

A safeguards clause also allows a member state to take appropriate measures to safeguard its legitimate interests, other than those taken into consideration in the regulation, provided these interests are compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules are regarded as legitimate interests and the applicability of other interests is left to the Commission to determine.

The Commission has indicated that it does not intend to apply Articles 85 and 86 of the Treaty of Rome to mergers other than by means of the Regulation. In any case, both Articles require an effect on trade between Member States before the prohibitions will apply. Nevertheless, Article 86 remains directly enforceable in national courts and Article 85 remains applicable by the competent authorities of member states.

The Regulation provides (at Article 2) that mergers shall be declared either compatible or incompatible with the common market depending on whether or not they 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.

The Regulation also provides that the Commission shall take into account the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned (both inside and outside the Community), and the actual or potential competition from undertakings located either within or outside the Community. While this is essentially a competition-based test, the Commission must also place its appraisal within the "framework of the achievement of the fundamental objectives of the Treaty of Rome". These include the harmonious development of economic activities and the strengthening of the Community's economic and social cohesion. This framework appears to leave the Commission with considerable discretion on the basis of industrial policy or other grounds.

The previous EC Commissioner frequently repeated that the EC regulation was concerned with competition policy alone. The new Commissioner, Karel van Miert, has made it clear that it will no longer be prudent to assume that mergers will be judged by competition criteria alone. In his first speech in February of this year, he noted that competition policy "cannot be ...applied without reference to (the) legal, economic, political, and social context" or "determined by dogmatism"; EC industry