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Control of Concentrations in the European Economic Community: Evolving Restrictions on the Urge to Merge

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It would be wrong to say that the European Community's competition policy has been a failure. You can only call something a failure if it happens to have gotten going and still not made it. Nothing of the sort here — far from having gotten going, the competition policy of the Commission of the European Communities is distinguished first and foremost by its absence. Inaction, deliberate inaction, is the word — and that in a field in which the Treaty of Rome did assign precise political aims to the Commission. For in no other field is the Commission given such free rein (it can fine firms up to a million dollars or 10% of their turnover). In other sectors it has shown that it possessest some political courage; but here it has preferred not to recognize the part which effective action could have played from 1959 onwards in integrating Europe and stimulating other European policies.

I. INTRODUCTION

The antitrust posture of the European Economic Community (EEC), especially in the area of close-knit combinations, has changed markedly since that stinging criticism of late 1970. In moving from this alleged nonfeasance, the EEC Commission, as evidenced by its recently proposed anti-merger regulations, has demonstrated a rather impressive degree of sophistication within a very short time. And, although the Commission's competition policy is still in its formative years, some firmly implanted legal and extralegal principles have already been established.

Practical considerations alone should justify American interest in the evolving merger controls of the EEC. Acquisitions of European-based enterprises by American multinational corporations have continued
to climb. Such activity is subject, of course, to the antitrust limitations of the particular host nation. And, with the extraterritorial reach of American restrictions, potential violations of the Sherman Act, Clayton Act, and section 5 of the Federal Trade Commission Act should also be considered. However, merger activity within the common market countries is controlled, significantly and preeminently, by the Treaty of Rome which created the EEC.

6. It has been predicted that by 1975 the third largest industrial power in the world will be American-controlled industry in Europe. Vagts, The Multinational Enterprise: A New Challenge for Transnational Law, 83 Harv. L. Rev. 739, 748 (1970).

For a number of tables dealing with American multinational enterprises and their European acquisition activity, see Business Int'l Information Sys., Acquisitions in Europe: Causes of Corporate Successes and Failures (J. Kitching Report) 39-54 (1973). The following statistics are included to describe acquisitions by 187 American companies:

<table>
<thead>
<tr>
<th>Host Country</th>
<th>1946-57</th>
<th>1958-67</th>
<th>% Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>67</td>
<td>282</td>
<td>12.5</td>
</tr>
<tr>
<td>France</td>
<td>22</td>
<td>201</td>
<td>23.0</td>
</tr>
<tr>
<td>Germany</td>
<td>35</td>
<td>177</td>
<td>16.0</td>
</tr>
<tr>
<td>Italy</td>
<td>13</td>
<td>135</td>
<td>25.0</td>
</tr>
<tr>
<td>Belgium/Lux.</td>
<td>9</td>
<td>77</td>
<td>22.0</td>
</tr>
<tr>
<td>Scandinavia</td>
<td>13</td>
<td>74</td>
<td>16.5</td>
</tr>
<tr>
<td>Netherlands</td>
<td>11</td>
<td>66</td>
<td>17.5</td>
</tr>
</tbody>
</table>

7. However, these limitations are often relatively insignificant. See notes 345-47 and accompanying text infra.


11. The English version, which became authentic January 1, 1973, with the accession of the United Kingdom, Ireland and Denmark, is also set forth in 1 CCH Comm. Mkt. Rep. ¶ 151 (1973) (citation to the Rome Treaty will be to the CCH Common Market Reporter unless otherwise stated).

The Treaty of Rome established more than a customs union. Its far-reaching, ultimate purposes are reflected in article 2, which calls for the promotion of harmonious economic development, balanced expansion and stability, and closer relations within the EEC. This goal of economic integration naturally demands a certain harmonization of the legal as well as the economic postures of the member states. The Treaty, unlike other international treaties, created its own legal order, integrated with those of the member states and enforceable by their domestic courts. More than a treaty, but establishing less than a federation, the pre-eminence of its law necessarily limits the sovereignty of the member state, directly establishing enforceable legal rights and obligations within the Community.

12. A customs union was established pursuant to the provisions of Rome Treaty article 9, 1 CCH Comm. MKT. Rep. ¶ 201 (1973), which provides for the elimination of customs duties on imports and exports between member states and the adoption of a common customs tariff in their relations with third countries. For a general discussion of the customs union and its dynamic role in the functioning of the EEC, see D. McLachlan & D. Swann, Competition Policy in the European Community 3-25 (1967).


14. For example, prohibition of discriminatory internal tax charges which would indirectly replace the tariff barrier between member states is provided by article 95 of the Rome Treaty. 1 CCH Comm. MKT. Rep. ¶ 3001. For analysis of the problems and Treaty solutions to discriminatory turnover taxes, see Antal, Harmonisation of Turnover Taxes in the Common Market, 1 Comm. MKT. L. Rev. 41-57 (1963). See also M. von der Groeben, Competition Policy as Part of Economic Policy in the Common Market 6 (1965) (address by M. von der Groeben, Member of the Commission of the EEC, President of the Competition Group).

15. Article 5 of the Rome Treaty provides in part:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.

1 CCH Comm. MKT. Rep. ¶ 181 (1973). These obligations may include not only the appropriate Treaty articles but also certain regulations and directives issued by the Council and Commission. Regulations, having general applicability, are binding in every respect and are directly applicable in each member state. Directives are binding in respect to the result to be achieved, but the manner of their enforcement is a matter for the national authorities. Article 189, 2 CCH Comm. MKT. Rep. ¶ 4901 (1971).

The Court of Justice, in Costa v. ENEL, Court of Justice Case No. 6/64, [1961-1966 Transfer Binder] CCH Comm. MKT. Rep. ¶ 8023 (1964), held that the pre-eminence of EEC law is confirmed by article 189. Rights created by the Treaty of Rome cannot be contradicted by internal law without undermining the legal basis of the EEC. Id. ¶ 8023, at 7390-91. As to the procedural aspects of the operation of the Court of Justice under article 177, see note 57 and accompanying text infra. For other cases concerning the application of EEC law by national courts, see L. Brinkhorst & H. Schermers, Judicial Remedies in the European Communities 103-17 (1969). For a discussion of the effect the EEC has upon various national constitutions, see id. at 136-76. For a general discussion of the relationship between EEC law and national law, see Ipsen, The Relationship of the Law Between the European Communities and National Law, 2 Comm. MKT. L. Rev. 379-402 (1965).


Undistorted competition, recognized as one of the prime tools in effecting Community policy, is regulated on such a level; through the implementing regulation the antitrust proscriptions of articles 85 and 86 are directly enforceable within each member state. Thus, the American corporation contemplating a merger involving a Community enterprise is directly confronted with a regulatory scheme oftentimes more imposing than that of the host nation itself. Furthermore, the Court of Justice has clearly stated that a parent firm, not located within the Community, which effects an acquisition through a subsidiary located outside of the member states, will have such conduct imputed directly to it. An American multinational corporation, therefore, cannot insulate itself from EEC competition law. In addition, although there has never been an announced anti-American policy, it is well known that the EEC rules of competition reflect a “particularly deep concern ... over any dominant position of large, financially powerful firms from non-member countries.” It is perhaps more than coincidental that the most significant Court of Justice decision in this area, Europemballage & Continental Can Co. v. role of the Court of Justice ... confirms the fact that the States have acknowledged that Community law has an authority which may be invoked before such courts by their nationals.”

19. See M. Von der Groeben, supra note 14, at 1; ECSC, EEC, EURATOM, COMMISSION, FIRST REPORT ON COMPETITION POLICY 11-15 (1972) [hereinafter cited as FIRST COMMISSION REPORT]. The competition policy is inextricably tied in with the so-called regional and industrial policies of the Community. See text accompanying notes 71-86 infra. See also EEC Commission, Industrial Policy in the Community; Memorandum From the Commission to the Council, 11/18-11/22 (Mar. 18, 1970) [hereinafter cited Industrial Memo].


22. Belgium’s antitrust law, for example, authorizes action against “practices that distort or restrict the normal play of competition.” C. Edwards, Control of Cartels and Monopolies — An International Comparison 344 (1967). By not discriminating between restrictive trade agreements and market-dominating firms, Belgian internal law is favorable to the unrestricted development of economic power since there is no presumption that cartels or concentrations are contrary to public interest. See R. Joliet, Monopolization and Abuse of Dominant Position 145 (1970); Seutens, Belgian Antitrust Law “In Action,” 2 COMM. MKT. L. REV. 325 (1965). Such a difference between internal and EEC antitrust policies may make it difficult to obtain acceptance of the harsher EEC policies. See notes 345-47 and accompanying text infra.

23. Europemballage & Continental Can Co. v. Commission, Court of Justice Case No. 6/72, 2 CCH COMM. MKT. REP. ¶ 8171 (1973). This principle has been significantly strengthened by the Court of Justice’s recent refusal to reverse the Commission in its action against the American company, Commercial Solvents Corporation (CSC), and its Italian subsidiary, Institute Chemioterapico Italiano (ICI). The Court of Justice held that a parent company domiciled outside the EEC but controlling a subsidiary there could be held jointly and severally responsible for the subsidiary’s conduct. ICI and Commercial Solvents Corp. v. Commission, Court of Justice Case Nos. 6, 7/73, 2 CCH COMM. MKT. REP. ¶ 8209 (1974). See note 173 infra.

Commission, involved an American corporation seeking further extension of its European influence.

An analysis of the EEC competition policy is also interesting from a comparative standpoint. Traditionally, EEC competition rules have been said to be based on a model strikingly different from the neo-classical tradition of American antitrust which reflects ultimate confidence in the perfectly competitive marketplace. Proscriptions based upon control of conduct rather than of the marketplace have been a generally accepted orientation of EEC controls. Such regulations, aimed directly at the

25. Court of Justice Case No. 6/72, 2 CCH COMM. MKT. REP. ¶ 8171 (1973).

26. Neoclassical theorists argue that lack of perfect competition will necessarily result in fewer goods at higher prices as well as misallocation of resources. See A. ACOV, THE ECONOMICS OF WELFARE (1932).

27. This is to be contrasted with an approach which expresses ultimate confidence in the ability to control the evils which are said to flow from a non-competitive marketplace. Both the “structure” and “abuse” theory of American antitrust law are aimed at the existence, acquisition, or maintenance of overwhelming power. See G. HALE & R. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 18-169 (1958).

The structure theory was elevated to prominence in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) [hereinafter referred to as Alcoa]. Judge Hand found illegal monopolization from the mere existence of monopoly power itself in the absence of proof that the monopoly was not “thrust upon” the defendant. Id. at 431. By permitting only such a narrow “excuse” for monopoly, the existence of monopoly power became almost synonymous with the proscribed monopolization. A year later, in American Tobacco Co. v. United States, 328 U.S. 781 (1946), the United States Supreme Court stated:

The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.

Id. at 811. The Court also noted:

Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.

Id. at 810. The mere existence of power to monopolize, if accompanied by the purpose or intent to exert it, constitutes an evil at which the Sherman Act is aimed. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 130 (1948); United States v. Griffith, 334 U.S. 100, 107 n.9 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1948).

Even the abuse theory, forerunner to the structure theory and Alcoa, was directed at the tactics of maintaining or acquiring power as opposed to misbehavior in the sense of power misuse. Thus monopolization could be found even before a restraint of trade under section 1 of the Sherman Act was found. Monopolization would be invoked where there was “ungentlemanly conduct” in dealing with one’s competitors. Levi, The Antitrust Laws and Monopoly, 14 U. CHI. L. REV. 153, 160 (1947). However, it is clear that percentage of control maintained was still a significant factor. Id.

Even after Alcoa and the popularization of the structure theory, abusive behavior remained significant in the determination of illegal monopolization. In United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954), the offense of monopolization was found where size was buttressed by conduct that was less competitive than possible. See C. KAYSER & D. TURNER, ANTITRUST POLICY 107 (1959). United Shoe, however, has been cited by European commentators seeking a link between the American concept of abuse and a structural development of the European notion of abusive behavior. See notes 188-92 and accompanying text infra.


28. See notes 129-38 and accompanying text infra.
evils sought to be eliminated, might be one answer to the American plea for "a more analytical, factually based approach." It will be shown, however, that the different models are not necessarily vastly different in application, especially where common end-results are sought. That similarity is significant not only because it may indicate an outside affirmation of the long American experience but also because convergence of the two systems could lay the groundwork for an eventual, common trans-Atlantic antitrust law.

The purpose of this Comment is to analyze, with the above thoughts in mind, the present, proposed, and probable developments in the regulation of close-knit combinations, or concentrations, in the EEC. A close-knit combination, as opposed to a cartel, involves some type of control relationship between the coacting enterprises. Certainly, merger-induced concentrations and amalgamations of share capital exhibit such a relationship. As will be demonstrated, control may be also manifested by rights to assets and certain other contractual relationships. On the other hand, cartels, which entail loose association of economically and legally distinct enterprises, do not involve this control element and will not be considered in this Comment.

Only the EEC and its regulations are directly within the scope of this Comment. "Common Market" generically describes not only the EEC, but the European Coal and Steel Community (ECSC) and the European


31. "Concentration," within the meaning of this comment, shall refer to economic concentrations effected through close-knit combinations between enterprises. See note 3 supra. Concentration of economic power achieved solely through internal growth will not be covered as such. On the other hand, concentrations may be brought about through more than outright stock or asset acquisition. The Commission has clearly indicated that the following may fall within the ambit of "concentration": 1) financial participation by companies in other companies; 2) merger of formerly legally independent companies; 3) the interlocking of companies on a personal basis, where the same persons are managers or members of the supervisory boards of legally independent companies; 4) arrangements, particularly contractual, which put legally independent enterprises under management or control of another enterprise. Memorandum of the EEC Commission to the Governments of the Member States, Concentration of Enterprises in the Common Market, Dec. 1, 1965, in CCH Common Market Reports, No. 26, ¶ 21, Mar. 17, 1966 [hereinafter cited Commission Memorandum].

For the expanded definition of "concentrations" that would be applied under the Commission's recently proposed regulation, see text accompanying notes 289-91 infra.

32. Control would appear to include any arrangement which subjects one enterprise to management by another. The recently proposed regulations would find control sufficient to qualify a business relationship as a combination in any right or contract which "make it possible to determine how a firm shall operate." See text accompanying notes 289-91 infra.

33. Such agreements lack the element of economic control found in concentrations. See note 31 supra. The Commission would distinguish the questioned agreement from a concentration if it results in "no permanent change in the ownership but a coordination of the market behavior of enterprises that remain economically independent." Commission Memorandum, supra note 31, ¶ 58.

34. The ECSC was created by the Treaty Establishing the European Coal and Steel Community (Treaty of Paris), signed by Belgium, France, Germany, Italy, Luxembourg and The Netherlands on April 18, 1951, and taking effect on July 25,
Atomic Energy Community (Euratom) as well. The three were procedurally integrated in 1966 but each has maintained an independent legal status. However, since the ECSC, as the forerunner of the EEC created a certain psychological foundation in European competition policy, it will be tangentially considered.

This Comment will be developed in five stages: The first part will provide the framework necessary for an appreciation of Community competition law generally, and control of concentrations specifically. This will include consideration of the basic procedural aspects and legal provisions of EEC law, as well as the extralegal interests which, in light of the traditional teleological interpretation given EEC law by the Court of Justice, play a crucial role in the competition policy of the EEC.

The second part will consider the theoretical and potential applicability of article 85 of the Treaty of Rome as an anti-merger tool. Tailored more to cartels than concentrations, article 85 has heretofore been shunned by the Commission as such a tool, but its existence as a potential Commission weapon or as the basis of private action cannot be ignored.

The third part will deal with the pre-Continental Can interpretation of article 86, the present source of power for the Commission's policy. Proscribing the "abuse of a dominant position," this article's applicability to mergers effected by less than predatory practices was doubted, at least by some observers outside of the Commission, until the Court of Justice's definitive decision in Continental Can.

Fourth will be an analysis of the reasoning, holding, and implications of Continental Can. Arguably based on a somewhat tortured reading of article 86, and apparently inspired more by the fundamental Treaty aims, this decision has given the Commission widespread but as yet ill-defined powers. By bringing a merger which effects further growth of a dominant position within the scope of "abuse," the Court of Justice has perhaps sought a structural regulation of the marketplace in the guise of article 86's behavior controls. Some basic comparisons with the American system, with its reliance on the structural theory, will aid in this analysis.

The final part will deal with the Commission's draft regulation on the control of concentrations, announced July 20, 1973. Threatening 1952. For official translation, see European Communities, Treaties Establishing the European Communities (1973).

The ECSC was limited to regulation of the basic commodities of the coal and steel sector. 1 CCH COMM. MKT. REP. ¶ 101.38, at 120 (1965).

35. Treaty establishing Euratom was signed concurrently with the Treaty of Rome on March 25, 1957, becoming effective on January 1, 1958. See TREATIES, supra note 34, for official translation.


37. See note 88 infra.

38. The text of article 85 is set forth in note 63 infra.

39. The text of article 86 is set out in note 64 infra.

40. 2 CCH COMM. MKT. REP. ¶ 9586 (1973).
articles 85 and 86 with obsolescence in this area, the proposed regulation marks the first attempt to implement a truly systematic and comprehensive arrangement. Five major areas will be dealt with in the analysis of this proposed regulation: (1) its preliminary inspirations; (2) mechanics of its application; (3) possible origin of its operative terms; (4) theoretical problems in its formulation; and (5) the possibility of its acceptance by the Council. Whether or not it is ultimately accepted in its present form, the effort alone evidences new direction and sophistication in the control of concentrations.

II. FRAMEWORK OF THE COMMUNITY PROCESS

A. Legal

1. Community institutions

Before undertaking a specific analysis of the relevant EEC law, it is important to first understand the basic functions of, and interrelationships among, the four Community institutions: Commission, Council, Parliament and Court of Justice. Each has and will play a particular part in the development of the EEC law regarding concentrations.

The Commission\(^1\) is crucial to both the creation and administration of Community law. This apolitical body,\(^2\) initiates Community legislation by submitting draft regulations\(^3\) and directives\(^4\) to the Council.\(^5\) Because the Commission has the sole power to set a proposal in motion, while the Council maintains ultimate power of rejection, there is dynamic interplay and compromise between the two bodies in the legislative process. As the Community "watchdog," the Commission is also charged with the implementation and application of Community law, and has the right and duty to take action against violating member states or firms.\(^6\) Specifically in the area of antitrust, the Commission has extensive powers. The Com-

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\(^1\) The general function, obligations, and make-up of the Commission is set forth in Rome Treaty, articles 155-63, 2 CCH COMM. Mkt. Rep. §§ 4471-4512 (1967), as amended by the Merger Treaty, 2 CCH COMM. Mkt. Rep. §§ 5115-95 (1966). See note 11 supra. There were further modifications by the Treaty of Accession, signed January 22, 1972 and ratified by Denmark, Great Britain, and Ireland which provided for entry of those countries into the Common Market on that latter date. Note that the number on the Commission was increased from nine to thirteen. Treaty of Accession, article 15, 2 CCH COMM. Mkt. Rep. ¶ 7055 (1972).

\(^2\) Article 157, section 2, of the Rome Treaty provides in part: The members of the Commission shall act completely independently in the performance of their duties, in the general interest of the Community. In the performance of their duties, they shall neither seek nor take instructions from any Government or other body. 2 CCH COMM. Mkt. Rep. ¶ 4481 (1967).

\(^3\) Regulations are directly binding and applicable within the member states, and are enforceable by their domestic courts. Rome Treaty, article 189, 2 CCH COMM. Mkt. Rep. ¶ 4901 (1971).

\(^4\) Directives, while binding upon member states, may be enforced by them in a discretionary manner. Rome Treaty, article 189, 2 CCH COMM. Mkt. Rep. ¶ 4901 (1971).

\(^5\) Rome Treaty, article 149, 2 CCH COMM. Mkt. Rep. ¶ 4421 (1967), permits the Council, when acting on a Commission proposal, to amend it only by a unanimous vote.

mission is empowered to directly impose substantial penalties on a firm violating articles 85 or 86,47 provided the enterprise concerned is afforded a full hearing.48 When making its decision the Commission acts as investigator, prosecutor, and judge, subject to review on questions of law and fact by the Court of Justice.49

The Council of Ministers,50 composed of nine members — one per member state — is the only institution whose members directly represent their national governments.51 Having been granted the essential powers for enacting normative regulations and directives, the Council is becoming increasingly powerful vis-à-vis the Commission.52 This new strength has given rise to a tendency for the Community decision-making process to consist more of diplomatic negotiation than of apolitical and autonomous analysis. As will be demonstrated, this fact will play a large role in the eventual fate of the proposed Commission regulation on control of concentrations now before the Council.

The European Parliament,53 composed of representatives appointed from the national parliaments, possesses only nominal democratic control over the Community institutions.54 At present, its function is limited to giving advisory opinions on Commission proposals, drafting its own pro-

47. Regulation 17, article 3, provides in part:
   (1) If, acting on request or ex officio, the Commission finds that an enterprise or association of enterprises is infringing Article 85 or Article 86 of the Treaty, it can by means of a decision oblige the enterprise or associations of enterprises concerned to put an end to such infringement.
   (2) A request to this effect may be submitted by:
      (a) Member States;
      (b) Natural and legal persons and associations of persons, who show a justified interest.


48. Hearings are guaranteed by regulation 17, article 19, 2 CCH COMM. Mkt. Rep. ¶ 2581 (1973). Parties are given the right to reply, to inspect the record of the case, and to have the transcript reviewed. Regulation No. 99/63 sets forth a detailed set of procedural rights related to such hearings. 2 CCH COMM. Mkt. Rep. ¶ 2635 (1973).


52. A number of basic reasons have been cited for this institutional imbalance. Most importantly, since the so-called "Luxembourg compromise" of January 1966 resulted in an informal agreement within the Council that all important matters would be passed only upon unanimous consent, the power granted to the Commission by Rome Treaty, article 149, became less significant in its requirement of a unanimous vote for the Council to amend a Commission proposal. See COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT OF THE WORKING PARTY EXAMINING THE PROBLEM OF THE ENLARGEMENT OF THE POWERS OF THE EUROPEAN PARLIAMENT (Report Vedel) (1972).


54. Members are appointed as representatives of their national parliaments and thus represent the interests of their individual parties; there is presently no direct suffrage. Rome Treaty, article 138, 2 CCH COMM. Mkt. Rep. ¶ 4305 (1967).
posals relating to budgetary matters, and maintaining rights of censure over Commission members. In spite of these limitations, the Parliament was instrumental in spurring the Commission's recent draft proposal on the control of concentrations. 55

Finally, the Court of Justice, 56 a body of nine appointed judges, functions as the supreme appellate court for Community law. Article 177 specifically grants the court jurisdiction to issue preliminary rulings concerning the interpretation of the Rome Treaty and the validity of measures taken by EEC institutions. 57 In fulfilling that function, the Court applies law derived primarily from two sources: the "self-executing" articles of the Rome Treaty, which are deemed directly applicable to member states 58 without need for unilateral national action, and certain secondary sources in the form of Council regulations which establish a direct legal basis for individual control. The antitrust proscriptions of articles 85 and 86, while deemed "self-executing," 59 have been further implemented by regulation 17.

2. Applicable sources of law

The basic EEC competition policy is set forth in article 3(f), which calls for "the institution of a system ensuring that competition in the common market is not distorted." 60 Although this article appears to be

55. See text accompanying notes 284-85 infra.
57. Article 177 provides:
   The Court of Justice shall be competent to give preliminary rulings (à titre préjudiciel) concerning:—
   (a) the interpretation of this Treaty;
   (b) the validity and interpretation of acts of the institutions of the Community;
   (c) the interpretation of the statutes if any bodies set up by a formal measure of the Council, where the said statutes so provide.
   Where any such question is raised before any court of law of one of the Member States, the said court may, if it considers that a decision on the question is essential to enable it to render judgment, request the Court of Justice to give a ruling thereon.
   Where any such question is raised in a case pending before a domestic court of a Member State, from whose decision there is no possibility of appeal under domestic law, the said court is bound to refer the matter to the Court of Justice. 2 CCH COMM. Mkt. Rep. ¶ 4655 (1968).

58. The Court of Justice in Van Gond en Loos v. Netherlands Tax Administration, Court of Justice Case No. 26/62, [1961-1966 Transfer Binder], CCH COMM. Mkt. Rep. ¶ 8008 (1963), upon finding article 12 self-executing, described the direct applicability of that article upon persons within the member states. Id. at 7214-15. Note the conclusions of Advocate General Karl Roemer who cited articles 85 and 86 as similarly applicable. Id. at 7220.
60. Treaties, supra note 34, at 180. Article 3(f) is also set forth in 1 CCH COMM. Mkt. Rep. ¶ 171 (1957).
merely an outline provision or general program, the Court of Justice has indicated its binding legal effect in light of the essentiality of its objective. At the very least, it provides a general flavor to all EEC competition law, and its broad applicability is partly responsible for the expansive reading of the other, more limited articles.

Article 85 prohibits agreements and concerted practices between independent enterprises which restrict or distort competition within the common market, specifically proscribing price-fixing, production limitations, division of markets, commercial discrimination, and tying arrangements. In addition to other possible penalties, article 85 provides that all such agreements shall be deemed automatically null and void. However, a limited number of exemptions from the article's proscriptions are available upon an adequate showing that the activity is justified on the basis of improved production or distribution of goods.

Article 86 declares the abuse of a dominant position to be incompatible with common market policies where it affects trade between member states. Void of any possible exemptions, and specifically applicable

62. See text accompanying notes 233-37 infra.
63. Article 85 states:
1. The following shall be prohibited as incompatible with the common market:
   - all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
     - directly or indirectly fix purchase or selling prices or any other trading conditions;
     - limit or control production, markets, technical development, or investment;
     - share markets or sources of supply;
     - apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
     - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
   2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings;
   - any decision or category of decisions by associations of undertakings;
   - any concerted practice or category of concerted practices;
   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
     - impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
     - afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

64. Article 86 provides:
Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible
to single enterprises, it facially appears to be a much more appropriate basis for merger control policy than article 85.

Article 87, which calls for the rapid implementation of the principles of articles 85 and 86, provides that the Council, on motion of the Commission, shall enact any needed regulations or directives to ensure compliance with those articles.65 Pursuant to this authority, regulation 1766 was enacted by the Council in 1962. In addition to reaffirming the direct applicability of articles 85 and 86 to the member states,67 the regulation delineates the specific authority of the Commission in these matters,68 including its power, upon finding a violation, to order a halt to the practice and to impose substantial fines.69 During Commission proceedings, the accused concern is entitled to a hearing pursuant to article 19 of the regulation.70

B. Extralegal considerations

EEC competition rules can be understood only with reference to the general competition policy. In turn, the Commission has often stated that this "competition policy cannot operate in isolation independent of efforts made in other fields."71 Thus, the undistorted competition called for in article 3(f) has been construed to require workable, but not perfect competition — workable in the sense that competition is regarded as a tool to effect the general economic policy of the Community.72 Competition regulations are not primarily aimed towards the achievement of a purely competitive atomistic economy. Promotion of internecine struggle between enterprises, merely for the sake of a competitive marketplace, is not the objective.73 Viewed as a means rather than an end, competition policy of the EEC, unlike the American approach, appears preoccu-

with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchases or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

69. Regulation 17, article 16, 1 CCH Comm. Mkt. Rep. ¶ 2551 (1973), permits penalties of 50 to 1000 UA (one UA or unit of account is equivalent to an undervalued U.S. dollar as of 1971) per day of delay in complying with a Commission order.
70. See note 48 supra.
71. First Commission Report, supra note 19, at 12.
73. This was made very clear in a 1965 speech by the then President of the Competition Group, M. von der Groeben, supra note 14, at 4.
plied with the promotion of many aims besides mere survival of the competitive process.

Elimination of all internal economic frontiers within the Community is a primary aim of the Treaty of Rome.\textsuperscript{74} Governmental restrictions and barriers have been largely abolished through the customs union and supranational legal system, and the Commission, naturally, has sought to keep private fragmentation from replacing the fading national partitions.\textsuperscript{75} Development of a true continental economy has been the recognized means of achieving this effect;\textsuperscript{76} concentrations at a European level are said to aid in the transition from the nationally-oriented economy.\textsuperscript{77} Therefore, certain concentrations of economic power which span national borders are likely to be encouraged through the elimination of psychological and legal obstacles.\textsuperscript{78} However, the increasing number of international links between Community undertakings and those of third countries, particularly the United States, has been considered potentially harmful to the integration policy.\textsuperscript{79} While the importance of links with non-member state firms has been acknowledged,\textsuperscript{80} the industrial policy of the Community has emphasized the countervailing need for the development of truly transnational European undertakings, financed with European capital and managed by directors from the member states.\textsuperscript{81} This recognition has been motivated in part by a desire for European firms to improve their competitive position in order to cope with the economic challenges posed by non-Community firms.\textsuperscript{82} Especially in the high technology industries, large-scale production capacity may be necessary in order to compete effectively in international trade.\textsuperscript{83} Thus, the Commission has indicated that it might actually promote affiliations between Community firms where, for instance, they would result in the pooling of research or marketing resources, or result in the acquisition of a larger portion of the market vis-à-vis the United States.\textsuperscript{84} This has recently become obvious in the computer field where the combination of European com-

\textsuperscript{74} Id.
\textsuperscript{75} First Commission Report, supra note 19, at 13.
\textsuperscript{76} Commission Memorandum, supra note 31, at 7.
\textsuperscript{77} Industrial Memo, supra note 19, at 21 and II/19.
\textsuperscript{78} Commission Memorandum, supra note 31, at 9.
\textsuperscript{79} Industrial Memo, supra note 19, at 21.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} The Commission has stated: Trans-national European undertakings should be taken to mean not only undertakings which spread their activities over several countries, but those of which the capital and directors come from several countries and of which the management centre is situated in Europe.
\textsuperscript{83} Id.
\textsuperscript{84} See M. Von der Groeben, supra note 14, at 4; Commission Memorandum, supra note 31, at 8-9.
\textsuperscript{85} Commission Memorandum, supra note 19, at 9-9.
puter firms to pool research resources in order to compete effectively with IBM has been raised as a definite possibility. 86

The above fundamental extralegal considerations take on added importance in the interpretation of competition law when it is recognized that there is little legislative history to provide workable interpretive guidelines for EEC law. 87 And, more importantly, when subjected to judicial scrutiny, the articles of the Rome Treaty are often interpreted teleologically to reflect the so-called “higher aims” of the Treaty. 88

III. Article 85 89

The Commission has flatly denied the applicability of article 85 to concentrations. 90 As will be demonstrated, however, there are no insuperable textual barriers to such a utilization. A literal reading of the article, while not disclosing a specific reference to mergers, does not facially exclude a reference to the close-knit combination. Many of the arguments set forth by the Commission simply do not compel the inference that article 85 is inappropriate as an anti-merger device. Therefore, given the revocability of the Commission’s decision not to employ article 85, 91

86. Ganging Up on Snow White, TIME, July 2, 1973, at 55 (European ed.).
87. The only real source of preparatory materials is supplied by COMITÉ INTER-GOUVERNEMENTAL CRÉÉ PAR LA CONFESSION DE MESSINE, RAPPORT DES CHEFS DE DÉLÉGATION AUX MINISTRES DES AFFAIRES ETRANGÈRES (Spaak Report) (1956). While this report has furnished some very general guidelines, it is of little help in interpretation of antitrust laws.
88. Teleological interpretation refers roughly to the “purpose oriented” reading of Community law. It has been stated as a general rule that the ultimate task facing the Court of Justice in interpreting the text of the Treaty of Rome is to reflect the thinking of the authors. Chevallier, Methods and Reasoning of the European Court in its Interpretation of Community Law, 2 COMM. MKT. REV. 21, 23 (1964). Although this proposition sounds too simplistic to be of significant value, this approach gives rise to certain interpretive effects and provides a hierarchy of analytic tools which aid in the construction of the treaty. See L. BRINKHORST & H. SCHERMERS, supra note 15, at 221-23.

Systematic interpretation, applied by the Court of Justice when the literal language of the text is unclear, construes the provision in question so to best fit the context of the chapter of the treaty in which it is found. Articles 85 and 86, for example, have been played against each other — certain features of article 85 have been “read into” article 86, even where the latter section provided no literal justification for the interpretation. See text accompanying notes 238-46 infra. These articles may also be read so as to conform with the treaty as a whole. This is facilitated by explicit reference in articles 85 and 86 to proscriptions of anti-competitive activities which are “incompatible with the Common Market,” a reference to the general principles espoused in article 3(f). Canellos & Silber, Concentration in the Common Market, 7 COMM. MKT. REV. 138, 150-51 (1970). This tendency to fill the literal gaps in such a manner consequently has resulted in a downplay of other interpretive tools. For example, the use of a contrario reasoning, finding negative implications in statutory silence, has been declared an unsound judicial principle and has been criticized by the Court of Justice. Id. at 155.

Finally, the Court occasionally has been guided by a so-called “functional interpretation” in its treatment of treaty law. Seeking to best serve the economic and political underpinnings of the authors’ intent, the Court has reached for a reconciliation of individual articles with the general spirit of the treaty, notwithstanding “oversights” in its drafting. See L. BRINKHORST & H. SCHERMERS, supra note 15, at 221-28.
90. For the text of article 85, see note 63 supra.
91. The use of article 85 might become a particularly likely possibility if the Commission’s recently proposed regulation (see notes 273-79 and accompanying text infra) is ultimately rejected.
plus the possibility of its use as the basis of a private action, this article should not be discounted in any study of EEC merger controls.

Article 85, with its three subsections, is directed towards a broad range of enterprise cooperation which threatens distortion of the desired competition level. Article 85(1) provides the outside limits of the article's applicability, prohibiting:

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . .

The content of this prohibition is quite broad in the abstract as it does not specify either the nature of the agreement or the desired level of competition. In the event that such a proscribed agreement is found, however, article 85(2) clearly mandates the automatic voidance of such ties. Article 85(3) also establishes an exemption which provides that the article's proscriptions are inoperative under certain conditions. Generally sanctioned is the agreement or practice which might ordinarily be prohibited but "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit." In order for an agreement to fall within this exempting provision, it must also be shown that there is no imposition of restrictions which are incompatible with competition objectives or which present the possibility of eliminating substantially all competition.

The construction of the word "agreement," is critical as it would appear that concentrations achieved through mergers might easily fall within the language of article 85. Indeed, a working group of professors (Working Party), assigned by the Commission to investigate the possible applicability of article 85(1) to combinations other than cartels, concluded that the article would be applicable to concentrations in which the enterprises remain legally distinct. The requisite agreement could thus be found in a merger achieved through pre-arranged transfer of a controling stock interest, where the acquired undertaking maintained its legal identity. While certain acquisitions, such as those achieved through

92. Such a case was brought in the French courts by St. Gobain Glass Company to resist a takeover bid. Europe, Jan. 8, 1969, (neue serie), at 7 (German ed.).
94. Id. The Commission asserts that this section would thus necessarily require divestiture if article 85 were deemed applicable to merger agreements. Commission Memorandum, supra note 31, at 26.
95. There had been some question as to whether article 85(3) provided an automatic exemption from the operation of article 85(1), or merely granted a power to the Commission to declare article 85(1) inapplicable where those conditions were met. The latter has now been generally recognized. A. PARRY & S. HARDY, EEC LAW 292 (1973).
96. Article 85(3), 1 CCH COMM. MKT. REP. § 2051 (1973).
97. Id.
98. The consensus of the Working Party is set forth in Commission Memorandum, supra note 31, at 24. Note that this was the majority opinion. The minority would deny the applicability of article 85 to concentrations. Id.
99. Id. This would still require that the purchase of shares be pursuant to an agreement between the undertakings.
stock purchases on an exchange, would still remain outside the range of article 85, the Working Party's application of article 85 to merger agreements would "include the most important cases." Thus far, the Commission has not agreed with this reading. The Commission requires not only separate legal entities, but also economic independence between the interacting firms before finding an illegal article 85 agreement. By focusing on economic independence, the Commission has strictly limited the article's application to pure cartel arrangements, emasculating it as a control on concentrations by insisting:

[I]t is not possible to apply Article 85 to agreements whose purpose is the acquisition of total or partial ownership of enterprises or the reorganization of the ownership of enterprises (merger, acquisition of holdings, purchase of part of the assets).

Comparison of article 85 with the American experience under the Sherman Act demonstrates that such arrangements could be brought within the article's conceptual framework. Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." Like article 85, section 1 seems tailored to cartel agreements rather than permanent changes in ownership consummated through merger reorganizations. It is true that the Sherman Act's specific inclusion of combinations achieved through trust arrangements makes it somewhat more applicable to the close-knits, and presents a stronger case for bringing mergers within its range.

100. Id.
101. Id.
102. The Commission concluded:
Article 85, paragraph 1, continues to be applicable if the agreement has as its purpose no permanent change in the ownership but a coordination of the market behavior of enterprises that remain economically independent.

Id. at 27.

103. Id.


106. Section 1 was used to prevent mergers prior to the enactment of the Clayton Act in 1914. United States v. Southern Pac. Co., 259 U.S. 214 (1922); United States v. Union Pac. R.R., 226 U.S. 61 (1912); Northern Secs. Co. v. United States, 193 U.S. 197 (1904). It was also used to dismember the oil and tobacco trusts. Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

After the Clayton Act was passed, but prior to its amendment in 1950, section 1 of the Sherman Act was used to halt acquisitions effected through purchase of shares rather than stock, immune from Clayton proscriptions. The Supreme Court in United States v. Columbia Steel Co., 334 U.S. 495 (1948), while absolving the nation's largest steel producer of Sherman Act liability for the acquisition of the largest independent steel fabricator on the west coast, established a test to be applied in determining the validity of horizontal mergers under the Sherman Act:
If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint . . . we look . . . to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business
Yet, section 1 has been used against restraints of competition involving concentrations of a non-trust variety, despite the fact that no traditional cartel-type agreements were involved. For example, in United States v. Union Pacific R.R., the purchase of a controlling stock interest was held to be an illegal combination under the Sherman Act. The term “agreement” within article 85 might also be construed to include such pre-arranged understandings to combine.

The Commission has stated, however, that if concentrations were to be considered properly within the ambit of article 85, it would be forced to utilize a double standard in the application of the article’s provisions. Cartels have been viewed differently than have concentrations, even where they have the same economic impact. The Commission has generally favored concentrations in its implementation of avowed policies, and has, for example, noted that, in the achievement of true economic integration, loose associations are, in the great majority of cases, insufficient substitutes for a truly efficient economic concentration. Since the Commission utilizes different standards for its treatment of cartels and concentrations, it finds the application of a single article to both inappropriate. The American experience demonstrates, however, that such broad control certainly can be founded on the same legislative formulation; judicial interpretation of section 1 of the Sherman Act has resulted in its being applied to both close-knit and loose-knit federations through the use of a “rule of reason” approach. While such a broad two-level approach has thus far requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market.

Id. at 527.

Even after the Clayton Act was amended, the Supreme Court condemned the consolidation of two large commercial banks as violative of section 1 due to the elimination of “significant competition” between them. United States v. First Nat’l Bank & Trust Co., 376 U.S. 665 (1964).


110. Id.

111. Id.

112. Section 1 has been applied most often to loose-knit combinations. See, e.g., United States v. Loew’s, Inc., 371 U.S. 38 (1962) (tying arrangement); Kiefer-Stewart v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (concerted refusal to deal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price-fixing agreement to stabilize market price); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (division of markets); Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176 (E.D. Tenn. 1940), aff’d per curiam, 123 F.2d 1016 (6th Cir. 1941) (allocation of customers).

However, as noted previously, mergers have also been subject to section 1. See Northern Secs. Co. v. United States, 193 U.S. 197 (1904). The coverage of section 1 is often co-extensive with that of section 7 of the Clayton Act. See United States v. Philadelphia Nat’l Bank, 374 U.S. 321 (1963). However, an actual restraint must be proved under the Sherman Act, while the incipiency standard of the Clayton Act requires only proof that a merger may substantially lessen competition. Compare United States v. Von’s Grocery Co., 384 U.S. 270 (1966) (violation of section 7 of the Clayton Act) with United States v. Columbia Steel Co., 334 U.S. 495 (1948) (no violation of section 1 of the Sherman Act); but see United States v. First Nat’l Bank, 334 U.S. 495 (1948).
been shunned by the Commission, article 85 could support it. The exemption of article 85(3) could be read as sanctioning the desired mergers in "promoting economic progress" without lowering the overall stringent proscriptions against harmful cartels.

The Commission has cited the nullity section of article 85(2), which provides for automatic voidance of any prohibited agreements, in support of its claim that the article is not applicable to the control of concentrations. Since it is the merger agreement that would be annulled, it would require dissolution or divestiture, arguably too harsh and inappropriate a remedy for all unlawful concentrations. However, even assuming that this concern is justified with respect to some mergers, the validity of the point may be questioned when the merger action is in the form, for example, of a consolidation, where the legal existence of the resulting corporation can be distinguished from the agreement which created it.

A final argument which may be advanced against article 85's applicability to concentrations is based upon comparison of the article with certain provisions of the European Coal and Steel Community Treaty, forerunner to the Treaty of Rome. Article 65 of the European Coal and Steel Community Treaty, which roughly parallels article 85, has never been used in the control of concentrations, mainly because of the extensive regulatory scheme provided by article 66. However, this reasoning is less than convincing. First, no


The Commission steadfastly has refused to recognize the "rule of reason" standard in any article 85(1) application, pointing out that the article 85(3) exceptions amount to a specific limitation on any further "flexibility" of article 85. See, e.g., Consten & Grundig v. EEC Commission, Case Nos. 56/64 and 58/64, [1961-1966 Transfer Binder] CCH COMM. Mkt. Rep. ¶ 8046, at 7641 (1967).

114. This is especially true in light of the flexibility afforded by the recognized legal effect of article 85(3). See note 95 supra.

However, the "rule of reason" approach to article 85 would probably be much more supportable by a more "flexible" interpretation of 85(1) directly rather than a reliance on the article 85(3) exceptions. This approach to article 85(1) has been endorsed partly by the Court of Justice in other areas. R. JOLIET, THE RULE OF REASON IN ANTITRUST LAW 185-87 (1967).


117. While the Commission has never forcefully argued this point, it has been suggested by a number of commentators as a possible explanation for the Commission's stance. R. JOLIET, supra note 22, at 275-76.

118. Id.

119. Article 66(1)-(6) sets forth a rather detailed scheme that subjects proposed mergers to the requirement of prior authorization by the High Authority (Commission). Id. Article 66(7), in effect, prohibits an enterprise's abuse of dominant position, and is similar to the proscriptions of article 86 of the Treaty of Rome. Id. at 68-69, 246-47. However, article 86 does not include the mechanisms of article 66(1)-(6).

120. It has even been suggested that "[t]he omission from the Rome Treaty of a provision corresponding to Article 66(1) could be interpreted as reflecting an intention
extensive regulatory scheme paralleling article 65 appears in the Treaty of Rome, and thus there is less reason to declare article 85 preempted.\textsuperscript{121} Second, this type of \textit{a contrario} reasoning is not generally used in the interpretation of Community law.\textsuperscript{122}

Thus, it is submitted that the decision not to apply article 85 is more the result of administrative discretion than legal compulsion.\textsuperscript{123} The strong policy favoring the promotion of certain types of intra-Community concentration to encourage European economic integration and to promote industrial competition with third countries has apparently discouraged a comprehensive regulation of close-knits through use of article 85. This stance could change with the advent of new attitudes towards concentrations in general or towards other controls upon which the Commission relies. It would be well to note that the Commission's newly proposed regulation would subject most intended mergers to a rather extensive system of Commission notification and control.\textsuperscript{124} This was motivated by a recognition that "the degree of concentration is growing in such a manner that the preservation of effective competition in the Common Market and the objective set out in Article 3(f) could be jeopardized . . .."\textsuperscript{125} If this represents a changing Commission attitude, then it would be reasonable to assume that if the proposal is ultimately rejected by the Council, the Commission will, of necessity, rely on the present antitrust mechanism to combat the new threat. As will be demonstrated, article 86 has certain limitations as the basis for a comprehensive system. Although the Commission has never given official recognition to the possibility, it may be that article 85 could serve as the foundation for such a system in the future.

\begin{itemize}
  \item \textsuperscript{121} Article 66 makes explicit reference to mergers. \textit{Treaties}, supra note 34, at 64. However, article 86 makes no such corresponding reference to such close-knit combinations. 1 CCH COMM. MKT. REP. ¶ 2101 (1973).
  \item \textsuperscript{122} This would be an inappropriate technique under the teleological interpretation of Community law. \textit{See note 88 supra.}
  \item \textsuperscript{123} In discussions with common market antitrust officials, it became clear to one highly respected commentator that the inapplicability of article 85 to mergers was due not to problems of construction but rather "a grave policy question." \textit{Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, International Aspects of Antitrust}, 89th Cong., 2d Sess, pt. 1, at 367, 384 (1966) (statement by Mr. Rahl).
  \item The Commission's stance regarding article 85 must also be considered in light of its pro-concentration feelings at the time. It asserted:
  \begin{itemize}
    \item A positive attitude toward concentrations has convinced the Commission as well as industrial circles that legal or psychological obstacles to concentrations must be eliminated.
  \end{itemize}
  Commission Memorandum, supra note 31, at 9. Much of the memorandum particularly pointed out the need for concentration of small and medium-size enterprises. \textit{Id.} at 10-11. Removal of psychological barriers might have been one compelling reason for the Commission's refusal to subject those enterprises to possible article 85 violations. This attitude may be changing however.
  \item \textsuperscript{124} Proposal For a Regulation on the Control of Concentrations Between Undertakings, 2 CCH COMM. MKT. REP. ¶ 9586, at 9300-04 (1973).
  \item \textsuperscript{125} \textit{2 CCH COMM. MKT. REP.} ¶ 9586, at 9302.
\end{itemize}
Like article 85, article 86 makes no specific mention of mergers or concentrations, but, unlike article 85, this has not quelled Commission enthusiasm for its use as an anti-merger tool. This section shall deal with the theoretical foundation for its applicability, which was ultimately tested in Continental Can.

The operative portion of article 86 provides:

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

The provision additionally provides four illustrations of abuse: imposition of unfair trading terms; limitation of production, markets, or technical development; discrimination among competing parties; and creation of tying arrangements. The language of the article, then, embraces a behavioral, as opposed to structural, approach; it is not a dominant position that is to be regulated, but rather the abuse of that position which is to be subject to control. Article 86 does not appear to be concerned with mere achievement of market power, and regulation would seem to be imposed for acts independent of the firm's growth to market dominance. If this is so, the act of enterprise expansion through non-predatory merger would appear to be beyond the article's reach.

American law, on the other hand, is aimed more at the achievement or maintenance of economic power itself. This policy is directed at the preservation of competition through the self-regulating mechanism of the market, rather than through direct control of the evils sought to be prevented. Section 2 of the Sherman Act, which proscribes the monopolization

126. The text of article 86 is set forth in note 64 supra.
128. See notes 226-46 and accompanying text infra.
129. 1 CCH Comm. MKT. REP. f 2101 (1973).
130. These examples are meant to be illustrative rather than exhaustive. A. Deringer, The Competition Law of the European Economic Community 168 (1968). However, as all of the examples appear to involve behavioral, as opposed to structural matters, they often have been read as a limitation on the applicability of article 86 to purely structural considerations. R. Joliet, supra note 22, at 247. But see the Court of Justice's interpretation in Continental Can, notes 229-32 and accompanying text infra.
131. The United States Supreme Court has stated: So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the [Sherman] Act is aimed, inter alia, at the acquisition or retention of effective market control. United States v. Griffith, 334 U.S. 100, 107 (1948). Especially under the prevailing structure theory of monopolization, the existence of abuse is logically unnecessary and irrelevant, for the defendant's conduct is immaterial. G. Hale & R. Hale, supra note 27, at 166; Rostow, Monopoly Under The Sherman Act: Power or Purpose?, 43 Ill. L. Rev. 745, 772 (1949). However, proof of genuine abuse might constitute an a fortiori violation of section 2 under the structure theory. G. Hale & R. Hale, supra note 27, at 166 n.6.
of interstate trade, may be violated even without a showing that market power is coupled with unfair restraints of trade or predatory practices.\textsuperscript{132} Although a concept of abuse historically has been associated with section 2, it was directed towards means used to achieve and hold the monopoly power rather than to acts involving exploitation of a controlled market.\textsuperscript{138} Even the need for this showing was de-emphasized in \textit{United States v. Aluminum Co. of America (Alcoa)}.\textsuperscript{134} Judge Hand, confronted with monopoly power achieved through Alcoa's overwhelming share of the industry, held that possession of monopoly power was enough to support a finding of illegal monopolization, unless it was determined that the market share of the enterprise had been "thrust upon it."\textsuperscript{135} Thus, for all practical purposes, illegal monopolization was primarily a structural concept; it could be held to exist even without a showing of active exploitation of that position. However, in \textit{United States v. United Shoe Machinery Co.},\textsuperscript{136} the court, in taking the position that monopoly power was tantamount to illegal monopolization unless such power was attributable to superior skill or efficiency,\textsuperscript{137} evidenced a partial retreat from Judge Hand's test and a widening of excusable causes in the achievement of the market power. But it was still true that Sherman Act monopolization did not require the existence of abusive tactics in exploiting the monopoly position. This dichotomy between the Sherman Act and article 86 led a number of commentators to conclude that the "European approach is antagonistic to a true antitrust philosophy."\textsuperscript{138} The Commission disagreed,\textsuperscript{139} and, with the hindsight afforded by \textit{Continental Can}, the validity of the Commission's position can be seen. Full appreciation of article 86's metamorphosis into an effective merger control device necessitates analysis of its two fundamental operative terms: "dominant position" and "abuse."\textsuperscript{140}

\textsuperscript{132} The Supreme Court has stated:
Monopoly power is not condemned by the Act only when it was unlawfully obtained. The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed. \textit{Schine Chain Theatres, Inc. v. United States}, 334 U.S. 110, 130 (1948). \textit{Accord: United States v. Griffith}, 334 U.S. 100, 107 (1948); \textit{United States v. Paramount Pictures, Inc.}, 334 U.S. 131, 173 (1948); \textit{United States v. Line Material Co.}, 333 U.S. 287, 305 (1948).

\textsuperscript{133} \textit{See note 27 supra.}

\textsuperscript{134} 148 F.2d 416 (2d Cir. 1945).

\textsuperscript{135} Id. at 429.

\textsuperscript{136} 110 F. Supp. 295 (D. Mass. 1953), \textit{aff'd per curiam}, 347 U.S. 521 (1954). This case is often cited by European commentators as a link between section 2 of the Sherman Act and article 86. \textit{See text accompanying notes 188-92 infra.}

\textsuperscript{137} The court would require that control "rest solely in its original constitution, its ability, its research, or its economics of scale." \textit{Id.} at 344.

\textsuperscript{138} R. JOLIET, \textit{supra} note 22, at 297.

\textsuperscript{139} Commission Memorandum, \textit{supra} note 31, at 30.

\textsuperscript{140} While article 86 will be deemed to contain only these two primary operative features for purposes of this analysis, other commentators have considered article 86 "an equation with three unknowns:" dominant position, substantial part of the common market, and abuse. Samkalden & Druker, \textit{Legal Problems Relating To Article 86 of The Rome Treaty}, 3 \textit{Comm. Mkt. L. Rev.} 158, 169 (1965). The instant analysis combines the first two features in discussion concerning market dominance.
Interpretation of these terms, especially in comparison with the terms of the Sherman Act, highlights the significance of the Court of Justice's holding in *Continental Can*.

**A. Dominant position**

The definition of market domination for EEC purposes has itself been couched in behavioral rather than structural terms. One of the earliest proposals concerning the concept was advanced by the Working Party charged with preliminary analysis of article 86. Their suggested definition turned on whether the enterprise was "able to exert a major influence on the decisions of other economic entities by means of an independent strategy, so that no practicable or sufficiently effective competition can arise or be maintained on that market." This definition, which regarded *power* to achieve undesirable results as market dominance, was not viewed favorably by commentators or by the Commission. For example, Rene Joliet suggested the resulting tautology where "competition is defined in terms of performance and dominant position is considered as the power to achieve economic results different from those which would indicate a state of effective competition." So viewed, there is no real starting point in the Working Party's formulation; the terms "dominant position" and "competition" refer to each other without reference to market structure. Since the source of the power of the dominant firm lies in the structure of the market, Joliet has suggested that it is essential to refer to the pressures or lack of pressures of the industry structure in defining dominance.

The concept of monopoly power under the Sherman Act is focused more upon structural considerations. The basic definition of monopoly power, set forth in *American Tobacco v. United States* as "the power to combat prices or exclude competition," contains wording somewhat similar to that of the initial article 86 definition of market dominance. However, since the concept of competition in the American sense is not so much founded on tests of performance, the existence of monopoly power may be inferred irrespective of whether an enterprise has the strength "to achieve undesirable results." Thus, mere predominance of the business done in a relevant market was enough to demonstrate monopoly power in *United States v. Grinnell Corp.* Other factors in

142. Id.
143. R. JOLIET, supra note 22, at 233.
144. Competition was regarded by the Working Party to exist where enterprises do not limit sales or production in an extreme or artificial manner, if they meet demand in a satisfactory manner, and if they allow the purchasers of their products a fair share of the profit resulting from technical and economic progress.
145. R. JOLIET, supra note 22, at 234.
146. 328 U.S. 781 (1946).
147. Id. at 811.
the structural analysis include increase or decrease of a defendant's share of the market, the ease of market entry by newcomers, and the effect of price changes on consumer behavior.

The Commission itself has emphasized the relative unimportance of the American-type structural analysis. While noting in particular a distinction between monopoly and market dominance, it observed that: "[m]arket domination cannot be defined solely in terms of the market share of an enterprise or of other quantitative elements of a particular market structure." It particularly emphasized the insignificance of market share as a determinative factor by specifically asserting that a firm might hold a position of dominance even if its own share of the market is relatively small. The Commission has set forth a strikingly broad standard, stating that market dominance:

is primarily a matter of economic potency, or its ability to exert on the operation of the market an influence that is substantial and also in principle foreseeable for the dominant enterprise.

The flexibility of the Commission's definition comports with the EEC's competition policy. Reflected in its formulation are many of those extralegal considerations which the Commission seeks to inject into its analysis. For example, the desire to reduce the influence of large third-nation enterprises would be facilitated by the broad standard of "economic potency" which would allow the Commission to reach firms with powerful outside backing even where the market share is otherwise insignificant. The Commission can thus cut through burdensome market analyses and focus on the economic realities. Furthermore, this definition, which may reflect actual as well as potential enterprise activity, is quite conducive to the behavioral orientation of article 86.

149. While "share of the market" is a significant factor, it can be difficult to determine what proportions of market control are legal. G. Hale & R. Hale, supra note 27, at 120. Monopoly power has been found under section 2 of the Sherman Act where market share has been as low as 20 per cent. United States v. Lehigh Valley R.R., 254 U.S. 255, 270 (1920).


152. A monopolistic situation is regarded by the Commission as a possible abuse within the meaning of article 86. Commission Memorandum, supra note 31, at 30. As such, monopoly power would be clearly treated on a separate level from mere market dominance.

153. Id. at 28.

154. Id.

155. Id.

156. "Economic potency" would thus seem to include such considerations of large outside financial resources. This would comport with certain extralegal considerations in the Commission's competition policy. See notes 71-88 and accompanying
The Commission's formulation, while escaping the previously mentioned tautology, still does not circumvent the need for some structural analysis. Even the term "economic potency" can only be measured against the background of a relevant geographic or economic market. First, the finding of a limited submarket significantly enhances the chances of finding market domination; a firm may have sufficient economic potency in a relatively small market while being subjected to intensive market pressure on a broader scale. Second, article 86's explicit reference to market domination measured against "a substantial part of" the common market makes it clear that geographical submarkets may be relevant in the determination of a dominant position. This need for structural analysis will become further evident in the discussion of Continental Can — the first real Court of Justice review of the Commission's formulation.

In the final analysis, the determination of a relevant geographic market will probably entail structural determination balanced by policy considerations. The EEC's general encouragement of continental markets so as to promote trans-national integration makes it likely that the ultimate market boundaries will be somewhat wider than that of their American counterparts. The EEC's trans-national orientation led various commentators to conclude that it would be impossible to confine a relevant market to the geographical boundaries of a single member state. That belief, however, was laid to rest by the limited market finding in Continental Can, which itself may be said to indicate the acceptance of a structural analysis, although that finding may also be explained by the fact that the case involved a third nation enterprise seeking expansion, and that in

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157. The definitional formulation is not based upon the existence or non-existence of "competition" as was the standard proposed by the Working Party. See text accompanying note 142 supra.

158. Even the Commission recognizes that quantitative elements of market structure are of some significance. Commission Memorandum, supra note 31, at 28.

159. This is explicitly recognized by the Commission. Commission Memorandum, supra note 31, at 29.

160. Id.

161. The determination of this would be essentially based upon the determination of a relevant market. For a general review of the possible territorial and material delineations, see Samkalden & Druker, supra note 140, at 169-72. However, the factors in this determination are still unclear. See notes 169-71 and accompanying text infra. For the Court of Justice's analysis in Continental Can, see notes 251-56 and accompanying text infra.

162. The Commission's lack of regard for such structural considerations was largely responsible for its failure to prove its case. See notes 249-58 and accompanying text infra.

163. For review of the American process, see G. HALE & R. HALE, supra note 27, at 113-19.

164. McLachlan & Swann have stated that "the possibility of the 'substantial part' of the Common Market referring to one Member State only would appear to be excluded." McLachlen & Swann, Competition Policy in the Common Market, Economic Journal, March, 1963, cited by Roberts, The Concept of the Dominant Firm, 8 CARTEL 142, 150-51 (1963). However, the Commission, addressing itself to this question, stated the contrary. EEC, ARTICLES 85 AND 86 OF THE EEC TREATY AND THE RELEVANT REGULATIONS: MANUAL FOR FIRMS 5 (1962).
such a situation the countervailing policy against outside dominance can
be considered as a justification for the more restrictive policy.

Undoubtedly, a relevant product market also enters into the final
determination of dominant position, and might well be established
along the lines of the test followed in United States v. E.I. duPont
deNemours & Co.: Determination of the competitive market for commodities depends on
how different from one another are the offered commodities in char-
acter or use, how far buyers will go to substitute one commodity
for another.

This examination, in turn, would entail an analysis of such economic
factors as cross-elasticity of demand and ease of entry by alternative
suppliers. Here again, extralegal considerations could conceivably come
into play. For example, the desire to secure a competitive position for
the European firms vis-à-vis third nation enterprises might dictate that
narrower product market boundaries be drawn where the particular in-
dustry is marked by high entry costs which normally give financially
powerful outside firms a competitive advantage.

B. Abuse

Since it is the misuse of a dominant position that is illegal rather
than the achievement of dominant status alone, it is not surprising
that the applicability of article 86 turns primarily upon the construction
of the term "abuse." Clearly the term would include behavior on the part
of the dominant enterprise that involves a form of market exploitation.
The article itself set forth illustrative, though not exhaustive, examples of
such behavior which is deemed to be abusive — imposition of unfair trading
terms; limitation of production, market, or technical development;

166. Obviously, the relative competitive position of an enterprise may appear
greater when viewed in relationship to products in a "single market" than when
viewed as an absolute. A "single market" includes all goods which are used for the
purpose of meeting a certain need or accomplishing a certain purpose and which can
therefore be substituted for one another. A. DERINGER, supra note 130, at 160.
167. 351 U.S. 377 (1956). The use of this "reasonable interchangeability test" as
the basis for finding the relevant product market has been suggested by some foreign
commentators. J. MICHAEL, DIE BEURTEILUNG VON UNTERNEHMENSZUSAMMEN-
L. REV. 580 (1954)
169. 351 U.S. at 393. The market concept must be narrowed so that only like
products with a considerable cross-elasticity of demand will be included in a particular
170. This factor was stressed by the Court of Justice when striking down the
Commission's determination of a relevant product market in Continental Can. See
text accompanying notes 252–56 infra.
171. The Court of Justice has not yet articulated a precise structural standard
to be used in the determination of the relevant market. It would thus appear that many
of these extralegal factors could be taken into consideration.
172. Article 86 proscribes "any abuse . . . of a dominant position. . . ." 1 CCH
discrimination among competing parties; and creation of tying arrangements. Not so clear, however, is whether article 86 would be able to reach more than behavior related to direct market exploitation, whether it could, for instance, be applied to activity consisting of purely structural market extension by a dominant firm which was unaccompanied by economic exploitation. As shall be demonstrated, the resolution of that problem bears directly upon the applicability of article 86 to mergers and, until the clarification provided by Continental Can, a wide split developed in regard to the interpretation.

Joliet expressed the first and more traditional theory of abuse applicable to article 86:

The test of legality is not the interference with other firms’ freedom to compete and the use of “exclusionary” practices to achieve and hold power, but rather whether there is monopolistic exploitation of the market however market domination has been achieved and maintained.

The monopolistic exploitation referred to in this narrow interpretation presumably only includes, besides the article 86 examples, any coercive or predatory conduct which restricts economic freedoms. Indeed, early application of the article was limited to preventing a dominant firm from taking an unjust advantage of its market position. In the first article 86 action, for example, the Commission found such abusive behavior on the part of GEMA, a society dealing with authors’ rights with regard to musical works. Having a monopoly on the German market through its holdings of musical copyrights, GEMA was found to have abused that position through the imposition of unfair tying arrangements as well as through discriminatory behavior against non-Germans. Since each

173. For the text of article 86, see note 64 supra.

One recent example of abusive behavior which is not specifically mentioned in article 86(b) concerned the American company, Commercial Solvents Corporation (CSC), and its Italian subsidiary, Institute Chimioterapico Italiano (ICI), CSC, holding the world monopoly on the manufacture of materials necessary for the production of a necessary drug, refused to supply a competitor with the necessary ingredients. The Commission found that this had the effect of eliminating a substantial competitor and, since it was without commercial justification, must be considered abusive. CSC and ICI not only were fined substantially, but were also forced to supply its competitor with the ingredients, thereby extending the remedies previously employed. 2 CCH COMM. MKT. REP. ¶ 9543 (1973). The Court of Justice recently rejected the appeal by CSC and ICI, affirming the principle that the refusal to sell by a de facto monopoly, which tends to eliminate competition, is an abuse of a dominant position. ICI and Commercial Solvents Corp. v. Commission, Court of Justice Case Nos. 6, 7/73, 2 CCH COMM. MKT. REP. ¶ 8209 (1974). 2


175. Id. at 250 (emphasis added). Joliet considered the goal of the Rome Treaty, and specifically that of article 86, to be “to preserve competitive processes but to ensure that market domination is not actually exploited to the detriment of utilizers, whatever tactics have been used against competitors.” Id. at 293.


177. Gesellschaft für musikalische Aufführungs und mechanische Verpflichtungsrecht.
form of abuse related to unfair exploitation — conduct sharply distinct from the achievement or maintenance of a dominant position — it was possible to prohibit the abuse without violating the confirmed right to achieve market dominance. This distinction is not so clear, however, where the alleged abusive behavior consists of market extension rather than market exploitation. It is at this point that the narrow reading becomes significant, since market extension, being more structural than behavioral in nature, would not appear to fit this traditional notion of abuse. Joliet's refusal to include such action within the proscriptions of article 86 is made clear by his specific refusal to consider the use of exclusionary practices to achieve and hold market power as an element of the article's test of abuse.

Other commentators as well as the Commission espouse a second theory of abuse which would permit market extension to be brought within article 86's proscription. The rationale for this expanded reading roughly parallels the American treatment of single firm monopolization under section 2 of the Sherman Act as interpreted in United States v. United Shoe Machinery Corp. United Shoe, having developed overwhelming strength in the shoe machinery market, distributed its equipment through a network of long-term leases, which it applied "so as to strengthen [its] power to exclude competition." With some market power traceable to the exclusionary feature of the lease-only policy of the company, illegal monopolization was found on the ground that the policy would "affect potential competition." Likewise, it was this concern with effect upon potential competition that formed the basis of the theory that article 86 was to be broadly read to reach market extension. Proponents of this second theory would include market expansion as an abusive behavior, recognizing the damaging eventualities brought about through the consequent reduction of potential competition. As such, even absent a present abusive exploitation of the market position, a firm could be guilty of illegal article 86 abuse through a mere structural extension of its market power. This proscribed market expansion would, however, presumably include a much greater degree of market power than mere dominance, since a dominant position alone is not proscribed.

The inclusion of market expansion within the reach of article 86, in turn, bears directly on its applicability to mergers which effect the further growth of an already dominant firm. After all, by increasing market

178. Market extension, as used in this context, refers to external growth by means of acquisition as opposed to purely internal expansion.

179. Such action would appear to merely further entrench the enterprise's dominant market position rather than to present any sort of abusive behavior in the traditional sense of direct market exploitation.

180. R. JOLIET, supra note 22, at 292-93.

181. See notes 188-98 and accompanying text infra.


184. Id. at 343.

185. Id. at 344 (emphasis omitted).
domination, the firm would enjoy the benefit of excluding a potential competitor. The merger, as an exclusionary practice within the meaning of United Shoe, could thus be deemed abusive behavior\(^\text{186}\) even though it did not involve direct market exploitation.\(^\text{187}\) Drawing on the American Sherman Act experience, proponents of the second theory have thus argued strenuously for an interpretation of article 86 that includes merger activity as abusive behavior.\(^\text{188}\) Ernst-Joachim Mestmäcker,\(^\text{189}\) for example, has found that whereas maintenance of power by a dominant enterprise is the most important task of its market strategy, the most typical instances of abuse lie in the dominant enterprise's defense and extension of its market power.\(^\text{190}\) He cites United Shoe to show this steady preoccupation with the existence and activity of present and potential competitors,\(^\text{191}\) and notes that, above all, enterprise concentration may hamper the development of the common market by denying competitors access to the market dominated.\(^\text{192}\) Thus, in 1966, he declared: "From that it follows: he who controls market entry, dominates the market; if he forecloses entry by others, he abuses his dominant position."\(^\text{193}\) This position provides the necessary conceptual foundation for the applicability of article 86 to the merger activity of an already dominant firm. If that firm were to expand its influence through acquisitions so that all effective competition were essentially eliminated, it would be deemed abusive within the meaning of article 86. This would, of course, inject a purely structural element into the meaning of abuse\(^\text{194}\) and, while under this approach article

\(^\text{186}\) It should be noted that this abuse would be found even where no predatory practices were employed in achieving this exclusion of competitors. \\
\(^\text{187}\) This theory would find abusive behavior through market extension, even where that growth was independent of the original market dominance. See notes 259-61 and accompanying text infra. As such, this approach would go even farther than United Shoe. See note 357 and accompanying text infra. \\
\(^\text{189}\) Mestmäcker was one of the earliest proponents of this principle. Mestmäcker, Die Beurteilung von Unternehmenszusammenschliissen nach Artikel 86 des Vertrages Ã"ber die EuropÃ"ische Wirtschaftsgemeinschaft, in PROBLEME DES EUROPÃ"ISCHEN RECHTS 322-54 (1966) [hereinafter cited Mestmäcker 1966]. He published some of those ideas in English seven years later. Mestmäcker, Concentration and Competition in the EEC, 6 J. WORLD TRADE L. 615-47 (1973), 7 J. WORLD TRADE L. 36-63 (1973) [hereinafter cited Mestmäcker 1973]. \\
\(^\text{190}\) Mestmäcker 1973, supra note 189, at 645. \\
\(^\text{191}\) Id. at 644. \\
\(^\text{192}\) Mestmäcker 1966, supra note 189, at 333. \\
\(^\text{193}\) Id. at 333-34 (writer's translation). The original text reads: 
Daraus folgt: Wer Ãüber den Zugang zum Markt entscheidet, beherrscht den Markt; wer andere vom Zugang zum Markt ausschliesst, nutzt seine beherrschende Stellung missbrÃ"uchlich aus. \\
\(^\text{194}\) Although acquisition constitutes activity on the part of the dominant firm, it is structurally oriented. As such, that behavior would be similar to the activity found to be monopolization in United Shoe. See notes 186-87 and accompanying text supra.
86 would still permit the existence of a dominant enterprise on the market, any further growth would be deemed abusive if it had the prohibited effect of eliminating competition. Although this dual-level structural standard would appear to raise conceptual difficulties, Mestmäcker was unconcerned, stating: "The fact that article 86 does not prevent the formation of dominant firms does not preclude treating the further strengthening of this dominance as an abuse of power." Mestmäcker did not view article 86 as necessarily neutral vis-à-vis economic power just because market dominance itself is immune from attack. Since market power may increase beyond the point of mere dominance, he considered that controls may be imposed which prevent the further restriction of competition. When a merger affords the dominant enterprise this proscribed proportion of control, the acquisition should be deemed abusive.

The Commission, long a proponent of this second theory, explicitly recognized the harmful effects resulting from further growth of an already dominant firm. Noting that such activity is just as dangerous as the practices described in article 86(b), the Commission explained:

[A] monopolistic situation removes incentives toward 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.

This position was bothersome to the proponents of the first theory since it viewed competition from more of a structural angle than they thought to be proper. Those behaviorists often cited the non-structurally oriented examples of article 86(b) as a limitation on the type of conduct which could be proscribed through the article. The apparent two-level market dominance which was thought to be injected into article 86 also troubled adherents of the first theory. The Commission, in mentioning

195. See notes 203-07 and accompanying text infra. 196. Mestmäcker 1966, supra note 189, at 330 (writer's translation). The original text reads:

Die Tatsache, dass Artikel 86 der Entstehung beherrschender Unternehmen nicht unmittelbar entgegenwirkt, schliesst aber nicht aus, die weitere Steigerung der Marktmacht als missbräuchliche Ausnutzung zu beurteilen.

197. Id., Mestmäcker 1973, supra note 189, at 642. This recognizes that market power is not to be regarded as an absolute but, rather is capable of considerable gradation and change. Id.

198. It would, as such, be in violation of the principles set forth in article 3(f) calling for undistorted competition. Mestmäcker 1966, supra note 189, at 330.


200. Id. Article 86(b) is set forth in note 64 supra.


203. Joliet stated:

If there is only a difference of degree between market domination and the position described as monopolistic by the Commission, and if both situations carry with them the same dangers, one must wonder how a differential treatment can be justified.

Id. at 292, citing Hefermehl, Marktscheinende Unternehmen und Zusammenschlüsse im Lichte der Artikel 85 und 86 EWG-Vertrag, in EUROPEES KARTELRECHT
monopolistic situations, appeared to be distinguishing monopoly from mere market dominance. Objections were based on the contention that no such dual plateau was intended by the article, and, that even if it were, the precise definitional nature of the second level was unknown. That problem is compounded by the fact that dominant position itself is arguably only a muddled concept.

In spite of the skepticism with which the Commission's principle was received, it reaffirmed that position in 1972, stating that "subject to a contrary interpretation by the Court of Justice, the Commission ... applies article 86 of the EEC Treaty to concentrations of enterprises holding a dominant position where they are detrimental to consumers." That the Commission meant to include growth-through-merger within the category of conduct "detrimental to consumers" became quite clear when it moved against Continental Can's contemplated expansion in 1970. The Commission's action provided the basis for the eventual Court review of its position.

**C. The Commission Applies its Principle**

Continental Can Co., Inc., of New York (Continental), a major international producer of metal containers and other packaging materials (as well as machinery for manufacturing and utilizing containers), acquired control over Schmalbach-Lubeca-Werke (SLW), a German-based company which was a large manufacturer of light metal containers and sealing machines. Continental also had a Dutch licensee, Thomassen & Drijver-Verblifa N.V. (TDV), which produced metal containers and other packaging products. In order to effect a contemplated extension of its activity and influence in Europe, Continental, in February 1970, consummated an agreement with TDV, under which Continental would set up a holding company in Delaware (U.S.A.), called Europemballage Corp., and transfer to it Continental's entire interest in SLW. Continental would then have Europemballage offer TDV shareholders an adequate amount for their stock while the TDV management would encourage their shareholders to sell. This agreement was carried out, resulting in Europemballage achieving a 91 per cent interest in TDV by April 8, 1970.

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204. Commission Memorandum, supra note 31, at 28.
205. R. JOLIET, supra note 22, at 291.
206. This remains true even after the Continental Can decision. See notes 264-67 and accompanying text infra.
207. Id.
209. The facts set forth are a summary of those relied upon by the Court of Justice in the subsequent appeal. 2 CCH COMM. MKT. REP. ¶ 8171, at 8281-83 (1973).
The Commission promptly initiated proceedings under article 3 of regulation 17211 against Continental and Europemballage. In its formal decision, handed down December 9, 1971, the Commission found that Continental held, through SLW, a dominant position in a substantial part of the common market (Germany) — specifically in the market for certain light containers and metal lids for glass jars. The acquisition of TDV in the Netherlands, Continental's one-time competitor, was found to have had the effect of strengthening its dominant position so as to virtually eliminate competition. Since the action eliminated competition across a national frontier, the Commission held that there had been an abuse within the meaning of article 86. The Commission consequently decided that Continental had to terminate that abuse and submit proposals for complying with its order before July 1, 1972.

Continental, contending that the Commission had incorrectly applied article 86, refused to comply and brought suit in the Court of Justice to annul the Commission's decision. The Court reached a decision which examined the merits of the Commission's theory on February 21, 1973.

V. Continental Can: Losing the Battle, but Winning the War

The Commission was reversed on the facts, but affirmed in principle. Viewing Continental Can merely as a test case, the Commission expressed satisfaction with the power which was bestowed upon it by the Court's favorable reaction to its controversial interpretation. However, while the Commission's newly found powers appeared broad, they remained ill-defined, so that the value of the Continental Can interpretation as the basis of a systematic and comprehensive regulatory scheme can...
be judged only in reference to the quantum of proof which the Court of Justice would have required to sustain the Commission.

A. Affirmed in principle

Since the alleged abuse was committed by Europemballage, a subsidiary of Continental which had its own legal personality, the Court of Justice, after disposing of a number of peripheral issues,221 dealt with the competence of the Commission to issue its order against Continental.222 The fact that Europemballage was answerable for the alleged wrong was not questioned. Continental argued, however, that, as a separate legal entity, it could not be deemed responsible for Europemballage's conduct.223 The Court found that the action of a subsidiary could be imputed to the parent, especially where the facts indicated that Europemballage had acted on direct orders from Continental.224 Apparently, the Court, was willing to disregard separate legal personalities and find one juridical unit among companies that form a single economic whole.225

The Court then turned to the central issue of whether the word "abuse" in article 86 was to be limited to acts which amount to direct and detrimental anti-competitive behavior or whether it could include acts which accomplished structural alterations in the marketplace.226 In accepting the latter interpretation, the Court held that abusive conduct could be present where the dominant enterprise strengthened its position "to the point where the degree of dominance achieved substantially hampers competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market."227 The Court then suggested that the Commission would be required to show that competition was so substantially affected that remaining competitors could no longer provide "a sufficient counterbalance."228

In arriving at its holding, the Court merely paid lip service to the language of article 86. Citing the four examples of abusive behavior set forth within the article, the Court properly determined that the list was not exhaustive.229 But, it went on to state that two of the examples —
discriminatory dealings and tying agreements — demonstrated that not only immediately detrimental activity was within the scope of the article but also practices which involved potential harm to consumers through inherently structural changes of actual competition.\textsuperscript{230} Apparently, the Court found this to be a basis for extending the reach of article 86 to extension of market power.\textsuperscript{231} As such, both the Court’s premise and its conclusion would appear to be questionable.\textsuperscript{232} 

The Court sacrificed a literal reading to the traditional European approach of a teleological interpretation,\textsuperscript{233} and stressed the underlying rules and objectives of the Treaty as the determinative factors in its decision.\textsuperscript{234} The policy which formed the foundation of the decision was based upon article 3(f), which calls for the establishment of a system ensuring undistorted competition.\textsuperscript{235} The Court deemed the competition articles to contain only general provisions enacted to achieve the stated objectives.\textsuperscript{236} Literal flaws were not to be permitted to interfere with the overall Treaty effectiveness.\textsuperscript{237} 

The Court of Justice continued this analysis, expounding a theory very similar to that of Mestmäcker.\textsuperscript{238} Articles 85 and 86 were viewed as pursuing the objective of effective competition at two levels — article 85 dealing with concerted practices, and article 86 concerning unilateral action taken by one or more enterprises.\textsuperscript{239} Although the articles applied at separate levels, the Court would not, in the absence of an express contrary provision, assume that the Treaty contemplated a difference in the legal treatment between the two.\textsuperscript{240} Otherwise, results which article 85 prohibited, when accomplished through simple agreement of enterprises, might be permitted by article 86 if achieved through a merger association.\textsuperscript{241} That “would open up in the competition law as a whole a breach that could jeopardize the proper functioning of the Common Market.”\textsuperscript{242} 

\textsuperscript{230} Id. The Court of Justice mentioned the last two examples listed in article 86(b) with particularity. Discriminatory behavior and tying arrangements were cited to show that article 86: 

\ldots relates not only to practices that are likely to cause an immediate detriment for consumers, but also to practices which, because of their effect on the structure of actual competition as referred to in Article 3(f) of the Treaty, could be harmful to them. 

Id. (emphasis added). 

\textsuperscript{231} Id. 

\textsuperscript{232} Assuming that the two cited examples properly support the proposition that abusive behavior may include structural considerations, it is nevertheless true that each listed example relates to activity that has an unfair and immediate effect upon consumers. Since this is not the case where a purely structural modification through market extension is involved, an obvious distinction remains. 

\textsuperscript{233} See note 88 supra. 

\textsuperscript{234} 2 CCH COMM. MKT. REP. ¶ 8171, at 8299–8300. 

\textsuperscript{235} See notes 60–62 and accompanying text supra. 

\textsuperscript{236} 2 CCH COMM. MKT. REP. ¶ 8171, at 8300. 

\textsuperscript{237} Id. at 8299–8300. 

\textsuperscript{238} See notes 188–98 and accompanying text supra. 

\textsuperscript{239} 2 CCH COMM. MKT. REP. ¶ 8171, at 8300. 

\textsuperscript{240} Id. 

\textsuperscript{241} Id. 

\textsuperscript{242} Id.
The Court specifically expressed the concern that a contrary reading of article 86 would allow firms to avoid the article 85 proscriptions against market division through the use of merger-produced concentrations. Under the Court's analysis, the principle of article 85 (3) (b), which seeks to avoid elimination of competition with respect to a "substantial part" of the products in question should be equally applicable to article 86. Thus, merger activity should not escape the system contemplated by the Treaty's authors as manifested by article 85. A preliminary criticism of the Court's reasoning is that it appears to disregard the long-established principle that concentrations generally are viewed more favorably than cartels in effecting overall Community policy. By viewing both in an equally harsh light, the Court is approaching competition policy in a vacuum — certainly not the intent of the authors of the Treaty of Rome.

B. Reversed on facts

Simply stated, the Commission failed to prove its case. Of particular consequence was its inability to properly define the relevant market in order to establish market dominance.

The Commission attempted to establish three particular product submarkets: light containers for canned meats; light containers for canned fish; and metal closures for the canning industry. The Court found two apparently crucial factors missing in the Commission's proof of dominance in those markets. First, an adequate boundary which distinguished the particular submarkets from alternative product markets was not demonstrated. Focusing on potential consumers, the Court indicated that a sufficient lack of interchangeability had to be demonstrated in order to merit separate treatment. On the facts of Continental Can, the Court indicated that a general market for light metal containers might well have

243. Id.
244. For the text of article 85 (3) (b), see note 63 supra.
245. 2 CCH COMM. MKT. REP. ¶ 8171, at 8300.
246. Id. The Court of Justice stated: "Articles 85 and 86 cannot be construed so as to contradict each other, since they serve for the realization...[the] same objective." Id.
247. See text accompanying note 110 supra.
248. However, one must note the countervailing factor presented by the facts of this case. Since this expansion involved the significant growth of an outside enterprise, perhaps the ordinarily lenient stance taken by the Commission towards concentrations was disregarded. See text accompanying notes 79–82 supra. The Court, however, took no judicial recognition of this.
249. While the court rejected the Commission's determination of the relevant product market, it left unchallenged the Commission's finding that a single country (Germany) was the proper geographical market against which to measure the firm's dominance.
250. 2 CCH COMM. MKT. REP. ¶ 8171, at 8301.
251. Id.
252. Id. While the Court of Justice clearly indicated that the Commission's three proposed submarkets did not merit separate treatment, it failed to articulate specific guidelines. It did state, however, that the Commission must "define the market to be considered with sufficient precision to [at least] permit an evaluation of the comparative strength of the enterprise on such a market." Id. at 8302.
been the relevant product market.\textsuperscript{253} Second, the Court indicated that a dominant position had not been shown since the particular product might easily have been supplied through minor alterations by existing competition.\textsuperscript{254} This second factor focuses on the ease with which other manufacturers might "step into" a market to provide a "serious counterbalance."\textsuperscript{255} SLW's alleged dominance in the proposed submarket could have been effectively countered through industry movement from the general market.\textsuperscript{256}

Aside from considerations concerning the existence of market dominance, the Commission probably would have failed in proving that the necessary elimination of competition would have resulted from the merger action. Since the court discussed the prospect of manufacturers providing the counterbalance in reference to market dominance,\textsuperscript{257} these same considerations doubtless would have been applied in finding that the Commission had not met its abuse burden of proof by showing that "only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market."\textsuperscript{258}

\textbf{C. Implications of the decision}

\textit{Continental Can} appears to advocate a rather structural approach to the control of merger-induced concentrations. This is especially demonstrated by the fact that the court found no need for the showing of a causal connection between the dominant position and the abuse alleged.\textsuperscript{259} The purchase of TDV stock could have been carried out on the open market regardless of SLW's dominant position. In fact, acquisition of TDV stock was achieved totally independently of the product and geographic market allegedly dominated.\textsuperscript{260} Since the court found the question of causal connection totally immaterial to Article 86's proscription,\textsuperscript{261} it appears that the strengthening of a dominant position can be deemed abusive regardless of the methods or means used to attain it.

\begin{itemize}
\item \textsuperscript{253} \textit{Id.}
\item \textsuperscript{254} \textit{Id. at 8301.}
\item \textsuperscript{255} \textit{Id.} The Court of Justice also mentioned the potential competition from large buyers who might start producing for themselves. \textit{Id. at 8302.}
\item \textsuperscript{256} \textit{Id. at 8302.}
\item \textsuperscript{257} \textit{Id. at 8301.}
\item \textsuperscript{258} \textit{Id.} The court's use of the "serious counterbalance" test in defining market dominance as well as in the formulation of an abuse standard further muddles the two concepts. \textit{See} text accompanying notes 265-67 \textit{infra.}
\item \textsuperscript{259} \textit{2 CCH COMM. MKT. REP. 18171, at 8300.} It should be noted that this view is in sharp contrast to the prior opinions of many commentators. As one suggested:
\begin{quote}
It is inherent in the word "exploitation" that there must be a connection between the market-dominating position and the conduct of the particular enterprise, in other words, that its dominant market position alone enables the enterprise to engage in the particular conduct.
\end{quote}
\item \textsuperscript{A. DERINGER, \textit{supra} note 130, at 165-66.}
\item \textsuperscript{260} This point was strenuously argued by Continental's counsel, who contended:
\begin{quote}
Continental could be charged with violation of Article 86 only if it can be established that it used the allegedly dominant position of SLW in the Federal Republic of Germany to buy the TDV stock in the Netherlands.
\end{quote}
\item \textsuperscript{261} \textit{Id. at 8300.}
\end{itemize}
Article 86 thus would prohibit a merger, regardless of whether it was made possible by the firm's dominance.\footnote{262} The decision implies that even growth justifiable on the grounds of scale efficiencies or internal expansion might be precluded if it has the prohibited effect. This all-encompassing reach is compounded by the fact that article 86 does not provide for specific exemptions as does article 85.\footnote{263} This sweeping decision, therefore, could have the practical effect of prohibiting market dominance itself.\footnote{264} While the Court in \textit{Continental Can} appears to have initiated a two-level approach, the distinction between the two levels is not entirely clear. The first stage of market dominance, while certainly structural in nature, is not defined with clarity. Abuse through merger, which seems to be on a different plane, is manifested by a lack of the "sufficient counter-balance" on the part of remaining competitors, but how this would differ from the mere condition of market dominance is not entirely certain.\footnote{265} As a result of these somewhat unclear definitions, it is conceivable that the distinction between the two might become muddled.\footnote{266} If this happens, it is entirely possible that abusive behavior might be found, not only from further growth through merger, but also from the mere activity of doing business as a monopolistic enterprise.\footnote{267} This would, of course, have the practical effect of proscribing the mere achievement of market power, and would operate in a manner even beyond section 2 of the Sherman Act.\footnote{268}

While \textit{Continental Can} arguably supplies the Commission with very broad powers, the power it grants is quite limited in some respects. Specifically, since proof of a dominant position must be made before a company may be subjected to the proscriptions of article 86, the article

\begin{itemize}
  \item \footnote{262} As such, this doctrine arguably transcends \textit{United Shoe} wherein it was found that the elimination of competition was effected by conditions which were an outgrowth of the advantages resulting from United's market power. 110 F. Supp. 295 (D. Mass. 1953), \textit{aff'd per curiam}, 347 U.S. 521 (1954). \textit{See} notes 183-85 and accompanying text \textit{supra}.
  \item \footnote{263} These exemption sections would permit cartel agreements where certain beneficial effects were shown. \textit{See} note 114 and accompanying text \textit{supra}. Since exemptions are lacking in article 86's formulation, it would perhaps give the Commission even wider powers against concentrations.
  \item \footnote{264} \textit{See} text accompanying note 357 \textit{infra}.
  \item \footnote{265} This had been particularly bothersome to the behaviorists. R. Joli\textit{et}, \textit{supra} note 22, at 292.
  \item \footnote{266} This is evident from the use of the same determinative factors in the definition of market dominance and abuse.
  \item \footnote{267} Article 86 was adjudged to ensure respect of the article 3(f) principles that call for undistorted competition. 2 CCH \textit{Comm. Mktx. Rep.} \textit{¶} 8171, at 8300. Competition is distorted by a monopolistic power \textit{no matter how} it achieved that position. Thus, if the Court extends its rationale to its logical conclusion, it appears that article 86 might be violated by the mere existence of the monopolistic enterprise. \textit{See} note 357 and accompanying text \textit{infra}.
  \item \footnote{268} Even \textit{Alcoa}, the strongest American case so far against achievement of market influence, would allow a monopoly power to exist where such power was found to have been "thrust upon it." \textit{See} notes 133-35 and accompanying text \textit{supra}. Article 86 would not seem to provide for such an excuse, arguably finding a violation whenever the principles of article 3(f) were not respected. \textit{Continental Can}, 2 CCH \textit{Comm. Mktx. Rep.} \textit{¶} 8171, at 8300. Viewed in a structural manner, undistorted competition would preclude monopoly power \textit{no matter how} it was achieved.
\end{itemize}
cannot be utilized to prevent the merger of two companies when neither of them had maintained the status of market dominance before such acquisition.269 A merger between non-dominant firms would be permitted even when the combined enterprises would control the market to such a degree that the merger would have been regarded as abusive within the meaning of Continental Can had one of the firms been initially declared dominant. Thus, as long as the contemplated merger is between non-dominant firms, it would not be prohibited by article 86.270

The Continental Can interpretation of article 86 thus does not provide the possible foundation for a prophylactic rule of a Clayton-type variety.271 As amended by the Celler-Kefauver Act, section 7 of the Clayton Act prohibits dangerous mergers in their incipiency by providing, in part “that no corporation . . . shall acquire, directly or indirectly . . . stock . . . or assets of another corporation . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”272 The failure of article 86 to combat acquisitions which may create future competition problems could undermine a true competition policy. The Continental Can use of article 86 against mergers and concentrations has armed the Commission with more of a bludgeon than a sword. It certainly would appear to provide a less than adequate foundation for an intelligent and comprehensive system of control. Recognizing this, the Commission has looked elsewhere for a workable scheme.

VI. PROPOSED MERGER REGULATION273

On July 20, 1973, the Commission announced its proposal for a new, sweeping regulation to control merger-produced concentrations in the EEC.274 Although its ultimate acceptance by the Council is still hardly imminent275 and somewhat speculative,276 the proposal itself indicates a recognition of the need for an extensive revamping in this area. Article 85, while perhaps applicable to some concentrations, does not cover all mergers. And, although article 86 is conceptually sufficient to provide broad controls, the Court of Justice has demanded a high burden of proof which must be met by the Commission in order to sustain an action.

269. The proposed merger regulation was inspired in part by this inadequacy. 2 CCH COMM. Mkt. Rep. ¶ 9586, at 9302 (1973).
270. Thus, it appears that five enterprises, each of which controls 20 per cent of the market might all merge with impunity.
271. However, note that article 85, if deemed applicable to concentrations, might apply to such “incipiency” situations as it does not require proof of market dominance.
274. The text of the final draft regulation was approved on July 18, 1973, and announced in Brussels on July 20, 1973. Id.
275. The Council will hold a discussion on the subject by May 1, 1974, and expects to take action by January 1, 1975. 2 CCH COMM. Mkt. Rep. ¶ 9624, at 9400 (1974).
276. See notes 344-54 and accompanying text infra.
It is not surprising, therefore, that the Commission went beyond the competition articles and employed article 235 as the basis for its proposed regulation. This “catch-all” section provides that the Council, acting unanimously on a proposal from the Commission and after consulting the Assembly, may enact any new measures or provide the powers needed in order to attain the objectives of the Treaty. Based on this provision as well as on articles 86 and 87, the proposed regulation would completely replace regulation 17 in the area of concentrations, thereby effectively eliminating the use of articles 85 and 86 in the field.

A. Inspirations for a new system

The need for a new, systematic regulatory scheme in the area of concentrations has become almost universally recognized throughout the Community. As early as 1969, the Council stressed the urgency of formulating a clearly defined program. In Continental Can, the Court of Justice strongly emphasized the need for the development of a Treaty system which would ensure the undistorted competition called for in article 3(f).

At the Paris Summit Conference of October 19-21, 1972, the participants called for the formulation of new measures to ensure that mergers affecting Community firms were in harmony with the economic and social aims of the EEC. In order to maintain such a system, they agreed that it was desirable to make the “widest possible use” of all Treaty provisions, including article 235.

It was the Parliament, however, that laid the real conceptual groundwork, formulating the principles that eventually were to be adopted in the Commission proposal. In the formal Resolution of June 7, 1971, the European Parliament demanded:

that for concentrations which exceed a certain share of the market or a certain size there should be prior notification; such concentrations should be regarded as authorized only if the Commission does not raise any objection within a time-limit yet to be fixed.

278. Id.
279. However, many of the old features of regulation 17 would be incorporated. Cf. notes 66-70 and accompanying text supra.
281. 2 CCH COMM. Mkt. Rep. ¶ 8171, at 8299.
283. Id.
The concept of a notification requirement coupled with an authorization provision was thus introduced. The Commission developed the idea into a concrete proposal containing 22 articles.\textsuperscript{285}

### B. Mechanics of the proposal

#### 1. Scope

The all-encompassing reach of the proposal is suggested in its article [R]1(1)\textsuperscript{286} which would subject to regulation all transactions having the direct or indirect effect of bringing about a concentration between undertakings which enhances "the power to hinder effective competition" in the common market.\textsuperscript{287} This article makes it possible to deal with all but the most insignificant mergers within the Community.\textsuperscript{288}

The definition of concentration, located in article [R]2,\textsuperscript{289} turns on the concept of control. The requisite control over an acquired enterprise is found where there is either a right or a contract which "makes it possible to determine how an undertaking shall operate."\textsuperscript{290} This term cuts through legal formalities and views the principle in the context of any real enterprise influence. The presence or absence of a "legal or economic entity" thereby becomes an insignificant consideration. Rights to assets, power to manage or influence, stake in the profits, or contracts of more than a commercial nature all may manifest this control.\textsuperscript{291}

Only concentrations which "enhance the power to hinder effective competition"\textsuperscript{292} are proscribed. This provision, which should not be confused with either the term "dominant position" or "abuse" within the meaning of article 86, is intended to be very broad in its scope. Reflected in the proposal's proscription will probably be all of the extralegal considerations inherent in the competition policy. Thus, not only would traditional market structure criteria be used in the determination, but also such factors as special availability of technical knowledge, raw materials, and

\textsuperscript{285} 2 CCH Comm. Mkt. Rep. 9586, at 9303-4 (1973). (In order to avoid confusion, the article numbers of the proposed regulation will be designated by [R]).

\textsuperscript{286} Article [R]1(1) provides:

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

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

\textsuperscript{287} Id.

\textsuperscript{288} See notes 297-99 and accompanying text infra.


\textsuperscript{290} Id.

\textsuperscript{291} Id.

\textsuperscript{292} See the text of article [R]1(1) set forth in note 286 supra.
or outside finance as well as special links with suppliers, resellers, or third-country undertakings.

Article [R]1 does include a provision which would exclude from the regulation concentrations in which the aggregate turnover of the participating undertakings is less than 200 million units of account (UA), and in which the share of the market in terms of the goods or services involved does not exceed 25 per cent in any one member country. Article [R]5 stipulates that in the calculation of this aggregate turnover, both the enterprises directly participating in the concentration as well as all other undertakings in a control relationship with the participants shall be included. Presumably, concentrations which are indispensable to the attainment of a Community objective will also be immune from regulation. However, there are certain conceptual difficulties in the application of this exemption which will be discussed later.

The scope of the regulation thus includes nearly all mergers of any significant size involving a Community enterprise. Even transactions involving third-country enterprises in an indirect way would be subject to the proposal. Whether of the horizontal, vertical or conglomerate type, and whether or not they involve undertakings in a dominant position within the meaning of article 86, merger-produced concentrations deemed likely to prevent effective competition within the common market may be declared incompatible with Community interests.

2. Operating procedure

The operative standard, “enhance the power to hinder competition in the common market or in a substantial part thereof” is left largely undefined; the Commission is granted the exclusive competence to determine the “compatibility” of the proposed concentration, subject only to review.
by the Court of Justice. Post-merger action is dealt with in article [R]3(3), which grants the Commission the power to take any action to restore the condition of effective competition. Such compliance orders are backed with substantial fines for each day of delay under article [R]14.

However, it is merger prevention rather than post-concentration divestiture that forms the heart of the proposed system. This is achieved by means of a conclusive clearance procedure whereby the Commission may judge a contemplated merger on the basis of information supplied through a mandatory pre-merger notification requirement. Pursuant to this plan, article [R]4 demands that where a proposed merger involves

300. Article [R]3(1), (4), (5), provides that:

1. When the Commission finds that a concentration is caught by Article 1(1) and that the conditions laid down in Article 1(3) are not satisfied, it shall issue a decision declaring the concentration to be incompatible with the Common Market.

4. When the Commission finds that a concentration is caught by Article 1(1) and that the conditions laid down in Article 1(3) are satisfied, it shall issue a decision declaring Article 1(1) to be inapplicable; conditions and obligations may be attached thereto.

5. Subject to review by the Court of Justice, the Commission shall have sole power to take the decisions provided for in this article.


301. Article [R]3(3) states:

3. Where a concentration has already been put into effect, the Commission may require, by decision taken under paragraph 1 or by a separate decision, the undertakings or assets acquired or concentrated to be separated or the cessation of common control or any other action that may be appropriate in order to restore conditions of effective competition.


302. Id. However, the Commission's right is qualified somewhat in Article [R]3(2):

2. The decision by which the Commission declares a concentration to be incompatible within the meaning of paragraph 1 shall not automatically render null and void the legal transactions relating to such operation.

2 CCH COMM. MKT. REP. ¶ 9586, at 9303-2 (1973). This would avoid the problem which was partly responsible for the Commission's decision not to apply Article 85 to concentrations. See notes 115-16 and accompanying text supra.

303. Article [R]14 would permit periodic penalty payments up to 25,000 units of account for each day of delay. 2 CCH COMM. MKT. REP. ¶ 9586, at 9303-5 (1973).

304. Article [R]4(1) and (2) stipulates that:

1. Concentrations shall be notified to the Commission before they are put into effect, where the aggregate turnover of the undertakings concerned is not less than one thousand million units of account.

2. Where concentrations proposed by an undertaking or a group of undertakings have already reached or exceeded the amounts referred to in paragraph 1, they shall be exempted from the obligation of prior notification, if the turnover of the undertaking the control of which they propose to acquire is less than 30 million units of account.

enterprises with an aggregate turnover\(^{305}\) of at least one billion UA\(^{306}\) and the turnover of the acquired undertaking exceeds 30 million UA,\(^{307}\) the Commission must be formally notified of the plan. This sales turnover would include the annual receipts of not only the undertakings directly involved, but also of all firms participating even indirectly in the merger transaction.\(^{308}\) Article \([R]6(1)\)\(^{309}\) provides that the Commission may then commence proceedings against any concentration likely to fall within the "incompatibility" standard of the \([R]1(1)\) proscription.

The draft regulation provides that firms which have complied with this notification procedure may be given assurance, by a period of Community inaction, that the proposed merger is conclusively approved. Article \([R]6(2)\)\(^{310}\) demands that the Commission initiate any proceeding against the contemplated concentration within three months after receipt of the completed notification or else such concentration will be presumed "compatible" with the common market under article \([R]6(4)\).\(^{311}\) Once a decision has been made to commence proceedings against a planned merger, article \([R]17(1)(a)\)\(^{312}\) dictates that a final decision be made within the next nine months. Firms which give proper notification will, therefore, presumably know the fate of their proposal within one year: three months for the commencement of proceedings followed by a final decision within the subsequent nine months. This period may be altered.

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305. Turnover criteria were favored over a market share test since the former are less difficult to determine and thus more suitable as a workable basis. Interview with Mme. Tobias Espion, Commission competition staff member, assistant to the director-general, in Brussels, July 19, 1973. Mme. Espion took an active part in drafting the proposal.


308. Thus, the turnover of the parent firm of the participating enterprise would be included in the calculation.

309. Article \([R]6(1)\) provides:

1. Where the Commission considers that a concentration is likely to become the subject of a decision under Article 1(1) or (3), it shall commence proceedings and so inform the undertakings in question and the competent authorities in the Member States.

2 CCH COMM. MKT. REP. ¶ 9586, at 9303-3 (1973).

310. Article \([R]6(2)\) provides:

2. As regards concentrations notified to it, the Commission shall commence proceedings within a period not exceeding 3 months unless the relevant undertakings agree to extend that period. The period of 3 months shall commence on the day following receipt of the notification, or if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.

2 CCH COMM. MKT. REP. ¶ 9586, at 9303-3 (1973).

311. Article \([R]6(4)\) provides:

4. Without prejudice to paragraph 3, a concentration notified to the Commission shall be presumed to be compatible with the common market if the Commission does not commence proceedings before expiration of the period specified in paragraph 2.

2 CCH COMM. MKT. REP. ¶ 9586, at 9303-3 (1973).

312. Article \([R]17(1)(a)\) provides:

1. (a) Decisions under Article 3(1) and (4) shall be taken within 9 months following the date of commencement of proceedings, save where there is agreement with the relevant undertakings to extend that period.


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in certain circumstances. The three month commencement period may be
lengthened under article [R]6(3)\textsuperscript{313} if supplied information is false or
misleading and shortened under article [R]7(1)\textsuperscript{314} upon the Commis-
sion's prior approval of the merger; the nine month period may be extended
under article [R]17(1)(b)\textsuperscript{315} in the event special information is required
by the Commission for its proceeding, pursuant to article [R]10.\textsuperscript{316}

While only concentrations involving enterprises with an aggregate
turnover of at least one billion UA fall within article [R]4's mandatory
notification provision,\textsuperscript{317} enterprises involving a smaller turnover may de-
sire to notify the Commission so that they may benefit from article [R]6's
"presumption through inaction." Article [R]4(4)\textsuperscript{318} thus permits volun-
tary submission to notification. Such action would allow the firm the
positive clearance assurances of articles [R]6 and [R]17\textsuperscript{319} although it
would preclude, under article [R]7(1),\textsuperscript{320} the contemplated merger dur-
ing the three month waiting period.

The Commission is given wide powers in conducting its proceedings
under the proposed regulation. Broad investigatory powers are granted
under article [R]12,\textsuperscript{321} which allows the Commission to secure any
needed corporate books or records, and are facilitated by the grant of full
rights to enter the premises of any involved enterprise. Article [R]11\textsuperscript{322}
guarantees the cooperation of competent authorities of the member states
in conducting such investigations. Finally, certain procedural safeguards
are granted and obligations are imposed upon enterprises involved with
the Commission hearings. Most of these follow the procedural system of
the present regulation 17\textsuperscript{323} and are thus generally familiar.\textsuperscript{324}

C. Origin of operative terms

Comparison of the new proposal to the system employed by the ECSC
is tempting. Article 66\textsuperscript{325} of that Treaty calls for a very broad authorization
system dealing with concentrations. Section 1 provides, in relevant part:

\textsuperscript{313} Id. at 9303-3.
\textsuperscript{314} Article [R]7(1) provides:
1. Undertakings shall not put into effect a concentration notified to the
Commission before the end of the time limit provided for in Articles 6(2) unless
the Commission informs them before the end of the time limit that it is not
necessary to commence proceedings.
2 CCH COMM. MKT. REP. ¶ 9586, at 9303-3 (1973).
\textsuperscript{315} Id. at 9303-5.
\textsuperscript{316} Id. at 9303-3 to -4.
\textsuperscript{317} See note 304 supra wherein the text of article [R]4 is set forth in part.
\textsuperscript{318} Article [R]4(4) provides:
4. Concentrations which are not caught by paragraph 1 may nevertheless be
notified to the Commission before they are put into effect.
\textsuperscript{319} See notes 310-12 and accompanying text supra.
\textsuperscript{320} The text of article [R]7(1) is set forth in note 314 supra.
\textsuperscript{321} 2 CCH COMM. MKT. REP. ¶ 9586, at 9304-4 to -5 (1973).
\textsuperscript{322} Id. at 9303-04.
\textsuperscript{323} See notes 66-70 and accompanying text supra.
\textsuperscript{324} See 1 CCH COMM. MKT. REP. ¶¶ 2401-2633.
\textsuperscript{325} TREATIES, supra note 34, at 64-69.
Any transaction shall require prior authorization of the High Authority [equivalent to the Commission in the EEC] . . . if it has the direct or indirect effect of bringing about . . . a concentration between undertakings . . . whether it is effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control.326

Certainly the concept of control in the proposed regulation was largely inspired by the ECSC article. In fact, the elements mentioned in article [R]2 of the proposal concerning what constitutes control follow almost verbatim the first decision by the High Authority (1954) interpreting section 1 of article 66 of the ECSC Treaty.327

Yet, it is important to note the difference in approach between the systems. Prior authorization under the ECSC Treaty required the High Authority to act on all merger requests by deciding on the merits of each application.328 On the other hand, the EEC proposal, with its "acceptance through non-action" policy, would require the Commission to take affirmative action only where it was deemed necessary. This would, of course, severely reduce the administrative burden of implementing the new scheme. One of the drafters of the new proposal cited these practical considerations

326. Id. at 64.
327. Compare Article [R]2(2) of proposal which provides:
   2. Control is constituted by rights or contracts which, either separately or jointly, and having regard to the considerations of fact or law involved, make it possible to determine how an undertaking shall operate, and particularly by:
      (1) Ownership or the right to use all or part of the assets of an undertaking;
      (2) Rights or contracts which confer the power to influence the composition, voting or decisions of the organs of an undertaking;
      (3) Rights or contracts which make it possible to manage the business of an undertaking;
      (4) Contracts made with an undertaking concerning the computation or appropriation of its profits;
      (5) Contracts made with an undertaking concerning the whole or an important part of supplies or outlets, where the duration of these contracts or the quantities to which they relate exceed what is usual in commercial contracts dealing with those matters.

2 CCH COMM. MKT. REP. ¶ 9586, at 9303–2 (1973), with the definition of control set forth in the decision by the High Authority in one of its earliest actions:

Les droits ou contrats mentionnés ci-après constituent les éléments de contrôle d'une entreprise lorsqu'ils confèrent, seuls ou conjointement et compte tenu des circonstances de fait ou de droit, la possibilité de déterminer l'action d'une entreprise dans les domaines de la production, des prix, des investissements, des approvisionnements, des ventes ou de l'affectation des bénéfices:
1) Droit de propriété ou de jouissance sur tout ou partie des biens d'une entreprise,
2) Droits ou contrats qui confèrent une influence sur la composition, les délibérations ou les décisions des organes d'une entreprise,
3) Droits ou contrats permettant à une personne, seule ou avec d'autres, de gérer les affaires d'une entreprise,
4) Contrats relatifs à la comptabilisation ou à l'affectation des bénéfices d'une entreprise,
5) Contrats relatifs à la totalité ou à une partie importante des approvisionnements ou des débouchés d'une entreprise, lorsque ces contrats dépassent en quantité ou en durée la portée usuelle des contrats commerciaux en la matière.


328. ECSC article 66(1). TREATIES, supra note 34, at 64.
as the principal reason for rejecting a regulatory process patterned after the ECSC approach.\(^3\)

The drafters were also somewhat influenced by the relatively sophisticated British system of concentration control.\(^3\) The Monopolies and Mergers Act, 1965,\(^3\) is one of the few European enactments allowing governmental regulation of concentrations through divestiture. With regard to mergers, that Act provides that any acquisition involving a minimum asset takeover or market extension can be referred by a Board of Trade (BOT) to the Monopolies Commission (MC) which has the right to undertake analysis and make recommendations.\(^3\) The MC is specifically charged with determining whether the merger violates "the public interest," although this term is not really defined.\(^3\) The BOT reviews the determination and decides what action should be taken. The EEC proposal shares the British policy of subjecting only certain, minimally-sized concentrations to review. Yet, the drafters did not care to have a system of two-level review, preferring to integrate the scheme through a built-in exemption. Also, the British system does not provide for an advanced notification procedure.

The system of pre-merger mandatory notice appears to have been inspired by American law. Although the competition staff members, with whom the writer spoke, did mention general American influence in the development of EEC antitrust principles, none mentioned any specific provisions used in formulating the proposal. It seems inescapably clear, however, that the notification procedure was largely influenced by the FTC merger notification system effective April 4, 1972.\(^3\) In a 1969 resolution,\(^3\) the FTC initiated a system requiring notification of contemplated mergers and the submission of "special reports" under certain circumstances. For each acquisition within its jurisdiction of a firm with assets or sales of $10 million or more, with total assets or sales among all the concerned enterprises exceeding $250 million, the FTC would require the filing of a special report within 10 days after the merger agreement is reached and no less than 60 days prior to consummation of the merger.

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\(^{329}\) Espion interview, \textit{supra} note 305.

\(^{330}\) Id. While the act is sophisticated relative to other European enactments, it has been described as "laughable" compared to American antitrust law. \textit{Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, International Aspects of Antitrust, 89th Cong., 2d Sess., pt. 1, at 331 (1966)} (statement by Mr. Schwartz).


\(^{332}\) R. Jolivet, \textit{supra} note 22, at 183-85.

\(^{333}\) Id. at 179.

\(^{334}\) 37 \textit{Fed. Reg.} 7951-52 (1972). This conclusion has been reached by several European lawyers including the French firm, Gide, Loyrette & Nouel, which was involved with the \textit{Continental Can} case. \textit{See} Gide, Loyrette & Nouel, \textit{Dictionnaire du Marche Commun}, No. 65, June 1973, at 11-12.

\(^{335}\) 1 \textit{CCH Trade Reg. Rev.} 4540, at 6929 (1973).
or acquisition. Acquisition achieved through either sale of assets or 10 per cent ownership of voting stocks would be included.336

There are two differences between the FTC procedure and the EEC proposal. First, the FTC 60 day requirement may be lessened to "as promptly as possible" should exceptional circumstances warrant,337 the time limit was not intended as a waiting period, unlike the three month limit in the EEC proposal. Second, the FTC has made it clear that the mere fact that it has not challenged a merger prior to its consummation should not be interpreted as approval of the legality of the transaction,338 while under the proposed regulation the EEC Commission would appear to sanction any such transaction carried out after the waiting period.

D. Conceptual difficulties

In light of the almost unlimited powers given to the Commission in determining whether a proposed concentration is "compatible," the legal effect of the article [R]1(3)339 exemption is not clear. It declares that the basic proscription of article [R]1(1) may be deemed inapplicable to concentrations which are indispensable to the attainment of an objective which is to be given priority treatment.340 This provision, included largely upon the insistence of Commissioner Albert Borschette,341 was meant to make the proposal more politically palatable. It was, therefore, designed to integrate the competition policy with other specific Community objectives, perhaps softening an ordinarily harsh stance where other Community policies would be adversely affected. One example cited to the writer particularly involved deference to the regional policy. A contemplated merger, which would effect a total monopoly on the market and thus be prohibited in most areas, might be permitted in a particularly undeveloped market, such as southern Italy, if it could be shown that overall industrial development would thereby be encouraged.342

Whether the provision has the effect of limiting Commission power is, however, far from clear. The explanatory letter accompanying the proposal explicitly states that article [R]1(3) does not have the effect of a legal exception.343 It thus seems hardly more than a manifestation of Commission intentions, certainly not the legal basis for challenging Commission action before the Court of Justice. One possible explanation for its non-legal status is that the Commission may not want to reduce any of the power bestowed by Continental Can. The Court of Justice, under its notion of abuse, would not require that a Commission action be coupled

337. 1 CCH TRADE REG. REP. ¶ 4540, at 6936 (1973).
339. For the text of article [R]1(3), see note 295 supra.
340. Id.
341. Espion interview, supra note 305.
342. Id.
343. Explanatory Memorandum, supra note 284, at 10.
with a showing that it would not adversely affect other Community policies. Since the proposed regulation would replace article 86 as the anti-concentration tool, the Commission apparently attempted to ensure that all of its previous power would be retained.

E. Chances for acceptance

As previously noted, article 235 requires unanimity among Council members, directly representing their member States, to pass the Commission proposal. Aside from the inevitable industrial lobbying, there are a number of political and legal considerations which could conceivably force an alteration or rejection of the plan.

Since Treaty law must be applied in conjunction with the antitrust proscriptions of the national laws, it is quite obvious that the potentially far-reaching rules may be quite incompatible with the regulatory schemes of the member states. Particularly where antitrust restrictions are rather lenient, the national may be unwilling to compromise its policies in the name of the Community interest. Belgium, for example, imposes national controls which are relatively favorable to the formation of economic power. The Belgian statutes, which are not opposed to the development of market dominant firms by way of mergers, call only for supervision by administrative enforcement of firms’ behavior. Exclusionary practices, however coercive or predatory, would not be subject to corrective action. The EEC proposal thus would have the effect of radically altering the Belgian stance as to concentrations.

Of even greater consequence is the possible infringement of the new controls on the very political posture of the member state. The Commission made it explicitly clear, in the press conference announcement of the proposal, that no exceptions would be made for public, as opposed to private concentrations of economic power. One particularly bothersome question is the potential effect of the Commission policy on the large Italian governmental holding companies. Certainly such concentrations could jeopardize economic integration and the development of a Community-wide economy, yet in the final analysis this concern must be balanced by

344. See note 278 and accompanying text supra.
347. R. Jollet, supra note 22, at 147.
348. This concern was evidenced by at least one question directed to the Commission at the press conference:

[Q. directed to Mr. Borschette] The frontier between the public and private sectors is sometimes not very well defined. What happens if an enterprise controlled by the state undertakes certain control operations or merger operations. I'm thinking particularly of the Italian holding companies. Are they covered by this regulation?

[A.] The case you mention is, in fact, covered.

some recognition of national sovereignty. This will likely be a point of compromise to be reflected in the final form of the regulation.

Recent events have also indicated that the proposed regulation, even if accepted, is likely to be somewhat watered down. At present the cry for national egoism among the member states has drowned the plea for Community unity. One manifestation of this present disharmony has been the European Parliament's slim rejection of the proposal, made possible through the general boycott of Britain's Labour members. While the Parliament has only a consultative function at this time, the rejection is significant in light of the Assembly's one time enthusiastic promotion of the principles involved. Thus, the proposal should find an even more fundamental resistance on the part of the Council of Ministers when it decides the ultimate fate of the Regulation by January 1, 1975. It appears likely that a compromise stance will be taken by the Commission before submission of a final proposal to the Council. Commissioner Albert Borschette has already indicated a possible willingness to modify certain of the proposal's provisions.

VII. CONCLUSION

Continental Can and the Commission's proposed regulations evidence a rapid evolution in the ECC's control of concentrations. However, this has not been without certain growing pains, and competition policy in the area of close-knit combinations remains in an "awkward stage," encountering certain conceptual difficulties on the way to maturity.

The difficulties are caused primarily by the fact that neither article 85 nor 86 is really an adequate basis for comprehensive control. One explanation for the lack of a truly adequate article is that the drafters of the Rome Treaty, viewing concentrations as fundamentally important to the development of an integrated European economy, sought to avoid any real legal or psychological obstacles to their development. Article 85 was designed to attack only the less beneficial cartels while article 86 permitted the maintenance of dominant market power, subject only to a degree of control over economic exploitation of that power. Article 86 appears to seek the best of both worlds — the Community would reap the benefits of concentrations while consumers would be protected from the dangers. It appears inescapably clear that since only a misuse of a dominant position was to be prohibited, article 86 originally had a pure abuse orientation; concentrations could grow with absolute impunity as long as they "behaved."

353. See notes 284-85 and accompanying text supra.
However, in what appears to have been the recognition of the inadequacies of such a formulation, the Commission sought to inject structured elements into article 86's prohibition. It now considers the term "abuse" to include not only economic exploitation, but also the growth of a dominant enterprise by merger. As this involves a purely structural matter, this interpretation strains the article 86 formulation. First, none of article 86's four illustrative examples seem to classify merger activity as within the scope of such misuse. Second, the Commission's reading requires the formulation of separate levels of market power. Exactly how much further growth of an already dominant firm must take place before being deemed an abuse is not delineated. Why the article did not indicate that there might be "quanta of concentration" involved in its operation is similarly unclear. Third, even if these issues were settled, it appears doubtful that article 86 was meant to be read so as to reach an abuse that was achieved totally independently of the firm's dominant position. It is difficult to understand how an activity that has been maintained independently of the firm's market power can be deemed "abuse of a dominant position." Prohibition of the Continental Can-type merger, however, clearly requires such a reading.

In spite of these conceptual difficulties, the Court of Justice gave judicial approval to the Commission's interpretation of the article. While the tortured reading of article 86 can be partially explained by the teleological interpretation of Community law, that emphasis on the promotion of fundamental Treaty aims may have extensive ramifications. Specifically, while it is true that market power alone is still presumably immune from the reach of article 86, further erosion of the concept of abuse might put this principle in jeopardy as well. One of the underlying rationales of the Court in Continental Can was that the policy of article 3(f) — undistorted competition — would be violated where the merger-produced growth might constitute a danger of weakened competition. However, this danger would be presented by monopoly power no matter how it was achieved, and the principle of article 3(f) could be violated by any monopoly power simply doing business. Since it is the monopoly power that creates the danger and not necessarily the means of its achievement, the Court's rationale would appear to strike at the market position itself. As abuse has taken on this structural connotation, article 86 would now appear to implicitly outlaw all enterprise concentration achieving the proscribed level.

So construed, article 86 would not only take the final step toward a purely structural orientation, but would seem to go beyond section 2 of the Sherman Act. Even the Alcoa decision, which went the farthest towards finding a monopoly power tantamount to illegal monopolization, recognized certain legitimate "excuses" for monopoly power, as where

356. See note 88 supra.
monopoly was "thrust upon" the organization involved. The Commission's interpretation of article 86, if taken to its logical conclusion, would presumably find monopoly power to be abuse regardless of the means by which it was achieved.

While the court's decision may contain strained legal reasoning, it is understandable in light of the circumstances presented. The Commission was waiting for the Continental Can decision before introducing its proposed merger regulation. While receiving enthusiastic backing for this comprehensive regulatory scheme from the Parliament as well as tentative approval by the Council, the Commission apparently sought some support from the Court of Justice before attempting to actually introduce such broad controls. If the Commission could back its proposal with a showing that it already had widespread article 86 powers, the proposed plan would be more palatable to the Council members. Thus, it is submitted that the Court, realizing that such a regulation was necessary to carry out the principle of article 3(f), may have stretched the article 86 interpretation to show the needed support. That the two events may have been so connected is partly evidenced by the fact that the new proposal, if adopted, would totally preempt the use of article 86 in the area of concentrations.

Whether or not the merger regulations are accepted in their final form, it is clear that concentrations in the EEC are becoming subject to rapidly expanding control. Article 86 has proven to be an effective tool in halting growth-through-merger of a dominant firm. The proposed regulation would apply to the small as well as the dominant enterprise. Both recent developments indicate uncontrolled concentrations are a business luxury of the past. They also make clear that, notwithstanding appearances to be contrary, EEC law has chosen the American tradition of a structurally-oriented control of concentrations, a fact which has recently excited some commentators into speculating about the eventual creation of a common trans-Atlantic merger policy. On a more practical level, however, this development should be strong caveat to the American enterprise operating within the EEC — foreign expansion may now be subject to further reaching regulation.

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