Politics as Usual: The History of European Community Merger Control

Ethan Schwartz†

I. INTRODUCTION .......................... 608

II. ROOTS OF EUROPEAN COMMUNITY COMPETITION LAW ..................... 610
   A. The Treaty of Rome .......................... 610
   B. The 1966 Memorandum ...................... 614

III. EUROPEAN COURT OF JUSTICE DECISIONS DURING THE 1970s ............. 616

IV. POLITICAL LOGJAM: THE DECADE-LONG DEBATE OVER A MERGER TEXT ......... 623

V. DOMESTIC MERGER CONTROL: NATIONAL INTEREST ÜBER ALLES ............. 625
   A. Germany ........................................ 627
   B. France .......................................... 632
   C. Great Britain .................................... 635

VI. REBIRTH OF THE MERGER TALKS .......................................................... 638
   A. European Community Relaunch .................. 639
   B. BAT & RJ Reynolds: Article 85 Resurrected ...... 640
   C. Negotiations Resume ......................... 643
   D. The Member States React ...................... 645
      1. Germany ....................................... 645
      2. Great Britain ................................ 646
      3. France ....................................... 648
      4. The Final Negotiations ..................... 650
      5. Final ......................................... 651

VII. REGULATION 89/4064: SUBSTANTIVE AND JURISDICTIONAL ASPECTS .......... 653
   A. Substantive Evaluation of Mergers: The Industrial-Policy-Versus-Pure-Competition Debate ......................... 654
   B. Regulatory Clarity: A "One-Stop Shop" for Merger Control? .............. 655
      1. Jurisdictional Hurdles Within the Regulation ...................... 656
      2. Reference to a Member State's Authorities — the "German Clause" .... 657
      3. Legitimate National Interests — the "British Clause" ................. 657
      4. Continued Application of Articles 85 and 86 ......................... 658
      5. Application of the Regulation Below the Thresholds — the "Dutch Clause" .... 660
      6. Evaluation of the "One-Stop Shop" ................................ 660

VIII. CONCLUSION ........................................ 661

† J.D. candidate, Yale Law School, 1994. Earlier versions of portions of this article appeared in the case study, "EC Competition Policy: The Merger and Acquisition Directive" (A) (B), written by Ethan Schwartz, then Research Assistant, under the supervision of Jonathan Story, Professor at INSEAD, and with copyright 1991 INSEAD-CEDEP, Fontainebleau, France. They are reprinted with the permission of INSEAD-CEDEP. The author wishes to thank Professor Jonathan Story and Professor Paul Kahn for their assistance.
I. INTRODUCTION

In 1986, the European Community's twelve member states revived the long moribund dream of creating a single market, pledging to finalize its design by January 1, 1993.¹ The apparent premise of the project was economically liberal: only an integrated market encompassing over 320 million people could offer EC firms the economies of scale needed to reduce inefficiencies and compete effectively with Japanese and American firms. Experts commissioned by the European Community offered various predictions of the expected benefits from such a market. The most influential of these predictions, the Cecchini report of 1988, predicted savings of between 174 million and 258 million ECU, of which one-third to one-half would come from restructuring and rationalizing inefficient firms.²

Since mergers and acquisitions—"concentrations," in European parlance—play a key role in industrial restructuring, it was essential for the Twelve to agree on some system to police interstate mergers. The Council of Ministers, which is the chief policy-making body of the Community and consists of cabinet-level representatives from all twelve states, reached such an agreement in the form of a common merger control regulation, announced with great fanfare on December 21, 1989.³ EC Competition Commissioner Leon Brittan hailed the agreement as a "historic breakthrough in the creation of a single European market."⁴

The Regulation gives the Commission the authority to approve or reject all mergers of a "Community dimension," defined as mergers whose participants have an aggregate worldwide turnover⁵ of more than five billion ECU, with at least two participants having a Community-wide turnover of 250 million ECU each.⁶ The parties to any such merger must pre-notify the Commission, which must reject or approve the proposed merger based on whether it would "create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it...."⁷ Rejection or approval hinges on factors such as the structure of the market, the firms' economic and financial power, potential competition, barriers to entry, and the extent to which the

². PAOLO CECCHINI, THE EUROPEAN CHALLENGE, 1992: THE BENEFITS OF A SINGLE MARKET 84 (John Robinson trans., 1988). The report, commissioned by the European Commission, was authored by a distinguished group of European academics, businessmen, and officials led by Cecchini. The ECU, the unit of value used throughout the report and in most EC documents, represents a basket of EC currencies. Its value was 1 ECU = $1.217 in mid-March, 1988. Id. at 107.
⁵. Aggregate turnover is defined in the Regulation as amounts derived from the sales of products and the provision of services, after deducting sales rebates and value added tax. 1989 Regulation, supra note 3, art. 5(1).
⁶. Id. art. 1.
⁷. Id. pmbl.
proposed merger might contribute to "the development of technical and economic progress" in the European Community.

The Regulation followed sixteen years of sputtering negotiations that began in 1973 when the Commission, the central administrative body of the European Community, first proposed a merger text to the Council. In fact, Commission jockeying for competency over concentrations dates back to 1966, when the Commission circulated a legal opinion on the subject. Stop-and-go Council talks on merger control throughout the 1970s and 1980s paralleled a series of European Court of Justice decisions from the 1973 ruling in Continental Can to the 1987 decision in BAT & RJ Reynolds, in which the Court gingerly sought to interpret the Treaty in a light most favorable to the expansion of the Commission’s competencies over concentrations.

The merger text that the Council finally adopted in 1989 was ambiguous and limited in scope. The text failed to resolve key disputes which had plagued the decades of negotiations, such as the demarcation of Community and national jurisdiction, the criteria for evaluating mergers, and the procedures the Commission was to follow in undertaking evaluation. Moreover, the document preserved in the hands of member states as much authority as it placed in the Commission. Overall, the 1989 Regulation resisted as much as it acknowledged any underlying "spirit" or "objectives" of the Treaty of Rome, to which the European Court had appealed in Continental Can.

This article will sketch the thirty-year history of Commission politicking, court adjudicating, interest-group lobbying, and member state negotiating that preceded the adoption of the merger regulation. Its discussion will focus alternatively on the Commission, the European Court of Justice, and the national bureaucracies of the major players. The article explains how states translated divergent interests into the language of consensus, and argues that the process of compromise reveals the shallowness of the common purpose rhetoric that surrounded the efforts to adopt a single merger control policy. By uncovering the roles and interests of the diverse national and institutional parties, this article hopes to reveal the disarray behind the apparent consensus on the new regulation.

Several commentators discussing the EC’s mid-1980s "relaunch" have stressed apparent agreement among the Twelve on the virtues of deregulatory economics and a seeming consensus on the benefits of open markets and competition. However, the inability of the EC member states to reach

---

8. Id. art. 2.
9. See infra note 102 and accompanying text.
10. See infra note 40 and accompanying text.
13. See infra notes 343-390 and accompanying text.
agreement on anything but the outermost perimeter of the sphere of merger control suggests otherwise. Antitrust policy is a realm in which the rhetoric of neutral economic principles can mask strategic decisions about the distribution of property, and the merger control regulation reveals how divergent the member states’ decisions are. Despite the popular perception that each of the Twelve is devoted to a specific economic philosophy, and despite each government’s self-proclaimed dedication to a European Community relaunch predicated on open markets and common economic goals, these sentiments are not yet strong enough to overcome the use of merger control as a national tool of economic intervention. Supranationalism has yet to replace realpolitik. The story of the 1989 Regulation is one of twelve states’ struggle to keep the merger control tool from Brussels, mixed with nominal devotion to the virtue of a common policy. As such, the evolution of Community merger control supports the thesis that the Community’s member states, rather than the Community’s institutions, remain the ultimate charters of the Community’s future. Interstate bargaining driven by national interest, rather than consensus building driven by commonly-perceived shared interests, continues to characterize the Community’s development.

II. ROOTS OF EUROPEAN COMMUNITY COMPETITION LAW

A. The Treaty of Rome

Articles 85 and 86 of the Treaty Establishing the European Economic Community (Treaty of Rome) are the twin bases of the European Community’s authority over competition. Article 85 bans “any agreements between enterprises, and decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market.” Article 86 states that “[t]o the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market, or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.” Both articles enumerate actions that they control or prohibit, but the use of the phrase “in particular” in both cases suggests that the lists

in Europe in the 1980s, in THE NEW EUROPEAN COMMUNITY 1, 23, 24 (Robert O. Keohane & Stanley Hoffmann eds., 1990). Analysts have attributed this convergence of views to the election of center-right governments in several member states in the late 1970s and early 1980s and to France’s 1983 abandonment of the socialist experiment launched by President Mitterrand in the early 1980s. See, e.g., Cameron, supra, at 56-59.
16. For one authority who advances this theory, see Institutional Change, supra note 15, at 17.
20. Id. art. 86.
are not meant to be exclusive. These provisions seem to reflect a coherent resolve to establish a free market with competition moderately policed by the Commission. Their wording, however, reveals a series of unresolved questions of both substance and procedure.

One central substantive issue concerns whether the Community’s antitrust policy should be based solely on the goal of maintaining perfectly competitive markets — in which case, the Commission should evaluate potentially anti-competitive actions solely for their effects on competition — or whether, instead, the policy should be based on a mixture of competition and industrial policy criteria. Industrial policy encompasses a wide range of government management of industrial activity, from long-term planning and government intervention in industrial behavior and restructuring, to more subtle government-sponsored encouragement of particular industrial actions. The objectives of industrial policy are also wide-ranging, encompassing social, regional, and employment goals, as well as the desire to channel investment into particular sectors and technologies. Industrial policy appears in Article 85(3), which exempts from regulation any anti-competitive agreement that "contribute[s] to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom . . . ." Article 86, on the other hand, seems to be more of a pure competition text, but its strictness is tempered by the fact that it prohibits only those anti-competitive activities that the Commission can prove constitute an abuse of a dominant position.

Another substantive question concerns the utility of banning only abuse of pre-existing dominant positions rather than the creation of dominance itself. Some analysts argue that by adopting this dichotomy, the Treaty of Rome’s drafters introduced a "double standard" into Community competition law with stricter prohibitions against cartelization than against concentration. Given the variety of economic and political motives for encouraging concentration, this double standard could have a profound impact on the extent of concentration in the European Community.

The main procedural debate raised by Articles 85 and 86 concerns which institution should decide what constitutes an abuse under Article 86 or what agreements qualify for an exemption under Article 85(3).

22. Treaty of Rome, supra note 17, art. 85(3).
25. Economic motives include a perceived need to form industrial giants large enough to compete with U.S. and Japanese firms. DENNIS SWANN, THE ECONOMICS OF THE COMMON MARKET 160 (2d ed. 1970). Political motives include the wish to encourage integration of the economies of EC members. Id. at 55.
26. The European Community is composed of four main institutions: the Council of Ministers, the Commission, the Court of Justice, and the Parliament.

(1) Representatives of each member state sit on the Council, which functions as the supreme legislative body for most EC activities except those stemming from the European Coal and Steel
appears to grant jurisdiction to the Commission to decide these issues, subject to de novo review by the European Court of Justice as specified in Article 173. However, other Treaty provisions make this situation more complex. Article 87(1) gives the Council — i.e., the member state governments that constitute the Council — three years to enact unanimously regulations "with a view to the application of the principles set out in Articles 85 and 86," following which it may adopt further regulations by qualified majority vote. Article 87(2) lists issues which the Treaty's authors felt the document did not resolve, calling for adoption of regulations and directives:

(a) to ensure observance . . . of the prohibitions referred to in Article 85(1) . . .
(b) to
determine the particulars of the application of Article 85(3) . . .
(c) to specify, where
necessary, the scope of the application in the various economic sectors of the provisions contained in Articles 85 and 86 . . .
(d) to define the respective responsibilities of the Commission and of the Court of Justice in the application of the provisions referred to in this paragraph . . .
(e) to define the relation between . . . municipal law and . . . the provisions contained in this Section or adopted in application of this Article.

The contents of Article 87 demonstrate that the drafters of the Treaty of Rome did not agree upon many of the procedural and substantive issues present in Articles 85 and 86.

Articles 88 and 89 render the jurisdictional puzzle still more complex. The latter two provisions divide competence between the Commission and the constituent states. Article 88 states that:

until the date of the entry into force of the provisions adopted in application of Article 87, the authorities of Member States shall, in accordance with their respective municipal laws and with the provisions of Article 85, particularly paragraph 3, and of Article 86, rule upon the admissibility of any understanding and upon any improper advantage taken of a dominant position in the Common Market.

The article does not specify whether the authorities are to apply their own interpretation of articles 85 and 86 or the interpretation of the Commission or Community. Decisions are taken by either weighted majority vote or unanimous vote, depending on the area under consideration.

(2) The Commission is made up of 17 civil servants appointed by common accord of the member states' governments. It proposes legislation to the Council, implements and administers Community law and policy, and, to some extent, serves as the Community's executive branch.

(3) The European Court of Justice consists of 12 members. It may consider actions brought against member states alleging their failure to fulfill EC obligations, actions against the Council or the Commission alleging their failure to act in conformity with EC law, and references from national courts for preliminary rulings to clarify the meaning and scope of Community law. A Court of First Instance hears some cases before the senior Court does.

(4) The European Parliament, elected by direct universal suffrage since 1978, has limited powers to supervise the work of the Commission and Council. Through a complex "cooperation procedure," the Parliament may reject proposed Council legislation, forcing that body to vote unanimously to override the Parliamentary veto.

the European Court of Justice. Article 89 instructs the Commission to "ensure the application of the principles laid down in Articles 85 and 86" by investigating "any alleged infringement" after which "it shall propose appropriate means for [bringing it] to an end."32

Other questions arise from the fact that the Treaty of Rome does not explicitly place merger control under Community purview. Evidence suggests that the Treaty’s authors considered that option and either explicitly rejected it or bypassed it when they could not agree on common criteria and procedures.33 At the very least, it is clear that the Treaty’s authors were aware of the uses of merger control and the possibilities for a Community role.34 Belgian Foreign Minister Paul-Henri Spaak’s 1955 report to the Council, which formed one of the bases for the text of the Treaty of Rome, discussed the need to control the formation of monopolies.35 In addition, the Treaty Instituting the European Coal and Steel Community (ECSC Treaty) contained explicit merger control provisions which required merging firms to notify Community institutions prior to merger.36

Given this experience under the ECSC Treaty, why might the drafters of the Treaty of Rome have rejected Community-level merger control? According to one theory, the original EC member states sought to encourage, rather than restrict, concentration of European industry. Their goal was to allow war-ravaged and historically under-industrialized Europe to attain American levels of industrialization by encouraging the formation of American-sized industrial giants.37 However, that motive alone does not fully explain the failure to include merger control in the Treaty of Rome. In fact, had the creation of industrial giants been their only goal, the drafters could have explicitly encouraged mergers in the Treaty provisions. The absence of merger regulation in the Treaty suggests that additional factors were at work, such as a divergence of strategic interests both within governments and between governments.38

32. Id. art. 89.
34. See T. ANTONY DOWNES & JULIAN ELLISON, THE LEGAL CONTROL OF MERGERS IN THE EUROPEAN COMMUNITIES 2 (1991). Advocate-General Roemer drew the same conclusion in arguing against Commission authority to police mergers generally in his opinion in Continental Can, Case 6/72, Europemballage Corp. and Continental Can Co. v. Commission, 1973 E.C.R. 215, 256. Moreover, Roemer went on to argue that the Treaty’s drafters intended to allow formation of full-fledged monopolies, so long as there was no actual "abuse" of the dominant position, because they deliberately chose to exclude language similar to that found in Section 2 of the Sherman Act. Id.
37. MERGER CONTROL, supra note 33, at 223; see also Aurelio Pappalardo, Le Règlement CEE Sur Le Contrôle Des Concentrations, 1 REVUE INTERNATIONALE DE DROIT ECONOMIQUE 3, 4 (1990). On the Community’s pro-concentration ethos, at least through the 1960s, see Bos, supra note 24, at 6.
38. See infra notes 138, 145-176, 181-184, and 224-234 and accompanying text. Merger control represents one area in which idealistic "common destiny" motivations run up against traditional state interests. Stanley Hoffmann and Robert O. Keohane make a similar point about the European
In sum, the competition provisions in the Treaty of Rome left many questions unanswered. The Treaty did not resolve whether competition alone or competition plus industrial policy should motivate the application of the competition provisions; in addition, the Treaty did not determine precisely where authority lies. Even at its origins EC competition policy raised two sets of questions: normative questions about what economic principles inspired and should govern such a policy, and political questions about who would administer competition policy and who might be bound by it.

B. The 1966 Memorandum

In 1966, the Commission issued a memorandum on concentrations that stated that "it is not possible to apply Article 85 to agreements whose purpose is the acquisition of total or partial ownership of enterprises or the reorganization of the ownership of enterprises (merger, acquisition of holdings, purchase of part of the assets)." The memo offered a number of arguments to support that conclusion, faulting Article 85 for both over-inclusiveness and under-inclusiveness.

First, the strict criteria of Article 85(1) would preclude too many permissible mergers and therefore were over-inclusive. On the other hand, the exemption criteria in Article 85(3) might create an industrial policy loophole that would gut the effectiveness of merger control, a situation that rendered Article 85 under-inclusive. In addition, any exemption granted would

---

39. See GOYDER, supra note 18, at 27-30. Goyder attributes these ambiguities to the need for cooperation. In short, doubt was written into the text to allow future power relationships to clarify themselves. This comport with a general understanding of the Treaty as not merely an effort to secure economic well-being for Europe, or to advance a common economic ideology or political vision, but, to put it bluntly, as a "way" for the French "to tie down their old enemies, the Germans," and for Germany to bind itself just enough to reassure the rest. The European Revolution, THE ECONOMIST, Nov. 9, 1991, at 60.

A comparison with the Treaty Instituting the European Coal and Steel Community, adopted in 1952, is instructive. This earlier pact laid out far stricter criteria for controlling competition and placed decision-making firmly in the hands of the High Authorities. ECSC Treaty, supra note 36, arts. 65 & 66. The strict controls on competition stemmed from American post-war pressure as Washington sought to limit the resurgence of German industry. David Allen, Policing or Policy-Making? Competition Policy in the European Communities, in POLICY-MAKING IN THE EUROPEAN COMMUNITIES 91, 94 (Helen Wallace et al. eds., 1977).


be revocable according to the procedures established in Regulation 17, the 1962 Regulation which specified the procedures to be followed by the Commission in several areas of EC competition control. This revocability of completed mergers would upset vested property rights. Furthermore, Article 85(2)’s declaration that offensive agreements are "automatically void" would make it an extremely crude tool for controlling mergers. Finally, Article 85 might not cover actions, such as open market purchases of shares, where one could not point to an "agreement" or "concerted practice," but that nonetheless facilitated concentrations that damaged competition.

Despite these criticisms, the memo’s legal argument was weak. Indeed, a panel of legal experts had suggested, contrary to the Commission’s opinion, that Article 85 might make an adequate vehicle for merger control. As the 1966 Memorandum recognized, the exemptions under Article 85(3) could have provided a way to evade the constraints of the automatic prohibitions of Article 85(1). Moreover, since Article 9(1) of Regulation 17 gives the Commission the sole power to grant exemptions envisioned under Treaty of Rome Article 85(3), the Commission could exercise its authority flexibly and consistently. Admittedly, Article 4(1) of Regulation 17 did complicate the Commission’s power to exempt, restricting it to only those deals of which it has been notified. However, the Commission might have attempted to use this requirement to force adherence to a pre-notification system of the very sort it would seek to erect later, through adoption of the merger control regulation in 1989.

Although it rejected Article 85 as a source of EC competition policy, the 1966 Memorandum did suggest that "a concentration of enterprises which has the effect of monopolizing a market should be treated as improper exploitation of a dominant position within the meaning of Article 86, except where special circumstances are present." The Commission thus proposed treating Article 86 as a source of control over only those concentrations which created a monopoly. Nevertheless, the proposal offered a small opening for expanded Community competency over mergers. The European Court of Justice picked up on this opening seven years later in Continental Can.

The EC politics of the mid-1960s helps explain why the Commission rejected the applicability of Article 85 to merger control. In 1965 French President De Gaulle sparked a crisis within the European Community when he refused to allow France to participate in any EC decisions taken by

43. Hawk, supra note 41, at 195, 196.
44. MERGER CONTROL, supra note 33, at 224.
45. Bos, supra note 24, at 5-6.
46. MERGER CONTROL, supra note 33, at 223 n.3.
47. The Commission has not made much use of its power to exempt. CHRISTOPHER W. BELLAMY & GRAHAM D. CHILD, COMMON MARKET LAW OF COMPETITION 130-34 (3d ed. 1987).
48. See id. at 134 n. 42; Council Regulation 17/62, supra note 42, art. 4(1).
49. Hawk, supra note 41, at 196.
qualified majority rather than by unanimous vote. De Gaulle believed that all authority over EC matters, even in the event of a "political union," should be vested in the heads of state acting unanimously and that the Commission, the Court of Justice, and other EC institutions should play a minor role at best in European policy.\textsuperscript{51} De Gaulle’s position had major implications for competition policy, since under Article 87 qualified majority voting was to apply three years after the Treaty of Rome came into force. The Luxembourg Accords of January, 1966 — in which the EC members reached a non-binding agreement to attempt to decide "very important interests" by unanimous vote — offered only a fragile solution to the dispute.\textsuperscript{52} Clearly, 1966 was a politically inauspicious time for the Commission to take an activist stance by discovering new powers for itself within the Treaty of Rome.

The French crisis alone does not explain the Commission’s decision to issue a memorandum criticizing Article 85 as a tool of merger control. If the Commission were simply concerned with avoiding potentially controversial interpretations of the Treaty of Rome in the prevailing political climate, the Commission could have invoked familiar arguments about the original intent of the Treaty of Rome’s signatories,\textsuperscript{53} and dispensed with legal arguments over Article 85’s potential use. By shifting discussion of the jurisdiction accorded to the Community by the Treaty of Rome from the realm of historical evidence regarding the intent of the signatories, the memo helped dissipate strict limits on Treaty interpretation. By casting the memo’s conclusion in legal terms, the Commission opened a door for altered interpretations in the future. One of these new interpretations might bring Article 85 back to life when the political situation permitted. The memo helped convert the Treaty from a text that granted limited authority based on literal readings and original intent, into one that, through expansive reading, could be interpreted as granting broad-based, discretionary authority to govern, to make decisions, and to interpret the Treaty of Rome for the good of the European Community as a whole.

III. EUROPEAN COURT OF JUSTICE DECISIONS DURING THE 1970s

A convergence of factors in the early 1970s briefly peaked expectations of an EC relaunch.\textsuperscript{54} The period of American-Soviet détente sparked European anxiety over the American commitment to NATO, and the dollar crisis of the late 1960s and 1970s led to the formation of the European

\textsuperscript{51} On the Luxembourg Crisis and De Gaulle’s views of proper institutional power see generally P.J.G. Kapteyn & P. Verloren van Themaat, Introduction to the Law of the European Communities 21-22 (2d ed. 1989).


\textsuperscript{53} Advocate-General Roemer invoked such arguments in Continental Can. See infra notes 60, 63 and accompanying text.

\textsuperscript{54} Keohane and Hoffmann note that the strengthening of European institutions, predicted under what they term the political economy hypothesis, could have occurred at any time after 1973. Institutional Change, supra note 15, at 23.
Monetary System in 1978. Charles De Gaulle had resigned the French Presidency in 1969, which, in turn, facilitated Great Britain's entry into the Community in 1973. The Paris Summit of 1974 created the European Council, under whose auspices heads of state would meet several times a year, and ordered a high-level report on the potential for political union. This political background is vital to an understanding of the 1973 ruling of the European Court of Justice in Europemballage Corp. & Continental Can Co. v. EC Commission, for it helps explain both the timing and content of the radically expansive decision handed down by the Court.

Continental Can, a New York manufacturer of metal containers and other packages, held close to ninety percent of the nominal capital of a German company, SLW, that specialized in metal packaging for meat, fish, and crustacea. In 1969, Continental Can agreed with the Dutch firm Thomassen & Drijver Verblifa (TDV) and the British firm Metal Box to set up a new European holding company, Europemballage Corporation. The new firm would then purchase the majority shares of TDV, which, like SLW, specialized in packaging for preserved meats, fish, and crustacea, and in metal caps for glass containers.

The Commission learned of the plan and warned the participants that in the Commission's opinion Continental Can's SLW subsidiary gave the U.S. corporation dominance in the market for meat, fish, and crustacea packaging in a "substantial part" of the Common Market. As a result, the Commission threatened to charge Continental Can and Europemballage with violating Article 86(1) of the Treaty of Rome. Metal Box pulled out of the deal, but Continental Can went ahead, creating the holding company Europemballage, which bought a ninety-one percent stake in TDV.

The Commission, acting under powers granted to it in Article 3 of Regulation 17, prohibited the concentration as a violation of Treaty of Rome Article 86. Continental Can challenged the ruling in the European Court of Justice under Treaty of Rome Article 173. The corporation first questioned the Commission's jurisdiction over American companies. It also argued that Article 86 applied only to behavior that affected consumers (an actual abuse of a dominant position), not to mere structural change of the market through the creation or strengthening of market concentration. It adduced historical evidence of the intent of the drafters of the Treaty of Rome, drawing support

55. These factors are similar to some of those that contributed to the 1980s relaunch fifteen years later, such as the IMF Treaty, General Secretary Gorbachev's rapprochement with Presidents Reagan and Bush, and the instability of the dollar under the Reagan Administration in the mid 1980s. In particular, instability in American monetary policy, and Europeans' ensuing decision to seek greater autonomy in monetary policy, were factors both in the decision to form the European Monetary System in 1978 and in the decision to broach suggestions for European monetary union beginning in the mid-1980s. See id. at 23.

56. KAPTEYN, supra note 51, at 23-26; see also Institutional Change, supra note 15, at 16.


58. Id. at 225. Continental accused the Commission of wrongly interpreting the Treaty of Rome through the lenses of American anti-trust law, "whose sources, philosophy and history are, however, different from those of the competition law created by the six Member States." Id. at 228. Advocate-General Roemer echoed that view in his opinion. Id. at 256.
from what they left out of that text. Continental Can observed that the Treaty is conspicuously silent on merger control, in contrast to the ECSC Treaty, which explicitly provided for such control, and concluded that the drafters were conscious of the possibility of incorporating merger control into the Treaty of Rome but deliberately did not do so. Continental Can finally asserted that even if Article 86 applied to mergers, it could apply only narrowly, as where the acquiring firm deliberately wielded its prior dominance as an instrument in the creation of an abusive level of concentration. In this light, even the Commission conceded that Continental Can's market strength had had nothing to do with its acquisition of TDV shares and had not been brought to bear against TDV in any way.

Continental Can prevailed on the merits. The Court found that the Commission had failed to prove that the relevant market should be defined as the specialized one of light metal packages for preserved meats, fish, and crustacea — the smaller market in which SLW was allegedly dominant — rather than the larger market for metal packaging in general. The Court also noted that Continental Can would not be immune from competition from other types of packaging, and this would diminish its market strength.

While the Court held for Continental Can on the facts of this case, the opinion is more remarkable for its interpretation of Article 86 in a light that would be favorable to the Commission's exercise of jurisdiction in the future. The Court accepted the Commission's interpretation of Article 86 as banning mergers that strengthen a dominant position. In so doing, the Court rejected the opinion of Advocate-General Roemer, who argued that Article 86 could not apply to mergers unless the acquiror used a dominant position to force a competitor to merge. The justices explicitly rejected the argument from comparison with the ECSC Treaty, and all but ignored the Advocate-General's lengthy historical analysis of the original intent of the drafters and signatories of the Treaty of Rome.

Instead, the justices appealed to what they termed "the spirit, general scheme and wording of Article 86, as well as to the system and objectives of the Treaty." From the broad statement of principle in Treaty of Rome Article 2, which instructs the European Community "to promote throughout the Community a harmonious development of economic activities," the Court derived a fundamental Treaty "aim," which it declared to be "decisive" when interpreting provisions such as Article 86. The Court also mustered support for its ruling from Treaty Article 3(f), which calls for "the institution of a system ensuring that competition in the Common Market is not distorted . . . ." The Court challenged the argument that Article 86 applied only to a

59. Id. at 224.
60. Id. at 253. (Advocate-General Roemer's points). Note that Advocate-General Roemer himself accepted Continental Can's extremely narrow reading of what forms of mergers the Treaty could cover.
61. Id. at 226-27, 247-48.
62. Id. at 256.
63. Id. at 243.
64. Id. at 243.
65. Id. at 244.
firm's abuse of a dominant position and not to structural change the firm induced in the market, noting that "[t]he distinction between measures which concern the structure of the undertaking and practices which affect the market cannot be decisive, for any structural measure may influence market conditions." 66 The Court also rejected the argument that Article 86 required some "link of causality . . . between the dominant position and its abuse." 67 Finally, the Court established a benchmark for determining when the strengthening of dominance amounts to abuse: the attainment of a "degree of dominance" that "substantially fetters competition, [such] that only undertakings remain in the market whose behavior depends on the dominant one." 68

Continental Can is the "best known" example of the European Court of Justice's use of a "teleological approach" to analyzing the Treaty of Rome. 69 Under this approach, the Court interprets the intent of the Treaty's drafters in light of some perceived "spirit" 70 of the Treaty, thereby giving an integrationist meaning to the text. Professor Joseph Weiler notes that, beginning in 1973, the Community underwent a period in which "the principle of enumerated powers as a constraint on Community material jurisdiction (absent Treaty revision) substantially eroded and in practice virtually disappeared." 71 The opinion of the European Court in Continental Can reflects this process. On merger control in particular, Continental Can was one of a number of decisions that, taken cumulatively, created the potential for increased Commission authority.

Following Continental Can, a number of cases strengthened the Commission's ability to use Article 86 to preempt practices it deemed anti-competitive. In 1978, in United Brands Co. & United Brands Continental B.V. v. Commission, 72 the Court upheld the Commission's decision that an American banana vendor had violated Article 86 by prohibiting its distributors from selling bananas while they were still green. The vendor had thus made it difficult for fruit to cross borders while still ripe, allowing it to charge different prices in different regions. Additionally, the company had refused to sell bananas to a Danish firm that also bought fruit from a rival. The Commission found these practices to be "unfair," 73 and the Court agreed.

The Court in United Brands defined "dominance" as the "position of economic strength enjoyed by an undertaking, which enables it . . . to behave to an appreciable extent independently of its competitors, customers and

66. Id. at 242.
67. Id. at 245.
68. Id. at 245. Some commentators suggest that the Court set up a "substantial" fettering test as an antidote to the radicalism of its interpretation of Article 86 as requiring dominance rather than abuse to find illegality. See Bos, supra note 24, at 11.
69. Goyder, supra note 18, at 71 n.l.
73. Id. at 268.
ultimately of its consumers." Dominance, then, does not mean the elimination of all competition from the market. Rather, the label applies to any market position that "hinder[s] to a large extent any effective competition from competitors who can only . . . secure the same advantages after great exertions." The Court also attempted to flesh out the meaning of the term "abusive," defining it to cover actions that "limit markets to the prejudice of consumers." Imposing "unfair purchase or selling prices" and reaping "trading benefits which [the firm] would not have reaped if there had been normal and sufficiently effective competition" would also be abusive. Because the Court did not define these phrases precisely, the Court effectively gave the Commission more leeway to find corporate consolidation abusive.

In Hoffman-La Roche & Co. v. Commission, the Court lowered Continental Can's "substantially fettering" threshold for abuse. In Hoffman-La Roche the Court defined abuse as

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 that behavior] has the effect of hindering the maintenance of the degree of competition still existing.

Whereas Continental Can's test of abuse looked for the creation of an oligopolistic market with a dominant firm, Hoffman-La Roche's test of abuse looked only for a weakening of the level of competition that existed prior to the challenged behavior. Some experts on EC jurisprudence believe that Hoffman-La Roche continued a trend whereby the Court slowly lowered the Continental Can hurdle, which had required a "substantial" effect on competition for Article 86 to apply.

Thus, by the end of the decade, the Court considered a "weakening" rather than a "substantial fettering" of competition to be abusive. The measure of dominance had shifted from the full elimination of competition, as in Continental Can, to the ability to act to a large degree independently from competition. It was still unclear whether the Court would apply the "weakening competition" test only to abusive market behavior, but still apply the "substantially fettering test" to structural change, such as mergers and takeovers. On the other hand, since "any large undertaking whose market share is significantly higher than that of its next competitors will easily be found to have a dominant position," the Court might find any strengthening

74. Id. at 277.
75. Id. at 276-77.
76. Id. at 289.
77. Id. at 301.
78. Id.
80. See MERGER CONTROL, supra note 33, at 232-33.
81. Id. at 540.
82. Id.
of that position to be abusive, even if the strengthening were due to structural change.

In addition to the cases interpreting Article 86, a number of cases clarified the Commission's authority over competition and enhanced the Commission's potential power to police mergers through Article 86. One such decision, Wilhelm & Ors v. Bundeskartellamt, had preceded Continental Can by several years. In Wilhelm & Ors the Court held that national competition authorities may apply domestic competition law paralleling Community decisions only if "the application of national law" does not "prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement [EC law]." The Commission has interpreted Wilhelm to mean that a Community decision to prohibit an action as in violation of Article 86 overrides national approval, while a determination by the Commission that an action does not infringe the Treaty (a "negative clearance") does not necessarily preclude national prohibition. This interpretation has not been tested. Furthermore, some question remains as to what occurs when the Commission grants an exemption under Treaty of Rome Article 85(3).

In BRT v. SABAM, decided one year after Continental Can, the Court ruled that Articles 85 and 86 are "direct effect" articles, meaning that they "create direct rights in respect of . . . individuals." As a result, individuals may sue for enforcement of Articles 85 and 86 in national courts, subject to some important caveats. Domestic courts hearing such cases are obligated to treat the two articles and the European Court of Justice's jurisprudence under them as incorporated into domestic law. The ramifications of this decision would become an important issue in the drafting and application of any EC merger regulation. After BRT, the drafters of a new regulation would have to consider the degree to which that regulation would preempt Articles 85 and 86 of the Treaty. Barring a Treaty amendment, adoption of a merger regulation alone might not eliminate the Commission's and national authorities' obligation to apply Articles 85 and 86 to merger cases because of the direct effect of those articles.

Cumulatively, these ECJ decisions yielded three important results: 1) they recognized the application of Article 86 to merger control; 2) they established

---

85. Id. at 17.
86. See VAN BAEL & BELLIS, supra note 83, at 83-86 (citing Tenth Report on Competition Policy); see also MERGER CONTROL, supra note 33, at 240-44. Wilhelm & Ors involved a Bundeskartellamt decision to fine a group of dye companies for price fixing under German domestic law while the Commission was still investigating the case under EC law. The narrow holding therefore applies only when domestic merger authorities act on cases still pending before the Commission and the opinion's broader ramifications remain speculative.
87. VAN BAEL & BELLIS, supra note 83, at 85.
88. Id.
90. Id. at 62.
91. See infra notes 302-390 and accompanying text.
and then lowered thresholds for proving dominance and abuse; and 3) they established the supremacy of EC competition law over domestic competition law, and gave EC law "direct effect." By early 1980, then, the Court had handed the Commission what could be a "powerful and flexible weapon for dealing with mergers." 92

Although the Commission has had this weapon in hand, the Commission has hardly wielded it. Continental Can represented the only time the Commission has gone to Court to try to apply Article 86 to a merger. In addition, the Commission has used the threat of an Article 86 action to win changes to mergers only a handful of times, notably with the BSN/Gervais/Danone and Amicon Corp/Fortia mergers. 93 Meanwhile, scores of mammoth corporate marriages have gone unchecked by EC authorities, including Alfa Romeo/Fiat, Brown-Boveri/Asea, AVEBE/KSH, Pont-à-Mousson/Stanton, Eagle Star/Allianz, and the gargantuan MBB/Daimler Benz merger. 94

Several aspects of Article 86 help explain this result. First, Article 86 seems to ban only misuse of a prior dominant position, not the creation of a new dominant position as occurs in most mergers. 95 This interpretation suggests that the Commission cannot use Article 86 to control most mergers. Some scholars have suggested that the Commission should have argued before the Court that the term "dominance" should include collective dominance because this broader definition would cover mergers involving firms that dominated a market "jointly" along with others prior to the merger. 96 However, the Commission never advanced this argument before the Court.

Second, Article 86 seems to give the Commission no power to intervene until a merger is completed. This interpretation forces the Commission to undertake the unenviable task of taking apart complex corporate combinations after their completion.

In one case, however, Camera Care v. Commission, the Court ruled that Article 3(1) of Regulation 17 implicitly gives the Commission authority to take "interim protective measures" in cases of alleged violations of Community competition policy. 97 Observers have suggested that this might allow the Commission to issue injunctions or order temporary halts to merger plans not yet enacted. 98 However, under Camera Care the Court explicitly allowed the Commission only to preempt a merger in order to avoid "serious and irreparable damages to the party seeking [preemption]." 99 In addition, the Commission's decisions would be subject to Court review.

92. MERGER CONTROL, supra note 33, at 234.
93. Id. at 235.
94. See id. at 234, 254-57; see also DOWNES, supra note 34, at 12-13. On the MBB/Daimler Benz deal see infra notes 163-175 and accompanying text.
95. DOWNES, supra note 34, at 3; see also GOYDER, supra note 18, at 322.
96. MERGER CONTROL, supra note 33, at 286; see also VAN BAEL & BELLIS, supra note 83, at 67. A number of Commission decisions, though no Court case yet, have tested this notion.
98. DOWNES, supra note 34, at 9.
The Commission has never tested the possibility of preempting a merger. Instead, it has referred parties seeking injunctions to national courts, recommending that they turn to Brussels only as a last resort. Rather than exercise or seek to expand its Court-made powers and risk exacerbating member states' resistance to entrusting the Community with merger control, the Commission made a political decision to expand its powers through the Council.

IV. POLITICAL LOGJAM: THE DECADE-LONG DEBATE OVER A MERGER TEXT

In July 1973 the Commission placed a proposed merger regulation before the Council. The draft would have granted the Commission authority to review any merger involving at least one EC firm, in which the entities involved had a world-wide turnover of over 200 million ECUs and more than twenty-five percent market-share (measured by turnover) for a particular good or service in at least one EC member state. For proposed mergers creating entities with over 1 billion ECUs in turnover, the participants would be required to give prior notification to the Commission. The draft text defined any merger that would enable firms to "acquire or enhance the power to hinder effective competition" and to affect trade between member states to be incompatible with the Common Market. The Commission would use classic competition criteria, such as product substitution, supply and demand, and financial power of the firms involved, to evaluate the effects of the proposed merger. The draft attempted to resolve the pure-competition-versus-industrial-policy debate by allowing for the exemption of concentrations in EC economic sectors designated for "priority treatment." Pure competition would serve as the baseline criterion for evaluating mergers, but the Commission would carve out certain sectors for exemption on industrial policy grounds. Ultimate authority to rule both on mergers and on the sectors to receive "priority treatment" would rest with the Commission, although the Commission would ask the Council for an opinion from an Advisory Committee of experts appointed by the member states.

Although the European Parliament endorsed the draft, the proposed regulation failed the test before the member states in Council. Several themes
emerge from the Council debates over the draft. Member states could not agree on the fundamental normative issues, the economic and social principles on which EC merger control should be based. Key among these was whether the regulation should provide for evaluation of mergers solely for their effects on competition or instead reflect some industrial policy goals like those in the Treaty of Rome’s Article 85(3). If the latter were the case, the Commission would be able to approve anti-competitive mergers on the basis of other factors. These factors might include a merger’s social or regional effects, its contribution to technological development, or even its consonance with activist industrial policy goals set by the Community’s member states. Given the latitude inherent in these factors, the member states’ positions on the pure-competition-versus-industrial-policy debate differed significantly.

France, the United Kingdom, Italy, and Ireland sought clear rules that would permit anti-competitive mergers if they accomplished industrial policy, social, or regional goals. Italy in particular feared that without such rules, the EC would meddle in its mammoth public holding companies and hinder expansion by Italian firms that the Italian government perceived to be too small relative to other European entities. Italy, therefore, expressed reservations about the entire merger control project.

Germany and Denmark, on the other hand, wanted mergers to be evaluated solely for their effect on competition. The Benelux states and Ireland joined Germany and Denmark in resisting any Italian-sought exemptions for public enterprises. However, the Benelux states petitioned for exemptions for banking concerns, which are important in their economies.

In addition to demonstrating member states’ disagreement over the goals of competition policy, the debate over the 1973 draft shows that several member states did not want to cede any authority to the Commission. Germany, Denmark, and the Benelux group wanted final authority over mergers to rest with the Commission, while France, Italy, and the United Kingdom wanted that authority to remain in the Council. As a result of these disagreements, the Council rejected the draft regulation.

It took the Commission eight years to present a new draft regulation. In the 1981 draft, the Commission tried to ensure Council approval by limiting the area to be brought under Commission authority. The new draft

---

109. MERGER CONTROL, supra note 33, at 282; see also Rapport d'Information, Delegation du Senat (France) Pour la C.E., June 1-Dec. 31, 1982, at 87.
110. MERGER CONTROL, supra note 33, at 281; see also Rapport d'Information, supra note 109, at 86.
111. MERGER CONTROL, supra note 33, at 281.
112. Rapport d'Information, supra note 109, at 87.
113. MERGER CONTROL, supra note 33, at 282; Rapport d'Information, supra note 109, at 87. See also Comité Economique et Social, Avis du Comité économique et social sur la "Modification de la proposition de règlement du Conseil sur le contrôle de la concentration" Doc. No. COM (81) 773 (1982) (final).
114. Modification de la proposition de règlement du Conseil sur le contrôle de la concentration, COM(81) 773 (final).
changed the 1973 draft's "dominant position" threshold from 200 million ECUs to 500 million ECUs. The 1981 draft would presume that mergers involving entities with a combined market share of less than twenty percent based on turnover in the Community as a whole were permissible. By contrast, the 1973 draft had contained an exemption, rather than a presumption, for mergers that resulted in firms that did not have a combined turnover in any product in any member state of more than twenty-five percent of the market. The 1981 draft exempted mergers involving the acquisition of firms with under thirty million ECUs turnover. As in the 1973 draft, in the 1981 draft the Commission again proposed that final authority over mergers rest with it, not the Council.

The new proposal, like its predecessor, failed before the Council because of divisions among the member states. The Commission submitted a third proposal three years later, in February 1984. Once again it raised the turnover threshold over which the Commission could prohibit mergers, this time to 750 million ECUs — three times the original 1973 proposal. Below that threshold, mergers would be subject to regulation only if they produced companies with a fifty percent market share (by turnover) in a given product in a substantial part of the Community. The Commission pledged to consult the Council frequently, but insisted on retaining final authority. Like its predecessors, the third proposal died in the Council.

**V. DOMESTIC MERGER CONTROL: NATIONAL INTEREST ÜBER ALLES**

Histories of the negotiations on the three proposed merger regulations and the final talks leading to the 1989 Regulation report that the talks faltered in part because the Council members could not resolve the industrial-policy-versus-pure-competition debate. These works present France and Italy as leading the industrial policy camp, and Great Britain (under Thatcher) and Germany as championing a regime of pure competition, resisting a transfer of authority if the Commission would not be as dedicated to pure competition as their own domestic authorities.

This Part of the present article argues that the Council debate was not as sharply defined as this description suggests. Merger control was, and to a large extent remains, a highly politicized aspect of government economic

---

116. Id. at 1.
117. Id. at 3.
118. Commission des Communautes Europeennes, Proposition Modifiée de Règlement du Conseil sur le contrôle de la concentration, Doc. No. COM(84) 59 (final); see also Concurrence: Avis de la Commission CEE sur les Fusions et les Joint Ventures, EUROPOLITIQUE, Sept. 20, 1986, at 4, 5.
120. See, e.g., Concurrence: Sir Leon Brittan Met des Gants pour Évoquer Avec les Ministres CEE le Contrôle des Concentrations, EUROPOLITIQUE, May 10, 1989, at 4, 5; see also infra note 324 and accompanying text.
121. See infra notes 290-294 and 296-297 and accompanying text.
intervention for all of the member states, including Great Britain and Germany. In each state, final discretion remains with a minister who can overrule competition authorities.\(^\text{122}\)

During the 1980s, domestic regimes moved away from state-oriented (dirigiste) and discretionary industrial intervention towards deregulatory economics and more purely competitive policies.\(^\text{123}\) The European Community's relaunch, including the adoption of a merger control regulation in 1989, therefore, can be attributed partly to a convergence of economic policies among the twelve EC states.\(^\text{124}\) However, while the apparent end of this convergence was consensus, below the surface the consensus on norms to guide a Community-wide regime is less clear. France's shift to deregulatory economics, for instance, was less than met the eye.\(^\text{125}\) In addition to broad economic motives, broad strategic concerns, chiefly the desire to rein in an increasingly strong and, by decade's end, newly-united Germany, encouraged France to support Community relaunch in the mid-to-late 1980s. Yet on specific economic measures, such as merger control, the French were (and remain) deeply reluctant to consign powers to Brussels.\(^\text{126}\)

Germany also took a position during the merger regulation talks that appeared to be consistent with its rhetorical commitment to pure competition and its domestic economic ideology. Yet the need to keep European markets open to German exports also provided strong inducement to cooperate on a common merger control regime,\(^\text{127}\) as did the need to persuade its neighbors that a united Germany would be a good Community player. Moreover, there were (and still are) also industrial policy tendencies running beneath the surface in Germany.\(^\text{128}\) The German government had to balance its interest in preserving competition against its interest in pacifying domestic industries complaining of disadvantage vis-à-vis industries in countries with stronger industrial policy regimes.

Great Britain, despite Prime Minister Thatcher's free market stance, also allowed government discretion in merger control and was unwilling to transfer that prerogative to Brussels.\(^\text{129}\) Moreover, Britain might have hoped that a common regime in Brussels would lower barriers to acquisitions across the Continent, and thus help London banking interests as well as British firms that felt that they were unprotected targets for foreign raiders at home, while


\(^\text{123. Institutional Change, supra note 15, at 21-23.}\)

\(^\text{124. Wayne Sandholtz & John Zysman, 1992: Recasting the European Bargain, 42 World Pol. 95, 111-12 (1990).}\)

\(^\text{125. See infra notes 179-206 and accompanying text.}\)

\(^\text{126. This desire to have the European Community control policy but at the same time to avoid surrendering French authority to the Community had been present in De Gaulle's plans for "political union" in the early 1960s. He sought to have the Council retain full control over all policy but require that actions be taken by unanimous vote, thereby effectively giving France a veto.}\)

\(^\text{127. Institutional Change, supra note 15, at 28.}\)

\(^\text{128. See infra notes 137-176 and accompanying text.}\)

\(^\text{129. See infra notes 297-301 and accompanying text.}\)
remaining stymied in their attempts to acquire continental companies.\textsuperscript{130} When it became apparent that Community control would not accomplish that goal, however, Britain withheld its support for a Community-based merger policy. Great Britain became the last member state to lift its basic reservations to the idea of EC merger control.

The sections that follow sketch some of the real interests behind the positions taken by the major players in EC merger regulation. The discussion complicates the idea that EC member states supported Community merger control because of consensus on neutral economic policy norms or ideology. Rather, while the 1989 Regulation embodied an apparent Community-level consensus on goals, merger control is in fact deeply entangled with national politics.

\textbf{A. Germany}

Germany’s economic policy and industrial structure have their roots in the concept of a "social market economy."\textsuperscript{131} The initial proponents of this concept, including the first Federal Minister of Economics, Ludwig Erhard, believed that the dispersal of political powers under a loose form of federalism along with a high degree of industrial deconcentration would allow both market-based competition and individual freedoms to flourish.\textsuperscript{132} This theory reflected the Germans' popular distrust of industrial concentration, a distrust that developed as a reaction to the close association among industrialists, cartels, and Nazism.\textsuperscript{133}

Despite the "social market economic" theory, however, Germany’s post-war political and economic rebirth has relied considerably, some might say excessively, on collusion among major industries, banks, and regional political bodies with mutual interests and holdings in one another.\textsuperscript{134} The result of these two tendencies is perpetual tension between economic decentralization and concentration.

Germany portrays itself as having the strictest prohibitions against industrial concentration in Europe, and observers of the European Community consider German antitrust authorities to be Europe’s strongest.\textsuperscript{135} The Bundeskartellamt, the federal authority responsible for antitrust control, is an island of authority independent of political coercion, devoted to a "competition \textit{über alles}" approach.\textsuperscript{136} Notwithstanding the Bundeskartellamt’s reputation

\textsuperscript{130} See infra notes 297-298 and accompanying text. This motive meshes with broader British reasons for supporting the EC relaunch: the desire to win deregulation across the continent to aid British banking interests and to favor Britain’s bid to become an off-shore manufacturing site for non-EC firms.

\textsuperscript{131} See generally ERIC OWEN SMITH, THE WEST GERMAN ECONOMY 19-23 (1983).

\textsuperscript{132} Id. at 22-24.

\textsuperscript{133} DUMEZ \\& JEUNEMAITRE, supra note 122, at 161.

\textsuperscript{134} SMITH, supra note 131, at 22-24.

\textsuperscript{135} DUMEZ \\& JEUNEMAITRE, supra note 122, at 123; see also Andrew Fisher, Merger Policy Talks Please German Cartel-busters, FIN. TIMES, Jan. 9, 1989, at 3.

\textsuperscript{136} Defending the Small Man, FIN. TIMES, Oct. 16, 1978, at Supplement. While the Bundeskartellamt is statutorily a division of the Ministry of Economics, the Bundeskartellamt functions
for independence and integrity, however, Germans and non-Germans alike perpetually debate whether Germany's closely-knit banks and industries wield too much influence in German society.\textsuperscript{137} Kenneth Dyson found the German government-banking-industry network to be far more concentrated than its counterpart in any other Western state, and described the network as the "structural bedrock" of Germany's economy.\textsuperscript{138} German banks do have a substantial hold over the nation's industry. A 1977 German Monopolies Commission inquiry found that twenty-two of twenty-seven major German banks had holdings in the top 100 German firms that amounted to more than twenty-five percent of the stock of those firms. The Commission concluded that the banks "substantially influence a good portion of the overall decision-making of the large firms."\textsuperscript{139} A 1986 Monopolies Commission report found that Deutsche Bank held seats on supervisory boards for thirty-nine of the 100 largest companies. Among the same group of 100 companies, Dresdner Bank held twenty-two seats, and Commerzbank fifteen.\textsuperscript{140} Moreover, within the financial industry itself, by 1988 the ten largest German financial institutions held 37.3 percent of all financial institution assets.\textsuperscript{141}

Industrial firms have experienced a similar trend toward concentration since World War II. In 1954, the top 100 firms yielded one-third of German gross domestic product; by 1960, the top fifty firms did so.\textsuperscript{142} A 1976 Monopolies Commission study found that the top 100 firms held shares in 4,300 smaller firms and participated in one half of all mergers, having absorbed 436 companies outright.\textsuperscript{143} The number of mergers and the degree of large firm participation in smaller firms reached new heights throughout most of the decade.

German merger control policy reveals the tension between pure competition and the facilitation of industrial self-organization. Thus, though the 1958

\begin{footnotesize}
\begin{itemize}
\item independently. It has independent powers to initiate investigations, subpoena witnesses, search and seize documents, and render decisions. Ten sections staffed entirely by civil servants cover various sectors of the German economy. These sections render judgements on their own; the President of the agency plays only a supervisory role. \textit{See} DUMEZ \& JEUNEMAITRE, \textit{supra} note 122, at 121-25, 132-36; SMITH, \textit{supra} note 131, at 273. The Monopoly Commission, an advisory body composed of five experts appointed by the West German President, assists the \textit{Bundeskartellamt} in efforts to maintain a pro-competitive ethos. The Commission publishes biennial reports on the state of West German competition, can publish additional reports on issues or industrial developments of its choosing, and must deliver an opinion on any mergers which the \textit{Bundeskartellamt} wishes to forbid and which the Minister of the Economy would like to consider for exemption. DUMEZ \& JEUNEMAITRE, \textit{supra} note 122, at 125-31.
\end{itemize}
\end{footnotesize}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{138} Kenneth Dyson, \textit{Economic Policy, in DEVELOPMENTS IN WEST GERMAN POLITICS} 148, 166 (Gordon Smith et al. eds., 1989).
\item \textsuperscript{139} MONOPOLIES COMMISSION, \textit{THE FIRST BIENNIAL REPORT BY THE MONOPOLIES COMMISSION} (1977).
\item \textsuperscript{140} Esser, \textit{supra} note 137, at 25.
\item \textsuperscript{141} MONOPOLIES COMMISSION, \textit{EIGHTH BIENNIAL REPORT BY THE MONOPOLIES COMMISSION} (1988-89).
\item \textsuperscript{142} SMITH, \textit{supra} note 131, at 287.
\end{itemize}
\end{footnotesize}
law creating the Bundeskartellamt\textsuperscript{144} stressed the need to preserve competition, the German Parliament deliberately omitted merger control from the Bundeskartellamt's purview.\textsuperscript{145} In addition, the 1958 law was weak in other respects. For example, it prohibited cartels, while allowing retail price maintenance.\textsuperscript{146} Crucially, it allowed the Economics Ministry to override the Bundeskartellamt for reasons of "overall economic advantages" or "overriding public interest."\textsuperscript{147} A 1965 modification of the law changed little.\textsuperscript{148} In 1973, however, a Socialist-Free Democrat coalition sponsored reforms that established the Monopolies Commission to publish opinions on concentrations.\textsuperscript{149} Most importantly, the amendments gave the Bundeskartellamt control over any acquisition of a firm with gross revenue greater than fifty million DM. More recent reforms have lowered that threshold.\textsuperscript{150} These 1973 reforms espoused strict competition criteria and required the Bundeskartellamt to prohibit any concentration that would "result in or strengthen a position of market domination" unless the "participating enterprises prove that the merger will result in improvements of competitive conditions."\textsuperscript{151} In addition, the reforms made pre-merger notification obligatory in some cases.\textsuperscript{152} Nonetheless, the reforms left final control over mergers with the Minister of Economics, who remained free to override a Bundeskartellamt prohibition for reasons of "economic advantages" or "overriding public interest."\textsuperscript{153}

Of the 582 mergers that came before the Bundeskartellamt between 1973 and 1975, the agency banned only four.\textsuperscript{154} These feeble antitrust efforts were too few and too late to prevent the sharp increase in concentration from the 1950s through the 1970s.\textsuperscript{155} Even the controversial Free Democrat party chief, Otto von Lambsdorff, a perpetual public critic of Germany's powerful bank-industrial complex, approved several major mergers over Bundeskartellamt opposition while serving as Economics Minister in the mid-1970s.\textsuperscript{156} By the late 1970s, the Bundeskartellamt and the Social Democrats

\textsuperscript{144} Gesetz gegen Wettbewerbsbeschränkungen, Neufassung Sept. 24, 1980, BGBl. I 1761, § 24, paras. 3-5 [hereinafter GWB].
\textsuperscript{145} MERGER CONTROL, supra note 33, at 51; see also SMITH, supra note 131, at 271-72. At least one scholar has suggested that the Parliament did this specifically to allow the three largest banks, broken up by Allied forces following the war, to regroup. DUMEZ & JEUNEMAITRE, supra note 122, at 226-27.
\textsuperscript{146} SMITH, supra note 131, at 271-72.
\textsuperscript{147} GWB, supra note 144, at § 24, paras. 3-5.
\textsuperscript{148} SMITH, supra note 131, at 272.
\textsuperscript{149} Id.
\textsuperscript{150} Colin Jones, The GKN-Sachs Case: A Bouquet of Barbed-Wire for Euro-mergers, Fin. Times, Feb. 23, 1978, at 22; see also SMITH, supra note 131, at 278.
\textsuperscript{151} MERGER CONTROL, supra note 33, at 69.
\textsuperscript{152} Id.
\textsuperscript{153} GWB, supra note 147, § 24, paras. 3-5.
\textsuperscript{154} A.H. Herrmann, Mergers: Why Governments Are Thinking Again, Fin. Times, Nov. 29, 1977 at 18.
\textsuperscript{155} See supra notes 139-143 and accompanying text.
\textsuperscript{156} SMITH, supra note 131, at 279; see also West German Oil: Forever Different, Economist, Mar. 10, 1979, at 84.
called for strict antitrust enforcement against industrial "elephants," while small and mid-size firms requested protection against takeovers. As a result, Parliament lowered the thresholds for Bundeskartellamt control again in 1980.

This change did not stop debate on concentration law, however, particularly when the mid-1980s merger boom brought concentration law again to the fore. Several deals, such as Daimler-Benz's takeover of AEG, sparked debate within Germany, and highlighted the role of the "big three" banks. Other deals revealed that banks were helping clients evade the twenty-five percent share limit over which the Bundeskartellamt may investigate planned concentrations. For example, the Big Three often pooled their shares with corporations, which enabled the firms to buy 24.95 percent of target companies, thereby avoiding Bundeskartellamt scrutiny while retaining control thanks to bank acquiescence.

Throughout the 1980s, the Liberal Party called publicly for new limits on the banks. Ironically, however, Liberal Minister of Economics Martin Bangemann became the mastermind of the most controversial merger in post-war Germany — Daimler-Benz's acquisition of MBB. MBB owned a 37.9% stake in Airbus, the European airline consortium that receives significant German government subsidies. When Bangemann proposed the merger in late 1987, he claimed that hooking MBB up with a cash rich firm such as Daimler would help wean Airbus from its dependence on the public fisc. Overall, he painted the deal in economically liberal colors, claiming it marked an advance towards the principle of privatization in Germany. However, the Bundeskartellamt and other critics never believed Bangemann's liberal explanations. They thought the deal proved Bangemann and elements in his ministry, with backing from big banks and industry, favored an activist industrial policy that formed national giants. In the opinion of one German official, "Bangemann was never a close friend of competition."

In the spring of 1987 Deutschebank's chief, Alfred Herrhausen, used the bank's twenty-eight percent share in Daimler to force out Daimler's president

158. Herrmann, supra note 154.
159. MERGER CONTROL, supra note 33, at 5-12.
161. Peter Bruce, The Political Pressures Are Starting To Tell; West Germany's Banks, FIN. TIMES, Jan. 8, 1987, at 22.
162. This was how MBB took over Krauss-Maffei. Id.
165. Interview with a senior official of the Bundeskartellamt responsible European competition policy, in Berlin (March 25, 1990) [hereinafter Bundeskartellamt Interview].
166. Id.
and to install Edzard Reuter. This move generated speculation that Reuter and Herrhausen wanted to pursue Bangemann's suggestion to bid for MBB. However, Reuter and Herrhausen first demanded government guarantees against the possibility that Airbus might suffer losses from exchange-rate fluctuations in the 1990s.

At the same time, critics expressed dismay about the "elephant marriage." The Defense Ministry opposed the merger on the grounds that the new firm would receive forty percent of Germany's defense spending. I.G.-Metall, Germany's influential metal workers union, also objected; it was struggling with Daimler over work schedules and pay and feared any strengthening of Daimler's industrial clout. Social Democrats lambasted the proposal because it would strengthen the "military-industrial complex." Wolfgang Kartte, the Bundeskartellamt chief, called the proposed merger "idiotic." In the end, however, Helmut Haussmann, the Economics Minister who replaced Bangemann, approved the merger in the autumn of 1989, only weeks before Germany announced its support for the new EC merger regulation. Before the deal received final approval, Bangemann went to Brussels in the winter of 1988-89 to become EC Commissioner of Industry. His appointment, particularly in light of his support for the Daimler-MBB merger, caused deep fears in the Bundeskartellamt that he would bring industrial policy leanings to the European Community.

This domestic debate reveals an ambivalence between competition and industrial policy that contrasts sharply with Germany's unequivocal profession of preference for an EC-wide antitrust control based exclusively on economic criteria. The incident clouds the externally-directed rhetoric of an ideological commitment to strict competition policy. It suggests that Germany's position on European Community merger control was the result of significant considerations of realpolitik, rather than ideological proselytization. To begin with, Germany made no tremendous sacrifice in advocating merger control for the European Community. Since the 1989 thresholds for Commission control were set twenty-five times higher than under the 1973 proposal, and since the 1989 proposal excluded companies with a large proportion of their gross revenue in a single state, the 1989 Regulation would barely touch Germany. Thus, the practical effect of the proposal would be slight, especially compared

171. West Germany: Trade Union Objects To Reorganisation of MBB, FRANKFURTER ALLGEMEINE ZEITUNG, July 12, 1988, at P14.
175. Bundeskartellamt Interview, supra note 165.
to the major political gains advocacy offered. Domestically, support for EC merger control enabled the brokers of the MBB-Daimler deal to reassure the Bundeskartellamt that they had not lost sight of the virtue of competition. Internationally, support for the Regulation enabled Germany to demonstrate to its neighbors a willingness to be "bound" by the European Community. Germany hoped to win British, French, and American trust in the face of impending re-unification by supporting a panoply of EC agreements. Supporting the merger control agreement helped Germany to advance this goal.

B. France

Through much of its history, France has pursued a dirigiste economic policy, in which the state plays an active role in the management of industry and finance. Governments on both the right and the left have used the Ministry of Economics and Finance to pursue macroeconomic goals by orchestrating nationalizations, state control of raw materials, price controls, state control of bond and stock issues, and government-channelled finance. A lack of formalized administrative procedures or criteria for merger controls marked the French interventionist tradition. Until the late 1970s, no clear criteria existed for evaluating proposed mergers. The French stock market, underdeveloped in comparison with those of other industrialized nations, was barely a factor in industrial activity until the securities reforms of the mid-1980s.

The French National Assembly first passed legislation on merger control on July 19, 1977. The act declared that mergers were not harmful a priori; only mergers that might hinder "sufficient" competition without bringing countervailing economic advantages were subject to the statute. The law stated that the Minister of Economics and Finance could call on the Commission de la Concurrence (competition commission) to advise him on a merger's effects on competition or other economic issues. The Minister had wide latitude to ignore or modify the Commission's report. From 1977

176. See infra note 366 and accompanying text.
177. See infra note 291 and accompanying text.
178. See Pohl Throws a Gauntlet, FIN. TIMES, Jan. 23, 1990, at 16 (Germany as husband with "new mistresses in the east" must "prove his love" for his "jealous wife," France, by giving her EC conferences on economic and monetary union); Peter Ludlow, Europe's Institutions, Europe's Politics, in THE SHAPE OF THE NEW EUROPE 59, 74 (Gregory F. Treverton ed., 1992). Of course, Germany's "encasement" within the European Community may, in the long run, enhance Germany's influence as much as it limits it. See, e.g., Institutional Change, supra note 15, at 30-33.
182. Law No. 77-806, 1977 J.O. 3833 (July 20, 1977) (Fr.).
183. MERGER CONTROL, supra note 33, at 33.
184. Law No. 77-806, supra note 182, art. 8.
to 1986, the Commission reviewed only eight mergers, and the Minister prohibited only one — Ashland Chemical France’s effort to take over Cabot. In that instance the Conseil d’État, the supreme administrative court to which all administrative decisions may be appealed, overturned the Commission’s prohibition.

During the first years of François Mitterrand’s presidency in the early 1980s, the Socialist government embarked on a restructuring of the French economy. The government lowered the minimum wage, hired 100,000 new workers, and cut the work week to thirty-nine hours. Most controversially, the government nationalized forty-nine firms, and expanded aid to French industry from thirty-five billion francs in 1981 to eighty-six billion francs by 1985. By 1986 the state managed twenty-four percent of France’s employees and controlled thirty-two percent of France’s sales, thirty percent of its exports, and sixty percent of its annual investment in industry and energy.

President Mitterrand’s policies, coupled with a poor global economic climate, cast France into economic difficulties. In 1983, the government compromised its earlier ideology by encouraging market-led reform and a scaling-back of industrial policy. At the same time, the government chose to devalue the franc and remain within the European Monetary System, while renewing support for political and economic integration within the European Community.

When Jacques Chirac’s center-right coalition gained control of the national assembly in 1986 it advocated industrial restructuring and a major privatization program. Prime Minister Chirac pledged to make France a nation of shareholders and property owners. However, Chirac’s proposed reforms did not get very far. The state sold only eight big corporations, three smaller banks, and three small firms. Investment groups, each composed of approximately ten investors closely connected to French industrial and

185. Merger Control, supra note 33, at 33.
186. Id. at 42.
188. Hall, The State, supra note 179, at 176-77.
190. Id. at 56, 68-71.
191. The decision to remain within the European Monetary System was critical. See Hall, The State, supra note 179, at 177. Mitterrand’s decision to devalue the franc and keep France in the System, rather than to pull France back into currency controls and autarky, marked a “turning point not only in French domestic politics but also in French policy toward the EC.” Andrew Moravcsik, Negotiating the Single European Act, in The New European Community 41, 51 (Robert Keohane et al. eds., 1991).

633
political leaders, bought one-quarter of the shares in those businesses.\(^{194}\) Moreover, despite its professed liberalism, the new government imposed new restrictions on foreign purchases of French companies.\(^{195}\) The merger control law of 1986\(^{196}\) renamed the *Commission de la concurrence* the *Conseil de la concurrence*, but little else changed. Discretion over mergers remained in the hands of the Minister of Economics and Finance.\(^{197}\) In fact, the *Conseil* lost the *Commission*'s authority to initiate investigations into mergers *sua sponte*.\(^{198}\)

The Socialists regained control of the National Assembly in 1988. President Mitterrand halted the privatization process, but pledged not to reverse the Chirac government's privatizations.\(^{199}\) The theme of "neither nor," neither privatization nor nationalization, characterized the early part of Francois Mitterrand's second seven-year term.\(^{200}\) Socialist Prime Minister Rocard trimmed French government spending and edged away from state-directed industrial policy, but shifted activist industrial policy towards regional management and aid to smaller and mid-sized companies.\(^{201}\) Meanwhile, many groups continued to exert pressure for activist central government industrial and economic policies. The Chirac and Rocard governments had "by no means . . . completely dismantled" the *dirigiste* apparatus.\(^{202}\)

As in the case of Germany, France's domestic policy drama confuses rather than clarifies France's stated economic and political policy within the European Community. The step back from state interventionism was significant,\(^{203}\) but complex and ambivalent beneath the surface. France's wavering between *dirigisme* and privatization paralleled its ambivalence toward the European Community. President Mitterrand had been the first major European leader to turn decisively towards Euro-patriotism, calling in 1984 for a European relaunch based on a single market and progress towards federalism.\(^{204}\) When the time came to discuss specific actions such as merger control, however, support among some political and private interest groups within France withered. They remained reluctant to grant Brussels authority and to relinquish national discretion.\(^{205}\) Moreover, despite France's apparent adoption of free-market ideology, it did not fully abandon the tradition of activist industrial policy; it sought instead to retain an opening for industrial policy in any EC merger control text.\(^{206}\)

---

195. Id.
198. MERGER CONTROL, *supra* note 33, at 41.
199. Hall,*The State,* *supra* note 179, at 183.
201. Hall,*The State,* *supra* note 179, at 180-83.
202. Id. at 186.
203. See generally *Id.* at 177-87.
204. Moravesik, *supra* note 204, at 51.
205. See infra notes 303-312 and accompanying text.
206. Id.
C. Great Britain

While post-war British governments have been largely wary of industrial policy, the British have made some efforts to manage industry. The immediate post-war Labor government nationalized some key sectors, such as electricity, gas, mail services, telecommunications, and water, and gave Britain one of Europe's largest public enterprise sectors. Between 1971 and 1979, the government spent £9.29 billion on private sector subsidies, an amount that rivals France and Germany in terms of percentage of gross domestic product. In addition, since under Great Britain's competition policy authorities examine whether mergers are broadly in the "public interest," rather than merely anti-competitive, governments can use merger control to protect or further social or industrial policy goals when necessary.

Britain's competition bureaucracy has grown over time. A Labor government created Britain's Monopolies and Restrictive Practices Commission in 1948. Its members come from management, unions, the professions, and a staff of civil servants. The 1965 Monopolies and Mergers Act added to the system when it authorized a Board of Trade (predecessor of the Department of Trade and Industry) to refer mergers to the Commission for consideration. In 1973 Parliament passed the 1973 Fair Trading Act which placed all acquisitions worth more than £5 million and all mergers yielding a combined market share of twenty-five percent or more under government control. The Act also established the Office of Fair Trading (OFT) to screen all mergers, and to advise the Secretary of State for Trade and Industry whether to refer particular mergers to the Commission (renamed the Monopolies and Mergers Commission). The Secretary of State has the authority to accept or reject the Commission's recommendations.

One major problem with these merger policies was that ministerial decisions were inconsistent. The relative importance that the Monopolies and Mergers Commission and Secretary of State attached to competitiveness, productivity, financing, social goals, employment, and regional factors (all elements that they could consider) varied from case to case. Political pressure contributed to the fluctuation, as did behind-the-scenes lobbying by industry,

207. See Peter Hall, Governing the Economy 65-68 (1986).
209. HALL, GOVERNING THE ECONOMY, supra note 207, at 52.
213. Fair Trading Act, supra note 210, at 177-78.
214. Id. at 128-30, 131-32, 187.
215. Id. at 184.
labor, and other special interest groups. In 1977 the Labor government's Secretary of Prices and Consumer Protection reviewed Britain's merger-control process but changed little. Industrialists and trade unions opposed reform.

When the Tories came to power in 1979, they inherited a highly discretionary merger control procedure that prior governments had used as a tool for accomplishing regional and social goals. Gordon Borrie, the new Director General of Fair Trading, began to examine mergers more closely for anti-competitive effects. In 1981 he recommended that a record number of mergers be sent to the Commission for evaluation. He took a particularly dim view of conglomerate mergers between two firms that did not compete in the same markets, even though the fusions did not increase market share, if the merger gave the new conglomerate greater resources with which to fight off potential market entrants.

Despite the new vigilance, however, the criteria by which the Mergers and Monopolies Commission and the Secretary of State for Trade and Industry evaluated pending mergers and acquisitions remained unclear. The Secretary of State for Trade and Industry overruled Commission and OTF recommendations for several mergers, including Woolworth's bid for Dodge City, the battle for Sotheby's, and a number of mergers involving foreign firms.

The Secretary justified seemingly inconsistent decisions by citing the need to protect national firms, or to accomplish regional development and employment goals. In December 1981, the Commission rejected Sunny Rowland's bid for the House of Fraser, which owned Harrod's Department Store, not on competition grounds, but because the Commission did not consider Rowland's management team competent.

The Thatcher government responded to criticism of the Commission by trying to better define the Commission's purpose. Parliament also raised the threshold above which the government might intervene in mergers to £15 million in 1980 and £30 million in 1984, reflecting a Thatcherite belief that industries should have leeway to restructure. In July 1984, Norman Tebbit, the new Secretary of State for Trade and Industry, pledged that

---

216. A Discipline for Merger Control, FIN. TIMES, May 18, 1982, at 18 ("the more noise opponents of a merger make, the more likely it is that it will be referred to the Commission").
217. Herrmann, supra note 154, at 18.
220. Id.; see also Hazel Duffy, Why Britain Blocked Enserch, FIN. TIMES, Sept. 11, 1981, at 24.
221. For example, the Hong Kong and Shanghai Banking Corporation's bid for the Royal Bank of Scotland Group Limited was referred by the Secretary to the MMC for consideration because of anxiety over a takeover of a Scottish institution by a foreign entity. MERGER CONTROL, supra note 33, at 195.
222. For example, the MMC recommended prohibiting Charter Consolidated PLC's proposed merger with Anderson Strathclyde PLC to protect employment in certain depressed regions where the merged firms might lay-off workers. Id. at 207.
224. Id.; see also, UK Government Relaxes Policy on Screenings of Large Mergers, ANTITRUST & TRADE REG. REP., July 26, 1984, at 18.
competition would henceforth be the Commission’s main criterion for evaluating mergers.225

Tebbit at least partially fulfilled his pledge. For example, in contrast to its handling of Sunny Rowland’s bid four years earlier, the Office of the Secretary of State for Trade and Industry did not refer foreign firm Al-Fayed’s bid for Fraser to the Commission, despite the suitor’s newness to British industrial circles.226 In addition, the Commission evaluated GEC’s major 1986 bid for Plessey solely on competitiveness grounds.227

On the other hand, by late 1985 giants like Distillers, Allied-Lyons, and Plessey were all under hostile-takeover siege,228 and neither targets nor suitors could look to the merger control regime for a clear statement of their respective rights. When Elders of Austria sought to take over Allied-Lyons for £1.2 billion in 1985, the Secretary of State for Trade and Industry referred the bid to the Commission, not because of fears of anti-competitive effects, but because of doubts about the deal’s financing.229 By this time Britain, like much of the rest of the world, was experiencing a merger boom. In the first nine months of 1986 firms spent £6.1 billion to buy other firms, compared to £5.5 billion in all of 1985.230 This activity reaffirmed interest in using criteria other than competition to evaluate mergers so as to further particular players’ goals.

As the boom continued, the Labor Party began to rail against the financial feeding frenzy. Its platform pledged to place new restrictions on mergers, and to shift the burden of proving that mergers would provide industrial and economic benefits to would-be acquirors.231 Despite this opposition, the Thatcher government held fast to its system.232 When the Swiss firm Nestlé made a bid for Rowntree in the spring of 1988, even prominent Tories (most notably Michael Heseltine) called for the deal to be vetoed.233 Disregarding this criticism from within its ranks, the government declared that the bid posed no danger to competition and that any attempt to block it might draw foreign government retaliation against British bidders for foreign firms.234

225. MERGER CONTROL, supra note 33, at 195.
227. The electronics division of the Department of Trade and Industry backed the bid on the grounds that the merger would create a British electronics giant capable of competing worldwide. Mergers and Competitiveness, FIN. TIMES, Aug. 7, 1986, available in LEXIS, Nexis Library, Financial Times File. However, the Department of Defense opposed the takeover because it feared that the merger would give the new firm monopoly power in certain defense fields. Id. The Monopoly Commission recommended that the government bar the takeover, a decision reached solely by examining the merger’s competitive effects. Id.
230. Batchelor, Establishing, supra note 228.
234. Nikki Tait, Lord Young Defends Merger Policy, FIN. TIMES, Oct. 28, 1988, at 26; David
Nevertheless, the government could not ignore mounting anxieties over foreign takeovers of British firms, especially since they were coupled with complaints about foreign barriers to British acquisitions abroad. In 1988-89, Rowntree, Jaguar, Intercontinental Hotels, Pearl Group, Metal Box, and DRG were among the British firms acquired by overseas owners. British industry demanded that the government pressure continental states to "level the playing field" and eliminate their barriers to acquisitions or erect such barriers in Great Britain. British barriers might discriminate against countries deemed protectionist or protect British firms from all foreign predators. Domestic merger regulation could establish either type of barrier. Banking interests, eager to continue their role in the takeover activity, disagreed with industry's position and lobbied against any such measures.

Thus, even the Thatcher government did not fully purge social, regional, and industrial policy considerations from British merger control. British negotiators were among the very last to accept the basic concept of any EC control over mergers. Publicly, they attributed their resistance to a concern that Brussels would place too much weight on industrial policy and too little weight on competition. As in Germany and France, however, in Britain too there was a deep appreciation for the diversity of domestic interests that would be affected by merger control decisions. Throughout the EC negotiations, this appreciation counseled the British to resist a common regime.

VI. REBIRTH OF THE MERGER TALKS

As the foregoing discussion illustrates, disagreement among the three major EC powers on economic principles does not fully explain why talks on an EC merger regulation remained stalled throughout the 1980s. Both the British government after Margaret Thatcher's election and the French government after the policy turnabout of 1983 embraced more market-oriented approaches. However, merger talks remained mired because the key governments were entangled in domestic political webs that sometimes pulled


235. Pledges by the EC Commission to "level the playing field" by attempting to remove barriers to takeovers in continental states may have been one of a number of quid pro quos offered to Great Britain in 1989 to win British support for the EC merger regulation. See infra notes 299-310 and accompanying text.

236. Hazel Duffy, Banham to Call for CBI Action on Hostile Foreign Takeovers, FIN. TIMES, Feb. 22, 1989, at 8. The argument that governments were using domestic merger control to block foreign acquisition of domestic firms played a role in domestic debates on the value of EC-wide merger controls. See infra notes 298-302 and accompanying text.

237. In the late 1980s, four-fifths of all contested EC stock market takeovers took place in the U.K. As a result, British banks profited considerably. David Buchan & William Dawkins, EC States Set for Advance on Vetting of Cross-Border Mergers, FIN. TIMES, Sept. 18, 1989, at 6.


them in directions inconsistent with their purported ideologies. Rhetoric notwithstanding, each member government grasped the importance of merger control as a tool for intervening in their domestic economies. Circumstance had not yet created a coincidence of national self-interest that would facilitate consigning merger control to Brussels. In the negotiations on merger control this divergence of national interests took the form of highly complex and politicized strategic calculations by each member state.240

The merger regulation the member states finally adopted in autumn 1989 was a legal hodgepodge.241 Negotiators set disagreement aside to come up with a document at all costs. The merger control regulation that resulted was a jumble of symbolic gestures pushed through in the late 1980s to give credence to the EC’s relaunch, particularly in the shadow of Germany’s imminent reunification. The document constrained as much as it empowered the Commission.

A. European Community Relaunch

In 1985 Lord Cockfield, the Vice President of the European Commission, presented a White Paper calling for the elimination of barriers to trade within the Community. That White Paper formed the basis for the Single European Act, which the member states signed in February 1986.242 The publicly proclaimed premise of the single market project was economically liberal: only a large common market would enable EC firms to compete efficiently with American and Japanese companies.

Against this backdrop, Commissioner Peter Sutherland, responsible for Director Generalate IV (DG IV), the section of the Commission responsible for competition, renewed the call for tough Community control over mergers and greater power for the Commission. Dubbed the "little Sheriff" by EC Commission President Jacques Delors, Sutherland used a combination of carrots and sticks alternatively to lure and bully the Council. Sutherland stated that he approved of mergers needed to "improve the competitive structure" of Europe, and claimed that he had no intention of overruling member states’ policies.243 However, he also threatened that the Commission would turn to case law to develop merger control if the Council did not adopt a regulation.244

240. On the 1992 project as a "hierarchy of bargains," see id. at 100.
241. See infra notes 343-390 and accompanying text.
242. For a discussion of the range of political considerations that led the chief EC member states to sign the Single European Act and support the EC revival that followed, see Moravcsik, supra note 204, at 50-53.
243. Peter D. Sutherland, Address to the Merger in the EEC Colloquium (Mar. 11, 1988) [hereinafter Sutherland Address].
244. Concurrence: La Commission Demande que le Conseil "Marche Interieur" S’engage a Adopter Avant la fin de 1988 la Directive sur le Controle des Concentrations, EUROPE, Nov. 28, 1987, at 9, 9; see also MERGER CONTROL, supra note 33, at 285-87 (citing four Sutherland speeches).
Sutherland received a dramatic boost for his campaign in November 1987. In an entirely unexpected move, the European Court of Justice strongly implied in **BAT & RJ Reynolds Industries v. Commission** that Article 85 — moribund as to mergers since the 1966 memorandum — might be revived as a source of Commission authority.

The activities that preceded this case were as follows. A South African company, the Rembrandt Group Ltd (Rembrandt), owned all of Rothmans Tobacco (Holding) Ltd (RTH). RTH in turn had a controlling interest in Rothmans International (RI). In April 1981 the American cigarette concern Philip Morris, Inc. purchased fifty percent of Rembrandt's equity in RTH. Philip Morris and Rembrandt then agreed that they would jointly manage RI. Philip Morris and Rembrandt feared that the transaction might be an illegal agreement restricting competition under Article 85; therefore, they notified the Commission of their deal according to the provisions of Regulation 17, perhaps hoping to qualify for an exemption under Article 85(3), the Treaty clause permitting agreements that yield distributional, economic, or technical benefits. A rival American company, RJ Reynolds (joined later by the British American Tobacco Company (BAT)) complained to the Commission about the agreement, claiming that it would allow Philip Morris to influence RI's market behavior and thereby distort competition in violation of Article 85.

The Commission agreed with RJ Reynolds' complaint and threatened Rembrandt and Philip Morris with an injunction under Article 85. Rembrandt and Philip Morris then began negotiations with the Commission. In 1984, they agreed that Philip Morris would give up its fifty percent stake in RTH and would take only a 30.8 percent direct stake in RI, limiting its voting rights to 24.9 percent of voting equity. This, they argued, would leave Rembrandt in essential control of RI through RTH, which would control 43.6 percent of RI's voting rights. Other terms designed to ensure that Philip Morris would not influence RI also were written into the pact, including clauses to keep Philip Morris completely out of RI management and to ensure that Philip Morris would receive no inside information about RI's behavior. The companies also settled on terms giving Rembrandt and Philip Morris certain rights of first refusal if either were to dispose of its shares. These additional terms included future adjustments in voting rights.

The Commission concluded that the final package did not violate Article 85(1) and approved it. The two competing tobacco companies, RJ Reynolds and BAT, protested. They claimed that the share disposal and voting rights terms of the accord would allow Philip Morris to scare off potential RI suitors and give Philip Morris powerful leverage over RI. RJ Reynolds and BAT also

---

247. See supra notes 40-47 and accompanying text.
argued that Philip Morris might seek to control RI in the future. Unable to convince the Commission to reverse its ruling, RJ Reynolds and BAT applied to the Court to have the Commission's decision overturned.

As in Continental Can, the Court ruled in favor of the corporation whose transaction was being challenged, and rejected RJ Reynolds and BAT's complaint of a violation of Article 85(1). The Court ruled that the plaintiffs had failed to prove that the Commission had made any "manifest error" in its consideration of the competitive effects of the transactions. As in Continental Can the Court used this case as a platform from which to test potentially explosive dicta. Unlike the situation in Continental Can, however, the Commission's brief in BAT did not ask for a departure from accepted interpretation of Treaty powers.

The Court could have evaluated the Treaty status of the agreement between the firms narrowly, as an acquisition of a minority shareholding, without extending its analysis to the issue of concentrations. The Court also could have categorized the transaction as one that gave one company control of another, thus clearly enabling it to extend its analysis to concentrations. However, the Court's opinion was written ambiguously enough to support either a restrictive or an expansive reading of Article 85. Those who believe that the Court found a heretofore unrecognized, broad scope for Article 85 observe that the Court included amongst agreements "prohibited by Article 85" instances "where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or de facto control of the commercial conduct of the other company . . . ." The Court also prohibited any agreement [that] gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan.

Later in its opinion, the Court stressed that in "[oligopolistic and stagnant] markets any attempted takeover . . . is liable to result in restriction of competition" and therefore is likely to violate Article 85. The next paragraph specifically affirmed the Commission's authority to consider whether "an agreement which at first sight provides only for a passive investment in a competitor is not in fact intended to result in a takeover" in determining whether a passive investor has violated Article 85.

By stressing a test of "legal or de facto control" and signalling an understanding of the Commission's authority to consider whether potential takeovers infringe Article 85, the Court came extremely close to declaring that

---

248. 1987 E.C.R. at 4509-44.
249. See MERGER CONTROL, supra note 33, at 274; see also Bos, supra note 24, at 75.
250. Bos, supra note 24, at 70 n.3 (listing authorities who interpret ruling expansively).
252. Id.
253. Id. at 578.
254. Id.
Article 85 covers mergers and acquisitions. Since this expansive reading of Article 85 was not necessary to decide the case, the dicta may have been the Court's way of testing the political waters, as it had done in Continental Can. That the Court's pronouncements on Article 85 were not clear further suggests this possibility. In particular, the Court's vagueness suggests uncertainty as to how institutional and political actors would receive the Court's interpretation. Thus the Court included escape clauses in the opinion to "allow future limitation" in case expansive readings of the decision proved "unworkable." The Court also laced its opinion with passages that could be read as narrowing its interpretation of the applicability of Article 85. The Court characterized the issue before it as

whether and in what circumstances the acquisition of a minority shareholding in a competing company may constitute an infringement of articles 85 and 86 of the Treaty. Since the acquisition of shares in Rothmans International was the subject-matter of agreements entered into by companies which have remained independent after the entry into force of the agreements, the issue must be examined first of all from the point of view of article 85.

This passage suggests that one should apply the holding only to acquisitions of minority shareholdings; Article 85 applies, the Court said, only because the agreements at issue were "entered into by companies which have remained independent." If one of the parties to the agreement were to lose its independence — in other words, if a true merger or acquisition were to occur — Article 85 might not apply. Finally, the mention of "competing companies" suggests that even if mergers were brought under Article 85, the holding might not reach vertical and conglomerate mergers.

The BAT ruling spawned strong legal debate. Some analysts declared that it "radically revised" the application of Article 85 to mergers. Others dismissed it as "far less revolutionary than some may pretend," citing the limiting language.

In any case, the decision offered Peter Sutherland a powerful stick with which to expand the Commission's authority over mergers. Soon after the judgment, he threatened to exercise Commission authority to win changes to a number of proposed concentrations. In early 1988, British Airways and British Caledonian agreed to Sutherland's demand that they change the terms


256. Downes, supra note 34, at 21.

257. 1987 E.C.R. at 4575.

258. Id.

259. Bos, supra note 24, at 77-78; see also Downes, supra note 34, at 21-22.

260. Downes, supra note 34, at 21-22.

261. Id. at 14; see also Bos, supra note 24, at 70 n.3 (citing articles in debate over case).

262. Van Bael & Bellis, supra note 83, at 303.

of their merger, even though British merger authorities had approved the 
deal. That year the Commission also prevented BC&C, a holding company 
formed by a British consortium of three beverage producers, from taking 
over Irish Distillers Group (IDG) after IDG complained that the holding 
company had been formed specifically to prevent more competitive bids.

The BAT ruling, coupled with these Commission victories, fueled industry's 
requests for clarification of the Commission's and member states' 
jurisdiction and the substantive standards each would apply to future merger 
control.

C. Negotiations Resume

In spring 1988, Commissioner Sutherland presented yet another draft 
merger control regulation for Council consideration. The 1988 draft 
would ban any concentration that created or reinforced a dominant position. 
The draft defined "concentration" as a transaction whereby a person 
or an undertaking acquires control of other undertakings, and defined 
"control" as "rights or contracts which . . . make it possible to determine how 
an undertaking shall operate." Under this definition of control the 
Commission might consider transactions such as those covered by the German 
law barring an attempt to acquire a share of twenty-five percent or more in 
a target firm, or the French law barring an attempt to acquire a share of 33.3 
percent or more in a target. However, the Regulation would cover only 
mergers in which the aggregate worldwide turnover of all the undertakings 
concerned exceeded one billion ECUs — a threshold five times higher 
than in the original 1973 draft. In addition, the acquired firm would have to 
have a turnover of at least 50 million ECUs. If all the undertakings 
effecting the concentration achieved more than three-quarters of aggregate 
community-wide turnover in a single state, the concentration would be subject 
to the merger authorities of that state exclusively. Finally, if the new firm 
controlled a share of twenty percent or less of the relevant EC market, the

264. David Buchan & Michael Donne, BA Agrees to Concessions on Merger with BCal Over 
European Routes, FIN TIMES, Mar. 10, 1988, at 1.
18, 1988, at 19.
266. William Dawkins, Competition Lawyers Strike A Bonanza in Brussels: The European Market, 
267. Sutherland Address, supra note 213, at 4; Amended Proposal for a Council Regulation on the 
Control of Concentrations Between Undertakings, COMMON MARKET LAW REPORTS ANTITRUST 
268. 1988 Proposal, supra note 267, arts. 2(2), 8(2).
269. Id. art. 3(1) & (3).
270. Internal French Ministry of Finance reports on the negotiations made available to the author 
by a former senior official in the Ministry who participated in the negotiations [hereinafter French 
Ministry of Finance Reports].
272. Id. art. 1(3)(b).
273. Id. art. 1(3)(c).
merger would be per se permissible.\textsuperscript{274} The Commission pledged that no more than two months would elapse from notification to the commencement of proceedings,\textsuperscript{275} and four months from the commencement of proceedings to a final decision.\textsuperscript{276}

The draft regulation contained important industrial policy caveats. The Commission would consider factors other than mere dominance, including "improving the production and distribution, ... promoting technical or economic progress, or ... improving the competitive structure within the Common Market."\textsuperscript{277} However, these criteria would be considered only insofar as the merger did not block competition. The Commission also promised that it would take account of "international competition ... as well as the interests of the consumers."\textsuperscript{278} Finally, the Commission promised "close and constant co-operation" with the authorities of the member states.\textsuperscript{279} Nevertheless, final authority over concentrations would lie with the Commission.\textsuperscript{280}

Commissioner Sutherland estimated that had the Regulation been in force in 1986 and 1987, the Commission would have had the power to examine about 150 mergers during those years; the member states estimated that figure as closer to 200.\textsuperscript{281} German and French firms would have been most affected.\textsuperscript{282} According to one French estimate, eighty-five mergers involving two or more firms all from the same state might have come under Brussels' purview in 1987 had the proposed regulation been in force in that year, because portions of the firms' sales occurred in other Community states.\textsuperscript{283}

In response to such state discomfort Commissioner Sutherland amended the draft regulation further in July 1988, adding that dominance alone would not constitute a per se violation of merger standards. Rather, the Commission would have to prove that the proposed merger would harm the market.\textsuperscript{284}

\begin{footnotes}
\item \textsuperscript{274} Id. art. 2(3).
\item \textsuperscript{275} Id. art. 6(3).
\item \textsuperscript{276} Id. art. 19(1).
\item \textsuperscript{277} Id. art. 2(4).
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Id. art. 18(3).
\item \textsuperscript{280} Id. art. 21 ("Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this regulation."); Une étape décisive vers l'instauration d'un système de contrôle des concentrations au niveau communautaire, COMMUNITY INFORMATION (Comm'n of the Eur. Communities), Mar. 2, 1988; see also William Dawkins, EC Faces Up to Merger Worries As 1992 Beckons, FIN. TIMES, Mar. 4, 1988, at 3; Controle des Fusions, supra note 263.
\item \textsuperscript{281} French Ministry of Finance Reports, supra note 270.
\item \textsuperscript{282} Id.
\item \textsuperscript{283} Id.
\end{footnotes}
D. The Member States React

In each of the three largest member states, contradictory demands from competing domestic interest groups made it impossible for negotiators to come up with a coherent normative vision of what European merger control should be. Moreover, given the strong national interests in this area, the Community’s approach to merger control remained the approach of an international organization, not that of a supranational entity that is capable of making and enforcing broad-based policy determinations in the name of the public interest. The authority the member states relegated to Brussels was as circumscribed as possible. Control over most mergers remained in the hands of the member state governments.

1. Germany

Germany’s 1987 decision to support the principle of regulating cross-border mergers provided a crucial impetus to Commissioner Sutherland’s campaign. Unlike their counterparts in other states, German officials responsible for administering merger control urged that any European text require the Commission to evaluate mergers exclusively on competition grounds and not on industrial policy grounds.

However, German officials differed in their motives for supporting a document dedicated to pure competition. The Bundeskartellamt favored a strict competition text for ideological reasons. Moreover, it did not trust Brussels to enforce a competition policy free of any politicking — particularly after Martin Bangemann, the German minister who had been responsible for the MBB-Daimler Benz merger, became the EC Commissioner of Industrial Affairs. The Bundeskartellamt hoped that a strict text would keep the Commission honest. Bangemann’s former office, the Ministry of Economics, also favored a strict text. However, Bundeskartellamt officials believed that the Ministry’s position stemmed from its association with German industrialists who were complaining of the advantages enjoyed by competitors in member states more lax in their antitrust enforcement. These

285. The following section on member state negotiating positions is based largely on interviews with EC and national officials involved in the talks. These include the Schröter Interview, supra note 101; an interview with a senior official with UNICE (the federation of EC industries), in Brussels (Mar. 19, 1991); an interview with a former senior official in the British Office of Fair Trading during the negotiations, in London (Mar. 20, 1991) [hereinafter Interview with British Official]; the interview with the Bundeskartellamt official, supra note 165; and an interview with a former senior official in the French Ministry of Economics and Finance in charge of competition policy, who participated in the development of the French position, in Paris (Mar. 27, 1991) [hereinafter Interview with French Official].
288. Interview with Bundeskartellamt official, supra note 165.
289. See supra note 163 and accompanying text.
290. See supra note 175 and accompanying text.
industrialists hoped that a European text would either force Bundeskartellamt-like strictures on other European firms or allow German firms to share with their competitors the benefits of more lax regulation.291

The perceived need to pacify German domestic opinion during and following the MBB affair led German negotiators to adopt the Bundeskartellamt's position that competition should be the sole measure by which to evaluate mergers. Under pressure from Wolfgang Kartte, head of the Bundeskartellamt, Germany floated proposals for a two-step process. Under the German proposal, an independent body similar to the Bundeskartellamt would evaluate proposed mergers, and the Commission would then accept or reject that body's recommendation. This procedure would force the Commission either to defend its decisions publicly or to acknowledge the political constraints by which it was bound.292 Nonetheless, German negotiators also urged that ultimate control over mergers remain in the hands of national authorities who would have discretion to veto Commission approval on competition grounds.293 German negotiators favored a text that would allow the Commission to tolerate rather than to authorize mergers; in other words, a text that would permit the Commission to provide negative clearance that would not override national laws.294

Other member states, notably Great Britain, opposed Germany's demand that domestic authorities retain ultimate control over mergers. In particular, they noted that under German law, the Ministry of Economics may overrule the Bundeskartellamt.295 They feared that if domestic authorities retained a veto, the Ministry might permit a merger to further German interests even when the Bundeskartellamt and Commission sought to prohibit the merger on competition grounds.

2. Great Britain

Just as German negotiators looked to the Bundeskartellamt, British negotiators looked to the Office of Fair Trading (OFT) to support pure

291. "The German firms always claimed they were handicapped, complaining about the strong competition system in Germany," the Bundeskartellamt official told me during our interview. "Volkswagen could never buy BMW, but Fiat could buy Alfa Romeo, or French and Italian firms could merge. So German industries wished either to weaken the German position, or strengthen the Commission's." Interview with Bundeskartellamt official, supra note 165.

292. Id.; see also Concurrence: Le Secrétaire d'Etat Allemand Otto Schlecht Plaide Pour un Système CEE à Deux Etapes Pour le Contrôle des Fusions et un Parallélisme Entre Systèmes Européens et Nationaux au cours d'une Etape Intermédiaire, EUROPE, Sept. 5, 1988, at 14; Andrew Fischer, Merger Policy Talks Please German Cartel-Busters, FIN. TIMES, Jan. 9, 1989, at 3.


295. See supra note 153 and accompanying text.
competition in a merger regulation.\textsuperscript{296} Deeply distrustful of what it perceived as Brussels' industrial policy bent, the OFT lobbied hard for national review.\textsuperscript{297} Unlike the German negotiators, however, the British negotiators did not enjoy domestic bureaucratic support for a regime that would allow national authorities to review Commission decisions. Some officials in Britain's Department of Trade and Industry wanted to have the Commission review almost all Community mergers, preempting continental national authorities, in order to facilitate British firms' takeovers of continental firms.\textsuperscript{298} These officials bitterly opposed the OFT-Bundeskartellamt goal of retaining national authority over mergers, particularly because they suspected that the German Ministry of Economics would use its final say over mergers in Germany to advance German industry's aims and to block foreign acquirors.\textsuperscript{299} As a quid pro quo for British support for common merger control, the EC Commission proposed removing barriers to takeovers across the continent.\textsuperscript{300}

Not all officials in Britain's Department of Trade and Industry opposed leaving the final word to national authorities. Some embraced this position because they feared the consequences of foreign public firms buying British private firms. However, these officials did not trust other states' commitments to applying a pure competition standard; therefore, these officials suspected any attempts by Germany, France, or other member states to have their national authorities review Commission decisions.

Despite the general British opposition to national review, the British negotiators proposed a clause that would allow national authorities to take measures to protect "national public interests."\textsuperscript{301} Britain's difficulty in forming a negotiating position therefore manifested the same restraints felt by the other states. In short, there was no way for Great Britain to come up with a regulation that would allow its own government to retain authority and discretion while stripping others governments of theirs.

\textsuperscript{296} Interview with British Official, supra note 285; see also Philip Coggan, Getting Europe Ship-Shape to Compete in World Markets, FIN. TIMES, Feb. 8, 1989, at 232.

\textsuperscript{297} "The moment the full horror of it struck was when it became apparent the Commission was seeking a one-stop shop," said one Office of Fair Trading official. "That meant whatever objections national authorities had, they would be powerless to oppose the Commission." Interview with British Official, supra note 285.

\textsuperscript{298} \textit{Id.} Seventy-three percent of European takeovers (by value) in 1988 were of British companies. Of twenty-six hostile takeovers, twenty-three were in Great Britain, with only one each in France, Italy, and the Netherlands. Lucy Kellaway, \textit{EC Commission Pledges Freer Regime on Corporate Takeovers}, FIN. TIMES, Nov. 24, 1989, at 1.

\textsuperscript{299} Interview with British Official, supra note 285. Bankers joined the group of Ministry officials opposed to national review of Commission decisions. They saw British antitrust policy as one of the few domestic hurdles to mergers, and hoped that transferring powers to Brussels might eliminate that barrier.

\textsuperscript{300} See WOOLCOCK, supra note 286, at 36-37; see also Lucy Kellaway, \textit{Brussels Faces Uphill Struggle to Remove Takeover Barriers}, FIN. TIMES, Nov. 27, 1989, at 17 (noting British government published list of barriers to takeovers, and EC Commission responded with list of proposed antidotes).

\textsuperscript{301} \textit{La Commission Tente D'Amadouer}, supra note 284.
3. France

Through most of the talks, French negotiators supported a loose text that would allow firms to merge for industrial and technological reasons, even if such mergers weakened competition. Several French policy interests recommended maximizing Commission authority: desire to circumvent antitrust authorities in foreign states, regulatory clarity, and the public image of France as a strong supporter of the European Community. However, other French policy interests suggested a more conservative position: protecting French business from aggressive foreign investment and facilitating restructuring by French firms.

These competing interests fostered a domestic French debate over France’s negotiating position that involved the Ministry of Industry, the Ministry of Economics and Finance, and the Ministry of Foreign Affairs (which sought a symbolic victory in France’s push for a strengthened European Community). The fact that each ministry modified its own position mid-course further complicated internal French discussions.\(^{302}\)

Many officials in the Ministry of Economics and Finance did not want Brussels to determine what was best for French industry.\(^{303}\) Thus, when talks on a merger regulation began again in late 1987, the Ministry supported a transfer of power to Brussels qualified by national review, a position similar to that espoused by the German Bundeskartellamt and the British OFT. The Ministry of Industry suspected any EC regulation. It argued that authorizing the Commission to control mergers would impede French firms’ ability to restructure\(^{304}\) and therefore shared the view that national governments should retain a right to review Commission decisions. Industrial leaders also opposed any a priori notification of the Commission, which would offend French traditions of confidentiality. On the other hand, the Ministry of Foreign Affairs argued that it would be harmful for France to be seen as the only power aside from Great Britain that opposed transferring merger control authority to the Commission. The Ministry of Foreign Affairs thus pleaded for all the other ministries to accept giving Brussels competence over mergers.\(^{305}\)

The Socialists’ national electoral success in May-June 1988 altered the positions of the Ministry of Industry and the Ministry of Economics and Finance. The former agency, which had supported a right of national review before the election, decided after the election that any EC regulation should maximize judicial clarity by assigning to the Commission the last word on all decisions.\(^{306}\) By contrast, the Ministry of Economics and Finance lobbied

---

\(^{302}\) French Ministry of Economics and Finance, chronological chart of positions advocated by various French ministries throughout the negotiations (unpublished document, on file with author) [hereinafter Chart].

\(^{303}\) Interview with French Official, supra note 285.

\(^{304}\) Chart, supra note 302.

\(^{305}\) Id.

\(^{306}\) Interview with French Official, supra note 285.
even more strongly for preserving national control, and was prepared to ally with the British and Germans to defend that position.

Several factors explain why the Ministry of Economics and Finance continued to support this position. First, it continued to fear that proposed turnover thresholds would allow the Commission to intervene unnecessarily in local markets even when the effects of a merger would be felt primarily within the region. Second, ministry officials worried that the Commission might make decisions without considering their inflationary effects. Since France had just lifted price controls and was planning to strengthen its prohibitions against cartelization and restraint of trade, this worry was particularly acute.

Third, the Ministry of Economics and Finance believed that national authority over competition was necessary to safeguard against foreign investments and takeovers that might harm important state interests, including the wish to develop domestic industrial giants. An internal Ministry study argued that the potential harm from unrestrained German acquisitions in France would outweigh potential benefits to French companies struggling to overcome perceived antitrust hurdles to acquisitions in Germany. The report asserted that the Bundeskartellamt had only blocked two French acquisitions in Germany, with little sign of discriminatory treatment. It noted that German investment in France overshadowed French investment in Germany by a ratio of three to one and urged that industry's wish for judicial clarity take a back seat to the French public interest and the need to maintain antitrust hurdles to foreign acquirors.

Finally, the Ministry of Economics and Finance argued that any European text would necessarily neglect French concerns about competition from outside the European Community and about the importance of industrial policy. Minister of Economics and Finance Pierre Beregovoy lobbied at one point to have "total economic effect" enshrined in the Regulation as the criterion by which proposed mergers would be evaluated. Yet he balked at the prospect of allowing the Commission to make industrial policy decisions for France. British and German firms were larger than French firms, wrote Beregovoy in one confidential memo to then Minister for European Affairs, Edith Cresson. "French industry is in a period of full restructuring," and restraints must not be placed in its way. Like Great Britain, France faced the paradox that there was no way to bind the others, notably Germany, by an EC regime, without allowing itself to be bound as well.

307. Id.
308. Id.
309. Id.
310. French entities invested F647 million in the Federal Republic of Germany in 1987; Germans invested three times as much in France in the same year. The study and inter-ministry memos sketching arguments regarding the proposed merger regulation were made available by the former French Ministry official. French Ministry of Finance Reports, supra note 270.
311. Id.
312. Id.
313. Id.
4. The Final Negotiations

By late 1988, many national delegations realized that they would not be able to produce a text for a merger regulation that would reconcile disagreements with other member states and competing internal demands. British negotiators acknowledged that they might not get a pure competition text and resigned themselves to the position that enabling British firms to circumvent other states’ merger regulations was less important than safeguarding their own merger regulations. British negotiators acknowledged that they might not get a pure competition text and resigned themselves to the position that enabling British firms to circumvent other states’ merger regulations was less important than safeguarding their own merger regulations. The Germans had to concede that their two-step proposal probably would not be accepted, but still had to satisfy the Bundeskartellamt’s insistence on retention of national authority. The French were unable to develop a unified domestic position.

Unable to achieve consensus, but unwilling to walk away without at least creating the impression that they had achieved something, the national delegates began pushing for extremely high thresholds. They would produce a regulation, but one that would confer jurisdiction on the Commission in only the most extreme cases. The British and Germans sought a 10 billion ECU hurdle, and the French articulated no formal position. Only the smaller states, anxious to have the Commission regulate mergers that they lacked the resources or political muscle to police, sought sharply lower thresholds.

In March 1989 Sir Leon Brittan of Great Britain, who had replaced Sutherland as Commissioner in January, presented still another draft regulation. This time the Commission proposed a jurisdictional threshold of an EC-wide turnover of two billion ECUs, with a temporary threshold of five billion ECUs until 1992. Merged entities that would generate at least two-thirds of their revenue in a single state would be exempt, a reduction from prior drafts’ three-quarters hurdle. In an attempt to reconcile the interests of clarity and simplicity with the interests of national particularism, Sir Leon pledged that the Commission would not use Articles 85 or 86 after a merger is completed and would restrict its evaluations to the criteria and thresholds laid out in any new regulation. The Commission hoped that this pledge would win over industries hoping for regulatory clarity and member states worried about the Commission’s accretion of power under Articles 85 and 86. The Commission estimated that the new proposals, if adopted, would limit

---

314. Interview with British Official, supra note 285.
315. See supra note 292 and accompanying text.
316. Concile March Interieur, supra note 293, at 5.
319. Id.
320. Spokesman’s Service, European Commission, Press Release No. IP (89) 200 (Mar. 31, 1989). Whether this pledge is legally binding or permitted under the Treaty of Rome is debatable. See infra notes 375-388 and accompanying text.
Commission competence to thirty or forty transactions per year, as opposed to the estimated 150 transactions under previous versions.  

Despite the new draft and Brittan's pledge, the member states remained divided. The smaller countries, including the Netherlands, Belgium, Ireland, and Spain, continued their call for lower jurisdictional thresholds, at a maximum of two billion ECU. France now lobbied for a "reciprocity" clause that would ban acquisitions from non-EC states that used their own merger laws against EC-based buyers. In addition, French and Italian negotiators continued to argue that industrial policy should be a factor in decisions to allow or to prohibit particular mergers. Finally, the poorer states now demanded that the Regulation protect "cohesion" (the need for economic development) in the southern tier of the European Community.

In the autumn of 1989, the German Ministry of Economics approved the MBB-Daimler merger over the objections of the Bundeskartellamt, and despite the resignation of the director of the Monopolies Commission. The decision provoked a domestic uproar, and the need to appease the Bundeskartellamt led German negotiators to demand openly that their national authorities be given a final right to block Commission-approved mergers.

Finally, Britain, swayed by OFT arguments, asserted that it would allow a single EC regime to supplant diverse national merger regimes only if the Regulation incorporated pure competition criteria. Their commitment to a single regime notwithstanding, the British called for a "public interest" clause similar to their own rules allowing national authorities to intervene to block mergers in the "public interest" — an appeal to hardline Tory worries about ceding any national sovereignty to Brussels.

5. Finalé

France took the EC Presidency in the second half of 1989 and hoped
to rush through a large menu of EC achievements. Agreement on a merger control regulation, even a flawed one, was one of France's goals.\textsuperscript{332} Impeding German unification provided strong fuel for the EC relaunch.\textsuperscript{333} As a result, France's negotiators softened their demands on industrial policy criteria over the objections of the French Ministry of Economics and Finance.

Despite French encouragement, the member states still disagreed sharply on key issues both within their delegations and among delegations. The German delegation wavered between the goal of a single clear rule administered from Brussels, a position consistent with projecting a cooperative image of a newly-united Germany, and the pressure of its own Bundeskartellamt to keep the last word on mergers in the hands of national authorities. The internal German compromise resulted in the "German Clause,"\textsuperscript{334} a provision in the final regulation that left the last word to domestic authorities, but did so in a way that appeased both the Bundeskartellamt and states worried about Germany's discretionary use of merger control.\textsuperscript{335}

Great Britain qualified its support for a single clear rule with insistence on a "public interest derogation." Faced with an impasse on this point, the delegates drafted a vague provision which came to be known as the "British Clause"\textsuperscript{336} as a compromise.

Weighing domestic pressure to defend the primacy of "industrial policy" against its interest in overcoming German and British opposition, France too had to settle for a vague list of evaluation criteria in the final text, which could be read as allowing industrial policy and other non-economic criteria to enter into the evaluation of a merger's legality.\textsuperscript{337} Similarly, France had to compromise its call for reciprocity of treatment between the European Community and more protectionist non-EC states in order to keep Britain's support.\textsuperscript{338} The final text mentions the need to seek "non-discriminatory" treatment for EC firms in third countries\textsuperscript{339} but is, like the other compromises, ambiguous.

\begin{footnotesize} 
\begin{itemize}
\item importance of the prestige and pressures of the presidency in EC diplomacy, see Wolfgang Wessels, \textit{The EC Council, in The New European Community: Decisionmaking and Institutional Change} 133, 147 (Robert O. Keohane & Stanley Hoffmann eds., 1991).
\itemFrench Coax, supra note 119, at 2.
\itemInterview with French official, supra note 285.
\item1989 Regulation, \textit{supra} note 3, art. 9; see also infra note 370 and accompanying text.
\itemSee infra note 370 and accompanying text. Leon Brittan declared that the Commission would "so control the circumstances" of the Regulation's application that if the Commission made its decisions wisely, Germany would never have to intervene under the German Clause. David Buchan & Richard Lambert, \textit{EC 'Making Progress' on Merger Control Powers, Fin. Times}, Sept. 20, 1989, available in LEXIS, Omni Library, Financial Times file.
\item1989 Regulation, \textit{supra} note 3, art. 21(3).
\itemSee infra notes 346-354 and accompanying text.
\itemBritain hoped to become an offshore manufacturing plant and investment banking center for non-EC firms hoping to enter the Community, and thus fought French demands for retaliatory "reciprocity." The same British-French debate was played out later in the auto-quotas negotiations. See, e.g., Ethan Schwartz, \textit{EC States Open Up To Japan; Protectionist Spirit Weakens In Car Talks, Wash. Post}, Nov. 4, 1990, at H1.
\item1989 Regulation, \textit{supra} note 3, pmbl., art. 24.
\end{itemize}
\end{footnotesize}
Finally, the poorer southern states received "soft" assurances that their development needs would be included in the merger control calculus.\footnote{340} In theory, the goal of the new merger regulation was to bind all member states equally. However, each delegation sought to tailor the Regulation to leave its own interests unconstrained, while ensuring that others would be strictly bound. No text could surmount this tension. Therefore, the text that resulted was stunted on arrival. The threshold for Commission jurisdiction was raised to five billion ECUs,\footnote{341} a full twenty-five times higher than the original 1973 proposal. This threshold will give the Commission authority over only a fraction of transcontinental mergers. To appease smaller states' interest in Commission intervention at lower thresholds, a "Dutch Clause" allows member states to appeal to the Commission even when the combined EC revenue of the acquiror and target firms is less than five billion ECUs.\footnote{342} As these compromises indicate, the member states had managed to project the appearance of unity despite tenacious commitment to self-interested policy positions.

VII. REGULATION 89/4064: SUBSTANTIVE AND JURISDICTIONAL ASPECTS\footnote{343}

The Council adopted the final merger control text, Regulation 4064/89, on December 21, 1989. Sir Leon Brittan lauded the text, declaring that the "Community as a whole will have, for the first time, a single framework within which takeovers and mergers of a community dimension can be dealt with, recognizing the importance of maintaining fair competition throughout the single market."\footnote{344}

On close inspection, however, two sets of considerations temper Brittan's optimism. First, although the substantive criteria for evaluating mergers are more clearly based on pure competition considerations than in earlier drafts of the Regulation,\footnote{345} the tension between industrial policy and pure competition continues to exist within the EC.\footnote{346} Whether the meaning or "importance of maintaining fair competition" has been agreed upon by all, as Brittan asserted, is far from clear.

\footnote{340. Id. pmbl.}
\footnote{341. Id. art. 1.}
\footnote{342. Id. art. 21.}
\footnote{343. For provision by provision analyses of the Regulation, see Bos, supra note 24; Downes, supra note 34; Gerondeau, supra note 245; Hawk, supra note 41; Pappalardo, supra note 37. Bos et al. analyze the Regulation to determine the extent to which it perpetuates what they perceive as the "double standard" in EC law, whereby concentrations are treated more favorably than collusion. They conclude that the Regulation does perpetuate this bias. Bos, supra note 24, at 403-04.}
\footnote{344. Lucy Kellaway, EC Ministers Hand Brussels the Power to Vet Large Mergers, FIN. TIMES, Dec. 22, 1989, at 2.}
\footnote{345. Bos, supra note 24, at 23.}
\footnote{346. On the continuation of this debate in EC politics and within the Commission, see David Gardner & Andrew Hill, Delors Reshuffles the European Commission Pack, FIN. TIMES, Dec. 23, 1992, available in LEXIS, Nexis Library, Financial Times File.}
More importantly, as the above discussion illustrates, the industrial-policy-versus-pure-competition debate is itself a rhetorical mask for more basic divisions hinged on calculations of national self-interest. In this context, the most important question to be asked about the Regulation is how far it goes towards establishing a clear, unitary system for controlling mergers in the European Community. Unfortunately the response is, not very far. The Regulation sets high hurdles for Commission jurisdiction and fails to clarify the regulatory landscape which is now comprised of the Regulation itself, Articles 85 and 86 of the Treaty of Rome, and national competition law.

A. Substantive Evaluation of Mergers: The Industrial-Policy-Versus-Pure-Competition Debate

Article 2 of the Regulation sets out the substantive criteria for evaluating a concentration's compatibility with the common market. Paragraph 2 states that "[a] concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market." 347 Paragraph 3 declares with similar clarity that "[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market." 348

On a first reading, these instructions appear to enshrine "effective competition" as the sole and absolute criterion by which the Commission must appraise mergers. 349 As such, they mark a substantial victory for those states that advocated a pure competition regime during the negotiations. 350 However, closer inspection reveals ambiguity in the text, particularly regarding how the absolute imperatives in paragraphs 2 and 3 of Article 2 relate to Article 2, paragraph 1. Paragraph 1 instructs the Commission, in determining whether concentrations are compatible with the common market, to consider

the need to maintain and develop effective competition within the common market in view of,

among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community . . . the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and

347. 1989 Regulation, supra note 3, art. 2(2).
348. Id. art. 2(3).
349. Downes, supra note 34, at 84. On the question of the extent to which Community case law and Commission practice clarify the concept of "effective competition" compare Bos, supra note 24, at 206-213 (sound body of Court case law exists under Article 86 establishing well-understood meaning of effective competition), with Pappalardo, supra note 37, at 23-24 (noting several conflicting interpretations).
350. See Bos, supra note 24, at 203 (competition analysis remains at heart of competition control, except in "borderline cases"); Stephen Woolcock, et al., Britain, Germany and 1992 at 19 (1991) ("the Germans and British prevailed").
economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.\textsuperscript{351}

This last portion of paragraph 1 echoes the industrial policy goals in Treaty of Rome Article 85(3) that provide grounds for exempting anti-competitive actions. Moreover, the preamble to the Regulation, to which civil law courts as well as the European Court of Justice might turn for interpretive assistance,\textsuperscript{352} instructs the Commission to appraise concentrations in light of the "fundamental objectives referred to in Article 2 of the Treaty [of Rome], including that of strengthening the Community’s economic and social cohesion, referred to in Article 130a."\textsuperscript{353} It is unclear how these industrial policy and social criteria will interact with the absolute stress on competition in Article 2 paragraphs 2 and 3, and the long list of economic criteria listed for consideration in paragraph 1.\textsuperscript{354}

B. Regulatory Clarity: A "One-Stop Shop" for Merger Control?

Another important question is the extent to which the Regulation consolidates authority over industrial concentration in the Commission.\textsuperscript{355} Again, the response is, not much. The Community is still far from achieving a single, clear regime to replace the twelve national regimes currently in place. According to one analysis, "[a]fter September 21 1990 [the date the Regulation went into effect] there will not be one-stop merger control. Indeed, it is going to get worse."\textsuperscript{356} Significantly, if the ECJ’s holding in \textit{BAT} did point the way to an expansion of Commission jurisdiction over Community mergers, the Regulation fails to acknowledge that empowerment. The fact that the Regulation was unable to achieve a one-stop shop indicates that the member states have not fully accepted the economic rationalization arguments offered to spur the EC relaunch, however much the White Paper, the Cecchini

\begin{footnotesize}
\begin{enumerate}
\item[351.] 1989 Regulation, supra note 3, art. 2(1) (emphasis added).
\item[352.] Goyder, supra note 18, at 36.
\item[353.] 1989 Regulation, supra note 3, pmbl.
\item[354.] Compare Bos, supra note 24, at 17, 22-26, 228-231 and \textit{Van Bael & Bellis}, supra note 83, at 324 and Hawk, supra note 41, at 212 ("Read together, these provisions appear to permit the Commission to consider a wide assortment of competition and noncompetition factors.") with Downes, supra note 34, at 96 ("technical or economic progress are not allowed to operate as an obstacle to competition."); see also Woolcock, supra note 286, at 19. The latter is the view of one former British Office of Fair Trading official who advised on the negotiations. He dismissed the industrial and social policy language of the Regulation as "so much mumbo jumbo" thrown in to give the French a "fig leaf" to take back home. Interview with British Official, supra note 285.
\item[355.] The seventeen Commissioners may, of course, act as proxies for their home governments. See, e.g., Peter Ludlow, \textit{The European Commission, in The New European Community}, supra note 15, at 85, 90 (Commissioners as "national champions"). Commission critics point to the Commission decision regarding Douwe Egberts and Van Nels as a case in which Commissioners followed national interests. Eur. Rep., Nov. 9, 1990, cited in Bos, supra note 24, at 26. In this decision, Dutch Commissioners convinced the Commission to overrule the recommendation of Director Generalate IV — the EC department charged with anti-trust analysis — to veto an acquisition by a Dutch coffee concern. See Robert Rice, \textit{Storm in a Coffee Cup Highlights EC Contest Over Competition}, Fin. Times, Dec. 10, 1990, at 10.
\item[356.] Hawk, supra note 41, at 458.
\end{enumerate}
\end{footnotesize}
report, and the other gospels of 1992 laud them. The member states do not yet conceive of Europe as a single market which can be administered by a unified body in Brussels according to neutral economic principles.

1. Jurisdictional Hurdles Within the Regulation

The hurdles to Community jurisdiction are the Regulation’s most serious problem. They are far too high to effect any but a handful of the mergers and acquisitions that take place in Europe each year. The thresholds represent how little authority the member states were willing to yield to Brussels: unable to balance their own competing domestic concerns and to agree among themselves, the states attempted to take back from the Commission much of what they purported to give it.

To be subject to the Regulation, a concentration must meet two criteria. First, aggregate worldwide revenue of all the undertakings concerned must be more than five billion ECUs. Second, the aggregate Community-wide revenue of each of at least two of the undertakings concerned must be more than 250 million ECUs. Concentrations in which each of the undertakings concerned earns more than two-thirds of its aggregate Community-wide revenue within a single member state are excluded from Community control. It is not clear whether, in the case of concentrations involving more than two firms, the two-thirds proviso applies to all participants or only to those with turnover above 250 million ECU.

As a result of these provisions, important transactions will escape the reach of the Regulation. Mergers topping the five billion ECU hurdle will be mainly conglomerate mergers — mergers linking two firms whose product lines bear little direct relation to one another. The mergers that are potentially most harmful to competition, vertical and horizontal mergers, will often fall beneath the hurdle. In addition, the requirement that each of at least two firms in the proposed merger yield at least 250 million ECUs of revenue within the European Community will exclude several controversial forms of merger. A large foreign firm that does not do much business in the European Community could buy a very large firm without Commission scrutiny. Even large EC firms might be able to buy a number of smaller firms of appreciable size without topping the thresholds. Finally, the exception for mergers in which each of the parties concerned generates more than two-thirds of its revenue in a single state will exclude important deals from the scope of the Regulation. As one Commission official pointed out, "[e]ven giant firms

357. Pappalardo, supra note 37, at 42.
359. 1989 Regulation, supra note 3, art. 1(2)(a).
360. Id. art. 1(2)(b).
361. Id.
362. Dow, supra note 34, at 56.
363. Pappalardo, supra note 37, at 20.
364. Id.
365. Id.
like Siemens have more than two-thirds of their European turnover in one member state.\textsuperscript{366}

One measure of how ineffectual the Regulation's high thresholds are is the expectation that no more than forty to fifty mergers a year will fall under the Regulation's purview.\textsuperscript{367} To put that number in perspective, one should consider that each year the \textit{Bundeskartellamt} examines over one thousand cases.\textsuperscript{368} Perhaps aware of the Regulation's jurisdictional shortcoming, the member states undertook to review the thresholds by December 31, 1993 and to make revisions by qualified majority vote.\textsuperscript{369}

2. \textbf{Reference to a Member State's Authorities — the "German Clause"}

Article 9 contains the first of three derogations from Commission authority put in the Regulation at the insistence of member states — in this case, Germany. Under this provision, a member state may demand that the Commission allow national competition authorities, rather than the Commission, to consider the proposed concentration under the member state's national competition law. The Commission may accept or reject such a demand. The Article allows member states to make such requests if they believe competition may be impeded within a "distinct market" within their territory.\textsuperscript{370} It is intended to allow member states to block mergers that may have anticompetitive effects in their territory that they fear the Commission may permit. As such, this clause was made part of the final text in order to assure German negotiators who, in turn, sought to assure the \textit{Bundeskartellamt}, that any EC-imposed regime would be at least as strict as Germany's.

3. \textbf{Legitimate National Interests — the "British Clause"}

Article 21(3) allows member states' merger authorities to control concentrations under domestic law, rather than under the new Regulation, if necessary to protect "legitimate interests." Legitimate interests include "public security, plurality of the media, and prudential rules" for financial institutions. The list is not exclusive, but the Commission must authorize other rationales.

\textsuperscript{366} Schröter Interview, \textit{supra} note 101.

\textsuperscript{367} Hawk, \textit{supra} note 41, at 224; \textit{see also} Dumez & Jeunemaître, \textit{supra} note 122, at 227 (comparing European Community competition law to guard dog "seemingly awe-inspiring and independent. The political branch [i.e., the Council] will solemnly put it in place, underscoring its independence and autonomy. But [the Council's] very logic . . . leads it immediately to file down [this guard dog's] fangs and to chain it . . . to let it bark but not bite . . . ").

\textsuperscript{368} Schröter Interview, \textit{supra} note 101.

\textsuperscript{369} 1989 Regulation, \textit{supra} note 3, art. 1(3).

\textsuperscript{370} \textit{Id.} art. 9(2). The goal is to protect competition in regions, defined in the Regulation as "geographical reference markets," in which competition in the market for a particular good or service may be weak, even if competition is strong in neighboring regions or in the Community as a whole. Article 9, paragraph 7 lists the factors to consider in deciding whether such a "geographical reference area" exists. These include whether there are unique barriers to product entry in that geographical region, consumer preferences that may impede competition, or sharp differences in market share between that region and neighboring ones. \textit{Id.} art. 9(7).
for national authorities' assertion of jurisdiction. One commentator has noted that "there is considerable uncertainty over which interests may be so protected and over the precise steps open to a Member State." Thus, social, economic, technological, and regional criteria may enter into merger policy through this back door. Moreover, unlike the German Clause which restricts national authorities' actions to measures "strictly necessary" to protect legitimate interests, the British Clause permits any "appropriate measures." Article 21(3) is intended for cases in which the Commission approves a merger but a member state opposes it. Where the Commission rejects a merger of which a member state approves, the Commission has stated its belief that the Commission would prevail, relying on the ECJ's opinion in \textit{Wilhelm \\& Ors.}

4. Continued Application of Articles 85 and 86

Another important question that will confront Brussels is whether Articles 85 and 86 of the Treaty of Rome, as interpreted in \textit{Continental Can} and \textit{BAT \\& RJ Reynolds}, continue to apply to mergers both above and below the thresholds laid out in the new Regulation. The Regulation was adopted under Articles 87\textsuperscript{376} and 235\textsuperscript{377} of the Treaty of Rome.\textsuperscript{378} Therefore, the Regulation was not a Treaty amendment.\textsuperscript{379} Given that the Regulation did not amend the Treaty, it can be argued that despite the declarations in Article 22 of the Regulation,\textsuperscript{380} the Regulation does not change whatever powers and obligations over merger control the Treaty grants to the Commission under Articles 85 and 86.

On the other hand, the Council might argue that the Regulation endows the Community with jurisdiction it never had under \textit{Continental Can} and \textit{BAT \\& RJ Reynolds}. Such an argument would point to the preamble to the new

\begin{footnotes}
\item[371] \textit{Id.} art. 21(3).
\item[372] \textit{Downes, supra} note 34, at 66.
\item[373] \textit{Commission of the European Communities, Nineteenth Report on Competition Policy} \textit{267} (1990).
\item[374] See \textit{supra} note 84 and accompanying text.
\item[375] For a general discussion of the continued application of Articles 85 and 86 of the Treaty of Rome, see Bos, \textit{supra} note 24, at 395-401; \textit{Downes, supra} note 34, at 181-90; Pappalardo, \textit{supra} note 37, at 40-41.
\item[376] Treaty of Rome, \textit{supra} note 17, art. 87. This Article allows the Council to adopt regulations to "give effect to the principles set out in Articles 85 and 86."
\item[377] \textit{Id.} art. 235. This Article, which functions as a sort of "necessary and proper" clause for the Community, allows the Commission to take appropriate measures that are "necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action. . . ." On the use of Article 235 to avoid treaty amendment and the ensuing expansion of EC jurisdiction, see Weiler, \textit{supra} note 71, at 2442-53.
\item[378] 1989 Regulation, \textit{supra} note 3, pmbl.
\item[379] A Treaty amendment would have to have been adopted pursuant to the procedures specified in Article 236 of the Treaty, a provision that was repealed at Maastricht, but that was in force when the Council adopted the merger regulation in 1989.
\item[380] Article 22 of the Regulation states that "[t]his Regulation alone shall apply to concentrations as defined in Article 3." 1989 Regulation, \textit{supra} note 3, art. 22(1).
\end{footnotes}
Regulation, which stresses that it was adopted "principally" under Article 235 of the Treaty of Rome,\textsuperscript{381} the Treaty's analogue to the necessary and proper Clause in the United States Constitution. Any provision adopted pursuant to Article 235 by definition fills a void. The Council therefore could argue that its reference to Treaty Article 235 in the Regulation's preamble reflects its assumption that, Continental Can and BAT & RJ Reynolds notwithstanding, the Community had no jurisdiction over concentrations until 1989. If this assumption is true, the Regulation creates an entirely new substantive law.

However, the foregoing argument relies on a narrow interpretation of both Continental Can and BAT & RJ Reynolds. The Regulation's preamble even acknowledges that "Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not however, sufficient to cover all operations which may prove incompatible with the system of undistorted competition."\textsuperscript{382} Therefore, despite the hypothetical argument that the Council could raise, Articles 85 and 86 continue to apply to mergers and acquisitions. As a result, the Commission might retain authority under Articles 85 and 86, and in fact could remain obligated to apply Articles 85 and 86 to concentrations. States and affected individuals could bring suits under Articles 173 and 175 of the Treaty of Rome to compel the Commission to act under Articles 85 and 86 if the Commission failed to do so.\textsuperscript{383}

Moreover, whether or not the Regulation preempts the Commission's authority under Articles 86 and 85 of the Treaty of Rome, Article 86 and perhaps Article 85 (and their application to mergers under Continental Can and BAT & RJ Reynolds) may remain enforceable at the national level. The European Court of Justice has ruled that Article 86 has direct effect; in other words, Article 86 can be applied by national courts without the passage of any additional implementing regulation by the Council.\textsuperscript{384} Thus, unless courts interpret Regulation Article 22(1) to mean otherwise, national courts remain obligated to apply Article 86, as understood in Continental Can, to all concentrations, regardless of whether or not they fall under the scope of the new Regulation. The continued application of Article 85 is a bit more complex. In Ministere Public v. Lucas Asjes,\textsuperscript{385} the ECJ ruled that national courts — as opposed to national competition authorities — may not apply

\begin{footnotes}
\item[381] Id. pmbl.
\item[382] Id.
\item[383] Article 173 allows the European Court of Justice to review Commission actions. The Council, member states, or natural or legal persons to whom decisions have been addressed may have standing to bring cases to the Court under Article 173. Article 175 allows the Court to review failures to act by the Commission, where it has an obligation to do so. Individuals may have standing under Article 175 as well, under certain circumstances. For potential Commission obligations to continue applying Articles 85 and 86 to all concentrations, despite Article 22(1) of the merger regulation, see DOWNES, supra note 34, at 187.
\item[384] Case 66/86, Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs, 1989 E.C.R. 803, 848; see also DOWNES, supra note 34, at 183.
\end{footnotes}
Article 85 if no EC regulation to implement Article 85 has been adopted.\textsuperscript{86} Since Regulation Article 22(2) terminated the application of Regulation 17, no EC regulation currently implements Treaty Article 85. Therefore, Article 85 no longer has direct effect with regard to concentrations, and individuals may not bring cases under Article 85 in national courts to block concentrations. Even after Lucas Asjes, however, national competition authorities retain their right to act under Article 85, and they may continue to apply that Article to all concentrations, as decided under BAT & RJ Reynolds.\textsuperscript{8}

Of course, another argument can be made to support the proposition that national authorities should no longer apply Articles 85 and 86 to concentrations. The Council adopted the new Regulation partly under Treaty Article 87\textsuperscript{387} which gives the Council the right to "determine the relationship between national law and the provisions . . . adopted pursuant to this Article."\textsuperscript{388} Regulation Article 22(1) therefore also might be interpreted as a provision through which, under Article 87, the Council determined that national courts and authorities should not apply Articles 85 and 86 to concentrations.\textsuperscript{388} Whether the Council will adopt this argument remains to be seen.

5. Application of the Regulation Below the Thresholds — the "Dutch Clause"

Article 22(3)-(6) of the Regulation, the "Dutch Clause," presents the issue of sending proposed mergers from national authorities to the Commission. The clause allows member states — presumably small ones that either do not have a competition authority or that are unwilling to challenge larger member states or multinational corporations on their own — to petition the Commission to exercise its jurisdiction over concentrations below the Regulation’s thresholds. The Commission may act under the provision if the concentration "affects trade between member states."\textsuperscript{389} The Commission and courts have yet to decide whether the Commission’s authority under the Dutch Clause is the authority to apply Articles 85 and 86, or to apply the Regulation itself.

6. Evaluation of the "One-Stop Shop"

In sum, then, the Regulation that the Council passed after so many years of proposals and negotiations has resolved few of the complexities it was intended to clarify. The Community has not achieved "one-stop" merger

\textsuperscript{86} The ECJ reasoned that since Article 85(3) gives alleged violators the right to seek an exemption that can appropriately be granted only by a competition authority, not a court, a court can rule on illegality under Article 85 only if there has been a positive decision of illegality by a competition authority, or if implementing legislation has given the court such power. Otherwise, such a ruling would violate the principle of "legal certainty" — the notion that "vested rights" and "legitimate expectations" may not be removed retroactively. \textit{Id.} at 1426. On "legal certainty," see HARTLEY, \textit{supra} note 52, at 139-45.

\textsuperscript{87} See supra note 376 and accompanying text.

\textsuperscript{88} See DOWNES, \textit{supra} note 34, at 185-86.

\textsuperscript{89} 1989 Regulation, \textit{supra} note 3, art. 22(3).
control. "The most serious problem arising out of the interface of Community law and national law in the field of merger control is that of the potential for conflict between Community measures applied by the Commission and national measures applied by the competition authorities in the individual member states." The member states have neither accepted nor rejected Community authority to administer a common EC policy regarding mergers and acquisitions. Rather, they have postponed the most critical issues yet again.

VIII. CONCLUSION

The effort to draft a unified system to control European mergers ended poorly. Whatever each government's popularly perceived devotion to a specific economic philosophy and its self-proclaimed dedication to a European Community relaunch predicated on open markets and common economic goals, these sentiments were not yet strong enough to overcome the use of merger control as a nationally-based tool of economic intervention. Supranationalism has yet to replace realpolitik.

Obviously, analysis of one relatively small realm of EC policy-making cannot gauge the state of the Community's relaunch as a whole. Nonetheless, antitrust law — as a field in which governments both police and set policy for the market — may be a particularly good realm in which to take the European Community's pulse. Following the failure of more overtly supranational European visions, such as the planned European Defense Community in the 1950s, it was the genius of those EC founders who hoped for a federalist outcome to frame the construction of Europe within the more palatable context of a Common Market. Market rhetoric is palatable because it connotes neutral economic principles while promising economic gain for all. This rhetoric can therefore be used by domestic elites — such as business leaders — who seek formation of a common market for their own advantage, as well as by political leaders who, faced with policy failure at home, must seek international solutions for domestic problems, and then "sell" these painful compromises to domestic constituencies. Mitterrand's discovery of Europe following the failure of his domestic experiment with socialism, and his consequent realization of the need to reform France's economy, can perhaps be seen in such a light.

Markets are not neutral — different market structures dictate different sets of winners and losers. The nation-state, which commands a considerable degree of loyalty, serves to ease the shock over such losses. At this stage in Europe's construction, the European Community does not yet command the popular legitimacy to serve such a purpose. Put bluntly, a Frenchman will

---

390. Downes, supra note 34, at 208.
391. As such, industrial and corporate leaders were the strongest proponents of the "one-stop shop" for merger control.
agree to compromise and sacrifice for a French farmer in a way that he will not for other Europeans.

The unsatisfactory outcome of the merger control debate raises skepticism about European political leaders’ ability to sell supranational solutions for domestic ailments to their peoples at this stage in European history. The inability of institutions such as the Commission and the European Court of Justice to fully advance a supranational solution on merger control and scores of other issues like it raises questions about their abilities to hurry integration along in broader realms, such as social policy, monetary union, and foreign and defense policy. Events of the past two years — the wrangling over Maastricht, the humiliating ouster of France’s socialist government, the inability of Europe to form any common approach to the Balkan problems — have raised doubts about the prospects for great progress towards European union in the near future. The doubts of Euro-skeptics appear to have been confirmed.

Nonetheless, the economic and political forces that call for greater European integration continue to exist. If the 1989 Regulation and the process by which it was adopted are any indication, the next few years for Europe will be a period of intensified bargaining between the member states and a period of muddling through.