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The New EC Merger Control Regulation

On December 21, 1989, the Council of the European Community, the European Community's decision-making body, unanimously adopted a mergers control that will have a very significant effect on corporate reorganizations, not only within the Community, but also between non-EC businesses, taking place as early as the fall of 1990. Pursuant to the Regulation on the Control of Concentrations Between Undertakings,[1] the Commission of the European Community (the Commission) will have, as of September 21, 1990, the exclusive power to oppose large-scale mergers likely to impact on the EC market, subject to a few exceptions. The timeliness of this adoption is obvious. The prospect of 1992 and the dismantling of internal frontiers has resulted in a flurry of cross-border acquisitions and corporate reorganizations within the European Community.[2]

In light of other relevant Community legislation, such as the draft directive on takeovers[3] and the directive on mergers of limited liability companies,[4] which both deal with takeovers and mergers from a general corporate law viewpoint, the adoption of the merger Regulation, which deals with takeovers and mergers

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1. Council Regulation No. 4064/89 on The Control of Concentrations Between Undertakings [hereinafter the Regulation], O.J. EUR. COMM. (No. L 395) 1 (1989) (as of yet unpublished). Note that the term "mergers" is not the term of art used in the E.C. legal vocabulary, but rather the economic vocable of "concentration." Likewise, the E.C. uses as equivalent for the economic concept of firms the word, probably derived from the French language, of "undertakings."

2. The Commission noted that the number of mergers and acquisitions of majority stakes in the Community increased by 26 percent in 1987–1988. Commission Eighteenth Report on Competition Policy 233–45 (1988). Many of these acquisitions have involved U.S. and French corporations, including the recent acquisitions of Kayserberg by James River, of Aussedat-Rey by International Paper, of Wonder-Mazda by UCAR, and of DIM by Sara Lee.

3. Commission Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, COM (88) 823 final, O.J. EUR. COMM. (No. C 64) 8 (1989).

4. Third Council Directive on Mergers of Public Limited Liability Companies, No. (78/855), O.J. EUR. COMM. (No. L 295) 36 (1978).

from an antitrust perspective, seems likely to provide the Community with adequate tools to handle the increased mergers and acquisitions activities within what will soon be the Single European Market. The need for such a merger control Regulation has long been obvious. From an economic viewpoint, while the increasing size of businesses, resulting from mergers, favors economies of scale and favors the competitiveness of European industry, the Commission's economists were wary of the simultaneously higher degree of oligopolization, collusion, and ultimately, monopoly.[5] From a legal perspective, although the vacuum was not complete, not all Member States had a merger control, and the existing EC law provisions had long been regarded as inadequate.[6] The underlying political motivation for this late step can hardly be denied. The integration process underway since the adoption of the White Paper on the completion of the internal market[7] and the Single European Act[8] perhaps reflects the industry's expectation of a resulting boost of growth. European companies started restructuring at an unprecedented level, and non-EC businesses responded by reinforcing their positions in Europe. The Member States in varying degrees of unpreparedness were unable to monitor the process. It is in this context that the Member States finally found a compromise and adopted the Regulation, after sixteen years of work.

5. Schwarz, *New E.E.C. Regulation on Mergers, Partial Mergers and Joint Ventures*, in 1988 FORDHAM CORP. L. INST. 21-1 2-13 (B. Hawk ed. 1989); *see also* Fourth and Fifth Considerations to the Regulation.

6. The Commission's original position was that the E.E.C. Treaty's provisions on competition could not apply to mergers. Article 86, which prohibits the abuse of a dominant position—a provision somewhat comparable to § 2 of the Sherman Act—was applied for the first and only time to a merger in Continental Can Europemballage Corporation & Continental Can, Inc. v. E.C. Commission, 1973 E. Comm. Ct. J. Rep. 215, Common Mkt. Rep. (CCH) ¶ 8171. However, as it is a repressive provision not allowing for any clearance of projects prior to their implementation, the Commission expressed the view that it was ill-adapted to mergers. Commission Competition Series No. 3, The Problem of Industrial Concentration in the Common Market ¶¶ 3–15 (1966), *reproduced in* Comm'n Mkt. Rep. (CCH) No. 26 (1966).

Article 85, on the other hand, which prohibits agreements in restraint of trade—quite similarly to § 1 of the Sherman Act—does contain provisions for prior notification and clearance where an agreement has sufficient redeeming virtues. However, the Commission considers that it does not apply to "the acquisition of total or partial ownership of enterprises or the reorganization of enterprises." *Id.*

In *Philip Morris* the Court of Justice applied article 85 to the acquisition by one company of shares of a competitor, stating that it might serve as a means of influencing the competitive behavior of the companies involved. British American Tobacco Co., Ltd. & R. J. Reynolds Indus., Inc. v. E.C. Commission (Joined Cases 142 and 156/84), 2 Comm. Mkt. L.R. 40 (1984), Common Mkt. Rep. (CCH) ¶ 14,405 (1987).

7. Completing the Internal Market, White Paper from the Commission to the European Council, June 14, 1985, COM (85) 310 final.

8. Single European Act of Feb. 17, 1986, O.J. EUR. COMM. (No. L 169) 10 (1987). *See, e.g.*, Meessen, *Europe en Route to 1992: The Completion of the Internal Market and Its Impact on Non-Europeans*, 23 INT'L LAW. 359 (1989); Schildaus, *1992 and the Single European Act*, 23 INT'L LAW. 549 (1989); Thieffry, Van Doorn & Lowe, *The Single European Market: A Practitioner's Guide to 1992*, 12 B.C.L. REV. 357 (1989).

I. Scope of the Control

The Commission will have jurisdiction over deals of a certain nature and size: mergers which have a "European Community dimension" having significant contact with the EEC.

A. Mergers, Joint Ventures, and Takeovers

Mergers are defined in very broad terms. A merger is not only deemed to take place in the straightforward situation where two or more corporations merge, but also where direct or indirect corporate control is acquired through stock or asset purchases, contractual relationship, or other means.[9] Control is defined in practical terms, that is, as the capacity of exercising decisive influence on a firm's conduct.

It is worth noticing, in view of the large number of joint ventures set up or now being negotiated in anticipation of the post-1992 single market, that certain forms of joint ventures are explicitly within the scope of control, namely, joint ventures where the parties create an autonomous economic entity.[10] Such would, most remarkably, be the case of the creation of joint subsidiaries granted corporate autonomy, where the parents transfer existing assets and coordinate activities, or major research and development efforts.[11] By contrast, joint ventures merely coordinating the behaviors of the parties remain fully within the scope of preexisting competition provisions. Also of significance is the inclusion within the Regulation's scope of takeovers, probably both friendly and hostile.[12]

B. Community Dimension Mergers

The Community dimension of the above-defined merger is measured by reference to the turnover within the Community of the entities involved. In fact, the turnover thresholds have been one of the issues on which a compromise has been the most difficult to reach, and these quantitative criteria have been greatly

9. Article 3 of the Regulation.
10. Article 3(2) of the Regulation provides that:

> An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behavior of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1(b).
>
> The 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 behavior of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b).

See Schwarz, *supra* note 5, at 21–13.
11. Schwarz, *supra* note 5.
12. Articles 3(1)(b) and 4(1) of the Regulation.

modified over the years.[13] The Commission will have exclusive powers to investigate mergers involving groups[14] with a combined worldwide turnover[15] of at least ECU 5 billion (approximately $6 billion) and if the aggregate Community-wide turnover of at least two of them is greater than ECU 250 million (approximately $300 million).[16] Other mergers will fall under the jurisdiction of Member States' authorities. It is anticipated that from forty to fifty deals a year will meet these thresholds and thus will be found to have a Community dimension. Obviously, the turnover thresholds are arbitrary and fail to provide the Commission with jurisdiction over deals involving firms in highly concentrated markets whose turnover is lower than the Regulation's thresholds. However, the turnover threshold can be revised after four years. Although the United Kingdom has insisted that the future lower threshold remain unstated at this point, the decision will be made by a vote of a qualified majority of the Member States.[17] As most Member States are in favor of a lower threshold, it is expected, at this time, that all mergers involving business with combined worldwide turnovers of ECU 2 billion and more would become subject to the control.

The above jurisdictional mechanism, however, contains certain exceptions. First, Member States' laws will apply where two-thirds of the activities of each of the firms involved in a merger take place in the same Member State.[18] Second, Member States will have the right to oppose mergers on grounds of public security, preservation of plurality of media ownership, specific rules applicable to financial institutions, and other legitimate interests.[19] Third, a Member State may ask the Commission to investigate mergers involving businesses whose turnovers do not meet the thresholds, provided however, that such mergers are likely to create or strengthen a dominant position within that Member State's market.[20] Member States without national merger control are those likely to seek such action. Finally, the Commission may allow Member States' antitrust authorities to investigate mergers that are likely significantly to affect competition in a local market, even if they meet the thresholds.[21]

13. F. FINE, MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC (1989).

14. For the purpose of the Regulation, the turnover of each party involved includes not only that of the concerned legal entity, but also of persons controlling them and of their controlled subsidiaries, according to quite detailed rules. Article 5(4) of the Regulation.

15. The concept of turnover under the Regulation is defined at length in article 5 of the Regulation. Where parts only of the groups parties to the merger are involved, only their turnovers are taken into account. Article 5(2) of the Regulation. Special rules apply to credit institutions and insurance carriers. Article 5(3) of the Regulation.

16. Article 1.2 of the Regulation.

17. Article 1(3) of the Regulation. If the ECU 5 billion threshold was lowered to ECU 2 billion, it is estimated that about 150 deals a year would fall within the scope of the Regulation.

18. Article 1(2) of the Regulation.

19. Article 21(3) of the Regulation.

20. Article 22(3) of the Regulation.

21. Articles 1-2, 9, 21-3, 22-3 of the Regulation.

Of course, Member States' laws will remain fully applicable to mergers that do not meet the thresholds, as will the preexisting competition provisions of the EEC Treaty, articles 85 and 86. Mergers between smaller concerns may thus paradoxically be subject to substantially more lengthy and complex proceedings than those of larger businesses.

C. Extraterritorial Reach

The turnover threshold is likely to result in extraterritorial application of the merger Regulation. Indeed, not only is it possible that mergers between U.S. and Member State firms will be subject to the Regulation's provisions, but also, presumably, mergers between two U.S. firms whose worldwide and Community-wide turnovers would reach the thresholds set forth in the Regulation, even if their actual presence in the Community was limited, for example, to selling American-made products. This effect is a result of the Community's jurisdictional long arm as illustrated by the case law of the European Court of Justice. In *Wood Pulp* the Court ruled that EC competition law applies to a cartel agreement between non-EC Corporations, on the grounds that said agreement was in fact implemented within the Community.[22]

II. The Control Process

Because of the broad extraterritorial reach of the Regulation, U.S. corporations involved in mergers and acquisitions or other deals falling within the Regulation's merger definition, even in a purely domestic context, should become familiar with the Regulation's provisions in order to determine whether notification to the Commission is warranted. The mandatory character of the control is of its very essence. The most rewarding of its features, from the viewpoint of the interested parties, is the straight timetable imposed on the Commission to make its ruling.

A. The Notification

Mergers falling within the scope of the Regulation will have to be notified to the Commission within one week of the signing of the merger agreement, the acquisition of a controlling interest, or the announcement of a takeover bid.[23] Failure to notify where required would expose corporations involved to fines from ECU 1,000 to ECU 50,000.[24]

22. A. Ahlström Osakeyhitiö v. Commission, 1988 E. Comm. Ct. of J. Rep. ____, Comm. Mkt. Rep. (CCH) ¶ 14,491, *aff'g* Commission's ruling cited at 27 O.J. Eur. Comm. (No. L 85) 1 (1984), [1982–85 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,654 (1985); *see, e.g.*, F. Fine, *supra* note 13, at 22; Vollmer & Sandage, *The Wood Pulp Case*, 23 Int'l Law. 721 (1989).

23. Article 4(1) of the Regulation.

24. Article 14(1) of the Regulation.

The Commission is reportedly preparing a long and complete notification form.[25] Obviously, the famous "Form A/B" used to notify agreements pursuant to the preexisting competition provisions of the EEC Treaty is not adequate to provide the Commission the necessary information to enable it to meet the Regulation's timetable. It is likely that the process of notification will entail the filing of extensive forms not unlike that required under the Hart-Scott-Rodino Act.

The Commission will publish notified mergers that it finds fall within the scope of the Regulation and invite third parties' observations.[26]

A merger resulting from a takeover would be subject, after adoption of the proposed directive on takeovers mentioned above,[27] to two series of notification: first, under the merger Regulation, and second, under the rules of the proposed directive. Indeed, as soon as an entity decides to make a bid, the offeror would have to publicize its intention and notify the competent national supervisory authority, to be set up in each Member State.

B. Timetable for Commission Action

The new Regulation sets forth a precise timetable. When the Commission decides, upon review of a notification, to investigate a merger, it must notify the corporations involved and, as the case may be, their respective Member States, within one month from the notification. Once the Commission has decided to investigate, it has four more months to clear or oppose a deal.[28] During these periods, the merger cannot be put into effect, except in the case of public bids, provided the acquirer does not exercise voting rights. In special circumstances, however, derogations can be obtained from the Commission.[29] If, at their expiration, the Commission has not taken the appropriate action, the merger shall be deemed approved.[30]

The Commission is said to be actively reinforcing its structures in an attempt to respect the imposed deadlines. Reportedly, officials are being recruited, and a new Directorate could be created within Directorate-General IV, the Commission's unit in charge of implementing the Regulation and, more generally, competition policy, with the sole duty of processing notifications under the Regulation.

25. As it is empowered under article 23 of the Regulation.
26. Article 4(3) of the Regulation.
27. *Supra* note 3.
28. Article 10 of the Regulation. These time periods can be extended only in limitatively listed situations.
29. Article 7(4) of the Regulation.
30. Article 10(5) of the Regulation.

III. Assessment of the Merger

As with agreements notified pursuant to article 85(3),[31] the Commission will evaluate the proposed merger and, probably in a large number of instances, require modifications or impose conditions or obligations.

A. Factors Considered by the Commission

The Commission will evaluate mergers based on their effect upon competition. The focus of the query will be whether they are "compatible with the common market."[32] The creation or strengthening of a dominant position as a result of which competition "would be significantly impeded" will not be compatible with the common market.[33]

The final text of the Regulation, however, allows the Commission to consider factors such as "the interests of the intermediate and ultimate consumers, and the development of technical and economic progress."[34] While northern Member States like France, Germany, and the United Kingdom have different conceptions in this respect, the southern Member States of the Community have expressed the hope that this will enable the Commission to take into account industrial policy considerations.[35] This question is of particular significance now that the Single European Act has amended the EEC Treaty to include formally a basis for the conduct of an industrial policy within the Commission's duties.[36] It seems likely, as was acknowledged by an official of Directorate-General IV, that the Com-

31. Article 85, paragraph 3 of the Rome Treaty states:
The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

32. Article 2(1) of the Regulation.

33. Article 2(2) of the Regulation.

34. Article 2(1)(b) of the Regulation.

35. There has been extensive discussion as to whether such a course of action would be desirable and proper. From a policy viewpoint, this was one of the reasons for the reluctance of some of the Member States towards the proposed Regulation. For a legal and institutional analysis of the Commission's powers and the basis for the Regulation, see, e.g., Mestmäcker, *Merger Control in the Common Market: Between Competition Policy and Industrial Policy*, in 1988 Fordham Corp. L. Inst. 20-1 (B. Hawk ed. 1989).

36. New article 130.f of the EEC Treaty as added by the Single European Act, *supra* note 8, reads: "The Community's aim shall be to strengthen the scientific and technological basis of European industry and encourage it to become more competitive at the international level."

mission's merger analysis will be similar to that made under article 85(3) of the EEC Treaty.[37]

B. Negotiation and Clearance

The Commission may request information from the parties,[38] investigate their records[39] or request Member States to conduct investigations,[40] and impose conditions and obligations to the parties when it clears a merger.[41] It has the power to assess fines up to 10 percent of the aggregate turnover of the parties, or daily fines, similar in their results to civil contempt of court, of up to ECU 100,000, if its decisions are not complied with.[42]

Where a merger has already taken effect, the Commission may order that the corporations or assets acquired be separated. It may further order the cessation of common control, or take any other action that may be appropriate in order to restore conditions of effective competition.

Decisions of the Commission upon notification of a merger should be referred to the newly created Court of First Instance for annulment.[43]

IV. Conclusion

On the whole, the adoption by the Community of a merger control Regulation should be seen as a victory for corporations planning large-scale mergers. Generally, they will no longer face double investigations by the Commission and Member States' authorities. Instead, a long expected "one-stop" control will allow them to obtain clearance. Furthermore, the Regulation sets forth a rather speedy procedure. This, in itself, is also a very important improvement from the former situation, where lengthy investigations and negotiations were conducted pursuant to article 85(3).[44] It remains to be seen, however, how the Commission will use its new powers, that is, whether it will show a commitment to free market policies or rather succumb to the temptation of using them to increase the efficiency of its industrial policy.

Significant difficulties can be expected with respect to the new system's application. For example, the Regulation does not exclude the application of preexisting competition provisions, which belong to the EEC Treaty, to mergers within its scope. Although the Commission will not, on its own motion, apply

37. *Supra* note 31.
38. Article 11 of the Regulation.
39. Article 13 of the Regulation.
40. Article 12 of the Regulation.
41. Article 8 of the Regulation.
42. Articles 14 and 15 of the Regulation.
43. Thieffry, *1992 Program, New Legal Landscape in Europe*, NAT'L L.J., Oct. 16, 1989, at 15, col. 1. However, article 21 of the Regulation refers to the review of the Court of Justice itself.
44. *Supra* note 31.

articles 85 and 86 to mergers notified pursuant to the Regulation, these provisions remain fully applicable from a strict legal viewpoint. Thus, third parties will attempt to use them to interfere with the merger. For instance, interested parties—a competitor or, perhaps, the target of a hostile takeover—might seek an injunction under article 86.[45] It is likely that this issue will have to be resolved by the European Court of Justice, since prior case law with respect to the jurisdiction of Member States' courts in cases under review by the Commission may not apply, due to the lower legal standing of the Regulation.

In any event, U.S. corporations contemplating mergers or acquisitions in Europe, or even in the United States, should become familiar with the Regulation and be aware of its potential pitfalls. While the Commission has traditionally refrained from scrutinizing strictly foreign operations where they had no significant competition impact in the Community, it should not be overlooked that mergers and acquisitions, takeovers, and certain joint ventures, even though strictly between U.S. businesses, but with significant turnovers in the EC, must be notified.

45. *Supra* note 6.