

The Division of Jurisdiction over Concentrations in the EEC

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The EEC Merger Control Regulation divides jurisdiction over concentrations in a fashion that may appear straight forward but is actually quite complex. The basic outline is clear: concentrations that have a "Community dimension" fall within the Commission's jurisdiction, whereas those that lack a "Community dimension" do not. For the moment the "Community dimension" is measured by a three-part test: (1) Each of at least two undertakings must have an "aggregate worldwide turnover" exceeding ECU 5 billion; (2) each must have an "aggregate Community-wide turnover" of ECU 250 million; and (3) at least one of the undertakings must achieve more than one-third of its aggregate Community-wide turnover outside of a single EC member state. The Commission would have preferred lower thresholds (of ECU 2 billion and 100 million, respectively), and may get them when the matter is reviewed by the Council in 1993.

The apparent simplicity of the Regulation's jurisdictional division is marred by two additional provisions: The "German Clause" and the "Dutch Clause." The former provides for the referral of a concentration by the Commission to a member state where the "concentration threatens to create or to strengthen a dominant position" and thereby impede competition in a "distinct market" within that member state. Provision is made for judicial review. Reportedly Germany would not accept the Merger Control Regulation without some mechanism for taking jurisdiction of concentrations that could have a significant impact on competition in local markets. The "Dutch Clause" refers to referral of a concentration in the opposite direction,

that is, referral from a member state to the Commission. Under this provision a concentration that lacks a Community dimension can be referred by a member state to the Commission where the concentration creates or strengthens a dominant position and thereby significantly impedes competition.

A concentration that has a Community dimension and is not referred to a member state pursuant to the "German Clause" will be reviewed for its impact on competition exclusively by the Commission. Nevertheless such a concentration may still be reviewed by a member state in protection of its "legitimate" non-economic interests. The Regulation allows member states to take "measures to protect legitimate interests other than those taken into consideration by this Regulation" and specifically mentions three such legitimate interests: "public security, plurality of the media, and prudential rules." Whatever ambiguities may lie within the scope of these exceptions, the framework is clearly stated in the Regulation. When a member state's interests are recognized by the Commission as "legitimate" and "compatible" with Community law, the member state may add its regulation to that imposed by the Commission but only in respect of interests that lie outside the scope of the Regulation and only by way of further restricting or prohibiting the concentration approved by the Commission. Although member state authority to protect "legitimate" interests may prove complex in application, the division of jurisdiction is clear: the Commission will review the impact of the concentration on competition whereas the member state may review its impact on legitimate non-economic interests.

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Turning to concentrations that lack a Community interest, the Regulation seems intended to leave such concentrations to national review. This is accomplished by revoking the application to such concentrations of existing regulations that empower the Commission to apply the competition rules of the EEC Treaty to such concentrations. The Merger Control Regulation cannot revoke the EEC Treaty rules themselves, but it does withdraw the authority that had been granted to the Commission to apply those rules to concentrations that lack a Community dimension. Thus, Regulation 17, the First Regulation Implementing Articles 85 and 86 of the EEC Treaty, is explicitly made inapplicable to concentrations that lack a Community dimension. What is the legal effect of this change? The question has two parts. First, does the Commission have authority to enforce Articles 85 and 86 without implementing legislation? Second, will Articles 85 and 86 have effect in national law independent of implementing legislation?

As to the authority of Commission, an interim provision, EMC Treaty Article 89, authorizes the Commission to "investigate cases of suspected infringement" of the principles laid down in Articles 85 and 86 and to take action by way of a "reasoned decision." Article 89 was included to allow the Commission to act under Articles 85 and 86 in the period prior to the adoption of the implementing legislation provided for in Article 87. The Commission has taken the view that its Article 89 powers continue in force and indicated that it may utilize those powers in respect of concentrations, but that it would do so only in the case of concentrations that exceed its recommended thresholds of ECU 2 billion.

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worldwide turnover and ECU 100 million Community-wide turnover. One problem is that Article 89 contemplates that the Commission will "authorise Member States to take the measures . . . needed to remedy the situation." Precisely how this would work in the case of a concentration contrary to the principles of Articles 85 and 86 remains to be seen.

With respect to the direct effect of Articles 85 and 86 in national law, again as Treaty provisions their application cannot be excluded by the Merger Control Regulation. A distinction must be drawn between Article 85 and Article 86, however. Article 85 is a complex provision. In outline the article (1) prohibits certain enumerated agreements and concerted practices which may affect intra-Community trade, (2) declares that agreements "prohibited pursuant to this Article shall be null and void," and permits the prohibition to be "declared inapplicable" where the agreement or practice improves the production or distribution of goods without eliminating competition. The European Court of Justice has taken the view that the Article must be read as a whole; hence the prohibition of agreements pursuant to paragraph 1 is dependent upon the absence of an exemption under paragraph 3, and it is only prohibited agreements that are void under paragraph 2. As the Court put it in a case relating to the effect in national law of Article 85 prior to the adoption of implementing regulations, that is, prior to the adoption of Regulation 17, the nullity provision of Article 85, paragraph 2, applies only "in respect of agreements and decisions which the authorities of the Member States, on the basis of Article 88, have expressly held to fall

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under Article 85(1), and not to qualify for exemption under Article 85(3), or in respect of which the Commission has taken the decision envisaged by Article 89(2)." [Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH, 1962 ECR 45, 52.] Thus parties affected by a concentration that lacks a Community dimension cannot invoke Article 85 to void that concentration unless such a decision has already been taken by the competent national authority, and then there would be no need to rely upon Community law as the national law would be fully effective to accomplish the desired result.

With respect to Article 86, however, national courts will be competent to apply the provisions of that article even though the implementing legislation has been set aside. This is because Article 86 prohibits abuse of a "dominant position within the Common Market" as specified in the article without further qualification, ^{and without} ~~as~~ vesting in the member states or the Commission ~~of~~ authority to declare the provisions of the article inapplicable in any given context. Article 86 fits exactly the European Court's classical conception of EEC Treaty provisions that have direct effect in national law: the article provides a clear and unconditional prohibition of certain defined conduct, and the operation of the article does not depend upon further action being taken by national authorities or by the Commission. Persons affected by a concentration that lacks a Community dimension will therefore be able to invoke Article 86 in litigation before national courts, and correspondingly to take the matter to the European Court of Justice for a preliminary ruling pursuant to EEC Treaty Article 177.

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Since the Merger Control Regulation cannot bar the application of EEC Treaty Articles 85 and 86 to concentrations that lack a Community dimension, we have seen that the Commission intends to rely upon both articles to review concentrations above its ECU 2 billion and 100 million threshold, and that national courts will apply Article 86 presumably without regard to the Commission's announced threshold. It is therefore relevant to ask how EEC Treaty law might be expected to affect such concentrations. Here the principal point to be made is that the Merger Control Regulation distinctly moves into areas not yet recognized as falling under Articles 85 and 86. The seminal Continental Can case applied Article 86 to find abuse of a dominant position in the acquisition of a competitor, and the Philip Morris case found Article 85 applicable to acquisition of a minority interest in a competitor where such acquisition might impair competition. No case has yet applied Articles 85 and 86 to a concentration through which the merged firm (or concentrative joint venture) has acquired a dominant position, yet this is precisely the behavior that can be reached under the Merger Control Regulation. Furthermore, the definition of dominant position will likely be more expansive under the Merger Control Regulation than it has been in Commission and Court practice under Article 86. Whereas the Regulation implies that a dominant position can be achieved with a stake as low as 20%, Article 86 cases have so far required at least 40%. Thus under the Merger Control Regulation concentrations that have a Community dimension will in effect be subjected to legal standards that differ from the Treaty standard that will remain applicable to concentrations that lack a Community dimension.

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Although it may appear anomalous to apply one standard to concentrations reviewed under EEC Treaty Articles 85 and 86, and a different standard to concentrations reviewed under the Merger Control Regulation, this is fully understandable from the legal point of view. The two measures address the same issues but stem from different legal authority. The Merger Control Regulation is supported by EEC Treaty Article 235 which authorizes the Council, "acting unanimously on a proposal from the Commission and after consulting the Assembly," to take "appropriate measures" to attain an objective of the Community where the Treaty "has not provided the necessary powers." This "gap filler" was invoked in the Merger Control Regulation precisely because Articles 85 and 86, as they had been developed and applied, were inadequate to the task.

In legal theory, then, it is not startling to observe that concentrations vetted under the Merger Control Regulation will be treated differently from concentrations vetted under Articles 85 and 86. What is of more interest will be to observe whether in the dynamics of their application the two parallel legal procedures will be drawn closer together so that in the end what are now different standards will become essentially the same.

One might easily expect such a development where the Commission undertakes to review both types of concentrations. We have seen that at least at the outset this will be true in two circumstances: (1) where a member state requests the Commission to review a concentration that lacks a Community dimension (the "Dutch Clause"), and (2) where the

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Commission undertakes to review a concentration that lacks a Community dimension by Merger Control Regulation standards, but that satisfies the Commission's threshold turnover figures of ECU 2 billion and 100 million. When the Commission reviews a concentration under the "Dutch Clause," however, the Commission will apply the Merger Control Regulation so that by itself such a review will not develop the jurisprudence of Articles 85 and 86. Commission review of concentrations that fall between the two sets of threshold figures will apply Articles 85 and 86, but such review is seen by the Commission as an interim measure pending Council acceptance of the Commission's recommendation for broader application of the Merger Control Regulation. If the Regulation is extended to the Commission's threshold at the first Council review in 1993, the Commission will have at most three years for independent application of Articles 85 and 86. While much can be done in even so short a time, it is questionable whether in the normal course the jurisprudence of Articles 85 and 86 will be brought very much closer to the Merger Control Regulation. Viewed as an interim measure, the Commission is not likely to make vigorous use of such review or to move forcefully in the direction of eliminating the disparities between the Merger Control Regulation and Articles 85 and 86.

In the longer run the instrumentality for harmonization will be the European Court of Justice. Two developments can be foreseen. First, it can be expected that Commission decisions under the Merger Control Regulation will be regularly subjected to judicial review. Ample provision is made for recourse to the Court and the matters involved are

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of such importance that the option to litigate is not likely to be set aside. Second, litigation under the Merger Control Regulation will develop a jurisprudence that will as well fit the circumstances of concentrations that lack a Community dimension. When those affected by such concentrations seek national court review their counsel will naturally invoke the European Court's Merger Control Regulation jurisprudence ^{for} ~~the~~ the interpretation of Article 86. Thus there will be a flow of applications for preliminary rulings under EEC Treaty Article 177 which will give the European Court frequent opportunity to reinterpret Article 86. Although it is obviously premature to predict how the European Court will approach the differences between Article 86 and the newly developed jurisprudence of the Merger Control Regulation, it would not be surprising for the Court to find within Article 86 many of the theories that the Court will have developed in its interpretation of the Merger Control Regulation. Without fear of immediate contradiction, one can predict that the European Court will bring the two lines of decision closer together. Hence what has begun as a "gap filler" supported by EEC Treaty Article 235 may well lead to a judicial closing of the gap by re-interpretation of EEC Treaty Article 86 in response to the leadership of the Commission and the Council.