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Mergers and Acquisitions in Europe: Analysis of EC Competition Regulations

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MERGERS AND ACQUISITIONS IN EUROPE
—ANALYSIS OF EC COMPETITION REGULATIONS

by

YOUNGJUN LEE

(Under the direction of Professor Fredrick Huszagh)

ABSTRACT

This paper analyzes three competition regulations in the European Community—article 85 and 86 of the EC Treaty and the EC Merger Regulation. Specifically, article 85 focuses on the market structure and article 86 focuses on the market dominance. The paper explores the Merger Regulation, its objectives and its scope. The amendment to the Merger Regulation extending its scope to include smaller-scale mergers and cooperative joint ventures is explained. The paper concludes with the extraterritoriality of the EC competition regulations.

INDEX WORDS: EC competition regulations, Article 85, Article 86, The Merger Regulation, The Merger Regulation Amendment, Extraterritoriality

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Fulfillment of the Requirements for the Degree

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DEDICATION

I dedicate this thesis to my father, Mr. KyeIn Lee, and mother, Mrs. EunSook Lee.

I love you.

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SECTION I

INTRODUCTION

Competition law is designed to protect trade and commerce from unlawful restraint.¹ The importance of competition law, better known as antitrust law in the United States,² has increased in almost every country around the world. As restraints on competition grow following globalization, the United States is no longer the only country that has antitrust laws. This presents an international trend that creates and develops competition law impacting economic activity in different countries. For this reason, almost every government and business decision-maker in the world considers competition law a major policy concern.³

The European Community (Hereinafter “Community”) has recognized the importance of competition law and has tried to protect the process of competition at the Community level, even though each member state has its own national competition law. The Community structured main competition rules through articles 85 and 86 of the EC treaty (Hereinafter “Treaty”) to control undertakings involved in mergers, acquisitions, or joint ventures. For several decades, these articles have functioned well, but some fundamental problems such as the difficulty of controlling post-mergers were found.⁴ In

¹ BLACK’S LAW DICTIONARY 94 (6th ed. 1990).

² “Antitrust law” is the more common term in the United States, and “competition law” is a more generic term and is used outside the United States.

³ David J. Gerber, Europe and the Globalization of Antitrust Law, 14 CONN. J. INT’L L. 15, 15 (1999).

⁴ William Elland, The Mergers Control Regulation (EEC) No. 4064/89, 11(3) EUR. COMPETITION L. REV. 111, 117 (1990).

order to fix these problems, the Merger Regulation⁵ was created in 1989 and gave the European Commission (Hereinafter “Commission”) the sole power to control mergers before they were consummated.

The Merger Regulation sets up the turnover limit of companies involved in mergers to assess whether the Commission should control them.⁶ If the mergers are within the regulation scope, companies should notify the Commission in advance⁷ through the one-stop-shop principle.⁸ Using the one-stop-shop principle, companies can save administrative and legal costs because the principle makes the procedure simple by requiring only one filing with the Commission, rather than multiple filings with national authorities.⁹ While the regulation controls mergers with a Community dimension, national competition laws and article 85 and 86 also govern those that lack a Community dimension.¹⁰

In spite of the general success of the Merger Regulation, the Commission proposed amendments to the regulation in order to serve the regulation’s goal: giving the Community the power to govern mergers that negatively impact competition. As a result

⁵ Council Regulation 4064/89 Merger Regulation, 1989 O.J. (L395/1) 4.

⁶ Merger Regulation art. 2.

⁷ Merger Regulation art. 4.

⁸ Simon Hirsbrunner, Referral of Mergers in EC Merger Control, 20(7) EUR. COMPETITION L. REV. 372, 372 (1999).

⁹ See Christian Ahlborn and Vanessa Turner, Expanding Success? Reform or the E.C. Merger Regulation, 19(4) EUR. COMPETITION L. REV. 249, 251 (1998).

¹⁰ Georgios I. Zekos, The New E.U. Approach to Mergers and Market Integration, 21(1) EUR. COMPETITION L. REV. 37, 41 (2000).

of amendments, the regulation extended its scope to include smaller, but important concentrations.¹¹

As briefly mentioned above, the Community approach is focused on market structure and the analysis of dominance, unlike the US approach focusing on efficiency defenses.¹² This paper deals with differences and similarities of different competition regimes between article 85 and 86 of the Treaty and the Merger Regulation. In addition, through the comparison of the regulation and its amendments, the typical features of the EC competition laws will be analyzed.

¹¹ Council Regulation 1310/97, amending Merger Regulation 4064/89, 1997 O.J. (L180/1).

¹² See Peter D. Camesasca, The Explicit Efficiency Defence in Merger Control: Does It Make the Difference, 20(1) EUR. COMPETITION L. REV. 14, 20 (1999).

SECTION II

INTERPRETATION OF COMPETITION REGULATIONS

Regarding the terms anti-trust and competition law, the function of both laws is to protect the process of competition against limitations on its operation.¹³ The U.S. antitrust law focuses on efficiency through the prohibition of monopoly, and is enforced through civil and criminal actions.¹⁴ In contrast, EC Merger Regulations approach this topic from a different perspective.

The Community has economic as well as a social purpose, and the EC competition laws have been devised to support these goals.¹⁵ As shown in article 2 of the Treaty,¹⁶ the Community tries to accomplish those goals through the mechanism of the EC Common Market (Hereinafter “Common Market”). For this reason, the competition laws such as articles 85 and 86 and the Merger Regulation should be construed in the light of the objectives of the Treaty. Interpreted in this manner, EC competition laws focus on the competitive structure of the market in order to protect the Common

¹³ Gerber, supra note 3, at 18.

¹⁴ Camesasca, supra note 12, at 23.

¹⁵ Gerber, supra note 3, at 22.

¹⁶ TREATY OF ROME 1957 (EC TREATY) art. 2, (“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.”).

Market.¹⁷ The Court of Justice of the European Communities (Hereinafter “Court”) has held the view that articles 85 and 86 should be interpreted in this context in several cases, including Continental Can.¹⁸

The Commission stated that it would no longer apply articles 85 and 86 to mergers.¹⁹ Nevertheless, the Merger Regulation does not expressly exclude the applicability of articles 85 and 86 to concentrations. In addition, since the regulation has adopted the criterion of article 85 to test co-operative joint ventures, both the Merger Regulation and articles 85 and 86 are somewhat related to each other.²⁰ It is also required in the amended regulation that the Commission cooperate with national competition authorities by dividing case loads between them.²¹ Even though the scope of each EC competition law is different, these competition regulations are somewhat related to one another; therefore, these regulations should be read in light of the EC treaty.²²

It is clear that the Commission functions as a central authority to administer mergers under the regulation, but it is not expressed under the regulation whether the Commission has the same authority in regard to mergers that are outside the Community, but impact the Common Market.²³ The Court also held that the Commission has extraterritorial enforcement jurisdiction to concentrations creating a dominant position

¹⁷ Valentine Korah, An Introductory Guide to EC Competition Law and Practice 6 (6th ed. 1997).

¹⁸ Continental Can Company Inc. and Europemballage Inc., Case 72/21/EEC, J.O. 1972 L7/25, [1972] C.M.L.R. D11.

¹⁹ See Zekos, supra note 10, at 41.

²⁰ Adrian Brown, Distinguishing between Concentrative and Cooperative Joint Ventures: Is It Getting Any Easier, 17(4) EUR. COMPETITION L. REV. 240, 249 (1996).

²¹ Ahlborn & Turner, supra note 9, at 253.

²² Korah, supra note 17, at 275.

within the Community.²⁴ In addition, the Commission argues²⁵ that the Merger Regulation should apply the international jurisdictional principles that were established in Wood Pulp.²⁶ As long as the competitive structure of the Common Market is restricted, the Commission can be involved under the regulation by controlling the mergers that have a negative impact on the Community market.²⁷

²³ Gerber, supra note 3, at 25.

²⁴ Ahlström & Others v. Commission, (Wood Pulp) Case C-89, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901.

²⁵ Zekos, supra note 10, at 38.

²⁶ Ahlström & Others, Case C-89, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901.

²⁷ Joseph P. Griffin, Antitrust Aspects of Cross-Border Mergers and Acquisitions, 19(1) EUR. COMPETITION L. REV. 12, 16 (1998).

SECTION III

ARTICLE 85²⁸

1. Introduction

The main competition rules that govern undertakings in both the public and private sectors have been set up since 1957 by articles 85 and 86 of the Treaty of Rome. The rules have continued without amendments in subsequent treaties, such as the Treaty of Maastricht, the Treaty of Amsterdam, and the Treaty of Nice.²⁹

Article 85 prohibits the collusion of undertakings that is not compatible with the Common Market, and governs agreements between undertakings. Article 85 is enforced not only by the Commission's intervention under regulation 17 with prohibition orders and fines or exemptions, but also through national courts.³⁰

Article 85(1) prohibits a collusion that restricts competition and that threatens the Common Market.³¹ Examples of anti-competitive conduct are listed in the article.³² The cartels made before the Second World War are clearly forbidden because through the cartel, producers control the price and market by quota.³³ The price of goods and services is higher under the cartel than under free-competition. According to article

²⁸ Articles 85 and 86 of the EC TREATY have been changed to articles 81 and 82 since the TREATY OF AMSTERDAM.

²⁹ Korah, supra note 17, at 2.

³⁰ See id. at 3.

³¹ EC TREATY art. 85(1).

³² EC TREATY art. 85(3).

³³ Korah, supra note 17, at 41.

85(2), agreements infringing article 85(1) as a whole shall be void. Article 85(3) provides for exemption from the prohibition of article 85(1):

Article 85(1) “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which... ”

The Court and the Commission have not construed article 85 in the way that a U.S. court or administrative agency would interpret a federal statute. Instead, it has been construed in much more teleological way. That is, the Court and the Commission emphasize and give weight to the particular aspect that would play an essential role within the whole setting of the Treaty, and that part affects other articles to influence their interpretation within the general scheme of the Treaty. Thus, exact analysis of individual words and phrases seems to be less important. However, it is still helpful to approach article 85 by analyzing its scope and meaning in order to have a better understanding of article 85. Article 85 will be examined by analyzing its general scope and criteria to determine the violation of the article.

The Commission exercises its power through a number of Directorates-General (DG).³⁴ Among DGs, DG IV works for the Commission in competition matters, such as the application and enforcement of article 85 and 86.³⁵

³⁴ D. G. GOYDER, EC COMPETITION LAW 128 (3rd ed. 1998).

2. Scope of Article 85

Article 85 has decided its scope by specifically excluding something from its scope rather than by enumerating everything that it covers. Some of the exclusions result not directly from article 85 in the Treaty, but from some other regulations, such as the ECSC Treaty, the Common Agricultural Policy, and some regulations for transport, and some from other provisions in the Treaty such as article 223, 43, and 90. On one hand, the exclusion from its coverage has been partial or complete exemption for a sector of competition rules. On the other hand, the exclusion from the scope of article 85 has been intended to provide an alternative set of competition rules.

(i) According to article 232(1), article 85 will not affect the ECSC Treaty and the rules for the functioning of the Common Market in coal and steel, which was formed in articles 65 and 66.³⁶ However, after the ECSC expires in 2002 under its own article 97, the competition rules including article 85 will likely be applied to those products which are currently covered by the ECSC.³⁷

(ii) Any product on the list of defense items prepared by the Council under the article 223(1)(b), may also be excluded from the application of the competition rules.³⁸ Under article 223(1)(b), member states have the right to take necessary measures to

³⁵ Id. at 130.

³⁶ A.M. Van den Bossche, The International Dimension of EC Competition Law: The Case of the Europe Agreement, 18(1) EUR. COMPETITION L. REV. 24, 34 (1998).

³⁷ Goyder, supra note 34, at 76.

protect their essential security interests connected to the production of or trade in arms, munitions, and war materials.³⁹ Currently, the Commission tends to decrease the scope of this exemption.

(iii) The application of the competition rules may be limited to some agricultural products that the Council determines under the framework of article 43.⁴⁰ In addition, the competition rules applying to agriculture are subject to the Common Agricultural Policy, whose objectives are enumerated in article 39.⁴¹

(iv) Because the transport sector including road, rail, inland waterway, sea, and air transport are indispensable to the Common Market, the competition rules of article 85 are postponed in application to the whole sector under articles 74 to 84 of the Treaty.⁴² Regulation 1017/68, established in 1968, has governed transport by road, rail, and inland waterway.⁴³ As a result of this regulation, article 85 applies only marginally to transport undertakings under several qualifications,⁴⁴ rather than to the industry in general.⁴⁵

³⁸ Celia Hampton, Unofficial Consolidated Text of Council Regulation (EEC) No.4064/89 of 21 December 1989 on the Concentrations between Undertakings with Council Regulation (EC) No. 1310/97 of 30 June 1997, 18(7) EUR. COMPETITION L. REV. 451, 455 (1997).

³⁹ The only qualification is that “such measures shall not adversely affect the conditions of competition in the Common Market regarding products which were not intended for specifically military purposes.”

⁴⁰ Korah, supra note 17, at 6-7.

⁴¹ Paul Spink, Flying the Flag: State-Funded Advertising Campaigns, 18(6) EUR. COMPETITION L. REV. 382, 385 (1997).

⁴² Georgios I. Zekos, The Implementation of E.U. Competition Policy and its Rules in Air and Maritime Transport, 19(7) EUR. COMPETITION L. REV. 430, 430 (1998).

⁴³ Id. at 430-31.

⁴⁴ Articles 3, 4, and 5 provide qualifications. In addition, the Commission may also provide a specific exemption in case of “a state of crisis” in a transport market.

Unlike road, rail, inland waterway, sea and air transport was quite different because these transports were covered in many international treaties and conventions. Even though the Court recognized that no regulation has been made for sea and air transport under article 87, the court held that under articles 88 and 89, article 85 should be applied by the authority of the member states until relevant regulations had been adopted.⁴⁶ Adopting a detailed regulation 4056/86 dealing with international maritime transport, the Council let the Commission apply article 85 to the transport.⁴⁷ Since the Council adopted regulations 3975 and 3976/87 dealing with air transport, article 85 also applies to the transport, but limited only to domestic and international air transport between Community airports to which the regulations can apply.⁴⁸

On the contrary, the Merger Regulation can intervene in proposed mergers involving even international routes to or from non-member states, as long as these mergers have potentially anti-competitive effects.⁴⁹ It is essential to extend the scope of article 85 to such international routes involving non-member states.

(v) The Commission's interest in banking and financial services has been increasing since mid-1980s.⁵⁰ Since 1995, article 85 has been applied to cross-border credit transfer services.⁵¹ Similarly, insurance services are also governed by article 85.⁵²

⁴⁵ Commission v. UIC, Case C-264/95P, [1997] 5 C.M.L.R. 49.

⁴⁶ Ministère Public v. Asjes, Cases 209-213/84, [1986] E.C.R. 1425, 3 C.M.L.R. 173.

⁴⁷ Zekos, supra note 42, at 434 (The member states must apply article of 85 to the transport sector.).

⁴⁸ Id. at 437.

⁴⁹ Id. at 433-34.

⁵⁰ Zuchner v. Bayerische Vereinsbank, Case 172/80, [1981] E.C.R. 2021, [1982] 1 C.M.L.R. 313.

While the U.S. gives some exemptions of competition regulations to the insurance industry, the Commission applies article 85 to insurance services without any exemption except for the exchange of information between companies.⁵³

(vi) Public undertakings, which are afforded a variety of governmental or quasi-governmental responsibilities, are exempted from the scope of article 85, and are governed by member states granting special or exclusive rights.⁵⁴ However, under article 90(1), member states are prohibited from enacting any measures contrary to the Treaty.⁵⁵ Furthermore, article 90(2) allows the competition rules to govern such undertakings “entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly.”⁵⁶

3. Three Criteria

There are three criteria to determine whether article 85(1) has been breached: (i) there must be some form of collusion between undertakings; (ii) the collusion must affect trade between member states; and (iii) the collusion must have an objective or an effect of restricting competition within the Common Market.

⁵¹ Goyder, supra note 34, at 85.

⁵² R.P. Falkner, European Community Competition Policy and Financial Services: An Overview, 12(3) EUR. COMPETITION L. REV. 113, 119 (1998).

⁵³ Id.

⁵⁴ Goyder, supra note 34, at 86.

⁵⁵ EC TREATY art. 90(1).

⁵⁶ EC TREATY art. 90(1).

(i) There must be some form of collusion between undertakings.

(1) The Concept of an Undertaking

The definition of the term “undertaking” is essential to the understanding of article 85(1). The concept of “undertaking” is broad and seems to have the same meaning in articles 85 and 86.⁵⁷ From the Mannesman case,⁵⁸ the concept of an undertaking can be inferred. An undertaking must be an organization capable of having legal rights and duties, and of acting in co-operation with other parties.⁵⁹ The concept of an undertaking can include private individuals involved in any form of business, commerce, or profession, partnerships, co-operatives, companies, and performing rights societies.⁶⁰ Moreover, such a broad definition of an undertaking can also apply to state organizations engaged in commerce, nationalized industries operating as separate legal entities, municipalities, federations, trade associations, and publicly owned undertakings with special rights granted by the state.⁶¹

From these examples of undertakings, it is clear that the objective of making a profit is not essential.⁶² The key element is to decide if an undertaking is in the nature of the activities, rather than the organization.⁶³ It covers any collection of resources used to

⁵⁷ C. J. COOK AND C. S. KERSE, *E.C. MERGER CONTROL*, § 2 (2nd ed. 1996).

⁵⁸ Mannesman v. High Authority, Case 19/61, [1962] E.C.R. 357, 371 (The Court defined an undertaking as “a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long-term economic aim.”).

⁵⁹ Id.

⁶⁰ Peter-Armin Trepte, Competition and the Internal Energy Market, 13(4) *EUR. COMPETITION L. REV.* 149, 150 (1992).

⁶¹ MARK FURSE, *COMPETITION LAW OF THE UK & EC* 32 (2nd 2000).

⁶² Id. at 32-33.

⁶³ See SAT v. Eurocontrol, Case C-364/92, [1994] E.C.R. I 43, 5 C.M.L.R. 208.

carry out economic activities, and embraces a company, a partnership, a sole trader or an association, whether dealing with its members or not.⁶⁴

A trust company authorized to police a cartel was held by the Commission to be an undertaking.⁶⁵ General cartels, which fix prices and allocate production or sales, have long been regarded to be anti-competitive and contrary to the public interest because prices are likely to be higher under the cartels than they would be under free competition. Under the latter, customers would have bought at a competitive price, and would have paid at least as much as the costs of production and distribution, but under the former, they are forced to spend money on other things that they desire less.⁶⁶ Moreover, cartels misallocate scarce resources. For those reasons, cartels are thought to be incompatible with the Common market, as well as inefficient.⁶⁷

(2) The Concept of Agreements, Decisions, and Concerted Practices

“Collusion” includes agreements,⁶⁸ decisions, and concerted practices that are incompatible with the Common Market.⁶⁹ An agreement can be successful when there is an objectively sufficient consensus between undertakings as to the bargain to which they have mutually committed themselves. The parties’ lack of autonomy in their decision for commercial arrangements may cause forfeiture of their voluntary agreement.⁷⁰ Both the

⁶⁴ Korah, supra note 17, at 42.

⁶⁵ The Community v. Fabbrica Pisana SpA and Others, Case 80/1334/EEC, [1982] 2 C.M.L.R. 61.

⁶⁶ Korah, supra note 17, at 9.

⁶⁷ Id. at 48.

⁶⁸ The concept of agreement clearly includes a contract, but is broader.

⁶⁹ Article 85 was drafted to cover these three situations.

⁷⁰ Asia Motor France (No. 3), Case T-387/94, [1996] E.C.R. II-961, 5 C.M.L.R. 537.

Court and the Commission have dealt with cases on horizontal and vertical agreements.⁷¹ Horizontal agreements are made between undertakings at the same level.⁷² Vertical agreements whose relationship is complementary are made at different levels in the commercial chain.⁷³

A decision by an association is any provision of the rules of either an association or separate undertakings, or any decision or recommendation made under those rules.⁷⁴ Concerted practices were designed to cover any kind of co-operative activity between undertakings which falls short of an actual agreement.⁷⁵ The Commission often considers concerted practices as an alternative even when an agreement also exists.⁷⁶ Concerted practices are also involved in horizontal and vertical levels, like the U.S. antitrust law.⁷⁷ While agreements and concerted practices require at least two undertakings between parties in order to make an agreement or practice, a decision by an association could involve the association alone.

⁷¹ Tom S. Pick, Sub-Contracting Agreements under E.U. Competition Law – Applicability of Article 81 E.C., 23(3) EUR. COMPETITION L. REV. 154, 154 (2002).

⁷² Wulf-Henning Roth, European Competition Policy for the Insurance Market, 21(2) EUR. COMPETITION L. REV. 107, 109-10 (2000).

⁷³ Pick, supra note 71, at 155.

⁷⁴ See Application of Article 85(1) to Price-Fixing Arrangements in the Insurance Market, 7(4) EUR. COMPETITION L. REV. 361, 366 (1986).

⁷⁵ Barry J. Rodger, Ologopolistic Market Failure: Collective Dominance Versus Complex Monopoly, 16(1) EUR. COMPETITION L. REV. 21, 21 (1995).

⁷⁶ Floral Düngemittelverkaufs, 80/182/EEC, [1980] 2 C.M.L.R. 285.

(ii) The collusion may affect trade between member states

Agreements, decisions, and concerted practices have a significant meaning under article 85 if they are capable of affecting trade between member states.⁷⁸ This phrase was initially interpreted as to agreements and concerted practices that have an effect merely within a single member state that are not controlled by article 85.⁷⁹ In Société La Technique Minière, the Court interpreted the phrase: “for this requirement to be fulfilled, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states.”⁸⁰

This phrase has been interpreted in light of the need to create a single market in the context of the competition rules.⁸¹ In Consten and Grundig,⁸² the Court said that “the concept of an agreement ‘which may affect trade between member states’ is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law.” However, this interpretation does not draw the

⁷⁷ Goyder, supra note 34, at 98.

⁷⁸ George Cumming, Cabour Sa Et Nord Distribution Automobile Sa/Arnor Soco Sarl, 20(1) EUR. COMPETITION L. REV. 29, 29 (1999).

⁷⁹ Korah, supra note 17, at 58-59.

⁸⁰ Société La Technique Minière v. Maschinenbau Ulm GmbH, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

⁸¹ Rein Wesseling, The Commission White Paper on Modernisation of E.C. Antitrust law: Unspoken Consequences and Incomplete Treatment of Alternative Options, 20(8) EUR. COMPETITION L. REV. 420, 427 (1999).

⁸² Etablissements Consten SA and Grundig-Verkaufs-GmbH v. Commission, Case 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418.

line between Community law and national law. Moreover, in Wilhelm,⁸³ the Court's ruling⁸⁴ limits the scope of Community law. Only to the extent that Community law conflicts with national law does this condition limit the scope of national law.

Another problematic question was how to exclude from the scope of article 85 many agreements which are considered to have minor importance.⁸⁵ In Frans Völk, the Court decided that insignificant agreements are not governed by article 85.⁸⁶ In assessing the effect on trade between member states, the Court used a market share as a measure.⁸⁷ If the effect of agreements on trade between member states and on competition in the Common Market is negligible, the agreements did not fall under article 85(1) because the article applies only to the agreements affecting the market position.⁸⁸

This definition is similar to the Court's approach in Société La Technique⁸⁹ and Consten and Grundig.⁹⁰ The Commission sought to decide whether agreements fall under article 85 in a quantitative way such as a market share and an aggregate annual turnover.⁹¹ The Commission decided the maximum market share and turnover limit through Notices, and have continued to control agreements that fall under the scope of

⁸³ Wilhelm v. Bundeskartellamt, Case 14/68, 1969 E.C.R. 1, [1969] C.M.L.R. 100; See also Société La Technique Minière, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

⁸⁴ The Court ruled that some agreements may be subject to both national and Community law.

⁸⁵ Korah, supra note 17, at 44-45.

⁸⁶ Frans Völk v. Vervaecke, Case 5/69, [1969] E.C.R. 295; C.M.L.R. 273.

⁸⁷ Id. (The Court ruled that agreements affecting a market share of 1 per cent or below would be unlikely to have the required effect.)

⁸⁸ Korah, supra note 17, at 67-68.

⁸⁹ Société La Technique Minière, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

⁹⁰ Etablissements Consten SA and Grundig-Verkaufs-GmbH, Case 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418.

article 85.⁹² However, the Commission attempted to reduce the number of agreements falling within its jurisdiction by setting no maximum turnover.⁹³ The Commission's limit of its jurisdiction to insignificant agreements results from its lack of resources to govern them, and from the consequent request of member states which need to deal with a higher proportion of less important agreements.⁹⁴ The definition of "the collusion may affect trade between member states" has been developed, and includes many cases based on trade associations within a single member state.

Finally, "trade" is a very broad concept that covers all economic activities relating to goods or services.⁹⁵ It includes not only the general industrial and commercial activity, such as manufacture and distribution, but also commercial services, such as banking, insurance, and financial services.⁹⁶ Trade extends also to the right of establishment and the free movement of the suppliers.⁹⁷ It can also apply to the free movement of other activities with a commercial nature such as capital, cultural activities, or television programs.⁹⁸ This application is not limited to the member states, but extends to other countries outside the Common Market as long as they have an economic relationship under some treaty or agreement. It is easy to satisfy the condition requiring that trade

⁹¹ Furse, supra note 51, at 134-35.

⁹² Id.

⁹³ Id. at 136.

⁹⁴ Goyder, supra note 34, at 111.

⁹⁵ BLACK'S LAW DICTIONARY 1492 (6th ed. 1990).

⁹⁶ R.P. Falkner, European Community Competition Policy and Financial Services: An Overview, 12(3) EUR. COMPETITION L. REV. 113, 113-14 (1991).

⁹⁷ Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.

between member states be affected because even an agreement limited to activities in a single member state may violate article 85(1).⁹⁹

In recent decades, the Court has placed less importance on the condition that trade between member states must be affected.¹⁰⁰ The condition in article 85 is also similar to the construction of the term “may affect trade between member states” in article 86. Moreover, the Court said that the condition should be applied in light of article 2 and 3(g) of the Treaty in Commercial Solvents.¹⁰¹

(iii) The collusion must have an objective or an effect of restricting competition within the Common Market

To infringe article 85(1), arrangements must have a negative effect on competition “as their object or effect.”¹⁰² However, appraising whether an agreement has the prevention, restriction, or distortion of competition as its object or effect is very difficult because almost all the product and service markets within the Community are imperfectly competitive.¹⁰³ In addition, the interpretation of “the prevention, restriction or distortion of competition within the common market” is also problematic. While too strict a definition might include almost all the product and service market, too flexible a

⁹⁸ Goyder, supra note 34, at 115.

⁹⁹ Vereeniging van Cementhandelaren v. Commission, Case 8/72, [1972] E.C.R. 977, [1973] C.M.L.R. 7.

¹⁰⁰ Windsurfing International Inc. v. Commission, Case 193/83, [1986] E.C.R. 611, paras. 96-97, [1986] 3 C.M.L.R.489; Case 161/84, 1986 E.C.R. 353, para. 26; Verband der Sachversicherer eV v. Commission, Case 45/85, [1987] E.C.R. 405, para. 49, [1988] 4 C.M.L.R. 264.

¹⁰¹ Istituto Chemioterapico Italiano and Commercial Solvents Corporation v. Commission, Cases 6-7/73, [1974] E.C.R.223, para. 32., 1 C.M.L.R. 309.

¹⁰² EC TREATY art. 85(1).

¹⁰³ K.P.E. Lasok, Assessing the Economic Consequences of Restrictive Agreements: A Comment on the Delimitis Case, 12(5) EUR. COMPETITION L. REV. 194, 199 (1991).

definition would limit the scope of the competition rules, causing exclusion of a substantial number of cases having a negative effect on competition in the Common Market.¹⁰⁴

To answer this question, it is necessary to identify whether article 85(1) is primarily designed to assert jurisdiction, or to provide an assessment of the justifiability of an individual agreement.¹⁰⁵ Even though the Court has taken the view that article 85(1) is a jurisdictional clause, there are also many indications in its decision that describe the limitation of the scope of article 85, which is described as “the rule of reason.”¹⁰⁶

The initial interpretation of “the prevention, restriction or distortion of competition” was strict, but in recent years has been more flexible. In the normal business environment, any businessman seeking to enter a specific geographic and product market will have complete freedom of choice as to the territories without agreements or concerted practices.¹⁰⁷ However, if some agreement between other undertakings limits his freedom of choice, the restraint of trade by the agreements already in the market is directly responsible for the reduction in the freedom of his business. Article 85(1) is designed to eliminate such agreements.

To decide whether an agreement has an object or an effect of restricting competition, the Court must first look at the object or purpose of the agreement by

¹⁰⁴ Goyder, supra note 34, at 116.

¹⁰⁵ Wesseling, supra note 81, at 422-23.

¹⁰⁶ Id.

¹⁰⁷ Stephen Kon, Parallel Imports of Pharmaceutical Products: A New Realism, or Back to Basics, 18(3) EUR. COMPETITION L. REV. 123, 136 (1997).

reference to its express provisions, considered in its economic context.¹⁰⁸ The agreement must either be intended to have such a result on competition, or actually have such a result, regardless of the parties' intentions.¹⁰⁹ In Consten and Gündig,¹¹⁰ the Court ruled that if the object is to restrict competition in an agreement, it is not necessary to examine its effects. However, to appraise whether an agreement has "an effect" of restricting competition, the Commission should conduct a careful market analysis of the effect on the patterns of trade.¹¹¹

4. Exemptions

Not every agreement restricting competition is prohibited as an object of article 85(1). Some category of agreements may have beneficial effects on the Community and be exempted by the Commission. Article 85(3)¹¹² provides for a list of exemptions for any agreements or category of agreements that are inapplicable for the prohibition of article 85(1).

Whereas the prohibition under article 85(1) can be applied by national authorities and national courts as well as by the Commission, the power to grant exemptions for notified agreements under article 85(3) is given only to the Commission.¹¹³ While the former sets out the prohibition, the latter limits its application. These exemptions can be

¹⁰⁸ Wesseling, supra note 81, at 423-24.

¹⁰⁹ Id. at 423.

¹¹⁰ Etablissements Consten SA and Grundig-Verkaufs-GmbH, Case 56 & 58/64, [1966] E.C.R. 299, 341, [1966] C.M.L.R. 418

¹¹¹ Korah, supra note 17, at 55.

¹¹² EC TREATY art. 85(3).

given not by the Court asked to enforce an agreement, but only by the Commission under regulation 17.¹¹⁴ Exemption can be done either to individual agreements or to groups.¹¹⁵

Block exemptions, which have been known as group exemptions, are of more practical importance in most cases than individual exemptions.¹¹⁶ Block exemptions, which the Council and the Commission have promulgated under the legislative provisions, apply to particular categories of agreements rather than individual agreements.¹¹⁷ Most block exemptions primarily deal with vertical agreements,¹¹⁸ and a few relate to horizontal agreements.¹¹⁹

Generally, block exemptions define a kind of agreement that can be within the exemption.¹²⁰ To define it: block exemptions provide for permissible clauses in a “White List,”¹²¹ and for the conditions preventing the application of the exemption in a “Black List.”¹²² Some block exemptions also include an “opposition” clause.¹²³ This means that

¹¹³ Alexander Schaub, Modernization of EC Competition Law: Reform of Regulation No. 17, 23 FORDHAM INT’L L.J. 752, 753 (2000).

¹¹⁴ Korah, supra note 17, at 3.

¹¹⁵ Until 1965, the Commission probably had power to grant exemptions only to individual agreements. However, by Regulation 19/65, the Commission was also empowered to group exemption.

¹¹⁶ Valentine Korah, Exclusive Purchasing Obligations: Mars v Langnese and Scholler, 15(3) EUR. COMPETITION L. REV. 171, 174 (1994).

¹¹⁷ Christopher S. Kerse, Block Exemptions under Article 85(3): The Technology Transfer Regulation – Procedural Issues, 17(6) EUR. COMPETITION L. REV. 331, 331 (1996).

¹¹⁸ Examples are exclusive distribution and purchasing arrangements and technology transfer licenses.

¹¹⁹ Examples are research and development and specialization agreements.

¹²⁰ Furse, supra note 51, at 150.

¹²¹ Kerse, supra note 117, at 338.

¹²² Korah, supra note 116, at 174.

¹²³ Mark Clough, The Devil and the Deep Blue Sea (EC Competition Law and Liner Shipping Consortia), 16(7) EUR. COMPETITION L. REV. 417, 426-27 (1995).

disputed agreements limiting competition which are not on the “White List” nor on the “Black List” may be exempted.¹²⁴ However, the Commission may also oppose the inclusion of the agreement within six months.¹²⁵

Block exemptions which are designed to deal with an agreement under article 85, cannot be used to exempt an agreement made by a dominant firm from infringing article 86.¹²⁶ Generally, all block exemptions are subject to some general condition that relates to the free movement of goods and to the sustenance of competition of those goods protected by the exemption.¹²⁷ In addition, block exemptions are only valid for a given period—normally for 10 years or at most 15 years.¹²⁸ That is, the review of the exemptions based on the experience of its operation is always required at the expiration of the time period.¹²⁹

Finally, unlike the flexible interpretation of article 85, the Court has interpreted block exemptions very strictly.¹³⁰ As a result, block exemptions would be inapplicable if a particular agreement included a single clause restricting competition of any party, even if the clause is not in both the “White List” and “Black List.”

¹²⁴ Kerse, supra note 117, at 333.

¹²⁵ Id.

¹²⁶ Clough, supra note 123, at 423.

¹²⁷ Id. at 424-25.

¹²⁸ Goyder, supra note 34, at 133.

¹²⁹ Id.

¹³⁰ Delimitis v. Henniger Bräu, Case C-234/89, [1991] E.C.R. I-935, [1992] 5 C.M.L.R. 210.

5. Nullity

Article 85(2)¹³¹ provides that agreements that infringe on the article are void. Article 85(2) applies only if the agreement infringes on article 85 as a whole.¹³² The legal effect of article 85(2) should be applied in conjunction with the provisions of regulation 17, which enables the Commission to give retroactive exemption from article 85(1) where appropriate notification of the agreement has been made.¹³³ In all other cases, article 85(2) is construed to say that any agreements infringing on article 85(1) should be treated invalid within the Community.¹³⁴

Generally, the validity of agreements including restrictions in this category are judged by national courts.¹³⁵ However, national courts will not be able to order parties to complete their contracts if the provisions in question infringe article 85(1), even though the Court held in Société La Technique Minière¹³⁶ that article 85(2) which nullifies infringed agreements applies only to the agreements having the prohibited object or effect.¹³⁷ The consequences of this decision are that it may produce a Euro-defense that sections of an exclusive agreement that infringe article 85(1) are therefore nullified.¹³⁸

¹³¹ EC TREATY art. 85(2) (stating that any “agreements or decisions prohibited pursuant to this article shall be automatically void.”).

¹³² That is, article 85(2) applies to the agreement that is not exempted under article 85(3).

¹³³ George Cumming, Passmore v Morland PLC [1999] 3 ALL E.R. 1005 (CA), 21(5) EUR. COMPETITION L. REV. 261, 264 (2000).

¹³⁴ Goyder, supra note 34, at 155.

¹³⁵ Cumming supra note 133, at 265.

¹³⁶ Société La Technique Minière, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

¹³⁷ Cumming supra note 133, at 265.

¹³⁸ Id.

SECTION IV

ARTICLE 86

While article 85 governs the collusion of undertakings, article 86 forbids the abusive exploitation of a dominant position, and controls the conduct of the firm. In some cases, the conduct of the firm may infringe both articles.¹³⁹ Article 86 is also enforced not only by the Commission's intervention under regulation 17 with prohibition orders and fines or exemptions, but also through national courts.¹⁴⁰

Article 86 is not expressed to prohibit non-competitive structures, or conduct that leads to the existence or acquisition of market power. It is expressed to restrain the conduct of a dominant firm that harms those with whom it deals.¹⁴¹ However, the Court has interpreted the notion of abuse widely to include some kinds of conduct of an already dominant firm that extends or consolidates its market power by restricting the remaining competition, even minimally.¹⁴² Hence, conduct that adversely affects the structure of the market may be forbidden by article 86.¹⁴³ Article 86 provides a list of categories that is applicable for prohibition by article 86.¹⁴⁴

¹³⁹ Hoffmann-La Roche & Co. AG, Case 85/76, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

¹⁴⁰ See Korah, *supra* note 17, at 3.

¹⁴¹ Korah, *supra* note 17, at 77.

¹⁴² Europemballage Corporation and Continental Can Co. Inc. v. Commission, Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199.

¹⁴³ Korah, *supra* note 17, at 77.

¹⁴⁴ EC TREATY art. 86.

1. Dominant position

(i) The Concept of Dominance

The term “dominance” is a position of power for an undertaking in relation to a specific product market, and within a relevant geographical market, and is used in a commercial context.¹⁴⁵ Since the term “dominance” may vary depending on the market and the industry, it is hard in the legal perspective, to determine how dominant a firm is.¹⁴⁶ Both the Commission and Court failed to make a clear decision based on a legal view.¹⁴⁷

In Continental Can,¹⁴⁸ the Commission defined the concept of a dominant position in much the same way as economists. The Commission paid attention to the discretionary power that the monopolist uses in order to set its prices, as well as other market decisions, without restriction by competitive pressures.¹⁴⁹ The definition in the case focuses on the need for capital and technology. This definition of the Commission was approved by the Advocate General and was accepted by the Court.¹⁵⁰

¹⁴⁵ Furse, supra note 51, at 185-86.

¹⁴⁶ Trevor Soames, An Analysis of the Principles of Concerted Practice and Collective Dominance: A Distinction without a Difference, 17(1) EUR. COMPETITION L. REV. 24, 25 (1996).

¹⁴⁷ GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW § 23 (1993).

¹⁴⁸ Continental Can Company Inc. and Europemballage Inc., Case 72/21/EEC, J.O. 1972 L7/25, [1972] C.M.L.R. D11, (“[T]hat is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question.”).

¹⁴⁹ Id. para. II. 3.

¹⁵⁰ Europemballage Corporation and Continental Can Co. Inc. v. Commission, Case 6/72, [1973] E.C.R. 215 para. 33-36, [1973] C.M.L.R. 199.

The Commission and the Court developed a legal concept of a dominant position that is quite different from the economists' concept of power over price.¹⁵¹ The Court has defined a dominant position as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers” in United Brands.¹⁵² That is, if a company prevents competitors or customers from doing regular transactions based on effective competition, the company is dominant in a market even though it has no power over price.¹⁵³

The Court had a different definition of dominance than the Commission in the Vitamins case.¹⁵⁴ While the Commission relied on the size of the company and the volume of turnover to decide dominance, the Court did not accept that the size and turnover alone could establish dominance, and instead relied heavily on the market share.¹⁵⁵ The concept of dominance can be applied to not only large-scale markets, but also narrow markets, where an undertaking controls the market in a strong position, which substantially reduces competition.¹⁵⁶

Any undertaking which holds an exclusive legal right for the performance of a statutory duty, delegated by a state or public authority, must not abuse its powers given

¹⁵¹ Bermann et al., supra note 147, § 23.

¹⁵² United Brands Co. and United Brands Continental BV v. Commission, Case 27/76, [1978] E.C.R. 207, para. 65, [1978] 1 C.M.L.R. 429.

¹⁵³ Bermann et al., supra note 147, § 23.

¹⁵⁴ Hoffmann-La Roche & Co. AG, Case 85/76, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

¹⁵⁵ Furse, supra note 51, at 196-200.

so as to enhance its other objectives.¹⁵⁷ Otherwise, the Court would hold that national legislation giving a monopoly places a business in a position of dominance as in Hilti.¹⁵⁸

To assess whether a firm is dominant, the Commission needs to analyze the firm's market power in two aspects: defining the relevant market,¹⁵⁹ and assessing the firm's dominance therein.¹⁶⁰

(ii) The Definitions of Relevant Geographic and Product Markets

Market share percentage can be changed depending on the size of the market. Market share percentage has no meaning without defining the market itself. The undertakings benefit from defining a relatively wide area as a market because their individual market shares are reduced. Initially, based on article 86,¹⁶¹ the geographic market was assumed to be no smaller than an individual member state.¹⁶² However, in Suiker Unie,¹⁶³ the Court and the Commission agreed that a substantial region of a member state could also be a market given a sufficient volume of sales. Nevertheless, the Commission has a view that the fact that undertakings arrange their distribution on a

¹⁵⁶ General Motors Continental v. Commission, Case 26/75, [1975] E.C.R. 1367, [1976] 1 C.M.L.R. 95; See British Leyland v. Commission, Case 226/84, [1986] E.C.R. 3263, [1987] 1 C.M.L.R. 185.

¹⁵⁷ Hilti v. Commission, Case T 30/89, [1991] E.C.R. II 1439, [1992] 4 C.M.L.R. 16.

¹⁵⁸ Id.

¹⁵⁹ The relevant market has two dimensions: the product and the geographic area.

¹⁶⁰ Europemballage Corporation and Continental Can Co. Inc., Case 6/72, [1973] E.C.R. 215 paras. 32-37, [1973] C.M.L.R. 199.

¹⁶¹ EC TREATY art. 86 (“...[w]ithin the Common Market or in a substantial part of it...”).

¹⁶² Christopher Vajda and Anders Gahnstrom, E.C. Competition Law and the Internet, 21(2) EUR. COMPETITION L. REV. 94, 97 (2000).

¹⁶³ Suiker Unie v. Commission, Case 40/73, [1975] E.C.R. 1991-4, [1976] 1 C.M.L.R. 434, (The Court found southern Germany as a geographic market for sales of sugar.).

national basis implies that they regard such national territory as a separate market.¹⁶⁴ The Court has found that the geographic market is defined more broadly, and the Court considers beyond the geographic market in the context.¹⁶⁵

It is very hard to define product markets because of the difficulty of exact analysis regarding the interrelationship of quality, price, and availability.¹⁶⁶ Sometimes, product markets might be defined based on cross-elasticity of demand between substitutes.¹⁶⁷ The Court and the Commission agree that the product market could be defined in terms of year-round availability, price, suitability for particular types, and other characteristics.¹⁶⁸ The Court also found that as long as it applied more than one end use, a simple product could be regarded to belong to separate product markets.¹⁶⁹ Recently, the Court found a dominant position in the second market in conjunction with its close relationship with a primary market.¹⁷⁰ However, this ruling is dangerously wide because this doctrine can be used to support a finding of dominance in secondary markets where the company had relatively little market power.¹⁷¹

¹⁶⁴ Vajda and Gahnstrom, supra note 162, at 98 (However, the Commission concluded that the relevant geographic market for the top-level networks was global, although based in a country, because they affect consumers everywhere in the world.).

¹⁶⁵ Alsatel v. Novasam, Case 247/86, [1988] E.C.R. 5987, [1990] 4 C.M.L.R. 434.

¹⁶⁶ Furse, supra note 51, at 186-91.

¹⁶⁷ United Brands Co. and United Brands Continental BV, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

¹⁶⁸ Id.

¹⁶⁹ Hoffmann-La Roche & Co. AG, Case 85/76, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

¹⁷⁰ Tetra Pak International SA v. EC Commission, (Tetra Pak (No. 2)), Case C-333/94P, [1997] 4 C.M.L.R. 662.

¹⁷¹ Valentine Korah, "Tetrapak(No.2)—Lack of Reasoning in Court's Judgment" (1997) E.C.L.R. 98.

Finally, unlike in merger cases, where the focus is on the future consequences of the concentration, in article 86 cases, the Commission focuses on the past conduct of the particular undertakings and concerns what the way that market has worked over the period.¹⁷² Nevertheless, the same basis on both geographical and product markets will be applied in both merger and article 86 cases because the main goal of both competition rules is to define and limit the abusive conduct with a concept of dominance.¹⁷³

2. “Abuse” or “Abusive Exploitation”

The purpose of Article 86 is to prohibit, not the undertaking of a dominant position, but only its abusive exploitation even though the English text of the Treaty uses only one single term, “abuse.”¹⁷⁴ In Vitamins,¹⁷⁵ the Court said that abuse is an objective concept. However, article 86 does not contain a comprehensive definition of either “abuse” or “abusive exploitation.”¹⁷⁶ The concept of “abusive exploitation” forbids the exploitation of market power to harm customers and suppliers, as well as the conduct of a dominant firm that reduces competition.¹⁷⁷

¹⁷² Barry J. Rodger, Early Steps to a Mature Competition Law System: Case Law Developments in the First 18 Months of the Competition Act 1998, 23(2) EUR. COMPETITION L. REV. 52, 59 (2002).

¹⁷³ Furse, supra note 51, at 194.

¹⁷⁴ EC TREATY art. 86 (“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. Such abuse may, in particular, consist in...”).

¹⁷⁵ Hoffmann-La Roche & Co. AG, Case 85/76, [1979] E.C.R. 461 para. 91, [1979] 3 C.M.L.R. 211.

¹⁷⁶ Korah, supra note 17, at 77.

¹⁷⁷ Europemballage Corporation and Continental Can Co. Inc., Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199.

The definition of abuse varies depending on a variety of cases to many different practices.¹⁷⁸ Many of the particular abuses reflect the case law, and include refusal to provide access to competitors, withdrawal of existing access, exclusionary practices, excessive or predatory pricing, and discrimination.

(i) Refusal to Provide Access to Competitors

In the normal business situation where one big company having a world monopoly has supplied a product to one small company, if the big company suddenly raises its price for the purpose of eventually refusing to supply, it is considered to have used its dominant position in the market. Under these circumstances, the Court and the Commission would find that the big company restricts competition in the market for the product, even if the company claims the excuse of the commercial reason.¹⁷⁹

The Court held that any undertaking that abuses its dominant position within a substantial part of the Common Market for the purpose of eliminating a competitor is in breach of article 86.¹⁸⁰ As long as the elimination of the competitor would have effects on the competitive structure of relevant market within the Community, it does not matter whether the conduct of the dominant company relates to its export or to trade within the Common Market.¹⁸¹ Since United Brands,¹⁸² many cases have been concerned with

¹⁷⁸ Soames, supra note 146, at 24-25.

¹⁷⁹ Istituto Chemioterapico Italiano and Commercial Solvents Corporation, Cases 6-7/73, [1974] E.C.R.223, 1 C.M.L.R. 309.

¹⁸⁰ Nikos Th. Nikolinakos, Access Agreements in the Telecommunications Sector – Refusal to Supply and the Essential Facilities Doctrine under E.C. Competition Law, 20(8) EUR. COMPETITION L. REV. 399, 400 (1999).

¹⁸¹ Goyder, supra note 34, at 335.

monopolists which increase their market share because the unfair abuses are less likely to affect the structure of the market unfavorably.¹⁸³

(ii) Excessive or Predatory Pricing

Regarding incompatibility with the Common market in article 86, the Court focused on prohibiting conduct that substantially restricts competition in Continental Can.¹⁸⁴ As in Continental Can,¹⁸⁵ the Court refused to accept the economic analysis to decide restriction of competition on the ground that the economic analysis lacked the depth and adequacy to verify the claim. Nevertheless, the Court agreed that article 86 could apply when the dominant undertaking directly or indirectly applied unfair prices to its customer.¹⁸⁶ When prices of a product are not reasonably related to the economic value of the product supplied, the Court decides that prices are excessive. Article 86 is breached if the consumer suffers as the result of such excessive prices, regardless if there is no effect on condition.¹⁸⁷ The Court indicated that whether an individual price is excessive should be based on a cost analysis and a comparison of competitors' price.¹⁸⁸

¹⁸² United Brands Co. and United Brands Continental BV, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

¹⁸³ Korah, supra note 17, at 97.

¹⁸⁴ Europemballage Corporation and Continental Can Co. Inc., Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199.

¹⁸⁵ Id.

¹⁸⁶ Derek Ridyard, Domco's Dilemma – When is Price Competition Anti-Competitive, 20(6) EUR. COMPETITION L. REV. 345, 346 (1999).

¹⁸⁷ Goyder, supra note 34, at 342.

¹⁸⁸ Id.

Article 86 is also applied to a dominant undertaking's predatory pricing, which is below its production costs for a purpose of eliminating competitors.¹⁸⁹ The Commission focuses on the objective of a dominant company to intend to eliminate or damage its competitors in the relevant markets, rather than prescribing any specific pricing rules linked to costs.¹⁹⁰ The Court stated that it is not necessary for the Commission to prove that the dominant company will actually succeed in subsequently raising its prices following the elimination or weakening of its competitors.¹⁹¹

(iii) Discount and Rebates

The Court is also concerned with discount and rebates which dominant companies use to restrict competition.¹⁹² Both discount and rebate have the same commercial purposes: to encourage the customer to do business with the seller, rather than with its competitors.¹⁹³ However, rebates can be used by a dominant company so as to make it difficult for customers without substantial countervailing market power to switch purchases between suppliers, to take advantage either of price fluctuations, or other changes in market conditions, or because some of the products of other suppliers are considered to be of better quality or suitability.¹⁹⁴

¹⁸⁹ AKZO v. Commission, Case C-62/86, [1991] E.C.R. I 3359, [1993] 5 C.M.L.R. 215.

¹⁹⁰ Rodger, supra note 172, at 57-58.

¹⁹¹ Tetra Pak International SA, Case C-333/94P, [1997] 4 C.M.L.R. 662, para 44.

¹⁹² Korah, supra note 17, at 100-03.

¹⁹³ Michael W. Darcey, The Misuses of Change-in-Real-Price Information in Competition Inquiries, 13(6) EUR. COMPETITION L. REV. 245, 247 (2000).

¹⁹⁴ Id.

Pressure thus applied by a dominant undertaking to its purchasers to obtain all or most of their requirements from itself is an abuse, whether or not accompanied by a rebate payable to the customer, so long as the customer remains loyal to all its requirements.¹⁹⁵ The Court held that the application of such pressure is itself incompatible with the normal working of competition, since it has the effect that orders are placed not because the buyer has made a simple commercial choice in its own interests, but because the buyer, given his dependence on the dominant supplier, simply cannot afford to spread his orders over a variety of suppliers and thus risk losing the rebate offered by the dominant company.¹⁹⁶

The Commission had ruled that, for the use of rebates to be acceptable as normal commercial practice for the purpose of article 86, they must be both clearly known to the purchaser and defined on an objective basis.¹⁹⁷

(iv) Access to Essential Facilities

When an undertaking, which controls a facility or an infrastructure, deliberately makes it difficult for competitors to share it, abuse can be established.¹⁹⁸ Alternatively, the abuse may involve allowing access only on such unfavorable and discriminatory terms that it places new or existing competitors at a competitive disadvantage so that they cannot compete effectively.¹⁹⁹ The facility may include a harbor, an airport, a

¹⁹⁵ Hoffmann-La Roche & Co. AG, Case 85/76, [1979] E.C.R. 461 para. 90, [1979] 3 C.M.L.R. 211.

¹⁹⁶ Id.

¹⁹⁷ Goyder, supra note 34, at 345.

¹⁹⁸ Nikolinakos, supra note 180, at 404-05.

¹⁹⁹ Id.

telecommunication network, or an electronic system.²⁰⁰ In B & I Line,²⁰¹ the Commission ruled that because a port was a substantial part of the Common Market and the owner of the port had a dominant position, the owner of the facility must not change its schedules to put its users at a disadvantage.

In addition, the Commission stated that any dominant company providing an essential facility to competitors which abuses that facility, and refuses access without objective justification,²⁰² or grants access only on terms favorable to those which it provides its own services, breaches article 86.²⁰³ The competitor seeking access clearly has to behave reasonably and not ask for what is demonstrably impossible or out of proportions to the needs of other users.²⁰⁴

3. Limits

The Court's focus fits well with the spirit of the Community in light of the basic principle shown in the Treaty.²⁰⁵ Also, anti-competitive conducts can be performed only by the firm that already enjoys a dominant position in the Common Market.²⁰⁶ However, it is hard to apply article 86 to firms in the real world. Since the Community has too few resources to enforce the competition rules, this article is not practical. The Court could not distinguish prohibited conduct without using a standard of efficiency. As a result of

²⁰⁰ Clive Gringras, Competition in Cyberspace, 17(2) EUR. COMPETITION L. REV. 71, 73 (1996).

²⁰¹ B & I Line v. Sealink Harbours, [1992] 5 C.M.L.R. 255.

²⁰² Nikolinakos, supra note 180, at 405.

²⁰³ Containers v. Stena Sealink, [1994] OJ L 15/8.

²⁰⁴ Nikolinakos, supra note 180, at 408.

²⁰⁵ Merger Regulation art. 2 and 3(g).

using this standard only, the competition rules are used to protect small firms at the expense of large and efficient firms, rather than to enable efficient firms to expand at the expense of the less efficient. Consequently, article 86 would not be consistent with the Community spirit.²⁰⁷

²⁰⁶ Korah, supra note 17, at 98.

²⁰⁷ Id. at 4.

SECTION V

THE MERGER REGULATION

1. Introduction

For 16 years after the first draft was proposed in 1973, there was a great debate on the scope of the Merger Regulation and on the authority of the Commission.²⁰⁸ The Commission continuously proposed a regulation that would prohibit anti-competitive mergers and would give the Commission power to control them. However, some of the member states were hesitant to relinquish their power to control mergers.²⁰⁹ This hesitation created the abnormally long period to get the agreement signed, and the significantly decreased scope of turnover.²¹⁰

On December 21, 1989, following the request of business and industry, the Council eventually adopted a regulation²¹¹ that requires firms to notify the Commission about their mergers in advance and provide the Commission with the sole power to control them.²¹² With the preemptive power, the Merger Regulation applies to all industries except coal and steel fields that are governed directly by the Coal and Steel

²⁰⁸ Elland, supra note 4, at 111.

²⁰⁹ Korah, supra note 17, at 262.

²¹⁰ Id.

²¹¹ Council Regulation 4064/89, 1989 O.J. (L395/1) 4.

²¹² Griffin, supra note 27, at 15.

Treaty.²¹³ In fact, concentrations in the E.U. steel industry fall both under EC regulations and the ECSC.²¹⁴

There are several advantages under the new Merger Regulation in 1989. In terms of legal and administrative costs, firms that need concentrations can benefit under the regulation because the processing period, as well as the business cost, has decreased.²¹⁵ Regarding the scope of concentrations, the Merger Regulation is much more favorable than article 85(1).²¹⁶ In addition, the analysis of the markets under the regulation has been more satisfactory than under article 85.²¹⁷

The Merger Regulation was designed for three major purposes. The first purpose was to give the Commission the sole authority to control competition-distorting concentrations that would threaten competition in the Common Market, and thus to end the debate as to whether the Treaty conferred such authority to the Commission.²¹⁸ Before the Merger Regulation was first introduced in 1989, every concentration was debated as to whether it had a Community dimension. If it did, the Commission was given authority over the concentration.

The second purpose for the Merger Regulation was to provide the Commission with basic information on how the concentration will be carried out before mergers are

²¹³ TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140.

²¹⁴ Griffin, supra note 27, at 15.

²¹⁵ Ahlborn and Turner, supra note 9, at 251.

²¹⁶ Elland, supra note 4, at 117.

²¹⁷ Id.

²¹⁸ Bermann et al., supra note 147, § 24.

consummated.²¹⁹ Following the market analysis based on the information, the Commission decides whether to stop problematic mergers before their consummation. It is very difficult to control concentrations after they have been completed. Giving the Commission a chance to review the mergers in advance can save a lot of time, money, and effort.

Finally, the third purpose was to grant enforcement power to the Commission on the Community level so that enterprises may avoid complicated and inconsistent regimes on the national level.²²⁰ Through the one-stop-shop principle, the involved undertakings need to make only one filing to the Commission rather than multiple filings to each nation.²²¹ As a result of this principle, the legal and administrative costs and the processing period are decreased significantly. The most important benefit of this regulation is that this unified regulation can overcome the inconsistency of the national competition laws.²²²

2. Definition of Concentrations

The general expression “merger” has been used to refer to the normal situation where a bidder acquires control of the target until the term “concentration” was used in the Merger Regulation.²²³ The definition of concentrations has been introduced in article

²¹⁹ Id.

²²⁰ Id.

²²¹ Elland, supra note 4, at 116.

²²² Bermann et al., supra note 147, § 24.

²²³ Trevor Soames, The ‘Community Dimension’ in the EEC Merger Regulation: The Calculation of the Turnover Criteria, 11(5) EUR. COMPETITION L. REV. 213, 213 (1990).

3 of the Merger Regulation.²²⁴ This article covers mergers, acquisitions, and joint ventures.

The general definition of merger is the combination of several separate companies or corporations into a single body. Depending on the combination, there are many different kinds of mergers such as down-stream merger, cash merger, and conglomerate merger. Acquisition means gaining the assets or the stock of the target company for the purpose of possessing or controlling the target company wholly or partially. “Control” is defined as “rights, contracts, or any other means which either separately or jointly ... confer the possibility of exercising decisive influence on an undertaking,” through share ownership, voting, management agreements, or any other ways of rights operating on the undertaking.²²⁵ There are two kinds of acquisitions, asset acquisition and stock acquisition.

In fact, about half of the Commission’s decisions under the regulations have involved joint ventures.²²⁶ A joint venture is an association of companies jointly undertaking some commercial enterprise.²²⁷ A joint venture is not exactly the same as a partnership; rather, it is a legal entity functioning as a “temporary partnership.”²²⁸ A joint venture is also within the definition of concentration only if it is properly described as

²²⁴ Council Regulation 4064/89, 1989 O.J. (L395/1) 4.

²²⁵ William Elland, The Merger Control Regulation and its Effect on National Merger Controls and the Residual Application of Articles 85 and 86, 12(1) EUR. COMPETITION L. REV. 19, 20-21 (1991).

²²⁶ Brown, supra note 20, at 242.

²²⁷ BLACK’S LAW DICTIONARY 839 (6th ed. 1990).

²²⁸ HARRY G. HENN AND JOHN R. ALEXANDER, LAWS OF CORPORATIONS 106 (1983).

“concentrative,”²²⁹ rather than “co-operative.”²³⁰ Among two joint ventures, only concentrative joint ventures are governed directly by the Merger Regulation.²³¹ Because the Commission had long regarded concentrative joint ventures not to be controlled by article 85, the Commission put concentrative joint ventures on the regime of the Merger Regulation.²³²

Throughout article 3, concentrations are defined to be the act of forming a new economic entity through mergers, acquisitions, or joint ventures.²³³ However, not every concentration is governed by the Merger Regulation. Instead, according to the regulation, the Commission should intervene only in concentrations having a Community dimension.²³⁴ When the Commission governs the concentrations with a Community dimension, the national authorities involved are no longer able to control them because the Commission has superior power.²³⁵

²²⁹ Article 3(2) of the Merger Regulation described as “forming on a lasting basis all the functions of an autonomous economic entity, which does not give rise to co-ordination of competitive behavior of the parties among themselves or between them and the joint venture.”

²³⁰ The co-operative joint venture is one whose object or effect is the co-ordination of the competitive behavior of undertakings which remain independent or which is not full-function.

²³¹ Council Regulation 4064/89 art. 3(2), 1989 O.J. (L395/1) 4, (“[T]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b).”).

²³² Korah, *supra* note 17, at 264.

²³³ Council Regulation 4064/89, art. 3, 1989 O.J. (L395/1) 4.

²³⁴ Council Regulation 4064/89 art. 2, 1989 O.J. (L395/1) 4.

²³⁵ Elland, *supra* note 4, at 112.

3. One-Stop-Shop Principle

Before the Merger Regulation, member states had a unique competence of merger control under national law.²³⁶ Even though the member states opposed the extension of the Commission's power to the field of merger control, they seemed to be more attracted to solving the problem of multi-notification under the Merger Regulation.²³⁷ The regulation avoided problems of concurrent application, whether with European law and with national law, or whether with national laws involved in mergers.²³⁸

In the European Community, the Commission is the only organization with exclusive power that administers and approves concentrations with a Community dimension under the Merger Regulation.²³⁹ Since the Commission has power to assess whether a concentration is able to comply with the Common Market, undertakings involved in concentrations with a Community concern file only with the Commission. Even though a concentration is involved in several member states, the parties of the concentration are not required to report to each member state involved. Instead, the Merger Regulation affords companies the opportunity of one filing, rather than multiple filings.²⁴⁰ This is called the “one-stop-shop principle,”²⁴¹ which is the uniformity of the law's regulation.

²³⁶ A.O. Salord, Concurrent Application, the April 1999 White Paper and the Future of National Laws, 21(2) EUR. COMPETITION L. REV. 128, 128 (2000).

²³⁷ Id.

²³⁸ Id.

²³⁹ Hirsbrunner, supra, note 8, at 372.

²⁴⁰ Ahlborn and Turner, supra note 9, at 251.

²⁴¹ Bermann et al., supra note 147, § 24.

Through the one-stop-shop principle, companies cut their administrative and legal costs and reduce the uncertainties resulting from various national levels.²⁴² It is very expensive to furnish information on different forms for several national authorities.²⁴³ For these reasons, this regulation has been created under the suggestion and pressure of the businesses and industries that need to do concentrations.

However, this one-stop-shop principle is applied only to concentrations within the scope of the regulation. The undertakings which do concentrations with a Community dimension are released from a duty to notify national authorities about the concentrations under national law. Most member states have their own competition regulation controlling mergers, acquisitions, or joint ventures. Regarding concentrations below a Community dimension, national authorities govern under national laws.²⁴⁴

While the Merger Regulation does not explicitly exclude the possibility of applying articles 85 and 86 to concentrations, the Commission expressly refused the applicability of these articles to mergers.²⁴⁵

4. Standard and Objects

Not every merger, acquisition, joint venture or concentration is the object of this regulation. According to the regulation, only concentrations having a Community dimension are within the scope of the regulation.²⁴⁶

²⁴² Ahlborn and Turner, supra note 9, at 251.

²⁴³ Korah, supra note 17, at 274.

²⁴⁴ Id.

²⁴⁵ Zekos, supra note 10, at 41.

²⁴⁶ Regulation 4064/89 art. 1, 1989 O.J. (L395/1) 4.

Following the intention of the Community legislature, the Commission needs to control mergers whose operation is of a certain economic size; that is, where the aggregate amount of the turnover exceeds the threshold of the Community.²⁴⁷ The regulation is designed to control not a small concentration but a large one that can make a significant impact on the Common Market.²⁴⁸ Therefore, insignificant concentrations which do not largely affect competition should be approved without delay.²⁴⁹

The Community dimension is provided in Article 1 of the regulation.²⁵⁰

- (2) For the purpose of this Regulation, a concentration has a Community dimension where:
- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5000 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.

To have a Community dimension, three tests should be passed: (i) the two-thirds test, (ii) the worldwide turnover, and (iii) the Community-wide turnover.²⁵¹

Even though several member states have been involved in a merger, the merger is regarded as not having a Community dimension if the majority of the transactions of the

²⁴⁷ Zekos, supra note 10, at 37.

²⁴⁸ SAT, Case C-364/92, [1994] E.C.R. I-43, 5 C.M.L.R. 208.

²⁴⁹ Zekos, supra note 10, at 37.

²⁵⁰ Council Regulation 4064/89 art. 1, 1989 O.J. (L395/1) 4.

merger are concentrated in a member state where at least one undertaking achieves more than two thirds of total Community-wide turnover. This is the two-thirds test, and the Merger Regulation does not apply to concentrations which fail this test. As a result of the two thirds test, there is a different treatment of concentrations between smaller and larger member states because the test does not consider the possibility of a different market share which can significantly impact interstate trade.²⁵²

In addition, when the aggregate worldwide and Community-wide turnover exceeds the thresholds presented in article 1, all concentrations are considered to have a Community dimension. Undertakings involved in a concentration having a Community dimension are required to notify the Commission about their concentrations following the regulation.²⁵³

The Commission analyzes mergers within the scope of the regulation. The Commission's approach focuses on the compatibility with the Common Market, and the analysis of dominance.²⁵⁴ The Community competition rule has been created to protect the Common Market, in terms of not only competition issues, but also social and industrial policy.²⁵⁵ Through the maintenance and development of effective competition in the Community, the Community wants to defend the Common Market.²⁵⁶ The Common Market plays an essential role in achieving the Community's goals.

²⁵¹ Zekos, *supra* note 10, at 39.

²⁵² *Id.* at 40.

²⁵³ Regulation 4064/89 art. 4, 1989 O.J. (L395/1) 4.

²⁵⁴ Elland, *supra* note 4, at 116.

²⁵⁵ Zekos, *supra* note 10, at 39-40.

²⁵⁶ *Id.* at 40.

Contrary to what may have been expected, the Merger Regulation in its final form does not reflect a compromise between two approaches: competition issue and social policy.²⁵⁷ Instead, the regulation established the standard mostly based on competition issues, despite several factors suggested in article 2.²⁵⁸ A clear advantage of the regulation is the reduction of the need to use article 86 in subsequent cases, if the Commission has been able to prevent the creation or strengthening of companies with dominant position within the scope of the regulation.²⁵⁹

One of the great objectives of the Community is to improve the standard of living and expand economic activities.²⁶⁰ To achieve these goals, the Community needs to establish a common market because throughout the common market, all economic resources are free to move without the limits of national boundaries.²⁶¹ However, if there are some agreements restricting competition, such as strong cartels or monopolies, then the common market is useless. For this reason, the Community wants to directly control any agreement or concentrations restricting competition.

The concept of a dominant position is applied much the same in article 86 and in the Merger Regulation.²⁶² While article 86 deals with the abusive exploitation by companies which already have a dominant position in their past conduct, the Merger Regulation focuses on the future consequences of the concentrations, which will create or

²⁵⁷ Id.

²⁵⁸ Christopher Bright, The European Merger Control Regulation: Do Member States Still have an Independent Role in Merger Control? Part 2, 12(5) EUR. COMPETITION L. REV. 184, 184 (1991).

²⁵⁹ Zekos, supra note 10, at 40.

²⁶⁰ Korah, supra note 17, at 1.

²⁶¹ Id.

²⁶² Bermann et al., supra note 147, § 23.

strengthen a dominant position. A dominant position in the Merger Regulation is defined as “a position of market power which enables the entity to act independently of its competitors, customers and consumers and exists only when market shares exceed 40 per cent.”²⁶³ The concentrations that do not create or strengthen a dominant position are considered to be compatible with the Common Market.²⁶⁴

The competitive structure of the market is the main concern of the Commission under the regulation. The regulation allows transactions to change a market structure but only prohibits negative effects on competitive market structure.²⁶⁵

5. Referral of Concentrations back to Member States

One of the main reasons that member states accepted the Merger Regulation was the value of the one-stop-shop principle for larger concentrations having both a substantial world and Community turnover.²⁶⁶ Nevertheless, there are two major exceptions to the one-stop-shop principle in the regulation: article 9 “Referral to the competent authorities of the Member States”²⁶⁷ and article 21 “Jurisdiction.”²⁶⁸

Article 9 was designed to respond to some states’ desire to retain authority to challenge mergers that threatened competition in the states even if the merger had a Community dimension.²⁶⁹ Satisfying two conditions of article 9, allow member states to

²⁶³ Alsattel, Case 247/86, [1988] E.C.R. 5987, [1990] 4 C.M.L.R. 434.

²⁶⁴ Regulation 4064/89 art. 2(2), 1989 O.J. (L395/1) 4.

²⁶⁵ Zekos, supra note 10, at 43.

²⁶⁶ Goyder, supra note 34, at 407.

²⁶⁷ Regulation 4064/89 art.9, 1989 O.J. (L395/1) 4.

²⁶⁸ Regulation 4064/89 art 21, 1989 O.J. (L395/1) 4.

request that the Commission refer a merger to them.²⁷⁰ One condition is that a distinct market exists within the member state, and the other is that the concentration threatens effective competition through creating or strengthening a dominant position.²⁷¹

However, the final decision to refer back is taken by the Commission.²⁷² The Commission may decide to deal itself with some aspects of the case and refer others back to the member state which have impact on the distinct market.²⁷³ Furthermore, the Commission still supervises the final outcome of the case. This referral procedure reflects the necessity for the Commission to show its willingness to co-operate with the member states.²⁷⁴ Since Tarmac/Steetly,²⁷⁵ there have been a lot of other referrals back to member states under article 9.

According to article 21, even though the Commission has sole jurisdiction to govern a concentration with a Community dimension, exceptional jurisdiction is given to member states. To protect “legitimate interests” such as public security, plurality of the media, and prudential rules, and any other “public interest,” member states may take suitable actions other than those taken by the regulation.²⁷⁶ The effect of this provision is primarily negative because it does not provide any new rights for member states, but accepts in Community law their power to intervene in certain aspects of concentrations

²⁶⁹ Bermann et al., supra note 147, § 24.

²⁷⁰ Id.

²⁷¹ Regulation 4064/89 art. 9, 1989 O.J. (L395/1) 4.

²⁷² Ahlborn and Turner, supra note 9, at 253.

²⁷³ Id.

²⁷⁴ Hirsbrunner, supra note 8, at 373.

²⁷⁵ Tarmac/Steetly, Case IV/M 180, [1992] OJ C50/25, [1992] 4 C.M.L.R. 343.

that affect them on important public interests other than those covered by the Merger Regulation.²⁷⁷

In Lyonnaisse/Northumbrian Water,²⁷⁸ where legislation made mergers between water enterprises following privatization of the water and sewerage industry in the United Kingdom, the Commission accepted the request and referred back to the United Kingdom because the merger was concluded to be against the public interest. Member states could insist on their jurisdiction in such situations, as newspaper mergers and arsenal company acquisitions that threaten national security.²⁷⁹

²⁷⁶ Council Regulation 4064/89 art.21, 1989 O.J. (L395/1) 4.

²⁷⁷ Ahlborn and Turner, supra note 9, at 254.

²⁷⁸ Lyonnaisse/Northumbrian Water, Case IV/M567, [1996] OJ C11.

²⁷⁹ Elland, supra note 4, at 117.

SECTION VI

THE MERGER REGULATION AMENDMENT

Going into effect March 1, 1998, the provision of Regulation 1310/97²⁸⁰ amended Regulation 4064/89. The amendments of the regulation were created to resolve the problems arising from the high thresholds of the regulation.²⁸¹ Even though a merger does not attain the primary thresholds of the regulation, it needs to be considered as having a Community dimension if the merger will significantly impact many member states. Otherwise, the Merger Regulation no longer serves the original purpose: the decrease of legal uncertainty and the reduction of merger costs from multiple notifications of the merger transaction.

Since the original regulation did not cover this small but important concentration due to excessively high thresholds, the new amending regulation includes the extension of the scope to smaller-scale mergers.²⁸² To extend the scope of the regulation, the amendments not only have included cooperative joint ventures but have also decreased the turnover thresholds in the regulation.²⁸³ The basic structures of the old regulation remain, even though the amendments have extended the regulation scope. These minor amendments reflect the success of the old regulation.²⁸⁴ The new amendments show a

²⁸⁰ Regulation 1310/97, 1997 O.J. (L180/1).

²⁸¹ Zekos, *supra* note 10, at 39.

²⁸² *Id.*

²⁸³ Regulation 1310/97 art. 1, 1997 O.J. (L180/1).

²⁸⁴ Ahlborn and Turner, *supra* note 9, at 249.

trend in interpreting Community competition laws—a more economic approach, rather than a legal one.²⁸⁵

1. The new thresholds

While the existing turnover thresholds remain in the amending regulation, the amendments have introduced new thresholds in order to include merger transactions, which have a crucial cross-border effect, but are not within the scope of the regulation because of its high thresholds.²⁸⁶ The new turnover threshold was expected to efficiently serve the purpose of the regulation, but it has turned out to be a meaningless extension.²⁸⁷

Initially, the Commission proposed to substantially lower the worldwide and the Community-wide threshold, but this proposal was defeated by most member states because they argued that thresholds had already been lowered in real terms as a result of inflation.²⁸⁸ In addition, the general growth of businesses and the geographic extension of the European Union through the acceptance of new member states have made it easier for companies to satisfy the thresholds.²⁸⁹ However, following the response of the industry, the Council adopted the amendments.

In article 1 of the amending regulation, the three tests established in the original regulation still remain, but the scope of the regulation has been extended to include small

²⁸⁵ Zekos, supra note 10, at 37.

²⁸⁶ Ahlborn and Turner, supra note 9, at 249.

²⁸⁷ Id.

²⁸⁸ Id. at 250.

²⁸⁹ Id.

mergers through the introduction of additional, lower turnover thresholds.²⁹⁰ Actually, the minimum threshold requirements for both the worldwide and the Community-wide turnover have been decreased from ECU 5 billion to ECU 2.5 billion and from ECU 250 million to ECU 100 million.²⁹¹ Moreover, the amendments introduced two new thresholds to cover substantial overall turnover²⁹² and individual turnover.²⁹³

The new turnover thresholds are created to help comparatively small undertakings benefit from the one-stop-shop principle under the regulation. In the amendment of the regulation, the Commission extended its jurisdiction and the scope of the regulation by lowering thresholds.²⁹⁴ However, there are several problems with the new thresholds. Even though the amended regulation has greatly decreased the minimum turnover requirement, the threshold is still regarded as substantial at the Community level. Although the new thresholds were created with good intentions, their introduction has had a negative impact on the undertakings involved.²⁹⁵ The companies involved in a concentration benefit from the reduction of administrative and legal costs; however, the benefit comes at the price of a greater regulatory complexity.²⁹⁶ In concentrations involving many parties across almost the entire Community, more combinations of turnovers than before may be necessary in order to decide whether the regulation will

²⁹⁰ Regulation 1310/97 art. 1, 1997 O.J. (L180/1).

²⁹¹ Regulation 1310/97 art 1(3) (a) and (d), 1997 O.J. (L180/1).

²⁹² Regulation 1310/97 art 1(3) (b), 1997 O.J. (L180/1), (“[I]n each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million.”).

²⁹³ Regulation 1310/97 art 1(3) (c), 1997 O.J. (L180/1), (“[I]n each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million.”).

²⁹⁴ Salord, *supra* note 236, at 128.

²⁹⁵ Zekos, *supra* note 10, at 39.

apply to the concentration. Since the analysis of the concentrations requires a breakdown of each party's Community turnover on a state by state basis, these various combinations could increase administrative and legal costs for a number of unnecessary transactions that turn out not to be within the Community's scope.²⁹⁷ In addition, there is great potential to miscalculate the new lower thresholds because of the many calculations based on each member state.²⁹⁸

2. Joint Ventures

The manner of classifying joint ventures differs depending on the statute or the country. The joint venture in the context of this paper should be interpreted in the language of the regulation because this definition of joint venture has been developed by the Commission through the regulation.²⁹⁹ Since the creation of the regulation in 1989, joint ventures have been classified into two categories: concentrative joint ventures and co-operative joint ventures.

Before the amendments of the Merger Regulation, the original regulation only defined concentrative joint ventures.³⁰⁰ To be a concentrative joint venture with a Community dimension, the joint venture had to satisfy positive and negative conditions.³⁰¹ The positive conditions³⁰² were that the parents of the joint venture must

²⁹⁶ See id.

²⁹⁷ Ahlborn and Turner, supra note 9, at 250.

²⁹⁸ Id.

²⁹⁹ Brown, supra note 20, at 242.

³⁰⁰ Council Regulation 1310/97 art. 3(2), 1997 O.J. (L180/1).

³⁰¹ Brown, supra note 20, at 242.

have joint control, that the joint venture must perform all the functions of an autonomous economic entity, and that it must run its business continuously.³⁰³ The positive condition was also used in the amendment because of its importance. The negative condition was that there was no co-ordination between parents and the joint venture in the same market.³⁰⁴ The significance of the negative condition was greatly decreased because the amendment did not use the negative condition in its definition of joint ventures.³⁰⁵

Since a concentrative joint venture with a Community dimension was within the scope of the regulation, the joint venture was governed by the Commission. However, neither the regulation nor article 85 of the Treaty of Rome controlled the concentrative joint venture which lacks a Community dimension.³⁰⁶ Only national competition law may be applied to the joint venture.³⁰⁷ Nevertheless, co-operative joint ventures out of the scope of the Merger Regulation have been subject to article 85 until the amendment of the Merger Regulation includes co-operative joint ventures within its scope.³⁰⁸ As a result of the amendment, the only joint ventures subject to article 85 are co-operative joint ventures, which do not have a Community dimension because of the low aggregate turnover.³⁰⁹

³⁰² Regulation 1310/97 art. 3(2), 1997 O.J. (L180/1).

³⁰³ Joint ventures which satisfy the positive three conditions are regarded as full-function.

³⁰⁴ Regulation 1310/97, art. 3(2), 1997 O.J. (L180/1).

³⁰⁵ Zekos, supra note 10, at 42-42.

³⁰⁶ Brown, supra note 20, at 240.

³⁰⁷ Id.

³⁰⁸ Zekos, supra note 10, at 42-42.

³⁰⁹ Id.

Any other joint ventures, which were not categorized as concentrative in the regulation, were considered to be co-operative.³¹⁰ That is, when a joint venture had all the positive conditions above, the joint venture was a co-operative joint venture if the joint venture would remain in the same market as the parents.³¹¹ All co-operative joint ventures were out of the scope of the regulation; therefore, the joint venture was automatically not controlled by the regulation. Instead, it was dominated by article 85 of the Treaty of Rome and national competition regulations.

Before the amendments, the distinction between co-operative and concentrative joint ventures was critical because each joint venture was governed by a different regime, either the Merger Regulation or article 85 of the Treaty of Rome.³¹² In spite of the difficulty and uncertainty caused by the distinction between the two joint ventures, the original regulation included in its scope, not a co-operative joint venture, but only a concentrative one.³¹³ This distinction was made because the majority of concentrations were concentrative joint ventures when the regulation was established the first time.³¹⁴ However, as time went by, the Commission recognized the need to control the two joint ventures under a unified authority in order to resolve such problems as complexity and uncertainty. The amendment eliminates the negative condition, which was used to define concentrative joint ventures, to include co-operative joint ventures within the scope of the regulation; therefore, all full-function joint ventures are covered in the Community scope.

³¹⁰ Brown, supra note 20, at 240.

³¹¹ Bermann et al., supra note 147, § 24.

³¹² Id.

³¹³ Brown, supra note 20, at 249.

³¹⁴ Id.

Before the amendment to the Merger Regulation, it was the only requirement for concentrative joint ventures to satisfy. After the amendments, however, the regulation needed to be incorporated with article 85 of the Treaty of Rome.³¹⁵ That is, full-function joint ventures should pass not only the dominance test of the regulation but also the criteria of article 85(1) in order to assess the effect of the joint venture on the relationships between parents.³¹⁶

In the past, depending on the “risk of co-ordination” criterion joint ventures were assessed to be ruled under article 85 of the Treaty or the regulation. As the criterion was getting restricted, a joint venture was considered co-operative when a high probability of co-ordination was accepted in an instance such as multiple parents running their business in the same market with the joint venture.³¹⁷ Only those joint ventures where two or more parents operate in the joint venture’s market are controlled by the regulation, as a result of the amendments.³¹⁸

Since the amendments were adopted, companies involved in mergers do not try to make an effort to structure joint ventures as concentrative because the regulation covers all full-function joint ventures, both concentrative and co-operative. As a result, many transactions which were regarded as concentrative joint ventures now fall into co-operative joint ventures.

Even though both joint ventures are within the scope of the regulation, there is a different treatment between concentrative and co-operative joint ventures in relation to

³¹⁵ Ahlborn and Turner, supra note 9, at 252.

³¹⁶ There is some uncertainty as to whether the criteria to establish “risk of co-ordination” differ from those under article 85(1) of the EC TREATY.

³¹⁷ Ahlborn and Turner, supra note 9, at 252.

the applicability of regimes.³¹⁹ All concentrative joint ventures are not out of the scope of article 85, regardless of the undertakings' turnover. However, co-operative joint ventures lacking a Community dimension are still subject to both national competition regulation and article 85.³²⁰

³¹⁸ Id. at 253.

³¹⁹ Id. at 259.

³²⁰ Id.

SECTION VII

APPLICATION OF EC COMPETITION REGULATIONS

While the Community competition regulations initially have been designed to control concentrations of undertakings whose commercial activities are within the Community, the application of the regulations is also extended to other countries outside the Community.³²¹ The Community can only extend its jurisdiction outside the Community based on international law principles.³²² However, since the substantive competition regulations are not universally agreed upon, it is necessary to examine the extraterritorial application of the Community competition law.³²³ The Community competition law should be understood in the context of world trade, enabling the treatment of the competition law problems to be carried out on a more global basis.³²⁴

In addition, whether the competition law functions efficiently in a new market involving new technologies in rapidly evolving market will be examined.

³²¹ J.D. Banks, The Development of the Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation Following the Boeing/Mcdonnell Douglas Decision 1997, 19(5) EUR. COMPETITION L. REV. 306, 308-09 (1998).

³²² Andre R. Fiebig, International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform, 19(6) EUR. COMPETITION L. REV. 323, 325-26 (1998).

³²³ Id. at 326-27.

1. Extraterritoriality

Through its historical development, the EC competition policy has been dealing with its extraterritorial applicability outside the Community under article 85 and 86 of the Treaty and under the Merger Regulation.³²⁵

(i) Under Articles 85 and 86

Article 85 and 86 has affected foreign multinationals which operate in the Community through subsidiaries or under agreements such as distribution or licensing. Through their decisions, the Court and the Commission have created the territorial scope of articles 85 and 86 of the Treaty.³²⁶ Based on two theories, the “Single Economic Entity” theory and the “Effects” doctrine, the Court and the Commission assert that their jurisdiction have been extended to undertakings whose headquarters are located outside the Community.³²⁷

(1) The Single Economic Entity Theory

Through both cases, Dyestuffs³²⁸ and Continental Can,³²⁹ the Court and the Commission indicated clearly that the independent personality of a subsidiary, which is separated legally from its parent company, was not able to preclude the possibility of imputing the conduct of the subsidiary to the parent.

³²⁴ Philip B. Marsden, A WTO ‘Rule of Reason,’ 19(8) EUR. COMPETITION L. REV. 530, 533-34 (1998).

³²⁵ BELLAMY AND CHILD, COMMON MARKET LAW OF COMPETITION, 125-34 (4th ed. 1993).

³²⁶ Banks, supra note 321, at 306.

³²⁷ Id.

³²⁸ ICI v. Commission, (Dyestuffs) Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557.

³²⁹ Europemballage Corporation and Continental Can Co. Inc., Case 6/72, [1973] E.C.R. 215 para. 15, [1973] C.M.L.R. 199.

In Dyestuffs,³³⁰ where ICI, a parent company, gave price instructions to its wholly owned subsidiary incorporated in Belgium to increase price of dyestuffs, ICI argued that it was established, located, and operated outside the Community; therefore, the Commission, which was supposed to govern undertakings within the Community, was not given the power to control or impose fines on external undertakings merely based on the effects occurred within the Community. However, the Commission found that with other companies, ICI was actually engaged in illegal price fixing agreements through subsidiaries, which were placed within the Community, but were controlled under ICI.³³¹

The Court did not take all arguments of the Commission, except the single economic entity theory. Based on the theory, the Court went beyond the legal distinction between parent and subsidiary companies, and decided that ICI limited competition in the Common Market through the use of power to control subsidiaries within the Community.³³²

The Court confirmed again this single economic theory in Continental Can, stating “simply because a subsidiary had its own legal personality, it did not preclude the possibility that its conduct might be attributed to the parent company.”³³³ However, to apply the single economic entity theory, it should be clarified whether the parent company actually controls its subsidiary undertaking.³³⁴ To decide the relationship between the parent and the subsidiary company, the Court and the Commission consider

³³⁰ ICI, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557.

³³¹ Id.

³³² Id. P 662, para. 130-133.

³³³ Europemballage Corporation and Continental Can Co. Inc., Case 6/72, [1973] E.C.R. 215 paras. 15, [1973] C.M.L.R. 199

various factors such as the size of shareholding held by the parent, the amount of representation on the board of the subsidiary, and its influence for the subsidiary's commercial activity.³³⁵

Both the Dyestuffs³³⁶ and Continental Can³³⁷ cases show that the subsidiary does not make a decision independently; but instead, the parent companies control their subsidiary regardless of their location, nationality, or domicile. Even though both cases' test can be used in both the "single economic entity theory," and the "effects" doctrine, the Court intended to establish the first.³³⁸

(2) The Effects Doctrine.

Under the terms of article 85 and 86, if any undertaking within the scope of these articles have an effect on trade of member states, the undertaking is responsible for any proceedings brought against it regardless of its nationality, place of incorporation, or domicile.³³⁹ The "effects" doctrine originated in the United States.³⁴⁰ The U.S. courts have accepted this doctrine since Aluminum Co. of America³⁴¹ asserting extraterritorial application of the U.S. antitrust law.³⁴²

³³⁴ Banks, supra note 321, at 307.

³³⁵ Id. at 306.

³³⁶ ICI, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557.

³³⁷ Europemballage Corporation and Continental Can Co. Inc., Case 6/72, [1973] E.C.R. 219 at para. 15.

³³⁸ F. FINE, MERGERS AND JOINT VENTURES IN EUROPE, 97 (1989).

³³⁹ Banks, supra note 321, 309.

³⁴⁰ Furse, supra note 51, at 299.

³⁴¹ US v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945).

³⁴² Furse, supra note 51, at 299.

To decide whether a transaction satisfies the doctrine, the court proposed a test containing two conditions: (1) the conduct outside the United States has to “have substantial effect” within the state’s territory and (2) this conduct has to “be intended.”³⁴³ However, the U.S. court has limited the scope of the doctrine by adding a balancing test,³⁴⁴ which was introduced in Timberlane Lumber Co.³⁴⁵

As far as the Community is concerned, the “effects” doctrine was referred from dicta in Béguelin Import Co.³⁴⁶ According to the doctrine, the fact that one of the companies involved in the agreement was located in a non-member country did not interrupt the applicability of article 85 as long as the agreement affected the competition in the Common Market.³⁴⁷ On the contrary, the Commission has not made any decision based on the “effects” doctrine.³⁴⁸

The Commission’s view has been upheld in Dyestuffs.³⁴⁹ In Dyestuffs, Advocate General Mayras supported the “effects” doctrine which was, one of arguments made by the Commission.³⁵⁰ He conceded that the jurisdiction of the EC competition law can be extended outside the Community based on the doctrine.³⁵¹ He established three pre-

³⁴³ Id. at 444.

³⁴⁴ It requires consideration of “whether the interests of, and links to the United States, including the magnitude of the effects on American foreign commerce are sufficiently strong, to justify an assertion of extraterritorial authority.”

³⁴⁵ Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (1976).

³⁴⁶ Béguelin Import Co. v. GL Import Export SA, Case 22/71, [1971] E.C.R. 949, [1972] C.M.L.R. 81.

³⁴⁷ Id. para. 11.

³⁴⁸ Banks, supra note 321, 307.

³⁴⁹ ICI, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557.

³⁵⁰ Id.

³⁵¹ Id. 693-94.

conditions before applying the effects test: (1) the agreement must restrict “directly and immediately” the competition in the Common Market, (2) the effect of the performance must be “reasonably foreseeable,” and (3) the effect resulted from the conduct must be “substantial.”³⁵²

In Wood Pulp,³⁵³ the Court finally agreed with the Commission to the “effects” doctrine, and found that all wood pulp producers infringed article 85 even though all of their headquarters were outside the Community. Nevertheless, the Court did not fully approve the doctrine, and concluded that its decisions did not rely on the “effects” doctrine. Instead, the Court considered the place where the agreement was implemented as a decisive factor.³⁵⁴

In the light of the discussion above, a combination of both the “effects” and “single economic entity” has been appeared in several cases.³⁵⁵ However, the Court has seemed to support a single economic entity theory, rather than the effects doctrine³⁵⁶ because in most cases, the Court resolved cases based on not the latter but the former.³⁵⁷

(ii) Under the Merger Regulation

Under article 85 and 86, the legal basis for exercise of extraterritorial jurisdiction remains unclear, the Commission made it clear that its jurisdiction of competition

³⁵² Id.

³⁵³ Ahlström & Others, Case C-89, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901.

³⁵⁴ The Court stated that “an infringement of article 85 ... consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice, and the implementation thereof.”

³⁵⁵ D.G.G. Lange and J.B. Sandage, The Wood Pulp Decision and Its Implications for the Scope of E.C. Competition Law, 16 C.M.L. REV. 137, (1989).

³⁵⁶ Fine, supra note 338, at 97.

regulations outside the Community is justified under the Merger Regulation.³⁵⁸ The Merger Regulation has two aspects that clarify its jurisdiction outside the Community: notification to the Commission and remedy of negative effect of concentrations.³⁵⁹

The Merger Regulation implicated that concentrations having a Community dimension are within the scope of the regulation regardless of the nationality or country of undertakings involved in the concentrations.³⁶⁰ Therefore, extraterritorial operations within the scope must notify to the Commission.³⁶¹ As a standard to decide whether a transaction has a Community dimension, the regulation provides for the worldwide turnover and the Community-wide turnover.³⁶² This standard has targeted undertakings that perform a very large proportion of their activities outside the Community.

According to article 2 of the Merger Regulation, the Commission is empowered to control concentrations that create or strengthen a dominant position in the Common Market or a substantial part of it.³⁶³ This implies that the Commission may take substantive actions to even undertakings whose headquarters and main operations are outside the Community, for the purpose of remedying anti-competitive effects of the concentrations of such undertakings. However, the Commission has limited its right to apply its competition rules only to the concentrations within the Community.³⁶⁴

³⁵⁷ R. WHISH, *COMPETITION LAW* 380-82 (3rd ed. 1993).

³⁵⁸ Banks, *supra* note 321, at 308.

³⁵⁹ *Id.* at 309.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² Council Regulation 4064/89 art. 1, 1989 O.J. (L395/1) 4.

³⁶³ Council Regulation 4064/89 art. 2, 1989 O.J. (L395/1) 4.

(iii) Boeing/McDonnell Douglas Case

Under the Merger Regulation, undertakings that have minimal or no assets within the Community are also liable to Community jurisdiction, for concentrations which have the potential to enter the Common Market.³⁶⁵ The regulation also applies to particular transactions which have no effect on the Community.³⁶⁶ Boeing/McDonnell Douglas represents this situation.³⁶⁷

During the period between 1987 to 1996 the aerospace industry consisted of three main players: Boeing, Airbus, and McDonnell Douglas Corporation (MDC). Their average market share was 61%, 27%, and 12% respectively.³⁶⁸ In 1996, Boeing and MDC entered into an agreement by which MDC would be a subsidiary of Boeing; therefore, this merger created the world's largest aerospace company, whose value was \$14 billion and whose world market share was over 70% of commercial jet aircraft.³⁶⁹

While the U.S. Federal Trade Commission approved the merger, the Commission was against it because the proposed concentration would strengthen Boeing's already dominant position.³⁷⁰ The Commission worried that the dominant position would significantly alter effective competition in the common market. In fact, Boeing's

³⁶⁴ Banks, *supra* note 321, at 309.

³⁶⁵ Article 5(1) of the Merger Regulation.

³⁶⁶ Banks, *supra* note 321, at 310.

³⁶⁷ Boeing/McDonnell Douglas, Case IV/M.877, OJ [1997] C336/16.

³⁶⁸ Boeing/McDonnell Douglas: Aircraft – Conditions Attached to Merger Clearance, 19(4) EUR. COMPETITION L. REV. N63 (1998).

³⁶⁹ Banks, *supra* note 321, at 309.

³⁷⁰ Andre R. Fiebig, International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform, 19(6) EUR. COMPETITION L. REV. 323, 323 (1998).

dominance was demonstrated in 20-year exclusive supplier agreements with Continental, Delta, and American Airlines.³⁷¹

To remove the potential competition concerns of the Commission, Boeing offered the Commission several undertakings as an alternative.³⁷² As a result of these concessions, the Commission approved the merger with a belief that Boeing's undertakings were sufficient to offset the negative effects the merger might have on the Community.³⁷³ Through the Boeing/MDC merger, the Commission confirmed that it has the right to control even an all-American merger when it is likely to affect the Common Market.

Regarding the Boeing/MDC merger, both the U.S. and the EC had apparently different views on the effectiveness of the conditions offered by Boeing.³⁷⁴ However, it is shown that the territoriality of the Merger Regulation has been based on the "effects" doctrine.³⁷⁵ Also, through the merger, the Commission was shown to be empowered to govern even overseas concentrations which have direct, substantial, and foreseeable effects on the Common Market. In terms of extraterritoriality, the Merger Regulation gives the Commission jurisdiction to control mergers outside the Community, which have the potential to create or strengthen a dominant position within the Community.³⁷⁶

³⁷¹ THE TIMES, July 22, 1997, at 26.

³⁷² Antonio F. Bavasso, Boeing/McDonnell Douglas: Did the Commission Fly Too High, 19(4) EUR. COMPETITION L. REV. 243, 246 (1998).

³⁷³ Supra note 368, at N63.

³⁷⁴ Boeing/McDonnell Douglas, Case IV/M.877, OJ [1997] C336/16.

³⁷⁵ JONES AND GONZALES-DIAZ, THE MERGER REGULATION, 88-91 (1992).

³⁷⁶ Id.

2. New Market

In the fast-moving world of the “new economy” mergers and joint ventures have become a potent means for companies to develop new products and services ahead of competitors. By their very nature, such innovation-led transactions are likely to give the merged company a competitive advantage.³⁷⁷ Two recent cases—Vodafone Airtouch/Mannesmann and Microsoft/Liberty Media/Telewest—illustrate the difficult judgment which needs to be made in applying merger control to markets of this kind.³⁷⁸

In the Vodafone/Mannesmann merger,³⁷⁹ the Commission recognized that as a result of the merger, the undertakings would benefit only for a short period from early leadership that has been produced by the innovation of mobile technology. Nevertheless, the Commission argued that the new service of Vodafone/Mannesmann composed a separate market, and concluded that as an only supplier in the market, the company has a dominant position.³⁸⁰ The Commission is unlikely to allow mergers that establish even a temporary market power in a new market. In light of a market economy, it is unreasonable to consider such a transitory advantage a dominant position because the limit of profit opportunities for a transitory period reduces the incentive for investment or innovation.³⁸¹

³⁷⁷ Bill Bishop, Merger Control in “New Markets,” 22(1) EUR. COMPETITION L. REV. 31, 31 (2001).

³⁷⁸ Id.

³⁷⁹ The merger created the first single Europe-wide mobile network through proposing new service for “advance pan-European mobile services.”

³⁸⁰ Bishop, supra note 377, at 31.

³⁸¹ Id.

SECTION VIII

CONCLUSION

Articles 85 and 86 of the Treaty of Rome were the major competition regulations at the Community level before the Merger Regulation was set up in 1989. It was necessary that the Commission have a unified central power to deal with mergers at the Community level, but under articles 85 and 86 of the Treaty, the Commission could not prevent mergers creating a dominant position. Instead, it could govern only mergers which strengthened the company's dominant position.³⁸² However, the Commission lacked adequate power to control anti-competitive mergers in advance. Even though the Commission intervened informally after 1973 in several large mergers through prevention or modification of their transactions, the Commission did not take formal action.³⁸³

Following the need for of structured competition law at the Community level, the Merger Regulation was created in 1989. Since then, the regulation has proven to be a success in controlling concentrations within its scope, in advance.³⁸⁴ Through the fast procedure and the one-stop-shop principle, the Commission satisfied businesses and industries even though there were structurally some problematic provisions, such as extensively high thresholds, and the distinction between concentrative and co-operative

³⁸² Korah, supra note 17, at 262.

³⁸³ Id. at 262.

³⁸⁴ Ahlborn and Turner, supra note 9, at 249.

joint ventures.³⁸⁵ Those unsatisfactory propositions prevented the regulation from serving its goals. To solve these problems, the Commission proposed amendments with support from businesses.³⁸⁶

The amendments to the original regulation seem to extend the scope of the regulation significantly, and to reflect its success against control of national competition law and of article 85. However, the additional number of mergers falling into the regulation as a result of the amendments has been less than expected.³⁸⁷ In addition, the complicated amending regulation has reduced the benefit of the administrative and legal costs saving from the change.³⁸⁸

It is difficult to estimate how many additional cases fall under the scope of the amended regulation because of the new definition of concentrations, which includes co-operative joint ventures.³⁸⁹ Even though the new assessment of joint ventures does not greatly improve the analysis of the regulation, companies benefit from the efficient procedure and the fast process under the amended regulation. Also, the amendments bring a negative effect through the analysis of article 85 because the analysis of the regulation conflicts somewhat with that of article 85.³⁹⁰ Companies can benefit from the new joint venture analysis when the article 85 criterion is interpreted appropriately. Unless the interpretation is acceptable, the potential problem of the article 85 analysis comes at the cost of other procedural benefits.

³⁸⁵ Brown, supra note 20, at 249.

³⁸⁶ Zekos, supra note 10, at 39.

³⁸⁷ Ahlborn and Turner, supra note 9, at 250.

³⁸⁸ Id.

³⁸⁹ Id. at 261.

The EC merger regulations seem to have been well developed since articles 85 and 86 through the amendments to the regulation. From a theoretical point of view, the Community competition laws have tried to eliminate inconsistencies caused by different national competition regulations between member states. However, the closer the Community comes to reaching its goals through unification of competition regulations in the Common Market, the more the inconsistencies increase between the Community and the rest of the world.³⁹¹

Today, the world is becoming globalizes, and the number of countries that have adopted competition laws have increased. Multiple enforcement authorities around the world review single transactions involving several countries whose authorities are different. To facilitate the process of controlling mergers within the framework of the Community, it is necessary for the various authorities to review the transaction with a consistent standard. Otherwise, mergers that have been successfully approved by the Community authority might still conflict with the authority of countries outside the Community.

³⁹⁰ Id.

³⁹¹ Griffin, supra note 27, at 16.

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