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CRITICAL EVALUATION OF THE IMPACTS OF ECONOMIC INTEGRATION ON THE ACTIVITIES OF MULTINATIONAL ENTERPRISES

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INTRODUCTION

After the World War II Europe's economic and political collapse ushered the necessity to reorder Europe along more radical lines. The most devastated European countries decided to pool their national powers and policies to form an integration with the purposes of establishing a better and freer place to live. Therefore, post-1945 era witnessed the establishment of many international organisations in Europe. The major group of European organisations includes the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community which would later give birth to the European Community.

Since the establishment of the European Communities in 1957 the basic idea has been to achieve economic integration through a free trade area that would later lead to a political and social integration in restoring and strengthening peace in Europe. This idea was enhanced by the Single European Act which brought ultimate objectives in the completion of the internal (or single) market by the end of 1992. In fact, all of these efforts are to maintain higher living standards with full employment in an ever-expanding economy for the benefit of 340 million people.

Therefore, it is necessary to eliminate all obstacles to trade by guaranteeing free movement of goods, people, services and capital. These fundamental freedoms can function effectively only under free competition conditions. The significance of competition was emphasized firstly in the establishing treaty of the European Economic Community, and lastly in the Maastricht Treaty in 1992. Through all these years the idea of economic integration is kept along the idea of non-distorted and non-restricted competition within the Community borders. Moreover, this practice is supported by the common Competition Policy whose implementation is conducted by the Community institutions on behalf of the member states.

Competition Policy of the European Community appears necessarily to guarantee free trade in an internal market and to control concentrations of economic power through mergers, acquisitions and/or alliances. In this context, business has an important role to ensure the removal of all kinds of barriers which impede freedom of factor movements. In order to serve to this prospective market enterprises with EC or non-EC origins are facing structural changes in their policies and internal corporate structures. This is especially valid for multinational enterprises which constitute a crucial factor in this process

due to being main instruments of welfare maximisation in the world economy.

This study is concerned with the implications originating from the Community's Competition Policy over multinational firms. In this regard, it is aimed to deal with the relationship between the Competition Policy and multinational enterprises in both economic and legal contexts.

The creation of a large single market makes possible to attain economies of scale by lowering the costs per unit if production is high. Multinational enterprises with their policies, advanced managerial skills and technology are designed to operate in a large single market. In this process, their operations promote economic and industrial integration primarily. Therefore, an analysis of the bilateral manipulation between the Competition Policy and multinational enterprises can demonstrate us how well this Policy contributes to the realisation of economic integration, and how different circumstances affect this influence. Thus, first of all, the paper concentrates on general features of Competition Policy within the framework of the Treaty of Rome - leaving aside state aid and dumping issues which seem irrelevant for the objectives of this paper. After

an attempt to give characteristics of multinational enterprises with an emphasis on ownership and control structures the focus shifts to examine the Community's position towards these enterprises. Lastly, it is intended to deal with changing conditions for the accomplishment of an economic union. As a result, effects of economic integration process are discussed from the perspective of multinational enterprises' strategies.

It appears that the subject requires a definitional approach supported by case references. Nevertheless, it is aimed to force this limited scope, and to be critical to certain extent.

1. COMPETITION POLICY IN GENERAL

1.1 The Community Context

Since the idea of single market is followed for the promotion of benefits accruing to consumers and industries within the European market, it is necessary to eliminate all kind of barriers which hinder the trade between the member states. In this context, although these barriers have a broad spectrum from customs tariffs, different technical standards to environmental regulations, we are going to focus on obstacles, which are fostered by enterprises towards other enterprises through restrictive practices, agreements, or cartels, due to our concern about the relationship between the EC and multinational enterprises. These obstacles will be examined within the legal framework of the Treaty of Rome, i.e. Articles 85 and 86. However, it is not possible to draw a comprehensive line only with these provisions on the basis of their shortcomings in certain matters like enforcement and merger control. As the Commission supports this point, it issues various regulations, decisions and notices to complement the relevant articles in the Treaty of Rome. However, the two of them, the Regulation 17 which gives powers to the Commission for investigation and enforcement, and the Regulation 4064/89 which fills the gap for control of concentrations within the

common market will be dealt here. Hence, beside Art. 85 and 86 these two regulations will be considered in order to complete the framework set up by the Community for private enterprises.

1.2 Article 85

In order to increase their market shares and profits enterprises may engage in certain activities to restrict, distort or prevent competition in the common market. One of the most common ways to restrict the degree of competition is to engage in agreements, decisions or concerted practices among enterprises or groups of enterprises. These kind of restrictions are presented in Article 85(1) of the Treaty of Rome, whereas Art. 85(2) declares these practices are null and void; and, correspondingly Art. 85(3) defines certain agreements which can be exempted if they satisfy certain criteria.

As it is stated in Art. 85, business practices, which are not compatible with the principles and objectives of the common market, include all kinds of agreements between undertakings, decisions by associations, and concerted practices which aim to prevent or affect competition in trade between member states.

The prohibition includes directly or indirectly to fix prices, to limit or control production, markets, technical development, or investments, to apply dissimilar conditions to equivalent transactions, and to make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the essence of the contract. Therefore, the Commission has to deal with various restrictive business practices which may affect trade in the common market. However, to understand whether Art. 85 is applicable or not, it is required to evaluate problems both from economic and legal perspectives beside the given facts. (1) In this scope, it is also important to assess some critical concepts in the wording of this article.

1.2.1 Undertakings

Instead of enterprises or companies, undertakings are chosen to refer economic entities in Art. 85. Although it is not defined directly in the Treaty (2), the Commission gives some explanations in considering certain cases. According to the Commission, an undertaking comprises any economic activity irrespective of the legal forms of undertakings and regardless of the objective to earn profits. (3) Similarly, the Court

ruled in Hydrotherm case that an undertaking should be considered "as designating an economic unit for the purposes of the subject matter of the agreement in question even if in law that economic unit consists of several persons natural or legal„. (4) The evidence shows that the Community's approach originates from economic considerations in defining undertakings. Rather than having a separate legal personality it is more crucial to conduct economic activities, even if it is a one-person and/or non-profit activity. (5) In this context, to understand economic independence is more important than to understand its organisational structure as different legal entities on the paper.

Although "undertaking„ is used in the Treaty of Rome, the Court has also used the concepts of economic entity or enterprise (6) due to practical concerns about the companies which are organised in a rather complex way, mainly, multinational enterprises (hereafter, MNEs or MNE) operating through subsidiaries within the Community. This is also important with the purpose of understanding the nature of restrictive practices and whether these are really distortive or not. However, in order to elaborate the practical benefits of the use of economic entity for the activities of parent-subsidiary firms, it should be noted that, first, although subsidiaries have different

legal personalities (not necessarily), it is possible to attribute their conducts to parent companies which are supposed to be responsible for the activities of their subsidiaries, (7) and, second, the Commission decided that agreements between a subsidiary and parent or between subsidiaries are not in the context of Art. 85(1) if they form a single economic entity. (8) Nevertheless, the question is around ownership, which we shall deal with later, but it should be noted that the Commission's position supports the view of "50 % or more ownership principle„ (9), and "economic unity principle„ which brings the rule that even if subsidiaries have different legal identities, the important thing is to conduct their economic activities collaterally. If economic practices - in respect to means or ends - are pursued separately, these are different undertakings and it is possible not to consider them under the same economic entity. (10)

1.2.2 Agreements, decisions, concerted practices

As it is stated earlier, Art. 85(1) implements authority for agreements, for decisions of two or more enterprises, and for concerted practices.

Although there is no general rule about the forms of agreements,

an agreement is signed when there is consensus among enterprises to commit themselves to the conditions of the agreement. (11) The Commission and the Court decide that Art. 85(1) is violated due to the degree and intensity of the consensus in any kind of rules and regulations - even if they are not written or legally binding - may be classified as agreement (12) as it happened in the Quinine case where the Commission's decision addressed to a gentlemen's agreement which had a written but non-signed document. (13) Nevertheless, firms make agreements, first, to fix prices through horizontal arrangements which mean that enterprises, which are at the same level of production, distribution, or marketing, act collectively to affect prices with the purpose of selling to those in the vertical line of the process. The underlying reason is desire to achieve a collective market power through which enterprises can raise prices more than the market mechanism allows in order to secure market stability and status quo. On the other hand, since high prices are attractive for entrepreneurs who think to invest in these areas, it remains only as a short run advantage for colluded enterprises in the market. (14) However, through horizontal arrangements enterprises also control production, investment and development. Since they control production, they can determine prices in the market because of simple demand-supply equilibrium of

microeconomics. Hence, enterprises, which come together to act collectively, can increase prices by holding quotas for the quantity supplied. Although this seems reasonable for enterprises with desire of more profit, it depends on position and strategy of the firms in the market since they intend to share market rather than to influence because of their excess supply problem. (15) In this respect, market and/or raw material sharing is the third practice of horizontally impeded obstacles. However, for the time being, we leave this subject, because it requires special attention; therefore, it will be concentrated on later under Art. 86. Finally, exclusionary practices are another outcome of horizontal arrangements. These practices which generally bring competitive disadvantage to the external trading parties can emerge in different forms. One of these is aggregate rebate system which brings more to the consumers due to their purchases from the horizontally organised group. Beside there is collective exclusive dealing agreement which is set up between suppliers and dealers to sell through each other. (16) All these agreements serve to the purpose of increasing market power of enterprises by having bigger market shares. For this reason, it can be concluded that these are incompatible with the EC rules.

Since the EC's concern is to eliminate all obstacles to affect

trade in the common market, it is also declared horizontal practices, to affect prices by exchanging commercial information, have influence to minimise competition, and therefore, they are illegal per se. (17)

Enterprises can collude on a vertical basis through collective exclusive dealing or sole dealing agreements which originate from the fact that individual suppliers decide to restrict their capacity at the sale stage to one dealer who is protected in its own territory against the supply of other dealers. However, the Commission has ruled that such kind of agreements were not acceptable due to the Art. 85(1). (18)

In the context of Art. 85(1) some activities of associations of enterprises and of trade associations are prohibited. It is assumed that in such kind of organisations each member participates in decision-making process; therefore, according to the Court, recommendations from an association to its members have effect to distort competition even if these are not obligatory for members. (19)

Last component of Art. 85(1) is concerted practices which can be defined as a form of coordination between undertakings which is not as concrete as an agreement. (20) These are the widest of

all the three practices and the least formal way of collusion. Due to the fact that a concerted practice covers cooperative activities of any kind between enterprises (21), any representation made by one enterprise to another with the intention of imposing to exercise the same practice, e.g. to charge the same price, comes into the interest area of the Commission. Depending on the reaction of the other firm there may emerge a sustained behavioural pattern which causes respective responses to successive representations; and this can be done without any formal agreement. Thus, the Commission monitors all activities of enterprises; e.g. in Dyestuffs cases the Commission has noted that there were successive price increases by European dyestuff producers. According to the Commission,

> " in order that there should be a concerted practice, ... , it suffices that they should mutually inform each other in advance of the attitudes they intend to adopt.„ (22)

However, despite the separation in the Treaty, the Commission's position to differentiate these three restrictive practices is not strict; and in the direction of looking for concerted practices in the first place rather than agreements. (23) This is an interesting point in the sense that it shows how

sensitive the Community is in competition matters and how easy enterprises can fall under the scope of prohibitions.

1.2.3 Exemptions

While the Treaty of Rome determines the illegal practices under Art. 85(1), Art. 85(3) leaves an open door to get exemptions for certain kinds of agreements. In order to benefit from these exemptions, enterprises should contribute to the improvement of production and distribution or to the promotion of technical or economic progress while consumers get benefits from the end result. However, this contribution should not include imposition of indispensable restrictions and possibility of eliminating competition in respect of a substantial part of the market which is relevant for the products in question. (24) The main purpose of exemptions is to maintain an efficient competition in the Community. It is accepted that to allow some restrictions upon competition for the sake of bigger economic benefits and welfare effects for the Community as a whole is not contradictory but supplementary for the attainment of the final objectives. (25) Therefore, by Regulation 17 the Commission has power to issue exemptions, which can be either individual or block (26), with the purpose of continuous functioning of economic activities in

the common market which should have more effects from the efficiency argument at the expense of restrictions.

1.3 Article 86

The EC has formulated the prohibition of abusive practices in Art. 86 of the Treaty of Rome which states that any abuse, by one or more undertakings, of a dominant position within the common market or in a substantial part of it shall be prohibited. Article 86 specifies abuses by one or more than one firm, and it is not the dominant position of the firm, but abuse of that position which restricts competition. The underlying reason can be related to the fact that a firm may possess market power due to being more efficient than its rivals. Although this kind of monopoly can be criticized on the ground of an inefficient allocation of resources and consumer welfare (27), the economies of scale argument dictates to firms bigger sizes, and, therefore, bigger market shares. So, condemned practices of monopolistic competition are only abnormal practices used for the maintenance of this power, and abusive exploitation of dominant market position. (28)

1.3.1 Dominant position and relevant market

Due to the wording of Art. 86 it is important, but not sufficient, to determine the existence of dominant position. In several cases, United Brands, Hoffman-La Roche, and Michelin, (29) the Commission has given the definition as the ability of one of the companies in the market to thwart the maintenance of effective competition by acting independently of competitors and consumers, and using its power to exercise a substantial influence on the conditions of competition. (30) However, there are many difficulties in deciding whether there is a dominant position or not because it depends on several factors. The Commission's view in the Continental Can (31) and Commercial Solvents (32) was in such a way that

> " undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers, or suppliers. And it is a position where they have the power to determine prices or to control production or distribution for a significant part of the products in question ...".

Furthermore, the Commission and the ECJ (European Court of Justice or, shortly, the Court) defined dominant position mainly in terms of market power. In Hoffman-La Roche it is

accepted that a very big market share sometimes gives evidence for the existence of dominant position. However, if the market share is lower, it may be required to examine other relevant factors such as existing market barriers for entry, or substitutability of the products of the firm in consideration. Although the Court has analysed different factors in United Brands, it has rejected to check relevant factors all the time; e.g. it ignored to consider the substitutability of products in Hoffman-La Roche. (33) In addition, the Community's approach in evaluating market power for determination of dominant position reflects a strict view due to the fact that it does not consider the limitations to the powers of dominant firm which can come from outside the relevant market. (34) In any case, in order to determine market share it is important to identify the relevant product market as well as the geographic market. So, to be dominant an enterprise should possess a large market share and/or control over the products which could be interchangible. In this context, it should be noted that the concept of dominant position can only be defined after the limits of market is analysed with reference to geographical area and product. Nevertheless, to identify relevant market is only half-way through because the proportion of the relevant market dominated should be known also. The decisions of the

Court are various in different cases, e.g. in Sugar Raffinerie (35) market share was 85 per cent, in Hoffman-La Roche 47 per cent, and in United Brands 40 per cent. These different levels prove that through barriers to entry, which affect supply and demand in the market, firms can achieve a dominant position.

1.3.2 Abuse of Dominant Position

The critical point of Art. 86 originates not from the existence of dominant position, but from the abuse of that position. A dominant enterprise in relevant market can abuse it by impeding unfair pricing, by restricting production, markets or technical development, by discriminating in trade, and by concluding contracts subject to the approval of the third parties. However, the meaning of abuse is quite clear after it is defined in Hoffman-La Roche;

> " the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where ..... the degree of competition is weakened and which ..... has the effect of hindering the maintenance of the degree of competition

still existing in the market or the growth of that competition. "

In certain cases different practices fall under the jurisdiction of Art. 86. It is refusal to supply in Commercial Solvents, excessive and discriminatory pricing in United Brands, merger to eleminate competitors and to dominate the market in Continental Can. (36) These practices should take place as to affect trade between member states; i.e. unlawful applications in each member state regarding to its trade are not taken into consideration. Also it is noteworthy that whenever an abuse is practised by any member state for any reason, unlike Art. 85, there is no way to be exempted by the Commission. Nevertheless, every exploitation of dominant position does not need to be abusive. (37)

1.4 Complementary Regulations

Although Art. 85 and Art. 86 embrace all practices, except mergers, to infringe competition with regard to intra-EC trade, they do not include anything about the enforcement of the rules of competition. At the beginning, member states had power to deal with these problems in response to limited powers of the Commission. However, due to the

shortcomings and deficiencies in different applications by member states the Commission has been given powers, in accordance to Art. 87, to implement and enforce the two relevant articles. In fact, Art. 87 empowers the Council to issue regulations and directives based on a proposal from the Commission. In this context, Regulation 17 was issued by the Council as the first regulation for the accomplishment of the principles put forth in Art. 85 and 86. Similarly, Reg. 141/12 and Reg. 1017/6 were prepared in order to cover economic activities in transport sector. These were followed by various regulations and directives to give a dimension of comprehensiveness to the competition rules. (38) In addition to these, Reg. 4064/89 was implemented to control concentrations in the Community.

1.4.1 Regulation 17

As we stated earlier, the Commission has certain powers of enforcement through regulations. Regulation 17/62 (shortly, Reg. 17) is to concern with the enforcement and practical applicability of Art. 85 and 86. This regulation provides a system of notification, under which enterprises may ask for the analysis of their practices to understand whether it is prohibited or not. Although notification is not

compulsory, it is strongly advised for enterprises. Otherwise, if they are in a position of infringement, heavy fines can be imposed upon them by the Commission. If there is nothing distortive/restrictive, the Commission may issue negative clearance which shows that it does not intend to intervene. (39) This Regulation also gives the Commission the power to take decisions about the termination of infringements, and to grant exemptions in pursuance of Art. 85(3). Moreover, by Reg. 17 the provided enforcement powers are also applicable to abuses although notifications are not relevant. Therefore, the role of the Commission increases to the extent to monitor market structure, cross-sectoral investigations, and complaints from third enterprises.

1.4.2 Regulation 4064/89

A dominant position can be created by mergers which are certain results of structural adjustments by enterprises as a response to the internal market. Although in the Treaty of Rome there are no direct provisions for control of mergers, the Court has accepted that Art. 86 could be applicable to mergers. However, it is not effective enough since it cannot be activated until a dominant position is proven to exist. So, there was a need for a

new legal instrument based on Art. 235, which enables the Council to adopt necessary measures for the objectives presented by the Treaty of Rome in order to fill the gap of legislation; to permit effective control of mergers. (40) In this respect, Reg. 4064/89 was adopted in 1989 in order to control concentrations - which have a " Community dimension„ (41) - between enterprises. It provides prior notifications and control of mergers and acquisitions through the review of the Commission which is oriented to find out whether merger creates a dominant position in relevant market to restrict competition. After the search the Community dimension is given if the aggregate turnover of enterprises involved is 5 billion Ecu or more, or each enterprise's annual turnover is 250 million Ecu or over. This means control of mergers with these features automatically bring a kind of supervision mechanism upon multinational enterprises. In order to be classified under Community or national dimension all mergers should be notified to the Commission of which main criterion is to examine whether proposed concentration creates adverse effects on competition or not. The control is made through the investigation of relevant market and the possible outcomes such as technological or economic progress.

Notes to the Chapter 1:

1 See Kerse, 1988, pp. 2-3; it is the situation in most cases related to competition issues, e.g. L'Oréal NV and L'Oréal SA v. De Nieuwe AMCK Pvba (Case 31/80) [1980] ECR 3775; or La Technique Miniére v. Maschinenbau Ulm Gmbh (Case 56/65) [1966] ECR 235.

2 This is defined in Art. 52, however, purpose is to explain the rules related to self-establishment not to highlight to restrictive practices.

3 [1989] OJ L284/36 at 41.

4 Hydrotherm v. Andreoli (Case 170/83) [1984] ECR 2999.

5 e.g. Reuter/BASF [1976] OJ L254/40; GVL [1981] OJ L370/49.

6 ICI and others v. Commission (Cases 48, 49, 51 - 57/69) [1972] ECR 619.

7 AEG - Telefunken v. Commission (Case 107/82) [1984] 3CMLR 325 at 47 - 53.

8 Christiani and Nielsen [1969] OJ L165/12, [1969] CMLR D36.

9 Zinc Producer Group [1984] OJ L220/27.

10 This view was expressed in Kodak [1970] OJ L147/24 and [1970] OJ L159/22; BMW Belgium v. Commission (Cases 32, 36-82/78) [1979] ECR 2435.

11 Goyder, 1988, p. 83.

12 Kerse, p. 5; Goyder, pp.83-84.

13 See [1969] OJ L192/5; [1969] CMLR D41.

14 Swann, 1983, pp. 77-78; the newcomers distort the high profit structure and eliminate the significance of vertical integration.

15 Ibid, p.78.

16 Ibid, p.79.

17 Kalmansohn, 1984, p.14.

18 Consten and Grundig v. Commission (Cases 56-58/64) [1966] ECR 299.

19 NV IAZ International Belgium SA v. Commission (Cases 96-102, 104, 105, 108 and 110/82) [1983] ECR 3369; Vereeniging van Cementhandelaren v. Commission (Case 8/72) [1972] ECR 977.

20 supra note 6.

21 Goyder, pp. 84-85.

22 supra note 6.

23 Kerse, p.7.

24 See Art. 85(3) in the Treaty of Rome.

25 Kerse, p.13; Swann, p. 80.

26 Kerse, p.14; Kalmansohn, p.14.

27 Pathak, 1988, p.16.

28 Swann, p.112.

29 Respectively, United Brands (Case 27/76) [1978] ECR 207; Hoffman-La Roche (Case 85/76) [1979] ECR 461; Michelin (Case

322/81) [1983] ECR 3461.

30 Venit, 1990, p.20.

31 OJ [1972] L7/25.

32 OJ [1972] 299/51.

33 Kerse, pp.15-16.

34 Pathak, 1988, p.48; Landes and Posner, 1981, p.968.

35 (Case 40/73) [1975] ECR 1663.

36 Kerse, p.18; Lang, 1979, p.345.

37 Kerse, p.19.

38 According to van der Esch, flexibility and comprehensiveness are main characteristics of competition rules. See van der Esch, 1980, pp.75-85.

39 Reg.17, Art. 24.

40 Venit, 1990, pp.13-15; Downes and Ellison, 1991, p.2. Also the merger control regulation is presented in the Appendix.

41 These are concentrations which affect the intra-EC economic activities. This subject shall be dealt largely in the Chapter 4.

2. MULTINATIONAL ENTERPRISES

Multinational enterprises (1) constitute a big portion of economic activities in the world. They influence the economies in which they operate. It can be simply said that they are legal and economic entities; therefore any attempt to explain MNE requires - at least - two approaches. One is the legal side of view which embraces legal framework with exemptions and interpretations; and the other is rather economic or business approach which does not give much space for interpretations.

2.1 Legal Point of View

2.1.1 Definitive Approach

According to the OECD Guidelines for Multinational Enterprises, MNEs are companies whose ownership may be private, state or mixed, established in different countries and linked such that one or more of them may be able to exercise significant influence over the activities of others and to share resources and knowledge. (2) Although this is a definition with economic emphasis, it is sufficient to show the need for legal elaboration in definition and in practice. In fact, the situation of MNEs is not so clear-cut from the point of law due to

multinationality concept. In order to be recognised as "international corporation„ under law entities should be established by international law. However, this means that recognition is only possible for joint ventures established by international treaties; for instance, joint ventures by EC member states. In this respect, MNEs cannot be evaluated under international law but under national law which has a contradictory position in regard to continental and Anglo-American law systems. For the former one the place of the headquarter is essential in the determination of the jurisdiction whereas the latter looks for the nationality of jurisdiction which hosted MNE. (3) In some statues nationality is determined on the basis of management, ownership and control. (4) As a result, there is a continuous debate in the description of nationality, whereas entrepreneurs still retain the power to choose the nationality of their corporations. The significance of nationality lies mainly in the fact that states want to dominate upon the activities of MNEs; i.e. certain internal affairs of MNEs are under the competence of "those vested with corporate powers„. (5) Therefore, an MNE can be defined as an entity which is comprised of a parent company or headquarter and subsidiary companies, each organised in the country where it operates. However, there are two legal prerequisites: firstly, the parent company should have the capacity and power to own

the shares of at least one more company. Secondly, these shares should be owned in such a way to give the parent company the power to exert efficient control upon the subsidiary. (6) Nevertheless, this kind of a legal framework cannot avoid to challenge the economically independent character of the MNE. On the other hand, home country wants to be competent on all the activities of the subsidiaries as if they are natural extensions of the parent company; and on the other, host country is always unwilling to give up the power which it has upon the subsidiary company. In this respect, host country may propose to take into consideration the existence of local management and the ratio of local shareholders. And also it is possible to suggest the idea that "the subsidiary's management operates in pursuit of the best interests of the subsidiary„ . (7)

2.1.2 Theories about MNEs

Due to the inadequacy of the orthodox legal approach, it is attempted to develop new theories without undermining the effects of economics and politics. Thus, one of the theories suggest that there is a link between the parent firm and the home country. (8) This indicates that home country has competence on subsidiaries as well as it has on parent company.

Another theory gives an economic emphasis by describing MNE as an entity whose only pursuit is profit maximisation. Therefore, it is inapplicable to search for the nationality. Also such a view provides flexibility in decision-making process of MNE. Moreover, a rather optimistic approach qualifies MNE as a corporation which obeys the rules of country where it functions and fulfills the economic expectations. Despite a number of different theories legal approach to the MNE is still in need of an economic touch. Even the EC has, though it was tentatively, defined MNEs with economic emphasis:" ... all direct foreign investment, 80 per cent of which is certainly due to undertakings intuitively recognized by all ....." (9)

2.2 Economic / Business View

2.2.1 Definition

Since late 19th century MNEs have become key instruments in the world economy for welfare maximisation due to economic gains in efficiency and productivity. Economic enterprises have preferred to involve in multinational activities which comprise of exporting factor inputs such as raw material, and/ or capital, finished or semi-finished goods; licensing and technical agreements to expand the market by transferring intellectual property rights; portfolio investments in

foreign companies; and direct investments to own - wholly or partially - and to control the decision-making of the company. In this context, MNEs reflect the involvement in foreign direct investment. (10) From a broader perspective, foreign direct investment (FDI, hereafter) is an indicator of the activities of MNEs regardless of these are financed by home or host country.

It is possible to define MNEs in various ways by emphasizing their different characteristics. However, it is important to note certain sine qua non facts to be qualified as MNE. These include direct foreign investment in order to obtain the power of control of the foreign enterprise; transferability of all kinds of resources from one location to another; and income-generating assets located in more than one country.(11) However, it is also a fact that MNEs can be set up by takeovers, especially when investment in particular areas is risky. Hence, from economic point of view MNEs can be defined as a corporation that owns, controls, and manages income-generating activities in at least two countries. (12)

So, MNEs can be identified by foreign direct investment. Although an MNE carries different characteristics of all international economic activities, its motives are stimulated

by the incentives that encourage FDI. To set production plants and operate in a different country enterprises should acquire certain advantages which give them superiority over indigenous firms. These advantages include, according to the eclectic paradigm, (13) ownership-specific advantages, e.g. product innovations, production management, organisational and marketing skills, innovatory capacity, human capital management, finance etc., i.e. advantages arising from income-generating assets; location-specific advantages, e.g. input prices, size of the market, investment incentives and disincentives, barriers to trade, transportation costs etc.; and internalisation advantages which are institutional responses to transactional costs, i.e. MNEs engage in FDI where it is less costly to allocate international resources internally than to use the market channels. Thus, an enterprise may engage in either foreign direct investment or licensing, instead of exporting, if it possesses ownership advantages which can be profitably internalised; but it will prefer FDI to licensing if there are, at least, some location-specific factors of the foreign country which is considered for investment. In addition to these, the most striking difference of FDI from other types is the existence of an enterprise which builds up wholly-owned foreign subsidiaries or acquires local firms wholly or partially. (14) Moreover, to have more investment in foreign

companies is not so significant if control is still retained by the local management. This is the situation which MNEs realize through FDI all over the world. In this context, we should not undermine the significance of the ways of these firms in acquiring control of their subsidiaries, e.g. mergers or acquisitions arise as unique examples especially in an economic environment which functions to gain more competitive position in internal markets but less competitive in external ones.

2.2.2 Size and Power

Although size does not signify anything about MNEs, one can easily notice that these are usually companies with enormous sizes. However, it is possible to say that MNEs with large sizes can be in a weaker position in the market than small size MNEs, if their activities are widely dispersed rather than concentrated in a geographical area which helps to decrease costs, and promotes the development of the enterprise. Therefore, it is not wrong to assume that size brings economic and political power to MNEs if it is supported by control over production factors which can be easily realized through concentrations. (15) The big size of MNEs and their activity areas are closely linked to each other. They generally operate in areas which require advanced technology and product

differentiation, since all these activities can be financed and developed within the organisation of the MNE. Due to their power they can foster R and D activities and extensive advertising for the promotion of their products/services. however, on the other hand, the power, they acquire, puts them in a rival status with nation states. (16) In fact, aggregate turnovers of some MNEs are higher than total GNPs of most of the nation states. This means MNEs have potentiality to constitute an economic and/or political threat to the status quo. So, protective policies have been erected in certain regions to lessen their impact, e.g. strict antitrust and competition laws even in most economically liberal states. At this point, the EC gains importance because of its competition policy which is briefly summarized in the previous chapter. However, we shall deal, in detail, with the EC's practices in regard to MNEs later.

2.2.3 Organisational Structures

As we mentioned before, MNE is organised in such a way to operate from a headquarter through its subsidiaries. It is owned by shareholders, and managed by - in general - board directors. The control process within the organisation belongs to the group (economic entity or people) who holds

majority of voting shares.

mpanies develop their corporate organisations in three
ages; (17) first of all, enterprise is very centralised
d identified with one-man management. This kind of
ganisation bears all weakness of person-identified
nagement. Its life-span is correlated to its chief executive's.
, firms begin to train specialised people to assist the
ecutive in production management; however, despite their
ecialisation they suffer from the lack of "diversified
perience". As the last stage, therefore, a multi-product
ructure is developed, in which profit centres emerge for each
oduct line. In this type, beside chief executive and
ecialised people lower managers become able to contribute
the management along their divisional lines. This kind of
nagement structure is called as " M-type " management pattern
ich emerges due to increasing competition. (18) After
terprises develop international product divisions, they
gage in internalization process to realize overseas investment.
is process is organised around power / control balance due
the fact that headquarter decides in strategic matters for
e interests of the corporate enterprise whereas subsidiaries
e delegated to operate within a degree of autonomy in the
untries where they are located. The degree of autonomy depends

on the enterprise's internal structure which combines the features of ownership and control within the organisation. Therefore, in MNEs "coordinated control" of policies is rather significant. (19) In this context, it should also be mentioned that shareholders and board of directors affect this control process. However, in overall, MNEs act to coordinate different economic interests and purposes in the direction of accomplishing a common aim.

2.2.4 Strategies and Goals

MNEs set their strategies for survival and growth in the long run. With this purpose their strategists use instruments such as product differentiation, new markets or techniques for production by encouraging enterprises to engage in horizontal, vertical or diversified / conglomerate expansions. (20) However, since the corporate motivation of the firm is identified with profit-maximization, though it is short-run, the strategy is determined by comparing alternative strategies; i.e. firms can define their objectives for each operation carried on their organisational structure; and then, through a comparison between these aspiration levels and the achievements they succeeded till that time they can decide whether the strategies they have adopted or will adopt are

realistic or not. (21) MNEs' decision on strategy is also influenced by the tendency of lower managers to give emphasis on the significance of their divisions, and by differences coming from background, training and culture. Thus, it is possible to say that strategy is essential element for the enterprise's corporate structure on the basis of the fact that it identifies different policies for an ultimate goal of its success. However, strategy, in fact, is nothing, but only a fixation for more desirable alternatives. (22) This means strategy, rather than putting strict limits and policy lines, gives flexibility to enterprises for changing circumstances.

2.3 Ownership and Control in the Intertwined Area of Law and Economics

One of the most critical issues related to MNEs concerns ownership and control within the group. While the main characteristic of MNEs rises as their organisation which embraces a parent company and subsidiaries functioning for a common economic aim, the link between those remains as a conflictual area under legal and economic implications; therefore, it is preferred to analyze the determinators of of the power domain in MNEs under a separate heading.

In a multinational enterprise, there are two kinds of subsidiaries. One is wholly-owned subsidiaries, and the other is partially-owned subsidiaries which can be either minority shareholding-owned or jointly-owned. (23) Since the parent company looks for expansive control upon its subsidiaries, it exercises direct or indirect control in different forms ranging from shareholding, contractual relations to de jure or de facto power on the appointment of subsidiary's managerial personnel. The most controlled form of subsidiary is a wholly-owned subsidiary in which, at least, 51 per cent of equity assets belong to the parent company. However, to exercise control on the subsidiary, i.e. to have power to initiate, modify or terminate any action by influencing the decision-making mechanism of the subsidiary, is also possible by securing smaller amounts of equity. This means that it is unlikely to talk about a definitive relationship between ownership and control. (24) On the other hand, one can propose a strong positive correlation between ownership and control by supporting the idea of how much ownership is acquired in a firm shows the degree of control on subsidiaries. (25) In fact, influence of ownership on control mechanism is closely related to the managerial strength of owners.

There are several different methods to manage MNEs. It is

possible to give substantial autonomy to subsidiaries even in financial matters, or to impose strict central control which allows only simple managerial functions. Usually, US enterprises have inclined towards serving through wholly-owned subsidiaries with the purpose of keeping control on decision-making process of subsidiaries and of preserving the assets which constitute MNEs' ownership advantages like technology; nevertheless, MNEs from other countries have more flexible approach in ownership and control of their international involvement. (26) These prefer to invest through less-control-needed subsidiaries such as joint ventures.

The significance of ownership issue in subsidiaries originates from legal problems. The essential problem of MNEs before the law stems from their special structure: Are the subsidiaries liable for their actions or not? There are two prevailing theories in this respect. One is the legal separation theory which stresses the fact that subsidiary and parent have separate legal personalities; and they can be evaluated as two (or more) independent companies. The other is the economic entity theory whose emphasis is on the integrated economic existence of parent and subsidiary for the prosperity of MNE as a whole. (27) That means in a system which favours legal separation theory each unit is responsible from its own acts,

i.e. it is not easy to mention the liability of parent to its subsidiary. However, in the system of economic theory, parent company, whose location is insignificant, is liable for the acts and debts of its subsidiary. The latter also reflects the existing trend in modern European law. (28) In this context, the situation of partially / jointly-owned subsidiaries need elaboration due to the fact that the degree of control is related to the autonomy, and therefore, to the evaluation of these subsidiaries before law. Although there are different approaches to the issue, the EC has defined a subsidiary as an enterprise of which more then half of the equity share is controlled by a parent company. (29) For the question of debt liability of parents the degree of control should be considered as well; i.e. if more than 50 per cent of equity shares of a subsidiary belongs to the parent, it is liable for debts of subsidiary. (30)

To conclude, the relationship between parent and subsidiary is still not clear. The ownership pattern determines the degree of control exercised by the parent upon the subsidiaries. Although there is no explicit link between ownership and control, it is accepted that the more the shares held by the parent firm brings it more legal prospects to control its subsidiary.

Notes to the Chapter 2:

1 Several terms can be used interchangeably: multinational enterprise, multinational corporation, transnational corporation (as it is called by the UN), etc.

2 OECD Guidelines for Multinational Enterprises, Press / A(76) 20 of 21.6.1976.

3 Vagts, 1970, p.740.

4 Ibid, p.741; 1961, pp.1526-1530.

5 Ibid, 1970, p.741 .

6 Ibid, p.742.

7 Ibid, p.743.

8 Ibid, p.744.

9 Bulletin of the European Communities, Supplement 15/73, p.21.

10 Hood and Young, 1979, p.10.

11 Ibid, p.2.

12 Caves, 1982, p.1; Hood and Young, p.3.

13 Dunning, 1981, pp.1-47.

14 Hood and Young, pp.9-10.

15 Vagts, 1970, pp.749-751; Hood and Young, p.16.

16 Hood and Young, p.16; Wilson, 1990, pp.163-179.

17 This view of gradual development of enterprises is mainly suggested by Chandler in Strategy and Structure (1970).

18 Jacoby, 1972, p.28; Sutton, 1980, pp.72-75.

19 Vagts, 1970, p.752.

20 Caves, pp.3-29; Hood and Young, pp.34-35.

21 Sutton, p.7; Vagts, 1970, pp.755-756.

22 Sutton, p.11.

23 Schmitthoff in Simmonds, 1977, pp.71-72; Brooke and Remmers, 1978, pp.200-202.

24 Hood and Young, p.3.

25 Kallinikos, 1984, pp.24-26.

26 Hood and Young, pp.30-31.

27 Schmitthoff, pp.73-74.

28 Ibid, pp.76-79.

29 Ibid, p.80.

30 Ibid, pp.81-82.

3. EC'S POSITION IN REGARD TO MULTINATIONAL ENTERPRISES

After we have analysed, on the one hand, the EC Competition Policy along its general lines, and on the other, MNEs within a rather comprehensive approach, we, now, turn our attention to focus on the Community's position. As MNEs expand their activities all over the world, the EC with all advantages coming from factor movements and characteristics of a common market becomes an attractive place for investors. Beside foreign MNEs also EC-based MNEs are encouraged to conduct their economic activities within the EC territory. In this respect, the Commission, in its Communication to the Council of Ministers presented on November 8, 1973, proposed that the EC should determine its position regarding to removal of the economic and fiscal obstacles for member states' economic enterprises, which could be developed by cooperation projects, by mergers of enterprises and by creation of MNEs to contribute positively to the accomplishment of the Community's objectives. However, growing impact of MNEs on economic, social and political areas of member states became sufficient to foster the apprehension about their effects on various aspects of the Community's policies. Since our interest is focused on competition policy, the responses of the Community will be given from the perspective of competition policy. Nevertheless,

because of lack of regulations and/or directives about competition side of the MNEs we will go through the prominent cases in order to determine the EC's status through decisions of the Commission and the Court.

As it is mentioned before, the EC's Competition Policy is uniformly applicable to all restrictive, distortive and/or abusive practices of enterprises regardless the place of their head offices. (1) However, it is a fact that the policy is rather clear for Community-based MNEs, and it is applied in the same way as to non-multinational Community enterprises. This is also emphasized in the Eleventh Competition Report such as " undertakings of Community origin have no particular features that would distinguish them from other European undertakings for the purposes of competition law ". (2) Only problematic situation is the relationship between parent and subsidiary. In this context, the cases before the Commission or the Court can be considered under three groups; first group can be related to cases which have possibility to fall under Art.85(1) due to restrictive practices between parent and subsidiary or subsidiaries; second group constitutes cases about companies which can create "abuse" or "dominance" due to their organisational structures under Art.86; and final group includes cases which are relevant to the fact that subsidiaries'

actions can be imputed to a parent company regardless the place of the head office.

3.1 Direct Application of Competition Rules

3.1.1 MNEs under Article 85

When we considered Art.85 of the Competition Policy in the first part, we have mentioned horizontal and vertical restraints. EC's application of law due to horizontal restraints is directed to eliminate barriers to trade, division of markets and any distortive exercises which hinder the Community's objectives. In this respect, the Commission and the Court have ruled that all horizontal export bans and import restrictions within the Community, and price-fixing arrangements are illegal under Art.85(1). For instance, in French and Taiwanese Mushroom Packers (3) it was decided that the market division agreement between French and Taiwanese manufacturers violates competition law; similarly in the Franco - Japanese Ballbearings (4) the Commission concluded that the agreement between French and Japanese producers was illegal, even if it aims to promote orderly marketing, (5) on the grounds of restricting imports to France and causing to keep prices artificially high. Also the Community determined its position for price-fixing arrangements by the Court's decision in ICI v. Commission (6)

where the price-fixing cartel between aniline dye producers was condemned distortive. The reason for prohibiting price-fixing agreements was presented in the First Competition Report which enumerated that those agreements constituted an obstacle to trade since they prevented buyers from benefiting from the existing market conditions which would have prevailed if there had been no such agreements. (7)

With regard to vertical restraints, the Commission found a broader arena to authorise MNE's activities. Since MNEs, because of their size and operational mechanism, prefer to conduct their activities through vertical distribution systems which need certain requirements to be followed such as demands of manufacturers for price and/or sales conditions maintenance, they fall frequently under the jurisdiction of Art. 85(1). While the manufacturer engages in vertical distribution system with the purpose of economic efficiency in the market, most of the time these agreements have restrictive character. It is not only because they limit the sale of particular product to selected distributors, but also they may prohibit use of extensive distribution systems. Hence, these agreements prevent competition within the EC scope. (8) In Consten and Grundig the Court decided, without considering efficiency effects, that " the agreement aims at isolating the French market for Grundig

products and maintaining artificially, ..., separate national markets within the Community, it is therefore such as to distort competition in the Common Market „. (9) Likewise, the Commission came to a conclusion in National Panasonic that the distributor of a Japanese-based MNE in the UK has imposed an export ban on its dealer, objecting to affect intra-brand competition; and therefore it infringed Art. 85(1). (10) Another case which fell under Art. 85(1) is Johnson and Johnson where an American-based multinational and its subsidiary in the EC were declared as exercising illegal act because of the fact that the subsidiary banned its dealers to export to the other EC countries. (11) As a result, regarding to vertical restraints it is possible to say that although the Commission allowed to advocate distribution systems - if selection criteria can be practised non-arbitrarily -, it has encountered problems in the determination of these criteria. Therefore, the decisions were made in a very restricted evaluation both for EC and non-EC MNEs. Mostly, the Commission underestimated the economic efficiency argument and concluded that vertical distribution systems were illicit.

Although EC's criteria are the same for horizontal and vertical restraints by EC-based and non-EC based MNEs, the practice for exemptions exhibit a biased approach in terms of size rather

than nationality of enterprises. As we mentioned before, there are three ways for enterprises to be exempted from the liability under Art.85. Firms can ask for notification to the Commission which may grant negative clearance after the examination of the situation. However, even if firms cannot be granted negative clearance, they can be excluded from liability either through individual exemption under Art.85(3), or block exemption. Although this system seems to ensure the flexibility of the EC's Competition Policy, it is done in favour of small business entities. (12) Therefore, these derogations were used by the Commission as a means of encouraging certain activities such as cooperation agreements between small and medium sized enterprises (SMEs). " Wherever possible, bans have been lifted for small undertakings in order to foster their activities and their development „. (13)

In granting exemptions and negative clearances enterprises should pursue activities which are not incompatible with the Community's objectives. In this context, MNEs, despite their economic contribution to the EC, are in an inferior position comparing with the SMEs. Any kind of agreements between SMEs are kept outside the jurisdiction of Art. 85. Moreover, agreements by the Community undertakings in their commercial activities with the non-EC world are exempted because of the

promotion of Community-trade. For instance, in French Producers of Fine Papers the Commission allowed French manufacturers to create a cartel for joint market research, distribution and ordering services in order to promote the conduct in foreign commerce of the EC. (14) Similarly, in Kodak export bans by the US multinational on non-EC exports did not astonish the Commission. (15) Beside these two priorities of the EC, there is one more special situation which can easily obtain exemption or negative clearance. This is related to the development of new products or technology. In this context, in Vacuum Interrupters Ltd., partner companies in a joint subsidiary were granted for exemption due to the fact that they manufactured a new product within the EC. (16) This objective also sets up a channel for non-EC MNEs to obtain exemptions when they advocate EC's interests. Moreover, as a result we can state that the EC ruled the activities of MNEs in a protectionist framework. It has concerned, primarily, with the SMEs in the realisation of economic integration; but it has held a careful approach to MNEs especially non-EC-based ones.

3.1.2 MNEs under Article 86

MNEs, due to their size, structure and power from their

tangible and intangible assets, could not prevent themselves being the subject of proceedings under Art.86.

As it is presented in the Fifth Competition Report, "a dominant firm has an obligation not to indulge in business practices which are at variance with the goals of integrated markets and undistorted competition in the common market ". (17) Therefore, the Community has enforced Art.86 on the basis of these objectives in addition to permanent consideration of SMEs.

The distinction in the wording of Art.86 such as relevant market, dominant position and abuse of that position enlarged the Community's involvement in MNE's activities in order to protect common market from abusive practices.

First of all, there are cases which infringe Art.86 because of relevant market concept. As we pointed out before, the relevant market can be divided for products and geographical areas. In General Motors, the relevant product market is defined by the Commission and the Court in intrabrand terms in the strictest sense. Instead of import and sales of cars in Belgium it is determined as the subsidiary's service to provide technical approval certificate. (18) Correspondingly, in Hoffman-La Roche the Commission's and the Court's approach was more limited

while they decided that each vitamin group produced by an American-based MNE and its Swiss subsidiary constituted another product market. The criteria to determine market conditions shifted to the nature of products and their end uses. (19) Likewise, this decision is repeated in United Brands for the practice by an American-based multinational and its EC subsidiary on the grounds of certain characteristics originating from the nature of the product. (20) Beside product market the Commission and the Court defined geographic market in terms of a dominant position "within the common market or within a substantial part thereof". In this respect, it is possible to see the Commission's relevant geographic market definition in several cases. The outstanding example is the Continental Can which is about a world-wide metal container manufacturer. (21) Here, the market is limited to one member state where the alleged act took place, and the rest of the market was ignored. Nevertheless, despite this decision the Court emphasized the necessity of determination of substantial part of the market within the meaning of Art.86, the pattern and the volume of the production and consumption for the relevant product beside the position of sellers and buyers. (22)

After the determination of relevant market it is necessary to find the dominant position in order to go one step further in

controlling abusive practices for competition within the common market. The Commission's approach to clarify dominant position is based on market share argument. However, it does not mean that if an enterprise has more than 50 per cent share in the market, it becomes automatically in dominant position. The Commission considering "commercial dynamism and economic performance„ took into account the market conditions. For instance, in United Brands although it is found that the market share is around 40-45 per cent, the Court decided to assess this percentage within the context of strength and number of competitors. (23) However, the profitability of the dominant firm and the elasticities of demand and supply for the product were not analysed.

In order to apply Art.86 it is known that all these criteria should be supported by the existence of an abusive situation. Otherwise, as it is stated before, to prove a dominant position in a relevant market does not necessarily mean anything incompatible with the competition rules. In regard to MNE's activities, the Court emphasized the fact that "a dominant firm must respect the principle of proportionality when imposing restrictions ... even where these restrictions derive from legitimate objectives, such as maintaining the quality of the product or protecting business interests„. (24) In

Commercial Solvents the Court found infringement of Art.86 due to abuse of dominant position by restricting supply of raw material in order to eliminate the rivals' competitive power. (25) Likewise, the Commission ruled that in Continental Can the American parent company through its subsidiary violated Art.86 when it acquired the largest manufacturing company in Benelux. (26) Although EC's approach is criticised on the basis of lack of economic efficiency concern (27), it is possible to say that the Community does not entirely sacrifice economic efficiency for the sake of preserving competitive position in the common market.

3.2 Indirect Application of Competition Rules

Art. 85 and 86 of the Treaty of Rome have a special feature of indirect application because even single words like "undertaking„ or "effect„ are open to different interpretations. It is a situation which makes the Community stronger in dealing with MNEs.

3.2.1 Interpretation of " Undertaking „ for MNEs

Although it is unnecessary to define "undertaking„ once more, the term needs to be enlarged interpretation in order to

solve the dilemma in parent-subsidiary relation. Since MNEs are organisations composed one parent company and one or more subsidiaries, their structure causes questions in the application of competition rules. The problem comes from the fact whether they are two (or more) distinct companies before the law or one economic entity, i.e. the Court should find the answer in applying the competition rules whether a parent outside the EC territory with a controlled subsidiary in the EC is under the jurisdiction of Art. 85 and 86.

The separation of legal personality and economic entity concepts became important in late 1960s due to the expansion of multinational activity and intensive foreign direct investment flow to the Community. In this context, the Commission determined its position with Christiani and Nielsen case, (28) where the Commission granted negative clearance to the agreement between a Danish (before the accession into the EC) parent company and its wholly-owned subsidiary in the Netherlands. Although the agreement had restrictive provisions, the Commission decided on the basis of the facts that there existed a continuous link between parent and subsidiary such as parent company had right to nominate the members of the board of directors of the subsidiary, and the subsidiary like the others in various countries emerged in order to carry out

economic activities of the parent in that particular territory as a result of distribution of tasks within a single economic entity, to grant negative clearance. (29) With this decision the nature of the relationship between parent and subsidiary is accepted as an internal matter of an economic entity.

In Kodak, accordingly, the Commission used the same approach. Whereas American parent company and its subsidiaries in the EC signed contract about identical prices and sale conditions, the Commission granted negative clearance by considering that "the subsidiary companies in question are exclusively and wholly subject to their parent company, and that the latter in fact exercises its power of control by issuing to them precise instructions, it is impossible for them to behave independently inter se in the areas governed by the parent company". (30) However, it was caught by Art. 85(1) because of the restrictions on resellers which are in the nature of affecting intra-EC trade. (31)

Similarly, in Béguelin, the Commission and the Court upheld that agreements concluded between the Belgian parent company and its French subsidiary cannot be considered as restrictive practices under Art. 85(1) "because the subsidiary is not free to act independently of the parent company". (32) So,

after Béguelin, the view of "legal personality„ was completely replaced by the view of "economic entity„ in assessing parent-subsidiary relations in MNEs.

Moreover, increasing multinational activity and changing ownership structure in MNEs have shown the inadequacies in applying economic entity approach. Thus, intra-group liability (principle of internal behavior) approach has been introduced in order to contribute to the attempts in clarifying intra-enterprise relationship. With this approach control mechanism in complex organisational structures came into agenda. This means that voting power and - correspondingly - ownership lost their importance in the determination of autonomy in multinational organisations. Although to use the ownership criterion could bring certainty, there is a risk to remain uncertain in the context of MNEs due to intertwined ownership and control relations especially after takeovers among MNEs.

The EC had decisive position about intra-group competition. The Commission has applied "internal effect theory„ to foreign companies both in positive and negative ways. (33) However, except Commercial Solvents all the cases in front of the Commission and the Court were about companies which were controlled de facto and de jure by the holders of majority of

shares. This made easier the applicability of economic entity theory. The situation is pointed out by the Commission in the Sixth Competition Report as "... the application of the Community competition rules does not depend on the legal form which may have been chosen by the firms concerned, but on the economic realities of their situation„. (34) But, in Commercial Solvents de facto and de jure control of the MNE were not held together. So, the Court, due to internal behavior principle, decided that " in the circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition „. (35) In this context, the actions of the subsidiaries can be attributed to the parent if subsidiaries are dependent on the parent's decisions in conducting their activities. The criterion of the Court in Commercial Solvents was the market shares. With this case, it is decided that "the subsidiary has a distinct legal personality does not suffice to dispose of the possibility that its behaviour might be imputed to the parent company. Such may be the case in particular when the subsidiary, although having a distinct legal personality, does not determine its behaviour on the market in an autonomous manner but essentially carries out the instructions given to it by the parent company.

When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, the prohibitions imposed by Art. 85(1) may be considered inapplicable in the relations between the subsidiary and the parent company, with which it then forms one economic unit. In view of the unity of the group thus formed, the activities of the subsidiaries may, in certain circumstances, be imputed to the parent company... In these circumstances, the formal separation between these companies, arising from their distinct legal personality, cannot, for the purposes of application of the competition rules, prevail against the unity of their behaviour on the market „. (36) This analysis is relevant on the fact that parent company has power to control and this makes it liable for the subsidiary's offending conducts.

As a result, to impose competition rules for EC and non-EC MNEs did not constitute many problems for the Commission. Within a protectionist approach the Commission worked out by collecting information about the existence of control upon subsidiaries established in the common market, notifying certain documents, and enforcing decisions.

3.2.2 Extraterritoriality or Dissolution of Geographical Frontiers

Beside economic entity approach "effects„ theory is also advocated by the EC. This is a theory which authorises the Community to use its territorial jurisdiction on restrictive trade practices when any slight effect emerges in the common market, notwithstanding the place which the conduct for restrictive practice has occured, and the place where the firm in question is located. This idea was endorsed by the Commission, not by the Court, which relied on the presence of a subsidiary in the Community territory in order to extend its jurisdiction. (37)

However, the Court adopted this approach to a certain extent in Béguelin, where an exclusive dealing agreement signed between a Japanese firm and its distributor in the EC. The reasoning was such that "... undertakings which are parties to the agreement is situated in a third country does not prevent the application of Art. 85 since the agreement is operative on the territory of the common market„. (38) In this case since subsidiary was EC-based, the Court did not abstain in enforcing effects theory. Similarly, the Commission pointed out the same principle in the Notice Concerning Imports Into the Community of Japanese Goods. (39) Respectively, in Franco-

Japanese Ballbearings decision it decided that the agreement between French and Japanese manufacturers infringed Art. 85, and despite one of the parties from a non-EC country the agreement was in a position to affect intra-EC trade. However, the Commission failed to impose fines upon infringing parties. (40) On the contrary, in Vegetable Parchement, the Commission, by applying effects theory, found that Finnish manufacturer involved in concerted practice to fix prices in particular markets; and therefore fined the Finnish company. (41)

So, it is possible to say that the Commission applies competition rules not only on the basis of links between the activities of parent company and subsidiaries in the Community, but the effects of their acts which could happen in the Community or outside. Although the Court did not explicitly support the application of extraterritoriality on the basis of effects within the Community, the Commission continues to claim that the application of effects theory is compatible with the competition rules. This is stated in the Fourteenth Competition Report (42) with reference to Woodpulp Case (43) that the Community has jurisdiction upon non-EC enterprises when their activities have a direct and observable effect on EC's competition and trade. Correspondingly, the Commission considered that all enterprises having business relations with the EC

must obey the competition rules in the same way, irrespective of the place where they are situated, as the EC enterprises.

3.3 Consequences for Multinational Enterprises

In general, the Community has not met with many problems in applying competition rules on MNEs. Except the uncertainties regarding to the effects theory the main area which might be conflictual, in the sense of allegations for discrimination against non-EC enterprises, is the application of negative clearance, notifications and fines or prohibitions. However, the Commission's impositions of fines and prohibitions depends on the facts of that relevant case which may give evidence to find out whether parent and/or subsidiary acted jointly in conduct of the infringing act, or subsidiary was under total control of the parent. For instance, it has been pointed that in Benelux Flat Glass (44) and John Deere (45) subsidiaries were functioning under the parent's control; therefore, their illegal acts can be attributed to the parent companies. In this context, both parent companies were imposed fines and prohibitions. Nevertheless, it is important to know whether subsidiary acts autonomously or not. If it has autonomy in certain decisions, the parent is not normally fined for these acts of the subsidiaries. For instance, fines were imposed only

on subsidiaries in National Panasonic (46) and in Michelin (47). So, although it cannot be generalised in the strictest sense, it is possible to say that the Commission imposed fines on both parents and subsidiaries, separately or jointly.

In the application of competition rules the Commission advocated intra-group liability and extraterritoriality for multinational activities. The phenomenon of intra-group competition has a specific Community dimension which gives MNEs relatively more capability for manoeuvring. In this context, it is interesting to note different views about the relations between the Community and MNEs. According to one view, competition articles and their associated meanings are Community's protectionist weapons. (48) On the other hand, there is opposite view which criticizes the flexibility of the EC Competition Policy and its application; and alleges that MNEs are "independent undertakings united in a cartel-like structure but under the guidance of a well-structured diversified decision centre of transnational character are .... assessed differently". (49) Hence, another idea emerges such that as long as MNEs are treated differently due to their organisational structures, it is difficult to eliminate national differences in the common market. (50) Despite all, the EC has tried to attain a balanced approach without undermining the necessity for competition rules in an economically efficient context.

Notes to the Chapter 3:

1 Commission of the EC, Third Report on Competition Policy, 1974, p.25.

2 Commission of the EC, Eleventh Report on Competition Policy, 1982, p.37.

3 [1975] OJ L29/26; [1975] CMLR D83, D86.

4 [1974] OJ L343/19; [1975] 1 CMLR D8, D16.

5 Commission of the EC, Fourth Competition Report, 1975, p.41.

6 Cases 48, 49, 51 - 57/69, [1972] ECR 619.

7 Commission of the EC, First report on Competition Policy, 1972, p.28.

8 Chard, 1982, pp.83-84.

9 Cases 56 - 58/64, [1966] ECR 343.

10 [1982] OJ L354/28.

11 [1980] OJ L377/16.

12 Commission of the EC, Seventh Competition Report, 1978, p.28.

13 Commission of the EC, Eighth Competition Report, 1979, p.11.

14 [1972] OJ L182/24; [1972] CMLR D94.

15 [1970] OJ L147/24 and [1970] OJ L159/22.

16 [1977] OJ L48/32.

17 Commission of the EC, Fifth Competition Report, 1976, p.59.

18 General Motors Continental BV v. Commission (Case 26/75) [1975] ECR 1367; [1976] 1CMLR 95.

19 Hoffman-La Roche (Case 85/76) [1979] ECR 461.

20 United Brands (Case 27/76) [1978] ECR 207 - 272.

21 [1972] OJ L7/25; [1972] CMLR D29.

22 (Case 40/73) [1975] ECR 1977.

23 Commission of the EC, Eighth Competition Report, 1979, p.25.

24 Ibid, p.26.

25 OJ [1972] 299/51.

26 OJ [1972] L7/25; [1972] CMLR D29.

27 Kalmansohn, 1984, pp.19 - 25.

28 Christiani and Nielsen [1969] OJ L165/12, [1969] CMLR D36.

29 Ibid, D37 - D39.

30 Kodak [1970] OJ L147/24, [1970] OJ L159/22.

31 Ibid, D22 - D23.

32 Béguelin Import Co. and Others - Reference for a preliminary ruling (Case 22/71) [1971] ECR949, at 955.

33 Commission of the EC, Eleventh Competition Report, 1982, p.36.

34 Commission of the EC, Sixth Competition Report, 1977, p.38.

35 Supra note 6.

36 [1972] CMLR 557 and [1974] 1 CMLR 309.

37 Commission of the EC, Sixth Competition Report, 1977, p.31.

38 Supra note 32 at 959.

39 [1972] OJ C111/21.

40 Supra note 4.

41 [1978] OJ L70/54; [1978] 1 CMLR 534, 550-1.

42 Commission of the EC, Fourteenth Competition Report, 1985, pp.57 - 59.

43 Ahlstrom Osakejhtio v. Commission (Case 89/85) [1988] 4 CMLR 901.

44 [1984] OJ L212/13; [1985] 2 CMLR 350.

45 [1985] OJ L35/58; [1985] 2 CMLR 554.

46 Supra note 10.

47 Michelin (Case 322/81) [1983] ECR 3461.

48 Supra note 27.

49 Witlox in Slot and van der Woude, 1988, pp. 63 - 64.

50 Ibid, pp. 75 - 76.

4. MERGERS AND ACQUISITIONS IN THE EUROPEAN COMMUNITY

The first step on the way towards economic integration is the stage of customs union, as it is mentioned before, where the member states removed customs duties among themselves and put a common external tariff for the goods and services from the non-EC countries. In this respect, capital movements appear as an important factor for the countries which want customs union to lead to a more advanced integration. Within the limits of this part it is aimed to analyse these capital movements in the context of MNEs through finding out an answer to the effects of integration upon the strategies of these enterprises, in particular the merger activity. This activity is examined with its policy implications by EC-based and non-EC based enterprises.

Economic integration, which is the primary purpose of the EC member states, is a complex process that cannot be achieved only by customs union, but requires to be supported by various components, mainly by factor movements. (1) Due to this fact economic integration can also be defined as factor-price equalization, i.e. equalization of prices, wages, interests in all member states. Moreover, since foreign capital is crucial for countries to set up an economic integration, which is based on factor equali zation, capital movements needs to be analysed

to get a better understanding of the activities of multinational enterprises. As we know, for foreign direct investment three criteria (OLI advantages) need to be satisfied. The formation of customs union which is planned to lead to an economic integration causes enormous increase in the locational advantages of markets due to elimination of tariffs (2).

The theory of international economic integration incorporates a number of static and dynamic effects. First of all, trade creation and trade diversion effects come forth as static effects. (3) The influence of trade creation on the international production process is a kind of intra-region rationalisation due to partner country's comparative advantages. (4) On the other hand, trade diversion causes a move in sources of supply from more efficient non-EC producers to less efficient member state producers. Similar to the static effects on foreign production, there are also dynamic effects on international investment. Two major outcomes of these effects, in general, are better exploitation of economies of scale, which inevitably brings cost reduction and trade suppression effects, and productive efficiency gains from the intensification of competition. (5) Both static and dynamic effects improve the locational advantages of the firms of which production bases are inside the Community. In addition, dynamic effects contribute

positively to ownership specific advantages of the firms located inside the region and accordingly give a stimulus to direct investment within the region and to other kinds of international involvements. In short, FDI comes out as a "strategic response„ of firms in dealing with the changes in international competitive structure, location specific advantages and new organisational forms emerged after the elimination of tariffs. (6) However, this strategic response can be interpreted in different ways, e.g. it is possible to suggest that that response originates from the evolution of investment creation and investment diversion effects. (7) Investment creation can be explained as a response by the outside producer to the stimulus of trade diversion. It reflects in the sense that investment in Europe became more profitable after internal tariffs removed. On the other hand, investment diversion originated from the expected reorganisation facilities of European investment made by non-EC companies that were already established in Europe in order to capture the new opportunities of specialisation and economies of scale. The single market programme stimulates both inward investment - either of a defensive import substituting type or offensive type - and outward investment as a result of the search for lower costs - i.e. rationalised investment - and/or of the strengthening of EC-based firms. However, these responses can be evaluated

from a more specific point of view. If firms pursue an investment strategy in order to maintain their market share after tariff removal, it seems a defensive import-substituting investment. This kind emerges as a result of the trade diversion effects of integration which is based on the assumption of subsidiarity, i.e. non-EC firms prefer to subsidise their trade losses by internalising their production, marketing or distribution activities within the Community. The second type of investment pattern is, in fact, the investment motivated by growing demand and new markets . (8) It emerges through offensive reasons. The third type results from trade creation effects. Firms may prefer to invest for reorganising and reallocating their factors for FDI. Reorganisation investment may be either in the form of divestment and restructuring or in the form of expansion to establish larger manufacturing facilities to compete in the single market. The latter form is likely to take place through mergers. (9) Other than these responses, firms may rationalise their investments when costs decrease and efficiency in production increases. This may be also undertaken inside the EC by non-EC MNEs to exploit new sources due to changing cost structures. The most common rationalised investment patterns are concentration and/or specialisation. Firms will attempt to extend the geographical sphere of their operations by buying firms in other member states in their core business.

As it can be seen from different patterns of investment, FDI is one of the most crucial tools for the marketing strategies of international firms. (10) If there is a movement of FDI in a member state, the effects of integration process are expected to be determined by the investment impact on economic benefits of these companies from using their exclusive assets, which include ownership advantages. (11)

Moreover, the big portion of contemporary FDI is engaged by the companies which possess a considerable degree of market power - generally, oligopolistic - and operate on a multicountry basis. The most important factor for those companies is prices at which intra-firm transactions are conducted, such that firms arrange their production, trade and/or distribution of costs and benefits. In fact, this is another definition of internalisation process. However, this kind of transfer pricing is higher, as long as financial differences exist between countries, i.e. with the integration process motives to internalise will be inevitably diminished. (12)

The influence of economic integration on the strategies of MNEs also related to the share of the firm in the market. When monopolistic market structure dominates, it means that market is affected by transfer pricing process.

In short, elimination of non-tariff barriers brings new opportunities for reorganised and rationalised investment. Nevertheless, investment from non-region multinationals may have beneficial competitive effects in some countries, and non-beneficial anti-competitive effects in others. If the ownership advantages are strong enough to dominate the transaction process, new entry of FDI may contribute to the increase in research and development (R and D) activity and may create a faster growth of output, otherwise local firms are driven out and the remainings become more dependent on external sources. As a matter of fact, this emphasizes that integration process has discriminatory effects upon the ownership advantages of foreign-based or domestic-based firms. In conclusion, economic integration has effects on competitive advantages and locational factors of both non-region and intra-region companies.

The impact of integration factor on strategies of multinationals in Europe is difficult to analyse because many factors are involved in the final decisions of the companies and the reaction of each MNE is unlike the others. However, a priori, economic integration may have two opposing effects on the strategy of these companies in the EC. (13) The first effect is a decreased horizontal integration, i.e. as a result of

elimination of trade barriers firms may choose to concentrate their activities in one location. The other effect is the better division of labour and relatedly an increased vertical integration. (14)

Supported by empirical evidence (15) it has been shown that inward investment in Europe proliferated with the expectation of higher output as a result of reallocation of production facilities. After the first enlargement of the Community the pattern of intra-EC investment was the growth of intra-firm transaction costs. However, with the White Paper of 1985, which set a more clarified road towards single market, the multinational activities have accelarated. The impact of economic integration of the EC on FDI is concentrated on several points. First of all, it affects intra-EC investment and the size and structure of outward investment because the elimination of intra-EC tariffs will discriminate in favor of firms originated from the EC. Those firms would have easier access to investment rather than non-EC firms. In addition, elimination of non-tariff barriers which still exist would bring larger benefits for the companies from the EC. The second effect is related to uncertainty. The removal of tariffs and adoption of a common external tariff policy may attract firms to produce/manufacture inside the region. (16) In both

cases, existing firms are intended to choose defensive import-substituting investment. The third factor is about the reallocation of location facilities. After economic integration locations within the Community will become more attractive. In this context, costs of intermediate products decline as a result of an increase in economies of scale. So, firms which try to enter into market or which try to keep their market shares are expected to follow rationalised investment patterns. This type of investment pattern is observed through increasing merger and acquisition activities beside greenfield investments of Japanese firms. Moreover, it should be added that economic integration will increase competition in the EC. As a result, firms, in order to compete with American and Japanese rivals, will emphasize innovative activities. Accordingly, the promotion of trans-frontier links by the Commission in certain key sectors is accepted as essential to make European economy more powerful against American and Japanese challenge. (17)
The challenges of single market have given a new impetus to US direct investments in the EC and have encouraged other patterns of FDI like mergers and acquisitions of the EC in the USA. (18) To invest through mergers and acquisitions gives European multinationals the advantage of risk minimising for product development and marketing. In the same context, the reverse pattern rises more powerful when the rush of non-EC

MNEs to invest in the EC is considered.

4.1 Merger Activity in the European Community

Merger and acquisition activity is a worldwide phenomenon, not specific to the EC. (19) Although the most recent trend is towards strategic alliances and coalitions due to some reasons such as lesser financial costs, opportunity for reciprocal market access and cooperation in product development (20), mergers still dominate as the most effective way of undertaking new market shares.

In this regard, the underlying reasons of the intense merger and acquisition activity in a worldwide context can be indicated as the globalisation of markets, the need to improve market positions and the abundance of firms failed during the economic recession of 1979-81. (21) All these factors together with single market programme stimulated firms to enhance their market position in preparation for the stronger competition. Those firms which experience competition only in their domestic markets are directed towards the exploration of new markets by acquiring a safe base in the Community. Thus, mergers and acquisitions come out as the quickest way to establish the required sales network to penetrate unfamiliar market segments and the safest

way of entering markets because of its risk-minimisation aspect for product development and marketing. Similarly, merger and acquisition activity also contributes to accomplish better economies of scale.

In order to analyse merger activity in detail as a response by larger firms - mainly MNEs - to changing market structures we are going to deal, first, with the corporate restructuring in the EC-based MNEs. This will be investigated from two perspectives: of EC and non-EC enterprises.

4.1.1 Corporate Restructuring

In analysing merger and acquisition (M and A) activity in the Community we need to emphasize changing characteristics of Euro-business structure, especially in engineering, electronics, chemicals and telecommunications. In fact, these are industries which can be identified with technological change, high cost for R and D, inevitable advantage of economies of scale in production supported by immense capital flow. Therefore, these are very keen for M and A and joint ventures to provide a strong position to expand. Companies, especially intra-EC ones, choose a strategy to merge with the purposes to strengthen their positions in the market, to expand in order to get full benefits of the single market and to rationalise their investments in

relevant sectors. (22) The intense takeover activity reveals the tendency of adjustment to the single market in respects of production, marketing and distribution. Similarly, this restructuring process is linked with the impacts of harmonisation of national economies. Breakdown of fiscal, cultural and political barriers fostered the motive of seeking a business partner from a different national background as it can be seen in Table 1:

Number of Takeovers Involving Member States of the EC

Country	1980	1982	1985	1986	1987
Acquiring companies from:					
France	-	-	31	75	121
Italy	-	3	14	22	40
United Kingdom	12	10	15	13	68
United States	64	57	101	94	82
Acquiring companies in:					
France	-	-	46	72	102
Italy	-	13	15	26	51
United Kingdom	6	4	3	5	5
Germany	112	71	86	-	-
Netherlands	16	15	19	-	-

TABLE 1

Source: UNCTC, The process of transnationalisation and transnational mergers, New York, 1988.

Nevertheless, this attempt is only made by multinational enterprises. (23) These enterprises can more likely undertake structural adjustment with superior technology and financial strength in comparison with domestic enterprises because they could easily move from one location to another without caring costs of mobility. Also they are in a position such that their vast organisational structure entails intra-industry specialisation. (24) When firms are not vertically integrated, corporate restructuring generated by integration would only take place through FDI to the extent of the factors possessed by MNEs. Therefore, inter-industry trade flows and FDI flows are strongly related to each other.

Here, it seems necessary to distinguish between FDI flows with ownership advantages and those with location advantages because their responsive strategy for restructuring may show some differences. Firms with ownership specific advantages involve in market-based investments in order to provide closeness to clients, to reduce transaction costs, and to ensure an access to distribution systems through their subsidiaries. (25) Thus, investment flow in the form of M and A occurs mostly when investing firm does not have any intangible assets or it is too small to get benefits from its assets. On the other hand, firms with location advantages engage in factor-based investments to

seek benefits such as risk diversification through product differentiation, firm level economies of scale through complementary activities - e.g. in R and D or management-, and access to technology by providing financial support. (26) However, it is also necessary to state that firms wish to combine their functions to prevent a duplication in research. It means that the current trend to merge is a result of the incentive to save on costs. (27) This is especially relevant for hi-tech industries such as aircraft and defence. As long as technological content in many products increases, this strategy may most likely prevail. In regard to corporate strategy, increasing intra-EC investment flows signifies "regionalisation" of EC industry which was motivated by 1992 Programme.

Lastly, enterprises having certain incentives to merge may prefer among horizontal and vertical mergers or choose both. Horizontal mergers are better options if enterprises aim to enter protected markets, whereas vertical mergers are preferred if the primary purpose is to maintain lower costs of production. Nevertheless, enterprises may merge both vertically and horizontally when government incentives become very appealing. (28) In order to understand the motives of corporate restructuring we also need to assess the empirical evidence to clarify the search of MNEs in reorganising their activities.

4.1.2 Merger and Acquisitions in European Business

The idea of the single market has influenced merger and acquisition movement by both EC-based and non-EC based enterprises. This acceleration is a natural result of the motives coming through freedom of movement and technical harmonisation in order to eliminate all the obstacles to competition.

In general, the tendency of European-based enterprises is positive towards single market. This tendency is supported by the fact that there was going to be a large and very efficient market for goods and services. Although it means fiercer competition, this does not discourage Euro-corporates who believe that only the biggest and strongest can survive under the current circumstances. However, the survival completely depends on the fact that they should expand within EC borders, i.e. first of all, this is a competition between Euro-enterprises which use the opportunity of very big single market to increase their market shares against limited attempts of non-EC enterprises.

In this regard, it is possible to say that acquisitions emerge as the easiest and quickest way of enlarging market shares. This is one of the reasons of an ever-increasing domestic and

cross-border acquisition activities. Moreover, evidence on the level of M and A activity in the EC justifies the fact that the challenge of 1992 has become a determinant in the intensification of these activities. In general, the Community reinforced its position as the most popular target region for mergers. In 1992, EC cross-border transactions accounted for 57 per cent of worldwide sales, whereas it was 42 per cent in 1991. (29) This is an expected outcome of the trend of EC-based enterprises after the internal market programme has become more likely to be realised with White Paper. As it can be seen from the Table 2, this increase is clearly observable:

Domestic, Community and International M and As in the EC

1982 - 83	117 (x)
1983 - 84	155 (x)
1984 - 85	275 (xx)
1985 - 86	296
1986 - 87	415
1987 - 88	558
1988 - 89	666
1989 - 90	833

TABLE 2

x The number includes only M and As in industry.

xx The number includes also distribution, banking and insurance.

Source: Competition Reports of the EC

In sectoral analysis, the chemical industry leads in M and As, followed by food and food retailing. The former accounted for 24 per cent of all transactions in industry, whereas the latter occupied one sixth of all industrial operations in 1989 - 90 period.(30) The other popular sectors consist of electronics and electrical equipment, paper, printing and advertising. (31)

If one analyses the structure of M and A activity, it can be seen that British, French, German and Italian enterprises show the most acquisitive characteristics. During the second quarter of 1989 these countries accounted for 84 per cent of the total value of intra-EC deals. On the contrary, these countries become the most popular targets as well. Nearly 70 per cent of all Community deals involved enterprises from these countries as acquired parties. (32)

Acquiring Nations (first nine months of 1989)

	% of total	total number of deals(x)
France	23.5	122.1
UK	14.6	232.3
Germany (West)	8.6	88.3
Italy	4.7	42.3
US	30.2	129.2

Target Nations (first nine months of 1989)

	% of total	total number of deals(x)
UK	46.9	177.3
Germany (West)	14.2	160.9
Italy	11.5	79.1
France	9.7	148.4

TABLE 3

x Not all are whole numbers because they include acquisitions with split national ownership.

Source: Eurobusiness, February 1990.

The UK involved in most of the transactions, where British enterprises were sold to foreign buyers from the other EC member states and non-EC states for 15.1 billion dollar in 1992. France and Germany were the next popular targets with 6 billion dollar each. (33) Generally, the balance within the Community prevails in regard to M and As. Nevertheless, it is certain that there is growing concern in small economies of the Community because of increasing transfer of corporate assets to foreigners. This concern also includes the lack of big strong enterprises in these member states which would pick the benefits of the single European market. In this context, some of the member states began to encourage domestic enterprises to restructure themselves by allowing domestic mergers. Another

aspect of industrial restructuring, which stimulate M and A activity, is the transfer of assets belonging to family-owned enterprises to larger groups which are ready to expand. Although these precautions can be interpreted as a protectionist shield toward other member states, in the long run it will become a factor to strengthen the competitive advantages of the Community.

4.1.3 Non-EC Enterprises

When EC-based enterprises determine new strategies to maintain competitive positions, non-EC enterprises feared to be left outside and to be enforced to close down their business. Therefore, non-EC enterprises have increased their M and A activity in the EC. At this point, it seems necessary to state the existence of other factors such as globalisation of strategies and financial markets and exchange rate alignments among developed countries beside the Single Market Programme. (34) Nevertheless, it is still the Single Market Programme that determines the FDI movement into the Community.

To understand the increase in the level of FDI, which comes out as M and A activity, from outside the EC it is required to look at the previous attempts of total US and Japanese investments

to the EC. Since the greatest changes in the level of integration within the EC took place in 1957, 1973 and 1986, i.e. in the years when the new member states became absorbed into the EC, the rate of growth of US FDI increased after 1957 and 1973.

Flows of US Direct Investment to Western Europe (%)

	1950	1957	1964
Western Europe	100.0	100.0	100.0
EC	45.6	36.5	50.5
EFTA	48.9	59.7	44.1

TABLE 4

Source: Yannopoulos, Foreign Direct Investment ..., 1990.

However, it should be added that US FDI boosted eventually in every year from 1950 to 1980.

US Direct Investment stake in the USA

	EEC(x)	
	% total	% increase(xx)
1950	5.4	
1954	5.8	12.4
1957	6.6	19.6
1959	7.4	14.7

1965	12.7	15.8
1972	17.1	18.8
1977	33.7	13.9
1982	34.5	8.4
1985	35.3	0.4
1986	36.8	17.5
1987	37.6	21.2
1988	38.7	5.4

TABLE 5

x In the Table, data for 1950-72 refers to EC-6, that between 1972-85 EC-9, and that between 1986-8 EC-10 and that of 1988 EC-12.

xx Annual average.

Source: Dunning, European Integration and Transatlantic FDI, 1991

This reveals the general inclination of US enterprises in the EC (35) and the fact that Europe has been an attracting place for US FDI rather than Japanese FDI due to cultural proximity and differences in investment priorities. It should also be mentioned that competitive and ownership advantages of US and EC firms enhanced during the 1970s and early 1980s. Nevertheless, this is a result of a need to acquire US technology and to achieve better economies of scale beside the motive of holding a more competitive position against other US or Japanese firms. (36)

Whatever the reason for US FDI is, the US by spending more than 10 billion dollar on European acquisitions in 1989 has become the first in the rank of acquiring nations. (37) This was a reflection of globalisation in the strategies of multinational enterprises.

Despite the US' interests in investing within the EC Japan is way down the list of acquiring nations. Although Japanese FDI share going to the EC has increased in the 1980s (38), they prefer to start up on greenfield sites rather than by M and A. Moreover, most of the Japanese investment in the EC is in the form of portfolio investment rather than FDI. The growth of outward Japanese investment has been achieved very recently. Although Japanese investors prefer US more than EC, the rate of investment growth has increased 77 per cent in the EC, whereas it has shown 19 per cent decrease in the US between 1987-8 and 1989-90. (39)

Regional Distribution of Japanese FDI (%)

	1986	1989	1951-89
North America	36.2	50.2	42.9
of which: USA	34.3	48.2	41.1
EC	10.8	21.3	17.0
Asia	30.8	12.2	15.9

TABLE 6

Source: Balasubramanyam and Greenaway, Economic Integration and FDI: Japanese Investment in the EC, 1992.

Here, we have to focus on the striking feature of Japanese investment in the EC. This is their concentration in the services sector, i.e. they prefer FDI as to complement their exports to the EC. As a result, the rate of growth of Japanese investment is strongly related to the level of trade barriers in the EC. As long as tariff level has become favorable for Japanese entrepreneurs, they are going to substitute FDI for exports. (41)

Non-EC enterprises prefer M and A as a solution not only to increase their market share but also to set a production capacity. (42) Economic integration has implications on the choice of investment location rather the decision to invest. However, non-EC enterprises incline less towards labour costs for being competitive, i.e. the single market without any internal frontiers - but with wage differences - would mean less significant to them. This does not indicate that wage differences are totally unimportant for non-EC enterprises, e.g. for assembly operations enterprises would choose the lower labour cost regions. But when FDI flows are directed through political concerns, the choice of location would also depend on the

receptiveness of host governments. Therefore, non-EC companies which were already established within the EC would be more likely affected by the single market programme. They engaged in reorganisation in order to strengthen their positions in the EC in those activities in which they are already competitive internationally and to relatively contract with weaker enterprises. This may bring a geographical diversification for the activities of non-EC MNEs and their subsidiaries within the EC.

All these moves by non-EC companies indicate the importance of the completion of the single market for non-EC as well as EC-based firms. They do invest in the EC because they are competitive. Although the presence of non-EC enterprises within the EC postures a challenge to EC-based enterprises, both types of firms realised this fact when they are enforced to restructure their internal corporate mechanisms beyond enlarging their market shares and adjusting policies due to characteristics of the single market. After all, the completion of the single market and slow progress in trade liberalisation determine the degree of FDI by rival non-EC enterprises.

4.2 The Application of Competition Rules to Mergers

4.2.1 Relevant Articles in the Treaty of Rome

Although merger and acquisitions do not suit into conceptual framework of Articles 85 and 86, they can be classified as collusive arrangements between two or more enterprises in order to concentrate economic power totally or partially. (43) This happens through reducing number of the entrants to the market and the degree of competition. Therefore, M and A require an authority to control the existence or likely occurance of collusion in the market.

The EC has several objectives which are aimed to be realised on the grounds of having a stronger competitive position against the USA (44) and other rivals. In this context, possible structural changes in the industry should be interpreted not to give a way to increase concentration which may cause harmful effects within the Community as well. Moreover, the numbers about concentration in the EC reveal the fact that there has been an upward trend in concentrations except periods of recession. This upward trend was observable between 1975 and 1981. (45) Until 1984 there has been a stabilisation period, but after that concentrations have become more frequent than ever. (46) In general, we can say that companies go for takeovers as a result of certain motives which can be summed up as rationalisation and expansion rather than profitability, integration or R and D. (47) More significantly, there has been a domination of national operations in regard to takeovers. (48) This fact leads an

inevitable difference between competition policies of the Community and individual member states. Despite this, there are many cases of M and A which fall within Art. 85. However, the application of this article is related to the conception of shareholders being understood as undertakings. (49) Nevertheless, definition of "undertaking„ includes the requirement of economic involvement (50), e.g. the Court held this position in Case 170/83 Hydrotherm Gerätebau v. Compact de Dott Ing Mario Andreoli: 1984:ECR 2999. On the other hand, agreements having a merger effect, e.g. agreements for the purchase of shares, would fulfil the conditions of Art.85 and be void ab initio according to Art.85(2). Under these circumstances it is also possible to obtain exemption due to Art.85(3), nevertheless, since it is based on a detailed economic analysis by the Commission, exemption can be given to mergers after a long notification process which has no retrospective effects, and for a limited time which is against the permanent nature of mergers. As a result, Art.85 is inappropriate for concentrations and controlling mergers because it is written down not to preserve competition in vague terms but to provide efficient and "workable" competition. (51)

However, in the absence of merger control regulation Art.86 can be interpreted to substitute the role of an authority to control

concentrations. Although Art.86 does not prohibit concentrations, it prohibits some behaviours which constitute a dominant position. The application of Art.86 to M and A has come through Continental Can case. (52) The Court clarified the point that abuse of dominant position is strengthened by reaching a degree to distort competition. (53) With this case Art.86 was accepted applicable not only to the conduct of the companies in the market but also to structural distortions of competition. So, although distortion by M and A emerges in a structural rather than behavioural form, it seems meaningless to exclude this kind of structural distortions from the scope of Art.86. However, Art.86 has still lack of efficiency in dealing with concentration issues because its characteristic is based on underestimation of dominant positions unless it causes an abuse. Its scope is restricted only to prohibit a conduct after the merger has taken place, i.e. this provision can be used if there is an abuse of a dominant position as a result of merger activity, otherwise emergence of dominant position in any part of the market is left entirely out the domain of Art.86. (54) Nevertheless, as long as Art.86 is used to control mergers, it is wise to limit its application in two ways: 1.when the dominant firm uses this dominance through abuse to coerce the other firm into merger, 2.when acquisition brings a substantial position to prevent competition in the relevant market. (55) In this respect, it is

clear that there was a need for a regulation to satisfy all the requirements for merger control within the context of EC's Competition Policy that does not aim the investigation of behaviours of undertakings but the maintenance of market structure for effective competition. (56)

4.2.2 Merger Control Regulation

The Council adopted Merger Control Regulation (ECMR) 4064/89 on December 21, 1989 as a result of increasing need of an authority to control concentrations in a way not to prevent efficient functioning of the single market. In fact, ECMR is agreed unanimously by member states in order to help in completing internal market. (57) Despite previous attempts it became more significant and came into existence with the idea of internal market where undertakings go for structural changes through concentrations. It is already the fact that EC-based or non-EC based firms act in a rapid fashion to acquire EC-based firms partially or totally. In 1984 the number of mergers among the biggest 1000 firms of the EC was 155, on the other hand in 1987 it was 303. (58)

Mergers are seen positively by the Community because of economic reasons, and their control seems necessary because of political

and economic reasons. (59) Since mergers are perceived as natural extensions of restructuring process, member states feel the necessity to ensure "competition policy friendly mergers" in a Community scale. Although it seems contradictory, when it is thought that member states always brought obstacles for the achievement of a common control mechanism, their interests which are full of expectations from the benefits of single market are strongly related to the preservation of competition. As a result, an immense need to control and examine Community-scale mergers and to fill the gap of advicing to member states, which do not have merger control regulations, has given birth to the regulation for control of concentrations between undertakings.

Main principle of the regulation is based on the difference between Community-scale mergers and national mergers. The latter includes those which have effects within national borders of member states. However, the regulation brings the power to the Commission to deal with this type of mergers if such an expertise is requested by the member states. (60) In addition, the power of the Commission is restricted to cover mergers with Community dimension which is defined by three criteria: firstly, aggregate turnover of all the undertakings concerned should account more than 5 000 million ECU; secondly, aggregate Community turnover of each undertaking should be at least 250 million ECU; and

finally, undertakings should not focus their activities as to achieve two-thirds of their turnover in one member state. In short, only concentrations by undertakings which have worldwide economic power and a substantial place in the EC through dispersed activities in more than one member state are under the control mechanism provided by the regulation. (61)

According to the CMCR, effective control of mergers include the following: the mandatory prior notification by the undertakings in question is prepared. This notification may result in suspensions for a period of three weeks. The Commission should initiate proceedings within one month following the notification. The proceedings by the Commission cannot prolong more than four months. After four months the Commission should explain its decision. If decision comes out negative, investigation is initiated by the Commission which can enforce fines and split of unlawfully merged undertakings. (62)

The regulation has reconciliatory characteristics in regard to its provisions. The big member states with strong merger control laws such as Germany, France and the UK became active in determining the present thresholds which are higher than previous suggested ones. (63) These member states were reluctant to give up the control of national mergers to the Commission. In

fact, this idea was opposed by some member states which did not have their own regulations and wanted to hold lower thresholds for the EC regulation as to include their national operations. Therefore, thresholds will be open to further revisions after four years of adoption. This time those will be agreed by majority voting not unanimously, i.e. the Commission could not let the demands of small member states unheard. At the end of a transition period the Commission will prepare a draft in accordance with EC's benefits and small member states' demands. It is obvious that the likely outcome will reflect a position to prevent imbalances in merger control area of each member state whereas the economic efficiency in a Community-scale can be undermined.

4.3 Concluding Comments

Since it is accepted that the post-1992 single market would bring considerable economic gains to the Community due to the elimination of customs controls, both EC and non-EC based firms will continue to be active in international mergers and acquisitions. Despite the recent corporate restructuring, many industries are still fragmented in the Community. In this context many enterprises and governments choose Europeanisation as a strategy in the battle of international competition. As a matter

of fact, many industries in the EC do not have competitive advantages which can only arise due to the pressure of local rivals to advance. If there is lack of local rivals with the similar conditions, improvement comes out less likely. This situation does not change even in the presence of intra-EC competitors. Therefore, to maintain or to gain competitive advantage encourages companies to merge or form alliances. It is not difficult to understand why companies pursue merger, acquisition or alliance strategies. They want to decrease the risk of losing their power in the market as much as possible, however, they underestimate the danger of static functioning in a web of links with other competitors and collaborators.

The Commission states its willingness to stimulate competition and to strengthen the competitiveness of the Community industry. With this purpose, concentrations in the Community are taken under control by legislative measures - mainly, the merger control regulation. Although this is not a real solution to the competition problems in the EC because of difficulties in the application of extraterritoriality effects and enforcement, it is at least a step to create competitive advantage for the Community industries and to ensure more effective competition.

Notes to the Chapter 4:

1 Kindleberger, 1966, pp.64-65.

2 Yannopoulos, 1990, p.249.

3 Robson, 1987, pp.14-15.

4 Yannopoulos, pp.249-250.

5 Robson, pp.31-41.

6 Yannopoulos, p.250.

7 Kindleberger, p.71.

8 Yannopoulos, p.251.

9 Catoline, p.36.

10 Yannopoulos, p.254.

11 Robson, p.70.

12 Ibid, p.72.

13 Robson, p.76.

14 Cantwell, 1987, pp.135-136.

15 This subject is analysed by Franko, 1976, in the European Multinationals; and by Dunning, 1991, in his article "European Integration and Transatlantic Foreign Direct Investment ...".

16 Yannopoulos, p.257.

17 Robson, p.81.

18 Dunning, p.172.

19 See International Mergers and Competition Policy, OECD, 1988.

20 The Economist, September 19, 1992, "The Marriage of True Minds", p.97.

21 Yannopoulos, p.260.

22 Competition Report, 1990, p.232.

23 Mailander, 1968, pp.19-20.

24 OECD, 1988, p.14; Thomsen and Nicolaides, 1990, p.10.

25 Thomsen and Nicolaides, p.30.

26 Ibid, pp.6-7.

27 The Economist, May 5, 1990, "The Latest Business Game", p.18.

28 OECD, 1988, p.13.

29 Financial Times, January 7, 1993.

30 Competition Report, 1990, pp.225-227.

31 This is comparatively referred to the Competition Report, 1990 and Eurobusiness, February 1990, p.15.

32 Eurobusiness, February 1990, pp.13-14.

33 Supra note 29.

34 Balasubramanyam and Greenaway, 1992, p.176.

35 Yannopoulos, pp.236-238.

36 Dunning, 1991, p.167.

37 Eurobusiness, February 1990, p.14.

38 Dunning, 1986, pp.1-26.

39 Balasubramanyam and Greenaway, p.177.

40 Ibid, p.183; Heitger and Stehn, 1990, p.3.

41 Heitger and Stehn, p.7.

42 Mailander, p.20.

43 Lever and Lasok, 1986, p.123.

44 Ibid, pp.123-124.

45 Competition Report, 1985, p.190.

46 Ibid, pp.193-195 and 15th Competition Report, 1986, pp.211-215, 221.

47 14th Competition Report, 1985, pp.198-201.

48 15th Competition Report, 1986, p.221.

49 Lever and Lasok, p.127.

50 See the Chapter 1 for definition of "undertaking".

51 Lever and Lasok, pp.128-129.

52 OJ [1972] 299/51.

53 Ibid.

54 Mailander, p.36.

55 Lever and Lasok, p.140.

56 Ibid, p.134.

57 19th Competition Report, 1990, pp.33-34.

58 Financial Times, June 22, 1989.

59 Supra note 57.

60 Merger Control Regulation, p.7.

61 Ibid, pp.7-9.

62 Ibid, pp.16-19.

63 Financial Times, September 20, 1989.

CONCLUSION

In this paper it is attempted to analyse the responses of multi-national enterprises with reference to the Community's Competition Policy. Although the relationship between MNEs and the EC has multidimensional aspects, due to academic concerns it is preferred to concentrate only on competition dimension with slight references to industrial and enterprise policies.

The contributions of MNEs to the EC's economy are definite in the sense that they are economic organisations which emerged as a result of increasing direct investment activities that are fostered by the "1992 Single Market" idea. These enterprises involve business in both the Community and outside. In fact, MNEs are generally supported by the Commission which considers that MNEs cause to raise efficient economies of scale, employment opportunities, commercial dynamism and improvement of economic performance in member states. Therefore, the Community gives relatively more freedom to these enterprises in the context of Art. 85 and 86. Although these articles declare all kind of restrictive, distortive and abusive practices "null and void", keeping exemption possibility, the approach is in the direction of evaluating their anti-competitive activities within a rather flexible scope. Main evidence of this attitude

is the replacement of economic entity theory by the Commission instead of legal personality theory which is still prevailing in several law systems. However, it is a fact that this attitude is more rigid in interpreting the actions of the non-EC MNEs because it seems that the overall tendency in the Community is a kind of discomfort towards their activities. It is possible to say that despite the presence of liberal concerns protectionism is dominant in the external commercial relations of the EC. With this protectionist trend, the Commission is keen to adopt extra-territoriality principle by using effects theory as the main instrument which gives way to the most limited interpretation of the competition rules.

In this context, it is not surprising to witness supports by the EC for the development of small and medium-sized enterprises which are proclaimed as means in achieving economic integration. The underlying reason in this increasing emphasis upon small and medium-sized enterprises originates from the difficulty of finding original Community-based MNEs which are perceived as the motivating force of the economic activity within the common market. As a result, small and medium-sized enterprises whose lack of advantage in economies of scale are compensated by an integrated market appear in a more competitive position against MNEs.

The attraction of single market and the integration phenomenon made the EC a target for investors. MNEs, therefore, increased their investments in the EC either in the form of subsidiaries or through mergers, acquisitions and alliances. So, most of the existing Community-based MNEs have chosen to merge with non-EC partners. In this respect, the Commission, on the one hand, issued a regulation to control concentrations, and on the other, it has increased its pressure for the full adoption of extraterritoriality principle and for the promotion of small and medium-sized enterprises at the expense of economic benefits from MNEs.

Hence, after the completion of integration it can be presumed that the Commission will continue to apply competition rules for foreign MNEs, in a much stricter context, sustained with a strong protectionist tendency due to the fear of losing the EC market to the bigger foreign enterprises. This is, for sure, the last option for the EC while it fights to be an economic superpower in the global arena.

March 21, 1993
İstanbul

APPENDIX:

Council Regulation (EEC) No 4064/89 of 21 December 1989
on the control of concentrations between undertakings

(OJ L 395, 30.12.1989
Corrigendum : OJ L257, 21.9.1990)

Introduction

(Extract from the Nineteenth Report on Competition Policy, Brussels 1990)

On 21 December, the Council adopted the Commission's proposal on the control of concentrations between undertakings.[1] The regulation will form a cornerstone of competition policy and make a major contribution to ensuring success in the completion of the internal market.

Given the inadequacy of the existing competition rules in dealing with the entire concentration phenomenon at Community level, the need for such a regulation was recognized as early as 1973 in the wake of the *Continental Can* judgment.[2] However, at that time, the Council did not give serious consideration to the new draft regulation. The Commission tabled an updated proposal in the autumn of 1987. At its meeting on 30 November 1987, the Council adopted a generally positive attitude on the main lines of the Commission's approach.[3]

The progress made towards completing the internal market and the new political environment provided a key impetus towards approval of the merger control regulation. The logic of the single market prompted Member States to agree unanimously on a system of merger control at Community level for Community-scale mergers.

Merger control is necessary for both economic and political reasons. The process of restructuring European industry has given rise and will continue to give rise to a wave of mergers. Although many such mergers have not posed any problems from the competition point of view, it must be ensured that they do not in the long run jeopardize the competition process, which lies at the heart of the common market and is essential in securing all the benefits linked with the single market. In addition, it has become ever more clearly apparent that national rules are inadequate as a means of controlling Community-scale mergers, mainly because such rules are restricted to the respective territories of the Member States concerned. Clearly, Community law must be applied in controlling and examining large-scale mergers, where the reference market is increasingly the Community as a whole or a large part of it. The new regulation also introduces a system of control for Member States which do not have any specific rules in this area.

The fundamental principles of the regulation are as follows:

(a) The basic concept underlying the regulation is to establish a clear allocation between Community-scale mergers, for which the Commission is responsible, and those whose main impact is in the territory of a Member State, for which the national authorities are responsible.

(b) In its scope, the new regulation covers mergers having a Community dimension, which are defined on the basis of three criteria, namely:

(i) A threshold of at least ECU 5 000 million for the aggregate world-wide turnover of all the undertakings concerned. This figure reflects the aggregate economic and financial power of the undertakings involved in a merger. In the case of financial institutions and insurance companies, specific criteria are laid down;

(ii) A threshold of at least ECU 250 million for the aggregate Community-wide turnover of each of at least two of the undertakings concerned. Thus, only undertakings with a specified level of activity in the Community are covered by the regulation;

(iii) A transnationality criterion. Community control does not apply if each of the undertakings concerned achieves two-thirds of its turnover within one and the same Member State. This criterion allows mergers whose impact is mainly national to be excluded from the Community control system.

1 OJ L 395, 30.12.1989.
2 See *Third Competition Report*, pp. 15 and 16.
3 See *Seventeenth Competition Report*, points 44 to 51.

(c) The current thresholds were set at a high level for an initial stage in implementing the regulation. However, this represents an important first step in establishing Community merger control and will probably result in some 50 cases being examined a year, on the basis of an extrapolation of the statistics for the last few years. The thresholds are to be reviewed by the Council, acting by a qualified majority on a proposal from the Commission, in the light of experience, no later than four years after the adoption of the regulation. The Commission's declared intention is that the thresholds will be revised downwards: the objective is to lower the overall threshold to ECU 2 000 million and to reduce the Community threshold similarly.

(d) All mergers falling within the scope of the regulation will be assessed on the basis of clearly defined criteria. The basic concept is that of 'dominant position'. The creation or strengthening of a dominant position will be declared incompatible with the common market if effective competition is impeded to a significant extent, whether within the common market as a whole, or in a substantial part thereof; conversely, a merger which does not impede effective competition will be declared compatible with the common market. The assessment process will take various aspects of competition into account. These will include the structure of the markets concerned, actual and potential competition (from inside and outside the Community), the market position of the undertakings concerned, the scope for choice on the part of third parties, barriers to entry, the interests of consumers and technical and economic progress. This overall list will be used in assessing the impact of a merger on competition.

(e) For the purposes of the regulation, a 'concentration' is defined as the acquisition of control and covers both mergers and acquisitions. The definition includes partial mergers and merger-type joint ventures, but it does not cover the coordination of the behaviour of undertakings which remain independent.

(f) So as to ensure that control is effective and that undertakings enjoy legal certainty, the merger control arrangements include the following:

(i) The principle of mandatory prior notification by the undertakings concerned. This has a suspensory effect on the concentration for a period of three weeks (suspension of the concentration may be extended or, in some cases, dispensed with). However, the validity of stock-exchange transactions will not be affected.

(ii) The setting of strict deadlines to be met by the Commission in its proceedings:

— The Commission has one month following notification within which to initiate proceedings.[1] In cases where the Commission does not raise any objections (this is likely to be the general rule), the parties will receive the go-ahead within one month;

— Four months after the initiation of proceedings, the Commission must take its final decision on the concentration. During that period, the parties are free to propose adjustments to the concentration so as to avoid a negative decision;

(iii) The Commission's powers of investigation and the fines provided for in the regulation are similar to those applicable to restrictive practices. Furthermore, the Commission may require undertakings or assets unlawfully merged to be separated.

(g) The regulation is based on the principle of exclusivity, but provision is made for a few limited exceptions to this rule. The principle of exclusivity applies as follows:

(i) All decisions relating to Community-scale mergers falling within the scope of the regulation will be taken by the Commission. The Member States have undertaken not to apply their national law to such cases. There will, therefore, be no need for concurrent proceedings.

(ii) There are two derogations from the principle of exclusivity:

— The regulation provides for referral to the national authorities of a Member State where a problem of a dominant position arises on a distinct market within its territory and where application of the regulation would not achieve a satisfactory solution to the particular problem. This mechanism would normally apply to local markets, for example in distribution or hotels; exceptionally, the provision could also apply to a national market which is to some extent isolated from the rest of the Community, for example, because of high transport costs.

[1] This period is increased to six weeks if the Commission receives a request from a Member State that a notified merger case be referred to it (see below).

— In cases where Member States may invoke legitimate interests other than those protected by the regulation. These include public security, plurality of the media and prudential rules. Exceptionally, other legitimate interests may be recognized by the Commission after an assessment of their compatibility with Community law; certain such legitimate interests may be protected by the provisions of national law. In such cases, a Member State may take appropriate measures to protect such interests, which means that they have the power to prohibit a concentration or to make its approval subject to additional conditions or requirements. However, a Member State may not, under this heading, authorize a concentration which has been prohibited by the Commission.

(h) Concentrations which are not covered by the Community regulation fall in principle within the jurisdiction of the Member States. However, the regulation gives the Commission the power to take action with regard to concentrations that do not have a Community dimension at the request of a Member State concerned, in cases where a problem involving a dominant position arises within the territory of that Member State.

Four implementing measures have been adopted by the Commission.

Two notices provide explanatory guidelines on how the terms 'concentration' and 'ancillary restrictions' must be interpreted. These are technical questions of considerable importance, and the notices were drafted in close collaboration with the Member States, industry and the various other parties concerned.

A procedural regulation lays down the rights and obligations of the Commission and of the companies concerned in individual cases. This was based on existing procedures, with adjustments being made where necessary to take account of precedents set by the Court of Justice and the specific requirements of merger control.

A form has been drawn up for notifications. After wide-ranging consultations, a balance was struck between the Commission's need to obtain full information from the start of a case and the need to keep the burden imposed on industry as light as possible. The form confines itself to the information that is necessary for a full analysis of the market. If a company cannot provide some of the information requested or is able to show that some questions are not relevant to examination of the case, it may be relieved of its obligations.

COUNCIL REGULATION (EEC) No 4064/89
of 21 December 1989
on the control of concentrations between undertakings

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

(1) Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3 (f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';

(2) Whereas this system is essential for the achievement of the internal market by 1992 and its further development;

(3) Whereas the dismantling of internal frontiers is resulting and will continue to result in major corporate reorganizations in the Community, particularly in the form of concentrations;

(4) Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;

(5) Whereas, however, it must be ensured that the process of reorganization does not result in lasting damage to competition; whereas Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it;

(6) Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

(7) Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

(8) Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, including with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;

(9) Whereas the provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State;

(10) Whereas the scope of application of this Regulation should therefore be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension; whereas, at the end of an initial phase of the application of this Regulation, these thresholds should be reviewed in the light of the experience gained;

(11) Whereas a concentration with a Community dimension exists where the combined aggregate turnover of the undertakings concerned exceeds given levels worldwide and within the Community and where at least two of the undertakings concerned have their sole or main fields of activities in different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has substantial operations in at least one other Member State; whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there;

(12) Whereas the arrangements to be introduced for the control of concentrations should, without prejudice to Article 90 (2) of the Treaty, respect the principle of non-discrimination between the public and the

(1) OJ No C 130, 19. 5. 1988, p. 4.
(2) OJ No C 309, 5. 12. 1988, p. 55.
(3) OJ No C 208, 8. 8. 1988, p. 11.

private sectors ; whereas, in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them ;

(13) 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 maintain and develop effective competition in the common market ; whereas, in so doing, the Commission has to take into account the wider framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a ;

(14) Whereas this Regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market ;

(15) Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market ; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it ;

(16) Whereas the Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore effective competition ;

(17) Whereas to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary ; whereas in the interests of legal certainty the validity of transactions must nevertheless be protected as much as necessary ;

(18) Whereas a period within which the Commission must initiate proceedings in respect of a notified concentration and periods within which it must give a final decision on the compatibility or incompatibility with the common market of a notified concentration should be laid down ;

(19) Whereas the undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated ; whereas the members of the management and supervisory bodies and the recognized representatives of the employees of the undertakings concerned, and third parties showing a legitimate interest, must also be given the opportunity to be heard ;

(20) Whereas the Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information ;

(21) Whereas, for the purposes of this Regulation, and in accordance with the case-law of the Court of Justice, the Commission must be afforded the assistance of the Member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to appraise concentrations ;

(22) Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments ; whereas the Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 172 of the Treaty ;

(23) Whereas it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a lasting change in the structure of the undertakings concerned ; whereas it is therefore necessary to exclude from the scope of this Regulation those operations which have as their object or effect the coordination of the competitive behaviour of undertakings which remain independent, since such operations fall to be examined under the appropriate provisions of the Regulations implementing Articles 85 and 86 of the Treaty ; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures ;

(24) Whereas there is no coordination of competitive behaviour within the meaning of this Regulation where two or more undertakings agree to acquire jointly control of one or more other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets ;

(25) Whereas this Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration;

(26) Whereas the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice;

(27) Whereas the Member States may not apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor; whereas the relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation; whereas the Member States concerned must act promptly in such cases; whereas this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies;

(28) Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

(29) Whereas concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States; whereas, however, the Commission should have the power to act, at the request of a Member State concerned, in cases where effective competition could be significantly impeded within that Member State's territory;

(30) Whereas the conditions in which concentrations involving Community undertakings are carried out in non-member countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for Community undertakings;

(31) Whereas this Regulation in no way detracts from the collective rights of employees as recognized in the undertakings concerned,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 22 this Regulation shall apply to all concentrations with a Community dimension as defined in paragraph 2.

2. For the purposes of this Regulation, a concentration has a Community dimension where:

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

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

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this Regulation by the Council acting by a qualified majority on a proposal from the Commission.

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 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 outwith the Community;

(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.

2. A concentration which does not create or strengthen 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 compatible with the common market.

3. 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.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge, or

(b) — one or more persons already controlling at least one undertaking, or

— one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1 (b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b).

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1 (b) are carried out by the financial holding companies referred to in Article 5 (3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies [1], as last amended by Directive 84/569/EEC [2], provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations

1. Concentrations with a Community dimension defined in 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.

2. A concentration which consists of a merger within the meaning of Article 3 (1) (a) or in the acquisition of joint control within the meaning of Article 3 (1) (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

[1] OJ No L 222, 14. 8. 1978, p. 11.
[2] OJ No L 314, 4. 12. 1984, p. 28.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of Article 1 (2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, as regards Article 1 (2) (a), one-tenth of their total assets.

As regards Article 1 (2) (b) and the final part of Article 1 (2), total Community-wide turnover shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with Community residents and the total sum of those loans and advances.

As regards the final part of Article 1 (2), total turnover within one Member State shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with residents of that Member State and the total sum of those loans and advances;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1 (2) (b) and the final part of Article 1 (2), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of Article 1 (2) shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

— has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (a);

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4 (b), in calculating the aggregate turnover of the undertakings concerned for the purposes of Article 1 (2):

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4 (b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

(c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

2. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. For the purposes of paragraph 2 a concentration as defined in Article 1 shall not be put into effect either before its notification or within the first three weeks following its notification.

2. Where the Commission, following a preliminary examination of the notification within the period provided for in paragraph 1, finds it necessary in order to ensure the full effectiveness of any decision taken later pursuant to Article 8 (3) and (4), it may decide on its own initiative to continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect.

3. Paragraphs 1 and 2 shall not prevent the implementation of a public bid which has been notified to the Commission in accordance with Article 4 (1), provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission under paragraph 4.

4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1, 2 or 3 in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

5. The validity of any transaction carried out in contravention of paragraph 1 or 2 shall be dependent on a decision pursuant to Article 6 (1) (b) or Article 8 (2) or (3) or on a presumption pursuant to Article 10 (6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 or 2.

Article 8

Powers of decision of the Commission

1. Without prejudice to Article 9, all proceedings initiated pursuant to Article 6 (1) (c) shall be closed by means of a decision as provided for in paragraphs 2 to 5.

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2 (2), it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion laid down in Article 2 (3), it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

6. In the cases referred to in paragraph 5, the Commission may take a decision under paragraph 3, without being bound by the deadline referred to in Article 10 (3).

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a destinct market, be it a substantial part of the common market or not.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned; or

(b) it shall refer the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

(a) as a general rule within the six-week period provided for in Article 10 (1), second subparagraph, where the Commission, pursuant to Article 6 (1) (b), has not initiated proceedings; or

(b) within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures under Article 8 (2), second subparagraph, (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the three months referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers of of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.

10. This Article will be reviewed before the end of the fourth year following that of the adoption of this Regulation.

Article 10

Time limits for initiating proceedings and for decisions

1. The decisions referred to in Article 6 (1) must be taken within one month at most. That period shall begin on the day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following that of the receipt of the complete information.

That period shall be increased to six weeks if the Commission receives a request from a Member State in accordance with Article 9 (2).

2. Decisions taken pursuant to Article 8 (2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6 (1) (c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.

3. Without prejudice to Article 8 (6), decisions taken pursuant to Article 8 (3) concerning notified concentrations must be taken within not more than four months of the date on which proceedings are initiated.

4. The period set by paragraph 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13.

5. Where the Court of Justice gives a Judgement which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the Judgement.

6. Where the Commission has not taken a decision in accordance with Article 6 (1) (b) or (c) or Article 8 (2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

Requests for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and comptent authorities of the Member States, from the persons referred to in Article 3 (1) (b), and from undertakings and associations of undertakings.

2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 14 (1) (c) for supplying incorrect information.

4. The information requested shall be provided, in the case of undertakings, by their owners or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, by the persons authorized to represent them by law or by their statutes.

5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14 (1) (c) and 15 (1) (a) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

Article 12

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 13 (1), or which it has ordered by decision pursuant to Article 13 (3). The officials of the competent authorities of the Member States responsible for conducting those investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State within the territory of which the investigation is to be carried out. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State within the territory of which the investigation is to be carried out, officials of the Commission may assist the officials of that authority in carrying out their duties.

Article 13

Investigative powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To that end the officials authorized by the Commission shall be empowered:

(a) to examine the books and other business records;

(b) to take or demand copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized to carry out the investigations shall exercise their powers on production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14 (1) (d) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform, in writing, the competent authority of the Member State within the territory of which the investigation is to be carried out of the investigation and of the identities of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it shall begin and state the penalties provided for in Articles 14 (1) (d) and 15 (1) (b) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.

5. Officials of the competent authority of the Member State within the territory of which the investigation is to be carried out may, at the request of that authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking or association of undertakings opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to carry out their investigation. To this end the Member States shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings fines of from ECU 1 000 to 50 000 where intentionally or negligently:

(a) they fail to notify a concentration in accordance with Article 4;

(b) they supply incorrect or misleading information in a notification pursuant to Article 4;

(c) they supply incorrect information in response to a request made pursuant to Article 11 or fail to supply information within the period fixed by a decision taken pursuant to Article 11;

(d) they produce the required books or other business records in incomplete form during investigations under Article 12 or 13, or refuse to submit to an investigation ordered by decision taken pursuant to Article 13.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they:

(a) fail to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph;

(b) put into effect a concentration in breach of Article 7 (1) or disregard a decision taken pursuant to Article 7 (2);

(c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8 (3) or do not take the measures ordered by decision pursuant to Article 8 (4).

3. In setting the amount of a fine, regard shall be had to the nature and gravity of the infringement.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings concerned periodic penalty payments of up to ECU 25 000 for each day of delay calculated from the date set in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision pursuant to Article 11;

(b) to submit to an investigation which it has ordered by decision pursuant to Article 13.

2. The Commission may be decision impose on the persons referred to in Article 3 (1) (b) or on undertakings periodic penalty payments of up to ECU 100 000 for each day of delay calculated from the date set in the decision, in order to compel them:

(a) to comply with an obligation imposed by decision pursuant to Article 7 (4) or Article 8 (2), second subparagraph, or

(b) to apply the measures ordered by decision pursuant to Article 8 (4).

3. Where the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payments imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of Article 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Articles 4 (3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Articles 7 (2) and (4), Article 8 (2), second subparagraph, and (3) to (5) and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision to continue the suspension of a concentration or to grant a derogation from suspension as referred to in Article 7 (2) or (4) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8 (2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23.

4. The Advisory Committee shall consist of representatives of the authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 14 days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take due account of the legitimate interest of undertakings in the protection of their business secrets and of the interest of the undertakings concerned in such publication's taking place.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8 (2) to (5) in the *Official Journal of the European Communities*.

2. The publication shall state the names of the parties and the main content of the decision ; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Jurisdiction

1. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any consideration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Article 9 (2) or after referral, pursuant to Article 9 (3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9 (8).

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission 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.

Article 22

Application of the Regulation

1. This Regulation alone shall apply to concentrations as defined in Article 3.

2. Regulations No 17 [1], (EEC) No 1017/68 [2], (EEC) No 4056/86 [3] and (EEC) No 3975/87 [4] shall not apply to concentrations as defined in Article 3.

3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).

4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which proceedings may be initiated pursuant to Article 10 (1) shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or store effective competition within the territory of the Member State at the request of which it intervenes.

6. Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1 (2) have been reviewed.

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[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No L 175, 23. 7. 1968, p. 1.
[3] OJ No L 378, 31. 12. 1986, p. 4.
[4] OJ No L 374, 31. 12. 1987, p. 1.

Article 23

Implementing provisions

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time limits pursuant to Article 10, and hearings pursuant to Article 18.

Article 24

Relations with non-member countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a non-member country.

2. Initially not more than one year after the entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to Community undertakings, in the terms referred to in paragraphs 3 and 4, as regards concentrations in non-member countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a non-member country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for Community undertakings.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Entry into force

1. This Regulation shall enter into force on 21 September 1990.

2. This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

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