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New Merger Control Rules in the EEC†

Article 8a of the Treaty of Rome[1] (EEC Treaty), inserted by the Single European Act[2] in 1986, provides for the establishment of an internal market by the end of 1992. This internal market is intended to create a homogeneous economy within the European Community (EC) where national regulations cease to impede the free movement of goods, services, persons, and capital. For a long time, undertakings[3] established in and outside the EC have tried, and still try, to protect or strengthen their economic position in the coming internal market. Such actions occur principally by means of large-scale concentrations,[4] and Europe has experienced a wave of mergers during the last five years. This activity highlighted the need for effective merger control rules in the European Economic Community (EEC) and led to the adoption of Council Regulation 4064/89 on December 21, 1989.[5]

I. European Merger Control in the EEC Treaty

The original 1957 version of the EEC Treaty adopted no specific rule aimed at control of concentrations. Although six years prior to the EEC Treaty Article 66 of the European Coal and Steel Community Treaty (ECSC) introduced a special

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1. 25 Mar. 1957, 298 U.N.T.S. 3 (1958).
2. 30 O.J. EUR. COMM. (No. L 169) 7 (1987) (effective on July 1, 1987).
3. The term "undertaking" means "company."
4. This term will be used in the text for mergers and acquisitions.
5. 32 O.J. EUR. COMM. (No. L 395) 1 (1989); Common Mkt. Rep. (CCH) ¶ 2839 (1989). The corrected version is in 33 O.J. EUR. COMM. (No. L 257) 13 (1990).

merger control procedure, the authors of the EEC Treaty did not see such a need for the EEC. Concentrations were considered a means for strengthening the national economies and integrating them into the Common Market. Nevertheless, during the long period between the establishment of the EEC in 1957 and the entry into effect of Regulation 4064/89 in 1990, the Commission and the European Court of Justice attempted to use the general rules of competition embodied in the EEC Treaty to control mergers at the EC level.[6] Two articles of the EEC Treaty were particularly important: article 86 and article 85.

A. Merger Control under Article 86 of the EEC Treaty

Article 86 of the Treaty prohibits any abuse of a dominant position within the Common Market, or a substantial part of it insofar as it may affect trade between Member States. Article 86 provides a list of abusive practices, including: imposing unfair purchase or selling prices or unfair trading conditions; limiting production, markets, or technical development; applying discriminatory conditions; and making tie-in arrangements. Based on this general language, article 86 has been applied to mergers that could be qualified as abuses of dominant market positions.[7] The leading case was the *Continental Can*[8] decision rendered by the Commission in 1971. In that decision, the Commission stated that mergers may fall within the scope of article 86 and, hence, have to be dissolved if and insofar as the mergers are carried out by undertakings that already hold a dominant market position, and if those enterprises gain by their merger still more market power so as to eliminate any further actual or potential competition in the Community or in a substantial part of it.[9] The European Court of Justice endorsed this interpretation of article 86.[10]

Article 86 can block concentrations, however, only when at least one undertaking had achieved market dominance prior to merging. Correspondingly, article 86 could not and cannot be applied to concentrations where market dominance follows concentration, that is, where market dominance is achieved as a consequence of the merger. In view of this shortcoming, article 86 could not and still cannot be regarded as an adequate instrument for effective EEC merger control.

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6. *See* Korah, *The Control of Mergers Under the EEC Competition Law,* 1987 Eur. Compet. L. Rev. 239.

7. *See* Memorandum on the Problem of Industrial Concentration in the Common Market, Competition Series No. 3, (1965) *reprinted in* F. Fine, Mergers and Joint Ventures in Europe annex G (1989); Sandrock, *Overview of Antitrust Law and Policy,* in European Economic Community: Trade and Investment § 15.03 [5] (J. Norton ed. 1986).

8. The Continental Can Co. Inc., Commission Decision of 9 Dec. 1971, 15 J.O. Comm. Eur. (No. L 7) 25 (1972); [1972] 11 Common Mkt. L.R. D11.

9. *Id.* at para. 26.

10. Case 6/72 Europemballage Corp. and Continental Can Co. Inc. v. Com'n [1973] E.C.R. 215; Common Mkt. Rep. (CCH) ¶ 8171; 10 Common Mkt. L. Rev. 311 (1973) (with a note by Alexander).

B. Merger Control under Article 85 of the EEC Treaty

Article 85 of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that restrict competition and thereby affect trade between Member States unless the Commission exempts the transaction. This article applies only to the conduct of independent undertakings when their independence remains unaffected by the restrictive practice agreed upon between them. As a result of a typical merger, at least one undertaking loses its independence. Hence, the Commission was unable to apply article 85 to concentrations except when the undertakings concerned remained independent, as in the organization of a joint venture.

The European Court of Justice confirmed this principle in its *Philip Morris* decision.[11] In 1984, the South African Rembrandt Group Ltd. and the American Philip Morris Company agreed that Philip Morris would acquire a 30.8 percent stake in Rothmans, a subsidiary wholly owned by Rembrandt. Philip Morris, however, would hold only 24.9 percent of the voting rights in Rothmans. The parties had previously failed to overcome objections raised by the Commission and by several national authorities to plans of Philip Morris to acquire a larger share. Thus Philip Morris owned 30.8 percent of Rothmans' equity, but could exercise voting rights only to an extent of 24.9 percent.

The Commission found no objection to the parties' agreement since Morris did not acquire a substantial influence on Rothmans and Rothmans thus remained under the exclusive control of Rembrandt. On appeal by competitors of Morris and Rembrandt, however, the European Court declared article 85 to be, in principle, applicable. The Court reasoned that though the undertakings concerned remained independent after the agreement had entered into effect, "such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question [Rembrandt and Philip Morris] so as to restrict or distort competition on the market on which they carry on business."[12] In the final result the Court dismissed the appeal, finding that competition between Rembrandt and Philip Morris remained unaffected, and that Morris's restricted voting rights in Rothmans did not enable it to influence the commercial conduct of Rothmans.

The decision of the European Court illustrates that the acquisition of a minority shareholding may violate article 85 of the Treaty: Article 85 may apply to concentrations where the undertakings involved remain independent. Nevertheless, the Court's judgment makes it clear that an acquisition of a majority shareholding is not impeded by article 85[13] when the acquisition cannot be used

11. Joined Cases 142 and 156/84 British American Tobacco and R.J. Reynolds v. Com'n (Philip Morris) [1987] E.C.R. 4487; Common Mkt. Rep. (CCH) ¶ 14,405.

12. *Id.* at para. 37.

13. *Cf.* LeBolzer, *The New EEC Merger Control Policy After the Adoption of Regulation 4064/89*, 14 World Competition 31, 35 (1990); Blumberg & Schödermeier, *No Smoke without Fire* Int'l Fin. L. Rev. 35 (Jan. 1988).

to influence commercial conduct so as to restrict competition. Therefore, the *Philip Morris* decision cannot be interpreted as the introduction of a general European merger control. To the contrary, article 85 could, and it still can, only be applied to a very limited number of concentrations.

II. European Merger Control through Regulation 4064/89

To cope with the insufficiency of the EEC Treaty, it was necessary to create a new legal instrument granting additional powers to the Community to enable it to challenge mergers that were incompatible with the objective of "nondistorted competition" enshrined in article 3(f) of the EEC Treaty).[14] To this end, the EEC Council adopted Council Regulation 4064/89 on Control of Concentrations between Undertakings in December 1989; Regulation 4064/89 entered into force on September 21, 1990.

A. Historical Background

Shortly after the European Court had confirmed, in its *Continental Can* decision,[15] the applicability of article 86 to concentrations, the Commission in 1973 presented a draft European Merger Control Regulation to the EEC Council.[16] This draft regulation and its subsequent revisions sought to go beyond articles 85 and 86 of the Treaty by granting to the Community additional powers over concentrations. These early draft regulations simply prohibited concentrations incompatible with the Common Market without specifying any particular criteria of market dominance that, for the operation of the control, would have to be met. Moreover, the introduction of these drafts was based not only on article 87, but also on article 235 of the Treaty, a provision that required a unanimous decision of all Member States in the Council. Without specific criteria of market dominance, however, such unanimous support could not be obtained for the 1973 draft or for its subsequent revisions presented in 1982,[17] 1984,[18] and 1986.[19]

The insufficiency of the Treaty, revealed again by the *Philip Morris* decision in 1987, foreshadowed a new beginning for European merger control. In April 1988 the Commission presented a new draft Regulation,[20] and for the first time the question of the concentration's compatibility with the Common Market was connected with the criterion of market dominance. However, numerous exemp-

14. *See* Hawk, *The American Antitrust Revolution: A Lesson for the EEC?*, 1988 Eur. Compet. L. Rev. 53.

15. Case 6/72 Europemballage Corp. and Continental Can v. Com'n [1973] E.C.R. 215; Common Mkt. Rep. (CCH) ¶ 8171; 10 Common Mkt. L. Rev. 311 (1973).

16. 16 O.J. Eur. Comm. (No. C 91) 1 (1973).

17. 25 O.J. Eur. Comm. (No. C 36) 3 (1982).

18. 27 O.J. Eur. Comm. (No. C 51) 8 (1984).

19. 29 O.J. Eur. Comm. (No. C 324) 5 (1986).

20. 31 O.J. Eur. Comm. (No. C 30) 4 (1988); *see* Sutherland, *The New Proposals of the Commission on Concentration Control*, EEC Colloquium 3 (Nov. 3, 1988) (an EC publication).

tions based on questionable industrial policy considerations riddled the general rule put forth by the Commission.

These exemptions were a major point of dispute during the negotiations over the draft.[21] In particular Germany, backed up to a certain extent by Great Britain, expressed its fears that such an extensive catalogue of industrial policy considerations could endanger the realization of a competition-oriented regime of merger control.[22] Ultimately, as a result of the political pressure exerted by Germany and Great Britain, these exemptions were abandoned. Notwithstanding this accord on the suppression of industrial policy considerations, remarkable differences of opinion remained when the EEC Council finally met on December 21, 1989. Due to an increasing sense of urgency, however, the Council reached a compromise and passed Regulation 4064/89, which entered into effect on September 21, 1990.[23]

B. The Scope of Regulation 4064/89

A merger control may be exercised not only on the level of the EC, but also on the national level. Many Member States of the EC already had long-standing, but differing, national statutory regulations providing for the control of concentrations.[24] The first problem the EC legislature had to cope with, and one of the most cumbersome, was the delimitation of the sphere in which the EC merger control, as opposed to the different national merger controls, would operate. Concomitant with such delimitation the EC legislature also had to determine the international purview of Regulation 4064/89: a purview of utmost importance for all undertakings based outside the EC, but affecting mergers and acquisitions within or even outside the EC if there are effects within the EC boundaries.

For the purpose of these delimitations, Regulation 4064/89 introduces a magic notion: the Regulation applies to "all concentrations with a Community dimen-

21. *See* Mestmäcker, *Merger Control in the Common Market: Between Competition Policy and Industrial Policy, European/American Antitrust and Trade Law,* in Fordham Corp. L. Inst. ch. 20 (1988).

22. *See* Kartte, *Doping für die Giganten,* Frankfurter Allgemeine Zeitung, Apr. 22, 1989, at 15; Mundorf, *Zustimmung der Bundesrepublik würde Verzicht auf die Ordnungspolitik bedeuten,* Handelsblatt, Oct. 27, 1989; Hölzler, *Die Bundesrepublik wird ihre ordnungspolitischen Essentials in Brüssel nicht durchsetzen können,* Handelsblatt, Nov. 21, 1989, at 4; Hölzler, *Bei den Kontrollkriterien ist der Müll der Industriepolitik übernommen worden,* Handelsblatt, Nov. 27, 1989, at 5; Immenga, *Der Preis der EG-Fusionskontrolle,* Handelsblatt, Dec. 19, 1989.

23. *See* Bechtold, *Die Grundzüge der neuen EWG-Fusionskontrolle,* 36 Recht der Internationalen Wirtschaft 253 (1990); Niederleithinger, *Grundfragen der neuen europäischen Zusammenschlußkontrolle,* Europäisches Wirtschafts- und Steuerrecht 73 (1990).

24. France: *La Loi Portant Amélioration de la Concurrence (30 Dec. 1985),* art. 4, 1985, Journal Officiel de la République Francaise [J.O.] 15–513. Spain: Defense of Competition Law, ch. II, art. 14, Ley 16/1989 (B.P.O. 18 Julio 1989). United Kingdom: Fair Trading Act, 1973, ch. 41, §§ 64, 65, 75, 84. Germany: *Gesetz gegen Wettbewerbsbeschränkungen, 22 Dez. 1990,* §§ 22–24(c), Bundesgesetzblatt, [BGB1] I 2486. Italy: L. 10 Oct. 1990, n. 287, *norme della tutela della concurrenza e del mercato,* arts. 5–9, Gazetta Ufficiale della Repubblica Italiana [G.U.] 13 Oct. 1990, n. 240.

sion'' as defined in article 1, paragraph 2. According to paragraph 2, a concentration has a Community dimension where:

(a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million, and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. What is behind this almost incomprehensible language?

1. *The Community Dimension as Distinguished from the Different National Dimensions*

In the first place, article 1, paragraph 2(a) makes it clear that the new Regulation is not concerned with ''peanut'' mergers, but only with those of elephantine size. The combined aggregate worldwide turnover[25] of all undertakings taking part in the concentration (the Regulation speaks of ''undertakings concerned'') must exceed ECU 5,000 million,[26] which, at the current[27] rate of exchange, would amount to about U.S. $6,850 million. This criterion is wholly unrelated to any Community dimension. Article 1, paragraph 2(b) specifies that at least two of the undertakings concerned must each reach a Community-wide turnover of more than ECU 250 million (approximately U.S. $342.5 million). Thus the minimum aggregate amount of sales within the EC required to trigger the application of Regulation 4064/89 is two times ECU 250 million (approximately U.S. $685 million). Such an aggregate amount, however, still is of no relevance for the operation of Regulation 4064/89 where not only two, but each of the undertakings concerned, achieves more than two-thirds of its individual sales within the same Member State. In this instance it is assumed the concentration has only a national dimension and does not significantly affect trade between Member States.

The requirement of Community dimension was a major point of dispute in the negotiations between the Member States prior to the adoption of the Regulation. The Community dimension of a concentration determines the scope of the Regulation and thereby allocates power to the Commission at the expense of each Member State. The threshold of 5,000 million ECU was a compromise between a threshold of 10,000 million ECU favored by the German and British delegations[28] (which would have left all concentrations below that level under the rules of the national legislatures) and a threshold of 1,000 million proposed by the

25. The Regulation uses ''turnovers'' to mean sales.

26. *See* Soames, *The ''Community Dimension'' in the EEC Merger Regulation: The Calculation of the Turnover Criteria*, 1990 EUR. COMPET. L. REV. 213, 215.

27. End of February 1991.

28. *See* Elland, *The Mergers Control Regulation (EEC) No. 4064/89*, 1990 EUR. COMPET. L. REV. 111; Soames, *supra* note 26, at 220.

Commission. Under the German proposal the Commission would revise only about ten mergers annually. Such a high threshold would have preserved the prior powers of the national authorities to a far greater extent. Now it is anticipated that forty to sixty merger operations per year will meet the Regulation's threshold of 5,000 million ECU.

According to paragraph 10 of Regulation 4064/89's preamble, these thresholds are to be reexamined in light of the experience gained by the end of the initial phase of the Regulation's implementation. To this effect, article 1, paragraph 3 provides that the threshold figures shall be reviewed before the end of 1993. The thresholds are expected to be lowered then to an aggregate turnover of 2,000 million ECU and to a Community-wide turnover of 100 million ECU.[29]

2. *Application of Regulation 4064/89 to Concentrations of Non-Community Dimension*

Even if a concentration does not have a Community dimension within the meaning of article 1, article 22, paragraphs 3–5 provide that the Commission may apply the Regulation to concentrations below the mentioned thresholds at the request of a Member State. Under these conditions, the commission will examine the concentration concerned with a view to determining whether it creates or strengthens a dominant position in the territory of that Member State and whether the trade between the Member States could be affected thereby.

Several states including the Netherlands, Belgium, and Luxemburg, which do not have their own merger control rules, requested such a provision to enable them to invoke the Commission's facilities of merger control for the protection of their own national economies.[30] Nevertheless, the Commission has announced it will not intervene in the concentration of undertakings with a combined aggregate worldwide turnover of less than 2,000 million ECU and a Community turnover level of less than 100 million ECU.[31] The life span of this intervention of Regulation 4064/89 below Community dimension is limited, however; article 22, paragraphs 3–5 will apply only until the thresholds laid down in article 1, paragraph 2 have been reviewed.[32]

3. *The International Purview of Regulation 4064/89*

Regulation 4064/89 applies to all concentrations that have an effect in the common market, notwithstanding the nationality of the undertakings involved. This is in accord with the well-known "doctrine of effects" endorsed by the

29. *Erklärungen für das Ratsprotokoll vom 19 Dezember 1989 zu art. 1, Erkl. 1, lit. a, reprinted in* 1990 WIRTSCHAFT UND WETTBEWERB S. 240; Soames, *supra* note 26, at 220.

30. *See* Soames, *supra* note 26, at 222.

31. EUROPE, no. 5907, Sept. 25–26, 1989, at 11; Elland, *supra* note 28, at 117.

32. Regulation 4064/89, art. 22, para. 6, 32 O.J. EUR. COMM. (No. L 395) 1, 12 (1989).

European Court in its *Continental Can* decision of 1973[33] and used by the Commission since then as a basis for determining the international purview of the EEC's antitrust provisions.[34] A link to the EEC market is, however, required by article 1, paragraph 2(b), which provides that the Regulation is only applicable if each of at least two of the undertakings involved has an aggregate Community-wide turnover of more than 250 million ECU.[35] Thus, if the undertakings do not have their principal fields of activities in the Community, for Regulation 4064/89 to operate, the undertakings concerned must carry on at least some substantial operations within the boundaries of the EEC.[36]

C. The Definition of Concentration

What is a concentration under Regulation 4064/89? The definition of concentration will, on the one hand, positively identify the kind of merger required to satisfy the criteria of the Regulation. The definition will, on the other hand, identify cases where the Regulation is not applicable. In situations where the Regulation does not apply, the Commission will have to examine whether instead of Regulation 4064/89, articles 85 and 86 of the EEC Treaty must be applied. Finally, the Commission will determine whether joint ventures will fall into the purview of the Regulation, and if so, to what extent.

1. *The Criteria for a Concentration*

Article 3, paragraph 1 of Regulation 4064/89 sets out criteria for the Regulation's notion of concentration:

> A concentration shall be deemed to arise where:
> (a) two or more previously independent undertakings merge, or
> (b) one or more persons already controlling at least one undertaking, or
> —one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

Thus, a concentration may be effectuated by two different procedures: either by a "clear-cut" merger, or by the acquisition of direct or indirect control over another undertaking.

The definition of a "clear-cut" merger does not present many difficulties. According to Council's Directive 78/855/EEC of October 9, 1978 (Third Directive on Company Law[37]), companies merge when one of them absorbs the

33. Case 6/72 Europemballage and Continental Can v. Com'n, para. 14–16 [1973] E.C.R. 215, Common Mkt. Rep. (CCH) ¶ 8171, 10 Common Mkt. L. Rev. 311 (1973).

34. *Kugellager*, 17 O.J. Eur. Comm. (No. L 343) 19, 25 (1974); *Johnson & Johnson*, 23 O.J. Eur. Comm. (No. L 377) 16, 24 (1980); *Hasselblad*, 25 O.J. Eur. Comm. (No. L 161) 18, 29 (1982).

35. *See supra* text section II.B.1.

36. *See* preamble, para. 12.

37. 21 O.J. Eur. Comm. (No. L 295) 36 (1978).

other (the absorbed company transferring its assets to the absorbing company while losing its juristic personality) or where all merging companies become extinct after transfer of their assets to a newly organized third company. Mergers in such a narrow sense of the term will be rather rare. The acquisition of direct or indirect control over another undertaking will occur more frequently. This kind of case will probably be the Commission's weekly bread; unfortunately, its definition poses more problems.

According to the above quoted article 3, paragraph 1, control may be acquired by one or more persons who already control at least one undertaking. In this alternative, natural persons already in control of one or more companies are the actors. A second alternative presupposes the existence of one or more companies which gain control of one or more other companies; here, the acquiring companies are the Regulation's addressees. While such definition of the actors of a concentration is rather self-evident, article 3 takes great care to define thresholds where control by such actors begins. Pursuant to article 3, paragraph 3, control may be obtained

> by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising *decisive influence* on an undertaking, in particular by:
> (a) ownership or the right to use all or part of the assets of an undertaking;
> (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. [Emphasis added.]

"Control" in the meaning of the Regulation may be summarized as the legal or factual possibility of exercising decisive influence on an undertaking. It is not necessary, however, that such control is exercised; the mere possibility for its exercise is sufficient. Further, a mere potential for influence is sufficient for the existence of control. For example, even a minority share can be regarded as a concentration where the distribution and the size of the remaining shares allow the minority shareholder to exert a decisive influence.

2. *The Purview Left to Articles 85 and 86 of the EEC Treaty*

A merger or an acquisition of control over each other is not the only way for undertakings to cooperate. Other ways and means of such cooperation are manifold. These alternative ways and means, however, may violate articles 85 and 86 of the EEC Treaty; therefore, all undertakings, when cooperating with each other, have to observe a two-pronged standard of Community antitrust law. Not only must undertakings observe Regulation 4064/89, but also articles 85 and 86 of the EEC Treaty. Articles 85 and 86 represent primary Community law and take precedence over Regulation 4064, which is mere secondary Community law.

Article 22 of Regulation 4064/89 tries to avoid any collision between the Regulation and articles 85 and 86 by providing in paragraph 1 that "[t]his Regulation alone shall apply to concentrations as defined in Article 3" and by

decreeing, in paragraph 2, that "Regulations No. 17,[38] (EEC) No. 1017/68,[39] (EEC) No. 4056/86[40] and (EEC) No. 3975/87[41] shall not apply" to such concentrations.

3. *The Position of Joint Ventures*

The position of joint ventures under the Regulation was a highly debated theme. In practice, joint ventures come in many varieties.[42] Some may be viewed as concentrations within the meaning of Regulation 4064/89 and therefore fall under its purview. Others may be qualified as mere instruments of cooperation wholly out of the reach of the Regulation, but eventually affected by articles 85 and 86 of the EEC Treaty. In paragraph 23 of its preamble, the Regulation states that it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a lasting change in the structure of the undertakings concerned; that it is therefore necessary to exclude, from the scope of this Regulation, those operations that have as their object or effect the coordination of the competitive behavior of undertakings that remain independent, since such operations fall under the appropriate provisions of the regulations implementing articles 85 and 86 of the EEC Treaty; and that it is appropriate, therefore, to make this distinction specifically in the case of the creation of a joint venture.

To implement this objective, article 3, paragraph 2 provides that the creation of a joint venture, which has as its object or effect only the coordination of the competitive behavior of undertakings that remain independent, shall not constitute a concentration within the meaning of the Regulation. However, 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 a coordination of the competitive behavior of the parties amongst themselves or between them and the joint venture, shall constitute such a concentration.

D. The Appraisal of Concentrations

Pursuant to article 2, paragraph 1 of Regulation 4064/89, all concentrations within the scope of the Regulation will be appraised with a view to establishing whether or not they are "compatible with the common market." When rendering those decisions, the Commission shall take into account:

(a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of the markets

38. 5 J.O. Comm. Eur. (No. L 13) 204 (1962).
39. 11 J.O. Comm. Eur. (No. L 175) 1 (1968).
40. 29 O.J. Eur. Comm. (No. L 378) 4 (1986).
41. 30 O.J. Eur. Comm. (No. L 374) 1 (1987).
42. *See* Niemeyer, *Die Europäische Fusionskontrollverordnung* (*Sonderveröffentlichung zum* Recht der Internationalen Wirtschaft) 17 (1991).

concerned and the actual or potential competition from undertakings located either within or without the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[43]

All the above criteria illustrate a competition-oriented merger control policy except the last one, which allows industrial policy considerations to be taken into account. In the last criterion, an anticompetitive effect is tolerated as far as it serves the development of technical and economic progress in the Community. Through the last criterion, the Commission is able to use the Regulation as a means to strengthen the competitiveness of European companies in relation to their non-EEC competitors such as Japanese and U.S. multinationals.[44]

Thus, the criteria to determine whether a concentration is compatible with the common market are still a mix of competitive and industrial policy goals.[45] Although heavily criticized by Germany and Great Britain,[46] both states accepted this mix in order to achieve Community solidarity. Whether the new merger control policy is more industrial-policy-oriented or competition-oriented will depend on the Commission's enforcement strategies.[47]

According to article 2, paragraph 3, a concentration shall be declared incompatible with the Common Market, if it "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it." This test goes beyond the scope of article 86 of the EEC Treaty in requiring a determination of whether a dominant position is "created or strengthened" as a result of the planned merger. The creation and the reinforcement of a dominant market position already suffices to trigger the application of the Regulation whereas such existence or strengthening would not be sufficient under article 86. Moreover, article 86 requires an "abuse" of such a dominant position. Article 2 of the Regulation therefore fills one of the main gaps in EEC merger policy. In addition, by excluding a wide range of exemptions based on noneconomic criteria like those in article 85, paragraph 3 of the EEC Treaty, the Regulation provides a more predictable basis both for the undertakings concerned and for Member States.

43. Regulation 4064/89, art. 2, para. 1(a) & (b), 32 O.J. EUR. COMM. (No. L 395) 1, 3 (1989).

44. *See* Schwartz, *New EEC Regulation on Mergers, Partial Mergers and Joint Ventures, European/American Antitrust and Trade Law*, FORDHAM CORP. L. INST. ch. 21 (1988); Elland, *supra* note 28, at 116.

45. *See* Schmidt, *Die Europäische Fusionskontroll-Verordnung*, WIRTSCHAFTSDIENST 90, 93 (1990).

46. *See supra* section II.A. Historical Background.

47. *See* Commission Press Release IP (90) 751 (Sept. 24, 1980) (statements of Sir Leon Brittan).

The Regulation does not contain an express definition of market dominance. According to paragraph 15 of the preamble, a concentration is not considered likely to impede competition if the market share of the undertakings concerned is less than 25 percent of the relevant market. An undertaking possessing a market share of less than 25 percent could hardly be regarded as dominating a market. The Commission regards an undertaking to have a dominant position when its market share exceeds 45 percent.[48]

E. Procedure

Regulation 4064/89 establishes numerous procedural rules. They are necessary principally because article 22, paragraph 2 provides that other Community competition enforcement procedures are not applicable to concentrations defined in article 3. Enforcement procedures specifically excluded include Regulation No. 17,[49] which is the main regulation concerning EEC antitrust procedure, as well as Regulations 1017/68,[50] 4056/86,[51] and 3975/87.[52]

1. *Prior Notification and Suspension*

Pursuant to article 4, paragraph 1 of Regulation 4064/89, concentrations of a Community dimension as defined above have to be notified to the Commission not later than one week after the conclusion of the agreement, or after the announcement of a public bid, or after the acquisition of a controlling interest, whichever is earliest. When the merger is consensual or is carried through by a joint acquisition, all the parties together must make the notification. In other cases, such as contested mergers, only the acquisitor has to notify. Pursuant to article 14, paragraph 1, if an undertaking intentionally or negligently fails to fulfill its obligation under article 4 by omitting any notification or supplying incorrect or misleading information, the undertaking will be liable for fines between 1,000 and 50,000 ECU.

The requirement of notification is linked to the principle of suspension. By article 7 the notified concentration may not be put into effect either before its notification or within the first three weeks following the notification. The Commission may decide on its own initiative to continue the suspension when this is necessary in order to review the notified concentration. Any transaction carried out in contravention of the suspension can be voided retroactively depending on the final decision of the Commission, and again, pursuant to article 14, para-

48. *See* Ehlermann, *Die Europäische Fusionskontrolle läuft glatter als gedacht,* Frankfurter Allgemeine Zeitung, Jan. 14, 1981, at 13 (Director General of Directorate IV, which administers competition matters).

49. 5 J.O. Comm. Eur. (No. L 13) 204 (1962).

50. 11 J.O. Comm. Eur. (No. L 175) 1 (1968).

51. 29 O.J. Eur. Comm. (No. L 378) 4 (1986).

52. 30 O.J. Eur. Comm. (No. L 374) 1 (1987).

graph 2, a failure to observe this rule exposes the undertakings concerned to fines of up to 10 percent of their aggregate worldwide turnover.

By means of articles 4 and 7, for the first time, a policy of mandatory notification and suspension has been put into effect in the Community with respect to large-scale mergers. These provisions mark a significant change in European merger control in comparison to articles 85 and 86 of the EEC Treaty,[53] which could only be applied ex post facto.[54]

2. *Examination of the Notification*

After having received the complete notification, the Commission must examine the facts promptly and pursuant to article 6, paragraph 1:

> (a) Where it concludes that the concentration notified does not fall within the scope of the Regulation, it shall record that finding by means of a decision.
> (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.
> (c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

In each of these cases the Commission must make the decision, according to article 10, paragraph 1, within one month after receipt of a complete notification. This period may be increased to six weeks, however, when the Commission receives a request from a Member State in accordance with article 9, paragraph 2, which leaves certain competences with the national authorities insofar as the merger particularly affects their domestic markets.[55] If no decision has been taken within these deadlines, the notified concentration is deemed to be compatible with the common market.

The preliminary examination procedure gives immediate clarification to the undertakings concerned whether the notified concentration is likely to conform with Regulation 4064/89. Where the concentration does not fall within the scope of the Regulation or where it does not present any serious problem, the Commission will so notify the undertakings. Otherwise, if the Commission, after its first examination, decides the notified concentration may not be compatible with the common market, the Commission will initiate proceedings under article 6, paragraph 1(c) to gather additional information about the concentration.

3. *Initiation of Proceedings*

If the Commission has initiated investigative proceedings according to article 6, paragraph 1(c), it has to make a final decision on the compatibility of the concen-

53. *See* Fine, *EC Merger Control: An Analysis of the New Regulation,* 1990 EUR. COMPET. L. REV. 47.

54. *See* Elland, *supra* note 28, at 112.

55. *See infra* section II.F. Remaining Competences for National Authorities.

tration as soon as all doubts on the validity of the concentration have disappeared. This is particularly the case where doubts can be removed following modifications by the parties as provided in article 8, paragraph 2. In any event, according to article 10, paragraph 3, the Commission must render its final decision within four months of the date on which the proceedings were initiated. Under article 10, paragraph 4, this period can be further extended for two reasons: when one of the parties has not made a complete notification, and the Commission has to request information pursuant to article 11; or, if the Commission has to order an investigation pursuant to article 13, when one of the undertakings concerned is uncooperative and further examination is needed. After expiration of the four-month time limit, the transaction is deemed compatible with the common market by virtue of article 10, paragraph 6. The Commission estimates that it will normally take the maximum period of five months to rule on the compatibility of a merger when a full investigation is required.[56]

4. *Remedies*

According to article 21, paragraph 1, the European Court of Justice has the power to review the decisions taken under Regulation 4064/89. The undertakings involved may challenge a Commission's decision that the concentration is incompatible[57] with the common market. They may bring an action before the European Court of Justice by virtue of article 173, paragraph 2 of the EEC Treaty.

If the Commission has found in favor of the undertakings concerned, the Member States may also challenge the decision under article 173, paragraph 1 of the EEC Treaty. Any other natural or legal person, however, who is not the addressee of the Commission's decision normally does not have locus standi under article 173, paragraph 2. Only exceptionally, when a complaint of a competitor leads to an investigation and, for example, to the exoneration of the defendants, is the complainant regarded as individually concerned by the final decision and therefore allowed to institute proceedings under the aforementioned article.[58] Furthermore, under article 16, the Court of Justice has unlimited jurisdiction under article 172 of the EEC Treaty to review decisions in which the Commission has assessed a fine or periodic penalty payments.

F. Remaining Competences for National Authorities

In 1969 the European Court of Justice held in *Walt Wilhelm v. Bundeskartellamt*[59] that Community and national competition laws operate in separate but parallel spheres. This concept of parallelism, however, has recently been criticized. In view of the establishment of the internal market by the end of 1992, Community law has increased in importance. Many believe giving precedence to Community law over the laws of the Member States is more suitable.

56. *See* Elland, *supra* note 28, at 114.
57. Decisions regarding compatibility are pursuant to art. 8, para. 2 & 3.
58. Case 75/84 Metro v. Com'n, [1986] E.C.R. 3021; Common Mkt. Rep. (CCH) ¶ 14,326.
59. Case 14/68 Wilhelm v. Bundeskartellamt, [1969] E.C.R. 1; Common Mkt. Rep. (CCH) ¶ 8056.

Regulation 4064/89 has paved new ways regarding the priority of Community law over national laws. Pursuant to article 21, paragraph 2, national competition legislation is no longer applicable to any concentration having Community dimension.[60] Nevertheless, this so-called "one-stop shopping," especially favored by the United Kingdom, is not without exemptions. Three of these exemptions deserve special attention.

The first results from article 21, paragraph 2 of the Regulation. Since that article only applies to concentrations within the scope of the Regulation, the concept of parallelism still covers concentrations not having Community dimension. To such concentrations the national competition regulations continue to apply and articles 85 and 86 of the Treaty also remain applicable.

A second exemption to the one-stop-shopping rule is found in article 9 (the German clause). Upon request, the Commission may refer a notified concentration covered by the Regulation to the competent national authorities, which will then apply their own national competition laws to the concentration. This clause is limited to concentrations that may threaten to create or strengthen a dominant position in a market within that Member State. The market must have all the characteristics of a distinct market, regardless of whether the market is a substantial part of the common market.

Pursuant to paragraph 7 of article 9, a "distinct" market is an area in which the competitive conditions are homogeneous and which exhibits appreciably different conditions in comparison to neighboring areas. The assessment shall take into account the nature and characteristics of the goods or services concerned, the existence of entry barriers, consumer preferences, and substantial price differences. If the Commission concludes that a distinct market does not exist or the concentration does not seem to threaten competition within a distinct market, then the Commission will not refer the case to the national authorities. Even if the Commission regards the requirements of article 9, paragraph 2 as satisfied, it nevertheless may itself deal with the case, pursuant to article 9, paragraph 3.

The German clause must be regarded as a compromise between the position of the Commission trying to obtain sole jurisdiction on concentrations having Community dimension and the position of countries wishing to retain their own competence to challenge concentrations which may affect their own national economies. Germany in particular tried to defend its own competition-oriented concept of merger control against imposition of a system that seemed to be unduly influenced by industrial policy considerations.[61] The referral procedure under article 9, however, is only expected to be applied in exceptional cases.[62] This referral provision is also subject to review before the end of December 1993, along with other provisions of the Regulation.

60. *See* Hornsby, *National and Community Control of Concentrations in a Single Market: Should Member States Be Allowed to Impose Stricter Standards?*, 1988 EUR. L. REV. 195.

61. *See* Soames, *supra* note 26, at 222.

62. *See* Elland, *supra* note 28, at 116.

A third exemption to the exclusive application of Regulation 4064/89 to concentrations of Community dimension is contained in article 21, paragraph 3. This provision allows Member States, where the Commission has found a notified concentration to be compatible with the common market, to take appropriate measures for the protection of their own legitimate interests—interests other than those taken into consideration by the Regulation. Public security, plurality of the media, and prudential rules are specified as legitimate interests. This enumeration, however, is not exhaustive. Any other interests regarded by a Member State as legitimate in the meaning of article 21, paragraph 3 may be notified to the Commission. The Commission will then decide whether this interest is compatible with the general principles of the Treaty, such as the principles of proportionality and legitimate expectation.[63] Article 21, paragraph 3, however, does not create any new rights for the Member States.[64] This provision only clarifies that the enforcement of national interests other than merger control objectives may as a practical matter contravene a decision taken by the Commission under Regulation 4064/89.

III. Conclusion: The First Hundred Days of Regulation 4064/89

The adoption of Council Regulation on 4064/89 on September 21, 1990, constituted a fundamental change in European merger control policy. From its theoretical beginnings, the new Regulation, by providing a system of mandatory prior notification, has reduced many uncertainties for the undertakings involved, uncertainties that had existed since the *Continental Can* judgment. Furthermore, the Regulation is a promising attempt to bring consistency into the European merger control policies hitherto subject to widely divergent national antitrust laws and enforcement by Member States.

During the first three months, the Commission dealt with fifteen concentrations that came within the scope of the new Regulation. So far, the Commission has rendered nine decisions. The Commission found all nine concentrations compatible with the common market. The Chairman of General Directorate IV, in charge of competition matters, considers the new EC Regulation to have fulfilled the requirement of practicability.[65] Fewer deficiencies came to light than critics had predicted.[66]

In summary, the adoption of Regulation 4064/89 is an important step toward a more uniform merger policy in Europe. The Regulation provides the Community with an instrument that seems to be appropriate to meet the challenge of the future internal market. The new EEC Regulation on merger control has stood its first test.

63. *Id.* at 117.

64. *See* Soames, *supra* note 26, at 222.

65. *See* Ehlermann, *supra* note 48.

66. *See Practitioners are Critical of EC Merger Control Regulation,* 58 Antitrust & Trade Reg. Rep. (BNA) 719 (May 10, 1980); Pathak, *EEC Concentration Control: The Foreseeable Uncertainties,* 1990 EUR. COMPET. L. REV. 119; Ridyard, *An Economic Perspective on the EC Merger Regulation,* 1990 EUR. COMPET. L. REV. 247.