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Abstract

This Article deals with two main issues. One is the division of powers between the European Economic Community and the Member States with regard to merger control after September 21, 1990. The other is the possible application, by the Commission of the European Communities or by national authorities, of Article 85 and 86 of the Treaty Establishing the European Economic Community to mergers covered by Regulation No. 4064/89. The Article casts a brief look at how the dividing line between merges and operations which do not qualify as mergers within the sense of article 3 of the Regulation will be treated in the future.

JURISDICTIONAL ISSUES: THE EEC MERGER CONTROL REGULATION, MEMBER STATE LAWS, AND ARTICLES 85 AND 86†

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INTRODUCTION

The European Economic Community (the "EEC" or the "Community") Council Regulation No. 4064/89 (the "Merger Control Regulation" or the "Regulation")[1] has confronted competition lawyers with quite a few riddles related to its interpretation and application to mergers falling within its scope. These have been dealt with in other papers presented at the 1990 Fordham Corporate Law Institute Conference.[2] In addition, the Regulation has raised a number of problems in the fields adjacent to Community merger control in a vertical as well as in a horizontal sense.

This Article deals with two main issues that arise in the latter respect. One is the division of powers between the Community and the Member States with regard to merger control after September 21, 1990. The other is the possible application, by the Commission of the European Communities (the

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1. Council Regulation No. 4064/89, O.J. L 395/1 (1989), Common Mkt. Rep. (CCH) ¶ 2839, corrected version in O.J. L 257/13 (1990) [hereinafter Merger Control Regulation].

2. *See* Holley, *Ancillary Restrictions in Mergers and Joint Ventures*, in 1990 FORDHAM CORP. L. INST. ch. 20 (B. Hawk ed. 1991); Jones, *The Scope of Application of the Merger Regulation*, in 1990 FORDHAM CORP. L. INST. ch. 18 (B. Hawk ed. 1991), *also published as* Jones, *The Scope of the Merger Control Regulation*, 14 FORDHAM INT'L L.J. 359 (1990-1991); Langeheine, *Substantive Review Under the EEC Merger Regulation: An Official Perspective*, in 1990 FORDHAM CORP. L. INST. ch. 22 (B. Hawk ed. 1991); Lever, *Substantive Review Under Merger Regulation: A Private Perspective*, in 1990 FORDHAM CORP. L. INST. ch. 23 (B. Hawk ed. 1991); Overbury, *Procedures and Enforcement Under EEC Merger Regulation*, in 1990 FORDHAM CORP. L. INST. ch. 17 (B. Hawk ed. 1991).

"Commission") or by national authorities, of Articles 85 and 86 of the Treaty Establishing the European Economic Community (the "EEC Treaty" or the "Treaty")[3] to mergers covered by the Regulation.[4] Jurisdictional issues between the Community and third countries with regard to merger control shall not be examined in this Article. Neither does the Article address the question of the dividing line between mergers and operations which do not qualify as mergers within the sense of article 3 of the Regulation. The Article does, however, cast a brief look at how these other operations will be treated in the future.

I. *DIVISION OF POWERS BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE MEMBER STATES—A CONSTITUTIONALLY UNFINISHED BUSINESS*

A. *Division of Powers in General*

The EEC Treaty[5] is the centerpiece of what might be termed the Community's Constitution. The Treaty does not provide for a general rule as to the division of powers between the Community and the Member States, but rather confers a number of specific powers upon the Community which are defined in greater or lesser detail in various Treaty provisions. This becomes clear, in particular, from a reading of Article 4. According to this provision, "[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty."[6] In legal literature, this phenomenon has been described as a system of "attributed powers."[7]

No comprehensive enumeration exists of areas in which the Community has jurisdiction. Article 3 gives only rough

3. Mar. 25, 1957, arts. 85-86, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

4. It should be noted that the Merger Control Regulation uses the wider term "concentration," since it also applies to operations other than mergers in the strict sense (*e.g.*, partial mergers). Merger Control Regulation, *supra* note 1, art. 3 (1)(b). For reasons of conformity and simplification, this Article will use the term "merger" to refer to concentrations within the meaning of the Regulation unless indicated otherwise.

5. EEC Treaty, *supra* note 3.

6. *Id.* art. 4.

7. *See, e.g.*, P.J.G. KAPTEYN & P.V. VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 113 (2d Eng. ed., L. Gormley ed. 1989); H.P. IPSEN, EUROPÄISCHES GEMEINSCHAFTSRECHT 425 (1972).

guidance in this respect without attributing in itself any powers, as follows from the wording "as provided in this Treaty."[8] Instead, attributions of powers are dispersed over various chapters of the Treaty, each dealing with specific fields of action including agriculture,[9] free movement of persons,[10] services and capital,[11] transport,[12] and commercial policy.[13]

The Community's powers are not limited, however, to specific areas. The drafters of the Treaty were clearsighted enough to insert a number of general clauses granting the Community powers that are defined in functional terms. These clauses enable the Community to legislate when the creation or functioning of the common market is affected by divergent national laws[14] or if the achievement of another objective of the Community requires action at the Community level.[15] Legislation in areas other than those specifically designated by the Treaty is therefore not excluded. The functional link with the common market or with the objectives of the Community ensures, however, that even when acting under such general provisions the Community legislator does not trespass the boundaries established by the Treaty.

In addition to the competences outlined above, the Court of Justice of the European Communities (the "Court") has recognized implied powers of the Community, albeit in rare and narrowly defined cases. The Court has done so by referring to "a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."[16] Implied powers in this sense derive from a specific power which could not be reasonably applied without those powers. The use of implied powers consequently has to follow the procedural rules for the

8. EEC Treaty, *supra* note 3, art. 3.
9. *Id.* arts. 38-47.
10. *Id.* arts. 48-58.
11. *Id.* arts. 59-73.
12. *Id.* arts. 74-84.
13. *Id.* arts. 110-116.
14. *See id.* arts. 100 & 100a.
15. *See id.* art. 235.
16. Fédération Charbonnière de Belgique v. High Authority of ECSC, Case 8/55, 1956 E.C.R. 292, 299.

application of the specific power concerned. In this respect, implied powers are different from the gap-filling provision of Article 235, under which the Community can exercise additional powers that have not been explicitly provided for in the Treaty.[17] Furthermore, in the field of external relations, the Community's power to negotiate and enter into international agreements follows implicitly as a mirror effect from regulation of the area concerned, be it by virtue of a Treaty provision or by secondary Community law.[18]

This brief outline demonstrates that no definitive dividing line exists between the powers of the Community and those of the Member States. European integration is a dynamic process, and legislative powers can shift together with a changing socio-economic context, in particular where new challenges threaten the functioning of the common market or the achievement of the Community's objectives. For example, community environmental legislation could be formerly adopted only if it was linked to the common market concept and was mainly based on general clauses for lack of express powers. Constitutional developments have since caught up with political reality by granting explicit powers to the Community in the environmental field through an amendment to the Treaty in mid-1987.[19]

Apart from the difficulties of clearly delimiting *ratione materiae* the respective powers vested in the Community and the Member States, a further problem arises with regard to the nature of the Community's powers: are they exclusive or concurrent? In other words, are the Member States precluded from legislating in a field where the Community has not made use of its powers? Again, the Treaty is silent on this question. The Court, however, has been frequently called upon to resolve questions as to whether and to what extent concurrent national legislation is valid.

The Court's case law on this point varies with the subject matter. In general, the Court seems to assume that the Community's and the Member States' powers are concurrent. This

17. EEC Treaty, *supra* note 3, art. 235.

18. Commission v. Council (*In re ERTA*), Case 22/70, 1971 E.C.R. 263, 274, Common Mkt. Rep. (CCH) ¶ 8134, at 7525.

19. *See* EEC Treaty, *supra* note 3, arts. 130r-130t.

assumption is evident from the Court's approach to resolving a clash of conflicting Community and national norms.

In the 1964 case of *Costa v. ENEL*,[20] the Court established two basic principles relevant in this respect. It decided, first, that Community law takes precedence over subsequent and conflicting national legislation, and, second, that certain Treaty provisions are directly applicable—that is, they create individual rights that national courts must protect.[21]

These principles were further elaborated in the Court's *Italian Finance Administration v. Simmenthal ("Simmenthal II")* judgment,[22] where it stated that

> [i]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.
>
> Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.[23]

The Court's express reference to the "entry into force" of the Community provisions and to the "extent" of incompatibility indicates its preference for a system of concurrent powers.

In most cases of conflict between Community law and national laws, the Court immediately proceeds to examining

20. Case 6/64, 1964 E.C.R. 585, Common Mkt. Rep. (CCH) ¶ 8023.
21. *Id.*
22. Case 106/77, 1978 E.C.R. 629, Common Mkt. Rep. (CCH) ¶ 8476.
23. *Id.* at 643, Common Mkt. Rep. (CCH) ¶ 8476, at 8610.

whether the Community legislator intended to regulate exhaustively the subject matter in question. If so, there is no room for national legislation in the area concerned, even if the Community rules do not extend to all potential problems that may arise.[24] If, on the other hand, the Community legislator intended only partially to regulate the relevant matter, there is scope for national rules. Again, this approach indicates the Court's preference for a system of concurrent powers.[25]

There are exceptions to this approach with regard to the external relations of the Community, however, such as the common commercial policy. Here, the Court's reasoning was influenced by the fact that a common commercial policy *vis-à-vis* third countries would be compromised if Member States were allowed to continue in their role as independent actors. Consequently, the Court, in its *Opinion 1/75*, concluded that

> [i]t cannot therefore be accepted that, in a field such as that governed by the . . . common commercial policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere. The provisions of Articles 113 and 114 . . . show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible.[26]

The Community's powers in the field of common commercial policy, therefore, are to be generally regarded as exclusive. Similar reasoning has been adopted by the Court with regard to the Community's fisheries policy.[27]

At the same time, the common commercial policy is far from being all-embracing and complete. Member State treaties with third countries continue to exist, but they are only admissible if the Community has granted specific authoriza-

24. *See, e.g.*, Public Prosecutor v. Ratti, Case 148/78, 1979 E.C.R. 1629, 1642, Common Mkt. Rep. (CCH) ¶ 8569, at 8282.

25. *See* K. LENAERTS, LE JUGE ET LA CONSTITUTION AUX ETATS-UNIS D'AMERIQUE ET DANS L'ORDRE JURIDIQUE EUROPEEN 502 (1988) (setting forth detailed discussion of problem).

26. Opinion 1/75 (OECD), 1975 E.C.R. 1355, 1364, Common Mkt. Rep. (CCH) ¶ 8365, at 7643; *cf.* Commission v. Council, Case 22/70, 1971 E.C.R. 263, 276, Common Mkt. Rep. (CCH) ¶ 8134.

27. *Cf.* In re Kramer, Joined Cases 3, 4 & 6/76, 1976 E.C.R. 1279, Common Mkt. Rep. (CCH) ¶ 8372; Commission v. United Kingdom, Case 804/79, 1981 E.C.R. 1045, Common Mkt. Rep. (CCH) ¶ 8752.

tion. Furthermore, Article 115 expressly mentions the possibility of the Commission authorizing Member States to take—with regard to *intra*-Community trade—protective measures necessary to avoid, for example, deflections of trade that obstruct national measures of commercial policy "taken in accordance with this Treaty."[28] Again, this provision implies the concept of exclusive Community powers with respect to commercial policy. This concept was underlined by the Court in *Criel v. Procureur* ("*Donckerwolcke*"):[29]

> As full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113(1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community.[30]

In a more recent judgment relating to national export restrictions on crude oil, the Court has somewhat mitigated its exclusive powers approach in the field of commercial policy.[31] The Court regarded the exclusion of the product in question from the scope of application of the Council Regulation establishing common rules of export as "a specific authorization permitting the Member States to impose quantitative restrictions on exports of oil to non-member countries."[32] This reasoning, although formally adhering to the concept of specific authorization of national measures, comes very close to the exhaustivity test applied by the Court outside the field of commercial policy.

These decisions demonstrate that the Court's jurisprudence is mainly based on the concept of concurrent powers of the Community and of the Member States. Only in the fields of common commercial policy and common fisheries policy does the Court attribute exclusive competences to the Community. Even in these areas, however, the Court assumes that any lacunae could be filled by the Member States upon specific or implicit authorization by Community institutions.

The Court's approach seems reasonable and well-bal-

28. EEC Treaty, *supra* note 3, art. 115.
29. Case 41/76, 1976 E.C.R. 1921, Common Mkt. Rep. (CCH) ¶ 8398.
30. *Id.* at 1937, Common Mkt. Rep. (CCH) ¶ 8398, at 7192.
31. Bulk Oil v. Sun Int'l, Case 174/84, 1986 E.C.R. 559, Common Mkt. Rep. (CCH) ¶ 14,288.
32. *Id.* at 587, Common Mkt. Rep. (CCH) ¶ 14,288, at 16,809.

anced. It takes into account the Community's need to act with a maximum degree of uniformity in its relations with third countries, and at the same time leaves the Member States sufficient freedom to legislate in other fields not yet occupied by the Community. Member States are bound by the condition, however, that national measures must be compatible with the Treaty.

B. *Division of Powers in the Field of Competition Law*

In competition law, Community law and national laws exist alongside each other with no clear dividing line between them. Articles 85 and 86 require that a restrictive Community agreement, practice or abuse be one that "may affect trade between Member States."[33] This "interstate-trade" criterion is, nevertheless, far from providing definitive guidance as to which authority has jurisdiction in a given case.[34]

The Court, for example, has interpreted the interstate-trade clause rather extensively. In *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen*,[35] the Court held that an agreement which, taken individually, would only produce effects at the national level could nevertheless fall under Article 85 if Community jurisdiction were justified in light of economic and legal contexts.[36] The Court found it sufficient that the agreement or practice "appear[ed] to be capable of having some influence, direct or indirect, on trade between Member States."[37] Furthermore, the Court held that a cartel which extends only to the territory of one Member State, and of which all participants are only active in that State, could affect trade between Member States insofar as the agreement foresees mechanisms di-

33. *See* EEC Treaty, *supra* note 3, arts. 85-86.

34. *Cf.* Consten and Grundig v. Commission, Joined Cases 56 & 58/64, 1966 E.C.R. 299, 341, Common Mkt. Rep. (CCH) ¶ 8046, at 7652 (stating that "concept of an agreement 'which may affect trade between Member States' is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law").

35. Case 23/67, 1967 E.C.R. 407, Common Mkt. Rep. (CCH) ¶ 8053.

36. *Id.* at 415, Common Mkt. Rep. (CCH) ¶ 8053, at 7810. Such a situation could arise, for example, where a multitude of similar agreements existed which taken together affected trade between Member States.

37. *Id.*

rected against potential importers.[38] The question of whether trade between Member States is affected, consequently, has to be examined in light of each case.

Alternatively, there may be agreements or practices that are caught by both Articles 85 and 86 and the respective national competition rules. The Court dealt with this problem in *Wilhelm v. Bundeskartellant.*[39] In *Wilhelm,* German authorities applied their national antitrust legislation despite the Commission's having previously opened a proceeding to examine a violation of Article 85. The Court held that "[i]n principle the national cartel authorities may take proceedings also with regard to situations likely to be the subject of a decision by the Commission . . . so long as a regulation adopted pursuant to Art. 87(2)(e) of the treaty has not provided for otherwise."[40]

The Court thus accepted the idea of "parallel jurisdiction," which permits a dual procedure based on the same facts at both the Community and national levels. An agreement falling under both sets of rules does not necessarily have to clear a "double barrier," however, because the Council of Ministers of the European Communities (the "Council") has the power to adopt an implementing regulation under Article 87(2)(e), changing the system of parallel powers to one of exclusivity in favor of the Community. Such a system currently exists for the coal and steel sector, where the Community, according to the Treaty Establishing the European Coal and Steel Community (the "ECSC Treaty"),[41] has exclusive jurisdiction in competition matters.[42] More importantly, the Court held in *Wilhelm* that "th[is] parallel application of the national system . . . is permissible, but only insofar as it does not jeopardize the uniform application throughout the Common Market of the Community cartel rules or the full effect of the measures taken under such rules."[43]

The express recognition of the supremacy of Community

38. Societe Cooperative des Asphalteurs Belges (SC Belasco) v. Commission, Case 246/86, 1989 E.C.R. 2117.

39. Case 14/68, 1969 E.C.R. 1, Common Mkt. Rep. (CCH) ¶ 8056.

40. *See id.* at 14-15, Common Mkt. Rep. (CCH) ¶ 8056, at 7866.

41. Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

42. *Id.* arts. 65-66.

43. *Wilhelm*, Case 14/68, 1969 E.C.R. at 14, Common Mkt. Rep. (CCH) ¶ 8056, at 7866.

law in antitrust matters, which amounts in fact to something like a mitigated "double barrier" approach, has not eliminated all problems with regard to the relationship between Community law and national laws. In practice, difficulties arise mainly where there is a danger of conflicting decisions. If, for example, the Commission has established an infringement of Article 85, national authorities are precluded from exempting the agreement or practice in question. Things are rather more complicated in the reverse situation—for example, where the Commission has not raised any objections under Article 85 but a Member State wants to apply its national antitrust legislation to the case. Here, the Court has stated that a simple "comfort letter," by means of which the Commission declares its intent not to pursue the case under Article 85, does not preclude national authorities from applying national antitrust laws to the agreement in question.[44] The Court left open the question whether this principle also applies in cases where the Commission has expressly granted an individual or a block exemption. It is reasonable to assume, however, that such decisions are to be regarded as "positive action" on the part of the Commission which—according to *Wilhelm*—take precedence over national measures to the contrary.[45]

A jurisdictional sharing of antitrust matters is acceptable as long as the supremacy of the Community legal order and of the decisions taken thereunder are not questioned. The risk of conflicting decisions can be minimized by close cooperation between the Commission and the national cartel authorities. The few cases where the Court has dealt with conflicts of jurisdiction in this area indicate that cooperation has worked satisfactorily in the past. This "parallelism" has also contributed to a certain approximation in the interpretation and application of national antitrust laws.

Nevertheless, for the purposes of merger control the Community legislator has explicitly chosen a different approach in an attempt to avoid the obstacle of "double barriers" for the companies concerned.

44. Procureur v. Giry and Guerlain, Joined Cases 253/78 & 1-3/79, 1980 E.C.R. 2327, 2375, Common Mkt. Rep. (CCH) ¶ 8712, at 8542.

45. Wilhelm v. Bundeskartellant, Case 14/68, 1969 E.C.R. 1, 14, Common Mkt. Rep. (CCH) ¶ 8056, at 7866.

II. *JURISDICTION WITH RESPECT TO MERGER CONTROL*

A. *The Situation Before the Merger Control Regulation*

Unlike the ECSC Treaty,[46] the EEC Treaty does not contain any rules on merger control. Presumably, the Treaty's drafters did not necessarily regard a certain concentration process in sectors other than coal or steel as undesirable. Problems of merger control were first recognized by the Commission in 1966.[47] The Commission concluded that Article 85 would not provide an appropriate remedy, but also that it was not precluded from applying Article 86 (abuse of a dominant position) to certain merger cases.[48]

In *Europemballage and Continental Can v. Commission* ("*Continental Can*"),[49] the Court held that Article 86 was applicable to mergers in which a company already in a dominant position acquired a competitor and thereby eliminated the remaining competition in the market concerned.[50] The Court went a step further in its *British Amercian Tobacco Co. v. Commission* ("*Philip Morris*") judgment of 1987,[51] in which it declared Article 85 to be applicable to the taking of a minority interest in a competitor insofar as the taking gives rise to a coordination of competitive behavior.[52] Apart from these two particular antitrust situations, there was no merger control at the Community level. A particular situation existed (and continues to exist) in the coal and steel sector where—according to article 66 of the ECSC Treaty—the Commission had been granted exclusive competence to deal with mergers. Otherwise, national merger control laws apply: by 1989, legislation existed in France, Germany, Ireland, Spain, and the United Kingdom.

The surveillance of concentrations exercised by national authorities was necessarily limited to the assessment of possible negative effects on competition within the Member State.

46. ECSC Treaty, *supra* note 41.

47. EEC Studies: The problem of industrial concentration in the Common Market, Competition Series No. 3 (1966), *reprinted in* F. FINE, MERGERS AND JOINT VENTURES IN EUROPE annex G (1989).

48. *Id.* at 163-69.

49. Case 6/72, 1973 E.C.R. 215, Common Mkt. Rep. (CCH) ¶ 8171.

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

51. Joined Cases 142/84 & 156/84, 1987 E.C.R. 4487, Common Mkt. Rep. (CCH) ¶ 14,405.

52. *Id.* at 4577, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761-62.

Cross-frontier mergers could therefore be subject to multiple national scrutiny, putting a heavy burden on the companies concerned. In addition, the situation was difficult to reconcile with the idea of a Community-wide internal market to be achieved by the end of 1992. Together with the Commission's declared intention to use *Philip Morris* as an entry to EEC merger control, these factors finally created sufficient political pressure to bring about the Merger Control Regulation.

B. *The Situation Under the Merger Control Regulation*

1. Basic Principles

The Merger Control Regulation is based on several policy considerations: that mergers of a Community-dimension shall be subject to control by the Commission; that such mergers shall not be subject to any control at the national level, such as by the one-stop-shop principle; and that Articles 85 and 86 shall no longer apply to such mergers. As always, there are exceptions to these basic principles and, the Merger Control Regulation being the result of a political compromise between divergent national views, the exceptions are rather complex. On the one hand, Member States possessing national merger control instruments wished to retain the ability to exercise jurisdiction over operations that had a particular impact within their territory. Member States without merger control legislation, on the other hand, wanted the Commission to control certain mergers even if they were merely national and would not normally fall under the Regulation. Finally, Member States agreed in the Council that certain paramount and non-economic interests should override any Commission assessment of a merger having a Community dimension.

These principles and, more importantly, exceptions, shall be examined in more detail below by looking first at the situation with regard to mergers that meet the threshold requirements of the Regulation, and then at those mergers that are below the thresholds.

2. Mergers Falling Under the Regulation

Mergers fall within the scope of the Regulation if the undertakings concerned achieve certain turnover figures on a worldwide and Community-wide basis. In order for a merger to qualify, "the combined aggregate worldwide turnover of all the undertakings concerned [must be] more than ECU 5000 million," and "the aggregate Community-wide turnover of each of at least two of the undertakings concerned [must be] more than ECU 250 million."[53] Unlike under Articles 85 and 86, the division of powers between the Community and the Member States is not determined by an abstract criterion (*i.e.*, whether or not trade between Member States is affected), but rather by precise figures. The underlying idea is nevertheless the same: if certain thresholds are met, it is assumed that interstate trade is affected. Additionally, merger control at the Community level is subject to the condition that the structural changes in question have a negative effect on competition in at least a substantial part of the common market. EEC merger control thus forms part of "a system ensuring that competition in the common market is not distorted" which, according to Article 3(f) of the EEC Treaty, is one of the objectives of the Community.[54] This consideration in particular paved the way for establishing jurisdiction under Article 235.

The Regulation provides that the turnover figures necessary to assume the existence of effects on interstate trade can change with the degree of market integration. Moreover, the Commission considers the current turnover requirements to be set too high, and it plans to propose a reduction in accordance with Article 1(3).

a. Two-thirds Rule

The Regulation shall not apply where a merger with a Community dimension has its center of gravity in one Member State. If each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State, the authorities of this State shall have jurisdiction over the matter. The Member State in question may, however, request Commission involvement.[55]

The two-thirds rule is based on the consideration that

53. Merger Control Regulation, *supra* note 1, art. 1(2), O.J. L 257/13, at 16.
54. EEC Treaty, *supra* note 3, art. 3(f).
55. *See infra* notes 85-88 and accompanying text (discussing when Member State may make request of Commission).

mergers that mainly affect one national market and have a limited impact on the Community as a whole can be more adequately assessed in light of that country's merger legislation. This rule also expresses the principle of subsidiarity.

b. Legitimate Interest Clause

Article 21(2) of the Merger Control Regulation prohibits Member States from applying national competition legislation to any concentration that has a Community dimension. According to article 21(3), however, they may "take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law."[56] Furthermore, Member States may invoke a procedure whereby national public interests can be recognized by the Commission after an assessment of their compatibility with the general principles and other provisions of Community law. The national measures may not be taken before the Commission has issued a favorable decision.[57]

The insertion of this national interest provision forms part of the consideration that was given to the Member States when a system of merger control was adopted at the Community level. The clause is limited to certain sectors and, more importantly, to interests of a non-economic nature. The latter point becomes clear from the examples mentioned in article 21(3) and is confirmed by the interpretation of similar derogations in other fields of Community law by the Court.[58] In applying the clause in practice, the Commission will probably be cautious and will consider the fundamental Community principles of proportionality and non-discrimination.

The Commission underlined three main points in its interpretative statement to the Council minutes of article 21(3):

1) That the clause does not create new rights for Member

56. Merger Control Regulation, *supra* note 1, art. 21(3), O.J. L 257/13, at 24. The following are considered to be legitimate interests: public security, plurality of the media, and prudential rules. *Id.*

57. *See id.* (stating that "Commission shall inform the Member State concerned of its decision within one month of that communication").

58. *See, e.g.* Commission v. Italy, Case 7/61, 1961 E.C.R. 317, 327, Common Mkt. Rep. (CCH) ¶ 8001, at 7112 (stating that no "generic safeguard clause" was created).

States but is restricted to certain reserved powers relating to grounds other than those covered by the Regulation;
2) That the clause does not authorize mergers which the Commission has prohibited; and
3) That national measures may not be justified on the basis of considerations that the Commission itself must take into account when assessing a merger.

The potential risk of rendering a merger inoperable at the national level is thus lessened if the merger has already been cleared by the Commission.

c. Referral to Competent Authorities of Member States: The "German Clause"

There is still another exception to the Commission's exclusive competence to deal with mergers of a Community dimension. According to article 9 of the Regulation, certain cases that would normally fall within the Community's jurisdiction can be referred by the Commission to the competent authorities of the Member States.[59] This provision is generally regarded as a concession to Germany, which was particularly concerned about a loss of jurisdiction in cases that present problems in a national context.

Article 9 provides for a complex procedure that can only be roughly outlined in this Article. Within three weeks of receiving a copy of a Commission notification, a Member State may inform the Commission that a concentration threatens to create or to strengthen a dominant position, as a result of which effective competition would be significantly impeded in a market within that Member State. The market concerned must be one that presents all the characteristics of a distinct market, regardless of whether it is a substantial part of the common market or not.[60]

If the Commission considers that both a distinct market and the threat alleged by the Member States exist, it has two options: it can either deal with the case to maintain or restore effective competition, or it can refer the case to the competent authorities of the Member State concerned.[61]

59. Merger Control Regulation, *supra* note 1, art. 9, O.J. L 257/13, at 20.
60. *See id.* art. 9(2), O.J. L 257/13, at 20.
61. *See id.* art. 9(3)(a)-(b), O.J. L 257/13, at 20.

If the Commission does not share the Member State's views as to the existence of a distinct market and threat to competition, it is obliged under the Regulation to adopt a decision expressly refusing to refer the case to the Member State.[62] This decision is subject to appeal before the Court. The Court, upon request, may adopt interim measures allowing a Member State to apply its national competition law to the case.[63] Furthermore, a mechanism of implicit referral exists in cases where the Commission opens proceedings but does not issue a statement of objections within a certain time limit.[64]

It has been pointed out that the referral clause of article 9 was necessary in order to allow national authorities to safeguard competition on smaller markets.[65] Furthermore, it has been suggested that where the national market concerned does not constitute a substantial part of the common market, the Commission must refer the case to the competent authorities of the Member State[66] because it cannot issue a decision of incompatibility with articles 2(2) and 2(3), which only entrust the Commission with ensuring effective competition "in the common market or in a substantial part of it."[67] One could, however, defend the opposite view by considering that article 9(3)(a) of the Regulation constitutes a *lex specialis* to article 2 that expressly empowers the Commission to "restore effective competition on the market concerned," even where this market does not form a substantial part of the common market.[68]

Where the Commission has referred a case to the competent authorities of a Member State, these authorities apply national competition law despite the fact that the merger has a Community dimension. The Regulation specifies two requirements that must be met:

1) The Member State may only take measures strictly nec-

62. *Id.* art. 9(3), O.J. L 257/13, at 20.

63. *See id.* art. 9(9), O.J. L 257/13, at 20.

64. *See id.* art. 9(4)(b), O.J. L 257/13, at 20; *id.* art. 9(5), O.J. L 257/13, at 20.

65. Niederleithinger, *Das Verhäitnis nationaler und europaischer Kontrole von Zusammenschlussen*, 9 WIRTSCHAFT UND WETTBEWERB 721, 725 (1990).

66. Bechtold, *Die Grundzuge der neuen EWG-Fusionakontrolle*, 36 RECHT DER INTERNATIONALEN WIRTSCHAFT 253, 267 (1990); Neiderleithinger, *supra* note 65, at 727.

67. Merger Control Regulation, *supra* note 1, art. 2(2)-(3), O.J. L 257/13, at 17.

68. *Id.* art. 9(3)(a), O.J. L 257/13, at 20.

essary to safeguard or restore effective competition.[69]
2) The case must be decided within four months after referral by the Commission,[70] that is, within the same time-limits that apply on the Community level.[71]
Article 9(7) gives a rather detailed definition of the relevant geographic market. One may find it striking that one of the elements required for delimitation is that "conditions of competition [be] appreciably different" from neighboring areas. Because the Commission's policy over the past thirty or more years has been aimed at creating homogeneous conditions of competition throughout the Community, the question arises whether such differences still exist on today's common market. The second part of article 9(7), however, indicates that it is not the overall comparison between certain areas that counts. Instead, one must look at rather specific elements, such as the nature and characteristics of products, consumer preferences, appreciable differences of market shares, or substantial price differences between neighboring areas. With respect to these elements, the common market is still far from being uniform—and indeed might never be so. Member States may, consequently, demonstrate difficulties in a distinct reference market.

It is reasonable to assume, however, that the Commission itself will deal with cases where a substantial part of the common market is concerned, which should leave a rather limited number of cases to be considered for referral. In their joint statement to the Council minutes, the Council and the Commission noted that an application of article 9 should be confined to cases where competition interests in a Member State could not be adequately protected otherwise.[72]

d. Application of Articles 85 and 86

As discussed above, the Commission has applied Articles

69. *See id.* art. 9(8), O.J. L 257/13, at 20.
70. *Id.* art. 9(6), O.J. L 257/13, at 20.
71. *See id.* art. 10(3), O.J. L 257/13, at 20. It is difficult to predict the importance of article 9 referrals in practice. The discussions preceding the adoption of the Merger Control Regulation, however, suggest that requests for referral can be expected in particular from the British and German cartel authorities.
72. *See* Notes on Council Regulation (EEC) 4064/89, E.C. BULL., supp. 2/90, at 24.

85 and 86 to certain types of mergers and has been upheld by the Court.[73] Nevertheless, merger control under these provisions was imperfect and insufficiently covered relevant operations.[74] It was one of the declared intentions of the Regulation's drafters to remedy this situation by creating a "new legal instrument" to control mergers. Articles 85 and 86 could not simply be declared void with respect to mergers, however, because they form part of primary Community law and as such are immune from any subsequent change by an act of the Council.[75]

Article 22 only offers a partial solution to this dilemma. First, it provides that the Regulation alone should apply to mergers as defined in article 3 regardless of whether a merger meets the turnover threshold or not. Second, it repeals Regulation No. 17,[76] as well as the corresponding implementing regulations for the different transport sectors with regard to mergers.

It has been suggested that this partial revocation of the implementing regulations might be *ultra vires*, going beyond the power granted to the Commission under the gap-filling provision of Article 235.[77] In particular, article 22 deprives third parties of their right to bring complaints before the Commission or to rely directly on Article 85 before national courts.[78] There may be no effective control, therefore, with regard to mergers below the thresholds. These concerns seem exaggerated, however, because article 22 does not foreclose the application of Articles 85 and 86 to mergers. According to Article 89 of the EEC Treaty, the Commission must ensure respect for principles laid down in Articles 85 and 86 regardless of the existence of any implementing regulation and of any provision of the Merger Control Regulation. Article 89 is a

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73. *See supra* notes 49 & 51 and accompanying text.

74. *See* Merger Control Regulation, *supra* note 1, recital (6), O.J. L 257/13, at 14.

75. Primary Community law, such as the EEC Treaty, can only be modified by way of the procedure laid down in Article 236 of the EEC Treaty. Council Regulations, as secondary Community law, cannot be used to modify primary law.

76. Competition Regulation No. 17, 5 J.O. 204/62, O.J. Eng. Spec. Ed. 1959-1962, at 87, Common Mkt. Rep. (CCH) ¶ 2401 [hereinafter Regulation No. 17].

77. Venit, *The "Merger" Control Regulation: Europe Comes of Age . . . or Caliban's Dinner*, [1990] COMMON MKT. L. REV. 7, 15.

78. *See* Lord Bethell v. Commission, Case 246/81, 1982 E.C.R. 2277, 2291, Common Mkt. Rep. (CCH) ¶ 8858, at 8103.

transitional provision that was designed to enable the Commission to apply the substantive antitrust rules before Regulation No. 17 or other implementing regulations entered into force. When the Merger Control Regulation was adopted, however, the Commission made a declaration to the Council minutes pledging to refrain from applying Articles 85 and 86 to mergers below the thresholds originally proposed by the Commission.[79] It seems reasonable to assume that, below these thresholds, there would not be any Community competence because trade between Member States would not be affected.

Doubts have been expressed about the applicability of Article 89. It has been argued that this provision has lost its purpose by the adoption of the different implementing regulations and cannot, therefore, be automatically brought back to life by a partial repeal of those acts.[80] The main argument put forward in this respect is that Article 89 is to be read together with Article 88 of the EEC Treaty, which is to be effective "[u]ntil the entry into force of the provisions adopted in pursuance of Article 87." Because the Regulation lays down such provisions, Articles 88 and 89 are no longer operative.[81] This argument, however, is hardly convincing. First, it is at odds with the fundamental purpose of Articles 88 and 89, which is to ensure as far as possible the application of Articles 85 and 86 in the absence of appropriate implementing provisions. Second, the interpretation on which the argument rests would allow the Council to disapply Articles 85 and 86. If this interpretation were correct, it would be enough for the Council to adopt provisions purporting to implement Articles 85 and 86 for the rest of the economic sector concerned. Whatever may be the powers of the Council under other Treaty provisions,

79. The threshold figures are ECU 2 billion and ECU 100 million, respectively. For the thresholds ultimately adopted by the Regulation in article 3, see *supra* note 53 and accompanying text.

80. *See* Ministere public v. Asjes, Joined Cases 209-213/84, 1986 E.C.R. 1425 Grounds 52 ("in the absence of rules as referred to in Article 87 of the Treaty, Articles 88 and 89 continue to apply") and 58 ("Article 89 regulates the powers of the Commission during the period before the entry into force of the provisions referred to in Article 87"), Common Mkt. Rep. (CCH) ¶ 14,287.

81. F. Wijckmans, *One Stop (Shop) Principle and Articles 85 and 86 of the Treaty*, paper presented at conference organized in Brussels on September 25, 1990 on "The implementation of the EEC Merger Control Regulation." The same argument was put forward by R. Lauwaars at the 14th FIDE Conference Section III (Madrid Sept. 27-29, 1990).

Article 87 does not entitle the Council to disapply Articles 85 and 86.

Resolution of these "constitutional" issues is beyond the scope of this Article. Suffice it to say that there will be no application of Articles 85 and 86 to merger operations above the thresholds and that there will be only rare cases for such application to other mergers. Past experience has shown that Article 86 has not proven to be a very effective instrument of merger control because it only provides a remedy in particular situations. With regard to Article 85, *Philip Morris*[82] is a rather controversial judgment which does not clarify how meaningful a tool Article 85 is for dealing with mergers.

In considering the application of Articles 85 and 86 by national courts, one must distinguish between the two provisions. According to the Court's case law, Articles 88 and 89 are not capable of guaranteeing the full application of Article 85 by their mere existence, and thus do not therefore permit the conclusion that Article 85 had become fully effective as of the Treaty's entry into force.[83] The Court considered that Articles 88 and 89 do not provide an exception under Article 85(3), and noted that the possibility of an exception could only be created by an implementing regulation based on Article 87. In the absence of an implementing regulation, therefore, third parties cannot rely directly on Article 85 before national courts. With the repeal of Regulation No. 17 and the other implementing regulations in the transport sector by article 22,[84] third parties are consequently no longer in a position to rely directly on Article 85 with regard to mergers.

The situation is different with regard to Article 86. Its application is not subject to any conditions and, unlike Article 85, does not permit any exemption by means of a weighing of interests. Article 86 can therefore be invoked by third parties and applied by national courts, irrespective of whether an implementing regulation under Article 87 exists.

In practice, it is highly unlikely that a merger that violated

82. British American Tobacco Co. v. Commission, Joined Cases 142 & 156/84, 1987 E.C.R. 4487, Common Mkt. Rep. (CCH) ¶ 14,405.

83. *See generally* de Geus v. Bosch, Case 13/61, 1962 E.C.R. 45, Common Mkt. Rep. (CCH) ¶ 8003; Ministere public v. Asjes, Joined Cases 209-213/84, 1986 E.C.R. 1425, ground 61, Common Mkt. Rep. (CCH) ¶ 14,287.

84. Merger Control Regulation, *supra* note 1, art. 22(2), O.J. L 257/14, at 24.

Article 86 (*i.e.*, a *Continental Can*-type merger) would be cleared by the Commission under the Regulation. Little danger exists, therefore, of conflicting decisions at Community and national levels.

3. Mergers Below the Thresholds

a. Application of the Merger Regulation Upon Request: The "Dutch Clause"

Mergers that do not meet the threshold criteria of article 1 of the Regulation do not normally fall within the Commission's jurisdiction and are, as a rule, to be assessed under the respective merger laws.[85] There is, however, one important exception to this rule. Under article 22(3), a Member State may request the Commission to apply the Regulation with regard to its own national territory.[86]

This provision is the reverse of the referral of a Community-format merger to a national authority.[87] It was included at the request of Member States not possessing merger legislation of their own, in particular the Netherlands. The provision has consequently become known as the "Dutch Clause." The major effect of this clause is to prevent any *lacunae* with regard to the control of mergers that fall below the thresholds of article 1 and would normally escape scrutiny by the Commission or national authorities.

The "Dutch Clause" is notable for several reasons. First, the Commission cannot act on its own initiative or upon a request from a Member State other than the one concerned. If the Commission finds that a merger below the threshold requirements creates or strengthens a dominant position that significantly impedes competition within that national territory, it may make the merger subject to conditions and obligations or decide on the basis of incompatibility or divestiture provided for in article 8 of the Regulation. Any Commission decision is subject, however, to the requirement that the merger in question affects trade between Member States, underscoring once again the limit of Community jurisdiction,

85. *Id.* art. 1(1), O.J. L 257/13, at 16 (stating that "Regulation shall apply to all concentrations with a Community dimension").

86. *Id.* art. 22(3), O.J. L 257/13, at 24.

87. *See supra* notes 59-71 and accompanying text (discussing "German Clause").

particularly the relevance of any merger to the functioning of the common market. Mergers of a purely national dimension cannot be prohibited by the Commission upon referral under article 22(3).

Furthermore, according to article 22(5), the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.[88] This limitation leaves open the possibility for other Member States equally affected by the merger that possess their own merger rules to take a decisive role as well in the same case. There is, therefore, a certain risk of conflicting decisions. This risk can be kept to a minimum by close and constant liaison between the Commission and national authorities that is provided for in article 19 and that also applies under article 22(3)-(5).[89] One provision not applicable in the context of the "Dutch Clause" is article 7,[90] which means that the Commission cannot suspend the merger.

The wide-ranging diversity of national laws on merger control might not provide appropriate remedies in respect of mergers carried out outside an affected national territory. An intriguing question therefore arises: Assuming that the Council rightly adopted only rules for mergers of a Community dimension, but assuming also that in certain mergers below the thresholds the absence of any merger control is at odds with the system of undistorted competition required by Article 3(f), is there room for the argument that Member States are bound either to apply their national merger legislation, to adopt appropriate legislation to that effect, or at least to submit the case to the Commission under article 22(3)?

b. Application of Articles 85 and 86

As stated above, the Commission is not competent to ap-

88. Merger Control Regulation, *supra* note 1, art. 22(5), O.J. L 257/13, at 24.

89. *Id.* art. 19, O.J. L 257/13, at 23-24.

90. *Id.* art. 7(2), O.J. L 257/13, at 19 (stating that "[w]here the Commission, following a preliminary examination of the notification within the period provided for . . . finds it necessary in order to ensure the full effectiveness of any decision taken later . . . it may decide on its own initiative to continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect").

ply the Regulation to mergers not meeting the threshold unless it has received a request from a Member State under article 22(3).[91] The possible application of Articles 85 and 86 by the Commission is therefore particularly relevant with regard to those mergers.

According to its declaration, the Commission will not apply Articles 85 and 86 to mergers that involve less than a worldwide turnover of 2 billion ECU and a Community-wide turnover of each of the firms concerned of less than 100 million ECU.[92] Where those fall-back thresholds are fulfilled, the Commission probably will not hesitate to act in situations of the type dealt with in the *Continental Can* or *Philip Morris* judgments.[93] It will be necessary, however, for the Commission to have recourse to Article 89, since Regulation No. 17 has been repealed in respect of all mergers regardless of the turnover involved. Notably, the standard to be applied under Article 85 is somewhat lower than the one prescribed by the Merger Control Regulation. The Regulation requires a significant impediment to effective competition, whereas Article 85 only requires that the operation in question be capable of affecting trade between Member States. This difference is of particular relevance when identifying a merger within the meaning of article 3 of the Regulation, since mergers seem to be privileged in comparison to situations falling under Article 85.

Because Regulation No. 17 is disapplied in respect to all mergers within the meaning of the Merger Control Regulation, there is no possibility of third parties requesting the Commission to act under Articles 85 and 86. As far as the applicability of Articles 85 and 86 by national courts is concerned, the situation is the same as in the case of mergers meeting the threshold limits—*i.e.*, only Article 86 can be directly invoked by third parties.

4. Operations That Do Not Constitute Mergers

Finally, where an operation does not fulfill the requirements of article 3 and thus does not constitute a merger within

91. *See supra* notes 85-90 and accompanying text (discussing "Dutch Clause").
92. *See supra* notes 53-54 and accompanying text (setting forth threshold limits).
93. *See supra* notes 49-52 and accompanying text (discussing *Continental Can* and *Philip Morris* decisions).

the meaning of the Regulation, the traditional regime applies. There is, in particular, no repeal of Regulation No. 17 with respect to such operations. The Commission will continue to apply Article 85, and possibly Article 86, to such transactions and it will also do so upon request of third parties.

An important problem can arise in this context relating to operations, such as the acquisition of a minority share holding, that might not fulfill the criteria of article 3, but that might be subject to merger control at the national level due to a wider definition of the term "merger."[94] Article 21(2) does not provide a solution because it only prevents Member States from applying their laws to mergers within the sense of the Regulation. It is conceivable, therefore, that an operation might be cleared by the Commission under Article 85 but might, at the same time, meet the opposition of national merger control authorities. Whether this possibility exists in practice will depend on the criteria applied under Article 85 on the one hand, and respective national merger control standards on the other hand.

In view of the Commission's practice, particularly with respect to Article 85(3), the Court, in the future, might be faced with another *Walt Wilhelm* situation.[95] If so, the Court will need to decide whether a clearing of the operation at the Community level prevents Member States from prohibiting it under their merger control laws.

CONCLUSION

The Merger Control Regulation probably has raised as many jurisdictional issues as it was designed to resolve. In particular, the powers to deal with mergers have been reapportioned: Before the coming into force of the Regulation, it was unclear to what extent the Commission could use Articles 85 and 86 to control mergers. The Court's case law in this respect only concerned special situations and one cannot be certain how the Court would have reacted to an extensive interpretation of its decisions by the Commission.

94. Section 23(2) of the German Law on restrictive practices establishes a threshold of twenty-five percent with regard to minority shareholdings that are to be considered as mergers.

95. *See supra* notes 39-43 and accompanying text (discussing *Wilhelm* case).

The basic rule is clear now. The Commission deals with mergers above the thresholds (whatever these may be), whereas the national authorities handle all other mergers. But this is far from being a hard and fast rule in view of the various exceptions. Community-wide mergers can be referred back to the Member States and mergers of a national dimension can be referred to the Commission. In addition, Member States may apply certain public interest considerations to block mergers that have been cleared by the Commission. And finally, the traditional Articles 85 and 86 continue to loom over the entire scene, although one should not overstate this risk in practice.

Taken together, all of this creates a rather confusing and disorderly picture, but a picture not unfamiliar to spectators of an ambitious venture called European integration. The parameters are well known from other fields of action: the delicate interplay of Treaty provisions and derived Community law; the idiosyncrasies of Member States and their fear of the Community's inability to arrive at acceptable solutions; the Community's striving for harmonized rules in order to achieve maximum market integration; and, last but not least, the imperfection inherent in any political compromise.

There is no reason to believe, however, that merger control will prove less workable than other types of Community legislation which are ridden with the same problems. What counts at the end of the day is the way in which the different actors make use of their powers. To judge from experience, there is hope that this will be done with a good deal of foresight and mutual consideration.