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EEC Commision

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Regulating Multinational Corporate Concentration—The European Economic Community

JOHN TEMPLE LANG

It is the purpose of this article to discuss the policies and goals of the efforts of the European Communities to regulate multinational corporate concentration. For reasons that will become clear in the course of the article, it is necessary to start by outlining the means available to the European Communities, both presently and potentially, to promote these policies. It is not possible to see what those policies might be or how they are likely to develop without understanding the practical implications of the various legal rules on which the Community might rely in the future.

This article does not deal directly with merger regulation under the European Coal and Steel Community Treaty (ECSC Treaty), or with procedural questions, although both of these are of some interest in connection with the main topic.

SOME BASIC CONCEPTS: DOMINANT MARKET POWER AND OLIGOPOLIES

The basic provisions for antitrust enforcement in the European Community (Community) are found in Articles 85 and 86 of the EEC Treaty. Article 85 prohibits restrictive agreements and enumerates several forms of restriction that fall within the ban. Article 86 prohibits the abuse of a dominant market position by one or more firms. Both articles require some effect on trade between the members of the European Community.

The EEC Treaty makes it clear that dominant positions are not themselves unlawful. It is only the abuse of a dominant position, including all kinds of anticompetitive and exclusionary behavior that is prohibited. Therefore, even a monopoly or other clearly dominant corporation does not have to prove that it acquired its position legitimately by "superior skill, foresight and industry." No action can be taken to end the dominance of a corporation as such, no matter how undesirable its market power may appear to be, nor how

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often or how seriously it may have abused it. This explains and justifies a concept of dominance that is broader, and is applicable to corporations with smaller market shares, than the concept of monopoly under U.S. antitrust law.

THE CONTINENTAL CAN JUDGMENT AND ITS LIMITATIONS

In 1973 the Court of Justice rendered its judgment in *Europemballage Corporation and Continental Can Co. Inc. v. Commission.* The Court of Justice held that it is a violation of Article 86 of the EEC Treaty for a corporation already in a dominant position to acquire a competitor, if the acquisition strengthens its position so that the resulting market power "substantially fetters competition." The Court of Justice rejected the argument that a violation of Article 86 could be committed only if existing dominant power was used to carry out the acquisition, and held that structural changes likely to restrict competition indirectly were prohibited by Article 86 as well as behavior likely to restrict it directly. Thus, acquisition of a competitor by a dominant firm is unlawful even if the same acquisition would be lawful in the absence of a dominant position. On the ultimate question of liability, the Court of Justice annulled the EEC Commission's (Commission) decision, holding that the Commission had failed to prove the relevant market; but the principles stated by the Court of Justice still stand. Although the Court of Justice's interpretation of Article 86 had been suggested by the Commission as early as 1966, in 1973 the judgment created some controversy; however, it is not now seriously questioned that it correctly states the law. The case law since *Continental Can* suggests that the Court of Justice might now accept the notion that any acquisition which substantially increases the market power of an already dominant corporation (or that substantially reduces the amount of competition remaining) would violate Article 86.

As a rule of law regulating, or enabling the EEC Commission to regulate, corporate concentration, the rule in *Continental Can* had two serious limitations. First, the prohibition applies only where at least one of the corporations involved in the concentration or merger was already dominant within the meaning of Article 86. Second, the Commission could take action only after the concentration or acquisition had been carried out and therefore could not act to prevent the concentration beforehand. The limitations call for some comments.

The first limitation is less important now than it appeared to be, since the Court of Justice in *United Brands* held that a corporation with a market share of only 40-45 percent, but facing only much smaller competitors in the relevant market and having considerable competitive advantages, can possess a dominant position. Hence, many more corporations are dominant, and so subject to Article 86, than was believed in 1973.

The second limitation is also less important than it might appear, since a
prudent and well-advised corporation is likely to seek informal approval from
the Commission before carrying out a merger that it might later be compelled
to unwind. Even if it does not seek such approval, merger documents almost
always expressly condition the merger on the receipt of all necessary con-
sents including the consents of national antitrust and exchange control au-
thorities as well as that of the EEC Commission. It is true that there are
limits on the legal value of an informal approval from the Commission, although a formal negative clearance, which would have more value, could be obtained in due course. Unwinding a merger which has been carried out is an extremely difficult, expensive, and unsatisfactory operation even if it had been previously contemplated that it may be necessary.

Moreover, it is not completely clear that the Continental Can rule would
apply to the acquisition of a dominant corporation by a smaller competitor, although this would have substantially the same effect on competition as the more familiar scenario of a large company acquiring the smaller.

Another problem relates to the substantive content of the rules as to
"abuse" under Article 86. Although the word implies some ethical content, the Continental Can judgment is expressed objectively. The question therefore arises: Could an acquisition that undoubtedly had anticompetitive effects but that was thought desirable for other reasons be permitted under Article 86? The question (to which there is no clear answer under existing law) is probably one that would occur more readily to a European antitrust lawyer than to a U.S. antitrust lawyer. It is perhaps a question of more theoretical than practical importance under Article 86.

It might, however, be significant since Article 86 prohibits abuse of a
dominant position "in a substantial part" of the Common Market. Such a
dominant position might exist now in the EEC, or might exist in the future
in one of the new member states, because economic integration had not
brought about a free flow of goods from elsewhere in the EEC. (Indeed, the
abuse might lie precisely in preventing such a flow from taking place.) An
acquisition by a firm which was regionally dominant might have serious
anticompetitive effects in the region in question, and so might be prohibited
under Article 86, even though it was (or would become) reasonable in the
context of the Community as a whole.

A question related to the use of Article 86 in merger cases in practice is
whether the Commission has an implied power under the EEC Treaty to adopt
an interim decision before a final decision prohibiting a dominant firm from
commencing or continuing a course of action which the Commission con-
siders, pending a final decision on the matter, is contrary to Article 86. The
Court of Justice held in National Carbonising that the Commission had such
an implied power under Article 66 of the European Coal and Steel Community
Treaty, but the corresponding question under the EEC Treaty did not come
before the Court of Justice until 1980, when the court held that this power also
exists in both Article 85 and Article 86 cases under the EEC Treaty.

There is no doubt that the Continental Can rule would enable the Com-
mission to prohibit many undesirable mergers, without any need for new legislation. Equally, however, it is clear that some mergers which would be undesirable could not be attacked under the rule.

PROPOSED REGULATION FOR THE CONTROL OF MERGERS: CONTENTS AND COMMENTS

Primarily because of the two limitations on the Continental Can rule, in 1973 the Commission submitted to the Council of the European Communities (Council) a proposal for a regulation giving the Commission power to control mergers. The draft requires prior approval by the Commission for certain mergers, and applies to mergers even if neither of the corporations involved is dominant.

The discussions on the draft are still continuing in the Council, six years later, despite regular urging from the Commission and from the European Parliament. It is clear that the draft will not be adopted in its original terms, and it is not yet clear what the final terms of the regulation are likely to be. The draft regulation has received extensive commentary, but has not been formally altered since it was published.

The draft regulation declares:

Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market in so far as the concentration may affect trade between Member States.

The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services.

In other words, the draft, in broad terms, made it unlawful to create a dominant position by means of a concentration. The language is the same as that used in Article 66 of the European Coal and Steel Community (which, however, contains no overriding exemption for good mergers).

The draft regulation went on to say:

3. Paragraph 1 may, however, be declared inapplicable to concentrations which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community.
It thereby allows the Commission to permit an anticompetitive merger for some unspecified overriding purpose, in language much vaguer than Article 85(3).\(^9\) There is a similar provision in German law.

The draft permits smaller concentrations falling below a specified threshold. A merger would be exempt under the draft regulation if:

1. The aggregate turnover of the undertakings participating in the concentration is less than 200 million units of account [U.S. $276 million at end August 1979]; and
2. The goods or services concerned by the concentration do not account in any Member State for more than 25% of the turnover in identical goods or services which, by reason of their characteristics, their price and the use for which they are intended, may be regarded as similar by the consumer.\(^20\)

As can readily be imagined, the level at which this threshold should be drawn has been one of the most controversial aspects of the draft regulation.

The draft also provided an exemption from its prior notification requirements: concentrations where the aggregate turnover of the enterprises concerned is between 200 and 1,000 million units of account (U.S. $276 million and U.S. $1,381 million at the end of August 1979), and also cases where the firm being acquired was small (turnover less than 30 million units of account [U.S. $41.43 million]). Turnover in all cases means group turnover, and includes turnover outside the EEC.

The draft regulation defines concentration in terms of a wide definition of control, not limited to shareholding or ownership.\(^21\)

1. The concentrations referred to in Article 1 are those whereby a person or an undertaking or a group of persons or undertakings, acquires control of one or several undertakings.
2. Control is constituted by rights or contracts which, either separately or jointly, and having regard to the considerations of fact or law involved, make it possible to determine how an undertaking shall operate, and particularly by:
   1. Ownership or the right to use all or part of the assets of an undertaking;
   2. Rights or contracts which confer power to influence the composition, voting or decisions of the organs of an undertaking;
   3. Rights or contracts which make it possible to manage the business of an undertaking;
   4. Contracts made with an undertaking concerning the computation or appropriation of its profits;
   5. Contracts made with an undertaking concerning the whole or an important part of supplies or outlets, where the duration of these
contracts or the quantities to which they relate exceed what is usual in commercial contracts dealing with those matters.

3. Control is acquired by persons, undertakings or groups of persons or undertakings who:

   (1) Are holders of the rights or entitled to rights under the contracts concerned;

   (2) While not being holders of such rights or entitled to rights under such contracts, have power to exercise the rights deriving therefrom;

   (3) In a fiduciary capacity own assets of an undertaking or shares in an undertaking, and have power to exercise the rights attaching thereto.

4. Control of an undertaking is not constituted where, upon formation of an undertaking or increase of its capital, banks or financial institutions acquire shares in that undertaking with a view to selling them on the market, provided that they do not exercise voting rights in respect of those shares.22

Under the draft regulation, the Commission has three months from receipt of notification to commence proceedings. If it does not act within that time, the concentration (even if it is one for which prior approval is needed) may go into effect, but the Commission may make an interim decision requiring suspension of the concentration.23 It must then reach a final decision within nine months. Regulations 17/6224 and 1017/6825 would not apply to concentrations covered by the regulation and Articles 85 and 86 remain applicable to mergers not covered by the draft regulation. Moreover, Article 85 and Article 86 liability would be preempted by the regulation in these cases covered by the regulation. A few comments on this proposed legislation are worthwhile.

First, market share requirements are unavoidable, but not easy to apply in practice. It is not clear whether the market concept in the draft regulation above would be interpreted by the Court of Justice in exactly the same way as it has interpreted the concept of the relevant market, as for example, in United Brands and Hoffmann-LaRoche.26

Second, merger control is regarded as filling what seems to be a gap in the Community's antitrust powers, so it is essential that the decision-making body under the regulation should be the same as for other antitrust questions, namely, the Commission. Under the merger regulation, the Commission would have exclusive power in merger cases. In cases under Articles 85–86 its power is not, in theory, exclusive (although in practice national antitrust authorities never enforce Community law).

Third, the basic principle (preventing mergers creating dominant positions) is a much narrower one than the principle of substantially lessening competition found in Section 7 of the Clayton Act.
Fourth, the market share threshold is based on the market in any one member state. This means that smaller mergers come under closer scrutiny in small member states than in large ones since the markets are smaller. Moreover, the regulation does not expressly contemplate a merger whereby the merged firms join a group of oligopolists who together have the power to hinder competition, although Article 86 expressly applies to a dominant position held by more than one firm.

Finally, the draft regulation would apply to some joint ventures, although joint ventures are not mentioned specifically. The Commission would therefore have to ensure that its policy on creation of dominance under the regulation was in line, mutatis mutandis, with its policy on otherwise similar joint ventures not falling under the regulation but substantially restricting competition and falling under Article 85(1).

The Commission has stated five main problems related to the draft regulation: (1) the legal basis for the proposed regulation, (2) the principle of premerger control, (3) the scope of the regulation, (4) the possibility of derogations from the concept of incompatibility with the Common Market, and (5) notification of planned mergers and decision-making powers.

First, the legal basis of the proposed regulation is found in Articles 87 and 235 of the EEC Treaty. (Article 235 gives power to adopt appropriate measure to take any action necessary to attain any Community objective, where no other means are provided in the Treaty.) The Legal Affairs Committee of the European Parliament has stated that it considers this sufficient. Second, premerger control avoids the difficulties of undoing a completed merger, and even if it was not obligatory, enterprises would normally seek informal opinions before putting the merger into operation. Premerger control has worked under the ECSC Treaty and in Germany. Third, the threshold above which mergers are prima facie unlawful is of course a key issue, and is one of the most controversial clauses in the draft regulation. The higher the threshold, the fewer the number of cases that will warrant examination and the easier it would be for the Commission, with its limited manpower, to handle them.

ARTICLE 85 APPLICATION TO CONCENTRATION

In 1966 the Commission published its Memorandum on Concentrations. It examines whether Article 85 could be used to control concentrations, and sets out the views of certain professors who had been asked by the Commission for their analysis as well as the Commission’s comments on these views and related issues.

A majority of the professors believed that Article 85 applied to concentrations when three conditions were fulfilled: (1) that competition is appreciably restricted (sensiblement restreinte), (2) that the concentration results from an agreement (and not, for example, from the acquisition of shares on a stock exchange without the agreement of the corporation being acquired), and (3)
that "legally distinct enterprises remain in existence after the concentration" is carried out. Whether, according to this interpretation, Article 85 would offer effective control over concentrations depends on the interpretation of the third condition. Whatever its exact meaning, it appears to be a condition which would not be difficult for well-advised corporations to avoid (although there might be tax and other disadvantages of doing so) through "fusions" of the legal entities of the participating corporations or by acquisition of the business of a corporation rather than the shares in the corporation itself (with, if necessary, the liquidation of the selling corporation).

A minority of the professors considered that Article 85 did not apply to concentrations because concentrations do not relate to the behavior of enterprises but rather modify their internal structure which, it was thought, does not necessarily limit competition.

The Commission came to the same conclusions as the minority, but for rather different (and more convincing) reasons. The Commission noted that national antitrust legislation usually treats mergers and restrictive agreements separately, regarding the latter as prima facie objectionable and the former as prima facie or generally acceptable. The Commission thought that the uniform application of Article 85 to both would prohibit too many mergers or too few restrictive agreements.

Also Article 85(3) was thought inappropriate to mergers since their effects on competition are not easy to foresee. Moreover, it would be difficult to approve a merger under Article 85(3), since an exemption can be granted only if the legally suspect activity is indispensable to obtain the benefits. In addition, Article 85(3) implies temporary exemptions given only as long as the conditions required for them are fulfilled; but mergers would need to be authorized permanently.

And automatic nullity, provided for by Article 85(2), would sometimes be inappropriate for unlawful mergers, since nullification would have consequential effects on related transactions and on stock ownership and so would go further than merely reestablishing the previously existing position. The appropriate way of dealing with an unlawful merger is divestiture.

To sum up, the Commission felt that, in view of the structural consequences of mergers, they should be subject to legal rules different from those applying to agreements. These arguments do not now seem as strong as they did in 1966, and there are contrary arguments to be drawn from court decisions since then. The contrast between official attitudes at the national level toward restrictive agreements and mergers is certainly not now as strong as it once was. To apply Article 85 to both restrictive agreements and mergers does not necessarily mean to apply it uniformly. Granted, it is not always easy to judge the effect of restrictive agreements on competition, but judging the effects of mergers does not seem to be necessarily or inherently more difficult. Indeed in some circumstances it might be easier. The argument that mergers could only be approved under Article 85(3) if they were "indispensable" to achieve the benefits expected of them is of course correct, but it does
not by any means follow that this would be an unsatisfactory result. (After all, mergers are always thought to bring some benefits, and the Court of Justice has recognized preservation of employment as a legitimate matter for the Commission to take into account under Article 85(3).)\textsuperscript{35}

Nor does it follow that Article 85 should be interpreted as not applying to mergers at all. Exemptions under Article 85(3) are indeed given for specified periods, but this is mandated by Regulation 17/62, not Article 85(3) itself. As regards the "nullity" fear, the better view is that Article 85(2) applies to agreements to set up joint ventures and that ownership of a joint venture is never void.\textsuperscript{36} If this is true for joint ventures, the same would also be true for mergers.

The argument that mergers involve changes of ownership\textsuperscript{37} to which Article 85(2) is inappropriate is certainly not applicable to many of the kinds of mergers covered by the definition of control in the draft merger regulation. Many of these would not involve any change of ownership but would involve contracts to which Article 85(2) could reasonably be applied.

More important, the Court of Justice has repeatedly said that Article 3(f) must be used to interpret Articles 85 and 86.\textsuperscript{38} Article 3(f) states that it is one of the Community's tasks to institute "a system ensuring that competition in the common market is not distorted." In \textit{Continental Can} the Court stressed that the antitrust Articles of the Treaty must be interpreted so as to avoid a lacuna in the law (as there clearly would be if mergers were permitted freely), and that the distinction between structural changes and behavior is not decisive if both restrict competition.\textsuperscript{39}

These arguments all suggest that Article 85 might indeed apply to mergers between firms neither of which was occupying a dominant position. It would also obviously be irrational if a dominant firm having a 60 percent market share was unable to acquire a competitor having a further 30 percent (which is clearly the law under \textit{Continental Can}), but if when all the circumstances other than market shares were similar, two firms each having a 45 percent market share were entirely free to merge. It could of course be argued that such a merger was an abuse by the two firms of a jointly held dominant position, but seems an unsatisfactory approach to the problem since it could apply only when all the evidence needed to prove joint dominance (whatever that evidence may be, exactly as to which, see below) was available. This is an anomaly which has been apparent only since \textit{Continental Can}.

Some of the reasons given by the Commission seem in retrospect to be less important than practical considerations which could have been given in 1966. There are two practical reasons for considering Article 85 as being inapplicable to mergers. First, it was widely believed that most corporations in most sectors of industry in the European Community were too small to be efficient or competitive on an international level, and that mergers would be desirable and should not be inhibited. Indeed the Commission has ensured the adoption of various measures intended to facilitate mergers of
small firms. Second, if Article 85 applies to mergers, it would apply to so many mergers that the work of the competition directorate general would be greatly increased. However, the parties to mergers, unlike the parties to most restrictive agreements, wish to know as soon as possible whether an antitrust authority will or will not approve of what they are doing. A given number of merger cases will therefore cause far more pressure from the participants for quick decisions than the same number of cases involving restrictive agreements. These are both respectable arguments, and are legitimate policy considerations for a small and, in 1966, relatively inexperienced antitrust authority.

In retrospect, there was another policy reason for not seeking to apply Article 85 to mergers, whether or not it was in the minds of those responsible at the time. Europe then contained, and still does, many serious and unjustifiable restrictive agreements. It would certainly have been bad enforcement policy to divert the attention of the Commission from its first task of dealing with clearly unlawful agreements and involving it in the much more complex, legally and politically controversial, and time-consuming task of dealing with mergers. Many of the most basic principles of Community law were not yet clearly established in 1966; it was obviously the best policy for the Commission to establish them, and to deal with the most obviously and seriously unlawful arrangements, before launching itself into more difficult and sophisticated problems. If this consideration was in the minds of the Commission in 1966, it was a legitimate and sound reason for the articulated policy on mergers. But, like the other considerations set out above, the passage of time may have seriously eroded its validity.

Theoretically, the question whether Article 85 prohibits mergers could be brought before the Court of Justice at any time by a private litigant, whether a corporation trying to prevent itself being taken over or a competitor fearing the creation of an overwhelming rival. The Court of Justice would consider the question in the light of Article 3(f), and might again hold, as it did in Continental Can, that the EEC Treaty should not be interpreted as having an important lacuna. If the Court of Justice were to disagree with the position taken by the Commission in 1966, it could adopt either of two interpretations of Article 85: one position would be that Article 85, in the light of Article 3(f), prohibited mergers creating a corporation or group with a dominant position. This would be essentially the position under the draft merger regulation. Alternatively, it could take the position that Article 85 applied to all mergers on the same conditions as to restrictive agreements; that is, they are prohibited if they appreciably restrict competition (and would have to be justified under Article 85(3). This would correspond more closely to the principle in Section 7 of the Clayton Act. With either approach it would be necessary to prove an effect on trade between member states. Neither interpretation would require prior authorization for mergers, and neither would imply that Article 85 would apply to mergers not resulting from agreements between the merging corporations.
Would the Court of Justice interpret Article 85 to apply to mergers? If Article 3(f) prohibits strengthening of a dominant position by acquisition of a competitor, as the Court of Justice held in *Continental Can*, then it may also prohibit creation of a dominant position by merging of two nondominant competitors. If Article 3(f) prohibits the elimination of competition by merger involving a dominant company, it may prohibit the elimination of competition by mergers involving nondominant companies. Indeed the Court of Justice in *Continental Can* said,

> [O]ne cannot assume that the Treaty which prohibits in Article 85 cer-
> tain decisions of ordinary associations of undertakings restricting com-
> petition without eliminating it, permits in Article 86 that undertakings after merging into organic unity, should reach such a dominant posi-
> tion that any serious chance of competition is practically rendered impossible... The endeavour of the authors of the Treaty to maintain in the market real or potential competition even in cases in which re-
> straints on competition are permitted, was explicitly laid down in Arti-
> cle 85(3)(b)... Articles 85 and 86 cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim... (Article 86) is not only aimed at practices which may damage consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure, such as is mentioned in Article 3(f) [emphasis added].

Certainly there are strong arguments for saying that, since *Continental Can*, Article 85 applies to mergers, or at least to mergers which create a dominant firm.

It hardly needs to be stressed that interpreting Article 85 as applying to mergers would eliminate certain anomalies and irrational results. If Article 85 does not prohibit mergers, then close cooperation between two firms with large market shares would be prohibited if it substantially eliminated competition between them, yet a complete merger, which would end all competition between them, would be lawful.

**JOINT VENTURES**

The view that Article 85 applied to joint ventures with restrictive effects on competition, and to any other arrangements under which economically (and not merely legally) separate enterprises continued to exist after a transaction, was expressed clearly by the Commission in the Concentration Memorandum. However, the principles upon which Article 85 should be applied to joint ventures have been confused by an argument prompted by, though not found in, the Concentration Memorandum. The argument centered around the question of where the line should be drawn between concentrations and
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joint ventures. It was based implicitly on the assumption that concentrations were exempt from Article 85; therefore, if it could be shown that a joint venture should be regarded as a concentration, it would not be subject to Article 85 even if it had the effect of restricting competition. Needless to say, this assumption was difficult to justify since it implied that Article 85 would not be applied in situations where it appeared that it should apply fully. The assumption, however, gained respectability from the undoubted fact that in German and U.S. antitrust laws joint ventures are dealt with primarily under the provisions under merger regulation, and not restrictive agreements. It never became clear why this would necessarily be the appropriate approach in a legal system with no express merger control legislation, such as the EEC. The assumption also gained respectability from the habit of describing some joint ventures as partial concentrations, thereby adding a third imprecise basic concept to a field already equipped with two (joint venture and concentration).

Under the view that Article 85 does not apply to complete mergers, two approaches were possible. Article 85 could be interpreted as applying to all agreements except those leading to complete mergers or concentrations, that is, those after which only one economic entity remains. Alternatively, Article 85 could be interpreted as not applying to any agreements leading to partial mergers or concentrations (however exactly these should be defined) or a fortiori to complete mergers or concentrations. Obviously, if the first alternative correctly stated the law, it would be important to be able to distinguish between complete mergers and joint venture arrangements. If the second alternative was the law, it would be important to be able to distinguish between joint ventures which are partial concentrations and joint ventures which are not.

Faced with joint venture situations of considerable genuine difficulty and with a situation of considerable intellectual confusion, the Commission, conscious that this was ultimately a question to be decided by the Court of Justice, reacted with caution. In its Sixth Report on competition policy, the Commission limited the practical scope of the putative partial concentration theory by saying what, in its opinion, the theory did not mean. In particular, the Commission stated that no joint venture could be regarded as a concentration exempt from Article 85 if the pooling of the areas of business involved weakened competition between the parent companies in other areas, particularly in related areas, where the parent firms remained formally independent of each other. The other requirement, according to the Commission, of these "exceptional cases" is that the parent firms must have irreversibly transferred their business activities in the field in question to the joint venture. This means that a joint venture could never be regarded as a concentration unless both the parent firms previously carried on the activities in question independently. So understood it is indeed relevant only in "exceptional cases."

On the assumption that either the first approach is correct and Article 85
may apply to all joint ventures unless they are really complete mergers, or that cases of “partial concentrations” are rare enough to be ignored in the rest of this article, the next question is how to distinguish between joint ventures and complete mergers. The Commission’s Sixth Report makes this clear: “Cases in which the parent companies transfer all their assets to the joint venture and themselves become no more than holding companies... will usually be considered to constitute a merger,” that is, a complete merger. Although in the past difficulties caused by company and tax laws of member states have given rise to highly complex arrangements such as those in the Dunlop-Pirelli and Agfa-Gevaert mergers, most people would agree that the distinction between joint ventures and complete mergers is a genuine distinction in theory, even if it may occasionally be difficult to apply in practice.

No discussion of this rather complex area of law would be complete without an examination of the rules applying to joint ventures themselves. These rules are important because the joint ventures prohibited by Article 85 are primarily those that occur in already concentrated markets.

Under the Continental Can ruling, Article 86 prohibits the extension of a dominant position through the setting up of a joint venture, or the acquisition of a share in an existing joint venture. No joint venture cases under Articles 85 and 86 have yet come before the Court of Justice. However, the court has laid down several rules which are relevant to joint ventures. Articles 85 and 86 and Article 3(f) are aimed not only at behavior which may cause damage to consumers directly, but also at practices which are detrimental to them through their impact on an effective structure of competition.

The distinction between measures which concern the structure of the undertaking and practices which may influence the market cannot be decisive, for any structural measure may affect market conditions, if it increases the size and economic power of the undertaking. 

Article 85(1) applies to agreements which clearly tend to reduce competition, even if they contain no formal restrictions on the freedom of the enterprises involved. In assessing the economic effects of a given agreement all the surrounding economic circumstances must be taken into account.

The general principle applied by the Commission is that any agreement between two or more enterprises under which a corporation is owned or controlled jointly by them may fall under Article 85 if the agreement has the effect, directly or indirectly, of restricting or reducing competition between the parent enterprises or from third parties.

The effects on competition may result from express contractual clauses or may result naturally from the mere existence and operation of the joint venture and of the relationship of the parent enterprises with it. If such effects are reasonably foreseeable, it is irrelevant that there are no contractual restraints on the freedom of the parties to compete.
Joint ventures may have a variety of different kinds of effects on competition. For example, if the joint venture sells the products of its parents to third parties, it may largely eliminate competition between them. Even if it does not sell all of its parents' products, they will tend to align their prices on the joint venture's prices. If the joint venture sells its products or services to its parent corporations, or does research for them, it may reduce competition between them, especially if its products are end products. Again the parents may tend to align their prices. Even if the joint venture is selling to third parties and is not in competition with either of its parents, the existence of the joint venture may preclude the parents from entering the market independently of one another, as they would otherwise have done in the absence of the joint venture.

In an oligopolistic market a joint venture between two oligopolists may alter the structure of the market, both reducing competition between the parents and making it less likely that other competitors will enter the market. If the joint venture has taken over all the activities of one or both parents in a given sector, this might indicate inability to continue independent operations in the market, or a wish to end competition with a major competitor. Much depends on circumstances. The facts of the only case involving a situation of this kind were unusual, involving vertical relationship between two corporations neither of which were in a position to remain in the market without close links with some other firms already in the market. Alternatively, a joint venture may be a forum for coordinating the parents' policies, but this has never been the sole ground for a finding that the joint venture fell under Article 85(1); rather, it was used as an argument in a case where there was specific evidence that this was the intention of the parents.

Article 85(1) will apply to any of these kinds of effects on competition only if in the circumstances they are significant. Even if Article 85(1) applies, a joint venture can often be justified under Article 85(3). The extent of the effect on competition is often crucial in joint venture cases. Joint ventures where one or both parents, or the joint venture itself, have a large market share, or where the joint venture has the effect of eliminating most of the competition between its parents, are particularly likely to be unjustifiable.

The better view is that joint ventures which are prohibited by Article 85 are not void (though express restrictive clauses in joint venture agreements may be). They are, however, subject to divestiture.

The Commission has so far approved a number of joint ventures under Article 85(3), and has prohibited a joint venture only in one case, in which the agreement offered no advantages and involved parties with large market shares.

In theory and in practice, it is important to ensure as far as possible that an antitrust policy is consistent and uniform across the whole spectrum, from cartels through joint ventures to complete mergers. As the Commission has never claimed power to control complete mergers (except in cases under Article 86), it has limited itself to ensuring that its policies on joint ventures
and cartels are consistent with one another, and that firms cannot do by joint venture what they could not do without a joint venture.

**ARTICLE 86 APPLICATION TO DOMINANT POSITION, OLIGOPOLY, AND MERGERS**

Article 86 expressly prohibits any abuse by more than one undertaking of a dominant position. This makes it clear that there may be a violation of the EEC Treaty by several dominant enterprises in circumstances to which Article 85 does not apply, that is, where there is no collusive or concerted behavior. Oligopoly is not, of course, itself unlawful under EEC law. Thus far, however, there are no decisions involving a dominant position held by more than one firm.

In any market in which a small number of large firms held most or all of the market, the firms in question will be acutely aware of one another's behavior. The market strategy of each must take account of the probable reactions of the others, and they will tend to act similarly, especially if the other oligopolists' behavior can be accurately foreseen.

Several authors have suggested that Article 86 applies to an abuse by a small number of enterprises in an oligopolistic market, even if no one of them has overall dominance and even without any concerned practice between them, at least when all behave in a parallel manner.

For example, if all the members of an oligopoly charge excessive prices for their products, this can occur over a significant period of time only if there is no significant price competition between them (and no significant price competition from outside the oligopoly). Excessive prices and absence of price competition might coexist with competition between the members of the oligopoly in other respects. Article 86 seems to be applicable both when there is no competition between oligopolists and when the only competition between them, for whatever reason, does not have the effect of eliminating the allegedly illegal collective behavior. In other words, if all the oligopolists practice the behavior that is said to be abusive, the fact that there may be competition between the oligopolists in other respects is irrelevant.

Most abuses of dominant power occur because normal competition does not occur or is not sufficient to prevent them. If market power is being used in the same way by a number of enterprises, the fact that the users of it are not a monolithic bloc in other respects does not make the market power any less real, or any less liable to abuse.

But, if it is not necessary for several enterprises to occupy a dominant position in order to eliminate competition between them at all, what are the tests of a collective dominant position? Basically, the tests of market power are the same whether it is held by one or more enterprises. The power to behave independently of outsiders, to exclude competition, to determine prices or to control a significant proportion of total production or distribution,
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without being subject to the influence of competitors, purchasers, or suppliers, may be exercised collectively. If dominant power is power which is great enough to be abused, then collective dominant power is power which may be abused collectively.

As will be recalled, Continental Can held that Article 86 prohibits an anticompetitive merger by a firm occupying, alone, a dominant position. Article 86 clearly prohibits abuse by more than one firm occupying a dominant position. How far can Article 86 be used to control mergers not involving the only dominant firm in the market? Several cases need to be considered:

1. If two firms are shown to hold a dominant position (whatever the precise requirements for such a finding), it seems clear that if they merge with one another, the merger would be under Continental Can a violation of Article 86. Similarly, if they set up a joint venture which has, or is likely to have, substantial anticompetitive effects on their behavior, this is unlawful under Article 86 even if Article 85 does not apply;
2. If three firms are shown to hold a dominant position, and two of them merge with one another, a more difficult question arises.
3. Moreover, two firms may jointly hold a dominant position, and one of them may merge with a third, nondominant competitor in the same market, thereby increasing its own market power and the aggregate market power of the two dominant firms. Here again the question arises whether this might be unlawful.

Article 86 speaks of "abuse by one or more undertakings of a dominant position" not of "abuse by an undertaking occupying, alone or with other undertakings, a dominant position." Should it therefore be interpreted as prohibiting only conduct committed by all the undertakings involved? If the answer is yes, the acquisition of a competitor by one of several dominant firms is lawful, and probably the merger of two dominant firms, where a third exists, is also lawful.

On the other hand, Article 86 could also be interpreted as prohibiting abuses committed by one or more, but not necessarily all, dominant firms (provided that competition between the dominant firms does not prevent the putatively unlawful behavior from continuing, or being successful, in which case the firms are not jointly dominant in the relevant respect, according to the theory suggested here).

To illustrate this proposition, suppose a market dominated by two firms each having a 45 percent market share, the remaining 10 percent being held by a few small corporations unable to offer serious competition. Suppose that firm A, one of the two dominant firms, begins to offer fidelity rebates and require its customers and distributors to deal exclusively with it by various means. Is this contrary to Article 86?

It is submitted that it is. This behavior would strengthen A's market position vis-à-vis its only serious rival, and its minor competitors. It would
make the market shares of the two big firms more static. Competition would be further reduced. Also, if A's behavior is lawful, the absurd result is that it would become unlawful as soon as its chief rival began to practice the same behavior. This result would be not only irrational and contrary to principle, but intolerable, since it would deny to the rival the freedom to compete with its major competitor on equal terms, and would favor the first oligopolist in adopting new anticompetitive practices. One could envision a type of race by each oligopolist to initiate behavior that, but for the fact that it was the only company so behaving, would be unlawful and contrary to competition in the Common Market. The EEC Commission and the Court of Justice, it is suggested, should be particularly ready to insist on the preservation of that degree of competition which can exist between oligopolists jointly holding a dominant position, and should prevent either of them from strengthening its position by anticompetitive means at the expense of anyone else.

It seems to follow that a merger or acquisition by one of several firms together having a dominant position will, if the effect of the merger on competition is sufficiently significant, constitute a violation of existing Community law, whether or not the other firms involved in the merger also occupy the collective dominant position. The practical significance of this result for the Community power to control concentration in already concentrated industries is considerable.

However, it must not be assumed that a merger of one oligopolist with a smaller competitor necessarily has adverse effects on competition. A smaller number of stronger competitors may cause intensified competition and an acquisition by the smallest oligopolist of a smaller firm (or of a large firm outside the relevant market) may strengthen the former's position and promote competition. Similarly, although a merger creating a jointly dominant firm, for example, creating the second firm in a duopoly, might be unlawful, it might also be desirable if on balance it strengthened rather than reduced such competition as existed in the market. If such an affirmative competition-enhancing defense is proved in fact, it apparently would be valid under Community antitrust law. This is because a merger by a jointly dominant firm that increased competition appears to be lawful under the Continental Can principle.

Similar questions may be raised under the draft merger regulation, which prohibits any concentration whereby the participants "acquire or enhance the power to hinder effective competition." Does this mean the exclusive power to hinder effective competition, or the power, whether alone or with other firms not involved in the concentration, to hinder effective competition? The interpretation of this is slightly easier than that of Article 86, however, and may not depend on it. Since Article 86 makes it clear that more than one enterprise can occupy a dominant position, that is, can have the power to hinder effective competition, it would follow that a concentration which enhances that power would fall under the regulation. The power of all the holders of a collectively dominant position would be enhanced if two of
them merge and the third does not, or if one of two dominant firms acquires a third competitor, but of course only the firms involved in the merger or acquisition would have violated the EEC Treaty.

SUMMARY OF COMMUNITY LAW ON CONCENTRATIONS

In summary, the EEC clearly has power under existing law to prevent mergers and acquisitions involving firms which are already dominant. Under well-established law a considerable number of firms are considered dominant, and are thus subject to all the duties which Article 86 imposes, at least in narrow markets. The EEC also has power to prevent already dominant firms from increasing their market power through anticompetitive practices, and also to prevent oligopolies from behaving in corresponding ways (although in this respect the extent of the law is unclear). In general, however, there is no power to put an end to dominance or oligopoly as such, and until either new legislation or a new interpretation of the EEC Treaty is adopted there is no power to prohibit mergers involving previously nondominant firms even if their effect is to create a clearly dominant firm, or even a monopoly. Under existing law there is no power to approve a merger involving a dominant firm that would have the effect of substantially restricting competition, no matter how desirable the merger might seem on other grounds. Joint ventures can be adequately controlled under existing law. The Community probably already has power to prohibit mergers involving one or more of the members of an oligopoly who together occupy a dominant position.

The Community will have no power to control mergers between corporations which after the merger will not be dominant (either alone or together with other firms) under the proposed merger regulation; such a power could come only from the wider of the two theoretically possible new interpretations of Article 85. This adds up to a position which is not wholly satisfactory, but which provides powers which are by no means insignificant and which so far have been little used.

SPECIAL PROBLEMS OF APPLICATION:
INTERFACE OF NATIONAL AND COMMUNITY LAW

The national authorities of several member states, in particular Belgium, Germany, France, Ireland, and the United Kingdom, have, at least in theory, some powers to control concentrations under existing national laws. Belgium and the Netherlands are considering new legislation on mergers. Also, other national legislation is sometimes used to prevent what are considered to be undesirable concentrations.

National authorities would not seek to prevent mergers of corporations
outside their countries, and Community law applies only when trade between member states is affected, so some mergers would be subject only to one set of legal rules or the other. However, a merger between, for example, a German corporation and a British firm may now be subject to three laws, the German and British national merger control legislation and Community law.

If Community law and applicable national laws both prohibit, or both permit, a given merger, no difficulty is likely to arise. If Community law prohibits a merger allowed by national law, Community law prevails. It is not yet clear what the legal position is if Community law permits a merger but national law does not.

In *Walt Wilhelm v. Bundeskartellamt*, an antitrust case (but not a merger case), the Court of Justice said:

> [I]n principle the national cartel authorities may take proceedings also with regard to situations likely to be the subject of a decision by the Commission. However, if the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the Common Market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules. . . .

> Article 87(2)(e), in conferring on a Community institution the power to determine the relationship between national laws and the Community rules on competition, confirms the supremacy of Community law. . . .

> It would be contrary to the nature of [the EEC ] system to allow member states to introduce or retain measures capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence.

Consequently, and so long as a regulation adopted pursuant to Article 87(2)(e) of the Treaty has not provided otherwise, national authorities may take action against an agreement in accordance with their national law, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.
The Court of Justice is clearly not saying that a national authority may do as it likes, nor apparently is it saying that Community law has wholly occupied the field. Rather, there appears to be a category of cases not clearly defined in which action by national antitrust authorities would be incompatible with Community law. The mere fact that the result might be different under the two systems of law does not mean automatically that national law cannot be applied.

In the area of exemptions from regulation under Article 85(3), there may perhaps be two kinds of cases: (1) those where the Commission has granted an exemption for an agreement of relatively little importance, not because it promotes some very important Community objective but because there is no strong objection to it, and (2) cases where the Commission has granted an exemption for an agreement of great importance for Community policy in the sector in question. If this distinction is valid, it would follow that national law could be applied so as to prohibit an agreement in the first category but not one in the second category. However, the first kind of case may not in fact exist, and if it does not exist the legal position is clear. On the other hand, if indeed the two categories exist, and if the Commission approved a restrictive merger, acting under Article 85, it would have to be determined into which of the two categories the case fell. In practice such cases would normally fall within the second category, if the Commission confined itself to important merger cases.

It seems clear from the wording of the draft merger regulation that if the Commission authorizes a merger under the clause which permits authorization for mergers "indispensable to an objective given priority treatment in the common interest of the Community," it would be contrary to Community law for a national antitrust authority to prohibit the merger.61

How likely is a conflict over merger cases between the Commission and a national antitrust authority? Not all the member states have authorities with power to control mergers. It is possible to imagine a situation in which a national authority might want to allow a merger at any cost to preserve jobs, or might want to prevent a takeover by interests outside the member state in question. But national antitrust policies are moving toward harmonization with Community law on other issues, and national authorities might be glad to have the help of the Commission either to prevent or to promote a controversial merger. Though differences of opinion are perhaps more likely to arise over merger policy than about restrictive agreements, the fact that there have been so few differences of opinion in the application of Articles 85 and 86 is encouraging.

Markert62 has suggested that the situation in relation to mergers could be clarified by providing that all mergers falling under the regulation should be exempt from national merger control laws, provided that the jurisdictional test of an effect on trade between member states was objective and capable of being readily applied, that the Commission's standards were not significantly less strict than those of national authorities, and that the Commission has the
administrative facilities necessary to carry out a prompt and thorough investigation of all difficult cases. Meanwhile, practical solutions could be found through cooperation between the Commission and national authorities.

POLICY IMPLICATIONS FOR THE FUTURE

Although a number of merger cases have been dealt with informally by the Commission and are described in the annual competition policy reports of the Commission, Continental Can remains the only formal decision on mergers that has so far been adopted by the Commission. It is hardly possible therefore to outline a comprehensive EEC policy on mergers. However, it is possible to note a series of points about such a policy which have been suggested from various sides, although none of them has ever been adopted as the policy of the Commission.

Community merger policy will seek to limit itself to dealing with a small number of truly important cases, initially horizontal mergers between competitors, then vertical mergers, and finally conglomerate mergers much later. It is believed that only a small number of very large mergers are likely to be found to be contrary to the Community interest. Moreover, the small staff in the Competition Directorate General of the Commission would not be in a position to handle a large number of merger cases in addition to their existing work. Thus, this approach would therefore be adopted as a pragmatic enforcement policy, whatever the exact terms of the merger regulation when it is finally adopted. Consequently, businessmen need not anticipate Commission involvement in any but the largest and most obviously anticompetitive mergers. The Commission will of course seek more staff to handle merger cases and may attempt to delegate simple restrictive practices cases to national authorities and courts.

The Commission is likely to avoid articulating general policies, opting instead for a case-by-case approach. This implies an approach adjusted to the circumstances of each industry involved. The Committee on Economic and Monetary Affairs said in 1973, "Probably...the Commission is not yet as familiar with the conditions of competition and economic interlinking in the Community as would really be desirable for a European monopoly authority."

Community jurisdiction over mergers will be limited by two requirements. One or more of the corporations or groups of corporations involved must be "established" in the EEC, and the merger must have an effect on trade between member states. A merger affecting only the external trade of the Community would not be subject to Community jurisdiction, because Articles 85 and 86 and the merger regulation only apply when trade between member states is affected. These broad principles would apply even if Community jurisdiction over mergers was based on a new interpretation of Article 85 rather than on the new merger regulation.

It is not clear how far the Commission would seek to exercise jurisdiction-
tion over a merger involving holding companies outside the EEC but with subsidiaries established in the Common Market; in clear cases of attempted evasion it would no doubt do so.

In considering the effects of a merger on competition, the Commission will likely take into account actual or potential competition from outside the Common Market as well as from competitors already established in it.65

Economic studies carried out by the Commission and summarized in the annual reports on Competition Policy show that concentration has increased in European industry. For the reasons already referred to this is in general probably desirable.

The Commission will tend to favor mergers across frontiers within the Community rather than mergers between corporations or groups in the same member state, because the former kind of mergers promote the economic integration of the Community.66 This is a policy consideration with no parallel in United States antitrust law.

A law granting an antitrust authority discretion to allow even seriously anticompetitive mergers for overriding policy reasons is likely to be much more difficult and controversial to administer (and much more difficult to foresee) than a simple ban, notwithstanding the experience of the Commission and other European antitrust authorities in operating such "weighing-up" rules. In performing this discretionary function, the Commission is likely to be guided by the principles of Article 85(3) under which the merger must be indispensable to promote an overriding Community objective, consumers must get a fair share of the benefits to be obtained from it, and the merger must not give the firms concerned the opportunity to eliminate competition. Obviously, the benefits obtained from the merger must outweigh the harm resulting from any restriction of competition.67 The Commission will also refer to the rules laid down in Article 66 of the ECSC Treaty, in particular the prohibition on mergers which evade competition rules by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

Economies of scale are easy to allege and hard to prove. The Commission is unlikely to be much impressed by any argument about greater efficiency due to larger size, or increased concentration, unless it is a very well researched argument. There is evidence that these benefits are often not obtained, or that these benefits are outweighed by the difficulties of running large and complex enterprises. In any case, economies of scale can usually be obtained through internal expansion, and the Commission’s policy of confining itself to large mergers should mean that no merger justified by economies of scale should come up for consideration.68

As a matter of procedure, complaints about mergers can be expected from corporations resisting a take-over bid or from competitors fearing the emergence of more powerful rivals. The Commission will be compelled to decide when it is appropriate to adopt interim (interlocutory) measures. These questions have already arisen in merger cases and others under the
European Coal and Steel Community Treaty and in the Camera Care case, a refusal to supply case under the EEC Treaty.\textsuperscript{59}

The Commission will not be anti-United States or anti-Japan in its policies. Indeed, it is less likely to be so than the national authorities of some of the member states might be, or might have been in the past. Furthermore, the greater the degree of economic integration achieved within the Common Market, the less difficult it will be for the Commission to have a clearly coherent and consistent policy on mergers, not subject to adjustment to suit special regional circumstances.

In assessing the effect of a proposed merger on competition the Commission is likely to focus primarily on market structure: the number of substantial sellers and buyers on the market, the relative sizes of the market shares of the firms, barriers to entry, the extent to which the Common Market forms a unified market, and the degree of rigidity in distribution systems. The Court of Justice has in several cases under Articles 85 and 86 emphasized the importance of these factors, and one would expect them to be still more important in merger cases.\textsuperscript{70}

The effects of a proposed merger must be assessed primarily on structural criteria because a merger is approved on a permanent basis and its long-term effects will not depend, for example, on whether the firms involved have or have not practiced exclusionary behavior in the years before the merger. The criteria written into the draft merger regulation for the absolute prohibition of a merger are “the power to hinder effective competition in the Common Market or in a substantial part thereof” and two quantitative criteria premised on turnover and market share. The phrase quoted is likely to be interpreted in the light of the case law of the Court of Justice on dominance under Article 86, which gives some weight to factors other than market share.\textsuperscript{71}

Both the Continental Can rule and the draft merger regulation prohibit the acquisition of dominant power through mergers (though the regulation has certain exceptions). Under the Treaty, dominant power legitimately acquired is subject to restraints on behavior under Article 86, but not to divestiture. However, it would not be an argument in favor of a merger that the Commission will in any event retain the power to control the behavior of the new dominant firm.

In horizontal merger cases one would expect the Commission to seek to prevent significant additional concentration and the elimination of important competitors. Market shares would be the principal criterion used, but not the only one. The Commission can also be expected to follow a stricter enforcement policy when the industry concerned is becoming more concentrated than when the merger takes place in an otherwise static situation. Therefore, the Commission will be attentive to trends in market structure as well as market shares. The Commission would probably also tend to favor a merger necessary to keep a firm in business if no less restrictive course of action was available. No figures can be given for the percentage market shares which
would trigger Commission intervention, although some indications can perhaps be obtained from the cases under Article 86, notably United Brands and Hoffmann-LaRoche.

EEC antitrust law does not limit itself to horizontal mergers, and it is clear that the rules also prohibit vertical mergers with substantial anticompetitive effects, such as raising barriers to entry or creating competitive disadvantages for other corporations (as distinct from making the merged firm more efficient) by cutting off their access to customers or suppliers. 72

Nothing useful at this stage can be said about probable EEC antitrust policy on conglomerate mergers, although no doubt mergers involving potential entrants and mergers making uncompetitive reciprocal buying probable will be looked at carefully.

NOTES


3. To this general principle there appears to be one exception, or apparent exception. If it is shown that the dominance of a dominant firm was due primarily or wholly to behavior unlawful under Article 85 or 86 of the Treaty Establishing the European Community, 298 U.N.T.S. No. 4300 (1958), merely prohibiting the firm from continuing the behavior in question is an insufficient remedy, since the firm would still enjoy the results of its past unlawful behavior. In those circumstances the Commission has the power to order divestiture in order to recreate a competitive situation and take away the privileged position insofar as it had been improperly obtained.


5. Article 86 of the EEC Treaty reads, in part:
Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.


19. Article 85(3) of the EEC Treaty permits the nonapplication of Article 85(1) to an otherwise prohibited agreement, decision, or concerted practice . . . which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.


21. See also the definition of control under the ECSC Treaty, Decision No. 24–54, O.J. EUR. COMM. 345 (1954).


23. See also U.K. Fair Trading Act 1973, c. 41 § 74.


27. EEC COMMISSION, SEVENTH REPORT ON COMPETITION POLICY 57 (1978).


33. The Commission also said that it would be difficult to draw a clear and complete line of demarcation between concentrations and restrictive agreements. However, Article 85 would apply where two economically independent enterprises continue to exist after the transaction is completed; therefore, in the case of joint ventures, Article 85 would apply.

34. See, e.g., A REVIEW OF MONOPOLIES AND MERGERS POLICY, Cmnd. No. 7198 ¶ 1.14, 5.9–5.22 (1978). In recent years Ireland and France have enacted legislation providing for merger control and the U.K. and Germany have strengthened their laws on the subject. For further consideration of these issues, see Stockmann, Reflections on Recent OECD Activities: Regulation of Multinational Corporate Conduct and Structure, post.


Article 3 of the draft merger regulation expressly provides that a Commission decision that a concentration or proposed concentration is not permissible under the regulation “shall not automatically render null and void the legal transactions relating to such operation” and gives the Commission power to order divestiture or any other action that may be appropriate in order to restore conditions of effective competition.


43. EEC COMMISSION, SIXTH REPORT ON COMPETITION POLICY (1977), ¶ 38.


47. Temple Lang, supra note 36, at 19–22.


54. Temple Lang, supra note 36, at 33–36.


58. Developments in national laws are outlined in the annual reports of the EEC Commission on Competition Policy; see also OECD, FUSIONS ET POLITIQUE DE CONCURRENCE (1974).


61. Markert, supra note 30, at 136–38. It should be noted that because Article 86 requires the abuse of a dominant position “within the common market or in a substantial part of it,” a problem arises where a proposed merger would be anticompetitive in a national context, but likely to increase competition, at least in the long run, in the European Community. It is probable that the Commission would approve such a merger, provided there is adequate proof of the procompetitive effects.


65. Id. The Committee on Economic and Monetary Affairs of the European Parliament recommended that this should be said expressly in the regulation.

Any demonstrable procompetitive effects on the world market of mergers within the Community
might need to be considered. It is necessary when determining the competitive level of a particular market to take account of potential competition from extra-Community sources. Also, if a merger of two Community corporations would facilitate their joint penetration of, for example, the Japanese market, thus providing a substantial net benefit to the Community, that factor should be considered, even though such a merger might appear to diminish competition looking only in the Community market.

66. This policy consideration would not apply to a merger between a corporation based outside the Community and a corporation based in the Community. Insofar as such a merger might increase the competitive position of the Community-based corporation and thus increase competition (and so perhaps economic integration) within the Community, this might need to be taken into account.


68. See Markert, supra note 30, at 117.


70. See, e.g., the United Brands and Hoffmann-LaRoche cases, supra note 17.


72. See ECSC Treaty, Article 66.