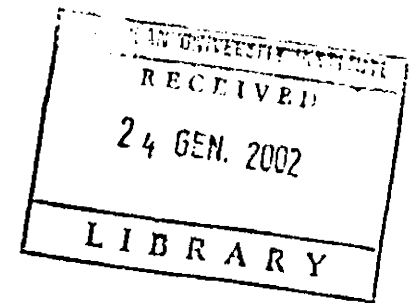


8 December, 2001



RICHARD BURNLEY

**COMMUNITY COMPETENCE TO
CONTROL MERGERS:
THE JURISDICTIONAL DIVIDE**

**Thesis submitted with a view to obtaining the title of doctor of laws of
the European University Institute**

Thesis Jury: Professor Giuliano Amato (Supervisor)

Professor Claus-Dieter Ehlermann (Co-Supervisor)

Member of the Appellate Body of the WTO

Professor Ulrich Petersmann

Professor of the European University Institute

Professor Koen Lenaerts

Judge of the European Court of First Instance

Professor Francisco-Enrique Gonzalez-Diaz

Head of Unit, Merger Task Force, The European Commission

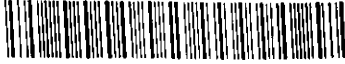
B/c →

Vertical line on the left side of the page.

Vertical line on the right side of the page.

8 December, 2001

European University Institute



3 0001 0034 9553 0

02
R. 2001.0



RICHARD BURNLEY

**COMMUNITY COMPETENCE TO
CONTROL MERGERS:
THE JURISDICTIONAL DIVIDE**

**Thesis submitted with a view to obtaining the title of doctor of laws of
the European University Institute**

Thesis Jury: Professor Giuliano Amato (Supervisor)

Professor Claus-Dieter Ehlermann (Co-Supervisor)

Member of the Appellate Body of the WTO

Professor Ulrich Petersmann

Professor of the European University Institute

Professor Koen Lenaerts

Judge of the European Court of First Instance

Professor Francisco-Enrique Gonzalez-Diaz

Head of Unit, Merger Task Force, The European Commission

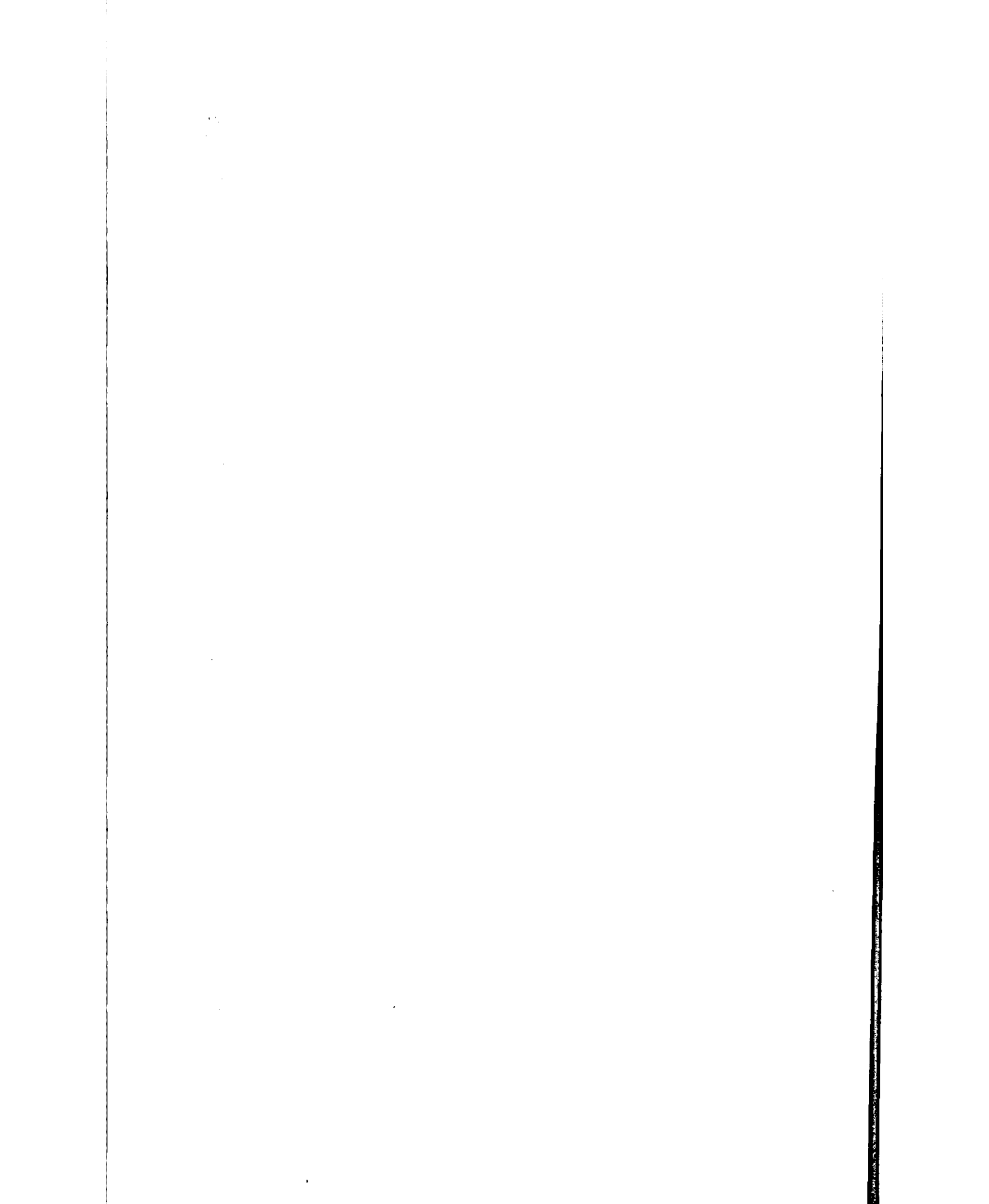


CONTENTS

<i>Acknowledgements</i>	i
<i>Abbreviations</i>	iii
PART I Introduction	
PART II Community Competition Law for Private Undertakings - the Provisions of the EC Treaty	
A The Issue	5
B Origins of the Substantive Provisions of Community Competition Law - Historical Overview	5
C Competition Policy	11
PART III EC Merger Regulation: Historical Overview	
A The Issue	33
B The General Controversy	33
C The European Controversy	39
D Summary of the Need for an EC Merger Regulation	55
PART IV The Establishment of a Legal Competence to Assess Mergers under Community Law according to Articles 81 and 82 EC	
A The Issue	57
B The Legal Competence to Control Concentrations according to Article 82 EC	57
C The Legal Competence to Control Concentrations according to Article 81 EC	76
D Summary of the Types of Concentration to which Articles 81 and 82 EC may be Applied	103
PART V The Scope of Articles 81 and 82 EC - the Jurisdictional Demarcation Lines	
A The Issue	105
B The Jurisdictional Criterion for Articles 81 and 82 EC - An Effect on Interstate Trade	105
C The Changing EC Constitution and the Interstate Trade Criterion	122
D The Application of the Interstate Trade Criterion to Concentrations to which Articles 81 and 82 EC Apply in Practice	128

E	'Appreciability' and Article 81(1) EC	130
PART VI The Jurisdictional Criterion of the Merger Regulation and the Principles and Issues lying behind it		
A	The Issue	139
B	The History and Evolution of the Jurisdictional Criterion of the EC Merger Regulation	140
C	The Compromise	148
D	The Commission's Consideration of an Appropriate Scope for the Merger Regulation in its Subsequent Review	150
E	The Commission Proposal and the Subsequent Amendment to Article 1 of the EC Merger Regulation	154
F	The Approach of the Literature in considering an Appropriate Scope for the Merger Regulation	156
G	Evaluation of the Approach of the Commission and the Literature	158
Part VII The Legal Bases of the Merger Regulation, The Legal Principle of Subsidiarity and an Appropriate Jurisdictional Criterion		
A	The Principle of Subsidiarity	161
B	The Merger Regulation as an Amendment to the Treaty or an Expansion of the Treaty - Article 308 EC or Article 48 TEU as a Legal Base?	167
C	The Legal Bases of the Merger Regulation - Articles 83 and 308 EC	170
D	Summary of the Significance of the Legal Bases of Article 83 EC and Article 308 EC for the Determination of an Appropriate Jurisdictional Trigger for the Merger Regulation	193
Part VIII Evaluation of the Operation of the Jurisdictional Trigger of the Merger Regulation with Regard to its Legal Bases		
A	The Issue	195
B	The First Condition: Concentrations with a Community Dimension according to the Merger Regulation that do not affect Interstate Trade	196
C	The Second Condition: Concentrations that affect Interstate Trade and do not have a Community	

	Dimension under the Merger Regulation	209
D	Conclusion - The Inconsistency of the Jurisdictional Trigger of the Merger Regulation with the Operation of the Interstate Trade Criterion	233
Part IX	The Legal Implications of the Inconsistency of the Jurisdictional Trigger of the Merger Regulation with the Interstate Trade Criterion	
A	The Issue	235
B	The Legal Base of Article 308 EC	235
C	The Legal Base of Article 83 EC	237
D	Summary of the Legal Implications of the Inconsistency of the Merger Regulation with its Legal Bases	268
Part X	The Policy Implications of the Inconsistency of the Jurisdictional Trigger of the Merger Regulation with the Interstate Trade Criterion	
A	The Issue	271
B	The Principle of a One-Stop-Shop	272
C	The Single Market Integration Objective	273
D	Legal Certainty	284
E	Conclusion on the Policy Implications of the Inconsistency of the Jurisdictional Trigger of the Merger Regulation with the Interstate Trade Criterion	287
Part XI	Conclusion	
	<i>Annex 1</i>	i
	<i>Annex 2</i>	vii
	<i>Case Law of the European Court of First Instance</i>	xi
	<i>Case Law of the European Court of Justice</i>	xiii
	<i>Decisions of the European Commission</i>	xvii
	<i>Bibliography</i>	xxi



ACKNOWLEDGEMENTS

I am deeply indebted to my supervisor, Professor Giuliano Amato, who has been a constant and generous source of advice, encouragement and inspiration throughout the completion of this work. In addition, I have been privileged to work under the guidance of Professor Claus-Dieter Ehlermann, whose input and recommendations have been both instrumental and an education in themselves.

I would further like to thank the Merger Task Force of the European Commission for all the help and information I received during my Stage in the winter of 2000/2001, and would like to express my gratitude to Professor Richard Whish, Barry Rodger, Sylvie Nunn and all the staff of the European Institute, Florence, where I spent three very enjoyable years.

Finally, this thesis could scarcely have been completed without the patience and support of my family and, for those final months of writing, the serenity of 'Casa Brunelli'.

ABBREVIATIONS

AB	Antitrust Bulletin
AJCL	American Journal of Competition Law
BB	Betriebs Berater
CFI	Court of First Instance
CLP	Current Legal Problems
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
DG	Directorate General
Diss	Dissertation
EC	European Community
ECLR	European Competition Law Review
ECR	European Court Reports
ECSC	European Coal and Steel Community
Ed.	Editor/Edition
EE	European Economy
EEA	European Economic Area
EEC	European Economic Community
ECJ	European Court of Justice
EG	Europäische Gemeinschaft
EIPR	European Industrial Property Review
ELJ	European Law Journal
ELR	European Law Review
ER	European Review
EU	European Union
EuGH	Europäisches Gerichtshof
EUI	European University Institute
EuR	Europarecht
EuZW	Europäische Zeitschrift fuer Wirtschaftsrecht
FLR	Fordham Law Review
FS	Festschrift
Hb	Handelsblatt
HILJ	Harvard International Law Journal
JuS	Juristische Schulung
MLR	Modern Law Review
MR	EC Merger Regulation 4064/89
NJW	Neue Juristische Wochenschrift
NILQ	Northern Ireland Law Quarterly
NLJ	Nordic Law Journal
OJ	Official Journal of the European Communities
RIW	Recht der Internationalen Wirtschaft
US	United States Supreme Court Reports
VO	Verordnung
WC	World Competition
WuW	Wirtschaft und Wettbewerb
YEL	Yearbook of European Law
YLJ	Yale Law Journal
ZHR	Zeitschrift fuer das gesamte Handelsrecht und Wirtschaftsrecht

1

2

I

INTRODUCTION

The thesis is concerned with the *appropriateness* of the existing jurisdictional divide in the application of Community and national laws to mergers.

The thesis uses the word 'merger' or 'concentration' in a broad sense, embracing the wide variety of legal arrangements that may fall within different systems of merger control legislation. Nevertheless, a more precise and technical definition of 'concentration' is provided below with specific regard to the application of the European Merger Regulation.

Jurisdiction is concerned with a State's right of *regulation*,¹ or the right '*to apply the law to the acts of men*.'² That regulation incorporates the *prescription* or *implementation* of legal rules, which designates a State's international right to make legal rules, and the *enforcement* of legal rules (or prerogative jurisdiction), involving the right of a State to give effect to its legal rules in a given case³.

The European Merger Regulation was *implemented* on 21 September 1990.⁴ According to Article 21(1) MR, the European Commission had an exclusive competence to apply the Regulation to all those concentrations that fell within its jurisdictional scope. Thereby, these concentrations would not be assessed under the relevant national provisions.⁵

The jurisdictional scope of the Merger Regulation (that is, the extent to which it is *enforced*) is determined according to two separate conditions: first, it must be established that the transaction in question constitutes a 'concentration' within the meaning of Article 3 MR; secondly, that concentration must have a 'Community Dimension' within the meaning of Article 1 MR.

¹ Mann, F., *The Doctrine of Jurisdiction in International Law* in: *Recueil des Cours*, Academie de Droit International, 1964 Vol. 1 at p.13.

² *Wedding v Meyler*, 192 US 573, 584 (1904); *Central Railroad v Jersey City* 209 US 473, 479 (1908).

³ See Mann, F., *ibid*, 1964.

⁴ Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, as amended by Council Regulation (EC) No. 1310/97 of 30 June 1997.

⁵ Article 21(2) MR.

It is this second criterion that is traditionally seen as the 'jurisdictional trigger' of the Merger Regulation, that *directly* determines the jurisdictional divide in the application of national law and the Merger Regulation to mergers.

The appropriate definition and interpretation of Article 1 MR has been, and continues to be, a matter of significant controversy. It was by far the most controversial issue during the negotiations that took place within the Council of Ministers in the drafting of the Regulation.⁶ This was reflected by the final terms of the Merger Regulation, that included a provision for the revision of the jurisdictional trigger before the end of the fourth year after the adoption of the Regulation.⁷ The criterion has in fact been the subject of three subsequent Reviews. A Review in 1993 determined that while there was some concern about concentrations with a cross-border effect not falling within the scope of the Regulation, this was not sufficient to convince the Member States and European industry that an amendment to the jurisdictional thresholds was necessary.⁸ In 1996, the Commission's Green Paper on the Review of the Merger Regulation proposed a first and a second choice amendment to the jurisdictional trigger.⁹ The second of these proposals - aimed at the problem of multiple filing of single concentrations - was implemented in 1998. However, the Commission deemed a further review of the operation of the jurisdictional trigger of the Merger Regulation to be necessary, and a Report was to be made to the Council before 1 July 2000. In the event, this Report proved to be inconclusive. The Commission undertook to make a second more in-depth Report before the end of the year 2001.¹⁰

If the issue of an *appropriate* jurisdictional trigger for the Merger Regulation remains unresolved in practice, the continued review and debate surrounding the subject determines that at least the elements of controversy are well defined. The debate

⁶ See eg., Ehlermann, C-D, *In Bruessel gibt es keine Industriepolitischen Intrigen, sondern nur andere Auffassungen vom Wettbewerb*, Handelsblatt, 25 November 1992; Broberg, M., *The European Commission's Jurisdiction to Scrutinise Mergers*, 1998, Kluwer International at p.3; Broberg, *The European Commission's Jurisdiction under the Merger Control Regulation*, Nordic Law Journal, 1994, p.18; Bos, P.-V., Styuck and Wytinck, P. *Concentration Control in the EEC*, 1992, pp 4 and 18-26; Woolcock, S., *European Mergers: National or Community Controls?*, The Royal Institute of International Affairs, 1989, pp.20-31; Bulmer, S., *Institutions and Policy Change in the European Communities: the Case of Merger Control*, Public Administration, 1994.

⁷ Article 1(3) MR.

⁸ Report from the Commission to the Council on the Implementation of the Merger Regulation, COM(93) 385 final, Brussels, 28 July 1993.

⁹ Commission's Green Paper on the Review of the Merger Regulation, COM (96) 0019-C4 - 0106/96, 1996, Brussels.

concerns issues of political sovereignty of the Member States. It concerns Community competition policy and the reasons for the implementation of a system of Community merger control. It concerns rational economics. It also concerns regulatory efficiency and legal certainty for business.

The thesis aims to examine the extent to which the existing scope of application of the Merger Regulation fulfils each of these elements according to its existing jurisdictional criterion, Article 1 MR. The thesis considers the operation of Article 1 MR as it was originally implemented and as amended, as well as in conjunction with the so-called fine-tuning provisions of Articles 9 and 22(3) MR.

There is however a broader context that the thesis identifies as vital in any analysis of the jurisdictional trigger of the Merger Regulation, yet that has been to date largely ignored in analyses carried out by the European Commission and in the literature. This concerns the fact that the jurisdictional trigger of the EC Merger Regulation must be recognised as being set within the context of a provision of *secondary* Community law. The thesis therefore considers that it is imperative to determine whether there was a structure of *primary* Community law that pre-dated the implementation of the EC Merger Regulation, delineating a specific scope of application of Community law to mergers. It is trite law that the Merger Regulation, as a provision of *secondary* Community law *based upon* primary Community law, should have been - and should continue to be - consistent with any such pre-existing scope.

Furthermore, as a provision that has been implemented upon the basis of the EC Treaty, the significance of the legal principle of subsidiarity must be considered for the Merger Regulation. While it may be shown that the Commission is correct to deny the application of that principle directly to the text of the Merger Regulation itself in its on-going reviews of the jurisdictional issue, a broader analysis considering the legal bases according to which the Merger Regulation was implemented gives subsidiarity a vital role. Indeed, the principle may be seen to provide the framework within which the legal analysis of the jurisdictional issue must be discussed and considered.

As a starting point therefore, the thesis considers the origin of merger control policy within the Community. Thereby, it is necessary to analyse Community competition

¹⁰ Report from the Commission to the Council on the application of the Merger Regulation thresholds, COM(2000) 399, Brussels 28/06/2000.

policy in its early years in general terms and to demonstrate why the Treaty did not contain a specific provision for the control of mergers. Subsequently, it may be shown how, as Community competition policy developed, the European Commission and the European Parliament came to consider that a specific system of merger control at the Community level was an imperative. In the face of continued resistance by the Member States to a specific Regulation to control mergers however, the European Commission and the European Court of Justice turned to existing provisions of the EC Treaty to control mergers at the Community level.

By the time the Member States had been finally persuaded that the implementation of a Community Merger Regulation was a necessity, there was already therefore an outstanding Community competence to assess mergers according to Articles 81 and 82 EC. What is the relationship between this existing competence of the Community and the competence afforded the Commission under the terms of the Merger Regulation? To what extent is there an overlap of control? To what extent should the competence of the Commission to apply the EC Merger Regulation have been predetermined by the pre-existing competence under Articles 81 and 82 EC? These are questions that the thesis considers in detail.

Thereby, it is determined that the operation of the legal bases according to which the Merger Regulation was implemented required a specific jurisdictional criterion to be used whose operation does not reflect the operation of the original *or existing* legal text (as amended) of Article 1 MR (in conjunction with Articles 9 and 22(3) MR). Rather, other factors and issues were deemed more persuasive in the drafting of Article 1 MR. The thesis considers the legal consequences of this fact for the legitimacy of the EC Merger Regulation as a whole. It further considers the implications for the Community competition policy that is pursued in the application of the competition law provisions laid down by the Treaty.

In conclusion, the actual possibility of implementing a more appropriate jurisdictional criterion must be considered. How would it interrelate with those other pressing elements that would ideally combine to represent an appropriate jurisdictional criterion? Is there, in effect, a jurisdictional criterion that represents a 'perfect fit' for the EC Merger Regulation?

II COMMUNITY COMPETITION LAW FOR PRIVATE UNDERTAKINGS - THE PROVISIONS OF THE EC TREATY

A THE ISSUE

The issue of an appropriate legal scope for Community law to apply to concentrations is clearly aided by a consideration of the original reasons for the introduction of a Community concentration control into Community law *per se*. In order to understand these reasons to their fullest extent, it is imperative to be clear about the role competition law plays in the Community legal system in general. This includes analysis of the role that was *originally* defined for competition policy in its initial inclusion in the provisions of the Rome Treaty, and an examination of any changes in that role that may have occurred in view of the on-going development of the Community.

B ORIGINS OF THE SUBSTANTIVE PROVISIONS OF COMMUNITY COMPETITION LAW - HISTORICAL OVERVIEW

1 The General Aims Behind the Creation of the European Community

In signing the Rome Treaty, the original six Member States expressed a determination not simply to extend the provisions of the European Coal and Steel Community (1951)¹¹ to other areas of the industry, but to create a Common Market in specific sectors. Thereby, apart from an intention to replace historical military conflict with economic co-operation, they hoped to increase European competitiveness on the global scale and to compete effectively with, in particular, the trading bloc of the United States. European business should be enabled to specialise, to engage in mass production and to enjoy economies of scale in the wider Community markets.¹² What was not clear between the different Member States from the outset of the negotiations leading to the signing of the Treaty was the appropriate way to achieve those aims.

¹¹ Treaty of Paris, 18 April 1951

¹² In detail on this, see eg., Milward, A., *The Reconstruction of Europe - 1945-51*, (London, Methuen 1984); Mayne, R., *The Recovery of Europe: 1945-1973* New York, Harper Row 1970; Kuesters, H.J.; *Fondements de la Communauté Économique Européenne*,

1.1 The Spaak Report

The Treaty negotiations were based upon a preliminary study - the Spaak Report.¹³ The Report championed the idea of a Common Market based upon free competition, which would lead to increased competitiveness of European firms and a reallocation of the means of production. The required structure of free competition would flow from the creation of a Common Market in which trading conditions were equal for all firms across its territorial scope. Thereby, the Report pinpointed not only the significance of existing *public* restrictions on free trans-national trade and competition (which at that time hindered the establishment of a Common Market system), but also the significance of distortions which may be caused by *private undertakings* intent on re-partitioning the markets. Thus, even where public barriers may be removed, conditions of free competition as a direct result of the existence of the Common Market may nevertheless be impeded by private undertakings re-erecting those barriers to trade. For a Common Market regulatory system based upon free competition there arose a concomitant need for Treaty provisions directed at the conduct of private undertakings.¹⁴

The Spaak Report therefore considered that competition provisions were necessary to prevent partitioning of national markets *in order that* free competition was maintained within the Common Market. The Common Market was to be *based on a* system of free competition, which would derive *from the very existence* of the Common Market. Rather than an essential means to protect competition *directly*, competition regulations were envisaged primarily as a means to protect the Common Market itself.

1.2 The Member States' Approach

If this was the economic and political approach adopted by the Spaak Report, that is not to say that it was an approach unreservedly embraced by all the Member States in the negotiations leading to the signing of the Rome Treaty. While the Member States were unanimous in their wish to increase European competitiveness, they were not

Luxembourg, Office de Publication Officielle des Communautés Européenne'; Kitzinger, U.W., *The Politics and Economics of European Integration*, 1961, pp.21-59.

¹³ The Spaak Report, Comité Intergouvernemental Créé par la Conférence de Messine, 21 April 1956, Brussels. The final version of the Rome Treaty embodied the greater part of the content of the Spaak Report, see Goyder, D., *EEC Competition Law*, 1993 at p.23-4.

¹⁴ See, The Spaak Report, *ibid* at p.16.

naturally in agreement about the best political and economic method to promote this. Free competition as the regulating tool for the economy was coherent with the German economic model,¹⁵ but it was far from the French and Italian more dirigiste economic systems.¹⁶ German enthusiasm for a Common Market based upon a system of free competition during negotiations leading to the Treaty is as equally well documented as French and Italian reluctance.¹⁷

Recognition of the outcome of the negotiations and the fact that the Rome Treaty included provisions of competition law within its text reveals however that it was the German position (and the proposals of the Spaak Report) that would ultimately hold sway in the final negotiations.¹⁸

It is necessary to analyse the provisions of Community competition law which were implemented in the Rome Treaty more closely, as well as their relationship to the other Treaty provisions.

¹⁵ The German approach was heavily influenced by Ordoliberal thought, emphasising the need for a constitutional framework for economic policy. The Ordoliberals advocated a restriction of power in private hands, fearing the public links that may be made and the potential political consequences. See on this eg., Gerber, D.J., 'Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe', 41 *American Journal of Competition Law* 1994; Peacock, A.T. and Willgerodt, H., (eds), 'German Neo-Liberals and the Social Market Economy' 1989.

¹⁶ They had a tradition of allowing governmental agencies to play major roles in directing the economy. Their conception of competition policy was based upon political and industrial planning. See on this eg., Gerber, D.J., 'Law and the Abuse of Economic Power in Europe', *Tulane Law Review*, (1987), 62 at pp. 64-66; Aujac, H., 'An Introduction to French Industrial Policy', in: Adams, W. and Stoffaes, C. (eds), 'French Industrial Policy', 1986.

¹⁷ See, eg., Kuesters, H.-J., 'Fondements de la communauté économique européenne', Luxembourg, Office des Publications Officielles des Communautés Européenne, 1990; Kuesters, H.J. 'Die Gruendung der Europaeischen Wirtschaftsgemeinschaft', 1982, pp. 364-369; Gerber, D. 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe', (1994), 42, *American Journal of Comparative Law*, 25-84; von der Groeben, H. 'Die Europaeische Gemeinschaft und die Herausforderungen unserer Zeit; Ausaezte und Reden 1967-1987', Baden-Baden, Nomos Verlagsgesellschaft, 1987; Griffiths, R. 'Agricultural pressure groups and the origins of the Common Agricultural Policy', (1995) 3 *European Review*, 233-242 at 238; Wesseling, R., *Constitutional Developments in EC Antitrust Law - The Transformation of Community Antitrust Law and its Implications*, Diss., Florence, 1999 at pp.19-21.

¹⁸ Thereby, it is considered that the French were compensated through the exception of the agricultural sector from the competition rules, and the adoption of a common agricultural policy. See eg., Kuesters, H.-J., *Fondements de la Communauté Européenne* (Luxembourg, Office des Publications Officielles des Communautés Européennes', 1990). But against this, see Griffiths, *ibid.*

2 The Substantive Provisions of EC Competition Law and their relationship to other Treaty Provisions

The competition law provisions of the EC were originally envisaged as a means to pursue specific objectives within the context of the establishment of the Common Market.¹⁹ Thus, they were *ancillary* to the overall aims of the Community.

The competition law provisions Articles 81 and 82 EC were to be interpreted within the context of Articles 2 and 3 EC.

2.1 Article 2 EC

Article 2 of the Rome Treaty expressed the tasks and objectives of the Community. This was to establish the Common Market and to approximate the economic policies of the Member States in order to promote the harmonious development of economic activities within the Community.²⁰

What was this goal of establishing a Common Market specifically?

In general terms, it can be understood to constitute the integration of the individual markets of the Member States through the removal of non-tariff barriers between the Member States, in tandem with substantive Community provisions on free trade and non-discrimination.²¹ The broad principles of free-trade and non-discrimination represented by these provisions aimed above all to ensure that competition was fair throughout the territory of the Community.²² There should be a level playing field for undertakings active within the Community.

The establishment of the Common Market between the Member States was not however insular in its goals. It included both the success of internal integration *and*

¹⁹ The Commission expressly stated that the rules of Community competition law were to be read in conjunction with the other Treaty provisions as one of the basic principles in their interpretation in: *Premier Rapport Général sur l'activité de la Communauté Économique Européenne*, (1958) p.61.

²⁰ Before the amendments implemented by the Treaty of Maastricht, Article G(2).

²¹ In particular, Articles 3, 12, 23-31, 39-61, 70-80 90-93 EC. For a useful summary of the relevant provisions of Community law, see Nicolaidis, P., 'The Role of Competition Policy in Economic Integration', in: Nicolaidis, P. and van der Klugt, A., *ibid*, at pp.9-17.

²² Nicolaidis, P., 'The Role of Competition Policy in Economic Integration', in: Nicolaidis, P. and van der Klugt, A., *ibid*, at p.10.

the success of that integrated market on the external (global) market ('external integration'). Thus, the Commission stated in its First Report on Competition Policy:

'...the Commission particularly encourages co-operative efforts between small and medium-sized enterprises to establish themselves in markets other than their own'.²³

The tendency of the Commission to emphasise the importance of co-operative behaviour within Community industry in order to achieve a globally competitive size has not disappeared. It has however shifted in perspective, and although the potentially beneficial effects of co-operative behaviour are recognised, they must now be consistent with an approach that regards undistorted competition structures as a primary goal.²⁴ This general dichotomy in approach to co-operation within the Community - and its shift in emphasis over time - was fundamental in the reasons for the original omission, and the eventual inclusion, of a system of European concentration control.²⁵

2.2 Article 3 EC

Article 3 EC meanwhile provides some of the means to create internal integration, and to derive economic, social and political benefits from that process. Thereby, competition was to be protected under Article 3g EC²⁶ as a means of pursuing the goal of Single Market integration.²⁷

²³ See also eg.: Commission Memorandum 1966 on Concentrations in the Community at p7; Commission White Paper '*Completing the Internal Market*' (CEC, 1981, paragraph 1).

²⁴ European Commission, Report from the Commission to the Council on the Implementation of the Concentration Regulation, COM (93) 382, Brussels, 28 July 1993, at p.5; Recitals 3-5 of the Merger Regulation; Van Miert, K. in: Amato, G. and Van Miert, K., *The Importance of Competition Policy for the Future of European Integration*, Paul-Henri Spaak Foundation, Brussels 1997 p.23; Lord Leon Brittan, *European Competition Policy - Keeping the Playing Field Level*, CEPS, Brassey's, London at p.7 and p.29.

In the literature, see eg., Alexander, W., '*The EC Rules of Competition*', (1973) at p. 111; Krimphove, D., '*Europäische Fusionskontrolle*', 1992, Carl Heymanns Verlag KG, at pp. 96-98; de Richemont, J., '*Les concentrations d'entreprises et la position dominante*', Paris, 1971, pp. 262-717.

For a criticism of the emphasis of 'external integration' in terms of economics, see Kay, W., '*Mergers, Acquisitions and the Completion of the Internal Market*'. pp.161-180 and Kay, N., *Concentrations, acquisitions and the internal market*, in: Hughes, K, *European Competiveness*, 1993, Cambridge.

²⁵ See below.

²⁶ Article 3g EC states that the activities of the Community include '*a system ensuring that competition in the internal market is not distorted*'.

²⁷ There has been some academic dispute about whether the legal concepts of Common Market and the Single Market are synonymous or different. Some consider the single market to be narrower, see eg, Pescatore, P., '*Die Einheitliche Europäische Akte, Eine Ernste Gefahr fuer den Gemeinsamen Markt*', *Europarecht* 21, 1986 Heft 2 p.117; Zacker, C., '*Binnenmarkt und*

3 The Specific Provisions of Competition Law in the Treaty

There are two broad areas of *private conduct* that are regulated under the provisions of competition law contained in the Rome Treaty: cartel agreements and concerted practices by undertakings under Article 81 EC and the abuse of a dominant position by an undertaking under Article 82 EC. These Articles have both been expanded and refined by subsequent secondary legislation and judicial interpretation.²⁸

It is vital to note at this point that Articles 81 and 82 EC are aimed at anti-competitive *conduct* by private undertakings. This is explained by the reason for their inclusion, as initially expressed in the Spaak Report - that is, to prevent firms from re-erecting barriers to free trade through private conduct.²⁹ There was no *direct* control of competition *structures*³⁰; there was no system of concentration control within the Rome Treaty. On the contrary, mergers were seen as potentially beneficial to the process of integration - the embodiment of the type of industrial co-operation and restructuring that was actively encouraged in the early years as 'external integration'.³¹

If the purpose of the inclusion of Articles 81 and 82 EC within the Rome Treaty was clear, there remains the question of *how* they were actually applied.

Gemeinsamer Markt; Recht der Internationalen Wirtschaft, 35, 1989, Heft 6 p.489. Others see the two terms as synonymous, see eg, Grabitz, E., 'Kommentar zum EWG-Vertrag', Loseblattsammlung, 2.Edition, Muenchen 1990, Art. 8a Nr. 3. A third theory considers the single market concept to render the goals involved in the realisation of the Common Market more specific, perhaps even extending those relevant elements, see eg, Everling, U., 'Der Beitrag des Europaeischen Gerichtshofs zur Weiterentwicklung des Wettbewerbsrechts der Gemeinschaft', in:FIW-Schriftenreihe, Heft 134, Koeln/Berlin/Bonn/Muenchen 1989 p. 1160; Ehlermann, C.D., 'Der Beitrag der Wettbewerbspolitik zum Europaeischen Binnenmarkt', Wirtschaft und Wettbewerb, 42, 1992, Heft 1 p.369.

These academic arguments will not be considered further here. The thesis adopts the approach that the two terms are synonymous, as indeed they appear to be treated by the ECJ, see eg., *Hugin Kassaregister AB v Commission* Case 22/78 (1979) ECR 1829, at paragraph 17.

²⁸ Details are to be found in all the main text books on EC competition law.

²⁹ See above p.6.

³⁰ Although, in the approach adopted by the Community institutions (to promote integration), the provisions were effectively used in relation to the structure of the Common Market, see below.

³¹ See in more detail below p.40.

C COMPETITION POLICY

1 Competition Policy – In General

1.1 A General Definition

Clearly, the protection of competition is the guiding principle and common denominator of all competition policies. The decision by any specific government to implement a competition policy has followed a political choice that the active protection of competition is the appropriate means to achieve a specific goal.³² In the most general of terms, it may therefore be stated that competition policies '*allow for the development of a regulatory framework within which governments can maintain or encourage competition.*'³³ They can and do however serve a multitude of much more wide-ranging goals. Thereby, a distinction has been made between ultimate goals and intermediate (operational or direct) objectives of competition policy.³⁴ Intermediate goals are understood to be the goals that are pursued directly in the actual decision-making process involved in the application of specific provisions of competition law. Ultimate goals meanwhile extend beyond these more 'immediate' goals to embrace the more generalised political and economic development within a given jurisdiction. Clearly however the two types of goals are interdependent, in particular to the extent that the intermediate goals will normally be aimed at engendering those larger more fundamental aims, normally as the ultimate by-product of the application of competition law.

Within the context of the intermediate goals pursued in the application of competition law however, the protection of competition itself should not necessarily be taken as inviolable: economic co-operation and collaboration may even be encouraged in the

³² See on this in general, van Mourik, Aad, '*The Role of Competition Policy in a Market Economy*', in: Nicolaides, P. and van der Klugt, A., '*Competition Policy of the European Community*', 1994, European Institute of Public Administration, Maastricht.

With specific reference to the Community's position, see below pp13-30.

³³ Cini, M. and McGowan, L., '*Competition Policy in the European Union*', 1998, New York at p.3.

There are a number of different regulatory frameworks which may be implemented to pursue these goals, including the regulation of both private and state conduct. As will become clear from the description of the evolution of concentration control in the Community, there is no unanimous agreement about what types of control the general bracket of competition policy should include.

³⁴ Ehlermann, C-D and Laudatti, L. (Eds), '*European Competition Law Annual 1997: Objectives of Competition Policy*', European University Institute, Hart Publishing 1998, at p.ix.

pursuit of particular ends.³⁵ Therefore, differing – and at times, incompatible – objectives may be pursued by one and the same system of competition law.³⁶

The content of the objectives of competition policy varies enormously between different individual systems of competition law. The differing motivations and objectives that an individual competition policy may serve are in fact founded upon different political, economic and social ideologies.³⁷ Furthermore, the pursuit and fulfilment of an individual and established competition policy may in practice be affected by the institutional dynamics at the core of its implementation.³⁸

A general definition of competition policy covering all systems of competition law is therefore not possible. It may be stated that:

'...competition policy has been introduced into a variety of national settings, with varying motivations and at varying time periods...Hence, although there are common concerns, there is no ambiguous and universal 'core' of policy.'³⁹

1.2 An Overriding Approach

If it is not possible to define competition policy *in general* as involving the pursuit of any particular intermediate goals, it is however possible in the *specific* to identify the *overriding* (or *dominant*) *approach* of individual systems of competition regulation. The description of such an *overriding approach* does not attempt to pinpoint exhaustively *all* the aims and objectives pursued by a system of competition law, nor does it attempt to consider in detail differences there may be in the specific approaches of individual institutions within that system.⁴⁰ Rather it is an account which acknowledges that there is usually a dominant intermediate objective in the

³⁵ See above concerning the early Community encouragement of 'external' integration and its attitude towards concentrations.

³⁶ See eg., Frazer, T., for an account of the different types of competition policy model which might have been suited for the single market (post-SEA 1982), *ibid* at pp.621-623.

³⁷ Extensively on this, see Amato, G., '*Antitrust and the Bounds of Power*', (1997) Hart Publishing. Also, Wilks, S. and Cini, M., '*Competition Policy - a research prospectus*', RUSEL Working Paper, 1991, University of Exeter at pp.1-5; Wilks, S. and McGowan, L., '*The First Supranational Policy in the EU: Competition Policy*', *European Journal of Policy Research*, 1995 28 pp.141-169.

³⁸ See in particular on this Wilks, S., '*The Metamorphosis of European Competition Policy*', RUSEL Working Paper, 1992, University of Exeter.

³⁹ Wilks, S. and Cini, M., '*Competition Policy - a research prospectus*', RUSEL Working Paper, 1991, University of Exeter at p.2.

⁴⁰ Here, the possible different approaches taken by the Commission and the European Court of Justice.

implementation of a system of competition law by a specific institution (or system of related institutions) which stands out over and above all the other variables. Consistency with this *overriding* goal influences the way that *most* cases will be decided and *most* reforms or amendments to the system of regulation will be effected.

The Community system of competition law is no exception in this regard. An overriding goal can be traced within the implementation of the Community competition law from the very beginning. If this goal has not always been strictly static, it has never ceased in pertinence. Appreciation of this overriding goal is essential, first, in order to explain the absence of a system of concentration control within the text of the Treaty of Rome and, secondly, the final decision to implement the European Concentration Regulation 4064/89 in 1990 (following successive proposals by the European Commission).

2 Competition Policy in the European Community

The Community's position with regard to the *need* for provisions of Community competition law (as a political choice) found its expression in the Commission's First Report on Competition Policy:

'Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development...competition enables enterprises continuously to improve their efficiency, which is the *sine qua non* for a steady improvement in living standards and employment prospects within the countries of the Community. From this point of view, competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society.'⁴¹

Once provisions of competition law had been implemented within the Rome Treaty, there arose the second question: how were those provisions to be applied.

⁴¹ Commission First Report on Competition Policy, 1972, at p.11.

2.1 The Implementation of Articles 81 and 82 EC and the Integration Paradigm

The Commission and the Court of Justice might have relied upon the literal wording of the provisions to protect generic competition⁴² directly (as a *means* to establish the Common Market, within the meaning of Article 3g EC).⁴³ Instead, they chose to interpret Articles 81 and 82 EC teleologically and to *directly* pursue the integration paradigm in their application.⁴⁴ This approach was more evident in the application of Article 81 EC than Article 82 EC. This was for the reason that Article 82 EC, by the very nature of its substantive condition, involves extensive analysis of the effect of the conduct on competition structures.⁴⁵

⁴² The true definition of 'competition' is notably controversial. The Treaty of Rome offers no definition. Economists have traditionally explored the concept by referring to two models that describe two extreme sets of conditions: perfect monopoly and perfect competition.

In acknowledgement that either model is an unattainable ideal in real markets, some economists have proposed the concept of 'workable competition', eg., Clark, *Toward a Concept of Workable Competition*, (1940) 30 American Economic Review, 241-256; Sosnick, *A Critique of Concepts of Workable Competition*, (1958) 72 Qu J Ec 380-423. In *Metro*, the Court of Justice invoked the concept, defining it in the following terms:

'...workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of the single market achieving conditions similar to those of a domestic market. In accordance with this requirement, the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.' *Metro SB-Grossmaerkte GmbH & Co KG v Commission Case 26/76 (1977) ECR 1875*, para. 20.

It is 'workable competition' that the thesis refers to when it refers to 'competition' with in the context of Community competition policy. It should be highlighted however that the true definition of workable competition is not uncontroversial: see eg., Asch, *Industrial Organisation and Antitrust Policy*, (1983) pp.100-104; Goyder, 1993 *ibid*, pp.10-11. For the purposes of the thesis however, it is not necessary to analyse the definition of 'workable competition' in theoretical terms any further.

⁴³ Article 81 (1) EC prohibits *'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.'*

Article 82 EC prohibits *'any abuse by one or more undertakings of a dominant position within the Common Market or a substantial part of it...in so far as it may affect trade between Member States.'*

According to the literal text however factors other than 'pure' competition can be of overriding importance. Article 81 (3) for example provides an exemption for an agreement falling within Article 81 (1) EC if it promotes *'technical and economic progress.'* and allows consumers a fair share of the benefits which the agreement brings.

⁴⁴ For a discussion of 'teleology' in the competition law context, see eg, Schwartz, E., *'Politics as Usual: The History of European Community Concentration Control'*, Yale Journal of International Law 18 (1993) 607.

References concerning this emphasis of integration in the application of Articles 81 and 82 EC are numerous: eg., Gerber, D.J., *ibid*, 1994 p.98; Hawk, B., *'Antitrust in the EEC - The First Decade'*, 41 Fordham Law Review, 229, 231 (1972); Whish, *ibid*, pp.10; Bellamy and Child, *ibid*, at p.34; Korah, V., *ibid*, at pp.5-6 ; Goyder, *ibid*, at p.44.

⁴⁵ The analysis of a dominant position, for example, involves a detailed examination of the relevant market.

Furthermore, the Commission in any case proved rather reluctant to apply Article 82 EC until the early 1970's. For the reasons, see Gerber, 1994, *ibid* at p.113.

Close analysis of Article 81 EC reveals that the approach was not actually contrary to the literal wording of Article 81 (1) EC. Article 81 (1)(a) to (e) EC provided examples of agreements covered by Article 81 (1) EC. Therein, Article 81 (1)(c) includes 'agreements to share markets'. Therefore the approach of the Commission and the Court of Justice constituted an *emphasis* of the integration goal over the other goals (in particular, over competition), within the literal wording of Article 81 (1) EC.

The pursuit of integration as the overriding goal of Community competition policy was evident in both the practice of the Commission and the Court of Justice and in the Commission's statements of competition policy.

2.1.1 The Practice of the Court of Justice and the Commission

The approach was clear in many cases. Typical is the Court of Justice's statement in *Italy v. Council and Commission*⁴⁶, that Article 81 EC:

"...should be read in the context of the provisions of the Preamble to the Treaty which clarify it and reference should particularly be made to those relating to 'the elimination of barriers' and to 'fair competition' both of which are necessary for bringing about a single market."

Therefore, the Court of Justice and the Commission were anxious to promote and maintain a level playing field for undertakings active within the Community. Direct integration arguments even prevailed over the encouragement of efficient production and distribution within the Common Market in case decisions by both the Court of Justice and the Commission.⁴⁷ The essential question in the substantive assessment of

⁴⁶ Case 32/65 (1966) ECR 389 at 405, (1969) CMLR 39. See also eg., *Consten and Grundig v Commission* Joined Cases 56 and 58/64 (1966) ECR 299, p.340; *Hugin Kassaregister AB v Commission* Case 22/78 (1979) ECR 1829.

⁴⁷ The classic example is *Consten/Grundig v. Commission* Cases 56 and 58/64 (1966) ECR 341, (1966) CMLR 418 See also, eg., *Soda Ash* Commission Decision of 19 Dec. 1990, OJ 1991, L152; *Omega*, Commission Decision of 28 October 1970, OJ (1970) L 242/22.

There are numerous academic references. See eg., Gerber, D. J., 'The Transformation of European Community Competition Law?', *Harvard International Law Journal* 35 (1994) 97-147; Hawk, B. 'Antitrust in the EC - The First Decade' 41 *Fordham Law Review* (1979) 229 at p. 231; Whish, R., *ibid* (1993) at p. 28; Massey, P., 'Reform of EC Competition Law: Substance and Procedure and Institutions' in: Hawk, B., 'Fordham Corporate Law Review', 1996 at p.91; Van Bergh, 'Modern Industrial Organisation versus old-fashioned European Competition Law', (1996) 2 *ECLR* at p. 75; Temple Lang, J., 'European Community Constitutional Law and the Enforcement of Community Antitrust Law', in: Hawk, B. *Fordham Corporate Law Institute* 1993 at p. 587; Waelbroeck, 'Competition, Integration and Economic Efficiency in the EC from the Point of View of the Private Firm', in: *The Art of Governance, Festschrift zu Ehren von Eric Stein* (Michigan Law Review Association, 1987), pp. 301-308.

the conduct of private firms under Article 81 EC was whether the agreements contained restrictions on the parties' freedom to trade across borders.⁴⁸ Thereby, Community competition law focused upon vertical relationships between firms, which, by their nature, were apt to be used by manufacturers and distributors to protect national markets.⁴⁹

This emphasis of the potential harm caused by vertical relationships was at the expense of the potential harm caused by horizontal agreements, which are by their nature more likely to restrict *competition*.⁵⁰ With regard to horizontal agreements, the Commission tended to concentrate its efforts on large firms.⁵¹ Not only was this because of the lesser significance horizontal cartels played for the role of integration, but also it was in line with the expressed policy of the Commission to allow firms to expand to compete effectively on the global markets.⁵² Those co-operation agreements between smaller firms which might fall within Article 81(1) EC generally obtained exemptions as long as there remained some competition within the Common Market.⁵³

2.1.2 The Commission's Statements of Policy

The emphasis of the integration paradigm in the application of Community competition policy was also explicitly expressed in policy statements made by the

⁴⁸ It is noted that the Court of Justice has been more erratic in following this principle than has the Commission. This stems from *STM v Maschinenbau Ulm* Case 56/65 (1966) ECR 235, in which the Court found that where the object of the agreement was not clearly and intentionally damaging competition, its market consequences must be analysed to determine its actual or potential effect on competition. The Court has therefore sometimes found it difficult to reconcile this reasoning with the principle that absolute territorial protection should automatically breach Article 81 EC (as stated in the *Grundig* case). Compare eg., *Miller International Schallplatten GmbH v Commission* Case 19/77 (1978) ECR 131 where an automatic breach was found because of a restriction of exports with eg., *Voelk v Etablissements Vervaecke* Case 5/69 (1969) ECR 295, where exclusive dealing escaped prohibition following market analysis.

Generally however, if the Courts reasoning was more economic, its overriding goal was the same as the Commission - integration.

⁴⁹ This was an expressed policy of the Commission, see Action Programme for the Second Stage of the Community, November 1962, as cited in Goyder, 1993 *ibid* at p.44.

⁵⁰ In particular recognising this emphasis, see eg., Goyder, 1993 *ibid* at p.44; Hawk, B., 'United States, Common Market and International Antitrust: A Comparative Guide', 1990, pp.403-573; Gerber, 1994 *ibid*, p111-112; Frazer, T., *Competition Policy after 1992: the Next Step*, 53 *Modern Law Review*, 609, pp.618-20 (1990).

⁵¹ Hawk, B. *Antitrust in the EC - The First Decade*, 1979 *ibid* at pp.249-65; Gerber, D.J., *The Transformation of EC Competition Law*, 1994, *ibid* at p.112.

⁵² Gerber, D.J., *The Transformation of EC Competition Law?*, *ibid* at p.112. See above regarding this policy.

⁵³ See eg., *Transocean Marine Paint I*, Commission Decision OJ (1967) 163/10.

Commission. For example, in its First Commission Report on Competition Policy the Commission stated:

'... it is evident that the competition policy of the Community must be directed towards the creation and proper operation of the Common Market...'⁵⁴

and again that:

'...the Community's policy must, in the first place, prevent governmental restrictions and barriers which have been abolished from being replaced by similar measures of a private nature.'⁵⁵

It was further acknowledged by *Ehlermann*, the then Director-General of DGIV:

'...most of the decisions have ... the specific aim of promoting integration'.⁵⁶

Similarly, the then Commissioner for competition, *Van Miert*:

'Let me say very clearly that competition policy has never been strange to the idea of European integration. For the last 40 years, competition policy has played a key role both in the modernisation of the European economy and in the creation of the Single Market.'⁵⁷

2.2 The Pursuit of Competition Ancillary to the Integration Goal

If Article 81 EC (as a provision aimed at market conduct) was used primarily to regulate and control the structure of the Common Market in the promotion (and protection) of integration, that does not mean of course that there was absolutely no interest in pursuing the generic benefits of competition.⁵⁸ Both the Commission and the Court have referred at times to the potential benefits of improved competition and efficiency - for example, lower prices, technological progress, distributive

⁵⁴ Commission of the European Communities, First Report on Competition Policy (1972), at p.12.

⁵⁵ Commission of the European Communities, First Report on Competition Policy (1972), at p.13, 15-16.

⁵⁶ Ehlermann, C.D., *'The Contribution of the EC Competition Policy to the Single Market'*, (1992) CMLRev 29 257, at 260, referring in particular to the (then recent) decisions: *Soda Ash-ICI* Commission Decision of 19 December 1990, O.J. 1991, L152 and *Tetra Pak I* Commission Decision of 24 July 1991, Press Release IP (91) 715.

⁵⁷ Van Miert, K., in: Amato, G. and Van Miert, K., *ibid*, p.15. Similar, see eg., Van Miert, K., *'Competition Policy in the 1990's'*, Royal Institute of International Affairs, 11 May 1993.

⁵⁸ Gerber, D.J., *The Transformation of EC Competition Law?*, *ibid* at p.102.

efficiency.⁵⁹ The *direct* pursuit of the competition paradigm was however clearly subordinate to the *direct* pursuit of integration in the earlier years of the implementation of Community competition policy.⁶⁰

Thereby, it is important to recognise that the direct pursuit of integration in the application of Articles 81 and 82 EC was not an exclusively political one; competition policy was not simply being used as an instrument of politics. As detailed above with reference to the Spaak Report, although a political aim, there are rational economic arguments justifying the Community market integration process.⁶¹ Net efficiency gains were expected to result from the creation of a customs union (that is, a free trade area and a common external tariff) amongst small and previously protectionist states.⁶² It was argued that the benefits include scale economies and increased import competition and export gains, which lead to increased allocative efficiency. Therefore, it must be re-emphasised that competition and integration can be seen to be actually consistent in their goals. In fact, competition was not so much *subordinate* to the integration paradigm, but *ancillary* to it. The Commission and the Court of Justice assumed that a system of undistorted competition would derive directly from the primary goal of the establishment of the Common Market.⁶³ If there was a hindrance to the establishment of the Common Market, there was a distortion of competition within the meaning of Article 81(1) EC.

⁵⁹ See eg., *Consten and Grundig v Commission* Cases 56 and 58/64 (1966) ECR 299, (1966) CMLR 418 at 339 and 470 respectively.

EC Commission First Report on Competition Policy, (Brussels, 1972), at p. 11; EC Commission Fifteenth Report on Competition Policy: 1983 (Brussels, 1984) at p. 11; Van Miert, K., 'Competition Policy in the 90's', speech for the Royal Institute of International Affairs (Cheltham House, London), 11 May 1993; Commission's Action Programme for the Second Stage of the Common Market (Nov. 1962), Common Market Report (CCH) 201-21 (Feb. 1963).

⁶⁰ Furthermore, there were explicit and implicit agricultural and industrial policies pursued within the Community which, for public ends, were generally applied in a way incompatible with free competition

Amato, G., 'Antitrust and the Bounds of Power', (1997) at pp.43-44.

⁶¹ Fels, A. and Edwards, G., in Ehlermann, C-D and Laudatti, L., *ibid*, 1998, pp. 63-64. Also Schaub, A. at pp. 126-127.

⁶² See eg. Pelkmans, J. 'The Institutional Economics of European Integration' in: M. Cappelletti, Seccombe, M. and Weiler, J. (eds), 'Integration Through the Law: Europe and the American Federal Experience', (1981), Berlin; Cini, M. and McGowan, L., 'Competition Policy in the European Union', (1998), New York.

⁶³ Mirroring the original position of the Spaak Report, see above, p.6.

Thus, the Court of Justice, echoing the Commission's reasoning,⁶⁴ stated in the *Grundig Case*:

'Since the agreement...aims at insulating the French market for Grundig products and maintaining artificially, for products of a very widespread brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market.'⁶⁵

2.3 Other Aims Pursued in Community Competition Policy

Consideration of the *overriding* approach of Community competition policy does not exclude the possibility that other aims have also been pursued under Community competition policy beyond the interests of Single Market integration (and competition). The Court of Justice stated that restraints on competition in the pursuit of other policy objectives can be justified, so long as 'workable competition' is maintained:

'The powers conferred upon the Commission under Article 81(3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market.'⁶⁶

As stated above, however, it is difficult to delimit these further aims individually and to determine their relationship with each other and with the paradigm of workable competition accurately. *Jacquemin and de Jong*,⁶⁷ for example, consider the aims of EC competition law (beyond the primary aim of Single Market integration) to be:

- diffusion of economic power, even with the sacrifice of efficiency;
- economic freedom of market participants, specifically of small and medium-sized firms;⁶⁸

⁶⁴ A further example of the Commission's approach is *Soda Ash-ICI*, Commission Decision of 19 December 1990, OJ 1991, L152 at 13.

⁶⁵ Case, *ibid* at 474.

⁶⁶ *Metro SB-Grossmaerkte GmbH & Co KG v Commission* Case 26/76 (1977) ECR 1875, para 21.

⁶⁷ Jacquemin and de Jong, *European Industrial Organisation*, Macmillan Press, 1977.

⁶⁸ This approach can be traced to the influence of the Freiburger School on German competition theory and practice, see Ehlermann, C-D and Laudati, L (eds), *ibid*, 1998, at p.xi.

- efficient allocation of resources and the maximum satisfaction of consumers.

Bellamy and Child,⁶⁹ on the other hand, do not consider the Community to be pursuing such a direct approach in protecting small and medium-sized firms, nor do they believe that the Community ignores the benefits of micro-economic efficiencies so easily. They state that the Community rules on competition only fulfil two broad functions beyond the direct prevention of barriers to trade by private agreements and undertakings:

- preservation of effective competition to stimulate the creation of the Single Market
- to encourage efficiency, innovation and lower prices.

Consideration of these two opinions alone are enough to show that, beyond the aim of single market integration, it is not completely clear which specific aims Community competition policy pursues.⁷⁰ Suffice it to say that these further aims were always embedded in a reasoning that was focused on the overriding goal of economic integration. Where private parties were attempting territorial restrictions, there would be severe scrutiny by the authorities and, in the case of absolute territorial protection, even a quasi-automatic illegal restriction of competition.⁷¹

2.4 Summary

Integration, as the main goal of the Community, became the *overriding goal directly* pursued in the application of Article 81 EC.⁷² This can not be criticised in *legal*

For a critique of the policy of protecting small and medium-sized firms, see Korah, V., 'EC Competition Policy: Legal Form or Economic Efficiency', (1982) 39 Current Legal Problems 81.

⁶⁹ Bellamy, C. and Child, G.D., 'Common Market Law of Competition', 4th Ed., (1993), p.33.

⁷⁰ See further, eg., Hawk, B., in: Ehlermann, C-D and Laudatti, L (eds), 1998 at p. 356. For a thorough analysis of the different policies pursued, see Bouterse, R., *Competition and Integration - What Goals Count?*, The Hague, Kluwer Law International, 1995.

⁷¹ *Consten and Grundig v Commission* Cases 56 and 58/64 (1966) ECR 299, (1966) CMLR 418 at 339 and 470 respectively.

⁷² In economic terms however, this approach has been strongly questioned. *Massey* argues that the approach of the Community may be wrong on the basis that an effective competition policy based upon an efficiency assessment is a key element in ensuring that the benefits of market integration are achieved, which however 'is not the same as making market integration an objective of competition policy at the expense of efficiency'. Massey, P., *ibid*, at p. 100. *Van den Bergh* even argues that 'the failure to take account of economic insights has enabled EC competition rules to harm, rather than promote market integration.', Van den Bergh, R., *Modern Industrial Organisation versus Old-fashioned European Competition Law*, (1996) 2 ECLR 75-87 at p.75.

terms, since it adheres both to the literal wording of Article 81 EC and the subordination of the provisions to the overall integration objective within the terms of the Treaty.⁷³

Questionable is whether this *overriding* goal in the direct implementation of Community competition policy has remained unchanged following the amendments made to the Treaty of Rome, whereby, in particular, the *de jure* completion of single market integration was brought about.⁷⁴ This question does not consider in detail any changes in the *reasoning* in Commission decisions or cases before the European Courts that might have occurred.⁷⁵ It aims solely to identify any move away from the pursuit of integration as the overriding paradigm in the application of Community competition law.

3 Community Competition Policy, the Single European Act and the Treaty of Maastricht

3.1 Competition Policy in General

The Single European Act⁷⁶ marked a determined change in approach in the Community's attitude towards the importance of competition provisions as a whole within the Community, and the importance of protecting undistorted structures of competition in the application of Community competition policy.

The SEA detailed the completion of the Single Market by 1992.⁷⁷ In an attempt to strengthen the ability of the Community to prevent national regulations from inhibiting intra-Community trade, the SEA implemented a series of measures to

For a classical critique of the approach, see Joliet, R., '*The Rule of Reason in Antitrust Law*', (1967), Diss., University of Liege; Korah, V., '*EC Competition Policy: Legal Form or Economic Efficiency*', (1982) 39 *Current Legal Problems* 81

⁷² OJ 1973 C92/1.

⁷³ See above at p.15

⁷⁴ According to the Single European Act 1986.

⁷⁵ Note that *Gerber* and *Wesseling*, for example, detect a change in *reasoning* during the early 1980's, whereby there was an increased use of economics and politics, characterised by a sectorially differentiated application of the antitrust rules (while however still maintaining an *overriding* goal of integration). *Gerber*, 1992, *ibid*; *Wesseling*, Diss., 1999 *ibid* at pp.45-56.

⁷⁶ 17 February 1986, OJ (1987) L 169/7, following Commission White Paper, '*Completing the Internal Market*', COM (85) 310 final, 14/06/1985.

⁷⁷ For a bibliography of literature analysing the SEA and the 1992 programme, see Bahiyiyih G. Tahzib, *Selected Bibliography on Europe*, 11 *Michelin Journal of International Law* 571 1990 (as cited in *Gerber* 1994, *ibid* at p.124).

remove all remaining trade restrictions in practically all sectors of the economy.⁷⁸

This policy expanded the scope of free competition within the Common Market.⁷⁹

In conjunction with this development, the Commission determined that in general, within the context of the Single Market programme under the SEA, the instrument provided by Community competition law in maintaining systems of undistorted competition should be intensified (rather than reduced).⁸⁰ While maintaining that competition policy should also foster market integration in a positive way, allowing scope for co-operation between firms likely to further technical and economic progress in the wider Community interest⁸¹, the Commission determined that a structure of free and undistorted competition within the Community would be vital if the benefits deriving from integration were to be felt by the consumers:

'Competition policy has a key role to play in ensuring that the opening of the market yields all the benefits expected of it. It must ensure that these barriers are not replaced by divisions of markets resulting from restrictive business practices or protectionist measures taken by the Member States'.⁸²

⁷⁸ Excluding, for example, defence industries.

⁷⁹ For a more detailed analysis of this process, see Ehlermann, C-D., *The Contribution of Competition Policy to the Single Market*, *ibid* 1992; Nicolaidis, P., *ibid*, p.11-12. See also Amato, G. in: Amato, G. and Van Miert, K., *ibid* at p.8, who notes that the increase in competition was a natural result of the integration process: integration could not be driven by centralised economic planning since such policies differ considerably between Member States. While it is never a non-normative science, the protection of competition is less controversial than centralised industrial policy.

⁸⁰ See eg., Commission White Paper 1985 COM (85) 310 June 14 1985 at 39-40; European Commission, Fifth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM (90)90, March 28 1990; 'Horizontal Concentrations and Competition Policy in the European Community', in: *European Economy*, May 1989, No.40; Report made for Commission by T. Padoa-Schioppa *et al.*, 'Efficiency, stability and equity', Oxford University Press, 1987.

A good academic study of the issues is provided by Montagnon, P., 'European Competition Policy', (1990), Chatham House Papers, Pinter Publishers, London.

Note that, in the minority, Davidow suggests that there is no consistent relationship between strengthened antitrust enforcement and the integration of the Member States into a Common Market. He does however recognise that the Common Market is based upon free competition and thereby his argument that the development was purely political and bureaucratic appears self-contradictory, in: Davidow, J., *Competition Policy, Merger Control and the European Community's 1992 Program*, *Columbia Journal of Transnational Law*, 1991, Vol. 29 pp.11-40.

⁸¹ See eg., Commission Sixteenth Report on Competition Policy, 1987, Introduction at p.14.

⁸² Commission Sixteenth Report on Competition Policy, 1987, Introduction at p.13-14.

Therefore, the Single European Act led to an emphasising of the *significance* of competition policy and a re-assessment of its *role*. Hence, *Lord Leon Brittan*, then Commissioner for competition, stated in 1990 that:

'We are on the eve of 1992. Competition policy is now mature...it is now at the centre of politics, economics and law.'⁸³

The Council may also be seen to have been expressing its view of the importance of competition policy during this period.⁸⁴ It extended the scope of Community competition rules to include new industrial sectors (for example, air and sea transport).⁸⁵ Most importantly, this dynamic led, as we shall see below, to the adoption of a system of Community concentration control.⁸⁶

In tandem with these Community developments was the greater importance given to competition policy by those Member States for which previously it had had little significance. Thus, Spain established a system of competition law in 1989,⁸⁷ Italy in 1990,⁸⁸ followed by Ireland in 1991,⁸⁹ and Denmark and Holland in 1997.⁹⁰

3.2 Generic Competition in the Implementation of Competition Policy

The emphasis placed upon the significance of *competition policy* in the lead up to the Single European Act and its aftermath pre-empted not only an expansion of Community competence in competition matters, but also an increased significance of

⁸³ Brittan, L. (1990), *Observations to the Directors General Competition Meeting*, Brussels, July 1990. See Wilks, S. and McGowan, L., who also emphasise the importance of the ability and conviction of the then Competition commissioners, Lord Leon Brittan and Peter Sutherland, who were, in their opinion, also instrumental in raising the profile of competition law during the 1980's, in: *The First Supranational Policy in the European Union: Competition Policy*, European Journal of Political Research, (1995), Vol28, 141-165 at p.151-2.

⁸⁴ Ehlermann C-D, *The Contribution of EC Competition Policy to the Single Market*, CMLRev (1992) 29 at p.258. Gerber has also noted a heightened emphasis of the application of the provisions aimed at preventing national government interference with the process of free competition, even at the expense of the regulation of private conduct., see Gerber, 1994 *ibid* at pp.137-141.

⁸⁵ Council Regulation (EC) No. 4056/82 of 22 Dec. 1982, O.J. 1982, L 378/4; Council Regulation (EC) No. 3975/87 of 14 Dec. 1987, O.J. 1987, L374/1.

⁸⁶ Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings.

⁸⁷ Spanish Defence of Competition Law, Law No.16, 17th July 1989 (as amended).

⁸⁸ Law No. 287 of 10 October 1989, Official Gazette of the Italian Republic No. 240, 13.10.1989

⁸⁹ Competition Bill 1991 (as amended).

the protection *generic competition* itself in the application of Articles 81 and 82 EC.⁹¹ Again this development is evident upon analysis of the practice of the Court of Justice and the Commission and the Commission's statements of policy. This does not necessarily mean however that the Community institutions were thereby in effect altering the substantive text of the competition articles laid down in the Treaty, action that would clearly be beyond the limits of their own competence. Rather, they found the literal wording of Articles 81 and 82 EC to be sufficiently general as to allow for a change of emphasis in their interpretation.⁹²

3.2.1 The Practice of the Court of Justice and the Commission

As early as 1974, Advocate General *Trabucchi* had predicted in the *Belgian Peintres* case that, once the markets become integrated, the objectives of the Community in its *application* of competition law (that is, the intermediate goals) must change. Hence:

' the Community interest which the prohibition of restrictive agreements is designed to further is not simply one of preventing the partitioning of the territory of the Community into separate national market but now, principally, of *keeping competition in a healthy state in terms of the Common Market*.'⁹³

Thus, he called for an emphasis on the protection of *generic* competition (moving away therefore from the previous Community approach of treating a restriction on parallel trade as constituting a 'restriction on competition').

This prediction proved to be remarkably prescient upon analysis of Commission decisions and Court of Justice cases from the later 1980's.⁹⁴ As early as in 1966, the Court of Justice had stated that a term conferring exclusivity on a distributor might not infringe Article 81(1) where it was vital to his decision to market a particular supplier's goods.⁹⁵ A progressive limiting of the scope of Article 81(1) EC became

⁹⁰ Respectively: Competition Act 1997, Statute No.384 10th June 1997; New Regulations on Economic Competition (Competition Act) Statute Book 1997, 242.

⁹¹ Again, for reasons stated above, the thesis will concentrate mainly upon developments affecting Article 81 EC.

⁹² See eg., Frazer, T., '*Competition Policy after 1992: The Next Step*', MLR 1990 609-623 at 612-617.

⁹³ Case 73/74, *ibid* at p. 1523 (author's emphasis).

⁹⁴ Note that it is not categorically stated that these developments are *exclusively* a reaction and response to the changing economic and constitutional conditions of the Community.

⁹⁵ *Societe Technique Miniere v Maschinenbau Ulm Case 56/65* (1966) ECR 235 at 250. Also, eg., *Grossmaerkte v Commission Case 26/76* (1977) ECR 1875 and *LC Nungesser KG v Commission Case 258/78* (1982) ECR 2015.

more prevalent in the run up to, and after, the SEA. For example, the Court of Justice in *Delimitis v Henninger Braeu AG*⁹⁶ held that an exclusive purchasing obligation in a beer supply agreement does not automatically mean that the agreement restricted or distorted competition.⁹⁷

3.2.2 The Commission's Statements of Policy

The Commission has consistently stressed the importance of competition policy within the context of the integration objective in its annual Reports on Competition Policy.⁹⁸ An example is in its Eighteenth Competition Policy Report, where the Commission stated that:

'An effective competition policy is the sole means of making the most of the potential offered by the completion of the large market and thus, by increasing competitive pressure, of producing a more competitive Community economy. More competition will also strengthen the position of European industry in both world and dominant markets. Without such a policy, there is the risk that Community consumers would be unable to enjoy the promised benefits of a large integrated market.'⁹⁹

Furthermore, the Commission's Green Paper on Vertical Restraints expressed this development clearly. The emphasis in the text was decisively concerned with the economic effect of individual vertical restraints on competition rather than their implications for single market integration. Thus, the ongoing integration process of the Single Market is described as only adding an extra dimension to the analysis of vertical restraints, rather than providing the main parameters.¹⁰⁰ This development

⁹⁶ Case C-234/89, (1991) I ECR 935, (1992) 5 CMLR 210

⁹⁷ Other case examples include: *Remia Nutricia v Commission* Case 42/84, (1985) ECR 2545, (1987) 1 CMLR 1, where the ECJ held that restrictive covenants imposed on the vendor of a business and its associated goodwill might fall outside Article 81(1) EC where they are necessary to the performance of the transfer in question; *Erauw-Jacquery Sprl v La Hesbignonne Societe Co-operative* Case 27/87 (1988) ECR 1919, where the ECJ held that a provision preventing a licensee exporting seeds protected by plant breeders' rights could fall outside Article 81(1) EC where it was necessary to protect the right of the licensor to select his licensees; *Delimitis v Henninger Braeu AG* Case C-234/89, *ibid*.

This development is analysed by Green, N. in: 'Article 85 in Perspective: Stretching Jurisdiction, Narrowing the Concept of a Restriction and Plugging a Few Gaps', (1988), 9 ECLR 190. Also see eg., Whish, 1993 *ibid* pp.208-211.

⁹⁸ This has been consistently expressed in the Introductions to most Competition Reports by the Commission. It was particularly emphasised in the Introduction to the 24th, 25th and 26th Reports.

⁹⁹ European Commission, Eighteenth Report on Competition Policy, 1988, Introduction.

¹⁰⁰ European Commission, Green Paper on Vertical Restraints in the EC Competition Policy, COM (96) 721, Brussels, 22.01.1997, at p.23. See also, analysis on pp. 23-26, *ibid*.

was stated in more concrete terms in the Communication published by the Commission as a follow-up to the Green Paper.¹⁰¹ The Commission stated:¹⁰²

'In reforming Community policy in the field of vertical restraints, the Commission pursues the following objectives:

- the protection of competition, which is the primary objective of Community competition policy, as it enhances consumer welfare and creates an efficient allocation of resources;
- market integration, in the light of enlargement, which remains a second important objective when assessing competition issues.'

This shows a firm change in approach by the Community.

The change is further borne out when considering the substantive assessment introduced under the Merger Regulation for concentrations in 1990.¹⁰³ This is concerned solely with the competitive effect of the structural changes on the market as a whole and does not include reference to, or scope for, integration considerations (nor for efficiency concerns).¹⁰⁴

Arguably, this process was codified in the Maastricht Treaty, in which there was an assertion of generic competition as an autonomous fundamental principle, together with an adoption of a Community industrial policy that was no longer regarded as the enemy of competition, but on the contrary as an expression of the need to restructure all sectors of the economy along competitive lines.¹⁰⁵

¹⁰¹ European Commission, Communication from the Commission on the application of the Community competition rules to vertical restraints, COM (1998) 544.

¹⁰² *ibid*, at p. 5. Note that it also stated that legal certainty for business, the enforcement costs to business and competition authorities, and the possibilities for improving decentralisation have to be taken into account.

¹⁰³ Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings.

¹⁰⁴ Note that Article 2 of the Regulation mentions that among the factors to be taken into account in the appraisal of concentrations is the '*development of technical and economic progress*' providing that it is '*to the consumer's advantage and does not form an obstacle to competition*'. It is therefore considered that there is no efficiency criterion in the Merger Regulation, see eg. Jacquemin (1990) at p. 549; Camesasca, P., *The Explicit Efficiency Defence in Merger Control: Does it Make the Difference?*, (1999) ECLR 14-28.

¹⁰⁵ Articles 3(1)m and 157 EC. See Amato, *ibid* at p. 45. Also, Ehlermann, C.D., '*The Contribution of EC Competition Policy to the Single Market*', in (1992) 29 CMLRev 257-282. Amato, taking up this idea, states that the evolution of Community competition law has ensured that today the understanding of industrial policy as implemented at the Community level means protecting competitive markets, in: Amato, G. and Van Miert, K., *ibid* at p.9. This is not however undisputed, see eg. Streit, M.E. and Mussler, W., '*The Economic Constitution of the European Community: From "Rome" to "Maastricht"*', (1995) 1 ELJ, 5-30

The development at the Community level is to a certain extent reflected by the Member States. Belgium reformed its system of competition law in 1991¹⁰⁶ and the UK has made similar reforms more recently to create a more competition-orientated system.¹⁰⁷

It is not possible or necessary to analyse the shifts in approach to the substantive application of Article 81 (1) EC in any more detail within the confines of the thesis, or the degree to which they have been implemented.¹⁰⁸

Vital, on the other hand, is to be clear about their implications for the relationship between the Single Market integration paradigm and the competition paradigm in the implementation of EC competition policy.

4 Implications of the Developments in EC Competition Policy

Some commentators perceive that the changes implemented and pre-empted by the Single European Act and the Maastricht Treaty (in particular, the *de jure* completion of the single market) have lead (and must lead) to a change in the *overriding* goal of Community competition policy: from an aid to integration to an instrument to protect

at 21-25, interpreting Article 130 TEU (now 157 EC), which states that '*The Community and the Member States shall ensure the conditions necessary for the competitiveness of the Community's industry*', and the effectiveness, with regard to specific provisions of the TEU, of the accompanying limitation in Article 130 (3) that: '*This title shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition*'. According to the authors, the discretion allowed by other provisions of the Treaty lead to the conclusion that, '*The principle of undistorted competition must now be considered of equal rank with industrial policy, R&TD policy and social policy, regional policy, environmental policy and further activities introduced by Article 3.*' (ibid, at p.24). It is submitted however that in legal terms, none of these objectives state directly that the structures of competition should be distorted, whereas Article 130 (3) contains an explicit prohibition on Community policies which distort competition.

See also however Sauter, W., '*The Relationship between Industrial and Competition Policy under the Economic Constitution of the European Union, with a Case Study of Telecommunications*', 1995, EUI Diss., Florence, who considers that Community competition law is integrated into the wider plane of economic law of the EU, taking account of broader social and economic goals. Also Gerber, D., 1992 ibid at p.136.

¹⁰⁶ Law of July 1991 on the protection of economic competition.

¹⁰⁷ Competition Act 1998.

¹⁰⁸ For a thorough account of the transformation of Community competition law, and a consideration of future developments, see Gerber, D.J., '*The Transformation of European Community Competition Law?*', Harvard International Law Journal (1994) 35 Harvard Law Journal, 97-147.

See also Wilks, S., 1992 ibid, concentrating in particular on the institutional dynamics involved.

competition in the Single Market. Endemic is the opinion expressed, for example, by Gerber, that the integration paradigm must be replaced:

'Competition law conceived as a means of achieving economic integration loses its way where such integration already has been achieved...shorn of its special role in achieving economic integration, the competition law system must redefine its mission.'¹⁰⁹

These submissions can however be shown to have ignored the (on-going) context in which the changes have taken place.

Following the Maastricht Treaty, the goal of structures of undistorted competition within the Community did arguably become autonomous of other Community goals.¹¹⁰ However, this goal does not exist in a vacuum. We have seen above that competition is a *result of the Single Market*. It is also *desirable for the Single Market*: it is necessary for the consumers to derive the benefits of integration; structures of undistorted competition within the Single Market breed competitiveness of Community firms, which in turn benefit the consumer.¹¹¹ Thus, the Commission stated in its Green Paper on Vertical Restraints:

'... a successful single market giving European companies the possibility of economies of scale and scope while still being subject to effective competition, is seen as the springboard for competitiveness in increasingly global and competitive world markets.'¹¹²

¹⁰⁹ Gerber, (1994) *ibid*, at p.142. He later refines this statement however, acknowledging that integration issues will not disappear in the application of competition law provisions; rather, they are losing their dominant, identity-defining position.

On the contrary, however, integration remains the overriding goal, lying behind any changes in direction which may appear in the direct application of the competition law provisions (as shown below).

See also eg., Bos, P-V., ECLR (7) 1995 p.412; Wesseling, R., ECLR (2) 1997 p.95; Wesseling, R., ELR (22) 1997 p.44-5.

¹¹⁰ See above p.26.

¹¹¹ See above at p.13.

¹¹² *ibid*, at p.22.

The Commission goes on to highlight the benefits to be gained from structures of undistorted competition within the Community as including static efficiencies (where competitive pressures reduce the price in high priced Member States to levels nearer those in lower-priced Member States) and lower prices (because of 'natural' cost advantages or greater competitive pressures). Further, dynamic efficiencies involve the increasing competitive pressures, which encourage firms to greater efficiencies (e.g. economies of scale).

See also, Commission Green Paper on Vertical Restraints, *ibid* at p.1.

It cannot be maintained that the objective of undistorted competition *alone* is necessary to obtain the benefits of an integrated market, with the consequence that the integration objective is subordinate to that goal. The integrated Single Market is *based* upon a system of undistorted competition, and there must be a fully integrated market to obtain those benefits in the first place. They are not (and never were¹¹³) two incompatible and opposing aims. Indeed, the benefits envisaged by the Commission as deriving from structures of undistorted competition mirror those that should derive from integrated markets.¹¹⁴

To cite *Amato*, the relationship between competition and integration is a circular one:

'...on the one side the process of integration has greatly enhanced the role of competition, on the other competition has become the main weapon that the integration could use to enforce its own goals. And the process has been a circular one: more competition has resulted in more integration, more integration has resulted in more competition.'¹¹⁵

Following the SEA and the Maastricht Treaty, the *overriding* goal of integration in the application of Community competition law does not therefore simply disappear, nor does it become any less significant in Community competition law. The change that has taken place is a change in the *direct* application of the Community competition provisions. Previously the *direct* application of the competition provisions emphasised the promotion (and protection) of integration over and above the maintenance of a structure of undistorted competition (that integration was anyway deemed to bring about). A restriction on the freedom to trade across the borders of a Member State (and therefore a hindrance of the integration objective) *was taken to be* a restriction on competition within the meaning of Article 81(1) EC. Following the SEA and the Maastricht Treaty (and the *de jure* completion of the single market), the thrust of competition policy is rather to protect and promote the structure of undistorted competition *directly* (in order to promote and protect integration). A restriction of competition within the meaning of Article 81(1) EC *is* a hindering of the integration objective.

¹¹³ See above, where it is described how pursuing integration was deemed to lead automatically to competitive markets.

¹¹⁴ Compare benefits as listed in note 112 with those listed at p18.

¹¹⁵ in: *Amato, G. and Van Miert, K., ibid, 1997 at p.6.*

Nevertheless, the *direct* protection of single market integration may *still* take precedence in the application of the competition law provisions. The Commission states in its Green Paper that absolute territorial protection and Resale Price Maintenance which may affect interstate trade between Member States will not only continue to fall *per se* within Article 81 (1), but are unlikely to be exempted.¹¹⁶ In this sense, Community competition law must continue to be aimed at preventing private agreements that re-erect the trade barriers:

' The EC experience shows that the removal of non-tariff barriers is not sufficient for the full development of parallel trade, arbitrage and changes in distribution across Europe. For the complete success of economic integration it is necessary that producers, distributors and consumers, find it profitable to move towards the new market situation and do not take actions to avoid or counteract the effects of the Single Market measures. The elimination of barriers to trade may not achieve its objectives if producers and/or distributors introduce practices contrary to integration. Unfortunately in many cases it is likely that they have strong incentives to do so.'¹¹⁷

The emphasis on the *direct* pursuit of competition in the application of Articles 81 and 82 EC that has occurred as a result of the *de jure* completion of the Single Market is therefore qualified by the integration goal in two dimensions. First, it is limited by the *direct* protection of integration in the continued quasi-*per se* prohibition on territorial protection. Secondly, where competition is *directly* pursued in the application of Articles 81 and 82 EC, the overall objective of integration (as the main goal of the Community according to Article 2 EC) remains *paramount*: the integration of the markets remains *the reason* for the direct protection of the structures of undistorted competition.

Therefore, the *overriding* goal of competition policy has not changed. This fact was echoed by *Lord Leon Brittan*, then Commissioner for competition, when he stated:

' It should not be assumed...that the goal of 1992 has somehow changed the nature of competition policy. It has not. Rather, it has served to give new impetus to our implementation of policy and to educate both industry and governments on the crucial role of competition in Europe.'¹¹⁸

¹¹⁶ See, Executive Summary, *ibid*.

¹¹⁷ Commission Green Paper on Vertical Restraints, COM (96) 721 at para. 78.

¹¹⁸ Brittan, L., '*European Competition Policy - Keeping the Playing Field Level*', *ibid* at p.2.

As will become clear, the overriding objective of integration (both 'internal' and 'external') was behind the implementation of a Community Merger Regulation and is vital to the question of the proper scope of the Merger Regulation.

1912

1913

1914

1915

1916

1917

1918

1919

1920

1921

1922

1923

1924

1925

1926

1927

1928

1929

1930

1931

1932

1933

1934

1935

1936

1937

1938

1939

1940

1941

1942

1943

1944

1945

1946

1947

1948

III EC MERGER REGULATION: HISTORICAL OVERVIEW

A THE ISSUE

As stated above, there was no specific system of concentration control included in the Rome Treaty. The Merger Regulation suffered an extremely long incubation period of over twenty years, having been mooted for the first time by the Commission in 1972.¹¹⁹ Why was the implementation of a regulation of concentrations at the European level such a delicate issue? There are two sides to the answer:

First, the regulation of concentrations *in general* is a matter of considerable controversy as a matter of economics, politics and the law.

Secondly, within the context of the Community and the *overriding* approach of Community competition policy (based as it was upon the success of Single Market integration), concentrations were regarded as being a positive and even natural response to integration and the globalisation of the markets. Moreover, the Member States had to be convinced not only of the benefits of concentration control within the Community (controversial in itself), but also of concentration control at the *Community level*.

Each of these reasons shall be considered in turn.

B THE GENERAL CONTROVERSY

As a starting point, it must be noted that the reluctance to implement a formal and general concentration control at Community level was actually mirrored at the national level.¹²⁰ Concentrations are different. Wherein lies that difference?

¹¹⁹ The Commission explicitly informed the Council of its intention to implement a system of Community concentration control in 1972, Council Resolution of 5 December 1972 on inflation control, item VIII, OJ No. C133, 23 December 1972, p.14. This led to a formal proposal in 1973, OJ 1973 C92/1 of 31.10.1973.

¹²⁰ See Annex 1 and the dates for entry of national legislation.

The regulation of concentrations *per se* provokes political sensitivities and controversies in a greater intensity than does the control of the conduct of undertakings:

'Intervention to prevent a concentration is an interference with the operation of the free market in which, generally, shareholders are left to buy and sell shares as they deem appropriate. Some proponents of the free market argue that interference is justified only where a concentration would have a seriously damaging effect on the competitive structure of an industry...Others however, more sceptical about the operation of the free market, argue that a more interventionist stance should be adopted so that various socio-political considerations...can also be taken into account.¹²¹

Hence, unrestricted concentration activity pertains more to liberal ideas on natural forces of the free market. Restrictive agreements *directly* affect competitors' freedom to act in line with the natural forces of free competition, but concentration control constitutes a form of *structural* regulation. Concentrations may in fact be a response to such natural market forces. They may be necessary to enhance efficiency and competitiveness of an individual firm. They may even be necessary for the continued survival of a company.¹²²

Nevertheless, where a political order wishes to promote structures of free competition, the control of concentrations may be deemed necessary. This is in recognition of the changes in economic power in a given market that concentrations can effect. Concentrations establish structural control - the control of permanent or long-run contractual relations among suppliers; they may create the *conditions* in which anti-competitive conduct is more likely. Thus:

'... they can create or enhance interdependencies among buyers and sellers and thereby enhance the likelihood of joint or co-operative exercise of market power or the abuse of economic power against small trading partners ...The rationale for the anti-trust oversight of concentration structure lies in the influence of market structure on the feasibility and profitability of conduct inconsistent with efficiency and economic freedom.¹²³

¹²¹ Whish, *Competition Law*, 1993, 3rd Edition, at p.664.

¹²² See eg., *Continental Mergers are Different*, Centre for Business Strategy, London Business School, 1990 at pp.106-7; Bishop, M. and Kay, J., *European Mergers and Merger Policy*, *ibid*, 1993, p.295.

¹²³ Boner, R. and Krueger, R. *The Basics of Antitrust Policy - A Review of Ten Nations and the European Communities*, World Bank Technical Paper Number 160, 1991 at p.68.

In relation to this concern, it has further been suggested that structural *ex ante* regulation is often superior to *ex post* conduct regulation because of the practical informational difficulties faced by the regulator in controlling anti-competitive conduct:

'...the merit of structural regulation...is that it stops the additional incentive and opportunity for anti-competitive behaviour. Conduct regulation aims to address that behaviour directly, but it is questionable whether the authorities are always sufficiently well-informed to detect undesirable conduct, and to impose effective and appropriate remedies. Thus, structural regulation eases problems of enforcement...'¹²⁴

Yet even if we accept that maintaining competitive market structures denies market players the *opportunity* to behave anti-competitively, this does not necessarily condone the regulation of concentrations. It must be shown that firms enjoying a position of economic power on a given market *will* act anti-competitively and are capable of doing so over a long period of time; in short, that they should be legally punished for just such a position.

There are contrasting positions adopted on this point in academic thought. The most traditional and diametrically opposed are the Harvard and the Chicago Schools.

1 The Harvard School

According to the Harvard School¹²⁵ in the US, the potential to behave anti-competitively in a position of economic power relies upon the presence of natural barriers to entry on a concentrated market (for example, economies of scale, absolute cost advantages and consumer loyalty). These barriers enable an established dominant firm to maintain and exploit its position.

¹²⁴ Kay, J. and Vickers, J., 'Regulatory Reform in Britain', Economic Policy, Oct. 1988. But see the criticism of this proposition in 'Discussion', Kay and Vickers, *ibid.*, at pp.345-349, in particular at p. 344 and p.346-7.

¹²⁵ e.g., Bain, 'Barriers to New Competition' 1956 Harvard University Press, Cambridge; Kaysen and Turner, 'Antitrust Policy: An Economic and Legal Analysis' 1959 Harvard University Press, Cambridge; Galbraith, 'The New Industrial State' 1967,); Scherer, F. and Ross, D., 'Industrial Market Structure and Economic Performance' 3.Ed., 1990; Adams, W. and Brock, J., 'Revitalising a Structural Antitrust Policy', 39 Antitrust Bulletin (1994) 235.

The Harvard School represents a structural approach to competition regulation. It presumes that there is, in general, a positive link between intense competition and increases in social welfare, based upon the direct causal links between structure, conduct and performance. Hence, competition and competitive market *structures* should be defended, and thereby concentrations which would create or consolidate an undesirably concentrated market structure should be prohibited.¹²⁶ Taken to its limits, it is suggested that if market structure is taken care of, market conduct and performance may even take care of themselves.

2 The Chicago School

To this picture must, in contemporary competition policy thinking, be added the critique of the Chicago School.¹²⁷ This school questioned the substantiality of these barriers to entry. They claimed that the Harvard School had exaggerated their size and effect. Many barriers pertained to by that school - where they are not artificial - are not barriers at all but actually result in a benefit to welfare through efficiency gains. If a dominant firm were to charge supra-competitive prices in the absence of artificial barriers to entry, new and dynamic competition would quickly enter the relevant market. Therefore:

'Antitrust...can be confined to the demolition of arbitrary (deliberately devised and imposed) barriers to entry and the prevention of the creation of such barriers. It need not confuse itself with such tasks as attempting to break up major firms in highly concentrated industries'.¹²⁸

Clearly, this defines a different line on the appropriate approach to monopoly and concentration policy. The causal links between structure, conduct and performance are not regarded as being completely deterministic. Therefore, a neutral stance is adopted with regard to concentrated markets. Rather, market *conduct* should be

¹²⁶ In favour of structural regulation on the basis that economic theory suggests that markets cannot be left completely on their own, see eg, van Mourik, Aad, *The Role of Competition Policy in a Market Economy*, in: Nicolaidis, P. and van der Klugt, A., *Competition Policy of the European Community*, 1994, European Institute of Public Administration, Maastricht.

¹²⁷ e.g., Stigler, *The Organisation of Industry* 1988 Harewood; Bork, *The Antitrust Paradox* 1978 N.Y. There can be no doubt that it has been of substantial influence in US Antitrust. For useful demonstrations of the debate, see Lonbay, J. (ed.), *ibid*; Williamson, *'Antitrust Enforcement: Where it has been; where it is going'* in: *Antitrust Economics* (1989) Oxford; Posner, *'The Chicago School of Antitrust Analysis'* (1979) 127 *University of Pennsylvania Law Review* 925-48.

¹²⁸ Brozen, *'Competition, Efficiency and Antitrust'* in: *The Competitive EC: Selected Readings* (1975).

regulated in a cost-benefit approach. There should be a case-by-case assessment of the conduct of large firms to assess whether the benefits of large size (e.g. economies of scale) might outweigh the anti-competitive costs. According to this view, a concentration policy is not strictly necessary, since a firm created by a concentration can be assessed and controlled in the same way as a large firm.

Clearly, although founded upon economic theory, the two schools would be attractive for very different political ideologies. Yet the ultimate aim of the two is the same - to explain the effect of concentrated markets for the aim of maintaining structures of free competition (in the interests of consumer welfare). To this extent, recourse to empirical evidence may be made.

3 Empirical Evidence

There is no doubt that concentrations may engender efficiency benefits in the form of economies of scale which may override competition concerns for a particular industry:

' Cartels tend to preserve the status quo and keep less efficient business units in existence, thereby enabling the more efficient firms to make comfortable profits. Concentrations, on the other hand, are thought to play a more dynamic role in the development of the economy. Economies of scale have almost become a slogan which is repeatedly invoked so as to grant complete immunity to concentrations. ¹²⁹

According to empirical evidence however, the potential for negative effects of a concentration on a given market for the ultimate consumer tend to outweigh the positive.¹³⁰ Generally, concentrations often do not lead to efficient economies of

¹²⁹ Joliet, R., *Monopolisation and the Abuse of a Dominant Position*, (1969), RTDE p259.

¹³⁰ Recognised explicitly by the Commission in its Third Report on Competition Policy (1973) at paragraph 27.

See for a good summary of the economics involved in the trade-off between the benefits and problems of a monopoly situation, Van Mourik, Aad, *The Role of Competition Policy in a Market Economy*, in: Nicolaidis, P. and van der Klugt, A., *Competition Policy of the European Community*, 1994, European Institute of Public Administration, Maastricht.

For a more detailed analysis, see Jacquemin, A., Buigues, P. and Ilzkovitz, F., *Horizontal Concentrations and Competition Policy in the European Community*, in: *European Economy*, May 1989, No.40 at pp. 17-22. They conclude that the theoretical argument about the costs and benefits of concentrations does not allow a general presumption for or against regulation. Regarding empirical evidence, they suggest that: *'a body of convergent evidence suggests that concentrations are far from being a panacea to improve competitiveness'*. They go on to the less sweeping, yet still consistent, conclusion that a general presumption *in favour* of such

scale, and the post-merger performance of the merged entity is often no better than the performance of the separate undertakings. Concentrations will often lead to insuperable barriers to entry for new entrants on the market and anti-competitive conduct by the merged entity.¹³¹ A political system that aims to promote structures of free competition and competitiveness should lean towards regulation rather than apathy with regard to mergers.

Structural regulation and conduct regulation should therefore be seen as complementary. The one does not obviate the need for the other.¹³²

As noted repeatedly above, this was not however the original approach adopted in the Rome Treaty. The Rome Treaty only regulated private conduct of firms rather than structural changes of the market. This may be contrasted with the ECSC Treaty of 1951, which had given the High Authority the right to declare a concentration in the coal or steel industry 'unlawful', and to prohibit it, if it so chose.

concentrations is *not* justified. Kay however criticises the conclusions they make on the basis of the empirical evidence they have used. He states that a more accurate interpretation would be '*the only conclusion to be drawn from the empirical evidence is that a general presumption against (horizontal) concentrations is justified*', Kay, N., '*Mergers, acquisitions and the completion of the internal market*', in: Hughes, K.(ed.), '*European Competitiveness*', 1993, Cambridge University Press. It should be noted however that the authors draw that final conclusion in the *European* context (and in consideration of the fact that the empirical evidence does not refer to the dynamic conditions which are the result of the 1992 single market programme). This may therefore explain their more cautionary approach.

Most strictly, see Blank, *ibid*, who considers that concentrations in general represent as much of a danger to competition as cartels and that the possible efficiency gains are overstated at pp.68-81;127.

Generally, see eg., See also, eg., Meeks, G., '*Disappointing Marriage: A Study of the Gains from Concentration*', (1977), Cambridge University Press, Cambridge; Hughes, A., '*The impact of concentration: a survey of empirical evidence for the UK*', in: Fairburn, J.A. and Kay, J.A.(eds), '*Mergers and Merger Policy*', Oxford University Press, Oxford, pp.30-98; Whish, 1993, *ibid*, p.669-671; Jacquemin, A.P., '*Concentration and European Policy*', in: '*Concentration and Competition Policy in the European Community*', Admiraal, P.(ed), 1990.

¹³¹ Whish, 1993 *ibid*, at p.671.

¹³² Boner and Krueger, *ibid*, p.68; Van Mourik, Aad, '*The Role of Competition Policy in a Market Economy*', in: Nicolaidis, P. and van der Klugt, A., '*Competition Policy of the European Community*', 1994, European Institute of Public Administration, Maastricht; Whish, 1993, *ibid*, p.669-671; Jacquemin, A.P., '*Concentration and European Policy*', in: '*Concentration and Competition Policy in the European Community*', Admiraal, P.(ed), 1990; Jacquemin, A., Buigues, P. and Ilzkovitz, F., '*Horizontal Concentrations and Competition Policy in the European Community*', in: *European Economy*, May 1989, No.40 at pp. 17-22; Kay, N., '*Concentrations, acquisitions and the completion of the internal market*', in: Hughes, K.(ed.), '*European Competitiveness*', 1993, Cambridge University Press; Meeks, G., '*Disappointing Marriage: A Study of the Gains from Concentration*', (1977), Cambridge University Press, Cambridge; Hughes, A., '*The impact of concentration: a survey of empirical*

On the basis of the empirical evidence concerning the effect of concentrations however, the omission of a concentration control in the Rome Treaty is surprising. The objective of the Community was the integration of the markets (Article 2 EC), whereby the maintenance of structures of undistorted competition constituted a means of achieving this aim (Article 3g EC). Was it the result of an adherence to a specific economic theory that explains the omission, or was it the pursuit of more pressing aims that lay behind the Community's apparent benevolent attitude to mergers outside the coal and steel sectors?

C THE EUROPEAN CONTROVERSY

The regulation of concentrations at the Community level concerns two specific issues. First, it is necessary to consider the need to control concentrations within the Community. Secondly, it is necessary to consider the need for such control to take place *centrally*, at the Community level.

1 The Need for Concentration Control within Community

1.1 The Need of Concentration Control and the Rome Treaty

The general theoretical analysis above has demonstrated that there was some debate about the significance of merger control in a legal and political order that pursues structures of undistorted competition. Empirical evidence however provides a persuasive reason for the regulation and control of concentrations in preference to a more *laissez-faire* approach.

Yet the Community approach to concentration control at the time of the implementation of Rome Treaty was not based upon this theoretical debate concerning the effect of concentrations on the structures of free competition within the Community. Rather, it was based upon *political* concerns. This explains the disparity in approach between the ECSC Treaty (that included a system of concentration control) and the Rome Treaty (that did not include a system of concentration control). For the coal and steel industry had been the basis of German

evidence for the UK', in: Fairburn, J.A. and Kay, J.A.(eds), '*Concentrations and Concentrations Policy*', Oxford University Press, Oxford, pp.30-98.

military machine in the Second World War, and there was palpable political concern to restrict significant levels of national concentration in that sector.¹³³

On the other hand, during the negotiations of the Rome Treaty in the mid-1950's there were perceived no political reasons to control concentration activity in industries other than coal and steel.¹³⁴ For this reason, a concentration control was missing from the Community competition laws enshrined in the Treaty; concentrations were not perceived to present a problem. This conclusion is supported by the fact that none of the Member States themselves had any system of concentration control at that time.¹³⁵ Economic considerations that there were centred not upon the potentially adverse effect of too much concentration on a specific market, but rather upon the need for the growth and expansion of companies in the progress of the reparation of the war-torn national economies.

As the national economies of the Member States began to recover, this benevolent attitude of the Community towards concentrations did not disappear entirely, but merely shifted their focus. Hence, they concentrated upon the globalisation phenomenon, and the need for European companies to compete with the American and Asian markets. Unregulated concentration activity was deemed to be important in allowing the corporate restructuring which was necessary for the opening up of national markets to Community and world markets.¹³⁶ Community firms began to recognise the need to adapt and to grow in order to increase profitability, efficiency and technical progress. Concentration and acquisition was therefore a natural and legitimate reaction to the goal of integration of the Member State markets, and the Community adopted a correspondingly benevolent attitude towards them.¹³⁷

¹³³ See eg., Lord Leon Brittan, *Competition Policy and Merger Control in the Single European Market*, *ibid*, p.23.

It may be submitted that the Freiburger Ordoliberalen School was influential in this approach. They had highlighted the need to regulate for a competitive economy to prevent the building up of private power in too few hands, possibly leading to links with public power, see note 15 above.

¹³⁴ See eg., 'Concentration Control in the EC: a Survey of European Competition Laws', London, Kluwer, 1988 at p.222; Bourgeois, J.H.J. and Langeheine, B., *Jurisdictional Issues: The EEC Merger Control Regulation, Member State Laws, and Articles 85 and 86*, *Fordham International Law Journal*, (1990-1), Vol.14 387-411 at p.497; Lord Leon Brittan, *Competition Policy and Merger Control in the Single European Market*, *ibid*, p.23.

¹³⁵ Germany was the first in 1973 and France in 1977. When it joined the Community in 1973, the UK already had a system of merger control (dating from 1965). For details of all Member States, see Annex 1.

¹³⁶ So-called 'external integration', see above at p.9.

¹³⁷ See eg., Commission Memorandum, p.8; See Von der Groeben, M. H., Member of the European Commission, Address to the European Parliament of 16 June 1965, 'La politique de

Nevertheless, the Commission was aware of the threat that concentrations could represent to the structures of free competition within the Community that constitute the means of achieving the integrated market (Article 3g EC in conjunction with Article 2 EC). Powerful concentration of industries along national lines could act to foreclose individual markets and hinder the integration process. Concentrations could therefore present a problem with regard to the Community objectives.

A dichotomy in the approach towards concentrations within the Community arose. It was explicitly expressed by the Commission in its Memorandum of 1966.

1.2 Concentration Control and the Commission Memorandum of 1966

The issues and concerns presented by concentrations prompted a Commission study in 1966 entitled '*Le Problème de la Concentration dans le Marché Commun*'. In this Report, the Commission detailed precisely the *dichotomy* that concentrations represented at the Community level.¹³⁸ While there clearly remained a bias towards the *positive* effects that concentrations can have for the Community, the Commission also considered that it was necessary to control concentrations that could lead to *monopolistic* conditions on a given market. Thus, it stated that:

'Cette adaptation des entreprises aux dimensions du marché commun va d'ailleurs dans le sens des objectifs du traité de Rome. La croissance des entreprises permettra une amélioration de la rentabilité, une accélération du progrès technique et une réduction des coûts de production...Une raison supplémentaire d'agrandissement des firmes européennes est la concurrence internationale de plus en plus vive sur les marchés mondiaux...'¹³⁹

while maintaining that:

concurrence partie intégrante de la politique économique dans le Marché communautaire', Doc. 8158/1, VI/1965/5.

This policy has not been without reproach. See eg., Kay, who presents evidence that the subversion of internal market objectives to external market objectives and the benevolent attitude towards concentrations has the very opposite effect, restricting competition in the internal market, which in turn restricts Community competitiveness vis-à-vis the rest of the world. According to Kay, the two agendas are actually consistent where the Community directly pursues a system of undistorted competition as a primary and ultimate aim. Kay, N., '*Concentrations, acquisitions and the internal market*', in: Hughes, K., *European Competitiveness*, 1993, Cambridge.

¹³⁸ This dichotomy remains discernible. More recently the balance of the equation has however changed. See above, p.9.

¹³⁹ Commission Memorandum, 1966, *ibid* at p.7.

'Une concurrence efficace entre entreprises oligopolistiques répond aux objectifs du Traité. Cette concurrence peut favoriser le progrès technique et économique à de multiples égards et elle peut en même temps être suffisamment intensive pour que les utilisateurs et les consommateurs bénéficient de ce progrès.

En revanche, il y a lieu, du point de vue de la concurrence, de formuler des réserves à l'encontre des concentrations sd traduisant par la création de situations de monopole dans le marché commun.'¹⁴⁰

1.3 Commission Proposals for a Merger Regulation

1.3.1 The 1970's

In the 1970's, the Commission's conviction that there was a need for a system of Community merger control to prevent the creation of monopolistic markets gathered momentum. The Commission explicitly informed the Council in 1972 of its intention 'to submit, independently of the application of Article 86 (now Article 82 EC) to specific cases, proposals for the introduction of more systematic supervision arrangements for mergers reaching a certain scale'.¹⁴¹ It was an intention that led to a formal proposal.¹⁴²

The reasons for the Commission's proposal were given in detail in its Third Report on Competition Policy. Again, the dichotomy that mergers represented for the Community objective of successful integration was presented:

'It is incontrovertible that the process of industrial concentration is on the increase. The causes lie largely in the desire and need of Community firms to adapt constantly to the new scale of their markets and to improve their competitiveness on the world market. Many mergers, as a result of the structure of the markets in which they occur, in no way lessen competition but, on the contrary, can increase it. However the Commission cannot overlook that the EEC Treaty, in making it responsible for applying the rules on competition, requires it to preserve the unity of the Common Market, to ensure that the market remains open and ensure effective competition. Excessive concentration is likely to obstruct these aims'.¹⁴³

¹⁴⁰ *ibid* at p.11.

¹⁴¹ See Council Resolution of 5 December 1972 on inflation control, item VIII. OJ No. C133, 23 December 1972, p.14.

¹⁴² Proposal by the Council of a Regulation for the Control of Mergers, OJ C92 of 31.10.1973.

¹⁴³ *ibid* at pp.28-9. See also, in particular, pp.31-3.

The Commission no longer limited the necessity for a system of Community concentration control to a prevention of the creation of *monopolistic* market conditions. The substantive test of the proposed Regulation concerned the acquisition or enhancing of the power to hinder effective competition, unless the concentration is indispensable to the attainment of an objective given priority by the Community (Article 1).

The European Parliament had also expressed its belief in 1971 that there should be a system of Community concentration control.¹⁴⁴ Therefore, it was not surprising that the proposal (with some amendments¹⁴⁵) was approved by the Parliament.¹⁴⁶ The momentum towards the successful implementation of a Merger Regulation were however stalled in the Council.¹⁴⁷ Here, the proposal encountered intractable Member State resistance.¹⁴⁸

While they had recognised that there was the need for such a system in general terms,¹⁴⁹ in practice the Member States were extremely suspicious about ceding national control over concentrations to a supranational authority. The main reservations of the Member States were founded upon the worry that national social and regional policies may not be adequately safeguarded in individual decisions taken at the Community level.¹⁵⁰ In 1980, the Commission, in restating its opinion that there was a need for a Community Merger Regulation, highlighted the main political concerns preventing the Council from implementing a Regulation:

'(i) the legal basis of any such Regulation which the Commission feels should refer not only to Article 87 but also Article 235 of the EEC Treaty;

¹⁴⁴ Resolution of the European Parliament on the rules of competition and the position of European firms in the common market and in the world economy, OJ C 66 of 1.7.1971, p.12.

¹⁴⁵ For the details of these amendments, see Commission Fourth Report on Competition Policy at p.19.

¹⁴⁶ OJ C23 of 8.3.1974, p.19. The Economic and Social Committee followed suit, see OJ C88 of 26.7.1974, p.19.

¹⁴⁷ A series of meetings took place of a Council Working Party on Economic Questions. In 1976 it submitted an interim report to the Committee of Permanent Representatives, calling for political guidelines on five main problems - the legal basis for the proposed regulation and the principle of premerger control, the scope of the regulation, the possibility of derogations from the concept of incompatibility with the common market, notification of planned mergers and decision-making powers. The Committee considered the Report during 1977. See European Commission, Seventh Report on Competition Policy at p.57.

¹⁴⁸ In detail on this, see Markert, K, '*EEC policy towards mergers*', in: George, K. and Joll, C. (eds) '*Competition Policy in the UK and EEC*', 1975 Cambridge University Press.

¹⁴⁹ As agreed upon at the Paris Summit, 21.10.1972, EC-Bulletin Nr. 10-1972, p.20.

¹⁵⁰ European Commission, Fourth Report on Competition Policy, p.19.

(ii) a clearly-defined sharing of responsibilities between the national and Community authorities in applying the relevant national law and implementing a future Community law;

(iii) closer association by the Member States in the Commission's decision-making process when establishing that a given merger is incompatible with the common market rules of competition or when granting exemption to these rules on account of other objectives.¹⁵¹

1.3.2 The Early 1980's

In recognition of the inherent limitations of the established use of Article 82 EC as a system of structural control, the Commission increased its calls for a specific legal provision to control concentrations. In 1981 it made a further proposal.¹⁵² However, it was again met by resistance from the Member States, in particular the UK and Germany. Their basic reluctance was compounded by the decline of merger activity in the 1970's.

1.3.3 The Single European Act 1986

Fundamental for the final implementation of a European Merger Regulation was the Single European Act in 1986 and its implications.

As described above, the Single European Act detailed the completion of the Single Market by 1992 in legal terms. Within the context of this development, the Commission determined that in general the Community goal under Article 3g EC of ensuring the non-distortion of competition within the Common Market should be reinforced (rather than reduced).¹⁵³

¹⁵¹ European Commission, Tenth Report on Competition Policy, p.29.

¹⁵² COM (81)773, 12.2.1982.

The proposal was approved by the Economic and Social Committee, subject to a number of comments, see OJ C 252, 27.9.1982.

The proposal was approved by the European Parliament, subject to a number of recommendations, see OJ C 322 of 28.11.1983.

¹⁵³ See above, pp21-23.

Specifically, see '*Horizontal Mergers and Competition Policy in the European Community*', in: European Economy, May 1989, No.40, considering the question: should European competition policy be strengthened or loosened in the context of achieving the internal market, within the context of horizontal concentrations?'

See also, in particular, the study by T. Padoa-Schioppa *et al.*, '*Efficiency, stability and equity*', Oxford University Press, 1987. But cf. Davidow, who states that it was never obvious that the EC had to have greater antitrust powers just because it is a common market. He submits that there is no consistent relationship between strengthened antitrust enforcement and the integration of nation-states into a common market. The Commission strengthened its competition policy on the basis of the 1992 Single Market Programme, but the real reasons

The Commission thereby became increasingly concerned that there were types of co-operation - in particular national mergers affecting cross-border markets - which might significantly hinder this integration process. The arguments centred around the reduction in the number of independent actors that mergers effect. As a consequence of this structural change, national champions might attempt to foreclose their national markets to improve their competitive position in a potential or actual Community-wide market. The Commission considered that merger control was a necessary corollary of the 1992 programme.

In tandem with this change in attitude was the expected proliferation of mergers as firms responded to the new market conditions. The Single Market programme, and the anticipated increase in competition, forced European companies to restructure and to concentrate on their core businesses, an impetus which had be initiated by the market integration dynamic precipitated by the Rome Treaty. This contributed to an increase in concentrations taking place within the Community for two reasons. First, there were divestments by firms of non-core activities in which they did not enjoy a comparative advantage, which increased the number of mergers and acquisitions. Secondly, European firms recognised the need to expand Community-wide operations as the Community markets integrate and grow. Larger Community firms realised that they had to be present in the different Member States in order not to forgo demand. The easiest and quickest method to achieve this was of course to take-over or merge with firms in other Member States. Added to this dynamic were firms of non-Community countries attempting to gain some representation in Europe, fearing that the Community might become a near impenetrable economic base. In the late 1980's and early 1990's, there was a significant increase in cross-border concentrations.¹⁵⁴

were political and bureaucratic, in: *Competition Policy, Merger Control and the European Community's 1992 Program*, Columbia Journal of Transnational Law, 1991, Vol. 29, pp.11-40.

¹⁵⁴ Statistics show that there was a corresponding peak of concentration activity within the Community in the period 1989-1990, see eg. '*Competition and Integration - Community concentration control policy*', European Economy, European Commission, Directorate-General for Economic and Financial Affairs at p.22. On the reasons for this, see eg., Jacquemin, A., '*The International Dimension of European Competition Policy*', Journal of Common Market Studies, (1993) 31 pp.91-101 at pp.92-94.

As a result, the Commission became ever more vocal in its call for a Community Merger Regulation in the mid to late 1980's.¹⁵⁵ In 1984 (taking into account the proposals and suggestions made by the European Parliament and the Economic and Social Committee with regard to the 1981 proposal¹⁵⁶) it made a modified proposal for the adoption of a Regulation to control mergers.¹⁵⁷ Its efforts were again rejected by the Member States. Nevertheless, it noted that the majority of Member States were in agreement about the need for a system of Community control, if of differing opinions about how such a system should be framed.¹⁵⁸

The Commission modified its 1984 proposal in 1986 with respect to the procedures under the proposed Regulation.¹⁵⁹ There was however no progress in the Council towards a final implementation of a Regulation. Again, in its Report on Competition Policy for that year, the Commission however emphasised that such a system of control was necessary to achieve an integrated internal market by 1992.¹⁶⁰ The European Parliament meanwhile suggested that the Commission should withdraw the proposal altogether (which had been the result of a series of modifications to the original 1973 proposal) and make an entirely fresh start in the attempt to fill the important gap in Community competition policy.¹⁶¹

While Member State resistance was still proving decisive, a further development occurred that indirectly added impetus to the eventual implementation of a Community Merger Regulation. This was the *Philip Morris* case, in which the Court of Justice concluded that Article 81 EC may be applied to mergers.¹⁶² The unclarity of the case decision itself and the inappropriateness of Article 81 EC as a provision of merger control meant that the after-effects of the *Philip Morris* judgment were instrumental in persuading the Member States.¹⁶³

¹⁵⁵ Krimphove, D., *'Europäische Fusionskontrolle'*, 1992, Carl Heymanns Verlag KG, at pp. 91-110.

¹⁵⁶ See above, note 152.

¹⁵⁷ COM (84) 3.2.1984.

¹⁵⁸ See Commission Fourteenth Report, p.50 and Commission Fifteenth Report at p.47.

In particular, the proposed exclusivity of control by the Commission for mergers falling within the scope of the Regulation had been a stumbling block in the Council. For details (and the compromise reached), see below at pp. 140-50.

¹⁵⁹ COM (86)675, 2.12.1986.

¹⁶⁰ Commission Sixteenth Report, p.49.

¹⁶¹ See Parliament Resolution on the Fifteenth Report of the Commission of the EC on Competition Policy at point 29, in: Annex 1, Commission Sixteenth Report.

¹⁶² Cases 142/84 and 156/84 (1987) ECR 4487, (1988) 4 CMLR 24. For full details, see below.

¹⁶³ See Bulmer, S., *'Institutions and Policy Change in the European Communities: the Case of Concentration Control'*, 1994 Public Administration, 72, 423-444 at p. 431-2. He notes that

These developments in particular changed the opinion of the previously sceptical European industry.¹⁶⁴ Furthermore, as integration was progressing, the benefits of centralised control of concentrations in terms of regulatory efficiency of a one-stop shop rather than multiple referrals to individual Member States was, for European industry, tangible.¹⁶⁵

On 25th April 1988, the Commission once again offered a modified proposal.¹⁶⁶ Following consultations with the European Parliament and the Economic and Social Committee, the Commission made a second (amended) proposal in 1988 in November.¹⁶⁷

It was this proposal that was finally adopted by the Council on 21 December 1989.¹⁶⁸ The Commission stated in its 1990 Report on Competition Policy that the logic of the single market was behind the Member States unanimous agreement to implement a European Merger Regulation.¹⁶⁹ It went on to state:

the legal uncertainty caused businesses to begin to notify concentration activity to DG IV, even though there was no clear set of rules and conventions, and created such concern that corporate actors joined the existing alliance for supranational regulation.

See also, eg., Bulmer, S., *'The Supranational Regulation of Mergers'*, RUSEL Working Paper May 1993; Woolcock, S., *'European Concentrations: National or Community Controls?'*, RIIA Discussion Papers, 15, 1989; Korah, V. and Lasok, P., *'Philip Morris and its Aftermath'*, CMLRev (1988) vol.25, no.2, pp.333-68; Broberg, M., *The European Commission's Jurisdiction to Scrutinise Mergers*, 1998 *ibid.*, at p.2.

¹⁶⁴ See eg., Woolcock, S., 1989 *ibid.*, p.18.

¹⁶⁵ In particular, the EC industrialists' interest group, UNICE. See eg. UNICE *'Concentration control at community level'*, UNICE declaration of 10 Nov.1987, Brussels; UNICE *'Amended proposal for a Council regulation on the control of concentrations between undertakings'*, UNICE position of 4 May 1988, Brussels; UNICE *'Draft regulation regarding the control of concentrations'*, UNICE note of 17 Nov. 1989. Brussels; UNICE *'Draft regulation on concentration control'*, UNICE position paper of 14 Dec.1989 Brussels.

¹⁶⁶ OJ C 130 of 19.5.1988.

¹⁶⁷ COM(88) 734 25.11.1988.

¹⁶⁸ OJ L395, 30.12.1989.

¹⁶⁹ In support of this conclusion, see eg. the statements of UK Junior Trade Minister *John Redwood* at a press conference held to mark the adoption of Regulation 4064/89, who stressed the need in view of business facing multiple hurdles in the execution of concentrations (Independent, 22 December 1989). See also, *Baroness Elles*, MEP, (then Chairman of the Legal Affairs and Citizen's Rights Committee of the European Parliament) in: House of Lords Select Committee on the European Communities, *Concentration Control*, Session 1988/89, 6th Report at p.10 (London, 1989); Schwarz, E., *'Politics as Usual: The History of European Community Concentration Control'*, (1993) 18 *Yale Journal of International Law* 607-662; Bulmer, S., *Institutions and Policy Change in the European Communities: the Case of Merger Control*, Public Administration, Volume 72, 1994 (423-444) at pp.432-3; Woolcock, S., *European mergers: national or Community controls?* RIIA Discussion Paper No.15, London; Lord Leon Brittan, *Competition Policy and Merger Control in the Single European Market*, *ibid.*, at p.32.

'Merger control is necessary for both economic and political reasons. The process of restructuring European industry has given rise and will continue to give rise to a wave of mergers. Although many such mergers have not posed any problems from the competition point of view, it must be ensured that they do not in the long run jeopardise the competition process, which lies at the heart of the common market and is essential in securing all the benefits linked with the single market. In addition, it has become ever more clearly apparent that national rules are inadequate as a means of controlling Community-scale mergers, mainly because such rules are restricted to the respective territories of the Member States concerned. Clearly, Community law must be applied in controlling and examining large-scale mergers, where the reference market is increasingly the Community as a whole or a large part of it. The new Regulation also introduces a system of control for Member States which do not have any specific rules in this area'.¹⁷⁰

Since its first proposal, the Commission had stressed the need for a system of merger control within the Community for economic reasons, within the context of the integration aim. After all, the integrated market was based upon a system of undistorted competition. Concentrations should not therefore be allowed to distort the structures of competition within the Community so that the integration process might be hindered. On the other hand, it is important to examine the further assumption of the Commission that a structure of national systems of merger control was not adequate to fulfil the need for a system of concentration control within the Community. The UK government in particular appeared not to be convinced of this need even as late as May 1989.¹⁷¹ Why was there a need for a system of *centralised* control under *Community* law?

2 The Need for Centralised Control

If the Commission was convinced of the need to control concentrations *per se* (in terms of the goal of integration and its success), this was not to assume that there was automatically an objective need for a *centralised* Community system of control.¹⁷²

¹⁷⁰ Commission Nineteenth Report on Competition Policy, pp.33-4.

¹⁷¹ See statement by Director General of Fair Trading, *Sir Gordon Borrie*, arguing that increased international co-operation could be adequately taken into account in assessments of the structure of competition on national markets, in: *Financial Times*, 12 May 1989. Also the views of *Lord Young*, then Secretary of State for Trade and Industry, *Financial Times*, 13 May 1989.

¹⁷² Note that the Member States had agreed as early as 1972 that there was a need for the control of mergers in accordance with the aims of the Community. They were not however

Could not the Commission have encouraged national Member States to adopt their own systems of concentration control? Would those already in place not be sufficient to control concentrations within the Community? Recourse to economic theory demonstrates that within the Community market, centralised control of concentrations was a requisite.

2.1 Economic Theory of Centralised and Decentralised Regulation

2.1.1 The Tiebout Model

Traditionally, economic analysis of the costs and benefits of decentralised regulation by the Community has applied *Tiebout's* model of the efficient provision of local public goods.¹⁷³ The model points initially to a presumption in favour of decentralisation. This presumption is operational when certain conditions are fulfilled:

- the costless mobility of citizens (or in this case, firms) between jurisdictions;
- a large number of jurisdictions;
- no external effects between jurisdictions.¹⁷⁴

Where these conditions are met, there is effective competition between jurisdictions, since the individual has the opportunity to leave one jurisdiction for another that may better serve their interest. This opportunity puts pressure on the government regulator

convinced that such control should take place at the *Community* level, Summit Conference for Heads of State or Government of the Member States, 19-20 October 1972.

¹⁷³ Tiebout, C.M., (1956), '*A pure theory of local expenditures*', *Journal of Political Economy* Vol.64, October pp. 416-24.

Application with regard to the assignment of regulatory powers see eg., Neven et al., *ibid*, at p.176; '*Competition and Integration - Community concentration control policy*' European Economy, European Commission, DG for Economic and Financial Affairs at pp. 81 and 91-92; Easterbrook, F. H., '*Antitrust and the Economics of Federalism*', (1983), *Journal of Law and Economics*, vol. XXVI pp. 23-50; Rose-Ackerman, S., (1981) '*Does Federalism Matter? Political Choice in a Federal Republic*' *Journal of Political Economy*, Vol.89 No.1 pp.152-65; Gatsios, K. and Seabright, P.B. (1989) *Regulation in the European Community*, Oxford Review of EC Policy Vol.5 No.2 pp.37-60; Neven, D.J. (1992) *Regulatory Reform in the European Community*, *American Economic Review*, Papers and Proceedings, Vol.82 pp.98-103; Klibanoff, P. and Murdoch, J. (1998) *Local Public Goods Provision with Externalities, Local Information and Local Autonomy*, MIT, mimeo.

For a general survey of the literature applying the Tiebout model, see Dourding, K., John, P. and Biggs, S., *Tiebout: a survey of the empirical literature*, *Urban Studies* 1994 Vol.31 pp.769-798.

¹⁷⁴ These conditions should be compared with the conditions identified by the McDougall Report on fiscal federalism in the EC (see below, note 978).

to enact a set of laws which will be most beneficial to the population in the individual jurisdiction.¹⁷⁵

The Tiebout presumption for decentralised regulation has been widely criticised as being of little use in real terms, on account of its very limited applicability.¹⁷⁶ *Easterbrook*¹⁷⁷ nevertheless states that where the jurisdictions can also select any set of laws they desire, the closer that the conditions are fulfilled, the more likely is competition among jurisdictions to be effective - there will be, at the very least, a powerful *tendency* toward optimal legislation.¹⁷⁸

It is unnecessary for the purposes of the analysis in hand to examine the extent to which the fulfilment of these conditions denotes a valid presumption for decentralisation since, in consideration of whether regulation should be carried out at Community or at national level, we see that these conditions for decentralisation are not met. There are large costs (including linguistic and cultural costs) involved in the mobility of firms between Member States. Furthermore, there were very few competing jurisdictions. In 1989, only five of the Member States had a system of concentration control.¹⁷⁹ Even had all fifteen Member States has some sort of system of control in 1989 however (as is the case today), the number would be too small to offer every different combination of regulatory structures possible (given the large number of regulatory questions on which each must act).

Neven et al. state that the non-fulfilment of the first two conditions is not necessarily sufficient to rebut the presumption for decentralised control: if, for instance, there is only limited mobility between jurisdictions, there may be an increased likelihood of

¹⁷⁵ Furthermore, if states collectively fear that particular policy programmes would cause exit, they would support centralised (and therefore unified) legislation, see Rose-Ackerman, S., 'Does Federalism Matter? Political Choice in a Federal Republic', Vol. 89 (1981) *Journal of Political Economy* pp. 152-165.

¹⁷⁶ CEPR, *ibid*, 1993, which considers the non-fulfilment of any of the conditions sufficient to rebut the presumption are so restrictive as to make it unhelpful for the analysis of actual governments, at pp. 59-62. See also Bewley, T. F., 'A Critique of Tiebout's Theory of Local and Public Expenditures', *Econometrica*, pp. 713-40; Gatsios, K. and Seabright P.B., 'Regulation in the European Community', *Oxford Review of Economic Policy*, Vol.5, No.2, pp. 37-60.

¹⁷⁷ Easterbrook, F., 'Antitrust and the economics of federalism', *Journal of Law and Economics*, Vol. 26, at p. 34.

¹⁷⁸ Also, see Epple, D. and Zelenitz, A., 'The Implications of Competition among Jurisdictions: does Tiebout need Politics?', Vol.89 (1981), *Journal of Political Economy*, 1197; McGuire, M., 'Group Segregation and Optimal Jurisdictions', Vol. 82, (1974), *Journal of Political Economy* 112.

¹⁷⁹ Being Germany, the UK, France, Luxembourg and Ireland. See Annex 1.

regulatory capture at a local level (since mobility is a guarantor of accountability); on the other hand, there is no reason to believe that centralisation would improve this; rather, there would simply be a danger of regulatory capture by interests other than those national ones.

Nevertheless, the absence of the third condition - the presence international spillover effects between jurisdictions (and the non-fulfilment of the third condition) - is considered by the majority of the literature to be sufficient to rebut the decentralisation presumption.¹⁸⁰ Furthermore, it was identified by the Commission in the *Padoa-Schioppa Report* in 1987¹⁸¹ (concerning a strategy for the evolution of the Community economy) as a justification for Community-level action, and was one of the three conditions highlighted in the *McDougall Report*¹⁸² for the Commission justifying centralised financial regulation.

Moreover, Article 12(2) of the draft European Union Treaty¹⁸³ drawn up by the European Parliament in 1984 included an explicit reference to the spill-over effects within the terms of a principle of subsidiarity (a reference that was later lost in the subsidiarity principle that was articulated in the Treaty of Maastricht¹⁸⁴):

'Where this Treaty confers concurrent competence on the Union, the Member States shall continue to act as long as the Union has not legislated. The Union shall only act to carry out those tasks *which may be undertaken more effectively in common* than by the Member States acting separately, in particular those whose execution requires action by the Union *because their dimension or effects extend beyond national frontiers*.'¹⁸⁵

¹⁸⁰ Rose-Ackerman, *ibid* and Neven et al., *ibid*; Bishop, M. and Kay, J., *ibid* at pp.309-10. Also, Klibanoff and Murdoch (1993), *ibid*, where there are no informational advantages of the local regulators.

But cf. Gatsios and Seabright (1989), *ibid*, who advocate decentralisation with policy co-ordination. But see the criticism of this suggested solution below.

More extreme (and in the minority), Easterbrook (1983), *ibid*, doubts that spillovers are significant enough to outweigh the virtues of decentralisation.

¹⁸¹ Europe Documents, Brussels and Luxembourg, No. 1451, 28th April 1987.

¹⁸² The McDougall Report highlighted the conditions of: the existence of economies of scale, political homogeneity and cross-frontier effects, Commission of the European Communities, *McDougall Report of the Study Group on the Role of Public Finance in European Integration* (1977, OOEPEC, Luxembourg).

¹⁸³ See, OJ (1984) C77/33.

¹⁸⁴ See below, p.163.

¹⁸⁵ Author's emphasis.

The Draft Treaty therefore also stated that the existence of spill-over effects rendered centralised regulation necessary.

Spill-over effect occurs where economic activity within one jurisdiction may effect the economic conditions in another, separate jurisdiction. Thus, in the context of concentrations, an example would be where a purely national concentration may affect a relevant product market which is not just national, but may extend over other Member States, and may even be Community-wide. Why are the spillover effects so persuasive in the overall balance?

2.1.2 The Problem of Spill-Over Effects

The basic economic premise of a spill-over effects criterion rests on the fact efficiency requires that benefits should be enjoyed by those who create them while costs should be borne by those who cause them.¹⁸⁶ Where this principle is violated, spill-over effects have occurred. Such effects have definite consequences for the regulation of competition within the Community.

a **A Level Playing Field**

First, where a national concentration having spill-over effects is assessed by the competition authority of that Member State, it is possible that this authority will consider only the effects of market power upon domestic interests rather than to foreign consumers (or at least, will weight its assessment that way).¹⁸⁷ Hence, concentrations which might be beneficial in Community terms (because of gains to shareholders, workers and consumers outside the jurisdiction of that Member State) might be prevented and, conversely, concentrations which distort competition at the Community level might be approved (on competition, or even political grounds).¹⁸⁸

Furthermore, business in the Community that may extend beyond the borders of a single Member State should be as much as possible subject to a singular set of standards (procedurally and substantively) so that there are certain parameters by which it can shape its conduct. Different standards in the regulation of concentrations

¹⁸⁶ See Emiliou, N., *Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition?'*, ELRev (1992) 383 at p.396.

¹⁸⁷ Neven et al, *ibid*, at p194-7.

¹⁸⁸ An example would be the concentration between *British Airways* and *British Caledonian*, upon which the European Commission imposed much stricter conditions than had been imposed by the Monopolies and Concentrations Commission in the UK (1988), See The Financial Times 20 December 1988.

in different national jurisdictions within the Community can lead to forum-shopping by firms and a resultant partitioning of the Single Market along national lines.¹⁸⁹

b Regulatory Efficiency and National Political Sensitivities

Secondly, there is the danger of multiple jurisdiction over one and the same concentration, and even of conflicting decisions made by different Member State authorities. This is especially true of what may be termed 'direct' spill-overs, which would be the result of cross-border concentrations. Multiple notifications and decisions may be expensive in political terms (concerning the relationship between individual Member States). Moreover, national competition authorities may encounter informational difficulties where relevant facts are located in other jurisdictions.

Furthermore, multiple national regulation of one and the same concentration is expensive in terms of time and resources for the firms involved: the facts contained in notification and the manner they are presented may differ for each national market and procedure; familiarity with different legal systems and languages is required (invoking the need for local experts); the deadlines for decision-making may differ and differences in substantive approach by the national systems may affect the predictability of the final outcome.¹⁹⁰ It is also easier and more effective to negotiate remedial action and third parties can intervene more effectively when only one authority is involved.¹⁹¹ These considerations are especially important with regard to concentration control since without speedy and efficient decision-making the optimum moment for concentration may be lost, and the target company may even fail in the meantime.

2.1.3 A Co-ordinated System of National Merger Control?

While the presence of spillovers is generally accepted in the literature as highlighting the inefficiencies of unilateral national decision-making,¹⁹² this does not however

¹⁸⁹ See eg., Temple-Lang, J., *European Community Constitutional Law and Enforcement of Community Antitrust Law*, *ibid*, p.534-5.

¹⁹⁰ The Commission states in its Green Paper that as a general rule and in comparable cases, the application of the Regulation represents a significant cost advantage for business in: Commission's Green Paper on the Review of the Merger Regulation 1996, *ibid* at para.55. See also, eg., Temple-Lang, J., *European Community Constitutional Law and Enforcement of Community Antitrust Law*, *ibid*, at p.535.

¹⁹¹ See the Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid* at para. 56.

¹⁹² Rose-Ackerman, S. *ibid*; Neven et al., *ibid*; Nevenk, D.J. (1992), *ibid*; Klibanoff, P and Murdoch, J. *ibid*.

necessarily lead to the conclusion that there should be a *centralised* policy and control. On the contrary, *Gatsios and Seabright* have argued that a co-ordination of the different national policies may be made which could take account of the externalities.¹⁹³

Neven et al. point however to the deficiencies of such co-ordination in this context.¹⁹⁴ Co-ordination should in theory be ensured by the threat of any Member State to revert to non-co-operative policy if any other Member State breached the agreed mutual policy. Yet, some states might gain more than others by breaking the co-operative agreement and centralisation insures against this. Furthermore, where the policy to be implemented involves a large degree of discretion - which the application of substantive provisions of competition law does - it may be difficult to detect whether an individual Member State is adhering to the policy agreed upon; the only way might be for the other Member States to conduct a parallel inquiry themselves.¹⁹⁵

2.1.4 Centralised Co-ordination of National Merger Control Policies?

An alternative to centralised *regulation* might be centralised *co-ordination* of the implementation of national policies by the Commission in the case of spill-overs. Such an approach would however present insurmountable difficulties. The Member States would somehow have to be persuaded by the Commission to prohibit concentrations that might be beneficial at the national level but which might be harmful at the Community level (or vice versa). Thereby however, the Commission would not have access to all the relevant information in the individual case. Therefore, the Member State would have a position of leverage, and could in its decision-making exaggerate or play down the effect of a concentration in its jurisdiction in order to force political concessions.¹⁹⁶

cf. however *Easterbrook*, whose own very specific interpretation of competition among jurisdictions in competition policy doubts that spillovers are sufficient to rebut a general presumption for decentralised policy and control, *Easterbrook*, (1983) *ibid.*

¹⁹³ *Gatsios and Seabright*, *ibid.*

¹⁹⁴ *Neven et al.*, *ibid* at p.180.

¹⁹⁵ See also, *Temple-Lang, J.*, *European Community Constitutional Law and Enforcement of Community Antitrust Law*, *ibid*, pp.590-592.

¹⁹⁶ See *Neven et al.*, *ibid* at p181, applying the Tiebout model by *Klibanoff and Murdoch* (1993), *ibid*, to European merger policy.

See also, *Temple-Lang, J.*, *ibid*, pp.590-592; *Commission of the European Communities, McDougall Report of the Study Group on the Role of Public Finance in European Integration* (1977, OOEPEC, Luxembourg).

D SUMMARY OF THE NEED FOR A EUROPEAN MERGER REGULATION

There was therefore a clear need for a system of merger control within the Community system of competition law that aimed to promote structures of undistorted competition within the Community. Following the Single European Act in particular, the process of Single Market integration was held to be based upon structures of free competition within the Community. Since concentrations often distorted these structures, the success of Single Market integration required an effective system of Community concentration control.

Furthermore, economic, political and regulatory efficiency factors determined that this system of control should be *centralised*. The Commission has consistently maintained that: *'overall, merger policy is a good illustration of a case where the gains from centralisation are high'*.¹⁹⁷ The validity of this assertion has been demonstrated by the application of the Tiebout economic model. While it is not clear the extent to which the application of this specific model played a role in the Commission's conviction (that was shared by the European Parliament), it was applied in a study made for the Commission.¹⁹⁸ Thereby, the importance of the spill-over effect that concentrations in one Member State may have in others was emphasised as being determinative in the case for centralised (Community) control. Generally, spill-over effects have been seen to independently provide justification for Community action.¹⁹⁹

Before examining the competence of the Commission to assess concentrations under the EC Merger Regulation - and the appropriateness of the jurisdictional trigger - it is necessary to consider that, at the date of the implementation of the Merger Regulation, such a legal competence was already in existence. Articles 81 and 82 EC had already been found to apply to certain concentrative transactions.

It is necessary to consider in detail the scope of these Articles to apply to concentrations, before analysing whether this pre-existing legal competence should

¹⁹⁷ CEPR, *Making Sense of Subsidiarity: How Much Centralization for Europe?* (1993, CEPR, London), p.19, n.5.

¹⁹⁸ See *Padoa Schioppa Report*, see note 181 above.

¹⁹⁹ See the *Padoa Schioppa Report* and the *McDougall Report*, notes 181 and 182 above.

have any bearing upon the appropriateness of the legal competence of the Commission to assess mergers according to the existing jurisdictional trigger of the Merger Regulation.

IV THE ESTABLISHMENT OF A LEGAL COMPETENCE TO ASSESS MERGERS UNDER COMMUNITY LAW ACCORDING TO ARTICLES 81 AND 82 EC

A THE ISSUE

Before the implementation of the Merger Regulation, a legal competence to assess mergers according to Community law had been established in the application of Articles 81 and 82 EC. The application of Articles 81 and 82 EC was however limited to certain types of concentrations.

Since Articles 81 and 82 EC are provisions of *primary* Community law, the fact that they are applicable to certain types of concentration may have a direct bearing upon the appropriateness of the turnover thresholds of the Merger Regulation (as a provision of secondary Community law). It is necessary therefore to examine in detail the scope of the application of these Articles to concentrations. It is necessary, first, to determine the types of concentrations to which they apply. Secondly, it is necessary to interpret in detail the application of the jurisdictional trigger according to which Articles 81 and 82 EC are applicable in general.

B THE LEGAL COMPETENCE TO CONTROL CONCENTRATIONS ACCORDING TO ARTICLE 82 EC

1 The Commission Memorandum 1966

As stated above, the Commission first considered the issue of concentrations within the context of the Common Market in detail in its Memorandum of 1966.²⁰⁰ Thereby, it reiterated the benefits that concentrations could bring about in the Common Market, in particular with regard to external integration in the face of global markets. Nevertheless, it expressed concern about concentrations that led to *monopoly* positions on a specific market. The Commission determined that such concentrations

²⁰⁰ Commission Memorandum 1966, *ibid*

should be controlled. Thereby, it considered the legal instruments that were available to it to implement a system of *structural* control, namely Articles 81 and 82 EC (that were, it should be recalled, primarily aimed at the control of market *conduct*).²⁰¹ While dismissing the appropriateness of Article 81 EC as a provision for concentration control²⁰², the Commission advocated the use of Article 82 EC in certain circumstances.²⁰³ It stated:

'...une concentration d'entreprises se traduisant par la monopolisation d'un marché doit être traitée, exception faite de circonstances particulières, comme l'exploitation abusive d'une position dominante au sens de l'article 86 (82).'²⁰⁴

According to the Commission, such an application corresponded to the Treaty objectives:

'Cette interprétation correspond au système et aux objectifs du Traité, étant donné que les articles 85 (81) et 86 (82) doivent garantir le fonctionnement du régime de concurrence qui doit être instauré d'après le Traité'.²⁰⁵

The Commission stated that monopolistic positions resulting from such concentrations were likely to have the same harmful effects as practices specifically mentioned as being prohibited in Article 82 (a-d) EC, for example, a limiting of production or technical development.²⁰⁶ It did not however spell out in detail the conditions when the formation of a concentration will constitute a breach of Article

²⁰¹ Commission Memorandum 1966, *ibid* at pp. 21-26.

²⁰² See the reasons below.

²⁰³ Article 82 EC provides:

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

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.'*

²⁰⁴ Commission Memorandum, 1966, *ibid* at p.26, point 26.

²⁰⁵ Commission Memorandum 1966, *ibid* at p.26 at point 26.

²⁰⁶ Note that in the year preceding the publication of the Memorandum of 1966, the Commission twice espoused this theory. See Von der Groeben, Speech before the European

82 EC. Rather, it considered that each case would depend upon its specific facts. In general, the nearer to a monopolistic position on the market a dominant undertaking is brought by means of a concentration with another undertaking or undertakings, the more likely the Commission considered the operation to fall within the scope of Article 82 EC.²⁰⁷

2 The Continental Can Decision by the Commission²⁰⁸

It was not until 1971 that the Commission put into practice the principle it had espoused in its Memorandum of 1966.

Continental Can held a dominant position on the German market (through its majority-owned subsidiary SLW) in the market for metal containers for meat products, metal containers for fish products and metal lids. SLW acquired a 81% shareholding in the capital of TDV, the main Benelux manufacturer of metal containers for meat and fish, in which it already held a 10% share.

The Commission held that this transaction virtually eliminated all competition in the relevant product markets in a 'substantial part' of the Common Market, that is an area comprised of the Netherlands, Belgium, Luxembourg and the northern and central parts of Germany. The combined entity would hold a market share of between 80 and 90 % on the relevant market. According to the Commission, SLW and TDV were capable of competing on this geographic market, even though at the time of the transaction SLW was only active on the German market and TDV on the Benelux market.

Parliament in Strasbourg on 16/06/1965, published by the EC Commission, and Commission Document, 'The Problem of Concentration in the EC', Brussels, December 1965.

²⁰⁷ Commission Memorandum, *ibid* at p.26, point 27.

Note that in the same year, *Mestmäcker* extensively considered the application of Article 82 EC to concentrations. He concluded that Article 82 EC would apply to horizontal and vertical concentrations involving an undertaking in a dominant position and resulting in the elimination of effective competition for a substantial part of the relevant product. He advised however against the application of Article 82 EC to conglomerate mergers on account of the evidentiary issues. See *Mestmäcker*, E-J, *Die Beurteilung von Unternehmenszusammenschlüssen nach Article 86 des Vertrages über die Europäische Wirtschaftsgemeinschaft*, in: Caemmerer, von E., Schlochauer, H-J and Steindorff, E, *Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, Vittorio Klostermann, Frankfurt am Main, 1966, pp322-354.

²⁰⁸ 72/21/EEC 9th December 1971, OJ 1972 L7/25 (1972) CMLR D11, CMR 9481.

In the Commission's opinion, the prohibition according to Article 82 EC applied. It stated:

'For an undertaking in a dominant position to reinforce that position by means of a merger with another undertaking with the consequence that the competition which would have existed actually or potentially in spite of the existence of the initial dominant position is in practice eliminated for the products in question in a substantial part of the Common Market constitutes behaviour which is incompatible with Article 86 (Article 82) of the Treaty'.²⁰⁹

The decision was appealed to the Court of Justice.

3 The Continental Can Judgment by the Court of Justice²¹⁰

The Court of Justice annulled the decision of the Commission for the lack of an adequate definition of the product market, in particular, the lack of consideration of supply-side substitution.²¹¹ Nevertheless, it upheld the Commission's finding that Article 82 EC can apply to certain mergers.

Its reasoning was teleological, based not only upon the specific provision itself, but upon the system and objectives of the Treaty as a whole. The Court stressed that Article 82 EC is part of a chapter devoted to the common rules on the Community's policy in the field of competition, a policy which is based upon Article 3(g) EC. According to Article 3(g) EC, the Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted.²¹² The applicants had claimed that Article 82 EC is restricted to its literal scope as a provision which is merely the *specific expression* of the framework rule of Article 3(g) EC. In reply, the Court stated that, on the contrary, Article 3(g) EC considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks and it is therefore decisive for the *interpretation* of Article

²⁰⁹ *ibid* at paragraph 23.

²¹⁰ *Europemballage Corporation v Commission & Continental Can Co.*, Case 6/72, 1973 ECR 215.

²¹¹ *Europemballage Corporation v Commission & Continental Can Co.*, Case 6/72, 1973 ECR 215, 247-49; CMR para.9481 at 8302.

²¹² Case 6/72, *ibid*, (1973) ECR at 244, para 23.

82 EC; the provisions of competition law in the Treaty must be applied to pursue the Community objectives set down in Articles 2 and 3 EC.²¹³

From this premise, the Court deduced that the combined application of Articles 81 and 82 EC should not conspire to allow a significant gap in the control of activity which might prove to restrict competition (and hinder the Community objectives set down in Articles 2 and 3 EC).²¹⁴ The two provisions should operate coherently to achieve the same aim on different levels:

'In the absence of explicit provisions, one cannot assume that the Treaty, which prohibits in Article 85 (Article 81 EC) certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in Article 86 (Article 82 EC) that undertakings, after merging into an organic unity, should reach such a dominant position that any serious chance of competition is practically rendered impossible.'²¹⁵

The Court emphasised that the proper functioning of the Common Market depends upon this result.²¹⁶ It determined that there is no limitation that provides that the provision should apply only to practices which damage consumers *directly*.²¹⁷ Neither must there be, as claimed by the applicants in the case, a link of causality between the dominant position and the abuse:

'...the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above'.²¹⁸

Thereby, the Court concluded that within the meaning of Article 82 EC:

²¹³ This standpoint has been criticised in the literature and the applicant's standpoint supported. See eg., Krimphove, *Europäische Fusionskontrolle*, *ibid* at p.196-7. In Krimphove's opinion, Article 82 EC may only be applied to concentrations where a dominant undertaking *forcibly* takes over another by abusing that dominant position through its specific *conduct*.

For an opposing view, see Mestmäcker, E-J, 1966, *ibid*.

²¹⁴ Reflecting the Commission's statement above in its Memorandum of 1966, see pp55-56

²¹⁵ Case 6/72, *ibid*, (1973) ECR at 244 at para 25.

²¹⁶ Case 6/72, *ibid*, (1973) ECR at 244 at para 25.

²¹⁷ Case 6/72, *ibid*, (1973) ECR at 245 at para 26. The Court emphasises that this is also implicit from the text of Article 82 EC: letters (c) and (d) of Article 86(2) provides that the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.

²¹⁸ Case 6/72, *ibid*, (1973) ECR at 245 para 27.

'Abuse may...occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e., that only undertakings remain in the market whose behaviour depends on the dominant one.'²¹⁹

3.1 The Legal Scope of the *Continental Can* Principle

3.1.1 The Condition of Dominance

Decisions of the Commission and the Court of Justice in the application of Article 82 EC have shown that the requisite 'dominance' may arise from the position of a single undertaking alone or the combined position of several undertakings (effectively providing a position of 'joint dominance').

The wording of Article 82 EC itself contains a further condition for the prohibition to bite: the position of dominance held by the undertaking or undertakings must be held 'within the common market *or in a substantial part of it.*' There is therefore a quantitative condition in establishing 'dominance'.

a **Single Dominance**

The Commission stated that the concept of dominant position adopted in the later judgments of *United Brands*²²⁰ and *Hoffmann-La Roche*²²¹ is valid in the application of Article 82 EC to mergers.²²² Proof of a dominant position therefore requires the initial definition of the relevant product market and the relevant geographic market.²²³ Once this has been determined, it is necessary to show:

Confirmed by the Commission, see eg., *ECS/AKZO (No.2)*, Commission Decision of 14/12/1985, OJ 1985 L374/1 at paragraph 85.

²¹⁹ Case 6/72, *ibid.*, (1973) ECR at 245.

²²⁰ *United Brands v Commission* Case 27/76, (1978) ECR 207, (1978) 1 CMLR 429.

²²¹ *Hoffmann-La Roche v Commission* Case 85/76, (1979) ECR 461, (1979) 3 CMLR 211.

²²² Commission answer to Written Question No. 67/89 by Mr Bangemann, OJ C.167, 7.7.1988.

²²³ The Court of Justice stated that this is 'of essential significance' in *Continental Can*, Case *ibid.*, para.32.

For the purposes of the thesis, it is not necessary to analyse in detail the definition of relevant market, which is the same throughout Community law. The Commission has published a Notice on establishing the definition of a relevant market, Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997, C.372/03.

See all the main textbooks for more detail, eg., Fine, F., 1994 *ibid.*, pp. 84-104; Bellamy and Child, *ibid.*, pp.593-601, 614-616; Whish, R., 1993 *ibid.*, pp.249-259;

'...a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers'.²²⁴

Thereby, a *dominant position* does not necessarily constitute a *monopolistic position*. There may indeed be 'lively competition' on the relevant market.²²⁵ Above all, proof of a dominant position requires a thorough economic analysis of the market and the undertaking's position on the market.

Nevertheless, the absolute market share of the relevant undertaking may alone be determinative where it has persisted over time.²²⁶ In *Hoffmann-La Roche*, the Court stated that 'very large' market shares *are in themselves*, except in unusual cases, evidence of the existence of a dominant position.²²⁷ Here, the Court was referring to market shares of 65 % and 80 % on the relevant markets. The Court has presumed a dominant position for an undertaking with a market share as low as 50 %.²²⁸ On the other hand, a market share of 10 % has been deemed too small to constitute evidence of a dominant position.²²⁹

²²⁴ *United Brands v Commission* Case *ibid* at para 65; *Michelin v Commission* Case 322/81 (1983) ECR 3461, 3503 (1985) 1 CMLR 282, 321, para.30; *Telemarketing* (1985) Case 311/84 ECR 3261, 3275 (1986) 2 CMLR 558, 571, para. 16; *Hoffmann-La Roche v Commission* Case 85/76 (1979) ECR 461, 520 (1979) 3 CMLR 211 274, para.38.

²²⁵ See eg., *Hoffmann-La Roche*, Case *ibid*; *United Brands* Case *ibid*. See European Commission's Tenth Report on Competition Policy p. 103. See Bellamy and Child, 4th ed., pp.604-5.

²²⁶ *Hoffman-La Roche* Case *ibid* at para 41; *ECS/AKZO* Commission Decision (1986) 3 CMLR 273 at paragraph 69; *Soda-ash-Solvay*, Commission Decision OJ L152/21 (1991) at paragraph 44.

No minimum period has been given by the Court. In the *AKZO* Case (5/85), three years was however sufficient.

²²⁷ Paragraph 41.

²²⁸ *AKZO Chemie BV v Commission* Case 5/85 (1986) ECR 1965, (1987) 3 CMLR 716.

²²⁹ *Metro-SB-Groessmaerke v Commission (No.2)*, Case 75/84 1986 ECR 3021, 1987 CMLR 118.

In its Tenth Report on Competition Policy, the Commission stated that dominance cannot be ruled out where the market share of the undertaking is between 20 % and 40 %, at p.103, note 4. By implication therefore, a market share below 20 % may well be too small for the undertaking to be considered dominant. See Fine, F., *ibid*, pp.115-6.

Note that in a specific application of the *Continental Can* doctrine, an undertaking was assumed not to be dominant from the fact that it had a market share of 18 % in: *Metaleurop SA*, Commission Decision of 26/06/1990 OJ L179/41 at p.41, paragraph 17.

Where no dominance may be presumed from the market shares alone, other factors must be taken into account. This includes the market share of the undertaking relative to that of the nearest competitors.²³⁰

Furthermore, barriers to entry for new undertakings wanting to enter the market are important.²³¹ Such barriers may derive from the specific characteristics of the individual undertaking itself or from the structure of the relevant market as a whole. Relevant characteristics of the undertaking include any technological lead the undertaking might have in the relevant product market;²³² the overall size and strength of the undertaking with regard to its competitors;²³³ the fact that an undertaking has an extensive product range;²³⁴ the extent of vertical integration.²³⁵ Relevant structural barriers to entry include possible legal barriers (for example intellectual property rights); the need for specialist know-how;²³⁶ the requirement of large capital investment;²³⁷ brand loyalty.²³⁸

Moreover, an undertaking might show dominance by its actual conduct, where it has acted without having to take the actions of its competitors into account.²³⁹ In practice, this generally concerns the pricing patterns of the undertaking.

In summary, in the absence of a very large market share a full economic analysis is required in the individual case to establish whether or not the undertaking is able to behave to an appreciable extent independently of its competitors and consumers.

²³⁰ *United Brands*, Case *ibid*, paragraph 110; *Hoffman-La Roche*, Case *ibid*, paragraph 51.

²³¹ See *eg.*, *United Brands*, Case *ibid*. These consist of access to resources, overall strength, economies of scale, intellectual property rights.

²³² See *eg.*, *Tetra Pak Rausing SA v EC Commission* Case T-51/89 (1990) II ECR 309, (1991) 4 CMLR 334.

²³³ *Michelin v Commission*, Case *ibid*. Care must however be taken. It must have some relevance to market power within the relevant market; it does not include resources used by the undertakings for different purposes which can not be employed in the production or supply of goods on the relevant market. See *eg.*, *Hoffmann-La Roche* Case 85/76 (1979) ECR 522-4 CMLR 276-8.

²³⁴ *Michelin*, Case *ibid* at paragraphs 53, 55 and *AKZO* Case *ibid*, apparently overturning the earlier finding in *Hoffmann-La Roche*, Case *ibid* at paragraphs 45-6.

²³⁵ *eg.*, *United Brands*, Case *ibid*, (1978) at paragraph 71; *AKZO*, Case *ibid*, (1986) at paragraph 61.

²³⁶ *Hoffmann-La Roche*, Case *ibid*.

²³⁷ *United Brands*, Case *ibid*.

²³⁸ *United Brands*, Case *ibid*, paragraphs 93-4.

²³⁹ *Hoffmann-La Roche*, Case *ibid*, (1979) paragraph 74; *AKZO*, Case *ibid* (1987) at paragraph 69.

b Joint Dominance

The literal text of Article 82 EC refers to 'an abuse by one *or more* undertakings'.

Hence, the Commission, the Court of First Instance and the European Court of Justice have held that Article 82 EC could be applied to dominant positions held by more than one undertaking.²⁴⁰

The relevant joint dominant position may be as a result of structural links between the undertakings (where they may not however be considered to be a single economic entity). Hence, in *Societa Italiano Vetro and others v. Commission*²⁴¹, the Court of First Instance considered the situation where there are 'economic links' between the undertakings:

'There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by economic links that, by virtue of that fact, together they hold a dominant position vis-a-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers...'²⁴²

This latter approach of the Court of First Instance has been confirmed by the Court of Justice in other cases.²⁴³ Economic links may be contractual (incorporating simultaneously the risk of Article 81 EC proceedings) or non-contractual (for example, cross-shareholdings or common directorships²⁴⁴). The Commission meanwhile has appeared to develop the condition, requiring that the undertakings must together have the same position with regard to their customers and competitors

²⁴⁰ eg., *Italian Flat Glass*, Commission Decision OJ (1989) L33/44, (1990) 4 CMLR 535; *French West-African Shipowners' Committees* Commission Decision OJ (1992) L 134/1; *Cewal* Commission Decision OJ (1993) L34/20; *Societa Italiano Vetro and others v. Commission* Cases T-68/89 and T-77-78/89 (1992) ECR II 1403; (1992) 5 CMLR 302 at paragraphs 358-269.

²⁴¹ Cases T-68/89 and T-77-78/89 (1992) ECR II 1403; (1992) 5 CMLR 302 at paragraphs 358-269.

²⁴² *Societa Italiano Vetro and others v. Commission* Cases T-68/89 and T-77-78/89 (1992) ECR II 1403; CMLR 302 at paragraph 358.

²⁴³ *Alemelo v NV Energiebedrijf Ijsselmij* Case 393/92 (1994) I ECR 1477; *Centro Servizi Spediporto* Case 96/94 II ECR 753.

²⁴⁴ See eg., the opinion of Advocate General Fennelly in *Compagnie Maritime Belge NV and Dafra-Lines v Commission* Cases C-395/96P and C-396/96P (1996) ECR II 1019.

as a single company would have if it were in a dominant position. Further, there must be no effective competition between the companies on the relevant market.²⁴⁵

The structural links approach does not however appear to be definitive. In an application of the EC Merger Regulation, the Court of First Instance has confirmed the Commission's view that Article 2(3) MR prohibits the creation of an oligopolistic market structure, where actual structural links between the undertakings are rendered unnecessary:

'...there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices.'²⁴⁶

The Court of First Instance therefore indicated that market structure could also lead to a determination of joint dominance, as well as actual economic links between the undertakings. Other elements are also significant such as likelihood of tacit co-ordination according to factors such as market transparency, product homogeneity, growth levels, rates of technological change and barriers to entry. Indeed, the Court of First Instance made direct reference to the established 'economic links' approach (as used in the case *Societa Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission*²⁴⁷), stating that any reference to structural links between members of an oligopoly in that case had merely been by way of example, and that such links are not necessary for a finding of oligopolistic dominance.

While the *Gencor* case was decided within the context of the application of the Merger Regulation, the Court of First Instance stated that its findings on collective

²⁴⁵ See eg., *French West-African Shipowners' Committees* Commission Decision OJ (1992) L 134/1; *Cewal* Commission Decision OJ (1993) L34/20. See also Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (1988) OJ C265/3, paragraphs 78-79. See also, Faull and Nickpay, *ibid* at p.139.

²⁴⁶ *Gencor v. Commission* Case T-102/96 (1999), II ECR 753.

²⁴⁷ Case *ibid*.

dominant positions apply equally to Article 82 EC.²⁴⁸ The approach represents the position identified previously by the Commission as being the most appropriate in the determination of joint dominance.²⁴⁹ It can therefore be stated with reasonable assurance that economic links will not longer be a prerequisite and joint dominance extends to tight oligopolistic situations.²⁵⁰

c Dominance in a *Substantial Part of the Common Market*

As detailed above, Article 82 EC prohibits the abuse of a dominant market position only 'within the common market or in a substantial part of it'. In *Suiker Unie*, the Court of Justice stated:

'for the purpose of determining whether a specific territory is large enough to amount to 'a substantial part of the common market' within the meaning of Article 82 of the Treaty, the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered'.²⁵¹

Hence, it appears that the condition requires a quantitative analysis not just of the *geographic extent* of the market but also of the product market within that geographic area, considering the economic importance of the market in relation to the Common Market as a whole.²⁵²

Thereby, however, it has been noted by several commentators that the Commission - and the Court of Justice - should not be content simply to find a market that constitutes a 'substantial part of the market' on which the undertaking is dominant.²⁵³

²⁴⁸ Case, *ibid*, at paragraphs 273-277. See also the opinion of Advocate General Fennelly in *Compagnie Maritime Belge NV and Dafra-Lines v Commission* Cases C-395/96P and C-396/96P (1996) ECR II 1019 at paragraph 27.

²⁴⁹ Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (1988) OJ C265/3, paragraphs 78-79.

²⁵⁰ In agreement, see Faull and Nickpay, *ibid* at p.142.

²⁵¹ *Suiker Unie v Commission* Case 40/73 (1975) ECR 1663, 1977, (1976) 1 CMLR 295, 452.

²⁵² See eg., Schroeter, H. in: Groeben, Thiesing, Ehlermann, *ibid*, p827-8; Calliess, C. and Ruffert, M. (eds), *Kommentar zu EU-Vertrag und EG-Vertrag*, 1999, Hermann Luchterland Verlag GmbH, p927; Bellamy and Child, *ibid*, p615; Waelbroeck, M. and Frignani, A., *European Competition Law*, (1999) at p258; Faull and Nickpay, *ibid*, p.145; Gleiss and Hirsch, *Kommentar zum EWG-Kartellrecht*, p330.

²⁵³ See eg., Waelbroeck, M. and Frignani, A., *ibid* at p258, criticising the approach of the Commission in the interim order of July 29 1983 in the *ECS/AKZO* case.

See also *United Brands*, Case *ibid*, at paragraph 44 and *Michelin*, Case *ibid* at paragraph 23 where the Court of Justice mixed up the definition of relevant market and the condition for a 'substantial part of the Common Market'. This approach was heavily criticised, see eg., Waelbroeck, M. and Frignani, *ibid* at p258; Markert, K., *Note Under the United Brands Judgment*, in *Europarecht* 48, 51 (1979); Korah, V., *Developments in the Interpretation and*

A single Member State may constitute a 'substantial part of the market', but just because an undertaking is dominant in that Member State, it may not be dominant on the actual relevant market, which might even extend to the whole Community. The actual geographical and product market must initially be determined before considering the minimum quantitative threshold which the dominant position must meet.

What constitutes a 'substantial part of the Common Market' is a question of fact in each case. As will become clear in the analysis of the jurisdictional criterion for Articles 81 and 82 EC (that is, the interstate trade criterion), the application of Article 82 EC is not confined to relevant markets that extend beyond the borders of a single Member State. Nevertheless, the 'substantial part' condition prevents *all* relevant conduct that fulfils the interstate trade criterion falling within the scope of Article 82 EC. The area over which dominance exists must have a certain economic importance: trade between a shop situated in Luxembourg with a shop situated in France will clearly not fulfil this condition.

Essentially, the extent of the market over which the undertaking has been found to be dominant must be considered in conjunction with the dynamics of the product market in that geographical area (relative to the dynamics over the Community as a whole). This includes the total population of the area as well as factors such as production and consumption and buying power. It is clearly possible for a territory to constitute a 'substantial part' of the Common Market for a given product and not for another.²⁵⁴ Similarly, it is possible for a limited part of the territory of a Member State to be a 'substantial part' of the Common Market, given its economic importance in the production or consumption of the relevant product.²⁵⁵

Application of Article 86 of the Treaty of Rome - Abuse of a Dominant Position Within the Common Market, Notre Dame Law, 768 (1978) at 780.

²⁵⁴ Korah, V., V., *Developments in the Interpretation and Application of Article 86 of the Treaty of Rome - Abuse of a Dominant Position Within the Common Market*, Notre Dame Law, 768 (1978) at 793.

²⁵⁵ See eg., *Suiker Unie*, Case *ibid*, where the south of Germany was found to be a 'substantial part', paragraphs 443-8; *Porto di Genova*, Commission Decision (1997), OJ L301, where the port of Genoa sufficed, given its importance with regard to all maritime import and export activities throughout Italy. Similarly, the port of Rodby in Denmark (see Report on Competition Policy 1994, Vol XXIV point 226), the port of Holyhead in the UK (Report on Competition Policy 1993, Vol XXIII, point 234) and the airport of Zaventem near Brussels (*British Midland/Regie des voies aeriennes*, Commission Decision June 28, 1995, Report on Competition Policy 1995, Vol XXV, point 120) have all been found to constitute 'a substantial part' on similar principles.

Clearly, the condition of a 'substantial part' of the Common Market is similar to the *de minimis* criterion for Articles 81 and 82 EC.²⁵⁶ It is a quantitative condition declaring that the relevant dominant position must be of a dimension that might harm Community objectives. It is however different. It relates to the size and importance of the relevant market relative to the product in question. It does not relate to the size of the undertaking itself on that relevant market. Furthermore, it involves a process of assessment that is not so formalistic, based mainly upon percentage thresholds relative a particular geographical area. This fact was stressed by Advocate General Warner, who stated that attention should not be exclusively focused upon percentage thresholds. He was not prepared to deny, for example, that Luxembourg as a country with only 0.23 % of the entire population of the Community could not be a 'substantial part'.²⁵⁷ It appears therefore that test is not actually one of the actual size of the relevant market relative to the size of Common Market as a whole, but rather one of the economic size and importance of that market within the Common Market, as considered in absolute terms.

3.1.2 The Concept of Abuse

a Abuse of a Position of Single Dominance

In *Hoffmann-La Roche*, the Court of Justice held:

'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.²⁵⁸

On the other hand, with regard to all the facts, Humberside ports in the UK and the North of England have been found not to be sufficient (see, respectively, *Felixstowe Docks and Railways Board v British Transport Docks Board* (decision of the English Court of Appeal) (1976) 2 CMLR 655; *Cutsforth v Mansfield Inns* (decision of the English High Court QB) 1986, 1 WLR 558). Similarly, County Kerry in Ireland (*Cadbury Ltd v Kerry Co-op* 1982, (decision of the Irish Court) ILRM 77).

²⁵⁶ For a detailed description, see below, pp127-134.

²⁵⁷ *BP v Commission Case 77/77* (1978) ECR 1513, 1537 (1978) 3 CMLR 174, 184.

²⁵⁸ *Hoffmann-La Roche v Commission*, Case *ibid*.

This objective definition of the concept of abuse has been adopted as the standard formula in subsequent cases applying Article 82 EC.²⁵⁹

Questionable is whether the concept of abuse used in the application of Article 82 EC to concentrations is the same. Analysis of the words of the Court of Justice suggests that the concept is more strict in these circumstances. The Court stated that a structural strengthening of an undertaking in a dominant position will be an abuse where the degree of dominance thereby reached '*substantially fetters competition, ie that only undertakings remain in the market whose behaviour depends upon the dominant one.*'²⁶⁰

Some commentators have interpreted this principle strictly, claiming that it is no more than a refinement of the Commission's original principle expressed in its 1966 Memorandum (referring to the creation of monopolistic situations) that it applied in its Decision on the concentration. According to this view, the principle is confined to abuses which will create monopolistic positions, where competition '*is in practice eliminated*'.²⁶¹ This interpretation is however clearly contrary to the literal wording used. The condition that the concentration '*substantially fetters competition*' is clearly wider. Moreover, the Court explicitly stated that '*such a narrow precondition as the elimination of all competition need not exist in all cases.*'²⁶²

However, the Court did appear to set a quantitative condition that is narrower than the condition espoused in *Hoffman-La Roche*, which requires only that the maintenance of the degree of competition still existing in the market or the growth of that competition is '*hindered*'.²⁶³ *Prima facie*, it appears that the abuse must effect a *substantial* distortion of competition structures.²⁶⁴ The Commission appears to have implicitly supported this interpretation in *Tetra Pak 1*, which is the only decision where the *Continental Can* doctrine was found to be fulfilled. The Commission stated that the concentration constituted an abuse since it led 'to Tetra strengthening its

²⁵⁹ Bellamy and Child, *ibid* 1993 at p.617.

²⁶⁰ *Hoffmann-La Roche v Commission*, Case *ibid* at paragraph 26.

²⁶¹ See *eg.*, Banks, K., *Mergers and Partial Mergers under EEC Law*, Fordham International Law Journal, (1988), 11 255-309 at pp.268-272; Bechtold, RIW 1985, p.445.

²⁶² *Hoffmann-La Roche v Commission*, Case *ibid* at paragraph 29.

²⁶³ See above.

²⁶⁴ Gleiss/Hirsch, *Kommentar zum EG-Kartellrecht*, Artikel 86, Paragraph 97; Fine, F., 1994 *ibid*, p.121-3.

previously preponderant dominant position in the market...to the extent that *any competition remaining is substantially fettered or practically rendered impossible*.²⁶⁵

Such an interpretation however ignores the basis of the Court's reasoning. As described above, the Court (in upholding the Commission's reasoning) interpreted the concept of abuse in the *Continental Can* decision with specific regard to the objectives of the Treaty laid down in Article 3 (g) EC (ancillary to Article 2 EC). Such an interpretation of Article 82 EC has been affirmed on numerous occasions by the Court in the application of Article 82 EC to 'classic' situations of abuse of a dominant position.²⁶⁶ If Article 82 EC is interpreted within the context of this broad Community aim, the concept of abuse cannot be limited artificially with regard to the specific mode in which it is carried out by the dominant undertaking (that is, whether by a merger or by more 'traditional' abusive conduct).

A further - and related - argument for such an interpretation is that there is no sense in having a quantitative threshold in the definition of abuse for Article 82 EC. The very fact that an undertaking is in a dominant position means that the operation is not *de minimis*.²⁶⁷ The undertaking must be of a certain size in terms of its competitors in order to be dominant. The accuracy of these comments is borne out by the Court's tendency to emphasise that an undertaking in a dominant position is deemed to have '*a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market*'.²⁶⁸ Such an undertaking already has a position which is of concern with regard to the Community objectives. With reference to the text of the individual case, *Schroeter* demonstrates that the concept of abuse employed by the Court (that is, a substantial distortion of competition whereby the competitors are dependent upon the behaviour of the relevant undertaking) equates with the Court's definition of *dominance* in the case. Therefore, within the actual

²⁶⁵ *Tetra Pak I*, Commission Decision *ibid*, at paragraph 47.

Also, in *Argyle Group v Distillers*, (decision of Scottish Outer House of the Court of Session) (1986) 1 CMLR 764, Lord Jouny stated that with regard to the application of Article 82 to mergers: '*It seems reasonably clear that something more than a mere alteration, albeit measurable, in the level of competition is required before the event producing that alteration can be categorised as an abuse*'.

²⁶⁶ See eg., *Zoja Cases* 6,7/73 (1974) ECR 223, (1974) 1 CMLR 309; *Case Hugin ibid*; *Case Hoffmann-La Roche, ibid*.

²⁶⁷ Koch in Grabitz, *Kommentar zur EU*, (1998), Beck, Artikel 86, Paragraph 85; *Schroeter, H.* in: Groeben, Thiesing, Ehlermann, *Kommentar zum EU Vertrag* (1997-9) Baden-Baden: Nomos, Artikel 86, Paragraph 68; Deimel, *Rechtsgrundlagen einer europaischen Zusammenschlusskontrolle* (1992), Nomos, pp. 69-71.

²⁶⁸ *Michelin v Commission Case 322/81*, (1983) ECR 3461, paragraph 57.

terms used by the Court in *Continental Can*, a further strengthening of this position automatically involves an *abuse*.²⁶⁹

The concept of abuse according to the *Continental Can* principle should not therefore differ from its interpretation in the general application of Article 82 EC.²⁷⁰ Accordingly, the Commission stated in its Tenth Report on Competition Policy:

'Strengthening by means of merger is likely to constitute an abuse if any distortion of the resulting market structure interferes with the maintenance of remaining competition (which has already been weakened by the very existence of this dominant position) or its development. Such an effect depends, in particular, on the change in the relative market strength of the participants after the merger, ie the position of the new unit in relation to remaining competitors'.²⁷¹

Thereby, any concentration effected by a dominant undertaking constitutes an abuse within the meaning of Article 82 EC if the resulting change in market structure interferes with the maintenance (or development) of the remaining competition in that market.

On these terms, the scope of the condition for an abuse within the meaning of Article 82 EC is extremely broad where an undertaking that is dominant on any given market effects a concentration with a competitor. Nevertheless, it is conceivable that a concentration involving a dominant undertaking may lead to an economy of scale that could lead to lower costs and increased competition.²⁷²

²⁶⁹ *Schroeter, H.* in: Groeben, Thiesing, Ehlermann, *ibid.*, Art.86, paragraph 68; Krimphove, *Europäische Fusionskontrolle*, *ibid.* at p.200 (in criticising the *Continental Can* case for its lack of clarity and attempting thereby to limit its significance).

²⁷⁰ *Schroeter*, in: Groeben, Thiesing, Ehlermann, *ibid.*, Art.86, paragraph 68.

Korah states that '*something less than the elimination of competition probably suffices to infringe the Article*'. Thereby, she refers to the standard application of Article 82 EC which provides that any reduction of competition making it harder for others to compete might infringe the Article. *Korah, V., Control of Mergers under EEC Competition Law*, (1987) ECLR pp.239-255 at p.241.

Elland relies simply on the Commission's statement in its Tenth Report on Competition Policy (at p.103), *Elland, W., ibid.* (1991) at p.25.

²⁷¹ *ibid.*, at paragraph p.103.

²⁷² *Korah, V., Control of Mergers under EEC Competition Law*, (1987) ECLR 239-255 at p. 243.

b Abuse of a Position of Joint Dominance

Questionable is whether the *Continental Can* doctrine can be extended to cover concentrations by undertakings on an oligopolistic market. Thereby, it may cover situations where an undertaking that is part of the oligopoly merges with one or more of its competitors.

Based upon the context in which the principle is to be applied - that is, the general aim of the Community under Article 3 g EC - it is submitted that it would extend to cover such concentrations. An undertaking in a *joint* dominant position has the same position of special responsibility not to impair undistorted competition on the Common Market.

3.1.3 Vertical and Conglomerate Concentrations

The main scope of the principle under *Continental Can* covers *horizontal* concentrations between competitors. Nevertheless, where competition on the relevant market is distorted by a vertical or a conglomerate concentration, Article 82 EC will also apply. For vertical concentrations, this is conceivable where the connection to an upstream or downstream market influences the market entry of competitors.²⁷³ Similarly, barriers to entry may be created by conglomerate mergers sufficient to constitute an abuse within the meaning of Article 82 EC (in particular through the addition to the overall financial strength of the dominant undertaking).²⁷⁴

The Court has indeed found that an abuse within the meaning of Article 82 EC can take place on a different market from the market on which the undertaking in question is dominant.²⁷⁵

²⁷³ Article 82 EC was applied to a vertical concentration in *Michelin/Actor NV*. The Commission decided that the concentration did not breach Article 82 EC. See Commission Eighth Report on Competition Policy, p.104.

In agreement, see eg., Gleiss/Hirsch '*Kommentar zum EWG-Kartellrecht*', Artikel 86, paragraph 100; *Schroeter* in: Groeben, Thiesing, Ehlermann, *ibid*, Art.86 paragraph 68; Deimel, *ibid* p.71-2

²⁷⁴ See eg., Gleiss/Hirsch, Art.86 paragraph 100; *Schroeter* in: Groeben, Thiesing, Ehlermann, *ibid*, Art.86, paragraph 68; Deimel, A. *ibid* p.71-2.

Against this (but for practical evidential reasons only), Mestmäcker, E-J, *ibid*, 1966.

²⁷⁵ See eg., *CBEM v CLT and IPB*, Case 311/84 (1985) ECR 3261; *ECS/AKZO* Commission Decision (1986) 3 CMLR 273.

4 The Limitations of Article 82 EC as a Source of Merger Control

As a seamless instrument to control concentrations within the Community, Article 82 is clearly inadequate.

4.1 The Scope of Article 82 EC

First, the provision is only applicable where an undertaking is already dominant - it does not catch the creation of dominance in the first place.²⁷⁶ Not only did this leave a lacuna in the Community's competence to assess mergers, but it was illogical in economic terms, treating differently situations with an identical economic effect on account of the means in which they are brought about. For example, a take-over effected in stages by a non-dominant undertaking may breach Article 82 EC as soon as the acquiring undertaking thereby becomes dominant, and attempts to take-over an additional share of the target undertaking. On the other hand, if a non-dominant undertaking acquires another (non-dominant) undertaking in one single transaction so that it *becomes* dominant, Article 82 EC will not apply.

4.2 The Procedure under Article 82 EC

Secondly, there was no notification procedure under which concentrations could be registered in advance for an initial assessment. Assessment takes place *a posteriori*, according to criteria which must be applied to the individual facts of the case. This is extremely inappropriate for mergers, which in particular require fast decision-making and legal certainty.²⁷⁷

4.3 The Remedies under Article 82 EC

Thirdly, divestiture, which would appear to be the remedy available under Article 82 EC²⁷⁸, is unsatisfactory and complex. Its severity could deter the implementation of many potentially beneficial mergers. It was not clear whether there was an effective

²⁷⁶ See *Metaleurop SA*, Commission Decision of 26/06/1990, OJ L179/41, paragraph 17.

See eg, Vogel, L., (1988), *Droit de la Concurrence et Concentration Economique, Etude comparative*, Collection Droit des Affaires et de l'Entreprise, Serie Etudes et Recherches, Paris, p.334; Banks, K., *Mergers and Potential Mergers under EEC Law*, Fordham International Law Journal, 11 (1988) at p.273; Bellamy and Child, *ibid*, p.380; Krimphove, *ibid*, at p.190-1 and 195. Against this, in the minority, Deimel, *ibid*, p.71

²⁷⁷ See above. See eg., Krimphove, *ibid*, p.203.

²⁷⁸ This had been ordered by the Commission in *Continental Can*, Commission Decision, (1972) OJ L725.

procedure to grant interim relief to prevent a concentration taking place (as an alternative remedy and with a *preventive* function).²⁷⁹

4.4 Summary

These problems which are inherent to the application of Article 82 EC to concentrations provide the reason for the rare use of the *Continental Can* doctrine in practice. The Commission has formally applied the doctrine in only two decisions. In *Metaleurop SA*, the doctrine was invoked but declared inapplicable to the transaction in question since none of the parties was dominant on any of the relevant market.²⁸⁰ In *Tetra Pak I*, the Commission applied the *Continental Can* doctrine.²⁸¹ The abuse of the dominant position (through its strengthening) arose however not from the concentration *per se* but from the fact that *Tetra Pak* had thereby acquired an exclusive licence with regard to technology which was essential for the relevant market.

The usefulness of Article 82 EC as a means to control mergers within the Community was more informal, where the uncertainties of its scope could be overcome amicably in the pragmatic negotiation with the parties concerned. Following the *Continental Can* judgment, the annual Competition Reports did contain a large number of instances of Article 82 proceedings having been used by the Commission as a leverage to force parties to modify their original plans and to make themselves compatible with the requirements of effective competition within the Common market.²⁸² Furthermore, there were many investigations which did not result in formal decisions, either because there was no dominant position²⁸³ or no evidence of abuse.²⁸⁴

²⁷⁹ In particular on this, see Banks, *ibid*, pp.277-278, who considers that interim relief could only be granted in very limited circumstances.

²⁸⁰ *Metaleurop SA*, Commission Decision of 26/06/1990, OJ L179/41 paragraph 17.

²⁸¹ *Tetra Pak I*, Commission Decision of 26/07/1988, OJ L272/1 at pp.39-40.

²⁸² *eg.*, *British Airways/British Caledonian*, Commission Decision, Commissions' Eighteenth Report on Competition Policy 1988, at para. 81; *Pilkington/BSN-Gervais-Danone*, Commission Decision, Commission's Tenth Report on Competition Policy 1980, at para's 152-55; *Air France/Air Inter/UTA*, Commission Decision, Commission's Twentieth Report on Competition Policy 1990, para.116.

²⁸³ *See eg.*, *AVEBE/KSH*, Commission Decision, Commission's Eighth Report on Competition Policy (1979) points 147-8; *Coats Paton/Guetermann*, Commission Decision, Commission's Ninth Report on Competition Policy (1980), point 132; *Fichtel & Sachs/Huret*, Commission Decision, Commission's Ninth Report on Competition Policy (1980), at point 133; *Ashland Oil/Cabot*, Commission Decision, Commission's Fourteenth Report on Competition Policy (1985) at point 109; *Pont a Mousson/Stanton & Stavelly*, Commission Decision, Commission's Fourteenth Report on Competition Policy (1985) at point 10; *Baxter Travenol*

5 Summary of the Legal Competence to Apply Article 82 EC to Concentrations

The Commission, upheld by the Court of Justice, had established a legal competence to assess concentrations under Article 82 EC. This was possible with regard to any concentration involving an undertaking in a position of single or joint dominance that hinders the maintenance of the degree of competition still existing in the market or the growth of that competition constitutes an abuse within the meaning of Article 82 EC. The concentration may be horizontal, vertical or conglomerate (although the condition is clearly more easily satisfied for horizontal concentrations).

The scope of Article 82 EC to apply to such concentrations was however subject to a specific jurisdictional criterion - the interstate trade criterion. It is necessary to examine the application of this criterion in detail. First however we must consider the applicability of Article 81 EC to concentrations, since the jurisdictional trigger for this provision is the same.

C THE LEGAL COMPETENCE TO CONTROL CONCENTRATIONS ACCORDING TO ARTICLE 81 EC

1 The 'Dual-Standard' Doctrine

1.1 Implementation of the Principle

In its Memorandum of 1966, the Commission had discounted the applicability of Article 81 EC to concentrations:

'...la différenciation généralement appliquée dans le traitement juridique des ententes et des concentrations s'impose pour des raisons de fait et que l'article 85 (Article 81 EC) ne peut ...

Laboratories/Smith Kline RIT, Commission Decision, Commission's Fourteenth Report on Competition Policy (1985) point 157; *Sea Containers/Stena Tiphook*, Commission Decision, Commission's Twentieth Report on Competition Policy, point 109.

²⁸⁴ eg., *GKN/Sachs*, Commission Decision, Commission's Sixth Report on Competition Policy (1977) at points 181-2; *AVEBE/KSH*, Commission Decision, Commission's Eighth Report on Competition Policy, points 147-8; *Michelin and Michelin Nederland/Actor*, Commission Decision, Commission's Eighth Report on Competition Policy, point 146; *PSA Peugeot-Citroen/Chrysler*, Commission Decision, Commission's Eighth Report on Competition Policy, at point 149; *Eagle Star-Allianz Versicherung*, Commission Decision, Commission's Twelfth

être appliqué aux accords ayant pour objet l'acquisition de la propriété d'entreprises ou de parties d'entreprises ou la réorganisation de la propriété des entreprises (fusion, participation, acquisition d'éléments d'actif).²⁸⁵

Here, it clearly advocated introducing a 'dual-standard' doctrine into Community law.²⁸⁶ According to this principle, different legal rules should be applied depending on whether the behaviour restricting competition is a cartel or a concentration, that is whether the conduct in question is *behavioural* or *structural*. The Memorandum does not have any binding force, but indicated precisely the attitude of the Commission towards the application of Article 81 EC to concentrations. It did not reflect the views of the experts consulted in the report, nor did it reflect the experience of US law.²⁸⁷ It was however an opinion held by the majority of commentators at that time.²⁸⁸

Report on Competition Policy (1983) at point 103; *GEC-Siemens/Plessey*, Commission Decision OJ C239/2 (1990), (1992) 4 CMLR 471 at paragraph 42.

²⁸⁵ Community Memorandum, 1966, *ibid* at p.24, para.14.

²⁸⁶ See eg., Vogel, L., who makes a comparison of the 'double standard' doctrine in US and European law in: (1988), *Droit de la Concurrence et Concentration Economique, Etude comparative*, Collection Droit des Affaires et de l'Entreprise, Serie Etudes et Recherches, Paris, pp.232-70. See also, Bos et al, *ibid*, at p. 5; Goldman and Lyon-Caen, *ibid*, at pp. 496-500.

²⁸⁷ Joliet, *The Rule of Reason in Antitrust Law*, 1967, Diss., L'Université de Liege, at p.42 has however noticed some distinction in the operation of the Sherman Act to concentrations and cartels. He notes that despite the anomalous decision of *Appalachian Coals Inc. v US*, 288 US 344 (1933), a distinction has remained between the rules applied to cartels and those applied to concentrations under the Sherman Act, showing an undeniable discriminatory treatment in favour of integration.

The majority opinion however corresponds to the comments of Rahl in relation to s.7 of the Clayton Act: '*antitrust evolution has finally ironed out its old ambivalence and has brought anti-concentration policy alongside the policy of loose arrangements*' in: Rahl, J. '*Antitrust Law in Search of a Policy*', Proceedings of the 4th Annual Corporation Counsel Institute 57 (1965).

²⁸⁸ Bail, in: Groeben, Thiesing, Ehlermann, *ibid*, para.169 on Article 85; Gleiss/Hirsch, '*Kommentar zum EWG-Kartellrecht*', Paragraphs 220 zu Article 81 (1), Para. 100 zu Article 82; Steindorff, '*Kooperation, Konzentration und Fusionen von Unternehmen in der EWG*', Revue de Marché Commune 1968, p.182; Mestmaecker, '*Die Beurteilung von Unternehmenszusammenschluessen nach Article 82 des Vertrages ueber die Europaeische Wirtschaftsgemeinschaft*', p.327; Riesenkaempff, A., '*Auswirkungen des Urteils des EuGH vom 17.11.1987 (Philip Morris)*', WuW 1988; Immenga/Fuchs, '*Article 81 EWG-Vertrag als Grenze fuer Unternehmensbetweiligungen*', NJW 1988, p.3052; Hefermehl, W., '*Beurteilung von Fusionen und Konzernbildungen nach Art. 85 und 86 des EWG-Vertrages*', in: Dietz/Huebner (ed.), *Festschrift fuer H.C. Nipperdey II*, p.771; van Ommeslaghe, P., '*Die Anwendung der Artikel 85 und 86 des Rom-Vertrages auf Fusionen, Gesellschaftszusammenschluesse und Gemeinschaftsunternehmen*', in: *Beitraege zum EWG-Kartellrecht*, p.49.

But against this, see eg., Blank, J., '*Europaeische Fusionskontrolle im Rahmen der Art. 81, 82 des EWG-Vertrages*', 1991, p.128; Emmerich, '*Die Auslegung von Article 81 (1) EWGV durch die bisherige Praxis der Kommission*', EuR 1971, p.295; Bernini, Revue de Marché Commune 1968, p.274; Canellos and Silber, '*Concentration in the Common market*', CMLRev 1970 p.138; Goldman, Lyon-Caen, '*Europaeisches Handelsrecht*', p.296.

1.2 The Reasoning behind the Implementation of the Dual-Standard Doctrine

1.2.1 The Literal Wording of the Provisions and the Legal Question

According to the literal wording of the condition laid down in Article 81 (1) EC, it is difficult to exclude the possibility that the prohibition *could* extend to cover concentrations in legal terms. It is not, according to its literal wording, a condition aimed solely at cartels.²⁸⁹ In general terms, all that is necessary for a breach of the condition in Article 81 (1) EC is an agreement (or concerted practice) between undertakings that has as its '*object or effect the prevention, restriction or distortion of competition within the common market.*'²⁹⁰

The *minority* opinion of the experts consulted in the Memorandum (who advised against the application of Article 81 EC to concentrations) stressed the fact that the provision is directed at market conduct rather than at a change in the internal structure of the undertakings.²⁹¹ This was accepted by both the Commission and the majority of commentators.²⁹²

However, it may be submitted that this is not accurate as a statement of law.

First, the argument cannot be sustained that because the examples contained in Article 81 (1) (a-e) of restrictions of competition relate only to the conduct of undertakings, the scope of the Article implicitly does not embrace concentrations.²⁹³ While these examples relate to the Member States original intentions, they are not exhaustive, and may be seen only as a system of priorities existing at that time. They do not exercise a limitation on the scope of the prohibition condition under Article

²⁸⁹ *Downes and Ellison* posit the theory that it had been nevertheless originally intended that Article 81 EC should apply to concentrations, but that such an application was thwarted, not by the substantive wording of Article 81 EC itself, but by Regulation 17, which was passed by the Council under powers conferred by Article 87 EC in order to implement the substantive law established by Articles 81 and 82 EC in: Downes, A and Ellison, J., '*The Legal Control of Concentrations in the European Communities*', Blackstone Press, 1991 at p.2. See also Blank, J., *ibid*, p.110. But against this, see Sedemund, J. and Montag, F., '*Europaeisches Gemeinschaftsrecht*', NJW 1988, 10, p.608.

²⁹⁰ Generally, the restriction should be 'appreciable', see Commission Notice on Minor Agreements, 1970, OJ 1986, C231/2. Amended in 1977, 1986 and 1997 OJ 1997 C372. For a more detailed analysis of the condition, see below, pp130-137.

²⁹¹ Commission 1966 Memorandum, *ibid*, p.21

²⁹² See note 288.

²⁹³ This is the position adopted by Hefermehl, W, '*Beurteilung von Fusionen und Konzernbildungen nach Art. 85 und 86 des EWG-Vertrages*', in: Dietz/Huebner (ed.), '*Festschrift fuer H.C. Nipperdey II*', p.771.

81(1) EC.²⁹⁴ Indeed, the Commission has stated that Article 81 EC does not include any limits that are not clearly contained within its text.²⁹⁵

Secondly, and more fundamentally, it should be recognised that concentrations are as much the result of conduct on the market as are cartels.²⁹⁶ They may (although not always) involve an agreement between parties which may restrict competition within the meaning of Article 81 (1) EC.

Thirdly, the statement is inconsistent with the Court of Justice's later interpretation of Article 82 EC in *Continental Can*²⁹⁷, determining that Article 82 EC does not only apply to market conduct that may *directly* harm competitors, but also to conduct which harms competitors by distorting the structure of undistorted competition in the Community within the meaning of Article 3g of the Treaty.²⁹⁸ The ECJ feared in that case that a '*diverse legal treatment*' of economic activity within the Commission by the provisions of competition law in the maintenance of effective competition within the Common market would make a '*breach in the entire competition law which could jeopardise the proper functioning of the Common market*'.

The dual doctrine invoked by the Commission therefore remains a statement of principle rather than a summary of the legal position.²⁹⁹ The Commission's reasoning was not based upon the actual scope of the prohibition condition under Article 81(1) EC according to its literal wording, but rather upon matters of policy and upon technical grounds.³⁰⁰

²⁹⁴ Also, Blank, J., *ibid*, p.112

²⁹⁵ Case *Grundig*, *ibid*, p.322

²⁹⁶ Blank, *ibid*, p.128

²⁹⁷ Case 6/72, *ibid*.

²⁹⁸ Case 6/72, *ibid*, p.244.

²⁹⁹ In agreement, see Venit, J., *ibid*, Private Investors Abroad, p.12.

It has even been suggested that the approach adopted by the Commission represents a breach in Community law, as was feared by the ECJ in *Continental Can*, see Kassamali, R.A., *From Fiction to Fallacy* 21 (1996) p.97.

³⁰⁰ See below. In agreement, see Venit, J., *Mergers, Acquisitions, and Joint Ventures under EEC Law after Philip Morris: Plus Ca Change, plus c'est la Même Chose? The Applicability of Article 85 to Mergers and the uncertain Content and Fate of the Proposed Regulation on the Control of Concentrations*, Private Investors Abroad, p.12.

1.2.2 The Dual Doctrine as a Statement of Principle

a **The Unsuitability of the Substantive Condition in General under Article 81(1) EC**

The Commission pointed to the fact that there was a need for different tests for concentrations and cartels since they have different characteristics and potential effects on competition.

This conclusion is valid. Concentrations often involve a costly one-off investment, and represent permanent change in the personality of the companies involved and the structure of the market on which they are active. The consequences of these changes will only appear in the medium to long term. Cartels, on the other hand, are transitory and can be subject to on-going control and revision of any regulatory decision taken. Furthermore, the effect of concentrations on the market in question differs from that of cartels. They are in general more likely to increase competition in the long term through efficiency gains and to constitute the natural structural development of the relevant market, particularly with respect to the progress of Single Market integration.³⁰¹

The Commission therefore determined that the application of Article 81 EC would not provide logical results, since it prohibits cartels in principle (according to Article 81(1) EC) whereas - given the potential benefits to consumer welfare of concentrations - the prohibition on concentrations should be stated only as an exception. It should be limited to those instances in which the existence of the concentration offers undertakings concerned excessive economic power. According to the Commission, the same treatment of these two different types of potentially anticompetitive conduct would lead either to too few cartels or to too many concentrations being prohibited.³⁰²

More recent commentators have stated that this concern of the Commission is not valid: different types of cartels are assessed in different ways according to their own specific character; there is no all-embracing *per se* prohibition of cartels. Moreover,

³⁰¹ See above, pp.39-41.

³⁰² Commission Memorandum, 1966, *ibid* at p.22.

the Court of Justice has always stressed that not every restriction of competition falls under Article 81(1) EC.³⁰³

This more recent criticism is the result of a failure to appreciate the prevalent approach of the Commission at the time when the Memorandum was written. The Commission's statements have specific regard to its policy (particularly prevalent in the early years) of finding a restriction on the freedom to trade of the parties to the agreement to be a restriction of competition. Thereby, almost all concentrations without exception would fall within the scope of Article 81(1) EC, even if they may have beneficial results in competition terms. While those beneficial results could be taken into account under Article 81(3) EC, this would mean intolerable delay and uncertainty for projected concentrations.

b Type of Agreements covered by Article 81 (1) EC

The Commission pointed out that the express requirement of an *agreement* under Article 81 (1) EC would inevitably exclude the control of concentrations achieved by other means, for example by the acquisition of control by stock exchange purchases.³⁰⁴

This does not restrict the applicability of Article 81 EC to *some* types of concentrations. It does however limit its usefulness relative to an independent system of control implemented specifically for the regulation of concentrations.

c The Problem of the Nullity Sanction - Article 81 (2) EC

According to Article 81 (2) EC, where an agreement bringing about a concentration falls within Article 81(1) EC (and there is no exemption under Article 81(3) EC), that agreement is null and void and the concentration itself would have to be divested. The Commission considered divestment to be too severe a sanction for concentrations.³⁰⁵

³⁰³ For example, *STM v Maschinenbau Ulm*, Case *ibid* p.282; *Consten and Grundig v Commission*, Case *ibid*, p.322; *Brasserie de Haecht v Wilkin and Wilkin*, Case *ibid*, p.544; *Voelk v Vervaeke* (1969) Case 5/69 (1969) ECR 295 (1969) CMLR 273.

³⁰⁴ Commission Memorandum, 1966, *ibid* at p.26.

³⁰⁵ Commission Memorandum, *ibid* at p.23.

This position is to be supported.³⁰⁶ Not only is divestment extremely complex and expensive but Article 81(2) EC may, at the Commission's discretion, be accompanied by a heavy fine. These sanctions are inappropriate in the circumstances that a concentration might take place simply in order to save a failing firm, or might in fact enhance the Community objective of 'external' integration.³⁰⁷ While an Article 81(3) EC exemption would take such potential benefits into account, the legal uncertainty and delay renders it similarly inappropriate. Legal certainty and speed of the decision are consistently stressed as being of paramount importance for concentration activity. Moreover, the specific application of Article 81(3) EC brings with it its own difficulties, as shown below.

d The Problem of the Exemption to the Rule - Article 81 (3) EC

First, the Commission stated that the examination of *potential* efficiency benefits of a concentration (*ex ante*) under Article 81(3) EC cannot be undertaken as reliably as it can concerning an anti-competitive co-operative agreement. This reason is however easily dispelled. Is not such an *ex ante* assessment necessary in any type of policy to control concentrations (where efficiency benefits are taken into account)?

Secondly, according to Article 81 (3) a, concentrations could only be exempted where it was demonstrated that the necessary benefits required could not have been achieved by a lesser restriction on competition. The Commission considered that this precluded its application to concentrations since concentrations involve the total fusion of one undertaking with another; the parties are no longer free to act independently.

Recent commentators have criticised this standpoint. They claim that the clause does not refer to a restriction on the parties' conduct but to a restriction on competition on the market.³⁰⁸ It is submitted however that this criticism does not take adequate notice of the early Commission approach, which was to concentrate upon restrictions on the freedom to trade of the parties to the agreement. On the basis of this latter (and at that time, predominant) reasoning, it is a valid concern. It is only within the context of the

³⁰⁶ Also Hefermehl, W, *Beurteilung von Fusionen und Konzernbildungen nach Art. 85 und 86 des EWG-Vertrages*, in: Dietz/Huebner (ed.), *Festschrift fuer H.C. Nipperdey II*, p.771 at p.780; van Ommeslaghe, *ibid* at p.69.

Against this, in the minority, Blank, *ibid* at p.132, who considers that the application of the Community principle of proportionality would prevent divestment taking place.

³⁰⁷ See above at p.8.

³⁰⁸ Blank, *ibid* p.131.

more recent approach - an assessment of the conduct's effect on competition structures - that the stated position of the Commission may be queried.³⁰⁹

Thirdly, the Commission validly pointed out that Article 81 (3) EC required that the benefits should be overseen for a long period of time. Concentrations however involve a definitive change in the ownership of undertakings and, for reasons of legal certainty, can only be forbidden or allowed on a lasting basis.³¹⁰

Lastly, Article 81 (3) was, according to the Commission, unsuited to the assessment of concentrations since it presents the Commission with some opportunity to introduce industrial policy factors into its analysis. This would have encountered stiff opposition from some Member States (most notably Germany and the UK). Such a concern is however still valid with regard to the implementation of a specific system of merger control: regulation of market structures directly provides the opportunity to pursue particular industrial policy aims.³¹¹

1.3 Summary and Evaluation of the Unsuitability of Article 81 EC to Apply to Concentrations

The analysis above determines that in *legal* terms, Article 81 EC was by no means excluded from application to concentrations. Some of the perceived unsuitability of Article 81 EC to assess concentrations derived from the Commission and the ECJ's pervasive tendency to equate a restriction on the freedom to trade of a competitor with a restriction on competition within the meaning of Article 81(1) EC. Thereby, all horizontal concentrations would have breached Article 81(1) EC, since a horizontal concentration involves a complete restriction on the freedom to trade of a competitor (as the target company). Supporting this conclusion is the difference in the positions adopted by the contemporary commentators and by those considering the issues more recently. The majority of contemporary commentators tended to accept the

³⁰⁹ Thus, *Joliet* considers that this second reason is the main reason for the inappropriateness of Article 81(3) to concentrations, not because concentrations could not be assessed effectively under this condition (criticising the Commission's other reasons) but because it would favour loose-bound cartels over concentrations, which is absurd, (1970) *ibid* at p.280.

³¹⁰ Note that this is purely a procedural matter and does not affect the applicability - or suitability - of Article 81 EC as a provision to assess concentrations. The period of time for supervision derives from Regulation 17 with specific regard to cartels and may also be subject to the principle of proportionality. If this period is not appropriate for concentrations, this only affects the applicability of Article 3 of Regulation 17. *Joliet*, 1970 *ibid* at p.281; *Blank*, *ibid*, at pp.131-2.

³¹¹ These concerns ensured however that there would be no specific efficiency defence when the European Concentration Regulation was implemented. See below at note 978.

Commission's position, even if some of them differed slightly in their specific reasoning.³¹² More recent studies have tended to be more severe about the Commission's reasoning in its rejection of Article 81 EC as a provision for concentration control.³¹³ Thereby, *Bos et al*³¹⁴ and *Vogel*³¹⁵, for example, claim that the Commission exaggerated these technical difficulties involved. They point to the undesirability of treating concentrations and agreements differently, where they have the same effect in economic terms. According to these authors, what lay behind the reluctance to apply Article 81 EC to concentrations was in fact solely their benevolent attitude towards concentrations in terms of economic and industrial policy.³¹⁶ This was in spite of the potential distortions of competition they might represent by effecting a reduction of the number of independent players on a relevant market.

Certainly, the Commission expressed such a positive approach towards concentrations on numerous occasions,³¹⁷ and this approach contributed to the early omission of a Community system of merger control (whether directly or through the application of existing Treaty provisions). It should not however be forgotten that the Commission had expressed awareness about the dangers that concentrations could present to competition structures (and, by direct connection, single market integration) as early as 1966.³¹⁸ Furthermore, the Commission applied Article 82 EC to the creation of a concentration just five years later in *Continental Can*.³¹⁹

It is submitted that the technical deficiencies of the provision that were highlighted by the Commission, in particular those that led to legal uncertainty and delay, were pertinent. These include, specifically, the nullity sanction and the exemption procedure. Any concentration fulfilling the conditions of the *Philip Morris* doctrine is

³¹² For example, *Joliet*, whose main reasons lay more with Article 81 EC's inapplicability on grounds of legal policy, set in the legislative history and wording of the substantive provision (see above regarding his criticism of the use of Article 81(3) EC, based upon a restriction of economic freedom of the parties being a restriction of competition), than its actual technical deficiencies in practice. *Joliet*, *ibid*, 1970, p274-7.

³¹³ Blank, *ibid*, who submits that neither the literal wording, the teleological structure, the legislative history nor the technical issues prevent the application of Article 81 EC to certain types of concentrations. Similarly, *Bos*, *ibid*, p.5-6 and *Vogel*, *ibid*, pp.234-238; *Goldman*, B. et *Lyon Caen*, A., *ibid*, pp. 670-671.

³¹⁴ *ibid*.

³¹⁵ *Vogel*, L., (1988), *ibid*.

³¹⁶ *Bos*, P.-V. et al., *ibid*, pp.5-6. See also, *Vogel*, L. *ibid*, pp.234-238; *Goldman*, B. et *Lyon Caen*, A., *ibid*, pp. 670-671.

³¹⁷ See above.

³¹⁸ Commission Memorandum 1966, *ibid*. (see above).

³¹⁹ *Case*, *ibid*.

provisionally void under Article 81(1) EC, pending the possibility of an exemption according to Article 81(3) EC. This procedural structure is particularly unsuited to merger control because of the delays involved and the legal uncertainty. Moreover, the notification procedure under Article 81 EC was ill-equipped for concentration control: there was no definite time limits for the Commission to decide whether an agreement infringes Article 81 EC.³²⁰ Thereby, comfort letters are useful for certainty in the *individual case*, but do not aid the construction of coherent concentration policy.³²¹ Another significant factor was that Form A/B did not provide adequate instructions for determining the relevant product and geographical markets, or whether a specific transaction constitutes a 'concentration'.³²²

Uncertainty would have also developed where the Commission might give negative clearance to a concentration under Article 81 EC, but the Member States are not prevented from applying their own national laws.³²³

What the Commission can however be criticised for is ignoring the fact that most of these technical deficiencies of Article 81 EC in the assessment of mergers were procedural and derived from Regulation 17/62. They might therefore have been overcome by the appropriate amendment of that Regulation, an option that the Commission apparently failed to consider.

With the Commission's position towards the applicability of Article 81 EC to concentrations as it was, there arose the significant danger of a legal loophole in control. Even after *Continental Can*³²⁴, there was a broad band of co-operative behaviour by firms which, being more concentrative than collusive, would not fall within Community control. This was a lacuna of control that the Court of Justice proved to be extremely concerned about. In a landmark decision, the Court of Justice appeared to tackle the anomaly head on.

³²⁰ See in particular, Fine, F., *Concentrations and Joint Ventures - the Law and Policy of the EC*, (2nd Ed.), 1994.

³²¹ Note that the MR involves short and strict time limits.

³²² The Commission adopted Form CO to deal with this problem under the MR.

³²³ See eg. *Procureur de la Republique v Giry and Guerlain*, Cases 253/78 and 1-3/79, (1980) ECR 2327, (1981) 2 CMLR 99.

³²⁴ Case, *ibid*.

2 The Philip Morris Case - *BAT and Reynolds v Commission*³²⁵

In its *Philip Morris* decision, the Commission had found a previous arrangement between *Philip Morris* and *Rembrandt* to breach Article 81 EC. Following a significant restructuring of the agreement however, the Commission declared the transaction to be compatible with Article 81 EC. Competitors of the two companies pursued their original claim of a breach of the same article to the European Court of Justice.

Under the new agreements, *Philip Morris* (PM) obtained a direct shareholding in *Rothmans International* (RI), which was previously solely controlled by *Rothmans Holdings* (RH), a 100 % owned subsidiary of *Rembrandt* (R). That holding was 30.8 %, representing 24.9 % of the votes. R, on the other hand had a 30.8 % interest in RI, representing 43.6 % of the votes, which was held in its favour by RH. The agreements also provided, in particular, that: PM would not increase its shareholding in RI in such a way that its voting power would reach 25 % or more; that each of the parties had a right of first refusal if either of them assigns its shareholding; that PM would inform the Commission about any future amendment to the agreements; that PM would not have any representative on the board or management body of RI; that PM would not seek or accept any information which would be relevant to its own competitive behaviour within the Community.

Thus, in general terms, the transaction involved the acquisition of a minority shareholding by one company in another.

The Commission's decision was appealed to the Court of Justice. Regarding the facts of the case, the Court considered that, while the acquisition of a *minority* holding in a competitor could fall within Article 81 (1) EC, there was further necessary a framework whereby the commercial conduct of the companies in question would be influenced. On the facts, there were no such agreements or strategies between the purchaser and the target company which could fulfil this criterion and the Court of Justice upheld the Commission's decision.³²⁶

³²⁵ Cases 142/84 and 156/84 (1987) ECR 4487, (1988) 4 CMLR 24.

³²⁶ Advocate General *Mancini* on the other hand considered a breach of Article 81 (1) to have occurred. On this, see Fine F., ECLR 1987, p333 at 340-41, who also criticises the Courts conclusion in the judgment. Also, see Korah, V. and Lasok, P., *ibid.* The Court of Justice also upheld the Commission decision that Article 82 EC was inapplicable, since there was no possibility of an abuse occurring where *Philip Morris* was in no position to exercise an influence on the commercial policy of *Rothmans International*, Case *ibid* at paragraph 65.

The significance of the case however lies in the further statement of principle espoused by the Court. This is contained in the following paragraphs:

‘Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.

That will be true in particular where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or *de facto* control of the commercial conduct of the other company or where the agreement provides for the commercial co-operation between the companies or creates a structure likely to be used for such co-operation.

That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan.³²⁷

The Court further stated that every agreement must be assessed in its economic context and in particular with regard to the situation on the relevant market. This includes any commercial relationships that the participating companies might have outside the Community, in recognition of the fact that the agreement might be part of a policy of global co-operation between the companies which are part of it.³²⁸

Questionable is whether the Court thereby extended the scope of the prohibition under Article 81(1) EC beyond the acquisition of minority holdings with attendant ability to influence the commercial conduct of the target company (as a competitor), to include the simple acquisition of majority holdings or even total mergers.

3 The Legal Implications of the *Philip Morris* Decision

The paragraphs 37-40 of the *Philip Morris* decision raised three points of controversy.³²⁹

³²⁷ Case, *ibid* at paragraphs 37-39.

³²⁸ Case, *ibid* at paragraph 40.

³²⁹ The thesis does not consider in any further depth the more traditional conditions required under Article 81 (1) EC, for example the meaning of ‘*undertaking*’. See further on this eg.,

- First, what constituted the 'Agreement' within the meaning of Article 81 (1) EC whose anticompetitive effect was to be assessed (and which would be void under Article 81 (2) EC)?
- Secondly, in what circumstances the acquisition of a holding in a competitor constitutes a restriction of competition within the meaning of Article 81(1) EC? Thereby, is *any* minority holding sufficient, or is at least the possibility of legal or *de facto* control over another competitor necessary? If the acquisition of control is required, does the principle extend to majority holdings and total integration (where control is *per se* acquired) or must the participating undertakings retain some independence?
- Thirdly, must the target company always be a competitor or could the principle extend to vertical and conglomerate concentrations?

3.1 The Meaning of 'Agreement' according to Article 81(1) EC in the Application of the *Philip Morris* Doctrine

Article 81(1) EC prohibits co-operative conduct between undertakings which affects interstate trade and has as an object or effect a restriction of competition on the common market.³³⁰

Fundamental to its application therefore is an '*agreement*' between undertakings, a '*decision*' by associations of undertakings or a '*concerted practice*' carried out by undertakings.³³¹ If these agreements or practices are considered to fall within Article 81 (1) EC, they are void under Article 81 (2) EC.

Questionable is what constitutes an 'agreement' or 'concerted practice' within the meaning of Article 81 (1) EC (that is void under Article 81 (2) EC) for the application of the principle espoused in *Philip Morris*.

Blank, *ibid*, pp.137-145. The jurisdictional condition of '*an effect on interstate trade*' however is analysed below.

³³⁰ For the full text, see note 43.

³³¹ The concept of concerted practice is extremely broad, and the borderline between where a 'concerted practice' ends and an 'agreement' begins within the meaning of Article 81 (1) EC is not distinct.

See in particular, *ICI v Commission* Case 48/69 (1972) ECR 619 at 64. For comment, see eg., Whish, (1993) *ibid*, p190-201; Koch in Grabitz, *Kommentar*, *ibid*, Artikel 81EC, paragraph 19.

3.1.1 The Agreement to Transfer Shares

From the literal text of the judgment, it appears that the agreement to transfer the ownership of the shares constitutes the 'agreement' within the meaning of Article 81 (1) EC.

Some commentators however refuse the submission that the agreement to transfer represents the agreement which falls within Article 81 (1) EC (and hence, is void according to Article 81 (2) EC) under the *Philip Morris* doctrine.³³² They restrict the application of the *Philip Morris* doctrine by submitting that it concerns only a further agreement or concerted practice between the parties (or between one of them and a third party) beyond the actual agreement to transfer ownership, through which the freedom to compete of at least one will be restricted. There is, according to them, a workable distinction between the acquisition of the equity and the exercise of an influence over the commercial conduct of that undertaking. Only the exercise of the voting rights pursuant to the acquisition of the shares is void, not the actual transferral. Accordingly:

'Die Kapitalbeteiligung selbst an einem Wettbewerber ist insoweit lediglich ein *Indiz* fuer eine daneben bestehende Vereinbarung oder abgestimmte Verhaltensweise zwischen den betroffenen Unternehmen.'³³³

This interpretation however ignores the literal wording of the case. In strict legal terms, *Philip Morris* extends to the agreement to transfer the shares itself (that is, between two participating undertakings or by friendly public bid):

'Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, *such an acquisition may nevertheless serve as*

³³² Fuchs, A. and Immenga, U., *Artikel 85 EWG-Vertrag als Grenze für Unternehmensbeteiligungen?*, NJW 1988, pp.3053-55; Deimel, *ibid*, pp.89-91; Korah, V. and Lasok, P., *ibid*; Riesenkampff, A., *Auswirkungen des Urteils des EuGH vom 17.11.1987 ('Philip Morris')*, in: WuW 1988, p.469.

Venit considers that the example given in paragraph 38 of the judgment of an acquisition by one company in another falling within Article 81(1) EC (that is, where through the acquisition the acquiring company obtains legal or de facto control over the conduct of the company taken over) requires further agreements between the acquirer of the minority share and the majority shareholder in the target company to co-ordinate conduct (thereby resolving the apparently conflicting statements by the Court, referring to the companies remaining independent in paragraph 31 and the acquisition of control by one in another in paragraph 38, see below), in: *Venit, J., Private Investors Abroad*, *ibid*, pp.69-71. In agreement, see also Riesenkampff, A., *Auswirkungen des Urteils des EuGH vom 17.11.1987 ('Philip Morris')*, in: WuW 1988, p.466.

*an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.*³³⁴

Here the Court states that, while such a transfer agreement does not constitute conduct restricting competition *as a general rule*, nevertheless it may be an instrument fulfilling this purpose. It may of course be argued that the Court only intended to state that a transfer agreement only serves as such an instrument where there are other ancillary restrictive agreements that bring about a co-ordination of the conduct of the parties.³³⁵ The Court's further statements contradict this interpretation however. There will be a restriction of competition where the *transfer agreement ipso facto* gives legal or *de facto* control. Thus:

The circumstances in which this will be true are if the investing company, *by the acquisition of a shareholding* or through subsidiary clauses in the agreement, *obtains legal or de facto control* or where the agreement provides for commercial co-operation between the companies or creates a structure likely to be used for such co-operation.³³⁶

It is clear that the acquisition itself may be the instrument which effects this influence or control, independent of further agreements or circumstances.

If the agreement to transfer the ownership of the shares constitutes an agreement within the terms of Article 81 (1) EC under the *Philip Morris* principle therefore, it appears - *prima facie* - that this should be indiscriminate of the *method* of acquisition: it would include the acquisition of shares by agreement with the undertaking itself or its parent company (as in *Philip Morris*), an acquisition through purchases from third parties (for example, on the stock exchange), or the purchase of shares subject to public offer. It is necessary to investigate this hypothesis more closely.

a Direct Agreement between the Participating Undertakings

Clearly the first example is an agreement within the meaning of Article 81 (1) EC, since it corresponds directly to the Court's statement in *Philip Morris*, as analysed above.

³³³ Immenga and Fuchs, (1988) *ibid*, p.3053 (author's emphasis).

³³⁴ Case, *ibid*, at Paragraph 37 (author's emphasis).

³³⁵ See note 332 above.

³³⁶ Case, *ibid*, at Paragraph 38 (author's emphasis).

b Acquisition on the Stock Exchange

On the other hand, the Court did not consider directly the acquisition of shares from third parties, for example on the stock exchange. Clearly acquisition on the stock exchange can lead to integrated structures which enable co-operation which may restrict competition. This alone is given by some commentators as a reason for Article 81 (1) EC to apply to such transactions.³³⁷ However, in strict legal terms, an insuperable difficulty arises since there appears to be no 'agreement' within the meaning of Article 81 (1) EC; there is no co-ordination of market conduct between the parties (which could lead to a restriction of competition).³³⁸

There is a further practical difficulty with regard to acquisition on the stock exchange.³³⁹ This considers the fact that such acquisitions are characterised by the acquisition of shares from numerous third parties. Questionable thereby is which of these many contracts restricts competition (and is therefore null and void according to Article 81 (2) EC)? If a combination of more than one is involved, at what point is competition restricted where they are bought successively?

c Acquisition by Public Bid

The third issue concerns the applicability of Article 81 EC to public bids. In legal terms, where the public bid is hostile there is no agreement that could represent co-ordinated or collusive conduct within the terms of Article 81 (1) EC, and the provision is inapplicable. Where the public bid is friendly however, Article 81 (1) EC would be applicable in legal terms.³⁴⁰

d Ancillary Agreements

Aside from the agreement to transfer the shares itself, other ancillary agreements may be relevant (if not necessary). The Court states that:

³³⁷ Mestmaecker, EuR 1988, p.371; Von der Esch, *Merger Control at the Community Level - Evidence submitted to the European Communities Committee of the House of Lords*, at p.2, relying on Article 3g EC; Schoedermeier, WuW 1988, p.191.

³³⁸ See eg., Immenga and Fuchs, NJW 1988, p.3053; Deimel, A., *ibid* at p.88.

But against this, in the minority, see Blumberg, J.P. and Schoedermeier, M., '*EC Concentration Control: no smoke without fire?*', *International Financial Law Review*, London, Vol.7, Nr.1, January 1988 p.36: '*the share purchasing contracts (between the bidding company and the shareholders of the target) can very well be agreements to acquire control.*'

³³⁹ See eg., Deimel, *ibid*, p.89; Immenga and Fuchs, (1988) *ibid*, p.3052.

³⁴⁰ See eg., Calkoen, J.L. and Feenstra, J.J., *Acquisition of Shares in other Companies and EEC Competition Policy: The Philip Morris Decision*, *International Business Lawyer*, 1988, pp.167-170, at p.168.

'The circumstances in which this will be true are if the investing company, by the acquisition of a shareholding *or through subsidiary clauses in the agreement*, obtains legal or *de facto* control...'³⁴¹

Therefore, where the transfer agreement itself does not lead to such an acquisition of control or commercial influence, there may be other agreements arising whereby the commercial conduct of the participating undertakings (as competitors) will be affected and which fall within Article 81 (1) EC.³⁴² These need not be explicitly within the contract to transfer, but may arise from the surrounding circumstances.³⁴³ They do require initially however that there be an agreement within the meaning of Article 81 (1) EC.

3.1.2 Evaluation

Upon analysis, the *Philip Morris* principle applies to the agreement to transfer the ownership of shares in one undertaking to its competitor. Such an agreement only however exists where those shares are transferred by *direct agreement between the parties* or by *acquisition under friendly public bid*.

The principle also covers ancillary agreements between the parties which may restrict competition within the common market. These would however fall within the scope of Article 81 EC in its traditional application.

3.2 The Types of Acquisition of a Holding in a Competitor that Constitute a 'Restriction of Competition' within the Meaning of Article 81(1) EC in the Application of the Philip Morris Doctrine

3.2.1 The Apparent Paradox in the Judgment - Independence versus Control

Various commentators have pointed to a paradox in the Commission's reasoning in the principle espoused in *Philip Morris*.³⁴⁴ This centres around the fact that Article 81

³⁴¹ Case, *ibid*, at Paragraph 38 (author's emphasis).

³⁴² Immenga and Fuchs, (1988) *ibid*, p.3053; Deimel, *ibid*, p.89.

³⁴³ Immenga and Fuchs, (1988) *ibid*, p.3053; Deimel, *ibid.*, p.89.

³⁴⁴ Steindorff, E., *Kooperativer Unternemmerszusammenschluss und Kartellverbot - Erste Bemerkungen zum Rothmans-Morris-Urteil des EuGH*, *Zeitschrift fuer das Gesamte Handelsrecht*, p.60; Riesenkampff, A., (1988) *ibid* at p469-70; Schroeder, D, *Die Anwendung des Kartellverbotes auf verbundene Unternehmen*, WuW 1988 at p. 279.

Deimel goes so far as to claim that this independence must be not only at the time of the agreement, but continue in the long term, Deimel, A., *ibid*, at p.94.

is aimed at collusive conduct of independent undertakings. Concerning the facts of the judgment, the two participating undertakings certainly remained independent, since the issue involved a minority share holding with various agreements excluding co-operation between the parties. In the further principle set forth in *Philip Morris* however, there is a breach of Article 81 EC where there is an acquisition of control by one undertaking in another.³⁴⁵

How are the participating undertakings to remain independent (and therefore in co-operation) if one is simultaneously acquiring control over another? The answer to this paradoxical situation has direct implications for the scope of the principle. If the participating undertakings are not required to remain independent - that is, the principle includes the acquisition of control of one over another - then it may extend to the acquisition of majority holdings and even to total merger.

a Paragraph 31 - Continued Independence of the Undertakings

Some commentators have highlighted the Court's statement in paragraph 31 of the decision:

'Since the acquisition of shares in RI was the subject-matter of agreements entered into by companies which have remained independent after the entry into force of the agreements, the issue must be examined first of all from the point of view of Article 85 (Article 81 EC).'³⁴⁶

According to them, this condition would be irrelevant if Article 81 EC were to be used to assess effects on market structure.³⁴⁷

Upon analysis however, this statement by the Court is not conclusive. It is made solely in relation to the specific case at issue and the requirement to consider the applicability of Article 81 initially with regard to the specific facts of the case. Since co-operation was possibly involved, Article 81 EC is the logical provision to consider

But against this conclusion, see eg., Emmerich, V, *Europäische Fusionskontrolle nach dem Zigaretten-Urteil*, p. 951 in: Baur, J.F., Hopt, K.J., Mailaender, K.P., *FS fuer Ernst Steindorff zum 70. Geburtstag*, Berlin/New York 1990, at p.958. Also, Fine, F., (1987) ECLR *ibid*, at p.342.

³⁴⁵ Case, *ibid* at Paragraph 38.

³⁴⁶ Case, *ibid*, at Paragraph 31.

³⁴⁷ See eg., Deimel, *ibid*, p.94; Gleiss A. and Hirsch, M., *Kommentar* *ibid*, Paragraph 19; Fine, F, (1987) *ibid*, p.342; Emmerich, V., in *FS fuer Ernst Steindorff*, (1990) *ibid*, at p.958; Venit, J., *Private Investors Abroad*, *ibid*, p.60-61.

first since it is *primarily* directed at cartels and collusive behaviour. It does not represent a general limitation of the scope of Article 81 EC.

More pertinent is to turn to the literal wording of the substantive condition under Article 81 (1) EC. We find that does not in fact explicitly require that the two parties to the agreement in question remain independent after the consummation of their agreement.³⁴⁸ It requires only that there be agreement between undertakings which may affect trade between Member States and which has the object or effect the prevention, restriction or distortion of competition within the common market.³⁴⁹

In terms of practical policy, Fine states further that:

'to limit the application of Article 85 (1) (Article 81(1) EC) to the acquisition of control in another undertaking falling short of actual merger would constitute an artificial distinction which would only encourage raiders to obtain control rather than to accomplish a take-over.'³⁵⁰

b Paragraphs 44-45 - Co-ordination not Concentration?

Some commentators submit that the wording of the Court stresses the *collusive* nature of the agreements:³⁵¹ it did not explicitly consider to what extent the effects on the *market structure* resulting from the concentration may be assessed under Article 81 EC; rather, it focused upon the issue of the co-ordination of competitive behaviour of the companies involved in the concentration.

On the contrary however, the Court makes explicit reference to 'take-overs' in its judgment. Thus, in paragraph 44, it states:

' In the market situation described by the Commission...any company wishing to increase its market share will be strongly tempted...to take control of a competitor. In such circumstances, *any attempted take-over* and any agreement likely to promote commercial co-operation between two or more of those dominant companies is liable to result in restriction of competition.'

³⁴⁸ Fine, F., (1987) *ibid*, at p.342; Scrivens, R. 'The 'Philip Morris' Case: Share Acquisitions and Complainants' Rights', 1988 6 EIPR 163-171. But against this, see Sedemund J. and Montag, F., *Europaeisches Gemeinschaftsrecht*, in: Neue Juristische Wochenschrift, *ibid*, at p.609 and Immenga and Fuchs, *ibid*, at p.3055-6

³⁴⁹ In full, see note 43.

³⁵⁰ Fine, F., (1987) *ibid*, at p.342.

In paragraph 45 of the judgment, the Court again states:

'It must consider in particular whether an agreement which at first sight provides only for a passive investment in a competitor is not in fact *intended to result in a take-over of that company*, perhaps at a later stage, *or to establish co-operation between the companies with a view to sharing the market.*'³⁵²

Therefore it can not be maintained that the wording of the judgment was clearly and exclusively aimed at collusive conduct.

3.2.2 Other Relevant Statements by the Court of Justice in its Judgment

a **Paragraph 71 - a Statement of New Principles**

Some commentators have drawn attention to paragraph 71.³⁵³ In consideration of the legality of the Commission's statement of reasons for its decision, the Court states:

'In this case the contested decisions concern the agreements of a type which had not been dealt with in the previous administrative practice of the Commission; *they do not lay down new principles but are limited essentially to an examination of the special features of the agreements in question.*'³⁵⁴

This does not however constitute a limitation to the principle. First, the statement refers to the *Commission decision*, not to the *judgment by the Court* itself. Secondly, the statement relates to application of the law to the specific facts of the case itself (which was found to be coherent with Article 81 EC), not the statement of principle concerning the general applicability of Article 81 to acquisitions. Furthermore, the judgment does not lay down any new principles since it is coherent with the Community task as set down in Article 3g EC: that is, to maintain a system of undistorted competition within the Community.

³⁵¹ Van Bael and Bellis, 2nd Edition, at p.304; Venit, J., *Private Investors Abroad*, *ibid*, pp.67-69.

³⁵² Author's emphasis.

³⁵³ Riesenkampff, A. (1988) *ibid*, at p.371. Also, Venit, J., *Private Investors Abroad*, *ibid*, p.66.

³⁵⁴ Author's emphasis.

b Paragraphs 43-5 - Related only to Oligopolistic Markets

Lastly, some commentators have suggested that the principle in *Philip Morris* (and they are not unanimous in their interpretation of that principle) is further restricted by the Court's emphasis in the case that the relevant market was a tight oligopolistic one.³⁵⁵ Once again, this fails to make the distinction between the Court's statement of general principle concerning the application of Article 81 EC to concentrations in general and the consideration of the facts of the specific case in an application of Article 81 EC.

3.2.3 Summary of the Types of Acquisition of a Holding in a Competitor that Constitute a Restriction of Competition within the Meaning of Article 81(1) EC in the Application of the *Philip Morris* Doctrine

Therefore there is no condition within the *Philip Morris* principle that the undertakings should remain independent after the agreement. It applies to total concentrations (where there is an 'agreement' within the meaning of Article 81 (1) EC).³⁵⁶

This was the view expressed by Peter Sutherland, then Commissioner for competition, in a press release following the *Philip Morris* judgment:

'The unambiguous confirmation by the Court that Articles 85 (and 86)³⁵⁷ apply to transactions relating to changes in corporate ownership will help the Commission to develop a merger policy based on sound legal principles and market analysis.'³⁵⁸

3.3 Relationship of the Acquiring Undertaking to the Target Undertaking - Does the *Philip Morris* Doctrine Extend to Vertical and Conglomerate Mergers?

In the *Philip Morris* case, the Court focuses the application of the doctrine it espouses on the acquisition of shares in a *competitor*.³⁵⁹ Questionable is whether the principle extends beyond such horizontal concentrations to vertical and conglomerate concentrations.

³⁵⁵ Case, *ibid* at Paragraphs 43-45. See Fine, F., (1987) *ibid* at p. 342; Moosecker, K., 'Wendepunkt in europaeischen Kartellrecht: Einfuehrung einer Fusionskontrolle durch di richterliche Hintertuer?', *Handelsblatt* of 3.12.1987, Nr.232 at p.3.

³⁵⁶ As considered by Advocate General Mancini in *Philip Morris* at paragraph 7; Fine, F., (1987) *ibid*; Scrivens, (1988) *ibid*.

³⁵⁷ Now Articles 81 and 82 EC.

³⁵⁸ Commission Press Release IP (87) 407 dated 18 November 1987, 'Breakthrough for Competition Policy in Court Judgment'.

3.3.1 Vertical Mergers

The *Grundig* case³⁶⁰ and the *Italy* case established that Article 81 EC does not distinguish between cartels and, for example, systems of selective distribution. The provision does not just apply to agreements between competitors.

Therefore, it is submitted that the principle in *Philip Morris* should not be restricted to only horizontal concentrations, but should extend also to vertical concentrations where the object or effect is to restrict competition within the meaning of Article 81(1) EC.³⁶¹ This is in recognition, further, that large concentrations often cannot be labelled simply horizontal, conglomerate or vertical, but may involve more than one such link.

3.3.2 Conglomerate Concentrations

Although some commentators have rejected the application of the *Philip Morris* principle to conglomerate concentrations because there is no competition link between the participating parties,³⁶² there is no reason to do so in a strict legal interpretation of Article 81 (1) EC.³⁶³ Competition can be restricted within the meaning of Article 81 (1) EC by such concentrations where, for example, the merged entity will have a financial strength vastly superior to its competitors.³⁶⁴

Therefore, Article 81 EC is applicable to conglomerate concentrations where their object or effect is to restrict competition within the meaning of Article 81(1) EC

3.3.3 Evaluation

Upon analysis, the *Philip Morris* principle applies to agreements to transfer the ownership of shares in one undertaking to another undertaking, regardless of whether they are direct competitors. It includes vertical and conglomerate mergers as well as

³⁵⁹ Case, *ibid.*, at Paragraph 37.

³⁶⁰ *Consten and Grundig v Commission*, Case *ibid.*, at Paragraph 387; *Italian Republic v Commission*, Case *ibid.*, at Paragraph 485.

³⁶¹ Emmerich, V. in: FS fuer E. Steindorff, (1990) *ibid.*, at p.963; Schoedermeier, M., WuW 1988, p.189; Korah, V., who states that at least leaves the door open for application to vertical mergers, in: ECLR 1987, *ibid.* at p.247; Deimel, A., *ibid.*, at p.92; Moosecker, K., (1987) *ibid.*, p.3.

But, in disagreement, see *Riesenkampff* who, in a very restrictive analysis of the law as applied to the facts, denies that the principle applies to vertical mergers, *ibid.* (1988) at p.470.

³⁶² Schoedermeier, 1988, *ibid.*, at p.188; *Riesenkampff*, *ibid.* (1988) at p.470.

³⁶³ Emmerich, V. in: FS fuer E. Steindorff, (1990) *ibid.* at p.963; Deimel, *ibid.*, at p.92.

³⁶⁴ Deimel, *ibid.*, p.92.

horizontal mergers where the object or effect of the merger is to restrict competition within the meaning of Article 81(1) EC.³⁶⁵

3.4 The Commission's Subsequent Practice

The response of the Commission to the case appeared to be mixed.

On the one hand, the Commission did not consider the *Philip Morris* case to be a radical extension of its powers. Rather, it considered it to be a confirmation of its already established policy towards joint ventures.³⁶⁶ The Commission considered it to endorse its previous policy towards joint ventures, whereby Article 81 EC applies not only to specific restrictive clauses in agreements on the formation of joint ventures, but to the formation of the joint venture itself, where such a transaction provides a framework for co-operation between the parents that is likely to restrict competition.³⁶⁷

On the other hand, the Commission made some much more direct public statements. In a press release following the Court's judgment, it claimed that:

'the importance of the case for the development of the Community's competition policy lies in the Court's ruling that Article 85 (Article 81) of the EEC Treaty is applicable to agreements whereby a company acquires control of a competitor by buying shares or making arrangements for co-operation between them.'

The Commission went on to state:

'the unambiguous confirmation by the Court that Articles 85 and 86 apply to transactions relating to changes in corporate ownership will help the Commission to develop a merger policy based on sound legal principles and market analysis.'³⁶⁸

Furthermore, *Peter Sutherland*, former Commissioner for competition stated:

³⁶⁵ Emmerich in: FS fuer E. Steindorff, (1990) *ibid* p.963; Schoedermeier, WuW 1988, p.189; Korah ECLR 1987 at p247; Deimel, *ibid*, p.92

Against this, Riesenkauff, A., *ibid* (1988) at p.470.

³⁶⁶ Van Bael and Bellis, 2nd ed., at pp. 304-307; Immenga and Fuchs, *ibid*, at p.3056.

Cf. Riesenkauff, A., *ibid*, (1988) who sees the *Philip Morris* Case (and the *Cornaud* Decision below) as no more than an application of Article 81 to a co-operative joint venture agreement. Also, Koenigs, F. '*Neuere Entwicklungen des EWG-Rechts*', p.152.

³⁶⁷ Commission Seventeenth Report on Competition Policy, at Paragraph 101.

³⁶⁸ Commission Press Release IP(87)497 (November 18, 1987).

'...the article 85 (Article 81 EC) applies to certain forms of concentrations.'³⁶⁹

The only opportunity for real clarification of the Commission's position in legal terms arose in the case *Carnaud/S.O.F.R.E.B.*³⁷⁰ The Commission's reasoning in the case however was ambiguous.

The decision involved the acquisition of 66.6 % of the shares held by *Sacilor S.A.* in *Sofreb* by its competitor, *Carnaud*. The Commission found, directly referring to *Philip Morris*, that this acquisition would create a structure which would result in co-operative behaviour with another competitor, *Continental Can*, which owned 33.4 % of the shares in *Sofreb* through a subsidiary. This constituted therefore an application of the principle in *Philip Morris* to the acquisition of *majority* holdings.³⁷¹

As a compromise, *Carnaud* offered to buy the shares owned by *Continental Can* through its subsidiary. Following an assessment under the Community competition rules, the Commission agreed to this since there would then be no risk of co-operation between two direct competitors.

Questionable is under which provision the Commission assessed these modifications to the transaction. The Press Release issued after the case was remarkably unclear on this point.³⁷² Indeed, it does not say at all whether the assessment took place under Article 81 or 82 EC. Certainly there were no indications that *Cornaud* held a dominant position in the market within the meaning of Article 82 EC. This does not preclude however that it was this provision under which the revised transaction was assessed.³⁷³

³⁶⁹ In *Ferry, J.*, *ibid.*, p.18. And see statement by *Peter Sutherland* above.

³⁷⁰ Other interesting but inconclusive cases include: *British Airways/British Caledonian*, Commission Decision, (1988) 4 CMLR 258; *Air France/Air Inter/UTA*, Commission Decision, Commission's Twentieth Report on Competition Policy at point 116; *GC&C/Irish Distillers*, Commission Decision, (1988) 4 CMLR 840; *GEC-Siemens/Plessey*, Commission Decision, OJ C239/2 (1990); *Hudson Bay*, Commission Decision of 28 October 1988, OJ 1988 L316/43. Further, see *Fine, F.* (1987) *ibid.*, pp. 58-64.

³⁷¹ Repeated in Commission Bulletin, 1988 -1, p.27 that the principle applies to majority holdings.

Cf. *Riesenkampff*, who maintains that the case concerned a joint venture and simply followed an established Commission policy in: *Riesenkampff, A.*, *ibid.* (1988) at pp.471-2.

³⁷² Commission Press Release IP (88) 14 dated January 1988, '*Settlement of a Dispute Concerning the Acquisition of Sofreb Shares by Carnaud (France).*'

³⁷³ Although cf. *Scrivens*, who considers that this fact alone allows the conclusion that Article 81 EC was the provision applied in this case, in: *Scrivens, R.* '*The 'Philip Morris' Case: Share Acquisitions and Complainants' Rights*', 1988 6 EIPR 163-171.

If the reporting of the reasoning in the case was (perhaps deliberately) vague, the attitude of the then Commissioner for competition, Peter Sutherland, however was (again) not:

'This case is an important example of how the Commission can apply Article 81 to mergers following the Court's jurisprudence in the *Philip Morris* case.'³⁷⁴

3.5 Legal Climate Post-Philip Morris

As a preliminary, it is important to note that the *Philip Morris* decision by the Court of Justice was not as radical a development in legal terms as it might first appear. It was in line with the Court of Justice's previous statements about the applicability of Article 82 EC to both conduct and to structural changes of ownership in *Continental Can*.³⁷⁵

In terms of its specific application in future concentration cases, the effect of the case was very limited. Its immediate legal implications were largely of uncertainty - legal and practical.

First, intense academic debate arose about the exact scope of the principle. Where it was - wrongly - denied that the case extended to the regulation of concentrations,³⁷⁶ this led only to further problems of principle: what was the meaning and extent of the required 'independence' of the participating companies (economic or legal)? How long must such independence subsist? How can the paradox between assumption of control and continued independence be resolved?³⁷⁷

³⁷⁴ Agence Europe, Nr. 4698, 13 January 1988, p.9. But cf *Koenigs*, who stresses that the Commission emphasised the danger of co-operation between the two parent companies which this case represented, and therefore this can be brought within the joint venture policy of the Commission in: Koenigs, F. *Neuere Entwicklungen des EWG-Rechts*, at p.152. In agreement, see Riesenkampff, A., *ibid* (1988), p.471-2.

³⁷⁵ See above, pp.60-62.

³⁷⁶ The difficulties in maintaining this position resulted in some rather artificial theoretical distinctions being drawn. For example, *Schmidt* claimed that the *Philip Morris* doctrine did not implement a system of concentration control according to Article 81 EC, but rather the application of EC cartel rules to conditions of concentration, in: Schmidt, K., '*Europaeische Fusionskontrolle im System des Rechts gegen Wettbewerbsbeschraenkungen*', BB Heft 11, 20.04.90, p.723.

³⁷⁷ Various solutions to the paradox were posited. Some authors maintained that the Court had referred to the *legal* independence of the parties rather than to their *economic* independence. See eg., Schoedermeier, M., *ibid* at pp.189-90; Emmerich, V., JuS 1989, *ibid* at p.55. In detail on the implications of this distinction, see Deimel, A., *ibid* at p.101.

Secondly, even if it is accepted that Article 81 EC applies to some types of concentrations, unacceptable levels of uncertainty still existed in the practical application of Article 81 EC to concentrations.³⁷⁸ If Article 81 EC were to apply to friendly public bids for example, and the transfer of the shares is declared null and void retrospectively, there arises the apparently insurmountable problem of tracing the original vendors.³⁷⁹ Furthermore, to re-enter the shares onto the stock exchange would create unacceptable legal and economic uncertainty on the markets.

The uncertainty caused by the *Philip Morris* judgment was coupled by a tangible hardening of attitudes by the Commission: the Commissioner in charge of competition policy, *Peter Sutherland*, warned that if the Council failed to adopt a Merger Control Regulation, the Commission would not have hesitated to apply Article 81 to concentrations.³⁸⁰

Thereby, the after-effects of the *Philip Morris* judgment was instrumental in changing the attitudes of both European industry and the Member States with regard to concentration control.³⁸¹ Fundamental however was the aftermath of the implementation of the Single European Act.³⁸²

Another solution posited was that the requirement of independence concerns the relationship between the seller and the purchaser, while the requirement of legal or *de facto* control concerns the relationship between purchaser and target company. See again, eg., Emmerich, JuS 1989, *ibid* at pp. 54-55. This distinction is at best arbitrary and illogical. See criticism of *Riesenkampff*, who rightly states that only the relationship between the target and the purchaser is of any relevance in competition terms, *Riesenkampff*, *ibid* (1988).

Steindorff considers that Article 81 EC applies to the acquisition of control through the acquisition of shares up to a certain intensity where there is commercial or strategic unity. This is as clearly unworkable standard and it is not justified according to the wording of the *Philip Morris* decision. His alternative is to restrict the meaning of the *Philip Morris* doctrine to the facts of the case, but again this is clearly against the literal wording of the case, in: *Steindorff*, *ibid*.

Riesenkampff suggests that the *Philip Morris* doctrine only applies to the acquisition of a minority holding by one undertaking in another where there are also ancillary clauses giving *de facto* or legal control of the acquiring undertaking over the commercial conduct of the target undertaking, in: *Riesenkampff*, A, *ibid* (1988) at pp.469-70. Also Venit, J., *Private Investors Abroad*, *ibid*.

³⁷⁸ On the uncertainty caused for business circles, see in particular, Calkoen, J.L. and Feenstra, J.J., *Acquisition of Shares in other Companies and EEC Competition Policy: The Philip Morris Decision*, *International Business Lawyer*, 1988, pp.167-170.

³⁷⁹ See eg., Blumberg and Schoedermeier, *ibid*, p.36; Korah, V., *ECLR* 1987, *ibid*, p.240.

³⁸⁰ Commission Press Release, IP(87) 282 of 9 July 1987.

³⁸¹ See Bulmer, S., *Institutions and Policy Change in the European Communities: the Case of Concentration Control*, 1994 *Public Administration*, 72, 423-444 at p. 431-2. He notes that the legal uncertainty caused businesses to begin to notify concentration activity to DG IV, even though there was no clear set of rules and conventions. This created such concern that



Summary of the Scope of the *Philip Morris* Principle

Legal analysis of the *Philip Morris* case and the weight of subsequent Commission statements determines that Article 81 EC is applicable to horizontal mergers undertaken by previously independent undertakings by direct agreement or by friendly public take-over.³⁸³ It is also applicable to vertical and conglomerate mergers undertaken by previously independent undertakings by direct agreement or by friendly public take-over where their object or effect is a restriction of competition within the meaning of Article 81(1) EC.

The reluctance of some contemporary commentators³⁸⁴ to admit a system of concentration control under Article 81(1) EC, and consequent restrictive interpretation of the open-ended statement of principle by the Court, can be explained by two reasons. First, the definition of a restriction of competition within the meaning of Article 81(1) EC that was pervasive at that time included a restriction on the freedom to trade of a competitor, an approach that threw the inadequacy of Article 81 EC as a system of merger control into sharp relief. Secondly, the inadequacies

corporate actors joined the existing alliance for supranational regulation. Also, see eg., Bulmer, S., *The Supranational Regulation of Mergers*, RUSEL Working Paper May 1993; Woolcock, S., *European Concentrations: National or Community Controls?*, RIIA Discussion Papers, 15, 1989; Korah, V. and Lasok, P., *Philip Morris and its Aftermath*, CMLRev (1988) vol.25, no.2, pp.333-68.

³⁸² See above, pp.21-22.

³⁸³ See below on issue of *continued* applicability.

Note that *Mestmaecker* considers that the *Philip Morris* doctrine is applicable to all types of mergers, in: Mestmaecker, E-J, *Fusionskontrolle im Gemeinsamen Markt zwischen Wettbewerbspolitik und Industriepolitik*, EuR, 1988, p.349.

³⁸⁴ eg., Sedemund, J. and Montag, F., *ibid*; Schmidt, K., *ibid*; Steindorff, E., *ibid* (all without elaborating on the reasons);

Gonzalez Diaz and Jones, who state only that the *Philip Morris* case is ambiguous and suggest only that it should be read in the context of preceding *Commission* policy, Gonzalez-Diaz, E. and Jones, C., *ibid* at pp.79-83;

Immenga, U. and Fuchs, A. who posit the doctrine of a qualified minority holding, being the acquisition of a minority holding in a competitor with further agreed restrictions of competition, in: Immenga and Fuchs, *ibid*.

Riesenkampff, A., *ibid*, who maintains that *Philip Morris* was restricted to the specific facts of case and in any case follows established Commission policy with regard to joint ventures, see Riesenkampff, *ibid* (1988);

Moosecker, K., who rejects the application of Article 81 EC to the acquisition of majority holdings according to an interpretation of the literal text (in particular paragraph 37) but does not thereby consider the paradox issue of the later paragraphs in: *Wendepunkt in europaischen Kartellrecht: Einfuehrung einer Fusionskontrolle durch di richterliche Hintertuer?*, Handelsblatt of 3.12.1987, Nr.232 at p.3.

But accepting the application of Article 81 EC to concentrations, see eg., Scrivens, R. *The 'Philip Morris' Case: Share Acquisitions and Complainants' Rights*, 1988 6 EIPR 163-171; Mestmaecker, E., 1988, *ibid*; Fine, F., (1987) *ibid*, at p.342 (although he does seem to limit the doctrine to concentrations effected in oligopolistic markets); Schoedermeier, *ibid* at p.191.

presented by the combination of Articles 81 and 82 EC meant that many commentators were anxious to maintain the pressure for an independent system of concentration control and to restrict the uncertainty of application of Article 81 to already established principles (according to the approach to joint ventures).

The contemporary stance adopted by the literature did not however reflect the reaction of the Commission (as shown by several official statements) or of the business community. Companies began to notify merger activity to the Commission voluntarily for clearance under Article 81 EC, even though there were no clear rules.³⁸⁵

D SUMMARY OF THE TYPES OF CONCENTRATION TO WHICH ARTICLES 81 AND 82 EC MAY BE APPLIED

The Commission and the Court of Justice had therefore established a competence to apply Community law to certain types of concentrations before the implementation of the Merger Regulation.

The Commission, upheld by the Court of Justice, had established a legal competence to assess concentrations under Article 82 EC. This was possible with regard to any concentration involving an undertaking in a position of single or joint dominance over a substantial part of the Community that hinders the maintenance of the degree of competition still existing in the market or the growth of that competition constitutes an abuse within the meaning of Article 82 EC. The concentration may be horizontal, vertical or conglomerate (although the condition is clearly more easily satisfied for horizontal concentrations).

The Court of Justice had also held that Article 81 EC is applicable to horizontal mergers undertaken by previously independent undertakings by direct agreement or by friendly public take-over.³⁸⁶ It is applicable to vertical and conglomerate mergers undertaken by previously independent undertakings by direct agreement or by

³⁸⁵ eg., *Carnaud*, Commission Decision, *ibid* and *GEC/Siemens/Plessy*, OJ C239/2 (1990), (1992) 4 CMLR 471. See *Financial Times*, 6 February 1989, p.4 (noting that in 1988 DGIV had made 25 formal decisions and 36 written clearances).

³⁸⁶ See below on issue of *continued* applicability.

Note that *Mestmaecker* considers that the *Philip Morris* doctrine is applicable to all types of mergers, in: *Mestmaecker, E-J, Fusionskontrolle im Gemeinsamen Markt zwischen Wettbewerbspolitik und Industriepolitik*, EuR, 1988, p.349.

friendly public take-over where their object or effect is a restriction of competition within the meaning of Article 81(1) EC. In both cases, there must be an 'appreciable' effect on the free play of competition for the prohibition of Article 81(1) EC to bite.

Having considered the types of concentrations to which Articles 81 and 82 EC are applicable, it is necessary to consider the extent to which they apply where there is an overlap with national control. In view of the primacy of Community law³⁸⁷, the jurisdictional divide between national and Community control of the types of mergers for which Articles 81 and 82 EC are applicable is established by the jurisdictional scope of Articles 81 and 82 EC.

³⁸⁷ See eg., *Walt Wilhelm v Bundeskartellamt*, Case 14/68 (1969) ECR 1, (1969) CMLR 100.

V THE SCOPE OF ARTICLES 81 AND 82 EC - THE JURISDICTIONAL DEMARCATION LINES

A THE ISSUE

As stated above, the Commission and the Court of Justice established a legal competence to apply Community law to certain types of concentrations.³⁸⁸ This was in recognition of an existing gap in the Community's competencies with regard to the Treaty aim of maintaining structures of undistorted competition within the Common Market (Article 3g EC). As has been demonstrated, this aim is consistent with the Community objective of Single Market integration.

The competence to apply Articles 81 and 82 EC to mergers in general not only restricted to concentrations of a specific form and structure. It is also limited by the jurisdictional scope of Articles 81 and 82 EC: the scope of the application of the interstate trade criterion. With regard to Article 81 EC, there is also a further condition that must be fulfilled: the restriction on competition must be 'appreciable'. This is a quantitative condition requiring that the restriction be of sufficient gravity for Community law to be applicable in place of national provisions of competition law.

B THE JURISDICTIONAL CRITERION FOR ARTICLES 81 AND 82 EC - AN EFFECT ON INTERSTATE TRADE

The interstate trade criterion determines the legal competence to apply Articles 81 and 82 EC. It defines the boundary between conduct which is subject to Community law and conduct which is governed solely by national law. For either of Articles 81 and 82 EC to apply, the conduct in question must '*affect interstate trade*' in order for either of the Articles to be applicable.

Whereas the appreciability condition for Article 81 EC sets a quantitative threshold to omit conduct that is not of sufficient *scale* to be of concern at the Community level,

³⁸⁸ Note that this is not a legal right of the *Community* to apply Articles 81 and 82 EC; it is a *general* legal right of application since national authorities (and in certain cases, national courts) may also apply Articles 81(1) and Article 82 EC. See in detail on this, eg., Bellamy and Child, (1994), *ibid*, pp.641-668; Whish, (1993) *ibid*, pp.318-328. Contrast this position with the Merger Regulation below.

the interstate trade criterion pinpoints conduct that is likely to be of a Community dimension rather than a national dimension because of its actual *effect*.

In order to analyse the legal competence to apply Community law to concentrations, it is necessary to analyse the interpretation and the operation of this criterion in detail.

2.1 The 'Effect on Interstate Trade' Condition as an Autonomous Criterion

Analysis of early academic debate reveals that it was by no means clear that the interstate trade criterion represented an independent jurisdictional criterion at all. There was some suggestion that it might rather form part of the condition in the substantive assessment of conduct under Articles 81 and 82 EC. The debate centred upon the correct interpretation of the word 'effect'.

2.1.1 The Academic Debate - The Meaning of 'Effect'

The controversy focused upon whether the word 'effect' should be interpreted as a neutral or a pejorative condition: is the condition of the criterion fulfilled when conduct has both a negative *and positive* influence on interstate trade, or does it only require a *harmful* influence on those trade patterns?³⁸⁹

The problem was exacerbated by the words adopted in the different language versions of the original Treaty. The verb used in French, '*affecter*', has a predominantly neutral sense, but could also be employed to suggest a pejorative meaning. The German word '*beeinträchtigen*' is similarly ambiguous. On the other hand, the corresponding words used for the Italian ('*pregiudicare*') and Dutch ('*ongunstig beïnvloeden*') versions of the Treaty are more pejorative.

The consequences of each approach are distinct. If the criterion is pejorative, it may thereby be seen as dependent upon - and even part of - the substantive assessment determining a breach of Articles 85 or 86 EC. If, on the other hand, it has a neutral sense, it may be seen as an autonomous jurisdictional trigger.

While the early academic debate concentrated upon the literal text of the criterion, the approach of the Court of Justice however could be seen to move away from the literal text to adopt a more teleological approach.

³⁸⁹ For a detailed account, see Goldman, B. and Lyon-Caen, A., '*Droit Commercial European*', Fourth Edition, 1983, Paris.

2.1.2 The Approach of the Court of Justice

2.1.2.1 The Interstate Trade Criterion as a Jurisdictional Criterion

The Court of Justice has declared on numerous occasions that the purpose of the interstate trade criterion was to '*define the boundary between the areas respectively covered by Community law and the law of the Member States.*'³⁹⁰ It therefore clearly considers the interstate trade criterion to be a jurisdictional criterion determining the scope of Articles 81 and 82 EC, autonomous of the substantive assessment carried out according to these Articles.

This result may be further deduced by a comparison of Articles 81 and 82 EC with the equivalent provisions set down in the Coal and Steel Treaty. Within the sectors to which the ECSC Treaty applies, the Member States gave up entirely their competencies to apply national provisions of competition law. There is no jurisdictional issue with regard to the delimitation of Member State and Community competence in these sectors. Thereby, Articles 65(1) and 66(7) ECSC, which are equivalent provisions to Articles 81 and 82 in the EC Treaty, do not contain the further condition that there should be an effect on interstate trade.

2.1.2.2 The Context for the Interpretation of the Interstate Trade Criterion

a **The Original Definition**

The original definition of the '*effect on inter-state trade*' criterion laid down by the Court of Justice was in the case of *Societe Technique Miniere v Maschinenbau Ulm*:

³⁹¹

' it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.'³⁹²

³⁹⁰ See eg., *Consten and Grundig v Commission* Cases 56 and 58/64 1966 ECR 299 at 341; *Commercial Solvents v Commission* Cases 6 & 7/73 (1974) ECR 223 (1974) 1 CMLR 309, Paragraphs 30-33; *Hugin Kassaregister AB v Commission* Case 22/78 1979 ECR 1869 at 1899. See also Advocate General Trabbuchi in *Papiers Peints v Commission* Case 73/74 (1975) ECR 1491, 1522-1524 (1976) 1 CMLR 589, 602-605.

³⁹¹ Case 56/65 (1966) ECR 235, (1966) CMLR 357.

³⁹² *Societe Technique Miniere v Maschinenbau Ulm* Case 56/65 1966 ECR 235 at 249.

b The Development of the Original Interpretation

Subsequently, however, that initial interpretation was developed. In fact, within the space of a month, the European Court had supplemented this ruling by its decision in the *Grundig* case.³⁹³ Here, the Court emphasised the overall context in which the criterion must be examined. Its purpose is to establish a boundary between Community law and that of the Member States in the context of competition rules, whereby it covers:

'any threat, either direct, actual or potential, to freedom of trade between Member States in a manner which *might harm the attainment of the objectives of a single market between States*'.³⁹⁴

The scope of Articles 81 and 82 EC should therefore cover all conduct that affects interstate trade whereby the objectives of the Single Market might be harmed.

c Pejorative or Neutral Effect?

The Court then went on to state the nature of 'effect' on interstate trade that was required:

'Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between States is not sufficient to exclude the possibility that the agreement may 'affect' such trade...'.³⁹⁵

In an answer to the linguistic debate that had been carried out in academic circles, the Court therefore made clear that the '*effect*' did not have to be detrimental; it could even mean an *increase* in trade. The decisive factor denoting a Community interest was shown to be not in the *quantitative* effect on trade, that is whether trade is increased or hindered, but rather in a change in the *structures and flow* of trade itself. If the alleged infringement changed the intensity or the direction of the flow of goods, artificially diverting it from its normal and natural course (in a manner that might harm Community objectives), then Community law is invoked.

³⁹³ *Consten and Grundig v Commission* Cases 56 and 58/64 1966 ECR 299.

³⁹⁴ Author's emphasis.

³⁹⁵ *Consten and Grundig v Commission* Cases 56 and 58/64 1966 ECR 299 at 341.

Hence, the word 'effect' is indeed neutral in its application: it entails both positive and negative consequences. Nevertheless, it also must have as a consequence a *negative* effect on the objectives of the Single Market.

3 The Application of the Interstate Trade Criterion in Practice

3.1 An Effect on the Flow or Pattern of Trade

3.1.1 The Concept of 'Trade'

First, the meaning of 'trade' has been found to extend beyond just the movement of goods. It also incorporates the supply of services³⁹⁶, such as insurance³⁹⁷, banking and money transmission³⁹⁸, the management of artistic copyrights³⁹⁹, the organisation of trade fairs⁴⁰⁰, television broadcasts and the services of public utilities⁴⁰¹ (such as gas and electricity⁴⁰²). Even the performance of individual artistes⁴⁰³ and the provision of consulting services by an individual⁴⁰⁴ have been held to constitute 'trade' within the context of the criterion.

Moreover, the right of establishment and the free movement of the suppliers also constitute 'trade'⁴⁰⁵. Similarly, the flow of profits from one Member State to another⁴⁰⁶. It even appears that where a business established in one Member State has a branch⁴⁰⁷ in another, the existence of the branch constitutes trade, so that if the

³⁹⁶ eg., *GVL v Commission* Case 7/82 (1983) ECR 483; *Bodson v Pompes Funèbres des Régions Libérées* Case 30/87 (1988) ECR 2479 (1989) 4 CMLR 984.

³⁹⁷ eg., *VdS v Commission* Case 45/85 (1987) ECR 405 (1988) 4 CMLR 264.

³⁹⁸ eg., *Zuechner v Bayerische Vereinsbank* Case 172/80 (1981) ECR 2021 (1982) 1 CMLR 313.

³⁹⁹ eg., *BRT v SABAM* Case 127/73 (1974) ECR 51 and 313 (1974) 2 CMLR 238, 269 and 282.

⁴⁰⁰ eg., *SMM&T Exhibition Agreement*, Commission Decision OJ 1983 L376/1 (1984) 1 CMLR 611.

⁴⁰¹ eg., *Sacchi* Case 155/73 (1974) ECR 409 (1974) 2 CMLR 177.

⁴⁰² eg., *Scottish Nuclear, Nuclear Energy Agreements*, Commission Decision OJ 1991 L178/31.

⁴⁰³ *RAI/UNITEL*, Commission Decision OJ 1978 L157/39 (1978) 3 CMLR 306.

⁴⁰⁴ *Reuter/BASF*, Commission Decision OJ 1976 L254/40 (1976) 2 CMLR D44. Note however that it is not clear whether the provision of professional services fulfils the term, even if governed by a system of ethical rules, see Bellamy and Child, *ibid*, at p.109.

⁴⁰⁵ *Pronuptia de Paris v Schillgalis*, Case 161/84 1986 ECR 353 at 26.

⁴⁰⁶ *Fire Insurance (D)*, Commission Decision OJ 1985 L35/20, 29-36 (1985) 3 CMLR 246, on appeal *VdS v Commission* Case 45/85 (1987) ECR 405 (1988) 4 CMLR 264.

⁴⁰⁷ The definition of 'branch' is broad; it is thought to include any company in which more than half of the shares are owned by foreigners.

activities of the branch are affected directly or indirectly, there is a relevant effect⁴⁰⁸. 'Trade' is therefore an extremely broad concept⁴⁰⁹.

3.1.2 The Concept of 'Effect' - Alteration of Trade Flows

'...it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States.'⁴¹⁰

The Court of Justice and the Commission adopt the same approach in assessing the criterion. In essence, the condition is fulfilled if the conduct in question alters the normal flow or pattern of trade, or causes trade to develop differently from the way it would have developed in the absence of the agreement⁴¹¹.

As noted above, the 'effect' upon transnational trade itself is neutral, and may therefore include an increase in interstate trade⁴¹². It may be *direct*⁴¹³: there is no doubt that the condition is satisfied if it could directly result in the partitioning of national markets, thereby hindering the objective of integration, which represents the context in which the criterion is to be applied⁴¹⁴. This covers arrangements confining an undertaking's activities to one area that will prevent it from operating elsewhere in the Community, and such exclusive arrangements often have a virtually automatic effect on trade between Member States⁴¹⁵.

⁴⁰⁸ *Verband der Sachversicherer e.V. v. Commission* Case 45/85, 1987 ECR 405 pp.441-4, 458-9; *Belgische Vereeniging der Banken*, Commission Decision O.J. 1987 L. 7/27 p.33.

⁴⁰⁹ The concept of 'trade' was described by the Court of Justice as having 'a wide scope', in, eg., *Zuechner v Bayerische Vereinsbank*, Case 172/80 (1981) ECR 2021 (1982) 1 CMLR 313.

⁴¹⁰ This is the interpretation which the Court of Justice has consistently used, eg., *Grundig v Commission*, Case, *ibid*.

⁴¹¹ eg., *Frubo v Commission* Case 71/74 (1975) ECR 563 (1975) 2 CMLR 123; *Michelin v Commission* Case 322/81 (1983) ECR 3461 (1985) 1 CMLR 282; *VW/MAN*, Commission Decision OJ 1983 L376/11 (1984) 1 CMLR 621; *Aluminium imports from Eastern Europe* Commission Decision OJ 1985 L92/1, 46 (1987) 3 CMLR 813.

⁴¹² Case, *ibid*.

⁴¹³ eg., the agreement directly relates to international transactions (eg., *Zuechner*, Case *ibid*), restricts imports or exports (eg., *Miller v Commission* Case 19/77 1978 ECR 131 1978 2 CMLR 334), where the parties are situated in different Member States (eg., *Sole distribution agreements for whisky and gin*, Commission Decision OJ 1985 L369/19 1986 2 CMLR 664), or where the agreement applies to more than one Member State (eg., Cases 43 & 63/82 *VBVB and VBBB v Commission* 1984 ECR 19 1985 1 CMLR 27).

⁴¹⁴ eg., *Papier Peints v Commission* Case 73/74 (1975) ECR 1491 (1976) 1 CMLR 589; *Salonia v Poidomani and Giglio* Case 126/80 (1981) ECR 1563 (1982) 1 CMLR 64.

⁴¹⁵ See eg., *Pronuptia* Case 161/84, 1986 ECR 353, 384, (CCH) at 14,245, ground 26, where the Court of Justice held that: 'franchise agreements for the distribution of goods which contain provisions sharing markets between the franchiser and the franchisees or between the

It may also be *indirect*⁴¹⁶: foreign trade is not necessary; it is sufficient if the behaviour merely renders it more difficult to import products⁴¹⁷. Indeed, the products affected need not even be goods or services which are in competition with those of the party under investigation. Thus, in *Salonia v Poidomani*⁴¹⁸, an agreement concerning domestic press had a sufficient effect on the import of foreign newspapers (which were not inter-changeable with the national product) since the products shared the same channels of distribution. In *B.N.I.C. v Aubert*⁴¹⁹ the Court of Justice found that a restriction on the production of a raw material (produced locally) affected interstate trade because the end product (cognac) was exported all over the world.

It may be further stressed that there is not even a need to prove an *actual* effect on trade between Member States - a *potential* effect suffices.⁴²⁰ It is then sufficient that there is a *possibility* that foreign competitors might decide to enter the home market, or that such a demand might come into existence and the Commission and the European Courts will also consider the way the market and the trade of the parties concerned might develop over time.⁴²¹ Thus, the Court of Justice stated in *AEG v Commission*:

'...the mere fact that at a certain time traders applying for admission to a distribution network or who have already been admitted are not engaged in intra-Community trade cannot suffice to exclude the possibility that restrictions on their freedom of action may impede intra-Community trade, since the situation may change from one year to another in terms of

franchisees themselves are in any event liable to affect trade between Member States, even if they are entered into by undertakings established in the same Member State, in so far as they prevent franchisees from establishing themselves in another Member State'.

See also, Commission Decisions: *BMW Belgium NV and Belgian BMW Dealers*, OJ (1978) L046/33, paragraph 23; 80/1283, *Johnson and Johnson* at paragraphs 35-36; 84/282 *Pilots SpA and Arbois-Modelud Agreement* at paragraphs 40-43, 50-51; 82/203 *Moet et Chandon Ltd* at paragraph 13; *Miller International Schallplatten GMBH*, paragraphs 5-6, 10-17.

⁴¹⁶ *Re Zanussi SpA Guarantee*, Commission Decision OJ (1978) L 322/26, (1979) 1 CMLR 81.

⁴¹⁷ An example of this would be the requiring of a foreign business to sell goods through smaller distributors, see eg *Vereeniging van Cementhandelaren v EC Commission* Case 8/72 1972 ECR 977, p.991.

⁴¹⁸ Case 126/80 1981 ECR 1563.

⁴¹⁹ Case 136/86, 1987 ECR.

⁴²⁰ Eg *AEG-Telefunken v Commission* Case 107/82 1983 ECR 3151, 1984 3 CMLR 325.

Commission Decisions: *Re Vacuum Interrupters Ltd* OJ 1977 L 48/32, 1977 1 CMLR D 67; *Servicemaster*, L332/38 OJ (1988), (1989) 4 CMLR 581 at paragraph 23; *Scottish Nuclear, Nuclear Energy Agreement*, OJ (1991) L 178/31 at paragraph 31.

alterations in the conditions or composition of the market both in the common market as a whole and in the individual national markets.⁴²²

Furthermore, the condition may also be fulfilled if the conduct is confined to a single Member State. There have been numerous cases.⁴²³ Where an agreement is intended to operate across an entire national market there seems to be an almost irrebuttable presumption that it will affect inter-state trade.⁴²⁴ In *Belasco v Commission*⁴²⁵, the Court stated that successful cartels confined to a single Member State have to take measures to oppose imports, and therefore national agreements may be prohibited. Distribution agreements within one Member State (or even to a small area within a Member State) may fulfil the criterion if they are part of a network of identical or similar agreements. Thereby, the cumulative effect of the network on trade must be considered.⁴²⁶

In general, where there are actual or potential direct restrictions on imports or exports between Member States, the conditions of application for the prohibition are usually

⁴²¹ *Allgemeine Elektrizitäts-Gesellschaft A.E.G.-Telefunken A.G. v Commission* Case 107/82 1983 ECR 3151; *Miller International Schallplatten GmbH. v. Commission* Case 19/77, 1978 ECR 131 pp.150-1; *Chemie B.V. v. Commission* Case C-62/86 1991 ECR I-3359 p.3374.

⁴²² *AEG v Commission* Case 107/82, 1983 ECR 3151, 3201, at 14018, ground 60.

⁴²³ eg. *Societe Technique Miniere v Maschinenbau Ulm GmbH* Case 56/65 (1966) ECR 235, (1966) 1 CMLR 357; *Vereeniging van Cementhandelaren v Commission* Case 8/72 (1972) ECR 977; (1973) CMLR 7; *S C Belasco v Commission* Case 246/86 (1989) ECR 2117, (1991) 4 CMLR 96; *Remia and Others v Commission* Case 42/84 (1985) ECR 2545 para.22, (1987) 1 CMLR 1; *Bundeskartellamt v Volkswagen* Case C-266/93 (1995) ECR, I-3477, (1996) 4 CMLR Antitrust Reports 505; *Re Vacuum Interrupters Ltd* Commission Decision OJ 1977 L 48/32, 1977 1 CMLR D 67; *Re Italian Cast Glass* Commission Decision OJ 1980 L 383/19, 1982 2 CMLR 61; *Re Italian Flat Glass* Commission Decision OJ 1981 L 326/32 1982 3 CMLR 366.

⁴²⁴ See also eg *Salonia v Poidomani* Case 126/80 1981 ECR 1563, 1982 1 CMLR 64; *Pronuptia de Paris v Schillgalis* Case 161/84 1986 ECR 353, 1986 1 CMLR 414. See Faull, *ibid* at p.494, who affirms this principle. Also Whish, 1993, *ibid*, p218.

⁴²⁵ Case 246/86 (1989) ECR 2181, (1991) 4 CMLR 96 at 33-35.

⁴²⁶ eg., *Brasserie de Haecht v Wilkin and Wilkin*, Case 23/67 1967 ECR 407; *Erauw-Jacquery v La Hesbignonne*, Case 27/87 (1988) ECR 1919 (1988) 4 CMLR. The Court of Justice has also analysed a selective distribution system by reference to the structure of the market concerned including the possible existence of similar distribution arrangements operated by other manufacturers, eg., Case 75/84, 1986 ECR 3021, 3985.

For an example of the Commission applying the cumulative approach to a distribution system, see *Royon/Meilland (Roses)*, Commission Decision OJ L369/9 (1985). It has also applied the approach in its substantive analysis of joint ventures, eg. *Optical Fibres*, Commission Decision OJ L236/30 (1986).

Note that the De Minimis exception is also subject to the network rule. It does not apply 'where in a relevant market competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers.', OJ (1997) C372/04.

satisfied.⁴²⁷ More recently, however, the Court of Justice has tended to accept appreciable effects on interstate trade even where there was no indicated mechanism restraining trade across frontiers.⁴²⁸ Thereby, the application of the condition in practice has become extremely wide. In the case *Windsurfing International Inc v Commission*⁴²⁹, the ECJ stated that, although it would only be the particular provisions that restricted competition that would be void, if an agreement as a whole affects trade between Member States, Article 81 may be breached even where those restrictions of competition do not affect such trade.⁴³⁰

Essentially, there need only be an indirect causation between the conduct and *any* actual or potential effect on interstate trade in the relevant market, or on a dependent market.⁴³¹

3.2 The Hindering of the Objectives of the Single Market

If the required 'effect' is neutral, it must however have a negative consequence: it must hinder the objectives of the Single Market:

'any threat, either direct, actual or potential, to freedom of trade between Member States in a manner which *might harm the attainment of the objectives of a single market between States*'.⁴³²

⁴²⁷ See eg., *Servicemaster*, Commission Decision of 14 November 1988, OJ 1988, L332/38 at Paragraph 23; *Scottish Nuclear, Nuclear Energy Agreement*, Commission Decision of 30 April 1991, OJ (1991) L 178/31 at Paragraph 31.

An exception appears to be the *Hugin* case, Case *ibid*. *Korah* suggests that the reason for this is that the condition about trade between Member States is meant to distinguish important agreements, subject to Community competence, from minor ones to be dealt with only by national authorities (see *Korah, V.*, 'An Introductory Guide to EC Competition Law and Practice', 1997, Hart, Oxford, at p. 59). It is submitted that this interpretation is misguided (note that *Korah* herself states that the Court did not make such an argument) and here would only add to the uncertainty of the application of the criterion. In fact, the case can be explained upon much more objective reasoning that there was no current interstate trade in the relevant market, nor was there likely to be in the future (see below).

⁴²⁸ See eg., *BNIC v Aubert*, Case 136/86, 1987 ECR

See *Korah*, 1997, *ibid* at p.59

⁴²⁹ Case 193/83 (1986) ECR 611, (1986) 3 CMLR 489.

⁴³⁰ See further eg, *Cutsforth v Mansfield Inns* (decision of the English High Court QB) 1986 1 CMLR 1; *Welded Steel Mesh* Commission Decision OJ 1989 L 260/1, 1991 4 CMLR 13 at 162; *Holleran v Daniel Thwaites P.L.C.* (decision of the English High Court Chancery Division) 1989 2 CMLR 917 and see Shaw, 'The United Kingdom', in: Behrens, P. 'EEC Competition Rules in National Courts', Part 2, Nomos, Baden Baden 1992 p. 140 on *Holleran* as an example of this rule.

⁴³¹ *BNIC v Aubert*, Case 136/86, *ibid* (the case concerned a down-stream market).

The early practice of the Commission and the Court of Justice regarded an actual or potential effect upon interstate trade as automatically hindering the objectives of the common market. Specifically, conduct or agreements (or concerted practices) that affected (or could affect) interstate trade would automatically hinder the process of integration by partitioning markets and preventing the free flow of trade between the Member States.

It has been established above that conduct is assessed for its compatibility with Articles 81 and 82 EC (once it has been established that either is applicable) within the context of the overriding Community objective of Single Market integration: the integration objective informs the *substantive* assessment of conduct that takes place under Articles 81 and 82 EC.⁴³³ It could therefore be envisaged that a condition requiring a hindering of the Single Market integration process for Articles 81 and 82 EC be applicable (in the application of the jurisdictional criterion) is superfluous; the substantive assessment embraces both the question of the applicability of Articles 81 and 82 EC and the question of whether they have been infringed.⁴³⁴ This would be however to ignore the literal wording of the Court of Justice. The ECJ considered the jurisdictional criterion to be fulfilled where 'any threat, either direct, actual or potential, to freedom of trade between Member States in a manner which *might* harm the attainment of the objectives of a single market between States.'⁴³⁵ Thus, the condition contained within the *jurisdictional* criterion requires a *potential* harm to the objectives of the Community for Articles 81 or 82 EC to apply. On the other hand, the *substantive* condition of each of these Articles, that is the assessment of conduct once it is established that either Article 81 or 82 EC is applicable, focuses upon assessing whether there has been an *actual* harm to those objectives. As detailed above, the Court of Justice and the Commission prohibit agreements under Article 81 EC and conduct under Article 82 EC that actually harm the integration paradigm.⁴³⁶

Faull has expressed the test as '*the reasonably foreseeable effect on the reasonably foreseeable development of trade*'. *Faull*, (1989) *ibid*, at p. 493

⁴³² Case, *ibid*, Author's emphasis. See also, eg., *Brasserie de Haecht S.A. v Wilkin and Another*, Case 23/67 (1967) ECR 407, (1967) CMLR 26 at Paragraph 5.

⁴³³ See above.

⁴³⁴ Thereby, some German scholars would describe the interstate trade criterion as being both a 'Kollisionsnorm' and a 'Sachnorm'. See eg, Koenigs, F., '*Die Beeinträchtigung des Handels Zwischen Mitgliedstaaten*', *ibid*, at p.570.

⁴³⁵ Author's emphasis.

⁴³⁶ See above at pp13-31.

Some years after the *Grundig* judgment⁴³⁷ however, the Court of Justice appeared to develop the application of the interstate trade criterion on the basis if this further condition.

3.2.1 The Commercial Solvents Case⁴³⁸ - A Structure of Undistorted Competition within the Community as an Autonomous Criterion

The case concerned a refusal to supply by an Italian company (a subsidiary of the US-based *Commercial Solvents* company) to a downstream competitor in Italy (*Zoja*). *Commercial Solvents* was the only world source of the raw material concerned and a refusal to supply meant that *Zoja* would be eliminated from the relevant market. *Zoja* sold 90% of its production on world (non-Community) markets. The applicants therefore claimed that the refusal to supply did not affect interstate trade, since *Zoja* was not involved in interstate trade.

The Court of Justice however, in its consideration of the scope of Article 82 EC, stressed the importance of Article 3g EC (that is ancillary to the overall integration objective under Article 2 EC), according to which the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted:

'when an undertaking in a dominant position within the Common Market abuses its position in such a way that a competitor in the Common Market is likely to be eliminated, *it does not matter whether the conduct relates to the latter's exports or to its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.*⁴³⁹

⁴³⁷ Case, *ibid.*

⁴³⁸ Case 6 and 7/73 (1974) ECR 223.

⁴³⁹ *ibid.*, at 8821. The *Commercial Solvents* doctrine has been confirmed on numerous occasions, see eg, *Greenwich Film Prod. v. SACEM*, Case 22/79, 1979 ECR 3275; *United Brands* Case *ibid.*; *GVL v EC Commission* Case 7/82, 1983, ECR 483, 3 CMLR 645; *BPCL/ICI*, Commission Decision O.J. L 212/1 (1984); *Re Vacuum Interrupters Ltd* Commission Decision OJ (1977) L 48/32; *ENI/Montedison*, Commission Decision OJ L5/13 (1987) *Napier Brown-British Sugar* Commission Decision OJ (1988) L284/41; *ECS/AKZO* Commission Decision OJ (1985) L374/1; *London-European-Sabena*, Commission Decision OJ 1988 L317/47, 1989 4 CMLR.

Thereby, it became arguable that a mere distortion of the competitive structures with the Community was sufficient to render Articles 81 and 82 EC, without the need to show an actual or potential effect on interstate trade.⁴⁴⁰

3.2.2 A Synthesis of the Two Approaches in Practice: *Hugin*⁴⁴¹

The judgment of the Court of Justice in *Hugin*⁴⁴² provided an implicit limitation to the scope of the criterion in line with an explicit recommendation by Advocate General *Reischl* in the same case. Advocate General *Reischl* had emphasised that the effect on the structure of competition within a Member State was not sufficient to fulfil the condition of an effect on interstate trade. His reasoning centred upon the need to keep the *jurisdictional* criterion separate from the *substantive* condition of Articles 81 and 82 EC, which was in line with the purpose and the wording of the interstate trade criterion:

'To me it would at any event appear unacceptable to treat the criterion of an effect on trade as being virtually the same as an effect on competition. That would be an interpretation contrary to the wording, according to which the element of an effect on trade is of particular importance in delineating the sphere of application, which can only mean that that element must have an independent meaning.'⁴⁴³

He also stressed that in the *Commercial Solvents* and *United Brands* judgments (the latter of which invoked the *Commercial Solvents* doctrine), the conduct involved was

⁴⁴⁰ See eg. Goldman, B., Lyon-Caen, A. and Vogel, L., *ibid*, at p.742. *Koenigs* offers a useful breakdown of the types of conduct and agreements which will fulfil the criterion, stating that there are two groups: conduct or agreements which directly or indirectly partition national markets and conduct or agreements which effect the system of undistorted competition within the Community in the sense of Article 3g EC. Nevertheless, he concedes that the Court of Justice does not expressly distinguish between these two types and concludes that the criteria developed by the Court of Justice determining the fulfilment of the criterion are very abstract and undefined, Koenigs, F., 1988, 'Die Beeingtraechtigung des Handels zwischen Mitgliedstaaten', in: 'Strafrecht, Unternehmensrecht, Anwaltsrecht', Festschrift fuer Ernst Pfeiffer at pp.573-5; 585.

See also Faull, J. (1989) at p.499. He suggests however that nearly all cases impairment of structure will also give rise to actual or potential alteration of trade patterns and that it is often difficult to determine which approach has been adopted by the Commission or the European Courts (See eg. *Suiker Unie v Commission*, Joined Cases 40-48/73, 50/73, 54-56/73, 111/73, 113/73, 114/73, 1975 ECR 1663; *C.R.A.M. and Rheinzink v. Commission*, Cases 29 & 30/83, 1984 ECR 1679); *Rolled Zinc and Alloys*, Commission Decision OJ L362/40 (1982).

⁴⁴¹ *Hugin v. Commission*, Case 22/78, 1979 ECR 1869.

⁴⁴² *Hugin v. Commission*, Case 22/78, 1979 ECR 1869.

⁴⁴³ Case, *ibid* at Paragraph 8.

not actually confined to a single Member State; some interstate trade was involved.⁴⁴⁴ Analysis of the two cases confirms this contention. In *Commercial Solvents*⁴⁴⁵ the Court of Justice stressed that Zoja was at present able to export (and was actively doing so on a very limited scale) to at least two Member States. In *United Brands*,⁴⁴⁶ the relevant conduct had made it impossible for the Danish undertaking concerned to purchase bananas in Germany and then market them in Denmark.

The effect of the Court of Justices final judgment in *Hugin*⁴⁴⁷ was to provide a synthesis of the two approaches, without however explicitly addressing the controversy.

The *Hugin*⁴⁴⁸ case involved a refusal by of a cash register manufacturer (*Hugin*) to supply new cash registers (for sale and rent) and spare parts (for maintenance) to *Liptons*. *Liptons* was established in London. In 1971, *Liptons* became general agent for the marketing of *Hugin* cash registers in England, Scotland and Wales. In the European countries where it was active (United Kingdom, Belgium, Denmark, France, Germany, Ireland, Italy and the Netherlands), the machines were marketed by subsidiary companies of *Hugin*, general agents or main distributors. Following a restructuring of the UK distributors in UK, distribution in the UK fell under the almost exclusive control of a subsidiary company of *Hugin*. This subsidiary restructured the sales organisation in the UK, including thirteen main distributors each responsible for a certain territory. Under this system, *Liptons* was offered the opportunity to be authorised dealer for the London region.

⁴⁴⁴ Note also that Advocate General Mischo stated in his second opinion in *Belasco and others v Commission* that:

'... I do not share the opinion that in the case of a purely national agreement it is permissible to conclude that trade between Member States has been affected solely because the structure of competition within that Member State has been changed in such a way that imports encounter conditions different from those which would have prevailed in the absence of the agreement. It seems to me that if such a principle were upheld, the great majority of purely national agreements would be deemed to affect trade between the Member States and would be caught by Article 85. I do not think that such a result is in conformity with the spirit of the provision.' Case, *ibid* at Paragraph 14.

⁴⁴⁵ Case, *ibid*.

⁴⁴⁶ Case, *ibid*.

⁴⁴⁷ *Hugin v. Commission*, Case 22/78, 1979 ECR 1869.

⁴⁴⁸ *Hugin v. Commission*, Case 22/78, 1979 ECR 1869.

Unhappy with the profit margins of such a distributory network, *Liptons* refused, and subsequently the UK subsidiary of *Hugin* refused to supply new cash registers and spare parts. *Liptons* complained to the Commission that this was an abuse of a dominant position under Article 82 EC. The Commission sustained this claim. *Hugin* then appealed to the Court of Justice.

The Court of Justice examined the applicability of Article 82 EC to *Hugin's* conduct based upon the application of the interstate trade criterion in some detail.

The application of the test depends on establishing the hypothetical situation where the alleged infringement does not exist. If this demonstrates a pattern of interstate trade different from that which has evolved because of the infringement, the relevant effect is established.

The Court examined separately the effects on *Lipton's* commercial activities and on trade in spare parts in general, both of which were markets on which *Hugin* held a dominant position.

a *Hugin's* Commercial Conduct

Thus, it was established that *Liptons'* commercial activities were based in the London region; they never extended beyond the United Kingdom, nor were there any intentions to do so. This conclusion was reinforced by looking at the particular nature of the activities in question: the maintenance, repair and renting out of cash registers and the sale of used machines cannot constitute profitable operations beyond a certain area around the commercial base of the undertaking. On this basis, there could neither be an effect on interstate trade in terms of the pattern or flow of trade, nor in terms of a distortion of the structure of competition in the Community; the markets are strongly localised.

b *Hugin's* Distribution of Spare Parts

In terms of the distribution of *Hugin* spare parts, it was noted that *Liptons* had attempted unsuccessfully to obtain such parts from *Hugin* distributors in other Member States. *Prima facie*, there appeared to be then an impediment to interstate trade.

Questionable was whether this conduct of *Hugin* had the *effect* of an export ban, preventing interstate trade where it would otherwise take place. Here, it was

necessary to examine whether there would have been any advantage to a potential repairer (which is not subject to a refusal to sell) in obtaining spare parts from another Member State other than the one in which it is based (barring in mind that the Community-wide structure of the market is of small localised firms).

In considering this question, the Court of Justice pointed to the value of spare parts as being 'relatively insignificant'. Therefore, there was little commercial interest in imports and exports from and to different Member States. Furthermore, it was not alleged that there were price differentials on various local markets. The Court of Justice concluded that:

'...Hugin's conduct cannot be regarded as having the effect of diverting the movement of goods from its normal channels, taking account of the economic and technical factors peculiar to the sector in question.'

In summary then, there was no reason *under normal commercial conditions* for an independent undertaking to turn to a supplier based in a Member State different from the one in which it operated. *Liptons'* attempts to exercise interstate trade represented not the course of normal trade, but an attempt to compensate for the existence of the refusal to supply. Without the *Hugin* distribution network (which excludes *Liptons*), there would be no question of interstate trade.

Thus, the jurisdictional criterion for the application of Article 86 EC was not fulfilled for *Hugin's* conduct on either market.

c Evaluation

The *Hugin* judgment⁴⁴⁹ determines that where the relevant markets are, according to normal commercial conditions, localised, exclusively national and *isolated* and there is no actual or potential interstate trade within the relevant product market, or a dependent market, Articles 81 and 82 EC will not apply. There must be an interstate trade element involved. It is irrelevant that there was a clear effect on the structures of competition (including the actual exclusion of a market player).⁴⁵⁰

⁴⁴⁹ Case, *ibid.*

⁴⁵⁰ Note that *Goldman and Lyon-Caen* even considered that *Hugin's* distribution system was large enough to have had a Community dimension, that is that the conduct affected *Community* structures of competition and not just *national* structures of competition, *ibid.* at p.742. But against this, *Bellamy and Child*, *ibid.* at p. 117-118.

This conclusion is coherent with the general statement of the Court of Justice expressed in the judgment concerning the application of the interstate trade criterion:

'Community law covers any agreement or practice which is capable of constituting a *threat to freedom of trade between member-States* in a manner which might harm the attainments of the objectives of a Single Market between the member-States, in particular *by partitioning the national markets or by affecting the structure of competition within the Common Market.*'⁴⁵¹

Questionable is whether this pattern has been followed in the application of the *Commercial Solvents* doctrine in subsequent Commission decisions and cases before the Community courts.

3.2.3 Later Applications of the *Commercial Solvents* Doctrine

This approach has been followed in all the applications of the structural approach by the Court of Justice and the Court of First Instance.⁴⁵² Similarly, the Commission has consistently adopted this approach. Two examples are *Soda-ash - ICI*⁴⁵³ and *Soda-ash - Solvay*.⁴⁵⁴

Soda-ash-ICI Decision

In the first case, there was conduct which was directly aimed at imports from outside the Community by a dominant undertaking in the UK market. The Commission stressed that the relevant conduct should be examined in the overall context of the phenomenon of the strict separation of national markets in the Community. It stated:

⁴⁵¹ *ibid*, at paragraph 17 (author's emphasis).

⁴⁵² See eg, *Greenwich Film Prod. v. SACEM*, Case 22/79, 1979 ECR 3275; *Radio Telefis Eireann v European Commission*, Case T69/89, ECR 1991, vol.II, 485; *BBC v European Commission*, Case T-70/89, ECR 1991 Vol.II, 535; *GVL v EC Commission* Case 7/82, 1983, ECR 483, 3 CMLR 645; *Belge Transports v Commission* Cases T-24/93, T-25/93, T-26/93, T-28/93, ELR 1996, II-1201; *Corrine Bodson v Pompes Funebres des Regions Liberees* Case 30/87 1988 OJ C157, p.5; *ENI/Montedison*, Commission Decision OJ L5/13 (1987).

⁴⁵³ Decision 91/299/EEC (1990), OJ No.L152 p.21, para's 63-64.

⁴⁵⁴ Commission Decision OJ 1990 L52 p.40, para's 65-66. See also, eg. Commission Decisions: *Napier Brown-British Sugar* OJ 1988 L284/41; *ECS/AKZO* OJ 1985 L374/1; *London-European-Sabena*, OJ 1988 L317/47, 1989 4 CMLR; *BPCL/ICI*, O.J. 1984 L 212/1; *Re Vacuum Interrupters Ltd* OJ 1977 L 48/32; *Aluminium Imports from Eastern Europe* OJ 1985 L92/1.

'The maintenance and reinforcement of ICI's dominant position in the United Kingdom affects the whole structure of competition in the common market and ensures that the status quo, based on marked separation, will be maintained.'⁴⁵⁵

The Commission clearly envisages the possibility of there being interstate trade in the relevant product market if the conduct had not been carried out, since otherwise the issue of market separation along national lines would not be an issue - it would have been a natural characteristic of that relevant product market.

Soda-Ash-Solvay Decision

Similarly, in the second case, the conduct was directly aimed at eliminating imports from the United States, where *Solvay* was in a dominant position on the UK Market and was tying in customers along national lines. Although aimed at extra-Community competitors, the Commission stressed that these practices had the effect of reinforcing the structural rigidity and the division of the soda-ash market on national lines, thus harming or threatening to harm the attainment of the single market. The Commission clearly envisaged that, without the structured tie-ins, there might be transnational trade which might have exerted competitive pressure on the UK market.

Summary

According to this analysis, therefore, the structural approach does not represent an autonomous approach in the application of the interstate trade criterion. The Court of Justice has after all rejected attempts to create artificial distinctions in Community competition law between behaviour and structure, emphasising above all the Single Market objectives as the context for interpretation.⁴⁵⁶ Conduct will fall within the ambit of Articles 81 and 82 EC if it distorts the structure of competition. However those competition structures must be structures of competition at the *Community* level rather than at the purely national or local. Hence, there must initially be an actual or potential, direct or indirect effect on cross-border trade on the relevant market (or a market directly dependent). The fulfilment of this condition determines automatically the fulfilment of the second condition of a *potential* hindering of the integration objective of the Community.

⁴⁵⁵ *ibid.*, at para. 64

This conclusion raises however a further question. The application of the interstate trade criterion as the jurisdictional criterion has been shown to be aligned with the overriding objective of Community competition policy - the pursuit of Single Market integration. Conduct falls within the scope of Articles 81 and 82 EC because it actually or potentially affects interstate trade *and thereby* potentially hinders the process of Single Market integration. Questionable is whether the effect of the *de jure* completion of the Single Market (according to the Single European Act)⁴⁵⁷ might affect either the application or even the appropriateness of the interstate trade criterion to determine the jurisdiction to apply Articles 81 and 82 EC.

C THE CHANGING EC CONSTITUTION AND THE INTERSTATE TRADE CRITERION

1 The Issue

Having analysed in detail the legal scope to apply Articles 81 and 82 EC according to the interstate trade criterion, it is necessary to consider the claims advocated by some commentators that the constitutional amendments made to the EC Treaty since its original implementation in 1957 have changed the appropriateness of the interstate trade criterion as a jurisdictional trigger.⁴⁵⁸

Firstly, it might be that the *de jure* completion of the Single Market after the Single European Act has changed the structures of Community markets to the extent that the interstate trade criterion is no longer suitable in practical terms. Secondly, the *de jure* integration of the national markets in 1992 and the effect of the Maastricht Treaty,

⁴⁵⁶ See eg., *Europemballage & Continental Can Co. v Commission*, Case 6/72, 1973 ECR 215, at paragraph 8171 and (implicitly) *B.A.T. and R.J. Reynolds v Commission*, Cases 142 & 156/84, 1987 ECR at paragraph 14,405.

⁴⁵⁷ See above, pp.21-30

⁴⁵⁸ See in particular Bos, P-V 'Towards a Clear Distribution of Competence between EC and National Competition Authorities', (1995) 7 ECLR 410-416; Wesseling, R., 'Subsidiarity in Community Antitrust Law: Setting the Right Agenda', (1997) 22 ELR 35-54; Wesseling, R., 'The Commission Notices on Decentralisation of EC Antitrust Law: In for a Penny, Not for a Pound', (1997) 2 ECLR 94-97; Rodger, B.J. and Wylie, S.R., 'Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement', (1997) 8 ECLR 485-491. Also, see Wolf, who proposes a new jurisdictional divide between Community and national competition laws, but does not however suggest how such a new attribution of powers should be made, in: Wolf, D., 'Zum Verhaeltnis vom Europaeischen und Deutschen Wettbewerbsrecht', (1994) 8 Europaeische Zeitschrift fuer Wirtschaftsrechts at p.223 onward; Gaeblein, W., 'Einheit der Wettbewerbsordnung im Europaeischen Binnenmarkt', in Festschrift fuer Karl Beusch zum 68. Geburtstag am 31. Oktober 1993, Walter de Gruyter, Berlin, New York, 1993 at p. 267 onward.

according to which the goal of protecting structures of undistorted competition within the Community arguably became autonomous of other Community goals, may have refocused the thrust of competition policy. A perceived change in the goals of Community competition policy might have clear implications for the continued relevance of the interstate trade criterion that is focused in its application upon the integration goal.

The Maastricht Treaty introduced another principle that might affect the continued relevance of the interstate trade criterion. This is the subsidiarity principle that directly relates to the appropriate scope of Community law.⁴⁵⁹ However, it must be recognised that Articles 81 and 82 EC are enshrined in the EC Treaty. In a binding Protocol annexed to the EC Treaty by the Treaty of Amsterdam, it was made clear that the principle of subsidiarity does not call into question the powers conferred on the European Community by the Rome Treaty, as interpreted by the Court of Justice.⁴⁶⁰ Subsidiarity does not therefore affect the interpretation or application of the interstate trade criterion of Articles 81 and 82 EC.

2 De Jure Integration and the Need for a New Jurisdictional Criterion or Articles 81 and 82 EC

Commentators who press the need for a new jurisdictional criterion highlight the statements made by Advocate General Trabbuchi in *Papier Peints* in 1974, in which

⁴⁵⁹ Note that there is a further issue of the Member States obligations under Article 3g EC, and whether they are thereby under an obligation to harmonise their systems of competition law, and the relation of this obligation to the principle of subsidiarity. In deference to politics, the debate is centred upon procedure rather than substantive law. Nevertheless, the consensus of opinion is that there is no such obligation. See eg. Bos, *ibid*, (1995) pp.415-6; Wesseling, *ibid*, (1997) 22 ELR at pp. 40 and 53; Dreher, M., *ibid*, Part V; Lenz, C.O., 'Pflicht zur Harmonisierung des Kartellrechts in der Europaischen Gemeinschaft, insbesondere fuer die Mitgliedstaaten?' in: *Schwerpunkte des Kartellrechts, 1992/3, Referate des Einundzwanzigsten FTW-Seminars 1993*, Carl Heymans Verlag, Koeln, 1994, 25 at 30 and 31; Weatherill, S., 'Law and Integration in the European Union' (1995) p.152; Ullrich, 'Harmonisation within the European Union' (1996) 17 ECLR 178.

But against this, Power, V., 'Competition Law in the EU: Should there be a Convention?' (1995) 2 ECLR at pp.75-6.

⁴⁶⁰ See Protocol 30, at paragraph 3.

Similarly, although less equivocally, the Commission stated in its 1993 Report to the Council on the application of the subsidiarity principle to Community legislation that the *acquis communautaire* should not thereby be called into question, see Commission Report to the European Council on the Adaptation of Existing Legislation to the Subsidiarity Principle, COM (93) 545 at p.6.

In the literature, see eg., Emiliou, N., *Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition?'*, ELRev (1992) 383 at p401.

he considered the future appropriateness of the interstate trade criterion in some detail. It is necessary to consider the validity of the statements made by Advocate General *Trabucchi* within the context of the *existing* scope of the interstate trade criterion, before dealing with the specific arguments of the commentators.

2.1 Advocate General *Trabucchi* in *Papier Peints* and the Need for a Reinterpretation of the Interstate Trade Criterion

In *Papier Peints*, Advocate General *Trabucchi* first acknowledged that the interstate trade criterion was originally defined in order to emphasise the importance of freedom of trade between States and the integrationalist goals. He suggested that once this integration has been achieved, the Community interest which the prohibition of restrictive agreements is designed to further becomes *not simply* one of preventing the partitioning of the territory of the Community into separate national markets, but *principally* of keeping competition in a healthy state in terms of the common market.⁴⁶¹ Thereby, the criterion must adapt itself accordingly. There will be, according to the Advocate General, a need to:

'...replace the concept of interstate trade with a concept which is not limited by reference to the location of the undertakings which are parties to the agreement, or to the place where the products covered by the agreement had their origin or are sold within the Community.'⁴⁶²

He did not however claim that there will be a need for an entirely new jurisdictional criterion:⁴⁶³

'...possible consequences of the literal interpretation of the criterion...should impel us to seek a *wider interpretation*, better suited to the purpose which must be ascribed to Article 85 within the framework of a common market characterised henceforward by a high degree of economic integration between the States which constitute it.'⁴⁶⁴

⁴⁶¹ *Groupement des Fabricants de Papier Peints de Belgique v Commission* Case 73/73 (1975) ECR 1491 at p.1522.

⁴⁶² Case, *ibid* at p.1523.

⁴⁶³ As maintained by Goldman and Lyon-Caen, *ibid* at p.742; Faull, (1989) *ibid* at p. 505-6; Wesseling, (1997) ELR, *ibid*, pp. 47-8.

Note that according to *Korah*, this represented a third way of interpreting the interstate trade criterion, see *Korah, V.*, (1997) pp. 57-8. This interpretation does not however represent the literal wording of *Trabucchi's* statement.

⁴⁶⁴ Case, *ibid*, at p.1524 (author's emphasis).

In essence therefore, the Advocate General advocated an expansion and increased flexibility in the interpretation of the criterion to take into account the changed *structure* of the Single Market. There should be a shift in emphasis in the interpretation of the existing interstate trade criterion away from its literal text towards an interpretation which includes an effect on competition structures within the Community.

In effect, he predicted the way that the interpretation of the interstate trade criterion was to develop in response to the changing Community. This may be demonstrated by analysing the anomalous situations which he highlighted as arising through the application of the literal interpretation⁴⁶⁵.

2.1.1 The First Case Scenario

The Advocate General's first concern was that an agreement involving two national firms covering nearly the whole of Germany would not be covered by the interstate criterion. It is submitted however that the teleological interpretation of the interstate trade criterion according to the integration goal would include such an agreement. Recall that the condition is not purely locational and literal, but may be fulfilled even if the agreement is confined to a single Member State⁴⁶⁶. It depends upon the patterns of interstate trade (actual or potential) within the Community, which must have developed in a manner different from the way they would have developed without the alleged anti-competitive conduct having taken place. The effect on these patterns may be actual or potential, direct or indirect.

Therefore, it is highly unlikely that Advocate General *Trabucchi's* first case scenario would not be held to fulfil the criterion in its existing interpretation. The only conduct falling outside the scope of the criterion would be conduct effected on a market that is an isolated, local and national market involving no interstate trade whatsoever; in short, for conduct that would not distort *Community* structures of competition (and therefore hinder the integration objective).⁴⁶⁷

⁴⁶⁵ Note that these examples have been picked up in more recent literature as well, eg. Wesseling, *ibid*, 1997, at p.96.

⁴⁶⁶ Indeed, if it covers the whole of a single Member State, there is effectively an irrebuttable presumption that interstate trade has been affected, see above.

⁴⁶⁷ Furthermore, even if such conduct were to fall within the scope of Article 81 EC, it would most likely fall under the *de minimis* thresholds (Notice on Minor Agreements, 1970, OJ 1970, C231/2. Amended in 1977, 1986 and 1997 OJ 1997 C372). For a detailed analysis of the *de minimis* provision, see below at pp127-133.

2.1.2 The Second Case Scenario

The Advocate General's second case scenario concerned agreements of minimal importance to the Community in Luxembourg which will nevertheless always have cross-border effect (because of the size of the country) and will be caught by a literal interpretation of the criterion.

This concern is only of concern with regard to the application of Article 81EC, since abusive conduct under Article 82 EC will only be prohibited where dominance can be shown over a '*substantial part of the Common Market*'.⁴⁶⁸ With regard to Article 81 EC however, the interstate trade criterion has developed in its application so that it will not bring conduct under the prohibition of that Article that is not of sufficient scale to affect Community objectives. It incorporates the condition of '*appreciable*' effect, which has been articulated in more formal terms by a Commission Notice.⁴⁶⁹

2.1.3 Summary

Advocate General *Trabucchi* was remarkably prescient in predicting the increasing importance of a system of undistorted competition within a unified and integrated Single Market and its protection in the application of Community competition law. This development has taken place within the context of the integration objective, which is a present and on-going process.⁴⁷⁰ Thereby, the teleological interpretation of the interstate trade criterion that the Commission and the Court of Justice have developed has been able to take these changes into account.

2.2 The Literature and the Need for a New Jurisdictional Criterion of Articles 81 and 82 EC

In spite of the flexibility of the interstate trade criterion in its teleological interpretation and application, some commentators maintain that there is a need for an entirely new jurisdictional criterion.⁴⁷¹

According to *Bos*, for example:

⁴⁶⁸ See above for an analysis of this concept.

⁴⁶⁹ Commission Notice on Agreements of Minor Importance OJ (1997) C372/04. For a detailed analysis of the condition of 'appreciability' for Article 81 EC, see below.

⁴⁷⁰ See above.

⁴⁷¹ See note 458.

'...politically and economically market integration should now be deemed to have been fulfilled and the criterion of effect on the trade between Member States should be said to have lost its market integration objective and therefore its meaning as a criterion for the application of European Commission competition law.'⁴⁷²

Similarly, *Wesseling* has stated:

"The formal establishment of the internal market ... affected the pertinence of "interstate trade effect"...In a unified multinational market, within which there are no longer any national frontiers hindering the movement of goods, the jurisdictional criteria must assume a significance to match the new situation which has come into being.'⁴⁷³

These claims are however unfounded. With the *de jure* integration brought about by the Single European Act, integration has not necessarily been achieved *de facto*. The European Commission has underlined the fact that the Single Market has not yet been fully accomplished, even after 1992:⁴⁷⁴

'Even though many of the administrative and other public barriers to trade have been removed, we do not yet have a real single market in some sectors and there remain significant price differences between Member States. This suggests there are still significantly unexploited advantages to be had from further integration...'

Hence, the need to *promote* integration is still present and pertinent. Furthermore, there is a need to *protect* existing integration. Competition policy, even if increasingly pursuing generic competition directly, is wedded to the integration objective. As

⁴⁷² Bos, *ibid*, 1995, p. 412.

⁴⁷³ Wesseling, R., '*The Commission Notices on Decentralisation of EC Antitrust Law: In for a Penny, not for a Pound*', (1997) 2 ECLR 94-97 at p. 96.

⁴⁷⁴ See also EC Commission Green Paper on Vertical Restraints, p.21.

See in the literature, eg., Groger, T. and Janicki, T. who stress that the internal market has not yet been completed in a practical sense in view of the residual technical, regulatory and distribution-related barriers, '*Weiterentwicklung aus Europaischen Wettbewerbsrechts*', WuW 12 (1992) 991 at p.1000.

Note that *Bos* admits that the internal market in a practical sense has not yet been completed in view of the numerous technical, regulatory and distribution-related barriers, but then appears to discount it. In fact, *Bos*'s overall argument is inherently contradictory. On the one hand, he proclaims the completion of integration and the end of national markets. On the other, he pushes a restricted role for Community supranational law in favour of national law. In effect then, he bases his argument for a restricted application of Community law upon there being no definable national markets post single market integration, but then, as a result, proposes increased application of national regulations by national authorities who will assess economic conduct according to its potential effect on national market competition structures, in: *Bos*, (1995) *ibid*.

described above, the maintenance of structures of undistorted competition is consistent with the integration goal.⁴⁷⁵

2.3 Summary

The analysis above has shown that the teleological interpretation and application of the interstate criterion ensures that it is not rendered obsolete by the changing constitutional structure of the Community and the evolving goals of competition policy. There is no need for a new jurisdictional criterion for Articles 81 and 82 EC. Above all, it is the functionalist formulation of the interstate criterion that has enabled it to adapt to cover all conduct that could fall within the prohibition of Articles 81 and 82 EC that might hinder the integration objective of the Community (either in its promotion or protection).

D THE APPLICATION OF THE INTERSTATE TRADE CRITERION TO CONCENTRATIONS TO WHICH ARTICLES 81 AND 82 APPLY IN PRACTICE

1 Applying the Interstate Trade Criterion in General

The Commission is under an obligation to provide *some* rational reasoning for its conclusion upon the likely effect of the alleged infringement upon interstate trade.⁴⁷⁶ In practice however, it has often failed to provide detailed reasoning for its finding of an effect on interstate trade - the condition is dealt with in a brief and cursory way.⁴⁷⁷

Nevertheless, analysis of the Commission's statement of reasons in successive cases reveals a juridical reasoning that can be drawn upon by private parties to give them some certainty in the assessment of whether Articles 81 or 82 EC might be applicable to a specific case.

⁴⁷⁵ See above at pp27-31.

⁴⁷⁶ In *Groupement des Fabricants de Papiers Peints de Belgique v Commission* the Court of Justice overturned the Commission's finding that a national system of collective resale price maintenance affected interstate trade, since the Commission had not explained in sufficient detail the precise way in which interstate trade would be affected, Case 73/74 (1975) ECR 1491, (1976) 1 CMLR 589

⁴⁷⁷ See Koenigs, F., (1988) *ibid* at p.570. *Koenigs* also criticises the tendency of the Commission not to apply the criterion at the beginning of an investigation, as would be expected of a jurisdictional criterion which establishes the applicability of Community law.

It was demonstrated that the 'effect' required to fulfil the criterion is neutral, and may be actual or potential, direct or indirect. The substance of analysis therefore becomes focused upon establishing that there was an element of interstate trade involved (according to a very broad interpretation of 'trade'). This element may be detected in very broad circumstances: if the relevant market (or a market *dependent* upon it⁴⁷⁸) *naturally involves or may involve* (according to the natural dynamics of the market) any interstate trade at all⁴⁷⁹ (not only as regards the parties directly concerned in the alleged anti-competitive conduct, but the structures of the market in general), then it may be stated that the condition will be fulfilled, except perhaps in very exceptional circumstances.

The condition may therefore be more succinctly stated: where the relevant product market (or a market directly dependent upon that market) involves actual or potential interstate trade (according to the natural development of the market), there is a *de facto* presumption that an alleged anti-competitive conduct which takes place on that market will affect interstate trade.

In general terms, particularly due to the increased integration of and interrelationship between national markets within the Community following the creation of the Single Market, this effective shift in the burden of proof has not gone unnoticed in the literature, even if not clearly delineated in legal terms. For example, *Goyder* has commented:

'In practice, the Commission will now assume that trade between Member States is affected by virtually any practice which brings about some noticeable effect on market conditions or structures and involves undertakings of a size above the level affected by the current Notice.'⁴⁸⁰ The onus of proof will then effectively shift to the parties to prove the negative, in most cases a difficult task.⁴⁸¹

⁴⁷⁸ *BNIC v Aubert*, Case, *ibid.*

⁴⁷⁹ See eg., *Commercial Solvents v Commission*, Case *ibid.*

⁴⁸⁰ This is a reference to the *De Minimis* Notice described above.

⁴⁸¹ *Goyder*, 1993 p.116. See also, eg., *Emmerich, V., 'Kartellrecht'*, 6. Edition, Muenchen 1991, p.518; *Reich, N., 'Die Bedeutung der Binnenmarktkonzeption fuer die Anwendung der EWG-Wettbewerbsregelungen'*, FS fuer Ernst Steindorff, Berlin/NY 1990, p.1071; *Van Bael, I. and Bellis, J.-F., 'World of Competition'*, Unit B, Western Europe, Vol. B1, European Economic Community, New York 1987 Nr.222; *Green, N., 'Article 85 in Perspective: Stretching Jurisdiction, Narrowing the Concept of a Restriction and Plugging a Few Gaps'*, (1989) ECLR Vol.9, 190-207 at p.192.

2 Applying the Interstate Trade Criterion to Concentrations

As stated above, Articles 81 and 82 EC may apply to some types of horizontal, vertical or conglomerate mergers where interstate trade is affected. Thereby the interstate trade criterion is *de facto* fulfilled where any of the relevant markets involved in the merger involve actually or potentially, directly or indirectly interstate trade (or there is such a market that is directly dependent upon any of the relevant markets). This presumption is only rebutted in exceptional circumstances (that will be clear upon any analysis of the specific markets affected by the individual concentration).

Hence, for horizontal mergers, the interstate trade criterion is usually fulfilled where the merger involves one or more undertakings active on any markets that actually or potentially involves interstate trade (or there is such a market that is directly dependent upon any of those markets).

For vertical mergers, trade may be affected within the meaning of the interstate trade condition where, for example, distribution channels are thereby actually or potentially 'locked in' within a single Member State for a product that is marketable Community-wide, or where the merger actually or potentially leads to a significant increase in resources of the combined entity such that cross-border trade and competition is affected for the relevant product. The requisite effect on interstate trade may be on any of the markets on which the individual entities were active or any directly dependent markets.

A conglomerate merger is effected by firms active on different and independent markets. Again, trade may be affected actually or potentially, directly or indirectly on each of the relevant markets or a directly dependent market.

E 'APPRECIABILITY' AND ARTICLE 81(1) EC

In its application of the Article 81(1) EC prohibition, the European Commission and the Court of Justice have developed a further condition that must be fulfilled before an agreement (or concerted practice) will be found to be void under Article 81(2) EC (subject to exemption under Article 81(3) EC). It is a quantitative condition of 'appreciability' that attempts to restrict the application of Article 81(1) EC to

agreements and conduct that pose a real threat to the integration objectives that are pursued at the Community level in the application of Community competition law provisions.

Expression of the condition may be found in Commission decisions dating from as early as 1964.⁴⁸² The Court of Justice followed a similar approach in its case *Societe Technique Miniere v Maschinenbau Ulm*.⁴⁸³ In this case, the Court of Justice stated that in applying Article 81 EC, it is initially necessary to consider the *purpose* of the agreement or conduct at hand in its full economic context. If this does not reveal '*an effect on competition that is sufficiently deleterious*', the *consequences* of the agreement or conduct should then be considered. It is thereby necessary to find those factors present that show that competition has in fact been prevented, restricted or distorted *to an appreciable extent*.

The Court of Justice thus introduced a further quantitative condition to the substantive assessment of agreements or conduct under Article 81(1) EC. In effect, agreements or conduct would be considered to be consistent with the integration objectives of the Community where their object or effect was not 'appreciable'.

In later cases, the Court of Justice appeared to develop and expand the significance of the 'appreciability' condition. Thereby, its relevance was extended to include the application of the interstate trade criterion as well as the substantive assessment of whether there has been the required restriction or distortion of competition. The approach is expressed succinctly in *Beguelin Import v GL Import Export*.⁴⁸⁴

'...to come within the prohibition imposed by Article 85 (Article 81), the agreement must affect trade between Member States and the free play of competition to an appreciable extent.'⁴⁸⁵

Thereby, the early Commission practice that had considered appreciability only within the context of the substantive assessment of a potential restriction of

⁴⁸² *Grosfillex/Fillistorf*, OJ (1964) 58/915; *Nicholas Freres/Vitapro*, OJ (1964) 156/2287.

⁴⁸³ Case 56/65 (1966) ECR 235, at p249.

⁴⁸⁴ Case 22/71 (1971) ECR 949 (1972) CMLR 81.

⁴⁸⁵ This is the approach that the Court of Justice has consistently followed in its case law, see eg., *Voelk v Vervaeke* Case 5/69 (1969) ECR 295 (1969) CMLR 273; *Cadillon v Hoess* Case 1/71, (1971) ECR 351; *Distillers v Commission* Case 30/78 (1980) ECR 2229, (1980) 3 CMLR 121; *Salonia v Poidomani and Giglio* Case 126/80 (1981) ECR 1563 (1982) 1 CMLR.

competition⁴⁸⁶ was revised in the Commission's first Notice on Agreements of Minor Importance in 1970⁴⁸⁷, and in its later decisions.⁴⁸⁸

Although the 'appreciability' condition was therefore deemed applicable to both the jurisdictional as well as the substantive assessments under Article 81 EC, in practical terms the blurring of that distinction is of negligible importance: such is the breadth of the interstate trade criterion in its application (as demonstrated above) that where there is no appreciable effect on interstate trade because the relevant market is localised and regional, there can hardly be any appreciable effect on competition. Conversely, if there is an appreciable distortion of competition within the Common Market, an appreciable affect on interstate trade may be assumed.⁴⁸⁹

Nevertheless, there are dangers inherent to a blurring of the substantive and jurisdictional lines, even if the operation of the substantive and the jurisdictional conditions of Article 81(1) EC are coherent in their overriding policy aim of promoting and protecting Single Market integration. It should not be forgotten that if Article 81 EC is found not to apply on the basis of a lack of an appreciable effect on interstate trade, national laws are automatically applicable. This may operate to distort the level playing field sought in the application of competition law within the Community and it also raises the spectre of the (covert) pursuit of national policies through the regulation of agreements and conduct that essentially is of a Community dimension (although of no direct threat to the Community goals). There is therefore a valid reason to resist the development of the appreciability condition into a quasi-jurisdictional criterion.

⁴⁸⁶ See eg., *Grosfillex/Fillistorf*, OJ (1964) 58/915; *Nicholas Freres/Vitapro*, OJ (1964) 156/2287; *SECEMAS*, OJ (1968) L201/4; *Conventron Chauffournier*, OJ (1964) L122/8.

⁴⁸⁷ Commission Notice, OJ C64/1.

Subsequent Commission Notices followed the same pattern: Commission Notice on Agreements of Minor Importance OJ (1997) C372/04; Commission Notice on Agreements of Minor Importance OJ (1986) C231/2; Commission Notice OJ (1977) C 313/3, (1976) 3 CMLR 648.

It is an approach that has also been – where it has been considered at all – acknowledged in the literature, see eg., Bellamy and Child, *ibid* at p.118; Korah, V., *An Introductory Guide to EC Competition Law and Practice*, pp67-8; Schroeter, H. in Groeben/Thiesing/Ehlermann, *ibid*, pp240-249; Emmerich, in: Immenga/Mestmaecker, *ibid*, p175.

⁴⁸⁸ See eg., *IATA Passenger Agency Programme and IATA Cargo Agency Programme*, OJ (1991) L258/18.

⁴⁸⁹ See in agreement, Schroeter, H., in: Gleiss/Hirsch, *ibid* at p.241-2.

In its recent draft proposal for a new Notice on Agreements of Minor Importance,⁴⁹⁰ the Commission has clearly recognised that the continued blurring of the jurisdictional/substantive conditions in the application of the 'appreciability' criterion is untenable. The Notice provides that the appreciability condition should apply only to the determination of a restriction of competition according to Article 81(1) EC. Unofficially at least, it appears that the 'appreciability' condition as defined in the new Notice is not a good indicator of what conduct or agreements have a Community Dimension.⁴⁹¹ The reason for this is that the definition of 'appreciable' has become, both in the hands of the Court of Justice and the Commission, increasingly formalistic rather than effects-based. Where these thresholds are raised to the levels proposed in the new draft notice, there would be even less logic in applying the criterion to the jurisdictional trigger.

The application of the 'appreciability' condition was not however always formalistic, in particular in the hands of the Court of Justice. In the early case of *Völk v Vervaeke*⁴⁹² the Court of Justice had stated that:

'...an agreement falls outside the prohibition of Article 85 (Article 81) where it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question.'

Therefore, the requirements of Article 81(1) EC had to be considered in the actual economic context in which the agreement existed. The Court considered that it was essential to be able to show that the agreement was of such significance that there was a *reasonable expectation* that it would exercise an influence direct or indirect, actual or potential, on trade between Member States to an extent that would harm the attainment of the objectives of a Single Market between the Member States. The emphasis was on the overall expected effect of the agreement in its context, rather than any specific quantitative thresholds. Generally, it was necessary to compare the market situation that has arisen on account of the agreements with the market situation that would have arisen if there had been no such agreements at all. Thereby, the effect on competition, the market position of affected parties, the type and

⁴⁹⁰ Commission Draft Notice on Agreements of Minor Importance, OJ (2001) C149/18.

⁴⁹¹ Peeperkorn, L., *Revision of the 1997 Notice on Agreements of Minor Importance*, Competition Policy Newsletter, 2, June 2001, p4.

⁴⁹² Case, *ibid.*

quantity of goods affected and the legal context were all considered.⁴⁹³ If the analysis was ostensibly based upon economic evaluations, issues of competition policy - in particular, the integration of the markets - were also influential.⁴⁹⁴

Subsequently, however, a more formalistic approach did become discernible. The Court of Justice began to concentrate upon the size of the participating undertakings on the relevant markets. Sometimes this would involve considering the turnover of the undertakings themselves.⁴⁹⁵ More often however, market share was the key indicator. Thus, it was determined that a cumulative market share of less than 1% would not be appreciable.⁴⁹⁶ On the other hand, a market share of more than 5% would generally give automatic 'appreciability'.⁴⁹⁷ While this 5% threshold has been followed in the majority of cases, it can not be viewed as absolute. Some heed is still taken of the overall economic context in which the agreements or conduct were to operate. This works to bring certain agreements or conduct within the scope of Article 81(1) EC even where the 5% threshold was not achieved, in particular where those agreements involved large undertakings,⁴⁹⁸ or where they are necessary to enable entry into a new market.⁴⁹⁹

The 'appreciability' criterion that had been read into the application of Article 81 EC by both the Court of Justice and the European Commission in their practice was deemed by the Commission as early as 1970 to be at once important and uncertain enough to warrant specific definition in a Notice. In its Notice on Agreements of Minor Importance, the Commission adopted the 5% market share threshold to determine appreciability, in conjunction with a combined annual turnover of less than

⁴⁹³ See eg., *Beguelin Import v GL Import Export* Case 22/71 (1971) ECR 949 at 960.

⁴⁹⁴ *Schroeter, H.*, in *Groeben/Thiesing/Ehlermann*, *ibid* at p242; *Rehbinder*, in: *Immenga/Mestmaecker*, *ibid* at p.60.

⁴⁹⁵ See eg., *Distillers v Commission* Case 30/78 (1980) ECR 2229, (1980) 3 CMLR 121; *Musique Diffusion Francaise* Case 100/80 (1983) ECR 1825, 1900-1901 (1983) 3 CMLR 221, 329-330.

⁴⁹⁶ See eg., *Voelk v Vervaeke* Case 5/69 (1969) ECR 295 (1969) CMLR 273; *Cadillon v Hoess* Case 1/71, (1971) ECR 351

⁴⁹⁷ See eg., *Miller v Commission* Case 19/77 (1978) ECR 131 (1978) 2 CMLR 334; *AEG v Commission* Case 107/82 (1983) ECR 3151 (1984) 3 CMLR 325; *Enichem v Commission* Case T-6/89 (1991) ECR 1623.

See on this, *Bellamy and Child*, *ibid*, at p.119-120.

⁴⁹⁸ See eg., *Musique Diffusion Francaise* Case 100/80 (1983) ECR 1825, 1900-1901 (1983) 3 CMLR 221, 329-330.

⁴⁹⁹ See eg., *Voelk v Vervaeke* Case 5/69 (1969) ECR 295 at 305; *Nungesser* Case 258/78 (1982) ECR 2015.

15 million currency units for the participating undertakings (20 million currency units for vertical agreements).⁵⁰⁰

The threshold has been revised on numerous occasions since⁵⁰¹ and the terms of the most recent 1997 Notice on Agreements of Minor Importance⁵⁰² are more complex. The Commission retains the general threshold that agreements between undertakings fall outside the scope of Article 81(1) EC if the aggregate market shares held by all of the participating undertakings does not exceed 5% but no longer incorporates a turnover criterion.⁵⁰³ This general condition relates however only to horizontal agreements. For vertical agreements, the Notice is more generous, setting a 10% limit.⁵⁰⁴ Nevertheless, the Notice states that for any agreement that has as its object the fixing of prices, the limiting of production or sales or the sharing of markets or sources of supply, the application of Article 81(1) EC cannot be ruled out.⁵⁰⁵ For these types of cases however, the Notice states that it is for the national authorities in the first instance to take action. The Commission will only intervene when it considers that the interest of the Community so demands, and in particular if the agreements impair the proper functioning of the internal market.

The Notice incorporates further refinements to the existing case law. Agreements between small and medium sized companies (as defined by the Commission Recommendation of 3rd April 1996⁵⁰⁶) are deemed to fall outside the scope of Article 81(1) EC, even if they collectively exceed the market share thresholds, unless the agreements cover a 'substantial' share of the relevant market. Further, the Notice states that the *de minimis* thresholds do not apply where competition in a relevant

⁵⁰⁰ Commission Notice on Agreements of Minor Importance of 27.05.1970, OJ (1970) C64 p.1.

⁵⁰¹ Commission Notice on Agreements of Minor Importance OJ (1997) C372/04, amending (and refining) the 1986 Notice, *Notice on Agreements of Minor Importance* OJ (1986) C231/2 (that had replaced Notice OJ (1977) C 313/3, (1976) 3 CMLR 648 which had amended the original 1970 Notice).

⁵⁰² Commission Notice on Agreements of Minor Importance OJ (1997) C372/04, amending (and refining) the 1986 Notice, *Notice on Agreements of Minor Importance* OJ (1986) C231/2 (that had replaced Notice OJ (1977) C 313/3, (1976) 3 CMLR 648).

See *Korah*, who evaluates the draft version of the Notice which was eventually implemented in 1997 in her book, *ibid* at pp. 67-8.

⁵⁰³ Notice 1997, *ibid* at paragraph 9a.

⁵⁰⁴ Notice 1997, *ibid* at paragraph 9b.

⁵⁰⁵ Notice 1997, *ibid* at paragraph 11.

⁵⁰⁶ (1997) 4 CMLR 510, Document COM (96) 261, whereby the maximum number of employees is 250, the annual turnover is 40m ECU and the balance sheet total is 27m ECU.

market is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers and dealers.⁵⁰⁷

Although in practice the Commission has normally followed the principles set out in the Notice, these criteria are not, in legal terms, an absolute yardstick, and specific agreements falling below the thresholds may none the less be found to have an appreciable effect.⁵⁰⁸ Hence, where agreement or conduct involves large undertakings, the Commission has followed established Court of Justice practice, in particular where oligopolistic markets are involved.⁵⁰⁹

It must be highlighted that the European Courts may not feel bound by the criteria within the Notice, and may continue to follow their own jurisprudence when determining whether agreements are *de minimis* under Article 81(1) EC.⁵¹⁰

Having established that Articles 81 and 82 EC apply to some types of concentrations that may affect interstate trade (and that fulfil the respective quantitative conditions for Articles 81 and 82 EC), it is imperative to recognise that this competence pre-empted the implementation of the Merger Regulation. Furthermore, that it derives

⁵⁰⁷ Notice 1997, *ibid* at paragraph 18.

See *Delimitis* Case C-234/89 (1991) 1 ECR 935 (1992) 5 CMLR 210 for the two fold test in assessing whether such agreements might have the requisite 'cumulative effect' at paragraphs 23-24.

See *eg.*, *Breeders rights: roses*, Commission Decision OJ 1985 L369/9 (1988) 4 CMLR 193; *Yves Saint Laurent Parfums*, Commission Decision OJ 1992 L12/24, 31.

⁵⁰⁸ See *eg.*, *Musique Diffusion Francaise* Case 100/80 (1983) ECR 1825, 1900-1901 (1983) 3 CMLR 221, 329-330; *Distillers Company v Commission* Case 30/78 (1980) ECR 2229 (1980) 3 CMLR 121.

It may be argued that the fact that the Notice is not binding inhibits its usefulness, see *eg.*, Goyder, D., *ibid*, at p.111.

On the other hand, it may be submitted that to override the presumption of the Notice, the issue of jurisdiction in a specific case would be so clear-cut that there is sufficient certainty for the applicability of Articles 81 and 82 EC. Furthermore, the Notice may be relied upon by individual parties without the risk of any sanction should the presumption prove unjustified. The Commission states that notification will no longer be necessary for such agreements, *ibid*, at Paragraph 4. Moreover, the Commission will not institute any proceedings either on application or on its own initiative for such agreements, and where undertakings fail to notify an agreement falling within the scope of Article 81 (1) because they assumed in good faith that the agreement was covered by this Notice, the Commission will not consider imposing fines, *ibid*, at Paragraph 5.

⁵⁰⁹ See *eg.*, *Floral*, Commission Decision 28 November 1979, OJ 1980 L39/51 (1980) 2 CMLR 265, where the parties held only 2% of the German market but were the three largest French manufacturers and represented over 10% of Community production. See also, *eg.*, *UK Agricultural Tractor Registration Exchange*, Commission Decision OJ 1992 L68/19.

⁵¹⁰ See *eg.*, the comments of Advocate General Warner, *Miller v Commission* Case 19/77 (1978) ECR 131 at pp.156-8. See Korah, V., *An Introductory Guide to EC Competition Law and Practice*, p.68.

from *primary* Community law. Questionable therefore is the direct implications that this pre-existing competence to assess concentrations according to primary Community law should have upon the appropriate jurisdictional scope of the Merger Regulation.

Before considering this issue in detail, it is necessary to examine the nature of the existing jurisdictional criterion of the Merger Regulation itself.

VI THE JURISDICTIONAL TRIGGER OF THE EC MERGER REGULATION - HISTORY AND EVOLUTION

A THE ISSUE

As detailed above, for more than twenty years before the final implementation of the Merger Regulation the Commission had consistently stated that there was a need for a Community merger control in order to protect the process of Single Market integration. Thereby, it might be assumed that the jurisdictional scope of the Merger Regulation would extend to all concentrations that may harm that process. There were however other pressing factors to be considered that were to prove persuasive in the drafting of the final jurisdictional criterion for the European Merger Regulation.

One of the most important principles in the consideration of an appropriate jurisdictional trigger was the principle of legal certainty and the idea of a one-stop shop. Companies that intend to merge should be clear about the relevant law to be applied.⁵¹¹

This is not only a matter of the general legal principle of Community law.⁵¹² As has been consistently stressed throughout the thesis, certainty is of particular significance in the regulation of mergers. If the merging companies are not clear about their legal rights and obligations from the outset, the optimum moment for the merger may be

⁵¹¹ This was a particular concern of European industry, see eg., Declaration of UNICE, The Union of Industry and Employment Federations in Europe, 4 November 1987.

⁵¹² The principle of legal certainty was invoked by the Court of Justice in Case 43/75 *Defrenne v Sabena (No.2)* Case 30/87 (1976) ECR 455, (1976) 2 CMLR 98. The principle has been applied in more specific terms as:

(a) The principle of legitimate expectations (See eg., *August Toepfer & Co. GmbH v Commission*, Case 112/77 (1978) ECR 1019).

(b) The principle of non-retroactivity (See eg., *Diversinte SA v Administración Principal de Aduanos e Impuestos Especiales de la Junqueros* Joined Cases 260/91 and 261/91 ECR 1993 I 1885.

See also eg., *Tetra-Pak Rausing S.A. v Commission* Case 260/9 (1990) ECR II 309, p362 paras. 36-7, citing *Amministrazione delle finanza dello Stato v Salumi* Joined Cases 212-217/80, (1981) ECR 2735, para.10; *De Geus v Bosch and van Rijn* Joined Cases 212-217/80, (1962) ECR 45 p52.

The European Court of Human Rights has also stated that an accepted standard of legal certainty is where the citizen is given an adequate indication of the applicable rules, such that he can predict in advance what are his rights and obligations: e.g. *Silver v UK Eur.Ct. HR*

lost. A failing target company may disappear. In short, a merger that might have a beneficial effect on the Community economy may not take place.⁵¹³

Furthermore, a certain and fixed jurisdictional criterion was more satisfactory to the Member States. They proved anxious not to cede too much control in the assessment of mergers that, after all, may have serious implications for national political, social and economic goals. Therefore, they consistently expressed their desire to restrict the competence of the Community to assess mergers to narrowly defined boundaries that were set and clear and could not be gradually eroded through reinterpretation by Community institutions. These factors and fears can be seen to have been persuasive in the genesis of the jurisdictional trigger of the EC Merger Regulation, and to continue to play a role in subsequent Reviews of the operation of the jurisdictional criterion by the EC Commission.

B THE HISTORY AND EVOLUTION OF THE JURISDICTIONAL CRITERION OF THE EC MERGER REGULATION

The Commission's initial proposal for a Community Merger Regulation in 1973 envisaged that all concentrations would fall within its scope '*in so far as the concentration may affect trade between Member States*'.⁵¹⁴ Thereby, a formalistic *de minimis* provision was provided, whereby concentrations would fall outside the scope of the Regulation where:

- the aggregate turnover of the undertakings participating in the concentration is less than 200 million units of account, *and*
- the goods or services concerned by the concentration do not account in any Member State for more than 25% of the turnover in identical goods or services or in goods or services which, by reason of their characteristics, their price and the use for which they are intended, may be regarded as similar by the consumer.⁵¹⁵

series A, No.61, judgment of 25th March 1983 5 EHRR 347; *Malone v UK Eur.Ct.H.R.* Series A, No.82, judgment of 2nd August, 1984, 7 EHRR 14; Feldman, 1993, p373-5.

⁵¹³ *Neven et al.* show that in a structure of costs imposed upon society by a system of merger control, the costs of delay imposed on firms and the costs of mistaken judgments about the approval or prevention of mergers constitute are the highest, in: Neven et al., *ibid*, Chapter 2. Clearly, certainty is directly related to reducing such costs.

⁵¹⁴ Commission Proposal for a Regulation (EEC) of the Council on the control of concentrations between undertakings, Article 1(1), Official Journal, C92, 31.10.73 at p2.

Where concentrations fell within the scope of the Regulation, the Commission would have *exclusive* competence to assess their compatibility with the Common Market. Nevertheless, there was envisaged a role for the Member States: there should be an Advisory Committee including a representative of each Member State that should be consulted before any concentration was prohibited.⁵¹⁶ The Committee had the right to deliver and annex an opinion to the draft decision of the Commission.

In general, at least to the extent that an interstate trade criterion was adopted in conjunction with a *de minimis* provision, the approach of the Commission towards the jurisdictional scope of its proposed Community-level Merger Regulation closely mirrored the structure of the existing Articles 81 and 82 EC. It appears to have been founded upon the overriding policy for which the Merger Regulation was originally implemented - to protect and enhance the process of integration.

Following publication of the proposal, the Economic and Social Committee focused upon the considerations that the approach of the Commission raised.⁵¹⁷ It noted that turnover criteria were suitable because of their simplicity and the fact that there is likely to be a relationship between turnover and market power. Nevertheless, while accepting the overall suitability (and level) of the turnover thresholds, it highlighted the fact that they may include a large element of trade carried out outside the Community, and that turnover may in fact bear little evidence of market power in practice. The Committee considered that since any threshold must by nature be an arbitrary one, there should be provided the opportunity for review at regular intervals, which would also take into account the effect of inflation. The Committee was however less keen on the market share limb of the jurisdictional trigger proposed by the Commission. It considered that the 25% figure could discriminate against undertakings in smaller Member States. It urged the Commission to consider whether there might be another criterion fairer in its application.

The original Commission proposal in 1973 had also envisaged a distinction between applicability and the obligation to notify. Only where the aggregate turnover of the undertakings concerned was one thousand million units of account or more were

⁵¹⁵ Article 1(2), Official Journal, C92, 31.10.73 at pp.2-3.

⁵¹⁶ Article 19, *ibid.*

⁵¹⁷ Consultation of the Economic and Social Committee on a Proposal for a Council Regulation on the Control of Concentrations between Undertakings, OJ C88, 26.7.74, pp21-22.

concentrations to be notified.⁵¹⁸ Furthermore, there was an exception where the turnover of the target undertaking was less than 30 million units of account.⁵¹⁹ The Economic and Social Committee on the other hand considered that the maintenance of competition was of overriding importance. On account of the difficulty of breaking up mergers that had already been completed, all mergers falling within the scope of the Regulation should be notified.⁵²⁰

This idea of a jurisdictional scope based upon the very broad interstate trade criterion was met by staunch opposition from the Member States. They would not countenance the implementation of a broad Community regime that could run counter to their own national policies.⁵²¹ Germany had a tradition of strongly competition-orientated legislation (although with the possibility of the federal economics minister using a political override to reject the recommendation of the Bundeskartellamt report).⁵²² Britain, France, Italy, Portugal and Ireland, on the other hand, expressed concern about maintaining their ability to pursue national, industrial, regional and social policies. Furthermore, Italy had reservations about the proposed coverage of public enterprises.

Member State opposition proved to be intractable throughout the 1970's. In 1982 however, the Commission tabled an amended proposal for a Council Regulation on the control of concentrations.⁵²³ The Commission, in keeping with the Economic and Social Committee's comments of 1974,⁵²⁴ considered first that the market share limb of the original proposal in 1973 was far too uncertain and difficult to calculate to act as a jurisdictional trigger.⁵²⁵ It nevertheless maintained that market share was an important indicator of market structure and an important element in assessing whether a merger threatens to eliminate effective competition. Therefore, market share would

⁵¹⁸ Article 4(1), *ibid.*

⁵¹⁹ Article 4(2), *ibid.*

Note that the European Parliament suggested simplifying this provision, and limiting it to the concentration of only two independent undertakings, see OJ C23, 8.3.74, p.21. It was a suggestion ignored by the Commission in its subsequent proposal in 1982, see OJ 36, 12.2.82.

⁵²⁰ OJ C88, 26.7.74, p.21.

⁵²¹ See Woolcock, S., *European Mergers: National or Community Controls?*, *ibid.*, p.12.

⁵²² Note that *Bulmer* has suggested that domestic institutional dynamics (concerning the Bundeskartellamt and the Federal Government) were also important in determining Germany's position, in: *Bulmer*, *ibid.* at p.14.

⁵²³ Amended proposal for a Council Regulation on the control of concentrations between undertakings, OJ C36, 12.2.82.

⁵²⁴ See above, p.141.

⁵²⁵ OJ C36, 12.2.82, at p.4.

be dropped as a jurisdictional criterion, but be employed as a presumption of compatibility (at the level of 20%).⁵²⁶

Secondly, the Commission proposed to raise the *de minimis* threshold based upon the aggregate turnover of the participating undertakings to 500 million ECU.⁵²⁷ This would limit the scope of application of the Merger Regulation and acted as a clear attempt to placate the worries of the Member States over the erosion of national sovereignty in the policy areas covered by the proposed Regulation. Indeed, the Commission suggested that clear reference should be made in the prohibition under Article 1(1) to concentrations having a 'Community Dimension' in order to make it clear that the Regulation was to apply to mergers which are of a scale that transcend the national context and produce effects at Community level.⁵²⁸

Furthermore, the powers of the Advisory Committee (representing the interests of the Member States) were enhanced. Thereby, it was granted the right to delay a decision of the Commission and to refer specific mergers to the Council on account of non-competition criteria that might be considered to take priority in its assessment.⁵²⁹ The overriding competence for the application of the Regulation remained however in the hands of the Commission, and any opinion of the Council in an individual case would be for guidance only.⁵³⁰

These specific amendments - and the oblique references to 'Community Dimension' - proposed by the Commission in 1982 were not enough to satisfy the Member States, whose resistance once again proved determinative.

In 1984, the Commission again made an amended proposal.⁵³¹ The *de minimis* criterion was revised and the threshold raised to 750 million ECU, with the proviso that the exception would not apply where, irrespective of turnover in the market as a

⁵²⁶ OJ C36, 12.2.82, at p4.

It was an amendment that was warmly received by the Economic and Social Committee, while stressing that such a presumption should not be irrebuttable, OJ C252, 27.9.1982, p16.

⁵²⁷ Note that the Economic and Social Committee considered this figure too high, suggesting that 350 million ECU was more appropriate, OJ C252, 27.9.1982, p.16.

⁵²⁸ OJ C36, 12.2.82, at p3-4.

⁵²⁹ OJ, C36, 12.2.82, at pp7-8.

⁵³⁰ The Economic and Social Committee emphasised the importance of this fact, OJ C252, 27.9.1982, pp.16-17.

⁵³¹ Amendment to the proposal for a Council Regulation on the Control of Concentrations between Undertakings, OJ C51, 23.2.1984, p8.

whole, the share in a substantial part of the common market was greater than 50 %. The proposal floundered once again before the Council and the Member States still proved to be unprepared to grant the Community the scope of authority over competition and other policies that the terms of the Regulation would provide.

In 1986, the Commission made a further amended proposal. It did not however amend either the substantive assessment of concentrations under the Regulation nor the jurisdictional scope of the Regulation that had been envisaged in the 1982 proposal. Rather, it made some minor alterations to the role of the Advisory Committee.⁵³² It is not surprising therefore that it met the same fate as the preceding proposals before the Council.

The ramifications of the *Philip Morris* decision gave the Commission fresh impetus in 1988. Furthermore, in the late 1980's, the Commission (and the European Parliament and the Economic and Social Committee) gained a powerful ally with the voice of the European industrialists.⁵³³ This came as a result of the fact that during the later 1970's⁵³⁴ and 1980's many of the Member States were adopting national systems of merger law.⁵³⁵ Compounded with this development was the wave of concentrations that took place in anticipation of, and in response to, the process of Community integration. Thereby, increasing numbers of concentrations were subject to multiple national systems of regulation. European industry showed great concern about the inefficiency, the waste of time and resources, and above all the legal uncertainty of concentrations falling under the jurisdiction of more than one national law. Not only may the assessment criteria differ between the national authorities (creating great legal uncertainty) but the ultimate completion of the deal would be delayed until the decision of the last authority had been made. Further, the facts contained in the notification and the manner they are presented needs to be adapted to the particularities of each national market and procedure; there must be a familiarity with different legal systems and languages, requiring the use of external local experts in most cases. The costs of pre-1992 regulatory diversity (in all policy areas of the Community) were examined in the *Cecchini* report.⁵³⁶ It was estimated that their cost

⁵³² OJ C324, 17.12.1986, p5.

⁵³³ See eg., Woolcock, S., *ibid* p13.

⁵³⁴ Germany was earlier in 1973. The UK had a system of merger control in place upon joining the Community in 1973.

⁵³⁵ For details of the dates (and amendments) see Annex 1.

⁵³⁶ Cecchini, P., Catinat, M. and Jacquemin, A., *The European Challenge 1992: The Benefits of a Single Market* (1988, Wildwood House, Aldershot), p.31.

ran into tens of billions of ECUs. An application of the *Tiebout* economic model of regulation above clearly provided that where there are spill-over effects, centralised regulation is appropriate.⁵³⁷

In view of the significant cost savings it allows, most European industrialists therefore advocated the principle of a one-stop-shop centralised regulation of concentrations having a cross-border effect, together with exclusive control.⁵³⁸ According to these principles, there would be a level playing field for all concentrations with a cross-border effect, whereby they would be subject to a uniform set of rules: concentrations falling within the scope of the Merger Regulation would be assessed by a single authority only, and would not be subject to multiple scrutiny at the national level.⁵³⁹ Such a system was clearly not encapsulated by the uncertain application of Article 81 EC post *Philip Morris*.

Emboldened by the increasing support of European industrialists, and very aware of the confusion engendering from the *Philip Morris* decision, the Commission made a further amended proposal in 1988.⁵⁴⁰ This time however, it confronted the fears of the Member States of an overbroad application of the Regulation head on. Instead of the hitherto all-inclusive approach based upon the interstate trade criterion, the Commission proposed a more limited positive threshold criterion to limit the scope of the Merger Regulation. Thus, concentrations would fall within the scope of the Regulation where they had a Community dimension, that is where:

- at least two of the undertakings effecting the concentration have their principal field of Community activities in a different Member State; or
- the undertakings effecting the concentration have their principal field of Community activities in one and the same Member State, but where at least one of them has

⁵³⁷ See above at pp.49-54.

⁵³⁸ See Declaration of UNICE, The Union of Industry and Employment Federations in Europe, 4 November 1987; Lord Leon Brittan, *Competition Policy and Merger Control in the Single European Market*, *ibid* at p.31.

⁵³⁹ In the minority, see Centre for Business Strategy, which highlights the dangers of regulatory capture that arise under the principle of one-stop-shop, Centre for Business Strategy, *Continental Mergers Are Different - Strategy and Policy for 1992*, London Business School, Sussex Place, Regent's Park, London, 1990 at pp.126-7. Also, Bishop, M. and Kay, J., *European Mergers and Merger Policy*, *ibid*, p.311-2.

⁵⁴⁰ Amended proposal for a Council Regulation on the control of concentrations between undertakings, OJ C130, 19.5.1988, p4.

substantial operations in other Member States in particular through subsidiaries or direct sales.⁵⁴¹

A concentration was deemed not to have a Community Dimension where:

- the aggregate worldwide turnover of all the undertakings concerned is less than 1000 million ECU; or
- the aggregate worldwide turnover of all the undertakings concerned exceeds 1000 million ECU, but where the aggregate worldwide turnover of the undertaking to be acquired is less than 50 million ECU; or
- where all the undertakings effecting the concentration achieve more than three-quarters of their aggregate Community-wide turnover within one and the same Member State.⁵⁴²

The Commission was to retain exclusive competence to apply the Regulation. The position of the Advisory Committee was retained, but it no longer had the power to delay decisions by the Commission, or to refer them to the Council. Rather, it would be kept fully informed throughout the proceedings and the Commission would have to take utmost account of any opinion it delivered, informing it of the manner in which its opinion was taken into account.⁵⁴³ While apparently weakening the Member States' participation in decision-making under the Regulation, the amendment made sense in terms of legal certainty and speed, issues whose importance had been emphasised by the Economic and Social Committee.⁵⁴⁴

The development was not however to satisfy the Member States. It was not only the jurisdictional criterion that was proving controversial. The proposed provision for the substantive assessment of concentrations for compatibility with the Common Market retained non-competition criteria.⁵⁴⁵ Germany and the UK in particular expressed concern that the exclusive competence of the Commission to examine mergers on non-competition grounds falling within the Merger Regulation would afford it too much opportunity to pursue its own industrial or political goals, at the expense of

⁵⁴¹ Article 1(2), *ibid.*

⁵⁴² Article 1(3), *ibid.*

This proposal was accepted without amendment by the European Parliament, OJ C309, 5.12.1988, p55.

⁵⁴³ Article 18, *ibid.*

⁵⁴⁴ OJ C252, 27.9.1982, p16-17.

⁵⁴⁵ This was unchanged from the 1973 proposal.

national policies. The UK still advocated decisions based upon public interest grounds (although admittedly the 'Tebbit Doctrine' of July 1984 - as a Parliamentary answer to a question in the House of Commons - had provided that references should be made to the MMC on competition grounds only). Germany remained adherent to competition as the exclusive basis for the assessment of mergers. Meanwhile, Italy, Spain and Portugal now advocated the inclusion of a public interest defence based upon issues of regional policy.⁵⁴⁶

It was the position shared by the UK and Germany that was to hold sway in final negotiations for the provision for the substantive assessment of mergers under the Merger Regulation: the assessment of concentrations under the Regulation was to be limited to their effect on competition within the Community. The exact reasons for this result are unclear. In general however it is likely that the smaller countries (and those, like Italy, without their own systems of merger control) were won over by the feeling that supranational control could be more trusted to look after their interests in assessing mergers affecting their territory than a haphazard system of national controls. It has been suggested further that France proved more malleable in its position because it held the Presidency of the Council of Ministers at the time and wanted to take the credit for the successful implementation of the Merger Regulation.⁵⁴⁷

The jurisdictional question remained bitterly contested to the last however.⁵⁴⁸ Specifically, the smaller states (and Italy) favoured a lower threshold. Many (including Italy) did not have merger control systems of their own and for these countries that generally had smaller, highly interdependent economies, the European market was the relevant geographical context for appraising concentrations.⁵⁴⁹ France, the UK and Germany on the other hand favoured higher thresholds because they considered that low thresholds would include mergers with a largely domestic effect. The concern was that mergers assessed at the Community level would result in anti-competitive conditions at the national level. Furthermore, France was anxious not to lose the opportunity to allow mergers that might promote national champions, perhaps under state ownership.

⁵⁴⁶ The industrial group UNICE also strongly supported a public interest exemption.

⁵⁴⁷ See Bulmer, S., (1994) *ibid* at p.15.

⁵⁴⁸ Bulmer, S., (1994) *ibid*, at p.12.

These political dynamics lead to a particular structure of competence for the Commission to control concentrations under the European Merger Regulation.

C THE COMPROMISE

Even though economic analysis suggested that the gains of centralisation in the control of mergers within the Community were high, and industry championed the idea for a one-stop shop for cross-border mergers, in the event the jurisdictional trigger within the formal text of the EC Merger Regulation that was finally implemented allowed a very narrow scope of competence for the Commission (which was solely responsible for the application of the Regulation, subject to review by the ECJ⁵⁵⁰). This was clearly in deference to the fears of the larger Member States. Article 1(2) MR provided that a concentration has a Community dimension where:

- '(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State'.⁵⁵¹

Even with a jurisdictional threshold set at this high level however, further provisions were necessary to satisfy the fears expressed by Germany that concentrations with exclusively national effects might be assessed at the Community level rather than for their effect on localised national markets. Thus, Article 9 MR, known as 'the German clause', provides that the Commission may refer a notified concentration to competent Member State authorities where the Member State so requests within the allowable time, based upon the threat of a concentration to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in a Member State market presenting all the characteristics of a distinct market.⁵⁵² Furthermore, there was also the 'two-thirds' rule laid down in Article 1 MR, providing that where each of the undertakings concerned in a concentration

⁵⁴⁹ Bulmer, S., (1994) *ibid* at p.12.

⁵⁵⁰ Article 21(1) MR.

⁵⁵¹ Before amendments, see below at pp.154-156.

⁵⁵² For a detailed analysis of this provision, see below at pp198-206.

achieves more than two-thirds of the aggregate turnover within the same Member State, the Merger Regulation will not apply.⁵⁵³

In an attempt to satisfy the desires of the smaller Member States (in particular, Holland), many of which did not have their own independent systems of merger control, Article 22(3) MR was also included. It provides that decisions regarding the compatibility of concentrations lacking a Community Dimension within the Common Market can be taken by the Commission where a Member State so requests.⁵⁵⁴ The provision became known as the 'Dutch Clause'.

It is clear that both Articles 9 and 22(3) MR compromise the one-stop-shop principle that constitutes one of the most significant principles upon which the Merger Regulation was based. However, their inclusion into the text of the Merger Regulation proved to be essential for its successful implementation (even if, in practice, they have seldom been invoked⁵⁵⁵). Indeed, *Lord Leon Brittan*, then Competition Commissioner, said of Article 9 MR:

'It is a well known secret that this was the last provision of the Regulation to be agreed and that on that agreement depended the fate of the Regulation as a whole.'⁵⁵⁶

That the competence structure was the result of a political compromise was therefore never in doubt. We have moved a long way from the original proposal - moulded largely by the objective of integration - of a jurisdictional trigger of the Regulation based upon the interstate trade criterion with a *de minimis* threshold.

⁵⁵³ A further relevant provision is Article 21(3) MR, that provides that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Regulation that are compatible with general principles and other provisions of Community law.

This is not strictly a 'fine-tuning' provision or an exception to the one-stop-principle, since it is only meant to apply outside the field of competition, see eg.: Commission Decision of 19 May 1993, *IBM France/CGI* Case IV/M336; Commission Decision of 14 March 1994, *Newspaper Publishing*, Case IV/M423; Commission Decision of 21 December 1995 *Lyonnaise des Eaux/Northumbrian Water* Case IV/M567; European Commission, XXIIIrd Report on Competition Policy 1993, at paragraph 321; European Commission, XXIVth Report on Competition Policy 1994, paragraph 335.

⁵⁵⁴ For a detailed analysis of this provision, see below at pp.226-230.

⁵⁵⁵ See below.

⁵⁵⁶ Lord Leon Brittan, *The Law and Policy of Merger Control in the EEC*, 15 (1990) ELR, (351) at 355.

The explicit terms of the Regulation as finally implemented admitted that the compromise was far from ideal. Thus, Article 1(3) MR provided that the thresholds would be reviewed before the end of the fourth year. In its notes to the Council, the Commission further reserved the right to consider other criteria to determine jurisdiction. However, the compromise agreed upon did manage to satisfy the competing issues of regulatory efficiency, the concerns of the Member States and, where the thresholds were reached, the principle of a one-stop-shop. *Lord Leon Brittan*, then Commissioner for competition, stated:

‘The clear division of tasks brought about by the Regulation will mean that there will be no scope for argument about jurisdiction between the Community and the Member States. The turnover threshold was chosen as a criterion for that very purpose. It is in some ways a blunt and arbitrary instrument but has the great merit of clarity’.⁵⁵⁷

The Commission has subsequently considered what would be a more appropriate scope for the European Merger Regulation in 1993, 1996 and 2000 (ongoing).

D THE COMMISSION’S CONSIDERATION OF AN APPROPRIATE SCOPE FOR THE MERGER REGULATION IN ITS SUBSEQUENT REVIEW

Neither the ECJ nor the Court of First Instance has considered what would be the appropriate definition of ‘Community Dimension’ in the abstract, that is outside the technical application of Article 1 MR.⁵⁵⁸

Corresponding to the legal requirement in Article 1(3) MR, the Commission on the other hand reconsidered the appropriateness of the jurisdictional trigger in 1993.⁵⁵⁹ It concluded that while there was some concern about concentrations with a cross-border effect not falling within the scope of the Regulation, this was not sufficient to

⁵⁵⁷ Lord Leon Brittan, *Competition Policy and Merger Control in the Single European Market*, Grotius Publications Ltd., Cambridge 1991, p. 53.

Echoing this statement, see Green Paper on the Review of the Merger Regulation (1996), *ibid*, paragraphs 31 and 32.

⁵⁵⁸ In *Air France v EC Commission*, the Court of First Instance considered the question of whether the Commission had applied Article 1 MR correctly to a concentration, *Societe Anonyme à Participation Ouvrière Compagnie Nationale Air France v Commission of the EC*, Case T-3/93 CLR 1994 II 121.

⁵⁵⁹ Report from the Commission to the Council on the Implementation of the Merger Regulation, COM(93) 385 final, Brussels, 28 July 1993.

convince the Member States and European industry that an amendment to the jurisdictional thresholds was necessary. It determined to continue to analyse the operation of the existing Regulation before making any proposal for revision. To this end, the Commission determined that a proposal would be made to the Council by the end of 1996.

In its Green Paper of 1996, the Commission considered what would be the optimum allocation of merger cases between the Commission and the Member States in the light of two fundamental Community objectives: the principle of subsidiarity and the objective of sustaining market integration (with the principle of a one-stop-shop for merger control).⁵⁶⁰

Thereby, it might be considered that the Commission was adopting a part policy (the Single Market objective and regulatory efficiency) and part legalistic (the principle of subsidiarity) approach in its review. However, the analysis of subsidiarity undertaken above determines that this was not so. Aside from the controversy over whether it may be applied retrospectively, Article 5 EC is not *legally* applicable to the actual *text* of the EC Merger Regulation in isolation: where the EC Merger Regulation applies, the Commission was given exclusivity of control.⁵⁶¹ In recognition of this fact, the Commission was careful not to claim that subsidiarity had *legal* implications within the terms of the review of the turnover thresholds: it stated rather that the definition of Community Dimension given in Recital 9 of the Regulation (*'significant structural changes the impact of which goes beyond the national borders of any one Member State'*) is *'inspired by the same principles that underpin subsidiarity'*. The approach of the Commission in its 1996 Review may therefore be stated to have been purely policy-based.

1 The Principle of Subsidiarity

The Commission intimated that subsidiarity represented a policy benchmark against which the operation of the jurisdictional trigger of the Merger Regulation should be measured. That is, that action should be taken at the most appropriate level of

⁵⁶⁰ *ibid*, at pp.9-16.

⁵⁶¹ Kamburoglou, P. *'EWG-Wettbewerbspolitik und Subsidiaritaet'*, *Wirtschaft und Wettbewerb* (1993) 4 at p.275.

jurisdiction in view of the objectives to be attained and the means available to the Community and the Member States.⁵⁶²

It considered the relevant Community objective with regard to concentration control to be the distortion of competition structures within the Community that may impede the process of integration.⁵⁶³ According to the Commission, concentrations may impede this Community objective where they have significant cross-border effects, that is where their impact on the structure of competition extends over a geographic area exceeding the borders of a single Member State. This is the case when, for example, the parties have significant activities in more than one Member State, or their activities in one Member State have significant competitive repercussions in other parts of the Community.⁵⁶⁴

The Community provides the best means to deal with such concentrations since its powers of investigation and its remedial and enforcement action extend beyond national boundaries. Furthermore, control at the Community level is best placed to take into account issues such as the globalisation of the relevant markets. Therefore, action by the Community is justified to assess cross-border concentrations that have a cross-border effect on competition at the Community level.

2 The Single Market Objective and a 'One-Stop-Shop'

Referring to the Single Market objective specifically, the Commission reiterated the dual policy of the Community towards concentrations: the need for European business to adapt in size to multi-national markets (as laid down in Recitals 3-5 of the Merger Regulation) and the need to preserve undistorted competition structures within the Community.

In line with these objectives, all concentrations that have cross-border effects on competition should be assessed at the *Community* level for their effect on *Community* structures of competition (where they are not *de minimis*).

⁵⁶² See analysis below of Article 5 EC, pp155-161.

⁵⁶³ Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid* at point 25.

⁵⁶⁴ Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid* at points 25-6.

The 'one-stop-shop' principle facilitates another goal of the Merger Regulation, that is the provision of a single framework within which concentrations with a Community Dimension are assessed within a definite and foreseeable timetable. It is related to subsidiarity since the scale and effects of concentrations with a Community Dimension justify Community action. The Commission states that it is also linked to regulatory efficiency considerations, whereby the costs for business restructuring in the Single Market are minimized for concentrations with a Community Dimension, since a one-stop-shop averts the need for multiple filing according to differing notification requirements, procedures and legal standards.⁵⁶⁵

3 Summary

According to the Commission, consideration of the Community objectives of subsidiarity, the Single Market and the principle of a one-stop-shop determine that all concentrations with a cross-border effect on competition should be assessed at the Community level:

'...the Community dimension of a concentration should ideally be defined on the basis of its effects on the market.'⁵⁶⁶

On the basis of these conclusions, the Commission expressed concern about the high level of multiple national filings in the Community. It stated that it was aware of about one hundred cases in the last two and a half years, of which about 35% were notified to two or more (and up to ten) national authorities.⁵⁶⁷ This suggested that a large number of mergers with a cross-border effect were not falling within the EC Merger Regulation.

The situation was seen to be especially pressing on account of new systems of national control coming into force, and the increase in merger activity as a result of market integration.

⁵⁶⁵ See also on this eg., Commission White Paper on Growth, Competitiveness and Employment 1994, especially Part II, Chapters 2-6.

⁵⁶⁶ Commission's Green Paper on the Review of the Merger Regulation, *ibid.*, at para's 31-2. See also statement by Commission in Commission XXIIIrd Report on Competition Policy 1993 (1994, OPEEC, Luxembourg), paragraph 43.

⁵⁶⁷ Commission's Green Paper on the Review of the Merger Regulation, 1996, at Paragraphs 87-88. It stresses that these numbers are represent the minimum level that the actual total must

The initial conclusions reached by the Commission in its Review seem to suggest a solution that mirrors the original proposals made in 1973 for a jurisdictional trigger based upon the interstate trade criterion and perhaps incorporating a more formalistic *de minimis* provision.⁵⁶⁸ However, the Commission was well aware of the other factors contributing to the issue.

E THE COMMISSION PROPOSAL AND SUBSEQUENT AMENDMENT TO ARTICLE 1 MR

Reasons of practicability, legal certainty and - undoubtedly - political viability, determined that the Commission did not recommend a change from the definition of 'Community Dimension' for the purposes of the Regulation as currently used (that is, the jurisdictional criterion based upon turnover thresholds).⁵⁶⁹ A *reduction* in the level of the quantitative criteria was however proposed.

The Commission considered that a reduction of the threshold criteria to a combined world-wide threshold of ECU 2 billion and a Community threshold of ECU 100 million for each of at least two companies involved would embrace most instances of multiple filings⁵⁷⁰. However, the Commission was aware that this proposal could well be met by firm opposition in the Council. It therefore proposed a second, more limited, amendment.

The Commission proposed that mergers of multiple notification falling between the current thresholds and lower thresholds should fall within the jurisdiction of the Regulation⁵⁷¹. It recommended a cut-off threshold of ECU 2 billion (world-wide) and

be, since it did not yet have the records for 1995, and the 1993-4 records were difficult to analyse accurately.

⁵⁶⁸ See above at pp.140-141.

⁵⁶⁹ Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid*, at paragraph 31.

⁵⁷⁰ Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid*, at paragraph 65.

⁵⁷¹ It stated that the suggestion of the Member States that three or more notifications should be taken to trigger the application of the Regulation (where if there were only two, this could be solved by bilateral co-ordination) should be considered and evaluated in the consultation period (at para.80). Note however that para. 86 it stated that the smaller the number of Member States' laws required for establishing the Commission's competence, the simpler the procedures and the greater the degree of legal certainty for the undertakings.

Similarly, the *Economic and Social Committee* rejected the need for such a limitation. They state that it is not so much a matter of co-ordination as of contributing to the creation of a level

100 million (Community-wide). A concentration would be considered to come within the jurisdiction of an individual Member State if it met the national thresholds triggering an obligation to notify in systems of mandatory control or subjecting a concentration to a system of voluntary notification.⁵⁷²

Following the publication of the Green Paper, the *Economic and Social Committee* published a reaction.⁵⁷³ In this paper, they considered the Commission's proposal for a solution to the multiple filing problem. It expressed some important - and valid - reservations:

First, they highlighted the fact that a concentration which is subject to filings in several Member States might only have significant effects in one State. Hence, the mere existence of several filings is not enough to determine Commission competence to assess mergers.

Secondly, the mechanism proposed makes Community competence not only conditional on national legislation, but also on the interpretation given it by the national authorities in each individual case. Furthermore, this procedure is very slow and expensive for the undertakings concerned.

Although not specifically focused upon by the Committee, it should further be pointed out that, as the Commission has subsequently noted, not all Member States at that time had a system of merger control and others had a system based on voluntary notifications.⁵⁷⁴

The Committee therefore proposed a different solution. The suggested parameter was a turnover by at least two parties in each of two or more Member States affected by the concentration of over a certain threshold. This would not require any system of referral to national legislation.⁵⁷⁵

playing field across the Community which is important. Further, the avoidance of conflicting decisions and legal uncertainty, OJ No. C56/71 of 24.2.1997 at paragraph 2.2.3.

⁵⁷² Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid*, paragraph 79.

⁵⁷³ OJ No. C56/71 of 24.2.1997.

⁵⁷⁴ See Commission Report to the Council on the application of the Merger Regulation thresholds, 2000, paragraph 5.

⁵⁷⁵ This reflected a similar proposition made by the Italian Delegation in the Council Working Group on the Commission's proposal for amending the Merger Regulation, ie below the original thresholds, the Merger Regulation would also apply to concentrations meeting a world-

We can see that in the amendments to the Regulation, which were made in 1997 (coming into force on 1 March 1998), the Committee's general suggestion was adopted by the Council in a specific provision. Council Regulation 1310/97⁵⁷⁶ amended the text of the Merger Regulation, allowing for an *alternative* test of Community dimension that was to be considered as well as the original test as implemented in 1989 (see above):

a) the undertakings concerned have a combined aggregate world-wide turnover of more than ECU 2,500 million;

b) in each of at least three Member States, the combined aggregate turnover of all undertakings concerned is more than ECU 100 million;

c) in each of at least three Member States included for the purpose of point b, the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million, *and*

d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million,

unless each of the undertakings concerned achieves more than 2/3's of its aggregate Community-wide turnover within one and the same Member State'.⁵⁷⁷

F THE APPROACH OF THE LITERATURE IN CONSIDERING AN APPROPRIATE SCOPE FOR THE MERGER REGULATION

Several commentators have criticised the fact that the existing jurisdictional criterion of the Merger Regulation is approached as a matter of regulatory efficiency, legal certainty and political compromise, rather than rational economic theory.⁵⁷⁸

wide threshold of ECU 2 billion and a national threshold of ECU 50-100 million for each of at least 2 companies in each of at least three Member States).

⁵⁷⁶ 30 June 1997, OJ L 180/1 (1997).

⁵⁷⁷ Note that Article 1(4) MR, as amended by Council Regulation 13010/97, required the Commission to report to the council before 1 July 2000 on the operation of the threshold criteria set out in paragraphs 2 and 3.

⁵⁷⁸ Kassamali, R.A., (1996) *ibid*, at p.99-102; O'Keefe, S., *Merger Regulation Thresholds* (1994) ECLR (1), at p.30; Morgan, E.J., *Subsidiarity and the Division of Jurisdiction in EU*

These analyses are based upon the assumption that economic theory should dictate what the law is. Economic theory determines that mergers should fall within the scope of the Merger Regulation where their economic effect is of such significance that the Community has an interest in applying its own law rather than leaving it to national assessment according to national laws. Spill-over effect of concentrations rebuts the general presumption for decentralised regulation, and requires a system of centralised jurisdiction. 'Spill-over effect' occurs where economic activity within one jurisdiction may effect the economic conditions in another, separate jurisdiction (it is not synonymous with the idea of multiple national filing).⁵⁷⁹ Without explicitly acknowledging the *Tiebout* model⁵⁸⁰, it appears that this is the approach adopted in the literature considering the appropriateness of the jurisdictional criterion of the Merger Regulation.⁵⁸¹

Kassamali and *Morgan* provide suggestions for an alternative jurisdictional trigger. They do not however consider that such a criterion should be effects-based. Rather, they emphasise the need to align the *technical* jurisdictional and the substantive criteria in economic terms. Thereby, they propose that a market share criterion would be more appropriate to determine those concentrations that might have a significant effect upon the competition structures of the Community.

The proposed solution is not however consistent with their preceding analysis. In effect, they propose to replace one arbitrary quantitative jurisdictional criterion with another, even if the one they propose may be more consistent with the substantive assessment under Article 2 MR than are the existing turnover thresholds.

Merger Control (1999) Antitrust Bulletin at p.8; Broberg, M., *The EC Commission's Jurisdiction to Scrutinise Mergers* (1998), Kluwer.

Similarly, in an application of the principle of subsidiarity, see *Continental Mergers are different*, Centre for Business Strategy, London Business School, 1990; Bishop, M., and Kay, J., *European Mergers and Merger Policy*, *ibid* pp.308-312.

⁵⁷⁹ See above pp.52-53.

⁵⁸⁰ See above, pp.49-52.

⁵⁸¹ *Kassamali*, (1996) *ibid*, p.105; *Morgan*, (1999) *ibid* at pp.8-10.

**G EVALUATION OF THE APPROACH OF THE COMMISSION AND
IN THE LITERATURE**

The Commission determined in its Green Paper of 1996 that in *policy* terms, that is with respect to regulatory efficiency and a straightforward application of the concept of subsidiarity within the context of the goal of the Single Market, those concentrations that may have a cross-border effect on competition should fall under the scope of the Merger Regulation.⁵⁸²

The literature reaches a similar conclusion that all concentrations that have a spill-over effect onto more than one national market should fall within the scope of the Merger Regulation, whereby it bases its conclusions upon economic theory.

In the literature, a full definition of 'spill-over' effect is not articulated in any detail. Since both commentators however make reference to the Commission's Green Paper, it may be that they use 'spill-over' in the same narrow sense as the Commission - that is, to mean a cross-border effect on *competition* alone.⁵⁸³ This condition would appear to be synonymous with the condition of the interstate trade criterion that is the jurisdictional trigger of Articles 81 and 82 EC. Recall that the interstate trade criterion is fulfilled where *Community* structures of competition are distorted by an actual or potential effect on interstate trade (rather than at the national/local level).⁵⁸⁴

Therefore, both the Commission and the literature consider that all concentrations that have an effect on interstate trade within the Community should fall within the Merger Regulation and, by implication, under the exclusive control of the Commission (even if the criterion finally proposed is a compromise of this position in consideration of other principles). This is consistent with an application of the *Tiebout* principle of regulation that has been shown to be persuasive in previous Commission Reports.⁵⁸⁵ In practical policy terms, however, the direct application of the interstate trade criterion was however rejected: both the Commission and the literature dismiss the interstate trade criterion as being too vague, and, in the event,

⁵⁸² See above, pp.153-154.

⁵⁸³ Although note that *Kassamali*, (1996) *ibid*, at p.97 (note 40) seems to consider that spill-over effect refers to external industrial and social implications of decisions taken at the national level.

⁵⁸⁴ See the analysis of *Commercial Solvents* above.

⁵⁸⁵ For an application of *Tiebout*, see above at pp.49-53. For an application of *Tiebout* by the Commission, see *Padoa Schioppa Report*, note 181.

the Commission was forced to accept that a substantial lowering of the current quantitative thresholds would not be possible in the current political climate.

The approach of the literature and the European Commission therefore mirror each other in as much in their conclusion as in their approach that is based upon seeking a 'policy-compromise' (the Commission in terms of the Community objective of integration, together with the principles of regulatory efficiency, a one-stop-shop, subsidiarity and the recalcitrance of the Member States; the literature in terms of rational economic theory).

Questionable however is whether it is absolutely correct to approach the issue in terms of policy alone, in acknowledgement of the wider legal dynamics of the Community. The EC Merger Regulation, as a provision of secondary Community law, derives from the Treaty in which boundaries of competence of the Community are drawn. It is therefore necessary to consider specifically in the analysis of the appropriateness of the jurisdictional trigger of the Merger Regulation whether the Treaty requires in and of itself a specific scope of Community competence to assess mergers as a matter of *law*.

The Merger Regulation was implemented according to specific legal bases of the Treaty - Articles 83 and 308 EC. Questionable is whether these legal bases have legal implications for the appropriate scope of the EC Merger Regulation - do they delimit a specific scope of the Merger Regulation in legal terms? The question entails analysis not only of the operation of Articles 83 and 308 EC in technical terms as legal bases for secondary Community law, but also a consideration of their operation in conjunction with the principle of subsidiarity. As will be demonstrated below, subsidiarity informs the use of Articles 83 and 308 EC to the extent that they are not relied upon to implement an exclusive competence of the Community.

VII THE LEGAL BASES OF THE MERGER REGULATION, THE LEGAL PRINCIPAL OF SUBSIDIARITY AND AN APPROPRIATE JURISDICTIONAL CRITERION

A THE PRINCIPLE OF SUBSIDIARITY

The operation of subsidiarity is contextual in the sense that it is a principle that operates in conjunction with existing or proposed Community legislation, refining and adapting either the literal text of a provision or its interpretation. In order to fully understand its operation in conjunction with the material provisions of Articles 83 EC and 308 EC, it is however useful to analyse the principle in isolation.

Subsidiarity, as a principle guiding the relationship between the individual, the group and society, has noble origins in papal dictates dating back to the early twentieth century.⁵⁸⁶ It has also been developed as a legal concept in Germany with regard to the relationship between regional and federal regulation.⁵⁸⁷

Within the context of the European Community, the principle of subsidiarity is essentially to clarify the spheres of competence of the Community with regard to those of the Member States. It is arguable that subsidiarity as a principle of policy was first introduced into the debate about the Community's appropriate legal and political structure in the mid-1970s,⁵⁸⁸ finding its expression in particular in the *McDougall Report* on the role of public finance in European integration. This Report considered the question of which economic policy areas should be funded at Community level and the effect of Community funding on the policies that remained in the hands of national governments.⁵⁸⁹ As noted above, the Report considered that the existence of economies of scale, political homogeneity and cross-frontier effects provided that centralised regulation was appropriate.

⁵⁸⁶ See eg., Pope Pius XI, *Quadragesimo Anno*, (London, Catholic Truth Society, 1936), p.31 paragraph 79.

⁵⁸⁷ For a useful overview, see Stadler, H., *Subsidiaritaetsprinzip und Federalismus*, (1951) Freiburg.

⁵⁸⁸ See Emiliou, N., *Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition?'*, *ELRev* (1992) 383 at p.391.

The draft European Union Treaty by the European Parliament on the other hand referred *explicitly* to subsidiarity in its Article 12(2).⁵⁹⁰ Thereby, it considered that the Community must only act to carry out those tasks *which may be undertaken more effectively in common* than by the Member States acting separately. A particular example of this was held to be the where the relevant action has a dimension or effects that extend beyond a single Member State.

The Single European Act introduced subsidiarity formally, but it was restricted to a limited field and its meaning was not elucidated. Hence, Article 130r(4) EEC provides:

'The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States.'

The *Padoa-Schioppa Report*⁵⁹¹ undertaken by the Commission one year later employed subsidiarity as a political principle.⁵⁹² The Report concerned the economic policy issues arising as a result of Iberian accession and the project for the completion of the European internal market. It considered that there were two guiding principles which could be used to decide whether Community intervention was necessary: cross-frontier spill-over effects and the need to combat unemployment. Essentially, where spill-over effects were present, the question arose of which level of authority was better suited to fulfil a particular objective adequately. This second test was an efficiency test involving in particular the issue of unemployment: the Report considered that if regional unemployment was the result of Community policies, the Community was entitled to act. It was therefore a two-tier test that was founded upon the existence of spill-over effects.

The Treaty of Maastricht finally implemented subsidiarity as a general legal criterion into the text of the EC Treaty itself. Article 5 EC states:

⁵⁸⁹ Report, *ibid.*

⁵⁹⁰ In full, see above, p.51.

⁵⁹¹ Report, *ibid.*

⁵⁹² See Emiliou, N., *Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition?'*, ELRev (1992) 383 at p.396.

'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'⁵⁹³

In general terms it determines that the Community⁵⁹⁴ may only act within the confines of the aims and competencies laid down in the EC Treaty. The provision is a formal expression of a limitation on the competence of the Community to act in its status as an international organisation. Thereby, the right of the Member State to act at the national level takes precedence over the right of the Community to act on the Member States' behalf, unless the relevant area falls within the Community's exclusive competence, or unless the object of the proposed action cannot be achieved at the national level and lies within the framework of the powers and aims laid down in the Treaty. Where such Community-level action is required, it is only legitimated *to the extent that it is necessary*.

The application therefore involves a presumption for decentralisation in the sense that if the desired end may be effectively achieved at the national level, the Community has no mandate to act.⁵⁹⁵ It is above all designed to ensure that Community decisions are taken as near to the citizens of the Community as possible and that the national identity of the Member States and their national legal systems are guaranteed to the greatest extent within the context of the Community's objectives. Thereby, it is debatable whether the Member States have a right to refuse to act in the instance where that action would be effective without triggering the Community's competence according to Article 5 EC. The better opinion is that it cannot: the ability of the

⁵⁹³ As introduced by Article G(7) TEU.

⁵⁹⁴ The Community is the actual addressee of the principle, and thereby all its political organs, see Lambers, H.-J, *Subsidiaritaet in Europa - Allheilmittel oder juristische Leerformel*, EuR (1993) p.229 at pp237-9; Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.228.

While it is possible (although not universally accepted) that they might consider the acts of Community institutions within the context of subsidiarity, the actual decision-making of the European courts is thought not to be subject to the application of the principle, see Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.228-9.

⁵⁹⁵ See eg., Commission Public Comment, AE 1805/4; Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.226; Groger, T. and Janicki, T., 'Weiterentwicklung aus Europaeischen Wettbewerbsrechts', WuW (1992) Vol.12 at p.993; Emiliou, N., *Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition'?*, ELRev (1992) 383 at p401.

Community to use its competencies cannot depend upon the willingness of individual Member States.⁵⁹⁶

The implications of the implementation of the principle of subsidiarity for Community competition law are expressed in two dimensions.⁵⁹⁷ First, it is applicable to the jurisdictional divide between the application of national and Community provisions of competition law. In recognition of the primacy of Community law, it therefore influences the *scope* of Community competition law. Secondly, since it refers to Community 'action', it also influences the *enforcement* of Community law, determining whether this should be in the hands of Community or national authorities. With regard to Community law generally, the Commission has expressed the scope of the subsidiarity thus:

'The full effect of the subsidiarity principle depends on consideration by the Community's institutions of a number of questions...:

- What degree of constraint is to be applied for the implementation of shared powers?
- What are the limits on *legislative action* compared with non-binding means of action?
- What is the role of subsidiarity in the *management and control of implementation*?⁵⁹⁸

Questionable is *how* the principle is applied to these two dimensions of Community competence in competition law: when can it be said that a particular objective of the Treaty cannot be effectively achieved at the Member State level? In its Report to the European Council, the Commission proffered three questions that must be answered in each case:

- '- What is the Community Dimension of the Problem?

⁵⁹⁶ See eg., Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.226; Lambers, H.-J., *Subsidiaritaet in Europa - Allheilmittel oder juristische Leerformel*, EuR (1993) p.229 at p. 236.

In favour of the Member State prerogative, see Jurass, H., *EG-Kompetenzen und das Prinzip der Subsidiaritaet nach Schaffung der EU*, EuGRZ (1994) p209 at p. 210.

⁵⁹⁷ In general terms, three dimensions have been identified: uniform versus differentiated policy design; central versus local administration; central versus local government, in: CEPR, 'Making Sense of Subsidiarity: How Much Centralisation for Europe?', in Series: *Monitoring European Integration* 4, 1993.

With specific regard to competition law however, only two are relevant: see eg., European Commission, Green Paper on Vertical restraints; Van Miert, K., *Subsidiarity and Decentralization in the Application of European Competition Law*, Antitrust: Rules, Institutions and International Relations, International Conference, 20th November 1995

⁵⁹⁸ Commission Report to the European Council on the Adaptation of Existing Legislation to the Subsidiarity Principle, COM (93) 545 at p.2 (author's emphasis).

- What is the most effective solution, given the means available to the Community and to the Member States?
- What is the real added value of common action compared with isolated action by the Member States?⁵⁹⁹

Questionable is whether the principle presents a clear set of justiciable rules that can be analysed in the abstract. This has been severely doubted, even by the Commission itself.⁶⁰⁰ Nevertheless, certain conditions are discernible that elaborate the basic framework provided by the Commission above.

In the first place, there must be a need for action with regard to the Treaty objective, and the effect that is sought must not already be in existence.⁶⁰¹

Secondly, as is clear from the literal text, the relevant area in which the Community intends to act must be an area in which the Community does not have exclusive competence for the subsidiarity principle to apply. The category of 'exclusive competences' of the Community is difficult to delineate. In broad terms, exclusivity will be characterised by areas in which the Community has the sole task of 'completing' a particular field of regulation.⁶⁰² This is not however the same as where the Community simply has an obligation to act in any given area,⁶⁰³ and exclusivity does not, for example, extend to the general competence that the Community has to propose and implement provisions according to the general legal bases of Articles 308 and 94 and 95 EC.⁶⁰⁴ A further example of exclusive competence is where the Community has actively exhausted the extent of its competence in a given field: exclusive competence may not just be inherent to the provisions of the Treaty, but

⁵⁹⁹ Commission Report to the European Council on the Adaptation of Existing Legislation to the Subsidiarity Principle, COM (93) 545 at p.1.

⁶⁰⁰ The Commission itself has stated: '*...subsidiarity cannot be reduced to a set of procedural rules; it is primarily a state of mind*' COM (93) 545. See also, eg., Moeschel, W., *Zum Subsidiaritätsprinzip im Vertrag von Maastricht*, NJW (1993) p.3025 at 3070. The House of Lords Select Committee, in denying the justiciability of subsidiarity, has stated:

'The Committee do not believe that subsidiarity can be used as a precise measure against which to judge legislation. The test of subsidiarity can never be wholly objective or consistent over time...to leave legislation open to annulment or revision by the European Court on such subjective grounds would lead to immense confusion and uncertainty in Community law', House of Lords Select Committee, Report on Economic and Monetary Union and Political Union.

⁶⁰¹ Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.226.

⁶⁰² Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.214.

⁶⁰³ Communication de la Commission au Conseil et au Parlement Européen', *Le Principe de Subsidiarité*, SEC (92) 1990 at p.6.

⁶⁰⁴ Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.215.

may also arise out of the measures taken by the Commission or the Council on the basis of the Treaty.⁶⁰⁵ In general, each area of purported Community action must be considered on its own terms to determine whether it may be stated to be characterised by 'exclusivity'.

Thirdly, it appears from the Commission Report to the Council above⁶⁰⁶ that the issue must be shown to have a 'Community Dimension'. From the *McDougall* and *Padoa* Reports above, it is apparent that the Commission considers that 'Community Dimension' is embodied by spill-over effects.⁶⁰⁷ This also corresponds to Article 12(2) of the draft Treaty drawn up by the European Parliament that refers to '*dimension or effects that extend beyond a single Member State.*' It is effectively an expression of the *Tiebout* principle.⁶⁰⁸

Fourthly, it is necessary to consider the effectiveness and efficiency of action at the national level to achieve the particular objective. Thereby, it may be determined that the harmonisation or co-ordination of national laws might bring the required result and Community action is not necessary. Further, the Member States may be able, through individual (unconcerted) parallel action, to fulfil the relevant Community aim.⁶⁰⁹ On the other hand, the interests of the objective of integration might override this, for example where national authorities might not co-operate with this goal in their decision-making or legislating so that the unified development of the economic conditions within the Community might be affected.⁶¹⁰ A classic example of this would be of course the maintenance of undistorted competition throughout the whole Community.

⁶⁰⁵ Opinion of the Court of Justice delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty, Opinion 2/91 ECR (1993) I 1061 at p1076-7.

⁶⁰⁶ Commission Report to the European Council on the Adaptation of Existing Legislation to the Subsidiarity Principle, COM (93) 545 at p.1.

⁶⁰⁷ In agreement that spill-over effect normally justifies Community action, although unanimously incorporating this condition into the fourth test laid out in this thesis, see eg. Jurass, H., *EG-Kompetenzen und das Prinzip der Subsidiarität nach Schaffung der EU*, EuGRZ (1994) p209 at p. 215; Geiger, R., *Kommentar zum EG-Vertrag*, (1993), p.29; Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.228.

⁶⁰⁸ See above, pp.49-53.

⁶⁰⁹ See eg., *Everling*, in: Everling, U./Schwartz, I./Tomuschat, C., *ibid*, at p.12; *Schwartz, I* in: Groeben et al., *ibid*, pp.669-671.

⁶¹⁰ See eg., Groger, T. and Janicki, T., '*Weiterentwicklung aus Europäischer Wettbewerbsrechts*', WuW (1992) Vol.12; Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.228.

Fifthly, it is necessary to consider the efficiency of action at the Community level with regard to the specific objective in comparison with action at the national level within the specific context of its scale or effect.¹ Generally, if it has been determined that national action is not appropriate, it will be clear that the Community represents a more efficient forum. However, it is conceivable that action at the level of the Community suffers from the same deficiencies as at the national level.²

Finally, Community action is only legitimised *to the extent that* it is necessary and suitable to achieve the relevant Community objective. This is a formal expression of the proportionality principle that has long been recognised as a general principle of Community law by the European Courts.³ Thereby, where there exists a choice of suitable action or measures to pursue a given Community objective or objectives, the least onerous must be selected. Further, the extent of the encroachment into the competencies of the Member States must be proportionate to the objective sought.⁴ Thereby, the Commission and the Council enjoy a degree of discretion that may however be subject to scrutinization by the European Court of Justice.⁵

B THE MERGER REGULATION AS AN AMENDMENT TO THE TREATY OR AN EXPANSION OF THE TREATY - ARTICLE 308 EC OR ARTICLE 48 TEU AS A LEGAL BASE?

In analysing the legal bases of the Regulation, it is necessary to demonstrate initially why a Community system of merger control could be implemented according to *secondary law* and did not require an amendment to the Treaty according to Article 48 TEU (ex.309 EC).

The issue of how a Community system of merger control could be legally implemented was, from the initial proposal by the Commission in 1973 until the final agreed upon

¹ Geiger, R., *Kommentar zum EG-Vertrag*, (1993), p28; Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.228.; Jurass, H., *EG-Kompetenzen und das Prinzip der Subsidiarität nach Schaffung der EU*, EuGRZ (1994) p209 at p.211.

² Jurass, H., *EG-Kompetenzen und das Prinzip der Subsidiarität nach Schaffung der EU*, EuGRZ (1994) p209 at p. 211

³ First invoked in *Internationale Handelsgesellschaft mbH* Case 11/70 (1970) ECR 1125. See also, eg., *Werner A. Bock KG v Commission* Case 62/70 (1971) ECR 897; *Behla-Muehle Josef Bergmann KG v Grows-Farm GmbH* Case 114/76 (1977) ECR 1211.

⁴ See *Schraeder v Hauptzollamt Gronau* Case 265/87 ECR (1989) 2237 at 2269.

⁵ *United Kingdom v European Council* Case 84/94 I ECR (1996) 5755.

text of the provision, one of the most controversial matters involved in the implementation of the Merger Regulation. Italy in particular argued that the only possibility for an implementation of a Community system of merger control was an amendment to the Treaty text according to the procedure under Article 48 TEU.⁶

The origin of the dispute lies in the fact that it was unclear what exactly constitutes an *amendment* of the Treaty text (requiring Article 48 TEU⁷ procedure) as opposed to a necessary *expansion* of the Treaty according to its objectives (requiring Article 308 EC⁸ procedure), and how the two procedures are related.⁹

With regard to this issue, there is a consensus of opinion that if a new legal provision intentionally diverges from a specific and set Treaty text in its material content, this constitutes a 'Treaty amendment'.¹⁰ This would require a procedure under Article 48 TEU, since the Court of Justice has expressly stated that Article 308 EC must not be invoked to implement an amendment to the existing EC Treaty:

'(Article 308), being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those which define the tasks and activities of the Community. On any view, Article 308 cannot be used as the basis for the adoption of provisions whose effect would in

⁶ Groeben, von der H. *'Handbuch des Europaischen Rechts'*, (1983) at p.445; Krimphove, (1992) *ibid*, p.340.

⁷ Article 48 TEU states: *'The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member State, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.'*

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.'

⁸ Article 308 EC states: *'If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall take the appropriate measures, acting unanimously on a proposal from the Commission and after consulting the European Parliament.'*

⁹ In detail on this, see Haede, U. and Puttler, A., *Zur Abgrenzung des Artikels 235 EGV von der Vertragsaenderung* (1997) 1 EuZW.

¹⁰ Krimphove, (1992) *ibid*, p.340; Schwartz, I., in: Groeben et al., *Kommentar* *ibid*, Artikel 236, Paragraph 2f; Grabitz, E. in: Grabitz, E. (ed) *Kommentar zum EWG-Vertrag*, 1990, Artikel 308, Paragraph 4.

substance be to amend the Treaty without following the procedure which it provides for that purpose.¹¹

Advocates of Article 48 TEU as the appropriate legal base therefore claimed that the parties to the Treaty had wished to establish European economic law forever according to the set legal parameters in the Treaty. They argued that to implement a system of Community merger control would be to intentionally amend that set Treaty text, and this may only be effected on the basis of Article 48 TEU proceedings.¹²

This assumption is however starkly inaccurate. The Treaty does not pertain to limit itself to a static legal, economic and political structure (existing at the time of its conception). The inclusion of legal bases in the Treaty text (for example, Articles 83 and 308 EC), and the fundamental principles set down in Articles 2 and 3 EC alone, make it clear that the Treaty is concerned with the establishment (and maintenance) of a *dynamic* integrated market, based upon a developing structure of effective competition.¹³ This is a long-term and continual goal of the Treaty. Since merger control is aimed above all at the prevention of the creation of anti-competitive concentrations of economic power, a system of Community merger control is consistent with the Treaty text.

This was certainly the opinion of the Spaak Report, which clearly envisaged the Treaty objectives as encompassing a system of Community merger control.¹⁴ On the basis of that Report, a system of Community merger control was mooted between the Member States at the signing of the Rome Treaty. The impediment to its implementation was the Community policy towards concentrations *at that time* (outside the coal and steel sector), rather than legal issues.¹⁵ Moreover, and vitally, the ECJ subsequently extended Articles 81 and 82 EC and established a legal competence of the Community law to assess concentrations.¹⁶

It is clear therefore that a system of Community merger control was coherent with the objectives laid down in the Rome Treaty. In particular, it conformed to the aim of ensuring that competition within the Common Market is not distorted according to

¹¹ Opinion 2/94 (re Accession of the European Communities to the European Human Rights Convention) (1996) 2 CMLR at paragraph 30.

¹² See in more detail, Krimphove, (1992) *ibid* at p.340.

¹³ See above. See also, Krimphove, (1992) *ibid* at p.341.

¹⁴ *ibid*, at p.60.

¹⁵ See above, pp.39-41.

¹⁶ See *Continental Can* and *Philip Morris* principles above.

Article 3(1)g EC, an aim that became more pronounced following the Single European Act of 1986. The introduction of a system of European merger control did not necessitate a change to the Treaty text. Therefore, the system of Community merger control was legitimately implemented on the basis of a provision of secondary Community law.

Paragraph 8 of the Preamble to the Regulation states that the Regulation is based upon both the legal base of Article 83 EC and the base of Article 308 EC. Questionable is whether either or both of these legal bases have implications for the appropriate jurisdictional scope of the Merger Regulation.

C THE LEGAL BASES OF THE MERGER REGULATION - ARTICLES 83 AND 308 EC

Article 308 EC is a provision which is only to be invoked where the Treaty itself does not provide the relevant powers to fulfil the Treaty aims.¹⁷ It is subordinate to the other legal bases. Therefore it is prudent to first examine the extent to which the legal base of Article 83 EC acted as a legal base for the Merger Regulation and its possible implications for the appropriate jurisdictional scope of the Regulation.

1 Article 83 EC

1.1 The Substantive Provision

Fundamentally, Article 83(1) EC provides:

‘Within three years of the entry into force of this Treaty the Council shall...adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86 (Articles 81 and 82 EC).’

1.2 Article 83 EC and the Merger Regulation

Article 22(2) MR states that Regulations 17/62, 1017/68, 4056/86 and 3975/87 are not to apply to ‘concentrations’ as defined in Article 3 MR. Regulations 17/62, 1017/68, 4056/86 and 3975/87 were the implementing regulations for the principles

¹⁷ See eg., Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* (1973) ECR 897; Case 45/86 *EC Commission v Council* (1987) ECR 1493. See eg., Krimphove, (1992), *ibid* p.342; *Schwartz, I.* in: Groeben et al, *Kommentar* *ibid*, p.602; Mestmaecker, *ibid*, 1988, p.371; Steindorff, *ibid*, p.3; Boehm, R., *ibid*, at pp.113; Dorn, D., *ibid*, pp.39-40; Heade/Puttler, *ibid*, p.15; Gericke, H., *ibid*, pp.107-9; Everling, *ibid*, p.13; Geiger, *Kommentar* *ibid*, Art. 308, Paragraph 9.

of Articles 81 and 82 EC according to Article 83 EC.⁶²⁸ On the basis of Article 22(2) MR therefore, the Merger Regulation has become the sole implementing regulation according to Article 83 EC for all concentrations falling within the scope of Articles 81 and 82 EC.

A minority of commentators have sought to question the legitimacy of this partial disapplication of Regulations 17/62, 1017/68, 4056/86 and 3975/87.⁶²⁹ The majority however accept that regulations implemented according to Article 83 EC may be amended or disapplied by later regulations implemented according to the same Article.⁶³⁰ This is in line with the position adopted by the Court of Justice.⁶³¹

Questionable is the extent to which Article 83 EC represents the legal base of the Merger Regulation.

1.3 The Principles of Articles 81 and 82 EC to be Implemented According to Article 83 EC

Since Articles 81 and 82 EC are applicable to concentrations, and the Merger Regulation implements the principles of Articles 81 and 82 EC, it has been mooted that Article 83 EC may provide an adequate legal base for the Merger Regulation. This is the position adopted by the English Court of Appeal in *Dan Air*.⁶³²

⁶²⁸ Note that the Commission's Proposal for new Council Regulation on the implementation of the rules in Articles 81 and 82 EC provides that there should be a single implementing regulation for all sectors on the base of Article 83 EC, since the Court of Justice has held that the Community competition rules apply in full to the transport sector, see Commission Proposal COM (2000) 582 at p.5.

⁶²⁹ Fine, F., *ibid* 1990 (but opinion revised in Fine, F., *ibid* 1994 at pp. 131-3); Venit, J., 'The Merger Control Regulation - Europe Comes of Age...or Caliban's Dinner', *CMLRev* (1990) 7-50 at pp. 16-17.

⁶³⁰ The majority of commentators accept the legitimacy of this partial disapplication of Regulation 17/62 on the basis of Article 83 EC and replacement by MR for concentrations above the thresholds. See eg., Jones and Gonzalez-Diaz, *ibid*; Soames, T, *ibid*, at p.224; Bourgeois, J. and Langeheine, B., *Jurisdictional Issues: the EEC Merger Control Regulation, Member State Laws and Articles 85 and 86*, *Fordham International Law Journal*, 1990-1, 14 p.387; *Immenga, U.* in: *Immenga/Mestmaecker*, *ibid* at p.1084; Fine, F., (1994) *ibid* p131-3; Downes and Ellison, *ibid* pp.184-5; Cook and Kerse, *ibid* p14 (stressing adequate procedural framework rather than substantive however); Deimel, A., *ibid*, at p.119-20. Bos et al. 1992, *ibid*, stressing that the Merger Regulation has far more comprehensive powers for Commission, at p.374.

⁶³¹ *Case 32/65 Italy v Council and Commission* (1966) ECR 389; (1966) CMLR 39.

⁶³² *R. v. Secretary of State for Trade and Industry and another, ex parte Airlines of Britain Holdings PLC and others* (The Times, December 10, 1992). The Court regarded the matter as *acte clair* and refused to refer the question to the Court of Justice for a preliminary ruling.

'It seems to me to be quite clear that Regulation 4064 has been adopted as an 'appropriate regulation' to give effect to the principles set out in Article 86 (Article 82 EC)...the effect of the Regulation is to require the Commission to deal with all questions arising under Articles 85 and 86 (Articles 81 and 82 EC) and to leave it to the national courts to apply their own domestic competition legislation to concentrations within their purview.'

This would have serious implications for the Merger Regulation. In *Commission v Council*⁶³³ the ECJ held that the relevant Regulation based on Article 133 EC and 308 EC was void since Article 113 EC would have been an adequate legal base.

However, in *technical* terms Articles 81 and 82 EC do not apply to *all types* of concentration within the meaning of Article 3 MR (Article 3 MR does not require, for example, an 'agreement' between the parties). This would suggest that there is a legitimate need for Article 308 EC as a legal base.

The contrary position may however be sustained where a very wide interpretation of the clause '*...principles set down in Articles 81 and 82 EC*' is adopted. This interpretation does not restrict the use of Article 83 EC to the material content of the provisions (Articles 81 and 82 EC) in the individual cases (that is, their *technical* scope). It embraces instead the *fundamental* principles according to which Articles 81 and 82 EC are in general applied - that is, the pursuit of the goal of integration (and the ancillary maintenance of undistorted systems of competition). Thereby, it is arguable that the scope of Article 83 EC is broad enough to be adequate as the legal base for a Community Merger Regulation on its own. This position has been adopted by some commentators.⁶³⁴

The majority of commentators have however adopted a more limited interpretation of the 'principles' of Articles 81 and 82 EC to be implemented by a legal provision on the basis of Article 83 EC. According to them, Article 83 EC refers only to the *material* principles of Articles 81 and 82 EC in their limited application to concentrations.⁶³⁵ It is used in order to realise the material principles laid down in Articles 81 and 82 EC in the concrete and specific case.

⁶³³ Case 45/86, 1987, *ibid*.

⁶³⁴ See eg., Mestmaecker, *ibid*, 1988 p.365; Mestmaecker, E., *Europaeisches Wettbewerbsrecht* 1974, pp. 420-424; Steindorff, *FIW Skript* 10, *ibid* 1988; Blank, *ibid*, pp202-203.

⁶³⁵ See eg., Gleiss/Hirsch, *Kommentar* *ibid*, Artikel 87, Paragraphs 2 and 3; Schroeter, H., in: Groeben et al., *Kommentar*, *ibid*, p905; Ritter, in: Immenga/Mestmaecker, *ibid* pp1470-1.

The majority opinion is to be approved in view of the literal text of Article 83 EC. The provision refers explicitly to the 'principles *set out* in Articles 81 and 82'. Furthermore, the (admittedly non-exhaustive) examples given in Article 83 paragraph 2 (a-e) EC refer exclusively to the material content of Articles 81 and 82 EC. It further reflects the position adopted by the Court of Justice⁶³⁶ and is the interpretation explicitly adopted within the terms of the Merger Regulation itself (Preamble):

'- Whereas Articles 85 and 86 (Articles 81 and 82 EC), while applicable, according to the case-law of the Court of Justice, to certain concentrations, they are not, however, sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

- Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

- Whereas this Regulation should therefore be based not only on Article 87 (Article 83EC) but, principally, on Article 235 (Article 308EC) of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives...'⁶³⁷

Article 83 EC is therefore a base for the Merger Regulation to the extent that the Merger Regulation realises the material principles laid down in Articles 81 and 82 EC where they are applicable to the specific area of mergers. The Merger Regulation has however extended the application of Community law to concentrations beyond the material scope of Articles 81 and 82 EC (which is covered by the legal base of Article 83 EC).⁶³⁸ For this extension of substantive Community legal competence, the legal base of Article 308 EC is required.⁶³⁹ Furthermore, Article 308 EC is required because of the different procedural and substantive approaches introduced by the Merger Regulation. For example, the Regulation is preventative in its approach to

⁶³⁶ *Nouvelles Frontières* (Joined Cases 209-213/84); Case 32/65 *Italy v Council and Commission* (1966) ECR 389 (1966) CMLR 39.

⁶³⁷ Recitals 6-8 (Author's emphasis).

⁶³⁸ See above. Cf., in the minority, *Mestmaecker*, who considers that the *Philip Morris* principle extends to *all* types of concentration. Therefore, in his opinion, whichever interpretation of 'principle' within the meaning of Article 83 EC is adopted, Article 83 EC alone serves as an adequate legal base for the Merger Regulation, in: *Mestmaecker*, *ibid* 1988 pp.367-371.

⁶³⁹ See eg., Krimphove, (1992) p. 344-5; Blank, *ibid* p.207; Venit, *ibid*, 1990, pp.13-14; *Schwartz, I.*, in: Groeben et al, *Kommentar* *ibid*, p.602-4; *Ritter*, in: Immenga/*Mestmaecker*, *ibid* 1472.

concentrations, allowing also for negotiation and the giving of undertakings according to Article 8 MR.⁶⁴⁰ Moreover, the Merger Regulation - unlike Articles 81 and 82 EC - includes strict deadlines which, if not met, provide for the automatic validity of the proposed concentration.⁶⁴¹

It remains to be considered the legal relevance of Article 83 EC as a legal base for the Merger Regulation. Does it determine that the Merger Regulation must - to the extent that they apply to concentrations - implement *exactly* the material principles set out in the text of Articles 81 and 82 EC? Is it at least permissible to restrict or modify in any way the established jurisprudence in the interpretation of Articles 81 and 82 EC within the terms of the EC Merger Regulation?

1.4 The Legal Effect of Article 83 EC as a Legal Base

Article 83 EC incorporates an imperative: the Council is *obliged* to implement all suitable Regulations or Directives to give effect to the material principles set out in the text of Articles 81 and 82 EC.⁶⁴² Thereby, legal provisions implemented on the basis of Article 83 EC do not have to provide for the *comprehensive* and *absolute* implementation of the material principles of Articles 81 and 82 EC, but they must not alter the material text of these provisions.⁶⁴³ This refers to both the material *content* and the material *scope* of Articles 81 and 82 EC.

With specific regard to the jurisdictional criterion of Articles 81 and 82 EC, we find therefore that Article 83 EC does not legitimate any substantive amendment to the interstate trade criterion. The Council may not adopt a provision on the basis of Article 83 EC that allows the regulation of agreements or conduct that does not actually or potentially affect interstate trade according to the principles of Articles 81 and 82 EC.⁶⁴⁴

⁶⁴⁰ *Immenga*, in: *Immenga/Mestmaecker*, *ibid*, p.782; *Krimphove*, (1992) *ibid*, p.344.

⁶⁴¹ *Krimphove*, (1992) *ibid*, p.344

⁶⁴² See *eg.*, *Schroeter, H.*, in: *Groeben et al.*, *Kommentar* *ibid*, p.902; *Gleiss/Hirsch*, *ibid*, Article 87 paragraph 1; *Mederer, W.*, in: *Groeben et al.*, *Kommentar* *ibid*, p.2043.

⁶⁴³ *Gleiss/Hirsch*, *ibid*, Artikel 87, Paragraph 3; *Blank*, *ibid*, p.202; *Schroeter, H.*, in: *Groeben et al.*, *Kommentar*, *ibid*, pp.905, 907; *Mestmaecker, E-J.* in: *Immenga/Mestmaecker*, *ibid*, p.14-5; *Ritter*, in: *Immenga/Mestmaecker*, *ibid*, pp.1470-1.

See also by analogy the Court of Justice's decision in *Brasserie de Haecht/Wilkin* Case 48/72 ECR 1973, 77, 86, no.6. In this case, the Court stressed that Regulation 17/62 did not and could not modify the effects of Article 81(1) and (2) EC.

⁶⁴⁴ See expressly, *Schroeter, H.*, in: *Thiesing/Groeben/Ehlermann*, *ibid* p.905.

This restriction on the operation of Article 83 EC as a legal base appears to extend to the limitation of application of the principles of Articles 81 and 82 EC to undertakings of a particular *size and dimension*. Consider the 'appreciability' criterion of Article 81 EC which was shown above to exercise a quasi-jurisdictional function in the way it has been applied and developed by the Court of Justice and the European Commission. When the Commission decided formally define the 'appreciability' criterion in the application of Article 81(1) EC (in a way that did not entirely reflect the existing case law of the Court of Justice) it did not look to the Council to implement a Regulation based upon Article 83 EC. Rather, it introduced a (non-binding) Commission Notice that gave formalistic expression to its application of the *de minimis* criterion.

It could be deduced from this fact that Article 83 EC does not provide a legitimate legal base to implement a Regulation that would alter the *interpretation* of the material provisions of Article 81(1) EC. This goes beyond the more traditional belief that Article 83 EC cannot countenance an alteration to the *material text* itself.⁶⁴⁵ However, this assumption determines a limitation on the use of Article 83 EC that might be overly broad. Is it not plausible, for example, that the interpretation of the principles laid down in Articles 81 and 82 EC might be legitimately 're-focused' for specific *types of transaction*? This would be in recognition that certain types of transaction might have differing effects on Community objectives, in particular for the overriding objective of Community competition law - Single Market integration.⁶⁴⁶ It might also be in recognition of the fact that the material provisions of Articles 81 and 82 EC are ill-suited to regulate certain types of transactions that affect these objectives.

Traditional analysis appears to deny this application of Article 83 EC. *Schroeter* expressly states that provisions implemented on the basis of Article 83 EC should *enable* the principles of Articles 81 and 82 EC and cannot *restrict* them for certain types of transactions, making specific reference to concentrations.⁶⁴⁷ Nevertheless,

⁶⁴⁵ *Schroeter* considers that Article 83 EC does not empower the Council to exclude particular undertakings, branches of the economy or areas within the Community Market from the application of the principles of Articles 81 and 82 EC, *Schroeter, H.*, in: Thiesing/Groeben/Ehlermann, *ibid* p905.

⁶⁴⁶ I am indebted to Professor Claus-Dieter Ehlermann for suggesting this theory, as well as the analogy that follows.

⁶⁴⁷ *Schroeter, H.*, in: Thiesing/Groeben/Ehlermann, *ibid* p.907.

heed should be taken of more recent developments in the area of state aid regulation that suggest a rather different conclusion.

In the area of state aids, Article 89 EC provides a legal basis equivalent to Article 83 EC for the Commission to implement suitable Regulations for the application of Articles 87 and 88 EC (and in particular, to determine the conditions in which Article 88(3) EC shall apply and categories of aid that are exempted from the procedure). Article 89 does not incorporate an imperative like Article 83 EC: it only *empowers* the Council to implement Regulations. It operates however in a similar way in that it does not allow the implementation of a Regulation that would constitute a material change to the principles enshrined in Articles 87 and 88 EC.⁶⁴⁸ Nevertheless, a debate arose in the literature about whether regulations might be implemented on the basis of Article 89 EC in order to define or render specific particular terms within Articles 87 and 88 EC - for example, the meaning of 'aid', 'the furthering of economic development' or 'effect on interstate trade', whereby the consensus of opinion suggested that it did.⁶⁴⁹

Although an initial proposal by the Commission establishing certain conditions relating to the examination of notified aids that was submitted to the Council on 4 April 1966⁶⁵⁰ failed to gain the Council's approval, the debate referred to above has been rendered academic in view of the more recent use of Article 89. It has been invoked to implement various Regulations that have actually adapted the interpretation of conditions laid down in Articles 87 and 88 EC for specific types of state aid. The *de minimis* Regulation for the application of Articles 87 and 88 EC provides a specific example of this.⁶⁵¹ This 'appreciability' Regulation effectively

⁶⁴⁸ Mederer, W., in: Thiesing/Groeben/Ehlermann, *ibid*, p2044.

⁶⁴⁹ See eg., Mederer, W., in: Thiesing/Groeben/Ehlermann, *ibid*, p2044; Wenig, F-H, in: Thiesing/Groeben/Ehlermann, (4th Ed.) , p2747; Schina, D., *State Aids under the EEC Treaty*, (1987) ESC Publishing, Oxford, p118; D'Sa, R.M., *European Community Law on State Aid*, 1998, Sweet and Maxwell, p106.

This is aside from the debate about whether such Regulations *should* be implemented with regard to policy issues, see on this Schima, B., *Das Subsidiaritätsprinzip im Europäerischen Gemeinschaft*, Wien 1994, at p118; D'Sa, R.M., *European Community Law on State Aid*, 1998, Sweet and Maxwell at pp38-9; Mederer, W., in: Thiesing/Groeben/Ehlermann, *ibid*, p2044-45.

The defining sentiment in terms of policy *in practice* was however that the Notice was proving inadequate, and that it had failed to stem the tide of notifications, see Commission's Twenty Fourth Report on Competition Policy, paragraph 20; Brittan, L., *European Competition Policy - Keeping the Playing Field Level*, Brassey's, 1992, p.8.

⁶⁵⁰ See European Commission Xth Report on Competition 1967, paragraph 64.

⁶⁵¹ Council Regulation 69/2001 OJ (2001) L010/30. This was implemented according to Article 2 of Council Regulation 994/98 of May 7 1998 *on the application of Articles 87 and 88*

restricts the scope of the interstate trade criterion laid down in Article 87 EC (by setting a minimum fixed amount of aid over a given period of time for which the prohibition of Article 87 EC applies). What is particularly interesting is that the Council implemented Regulation in spite of the fact that *de minimis* Notices⁶⁵² that the Commission had previously issued had been heavily criticised as illegally amending the text of Article 87(1) EC.⁶⁵³ Indeed, the Court of Justice had not yet unequivocally accepted the presence of an 'appreciability' criterion in the field of state aid. In 1987, Advocate General *Lenz* had stated:

'...it would seem inappropriate to extend the principle of appreciable effect to the prohibition on aid in Article 92 (87) of the EEC Treaty. It cannot be inferred either from the wording of the relevant provisions or from the case-law of the Court of Justice that there should be such an exception to the fundamental prohibition of state aids.'⁶⁵⁴

This position was not unanimously held. Some read *de minimis* and the requirement of 'appreciability' to be a general principle of Community law, so that activity of too little significance is excluded from regulation within the Community.⁶⁵⁵ This appears to have been the rationale behind the Commission's approach, considering in the Notice itself that it '*...ought to be left to concentrate its resources on cases of real*

of the Treaty establishing the EC to certain categories of horizontal State aid (that had been implemented on the basis of Article 89 EC(1998) OJ L142/1). Article 2 of that Regulation provided that the Commission could adopt a *de minimis* Regulation for Article 87(1) EC according to the procedure under Article 8 of the Regulation.

But see also, for example, Council Regulation 70/2001 of 12 January 2001, allowing the Commission to approve certain types of aid to small and medium enterprises, subject to specific thresholds (implemented according to Article 1 of Council Regulation 994/98 of May 7 1998); Council Regulation 68/2001 exempting certain types of training aid, subject to specific thresholds (implemented according to Article 1 of Council Regulation 994/98 of May 7 1998); Article 19 of Regulation 659/1999 regarding the application of Article 88 EC, that effectively expands the literal text of Article 88 EC by providing that where a Member State accepts measures proposed by the Commission to alleviate prohibited instances of state aid (and informs the Commission), it is bound.

⁶⁵² Community Guidelines on State Aid for Small and Medium-Sized Enterprises OJ (1992) C213; Commission Notice on the De Minimis Rule for State Aid OJ (1996) C68/9.

⁶⁵³ See eg., D'Sa, R.M., *European Community Law on State Aid*, 1998, Sweet and Maxwell; Stuart, *Recent Developments in EU Law and Policy on State Aids* (1996) 4 ECLR 226 at p229.

⁶⁵⁴ *France v Commission* Case 102/87 (1988) ECR 4067 at 4078. Similar, though less forthright, see Advocate General *Capotorti* in: *Philip Morris v Commission* Case 102/87 (1988) ECR 4067 at 4078.

The Court had considered arguments that specific aid was *de minimis*, but each time had determined that there was no such argument, without affirming the actual presence of the condition: *Re Meura: Belgium v Commission* Case 234/84 (1988) ECR 2263; (1988) 2 CMLR 331; *Deufil v EC Commission* Case 310/85 (1987) ECR 901; (1988) 1 CMLR 553.

⁶⁵⁵ Schina, D., *State Aids under the EEC Treaty*, (1987) ESC Publishing, Oxford p27.

*importance to the Community.*⁶⁵⁶ It is further an application of the subsidiarity principle, even though in strict legal terms the principle is not applicable retrospectively to Treaty Articles.⁶⁵⁷ Nevertheless, there is no doubt that the 'appreciability' criterion is not explicitly enshrined in the literal text of Article 87 EC, nor was there existing Court of Justice case law, as had been the case with Articles 81 and 82 EC. It is therefore surprising - in view of the approach taken under Article 83 EC - that the basis of Article 89 EC was used to implement a *de minimis* regulation; that, in effect, Article 89 was used to restrict the scope of the material provision of Article 87 EC.⁶⁵⁸

The terms of the Regulation even appear to distinguish between different *sectors* of the economy in the application of Article 87 EC: thus, the Regulation is not applicable in the sectors of agriculture, fisheries and aquaculture and transport, since there is a risk that '*even small amounts of aid could fulfil the criteria of Article 87(1) of the Treaty in those sectors*'.⁶⁵⁹ Further, the *de minimis* Regulation only covers some *types* of aid: export aid and aid favouring domestic over imported products are expressly exempted from the application of the Regulation.⁶⁶⁰ These types of aid are clearly of particular concern to the protection an integrated Single Market.

Clearly, the effect of Council Regulation 69/2001 is to express an interpretation of *Article 89 EC* that has been hitherto denied the similar provision of *Article 83 EC*.⁶⁶¹ Questionable therefore is whether the traditional approach in the literature towards Article 83 EC is correct. May not analogy be drawn with the developments that have been established in practical and theoretical terms under Article 89 EC?

The regulation of state aids is a rather anomalous area of regulation within the competition law field. It raises its own specific issues that must be considered - for example, political, social and structural concerns - whereby certain types of aid may

⁶⁵⁶ Community Guidelines on State Aid for Small and Medium-Sized Enterprises OJ (1992) C213, p.9.

⁶⁵⁷ See above, p.123.

⁶⁵⁸ Indeed, it had been the method that had previously been envisaged in the literature as the legitimate way to introduce a *de minimis* provision into Community state aid regulation, see eg., Rose

⁶⁵⁹ Council Regulation 69/2001 OJ (2001) L010/30, Preamble Paragraph 3.

⁶⁶⁰ Council Regulation 69/2001 OJ (2001) L010/30, Preamble Paragraph 4. This is in line with the World Trade Organisation Agreement on Subsidies and Countervailing Measures (OJ (1994) L336/156).

⁶⁶¹ See above, pp.175-176.

have a positive effect for the overriding Community policy objective of Single Market integration.⁶⁶² Nevertheless, the overriding objective in the implementation of Articles 87 and 88 EC - as part of the *acquis* of the Community competition law provisions - is just that: the promotion and protection of Single Market integration. This reflects the application of Articles 81 and 82 EC, and the argument is therefore sustainable that the *material principles* of these Articles through the implementation of provisions on the basis of Article 83 EC may be defined or rendered specific for *sui generis* sectors or types of transaction that require different treatment within the context of that overriding goal.

1.5 Article 83 EC and the Subsidiarity Principle

In so far as Article 83 EC is not employed to implement an exclusive competence of the Community, the principle of subsidiarity informs its operation as a legal base. In order for an area of Community competence to be considered 'exclusive' within the meaning of Article 5 EC, exclusivity of action must actually be directly conferred according to the Treaty.

Article 83 EC only gives the Council (acting by qualified majority on a proposal by the Commission and after consulting the European Parliament) the competence to implement the appropriate regulations or directives to give effect to the principles of Articles 81 and 82 EC. It does not thereby stipulate that these provisions must bestow exclusive competence upon the European Institutions. Further, Article 85(1) EC states that national authorities in the Member States will assist and co-operate with the Commission in applying the principles laid down in Articles 81 and 82 EC. These substantive provisions themselves do not operate to prevent the application of national law to all agreements and conduct to which they are applicable. The primacy of Articles 81 and 82 EC before national competition law has been interpreted to operate only to the extent that there is a direct conflict with a provision of national law.⁶⁶³

It follows that exclusivity has not been conferred upon Article 83 EC in its operation as a legal base. Subsidiarity therefore applies to the extent that Article 83 EC is used as a legal base, that is to the extent that it is used to implement provisions in order to

⁶⁶² For a more comprehensive account of the issues raised by the regulation of state aids within a Community context, see Schina, D, *ibid*, pp1-10.

⁶⁶³ *Walt Wilhelm v Bundeskartellamt*, Case 14/68 (1969) ECR I, (1969) CMLR 100.

apply the principles of Articles 81 and 82 EC. Hence, in general terms, the use of Article 83 EC is only legitimated to the extent that Community action is required (that is, the issue has a 'Community Dimension'), and then only to the extent that action is necessary.

It has been demonstrated above that 'Community Dimension' is deemed for conduct and agreements that have spill-over effects: the Community - and, in particular, the Commission - has tended to use a straightforward application of the *Tiebout* principle.⁶⁶⁴ Further, it has been repeatedly shown that where potentially anticompetitive agreements or conduct have an effect on interstate trade, action at the national level is not adequate to achieve the Community's objectives: national competition authorities endure informational difficulties and an inability to extend remedial and enforcement action beyond national boundaries. Furthermore, control at the Community level is best placed to take into account issues such as the globalisation of the relevant markets.⁶⁶⁵

The application of subsidiarity to the legal base Article 83 EC upon which the EC Merger Regulation is (in part) based does not therefore affect the conclusion that the interstate trade criterion is the appropriate jurisdictional trigger, subject however to the suggestion above that its application might be 'refocused' to some extent for concentrations specifically.

2 The Legal Base of Article 308 EC

Article 308 EC provides:

'If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall...take the appropriate measures.'

⁶⁶⁴ See eg., EC Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid* at points 25-6; EC Commission's *McDougall* Report, *ibid*; *Padoa Schioppa* Report, *ibid*; Article 12(2) of the European Parliament's Draft European Union Treaty.

⁶⁶⁵ See eg., EC Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid* at points 25-6.

The proper definition of Article 308 EC and the appropriate conditions for its application have given rise to considerable debate and controversy.⁶⁶⁶ There is however a consensus of opinion that, generally, the provision provides the means to close the gaps which can exist between a Community objective deriving from the Treaty, and the scope of the powers of the Community which have been set down in the Treaty to fulfil this objective.

According to the literal text of Article 308 EC, there are five broad conditions which must be fulfilled for its application as a legal base:

- First, action must be required by the Community *in order to fulfil one of the objectives of the Community*;
- Secondly, that objective must be one which is to be *attained within the course of the Common Market*;
- Thirdly, there must not be any Community powers *existing* which are *sufficient* to pursue this objective;
- Fourthly, the appropriate measure must *appear necessary* to achieve the aforesaid Community objective.
- Fifthly, the measure implemented must be *appropriate* to fulfil the Community objective for which it is implemented.

It is necessary to consider each of these conditions in general, and then to consider how each one in turn is fulfilled by the Merger Regulation.

⁶⁶⁶ For the opinion of the Court of Justice, see in particular, *HZA Bremerhaven v Massey-Ferguson* Case 8/73 (1973) ECR 897; *OECD Court of Justice's Opinion 2/92* 1995. In the literature, see in particular: *Schwartz, I.* in: Groeben et al., *Kommentar* *ibid*, pp.590-718; *Contantinesco, V. et al*, *ibid*, pp.1509-1540; *Geiger, Kommentar* *ibid*, pp.789-792; *Boehm, R.*, *ibid*, pp.104-119; *Dorn, D.*, *ibid*; *Gerick, H-P, Allgemeine Rechtssetzungsbefugnisse nach Artikel 235 EWG-Vertrag*, Hamburg 1970; *Marenco, G., Les conditions d'application de l'article 235 du Traité CEE*, 1970 RMC pp.147-157; *Close, G., Harmonisation of laws: use or abuse of powers under the EEC Treaty?* 1978 ELR pp.461-481; *Nicolaysen, G., Zur Theorie von den Implied Powers in den Europaeischen Gemeinschaften*, 1966, EuR pp.129-142; *Everling, U./Schwartz, I/Tomuschat, C. Die Rechtssetzungsbefugnisse der EWG in Generalermachtigungen, insbesondere in Article 235 EWG-Vertrag*, 1976, EuR, Sonderheft; *Schwartz, I., Article 235 EG-Vertrag nach Maastricht*, in: *Festschrift Ernst-Joachim Mestmaecker*, Baden-Baden 1996, pp.467-482; *Steindorff, E., Grenzen der EG-Kompetenzen*, Heidelberg 1990 p.48, 82, 112-122; *Weiler, J., The Transformation of Europe*, Yale Law Journal 1991 100 pp.2403-2483; *Haed/Puttler, Zur Abgrenzung des Art. 235 EGV von der Vertragsaenderung*, 1 EuZW (1997) 13-17.

2.1 The Relevant Community Objective to be attained in the Course of the Operation of the Common Market

2.1.1 The Conditions in General

a The 'Relevant Community Objective'

The exact meaning and scope of the words 'Community objective' according to Article 308 EC have been the subject of some considerable debate. There is a consensus of opinion that it pertains to an objective deriving from the Treaty.⁶⁶⁷ It is not however generally agreed upon what constitutes an 'objective of the Treaty'.

In this regard, the aims and objectives of the Community that are set down in the Preamble are a cause of particular controversy.⁶⁶⁸ It is certain that the *direct* aims set down in Article 2 EC (the establishment of the Common Market,⁶⁶⁹ an economic and monetary union and the implementing of common policies or activities referred to in Articles 3 and 3a) constitute objectives of the Treaty.⁶⁷⁰ On the other hand, the further condition '*within the course of the operation of the Common Market*' of Article 308 EC would seem to exclude the establishment of the Common Market as an 'objective' within the meaning of Article 308 EC. Otherwise, the text of the provision would make no sense, where the object would be to create the Common Market 'in the course of the operation of the Common Market'. Further, it is not at all clear whether the other more indirect aims set down in Article 2 EC (which are to be pursued *through* the establishment of the Common Market, an economic and monetary union and the implementing of common policies or activities referred to in Articles 3 and 3a) could constitute a 'Community objective' within the meaning of Article 308 EC.⁶⁷¹

⁶⁶⁷ See eg., *Everling* in: *Everling, U/Schwartz, I./Tomuschat, C.*, *ibid.*, p.10; *Boehm, R.*, *ibid.* at p.105-6; *Schwartz, I.*, in: *Groeben et al., Kommentar* *ibid.*, p.641; *Hartley, T.C.*, *ibid.*, at p.104; *Haede, U. and Puttler, A.*, *ibid.*, p.14; *Dorn, D.*, *ibid.*, pp.22-3; *Krimphove, E.*, (1992) *ibid.*, p.345.

⁶⁶⁸ See eg., *Schwartz, I.*, in: *Groeben et al., Kommentar* *ibid.*, pp.140-152; *Boehm, R.*, *ibid.*, pp.108-110; *Dorn, D.*, *ibid.*, p.23-4; *Haede/Puttler, ibid.* at p.14.

⁶⁶⁹ The ECJ has stated that the establishment of the Community is a Community objective, see eg., *Gaston Schul Douane Expeditie BV v Inspecteur dr Invoerrecht en Accijnzen* Case 15/81 (1982) ECR 1409.

⁶⁷⁰ See eg., *Schwartz, I.*, in: *Groeben et al., Kommentar, ibid.*, p.644; *Everling, ibid.*, p.10; *Steindorff, ibid.*, p.45, 48-49, 117, 122.

⁶⁷¹ The ECJ has stated that they are, see eg., *Seeleute*, Case 167/73 (1974).

The majority opinion follows this: see eg., *Marenco, ibid.*, p.149; *Gericke, ibid.*, pp.22-4; *Tomuschat, ibid.*, p.60; *Dorn, ibid.*, pp.112-4; *Boehm, ibid.*, pp.105-6; *Schwartz, I.* in: *Groeben et al., Kommentar, ibid.*, p.647.

But against this in the minority, see, eg., *Everling, ibid.*, pp.9-10; *Steindorff, ibid.*, p.45, 48-9, 117, 122.

It is on the other hand well-established in the literature and by the Court of Justice that the aims and objectives contained in Article 3 EC may constitute an objective within the meaning of Article 308 EC.⁶⁷²

b *'In the Course of the Operation of the Common Market'*

The clause '*...in the course of the operation of the Common Market...*' appears to provide a qualification to the very broad power that Article 308 EC might otherwise provide. Nevertheless, many commentators either dismiss the significance of this further condition, or lend it an interpretation that is too wide to act as any limitation.⁶⁷³

This standpoint is not however without controversy. In particular, confusion has arisen because of the different phrasing of the clause in some of the official languages:

The Dutch, German and Danish versions correspond: (in German) '*im Rahmen der europaeischen Gemeinschaft*'. The French, Italian, Spanish and Portuguese versions are however more ambiguous: (in French) '*dans le fonctionnement du marche commun*'. The English version is also similar to this version: '*in the course of the operation of the Common Market*'. Various interpretations have been made.

The wider interpretation considers that the clause allows the implementation of a provision for any objective which may have *any connection* to the Common Market, however indirect. According to this standpoint therefore, the clause does not restrict the Community objective to economic and financial issues, or even to objectives which are directly within the Treaty text.⁶⁷⁴

The better opinion is that these do constitute objectives within the meaning of Article 308 EC, but are also limited in that they arise '*through the establishment of the Common Market...*', see eg., Schwartz, I in: Groeben et al., Kommentar, ibid, p.647; Gericke, ibid, pp.24; Steindorff, ibid, p.45, 48-9, 117, 122.

⁶⁷² See eg., Massey-Ferguson Case 8/73 (1973), 897 at p.907.

Schwartz, I in: Groeben et al., Kommentar ibid, p.641; Geiger, Kommentar 2nd Ed., p.790; Constantinesco, V. et al., ibid, p.1520; Boehm, R., ibid at p.110; Dorn, D., ibid, p.22-3.

⁶⁷³ See eg., Everling, U., *Die allgemeine Ermaechtigung der Europaeischen Gemeinschaft zur Zielverwirklichung nach Article 235 EWG-Vertrag*, in: Everling, U./Schwartz, I./Tomuschat, C., ibid, pp.2-26; Opperman, T., *Europarecht*, Muenchen, 1991.

⁶⁷⁴ Close, G., *Harmonisation of laws: use or abuse of the powers under the EEC Treaty?* ELR 1978, pp.461-481.

Alternatively, the clause has been interpreted restrictively, pertaining to a *protection* of the functioning of the Common Market only.⁶⁷⁵ Similar to this interpretation is the even more restrictive interpretation that the clause should pertain only to the protection of the Common Market as existed before the Treaty amendments, that is the protection of only the four freedoms and the system of undistorted competition.⁶⁷⁶ An interpretation which is aimed solely at the *protection* of the Common Market is however not coherent with the literal wording of the clause.⁶⁷⁷ The text of Article 308 EC refers to a provision which necessary to *attain* a particular objective of the Community.

The interpretation closest to the literal wording (which is also the majority opinion) finds that the clause requires the relevant Community objective to be pursued (in the implementation of a provision on the basis of Article 308 EC) *in harmony* with the rules of the Community. In its choice of provision to be implemented on the basis of Article 308 EC therefore, the legislator must ensure that it fits into the functioning of the Common Market according to the rules of the Treaty.⁶⁷⁸ Thereby, the majority opinion in the literature interprets 'Common Market' to embrace the whole economic, political and institutional system established according to the Treaty, in every phase of its development.⁶⁷⁹

2.1.2 The Application of the Conditions in the Implementation of the Merger Regulation

Questionable is what objective was or objectives were to be pursued through the implementation of the Merger Regulation according to the legal basis of Article 308

But cf. at the most extreme, the House of Lords Select Committee, which considered that Article 308 could extend only to the economic and financial purposes provided for by Article 2 EC, in: Session 1977/8, 22nd Report.

⁶⁷⁵ Tomuschat, C., *Die Rechtsetzungsbefugnisse in Generalermächtigungen, insbesondere in Article 235 EWG-Vertrag*, in: Everling, U./Schwartz, I./Tomuschat, C., *ibid*, pp.45-67; Gericke, *ibid* at p.42.

⁶⁷⁶ Mestmaecker, *Von der Wirtschaftsgemeinschaft zur Wirtschafts- und Währungsunion*, in: Hommelhoff, P./Kirchhof, P. (eds) *Der Staatenverbund der Europäischen Union*, Heidelberg 1994 at p.124.

⁶⁷⁷ Schwartz, I in: Groeben et al., *Kommentar*, *ibid*; Everling, in: Everling, U./Schwartz, I./Tomuschat, C., *ibid*, at p.10.

⁶⁷⁸ See eg., Schwartz, I in: Groeben et al., *Kommentar* *ibid*, p.663; Constantinesco, V., Jacque, J-P, Kovar, R., Simon, D., *Traité Instituant la CEE Communetaire*, Paris, 1992, pp.1509-1540 at p.1514; Boehm, R., *ibid*, p111 at note 21.

⁶⁷⁹ For a detailed consideration of the concept, and an evaluation of the divergent (and minority) opinions, see Dorn, D., *ibid* at pp.26-28.

EC (that must be consistent with the establishment and functioning of the Common Market according to its rules). Is there at least an overriding objective that is discernible, even if a comprehensive and definitive list is difficult to draw up according to the evidence available?

According to Article 190 EC, Regulations (directives and decisions) adopted by the Community institutions '*shall state the reasons on which they are based...*'. This obligation is applicable to Regulations implemented on the basis of Article 308 EC.⁶⁸⁰ Thereby, the Treaty objective which is to be pursued on the basis of Article 308 EC must be stated in the Preamble to the legal provision.⁶⁸¹ It is necessary therefore to turn to the text of the Regulation to determine the relevant Community objective.

The Preamble to the Merger Regulation states that it was primarily implemented in order to achieve the Treaty objective contained within Article 3g EC, that is a system ensuring that competition in the Common Market is not distorted.⁶⁸² This is described as '*essential for the achievement of the internal market by 1992 and its further development*'.⁶⁸³

As noted above, there is no doubt that Article 3 EC constitutes an 'objective' within the meaning of Article 308, which is, as required, coherent with the functioning of the Common Market objective according to its rules.⁶⁸⁴ Thus, the Community objective which was to be pursued through the implementation of the Merger Regulation (according to Article 308 EC) is the establishment of a system ensuring that competition within the Community is not distorted.⁶⁸⁵

Admittedly, Paragraph 13 of the Preamble to the Regulation states:

'...it is necessary to establish whether concentrations with a Community dimension are compatible or not with the Common Market from the point of view of the need to maintain and

⁶⁸⁰ *General Customs Preferences* Case 44/86 1987 ECR, 1493. at 1519.

Where the obligation is not fulfilled, the legal provision may be declared void as a breach of the Treaty (Article 173 paragraph 1).

⁶⁸¹ See eg., *Schwartz, I* in: Groeben et al., *Kommentar* ibid, p.637.

⁶⁸² Paragraph 1, Preamble.

⁶⁸³ Paragraph 2, Preamble.

See also, Commission XXIIIrd Report on Competition Policy 1993 (1994, OPOEC, Luxembourg), paragraph 43.

⁶⁸⁴ See Part I of the thesis.

develop effective competition in the Common Market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, *including that of strengthening the Community's economic and social cohesion, referred to in Article 130a*.⁶⁸⁶

This last clause does not however represent the objective for which the Merger Regulation was implemented on the basis of Article 308 EC:

First, it is less clear that this indirect objective deriving from Article 2 EC actually represents an 'objective' within the meaning of Article 308 EC.⁶⁸⁷

Secondly, and vitally, this objective represents only an indirect objective of the Community that is to be brought about *through* the '*establishing of the Common Market, an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a*'.⁶⁸⁸ It derives *from* these fundamental and more general goals of the Community. Therefore, it cannot be incoherent with (or superior to) the direct objective of maintaining a system of undistorted competition within the Community, which, according to Article 3g EC, provides the means to realise the fundamental goal of establishing the Common Market. This conclusion is further justified by the fact that the substantive assessment of concentrations under Article 2 MR considers only the effect of the proposed concentration on *competition* structures.⁶⁸⁹ If the strengthening of the Community's economic and social cohesion is formally a factor in the substantive assessment of an individual case, it must nevertheless be coherent with the maintenance of a system of undistorted competition within the Community.

⁶⁸⁵ In agreement, see eg., Krimphove, (1992) *ibid*, p.345; Schwartz, I in: Groeben et al., *ibid*, p.610; Bulmer, S., *ibid*, p8.

⁶⁸⁶ Author's emphasis.

⁶⁸⁷ See above, pp.182-183.

⁶⁸⁸ Article 2 EC.

⁶⁸⁹ Note that Article 2 of the Regulation mentions that among the factors to be taken into account in the appraisal of concentrations is the '*development of technical and economic progress*' providing that it is '*to the consumer's advantage and does not form an obstacle to competition*'. This is much more restrictive than the role given to technical and economic progress in the context of Article 81 EC: Article 81(3) EC allows exemption from a prohibition for a cartel if it '*contributes...to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not...afford...the possibility of eliminating competition in respect of a substantial part of the products in question*.' It is therefore considered that there is no efficiency criterion in the Merger Regulation, see eg. Jacquemin (1990), *ibid* at p. 549; Camesasca, P., *ibid*.

2.2 'No Sufficient Community Competence in Existence'

2.2.1 The Condition in General

The use of Article 308 EC as a legal base for the implementation of a provision of Community law requires that there be no existing power of the Community which would be sufficient to fulfil the purpose for which the provision is implemented.⁶⁹⁰

2.2.2 The Application of the Condition in the Implementation of the Merger Regulation

The analysis carried out above with regard to the scope of Article 83 EC established that the Treaty (in particular, Articles 81 and 82 EC) did not apply to all types of concentrations that could potentially distort structures of competition within the Community.⁶⁹¹

There was therefore, as expressed in the Preamble to the Merger Regulation⁶⁹², the need for the legal base of Article 308 EC.

2.3 'Appears Necessary'

2.3.1 The Condition in General

The implementation of the provision in question must *appear necessary* to attain one of the objectives of the Community. Therefore, one of the objectives of the Community is not (or is not sufficiently⁶⁹³) fulfilled, and this is an omission which can be remedied by the action of one of the Community organs upon the implementation of an appropriate legal provision. It is a broad condition, since it must only be proven that there *appears* to be a necessity. Such is the general nature of many of the Community objectives in fact that it could, in their regard, be practically always applicable.⁶⁹⁴ The required necessity therefore depends upon there being a particular *degree* of necessity for Community action.⁶⁹⁵

The required necessity is to be taken from the point of view of the attaining of the Community objectives with regard to the existing competential norms of the Treaty:

⁶⁹⁰ See note 627 above.

⁶⁹¹ See above, Part IV of the thesis.

⁶⁹² At paragraphs 6-8.

⁶⁹³ In detail considering this distinction (and its irrelevance), see Dorn, D., *ibid* pp.41-44.

⁶⁹⁴ Ehring, *ibid*, p.762; Schwartz, I in: Groeben et al., *ibid*, at p.667.

⁶⁹⁵ See eg., Schwartz, I in: Groeben et al., *ibid*, p.667.

the requisite provisions to pursue the relevant Community objective must not already be available; Article 308 EC is subordinate to the existing framework of competencies. Questionable however is whether this condition also incorporates the subsidiarity principle: is it restricted to the instance that the relevant Community objective cannot be achieved at the Member State level?

Certainly, the provision does not provide 'exclusive' Community competence within the meaning of Article 5 EC.⁶⁹⁶ If it did, its more general nature would allow the Community to gradually encroach unchecked on an incredible array of existing Member State competencies. Therefore, subsidiarity is applicable to Article 308 EC in its role as a legal base: it is only valid as a legal base insofar as the relevant Community objective cannot be achieved at the level of the Member States in the direct application of Article 5 EC.⁶⁹⁷ Questionable is the relationship of the condition of 'necessity' within the terms of Article 308 EC to the subsidiarity principle.

Some commentators consider that the condition of 'necessity' according to Article 308 EC should first be considered independently, and then, where it is considered to be fulfilled, the principle of subsidiarity should be applied.⁶⁹⁸ The better opinion however is that subsidiarity is enshrined within Article 308 EC, since the purpose of the Article is to allow Community action where it is necessary *per se* in the broadest sense with regard to the Community objectives. Article 5 EC effectively restricts Community action within the same parameters. Certainly, the Legal Service of the Council has expressed an opinion that the Article 308 EC condition incorporates subsidiarity.⁶⁹⁹

⁶⁹⁶ Zuleeg, M., in: Groeben, Thiesing, Ehlermann, *ibid* at p.215.

⁶⁹⁷ See eg., Edinburgh European Council Meeting of 11th and 12th December 1992, *Conclusions of the Presidency*, Paragraph I 4/2.

In the literature, see eg., Schima, B., *Das Subsidiaritätsprinzip im Europäischen Gemeinwesen*, Wien 1994, pp.100-1; Toth, A.G., *The Principle of Subsidiarity in the Maastricht Treaty*, CMLR (1992) 1079 at p. 1095; Schwartz, I., in: Groeben, Thiesing, Ehlermann, *ibid* at p.627.

Against this, only Grabitz, E., *Subsidiarität im Gemeinschaftsrecht*, in: Vogel, B./Oettinger, G.H. (Eds), *Federalismus in der Bewahrung*, Koeln 1992 139-149, at pp. 143-4.

⁶⁹⁸ See eg., Mueller-Graff, *Binnenmarktauftrag und Subsidiaritätsprinzip?*, ZHR (1994) 34 at p51; Schwartz, I., in: Groeben, Thiesing, Ehlermann, *ibid* at pp.626-8.

⁶⁹⁹ Council of the EC, Opinion of the Legal Service, Document 9404/92 of 21st October 1992, p.5.

In agreement, see Emiliou, N., *Subsidiarity: An Effective Barrier Against 'the Enterprises of Ambition?'*, ELRev (1992) 383 at p400.

Hence, the condition of necessity is applied in two ways: it requires that there is no existing and suitable Community competence and it requires that there is no possibility of the Community objective being fulfilled at the Member State level. It does not matter whether the Member States can act on an individual basis in this area if such action would not fulfil the specific Community objective.⁷⁰⁰ On the other hand, if the Member States could, through individual (unconcerted) parallel action, fulfil the relevant Community aim, it is widely considered that there is no 'necessity' within the meaning of Article 308 EC.⁷⁰¹

In general, the 'necessity' condition under Article 308 EC lends considerable discretion to the legislator, who will reach a decision according to complex economic, legal, political and technical factors.⁷⁰²

Thereby, however, the condition does invoke the legal principle of the minimum of intervention by the Community - that is, the principle of proportionality - which is equally a condition of the subsidiarity principle.⁷⁰³ Therefore, the Community may only act to the extent that is necessary for the fulfilment of the specific Community objective for which the provision was implemented: any hardship caused by the provision must not be disproportionate to the benefits accruing from the attainment of the objective.⁷⁰⁴ Analogy can be drawn here with those quantitative conditions of Articles 81 and 82 EC that determine that only conduct of the requisite size and dimension will be prohibited as interfering with the process of Single Market integration (being, respectively, 'appreciability' and 'dominance over a substantial part of the Community').

⁷⁰⁰ *Schwartz, I* in: Groeben et al., *ibid*, p.670; Everling, *ibid*, p.12; Tomuschat, *ibid*, p.58; Boehm, *ibid*, p.111.

⁷⁰¹ See eg., *Everling*, in: Everling, U./Schwartz, I./Tomuschat, C., *ibid*, at p.12; *Schwartz, I* in: Groeben et al., *ibid*, pp.669-671.

This reflects the application of the subsidiarity principle, see above pp.161-167.

⁷⁰² See eg., Constantinesco, V. et al., *ibid*, p.1515-6; *Schwartz, I* in: Groeben et al., *Kommentar*, *ibid*, p.666-7; Dorn, D., *ibid*, p.37; Tomuschat, in: Everling, U./Schwartz, I./Tomuschat, C., *ibid*, at p.60; Haede/Putter, *ibid* p.15.

⁷⁰³ See eg., Boehm, R., *ibid* at p.112; Dorn, *ibid*, p.50.

In line with the 'two-tier' approach to 'necessity' in Article 308 EC and subsidiarity, some however see the principle of proportionality as deriving from the applicability of Article 5 EC to the provision rather than enshrined in Article 308 EC itself, see eg., *Schwartz, I.*, in: Groeben et al., *Kommentar*, *ibid*, p.628.

⁷⁰⁴ Hartley, T.C., *The Foundations of EC Law*, 1988 (4th ed.) Oxford University Press at p.106.

2.3.2 The Application of the Condition in the Implementation of the Merger Regulation

The required necessity for a system of merger control in the Community has been demonstrated above. It derives principally from the huge increase in cross-border mergers prompted by the single market programme. It was expressed in the application of inappropriate provisions (Articles 81 and 82 EC) and an increased pressure by the Commission to implement a specific Regulation for merger control.⁷⁰⁵

Furthermore, it has been demonstrated above that, with regard to the Community's legal objectives deriving from the Treaty (in particular, the maintenance of a system of undistorted competition at the Community level), action at the *Community level* was necessary.⁷⁰⁶

The legal principle of minimum interference has been shown to be incorporated into Article 308 EC. Its application determines that the turnover thresholds should not bring within the scope of the Regulation concentrations that do not present a potential threat to the Community aim of maintaining a system of undistorted competition within the Community. This is valid at least to the extent that the Regulation applies to transactions that do not fall within the principles of Articles 81 and 82 EC.

Whether or not the Regulation respects this principle with regard to its jurisdictional scope depends upon the operation of the turnover thresholds.

2.4 'Appropriate'

2.4.1 The Condition in General

What can not be disputed is that the measures which are implemented on the basis of Article 308 EC must be 'appropriate' to fulfil the specific Community objective.

It is well-established that 'appropriate measures' includes the provisions of Community law within the meaning of Article 189 EC, including regulations.⁷⁰⁷

⁷⁰⁵ See above.

⁷⁰⁶ See above.

⁷⁰⁷ See eg., *Schwartz, I* in: Groeben et al, *Kommentar*, ibid p.716; Constantinesco, V. et al., ibid; Usher, J., *The gradual widening of European Community policy on the basis of Articles 100 and 235 of the EEC Treaty*, in: Schwarze, J. and Schmeermers, H. (eds), *Structure and Dimensions of EC Policy*, Baden and Baden, 1988 at p.27; Dorn, D., ibid, pp.63-65.

Furthermore, and vitally, the legal provision must be *appropriate* to fulfil the objective for which it was implemented.⁷⁰⁸ A general definition of this condition is clearly not possible, since it depends upon the specific aim for which the provision is implemented. It does however apply the legal principle of proportionality with regard to the appropriateness of the provision implemented to fulfil the specific Community goal, and thus mirrors the 'necessity' condition of Article 308 EC.⁷⁰⁹

2.4.2 The Application of the Condition in the Implementation of the Merger Regulation

As a regulation, the EC Merger Regulation is an 'appropriate' provision to fulfil the Community objective of maintaining a system of undistorted competition within the Community.

Again, the principle of proportionality is invoked, and the reader is referred to the analysis above for the 'necessity' condition on this issue.

2.5 Summary

Article 308 EC acts as a legal base for the Merger Regulation at least to the extent that it applies to concentrations that do not fall within the scope of Articles 81 and 82 EC. It does not however apply to such concentrations indiscriminately. It was invoked in order to pursue a specific Community objective or Community objectives. While it is not possible to give an unequivocal and definitive list of all the objectives it was implemented to fulfil, it is clear that the overriding objective mirrors the overriding objective of Community competition law: to prevent the distortion of structures of competition within the Community (consistent with the integration aim).

Within the context of Article 308 EC as a whole, the EC Merger Regulation should therefore be 'appropriate' to fulfil the Community objective of maintaining a system of undistorted competition within the Community. Thereby, it enshrines the principle of subsidiarity, and that principle, together with the principles of proportionality and minimum interference, determine that the Merger Regulation should not apply to concentrations that do not affect this goal.

⁷⁰⁸ See eg., Krimphove, (1992) *ibid*, pp.345-348.

⁷⁰⁹ Krimphove, (1992) *ibid*, p.347-8; *Schwartz, I* in: Groeben et al., *Kommentar*, *ibid*, p.687.

2.6 The Legal Effect of Article 308 EC as a Legal Base: Obligation or Choice?

The Court of Justice has stated, *obiter dictum*, that Article 308 EC *allows* the implementation of an 'appropriate provision' with regard to the specific Community objective. It does not however create a *legal obligation* where its conditions are fulfilled:

' (Article 308 EC) ne crée aucune obligation, mais confère au Conseil une faculté dont le non-exercice ne saurait affecter la validité d'une délibération'.⁷¹⁰

The Court did not however justify its standpoint. It has been widely criticised in the literature.⁷¹¹

In particular, the Court's statement is criticised as being contrary to the literal wording of Article 308 EC. For Article 308 EC explicitly uses the imperative '*the Council...shall take*', rather than the phrase '*can take*' that is used in Article 95(1) ECSC.⁷¹² The Treaty distinguishes between provisions that give a competence of the institutions to act ('*can act*') and those in which the institutions '*act*' or '*shall act*'. There are numerous cases in which the Court of Justice has found provisions of the latter kind to create an obligation to act.⁷¹³

Furthermore, *Constantinesco et al.* have pointed to the regrettable consequences that the position of the Court of Justice may have: if the conditions for the application of Article 308 EC are fulfilled and the implementation of a provision is *necessary* to pursue a *legal objective* of the Community, should that *legal necessity* be ignored with impunity?⁷¹⁴

⁷¹⁰ *Commission v Council* Case 22/70 (1971) ECR 263, paragraph 25.

⁷¹¹ See eg., Schwartz, I in: Groeben et al., Kommentar, *ibid*, p.682-4 (and particularly, at note 307); Constantinesco, V. et al., *ibid*, p.1511; Schwartz, I., *EG-Rechtsetzungsbefugnisse, insbesondere nach Artikel 235 - ausschliesslich oder konkurrierend?*, EuR 1976, Sonderheft 27-44 at p.29; Dorn, D., *ibid* at pp.140-1.

But against this, see eg., Geiger, *ibid*, Article 235 at para. 13; Ehring, Kommentar, p.762.

⁷¹² Thus, Constantinesco, V. et al., *ibid*, p.1511; Groeben et al, *ibid*, at p.683; Hallstein, W., *Die Europaeische Gesellschaft*, 5. ed., Duesseldorf/Wien 1979, p.391; Dorn, *ibid* pp. 448-9 and 140-1; Grabitz, *ibid*, Artikel 235 paragraphs 72-5; Schwartz, *ibid*, p.29.

But against this, see eg., Geiger, Art. 235 EC, Rn 13.

⁷¹³ See on this, Schwartz, I., *ibid*, p.29-30 and at notes 14-15. Also, Schwartz, I in: Groeben et al., *ibid* at p.683

Examples include: Article 43(2) EC - *Kramer*, Case 6/76 1976, 1279 (at p.1310 paragraph 24); Articles 49 and 51 EC - *Commission/Republic of France* Case 167/73 1974 359 (371, paragraph 33); Article 103(1) EC ('must' provision) and Article 103(2) EC ('can' provision) - *Balkan* Case 5/73 1973 1091 (1108 paragraph 13).

⁷¹⁴ Constantinesco, V. et al., *ibid*, p.1511.

The majority opinion of the literature is persuasive. The Commission has also stated that it considers that Article 308 EC contains an obligation to act where its conditions are fulfilled.⁷¹⁵ Hence, the discretion of the Commission and the Council lies only in determining whether the conditions of Article 308 EC are fulfilled. If they decide that the conditions are fulfilled, they *must* implement the appropriate provision in order to fulfil the relevant Community objective.⁷¹⁶

**D SUMMARY OF THE SIGNIFICANCE OF THE LEGAL BASES
ARTICLE 83 AND ARTICLE 308 FOR THE DETERMINATION OF
AN APPROPRIATE JURISDICTIONAL TRIGGER FOR THE
MERGER REGULATION**

According to the legal base of Article 83 EC (in conjunction with the principle of subsidiarity), the appropriate jurisdictional trigger for the EC Merger Regulation is the interstate trade criterion. It is not possible to materially expand the scope of Articles 81 and 82 EC. Nor, traditionally, is it possible to restrict the principles laid down in Articles 81 and 82 EC. There is however some suggestion, drawing upon experience in other areas of competition law and in specific recognition that the principles of Articles 81 and 82 EC in their entirety may be unsuitable, that the interstate trade criterion might in some way be refocused with regard to specific *types* of transaction. Thereby, for example, a *de minimis* - or, 'appreciability' - provision based upon Article 83 EC with specific regard to merger transactions might be regarded as both appropriate and legitimate.

Under the legal base of Article 308 EC, which was used for the EC Merger Regulation to the extent that concentrations according to Article 3 MR do not fall within the scope of Articles 81 and 82 EC, the Regulation should apply in such a way that is 'appropriate' to help fulfil the Community objective of maintaining a system of undistorted competition within the Community. There may be other objectives for which it was invoked on the basis of Article 308 EC, but it certainly requires that the EC Merger Regulation should apply generally to concentrations that might distort competition structures within the Community. Thereby, it operates consistently with Article 83 EC that was invoked within the context of the same Community objective:

⁷¹⁵ Commission Reply No. 406/75 to Mr Maigaard, OJ 285/27 (28) of 13th December 1975.

⁷¹⁶ *Schwartz, I* in: Groeben et al., *Kommentar*, *ibid* pp.683-4. ←

any jurisdictional trigger that is appropriate for the legal base of Article 308 EC will be compatible (if not exhaustively consistent) with the jurisdictional trigger that is required according to Article 83 EC (that is, the interstate trade criterion, to the extent that it might be adapted in its specific application to concentrations).

It is pertinent at this point to recall that the Merger Regulation adopted a formalistic jurisdictional criterion based upon the turnover of the undertakings concerned and the location where the turnover is achieved. Questionable is whether this jurisdictional trigger of the Merger Regulation operates consistently with the legal bases upon which it was implemented.

VIII EVALUATION OF THE OPERATION OF THE JURISDICTIONAL TRIGGER OF THE EC MERGER REGULATION WITH REGARD TO THE INTERSTATE TRADE CRITERION

A THE ISSUE

It was determined above that the use of Article 83 EC as a legal base for the Merger Regulation (in conjunction with the principle of subsidiarity) provides that, to the extent the Merger Regulation applies to the same transactions as Articles 81 and 82 EC, those material principles laid down in the two Articles may not be expanded or restricted. Upon analysis however, some qualification was made. Thereby, there was some evidence that their application might be 're-focussed' to the extent that they apply to specific *sui generis* transactions. That adaptation does not of course extend to the use of a completely different jurisdictional criterion. The interstate trade criterion - as laid down within the text of the Treaty of Rome - must be regarded as inviolable. Nevertheless, its specific interpretation and application might be limited in scope specifically for transactions such as concentrations that require a different approach than the more traditional conduct and agreements falling for assessment under Articles 81 and 82 EC.

On the other hand, Article 308 EC (that *incorporates* the principle of subsidiarity) provides that the Merger Regulation should apply in such a way that is 'appropriate' to help fulfil the objective of maintaining a system of undistorted competition within the Community. It is clear from the analysis undertaken above that the application of the interstate criterion ensures that all transactions that have a potential to distort Community competition structures are caught by the substantive provision. Hence, while it does not explicitly prescribe the use of such a criterion, Article 308 EC requires a jurisdictional trigger that is at least compatible with the operation of the interstate trade criterion.

Both of the legal bases of the EC Merger Regulation therefore provided that its jurisdictional trigger should at the very least be compatible with the operation of the interstate trade criterion, even if there is some suggestion that it might be applied differently for concentrations. It becomes necessary to analyse the operation of the

jurisdictional trigger of the EC Merger Regulation in relation to the interstate trade criterion.

If we initially ignore the suggestion that Article 83 EC allows some adaptation of the application of the interstate trade criterion initially, two conditions must be fulfilled if there is to be absolute consistency between the jurisdictional trigger of the EC Merger Regulation and the operation of the interstate trade criterion:

First, the jurisdictional trigger must operate to ensure that all concentrations falling within the scope of the EC Merger Regulation (as having a 'Community Dimension') also have an actual or potential effect on interstate trade.

Secondly, it must operate to ensure that there are no concentrations carried out within the Community having an actual or potential effect on interstate trade but not falling within the scope of the EC Merger Regulation (as having no 'Community Dimension').

B THE FIRST CONDITION: CONCENTRATIONS WITH A COMMUNITY DIMENSION ACCORDING TO THE MERGER REGULATION THAT DO NOT AFFECT INTERSTATE TRADE

As stated above,⁷¹⁷ there is a *de facto* presumption that concentrations will fulfil the interstate trade criterion where interstate trade is affected directly or indirectly, actually or potentially on any of the markets on which the undertakings are involved or are active (or on any directly dependent markets). Only where all the relevant markets on which the undertakings involved are active (and their dependent markets) are localised, exclusively national and isolated from interstate trade, may it be stated with any certainty that the criterion is not fulfilled.⁷¹⁸

Analysis of the merger decisions taken under the Merger Regulation since its implementation reveals that all concentrations that achieve the very high turnover thresholds laid down in Article 1 MR have an effect on interstate trade. Even where concentrations were carried out between undertakings which concerned a national and localised relevant geographic market, interstate trade was affected on a directly

⁷¹⁷ See above, pp128-130.

⁷¹⁸ See above, pp128-130.

dependent market (either upstream or downstream).⁷¹⁹ To this extent, therefore, the turnover thresholds appear to operate coherently with the legal competence of the Commission to assess mergers according to the legal bases of the Merger Regulation. This is the case even though they are formalistic and quantitative, and do not conform to the effects-based model of the interstate trade criterion.

Questionable is whether this result is achieved solely as a consequence of the *high level* at which the turnover thresholds are currently set for the Merger Regulation in Article 1(2) MR, or whether it is the 'fine-tuning' jurisdictional provisions the Merger Regulation includes that provides this coherent result. The 'fine-tuning' provisions that are relevant to this question are Article 9 MR and the Two-Thirds rule.⁷²⁰ It is necessary to consider the operation of these provisions because the Commission stated at the adoption of the Regulation that the turnover thresholds should be lowered in the future:

'the main (i.e. world) turnover threshold should be reduced from 5,000 to 2,000 million ECU at the end of the initial stage of implementation and that the Community turnover threshold of 250 million ECU should also be revised in the light of experience and the trend of the main threshold. If the same proportionate reduction is made as for the main threshold, this implies a threshold of 100 million ECU instead of 250 million ECU.'⁷²¹

⁷¹⁹ The concentrations involving national supermarkets provide good examples of these, where the relevant geographical markets have always been localised or national. More generally, a dynamic can be detected in these cases. The relevant geographical markets for such concentrations was originally held to be localised (regarding demand structures). See eg., *Promodes/DIRSA* Case IV/M027 of 17/12/1990, OJ 1990 C321; *Promodes/BRMC* Case IV/M242 of 13/07/1992 in OJ 1992 C232; *Delhaize/PG* Case IV/M471 of 22/08/1994, OJ 1994 C239, at p.3. Later however, more attention was paid to centralised planning at a national level for supermarket chains, and the relevant geographical markets were more often held to be national. See eg., *Kesko/Tuko* Case IV/M784 of 20.11.1996 OJ 1996 L110/53. In *Tesco/ABF* Case IV/M914 of 5/05/1997, OJ 1997 C162 p.3, the Commission stated: '*In a situation where several retail chains separate networks of stores on a national scale, the important parameters of competition are generally determinate on a national scale, and therefore what from the viewpoint of the catchment area may be a local or a regional market may be aggregated into a national market. In such circumstances, it is more appropriate to treat the retail markets at a national or regional level*'.

⁷²⁰ Note that Article 21 (3) MR provides that certain 'legitimate interests' are still the prerogative of the Member States. It is not, however, necessary to analyse this more politically orientated provision in any detail for the purpose of this thesis.

⁷²¹ Commission Report to Council on the Implementation of the Merger Regulation, COM (93) 385, Brussels 28 July 1993, at p.1b.

Note that the European Parliament has supported lower thresholds in its Resolution of the Nineteenth Report on Competition Policy, Point 26.

Similarly, the Economic and Social Committee at Point 1.3.2 of the Opinion on the Twenty First Report on Competition Policy, 25th November 1992.

This opinion is also expressed by Community business and industry during the year 2000 Review of the jurisdictional trigger of the Merger Regulation.⁷²²

Questionable is whether, if the turnover thresholds in Article 1(2) MR were lowered considerably, the jurisdictional trigger of the Merger Regulation would still operate coherently with the first condition - would they continue to ensure that no mergers that do not affect interstate trade fall within the scope of the Merger Regulation? It should be noted that, specifically, the Commission envisaged an expansion of the use of the Article 9 MR provision in order to compensate for the effect of lower turnover thresholds.

1 Referral of a Concentration to a Member State - Article 9 MR

1.1 Origin

Article 9 MR was introduced into the substantive text of the EC Merger Regulation largely at the behest of Germany (and has become known as the 'German clause'). It was prompted by the fear that the two-thirds rule would fail to remove some mergers of purely national concern from the scope of the Merger Regulation, and that mergers which may be acceptable when assessed under Article 2 MR (in terms of their effect on the Community market) may have a significant anti-competitive effect at a national level.⁷²³

How does Article 9 MR complement the legal structure of the Merger Regulation and, above all, does it provide the required flexibility to the jurisdictional trigger that enables it to operate coherently with the operation of the interstate trade criterion?

There is general consensus amongst commentators that the present thresholds are too high. The majority suggest however that a reduction of the thresholds will restore the validity of the Regulation according to economic theory, see eg. Krimphove, 1992, *ibid*, at pp. 223-237. They do not consider the question of the legitimacy of the turnover thresholds themselves however.

⁷²² See Report, *ibid* at paragraphs 54-63.

⁷²³ Note that Germany has the most strict system of competition law in Europe. The inclusion of the Article was extremely important to the overall successful implementation of the Merger Regulation. See above at p148.

For a useful and clear summary of the procedure under Article 9, see Johnson, N., 'The EEC Merger Control Regulation - Referral to Member States under Article 9', *World Competition*, 1999, pp.105-133.

1.2 The Substantive Provision

According to Article 9(2) MR:⁷²⁴

'Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market,

(b) a concentration affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.'

As a result of such a notice, the Commission will assess the concentration with regard to Article 9(3) MR:

'If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7⁷²⁵, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned; or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law. In cases where a Member State informs the Commission that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

⁷²⁴ As amended by Council Regulation (EC) No.1310/97 of 30 June 1997, OJ L 180/1 (1997).

⁷²⁵ *'The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand 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 into account in particular the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.'*

The geographical reference market within the meaning of Article 9 MR is not materially different from the general definition of the relevant geographical market.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member States concerned.'

Therefore, where the request concerns a distinct market within a Member State that constitutes '*a substantial part of the common market*', the Commission has a discretion to refer. Where however the request concerns a distinct market within a Member State that does not constitute '*a substantial part of the common market*', the Commission *must* make a referral of the whole or part of the case relating to the distinct market concerned. This correlates with the condition for the prohibition of mergers under Article 2(2) and (3) of the Merger Regulation: competition must be significantly impeded in the common market '*or in a substantial part of it*'.

1.3 General Approach

As a jurisdictional device, Article 9 MR is therefore different from the turnover thresholds. It refers to the *effect* of the merger on competition. However, there is still a quantitative element. Whether or not the Commission has a discretion to refer a concentration involving a distinct market within a Member State depends upon the *size* of that distinct market. Only if the distinct market constitutes a 'substantial part of the common market' is the Commission *obliged* to refer.

Is the operation of Article 9 MR, in spite of its differences in operation, compatible with the application of an interstate trade criterion? This depends, first, upon the way in which the Commission exercises its discretion and, secondly, upon its procedural structure.

1.4 Interpretation of the Provision

The '*distinct market*' is defined as a separate product market within the territory of a Member State.⁷²⁶ It therefore requires a definition of the relevant product market and the relevant geographical market.⁷²⁷ The latter must be *within* a single Member State (although it appears that this may comprise the *entire* national market).⁷²⁸

⁷²⁶ See eg., Cook and Kerse, *ibid*, p.234-5; Downes and Ellison, *ibid*, at p.80-1; Bos et al, *ibid*, p.363.

⁷²⁷ The analysis required a determination of the relevant geographical market is set down in Article 9(7) MR.

⁷²⁸ See eg., Commission Decision of 12.02.92, *Steetley/Tarmac*.

See in agreement on this point, Jones and Gonzalez-Diaz, *ibid*, p.39. But cf., Miersch, *ibid*, at p.140. He argues that a national market is a substantial part of the Common Market within the meaning of Article 9 MR, and therefore the Commission has jurisdiction according to the text of Article 2(2) and (3) MR and no referral can be made. The fact that a distinct market is a

Having determined that a concentration concerns a distinct market within a Member State, it is necessary to determine whether that distinct market constitutes a substantial part of the Community.

1.4.1 Distinct Market is not a Substantial Part of the Community

If a concentration affects competition on a distinct market that is *not* a substantial part of the Community, the Commission *must* make a reference to the relevant Member State of the whole or part of the case relating to the distinct market concerned. Questionable is whether a distinct market within a Member State that is not a substantial part of the Community covers those concentrations which do not have an effect on interstate trade (and for which the Commission does not have a legal competence to assess).

The approach of the Commission to the interpretation of 'a substantial part' of the Common Market has already been considered with reference to the application of Article 82 EC.⁷²⁹ As detailed above, the condition requires a quantitative analysis not just of the *geographical extent* of the market, but also of the product market within that geographical area, considering the economic importance of the market in absolute terms in relation to the Common Market as a whole.⁷³⁰ This includes an assessment of the pattern and volume of production and consumption of the product concerned, the habits and economic opportunities of sellers and purchasers and the density of population.⁷³¹

The notion has been interpreted very widely by the Commission. Even markets which are of a local scope from the viewpoint of the individual consumer could be aggregated to form larger markets for competition analysis purposes.⁷³²

substantial part of the Common Market does not however automatically prevent a referral according to Article 9 MR. It is therefore fallacious to maintain that because the concentration concerns a relevant market that constitutes a substantial part of the Common Market, it does not concern a 'distinct market' within the meaning of Article 9 MR.

⁷²⁹ See above, pp.67-69.

⁷³⁰ See above, pp.67-69.

⁷³¹ *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* Case 40-48/73, 50/73, 54-6/73, 113-114/73, (1975) ECR 1663, 1976-7, (1976) 1 CMLR 295.

⁷³² See eg., *Kesko/Tuko* Commission Decision (1996) OJ L110/53, p.56; *Rewe/Billa*, Commission Decision EEC Merger Control Reporter, B461; *Blokker/Toys "R" US* Commission Decision (1998) OJ L316/1.

Clearly, in order for the distinct market within the territory of a Member State to be found to be not a substantial part of the Common Market, it must be strictly localised.⁷³³ However, the condition has been found to have been fulfilled by single ports and airports where the services or goods in question are of considerable economic importance within the Common Market.⁷³⁴

In practice, it may be argued that the condition of a 'substantial part' of the Common Market reflects the operation of the interstate trade criterion. The cases where localised markets have been found to be a 'substantial part' have always concerned ports or airports that have a significant amount of international trade. However, the assessments required in the application of the interstate trade criterion and the 'substantial part' condition of Article 9 MR are substantially different. The interstate trade criterion requires an actual or potential effect on the patterns of interstate trade within the Common Market. The 'substantial part' condition however requires product market to be of sufficient economic size and importance within the Common Market. It is a quantitative condition as opposed to the purely effects-based interstate trade criterion.

Furthermore, even if the operation of Article 9(2)b MR in practice has some rationalising effect on the operation of the turnover thresholds, its ability to refocus the operation of the turnover thresholds so that the jurisdictional trigger of the Merger Regulation as a whole is in line with legal realities is significantly hindered by its procedural structure.⁷³⁵

⁷³³ See eg., Commission Decisions: *SEHB/VIAG/PE-BEWAG*, Commission XXVIIth Competition Report 1997, paragraph 179; *Holdercim/Cedest*, Commission XXIVth Report 1994, paragraph 332.

⁷³⁴ Commission Decision *Porto di Genova*, (1997), OJ L301, where the port of Genoa sufficed, given its importance with regard to all maritime import and export activities throughout Italy. Similarly, the port of Rodby in Denmark (see Report on Competition Policy 1994, Vol XXIV point 226), the port of Holyhead in the UK (Report on Competition Policy 1993, Vol XXIII, point 234) and the airport of Zaventem near Brussels (*British Midland/Regie des voies aeriennes*, June 28, 1995, Report on Competition Policy 1995, Vol XXV, point 120) have all been found to constitute 'a substantial part' on similar principles.

On the other hand, with regard to all the facts, Humberside ports in the UK and the North of England have been found not to be sufficient (see, respectively, *Felixstowe Docks and Railways Board v British Transport Docks Board* (decision of the English Court of Appeal) (1976) 2 CMLR 655; *Cutsforth v Mansfield Inns* (decision of the English High Court QB) 1986, 1 WLR 558). Similarly, County Kerry in Ireland (*Cadbury Ltd v Kerry Co-op* 1982, ILRM 77).

⁷³⁵ See below pp.204-205.

1.4.2 Distinct Market is a Substantial Part of the Common Market

Where the condition 'a substantial part of the Common Market' is fulfilled, the Commission has a discretion whether or not to make a referral to the relevant Member State. Questionable is how that discretion is exercised: does it depend upon the question whether the concentration affects (or could affect) interstate trade? Generally, Article 9 requests are considered by the Commission according to the concerns of regulatory efficiency - the principles of one-stop-shop and legal certainty.⁷³⁶ Where proceedings had already been initiated in the Member States concerned, the Commission was more likely to grant the request, having regard to the cost in time and money to the undertakings of having to submit their arguments to a new jurisdiction.⁷³⁷ Furthermore, the Commission will consider whether the Member State concerned may be better placed than the Commission to handle a case that has local or purely national aspects, where the national authority benefits from a more detailed knowledge of local markets and wider resources.⁷³⁸ This will however not be the case if more than one Member State jurisdiction is applicable to the concentration. Another issue of administrative efficiency is the capacity to conduct an enquiry: if a transaction with a national dimension involves foreign third parties, the Community probably has more efficient investigation instruments.⁷³⁹

Furthermore however, the Commission will not make a referral where the transaction raises important legal, economic and policy issues; in short, the concentration is of a Community interest.⁷⁴⁰ The notion of Community interest includes the issue of the effect on interstate trade that a concentration may have: concentrations may be referred where they do not affect interstate trade, as long as other Community interests are preserved. The notion however includes other factors, for example those instances where the Member State may have a conflict of interest in assessing a concentration (for example, when it has a significant stake in the capital of one of the parties).

⁷³⁶ Internal Commission Document.

⁷³⁷ This is what distinguishes the two sets of cases in the above note. See also in particular, *McCormick/CPC/Rabobank/Ostmann*, Case IV/M330 of 29/10/1993.

⁷³⁸ See eg, *Metsaelitto/Vapo* Case M2234 of 8/2/2001, Press Release IP/01/183, where the Commission granted a referral, stressing that the Finish Competition Authority was best placed to carry out the investigation, especially since it had only recently concluded an investigation into the alleged dominant position of Vapo on one of the relevant markets.

Similarly, *C3D/Rhone Capital LLC/Go-Ahead Group Plc* of 20/10/2000, Case M2154 Press Release IP/00/1195; *Interbrew/Bass* Case M2044 of 22/08/2000, Press Release IP/00/940.

⁷³⁹ Internal Commission Document.

⁷⁴⁰ Internal Commission Document.

The Commission's approach in exercising its discretion is not therefore coherent with the operation of the interstate trade criterion. Furthermore, any potential to fulfil such a role is further limited by its procedural structure.

1.5 The Procedural Structure⁷⁴¹

In any consideration of a request by a Member State for referral under Article 9, the Community has already assumed jurisdiction in such a case (according to the turnover thresholds). It lies within the Commission's discretion to determine whether the distinct market constitutes a substantial part of the Common Market (and it has a discretion to refer) or not (and it is 'obliged' to refer).

Article 9(9) of the Regulation does expressly give the Court of Justice the right to review Commission decisions under Article 9 MR:

'In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186⁷⁴², for the purpose of applying its national competition law.'

Hereby, the Member State whose request under Article 9 MR has been refused may appeal to the Court of Justice for interim relief. Other Member States (or the Council) have a right to appeal on the basis of Article 230(1) EC. Natural and legal persons may also make an appeal when the decision is of direct and individual concern to them on the basis of Article 230(3) EC (thereby allowing the parties to the concentration a right to appeal.⁷⁴³ Nevertheless, no such appeal against a Commission decision on the basis of Article 9 MR has yet been made. On balance, the controversy and inefficiency of making such an appeal before the Court of Justice is so great that it is only likely in the most extreme cases. On the whole, the Commission is unrestrained in the exercise of its broad discretion.

Furthermore, the application of Article 9 MR as a fine-tuning mechanism depends upon the Member State initially requesting a referral of a concentration. There is no guarantee that Member States will always request referrals based upon legal realities.

⁷⁴¹ For a detailed description of the procedure, see eg., Johnson, N., *ibid*, at pp.107-109.

⁷⁴² Now Article 243 EC.

⁷⁴³ For more detail, see Hirsbrunner, S., (1999) *ibid*, at pp.377-8.

Rather, the final decision is much more likely to be a political one. Member States may prefer to leave politically controversial cases with the Commission.

1.6 Summary of the Operation of Article 9 MR

Article 9(2)b MR may be invoked for concentrations that have a Community Dimension and fall within the scope of Article 1(2) MR but affect interstate trade. Thereby, it could *prima facie* be a rationalising provision to fine-tune the operation of the turnover thresholds so that the jurisdictional trigger as a whole fulfils the first condition - that no concentrations that do not have an effect on interstate trade fall within the scope of the Merger Regulation. However, the procedural structure of Article 9 MR provides that it is dependent upon a Member State initially making a request to the Commission.

An amendment to its text could conceivably provide for a 'voluntary referral mechanism'. Thereby, referrals could be made by the Commission (with the acquiescence of the relevant Member State) without the need for a specific request. The referral would however still depend either upon the quantitative condition ('a substantial part of the Community') and thereby upon the exercise of a broad discretion rather than the jurisdictional reality. The discretion of the Commission according to Article 9(2)a MR has not been exercised to determine jurisdiction according to legal competence of the Commission to assess mergers according to the legal bases of the Merger Regulation. Rather, it determines jurisdiction according to the factors which are more usually concerned with the *enforcement* interest of the Community (the 'Community interest'⁷⁴⁴).

In practice, the Commission has invoked the provision sparingly, in recognition of the dangers its procedure represents to the principle of a one-stop-shop on which the Regulation is based. The Council and Commission issued a joint statement regarding Regulation 4064/89:

'...when a specific market represents a substantial part of the Common Market the referral procedure provided for in Article 9 should only be applied in exceptional cases. There are indeed grounds for taking as a basis the principle that a concentration which creates or reinforces a dominant position in a substantial part of the Common Market must be declared

⁷⁴⁴ As used consistently in the Commission's White Paper on modernisation of the rules implementing Articles 85 and 86 (81 and 82) of the EC Treaty, OJ N° C132, 1999/05/12.

incompatible with the Common Market. The Council and the Commission consider that such an application of Article 9 should be confined to cases in which the interests in respect of competition of the Member State concerned could not be adequately protected in any other way.⁷⁴⁵

This extremely restrictive interpretation of the scope of Article 9 had the consequence that of the early requests made for a referral, few were granted. Thus, in the period from 1991 until the end of 1995, of nine requests, only three referrals were made.⁷⁴⁶ More recently this dynamic has been changing: from 1996 until July 1999, of twenty three requests, eighteen were granted.⁷⁴⁷ Nevertheless, the criteria upon which the decision to refer is based remains a poor reflection of the jurisdictional issue.

Above all therefore, if the turnover thresholds were lowered significantly, the application and operation of the procedure for referrals under Article 9 MR would not ensure that all concentrations falling within the scope of the Merger Regulation according to Article 1(2) MR affect interstate trade.

There is however a further 'fine-tuning' provision that may ensure this result.

⁷⁴⁵ Notes on Council Regulation (EEC) 4064/89, cited in Appendix 6, Jones and Gonzalez-Diaz, *ibid.*

⁷⁴⁶ *Tarmac/Steetley* Case M180 24/01/1992 (partial referral); *McCormick/CPC/Rabobank/Ostmann* Case M 330 29/10/1993 (full referral); *Holdercim/Cedest* Case M460 6/07/1994 (partial referral).

⁷⁴⁷ *Gehe/Lloyds Chemists* Case M716 22/03/1996 (full referral); *Bayernwerk/Isarwerke* Case M808 25/11/1996 (full referral); *RWE/Thyssengas* Case M713 25/11/1996 (full referral); *Rheinmetal/British Aerospace/STN Atlas* Case M894 24/04/1997 (partial referral); *Sehb/Viag/PE-Bewag* Case M932 25/07/1997 (full referral); *Promodes/Casino* Case M991 30/10/1997 (partial referral); *Preussag/Hapag-Lloyd* Case M1001 10/11/1997 (partial referral); *Preussag/TUI* Case M1019 10/11/1997 (partial referral); *Compagnie Nationale de Navigation/Sogelfa-CIM* Case M1021 1/12/1997 (partial referral); *Lafarge/Redland* Case M1030 16/12/1997 (partial referral); *Promodes/S21/Gruppo gs* Case M1086 10/03/1998 (partial referral); *Vendex/Bijenkorf* Case M1060 26/05/1998 (partial referral); *Krauss/Maffei/Wegmann* Case M1153 19/06/1998 (partial referral); *Alliance Unichem/Unifarma* Case M1220 23/07/1998 (full referral); *Total/Petrofina (II)* Case M1464 26/03/1999 (partial referral); *Rabobank-Beeck/Homann* Case M1461 6/04/1999 (full referral); *CSME/MSCA/Rock* Case M1522 11/06/1999 (full referral).

Between July 1999 and July 2001, a further eight Article 9 requests have been granted *Heineken/Cruzcampo* Case M1555 of 17.08.99 (partial referral); *Anglo American/Tarmac* Case M1779 of 1/12/1999 (full referral); *Carrefour/Promodes* Case M1684 of 11/12/1999 (partial referral to the Spanish and French authorities); *Hanson/Pioneer* Case M1827 of 18/02/2000 (full referral); *Interbrew/Bass* Case M2044 of 22/08/2000 (partial referral); *C3D/Rhone Capital LLC/Go-Ahead Group Plc* Case M2154 of 20/10/2000 (partial referral); *Enel/Infostada SpA* Case M2216 of 19/01/2001 (partial referral); *Metsaelitto/Vapo* Case M2234 of 8/2/2001 (partial referral).

No figures are currently available for the total amount of requests made during this period.

2 The Operation of the 'Two-Thirds' Rule

2.1 The Substantive Provision

Where a concentration meets either of the thresholds under Article 1 of the Merger Regulation, it shall have a Community Dimension *unless*:

'...each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.'⁷⁴⁸

2.2 Evaluation

According to the 'two-thirds' rule, where a merger is above the turnover thresholds it may still be assessed by an individual Member State according to its national law if each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The rationale behind this rule is that mergers whose effects are predominantly limited to a single Member State are best dealt with by the competent authorities of that Member State according to their own national law.

Questionable is whether the application of the two-thirds rule is responsible for the fact that the formalistic jurisdictional criterion of the Merger Regulation operates coherently with the operation of the interstate trade criterion. That is, whether it is this provision that ensures that all concentrations falling within the scope of the Merger Regulation affect interstate trade.

The first point to make in consideration of this question is that the two-thirds rule is not effects-based like the interstate trade criterion: the application of the two-thirds rule does not involve consideration of whether the relevant concentration has any effect beyond the borders of the individual Member State, but rather depends upon the location of the parties to the transaction (according to the size of the activities continued inside and outside a particular Member State).

⁷⁴⁸ The condition is used in the original threshold and the threshold as amended by the 1997 revisions (see above), see Articles 1(2)b and 1(3)d MR.

Nevertheless, the breadth of the two-thirds exception ensures that it covers those concentrations that do not affect interstate trade. As shown above, the interstate trade criterion is itself extremely broad: any agreement or specific conduct by one or more firms fulfils the interstate trade criterion where it actually or potentially, directly or indirectly affects interstate trade on the relevant market (or a directly dependent market).⁷⁴⁹ Therefore, only a concentration that is truly national and localised, involving no actual or potential cross-border trade whatsoever, will not fulfil the criterion. Such a concentration must inevitably involve undertakings present and trading in a single Member State, and will therefore fall into the two-thirds exception and escape the attentions of the EC Merger Regulation.

3 Conclusion on the First Condition

The analysis of the 'fine-tuning' provisions undertaken above shows that while Article 9 MR is of limited potential to provide that concentrations not affecting interstate trade are not brought within the scope of the Regulation, the breadth of the two-thirds exception does ensure that this condition is fulfilled. Even were the turnover thresholds to be lowered significantly, the two-thirds rule would operate to ensure that concentrations not affecting interstate trade did not fall within the scope of the EC Merger Regulation.

To this extent therefore, the jurisdictional trigger of the EC Merger Regulation operates perfectly consistently with its legal bases and also the legal mandate of the subsidiarity principle.

That broad scope of the two-thirds rule may however have significant implications for the second condition that must be fulfilled for the jurisdictional trigger of the Merger Regulation to be coherent with its legal bases.

⁷⁴⁹ See above, at pp128-130

C THE SECOND CONDITION: CONCENTRATIONS THAT AFFECT INTERSTATE TRADE AND DO NOT HAVE A COMMUNITY DIMENSION UNDER THE MERGER REGULATION

1 The Issue

The Commission has stated that:

‘...below (the thresholds’) levels a concentration would not normally significantly affect trade between Member States’.⁷⁵⁰

Ignoring the possibility that the interstate trade criterion might be applied differently for concentrations on the basis of Article 83 EC, we are concerned to analyse the validity of the Commission’s statement by comparing the operation of the jurisdictional trigger of the Merger Regulation with the interstate trade criterion as it is applied to standard transactions falling within the scope of Articles 81 and 82 EC. The thesis examines merger decisions adopted under the national systems of three Member States, the UK, Germany and Italy in 1999 (following the amendments introduced by Council Regulation (EC) 1310/97 that came into effect in March 1998⁷⁵¹). Questionable is whether concentrations falling under national assessment in each of these jurisdictions affected interstate trade in spite of being outside the jurisdictional scope of the Merger Regulation.

Recall the analysis carried out above: horizontal, vertical or conglomerate mergers fulfil the interstate trade criterion where they actually or potentially, directly or indirectly affect interstate trade on the relevant market (or a directly dependent market).⁷⁵²

⁷⁵⁰ Annexed to Merger Regulation, at ‘Re Article 22’.

Similarly, although not so specifically, Recital 9 of the Merger Regulation states that:

‘...the Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State’.

⁷⁵¹ Council Regulation (EC) 1310/97 of 30 June 1997 (OJ L180, 9 July 1997 at 1). For details of the jurisdictional amendments, see above.

⁷⁵² See above, at pp125-127.

The analysis above of the application of the interstate trade criterion determined that there is a *de facto* presumption of an effect on interstate trade where there is conduct involving undertakings that are active on markets that actually or potentially involve interstate trade (or there are markets dependent upon these relevant markets that actually or potentially involve interstate trade). It is sufficient for the purpose of the thesis to list mergers between undertakings that are *directly and actually* involved on markets that involve actual or potential interstate trade.⁷⁵³

2 Merger Decisions in the UK taken during 1999 that Affect Interstate Trade

2.1 The Jurisdictional Threshold under UK Merger Law - The Fair Trading Act 1973

The system of merger control under the Fair Trading Act 1973 is essentially benign, and predisposed in favour of mergers. There is no duty to notify mergers.

Any merger (within the meaning of section 64 FTA) can be referred to the Competition Commission⁷⁵⁴ by the Secretary of State according to his discretion (where he is advised by the Directorate General of Fair Trading).

In practice, very few mergers are referred to the MMC.⁷⁵⁵ Where a reference is made, the MMC makes an investigation and decides - according to a two-thirds majority - whether or not the merger should be prohibited. Where the MMC prohibits a merger, the Secretary of State still has the discretion not to prohibit the merger.

An examination of the *fourteen* Reports made by the Monopolies and Mergers Commission and the Competition Commission during 1999 reveals that *six* clearly involved mergers that affect actual interstate trade.

⁷⁵³ The actual breadth of the interstate trade criterion extends to include *indirect* effect on interstate trade on markets that are *dependent* upon the relevant product markets (see above).

⁷⁵⁴ Section 45 of the Competition Act 1998 dissolved the Monopolies and Merger Commission and replaced it with the Competition Commission.

⁷⁵⁵ See Whish, (1993) *ibid* at pp.687-8.

2.2 Reports made under the FTA 1973 involving Mergers that Affected Interstate Trade⁷⁵⁶

Rockwool Ltd/Owens-Corning Building Products (UK) Ltd

The Report concerned the proposed acquisition of the stone wool manufacturing business of Owens-Corning Building Products (UK) Ltd (OCBP) by Rockwool Ltd (Rockwool).

Rockwool was the UK subsidiary of Rockwool International A/S, a Danish company. OCBP was a subsidiary of a US company, Owens Cornell, and had a stone wool factory located in the UK.

The Competition Commission investigated the UK stone wool market. It found that stone wool is an internationally traded product and that imports were made into the UK from overseas (without specifying the countries of origin). It may be deduced that interstate trade either takes place or could take place on the relevant market and the acquisition fulfils the interstate trade criterion.

British Airways Plc/Cityflyer Express Limited

The Report concerned the proposed acquisition of CityFlyer Express Limited (CityFlyer) by British Airways Plc (BA).

Both undertakings were airlines and the merger clearly affected interstate trade since the provision of flights is carried out at a global level by international airlines.

Universal Foods Corporation/Pointings Holdings Ltd

The Report concerned the acquisition of Universal Foods Corporation (UFC) by Pointing Holdings Ltd (Pointing).

The Competition Commission determined that the companies overlapped *within the UK* in the manufacture and distribution of flavours and colours. Interstate trade was clearly affected by the merger since UFC had manufacturing plants in the UK, the Netherlands and Italy. The main competitors of the combined entity on the UK market included firms located outside the UK, in particular in Italy (Fiorio Colori SpA). The suitability for import and export of the product was stressed, according to the high value to weight ratio of the raw material.

⁷⁵⁶ Reports are available at the following website:
<http://www.mmc.gov.uk/inquiries/mergerref89-now.htm>

Alanod Aluminium-Veredlung GmbH & Co/ Metalloxyd Ano-Coil Ltd

The Report concerns the acquisition of Metalloxyd Ano-Coil Ltd (Ano-Coil) by Alanod Aluminium-Veredlung GmbH & Co (Alanod).

The UK authority investigated the UK market for the production and sale of aluminium coil. The merger clearly affected interstate trade since Alanod sold aluminium coil produced in Germany globally and, in particular, in the UK.

CHC Helicopter Corporation/Helicopter Services Group ASA

The Report concerns the acquisition by CHC Helicopter Corporation (CHC) of Helicopter Services Group ASA (HSG).

CHC was a Canadian supplier of helicopter services. HSG was a Norwegian supplier of helicopter services. Both were active internationally and sold their services throughout the Community. The merger therefore clearly affected interstate trade.

Vivendi SA/British Sky Broadcasting Group Plc

The Report concerned the acquisition by Vivendi SA (Vivendi) of a shareholding in British Sky Broadcasting Group Plc (BSkyB).

Both undertakings were active in the provision of pay-TV services. Vivendi was active in France 'and a number of other EC countries'. BSKyB was active in the UK. The merger therefore clearly affected interstate trade.

**3 Mergers Assessed in Germany during 1999 that Affect Interstate Trade -
GWB 1998⁷⁵⁷**

3.1 The Jurisdictional Test under GWB 1998

Mergers must be notified where:

The aggregate worldwide turnover of all undertakings exceeds 1 billion DM and at least one had a turnover of at least 50 million DM in Germany, *unless* one party is an independent company with a worldwide turnover of less than 20 million DM, or the relevant market (in existence for at least 5 years) had a total annual value of less than 30 million DM.⁷⁵⁸

⁷⁵⁷ GWB 1998 of 26/08/98, Bundesgesetzblatt I, p2546.

⁷⁵⁸ Article 23 GWB 1958.

In 1999, *fifteen* decisions from a total of *forty* made by the Bundeskartellamt can be seen to have clearly affected interstate trade.

3.2 Decisions made under GWB 1998 involving Mergers that Affected Interstate Trade⁷⁵⁹

Deutsche Babcock Aktiengesellschaft/Steinmueller Verwaltungs GmbH

The decision concerned the acquisition of 74.9 % of the shares of Steinmueller Verwaltungs GmbH (Steinmueller) by Deutsche Babcock AG (DB).

The merger did not fall under the scope of the European Merger Regulation since each of the parties achieved more than two thirds of their Community-wide turnover in Germany.

The activities of the parties overlapped in the area of constructing plants for environmental and energy technology.

In the area of energy particularly, the Bundeskartellamt highlighted the importance of foreign (and European) competition, and the merger therefore clearly affected interstate trade.

MG Bautechnik GmbH Beteiligungsgesellschaft fuer Bau- und Gebaeudetechnik/HOESCH Dach- und Fassadentechnik GmbH

The decision concerned the acquisition of all the shares of HOESCH Dach- und Fassadentechnik (HOESCH) by MG Bautechnik Beteiligungsgesellschaft fuer Bau- und Gebaeudetechnik (MG).

The relevant product market was the market for 'Halbzeug'. HOESCH was present on this market in Germany only as an importer, in particular for Italian (and American) producers. The Bundeskartellamt even states:

'Es ist zu erwarten, dass diese (the present foreign suppliers of HOESCH) ihr Halbzeug nach dem Zusammenschluss ueber andere Vertriebswege im Inland absetzen werden).'

The Dow Chemical Company/Shell Nederland Chemie B.V./ Shell Chimie S.A.

The decision concerned the proposed acquisition by The Dow Chemical Company (Dow) of Shell Nederland Chemie B.V. and Shell Chimie S.A. (Shell).

⁷⁵⁹ Decisions available at the following website:
http://www.bundeskartellamt.de/fusion_1999.html

The relevant product market was synthetic rubber. The Bundeskartellamt determined that the consumers of the relevant product in Germany were supplied by suppliers all over Europe.⁷⁶⁰ The merger therefore clearly affected interstate trade.

Hapag Touristik Union GmbH/ First Reisebuero Management GmbH & Co. KG

The decision concerned the proposed acquisition of First Reisebuero Management GmbH & Co. KG (FRM) by Hapag Touristik Union GmbH (HTU).

The relevant market was the provision of tourist and business travel. The Bundeskartellamt determined that:

'Grossunternehmen versuchen auch zunehmend, mit Reisemittlern eine europa- bzw. weltweite Betreuung ihrer Niederlassungen bzw. Tochterunternehmen zu vereinbaren'.⁷⁶¹

Therefore, the merger clearly affected interstate trade.

Comet GmbH Pyrotechnik-Apparatebau/ Piepenbrock Pyrotechnik GmbH

The decision concerned the acquisition of essential parts of Piepenbrock Pyrotechnik GmbH (PP) by Comet GmbH Pyrotechnik-Apparatebau (CP).

The merger fell under the 'two-thirds' rule of the European Merger Regulation and therefore did not fall under its scope.

The relevant product market was the market for pyrotechnical articles. Although the Bundeskartellamt found the geographical market to be national, it highlighted the importance of foreign competition from inside and outside the Community in sanctioning the merger. Therefore, the merger clearly had an effect on interstate trade.

Barilla/ Wasa

The decision concerned the acquisition of Wasabroed Holding AB, Wasa GmbH (Wasa) by Barilla G.e.R. F.lli S.p.A. (Barilla).

Barilla was an Italian undertaking active in the production of food-stuffs selling most of its products in the UK and Germany.

Wasa was a Swedish undertaking with subsidiaries in Sweden, Norway, Denmark and Poland.

The merger clearly affected interstate trade.

⁷⁶⁰ At paragraph 21-2.

⁷⁶¹ At p. 6.

Eramet S.A./Elkem Mangan KS/Elkem Metals Company LP/Cogema S.A.

The decision analysed the proposed acquisition of the production sites of Elkem Mangan KS (EM) and Elkem Metals Company (EMC) by a joint venture created between Eramet S.A (Eramet) and Cogema S.A. (Cogema).

Eramet and Cogema were both French undertakings. EM was a Norwegian undertaking and EMC was an American undertaking.

The relevant product market was manganese alloys. All the parties exported and the Bundeskartellamt noted that there was no production in Germany; all manganese alloys were imported from the parties or their competitors.

The merger clearly affected interstate trade.

Corning Inc./BICC Plc.

The decision concerned the acquisition by Corning International Corporation (Corning) of the telecommunications cable business of BICC Plc. (BICC).

The merger involved the market for the production and distribution of standard glass fibre cables to the providers or constructors of telecommunication networks. Trade in this market was carried out internationally by firms across the Community and world-wide.

The merger clearly affected interstate trade.

PPG Industries Lackfabrik GmbH/ ICI Lacke Farben GmbH

The decision concerned the acquisition of the 'paints for commercial vehicles' business of ICI Lacke Farben GmbH (ICI) by PPG Industries Lackfabrik GmbH (PPG).

The Bundeskartellamt stressed the low transport costs of the relevant product and the fact that the producers tended to have production sites in only one or two Member States and to export to the whole of Europe.

The merger clearly affected interstate trade.

Texas Instruments Incorporated/ Integrated Sensor Solutions Incorporated

The decision concerned the acquisition by Texas Instruments Incorporated (TI) of Integrated Sensor Solutions Incorporated (ISS).

The merger concerned in particular the market for high pressure sensors for use in the diesel injection systems of traditional common rail. The Bundeskartellamt found that the market for such products extended to the world market (including other

Community-based market players) on account of the low weight in relation to value ratio.

The merger clearly affected interstate trade.

Checkpoint Systems Inc./ Meto AG

The decision concerned the acquisition of Meto AG (Meto) by Checkpoint Systems Inc. (CS).

The relevant product market was the production and distribution of systems for the electronic protection of articles. The market was characterised by the fact that all the main suppliers of the relevant product had their production sites outside Germany (including in other Member States).

Emerson Electric Co./ Krautkraemer GmbH & Co. oHG/ NUKEM Nutronik GmbH

The decision concerned the acquisition of NUKEM Nutronik GmbH (NN) by Krautkraemer GmbH & Co. oHG (K) and Emerson Electric Co. (EE).

The relevant market concerned the production and distribution of ultra-sound technology. The Bundeskartellamt, in its consideration of the geographical market, determined that interstate trade in the relevant product took place between the Member States.

Therefore the merger affected interstate trade.

Norddeutsche Affinerie AG/ Huettenwerke Kayser AG

The decision concerned the acquisition of Huettenwerke Kayser AG (HK) by Norddeutsche Affinerie AG (NA).

The relevant product markets were the procuring of copper scrap and the production of copper cathodes, base metals (gold, silver, platinum).

The Bundeskartellamt noted that 44 % of the domestic consumption of copper was made up of imports. Clearly the merger therefore affected interstate trade.

Xerox Corporation/ Tektronix Inc.

The decision concerned the proposed acquisition by Xerox Corporation (X) of the colour printer business of Tektronix Inc (T).

The market for colour printers was described as extending beyond the domestic market and therefore the merger clearly affected interstate trade.

4 Merger Decisions in Italy taken during 1999 that Affected Interstate Trade

4.1 The Jurisdictional Test under Law No. 287 of October 10 1990

Mergers must be notified where:

'Turnover by all undertakings exceeds 710 billion lire in Italy, or turnover of the target on the Italian market exceeds 71 billion lire'.

The notification of mergers required according to Law No. 287 of October 10 1990 is mandatory where the jurisdictional threshold is reached. The threshold is lower than that used under German law and consequently many more mergers are notified and assessed by the L'Autorita Garante della Concorrenza e del Mercato.

Upon analysis, many of the mergers that were the subject of decisions during 1999 affected interstate trade. The thesis details these decisions for the first six months of 1999 below. A list of the decisions of the remaining six months are contained in Annex 2.

4.2 Decisions made under Law No.287 of October 10 1990 involving Mergers that Affect Interstate Trade⁷⁶²

Biochemie/HOECHST Marion Roussel Deutschland (C3260)⁷⁶³

The decision concerned the acquisition by Biochemie GmbH by HOECHST M.R.

The relevant market was the production and distribution of pharmaceutical goods for the production of antibiotics. The Antitrust Authority stressed the low transport costs of the relevant product and the fact that pricing was the same in different Member States.

This constitutes strong evidence that the merger affected interstate trade.

ELF Atochem Vlissingen/TH Goldschmidt⁷⁶⁴

⁷⁶² All decisions are available at the following website: <http://www.agcm.it/tema0111.htm>

⁷⁶³ Provvedimento n. 6768 (C3260), 8th gennaio 1999 in Bollettino n.1 del 25 gennaio 1999, p.13.

⁷⁶⁴ Provvedimento n. 6773 (C3346) 14 gennaio 1999, Bollettino n.1 del 25 gennaio 1999, p. 26.

The decision concerned the acquisition by ELF Atochem Vlissingen Bv (ELF) of TH Goldschmidt AG (G).

The relevant product market was found to be the production of chemicals for the coating of glass. The Authority found that the product was traded between the Member States of the Community by several firms. Therefore, the merger clearly affected interstate trade.

Solvay/Winnofil Division (C3379)⁷⁶⁵

The decision concerned the acquisition by Solvay SA of Winnofil Division, a subsidiary of the undertaking Zeneca Ltd.

The relevant product market was the market for calcium carbonate. The product has low transport costs with regard to pricing and it was traded internationally and between Member States.

Therefore the merger affected interstate trade.

Dow Benelux-Dow France/ Shell (C3404)⁷⁶⁶

The decision concerned the acquisition by Dow of business areas of Shell.

The relevant product market was the production and distribution of two particular types of rubber (PBR and SBR).

It was found that there was significant interstate trade within the Community in the relevant product. Therefore, the merger would clearly affect interstate trade.

Textron/ Breed Italian Interiors (C3407)⁷⁶⁷

The decision concerned the acquisition of Breed Italian Interiors Srl by Textron Inc.

The relevant product market consisted of the production, transformation, processing and distribution of plastic products and technical articles for equipping motor vehicles.

The Authority noted that car manufacturers located in the Community bought the relevant product from producers all over Europe. The merger therefore clearly affected interstate trade.

Dayco Europe/ Lombardini F.I.M. (C3416)⁷⁶⁸

⁷⁶⁵ Provvedimento n. 6835 (C3379) 28 gennaio 1999, Bollettino n.4 del 15 febbraio 1999, p. 47.

⁷⁶⁶ Provvedimento n. 6908 (C3404) 18 febbraio 1999, Bollettino n. 7 of 8 March 1999, p.8.

⁷⁶⁷ Provvedimento n. 6911 (C3407) 18 febbraio 1999, Bollettino n. 7 of 8 March 1999, p.18.

The decision concerned the acquisition of Lombardini F.I.M. Spa by Dayco Europe Spa.

The relevant product market was the production and distribution of diesel engines and pistol engines of low power.

The Authority noted that motors were sold by the parties all over Europe (and on at a global level). Therefore, the merger clearly affected interstate trade.

Wacker Chemie/ Huels Silicone-Sivento Chemie Rheinfelden (C3366)⁷⁶⁹

The decision concerned the acquisition of parts of the business of Wacker Chemie GmbH by Huels Silicone GmbH, subsidiary of Sivento Chemie Rheinfelden GmbH.

The relevant product market was the production and sale of different types of silicone.

The relevant product was produced by various multinational companies based in different Member States or outside the Community. The merger clearly affected interstate trade.

Fabbrica Italiana Accumulatori Motocarri Montecchio/ Uranio (C3422)⁷⁷⁰

The decision concerned the acquisition of parts of Fabbrica Italiana Accumulatori Motocarri Montecchio Spa (FIAMM) by Uranio.

The relevant product was the production and distribution of lead batteries. The specific market for lead traction batteries involved supply and demand across the borders of the Member States. Therefore the merger clearly affected interstate trade.

Sparta/ Zucchini (C3449)⁷⁷¹

The decision concerned the acquisition of Zucchini Spa by Sparta Spa.

The relevant product market was the production and sale of electric lines. The Authority noted that there were significant exports and imports of the relevant product within Europe and therefore the merger clearly affected interstate trade.

Atotech Italia/Technoriv (C3444)⁷⁷²

The decision concerned the acquisition by Atotech Italia Arl of Tecnoriv Sas.

⁷⁶⁸ Provvedimento n. 6934 (C3416) 25 febbraio 1999, Bollettino n. 8 of 15 March 1999, p.121.

⁷⁶⁹ Provvedimento n. 6951 (C3449) 26 marzo 1999, Bollettino n.9 of 22 March 1999.

⁷⁷⁰ Provvedimento n.6966, Bollettino n.10 of 29 March 1999.

⁷⁷¹ Provvedimento n. 7022 (C3449) 26 marzo 1999, Bollettino n.12 of 12 April 1999.

⁷⁷² Provvedimento n. 7018 , Bollettino n.12 of 12 April 1999. ←

The relevant product market was the market for the sale of galvanised products destined for industrial use in refining metals.

The Authority noted that demand for the product did not have any geographic limitations but was based upon the factors of price and quality. There were low transport costs and no technical or natural barriers to imports. The merger therefore affected interstate trade.

BASF/ DSM ASP (C3459)⁷⁷³

The decision concerned the acquisition by BASF AG of DSM ASP BV.

The relevant product market was the production and distribution of thermoplastics.

The Authority noted that the market was characterised by consistent inter-state trade within the Community and with third countries in the Orient. The merger therefore clearly affected interstate trade.

Key Foggini Europe/ Gruppo Foggini (C3471)⁷⁷⁴

The decision concerned the acquisition of control of Gruppo Foggini by Key Foggini Europe S.a.r.l.

The relevant product was the production, transformation, processing and sale of plastic products and technical articles for equipping motor vehicles. The Authority found that the products were produced in various Member States by firms that sold throughout Europe. The merger clearly affected interstate trade.

AB Electrolux/ McCulloch Italiana (C3466)⁷⁷⁵

The decision concerned the acquisition by AB Electrolux of McCulloch corporation.

The relevant product market was the production and sale of portable equipment used in electric motors or thermics for the 'Do It Yourself' market. The Authority noted a strong interstate trade between the Member States in the relevant product. Therefore the merger clearly affected interstate trade.

Comau/ Renault Automation (C3479)⁷⁷⁶

The decision concerned the acquisition of Renault Automation Spa by COMAU Spa.

The relevant product market is the planning, realisation and sale of working mechanical systems and their assembly for the motor vehicle industry. There was

⁷⁷³ Provvedimento n.7053 (C3459) 9 aprile 1999, Bollettino n.13-14 of 26 April 1999, p.50.

⁷⁷⁴ Provvedimento n.7089 (C3471) 15 aprile 1999, Bollettino n. 15 of 3 May 1999, p.45.

⁷⁷⁵ Provvedimento n.7087 (C3466) 15 aprile 1999, Bollettino n. 15 of 3 May 1999, p.39.

significant sale and acquisition of the systems within the Community and the merger therefore affected interstate trade.

British Elevators/ IMI Marston (C3478)⁷⁷⁷

The decision concerned the acquisition by British Elevators Ltd of IMI Marston Ltd. The relevant product market was the production of products for use in space flight. The Authority determined that the relevant product was traded across Western Europe, if not wider. Therefore the merger affected interstate trade.

ACE/INA (C3468)⁷⁷⁸

The decision concerned the acquisition of INA Corporation by ACE Ltd. The relevant product market was the insurance sector. In particular the market for maritime and aeronautics was found to be international, including companies throughout the Community and outside the Community. The merger therefore affected interstate trade.

Clariant International/ Songwon Color Co. (C3510)⁷⁷⁹

The decision concerned the acquisition by Clariant International AG of Songwon Color Co. Ltd.

The relevant product market was the production and trade of pigments. The Authority noted that the imports into Italy of the relevant product during 1998 consisted of more than 90 % of domestic demand. Therefore the merger clearly affected interstate trade.

E.I. Du Pont de Nemours/ Duconti (C3538)⁷⁸⁰

The decision concerned the acquisition by E.I. Du Pont de Nemours and Co. of Duconti Srl.

The relevant product market was the production of nylon. The Authority noted that there was significant interstate trade within Europe. Therefore the merger affected interstate trade.

BASF Italia/ Dohmen Italia (C3537)⁷⁸¹

⁷⁷⁶ Provvedimento n.7124 (, Bollettino n.16 of 10 May 1999.

⁷⁷⁷ Provvedimento n.7123, Bollettino n. 16 of 10 May 1999.

⁷⁷⁸ Provvedimento n.7174, Bollettino n.18 of 24 May 1999.

⁷⁷⁹ Provvedimento n.7231, Bollettino n.21 of 14 June 1999.

⁷⁸⁰ Provvedimento n.7296 (C3538) 17 giugno 1999, Bollettino n. 24 of 5 July 1999, p.21.

The decision concerned the acquisition of Dohmen Italia Srl. by BASF.

The relevant product market was the production of chemicals for the curing industry. The market was characterised by large multinational producers. The Authority noted that some sales were made by the merging companies in other Member States. Therefore the merger affected interstate trade.

5 Evaluation

The analysis of the merger decisions taken in 1999 in three Member States has determined that there are many concentrations that affect interstate trade and that do not have a 'Community Dimension' within the meaning of Article 1(2) MR. It is reasonable to assume that this is reflected throughout the other Member States of the Community.

The above analysis also revealed the problems inherent to the two-thirds rule. While the rule effectively provides that concentrations that do not affect interstate trade do not fall within the scope of the Merger Regulation, it is set much too wide and allows for concentrations that do affect interstate trade to escape the application of the Merger Regulation.⁷⁸² The proviso it sets for the application of the Merger Regulation to a concentration - that the parties should be mainly active in more than one Member State (that is, at least one third or more of the undertakings' turnover made outside a single Member State) - means that concentrations between very large nationally-based undertakings that affect competition structures in more than one Member State will not fall within the scope of the Merger. Yet transactions involving undertakings whose activities are exclusively based in one Member State can effect interstate trade.⁷⁸³ The Commission highlighted this problem in its 1993 Report to the Council on the Review of the Merger Regulation. It noted that of 20 operations that had fallen within the two-thirds exclusion rule,⁷⁸⁴ eleven involved relevant geographical markets

⁷⁸¹ Provvedimento n.7295, Bollettino n.24 of 5 July 1999, p.18.

⁷⁸² See from the above examples the German decisions: *Deutsche Babcock/Steinmueller Verwaltungs/Philipp Holzmann/VEW*; *Comet/Piepenbrock Pyrotechnik* (See note 759).

⁷⁸³ See above, p.112.

The Commission itself has described two ways in which cross-border effect can be achieved by such transactions in its Green Paper on the Review of the Merger Regulation 1996, *ibid*, paragraph 25. It stated that there is an effect where:

- (i) *the activities within a single Member State have significant competitive repercussions in other parts of the Community; or*
- (ii) *where the entrenchment of a national position has spillover effects in the rest of the E.C.*

⁷⁸⁴ During the time period from the implementation of the Merger Regulation until the writing of the Report.

much wider than the relevant Member State for which the two-thirds rule applied. These cases usually concerned niche sectors such as steel, textiles, automobile components, machine tools and electric equipment for railways.⁷⁸⁵ Summarising the problem that the two-thirds rule represented, the Commission stated:

'...large groups of companies such as Siemens or Daimler Benz come frequently under the two-thirds rule, given their strong home markets and considerable exports to countries outside the EC, although the mergers where they are involved have frequently substantial repercussions across the Community'.⁷⁸⁶

Once again, in its Report in the year 2000, the Commission noted that a significant number (two hundred and thirty eight) of concentrations having significant cross-border impacts fell outside the scope of the Merger Regulation as a result of the operation of the two-thirds rule.⁷⁸⁷ Indeed, transactions that are fundamentally similar may fall within the scope of different jurisdictions due to the anomaly of the two-thirds rule. The Commission highlights the recent mergers of *VEBA/VIAG* and *RWE/VEW* in the German electricity market. In both cases, the impact would mainly be felt in Germany. However, a significant impact on the electricity markets in neighbouring countries was also likely to occur. In spite of this, only *VEBA/VIAG* fell to be considered under the Merger Regulation. In the *RWE/VEW* case, each of the parties achieved more than two thirds of their aggregate turnover in Germany.⁷⁸⁸ In the *VEBA/VIAG* case, the Commission opened a full investigation of the merger under Article 6(1)c MR to determine its effect on competition structures within the Community. In the event the Commission only allowed the transaction to take place subject to strict undertakings taken from the merging entities.⁷⁸⁹ The Bundeskartellamt assessed the *RWE/VEW* merger for its effect on competition within

⁷⁸⁵ Commission Report to the Council on the Merger Regulation, 1993, *ibid* at Paragraph 6.

⁷⁸⁶ Commission Report to the Council on the Merger Regulation, 1993, *ibid* at Paragraph 6.

⁷⁸⁷ Commission Review of the Merger Regulation, 2000, *ibid* Paragraphs 27 and 28. The Commission gives as an example the merger between *Chase Manhattan Corporation* and *Robert Flemmings Holdings Ltd* that had a 'significant cross-border impact' since both undertakings were international financial companies managing assets that are in hundreds of billions USD and are active in 40-50 countries worldwide. Nevertheless, the transaction fell within the 2/3 exception rule.

A full list of mergers involving multiple filings during the period January 1999-December 1999 may be found at the following website:

http://europa.eu.int/comm/competition/mergers/review/multiple_filings_1999.htm.

⁷⁸⁸ See Commission Review of the Merger Regulation, 2000, *ibid* Paragraph 28.

⁷⁸⁹ See *VEBA/VIAG*, Case M1673 Press Releases IP/00/114 of 04/02/2000 and IP/00/613 of 13.06.2000.

Germany (according to Article 24(1) GWB 1998⁷⁹⁰). It allowed the transaction, but only subject to equally strict undertakings that were however only aimed at ensuring competition was not distorted within *Germany* rather than throughout the Community as a whole.⁷⁹¹

In its 1993 Report, the Commission investigated the likely effects of, first, removing it altogether and, secondly, of reducing it to a three-quarters rule.⁷⁹²

To remove the two-thirds rule altogether would be to remove its valid role in providing that concentrations that do not affect interstate trade do not fall within the scope of the Regulation (although it may be submitted that most concentrations meeting the present high turnover threshold will automatically affect interstate trade). The Commission considered whether a widened application of Article 9 could solve any problems created by the removal of the two-thirds rule. Not only is Article 9 an unsuitable provision (in both its formulation and procedure) to act as an effective filter for concentrations that do not affect interstate trade, but the Commission rightly stated that an increased reliance on that provision would create too much jurisdictional uncertainty.

The Commission was more convinced by the idea of replacing the two-thirds rule with a three-quarters rule. It noted that in such event, seven of the eleven cases that had previously fallen within the two-thirds rule while having Community-wide effects would have fallen within the scope of the Regulation. By 1996, however, the Commission had changed its mind. It regarded a three-quarters rule as being too narrow, and likely to include concentrations with only *national* implications within the scope of the Merger Regulation. It stated that on balance the two-thirds rule is consistent with the subsidiarity principle.⁷⁹³

⁷⁹⁰ According to this provision, a merger must be prohibited if it can be expected to result in the creation or strengthening of a market dominant position, unless the transaction would also lead to improvements in the competitive structure of one or more of the markets and if such improvements outweigh the negative effects of market dominance (an exception that is difficult to prove in practice, see Rowley and Baker, *International Mergers and the Antitrust Process*, 1996 at p.634).

⁷⁹¹ *RWE/VEW* Case B8-309/99 of 03/07/2000. The whole decision can be found at the following website: <http://www.bundeskartellamt.de/B8-309-99.pdf>

⁷⁹² Commission Report to the Council on the Merger Regulation, 1993, *ibid*, at Paragraphs 4-6.

⁷⁹³ Commission's Green Paper on the Review of the Merger Regulation 1996, at Paragraph 66.

The Economic and Social Committee, on the other hand, in their response to the Commission's 1996 Green Paper, noted that '*the fact that a large part of turnover is derived in one country does not necessarily mean that a merger is not of Community significance*'. The Committee does not however push this observation to its logical conclusion. It states that national authorities are best placed to assess the impact of such mergers on market structure, so national competence can indeed be justified under the subsidiarity principle (and further, abolition of the rule would mean an increased workload for the Commission in the face of an already strained capacity). Yet if the subsidiarity principle is applied, the relevant Community objective is surely not 'sufficiently achieved' within the meaning of Article 5 EC if national authorities are able to assess concentrations having a '*Community significance*' (and therefore affecting that Community objective) at the national level according to national objectives.

Neven et al. suggest a different reform of the provision. They suggest that rather than depending upon the size of the activities of the firms outside of the Member State where the merger takes place as a proportion to those taking place inside the Member State, the condition should depend upon the absolute size of those activities taking place outside the Member State, based upon a quantitative threshold. They have recourse to the idea of '*international spillovers*', whereby a certain quantitative threshold of such spillovers would determine Community jurisdiction. This, it should be recalled, would correspond to the considerations of the Commission in its 1996 Green Paper with regard to the most appropriate definition of 'Community Dimension', even though it determined in the final analysis that the turnover thresholds should be retained.⁷⁹⁴

Prima facie, this solution makes sense. Concentrations may, for example, fall into the two-thirds condition and yet involve very large undertakings, whereby the turnover that is made outside the relevant Member State (that is, less than one third of the total) is actually very high (and affects significantly specific niche markets at the Community level). Nevertheless, the solution fails to confront the *legal* problems inherent to the existing jurisdictional trigger of the Merger Regulation. It is still reliant upon a set formalistic and quantitative criterion. A threshold of turnover made outside the Member State where the concentration takes place would necessarily have to be set at an arbitrary level with regard to the actual effect the concentration may

have upon interstate trade. It would not therefore be coherent with the legal bases of the Regulation.

If the two-thirds rule - or an amended version - does not provide the means to rationalise the operation of the turnover thresholds of the Merger Regulation so that they are coherent with the legal bases upon which the Regulation was implemented, it is necessary to consider whether there are any other further 'fine-tuning' provisions which may be interpreted to carry out this role. It is necessary, first, to identify the relevant provisions, secondly, to consider why they presently allow concentrations that affect interstate trade to escape the scope of the Merger Regulation and, thirdly, to consider whether they may be interpreted in the future to avoid this anomaly.

6 Referral of a Concentration to the Commission - Article 22(3) MR

6.1 Origin

In parity with Article 9 of the Merger Regulation, Article 22(3) was also included in order to compromise the Regulation to satisfy the demands of a Member State, in this case Holland.⁷⁹⁵ This concession allowed a Member State to refer a concentration below the Community Dimension thresholds to the Commission.

The intention behind the inclusion of this provision was to appease several of the smaller Member States that had been in favour of a wider scope of application of the Merger Regulation because they themselves had no national system of merger control. The provision therefore allows them to pass concentrations which were of concern to them to the Commission for assessment, where the conditions of Article 22(3) MR are fulfilled.

In spite of the rather different intention of the implementation of Article 22(3) MR, questionable is why the provision does not operate in practice to ensure that all mergers affecting interstate trade fall under the scope of the Merger Regulation.

6.2 The Substantive Provision of Article 22(3) MR

⁷⁹⁴ See above, pp.153-156.

⁷⁹⁵ At the time of the implementation of the Merger Regulation, Holland did not have a national system of merger control.

'If the Commission finds, at the request of a Member State or at the joint request of two or more Member States, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State or States making a joint request, it may, insofar as that concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).'

The literal text of the provision is an effects-based condition. It includes the explicit condition that a concentration that is referred to the Commission must '*affect interstate trade*'.⁷⁹⁶

Nevertheless, it does not cover *all* concentrations which have or may have an effect on interstate trade. It only covers those concentrations which *do* affect interstate trade *and* which create or strengthen a dominant position as a result of which competition in the territory of the relevant Member State or States is significantly impeded.

The condition therefore incorporates a substantive assessment of the concentration for its effect on competition structures at the national level. In spite of this, the Commission has shown that it regards Article 22(3) MR as a provision that determines *jurisdiction* and not just enforcement interest. In the first of the *Holland Media* cases,⁷⁹⁷ the Commission showed that it would initiate the substantive assessment of the merger from the very beginning and was not bound by the preliminary findings of the Member State authority. The Commission justified this approach by referring to the operation of Article 9, which allows the Commission to refer *specific* products and services back to Member States for investigation.⁷⁹⁸ The approach was upheld by the Court of First Instance.⁷⁹⁹ However, it does not take jurisdiction in the conventional sense since the test still concerns the effect of the concentration on competition structures in the relevant *Member State or States* and not in the *Common Market*.

⁷⁹⁶ In *British Airways/Dan Air* the Commission held that the concentration fulfilled this condition because the acquisition '*has effects on air transport between Belgium and the United Kingdom*', Case IV/M278 OJ (1993) C68/5 at paragraph 7.

⁷⁹⁷ *RTL/Veronica/Endemol* Case M553, OJ (1996) L134/32.

⁷⁹⁸ *RTL/Veronica/Endemol* Case M553, OJ (1996) L134/32, paragraphs 18 and 19.

⁷⁹⁹ *Endemol Entertainment Holding BV v Commission of the EC* Case T-221/95 ECR (1999) at paragraph 40.

Clearly, the provision's appropriateness to rationalise the operation of the turnover thresholds is limited since it only applies to a proportion of concentrations that actually or potentially affect interstate trade (that is, those that restrict competition within a Member State). The *fundamental* inability of Article 22(3) MR to provide that the second condition is fulfilled by the jurisdictional trigger of the Merger Regulation - that all concentrations affecting interstate trade fall within the scope of the Merger Regulation - is however the result of its procedural structure.

6.3 The Procedural Structure⁸⁰⁰

Concentrations may be referred to the Commission under Article 22(3) MR only at the discretion of the Member State or States. There is no legal obligation to refer such concentrations, even though it is highly likely that they actually affect legal Community objectives (since they affect interstate trade *and* impede competition significantly).

Thus, the potential rationalising function of the provision depends first upon the Member State detecting such a condition. This is usually only the case if there is a system of prior notification in the relevant Member State⁸⁰¹ or the transaction has to be made public. Secondly, the Member State must have the will to pass it to the Commission for assessment under Community law.

Analysis of the limited circumstances in which the Article has been invoked reveals that the Member States have only made referrals on the basis of Article 22(3) MR for the purposes for which the provision was originally intended: concentrations which affect the competition structures on national markets which the relevant Member State cannot control due to a lack of appropriate legal mechanisms.

To date, only five decisions were successfully referred to the Commission: *British Airways/Dan-Air*; the two '*Holland Media Cases*'; *Kesko/Tuko*; *Blokker Toys 'R' Us*.⁸⁰²

⁸⁰⁰ For a detailed description of the procedure under Article 22(3) MR, see eg., Cook and Kerse, *ibid*, pp245-8; Miersch, *ibid*, pp.188-192; Downes and Ellison, *ibid*, pp. 63-65.

⁸⁰¹ The UK, France and Luxembourg do not have mandatory notification procedures for mergers. See Annex 1.

⁸⁰² *British Airways/Dan Air*, Case IV/M278, OJ (1993) C 68/5; *The Holland Media Cases (RTL/Veronica/Endemol)* Case M553, OJ (1996) L134/32 and OJ (1996) L294/14; *Kesko/Tuko* Case M784 OJ (1997) L110/53; *Blokker Toys 'R' Us (II)* Case M890 OJ (1998) L316/1.

Three of the successful referrals were made by Holland. The first decision of the *Holland Media Group* concerned three Dutch language pay TV networks operating in Holland and the largest independent producer of Dutch language television programmes.⁸⁰³ The Commission accepted the referral request. In the second, the Commission accepted a request from the Dutch Government to initiate proceedings under the Regulation for the operation *RTL/Veronica/Endemol*, concerning the (separate) markets for TV advertising, TV broadcasting and independently produced Dutch TV programmes in Holland.⁸⁰⁴

In *Blokker Toys 'R' Us* (1993), the Commission again accepted the referral, and finding that the proposed merger would strengthen the dominant position of Blokker in the Dutch specialist toy outlets market.

The third instance of a referral of a merger case from a Member State being accepted by the Commission was in 1996 in *Kesko/Tuko*. This case concerned an acquisition by Kesko of Tuko, both Finnish retail trading groups, which had already been carried out. The Commission accepted a referral from the Finnish authorities.⁸⁰⁵

A fourth referral was made by the Belgium Government in 1992 in *British Airways/Dan Air*, concerning the effect on competition in the territory of Belgium in connection with air routes between London and Brussels.

All of the referrals involved Member States which at the time of the referral did not have a system of merger control. Holland only implemented a system of merger control in 1997.⁸⁰⁶ Finland amended its existing legislation to include concentration control in 1998.⁸⁰⁷ Belgium implemented a law on mergers in 1991, which did not however enter force until April 1993.⁸⁰⁸

Since the implementation of a system of merger law in each of these two Member States, neither has referred a concentration to the Commission under the Article 22(3) MR procedure. This is not a surprising statistic. There is no reason to believe that national authorities of the larger Member States will willingly give up control over

⁸⁰³ *RTL/Veronica/Endemol* Case M553, OJ (1996) L134/32.

⁸⁰⁴ *RTL/Veronica/Endemol*, Case M553, OJ (1996) L294/14.

⁸⁰⁵ Hutchings, M., 'The Lessons of the Kesko/Tuko Case', 2 ECLR 75 (1997).

⁸⁰⁶ Competition Act, Statute Book 1997, 242.

⁸⁰⁷ Act on Restrictions on Competition (480/92), as amended.

⁸⁰⁸ Law on the Protection of Economic Competition of 5 August 1991 (as amended by the laws of April 26 1999).

mergers which are significant in terms of their national markets, especially given the inherent sovereignty issues involved in Community control of mergers.⁸⁰⁹

6.4 Summary

Article 22(3) MR is limited in its literal text as a provision that could ensure that all concentrations affecting interstate trade are assessed under the Merger Regulation.

Furthermore, the Article is also restricted by the fact that it may be invoked at the sole discretion of the relevant Member State or States. History has shown that this discretion is not exercised in a way that allows the provision to fulfil the second condition. It depends upon whether a Member State has an adequate legal mechanism to assess concentrations at the national level. Now that all Member States have a system of merger control, Article 22(3) MR may well lose its significance. It is however possible that it could be invoked for other reasons, for example where a Member State wishes to avoid shouldering the responsibility for prohibiting a merger for political reasons, whether domestic or international.

It is further necessary to consider whether the amendments made to Article 1MR that were implemented in 1998 operate to rationalise the operation of the turnover thresholds to be absolutely consistent with the operation of the interstate trade criterion.

7 The Amendments to Article 1 MR and Multiple Jurisdictions

Recall that the Commission has consistently stated that ideally, with regard to the objectives of the Single Market and the principle of a one-stop-shop, all concentrations with a cross-border effect should be assessed at the Community level.⁸¹⁰ Within this context, in its Green Paper on the Review of the Regulation in 1996, the Commission expressed concern about the high level of multiple filings taking place in the Community.⁸¹¹ The Commission's proposals for an amendment to Article 1 MR in its 1996 Green Paper were directed specifically at rectifying this

⁸⁰⁹ See above.

⁸¹⁰ Commission's Green Paper on the Review of the Merger Regulation, *ibid*, at para's 31-2. See also statement by Commission in Commission XXIIIrd Report on Competition Policy 1993 (1994, OPEEC, Luxembourg), paragraph 43.

⁸¹¹ Commission's Green Paper on the Review of the Merger Regulation, 1996, at Paragraphs 87-88.

situation. Thereby, however, its suggestion was substantially modified before implementation by the Council. Direct reference to multiple filing was lost, and recourse was made to turnover thresholds, albeit at a lower level and throughout at least three Member States.⁸¹² According to the amendment to Article 1 MR, concentrations must also be notified to the Commission when:

a) the undertakings concerned have a combined aggregate world-wide turnover of more than ECU 2,500 million; b) in each of at least three Member States, the combined aggregate turnover of all undertakings concerned is more than ECU 100 million; c) in each of at least three Member States included for the purpose of point b, the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million and d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million, unless each of the undertakings concerned achieves more than 2/3's of its aggregate Community-wide turnover within one and the same Member State'.⁸¹³

In practice, the amendment to Article 1 MR has certainly operated to refine the operation of the jurisdictional trigger to cover concentrations that affect interstate trade. Of the 39 concentrations that fell under the revised thresholds up to January 2000, only five have clearly involved only national geographic markets for all the relevant products, and all of these decisions affected more than one national market.⁸¹⁴ The majority of decisions concerning concentrations falling within the revised thresholds involved geographic markets that were at least Community-wide.⁸¹⁵

⁸¹² For a more detailed history, see above, pp.150-156.

⁸¹³ Note that Article 1(4) MR, as amended by Council Regulation 13010/97, requires the Commission to report to the council before 1 July 2000 on the operation of the threshold criteria set out in paragraphs 2 and 3.

⁸¹⁴ *ICI/Williams*, Case Comp/M.1567, OJ C101 of 03/04/1998; *Vedior/Select Appointments*, Case Comp/M.1702, OJ C272 of 25/09/1999; *AKZO Nobel/Hoechst Roussel Vet*, Case Comp/M.1681 OJ 294 of 14/10/1999; *Johnson and Johnson/Depuy*, Case Comp/M.1286, C294 of 23/09/1998 and *Getronics/Wang*, Comp/M.1561, OJ C143 of 21/05/1998.

⁸¹⁵ Eight cases affected geographic markets that were at least the EU as a whole: *Lucchini/Ascometal*, Case Comp/M.1567, OJ C146 of 21/05/1999; *Getronics/Wang*, Case Comp/M.1561, OJ C143 of 21/05/1998; *Newell/Rubbermaid*, Case Comp/M1355, OJ C387 of 12.12.1998; *Voest Alpine Stahl/Vossloh/VAE* Comp/M1259, OJ C283 of 12/09/1998; *Siebe/Eurotherm*, Case Comp/M1195, OJ C148 of 14.05.1998; *UPM-Kymmene/April*, Case Comp/M1006, OJ C88 of 24/03/1998; *Hyundai Electronics/LG Semicon*, Case Comp/M1492, OJ C151 of 29/05/1998; *Huhtamaki Oyj/Packaging Industries Van Leer*, Case Comp/M1656, OJ C248 of 01.09.1999.

Ten cases involved geographic markets at least EEA-wide: *Lucent Technologies/Ascend Communications* Comp/M1440, OJ C64 of 06/03/1999; *Dana/Glacier Vandervell*, Case Comp/M1335, OJ C353 of 19/11/1998; *Constructor/Dexion*, Case Comp/M1318, OJ C308 of 08/10/1998; *ELF Atochem/Atohaas*, Case Comp/M1158, OJ 141 of 06/05/1998;

Nevertheless, it is severely restricted in its ability to bring concentrations that affect interstate trade comprehensively within the scope of the EC Merger Regulation.

First, it is clear that the provision is only of very limited application, applying only to *large* mergers (with a combined aggregate turnover of ECU 2,500 million) in *at least three* Member States. Secondly, it retains the anomalous 2/3 rule.⁸¹⁶ Thirdly, and above all, turnover remains the relevant criterion: the operation of the criterion cannot pertain to cover all mergers having an effect on cross-border trade since it employs a condition of size rather than effect. It does not even require the related - although different - condition of multiple filing having actually taken place.⁸¹⁷

There is further some doubt whether the amendment is serving its regulatory efficiency goal adequately. European industry and business have been seen to complain about the complexity of the rule and the resultant costs and time required, and have even proposed that it should be repealed in the face of a straightforward lowering of the thresholds in Article 1(2) MR.⁸¹⁸

8 Conclusion on the Second Condition

The analysis undertaken above has revealed that the second condition is not fulfilled: the jurisdictional trigger does not bring all concentrations that affect interstate trade within the scope of the Merger Regulation.

Thereby, Article 22(3) MR in its present application does not operate to redress this problem. Even if it may be interpreted to perform this role, its procedural structure

Ispat/Unimetal, Case Comp/M1509, OJ C151 of 29/05/1999; *Norsk Hydro/SAGA* Case Comp/M1573, OJ C162 of 09/06/1999; *Suez Lyonnaise/Nalco* Case Comp/M1631, OJ C215 of 28/07/1999; *Dupont/Sabancı*, Case Comp/M1538, OJ C311 of 29/10/1999; *Dupont/Teijin*, Case Comp/M1599, OJ C309 of 28/10/1999; *Solutia/Viking Resins*, Case Comp/M1763, OJ C339 of 26/11/1999.

One case had a relevant geographic market that was world-wide: *Solvay/BASF*, Case Comp/M1469, OJ C125 of 06/05/1999.

⁸¹⁶ See above, pp.222-226.

⁸¹⁷ The Review of the jurisdictional trigger carried out in 2000 by the Commission determined that a significant number of multiple notifications were still taking place in spite of the amended Article 1 MR. Of a total of 4,303 mergers undertaken between March 1998 and the end of 1999, 294 cases were notified to two national competition authorities rather than to the Commission because they did not meet the turnover thresholds. Another 31 cases were notified in three Member States and 39 in more than three Member States.

See Commission Report 2000, *ibid*, paragraphs 34-48.

⁸¹⁸ See Commission Report 2000, *ibid*, paragraphs 59-61.

would prevent it from fulfilling it adequately. The amendments to Article 1 MR were implemented in 1998 address the problem of multiple filing directly. For this purpose, they have performed a satisfactorily, if far from perfectly. However, a provision that renders all concentrations with turnovers above a certain threshold in at least three Member States (and maintaining the two-thirds rule) clearly will not bring all concentrations having an actual or potential effect on interstate trade within the scope of the Merger Regulation. Therefore, the specific multiple filing rule does not and cannot act to 're-tune' the operation of the jurisdictional trigger of the Merger Regulation so that it is absolutely consistent with the operation of the interstate trade criterion.

D CONCLUSION - THE INCONSISTENCY OF THE JURISDICTIONAL TRIGGER OF THE MERGER REGULATION WITH THE OPERATION OF THE INTERSTATE TRADE CRITERION

The Merger Regulation was implemented according to specific legal bases of the Treaty - Articles 83 and 308 EC.

According to the legal base of Article 83 EC, the principles laid down in Articles 81 and 82 EC are transferred to the Merger Regulation to the extent that they are applicable to concentrations. Thereby, the Merger Regulation should apply to all such concentrations that affect interstate trade. The scope of this criterion should not be materially extended or restricted, although there is some possibility that they might be legitimately 'refocused' for certain types of agreement or conduct.

According to Article 308 EC, the Regulation should at least be appropriate to help fulfil the objective of maintaining a system of undistorted competition within the internal market.

The jurisdictional trigger of the EC Merger Regulation depends upon the structural location of the undertakings concerned, together with a quantitative threshold. The system of exceptions and referral procedures have resulted in a patchwork criterion that remains dependent upon formalistic provisions.⁸¹⁹ Where the turnover thresholds

⁸¹⁹ Note that in general economic terms, Ehrlich and Posner have demonstrated the superiority of functionalistic rules over formalistic rules where the rule is to pertain to a complex condition. *Ehrlich and Posner* describe such complex realities in conduct as 'heterogeneous

are high, they operate in combination with the fine-tuning provisions to ensure that concentrations not affecting interstate trade do not fall within the scope of the Merger Regulation. This is however at the expense of many concentrations that do affect interstate trade falling outside the scope of the Regulation.

In sum, the formalistic jurisdictional trigger of the Merger Regulation is not absolutely consistent with the operation of the interstate trade criterion. If the turnover thresholds were lowered (as is proposed by the Commission), the two-thirds provision would continue to ensure that mergers that do not affect interstate trade do not fall within the scope of the Merger Regulation. Articles 22(3) MR and Article 1 MR (as amended) cannot however provide that all concentrations affecting interstate trade would fall within the Regulation's scope.

This fact raises two important issues.

First, it is questionable what the implications of this fact are for the legitimacy of the Merger Regulation as a whole. It is necessary to examine the nature of the legal obligation that arises according to the legal bases of Article 83 EC and Article 308 EC with regard to the EC Merger Regulation specifically.

Secondly, it will be necessary to consider what the implications of this fact are with regard to Community competition policy and the reason for the implementation of the European Merger Regulation.

conduct', and consider that if such conduct is subject to formalistic rules, there will be 'allocative inefficiency' because of the imperfect fit between coverage of a rule and the conduct sought to be regulated - it results in 'underinclusion' and 'overinclusion' in the condition. See Ehrlich and Posner, *ibid*, at p.268.

**IX THE LEGAL IMPLICATIONS OF THE
INCONSISTENCY OF THE JURISDICTIONAL
TRIGGER OF THE MERGER REGULATION WITH
THE INTERSTATE TRADE CRITERION**

A THE ISSUE

As shown above, the operation of the jurisdictional trigger of the Merger Regulation is not absolutely consistent with the application of the interstate trade criterion. Questionable is the legal implications of this. The answer clearly depends upon the nature of the actual legal obligation deriving from the legal bases of Articles 83 and 308 EC with specific regard to the EC Merger Regulation. Do they determine that all mergers that actually or potentially affect interstate trade (directly or indirectly) should fall within its scope?

B THE LEGAL BASE OF ARTICLE 308 EC

According to the literal text of Article 308 EC, a provision implemented on this legal base must be 'appropriate' to fulfil the relevant objective of the Community.⁸²⁰ Furthermore, it was shown above that Article 308 EC invokes the principle of proportionality with regard to the Community objective pursued in the application of the provision.⁸²¹ The relevant Community objective was shown above to be the maintenance of undistorted competition within the internal market.

It is necessary to analyse in detail the legal obligation that the condition 'appropriate' and the principle of proportionality create within the context of the implementation of the Merger Regulation. Do they require that *all* concentrations that may distort competition in the internal market should fall within the scope of the Merger Regulation?

⁸²⁰ See above, pp.190-191.

1 The Legal Obligation According to Article 308 EC

1.1 The Principle of Proportionality

The principle of proportionality requires that:

'Any action by the Community shall not go beyond what is necessary to achieve the objective of this Treaty',⁸²²

Thereby, any hardship caused by the provision must not be disproportionate to the benefits accruing from the attainment of the objective.⁸²³ The relevant Treaty objective has been shown above to be the maintenance of undistorted competition within the internal market. Since all the concentrations that fall within Article 1 MR were shown to have (actually or potentially) affected interstate trade, they have also (actually or potentially) distorted competition in the internal market.⁸²⁴ Therefore the jurisdictional trigger of the Merger Regulation does not offend the principle of proportionality. Furthermore, those concentrations that do fall within the scope of the Regulation are not subject to automatic prohibition, but are assessed for their actual (future) effect upon competition.

1.2 An 'Appropriate' Provision

As detailed above, the majority opinion of the literature and the opinion of the Commission is to be preferred that Article 308 EC contains an obligation to act where its conditions are fulfilled.⁸²⁵ Hence, the discretion of the Commission and the Council lies only in determining whether the conditions of Article 308 EC are fulfilled. If they decide that the conditions are fulfilled, they *must* implement the appropriate provision in order to fulfil the relevant Community objective.⁸²⁶

As shown above, there is a need to control concentrations at the Community level in order to maintain undistorted competition within the internal market. Therefore, there was an *obligation* to implement the Merger Regulation. Questionable however is whether there was a legal obligation to bring *all* concentrations within the scope of

⁸²¹ See above, p184. See also, eg. Dorn, *ibid*, p.50.

⁸²² Article 5 EC, third paragraph

⁸²³ Hartley, T.C., *The Foundations of EC Law*, 1988 (4th ed.) Oxford University Press at p.106.

⁸²⁴ See above, pp. 116-122.

⁸²⁵ Commission Reply No. 406/75 to Mr Maigaard, OJ 285/27 (28) of 13th December 1975.

⁸²⁶ *Schwartz, I* in: Groeben et al., *Kommentar*, *ibid* pp.683-4.

the Merger Regulation that affected interstate trade (and therefore potentially hindered integration).

Turning to the literal wording of the provision, it is clear that the answer is no. A provision based upon Article 308 EC is not required to fulfil the relevant Community objective *exhaustively* (which are mostly very vague and broad), but only to be '*appropriate*' in the general aim of its fulfilment. This mirrors the subsidiarity principle under Article 5 EC. The Merger Regulation certainly falls within the broad terms of this condition since all concentrations that reach the jurisdictional thresholds will or may distort competition within the internal market. The Merger Regulation will assess such concentrations for their actual future effect upon competition within the Community, whereby those that create or strengthen a dominant position and thereby significantly distort competition within the Community will be prohibited.

C THE LEGAL BASE OF ARTICLE 83 EC

As detailed above, the Merger Regulation is partly based upon Article 83 EC, whereby it becomes the implementing Regulation for the principles laid down in Articles 81 and 82 EC where they apply to mergers. Thereby, the Merger Regulation may not materially extend or restrict the interstate trade criterion with regard to transactions that fall within the scope of Articles 81 and 82 EC.⁸²⁷

Nevertheless, the analysis of Article 83 EC carried out above suggested that, by analogy in particular with the developments in the use of Article 89 EC as a legal base, Article 83 EC may nonetheless allow a more refined interpretation of Articles 81 and 82 EC for certain types of *sui generis* transactions, or even sectors of the economy (within the context of the overriding goal of Community competition policy - Single Market integration). Recall that the *de minimis* Regulation for state aid applies only to those types of aid that do not include export aid or aid favouring domestic over imported products.⁸²⁸

With this hypothesis in mind, the particular characteristics of the regulation of mergers within the Community should be considered. Mergers may have both positive

⁸²⁷ See above, pp.174-179

and negative effects on the integration paradigm, whereby the Community has held a long-term belief that some deserve to be encouraged (in terms, particularly, of 'external integration' as well as the rescue of a failing firm) as opposed to prohibited. Added to this is the particular need for certainty and speed of decision-making that mergers require. Further, their regulation at the Community level involves political and national sensitivities which, if not the same, are akin to those engendered by the regulation of state aid. In short, the regulation of merger transactions is different.⁸²⁹ It is these differences that determine that the rules enacted for the implementation of Articles 81 and 82 EC are ill-adapted for their control, which lies outside the defining purpose of these provisions.⁸³⁰ We have seen above how the technical principles of Articles 81 and 82 EC were strained to an almost artificial degree in order to cover some types of mergers.

By analogy with the experience within the realm of state aid control, it is not unreasonable therefore to consider that the specific requirements inherent to the control of concentrations allow the use of the legal base of Article 83 EC to re-define the principles of Articles 81 and 82 EC in a way that is different and more suitable for that role. This would not of course allow a *replacement* of the literal text of Articles 81 and 82 EC, nor a material extension of their scope. It may however allow a *re-interpretation* within the context of a particular type of *sui generis* transaction - the concentration. Hence, with specific regard to the jurisdictional issue, a more restricted application of the interstate trade criterion might be both more appropriate and legitimate.

Recall the Commission's claim that:

'...below (the thresholds') levels a concentration would not normally significantly affect trade between Member States'.⁸³¹

⁸²⁸ Council Regulation 69/2001 OJ (2001) L010/30, Preamble Paragraph 4. This is in line with the World Trade Organisation Agreement on Subsidies and Countervailing Measures (OJ (1994) L336/156).

⁸²⁹ See above, pp.33-41

⁸³⁰ See above, Part IV of the thesis.

⁸³¹ Annexed to Merger Regulation, at 'Re Article 22'.

Similarly, although not so specifically, Recital 9 of the Merger Regulation states that: '*...the Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State*'.

We know of course that within the context of the standard application of the interstate trade criterion for Articles 81 and 82 EC, this statement is not correct: there is a significant number of concentrations that do not fall under the scope of the Merger Regulation, and yet affect interstate trade in the traditional sense.⁸³² However, where the Article 1 MR is considered to be a specific *interpretation* of the interstate trade criterion for (and only for) *concentrations* (as defined by Article 3 MR and to which Articles 81 and 82 EC apply) within the context of a provision implemented on the basis of Article 83 EC, the Commission's statement does not seem so eccentric. It assumes that there is a different 'appreciability' criterion for concentrations that is necessary because of the different implications they may have for the objectives of the Community.

The significance of this argument cannot be underestimated. It points to a automatic legitimacy of the Merger Regulation *as a whole* with regard to its legal base of Article 83. It should not be forgotten that the turnover thresholds do not represent the only 'amendment' of the principles of Articles 81 and 82 EC (as they apply to mergers) by the EC Merger Regulation: it also incorporates different substantive analyses and procedural rules.

However persuasive this argument appears, it may however be maintained that, in theoretical terms, the interstate trade criterion may not be 're-defined' for concentrations: if we argue for example that an analogy between the regulation of conduct under Articles 81 and 82 EC and under the provisions for state aid cannot be made⁸³³; if we argue that certain types of state aid presents a particular area of regulation that raises issues that the regulation of mergers does not; if we argue (against most of the evidence presented in the thesis) that 'concentrations' do not represent *sui-generis* transactions within the context of the overriding goal of Community competition policy; or if we even maintain that the Council's action in the implementation of regulations on the basis of Article 89 EC has been as illegitimate as would be the use of Article 83 EC in a similar way.

These arguments might have serious consequences for the legitimacy of the Merger Regulation as a whole by virtue of its jurisdictional trigger that is of much narrower

⁸³² See analysis above, pp.210-222.

⁸³³ By implication, this is the position of *Schroeter*, who considers that Article 1 MR was contrary to Article 83 EC, *Schroeter, H.*, in: Thiesing/Groeben/Ehlermann, *ibid* p907.

application than is the interstate trade criterion (aside from the substantive assessment issue that is undertaken under Article 2 MR). Furthermore, it should not be forgotten that Articles 81 and 82 EC create private rights and obligations that are justiciable before national courts:⁸³⁴ there might further be a constitutional issue.

Two questions must thereby be considered:

First, to what extent does it purport to apply to types of concentrations for which Articles 81 and 82 EC are also applicable?

Secondly, to what extent does it allow the continued application of Articles 81 and 82 EC to such of these concentrations that affect interstate trade but do not fall within the jurisdictional trigger of the Merger Regulation?⁸³⁵

1 The Interface between Articles 81 and 82 EC and the Merger Regulation in their Application to 'Concentrations'

1.1 The Issue

Initially it is necessary to determine the extent to which the Merger Regulation applies to the *types* of concentration that fall within the scope of Articles 81 and 82 EC (ignoring for the moment the issue of whether or not they have a Community Dimension).

1.2 'Concentration' within the Meaning of the Merger Regulation - Article 3 MR

Recital 23 of the Regulation describes concentrations as operations '*bringing about a lasting change in the structure of the undertakings concerned*'.

Article 3(1) MR provides the legal conditions which constitute such a lasting change in the structure of undertakings:

'(a) two or more previously independent undertakings merge, or

⁸³⁴ *BRT v SABAM* Case 127/73 (1974) ECR 51, (1974) 2 CMLR 238.

⁸³⁵ Note that the issue raises further questions concerning substantive assessment - to what extent does the substantive assessment under the Merger Regulation for mergers for which Articles 81 and 82 EC are applicable reflect the substantive assessment under these two Articles. This is of particular significance with regard to Article 81 EC, since according to the *Philip Morris* doctrine the implementation of a concentration itself is prohibited, without the need to assess whether a strengthening of a dominant position has taken place (cf. Article 2 MR).

The thesis however is only concerned with an appropriate *scope* for the Merger Regulation, and therefore will not address this issue directly.

(b) one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities of assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings’.

A concentration is therefore the result, either of a *merger* between independent undertakings, or the *acquisition of control* by one or more undertakings in one or more other undertakings.

1.2.1 Merger (Article 3(1)(a))

There is no further explanation in the Merger Regulation determining when two (or more) previously independent undertakings are deemed to have ‘merged’. In practical terms with regard to the scope of the Regulation, the condition is in any case unnecessary, since even in its narrowest sense (taken to mean the total fusion of previously independent undertakings), it is a condition which falls within the scope of the condition of Article 3(1)(b) (the acquisition of control).⁸³⁶

1.2.2 Acquisition of Control (Article 3(1)(b))

Article 3(3) MR defines ‘control’:

‘For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- (a) ownership or the right to use all or part of the assets of an undertaking;
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking’.

It is not necessary to analyse the definition of ‘acquisition of control’ exhaustively in the abstract for the purposes of the thesis. We are interested in how the scope of Article 3 MR relates specifically to the scope of Articles 81 and 82 EC to apply to concentrations, more specifically: to what extent the definition of ‘concentration’ under Article 3 MR covers concentrations which fall within the scope of Articles 81 and 82 EC.

⁸³⁶ The paragraph of the Article does however have some *procedural* relevance. A concentration according to Article 3(1)a must be notified jointly (Article 4(2) MR).

Thereby, it is practical consider Articles 81 and 82 EC separately.

1.3 The Application of Article 82 EC to Concentrations and the Definition of 'Concentration' under Article 3 MR

As demonstrated above, according to the *Continental Can* doctrine Article 82 EC prohibits any concentration involving an undertaking in a position of single or joint dominance that distorts the normal progress of competition on the relevant market (that is, the maintenance of the degree of competition still existing in the market or the growth of that competition).

The doctrine was not dependent upon the specific type of agreement by which the concentration is effected. It was a more general prohibition based upon the objectives of the Community. Recall that the Court of Justice stated:

'Abuse may...occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, ie, that only undertakings remain in the market whose behaviour depends on the dominant one.'⁸³⁷

Therefore, any strengthening of the position of an undertaking on a market on which it is already in a dominant position qualifies for prohibition under the *Continental Can* doctrine. This condition is clearly embraced by Article 3 MR, that extends the scope of the Merger Regulation to all transactions effecting total merger or the acquisition of control.⁸³⁸

The Merger Regulation according to Article 3 MR therefore applies to all the *types* of concentration to which Article 82 EC is applicable (apart from the exceptions for credit and financial institutions and insurance companies within Article 3(5) MR).

⁸³⁷ *ibid* at 245.

⁸³⁸ Thereby, it prohibits such concentration that create or strengthen a dominant position, as a result of which competition will be significantly impeded on the common market or in a substantial part of it. The concept of dominant position is the same as that used under Article 82 EC, see eg., *Whish*, (1993) *ibid* at pp717-9; *Faull and Nickpay*, *ibid*, at points 4.141. Furthermore, the Court of Justice has confirmed the Commission's findings that the Merger Regulation may be applied to oligopolistic markets, see *French Republic and Soci t  commerciale des potasses et de l'azote (SPCA) and Entreprise mini re et ch ique (EMC) v Commission* Joined Cases C-68/94 and C-30/95 (1998) ECR I-1375.

1.4 The Application of Article 81 EC to Concentrations and the Definition of 'Concentration' under Article 3 MR

1.4.1 The Issue

The analysis carried out above into the applicability of Article 81 EC to concentrations revealed that the scope of Article 81 EC extends to some types of concentration. It is necessary to consider the extent to which the Merger Regulation applies to the same types of concentration according to Article 3 MR.

First, the interface between the application of the Merger Regulation and the application of Article 81 EC to concentrations *in general* may be considered.

Secondly, the issue of *joint ventures* falls to be considered. This is a result of more recent developments, whereby transactions that would previously have been treated as co-operative and exclusively of relevance to Article 81 EC are now treated as concentrations falling within the scope of Article 3 MR.

1.4.2 Concentrations In General

It has been demonstrated above that the *Philip Morris* case established that horizontal concentrations would be prohibited according to Article 81(1) EC where they are undertaken by previously independent undertakings according to a direct agreement or a friendly public take-over. Vertical and conglomerate mergers undertaken by previously independent undertakings according to a direct agreement or a friendly public take-over are also prohibited where they have as an object or effect a restriction of competition within the meaning of Article 81(1) EC. Specifically, there is always required some form of agreement or concerted practice (within the meaning of Article 81 EC) between the parties to the concentration. The scope of the principle extends from the acquisition of control to total merger.

The condition under Article 3 MR for a 'concentration' within the meaning of the Merger Regulation is not restricted to the implementation of concentrations *by agreement* alone, but extends to the implementation of a concentration *per se*. It also extends to vertical and conglomerate mergers, regardless of whether they have as an object or effect a restriction of competition within the meaning of Article 81(1) EC.

The analysis used to establish oligopoly under the Merger Regulation is the same as is employed in the application of Article 82 EC, see *Gencor v Commission*, Case *ibid*.

According to Article 3(1) MR, the definition of concentration extends from the acquisition of control to total merger.

The definition of 'concentration' according to Article 3 MR is therefore broader. It is not restricted to the legal form in which the concentration was implemented. It covers vertical and conglomerate mergers regardless of their effect on competition. Some further qualification may however be necessary with regard to the definition of control according to the Merger Regulation in comparison with the definition used under the *Philip Morris* doctrine. Is the acquisition of control which establishes a 'concentration' according to the *Philip Morris* doctrine the same as the acquisition of control within the meaning of Article 3(1) MR?

The Regulation gives some guidance for the definition of an acquisition of control in Article 3(3) MR. The condition depends upon the exercise of a '*decisive* influence'. The prohibition under the *Philip Morris* doctrine is however aimed at acquisitions by one undertaking in another which can serve as an instrument '*for influencing the commercial conduct of the companies in question so as to restrict or distort competition...*', whereby the acquisition of control is given as an example of such a distortion.⁸³⁹ This is therefore a less strict condition than that according to Article 3 MR; there is no specific *degree* of control required.

Therefore scope of the definition of 'concentration' according to the Merger Regulation under Article 3 MR does not cover the *Philip Morris* doctrine to its fullest extent. It covers transactions falling within Article 81 EC that constitute full mergers or the acquisition of a 'decisive' influence (rather than just an influence on the commercial conduct of the undertakings).⁸⁴⁰

1.4.3 Joint Control according to Article 3 MR and the Application of Article 81 EC to Joint Ventures

Joint ventures are formed by an agreement by two or more independent undertakings to create a new company between themselves. The joint venture is jointly controlled by those undertakings, which remain independent of each other, but at least in part

⁸³⁹ See Case, *ibid*, at paragraphs 37-38.

⁸⁴⁰ Note that the thesis is concerned with the legal validity of the turnover thresholds according to the legal base of Article 83 EC. It does not consider the legal validity of the more restrictive applicability of the Merger Regulation in comparison with the *Philip Morris* doctrine on account of the more restrictive definition of 'control' under Article 3 MR.

may have effected a structural change. They are therefore hybrids from the perspective of the distinction adopted by the Commission between co-operative and concentrative behaviour.

In its 1966 Memorandum, the Commission had made it clear that it did not consider Article 81 EC applicable to concentrations.⁸⁴¹ It considered that the different issues presented by concentrations required a different system of control to that used for cartels. Thereby, it expressly treated joint ventures as concentrations involving 'changes of ownership' or structural changes.

In practice however, and in the face of continued resistance from the Council for the implementation of a Merger Regulation,⁸⁴² the Commission was also determined that co-operative-type agreements would not avoid scrutiny under Article 81 EC where a concentrative joint venture was, or appeared to be, involved. Early Commission practice adhered to the dual standard principle as expressed in the Memorandum. Joint ventures involving permanent structural changes in the ownership of the participating undertakings were excluded.⁸⁴³ Soon however the Commission's approach could be seen to be changing. In *S.H.V. Chevron*⁸⁴⁴ the Commission stated that the necessary permanent modification of structures which denote a concentration (as emphasised in the 1966 Memorandum) were, according to the Commission, founded upon two grounds. The first depended upon the intention of the parties and the length of the agreements. The second was a *realisation* of the permanent structural change. Unlike in its Memorandum however, the Commission in this case stated that structural change did not relate to a permanent change in the *internal structure of the companies*. Instead, emphasis should be placed on a permanent change in the *market structure*.⁸⁴⁵ The Commission stated that the creation of the joint venture between Chevron and SHV was concentrative (and therefore outside Article 81 (1) EC) because:

⁸⁴¹ See Commission Memorandum of 1966, *ibid*, p.24, paragraph 14. For the reasons, see above at pp.78-85.

⁸⁴² See above at pp.140-148.

⁸⁴³ See eg., *Cobelaz* Commission Decision, of 6th November 1968, OJ L276 of 14th November 1968.

⁸⁴⁴ Commission Decision of 20th December 1974, OJ (1975), L 38 p14.

⁸⁴⁵ Goldman and Lyon-Caen, 4th ed., *ibid*, no 618; Vogel, L. *ibid*, p.276

'Chevron has no industrial or commercial interest which could imaginably lead it to compete with its own 50 %-owned subsidiaries, and...SHV *disappeared completely as an independent wholesaler on the petroleum market, with no likelihood of ever returning.*'⁸⁴⁶

In order to fulfil the condition of 'irreversibility' (and therefore avoid the application of Article 81 EC), it was not therefore sufficient that there should be a modification of the ownership links between the undertakings; rather, the re-entry of any parent company onto the market on which the joint venture was active should be impossible; that is, none of the parent companies should be actual *or potential* competitors on that market. This was echoed in the Commission's Sixth Report on Competition policy, where the Commission stated that one or another of the parent companies must:

'completely and irreversibly abandon business in the area covered by the joint venture...'⁸⁴⁷

Thereby, the Commission had introduced a conceptual distinction between co-operative joint ventures (subject to scrutiny under Article 81 EC) and concentrative joint ventures that became known as the partial merger theory.

The Commission however restricted the conceptual scope of concentrative 'partial mergers' by interpreting potential competition in a very broad and often unrealistic manner, specifically in an attempt to also bring vertical and conglomerate joint ventures within its jurisdiction.⁸⁴⁸ Broadly, the Commission would consider a joint venture to be a partial merger in the very limited circumstances that two companies created a jointly owned company and:

- both of the parents completely and irreversibly abandoned the markets in which the joint venture was active, and
- the markets in which the joint venture was active were sufficiently remote from those on which the parents remained to ensure that no anti-competitive spill-over effect occurs on the parent's conduct due to their co-operation in the joint venture's market.⁸⁴⁹

⁸⁴⁶ Commission Decision, *ibid* at p.15 (author's emphasis).

⁸⁴⁷ Commission Sixth Report on Competition Policy, Point 55.

⁸⁴⁸ Pathak, A.S., *ibid*, at p.177.

⁸⁴⁹ See Commission Sixth Report on Competition Policy (1976) at Paragraph 178.

See eg., *SHV/Chevron* Commission Decision of 20th December 1974, OJ (1975), L 38 p14; *De Laval/Sork*, Commission Decision 25th July 1977, OJ (1977) L215, p.11; *ENI/Montedison*, Commission Decision of December 4th 1986, OJ (1987) L5/13.

The condition was notoriously difficult to apply, and in reality few joint ventures escaped scrutiny under Article 81(1) EC because they were held to be concentrative.⁸⁵⁰

The implementation of the Merger Regulation, while not rendering the distinction any clearer, did however change the thrust of the Community's approach towards joint ventures. Article 3(2) MR provided that:

'An operation, including the creation of a joint venture, which has as its object or effect the co-ordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration...The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to co-ordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of the Regulation'.

Therefore, in order to qualify as a concentration (and to fall within the less strict regime of the Merger Regulation) a transaction had to fulfil a positive condition (performing on a lasting basis all the functions of an autonomous economic entity) and a negative condition (not giving rise to the co-ordination of competitive conduct). For a joint venture to be concentrative (and to fall under the Merger Regulation rather than Article 81 EC) there was however apparently no longer any need for an *irreversible* market exit by both the parents.

See in detail, eg., Banks, K., *Mergers and Partial Mergers under EEC Law*, in 1987 Fordham Corporate Law Institute (1988), p.373; Jones, C., *Scope and Application of the Merger Control Regulation*, Fordham International Law Journal (1990-1), 14, p.359; Vogel, L., *ibid*, pp.276-282; Goldman, B. and Lyon-Caen, A., *ibid*, pp.682-91; Pathak, A.S., *ibid* at pp.174-5.

⁸⁵⁰ The Commission indicated certain specific questions that would be considered in determining whether there was potential competition in its Thirteenth Report on Competition Policy (1984), p.51.

Its definition in practice however was extremely wide and often inconsistent. See eg., Vogel, *ibid*, p.279, comparing *SHV Chevron* (where the length of agreements was a factor determining irreversibility) with the later Commission Decision *Kewa* (where the length of agreements was only a factor under Article 81(3) as a condition indispensable to the success of the transaction). See also, eg, *De Laval-Stork* (Commission Decision, *ibid*), where the fact that the parties continue their activities on neighbouring markets to that of the joint venture was held to determine 'irreversibility'. The same fact was ignored in *SHV Chevron* (Commission Decision, *ibid*).

Subsequently, and in order to give more procedural certainty and to reduce the analysis of substantive matters for jurisdictional purpose as much as possible, amendments were introduced to the scope of the Regulation in 1998.⁸⁵¹ These amendments redrew the limits of its application to joint ventures in a much more defined manner. They also broadened the definition of 'concentrative' joint venture considerably. According to Article 3(2) MR as amended, the Merger Regulation now applies to *all full function joint ventures*. Article 3(2) MR defines full function joint ventures as '*the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity*'.

According to the amendment, the condition of 'concentrative' now depends *solely* upon a specific *internal structural* change in the participating undertakings, requiring simply that the joint venture has a long term presence on a market independently of its parents. It refers to the joint venture's *resources and commercial independence*. Accordingly, the joint venture must: have a presence and carry out a recognised activity on a market; be self-sufficient or largely self-sufficient in terms of resources; have sufficient commercial independence and identity of its own that it is not simply operating as an auxiliary or service company for its shareholders.⁸⁵² Therefore, even if the joint venture also involves co-ordination of competitive conduct, the creation of the joint venture itself would now fall under the scope of the Merger Regulation.

The amendments of 1998 also effected a further expansion of the definition of 'concentrative', or at least restricted the conduct to which Article 81 EC might be applied in lieu of the Merger Regulation. According to Article 2(4) MR, co-ordinative *conduct* of the combined entity remains to be considered under Article 81 EC:

'To the extent that the creation of a joint venture constituting a concentration pursuant to article 3 has as its *object or effect* the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of

See also, eg., Hawk, B., *United States, Common Market and International Antitrust: Comparative Guide*, 2nd ed. 1985 at p.247; Venit, J., *Private Investors Abroad*, *ibid* at pp.22-23.

⁸⁵¹ Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No.4064/89 on the control of concentrations between undertakings, OJ No. L180/1, 9.7.97, pp1-6.

On the justification for the amendments, see Green Paper on the Review of the Merger Regulation, COM(96) 19.

⁸⁵² Cook and Kerse, *ibid*, p.50.

Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market’.

The second part of Article 2(4) MR states that, in appraising the co-ordination under Article 81 EC, the Commission shall take into account in particular:

‘whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is down-stream or upstream from that of the joint venture or in a neighbouring market closely related in this market (i.e. the risk of spill over between the parents); and

‘whether the co-ordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question [i.e. the risk of eliminating competition (see Article 81(3) EC fourth element)]’.

The terms of this amendment express concretely a development of Commission practice that had been detected in its distinction between concentrative and co-operative joint ventures post-implementation of the Merger Regulation. Thereby, focus had shifted, emphasising the risk of co-ordination between the parents rather than the risk between *one* parent and the joint venture: the definition of ‘co-operative’ had effectively become more restricted (with a consequential widening of the definition of ‘concentrative’).⁸⁵³ It was a development that had in fact been embodied in still wider terms within the text of the 1994 Notice(paragraph 17)⁸⁵⁴:

‘Co-ordination between the parents and the joint venture will only make a joint venture co-operative insofar as that co-ordination is an instrument for producing or reinforcing co-ordination between the parents’.

This definition is noticeably much narrower than previously expressed in the Commission’s 1990 Notice (paragraph 33)⁸⁵⁵:

⁸⁵³ See eg., Sibree, W. *ibid* at pp.100-103; Zonnekeyn, G., *ibid*, pp.419-20.

⁸⁵⁴ Commission Notice on the Distinction between Concentrative and Co-operative Joint Ventures under Council Regulation (EC) No. 4064/89 of December 21, 1989, OJ C358/1.

⁸⁵⁵ Commission Notice on the Distinction between Concentrative and Co-operative Joint Ventures under Council Regulation (EC) No. 4064/89 of December 21, 1989, OJ C203/10.

'where the parent companies, *or one of them*, remain active on the JV's market or remain potential competitors of the JV, a co-ordination of competitive behaviour...must be presumed'.⁸⁵⁶

On the basis of this earlier approach, the Commission had tended to treat joint ventures as concentrative even if the parent remained a significant competitor in the same market as the joint venture, on the condition that the non-existing parent assumed a 'leading role' in the management of the joint venture.⁸⁵⁷ The 1994 Notice abandoned the opportunity for the Commission to apply this 'industrial leadership' approach, but in fact allowed the same result, and indeed went further. The relationship between one parent and the joint venture was now only *a factor* in considering possible co-ordination between the parent undertakings. Hence it was now possible for a joint venture to be concentrative (and to avoid the application of Article 81(1) EC) where one parent remained active in the joint venture's market, whether or not it is the industrial leader. While Article 2(4) MR is not exclusively focused upon co-ordination between the parents, it is only concerned with co-ordination between *two or more of the parent companies* and the joint venture, rather than also including co-ordination between *one parent company* and the joint venture.

The net result is that there has been – on the one hand, through the extension of Article 3 MR to include all full function joint ventures, on the other hand through the restriction of the definition of 'co-operative conduct' of a joint venture that might fall within the scope of Article 81(1) EC - a clear *expansion* of the scope of the EC Merger Regulation to apply to concentrative agreements that previously would have fallen within Article 81(1) EC.

1.4.4 Summary of the Interface between Articles 81 and 82 EC and the Merger Regulation in their Application to 'Concentrations'

The Merger Regulation, according to Article 3 MR, therefore applies to all the types of concentrations for which Article 82 EC was applicable (apart from the exceptions for credit and financial institutions and insurance companies within Article 3(5) MR).

⁸⁵⁶ Author's emphasis.

⁸⁵⁷ See eg., *Thomson/Pilkington*, Case IV/M.086 of October 23, 1991.

See eg., Burnside, A. and Mackenzie Stuart, J., *ibid.*, at p.138 and p.141-2; Zonnekeyn, G.A., *ibid.* at p.419-20.

The Merger Regulation, according to Article 3 MR, also applies to the types of concentrations falling within Article 81(1) EC that constitute full mergers or the acquisition of a 'decisive' influence (rather than just an influence on the commercial conduct of the undertakings).⁸⁵⁸ Furthermore, the practice of the Commission has been to expand the concept of 'concentrative joint venture', thereby bringing joint ventures that would have previously been held to fall within the scope of Article 81 EC within the exclusive control of the Merger Regulation.

The analysis above determines that the Merger Regulation covers some types of concentrations to which Articles 81 and 82 EC are applicable, but only to the extent that they have a 'Community Dimension' according to Article 1 MR. Questionable is whether - according to the terms of the Merger Regulation - the principles of Articles 81 and 82 EC remain applicable to these same types of concentrations where they affect interstate trade but do not have a Community Dimension. We have already highlighted the fact that any Regulation implemented according to the basis of Article 83 EC may not alter the material principles of Articles 81 and 82 EC;⁸⁵⁹ the terms of the Merger Regulation should allow Articles 81 and 82 EC to remain applicable for such concentrations.

2 The Residual Application of Articles 81 and 82 EC to Concentrations without a Community Dimension

2.1 The Issue

As stated above, the Regulation's legitimacy depends upon whether its provisions allow Articles 81 and 82 EC to remain applicable to concentrations within the meaning of Article 3 MR that do not have a Community Dimension within the meaning of Article 1(2) MR.

In the analysis of the *purported* legal effect of the Merger Regulation on its own terms, two Articles are significant:

⁸⁵⁸ Note that the thesis is concerned with the legal validity of the turnover thresholds according to the legal base of Article 83 EC. It does not consider the legality of Article 3 MR, whose definition of 'control' is more restrictive than under the *Philip Morris* doctrine.

⁸⁵⁹ See above, pp.174-179.

First, Article 22 (1) MR provides that 'concentrations' within the meaning of Article 3 MR shall *only* be assessed under the Regulation (therefore including those below the turnover thresholds in Article 1(2) MR).

Secondly, Article 22 (2) MR disapples Regulations 17/62, 1017/68, 4056/86 and 3975/87 for all 'concentrations' within the meaning of Article 3 MR (therefore including those below the turnover thresholds in Article 1(2) MR). These regulations are the implementing regulations for Articles 81 and 82 EC according to Article 83 EC. Where they are disappled, the Commission loses its power to grant negative clearances⁸⁶⁰, to adopt interim measures⁸⁶¹, to exercise its various powers of investigation⁸⁶² and to order the termination of infringements⁸⁶³, the divestiture of assets or the imposition of fines⁸⁶⁴ for these concentrations.

In order to determine the scope of the residual application of Articles 81 and 82 EC that the Merger Regulation purports to allow, the legal effect and validity of both provisions must be determined.

2.2 The Legal Effect of Article 22 (1) MR

Article 22 (1) MR purports to exclude the application of *any* law other than the Regulation itself to 'concentrations' within the meaning of Article 3 MR; such transactions shall only be assessed under the Merger Regulation.

Article 21 (2) MR however states that no Member State shall apply its *national* competition law provisions to any concentration that has a Community Dimension. Implicitly therefore, *national* law may be applied to concentrations without a Community Dimension.⁸⁶⁵ Hence, in order to be coherent with Article 21 (2) MR, Article 22 (1) MR must only refer to *Community* law; it purports to exclude the applicability of other *Community* law to concentrations within the meaning of Article 3 MR.⁸⁶⁶

⁸⁶⁰ Council Regulation 17/62, Article 2.

⁸⁶¹ Council Regulation 17/62, Article 3(1).

⁸⁶² Council Regulation 17/62, Articles 11 and 14.

⁸⁶³ Council Regulation 17/62, Article 3.

⁸⁶⁴ Council Regulation 17/62, Articles 15 and 16.

⁸⁶⁵ This was expressly stated by the Commission in *Arjomari/Wiggins* IP (90) 1003 of 11.12.1990.

⁸⁶⁶ Further, paragraphs 27 and 29 of the Preamble to the Regulation refer explicitly to the continued applicability of national provisions to concentrations falling outside the scope of the Merger Regulation.

As established above, the other Community provisions which may be applicable to concentrations within the meaning of Article 3 MR are Articles 81 and 82 EC.⁸⁶⁷ These are provisions of primary Community law. Secondary Community law can not directly disapply provisions of primary Community law. It would appear therefore that Article 22(1) MR is *ultra vires*.⁸⁶⁸

In defence of the provision, it has been suggested that Article 22 (1) MR may be implicitly interpreted as meaning that Articles 81 and 82 EC must not be applied by *national courts* to any kind of concentration within the meaning of Article 3 MR.⁸⁶⁹ According to this argument, the legitimacy of Article 22(1) MR arises from the Regulation's legal base of Article 83 EC. That base enables the Council to adopt regulations to implement the principles set out in Articles 81 and 82 EC, and in particular '*define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86(now Articles 81 and 82 EC)*'⁸⁷⁰, and '*... determine the relationship between national laws and the provisions...adopted pursuant to this article*'.⁸⁷¹ According to this argument therefore, Article 22 (1) MR is simply a provision that determines the scope of Articles 81 and 82 EC and the relationship between the remedies available under national law according to the Treaty's competition rules and Regulation 4064/89. With regard to the literal text of Article 22 (1) MR, this interpretation is at best extremely artificial.

Downes and Ellison have further suggested that the effect of Article 22 (1) MR is that the Council was explicitly stating that Articles 81 and 82 EC were never applicable to concentrations. It is submitted however that this would be to deny clear evidence to the contrary. Not only has the ECJ stated explicitly that this was so⁸⁷², but the Council Minutes accompanying the Merger Regulation also acknowledge the position: 'the

⁸⁶⁷ See above, Part IV of the thesis.

⁸⁶⁸ As submitted by eg., Krimpenhove, *ibid*, p.353.

⁸⁶⁹ Downes and Ellison, *ibid*, at p.185.

⁸⁷⁰ Article 83(2)c EC.

⁸⁷¹ Article 83(2)e EC.

⁸⁷² See above, eg. *Continental Can*, *ibid*. Also obiter in the *Philip Morris* case, *ibid* above.

Further, the Commission has applied Article 82 in several decisions, see eg., *Metaleurop*, Commission Decision of 26/06/1990, (1990) OJ L179/41 at p.41, paragraph 17; *Tetra Pak 1*, Commission Decision of 26/07/1988, (1988) OJ L272/1 at pp.39-40.

Commission does not *normally* intend to apply Articles 85 and 86 (Articles 81 and 82 EC) 'to concentrations outside the scope of the Merger Regulation.'⁸⁷³

The better interpretation of Article 22(1) MR is that in *legal* terms it is to be read in conjunction with the limitation provided by Article 22(2) MR.⁸⁷⁴

2.3 The Legal Effect of Article 22 (2) MR

The legal effect of Article 22(2) MR on the applicability of Articles 81 and 82 EC to some types of concentrations must be considered.

As stated above, Article 22 (2) MR provides that Regulations 17/62, 1017/68, 4056/86 and 3975/87 are not to apply to 'concentrations' as defined in Article 3 MR.

In the disapplication of these regulations on the basis of Article 83 EC, the Merger Regulation becomes the implementing Regulation (within the meaning of Article 83 EC) for Articles 81 and 82 EC for the assessment of concentrations within the meaning of Article 3 MR with a Community Dimension according to Article 1 MR.⁸⁷⁵

Questionable is whether, according to the terms of the Regulation, there remains an implementing Regulation for Articles 81 and 82 EC for concentrations falling within their scope and within the meaning of Article 3 MR that do not have a Community Dimension. Before considering this question however, it is necessary to consider the thesis that the Merger Regulation represents an implementing Regulation on the basis of Article 83 EC for *all* concentrations within the meaning of Article 3 MR, regardless of whether or not they have a Community Dimension within the meaning of Article 1 MR. This is a vital point. If this hypothesis holds, then the Regulation *illegitimately* purports to exclude the application of Articles 81 and 82 EC to concentrations falling below the thresholds.

⁸⁷³ The Council Minutes accompanying the Merger Regulation (1990) 4 CMLR (Antitrust) 314 at 357.

⁸⁷⁴ *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid* at p.1084; *Miersch, Kommentar zur Eer-VO Nr. 4064/89 ueber die Kontrolle von Unternehmenszusammenschluessen*, 1991, Hermann, Luchterhand Verlag, Neuwied and Frankfurt at p.188.

Note that *Bright* considers that the Article might have prospective effect, preventing any future and subordinate legislation from extending to concentrations. This is however not coherent with the literal text and he himself doubts that the Council can bind itself by such a provision in a Regulation. *Bright, ibid* at p.193.

⁸⁷⁵ See above, pp.170-171.

The hypothesis was maintained by the UK Court of Appeal in the *Dan Air* case.⁸⁷⁶ Its reasoning was based upon the fact that it was open to the Member States to refer concentrations without a Community Dimension to the Commission for assessment under the Merger Regulation according to Article 22(3) MR. That possibility alone served to show that the Merger Regulation is an implementing Regulation according to Article 83 EC for all concentrations falling within the meaning of Article 3 MR, regardless of whether or not they had a Community Dimension.

This conclusion appears to be coherent with the literal text of Article 22(3) MR, which refers explicitly to those concentrations that affect interstate trade.⁸⁷⁷ On the other hand, Article 22(3) MR referrals are made at the sole discretion of the Member States where, in the opinion of a particular Member State authority, the proposed merger may lead to the strengthening or the creation of a dominant position that could impede competition within the territory of that Member State.⁸⁷⁸ The application of the principles under Articles 81 and 82 EC do not however depend upon the discretion of the Member State authorities. The Articles are *per se* applicable whenever the concentration actually or potentially affects interstate trade.⁸⁷⁹ Therefore, the Regulation does not fulfil the task of implementing the principles of Articles 81 and 82 EC as an implementing Regulation according to Article 83 EC where these two Articles are applicable to concentrations. It does not cover all concentrations to which Articles 81 and 82 EC apply that fall within the scope of Article 3 MR (as 'concentrations') but do not have a Community Dimension according to Article 1 MR.

Thereby, for concentrations not falling within the Regulation's jurisdictional scope yet falling within the scope of Article 3 MR (as 'concentrations'), it appears that there is no implementing Regulation according to Article 83 EC for Articles 81 and 82. This is analogous to the situation existing before the implementation of Regulation 17/62. Even though there was at that time no implementing regulation, the

⁸⁷⁶ *R v Secretary of State for Trade and Industry, ex parte Airlines of Britain Holdings plc and Another*, *The Times*, 10 December 1992.

⁸⁷⁷ See above, p.227.

⁸⁷⁸ See above, p.227.

⁸⁷⁹ Note that, aside from the constitutional implications with regard to the pre-existing application of Articles 81 and 82 to concentrations, a regulation enacted on the basis of Article 83 does not have to comprehensively cover the whole scope of Articles 81 and 82, see *Republic of Italy v Council*, Case 32/65 1966, ECR 563.

competition rules were however still valid and applicable. There were two Treaty provisions which were included to ensure this.

2.3.1 Article 85 EC

First, Article 85 EC empowered the *Commission* to ensure the application of the principles laid down in Articles 81 and 82 EC. It is a specific expression in this area of the general supervisory role conferred upon the Commission by Article 155 EC. It was intended as a transitional provision, operational until the Council had implemented the appropriate procedures. It does not however contain any direct reference to this transitional character and this has prompted some commentators to claim that it does not cease in applicability even after the introduction of implementing regulations under Article 83 EC; it may therefore be applied in parallel to the Merger Regulation.⁸⁸⁰ This interpretation is based upon the fact that Articles 11 and 14 of Regulation 17/62 explicitly refer to the continued applicability of Article 85 EC.

Against this it is however submitted that the corresponding Articles in the Merger Regulation (Articles 11 and 13 MR) do not contain any reference to the continued applicability of Article 85 EC after the implementation of the Merger Regulation.⁸⁸¹ The better interpretation is to follow the fundamental purpose of Article 85 EC, which was to ensure the application of Articles 81 and 82 EC where effective procedures are not in place. Where there are such effective procedures on the basis of Article 83 EC, Article 85 EC ceases to be applicable. Where the effective procedures are not in place, or alternatively cease to apply, Article 85 EC is once more valid.

2.3.2 Article 84 EC

Secondly, Article 84 EC empowered the *Member State authorities* to apply Articles 81 and 82 'until the entry into force of the provisions adopted in pursuance of Article 83'.

Some commentators have raised the issue that Article 84 EC had an inherently transitional character and can not be re-invoked.⁸⁸² Such an interpretation would

⁸⁸⁰ See eg., *Schroeter*, in: *Groeben/Thiesing/Ehlermann*, *ibid*, at paragraph 9 at Art. 85.

⁸⁸¹ See eg., *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid*, p.1084; *Staudenmayer, D.*, *Das Verhaeltnis der Art. 85, 86 EWGV zur EG-Fusionskontrollverordnung*, WuW 6/1992, 475-482 at p.481.

⁸⁸² See eg., *Bos et al*, *ibid* at p.373-4; *Niemeyer, H.-J.*, *Die Anwendbarkeit der Art. 85 und 86 EWG-Vertrag auf Unternehmenszusammenschluesse nach Inkrafttreten der EG-Fusionskontrollverordnung*, RIW (1991) Heft 1, 448-453 at pp.450-1.

however be at odds with the fundamental purpose of Article 84 EC, which was to ensure as far as possible the effective application of Articles 81 and 82 EC in the absence of appropriate implementing provisions.⁸⁸³ Furthermore, Article 9(3) of Regulation 17/62 clearly envisages the *continued* validity of Article 84 EC itself, even where an implementing regulation has been enacted. It provides that as long as the Commission has not initiated any procedure the authorities of the Member States remain competent to apply Articles 81(1) and 82 EC in accordance with Article 84 EC.⁸⁸⁴ Therefore, although not mentioned in the Merger Regulation, it is clear that its validity has not been entirely extinguished with the enactment of the implementing regulation on the basis of Article 83 EC. It is held in reserve for instances where no such effective procedure exists.

Prima facie, the enforcement of Articles 81 and 82 is (where appropriate) once more based upon Article 84 and 85 procedures for concentrations within the meaning of Article 3 MR which do not have a Community Dimension within the meaning of Article 1 MR.⁸⁸⁵ This is indeed the position stated in the Council Minutes to the EC Merger Regulation, which expressly reserved the right of the Commission to take action under Article 85 EC against concentrations without a Community Dimension.⁸⁸⁶

In *legal* terms therefore the terms of the Merger Regulation do not affect the general applicability of Articles 81 and 82 EC to concentrations without a Community Dimension according to Article 1(2) MR. To this extent the EC Merger Regulation, incorporating the jurisdictional thresholds based upon turnover, is legitimate. It is

⁸⁸³ Bourgeois and Langeheine, *ibid*, p.405.

⁸⁸⁴ See Kerse, who considers whether there remains an *obligation* on the Member State authorities to enforce Articles 81 and 82 where an implementing regulation (under Article 83EC) is in place, in: Kerse, C., 'Enforcing Community Competition Policy under Articles 84 and 85 of the EC Treaty - New Powers for UK Competition Authorities', (1997) 1 ECLR 17-23.

⁸⁸⁵ *Ministère public v. Asjes*, Cases 209-213/84, 1986 ECR 1425 at 52: '*in the absence of rules as referred to in Article 83 of the Treaty, Articles 84 and 85 continue to apply*'.

In agreement, see eg., Soames, T., *ibid* at p.224; Deimel, 143-172; *Schroeter* in: Groeben et al., *Kommentar* *ibid*, p.2515; Bourgeois, J. and Langeheine, B., *ibid*, p.404-6; Venit, J., *Private Investors Abroad*, *ibid*, pp.17-18; Kerse, C., *ibid*; Downes and Ellison, *ibid*, pp.182-188; *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid*, pp.1084-1086; Fine, F., (1994) *ibid* at pp.249-253.

cf. *Bos et al.*, *ibid*, who consider that Article 84 EC is no longer applicable since (unlike Article 85 EC) it is transitional provision which has been exhausted, at pp.373-374. But see reasoning in text above.

cf., in the minority, Miersch, who suggests that Article 85 EC *may not* be applicable after the implementation of the Merger Regulation, *ibid* p.192-3.

however pertinent to consider the effectiveness of these procedures in *practical* terms.

2.4 The Practical Effect of Article 22(2) MR - the Effectiveness of Proceedings under Articles 84 and 85 EC

2.4.1 Effectiveness of Article 85 Proceedings

Under the terms of Article 85 EC, where the Commission finds that there has been an infringement, '*it shall propose appropriate measures to bring it to an end.*'⁸⁸⁷ Where the Commission does not have the power to take those measures itself, it may, under paragraph 2 of Article 85 EC, '*publish its decision and authorise Member States to take measures, the conditions and details of which it shall determine, needed to remedy the situation.*'

The Commission expressly reserved the possibility to apply Article 85 EC to concentrations within the meaning of Article 3 MR.⁸⁸⁸ Nevertheless, it stated that:

'it does not intend to take action in respect of concentrations with a worldwide turnover of less than ECU 2,000 million or below a minimum Community turnover level of ECU 100 million on the grounds that below such levels a concentration would not normally significantly affect trade between Member States'.⁸⁸⁹

This level was the same as those previously proposed as the thresholds for Community dimension, and which the Commission at that time hoped would be implemented under the 1993 review required under Article 1(3) MR.⁸⁹⁰

As has been demonstrated above, a formalistic threshold such as this one is unable to pertain to the actual and potential effect on interstate trade of concentrations.⁸⁹¹ That effect does not depend upon the actual *size* of the undertakings involved. While there

⁸⁸⁶ Council Minutes to the EC Merger Regulation, see CMLR (Antitrust) (1990) 4 314 at 357.

⁸⁸⁷ See eg., *Sterling Airways*, Xth Report on Competition Policy, European Commission at points 1336-138.

⁸⁸⁸ Council Minutes accompanying the EC Merger Regulation on Article 22 MR, see CMLR (Antitrust) (1990) 4 314.

⁸⁸⁹ Council Minutes accompanying the EC Merger Regulation on Article 22 MR, see CMLR (Antitrust) (1990) 4 314.

⁸⁹⁰ *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid.*, p.1085.

⁸⁹¹ In agreement, see eg., *Deimel*, *ibid.*, pp.153-7; *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid.*, p.1085. Against this, only *Bourgeois and Langeheine*, *ibid.*, p.405.

is the structurally-based *de minimis* threshold, this is actually much lower than the figures proposed above, and further, is not legally binding.⁸⁹²

To the extent that this statement might bind the Commission's future conduct, it would constitute a legal limitation on the application of Article 85 to concentrations. A Commission statement can not however restrict the application of primary law and, furthermore, the majority of commentators highlight the fact that the statement was not officially published.⁸⁹³

Nevertheless, with regard to the Commission's express statement that it reserves the possibility to use Article 85 EC proceedings *per se*, it has been suggested that this does not represent a serious intention of the Commission in practice. It may simply have been a means to exert political pressure upon the Council to reduce the thresholds.⁸⁹⁴ It may simply have been an acknowledgement by the Commission of the continued applicability of Articles 81 and 82 EC (in the face of the invalidity of the literal terms of Article 22(1) MR), and an attempt to avoid any actions against it before the Court of Justice for a refusal to act under Article 175 EC proceedings.⁸⁹⁵ Backing up the conclusion that the Commission will not resort to Article 85 EC proceedings for concentrations without a Community Dimension in practice is the fact that it has not always been consistent in its statements concerning this issue. The then competition Commissioner, *Lord Leon Brittan*, stressed that, with regard to assessing concentrations :

'As a matter of policy, I do not intend to seek the application of the EEC Treaty rules in Articles 85 and 86⁸⁹⁶ by any means. I believe that the Council Regulation is the proper means of implementing the principles of Articles 85 and 86 to mergers.'⁸⁹⁷

He continued that even though he recognised that the thresholds of the Merger Regulation were so high that there was a risk that cases with an impact on the Community market did not fall within its scope, he did not intend to invoke Treaty

⁸⁹² See above, pp.30-37.

⁸⁹³ Deimel, *ibid*, pp.158-162; *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid*, p.1085; Pechstein, *EuR* 1990, 253.

Against this, only Niemeyer *RIW* 1991, 450, based on the principle of legitimate expectations.

⁸⁹⁴ Fine, F., *ibid*, at p. 250; *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid* p.1085; Downes and Ellison, *ibid*, p.188.

⁸⁹⁵ Downes and Ellison, *ibid*, at p.187.

⁸⁹⁶ Now Articles 81 and 82 EC, pursuant to Article 12 Treaty of Amsterdam.

⁸⁹⁷ Brittan, L., '*The Law and Policy of Merger Control in the EEC*', *ELR* 15 (1990), at p.357

Articles to counter this. Rather, he would rely upon the Member States to '*ensure that competition principles are applied thoroughly throughout the Community*'.

As well as the improbability of any proceedings taking place under Article 85 EC in these circumstances, analysis reveals that a procedure under Article 85 EC itself raises great practical difficulties.

Commission investigations under Article 85 EC may not be undertaken except upon the '*application by a Member State or (the Commission) on its own initiative*'. In practice this does not constitute a legal obligation of the Commission to initiate proceedings, since although a Member State may bring an action under Article 175 proceedings before the Court of Justice if its application is refused, such a step is extremely unlikely due to the availability of the Article 22 (3) MR procedure under the Merger Regulation.⁸⁹⁸ Effectively, therefore, the EC Commission has sole discretion to decide whether to initiate proceedings under Article 85 EC. Admittedly, this situation is comparable with the situation under Regulation 17/62, Article 3.⁸⁹⁹ Nevertheless, a significant difference is that competitors and third parties with a legitimate interest in the concentration do not have the right under Article 85 EC to make complaints to the Commission about allegedly anti-competitive conduct.⁹⁰⁰ This right is available according to Regulation 17/62, Article 3(2)b. It must be stressed however that although this right does not exist under Article 85 EC proceedings, it has not been illegitimately lost. The implementation of the Merger Regulation may amend Regulation 17/62. Indeed, as described above, the Merger Regulation displaces the application of Regulation 17/62 for concentrations within the meaning of Article 3 MR with a Community Dimension according to Article 1(2) MR.⁹⁰¹

What about the efficacy of the procedure for *enforcing* pre-existing legal obligations of primary Community law deriving from Articles 81 and 82 EC on the basis of Article 85 EC?

⁸⁹⁸ See eg., Deimel, *ibid*, p.163; Fine, F., (1994) *ibid* at p.240.

⁸⁹⁹ See Deimel, *ibid*, p.162-3; Koch in Grabitz, *Kommentar* *ibid*, Art. 83, VO Nr. 17 (Art.3), paragraph 15; Gleiss/Hirsch, *Kommentar* Art. 3 VO Nr.17 para.5.

⁹⁰⁰ It is clear law that where they might in any case request an initiation of Article 85 EC proceedings by the Commission, they may not successfully bring an action before the Court of Justice for a failure to act according to Article 175 EC.

Lord Bethell, Case 246/81, (1982), ECR 2277 at 2290.

⁹⁰¹ According to the legal base of Article 83 EC, see pp.170-171.

As a procedure to apply Articles 81 and 82 EC to concentrations falling outside the ambit of the Merger Regulation, Article 85 EC is extremely limited. It is even less suited to the control of mergers, which requires above all speed of decision-making and legal certainty.⁹⁰² Indeed, *Jones and Gonzalez-Diaz* have described the Article 85 EC procedure as '*wholly inappropriate to merger control.*'⁹⁰³ This is for several reasons.

First, the Commission has no independent investigatory powers; investigations must take place in co-operation with competent Member State authorities, which are obliged to give their assistance.⁹⁰⁴

Secondly, if the Commission finds an infringement exists (that has not been brought to an end), it must record that infringement in a reasoned decision, and may authorise Member States to take measures to remedy the situation. The Commission cannot itself order undertakings directly to end acts of infringement or impose fines.⁹⁰⁵ Therefore, it is completely dependent upon co-operation from the Member State concerned. The Commission may if necessary compel a Member State to co-operate⁹⁰⁶, but that procedure is slow and lacking in adequate sanctions.

Article 85 EC proceedings have thus far only been used in the air transport sector, either before the implementing Regulation 3975/87 was in place, or with regard to air transport between the Community and third countries, to which Regulation 3975/89 does not apply.⁹⁰⁷ Article 85 EC has not been used for concentrations within the meaning of Article 3 MR that do not have a Community Dimension under Article 1 MR. Indeed, in *Arjomari/Wiggins*, the Commission referred to the lack of Community Dimension of the proposed transaction under Article 1(2) MR, but considered

⁹⁰² See above.

⁹⁰³ *Gonzalez-Diaz*, *ibid*, at p.85. See also *eg.*, *Bos and Styuck*, *ibid*, p.376.

⁹⁰⁴ Article 85 EC, second sentence.

⁹⁰⁵ Article 85 EC, third sentence.

⁹⁰⁶ Article 169 EC proceedings.

⁹⁰⁷ Commission Decisions: *Sterling Airways/SA*, Tenth Report on Competition Policy 1980, para's 136-138 and a Commission action against 10 airlines, cited in European Commission, Sixteenth Report on Competition Policy 1986 at para. 36; *British Airways/USAir* Agence Europe 08/01/98; *KLM/NorthWest* Agence Europe 08/01/98; *Air France/Delta Airlines/Continental Airlines* Agence Europe 08/01/98; *British Airways/American Airlines* (1996) OJ C289/4; *Lufthansa/SAS/United Airlines*, Agence Europe 09/07/98; *Sabena/Austria Airlines/ Delta* Agence Europe 08/07/98; *Air France/Delta Airlines/United Airlines* Agence Europe 08/07/98.

Note that the Council is presently considering a Commission proposal to revise the present exclusion of this sector, see OJ L165, 31.05.1997, p.13-14.

national law to be applicable without even mentioning the possibility of Article 85 EC proceedings.⁹⁰⁸

Bos points to the potential effectiveness of the *threat* of Article 85 EC proceedings to effect informal settlements between merging parties.⁹⁰⁹ That threat is however a somewhat hollow one where the parties will be aware that the Commission does not have an efficient procedure of enforcement.

Admittedly, the possibility still exists for the application of Article 82 EC pursuant to Regulation 17/62 to any present or future behaviour of the new concern that would be severable from the concentration operation itself. Further, any ancillary restrictions as defined by Article 8 (2) Regulation 17/62, second sentence, may be assessed under Article 81 EC. This may act as some deterrent to the initiation of a merger in the first place (where its conduct may potentially be so restricted under Article 82 EC that there would not be a rational reason to carry it out). However it does not constitute a direct protection of those pre-existing rights and obligations which are at issue.

2.4.2 Effectiveness of Article 84 EC Proceedings

There remain inherent difficulties with the procedure that would deter the plaintiff from such actions.

The national authorities apply Articles 81 and 82 EC on the basis of Article 84 EC according to their own national rules of procedure.⁹¹⁰ Thereby, the plaintiff is reliant upon national powers of discovery. Thus, relevant information may lie outside the jurisdiction of the national authority that has initiated proceedings. Article 84 EC proceedings also raise the spectre of multiple and conflicting decisions by Member State authorities.⁹¹¹

Above all, national authorities are unlikely to apply Community law where they have an opportunity (in practical terms, ignoring the primacy of Community law) to apply their own national law, with which they are more familiar.⁹¹² Whether or not this fact

⁹⁰⁸ *Arjomari/Wiggins* IP (90) 1003 of 11.12.1990.

⁹⁰⁹ *Bos et al.*, *ibid*, p.376.

⁹¹⁰ *Bilger v Jehle*, Case 43/69 (1970) ECR 127, 136.

⁹¹¹ Venit, J., *Private Investors Abroad*, *ibid*, at pp.17-18.

⁹¹² In agreement, see eg., *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid*, p.1086; *Fine, F.*, (1994) *ibid*, p.251; *Cook and Kerse*, *ibid*, p.19.

lay behind the formal reasoning of the Court of Appeal in the UK, the Court firmly expressed its opinion that only national law applies to concentrations without a Community Dimension in *Dan Air*.⁹¹³ National authorities can not be obliged to initiate proceedings by private parties.⁹¹⁴

The validity of these procedural difficulties and obstacles in the use of Article 84 EC is borne out by the infrequency with which it has been invoked.⁹¹⁵

2.5 Summary of the Legal and Practical Effect of Article 22(2) MR on the Application of Articles 81 and 82 to Mergers

In *legal* terms, Article 1 MR may be approached as a legal expression of the 'appreciability' criterion of Articles 81 and 82 EC with specific regard to merger-type transactions (by analogy with the operation of Article 89 EC).⁹¹⁶ Even where this reasoning is not accepted however, with regard to the *jurisdictional* criterion of the EC Merger Regulation at least,⁹¹⁷ the purported effect of Article 22 MR is not illegitimate. Articles 81 and 82 EC remain applicable to concentrations falling within their scope that do not have a Community Dimension under Article 1 MR.

In *practical* terms however, the effect of the implementation of the Merger Regulation is effectively to exclude the continued application of Articles 81 and 82 EC to concentrations (where they applied) without a Community Dimension (according to Article 1(2) MR). This is due to the procedural inefficiencies of Article 84 and 85 EC procedures. Such concentrations will therefore be subject only to *national* provisions of competition law.

National authorities have shown a reluctance to initiate procedures according to Article 84 EC. A rare example in the UK was *BA/American Airlines*. This is the case in spite of the fact that action by Member State's authorities has recently been encouraged by the Commission's Notice on co-operation between national competition authorities and the Commission OJ 1997 C313/1.

⁹¹³ See above, p.171.

⁹¹⁴ See eg., English Court of Appeal decision, *R v Secretary of State for Trade and Industry ex parte Airlines of Britain Holdings*, 4th December 1992 (unpublished).

The Commission would have little interest in pressing Article 169 EC proceedings.

⁹¹⁵ See Deimel, *ibid*, p.169; Gleiss/Hirsch, *Kommentar* *ibid*, Article 84, Paragraph 1.

⁹¹⁶ See analysis above, pp.176-178.

⁹¹⁷ It is however questionable whether the *substantive* assessment of mergers under Article 2 MR faithfully transfers the principles established under Articles 81 and 82 EC where they apply to mergers.

A further consideration is however necessary. Recall that Articles 81 and 82 EC have direct effect.⁹¹⁸ They create rights and obligations that are enforceable against and in favour of private individuals before national courts. There is therefore a constitutional element to the legitimacy of the Merger Regulation. Article 22(2) MR may not purport to restrict or alter in any way the pursuance of such rights deriving from Articles 81 and 82 EC before national courts.

3 The Constitutional Legitimacy of the Merger Regulation according to its Legal Base of Article 83 EC - Private Rights and the Application of Articles 81 and 82 EC to Concentrations without a Community Dimension

3.1 The Issue

Articles 81 and 82 EC have direct effect and create rights for private individuals before national courts.⁹¹⁹ The Articles may be directly used by third parties with a sufficiently close interest to attack concentrations⁹²⁰ and by target companies to defend against take-overs⁹²¹ falling within the scope of Articles 81 and 82 EC.

Where a concentration has a Community Dimension according to Article 1 MR, it may be assumed that these rights and obligations are protected, since the participating undertakings are obliged to notify the Commission and the concentration will be assessed under Article 2 MR.⁹²² Questionable however is whether the rights and obligations of the individual are adequately safeguarded (according to the terms of the Merger Regulation) with regard to concentrations without a Community Dimension, where Article 22(2) MR has disapplied the implementing Regulations of Articles 81 and 82 EC.

⁹¹⁸ *BRT v SABAM* Case 127/73 (1974) ECR 51, (1974) 2 CMLR 238, at para. 16.

⁹¹⁹ *BRT v SABAM* Case 127/73 (1974) ECR 51, (1974) 2 CMLR 238, at para. 16.

On the general existing difficulties for national courts enforcing EC antitrust law, see eg., Riley, 'More Radicalism Please', ECLR (1993) 91; Goh, 'Enforcing EC Competition Law in Member States' ECLR (1993) 114; Van Beal, 'The Role of National Courts' ECLR (1994) 3; Whish, R., 'The Enforcement of EC Competition Law in Domestic Courts of the Member States' ECLR (1994) 60; Hutchings and Levitt, 'Concurrent Jurisdiction', ECLR (1994) 119.

⁹²⁰ See eg., the bid for an interim edict before a Scottish court by the Argyle Group, *Argyle Group plc and Others v The Distillers Co.*, (decision of Scottish Outer House of the Court of Session) (1986) 1 CMLR 764.

⁹²¹ See eg., Action brought before English Court by *Plessey Co. plc* against *GEC* and *Siemens* in December of 1988

The Court of Justice has directly considered the existence of private rights deriving from Articles 81 and 82 EC where there is no implementing Regulation in the air transport sector.⁹²³ The reasoning and general principles it espoused are equally applicable to the situation where Regulation 17/62 no longer applies.

3.2 Article 81 EC

In *Nouvelles Frontières*⁹²⁴, the Court of Justice held that where there were no implementing rules, national courts do not have jurisdiction to find conduct contrary to Article 81 EC; in order to invoke private rights arising from the application of these Articles, there must have first been a negative decision or an exemption according to Article 81(3) EC by the national authority (pursuant to Article 84 EC) or a negative decision by the Commission⁹²⁵ (pursuant to Article 85 EC). The reasoning behind this decision was the principle of legal certainty. The national court does not have the power to grant an exemption under Article 81(3) EC. A national court should not be able to prohibit agreements and to render them void (pursuant to Article 81(2) EC) when they might be subject to a legal exemption.⁹²⁶

3.3 Article 82 EC

This reasoning is not however valid for Article 82 EC, where no such exemption procedure exists. In *Ahmed Saeed*⁹²⁷, (again in the transport sector) therefore, the ECJ distinguished between Articles 81 and 82 EC, finding that Article 82 EC remains directly applicable by national courts.

⁹²² Note that the thesis does not intend to compare the substantive assessment carried out under Articles 81 and 82 and the Merger Regulation for their legitimacy with regard to Article 83 EC.

⁹²³ This situation changed with the introductions of Regulation 3975/87, OJ L374/1 31.12.1987, p.1, as amended by Regulation 1284/91 OJ L122 17.05.1991, p.2 and Regulation 2410/92 L240 24.08.1992 p.18.

The implementing regulation does not however cover air transport between the Community and third countries. Note that the Commission Proposal for a new implementing Regulation for Articles 81 and 82 EC leaves this exception untouched, see Commission Proposal COM (2000) 582.

⁹²⁴ *Ministère Public v Asjes*, Cases 209-213/84 (1986) ECR 1425; (1986) 3 CMLR 173. The decision is based upon the so-called *Bosch*-doctrine, in: Case 13/61, (1962) ECR 45; (1962) CMLR 1.

See also, eg., *Ministère Public v Lucas Asjes and others* Joined Cases 209 - 213/84 (1986) ECR 1425; *Brasserie de Haecht*, Case 48/72 (1973) ECR 77; (1973) CMLR 287.

⁹²⁵ The Commission does not have a power under Article 85 EC to grant an exemption according to Article 81 (3) EC, *Ministère Public v Asjes*, *ibid* at ground 62.

⁹²⁶ Note that with the envisaged changes in the enforcement of Article 81 EC, and the decentralised power to apply Article 81(3) EC, there will be no reason to treat Article 81 EC differently from Article 82 EC, and *Nouvelles Frontières* may be overturned.

⁹²⁷ *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung Unlauteren Wettbewerbs* Case 66/86 (1989) ECR 803, (1990) 4 CMLR 102.

3.4 Summary of the Constitutionality of the Merger Regulation

The purported effect of Article 22(2) MR is therefore to deny private individuals the right to actively pursue claims on the basis of Article 81 EC *directly* before national courts. Such proceedings require a preceding decision by either the Commission or the national authorities according to, respectively, Articles 85 or 84 EC. The private litigant however has no legal right to oblige the Commission or the national authority to initiate such proceedings.⁹²⁸ Thereby, the legal right to invoke Article 81 EC before national courts with regard to concentrations falling within its scope has been lost.⁹²⁹

The consequence is regrettable, particularly since recent dynamics in the field of antitrust law have been to attempt to promote private enforcement of Articles 81 and 82 EC through national courts.⁹³⁰ Is it however legitimate? Does it create the risk that an undertaking affected by a prohibition under the Merger Regulation (or even by a sanctioning of a merger under the Merger Regulation) could challenge the authority of the Commission's decision by claiming the unconstitutionality of the Merger Regulation?⁹³¹

The actual effect of decisions such as *Nouvelles Frontieres*⁹³² is that the Court of Justice has fundamentally restricted the principle of direct applicability of the

⁹²⁸ See below regarding Article 85 EC proceedings. The initiation of proceedings according to Article 84 EC depends upon national rules of procedure. It is however accepted that national authorities would have a tendency to apply their own national competition law provisions rather than to initiate an Article 84 EC procedure (see below regarding the *Dan Air* case).

⁹²⁹ See eg., Jones and Gonzalez-Diaz, *ibid*, at p.86; Bos et al., *ibid* p. 374; Fine, F., *Mergers and Joint Ventures in Europe*, *ibid*, pp.251-2; Downes and Ellison, *ibid*, p. 183; Cook and Kerse, *ibid*, p.15; Soames, T., 'The Community Dimension in the EEC Merger Regulation', (1990) 5 ECLR at p.224; Bourgeois, J. and Langeheine, *ibid*; Miersch, *ibid* at p.188; *Immenga, U.*, in: *Immenga/Mestmaecker*, *ibid*, p.1086-7; Venit, J., *Private Investors Abroad*, *ibid* at p.15; Niemeyer, H.-J., *ibid* at p.451.

⁹³⁰ Commission Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 EC, COM(2000) 582 at p.4

⁹³¹ It is not inconceivable that a third party with sufficient interest in the operation or a target company could challenge a decision by the Commission under the Merger Regulation sanctioning a concentration on the basis of the unconstitutionality of the provision.

An example of a third party challenging the validity of a Council Regulation (No. 3331/74) is *SpA Eridania-Zuccherifici Nazionali and SpA Societa Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry*, Case 230/78 (1979) ECR 2749.

While it is less likely that the parties to a concentration might challenge a positive decision of the Commission, some risk of this exists.

⁹³² *Ministère Public v Asjes*, Cases 209-213/84 (1986) ECR 1425; (1986) 3 CMLR 173. The decision is based upon the so-called *Bosch*-doctrine, in: Case 13/61, (1962) ECR 45; (1962) CMLR 1.

See also, eg., *Ministère Public v Lucas Asjes and others* Joined Cases 209 - 213/84 (1986) ECR 1425; *Brasserie de Haecht*, Case 48/72 (1973) ECR 77, (1973) CMLR 287.

prohibition enshrined in Article 81 EC. That direct applicability is inherent to Articles 81 and 82 EC.⁹³³ Nevertheless, the effect of the Court of Justice's approach has been to require an implementing provision on the basis of Article 83 EC to 'trigger' the direct applicability of Article 81(1) EC before national courts (unless there has been a negative decision or an exemption according to Article 81(3) EC by the national authority (pursuant to Article 84 EC) or a negative decision by the Commission (pursuant to Article 85 EC)).

This approach of the Court of Justice was justified upon the principle of legal certainty, as detailed above. The continued significance of this argument is questionable, whereby it is considered that there is now sufficient body of case-law to enable national judges to make consistent decisions in the application of Article 81(1) EC.⁹³⁴ Nevertheless, where it is still valid, it refers the issue of the legitimacy of the effect of Article 22(2) EC to the legal effect of Article 83 EC (since the Council may amend or even revoke regulation 17/62 at any time):⁹³⁵ does Article 83 EC require the Council to *maintain* an implementing regulation for the principles of Articles 81 and 82 EC that gives effect to their direct applicability before national courts?

Within the context analysis of Article 83 EC carried out above, we have seen that there is an obligation to implement Regulations that are *suitable* to implement the principles of Articles 81 and 82 EC. We must therefore turn again to the definition of 'principles of Articles 81 and 82 EC'. Do the 'principles of Articles 81 and 82 EC' within the context of Article 83 EC include their direct applicability before national courts? Recourse to the analysis carried out above with regard to the limitations of Article 83 EC as a legal base for the Merger Regulation (and the consequential need for Article 308 EC) determines that they do not: 'principles of Articles 81 and 82 EC' refers only to the *material* provisions of those Articles.⁹³⁶ It does not extend to the broader principles of Community law outside the specific text of Articles 81 and 82

to do

to do

⁹³³ See eg., *Estée Lauder*, Case 37/79 (1980) CLR 2481 at 2500; *BRT I* Case 127/73 (1974) CLR 51 at 62; *Asies*, Cases 209-213/84 (1986) 1425 at 1463.

⁹³⁴ See eg., *Schroeter, H.*, in: Groeben/Thiesing/Ehlermann, *ibid* p903; Salzmann, *IATA, Airline Rate-Fixing and the EEC Competition Rules*, ELR (1977) p409, at p413; Dagoglou, *Air Transport and the EC*, ELR (1981) p335 at p352.

⁹³⁵ See analysis above, whereby the Merger Regulation became the implementing regulation equivalent to Regulation 17/62 for Articles 81 and 82 EC to the extent that they apply to mergers.

⁹³⁶ See above, pp.174-175

EC (although it might incorporate the redefinition of those terms for specific types of transaction).⁹³⁷

The thesis cannot therefore be supported that the Council is obliged to *maintain* a regulation according to Article 83 EC that provides for the direct applicability of Articles 81 and 82 EC before national courts. The operation of Article 22(2) MR is not therefore unconstitutional.

It is worth noting further that constitutionality issue that arises from the operation of Article 22(2) MR may be rendered insignificant in the future if the recent White Paper by the European Commission on the *Modernisation of the Rules Implementing Articles 85 and 86 EC* (now Articles 81 and 82 EC) is implemented. The White Paper recommends that national courts (and authorities outside the procedure on the basis of Article 84 EC) should be given the uninhibited right to apply Article 81(3) EC.⁹³⁸

D SUMMARY OF THE LEGAL IMPLICATIONS OF THE INCONSISTENCY OF THE JURISDICTIONAL TRIGGER OF THE MERGER REGULATION WITH THE INTERSTATE TRADE CRITERION

In legal terms, the jurisdictional trigger of the Merger Regulation satisfies the condition of its legal base of Article 308 EC.

According to the legal base of Article 83 EC, the Merger Regulation becomes the implementing Regulation for Articles 81 and 82 EC where they apply to concentrations where they fall within the scope of the Article 3 MR ('concentration') and Article 1 ('Community Dimension'). Thereby, by analogy with the operation of Article 89 EC - and apparently consistent with the Commission's own view - Article 1 MR may represent a specific 'appreciability' criterion for the application of the principles of Articles 81 and 82 EC to mergers, implemented upon the basis of Article 83 EC. On the other hand, where this argument is not accepted, we are faced with the situation that, according to Article 22(2) MR, there is no implementing Regulation for Articles 81 and 82 EC where they apply to concentrations that fall within the scope of Article 3 MR and do not have a Community Dimension according to Article 1 MR.

⁹³⁷ See analysis above, pp.174-175.

⁹³⁸ Commission's White Paper, *ibid.*

This in itself does not render the EC Merger Regulation illegitimate, for the procedures under Articles 84 and 85 EC remain to apply the principles of Articles 81 and 82 EC, even if the inherent inadequacies of procedures under Articles 84 and 85 EC for merger control mean that in practice this is extremely unlikely. However, the consequence is that the Merger Regulation thereby purports to extinguish existing private rights and obligations deriving from Article 81 EC before national courts. This marks a regrettable consequence of the operation of the turnover thresholds, although it cannot be found to be unconstitutional.

Aside from legal implications of the inconsistency of the jurisdictional trigger of the Merger Regulation with its legal bases of the Treaty it is also necessary to consider the *policy* implications.

3
07
378

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

X THE POLICY IMPLICATIONS OF THE INCONSISTENCY OF THE JURISDICTIONAL TRIGGER OF THE MERGER REGULATION WITH THE INTERSTATE TRADE CRITERION

A THE ISSUE

In its Green Paper on the Review of the Merger Regulation of 1996,⁹³⁹ the Commission carried out an assessment of the operation of the turnover thresholds with regard to Community competition policy. As we have already shown, the overriding policy for the Community within the realm of competition law is the protection and promotion of Single Market integration. The Commission therefore considered whether the Merger Regulation was fulfilling the aims for which it was implemented, prohibiting concentrations that harm this process. The Commission discovered that a considerable number of concentrations having significant cross-border effects - and therefore potentially harmful to the process of Single Market integration - fell below the current thresholds. This concern was repeated in its 2000 Review.⁹⁴⁰ As stated above, this condition of 'cross-border effects' is synonymous with the application of the interstate trade criterion, where the Commission defined it as an impact on the structure of competition extending over a geographic area exceeding the borders of a single Member State.⁹⁴¹ The Commission's findings therefore mirror the findings of the thesis.⁹⁴²

It is necessary to consider in detail the implications of this fact for the policies for which the Merger Regulation was originally implemented.

⁹³⁹ See note 9 above.

⁹⁴⁰ See note 10 above.

⁹⁴¹ See above, pp.153-154. In its 1996 Review, the Commission considered that the fact that so many concentrations with *significant* cross-border effects fell below the current thresholds was due to the size and characteristics of the sectors concerned and to the size of the companies involved. The Commission determined that this would particularly be the case where the acquirer and/or the target companies are smaller specialized companies that are active in specialised but economically important markets such as mechanical engineering, electrical and electronic engineering, computer manufacturing, textiles, manufacture of food products and beverages, metal products, computer and related services, hotels and catering. These reasons are still valid after the changes implemented in 1998, as recognised by the statistical Review in 2000.

See paragraphs 37-38.

B THE PRINCIPLE OF A ONE-STOP-SHOP

We have already identified that the idea of a one-stop-shop was one of the key principles upon which the Merger Regulation was based.⁹⁴³

Considering the operation of the existing jurisdictional thresholds in its Green Paper of 1996, the Commission emphasised the problem of multiple national filings of concentrations that did not fall within the scope of the Merger Regulation.⁹⁴⁴ At present, all fifteen of the Member States have some form of national merger control.⁹⁴⁵ The Commission noted that the fact that not all national laws involve mandatory filing was not a significant factor because many companies felt the need to notify even if notification was voluntary for reasons of legal certainty.⁹⁴⁶

The lack of a one-stop-shop for such concentrations creates unwelcome delay, expense and legal uncertainty for business.⁹⁴⁷ The concerns of the Commission led to the proposal for an amendment to the Merger Regulation to deal with some of these cases⁹⁴⁸ (a variation of the proposal was adopted in 1998⁹⁴⁹). This did not however cover all such cases of multiple filings, but was limited to multiple filings in at least three Member States according to specific turnover thresholds.

Clearly, this undesirable state of affairs is not directly related to the fact that the turnover thresholds presently used do not bring all the concentrations having an effect on interstate trade within the scope of the Merger Regulation. The application of the national merger laws depend upon an individual and separate jurisdictional criterion.⁹⁵⁰ Even if the interstate trade criterion was used as the jurisdictional trigger for the Merger Regulation, this would not guarantee that some multiple filings might occur. Nevertheless, given the breadth of the interstate trade criterion in its application, it may be stated with some confidence that such instances of multiple filings would be rare if it were applied for the EC Merger Regulation.

⁹⁴² See above, pp.193-194.

⁹⁴³ See above at p.139.

⁹⁴⁴ *ibid*, p.153.

⁹⁴⁵ See Annex 1.

⁹⁴⁶ EC Commission's Green Paper on the Review of the Merger Regulation, 1996, *ibid* at paragraph 57.

⁹⁴⁷ For more detail, see above at pp.139-140 and 152-153.

⁹⁴⁸ *ibid*, pp.154-156.

⁹⁴⁹ See above, p156.

⁹⁵⁰ For a complete list, see Annex 1.

C THE SINGLE MARKET INTEGRATION OBJECTIVE

As described above, the Merger Regulation was primarily implemented upon the legal bases of Article 83 and Article 308 EC in order to further the Community aim of maintaining undistorted competition within the internal market. This is consistent with the overriding goal of Community competition policy - Single Market integration.

The substantive assessment of mergers under Article 2 MR conforms to the policy reasons for which a system of Community concentration control was implemented. It assesses concentrations for their effect on competition only, prohibiting those that *'create or strengthen a dominant position, the result of which competition will be significantly impeded in the Community or in a substantial part thereof'*.⁹⁵¹ Thus, it prohibits concentrations that distort significantly competition in the Community, and that thereby hinder the process of Single Market integration.

The operation of the jurisdictional trigger of the Merger Regulation has however been shown not to extend the application of the Regulation to all mergers that may distort competition significantly within the Community. Instead, many of such mergers are subject only to assessment at the national level (if at all).⁹⁵² Questionable is the effect this situation may have upon the integration paradigm (that is based upon undistorted structures of competition within the Community).

1 Assessment of Mergers at a National Level that Affect Interstate Trade

Assessment of a merger that affects interstate trade at the national level concerns only the effect of the merger on the national market. The situation may adversely affect the integration process in two ways: first, the substantive test in the national merger law

⁹⁵¹ Other issues may be taken into account, but only in so far that they do not provide an obstacle to competition, Article 2(1)b MR.

⁹⁵² It is beyond the scope of the thesis to analyse in detail the compatibility between the definition of 'concentration' under the national Member States provisions of merger control and the definition of 'concentration' under Article 3 MR. It is however conceivable that some concentrations within the meaning of Article 3 MR that effect interstate trade might fall outside the scope of national law because they do not constitute 'concentrations' according to those provisions.

provision may not be *exclusively* directed to the effect of the merger on *competition*; secondly, any assessment of the effect on competition of a merger that affects interstate trade carried out at the *national* level may not reflect the effect that the merger may have on competition structures at the *Community* level.

1.1 Assessing Mergers at the National Level According to Non-Competition Criteria

An assessment of mergers at the national level and according to national law may not exclusively concern the impact of the merger upon *competition* within the national territory. Rather, national competition authorities might base their decisions upon issues of strictly national concern, for example national industrial and social policies. This may be a result of the procedural structure of assessment under the relevant law, or the result of the wording of the substantive assessment itself.

Analysis of the systems of merger control in thirteen of the Member States provides that this concern is a valid one.

Austria

Mergers are controlled under Austrian law according to the *Cartel Act 1988*. The Cartel Court enforces the rules, determining whether the merger creates or strengthens a dominant position in the relevant market. Other non-competition issues may however sanction the merger even where this condition is fulfilled, including the international competitiveness of the undertakings involved and national economic issues.

Belgium

Mergers are controlled under Belgian law according to the *Law of 5 August 1991 on the Protection of Economic Competition*. The Competition Service investigates concentrations falling within the scope of the Act and prepares a report for the Competition Council, which makes a final decision. Concentrations are assessed to determine whether they create or reinforce a dominant position that restricts competition on the Belgian market or a substantial part of it to an appreciable extent. However even if this condition is fulfilled, concentrations may be cleared if they contribute to matters of general economic interest, which includes the competitiveness of economic sectors and the level of employment.

Denmark

Denmark introduced a system of merger control on 1 October 2000.⁹⁵³ Concentrations falling within the scope of the Statute are assessed by the Competition Council to determine whether the merger creates or strengthens a dominant position as a result of which effective competition would be effectively impeded. The substantive assessment of mergers under the Danish system of control therefore mirrors the European Merger Regulation.

Finland

Under the *Act on Competition Restrictions 480/1992*,⁹⁵⁴ the Competition Council may ban or order a concentration to be dissolved or attach conditions on the implementation of a concentration if, as a result of it, a dominant position shall arise or be strengthened which significantly impedes competition in the Finnish markets or a substantial part thereof.⁹⁵⁵ However, upon application, the Finnish Competition Authority may lift a condition attached to the implementation of a concentration or mitigate it, due to an appreciable change in market conditions or 'another substantial cause'.

France

Merger control in France is also basically an administrative process controlled by the Minister of the Economy, Finance and Budget. He is assisted by the Competition Council, which is a consultative body. According to the *Ordinance No.86-1242 of December 1, 1986* and the *Implementing Decree No.86-1309 of December 29 1986* (as amended by Decree 95-916 of August 9 1995), the Minister assesses mergers to determine whether they create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the relevant market in France. If the test is met, the Minister will determine whether the transaction's contribution to economic progress outweighs the adverse effect on competition. Thereby, issues such as employment or purely political issues such as the promotion of commercial relationships with certain countries may be considered.

Germany

⁹⁵³ Statute No.416 of 31 May 2000, amending Statute No.384 of 10 June 1997.

⁹⁵⁴ As amended by Act 303/1998.

⁹⁵⁵ There is a specific test for concentrations on the electricity markets, see Article 11d(2).

Mergers under German law are assessed under the *Gesetz gegen Wettbewerbsbeschränkungen 1998*. The law is mainly enforced by the Federal Cartel Office. Mergers are prohibited where they will lead to the creation or strengthening of a 'market-dominating position', unless the parties prove that the merger will also result in an improvement of conditions which outweigh the disadvantages of market domination.

Non-competition issues are not relevant in the substantive assessment by the Federal Cartel Office. However, the Federal Cartel Office's decision to prohibit a merger may be overruled by the Federal Minister of Economics for political reasons.

Greece

The relevant legislation in Greece is *Law 703/77 on the Control of Monopolies and Oligopolies and Protection of Free Competition*, as amended by *Law 2296/95*, which came into effect on February 24 1995.

The procedure of assessment of concentrations under this law is also politicised. The Competition Commission investigates mergers falling within the scope of the law to determine whether they create or reinforce a dominant position. Where the Commission finds that this is the case and prohibits the merger, the Minister of National Economy and Development may approve the concentration on the grounds of general economic interest, where this overrides the restriction on competition. Factors may include the attraction of investment, the modernisation of production, the strengthening of competitive position in the EU and international markets and job creation.

Ireland

Merger control in Ireland is governed by the *Mergers, Take-Overs and Monopolies (Control) Act 1978* as amended by Part IV of the *Competition Act 1991*. It is also a highly politicised procedure.

Those mergers falling under the scope of the Act are notified to the Minister for Enterprise and Employment. He may opt to refer the merger to the Competition Authority which will assess the merger by reference to 'the exigencies of the common good'.

These include its effect on competition and its effect on employment, efficiency and regional development. A report is made to the Minister, who will then has the exclusive authority to decide whether to prohibit the merger according to the same criterion: 'the exigencies of the common good'.

Italy

The Italian system of merger control is less politicised, but nevertheless it allows the consideration of factors other than competition in the assessment of mergers under *Law No. 287 of October 10 1990*. Section 6 provides six specific factors for the Authority to consider in determining whether a concentration would create or strengthen a dominant position (as a result of which competition is eliminated or substantially reduced on the Italian market), the fourth of which is 'the competitive situation of the national industry'. Furthermore, the Authority considers this list to be merely illustrative and not exhaustive of the factors that may be taken into consideration in evaluating a given concentration.⁹⁵⁶ Therefore, its discretion is not limited to competition factors in the same way as is the Commission's under the Merger Regulation.

Exceptionally, a concentration prohibited by the Competition Authority may be authorised by the government for reasons connected with the general interests of the national economy (although this is yet to have occurred).

Luxembourg

Luxembourg also has a politicised system of merger control. According to the *Law of June 17 1970 (Mémorial A 1970, p.892)*, as amended on April 20, 1989 (*Mémorial A 1989, p.504*) and on September 2 1993 (*Mémorial A 1993, p.1450*), the public prosecutor enforces a prohibition decision made by the Minister of National Economy. Investigations are launched either by the Public Prosecutor requesting the Minister of National Economic to refer a merger to the Commission des Pratiques Commerciales Restrictives (following a complaint from the public) or the Minister of National Economy itself deciding to proceed with an investigation (whereby there is a discretion to ask the opinion of the Commission des Pratiques Commerciales Restrictives). If consulted, the Commission produces an advisory report. The test for clearance (under Article 1) is whether the transaction and/or merger limits or distorts competition against the general interest and/or abuses a dominant position against the general interest. Non-competition issues are only taken into account if they weaken the position of the consumer. However, the provisions of Article 1 are broad and there is certainly scope for some political influence in the decision-making since the final decision whether or not to prohibit rests exclusively with the Minister.

⁹⁵⁶ Saja, F., *L'Autorita garante della concorrenza e del mercato: prime esperienze e prospettive di applicazione della legge*, Giurisprudenza Commerciale, 1991, p.459.

The Netherlands

Mergers in the Netherlands are controlled according to the *Dutch Competition Act of May 22 1997*. The Competition Authority is charged with the enforcement of the Act, under the responsibility of the Minister of Economic Affairs. The Competition Authority determines whether the mergers would lead to the creation or strengthening of a dominant position that would significantly impede competition on the Dutch market or a part thereof. The Minister of Economic Affairs may however overrule the Competition Authority's decision to refuse a licence if in his opinion reasons of general interest prevail, including factors such as structural unemployment.

Portugal

Mergers in Portugal are assessed under the *Decree-Law No. 371/93 of 29 October 1993*. According to the law, the Commission des Pratiques Commerciales Restrictives conducts an investigation into mergers falling within the scope of the law. Mergers are assessed to determine whether they create or reinforce a dominant position in the national market, or in a substantial part thereof, and may thereby prevent, distort or restrict competition. They may however be authorised if the international competitiveness of the participating undertakings is significantly increased. The assessment of the Commission des Pratiques Commerciales Restrictives is passed to the Minister in charge of trade matters, who has the authority to issue a decision (with a discretion to consult the opinion of the Competition Council).

Spain

Spanish law on merger control is contained in *Law 16/1989 on the Defence of Competition* (as amended in June 1996). The procedure for merger control under the Act is highly politicised. The Minister of the Economy and Finance may challenge a merger where it falls within the scope of the Act, according to section 14. Thereby, the Minister may refer the merger to the Antitrust Court for its opinion on whether the merger or take-over is likely to 'hinder the maintenance of effective competition in the market place' under section 15. The opinion of the Court is however purely advisory and it is the government that decides whether the transaction may proceed.

Sweden

Under the *Competition Act* that came into force on July 1, 1993, the Competition Authority determines whether the merger would create or reinforce a dominant

position on the market which would significantly impede, or be liable to impede, the existence or development of effective competition on the Swedish market as a whole or in a substantial part thereof. Such creation or strengthening would occur in a manner detrimental to the public interest. This second condition involves consideration of factors such as industry restructuring, rationalised production, beneficial socio-economic effects or the ability to meet international competition.

United Kingdom

The control of mergers in the UK is according to the *Fair Trading Act 1973*. The overall responsibility for merger control lies with the Secretary of State. He decides whether to clear a merger or refer it to the Monopolies and Mergers Commission and also decides on the outcome of a merger following an adverse report by the Monopolies and Mergers Commission. The Director-General of Fair Trading (head of the Office of Fair Trading) also plays a role in the control of mergers, monitoring mergers and advising the Secretary of State.

Mergers are assessed under the *Fair Trading Act* by the Monopolies and Mergers Commission for their effect on 'public interest', which is a criterion that embraces '*all matters which appear to them in the particular circumstances to be relevant*'. Clearly this is not restricted to the effect on competition alone.

1.1.1 Summary

The systems of merger control of the individual Member States (with the exception of the Denmark) clearly- as a result of the substantive assessment, the procedural structure or both - leave room for the assessment of mergers according to criteria that do not exclusively concern their effect on competition and which may not be compatible with the integration goal (for example, national political, industrial and social issues). Where national authorities pursue national political, industrial and social policies in the assessment of concentrations that have an effect beyond the national market, this can directly lead to market partitioning.

It is true that in practice the majority of Member State authorities responsible for assessing mergers according to their own systems of national law appear to concentrate upon the competition paradigm in their decision-making. Thereby, the majority concentrate upon whether the merger creates or strengthens a dominant position on the home market. Indeed, within the individual Member States there has been a tangible trend of soft harmonisation of national competition laws along the

lines of Community competition law. Thereby, national authorities are becoming more and more familiar with 'European' concepts and conditions of assessment in the application of national systems of competition law.⁹⁵⁷

Nevertheless, it should be recognised that - even where European principles and concepts are carefully followed - the prohibition on creating or strengthening a dominant position remains a functional condition.⁹⁵⁸ Significant discretion lies in the overall assessment of a merger, and thereby often in the hands of political actors. Thereby, it is not inconceivable that political and other factors can be taken into account in merger decisions that ostensibly make an assessment based upon the effect upon competition structures.

A case in point is the UK decision *Universal Foods Corporation & Pointings Holdings Ltd.* Post acquisition, the market share of Universal Foods rose from 51 % to 74 % of the UK domestic market. The Mergers and Monopolies Commission nevertheless sanctioned the merger on *competition* grounds (without commitments), citing the strength of potential competitors and the significance of buyer power.

The dissenting opinion of *Dame Helena Shovelton* noted however that there had been no entry on the market by a European manufacturer for ten years, that those competitors based outside the Community did not have established UK distribution channels, that Universal Foods had a significant reputation for quality and range and that its strength was such that the other active competitors were price-takers (and one even admitted so). All these considerations point to dominant position held by Universal Foods in the relevant product in the UK market pre-merger. If the merger had been assessed at the Community level, it is difficult to envisage that the Commission would have sanctioned a merger that involved Universal Foods taking over its only substantial competitor on the UK market.⁹⁵⁹

⁹⁵⁷ This harmonisation has been noted as a natural tendency as economic development sets in and markets become more globalised. See eg., *Jenny, F.*, in: Ehlermann, C-D and Laudatti, L (eds), *ibid*, 1998, p. 39; Ullrich, H., *Harmonisation within the European Union*, (1996) 3 ECLR pp.178-184.

⁹⁵⁸ Some Member State laws (for example, Germany) do however contain rebuttable presumptions of dominance.

⁹⁵⁹ In *Mannesmann/Hosch*, the Commission stated that: *High market shares represent an important factor as evidence of a dominant position provided they not only reflect current conditions but are also a reliable indicator of future conditions. If no other structural factors are identifiable which are liable in due course to change the existing conditions of competition, market shares have to be viewed as a reliable indicator of future conditions* (at paragraph 91 of the Decision).

Even where the assessment of a merger that affects interstate trade by the national authority is carried out exclusively according to its actual effect on competition, integration may still be adversely affected because of the geographical limits of the assessment:

1.2 Assessing Mergers for Their Effect on National Competition Structures as Opposed to Community Competition Structures

Where mergers affecting interstate trade are assessed by national authorities for their effect on competition in national markets there is a risk that they may be prohibited even though they do not significantly distort competition at the *Community* level (and even constitute beneficial restructuring for a firm to achieve a globally competitive size). Conversely, mergers may be sanctioned where they distort competition at a *Community* level (where there is no negative effect on competition within the national jurisdiction, but the relevant market affected extends beyond the borders of the relevant Member State). The mergers assessed during 1999 in the three Member States analysed above (Italy, the UK and Germany) that were found to have affected interstate trade may be considered in order to assess the extent of this risk.

United Kingdom

Of the mergers that affected interstate trade that were assessed by the UK Competition Authority during 1999, a decision that demonstrates the risk that assessment at the national level may represent is *Rockwool Ltd/Owens-Corning Building Products (UK) Ltd*. The Mergers and Monopolies Commission assessed the merger for its effect on competition (as a matter of the 'public interest'). The combined entity would have had a market share of 96 % in the UK. However, the relevant product was identified as being a transportable good (and some imports were made into the UK). It is possible therefore that an assessment of the transaction for its effect on competition at the Community level would have found a larger geographical market than the territory of the UK and it may be that the combined entity would have been subject to much more competition on this wider market.

Germany

The German Authority has demonstrated a more rational economic approach in its assessment of mergers, determining where necessary that the relevant market extends

beyond national boundaries to include even world-wide markets.⁹⁶⁰ Nevertheless, the legal assessment is not concerned with whether the merger strengthens or creates a dominant position in the *Community*, but rather whether such a position is created or strengthened at the *national* level. Thereby, the fallacy that derives from the operation of the turnover thresholds of the Merger Regulation is brought into sharp relief. A merger that does not fall under the scope of the Regulation may concern a relevant market that is *Community* or even world-wide, yet only be assessed at the national level for its effect on *national* competition structures. Market share, for example, is thereby assessed at the *national* level rather than at the *Community* level.

The danger that this situation creates is that mergers that may distort the integration process because of their effect on competition at the *Community* level may be sanctioned. An example in point could be *Barilla/Wasa*. The merger concerned an acquisition by an Italian undertaking of an undertaking with subsidiaries in Germany, Sweden, Norway, Denmark and Poland. The German Authority found that the market share of the combined undertaking in Germany would only be 1 % in Germany. Therefore, it did not cause any competition concerns. Nevertheless, no assessment was made of the effect the merger may have had on competition at the *Community* level in other geographical markets.

Conversely, there is a danger that the market shares of the participating undertakings are artificially high at the national level compared with at the *Community* level. The German Authority has however shown a willingness to consider the effect of foreign-based competition on the national market, and this anomaly was avoided in the sample of mergers that effected interstate trade during 1999.

Italy

Under its merger laws, the Italian Authority must determine whether a merger creates or strengthens a dominant position as a result of which competition is eliminated or substantially reduced on the *Italian* market. Nevertheless, examination of the mergers assessed during 1999 in Italy that affected interstate trade reveals that the assessment

⁹⁶⁰ The German decisions involving the assessment of the effect of a merger on markets that extend beyond the national territory are: *Dow Chemical Company/Shell Nederland Chemie/Shell Chimie*; *Eramet/Elkem Mangan/ Elkem Metals Company/ Cogema*; *Corning/BICC*; *PPG Industries Lackfabrik/ICI Lacke Farben*; *Texas Instruments Incorporated/Integrated Sensor Solutions*; *Checkpoint Systems/Meto/Sensormatic*; *Emerson Electric/Krautkraemer/NUKEM Nutronik*; *Norddeutsche Affinerie/Huettenwerke Kayser/L. Possehl & Co*; *Xerox Corporation/Tektronix* (For references, see note 759 above).

by the Competition Authority does not hesitate to consider relevant markets affected by a merger that are not limited to the national territory, but extend to include world markets.⁹⁶¹ An assessment subsequently takes place to determine whether the merger creates or strengthens a dominant position on that relevant market.

Since the assessment is not restricted to the effect of the merger upon national markets, but may extend to include world-wide markets, it reflects the assessment carried out by the Commission under the Merger Regulation and there is no danger of mergers that may adversely affect the integration process being sanctioned or prohibited by the Italian authorities (except where there may be covert political or industrial policy factors involved).

1.2.1 Summary

The UK and German systems of merger control therefore provide examples where the national assessment of a merger that affects interstate trade may ignore its effect on competition structures at the level of the Community. Thereby, mergers harmful to structures of competition at the Community level (and therefore harmful to the integration process) may be sanctioned, whereas mergers that are insignificant at a Community level (and even beneficial to the integration process) may be prohibited.

⁹⁶¹ The merger decisions taken by the Italian Antitrust Authority during 1999 involving mergers affecting interstate trade whose effect was assessed on supra-national markets are: *Biochemi/Hoechst Marion Roussel Deutschland*; *ELF Atochem Vlissingen/TH Goldschmidt*; *Solvay/Winnofil Division*; *Dow Benelux-Dow France/Shell*; *Textron/Breed Italian Interiors*; *Dayco Europe/Lombardini F.I.M.*; *Sparta/Zucchini*; *BASF/DSM ASP*; *Key Foggini Europe/Gruppo Foggini*; *British Elevators/IMI Marston*; *Comau/Renault Automation*; *AB Electrolux/McCulloch Italiana*; *Clariant International/Songwon Color Co.*; *E.I. Du Pont De Nemours/Duconti*; *BASF/BP France*; *Seat Pagine Gialle/Matrix*; *United Technologies Corporation/Sutrak Italia*; *Baldurion/Novembal*; *United Technologies Corporation/International Comfort Products Corporation*; *Hamilton Sundstrand Holdings/Pneumatic Aircraft Components Europe*; *Procter & Gamble/IAMS*; *BASF/Ultraform*; *GE Industrial Products Europe-GE Packaged Power/Thomassen International*; *Huntsman Speciality Chemical/Imperial Chemical Industries*; *United Technologies Corporation/Great Lakes Turbines*; *FCY Acquisition/Furon*; *Yamaha Motor Europe-Kayaba Industry/Paioli Meccanica*; *High Voltage Engineering/Ansaldo Sistemi Industriali*; *Markos/Mefar*; *Nord-Micro Elektronik Feinmechanik/Telair International Electronic Systems*; *Robert Bosch/Aresi*; *Danieli & C. Officine Meccaniche-Corus Group/Danieli Hoogovens Technical Services*; *Roehm/Polymer Latex*; *Grupo Mexico/Asarco Incorporated*; *United Technologies/Cade Industries*; *Cardo/Cardo BSI Rail*; *21 Investimenti-Sport Investments/Sport Timing*; *United Technologies/Holland Heating Carrier Holding*; *United Technologies/AB Electrolux* (for references, see note 762 above).

Lord Leon Brittan,⁹⁶² then Competition Commissioner, drew attention to the dangers of such a situation. He stated:

'Action at the Community level is required where national measures would not adequately address one of the Community's fundamental aims, set out in Article 3(f) (Article 3(g) EC) of the Treaty, namely the creation and maintenance of a system that ensures that "competition in the internal market is not distorted"...agreements, practices and mergers that have Community-wide effects require a Community-wide analysis. The focus of this analysis at national level would inevitably be limited to the territory of the country concerned...To look at a merger's effects in a single Member State when its effects and true economic context are Community-wide would lead to incorrect and unreliable decisions'.⁹⁶³

In this regard, the approach of the Italian Competition Authority is to be recommended. It considers the effect of mergers falling within the scope of its national law on relevant markets that extend beyond the territorial boundaries of Italy.

D LEGAL CERTAINTY

As has been consistently stressed throughout the thesis, the principle of legal certainty has been given paramount importance in the drafting and subsequent reviews of the EC Merger Regulation.

This policy aim for the jurisdictional trigger of the Merger Regulation is clearly unaffected by the fact that the existing thresholds do not bring all the concentrations that may affect interstate trade within the scope of the Regulation. Indeed, the fact that the existing jurisdictional trigger is formalistic - and therefore, apparently, certain - is one of the key reasons why it does not cover all concentrations that affect interstate trade (as well as the high level at which they are maintained).

Nevertheless, it is reasonable to consider whether the operation of the existing turnover thresholds do indeed offer a level of certainty that should be given such importance in the overall balance of factors competing for prominence in the drafting of the jurisdictional criterion.

⁹⁶² Now, Lord Leon Brittan.

⁹⁶³ Lord Leon Brittan, *European Competition Policy - Keeping the Playing Field Level*, *ibid*, p.92.

In agreement, see eg., Bishop, M. and Kay, J., *ibid*, pp.309-10.

For experience has in fact taught us that the certainty that is apparently afforded by formalistic provisions should not be treated as absolute. Some qualification is necessary. It should be considered for example that US businesses were overwhelmingly in favour of the introduction of the (functionalist) rule of reason into American antitrust law, at the expense of *per se* (formalistic) rules.⁹⁶⁴ Therefore, formalistic rules must also have their own disadvantages, which should be highlighted.

One such problem that is demonstrated by the turnover thresholds of the Merger Regulation themselves is that their application is highly technical. To determine whether the turnover criteria have been reached is extremely complicated.⁹⁶⁵ The consequence of this is that it may be that the application of the Community dimension criterion involves more specialised, costly and time-consuming legal advice than the application of the interstate trade criterion.

A further unwelcome characteristic of formalistic criteria is the possibility they lend to parties to a merger to mould their behaviour to avoid fulfilling them (or even to fall within the scope of the provision, where that provision is regarded as being more benign than the alternative⁹⁶⁶). It may be therefore that merging parties are able to adjust the technical characteristics of the merger in order to come within (or below) the turnover thresholds, without altering the substantive result or economic effect of the merger - that is, to indulge in 'forum shopping'⁹⁶⁷.

Furthermore, formalistic rules clearly do not have the flexibility to pertain to non-static conditions. In theoretical terms, *Ehrlich* and *Posner* have emphasised the inability of formalistic rules to adapt to changing circumstances for which they are applied, considering the costs and benefits over time of precise and formalistic laws ('rules') and imprecise and functionalistic ('standards') laws:

⁹⁶⁴ Note however that as a rule the Community legal tradition is more 'rule-orientated'

⁹⁶⁵ See Broberg, M. 1997 and 1998, *ibid*; Soames, T., *ibid*; O'Keefe, S, *ibid*; van Mourik, A., *Five Years of Community Merger Control in Developments in European Competition Policy*.

⁹⁶⁶ Generally, the Community system is regarded as being more benign and efficient than those of the Member States.

⁹⁶⁷ See Broberg, M, 1998 *ibid* at pp. 231-243.

'Standards'⁹⁶⁸ are relatively unaffected by changes over time in the circumstances in which they are applied, since a standard does not specify the circumstances relevant to decision or the weight of each circumstance but merely indicates the kinds of circumstance that are relevant.'⁹⁶⁹

On the other hand, in relation to formalistic rules:

'In general, the more detailed a rule is, the more often it will have to be changed. The greater detailedness of a very precise rule is thus also a source of additional costs, the costs of changing rules. These include the costs...of producing the new rule plus additional costs arising from the fact that change in the law is a source of uncertainty.'⁹⁷⁰

As if to prove this point, it should be noted that the formalistic jurisdictional trigger of the Merger Regulation has already been reviewed three times within the short period of the operation of the Merger Regulation, and a further review is currently underway.⁹⁷¹

On the other hand, it is established that functionalist legal conditions which regulate complex economic realities may, in spite of their vague wording, provide sufficient certainty for market players to adjust their conduct accordingly where they are interpreted and applied methodologically and consistently, for example using economic tools of assessment⁹⁷². Indeed, formalistic rules may derive from functionalist provisions by judicial decisions, where the rule summarises what has been learned in prior cases.⁹⁷³

Therefore, the certainty that the turnover thresholds are deemed to afford is certainly not absolute and whatever certainty they do bring must be balanced against countervailing checks to regulatory efficiency. We are able, at the very least, to maintain that the claim for a formalistic and fixed jurisdictional criterion for the

⁹⁶⁸ Where 'standards' taken to be open-ended and imprecise legal rules.

⁹⁶⁹ Ehrlich, I. and Posner, R., *An Economic Analysis of Legal Rulemaking*, 1975, *Journal of Legal Studies* III(1), p.277.

⁹⁷⁰ Ehrlich, I. and Posner, R., *ibid* at p.278.

⁹⁷¹ See notes 9 and 10 above.

⁹⁷² See, eg. Ehlermann, C-D and Laudatti, L., who point to the benefits of economic tools for the quality and predictability of decisions in competition matters, furthering transparency of decisions (while acknowledging that economics is not an entirely neutral science), in: *European Competition Law Annual 1997: Objectives of Competition Policy*, Robert Schuman Centre, European University Institute, 1998 at p.ix.

⁹⁷³ Ehrlich, I. and Posner, R. A., *ibid*, at p.266.

Merger Regulation in the name of certainty and regulatory efficiency cannot be unreservedly upheld.

E CONCLUSION ON THE POLICY IMPLICATIONS OF THE INCONSISTENCY OF THE JURISDICTIONAL TRIGGER OF THE MERGER REGULATION WITH THE INTERSTATE TRADE CRITERION

The analysis undertaken above has determined that the existing jurisdictional trigger is detrimental to the policy goal for which the EC Merger Regulation was originally implemented. This policy goal has been determined to be the prohibition of concentrations that may hinder Single Market integration by distorting the undistorted structures of competition upon which it is based.

The operation of the jurisdictional trigger of the Merger Regulation determines that mergers that may distort competition within the Community (and therefore may hinder the integration process) may be prohibited or sanctioned according to specific national interests that are not compatible with the integration process. Furthermore, national assessment of the effect of such mergers on competition at the national level may not always take account of the effect of the merger on competition at a Community level, risking the prohibition of mergers that may be pro-competitive at the Community level or the sanctioning of mergers that may be anti-competitive at the Community level. Thereby, the level-playing field for Community undertakings that is necessary for the success of Single Market integration is being denied.

As single market integration progresses, the anomaly of the present high turnover thresholds will be rendered more and more pressing. This is because more and more specific product markets will become Community-wide and more and more commercial transactions - including mergers - will be seen to have an effect upon interstate trade.

Furthermore, it has been determined that the certainty that turnover thresholds - as a formalistic jurisdictional criterion - lend to the Merger Regulation should not be considered absolute. Whatever advantages in certainty formalistic provisions may provide relative to more flexible criteria may even be outweighed by other regulatory

inefficiencies deriving from their technical application and their inability to adapt to a non-static environment.

XI

CONCLUSION

The thesis has determined that the Reviews of the jurisdictional trigger of the EC Merger Regulation by the Commission (and in the literature) have considered the issue only in terms of policy issues, specifically Community competition policy, rational economics, regulatory efficiency and the principle of subsidiarity (that may not be applied to the text of the EC Merger Regulation in isolation, but is applicable 'in spirit' as a desirable policy goal).

The author however considers that it is the *legal* dynamic of the debate that should be given overriding importance in any discussion of jurisdiction within the Community. The competence of the Community to assess mergers derives from EC Treaty that lays down the extent to which its institutions may act. Thereby, it is the operation of the legal bases in conjunction with the application of the legal principle of subsidiarity that determine an appropriate jurisdictional trigger for the EC Merger Regulation: the interstate trade criterion.

The thesis determines that the operation of Article 1 MR (together with the fine-tuning provisions of the Merger Regulation) does not operate absolutely consistently with the interstate trade criterion. Further analysis of the operation of the legal bases of the Regulation reveals that this fact does not render the EC Merger Regulation illegitimate, nor is it unconstitutional. Nonetheless, the legal consequences are that the Regulation extinguishes private rights deriving from Article 81 of the Treaty before national courts. This is clearly undesirable, particularly in a time when such private individual rights are actively being encouraged.⁹⁷⁴

The policy implications of the operation of the existing jurisdictional trigger are also significant, in particular for the aim of establishing a level playing field of competition regulation for undertakings within the Community. Mergers that may distort competition within the Community (and therefore may hinder the integration process) may be prohibited or sanctioned according to specific national interests that are not compatible with the integration process. Furthermore, national assessment of the effect of such mergers on competition at the national level may not always take

⁹⁷⁴ See Commission's *White Paper on modernisation of the rules implementing Articles 85 and 86* (81 and 82) of the EC Treaty, OJ N. C132, 1999/05/12 and *Commission Proposal for a new implementing Regulation for Articles 81 and 82 EC*, Commission Proposal COM (2000) 582.

account of the effect of the merger on competition at a Community level. This is a deficiency that will become increasingly evident as the Single Market progresses.

The EC Commission determined in its 1996 Review of the jurisdictional trigger of the Merger Regulation that in terms of Community policy (ignoring the legal issues) the interstate trade criterion was more appropriate than the existing turnover thresholds in Article 1 MR.⁹⁷⁵ The Commission has also stated that it is willing to consider factors other than turnover to determine the jurisdictional scope of the Merger Regulation,⁹⁷⁶ Nevertheless, the logical step from these two assertions has never been directly considered by the Commission since it dropped the interstate trade criterion from its first proposal for the EC Merger Regulation.⁹⁷⁷ In spite of the persuasive legal and policy reasons for the use of the interstate criterion, there are clearly outstanding factors that prevent its viability in real terms. Three of these factors are easily identifiable:

- First, the implementation of the interstate trade criterion would dramatically increase the scope of application of the Merger Regulation (in preference to the national systems of control). In spite of increasing harmonisation of national systems of competition law according to Community principles and approach and the fact that concentrations are assessed for their effect on competition alone under Article 2 MR⁹⁷⁸, the national governments remain coy about ceding substantial amounts of control to Community-level institutions in this area. Recall that the Member States were opposed to a reduction of the turnover thresholds made by the Commission in its

⁹⁷⁵ Commission's Green Paper on the Review of the Merger Regulation 1996, *ibid*, pp.25-6.

⁹⁷⁶ Commission's Green Paper on the Review of the Merger Regulation 1996, *ibid*, p.11.

⁹⁷⁷ The first Merger Regulation proposal did incorporate the interstate trade criterion, combined with a low turnover threshold and a market share threshold Article 1(1)(1) ('in so far as the concentration may affect trade between Member States.') and Article 1(2) (the aggregate turnover of the participating undertakings had to exceed 200 million units of account and the goods and services concerned by the concentration had to account for at least 25 % of the market in at least one Member State).

⁹⁷⁸ Although there is explicit reference to other criteria in Article 2(1)b MR, these will not be taken into account unless they are to the consumers' advantage and do not form an obstacle to competition. There is therefore no scope for an efficiency defence that could be employed to pursue Community industrial policy. In detail, see eg., Camesasca, P., *The Explicit Efficiency Defence in Merger Control: Does it Make the Difference?*, (1999) ECLR pp14-28.

There is further little evidence that the Commission has covertly pursued industrial policy agendas in the practical application of the Regulation.

Note that *The McDougall Report*, considering the need for centralised financial regulation, highlighted the conditions of: the existence of economies of scale, political homogeneity and cross-frontier effects. Where the Member States are increasingly assessing concentrations solely for their effect on competition, the relevant political homogeneity exists, and the argument for centralised regulation is pressing. Commission of the European Communities,

Green Paper on the Review of the Merger Regulation in 1996, where the end effect would have been a threshold set far above that of the interstate trade criterion. It is of course open to debate whether this is a rational - even logical - stance. According to the Treaty (Articles 2, 3 and 5 EC) Member States may not pursue policies that might contradict a system of undistorted competition within the Community. Therefore, an increased scope of the Merger Regulation would not change the fact that the Member States are already compelled to concede the right to pursue national policies as far as they conflict with the process of Single Market integration (based upon a system of undistorted competition). Furthermore, it is important to stress that the loss of this right of the Member States does not result in the power of the Community to re-regulate in this substantive field. Rather, the national powers just legally ceases to exist. Member State opposition appears therefore to be based more upon 'psychological' prejudice than any rational analysis. Whether this status quo may change in the near future is impossible to predict. At present, however, it is almost certain that the required qualified majority vote of the Member States to implement the interstate trade criterion as the jurisdictional trigger for the Merger Regulation could not be achieved in the Council of Ministers.⁹⁷⁹

- Secondly, even if it may be shown that functionalist legal provisions may in their application provide enough certainty to remain *legitimate* - and the use of the interstate trade criterion would have the benefit of an established precedent - we should not forget the interests of business at the every day level. The interstate trade criterion may not provide enough certainty in *practical efficiency terms*.⁹⁸⁰ Recall that for the regulation of mergers, certainty is especially vital. Uncertain jurisdictional scope of the Merger Regulation would mean long delays and expense and the optimum moment for a merger may be lost. Firms would be dissuaded from effecting potentially efficiency-enhancing mergers in the first place. Furthermore, merger control is politically a very contentious area so that an ambiguous jurisdictional dividing-line may provoke difficulties between the Commission and the Member States. Hence, the Commission expressly rejected the suitability of the interstate trade criterion as being too vague in its 1996 Review.

McDougall Report of the Study Group on the Role of Public Finance in European Integration (1977, OOEPEC, Luxembourg).

⁹⁷⁹ There would also be concerns about the risk of regulatory capture by expanded centralised control.

For a classical analysis of the problems of regulatory capture (with direct reference to Community merger control), see *Neven et al., ibid* at pp.163-192.

- Thirdly, the Commission has only limited resources and staff. *Schaub*, the present Director General of DGIV, has expressed concern about the limited resources of the Commission in the regulation of competition as a reason to amend the present structure of competences.⁹⁸¹ It is at present seriously over-worked and it is not possible that it could cope with the substantial expansion in the scope of the Merger Regulation that the adoption of the interstate trade criterion as the jurisdictional trigger would entail.⁹⁸²

The corollary of this is that the most appropriate jurisdictional criterion for the EC Merger Regulation in terms of *its legal bases and Community competition policy* is not a realistic possibility for reasons of *national sovereignty and regulatory efficiency*. This does not have implications of *legitimacy*. Private rights have (in theoretical terms) not been lost on the basis of Article 83 EC; the application of subsidiarity does not rest upon a basic and exclusive application of *Tiebout*, but incorporates other efficiency factors as well.⁹⁸³

It remains to be considered however whether there could ever be a 'perfect fit'. Is there a formula for a jurisdictional trigger that would ensure:

- that the legal constitutional issues were comprehensively laid to rest;
- that the Commission's already stretched resources would not be completely exhausted;
- that regulatory efficiency and legal certainty are not undermined;
- that would ensure that any residual national sovereignty issues would be provided for; and
- that the overriding policy goal of competition law would be adequately protected?

Several other solutions to the dilemma have been forwarded and considered by both the Commission and in the literature. Both consider these options from the point of view of policy and regulatory efficiency only, ignoring the claims of the legal bases.

⁹⁸⁰ In agreement, see Broberg, *ibid*, 1994, p. 99-100; Broberg, *ibid*, 1997, pp.107-8.

⁹⁸¹ Cited as 500 employees handling 1338 cases in 1997 in: *Die Zeit* Nr. 26, 18 June 1998, p.19

⁹⁸² See eg. Riley, *'The European Cartel Office: A Guardian Without Weapons?'* (1997) 1 ECLR 3 at pp. 11-13; Kerse's annotation on *Otto BV v Postbank NV*, (1994) 31 CMLR; House of Lords Select Committee on the European Communities, *Enforcement of Community Competition Rules*, Session 1993-4, 1st Report; Forrester and Norall, *'Competition Law'* (1990) 10 YEL 407, at p.409.

⁹⁸³ See the individual conditions as laid out above, p163-167.

Even within these limited parameters however, none of the possibilities has been deemed adequate:

- Turnover thresholds on a sectoral basis would require a threshold at a necessarily arbitrary level with regard to the potential effect on Community competition structures and their operation would be very complex where firms were active across a number of sectors.⁹⁸⁴

- Thresholds based upon the size of the transaction would again require a threshold that was entirely arbitrary with regard to the potential effect on Community competition structures.⁹⁸⁵

- A market share criterion would also be set at an arbitrary level with regard to the potential effect on Community competition structures. The Commission nevertheless has considered it to be a *more appropriate* jurisdictional criterion than the existing turnover thresholds.⁹⁸⁶ It discounts it however on practical grounds as rendering too much legal uncertainty in the application for a jurisdictional criterion.⁹⁸⁷ This position of the Commission is widely accepted in the literature.⁹⁸⁸ It should further be noted that in order to establish an accurate market definition, it is often necessary to contact the main customers and the main companies in the area to consider their views and to obtain relevant information. This information may include specific sales figures and other data which is usually kept confidential and it is unlikely that a firm which is considering participation in a concentration would be able to gain access to sales

⁹⁸⁴ See, rejecting its use for the latter reason, European Commission Report to the Council on the Implementation of the Merger Regulation, COM (93) 385, Brussels, 28 July 1993, at p. 14. In agreement, also Broberg, *ibid*, 1994, p.100.

⁹⁸⁵ This solution has been advocated by the American Bar Association, ABA Comments on Draft Form Notification, *Antitrust Law Journal*, 59, (1990), pp.252-4. Also Broberg, *ibid*, 1998.

⁹⁸⁶ Commission Green Paper, *ibid*, p.30. It discounts it however as rendering too much legal uncertainty in application for a jurisdictional criterion, see eg., Commission Report to Council on the Implementation of the Merger Regulation, COM(93) 386, Brussels, 28 July 1993, at p. 14.

⁹⁸⁷ Commission Report to Council on the Implementation of the Merger Regulation, COM(93) 386, Brussels, 28 July 1993 at p.14.

⁹⁸⁸ See eg., Cook, C.J. and Kerse, C.S., *ibid*, at pp. 62-63; Burnside, A., '*Comment - European Merger Control: Department Shopping?*' in: *Competition*, 1996, 2 at p. 2; Koegel, R., '*Die Angleichung der deutschen an die europäische Fusionskontrolle*', Nomos Verlagsgesellschaft, Baden-Baden 1996 at p.303; Broberg, M.P., 1998 *ibid* at p.262; Broberg, 1997 *ibid*, pp.107-8.

Against this, only Kassamali, *ibid* and Morgan, *ibid*.

figures of its competitors in order to more accurately calculate its exact market share.⁹⁸⁹

Another problem that would arise with all these possibilities, just as it would arise with the use of the interstate trade criterion, is the limited resources and staff of the Merger Task Force in the Commission. The structure is simply not in place to cope with a significantly increased scope of the Merger Regulation, whereby, under the present system, its application would remain in the exclusive competence of the Commission.

With this in mind, it is striking that the Commission has not appeared to consider the decentralised enforcement of the Merger Regulation (in tandem with an increased scope). This is in spite of the existing structure of Articles 81 and 82 EC, and the recent proposal by the Commission for a new implementing Regulation for Articles 81 and 82 EC to encourage and to materially expand the (already existing) decentralisation of enforcement.⁹⁹⁰ These recent recommendations for Articles 81 and 82 EC have been equally considered by the Commission to be consistent with the conditions deriving from Article 5 EC and the subsidiarity principle within the context of the Community objective of preventing the distortion of competition within the Community.⁹⁹¹

Questionable is why, according to the principle of subsidiarity, the Commission represents the most appropriate authority to regulate all mergers that affect interstate trade, and yet the enforcement of Articles 81 and 82 EC is most appropriately shared between the national and Community levels. Why should the enforcement of the Merger Regulation not be entrusted to national authorities?

Clearly, decentralised enforcement at the conception of the Merger Regulation was inconceivable since not all Member States had an effective system of competition law in general, never mind a structure in place to assess mergers. Analysis of *Annex 1*

⁹⁸⁹ See Broberg, *ibid.*, 1998 at p.262.

⁹⁹⁰ See Commission's *White Paper on modernisation of the rules implementing Articles 85 and 86 (81 and 82) of the EC Treaty*, OJ N. C132, 1999/05/12 and *Commission Proposal for a new implementing Regulation for Articles 81 and 82 EC*, Commission Proposal COM (2000) 582.

⁹⁹¹ Commission Proposal for a new implementing Regulation for Articles 81 and 82 EC, Commission Proposal COM (2000) 582, at p.1.

Some authors consider that subsidiarity does not operate in this way for Articles 81 and 82 EC. They consider that subsidiarity operates to require a new jurisdictional criterion for these Articles that will be more restricted in scope. This has however been refuted above, see pp.123.

however shows us that this is no longer the case, and all fifteen Member States have some form of merger control.

The approach of the Commission for *merger* regulation - with regard to *jurisdiction* as well as *enforcement* - might be taken to be a straightforward and undiluted application of the *Tiebout* principle: recall that this principle emphasises the importance of spill-over effect to rebut the presumption of decentralised regulation. Its importance to the Commission in its approach to the centralisation issue has been emphasised on numerous occasions in its own Reports.⁹⁹² On the other hand, the *Tiebout* principle appears to be of no importance for the issue of the *enforcement* of Articles 81 and 82 EC in the Commission's recent Proposal⁹⁹³ It appears therefore that, with regard to the *enforcement* issue, the principle of subsidiarity affects the area of antitrust in a different way than the regulation of mergers.

Let us however reconsider the operation of the *Tiebout* principle. According to the application of *Tiebout* for merger control, spill-over effects are determinative in rebutting the presumption for decentralisation for two main reasons. First, there is a need for a level playing field in the regulation of private conduct. This is not guaranteed if a national authority may assess conduct having an effect beyond the borders of its own jurisdiction with regard to purely domestic concerns.⁹⁹⁴ Secondly, multiple notifications may be expensive politically and in economic terms, and there are concomitant informational difficulties.⁹⁹⁵

It is necessary to consider the specifics of decentralisation as proposed for Articles 81 and 82 EC with regard to the operation of this presumption. The proposed regulation intends the increased of the scope of Articles 81 and 82 EC on the one hand (whereby *all* agreements or conduct affecting interstate trade will be subject to these Articles), and on the other an increased application of Articles 81 and 82 EC at the decentralised level (whereby national authorities will also be able to apply Article 81(3) EC). It therefore actually champions the idea of decentralised enforcement *upon the basis of* spillover effects.

Analysis of the terms of the Commission Proposal reveals however that this does not in fact, as it first appears, constitute a broad rejection of the *Tiebout* principle. On the

⁹⁹² See eg, *Padoa Schioppa Report* *ibid*.

⁹⁹³ Commission Proposal, *ibid*.

⁹⁹⁴ See above, pp.274-301.

contrary, a system of checks and formalities exist to counter the problems that traditionally rebut the *Tiebout* presumption. These safeguards act to justify decentralisation consistently with the practical fact that the Commission's resources alone are insufficient to apply Articles 81 and 82 EC adequately. Articles 11-13 of the Proposal provide for co-operation between the Commission and the national authorities and between the national authorities themselves, including exchange of information and case allocation provisions.⁹⁹⁶ Furthermore, Article 16 reiterates the Member States' obligation deriving from Article 10 EC, providing that national courts and authorities are obliged to make every effort to avoid taking decisions that conflict with decisions adopted by the Commission (whereby national courts may also initiate Article 234 EC preliminary reference proceedings). There are other safeguards. The Commission retains its autonomous power to enforce Articles 81 and 82 EC in the individual case upon its own initiative.⁹⁹⁷ The Commission may adopt and refine block exemptions and remove their benefit in the individual case,⁹⁹⁸ but a national authority may only withdraw the benefit of a block exemption for its own territory in the limited circumstances that it constitutes a distinct relevant market.⁹⁹⁹ National competition authorities *must* consult the Commission in all decisions aimed at terminating or penalising an infringement of Article 81 and 82 EC¹⁰⁰⁰ and, furthermore, the Commission retains its existing right to withdraw a case from a national competition authority and deal with it itself.¹⁰⁰¹ National courts will be obliged to transmit a copy of judgments applying Articles 81 and 82 EC to the Commission, and the Commission may appear as *amicus curiae* before national courts in any case where it felt that an issue of considerable importance for the consistent application of Community competition law is involved.¹⁰⁰²

Above all, national authorities and courts will in general only be applying a *prohibition* according to established principles of Community law. They will not be

⁹⁹⁵ See above, p.272.

⁹⁹⁶ The Commission states that detailed rules will be laid down in an implementing Commission regulation according to Article 34 of the proposed Regulation, and in a notice on co-operation between competition authorities, see Regulation Proposal, *ibid* at p.19.

⁹⁹⁷ See Article 7 of the Commission Proposal, *ibid*.

⁹⁹⁸ See Articles 28-30 of the Commission Proposal, *ibid*.

⁹⁹⁹ See Articles 29(2) of the Commission Proposal, *ibid*.

For an interpretation of 'distinct market' within the context of the EC Merger Regulation Article 9, see above, pp.200-202.

¹⁰⁰⁰ See Article 11(4) of the Commission Proposal, *ibid*.

¹⁰⁰¹ See Article 11(6) of the Commission Proposal, *ibid*.

This Article is the existing Article 9(3) of Regulation 17/63.

¹⁰⁰² See Article 15 of the Commission Proposal, *ibid*.

Admittedly, the right of the Commission to appear in national courts is shared with the national competition authorities.

able to take '*positive decisions*' - that is, individual exemption-type or non-infringement type decisions. Article 10 of the Proposal provides that the Commission - and the Commission only - may adopt decisions finding that Article 81 EC is inapplicable (either because the conditions of Article 81(1) EC are not fulfilled or the conditions of Article 81(3) EC are not satisfied), or that Article 82 EC is not applicable. This proposal warrants the end of the current individual exemption procedure followed by the Commission in its application of Article 81(3) EC, and envisages a determination that an individual agreement or conduct does not fall into Article 81 EC as a whole. The decisions would be taken 'in the Community interest' in cases that, as envisaged by the *White Paper on Modernisation*¹⁰⁰³ that pre-empted the Commission Proposal, are exceptional and raise new questions for which the market requires guidance.

The Proposal considers that such decisions will be binding and, in tandem with the obligation emphasised in Article 16 of the Proposal, will make an important contribution to the uniform application of Community competition law.¹⁰⁰⁴ In essence, however, Article 10 of the Proposal represents a *restriction* on the activity of the *Member States* within their new structure of competencies rather than a specific empowerment of the Commission. It would contribute to the uniform application of Community competition law in that it prevents Member States from effectively renationalising the application of Articles 81 and 82 EC by granting immunity to individual undertakings in their individual acts.¹⁰⁰⁵ An individual competition authority (or court) with its own interest in a particular undertaking cannot therefore prevent the initiation of Article 81 or 82 EC proceedings by the Commission or another national authority through a declaration that those Articles do not apply to the relevant agreement or conduct *per se*. The prohibition remains 'alive' and may be enforced by another authority.

The Proposal for the implementation of a new regulation for the application of Articles 81 and 82 EC therefore hopes to avoid the problems that mitigate against decentralised regulation according to the *Tiebout* principle. This it intends to achieve by the implementation of a specific structure of co-operation between the national

¹⁰⁰³ Commission White Paper, *ibid*.

¹⁰⁰⁴ Commission Proposal, *ibid* at p.19.

¹⁰⁰⁵ Hence, the Proposal emphasises that such decisions can be adopted only at the Commission's initiative and in the Community public interest to '*...ensure that decisions making a finding of inapplicability cannot be obtained on demand by companies.*', see Commission Proposal, *ibid* at p.19.

regulators, and a system that ensures that the Commission oversees consistency in the application of the principles of Articles 81 and 82 EC. Fundamentally, it prevents national courts and authorities from adopting positive decisions and potentially distorting the Community objectives pursued in the application of Articles 81 and 82 EC. This constitutes a more sophisticated approach to the principle of subsidiarity than the basic application of *Tiebout* principle that is apparent for the control of mergers. It provides that the fourth condition required to justify Community action according to the principle of subsidiarity is not fulfilled: it ensures that action at the national level is effective and efficient to achieve the objective of protecting and promoting Single Market integration in the application of Articles 81 and 82 EC.¹⁰⁰⁶

The question is re-posed: why is it not possible - within the context of subsidiarity - to provide a similar system and structure of checks and restrictions to allow the decentralised enforcement of the EC Merger Regulation? Why did the Commission, in particular in its reference to the subsidiarity principle, not even consider the application of the Merger Regulation on the basis of the interstate trade criterion and in the hands of national competition authorities in its 1996 Review of the Merger Regulation (that was after all only three years prior to its *White Paper on Modernisation of the Rules Implementing Articles 81 and 82?*)¹⁰⁰⁷

With regard to the *enforcement* of the EC Merger Regulation, there are clearly issues and problems involved in the regulation of mergers that continue to render decentralisation inappropriate, in spite of the fact that the factors arising from the simple application of the *Tiebout* model can apparently be effectively addressed. These issues lie within the text of the Merger Regulation itself, and within the other important principles lying behind its conception as they relate to the specialised nature of regulating mergers:

- In the first place, the assessment of mergers under Article 2 MR is by nature exactly the expression of positive decision-making that the Commission denied the Member States within the terms of its Proposal for a new implementing Regulation for Articles 81 and 82 EC: the assessment determines definitively in the individual case whether a concentration is *or is not* compatible with the Community objectives.¹⁰⁰⁸ Given the particular political and social issues that concentrations may invoke (that may be

¹⁰⁰⁶ See the abstract analysis of the application of the subsidiarity principle above.

¹⁰⁰⁷ Commission White Paper, *ibid*.

¹⁰⁰⁸ I am indebted to Professor Claus-Dieter Ehlermann for raising this point.

approached on a purely national rather than Community basis), it would be clearly highly inappropriate for national authorities to be given this scope to exercise their discretion. It could even provoke the unravelling of the body of concentration policy that the Commission has built up, since concentrations are by their very nature more liable to be found to be consistent with Community policy and objectives,¹⁰⁰⁹ giving national authorities more cover in allowing concentrations for reasons that are of exclusive concern to themselves.

- In the second place, it is necessary to recall the overriding importance attributed to the one-stop-shop principle in the conception (and subsequent reviews) of the EC Merger Regulation. We have already established that the regulation of mergers is different. Speed and certainty are of paramount importance. It is imperative therefore that the undertakings concerned have the opportunity to receive a definitive assessment of the proposed concentration *before* it is implemented to avoid the difficult and even impossible consequence that divestment would entail: it would be a situation intolerable for business were they required to perform concentrations under the constant threat of prohibition with no system of *a-priori* approval. This entails a system of prior notification of mergers. Thereby, it is extremely desirable that notification is made to only one authority in the interests of performing the concentration while the optimum conditions last, and of incurring the least amount of expense.

With regard to merger control therefore, the interests of centralised *enforcement* are pressing. This is however less as a result of an overriding influence of the *Tiebout* model (that have been shown to be capable of being overridden within the framework of the subsidiarity principle) and more to do with the other important principles at the heart of the Merger Regulation - legal certainty and a one-stop-shop.

The effect of subsidiarity is therefore to justify the current system of centralised *enforcement*.

Do all these considerations mean that we are bound to the existing regime that relies upon a set of quantitative jurisdictional thresholds? Does this mean that we are required to accept a Merger Regulation that has (however legitimately) the

¹⁰⁰⁹ See above, pp.39-42.

undesirable effect of extinguishing private rights that previously existed in the application of Article 81 EC before national courts?

Recent dynamics with regard to the enforcement of Article 81 EC suggest that the existing problems concerning the legal bases of the Merger Regulation and private rights may soon change. The recent White Paper by the European Commission on the *Modernisation of the Rules Implementing Articles 85 and 86 EC* (now Articles 81 and 82 EC) recommends that national courts (and authorities outside the procedure on the basis of Article 84 EC) should be given the right to apply Article 81(3) EC.¹⁰¹⁰ If such an amendment comes to fruition, then the constitutional concerns raised by the operation of the turnover thresholds will be removed.

The policy problems however remain present and pertinent, and apparently irreconcilable. In the face of the circle of elements (Community competition policy, legitimacy, political viability, regulatory efficiency) that seem to act in a centrifugal manner, pulling apart any proposal for an appropriate jurisdictional criterion, it appears that the search for an appropriate jurisdictional trigger for the EC Merger Regulation must necessarily be compromised: it becomes a search for a 'best fit' rather than a 'perfect fit'.

What is clear is that the present structure of the jurisdictional trigger is far from satisfactory, even if it is legitimate. It does not satisfy the claims of the overriding policy behind the implementation of Community competition law. If it does indeed represent a 'refocusing' of the interstate trade criterion according to the legal base of Article 83 EC (by analogy with the experience in the area of state aids), it is not appropriate. The Commission must continue to press its mandate for lower turnover thresholds. Success would at least dilute to a greater extent the fiction that arises through the use of a formalistic criterion that can never pertain exactly to the effect concentrations may have on interstate trade. Thereby, however, action will be needed to ensure that the Commission is able to undertake the role assigned to it. There are solutions that may be considered. One might be to simply give greater resources to the Merger Task Force to carry out its tasks. A more radical idea might be a system of European Commission agencies at the national level. This might allay some of the national sovereignty fears, or at least the fears that the interests of national markets are overlooked at the centralised level. Above all, however, it is fair to say that the

¹⁰¹⁰ Commission's White Paper, *ibid.*

integrity of Community competition policy should not be compromised for the basic reason that practical resources are insufficient.

Barring such developments, it is considered that focus should also be placed upon the application of national laws by the national authorities of the Member States. They should be encouraged - in tandem with the soft harmonisation of national competition laws that has been recognised to have been occurring in recent years - to consider the effect of the concentration on competition structures on the true relevant market, even if it extends beyond national boundaries. Thereby, concentrations even at the national level would be assessed according to their effect upon the integration paradigm (it may be assumed that few concentrations that fall within the scope of no national merger law would have an effect upon interstate trade).

Of course, tensions will remain: lower turnover thresholds will never guarantee that all concentrations that may affect Community goals will be brought within the remit of the Commission; without exclusive Commission control over all mergers that may affect interstate trade, there can be no structure of checks in place to ensure that a single national authority does not exaggerate its own national interests in assessing mergers with cross-border effect. However, such developments would at least constitute a 'best fit' that moves closer to the unattainable ideal.



ANNEX 1

Overview of National Merger Control Legislation

Country	Austria	Belgium	Denmark	Finland
Name of Bill	Cartel Act 1988	Law on the Protection of Economic Competition of 5 August 1991 (as amended by the laws of April 26 1999)	Competition Act 1997 of June 10 1997	Act on Restrictions on Competition (480/92)
Assets Threshold	NO	NO	NO	NO
T/o Threshold	W/w t/o of all u/g's is 4.2 billion Sch. or more and 210 million Sch. or more in Austria and the t/o of at least two of each is or exceeds 28 million Sch.	Agg. t/o in Belgium of all parties is 40 mill. Euro and at least two have an individual Belgian t/o of at least 15 million Euro	Agg. w/w t/o of u/g's exceeds 50 mill. Kr. unless the t/o of only one exceeds 10 mill. Kr.	Agg. w/w t/o of the parties exceeds FMk2 bill. and the agg. w/w t/o of at least two exceeds FMk150 mill., provided that the target company or a company in the same group is engaged in business activities in Finland
Market share threshold	NO	NO	NO	NO
Filing mandatory or voluntary	Mandatory where threshold reached	Mandatory where threshold reached	Mandatory where threshold reached (fines if fail to comply)	Mandatory where threshold reached
Foreign to foreign mergers	Yes – if requirements met	Yes – if requirements met	Yes – if at least one of the participating u/g's (ie directly involved in the transaction) is located in Denmark	Yes – if target engaged in business in Finland (physical presence required)

Country	France	Germany	Greece
Name of Bill	Ordinance No. 86-1243 of December 1 1986 (as amended)	Act against Restrictions of Competition of 1958 (as amended)	Law 703/1977 on control of monopolies and oligopolies and the protection of free competition
Assets Threshold	NO	NO	NO
T/o Threshold	Agg. total worldwide t/o of all parties (pre tax) exceeds 150 million euros and the total t/o achieved in France (pre tax) by at least 2 of the parties exceeds 15 million euros	Agg. w/w t/o of all u/g's exceeds Dm 1 bill. and at least one had a t/o of at least Dm50 mill. in Germany, <i>unless</i> one party is an independent company with a w/w t/o of less than Dm20 mill, or the relevant market (in existence for at least 5 years) had a total annual value of less than Dm30 mill.	<i>Post-merger</i> : agg. t/o of all u/g's at least dr15 mill in Greece or (see market share). <i>Pre-merger</i> : agg. t/o of u/g's at least dr 75 mill. in Greece and each of at least two has an agg. t/o of at least dr 7 mill. in Greece or (see market share)
Market share threshold	NO	NO	<i>Post-merger</i> : u/g's have a market share of at least 10% in the Greek market or subst part. <i>Pre-merger</i> : u/g's have market share of at least 25% in the Greek market or subst' l part
Filing mand/vol.	Mandatory where threshold reached	Mandatory where threshold reached	Mandatory where threshold reached
Foreign to foreign mergers	Yes - effects-based	Yes - effects-based unless none of the u/g's has a t/o of Dm50 mill. in Germany	Yes - effects-based (actual or potential)

Country	Holland	Ireland	Italy	Luxembourg
Name of Bill	Competition Act of May 22nd 1997	Mergers and Takeovers (Control) Acts 1978 to 1996	Law No.287 of October 10 1990	Law of June 17 1970 (as amended)
Assets Threshold	For credit and financial institutions one tenth of total assets of which at least NLG50 million of perm. assets are located in Holland	Gross assets of each of two or more of the enterprises involved is not less than IR10 mill. OR	NO	NO - Commission and Minister decide a posteriori whether activity against general interest
Turnover Threshold	Combined w/w annual t/o exceeds NLG250 million AND at least two u/g's concerned have annual t/o within Holland of not less than NLG30 million	T/o of each of two or more enterprises involved is not less than IR20 mill.	T/o by all u/g's exceeds 710 bill. lire in Italy, or t/o of the target on the Italian market exceeds 71 bill. lire	NO
Market share threshold	NO	NO	NO	NO
Filing mandatory or voluntary	Mandatory where thresholds reached	Mandatory where threshold reached	Mandatory where threshold reached	NO
Foreign to foreign mergers	Yes - where thresholds are met	Yes - thresholds not limited to Ireland <i>but</i> if target not exceed threshold in Ireland, a decision of 'no jurisdiction' given after short-form notification	Yes - T/o threshold reached	N/A

Country	Portugal	Spain	Sweden	United Kingdom
Name of Bill	Decree Law No. 371/93 of October 29 1993	Law 16/1989 on the Defence of Competition (amended in Royal Decree Law 6/1999)	Swedish Competition Act of July 1993	Fair Trading Act 1973
Assets Threshold	NO	NO	NO	Gross assets taken over exceeds 70 million pounds or NO
Turnover Threshold	U/g's have agg. after-tax turnover exceeding 30,000 million escudos in Portugal or	Agg. turnover in Spain of u/g's involved exceeds Ptas 40,000 mill, provided that the turnover in Spain of at least 2 parties exceeded Ptas 10,000 million or	Acquirer and target co's achieve w/w turnover of at least 4 billion kronor Target must carry out commercial activities in Sweden	
Market share threshold	If the merger would create or strengthen a market share greater than 30% of the national market or a substantial part thereof	A share of 25% or more of the nat. mkt or of a defined geog. mkt within which it is acquired or increased (ie the share of the target company)	NO	Merger creates or enhances 25% of supply of supply or purchases in UK or substantial part
Filing mandatory or voluntary	Mandatory where threshold reached	Mandatory where threshold reached	Mandatory where threshold above attained. Voluntary if w/w turnover of target co. below 100 million kronor but above threshold reached (unless Comp. Auth. requires notification)	Voluntary
Foreign to foreign mergers	Yes - legal-effects test	Yes - thresholds met	Yes - where the target has an entity in Sweden carrying out some form of commercial activity to which a turnover figure may be given	Yes - where either party controls any enterprise which is carried on or incorporated in the UK

ANNEX 2

Mergers Notified with the Italian Authorities during the Period July - December 1999 that affected Interstate Trade

NAME OF DECISION	DATE OF DECISION	REFERENCE
Ice Holding 1-2/Eco- Ecorefrigerazione-Rhoss	7th July 1999	Bollettino n.27 of 26th July 1999
BASF/BP France	16th July 1999	Bollettino n.28 of 2nd August 1999
Recticel-Greiner Holding- Orsa/Orsa Foam	27th July 1999	Bollettino n.29-30 of 16th August 1999
United Technologies Corporation/Sutrak Italia	10th August 1999	Bollettino n.31-32 of 30th August 1999
Baldurion/Novembal	10th August 1999	Bollettino n.31-32 of 30th August 1999
United Technologies Corporation/International Comfort Products Corporation	25th August 1999	Bollettino n.33-4 of 13th September 1999
Hamilton Sundstrand Holdings/Pneumatic Aircraft Components Europe	8th September 1999	Bollettino n.35-6 of 27th September 1999
Procter and Gamble/IAMS	8th September 1999	Bollettino n.35-6 of 27th September 1999
BASF/Ultraform	23rd September 1999	Bollettino n.38 of 11th October 1999
GE Industrial Products Europe-GE Packaged Power/Thomassen International	7th October 1999	Bollettino n.40 of 25th October 1999
Deutsche Lufthansa/Air Dolomiti	21nd October 1999	Bollettino n.42 of 8th November 1999
Huntsman Speciality Chemical/Imperial Chemical	27th October 1999	Bollettino n.43 of 15th November 1999

Industries

United Technologies Corporation/ Great Lakes Turbines	27th October 1999	Bollettino n.43 of 15th November 1999
FCY Acquisition/Furon	27th October 1999	Bollettino n.43 of 15th November 1999
Yamaha Motor Europe-Kayaba Industry/Paioli Meccanica	4th November 1999	Bollettino n.44 of 22nd November 1999
High Voltage Engineering/Ansaldo Sistemi Industriali	10th November 1999	Bollettino n.45 of 29th November 1999
Markos/Mefar	17th November 1999	Bollettino n.46 of 6th December 1999
Nord-Micro Elektronik Feinmechanik/Telair International Electronic Systems	17th November 1999	Bollettino n.46 of 6th December 1999
Robert Bosch/ARESI	24th November 1999	Bollettino n.47 of 13th December 1999
Danieli & C. Officine Meccanichecorus Group/Danieli Hoogovens Technical Services	24th November 1999	Bollettino n.47 of 13th December 1999
Roehm/Polymer Latex	2nd December 1999	Bollettino n.48 of 20th December 1999
Grupo Mexico/Asarco Incorporated	2nd December 1999	Bollettino n.48 of 20th December 1999
United Technologies/Cade Industries	7th December 1999	Bollettino n.49 of 27th December
Cardo/Cardo BSI Rail	16th December 1999	Bollettino n.50 of 3rd January 2000
21 Investimenti-Sport Investments/Sport Timing	22nd December 1999	Bollettino n.51-2 of 10th January 2000
United Technologies/Holland	22nd December 1999	Bollettino n.51-2 of 10th

Heating Carrier Holding
United Technologies/AB
Electrolux

22nd December 1999

January 2000
Bollettino n.51-2 of 10th
January 2000

CASE LAW OF THE EUROPEAN COURT OF FIRST INSTANCE

- Air France I v EC Commission* Case T-2/93 (1994) ECR II-323.
- Air France II v EC Commission* Case T-3/93 (1994) ECR II-121.
- Argyll Group v Distillers* Case T-221/95 (1986) 1 CMLR 764.
- BBC v European Commission* Case T-70/89 (1991) II ECR 535 (1991) 4 CMLR 669.
- Compagnie Maritime Belge Transports v Commission of EC* Joined Cases T-24/93, T-25/93, T-26/93, T-28/93 (1996) II ECR 1201, OJ No C336 1996/11/09 p27.
- Endemol Entertainment Holding BV v Commission of the EC* Case T-221/95 (1999) II ECR 1299.
- Gencor v. Commission* Case T-102/96 (1999) II ECR 753.
- Radio Telefis Eireann v European Commission* Case T69/89 (1991) II ECR 485 (1991) 4 CMLR 749.
- Societa Italiano Vetro and others v. Commission* Cases T-68/89 and T-77-78/89 (1992) II ECR 1403 (1992) 5 CMLR 302.
- Tetra Pak Rausing SA v EC Commission* Case T-51/89 (1990) II ECR 309, (1991) 4 CMLR 334.
- Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v. Commission of the European Communities* Case T-29/92 (1995) ECR II-0289.

CASE LAW OF THE EUROPEAN COURT OF JUSTICE

- AEG-Telefunken v Commission* Case 107/82 (1983) ECR 3151, 1984 3 CMLR 325.
- Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung Unlauteren Wettbewerbs* Case 66/86 (1989) ECR 803 (1990) 4 CMLR 102.
- AKZO Chemie BV v Commission* Case 5/85 (1986) ECR 1965, (1987) 3 CMLR 716.
- Alemelo* Case C-393/92 (1994) ECR I-1477.
- Allgemeine Elektricitaets-Gesellschaft A.E.G.-Telefunken A.G. v Commission* Case 107/82 (1983) ECR 3151.
- Amministrazione delle finanze dello Stato v Salumi* Joined Cases 212-217/80 (1981) ECR 2735.
- August Toepfer & Co. GmbH v Commission* Case 112/77 (1978) ECR 1019.
- Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof* Case 5/73 (1973) ECR 1091.
- Beguelin Import v GL Import Export* Case 22/71 (1971) ECR 949.
- Behla-Muehle Josef Bergmann KG v Grows-Farm GmbH* Case 114/76 (1977) ECR 1211.
- Belasco v Commission* Case 246/86 (1989) ECR 2181(1991) 4 CMLR 96.
- Beitritt MRK* Case 2/94 1996
- Bilger v Jehle* Case 42/69 (1970) ECR 127 (1974) 1 CMLR 382.
- BNIC v Aubert*, Case 136/86(1987) ECR 4789 (1988) 4 CMLR 331.
- Bodson v Pompes Funebres des Regions Liberees* Case 30/87 (1988) ECR 2479 (1989) 4 CMLR 984.
- BP v Commission* Case 77/77 (1978) ECR 1513 (1978) 3 CMLR 174.
- Brasserie de Haecht v Wilkin (No.1)* Case 23/67 (1967) ECR 407 (1968) CMLR 26.
- HZA Bremerhaven v Massey-Ferguson* Case 8/73 (1973) ECR 897.
- BRT v SABAM* Case 127/73 (1974) ECR 51 (1974) 2 CMLR 238.
- Bundeskartellamt v Volkswagen* Case C-266/93 (1995) I ECR 3477, (1996) CMLR 4.
- Cadillon v Hoess* Case 1/71, (1971) ECR 351.
- CBEM v CLT and IPB* Case 311/84 (1985) ECR 3261.
- Chemie B.V. v. Commission* Case C-62/86 (1991) I ECR 3359.
- Commercial Solvents v Commission* Cases 6 & 7/73 (1974) ECR 223 (1974) 1 CMLR 309
- Consten/Grundig v. Commission* Cases 56 and 58/64 (1966) ECR 341, (1966) CMLR 418
- Corrine Bodson v Pompes Funebres des Regions Liberees* Case 30/87 (1988) OJ C157, p5.
- Costa v ENEL* Case 6/64 (1964) ECR 585, (1964) CMLR 425.
- C.R.A.M. and Rheinzink v. Commission* Cases 29 & 30/83 (1984) ECR 1679 (1985) 1 CMLR 688.

- Defrenne v Sabena (No.2)* Case 43/75 (1976) ECR 455, (1976) 2 CMLR 98.
- De Geus v Bosch* Case 13/61 (1962) ECR 45 (1962) CMLR 1.
- Delimitis v Henninger Braeu AG* Case C-234/89 (1991) I ECR 935 (1992) 5 CMLR 210.
- Deufil v EC Commission* Case 310/85 (1987) ECR 901 (1988) 1 CMLR 553.
- Distillers v Commission* Case 30/78 (1980) ECR 2229, (1980) 3 CMLR 121.
- Diversinte SA and Iberlacta SA v Administracion Principal de Aduanos e Impuestos Especiales de la Junqueros* Joined Cases C-260/91 and C-261/91 ECR 1993 I 1885.
- Enichem v Commission* Case T-6/89 (1991) ECR 1623.
- Erauw-Jacquery Sprl v La Hesbignonne Societe Cooperative* Case 27/87 (1988) ECR 1919 (1988) 4 CMLR.
- SpA Eridania-Zuccherifici nazionali and SpA Societa Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry* Case 230/78 (1979) ECR 2749.
- European Commission v Council* Case 22/70 (1971) ECR 263.
- European Commission v Council* Case 45/86 (1987) ECR 1493.
- European Commission v Republic of France* Case 167/73 (1974) ECR 359 (1974) 2 CMLR 216.
- Europemballage Corporation v Commission & Continental Can Co.* Case 6/72 (1973) ECR 215, CMLR 8302.
- France v Commission* Case 102/87 (1988) ECR 4067.
- French Republic and Societe Commerciale des Potasses et de l'Azote (SPCA) and Entreprise Miniere et Chitique (EMC) v Commission* Joined Cases C-68/94 and C-30/95 (1998) I ECR 375
- Frubo v Commission* Case 71/74 (1975) ECR 563 (1975) 2 CMLR 123.
- Gaston Schul Douane Expeditieur BV v Inspecteur dr Invoerrechten en Accijnzen, Roosendaal* Case 15/81, (1982) ECR 1409.
- Greenwich Film Prod. v. SACEM* Case 22/79 (1979) ECR 3275 (1980) 1 CMLR 629.
- Grossmaerkte v Commission* Case 26/76 (1977) ECR 1875.
- Groupement des Fabricants de Papiers Peints de Belgique v Commission*, Case 73/74 (1975) ECR 1491, (1976) 1 CMLR 589.
- GVL v Commission* Case 7/82 (1983) ECR 483 (1983) 3 CMLR 645.
- Hauptzollamt Bremerhaven v Massey Ferguson GmbH* Case 8/73 (1973) ECR 897.
- Hoffmann-La Roche v Commission* Case 85/76 (1979) ECR 461 (1979) 3 CMLR 211.
- Hugin Kassaregister AB v Commission* Case 22/78 (1979) ECR 1829 (1976) 3 CMLR 345.
- ICI v Commission* Case 48/69 (1972) ECR 619 (1972) CMLR 557.
- Internationale Handelsgesellschaft mbH* Case 11/70 (1970) ECR 1125.

- Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v EC Commission Cases 6 and 7/73*, (1974) ECR 223, (1974) 1 CMLR 309.
- Italy v Council and Commission Case 32/65* (1966) ECR 389 (1966) CMLR 39.
- Kramer Cases 3, 4 and 6/76* (1976) ECR 1279.
- Lord Bethell v Commission Case 246/81* (1982) ECR 2277 (1982) 3 CMLR 300.
- Metro SB-Grossmaerkte GmbH & Co KG v Commission Case 26/76* (1977) ECR 1875 (1978) 2 CMLR 1.
- Re Meura: Belgium v Commission Case 234/84* (1988) ECR 2263 (1988) 2 CMLR 331.
- Michelin v Commission Case 322/81* (1983) ECR 3461 (1985) 1 CMLR 282.
- Miller International Schalplatten GmbH v Commission Case 19/77* (1978) ECR 131.
- Ministere Public v Lucas Asjes and others Joined Cases 209 - 213/84* (1986) ECR 1425 (1986) 3 CMLR 173.
- Musique Diffusion Francaise Case 100/80* (1983) ECR 1825, (1983) 3 CMLR 221.
- LC Nungesser KG v Commission Case 258/78* (1982) ECR 2015 (1983) 1 CMLR 278.
- Papiers Peints v Commission Case 73/74* (1975) ECR 1491, 1522-1524 (1976) 1 CMLR 589
- Procureur de la Republique v Giry and Guerlain Cases 253/78 and 1-3/79* (1980) ECR 2327, (1981) 2 CMLR 99
- Pronuptia de Paris v Schillgalis Case 161/84* (1986) ECR 353, (1986) 1 CMLR 414
- Remia Nutricia v Commission Case 42/84* (1985) ECR 2545, (1987) 1 CMLR 1.
- Sacchi Case 155/73* (1974) ECR 409 (1974) 2 CMLR 177.
- Salonia v Poidomani and Giglio Case 126/80* (1981) ECR 1563 (1982) 1 CMLR 64.
- Schraeder v Hauptzollamt Gronau Case 265/87* ECR (1989) 2237 at 2269.
- Societe Technique Miniere v Maschinenbau Ulm Case 56/65* (1966) ECR 235 (1966) CMLR 357.
- Suiker Unie v Commission, Joined Cases 40-48/73, 50/73, 54-56/73, 111/73, 113/73, 114/73* (1975) ECR 1663 (1976) 1 CMLR 295.
- United Brands v Commission Case 27/76* (1978) ECR 207, (1978) 1 CMLR 429.
- United Kingdom v European Council Case 84/94 I* ECR (1996) 5755.
- VBVB and VBBB v Commission Cases 43 & 63/82* (1984) ECR 19 1985 1 CMLR 27
- VdS v Commission Case 45/85* (1987) ECR 405 (1988) 4 CMLR 264
- Verband der Sachversicherer e.V. v. Commission Case 45/85* (1987) ECR 405.
- Vereeniging van Cementhandelaren v EC Commission Case 8/72* (1972) ECR 977.
- Voelk v Etablissements Vervaecke Case 5/69* (1969) ECR 295 (1969) CMLR 273.
- Werner A. Bock KG v Commission Case 62/70* (1971) ECR 897.
- Zuechner v Bayerische Vereinsbank Case 172/80* (1981) ECR 2021 (1982) 1 CMLR 313.

THE UNIVERSITY OF CHICAGO

PHILOSOPHY DEPARTMENT

PHILOSOPHY 101

PHILOSOPHY 102

PHILOSOPHY 103

PHILOSOPHY 104

PHILOSOPHY 105

PHILOSOPHY 106
PHILOSOPHY 107
PHILOSOPHY 108
PHILOSOPHY 109
PHILOSOPHY 110
PHILOSOPHY 111
PHILOSOPHY 112
PHILOSOPHY 113
PHILOSOPHY 114
PHILOSOPHY 115
PHILOSOPHY 116
PHILOSOPHY 117
PHILOSOPHY 118
PHILOSOPHY 119
PHILOSOPHY 120

DECISIONS OF THE EUROPEAN COMMISSION

- Air France/Air Inter/UTA*, Commission's Twentieth Report on Competition Policy 1990 point 147.
- Air France/Delta Airlines/Continental Airlines* OJ (1998) C325/2.
- AKZO Nobel/Hoechst Roussel Vet* Case Comp/M1681, OJ (1999) C294.
- Alliance Unichem/Unifarma* Case IV/M.1220, OJ (1998) C186/5.
- Aluminium Imports from Eastern Europe* OJ (1985) L92/1, (1987) 3 CMLR 813.
- Anglo American/Tarmac* Case M.1779, OJ (1999) C344/7.
- Apollinaris/Schweppes* Case IV/M.093 OJ (1991) C203/14.
- Ashland Oil/Cabot*, Commission's Fourteenth Report on Competition Policy 1985 point 109.
- AVEBE/KSH*, Commission's Eighth Report on Competition Policy 1979.
- Blokker/Toys "R" US* OJ (1998) L316/1.
- BMW Belgium NV and Belgian BMW Dealers* OJ (1978) L046/33.
- BPCL/ICI*, OJ (1984) L 212/1.
- Breeders rights: roses*, Commission Decision OJ 1985 L369/9 (1988) 4 CMLR 193.
- British Airways/American Airlines* OJ (1996) C289/4.
- British Airways/British Caledonian*, Eighteenth Report on Competition Policy 1988, paragraph 81.
- British Airways/Dan Air*, Case M278, OJ (1993), C 68/5, (1993) 4 CMLR 235.
- British Airways/US*, Commission Notice OJ (1998) C239/10.
- British Midland/Regie des voies aeriennes*, Commission's Twenty Fifth Report on Competition Policy 1995, point 120.
- Carnaud/Sofreb* Press Release IP (88) 14, January 1988.
- Carrefour/Promodes* Case M1684 OJ (1999) C298/13.
- Cewal* OJ (1993) L34/20.
- Coats Paton/Guetermann*, Commission Ninth Report on Competition Policy (1980), point 132.
- Cobelaz* OJ (1968) L276/19, (1968) CMLR D45.
- Compagnie Nationale de Navigation/Sogelfa-CIM* Case IV/M1021 OJ (1997) C327/18.
- Constructor/Dexion* Case Comp/M1318, OJ (1998) C308.
- Continental Can* OJ (1972) L7/25, (1972) CMLR D11.
- Conventron Chauffournier*, OJ (1964) L122/8.
- McCormick/CPC/Rabobank/Ostmann*, Case IV/M330 OJ (1993) C256/3.

C3D/Rhone Capital LLC/Go-Ahead Group Plc Case M2154, Commission Press Release IP/00/1195.

CSME/MSCA/Rock Case M1522, OJ (1999) C124/13.

Dana/Galacier Vandervell Case Comp/M1335, OJ (1998) C353.

De Laval/Stork, OJ (1977) L215/11, (1977) 2 CMLR D69.

Delhaize/PG Case IV/M471, OJ (1994) C201/11.

Dupont/Sabancı Case Comp/M1538, OJ (1999) C311.

Dupont/Teijin Case Comp/M1599, OJ (1999) C309.

Eagle Star-Allianz Versicherung, Commission's Twelfth Report on Competition Policy 1983, point 103.

ECS/AKZO (No.2), OJ 1985 L374/1, (1986) 3 CMLR 273.

ELR Atochem/Atohass, Case Comp/M1158, OJ (1998) C141.

ENI/Montedison, OJ (1987) L5/13.

Fire Insurance (D) OJ 1985 L35/20, (1985) 3 CMLR 246.

Floral, OJ 1980 L39/51, (1980) 2 CMLR 285.

French West-African Shipowners' Committees OJ (1992) L 134/1, (1993) 5 CMLR 446.

GC&C/Irish Distillers, (1988) 4 CMLR 840.

GEC-Siemens/Plessey, OJ C239/2 (1990), (1992) 4 CMLR 471.

GEHE/Lloyds Chemists Case IV/M716 OJ (1996) L43.

Getronics/Wang Case Comp/M1561, OJ (1998) C143.

GKN/Sachs, Commission's Sixth Report on Competition Policy (1977) point 181.

Grosfillex/Fillistorf, OJ (1964) 58/915.

Hanson/Pioneer Case M1827 OJ (2000) C045/6.

Heineken/Cruzcampo Case IV/M1555 OJ (1999) C191/7.

Holdercim/Cedest, Commission's Twenty Fourth Report on Competition Policy 1994, point 332.

Holland Media Group OJ (1996) L134/5, (1995) 4 CMLR 26.

Hudson's Bay OJ 1988 L316/43, (1989) 4 CMLR 340.

Huhtamaki Oyj/Packaging Industries Van Leer Case Comp/M1656, OJ (1999) C248.

Hyundai Electronics/LG Semicon OJ (1998) C151.

IBM France/CGI Case IV/M336 OJ (1993) C113/2.

ICI/Williams Case Comp/M1167 OJ (1998) C101.

Interbrew/Bass Case M2044, Press Release IP/00/940.

Ispat/Unimetal Case Comp/M1509, OJ (1999) C151.

Re Italian Cast Glass OJ 1980 L 383/19, 1982 2 CMLR 61.

Italian Flat Glass, OJ (1989) L33/44, (1990) 4 CMLR 535.

Johnson and Johnson, OJ (1980) L377/16.

Johnson and Johnson/Depuy, Case Comp/M1286, OJ (1998) C294.
Kesko/Tuko Case M784, OJ (1997) C110/53.
KLM/NorthWest, Agence Europe 08/01/98.
Krauss/Maffei/Wegmann Case M1153 OJ (1998) C148.
Lafarge/Redland Case M1030, OJ (1997) C338.
London-European-Sabena, OJ (1988) L317/47, 1989 4 CMLR.
Lucchini/Ascometal Case Comp/M1567, OJ (1999) C146.
Lucent Technologies/Ascend Communications Case Comp/M1440, OJ (1999) C64.
Lufthansa/SAS/United Airlines, Agence Europe 09/07/98.
Lyonnaise des Eaux/Northumbrian Water Case IV/M567, OJ (1996) C11.
Mannesmann/Hoesch Case M222, OJ (1992) C114/34, (1992) 5 CMLR 117.
Metaleurop SA, OJ (1990) L179/41.
Metsaelitto/Vapo Case M2234, Commission Press Release IP/01/183.
Michelin and Michelin Nederland/Actor, Commission's Eighth Report on Competition Policy, point 146.
Miller International Schallplatten GMBH, OJ (1976) L357/40.
Mitsubishi/UCAR Carbon Case IV/M024, OJ (1990) C300.
Moet et Chandon Ltd OJ (1982) L094/7.
Napier Brown-British Sugar OJ (1988) L284/41.
Newell/Rubbermaid, Case Comp/M1355, OJ (1998) C387.
Newspaper Publishing, Case IV/M423, OJ (1994) C54.
Nicholas Freres/Vitapro, OJ (1964) 156/2287.
Norsk Hydro/SAGA Case Comp/M1573, OJ (1999) C162.
Omega, OJ (1970) L242/22, CMLR D49.
Optical Fibres, OJ (1986) L236/30.
Pilkington/BSN-Gervais-Danone, Commission's Tenth Report on Competition Policy 1980.
Polistil SpA and Arbois-Modelud Agreement, OJ (1984) L136/9.
Porto di Genova, OJ (1997) L301/27.
Preussag/Hapag-Lloyd Case M1001, OJ (1997) C306.
Promodes/BRMC Case IV/M242, OJ (1992) C232.
Promodes/DIRSA Case IV/M027, OJ (1990) C321.
Promodes/Casino Case M991, OJ (1997), C291.
Rabobank-Beeck/Homann Case IV/M1461, OJ (1999) C054/15.
RAI/UNITEL OJ (1978) L157/39, (1978) 3 CMLR 306.
Reuter/BASF OJ (1976) L254/40, (1976) 2 CMLR D44.
Rewe/Billa, Case M803, OJ (1996) C221.
Rheinmetall/British Aerospace/STN Atlas, Case M894, OJ (1997) C82.

Rolled Zinc and Alloys, OJ (1982) L362/40.
Royon/Meilland (Roses), OJ (1985) L369/9.
RWE/Thyssen Case M713, OJ (1996) C308.
Sabena/Austria Airlines/Delta, Agence Europe 08/07/98.
Scottish Nuclear, Nuclear Energy Agreement, OJ (1991) L 178/31.
Sea Containers/Stena Tiphook, OJ (1994) L15/8.
SECEMAS, OJ (1968) L201/4.
SEHB/VIAG/PE-BEWAG, Commission's Twenty Seventh Report on Competition Policy 1997, point 179.
Servicemaster, L332/38 OJ (1988), (1989) 4 CMLR 581.
SHV/Chevron, OJ (1975), L 3814, (1975) 1 CMLR D68.
Siebe/Eurotherm, Case Comp/M1195, (1998) C148.
Soda Ash - ICI, OJ (1991), L152/40.
Soda Ash - Solvay, OJ (1991) L152/21.
Sole distribution agreements for whisky and gin, OJ (1985) L369/19 (1986) 2 CMLR 664.
Solutia/Viking Resins Case Comp/M1763, OJ (1999) C339.
Solvay/BASF Case Comp/M1469, OJ (1999) C125.
Steetley/Tarmac Case M180, OJ (1992) C1.
Sterling Airways, Commission's Tenth Report on Competition Policy, point 1336.
Suez Lyonnaise/Nalco Case Comp/M1631, OJ (1999) C215.
Tesco/ABF Case IV/M914, OJ (1997) C162.
Tetra Pak I, Commission Press Release IP(91)715.
Thomson/Pilkington, Case IV/M.086, OJ (1991) C250.
Total/Petrofina (II) Case M1464, OJ (1999) C47.
Transocean Marine Paint I, OJ (1967) L163/10, (1967) CMLR D9.
UK Agricultural Tractor Registration Exchange OJ (1992) L68/19.
UPM-Kymmene/April Case Comp/M1006, OJ (1998) C88.
Re Vacuum Interrupters Ltd OJ (1977) L 48/32, 1977 1 CMLR D 67.
Vendex/Bijenkorf Case 1060, OJ (1998) C93.
Vendior/Select Appointments Case Comp/M1702, OJ (1999) C272
Voest Alpine Stahl/Vossloh/VAE Case Comp/M1259, OJ (1998) C283.
VW/MAN, OJ (1983) L376/11 (1984) 1 CMLR 621.
Yves Saint Laurent Parfums, Commission Decision OJ 1992 L12/24.
Re Zamussi SpA Guarantee, OJ (1978) L 322/26, (1979) 1 CMLR 81.

BIBLIOGRAPHY

Adams, W. and and Stoffaes, C. (Eds) (1986). French Industrial Policy. London.

Admiraal, P. H., Ed. (1990). Merger and Competition Policy in The E.C., Basil Blackwell, Oxford and Cambridge.

Ahlborn, C. a. T., V. (1998). "Expanding Success? Reform of the EC Merger Regulation." ECLR 19(4): 249-262.

Alexander, W. (1973). The EC Rules of Competition. London, Kluwer Harrap.

Amato, G. a. V. M., K. (11 December 1997). The Importance of Competition Policy for the Future of European Integration. Paul-Henri Spaak Foundation, Palais des Academies, Brussels.

Amato, G. (1997). Antitrust and the Bounds of Power. Oxford, Hart Publishing.

Association, A. B. (1990). "Comments of the American Bar Association Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation on the Control of Concentrations between Undertakings." Antitrust Law Journal 59: 245-261.

Bach, A. (1993). "Die Marktbeherrschungsbegriff in der EG-Fusionskontrolle, auch im Vergleich zum deutschen Kartellrecht." WuW 10: 12.

Bain (1956). Barriers to New Competition. Cambridge, Harvard University Press.

Baker, R. a. (1996). International Mergers - The Antitrust Process. London, Sweet and Maxwell.

Baker, S. a. W., L. (1998). "Applying the Market Definition Guidelines of the European Commission." European Competition Law Review 19(5): 273-280.

Banks, K. (1988). "Mergers and Partial Mergers under EEC Law." Fordham International Law Journal 11: 255-2309.

- Barr, F. (1998). "Has the UK gone European: Is the European Approach of the Competition Bill more than an Illusion?" ECLR 19: 139-144.
- Baur, J. F., Hopt, K.J., Mailaender, K.P., Ed. (1990). FS fuer Ernst Steindorff zum 70. Geburtstag. Berlin/New York.
- Bechtold, R. (1985). "Die EWG-Fusionskontrolle de lege lata unter Einbeziehung von Gemeinschaftsunternehmen." Recht der Internationalen Wirtschaft 31(6): 442-448.
- Behrens, P. (1992). EEC Competition Rules in National Courts. Nomos, Baden Baden.
- Bellamy, C. W. a. C., G. D. (1993). Common Market Law of Competition. London, Sweet and Maxwell.
- Bernini, G. (1990). Jurisdictional Issues: EEC Merger Regulation, Member State Laws and Articles 85-86. Fordham Corporate Law Institute.
- Bewley, T. F. "A Critique of Tiebout's Theory of Local and Public Expenditures." Econometrica: 713-40.
- Bishop, M. (1990). European or National? The EC's New Merger Regulation. Continental Mergers are Different - Strategy and Policy for 1992. L. B. School. Oxford, Parchment Ltd.
- Bishop, M. a. K., J (1993). European Mergers and Merger Policy, Oxford University Press.
- Blank, J. (1991). Europaeische Fusionskontrolle im Rahmen der Artt. 85, 86 des EWG-Vertrages, Nomos Verlagsgesellschaft, Baden-Baden.
- Blumberg, J. P. a. S., M. (1988). "EC Concentration Control: no smoke without fire." International Financial Law Review 7(1).
- Boehm, R. (1985). Kompetenzauslegung und Kompetenzluecken im Gemeinschaftsrecht, Peter Lang.
- Boner A. and Krueger, R. (1991). "The Basics o f Antitrust Policy - A Review of Ten Nations and the EC." World Bank Technical Paper(Number 160).

Bork (1978). The Antitrust Paradox. New York.

Bos, P. S., J; Wytinck, P (1992). Concentration Control in the EEC.

Bos, P.-V. (1995). "Towards a Clear Distribution of Competence between EC and National Competition Authorities." ECLR 7: 410-415.

Bourgeois, J. (1990). "EEC Control Over International Mergers." Yearbook of European Law 10.

Bourgeois, J. H. a. L., B. (1990). Jurisdictional Issues: EEC Merger Regulation. Member State Laws and Articles 85-86. Fordham Corporate Law Institute, London, Sweet and Maxwell.

Bouterse, R. (1995). Competition and Integration - What Goals Count? The Hague, Kluwer International.

Bridgeman, J. (1997). Commission and National Competence. The Future of Merger Control in Europe, The European University Institute, Florence.

Bright, C. (1991). "The European Merger Control Regulation: Do Member States still have an Independent Role in Merger Control? Part II." ECLR 5: 184-193.

Brittan, L. (1990). "The Law and Policy of Merger Control in the EEC." European Law Review 15: 351-357.

Brittan, L. (1991). Hersch Lauterpacht Memorial Lectures - Competition Policy and Merger Control in the Single European Market, Grotius.

Brittan, L. (1992). European Competition Policy - Keeping the Playing Field Level. London, Brassey's.

Broberg, M. (1994). "The European Commission's Jurisdiction Under the Merger Control Regulation." Nordic Journal of International Law 63: 17-108.

Broberg, M. (1996). "Geographic Allocation of Turnover under the EC Merger Regulation." World Competition Law and Economics Review 20(2).

Broberg, M. (1997). "The Geographic Allocation of Turnover under the Merger Regulation." ECLR 2: 103-109.

Sectors of economy analysed

Broberg, M. (1998). The European Commission's Jurisdiction to Scrutinise Mergers. The Hague, London, Boston, Kluwer International.

Bruhlin, R. (1994). Die Zwischenstaatlichkeitsklausel des europaeischen Wettbewerbsrechtes in der Rechtsprechung des Gerichtshofes. Law. Bern, University of Freiburg, Switzerland.

Bulmer, S. (1993). The Supranational Regulation of Mergers. Exeter, RUSEL.

Bulmer, S. (1994). "Institutions and Policy Change in the European Communities: the Case of Merger Control." Public Administration 72: 423-444.

Bunte, H.-J. a. L., E., Ed. (1994). Kommentar zum Deutschen und Europaischen Kartellrecht. Berlin, Luchterhand.

Burke, T., Genn-Bash, A. and Haines, B. (1988). Competition in Theory and Practice, Croom Helm.

Burnside, A. a. M. S., J. (1995). "Joint Venture Analysis: The Latest Chapter." European Competition Law Review 3: 138-146.

Calceon, W. J. a. F., J. (1988). "Acquisitions of Shares in other Companies and EC Competition Policy: the Philip Morris Decision." International Business Lawyer 142: 167-170.

Calliess, C. a. R., M (1999). Kommentar zu EU-Vertrag und EG-Vertrag, Hermann Luchterland Verlag GmbH.

Camesasca, P. (1999). "The Explicit Efficiency Defence in Merger Control: Does it Make the Difference?" ECLR 20: 14-28.

Cappelletti, M., Seccombe, M. and Weiler, J, Ed. (1981). Integration through the Law: Europe and the American Federal Experience. Berlin.

Cardozo, B. G. (1923). The Growth of the Law, New Haven, Yale University Press.

Cecchini, P., Catinat, M. and Jacquemin, A. (1988). The European Challenge 1992: The Benefits of a Single Market. Aldershot, Wildwood House.

CEPR (1993). Making Sense of Subsidiarity: How Much Centralisation for the EC? London.

Christoforou, T. (1988). Recent Developments in European Economic Community Antitrust Law with particular reference to its Territorial Scope of application and Merger Control. Proceedings of the Annual Conference - Canadian Council on International Law.

Chung, C.-M. (1995). "The Relationship between State Regulation and EC Competition Law: Two Proposals for a Coherent Approach." ECLR 16(2): 87-97.

Cini, M. a. M., L. (1998). Competition Policy in the EU. New York.

Clark (1940). "Toward a Concept of Workable Competition." American Economic Review(30): 241-56.

Claydon, J.-M. (1986). "Joint Ventures - An Analysis of Commission Decisions." European Competition Law Review 7: 151-192.

Close, G. (1978). "Harmonisation of laws: use or abuse of powers under the EEC Treaty?" ELR 3: 486-81.

Constantinesco, V., Jacque, J-P, Kovar, R. and Simon, D. (1992). Commentaires du Traite C.E.E. Paris.

Cook, C. J. a. K., C.S. (2000). E.C. Merger Control. London, Sweet and Maxwell.

Corbey, D. (1995). "Dialectical Functionalism: Stagnation as a Booster of European Integration." International Organisation 49(2).

Dashwood, A. (1996). "The Limits of European Community Powers." ELR 21: 113-128.

- Davidow, J. (1991). "Competition Policy, Merger Control and the European Community's 1992 Program." Columbia Journal of Transnational Law 29: 11-40.
- de Gruyter, W., Ed. (1993). FS fuer Karl Beusch zum 68. Geburtstag. Berlin/New York.
- de Richemont, J. (1971). Les concentrations d'entreprises et la position dominante.
- Dehousse, R., Ed. (1994). Europe After Maastricht - An Ever Closer Union? Muenchen.
- Deimel, A. (1992). Rechtsgrundlagen einer europaeischen Zusammenschlusskontrolle - Das Spannungsfeld zwischen Fusionskontrollverordnung und den Wettbewerbsregeln des EWG-Vertrages, Baden Baden: Nomos.
- Dinnage, J. a. M., J. (1996). The Constitutional Law of the EU, Anderson Publishing.
- Dorn, D.-W. (1986). Artikel 235 EWGV - Prinzipien der Auslegung, Kehl: Engel.
- Dourding, K., John, P. and Biggs, S. (1994). "Tiebout: a survey of the empirical literature." Urban Studies 31: 769-98.
- Downes, T. A. a. E., J. (1991). The Legal Control of Mergers in the European Communities. London, Blackstone.
- Dreher, M. (1995). Gemeinsamer Europaeischer Markteinheitliche Wettbewerbsordnung? XXVIIIth FIW-Symposium, Innsbruck.
- D'Sa, R.M., European Community Law on State Aid, 1998, Sweet and Maxwell
- Dunn, G. B. (1987). "EC Merger Control and 1992: can the new Regulation meet the Challenges of the Common Market?" International Law and Politics 23(87): 115-167.
- Easterbrook, F. H. (1983). "Antitrust and the Economics of Federalism." Journal of Law and Economics XXVI: 23-50.
- Ehlermann, C.-D. (1992). "The Contribution of EC Competition Policy to the Single Market." CMLR 29: 257.

Ehlermann, C.-D. (1992). "In Bruessel gibt es keine Industriepolitischen Intrigen, sondern nur andere Auffassungen vom Wettbewerb." Handelsblatt, 25 November 1992.

Ehlermann, C.-D. (1992). "Der Beitrag der Wettbewerbspolitik zum Europaeischen Binnenmarkt." Wirtschaft und Wettbewerb 42(1): 369.

Ehlermann, C.-D. (1995). "Reflections on a European Cartel Office." Common Market Law Review 32: 471-486.

Ehlermann, C.-D. a. L., L., Ed. (1998). Objectives of Competition Law. Robert Schuman Centre Annual on European Competition Law. Oxford, Hart.

Ehrlich, I. a. P., R. (1975). "An Economic Analysis of Legal Rulemaking." Journal of Legal Studies III(1).

Elland, W. (1991). "The Merger Control Regulation and its Effect on National Merger Controls and the Residual Application of Articles 85 and 86 EC." ECLR 12.

Elster, J. a. S., R., Ed. (1988). Constitutionalism and Democracy, Cambridge University Press.

Emililou, N. (1992). "Subsidiarity: An Effective Barrier Against the Entertainments of Ambition." ELR 7: 383-407.

Emmerich, V. (1971). "Die Auslegung von Art. 85(1) EWGV durch die bisherige Praxis der Kommission." EuR: 295.

Emmerich, V. (1989). "Anwendbarkeit des art. 85 auf Unternehmenszusammenschlusse - Zigaretten-Urteil." Juristischeschulung(1): 54-55.

Emmerich, V, *Europaeische Fusionskontrolle nach dem Zigaretten-Urteil*, p. 951 in: Baur, J.F., Hopt, K.J., Mailaender, K.P., FS fuer Ernst Steindorff zum 70. Geburtstag, Berlin/New York 1990, p.958.

Epple, D. a. Z., A. (1981). "The Implications of Competition among Jurisdictions: does Tiebout need Politics?" Journal of Political Economy.

European Commission, Annual Reports on Competition Policy. Brussels-Luxembourg, Office for Official Publications of the EC.

European Commission, (1966). Memorandum: The Problem of Concentration in the Common Market. Brussels.

European Commission, (1977). McDougall Report of the Study Group on the Role of Public Finance in European Integration. Luxembourg, OOPEC.

European Commission, (1981). White Paper on Completing the Internal Market, COM (81)303. Brussels.

European Commission (1999). White Paper on modernisation of the rules implementing Articles 85 and 86 (81 and 82) of the EC Treaty. OJ N. C132, 1999/05/12

European Commission, (2000) Proposal for a new implementing Regulation for Articles 81 and 82 EC, COM (2000) 582.

European Commission, (1990). Fifth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM 90(90).

European Commission, (1993). Report from the Commission to the Council on the Implementation of the Merger Regulation, COM (93) 385. Brussels.

European Commission, (1996). Green Paper on the Review of the Merger Regulation, COM (96)19. Brussels.

European Commission, (1997). Green Paper on Vertical Restraints in the EC Competition Policy, COM (96) 721. Brussels.

European Commission, (1990). Communication to the Council and the European Parliament: Le Principe de Subsidiarité, SEC (92).

European Commission, (1998). Communication from the Commission on the application of the Community Competition Rules to Vertical Restraints, COM (1998) 544. Brussels.

European Commission, (1993), Report to the European Council on the Adaptation of Existing Legislation to the Subsidiarity Principle, COM (93) 545.

European Commission Directorate for Economic and Financial Affairs, (1989). European Economy - Horizontal mergers and competition policy in the EC. Brussels.

European Commission Directorate for Economic and Financial Affairs, (1994). European Economy - Competition and Integration - Community Merger Control. Brussels.

Everling, U., Schwartz, I and Tomuschat, C (1976). "Die Rechtsetzungsbefugnisse der EWG in Generaermaechtigungen, insbesondere in Artikel 235 EWG-Vertrag." Europarecht: 2-26.

Everling, U. (1976). "Die allgemeine Ermaechtigung des Euorpaecischen Gemeinschaft zur Zielverwirklichung nach Art. 235 EWG-Vertrag." EuR Sonderheft: 2-73.

Everling, U. (1989). Der Beitrag des Europaeischen Gerichtshofs zur Weiterentwicklung des Wettbewerbsrechts der Gemeinschaft. Koeln/Berlin/Bonn/Muenchen, FIW Schriftenreihe.

Fairburn, J. a. K., J (1989). Mergers and Merger Policy, Oxford University Press.

Faull, J., Ed. (1989). Effect on Trade Between Member States and Community: Member State Jurisdiction. Fordham Corporate Law Review. London, Sweet and Maxwell.

Faull, J. (1989). The Commission's Merger Control Draft Regulation. National and EEC Merger Control, Conflict or Peaceful Coexistence?, Berlin, International Bar Association.

Faull, J. a. N., A. (1999). The EC Law of Competition, Oxford University Press.

Fine, F. (1987). "The Phillip Morris Judgment: Does Article 85 now extend to Mergers?" ECLR 8: 333-343.

Fine, F. (1990). "EC Merger Control: An Analysis of the New Regulation." ECLR 11(2): 47-51.

- Fine, F. (1994). Mergers and Joint Ventures in Europe - The Law and Policy of the EEC, Graham & Trotman/ Martinus Nijhoff.
- Fishwick, F. (1993). Making Sense of Competition Policy. London, Kogan Page.
- Frazer, T. (1990). "Competition Policy after 1992: the Next Step." Modern Law Review 53: 609-623.
- Freiherr von Gamm, O. F., Raisch, P. und Tiedemann, K., Ed. (1988). Strafrecht, Unternehmensrecht, Anwaltsrecht. Festschrift fuer Gerd Pfeiffer. Koeln, Berlin, Bonn, Muenchen, Carl Heymanns Verlag KG.
- Garret (1992). "The European Community's Internal Market." International Organisation 46: 533-60.
- Gatsios, K. a. S., P. (1989). "Regulation in the European Community." Oxford Review of Economic Policy 5(2): 37-60.
- Geiger (1995). EG-Vertrag Kommentar. Muenchen, Beck.
- George, K. a. J., C., Ed. (1975). Competition Policy in the UK and EEC. Cambridge, Cambridge University Press.
- George, K. a. J., A (1992). "Dominant Firms and Mergers." The Economic Journal: 148-157.
- Gerber, D. (1987). "Law and the Abuse of Economic Power in Europe." Tulane Law Review 62: 57-107.
- Gerber, D. (1992). "The Origins of European Competition Law in Fin-de-Siecle Austria." The American Journal of Legal History 36: 405-440.
- Gerber, D. J. (1994). "The Transformation of European Community Competition Law?" Harvard International Law Journal 35(1): 97-147.
- Gerber, D. J. (1994). "Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe." American Journal of Competition Law 41.

Gerick, H.-P. (1970). Allgemeine Rechtsetzungsbefugnisse nach Artikel 235 EWG-V.
Hamburg.

Gilchrist, J. (1997). Merger Proceedings. I.B.A. Seminar, EUI Florence.

Gleiss, A., Hirsch, M. and Burkert, T., Ed. (1993). Kommentar zum EG-Kartellrecht.
Heidelberg, Verlag Recht und Wirtschaft.

Goldman, B. a. L.-C., A (1983). Droit Commercial Europeen. Paris, Dalloz.

Gonzalez-Diaz, E. a. J., C. (1992). The EEC Merger Regulation: Jurisdiction and Substance
- Procedure. London, Sweet and Maxwell.

Goyder, D. (1998). EC Competition Law.

Grabitz, E., Ed. (1998). Kommentar zur Europaeischen Union. Muenchen, Beck.

Green, N. (1988). "Article 85 in Perspective: Stretching Jurisdiction, Narrowing the Concept
of a Restriction and Plugging a Few Gaps." ECLR 9: 190-206.

Griffiths, R. (1995). "Agricultural pressure groups and the origins of the Common
Agricultural Policy." European Review 3: 233-242.

Groeben, H. v. d., Thiesing, J., Ehlermann, C-D (1997-9). Kommentar zum EU Vertrag.
Baden-Baden: Nomos.

Groger, T. a. J., T. (1992). "Weiterentwicklung aus Europaeischen Wettbewerbsrechts."
WuW 12: 991.

Haede, U. a. P., A. (1997). "Zur Abgrenzung des Art. 235 EGV von der
Vertragsaenderung." EuZW 1: 13-17.

Hartley, T. (1998). The Foundations of EC Law. Oxford University Press.

Hawk, B. (1972). "Antitrust in the EEC - The First Decade." Fordham Law Review(41):
229.

Hawk, B., Ed. (1991). International Mergers and Joint Ventures. Annual Proceedings of the Fordham Corporate Law Institute. London, Sweet and Maxwell.

Hawk, B. a. L., L. (1996). "Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: a Comparison." Fordham International Law Journal 20(1): 18-49.

Hawk, B. a. H., H. (1996). European Community Merger Control: A Practitioner's Guide. The Hague, Kluwer Law International.

Hawk, B., Ed. (1996-2000). International antitrust law and policy. Fordham Corporate Law Institute, Annual Meetings. London, Sweet and Maxwell.

Hawkes, L. (1992). "The EC Merger Control Regulation: Not an Industrial Policy Instrument: the De Havilland Decision." ECLR 1: 34-38.

Hefermehl, W, *Beurteilung von Fusionen und Konzernbildungen nach Art. 85 und 86 des EWG-Vertrages*, in: Dietz/Huebner (ed.), Festschrift fuer H.C. Nipperdey II, p.771

Hildebrandt, B. (1965). *Die Beeinträchtigung des zwischenstaatlichen Handels - eine Untersuchung zu Art. 85 EWG-Vertrag*. Law. Heidelberg, Ruprecht Karl Universitaet.

Hirsbrunner, S. (1999). "Referral of Mergers in E.C. Merger Control." ECLR 20(7): 372-378.

Holmes, K. (2000). "The EC White Paper on Modernisation" World Competition 23(4):51-79.

Hommelhoff, P. a. K., P., Ed. (1994). Der Staatenverbund der EU. Heidelberg.

House of Lords Select Committee on the EC (1996). *Review of the EC Merger Regulation*. London.

Hughes, K., Ed. (1993). European Competitiveness. Cambridge.

Hutchings, M. (1997). "The Lessons of the Kesko/Tuko Case." ECLR 2: 75.

Immenga, U. a. F., A. (1988). "Artikel 85 EWG-Vertrag als Grenze fuer Unternehmensbeteiligungen?" NJW(48): 3052-3059.

Immenga, U. (1993). Die Europäische Fusionskontrolle im Wettbewerbspolitischen Kraeffefeld. Tuebingen, J.C.B. Mohr.

Immenga, U. and Mestmaecker, I., Eds. (1997). Kommentar zum EG-Wettbewerbsrecht. Muenchen, Beck.

Ipsen, H. P. (1972). Europeaisches Gemeinschaftsrecht. Tuebingen.

Ison, S. (1996). Economics, Pitman Publishing.

Jacquemin, A. (1993). "The International Dimension of European Competition Policy." Journal of Common Market Studies(31).

Johnson, N. (2000). "The EEC Merger Control Regulation - Referral to Member States under Article 9." World Competition 23: 105-133.

Joliet, R. (1967). The Rule of Reason in Antitrust Law - American, German and Common Market Laws in Comparative Perspective. Laws, L'Universite de Liege: 192.

Joliet, R. (1970). Monopolization and Abuse of Dominant Position - A Comparative Study of the American and European Approaches to the Control of Economic Power. Laws, L'Universite de Liege.

Jones, C. (1990-1). "Scope and Application of the Merger Control Regulation." Fordham International Law Journal 14: 359.

Jong, J. a. d. (1977). European Industrial Organisation, Macmillan Press.

Jurass, H. (1994). EG-Kompetenzen und das Prinzip der Subsidiaritaet nach Schaffung der EU, EuGRZ p209.

Kassamali, R. A. (1996). "From Fiction to Fallacy: Reviewing the EC Merger Regulation's Community-Dimension Thresholds in the Light of Economics and Experience in Merger Control." ELR 21: 89-114.

Kauburoglou (1993). "EWG-Wettbewerbspolitik und Subsidiaritaet." WuW 4: 273.

Kay, J. a. V., J (1988). "Regulatory Reform in Britain." Economic Policy 7.

Kay, N. a. H., K.S., Ed. (1992). Mergers, acquisitions and the completion of the internal market. European Competitiveness, Cambridge University Press.

Kerber, W. S. z. N. (1994). Die Europaeische Fusionskontrollpraxis und die Wettbewerbskonzeption der EG. Bayreuth, Verl PCO.

Kerse, C. (1997). "Enforcing Community Competition Policy under Articles 88 and 89 of the EC Treaty - New Powers for UK Competition Authorities." ECLR 1: 17-23.

Kitzinger, U. W. (1976). The Politics and Economics of European Integration. Westport, Greenwood.

Klibanoff, P. a. M., J. (1993). Local Public Goods Provision with Externalities, Local Information and Local Autonomy, MIT Press.

Koegel, R. (1996). Die Angleichung der deutschen an die europaeische Fusionskontrolle. Law, Tuebingen.

Koenigs, F. (1988). "Die Beeintraechtigung des Handels Zwischen Mitgliedstaaten." in: Gamm von Ed. (1988), FS fuer Gerd-Pfeiffer zum Abschied aus dem Amt des Praesident des Bundesgerichtshofes, Cologne, Carl Heymann.

Korah, V. (1978). "Developments in the Interpretation and Application of Article 86 of the Treaty of Rome - Abuse of a Dominant Position Within the Common Market." Notre Dame Law: 768-780.

Korah, V. (1986). "EEC Competition Policy - Legal Form or Economic Efficiency." Current Legal Problems(1986): 28.

- Korah, V. (1987). "The Control of Mergers under the EEC Competition Law." ECLR 8: 239-255.
- Korah, V., Lasok, P. (1988). "Philip Morris and its Aftermath - Merger Control?" CMLR 25: 333-368.
- Korah, V. (1991-2). "Collaborative Joint Ventures: Competition Rules of the Common Market and the Invalidity of Contracts." FILJ 15: 248.
- Korah, V. (1997). An Introductory Guide to EC Competition Law and Practice. London, Hart.
- Krimphove, D. (1992). Europäische Fusionskontrolle. Koeln, Berlin, Bonn, Muenchen, Carl Heymanns Verlag KG.
- Kuesters, H. J. (1982). Die Gruendung der Europaeischen Wirtschaftsgemeinschaft, Baden Baden: Nomos.
- Kuesters, H.-J. (1990). Fondements de la communauté économique européenne. Luxembourg, Office des Publications Officielles des Communautés Européenne.
- Kutsukis, D. (1983). "Der VOvorschlag fuer eine europäische Fusionskontrolle im Lichte der Erfahrungen des deutschen Rechtes." 338: 12.
- Lambers, H.-J. (1993). "Subsidiaritaet in Europa - Allheilmittel oder juristische Leerformel." EuR 229.
- Lampert, T. (1995). Die Anwendbarkeit der EG-Fusionskontrollverordnung im Verhaeltnis zum Fusionskontrollrecht der Mitgliedstaaten, Carl Heymanns Verlag KG.
- Lever, J. a. L., P (1986). "Mergers and Joint Ventures in the EEC." Yearbook of European Law 6: 121-157.
- Levitt, M. (1993). "Article 88, the Merger Control Regulation and the English Courts: BA/Dan-Air." ECLR 2: 73-76.

Lonbay, J. e. (1994). Frontiers of Competition Law, Wiley Chancery Law.

Mancini, F. (1989). "Access to Justice: Individual Undertakings and EEC Antitrust Law - Problems and Pitfalls." Fordham International Law Journal 12: 189-203.

Mann, F. A. (1964). "The Doctrine of Jurisdiction in International Law." Recueil des Cours 1: 13.

Markert, K. (1979). "Note Under the United Brands Judgment." Europarecht 48: 51.

Massey, P., Ed. (1996). Reform of EC Competition Law: Substance, Procedure and Institutions in: Hawk, B. Ed., Annual Proceedings of the Fordham Corporate Law Institute, London, Sweet and Maxwell.

Mattli, B. a. (1993). "Europe before the Court: A political theory of integration." International Organisation 47: 41-76.

Mattli, W. a. S., A-M (1998). "Revisiting the European Court of Justice." International Organisation 52(1).

Mayne, R. (1970). The Recovery of Europe: 1945-1973. New York, Harper Row.

McGuire, M. (1974). "Group Segregation and Optimal Jurisdictions." Journal of Political Economy 82.

Meade, J. (1986). "Decentralisation in the Implementation of EEC Competition Law - a Challenge for the Lawyers." NILQ 37(2): 101-124.

Meeks, G. (1977). Disappointing Marriage: A Study of the Gains from Concentration. Cambridge.

Mestmaecker, E.-J. (1966). Die Beurteilung von Unternehmenszusammenschluessen nach Artikel 86 des Vertrages ueber die Europaeische Wirtschaftsgemeinschaft. Festschrift fuer Walter Hallstein zu seinem 65. Geburtstag. E. von Caemmerer, Schlochauer, H-J and Steindorff, E, Vittorio Klostermann.

Mestmaecker, E.-J. (1988). "Fusionskontrolle im Gemeinsamen Markt zwischen Wettbewerbspolitik und Industriepolitik." EuR 4: 349-377.

Miersch (1991). Kommentar zur EG-VO Nr. 4064/89 ueber die Kontrolle von Unternehmenszusammenschluessen, Hermann, Luchterhand Verlag.

Milward, A. (1984). The Reconstruction of Europe - 1945-51. London, Methuen.

Moeschel, W. (1993). Zum Subsidiaritaetsprinzip im Vertrag von Maastricht NJW p.3025

Montagnon, P. (1990). European Competition Policy. London, Pinter Publishers.

Moosecker, K. (1987). "Wendepunkt im europaeischen Kartellrecht: Einfuehrung einer Fusionskontrolle durch die richterliche Hintertuer?" Handelsblatt(232): 3.

Morgan, E. (2000). "Subsidiarity and the Division of Jurisdiction in EU Merger Control." Antitrust Bulletin 45(1): 153-93.

Mourik, A. v., Ed. (1996). Developments in European Competition Policy. Maastricht, European Institute of Public Administration.

Neven, D. J. (1992). "Regulatory Reform in the EC." American Economic Review 82: 98-103.

Neven, D. N., R; Seabright, P (1993). Merger in Daylight. London, CEPR.

Neven, D., Papandropoulos, P. and Seabright, P. (1998). Trawling for Minnows. London, Centre for Economic Policy Research.

Nicholaysen, G. (1966). "Zur Theorie von den Implied Powers in den Europaeischen Gemeinschaften." Europarecht: 129-140.

Nicolaides, P. a. v. d. K., A., Ed. (1994). The Competition Policy of the European Community. Maastricht, European Institute of Public Administration.

- Niemeyer, H.-J. (1991). "Die Anwendbarkeit der Art. 85 und 86 EWG-V auf Unternehmenszusammenschlüsse nach Inkrafttreten der EG-Fusionskontrollverordnung." RIW(1): 448-453.
- Norall, F. a. (1990). "Competition Law." YEL 10: 407.
- O'Keefe, S. (1994). "Merger Regulation Thresholds: An Analysis of the Community Dimension Thresholds in Regulation 4064/89." ECLR 1.
- O'Keefe/Twomey, Ed. (1994). Legal Issues of the Maastricht Treaty. London, Chancery Law Publishing.
- Opperman, T. (1991). Europarecht. Muenchen.
- Padoa-Schioppa, T. (1987). Efficiency, stability and equity, Oxford University Press.
- Pathak, A. S. (1991). "The EC Commission's Approach to Joint Ventures: A Policy of Contradictions." European Competition Law Review 5: 171-183.
- Peacock, A. T. a. W., H., Ed. (1989). German Neo-Liberals and the Social Market Economy. London, Macmillan.
- Pechstein (1990). EuR 3: 249-68.
- Peeperkorn, L., (2001), Revision of the 1997 Notice on Agreements of Minor Importance, Competition Newsletter, 2 June 2001.
- Pescatore, P. (1986). "Die Einheitliche Europaeische Akte, Eine Ernste Gafahr fuer den Gemeinsamen Markt." Europarecht 21(2): 117.
- Pindyck, R. a. R., D. (1995). Microeconomics, Prentice Hall Inc.
- Portwood, T. (1994). Mergers Under EEC Competition Law, The Athlone Press.
- Posner, R. (1979). "The Chicago School of Antitrust Analysis." University of Pennsylvania and Law Review(127).

Power, V. (1995). "Competition Law in the EU: Should there be a Convention?" ECLR 2: 75-77.

Rahl, J. (1965). "Antitrust Law in Search of a Policy." Proceedings of the 4th Annual Corporation Counsel Institute(57).

Redwood, J. (1989). . Press Conference, The Independent, 22 December 1989.

Reed (1995). Political Review of the ECJ and its Jurisprudence. Cambridge, Harvard Law School.

Reich, N., Ed. (1990). Die Bedeutung der Binnenmarktkonzeption fuer die Anwendung der EWG-Wettbewerbsregeln. Festschrift fuer Ernst Steindorff. Berlin.

Report, C. A. (1993). Making Sense of Subsidiarity: How Much Centralization for Europe? London.

Riesenkampf, A. (1988). "Auswirkungen des Urteils des EuGH vom 17.11.1987 (Philip Morris)." WuW 38: 465-475.

Riley (1997). "The European Cartel Office: A Guardian without Weapons?" ECLR 3(1).

Rodger, B. (1994). "Decentralisation and National Competition Authorities: Comparison with the Conflicts/Tensions under the Merger Regulation." ECLR 5: 251-254.

Rodger, B. J. a. W., S. (1997). "Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement." ECLR 8: 485-491.

Rose, M. (1998). EC Law on State Aid. London, Sweet and Maxwell.

Rose-Ackerman, S. (1981). "Does Federalism Matter? Political Choice in a Federal Republic." Journal of Political Economy 89(1): 152-65.

Sandalow, T. a. S., E., Ed. (1982). Courts and Free Markets - Perspectives from the United States and Europe. Oxford, Clarendon Press.

Satzky, H. (1988). "Fusionskontrolle nach Art. 85 EWG-V." DB(7): 379-384.

Sauter, W. (1995). The Relationship between Industrial and Competition Policy under the Economic Constitution of the European Union, with a Case Study of Telecommunications. Law. Florence, EUI.

Scherer, F. a R., D. (1992). "Industrial Market Structure and Economic Performance." Small Business Economics 4: 171.

Schilling, T. (1995). Subsidiarity as a Rule and a Principle, or Taking Subsidiarity Seriously. Cambridge: Harvard Law School.

Schmidt, K. (1990). "Europaeische Fusionskontrolle im System des Rechts gegen Wettbewerbsbeschaerungen." Betriebs-Berater(11): 719-725.

Schina, D., State Aids under the EEC Treaty. (1987) ESC Publishing, Oxford

Schoedermeier, M., WuW 1988, p.189.

Scholes, J. (1998). "The UK Draft Competition Bill: Comments based on Observations of the Competition Law Association." ECLR(19): 32-46.

Schroeder, D. (1988). "Die Anwendung des Kartellverbotes auf verbundene Unternehmen." WuW 38: 274-284.

Schwartz, E. (1993). "Politics as Usual: the History of EC Concentration Control." Yale Journal of International Law(18): 607.

Schwartz, I. (1996). Artikel 235 EG-V nach 'Maastricht'. Festschrift fuer Ernst-Joachim Mestmaecker zum 70. Geburtstag. U. Immenga, Moeschel, W. and Reuter, D., Baden Baden: Nomos.

Schwarze, J., Schmermers, H., Ed. (1988). Structure and Dimensions of EC Policy, Baden and Baden: Nomos.

Scrivens, R. (1988). "The 'Philip Morris' Case: Share Acquisitions and Complainants' Rights." EIPR 6: 163-71.

Sedemund, J. a. M., F. (1988). "Europeaisches Gemeinschaftsrecht." NJW 41(10): 601-609.

Sibree, W. (1992). "EEC Merger Control and Joint Ventures." European Law Review 17: 91-104.

Silber, C. and Cannellos (1970). "Concentration in the Common Market." CMLR: 138.

Siragusa, M. a. S.-S., G. (1992). "Italian and EC Competition Law: A New Relationship - Reciprocal Exclusivity and Common Principles." CMLR 29: 93-131.

Soames, T. (1990). "The 'Community Dimension' in the EEC Merger Regulation: The Calculation of the Turnover Criteria." ECLR 5: 213-225.

Stadler, H. (1951). "Subsidiaritaetsprinzip und Federalismus." Freiburg

Staudenmayer, D. (1992). "Das Verhaeltnis der Art. 85, 86 EWGV zur EG-Fusionskontrollverordnung." WuW 6: 475-483.

Steindorff (1968). "Kooperation, Konzentration und Fusionen von Unternehmen in der EWG." Revue de March Commune: 182.

Steindorff, E. (1987). Spannungen zwischen deutschem und europaischem Wettbewerbsrecht. Schwerpunkte des Kartellrechts 1986/87. FIW-Schriftenreihe, Carl Heymanns Verlag KG.

Steindorff, E. (1988). "Kooperativer Unternehmenszusammenschluss und Kartellverbot." ZHR 152: 57-65.

Steindorff, E. (1990). Grenzen der EG-Kompetenzen. Muenchen, Verlag Recht und Wirtschaft GmbH, Heidelberg.

Steiner, J. (1998). Textbook on EC Law. London, Blackstone.

Strategy, C. f. B. (1990). "Continental Mergers Are Different - Strategy and Policy for 1992." London Business School, London.

Streit, M. E. a. M., W. (1995). "The Economic Constitution of the EC: From Rome to Maastricht." ELJ 1: 5-30.

Stuart (1996). "Recent Developments in EU Law and Policy on State Aids." ECLR 4: 226.

Sufrin, W. a. (1987). "Article 85 and the Rule of Reason." YEL 7: 1-38.

Temple Lang, J. (1981). "Community Antitrust Law - Compliance and Enforcement." CMLR 18: 335-362.

Temple Lang, J. (1988). "European Community Constitutional Law: The Division of Powers between the Community and Member States." NILQ 39(2): 209-235.

Tiebout, C. M. (1956). "A Pure Theory of Local Expenditures." Journal of Political Economy 64: 416-24.

Tridimas, T. (1996). "The Court of Justice and Judicial Activism." ELR 21: 199-210.

Turner, K. a. (1959). Antitrust Policy: An Economic and Legal Analysis. Cambridge, Harvard University Press.

Ullrich, H. (1996). "Harmonisation within the European Union." ECLR 3: 178-184.

Upton, M. (1996). Private claimant in competition law - LLM. Law. Florence, EUI.

Van Beal and Bellis. EEC Competition Law. 2nd Edition.

Van Bael, I. and Bellis, J.-F., '*World of Competition*', Unit B, Western Europe, Vol. B1, European Economic Community, New York 1987 Nr.222.

Van den Bergh, R. (1996). "Modern Industrial Organisation versus Old-fashioned European Competition Law." ECLR 2: 75-87.

Van Miert, K. (1993). Competition Policy in the 90's. Royal Institute of International Affairs, London.

Van Miert, K. (1995). Subsidiarity and Decentralization in the Application of European Competition Law. Antitrust: Rules, Institutions and International Relations, Rome.

Van Ommeslaghe, P., *Die Anwendung der Artikel 85 und 86 des Rom-Vertrages auf Fusionen, Gesellschaftszusammenschlüsse und Gemeinschaftsunternehmen*, in: Beitraege zum EWG-Kartellrecht, p.49.

Venit, J. (1988). Mergers, Acquisitions, and Joint Ventures under EEC Law after Philip Morris: Plus ca change, plus c'est la meme chose? The Applicability of Article 85 to Mergers. Private Investors Abroad: 41-105.

Venit, J. (1990). "The 'Merger' Control Regulation: Europe comes of age...or caliban's dinner." CMLR 27: 8-50.

Vogel, L. (1988). Droit de la Concurrence et Concentration Economique. Etude comparative. Paris, Economice.

von Caemmerer, E., Schlochauer, H-J; Steindorff, E., Ed. (1966). Festschrift fuer Walter Hallstein zu seinem 65. Geburtstag. Probleme des Europaeischen Rechts. Frankfurt am Main, Vittorio Klostermann.

von der Groeben, H. (1987). Die Europaeische Gemeinschaft und die Herausforderungen unserer Zeit 1967-1987, Baden-Baden, Nomos.

Waelbroeck, M. a. F., A. (1999). European Competition Law, Transnational Publishers.

Wallace, W. a. (1990). "Subsidiarity: Approaches to Power Sharing in the EC." RILA Discussion Papers, London 27.

Walz, R. (1996). "Rethinking Walt Wilhelm, or the Supremacy of Community Competition Law over National Law." ELR 21: 449-464.

Weatherill, S. (1995). Law and Integration in the EU. Oxford, Clarendon.

Weiler, J. (1991). "The Transformation of Europe." YLJ 100: 2403.

Weiler, J. (1995). "European Democracy and its Critique." West European Politics 18(2): 4-39.

Wesseling, R. (1997). "The Commission Notices on Decentralisation of EC Antitrust Law: In for a Penny, Not for a Pound." ECLR 2: 94-97.

Wesseling, R. (1997). "Subsidiarity in Community Antitrust Law: Setting the Right Agenda." ELR(22): 35-54.

Wesseling, R. (1999). Constitutional Developments in EC Antitrust Law: The Transformation of Community Antitrust Law and its Implications. Law. Florence, EUI.

Wesseling, R. (1999). "The Commission White Paper on Modernisation of E.C. Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options". ECLR(22): 420-433.

Westermann, K. (1996). Die Einwirkungen der europaeischen auf die deutsche Fusionskontrolle. Law, Goettingen.

Whish, R. (1996). Competition Law. London, Edinburgh, Butterworths.

Wilks, S. a. C., Michelle, Ed. (1991). Competition Policy - a Research Prospectus. RUSEL Working Papers, University of Exeter.

Wilks, S. (1992). The Metamorphosis of European Competition Policy, University of Exeter.

Wilks, S. a. M., L. (1995). "The First Supranational Policy in the European Union: Competition Policy." European Journal of Political Research 28: 141-169.

Williamson (1989). "Antitrust Enforcement: Where it has been; where it is going." Saint Louis University Law Journal 27: 281-314.

Wolf, D. (1994). "Zum Verhaeltnis von europaeischem und deutschem Wettbewerbsrecht." EuZW 8: 233-238.

Woolcock, S. (1989). European Mergers: National or Community Controls? The Royal Institute of International Affairs, London, The Royal Institute of International Affairs.

Zachmann, J. (1994). Le Controle Communautaire des Concentrations. Paris, L.G.D.J.

Zacker, C. (1989). "Binnenmarkt und Gemeinsamer Markt." Recht der Internationalen Wirtschaft 35(6): 489.

Zonnekeyn, G. A. (1998). "The Treatment of Joint Ventures under the amended EC Merger Regulation." European Competition Law Review 19: 414-421.

1
2
3
4
5

6
7
8
9
10

11
12
13
14
15

16

