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## The State of E.C. Competition Law: Fifteen Years Ago and Today, The Symposium on European Competition Law

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# Introduction

## The State of E.C. Competition Law: Fifteen Years Ago and Today

*Frank Fine*

In 1989, I was asked by the *Northwestern Journal of International Law & Business* to participate in a published symposium on EC competition law. My topic was the draft EC Merger Regulation, which was adopted by the Council of Ministers later that year. Fifteen years later, the *Journal* has requested me to chair this symposium and to write the introduction for it. All of the practitioners and scholars participating in this current symposium are aware of the seismic changes that have jarred the EC competition law landscape during this time. I am privileged to offer a few personal thoughts and reflections on where we have been and where, perhaps, we are heading.

First of all, on the subject of merger control, the Commission has been unfairly targeted by various journalists, particularly from the United States, for what has been perceived as discrimination against U.S. multinationals seeking to merge or acquire each other. The GE/Honeywell merger is often singled out as evidence of this “trend.” This is not an apology of any kind for the Commission, but the facts are that of the numerically increasing number of deals that are prohibited by the Commission (as opposed to proportionally increasing, which is not the case), only a fraction of them involve U.S.-to-U.S. companies, and this is assuming that the U.S. domicile of a multinational, such as General Electric, is of any consequence at all on this account. The fact is, in order for deals to be prohibited by the Commission, the firms concerned must have a significant market share in the European Union. This usually means that the companies concerned have large numbers of employees on their European payrolls. Under these circumstances, a merger prohibition which fell into the anti-American paradigm (which still suffers from simplistic ambiguity) means that the Commission in effect would be shooting the E.U. economy in the proverbial foot.

In my view, the Merger Regulation is the Commission's greatest triumph of the last fifteen years in the field of competition policy, and arguably since EC enforcement began in the early 1960's. Without the Regulation (which coincidentally has been revised today for the second time since 1989), EC competition lawyers and their clients would still be in the dark ages. Memories tend to fade on what used to be—a world of parallel investigations carried out by Member States, or sometimes by a Member State and by the Commission, the latter acting on arcane, unworkable, re-interpretations of Article 81 or 82 of the EC Treaty which was never intended by the "Founding Fathers." This troubling environment came to an end with the "one stop shop" provided by the EC Merger Regulation. Most multinational companies are thankful for the Regulation. Their attention has turned to global convergence, and how the Regulation can be made to be more compatible with other proliferated merger control systems. That is not a criticism of the Regulation, but rather, a compliment to the Council and Commission for having adopted a regulatory scheme that works well in practice, while overcoming sovereignty issues at a national level.

The "shop" in which companies will only need to stop once to obtain EC merger clearances is about to become much larger. In May 2004, the European Union will expand to include the Baltic States, Poland, Hungary, the Czech and Slovak Republics, Slovenia, Malta, and Cyprus. This will be welcome news to all companies engaged in large-scale mergers, as they will be able to file one notification in Brussels and thereby, provided that the Regulation's thresholds for "[c]ommunity dimension" are met, avoid national competition filings in the twenty-five Member States.

Of course, there is much more that the Commission has accomplished in the field of competition law over the last fifteen years. Its complete reformation of vertical policy, as well as the upcoming block exemption and comprehensive guidelines on technology licensing, should not be overlooked as significant examples of how the Commission has sought to respond to the evolving commercial and antitrust climate.

It is here, perhaps, that plaudits for the Commission should be balanced with more critical concerns. It is indisputable that the Commission is achieving ever greater rationalization and efficiencies in the field of merger control, thereby maximizing commercial benefits while minimizing regulatory hurdles. The Commission appears to be on a completely different track when it comes to non-merger arrangements, such as strategic alliances, distribution agreements, technology licenses, joint selling agreements and joint purchasing agreements. While the Commission is seeking to maximize legal certainty for companies planning concentrations, in the other spheres of business activity which fall within the ambit of Articles 81 and 82, including those noted above, the Commission has decided that the legal certainty afforded by the old

notification/exemption system should be abandoned in favor of a “self-assessment” system. In short, the Commission’s time-honored notification regime will vanish starting in May 2004.

The self-assessment system is actually part of a larger reform of Commission enforcement policy known as the “modernization” program, which is intended to result in a large devolution of enforcement of Articles 81 and 82 to the Member State competition authorities and courts. The Commission wishes to dispense with the examination of notified agreements, most of which are not competition sensitive, so that it may focus its resources on large-scale cartels and abuses of dominant position. The objective is laudable, but the real issue will be whether the Commission’s new approach to competition enforcement will result in the time savings that the Commission is counting on. It is conceivable that rather than resulting in efficiencies, the decentralization of enforcement will create new, unforeseeable burdens for the Commission. Rather than poring over innocuous notifications, Commission officials will be responsible for coordinating the investigations of Member State regulators to avoid needless multiplicity (although forum shopping will become a given) and providing guidance to national regulators and courts in complex cases. Moreover, despite the abolition of notifications as such, the Commission will come under great pressure to provide companies with some form of “comfort” because they are unable to find sufficient guidance in the case law or in Commission guidelines and block exemptions to deal with complex factual situations. However, it is clear that the Commission’s willingness to provide legal guidance will be limited and non-binding.

The Commission’s modernization package includes a ramping up of Commission powers and penalties, in addition to information sharing with Member State authorities. The Commission will be empowered to raid private residences, to “interview” (effectively take recorded depositions from) prospective witnesses in Commission offices and, in the case of dawn raids, to fine target companies up to one percent of their past fiscal year’s group revenue for each individual failure of a company employee to correctly answer a question put by a Commission investigator. These developments come at a time in which criminal antitrust liability for company employees now exists in the United Kingdom, as the result of the Enterprise Act 2002, and when other Member States are likely to follow suit in order to demonstrate their competition credentials. Companies will need to review their European antitrust compliance programs and better educate their employees as to the potential consequences of illicit activity. The specter of jail time will be a powerful inducement for executives to snitch on their employers.

It is also noteworthy that the increased powers of the Commission were not accompanied by safeguards and warnings for the individual. Lurking in the shadows are human rights issues, which the Commission,

whether deliberately or by oversight, has left to the European Court and the European Court of Human Rights to sort out.

These reforms will come into force on the very day that the European Union absorbs ten new Member States. The Commission would have been under great pressure, even without the Accession, to get the new machinery up and running in a fair and efficient manner. By all accounts, the Accession will only complicate an ambitious enforcement scheme whose functions and effects on business have yet to be fully fathomed.

The post-modernization climate will have long-lasting effects on the way in which competition law is practiced in the European Union. The most significant trade-off for "self-assessment" will be increased reliance by companies on their outside competition advisors. In other words, being unable to obtain formal Commission exemptions, companies will want greater assurances from their competition lawyers. In terms of labor and expense, this might amount to the functional equivalent of completing a notification on Form A/B, minus some of the more mundane information elicited by the Commission. However, the variables posed by decentralized enforcement will greatly complicate the task of the competition advisor. Either to seek the advantages of a favorable forum or, in defense of his client, to determine whether the forum should be changed, the advisor will need to obtain a grasp of national enforcement procedures. Multiple complaints and parallel investigations will become much more common simply because the new Commission regime has facilitated this development. Human rights defenses and other procedural challenges will suddenly figure prominently in the representation of the client. All this seems to presage that legal costs will be on the rise, rather than the converse, at least with regard to contentious activity.

We may reasonably predict that the Merger Regulation will be lauded for years to come. The Commission has accepted a much more daunting challenge by having implemented its modernization program. We can only hope that it achieves similar success, which will only be evident after three to five years.

The *Journal* should be commended for having organized this timely symposium. There was no better time, in fact.