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Article 1

Mergers and Partial Mergers Under EEC Law

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Abstract

This Article, in Parts I-III, traces the development of Articles 85 and 86 of the EEC Treaty from the drafting of the Treaty, through discussions in the 1960s on their possible application to mergers, to the Continental Can case in 1973 and its subsequent interpretation. Part IV examines the Commission's proposal for a regulation on the control of concentrations between undertakings. Part V explains the Commission's practice in relation to joint ventures (partial mergers), tracing the connection between this phenomenon and the merger problem. Finally, Part VI looks at recent developments that demonstrate the currently unsatisfactory state of this area of the law.

MERGERS AND PARTIAL MERGERS UNDER EEC LAW†

*Karen Banks**

INTRODUCTION

It is no secret that the increasing number of concentrations in the European Economic Community ("EEC" or "EC") in recent years, and the EC Commission's relative powerlessness to control them, have caused concern in Brussels. In a recent speech,¹ Commissioner Sutherland, the Commissioner particularly responsible for competition matters, stated that if the Council failed to reach a decision on the Commission's proposal for a merger control regulation, the Commission "must envisage alternative means of achieving Community-wide merger control," including "direct application of the rules of the Treaty" to mergers.² In that context, it is interesting to review those provisions in an historical perspective and to see what their limitations may be.

This Article, in Parts I-III, traces the development of Articles 85 and 86 of the EEC Treaty from the drafting of the Treaty, through discussions in the 1960s on their possible application to mergers, to the *Continental Can* case in 1973 and its subsequent interpretation. Part IV examines the Commission's proposal for a regulation on the control of concentrations between undertakings. Part V explains the Commission's practice in relation to joint ventures (partial mergers), tracing the connection between this phenomenon and the merger problem. Finally, Part VI looks at recent developments that demonstrate the currently unsatisfactory state of this area of the law.

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1. Address by Commissioner Sutherland, Comm'n Press Release, Meeting of Directors General of Competition, IP(87) 282 (July 1987) (available at the *Fordham International Law Journal* office).

2. *Id.* at 7-8.

I. *THE TREATY*

The starting point for any discussion of the treatment of mergers³ and partial mergers under EEC law must be the absence of any specific provision for merger control in the EEC Treaty. It does not seem open to doubt that this omission was deliberate, since the same European states that concluded the Treaty of Rome in 1957⁴ had, six years earlier, included a specific provision in the European Coal and Steel Community ("ECSC") Treaty⁵ for the control of concentrations ("close-knit combinations" in American terminology). A comparison of Articles 65 and 66 of the ECSC Treaty⁶ and Articles 85 and 86 of the EEC Treaty⁷ shows a considerable similarity of scope as between Articles 85 and 65, both of which prohibit, broadly speaking, agreements in restraint of trade. As between Articles 66 and 86, however, the difference is marked. Thus, Article 66 provides for prior authorization by the High Authority (now the EC Commission) of transactions above a certain threshold that would bring about a "concentration" in the Common Market, whether by way of merger, acquisition of shares and assets, loan, contract, or any other means of control. Only the last paragraph of this article deals with the problem of controlling the behavior of an undertaking that already occupies a dominant position on a given market. By contrast, that is the exclusive concern of Article 86 of the EEC Treaty.

The stark contrast between these provisions, as well as the

3. It will be noted that in the Commission's 1966 study on the problem of concentration control, the word "merger" was given a technical meaning and distinguished from various ways in which one undertaking gained control of another. See *infra* notes 11-13 and accompanying text. The word "concentration" was used—and is still used—by the Commission as the generic term covering all these situations. However, as the word "merger" has since then come to have rather a broad meaning, covering many situations in which two or more undertakings lose their economic independence by effectively coming under joint control, in this Article, unless the context indicates otherwise, the terms "merger" and "concentration" are used largely interchangeably.

4. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English trans.), 298 U.N.T.S. 11 (1958) (unofficial English trans.) [hereinafter EEC Treaty].

5. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189) (official English trans.), 261 U.N.T.S. 140 (1957) (unofficial English trans.).

6. *Id.* at 57-66, 261 U.N.T.S. at 195-204.

7. EEC Treaty, *supra* note 4, 1973 Gr. Brit. T.S. No. 1, at 32-33, 298 U.N.T.S. at 47-49.

legislative history of the EEC Treaty,⁸ appears to have convinced legal writers in the late 1950s and early 1960s that it was not the intention of the draftsmen of the EEC Treaty to include a provision covering merger control⁹ and that they had contented themselves with a prohibition on restrictive agreements (and concerted practices) governing market behavior (Article 85) and an instrument to control abuse of a dominant position that already existed (Article 86), without attempting to prevent such dominance from coming into existence in the first place. Legal commentators then and now have remained unanimous as to the non-applicability of Article 86 to the acquisition or the existence of a dominant position.

This omission of a merger control provision from the Treaty is not surprising, given European economic thinking at that time. One of the main objectives of the EEC was to bring about the economies of scale made possible by an enlarged European market. Mergers—especially mergers across national boundaries—were seen as part of the process of European integration and as necessary to enable European industry to adapt to the new dimensions of the Common Market and to compete effectively against large foreign (notably American) enterprises.¹⁰ Against that background, the Member States clearly did not wish to include in the Treaty any provision that might inhibit such developments.

II. THE 1966 MEMORANDUM

The debate was reopened by the EC Commission in 1964 when it asked a group of academic experts to study “the rela-

8. The Report of the Messina Conference, which was the basis for the drafting of the Treaty of Rome, suggested a system of concentration control, but this recommendation was not followed by the negotiators. Declarations made by the German and Dutch governments on ratification of the Treaty also indicate that this difference from the ECSC Treaty was quite deliberate. See Hefermehl, *Fusionen und Konzernbildungen nach EWG-Vertrag*, in *FESTSCHRIFT FÜR HANS CARL NIPPERDEY* 781-83 (1965).

9. See, e.g., A. GLEISS & M. HIRSCH, *EWG-KARTELLRECHT* 100, 185 (2d ed. 1965); J. TEMPLE LANG, *THE COMMON MARKET AND COMMON LAW* (1966); Everling, *Die Europäische Wirtschaftsgemeinschaft*, in *KOMMENTAR ZUM EWG-VERTRAG* 253 (J. Wohlfarth, U. Everling, H. Glaesner & R. Sprung eds. 1960); Hefermehl, *supra* note 8, at 780; Thiesing, in *KOMMENTAR ZUM EWG-VERTRAG* 279 (H. von der Groeben & H. von Boeckh eds. 1959).

10. See von der Groeben, *Competition Policy as Part of Economic Policy in the Common Market*, 1965 E.C. BULL. No. 8, at 5.

tionship between policy on restrictive agreements (Article 85) and the concentration of undertakings.”¹¹ The conclusions of these experts, together with those of the Commission itself, were published by the Commission in 1966.¹²

A. *Treatment of Article 85 in the 1966 Memorandum*

The Commission concluded that Article 85 was not applicable to concentrations, a term which was used to cover any situation in which “several firms are brought together under a single economic management at the expense of their economic independence.”¹³ The most important types of concentration were said to be the acquisition of holdings by one company in another, the total or partial acquisition of another company’s capital assets, and the merger of two or more legally independent companies into a new company.¹⁴ The main reasons for the non-applicability of Article 85 to such transactions were presented as follows:

1. Since competition policy requires that restrictive agreements (cartels) be prohibited *as a rule*, whereas concentrations need only be forbidden exceptionally when they give rise to an unacceptable degree of market power, the uniform application of the same rule of prohibition to both would result in the banning of either too few cartels or too many concentrations.

2. It would not be possible to treat in the same way concentrations the economic effects of which were the same; where there was no agreement between undertakings, such as in the case of the purchase of shares on the stock exchange, Article 85 could not apply. This exclusion covers not only purchases of shares from private individuals on the stock exchange, but also the purchase by one firm of shares held by another since, even if an “agreement” could be construed between them, they would be agreeing, not in their capacity as undertakings on a given market, but as investors dealing in shareholdings.

3. The criteria set out in Article 85(3) for exemption from

11. COMMISSION, COMPETITION SERIES NO. 3, THE PROBLEM OF INDUSTRIAL CONCENTRATION IN THE COMMON MARKET 32 (1966) [hereinafter 1966 MEMORANDUM] (unofficial English trans. available at the *Fordham International Law Journal* office).

12. *See id.*

13. *Id.* at 31.

14. *Id.* at 19-21.

the prohibition of Article 85(1) are not suitable for concentrations because:

a) the positive assessment required under Article 85(3)¹⁵ could not be made for most concentrations, since the effects of such combinations cannot be judged *a priori* as reliably as those of an agreement concerning a certain course of conduct on the market;

b) the indispensability criterion of Article 85(3)(a) is logically inapplicable to concentrations, which necessarily involve a complete elimination of competition between the undertakings concerned. To find that a merger was indispensable to the benefits to be achieved, the Commission would have to say that they could not have been achieved by less restrictive means, *i.e.*, in this case by a cartel agreement, which would amount to an encouragement of loose associations instead of mergers;

c) the nature of an exemption requires that it be capable of reexamination after a certain time to ensure that the legal requirements continue to be satisfied. An exemption must therefore be limited in time; reexamination would be unsuitable for mergers, where a permanent clearance needs to be given;

d) similarly, revocation of an exemption must be possible at any time when the conditions upon which it was based cease to be fulfilled.

4. The absolute nullity of prohibited agreements provided for in Article 85(2) would not be a desirable legal consequence of prohibited concentrations.¹⁶

In concluding that Article 85 could not apply to mergers, the Commission focused not on the literal language of the provision, but on its system and objectives. Because it was designed to forbid restrictions on competition in the sense of obligations entered into with respect to market practices, Article 85 is structured as a prohibition in principle, with exceptions being made only on the basis of positive criteria. That is to say, a restrictive agreement is forbidden (and is null and void) unless exempted on the basis that it contributes to an improvement in the production or distribution of goods or

15. For a discussion see *infra* pp. 259-60.

16. 1966 MEMORANDUM, *supra* note 11, at 33-35.

that it helps to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit. These are the positive requirements of Article 85(3). The negative requirements are that the agreement does not impose on the undertakings concerned restrictions that are not indispensable for the attainment of the positive objectives, and that it does not afford them the possibility of eliminating competition in respect to a substantial part of the products in question. In relation to mergers, on the other hand, only a negative criterion is appropriate, *i.e.*, that excessive market power is not obtained. There is no interest in preventing mergers below this threshold. A merger control provision is, therefore, essentially concerned with market *structure*.

The different approach of Article 85 is explained by the fact that restrictive agreements are judged to be contrary to the public interest (unless in a given case they can be shown to have beneficial effects) even when no large amount of market power is involved.¹⁷ That is because restrictions on competition, entailing as they do a diminution of entrepreneurial freedom of action, are seen as damaging the competitive *process*, which works properly only when each market operator remains free to pursue its own commercial interests. Since the greatest efficiencies are deemed to be achieved through decentralized planning by freely taken individual business decisions, anything that constitutes a clog on businesses' freedom of action, such as pricing or market-sharing agreements, brings inefficiencies onto the market and is therefore condemned in principle, subject to possible exemption. Agreements through which mergers are brought about, on the other hand, do not constitute an impediment to the entrepreneurial freedom of action or decision making of economically independent planning centers, since by definition a merger eliminates economic independence.

It is clear, therefore, that there are different underlying considerations behind the EEC cartel prohibition as distinguished from those that are appropriate for merger control. The structure of the legal provision simply reflects this difference in purpose. The EEC provisions are different from that

17. *Id.* at 34.

of section 1 of the Sherman Act,¹⁸ which, with the overlay of the rule of reason, has been allowed to apply to both mergers and cartels. Judicial interpretation of section 1 may have led to somewhat different treatment of loose associations and close-knit combinations, but the criterion of legality has been a purely negative one for both: the absence of a significant effect on market competition.¹⁹

Could the rule of reason approach make it possible to apply Article 85 to mergers? Needless to say, it has been suggested that it would be possible to bring under Article 85(1) only those merger agreements that threatened market structures, since only these would be considered restrictive of competition.²⁰ However, in relation to these agreements, the difficulty of applying the unsuitable criteria of Article 85(3) would remain. So also would remain the problem of the nullity of the agreements under Article 85(2), which the Commission regarded as an excessive consequence of the illegality of a merger agreement, especially because of the danger that it could go beyond the restoration of the status quo because of the disappearance of the individual firms involved in a merger. Even where this was not a problem (for example, where one firm had bought a controlling shareholding in another), the impact of nullity on property rights and the consequent uncertainties would seem to be undesirable.

The real danger in "tinkering with the system" of Article 85 to force it to apply to mergers is that one would end up with a distorted system. An agreement would only be brought under paragraph 1 in order to be prohibited, for any acceptable mergers would have been found to be "non-restrictive," and any that were treated as restrictive could not respectably be exempted. This is true especially because of the indispensability requirement, the requirement that competition not be eliminated, and the requirement that consumers obtain a fair share of the benefits of the agreement. If a merger agreement

18. 15 U.S.C. § 1 (1982).

19. Cf. Joliet, *Monopolization and Abuse of Dominant Position, A Comparative Study of the American and European Approaches to the Control of Economic Power*, in *COLLECTION SCIENTIFIQUE DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ DE LIÈGE*, No. 31, at 278.

20. *Id.* at 279; see also Temple Lang, *Regulating Multinational Corporate Concentration—the European Economic Community*, 2 *MICH. Y.B. INT'L L. STUD.* 144, 151, 153 (1981) [hereinafter Temple Lang, *Regulating Multinational Corporate Concentration*].

was brought under Article 85(1) precisely because it brought a dangerous degree of concentration into the market, it would be odd for the Commission then to find that it did not afford the parties the possibility of eliminating competition in relation to a substantial part of the products in question. And how could it be likely in such market conditions that the fruits of improved efficiencies would be passed on to the consumer? Thus, the whole logic of Article 85 would be distorted, and by the very dubious step of bringing under its prohibition a whole class of agreements that could not benefit from its exemption provisions.

If, on the other hand, exemptions *were* wrested from Article 85, as matters stand they would have to be of a limited duration and revocable, especially because Regulation 17,²¹ the regulation implementing Articles 85 and 86, so provides. It seems, in fact, that the logic of Article 85 itself requires exemptions to be dependent on the continuation of the benefits of the agreement and of the factual situation upon which an exemption is based, so that it is not correct to say that the temporary and revocable nature of an exemption derives only from the implementing legislation. But even if this were not so, and if new implementing legislation were introduced pursuant to Article 87 to cover mergers specifically, the major problems would remain: only concentrations resulting from an agreement between undertakings could be caught, so that the law would not be uniformly applied; agreements would be null and void; the exemption criteria would be unusable; and, last but not least, what would happen in relation to "old" agreements?

As the Commission pointed out in the 1966 Memorandum, "the effects of all concentrations effected in the past endure."²² What would be the consequence of the nullity of all the past agreements that brought them about? Under the *Bosch*²³ doctrine, it could perhaps be (adventurously) argued that until appropriate implementing legislation was enacted, Article 85 would not be applicable to render the agreements

21. Council Regulation No. 17, O.J. Eng. Spec. Ed. 1959-62, at 87, Common Mkt. Rep. (CCH) ¶ 2401 [hereinafter Regulation 17].

22. 1966 MEMORANDUM, *supra* note 11, at 35.

23. *De Gues v. Bosch*, Case 13/61, 1962 E.C.R. 45, Common Mkt. Rep. (CCH) ¶ 8003; *see also* *Brasserie de Haecht v. Wilkin-Janssen* (No. 2), Case 48/72, 1973 E.C.R. 77, Common Mkt. Rep. (CCH) ¶ 8170.

illegal and void. However, from the moment of that enactment, Article 85 would apply in full force to all agreements still producing their effects on the market place, that is to say, to all past agreements. Even if they were all notified, and even if a new theory of "provisional validity" were developed (so that agreements that had been notified could not be treated as void until the Commission had decided whether or not to grant an exemption), once a negative decision had been made, they would be void with retroactive effect to the date of coming into force of the new Regulation.

In short, it seems to have been with good reason that the Commission concluded in 1966:

To sum up, it may be stated that the distinction generally made in the treatment of cartels and concentrations is necessary and that, for the reasons mentioned, it is not possible to apply Article 85 to agreements whose purpose is the acquisition of total or partial ownership of firms or the reorganization of the ownership of firms (merger, acquisition of holdings, purchase of part of the assets).²⁴

It added, however:

If, after the concentration process, several economically independent firms continue to exist (for example, in the case of joint ventures), it will be necessary to examine carefully whether, apart from changes in ownership, the participating enterprises have not entered into agreements or concerted practices, within the meaning of Article 85(1).

Furthermore, Article 85(1) continues to be applicable if the agreement does not result in a permanent change in ownership but only a co-ordination of the market behaviour of firms remaining economically independent. In such cases, the arguments that militate against an application of Article 85 to concentrations are without force. The situation in such a case is actually that of a cartel, and not that of a reorganization of ownership.²⁵

B. *Treatment of Article 86 in the 1966 Memorandum*

For the Commission, then, Article 85 applied only to agreements governing the market behavior of enterprises and

24. 1966 MEMORANDUM, *supra* note 11, at 36.

25. *Id.*

not to agreements whereby a structural change in their organization was brought about. In relation to Article 86, however, the conclusion of the study was that this article could apply to concentrations where the effect of a concentration was the monopolization of a market. It was pointed out that, unlike Article 66 of the ECSC Treaty, Article 86 does, in principle, permit the *existence* of a dominant position on a given market, since all that is prohibited is the *abuse* of such dominance. The Commission felt, however, that where an already dominant enterprise combined with another in such a way that there was a complete elimination of competition on a particular market, the abusive exploitation of a dominant position had occurred. This was felt to be especially true because the monopolistic position resulting from such fusion was likely to have the same harmful effects as practices specifically mentioned in Article 86 as being prohibited, *e.g.*, limitation of production, markets or technical development to the prejudice of consumers. Such effects result because:

A monopolistic situation removes incentives to technical progress. It often leads to a limitation of production with the aim of reaping maximum profits, through prices that are higher than they would be on a market with oligopolistic competition and with a level of production that would be higher on account of such competition.²⁶

It may be thought that the Commission's position was not entirely consistent. In relation to Article 86 it emphasized the *potential* similarity of *results* between a structural change on the market and the individual behavior of a dominant enterprise. However, it has often been pointed out that similar effects from a market point of view may be brought about either by a high degree of concentration or by a cartel,²⁷ but this had not

26. *Id.* at 40.

27. Schapiro notes that the German Federal Cartel Office, in its 1959 Report, emphasized that "business acquisitions can as effectively restrain competition as can cartels. There is thus a danger that the curbing of contractual restraints on competition may merely lead to a shift from cartels to consolidation" of economic power. Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects* (pt. 1), 62 *COLUM. L. REV.* 1, 46 n.274 (1962). Much earlier, in the U.S. *Hardwood* case of 1921, Justice Brandeis pointed out that the participants in the Open Price Plan of the Association, which had been declared by the majority of the Court to be an unlawful restraint of trade, might have entered "the inviting field of consolidation," and "through the formation of a consolidated company and the distribution

sufficed to lead the Commission to the conclusion that Article 85 was applicable to concentrations. Not having gone down this road in relation to Article 85, it is not clear why the Commission should have done so in relation to Article 86, although it is true that a number of the obstacles that it found to lie in the way of the application of Article 85 to concentrations did not exist in relation to Article 86.

There was no problem of having to distinguish between situations in which a merger came about as a result of an agreement between enterprises and those in which it did not, and the distinction between "old" and "new" agreements did not exist. The difficulties relating to the criteria for exemption and to the limited period of an exemption and its revocability also did not arise. Moreover—and this seems to have been an important consideration—in the application of Article 86 the legality of mergers would not depend on a positive assessment of each one, but would be judged according to a negative criterion, *i.e.*, the absence of an improper exploitation of a dominant position, meaning in this case the acquisition of monopoly power. The ban would thus apply only in "rare, exceptional cases"²⁸ and for most concentrations no notification would be necessary. Finally, the Commission stressed that:

As for the legal consequences of an infringement of Article 86, Article 3 of Regulation No 17 gives the Commission the power either to send the firm concerned a recommendation that they end the infringement, or to require them to do so through a decision.²⁹

The absence of an automatic nullity provision in Article 86 was therefore also considered important.

However, on the substantive question of the proper scope of Article 86, the Commission did not at all explain why the expression "abuse . . . of a dominant position" in Article 86 should not be given its most obvious meaning, that of an abuse organically connected with the phenomenon of dominance. A straightforward reading of the text of Article 86 would seem

of certificates of stock to the shareholders of the constituent companies, have accomplished what was forbidden by direct agreement." Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COLUM. L. REV. 179, 179 (1932) (discussing *American Column & Lumber Co. v. United States*, 257 U.S. 377, 418-19 (1921) (Brandeis, J., dissenting)).

28. 1966 MEMORANDUM, *supra* note 11, at 37.

29. *Id.*

clearly to indicate that it was intended to prohibit those harmful forms of conduct that might be possible for a dominant undertaking precisely because of its dominance. Of course, any firm, dominant or otherwise, can merge with another. This is not a type of behavior rendered possible by dominance and would not therefore have appeared at first glance to be the object of Article 86. It may be thought surprising that no explanation of its contrary approach was put forward by the Commission, but no doubt this reflected its recognition that policy considerations (the importance of having some kind of merger control) would have to prevail over technical niceties.

A further problem with the Commission's logic is its acknowledgement that Article 86 allows the acquisition of a dominant position, implying that the accumulation of market power is not in itself unlawful, followed by the conclusion that such accumulation is unlawful at the point where it results in the complete elimination of competition. This conclusion was said to be justified by reference to the objectives of the Treaty. In particular, it was pointed out that under Article 85(3)(b) a restrictive agreement could not be exempted if it might result in the elimination of competition with respect to a substantial part of the products in question. It was felt that Article 86 should be interpreted so as to bring about the same result, *i.e.*, the maintenance of an effective competitive structure. However, it has been pointed out that there is only a difference of degree between the concept of market dominance (which is permitted) and monopoly, and that the dangers perceived by the Commission as inherent in monopoly already exist when a firm is dominant.³⁰ The same commentator also argued persuasively that Article 86 is not directed against a probability of abuse, but against actual exploitation of market power to the detriment of consumers.³¹

III. *THE CONTINENTAL CAN DECISION*

Whatever its imperfections, the Commission's approach to concentrations under Article 86 was upheld by the Court of Justice on the first (and only) occasion that it was asked to pronounce on it.

30. Joliet, *supra* note 19, at 292.

31. *Id.* at 292-93.

In 1972 the Commission decided that a U.S.-based manufacturer of metal containers, Continental Can, had abused its dominant position on the German market (held through a majority-owned subsidiary SLW) by acquiring an additional 81% shareholding in the capital of the principal Benelux manufacturer of metal containers for meat and fish (TDV), in which it already held a 10% share.³² Having defined the relevant product markets as those for metal containers for meat products, metal containers for fish products, and metal lids, the Commission decided that by acquiring control of TDV, Continental Can had virtually eliminated all competition in those product lines in a "substantial part" of the Common Market, *i.e.*, an area covering all of the Netherlands, Belgium and Luxembourg and the northern and central parts of Germany.³³ This finding was based on the view that SLW and TDV were capable of competing on this geographic market, even though at the time of the acquisition SLW sold only on the German market and TDV on the Benelux. Continental Can appealed the Commission's decision to the Court of Justice. The Court annulled the decision for lack of adequate definition of the product market and in particular for the lack of consideration of supply-side substitution.³⁴ However, it upheld the Commission's view that Article 86 applies to certain mergers:

[A]buse may . . . occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, *i.e.*, that only undertakings remain in the market whose behaviour depends on the dominant one.³⁵

In reaching this conclusion, the Court evidently had to reject the argument that Article 86 is concerned only with the exploitative behavior of a dominant firm, and not with structural changes in the market. In this regard it said: "The distinction between measures which concern the structure of the undertaking and practices which affect the market cannot be decisive, for any structural measure may influence market conditions, if it increases the size and the economic power of the undertak-

32. Continental Can, O.J. L 7/25 (1972), Common Mkt. Rep. (CCH) ¶ 9481.

33. *Id.* ¶ 24, Common Mkt. Rep. (CCH) ¶ 9481, at 9032.

34. Europemballage Corp. v. Commission & Continental Can Co., Case 6/72, 1973 E.C.R. 215, 247-49, ¶¶ 33-37, Common Mkt. Rep. (CCH) ¶ 9481, at 8302.

35. *Id.* at 245, ¶ 26, Common Mkt. Rep. (CCH) ¶ 8171, at 8300.

ing.”³⁶

The Court also specifically rejected the argument referred to above that, in order for Article 86 to be infringed, there must be a causal connection between the dominance and the abuse.³⁷ It based this rejection on the idea that Article 86 applies not only to practices that damage consumers directly (exploitative behavior) but also to those that are detrimental to them through their impact on an effective competition structure.³⁸ In other words, in order to apply Article 86 to structural measures that threaten to eliminate competition, the Court had to “break the link” between dominance and abuse. It has been pointed out that the Court’s attitude in this regard was a reflection of its policy concern to apply Article 86 to certain mergers, and that therefore the breaking of the link between dominance and abuse should be regarded as limited to the merger-type fact situation.³⁹ This author respectfully agrees. If it were to be otherwise, the sacrifice in terms of the internal logic of Article 86 would be great indeed.⁴⁰

A. *The Legal Position Established by Continental Can*

The Court’s dictum as to the circumstances in which abuse may occur seems to echo the Commission’s view that Article 86 applies only to those mergers that have an ultimately damaging effect on the competitive structure of a market by effectively eliminating workable competition. The Court’s reference to a “substantial fettering” of competition and its subsequent explanation of this concept may perhaps be seen as a gloss upon the view of the Commission set out in the 1966 Memorandum:

The limit set by Article 86 for a market-dominating en-

36. *Id.* at 243, ¶ 21, Common Mkt. Rep. (CCH) ¶ 8171, at 8299.

37. *Id.* at 245, ¶ 27, Common Mkt. Rep. (CCH) ¶ 8171, at 8300.

38. *Id.*, ¶ 26, Common Mkt. Rep. (CCH) ¶ 8171, at 8300.

39. 2 B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTI-TRUST: A COMPARATIVE GUIDE 662 (2d ed. 1985).

40. The Court’s dictum in *Hoffmann-La Roche v. Commission*, Case 85/76, 1979 E.C.R. 461, 541, ¶ 91, Common Mkt. Rep. (CCH) ¶ 8527, at 7553, to the effect that an abuse can exist even where it has not been brought about by the use of economic power, should be read as related to the applicant’s argument in that case that no pressure had been brought to bear on the customers to adopt a system of fidelity rebates, since they themselves saw such a system as advantageous. This is a different argument from that of causality.

terprise with regard to concentration can be determined only in a given case in the light of the market situation. In general, only the following may be stated: the closer a firm occupying a dominant position comes to creating a monopoly through mergers with or absorption of other firms, and the more it thus jeopardizes the purchasers', suppliers', and ultimate consumers' freedom of choice, the more likely it is that it thereby enters the sphere of improper exploitation.

When examining the determining factors in each individual case, the key point will be whether the disappearance of smaller firms really limits competition in such a way as to conflict with the arrangement provided for in the Treaty. This condition can be considered to be met only where a dominant firm strengthens its position through concentration to the point where, in violation of the concept on which the Treaty and particularly Article 86(b) is based and to the detriment of consumers, suppliers and dealers, it thereby creates a monopolistic situation which prevents competition from functioning. In any evaluation of the determining factors, it should be borne in mind that the disappearance of smaller firms may in fact not affect competition at all. This may also apply in respect of a small firm, which, while competing effectively at present, were to disappear from the market in the near future, with or without a concentration.⁴¹

At first glance the result of *Continental Can* appears to be very much what the Commission indicated it intended to establish via Article 86—a limited form of merger control, which operates only in “rare and exceptional” cases—situations where such an ultimate degree of market power is acquired that the competitive structure must inevitably be damaged unless intervention is possible to prevent it. Subsequent pronouncements of the Commission, however, have reflected its view that the scope of the merger control possibilities established by *Continental Can* is broader than might have first appeared. Thus, in its Tenth Report on Competition Policy (covering the year 1980), the Commission pointed to the broader concept of abuse that had been developed by the Court of Justice in cases subsequent to *Continental Can* (cases concerned with “behavioral” rather than “structural” abuses).⁴² It indicated that it

41. 1966 MEMORANDUM, *supra* note 11, at 41.

42. Paragraph 21 of the Commission's Tenth Report on Competition Policy (1981) refers to the following cases: *Hoffmann-La Roche v. Commission*, Case

was this broader concept, under which *any* further weakening of the structure of competition brought about by the conduct of an already dominant undertaking could amount to an abuse of dominance, to which regard was now being had in the context of mergers rather than the "elimination of residual competition" approach of *Continental Can*. Thus, the Tenth Report states:

In assessing conditions for applying Article 86 to mergers, particularly as regards the concepts of dominant position and abuse, the Commission also based its action on the line taken in later judgments in the United Brands and Hoffmann-La Roche cases.

A dominant position can generally be said to exist once a market share to the order of 40% to 45% is reached. Although this share does not in itself automatically give control of the market, if there are large gaps between the position of the firm concerned and those of its closest competitors and also other factors likely to place it at an advantage as regards competition, a dominant position may well exist. Strengthening by means of merger is likely to constitute an abuse if any distortion of the resulting market structure interferes with the maintenance of remaining competition (which has already been weakened by the very existence of this dominant position) or its development. Such an effect depends, in particular, on the change in the relative market strength of the participants after the merger, i.e. the position of the new unit in relation to remaining competitors.⁴³

It will be noted that this more expansive approach to the applicability of Article 86 to mergers is based upon a lowering of the threshold of both dominance and abuse. In *Continental Can* the dominant position found by the Commission was based upon market shares as high as 80% to 90%, and never less than 50%. Thus, an undertaking can more readily be found to be dominant and, once that finding has been made, can be prevented from increasing its dominance.

85/76, 1979 E.C.R. 461, Common Mkt. Rep. (CCH) ¶ 8527; Hugin v. Commission, Case 22/78, 1979 E.C.R. 1869, Common Mkt. Rep. (CCH) ¶ 8524; United Brands Co. v. Commission, Case 27/76, 1978 E.C.R. 207, Common Mkt. Rep. (CCH) ¶ 8429; Suiker Unie v. Commission (Sugar Cartel Case), Cases 40-48, 50, 54-56, 111, 113 and 114/73, 1975 E.C.R. 1663, Common Mkt. Rep. (CCH) ¶ 8334.

43. COMM'N, TENTH REPORT ON COMPETITION POLICY ¶ 150 (1981).

It has been questioned whether the Commission is right to extrapolate from cases concerned with anti-competitive behavior principles to be applied to the strengthening of a dominant position through structural change.⁴⁴ An indication of the difficulty of applying the same rules to different factual situations appears from the passage in the Court's judgment in *Hoffmann-La Roche* upon which the broader test of abuse is largely based:

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operations, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.⁴⁵

Can mergers be said to fall within the category of aberrant competitive methods referred to by the Court? In reality their nature is different from the "methods" the Court had in mind, which were anti-competitive or exploitative techniques in the sense of *market behavior*.

The Commission's approach entails treating mergers (at least certain mergers) as "methods different from those which condition normal competition." The correctness of this equation of dissimilar phenomena may be questioned, especially because it does not seem warranted by the Commission's usual insistence on looking to results rather than form and focusing on the likely market effect of any given behavior rather than on its formal classification. In fact, the effects of a merger, at least a merger that does not result in a monopoly, are not the same as those of anti-competitive behavior on the market. Whereas it was possible for the Commission in 1966 to argue that the elimination of *all* competition from a given market could have the same harmful effects as market practices specifically forbidden by Article 86, the same cannot be said of a merger that increases a firm's market share from, say, 45% to 55%. It is

44. See Reynolds, *Merger Control in the EEC*, 17 J. WORLD TRADE L. 407, 409-10 (1983).

45. *Hoffmann-La Roche v. Commission*, Case 85/76, 1979 E.C.R. 461, ¶ 91, Common Mkt. Rep. (CCH) ¶ 8527, at 7553 (emphasis added).

generally not possible to predict a specific harm that will result from such a strengthening of market position, even though it inevitably means a lessening of the *amount* of competition faced by the "dominant" undertaking.

It may be, however, that in practice the Commission's broader approach does not represent a very great departure from the *Continental Can* doctrine. The somewhat dense language of the extract from the Tenth Report on Competition Policy may be interpreted as meaning that the Commission would consider an abuse to have occurred only when some "distortion" was apparent in the market structure after, and as a result of, the merger, such that the remaining competition could not be expected to be maintained or developed. In other words, it would not be enough that the merger itself had diminished competition in a quantitative sense; it would further be necessary to establish that such harm had been done to the structure of the market that it was unlikely that the remaining degree of competition could hold its own against the dominant enterprise. On that construction, the new formula is simply a more sophisticated presentation of the concern of both the Commission and the Court in *Continental Can*—that such a degree of dominance should not be achieved as to amount to an effective elimination of competition. Such an approach would not ignore particular strengths of small competitors, or the importance of potential competition. As to the apparent lowering of the threshold of dominance, the analysis of each case will depend on all the facts of that case; it is true that factors other than market share have a considerable role to play in determining whether a dominant position exists. It may be that the "new" approach is once again simply a more refined explanation of the analytical process necessary to make that determination, under which advantages such as a considerable leadership margin, size of competitors, technological exclusivities and barriers to entry are considered together with market share in assessing market power.

B. *Inadequacies of Article 86 as an Instrument of Merger Control*

On the basis outlined above, that the heart of the matter remains the elimination-of-competition concern of *Continental Can*, it would appear that the merger control instrument held

by the Commission at present is of somewhat limited application. This seems to be confirmed by the fact that the Commission has not formally condemned a single merger since *Continental Can*. It has, it is true, examined a number of mergers and proposed mergers,⁴⁶ and in at least two cases⁴⁷ a proposal for an acquisition was considerably modified as a result of Commission intervention. In another,⁴⁸ a proposed takeover was abandoned after the Commission had informed the parties of a complaint and warned them of possible interim measures. In yet a third,⁴⁹ the acquiring company divested itself of its interests in the relevant market in the course of a Commission inquiry. No doubt there may be numerous other cases in which proposed mergers or acquisitions have not gone ahead simply because of an awareness of the existence of Article 86 and the *Continental Can* doctrine. It is also true that certain Member States have strong merger control systems that may make it unnecessary for the Commission to intervene in a given case.

Nevertheless, it cannot be disputed that as an instrument for merger control, the Article 86 weapon leaves much to be desired. First, it can be used only where one undertaking already holds a dominant position. Undesirable market power resulting from the merger of two or more undertakings, none of which was dominant to begin with, is beyond its reach. The idea of a dominant position held jointly by more than one firm

46. See *Kaiser/Estel, Coust Patons Ltd./Güterman & Co., Fichtel & Sachs/Huret*, discussed in COMM'N, NINTH REPORT ON COMEPTITION POLICY ¶¶ 131-133 (1980); *Pilkington/BSN-Gervais-Danone, Baxter Travenol Laboratories/Smithkline RIT*, discussed in COMM'N, TENTH REPORT ON COMPETITION POLICY ¶¶ 152-154, 157 (1981); *Amicon Corporation/Fortia AB & Wright Scientific Ltd.*, discussed in COMM'N, ELEVENTH REPORT ON COMPETITION POLICY ¶ 112 (1982); *Eagle Star/Allianz Versicherung, British Sugar/Berisford*, discussed in COMM'N, TWELFTH REPORT ON COMPETITION POLICY ¶¶ 104-106 (1983); *Berisford/Napier Brown*, discussed in COMM'N, THIRTEENTH REPORT ON COMPETITION POLICY ¶ 166 (1984); *Mecaniver/PPG, Philip Morris/Rembrandt/Rothmans, Ashland Oil Inc./Cabot Co., Pont à Mousson/Stanton & Stavely*, discussed in COMM'N, FOURTEENTH REPORT ON COMPETITION POLICY ¶¶ 97-98, 109-110 (1985).

47. *Pilkington*, discussed in COMM'N, TENTH REPORT ON COMPETITION POLICY ¶ 152 (1981); *Philip Morris*, discussed in COMM'N, FOURTEENTH REPORT ON COMPETITION POLICY ¶ 98 (1985).

48. *Amicon*, discussed in COMM'N, ELEVENTH REPORT ON COMPETITION POLICY ¶ 112 (1982).

49. *Berisford-Napier Brown*, discussed in COMM'N, THIRTEENTH REPORT ON COMPETITION POLICY ¶ 166 (1984).

being abused by their merger could only be relevant where, prior to merger, there were such links between the firms that it would be possible to regard their position as in some sense "joint." Not only would such a case be rare, but one may wonder whether the competition loss resulting from the merger of such firms would be sufficiently great to bring Article 86 into play. Second, Article 86 reaches only an extreme form of concentration that results in the elimination of effective competition. A classical system of merger control imposes no such limitation, for it is evident that concentrations of market power may be undesirable short of the point of leaving only those undertakings in the market that are dependent on a dominant undertaking. Third, there is no power to intervene *before* a merger has taken place in order to prevent it, although it has been suggested that the Commission could block a merger by means of interim measures,⁵⁰ nor is there any system of prior notification of proposed mergers.

Finally, the bluntness of Article 86 as an instrument for merger control is illustrated by the absence from it of any possibility of exemption for reasons not connected with competition. Unlike the situation that would be created if the Commission's proposed Regulation were to become law,⁵¹ under Article 86 a merger either involves such damage to the competitive structure that it is prohibited or it does not. There is no room for balancing its anti-competitive effects against social or regional needs and allowing the latter to prevail in certain circumstances. It is true that the Commission announced in its Tenth Report on Competition Policy that it was "examining" the possibility of taking into account, in its assessments of mergers under Article 86, "the impact of any prohibition on industrial development and its social consequences."⁵² However, it is not clear how this could be done without grafting even more alien elements onto the body of Article 86 and rendering this area of the law even less certain than it is at present.

50. See Reynolds, *supra* note 44, at 415-19; Temple Lang, *The Powers of the Commission to Order Interim Measures in Competition Cases*, 18 COMMON MKT. L. REV. 49, 54 (1981) [hereinafter Temple Lang, *Powers of the Commission*].

51. Under Article 1(3) of the proposed Regulation, as amended in 1984, O.J. C 51/8 (1984), a concentration that would otherwise be prohibited may be exempted if it is "indispensable to the attainment of a priority of the Community."

52. COMM'N, TENTH REPORT ON COMPETITION POLICY ¶ 21 (1981).

C. Remedies

Since the evil to be remedied is the acquisition of excess market power, the normal remedy will be divestiture. In *Continental Can* the Commission ordered divestiture and required the company to submit proposals to the Commission within six months. The Court has made it clear that the powers held by the Commission under Article 3 of Regulation 17 (to order an infringement to be brought to an end) include the power to order positive steps to be taken where this is necessary.⁵³

It is, however, clearly unsatisfactory, both from the Commission's point of view and that of businesses, that mergers should have to be "unscrambled" after they have been completed. A more rational system—such as that which the Commission has proposed to the Council of Ministers—would provide for the prior notification to the Commission of mergers above a certain level of economic importance, and give the Commission a definite period within which to react. Of course, there is no reason why firms proposing a merger should not informally sound out the Commission about its likely reaction, but the informal reassurance they might thus obtain is no substitute for complete legal security.⁵⁴ It has also been pointed out that the lack of certainty in the present situation and the prospect of having to try to unwind a completed merger may have the result that mergers are called off or substantially modified on the basis of an informal indication from the Commission that it considers Article 86 to apply, and that this will happen without the Commission having had to carry out the thorough market analysis required by *Continental Can* for a formal decision.⁵⁵ The danger is thus that the fear of Article 86 will achieve more than Article 86 could have achieved itself, and that a body of quasi-case law will be built up on the basis of these "settlements" of cases, the exact basis or justification for which will not be clear. It must be added, however, that the same thing happens—and must inevitably happen—in relation to classical infringements of the competition rules. Although

53. *Istituto Chemioterapico Italiano SpA v. Commission (Commerical Solvents)*, Cases 6 and 7/73, 1974 E.C.R. 223, Common Mkt. Rep. (CCH) ¶ 8209.

54. See Temple Lang, *Regulating Multinational Corporate Concentration*, *supra* note 20, at 146.

55. See Reynolds, *supra* note 44, at 414.

the Commission's settlement practice has been criticized,⁵⁶ it is hard to see how an enforcement authority with limited resources can hope to deal with its workload without having some recourse to informal methods. The problem is particularly acute, however, in the merger context, where there has been one formal decision fifteen years ago and no clear jurisprudential developments since then to guide companies' lawyers in advising their clients.

D. *Interim Measures*

The question whether the Commission may intervene by way of interim measures to prevent a merger taking place is of considerable importance because of the difficulties of "unscrambling" a merger once it has been effected. The basis for such action by the Commission would be the Court's decision in the *Camera Care* case.⁵⁷ This case held that the Commission has power to order interim measures in competition cases to preserve the status quo pending a final decision. In that case, the Court stated:

[T]he Commission must also be able, within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings. The powers which the Commission holds under Article 3(1) of Regulation No 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist.⁵⁸

Reynolds believes it is "clear" that this decision, together with *Continental Can*, makes it possible for the Commission to

56. See, e.g., van Bael, *The Antitrust Settlement Practice of the EC Commission*, 23 *COMMON MKT. L. REV.* 68 (1986); van Bael, *Comment on the EEC Commission's Antitrust Settlement Practice: The Shortcircuiting of Regulation 17*, *SWISS REV. INT'L COMPETITION L.*, Oct. 1984, at 67.

57. *Camera Care Ltd v. Commission*, Case 792/79 R, 1980 E.C.R. 119, *Common Mkt. Rep. (CCH)* ¶ 8645.

58. *Id.* at 131, ¶18, *Common Mkt. Rep. (CCH)* ¶ 8645, at 7644.

order interim measures to prevent a merger that is likely to constitute an infringement of Article 86.⁵⁹ Temple Lang also has said that mergers and acquisitions might be halted by interim measures.⁶⁰ This path, however, does not seem to be quite clear of obstacles.

Both the indications given by the Court in *Camera Care*, as well as subsequent guidelines issued by the Commission⁶¹ and legal writings,⁶² show that there are limits on the circumstances in which the power to order interim measures may be used. The first requirement is that there should be a fairly strong prima facie case that a violation of competition law *has occurred*. This is only to be expected, given the extreme nature of the right to impose certain behavior on an undertaking before all the procedure and investigation leading to a final decision have been completed, and given also that the power to order interim measures is based on Article 3(1) of Regulation No. 17, which reads: "Where the Commission, upon application or upon its own initiative, finds that there *is* infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end."⁶³ The clear wording of Article 3(1), therefore, refers to the present existence of an infringement. It is true that the Court has already been very flexible in its interpretation of this provision, since in *GVL v. Commission*⁶⁴ it held that the Commission was entitled to issue a decision making a finding of infringement on the basis of Article 3 even where the infringement in question had ceased to exist. In that case, however, there *had been* an infringement; in the context of a proposed merger, the infringement has yet to be committed. This is not merely a formal argument, for to interpret Article 3(1) as if it read "where the Commission . . . finds that there is (probably about to be) infringement" would be to alter radically the nature of the power

59. Reynolds, *supra* note 44, at 415.

60. Temple Lang, *Powers of the Commission*, *supra* note 50, at 54.

61. These guidelines as to the circumstances in which the Commission would take interim measures are reproduced in C. KERSE, *EEC ANTITRUST PROCEDURES* app.I, at 322 (1981).

62. See, e.g., *id.*; Temple Lang, *Powers of the Commission*, *supra* note 50.

63. Regulation 17, *supra* note 21, art. 3(1), O.J. Eng. Spec. Ed. 1959-62, at 88, Common Mkt. Rep. (CCH) ¶ 2401, at 1731 (emphasis added).

64. Case 7/82, 1983 E.C.R. 483, Common Mkt. Rep. (CCH) ¶ 8910.

given to the Commission. No longer a power to make *ex post* findings of infringement, it would become a power of prevention. It must be doubted whether such an interpretation would be justified.

It may be that in certain cases a number of steps would have been taken preparatory to the actual transaction, such as an agreement in principle between firms prior to actual merger or steps preceding the purchase of shares from shareholders. It is difficult to see, however, how a declaration of intent to abuse can be equated with abuse.

Even if the two things could be equated, it would often be difficult for the Commission to predict with a sufficient degree of certainty that a proposed merger would result in an infringement of Article 86. It must be remembered that it would be called upon to make this assessment at a very early stage, and before it had time to carry out a thorough analysis of all the circumstances of the case.

The other requirements that must be fulfilled before interim measures can be ordered are that the matter must be urgent and that interim measures must be needed in order to avoid serious and irreparable harm to the party seeking their adoption, or which is intolerable for the public interest. If granted, the measures must be of a temporary and conservatory nature, and go no further than is needed to deal with the situation. These requirements are also likely to be difficult to fulfill in a merger-type situation, which is quite different from the situation in a case of anti-competitive abuse, such as a refusal to supply that could immediately threaten the continued presence of a competitor on the market. In the case of a merger, the most likely complainants are competitors that are unlikely to be able to demonstrate a probability of immediate and irreparable damage to themselves. It would therefore only be in an extreme case, where the market structure, and therefore the public interest, was gravely threatened, that the Commission might consider the requirement of urgency to be fulfilled. However, even in such a case, the damage might not be considered irreparable since the Commission has the power to remedy the anti-competitive effects of the merger by ordering divestiture at the conclusion of its administrative proceedings.

IV. THE PROPOSED REGULATION ON MERGER CONTROL

It was recognition of the shortcomings of Article 86 as an instrument of merger control, and of the need for a more systematic discipline, that led the Commission, shortly after the *Continental Can* judgment, to place before the Council of Ministers a proposal for a Regulation on the control of concentrations between undertakings.⁶⁵ This proposal made reference to the increasing degree of concentration in the Common Market and to the danger that effective competition could thereby be jeopardized. It recognized the limited nature of the powers already held by the Commission under Article 86 to deal with the problem and stressed in particular the need to be able to deal systematically with mergers *before* they were put into effect. It therefore invoked not only Article 87 but also Article 235, under which the Community may give itself the powers of action necessary for the attainment of the objectives of the Treaty where the Treaty itself has not provided the necessary powers.⁶⁶ The Commission's proposal, as subsequently amended, is essentially the following.

A. *The Commission's Proposal*

The Commission defined a concentration as taking place where a person or an undertaking, or a group of persons or undertakings, acquires control of one or several undertakings, that is to say, they acquire the power to determine how one or several undertakings shall operate. At least one of the undertakings or groups of undertakings concerned must be established in the Common Market.

1. Scope

The draft Regulation does not apply to concentrations where the aggregate turnover of the participating undertakings is less than 750 million ECU unless, irrespective of turnover in

65. Proposal for a Regulation (EEC) of the Council on the Control of Concentrations Between Undertakings, O.J. C 92/1 (1973). Discussion of this proposal is accurate as of January 1988.

66. Article 3(f) of the EEC Treaty requires the Community to establish "a system ensuring that competition in the common market is not distorted." EEC Treaty, *supra* note 4, 1973 Gr. Brit. T.S. No. 1, at 3, 298 U.N.T.S. at 16.

the market as a whole, the share in a substantial part of the Common Market (which may be interpreted as meaning in any sizeable Member State) is greater than 50%.⁶⁷ Neither does it apply to concentrations that do not affect trade between Member States.⁶⁸

2. Incompatibility

A concentration is "incompatible with the Common Market" if the undertakings concerned thereby acquire or enhance the power to hinder effective competition in the Common Market or in a substantial part thereof.⁶⁹ However, there is a rebuttable presumption that a concentration is compatible with the Common Market where the market share of the goods or services concerned accounts for less than 20% of the turnover of identical or substitutable goods or services in the Common Market or in a substantial part thereof.⁷⁰

The power to hinder effective competition is assessed at Community level, and in this assessment particular account is taken of the possibilities of choice available to suppliers and consumers, the economic and financial power of the undertakings concerned, the structure of the markets affected, international competition, and supply and demand trends for the relevant goods or services.⁷¹

3. Possibility of Individual Exemption

An exemption may be granted in relation to a concentration that is indispensable to the attainment of a "priority of the Community." Conditions and obligations may be attached to such an exemption.⁷²

4. Declaration of Incompatibility

Such a declaration is to be issued by the Commission when the conditions of incompatibility are satisfied, and when an exemption cannot be granted.⁷³ It does not have the conse-

67. O.J. C 51/8 (1984), art. 1(2).

68. O.J. C 92/1 (1973), art. 1(1).

69. *Id.*

70. O.J. C 51/8 (1984), art. 1(1).

71. *Id.*

72. *Id.* art. 1(3).

73. O.J. C 92/1 (1973), art. 3(1)-(2).

quence of rendering null and void the legal transactions upon which the concentration is based. If the concentration has already been put into effect, the Commission may require divestiture or reparation of assets or any other measure that may be necessary in order to restore conditions of effective competition.

5. Prior Notification

Before they are put into effect concentrations must be notified to the Commission where the aggregate turnover of the undertakings concerned is not less than one thousand million ECU.⁷⁴ However, the obligation does not apply if the turnover of one of the undertakings concerned is less than thirty million ECU.⁷⁵ (There is an option to notify the Commission of concentrations that fall outside the "obligatory notification" category.) Notification has suspensory effect; the notified concentration may not be put into effect during the three months following notification unless the Commission informs the undertakings concerned before the end of that period that it is not necessary to commence proceedings.⁷⁶ Failure to notify the Commission of a compulsorily notifiable concentration may result in the imposition of a fine.⁷⁷

6. Procedural Time Limits

The Commission has three months after notification within which to decide whether to commence proceedings, although this time limit may be extended with the consent of the undertakings concerned.⁷⁸ If it does not do so, and in the absence of false or misleading information supplied with the notification, the concentration is presumed to be compatible with the Common Market.⁷⁹ If the Commission does open proceedings, its final decision must generally be issued within a further nine months.⁸⁰

74. *Id.* art. 4(1).

75. O.J. C 51/8 (1984), art. 4(2).

76. O.J. C 92/1 (1973), art. 6(2).

77. *Id.* art. 13(2).

78. *Id.* art. 6(2).

79. *Id.* art. 6(4).

80. *Id.* art. 17(1).

7. Fines

Penalties may be imposed for a number of procedural infringements, and most importantly for concluding a concentration that the Commission has found to be incompatible with the Common Market or that the Commission has ordered to be suspended pending its final decision, or for doing so before the expiration of the three month period in relation to a concentration about which the Commission has been notified.⁸¹

In summary, it will be seen that the system envisaged by the proposed Regulation is one of considerable flexibility and sophistication. Below a certain threshold, mergers fall outside its scope altogether; above a higher threshold, the Commission must be notified; in between, no notification is necessary, although in particular circumstances they might be found to be incompatible with the Common Market. Clear procedural rules are laid down. Provision is made for the situation in which a merger has already happened before it comes to the Commission's attention. Allowance is made for balancing competing policy values. The system is neither one of prior authorization comparable to the regime under the ECSC Treaty, nor one of prohibition in principle. It is rather, as the Third Report on Competition Policy put it, "a system where incompatibility with the Common Market must be established case by case after assessment by the Commission of whether the concentration is liable to hinder effective competition in the Common Market."⁸²

B. Status of the Commission's Proposal

The draft Regulation was approved by the European Parliament on February 12, 1974,⁸³ and by the Community's Economic and Social Committee on February 28, 1974.⁸⁴ It has been substantially amended on three occasions since then, in

81. *Id.* art. 13(3).

82. COMM'N, THIRD REPORT ON COMPETITION POLICY ¶ 28 (1974). Lest this sound alarmingly vague, it should be noted that a new Article (Article 22a) inserted by the 1984 amendment provides for publication by the Commission of guidelines to indicate "the circumstances in which mergers or concentrations will be subject to examination or review by the Commission." O.J. C 51/8 (1984), art. 22a.

83. O.J. C 23/19 (1974).

84. O.J. C 88/19 (1974).

1981,⁸⁵ 1984,⁸⁶ and 1986.⁸⁷ However, in spite of various parliamentary questions and resolutions,⁸⁸ the Council has not made any real progress towards the adoption of the proposed Regulation. This is somewhat surprising in view of the fact that the Commission was encouraged to put forward its proposal by the statement that emerged from the EEC Summit Conference held in Paris from October 19 to 21, 1972, which referred to the problem of business concentration:

The Heads of State or of Government consider it necessary to seek to establish a single industrial base for the Community as a whole. This involves . . . the formulation of measures to ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community, and the maintenance of fair competition as much within the Common Market as in external markets in conformity with the rules laid down by the Treaties. The Heads of State or Government further believed that it was desirable to make the widest possible use of all the dispositions of the Treaties, including Article 235 of the EEC Treaty.⁸⁹

However, it appears that a number of problems have prevented a consensus from being reached in the Council. General reservations have been entered by two Member States, although one of them has been withdrawn. The main difficulties appear to have centered upon:

- a. The legal basis for the Regulation (which is strange, given the urging of the Paris Summit Statement, quoted above, to make maximum use of Article 235).
- b. The scope of the Regulation, for example, whether public enterprises should be included.

85. O.J. C 36/3 (1982).

86. O.J. C 51/8 (1984).

87. O.J. C 324/5 (1986).

88. *See, e.g.*, Written Question No. 225/79 (addressed to the Council), O.J. C 282/5 (1979), Common Mkt. Rep. (CCH) ¶10,178; Written Question No. 67/80 (addressed to the Commission), O.J. C 167/28 (1980); Written Question No. 925/80 (addressed to the Commission), O.J. C 312/12 (1980), and Written Question No. 1129/80 (addressed to the Council), O.J. C 322/7 (1980); Parliamentary Resolution on the Commission's Fifteenth Report on Competition Policy (1986), reproduced in the annex to the Commission's SIXTEENTH REPORT ON COMPETITION POLICY (1987).

89. Final Declaration of the Conference of the Heads of State or of Governments of the Member States of the Enlarged Communities ¶ 7.

- c. The requirement of prior notification (there have been objections both to the principle and to the criteria proposed).
- d. Possibilities of derogation: the concern here has related to a possible clash between competition goals and other policy objectives such as industrial, social, and regional concerns. This point has been at least partly covered by the provision for an exemption in the interests of "a priority of the Community."
- e. Possible conflicts between the concerns of national and Community competition authorities, in the sense that a national authority could not authorize a merger that was prohibited under Community law. In the reverse situation, where there was no objection to a merger under EEC law, there is no reason why a national authority could not forbid it on the basis of a stricter or otherwise different national law, since the Community law position would be permissive rather than obligatory. It has been suggested, however, that where an agreement is accorded a positive exemption under Community law, a Member State may not forbid it under national law⁹⁰ because such action could prejudice the uniform application of Community law, where for instance the same agreement (or, *mutatis mutandis*, merger) was authorized in some Member States and forbidden in others because of the strict national laws of the latter. But since an exemption has no binding force (enterprises being free to take advantage of it or not as they please), it would be odd if Member States were considered "bound" by it. An exemption is no more than the "waiving" of the incompatibility that would otherwise be found to exist. The Commission has no power to oblige a particular merger to take place, and it is submitted that, even if the reasons for granting an exemption are reasons of strong Community interest ("a priority of the Community"), that cannot convert permission into obligation or oust national jurisdiction. Politically,

90. In its reply to Written Question No. 1508/81, O.J. C 85/6 (1982), the Commission described exemptions pursuant to Article 85(3) as "Commission measures which prevent the application of domestic competition law where this would have the effect of prohibiting or annulling an agreement exempted under Article 85(3)." The arguments for and against this approach may be found in C. KERSE, *supra* note 61, at 280-81. See also Koch, *vor Article 85*, in *KOMMENTAR ZUM EWG-VERTRAG* ¶ 30 (E. Grabitz ed. 1986).

the Commission might want to encourage a particular merger; legally, however, it can only remove obstacles based on Community law. In the absence of Community power to command, there is no conflict with a national law that would forbid. However, the Commission has adopted a different attitude in relation to exemptions under Article 85(3), and not surprisingly the Member States are now wary in relation to exemptions under the proposed Regulation.

- f. The division of power between the Commission and the Council in the decision-making process envisaged in the draft Regulation: the real decision-making power lies completely with the Commission as the guardian of Community interests. Under the latest amendment to the draft, Member State participation would be limited to being represented on the Advisory Committee that would consider a draft decision, and having its representative's opinion recorded in the minutes, which would be annexed to the draft decision but would not be published. This seems unlikely to satisfy the Council.

There have been no indications of late that these problems are likely to be resolved soon. The Commission stated in its Sixteenth Report on Competition Policy that no progress had been made in 1986 towards dealing with the outstanding issues,⁹¹ and in spite of some apparent political movement subsequent to the *Philip Morris* judgment,⁹² there are no signs of progress on the technical aspects. The prospects for the adoption of the draft Regulation must therefore still be regarded as somewhat bleak. No doubt it was this realization that led the European Parliament (admittedly before the *Philip Morris* judgment) to advise the Commission to withdraw its proposal from the Council "in order that a fresh start can be made on filling this gap in the Community's competition policy."⁹³ Whatever this may mean exactly, it clearly refers to the use of means already within the Commission's grasp. How-

91. COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY ¶ 38 (1987).

92. *British American Tobacco Co. Ltd. & R.J. Reynolds Industries Inc. v. Commission*, Joined Cases 142 and 156/84, 1987 E.C.R. —; see *infra* notes 147-54 and accompanying text.

93. Resolution on the Fifteenth Report of the Commission of the European Communities on Competition Policy ¶ 29 (1986), reprinted in COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY annex (1987).

ever, it can hardly be hoped that as satisfactory and systematic a regime of merger control as that envisaged by the Regulation can be achieved by the use of tools not designed for that purpose.

V. *PARTIAL MERGERS/JOINT VENTURES*

Parallel with the developments—or lack of them—in the merger sphere outlined above, the Commission has been developing a body of case law in the area of joint ventures. The Court of Justice has not yet been asked to review any of these decisions. The purpose of this Part is not to examine in detail all aspects of these cases,⁹⁴ but simply to review those developments that have a bearing on the merger question.

The structural aspects of joint ventures have caused particular problems in the Commission's analysis of these arrangements. The efforts to distinguish between joint ventures that should be regarded as partial mergers on the one hand, and those that are really restrictive agreements on the other, has been described by one author as "the 'Partial Merger' Imbroglio."⁹⁵

It certainly must be admitted that a daunting degree of complexity has characterized the Commission's approach to this difficult area. This is explained by the absence of a power of merger control, which might reasonably have been expected to result in a lack of jurisdiction to control the structural aspects of joint ventures, and the Commission's efforts to overcome this deficiency.

A number of definitions of joint ventures have been put forward. Brodley has defined them as:

- an integration of operations between two or more separate firms, in which the following conditions are present:
- (1) the enterprise is under the joint control of the parent firms, which are not under related control;
 - (2) each parent makes a substantial contribution to the joint enterprise;

94. For a succinct explanation of the Commission's overall approach to joint ventures, see Faull, *Joint Ventures Under the EEC Competition Rules*, 5 *EUR. COMPETITION L. REV.* 358 (1984); Temple Lang, *European Community Antitrust Law and Joint U.C. Ventures Involving Transfer of Technology*, in 1982 *FORDHAM CORP. L. INST.* 203 (B. Hawk ed. 1983).

95. 2 B. HAWK, *supra* note 39, at 260.

- (3) the enterprise exists as a business entity separate from its parents; and
- (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market.⁹⁶

The Commission, for its part, has contented itself with saying simply that a joint venture is “generally defined as an enterprise subject to joint control by two or more undertakings which are economically independent of each other.”⁹⁷ The Commission has included within this definition joint buying agencies, joint selling agencies, and joint R&D companies, as well as more separate entities with an independent economic life of their own. The range of possible arrangements that come under the umbrella of “joint venture” is indeed very broad. However, they all have one feature in common—their creation results from a pooling of resources by the parent companies. Structurally, therefore, they may be regarded as a merger,⁹⁸ or, since only a part of the parents’ resources is merged, what is frequently called in the EEC a “partial merger.” This does not of course prevent them from also having anti-competitive aspects in the cartel sense; there may be—and often are—express or implied undertakings not to compete or other restrictive engagements entered into by the parent companies. The “chameleon-like” nature of a joint venture should not be understood as placing it definitely and for all purposes in either category “A” (mergers) or category “B” (cartels); the same arrangement may belong to both categories if it manifests characteristics of both. However, unlike the situation under United States law where the same joint venture

96. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1526 (1982) (footnote omitted).

97. COMM’N, FOURTH REPORT ON COMPETITION POLICY ¶ 37 (1975); COMM’N, THIRTEENTH REPORT ON COMPETITION POLICY ¶ 53 (1984).

98. This idea is dealt with in Mead, *The Competitive Significance of Joint Ventures*, 12 ANTITRUST BULL. 819, 822 (1967), where he examines the possible distinction between mergers and joint ventures, and concludes that “in substance, the distinction between mergers and joint ventures may not be significant.” Kaysen and Turner describe joint ventures as “a form of quasi-merger.” C. KAYSEN & D. TURNER, *ANTI-TRUST POLICY — AN ECONOMIC AND LEGAL ANALYSIS* 136 (1959). The same terminology is used by Pitofsky, *Joint Ventures under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969). Brodley considers joint ventures less restrictive than mergers and therefore deserving of milder antitrust treatment. See Brodley, *supra* note 96, at 1529.

may be scrutinized both under the anti-merger provisions and under the cartel prohibition,⁹⁹ EEC law suffers from a handicap in having no anti-merger provisions.

Under the ECSC Treaty it has been possible for the Commission to treat a joint venture—for example, a joint buying or selling agency—as being primarily in the nature of a cooperation agreement in relation to which the aspect of joint control was of secondary importance, and therefore to apply Article 65 of the ECSC Treaty. Alternatively, the Commission could analyze the arrangement as a concentration to be scrutinized under Article 66, with Article 65 being applied only to collateral restrictive agreements going beyond the creation of the joint venture. Thus the analytical distinction between cartels and changes brought about in the market due to structural alterations has been preserved, while at the same time both analyses have been applied to the relevant aspects of the same arrangement.

In the case of the EEC Treaty, the approach has been different. In the absence of a merger control provision, the tendency has been to bring all joint ventures between potential competitors under the cartel prohibition with the consequence that, in order to be lawful, they need an exemption pursuant to Article 85(3). In expending considerable effort to the end of defining away the merger aspects of joint ventures (and thus avoiding the label “partial merger”) the Commission appears to have proceeded upon the assumption that an admission of the merger-type nature of the creation of a joint venture would prevent it from dealing with the matter at all under Article 85, even where restrictions of competition were also entered into. Furthermore, and somewhat contradictorily, once practically all joint ventures have been classified as restrictive agreements, the Commission’s approach has allowed it to exercise a power of merger control in this area.

99. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964), held that both section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), which applies, *inter alia*, to restrictive agreements, and section 7 of the Clayton Act, ch. 323, 38 Stat. 670, 671-72 (1914) (current version at 15 U.S.C. § 18 (1982 & Supp. IV 1986)), which applies to the anti-competitive (structural) effects of mergers, were applicable to joint ventures.

A. *Early Developments*

In its Fourth Report on Competition Policy the Commission stressed the importance of deciding whether a joint venture was more in the nature of a cartel or a concentration, and it explained its approach to the question. It first stated that "Article 85 is clearly applicable to joint arrangements which, however these may be referred to by the parties, amount to cooperation agreements."¹⁰⁰ As in the case of the ECSC Treaty, joint sales agencies, for instance, would thus be brought under the rules applicable to cartels in general. This is what one would expect, for the essential nature of such arrangements is that the parent companies restrict their freedom of entrepreneurial action by agreeing to cooperate with one another rather than compete. However, the Commission continued:

In its 1966 memorandum on the problem of concentration in the common market, the Commission stated, particularly in relation to joint ventures, that careful attention should be paid to whether the parties concerned were applying agreements or concerted practices, especially in cases in which economically independent undertakings remained in the market following a concentration. In other words, where the formation of a joint venture amounts to a concentration between each of the parties and the new undertaking, without the founding parties being concentrated as between each other, the latter may end up by regulating their conduct in accordance with policy lines jointly determined in the interest of the operation of the new joint venture. Even in the absence of particularized agreements or concerted practices, it can be assumed that restrictive arrangements are more likely to be made in cases in which the parties involved are in effect competitors. A restrictive effect which could in such circumstances jeopardize the economic independence of the parties is also referred to as "group effect."¹⁰¹

The development of ideas is interesting. From the 1966 study's concern that agreements or concerted practices might exist side by side with the creation of the joint venture as such, the Commission passed to the somewhat vaguer notion of the

100. COMM'N, FOURTH REPORT ON COMPETITION POLICY ¶ 38 (1975).

101. *Id.* ¶ 39.

parent companies "ending up" by regulating their conduct in a certain way. The impression that this might refer to decisions arrived at unilaterally by each of the parents rather than to agreed behavior tends to be confirmed by the subsequent reference to the absence of "particularized agreements" or *even of concerted practices*. In the absence of either of these phenomena, it might be thought that one was outside the realm of collusion, but doubt remains, for in the next phrase the Commission speaks of "restrictive arrangements" being made. Doubt is dispelled, however, by the last sentence quoted above which refers to "group effect", *i.e.*, the possible impact of group control on the competitive behavior of the parent companies. This is clearly a structural phenomenon rather than the result of agreement between the parties. In fact, each parent undertaking is assumed to modify its own behavior in response to its (now altered) own commercial interests. The concept of group effect is well known in the context of the ECSC Treaty, and there it has been treated as a concentration phenomenon, *i.e.*, a possible result of factual circumstances, rather than the product of a cartel agreement.¹⁰²

It seems, therefore, that by 1974 the Commission had determined to bring the very creation of the joint venture and its structural consequences within the ambit of Article 85 by denying a "merger" characterization to these phenomena and dealing with them as if they were the product of a restrictive agreement. It exempted from this treatment, however, those joint ventures the creation of which amounted to a total integration of the parent companies, where they had transferred all their assets to the joint venture and had become management holding companies.¹⁰³ Moreover, in a case concerning a partial integration of the parent companies' assets and activities, *SHV/Chevron*,¹⁰⁴ the Commission granted negative clearance on the basis that the parents had transferred to their joint ventures all their own former capacity to act on the relevant markets, although they retained their own economic activities in other fields. In this case, SHV (a Dutch group with diversified interests in the coal industry, chain stores, and transport)

102. See, *e.g.*, *SIDMAR III*, O.J. L 717/67 (1967).

103. See *Agfa/Gevaert and Dunlop/Pirelli*, discussed in *COMM'N, FOURTH REPORT ON COMPETITION POLICY* ¶ 40 (1975).

104. *SHV/Chevron*, O.J. L 38/14 (1975), *Common Mkt. Rep. (CCH)* ¶ 9709.

and Chevron (a subsidiary of the Standard Oil Company of California) had set up, through a joint holding company, a number of subsidiaries, all known as Calpam, in which each party had an equal holding. The subsidiaries were to sell certain petroleum products in Belgium, the Netherlands, Luxembourg, Germany and Denmark, where SHV and Chevron had previously had independent distribution networks. The parents transferred to the Calpam subsidiaries, for a period of at least fifty years, their distribution networks and all assets relating thereto (plant, equipment, etc.).

In its decision the Commission stated that most aspects of the transaction suggested that the formation of the joint subsidiaries would result in an extensive concentration of operations relating to the distribution of Chevron and SHV products in the new Calpam trading structure. The agreements showed that there would be a permanent modification of market structures especially because SHV would no longer be in business as an independent wholesale buyer of petroleum products. SHV and Chevron, having divested themselves of their individual distribution systems, would no longer retail the relevant product separately. The fact that the joint subsidiaries had been set up for a fifty-year period was regarded as strong evidence that the assets in question were to be transferred permanently to the Calpam companies.

It should be noted that the "partial merger" characterization of the joint venture led the Commission to grant negative clearance even though the creation of the joint venture was accompanied by non-competition clauses. In this regard the Commission said:

As regards distribution of the products covered by the agreement, Chevron and SHV have each agreed not to compete with the other without the prior consent of the other. This clause provides SHV with the assurance that the assets transferred by it to the joint subsidiaries will not lose value as a result of competition by Chevron with those subsidiaries. In view of the fact that Chevron has no industrial or commercial interest which could imaginably lead it to compete with its own 50%-owned subsidiaries, and given also that SHV will disappear as an independent wholesaler on the petroleum product market, with no likelihood of ever returning, the clause in question cannot be said to involve

an appreciable restriction of competition.¹⁰⁵

There is a certain contradiction in this analysis, since the Commission first finds that Chevron's undertaking not to compete is valuable to SHV, but goes on to decide that the clause is really of no effect because Chevron has no interest in competing with its joint venture. The general burden of the finding, however, seems to be that neither Chevron nor SHV could be expected to compete with the joint venture in any event, so that the clauses restraining them from doing so did not constitute "appreciable" restrictions of competition.

One may wonder about this judgment, especially in the case of Chevron, which remained active in the petroleum field generally and which might have found it beneficial at a later stage to re-enter competition on the distribution market. This idea is borne out not only by the economic observation that it would benefit to the extent of 100% from any extra profit made on its own account, while it received only 50% of the profits of the joint ventures, but also by the Commission's finding that the clause restraining Chevron from competing provided SHV with a certain assurance as to its future conduct. Put another way, the situation might be seen as one in which there remained restrainable competition, and the non-competition clause served the purpose of restraining it.

However, it does appear that SHV, while retaining some oil exploration licenses, for all intents and purposes had disappeared from the market altogether. It may be that the Commission was content to observe that there was no potential competition *between the parent companies* that could be affected by the transaction, even in terms of "group effect," since one of them had removed itself not only from the relevant market but also from all connected markets on which a "spillover" effect might have been felt.

It seems odd that the Commission should, on the one hand, engage in the merger-type analysis involved in ensuring that a given structural change on one market will not weaken competition on another, while at the same time ignoring an explicit restriction of competition on the immediately relevant

105. *Id.* at 15, Common Mkt. Rep. (CCH) ¶ 9709, at 9575.

market that could well result in the presence of only one enterprise where there might have been two.

B. *The Tests of a "Partial Merger"*

Any impression that might have been given by *SHV/Chevron* that the "partial merger" theory would provide a generous exemption from the application of Article 85 to joint ventures was soon put to rout. In the Sixth Report on Competition Policy the Commission stated that where a transfer of assets to a joint venture was limited to a part of the total business of the parent companies, it would be treated in the same way as a merger only in "exceptional cases." These exceptional cases could be taken to arise only where:

the parent companies completely and irreversibly abandon business in the area covered by the joint venture, and provided that the pooling of certain areas of business does not weaken competition in other areas, and particularly in related areas, where the firms involved remain formally independent of each other.¹⁰⁶

The two tests thus enunciated have remained central to the Commission's thinking. Not surprisingly, few joint ventures have satisfied them. In fact there has not been a single formal decision since *SHV/Chevron* in which the Commission has held that a joint venture did not fall under Article 85 because of its essentially concentrative character, although two informal decisions to that effect have been mentioned in the Reports on Competition Policy.¹⁰⁷

Under the first test, the Commission's position is that a merger has not taken place unless the parent companies, or at least one of them, have divested themselves of the power to compete, even potentially, on the joint venture's market. A first essential requirement, therefore, is that all assets con-

106. COMM'N, SIXTH REPORT ON COMPETITION POLICY ¶ 55 (1977).

107. The first was *Kaiser/Estel*, discussed in COMM'N, NINTH REPORT ON COMPETITION POLICY ¶ 131 (1980), which concerned the pooling of the European aluminium businesses of the parents. The second was the case of *Forgemasters*, discussed in COMM'N, TWELFTH REPORT ON COMPETITION POLICY ¶ 100 (1983), a joint venture set up by two British steel firms in the forgings and castings sector; the Commission stated that the two parent companies were to withdraw completely from the businesses in which the joint venture was to operate and they did not compete in the supply of intermediate products.

nected with activity on that market be vested in the joint venture. Even this, however, may not be enough if the parent companies could reasonably return to the market in question. In *De Laval/Stork*,¹⁰⁸ where the parents were found to have remained competitors on the joint venture's market, the Commission said:

[I]t is not the case that at least one of the companies has completely and irreversibly abandoned business in the area covered by the joint venture nor that it is certain that the pooling of this area of business will [not] weaken competition in other areas, particularly in related industries, where the firms involved remain formally independent of each other.

To be regarded as having completely and irreversibly abandoned business in the areas covered by the joint venture, the parties would have had to have given up all their existing capacity to compete actually or potentially and to have ceased to do business in the industry. The withdrawal would have had to have been completely irreversible so that they could no longer be regarded as actual or potential competitors.¹⁰⁹

The reference to the possibility that only one of the parent companies might be required to have disappeared from the market is interesting. It seems to be based on the underlying idea that the parent companies must not remain actual or potential competitors *of one another*; if one of them is definitively removed from the market in question, that requirement is satisfied. It is not clear, however, how two companies can be deemed to have merged their interests in the thoroughgoing way apparently required by the Commission if one of them remains active, or potentially so, on the relevant market.

This problem, however, has not arisen often, and where it has its solution remains obscure. It has already been seen that in *SHV/Chevron* only SHV's departure from the market seems to have had the definitive character now required by the Commission, but no analysis of this point appears in the decision. In *Kaiser/Estel*,¹¹⁰ the very brief report of it states that one of

108. *De Laval/Stork*, O.J. L 215/11 (1977), Common Mkt. Rep. (CCH) ¶ 9972.

109. *Id.* ¶ 5, Common Mkt. Rep. (CCH) ¶ 9972, at 10,076-77.

110. *Kaiser/Estel*, discussed in COMM'N, NINTH REPORT ON COMPETITION POLICY ¶ 131 (1980).

the two founder firms, Estel, would totally and definitively disappear from the aluminium market, but does not reveal what the Commission's conclusions were in relation to the other parent.

In most cases, joint ventures failed the first test because the parent companies were actual or potential competitors on the joint venture's market. In *De Laval/Stork* the parents remained on neighbouring product and geographical markets, and there were no insurmountable barriers to their return to the joint venture's market. In *Kewa*,¹¹¹ a case concerning the formation of a joint venture by Bayer, Hoechst, Gelsenberg and Nukem, the four parents were held to be potential competitors on the joint venture's market although they had not theretofore been active on it. In the two *Vacuum Interrupters* cases,¹¹² it was found that the parents had the technical and financial resources that would enable them to enter the market of the joint venture. *Rockwell/Iveco*¹¹³ concerned a joint venture between parents that, prior to the agreement setting it up, already manufactured the products that the joint venture was to produce in the future and that, because of other interests retained by them, could return to this market in the future.

Those joint ventures that satisfy the first test still have to negotiate the exceedingly difficult hurdle of the second: the pooling of certain areas of business must not weaken competition in areas outside the field of the joint venture. Thus, if the parents remain competitors in other areas, and particularly in respect of related products, these must be, as they were in *SHV/Chevron*, "technically and economically distinct from the market in which the joint venture operate[s] and independent of that market."¹¹⁴

In *Bayer/Gist-Brocades*,¹¹⁵ the Commission opposed the formation of joint ventures to which the parents would have transferred their facilities for the manufacture of two products, raw penicillin and an intermediate product. One of the Com-

111. *Kewa*, O.J. L 51/15 (1976), Common Mkt. Rep. (CCH) ¶ 9807.

112. *Vacuum Interrupters*, O.J. L 48/32 (1977), Common Mkt. Rep. (CCH) ¶ 9926; O.J. L 383/1 (1980), Common Mkt. Rep. (CCH) ¶ 10, 296.

113. O.J. L 224/19 (1983), Common Mkt. Rep. (CCH) ¶ 10,509.

114. COMM'N, SIXTH REPORT ON COMPETITION POLICY ¶ 56 (1977).

115. *Bayer/Gist-Brocades*, O.J. L 30/13 (1976), Common Mkt. Rep. (CCH) ¶ 9658.

mission's reasons for objecting was that, in view of the economic importance of earlier production stages, the parents' participation in the joint venture would have led to cooperation between them on the market for processed penicillin and final products, where they remained competitors.

The Commission seems to have continued its insistence on the importance of markets other than that on which the joint venture will operate in the recent case of *Himont*.¹¹⁶ In that case, the joint venture represented a pooling of the parents' assets in the polypropylene sector. Under the agreements as originally drafted, Himont was to engage in the production of polypropylene resins (worldwide) and in polypropylene fibre production (in the EEC). Both parents—Hercules and Montedison—were to retain some of their capacity in certain areas of the polypropylene sector downstream of the joint venture's resins market. Montedison was to remain on an upstream market, and Hercules on the fibres market in the U.S. The Commission asked for modifications, and under the new version of the agreements Hercules and Montedison "abandoned all direct activities within the EEC in the downstream market of Himont."¹¹⁷ Himont's activities were reorganized so that they no longer included fibre production. There is no discussion of what happened in relation to Montedison's upstream activities, but the Commission concluded that the parent companies no longer operated in sectors related to that of the joint venture "except for activities of minor economic importance in relation to Himont's operations."¹¹⁸ There was also no longer any coincidence between the parents' activities and those of the joint venture.

In this case, however, the Commission's conclusion that the creation of the joint venture did not fall under Article 85 was also based upon a singular (and apparently new) development. To persuade the Commission to view the joint venture as a partial merger, the parties agreed to alter its fifty-fifty nature; 20% of Himont's common stock was floated to the pub-

116. This case did not lead to a formal decision, but the Commission issued a press release on March 26, 1987. Comm'n Press Release, IP(87) 128, Common Mkt. Rep. (CCH) ¶ 10,870.

117. *Id.* at 12,109.

118. *Id.* at 12,110.

lic.¹¹⁹ The Commission apparently felt that this gave it a desirable independence from its parents. It is not clear, however, how a company, owned by its parents as to 80% of its stock, can be seen as independent of them in any real sense, and in the absence of a reasoned decision setting out the Commission's thinking, it is impossible to know whether yet another taxing requirement is to be added to the two already outlined.

C. Problems with the Tests

It is clear that the Commission's tests to establish whether a "partial merger" may be said to have taken place are extremely difficult to satisfy. It may also be asked whether they are logically directed at identifying a particular category of joint ventures that are in reality mergers: what, after all, has a structural change on one market to do with deciding whether a pooling of resources on another market is in fact a merger? Even the requirement that the parent companies should have irreversibly withdrawn from the joint venture's market can only be understood in the context of the assumption that joint ventures have to be rigidly divided into two different categories, some being mergers and others restrictive agreements. Otherwise it would seem possible to acknowledge the essentially structural (or merger-like) nature of the operation whereby the joint venture is set up, whether or not the parents remain potential competitors, and nevertheless to inquire whether, apart from these structural aspects, restrictive agreements or understandings have been entered into.

Apart from the narrowness and problematic logic of the "partial merger" tests, their application can give rise to a considerable degree of confusion. Thus, for instance, a number of the cases referred to above, in particular *Kewa*, *Rockwell/Iveco*, and *Vacuum Interrupters*, show that there is a dual purpose in the "potential competition" criterion: before establishing that parent companies remain competitors after the formation of the joint venture, and that therefore no merger has taken place, it is necessary to show that they were at least potential competitors beforehand. But the tenor of the decisions, which is reflected in all the cases since *De Laval-Stork*,¹²⁰ is such that this

119. *Id.* at 12,109.

120. See Mitchell Cotts/Sofiltra, O.J. L 41/31 (1987), Common Mkt. Rep. (CCH)

inquiry is made primarily in order to establish simply whether the parents could have entered the joint venture's market themselves, so that their failure to do so constitutes a loss of competition on that market.

Thus, in *Rockwell/Iveco* the joint venture was founded to manufacture and sell rear-drive axles for heavy commercial vehicles. Since, prior to the agreement, both parents had manufactured this product, the supply structure of the market was found to be altered by the formation of the joint venture because it was judged that the parents had forgone the opportunity of manufacturing individually the products in question and selling them in competition with one another.

To the difficulty of keeping separate in one's mind these different uses of the concepts of "competition" and "potential competition" is added a further puzzlement, also illustrated by *Rockwell/Iveco*: how to reconcile the conclusion that a competition loss has resulted from the replacement of two enterprises by one with the Commission's other conclusion—that the parents remained potential competitors. Were there (at least potentially) three competitors on the market, or only one? Perhaps this difficulty can be resolved textually by answering that there remained three *potential* competitors, but the Commission's concern was that in all likelihood two of them would not compete. That still leaves the substantive question, however, whether—if it was extremely unlikely that the parents would compete with the joint venture and therefore with one another—it would not have been reasonable to treat them as having effectively merged all their interests in the area of the joint venture. In other words, it seems unsatisfactory—and contrary to the Commission's declared policy—to find that parent companies have withdrawn from the market and will in all probability not return, and at the same time to deny that a merger has taken place.

This apparent contradiction also appears in *De Laval/Stork*, *GEC/Weir*, and *Langenscheidt/Hachette*, since in all three

¶ 10,852; *Optical Fibres*, O.J. L 236/30 (1986), Common Mkt. Rep. (CCH) ¶ 10,813; *Amersham Buchler*, O.J. L 314/34 (1982), Common Mkt. Rep. (CCH) ¶ 10,431; *Langenscheidt/Hachette*, O.J. L 39/25 (1982), Common Mkt. Rep. (CCH) ¶ 10,350; *Sopelem/Vickers*, O.J. L 70/47 (1978), Common Mkt. Rep. (CCH) ¶ 10,014; *GEC-Weir Sodium Circulators*, O.J. L 327/26 (1977), Common Mkt. Rep. (CCH) ¶ 10,000.

cases the Commission found that the supply structure had been altered by the replacement of two enterprises by just one, and yet did not treat them as cases of merger. This could be interpreted as a further illustration of the Commission's restrictive attitude to the characterization of joint ventures as partial mergers.

D. *The Result*

In reality, however, the problem of confusion, like those of the narrowness and lack of consequence of the tests applied, derives from the fact that the Commission has been grappling with the difficulties inherent in a situation in which, on the one hand, it has felt constrained from applying Article 85 to mergers as such, while on the other the competitive disadvantages that it perceives in joint ventures derive largely from structural considerations. In the result, it has defined "partial mergers" as a very small category, and then gone on to apply Article 85 to all other joint ventures largely in a spirit of concentration control. Thus, some of the inquiries the Commission makes under Article 85(1) are as follows:

1. Will the establishment of the joint venture lead to a reduction in the number of competitors on that market? Or to a diminution of competitive enthusiasm? Although the Commission usually says that a parent will never compete with its joint venture, it nevertheless appears sometimes to conclude that the parents will continue to be present on the joint venture's market but that their participation in the joint venture will lead them to coordinate their own conduct, for example, *WANO Schwarzpulver*¹²¹ and *GEC/Weir*.¹²²
2. Will there be a reduction of competition on other markets as a result of the parents' cooperation in the joint venture?
3. Will third party competition be affected, for example, by foreclosure of market opportunities?

121. *WANO Schwarzpulver*, O.J. L 322/26 (1978), ¶ 2(a), Common Mkt. Rep. (CCH) ¶ 10,089.

122. *GEC/Weir Sodium Circulators*, O.J. L 327/26 (1977), ¶2(a)(i), Common Mkt. Rep. (CCH) ¶ 10,000, at 10,136.

4. Will entry barriers be raised?

Under Article 85(3) the Commission continues its structural analysis on the basis of the questions whether the restriction of competition involved in the joint venture is indispensable to the benefit to be achieved¹²³ and whether the agreement affords the parties the possibility of eliminating competition in respect of a substantial part of the products in question.¹²⁴ These questions enable the Commission to examine, again, whether the parent companies would have entered the market in the absence of the joint venture, whether the benefits of the joint venture could not be achieved by some other arrangement that is regarded as less likely to prejudice patterns of competition, and whether—in view of the number of firms, competing technologies, and so on—the market strength of the joint venture is likely to be excessive.

What is noteworthy in this development is the *structural* nature of the analysis. It must sound entirely normal to an American audience to hear of the Commission inquiring whether the formation of a joint venture is likely to lead to a loss of competition in the sense that, without the joint venture, one or both parents might have entered the market alone. Nevertheless, it should be remembered that in the United States that familiar process of analysis is carried out under the merger rationale of Section 7 of the Clayton Act.¹²⁵ The achievement of the Commission in this field is that, without merger control provisions, and in spite of the theory that it does not apply Article 85 to joint ventures that are really mergers, it has developed its reasoning in such a way as to allow it effectively to exercise a kind of merger control on the basis of a cartel prohibition.

This result, however, is not without its disadvantages. Apart from the problems already outlined, it means that virtually all joint venture agreements between competitors or potential competitors are brought under the prohibition of Ar-

123. EEC Treaty, *supra* note 4, art. 85(3)(a), 1973 Gr. Brit. T.S. No. 1 at 32-33, 298 U.N.T.S. at 48.

124. *Id.*, art. 85(3)(b).

125. Ch. 323, 38 Stat. 670, 671-72 (1914) (current version at 15 U.S.C. § 18 (1982 & Supp. IV 1986)); *see, e.g.*, *Yamaha Motor Co. v. Federal Trade Comm'n*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963), *vacated*, 378 U.S. 158 (1964), *on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd per curiam*, 389 U.S. 308 (1967).

ticle 85 because of predictions as to the likely effects of their existence on the competitive structure. These types of estimations, when applied to mergers in jurisdictions that have merger control laws, are never used to outlaw all mergers, even between competitors. It is accepted that a merger leaves only one operator on the market where before there were two or more, and this phenomenon is not regarded as unlawful. It is only when an unacceptable degree of market concentration results from a merger that it is prohibited. This would also be the case under the proposed Regulation on Control of Concentrations. Yet in relation to joint ventures, at least where the parents are potential competitors, this type of analysis leads to a prohibition in principle under Article 85(1), regardless of market strength and of whether the competitive structure is damaged by the accumulation of too much power. This imbalance seems curious, not to say harsh.

A further difficulty lies in the nature of Article 85: being a cartel prohibition that allows for the possibility of exemption of restrictive agreements where they produce benefits that outweigh the advantages of free competition, Article 85 is not ideally suited to the "balancing" analysis carried out in joint venture cases, whereby in effect the Commission assesses the relative competitive benefits of two different structural situations (the market with and without the joint venture). Article 85's two-tiered approach, under which an agreement has first to be found to be prohibited under paragraph 1 before it can be exempted under paragraph 3, leads to odd results in the context of joint ventures. Thus, in order to bring a joint venture agreement under Article 85(1), the Commission has to find that it results in a loss of competition because the parents could have entered the market separately. But in granting an exemption, in order to say that the agreement is indispensable to the benefits to be achieved, the Commission generally concludes that the parent companies would not have been likely to enter the joint venture's market alone,¹²⁶ or at least that they would not have been as dynamic or successful as the joint ven-

126. See, e.g., Langenscheidt/Hachette, O.J. L 39/25 (1982), Common Mkt. Rep. (CCH) ¶ 10,350; GEC/Weir Sodium Circulators, O.J. L 327/26 (1977), Common Mkt. Rep. (CCH) ¶ 10,000; Vacuum Interrupters, O.J. L 48/32 (1977), Common Mkt. Rep. (CCH) ¶ 9926.

ture.¹²⁷ This begs the question as to how real the "potential competition" between the parents was in the first place. It seems a pity that the "competition loss" should be found to be a competition gain only at the exemption stage, given the small number of agreements that are likely to receive formal exemptions and the problems of civil liability and nullity connected with the formal illegality of all the others.

Commission statements in the last couple of years have tended to emphasize the generally pro-competitive nature of joint ventures, recognizing them as positive structural adjustments to the requirements of the market place.¹²⁸ There seems to be a general acceptance that too many of them have been outlawed.¹²⁹ Concrete recognition of their real nature and merits could consist in drawing a distinction between the agreement to establish a joint venture and restrictive obligations that may accompany that agreement.

VI. RECENT INDICATIONS IN RELATION TO MERGERS

It will be recalled that in the 1966 Memorandum the Commission concluded that Article 85 did not apply to agreements for the sale and purchase of shares. However, two cases decided in 1984 indicate that the Commission's view is no longer so straightforward, and that the approach it has adopted in joint venture cases has also filtered through to the general area of mergers. Moreover, the judgment of the Court of Justice in the *Philip Morris* case indicates that Article 85 may apply at least to some such agreements.

127. See, e.g., *Rockwell/Iveco*, O.J. L 224/19 (1983), Common Mkt. Rep. (CCH) ¶ 10,509; *Amersham Buchler*, O.J. L 314/34 (1982), Common Mkt. Rep. (CCH) ¶ 10,431; *Sopelem/Vickers*, O.J. L 70/47 (1978), Common Mkt. Rep. (CCH) ¶ 10,014; *De Laval/Stork*, O.J. L 215/11 (1977), Common Mkt. Rep. (CCH) ¶ 9972.

128. COMM'N, THIRTEENTH REPORT ON COMPETITION POLICY ¶ 53 (1984); Sutherland, *Towards Positive Guidelines on Joint Ventures*, Remarks at Eighth Annual Competition Law Conference, European Study Conferences (Brussels, Nov. 7, 1985) [hereinafter Sutherland Speech] (available at the *Fordham International Law Journal* office).

129. Thus the declared intention to be "realistic" in relation to findings of potential competition, COMM'N, THIRTEENTH REPORT ON COMPETITION POLICY ¶ 55 (1984), and, even more telling, Commissioner Sutherland's question, "Have we stretched Article 85 too far?", Sutherland Speech, *supra* note 128, at 17.

A. Mecaniver/PPG

The Commission decision in *Mecaniver/PPG*¹³⁰ concerned the purchase by PPG, an American producer of flat glass already present on the EEC market, of an 81% holding in Boussois, a French glass company, as well as controlling interests in seven export sales companies. The Commission treated the matter as a "transfer of a business"¹³¹ (from the previous owner Mecaniver, a member of the BSN Group) and granted negative clearance. What is interesting, however, is that it did so in terms that implied that even a share purchase agreement may fall under Article 85(1) in certain circumstances. It stressed that the minority shareholding retained by Mecaniver in Boussois did not give rise to any possibility of its influencing Boussois's competitive behavior, and that its relatively small shareholding in another glass company did not give it control there either.¹³² The Commission's concern seems to have been to ensure that there could be no joint control of Boussois by PPG and Mecaniver (presumably because this might have led them to coordinate their behavior elsewhere) and that Mecaniver did not simultaneously have control or influence in more than one glass undertaking, the competitive behavior of which it could then have coordinated.

The latter point is particularly striking. The Commission seems to be saying that precisely a merger phenomenon (the possibility of determining the behavior of companies in which an undertaking has majority shareholdings, or other forms of control) would bring an otherwise innocent agreement under Article 85. The implication is that share purchase agreements will escape Article 85 only if they do not give rise to structural situations in which companies might tend to coordinate their behavior, even if such coordination is the result of merger.

B. Philip Morris

*Philip Morris*¹³³ originally concerned an agreement under which Rembrandt, a South African firm, sold to Philip Morris

130. *Mecaniver/PPG*, O.J. L 35/54 (1985), Common Mkt. Rep. (CCH) ¶ 10,650.

131. *Id.* ¶ 13, Common Mkt. Rep. (CCH) ¶ 10,650, at 11,545-8.

132. *Id.* ¶ 14, Common Mkt. Rep. (CCH) ¶ 10,650, at 11,545-9.

133. Discussed in COMM'N, FOURTEENTH REPORT ON COMPETITION POLICY §§ 98-100 (1985).

("PM"), a U.S. corporation with substantial interests in the cigarette industry, one half of its shares in its wholly owned subsidiary, Rothmans Tobacco Holdings Ltd. ("RTH"), which in turn held a controlling interest in Rothman's International P.L.C. ("RI").¹³⁴ PM and Rembrandt also entered into a partnership agreement providing for cooperation in the conduct of RI's affairs.¹³⁵ The subsidiaries of RI and PM are direct competitors on the oligopolistic EEC cigarette market, with RI having a market share of about 15%, and PM between 12% and 14%. As a result, therefore, one competitor now had a substantial holding in another.

Because of the complete parity between Rembrandt and PM on the board of RTH, which in turn controlled RI, it seemed that PM would be in a position to influence RI's behavior to a considerable degree. The Commission took the view that, because of the possibility of controlling RI (with Rembrandt), and because of its financial interest in RI, PM would be unlikely to compete with it in as thoroughgoing a manner as would otherwise be the case.¹³⁶ It also felt that PM's shareholding and influence would prevent RI from competing vigorously against PM.¹³⁷ The Commission therefore issued a Statement of Objections saying that, in all the circumstances, the agreement providing for the transfer of equity capital to PM fell under Article 85(1).¹³⁸ It also considered that Rembrandt, through RI, held a dominant position in the Benelux countries and that the agreements gave rise to an infringement of Article 86 by effectively neutralizing PM as a competitor of RI (since it was seen as unlikely that PM would compete with a company it controlled), thereby strengthening Rembrandt's dominant position on a substantial part of the Common Market.¹³⁹

After various stages of the administrative procedure had been completed, the companies involved agreed to change their agreements.¹⁴⁰ Under the new agreements, PM no

134. *Id.* ¶ 98.

135. *Id.*

136. *Id.* ¶ 99.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

longer held any share in RTH; instead, Rembrandt transferred to it a direct holding in RI, representing 24.9% of the voting rights (though 30.8% of the capital) in that company.¹⁴¹ Rembrandt resumed complete ownership of RTH, and held some 44% of the votes in RI. The partnership agreement was also abrogated.

In these new circumstances, the Commission decided that there were no longer grounds for regarding the agreements as an infringement of either Article 85(1) or Article 86.¹⁴² Rembrandt was regarded as being once again in a position to exercise effective control over RI without reference to PM. PM had become no more than a minority shareholder with only the influence over RI that its voting rights of 24.9% gave it. PM also undertook not to have any representatives on the board or any management body of RI. The Commission was no longer persuaded, in the new factual situation, that PM's having a substantial shareholding in RI would prevent it from competing.¹⁴³ As for Article 86, once the relationship of control or decisive influence over RI had been removed, so that it was no longer possible to regard it as likely that PM would forbear from competing with RI, the Commission thought it was impossible to say that the dominant position held by Rembrandt (through RI) would be strengthened.¹⁴⁴

The Commission's final decision entailed the rejection of three complaints it had received from competitors of PM.¹⁴⁵ Two of these competitors appealed to the Court of Justice against the Commission's (unpublished) decisions rejecting their complaints. Before examining the Court's judgment, it is interesting to note the essence of the Commission's approach to the agreements in question.

In relation to the original agreements, the Commission could have concluded that the kind of control over RI's affairs that PM was likely to have would give rise to a concentration. In that way, the fact that RI's and PM's affairs would be run in tandem would have seemed no more than the normal outcome of a merger operation.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* ¶ 100.

Alternatively, if it was not satisfied that a sufficiently clear degree of control existed, it could simply have reverted to its earlier view that Article 85 does not apply to an agreement to purchase shares. That conclusion need not have been upset by the existence of the partnership agreement, since this was an agreement concluded between shareholders about the management of their respective holdings and not an agreement between undertakings in their capacity as undertakings on the cigarette market. It might have been prompted in this direction by the fact that the circumstances of the case indicated at least a possibility that PM would wish to purchase further holdings in RI at a later date; if at that point a merger took place, which would be beyond the reach of Article 85, it might be thought odd if the earlier agreement (to purchase the first batch of shares) had been said to fall afoul of that provision.

On the contrary, however, in relation to the original agreements, the Commission's approach was similar to that which it adopts in relation to joint ventures: it regarded it as unlikely that a company that had made a large investment in another, and that was in a position (jointly) to control that other, would continue to compete wholeheartedly against it. It also focused on the opportunities PM and RI would have to coordinate their conduct on the market. This is reminiscent of the idea that parent companies will coordinate their own behavior as a result of cooperating in the context of the joint venture, except that here the coordination would have been between parent and child. Although it placed great emphasis on the position of strength that PM occupied in relation to RI, and the likelihood that this would lead to coordination of their activities, there was no hint in the Statement of Objections that the Commission would regard this as a merger (or "partial merger") operation.

Similarly, in relation to the final agreements, where there was no joint venture aspect, the Commission's approach was not to say simply that Article 85 does not apply to share purchase agreements, but rather to emphasize PM's new status as a mere minority shareholder and the lack of incentive under the new arrangements for Rembrandt to coordinate with PM in exercising its power of control over RI. As to the possibility that PM would eventually take over RI, again there was no indication that this would be regarded as beyond the scope of Arti-

cle 85; on the contrary, the implication seemed to be that, if this should happen, Article 85 might then become applicable. The relevant passage of the decision reads as follows:

While these provisions [certain rights of first refusal] give PM a possibility of modifying in the future its status as a minority shareholder in order to obtain control of RI, their existence does not at present have the effect of distorting competition within the meaning of Article 85.¹⁴⁶

In its judgment, the Court decided all the issues in favor of the Commission. On the facts of the 1984 agreements, the Court held that the Commission had been justified in taking the view that there was no infringement of Articles 85 or 86. However, in the course of arriving at this conclusion the Court made a series of statements the analysis of which is not easy.

First, the Court made it clear that "the main issue in these cases is whether and in what circumstances the acquisition of a *minority shareholding* in a competing company may constitute an infringement of Articles 85 and 86 of the Treaty."¹⁴⁷ Furthermore, the Court went on to predicate the rest of the judgment (at least as far as Article 85 was concerned) on the fact that the companies in question had "*remained independent* after the entry into force of the agreements."¹⁴⁸ One might therefore have expected merger-type situations to be excluded from the scope of the judgment.

However, the Court went on to develop guidelines to be applied in order to determine whether an agreement for the acquisition of shares is caught by Article 85.¹⁴⁹ At this point, it referred to a number of factors that would normally be thought to fall squarely within the merger context. The Court referred to the possibility that an acquisition of shares in a competitor might "serve as an instrument for influencing the commercial conduct of the companies in question."¹⁵⁰ It also referred to the investigating company acquiring legal or *de facto*

146. Comm'n, unpublished decision, ¶ 24.

147. *British American Tobacco Co. Ltd. & R.J. Reynolds Industries Inc. v. Commission*, Joined Cases 142 and 156/84, 1987 E.C.R. —, —, ¶ 30, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761 (emphasis added).

148. *Id.* at —, ¶ 31, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761 (emphasis added).

149. *Id.* at —, ¶¶ 36-40, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761.

150. *Id.* at —, ¶ 37, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761.

control of the commercial conduct of the other company.¹⁵¹ The Court speaks of an agreement giving the investing company "the possibility of reinforcing its position at a later stage and taking effective control of the other company."¹⁵²

Were it not for the apparent limitation of the judgment to a minority acquisition fact situation,¹⁵³ it might have been thought that the Court was laying down a new principle according to which Article 85 applies to any agreement by which one undertaking acquires a holding in another, competing undertaking where that holding has, or is likely to have, anti-competitive effects. An agreement whereby one undertaking obtained a majority interest in another would therefore be covered. However, the indications that the Court did not intend to go so far are reinforced by the dictum of the Court to the effect that the Commission decisions rejecting the complaints of R.J. Reynolds and British American Tobacco "do not lay down new principles but are limited essentially to an examination of the special features of the agreements in question."¹⁵⁴ Now the decision clearly indicated the Commission's view that Article 85 could apply to share purchase transactions between competitors, a view that was certainly not uncontroversial. Yet the Court seems to have considered that the question of the applicability of Article 85 to share purchase agreements as such did not give rise to any great new considerations of principle. It does not seem possible that it could have thought the same in relation to applying Article 85 to merger-type agreements. Therefore, in view of the indications that the Court intended to decide the case on its facts, and that it did not consider itself to be establishing new principles of any magnitude, it would be unwise to assume that the *Philip Morris* judgment can be applied to merger-type agreements.

It must be conceded that the result indicated above seems paradoxical; a minority acquisition by a competitor would be caught by Article 85, but not a takeover. The Court would thus appear to have singled out for the application of Article 85 a category of cases in which one company obtained effective

151. *Id.* at —, ¶ 38, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761.

152. *Id.* at —, ¶ 39, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761.

153. *Id.* at —, ¶¶ 30-31, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761.

154. *Id.* at —, ¶ 71, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,766.

control of another through a minority shareholding, and in which the companies therefore remained formally separate in structure. At first sight it is hard to see what the relevance of formal "independence" could be, if in fact one company controlled the other, or why it should matter whether the control was exercised by a blocking minority shareholding or an outright majority holding. It also seems odd that an agreement allowing for an ultimate takeover should fall under Article 85 if the takeover agreement itself would not. A possible explanation in this regard is that the Court considered the *Continental Can* doctrine to be in need of completion; in this perspective, Article 85 could be applied to agreements preparatory to a takeover, and Article 86 to the takeover itself where that had the result of eliminating residual competition.

It cannot be pretended that this judgment leaves the situation very clear in relation to the application of Article 85 to share purchase transactions between competitors. As for merger-type situations, not only do all the objections to the application of Article 85 hold good, but the Court seems to have hesitated, for the moment at least, to apply Article 85 to such transactions.

CONCLUSION

It is hard to avoid the conclusion that the absence of a power of merger control has given rise to unsatisfactory developments in the area of mergers and partial mergers. A lawyer trying to advise a client in this context is faced with a formidable task; not only are the signs from the Commission often difficult to reconcile but also there is now a particularly difficult judgment of the Court to be construed. In relation to Article 86, the situation is less impenetrable, but it cannot be pretended that it is satisfactory, or that anything less than a specific and clear merger control provision can lead to a comprehensive resolution of the problems in this field.