THE EUROPEAN UNION'S NEW MERGER REGULATION: IS EU LAW MERGING WITH U.S. APPROACH?

by

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The business world has experienced such a strong consolidation trend over the past ten years that some have called it a period of merger mania. Yet antitrust regulators in the United States have approved the overwhelming majority of all proposed mergers, including a number of massive combinations between directly competing companies. The perceived leniency of U.S. antitrust regulators, at least on the issue of mergers, prompted a new strategy for those opposed to these large combinations – seeking help from the European Union.

For at least the past five years, it was generally conceded that the European Union was enforcing antitrust law far more vigorously than the United States. As a result, competitors of large multinational companies based in the United States began to turn instead to EU regulators to try to prevent or complicate their rivals' merger plans. The EU's decision to block the proposed merger of General Electric Co. and Honeywell International Inc., even after U.S. regulators had approved the deal, provided the best example of a more stringent view on mergers in the EU.[1]

However, there were significant revisions to EU antitrust law in 2004, especially in the area of merger control. This paper will explore the major developments in people and policies in EU antitrust enforcement, seeking to assess what those changes will mean for multinational corporations doing business in the 25 nations of the European Union.

The EU's Antitrust Enforcers

The European Commission is the powerful executive branch of the EU government. An independent political body, it performs most of the regulatory work of the Union.[2] It can be forced to resign by a censure motion from the European Parliament, the legislative branch. The judicial branch, led by the European Court of Justice and including the lower Court of First Instance, can review decisions of the European Commission.

As head of the executive branch, the European Commission President is the chief administrative official of the EU. Jose Manuel Barroso, who had been the prime minister of Portugal, was selected in 2004 for a five-year term as European Commission President. Barroso came to office as a proponent of free markets and is seen as being "right of center," at least in the broad spectrum of EU politics.[3]

Carrying out the administrative work of the executive branch are various "directorate-generals," or commissions, for specific areas of governmental authority. One of the most powerful of these "DGs" is the Competition Commission, which oversees antitrust, mergers, deregulation of markets, and state aid to businesses. From 1999 to 2004, the Competition Commission was headed by Mario Monti, an Italian economist and academic. Monti gained the nickname "Super Mario" because of his reputation as a tough enforcer of antitrust law and a feared regulator by the business world.

Monti was seen as the driving force behind the decision to block the General Electric-Honeywell merger, as well as the EU's successful case alleging anti-competitive conduct by Microsoft Corp. Ultimately, Microsoft was fined more than $600 million by the EU for restricting the interoperability of competitors' server software with the Windows operating system, and for bundling (or tying) its less

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popular Windows media player with the operating system.[4] Because the EU claims antitrust authority if the activities of a company, regardless of nationality, have a substantial and intended effect within the EU, Monti's power was a major concern to multinational corporations, and especially annoying to businesses based in the United States that were already subject to extensive oversight by the Department of Justice and Federal Trade Commission.

As Monti's five-year term as Competition Commissioner neared its conclusion in 2004, he indicated his willingness to serve another term, either as Competition Commissioner or in a different EU directorate. (Each member nation sends one representative to the European Commission, where the Commission President then assigns the specific positions.) Monti was not given that opportunity, as Prime Minister Silvio Berlusconi of Monti's home nation of Italy selected a different person to serve as Italy's representative (apparently as a result of internal Italian politics, rather than a response to controversy over Monti's term as Competition Commissioner).[5]

Without question, Monti pursued a far more aggressive approach to antitrust enforcement than his U.S. counterparts at the time (with most of Monti's term overlapping the first term of the George W. Bush presidency). However, Monti's record as Competition Commissioner, as well as the EU's overall approach to antitrust issues, is more complex than the highly publicized cases such as General Electric-Honeywell and Microsoft would indicate. For example, the EU has reviewed more than 2,600 proposed mergers since 1990, but completely blocked only 19.[6] (However, it should be noted that EU regulators, like their counterparts in the U.S., often extract significant concessions before conditionally approving a merger.)

The conclusion of Monti's term as Competition Commissioner in late 2004 was in itself a major development in EU antitrust law, and its significance could become even greater depending on the ultimate record of his successor. Barroso, the new European Commission President, had to select a new Competition Commissioner from the 25 representatives sent to the EU by the member nations. After being lobbied heavily by various nations wanting their representative to hold this coveted post, Barroso surprised many observers by selecting businesswoman Neelie Kroes from the Netherlands to succeed Monti.[7]

The recurring complaint about Monti was that he appeared to be too hostile to big business. By contrast, the concern about Kroes was that her extensive business experience made her too close to the corporate world. Over a number of years, she had served on the boards of more than 25 companies, including major firms such as the Volvo Group. In hopes of facilitating her confirmation, Kroes resigned from any boards on which she remained and sold all of her stock.[8] A majority of a European Parliament committee eventually supported her nomination, but controversy continued to follow Kroes because of additional revelations about her business ties and potential conflicts of interest.[9]

Still, Kroes' nomination was not the most problematic one in Barroso's slate of commissioners. Ironically, the greatest furor involved the person selected to replace Monti as Italy's representative to the European Commission. Rocco Buttiglione's nomination as Justice Commissioner drew strong opposition in Parliament because of statements he had made about women's rights and his views on homosexuality.[10] The Buttiglione controversy delayed all of the nominations because the European Parliament must confirm or reject the entire slate of commissioners (rather than approving some but rejecting others, as the U.S. Senate may do for Cabinet nominees).

Eventually, Barroso withdrew his slate of nominees to avoid an embarrassing defeat in the European Parliament.[11] Parliament finally approved Barroso's selections only after Buttiglione was replaced by another Italian representative and Barroso made several other minor changes in the assignments for various commissioners. Kroes remained as Competition Commissioner, in spite of continuing concerns about her business connections. As a group, Barroso's commissioners are considered supporters of free markets, and the Barroso-led commission has made economic growth and jobs their top priorities.

Kroes' selection as Competition Commissioner was especially pleasing to the business world – both because of her extensive business experience, and because it meant simply that Monti was no longer in power. However, her early comments and actions surprised her business supporters. Kroes' first major decision, coming only a few weeks after assuming office in November 2004, blocked a merger of Portuguese and Italian energy companies – the first time that the EU had officially blocked a merger in more than three years. Kroes said that the combination was "a bad proposal, it was a quasi-monopoly and that is a sin in our dictionary of competition."[12] On the same day, she fined three chemical companies for colluding to set prices of animal feed vitamins, saying she would apply "zero tolerance" for such cartels.[13] Moreover, in an obvious response to continuing questions about how strong an antitrust enforcer she will be, Kroes added:

> I know that some people had doubts that someone who is as passionate about business as me and knows it inside out could act with the impartiality and sense of fair play that is really needed. I promised that I would blow the whistle when needed and today is hard evidence that I can put this into practice … the pussycat won't be here for the next five years.[14]

Her tough talk about antitrust enforcement continued several months later when she delivered a speech assessing her first 100 days in office. Commenting on illegal collusion between companies, Kroes said:

> I am an economist by training. My analytical experience tells me that it is rare in life that issues are either entirely one thing or another – or, if you like, purely black or white. But with cartels my judgement is clear-cut. Cartel behaviour is illegal, unjustified and unjustifiable – whatever the size, nature or scope of the business affected. … The long-term eradication of cartels is therefore essential if we are to deliver the fair competitive environment needed to allow growth and job-creation to flourish in Europe.[15]

Of course, it is too early in Kroes' five-year term to draw final conclusions about her views on antitrust enforcement. Her rulings on the first two cases (which she inherited from the Monti era), as well as her comments soon after taking office, might be explained as an overreaction based on the questions about her, or as merely an opening signal to businesses not to take advantage of her. Similarly, her comment about cartels several months later may not be overly indicative, as the need to stop illegal cartels is one of the few aspects of antitrust law where there is little debate along political or philosophical lines.

Despite Kroes' strong opening rhetoric, most still assume that she will not prove to be a more aggressive antitrust enforcer than Monti. The open question now is whether she will follow original expectations and actually be an improvement for the business world and, if so, to how great an extent. Yet any comparisons between Monti and Kroes will be complicated by the significant changes in EU antitrust law that took effect in 2004.

EU Antitrust Laws

The Competition Commission derives its antitrust authority initially from two articles of the European Community Treaty. Prohibitions on cartels and other "concerted practices" are found in Article 81 of the EC Treaty.[16] That provision is similar to Section 1 of the Sherman Act of U.S. antitrust law, which prohibits concerted action to restrain trade.[17] Article 82 of the EC Treaty addresses monopolistic behavior by prohibiting companies from "any abuse … of a dominant position" in the European Union.[18] That is comparable to Section 2 of the Sherman Act, which outlaws willful acquisition or maintenance of monopoly power.[19] Although U.S. and EU antitrust laws begin with fairly similar provisions, their application has not been as parallel. A typical, though arguably oversimplified, explanation of the different approaches is that U.S. antitrust law focuses more on protecting competition and consumers, while EU law is more interested in protecting competitors.[20]

Together, Articles 81 and 82 of the EC Treaty are used primarily to punish anti-competitive conduct of various types, such as when Microsoft was penalized by the EU last year for abusing its dominant position. However, the Article 82 theory of "dominance" by a company or by several companies collectively has also played an important role in EU merger law, at least before 2004.

While rules against anti-competitive conduct are a crucial part of antitrust law, they are not the primary focus of this paper on merger control. Still, it should be noted briefly that the EU revised its competition rules with a new regulation that took effect on May 1, 2004 – the same day that the EU added ten new members, expanding to 25 nations. This new regulation includes several provisions that enhance the Competition Commission's ability to investigate and punish anti-competitive conduct.[21] More specifically, EU officials now can search the homes and personal cars of directors or employees of a company under investigation for antitrust violations, in addition to searching business offices. The new regulation also enables the EU central office in Brussels to focus on larger and more serious antitrust cases by allowing competition authorities and courts in the 25 member nations to apply and enforce EU-wide competition law within each nation.[22] The involvement of national courts in this decentralization effort is seen as a possible first step toward much greater use of private antitrust suits brought by competitors in the EU – already a major component of antitrust enforcement in the United States.[23]

On mergers, the EU has relied more on European Council regulations than on treaty provisions (other than the indirect usage of the dominant position language of Article 82). The first merger regulation in the EU took effect in 1990.[24] It granted the EU central office jurisdiction over any proposed merger, regardless of the nationality of the companies involved, when the combined firms would exceed 5 billion euros in annual revenue worldwide, and when at least two of the merging companies would each have annual revenue exceeding 250 million euros inside the EU. (That would equate to approximately $6.35 billion in worldwide revenue and $320 million in EU revenue, based on the euro-dollar exchange rate in late spring 2005.)

Building on the "abuse of a dominant position" concept from Article 82, the 1990 merger regulation prohibited "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."[25] At least officially under the 1990 rule, companies were not allowed to defend their proposed merger by arguing that the combination would create economic efficiencies.[26] It was under this regulation that the General Electric-Honeywell merger was blocked in the EU, prompting indignation by the U.S. antitrust regulators who had already approved the combination. The Competition Commission in 2001 objected because a combined GE-Honeywell might use its dominant position to bundle products such as GE jet engines with Honeywell flight control equipment, harming competitors that could not sell both.[27] The EU's decision to deny the merger is still on appeal, and the final court decision will be either a symbolic victory or defeat for the Competition Commission. Yet the ruling will have limited practical or legal significance, as the two companies long ago abandoned their plans to merge, and the 1990 regulation is no longer the controlling authority on mergers.

The 2004 Merger Regulation

A series of court defeats suffered by the Competition Commission in 2002 influenced the development of the new merger regulation, which was already under consideration at the time. Monti and his merger task force were severely embarrassed when the European Court of First Instance – in three different cases in a span of less than five months – overturned the Competition Commission's decision to block a merger.[28] In the prior twelve years under the 1990 regulation, European courts had reversed a total of only two of the commission's merger vetoes.[29] Monti's first reaction was to revamp and improve his staff's work in support of merger decisions. Moreover, showing greater caution and determination to avoid additional court reversals after the three setbacks, the Competition Commission did not completely block any more mergers for the remainder of Monti's term.[30]

The new merger regulation, which took effect along with the separate competition regulation on May 1, 2004, maintained the same revenue thresholds for determining what mergers must be approved by the EU. Most importantly, the new rule changed the substantive test for judging proposed mergers. Specifically, the 2004 regulation states: "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular by the creation or strengthening of a dominant position, shall be declared incompatible with the common market."[31] By contrast, any merger that would not significantly impede competition should be approved.

The new regulation no longer specifically requires the EU to determine that the merging companies would be dominant, as had been necessary under Article 82 and the 1990 regulation. ("Dominant position" usually meant the firm with the largest market share, although the Commission's application of the dominance concept had become controversial and subject to question in the courts.) The 2004 test, according to the EU's own explanation, "has now been adapted to make clear that all anti-competitive mergers resulting in higher prices, less choice or innovation are covered. This is achieved by the new test, which states that a merger must be blocked if it would 'significantly impede effective competition.'"[32] Although market dominance is still one method of showing that a merger would have such an effect, the EU explains, "the central question is whether sufficient competition remains after the merger to provide consumers with sufficient choice."[33]

In other words, the Competition Commission is now looking more at a proposed merger's impact on competition, rather than market share alone. Exactly what this means in practice will be clearer only after the EU applies its new merger regulation for a significant period of time. In theory, the new test (known as the SIEC test for "significantly impede effective competition") could empower the EU to block additional mergers, such as a combination in an oligopolistic market even though the merged companies might not have the largest market share or be truly dominant.[34] (Oligopolies were seen as a gap in the old merger regulation.) For example, the SIEC test might allow the EU to block a merger creating a market share of perhaps only 25 to 40 percent (depending on its anti-competitive effects), while the 1990 version generally required at least a 40 percent market share, absent other proof of likely collusion.[35]

At least in wording, the new EU test is relatively similar to the U.S. test under the Clayton Act, which prohibits mergers when the effect "may be substantially to lessen competition, or to tend to create a monopoly."[36] However, there are differences. The U.S. test still relies more on consideration of market share, while the EU is shifting more toward an effects test.[37] In a crucial procedural issue, U.S. antitrust authorities must seek an injunction in federal court to stop a merger, while the EU's Competition Commissioner can block a merger without prior court involvement. The Competition Commissioner's decision can be reviewed later by EU courts, but by then it is usually too late to matter for the companies that had originally planned to merge.

Horizontal Merger Guidelines

There are other ways in which merger control in the EU and U.S. appears to be converging. Perhaps the most significant is that the new EU merger package includes a set of Horizontal Merger Guidelines, with detailed guidance on how the Competition Commission will evaluate proposed mergers between actual or potential competitors in the same market.[38] The U.S. has similar Horizontal Merger Guidelines issued by the U.S. Department of Justice and Federal Trade Commission.[39] In both cases, the intent is to provide quantitative guidelines to make it easier for companies considering a merger to assess the likelihood of a challenge by the government. In theory, that should provide greater certainty for the business world, while also reducing the number of proposed mergers that government regulators might need to reject.

Of course, a crucial issue in any merger decision is the definition of the relevant market (which is a combination of the product and geographic markets). If the market is defined narrowly, that gives the merging companies in that market a much larger share – perhaps too large a share for purposes of antitrust law. Companies seeking to merge therefore tend to argue for a very broad market definition, to lower their percentage share of the relevant market. As a preliminary matter, the EU's new Horizontal Merger Guidelines refer back to a 1997 notice defining relevant product market as comprising "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[40] The same document defines the relevant geographic market as comprising "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 the conditions of competition are appreciably different in those area."[41] Despite additional guidance in that notice on various factors to consider in applying those definitions, the inevitable ambiguity on market definition allows regulators some leeway on the decision to approve or reject a merger.

As an initial test for a proposed merger, the EU's 2004 guidelines look to the Herfindahl-Hirschman Index (HHI) in measuring concentration in the relevant market. The HHI is determined by first squaring the market shares of all companies in the market, and then adding up those numbers. (For example, a pure monopoly, with a 100 percent share of the market, would have an HHI of 10,000. A market with five equal competitors, all with 20 percent of the market, would yield an HHI of 2,000.) U.S. antitrust regulators have similarly relied on HHI calculations for the past two decades. In fact, the Horizontal Merger Guidelines of both jurisdictions now agree that combinations creating a post-merger HHI below 1,000 are not likely to be challenged.[42]

For mergers creating an HHI above 1,000, the outcome is less certain. Rather than relying on the pure HHI number alone, the EU is more concerned in those cases with the change in the HHI that would be caused by the proposed merger – in other words, the extent to which the market would become more concentrated. The Competition Commission will also consider several other factors in judging the merger, such as whether one of the companies is an important innovator or a potential or recent entrant into the market.[43] The new guidelines also discuss in some detail the various possible anti-competitive effects of horizontal mergers.[44]

In an important addition to EU merger practice, the Horizontal Merger Guidelines accept an efficiency defense – where prospective merger partners can argue that their combination would produce economic efficiencies that would actually aid consumers or competition. This is another area of convergence with U.S. law, where economic efficiency arguments rose to prominence in the pro-business, Chicago School antitrust era of the Reagan Administration in the 1980s and have remained an important consideration ever since. Specifically, the EU's new guidelines state:

> It is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have. … For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable."[45]

The guidelines further elaborate on those three requirements. For example, consumer benefit might be shown by evidence of lower prices due to reduced fixed costs, or of new products resulting from innovation.[46]

This new efficiency defense is one means by which EU antitrust regulators will now rely to a much greater extent on empirical economic analysis in merger reviews – yet another step toward conformity with long-standing U.S. practice.[47] This trend can also be seen in the Competition Commission's decision to name a Chief Competition Economist in 2003 (as part of Commissioner Monti's staff changes after the 2002 court reversals).[48]

As a further example of convergence in merger law, EU and U.S. regulators in 2002 agreed to coordinate their work and conduct parallel reviews when mergers of multinational companies require approval in both jurisdictions.[49] This was an attempt to avoid disagreements such as in the GE-Honeywell case. While not ensuring the same outcome in both jurisdictions, the coordinated review process certainly decreases the likelihood of conflicting decisions and eases the administrative burden on the merging companies.

Applying the New Regulation

Similar to the EU's new regulation on competition issues, the 2004 merger regulation also increases the Commission's power to investigate proposed mergers[50] and to impose significant fines and penalties for violating EU merger law.[51] In addition, it includes somewhat complicated rules on dividing cases between the EU central office and various member nations. The practical effect is that most large mergers will continue to be reviewed centrally by the Competition Commission, while smaller mergers primarily affecting only one member nation may be judged by that nation's competition authority.

The first year of applying the new merger regulation does not reveal a great deal about its long-term impact. In the twelve months after it became law on May 1, 2004, the Competition Commission approved a number of mostly non-controversial mergers, either unconditionally or with some conditions. It completely blocked only one merger during that time, and that was a somewhat unusual case. That was the merger that Kroes prohibited in her first decision as Competition Commissioner, when the Portuguese electricity company Energias de Portugal (ENP) and the Italian energy company ENI planned a joint acquisition of the Portuguese gas company Gas de Portugal (GDP). The case turned primarily on the effect on competition in Portugal, rather than on EU-wide concerns likely to be seen in mergers of multinational corporations. In rejecting the deal, Kroes noted that the "strengthening of the dominant positions of the existing electricity and gas suppliers would have resulted in higher prices for Portuguese consumers and industrial users, and so a loss of competitiveness for the Portuguese economy."[52]

Perhaps more telling will be a case in which the Competition Commission recently began an in-depth investigation, rather than summarily approving the deal. The giant health care company Johnson & Johnson is proposing a $24 billion acquisition of Guidant Corp., which makes medical devices that compete with some Johnson & Johnson products. The commission noted the potential for "significant competition problems" in several specific markets, with Kroes adding: "It is our duty to ensure that any changes to the competitive structure in these markets will not be to the detriment of consumer welfare."[53] Since both companies are based in the United States and the proposed merger is still under review by the Federal Trade Commission, this case could prove to be an important test of both the new merger regulation and of cooperation between EU and U.S. regulators.

Conclusion

Merger law and practice appear to be converging in the European Union and the United States. This is particularly evident in the EU's new Horizontal Merger Guidelines, its official acceptance of an efficiency defense in mergers, and its much greater reliance on economic analysis of cases. Even in philosophy, EU antitrust law now seems to be moving closer to the U.S. approach of greater concern about the effect on consumers, rather than on other competitors.

In truth, though, the real impact of the EU's new merger regulation will not be known with certainty until the Competition Commission has applied it to a number of difficult cases, and perhaps not for several years until EU courts have ruled on appeals of future commission decisions. Also still somewhat unclear is the approach to mergers that will be taken by the new Competition Commissioner, Neelie Kroes.

As a result, multinational corporations still face the possibility of differing outcomes from the U.S. and the EU on proposed mergers. While that is discouraging news for companies seeking to merge, it could be welcome relief for their competitors. The European Union could still provide a back door for U.S. companies wanting to block their rivals' merger plans, but those days may be numbered.

Footnotes

[1] William Drozdiak, *European Union Kills GE Deal*, WASH. POST, July 4, 2001, at A1.
[2] The Council of the European Union, with representatives from all 25 member nations, is the ultimate decision-making authority in the EU. However, its presidency rotates every six months among the member nations, leaving most of the continuing administrative work to be performed by the European Commission.
[3] Dan Bilefsky & Keith Johnson, *Opposing Views of Europe's Two New Leaders May Fuel Friction*, WALL ST. J., July 21, 2004, at A9.
[4] James Kanter, Don Clark & John R. Wilke, *EU Imposes Sanctions on Microsoft*, WALL ST. J., Mar. 25, 2004, at A2. Though the Microsoft case remains on appeal, an EU judge refused to delay the ordered changes to the Windows operating system, marking the first time that antitrust officials had actually forced Microsoft to alter its products. Jonathan Krim, *E.U. Orders Microsoft To Modify Windows*, WASH. POST, Dec. 23, 2004, at A1.
[5] Dan Bilefsky & James Kanter, *Change in Italy Ousts EU Competition Official*, WALL ST. J., July 26, 2004, at A13.
[6] European Merger Control Statistics, *available at* http://europa.eu.int/comm/competition/mergers/cases/stats.html.
[7] Bloomberg News, *Europe Picks Dutch Official to Enforce Antitrust Law*, N.Y. TIMES, Aug. 13, 2004, at W1.
[8] John W. Miller & Alexei Barrionuevo, *EU Nominee Vows To Quit Business, Divest All Stocks*, WALL ST. J., Sept. 21, 2004, at A20.
[9] *See, e.g.,* Alexei Barrionuevo & Daniel Michaels, *EU Antitrust Nominee Didn't Disclose All Ties*, WALL ST. J., Oct. 21, 2004, at A13; Alexei Barrionuevo, *Kroes's Blurring of the Lines*, WALL ST. J., Nov. 3, 2004, at A12. Interestingly, Kroes had awarded an honorary degree to Microsoft founder Bill Gates in 1996, when she was president of a business school in the Netherlands. *Remember that honorary degree in '96?*, SEATTLE TIMES, Aug. 23, 2004, at C2.
[10] Dan Bilefsky & Alexei Barrionuevo, *Fate of Nominees For Top EU Body Remains in Doubt*, WALL ST. J., Oct. 22, 2004, at A14.
[11] Dan Bilefsky, *Barroso Withdraws EU Slate of Commissioners*, WALL ST. J., Oct. 28, 2004, at A12.
[12] Raphael Minder & Peter Wise, *Commissioner warns: I'm no pussycat*, FIN. TIMES (LONDON), Dec. 10, 2004, at 30.
[13] Paul Meller, *Stern Stance for Europe's New Antitrust Chief*, N.Y. TIMES, Dec. 10, 2004, at W1.
[14] Minder & Wise, *supra* note 12.
[15] Neelie Kroes, Address at the International Forum on European Competition Law (Apr. 7, 2005), *available at* http://www.europa.eu.int/rapid.pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en.
[16] Treaty Establishing the European Community (consolidated text), 2002 O.J. (C 325) 64, *available at* http://europa.ue.int/comm/competition/legislation/treaties/ec/art 81_en.html.
[17] 15 U.S.C. § 1 (2005).
[18] European Community Treaty, *supra* note 16, at 65, *available at* http://europa.ue.int/comm/competition/legislation/treaties/ec/art 82_en.html.
[19] 15 U.S.C. § 2 (2005).
[20] Helen Disney, *A more subtle anti-trust regime for Europe,* FIN. TIMES (LONDON), Oct. 13, 2004, at 21.
[21] Council Regulation 1/2003 on The Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.
[22] *Id.*, art. 5-6, at 8-9.
[23] Brandon Mitchener, *EU Antitrust Regulators Gain More Enforcement Muscle,* WALL ST. J., Apr. 29, 2004, at C1.
[24] Council Regulation 4064/89 on The Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 13.
[25] *Id.*, art. 2.
[26] M.A. UTTON, MARKET DOMINANCE AND ANTITRUST POLICY, SECOND EDITION 194-95 (2004).
[27] Philip Shishkin, *How GE Got Into Such a Bundle of Trouble,* WALL ST. J., June 22, 2001, at A11.
[28] Andy Reinhardt & Dan Carney, *Trustbuster on Trial,* BUS. WK., Nov. 11, 2002, at 52.
[29] *Id.*

[30] Renee Cordes, *Monti's Tangled Legacy*, DAILY DEAL, Dec. 16, 2004.
[31] Council Regulation 139/2004 on The Control of Concentrations Between Undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1, 7.
[32] New Merger Regulation frequently asked questions, EUROPA Press Releases, *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/9&format=HTML&aged=0&language=EN&guiLanguage=en.
[33] *Id.*
[34] *Id.*
[35] Daniel Dombey, *Brussels introduces greater merger powers*, FIN. TIMES (LONDON), May 4, 2004, at 29.
[36] 15 U.S.C. § 18 (2005).
[37] Ilene Knable Gotts & David A. Katz, *Antitrust Review Continues To Play an Important Role in M&A*, ACCESS ANTITRUST, Sept./Oct. 2004, at 7, 10.
[38] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5.
[39] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html.
[40] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 OJ (C 372) 5.
[41] *Id.*
[42] Horizontal Merger Guidelines, *supra* note 38, at 7.
[43] *Id.*
[44] *Id.* at 7-12.
[45] *Id.* at 13.
[46] *Id.*
[47] Lawrence Wu, Paul Hofer & Mark Williams, *The Increasing Use of Empirical Methods in European Merger Enforcement: Lessons from the Past and a Look Ahead*, ANTITRUST INSIGHTS, Spring 2004, at 1.
[48] *Id.*
[49] James Kanter, *U.S., EU Agree to Jointly Review Proposed Mergers*, WALL ST. J., Sept. 30, 2002, at A14.
[50] EC Merger Regulation, *supra* note 31, art. 13, at 14-15.
[51] *Id.*, art. 14-15, at 15-16.
[52] *Commission prohibits acquisition of GDP by EDP and ENI*, EUROPA Press Releases (Dec. 9, 2004), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/1455&format=HTML&aged=0&language=EN&guiLanguage=en.
[53] *Commission opens in-depth investigation into Johnson & Johnson's take-over of Guidant Corporation*, EUROPA Press Releases (Apr. 22, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/471&format=HTML&aged=0&language=EN&guiLanguage=en.