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SINCE THE INCEPTION of the Common Market, it has been thought that the institutions of the European Economic Community[1] have no authority to prevent mergers of enterprises which might result in market domination, or to require divestiture in the event of market domination by such a merger. In fact, it is frequently argued that present E.E.C. enterprises must attain a high degree of concentration in order to compete effectively with the giant United States and other international corporations attempting to gain a foothold in the E.E.C. Yet, if the foothold is obtained, not through open competition with E.E.C. enterprises, but by acquisition of such enterprises, the purpose of European concentration is defeated. This interplay of competitive forces has caused E.E.C. personnel and others to look more closely at Articles 85 and 86 of the Treaty of Rome,[2] to determine whether the antitrust authority granted is broad enough to prevent concentrations by acquisitions.

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For purposes of this discussion, it may be helpful to consider the following hypothetical: Assume that USCO manufactures and sells product X in the United States and also manufactures and sells same through its subsidiaries in the Common Market, but only to the extent of about two percent of the total E.E.C. market. USCO intends to acquire through its existing German subsidiary, which does not manufacture product X, GERCO, a German company.

[1] Hereinafter referred to as E.E.C.

[2] The Treaty establishing the European Economic Community is often called the Treaty of Rome because it was signed in Rome on March 25, 1957 by the six Common Market Countries, Belgium, Federal Republic of Germany, France, Italy, Luxembourg, and Netherlands, who are often called "the inner six." March 25, 1957, No. 4300, 298 U.N.T.S. 14. E. STEIN & P. HAY, DOCUMENTS FOR LAW AND INSTITUTIONS IN THE ATLANTIC AREA 75 (1967).

GERCO dominates the product X market in Germany and produces less than 50 percent (but more than any other single competitor) of product X sold in the Common Market. USCO and GERCO each make product X under their own patents which are registered in both the United States and the E.E.C. If the two companies were merged, it still would be possible for other competitors to produce a third style product X which would not infringe the patents of either company.

The arrangement contemplated above by USCO would involve a concentration of enterprises by acquisition of an interest; consequently, it falls within the definition of concentration developed by the Commission of the E.E.C. in its study of the problem as it arises within the Common Market.[3] The Commission's definition of concentration incorporates the distinction between combinations, which includes cartels, and concentrations by mergers.[4] In spite of certain reservations concerning the possibility of arriving at an exact distinction between the formation of a cartel and a concentration of enterprises, a cartel is defined as an agreement regarding certain conduct in the market between independent enterprises; a concentration is assumed when several enterprises surrender their economic independence and combine under a lasting uniform economic leadership. When applying Articles 85 and 86 of the E.E.C. Treaty[5] the Commission has indicated that a merger by concentra-

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[3] The Problem of Concentrations of Enterprises in the Common Market. Study of of the European Economic Community, REIHE WETTEWERB NO. 3, Brussels (1966). (Hereinafter referred to as Study).

[4] The distinction between connections and mergers by concentration has already been accepted in the application of the rules of competition of the E.E.C. Treaty.

[5] Articles 85:

1. The following practices shall be prohibited as incompatible with the Common Market: all agreements between undertaking, [*] all decisions by associations of undertakings and all concerted practices which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. This shall, in particular, include:

(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;

(b) the limitation or control of production, markets, technical development or investment;

(c) market-sharing or the sharing of sources of supply;

(d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a competitive disadvantage;

(e) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations, which by their nature or according to commercial practice, have no connection with the subject of such contract.

tion occurs when there is a participation by companies in other companies, which includes the acquisition of all or parts of the fixed assets of other enterprises, as well as the merger of two or more legally independent companies to form a new company. The most significant factors in a concentration by merger, in the opinion of the Commission, are the "acquisition of title" or "a new arrangement in respect of ownership in an enterprise."

The definition of concentration of enterprises is significant when contrasted with the concept of a combination by cartel in that the Commission treats as a merger a combination of enterprises resulting from acquisition where only formal legal independence is maintained among the enterprises. In order for a combination to be independent so as to fit within the definition of a cartel, the enterprises must remain *economically* as well as legally separate so that they can continue to plan independently. Thus, economic independ-

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2. Any agreements or decisions prohibited pursuant to this article shall automatically be null and void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or type [*] of agreement between undertakings, [**]
— any decision or type of decision by associations of undertakings, and
— any concerted practice or type of concerted practice

which helps to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting profit and which does not:

(a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives;

(b) enable such concerns to eliminate competition in respect of a substantial part of the goods concerned.

1 CCH COMM. MKT. REP. paras. 2005, 2031, and 2051 (1968).

Article 86:

Any improper exploitation by one or more undertakings[*] of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall be prohibited, in so far as trade between Member States could be affected by it.

The following practices, in particular, shall be deemed to amount to improper exploitation:

(a) the direct or indirect imposition of any unfair purchase or selling prices or of any other unfair trading conditions;

(b) the limitation of production, markets or technical development to the prejudice of consumers;

(c) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a competitive disadvantage;

(d) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which by their nature or according to commercial practice have no connection with the subject of such contract.

1 CCH COMM. MKT. REP. para. 2101 (1967). For another translation of Articles 85 and 86 *see* E. STEIN & P. HAY, *supra* note 2, at 93-4. Study, *supra* note 3, at 21, 24.

ence may be lost by an enterprise not only through merger, but also through acquisition.[6]

A direct application of the rules of competition of the E.E.C. Treaty to concentrations of enterprises[7] such as the one suggested in the aforementioned hypothetical has not yet been the subject of a decision by the Court of Justice.[8] Therefore, any answers to the legal question posed by the hypothetical of whether this concentration is permissible must be reasoned from statements of the Commission regarding its interpretation of the provisions of the treaty and pertinent legal doctrines. This projection will be framed within the following considerations:

(1) The application of Article 85 of the E.E.C. Treaty to concentrations;

(2) The application of Article 86 of the Treaty to concentrations in general; and

(3) The concentration as an abuse within the meaning of Article 86 of the Treaty.

Article 85, para. 1 prohibits all agreements between enterprises, decisions by associations of enterprises, and concerted practices which are apt to impair trade between the member states and are intended to restrain competition,[9] and enumerates five situations which are illegal.[10] The language of the provision does not specifically distinguish a restraint of trade caused by a cartel from a restraint caused by a concentration. However, it appears that the prohibitions of the Article might apply in concentration situations provided they are based on agreements between enterprises and the competition is restricted. Nevertheless, both the Commission, in its Memorandum designated as "Rules of Guidance of the Commission,"[11] and most authors[12] deny that Article 85 is applicable to concentrations.

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[6] In the opinion of the Commission the distinction between merger and combination within a group of enterprises is not necessary with respect to a concentration of enterprises. Study, *supra* note 3, at 21. An alternative view is propounded by Hefermehl who does consider the distinction relevant for the purpose of applying Articles 85 and 86 of the E.E.C. Treaty. Hefermehl, *Beurteilung von Fusionen und Konzernbildungen nach Artikel 85 und 86 des EWG — Vertrages*, FESTSCHRIFT FÜR NIPPERDAY, 771 Bd. II (1965).

[7] Concentration of enterprises will be referred to hereinafter simply as concentrations.

[8] The Court of Justice was established pursuant to Article 4 of the E.E.C. Treaty. Its powers and functions are defined in Articles 164 to 188 inclusive. Under Article 177, the Court of Justice has jurisdiction "to give preliminary ruling concerning: (a) the interpretation of this treaty; . . ."

[9] Article 85, para. 1, *supra* note 5.

[10] *Id.*

[11] Study, *supra* note 3, at 22.

The Commission finds in this respect:

> Summarizing it can be said that the generally applied distinction in the legal treatment of cartels and concentrations is justified and that for the reasons stated, Article 85 is not to be applied to agreements whose subject is the acquisition of enterprises or parts of enterprises as well as the new arrangement of property in respect of enterprises (merger, acquisition of participations, acquisition of assets).[13]

The Commission justifies its refusal to apply Article 85 to concentrations by reference to the character, construction, and criteria of the provision. The Commission notes that all developed legal orders as a general rule prohibit cartel agreements while permitting concentrations. The explanation for the different legal treatment is that cartels are intended to restrain competition, whereas concentrations cause this result only in special cases.[14] Mestmaecker[15] observes that in an acquisition of an enterprise the entrepreneurial risk is completely taken over; this differs from the effect of a cartel where only certain aspects of the conduct of the enterprise are controlled. Therefore, the goal of the concentration is to achieve the most successful operation of the combined enterprises as an economic unit. "Even if such a combination were primarily brought about for purposes of restraining competition, the far-reaching (beneficial) effects connected therewith would have to be considered."[16]

The Commission finds authority for the conclusion that concen-

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[12] FIKENTSCHER, DB 689 (1966); Hefermehl, *supra* note 6, at 780, 783; Hefermehl, *Unternehmenszusammenschlüsse im Lichte der Artikel 85 und 86 des Vertrages über die Europäische Wirtschaftsgemeinschaft*, RECHTSVERGLEICHUNG UND RECHTSVEREINHEITLICHUNG 329 (1967) (hereinafter cited *Unternehmenszusammenschlüsse*); Mestmaecker, *Die Beurteilung von Unternehmenszusammenschlüssen nach Artikel 86 des Vertrages über die Europäische Wirtschafsgemeinschaft*, FESTSCHRIFT FÜR W. HALLSTEIN 321 (1966); Möhring, *Enflechtungsmassnahmen der EWG-Kommission bei Unternehmenskonzentrationen nach deutschem Recht*, in RECHTSVERGLEICHUNG UND RECHTSVEREINHEITLICHUNG 345-46 (1967); Ommeslahge, *Die Anwendung der Artikel 85 und 86 des Rom-Vertrages auf Fusionen*, BEITRÄGE ZUM EWG-KARTELLRECHT 41, 66 (1967); STEINDORFF, REVUE DE MARCHE' COMMUR, supp. a, No. 119, 186, 195 (1968); SCHLIEDER, *id.*, at 218, 225; GLEISS-HIRSCH, EWG-KARTELLRECHT, 2. Aufl. Anm. 24 zu Art. 85. *See also*, Study, *supra* note 3 at 21; Fikentscher, *Kooperation und Gemeinschaftsunternehmen*. EUROPÄISCH KARTELLRECHT 177 (1968) (hereinafter cited Fikentscher, *Kooperation*).

[13] Study, *supra* note 3, at 21.

[14] Study, *supra* note 3, at 24. Schlieder describes this finding as a result almost unanimously agreed to as "a definite factor." Schlieder, *supra* note 12, at 225.

[15] Mestmaecker, *supra* note 12, at 325. From the point of view of the rules of competition, cartels and concentrations must be distinguished; the uniform application of the same prohibiting provisions to both situations cannot lead to reasonable results. Study, *supra* note 3, at 22.

[16] Study, *supra* note 3 at 22.

trations are exempt from the general prohibition of paragraph 1 of Article 85[17] by examining the criteria laid down in paragraph 3 of Article 85. These criteria are considered inappropriate to the applied to concentrations. For example, the time limit applicable to an exemption from the prohibition of Article 85, para. 1, which was put into effect by Article 8 of Regulation 17[18] is inappropriate for

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[17] *See* Article 85, *supra* note 5.

[18] Council Regulation 17 provides:

Article 6. Decisions to issue a declaration under Article 85, paragraph 3.

(1) When the Commission decides to issue a declaration under Article 85, paragraph 3, it shall indicate the date from which the decision shall take effect. This date shall not be prior to the date of notification.

(2) The second sentence of paragraph 1 shall not be applicable to the agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2, nor to those which are referred to in Article 5, paragraph 1, and of which the Commission has been notified within the time-limit fixed therein.

Article 7. Special provisions for existing agreements, decisions and practices.

(1) Where agreements, decisions and concerted practices already in existence at the date of the entry into force of the present Regulation and of which the Commission has been notified within the time limitations provided by Article 5, paragraph 1, do not meet the requirements of Article 85, paragraph 3, of the Treaty, and where the enterprises and associations of enterprises concerned put an end to them or modified them so that they no longer fall under the prohibition laid down in Article 85, paragraph 3, the prohibition laid down in Article 85, paragraph 1, shall be applicable only for a period fixed by the Commission. A decision by the Commission pursuant to the foregoing sentence cannot be invoked against enterprises or associations of enterprises which have not given their express assent to the notification.

(2) Paragraph 1 shall be applicable to agreements, decisions and concerted practices which are already in existence at the date of the entry into force of the present Regulation and which fall within the categories referred to in Article 4, paragraph 2, provided that notification shall have taken place before January 1, 1967.

Article 8. Period of validity and revoking of decisions to issue a declaration under Article 85, paragraph 3.

(1) A decision to issue a declaration under Article 85, paragraph 3, of the Treaty shall be valid for a specified period and may have certain conditions and stipulations attached.

(2) The decision may be renewed on request provided that the conditions laid down in Article 85, paragraph 3, of the Treaty continue to be fulfilled.

(3) The Commission may revoke or alter its decision or prohibit those concerned from taking certain courses of action:

(a) where the *de facto* situation has changed with respect to a factor essential in the granting of the decision;

(b) where those concerned infringe a stipulation attached to the decision;

(c) where the decision is based on false information or has been obtained fraudulently; or

(d) where those concerned abuse the exemption from the provisions of Article 85, paragraph 1, of the Treaty granted to them by the decision.

In the cases covered by sub-paragraphs (b), (c) and (d), decision can also be revoked with retroactive effect.

Article 9. Competence.

concentrations as they "are based on a definite change of property in respect of the enterprise which for reasons of legal safety can only in the individual case either be prohibited or be permitted for good."[19] Also, the reasonable participation of the consumers in the profits resulting from the concentration required by Article 85, para. 3, can not accurately be determined.[20]

Contrary to the opinion held by the Commission and most writers, Fikentscher[21] has recently favored an application of Article 85 to concentrations. He wants to avoid the problems inherent in a direct application of paragraphs 2 and 3 by considering Article 85, para. 1, as "an authorization of the Commission to interfere."[22]

Fikentscher's unique contention is based on his distinguishing between two types of restraints of trade: 1) restraint by measures, which occurs when enterprises by their conduct intend to restrict competition, and 2) restraints resulting from market position, where restraint of trade is only a result or by-product. Restraints of trade by market position are generally caused by concentrations. The sanctions provided in Article 85, para. 2, may be inapplicable if the parties did not intend to restrain competition by their merger. However, upon examination of the general system of the rules of competition of the E.E.C. Treaty, and a comparison of Article 85, para. 1, with Article 65, para. 1, of the E.C.S.C. Treaty,[23] Fikent-

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(1) Subject to review of its decision by the Court of Justice, the Commission shall have sole competence to declare Article 85, paragraph 1, inapplicable pursuant to Article 85, paragraph 3, of the Treaty.

(2) The Commission shall have competence to apply Article 85, paragraph 1, and Article 86 of the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7, paragraph 2, have not expired.

(3) As long as the Commission has not initiated any procedure pursuant to Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85, paragraph 1, and Article 86 in accordance with Article 88 or the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7, paragraph 2, have not expired.

1 CCH COMM. MKT. REP. paras. 2451, 2461, 2471, and 2481 (1968). *See also*, E. STEIN & P. HAY, *supra* note 2, at 147-48.

[19] Study, *supra* note 3, at 23.

[20] Mestmaecker, *supra* note 12.

[21] Fikentscher, *Kooperation*, *supra* note 12.

[22] *Id.*, at 177.

[23] European Coal and Steel Community Treaty (ECSC) Article 65, paragraph 1 states:

1. All agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market are hereby forbidden, and in particular those tending:

(a) to fix or determine prices;

scher concludes that the prohibitions of Article 85, para. 1, are applicable to restraints of trade by market position resulting from concentrations. While the language of Article 65, para. 1, of the E.C.S.C. Treaty prohibits only restraints of trade by measures, where the enterprises intend a reduction in competition, Article 85 of the E.E.C. Treaty also covers conduct which only *results* in a restraint of trade by market position. Fikentscher reasons that this expanded test was necessary in order for Article 85 to reach restraints of trade by market position. Therefore, Article 66 of the E.C.S.C. Treaty, as compared with Article 85, necessarily has a more limited application with respect to concentrations.[24]

According to Fikentscher, Article 85's relationship to restraints of trade by market position is a "law directed against abuse with the possibility of eliminating the same." It has even been suggested that under Article 85, mergers and concentrations whose component enterprises have surrendered their economic independence could be ordered to divest their interests, the sanction of divestiture being derived from the prohibition of Article 85.[25] However, Fikentscher does not believe that under the treaty's present structure the Commission could apply Article 85 to concentrations with the aim of bringing about a divestiture. He opines: "In view of the requirements of legal safety and clarity, the authority of the Commission to interfere could not be based on Article 85, para. 1."[26] Rather, such authority to interfere, particularly with respect to divestiture, must come from an ordinance of the Council of the European Economic Community. He suggests that the Council pass a regulation under Article 87 placing this situation within the scope of Article 85, para. 1.[27]

(b) to restrict or control production, technical development or investments;

(c) to allocate markets, products, customers or sources of supply.

Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140 (1957); E. STEIN & P. HAY, *supra* note 2, at 53.

[24] Article 66, paragraph 1, ECSC Treaty provides:

1. Except as provided in paragraph 3 below, any transaction which would have in itself the direct or indirect effect of bringing about a concentration, . . . shall be submitted to a prior authorization of the High Authority. This obligation shall be effective whether the transaction in question is carred out by a person or an enterprise, or a group of persons or enterprises, whether it concerns a single product or different products, whether it is effected by merger, acquisition of shares or assets, loan, contract, or any other means of control. . . ."

E. STEIN & P. HAY, *supra* note 2, at 54.

[25] STEINDORFF, *supra* note 12, at 192.

[26] *Id.*, at 194-95.

[27] Article 87 of the E.E.C. Treaty states:

Notwithstanding this reservation, it is the opinion of this author that the control against abuses with the possibility of bringing about a divestiture, which Fikentscher bases on Article 85, para. 1, goes beyond the limits of a permissible legal interpretation. Irrespective of the objections based on the legislative history which will be discussed later,[28] nothing in the construction and the legal technique of Article 85 supports the proposition that Article 85, para. 1, may serve as the basis for a control against concentration.

Fikentscher justifies his interpretation on the basis of the background of his distinction between restraints of trade by measures and restraints by market position. This distinction may be helpful for some analysis, but it is of little use in interpreting Article 85. A concentration can also be a measure which may result in restraints of trade, and often does, not only by excluding competition between the enterprises involved, but also by changing the structure of the market concerned, and thereby affecting competitive conditions. As a rule, the enterprises involved are usually cognizant of these changes. They do not occur suddenly as with a market position, but rather are "caused" by the intended effect of the concentration on the market. For this reason, a concentration "conditioned by domination," the purpose of which is to dominate the market, would have to be considered according to the Fikentscher view an intended restraint of trade by measures and therefore would fall under the

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1. Within three years of this Treaty coming into force, the Council shall issue the necessary regulations or directions to put into effect the principles set out in Articles 85 and 86. The Council shall decide on these unanimously, on a proposal of the Commission and after consulting the Assembly.

If such regulations or directives have not been adopted within the specified period they shall be settled by the Council by qualified majority vote on a proposal of the Commission and after consulting the Assembly.

2. The regulations or directives referred to in paragraph 1 shall be designed, in particular:

(a) to ensure, by the institution of fines or penalties, the observance of the prohibitions referred to in Article 85 (1) and in Article 86;

(b) to decide exactly how Article 85 (3) is to be applied, taking into account the need both on the one hand to ensure effective supervision and, on the other hand, as far as possible to simplify administrative control;

(c) to define, where necessary, the extent to which the provisions of Articles 85 and 86 are to be applied in the various economic sectors;

(d) to define the respective functions of the Commission and of the Court of Justice in giving effect to the provisions referred to in this paragraph;

(e) to determine how domestic legislation is to be reconciled with the provisions of this Article and with any rules made thereunder. [*]

1 CCH COMM. MKT. REP. para. 2201 (1967). *See also*, E. STEIN & P. HAY, *supra* note 2, at 94.

28 *See infra.*

standard of Article 86.[29] Even Fikentscher would agree that Article 85 does not govern concentrations in which there is an intended restraint of trade by measures. Consequently, the application of Article 85 to concentrations must necessarily turn on whether it is, in a given case, considered to be an overt restraint of trade by measures of restraint resulting from market position.

The criteria for this distinction between restraints of trade cannot be found in Articles 85 or 86. According to Fikentscher, such distinction would have to be established by an ordinance promulgated under Article 87. The weakness of this interpretation is that such an ordinance would go beyond the authorization contained in Article 87 in that it would not be restricted to the realization of the principles laid down in Article 85. It would establish additional principles. For this reason, Fikentscher's view appears to be incompatible with the rules of competition of the Treaty.

There are additional objections to Fikentscher's theory. Under his theory, the application of Article 85 to concentrations, in the form of a law against abuse, with the possibility of divestiture, presupposes that it is possible to find criteria in the provisions of the treaty by which to distinguish permissible from nonpermissible concentrations. As one author[30] correctly observed, the valuation standards contained in Article 85, para. 3 are exclusively geared to agreements which encompass only a part of the economic planning of the enterprises involved.[31] This is particularly true of the principle contained in Article 85, para. 3(a) which states that the agreement may only impose such restrictions on the enterprises involved as are indispensible to achieve the purposes recognized under that paragraph.[32] This provision is based on a partial restriction of the entrepreneurial freedom of planning, and on the assumption that this partial restriction is to be measured against the advantages of the agreement. By definition, such measuring against these standards is impossible in the case of a concentration because concentration necessarily involves the economic planning of the enterprise as a whole. Therefore, the balancing of the interests involved, which is necessary under Article 85, cannot use the extent of the restriction as a guideline. Also, as was mentioned earlier in regard to concentration, it is impossible to make a reason-

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[29] Fikentscher, *Kooperation*, *supra* note 12, at 193.

[30] Mestmaecker, *supra* note 12, at 328.

[31] *See* Article 85, paragraph 3, *supra* note 5.

[32] Fikentscher, *Kooperation*, *supra* note 12, at 188, 198.

able forecast about consumer participation in the resulting profit. Concentration will, as a rule, not result in profits that can be passed on. This is especially true in the cases requiring concentration as a condition for technological progress as stated in Article 85, para. 3.

The application of Article 85 to concentrations in the manner proposed by Fikentscher would require the development of criteria which would permit weighing the consequences on competition of a concentration against the advantages of such a concentration from the viewpoint of controlling abuses. Without legislation, this is not possible on the basis of Article 85, even if the general principle of Article 3(f) is also considered.[33] Fikentscher admits that such legislation must be effected by an ordinance under Article 87. However, such an ordinance would violate the limits imposed on the Council by the authorization of Article 87.

In contrast to Article 85, both the Commission and some legal writers assume that Article 86 is the applicable Treaty provision governing concentrations.[34] The Commission correctly finds that in the application of Article 86, contrasted to Article 85, the means by which the business combination is brought about are not relevant. Nor do the criteria and the legal technique of Article 86 present any obstacles in applying the provision to concentrations. "The distinction between old and new cartels," the Commission writes, "as well as the problems which result from the time limits and the revocability of the exemptions granted, cease to exist"[35] with respect to Article 86. Furthermore — and this is essential — when applying this provision, the permissibility of a concentration will not be determined by positive but by negative criteria of abuse.[36]

The application of Article 86 to concentrations does not, therefore, meet with the same basic objections as the application of Article 85. However, the scope of the application of Article 86 to concentrations is disputed. There is no question that Article 86 can be applied to concentrations when a market-dominating enterprise brings about a merger or a combination of enterprises by abusing its

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[33] Article 3 provides that "the activities of the Community shall include . . . (f) the establishment of a system ensuring that competition in the Common Market is not distorted. . . ." 1 CCH COMM. MKT. REP. para. 171 (1965). *See also*, E. STEIN & P. HAY, *supra* note 2, at 76.

[34] Study, *supra* note 3, at 24; Hefermehl, *supra* note 6, at 789.

[35] Study, *supra* note 3, at 24.

[36] *Id.*

market power.[37] But when analyzed precisely, this is not a case of applying Article 86 to *concentrations*, but only to the realization of the prohibited facts, *i.e.* "An abuse of a dominating position."[38] If a concentration is brought about by an abuse of a dominant position,[39] the act of concentration itself, the merger agreement or the agreement which is the basis of the combination, may also be encompassed by the prohibition of Article 86 and therefore be considered void.[40]

Legally, the above situations fall within the scope of the general prohibition against abuse. Applying Article 86 to such facts does not, therefore, answer the question whether Article 86 is applicable to concentrations as such. The issue remains whether a concentration *per se* can be considered as "the abusive exploitation of a dominating position in the Common Market or an essential part thereof by one or several enterprises." It can be hypothesized that the Commission would decide the issue affirmatively, concluding that although Article 86 permits "the existence and creation of dominating position," such conduct might be abusive under the definition of the word in Article 86 when in view of the aims laid down by the Treaty it constitutes a misconduct. The act of concentration would constitute an abuse only when it would completely eliminate competition.[41] In other words, the abuse is the change of the market structure brought about by the concentration, and without that change, some other abusive acts would be necessary. Therefore, only in these above situations would Article 86 be applied directly to concentrations.

Mestmaecker shares the opinion of the Commission[42] and assumes that the effects of a concentration may be incompatible with the aims of a policy of undistorted competition. He suggests that as the concentration changes the market structure, each market should

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[37] Fikentscher, *Kooperation*, *supra* note 12, at 193.

[38] Möhring correctly states that, in these cases, the abuse of the dominant position of the enterprise is usually first manifested when the ruinous competition to eliminate a competitor is started. Möhring, *supra* note 12, at 348-49. The prohibition of Article 86 is in these cases, therefore, not directed against the concentration but against the abuse of the dominating position which is practiced at the occasion or with the aim of bringing about the concentration.

[39] This situation seldom happens and is difficult to prove. *See generally*, 1 CCH COMM. MKT. REP. para. 2101 and 2111 (1967).

[40] Hefermehl, *supra* note 6, at 794. This will at least be the case when the elimination of the prohibited abuse can only be accomplished by eliminating the merger or the formation of the combine. But such cases will always be border line.

[41] Study, *supra* note 3, at 26.

[42] Mestmaecker, *supra* note 12, at 331.

be evaluated in view of a possible abuse. He also realizes that a concentration may result in a restraint of trade since, as Article 86 presupposes, the acquiring enterprise already holds a dominating position in the market.[43] This raises the question whether and according to what criteria such an accretion of market power by concentration can by itself be considered an abusive exploitation of a dominating position. In answering this question, Mestmaecker assumes that the abuse does not presuppose any act against *bonos mores*, but rather conduct which is incompatible with the system of undistorted competition.[44] Whether the exploitation of a dominating position is considered abusive will be dependent on a determination of whether the aims of the Treaty, as well as the Treaty provision or provisions created by the organs of the community serving their realization, will be frustrated by the conduct or at least must be considerably disturbed.[45] The definition of the system of undistorted competition which is necessary for the application of Article 86 is found in Article 85, para. 3.[46] According to this provision, an agreement between enterprises may not be exempted from the prohibition of paragraph 1 when exemption makes it possible for said enterprises to eliminate competition with respect to an essential part of the products concerned.[47] Therefore, a concentration in which a market dominating enterprise is involved and whose result is to eliminate competition for an essential part of the products concerned constitutes an abusive exploitation of the dominating position in the Common Market.[48] Whether the concentration results in a market exclusion of such intensity "that it is incompatible with the protection of open markets in a system of undistorted competition" is a question to be decided in each individual case.[49] A concentration in which a market dominating enterprise is involved and which

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[43] Because of the original position of dominance of a concentration, any further restraint of competition is nothing but a confirmation or extension of the dominating position *vis-a-vis* present or potential competition. *Id.*, at 333.

[44] *Id.*, at 331. Likewise, the Commission considers the conduct of an enterprise adusive within the meaning of Article 86 when, in view of the aims laid down in the treaty, it constitutes a misconduct by objective standards. Study, *supra* note 3, at 26; *see also* DERINGER, WETTEWERBSRECHT DER EWG; GLEISS-HIRSCH, *supra* note 12.

[45] Deringer, *supra* note 44.

[46] Mestmaecker, *supra* note 12, at 344.

[47] Based on a decision of the Court of Justice on the question of the so-called small revision of the E.C.S.C. Treaty, Mestmaecker discerns a general principle of the E.E.C. Treaty which would also have to be considered in applying Article 86. Rechtssache 13/60, Sammlung de Rspr. des Gerichtshefs, Bd. 8 (1962), at 183.

[48] Mestmaecker, *supra* note 12, at 345.

[49] Study, *supra* note 3, at 26.

restrains competition does not necessarily go beyond the limit of Article 85, para. 3(b). On the other hand, every concentration which for an essential part of the products concerned eliminates competition, according to the view held by Mestmaecker, is abusive within the meaning of Article 86.[50]

The Commission[51] and Mestmaecker would apply Article 86 to concentrations without requiring the presence of any further qualifying abusive factors. This is in contrast to the view that under the E.E.C. Treaty, contrary to the E.C.S.C. Treaty, the Contracting Parties did not intend to introduce a control over concentrations through the competitive rules. The fact that this contrast is not discussed by the Commission, von der Groeben, or Mestmaecker is of considerable importance.

According to the German background materials concerning the E.E.C. Treaty, it is clear that the competition rules of the Treaty were not intended to preclude the formation of concentrations or to establish authority for their divestiture. The Bonn government has said that a monopoly position in the market which is harmful to competition cannot only be created by cartel agreements between several enterprises remaining independent, but can also arise when one or several enterprises reach a point at which they share a market and are no longer exposed to essential competition. Such a market dominating position can result both from a natural development of one or several enterprises or from a concentration of several enterprises. Contrary to the E.C.S.C. Treaty, the E.E.C. Treaty does not subject concentrations of enterprises to prior approval. It simply prohibits abusive exploitation of a market dominating position.[52]

In addition to the Bonn government's expression regarding competition, the German Federal Parliament was concerned with drafting a law against restraints of competition. The government's proposal contained provisions which subjected the concentrations of enterprises to a preventive control. Premised on Article 66 of the E.C.S.C. Treaty, it provided, *inter alia*, for the possibility of dissolving concentrations which were likely to achieve market domination.[53] This proposal has not been enacted in the Law against Restraints of Trade. The reporter of the Committee on Economic

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[50] Mestmaecker, *supra* note 12, at 347.

[51] Von der Groeben, *Die Wettbewerbspolitik als Teil der Wirtschaftspolitik im Gemeinsamen Markt in Europa*, PLAN UND WIRKLICHKETT 209, 210 (1967).

[52] Anlage C zur BT-DRUCKSACHE 3440, 2 Wahlperiode.

[53] Reg. *Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen*, BT-DRUCKSACHE 1158, 2 Wahlperiode.

Policy justified the deletion of the draft provision on the grounds that the concentration as such is not forbidden by the law, but only the abuse of economic power which "in a given case may result from such concentrations."[54] Consequently, the legislature only provided for controls of abuse under § 22 of the Law Against Restraints of Trade and introduced in § 23 a reporting requirement for concentrations when the concentration reaches a certain market share. However, even in a case where competition is eliminated, there is neither a provision prohibiting concentrations, nor is there one requiring divestiture.

The Law against Restraints of Trade and the E.E.C. Treaty were considered and adopted by the German Federal Parliament almost simultaneously. In view of the unambiguous statements of the Federal Government and committees on the question of control of mergers and divestitures, it is clear that the Federal Republic did not want to subject concentrations to legal control under the E.E.C. Treaty.

Herfermehl reports similar positions taken by the Dutch and the Italian governments.[55] The Dutch government has emphasized that the Treaty, contrary to Article 66 of the E.C.S.C. Treaty, does not provide for any prior approval of concentrations, and that only the actual abuse resulting from a concentration is prohibited.

A comparison of the E.E.C. Treaty with the E.C.S.C. Treaty illustrates that the Contracting Parties wanted to omit any rules of competition applying to concentrations as such. This is evidenced from the fact that the approval of concentrations required by Article 66 of the E.C.S.C. Treaty, has not been included in the E.E.C. Treaty.[56] There is also no provision dealing with a reporting requirement for concentrations in the E.E.C. Treaty.[57] Because of these differences, it cannot be assumed that the Contracting Parties intended the abuse provision of Article 86 to correspond to the prohibitions of Article 66 of the E.C.S.C. Treaty.

In view of the above analysis, the opinion of the Commission and of Mestmaecker that Article 86 is applicable to concentrations

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[54] Biedenkopf & Steindorff, *Bericht des Abg Illerhaus* LAW AGAINST RESTRAINTS OF TRADE (GWB) 174 (1957).

[55] Hefermehl, *supra* note 6, at 782.

[56] However, the language of the abuse in Article 86 was drafted in close reliance on Article 66 of the ECSC Treaty.

[57] The Comission has only recently stated its intention to introduce such a reporting requirement by an ordinance under Article 87 E.E.C. Treaty; *see* Frankfurter Allgemeine Zeitung 1969 No. 66, at 13.

as such appears dubious. Instead, the prevailing doctrine[58] considers the unambiguous language in the legislative history as indicating that the prohibitions of Article 86 would be applied only when abuse of the dominating position is manifested in acts or circumstances which are present in addition to the concentration as such.[59] Although the majority doctrine appears to be based solely on the legislative history of the E.E.C. Treaty, one writer[60] has suggested that the statements of intent by governments during ratification, debates, and preparations for treaties are only steps on the way to developing the definitive contents of the treaty. The Court of Justice of the E.E.C. has also hesitated in the past to draw governing conclusions from the legislative history of Articles 85 and 86. It must therefore be assumed to put less emphasis on the developed intent of the Contracting Parties. There are, however, additional reasons for objecting to the view held by Mestmaecker and the Commission.

Both the Commission and Mestmaecker base their view that simple exclusion of competition by the concentration is an abuse of application of the principles of Article 85, para. 3(b).[61] It is, however, questionable whether this principle can be incorporated into Article 86 without the legislative guidance contained in Article 66 of the E.C.S.C. Treaty.

In Article 85 the criterion is geared to cartel agreements in that it was developed for the approval or non approval of cartels. It contains a balance of interests with respect to cartels and similar restraints of trade. Transferring the same principle to concentrations would suppose that in light of competitive policy of the E.E.C. Treaty concentrations be evaluated the same as cartels. Neither the Commission nor Mestmaecker make this assumption.[62] Article 86, however, contains no criteria which would permit weighing the aspects of a concentration against consequences on competition so as to determine an abuse. The Commission would admit the need

[58] Hefermehl, *supra* note 6, at 782; STEINDORFF, *supra* note 12, at 195.

[59] Apart from concentrations which are the result of an intentional elimination of competition, there are concentrations which are carried on with the intent to abuse the position or to restrain competition. Fikentscher, *Kooperation*, *supra* note 12, at 195; Hefermehl, *supra* note 6, at 791; STEINDORFF, *supra* note 12, at 204-05. Steindorff considers such concentrations as an abuse of a legal form of business, rather than as an abuse of the exemption of concentrations from Articles 85 and 86. If such an abuse of form exists, Article 86 is applicable to the concentration act. Except for these cases, the rules of competition are inapplicable to concentrations.

[60] SCHLIEDER, *supra* note 12, at 215-16.

[61] Mestmaecker, *supra* note 12, at 342; von der Groeben, *supra* note 51, at 208.

[62] Mestmaecker, *supra* note 12, at 325.

to develop new standards for concentrations because the results of their existence are valued more positively for the development of the Common Market. It suggests to recognize an abuse only when the concentration results in a monopolization of a market. By doing so, however, it abandons the principle contained in Article 85, para. 3(b). Under this provision the possibility of eliminating competition for an *essential* part of the products concerned prevents granting an exemption for the agreement under the prohibition of paragraph 1. Such a possibility exists, however, before an enterprise reaches a monopoly position. The absence of substantial competition is sufficient. This clearly shows that cartels receive a less favorable evaluation under the competitive policy of the Treaty. By deviating from the principle of Article 85, para. 3(b), the Commission shows that it does *not* wish to assume a similar evaluation for concentrations, but permits concentrations even though they eliminate competition for an essential part of the products, but not for all. Only when competition for all products is eliminated would there be a monopolization which the Commission deems necessary for a prohibition of concentrations.

Since the Commission does not maintain the principle of Article 85, para. 3(b) for evaluating concentrations under Article 86, it abandons its reasons for applying Article 86 to concentrations: the assumption that Article 85 para. 3(b) establishes a principle which is generally applicable for the system of the rules of competition. The principle the Commission develops for Article 86 cannot be derived from Article 85, because the limits of Article 85 established for cartels are narrower. Since Article 3(f) of the E.E.C. Treaty,[63] contrary to Article 4 of the E.C.S.C. Treaty,[64] is not mandatory law, the principle developed by the Commission for Article 86 is without legal foundation in the Treaty itself.

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[63] Note 33, *supra.*

[64] Article 4 of the Treaty Establishing the European Coal and Steel Community states:

> The following are recognized to be incompatible with the common market for coal and steel, and are, therefore, abolished and prohibited within the Community in the manner set forth in this Treaty:
>
> (a) import and export duties, or taxes with an equivalent effect, and quantitative restrictions on the movement of coal and steel;
>
> (b) Measures or practices discriminating among producers, among buyers or among consumers, especially as concerns prices, delivery terms and transport rates, as well as measures or practices which hamper the buyer in the free choice of his supplier;
>
> (c) subsidies or state assistance or special charges imposed by the state, in any form whatsoever;

Moreover, one author[65] has correctly pointed out that if the application of Article 86 is limited to mergers which lead to a monopolization of the relevant market, the provision will be of no practical importance for cartels. The complete elimination of competition can hardly ever be proven, and it is more difficult to prove its absence in relation to concentrations than with cartels. The Commission itself acknowledged this difficulty in the final observations of its study; in considering the facts decisive for the monopoly situation, it noted that the disappearance of smaller enterprises may not necessarily lead to an absence of workable competition.[66]

Therefore, any attempt to increase the effectiveness of applying Article 86 to concentrations, by deeming the elimination of competition for an *essential part* of the products concerned as the essential criterion, results in concentrations being treated under the same principles as cartels. This would eliminate evaluating cartels and concentrations differently under the rules of competition, and thus would be contrary to the structure of these rules of the E.E.C. Treaty and the opinion of the Commission. Thus, it is correct to state that the anticompetitive effect of a concentration is not a criterion of violation under Article 86. Also, Article 86 would not even be applicable in those cases where the concentration only results in the elimination of a substantial part of competition on the relevant market, without resulting in monopolization.[67]

In conclusion, Mestmaecker's suggestion for divestiture of concentrations abusing their market dominating position must be examined in light of Article 222 and Regulation 17. Under the law in force at present, a divestiture procedure could only take place under Regulation 17. That Regulation, however, contains no provision specifically authorizing a divestiture proceeding. Article 3[68]

(d) restrictive practices tending towards the division or the exploitation of the market.

E. STEIN & P. HAY, *supra* note 2, at 41.

[65] STEINDORFF, *supra* note 12, at 203.

[66] Study, *supra* note 3, at 27.

[67] STEINDROFF, *supra* note 12, at 204.

[68] Council Regulation 17/62, Article 3 which deals with infringements states:
(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 enterprises 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.
(3.) Without prejudice to the other provisions of the present Regulation,

of the Regulation grants the Commission the possibility, by means of a decision, to obligate enterprises violating Article 86 "to put an end to such infringement." The text of the Regulation would not prevent a decision ordering the sale of the shares of another enterprise when the acquisition of these shares could be considered as a violation of Article 86. But the reasons which speak against the application of Article 86 to such facts are also opposed to the application of Article 3 of the Regulation. Even if the Commission should ignore this, it would still have to observe Article 222.[69] According to that provision the Treaty leaves unaffected the legal systems of the member states concerning property rights. As neither the Treaty nor Regulation 17 contains provisions concerning the question of divestiture, and German law also does not have such provisions, the legality of a divestiture decision of the Commission in our hypothetical case would have to be determined on the basis of Article 14, para. 3, sentence 2 of the German Constitution.[70] Under this provision an expropriation may only be effected by statute or by virtue of a statute which provides for the kind and the extent of the compensation. It is obvious that a decision to divest constitutes an intervention which may be tantamount to an expropriation. Such a decision would, in the absence of a statutory basis and in the absence of a statutory provision concerning the details of the compensation, be incompatible with Article 14, para. 3, sentence 2, of the German Constitution. A decision of the Commission ordering the sale of the shares acquired would, therefore, run afoul of Article 14 of the German Constitution and Article 222 of the E.E.C. Treaty.

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the Commission, before taking the decision mentioned in paragraph 1, may address to the enterprises or associations of enterprises concerned recommentions designed to put an end to the infringement.

1 CCH COMM. MKT. REP. para, 2421 (1968); *See also*, E. STEIN & P. HAY, *supra* note 2, at 147.

[69] Article 222 of the E.E.C. Treaty states: "This Treaty shall in no way prejudice existing systems and incidents of ownership." 1 CCH COMM. MKT. REP. para. 5261 (1967); E. STEIN & P. HAY, *supra* note 2, at 115.

[70] Article 14 guarantees the right of private property and the principle of inheritance. Paragraph 3, sentence 2 provides that expropriation is only possible "by law or on the basis of a law, providing for kind and extent of compensation."