the market on the basis of supply side substitutability.[206] The Commission did not contest that soft drink producers could easily bottle tap water. However, the Commission rejected the argument put forward by Nestlé that tap water would be considered by consumers as a substitute for spring water.[207] In fact, as the Commission pointed out, no soft drink or beer manufacturer had ever entered the spring-water market in France.[208] In addition to this past evidence, the soft drink producers consulted by the Commission confirmed that they did not envisage producing purified tap water for the French market; nor did they suggest that it would be commercially feasible or rational to do so.[209]

In *De Havilland*, the Commission found that smaller aircraft (thirty seats) and larger aircraft (fifty seats) did not constitute different product markets because the switch of production from one to another would have required modification of facilities, taking over three or four years.[210] This time period was considered too long for market definition.[211] Generally, the maximum time period within which the Commission would consider supply side substitutability is one year. The effects of supply side substitutability involving longer periods would instead be analyzed under dominance provisions.[212] In practice, however, the final outcome of the decision

205. Torras/Sarrió, 1992 O.J. (C 58) 20. The same approach was taken in *KNG/BT/VRG*, 1993 O.J. (L 217) 35, with regard to waste paper board.

206. Nestlé/Perrier, 1992 O.J. (L 356) 1, ¶ 18.

207. *See id.*

208. *See id.*

209. *See id.*

210. Aerospatiale/Alenia/De Havilland, 1991 O.J. (L 334) 42, ¶ 14.

211. *See id.*

212. This clear dividing time-line was laid down by the Commission in *Lucas/Eaton*, 1991 O.J. (C 328) 15.

should be neutral as to whether supply side substitutability is taken into account at one stage or the other.[213]

2. *The 1992 Guidelines*

The appraisal criteria used by the Commission can also be found in certain U.S. Supreme Court cases[214] and in the Horizontal Merger Guidelines issued by the DOJ in 1992 ("1992 Guidelines").[215] What are the differences between the U.S. and EU systems and what can be learned from U.S. practice? Some commentators have indicated that the most striking difference in relevant product market definition between the two systems lies not so much in the nature of the criteria used as in the relative weight that is given to each of them and in the way they are combined with each other.[216] Under the 1992 Guidelines, when defining the relevant product market the main factor to be taken into consideration is price increase.[217] The Agencies look at the other factors as ancillary criteria that indicate the likely effect of a price increase.[218]

The Agencies will begin with each product produced or sold by each merging company and make an inquiry into what would happen if a hypothetical monopolist (a sole seller) of that product imposed at least a "small but significant and nontransitory increase" in price, with the terms of the sale of all other products remaining constant.[219]

> If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist . . . would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging company's product [and will ask the same question again].
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> . . . .
>
> This process will continue until a group of products is identified such that a hypothetical monopolist . . . would profitably impose at least a "small but significant and nontransitory" increase including the price of a product of one of the merging firms. The Agency

213. *See* Alonso, *supra* note 162, at 207.
214. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 334-35 (1962).
215. 1992 Guidelines, *supra* note 23.
216. *See* Hellemans, *supra* note 143, at 634.
217. 1992 Guidelines, *supra* note 23, § 1(11)
218. *See id.*
219. *See id.* § 1(21).

generally will consider the relevant product market to be the smallest group of products that satisfies this test.

In the above analysis, the Agency will use prevailing prices of the products of the merging firms and possible substitutes for such products, unless premerger circumstances are strongly suggestive of coordinated interaction, in which case the Agency will use a price more reflective of the competitive price.

. . . .

In general, the price for which an increase will be postulated . . . is considered to be the price of the product at the stage of the industry being examined. In attempting to determine objectively the effect of a "small but significant and nontransitory" increase in price, the Agency, in most contexts, will use a price increase of five percent lasting for the foreseeable future. However, what constitutes a small but significant and nontransitory increase in price will depend on the nature of the industry, and the Agency at times may use a price increase that is larger or smaller than five percent.[220]

Supply side considerations also play a role in the Agencies' approach towards relevant market definition. Section 1(32) of the 1992 Guidelines refers to production substitution as to the shift by a company in the use of assets from producing and selling one product to producing and selling another.[221] Companies which are likely to enter the market within one year, and without incurring significant sunk costs[222] of entry and exit in response to a significant but nontransitory increase of price, will be treated as market participants.[223] These companies are termed "uncommitted entrants" because they could quickly cease production without significant loss.[224] If a company has "the technological capability to achieve such an uncommitted supply response, but likely would not . . . [then it] will not be considered to be a market participant."[225] Among the reasons for a company's inability to achieve an uncommitted supply response may be difficulties in achieving product acceptance, distribution, or production.[226]

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220. *Id.*

221. *Id.* § 1(32).

222. Sunk costs are defined in the 1992 Guidelines as "the acquisition costs of tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market." *Id.* "A significant sunk cost is one which would not be recouped within one year of the commencement of the supply response . . . ." *Id.*

223. *See id.*

224. *Id.*

225. *Id.* § 1(32).

226. *See id.*

The Agencies use these entry considerations in examining the dominance of the companies. Indeed, one of the most significant revisions of the 1992 Guidelines has been to sharpen the distinction between the treatment of various types of supply responses and to articulate the framework for analyzing the timeliness, likelihood, and sufficiency of entry.[227] According to the 1992 Guidelines,

> [a] merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter any anticompetitive merger in its incipiency.[228]

The basic idea is that in markets where entry is easy, i.e., where entry passes these tests of timeliness, likelihood, and sufficiency, the merger raises no antitrust concerns and ordinarily requires no further analysis.

a. Timeliness

The Agencies will generally consider "only those entry alternatives that can be achieved within two years from initial planning to significant market impact."[229] If entry can only occur outside of the two-year period, the Agencies "will consider entry to be timely so long as it would deter or counteract the competitive effects of concern within the two year period and subsequently."[230]

b. Likelihood

With regard to the likelihood of entry, the 1992 Guidelines provide:

> An entry alternative is likely if it would be profitable at premerger prices, and if such prices could be secured by the entrant. The committed entrant will be unable to secure prices at premerger levels if its output is too large for the market to absorb without depressing prices further.[231]

Entry is unlikely if the minimum viable scale, i.e., the smallest average annual level of sales that the committed entrant must

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227. *See* U.S. Dep't of Justice & Federal Trade Comm'n, Statement Accompanying Release of Revised Merger Guidelines, *reprinted in* 57 Fed. Reg. 41, 552 (Apr. 2, 1992).
228. 1992 Guidelines, *supra* note 23, § 3(0).
229. *Id.* § 3(2).
230. *Id.*
231. *Id.* § 3(3).

persistently achieve for profitability at premerger prices, "is larger than the likely sales opportunity available to entrants."[232]

Thus the 1992 Guidelines propose to measure the likelihood of entry by comparing the minimum viable scale of entry against a hypothetical 5% reduction in output.[233] If the identified scale of entry is greater than the 5% gap, then the entry is deemed to be unlikely.[234]

c. Sufficiency

Under the 1992 Guidelines, "entry, although likely, will not be sufficient if, as a result of incumbent control, the tangible and intangible assets required for entry are not adequately available for entrants to respond fully to their sales opportunities."[235] The main difference between this analysis and the Commission's entry side analysis is that unlike the 1992 Guidelines, the Merger Regulation and the Commission's practice leave unclear how rapid entry must be for firms to be considered part of the market. Some Commission officials have emphasized that in assessing changes in the market structure, the Commission must use a longer time scale than would be appropriate in assessing abusive behavior under Article 86 of the EC Treaty.[236] Merger advisers frequently argue that entry occurring up to five years is relevant. However, the Commission case law seems to indicate that although the time horizon is longer than under the 1992 Guidelines, five years is considered to be too long a period. In the *De Havilland* decision, the Commission rejected supply side considerations because the switch of production would require adaptations taking over three or four years.[237] Absent a definite standard, it seems that the time limit may be established only on a case-by-case basis.

In sum, a relevant market is the smallest product and geographic market in which a hypothetical monopolist could profitably impose a small but significant and nontransitory increase in price, usually in the order of 5%, without pulling in additional substitute products. If

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232. *Id.*

233. *See id.*

234. *See id. But see* Dissenting Statement of Commissioner Mary L. Azcuenaga on the Issuance of Horizontal Merger Guidelines, *reprinted in* 7 Trade Reg. Rep. (CCH) ¶ 50,085 (Apr. 2, 1992) [hereinafter Azcuenaga]. Commissioner Azcuenaga argued that the 5% standard (meaning that the increase of prices in 5% leads to a reduction of sales of no less than 5%) is an untested assumption which creates legal uncertainty. *See id.*

235. 1992 Guidelines, *supra* note 23, § 3(4).

236. *See* Dennis W. Carlton & William D. Bishop, *Merger Policy and Market Definition Under the EC Merger Regulation*, *in* 1993 FORDHAM CORP. L. INST. 422 (Barry E. Hawk ed., 1994).

237. Aeroespatiale-Alenia/De Havilland, 1991 O.J. (L 334) 42.

consumers turn to other products or buy from other suppliers outside the posited geographic area, so that the price increase becomes unprofitable, then the relevant market should be enlarged to include those products or suppliers in other areas. Supply side considerations will be taken into account as well in outlining the relevant product market.[238]

With regard to the two different approaches towards product market definition, a few preliminary conclusions can be drawn. The Commission should issue a notice giving clear guidelines as to the analytical framework it will apply in determining the relevant product market. Such a notice would close the legal uncertainty gap that practitioners suffer from when trying to advise clients on proposed mergers. The main advantage of having guidelines is that they would relieve lawyers from the time-consuming and not necessarily rewarding task of researching the Commission's decisions. These guidelines would set forth the criteria and the merger enforcement policy of the Commission and, as a result, would increase the predictability of the Commission's assessments.[239]

C. Definition of the Relevant Geographic Market

Product market definition and geographic market definition are interrelated. In order to calculate the market share resulting from the proposed merger, all undertakings that constrain the behavior of the merging entities by acting as effective competitors must be included in the relevant market.[240] Once the relevant product market is defined, the question arises as to what extent geographically dispersed companies will be considered in the relevant market.[241] Only after having determined both the relevant product and geographic markets will it be feasible to assess whether the proposed merger creates or strengthens a dominant position or whether its effect "may be substantially to lessen competition, or tend to create a monopoly."[242]

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238. *See* Mark Leddy, *The 1992 US Horizontal Merger Guidelines and Some Comparisons with the EC Enforcement Policy*, [1993] 1 EUR. COMPETITION L. REV. 15, 15-16.
239. *See* Hellemans, *supra* note 143, at 636-37.
240. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 177.
241. *See* Hellemans, *supra* note 143, at 637.
242. 15 U.S.C. § 18 (1994).

1. The Commission's Merger Control Policy

Geographic market definition can be approached in two ways. First, to determine whether the merging entities could, in the short term, begin selling significant quantities in the area in question, one can examine the manufacturers situated in areas geographically distinct from those in which the merging companies are active. Second, one can examine a number of structural factors to determine whether significant entry barriers exist to hinder or prevent undertakings in remote areas from competing in the areas where the merging companies are active.[243]

The classical definition of geographical market was given by the E.C.J. in *United Brands Co. v. Commission*[244] and later transposed into the Merger Regulation.[245] Under Article 9(7) of the Merger Regulation, the relevant geographic market consists "of the area in which the undertakings concerned are involved in the supply and demand 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."[246]

Like product market definition, determination whether the market in question is the relevant geographic market is not based on one criterion. The Commission has taken into account a number of factors including the following: the existence of regulatory barriers to market interpenetration; national procurement policies; cross-border imports; distribution and marketing infrastructures; transportation costs; consumer preferences; potential competition in the market; price differences; differing market shares; language; and differing local specification requirements.

a. Regulatory Barriers to Market Interpenetration

Consideration of this factor is required by the Merger Regulation.[247] Legislation can constitute an absolute or partial barrier preventing trade between different countries or geographic areas. For instance, with regard to the pharmaceutical industry, the Commission found that markets in the pharmaceutical industry were

243. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 118.
244. Case 27/76, United Brands Co. v. Commission, 1978 E.C.R. 207, 227.
245. Merger Regulation, *supra* note 2, art. 9(7).
246. *Id.*
247. *See id.*

national due to the "very tight legal framework" under which the industry operates.[248]

b. National Procurement Policies

Regulatory barriers can also take the form of procurement policies held by national monopolies or government departments that purchase exclusively from domestic suppliers. The Commission considered this issue in *Alcatel/Telettra*.[249] Alcatel, a supplier of telecommunications equipment, proposed to buy from Fiat nearly 70% of the shares of Telettra, another supplier of telecommunications equipment.[250] Telefónica de España, a Spanish telecommunications operator, held minority equity interests in both Telettra and Alcatel and was the only buyer of public switches in Spain.[251] In defining the relevant geographic market, the Commission, firstly, stated that until recently the telecommunications market in the EC was still largely fragmented into national markets.[252] The causes of this fragmentation were that national operators were buying from a small group of national suppliers and that the different national standards were creating high costs of adaptation for nondomestic suppliers.[253] Secondly, the Commission observed that Telefónica, the most important consumer of telecommunication equipment, had traditionally been buying from Spanish suppliers and that there was no obligation in Spain for the next five years to apply the Council's procurement procedures.[254] Therefore, Telefónica had no obligation to change its traditional practice of buying from domestic suppliers until 1996. Finally, Telefónica's minority stockholdings in Alcatel and Telettra would "put other suppliers without such links at a disadvantage."[255] In view of these three factors, the Commission reached the conclusion that Spain had to be considered as a separate relevant geographical market.[256]

The problem, however, is that the factors on which the Commission's decision was premised were assessed incorrectly. Thus Telefónica's traditional buying practice was not confined to buying only national products. This means that the Commission should

248. *See* Sanofi/Sterling Drug, 1991 O.J. (C 156) 10, ¶ 17.
249. 1991 O.J. (L 122) 48.
250. *See id.* ¶ 1.
251. *See id.* ¶¶ 1, 8.
252. *See id.* ¶ 30.
253. *See id.*
254. *See id.* ¶ 34.
255. *Id.*
256. *See id.* ¶ 35.

have taken into account whether Telefónica could turn to a seller outside Spain if the merging firm had raised its prices.[257] Further, the absence of an obligation to call for tenders without discriminating among them did not constrain Telefónica either.[258] The lack of this obligation did not mean that Telefónica would carry on with its discriminatory practices if it were economically harmed by doing so.[259] Finally, the fact that Telefónica had minority stock in both merging entities did not mean that it would allow them to increase prices or to impose more restricted purchasing conditions upon it.[260] Thus the relevant geographic market should have been defined as Community-wide and not nationwide.[261]

c. Cross-Border Imports

This is one of the most important criteria used by the Commission to define the relevant geographic market. The existence of cross-border imports may evidence that there are no other barriers hindering market interpenetration. Although the Commission has not issued guidelines as to quantitative thresholds of imports, some of its decisions indicate that it is inclined to rely on a minimum presumption threshold of 10%.[262]

Further, while the Commission has not viewed exports as a separate evidence of a broader market, to determine whether market interpenetration was substantial enough to constitute a broader market, the Commission has required that the 10% threshold be applied to both imports and exports.[263]

d. Distribution and Marketing Infrastructures

In the *Magneti Marelli/CEAc* case, the relevant geographic market for batteries was deemed to be France.[264] The Commission found sufficiently homogeneous conditions of competition which differed appreciably from the conditions of competition existing in other member states. One of the reasons adduced to support this assessment was that the Commission discovered that due to the existence

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257. *See* Fox, *supra* note 33, at 722-23.
258. *See id.*
259. *See id.*
260. *See id.*
261. *See id.*
262. *See* Union Carbide/Enichem, 1995 O.J. (C 123) 3, ¶ 49; Rütgerswerke/Hüls Troisdorf, 1994 O.J. (C 95) 6, ¶ 15; McCormick/CPC/Rabobank/Ostermann, 1993 O.J. (C 23) 13, ¶ 46.
263. *See* RWE/DEA/Enichem Augusta, 1995 O.J. (C 207) 11, ¶ 19; Akzo Nobel/Monsanto, 1995 O.J. (C 37) 3, ¶ 20; Mannesman Demag/Delaval Stork, 1994 O.J. (C 33) 3, ¶ 18.
264. Magneti Marelli/CEAc, 1991 O.J. (L 222) 38.

of consumer brand loyalty and the lack of cross-border distribution and marketing infrastructure, imports would be unlikely to enter France in response to an increased demand.[265]

This factor was also taken into account by the Commission in *Fiat Genotech/Ford New Holland*, a case concerning the acquisition by Fiat of 80% of the shares in Ford New Holland, the agricultural machinery manufacturing division of Ford.[266] Italy was considered the relevant market because, in order to distribute tractors, one needed access to local dealers, and Fiat already had multiple exclusive distribution agreements with them. This network had the effect of restraining distribution facilities for potential newcomers.[267]

Likewise, in *Mercedes-Benz/Kässbohrer*, a case involving a merger between two bus manufacturers, the Commission explained that the existence of a service and repair network operated by a manufacturer was a factor to be taken into account in defining the relevant geographic market.[268]

e. Transportation Costs

Transportation costs also play an important role in defining the relevant geographic market, especially with regard to products with low production costs and significant transportation costs, such as sugar, cement, beer, or water.[269] This means that producers situated close to the consumers will have a cost advantage compared to remote manufacturers. Therefore, transportation costs can make it unprofitable for a producer to meet the demand generated in another market due to the market behavior of the merging firms.[270] As to the percentage that transportation costs must represent in order to constitute an entry barrier, it is assessed on a case-by-case basis.[271]

f. Consumer Preferences

This factor indicates the fact that within a given geographical area purchasers reveal a preference for brands already known to them. Such a preference may impede the entrance of new

265. *See id.* ¶ 16.

266. Fiat Geotech/Ford New Holland, 1991 O.J. (C 118) 14.

267. *See* ELF/BC/CEPSA, 1991 O.J. (C 172) 8; *see also* BP/Petromed, 1991 O.J. (C 208) 24.

268. Mercedes-Benz/Kässbohrer, 1995 O.J. (L 211) 1, ¶¶ 33-34.

269. *See* VIAG/Continental Can, 1991 O.J. (C 156) 10 (involving concentration between two water suppliers).

270. *See* Aerospatiale/Alenia/De Havilland, 1991 O.J. (L 334) 42, ¶ 20.

271. *See, e.g.*, RWE-DEA/Enichem Augusta, 1995 O.J. (C 207) 11, ¶ 19; Rütgerswerke/Hüls Troisdorf, 1994 O.J. (C 95) 6, ¶ 14.

competitors.[272] Thus in *Mercedes-Benz/Kässbohrer,* the market for buses was found to be confined to Germany because local German purchasers preferred national brands.[273]

g. Potential Competition

Defining geographic markets requires not only the inclusion of already competing companies in the relevant product market in the area where the merging companies are active but also the inclusion of those companies which could immediately[274] begin trading in those areas in response to a price increase and which, therefore, must be considered as potential competitors of the merging entities in geographic terms.[275]

h. Price Differences

Sustained price differences between member states may give a strong indication that they constitute different markets. That was the case in *Magneti-Marelli/CEAc,* where the Commission found that manufacturers in France were able to charge prices different from those which they charged in the other member states for the same type of products.[276] Accordingly, the market was national.

The same reasoning was followed in *La Roche/Syntex,* a case involving a merger between two pharmaceutical manufacturers.[277] Concluding that the market in question was national, the Commission explained that the fact that price differences had not been significantly eroded over the past three to four years suggested that the

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272. *See, e.g.,* Kimberly-Clark/Scott Paper, 1996 O.J. (L 183) 1, ¶ 87; McCormick/CPC/Rabobank/Ostermann, 1993 O.J. (C 23) 13, ¶ 53.

273. Mercedes-Benz/Kässbohrer, 1995 O.J. (L 211) 1, ¶¶ 35-36, 40-41.

274. A maximum time of two years has been proposed as the period within which the entry must become possible, but until recently there had been no cases dealing with this issue. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 125.

275. *See id.* at 121; *see also* Aerospatiale/MBB, 1991 O.J. (C 59) 13. Therein, the Commission reached the conclusion that given the absence of barriers to market entry and given the fact that there was a great mutual penetration of the markets worldwide (especially considering the presence of the EEC manufacturers in the U.S. market (54%) and the presence of U.S. manufacturers in the EC market (31%)), the civil helicopter market was, from an economic point of view, a world market. *See id.* ¶ 17. The same conclusion was reached in the *De Havilland* decision. Aerospatiale/Alenia/De Havilland, 1991 O.J. (L 334) 42 (finding that the commuter markets were to be considered to be world markets due to the significant mutual interpenetration between the markets of both North America and Europe, as well as due to the negligible costs of transportation).

276. Magneti Marelli/CEAc, 1991 O.J. (L 222) 38, ¶ 16.

277. La Roche/Syntex, 1994 O.J. (C 178) 15.

importance of parallel imports from one member state to another was small.[278]

Price differences, however, are not conclusive evidence that the market in question is national. They may be attributable to independent causes, such as monetary devaluation, cost differentials, or differences in technical specifications.[279] Thus in *Mercedes-Benz/Kässbohrer,* price differences were not an appropriate criterion for defining the relevant geographic market because high prices on the German market were caused by consumers' demands for high-quality mechanical parts.[280]

i. Differing Market Shares

Varta/Bosch is a case involving the acquisition of joint control in a new joint venture to which Varta Batterie AG, the leading battery producer in Germany, and Robert Bosch GmbH, a worldwide producer of batteries which supplied the original equipment market for starter batteries mainly in Spain, were to transfer their starter-battery activities.[281] The Commission found that the various manufacturers had very different market shares in Germany and Spain compared with those in neighboring countries, and this was considered an indication that the markets were national.[282] However, the existence of different market shares in neighboring areas cannot, in itself, prove that these neighboring companies would not increase market shares rapidly in the other market if the prices across the border were increased.[283]

k. Language

Language was one of the reasons why the Commission, in mail-order cases, held that the relevant geographic market for mail order catalogue retailing was national in scope.[284] Consumer preference, which has been taken into account by the Commission in some of its decisions, refers to the fact that purchasers within a given

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278. *See id.* ¶ 31.
279. *See, e.g.,* KNP/BT/VRG, 1993 O.J. (L 217) 35, ¶ 17.
280. Mercedes-Benz/Kässbohrer, 1995 O.J. (L 221) 1, ¶¶ 25, 50.
281. Varta/Bosch, 1991 O.J. (L 320) 26, ¶¶ 1, 7-8.
282. *See id.* ¶ 41.
283. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 127.
284. *See* Otto/Grattan, 1991 O.J. (C 93) 6, ¶ 11; La Redoute/Empire, 1991 O.J. (C 156) 10, ¶ 12.

geographical area may show a special preference for brands already known to them, making the entrance of new competitors unlikely.[285]

l. Differing Local Specification Requirements

Although with the establishment of the internal market after December 31, 1992, these requirements, often protectionist, are deemed to have disappeared,[286] domestic industries and consumers have not necessarily discontinued to require such specification, and thus "technical consumer preference" continues to persist.[287]

In the *Renault/Volvo* case, one of the reasons for considering the market for buses to be national was the existence of local specification requirements.[288] The Commission stated that the bus market appeared to maintain the characteristics of a national market rather than a Community market.[289] The market was still "characterized by strong national buying preferences which constitute[d] a high barrier entry for competitors from other Member States."[290] In addition, there were "local specification requirements which . . . [could] considerably impede transferability of supply."[291]

By the same token, in the 1996 case of *Unilever/Diversey*, the Commission concluded that the market for detergent products was national.[292] This conclusion was based on the premise that in the absence of harmonized legislation on a Community level, there were

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285. In *Renault/Volvo*, 1990 O.J. (C 281) 2, the market for buses was deemed to be national because, *inter alia*, the market was "still characterized by strong national buying preferences which constitute[d] a high entry barrier for competitors from other Member States." *Id.* ¶ 17. Consumer preferences for well-known battery brands were also taken into account in *Magneti Marelli/CEAc*, 1991 O.J. (L 222) 38, ¶ 16.

286. Article 7(a) of the EC Treaty states:

> The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on December 31, 1992 . . . . The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty.

287. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 119.

288. Renault/Volvo, 1990 O.J. (C 281) 2. For a critical assessment on that decision, see Fox, *supra* note 33, at 733, and Hellemans, *supra* note 143, at 644-45. They argue that the relevant geographic market both for buses and trucks was indeed Community-wide because the conditions of competition were quite homogeneous and because of the existence in that market of fleet buyers which move towards a European purchasing policy. *See, e.g., id.* In fact, these factors were mentioned by the Commission in its decision, but, surprisingly, they were not taken into account in defining the relevant geographic market.

289. *Renault*, 1990 O.J. (C 281) 2, ¶ 17.

290. *Id.*

291. *Id; see also* Alcatel/AEG Kabel, 1992 O.J. (C 6) 23, ¶ 17 (finding that different technical specifications in the telecommunications industry can still be a relevant factor).

292. Unilever/Diversey, 1996 O.J. (C 113) 10, ¶ 15.

different national legislative requirements which hindered market interpenetration.[293]

2. *The 1992 Guidelines*

The method followed by the Agencies to determine the relevant geographic market runs parallel to that used to outline the relevant product market. The Agencies will begin the analysis with the location of each merging company and will ask "what would happen if a hypothetical monopolist of the relevant product at that point imposed a 'small but significant and nontransitory' increase in price," where the terms of sale at other locations did not change.[294]

> If in response to the price increase, the reduction in sales of the product at that location would be large enough that a hypothetical monopolist producing or selling the relevant product at the merging firm's location would not find it profitable to impose such an increase of price, then the Agency will add the location from which production is the next-best substitute for production at the merging firm's location.[295]

This process will continue until a group of locations is identified such that a hypothetical monopolist over that group of locations would profitably impose a "small but significant and nontransitory" increase in price.[296] Thus the technique is to take a provisional geographic market based upon the shipment patterns of the company and its closest competitors. "The provisional market will then be expanded to include sellers which could sell the product to customers of firms previously included in the provisional market in response to a hypothetical price increase of five percent."

As in its relevant product market analysis, this price-oriented approach is supplemented by a number of further criteria. These criteria include, but are not limited to, the following:

> (1) evidence that buyers have shifted or have considered shifting purchases between different geographic locations in response to relative changes in price or other competitive variables;

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293. *See id; see also* UAP/Provincial, O.J. 1994 (C 322) 5, ¶ 9 (concluding that due, *inter alia,* to "differing national systems of regulatory supervision" insurance markets remained national). *But see* UAP/Transatlantic/Sun Life, O.J. 1991 (C 296) 12, ¶ 13 (concluding that reinsurance markets were worldwide in scope).

294. 1992 Guidelines, *supra* note 23, ¶ 1(21).

295. *Id.*

296. *Id.*

(2) evidence that sellers base business decisions on the prospect of buyer substitution between geographic locations in response to relative changes in price or other competitive variables;

(3) the influence of downstream competition faced by the buyers in their output markets; and

(4) the timing and costs of switching suppliers.[297]

The 1992 Guidelines do not explicitly make reference to other criteria which were expressly listed in the 1984 Guidelines, such as shipment patterns, transportation costs as possible barriers to shipment into the area, costs of local distribution as possible entry barriers, and excess capacity by companies outside the location of the merging company.[298] Nevertheless, this does not mean that these factors are no longer taken into account. The 1992 Guidelines implicitly refer to them by stating that the Agencies will take into account "all relevant evidence."[299]

3. *Comments*

The criteria used by the Agencies and the Commission are essentially the same. The difference, however, can be found in their approach towards transportation costs, cost of local distribution, and overcapacity outside the location of the merging companies. These factors have received very limited weight in Commission decisions.[300] By stressing other criteria which lead to narrow market definitions, the Commission has taken a realistic approach to the situation of the internal market in the EU. This is because even after 1992, Community-wide markets have not yet been realized.[301]

The Commission should, as the Agencies have, issue a notice providing clear guidelines on the issue and listing the criteria that are relevant for the definition of the geographic market. Once again, the issuance of guidelines at the European level would avoid the legal uncertainty caused the Commission's practices and improve the predictability of the Commission's merger enforcement policy.[302]

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297. *Id.*
298. *See* 1984 Guidelines, *supra* note 23, § 2(3).
299. 1992 Guidelines, *supra* note 23, § 1(21).
300. *See* Hellemans, *supra* note 143, at 654.
301. *See id.*
302. *See id.* at 655.

VI. DOMINANT POSITION

A. Overview

According to Article 2 of the Merger Regulation, "[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."[303] Likewise, section 7 of the Clayton Act prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[304] If one reads these provisions carefully, one may notice that while Article 2 of the Merger Regulation requires the effective creation or strengthening of a position of actual dominance *before* the concentration can be deemed contrary to the common market, section 7 of the Clayton Act triggers Agencies' action at an earlier stage and prohibits a merger whenever the merger's effect "may be substantially to lessen competition."[305]

This section of the article will examine the criteria that the Agencies and the Commission use to determine whether a merger creates or strengthens a dominant position such that competition would be significantly impeded or lessened. Although both systems place great importance on the market share of the merging companies as the main indicator of dominance, the devices used to determine this market share are different.

B. Dominant Position Under the Merger Regulation

1. Developments

Although the review of a concentration under the Merger Regulation is based primarily on the concept of dominance, the Merger Regulation does not define "dominance." The concept of dominance referred to in the Merger Regulation was imported from Article 86 of the EC Treaty. As the E.C.J. put it, a dominant position under Article 86 is "a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of its consumers."[306]

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303. Merger Regulation, *supra* note 2, art. 2(3).
304. 15 U.S.C. § 18 (1994).
305. *Id.*
306. *See* Case 27/76, United Brands Co. v. Commission, 1978 E.C.R. 207, 277.

The first issue to address is whether the concept of "dominant position" has the same meaning under the Merger Regulation as under Article 86. The language of dominant position definition which the Commission has given in merger cases brought under the Merger Regulation is essentially identical to that contained in Article 86.[307] However, the use which the Commission has made of the concept under the Merger Regulation allows one to draw the conclusion that a dominant position under the Merger Regulation is not exactly the same as the dominant position referred to in Article 86.[308] Basically, the concept of dominance has had two developments:

Within the framework of Article 86, the E.C.J. ruled in the *Hoffman-La Roche* case that market shares covering a three-year period and ranging between 75% and 80% were so large that they were "*in themselves* . . . evidence of a dominant position."[309] However, the issue became more complicated when the court decided to set aside this "75-80% line" in *AKZO Chemie BV v. Commission*.[310] In this case, surprisingly, the line was brought down to 50%.[311] The E.C.J. held: "[V]ery large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50% such as

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307. The notion of dominance under Article 86 of the EC Treaty has two elements. The first refers to the prevention of effective competition, and the second, to the power to behave to an appreciable extent independently. Only in one of its decisions the Commission mentioned both elements in defining dominant position. *See* Renault/Volvo, 1990 O.J. (C 281) 2.

308. *See* BOS ET AL., *supra* note 80, at 234; COOK & KERSE, *supra* note 96, at 69-71; FRANK L. FINE, MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC 204-08 (2d ed. 1994); GOYDER, *supra* note 71, at 399-400; JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 130-32; TIMOTHY G. PORTWOOD, MERGERS UNDER EEC COMPETITION LAW 74 (2d ed. 1994); IVO VAN BAEL & JEAN-FRANÇOIS BELLIS, COMPETITION LAW OF THE EEC 433-34 (3d ed. 1994); Venit, *supra* note 28, at 527. Especially interesting is the article by Raffaele Pendibene, *Is the Concept of Dominant Position Different Under the Merger Regulation?*, 5 EUR. BUS. L. REV. 42 (1994). This author concludes:

> [I]f a difference between the concept of dominance under Article 86 and the Merger Regulation can be drawn, it flows directly from the changed perspective from which the same phenomenon is evaluated. This changed perspective does not imply a difference in the substantial concept of dominance, which remains the same; it rather emphasizes a different evaluation and role of the same relevant indicators of market power (namely: market shares, and actual and potential competition).

Id. at 47.

309. Case 85/76, Hoffman-La Roche v. Commission, 1979 E.C.R. 461, 521 (emphasis added).

310. Case 62/86, AKZO Chemie BV v. Commission, 1991 E.C.R. 3359.

311. *Id.* at 3453. Professor Jacques Steenbergen qualified this new 50% line as being a catastrophe from a legal certainty point of view. Jacques Steenbergen, Lecture at the Katholieke Universiteit Leuven, Belgium, 1995. According to him, the Commission acts on the assumption that the E.C.J. will change its view if explicitly asked to do so another time. *Id.*

that found to exist in this case."[312] Therefore, a market share of 50% establishes a presumption of dominance which can be rebutted by the party concerned.[313]

The second development occurred with the enactment of the Merger Regulation and was enhanced by the lack of a definition of dominance in the Merger Regulation and by the absence of clear and realistic appraisal thresholds.[314] When interpreting Article 86, the Commission has followed its previous decisions, as well as those of the E.C.J. The Commission has focused mainly on cases that involved market shares of approximately 40% or more.[315] The traditional dominance threshold level of 40-45% has been respected.[316]

However, in cases brought under the Merger Regulation, the Commission departs from the 50% line stated in *AKZO Chemie* and seems to be more reluctant to find the existence of a dominant position therein than in cases brought under Article 86.[317] Under the Merger Regulation, the consequences of establishing or having dominance are much more automatic than under Article 86 of the EC Treaty. Under Article 86, "dominance" is not illegal per se; however, to abuse the dominant position is against the law. It is not surprising, therefore, that the Commission has focused its analysis on the constraints which possible market entrants will place on the conduct of the merger entity and, in so doing, has been able to find no dominance even where market shares exceed 80%.[318]

Under the Merger Regulation, market shares are an important criterion of dominance.[319] Yet, according to the Commission, they are only one of a number of factors to consider.[320] This means that the Commission has taken a pragmatic approach, making it virtually impossible to give any meaningful guidelines as to which market

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312. *Hoffman-LaRoche*, 1991 E.C.R. at 3453 (citation omitted).

313. *See* Pendibene, *supra* note 308, at 43.

314. *See* BOS ET AL., *supra* note 80, at 234.

315. *See id.* at 235.

316. This 40% threshold was established by the E.C.J. in *United Brands*. Case 27/76, United Brands Co. v. Commission, 1978 E.C.R. 207, 282. Therein, the court held that a market share of 40-45% did not permit the conclusion that United Brands Co. automatically controlled the market. *See id.* To determine whether or not the company had control, "the strength and number of the competitors" must be taken into account. *See id.*

317. *See* VAN BAEL & BELLIS, *supra* note 308, at 637.

318. *See* Alcatel/Telettra, 1991 O.J. (L 122) 48.

319. In *Alcatel/Telettra*, the Commission expressly stated that "a very high share of any market share could indicate that a dominant position exists." *Id.* ¶ 38. However, one has to bear in mind that, until now, the Commission has not established dominance in the case of any notified concentration purely on the basis of the market share.

320. For a detailed analysis of these factors, see Frank L. Fine, *The Substantive Test of the EEC Merger Control Regulation: The First Two Years*, 61 ANTITRUST 699 (1993).

shares will constitute dominance.[321] Nonetheless, guidelines can be given to outline Commission practice towards mergers depending on their post-market shares.[322]

2. Commission Practice

Where a company holds less than 25% of the market share, it is virtually impossible to establish dominance. Recital 15 of the Merger Regulation indicates that concentrations between undertakings with a combined market share of less than 25% are not likely to impede effective competition and, therefore, may be presumed to be compatible with the common market.[323] Where a market share ranges from 25% to 29%, a finding of dominance is very rare, but not inconceivable. The Commission has never identified a dominant position in this category under the Merger Regulation or under Article 86 of the EC Treaty.

Most of the Merger Regulation cases in which dominance has been found involve market shares significantly higher than 43%. An exception to this tendency is *Du Pont/ICI,* which involved the acquisition of Du Pont's nylon business by ICI.[324] According to the Commission, the acquisition would have increased Du Pont's market shares between 23% and 40% in terms of value.[325] The Commission realized that Du Pont would have lengthened its considerable lead in a field where customer loyalty was obtained largely on the basis of product innovation.[326] Furthermore, the Commission found that due to their preexisting vertical integration, the parties obtained a competitive advantage over their competitors.[327] The concentration was finally cleared because Du Pont undertook, *inter alia,* to sell off sufficient production capacity to bring its postmerger share down below the dominance threshold.[328]

In general, the Commission has taken a liberal approach towards concentrations involving high market shares. Thus in *Renault/Volvo,* the Commission held that the merger did not create or strengthen dominance despite the fact that after the merger the combined market shares of the three major competitors in France would

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321. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 133; *see also* FINE, *supra* note 308, at 208.

322. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 133.

323. *See, e.g.,* BP/Petromed, 1991 O.J. (C 208) 24 (finding that the combined market share held by the new entity did not attain 15% in any of the markets affected by the concentration).

324. Du Pont/ICI, 1993 O.J. (L 7) 13.

325. *See id.*

326. *See id.* ¶ 47.

327. *See id.* ¶ 33.

328. *See id.* ¶ 48.

exceed 90% in the intermediate-range-truck market and more than 80% in the upper-range-truck market.[329] The Commission emphasized that the presence of other major competitors in the area would act as a counterweight to the new entity.[330]

Another example of the Commission's liberal approach is *Magneti Marelli/CEAc*.[331] In this case, unlike in *Renault/Volvo*, the Commission found that the proposed concentration would give the new entity a dominant position.[332] Effective competition would be significantly impeded for the following reasons: (i) "the market share of the new entity would amount to 60% in France"; (ii) "the gap in relation to the next larger competitor would be considerable (in the order of 40%)"; (iii) the new entity and its parent companies would possess a significant financial strength; and (iv) the dominant position could not be counterbalanced by the strength of purchasers since the largest of the numerous customers of the new entity achieved only a fraction of the new entity's turnover.[333] The merger, however, was finally cleared because Fiat, Magneti Marelli's parent company, decided to reduce its shareholding in Magneti Marelli's French subsidiary to 10%.[334]

Market shares in excess of 70% are likely to be viewed as a very strong indication of dominance. Nonetheless, in *Tetra Pak/Alfa-Laval*, the Commission recognized that a market share as high as 90% would not necessarily result in dominance.[335] "[I]f sufficiently active competitors are present on the market, the company with the large market share may be prevented from acting to an appreciable extent

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329. Renault/Volvo, 1990 O.J. (C 281) 2.

330. Some scholars have heavily criticized the Commission's reasoning in this case because the existence of strong and well established competitors

> does not necessarily prevent a merger from being anticompetitive: the fact that the other important competitors can still wage effective competition does not mean that they will have the incentive to do so. To the contrary, if there are a few and only a few established competitors in a high-barrier noncompetitive market, a merger or joint venture that increases concentration among the few may for that reason be likely to increase collaborative, nonrivaling behavior, and enable the oligopolists to better exploit buyers.

Fox, *supra* note 33, at 733. This assessment is probably right. *Renault/Volvo* was the first case brought under the Merger Regulation. The Commission's decision therein may only be explained either by the Commission's inexperience in handling such matters or by the fact that it surreptitiously took into account industrial policy concerns. In any case, the Commission should have given more consideration to the oligopolistic structure of the market.

331. 1991 O.J. (L 222) 38, ¶ 16.

332. *See id.*

333. *See id.*

334. *See id.* ¶ 19-20; *see also* Varta/Bosch, 1991 O.J. (L 320) 26 (clearing a merger where a combined market share of 44% was involved).

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

independently of the pressures typical of a competitive market."[336] This might be the case in an industry where new technology is being developed and where customer acceptance of the product is just beginning to crystallize.[337] In other words, a high market share may indicate the existence of dominant position only where the market share persists over time.[338]

Alcatel/Telettra helps to illustrate the point. In this case, the proposed merger amounted to a market share of 83% of Spanish microwave equipment.[339] Such a high market share did not prevent the Commission from clearing the operation primarily because entry barriers were not very high and because the main competitors of Alcatel in Spain (AT&T and Ericsson) were considered to be capable of increasing production within a short period of time.[340]

The above scheme is mainly applicable to a situation involving dominance of a single company. However, the fact that the Merger Regulation does not expressly address oligopolistic[341] and duopolistic dominance cannot be viewed as an indication that it excludes these types of dominance. Linguistically, the word "dominance" may refer to oligopoly or duopoly.[342] More importantly, in *Nestlé/Perrier*, the Commission expressly recognized that the Merger Regulation indeed covers collective dominance situations.[343] In this case, the merger was cleared because Nestlé undertook to sell three million liters of water capacity per annum and several brand names to a purchaser with enough means to develop quickly the assets which Nestlé would sell.[344]

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336. *Id.* ¶ 3(3).

337. *See* PORTWOOD, *supra* note 308, at 78.

338. *See* Aerospatiale/Alenia/De Havilland, 1991 O.J. (L 334) 42, ¶¶ 51-53.

339. Alcatel/Telettra, 1991 O.J. (L 122) 48.

340. *See id.* ¶¶ 38-40.

341. Oligopoly power can be created or strengthened by a merger that creates, for example, two 50% companies, three 33% companies, or four 25% companies, where the market conditions suggest that the companies will not behave competitively. *See* Fox, *supra* note 33, at 742.

342. *See* Fox, *supra* note 33, at 743.

343. In previous cases, this question was considered, and it was concluded that the question could be left open because the concentration cannot create or strengthen a dominant position. *See* Fiat Geotech/Ford New Holland, 1991 O.J. 1991 (C 118) 4; Varta/Bosch, 1991 O.J. (L 320) 26; Alcatel/AEG Cable 1992 O.J. (C 6) 23; Thorn EMI/Virgin Music, 1992 O.J. (C 120) 30.

In *Nestlé/Perrier*, the Commission concluded "that the market structure resulting from the merger between Nestlé and Perrier . . . would create a duopolistic dominant position on the French bottled water market which would significantly impede effective competition and would be very likely to cause a considerable harm to consumers." Nestlé/Perrier, 1992 O.J. (L 356) 1, ¶ 131.

344. *See id.* ¶ 136.

The *Nestlé/Perrier* approach has already been affirmed by the Commission in several other cases.[345] In these cases, the concentrations in question were declared compatible with the common market, even though they created postmerger market structures in which two suppliers would control over 60% of sales in a highly concentrated industry.[346] The Commission dismissed the fears of oligopolistic dominance referring, *inter alia*, to the overcapacity in the respective sectors and to the expected aggressive behavior on the part of the competitors of the merging companies.[347]

Interpreting the Merger Regulation to include collective dominance, the Commission has correctly construed the intent of the Merger Regulation's drafters. It is obvious that in the EC markets are changing from a national to a Community-wide orientation.[348] This change implies that without Community-wide merger control covering oligopolistic dominance, there is a considerable threat of having a Community market with oligopolistic structures. This situation would be contrary to the establishment of a system of undistorted competition listed in the EC Treaty as one of the main objectives of the EC.[349] It would, therefore, be absolutely incoherent to prohibit a single company from creating a dominant position while permitting dominance if it is created collectively.[350]

Finally, Article 2(3) of the Merger Regulation requires two conditions to be fulfilled for a concentration to be considered incompatible with the common market. First, the concentration must create or strengthen a dominant position.[351] Second, it must significantly

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345. *See, e.g.*, Pilkington-Techint/SIV, 1994 O.J. (L 158) 24 (involving a merger in the glass sector); Rhone-Poulenc/SNIA II, 1993 O.J. (C 272) 6 (involving a joint venture in the nylon textiles fibers market).

346. *See* Derek Ridyard, *Economic Analysis of Single Firm and Oligopolistic Dominance Under the European Merger Regulation*, [1994] 5 EUR. COMPETITION L. REV. 255, 260.

347. *See id.*

348. The experience of the U.S. antitrust merger control is relevant to justify the Commission approach: the more integrated a market becomes, the more the likelihood of having "oligopoly cases" increases. Indeed, in the U.S., the bulk of the merger control cases deals with controlling concentration in oligopolistic markets. It is not surprising then that section 2(1) of the 1992 Guidelines is devoted to this situation.

349. Recital 1 of the Merger Regulation reads as follows: "Whereas for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3(f) [before being amended by the Maastricht Treaty] gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted.'" Merger Regulation, *supra* note 2, rec. 1.

350. Some legal commentators have, however, a different view. *See, e.g.*, Chirstopher Bright, Nestlé/Perrier: *New Issues in EC Merger Control*, 11 INT'L FIN. L. REV. 22, 22-23 (1992). Relying upon a literal interpretation of Article 2(3) of the Merger Regulation, they argue that the Merger Regulation makes clearly provides for the prohibition of the creation of a single-company dominance but not for the prohibition of collective dominance. *See id.*

351. Merger Regulation, *supra* note 2, art. 2(3).

impede competition in the common market or in a substantial part of thereof.[352] The goal of the second requirement was explained by the Commission in the *De Havilland* case:

> In general terms, a concentration which leads to the creation of a dominant position may however be compatible with the common market . . . if there exists strong evidence that this position is only temporary and would be quickly eroded because of high probability of strong market entry. With such market entry the dominant position is not likely to significantly impede effective competition within the meaning of Article 2(3) of the Merger Regulation. *In order to assess whether the dominant position . . . is likely to significantly impede effective competition therefore, it is necessary to assess the likelihood of new entry into the market.*[353]

It follows from this statement that the requirement of "significant impediment of competition" aims at a dynamic assessment of market power. Only a dominant position which would persist in the near future threatens the competitive structure of the market.[354]

Furthermore, the requirement that effective competition be significantly impeded may be of some significance in cases where one of the parties to a concentration had a dominant position prior to the creation of concentration. This requirement seems to suggest that such strengthening must be appreciable and will not be deemed automatic.[355] Thus the "significant impediment" provision ensures that dominance under the Merger Regulation cannot be established solely on the basis of a mechanical computation of market shares.[356]

C. *The Herfindahl-Hirschman Index*

In contrast to the Commission's dominant position test, the U.S. antitrust authorities have developed the incipiency test.[357] This test is related to the fact that under section 7 of the Clayton Act, antitrust enforcement takes place at an earlier stage than under the Merger Regulation, namely whenever the merger's effect "may be substantially to lessen competition."[358]

In the U.S., an economic method based on the Herfindahl-Hirschman Index ("HHI") has been developed to measure the level

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352. *See id.*

353. Aerospatiale/Alenia/De Havilland, 1991 O.J. (L 334) 42, ¶ 53 (emphasis added).

354. *See* Dietrich Kleeman, *First Year of Enforcement Under the EEC Merger Regulation: A Commission View, in* 1991 FORDHAM CORP. L. INST. 649 (Barry E. Hawk ed., 1992).

355. *See* VAN BAEL & BELLIS, *supra* note 308, at 435.

356. *See* Fine, *supra* note 285, at 707.

357. *See* Hellemans, *supra* note 143, at 675.

358. 15 U.S.C. § 18; *see also* Hellemans, *supra* note 143, at 675.

of concentration by which undertakings can predict the Agencies' likely response to a merger. The HHI was introduced by the 1984 Guidelines and replaced the so-called "four firm concentration ratio" ("CR4") as a measure of market structure.[359] The 1992 Guidelines continue to use this method, offering, as the 1984 Guidelines did, a complete and clear description of the method.

Market concentration is a function of the number of firms in a market and their respective market shares. Accordingly, the HHI is calculated by summing the squares of the individual market shares of all the participants in the market concerned.[360] Unlike the CR4 method, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms.[361]

In evaluating horizontal mergers, the Agencies "will consider both the postmerger market concentration and the increase in concentration resulting from the merger."[362] To identify mergers which are likely to be challenged, the Guidelines divide the spectrum of market concentration into three regions.

A market with the HHI below 1,000 points is deemed to be unconcentrated.[363] A merger within such a market is unlikely to have an adverse affect on competition and will fall within a "safe harbor," where enforcement action is unlikely to be taken.[364]

A market with the HHI between 1,000 and 1,800 points is considered to be moderately concentrated.[365] In this market, a merger producing an increase of more than 100 points raises significant concerns as to factors listed in sections 2-5 of the 1992 Guidelines,

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359. *See* HOVENKAMP, *supra* note 7, at 302.

360. The 1992 Guidelines provide an example of the CR4 formula:

> [A] market consisting of four companies with market shares of 20%, 30%, 20% and 20% has an HHI of 2600 (30x30 + 30x30 + 20x20 + 20x20 = 2600). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching to zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about small firms is not critical because such firms do not affect the HHI significantly.

1992 Guidelines, *supra* note 23, § 1(5).

361. Economists believe that the HHI describes market structure and dangers of anticompetitive activity more accurately than the CR4. *See* HOVENKAMP, *supra* note 7, at 302. The CR4 method only took into account the market shares of the four larger companies in the market. *See id.* The advantage of the HHI is that it allows us to acknowledge that markets with the same CR4 may exhibit higher degrees of competition. *See id.*

362. 1992 Guidelines, *supra* note 23, § 1(51).

363. *See id.*

364. *See id.*; *see also* T. Lingos, *Transparency of Proceedings at the United States Federal Trade, in* PROCEDURE AND ENFORCEMENT IN EC AND U.S. COMPETITION LAW: PROCEEDINGS OF THE LEIDEN EUROPA INSTITUUT SEMINAR ON USER-FRIENDLY COMPETITION LAW 208 (Piet Jan Slot & Alison McDonnell eds., 1993) [hereinafter PROCEDURE AND ENFORCEMENT].

365. 1992 Guidelines, *supra* note 23, § 1(51).

namely, the existence of oligopolies, entry barriers, efficiencies, and the "failing company" defense.[366]

Markets with the HHI above 1,800 points are regarded as highly concentrated.[367] Mergers producing an increase of more than 50 points in highly concentrated markets also raise "significant competitive concerns."[368] If the postmerger HHI exceeds 1,800, the presumption is that "mergers producing an increase of more than 100 points are likely to create or enhance market power or facilitate its exercise."[369] The presumption may be rebutted by a showing that factors set forth in sections 2-5 of the Guidelines "make it unlikely that the merger will create or enhance market power . . . ."[370]

D. Comments

A comparison of the two methods of measuring concentrations reveals that indicators of market power considered in the U.S. and EU systems are similar. However, the Agencies rely on economic tools more heavily than the Commission does. Indeed, the lack of clear and objective analytical criteria has led to legal uncertainty in the Commission's decisions and has been seriously criticized by legal scholars.[371]

This criticism is well-founded. Unlike the Agencies, which employ the HHI, a reliable economic indicator of the level of market concentration, the Commission has failed to apply any economic methodology in assessing a merger's effects on competition.[372] This situation makes Commission decisions hardly predictable.[373] While the HHI has been criticized in the U.S. as being somewhat stiff, inflexible, and formalistic,[374] it is unquestionable that the HHI is a useful guide for lawyers when counseling parties who wish to participate in a merger or acquisition.

Given that the Agencies' use of economic methods, such as the HHI, increases legal certainty or predictability of decisions concerning market power, it is unclear why the Commission has not made any effort to incorporate or to develop similar methods in its

366. *See id.*
367. *See id.*
368. *Id.*
369. *See id.*
370. *See id*
371. *See* Afonso, *supra* note 43, at 62; Fox, *supra* note 33, at 746.
372. *See* Afonso, *supra* note 43, at 62.
373. *See id.*
374. *See, e.g.,* Lingos, *supra* note 364, at 208.

analysis. Arguably, the Commission's failure to do so reflects the immaturity of the EU merger control system.

Fortunately, the detriments of this situation are somehow compensated for by the fact that the Commission's approach towards concentrations has been more lenient than that of the Agencies. This assessment is not difficult to prove if one considers that many of the mergers which, despite their high market shares, have been cleared by the Commission would have been blocked by the Agencies if the HHI had been applicable.[375] Moreover, since 1991 when the Merger Regulation became effective, the Commission has vetoed mergers with a Community dimension only four times. This fact illustrates one of the main differences between both systems. While the U.S. merger control law and practice focus on controlling concentration in oligopolistic markets, the EU is not so concerned with control of oligopolies. The EU's more lenient approach towards mergers is no doubt a sensible approach because markets in Europe are not as fully integrated and developed as they are in the U.S. In practice, this means that the progressive lowering of communication costs, the harmonization and mutual recognition of technical rules, and the strengthening of cultural ties will likely lead to an increase in the optimal size of European companies.[376] This leads to the conclusion that under the present situation, there may be large efficiency gains from a merger.

Another important difference between the two merger control systems lies in the approach towards the efficiency defense. Section 7 of the Clayton Act proscribes all anticompetitive mergers without making any reference to this defense.[377] However, the 1992 Guidelines explicitly recognize the importance of efficiency gains in evaluating mergers,[378] thereby allowing a company to invoke the

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375. According to the Merger Regulation, when the market share of the undertakings concerned does not exceed 25%, the merger is presumed to be compatible with the common market. Merger Regulation, *supra* note 2, rec. 15. In the U.S., mergers leading to 25% or even a 20% postmerger share in a highly concentrated market have been challenged by the Agencies. *See* Hellemans, *supra* note 143, at 679; *see also* Carlton & Bishop, *supra* note 236, at 423-24.

376. *See* Carlton & Bishop, *supra* note 236, at 425.

377. 15 U.S.C. § 18 (1994).

378. Section 4 of the 1992 Guidelines focuses on "efficiencies."

> The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Agency.

1992 Guidelines, *supra* note 23, § 4.

efficiency defense at all times, no matter how high the postmerger market share is.[379] On the other hand, while this defense is permitted, it is not commonly accepted by the Agencies or the U.S. courts. Rarely, if ever, is an undertaking able to convince the Agencies or a court that proven efficiencies will outweigh demonstrated anticompetitive effects.[380]

Under the Merger Regulation, despite the reference to the technical and economic progress defense,[381] the Commission has constantly disregarded the value of efficiencies in evaluating concentrations. For instance, in *De Havilland,* the Commission refused to acknowledge the economies of scale that the proposed entity would have attained.[382] The rationale behind the Commission's position is that even if efficiencies were created as a result of the merger, they would not be to the consumers' advantage because consumers would suffer detriments of the undertaking's dominant position.[383] Thus there may be no efficiency defense where there is a clear finding of dominance.[384]

One of the main differences between the 1984 Guidelines and the 1992 Guidelines is that the obligation laid upon the parties to demonstrate the claimed efficiencies with *"clear and convincing evidence"* has been dropped. This would seem to signal that the Agencies will be somewhat more receptive to efficiency claims than in the past. *See* Leddy, *supra* note 238, at 20. It should be noted, however, that Commissioner Mary L. Azcuenaga adopted the opposite conclusion:

> The new Guidelines omit the statement contained in the 1984 Guidelines that efficiencies will be considered in deciding whether to challenge a merger provided that the parties to the merger show by "clear and convincing evidence" that a merger will achieve such efficiencies. This omission does not, as far as I am aware, signal any change in policy but nevertheless may send a message that little will be required to support an efficiency claim .... In my experience, the Commission always has been receptive to efficiencies in its merger analysis, but, as a practical matter, merger-specific efficiencies are infrequently demonstrated.
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> ....
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> It seems highly unlikely that the Commission intends to permit a greater number of anticompetitive mergers to go unchallenged because of assessed efficiencies than it was in the past. If this perception is correct, and I think it is, then the new Guidelines may be misleading.

Azcuenaga, *supra* note 234.

379. *See* Hellemans, *supra* note 143, at 680.

380. *See* JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 155.

381. Merger Regulation, *supra* note 2, art. 2(1).

382. In the *DeHavilland* case, the parties argued that one of their objectives in acquiring De Havilland was to reduce costs. Aerospatiale/Alenia/De Havilland, 1991 O.J. (L 334) 42, ¶ 60. Notwithstanding this argument, it was estimated that the potential cost savings arising from the concentration would amount to only ECU 5 million per year, or 0.5% of the combined turnover. *See id.* The commission found that "such cost savings would have a negligible impact on the overall operation" of the parties involved. *See id.*

383. *See id.* ¶ 69.

384. *See* Brittain, *supra* note 31, at 751.

Finally, the limited role efficiencies now play in the Commission's merger analysis will likely increase in the future. The leniency of the European merger policy will not be maintained forever. The markets in Europe are becoming more concentrated, and eventually the Commission will have to strengthen its merger policy and focus on the control of concentrations in oligopolistic markets. Presumably, the more stringent the Commission's policy towards mergers, the more important it will be to consider the efficiency gains in the merger analysis.

VII. PROCEDURAL TRENDS

There are two major differences between the EU[385] and U.S. merger procedures.[386] First, the Commission, in contrast to the Agencies, need not proceed in court to block a merger. It has the power to block a merger by rendering a decision addressed to the parties, thereby prohibiting them from putting the transaction into effect.[387] Conversely, the Agencies, in order to block a merger, need

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385. For a description of the EU merger control procedure, see JONES & GONZÁLEZ-DÍAZ, *supra* note 43, at 189.

386. In the U.S., an antitrust action may be brought by the Antitrust Division of the DOJ, the FTC, the States, and the private parties. *See* 15 U.S.C. §§ 15-15f (1994). The DOJ shares civil responsibility actions with the FTC and is also empowered to bring a criminal prosecution for antitrust violations. *See id.* §§ 1-4 (1994); *see also* E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 73-74 (2d ed. 1989). While the DOJ may bring judicial proceedings against a party, it does not have authority to adjudicate antitrust cases. As to the FTC, it combines prosecutorial and decision-making functions. *See* 15 U.S.C. § 45 (1994). Initially, commissioners are prosecutors when issuing a complaint; then, they are separated from the FTC trial staff and become judges. The FTC may decide to initiate a trial before an administrative law judge. The administrative law judge is an official "to whom the . . . [FTC] delegates the initial performance of its adjudicative fact-finding functions . . . ." 16 C.F.R. § 0(14) (1996). The administrative law judge conducts a procedure that is similar to the procedure which occurs before a U.S. district court and finally issues a so-called "initial decision." *See id.* § 3(51). This decision can be appealed to the full Commission on both facts and law by either the FTC staff or the merging companies. *See id.* § 3(52). Upon appeal, the FTC issues a final decision. *See id.* § 3(54)-(55).

Certain activities are assigned by statute to a particular Agency. Thus, while FTC has primary responsibility for consumer protection activities, the DOJ has exclusive jurisdiction over market divisions which are criminal in nature or which relate to certain industries that either are, or were, subject to government economic regulation, including banking, telecommunications, rail, and air transportation. *See* Janet D. Steiger, *Effectively Enforcing Competition Laws: Some Aspects of the U.S. Experience, in* EC AND U.S. COMPETITION LAW AND POLICY 21-22 (Barry Hawk ed., 1992); *see also* SULLIVAN & HOVENKAMP, *supra*, at 73-77. A number of areas are allocated to one Agency or the other based on historical experience. For instance, the DOJ handles matters involving steel, brewing, aluminum, and newspapers whereas the FTC has historically considered petroleum, refining, natural gas pipelines, cement, department stores, and grocery retailing. *See* Steiger, *supra*, at 21-22. If both Agencies seek to initiate the investigation, the dispute is brought before the liaison officers who resolve the matter based on which Agency has more expertise. *See id.*

387. *See* Merger Regulation, *supra* note 2, art. 7.

to obtain a preliminary injunction from a federal district court that has jurisdiction over the defendants.[388]

When a merger has been notified under the Hart-Scott-Rodino Act, the Agencies, if they believe that the merger raises doubts as to its compatibility with the Clayton Act, may issue, within thirty days, a second request, demanding that the parties involved provide additional information on the transaction.[389] If the Agencies intend to enjoin a merger, they must do so within twenty days running from the day the parties file a complete second request response.[390] If the Agencies do not ask the district judge to issue a preliminary injunction or if the request is dismissed by the judge, then the parties are free to consummate the transaction. However, an action may be brought against the parties either before an administrative law judge if the FTC is handling the case, or before a district court if the DOJ is handling it.[391]

The conclusion that can be drawn from this difference is that while parties negotiating a settlement with the Commission have limited bargaining power, companies negotiating with the Agencies know that a judge, and not the Agencies, will decide on the injunction. Therefore, U.S. companies enjoy a better situation when negotiating with the Agencies than European companies do when negotiating with the Commission.

The EU should adopt an approach similar to that followed in the U.S.[392] Namely, the role of the Court of First Instance should be enhanced to bring within its competence the ability to block a proposed merger at the request of the Commission. At present, the Commission prosecutes and decides the merits of the case. From the point of view of legal objectivity or even legal transparency, this cannot be considered an ideal situation. While the Commission's decisions can be appealed before the Court of First Instance and the

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388. *See* 15 U.S.C. § 26 (1994).

389. *See id.* 18a.

390. *See id.*

391. *See id.* 18a(f).

392. This direct participation of the judiciary in assessing the compatibility of a proposed merger with the antitrust laws is not unknown in Europe. For instance, the Belgian Act of August 5, 1991, on the Protection of Economic Competition provides for a clear separation between the investigative procedure, which is performed by the *Service de la Concurrence* (Competition Office), and the decision-making process, which is entrusted to the *Conseil de la Concurrence* (Competition Council). Act of Aug. 5, 1991, § 2, MONITEUR BELGE, Nov. 10, 1991, at 22493 (Belg.). The principal duty of the Competition Council, a body composed of six judges and six specialists in competition matters, is to act as an administrative judge. Its decisions, based on the report drawn up by the *Service de la Concurrence* can be challenged before the Brussels Court of Appeal. *See id.* §§ 17, 43.

E.C.J., until recently, such judicial control over the Commission's discretionary power has not been sufficient.[393]

The second and final difference is that in the EU only mergers which are notified or should have been notified, i.e., concentrations with a Community dimension within the meaning of Article 1(2) of the Merger Regulation, can be challenged by the Commission. Contrarily to this, in the U.S., the DOJ and the FTC can challenge a merger under section 7 of the Clayton Act, even though no premerger filing requirement under the Hart-Scott-Rodino Act exists.

VIII. CONCLUSION

A new term, "user-friendly competition law," has been recently coined in the literature.[394] "User friendly" not only has a meaning limited to treating respondents with reasonable courtesy and consideration; it goes even further.[395] A user-friendly system has at least three characteristics: efficiency, consistency, and transparency.[396] "Efficiency" refers to the need to resolve cases promptly, keeping the costs of enforcement as low as possible.[397] The notion of consistency is that a consistent law is a law upon which lawyers can rely in giving future advice.[398] Finally, "transparency" refers to the extent to which the content of a law is clearly articulated and publicly known.[399] It should be noted that a distinction is made between "procedural transparency" and "transparency regarding policy."[400]

A question arises as to whether both the U.S. and EU merger control systems qualify as "user-friendly"? This must be answered in relative and not absolute terms. Since both systems contain flaws with respect to efficiency, consistency, and procedural transparency, neither one is perfect. Differences do exist, however, in the area of transparency. In light of the developments outlined in this work, the U.S. merger control system is arguably more transparent

393. *See* Ivo van Bael, *Insufficient Judicial Control of the EC Competition Law Enforcement, in* INTERNATIONAL ANTITRUST LAW AND POLICY 733, 740 (Barry Hawk ed., 1993).

394. *See* Dan Goyder, *User-Friendly Competition Law, in* PROCEDURE AND ENFORCEMENT, *supra* note 364, at 1.

395. *Id.* at 3.

396. *See* Diane P. Wood, *User-Friendly Competition Law in the United States in* PROCEDURE AND ENFORCEMENT, *supra* note 364, at 8-10.

397. *See id.*

398. *See id.*

399. *See id.*

400. *See* Bernard van de Walle de Ghelcke, *Investigatory Powers, Fact Finding, Procedural Guarantees, Transparency and Independence, in* 1993 FORDHAM CORP. L. INST., *supra* note 236, at 292, 293.

regarding policy and certainly more consistent than its European counterpart.

The above assertions follow from the absence of burdensome distinctions similar to those between concentrative and cooperative joint ventures in the EU. In that sense, the distinction should be dropped, and a bright-line shareholding test should be adopted. Furthermore, since 1968, the U.S. practice of issuing merger guidelines has provided a comprehensible set of parameters (for instance, the HHI) for businessmen and practitioners to plan their transactions.

The Commission should issue similar guidelines to foster predictability and legal certainty of its decisions. The fact that the Commission has shown high flexibility and a pragmatic approach towards clearing mergers and the fact that only four transactions since the Merger Regulation became effective have been blocked do not prevent the conclusion that lessons of transparency and consistency should be gleaned from the U.S. enforcement merger system.[401] Likewise, these facts do not prevent the conclusion that the EU judiciary should be directly involved in the decision-making process as to whether to block a merger.[402] This is an element which contributes to making the U.S. system more transparent than its European counterpart. Powers of the Court of First Instance should be enlarged to allow it to decide on the blocking of a proposed merger.

Moreover, the need for transparency and the need for allowing the judiciary to assess the compatibility of mergers with the antitrust rules will increase if, as it is provided by the Merger Regulation, the turnover thresholds are lowered for a merger to qualify as a concentration with a Community dimension. Needless to say, the extremely high thresholds[403] that are now in force allow for only the most important mergers to come under the jurisdiction of the Commission. Supported by the industry and the business world, the Commission has always recognized that the thresholds had to be lowered.[404] The lowering would allow for more mergers to be

401. An idea that EC should adopt U.S. competition law as a model is not a new one and has been suggested by numerous commentators. *See, e.g.*, Eran Aharon Lev, *European Community Competition Law: Is the Corporate Veil Lifted Too Often?*, 2 J. TRANSNAT'L L. & POL'Y 199, 242 (1993).

402. *See* Bergmann, *supra* note 113, at 53.

403. *See* Merger Regulation, *supra* note 2, art. 1(2).

404. The Commission has proposed lowering merger thresholds from ECU 5 billion aggregate worldwide turnover to ECU 3 billion aggregate worldwide turnover, and from ECU 250 million aggregate Community-wide turnover to ECU 150 million aggregate Community-wide turnover. *See* Proposal for a Council Regulation (EC) Amending Regulation No. 4064/89

notified on a Community-wide basis, thereby avoiding the obligation to notify the proposed merger under the different domestic merger control statutes.[405]

In conclusion, one should refer to the issue dealt with at the beginning of this article.[406] We already know that both the U.S. and EU merger analyses are based on competition policy; however, the Commission should, in its merger analysis, equally consider both industrial policy concerns and strict competition-based factors. This will be a difficult equilibrium to maintain, yet it is the only way to attain the goals of a free market economy while preserving a socially-oriented legal system.

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of 21 December 1989 on the Control of Concentrations Between Undertaking, 1996 O.J. (C 350) 8; *see also* Green Paper Concerning the Amendment of the Merger Regulation §§ 65-66 (Jan. 31 1996) (on file with author) [hereinafter Green Paper].

405. This can be especially burdensome when the proposed merger requires prior notification to more than one national authority due to the absence of a homogeneous system for merger control within the different member states. For instance, in Germany, France, and Italy, a premerger notification procedure exists, but under Spanish law, there is no obligation to notify a concentration, although a voluntary notification procedure is provided for by the law. *See* Law 16/1989 of 17 June 1989 on the Defense of Competition art. 15, Boletin Oficial del Estado no. 170/1989, at 22747, *translated in* [1990] 4 EUR. COMPETITION L. REV., Suppl. 1, at 2; *see also* Green Paper, *supra* note 415, §§ 51, 62-63.

406. *See* discussion *supra* Part II.