The Impact of the Continental Can Case on Combinations and Concentrations within the Common Market

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By JAMES D. HURWITZ*

MULTINATIONAL corporations now account for 15 percent of the gross world product.¹ Not only may these enterprises be far larger economically than the countries in which they operate, but they also can move resources, operations and capital across national frontiers with a flexibility not available to governments. Divisions and subsidiaries of a multinational corporation can collaborate in many ways that are forbidden to separate enterprises. In this way, they are able to secure the most favorable mixture of political co-operation, currency stability and lenient tax and corporation laws as well as to resist efforts of single governments to regulate commerce and finance within national borders. Whether for good or evil, the widely reported impact of multinational corporations has been immense.

During the 1890's and the first two decades of the present century, the concern over large economic concentrations in the United States was due not to the world impact of the concentrations but rather to effects on local and national competition and politics. By the time the European Coal and Steel and the European Economic Community

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¹ Ruby, Global Companies: Too Big To Handle?, NEWSWEEK, Nov. 20, 1972, at 96. The article cited an estimate that approximately 4,000 companies met the three-pronged test it was using to define multi-national company. The three requirements were sales above $100,000,000, operations in a minimum of six countries, and overseas subsidiaries accounting for 20 percent or more of the company's world assets. Total world sales of these multinationals increased from $200 billion in 1960 to $450 billion in 1971.
Treaties (hereinafter referred to as the Paris and Rome Treaties, respectively) were drafted, the parties were aware, particularly from the United States' experience, of the power of large enterprises to restrict international as well as national commerce. The parties further realized, from wartime experience with the German coal and steel industries, that these concentrations would have to be controlled. This realization, combined with experiences of member states and of the United States in controlling restrictive practices of dominant enterprises and national and international cartels, led to the controls found in Articles 65 and 66 of the Paris Treaty and 85 and 86 of the Rome Treaty.

The merger boom of the 60's and the wave of outside investment in Europe, however, had not yet occurred. Especially in Europe, nei-

2. The signatories to the treaty establishing the European Coal and Steel Community were the Federal Republic of Germany, Belgium, the French Republic, the Italian Republic, Luxembourg and the Netherlands (Paris Treaty). Treaty Instituting the European Coal and Steel Community, done at Paris, Apr. 18, 1951, 261 U.N.T.S. 140. The treaty establishing the European Economic Community (EEC), signed by the signatories of the European Coal and Steel Community treaty, was signed in Rome, Italy on March 25, 1957 (Rome Treaty). Treaty Instituting the European Economic Community, done at Rome, Mar. 25, 1957, 298 U.N.T.S. 11. (This article will use the translation contained in 1 CCH COMM. MKT. REP. ¶ 161 et. seq. as this is the text used by the Office for Official Publications of the European Communities). These two communities plus the European Atomic Energy Community, created on March 25, 1957, done at Rome, 298 U.N.T.S. 167, were merged under the Treaty Establishing a Single Council and a Single Commission of the European Communities, signed in Brussels, Belgium on April 8, 1965. For text see 2 CCH COMM. MKT. REP. ¶ 5115.

3. COMMON MARKET AND AMERICAN ANTITRUST, 152 n.3 (J. Rahl ed. 1970) [hereinafter cited as Rahl]. Rahl makes particular mention of the huge international steel cartel which flourished prior to World War II.

4. For the provisions of Articles 65 and 66 of the Paris Treaty see note 59 infra.

5. For the pertinent provisions of Article 85 see notes 86 & 111 infra. For Article 86 see text accompanying note 37 infra.

6. Owen, Mergers: Commercial Logic and the Public Interest, The Financial Times (London), Nov. 23, 1972. In 1960 in Great Britain there were 739 mergers valued at £ 358 million. Estimated figures for 1972 are 1100 mergers valued at £ 2 billion. The method of valuation was not stated.

Markert states that in the United States mergers rose from just over 200 in 1950 to 2,268 in 1968 in mining and manufacturing industries. He also cites a statement of Professor Houssiaux that mergers and joint ventures in the Common Market rose from 273 in 1963 to 670 in 1967. Markert, Antitrust Aspects of Mergers in the EEC, 5 TEXAS INT'L L.F. 32 (1968) [hereinafter cited as Markert].

7. Owen, American Companies in Europe—An Uneasy Partnership, The Financial Times (London), Dec. 11, 1972, at 14, col. 3. Owen cites U.S. Commerce Department statistics which show that American investment increased between 1960 and 1970 from $2,200 million to nearly $5,000 million in the United Kingdom, from $1,500 million to more than $7,000 million in the Common Market, and from $200 million to $1,600 million in the rest of Europe.
ther the impact of multinational enterprises nor the deleterious effects of changes in an industry's structure due to an otherwise unobjectionable merger had been studied very extensively. Although these were post-treaty problems, they were problems with which the European Communities and especially the European Economic Community (EEC) would have to deal. In an important sense, they provide an early test of the viability of a legal-economic structure and how well it can deal with situations only vaguely foreseen by the creators of that structure. In 1965, the EEC Commission (hereinafter referred to as the commission) declared that mergers were covered by Article 86 of the Rome Treaty but were not within the scope of Article 85 of that same treaty; however, the arguments continued without resolution. It was in this climate that the commission in December, 1971, and the European Court in February, 1973, issued their decisions in the case of Continental Can.

The Court's decision has been described by The Times (London) as "arguably the most important test case in EEC legal history." The most spectacular holding of the case is that a merger, otherwise blameless and directly affecting only the structure of an industry as opposed to directly harming consumers or competitors, may nonetheless be considered an "abuse" and within the proscription of Article 86 if the article's other requirements are satisfied. Although the Court supported the commission's basic legal position, it did not feel that the commission had proved the existence of these other elements; therefore, the Court refused to condemn the specific merger before it. At the

8. C. Edwards, Control of Cartels and Monopolies: An International Comparison 177 (1967) [hereinafter cited as Edwards]. According to Edwards, in Europe national control of dominant enterprises generally was weaker, less rigorously enforced and occurred later (mostly in response to the growth of multinational corporations) than other kinds of competition policy.


close of the case, both Continental Can Company and the commission were rightly claiming victories because each had won what it had most sought. It is clear that to reach this position the Court had to weigh considerations of law and policy crucial to the functioning of the Common Market. The purpose of this paper will be to review those considerations to see what remains undecided and what trends of future law and policy can be discerned.

Facts of the Continental Can Case

Continental Can Company is the world's largest manufacturer of metal containers and is also an important producer of paper and plastic containers as well as of machines for making, filling and closing containers. In February, 1969, Continental obtained control of Schmalbach-Lubeca Werke (hereinafter referred to as SLW) and by the end of that year owned over 85 percent of that company's shares. SLW, heavily concentrated in Germany, is continental Europe's largest producer of light metal containers. In late 1969, Continental agreed with the British company, Metal Box, Europe's largest manufacturer of metal containers, to establish a joint holding company for Metal Box's and Continental's combined European interests. Continental was to have majority control of the resulting company. Toward this end, Continental created an American holding company, Europemballage, with offices in New York and Brussels. The agreement with Metal Box was that Continental would contribute to Europemballage its 10 percent holding in Thomassen & Drijver-Verblifa (hereinafter referred to as TDV), the largest producer of metal containers in the Benelux countries, its 86 percent holding in SLW, and its 1.3 percent holding in Superbox, a subsidiary of Metal Box and Italy's largest producer of metal containers. Metal Box would contribute to Europemballage its 9 percent holding in TDV, its 93 percent holding in Superbox, and its White Cap plant in Poole, England, which manufactured metal closures for bottles. Continental would cause Europemballage to offer to purchase the outstanding stock in TDV not already held by Metal Box. The leading French container manufacturer, J.J. Carnaud, declined the offer to join the agreement.

The offer for outstanding TDV stock was made on March 16,
1970. Within one month the commission had warned all the companies involved that such a purchase might be considered an infringement of Article 86. In response, Metal Box decided to suspend its entrance into Continental's "master plan for Europe." The purchase of TDV shares by Europemballage, still 100 percent owned by Continental, increased Continental's share of TDV stock to 91.07 percent. It was this transaction that the commission found to be abusive and an impermissible extension of the dominant position Continental already held through its control of SLW. In its decision, the commission stated:

23. Where an enterprise that has a dominant position strengthens that position through a concentration with another enterprise, with the result that the competition, which actually or potentially might have subsisted in spite of the existence of the dominant position, is virtually eliminated for the products concerned in a substantial part of the Common Market, this constitutes conduct that is incompatible with Article 86 of the Treaty.

24. Continental's acquisition of its competitor TDV, which itself has a strong position in a market adjoining the German market, constitutes an industrial operation that causes an irreversible change in the supply structure in a substantial part of the Common Market.

Review of the Commission's Decision

The commission used a four step analysis to find that Continental had violated Article 86. First it asserted, without giving reasons, that Article 86 was applicable to some mergers. Presumably the commission felt its reasons had been adequately detailed in the 1965 Concentration Memorandum. Second, the commission asserted that Continental enjoyed a dominant position in Germany, a substantial part of the Common Market. This conclusion was based on the reasoning that because Continental controlled SLW, and because SLW was found to hold a dominant position in the German markets for certain kinds


17. Commission Decision, supra note 10, at 325. The commission has also made similar rulings regarding extension of dominant positions in Re GEMA, 10 Comm. Mkt. L.R. D35 (1971) and in Laboratorio Chimico Farmaceutico Giorgio Zoja Sp A v. Commercial Solvents Corp. & Instituto Chemioterapico Italiano, 12 Comm. Mkt. L.R. D50 (1973), appeal docketed, 16 E.E.C. J.O. C36/5. Neither of these cases involved a merger and at present neither has been reviewed by the European Court.


19. See text accompanying note 39 infra.

of metal containers and metal closures, the dominant position of SLW could be ascribed to Continental.

Third, although existing competition was negligible between SLW and TDV in the areas of Northern and Central Germany and in the Benelux countries, the commission found a potential for increased competition. It was this potential competition that the acquisition of TDV allegedly restricted. Fourth, the commission found that trade between Member States was likely to be affected because the potential trade would be across national boundaries.

The facts of this case were not ideal for the commission's purpose of establishing a basis for future merger control. The Court agreed with the Advocate-General, Dr. Roemer, that the commission had not fully analyzed sources of potential competition for SLW in Germany. Its main failure here was that it did not adequately distinguish the markets it chose as relevant from one another or from the nonrelevant container markets.

It can be assumed that these products have a separate market only if they are distinguishable from others not just by the mere fact that they are used for packing certain products, but also because of special production features that make them specifically suited for that purpose. On this basis, a dominant position on the market for light metal containers for canned meats and fish is not shown so long as it has not been proved that competitors in other areas of the market for light metal containers cannot, by making a simple adjustment, step into that market with sufficient strength to provide a serious counterbalance.

The commission also did not analyze satisfactorily the potential for competition from foreign manufacturers, from manufacturers of glass

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21. Specifically, the commission found that SLW was dominant in Germany in the markets for light metal containers for meat and meat products, fish and fish products, and for metal closures other than crown corks for glass jars. Id.

22. Commission Decision, supra note 10, at 326. Cunningham refers to the theory that the market position and actions of a controlled enterprise can be ascribed to the controlling enterprise as the "enterprise entity" theory. J. Cunningham, The Competition Law of the EEC 111, (1973) [hereinafter cited as Cunningham].


24. Id. at 326-27.


26. Id. at 8301.
and plastic containers and from canners who were large enough to man-
ufacturer their own containers if SLW's prices did not remain reason-
able. Consequently, the Court held that the commission had not met
its burden of proof in the case to establish as the first step in its case
that SLW was dominant.

Considering the very distinct natures of the German and Dutch
container markets, the Court also found that the commission had not
proved that there was any potential competition between SLW and
TDV to be restricted. This was an especially difficult task because
Continental, as licensor of all the major metal container manufacturers
in Europe, arguably had been restricting past competition with its li-
censes. The commission was in a dilemma because by the time it
could review these licensing agreements under Article 85, a merger,
fait accompli, would have made the licenses unnecessary. The formerly
separate enterprises could collaborate with impunity as divisions of a
large multinational corporation. Similarly, proceeding against the mer-
ger would be difficult without being able to indicate some past history
that suggested a potential for competition.

Stating the commission's position strongly, it may be said that at
the time of the warnings to the parties involved, Continental was trying
to amalgamate under its control the largest metal container producers
in Italy, Great Britain, France and the Benelux countries. As a matter
of policy, this meant that if the commission did not act immediately,
the Common Market would lose a large measure of control over these
resources to an American firm. By the time the commission had

27. Id. at 8309 (conclusion of Advocate General Karl Roemer).
28. Id. at 8302. According to Mme. Espion of the EEC Commission, the com-
mission did not publish a full analysis of the market structure because it mistakenly
placed too much reliance on what it felt to be the conclusive nature of the market
share statistics in this case. Interview with Mme. Espion of the EEC Commission,
29. Id.
30. The commission was concerned with possible territorial or quota restrictions
in the Continental licenses. For discussion of the commission's dilemma, see V. Korah,
The Control of Mergers under Article 86 of the Rome Treaty: Continental Can, 26
CURRENT LEG. PROB. 82 (1973).
31. It is interesting to note that German and Benelux licensees of American Can
Co., which is larger than Continental in the United States and rivals it in total world
sales, had been absorbed respectively into SLW and TDV. CCH COMM. MKT. REP.
No. 178, at 323. American Can Co. was therefore virtually absent from the relevant
market because the American licenses expired upon acquisition of the licensees. Per-
haps some understanding for market sharing could be inferred between Continental and
American Can. Such an understanding, if one could be shown, would violate United
States, European Economic Community and many Member State antitrust provisions.
instituted proceedings, Carnaud of France had definitely decided not to join and Metal Box had suspended entry pending the outcome of any proceedings. Consequently, the only completed merger of which the commission could complain was the acquisition of TDV.

The commission certainly did not have an easy case on the facts nor, as will be seen, on the law. The absence of any oppressive or unfair activity on the part of the enterprises involved meant that it would be more difficult than otherwise for the commission to prove "abuse" contrary to Article 86. It also meant, however, that the Court would be confronted much more directly than otherwise with a situation requiring a decision regarding use of Article 86 as an instrument of merger control. Because this was the best available situation, the commission, in a high level policy decision, chose to use this as the vehicle for raising its contention that Article 86 may be applicable to mergers.

As stated above, the commission's failure to prove the dominance of SLW and thus, by implication, of Continental, resulted in a decision allowing Continental's acquisition of TDV. Because of that and the commission's decision not to reopen proceedings, Metal Box could resume its participation in the initial plan. Presumably, however, the commission could proceed against this extended amalgamation as a merger quite independent of the TDV acquisition.

Legal Arguments Regarding the Use of Article 86 as an Instrument of Merger Control

Arguments Based On a Literal Interpretation of Article 86

Article 86:

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

34. See text accompanying notes 28-31 supra.
35. Cross, EEC Prepares the Way for Control of Mergers, The Times (London), Feb. 28, 1973. "'The Continental Can case was a test case, not for the case itself, but for the doctrine', says Mr. Borschette [the commissioner in charge of competition policy]: 'and on the doctrine we won.' For this reason he rules out any reopening of the case 'under present circumstances.'" Id.
36. Mme. Espion suggests that such a proceeding would be brought and that investigation of possible remaining licensing violations will continue. Interview with Mme. Espion of the EEC Commission, in Brussels, Belgium, April 2, 1973.
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.\(^{37}\)

A literal interpretation of Article 86 suggests that both a dominant position and abuse are necessary for application of the statute. Because the requisite market power must exist before there can be any abuse contrary to Article 86, the methods by which that market power was created originally are not relevant to the application of Article 86. Therefore, it does not matter whether the dominant position is created by merger or by internal growth.

Article 86 does not distinguish among varying degrees of market power; by its language, a 100 percent market share is no more suspect than a lesser dominant position. Consequently, as long as abusive methods are not employed, extending a dominant position even to the point of 100 percent market control is just as permissible as the creation or continuation of a dominant position. Thus, the strengthening of a dominant position by merger, assuming that the merger contains no otherwise objectionable features, is permissible and outside the proscription of Article 86. Of course, if the merger did contain objectionable features, they would be objectionable regardless of whether or not a dominant position was involved.\(^{38}\) Some of the basic assumptions in this line of reasoning are open to challenge. It is undisputed that as long as there is no abuse, extending a dominant position is unobjectionable; but there is no reason why a feature common to all horizontal mergers, the elimination of a separate competitor, may not be considered abusive in some situations. In such a case, the extension of a dominant position would itself be the abuse.

In 1965, the commission took the first definitive step toward reso-

\(^{37}\) 1 CCH COMM. Mkt. Rep. ¶ 2101, at 1681. See note supra.

\(^{38}\) Joliet, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION 284 (1970) [hereinafter cited as JOLIET]. Professor Joliet puts forward this argument with clarity and accepts it as valid.
tion of this matter by supporting the view of the group of professors it had assigned to study the issue.

A merger of an enterprise occupying a dominant position and another enterprise, which has the effects of eliminating competition that would otherwise continue to exist on the market and of creating a monopolistic situation, can have exactly the same harmful effects as the practices described in Article 86(b). In fact, a monopolistic situation removes incentives toward technical progress. It often leads to a limitation of production, with the aim of reaping maximum profits, through prices that are higher than they would be on a market with oligopolistic competition and with a level of production that would be higher on account of such competition.

[A] concentration of enterprises which has the effect of monopolizing a market should be treated as an improper exploitation of a dominant position within the meaning of Article 86, except where special circumstances are present.39

This position reflects a second set of arguments on the interpretation of Article 86. The Advocate-General argued in Continental Can that an abuse which is not covered by the four situations listed in Article 86 should at least be that same kind of abuse.40 Specifically, he argued that unfair trading restrictions, limitations of production to the prejudice of consumers, economic discrimination, and the practice of tying products harm consumers or competitors directly by market behavior which is inherently predatory. By contrast, a merger is not market behavior but a morally neutral activity reflecting a management decision about corporate structure which may or may not have incidental effects on the market.41 Canellos and Silber have argued to the contrary that the harm from limitations of production and the harm from mergers are similar because with both, the prejudice to consumers may be indirect, a result of a decision concerning the internal management of the enterprise.42 The commission's contention43 strengthens this comparison by pointing out that the effects of a merger involving a dominant enterprise are often those very effects prohibited by Article 86 (b). The Court did not comment on this comparison but rather

40. In addition to the four statutory abuses, two additional abuses were discussed in the Concentration Memorandum. These are "cut-throat" pricing to eliminate competition and "cut-throat" competition to force an unfavorable or unwanted merger on a competitor. Id. at 29. Cunningham says that both of these are similar to economic discrimination which is prohibited by Article 86(c) because all three distort normal competition. Cunningham, supra note 22, at 106.
41. Court Decision, supra note 10, at 8306 (conclusion of Advocate General Karl Roemer).
43. See text accompanying note 39 supra.
found mergers to be similar to economic discrimination (Article 86 (c)) and tying (Article 86(d)) because all three may have effects on industrial structure as well as on market activity.  

Proponents of the Advocate-General's position bolster their contention with two further arguments based on the wording of the treaty. Although the text of Article 86 is the official English text, some analysts working from the official French text feel that "exploit in an improper manner" or "exploit abusively" is a better translation of the French phrase in Article 86, "d'exploiter de façon abusive," than is "abuse." These analysts reason that neither "exploitation" nor "improper manner" taken alone is sufficient for the application of Article 86 but rather that the exploitation of a dominant position must be in some way improper. The inference from this translation is that some morally questionable behavior is required and that mergers, unless they are shown to have this quality, are not within the proscription of the statute.

The second related contention is that the dominant position must be the instrument of the improper behavior. The ambiguous English translation of the pertinent part of Article 86 reads: "Any abuse by one or more undertakings of a dominant position . . . shall be prohibited . . . ." The Advocate-General maintains that the statute should be interpreted to mean that the dominant position must be the instrument of the improper behavior. However, the Court accepts the alternative interpretation, that is, that the undertakings which possess a dominant position may not commit abuses.

It is difficult to know what sort of instrumental use of dominant position the Advocate/General would require. For example, Continental's size rather than its dominance enabled it to make the purchase. Presumably quite a number of other enterprises could also have purchased TDV. On the other hand, Continental did use its dominant position as the foundation for the creation of a larger dominant position

44. Court Decision, supra note 10, at 8300.
45. The official French text reads in pertinent part: "Est incompatible avec le marché commun et'interdit, dans la mesure où le commerce entre États membres est susceptible d'en être affecté, le fait pour une ou plusieurs entreprises d'exploiter de façon abusive une position dominante sur le marché commun ou dans une partie substantielle de celui-ci." 1 CCH COMM. Mkt. Rep. ¶ 2101, at 1681. See note 2 supra.
46. These analysts have used translations other than "abuse." E.g., JOLIET, supra note 38.
47. 1 CCH COMM. Mkt. Rep. ¶ 2101, at 1681. See note 2 supra.
to the extent that its new dominance, which grew from the acquisition of TDV, would not have been possible without its initial dominant position. It should be noted that if Article 86 does require that the dominant position be used as the instrument of some morally wrong behavior, then it would be incorrect to assert that mere extension of a dominant position may itself constitute abuse.

Arguments Based on the Interpretation of Treaty Objectives

In attempting to resolve these problems, the Court looked for guidance to Article 3(f) which states:

For the purposes set out in Article 2,49 the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein . . . the institution of a system ensuring that competition in the common market is not distorted . . . .50

The Court interpreted this statute to place the emphasis on the effect produced regardless of how the alleged abuse was achieved.51 The phrase "is not distorted," refers to all activity which may produce the effect of distorted competition in the Common Market. There are no requirements that the activity employ the dominant position to achieve the effect, be predatory or occur directly in the market if the effect of the activity is contrary to Article 86 as interpreted in the light of Article 3(f). Similarly, the Court minimized the distinctions between "abuse" and "abusive exploitation" and between "alteration of industrial structure" and "impairment of market performance" by reasoning that "any structural measure can influence market conditions whenever it increases the size and economic power of the enterprise."52

The Court's reliance on Articles 2 and 3(f) highlights another area of disagreement. Continental Can Company and the Advocate-General both argued against such reliance, asserting that Articles 2 and 3(f) are only general declarations of policy, too broadly stated for useful application and not directly applicable in member states without enabling legislation.53 Nevertheless, the Court held that the spirit and

49. Article 2 of the Rome Treaty states: "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it." 1 CCH COMM. Mkt. Rep. ¶ 165, at 210. See note 2 supra.
50. 1 CCH COMM. Mkt. Rep. ¶ 171, at 211. See note 10 supra.
51. Court Decision, supra note 10, at 8300.
52. Id. at 8299.
53. Id. at 8306-07 (conclusions of Advocate General Karl Roemer).
terms of Article 86 should be examined in the light of the treaty's objectives as described in Articles 2 and 3(f) and implemented in Articles 85 to 90. A primary objective that undistorted competition be maintained would be violated and a loophole created in Community competition policy if, where a cartel restricting competition would be prohibited, a merger of enterprises involving a dominant position was allowed to cause the same restrictions yet evade legal sanction. Because Articles 85 and 86 both serve the purposes declared in Article 3(f), the Court reasoned, they cannot be interpreted as inconsistent with each other.

The implied reasoning is that because the system instituted to prevent distorted competition is in Articles 85 to 90, anything which distorts competition violates Articles 85 to 90. However, it should be clear at this point that the wording of Articles 2 and 3(f) neither requires nor forbids the interpretation that the Court chose. For example, the Court could have reasoned that if Articles 85 to 90 were designed to implement the objectives of Articles 2 and 3(f), and if Articles 85 to 90 do not expressly provide for control of mergers, then control of mergers is outside the scope of Articles 2 and 3(f). The choice here is clearly one of policy.

Arguments Based on Legislative Intent

Two sets of arguments against application of Article 86 to mergers were not given much weight by the Court. The first and one of the most convincing arguments is that the framers of the Rome Treaty in most respects closely followed the model of the competition provisions of the Paris Treaty found in Articles 65 and 66 yet did not

54. Id. at 8299-8300.
55. Id. at 8300. See Mestmächer, Concentration and Competition in the EEC: Part II, 7 J. WORLD TRADE L. 36, 39 (1973) (hereinafter cited as Mestmächer).
56. It is at this point in the analysis that many fears arise that Articles 85 and 86 will be expanded to cover every activity which arguably can be claimed to distort competition, regardless of whether or not the activity was traditionally considered to be outside the language and scope of Articles 85 and 86. See text beginning at note 88 infra.
57. Both of these interpretations are tautological. Resolution of the central dispute and the validity of either of these interpretations rests on the definitions of "competition" and "distorted." At present both of these concepts are vague.
58. Jolivet, supra note 38, at 225.
59. The competition provisions of the Paris Treaty are embodied in Articles 65 & 66.

Article 65 provides that:

1. There are hereby forbidden all agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, which would tend, directly or in-
include the merger control provisions found within that treaty. Articles 65 and 66(7) of the Paris Treaty establishing the European Coal and

2. However, the High Authority will authorize enterprises to agree among themselves to specialize in the production of, or to engage in joint buying or selling of specified products, if the High Authority finds:

(a) that such specialization or such joint buying or selling will contribute to a substantial improvement in the production or marketing of the products in question; and (b) that the agreement in question is essential to achieve such effects, and does not impose any restriction not necessary for that purpose; and (c) that it is not susceptible of giving the interested enterprises the power to influence prices, or to control or limit production or marketing of an appreciable part of the products in question within the common market, or of protecting them from effective competition by other enterprises within the common market.

If the High Authority should recognize that certain agreements are strictly analogous in their nature and effects to the agreements mentioned above, taking into account the application of the present section to distributing enterprises, it will authorize such agreements if it further recognizes that they satisfy the same conditions.

An authorization may be made subject to specified conditions and may be limited in time. If so limited, the High Authority will renew it once or several times if it finds that at the time of renewal the conditions stated in paragraph (a) to (c) above are still fulfilled.

The High Authority will revoke or modify the authorization if it finds that as a result of changes in circumstances the agreement no longer fulfills the conditions set forth above, or that the actual effects of the agreement or of the operations under it are contrary to the conditions required for its approval.

The decisions granting, modifying, refusing or revoking an authorization shall be published along with their justification; the limitations contained in the second paragraph of Article 47 shall not be applicable to such publication.

3. The High Authority may obtain, in accordance with the provisions of Article 47, any information necessary to the application of the present article, either by a special request addressed to the interested parties or by a regulation defining the nature of the agreements, decisions or practices which must be communicated to it.

4. Any agreement or decision which is prohibited by virtue of Section 1 of the present article shall be automatically void and may not be invoked before any court or tribunal of the member States.

The High Authority has exclusive competence, subject to appeals to the Court, to rule on the conformity of such agreements or decisions with the provisions of the present article.

5. The High Authority may pronounce against enterprises: which have concluded an agreement which is automatically void; which have complied with, enforced or attempted to enforce by arbitration, forfeiture, boycott or any other means, an agreement or decision which is automatically void or an agreement for which approval has been refused or revoked; which shall have obtained an authorization by means of knowingly false or misleading information; or which engage in practices contrary to the provisions of Section 1, fines and daily penalty payments not to exceed double the turnover actually realized on the products which have been the subject of the agreement, decision or practice contrary to the provisions of the present article; if the object of the agree-
Steel Community (hereinafter referred to as ECSC) closely parallel Articles 85 and 86 of the Rome Treaty. However, Articles 66(1-6),

tment is to restrict production, technical development or investments, this maximum may be raised to 10 percent of the annual turnover of the enterprises in question, in the case of fines, and 20 percent of the daily turnover in the case of daily penalty payments.

Article 66 provides that:

1. Except as provided in paragraph 3 below, any transaction which would have in itself the direct or indirect effect of bringing about a concentration, within the territories mentioned in the first paragraph of Article 79, involving enterprises at least one of which falls under the application of Article 80, shall be submitted to a prior authorization of the High Authority. This obligation shall be effective whether the operation in question is carried out by a person or an enterprise, or a group of persons or enterprises, whether it concerns a single product or different products, whether it is effected by merger, acquisition of shares or assets, loan, contract, or any other means of control. For the application of the above provisions, the High Authority will define by a regulation, established after consultation with the Council, what constitutes control of an enterprise.

2. The High Authority will grant the authorization referred to in the preceding paragraph if it finds that the transaction in question will not give to the interested persons or enterprises, as concerns those of the products in question which are subject to its jurisdiction, the power:

   —to influence prices, to control or restrain production or marketing, or to impair the maintenance of effective competition in a substantial part of the market for such products; or

   —to evade the rules of competition resulting from the application of the present Treaty, particularly by establishing an artificially privileged position involving a material advantage in access to supplies or markets.

In this appreciation, and in accordance with the principle of non-discrimination set forth in sub-paragraph (b) of Article 4, the High Authority will take account of the size of enterprises of the same nature existing in the Community, to the extent it deems justified to avoid or correct the disadvantages resulting from an inequality in the conditions of competition.

The High Authority may subject such an authorization to any conditions which it deems appropriate for the purposes of the present section.

Before taking action on a transaction concerning enterprises of which at least one is not subject to the application of Article 80, the High Authority will request the observations of the interested government.

3. The High Authority will exempt from the requirement of prior authorization those classes of transactions which, by the size of the assets or enterprises which they affect taken together with the nature of the concentration they bring about, must in its opinion be held to conform to the conditions required by Section 2. The regulation established for this purpose with the concurrence of the Council will also fix the conditions to which such exemption is to be subject.

4. Without limiting the applicability of the provisions of Article 47 to enterprises subject to its jurisdiction, the High Authority may obtain from physical or juridical persons who have acquired or regrouped or might acquire or regroup the rights or assets in question, any information necessary to the application of the present article concerning operations which might produce the effect mentioned in Section 1; it may do this either by a regulation established after consultation with the Council which defines the nature of the operations which must be communicated to it, or by a special demand addressed to the interested parties within the framework of such regulation.
in which the merger control provisions for the Paris Treaty are created, have no counterpart in the Rome Treaty. Professor Joliet argues that

5. If a concentration should occur, which the High Authority finds has been effected contrary to the provisions of Section 1 but which it finds nevertheless satisfies the conditions provided in Section 2, it will subject the approval of this concentration to the payment, by the persons who have acquired or regrouped the rights or assets in question, of the fine provided in the second subparagraph of Section 6; such payment shall not be less than half of the maximum provided in the said sub-paragraph in any case where it is clear that the authorization should have been requested. In the absence of this payment, the High Authority will apply the measures provided hereafter for concentrations found to be illegal.

If a concentration should occur which the High Authority recognizes cannot satisfy the general or special conditions to which an authorization under Section 2 would be subject, it will establish the illegal character of this concentration by a decision accompanied by a justification; after having allowed the interested parties to present their observations, the High Authority shall order the separation of the enterprises or assets wrongly concentrated or the cessation of common control, as well as any other action which it deems appropriate to re-establish the independent operation of the enterprises or assets in question and to restore normal conditions of competition. Any person directly interested may take an appeal against such decisions under the conditions provided in Article 33. Notwithstanding the provisions of that article, the Court shall be fully competent to judge whether the operation effected is a concentration within the meaning of Section 1 of the present article and of the regulations issued in application of that section. This appeal shall be suspensive. It may not be taken until the measures provided above have been ordered, unless the High Authority should agree to the taking of a separate appeal against the decision declaring the transaction illegal.

The High Authority may at any time, subject to the possible application of the provisions of the third paragraph of Article 39, take or cause to be taken such measures as it may deem necessary to safeguard the interests of competing enterprises and of third parties, and to prevent any action which might impede the execution of its decisions. Unless the Court decides otherwise, appeals shall not suspend the application of such precautionary measures.

The High Authority will grant to the interested parties a reasonable period in which to execute its decisions, at the expiration of which it may begin to impose daily penalty payments not to exceed one tenth of one percent of the value of the rights or assets in question.

Furthermore, if the interested parties fail to fulfill their obligations, the High Authority shall itself take measures of execution and in particular may: suspend the exercise, in enterprises subject to its jurisdiction, of the rights attached to the assets illegally acquired; bring about the designation by judicial authorities of a receiver-administrator for these assets; organize the forced sale of such assets in conditions preserving the legitimate interests of their proprietors; annul, with respect to physical or juridical persons who have acquired the rights or assets in question by the effect of illegal transaction, the acts, decisions, resolutions, or deliberations of the directing organs of enterprises subject to a control which has been irregularly established.

The High Authority is also empowered to address to the interested member States the recommendations necessary to obtain, within the framework of national legislation, the execution of the measures provided for in the preceding paragraphs.

In the exercise of its powers, the High Authority shall take account of the rights of third persons which have been acquired in good faith.

6. The High Authority may impose fines not to exceed:
because of the striking similarities in language between the provisions of the two treaties, the probabilities are against the possible alternative conclusion that the merger control provisions of Articles 66(1-6) are present but unspecified within Articles 85 and 86 of the Rome Treaty.\textsuperscript{60}

There are, however, several counterarguments. First, this reasoning is in essence an attempt to discern the legislative intent of the drafters of the Rome Treaty. To avoid reasoning based on legislative intent, the travaux preparatoires were to be locked away and interpretation was supposed to rest solely on the wording of the Treaty itself. It may be for this reason that the Court, in its judgment in Continental Can, did not find a comparison of the treaties relevant.\textsuperscript{61}

Second, the circumstances surrounding the drafting of the Rome Treaty were far different from those surrounding that of the Paris Treaty. Consequently, similar language in the two treaties may require different interpretations. After the war, some reorganization, rationalization and integration in Europe's coal and steel industries were felt to be needed for economic recovery and to prevent Germany from re-establishing her uncontrolled strength in these areas. These are com-

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-3 percent of the value of the assets acquired or regrouped or to be acquired or regrouped, against physical or juridical persons who shall have violated the obligations provided for in Section 4;
-10 percent of the value of the assets acquired or regrouped, against physical or juridical persons which shall have violated the obligation provided for in Section 1; after the end of the twelfth month following the transaction, this maximum shall be raised by one-twenty-fourth per month which elapses until the High Authority establishes the existence of the violation;
-10 percent of the value of the assets acquired or regrouped or to be acquired or regrouped, against physical or juridical persons which shall have obtained or attempted to obtain the benefit of the provisions of Section 2 by means of false or misleading information;
-15 percent of the value of the assets acquired or regrouped, against enterprises subject to its jurisdiction which shall have participated in or lent themselves to the realization of transactions contrary to the provisions of the present article.

Persons who are the object of sanctions provided for in the present paragraph may appeal before the Court under the conditions provided for in Article 36.

7. To the extent necessary, the High Authority is empowered to address to public or private enterprises which, in law or in fact, have or acquire on the market for one of the products subject to its jurisdiction a dominant position which protects them from effective competition in a substantial part of the common market, any recommendations required to prevent the use of such position for purposes contrary to those of the present Treaty. If such recommendations are not fulfilled satisfactorily within a reasonable period, the High Authority will, by decisions taken in consultation with the interested government and under the sanctions provided for in Articles 58, 59 and 64, fix the prices and conditions of sale to be applied by the enterprise in question, or establish manufacturing or delivery programs to be executed by it.

60. Joliet, supra note 38, at 274-76.
61. Court Decisions, supra note 10, at 8299.
paratively limited purposes for which the more specific drafting of the Paris Treaty is appropriate, particularly in dealing with industries in which concentrations have been historically prevalent. Because the Rome Treaty covers a full spectrum of economic activity, too much specificity in drafting would have been self-defeating. At the time of the formation of the EEC, Europe was less fractured politically than it was in the postwar climate of the Paris Treaty negotiations. Whereas the competition provisions of the Paris Treaty were actually written in Washington, D.C., it is arguable that by the middle 1950's, Europeans had enough experience with conjoint administration of antitrust laws to fashion a competition policy to match the broadly stated aims and coverage of the Rome Treaty. Moreover, although the language of the competition statutes of the Rome and Paris Treaties are similar, the provisions are not identical. This is evidenced by the requirement of Article 66(7) of the Paris Treaty that the High Authority conduct discussions with Member States, a requirement which is not found in Article 86 of the Rome Treaty. This difference is one reason for the suggestion that Article 86 was meant to be more comprehensive than Article 66(7).

The third of the counterarguments arises from the Oberreinische Kohlenunion case cited by Deringer and discussed by Canellos and Silber to the effect that Articles 65 and 66 of the Paris Treaty are not mutually exclusive in coverage. If this is expanded to argue that Articles 66(1-6) and 66(7) are also not mutually exclusive, then Article 66(7), which has never been applied in a merger context, theoretically would be applicable to mergers. Consequently, even if Joliet's assertion is correct that Article 86 is based on Article 66(7), Article 86 would not exclude merger situations. Again, it is submitted that legalistic arguments do not resolve the dispute.

The other set of arguments not discussed by the Court is that interpretation of national laws, especially those of Germany and Holland, in which the concepts of dominant position and its abuse are

62. Edwards, supra note 8, at 246.
63. See note 59 supra.
64. See text accompanying note 37 supra.
67. Canellos & Silber, supra note 42, at 158.
68. See text accompanying note 60 supra.
69. See Edwards, supra note 8, at 177-97. The Belgian Law also includes these
incorporated reveals that the framers of the Rome Treaty, working from their collective national experiences, intended the scope of Article 86 to be much narrower than the Court now holds it to be. Related to this are arguments based on speeches made to national assemblies, particularly at the time of the Rome Treaty negotiations, explaining that the scope of Article 86 would not include merger control. Considering the political bargaining on both the national and international levels that surrounded the drafting of the Rome Treaty, it would be an error to put too much reliance on any particular speeches or on personal interpretations of national laws. Therefore, it will be submitted here that these arguments have no greater relevance than other arguments based on legislative history.

**In Dubio, Pro Liberte**

The last of the traditional arguments against application of Article 86 to mergers is more jurisprudential than legalistic. Because of this, it serves to emphasize this author’s contention that because the Court did not have legally dispositive arguments on which to rely its decision had to be one based mainly on considerations of policy. The Advocate-General rightly noted that the commission was seeking a wide interpretation of Article 86 but in disagreement urged “in dubio pro libertate,” “in doubt, for freedom.” In other words, where a statute does not proscribe an action specifically, the statute should be interpreted to allow that action. This argument should be given added force when considering the penal nature of the sanction provided in Regulation 17/62, Article 15.

Dr. Gleiss, making this argument for the Continental Can Com-
pany before the Court, argued that such a wide interpretation of Article 86 as urged by the commission would put too great a burden on the statutory structure of the community. The community, he urged, is at its strongest when those it governs have confidence that they are being held to comply only with what they clearly agreed and when they know what the law is so that they can obey it.\textsuperscript{73} Merger control requires community legislation and the appropriate framework for such changes in EEC law is Article 235.\textsuperscript{74}

Canellos and Silber suggest a teleological response to this argument.\textsuperscript{75} They reason, as did the Court in applying Article 3(f), that because the EEC is designed to be a common market rather than a planned economy, it is necessary that effective competition, as the basis of that market, be protected. Consequently, Articles 85 and 86 should be interpreted toward this goal, even if it means broad statutory interpretations. They cite the statement of Chief Justice Hughes in \textit{Appalachian Coals, Inc. v. United States}:

The purpose of the Sherman Antitrust Act [which, like Article 86, is broadly drafted] is to prevent undue restraints of inter-state commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.\textsuperscript{76}

\textbf{Policy Considerations}

\textbf{Jurisprudential Considerations}

If, as is being contended, legalisms provide no resolution of the central dispute, then it is necessary to look to policy considerations for determining factors. So little of the criteria regarding control of dominant firms is provided in the primary and secondary legislation that


\textsuperscript{74} Article 235 of the Rome Treaty provides: "Where action by the Community appears necessary to achieve one of the objectives of the Community, within the framework of the Common Market, and where this treaty has not provided for the necessary powers of action, the Council shall adopt the appropriate provisions by a unanimous decision, after consulting the Assembly." 2 CCH COMM. MKT. REP. ¶ 5325, at 4367. See note 2 supra.

\textsuperscript{75} Canellos & Silber, \textit{supra} note 42, at 151.

\textsuperscript{76} 288 U.S. 344, 359-60 (1933).

the job of shaping law, and therefore policy, comes within the province of judicial interpretation. Because the law on combinations and concentrations is undeveloped, the motifs reflect those choices of policy which the Court must make in order to reach its decision. It must have been clear to the Court, whether it liked the situation or not, that holding Article 86 inapplicable to mergers in the absence of predatory tactics could influence policy as much as the broader interpretation of Article 86 which it chose.

It is conceivable that the Court could have granted Continental's appeal on the facts and not decided the legal issue; but this would have been unwise considering the importance of the central problem and the limited opportunities of the Court for statutory interpretation. The Court took what was probably the next most jurisprudentially conservative action by deciding that Article 86 did apply to mergers but by giving little concrete guidance as to how Article 86 should be applied. Beyond direction to the commission that it publish a fuller structural analysis of the market in its decisions, the Court said little that a businessman could use to help him decide what course of action to take in a specific situation, deferring instead to the other Common Market institutions in this matter.

By such deference, the Court was able to increase the flexibility of action of the other EEC institutions and thereby lessen the direct impact of its decision on EEC policy. The Court knew that if Article 86 was limited to covering predatory mergers, then regulations on merger control would not be possible under Article 87. It is asserted here that under Article 235\textsuperscript{77} it would be politically easier to restrict a court's holding that Article 86 is applicable to mergers than to create completely new powers in the face of an opposite holding. Of course, such a restriction is unlikely, but at least the possibility remains open for the council, commission and, to a lesser extent, the European Parliament.\textsuperscript{78}

\textsuperscript{77}. On the use of Articles 87 or 235 as the basis of a new regulation, see text accompanying notes 129-42 \textit{infra}.

\textsuperscript{78}. The Council of Ministers is comprised of delegates of each member state and is the primary legislative body for the Common Market. The European Commission is the primary enforcement body of the Common Market, though it does initiate some legislation by making proposals to the council. The European Parliament is at present primarily an advisory body, with its major powers centered in the budgetary field.

Members of the commission are appointed by member states but, unlike the council members, are required to act without regard to national origin. Members to the European Parliament are appointed by, and act as a delegation of, their member states.
Related to this is the recognition of the commission's function as a body for making and implementing policy as well as for applying law. The Court may well have felt inclined to defer to the opinion of a body which has been reviewing problems related to combinations and concentrations since 1962. Similarly, because the commission declared in its Concentration Memorandum that Article 85 would not be applied to mergers, the Court must have been aware that without some drastic shift of position by the commission or a significant case on the topic, the only merger control in the treaty without additional legislation must come from Article 86. It is quite possible that the Court felt reluctant to close off this remaining possibility.

Economic Considerations

Perhaps more influential considerations for resolving the dispute arise from the practical concerns of economics and politics. An initial economic concern of the Court would be to favor balance and certainty in competition policy. On this ground, however, the Court's decision has been criticized. Two hypothetical examples will serve to illustrate the problems. First, in a hypothetical industry with 100 firms each controlling 1 percent of the market, if one firm begins to buy out the other firms one by one, when does the purchasing firm become dominant and when does a purchase become abusive? This presents the classic problem of "line drawing" which, with regard to the application of Article 86, is a very real concern. Because there is no available guidance other than broad generalities for distinguishing bad mergers from permissible ones, a well-intentioned board of directors cannot be sure where to strike the balance between duties owed to shareholders to pursue lucrative opportunities for expansion and duties owed to the European Communities not to overextend a dominant position.

For the second hypothetical example, assume that a firm with 70 percent market share in a given field is unquestionably dominant and acquires its largest rival which has a 10 percent market share. Such an acquisition could easily be considered an abuse under Article 86. If there were three firms in the example, however, each with less than a

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79. It is quite possible that one major factor influencing the commission to limit the scope of Article 85 was that the same Memorandum purported to expand the scope of Article 86 and the former was a concession to make the Memorandum more acceptable.

80. See text accompanying notes 108-14 infra.

81. See note 30 supra.
30 percent market share, presumably none by itself would be dominant and conceivably the three might not enjoy a collective dominant position. An amalgamation of these three firms would again cause 80 percent of the market to be consolidated in one firm. Although the Court in Continental Can concentrated on the effect produced rather than how it was produced, Article 86 conceivably would not apply to the second situation because there was no pre-existing individually or collectively held dominant position. Yet, it could be argued that the second situation is actually more deleterious to competition than the first because less competition will be eliminated in the first situation in which the acquiring firm was initially seven times as large as the acquired firm. The inconsistent and unbalanced application of Article 86 is not only a problem in itself but also adds to the general lack of predictability in this field.

The hypothetical examples illustrate problems which the Court's decision both aggravate and relieve. For proper perspective, it should be noted that there was considerable uncertainty regarding the concepts in Article 86 even before Continental Can. Commentators could only speculate as to the meanings of "dominant position" and "abuse." Uncertainty and perhaps imbalance and inconsistency are to be expected when dealing with relatively new and untested statutes. Additionally, throughout the entire antitrust field, uncertainty is an inherent and serious problem due to the awkward but necessary mixing of legal and economic concepts. At least now there is no question about the general legality of applying Article 86 to mergers; but because there are still no available guidelines to help with specific situations, concerns will remain. If the inconsistency in the second hypothetical example is relieved in some situations by regarding the merging firms as collectively holding a dominant position in an oligopolistic industry, then even medium-sized or smaller firms will have Article 86 concerns for their acquisitions.

The Continental Can case helps to relieve these problems in several ways. By supporting the commission's legal contentions, the Court has given support and impetus to further commission proceedings under Article 86. It is hoped that with the fuller structural analysis of the

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82. This approach is consistent with the wording of Article 86 which begins, "Any abuse by one or more undertakings of a dominant position . . ." 1 CCH COMM. MKT. REP. § 2101, at 1681. Some connection between the firms would probably be required before the firms could be considered collectively. Consequently this approach probably could not be applied to an acquisition of an enterprise by purchase of its stock through a stock exchange.
market demanded by the Court, the new cases will serve to present some guidance for businessmen until a new regulation is adopted. Secondly, by highlighting the problems regarding all forms of concentration and combination, the Court's decision adds force to the drive for the resolution of these problems and, inevitably, for the new regulation. Uncertainty may be reduced significantly if enterprises can determine easily and "with certainty" the commission's opinion of a proposed action by use of the negative clearance procedure of Regulation 17/62, Article 2. This was the commission's position in Continental Can as it was reviewed by the Court.

Two concerns need further discussion. One is that Article 86 is inappropriate for control of mergers because it would prohibit them only after completion; and mergers, once completed, are very difficult to unwind. Unlike Article 85, Article 86 contains no procedure similar

83. See text accompanying note 76 supra.
84. Court Decision, supra note 10, at 8289.
85. Council Regulation 17, made on February 6, 1962 and brought into force on March 13, 1962, 13 E.E.C. J.O. 204 (1962), was the first regulation adopted pursuant to Article 87 of the Rome Treaty for the purpose of implementing Article 85. For the general relationship between Articles 85 and 87, see text accompanying note 140 infra and material cited therein. James P. Cunningham writes of Regulation 17: "The basic provision of Regulation 17 is Article 1. Subject to certain exceptions, all agreements, decisions, and concerted practices which infringe Article 85.1 are automatically prohibited. Nothing further is required—no investigation of the case, no declaration by an authority. Since the 13th March, 1962 when Regulation 17 came into force in the present six Member States, the provisions of any agreement, etc., falling within Article 85.1 and not coming within one of the exceptions to Article 1 of the Regulation or within the bloc exemption granted by Regulation 67/67, have been prohibited under 85.1 and null and void under 85.2. If the void provisions form the essence of the agreement or cannot be severed from the remainder of it, the whole agreement is null and void. The courts of the Member States have to give effect to that nullity. They cannot enforce the void provisions or a void agreement." CUNNINGHAM, supra note 22, at 73-74.

"Negative clearance," Article 2 of Regulation 17, is a means used by parties to agreements to determine if their agreements comply with Article 85, Cunningham explains: "Bearing in mind the serious consequences which can flow from infringement of Article 85.1, Regulation 17 provides a most useful procedure whereby the parties to an agreement, etc., can seek 'negative clearance' for it, i.e. a declaration that it does not come within the scope of, and consequently does not infringe, Article 85.1. It might be thought that the parties would always know whether their activities were in breach of 85.1 or not, but this is not necessarily so. To constitute a breach of 85.1 there must be an appreciable effect upon competition and an appreciable effect upon trade between Member States. Except in the clearest possible case, within the limits set out in the commission's 'Notice Concerning Minor Agreements' . . . or in Regulation 2822/71 . . . it would be unwise for the parties themselves to decide that any effect was not appreciable — they would be acting as judge in their own cause. Wherever there is any doubt whatsoever, those concerned would be well advised to seek negative clearance." Id. at 77.
to Article 85(3)\textsuperscript{86} for the legalization of violations after they have been committed. The Court did not find this consideration relevant and merely accepted that Article 85 and 86 establish different regimes to control different situations.\textsuperscript{87} Use of the negative clearance procedure and of prior notification, if such a system is introduced, will alleviate the underlying fears of having to dismantle a completed merger. It is also properly argued that a procedure similar to Article 85(3) is not needed in Article 86. The requirement of Article 85(3)(b) that competition not be eliminated would be incompatible in most circumstances with the provisions of Article 86 requiring dominant position and abuse.

The second cause for concern is that the position adopted by the Court increases uncertainty by reading into the concept of abuse the purportedly broader concept in Article 85 of "the prevention, restriction or distortion of competition." This analysis appears misdirected. The Court held that concentrations involving a dominant position cannot be so closely knit as to avoid Article 85 without coming within the sphere of Article 86.\textsuperscript{88} The only type of concentration to which this can apply is a merger because apparently all other types of concentration can be covered by Article 85. Therefore, Article 86 will not catch much that otherwise would not have been prohibited. What is important here and where the misdirection arises is that the Court did not read parts of Article 85 into Article 86 but rather read into both statutes the inclusive concept in Article 3(f) of distortion of competition.\textsuperscript{89} Although problems remain in applying legal analysis to essentially economic ideas, the use of Article 3(f) makes it clear that a broad regulation, perhaps covering situations or administrative procedures not

\textsuperscript{86.} Article 85(3) reads:

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

—any agreement or category of agreements between undertakings;
—any decision or category of decisions by associations of undertakings;
—any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1 CCH COMM. Mkt. Rep. ¶ 2051, at 1661. See note 2 \textit{supra}.

\textsuperscript{87.} Court Decision, \textit{supra} note 10, at 8300.

\textsuperscript{88.} \textit{Id.}

\textsuperscript{89.} See text accompanying notes 49-57 \textit{supra}. 

clearly within the reach of Common Market competition policy as previously interpreted, would not be incompatible with the treaty and thus would not be outside the legislative powers of Article 235.

There are also economic policy considerations as to how broad competition policy should be. This may appear to be a matter of more direct concern to the council, commission and European Parliament than to the Court. These considerations will be reviewed here not only because they may have influenced the Court to take the flexible stand it did, but more importantly because they certainly will influence the nature of the new regulation which the Court's decision has helped to foster.

Between 1962 and 1965, the commission reviewed these considerations of economic policy but, in its Concentration Memorandum of 1965, it did not present any empirical data to support its assertions regarding the benefits of and the need for large concentrations.

This adjustment of enterprises to the dimensions of the Common Market is, furthermore, in keeping with the objectives of the Treaty of Rome. The growth of enterprises makes it possible to increase profitability, to accelerate technical progress, and to reduce production costs. Effective competition will allow the consumers a fair share of the profits resulting from the economic progress and will raise their standard of living.

Another factor requiring a growth of European firms is the steadily increasing international competition on the world markets. Besides that, competition is also felt more keenly each day because of the establishment in the E.E.C. of large foreign enterprises that are attracted by the rapidly expanding market.

The difference between the size of foreign enterprises (particularly American and Japanese) and the size of European enterprises is likely to create problems with respect to the profitability of the enterprises.91

Since the time these statements were made, the trends regarding amalgamation of enterprises and investment in Europe have become more pronounced and their effects further subjected to study. The most recent study, prepared but not yet published by the British Department of Trade and Industry, reviewed French, Italian and German industries and concluded that mergers in medium-sized companies tend to depress EEC trade and competition and that "an industry's ability to compete with its counterparts on [sic] the European Community was related not so much to superior size of enterprise, as many would

90. See text accompanying note 39 supra.
91. Concentration Memorandum, supra note 9, at 7-8.
be inclined to think, but to superior plant size.”92 The import of this is that it gives some empirical support to the contention that broad merger control provisions would not be detrimental to effective Common Market and international competition. Fewer mergers will need encouragement and more may be challenged if this contention is accepted by the commission.

Various studies lend support to this hypothesis by suggesting that it is not the European firms which are undersized but the American firms which are oversized. These studies concluded that the benefits of large enterprises, such as those claimed in the Concentration Memorandum, are at best overrated. In a study of a large number of industries, maximum efficiency was found to be obtainable usually by firms controlling much less than 10 percent of the market. Immense size in research and development programs was found to be neither indispensable for nor even found to be a guarantee of significant invention. Important factors other than size which determine significant invention are the nature of the industry and its consumers, the product mix of the particular firm, the inventiveness of the researcher and the attitudes of management and competitors towards research and implementation of discoveries. Research by dominant firms is often directed towards making technologically insignificant changes which might enhance the marketing of the product. Major alterations in an established product are often expensive to make and leading firms are often complacent or unwilling to risk significant innovation.

One of the studies, using United Kingdom statistics for 1966-67 and employing several methods of evaluation, found that the 100 largest enterprises on “The Times 300” are slightly less profitable than the 100 smallest firms on that list. In this study, the smaller group was found to employ approximately one-sixth of the capital and personnel of the larger group.93 It must be remembered that some of these studies are now as much as ten years old or are based on statistics from the United States where the situation, especially regarding capital-labor relations, the amount of purchasing power in the economy and the effects of competition policy, is quite different than it is in the United Kingdom or the EEC. The issues about the size and benefits of companies and

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93. The best review of these studies and their relevance to Article 86 is in Canellos & Silber, supra note 42, at 5-28 and in de Jong, Concentration in the Common Market, 4 Comm. Mkt. L.R. 166 (1966-67).
mergers should become much clearer in the next few years as major studies in progress reach conclusions. 94

Political Considerations

As with economic policy considerations, considerations of political policy ostensibly are outside the realm of the Court's inquiry but certainly are central to a determination of the eventual direction of Common Market policy regarding concentration. Within the EEC, Member States often have views differing from each other or from the commission regarding the benefits and detriments of large concentrations and multinational corporations. For example, the growth of multinational corporations affects important areas of economic and political concern such as balance of payments, currency stability and international economic relations, over which both the EEC and the Member State wherein the multinational is located may be jealous of their supervisory interests.

The relations between foreign companies and a host country often comprise a significant part of that country's foreign relations. Control of foreign investment and multinational expansion of enterprises may appear vital to maintenance of the host country's economic policy and, arguably, to its national security as well. On the other hand, one of the rationales of the Common Market is that many problems, including many related to investment and competition, are more amenable to regulation by a supranational organization such as the EEC then by fragmented national units. Additionally, many national politicians and institutions may be willing to surrender some control to the EEC rather than face the dilemmas and conflicting political pressures regarding its exercise. Many of these same conflicts surround attempts to control large intranational enterprises. It is probable that much of the debate that will occur in the council on the commission's proposed regulation 95 will center on what is the appropriate balance of supervisory power for competition, not only as between the Member States and the EEC but as between the various institutions within the EEC structure.

94. At present, the United States and the Organization for Economic Co-Operation and Development (OCED) are both studying the problems caused by multinational corporations.

The EEC Commission is conducting a large study of concentration to discover the present situation, the causes, effects and "economic laws" relating to concentrations, and to make suggestions for future practice. The commission is also studying national and international concentration on a sector by sector basis. Prior Notification of Mergers?, European Community, Oct., 1972.

95. See text accompanying notes 129-47 infra.
Political policy considerations go far beyond this to the whole realm of international power relationships. When a foreign enterprise purchases a company in a Common Market country, there is an initial capital inflow into the Common Market as payment for that company. Not only do future profits flow out of the Common Market, but control over that company, its labor and operations shifts away from the EEC. Such control constitutes an important EEC resource. Often investment concentrates in commercial areas strategic to the economic functioning and development of a country. In particular these include areas such as high technology industries, computer science, electronics and corporate management, in which American or Japanese skills and technology may be better developed than their European counterparts. Tales of "economic imperialism" are legion, a recent and extreme example being the now well-publicized attempts of the International Telephone and Telegraph Company to use its formidable economic and political power to influence the Chilean elections. It is a common suggestion that, whether from a desire to curry political favor at home or merely as a result of corporate views unconsciously parallel with those of the home state government, the exercise of control from abroad often reflects home state foreign policy interests even when they are at variance with the interests of the country wherein the investment is located.

On the other hand, those outside the Common Market have feared discrimination against their companies in Europe. There is concern that some national administrators and bureaucrats in the commission may have developed a resentment for the American presence in Europe, not only as it influences politics and commerce but also as it affects the culture and general styles of living. It is conceivable that such feelings may have influenced the decision of the commission to initiate proceedings against the acquisition of TDV. Regardless of the strength of any such bias, it should be noted that prior to these proceedings the commission had commenced proceedings under Article 86 against an acquisition involving only Common Market interests; the acquisition was abandoned, however, and no decision was issued.96

Strict control of acquisitions by American firms in Europe might lead those firms to choose expansion by internal growth. Without further elaboration, it is suggested that the desirability of such a development will depend on the facts of each individual case. Strict regulation of acquisitions may preserve the integrity of each existing competitor but will dampen business activity by making many mergers prohibitive.

96. CUNNINGHAM, supra note 22, at 222-23.
It is also possible that foreign firms might reduce their activities in the Common Market although this appears unlikely. Regulation of foreign investment in the Common Market is still comparatively moderate; in many respects it is less stringent than the combination of antitrust, consumer protection, industrial and commercial regulations encountered in the United States, the home of many multinational corporations. Additionally, multinational expansion and foreign investment are increasing in many countries, particularly developing countries which have regulatory controls far greater than those in the EEC yet offer less developed markets and legal protection for foreign investment. If fears of discrimination increase, it would be detrimental to important international events such as the G.A.T.T. discussions, the negotiations on tariff adjustments resulting from the accession of three countries to the EEC, the discussions on the United States proposal for a new Atlantic Charter which would include Japan and efforts at cooperative resolutions of recent international monetary and energy problems.

Many of the above policy considerations arose in the Continental Can case. Had the original plan proceeded unhindered, the largest producers of metal containers in the United Kingdom, Germany, Italy and the Benelux countries would have been tied together under the 51 percent control of an American firm by bonds much stronger than the licensing agreements which formerly tied each of them to Continental. Yet Continental did nothing inherently wrong. In such a situation, there appears to be no possible compromise of conflicting values which would not have exposed the Court to justifiable charges of making policy, ignoring commercial realities or playing at economics and politics. The outcome of the case suggests that prejudice against non-European firms did not affect the decision. The impact on the Court's decision of economic and political factors other than prejudice is unclear; however, they certainly will remain crucial factors, influencing not only the economic environment and control of mergers, concentration and investment but also future competition policy generally.

Impact of the Continental Can Case on Article 86

Either one can hold the power down to a level one thinks is adequately curbed by competition, or one can introduce some kind of control that prevents the power from being used in ways one does not like.97

Before the Continental Can judgment it was widely assumed that Article 86 reflected the latter alternative. Continental Can must be

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examined now to determine just how much that position has altered and to predict how any new position might be reflected in future cases or regulations. This will be done by review of the impact of the Court's teleological reasoning, by examination of the new interpretation of the relationship between Articles 85 and 86, and, for perspective, by re-examination of the traditional comparison of EEC law with United States law. From this base, emerging trends and the proposed regulation can best be discussed. It should be noted that the changes caused by Continental Can are important not only for their effect on that regulation but also for the application of Articles 85 and 86 to concentrations until the regulation is adopted and for the use of Article 86 in situations not involving concentrations.

The Impact of the Teleological Reasoning Employed by the Court

A useful key for interpreting the Court's reasoning can be found in the following passage from the judgment:

If Article 86 of the EEC Treaty is so construed [with regard to Article 3(f)] the strengthening of the position held by one enterprise can be an abuse and prohibited under Article 86 of the Treaty regardless of the methods or means used to attain it, provided it has the effects described above.98

By this emphasis on effect the Court is able to avoid becoming mired in many arguments and distinctions previously thought to be relevant. These issues99 include questions as to (a) the need for a causal link between the dominant position and the effect produced; (b) distinctions between effects caused by direct market behavior and those caused by alteration of industrial structure, and (c) the need for some element of moral wrong. These matters relate not to the substance of the effect but to how that effect was produced and therefore are immaterial.

One result of holding these issues immaterial is that many arguments for avoiding competition policy objectives are eliminated. It is relatively easy for an enterprise to be able to achieve an economic goal by various methods. The choice among methods is often exercised to enable the enterprise to take advantage of or to comply with corporation or tax laws. A prohibition of abuse would be meaningless if it did not impose sanction on all methods of causing the undesired effect. The lack of a requirement of a causal link means that Article 86 can be applied in a wider variety of situations than otherwise and without the need to debate issues of proximate cause. Similarly, adoption of

98. Court Decision, supra note 10, at 8300.
99. See text accompanying notes 71-87 supra.
the concept of "enterprise entity" also makes Article 86 more comprehensive because it increases the number and locations of enterprises covered by the statute. The irrelevance of the second issue allows for the practical reality that there is a spectrum of possible forms for concentration, many of which, such as the joint venture, could be classified just as easily as alteration of market structure as direct market behavior. The absence of a question regarding the moral quality of the activity keeps the analysis within the realms of economics and law in which the issues are somewhat more manageable.

The judgment did not draw a distinction between internal and external growth. Although the Court decided only the applicability of Article 86 to cases where a dominant position was extended by merger, a form of external growth, the decision might have implications for related situations. Before the Court, Dr. Gleiss effectively illustrated the first of these related situations. If it is abusive to extend a dominant position by acquisition of another company, he asked, then may it also be abusive to achieve a similar increase in market power by the more internal activities of purchasing or constructing another factory or even by renting more production equipment? His argument is certainly well taken because it points out that there is a whole range of activity which could be considered either external or internal. A consistent application of Article 86 with emphasis on the effect produced appears to require that this distinction be considered as irrelevant as the distinctions between direct market behavior and activity affecting industrial structure. It may well be that on the basis of this reasoning future judgments will hold that in some situations growth due to internal activity may be abusive. A significant factual difference between internal activity and horizontal merger is that the latter involves the direct elimination of a competitor. Regardless, the criterion of judgment in either situation evidently will be whether on the facts the extension of a dominant position amounts to a "distortion" of competition.

Apparently the Court's reasoning would permit application of Article 86 even to the somewhat unusual situation in which a dominant firm, probably in a declining market, is doing nothing internally or externally to expand, yet nonetheless is faced with an increasing relative market share. Application of Article 86 to the mere continuance of a dominant position where that mere continuance could result in a dis-

100. See note 22 supra.
101. Pleadings, supra note 73, at 15.
tortion of competition certainly would raise problems of fashioning an appropriate remedy. An order for the enterprise to divide into two or more separate firms appears to be harsh and unfair. An order to reduce prices to stimulate demand might drive remaining competitors out of business; an order to increase prices, however, could secure monopoly profits for the dominant enterprise, reduce demand and accentuate the decline in the industry. These last two remedies lead to the same effects respectively if a dominant enterprise had engaged in cut-throat pricing or had limited its production to the prejudice of consumers. It is submitted that these problems are due less to the existence of a dominant enterprise than to an excess of supply over demand. Therefore, remedies should not be directed at limiting the dominant firm but rather at correcting the underlying imbalance in the market.

Two other situations for which Continental Can could have implications are those of a nondominant firm or firms expanding either by external growth such as merger or by internal growth. These situations would include most conglomerate and vertical mergers. There seems to be little reason to feel that either could fall within the present interpretation of Article 86; the required dominant position is not present. Continental Can may have implications for these situations by encouraging the implementation of a new regulation which may cover them. In these two situations there remain the same doubts discussed above as to the utility of the distinction between internal and external growth.

It now appears that an entirely different formulation is needed to examine the Common Market position regarding concentrations and combinations. The Court's reasoning merges the formerly separate concepts of limiting the attainable level of power and of merely controlling disapproved use of that power. This is done by reasoning that an extension of dominant position may also be regarded as use of existing power as a foundation for increased dominance in the future. In effect, this is the reasoning which would have been applied in Continental Can had the Court agreed with the commission's interpretation of the facts. In such a situation, limitation of the extent of Continental's power also would have been a limitation on their use of that power.

The Court provided the new formulation for examining merger situations with its instruction that Article 3(f) concepts are to be em-

103. Prohibited by Article 86A. See text accompanying note 37 supra.
104. Prohibited by Article 86B. See text accompanying note 37 supra.
phased. This formulation, however, does not answer many practical questions. Dominant enterprises still do not know whether internal expansion which increases dominance is as suspect as increases in dominance achieved by acquisition or merger. Such a position, which is implied by the Court, could, if enforced, dampen such formerly respected business activities as the building of new plants and equipment or the modernizing of production facilities. Improvements in efficiency which could lead to lower prices might be discouraged. Dr. Willy Schlieder, Director-General for Competition in the Common Market, takes a strict view on this matter.

In his view the court held that if a company has a dominant market position, it cannot improve its position by any means whatever. "If you have a dominant position," says Schlieder, "that is, if your competition depends on you for their behavior, you shouldn't enlarge your dominant position by any means." Schlieder himself is uncertain whether the decision means that a large company may not become bigger or increase its market share through internal growth.

Dominant enterprises also do not know how to evaluate various forms of growth with regard to the antitrust policy of the Common Market. An enterprise dominant in one area for one product may want to expand its marketing of that product into other geographic areas in which it may become dominant or in which it already possesses dominance for some other, possibly related, product. An enterprise which wants to expand its product line to include possible substitutes for the product in which it enjoys dominance will find it hard to determine when a change in its product constitutes an impermissible expansion of a dominant position. This will be Continental's position if it significantly expands its market share for forms of packaging other than light metal containers for meat or fish products or if it tries to expand the use of light metal containers for products other than fish or meat such as beer, milk, or motor oil.

Although the uncertainties appear to be infinite, it is submitted that the Continental Can case has not increased the uncertainties in business management but merely has swapped existing doubts about "abuse" for new ones regarding both "distortion" and "competition." The Court does give some guidance regarding interpretation of these terms:

Thus, abusive conduct could be present where an enterprise in a dominant position strengthens that position to the point where the degree of domination achieved substantially hampers competition,

so that only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market.

It can, in fact, aside from any fault, be considered an abuse if one enterprise acquires a dominant position to the point that the objectives of the Treaty are circumvented through a substantial alteration of the supply situation, so that the consumer's freedom of action on the market is seriously jeopardized.\footnote{106}

These are, of course, general statements and businessmen will have to wait for future cases and regulations to clarify the concepts in Articles 86 and 3(f). Some clarification will probably result from the Court's requirement that the commission present a fuller structural analysis of the facts than it did in \textit{Continental Can}.\footnote{107} Additionally, in the process of placing Article 3(f) in the forefront of competition policy, the Court has resolved many important issues by minimizing distinctions formerly thought to be relevant. The elimination of these questions greatly simplifies the analysis required under Article 86.

\textit{Reinterpretation of the Relationship Between Articles 85 and 86}

One impact of \textit{Continental Can} which may prove to be of major significance in most areas of competition policy other than merger control is the Court's reinterpretation of the relationship between Articles 85 and 86. The effects on competition policy generally are hard to predict at this early stage and are outside the scope of this paper. It may be academic now to discuss the application of Article 85 to merger policy in light of the Concentration Memorandum of 1965.\footnote{108} There the commission declared that Article 85 would not apply to mergers. Complete reversal of that position by the commission is unlikely, particularly since the question of merger control can now be handled in other ways. Yet it does appear that many of the commission's reasons for declaring Article 85 inapplicable to mergers have been eroded since 1965. Experience in the United Kingdom shows that a priori evaluation of prospective mergers is possible although the success of the United Kingdom's procedure in preventing undesirable mergers is, of course, debatable.\footnote{109} With such a priori evaluation, perhaps by negative

\footnotetext[106]{106}{Court Decision, \textit{supra} note 10, at 8300-01.}
\footnotetext[107]{107}{See text accompanying notes 76-85 \textit{supra}. It should be noted that the commission has been criticized in the past for not doing this kind of structural analysis. V. Korah, \textit{The Control of Mergers under Article 86 of the Rome Treaty: Continental Can}, 26 \textit{CURRENT LEG. PROB.} 82 (1973); JOLIET, \textit{supra} note 38.}
\footnotetext[108]{108}{See text accompanying note 39 \textit{supra}.}
\footnotetext[109]{109}{See Monopolies and Mergers Act 1965. Owen cites the statement of Sir Geoffrey Howe, Minister of State at the Department of Trade and Industry to the effect that since 1965 over 700 mergers have been examined by that Department. It
clearance\textsuperscript{110} or prior notification procedures, the nullity sanction of Article 85(2)\textsuperscript{111} would no longer be such a hindrance. Most completed mergers would not face the prospect of being declared void because they would have been cleared before the agreement was closed. The commission could be bound by regulation not to withdraw an 85 (3)\textsuperscript{112} exemption given to a merger. Similarly, the requirement in Article 85(3) that the restriction be indispensible for attaining the objectives of that article could be applied with sufficient leniency to account for commercial necessities. The application of Article 86 to mergers involving a dominant position would relieve most of the imbalance which could have arisen from the inapplicability of Article 85 to cases in which concerted action was lacking. The conjoint application of Articles 85 and 86 to concentrations would actually lead to the most balanced enforcement of competition policy. Between them these articles cover most of the undesired situations regardless of how they were caused. The only situation not covered where both concerted action and dominant position are lacking, would seldom present a problem.\textsuperscript{113}

This is in keeping with the reasoning of Continental Can that Articles 85 and 86 do not operate in individual vacuums but rather form a comprehensive integrated framework for implementing the objectives of Articles 2 and 3(f).\textsuperscript{114} If there is a reversal of the policy regarding application of Article 85 to concentrations, quite possibly it will be based on this reasoning. Such a reversal probably would not be a declaration but rather would be reflected in a regulation comprehensive enough to deal with all forms of concentration and combination and not merely mergers.

\textit{Impact of the Court's Reasoning in Areas Other Than Competition Policy}

Although at this point it is sheer speculation, one aspect of the Court's judgment has the potential of overshadowing the others in sig-
nificance. This is the possibility that just as the Court closely examined the objectives of Articles 2 and 3(f) to determine the scope of Articles 85 and 86, so it could also use the other treaty objectives set out in Articles 2 through 7115 to interpret the scope of all the other articles

115. Articles 2-7 of the Rome Treaty read as follows:

**Article 2**

"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

**Article 3**

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b) the establishment of a common customs tariff and of a common commercial policy towards third countries;

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;

(d) the adoption of a common policy in the sphere of agriculture;

(e) the adoption of a common policy in the sphere of transport;

(f) the institution of a system ensuring that competition in the common market is not distorted;

(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;

(h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;

(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;

(j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;

(k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

**Article 4**

1. The tasks entrusted to the Community shall be carried out by the following institutions:

   — an ASSEMBLY,
   — a COUNCIL,
   — a COMMISSION,
   — a COURT OF JUSTICE.

   Each institution shall act within the limits of the powers conferred upon it by this Treaty.

2. The Council and the Commission shall be assisted by an Economic and Social Committee acting in an advisory capacity.

**Article 5**

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achieve-
implementing these objectives. If a teleological approach was appropriate for *Continental Can*, there is no reason why it should not also be appropriate in future cases whether or not they deal with competition policy.

In *Continental Can*, Articles 2 and 3(f) were used to resolve a dispute as to whether Article 86 could be applied in a situation not explicitly covered by the statute. This case, in combination with Articles 2 and 3(f), is being used to urge legislation more comprehensive than was previously thought to be attainable. As will be seen, the proposed regulation covers situations not even implied in Articles 85 and 86. Perhaps in fields such as transport, labor and tariff policy, the basic principles of the Rome Treaty similarly will be used to resolve disputes. Because Articles 2 through 7 are broadly worded, application of these principles often would allow liberal statutory interpretations and comprehensive regulations. By this method the Court's reasoning could be used as an instrument by which the scope of EEC activity is greatly expanded. This development may be good or bad depending on how, if at all, this instrument is used. Evaluation also depends on personal judgments regarding how much power the EEC institutions in general and the Court in particular should have. It is predictable that the Court and commission will not be able to absorb significant new powers into the Rome Treaty without considerable resistance from Member States. This will be true especially in areas such as those connected with foreign relations where the exercise of power by the community may diminish the power exercisable by the individual Member States.¹¹⁶

116. Professor Mathijsen of the University of Nijmegen observed: "In the *ENEL* case in which the Court of Justice established that the Member States had restricted their sovereign rights and created a body of law applicable to both the Member States and their citizens, the Court concluded 'that the integration into the law of each

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**Article 6**

1. Member States shall, in close cooperation with the institutions of the Community, coordinate their respective economic policies to the extent necessary to attain the objectives of this Treaty.

2. The institutions of the Community shall take care not to prejudice the internal and external financial stability of the Member States.

**Article 7**

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council may, on a proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such discrimination." ¹ CCH COMM. MKT. REP. ¶ 165-191, at 210-23. See note 2 supra.
It should be expected, therefore, that *de facto* expansion of the treaty in this matter will be a slow process.

**Comparison of EEC and U.S. Laws**

Because the judgment in *Continental Can* brings structural effects within the purview of Article 86, it has been asserted that this case brings control of dominant firms in the EEC very close to its American counterpart in Section 2 of the Sherman Act.\(^{117}\) Professor Joliet convincingly asserts that the concepts of dominant position in EEC competition law and of monopoly power in American law are functionally equivalent concepts.\(^{118}\) Accepting this as valid, and if it is also true that "European antitrust law is becoming the same ballgame as in the United States,"\(^{119}\) then United States law and developments possibly can be examined to predict long-run trends in European law. Rather than make this traditional comparison, which has been done well elsewhere,\(^{120}\) some similarities and differences as they appear in the light of *Continental Can* will be made to temper any predictions by analogy.

It is valid to state that *Continental Can* adds a structural emphasis to Article 86 similar to that often applied in U.S. antitrust cases. In both systems the structure of a given market is analyzed to some degree to determine whether or not an enterprise has caused that structure to vary impermissibly from the vaguely defined ideal condition of "normal competition." Both systems also monitor the market activities

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Member State of provisions of Community origin and more particularly the wording and the spirit of the treaty have as a corollary the impossibility for the Member States to give preference over a legal order they accepted on a reciprocality basis, to a subsequent unilateral (national) measure; the latter cannot indeed be opposed to this legal order, since the binding force of Community law may not vary from one State to another because of subsequent national legislation without jeopardizing the implementation of the treaty objectives." P. Mathijsen, A GUIDE TO EUROPEAN COMMUNITY LAW 10-11 (1972). *See also* Commission of European Communities v. Council of the European Communities, 2 CCH COMM. MKT. REP. ¶ 8134, at 7525.

117. Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." Sherman Antitrust Act, 15 U.S.C. § 2 (1970).

118. *See generally* Joliet, supra note 38.


of enterprises not only by antitrust laws but also by specific social and industrial regulations. It would be better, therefore, to view American and European antitrust as similar because they both integrate structural and behavioral emphases to cover a spectrum of economic activity. One of the major impacts of *Continental Can* is that it provides this balance in EEC law. It now would be fair to say that Articles 85 and 86 supplement each other in the same way as do Sections 1 and 2 of the Sherman Act.

In examining American law, consideration should be given to the Sherman Act, which is most often said to present the counterparts to Articles 85 and 86 of the Rome Treaty, and to Section 7 of the Clayton Act, which applies to a wider range of mergers than does the Sherman Act. Equal consideration should be given to other sections of the Clayton Act which cover activities such as tying and economic discrimination and to the Federal Trade Commission Act, which is the federal "unfair competition" statute and often can cover situations also within the scope of the Sherman and Clayton Acts. Additionally, legislation governing industries, such as transport and banking, and activities, such as lending, advertising and labor relations, federal and state tax laws, and state corporate, antitrust and unfair competition statutes also influence patterns of competition and legal development. It is submitted that only in its legal environment can the scope of the Sherman Act or of the other laws mentioned be understood because this environment determines which problems arise, which legal theories lawyers will choose to emphasize and, consequently, which practical and theoretical developments will occur. To say, therefore, that the Common Market has adopted in the *Continental Can* case Section 2 of the Sherman Act is a meaningless statement because that act operates only in a context which Europe has not adopted.

It may be argued, of course, that the Common Market has approximated the American legal environment by the broad scope of Article 85 and now of Article 86 as well. There is some truth to this contention if it is not pushed too far. Both the Common Market and

121. Clayton Act § 7, 15 U.S.C. § 18 (1970) states in relevant part: "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or any other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

the United States seek to control the same sorts of anticompetitive activities, but neither makes the large size of an enterprise illegal per se. The practical controls on oligopoly are similar in effect.\textsuperscript{123} In both it may be argued that dominant enterprises must be careful not to take advantage of too many of the available opportunities for growth. They may be neither so inefficient that prices are unnecessarily high nor so efficient that low prices hurt competition or that high prices give monopoly profits. Consequently, in both Europe and the United States, corporate directors have a difficult time reconciling shareholders' demands for growth and profit with governmental demands for restraint.

These differences are crucial when American law is used to predict developments in the Common Market. The concept implicit in the Article 86 phrase "may affect trade between Member States" is far more limited than the American concept requiring an effect on interstate commerce. The American concept is construed so broadly now as to be virtually meaningless as a practical limitation on the application of federal antitrust legislation. Consequently, the American market is much more unified than the Common Market by its competition regulation and less burden need be placed on regulation by individual states.

American law has also abandoned the "Rule of Reason" as used in EEC law especially in the application of Article 85(1)(c) and the granting of group exemptions.\textsuperscript{124} United States law accepts the utility of per se proscriptions in a few situations such as price fixing. In other situations, if the restriction is shown, neither reasonableness nor social utility can be an excuse. It should be noted, however, that in the Department of Justice Merger Guidelines\textsuperscript{125} and in individual rulings and policy statements by the Federal Trade Commission, the United States has procedures which, depending on how they are used, may have an effect similar to group exemptions and negative clearances.\textsuperscript{126}

\textsuperscript{123} "In practice, therefore, the situation [under Art. 86] is not too different from that under section 2 of the Sherman Act, which does not appear to be properly applicable to 'oligopoly' acquired by non-related corporations unless there is some element of 'combining or conspiring to monopolize." Oberdorfer, Gleiss & Hirsch, Common Market Cartel Law 108 (2d ed. 1971) (footnotes omitted). For the application of Article 86 to oligopolies see Re The European Sugar Cartel, 12 Comm. Mkt. L.R. D65 (1973).

\textsuperscript{124} See R. Joliet, The Rule of Reason in Antitrust Law (1967).

\textsuperscript{125} U.S. Dept of Justice Merger Guidelines, 1 CCH Trade Reg. Rep. ¶ 4230 (1968).

\textsuperscript{126} Canellos & Silber, supra note 42, at 142.
Although it is true that in both systems, merely a showing of a likelihood of reduced competition is sufficient to invoke legal sanctions, significant differences remain. In the United States the required showing is much easier to make than in the EEC where, because of Continental Can, a much fuller analysis of market structure is required. Enforcement in the United States is also likely to be stronger than in the Common Market because of the treble damage incentive to enforcement by private civil suit. Although seldom applied, criminal sanctions also may be imposed for violations of the Sherman Act. This is important not only because it allows a government prosecution to provide a foundation for future private suits but also because it shows the traditional U.S. bias against economic concentration.

In the United States antitrust was originally a political doctrine arising from fear of the political power which so often accompanies the economic leverage available to large concentrations. Europe has not had experience comparable to that of the United States with trusts and concentrations and, therefore, has less innate bias against them. Control of oligopoly also reflects these historical differences. Economic theories of oligopoly had not been developed when most of the United States' antitrust statutes were enacted. Oligopolies were a major factor in the U.S. economy by the time the problem was recognized and even now oligopoly control under section 2 of the Sherman Act rests on the tenuous theory of implied conspiracy. The reverse was the situation in Europe at the time of the formation of the EEC and, consequently, it can be seen from the wording of the EEC statutes that they do not need to be so strained to cover activities of oligopolists.

The contrast of EEC and U.S. antitrust has been necessary to show that they are not becoming the "same ballgame." Rather, the impact of Continental Can has been to foster in EEC law a flexibility already present in U.S. antitrust law. Some general comparison of the two systems is indeed useful, particularly for understanding common problems such as those reflected in the growth of multinational corporations. However, the roots, development, present emphasis and respective economies of the two systems still present significant differences which should cast suspicion on specific predictions for EEC legal developments made by analogy to the more experienced United States system.

128. See note 120 supra.
The Proposed Regulations

A major theme of this paper is that the Continental Can case has given the institutions of the Common Market quite a flexible tool for the direction and implementation of policy regarding multinationals and mergers. The direction of the decision obviously helps, rather than hinders, broader control of concentrations and it is nearly a carte blanche regarding the fashion and extent of that control. Many of the attendant uncertainties of this carte blanche will be relieved by the proposed Regulation on the Control of Concentrations between Undertakings.129

In its proposal to the Council of Ministers, the commission has tried to take as full advantage of the Continental Can decision as intra-community politics will allow.130 The proposed regulation is based both on Article 235 and on Article 87.131 It is designed to cover all agreements, not just mergers, in which an enterprise will lose economic independence.132 Any transaction involving enterprises with aggregate turnover greater than 200 million units of account and enjoying a market share greater than 25 percent for the goods or services concerned is declared to be incompatible with the Common Market133 if it gives those enterprises "[t]he power to hinder effective competition . . . ."134 It establishes a system of prior notification to the commission of agreements involving enterprises with combined sales larger than one billion units135 of account and in which the acquired enterprise has an annual turnover greater than thirty million units of account. The agreement may not be put into effect within three months of notification.136 If the commission does not initiate proceedings within that time, the agreement may proceed as planned.137 If it does initiate pro-

130. Unlike commission members, who act for the entire community, ministers to the council are directed to pursue the interests of their respective states. Because the council acts as a brake on commission activities which tend to strengthen the Common Market at the expense of the individual states, the commission must take a moderate stance in its proposals to the council if it seriously seeks approval. The Council of Ministers failed to consider the proposed regulation on its merits and referred it to a committee. The Financial Times (London), Jan. 15, 1974.
132. Id. at 9303 (Article 1.1).
133. Id. at 9303-2 (Article 2).
134. Id. at 9303 (Article 1.1).
135. A European Unit of Account is the equivalent of one 1960 U.S. dollar or 0.88867088 grams of fine gold.
137. Id. (Article 6.4).
ceedings, the commission would be required to reach a final decision within nine months.\textsuperscript{138} Sanctions are established for failure to comply with the provisions of the proposed regulation.\textsuperscript{139}

All these elements are significant and controversial. They give the first major example of how the \textit{Continental Can} case can act as a charter for stricter competition policy in the Common Market. Because \textit{Continental Can} held control of horizontal mergers to be within the scope of Articles 85 and 86, the requirement for the use of Article 87 to control horizontal mergers is met.\textsuperscript{140} The commission has also decided to use Article 235 as a basis for the regulation because it is doubtful whether all that the commission wanted to include within its regulation falls within the scope of Article 86, even as expanded by the \textit{Continental Can} case. The commission was faced with the choice of limiting the scope of its regulation and confining it to Article 87, which requires approval by a majority of the council, or of seeking a broader regulation under Article 235 which requires the two-thirds majority approval of the council to add new powers not already provided by the treaty.\textsuperscript{141} The commission wanted to control conglomerate and vertical mergers as well as horizontal ones. To date, all definitions of dominant position have required dominance in a particular geographic and product market. It would be difficult to show expansion of a dominant position for most vertical and conglomerate mergers. There is also some doubt as to how nonmerger forms of concentration would be covered under Articles 85 and 86 so as to be open to coverage in a regulation based solely on Article 87. In order to avoid these peripheral legal battles and yet get the comprehensive regulation it seeks, the commission chose to proceed under Article 235 as well as under Article 87.

The scope of the proposed regulation is another matter of controversy. In essence, almost all control of concentration and combination in Articles 85 and 86 is removed from these articles and placed in the

\textsuperscript{138} Id. at 9303-5 (Article 17.1).
\textsuperscript{139} Id. at 9303-5 (Article 13).
\textsuperscript{140} Article 87(1) of the Rome Treaty reads: “Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.” 1 CCH COMM. MKT. REP. ¶ 2201, at 1697. See note 2 supra.
\textsuperscript{141} The different voting requirements of the two articles may have little practical significance in light of the “Luxembourg Agreement” of 1966 which stipulates that majority voting is not to be used against the important interests of a dissenting Member State. P. Mathijsen, \textit{A GUIDE TO EUROPEAN COMMUNITY LAW} 134-35 (1972).
regulation.\textsuperscript{142} From one point of view this appears perfectly proper. Such control arguably is within the treaty and serves to implement the objectives of Articles 2 and 3(f). At the same time it is also arguable that for such a restructuring of the treaty an amendment under Article 236 is required. The regulation may be perceived as pre-empting Articles 85 and 86 and making them “dead-letter” in this area. The argument for an amendment especially appears to have merit in light of the three month limit given the commission to respond to notification of an agreement. The essence of this argument is that by preventing the commission from complaining after three months, the commission’s powers are being curtailed. Article 235 allows only for the provision of additional powers, not for the curtailment of existing ones.

Article 235 also allows only for the addition of powers requisite to achieve an aim of the community. It is doubtful whether conglomerate mergers not involving a dominant position involve sufficient distortion of competition to be covered by Article 3(f). It is difficult to know how much distortion is required by that article. If indeed there is not sufficient threat of distorted competition, then Article 3(f) is not involved and the power the commission seeks in order to control these mergers is outside the legislative scope of Article 235. It should be noted in support of an extra-treaty approach that Article 220 provides instruction for member states to enter any necessary negotiations with each other regarding the “possibility” of international mergers.

There are two counterarguments to these contentions that an amendment is needed. The first is that community objectives are much broader than the activities described in Article 3(f). These objectives are mainly in Article 2 and are drafted so broadly that they apparently permit legislation for almost any desired purpose. The second argument is that, viewed as a whole, the proposed regulation expands rather than contracts the power of the commission.

To the extent that individual powers or limitations within the regulation must be examined individually, it is arguable that the three month time limit does not curtail existing power but rather is only one boundary on the new power to receive prior notification of agreements which would be granted. The commission is not limited by a three month time limit for objected to agreements for which it does not receive notification. Both sides of this dispute have merit. It will there-

\textsuperscript{142} Of course, Article 85 would retain its vitality in cases dealing with concerted action short of combination or concentration.
fore probably be an important point for argument before the Council of Ministers.

The entire concept of prior notification which the proposed regulation tries to establish is controversial. Prior notification is a compromise procedure. It is not as strict as an outright prohibition combined with an opportunity to seek exemption. Nor is it as strict as a procedure requiring not only prior notification but also prior and explicit authorization of the proposed combination. On the other hand, there are many situations in which secrecy or speed are required for successful negotiation. Notification and delays for approval could frustrate conclusion of such agreements. For this reason, and because mergers often promote efficiency and competition, a system of granting limited exemptions from a prohibition of further concentration would have been foolish. The ECSC requires that mergers receive prior authorization before they can proceed.143 This would have been inappropriate to the Common Market because the Common Market covers a much broader range of economic activity than does the ECSC and most concentration in industries other than coal and steel does not make it more possible for a country to wage war. On the other hand, requiring prior approval is certainly an easier method of enforcement than trying to unwind complicated mergers once they have been completed. A further advantage of prior notification is that it puts the initial burden on the enterprise and not on the commission's rather thin staff of twenty (as of August 1973) investigators.

Because it would be impractical both for the commission and for businessmen to review all agreements, only those agreements must be examined which involve enterprises with combined sales greater than one billion units of account and in which the acquired enterprise has turnover greater than thirty million units of account. These limits are open to the criticism that they are too high. Although the commission presently has the manpower only to review agreements of this size and greater, the limits should have been set lower in anticipation of a time when a larger number of agreements would receive full scrutiny. It would have been easier to build limits into the proposed regulation which actually reflect the needs of an effective competition policy rather than to try to extend the limits later after the commission develops the capacity to more fully utilize them. Lower limits would give the commission extra flexibility to review selected smaller agreements and also could be used as an argument for the need for a larger staff. Under

143. See text of Article 66 of the Paris Treaty in note 59 supra.
the proposed regulation, the commission may still review the smaller agreements when it learns of them, but as to these it will not have the advantage of receiving prior notification. The arguments in favor of the higher limits are that it would inconvenience businessmen to make reports which may not be reviewed and that these high limits reflect only the political compromises the commission has felt it necessary to make to aid approval of its proposal.

The limits are stated both in terms of annual turnover and in terms of market share. The turnover test can cover vertical and conglomerate mergers in which the market share in a particular good or service is not increased; and the market share test can include mergers among specialized firms with only modest turnover but which have a strong market position with respect to one particular product in a limited market. One virtue of this combined test is that it minimizes the agonizing problems of determining the relevant market and the market share which confront the Justice Department in the United States in applying its 1968 merger guidelines.

The regulation is primarily concerned with situations in which one undertaking acquires control of another undertaking. "Control" is given a very broad definition including rights of management, rights to use or liquidate assets in whole or in part, rights which make it possible to influence the internal structure of the organization and fiduciary rights to vote shares or own assets. The breadth of the concept of control makes the regulation comprehensive but consequently places a larger burden on the citizen who must determine if notification is required.

Review would be based on the criterion of the "power to hinder effective competition." Essentially this would be a public interest inquiry without bias for or against agreements involving large enterprises. In these particular respects it would be similar to the test used by the Monopolies Commission in the United Kingdom.

Mrs. Korah of the University College, University of London has criticized the use of the concept of the power to hinder effective competition as a damaging misdirection of emphasis. She reasons that this concept was borrowed from Article 66 of the ECSC Treaty and that although it was appropriate to the coal and steel industries in which

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144. Proposed Regulations, supra note 129, at 9302-2 (Article 2-2(1)-(5)).
146. Id.
all the large enterprises had vertical links with suppliers or customers, it may be inappropriate for application to the full spectrum of economic activity. She marks a distinction between "hindering" or "impeding competition" and "reducing competition." A horizontal merger in the coal or steel industry in Europe would almost necessarily entail cutting off a significant supplier or customer from a competitor; this would be "impeding competition" and often could be characterized as predatory conduct. In other industries, where the vertical links are absent, a horizontal merger might truly reduce competition without impeding it in the sense of denying to a competitor his suppliers or customers. The definition of control used in the regulation should therefore take greater account of such situations where competition is reduced but not necessarily impeded, than does the following definition from Section 1 of the proposed regulation:

The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services.\textsuperscript{147}

For prescription, Mrs. Korah suggests that the regulation look toward the power to set prices within a relatively broad range, without competitive restraint, as the determining feature of impermissible market control. Such a concept, unlike the concept of the power to hinder effective competition, would not require even by inference the existence of predatory conduct. The power to set prices within a broad range looks more objectively at the structure of and the effects on the market than does the concept used in the regulation and requires less strain to account for situations where vertical links are not present. It is also important that, even more than Section 1 of the proposed regulation, the concept proposed by Mrs. Korah is fully within the spirit and terms of the Court's decision in the Continental Can case. It is submitted that this important yet omitted factor may still be examined and given due emphasis within the terms of the proposed regulation. In particular, examinations of the market structure and of the freedom of choice and independence from market forces which a merger may confer on the enterprises involved can lead to review of the same factors Mrs. Korah would like to stress. Whether or not this will occur depends on how strictly the proposed regulation, if passed, will be enforced.

\textsuperscript{147} Proposed Regulations, \textit{supra} note 129, at 9303 (Article 1.1).
Conclusion

The Continental Can case is a true landmark decision and has significance far beyond its major holding that Article 86 applies to situations involving mergers. This significance is to be found in the effects of the reasoning employed by the Court. Article 3(f) has been placed in the forefront of competition policy and, with its policy-oriented approach, the Court has resolved the secondary yet serious problems of whether or not application of Article 86 requires a causal link between dominant position and abuse, direct market behavior and some quality of moral wrong. While clearing away these old concerns, the Court did not give guidance as to how Article 86 is to be applied and thereby deferred in this matter to the other EEC institutions. The decision did give some indirect aid here both by requiring that the commission publish a fuller analysis of market structure in future cases and by emphasizing the need for a new regulation. What may be the most far-reaching effects of the Court's use of teleological approach to treaty interpretation are also the most unpredictable. The use of broadly worded objectives to determine the scope of more specific statutes could make interpretation of the Rome Treaty more expansive, more capable of dealing with current problems and more unpredictable than it is at present. The future significance of this could be felt not only in the area of competition policy, but in all areas of EEC activity.

The EEC is a relatively new organization and it is important that its initial steps in controlling concentrations be ones which will not impede any needed future developments. The EEC will have to be flexible in order to respond effectively to such developments as the growth of multinational corporations and labor unions, the creation of the Eurocompany and the Europatent, the increasingly reciprocal effects of monetary policy, competition policy and politics on one another, and the incursion of state trading, particularly by Communist countries, into the Common Market. For such purposes the EEC will need to develop a full range of tools. In the legal sphere, the Continental Can decision has contributed to this development.