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COMMENT

THE BOEING/McDONNELL DOUGLAS MERGER: THE EUROPEAN COMMISSION'S COSTLY FAILURE TO PROPERLY ENFORCE THE MERGER REGULATION

I. INTRODUCTION

The *Boeing/McDonnell Douglas*[1] merger passage through the European Commission illustrates the challenges of the increasing globalization of antitrust law.[2] These challenges arise when leaders of anti-trust monitoring regimes, such as the European Commission, attempt to pacify disparate political and economic interests, secondary to the actual *bona fide* antitrust dispute. Regulatory bodies charged with the duty of monitoring and prohibiting anti-trust violations should decide cases on the basis of the actual facts presented for determination. The *Boeing* decision vividly illustrates the misapplication of principles and policies to an anti-trust dispute, because the Commission allowed external, non-legal considerations to infect the decision-making process.

Early in the merger approval process in *Boeing*, European Union Commissioner Karl Van Miert publicly stated that the proposed transaction exhibited a "community dimension" and violated the European Community's Merger Regulation.[3] Yet paradoxically, the European Commission, despite determining that the merger was anti-competitive in the commercial aircraft sector, decided to extract various concessions from the Boeing Company (hereinafter, Boeing) instead of blocking the merger.[4] The Commission's retreat from Van Miert's earlier position was largely a reaction to President Clinton's admonition that an anti-Boeing/McDonnell Douglas merger decision could lead the United States to bring the matter to the World Trade Organization or to pursue "some op-

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1. Commission Decision of 30 July 1997 Declaring a Concentration Compatible with the Common and the Functioning of the EEA Agreement, Case IV/M.877, Boeing/McDonnell Douglas v. Commission, 1997 O.J. (L 336) 42 (hereinafter Boeing).

2. Pursuant to Article 9, Regulation 17/62, authority to apply and enforce EEC competition rules lies primarily with the Commission in Brussels, the executive branch of the Community. *See* Council Regulation No. 17/62, art. 9, 1979 O.J. (L291) 94.

3. *See* Katherine Butler, *Boeing Deal Raises Anti-trust Flag in EU*, J. COM., December 19, 1996 at 3A.

4. *See* FTC Release, *FTC Chairman discusses merger waive and merger enforcement at the FTC; focus is Staples and Boeing* (Sept. 23, 1997), <http://www.ftc.gov/www/sop/9709/pitmerg.htm>.

tions ourselves."[5] Nonetheless, in *Boeing*, the European Commission strayed significantly from the dictates of its earlier *de Haviland* decision. In *de Haviland*, discussed *infra*, the Commission blocked a proposed merger and expounded upon the standards of the Merger Regulation by establishing the threshold evaluative criteria for analyzing and blocking proposed transactions.

Ultimately, the Commission must consistently enforce the Merger Regulation through case law to continue the movement toward complete economic integration in the EU. Decisions like *Boeing/McDonnell Douglas*, however, undermine the progressive harmonization of European Economic Community (EEC) rules and economic policies designed to lead to the establishment of a true "common market."[6] Admittedly, *e pluribus unum* is not yet a reality in the European Union, but Jean Monnet, one of the founding fathers of the EEC, remarked, "[t]he Common Market is a process, not a product."[7]

This Comment will discuss the propriety of the Commission's treatment of the *Boeing/McDonnell Douglas* merger in comparison with the decision in *de Haviland* and in consideration of the European Union's Merger Regulation. Sections II through V of this Comment set forth the factual scenario and the foundation for understanding the European Union's Merger Regulation. Section III, in particular, explains the rationale behind, and the practical application of, the Merger Regulation. Section VI explains the *de Haviland* decision, the benchmark against which all Commission decisions are measured. Section VII provides an in-depth analysis of the *Boeing/McDonnell Douglas* merger decision. Finally, section VIII discusses the failure of the *Boeing* Commission to properly apply the Merger Regulation to the proposed transaction.

II. FACTS

Boeing and McDonnell Douglas competed in the aerospace market for 75 years, long before the emergence of upstart Airbus, now Boeing's

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5. Mitchell, Alison, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. Times, July 18, 1997, at D2.

6. *Id.*

7. *Id.* at D5. *See also*, CCH Commentary: Community-Wide Merger Control (Regulation No. 4064/89), Common Mkt. Rep. (CCH) P 2843 (Nov. 1990) (hereinafter CCH Commentary). The Treaty of Rome established a European Economic Community (EEC) and gave it the task, in Article 2, "[t]o promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it." *Id.* at 19.

major competitor.[8] When the merger between Boeing and McDonnell Douglas finally occurred, Boeing reinforced its position as the colossus of airplane manufacturers, leaving commercial jet customers a choice only between Boeing and the European consortium, Airbus Industrie.[9]

McDonnell Douglas, the leader in defense aircraft for many years, first appeared vulnerable for merger talks when the Pentagon dropped McDonnell Douglas from a three-way competition to build the next generation strike fighter for both the U.S. Department of Defense (DOD) and the United Kingdom.[10] Boeing, however, benefited from the Pentagon's actions because prior to this defense contract Boeing had not received lead military program contracts for over 40 years.[11] Sensing MDC's susceptibility to merger discussions, on December 9, 1996, Phil Condit, Chairman and Chief Executive Officer of Boeing, received approval from Boeing's Board of Directors to pursue merger talks.[12] In fact, Phil Condit and Harry Stonecipher, Chief Executive Officer of McDonnell Douglas, did the merger *pas de deux* several times before, but never consummated the transaction. After a breakfast meeting in Seattle the following day, however, Condit and Stonecipher reached a compromise and agreed on the historic merger.[13]

By consummating the merger, Boeing reinforced its position as the leading player in the world market for large commercial jets, with a mar-

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8. Bill DiBenedetto, *Boeing Merger Ices Good Growth Year; McDonnell Douglas Acquisition Follows List of Notable Triumphs*, J. COM., December 26, 1996, at 3A. In fact, Phil Condit, Chairman and Chief Executive Officer of Boeing, and Harry Stonecipher, Chief Executive Officer of McDonnell Douglas, did the merger *pas de deux* several times before, but never consummated the transaction. *Id.*

9. *See id.*

10. *See id.*

11. *See id.* The two finalists for the U.S. Department of Defense and the United Kingdom contracts were Boeing and Lockheed Martin (Lockheed). The contract required the winner to build over 3,000 fighters potentially worth over $200 billion during the next 20 years. *Id.*

12. *See id.* On December 3, 1996, Boeing and McDonnell Douglas announced plans to collaborate and jointly build the next generation of super jumbo wide body jets. This collaborative effort stunned Airbus, who started wooing McDonnell Douglas as a partner on its super jumbo jet before Boeing. *Id.* The merger talks occurred far ahead of schedule because Boeing became fearful that McDonnell Douglas might purchase Huges Electronics' defense and aerospace units, thus making a purchase of McDonnell far too expensive. *Id.*

13. *See id.* Extensive in-house meetings occurred to plan and implement the merger package. The Boards of both Companies approved the merger and the name of the combined companies remained Boeing Co. Finally, Boeing and McDonnell Douglas jointly made the merger announcement in the presence of hundreds of journalists. *Id.*

ket share greater than 60 percent.[14] Furthermore, Boeing increased both its capacity to build commercial aircraft and its technological know-how by absorbing McDonnell Douglas' highly qualified personnel.[15] Finally, Boeing reinforced its negotiating power by obtaining exclusivity agreements with three airline companies, Delta, Continental and American Airlines, which all signed exclusive purchasing agreements with Boeing for a period of at least twenty years.[16] Eventually, this new entity is expected to control approximately 75 percent of the global market for commercial aircraft.[17]

With this statistic in mind, it is no surprise that Karel Van Miert, the EU's Competition Commissioner, scrutinized the merger under the 15-nation bloc's competition rules, which outlaw, *inter alia*, abuse of a dominant market position.[18] Such "abuses of a dominant position," prohibited by the Merger Regulation,[19] regulate behavior such as unfair and predatory pricing, exclusive sales agreements and discrimination on the grounds of nationality.[20] The Brussels-based Commission, the competition authority for the EU, has extensive powers to investigate possible breaches of the competition laws.[21] In the case of *Boeing/McDonnell Douglas*, the Commission scrutinized the merger to determine to determine what extent it enhanced Boeing's market share within the European Union.[22]

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14. *See* European Commission Press Release No. IP/97/236, of March 19, 1997. More importantly, Boeing's market share expressed in terms of clientele increased from 60 percent to 80 percent, given McDonnell Douglas' well established contacts in certain European countries, particularly Italy, Switzerland and Finland.

15. *See id.*

16. *See id.*

17. *See* Butler, *supra* note 3 at 3A.

18. *See id.* On September 21, 1990, the Commission acquired exclusive jurisdiction to regulate concentrations having a Community dimension that creates or strengthens a dominant position as a result of which effective competition in the common market would be significantly impeded. *See* CCH Commentary, *supra*, note 6. A dominant position occurs when bigger firms control very large shares of a given market and can use this position either to make customers pay a higher price or to squeeze out smaller competitors. *See also*, Europa Competition, <http://europa.eu.int/pol/comp/en/info.htm>, (*visited* November 5, 1997).

19. Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L395) 1, *corrected version* in 1990 O.J. (L257) 13 (hereinafter Merger Regulation or Regulation) (entry into force Sept. 21, 1990).

20. *See* Europa Competition, *supra* note 18.

21. Judicial supervision of the Commission's actions belongs to the European Court of Justice and the Court of First Instance; their jurisdiction extends to actions brought against the Union's institutions involving competition rules and other issues. *See id.*

22. *See* Butler, *supra* note 3. Large market shares tend to have an adverse affect on intra-community competition and thus, fall within the evaluative domain of the Commis-

The Federal Trade Commission (hereinafter FTC) also analyzed the *Boeing/McDonnell Douglas* merger. Unlike the European Commission, however, after an extensive and exhaustive inquiry, the FTC closed the investigation of Boeing's proposed acquisition of McDonnell Douglas Corporation.[23] In closing its investigation,[24] the FTC noted that the merger posed no threat to the competitive landscape in the aerospace markets.[25] The FTC, however, found the exclusive dealing contracts Boeing concluded with three major airlines potentially troubling, and stated that it intended to monitor the potential anti-competitive effects of these, and any future, long term exclusive contracts.[26]

III. SUMMARY OF THE COMMISSION'S REASONING

After an initial evaluation of the proposed merger, the Commission decided to initiate second phase proceedings under the EC Merger Regulation.[27] The Commission considered the merger a great concern because it would lead to the creation of the largest aerospace company in the world.[28] In this respect, the Commission examined the impact of the merger on the market for large commercial aircraft, since Boeing already controlled the world market for commercial jet aircraft of more than 100

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sion. *See* CCH Commentary, *supra* note 7.

23. *See* FTC Release, *supra* note 4.

24. The European Commission did not close their investigation after the initial inquiry. The Commission began to formally investigate only after the initial inquiry. *See id.*

25. *See* European Commission Press Release No. IP/97/236, *supra* note 14.

26. *See* FTC Release, *supra* note 4. The FTC believed that the airlines involved in these exclusive contracts are prestigious and could potentially serve as "launch" customers for aircraft manufacturers. In other words, they are airlines that can place massive orders and command sufficient market prestige to serve as the first customer for a new airplane company.

27. *See* European Commission Press Release No. IP/97/236, *supra* note 14. The Commission first must determine if the merger has a "Community dimension." A Community dimension occurs when either, 1) the combined aggregate world-wide turnover of all the undertakings is more than ECU 500 Million; and 2) 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. Europa Competition, *supra* note 18. *See also,* Merger Regulation, *supra* note 19. Decisions as to whether the merger exhibits a "Community dimension" must occur within one month of the initial inquiry. If the Commission decides to initiate second level proceedings and investigate further, it has another four months in which to adopt a final decision. *Id.* The Commission issued its ultimate decision to approve the merger after concluding a second level investigation.

28. *See* Europa Competition, *supra* note 18.

seats.[29] Additionally, the Commission reviewed the merger because the transaction resulted in a further increase in Boeing's market share and impacted negatively upon Airbus Industrie.[30] On the other hand, the Commission also examined the extent to which the large increase in Boeing's defense and space business, due to the acquisition of McDonnell Douglas, additionally strengthened its market position in the commercial aircraft sector.[31]

After an arduous review, the Commission declared Boeing's acquisition of McDonnell Douglas compatible with the common market,[32] albeit not before Boeing acquiesced to major concessions imposed by the Commission. The Commission found that the merger significantly strengthened Boeing's already dominant position in the worldwide market for large commercial jet aircraft.[33] Thus, the Commission, pursuant to the Merger Regulation[34] and arguably with the interests of the Common Market in mind, prepared to block Boeing's acquisition of McDonnell Douglas if Boeing did not agree to the requisite concessions.

The Commission reasoned that this merger affected potential entrants unable to challenge Boeing's dominant position, given the high barriers to entry into the very capital-intensive aerospace market.[35] Moreover, it believed that Boeing's conclusion of long-term exclusive supply deals with three of the world's leading carriers, American, Delta, and Continental airlines, evidenced Boeing's ability and willingness to abuse its dominant position in the Common Market.[36] The most immediate rein-

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29. *See* European Commission Press Release No. IP/97/236, *supra* note 14.

30. *See id.*

31. Approximately 70 percent of McDonnell Douglas' total business related to the defense and space sector. Thus, even without the recently completed acquisition of Rockwell Defense and Aerospace, Boeing will triple its defense and space activities through the McDonnell Douglas merger. *See id.*

32. *See* European Commission Press Release, No. IP/97/729, of July, 30 1997. Boeing, however, made many concessions in order to obtain Commission approval of the merger. For a complete discussion of the concessions see Boeing, *supra* note 1, at 36-39.

33. *Id.*

34. Article 86, written in absolute language, explicitly prohibits any abuse of a dominant position within the Common Market or a substantial part of it that may affect trade between member states. Furthermore, Article 86 listed examples of a number of abuses. It is important to note that occupying a dominant position in the EEC is not per-se illegal. Rather, it is the abuse of this dominant position by a given undertaking that is illegal, pursuant to Article 86. The Merger Relation, to the contrary, is far more flexible and allows the Commission a full panoply of options when analyzing a merger. For a thorough discussion of the Merger Regulation, see generally *infra* notes 70-98 and accompanying text.

35. *See* European Commission Press Release, No. IP/97/729, of July, 30 1997.

36. *See id.* These exclusive agreements purportedly last for approximately twenty

forcement of Boeing's dominance in the aerospace industry, however, arose through Boeing's prospective increase in overall market share from approximately 64 percent to 70 percent.[37]

The Commission recognized that Douglas Aircraft Company (DAC, the commercial aircraft division of McDonnell Douglas) suffered a decline in its business performance in recent years, due to a low level of investment relative to Boeing and Airbus.[38] Nevertheless, the Commission remained concerned because Boeing considered the acquisition of DAC's remaining resources beneficial.[39] The Commission thus declared the DAC acquisition an advantage constituting a strengthening of a dominant position under EU Competition law.[40]

Another vital element strengthening Boeing's dominance resulted from the increase of Boeing's customer base, from 60 to 84 percent of the current worldwide fleet in service.[41] The Commission believed that Boeing could increase opportunities for potential sales by exploiting its leverage over existing McDonnell Douglas aircraft users. Closer ties with airlines currently using McDonnell Douglas aircraft would enable Boeing to better identify and influence customer needs, or even exchange their current McDonnell Douglas aircraft for Boeing models. In particular, the Commission believed Boeing could use this leverage to induce airlines to enter into long term exclusive deals. Moreover, the exclusive purchase agreements with American, Delta and Continental Airlines evidence these concerns, as currently, these airlines are the first, third, and fourth largest operators of McDonnell Douglas Aircraft.[42]

Finally, the Commission found a further strengthening of Boeing's dominant position in the civil aircraft market through its acquisition of McDonnell Douglas' defense and space business.[43] The acquisition of the

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years. Given the fact that other "secret" agreements are usually negotiated simultaneously, in all likelihood, the exclusive agreement would span less that twenty years. Alternatively, businesses such as Boeing might not hold companies to such agreements. Thus, in all likelihood, American, Delta and Continental Airlines potentially could purchase airplanes from Airbus Industrie, if they so desired.

37. *Id.* Other newspaper articles and analysis of the merger posited an increase in market share from over 60 percent to 70 percent, but not necessarily from 64 percent.

38. DAC's decline was also exacerbated by a decline in investor and customer confidence following McDonnell Douglas' abandonment of several programs, as well as by the announcement of the Boeing take-over. *See id.*

39. *See id.*

40. *See id.*

41. *See* European Commission Press Release, No. IP/97/729, of July, 30 1997.

42. Additionally, prior to these agreements, exclusivity deals of this nature had not been used in this industry. *See id.*

43. *See id.* The Commission's investigation did not conclude that the proposed merger created or strengthened dominance in the defense sectors, only in the commercial

world's number two defense manufacturer and leading manufacturer of military aircraft considerably enhanced Boeing's access to publicly funded research and development material and intellectual property.[44] The large increase in Boeing's defense- related research and development potential increased the benefits obtained from the transfer of military technology to commercial aircraft. Thus, the combination of Boeing and McDonnell Douglas' technology and patent portfolio strengthened Boeing's dominance.[45] Furthermore, the Commission believed that the overall combination of the civil, defense and space activities of both companies would increase Boeing's bargaining power *vis-à-vis* suppliers, enabling Boeing to leverage its relationships with suppliers to the detriment of its competitors, namely, Airbus Industrie.[46] According to the Commission, all of these factors exacerbated the monopoly potential and, thus, forced the Commission to propose a series of concessions, with which Boeing had to agree in order for the Commission to clear the merger.[47]

IV. SUMMARY OF THE FEDERAL TRADE COMMISSION'S REASONING

After an extensive investigation, the Federal Trade Commission (FTC) decided to close its inquiry into Boeing's acquisition of McDonnell Douglas Corporation. Contrary to the European Commission, the FTC concluded that the acquisition would not substantially lessen competition or tend to create a monopoly in either the defense or commercial aircraft markets.[48] Chairman Robert Pitofsky framed the critical question in the FTC analysis as "whether Douglas Aircraft, McDonnell Douglas' commercial arm, had prospects of playing a significant competitive role in the commercial aircraft market in the future."[49]

The FTC commented that, on its face, the merger appeared to raise serious anti-trust concerns.[50] The transaction involved the acquisition by Boeing, a company that already accounts for roughly 60 percent of large

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sector. *Id.*

44. *See id.* For a discussion of the intellectual property considerations of the *Boeing* Commission see *infra* notes 221- 236 and accompanying text.

45. *See id.*

46. *See* European Commission Press Release, No. IP/97/729, of July, 30 1997.

47. *See id.* Karel Van Miert threatened to fine the companies $4 billion dollars if Boeing and McDonnell Douglas approved the merger as originally outlined. Michele Kayal, *Washington Comment*, J. COM., June 30, 1997 at 13.

48. *See* Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney, *Statement in the Matter of The Boeing Company/McDonnell Douglas Corporation* (September 29, 1997) (hereinafter *Boeing Statement*).

49. FTC Release, *supra* note 4.

50. *See Boeing Statement*, *supra* note 48.

commercial aircraft sales, of a non-failing, direct competitor in a market with only one other significant rival, Airbus Industrie.[51] Furthermore, the merger combined two firms in the U.S. defense industry that develop fighter aircraft, as well as myriad other defense products. Nevertheless, the FTC did not oppose the merger.

The FTC staff interviewed over forty airlines, including large and small U.S. and foreign carriers, as well as many other industry participants.[52] Furthermore, FTC staff deposed Boeing and McDonnell Douglas officials responsible for negotiating the acquisition and marketing of commercial aircraft. In addition, the FTC staff deposed company officials responsible for assessing their firms' financial condition.[53] Finally, the FTC reviewed voluminous documentation submitted by the merging companies and third parties, such as airlines and aircraft manufacturers.[54]

The evidence collected during the FTC investigation revealed that McDonnell Douglas' commercial aircraft division, Douglas Aircraft Company (DAC), no longer exerted a competitive influence in the worldwide market for commercial aircraft.[55] Specifically, the FTC determined that: 1) McDonnell Douglas, looking toward the future, no longer constituted a meaningful competitive force in the commercial aircraft market; and 2) McDonnell Douglas could implement no plausible economic strategy to change this grim prospect.[56] Over the past several decades, McDonnell Douglas failed to invest at a rate comparable to its competitors in new product lines, production facilities, company infrastructure, or research and development. Consequently, its limited product line lacked the state of the art technology and performance characteristics that Boeing and Airbus Industrie developed in their aircraft.[57] The FTC investigation revealed that McDonnell Douglas' failure to adequately improve the technology and efficiency of its commercial aircraft product caused a deterioration of its product line. As a consequence, the vast majority of airlines no longer consider purchasing DAC aircraft. Given its market position, then, McDonnell Douglas no longer significantly influenced the competi-

51. *See id.*

52. *See id.* Industry participants include regional aircraft producers and foreign aerospace companies. *Id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See Boeing Statement, supra* note 48

57. The FTC also determined that Douglas Aircraft's line of aircraft lacks common features, such as cockpit design or engine type. Thus, Douglas Aircraft are not efficient in interchangeable spare parts and pilot training in a manner that an airline obtains from a family of aircraft, such as Boeing's 737 family or Airbus's A-320 family. *See id.*

tive dynamics of the commercial aircraft market.[58] As a result of this analysis, the FTC approved the Boeing/McDonnell Douglas merger.

The FTC also noted that the "national champion" argument certainly did not enter into their anti-trust analytical equation. Experts speculated that the FTC derived its rationale for approving the merger from the "national champion" argument, namely that because aircraft manufacturing occurs in a global market, the United States, in order to compete in that market, needs a single powerful firm to serve as its "national champion."[59] In this respect, the FTC remarked, "[w]e do not have the discretion to authorize anti-competitive but 'good' mergers because they may be thought to advance the United States' trade interests."[60] Thus, the FTC scrutinized the merger, pursuant to the anti-trust statutes to ensure the vitality of the free market by preventing private actions that may substantially lessen competition, or tend to create a monopoly.[61]

V. LEGAL BACKGROUND

A. *The Origins of European Competition Law: Articles 85 & 86 of the Treaty of Paris, Predecessors of the Merger Regulation*

European states created the European Community (EC) in 1957 as a step toward establishing a European common market to "promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."[62] EC competition law arguably functions in a manner analogous to the Supremacy Clause in the United States, transcending interstate boundaries and creating a true Community-wide market where competition exists. Furthermore, EC Competition Law contains many unique enforcement procedures and institutional arrangements to achieve this end.[63] Prior to December 21, 1989, Articles 85 and 86 of the Treaty of Rome provided the source of EC competition law. Community competition law, therefore, consisted mainly of an examination of these two Articles and their application in many different situations respecting merger agreements. The Merger Regulation, however, largely displaced

58. *See id.*

59. *Id.*

60. *Id.*

61. *See id.*

62. TREATY ESTABLISHING EUROPEAN ECONOMIC COMMUNITY, entered into force, Jan. 1, 1958, art. 2, 298 U.N.T.S. 11 (hereinafter EEC TREATY).

63. *See* Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55 (1992).

Articles 85 and 86 and currently forms the cornerstone of competition policy in the area of mergers and acquisitions. The Regulation additionally serves as a major catalyst in the completion of the Single European Market.[64]

1. *Article 86 of the Treaty of Rome*

Article 86 of the Treaty of Rome regulates unilateral behavior of firms with significant market power.[65] The jurisprudence of this article prohibits a firm from abusing its dominant position in the marketplace.[66] Article 86, phrased solely in terms of abuse of a dominant position, expressly prohibits such abuse insofar as it affects trade between member states, thereby inhibiting the growth and integration of the Common Market.[67] Predatory pricing and price discrimination between member states, for example, both practices contrary to the aim of complete economic integration of the Community, are considered abusive under Article 86.[68] Virtually all aspects of the behavior of a dominant firm doing business in the Common Market merit review for abuse within the meaning of Article 86.

2. *Article 85 of the Treaty of Rome*

Article 85 prohibits all agreements between undertakings that prevent, restrict, or distort competition within the common market.[69] Article 85

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64. *See* Henriette K.B. Anderson, *EC Merger Control Regulation As Applied in the de Haviland Case*, 7 N.Y. INT'L REV. 25 (1994).

65. *See* CCH Commentary, *supra* note 7.

66. *See* EC TREATY, *supra* note 62, at art. 86. In terms of market shares, 60 percent is almost always conclusive proof of a dominant position, whereas, 45 percent may be sufficient, and 30 percent will rarely suffice. *See also* EC TREATY, *supra* note 62 at 68-69. *See generally* United Brands v. Commission, Case 27/26 1978 E.C.R. 207.

67. *See* Waller, *supra* note 63. Article 86 sets forth a non- exclusive list of abuses, including, but not limited to: 1) directly or indirectly imposing unfair purchase prices, selling prices, or other unfair trading conditions; 2) limiting production, markets, or technical development to the detriment of the consumer; 3) applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage; and 4) making contracts subject to acceptance by the other parties of supplementary obligations which, by their nature and commercial usage, have no connection with the subject of the contracts. *See id.* at 58.

68. *See* EEC TREATY, *supra* note 62, at 70.

69. *See id.* at art. 85, *et. seq.* Article 85(1) sets forth a non-exclusive list of prohibited conduct, pertaining to agreements or concerted practices, which: 1) directly or indirectly fix purchase prices, selling prices or other trading conditions; 2) limit or control production, markets, technical development, or investment; 3) share markets or sources of supply; 4) apply dissimilar conditions to equivalent transactions with other partners, thereby placing them at a competitive disadvantage; or 5) make contracts subject to ac-

further regulates decisions by associations of undertakings and concerted practices that may affect trade between member states.[70] In fact, the core of the Community's competition policy under Article 85 is the prevention of cartels and actions between trading competitors that inhibit the creation of a true European common market.[71] In the past, pursuant to Article 85, the Commission initiated proceedings against cartels doing business both inside and outside the community, when their actions impacted upon trade between member states.[72]

B. *The Merger Regulation*

The Merger Regulation codifies Articles 85 and 86 and simplifies European merger process by allowing non-EC firms to merge with approval only from the EC Commission.[73] The Regulation establishes a distinct division between large mergers with a "community-wide" impact, falling under Commission review, and smaller, intrastate mergers, where national merger control applies.[74] The Regulation applies to mergers with a "Community-wide dimension." Mergers between undertakings exhibit the "Community-wide dimension" by meeting two threshold requirements: 1) A threshold of combined world turnover, for the companies concerned, of at least ECU 5 billion (approximately $6.5 billion); and 2) a minimum aggregate Community-wide turnover ECU 250 million (approximately $340 million) for at least two of the firms concerned.[75] If, however, each of the undertakings involved derive more than two-thirds of their aggregate Community business in the same Member State, national authorities apply national merger control.[76]

The Regulation requires companies meeting the threshold requirements to submit a prior notification of the proposed merger transaction within one week of signing the merger agreement.[77] The Commission then conducts an initial review to determine the compatibility of the

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ceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the transaction. *See id.*

70. *See id.*

71. *See* Paul D. Callister, *The December 1989 European Community Merger Control Regulation: A Non-EC Perspective*, 24 CORNELL INT'L L.J. 97, 98-99 (1991). *See also* Waller, *supra* note 63 at 63.

72. *See id. See also* LENNART RITTER , ET. AL., ECC COMPETITION LAW: A PRACTITIONER'S GUIDE (1992).

73. *See* Merger Regulation, *supra* note 19. Of course, the merger must exhibit a "community dimension" for the Merger Regulation to apply. *Id.*

74. *See id.* at 26.

75. *See id.* at art. 1.

76. *See id.*

77. *See id.* at art. 4.

merger with Community competition policy[78] and must decide whether to initiate a formal inquiry within one month after the notification. Upon conclusion of an initial inquiry, the Commission may determine: 1) the notified concentration does not fall within the scope of the Merger Regulation,[79] 2) the notified concentration falls within the scope of the Merger Regulation, but fails to raise any serious doubts as to its compatibility with the common market,[80] or 3) the notified concentration falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the common market and merits an in-depth investigation.[81]

If the Commission decides to investigate further, it must issue a final decision on the merger within four months. Pursuant to any in-depth investigation, the Commission may decide: 1) the notified concentration does not create or strengthen a dominant position which impedes effective competition in the common market and, as a result, remains compatible with the common market,[82] 2) the notified concentration does not create a dominant position with anti-competitive effects because of modifications made to the notified concentration and is, therefore, compatible with the common market,[83] or 3) the notified concentration creates a dominant position negatively affecting competition on the common market and, consequently, is incompatible with the common market.[84]

Thus, the Commission queries as to whether the proposed concentration is compatible with the common market. If a concentration, "[d]oes not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market, or part of it," the concentration is compatible with the common market.[85] Likewise, "if a concentration does create or strengthen a dominant position, as a result of which effective competition would be significantly impeded in the common market, or a substantial part of it," the merger is incompatible with the common market.[86]

Article 2 of the Regulation lists several factors for the Commission to consider when determining the compatibility of a notified concentration with the common market: 1) the need to preserve and develop effec-

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78. *See* Merger Regulation, *supra* note 19 at art. 2(1)(b).
79. *See id.* at art. 6(1)(a).
80. *See id.* at art. 6(1)(b).
81. *See id.* at art. 6(1)(c).
82. *See id.* at art. 8(2).
83. *See id.*
84. *See* Merger Regulation, *supra* note 19 at art.8(3).
85. *See id.* at art. 2(2).
86. *See id.* at art. 2(3).

tive competition, 2) actual or potential competition from the EC or worldwide, 3) market position of the undertakings and their economic and financial power, 4) access of suppliers and users to supplies and markets, 5) legal or other barriers to entry, 6) supply and demand trends for the relevant goods, 7) the interests of the intermediate and ultimate consumers, and 8) the development of technical and economic progress, provided that it is to the consumers' advantage and does not form an obstacle to competition.[87] Additionally, the preamble to the Merger Regulation establishes a presumption of compatibility for any concentration resulting in a market share below 25 percent.[88]

C. *Three Step Analysis of the Commission*

The Commission analyzes these criteria for review in a three-step assessment.[89] Step one involves a determination of the relevant product and geographic markets. Step two assesses the undertaking's dominant position, relative to the geographic market determination in step one. Finally, assuming the Commission determines that the proposed merger creates or strengthens a dominant position, step three analyzes the significant impediment to effective competition resulting from the undertaking's dominant position.

1. *Relevant Product and Geographic Markets*

The Merger Regulation fails to provide decisive guidance on how to define the relevant product and geographic markets. In fact, some commentators point to the lack of express rules for defining the relevant product and geographic markets as a major weakness of the Merger Regulation.[90] Form CO,[91] a document the parties must submit when notifying the Commission of a proposed concentration, defines the 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."

87. *See id.* at art. 2, *et seq.* The preamble to the Merger Regulation suggests other factors including considerations listed in Article 2 of the EEC Treaty, and the strengthening of economic and social cohesion.

88. *See id.* at recital 15.

89. James S. Venit, *The Evaluation of Concentrations Under Regulation* 4064/89: *The Nature of the Beast, in* INTERNATIONAL MERGERS AND JOINT VENTURES 413, 519, 545, 548- 57 (Barry E. Hawk ed., 1991).

90. *See id.* at 213.

91. Form CO relating to the Notification of a Concentration Pursuant to Council Regulation (EEC) No. 4064/89, 1990 O.J. (L 219) 11, 15 (Annex 1 to Commission Regulation 2367/90, 1990 O.J. (L 219) 5) (hereinafter Form CO.)

Form CO defines the relevant geographic market as "[t]he area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas."[92] Relevant factors include, *inter alia*, the nature and characteristics of the products concerned and the existence of entry barriers or consumer preferences.[93]

The step one determination affects the step two dominant position assessment and hence the chances for merger approval. Therefore, undertakings often argue bitterly with the Commission for a favorable product and geographic market determination. The discussions, *infra*, of both the *de Haviland* and the *Boeing/McDonnell Douglas* merger decisions vividly illustrate this point.

2. *Dominant Position Assessment*

The Merger Regulation empowers the Commission to block any concentration that creates or strengthens a dominant position within the Community, more specifically within the relevant product and geographic smarkets. The first phase of this assessment involves a calculation of both the absolute and relative market shares of the notified concentration. The absolute market share reflects a notified concentration's overall market share in the relevant product and geographic markets.[94] The relative market share compares the notified concentration's market share to that of its competitors, "[t]o assess whether the new undertaking is likely to occupy a pre-eminent position."[95] Exactly what is an acceptable market share varies. Generally, market shares of 80 percent or higher evidence dominance. Because an undertaking might enjoy a market share of 80 percent, "[a]nd yet economically not be in an dominant position," the Commission remains reluctant to establish a threshold presumption of compatibility.[96]

The second phase of the dominant position assessment examines the "compatibility" factors set forth in Article 2 of the Merger Regulation to

92. *Id.*

93. *See id.*

94. *See generally* T. Antony Downes & Jullian Ellison, THE LEGAL CONTROL OF MERGERS IN THE EUROPEAN COMMUNITIES (1991).

95. JOHN COOK & CHRIS KERSE, EEC MERGER CONTROL 72 (1991).

96. *See* J. Weiler, DISCUSSION REPORT: COLLOQUIUM ON MULTINATIONAL CORPORATIONS IN EUROPEAN CORPORATE AND ANTITRUST LAWS, 28-31 May 1980 at the European University Institute in Florence, in European Merger Control, 189, 207 (K. Hopt ed. 1982). As previously stated, a presumption of compatibility exists for a notified concentration with a market share under 25 percent.

determine the relationship between a concentration's market share and its economic leverage. In this respect, the Commission considers, *inter alia*, barriers to entry, the strategic and economic potency of the undertaking in question, its ability to resist competition from other undertakings should it merge, and the fluidity of the product market in question.[97] The Commission additionally examines the supply and demand trends of the relevant market and then considers how the market itself might change over time. Given that high costs of entry hinder the development of effective competition in the relevant market, the Commission focuses on the legal and factual barriers to entry. The Commission's primary concern in this regard involves the effects on the Common Market of the elimination of an actual or perceived competitor through its acquisition by another corporation active in the relevant market. Another primary concern flows from the creation of vertical links between buyers and their suppliers that could restrict other suppliers' ability to access the relevant markets.[98]

3. *Significant Impediment to Effective Competition*

The Commission's determination that a concentration either creates or strengthens a dominant position does not automatically prohibit the concentration from operating in the Common Market. Rather, the Commission must decide if the concentration significantly impedes effective competition in the Common Market, thereby inhibiting the European Union's movement toward complete economic integration.[99] In this part of the analysis, the Commission assesses the degree to which the creation or strengthening of a dominant position impacts upon the relevant product and geographic markets.

Although the Regulation fails to expressly list factors for application with respect to the significant impediment test, the Commission generally employs the following factors in determining whether a notified concentration significantly impedes competition: 1) the need to preserve and develop effective competition within the common market in consideration of, *inter alia*, the actual or potential competition from undertakings located either within or outside of the Community and 2) the market positions of the undertakings concerned and their economic and financial power, including, a) barriers to entry, b) the opportunities available to suppliers and users, and, c) the interests of both intermediate and ulti-

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97. *See id.*

98. *See id.* at 92-93.

99. *See* CCH Commentary, *supra* note 7, at 2099.

mate consumers.[100] In this respect, the barriers to entry and the potential existence of prospective competition represent the most important considerations.

The Regulation requires the Commission to consider a notified concentration's effect on, "actual and potential competition, both inside and outside the community."[101] These criteria then enable the Commission to block mergers by international conglomerates because of their dominance in other markets. On the other hand, this third step in the competition analysis allows the Commission more flexibility in its decision- making process. Before the Regulation, Article 86 required the Commission to block any merger establishing a dominant position in the common market. The Regulation's significant impediment test, however, analyzes the degree to which competition impacts upon the Common Market. The Commission, therefore, could block a proposed concentration as it did in the *de Haviland* case, or choose another avenue, such as approval conditioned upon accepting certain concessions, as it did in the *Boeing/McDonnell Douglas* merger decision.

VI. APPLICATION OF THE REGULATION: THE *DE HAVILAND* DECISION - THE BENCHMARK FOR FUTURE MERGER ANALYSIS

On May 13, 1991, Avions de Transport Regional (ATR)[102] notified the Commission of an offer to acquire a Canadian corporation, de Haviland, owned by Boeing.[103] After examining the notification pursuant to Article 6(1) of the Regulation, the Commission determined that the proposed concentration fell within the purview of the Regulation. Questioning its compatibility with the Common Market, the Commission opened formal proceedings to examine the impact of the proposed merger on the European Community.[104] After concluding an in-depth investigation of the notified concentration on October 2, 1991, the Commission, for the first time, decided to prohibit the proposed merger from proceeding. The Commission determined that the proposed concentration, "[c]reates a dominant position on the world market . . . [t]his dominant position is

100. *See* Regulation, *supra* note 19, at art. 2(1). This list is by no means exhaustive as the Commission does use other factors listed in article 2 of the Regulation.

101. *See* Andersen, *supra* note 64, at 28.

102. Commission Decision, Case IV/M.053, Aerospatiale- Alenia/de Haviland v. Commission, 1991 O.J. (L 334) 42 (hereinafter "*de Haviland*"). At the time of this merger, Aerospaitle SNI, a French aerospace company, and Alenia- Aeritalia e Selina SpA, an Italian aerospace company controlled ATR. Alenia-Aeritalia e Selina SpA was part of the Finmeccania group of de Haviland, a Canadian division of Boeing. *See id.*

103. *See id.*

104. *See id.*

not merely temporary and will therefore significantly impede effective competition . . .[w]ithin the meaning of Article 2(3) of the Merger Regulation."[105]

The significance of the *de Haviland* case flows from the Commission's assessment of the proposed merger, pursuant to Article 2 of the Regulation. An examination of the Commission's decision, therefore, provides a practical framework for Article 2 application to future merger decisions, as well as a reference point for analyzing the *Boeing McDonnell Douglas* decision.

A. *Relevant Product and Geographic Markets*

1. *Relevant Product Market*

At the time of the proposed merger, both ATR and de Haviland designed, manufactured, and sold medium and regional transport aircraft and turbo-prop aircraft. De Haviland featured two types of regional turbo-prop aircraft. Given the differences in the products manufactured by these respective undertakings, the Commission defined the relevant product market as "[a]ll 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."[106] The Commission initially identified product market(s) potentially affected by the proposed merger and subsequently determined and targeted the regional turbo-prop market as its main concern.[107] The principal issue considered by the Commission in this respect involved the lack of substitutability of the different aircraft across the different product markets. First, the Commission distinguished the regional turbo-prop aircraft market from regional and medium-haul jet aircraft and asserted, "[r]egional jet aircraft have significantly higher operating costs, and furthermore, the time saving which a regional jet would offer compared to turbo-props is not significant . . ."[108] Differences in operating costs and disparities in distances flown, in the Commission's view, made these jets devoid of overlap and not easily substituted for one another. Given the differentials in the two product markets, the Commission proceeded to divide the turbo-prop market into three relevant product markets according to production and purchasing patterns: 1) 20-39 seaters; 2) 40-59 seaters; and 3) 60 and over seaters.[109] Such a division enabled the Commission to de-

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105. *De Haviland*, *supra* note 102, at 72.
106. *Id.* ¶ 10.
107. *See id.* ¶ 8.
108. *Id.*
109. *See id.* ¶ 10. *See also* Appendix I at A-1.

termine what, if any, competition existed in the turbo-prop market. The other "players in the field" factored heavily into this aspect of the competition analysis. For example, the other industry players furnished statements showing the aircraft that each airline offered in each sub-division of the turbo-prop market.[110] This sub-market segmentation was "generally consistent with the views of the overwhelming majority of customers and competitors who replied to the Commissions inquiries."[111]

The parties fervently disagreed with the Commission's division of the turbo-prop market into three product markets. The parties claimed that all 20-70 seaters comprised one relevant product market and considered any further segmentation arbitrary.[112] Furthermore, the parties argued that customers consider technological features and direct operating costs of aircraft, in addition to the number of seats.[113] The Commission rebutted these arguments with a general analysis of exactly how a customer decides which aircraft to acquire and determined that customers place particular emphasis on the number of seats needed to fulfill a given route.[114] Furthermore, the inquiry responses by competitors in the market exhibited a general consensus respecting the accuracy of the relevant market product as defined by the Commission. These inquiry responses helped to substantiate the Commission's rejection of the parties' claims.[115]

Thus, the Commission's definition of the relevant market generally rests on its perception of the customer preference when purchasing a given product. Supply-side substitution constitutes an additional consideration, one that the Commission addressed in the *de Haviland* case.[116] Supply-side substitution notwithstanding, the determination of the rele-

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110. *See id.* ¶ 8. Other "players in the field" included, *inter alia*, British Aerospace, Saab, Dash, Fokker and Casa. For an actual graphic breakdown of each sub-market and the aircraft offered by these respective competitors see *de Haviland*, *supra* note 102, ¶ 10.

111. *De Haviland*, *supra* note 102, ¶ 13.

112. *See id.* ¶16.

113. *See id* ¶ 17.

114. *See id.*

115. This demonstrates how the "veto power" of other competitors in a given market potentially operates. This is an indirect veto power. The parties, by responding to the Commission's inquiry, influence the Commission's product market determination. In this instance, most competitors, much to the dismay of ATR and de Haviland, believed the product market should be divided into three sub-markets. *See id.*

116. The Commission remained skeptical of the potential for supply-side substitutability between segments. It noted that, according to a study carried out on behalf of the parties, "[I]t would take longer than three or four years, for manufacturers for example of 30-seat aircraft to switch their facilities to produce 50-seat aircraft, to the extent that these facilities already exist." *Id.* ¶ 14.

vant product market from the customers' perspective constitutes the dominant analytical criteria.

2. *Relevant Geographic Market*

The Commission determined that the world market, excluding China, Eastern Europe and the former Soviet Union, constituted the relevant geographic market.[117] From an economic perspective, the absence of tangible political or economic barriers to prevent the sale of aircraft between world markets necessitated this determination. ATR, for example, sold 39 percent of its ATR 42 aircraft in North America.[118] Similarly, de Haviland sold 58 percent of its Dash 8-300 aircraft in Europe.[119] This market analysis excluded China, Eastern Europe and the former Soviet Union because of the lack of current and prospective interpenetration into these markets. The Commission noted, however, that the general economic state of the Eastern European countries in the future would determine the duration of their exclusion from the world market.[120] The parties concurred with the Commission's geographical market delimitation.

B. *Dominant Position Assessment*

1. *Market Share*

The Commission calculated market share based upon firm orders for new technology aircraft, including deliveries to date and all soon-to-be-delivered orders for existing aircraft.[121] This calculation discounts existing stock of "technology aircraft," aircraft still flying because, "[i]t is meaningless to analyze market shares for the former generation of products in assessing the market power of manufacturers now and in the future."[122] The Commission focused closely upon the effect of the notified concentration on the 40-59-seat market, as 84 percent of the turbo-prop aircraft ordered in the Community involved aircraft in the 40-59-seat range.[123] ATR/de Haviland potentially occupied a 64 percent world market share and a 72 percent Community market share in this sub-market.[124] Furthermore, de Haviland's elimination as the third largest competitor in the 40-

117. *See de Haviland*, *supra* note 102,. ¶ 20.
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.* ¶ 21.
122. *Id.* ¶ 22.
123. *See de Haviland*, *supra* note 102, ¶ 28.
124. The new firms market share, then, increased 19 percent, or from 45 percent to 64 percent. *See id.* ¶ 23.

59 seater market left only Saab and Casa, who represented the next largest competitors with scant 7 percent market shares.[125]

Thus, the Commission utilized a prospective evaluation of the aerospace industry to determine the relevant market share. It considered a manufacturer's earlier performance in selling lower technology products as irrelevant in assessing the firms market power now and in the future. The bottom line figures raised serious concerns.[126] The Commission, therefore, concluded that the proposed merger allowed ATR/de Haviland an anti-competitive share of the world and EC markets for the three subcategories on relevant market product.

2. *Impact of the Concentration*

In this second phase of the dominant position assessment, the Commission focused on four main factors: 1) the effect of eliminating de Haviland as a competitor; 2) coverage of the whole range of commuter aircraft and the effect on customer base; 3) evaluation of the remaining and potential competition; and 4) the position and strength of the customers of regional turbo-prop aircraft.[127]

a. *Effect of Eliminating de Haviland as a Competitor*

De Haviland, the third largest manufacturer before the proposed merger, experienced periods of growth enabling it to gain on the number two company, Fokker.[128] Furthermore, de Haviland began to develop an aircraft in the 60 and over seater market, where ATR already enjoyed a 76 percent world market share. If the Commission approved the proposed concentration and de Haviland succeeded in manufacturing aircraft in this sub-market, ATR/de Haviland would potentially occupy 76 percent in the over 60-seat market.[129]

The parties vehemently argued that Boeing eventually might phase out production at de Haviland, thereby eliminating effective competition, even if the Commission cleared the proposed concentration. In response, the Commission stated, "[w]ithout prejudice to whether such a consideration is relevant pursuant to Article 2 of the Merger Regulation, the Com-

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125. *See id. See also* Appendix II at A-2.

126. In the 60 and over seat market, the ATR/de Haviland would potentially occupy 76 percent of the world market and 74 percent of the Community market share. *See id.*

127. *See id.* at 49-56. *See generally,* Henriette K.B. Andersen, *EC Merger Control Regulation as Applied in the De Haviland Case, supra* note 62.

128. *See De Haviland, supra* note 99, ¶31 at 50.

129. *See id.* at 50.

mission considers that such elimination is not probable."[130] This determination implied that, even if, *arguendo*, the evidence overwhelmingly shows that a given company may falter even in the absence of merger, the Commission considers such evidence irrelevant, even when relied upon by the parties in seeking approval of the proposed transaction.

b. *Coverage of the Whole Range of Commuter Aircraft and the Effect on Customer Base*

With the acquisition of de Haviland, ATR formed the only company able to offer a "full range of seating capacity under the same umbrella,"[131] or aircraft in all three product markets. The Commission believed that such a result in the aftermath of the merger might reduce demand for the products of other existing manufacturers, thereby causing a "lock-in" effect on customers, once they made their initial purchase.[132] The "lock-in" effect, in the Commission's view, exacerbated these technical and economic constraints and tended to prevent airlines from switching from one manufacturer to another, thereby making market entry difficult.[133] Customers, then, in order to avoid incurring high fixed costs associated with each different make of aircraft, such as training pilots and mechanics and maintaining parts stock, would be "locked-in" to purchasing aircraft from ATR/de Haviland. The new firm could negotiate a lower price for a 30-seater in return for the purchase of a 60-seater.[134] This conclusion additionally illustrated the importance of the customer base in the market power for aircraft manufacturers. Furthermore, the Commission believed ATR/de Haviland could undercut the market by reducing prices once it benefited from the overlap in ATR's and de Haviland's spare parts stock. In so concluding, the Commission, in essence, stated that each manufacturer must have the same disadvantages, because a single manufacturer endowed with the ability to completely cover the entire aerospace market operates in contravention of the principles underlying the creation of the European Community.

c. *Evaluation of the Remaining and Potential Competitors*

The Commission assessed the current and expected future strength of the remaining competitors in order to determine, "[w]hether the new combined entity would be able to act independently of its competitors, in

130. *Id.* at 51.
131. *Id.* ¶ 32.
132. *See id.* ¶ 33.
133. *See id.*
134. *See de Haviland, supra* note 99, ¶ 32.

view of its strengthened position . . . ."[135] The only significant competition in the market, Fokker and British Aerospace, occupied low market shares. Fokker previously attempted to expand its customer base in the 40-59 seat aircraft for the Fokker 50. Given ATR's existing financial power, disparities between Fokker and ATR, and the putative competitive advantages created by the concentration would inhibit Fokker from broadening product and customer bases and further marginalize it in the commuter markets.[136] Other companies, such as Embraer, a Brazilian aircraft manufacturer, faced difficulties expanding beyond the 20-39 seat market if the Commission allowed the proposed concentration to proceed.[137] Furthermore, the Commission believed that British Aerospace had the resources to expand in the turbo-prop market, although it expressed reluctance to focus resources on the turbo-prop market if the concentration proceeded. The Commission, therefore, concluded, in the markets of 40 seats and over, that, "[i]t is questionable whether the other existing competitors could provide effective competition in the medium to long term."[138] With no effective competition in the medium to long term, ATR/de Haviland could potentially run roughshod over the entire product market.

d. *The Position and Strength of the Customers of Regional Turbo-prop Aircraft*

The Commission next examined the position of the customers in the commuter markets, in order to evaluate whether the, "[n]ew combined entity would be able to act independently of customers, in view of its strong position and the relative weakness of the competitors."[139] In this segment of the dominant position analysis, the Commission distinguished between established airlines and airlines yet to emerge, for purposes of assessing the effects of the proposed merger on customers.[140] Established customers would possess limited bargaining power if the Commission approved the merger because of the "lock-in" effect of purchasing decisions.[141] Therefore, a direct negative effect of the proposed merger would not appear initially, but rather over time. Established airlines may have an obligation to a particular aircraft manufacturer, or the high fixed costs may make switching airlines in the near future impractical.

135. *Id.* ¶ 34.
136. *See id.* ¶ 36.
137. *See id.* ¶ 38.
138. *Id.* ¶ 42.
139. *Id.* ¶ 43.
140. *See de Haviland, supra* note 99, ¶ 44.
141. *See id.* ¶ 45.

The new airlines would have a free choice to a certain extent, because they typically enter the market through leasing agreements, rather than buying new aircraft.[142] New airlines would indirectly have a limited choice because leasing companies generally place their orders where a majority of customers have their preferences.[143] ATR/de Haviland could benefit from this situation because leasing companies generally place their orders with the company with the greatest market share. Given these considerations, the Commission concluded that ATR/de Haviland, "[c]ould act to a significant extent independently of its competitors and customers, and thus would have a dominant position on the commuter markets as defined."[144]

C. *The Significant Impediment Test*

According to the Commission, a concentration creating a dominant position may nevertheless remain in the common market "[i]f there exists strong evidence that this position is only temporary and would be quickly eroded because of high probability of strong market entry."[145] The Commission, therefore, focused mainly on the potential for quick market entry by competitors. In addition, the Commission set forth two other general considerations as part of the significant impediment test: 1) whether the proposed merger would contribute to the interests of the customer and the development of technical and economic progress, and 2) potential market disturbances caused by the concentration.

With respect to the potential for new market entry, the Commission examined whether the turbo-prop market had already reached maturity. In this regard, the Commission's examined demand trends and time and cost considerations in the targeted markets and determined that the level of demand would remain constant through the mid- 1990's when demand would decrease and thereafter stabilize.[146] The time and cost considerations, however, yielded different results. The Commission discovered that, at a minimum, companies incur two or three years of expensive research in order to align commercial jets with the needs of the market.[147] Further, an additional four years would elapse from the time of initial research and development to production and delivery. Thus, notwithstanding the time required for construction, or to acquire the facilities necessary for aircraft construction, companies typically entered the market

142. *See id* ¶ 47.
143. *See id.*
144. *Id.* ¶ 56.
145. *Id.* ¶ 53.
146. *See De Haviland, supra* note 99, ¶ 54.
147. *See id.* ¶ 55.

seven years after launching their initial research and development programs.[148] As a consequence, the Commission concluded that the market matured before the proposed concentration. Given the cost and time considerations, the Commission considered entrance into the market irrational, both now and in the foreseeable future.

Finally, the Commission looked for evidence of market disturbances caused by the concentration. One market disturbance that concerned the Commission was ATR/de Haviland's potential ability to exploit their dominant position and create a monopoly through predatory pricing.[149] British Aerospace argued, and the Commission agreed, that if the merger proceeded, ATR/ de Haviland would pursue a price cutting agenda designed to drive competitors out of the market.[150] Such a price war would force many weaker companies out of the market and negatively affect their jet manufacturing capability. Furthermore, the aftermath of such a price war could result in a monopoly, culminating in the ability to raise prices without suffering any competitive consequences.

D. *The Commission's Disposition of the Proposed Merger*

The Commission decided against permitting the merger to proceed on the premise that it created a powerful and unassailable dominant position in the world market for commuter aircraft.[151] This merger significantly impeded effective competition in the Common Market within the meaning of the Merger Regulation. The projected weak market position of ATR's competitors and customers, coupled with the limited bargaining power of customers, forced the Commission to conclude that the merger enabled ATR/de Haviland to act independently of customers and competitors on the commuter markets.[152]

Six years later, in the case of *Boeing/McDonnell Douglas*, the Commission again applied the Regulation in evaluating the legality of the notified concentration, giving it yet another opportunity to reject a merger proposal for only the second time in Commission history.

VII. THE BOEING/MCDONNELL DOUGLAS MERGER DECISION

At the time of the proposed merger, Boeing operated in two principal areas: commercial aircraft, and defense and space. McDonnell Douglas, at the time of the proposed merger, operated in four principal areas:

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148. *See id.*
149. *See id.* ¶ 69.
150. *See id.*
151. *See id.* ¶ 72.
152. *See de Haviland, supra* note 99, ¶ 72

military aircraft and missiles, space and electronic systems, commercial aircraft, and financial services. Due to U.S. defense interests, the Commission limited the scope of the merger analysis to the civil side and asserted that its examination of the proposed merger "[h]as not established that a dominant position has been strengthened or created in the defense sector as a result of the proposed concentration."[153]

A. *Relevant Product and Geographic Markets*

1. *Relevant Product Market*

The Commission determined that the merger affected the market for large commercial jet aircraft. Boeing identified the relevant product markets with the large commercial jet aircraft sector as "narrow-body" and "wide-body" commercial jet aircraft.[154] The Commission agreed with this distinction, largely due to the discernible differences between the two types of aircraft. Narrow-body jets feature an operating range of approximately 2000 to 4000 nautical miles and seating capacity for about 100 to 200 passengers.[155] For wide-body jets, the corresponding parameters are 4000 to 8000 nautical miles with seating capacity of 200 to 400 passengers.[156] Furthermore, the Commission determined that the relevant aircraft were Western-built jets, since non-Western jets, such as the Russian Ilyushin, are neither technologically advanced nor reliable.[157] Notwithstanding the two distinct product markets, the Commission decided to assess the effects of the merger on both markets together, "[s]ince the structure of the narrow-body and the wide-body markets is similar and the competition problems resulting from the proposed merger are the same for both markets."[158]

In so concluding, the Commission remained consistent with the Regulation analysis in *de Haviland*, although the Commission defined the relevant product market with more particularity in that case. In *de Haviland*, the Commission initially distinguished the regional turbo-prop market from the regional and medium-haul jet aircraft as disparities between the two hampered their substitutability.[159] The Commission proceeded to further define the regional turbo-prop market with the three seat class

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153. *Boeing*, *supra* note 1, ¶ 13.

154. *See id.* ¶ 16.

155. *See id.* For a further description of the segmentation of narrow-body and wide-body jets, see *id.* ¶ 38.

156. *See id.*

157. *See id.*

158. *Id.*

159. *See de Haviland*, *supra* note 99, ¶ 8.

distinctions.[160] In *Boeing*, however, it refrained from further segregating the market with seat distinctions after initially labeling the large commercial jet market as the relevant product.

As in *de Haviland*, the Commission declined to include second-hand aircraft in the overall product comprising the large commercial jet aircraft market. Approximately 30 percent of passenger aircraft change airlines while remaining in passenger service.[161] Furthermore, converted used passenger aircraft account for almost two thirds of the total demand for freighters.[162] Nevertheless, the Commission cited *de Haviland* and opined that used aircraft, as a general rule, find safe harbor with smaller airlines where limited financial resources constrict their ability to purchase new equipment. While used aircraft sometimes alleviate specific short-term needs for larger airlines, they are complements rather than substitutes for new aircraft.[163]

The Commission in *Boeing* relied heavily on the demand side analysis in determining the relevant product market. The Commission examined the average customer's considerations in a purchasing decision and divided up the process into several stages, including operating requirements, technical requirements and, finally, economic and financial aspects.[164] The operating criteria included, *inter alia*, routes, traffic density, distances and optimal seating, and loading considerations.[165] Technical characteristics included performance and reliability, and range and fleet commonality; that is, the new fleet's compatibility with existing aircraft. Economic and financial considerations included the new present value according to the purchase price, forecasted revenues and costs, and residual value.[166] The Commission's assessment of the relevant product and market, primarily from the customer's perspective, followed the approach used in *de Haviland* where the demand-side approach also dominated the relevant market product analysis.

2. *Geographic Market*

Large commercial jet aircraft in use today are operated throughout the world under similar conditions of competition, relative transportation costs notwithstanding.[167] The Commission, therefore, labeled the world

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160. *See id.* ¶ 10.
161. *See Boeing*, *supra* note 1, ¶ 17.
162. *See id.*
163. *See id.*
164. *See id.* ¶ 14.
165. *See id.*
166. *See id.*
167. *See Boeing*, *supra* note 1, ¶ 20.

market as the geographic market. In *de Haviland*, the Commission similarly determined that the world market comprised the geographic market for the turbo-prop plane, although it declined to include the former Soviet Republic, China or Eastern Europe as part of the world market.[168] The Commission did, however, leave open for another day the possibility of including Eastern Europe in the world market analysis, depending on the future economic development of the Eastern European countries. These countries received no discussion in the *Boeing* decision and, therefore, it is unclear whether the Commission included the former Soviet Republic, China, and the Eastern Bloc countries in the world market. The *de Haviland* decision indeed allowed the Commission to consider these countries upon a showing of sufficient evidence of economic maturity. Speculation merits noting that, in all likelihood, the Commission refrained from considering these countries as part of the world market because only Western-built aircraft comprised the relevant market product. The Commission opined that non-Western aircraft, "[c]annot compete on technical grounds in their current versions, for reasons of reliability, after-sales service and public image."[169]

B. *Dominant Position Assessment*

The Merger Regulation empowers the Commission to block any concentration that creates or strengthens a dominant position within the community.[170] In *Boeing*, the test, performed in the conjunctive, required, *inter alia*, present and potential market share analysis to determine whether the merger created or strengthened a dominant position within the community.[171] In part two of the dominant position analysis, it considered Boeing's prospective market share, as well as the potential benefits and favorable industry scenarios bestowed upon Boeing, to assess whether the merger strengthened its dominant position in the market *vis-à-vis* its competitors.[172] This approach is consistent with the approach of

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168. *See de Haviland*, *supra* note 99, at ¶ 20.

169. *Boeing*, *supra* note 1, at ¶ 15.

170. *See generally*, Merger Regulation, *supra* note 19, at art. 2, 8.

171. *See Boeing*, *supra* note 1, at ¶ 20-24. In this case, Boeing's dominant position in the large commercial jet aircraft occurred before the proposed merger.

172. *See id.* at ¶ 53-113

the *de Haviland* Commission, although the *Boeing* Commission drafted this segment of the opinion in far greater detail.

1. *Market Structure for Large Commercial Jet Aircraft*

a. *The Competitors*

Before it undertook the merger analysis, the Commission briefly discussed the interested parties. At the time of the proposed merger, only three companies, Boeing, Airbus, and MDC, competed on the world market for large commercial jet aircraft. Boeing remained active in all aerospace sectors—commercial, defense, and space—but derived 70 percent of its annual revenues from commercial jet sales.[173] MDC, the third largest producer of large commercial jet aircraft at the time of the proposed merger, derived approximately 30 percent of its annual turnover from the large commercial jet aircraft and the rest from the military and defense sectors.[174] Airbus, a *groupement d'interet economique*, a consortium of European economic interests and the world's second largest producer of large commercial jet aircraft at the time of the proposed merger, competed with Boeing in most of the aerospace sectors.[175]

b. *The Customers*

Customers of large commercial jet aircraft, the Commission opined, included 561 airline companies, scheduled or non-scheduled, and leasing companies.[176] The customer's demand for large commercial jet aircraft is cyclical and predicated upon the demand for air transportation.[177] The industry continues to expand due to the economic liberalization processes within the European Community, China and the former Eastern Block. In the next ten years, figures project Europeans to account for 28 percent of the demand for Boeing planes or $490 billion in market potential in 1996 U.S. dollars.[178]

The *de Haviland* opinion, devoid of summaries of the customers and competitive landscape prior to the dominant position analysis, differs from the *Boeing* opinion in this respect. Perhaps the Commission in *Boeing*, through these summaries, attempted to justify its incursion into the

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173. *See id.* ¶ 22. The turnover figures were based on figures from 1996.

174. *See id.* ¶ 23.

175. *See id.* ¶ 24. Airbus consortium include Daimler-Benz Aerospace Airbus of Germany (DASA) (37.9%), British Aeropsace (20%), and government owned Aerospatiale of France and CASA of Spain, (37.9%) and (4.2%) respectively. *Id.*

176. *See Boeing, supra* note 1, ¶ 25.

177. *See id.* ¶ 26.

178. *See id.* ¶ 27.

affairs of two well-known, non-European companies. The claim that Europe will account for 28% of Boeing's revenue over the next ten years allows the Commission to assert some control over the transaction. Otherwise, the Commission's decision becomes more susceptible to arguments from "protectionist" groups. Moreover, those searching for the subtle political considerations and other "hidden" motivations behind the *Boeing* decision could undermine the credibility of the opinion and the Commission.

2. *Considerations Examined in Part One of the Dominant Position Analysis*

The Commission considered the following criterion in this segment of the dominant position analysis: 1) market share; 2) market segments; 3) fleet in service; 4) exclusive deals; 5) future market growth; 6) potential competition. In light of these various characteristics, the Commission concluded that Boeing already enjoyed a dominant position on the overall market for large commercial jet aircraft, as well as in the two submarkets for narrow-body and wide-body aircraft.[179]

a. *Market Shares*

As in *de Haviland*, the Commission calculated Boeing's pre-merger market share on the basis of backlogs that indicated the number of net orders, or the number of new firm orders minus the number of canceled orders.[180] Backlog data, widely viewed as the best indicator of market position in the industry, adequately reflects the market share, provided that the analysis conceptualizes backlog in terms of value to take into account disparities in prices of different aircraft.[181] According to the information provided by Boeing in the notification and data provided by Airbus, the overall market for large commercial jet aircraft in terms of backlog revealed Boeing comfortably ahead with a market share of 64 percent, Airbus with 30 percent and MDC with 6 percent.[182] In comparison, ATR, at the time of the de Haviland merger, enjoyed a 51 percent market share in the 40-seater turbo-prop jet market. Like MDC, *de Haviland* boasted the third highest market share with 15 percent.[183] Thus, Boeing's 64 percent market share alone justified the determination of dominance. ATR's

179. *See id.* ¶ 52.

180. *See id.* ¶ 28. Data based on 1996 figures. *See also*, Appendix III, at A-3.

181. *See Boeing, supra* note 1, ¶ 28. A Boeing 737-300, for example, costs approximately $38 to $44 million, whereas, the Boeing 747-400 ranges from $156 to $182 million.

182. *Id.* ¶ 29.

183. *See de Haviland, supra* note 99, at ¶ 24.

51 percent, at a minimum, represents a floor for a presumption of dominance, an indicator which Boeing exceeded by 13 percent.

b. *Market Segments*

The Commission segmented the market to determine whether Boeing enjoyed a dominant position prior to the merger, or if the merger created a position of dominance. Whereas in *de Haviland*, the Commission's primary concern rested in the regional turbo-prop market, in *Boeing*, the large commercial jet market represented the area of concern. Thus, the Commission, pursuant to Boeing's notification, divided the market into 4 segments; 100-120-seaters; 120-200-seaters; 200-320-seaters; and 400 + seaters.

This segmentation revealed Boeing's ability to offer a complete family of aircraft, due to its presence in every segment.[184] As in *de Haviland*, the Commission, with the customer in mind, remained skeptical of the substitutability of one segment for another. In the narrow-body submarket, the high per-trip operating costs of the 120-200-seaters demonstrated the lack of fluidity for substituting in favor of the 100-120-seat aircraft.[185] At the other end of the spectrum in the wide-body aircraft, Boeing offered the only aircraft in the 400 range, the Boeing 747-400.[186]

c. *Fleet in Service*

Prior to the proposed merger, Boeing led the world production of commercial airplanes for over three decades and manufactured more jet aircraft than all the other industry manufacturers combined.[187] Boeing, then, enjoyed a significant advantage *vis-à-vis* its competitors because the long operating life of airplanes endowed Boeing with a broad customer base.[188] The Commission estimated that Boeing supplied approximately 60 percent of the Western-built aircraft in service at the time of the proposed merger, in comparison with MDC's 24 percent and Airbus' 14 percent.[189]

Following the dictates of the customer or demand-side rationale in *de Haviland*, a large in-service fleet, combined with a broad product range, influenced decisional bodies within aircraft companies in charge of

184. *See Boeing*, *supra* note 1, ¶38. *See also*, Appendix IV at A-5.

185. *See id.*

186. *See id.*

187. *See id.* ¶ 40. Boeing stated this in its 1995 annual report.

188. *See id.*

189. *See id.* ¶ 41. The remaining 2 percent belonged to Lockheed, despite its inactivity in the commercial aircraft sector since 1984.

fleet planning and acquisitions.[190] In this regard, the Commission concluded that saving some of the high fixed costs mentioned in the *de Haviland* decision, such as commonality benefits, "[f]requently lead to the acquisition of a certain type of aircraft even if the price of competing products is lower."[191] As in *de Haviland*, the Commission received inquiry returns from other industry players such as Airbus, who emphasized the importance of the existing fleet in service consideration.[192]

d. *Exclusive Deals as Evidence of an Existing Dominant Position*

Prior to the proposed merger, Boeing concluded exclusive dealing agreements for the supply of large commercial jet aircraft to American Airlines (American), Delta Airlines (Delta), and Continental Airlines (Continental).[193] Valued at about $6.6 billion,[194] the arrangement with American, for example, made Boeing the exclusive supplier of jet aircraft to that airline until 2018.[195] In exchange, American received price-protection purchase rights for 527 additional jets during the twenty-year exclusivity period and retroactive price reductions of aircraft purchased by American in the past.

The Commission concluded that the exclusive dealing agreements with three of the biggest airlines in the world indicated Boeing's enjoyment of a dominant position in the large commercial jet market, even before the proposed merger. The Commission acknowledged that some customers received economic benefits from these exclusive deals, albeit the "lock- in" effect, as discussed in *de Haviland,* counterbalanced these benefits. As a consequence of the "lock-in" effect, customers often find themselves locked in to a single supplier such as Boeing, in the face of lower prices, increased technology and related services from competitors.[196]

e. *Future Market Growth and Potential Competition*

Boeing tried to rebut the dominant position assessment and argued that second hand aircraft and potential competition effectively constrained

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190. *See Boeing, supra* note 1, ¶ 41.

191. *Id.*

192. *See id.*

193. *See id.* ¶ 43.

194. American placed firm orders for 103 aircraft. *See id.*

195. *See id.*

196. *See Boeing, supra* note 1, ¶ 45. *See also, supra* notes 136-141 and accompanying text for a discussion of the "lock- in" effect in *de Haviland.*

Boeing's ability to increase its market share.[197] Earlier in the *Boeing* opinion, the Commission, following the *de Haviland* decision, deemed second hand aircraft ineffective substitutes. Studies show a projected growth rate of 80 percent in future demand for large commercial jet aircraft over the next twenty years. Second-hand aircraft cannot meet more than a fraction of this demand, given that more than 80 percent of existing aircraft, "[w]ill need to be retired and replaced during this same period."[198]

Boeing also argued that potential new market entrants situated in Russia, India, and the Far East effectively circumscribed its ability to increase market share. The Commission, however, rejected this argument, because Boeing previously admitted that massive barriers to entry in the large commercial jet industry inhibit new market entrants.[199] Initial research and development costs, economies of scale and strict safety standards severely limit market entry.[200] Thus, the Commission discounted prospective competition and its effect on the present competitive landscape in the large commercial jet aircraft over the foreseeable future.[201]

Most of these factors cited above, even in the abstract, provided substantial grounds for the Commission to conclude that Boeing enjoyed a pre-merger dominant position in the world market for large commercial jet aircraft. Nevertheless, pursuant to the dictates of the Regulation and the *de Haviland* decision, the Commission continued to painstakingly evaluate each factor attributed to Boeing's dominant position. Next, the Commission analyzed the effect of the proposed merger on Boeing's dominant position in the large commercial jet aircraft market.

3. *The Strengthening of Boeing's Dominant Position*

The acquisition of MDC, the Commission believed, determined the degree to which Boeing enhanced its market position *vis-à-vis* other competitors in the industry. Thus, the Commission examined the impact of Boeing's acquisition of both MDC's commercial aircraft business and the overall effects resulting from the defense and space business. In the end, the Commission concluded the obvious: that the proposed concentration, "would lead to the strengthening of a dominant position through which

197. *See id.* ¶ 47.

198. *Id.*

199. *See id* ¶ 49.

200. *See id.*

201. *See id.* ¶ 51.

effective competition would be significantly impeded in the Common Market within the meaning of article 2(3) of the Merger Regulation."[202]

a. *Impact of MDC's Commercial Aircraft Business*

The Commission cited several factors that illustrated the immediate effect of the proposed merger on the large commercial jet aircraft market. These factors included, *inter alia,* MDC's remaining viability as a competitor, increases in Boeing's customer base, and the increase in Boeing's skilled work force.

The Commission began with a redacted rehash of Boeing's increase in market share as a result of the merger.[203] Boeing, as a result of the proposed merger, increased its market share in terms of backlog from 64 to 70 percent, including increases to 73 and 66 percent respectively in the wide and narrow-body market.[204] More specifically, the Commission noted Boeing's ability to enjoy a further monopoly in the smallest narrow-body segment with 100-120 seats, in addition to its existing monopoly in the largest wide-body segment.[205] At the time of the proposed merger, only Boeing and MDC competed in the smallest narrow-body segment. Airbus, further marginalized by the proposed merger, would find competing in the aerospace market difficult in the foreseeable future. If that happened, it would frustrate the goal of economic integration in the European Union.

b. *Competitive Potential of MDC*

The inquiries received by the Commission in response to the notified concentrations' proposed merger revealed that 2 of 31 airlines that purchased new large commercial jets over the past 5 years purchased MDC aircraft.[206] The Douglas Aircraft Company (DAC), the commercial arm of MDC, showed a backlog of $7 billion, although these earnings essentially related to DAC's spare parts and product support business, rather than the sale of new aircraft.[207] DAC, in the nine months preceding the proposed merger, lost as customers American, Northwest Airlines (Northwest), Delta and Continental, the four largest operators of DAC

202. *Boeing, supra* note 1, ¶ 113.

203. *See id* ¶ 55. *See also, infra,* market share, notes 214- 217 and accompanying text.

204. *See id.*

205. *See id.* ¶ 56.

206. A study conducted by Lexecon Ltd., on behalf of Airbus and presented at the hearing, confirmed the accuracy of the inquiries. *See id.* ¶ 58.

207. *See id.* ¶ 59.

aircraft.[208] Based upon these findings, the Commission concluded that, "[D]AC would have no real prospects in the market for large commercial jet aircraft," and, thus, "[D]AC is no longer a real force in the market on a stand-alone basis."[209] Furthermore, the Commission noted that, due to the deterioration of DAC, aside from Boeing, "[n]either Airbus, the only competitor left in the market for large commercial jet aircraft, nor one of its parent companies, showed any interest in the acquisition of DAC."[210]

Nevertheless, the Commission feared the competitive potential of MDC's commercial aircraft business, when integrated into the Boeing group.[211] The negative perception that pervaded MDC's product line before the merger potentially benefited Boeing in the long run if it continued to manufacturer MDC aircraft.[212] Boeing's ability to remove the stigma attached to MDC planes based on the strength of its reputation in the aerospace industry troubled the Commission. Furthermore, the aftermath of the proposed merger allowed Boeing to decide when to place DAC aircraft into the stream of competition. Alternatively, the Commission noted, Boeing benefited from preferential access to the large customer base of DAC, even if Boeing phased out the production of DAC aircraft over time.[213]

c. *Increases in Customer Base*

Boeing, after the merger, increased its share in the existing fleet in service from 60 to 80 percent, in comparison to only 14 percent for Airbus.[214] Such an effect significantly broadened Boeing's customer base. Of the 561 airlines that operated Boeing, MDC and Airbus aircraft at the end of 1996, 75 airlines used only MDC aircraft and 10 operators used both MDC and Airbus products.[215] In addition, 316 airlines operated only Boeing aircraft and 50 airlines operated both Boeing and MDC aircraft.[216] These figures evidence the potential for closer contacts and new found

208. *See Boeing*, *supra* note 1, ¶ 58

209. *Id.*

210. *Id* ¶ 60.

211. *See id*

212. *See id.* ¶ 61.

213. *See id.*

214. *See Boeing*, *supra* note 1, ¶ 62.

215. *See id.*

216. *See id.*

opportunities for future sales. The proposed merger, then, further weighted the market in Boeing's favor.

d. *Increase in Boeing's Skilled Work Force*

The Commission unearthed strong evidence demonstrating Boeing's desire to access MDC's engineers for its own commercial aircraft production. MDC's 1996 annual report revealed that several hundred MDC engineers began to work for Boeing in December, 1996, in anticipation of the merger.[217] "In the aircraft industry, flexibility of capacity, or the ability to increase and decrease production easily, is an important factor."[218] An airline that offers timely delivery in periods of rapidly increasing demand clearly has an advantage, *vis-à-vis* other industry competitors. An essential element needed to establish flexibility of capacity is the availability of skilled labor.[219]

The *de Haviland* Commission considered similar factors when it assessed whether the ATR/de Haviland merger strengthened ATR's dominant position. Unlike MDC, de Haviland exhibited a greater ability to compete *vis-à-vis* its competitors. De Haviland planned to develop new aircraft, the Dash 8-400, and the proposed merger effectively eliminated de Haviland from competition in the 60 seat and over market.[220] Furthermore, unlike the present merger situation, where only Boeing expressed an interest in purchasing MDC, British Aerospace and others had expressed an interest in buying de Haviland.[221]

Notwithstanding these differences, the acquisition of MDC enabled Boeing to bolster its already thorough coverage of the whole range of large commercial jet aircraft. The *de Haviland* merger likewise enabled ATR to cover the whole range of commuter aircraft.[222] Furthermore, in both cases, the "lock-in" effect enabled both ATR and Boeing to broaden their customer bases, notwithstanding the customer's actual desire to purchase their aircraft. Only the *Boeing* opinion, however, exhibited exclusive airline agreements and the pre-merger movement of skilled workers from McDonnell Douglas to Boeing. These considerations, individually and in the aggregate, relegate Boeing's lone desire to purchase MDC to a position of irrelevance. Finally, placing the interests of the interested parties in both mergers aside, such post-merger effects inhibit the

217. *See id.* ¶ 65.
218. *Id.* ¶ 67.
219. *See id.*
220. *See de Haviland*, *supra* note 99, at ¶ 31.
221. *See id.*
222. *See id.* ¶ 32.

gradual transformation of the European Union into a complete common market.

4. *Overall Effects Resulting from the Defense and Space Business of MDC*

The Commission posited a further strengthening of Boeing's dominant position through the take-over of MDC's defense and space business. In particular, the Commission analyzed Boeing's increase in overall financial resources, Boeing's increased access to publicly funded research and development and intellectual property portfolios, and Boeing's increased bargaining power *vis-à-vis* suppliers.

a. *Overall Financial Resources*

The proposed merger would create the largest integrated aerospace company in the world, with estimated 1997 revenues in excess of $48 billion.[223] Boeing's commercial aircraft division accounted for 70 percent of the $48 billion. For MDC, however, 70 percent of its total business related to defense and space operations.[224] Thus, the merger potentially allowed Boeing to triple its defense and space activities. Even with the cyclical nature of the commercial jet market, Boeing arguably would cope and possibly thrive during recessionary periods in the commercial sector, because, *inter alia*, revenues generated in the defense and space sectors appeared much more stable than those generated in the commercial sector.[225] Airbus, a *groupement d'interet economique*, or a consortium of economic interests, does not publish its own financial accounts thereby making a comparison among Airbus, Boeing and MDC impossible. The 1996 turnover figures for Airbus ($8.9 billion), Boeing ($22.7 billion), and MDC ($13.8 billion), however, indicated the great disparity among these undertakings, both before and after the proposed merger.[226] The Commission believed that Boeing would use the increases in turnover and general revenue in the furtherance of anti- competitive pricing tactics.[227] To bolster this argument, the Commission cited Boeing's conduct on an order placed by Scandinavian Airline Systems (SAS) in March, 1995. SAS's internal evaluating committee recommended purchasing 50 of DAC's proposed new MD-95 jetliners for $20 million each.[228] In the

223. *See Boeing*, *supra* note 1, ¶ 73.
224. *See id.*
225. *See id.*
226. *See id.* ¶ 74.
227. *See id.* ¶ 78.
228. *See id.* ¶ 79.

end, SAS ordered 35 Boeing 737 aircraft for a price of $19 million per plane.[229] When Boeing undercut DAC, it demonstrated an ability to effectively impede competition in the aerospace market even without access to MDC's panoply of space and defense resources.

b. *Access to Publicly Funded Research & Development*

Above and beyond predatory pricing, Boeing's increase in its defense and space activities, benefited, *aliunde*, from a greater access to research and development funded by the US Department of Defense (DOD) and the National Aeronautics and Space Administration (NASA). Research and development budgets vary in amount from project to project, although approximately $50 billion represented the total research and development budget for the DOD and NASA. The merged entity, at the very minimum, would participate in all the current DOD programs with the highest research and development budgets.[230] By contrast, the 1996 European Ministries of Defense (MoD) combined budget in the Community barely exceeded $11 billion, with $10.6 billion accounted for by the MoD of France, Germany, and the United Kingdom, the main Airbus consortium partners.[231]

Obvious advantages from defense research and development for a manufacturer of commercial aircraft inhere in the transfer of this technology to the commercial sector. More importantly, Boeing's extensive participation in highly sophisticated research and development projects helps "[t]rain technical personnel in those companies and therefore increases general know-how."[232] Military research and development, the Commission noted, also pays for basic equipment and highly specialized tools frequently used in the commercial sector.[233] Increases in general know-how usually arise in the areas of design and manufacturing processes. For example, the Commission examined the DOD's major program on the use of synthetic design technology, which significantly limits the time and risk involved in producing new aircraft.[234] Thus, the disparities in research and development spending between the DOD and the MoD evidenced Boeing's ability to enhance its market dominance *vis-à-vis* Airbus and to cross-fertilize know-how between the commercial and defense sectors. Boeing's activities in the past led the Commission to believe Boeing

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229. *See Boeing*, *supra* note 1, ¶ 79.

230. *See id.* ¶ 90. Exact figures are not available because the Commission intentionally omitted them from the *Boeing* opinion. *See also*, Appendix V at A-6.

231. *See id.* ¶ 86.

232. *Id.* ¶ 92.

233. *See id.*

234. *See id.* ¶ 93.

would use these newfound advantages in the aerospace market in contravention of the goals of the Common Market.

In a technology intensive industry such as commercial aircraft manufacturing, intellectual property, in the form of unpatented know-how, plays an extremely important role for the competitive potential of the players in the market.[235] The Commission appeared extremely concerned that the, "[c]ombination of the world's largest manufacturer of commercial aircraft with the world's leading manufacturer of military aircraft will lead to the combination of two large portfolios of intellectual property."[236]

At the time of the merger, Boeing and MDC held a combined 500 patents that the Commission deemed relevant to the commercial aircraft industry.[237] Further, a combined 112 patents restricted access to important future technology.[238]The Commission, then, considered the combination of Boeing and MDC's know-how and patent portfolios a further element strengthening Boeing's dominant position in the large commercial aircraft sector.

c. *Bargaining Power vis-à-vis Suppliers*

The proposed merger substantially increased Boeing's buying power with many suppliers that furnish parts for both the civil and military sectors. The Commission feared MDC's buying power in the military sector when coupled with Boeing's strong position in commercial aircraft. It believed this combination would increase suppliers' overall reliance on Boeing.[239] This in turn potentially placed suppliers in a position where Boeing would receive priority over Airbus.[240] Boeing, then, could exert pressure on suppliers to discourage them from selling to Airbus and further diminish Airbus's competitive ability in the commercial aircraft sector. Such business practices could permanently cripple Airbus and afford Boeing a monopoly in the commercial aircraft sector.

C. *Disposition of the Boeing McDonnell Douglas Merger*

For the reasons outlined above, the Commission, not surprisingly, determined that the proposed concentration, "[w]ould lead to the strengthening of a dominant position through which effective competition

235. *See Boeing, supra* note 1, ¶ 102.

236. *Id.*

237. *See id.*

238. *See id.* For a detailed discussion of these patents see pages 34-35 of the *Boeing* opinion.

239. *See id.* ¶ 106.

240. *See id.*

would be significantly impeded in the common market within the meaning of Article 2(3) of the merger regulation. The Commission failed to designate a section of the opinion, "significant impediment to effective competition," but rather considered that the reasons outlined above demonstrated a significant impediment. In *de Haviland*, the benchmark for comparing future merger decisions, the Commission devoted a entire section to the significant impediment test. The Regulation itself does not expressly list factors for application in the significant impediment test, although many scholars suggest that the dominant position criteria in Article 2(1) remain relevant in this context. These factors, however, are continuously evaluated throughout the merger analysis and the Commission most likely remained cognizant of the potential for redundancy when it omitted this section from the *Boeing* merger analysis. Alternatively, the merger analysis evolved through a body of doctrine that expanded the meaning of the Merger Regulation and obviated the need for a separate significant impediment analysis.

VIII. CONCLUSION

The *de Haviland* decision sets the standard for the evaluation of a proposed concentration seeking to do business in the European Union. The Commission, in *de Haviland*, painstakingly set forth the evaluative criteria espoused in the Regulation in order to demonstrate the Regulation's practical application. Throughout the opinion, the *de Haviland* Commission faithfully applied the Regulation to the facts at hand and reached a result consistent with both the dictates of the Regulation and the goals of the Common Market. Furthermore, the *de Haviland* decision contemplated the permissibility of attributing international anti-trust implications to the Regulation. The *Boeing* Commission followed the *de Haviland* decision in this respect, because it too analyzed a merger between Boeing and McDonnell Douglas, two American corporations.

A. *Dominant Position: Correct Assessment, Unfaithful Decision*

By any and all standards espoused in the Regulation, Boeing occupied a dominant position before the merger. Furthermore, by virtue of the merger, Boeing significantly enhanced its position in the large commercial jet aircraft *vis-à-vis* other industry competitors. The *de Haviland* decision established ceilings with respect to the dominant position in almost every segment of the merger analysis that, if they succeeded, either individually, or in the aggregate, mandated a presumption of dominance.

1. *Market Share*

Before the merger, Boeing and de Haviland enjoyed 46 and 64 per-

cent market shares respectively in the relevant product markets.[241] The Boeing Commission faithfully applied the correct test set forth in *de Haviland* when it quantified the market share in the overall market for large commercial jet aircraft in terms of backlog.[242] The calculations demonstrate that the Boeing merger exceeded the *de Haviland* standard by 18 percent, and, in fact established a new threshold presumption of dominance, namely, a 64 percent market share, in the aftermath of the Boeing merger. Of far greater import in the commercial jet landscape in *Boeing*, Airbus, the only other viable commercial aircraft competitor, lagged far behind Boeing with a scant 30 percent market share. Clearing a merger exhibiting a 34 percent pre-merger market share disparity detracts from the goals of the Common Market. In *de Haviland*, on the contrary, the Commission blocked a merger exhibiting a 32 percent pre-merger market share disparity between ATR and Fokker, the other major competitor.[243] In addition, the Commission cleared Boeing's merger with a prospective 70 percent market share, compared to ATR's 63 percent. The Commission, therefore, established a new floor in the prospective market share as well. Further troubling, newly established production synergies between Boeing and McDonnell Douglas arguably laid a foundation for this market share to continue to increase.

2. *Exclusive Deals and the "Lock-In" Effect*

The Commission concluded that the exclusive dealing arrangements with Delta, American, and Continental, three of the biggest airlines in the world, evidenced Boeing's enjoyment of a dominant position in the large commercial jet market, even before the proposed merger. The Boeing Commission followed the rationale of *de Haviland* in this respect and noted that the "lock-in" effect would hinder these customers from switching manufacturers. In order to avoid incurring high costs associated with different types of aircraft, such as training pilots and mechanics, and maintaining parts stock, these customers must purchase from Boeing. Furthermore, customers presently using McDonnell Douglas commercial aircraft would experience a "lock-in" dependency because of the merger, especially in the face of lower prices, increased technology and related services from competitors. As with the market share, this "lock-in" fac-

241. *See* Appendices II-III at A-2, A-3. *See also*, Boeing, *supra* note 1 at 17. De Haviland's 46 percent represents its overall market share before the merger.

242. *Boeing*, *supra* note 1, ¶ 29.

243. *See* Appendices AII-AIII at A-2, A-3. Figures are based on the 40-59 seat world market.

tor alone created a presumption of dominance and enough ammunition for the Commission to block the merger.

B. *Significant Impediment to Competition: Predatory Pricing and Publicly Funded Research and Development*

The Commission faithfully applied the *de Haviland* decision in measuring the impact of the merger and determined, on the strength of a myriad of factors, that Boeing indeed occupied a dominant position in the commercial jet aircraft market. After the step two analysis, the Commission further determined that the merger strengthened Boeing's dominant market position *vis-à-vis* the rest of the industry players, because the proposed merger effectively impeded true competition within the Common Market. The Commission linked Boeing's potential market share, exclusive dealing agreements, and the potential benefits conferred from increased research and development allotments, to a prospective course of conduct unfavorable to both Airbus and to the Common Market.

Inquiries into Boeing's past conduct, mostly within the past two years, revealed that Boeing already used its competitive advantage to engage in some of the very practices the Commission feared most, namely, predatory pricing to drive other industry competitors from the market. The *de Haviland* factual scenario, devoid of predatory pricing considerations, clearly exhibited far fewer flagrant characteristics than the *Boeing* factual scenario. Yet paradoxically, the Commission still found it violative of EC competition law and blocked the merger.

The acquisition of new research, development and other resources certainly increased the likelihood that Boeing would continue such practices. Obvious advantages from defense research and development for a manufacturer of commercial aircraft result in the transfer of this technology to the commercial sector. The acquisition of highly specialized tools frequently used in the commercial sector and a new skilled work force increases production efficiency. Furthermore, access to new technology and patents would increase suppliers' overall reliance on Boeing. Boeing, in turn, could exert pressure on suppliers and discourage them from selling to Airbus. Such a course of action could freeze-out Airbus and further diminish its competitive ability in the commercial aircraft sector. For the above reasons, the *Boeing* Commission correctly followed the *de Haviland* decision and concluded that the merger effectively impeded

competition and strengthened Boeing's already dominant position in the large commercial jet aircraft market.

C. *Incongruity in the Commission's Findings and its Disposition*

The Commission, however, thereafter failed to apply the logic of *de Haviland* to the *Boeing* situation. The *de Haviland* Commission, on the strength of a less egregious factual scenario, blocked the merger between ATR and de Haviland. It disregarded foreign and domestic political and economic interests and faithfully interpreted and applied the Regulation. The *Boeing* Commission, however, decided against blocking the merger, but only contingent upon Boeing agreeing to certain concessions, to which Boeing ultimately acquiesced in order to obtain approval. On the strength of the facts alone, a faithful application of the *de Haviland* decision and the Merger Regulation unquestionably required the Commission to block the proposed *Boeing* merger. Clearly, the decision to propose concessions as an alternative to blocking the merger directly contradicts the dictates of the *de Haviland* decision, the Regulation and, as a consequence, economic integration, the chief goal of the Common Market.

The Commission imposed concessions *in lieu* of blocking the merger. These concessions embodied the Commission's biggest fears in the aftermath of the merger.[244] Some of the concessions appear illusory.

1. *Exclusive Dealings*

Boeing, for example, agreed to refrain from entering into exclusive agreements with other manufacturers until August 1, 2007, a period of ten years, unless another manufacturer offers to enter into such an agreement.[245] In addition, Boeing agreed to refrain from enforcing the exclusivity rights established under agreements with American, Delta and Continental.[246] Such a covenant purportedly enables Airbus to better compete, while at the same time decreases Boeing's monopoly potential in the commercial aircraft industry. This conclusion discounts the existing "lock-in" effect resulting from Boeings' 64 percent pre-merger market share and overall customer loyalty. Players in the aerospace industry, content with the manufacturer's product, frequently enter into tacit exclusive agreements without an express written agreement. Therefore, it seems unlikely that this concession would help to establish a new status quo on the commercial jet aircraft market. If anything, Boeing agreed not

244. For a complete discussion of the concessions made by Boeing, see *Boeing, supra* note 1, at 36-39.

245. *See Boeing, supra* note 1, at ¶ 116.

246. *See id.*

to enter into formal written agreements with other industry players for ten years. Informal understandings still abound and could ultimately enable Boeing to further its dominance.

2. *Suppliers and Manufacturer Discrimination*

Boeing agreed not to exert, or attempt to exert, undue or improper influence on suppliers and discriminate against other manufacturers of commercial jet aircraft.[247] In this respect, Boeing must refrain from leveraging supply relationships by requiring that suppliers should, 1) refuse to take up or seek out supply relationships with other manufacturers of large commercial aircraft; 2) refuse to increase their supply relationships with other manufacturers of large commercial jet aircraft; and 3) refuse to enter into subcontracts with other manufacturers on research or development for large commercial jet aircraft.[248] With this concession, Boeing appears to have substantially limited its bargaining power *vis-à-vis* other suppliers and manufacturers. The Merger Regulation already prohibits predatory pricing, an anti-competitive technique Boeing arguably employed to secure the SAS order for commercial jet aircraft. The SAS situation illustrates Boeing's willingness to engage in anti-competitive activity. Yet, according to the concession, Boeing may engage in some of these activities with, "reasonable business justification." The Commission, by allowing the continuance of these practices upon a showing of a "reasonable business justification," may afford Boeing legal justification for engaging in anti-competitive activities.

Both the concessions on exclusive dealings and supplier and manufacturer discrimination appear illusory. Only time will reveal the hollowness of these concessions. Boeing, if neither adversely affected nor constrained by these concessions, may still dominate the aerospace market.

D. *Final Thoughts*

Perhaps in order to avoid a trade war with the United States, or the imposition of unilateral sanctions against the European Union, the Commission decided to extract numerous concessions from Boeing as a face-saving gesture, as well as to avoid an unpleasant economic and political battle. These concessions, in the Commission's view, legitimize the decision and, at the same time, supposedly protect Airbus' viability as a competitor in the commercial aircraft industry. Nevertheless, these concessions represent nothing more than a pyrrhic victory for Van Miert and the European Commission. Customers like Delta, American, and Conti-

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247. *See Boeing*, *supra*, note 1 at ¶ 19.
248. *See id.*

nental still may purchase solely from Boeing, notwithstanding Boeing's concessions on exclusivity. Furthermore, Boeing's past conduct indicated a tendency to engage in predatory pricing even before the proposed merger. The concessions do not constrain Boeing's ability to engage in predatory pricing and, therefore, appear unlikely to deter a course of conduct practiced by Boeing on the Common Market and on other markets prior to the merger.

In short, the *Boeing* decision clearly compromises the merger law of the European Union, probably for the greater good of furthering diplomatic and trade relations with the United States. Nevertheless, the Commission necessarily failed to fully and completely apply the Regulation to inhibit the strong market dominance exhibited by Boeing, both before and after the merger. Such a compromise results in the willingness of other major non-European companies to test the Commission's application of the Regulation to this extreme factual scenario. Such companies are now cognizant of the fact that the desire to maintain favorable trade relations with the United States sufficiently deters the Commission from blocking one American business' attempt to merge with another American corporation.

It is doubtful whether the Commission, in the future, will be able to adhere to the benchmark *de Haviland* decision and block a merger featuring a company consistently engaging in anti-competitive and opprobrious behavior. The Commission, by disregarding its own case law and competition jurisprudence, established unprecedented minimum standards in the dominant position analysis. Examples include the new 64 percent premerger market share and the 70 percent prospective market share. A market share of lesser magnitude fails to meet the threshold presumption of dominance. As a consequence, the Commission, unable to block a merger exhibiting a far less egregious factual scenario, could face both corporate and country antagonism due to an unpredictable decision making process. Assuming, *arguendo*, that the Commission begins to reevaluate the merger threshold standards on an *ad hoc* or case-by-case, basis, undertakings doing business in the European Union, unable to conform their conduct to a consistent and identifiable standard, will become frustrated with future merger decisions. If the Commission desires to return to a unitary standard and greater predictability in a subsequent merger decision, it should remove the incongruity between the analysis and disposition in *Boeing* as a misleading shibboleth.

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APPENDIX I

Relevant Product Market: Aircraft in Current Production in Turbo-prop Market

20 to 39 seats		40 to 59 seats		60 seat and over	
BAe** J41	(27 seats)	Casa CN235	(44 seats)	BAe** ATP	(64 seats)
Embraer 120	(30 seats)	ATR 42	(48 seats)	ATR 72	(66 seats)
Dornier Do 328	(30 seats)	de Hav* Dash 8-300	(50 seats)		
Saab 340	(33 seats)	Fokker 50	(50 seats)		
de Hav* Dash 8-100	(36 seats)	Saab 2000	(50 seats)		

APPENDIX II

MARKET SHARE

20 to 39 seats				40 to 59 seats				60 seat and over			
World		EEC		World		EEC		World		EEC	
Saab	34	Embraer	41	ATR	45	ATR	51	ATR	76	ATR	74
Embraer	31	Saab	31	de Hav*	19	de Hav*	21	BAe**	24	BAe**	26
de Hav*	25	de Hav*	21	Fokker	22	Fokker	22				
Dornier	8	BAe**	6	Saab	7	Casa	6				
BAe**	2	Dornier	1	Casa	7						

*de Hav = de Haviland
**BAe = British Aerospace

APPENDIX III

Large Commercial Jet Aircraft—World Backlog Market Shares Evolution By Value—1987-1996

Market Share—Total (percentages rounded)

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	Avg.
Total Boeing	62	61	57	59	62	62	62	59	64	64	64
Total MDC	14	19	16	16	12	10	9	8	8	6	12
Boeing and MDC	74	80	73	75	74	72	71	67	71	70	73
Total Airbus	24	20	27	25	26	28	29	13	29	30	27

Market Share—Narrow Body

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	Avg.
Total Boeing	50	55	61	60	64	64	62	56	54	55	58
Total MDC	19	20	16	15	11	11	11	11	14	11	14
Boeing and MDC	69	75	77	75	75	75	73	67	68	66	72
Total Airbus	31	25	23	25	25	25	27	33	32	34	28

Market Share—Wide Body

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	Avg.
Total Boeing	74	68	53	59	60	60	62	61	70	71	64
Total MDC	8	19	16	16	13	10	7	6	3	2	10
Boeing and MDC	83	87	69	75	73	70	69	67	73	73	74
Total Airbus	17	13	31	25	27	30	31	33	27	27	26

APPENDIX IV

Commercial Aircraft Segments
Narrow Body Wide Body

Narrow Body			Wide Body		
Approximate Seating Capacity	**100-120**	**120-200**	**200-320**	**320-400**	**400+**
Boeing	737-500 737-600	737-300 737-400 737-700 737-800 757-200 757-300	767-200 767-300	777-200 777-300	747-400
MDC	MD-95	MD-80 MD-90		MD-11	
Airbus		A319 A320 A321	A310 A300	A330-200 A340-200 A330-200 A340-300	

APPENDIX V

DEPARTMENT OF DEFENSE BUDGET (millions US $)

	1995	**1996**	
F-22	2,281	2,165	2/3 = Lockheed 1/3 = Boeing
F/A-18	1,249	824	MDC
V-22 Osprey	453	737	Boeing
RAH-66 Comanche	475	292	Boeing
B-2	366	589	Boeing
JSF	182	193	Boeing & Lockheed in competition
C-17 Globemaster III	184	71	MDC