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THE NEW EUROPEAN COMMUNITY MERGER CONTROL REGULATION AND THE SHORT-TERM HORIZON OF UNITED STATES FIRMS

Marsha Cope Huie* and Stephen D. Hogan**

INTRODUCTION

On December 21, 1989, the European Community (EC) adopted the 1989 EC Council Regulation No. 4064 (Regulation) to provide effective control of mergers ("concentrations") at the EC level.[1] Prior to the adoption of the Regulation, such merger control had not existed. The Treaty of Rome of 1957 (Treaty),[2] which established the EC in 1958, contains no provisions specifically regulating mergers. Article 85 of the Treaty, the functional equivalent of section one of the United States Sherman Antitrust Act, prohibits agreements between "undertakings" in restraint of trade.[3] Article 86, the functional equivalent of section two of the Sherman Act, prohibits a party from abusing its dominant position.[4] The cases which discuss the application of articles 85 and 86 to merger activity have revealed gaps in the Treaty and created uncertainty about whether these articles apply to mergers.[5]

The Regulation increased the powers of the EC Commission (Commission), an institution created by the Treaty of Rome[6] that operates in conjunction with the Council,[7] the Parliament,[8] and the European

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1. *Council Regulation (EEC) No. 4064/89 of 21 December 1989*, 32 O.J. EUR. COMM. (No. L 395) 1 (1989) [hereinafter *Regulation*].
2. Treaty of Rome, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation) [hereinafter Treaty of Rome or EC Treaty].
3. *Id.* art. 85.
4. *Id.* art. 86. Article 3(f) generally proscribes any trade abuse which distorts EC competition. *Id.* art. 3(f).
5. *See infra* notes 71-80 and accompanying text (describing the Continental Can case and the Philip Morris/Rothmans case).
6. Treaty of Rome, *supra* note 2.
7. *Id.* art. 145. The Council, the EC's primary legislative body, is composed of one foreign minister from each of the 12 member states. *Id.* art. 146. If, however, the matter under consideration by the Council is agricultural policy, for example, the various ministers of agriculture will comprise the Council. *Id.* arts. 40, 43. The Council, which often works in collusion with the Commission at the expense of the Parliament, coordinates economic policy and makes political decisions. *Id.* arts. 145, 149, 152, 153,

Court of Justice.[9] The Commission has three main functions: administration;[10] legislation;[11] and supervision.[12] One of the Commission's main administrative duties is to monitor competition (antitrust) policy.[13]

155, 157, 159, 160, 162. Under the Treaty, the Council generally cannot act to implement legislation unless the Commission has first proposed the legislation. *Id.* arts. 21, 43, 44, 49, 54, 63, 69, 75, 89.

Article 87 of the Treaty directs the Council to adopt regulations (legal instruments that are both binding in their entirety and directly applicable in the member states) and directives (legal instruments binding on the member states only as to the required result) necessary for implementing articles 85 and 86. *Id.* art. 87. The Council adopted the main implementing regulation in 1962. *Council Regulation No. 17*, 204 J.O. COMM. EUR. 62 (1962).

8. Treaty of Rome, *supra* note 2, art. 137. The Parliament, principally a debating society, has enjoyed little real power and, until recently, has possessed only the right of "consultation." Treaty of Rome, Art. 137, 3 Common Mkt. Rep. (CCH) ¶ 4302 (1987). The Single European Act of 1986 has strengthened the powers of Parliament. *Id.* Now, in certain cases, such as those having to do with the free movement of goods, Parliament can insist on its right of "cooperation." *Id.* The Parliament, in such cases, can force a second reading of legislation. *Id.* ¶ 20,025.

A recent decision in the Court of Justice further strengthens the Parliament. Since the Single European Act of 1986, the Council enacted Council Regulation 3954/87 on Dec. 22, 1987, which set maximum levels of radioactivity for foodstuffs after the Chernobyl crisis. European Parliament v. EC Council, case 70188, 4 Common Mkt. Rep. (CCH) ¶ 95,500 (1990). In enacting this regulation, the Council did not consult the Parliament. *Id.* The Parliament sued the Council in the Court of Justice to annul the regulation. *Id.* The Court of Justice ruled that the case may proceed. *Id.* ¶ 95,501.

9. Treaty of Rome, *supra* note 2, art. 164. The European Court of Justice includes the new Court of First Instance which was authorized by the Single European Act of 1986. *Single European Act*, 30 O.J. EUR. COMM. (No. L 169) art. 11, at 6 (1987); *Council Decision of 24 October 1988*, 31 O.J. EUR. COMM. (No. L 319) 1 (1988). The Court of First Instance, which began operations in the fall of 1990, has jurisdiction to hear, *inter alia*, appeals from the Commission in competition law cases. 31 O.J. EUR. COMM. (No. L 319) art. 3, at 2 (1988).

10. Treaty of Rome, *supra* note 2, art. 155. The Commission ensures the proper application of the Treaty. *Id.* The Treaty gave the Commission "its own power of decision . . . in the manner provided for in this Treaty." *Id.* The Council delegates power to the Commission to implement rules that have been enacted by the Council. *Id.*

11. *Id.* art. 149. In most cases, the Commission enjoys the right of initiative, which means that the Council can only enact legislation that the Commission has first proposed. *Id.*

12. *Id.* arts. 169, 171. The Commission has a broad supervisory function. The Treaty obligates the Commission to see that "the provisions of the Treaty and of the measures taken by the institutions pursuant thereto are applied." *Id.* art. 155. These provisions impose upon the Commission the duty to ensure that the member states fulfill their Treaty obligations. *Id.* If they do not, the Commission may initiate proceedings against the defaulting member state in the European Court of Justice. *Id.* art. 169.

13. *Id.* The Commission's directorate-general for competition ("DG-IV") administers the EC's competition policy. *Id.* Article 89 of the Treaty charges the Commission with ensuring the application of articles 85 and 86, and making decisions remedying infringement of these articles. *Id.* art. 89. Article 87 confers power on the Council to make regulations or directives effectuating articles 85 and 86. *Id.* art. 87. Council Regulation 17 of 1962 (articles 3, 15, and 16) specifically grants to the Commission the power to order an undertaking to cease infringement of the Community competition

The Regulation extended the Commission's administrative function to include oversight of all proposed mergers, acquisitions, and other business combinations having a "community dimension."[14] A community dimension exists under the Regulation when the following quantitative thresholds are met: (1) the aggregate worldwide sales of all the undertakings concerned exceed five billion European currency units (ECUs);[15] and (2) the aggregate community-wide sales of at least two of the companies concerned exceed 250 million ECUs.[16] An intrastate exception applies, however, when each of the firms concerned obtains more than two-thirds of its aggregate community-wide sales within a single member state.[17] The Regulation considers a concentration which satisfies this exception to have no community dimension.

If a community dimension exists, parties to the concentration, or an acquirer seeking a controlling interest in an "undertaking" (firm), must provide pre-merger notification to the Commission.[18] Once the Com-

rules and to levy fines and/or penalties against violators. *Id. See infra* notes 42 and 49 on the Commission's powers under the Regulation.

14. *See Regulation, supra* note 1, preamble, ¶¶ 10, 11 (limiting the scope of the application of this Regulation to concentrations which have a community dimension and a specified rate of aggregate turnover).

The new merger control regulation directly empowers the Commission to police large-scale business combinations affecting the EC. *Id.* art. 8(1). It authorizes the Commission to require member states to investigate "concentrations." *Id.* art. 12(1). The Regulation delineates the investigatory powers of the Commission. *Id.* art. 13. The Regulation also imposes fines not exceeding 10% of the aggregate worldwide sales to non-conforming firms, and allows the Commission to impose periodic penalty payments for each day a firm delays after a Commission decision. *Id.* arts. 14(2), 15(1).

Parties may appeal a Commission decision to the European Court of Justice, which is responsible for ensuring that the Treaty is correctly interpreted and applied. Treaty of Rome, *supra* note 2, art. 173. Article 173 gives the Court jurisdiction to review the legality of decisions of the Council and Commission. *Id.* Article 164 requires the Court to ensure proper interpretation and application. *Id.* art. 164. *See supra* note 9 on the new Court of First Instance.

15. *Regulation, supra* note 1, art. 1(2)(a). The European Currency Unit (ECU) is the artificial currency of the EC. 2 Common Mkt. Rep. (CCH) ¶ 3603 (1986). It is a trade-weighted, adjustable pegged, exchange-rate currency used by the 12 member-nations in their trade transactions. *Id.* It is not generally used by non-EC nations. *Id.* As of Apr. 16, 1991, $1.24 would buy 1.00 ECU. Wall St. J., Apr. 17, 1991, at C12.

16. *Regulation, supra* note 1, art. 1(2)(b).

17. *Id.* This article defines the scope of the Regulation and, therefore, the scope of a community dimension. *Id.* Another provision mandates that a qualified majority of the Council review the quantitative thresholds by December 21, 1993 (thresholds subject to change). *Id.* art. 1(3). The Regulation provides different thresholds for financial institutions and insurance companies. *Id.* arts. 5(3)(a)-(b).

18. *Regulation, supra* note 1, art. 4. Because even purely domestic United States mergers might affect the Common Market, United States businesses with or without assets located inside the EC that are vulnerable to seizure by the Community, are subject to the pre-merger notification requirement of the Regulation. *Compare* Hart-Scott-Rodino Act, 15 U.S.C. § 18(a) (1988) [hereinafter Hart-Scott-Rodino Act] (requiring pre-merger notification and a 30 day waiting period). Under the Antitrust

mission finds a community dimension, it will appraise the concentration for its compatibility with the EC.[19] If the concentration creates or strengthens a dominant position resulting in a substantial diminution of competition in the EC, the Commission will declare the concentration incompatible.[20]

The Regulation offers a fascinating display of the evolution of federalism in the EC. Article 21(2) of the Regulation generally establishes exclusive Community competence on any concentration having a community dimension. The Regulation, however, lists two exceptions that allow member states to take action that is, respectively, "strictly necessary" or "appropriate." Under the distinct local market exception of article 9, even if a community dimension exists, a member state may nevertheless ask the Commission to refer a notified concentration to the

Guidelines for International Operations, the DOJ would not challenge a merger between foreign firms having all of their assets outside the United States which affects U.S. trade. The Hart-Scott-Rodino Act, however, may still require pre-merger notification to the DOJ and the Federal Trade Commission. Under Hart-Scott-Rodino, a transaction is exempted in two situations involving acquisition of American companies or American sales market share by foreign firms. First, no notice is required where the acquisition would not confer control over a United States company with annual net sales or total assets exceeding $25 million, or of any company with assets in the United States with a book value of $15 million or more. Second, the notice requirement is waived where aggregate annual net sales of the merging firms in the United States are less than $110 million and the aggregate book value of their assets in the United States is less than $110 million. The EC Regulation contains no such exemption for foreign merger activity.

The first notification to the Commission of a proposed merger came from the Renault and Volvo companies on Oct. 4, 1990. 4 Common Mkt. Rep. (CCH) ¶ 95,628 (1990). Renault proposed to purchase 25% of the shares of Volvo Car Corp. and 45% of Volvo Trucks Corp. *Id.* Volvo proposed to acquire 20% of La Régie Nationale des Usines Renault, S.A., and 45% of Renault Vehicles Industriels. *Id.* The Commission approved the merger on Nov. 9, 1990, based on compatibility with the EC. *Id.* ¶ 95,656. Regarding the joining of operations of cars, the Commission found the Regulation inapplicable; no concentration of a community dimension existed in cross-shareholdings of 25%. *Id.* Regarding the joining of operations of trucks and buses, the Commission found the Regulation applicable to the concentration of cross-shareholdings of 45% when considered with the degree of integration that already existed between Renault and Volvo in related products. *Id.* The Commission, however, found that the concentration did not create or strengthen a dominant position which would tend to impede competition in the EC. *Id.*

On Jan. 7, 1991, the Commission asserted jurisdiction for the first time over a joint venture under the Regulation. Gardner, *Brussels Applies EC Merger Rules to Joint Venture*, Financial Times (London), Jan. 8, 1991, at 3. A joint venture is a collaborative effort short of a merger that may be entered into for sound business reasons. For example, firms may wish to pool their efforts in research and development, marketing, or distribution. The Commission cleared such a "concentration" between Mitsubishi of Japan and Union Carbide USA that was designed to increase the market share of the firms. *Id.*

19. *Regulation*, *supra* note 1, art. 2(1).
20. *Id.* arts. 2(2)-(3).

appropriate national court.[21] If the Commission decides that effective competition is likely to be impeded significantly in a distinct local market, the Commission may either deal with the case itself or it may decide to relinquish its otherwise exclusive jurisdiction by referring the case to the competent national authorities for treatment under national competition law. Under the second exception, a member state may take "appropriate" measures over a concentration having a community dimension where "legitimate national interests" require national jurisdiction. Public security, plurality of the media, and prudential rules are examples of such interests.[22] Furthermore, where the concentration lacks a community dimension, a member state can ask the Commission to act under article 22 of the Regulation.[23] Smaller member states without national merger control laws are most likely to invoke this provision.[24]

The Regulation applies to two broad situations: (1) exclusively European mergers in which an EC company combines with another EC company; and, (2) proposed mergers involving non-EC companies. This article focuses on the latter rubric. This latter paradigm, in turn, has three possible situations: (1) a combination between an EC firm and a foreign firm (*e.g.*, between a French firm and a United States firm); (2) a combination between two non-EC firms having subsidiaries within the EC (*e.g.*, between two United States firms with subsidiaries in the Community); and (3) a combination between two foreign-based companies exporting to the EC but having no EC subsidiaries, (*e.g.*, between two United States firms with no EC subsidiaries).

Under the first situation, involving the merger of an EC firm and a foreign firm, the Regulation grants the Commission discretion which, although unlikely, could result in the EC's adopting a policy prohibiting foreign penetration of the domestic national market through foreign merger and acquisition activity.[25] The EC could invoke jurisdiction based on a territorial theory of jurisdiction, a generally accepted theory

21. *Id.* arts. 9(2)-(3).

22. *Id.* art. 21(3). This is in accordance with the safeguard provision of article 223 of the EC Treaty, which allows a member state to act in derogation of the Treaty where its national security is at stake. Treaty of Rome, *supra* note 2, art. 223.

23. *Regulation*, *supra* note 1, art. 22.

24. *Id.*, art. 22(3). This "Dutch" clause will apply only until the quantitative thresholds are reviewed, before the end of four years following the adoption of the Regulation. *Id.* arts. 22(6), 1(3).

25. *See id.* art. 2(1)(a) (requiring the Commission to "take into account the need to preserve and develop effective competition within the common market in view of the structure of all the markets concerned and the actual or potential competition from undertakings located either within or *without* the Community") (emphasis added).

of international law.[26] This theory grounds jurisdiction as long as the foreign firm involved is "present" within the borders of the EC.[27]

The second and third situations, involving combinations between two non-EC firms, implicate the controversial issue of extraterritoriality. United States case law recognizes that the territorial effects theory derives from, and is justified by, the objective territoriality principle that is generally accepted in public international law.[28] Under the territorial effects theory, business practices, such as price concertation, taken solely within one nation will subject the offending firm to the jurisdiction of a second nation when the second nation suffers injury from those practices. If, for example, two United States firms without subsidiaries inside the EC fix prices inside the United States but export to the EC through independent sales companies, the EC's assertion of jurisdiction over the United States firms would be based on the effects doctrine.

Academics, most particularly the British, have often criticized this expansive view of jurisdiction.[29] United States courts, however, persist

26. *See, e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (stating that all legislation is *prima facie* territorial) (Holmes, C. J., quoting *Ex parte* Blain, 12 Ch. Div. 522, 528 (1879)).

27. *See* HIGGINS, *The Legal Bases of Jurisdiction*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES 3, 5-7 (C. Olmstead ed. 1984) [hereinafter HIGGINS] (stating that territoriality is either subjective or objective). Subjective territoriality exists when a state has jurisdiction over acts originating within the territory but completed elsewhere. *Id.* at 7. Objective territoriality governs when a state has jurisdiction over acts begun elsewhere but completed within its own territory. *Id.* at 7.

28. *See* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (recognizing the effects doctrine).

29. *See* A. Ahlström Osakeyhtiö (Wood Pulp) v. Commission, 1988 E. Comm. Ct. J. Rep. 5193, 5214 [hereinafter *Wood Pulp*] (stating the United Kingdom's position, intervening in opposition to the Commission, that the EC's assertion of jurisdiction *in casu* could only be through the effects doctrine, a concept that neither the EC nor international law accepts). In the strict United Kingdom view, only the controversial territorial effects theory would ground jurisdiction over a company based in the United States without separately incorporated subsidiaries within the EC. *Id.* The United Kingdom vigorously rejects the effects doctrine. *Id.* at 5209. *See* British Nylon Spinners, Ltd. v. Imperial Chem. Indus., 2 All E.R. 780, 783 (C.A. 1962) (dictum of Sir Raymond Evershed) (noting that English courts did not recognize extra-territorial jurisdiction). *See also* A. NEALE & M. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION 186 n.21 (1988) (presenting the West German Federal Court of Justice's acceptance of the Effects Doctrine). The German Court holds German competition law applicable where the effect within the territory is "sufficient." *Id.* Neale and Stephens, however, interpret the German *sich auswirken* as adopting the principle of objective territoriality in that some business conducted must have an effect within the territory. *Id. See* Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983) (proposing diplomatic exchange over judicial process to resolve conflicting claims of authority); Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 AM. J. INT'L L. 783 (1984) (examining a way to balance the interests of the regulating state against the foreign states likely to be injured by regula-

in claiming power to act extraterritorially under the Effects Doctrine.[30] Although United States case law supports the doctrine of extraterritoriality, the EC may apply it against American interests. The Court of Justice stopped short of adopting the Effects Doctrine in a recent case.[31] Under the Regulation, however, and consistent with this recent case, the Commission could conceivably assume jurisdiction and enjoin or levy fines[32] against a merger of two American companies based entirely outside the geographic confines of the EC.[33] It is unclear whether the Court of Justice would go this far. Not only may the Commission attempt to reach beyond the EC's borders in exercising its powers, it may also attempt to restructure those operating objectives, procedures, and policies of non-EC firms which it finds objectionable, although this is unlikely.[34]

Part I of this article discusses the Regulation's technical aspects, emphasizing both the requirements which must be satisfied before the Commission can act and the Commission's inherent powers to act extraterritorially. Part II discusses merger suits brought under articles 85 and 86 of the Treaty of Rome instead of the Regulation. Finally, Part III describes the case law as applied in three distinct situations.

I. LEGISLATION

By specifically addressing mergers, EC Council Regulation No. 4064 addresses an issue which articles 85 and 86 of the Treaty of Rome had

tory measures); Rosenthal, *Jurisdictional Conflicts between Sovereign Nations*, 19 INT'L LAW. 487 (1985) (discussing the Restatement of the Foreign Relations Law of the United States' treatment of jurisdiction in conflicts between sovereign nations).

30. *See* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (acknowledging the Effects Doctrine with regard to the interpretation and rationale of antitrust legislation); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1988) (stating that "[a] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory which has or is intended to have substantial effect within its territory"). The United States Department of Justice, however, has stated its intent to retreat from aggressive assertions of jurisdiction over foreign firms. Antitrust Enforcement Guidelines for International Operations—1988, 4 Trade Reg. Rep. (CCH) ¶ 13,109 (Nov. 10, 1988).

31. *See infra* notes 81-85 and accompanying text (describing the European Court of Justice's sidestepping of the Effects Doctrine in *Wood Pulp*).

32. *Regulation*, *supra* note 1, art. 14.

33. *Compare* Boehringer Ingelheim GmbH v. CIBA Corp., 50 F.R.D. 501 (S.D.N.Y. filed Sept. 8, 1970) (involving impending merger arrangements between two Swiss companies that would lead to acquisition of American companies and perhaps diminish United States competition in the industry).

34. *See supra* note 13 and accompanying text (discussing the Commission's role in developing effective competition within the EC).

previously covered inadequately.[35] The Court of Justice applied article 86 to a merger only once, in 1973 in the Continental Can case,[36] and did not state that article 85 could be used against a merger until 1987, in the Philip Morris case.[37] According to the Commission, because the Treaty of Rome fails to cover mergers per se, it operates to that extent inconsistently with the harmonization of the EC scheduled for 1992.[38] In particular, the Commission has long argued that it could not fulfill its role of maintaining workable competition unless it gained clear powers to intervene in proposed business combinations.[39]

A. REGULATION 4064

Most proposed business combinations within the EC do not require Commission attention because they have negligible impact on overall competitive conditions.[40] Small mergers and buy-outs fall into this category. They do not have a community dimension and they pose no threat to overall competition and competitiveness. The Regulation generally regards smaller mergers and buy-outs as matters of strictly local concern.[41]

Larger combinations, however, draw the Commission's attention and encourage the Commission to use the wide discretion which the Regulation grants it to review proposed business combinations.[42] The Regu-

35. *See supra* notes 2-4 and accompanying text (describing how the Treaty of Rome fails to address concentrations).

36. Europemballage Corp. & Continental Can Co. v. Commission, [1973] Eur. Comm. Ct. J. Rep. 215.

37. British Am. Tobacco Co. v. Commission, [1987] Eur. Comm. Ct. J. Rep. 4487.

38. Tigner, *Brussels Dateline*, INT'L MGMT. 27 (1990).

39. *See* Commission, Third Report on Competition Policy (1974). The Commission used the 1992 harmonization program as a catalyst to get the Council of Ministers to agree to the new Regulation. Enactment of legislation in the EC is a tripartite process. The Commission has the right of initiative (of proposing legislation) to the Council of Ministers, which must then consult or cooperate with Parliament (called the European "Assembly" in the United Kingdom). The Single European Act of 1986 enhanced the relatively weak powers of the Parliament, instituting in some cases a new "cooperation" procedure. Now Parliament can, in some cases, force the Council to make a second reading of proposed legislation which the Council has previously rejected. *See* Single European Act of Feb. 17, 1986, O.J. EUR. COMM. (L 169) 10 (1987) art. 118A(2) (concerning adoption of directives setting minimum requirements for the safety and health of workers).

40. Osborne, *How the Common Market Will Control Large Mergers*, 24 MERGERS & ACQUISITIONS 65, 66 (1990).

41. *See supra* note 14 and accompanying text (describing a community dimension as a necessary requisite to Commission action).

42. *See supra* notes 10-13 and accompanying text (referring to the broad discretion the Commission possesses concerning the protection of competition). *But see supra* notes 14-17 and accompanying text (explaining that the Commission may act under the Regulation only where a community dimension exists). The Regulation enhanced

lation provides three triggers that allow the Commission to intervene to control potential corporate merger abuses.

1. Community Dimension Defined by Quantitative Thresholds

The first trigger operates on a strictly numerical basis. It gives the Commission the authority to review proposed combinations if quantitative thresholds defining a community dimension are met.[43] The Regulation does not apply if two-thirds or more of each party's total sales occur within the same member state.[44] For example, the Commission could review a proposal by the British firm Hanson PLC (with total sales of seven billion pounds or ten billion ECUs) to acquire the Italian firm Olivetti (with total sales of nine trillion lire or six billion ECUs). Both companies have sales of at least 250 million ECUs within the EC, and two-thirds of their aggregate Community-wide sales are not within one and the same EC country (either Great Britain or Italy).

The Commission, however, ordinarily would not have the authority under the Regulation to review a proposal by Hanson to acquire another British firm such as General Electric PLC (with total sales of six billion pounds) because no Community dimension exists. In this situation both firms have more than two-thirds of their total Community-wide sales within Great Britain. Because Hanson's proposed acquisition of General Electric would operate strictly as a local concern, only Britain's Monopolies and Mergers Commission, the competent national authority, may review it.[45]

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the powers of the Commission over mergers only to the extent to which the Commission has not lost its power to proceed under EC Tready articles 85 and 86 against small-scale mergers lacking a community dimension.

43. *See supra* notes 15-16 and accompanying text (describing the quantitative thresholds for finding a community dimension).

44. *Regulation, supra* note 1, art. 1(2). If each firm involved achieves more than two-thirds of its aggregate community-wide sales within the same member state, no community dimension exists. *Id.* art. 1(2)(b).

45. *See* Fair Trading Act, 1973, 21 and 22 Eliz. 2, ch. 41, § 64 (empowering the United Kingdom's Office of Fair Trade to investigate mergers). *See also* R. MERKIN & K. WILLIAMS, COMPETITION LAW: ANTITRUST POLICY IN THE U.K. AND THE EEC 244 (1984) (explaining that the secretary of state for Trade and Industry may refer certain, usually large-scale, mergers to the Monopolies and Mergers Commission). The United Kingdom also has a City of London Takeover Code regulating tender offers. *Id.* at n.21. One exception to the Commission's lack of jurisdiction exists under article 22(3). Ordinarily in this instance, under article 1(2), national law applies. Despite the lack of a community dimension, however, a member state may request the Commission to intervene if the concentration creates or strengthens a dominant position that would significantly impede competition within the concerned member state. *Regulation, supra* note 1, art. 22(3). Also, member states may act against mergers where a community dimension exists if a local market is likely to be affected significantly.

2. The Commission's Consideration of Important Factors in Appraising a Concentration

Once a Community dimension exists, the Commission must appraise the concentration to determine whether it is compatible with the Common Market. The Regulation allows the Commission to move beyond mere consideration of the participants' size. It empowers the Commission to consider other important factors. These factors include the effect of a proposed combination on access to markets, suppliers and consumers, market supply and demand, and any potential distortion of competition.[46] Under this broad provision, the Commission must examine virtually all elements important to EC antitrust concerns in its analysis.[47]

3. The "Wild Card": Regulation Article 2(1)(a)

The Regulation is ambiguous about whether and to what extent the Commission will consider factors other than traditional substantive merger criteria (such as definition of relevant markets). The Regulation requires the Commission, when reviewing proposed business combinations, to consider broadly not only the structure of all markets concerned but also "the actual or potential competition from undertakings located either within or without the Community."[48] This is the so-called "wild card." It is designed to increase the competitiveness of EC firms in both the Common Market and the international market. The Commission will undoubtedly consider the effect of foreign competition upon ease of entry into the relevant market inside the EC in determining whether a dominant position exists. Whether the Commission will play this card to erect barriers against the entry of foreign competition

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46. *Id.* art. 2(1).
47. *Id.*

> In making this appraisal the Commission shall take into account: . . . (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

Id. art. 2(1)(b).

48. *Id.* art. 2(1)(2).

> In making this appraisal the Commission shall take into account: (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community . . . .

Id. art. 2(1)(a).

into the EC by merger, however, is unclear. Under this wild card provision, the Commission has broad powers to consider competition from firms located outside the Community. The Commission might choose to review, and possibly forbid, a merger between an EC firm and a non-EC firm having a community dimension (or, even more unlikely, between two non-EC firms) solely on the basis of the foreign nationality of the non-EC firm.[49]

The expansive discretion that article 2(1)(a) of the Regulation gives to the Commission raises some concern, however slight, among non-EC-based firms.[50] A loose reading of the wild card provision would allow the Commission to discriminate against non-EC firms.[51] Under this provision, the Commission might take the position that effective competition, stated as an EC goal, means *European* competition only.[52] The Commission could conceivably decrease American or other foreign penetration into the EC and, thus, increase the competitiveness of European industry.[53] The Regulation would bolster the Commission's protectionist position in two ways. First, the Regulation's preamble aims to strengthen the EC's "economic and social cohesion."[54] Second, the wild

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49. Osborne, *supra* note 40, at 71. To the annoyance of business, the Regulation does not offer the convenience of "one-stop shopping," except in the case of a merger with a community dimension. *Id.* In other cases, acquiring companies seeking targets will still have to knock at the doors of more than one regulatory body, and potentially as many as 13. *Id. See* Allen & Overy et al., *Merger Control in the EEC: A Survey of European Competition Laws* at 3 (Kluwer, 1988) (Prepared by the Brussels Offices of Advokaterne Bredgade) (discussing the antitrust laws of the 12 member states). Individuals retain their right to bring actions under articles 85 and 86 of the Treaty when the Regulation does not apply. A target company, for example, may sue in a national court to prevent a hostile takeover under articles 85 and 86 even if no community dimension exists. The Regulation repeals Regulation 17 insofar as Regulation 17 is applied to concentrations having a community dimension. Regulation 17 is the main implementing instrument granting the Commission the authority to enforce Treaty articles 85 and 86. Removing Regulation 17 from the merger control Regulation prevents the Commission from applying articles 85 and 86 to large-scale mergers meeting the Regulation's quantitative thresholds. Thus the Commission cannot proceed under articles 85 and 86 against concentrations with a community dimension. And according to the Preamble of the Regulation, Recital 7, the Commission will not proceed under articles 85 and 86 where it cannot proceed under the Regulation.

50. *See Regulation, supra* note 1, preamble (establishing the EC's broad control objectives).

51. *Id.* art. 2(1).

52. *Id.*

53. *Id.*

54. *Id.* Preamble at ¶ 13. The Regulation provides:

> Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to preserve and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Arti-

card provision mandates the Commission's consideration, *inter alia*, of the effect on competition within the EC from undertakings located both "within or without the Community."[55]

If the EC should ever choose to use article 2(1)(a) to review potential combinations on the basis of foreign nationality, its actions could have significant political and economic effects upon the EC and its major trading partners.[56] For example, the Commission could employ the Regulation to force United States firms to plan their business combinations in accordance with EC goals instead of American short-term goals.[57] In many respects, EC commercial policy favors a long-term horizon for European corporations. EC citizens and policymakers encourage corporate decision-makers to downplay opportunities for quick,

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cle 23 of the Treaty, including that of *strengthening the Community's economic and social cohesion.*

Id. (emphasis added).

55. *See id.* art. 2 (discussing the appraisal of concentrations). Article 2 of the Regulation states:

> Article 2. Appraisal of concentrations.
>
> 1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.
>
> In making this appraisal, 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 all the markets 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."

Id. art. 2. (emphasis added).

56. *See Regulation, supra* note 1, art. 24 (discussing the EC's relationship with non-member countries). Article 24 supports two opposing positions. The first position is that the Commission has no intention of discriminating against non-member country firms unless and until the foreign countries themselves discriminate against EC firms in merger and acquisition activity. *Id.* The second position is that the Commission intends to evince sensitivity to the national origins of firms proposing to merge. *Id.* Only the Commission, subject to review by the European Court, knows at this juncture what the "wild card" means, if anything at all.

57. *See* Enderwick, *Multinational Corporate Restructuring and International Competitiveness*, 32 CAL. MGMT. REV. 44 (1989) (arguing that not only has the American horizon been short-sighted, *it also may have been misdirected*). Mr. Enderwick asserts with empirical support that United States firms have restructured themselves in order to control costs in their home markets and to overcome locational disadvantages. *Id.* at 44. In contrast, Japanese firms and, by implication, European firms, have restructured themselves for the purpose of long-term investment and technological change. *Id.* at 50. In the long term, the European and Japanese emphasis is probably superior to the U.S. emphasis on international competitiveness. *Id.* at 57.

and perhaps shallow, success and to concentrate instead on patiently building strong companies for the decades ahead.[58] This long-term approach would facilitate a smooth transition to the EC's goal of economic harmonization in 1992 and beyond.

In contrast to the EC's long-term perspective, many American corporate decision-makers favor a more opportunistic, short-term approach to their business decisions.[59] To the extent that it exists, this myopic American perspective may have emerged from such real threats as hostile takeovers, greenmail, and quarter-to-quarter performance pressures from large institutional investors, as well as misplaced risk-taking and executive greed.[60]

Although no empirical evidence indicates that the short-term view yields less satisfying economic results, the shorter perspective of many American managers may invite confrontation with the Commission and the EC.[61] Although the EC has not attempted to discriminate against American firms, and it is unlikely that it will, it might attempt to force them to modify their short-term view in favor of the longer-term European model.

The EC has internal mechanisms by which it may change American perspectives. The Commission may forbid or indefinitely delay business combinations involving American and EC companies.[62] In addition, it might attempt to prohibit mergers of non-EC firms whose expanded market power would threaten to distort European competition.[63] This alternative, however, is politically risky. Furthermore, the Commission

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58. *See* Narayanan, *Managerial Incentives for Short-Term Results*, 40 J. OF FIN. 1469 (1985) (warning of the dangerous practice of short-term business decision-making).

59. *Id.*

60. *See generally* Coffee, *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1 (providing theoretical background to corporate takeovers); Kosnik, *Greenmail: A Study of Board Performance in Corporate Governance*, 32 ADMIN. SCI. Q. 163 (1987) (comparing 53 companies that paid greenmail with 57 companies that resisted greenmail); Briloff, *Cannibalizing the Transcendent Margin: Reflections on Conglomeration, LBOs, Recapitalizations and Other Manifestations of Corporate Mania*, 30 FIN. ANALYSTS J. 74 (1988) (calling for more stringent accounting and disclosure standards in the corporate arena); Narayanan, *supra* note 58, at 1469 (demonstrating managerial incentives for avoiding long-term goals); Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197 (1986) (arguing that acquiring firms pay too much for targeted firms).

61. *See* Narayanan, *supra* note 58, at 1469 (providing reasons why firms should avoid short-term decision-making).

62. *See Regulation*, *supra* note 1, art. 2 (asserting the need to preserve effective competition through EC market control).

63. In a related matter, under a proposal sponsored by Luxembourg, the Community could impose penalties on member countries for having unsound economic policies. *EC Gets Tough on Economies*, Wall St. J., Feb. 6, 1991, at A14.

could forbid newly-combined foreign companies from doing business within the EC.

If the Commission rigorously attempts to reduce the influence of non-EC companies, the EC's major trading partners could opt to retaliate.[64] A full series of reprisals could quickly spin out of control, and could possibly lead to an EC-United States trade war. This would jeopardize the open trade policy that both entities have developed in the post-war years.

B. THE COMMISSION'S EXTRATERRITORIAL POWERS

The Commission also has the authority to impose extraterritorial sanctions upon companies that violate the tenets of EC antitrust law using either of two theories. First, the Commission could apply a single economic unit theory in order to justify sanctions. Under this theory, the wrongdoings of the parent and of the subsidiary companies are indistinguishable and indivisible.[65] This theory allows the Commission to assert unitary jurisdiction over the various members of a multicorporate enterprise. In attaining jurisdiction over one member of the corporate group, the Commission could gain jurisdiction over the entire entity.[66] Second, the Commission could impose sanctions under the more traditional *respondeat superior* theory. This theory holds a parent company liable for the violations of its subsidiaries. Whether or not the Commission can hold a European subsidiary liable for the foreign parent's antitrust violations remains unclear.

If the Commission assumes jurisdiction over a merger between two non-EC-based companies, the enforcement of any Commission order may prove formidable, especially where neither company has a subsidi-

64. *See, e.g.*, B. HAWK, UNITED STATES, COMMON MARKET & INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 950 (2d ed. 1986 and Supp. 1990) (noting the Commission's control over mergers and acquisitions).

65. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). The Supreme Court held that a parent and its wholly-owned subsidiary compose a single enterprise in the context of the Sherman Act. *Id.* at 771. Because the Sherman Act requires a contract, combination, or conspiracy in restraint of trade, a parent and its wholly-owned subsidiary cannot violate it. 15 U.S.C. § 1 (1990). Although the Court did not address the jurisdictional issue, *Copperweld*, taken to its logical conclusion, compels a unitary view of jurisdiction. *Copperweld*, 467 U.S. at 771. In the EC, it is unclear what position the European Court of Justice will take. *See* Bodson v. Pompes Funèbres, [1988] E. Comm. Ct. J. Rep. 2479, 2513-18, 4 Common Mkt. L.R. 984 (1989) (rejecting the enterprise entity theory insofar as it negates the possibility of intra-enterprise conspiracy under article 86).

66. *See* Huie, *Book Review*, 12 FORDHAM INT'L J. 589, 597 (1989) (discussing *Copperweld*'s unitary view of jurisdiction).

ary inside the EC.[67] The situation appears slightly less problematic where one or both of the foreign firms have a subsidiary inside the EC.[68] For example, if the Commission ordered divestiture or attempted to levy fines and penalties against a foreign firm, a full-fledged jurisdictional battle between nations might erupt. If notions of comity between the two states failed to calm the turbulent waters, the Commission alternatively could seek a consensual arrangement in which the foreign firms agreed to cease all practices that have deleterious effects upon competitors within the EC.[69]

II. ASSERTING EXTRATERRITORIAL JURISDICTION

An examination of the case law on merger and acquisition activity in the EC prior to the 1990 Merger Control Regulation is beyond the scope of this article.[70] Instead, this article will assess the Commission's and the Court's positions on asserting extraterritorial jurisdiction over merger activity. The focus will be on three distinct situations: (1) An American firm acquiring an EC firm; (2) mergers between two non-EC based firms having subsidiaries within the EC; and (3) non-EC-based firms without EC subsidiaries.

A. SITUATION ONE: AN AMERICAN FIRM ACQUIRES AN EC FIRM

In *Europemballage Corp. & Continental Can Co., v. EEC Comm'n (Continental Can)*,[71] the Commission and the Court, on appeal from the Commission's decision, examined the strengthening of Continental Can's dominant position by an acquisition of a potential competitor. This case stands for the proposition that EC Treaty article 86 applies to mergers. The Court, however, quashed the Commission's finding of a violation of article 86 on the facts, because it disagreed with the Commission's definition of the revelant product market.

In *Continental Can*, an American company manufacturing metal containers (Continental Can) increased its shareholdings in TDV, a

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67. *Id.* at 595 (discussing United States courts' assertions of jurisdiction over foreign activity, and the difficulties of enforcing judgments rendered extraterritorially).

68. *Id.* (arguing that the objective territorial principal would govern the situation where one or both EC firms have a subsidiary inside the EC).

69. *Regulation, supra* note 1.

70. *See* B. HAWK, *supra* note 64, at 950 (discussing the application of articles 85 & 86 to mergers and acquisitions).

71. Europemballage Corp. & Continental Can Co., v. EEC Comm'n, [1973] E. Comm. Ct. J. Rep. 215, 1973 Common Mkt. L.R. 199 [hereinafter *Continental Can*]. This remains the only formal decision in which the Commission has proscribed a merger under article 86. For the Commission's decision, see *Continental Can*, Case 21/72, 1972 Common Mkt. L.R. D11 (1973).

similar producer in the Netherlands, from ten percent to ninety percent. TDV was the main Benelux manufacturer of metal containers for tinned fish and meat. Before acquiring a ninety percent stake in TDV (Netherlands), Continental Can already had a strong position in Germany through its eighty-five percent-owned subsidiary SLW (Germany). To accomplish the acquisition of TDV, Continental had created another corporation called Europemballage (European Packaging) in Delaware. Continental Can sponsored Europemballage's tender offer to the shareholders of TDV, a company operating in the Netherlands.

The Commission maintained that Continental Can, through its German subsidiary SLW, already owned a dominant position because it controlled between eighty and ninety percent of the German market in tin cans for fish, seventy percent of the German market in tin cans for meat, and between fifty and fifty-five percent of the German market for metal closures other than crown corks. The Commission, however, failed adequately to consider the availability of substitutes. The Commission held that Continental Can already held a dominant position and had abused its dominant position, in violation of article 86, when it acquired TDV (Netherlands). Before the aquisition, TDV (Netherlands) and SLW (Germany) had been capable of competing. Although they were not actually in competition, the Commission decided that the acquisition stifled effective competition in the Germany-Benelux area.[72] The Court disagreed.

The Commission stated that it could apply article 86 to an acquisition that strengthened a dominant position. The problem with applying article 86 to mergers is that article 86 is silent on the *creation* of a dominant position. It prohibits the abuse of a dominant position. Soon after the Court's decision reversing the Commission on the facts, the Commission proposed a merger control regulation for the first time.

Additionally, *Continental Can* poses a jurisdictional problem. Continental Can was not domiciled in and did not carry on any business activity inside the EC. Continental Can argued that as a result of its not having a registered office within the EC, the Commission lacked jurisdiction to enforce article 86.[73] Continental Can claimed that because its subsidiary Europemballage constituted the acting legal person, the Commission could not ignore Europemballage's separate corporate status and hold Continental Can liable for the behavior of its

72. *Continental Can*, 1973 E. COMM CT.J.REP. at 219. The Commission calculated that the enterprise had market shares of 55% to 90% in the various relevant markets before the contested acquisition.
73. *Id.* at 222.

subsidiary.[74] It further argued that to do so would jeopardize the autonomy of a separate legal person. Continental Can stated that SLW (Germany), not Europemballage, held the dominant position;[75] thus, Europemballage could not have violated article 86. The Court, however, rejected this argument.[76]

The issue of extraterritorial assertion of jurisdiction under the territorial Effects doctrine did not arise in the Commission's view, nor in that of the Court, because the parent was brought within the EC on one of two theories: an ascription of liability theory, through the behavior of its subsidiary; or through an SEU theory that views the offending multicorporate actors as a single enterprise. *Continental Can* leaves unanswered the question of whether article 86 applies to acquisitions leading to market shares below the percentages in the case. *Continental Can* presents facts that occur more commonly than Situation Three, discussed *infra*, because a non-EC parent with enough market share to trigger article 86 is more likely to have an EC-based subsidiary.

B. Situation Two: Merger Between Two Non-EC-Based Firms Having Subsidiaries Within the EC

Philip Morris/Rothmans[77] presented the Commission and Court with a concentration between two foreign-based firms that had subsidiaries within the EC. Philip Morris, a United States company, sought to merge with Rembrandt, a South African company. Each firm was registered and headquartered outside the EC. Philip Morris argued that EC Treaty article 86 could not apply to permanent structural changes in firms.

Philip Morris sought to acquire a minority shareholding position which would allow it, as the acquirer, to exert influence over the market behavior of the target firm. That is to say, there were agreements between competitors, Philip Morris and the Rembrandt Group, that granted Philip Morris a substantial interest in its competitor. These agreements would allow Philip Morris to gain control of Rothmans International, a company that Rembrandt solely owned, should

74. *Id.* at 223.
75. *Id.*
76. *Id.* at 242.
77. British Am. Tobacco Co. & RJ Reynolds Indus., Inc. v. Commission of the European Communities (Philip Morris Inc. & Rembrandt Group Ltd. Intervening), 1987 E. Comm. Ct. J. Rep. 4487 [hereinafter *British American Tobacco (Philip Morris)*]. Although the Commission cites this case as applying article 85 to mergers, the ECJ further limited the holding. *Id.* at 4509. This case, however, allowed article 85 to apply to mergers. *Id.* at 4509-10.

Rothmans Tobacco Holdings decide to sell its interest in Rothmans International, and eventually to attain a position of parity with the Rembrandt Group.[78]

Three competing cigarette manufacturers, including R.J. Reynolds, lodged complaints with the Commission concerning this arrangement. These manufacturers alleged that Philip Morris, as a major competitor of Rothmans, would exert undue influence over the operations of Rothmans, thus distorting competition within the EC. The Commission issued a statement of objection, finding that one company's acquisition of a substantial interest in a major competitor constituted a restriction on competition under articles 85 and 86.

After the Commission's objection, the companies concerned rewrote the agreement, allowing Philip Morris to purchase only 24.9% of the voting shares of Rothmans International. Despite the complaints of individual competitors, the Commission found that the agreement as rewritten did not violate the Treaty articles. On appeal, the European Court of Justice, despite the opinion of Advocate General Mancini, rejected the application of the competitor plaintiffs, but stated that article 85 applied to the acquisition of a minority share in a target company under certain conditions. Although article 85 could apply to merger activity, it did not apply in this case because Philip Morris had not intended to influence commercial behavior and, at that time, competition did not appear to have been restricted.[79] The Court set out specific criteria for acquisitions and agreements that would restrict competition in violation of article 85.[80] Undoubtedly, the Commission's continued use of article 85 as a tool for challenging mergers, coupled with the Court's decision of November 17, 1987, in *Philip Morris* that stands for the proposition that article 85 applies to certain mergers, provoked the Council to enact the new merger control Regulation.

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78. *Id.* at 4492-93. Rembrandt, the target company, solely owned Rothmans Tobacco Holdings, a tobacco company having a majority share in Rothmans International. Rothmans International was a competitor of Philip Morris. Philip Morris made an agreement with Rembrandt Group, Ltd., by which Rembrandt would transfer 50% of the shares of Rothmans Tobacco Holdings to Philip Morris. This arrangement between Philip Morris and Rembrandt would transfer an interest to Philip Morris of Rothmans International, one of Philip Morris' principal competitors.

79. *British American Tobacco (Philip Morris)*, 1987 E. COMM. CT. J. REP. at 4524.

80. *Id.* at 4503-04. The *Philip Morris* case stands for the proposition that article 85 might apply to coordination of behavior by independent companies. *Id.* The Court's decision leaves unanswered more questions than answered about the applicability of article 85 to merger activity. *Id.* For example, the holding does not cover the applicability of article 85 to a single firm's majority acquisition, nor does it discuss article 85's applicability to an outright merger. *See* B. HAWK, *supra* note 64, at 952.

C. Situation Three: Merger of Non-EC Firms Without EC Subsidiaries

1. *The EC's Application of the Extraterritorial Effects Doctrine*

It is unclear whether the Commission will act under the merger control Regulation against a concentration between foreign firms possessing no EC branches or subsidiaries even where the concentration produces harmful effects within the Common Market because the firms export to the EC. If the Commission proceeds against these foreign firms, it must do so extraterritorially.

In the recent *Wood Pulp*[81] case, the Commission applied the extraterritorial effects doctrine in order to assert jurisdiction under article 85 over foreign agreements to set prices taken abroad by firms having no EC corporate presence, but exporting to the EC through independent distributors. The Court found that the Commission could assert jurisdiction over the foreign firms that were engaging in the price fixing only if the activity reprehended under article 85 was "implemented" within the EC. In *Wood Pulp*, the effects felt in the EC market were insufficient to ground jurisdiction, but the Court found the requisite "implementation" within the EC. The *Wood Pulp* standard makes it unclear whether the Commission and the Court would find an "implementation" within the EC when two non-EC firms without EC subsidiaries merge. It is likely that the Court would not consider such foreign merger activity to be implemented within the EC. Even if the Court extended *Wood Pulp*'s holding to embrace openly the territorial effects theory of jurisdiction, the Commission's assertion of jurisdiction would raise serious questions of international comity.[82] Moreover, the Commission or Court of Justice would have difficulty enforcing any judgment against the United States firms that have assets located outside the EC.

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81. *Wood Pulp*, 1988 E. Comm. Ct. J. Rep. at 5215.

82. *See* Biweekly Summary No. 674, Common Mkt. Rep. (CCH) ¶ 6 (1991). The 1992 program further harmonizes the internal EC market. After the consolidation of the EC position, the world's three largest trading blocs will be the EC, the United States, and the Pacific Rim countries. Jurisdictional clashes over the application of each area's different competition laws are inevitable. In recognition of the need to coordinate the application of their competition laws, the vice-president of the Commission responsible for competition policy, Sir Leon Brittan, met on January 15, 1991, with United States Attorney General Richard Thornburgh. They agreed that the EC, through the Commission, and the United States, through the Federal Trade Commission, would seek to establish a legal framework designed to achieve coordination of antitrust laws and to avoid conflicts from their application.

Wood Pulp's extension to mergers between two foreign firms having no EC subsidiaries but selling to the EC seems highly unlikely. Therefore, it is unlikely that the Commission will apply the Regulation to such concentrations. To act against these foreign firms, the Commission would need to apply the controversial territorial effects theory of jurisdiction.

In the Eleventh Report on Competition Policy, prior to *Wood Pulp*, the Commission indicated its intention to adopt the territorial effects doctrine. It argued that the EC competition laws clearly applied to undertakings situated in foreign states "where their conduct has an appreciable impact within the EC."[83] If a merger occurring outside the Community distorts or impedes competition within the Community, the requisite for the territorial effects is met.

The Regulation seems to apply to large-scale combinations between two United States firms that have no EC assets but export goods to the EC. The Regulation's definition of a Community dimension focuses on the aggregate worldwide sales of all the firms involved, not on whether the assets are located inside the Community.[84] The Regulation catches mergers of foreign firms, each of whose sales in the EC exceed 250 million ECUs, and where the aggregate worldwide sales exceed $5 billion ECUs unless each firm achieves more than two-thirds of its aggregate Community sales within a single member state.[85] Foreign companies involved in a proposed concentration with a Community dimension should notify the Commission. Although no language in the Regulation exempts this concentration from coverage, it is unclear under the controversial *Wood Pulp* decision whether the Commission's scope of extraterritorial jurisdiction extends to this paradigm.

CONCLUSION

The new merger control Regulation grants the Commission the discretion to attempt to exert influence upon the behavior of foreign firms. The Regulation also provides the opportunity for the Commission possibly to discriminate against non-EC firms, such as large multinational corporations headquartered in the United States whose mergers and acquisitions have effects on trade in the Common Market. If the Commission were to impose Europe's long-term business perspective on American firms, it essentially would erect an invisible wall around EC commerce. Resorting to such isolationism and protectionist measures in

83. Commission, Eleventh Report on Competition Policy (1982).
84. *Regulation*, *supra* note 1, art. 1(2).
85. *Id.*

an era of *perestroika*, free trade, and economic harmonization would exact a high price from the EC for having enacted regulations which encourage the United States to comply with long-term EC goals.[86] The mere suggestion of Commission discrimination and the specter of the concomitant foreclosure from Europe's multi-billion dollar markets, may induce United States managers and stockholders to retreat from their admiration of short-term as opposed to long-term goals. Furthermore, the Regulation raises questions of international comity because the Commission may apply it extraterritorially to firms headquartered outside, but having a presence inside, the EC.

An admittedly idealistic option for reconciling national differences and clashes of conflicting and overlapping jurisdiction is a joint adoption of the same set of substantive competition laws. This would immeasurably reduce the tension between the United States, the EC, and other trading partners. In addition, this would virtually eliminate the use of the territorial effects doctrine of jurisdiction. If, *mirabile dictu*, the same substantive antitrust laws were adopted, it would still be necessary for national representatives to meet periodically to resolve conflicting interpretations of the law. Cause for optimism exists in the wake of the January 15, 1991, agreement between the vice-president of the EC Commission responsible for competition policy and the United States attorney general to attempt to reconcile conflicting antitrust policies. The intent is to establish a legal framework for cooperation and coordination of antitrust policy of the EC and the United States.

Another cause for optimism is the Commission's clearance of a proposed acquisition of National Cash Register Company by the American Telephone & Telegraph Company (AT&T), announced January 21, 1991. Both companies are domiciled in the United States but have considerable presence in the EC. The Commission found that the concentration would not create or strengthen a dominant position in the relevant EC market. Therefore, the Commission found the acquisition

86. *See* Wall St. J., Nov. 7, 1990, at A11 (discussing the EC's reduction of agricultural trade barriers). In the current Uruguay Round of GATT talks, the United States and the EC are apparently at loggerheads over agricultural subsidies. *Id.* The United States wants to abolish subsidies, while the EC, with its politically popular Common Agricultural Policy, seeks to continue subsidies. *Id.* In an obvious attempt to intimidate, the EC (France and Germany in particular) has announced that it will soon forbid importation of American beef products, claiming that beef from hormone-fed cattle represents a health hazard to European consumers. *Id.* The United States has not yet announced if it plans to retaliate. *Id.*; *see also* Implementation of Common Agricultural Policy, Common Mkt. Rep. (CCH) ¶ 425 (1973) (detailing the EC's cooperative agricultural policy).

compatible with the Common Market according to the terms of the Regulation.[87]

Until national differences are reconciled, the Commission should carefully apply the "wild card" provision to monitor competition between EC and non-EC firms. The new Regulation has the appearance of offering a potential morass of protectionism which, once entered, could cause significant economic and political discord for years to come. Now, in an increasingly global market, is hardly the time for rash action.

87. Common Mkt. Rep. (CCH) ¶ 95,719. AT&T is the world's leading telecommunications company. NCR, the world's 12th largest information service company, had resisted AT&T's proposed takeover. *Id.* NCR manufactures hardware in the EC, and AT&T has wide-ranging activities inside the Community. *Id.* AT&T, for example, licenses UNIX, a widely used software package. Although the Commission will not oppose the acquisition, it is concerned with the linking of AT&T's telecommunications and computer networking with NCR's workstations operations. Thus, the Commission will continue to watch to ensure that the UNIX software package is readily available to competitors of AT&T and NCR. *Id.* The Commission's announcement pays no heed to the nationality of the companies, but focuses on competition concerns.