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Thomas J. Benz

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THE EMERGENCE OF A COMMON MARKET MERGER
CONTROL POLICY: THE AFTERMATH OF
CONTINENTAL CAN—THE PROPOSED
EEC MERGER CONTROL REGULATION

The basic provisions of the antitrust law of the European Economic Community (EEC) are contained in articles 85¹ and 86² of the Treaty of Rome.³ Neither of the provisions, however, was expressly designed to prohibit mergers or concentrations. In the absence of a discernible anti-merger policy, the EEC has witnessed, with growing concern, an increasing number of large scale business concentrations in the Common Market.⁴

It is within this context that article 86 has recently emerged as the foundation of the EEC Commission's⁵ first step in the formulation of a

1. Article 85(1) provides in part:

The following shall be prohibited as incompatible with the common market: 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

1 CCH COMM. MKT. REP. ¶ 2005 (1973). An unofficial translation appears in 298 U.N.T.S. at 47-48.

2. The text of article 86 is as follows:

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. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase 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.

1 CCH COMM. MKT. REP. ¶ 2101 (1973). An unofficial translation appears in 298 U.N.T.S. at 48-49.

3. Treaty Establishing the European Economic Community, done March 25, 1957, 1, CCH COMM. MKT. REP. ¶ 151 et seq. (1973), 298 U.N.T.S. 11 [hereinafter cited as the Treaty of Rome].

4. *Community Moves Toward Control of Mergers*, 2 CCH COMM. MKT. REP. ¶ 9586, at 9300-01 (1973).

5. Commission of the European Communities [hereinafter referred to as the Commission]. The Commission supervises the application of the provisions of the Treaty

merger control policy. In 1971, the Commission held that an American corporation, the Continental Can Company, had violated article 86 when it acquired a majority interest in a Dutch enterprise.⁶ On appeal to the Court of Justice of the European Communities, the Commission decision was overturned on the ground that the Commission had failed to prove its case on the facts.⁷ In commenting upon the substantive guidelines established by the Commission, however, the Court of Justice gave general affirmance to the proposition that a merger could, under certain conditions, be violative of article 86.

Robbed of a factual precedent, but armed with some support for its policy guidelines, the Commission has recently taken a definitive step in the formulation of a merger policy for the EEC. On July 18, 1973, the Commission released the final draft of a proposed merger control regulation.⁸

The purpose of this Note is to analyze this proposed regulation as the successor to the guidelines laid down by the Commission in *Continental Can*. Since the text of the new regulation can only be viewed in light of previous developments in the formulation of EEC policy with regard to mergers and concentrations, the approach will necessarily be historical. The first section of the Note will deal with the development of Commission policy prior to its decision in the *Continental Can* case; the second section will contain a discussion of the *Continental Can* litigation and the guidelines enunciated by the Commission and the European Court of Justice; the final section will be devoted to an analysis of the proposed merger control regulation.

of Rome and supervises the provisions of any measures passed upon by the Council of Ministers. The Commission is also the initiating body for the preparation and proposal of actions to be taken by the Council. E. STEIN & P. HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* 90 (1963).

6. Commission Decision of December 9, 1971, [1970-72 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9481 (1973); also translated in Comm. Mkt. L.R. D11 (R.P. Supp. 1972) (Comm'n of the EEC 1971) [hereinafter referred to textually as *Continental Can*; the opinion of the European Court of Justice shall hereinafter be referred to textually as *Continental Can v. Commission*].

7. *Europemballage and Continental Can Co. v. Commission*, 2 CCH COMM. MKT. REP. ¶ 8171, 12 Comm. Mkt. L.R. 199 (Eur. Ct. of Justice 1973) [hereinafter referred to textually as *Continental Can v. Commission*].

8. Commission Regulation on the Control of Concentrations Between Undertakings, Doc. No. COM (73) 1210 final, July 18, 1973, in 2 CCH COMM. MKT. REP. ¶ 9586, at 9302 (1973) [hereinafter cited as Concentration Regulation].

I

PRE-CONTINENTAL CAN POLICY FORMATION

A. THE LACK OF AN ANTI-MERGER TRADITION AND THE EEC
"PRO-MERGER" POLICY

Neither article 85 nor article 86 contains any language specifically dealing with mergers or concentrations, and the absence of such language is illustrative of the intent of the Member States not to apply the rules of competition under these articles to mergers as such.⁹ The drafting of articles 85 and 86 must be viewed in light of the lack of any strong antitrust tradition among the European nations and the lack of popular support for antitrust enforcement.¹⁰ National legislation among the Member States is based on the principle that "size" alone is not condemned.¹¹

Consequently, the policy of the EEC has, in the past, worked more toward promoting mergers than toward preventing them.¹² The EEC has traditionally had a favorable attitude toward concentration on the ground that larger enterprises would be better able to adapt to, and take advantage of, the expanded market created by the EEC.¹³ It has been

9. This stands in sharp contrast to article 66 of the European Coal and Steel Community (ECSC) Treaty which requires that prior approval be obtained from the Commission for any merger or concentration involving at least one firm engaged in the coal and steel industry within the Common Market. Treaty Instituting the European Coal and Steel Community, April 18, 1951, article 66, 261 U.N.T.S. 142, 199-205. For a summary discussion of the control of mergers under article 66 of the ECSC Treaty, see Markert, *Antitrust Aspects of Mergers in the E.E.C.*, 5 TEXAS INT'L L.F. 32, 37-46 (1969).

It is the contention of some commentators that the absence of similar language in articles 85 and 86 of the Treaty of Rome supports the conclusion that the Member States did not intend to apply these rules of competition to mergers. See, e.g., Biedenkopf, *The Applicability of Common Market Antitrust Law to Acquisitions and Mergers*, 2 CASE W. RES. J. INT'L L. 75, 89 (1970); Canellos & Silber, *Concentration in the Common Market*, 7 COMM. MKT. L. REV. 138, 154 (1970).

It is also pointed out that article 66 of the ECSC Treaty was not in keeping with traditional European political and legal concepts; it was adopted merely as a means of preventing the reconcentration of the German coal and steel industry after the Second World War. Markert, *supra* at 44.

10. L. B. KRAUSE, *EUROPEAN ECONOMIC INTEGRATION AND THE UNITED STATES* 149-50 (1968).

11. Samkalden & Druker, *Legal Problems Relating to Article 86 of The Rome Treaty*, 3 COMM. MKT. L. REV. 158, 161 (1966); see Mailander, *Mergers and Acquisitions in the Common Market: Problems Under Corporate, Tax and Antitrust Law*, 1 N.Y.U. J. INT'L L. & POL. 19, 31 (1968).

12. Markert, *supra* note 9, at 66; Mailander, *supra* note 11, at 21.

13. Rahl, *Common Market and European Antitrust Systems: An Overview*, 40 ANTITRUST L.J. 765, 773 (1971); Canellos & Silber, *supra* note 9, at 17; Markert, *supra* note 9, at 32-33. Larger enterprises are believed to promote greater efficiency by reason

asserted that larger "Community-sized" firms would also tend to reduce national boundaries and, thereby, promote the intended "integration" of the Common Market.¹⁴

Another major reason for the favorable attitude toward mergers has been the belief that only larger European enterprises could compete effectively with the large American and Japanese firms.¹⁵ However, this position presents a dilemma for the Commission: if a pro-merger policy encourages the acquisition of European enterprises by American-based multinational firms, it will tend to defeat the goal of European concentrations.¹⁶ But to the extent that the Commission sought to prevent mergers or acquisitions by American or other multinational corporations, it would provoke claims of an anti-American (or anti-multinational) bias in the enforcement of EEC antitrust laws.

B. THE COMMISSION MEMORANDUM AND POLICY FORMATION UNDER ARTICLE 86

In light of the doubts concerning the applicability of articles 85 and 86 to mergers or concentrations, the Commission in 1965 issued a memorandum to provide some guidelines as to the meaning of articles 85 and 86.¹⁷ The Commission concluded that although article 85 was applicable to cases involving cartel agreements, it was not applicable to mergers or concentrations.¹⁸

However, the Commission took the position that article 86 could apply to a merger if it constituted an "improper exploitation" of an existing "dominant position" within the language of article 86. In considering the meaning of a "dominant position," the Commission did not rely solely

of greater economies of scale realizable through mass production and centralized research and development.

14. See Rahl, *supra* note 13, at 773. But this theoretical approach has been severely criticized, particularly because it is unsupported by any empirical evidence. See Canellos & Silber, *supra* note 9, at 35; Markert, *supra* note 9, at 67.

15. Markert, *supra* note 9, at 33; Rahl, *supra* note 13, at 773.

16. Biedenkopf, *supra* note 9, at 75.

17. Concentration of Enterprises in the Common Market: Memorandum of the Commission of the European Economic Community to the Government of the Member States, CCH COMM. MKT. REP. No. 26, pt. 1, at ¶ 6 (1966), as quoted in Markert, *supra* note 9, at 32-33 [hereinafter cited as Concentration Memorandum].

18. *Id.* at ¶ 58. For a discussion of the reasons why the Commission rejected article 85, see Canellos & Silber, *supra* note 9, at 152-53; Mailander, *supra* note 11, at 33; Markert, *supra* note 9, at 47-48.

on the criteria of size and market share of a particular firm. "Dominant position" was viewed primarily as a matter of "economic potency"—the ability to influence substantially the market behavior of other enterprises—even though the dominant enterprise held a relatively small share of the market.¹⁹ This position is consistent with the traditional European view that the size of a firm does not, in and of itself, constitute a violation of antitrust laws. Since it is the abuse of a dominant position, not the dominant position itself, which constitutes a violation of article 86, its applicability to mergers would necessarily have to be based on the "abuse" principle.²⁰ Therefore, the Commission concluded that a concentration of enterprises could constitute an abuse of a dominant position where it had the effect of monopolizing a market and eliminating competition.²¹

Despite the Commission's conclusion, there was considerable criticism as to the narrow interpretation given to article 86. A major weakness was seen in the inference drawn from the Concentration Memorandum that an abuse under article 86 could be found only where a monopolistic situation resulted in a virtual elimination of competition.²² Furthermore, article 86 requires that at least one of the partners to a merger must hold a dominant position prior to the merger.²³ Finally, several observers felt that the narrow interpretation of article 86 was inconsistent with the broader competition policy of the Treaty of Rome.²⁴

^o In the final analysis, the strength or weakness of article 86 as an anti-merger weapon would only be determined through a judicial test.

19. [I]t is primarily a matter of economic potency, or the ability to exert on the operation of the market an influence that is substantial and also in principle foreseeable for the dominant enterprise. This economic ability of a dominant enterprise influences the market behavior and the economic decisions of other enterprises, irrespective of whether it is used in a specific sense. If an enterprise is able, at its pleasure, to oust a competing enterprise from the market; it might already occupy a dominant position and exert a controlling influence upon the practices of other enterprises even if its own share of the market is still relatively small.

Concentration Memorandum, *supra* note 17, at ¶ 63, as quoted in Markert, *supra* note 9, at 49-50.

20. Samkalden & Druker, *supra* note 11, at 163-64.

21. Concentration Memorandum, *supra* note 17, at ¶ 65, as quoted in Markert, *supra* note 9, at 50.

22. See Biedenkopf, *supra* note 9, at 91; Markert, *supra* note 9, at 51.

23. Mailander, *supra* note 11, at 36.

24. See Biedenkopf, *supra* note 9, at 92; Samkalden & Druker, *supra* note 11, at 176.

II

THE CONTINENTAL CAN CASE

A. THE COMMISSION DECISION

In the *Continental Can* decision, the Commission undertook to test its theory that article 86 could be applied to a merger or acquisition by a firm already occupying a dominant position within the Common Market. The Commission held: (1) that Continental Can, an American company and the world's largest producer of metal containers, had a dominant position in a substantial part of the EEC market for light containers through its German subsidiary SLW;²⁵ (2) that Continental Can abused that dominant position through the purchase in 1970, by its subsidiary Europemballage Corporation,²⁶ of approximately eighty percent of the stock of the Dutch enterprise TDV;²⁷ and (3) that this purchase resulted in a virtual elimination of competition for the containers in a substantial part of the Common Market. In reaching its decision, the Commission outlined several major aspects of its policy under article 86 as it applies to mergers.

1. Liability of the Parent Corporation

One of the most significant aspects of the Commission's approach is that it imputed the liability for the anticompetitive behavior directly to the parent company, Continental Can.²⁸ Equally significant is the fact that the Commission viewed the entire industrial group within the

25. In 1969, Continental Can had acquired 85.8 percent of the share capital of Schmalbach-Lubeca-Werke (SLW), then the largest producer of light metal containers in Western Europe. Commission Decision of December 9, 1971, [1970-72 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9481, at 9021 (1973); also translated in 11 Comm. Mkt. L.R. D11, at D13 (R.P. Supp. 1972) (Comm'n of the EEC 1971). The Commission found that SLW's share of the German market ranged between seventy and eighty percent in "open-top" cans for meat; eighty and ninety percent for "open-top" cans for fish; fifty and fifty-five percent for metal lids. *Id.* at 9029-30, 11 Comm. Mkt. L.R. at D27-D28.

26. In 1970, Continental Can established Europemballage Corporation as its holding company to which it transferred its shares in SLW. *Id.* at 9021, 11 Comm. Mkt. L.R. at D14.

27. Thomassen & Drijver-Verblifa NV (TDV) was the largest manufacturer of metal containers in the Benelux countries. *Id.* at 9023, 11 Comm. Mkt. L.R. at D17. In the Netherlands and Belgium TDV controlled the entire market in "open-top" cans for meat and fish products. *Id.* at 9026, 11 Comm. Mkt. L.R. at D23.

28. The Commission reasoned as follows:

Since it is the sole shareholder of Europemballage and holds 85.8 percent of SLW's capital, Continental controls both of these enterprises. It must therefore be held accountable for their conduct.

Id. at 9029, 11 Comm. Mkt. L.R. at D27.

concept of one "enterprise" whose members are dependent on the dominating member (i.e., Continental Can).²⁹

2. Dominant Position

It is important to note that, consistent with its previous position, the Commission did not hold that the existence of a dominant position was, in itself, violative of article 86.³⁰ However, the Commission placed considerable emphasis on the fact that the size of the enterprise involved is a significant factor in the determination of a dominant position. In particular, the Commission gave great weight to the impact of the size of the parent company, Continental Can, in determining that it held a dominant position within the German market through its subsidiary SLW.³¹

3. Abuse of the Dominant Position

The most significant, and most controversial, aspect of the Commission's holding in this regard is that the "abuse" is related to the suppression of potential, rather than actual, competition.³² The Commission

29. For analysis and criticism of the Commission's approach in "piercing the corporate veil," see Guyenot & Lunt, *The Continental Can Decision and the Birth of European Anti-Trust Laws*, 2 *ANGLO-AM. L. REV.* 69, 78-80 (1973); Comment, *European Economic Community Antitrust Law: The Continental Can Decision—Forerunner of a New European Anti-Merger Policy?*, 47 *TUL. L. REV.* 829, 837, 839-40 (1973).

30. See Guyenot & Lunt, *supra* note 29, at 75; Schlieder, *Recent Antitrust Developments in the European Economic Community*, 27 *RECORD OF N.Y.C.B.A.* 212, 219 (1972).

31. The Commission summarized the impact of this size as follows:

Continental's large market shares, the production program covering all the market segments and some substitute products, the supply of machinery for the production and use of the products, the technical lead and the economic and financial power based on overwhelming size make it possible for Continental to take independent action, which gives it a very strong position on the German market for light metal containers. . . .

Commission Decision of December 9, 1971, [1970-72 Transfer Binder: New Developments] *CCH COMM. MKT. REP.* ¶ 9481, at 9031 (1972); also translated in 11 *Comm. Mkt. L.R.* D11, at D30 (R.P. Supp. 1972) (Comm'n of the EEC 1971).

This latter approach of the Commission has serious implications for multinational firms.

The possibility of exposure to Article 86 is increased by the finding in Continental Can that a multinational's 'dominant position' may be found to exist in only one member state of the Common Market and that the world-wide resources available to a multinational may be considered in the determination of a 'dominant position'.

Hawk, *Antitrust In the EEC—The First Decade*, 41 *FORDH. L. REV.* 229, 287 (1972).

32. In establishing the abuse of the dominant position held by Continental Can, the Commission offered the following definition of abuse:

Where an enterprise that has a dominant position strengthens that position through a concentration with another enterprise, with the result that the competition, which *actually or potentially* might have subsisted in spite of the existence of the dominant position, is virtually eliminated for the products

found that there existed a potential for competition between Continental Can, through SLW, and TDV due to the proximity of their respective markets.³³ The Commission then concluded that the concentration of the two enterprises rendered such potential competition impossible, thereby leading to the impairment of trade between Member States and the elimination of freedom of choice for the consumers.³⁴

B. THE DECISION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

The decision of the Commission in *Continental Can* was appealed to the European Court of Justice.³⁵ In reversing the decision on the ground that the Commission failed to prove its case on the facts, the Court nevertheless affirmed the Commission's conclusions of law, and provided some important guidelines for the interpretation of article 86.³⁶

In upholding the applicability of article 86 to a merger engineered by a parent company domiciled outside of the Common Market,³⁷ the Court

concerned in a substantial part of the Common Market, this constitutes conduct that is incompatible with Article 86 of the Treaty.

Commission Decision of December 9, 1971, [1970-72 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9481, at 9032, (1972); also translated in 11 Comm. Mkt. L.R. D11, at D31 (R.P. Supp. 1972) (Comm'n of the EEC 1971) (emphasis added). For a criticism of the Commission's analysis in this regard, see Guyenot & Lunt, *supra* note 29, at 75; Comment, *supra* note 29, at 839, 841-43.

33. Commission Decision of December 9, 1971, [1970-72 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9481, at 9032 (1972); also translated in 11 Comm. Mkt. L.R. D11, at D31 (R.P. Supp. 1972) (Comm'n of the EEC).

34. *Id.* at 9033, 11 Comm. Mkt. L.R. at D33.

In effect, the Commission ruled that the elimination of potential competition between the merging enterprises was sufficient to constitute a violation of article 86. This approach was necessary to overcome the obvious difficulty of establishing an abuse, in terms of the elimination of actual competition, within the same geographic market in which the dominant position was said to exist. For criticism of this approach, see Comment, *supra* note 29, at 839. The Comment suggests that the "abuse" did not coincide with the "dominant position" since the two subsidiaries enjoyed dominant positions over different territories. "Article 86 requires that the dominant position and the abuse have an identical geographic basis." *Id.*

35. Under article 173 of the Treaty of Rome, the decisions of the Commission may be appealed to the Court of Justice of the European Communities. 298 U.N.T.S. 11, 75; 1 CCH COMM. MKT. REP. ¶ 4635 (1965).

36. *Europemballage and Continental Can Co. v. Commission*, 2 CCH COMM. MKT. REP. ¶ 8171, 12 Comm. Mkt. L.R. 199 (Eur. Ct. of Justice 1973).

37. Responding to the contention of Continental Can that the Commission was not competent to apply Community law to the parent company, the Court of Justice held that the alleged anti-competitive behavior of the subsidiaries (*Europemballage* and *SLW*) could be imputed directly to the parent company. The Court stated:

The fact that the subsidiary has its own legal personality is not sufficient to rule out the possibility that its conduct can be imputed to the parent company. This applies particularly where the subsidiary does not determine its

noted that article 86 could be applied "to changes in the structure of an enterprise [*i.e.*, merger] that would result in a serious alteration of competition in a substantial part of the Common Market."³⁸ The independent significance of the Court's approach is that it went beyond the Commission by relating the interpretation of article 86 to the impact of the general competition policy of the Community outlined in article 3 of the Treaty of Rome. The Court noted:

Article 86 belongs in the chapter devoted to the common rules on the policy of the Community in the area of competition. This policy is based on Article 3(f) of the Treaty, which provides that the activities of the Community shall include the establishment of a system ensuring that competition within the Common Market is not distorted.³⁹

Using the competition rationale, the Court concluded that the Treaty through article 86 cannot "permit enterprises, through a merger *with an organic unity*, to attain a position of such dominance as to virtually remove any serious possibility of competition."⁴⁰ The Court then proceeded to define "abuse" in language strikingly similar to that used by the Commission.⁴¹

market conduct autonomously but in the main follows the instructions of the parent company.

Id. at 8298, also translated in 12 Comm. Mkt. L.R. at 222, (1973).

Additionally, the Court found no problem with the application of Community law to an enterprise domiciled outside of the Community. "The fact that Continental does not have its seat in the territory of one of the Member States is not sufficient to remove this enterprise from the application of Community law." *Id.* For a discussion of the implications of the extraterritorial application of the EEC provisions, see Hawk, *supra* note 31, at 287-89.

38. *Europemballage and Continental Can Co. v. Commission*, 2 CCH COMM. MKT. REP. ¶ 8171, at 8299, 12 Comm. Mkt. L.R. 199, 223 (Eur. Ct. of Justice 1973).

39. *Id.* The Court added:

In providing for the establishment of a system ensuring that competition in the Common Market is not distorted, Article 3(f) requires, *a fortiori*, that competition not be eliminated. This requirement is so essential that without it many provisions of the Treaty would have no purpose.

Id.

40. *Id.* at 8300, 12 Comm. Mkt. L.R. at 224 (emphasis added).

It is interesting to note that, by the use of the term "organic unity," the Court seemed to be in accord with the approach of the Commission in viewing the corporate group as one "enterprise." This is further substantiated by the fact that the Court summarily rejected the contention of Continental Can that acts of the subsidiaries, as separate legal entities, could not be imputed to the parent company. See note 37 *supra* and accompanying text.

41. The Court defined "abuse" as follows:

Thus, abusive conduct could be present where an enterprise in a dominant position strengthens that position to the point where the degree of domination achieved substantially hampers competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market.

Europemballage and Continental Can Co. v. Commission, 2 CCH COMM. MKT. REP. ¶ 8171, at 8300, 12 Comm. Mkt. L.R. 199, 225 (Eur. Ct. of Justice 1973).

Having agreed in substance with the Commission's legal interpretation of the applicability of article 86, the Court nevertheless disagreed with the factual conclusions on which the Commission's decision was founded.⁴² According to the Court, the Commission failed to define sufficiently the relevant market in evaluating SLW's dominant position and the consequences of the merger. Having defined SLW's dominant position only in terms of the specific markets for metal containers for meat and fish, the Commission had disregarded the market of metal containers for other purposes. In so doing, it rendered impossible the necessary consideration of the interchangeability or "substitutability" of such products.⁴³ Therefore, by extending the breadth of the market within which a dominant position and the elimination of competition had to be defined, the Court imposed a rather strict burden of proof upon the Commission. The result is a tendency to diminish the applicability of the legal principles for which the Court gave general affirmance.

III

AN EEC MERGER CONTROL SYSTEM

A. THE PROPOSED MERGER CONTROL REGULATION

Recognizing the threat to competition posed by the significant growth in the number of business concentrations within the Common Market⁴⁴ and the general inadequacy of article 86 as a device to control such concentrations,⁴⁵ the Commission undertook to devise a regulation for the

42. The Court first established that, since the Commission had based its decision on the elimination of all competition, the Commission therefore had the burden of furnishing legally sufficient grounds for this basis, or at least the burden of proving "that competition was so substantially affected that any remaining competitors can no longer provide a sufficient counterbalance." *Id.* at 8301, 12 Comm. Mkt. L.R. at 225.

43. *Id.*, 12 Comm. Mkt. L.R. at 226-27. The Court then concluded that the "basic uncertainty" present in the Commission's finding of a dominant position "carries over to the other statements from which the decision concludes that there is no competition, actual or potential, in the market in question." *Id.* at 8302, 12 Comm. Mkt. L.R. at 227.

44. See note 4 *supra*.

45. In this regard, comment should be made on the Conclusions of the Advocate General of the European Communities relating to the merits of *Continental Can v. Commission*. Following the hearings before the Court of Justice, but prior to the Court's decision of February 21, 1973, the Advocate General of the European Communities rendered his conclusions on the merits of the case. See Conclusions of Advocate General Karl Roemer, November 21, 1972, 2 CCH COMM. MKT. REP. ¶ 8171, at 8303, 12 Comm. Mkt. L.R. 202 (1973).

In his conclusions, the Advocate General expressed considerable doubt about the validity and efficacy of using article 86 as the basis for a merger control system. The Advocate General offered the following argument:

systematic control of mergers. The result of this effort was the final draft of a proposed merger control regulation issued by the Commission on July 18, 1973.⁴⁶

1. Basic Provisions

The heart of the proposed regulation is contained in article 1 which provides in part:

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.⁴⁷

It is obvious from the outset that the regulation is intended to carry the powers of the Commission well beyond the limits originally imposed by article 86 of the Treaty of Rome. First, the regulation is not dependent on a predetermined status of a "dominant position," but is, in fact, aimed at the attempt to "acquire" or "enhance" such a position. Secondly, whereas article 86 was viewed as requiring a finding of "abuse" in terms of the virtual elimination of all competition, the regulation seeks to establish a lower standard of "incompatibility" in light of the "power to hinder effective competition."

The regulation is not intended to be based on a system of prior authorization similar to that found in article 66 of the ECSC Treaty.⁴⁸ However, the Commission clearly intends to subject large-scale mergers to review by the Commission, on a case-by-case basis, to consider whether

I believe . . . that it is more important, in the interest of bringing about a healthy system of competition in the Community, to show that Article 86 is in principle not suitable for merger control, and not to give the impression that the important problem of merger control can be overcome, at least partially, by giving a broad interpretation to Article 86

Id. at 8307, 12 Comm. Mkt. L.R. at 209.

Although this view is not reflected in the opinion of the Court of Justice, it nevertheless may have contributed to the impetus which prompted the Commission to formulate a merger control regulation.

46. Concentration Regulation, 2 CCH COMM. MKT. REP. ¶ 9586, at 9302 (1973).

47. *Id.* art. 1, para. 1, at 9303 (emphasis added). Article 1, paragraph 1 further provides:

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.

Id.

48. See note 9 *supra*.

there is any incompatibility with the competition policy of the Community under article 3 of the Treaty.

Article 1 also contains two important provisos. First, the regulation excludes from consideration those concentrations in which the aggregate sales of the enterprises (undertakings) involved are less than \$200 million and the goods and services involved account for no more than twenty-five percent of the sales of similar goods or services in any Member State.⁴⁹ Second, the regulation specifically excludes those concentrations "which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community."⁵⁰

Thus, a novel feature of the proposed regulation is that the exemption provisions contained in the first proviso of article 1 specify certain threshold limits beyond which the Commission recognizes the inherent danger of monopolistic power.⁵¹ While the regulation does not condemn "size," it does evidence the growing concern of the Commission over the effects of "size" in so far as its leads to the "power to hinder effective competition." This concern presented the Commission with a dilemma in terms of policy formation in that it contradicted the traditional "pro-merger" attitudes of the Community.

In this regard, article 1 sets the policy guidelines for the Commission's approach and attempts to affect the compromise position sought by the Commission. On the one hand, the exclusion provisions of article 1 of the regulation permit the policy of encouraging concentrations of small and medium-sized European firms to continue. On the other hand, the traditional belief in the economic benefits realizable from large firms is held intact by exempting large concentrations which are found to be "indispensable to the attainment" of Community goals.

2. *Definition of Concentration—Piercing the Corporate Veil*

Article 2 of the regulation defines "concentration" as follows:

The concentrations referred to in Article 1 are those whereby a person or an undertaking, or a group of persons or undertakings, acquires control of one or several undertakings.

49. Concentration Regulation, art. 1, 2 CCH COMM. MKT. REP. ¶ 9586, at 9303 (1973).

50. *Id.*

51. It is interesting to note that some observers had recommended that the Commission establish an antimerger law providing certain specific standards as to percentages of market concentration. See Rahl, *Competition and Antitrust in American Economic Policy: Are There Useful Lessons for Europe?*, 8 COMM. MKT. L. REV. 284, 309-10 (1971).

. . . 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 operate⁵²

By framing the definition of concentration in terms of the acquisition of control and the ability to "determine how an undertaking shall operate," the Commission has adopted the same approach it took in *Continental Can*.⁵³ By referring to a "group of . . . undertakings," the Commission obviously intends to include both subsidiary and parent corporate entities within the control of the regulation. Furthermore, in light of *Continental Can v. Commission*, there is every reason to presume that the regulation is intended to extend its control over concentrations which are controlled by an enterprise located outside the Common Market.⁵⁴ The only limitation in this respect is found in article 1, paragraph 1, which refers to groups of enterprises "at least one of which is established in the common market."⁵⁵

This tendency to ignore mere legal forms by piercing the corporate veil finds further support in the method specified by the regulation for calculating the aggregate "turnover" (sales) for determining the applicability of article 1 of the regulation. Article 5 specifies that in obtaining the aggregate sales of the concentration, the Commission is to include not only the enterprises (undertakings) directly involved in the merger, but also those "undertakings and groups of undertakings which control the undertakings participating in the concentration within the meaning of Article 2."⁵⁶ It is apparent that, consistent with its approach in *Continental Can*, the Commission will not hesitate to consider the influence of the world-wide financial and technical resources of a multinational parent company in determining the potential effect upon effective competition within the Common Market.⁵⁷

52. Concentration Regulation, art. 2, 2 CCH COMM. MKT. REP. ¶ 9586, at 9303-2 (1973).

53. See note 28 *supra* and accompanying text.

54. It should be recalled that the Court of Justice in *Continental Can v. Commission* found no problem with the application of Community law to a merger involving an enterprise domiciled outside of the Community. *Europemballage and Continental Can Co. v. Commission*, 2 CCH COMM. MKT. REP. ¶ 8171, at 8298, 12 Comm. Mkt. L.R. 199, 222 (Eur. Ct. of Justice 1973).

55. Concentration Regulation, art. 1, para. 1, 2 CCH COMM. MKT. REP. ¶ 9586, at 9303, (1973).

56. Concentration Regulation, art. 5, 2 CCH COMM. MKT. REP. ¶ 9586, at 9303-3 (1973).

57. See note 31 *supra* and accompanying text.

3. Prior Notification Requirement

To effectuate the overall power of the Commission to control large-scale mergers, article 4 requires that the Commission be notified of planned concentrations *before* they are put into effect, where the aggregate sales of all enterprises concerned is \$1 billion or more.⁵⁸ This provision represents a major improvement in the ability of the Commission to control the growth of concentrations within the EEC.⁵⁹ By requiring notification before the concentration is put into effect, the regulation would overcome a major weakness of a system premised solely on the applicability of article 86 of the Treaty of Rome, which is dependent upon a finding of "abuse" only after a concentration has been effected.⁶⁰

4. Investigatory Powers and Enforcement Provisions

In order to carry out its duties, the Commission is empowered to "undertake all necessary investigations into undertakings and associations of undertakings."⁶¹ It is reasonable to infer that such investigatory powers extend to all enterprises involved in the effectuation or control of the concentration.

The strength of the proposed system is found in the provisions for enforcement. The Commission is empowered to declare a concentration falling within the prohibitive language of article 1 of the regulation, to be "incompatible" with the Common Market,⁶² subject to review by the Court of Justice.⁶³ When, under its decisional powers, the Commission declares a concentration to be "incompatible," such decision does not automatically render the merger null and void. However, the Commission may require the enterprises to separate the assets acquired or to cease the common control.⁶⁴ Upon failure to comply with the decision of the Commission, a fine of up to \$50,000 per day may be imposed.⁶⁵ Furthermore, the Commission may impose fines of up to \$50,000 for the

58. Concentration Regulation, art. 4, 2 CCH COMM. MKT. REP. ¶ 9586, at 9303-2 (1973).

59. The system envisioned by the Concentration Regulation is strikingly similar to that recommended by Kurt Markert (Chief of the International Section of the German Federal Cartel Office). Markert had suggested that the Commission institute "a notification system with administrative powers to object in cases of anticompetitive effects." Markert, *supra* note 9, at 67-69.

60. Concentration Regulation, 2 CCH COMM. MKT. REP. ¶ 9586, at 9302 (1973).

61. *Id.* at 9303-4.

62. *Id.* at 9303-2.

63. *Id.* at 9303-5.

64. *Id.* at 9303-2.

65. *Id.* at 9303-5.

submission by an enterprise of false or misleading information and up to \$1,000,000 for a breach of the obligation to notify under article 4.⁶⁶ The inclusion of such enforcement powers has been recommended by most observers as a necessary component of an effective EEC merger control system.⁶⁷

B. POLICY RATIONALE OF THE CONCENTRATION REGULATION

1. Competition Policy

The significance of the proposed merger control regulation can be seen in terms of the Commission's underlying policy rationale. Most importantly, the Commission lays the policy foundation squarely on the Treaty of Rome objectives under article 3(f) which requires the Community to institute "a system ensuring that competition in the Common Market is not distorted."⁶⁸ In so doing, the Commission reflects the policy preference expressed by the Court of Justice in *Continental Can v. Commission*.⁶⁹

This shift in policy emphasis can be correlated directly to the increasing concern over the growth of the process of concentration within the EEC.⁷⁰ The basis of the concern is a limited recognition of the inherent threat to competition associated with large-scale concentrations. Therefore, the Commission recognized the need for an effective system of merger control. To this extent, the proposed regulation represents a response to the growing body of opinion challenging the economic basis of the Community's traditional "pro-merger" approach. The message of the regulation is clear. To the extent that large-scale concentrations create the "power to hinder effective competition," they will be subject to the control and prohibition of the Commission.

However, the foregoing conclusion must be qualified by the evidence that the Commission is actively seeking to retain certain fundamental beliefs in the benefits of large production units. As noted before, the proposed regulation seeks a compromise by exempting even large concentra-

66. *Id.*

67. See Rahl, *supra* note 51, at 309-10; Samkalden & Druker, *supra* note 11, at 181-82.

68. Concentration Regulation, 2 CCH COMM. MKT. REP. ¶ 9586, at 9302 (1973).

69. It should be recalled that, in *Continental Can v. Commission*, the Court of Justice emphasized the need to interpret article 86 in light of the competition rules of article 3(f), without which the Treaty's antitrust provisions would have little meaning. *Europemballage and Continental Can Co. v. Commission*, 2 CCH COMM. MKT. REP. ¶ 8171, at 8299 (Eur. Ct. of Justice 1973).

70. Concentration Regulation, 2 CCH COMM. MKT. REP. ¶ 9586, at 9302 (1973).

tions found "indispensable to the attainment" of community objectives. Likewise, concentrations among small and medium-sized firms are exempted, thereby permitting continued encouragement of such concentrations. This latter approach is supported by another recent development. Shortly after issuing the final draft of the proposed regulation, the Commission announced the outlines of its plans for a "European Industrial Base."⁷¹ In its memorandum, the Commission stated that it will actively encourage the formation of trans-European firms in order to enable European industry to "benefit fully from its new framework and be competitive on the world market."⁷²

2. *The Inadequacy of Article 86*

The proposed regulation also reflects the Commission's realization of the inadequacy of a merger control system dependent on the legal and factual technicalities of a predetermined status of "abuse of a dominant position" under article 86 of the Treaty of Rome.⁷³ In the regulation, the Commission expressly recognized that the inherent weakness of article 86, for the purposes of merger control, was that it was held to apply only to the "abuse," not to the gaining of the dominant position.⁷⁴ Therefore, the proposed regulation represents an attempt to supplement article 86 by giving the Commission additional powers in the form of a more definitive foundation for a merger control system.⁷⁵

CONCLUSION

The development of an EEC merger control system can most aptly be described as a process involving the transformation of both law and policy with regard to mergers. During the first stage, a policy which was generally favorable to mergers and large-scale concentrations predominated to the exclusion of a discernible merger control "law." When the undesirable effects of that policy were recognized in the form of large concentrations threatening the desired pattern of competition, the Commission, in 1965, attempted to define a legal basis for implementing a

71. See Background Note from the European Community Information Service on the Commission Plan for a "European Industrial Base," July 25, 1973, 2 CCH COMM. MKT. REP. ¶ 9592.

72. *Id.* ¶ 9592, at 9320-21.

73. Concentration Regulation, 2 CCH COMM. MKT. REP. ¶ 9586, at 9302 (1973).

74. *Id.* For additional comments upon the inadequacy of article 86 as a foundation for an EEC merger control system, see Markert, *supra* note 9, at 66-67; Rahl, *supra* note 51, at 286.

75. Concentration Regulation, 2 CCH COMM. MKT. REP. ¶ 9586, at 9302 (1973).

limited system to control anticompetitive mergers. To this end the Commission founded its legal theory on the ground that, under certain limited circumstances, article 86 of the Treaty of Rome could be applied to a merger by a firm already holding a dominant position within the Common Market.

The *Continental Can* litigation is significant in that it established the validity of the Commission's theory that article 86 was applicable to mergers. Although the Court of Justice upheld this legal theory, its reversal on factual grounds nevertheless served to point out the inadequacy of article 86 to combat the growing tide of large scale concentrations. Therefore, should the regulation recently proposed by the Commission be adopted and effectuated, the overall significance of the *Continental Can* litigation will have to be viewed in light of its function in highlighting the inherent weakness of a merger control system premised exclusively on the legal and factual technicalities of article 86 of the Treaty.

Striking the necessary balance between law and policy, the proposed merger control regulation provides far greater legal certainty by defining threshold limits beyond which concentrations will be subjected to Commission scrutiny. Founded directly on the competition rules of the EEC, the regulation contains the necessary legal machinery to prohibit and prevent large concentrations found to be incompatible with Community goals. At the same time it allows the flexibility needed for the Community to pursue its preference for trans-European concentrations. Whether these contradictory policy approaches can be successfully implemented within the framework of the merger control system envisioned by the regulation will be determined only after its effect and meaning have been further defined by the Commission through a test case and its validity reviewed by the Court of Justice.

In view of the design of the regulation to control large-scale concentrations, however, there is little doubt that the regulation evidences a desire of the Commission to limit the dominance of Common Market industries by large multinational corporations. Large multinational corporations may not only be the primary target of the regulation, they may very well be the primary cause of its existence.

Thomas J. Benz