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ESTABLISHING MORE EFFECTIVE MERGER CONTROL IN THE EUROPEAN COMMUNITY: A PROPOSED SOLUTION

Thomas B. Mann II*

INTRODUCTION

The European Community has not adopted a standard set of guidelines to regulate merger activity. Instead, the European Community relies on an archaic set of laws that are ineffective in dealing with increasing merger activity. Attempts have been made to eliminate this problem. In 1973, the Commission of the European Community adopted a proposal intended to provide more effective merger control. The Proposal, however, has not passed the Council of the European Communities, forcing the Commission to rely on the law established in Continental Can v. Commission for regulation of mergers.

This Comment suggests two possible methods that the European Community could adopt to achieve more systematic merger control. Section I describes the Community's present merger control system, including the system's scope and its inadequacies. The Comment then examines the merger Proposal and analyzes why the Commission continually fails to adopt the Proposal. The Comment also notes that the level of merger activity in the European Community increased significantly in the past few years. Finally, this Comment recommends that the Commission either (1) retract some of its executive authority concerning the regulation of mergers through an additional amendment to the Proposal or (2) begin utilizing article 85 of the Treaty of Rome as a supplement to article 86 in the control of mergers. These two sugges-


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tions are designed to overcome the most fundamental problems that exist with the regulation of merger activity in the Community. A failure to follow these recommendations, or something similar, will result in the Community’s continued failure to regulate mergers effectively.

I. THE PRESENT SYSTEM OF MERGER CONTROL UNDER ARTICLE 86

A. THE SCOPE OF THE PRESENT MERGER CONTROL SYSTEM

1. Substance of Continental Can Decision

Articles 85 and 86 of the Treaty of Rome stipulate the antitrust laws of the European Economic Community (EEC).\(^4\) In Continental Can,

\(^4\) Id. According to article 85:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings; decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market; and in particular, those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (d) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. 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.

Id. Article 86 reads:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist of:
   (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;
the European Court of Justice ruled that the Commission had the power to prohibit mergers under article 86. The Court held that an enterprise violates article 86 when through a merger it increases its already dominant market position to a point that substantially weakens the competitive structure of the relevant market. Although subsequent non-merger cases delineate more precise guidelines to construe "market domination" and "abusive behavior" in article 86, such standards

(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 other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id.

Unlike the European Economic Community, the European Coal and Steel Community (ECSC) has specific provisions within its establishing treaty that allow regulation of merger activities. The Treaty establishing the European Coal and Steel Community, April 18, 1951, Article 66, 261 U.N.T.S. 140. Article 66 supplies the ECSC's High Authority with enormous discretion to determine the legitimacy of transactions affected by mergers or acquisition of shares. Id.


6. See id. at 245 (establishing the standard for abuse when "an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition . . . ").

The decision in Continental Can made it clear that the concept of abuse is not confined to certain unfair behavior toward suppliers or consumers but that it could entail a company simply using its market position to prohibit potential competition and reinforce its dominant position. D. Wyatt & A. Dashwood, The Substantive Law at the E.E.C. 305 (1980) [hereinafter D. Wyatt & A. Dashwood]. Thus, Continental Can seemed to break the causal link between a dominant position and the abuse of a dominant position in that any strengthening of a position is prohibited under article 86, regardless of the means by which such strengthening is achieved. Id.

7. See Commission of the European Communities, Tenth Report on Competition Policy, point 150 (1981) [hereinafter Tenth Report] (stating that the Commission has scrutinized the legality of prospective mergers by relying on the concepts of abuse and dominant position developed in several non-merger cases such as United Brands, infra note 8, and Hoffman-LaRoche, infra note 9.


"The dominant position referred to in [article 86] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."


9. See United Brands Co. v. Commission, Case No. 27/76, 1978 E. Comm. Ct. J. Rep. 207, 294 (proclaiming that simply refusing to supply a reliant enterprise had enough effect on competition in the common market to constitute an abuse); Hoffman-LaRoche v. Commission, Case No. 85/76, 1979 E. Comm. Ct. J. Rep. 461, 552 (ruling that because Hoffman-LaRoche was already in a dominant position, its conduct of engaging in exclusive purchasing and loyal rebate agreements constituted an abuse in
have not been applied in a merger context.\textsuperscript{10}

2. \textit{Current Procedure for Premerger Control}

Article 87 of the Treaty of Rome directs the Council to adopt measures that give effect to the antitrust articles to define the Commission's role.\textsuperscript{11} Pursuant to article 87, the Council adopted Regulation 17/62\textsuperscript{12} that sets forth the Commission's procedure for implementing articles 85 and 86.\textsuperscript{13}

Subsequent non-merger cases have followed the \textit{Continental Can} view that a further weakening of the competitive structure in a relevant market by a dominant enterprise would constitute an abuse. \textit{See} Hoffman-LaRoche v. Commission, Case No. 85/76, 1979 E. Comm. Ct. J. Rep. 461, 552 (stating that “. . . since the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of article 86, any further weakening of the structure of competition may constitute an abuse of dominant position”).

Subsequent non-merger cases have followed the \textit{Continental Can} view that a further weakening of the competitive structure in a relevant market by a dominant enterprise would constitute an abuse. See Reynolds, \textit{supra} note 2, at 413 (stating that the terms of article 86 have not been elucidated in a merger context since \textit{Continental Can}).

10. \textit{See} Reynolds, \textit{supra} note 2, at 413 (stating that the terms of article 86 have not been elucidated in a merger context since \textit{Continental Can}).

11. Treaty of Rome, \textit{supra} note 3, at art. 87. Article 87 states:

1. 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.

If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly.

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

(a) to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86;

(d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this article.

\textit{Id.}


13. \textit{Id.} Where two or more firms intend to enter into an agreement that potentially restricts competition, they may seek approval from the Commission in one of two ways. They may notify the Commission at their own initiative to receive a negative clearance in which the Commission states it will not apply article 85. \textit{Id.} at art 2. Alternatively, the firms may attempt to qualify for an exemption under article 85(3). \textit{Id.} at art 4. Although firms planning to merge may not formally apply for exemptions under article
Under the current competition laws of the European Community, the
Commission is restricted to reviewing mergers *ex post facto*. There
are, nonetheless, certain procedures available to the Commission that
allow it to exercise some premerger control. The Commission can, for
example, take notice of potentially violative mergers through com-
plaints, informal contacts at the initiative of the merging firms made
prior to the merger, and press reports. After a preliminary market
analysis, the Commission delivers an opinion deciding whether it will
challenge the proposed merger. The Commission often finds article 86
inapplicable. In cases where the Commission issues warnings, the par-
ticipating firms usually retreat completely or somehow effectively
amend their merger agreement. Often, the Commission participates
in amendment negotiations to assist parties in interpreting the scope of
articles 85 and 86.

4 of the Regulation, they may still seek "administrative letters" from the Commission
stating that it will not pursue investigation of the merger.

Other parties may also initiate proceedings against the prospective merger. An inter-
ested third party may file a complaint with the Commission alleging a violation of
article 86. *Id.* at art. 3. The Commission itself may also institute an investigation into
the possible antitrust implications of the planned merger. *Id.*

14. Reynolds, *supra* note 2, at 413 (explaining the Commission's limitation in re-
viewing mergers only after they have been consummated); *see also* Kamp, *Antitrust in
Kamp] (citing *ex post facto* review of mergers as a major weakness in the use of article
86 to control mergers). Institutions within the European Communities have long recog-
nized the Commission's inability to evaluate mergers before consolidation. As early as
1971, the European Parliament expressed the view that a form of premerger verifica-

15. COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTEENTH REPORT ON COM-
PETITION POLICY, point 165 (1984) [hereinafter THIRTEENTH REPORT].

16. See TENTH REPORT, *supra* note 7, at point 157 (reviewing the proposed sale of
Smithkline RIT to Baxter Travenol Laboratories). The Commission determined that
the geographic market and shares both firms held could hardly allow Baxter to "domi-
nate the market or to strengthen [its] dominance" if it merged with RIT. COMISSION
OF THE EUROPEAN COMMUNITIES, NINTH REPORT ON COMPETITION POLICY, point 133
(1980) [hereinafter NINTH REPORT] (reviewing the proposed Fichtel and Sachs/Huret
merger and concluding that there was no dominant position because there were other
major competitors in the market for cycle drive systems).

17. See COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COM-
PETITION POLICY, point 112 (1982) (reviewing the proposed purchase by Fortia
AB of Wright Scientific Ltd.). After Fortia's American competitor filed a complaint
with the Commission and thereafter warned the parties of this action, Fortia elected to
break off negotiations. TENTH REPORT, *supra* note 7, at point 152 (1981) (reviewing
the Pilkington/BSN-Gervais-Danone plan where a warning was issued on the finding
that the dominant position would extend to a broader Community level if the merger
were to occur).

18. See COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTEENTH REPORT ON
COMPETITION POLICY, point 99 (1985) [hereinafter FOURTEENTH REPORT] (stating
178) 3 (1984), the Commission acted as an accessible consultant to the parties who
Another mechanism has evolved, apart from the informal opinion process, that permits premerger scrutiny. The Commission may independently order, or third parties may demand, the taking of interim measures. In Camara Care, Ltd. v. Commission, the Court of Justice confirmed that the Commission had the power to order interim measures in emergency situations, although such power had not been specifically conferred to it in the Treaty. The Court based its decision on the Commission's need to administer the Community's competition policy effectively. Despite this broad grant of injunctive power, the Commission seldom uses these measures. Only recently has the Commission elected to apply its power of ordering interim measures. It has never used interim measures, however, to prohibit mergers.

B. ANALYSIS: INADEQUACY OF THE CURRENT SYSTEM OF MERGER CONTROL

1. Substantive Defects

There are both substantive and procedural weaknesses in the current system of merger control under article 86. Substantively, the current system lacks legal certainty. Businesses are entitled to know when their actions will come within the purview of article 86. Unfortunately, there has been no direct application of article 86 to mergers for more than thirteen years. The one decision rendered, Continental Can, has

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20. Id. at 129-31.
21. Id. at 131.
22. Reynolds, supra note 2, at 426; see also infra notes 42-43 and accompanying text (explaining the reasons for the Commission's reluctance to use these interim measures).
24. Reynolds, supra note 2, at 415.
25. See Regulation 17, supra note 12, preamble (in English translation at 20) (stating: "Whereas it may be in the interest of undertakings to know whether any agreements, decisions or practices to which they are party or propose to become party, may lead to action on the part of the Commission pursuant to Article 85(1) or Article 86 . . . ").
26. Thirty Years, supra note 2, at 349 (1983); Reynolds, supra note 2, at 411.
been severely criticized for being inconsistent,27 ambiguous28 and unrealistic.29 Consequently, enterprises considering possible mergers or acquisitions are left with little antitrust guidance.30

Another serious substantive problem with article 86 is the absence of a mechanism that allows the Commission to determine a merger's compatibility with other Community goals.31 The Community's competition policy has two objectives. While the Commission seeks to promote competition within the Community, it also must help promote the integration of separate economies into a unified common market.32 Because the latter objective is considered more important,33 it follows that

27. See Kamp supra note 14, at 155 (observing that because the use of article 86 to control mergers requires that one firm maintain a dominant position prior to the merger, it is possible for two non-dominant firms with a substantial share of the market to merge legally); D. Wyatt & A. Dashwood, supra note 6, at 318 (noting that under Continental Can's requirement for preexisting dominant position, while a merger can seriously restrict competition and make further concentration inevitable, article 86 would remain inapplicable as long as the firms fall short of market dominance); Sher-linker, Merger Regulation in the E.E.C., 134 NEW. L. J. 809 (1984) [hereinafter Sher-linker] (noting that not every merger that adversely affects the Community's competition and trade involves enterprises that are dominant within the meaning of article 86).

28. The absolute requirement that one of the firms be in a dominant position creates an almost insurmountable evidentiary obstacle for the Commission. U.P. Toepke, E.E.C. COMPETITION LAW: BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET ANTITRUST CASES 127 (1982). This is particularly true since the Commission itself is not certain what constitutes a dominant position. Compare TENTH REPORT, supra note 7, at point 150 (stating that a dominant position usually occurs when a market share of 40% to 45% has been reached) with NINTH REPORT, supra note 16, at point 127 (stating that a dominant position did not exist when the market share reached 20%).

29. Moreover, the fact that any merger agreement, no matter how honestly entered into will be an "abuse" if undertaken by a dominant firm, ignores the implicit meaning of the provision. See J. Cunningham, THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY 244 (Supplement 1975) [hereinafter J. Cunningham] (stating that the words "[a]ny abuse by one or more undertakings of a dominant position within the common market" strongly suggest that a violation may only occur when market strength is used as an instrument and in a reprehensible manner).

30. Hell & Vorbrugg, Anti-trust in West Germany: Recent Developments in German and Common Market Regulation, 8 Int'l L. 349, 383 (1974) (noting that when the Court had to apply article 86 to mergers it was forced to make a teleological interpretation of the antitrust sections of the Treaty of Rome, looking not just to the strict wording of article 86, but to the broader aims of the Treaty itself). Such interpretative approaches, however, create legal ambiguities due to the difficulties experienced by firms when attempting to interpret the vague objectives of the Treaty. Id.

31. See Kamp, supra note 14, at 155 (maintaining that because in real competition all firms are always somewhat dependent on one another, the Court's test requiring independent behavior as a determinant of dominant market position was unrealistic).

32. B. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 423 (1979) [hereinafter COMPARATIVE GUIDE].
where a normally anticompetitive merger may help foster a stronger, more integrated common market, the Commission should refrain from invalidating the merger.44 Similarly, where a merger that is otherwise considered anticompetitive may help promote certain social or non-economic goals of the Community, the Commission should exempt it from invalidation.45 The Commission has stated its willingness to recognize such merger exemptions under the current system of merger control, but it appears that there is little room for such subjective analysis under the objective article 86 analytical standard adopted in Hoffman-LaRoche v. Commission.46 Consequently, article 86's merger control provisions do not provide a sufficient policy framework to allow the Commission to balance the competitive impact of a proposed merger with the higher ideal of Community integration.47

2. Procedural Defects

The fundamental procedural flaw of the current merger control system under the authority of the Continental Can is that article 86 does not provide any mechanisms or provisions to prevent mergers prior to consolidation. Consequently, the Commission can only find a violation

34. See Kamp, supra note 14, at 151 (stating that integration is a very important Community objective and that the Commission had originally encouraged transnational mergers because of their potential to improve technology, productivity, efficiency, and competition). This position was laid out in the Commission's Memorandum on Concentrations, published as Problems of Concentration in the Common Market: E.E.C. Study (Competition Series No. 3) 5-8 (1966), cited in Kamp, supra note 14, at 151.
35. See Proposal, supra note 1, at preamble (expressing the attitude that certain social or non-economic goals are more important than preservation of competition); see also COMMISSION OF THE EUROPEAN COMMUNITIES, THIRD REPORT ON COMPETITION POLICY, point 29, (1974) [hereinafter THIRD REPORT] (stating that the goal of the Proposal's exemption provision was to take into account certain requirements of industrial, technological, social, or regional policy objectives of the Community).
36. TENTH REPORT, supra note 7, at point 21.
37. D. WYATT & A. DASHWOOD, supra note 6, at 306; Reynolds, supra note 2, at 415. Accordingly, in Hoffman-LaRoche, the Court stated:

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

38. D. WYATT & A. DASHWOOD, supra note 6, at 318.
of article 86 after the merger has been consummated, thus limiting the remedy to divestiture, an extremely costly and wasteful solution. Despite the apparent efficiency of such premerger evaluation procedures such as the use of informal opinions and interim measures, serious defects persist. Informal opinions that merging companies solicit from the Commission are often inadequate. The fundamental problem with the informal opinion approach is that it relies on the prudence of the undertakings. Merging firms are not statutorily required to notify the Commission before their consolidation. Furthermore, it has been argued that the Commission’s preliminary opinions are usually based on insufficient market analysis. The Commission has no incentive to make such an analysis because it is not compelled to justify its opinions.

The use of interim measures as a source of premerger control poses a different problem. Although these measures provide the Commission with a potentially effective tool for controlling mergers, the Commission has consistently refused to employ them. This reluctance stems from the high burden of proof required for application of the measure. The party seeking the injunction must make a reasonably strong prima facie showing that there has been a violation of the competition rules of the EEC. The stringency of this test is likely to inhibit market competitors from attempting to prove that interim action is warranted. Some commentators believe, however, that the Commission can effectively use its power to protect the “public interest.” Nevertheless, the Commission continues to use the measure sparingly.

39. See Reynolds, supra note 2, at 414 (stating that the Commission may not have made an appropriately thorough market analysis in a number of instances).
40. Id. A thorough analysis is required only if the decision is appealed. Id.
41. Id. at 415.
42. Id. at 415-16.
43. See Practice Note: Applications to the E.C. Commission for Interim Measures under Article 3 of Regulation 17, [1980] 2 Common Mkt. L.R. 369 (describing the burden of proof placed on the plaintiff). The Note states:
   (1) there must be a reasonably strong prima facie case that there has been a violation of the Treaty;
   (2) interim measures must be urgently needed;
   (3) they must be needed to avoid a situation which is likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest.
Id.
44. Reynolds, supra note 2, at 416.
46. Reynolds, supra note 2, at 415; COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT OF COMPETITION POLICY, point 49 (1986) [hereinafter FIFTEENTH
When it finally did utilize the interim measure in its action against Ford, the European Court concluded that the Commission had decided the matter on very narrow grounds. Hence, the prospect of the Commission using interim measures to regulate mergers a priori is uncertain.

II. THE PROPOSED MERGER REGULATION

A. HISTORICAL DEVELOPMENT OF THE PROPOSAL

In the early seventies the need for premerger control became particularly great as the number of concentrations increased substantially. Shortly after Continental Can, the Commission drafted a proposal to provide for more systematic control over concentrations. The Proposal gained support from both the European Parliament and the Economic and Social Committee. Despite an agreement in principle on the need for such control, many member states expressed skepticism on a number of issues. Consequently, the Proposal has been amended twice.
All Commission proposals must have a legal basis in the Treaty of Rome. The Commission elected to use both articles 87 and 235 as the basis of the merger Proposal. Article 87 provides the Council with the specific authority to implement the antitrust provisions of articles 85 and 86 while article 235 grants the Council the general power to ensure that Community objectives, as expressed in article 3 of the Treaty, are achieved. Thus, the merger proposal was formulated to ensure that economic competition in the Community was "not distorted." The purpose of the Proposal is to prevent mergers that may hinder competition while encouraging mergers that promote competition or other Community objectives. Small mergers or mergers forged in highly competitive international industries may support the unified common market objective, but large mergers are typically considered...
more likely to obstruct competition within the community. To accomplish its purpose, the Proposal establishes a format that enables more systematic identification of undesirable mergers. Although the Proposal has been amended twice, this goal of achieving a clear delineation between "good" and "bad" mergers remains unchanged.

The Proposal contains specific criteria for the Commission to use to evaluate the legitimacy of mergers. The Proposal first prescribes certain quantitative thresholds below which a Community level merger control will not apply. These thresholds are based on the aggregate turnover and market shares of the firms. Once a merger has qualified for administrative scrutiny, the Commission uses a bifurcated analysis to judge the legitimacy of the concentration: (1) pursuant to article 1(1) the Commission must decide whether the merger will "hinder effective competition in the common market or a substantial part thereof"; and (2) pursuant to article 1(3) the Commission must then determine whether the merger is somehow "indispensable to the attainment of priority of the Community."

The original Proposal sat idly for almost eight years before the Commission, acting on a resolution of the Parliament, resubmitted a
revised version of the Proposal to the Council. Addressing the concerns of the Council members, the amended Proposal attempted to limit the scope of the Regulations to mergers of a Community dimension and to obtain greater involvement of the Member States in the decision-making process. Most of the changes embodied in the amendment affected parts of article 1, dealing with the Proposal's general scope, and article 19, pertaining to the relationship between the Commission and the relevant authorities of the Member States in the decision-making process. Under the amended version of article 1, the Commission broadened and clarified the purview of the assessment criteria, noting that appraisal of the merged firm's market power should take place at the Community level and that it should consider the effects of international competition within the particular industry. Also, the amendment limited the use of market share criteria to an assessment factor, rather than an assessment threshold.

The revised version of article 19 both broadened the powers of the Advisory Committee on Restrictive Practices and Dominant Positions as a consultant and established new means for the Council to voice its opinions regarding a priority objective within the meaning of article 1(3). Under the new procedure, a Member State would have an opportunity to state its opinion concerning whether the Commission should grant an exemption to the proposed merger under article 1(3).

Despite these amendments, the Council did not endorse the Proposal. A few years later, the Parliament and the Economic and Social Com-

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67. See id. (discussing the general goals of the revision).
68. Id. at art. 1(1).
69. See id. at 4 (amending the first Proposal to utilize the market share criterion as one element in the analysis of whether a merger threatens to eliminate competition).
70. Id. at art. 19(3)(4). The Advisory Committee on Restrictive Practices and Dominant Positions is composed of an official from each Member State. Id.
71. Id. at art. 19, §§ 3, 4, 7, 8. These provisions provide a means for both Member States and the Council to have input in the determination of whether a certain violative merger warrants a priority exemption. As it exists now, the Advisory Committee can oppose a Commission recommendation. Id. If a majority of its members do oppose a recommendation, the Commission cannot adopt the decision for twenty days, during which time a Member State may identify a benefit it feels merits consideration and present it to the Council. Id. The Commission then considers the Council's opinion in making its final decision on whether to permit the proposed merger. Id.
72. Id.
mittee of the Community suggested additional changes to break the deadlock. The Commission responded, amending the Proposal again in 1984. Although the Commission accepted the suggestions relating to the issuance of policy guidelines for businesses and the reevaluation of the assessment and turnover criteria, it refused to adopt the recommendation concerning the duplication of control over transfrontier concentration.

B. Analysis

Since its inception, the Proposal for merger regulation has been criticized on a number of different grounds. Although the passage of time and the adoption of amendments have diffused much of the original criticism, there are several aspects of the Proposal that still elicit strong disapproval. Among these are the legal validity of the Regulation and the adequacy of both the threshold and substantive criteria used in evaluating mergers.


75. Proposal III, supra note 61.

76. Parliament, supra note 73, at 31 (emphasizing the need for the Commission to periodically issue guidelines on merger policy to the business community); see also 1982-1983 EUR. PARL. DOC. (No. 1-807) 13 [hereinafter Working Document] (explaining Parliament's position on the need to keep the business community informed).

77. See Parliament, supra note 73, at 31 (recommending that to qualify for substantive scrutiny the aggregate turnover for both firms exceed 750 million ECU); Debates, supra note 60, at 24 (providing a rationale as to why such a high threshold is required before a merger is challenged).

Similarly, the Commission accepted the Parliament's suggestion that it amend article 1(1) and separately consider the issue of international competition in appraising corporations' power to hinder competition. See Proposal II, supra note 66, at art. 1(1), para. 2 (focusing on the competition itself and no longer on the "effects" of international competition); Working Document, supra note 76, at 14 (describing the rationale for Parliament's position that international competition is an important factor in determining the effect of a proposed merger on the Community).

78. Proposal II, supra note 66. Members of the Parliament argued that the Commission should exclusively regulate mergers at the Community level. See generally Debates, supra note 60, at 24-31 (discussing benefits of allowing the Commission to have sole capacity to intervene and act regarding a merger); Working Document, supra note 76, at 15 (describing the advantages to permitting the Commission alone to make article 1 determinations). They advised the Commission to withdraw the last half of articles 19(2) and 19(8). Debates, supra note 60, at 32-33. The Commission believed, however, that the Council would never approve the Proposal if certain supervisory rights to Member States were not provided. Id.
1. The Legal Basis of the Proposal

Although of less importance today, the issue surrounding the Regulation's legal validity warrants brief consideration. Attention is merited because the issue has never been decisively resolved and thus it is possible that should the Regulation become operative, critics would question the Regulation's legal validity. A general consideration of article 235 does not reveal apparent problems using the article as a basis for the Proposal. Nevertheless, a close examination of the article's wording reveals an inconsistency. Article 235 declares that the Community may act to achieve one of its objectives only when the Treaty of Rome has not already provided such powers. Some argue that because the Court of Justice ruled that the Commission may use article 86 to control mergers, the "requisite powers of action" have already been provided. Therefore, article 235 and Continental Can, when read together, imply that circumvention of the limited use of article 86 in controlling mergers is impermissible.

This concern over the Proposal's legal validity is, however, ill-founded. The Court has interpreted article 235 of the Treaty broadly, stating that it gives the Council the authority to take action in situ-

79. See TENTH REPORT, supra note 7, at point 20 (providing the Commission's opinion that the Proposal should be based not solely on article 87, but also on article 235). It is unlikely that anyone will raise the issue again before a final decision on the entire Proposal is taken. Interview with M. Lodewijk Briet, Second Secretary of Commercial Affairs for the European Community, in Washington, D.C. (Jan. 9, 1986) [hereinafter Interview].
80. See Comment, Proposed E.E.C. Regulation on the Control of Mergers, 26 INT'L & COMP. L.Q. 468, 478 (1977) (arguing that the failure to resolve the legal validity issue is due to the recognition that the question merely conceals political disputes); Interview, supra note 79 (acknowledging that real national political disputes are often disguised in lesser technical disagreements about such things as questions of Proposal validity).
81. See Treaty of Rome, supra note 3, at art. 177(1) (defining the scope of the Court's powers in reviewing the validity of EEC institutional acts). Pursuant to the Treaty of Rome, any entity affected by a Commission Regulation or Directive may raise the issue of its legal validity with the European Court of Justice. Id.
82. Treaty of Rome, supra note 3, at art. 235. See supra note 56 (providing the text of the relevant provision).
84. See Adler & Belman, The EEC's Proposal for a Regulation on the Control of Concentrations Between Undertakings, 8 J. INT'L L. & ECON. 267, 274 (1973) [hereinafter Adler & Belman] (giving merit to a strict reading of article 235 and maintaining the validity of the article as a legal basis could vastly expand the powers of the Commission and the Council by allowing these bodies to ignore the restrictive clauses of the Community's constitution though reliance on the amorphous wording of article 235).
tions even if no other Treaty provision confers the necessary powers.\textsuperscript{85} In \textit{Hauptzollamt Bremerhaven v. Massey-Ferguson, GmbH}\textsuperscript{86} a Council regulation had been adopted to address the administration of a customs union between member states leaving the Court to decide whether article 235 provided authority to enact the Regulation. Some contended that because other Treaty provisions already established exclusive rules for the implementation of a customs union, use of article 235 was prohibited.\textsuperscript{87} The Court held that article 235 was suitable as a legal basis because the Treaty’s provisions conferring regulatory power over customs unions to the Council were too vague and could not furnish the Council with an adequate basis for action.\textsuperscript{88} The language of article 86 is equally vague. From an examination of the text of the article, it is entirely unclear how the article will adequately control mergers.\textsuperscript{89} Pursuant to the reasoning of \textit{Hauptzollamt},\textsuperscript{90} article 235 could provide a sufficient legal basis for action. Given the logic and precedent of the \textit{Hauptzollamt} argument, any contention challenging the legal basis of such regulations is groundless.

2. \textit{The Threshold Criterion}

Before subjection to a qualitative examination under article 1(1) and 1(3), a merger must meet a quantitative test under article 1(2) and article 4 of the Proposal. Article 1(2) creates a minimum threshold of Regulation applicability\textsuperscript{91}, while article 4 establishes which firms are expressly required to notify the Commission prior to the consummation of a merger.\textsuperscript{92}

\begin{itemize}
  \item \textsuperscript{85} R. PLENDER \& T. USHER, \textit{supra} note 54, at 64. In discussing \textit{Hauptzollamt Bremerhaven v. Massey-Ferguson, GmbH}, infra note 86, the authors state that article 235 enlarges the powers of EC institutions thereby giving the Council the power to take action in certain circumstances even though no other Treaty article has conferred the necessary powers. \textit{Id.}
  \item \textsuperscript{86} Hauptzollamt Bremerhaven v. Massey-Ferguson, GmbH, Case No. 8/73, 1973 E. Comm. Ct. J. Rep. 897.
  \item \textsuperscript{87} See R. PLENDER \& T. USHER, \textit{supra} note 54, at 64 (reiterating the argument in \textit{Massey-Ferguson}).
  \item \textsuperscript{88} Hauptzollamt Bremerhaven v. Massey-Ferguson, GmbH, Case No. 8/73, 1973 E. Comm. Ct. J. Rep. at 908.
  \item \textsuperscript{89} See \textit{supra} notes 25-38 and accompanying text (explaining the many inadequacies of applying the language of article 86 to mergers).
  \item \textsuperscript{90} See \textit{supra} note 88 and accompanying text (providing the holding of \textit{Massey Ferguson}).
  \item \textsuperscript{91} See Proposal, \textit{supra} note 1, at art. 1(2) (exempting from article 1(1) scrutiny those mergers whose undertakings show an aggregate turnover of less than 750 million ECU unless “the share in a substantial part of the Common Market is greater than 50%...”).
  \item \textsuperscript{92} See \textit{id.} at art. 4 (stating that if the aggregate turnover of an undertaking con-}
\end{itemize}
In analyzing the effectiveness of the Proposal’s threshold criteria, it is important to recognize the underlying policies behind numerical delineations. There are two reasons for adopting objective divisions between allowable and potentially harmful concentrations. Providing legal certainty for the business community is a primary objective. Such predictability is a prerequisite for informed corporate decision-making. An additional purpose for establishing these objectives is to provide greater administrative ease for the Commission. The current quantitative thresholds serve these purposes well. While the criterion already affords more legal certainty than article 86 provides, the Commission has further provided, through its amendments, predictability within the Proposal. The original Proposal used a twenty-five percent market share criterion as a threshold measure. Following the 1981 amendments, market share merely represents one among many assessment factors. The rationale behind this change is that it is extremely difficult for either the undertaking or the Commission to ascertain the correct measure of a firm’s market share. Moreover, making an informed estimate requires extensive market analysis; something that is difficult to achieve at the national level, and even more difficult at the Community level. Overall, by removing the market share measure from the threshold criterion, the Commission reduced the administrative burden and created greater legal certainty for the undertakings.

The Commission increased the turnover threshold from 500 million concerned is more than 1000 million ECU, the undertaking must notify the Commission, unless the other undertaking(s) has a turnover of less than 30 million ECU, in which case the merger is exempt from the notification requirement). 93. Working Document, supra note 76, at 14. In a report drawn up on behalf of the Committee on Economic and Monetary Affairs for the European Parliament concerning merger control, the Committee stated: “Legal certainty as to the application of the criteria being put into effect [. . .] and [. . .] predetermined procedures [. . .] must be ensured where the controlling authorities intervene in the interests of flexibility of undertakings’ prerequisite for international competitiveness.” Id.

94. See Regulation 17, supra note 12, preamble (recognizing predictability as a necessary requirement for informed corporate decision-making).

95. Proposal, supra note 1, at art. 1(2).


97. Id.; see also DEBATES, supra note 60, at 25 (providing comments on the use of market share as a criterion for approval of a proposed merger). Mr. von Bismarck, the rapporteur of the Committee on Economic and Monetary Affairs, which evaluated the status of the Proposal stated:

It is impossible to tell straight away from newspaper articles and reports what a firm’s market share is. Further investigations have to be made before this question can really be answered . . . . It is clear that turnover is the applicable criterion, but market share as the assessment criterion is not considered until it comes to taking action.

Id.

to 750 million ECU, improving the legal certainty of article 1(2). In so doing, the Commission narrowed the gap between mandatory pre-merger notification under article 4 (1000 million ECU) and the maximum turnover exemption (presently 750 million ECU). Reducing the zone of uncertainty from 500 million ECU to 250 million ECU creates greater predictability for merging companies.

The Amendment raising the turnover threshold also would improve the efficiency of the Proposal's administration. Raising the article 1(2) turnover number, the Commission would reduce the number of mergers it needs to scrutinize. The Commission would examine only those mergers that are "the largest and most anti-competitive." Because it would not evaluate as many mergers, the Commission could test the effectiveness of its reviewing power. If the initial experience showed the Directorate General IV of the Commission administratively capable of handling the workload, the Member States could lower the threshold to bring more mergers under its scrutiny.

The Community should maintain the Proposal's current turnover numbers, used as qualifying standards for the Commission, to examine or exempt possible mergers. The standards are based on careful economic and political calculation. While any threshold the Commission establishes is subject to debate, the numerical cut-offs in this instance not only serve their important economic functions of affording legal certainty and administrative ease, but also represent political

99. See Debates, supra note 60, at 24-25 (providing remarks on the justification for 750 million ECU). Again, Mr. von Bismarck commented: "At first, 200 million ECU was considered appropriate, then 500 million ECU, and we finally agreed on 750 million ECU. Why? Because we believe that transfrontier control is something new which will pose new problems for the Commission and we should avoid overtaxing them." Id.

100. See id. at 24 (furnishing opinions that the real purpose of the Proposal is to preclude only the very largest mergers and that the new Proposal better accomplishes this task).

101. Id. at 29.

102. There are twenty different Directorate General offices within the E.C. Commission, each supervising a different aspect of E.C. law. Directorate General IV [hereinafter DG IV] regulates E.C. competition policy. DG IV is subdivided into four offices. Directorate A supervises general competition policy. Directorates B and C attempt to control restrictive practices and abuses of dominant position according to various industries (the latter overseeing ECSC industries). Directorate D is responsible for coordinating the various competition decisions.

103. See Debates, supra note 60, at 24 (suggesting that the Commission's decision to raise the turnover would overcome many objections of Member States if done in a limited period of 5 to 10 years).

104. See id. at 29 (discussing the market analysis the Commission used to determine whether the raising of the article 1(2) threshold from 250 to 500 ECU and from 500 to 750 ECU would exclude relatively few enterprises).
compromise.\textsuperscript{105} Like the thresholds established in article 1(2), the numerical standards of article 4(1) effectively support the underlying policies behind such criteria.\textsuperscript{106} Article 4's premerger notification requirement, however, is the starting point of a long, protracted decision-making process. Article 4's subsequent decision-making procedure regarding this notification negates the benefits that a quantitative threshold may bring to the undertakings involved.

The Commission is only obliged to commence its investigation of the proposed merger within three months of the parties' notification.\textsuperscript{107} The three-month period begins to run from the date that the Commission receives complete information from the undertaking. The potential problem here is that the meaning of "complete" information is never articulated. Consequently, the Commission is at liberty to request more information at any time, and the notifying undertakings will never know when formal examination begins.\textsuperscript{108} This ambiguity renders the grace period inoperative. Even after the Commission has all the information, it has nine additional months to render a final decision.\textsuperscript{109}

These delays may substantially harm the bargaining power of the companies involved. As Italy continually points out, such delays only enhance the possibility that the merger rumors are leaked to the public.\textsuperscript{110} In a takeover situation, for example, this will give speculators a chance to purchase shares of the target company thereby bidding up its price and making the venture less attractive to the purchasing enterprise. Moreover, such rumors seriously jeopardize third party contractual relations and may cause key management personnel to desert the target undertakings.\textsuperscript{111}

Although the Commission's use of the article 1(2) threshold criteria satisfies the policy objectives of promoting legal certainty and administrative efficiency, article 4 utilizes a procedure that is counterproductive to these objectives. Ironically, in supplying the Commission with...

\textsuperscript{105} See id. at 25 (noting von Bismarck's remark that one way to overcome all kinds of objections from Member States is to raise the amount to 1000 ECU for a limited period).

\textsuperscript{106} On the surface, the quantitative criteria provide legal certainty and administrative ease. The specific numerical cut-off relieves the Commission of the burden of reviewing all premerger notifications. Moreover, potential merging undertakings are thus put on notice as to when they must notify the Commission.

\textsuperscript{107} Proposal, supra note 1, at art. 6(2).

\textsuperscript{108} See Sherlinker, supra note 27, at 810 (discussing possible effects of failing to define more clearly the meaning of "complete").

\textsuperscript{109} Proposal, supra note 1, at art. 17(1).

\textsuperscript{110} Reynolds, supra note 2, at 421-22.

\textsuperscript{111} Sherlinker, supra note 27, at 811.
too much administrative flexibility, the Proposal severely jeopardizes the legal certainty that the thresholds were designed to ensure. An undertaking that is required under article 4 to notify the Commission of a proposed merger may clearly understand this notification requirement, but the company will have no way of knowing what information it is required to disclose or when the Commission will issue its decision regarding the merger's validity.

3. Substantive Criteria

Apart from the Proposal's procedural problems, substantive weaknesses that threaten successful adoption of the Proposal also exist. Article 1(1) is criticized as fatally ambiguous. Under article 1(1), if a firm engages in a transaction that gives it the power to hinder competition and thus attain a dominant position, its actions are incompatible with the Common Market and the Commission will prohibit any merger attempt. Such a standard is lower than both the requirements under the United States Clayton Act and the prior test under Continental Can. Because of its unclear application a number of suggestions have been proposed to amend article 1(1). One suggestion is to amend article 1(1) to parallel closely rules used by the United States Depart-

112. See Note, Sources and Development, supra note 59, at 522-24 (criticizing the proposed regulation for its "flexible non-specificity").

113. See Debates, supra note 60, at 28 (providing observations that article 1(1)'s dominant position criterion is unclear because it is uncertain whether dominant positions are illegal or whether only those created by mergers are illegal).


115. See Note, Sources and Development, supra note 59, at 522-24 (distinguishing alternative merger standards from the Proposal's article 1(1) standard). Article 1(1) differs from both the Clayton Act and the holding in Continental Can in that: (1) the Clayton Act requires that a merger "substantially lessen" competition; and (2) Continental Can requires actual impairment of competition inasmuch as the degree of dominance achieved by the dominant firm substantially fetters competition. Id.

Indeed, where the Commission has responded to the vague standard allegation, it justifies the ambiguity in article 1(1) by citing the need to intervene in situations where potentially harmful structural changes may occur, See Debates, supra note 60, at 31-32 (furnishing Tugendhat's belief that the Commission must have the power to intervene to regulate merger activity effectively). In other words, the Commission argues that it must have the ability to determine when dominant position alone would jeopardize competition in a particular market. Id.

116. See Debates, supra note 60, at 28 (providing an observation that the Commission has the obligation to codify its own behavior and that it must recognize the need for rules that would provide predictability for potential merging companies).

117. See supra note 62 (outlining article 1(1)).
ment of Justice (the "Baxter Rules"). The Department of Justice's merger guidelines are successful in reducing litigation in the United States.

Discussions on the vagueness of article 1(3) lead to a broader, more fundamental search for the proper role of certain decision-making bodies in the Community. While it is clear that "Community priorities" relate to preferred industrial, technological, or regional policies, it is not so obvious which of the governing organs of the Community is responsible for defining those priorities. Consequently, a substantial dispute arises between the Commission and some member states in the Council concerning their respective roles in deciding the "indispensability" question under article 1(3).

The Parliament and the Economic and Social Committee take the position that the Commission should independently decide the article 1(3) exemption issue. One argument in favor of the independent decision is that individual member state delegates in the Council do not possess the requisite objectivity necessary to render opinions for the Community as a whole. Another argument is that to allow the Council and the Commission dual control places a heavy administrative burden on the undertakings involved and could lead to contradictory decisions and greater legal uncertainty. The Commission disfavors the joint decision-making structure but is forced to accept the present

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118. See DEBATES, supra note 60, at 27-28 (criticizing the Proposal's evaluation criteria and urging the Commission to go further and produce a set of guidelines similar to the "Baxter Rules" antitrust guidelines followed by the United States Department of Justice).

119. Id. It is also possible that this reduction in litigation is attributable to the more lenient antitrust policies of the Reagan Administration. See More Lenient on Antitrust-Federal Merger Policies, L.A. Daily Journal, June 22, 1982, at 4, col. 1 (noting this Administration's more lenient attitude toward merger control and antitrust).

120. See THIRD REPORT, supra note 35, at point 29 (referring to the purposes of article 1 regarding competition and the Community's overall priorities).

121. See J. Weiler, Discussion Report in EUROPEAN MERGER CONTROL 208 (K. Hopt ed. 1982) [hereinafter Discussion Report] (observing that the decision concerning which organ should make non-economic decisions under the Proposal remains one of the major obstacles to the Proposal's ratification).

122. Parliament, supra note 73, at 31; Amendment Opinion, supra note 74, at 17.

123. See DEBATES, supra note 60, at 25 (furnishing von Bismarck's clarification of the Parliament's position). Von Bismarck stated:

If we involve politicians at a national level, we well know the pressure that is brought to bear on them, as in the case of subsidies, and we consider it important for the Commission to be accountable to the Court of Justice and not to Council members delegated by the national parliaments who cannot champion a cause, but must vote in such a way that they retain their positions...

Id.

124. Id. at 29-30.

125. See id. at 32 (providing Tugendhat's statement that the Commission supports
system for political reasons.\textsuperscript{128}

Some member states concerned with the regulation of the business interests of their nationals oppose giving the Commission full discretion in making article 1(3) exemption decisions. These states are reluctant to relinquish their control in the area of antitrust law that is so deeply linked to their own systems of government and social policy-making.\textsuperscript{127} Furthermore, member state governments with large, publicly owned concerns are necessarily directly and indirectly involved in the operations of particular undertakings.\textsuperscript{128} In cases in which a member state shifts the ultimate decision-making power to an independent Community body, the state opens itself to accusations of abandoning its governmental obligations. Moreover, given the broad language of article 1(3) concerning priority policies, it is the responsibility of the Council, not the Commission, to prescribe Community objectives.\textsuperscript{129}

In response to both concerns, the Commission developed a compromise. Article 19 of the Proposal now provides that the Commission show deference to the opinions of both the Advisory Committee on Restrictive Practices and Dominant Practices and the Council.\textsuperscript{130} Both provisions provide for a "cooling-off" period during which the Commission may not render a decision. The goal of the compromise is to make the Proposal politically palatable for the Council, while reserving sufficient authority for the Commission to direct consistent merger policy.\textsuperscript{131}

Unfortunately, the 1981 revision adding sections seven and eight to article 19 failed to resolve the underlying question of division of power in applying article 1(3). Not only has the Council refused to accept the Proposal, but the Parliament and the Economic and Social Committee sought the removal of the provisions.\textsuperscript{132} The Council is only likely to approve a new amendment that is politically acceptable. Therefore, al-

\textsuperscript{126} See id. at 33 (furnishing Tugendhat's opinion that it is unrealistic not to include the Member States in some aspect of the decision-making process).
\textsuperscript{127} Reynolds, supra note 2, at 422; Discussion Report, supra note 121, at 208.
\textsuperscript{128} See Reynolds, supra note 2, at 420 (using Italy as an example of a country that has several large state held concerns).
\textsuperscript{129} See infra notes 156-63 and accompanying text (suggesting that the Council possesses the legal power to influence the Commission regarding the Community's priorities).
\textsuperscript{130} Proposal, supra note 1, at art. 19.
\textsuperscript{131} See DEBATES, supra note 60, at 30 (providing Deleau's remark that the Commission acted to associate the Council more closely in the decision-making procedure out of necessity).
\textsuperscript{132} Parliament, supra note 73, at 31; Amendment Opinion, supra note 74, at 17.
though the Commission may agree theoretically with the Parliament and Economic and Social Committee regarding its role as policymaker, the Committee would probably have to relinquish that role to gain the Council's approval.

III. THE NEED FOR SYSTEMATIC MERGER CONTROL

The fact that criticisms continue to block the adoption of the Proposal is particularly alarming given the European Community's concern over increasing merger activity. While the increase in concentration was once seen as potentially helpful for industry in the European Community,\(^{133}\) today increased concentration in many industries is deemed undesirable.\(^{134}\) Because the Commission has linked increased merger activity to increases in industry concentration,\(^{135}\) any increase in industry concentration will alert the Commission to a possible increase in merger activity.\(^{136}\) The two most recent Commission studies on concentrations in the Community concluded that merger activity is growing and that there is a noticeable increase in the level of concentrations.\(^{137}\) Consequently, the Commission noted that the movement of many sectors of industry toward more oligopolistic structures necessitates fur-

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133. See Information Memo from EEC Commission No. P-1/66, [1965-69 Transfer Binder] Comm. Mkt. Rep. (CCH) D 9081 (1966) (noting the need to foster larger European companies through the merger process); THIRD REPORT, supra note 35, at point 22 (explaining that a major impetus for drawing up the Proposal was concern over increased concentration).

134. See THIRTY YEARS, supra note 2, at 348-49 (stating that the subject of concentration is now critically reappraised as a result of the popular return of small and medium sized firms).

135. FIFTEENTH REPORT, supra note 46, at point 267.

136. See Rahl, supra note 50, at 291 (describing the danger of increasing oligopolistic power and arguing that the European Community could follow the oligopolistic trend of the United States in the 1970's if stricter, more specific merger laws are not adopted).

137. See COMMISSION OF THE EUROPEAN COMMUNITIES, TWELFTH REPORT ON COMPETITION POLICY, point 294 (1983) (providing statistical data on the increase in merger activity since 1972). According to the report, merger activity has risen sharply over the last few years. In 1984/85 merger activity increased 34% from the 1983/84 figure of 155 total mergers. This is slightly more than last year's increase of 32% over the 1982/83 figure. Figures in the 1984/85 Report also indicate that for the past several years, a majority of the mergers involved firms whose combined turnover was greater than 1000 million ECU. Id. at table 3. The increase in merger activity among these very large firms (turnover greater than 1000 million ECU) has particular significance when considering the Merger Proposal's mandatory premerger notification requirement under article 1(2) for large firms. See Proposal, supra note 1, at art. 1(2) (stating that the Commissioner's scrutiny will begin for those firms whose combined aggregate turnover is above 750 million ECU).

The Commission concluded from the Report's results that "the level of concentration . . . shows a percipient, and in some cases, a marked upward trend." FIFTEENTH REPORT, supra note 46, at point 267.
other merger control.\textsuperscript{138} As this trend toward higher industry concentration continues,\textsuperscript{139} the Community is still without an effective regulatory mechanism.\textsuperscript{140} This Comment offers two suggestions that may aid the Commission in acquiring better administrative control over mergers.

IV. RECOMMENDATIONS

A. SUGGESTION ONE: AMENDING THE PROPOSAL

Recognizing the current political deadlock on the Merger Control Proposal, the Commission should make one final attempt to gain the Council's approval. Despite its technical deficiencies, the Proposal supplies a conceptual framework that, at the very least, could become the foundation for Community-wide concentration control.\textsuperscript{141} Until the various concerns are rectified, however, the Community will continue to lack a viable policy dealing with mergers.

1. Revising the Premerger Notification Process

The Commission should reevaluate the procedure it presently endorses for implementing the numerical criteria set forth in article 1(2) and article 4(1) and 4(2). The premerger procedure set forth in article 4 in conjunction with article 6 lacks a useful timetable and has been the subject of intense criticism.\textsuperscript{142}

Some changes have already taken place that could accelerate the decision-making process. In late 1984, the Directorate-General IV was reorganized.\textsuperscript{143} The purpose of the reorganization was to create a scheme of directorates or offices that would analyze certain market activity according to their specialty industries.\textsuperscript{144} This new organizational

\begin{enumerate}
\item \textsuperscript{138}See Fourteenth Report, supra note 18, at point 43.
\item \textsuperscript{139}See Merger Mania Crosses the Atlantic, Wash. Post, Dec. 11, 1985, at D1, col. 2 (describing the drastic increase in merger activity in Britain and labelling it "merger mania"); see also id. at D2, col. 2 (explaining that certain merger and acquisition experts believe that because the British takeover rate is about eighteen months behind that of the United States, Britain will experience a flurry of buyouts this year).
\item \textsuperscript{140}See Third Report, supra note 35, at point 22 (explaining that a major impetus for drawing up the Proposal was the concern over increased concentration).
\item \textsuperscript{141}See Reynolds, supra note 2, at 420 (stating that all Member States, except Italy, agree in principle that such control should exist at the Community level).
\item \textsuperscript{142}See The Internal Reorganization of DG IV, EEC Newsletter, Brussels, 4 (Jan./Feb. 1985) (observing that the reorganization took effect on October 1, 1984).
\item \textsuperscript{144}See id. (providing the overall purpose of the restructuring). The newsletter
arrangement will ideally facilitate more rapid resolution of antitrust problems.\textsuperscript{146} Although the effect on the Commission’s performance is still uncertain, the restructuring does signify the Commission’s recognition that the old process of evaluation is inadequate and that a new, more expeditious, system is necessary.\textsuperscript{146} Another change that will improve the Commission’s ability to tackle premerger notifications and data accumulation is the higher numerical threshold in article 1(2).\textsuperscript{147} It is hoped that this change will decrease the number of enterprises subjected to the Commission’s scrutiny. In decreasing the Commission’s workload, the Commission is free to improve the quality of examinations and accelerate the dispatch of decisions. Finally, by including the term “immediately” in article 6(1), the Commission demonstrated its commitment to improving the pace of its decision-making.\textsuperscript{148}

In addition to these recent improvements, the Commission should consider making other modifications in its procedural arrangements. The ambiguity surrounding the phrase “complete information” in article 6(2) presents a danger that the Commission’s three month grace period allotted to the Commission will become inoperative. To prevent this, the Commission should require the inclusion of certain minimum data in all premerger notices, with the amount of information required varying according to the industry. With DG IV’s new organizational structure, it is very feasible for each specialized office to devise guidelines for its respective industries. This will improve communication and certainty and would accelerate the premerger evaluation process. Once the proceedings commence, the Commission may compel more com-

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\textsuperscript{145} Id.  
\textsuperscript{146} Id.  
\textsuperscript{147} See supra notes 99-105 and accompanying text (discussing the general advantages of raising the article 1(2) threshold requirements).  
\textsuperscript{148} Proposal, supra note 1, at art. 6(1). The amended version of the Proposal now reads: “Where the Commission considers that a concentration is likely to become the subject of a decision under Article 1(1) or (3), it shall commence proceedings immediately and so inform the undertakings in question and the competent authorities in the Member States.” Id.
plete information when necessary. Because time can unfairly advantage or disadvantage one of the merging parties, it is important for the Commission to adopt a clear, consistent approach to premerger examinations. By accelerating and clearly defining the process, the Commission will reduce the risk of inequities being produced. Some question the possibility of hastening the Commission's actual decision-making. Through the restructuring of DG IV and the change in the article 1(2) threshold, however, a process exists in which the Commission can reach a final decision in less than twelve months.

2. Resolving the Division of Power Issue

Despite the continued criticism that article 1(1)'s substantive standards are vague, the real focus of the debate concerning article 1 centers on subsection three. The division of power issue implicit in the article's exemption clause, has remained a major stumbling block in the Proposal's approval. Consequently, the Commission is faced with a dilemma. To gain the Council's necessary approval of the Proposal, the Commission must divest itself of certain authority. At the present time, the Commission retains full discretion to decide the matter of "Community priorities," although the Council and the Advisory Committee may issue statements of opinion pursuant to article 19(7)

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149. See Proposal, supra note 1, at art. 10 (explaining the Commission's procedure for requesting additional information). The Commission may impose penalties pursuant to article 13(1)(b) and 14(1)(a) (both involving monetary fines) if certain time limitations or information specifications are not met. Id. If the elimination of the "complete information" requirement causes problems due to time restraints, the Commission can reduce the time limitations after the proceedings begin. Id.

150. See Sherlinker, supra note 27, at 811 (stating that the slowness of the decision-making process in Brussels will make the twelve month period envisioned by the Regulation appear optimistic).

151. Note, Sources and Developments, supra note 59, at 523.

152. See supra notes 120-32 (describing the issues associated with the division of power problem as it relates to article 1(3) of the Proposal).

153. See TENTH REPORT, supra note 16, at point 20(iii) (stating that closer association of Member States in the Commission decision-making process regarding incompatibility remained an outstanding problem); Interview, supra note 79 (declaring the incompatibility question to be a lingering concern blocking adoption of the Regulation); Comment, EEC Antitrust: An Exercise in Prior Restraint, 7 LAW & POL'Y INT'L BUS. 143, 171 (1975) (predicting as early as 1975 that the Regulation, as finally adopted, would not leave decision-making solely in the hands of the Commission).

154. But see Reynolds, supra note 2, at 422 (noting that not all Council members believe the Council ought to have final decision-making powers and citing Germany, Denmark, and the Benelux countries as examples). These countries believe a "purely consultative Committee with the final decision resting with the Commission" is entirely proper. Id.
To win the Council’s approval, the Commission will need to delegate a key decision-making role in merger control to the Council, specifically a role in granting exemptions under article 1(3).

The Commission should grant the Council the power, under the Proposal, to submit policy standards that would outline the Community’s priorities under article 1(3). The Council, acting independently of the Commission, would define the industrial, technological, regional, and social areas in which it may grant special exemptions to firms planning to merge. Once these policies are formulated, a separate office, perhaps within Directorate B of DG IV, could take responsibility for judging whether the firms’ business falls within those specially exempted areas. Accordingly, one office would review the competitive effect of the merger and a separate Commission office would determine the merger’s exemption status. The European Court of Justice could remain in a position to hear appeals.

There are a number of reasons why the Council should possess the sole authority to make article 1(3) exemption decisions. The Council has valid legal reasons for having this power. The Treaty of Rome is the legal foundation of the Common Market and every Commission proposal must conform to its language and intent. Since the Treaty provisions defining the different roles of the Council and Commission grant the Council general supervisory authority over the Commission, the Council may elect to retain its supervisory role in certain situations. Indeed, regarding antitrust policy, article 87 specifically gives the Council, and not the Commission, the direct responsibility for adopting instruments to give effect to articles 85 and 86. The ration-
ale for the hierarchical framework is that the social and human demands that the Council oversees should restrain the Commission's normally broad\textsuperscript{162} discretionary power as the administrator of the Community's competition policy.\textsuperscript{163}

There are equally important policy reasons for adopting a decision-making scheme under article 1(3) that will allow the Council to make exemption decisions. It is imperative that the Community use both a subjective cost-benefit analysis and an objective analysis in determining a merger's validity, because such business activity can have a significant effect on life outside the market sector. Because the Council is legally and traditionally the policy-maker in non-market areas (determining social, political, and industrial issues facing the Community), it is consistent that the Council have the capacity to prioritize public interest concerns with respect to mergers. This line of reasoning is the premise supporting the German system of merger control.\textsuperscript{164} Furthermore, this argument recently found strong support from scholars who warn of the potential problems created when subjective and objective evaluation are combined under one decision-making authority.\textsuperscript{165}

The Commission's attempt to secure absolute discretion with respect to granting exemptions is also inconsistent with current Community practices. The use of block exemptions under article 85(3) of the Treaty of Rome is an example of one such Community practice.\textsuperscript{166} During the 1960's many notification agreements seeking exemptions

\textsuperscript{162} See generally Regulation 17, supra note 12, preamble (providing the Commission with broad discretionary power regarding the implementation of its free market ideals with respect to competition).

\textsuperscript{163} COMPARATIVE GUIDE, supra note 32, at 423.

\textsuperscript{164} Hopt, supra note 156, at 166. Under the German system, the Federal Cartel Office evaluates competition and balances the pros and cons for competitive conditions. Id. The Federal Minister of Economics, who is responsible for overseeing much of that country's industrial policy, grants exemptions on the grounds of overriding economic and public interest. Id.

\textsuperscript{165} THIRTY YEARS, supra note 2, at 349 (citing the importance of having all parties decide general non-economic policy regarding mergers at the Community level); A. Jacquiem, Concentrations and Mergers in the EEC, in EUROPEAN MERGER CONTROL 165-66 (Hopt ed. 1982) (explaining the results when qualitative and quantitative merger analysis are combined). Jacquiem believes that such a combined analysis would result in: (1) the use of incompatible criteria; (2) the establishment of surreptitious compromises; and, (3) the creation of value judgments better left to political powers. Id. He maintains that the combination confuses objectives and tasks and further makes it practically impossible to exercise control over adopted options). Id.

\textsuperscript{166} See Treaty of Rome, supra note 3, at art. 85(3) (permitting the Community, in most cases, to adopt exemptions for certain classes of normally violative agreements that somehow benefit the Community). Under the current procedure for granting block exemptions the Council must first empower the Commission to adopt specific block exemptions. The Council has the absolute authority to review which class of agreements the Commission may exempt. Id.
were submitted to the Commission. In an effort to reduce the Commission's workload, the Council of Ministers authorized the Commission to specify conditions under which it would grant exemptions to certain types of agreements. The fact that such authorization is still required before the Commission may establish block exemptions signifies the Council's continued supervisory role in granting exceptions to Community law. It is necessary for the Council to retain a supervisory position when evaluating concentrations in light of the Community's social and regional policies, especially because of the power of concentrations, more than restrictive agreements, to change permanently the structure of an industry.

There is also an important political dilemma that is avoidable if the Council is allotted this supervisory power. Where an exemption is given at the Community level, Member States may lose the ability to prohibit concentrations at the national level. While countries like France, Italy, Ireland, and the United Kingdom believe that the Commission should consider national interests when granting an exemption, others, notably Denmark and Germany, do not feel this is necessary. From a strategic perspective, therefore, returning the entire policy-making responsibility to the Council will allow Member States to decide on which regional interests they want to consider.

The above arguments establish the rationale behind giving the Council, as opposed to the Commission, the power to draft policy outlines in reference to article 1(3). In providing the Council with this one responsibility, the Commission will retain its power to confer decisions, and still have ample discretion in making article 1(3) judgments. As long as the Commission's decisions remain within the boundaries of the Council's exemption policy, the Commission will have the power to issue a wide array of relief. Moreover, there is a checking mechanism built into this exemption authorization procedure. The Council would have to develop concrete guidelines to have any de facto decision-making power. Given the diverse opinions among Council members, arriving at a consensus is indeed a formidable task. The Commission would also have considerable authority to make decisions under article 1(1) of the

167. See Tenth Report, supra note 16, at point 20 (discussing the "division of responsibility" issue). In giving decision-making control to the independent Commission, Member States would lose their ability to object when an exemption harms their sovereign interests. Id.

168. See Reynolds, supra note 2, at 421 (providing the views of Denmark and Germany concerning the considerations of the Commission in granting exemptions).

Proposal which is vague and manipulable. The Commission could simply refuse to find a violation of competition in instances it considers exemptible. Thus, although the Commission will abandon much of its administrative authority on paper, as is legally and politically justified, it will retain most of its essential power in practice.

The most critical problems in the Regulation are found in the pre-merger notification procedure and the dual decision-making scheme associated with article 1(3). These problems continue to obstruct the approval process. In order to solve the remaining obstacles, suggestions, like those set forth above, are necessary. Otherwise, the Commission will be forced to continue to rely on archaic and ineffective laws dealing with merger activity.

B. SUGGESTION TWO: THE SUPPLEMENTAL USE OF ARTICLE 85 TO CONTROL Mergers

Some speculate that the Commission will not relinquish further decision-making authority to the Council. If this speculation concerning the Regulation is correct, the Commission should simply utilize article 85 as a supplement to article 86 in controlling mergers.

1. The Basis for the Commission's Reluctance to Use Article 85 to Control Mergers

In 1966, the Commission decided against using article 85 to regulate mergers. The Commission rendered its decision despite the conclusion by a working group designated to study the issue that the article could be applicable to mergers. There were several legal,
political, and practical reasons for the Commission's decision.

A fundamental legal and conceptual problem is in defining a merger or consolidation as an agreement. The Commission expressed concern whether a merger that results in a permanent structural change of two undertakings could be classified as an agreement or concerted practice within the meaning of article 85. More specifically, the Commission believed that article 85 could not account for mergers that are involuntarily closed through stock purchases on the open market.

There were also political reasons why the Commission refused to use article 85 to control mergers. At the time of its decision, the Commission was very sensitive to the political sovereignty of individual Member States. The Commission reasoned that if certain mergers were legal under national laws and national authorities varied in the priority they assigned to merger control, it would be illogical to apply article 85 to these states uniformly. There has also been speculation that the Commission's decision was dictated by a belief that European industry was not sufficiently concentrated.

Finally, the Commission highlighted several practical problems that would arise in attempting to apply the article 85(3) exemption provision to mergers. The Commission doubted its ability to make the necessary evaluation under that provision. It felt unable to forecast the effects of mergers as reliably as it could predict the effects of certain

cable to mergers. Id. The group studying article 85 decided 3 to 1 that the Commission should use it to combat mergers. Id.

176. 1966 Memorandum, supra note 174; see Cunningham, supra note 27, at 221 (noting the Commission's determination that article 85 was not appropriate to control mergers because mergers involve changes in the enterprise ownership rather than enterprise anticompetitive behavior).

177. Trends and Prospects, supra note 174, at 38.

178. See Note, Sources and Developments, supra note 59, at 508 (contending that the Commission's decision was politically motivated); Coleman, European Economic Community Antitrust Law: The Continental Can Decision-Forerunner of a New European Anti-Merger Policy, 47 Tul. L. Rev. 829, 857 (1973) (arguing that Continental Can, which adopted almost completely the Commission's 1966 Decision, was decided for purely political reasons).

179. See Trends and Prospects, supra note 174, at 37 (explaining that the Commission had doubts about implementing its powers); Note, Sources and Development, supra note 59, at 502 (noting that the goals of the Community are contradictory in espousing long-range union but limiting short-range costs).

180. Markert, supra note 175, at 48.

181. Thirty Years, supra note 2, at 348.

182. See Treaty of Rome, supra note 2, at art. 85(3) (stating that certain agreements or categories of agreements are acceptable if they contribute to improving aspects of commercial life within the Commission).

183. See H. Smit & P. Herzog, Law of the European Economic Community 3-202 (1982) [hereinafter H. Smit & P. Herzog] (enumerating the difficulties in making an evaluation under article 85(3)).
restrictive agreements. Moreover, since mergers resulted in a permanent structural change among the undertakings involved, the article 85(3) exemption, which is only allowed for a specified time period, could not be extended to merging companies. Finally, the Commission perceived a problem for firms in proving that the advantages under article 85(3) could not be achieved through a vehicle less restrictive of competition.

2. Refuting the Basis for the Commission’s Reluctance to Use Article 85 to Control Mergers

The position that article 85 is inapplicable to mergers is completely unfounded. Such use of article 85 is legally justified, and also practically and politically warranted by the current circumstances of European industry.

There are no legal or conceptual obstacles to adopting article 85 for the purpose of controlling mergers. The language of article 85 states that any “agreement between undertakings . . . which have as their . . . effect the prevention, restriction or distortion of competition with the common market . . . ” will be prohibited. While this language presents no real problem when a merger is consolidated through an agreement, it does pose a problem when a merger is concluded through an open market share purchase. The European Court has interpreted the term “agreement” within the context of article 85(1) so broadly that the term’s meaning is arguably extended to encompass the market share merger transaction. Moreover, the Commission may also be moving closer to adopting a similarly broad interpretation of agreement. Even if the Commission refuses to apply article 85 to merger

184. Id.
185. See Regulation 17, supra note 12, at art. 8(1) (stating that an article 85(3) exemption may only issue for a specified period).
186. See Cunningham, supra note 27, at 221 (declaring that the limited time period exemptions under article 85(3) and Regulation 17, article 8(1), are not adapted to dealing with mergers).
188. Treaty of Rome, supra note 3, at art. 85(1).
189. See supra note 177 and accompanying text (indicating the Commission’s substantial concern about defining open market share acquisitions as an agreement).
190. See H. Smir & P. Herzog, supra note 183, at 3-202 (arguing that the Court implicitly recognized share purchase agreements on a stock exchange as an article 85(1) violation). They cite S.A. Brasserie De Hecht v. Wilkin, Case No. 23/67, 1967 E. Comm. Ct. J. Rep. 407, 415, in which the Court held “in determining whether a contract runs afoul of article 85(1), the existence of similar contracts may be taken into consideration insofar as the totality of contracts of this nature is likely to restrain the freedom of commerce.” Id.
191. See infra note 202-06 and accompanying text (observing that a recent Com-
transactions, there simply is no valid reason for not applying the provision to mergers accomplished through an agreement. Article 85 covers any significant restrictive effect on competition, whether directly through a cartel agreement or indirectly through a merger. Under the present system, undertakings could engage in otherwise restrictive behavior, but avoid article 85 by disguising their arrangement in a blanket merger. Finally, there is no reason to believe that the European Court of Justice would overrule a decision to apply article 85 to mergers.

There is no political justification for not using article 85 in a merger context. By its reluctance to impose Community's antitrust policies on individual member states, the Commission ignores the entire premise of Community law. Article 85 was not meant to be read as the acceptable medium for antitrust laws of individual Member States, but was drafted rather for the Community as a whole.

mission decision to employ article 85 in a market share transaction giving rise to a potential dominant position led to speculation that the Commission has become considerably more liberal in its deployment of the article.

192. See A. Deringer, The Competition Law of European Community 169 (1968) (stating "[i]f application of article 85(1) were based solely on an agreement and not also on its content, the prohibition of 85(1) would apply to many agreements including mergers . . . since mergers are frequently concluded through agreements and such agreements can produce effects that result in a reduction of the number of competitors and hence reduce competition."); R. Jolivet, Monopolization and Abuse of Dominant Position ix (1970) (Forward by J. Rahl) (arguing that the language of article 85 obviously does not prevent the application of article 85 to mergers); A. Campbell, E.C. Competition Law: A Practitioner's Textbook 38 (1980) (noting that the Commission's distinctions between cartels and mergers for purposes of applying article 85 have been seriously criticized).

193. See Mailanger, Mergers and Acquisitions in the Common Market: Problems Under Corporation, Tax and Antitrust Law, 1 N.Y.U. J. Int'l L. & Pol'y 18, 35 (1968) (describing that in arguing for a rule-of-reason test, Prof. E. Steindorff notes that both article 85 and 86 ought to be read together since "firms could resort to a legal form of concentration to camouflage an arrangement solely to avoid violating article 85").

194. See Trends and Prospects, supra note 174, at 44 (speculating that although the Court has never ruled on the applicability of article 85 to mergers, it might now look on it favorably). The Court's implicit support for the applicability of article 85 to concentrations is also found in the only direct decision on mergers. In Continental Can, the Court insisted that, if necessary, both articles 85 and 86 be used together to achieve the common objective under Article 3(f). Continental Can v. Commission, Case No. 6/72, 1973 E. Comm. Ct. S. Rep. 215, 243, reprinted in [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) D 8171 (1973). Because mergers may at times distort competition and hence violate an important Community goal, the Court's language suggests that it was refusing to prohibit the possibility of using article 85 to control mergers. See Cunningham, supra note 27, at 252 (stating that the Commission itself relied on article 85(3) in its argument in Continental Can).

195. H. Smit & P. Herzog, supra note 183, at 3-201.
apply antitrust laws does not exist.\textsuperscript{196} The very fact that the Commission proposed the Merger Regulation indicates its willingness to assert its power. The political motivation to encourage greater Community concentration is also extinct.\textsuperscript{197}

The logistical difficulties in using article 85(3) to exempt certain mergers are troublesome, but not insurmountable. The old concern that the Commission is incapable of rendering an exemption decision obviously no longer holds since article 1(3) of the Proposal requires just such an evaluation.\textsuperscript{198} As for the difficulty in proving that article 85(3) benefits could not be achieved through another arrangement less restrictive of competition, such an argument ignores the fact that concentrations may also improve certain non-economic conditions in the Community.\textsuperscript{199} Imposing a time period and application renewal requirements on merger agreements under Regulation 17, however, presents a more difficult procedural problem. Nonetheless, nothing in the language of this Regulation restricts the Commission from imposing conditions and obligations more attuned to a permanent arrangement.\textsuperscript{200}

The Commission's initial reluctance to utilize article 85 as a means to control concentration is plainly unfounded under today's circumstances. It is noteworthy that in 1966, the year the Commission elected not to use article 85 to regulate mergers, the United States Supreme Court ruled that the parallel provision to article 85, section one of the Sherman Act, was applicable to mergers.\textsuperscript{201} Although publicly the

\textsuperscript{196} See Sherlinker, supra note 27, at 809 (arguing that in 1984 the Commission was eager to capture more control).

\textsuperscript{197} See Thirty Years, supra note 2, at 349 (stating that small and medium-sized firms have returned to favor and that the subject of concentration has been critically reappraised since the 1960's when the original article 85 application questions arose).

\textsuperscript{198} See Proposal, supra note 1, at art. 1(3) (providing an exemption for mergers that attain certain Community priorities).

\textsuperscript{199} Trends and Prospects, supra note 174, at 38; H. Smilt & P. Herzog, supra note 183, at 3-202.

\textsuperscript{200} See Regulation 17, supra note 12, at art. 8. The relevant provision reads:

1. A decision in application of Article 85(3) of the Treaty shall be issued for a specified period and conditions and obligations may attach thereto.

2. A decision may on application be renewed if the requirements of article 85(3) of the Treaty continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties . . . [when certain conditions arise].

\textit{Id.}

\textsuperscript{201} See United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665 (1964) (using section one of the Sherman Act to prohibit the merger of Kentucky's first and fourth largest commercial banks); see also Markert, supra note 175, at 53 (criticizing the Commission for blatantly disregarding the United States proclivity to apply section one of the Sherman Act to mergers).
Commission continues to be adamant in its refusal to use article 85 in merger cases, there is some evidence that it may be willing to abandon this position.\textsuperscript{202} In \textit{Philip Morris},\textsuperscript{203} the Commission made a significant move towards applying article 85 to agreements involving stock acquisitions.\textsuperscript{204} The case involved Philip Morris’ acquisition of control in a holding company which, in turn, had a substantial minority shareholding in Rothmans International, a tobacco industry competitor of Philip Morris. In attacking the acquisition, the Commission used both article 85 and 86. The significance of the decision is that the Commission holds article 85 applicable to all cases concerned with share transactions.\textsuperscript{205} In expanding the meaning of “agreement,”\textsuperscript{206} the Commission moves one step closer to classifying a full shareholder acquisition (and according to some definitions, a merger) as an article 85 violation. Whether the Commission will take those final steps is of course another crucial issue. Regardless, because the use of article 85 to regulate mergers appears legally sound and practically applicable, a brief sketch of its possible effects is in order.\textsuperscript{207}

3. \textit{The Beneficial Effects of Using Article 85 to Help Regulate Mergers}

Using both article 85 and 86 to regulate mergers has many advantages. Although procedurally, such use lacks both the legal certainty of numerical thresholds and the ability to control mergers \textit{a priori}, it does eliminate several of the substantive problems associated with employing article 86 alone.

A serious problem with using article 86’s language to control mergers is the requirement that one of the firms be in a dominant market

\textsuperscript{202} See B. Hawk, \textit{United States, Common Market and International Antitrust: Comparative Guide III} 660 (1979) [hereinafter \textit{Comparative Guide III}] (claiming that some Commission officials have indicated that under various circumstances, the Commission can apply article 85 to merger-type situations, e.g., certain long-term joint ventures).


\textsuperscript{204} Comparative Guide III, supra note 202, at 660.


\textsuperscript{206} See Comparative Guide III, supra note 202, at 660 (interpreting the decision as stating that where “a firm holding a minority shareholding in another firm exercises sufficient influence on the latter firm’s behavior in the market,” it will constitute “an agreement to purchase the shares.”)

\textsuperscript{207} See supra note 13 and accompanying text (noting that Regulation 17 permits the use of article 85 in conjunction with article 86). It is important to note this permissible combination when attempting to predict the effects of article 85 on mergers.
position prior to the merger. Consequently, the Commission may not take action against two large non-dominant undertakings whose merger would result in the kind of concentrated market the Commission seeks to avoid. The language of article 85 could prevent such a legal dilemma since it allows the Commission to prohibit any agreement that restricts, prevents or distorts competition.

The greater advantage article 85 provides is the ability for the Commission to utilize a bifurcated analysis. For the most part, article 85(1) and (3) parallel article 1(1) and (3) of the Merger Proposal. In this context, the exemption clause under article 85(3) would afford the Commission the flexibility to promote those types of anti-competitive mergers it contends will prove beneficial to the Community. Merging parties would likewise have greater opportunity to apply for exemptions. Although the procedure would remain limited to the Regulation 17 framework, undertakings could apply for either an individual exemption, or a block exemption. In the end, as long as the Commission adopts a consistent policy toward granting certain merger exemptions, the beneficial effects of the bifurcated analysis of article 85(3) will match article 1(3) of the Merger Proposal.

CONCLUSION

The current controversy concerning the effectiveness of the Commission's Merger Control Proposal symbolizes a deeper, more troublesome political problem. On the one level, there are disputes over whether the Proposal will serve its antitrust purposes. The advocates of the Proposal argue that the criteria are sound and the procedure, while perhaps imperfect, is still effective. The opponents of the Proposal contend that

208. See supra note 27 (discussing the absurdity of requiring one firm to be in a dominant position prior to the merger).
209. Id.
211. See supra notes 58-60 and accompanying text (discussing the purpose, procedure and benefits of the bifurcated analysis used in the Merger Proposal).
212. See supra notes 57-63 and accompanying text (noting how under EC competition policy, the Commission often evaluates vertical and horizontal arrangements according to factors not related to competition).
213. See Regulation 17, supra note 12, at art. 4(1) (granting merging parties the opportunity to seek an article 85(3) exemption on an individual basis).
214. See id. at art. 4(2) (detailing those categories of exemptions the Commission will recognize per se). The Commission, however, must receive additional authorization from the Council to grant block exemptions. See COMPARATIVE GUIDE, supra note 32, at 498. But see H. SMIT & P. HERZOG, supra note 183, at 3-150-53 (arguing that pursuant to article 9(1) of Regulation 17, the Commission has the sole power to grant block exemptions to article 85(3)).
the criteria are inexcusably vague and the procedure renders useless any helpful standards the Proposal creates.

On another level, there is the policy debate. This debate, as exemplified in the article 1(3) issue, centers on the pace at which Community integration should occur. The states that endorse the Proposal are striving for a stronger, more unified Common Market whose authority regarding competition policy should reside almost exclusively within the auspices of the Commission. Those states that criticize the Proposal wish to maintain a greater level of sovereign independence. These latter nations take issue with the fact that their own unique industrial structures prevent successful assimilation into a broader Community system of antitrust.

Acknowledging this two-tier policy debate, this Comment presents two suggestions. The first suggestion involves political compromise and retracts some executive authority from the Commission. Even assuming the suggested amendments would deprive the Commission of its ability to administer competition policy freely, these concessions are completely justified. As long as the Community is composed of individual national sovereignties, unanimity, in accordance with the procedures set forth in the Treaty of Rome, is required for any decision pertaining to the pace at which those nations will integrate. Consequently, where compromise is mandated, as in the present situation, the Commission must retreat to its traditional role, subordinate to the Council of Member States. This Comment, therefore, recommends that the Commission first attempt to modify the existing Proposal before undertaking any action under article 85.

Nevertheless, this Comment also recognizes that economic conditions may demand the circumvention of certain traditional methods of legislation. As merger activity within the Community becomes more unmanageable, and as global competition among multinationals becomes increasingly fierce, there may come a time when the Commission is forced to forego political compromise and adopt a short-term antitrust strategy; a strategy that may include using article 85 to control mergers. Whether the present merger and takeover climate warrants such a strategy is beyond the scope of this Comment. It appears, however, that the Commission is prepared to avail itself of this second suggestion. The recent Philip Morris decision, and recent remarks by Commission officials exemplify this changing attitude about article 85's potential.

215. See supra note 202 and accompanying text (explaining that Commission officials are now more receptive to applying article 85 to mergers).
With economic growth surging again in Europe\textsuperscript{216} and the possible failure of reaching a political compromise on the Merger Proposal,\textsuperscript{217} the expanded use of article 85 to regulate merger activity may be inevitable.

\textsuperscript{216} See Kirkland, \textit{Growth Takes Hold in Europe}, \textit{FORTUNE}, Feb. 3, 1986, at 112 (noting increase in business investment and consumer spending in Europe generally and in West Germany in particular).

\textsuperscript{217} See \textit{supra} note 172 and accompanying text (speculating that the Commission will refuse to surrender any more decision-making authority to the Council).