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# The EC Merger Control Regulation

By PHILIPPE DE SMEDT\*  
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## I. INTRODUCTION

The merger control regulation (Regulation) of the European Communities (EC) was formally adopted by the EC Council on December 21, 1989.<sup>1</sup> This ended many months of speculation as to the prospects of the Regulation's final adoption, as well as to its final form. This Article does not represent an exhaustive analysis of the Regulation. Rather, the Article outlines the history of merger control in the EC, describes the more important elements of the Regulation and notes some of the more interesting questions raised by it.

## II. BACKGROUND

Prior to the Regulation, the EC Commission relied on articles 85 and 86 of the EC Treaty,<sup>2</sup> the two traditional instruments of merger control. Article 85 and 86 cases have been the principal sources of EC anti-trust law. Article 85 is broadly drafted and applies generally to anticompetitive agreements and decisions.<sup>3</sup> Article 86 applies only to cases in which an abuse of a dominant position within the Common Market has occurred.<sup>4</sup> There is much case law on the meaning of a "dominant position." The definition of dominant position in the leading case of *United Brands Company v. EEC Commission*<sup>5</sup> is given at Section II(A)

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1. Council Regulation (EEC) No. 4064/89 of 21/12/89 on the control of concentrations between undertakings, 32 O.J. EUR. COMM. (No. L 395) 1 (1989) [hereinafter Regulation].

2. Treaty Establishing the European Community, Mar. 25, 1957, 1988 Gr. Brit. T.S. No. 47 (Cmd. 455) 82, 107-08 [hereinafter EEC Treaty] (original version at 298 U.N.T.S. 11).

3. *Id.*

4. *Id.* at 107.

5. 1978 E. Comm. Ct. J. Rep. 207.

below. Until now, article 86 has been the Commission's chief instrument for merger control.

#### A. History of the Use of Articles 85 and 86 for Merger Control

The *Commission Memorandum on Concentrations of 1966*<sup>6</sup> (1966 Memorandum) represents the first landmark in the history of the application of articles 85 and 86 to merger control. In the 1966 Memorandum, the Commission defined its position on the application of articles 85 and 86 to corporate acquisitions. The 1966 Memorandum distinguished between a "concentration" (encompassing mergers and acquisitions) and a mere "agreement" between companies. While the memorandum stated that it was sometimes difficult to distinguish between an agreement and a concentration, it declared that concentrations were essentially proprietary in nature, but might result from less than total ownership of a company.<sup>7</sup> The 1966 Memorandum concluded that article 85 did not apply to concentrations, while article 86, which prohibited the abuse of a dominant position, did apply to concentrations.

In 1972 the Commission confirmed that article 86 extended to concentrations in the case of *Europemballage & Continental Can Company v. EEC Commission*<sup>8</sup> (*Continental Can*) [appeal before the European Court of Justice (ECJ)]. *Continental Can*, the leading case in article 86 jurisprudence in the context of concentrations, firmly established that article 86 applies to a company in a dominant position that acquires a competitor even though article 86 itself contains no express provision to this effect.<sup>9</sup>

Continental Can Company, Inc., of New York, which had previously acquired control of a German manufacturer of light metal packages, acquired its Dutch license in 1970. In *Continental Can*, the ECJ held that an acquiring company abuses its dominant position when it fetters competition to such an extent that the only undertakings that remain in the market are dependent on the dominant one.<sup>10</sup> However, in subsequent article 86 cases, the test for "abuse" has become less stringent. An abuse is now defined as an action that hinders the maintenance

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6. Memorandum on the problem of concentrations in the Common Market, Competition Series, Study No. 3 (Brussels 1966).

7. *Id.* § 51.

8. *Europemballage Corp. & Continental Can Co. v. EEC Commission*, 1973 E. Comm. Ct. J. Rep. 215, 243-45.

9. *Id.*

10. *Id.* at 244-45.

of the degree of competition in the market.<sup>11</sup> The subsequent article 86 cases have not involved mergers. However, the Commission has repeatedly stated that it will apply a similar test in merger cases, a policy that presumably will be carried forward in its application of the Regulation.<sup>12</sup>

The classic test of whether an acquiring company enjoys a dominant position *ab initio* was enunciated by the ECJ in the case of *United Brands Company v. EEC Commission*.<sup>13</sup> In *United Brands*, the ECJ defined dominance 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 its consumers."<sup>14</sup>

The *United Brands* test refers to the "relevant market." The relevant market consists of two components, the relevant product market as well as the relevant geographic market.<sup>15</sup> Prior to the Commission's decision in the case of *Pilkington/BSN-Gervais-Danone*<sup>16</sup> (*Pilkington/BSN*), it was thought that article 86 did not apply when a company, dominant in a limited geographical sphere, attempted to extend that dominance geographically. However, when the French conglomerate BSN attempted to sell its flat glass division to the United Kingdom glass manufacturer Pilkington, the Commission ruled that the prospective sale violated article 86 since it strengthened Pilkington's position in the United Kingdom and extended Pilkington's dominance into another geographic area.

*British American Tobacco Company and R.J. Reynolds Industries v. EEC Commission*<sup>17</sup> (*Philip Morris*) extended the reach of article 86. In *Philip Morris*, the cigarette manufacturer Philip Morris agreed to acquire a thirty per cent interest in its competitor, Rothmans, from its South African parent company, Rembrandt. The Commission exempted this proposed acquisition of a competitor and the ECJ upheld the Commission's decision despite a challenge by two other tobacco companies, Brit-

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11. *United Brands Co. v. EEC Commission*, 1978 E. Comm. Ct. J. Rep. 207; see also *Hoffmann-La Roche & Co. v. EEC Commission*, 1979 E. Comm. Ct. J. Rep. 461, 520.

12. See, e.g., EEC COMM'N, TENTH REPORT ON COMPETITION POLICY para. 150, at 104 (1981).

13. 1978 E. Comm. Ct. J. Rep. 207; see also *NV Nederlandsche Banden-Industrie Michelin v. EEC Commission*, 1983 E. Comm. J. Rep. 3461, 3501-03.

14. *United Brands Co.*, 1978 E. Comm. Ct. J. Rep. at 227.

15. *Id.* at 270-77.

16. *Pilkington/BSN-Gervais-Danone*, in EEC COMM'N, *supra* note 12, paras. 152-54, at 105-06.

17. *British American Tobacco Co. v. EEC Commission*, 1987 E. Comm. Ct. J. Rep. 4487.

ish American Tobacco and R.J. Reynolds. In the past, the Commission had consistently held that an abuse of a dominant position could only occur if there was a change in control within the target company. In *Philip Morris*, however, the ECJ stated in dicta that article 86 not only applied to the acquisition of both legal and de facto control, but also applied when the acquisition of a substantial stake gave the acquiring company influence over the commercial policy of the target company. The *Philip Morris* case is better known for being the first case in which the ECJ considered that article 85 in addition to article 86 might apply to the acquisition of a minority interest by a competitor if the acquiring company gains substantial influence over the target company.

Application of articles 85 and 86 to mergers and acquisitions will not automatically cease with the adoption of the Regulation. The jurisprudence of articles 85 and 86 will influence the Commission in its application of the Regulation and the ECJ will undoubtedly use such jurisprudence in conjunction with the Regulation in reviewing the Commission's future decisions. Nevertheless, the precise role of articles 85 and 86 in European mergers remains uncertain now that the Regulation has been adopted.

## B. Reasons for the Adoption of the Regulation

The Commission pressed for the adoption of the Regulation for four main reasons. First, the Commission wanted exclusive jurisdiction over the large European mergers and acquisitions, those with a "Community dimension." To have a single European market, the Commission believed that Member States should not be able individually to block significant mergers and acquisitions of European companies. Therefore, one intention of the Regulation is to provide a "one stop shop" that requires only that the Commission in Brussels be satisfied (on competition grounds) that a proposed merger or acquisition should proceed.<sup>18</sup>

The need for a prior clearance procedure provides a second reason for the adoption of the Regulation. Often, the Commission intervened on the basis of article 86 very late in the transaction. The uncertainty produced by such ex post facto intervention was unsatisfactory to the business community. The Regulation provides a simple and well-defined procedure to obtain prior clearance for large European mergers and ac-

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18. However, Member States are permitted under the Regulation to intervene on certain limited non-competition grounds and also when there exists a detrimental effect upon competition within an internal market of the given Member State, and that market represents a "distinct market." See Regulation, *supra* note 1, art. 9, at 7.

quisitions.<sup>19</sup> Third, with the adoption of the Regulation, it is understood that the Commission hopes to obtain forty new executives to handle the work, a feature of great political attraction to the Commission.

The existence of substantive defects in the pre-existing law provided the final reason for the Regulation's adoption. Article 86, unlike United States antitrust law, does not prevent monopolies when two nondominant companies combine to form a dominant enterprise. However, the Regulation is intended to prevent the monopolization process. Also, article 86 probably does not prevent a nondominant company from acquiring a dominant company. The principal test of the Regulation not only prevents the enhancement of pre-existing dominance, but prevents the creation and the strengthening of a dominant position. Therefore, the acquisition of a dominant company by a nondominant one appears to be conceptually within the scope of the Regulation.<sup>20</sup>

### III. THE REGULATION

#### A. The Scope of the Regulation

Two concepts define the scope of the Regulation: The Regulation applies to "concentrations" having a "Community dimension" (article 1).

##### 1. Community dimension

Under article 1, the Regulation only applies to mergers having a "Community dimension." Community dimension is defined in terms of sales.<sup>21</sup> The Regulation applies when three conditions are fulfilled: (1) The aggregate worldwide sales of all the companies exceeds ECU<sup>22</sup> 5,000 million; (2) the aggregate Community-wide sales of at least two of the companies exceeds ECU 250 million; (3) each of the companies cannot exceed more than two-thirds of its aggregate Community-wide sales within one and the same Member State.<sup>23</sup> These conditions will be revised in four years after the Regulation enters into force.<sup>24</sup>

Sales are calculated by adding together the sales of all goods and services within the companies' ordinary activities, deducting sales rebates and value added tax, and deducting other taxes directly related to sales in

19. *Id.* arts. 4, 6, 7, at 4-5, 6.

20. *See infra* text in Section III(A).

21. The Regulation actually refers to "turnover" which is the English accounting term employed by the EC for "sales." *See* Regulation, *supra* note 1, at 1.

22. An ECU represents the average of a basket of currencies. On Feb. 21, 1990, 1 ECU = 1.22 United States dollars.

23. *Id.* art. 1(2), at 3.

24. *Id.* art. 9(10), at 7.

the preceding financial year.<sup>25</sup> If only a portion of an enterprise is involved, even if it is not a legal entity, only that portion of the sales will be included in the calculation.<sup>26</sup> Banks and financial institutions are subject to different rules. Rather than by sales, the measure is calculated on one-tenth of their assets according to a special formula.<sup>27</sup> For insurance companies, the equivalent of sales for purposes of these calculations shall be based on the value of premiums received.<sup>28</sup>

## 2. Concentrations

The Regulation also applies to "concentrations." A concentration is deemed to occur when: (1) two or more previously independent companies merge, or (2) one or more persons, already controlling at least one company, acquire direct or indirect control of the whole or parts of one or more companies, whether by purchase of securities or assets, by contract, or by any other means.<sup>29</sup>

"Control" is defined as rights, contracts, or any other means which, separately or jointly, can exercise decisive influence on a company.<sup>30</sup> Examples of control under article 3 of the Regulation illustrate that the acquisition of a majority interest in a company is not necessary for control.<sup>31</sup>

When banks or financial institutions acquire shares in a company for the purpose of selling them, it does not constitute control of that company, provided that the acquiring institution does not exercise voting rights with a view toward determining the competitive behavior of the company.<sup>32</sup>

When the only purpose of the operation is to coordinate the competitive behavior of independent companies, it will not be considered a concentration.<sup>33</sup> However, an agreement to coordinate behavior might fall under article 85 and thus infringe EC competition law. A joint venture permanently functioning as an autonomous economic entity will be treated as a concentration unless its purpose is to coordinate the competitive behavior between the companies.<sup>34</sup>

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25. *Id.* art. 5(3)(a), at 5.

26. *Id.* art. 5(2).

27. *Id.* art. 5(3)(a).

28. *Id.* art. 5(3)(b).

29. *Id.* art. 3(1)(a), (b), at 4.

30. *Id.* art. 3(3).

31. *Id.* art. 3.

32. *Id.* art. 3(5)(a).

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

34. *Id.*

## B. The Test

Article 2 describes how the Commission will analyze a proposed merger or acquisition. The article 2(3) test (Test) states: "A concentration *which creates or strengthens a dominant position* as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."<sup>35</sup>

## C. Procedure

One of the most important features of the Regulation is its prior notification procedure. This involves completing an extensive form very similar to the United States procedure known as a "Hart-Scott-Rodino filing."<sup>36</sup> The relevant parties must notify the Commission one week after the conclusion of an agreement or after "the announcement of the public bid, or the acquisition of a controlling interest."<sup>37</sup>

The Regulation allows the Commission one month from the receipt of a complete notification to determine whether the proposed concentration has a Community dimension and whether it raises sufficiently serious competition issues to require further investigation.<sup>38</sup> If, after the one month period, the Commission decides to conduct further investigations to determine if the proposed transaction violates competition laws under article 2, such investigations may extend another four months.<sup>39</sup> Therefore, a transaction may be suspended for a maximum of five months following a complete notification before the Commission makes a final decision.

The Regulation grants the Commission the power to veto a proposed merger.<sup>40</sup> When a merger has already been implemented, the Commission may require the merged companies or assets to be separated.<sup>41</sup> The Commission may also order the cessation of joint control, or require any other action that may be appropriate in order to restore conditions of effective competition.<sup>42</sup>

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35. *Id.* art. 2(3) (emphasis added).

36. Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires pre-merger notification of certain direct and indirect mergers or acquisitions to the FTC and to the Justice Department. Pub. L. No. 94-435, 15 U.S.C.A. § 18a (West 1976)(amended).

37. Regulation, *supra* note 1, art. 4(1), at 4.

38. *Id.* arts. 6(1)(c), 10(1), at 6, 8.

39. *Id.* art. 10(3), at 8.

40. *Id.* art. 8(3), at 6.

41. *Id.* art. 8(4).

42. *Id.*



The Regulation does not give the Commission the power to impede public bids, provided that the acquirer does not exercise the voting rights attached to the securities on which he is bidding.<sup>43</sup> An acquirer may only exercise those voting rights in order to maintain the full value of those investments and only if a derogation has been granted by the Commission.<sup>44</sup>

#### D. Retention of Jurisdiction by Member States

The Regulation allows Member States to apply their own competition laws and procedures to a merger or acquisition in two types of situations.<sup>45</sup> Additionally, in a third type of situation a Member State may intervene on the basis of non-competition grounds.<sup>46</sup>

If a merger or acquisition either does not exceed the relevant sales thresholds, or is so concentrated in one Member State that it constitutes a domestic transaction rather than a transaction with a Community dimension as defined by the Regulation, then that Member State may process the merger or acquisition under its own national laws.<sup>47</sup>

Furthermore, under article 9, the so-called "German Clause," the Commission has the authority to allow a Member State to examine a transaction when the Member State has convinced the Commission that the proposed transaction will have a detrimental effect on competition within a section of the domestic market that represents a distinct market of the given Member State.<sup>48</sup> However, the Regulation also provides that the Commission may refuse to transfer the matter to the Member State in question and to continue to process such a transaction.<sup>49</sup>

Article 21(3) gives the Member States the right to take appropriate measures when necessary to protect legitimate interests not otherwise protected by the Regulation.<sup>50</sup> The legitimate interests that Member States may protect include national security, pluralism of the media, and prudential rules applying to financial institutions.<sup>51</sup> A Member State may invoke other legitimate interests, but only with the approval of the Commission.<sup>52</sup>

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43. *Id.* art. 7(3).

44. *Id.* art. 7(4).

45. *Id.* art. 9, at 7.

46. *Id.* art. 21(3), at 11.

47. *Id.* art. 9(3)(b), at 7.

48. *Id.*

49. *Id.* art. 9(3)(a).

50. *Id.* art. 21(3), at 11.

51. *Id.*

52. *Id.*

Member States invoke the principle of media pluralism to prevent undesirable entities from dominating any organ of the media. Similarly, "prudential rules applying to financial institutions" are the national rules of the Member States that prevent undesirable entities from gaining control of financial institutions.

#### IV. COMMENTARY

It is not possible to provide a complete analysis of the Regulation in this Article. Instead, a brief discussion of two of the more interesting questions raised by the Regulation follows.

##### A. How Does the Test Alter the Substantive EC Law of Merger Control?

The most engaging question raised by the Regulation is how its article 2(3) test will alter the substantive law of EC merger control.<sup>53</sup> There will be no clear answer to this question until the Commission has processed several notifications and the ECJ has reviewed some Commission decisions. The Regulation expressly gives the ECJ the right to review all Commission decisions under article 21(1).<sup>54</sup> However, an understanding of why the Commission adopted the Regulation reveals clues of how they will likely interpret it.

It is fairly certain that the requirement of an abuse of a pre-existing dominant position under article 86 has been abandoned.<sup>55</sup> The Test now includes transactions that create a dominant position.<sup>56</sup> Therefore, the Regulation applies to a situation in which two nondominant companies in the same geographic and product market combine to form a single dominant enterprise. This represents a significant change in EC competition law and brings it in line with United States antitrust law. Also the Test probably applies when a nondominant company acquires a dominant company in the same market, since the acquirer will be transformed from a non-dominant company into a dominant one.

The principal Test was more broadly stated in previous drafts of the proposed Regulation and would have given the Commission an even broader scope for blocking potentially anticompetitive mergers. For example, in the draft of November 30, 1988,<sup>57</sup> article 2 contained the lan-

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53. *See id.* art. 2(3), at 4.

54. *Id.* art. 21(1), at 11.

55. *See EEC Treaty, supra* note 2, art. 86, at 107-08.

56. Regulation, *supra* note 1, art. 2(3), at 4.

57. *Amended proposal for a Council Regulation (EEC) on the control of concentrations between undertakings*, 32 O.J. EUR. COMM. (No. C 22) 14 (1989).

guage: "Concentrations which create or strengthen a position as a result of which the maintenance or development of effective competition is impeded in the common market or in a substantial part thereof shall be declared incompatible with the common market."<sup>58</sup>

Thus, the earlier proposal did not require the creation of a dominant position. Commentators characterized this earlier test as involving the strengthening, or creation of, a strong market position as opposed to a dominant one.<sup>59</sup>

The return to the use of the term "dominant position" in article 2 of the Regulation probably indicates a desire for continuity with article 86 and merely broadens the scope of prior substantive anti-competition law rather than replaces it. Thus, although the earlier draft of the Test was vague, article 86 may now help define a "dominant position."

## B. Jurisdiction

The Regulation raises another question: how will the competition authorities of Member States react to the usurpation of their jurisdiction over mergers or acquisitions that have a Community dimension? The Regulation clearly grants the Commission exclusive jurisdiction over mergers or acquisitions having a Community dimension except in the three circumstances outlined in Section III of this Article. Article 21(2) states unequivocally: "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension."<sup>60</sup>

Generally, the Regulation applies only to competition questions and does not affect those national laws, rules, and procedures of Member States that pertain to mergers and acquisitions unrelated to competition. However, there are at least two exceptions to the general principle. First, national procedures relating to public bids will probably be amended to address the EC prior clearance procedure introduced by the Regulation. Second, as mentioned before, article 21(3) of the Regulation permits Member States to veto a proposed merger or acquisition in order to protect legitimate interests.<sup>61</sup>

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58. *Id.* art. 2(3), at 16 (emphasis added).

59. *See, e.g.*, Intervention of Mr. Phillippe Chappatte, Partner, Slaughter & May, London, at Seminar on Mergers and Acquisitions Law within the EC, London Marriott Hotel (June 26-27, 1989).

60. Regulation, *supra* note 1, art. 21(2), at 11.

61. *See id.* art. 21(3). Previous proposals for the Regulation would have permitted the Commission to allow an anticompetitive merger or acquisition on certain noncompetition grounds, for example, the creation of "super" European companies to compete more effectively with large American and Japanese companies. However, this idea was dropped, and the

Besides the stated exceptions, there are at least three situations in which the Commission's attempts to obtain exclusive jurisdiction may be challenged. These three situations test the motivation and desire of Member States to create a truly "one stop shop" administrative hurdle in the completion of a large merger or acquisition.

The first situation, arising under article 6(1)(b), is one in which the Commission performs its preliminary investigation and determines that, although a concentration may fall within the scope of the Regulation, it does not raise serious anticompetition problems.<sup>62</sup> In such a situation, the Commission will not oppose the proposed transaction and will declare it compatible with the common market.<sup>63</sup> If the Commission truly has exclusive jurisdiction under article 21(2) of the Regulation, there should be no further competition issues to consider. Unfortunately, at least one national competition authority has expressed the view that the Bundeskartellamt in Germany, the Ministre des Finances in France, and the Office of Fair Trading in the United Kingdom could intervene at this juncture and apply their own national competition rules and possibly veto the transaction. Such intervention would make a mockery of the "one stop shop" concept.

Similarly, if the Commission clears a merger or acquisition after a full three to four month investigation, as per article 8(2),<sup>64</sup> the Regulation provides that the companies involved are then free to complete the transaction.<sup>65</sup> However, even in this situation, the Office of Fair Trading in the United Kingdom expressed the view that it has the right to intervene, and possibly veto, the acquisition of a United Kingdom company on competition grounds even after the Commission has given its approval.

Finally, a Member State may veto a Commission-approved merger or acquisition on grounds other than the legitimate interests permitted under article 21(3). The final paragraph of Article 21(3) states:

Any other public interest must be communicated to the Commission

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Commission's analysis is mostly limited under the Regulation to competition considerations alone. An exception, contained in article 2, mentions as a consideration "the development of *technical and economic progress* provided that it is to consumers' advantage and does not form an obstacle to competition." *Id.* art. 2(1)(b), at 3 (emphasis added). Thus one might, for example, envisage the Commission sanctioning the merger of large European silicon chip manufacturers on less than strictly "competition" grounds if it benefits the European silicon chip industry as a whole.

62. *Id.* art. 6(1)(b), at 6.

63. *Id.*

64. Regulation, *supra* note 1, art. 8(2), at 6.

65. *Id.*

by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication.<sup>66</sup>

It is not completely clear what would happen if the Commission failed to recognize the alleged public interest of the Member State, and the Member State subsequently chose to ignore the Commission's opinion.

In summary, the success of a "one stop shop" depends on the attitude and goodwill of the relevant authorities of the Member States. Without this cooperation, the Regulation simply will become an additional obstacle to large mergers and acquisitions and will deter major restructuring among large European companies. Thus, the Regulation will hinder, rather than help, the drive toward a single European market.

### C. Problems of Interpretation of the Regulation

As with any major new piece of legislation, the Regulation contains many ambiguous clauses, which will only be clarified as the Commission processes a number of notifications and a body of ECJ case law develops. This Article merely mentions a few of the possible problem areas. However, it should be noted that the Commission is apparently drafting an implementing regulation that supplements the merger control regulation. This implementing regulation is supposed to deal with *inter alia* notifications, calculation of time limits, and hearings. Therefore, some of the ambiguities mentioned below may be clarified by the implementing regulation.

Article 5 of the Regulation contains the formulas for the calculation of sales to determine whether a proposed transaction possesses a Community dimension.<sup>67</sup> Article 5(4) provides a fairly elaborate description of the parts of a large company's empire that must be included in the calculation of sales.<sup>68</sup> Depending on whether or not they want the Commission to review the proposed transaction, some companies may employ creative accounting. For example, an acquiror may decide that its chances of acquiring a target company are increased if the Commission, rather than the relevant national authorities, reviews the transaction.

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66. Regulation, *supra* note 1, art. 21(3), at 11.

67. *Id.* art. 5, at 5-6.

68. *Id.*

During the course of the investigation, a great deal of correspondence as well as arguments over accounting principles may be expected between the Commission and the companies.

Another problem for companies is ascertaining the correct time to notify the Commission of the proposed merger or takeover. Article 4(1) states:

Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.<sup>69</sup>

While the announcement of a public bid is a definite point in time, the other events are not. For example, in a friendly deal it is often difficult to determine exactly when an agreement has been concluded. Does conclusion mean the point when an oral agreement has been reached, when the agreement has been reduced to writing, or when the transaction has been completed? Notification must occur no later than one week after the acquisition of a controlling interest, assuming that the meaning of "controlling interest" under article 3 is understood.

With legislation as complex as the Regulation, unintentional inconsistencies are inevitable. For example, article 10(1) states that the Commission's decision whether or not to proceed with a full investigation must be made within one month from the date of the receipt of a complete notification.<sup>70</sup> However, article 7, which deals with the suspension of mergers, states that a merger may take effect either before its notification, or within the first three weeks following its notification.<sup>71</sup> Therefore, if the Commission is slow to issue a decision following its preliminary investigation, a window of as much as one week exists when the companies involved may proceed with the merger or acquisition before the Commission makes a preliminary decision. Of course, the companies take the risk that the Commission will proceed with a full investigation and ultimately prohibit the merger. The parties would then be faced with the complication and expense of unwinding the entire transaction.

#### **D. The Effect of the Regulation upon United States Corporations**

The Regulation contains possible advantages as well as disadvan-

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69. *Id.* art. 4(1), at 4.

70. *Id.* art. 10(1), at 8.

71. *Id.* art. 7(1), at 6.

tages for American corporations. One possible advantage is that a large American corporation that wishes to establish itself in the EC by purchasing a large European corporation might escape the requirement of notifying the Commission if its aggregate Community-wide turnover is less than ECU 250 million.<sup>72</sup> This is likely if the corporation has not previously concentrated on the European market. Thus, large American corporations may gain a competitive advantage over their European rivals in the acquisition of a desirable European target company. Of course, this advantage may turn into a disadvantage if the American corporation must instead satisfy the national competition authority of the Member State of the target company. Member States may be more prone to veto an acquisition than the Commission due to nationalistic considerations.

Additionally, article 24 of the Regulation contains a "reciprocity clause" regarding relations with non-EC countries.<sup>73</sup> The reciprocity clause requires the Commission to negotiate with non-EC countries if there is evidence of discrimination against EC companies attempting to acquire target companies in that non-EC State.<sup>74</sup> If future negotiations occur between the EC and the United States, the politically astute United States corporation should realize that it might have greater difficulty in obtaining clearance from the Commission under the Regulation than it had before under articles 85 and 86. However, at present this is not a serious concern for American corporations, given the current liberal takeover climate in the United States.

## V. CONCLUSION

As this Article was being written, Czechoslovakia obtained its first democratically elected noncommunist president in fifty years<sup>75</sup> and the Romanian dictator Nicholae Ceausescu was overthrown.<sup>76</sup> Such events in Eastern Europe dwarfed the EC merger control regulation; nevertheless, it is a very important piece of EC legislation. Depending upon the attitude of the authorities of Member States, the Regulation will either severely hinder the creation of large pan-European companies by creating additional roadblocks, or will assist it by creating the desired "one

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72. *Id.* art. 1(2)(b), at 2.

73. *Id.* art. 24, at 12.

74. *Id.* art. 24(3).

75. *See, e.g., Czechoslovak Leader Announces Amnesty*, Chicago Trib., Jan. 2, 1990, at C1.

76. *See World Capitals Revel in Dictator's Downfall*, Washington Post, Dec. 23, 1989, at A14.

stop shop.” Hopefully, Member States will adhere to the momentous spirit of the times and facilitate the latter course.



