EC Merger Control: A Commentary to the New Regulation on the Control of Concentrations

Av Ulf Djurberg[1]

Introduction

One of the burning issues in the European Community over the past 16 years has been whether the EEC would enact a Regulation on the Control of Concentrations. In 1973 the first proposal for Merger Control was published, however the discussion had started much earlier than that. Article 66 of the ECSC Treaty[2] provides for a preventive merger control for ECSC undertakings. However, the ECSC Treaty has a limited character and due to state subsidies the ECSC Treaty has not been able to develop particular competition policy relevance. When the EEC Treaty was enacted in 1957 there remained no room for any special provisions on Merger Control. Nevertheless, in 1966 the Commission published a memorandum in which it argued that Art. 86 of the EEC Treaty should always be applied if an undertaking in a dominant position eliminates competition by taking over another economically independent undertaking.[3] This opinion was later applied by the Commission and the Court of Justice in the *Continental Can Case*.[4] However, Art. 85 could not, according to the 1966 memorandum, be applied to concentrations. As already mentioned, in 1973 the Commission proposed a Merger Control Regulation, although, due to political considerations it was not possible to enact such a Regulation at that time. In 1981, 1982/1984 and 1986 the 1973 proposal was amended, but very little happened.[5] Then, in November 1987, the Commission applied Art. 85 of the EEC Treaty to a proposed merger-like

[1] Ulf Djurberg is Jur Kand (LLM) and has been studying EC–law at the Europa Institut in Amsterdam. This article is part of a major paper written under the supervision of Professor R.H. Lauwaars, director of the Europa Institut.
[2] i.e. the European Coal and Steel Community, established 1951.
[3] EEC Studies, Competition series No 3, The Problem of Industrial Concentration in the Common Market.
[4] Europemballage and Continental Can v. Commission; Case 6/72; (1973) ECR 215; (1973) CMLR 219; CCH para. 8171.
[5] OJ No C 282, 5.11. 1981, p. 4, OJ No C 36, 12.2. 1982, p. 3, OJ No C 51, 23.2. 1984, OJ No C 324, 17.12. 1986.

acquisition i.e. in the famous *Philip Morris Rothmans Case*.[6] All in a sudden, everything was speeded up, if it was due to the *Philip Morris Case* or if the Council felt that 1992 was getting to close or if it was the concentration trends in Europe which changed the working pace in the Council is impossible to say, probably a combination. Thus on the 21 of December 1989 was the Merger Control Regulation enacted.

As Merger Control consists of very complex forms of appraisals, definitions and calculations, it is necessary for a lawyer who deals with EC-law to have a detailed commentary to the Regulation, otherwise it is very difficult to understand the way of thinking in the Regulation. Thus, the purpose with this article is to give the uninitiated reader a clear and fairly detailed commentary to the new Regulation on the Control of Concentrations.

The turnover thresholds

The regulation, which came into force on September 21 1990, gives the European Commission sole power to investigate mergers with a "Community dimension" i.e. all the undertakings concerned must have an aggregate worldwide turnover which exceeds ECU 5000 million.[7] The notion "all the undertakings" includes not only the merging undertakings but also, according to Art. 5(4) of the Regulation, all those undertakings which are related to an undertaking involved in the concentration. Thus, daughter and sister companies will be included. Nevertheless, sales between members of each of the related groups are not counted in establishing turnover (Art. 5(1)). However, where the concentration consists of the acquisition of a part of a company, whether or not it constitutes a legal entity, only the turnover relating to the part which is subject of the transaction shall be taken into account with regard to the seller (Art. 5(2)). According to Fine, it will be more difficult for an acquisition of a part of a company to fall within the scope of the Regulation.[8] It is worth noting however that if two or more transactions (of parts) take place within a two-year period between the same persons or undertakings then these transactions will be treated as one and the same concentration arising on the date of the last concentration (Art. 5(2 para 2)). In addition to the worldwide turnover, each of at least two of the undertakings concerned must have an aggregate Community-wide

[6] British American Tobacco Company Ltd. and R.J. Reynolds Industries Inc. v. Commission; Cases 142/84 and 156/84; Judgement of 17 November 1987 (not yet published). It concerned the acquisition of a minority participation in a competing company.

[7] Art. 1(2) of the Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations between undertakings, OJ L 395/1 (1989) (hereinafter referred to as the Regulation).

[8] Fine, F, EDITORIAL (1990) 2 ECLR p. 48.

turnover which is higher than ECU 250 million (Art. 1(2b)). However, a concentration does not have a Community dimension if each of the undertakings concerned derive two-thirds of its aggregate Community-wide turnover in one and the same Member State (Art. 1(2 in fine)). This does not mean that the merging companies need to be resident in one and the same Member State, just that they must produce more than two-thirds of their Community-wide turnover within the same State. Thus, only concentrations which includes really large companies with at least Community-wide presence will be governed by the Regulation, all other cases will be dealt with by the competent authorities of the Member States. However, turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State (Art. 5(1 para 2)).

The turnover thresholds are, according to Sir Leon Brittan the Competition Commissioner, "a necessarily arbitrary way of defining which concentrations have sufficient impact on the Community as a whole to merit decisions by the Commission rather than by Member States. Alternative tests have been considered over the years, but the turnover test is the only one which is both reasonably certain in its application and not excessively complex. The current thresholds have been set at a rather high level and they are, in the view of the Commission, too high and will be reviewed in four years time (Art. 1(3))". According to the joint declaration by the Council and the Commission the worldwide turnover threshold will be reduced to ECU 2000 million and the Community-wide turnover threshold will also be reduced in proportion to the worldwide threshold, probably to somewhere around ECU 100 million. Before the thresholds are reduced should the Commission, according to Leon Brittan, "increase its experience in handling these matters, thus there will be some mergers which, even if they have an impact on the Community as a whole, will not be decided by the Commission".[9]

However, when calculating the turnover, there are some special rules for financial institutions and for insurance undertakings (Art. 5(3 a–b)). Moreover, Art. 5(5) gives special rules when calculating the turnover for joint undertakings under Art. 3(2) of the Regulation.

Aggregate worldwide turnover is for financial institutions replaced by one tenth of total assets and the Community-wide turnover is replaced by, for each financial institution, one tenth of total assets

[9] Lectures in Cambridge, 9 February 1990 on the Development of Merger Control in the EEC by Sir Leon Brittan QC.

multiplied by the ratio between loans and advances to credit institutions and customers within the Community; to the total sum of loans and advances to credit institutions and customers. Total turnover within one (and the same) Member State (final part of Art. 1(2)) is replaced by one tenth of total assets which is multiplied for each financial institution by the ratio between loans and advances to credit institutions and customers within one and the same Member State to the total sum of loans and advances to credit institutions and customers.

For insurance undertakings is aggregate worldwide turnover replaced by the value of gross premiums written worldwide whilst Community-wide turnover is replaced, for each insurance undertaking, by the value of gross premiums written with Community residents. Turnover within one (and the same) Member State (final part of Art. 1(2)) is replaced by the value of gross premiums written with residents of one (and the same) Member State.

Where undertakings concerned by the concentration jointly, for example, own more than half the capital or business assets in an undertaking shall, when calculating the turnover of the undertakings concerned, no account be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any of them. However, account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned (Art. 5(5a–b)).

The definition of a concentration

Since what we loosely call the new Merger Regulation is in fact a "Regulation on the Control of Concentrations between undertakings", the definition of the terms concentration and control is crucial. "Concentration", in economic terms, means the coming together of resources, assets and power in one set of hands.[10] However, in the Regulation is the definition of a concentration general and includes the situation where two or more previously independent undertakings merge as well as any acquisition of a controlling (decisive) influence on another undertaking.[11] "Control"

[10] E.g. Shorter Oxford English Dictionary, 3rd edition, Vol. 1, p. 416.

[11] However, the definition of a merger is somewhat different in the 3rd company law directive (OJ 1978 L 295/37). The directive makes a distinction between mergers by acquisition and mergers by the formation of a new company. A merger by acquisition shall, according to Art. 3, mean "....the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and

is according to the Competition Commissioner, Sir Leon Brittan,[12] the key but is in the Regulation used in two different senses. In the title, control means to check, to verify, to vet; in the substantive rules of the Regulation "control" is constituted by rights, contracts or any other means which confer the possibility of exercising, directly or indirectly, decisive influence on an undertaking (Art. 3(1b) and 3(3)).[13] However, this definition may, according to the doctrine, cause some problems. According to Fine it could be argued that a minority shareholding together with a co-operation agreement could have a "decisive" influence, for example, on a company's investment decisions. Likewise, a minority shareholding coupled with an agreement providing for "step" increases could "confer the possibility" of later exercising a decisive influence.[14] According to the Commission notice regarding the concentrative and cooperative operations under the Merger Regulation[15] it is possible that the taking of a minority shareholding in an undertaking can, if the new shareholder acquires the means of exercising a decisive influence on the undertaking's activity, be considered as a concentration in the meaning of Art. 3(1b) of the Regulation. Nevertheless, in cases where the agreement on the acquisition of the minority shareholding also provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation,[16] Art. 85:1 will apply. Moreover, Art. 86 is applicable where the shareholding gives the investing undertaking the possibility of exercising influence over the other undertaking's commercial policy, thereby strengthening its dominant position in a manner which substantially impedes competition.[17] It could be argued that these principles also apply where the acquisition of a minority shareholding is merely the first stage of a progressive scheme to take full control of the undertaking concerned. As long as the threshold of decisive influence has not been reached, the Regulation is not applicable. But if the threshold is reached then, in conformity with this author's view, we have to make a distinction between a contract which forces the

liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment...." According to Art. 4 "....shall a merger by the formation of a new company mean the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment...."

[12] Brittan, supra.

[13] It is sufficient that control of parts of an undertaking is acquired.

[14] Fine, supra. p. 48.

[15] OJ No C 203/10, 14.8 1990.

[16] Judgement in joined cases 142 and 156/84 BAT and Reynolds ECR 1987 4566, at p. 4577.

[17] Case cited above, at p. 4584 and judgement in case 6/72 Europemballage and Continental Can 1973 ECR 215 at p. 246.

buyer to buy within a couple of years and where the buyer has an option to buy. The first situation is in my opinion already covered by the words in Art. 3(1b) of the regulation ("indirect control") whilst the second situation cannot be covered by the regulation before the buyer has a decisive influence.[18]

As Art. 3(1a) of the Regulation refers not only to legal, but also to economic concentrations, it is relevant to talk about cross-shareholdings.[19] If the purpose with the cross-shareholding is to establish a combined group, then we may talk about a merger in the sense of the Merger Regulation. However, the condition for the recognition of a merger in the form of a combined group is that the undertakings or the groups concerned not only are subject to a permanent, single economic management but also are amalgamated into a genuine economic unit, characterised internally by profit and loss compensation between the various undertakings within the groups and externally by joint liability. In this context, reciprocal influences as exchange of 50 % of the shareholdings and common membership of managing acts as an indicator and may give rise to a presumption of a concentration.[20]

However, exceptions to Art. 3(1–4) are made in Art. 3(5). Firstly, when control is acquired by credit institutions or other financial institutions or insurance companies "which hold" on a temporary basis securities which they have acquired...with a view to reselling them. Secondly, an exception is made in favour of office holders appointed in connection with an insolvency, cessation of payments, compositions or analogous proceedings. Thirdly and finally, financial holding companies within the terms of Art. 5(3) of the Fourth Company Law directive are exempted. However, in the last case, as well as in the case of the banks and the insurance companies this immunity is subject to voting rights not being exercised "with a view to determining the competitive behaviour of that undertaking". However, banks and insurance companies may still exercise their voting rights with a view to selling off the undertaking or the securities concerned, provided such sale takes place within a year.[21]

Finally, definitely falls an operation which has as its object or effect the co-ordination of the competitive behaviour of undertakings which remain independent outside the scope of the regulation (Art. 3:2 first para). Such operations have to be examined under the

[18] The rules for how control is acquired are to be found in Art. 3:4.
[19] See the cross–shareholding situation between Volvo and Renault.
[20] Commission notice OJ No C 203/14, 14.8 1990.
[21] Van Empel, M, Merger Control in the EEC, World Competition Law and Economics Review, Vol 13. March 1990, No 3 p. 13.

appropriate provisions of the Regulations implementing Arts. 85 or 86 of the Treaty. In accordance with the preamble (para 23) it is appropriate to make this distinction, especially in the case of the creation of joint ventures. Thus, this would result in that the *Philip-Morris* doctrine will remain valid.

The applicability of the merger control regulation to joint ventures[22]

One of the most important questions for lawyers and in particular the Court of Justice will be how to define a joint venture (JV) and when a joint venture should be qualified as a concentration. As already indicated above, joint ventures which serve as the vehicle for coordination between independent enterprises will continue to be scrutinized under the general regime of Article 85 and 86.

However, substantial problems of definition can be expected when it must be decided in practice whether the criteria for assessment are to be taken from the Regulation or from Art. 85 (and 86). This question must already be answered at the time of the foundation of a JV, because in the former case (provided that the thresholds in Art. 1(2) are met) a notification for the purpose of merger control is sufficient, whereas in the latter case a request for an exemption pursuant to Art. 85(3) EEC Treaty could be necessary. It is therefore necessary to develop reliable criteria to distinguish *concentrative JV:s,* which, as already mentioned, have to be notified under the Merger Control Regulation, from *coordinative JV:s,* which are excluded from the scope of the Merger Control Regulation and possibly have to be notified for an exemption from the cartel prohibition. Thus, as a matter of law, the formation of a joint venture will either be subject to merger control or to cartel control, but shall not be subject to both review procedures.[23]

The Commission states in its notice regarding the concentrative and cooperative operations, that the scope of the Regulation depends on (i) what is to be considered a JV (ii) what constitutes the character of an independent economic entity and (iii) in what

[22] This chapter is mainly based on the Commission notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ No C 203/10, 14.8 1990.

[23] German anti–trust law has also developed a distinction between concentrative and cooperative JV:s. The German theory is probably a forerunner to the EC theory. According to the guidelines of the German Federal cartel office, a JV is to be considered as concentrative if: 1 the JV is a functioning undertaking in the sense that it possesses all the attributes of a separate undertaking; 2 the JV makes market-related performances and does not exclusively or prevailingly fulfill auxiliary functions for the parents on an upstream or downstream level; and 3 the parent companies do not, or cease to, engage in the market area covered by the JV.(Götting, H, and Nikowitz, W, EEC Merger Control: Distinguishing Concentrative Joint Ventures from Cooperative Joint Ventures, Fordham International Law Journal, Vol. 13, 1989–1990–No 2, p. 201).

circumstances a coordination of competitive behavior between the parent companies themselves or between them and the JV can safely be considered not to exist.

Firstly, JV:s are, according to the notice, undertakings that are jointly controlled by several other undertakings, the parent companies (the definition of control see above). Thus, joint control exists in every case where the parent companies must agree on decisions concerning the JV:s activities.

The second element in Art. 3(2) subparagraph 2 of the Regulation is fulfilled by a JV when it is a complete undertaking established on a longterm basis and with its own commercial policy. Thus, an undertaking is considered to be complete when it exercises all the functions of a normal undertaking and when it acts as an independent supplier and buyer on the market. However, the JV, to be caracterised as a concentration JV, must also intend and be able to carry on its activity for an unlimited, or at least for a long time (at least 20 years). Nevertheless, more important than the parent companies agreed time-limit are the human and material resources of the JV. They must be of such nature as to ensure the JV:s existence and independence in the long term. This is generally the cases where the parent companies invest substantial financial means in the JV, transfer an existing undertaking or business to it, or give it substantial technical or commercial know-how, so that it can support itself by its own means. Finally the JV must exercise its own commercial policy i.e. it must plan, decide and act independently.

Thirdly and finally, the decisive point for a JV to be considered to be concentrative within the meaning of Art. 3(2) sub-paragraph 2 of the Regulation is that it must not be accompanied by any coordination of the competitive behaviour of undertakings that remain independent of each other. There must be no such coordination either between the parent companies or between any or all of the parents on the one side and the JV on the other. The Regulation requires that the competitive commercial freedom of the parent companies and of the JV itself be preserved.

However, not every form of cooperation between parent companies in respect of the JV makes Art. 3(2) of the Regulation inapplicable, but it is only accepted as far and as long as the competitive behaviour of the parent companies and of the JV are not influenced by it. According to the Commission, certain situations where the ”JV incorporate pre-existing activities of the parent companies” can be treated as concentrations. For example, a JV will be considered as a merger or concentration when the parent companies

transfer all their assets to the JV and become no more than holding companies, thus losing their economic independence. This is what the Commission calls a "complete merger". However, it has also developed a "partial merger theory" which is firmly established in the Commission's case law. According to this theory a JV will fall within the scope of the Merger Regulation (and outside the scope of Art. 85) where:

(1) the parent companies completely and irreversibly abandon business in the area covered by the JV, and

(2) the transfer of assets does not restrict competition in areas where the parent companies are still competitors.[24]

Guidance on the application of these conditions is provided in *SHV/Chevron*.[25] In this case, the parent companies transferred their distribution network and all related assets to a network of joint subsidiaries for the distribution of specified petroleum products. The Commission held that this arrangement was a partial concentration, focusing on the fact that the parents would no longer retail the relevant products separately and that the subsidiaries were formed for a period of 50 years which evidenced a permanent transfer of assets. Moreover, the agreement did not restrict competition in areas other than those covered by the joint subsidiaries. Before the entering into force of the Merger Regulation JV:s have only rarely been treated as partial mergers. Indeed, the Commission's view in such cases was that JV's could only in exceptional cases constitute partial concentrations. This attitude is not surprising since a finding that Art. 85 did not apply to a JV left the Commission with its more limited authority under Art. 86. However, even if the Commission in its draft guidelines to the Merger Regulation has almost repeated its wording from earlier case-law in respect of partial mergers, it is possible to read in between the lines that in the future we will see more partial mergers than before. Indeed, the Commission has in its draft more or less precisely specified some partial merger situations:

1. Two undertakings established and operating outside Europe, that have transferred all their European operations to the JV established and operating in Europe and completely withdrawn from the European market, will usually not be considered to remain potential competitors of the JV.

2. If two European undertakings that compete with each other in the Community merge their operations on an external market into a

[24] Sixth Report on Competition Policy, No 55.
[25] SHV/Chevron, O.J. (1975)L 38/14; (1975) CMLR D 68; CCH para. 9709.

JV established there, this also should, in most cases, be without effect on their competitive relationship in the common market.

In the absence of a separate system of merger control under EEC competition law, the partial merger theory has been criticized as unsatisfactory. The Merger Control Regulation will put the partial merger theory into new perspective and allow it to fulfill its proper function. In the past the question was whether JV:s fall within Art. 85 of the EEC Treaty or escape antitrust control altogether (unless they constituted an abuse of a dominant position prohibited under Art. 86 of the EEC Treaty). The question now will be whether a JV is subject to Art. 85 of the EEC Treaty or to the Merger Control Regulation.

Another situation where a JV has a concentrative nature is when the JV undertakes new activities on behalf of the parent companies. For example, where the JV operates on a product or a service market which the parent companies individually have never yet entered and will not enter in the foreseeable future, because they lack the organisational, technical or financial means or because, in the light of all the objective circumstances, such a move would not represent a commercially reasonable course. Thus, there is no competitive relationship between the parent companies and the JV, but only as long as the JV:s market is neither upstream nor downstream of, nor horizontally close to, that of the parent companies.[26]

Notification, suspension, decisions and timelimits

The procedure for merger control envisaged in the original proposal has remained essentially the same. Prior notification of concentrations with a Community dimension to the Commission is compulsory within one week after the conclusion of the agreement, or the announcement of the public bid or the acquisition of a controlling interest, whichever is earliest (Art. 4(1)). Where the merger is consensual or a joint acquisition the notification must be made jointly by all the parties. In the case of all other acquisitions such as contested mergers the notification must be made by the acquisitor (Art. 4(2)). The Commission shall examine the notification as soon as it is received and when the merger does not fall within the scope of the regulation or when the concentration does not raise serious doubts as to its compability with the Common Market, the Commission shall by a decision record that finding 6(1a–b)in conjunction with Arts. 1(2)

[26] See also the situation where the parties start to divide up the assets of the undertaking immediately after the acquisition, then, according to the 24th recital, the Regulation shall in principle apply. In this context, the transfer of the assets in question from the acquired undertaking to one or other of the acquirers is considered in each case as a separate concentration operation.

and 2. This decision must be taken within one month, otherwise is the concentration deemed to have been allowed.[27] National merger control is then precluded (Art. 6(1) in conjunction with Art. 10(1) and (6), and Art. 21(2)). It is possible to bring an appeal against such decisions. However, if there are serious doubts about a concentration's compatibility with the Common Market, a further analysis becomes necessary. Formal proceedings are opened and must be completed within four months.[28] The results of these proceedings will be prohibition or approval of the concentration, with or without conditions, by means of a finding of incompatibility or compatibility (Art. 6(1c), 8(2–3) and 10(3). If the Commission has not taken a decision before the deadline in Art. 10(3), the merger shall (again) be deemed compatible with the common market (Art. 10(6)).[29] In contrast to the other decisions in Art. 6 the decision in Art. 6(1c) cannot be appealed because it is only the start and not the culmination of a procedure.[30] The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay (Arts. 6(2) and 19(1)).

Thus, the total length of an investigation could be five months following the date of notification. But there are, however, some derogations from that rule. First, the four month limit shall be suspended in exceptional cases where, owing to circumstances for which one of the undertakings involved is responsible, the Commission has had to request information or order an investigation (Art. 10(4)). Secondly, when the Commission, according to Art. 9, refers the notified concentration to the cartel office of a Member State, the decision may be delayed up to seven months following the date of notification (Art. 9(4 and 6)). Finally, the Commission may take a decision pursuant to Art. 8(3) without being bound by the four months deadline referred to in Art. 10(3) if, among other things, the declaration of compatibility is based on incorrect information for which one of the undertak-

[27] The period of one month may be increased to six weeks if the Commission receives a request from a Member State that the merger particulary affects its domestic market Art. 10(1 subpara 2) and Art. 9(2).

[28] During this period the parties will be free to propose changes to their merger in order to seek to avoid a negative decision. If the parties find a solution that suits the Commission it will probably be profitable for the parties since the Commission may take a decision pursuant to Art. 8(2) as soon as it appears that the serious doubts with the merger's compatibility with the Common Market has been removed (Art. 10(2)).

[29] According to Art. 10 of the Commission Regulation No 2367/90 on the notifications, time limits and hearings provided for in the Merger Regulation, the time limits referred to in Art. 10(1) and (3) of the Merger Regulation shall be met where the Commission has taken the relevant decision before the end of the period. Notification of the decision to the undertakings concerned must follow without delay.

[30] IBM v Commission Case 60/81;(1981) ECR 2639; (1981) 3 CMLR; CCH para. 8708.

ings is responsible or the undertakings concerned commit a breach of an obligation attached to the decision.

Article 23 of the Regulation gives the Commission power to adopt implementing provisions concerning the form, content and other details of notification pursuant to Art. 4 of the Regulation. Thus, the Commission's implementing Regulation[31] gives in its fourth Article information about when the notification becomes effective, i.e. when DG 4 has received the notification. In cases where the information submitted to the Commission is incomplete the Commission shall fix an appropriate time limit for the completion of the information. In such cases, however,the notification becomes effective on the date on which the complete information is received by DG 4 (Art. 4 para 2, Reg.nr. 2367/90).

Where the Commission finds that a notified concentration falls within the scope of the Regulation, it shall publish the fact of the notification, taking account of the concerned undertakings business secrets (Art. 4(3)).

What happens to the merger operation itself when it has been notified to the Commission? This problem is taken care of in Art. 7. To start with, the concentration "shall not be put into effect either before its notification or within the first three weeks following its notification" (Art. 7(1)). In fact the Commission, following a preliminary examination of the notification may decide on its own initiative to suspend the merger further, either wholly or in part until it takes a final decision or takes other interim measures (Art. 7(2)). It is, according to Van Empel,[32] submitted that the terms "on its own initiative" "could be interpreted as being meant to block legal proceedings by third parties aimed at further extension of the period of suspension". For that matter this may, argues Van Empel, "well be one of the first issues to lead to litigation. It is indeed obvious that in a 'take over battle' suspension of the merger for anything like a substantial period of time is a highly effective weapon in the hands of the opponents to the mergers concerned".

To minimise the difficulties that Art. 7(2) would give rise to in contested bids Art. 7(3) provides that suspension of the concentration "shall not impede the implementation of a public bid which has been notified to the Commission .... by the date of its announcement, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the

[31] Regulation No 2367/90, OJ No L219/5 1990.
[32] Van Empel, supra. p. 15.

Commission under paragraph 4". Thus shares in a public bid may continue to be purchased but the voting rights may not be exercised without permission from the Commission. In fact, according to Art. 7(4), the Commission may on request grant a derogation from the obligation to suspend "in order to prevent serious damage to one or more undertakings concerned by a concentration or a third party". That derogation may be subject to conditions. It is, according to Van Empel,[33] "submitted that the wording in Art. 7(4) provides a basis for legal proceedings to be instituted by the parties concerned or third parties, as the case may be, against the decisions, positive or negative, to be taken by the Commission in this regard. As of course time is of the essence here some may expect a multiplication of requests for provisional measures addressed to the Commission, and on appeal to the Court". This alone, argues Van Empel, "may well prove to create such a legal quagmire that it may make the Commission think twice before making use of its power to suspend the merger operations beyond the initial three weeks".

Article 7(5 subpara 2) allows for a derogation from the application of Art. 7 to transactions in securities on the stockexchange, unless the buyer and the seller knew or ought to have known that the transaction was incompatible with the Common Market. The consequences of a contravention of the suspension of the concentration follow from Art. 7(5 subpara 1), according to which the validity of any transaction carried out in contravention of the prohibition are dependent on how the Commission decides with respect to the concentration. Transactions carrying out a concentration which is suspended thus are not immediately and definitively invalid. Rather, they are valid subject to the condition precedent of a positive final decision by the Commission. They become definitively invalid if and when the Commission forbids the concentration in accordance with Art. 8(3).

Appraisals of concentrations

When a concentration meets the criteria under Art. 1(2) of the Regulation, it must be notified to the Commission for analysis. The Commission's first task is to consider whether a properly notified concentration "raises serious doubts as to its compatibility with the Common Market". Compatibility with the Common Market is determined on the basis of a dominant position analysis. Thus, if the concentration creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part thereof, it is incompatible; if it does

[33] Van Empel, supra. p. 16.

not, it is compatible. According to Art. 2 the Commission shall, when deciding whether or not a merger is compatible with the Common Market, take a great many factors into consideration. Thus, under Art. 2(1a), which should be read in conjunction with Art. 2(1b), the Commission shall take into account, among other things, the structure of all the markets concerned[34] and the actual or potential competition from undertakings located either within or without the Community. Further, Article 2(1b), which in contrast to Art. 2(1a) is a combination between codified case law and Art. 85:3 EEC Treaty, gives the Commission additional examples which it has to take into consideration e.g. the market position of the parties concerned, freedom of choice for third parties, barriers to entry, and the development of technical and economic progress provided that it is to consumers advantage and does not form an obstacle to competition.[35] Thus, what is called for is a detailed market analysis, starting with a precise definition of the relevant product or service market and the geographical market and ending up with a view of the impact of the concentration on competition in those markets.[36] It could be argued, that the criteria in Art. 2(1a–b) applies only if the market share alone does not clearly show that there is a dominant position, and in general practice the Commission decides that this is the case whenever a project covers 80 % or more of a market.[37] In other cases the Commission makes an overall assessment based on the criteria of Art. 2(1).To assist in the interpretation of Art. 2, the regulation suggests in the preamble that a *de minimis* test may be applied by the Commission in determining the compatibility of the concentration with the Common Market. Thus, according to recital 15, a concentration with a limited market share is not liable to impede effective competition, especially where the market share of the

[34] The Commission says in its declaration to the Regulation that the notion "the structure of all the markets concerned is aiming at both markets within the Community as much as markets outside it. Indeed this makes, according to Elland ((1990)3 ECLR p. 116), "that the competitiveness of Community industries in the context of international competition will be an important factor in determining whether or not the merger will be allowed. Clearly the Council had in mind the ability of Community industry to compete with the American and Japanese multinationals".

[35] The test of compatibility is the same, both in determining whether an investigation is appropriate and in making an ultimate appraisal of the concentration in the course of proceedings.

[36] Brittan, supra.

[37] It is accepted that very large market shares are in themselves evidence of a dominant position. In *Hoffman–La Roche* (Case 85/76; (1979) ECR 461; (1979) 3 CMLR 211; CCH para. 8227), the Court considered market shares of approximately 93%, 84% ,75 and 65% as evidence of the existence of a dominant position. Likewise, in *Michelin* (Case 322/81; (1983) ECR 3461), a market share of 57% to 65% was considered to be sufficient evidence of the existence of a dominant position. In *United Brands* (Case 26/76; (1978) ECR 207; (1978) 1 CMLR 429; CCH para. 8429), however, a market share ranging from 40 to 45% was held not to warrant, in itself, the conclusion that United Brands dominated the market.

undertakings concerned does not exceed 25 % either in the Common Market or in a substantial part of it. An interesting question in this respect is whether parties within the safe harbour must nonetheless notify their transaction because they are within the quantitative thresholds of Art. 1(2)? Fine thinks that if compatibility with the Common Market is presumed, notification should arguably be unnecessary.[38] Thus, if the Commission intends to enforce this provision it is, in this author's opinion, obvious that the parties do not have to notify a concentration with a limited market share, otherwise the rule is meaningless.

One element of Art. 2(1b) warrants specific mention, the phrase "technical and economic progress".[39] These words were a major stumbling stock in the negotiations before the Regulation was enacted. Nevertheless, this notion could be taken as to enable the Commission to pursue aims, not only of competition policy proper, but rather also of industrial policy. Van Empel suggests that "the draftsmen did not want to go beyond what would appear to have been accepted already by the Court of Justice,[40] viz. that of such considerations possibly being taken into account within the framework of competition policy (where it has to be weighted against other considerations), but not providing a separate ground of justification *outside* competition policy".[41] Götting and Nikowitz are of the opinion that because the Merger Control Regulation is based on Arts. 87 and 235 of the EEC Treaty it is possible for the Commission to assess proposed mergers not simply on the basis of their potential competitive effects but also on whether they otherwise contribute to the basic objectives of the EEC Treaty.[42] Thus, under the auspices of merger control, the Commission can take into account aspects of industrial policy and can allow a merger on the ground that it would support the development of a new sector of industry even though it impedes competition in the particular market. This should mean that merger control clearly goes beyond a mere application of competition law. Furthermore, the Commission has in its interpretation declaration to the Regulation stated that, in its appraisal of a particular merger, it will look especially at the possibility to competition at those undertakings which are situated in regions charaterised by an important need of reconstruction and particularly

[38] Fine, supra. p. 50.
[39] At the insistence of the UK the words were qualified to include the condition that competition have to be preserved.
[40] See Court of Justice, 25 October 1977, Case 26/76; (1977) ECR 1875; (1978) 2 CMLR 1; para. 8435, (Metro SB–Grossmrkte GmbH & Co. KG v Commission).
[41] Van Empel supra. p. 18.
[42] Götting and Nikowitz, supra. p. 192.

those regions which are underdeveloped. For people fearing that competition policy is threatened by subordination to industrial policy these words are maybe somewhat frightening but we have to remember that before the industrial policy criterion can be used, the concentration must give the consumers an advantage and it cannot form an obstacle to competition. Further, it could be difficult for the Commission to justify a concentration where effective competition is "significantly" impeded no matter what its other advantages may be. Finally, Elland argues that the concept of technical and economic progress "must be understood in the light of the principle enshrined in Art. 85(3) as interpreted by the case law of the Court of Justice".[43]

Moreover, the language used in Art. 2(2–3) should be noted. The regulation uses, which was the intention already from the first draft, the same language as in *Continental Can*, except that it adds that a merger which "creates" a dominant position will fall under the Regulation. Further, the same paragraphs also use the notion "impede", which should not be interpreted as "distort" as in Art. 85 of the Treaty. This is because,on the one hand, the intention was to reproduce or copy the Continental Can doctrine, and on the other hand to make it unattractive and to prevent national courts applying Art. 85 or 86 outside the scope of the regulation. It is also remarkable that the Regulation does not mention as a separate requirement that the merger must affect trade between Member States. This would make it easier for the Commission to intervene and excludes one stage in the investigation of a merger. In fact, the regulation does not have to include this concept because, as already mentioned, the goal of the regulation is to catch supradimensional mergers and when a concentration reaches the Community dimension mentioned in Art. 1(2) then it will always affect trade between Member States. The Commission has made a special remark on this in its interpretation statement to the Regulation, stating that a merger with a worldwide turnover which does not exceed ECU 2 billion and a Community-wide turnover which does not exceed ECU 100 million will not, as a rule, affect trade between Member States.

The exceptions to the one stop procedure

The idea of the regulation is that it should operate on the basis of exclusivity for the Commission to control mergers which fall within its scope. Further, no Member State shall apply its national legislation on competition to any concentration that has a

[43] Elland, W, The Mergers Control Regulation: (1990) 3 ECLR p. 116.

Community dimension (Art. 21(1) and (2)).[44] Nevertheless, there are two exceptions to this one-stop control, i.e. that the Commission has exclusive jurisdiction in respect of cases above the thresholds.

The first exemption is the so–called "German Clause" (Art. 9). According to this clause the Commission may refer a concentration to the competent national authorities if a Member State within three weeks of the date of receipt of the copy of the notification informs the Commission that a merger threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a "distinct market" within a Member State, irrespective of whether it is a substantial part of the Common Market or not (Art. 9(1)and (2)). In other words, in the opinion of a Member State there must be a danger that a concentration on its territory might lead to a dominant market position of a company in a regional or local market. What is important here is that it is the Member State that has the initiative. Further, as mentioned above, the timelimit of one month for the preliminary proceedings is extended to six weeks (Art. 10(1 subpara 2)).

The Commission then considers the Member State's application and may either decide that the case merits examination on this basis by the Commission itself, in accordance with the normal procedures under the Regulation, or refer it to the national authorities of the country concerned so that national competition law may be applied, or decide that the Member State's application is unfounded because there is no relevant "distinct" market or no threat of a dominant position (Art. 3(3)). In making this appraisal the Commission must regard the market for the products or services in question and the geographical reference market. The geographical reference market shall, according to Art. 9(7), consist of the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account of, among other things, the nature and characteristics of the products or services concerned. If the Member State does not accept the Commission's decision it may appeal to the Court of Justice and in particular request the application of interim measures (Art. 9(9)).

The time limits for the Commission to refer a case is indicated in Art. 9(4). As a general rule, a decision to refer or not to refer shall be taken within the six-week period provided for in Art. 10 where the

[44] However, the latter principle shall be without prejudice to Art. 9.

Commission has not initiated proceedings pursuant to Art. 6(1b), or within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Art. 6(1c), without taking the preparatory steps in order to adopt the necessary measures pursuant to Art. 8(2), second subpara, (3) or (4) to maintain or restore effective competition on the market concerned. If the Commission has failed to take a decision and the Member State reminds it, within the three months limit, it shall be deemed to have taken a decision to refer the case to the Member State (Art. 9(5)).

If the Commission refers a case to the competent authorities of the Member State, the Member State may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned. Moreover, any announcement or publication of the findings of the examination of the concentration shall, by the Member State, be effected not more than four months after the Commission's referral (Arts. 9(8) and 9(6)).

Finally, Art. 9 is subject to review in four years, however unlike the review provisions for other Articles of the Regulation it will have to gain the unanimous support of the Member States if it is to be modified. Furthermore, that the Commission will look at this provision narrowly is indicated in an explanatory memorandum issued by the Commission on 22 December 1989 in which it states that this provision would normally cover small "local" markets in, for example, the retailing or the hotel sector and exceptionally might be applicable to a national market which is somehow isolated from the rest of the Community, for example because of high transport costs.[45] Leon Brittan has described the Article as "narrowly circumscribed and likely to be applied very infrequently".[46]

Article 9 is not totally clear, but that is probably what one would expect from a provision which was deemed politically necessary. Thus, one of the questions raised among writers is; what happens if the Commission concludes in accordance with Art. 6(1b) that a concentration is admissible under European law, but fails to decide on the referral within the six-week period allowed? In this author's opinion it is possible to find three answers to that question. To start with, it could be argued, and Pathak agrees with this, that it might be appropriate to apply Art. 9(5) analogously, deeming the Commission to have referred the case to the national authorities.[47] Secondly, if Art. 9 is narrowly circumscribed and likely to be applied very infre-

[45] Elland, supra. p. 116
[46] Brittan, supra.
[47] Pathak, A, The Forseeable Uncertainties, Analysis Section (1990) 3 ECLR, p. 122.

quently then there exists no space for an analogy. Then it is a question of what normally happens in a case where the Commission has failed to take a decision in accordance with Art. 6(1b). According to Art. 10(6) the concentration shall be deemed compatible with the Common Market, which means that national merger control is precluded. Finally, as Art. 10(6) is without prejudice to the rights of the Member States under Art. 9 the Member State can appeal to the Court of Justice for the purpose of having the case referred to its authorities. Thus, remedies are available, but which one of these suggested answers is the right one? For that we will have to wait for the Court of Justice to decide.

There may in some cases be some problems for a Member State that does not concern the Community and in this case the competition rules. Therefore, according to Art. 21(3), the Member States may take appropriate measures to protect their "legitimate interests". However, these measures must be compatible with the general principles and other provisions of Community law. Three examples of legitimate interests are given: public security, media plurality and prudential rules. Thus, according to the declaration issued by the Commission and the Council, the notion of public security, as it has been interpreted by the Court of Justice, could be covered by the security to be able to provision and the production of goods or services which are of advantage to the protection of health for the population. Further, plurality of media means the maintaining of different sources of information. Finally, prudential rules concerns financial services which are controlled by national organisations, for example, bank, stockexchange and insurance organisations. If as a result of a merger above the Regulation's thresholds, a Member State finds itself with an arms manufacturer in the hands of a group which also supplies to unfriendly foreign Governments, or with one person or company owning to many publications, radio stations or television channels, or with a person or company who is unfit and improper owning a finacial institution, then, notwithstanding the Commission's verdict on the competition aspects of the merger, the Member State may take any appropriate measures to remedy the situation.[48] Those measures must, in accordance with the general principle of proportionality in Community law, be the minimum necessary to achieve the goal being pursued as a legitimate interest and must not breach any other rule or principle of Community law. If there are alternatives, then the Member State shall chose the alternative which is the least restrictive and implement it only to the extent that it is

[48] Brittan, supra.

necessary to protect its legitimate interests. Moreover, while the Member States cannot clear a merger which has been forbidden by the Commission, they can prohibit one which the Commission has cleared or make it subject to additional conditions and requirements provided that these neither form arbitrary discrimination nor a disguised restriction on trade between Member States. The three examples given are not exhaustive because it is impossible to forsee all possible national legitimate interests. A procedure is therefore provided for Member States to apply to the Commission for recognition of other non-competition legitimate interests. The Member State may not take any measures before the Commission has decided whether the interest claimed is compatible with Community law. The Commission must take its decision within one month of the Member state's application. Examples of what other legitimate interests that may be invoked by the Member States can be found in Art. 36 of the EEC Treaty. It lists national interests which may justify exceptions from the principle of free trade within the EEC. Of these, the protection of health, for instance, is one that could be relevant for merger control. The Commission considers it to be legitimate for a Member State to oblige the partners of a merger after a clearance from Brussels to maintain on its territory at least one factory for important medical preparations. Aspects to be considered by the Commission in its assessment of a concentration cannot be recognized as "legitimate interests".

One problem that arises is the time limits, because there is no guarantee whatsoever given in the Regulation as to the timelimits within which these additional procedures should be terminated. This is up to the national authorities and the legislation of the Member State dealing with the merger to decide.

The dutch clause

Article 22 (3), the Dutch Clause, has made it possible for smaller Member States which do not have an effective merger control system to refer a subdimensional concentration to the Commission. Thus, if the concentration creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within that Member State's territory, the Commission may, if the concentration affects trade between Member States, intervene. As already mentioned, the Commission has in its declaration to the Regulation stated that a merger will not, as a rule, affect trade between Member States if the worldwide turnover is less than ECU 2000 billion and the Community-wide turnover does not exceed ECU 100 million. Thus,

the Commission will not impugn a merger below that limit. In any event, if the Commission is going to deal with a subdimensional merger, then Arts. 2(1a and b), 5, 6, 8 and 10 to 20 of the Regulation shall apply. Further, the request from the Member State must be done within one month of the date on which the concentration was made known to the Member State or effected. Moreover, the period provided for in Art. 10(1) shall begin on the date of the receipt of the request from the Member State (Art. 22(4)). However, the Commission can only take measures which are strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes (Art. 22(5)). Finally, paragraphs 3 to 5 in Art. 22 are limited in time, they shall only apply until the thresholds referred to in Art. 1(2) have been reviewed. According to Brittan, "it is likely that this provision will be applied infrequently".[49]

The relationship between the regulation and article 85 and 86 of the EEC treaty

The fundamental objective of the Regulation is, to quote Leon Brittan, "to set up a simple, predictable and clear Community merger control system with the Commission responsible for cases above the thresholds and the Member States below".[50] Despite these words, it has been argued that the Regulation is dangerous for the industry because it has not limited the Commission's possibilities to apply Arts. 85 and 86 of the Treaty to concentrations. This is both right and wrong. Even if the Commission in its declaration to the Regulation said that it did not "normally" intend to apply Arts. 85 and 86 to concentrations defined in Art. 3 of the Regulation, there is no point in being overly concerned because the Commission cannot implement them against such mergers. This is due to Art. 22(1 and 2) which provides that the Regulation alone shall apply to concentrations as defined in Art. 3 and that Regulation 17/62 shall not apply to concentrations within the meaning of Art. 3 of the Regulation. Since Regulation 17 is the procedural legislation implementing Arts. 85 and 86 of the Treaty, the language of Art. 22(1 and 2) makes it impossible for the Commission to use Arts. 85 and 86 to regulate concentrations as defined in the Regulation. Thus, it should be clear that the Commission cannot apply Arts. 85 and 86 to concentrations regardless of whether the concentrations possess a Community dimension or not. However, the Commission has in its declaration to

[49] Brittan, supra.
[50] Brittan, supra.

the Regulation reserved the right to apply Arts. 85 and 86 through Art. 89 of the EEC Treaty to concentrations which have at least a worldwide turnover of ECU 2 billions and a Community-wide turnover of ECU 100 millions up to the concentrations mentioned in Art. 1 of the Regulation. Is this possible? It would seem that it is possible because Art. 22(2) of the Regulation does not and cannot prohibit the application of Art. 89 of the EEC Treaty. Thus, it is possible for the Commission to apply Art. 89 of the Treaty to concentrations below the threshold in Art. 1 of the Regulation. This is very devastating for two reasons: firstly, if the Commission applies Art. 89 of the Treaty, it would be a step back to the time before Regulation 17/62 and it would also be a very bureaucratic way of treating a merger since the Commission has, according to Art. 89 of the EEC Treaty, to cooperate with the competent authorities in the Member States. Secondly, it would be a threat against legal certainty as the subdimensional merger may be attacked by both the Commission and the national authorities.

It should be added that in the absence of Regulation 17/62, the Commission cannot apply Art. 85(3) of the Treaty. Further, as Art. 85 of the Treaty, without Regulation 17/62 has no direct effect, national courts have no possibility to apply Art. 85.[51] However, there is one possibility left for the national courts to apply Art. 85(1 and 2) and that is if the national authorities under Art. 88 of the EEC Treaty or the Commission under Art. 89 has taken such a decision, but that is very unlikely.[52] In contrast to Art. 85, Art. 86 of the EEC Treaty does not require any implementing legislation to be directly effective. Thus, it could still be invoked in a national court by a disgruntled competitor or an unsuccessful suitor of a takeover battle. Next question is, will the national courts apply Art. 86? Legally speaking they may do it but, as the new Merger Regulation has absorbed the *Continental Can Case,* they will probably ask for a preliminary ruling pursuant to Art. 177 of the Treaty, and the Court will provide an answer which is compatible with the Merger Regulation.[53]

Reciprocity

Article 24 requires Member States to notify the Commission of any difficulties that it encounters by its undertakings in effecting concentrations in non-member countries. Within a year of the entry into force of the Regulation the Commission is to draw up a report exam-

[51] The *Bosch Case*, Case 13/61; (1962) ECR 45; (1962) CMLR 1; CCH para. 8003.
[52] *The Nouvelles Frontières Case*, 209 to 213/84, (1986)ECR 1457, Ahmed Saeed Case, 66/86, Court judgement of April 1989.
[53] Pathak, supra. p. 121.

ining third country treatment of Community undertakings in this regard. Where it finds that there is discrimination it may seek a mandate from the Council to enter into negotiations with that country for comparable treatment. Moreover, for good measure it is added in paragraph 4 of this Article that international agreements, whether bilateral or multilateral, shall be respected, which of course refers in particular to the UNCTAD Code on Restrictive Practices. A lot of writers call this provision a reciprocity clause, though Brittan has emphasized that Art. 24 is not a reciprocity clause. The handling of individual cases, Brittan argues, "will not be affected by any consideration of whether the merger in question would have been permitted in the country of origin of any of the companies involved".[54] However, van Empel recalls the reciprocity battle which was fought over the Second Banking Directive and argues that "the provision in the Merger Regulation corresponds with the first draft of the Second Banking Directive",[55] which means that there is a reciprocity clause in the present Regulation. In this author's view, it is to early to tell how the clause is going to be used. We will just have to wait for the first report on the matter.

Requests for information, investigations, fines and procedural provisions

Despite the fact that the application of Reg 17/62 has been excluded by Art. 22(2), many of the remaining Articles are similar to the Articles in Reg 17/62. Thus, Art. 11 provides for the possibility for the Commission to ask for information from involved companies and competent authorities, Art. 12 deals with the powers of investigation of the authorities of the Member States and Art. 13 with the investigative powers of the Commission. Further, Arts. 14–15 provide the Commission with the power to impose fines and periodic penalty payments. There are two different fines, one dealing with, among other things, the supply of incorrect or misleading information and the other type of fine taking care of e.g. a breach of Art. 7(1). The amount, in the former case, is between ECU 1 000–50 000. In the latter case no amount is mentioned but it is possible for the Commission to impose fines up to 10 % of the aggregate turnover of the undertakings concerned. In addition to the fines, the Commission has been given the power to order divestiture in a situation where an unlawful concentration has already been implemented (Art. 8(4)). It shall, however, be noted that this measure is not a

[54] Brittan supra.
[55] Van Empel, supra. p. 21.

sanction. According to Art. 16, the Court of Justice shall have unlimited jurisdiction within the meaning of Art. 172 of the Treaty to review decisions taken by the Commission. What this author considers a little bit strange is that Art. 16 does not refer to the new Court of First Instance, because this Court shall treat cases concerning the implementation of the competition rules applicable to undertakings, which are initiated by private parties. Presumably it is implicit that the Court of First Instance has jurisdiction in this case.

The Regulation will not be administered by the Commission in isolation, it shall according to Art. 19(2) carry out the procedures in close and constant liaison with the competent authorities of the Member States. Furthermore, before the Commission decides to impose fines, periodic penalty payments or take any other adverse decision, it has to consult an Advisory Committee on Concentrations. The Committee, which consists of representatives of the authorities of the Member States, shall deliver an opinion on the Commission's draft decision. The Commission shall, although it is not obliged to publish the opinion, take the utmost account of the delivered opinion (Art. 19(3)(4)(6)(7)).

Article 17 deals with professional secrecy and Art. 20 provides that decisions taken by the Commission pursuant to Art. 8(2–5) shall be published in the Official Journal of the European Communities. This is in conformity with Regulation 17/62. However, Art. 18 provides us with some new material. Thus, Art. 18(1) states that before taking any decision to extend the period of suspension, attaching conditions to a concentration, ordering divestiture, declaring a concentration incompatible or pronouncing sentence on fines or periodic penalty payments, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them. This rule is subject to one exception. That is when the Commission takes a provisional decision in accordance with Art. 7(2 and 4) but the Commission must, as soon as possible, after having taken its decision, give the parties that opportunity. According to Art. 18(3) the Commission shall base its decision only on objections to which the parties have been able to submit their observations and that the files should be open to the parties directly involved subject to the protection of business secrets.

Article 18(4) provides for an obvious widening of those entitled to object a concentration, however it is qualified by the words "insofar as the Commission and the competent authorities of the Member State

deem it necessary". If the Commission and the competent authorities deem it necessary then, upon application, natural or legal persons showing a legitimate interest may be entitled to be heard. According to the Regulation implementing Art. 18, the Commission shall inform the parties concerned in writing about its objections and shall fix a time limit within which they may make known their views. The parties concerned shall make known their views and if they request they can put forward their arguments orally. Hearing sessions are not public.[56]

Extraterritoriality

There is no doubt that the Commission and the Court of Justice are using the principle of the economic entity and the theory of imputation. This means that the behaviour of a subsidiary may be imputed to the mother company.[57] However, the big question is whether the Commission and the Court will use the Merger Regulation against concentrations which only have an effect on the Common Market whilst the parties themselves are situated outside the Community? In other words, will the Commission or the Court use the Effects Doctrine? When applying Arts. 85 and 86 against foreign undertakings the Commission has since the *Dyestuff Cases*[58] advocated the Effects Doctrine whilst the Court has refused the full application of the Doctrine. However, in the *Woodpulp Case*[59] did the Court approach the Effects Doctrine when it stated that the decisive factor is where an agreement is implemented. The question is now whether it is possible to apply the Courts reasoning to a concentration? The text of the Regulation does not require the undertakings concerned to have a legal presence in the Common Market and Sir Leon Brittan argued in his lecture in Cambridge "that the Community's rules on jurisdiction in competition cases apply to mergers as well". He continued by saying that "any concentration, wherever conceived or born, involving any undertakings, wherever located, must be notified if it meets the threshold requirements". He finally stated that "there can be no doubt that mergers which are liable to have a significant impact on the competitive structure of our market are *implemented* in our territory. Our jurisdiction will be engaged and we shall exercise it to safeguard competition in the Community market". Thus he

[56] Very simplified version of the procedure.
[57] See *Christiani and Nielsen*, JO (1969) L165/12, *Centrafarm BV and de Peijper v. Sterling Drug Inc*, (1974) ECR 1147, *Continental Can Co Inc v. Commission*, (1972) ECR 215, *United Brands Co v. Commission* (1976) ECR 425, *ICI v. Commission (1972) ECR 619*.
[58] 48, 49 51–57/69, *ICI v. Commisson* (1972) ECR 619.
[59] *A. Ahlström O/Y, Helsinki and Others v. Commission*; Joined Cases 89, 104, 114, 116, 117, 125–129/85; Judgement of 27 September 1988.

quoted the *Woodpulp Case*. Against this, Fine argues that the Preamble (Recital 11) demands that the undertakings, involved in the concentration, must have their substantial operations there.[60] What does this mean? To be absolutely sure we must wait for further information, but, taking into account that Mr Brittan is an EC Commissioner and something of an authority in the field of competition it may well be that the Commission will embrace Brittan's reasoning with open arms.

Conclusion

By providing a system of prior notification, the Regulation has diminished the uncertainty which has existed since the *Continental Can* judgement. Moreover the Regulation is a significant move towards an integrated market. However, it does not provide us with a fully waterproof one-stop system of merger control, which means that we do not yet have the full legal certainty that was hoped for when the discussions about EC merger control started. Therefore, it is necessary to minimize the risk for double control, and that can only be done by lowering the thresholds in Art. 1(2). This will, however, entail that the Commission will get more powers, but that is necessary in order to obtain the fundamental goal, "legal certainty".

[60] Fine, supra. p. 48.