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Selected Aspects of European Economic Community Law on Investments and Acquisitions in Europe**

What is familiarly called the 1992 train is well on its way to reaching its final destination on time. All the major pieces of European Community (EC) legislation directly affecting the activity of the financial industry in Europe after January 1, 1993, have by now either been adopted, as in the case of the second banking directive,[1] or are close to adoption, as is the case for the draft investment services directive [2] and the capital adequacy directive.[3]

It is indeed fair to say, as suggested recently by some European Economic Community (EEC) officials, that the Commission of the European Communities (the Commission) is no longer concerned with the preparation of the 1992 legislation, but instead is concerned with the preparation of post-1992 legislation and, first and foremost, with the review of the treaties at the political and monetary level. This review has acquired a sense of urgency as a result of the momentous events that have taken place, especially in Germany, since November 1989. As far as the 1992 legislation is concerned, the Commission views it as being "behind it" and is now actually engaged in consultation with the various

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1. Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, 32 O.J. EUR. COMM. (No. L 386) 1 (1989) [hereinafter Second Banking Directive].

2. Commission Amended Proposal for a Council Directive on investment services in the securities field, 33 O.J. EUR. COMM. (No. C 42) 7 (1990) [hereinafter Draft Investment Services Directive].

3. Proposal for a Council Directive on capital adequacy of investment firms and credit institutions, 33 O.J. EUR. COMM. (No. C 152) 6 (1990) [hereinafter Capital Adequacy Directive].

Member States to ensure that the 1992 legislation already adopted is transposed by them into their national legislation in good time and to dispel any problem of interpretation of the 1992 legislation that may arise for the Member States as they engage in this transposition process.

The objective of this article corresponds to this post-1992 approach: it endeavors to draw attention to a necessarily limited number of developments that are taking place in various areas of EEC law that appear likely to have a significant effect, either directly or indirectly, on the way investments and acquisitions will be structured and financed in Europe in years to come and on the financial institutions that often play a crucial role in putting these transactions together.

I. Effect of the EEC Merger Control Regulation of December 21, 1989, Which Entered into Force on September 21, 1990[4]

The origins of the EEC Merger Control Regulation (the Regulation) go back to 1973 when the Commission first put before the Council of the European Communities (the Council) a proposal for a regulation, specifically aimed at controlling the concentration of undertakings in the EC. Needless to say, this original proposal was revised numerous times before the Council finally adopted it on December 21, 1989.

A. The Need for a Specific Regulation Aimed at Control of Concentrations

The EC came to consider a specific regulation aimed at control of concentrations necessary for essentially two basic reasons: the ambiguity of EC law in the area and the overlapping jurisdiction of the various Member States as regards multinational concentrations.

1. *The Initial Ambiguity of EEC Law in the Area of Concentrations Through Merger*

As is well-known, article 85, sections 1 and 2 of the Treaty of Rome[5] (the Treaty) declares void any agreement among undertakings that appreciably restricts competition within the EC. Article 86 of the Treaty, on the other hand, prohibits the abuse of a dominant position within the EC. A significant difference between these two Treaty provisions is that article 85, section 3, grants the Commission exclusive power to approve an agreement otherwise prohibited by article 85, section 1, if it feels that the anticompetitive effects of the agreement are outweighed by other benefits (for example, advantages for the consumer, or ratio-

4. Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 33 O.J. Eur. Comm. (No. L 257) 13 (1990) [hereinafter Merger Control Regulation].

5. Treaty Establishing the European Economic Community (EEC), 25 Mar. 1957, (Treaty of Rome), 298 U.N.T.S. 11 [hereinafter Treaty].

nalization of production). No similar provision exists with regard to the prohibition of an abuse of dominant position laid down by article 86 of the Treaty.

The demarcation between articles 85 and 86 and the possibility of using one or the other, or both, of these Treaty provisions as the basis for a systematic control of concentrations in the EC by the Commission has never been completely clear. In its memorandum on concentrations, published in 1966,[6] the Commission distinguished between concentrations and cartels. Concentrations change the structure of the companies involved and of the market in which they operate. Cartels, on the other hand, only restrict competition between companies that remain effectively independent. In line with this reasoning, article 85 of the Treaty was generally recognized as not being susceptible to application as an instrument of merger control. Article 86 thus became the Commission's primary instrument in this area.

In the *Continental Can* case, decided in 1973,[7] the European Court of Justice held that an abuse of dominant position contrary to article 86 *may* be committed if an undertaking already in a dominant position strengthens or extends its position by acquiring control of another undertaking, thus substantially fettering residual competition in the market concerned. One obvious drawback of this approach is, of course, that article 86 cannot be used to control concentrations *when there is no preexisting dominant position.*

The demarcation between article 86—applicable to *certain* types of concentrations—and article 85—traditionally held not to be applicable to concentrations—was significantly blurred in 1987 as a result of the *Philip Morris* case.[8] This case concerned the acquisition by one tobacco company, Philip Morris, of half the controlling interest of another tobacco company, then held by Rothmans. Some authorities have interpreted the judgment of the Court of Justice in the *Philip Morris* case as meaning that article 85 could possibly apply to merger agreements, that is, to agreements leading to the "legal or *de facto* control" of one company by one of its competitors.[9] However, it is far from evident that this was indeed the meaning of the judgment.

In any event, even on the basis of this interpretation, the position remains that whereas article 85 and article 86 can be used to control certain kinds of concentrations, they are limited and technically inadequate to do the job. For example, article 86 may not apply if there is no preexisting dominant position, and article 85 may not apply if there is no agreement between undertakings to start with.

6. Commission Memorandum on the problem of concentration in the Common Market, Competition series, Study No. 3, Brussels, 1966.

7. Europemballage Corporation and Continental Can Company Inc. v. Commission [1973] E. Comm. Ct. J. Rep. 215.

8. British American Tobacco Company Ltd. and R.J. Reynolds Inc. v. Commission, supported by Philip Morris Inc. and Rembrandt Group Ltd., [1987] E. Comm. Ct. J. Rep. 4487.

9. Bellamy, *Mergers Outside the Scope of the New Merger Regulation—Implications of the Philip Morris Judgment,* FORDHAM CORP. L. INST. 19 (1988).

The upshot of the 1987 *Philip Morris* judgment, together with the general move towards the 1992 single market, was, however, to give a new lease on life to the initial Commission proposal for specific merger control, first introduced in 1973, and to give this proposal a sense of urgency in view of the wave of concentrations that was taking place in the United States at the time and that looked likely to lap Europe's shores shortly.

2. *Need for "One-Stop" Vetting of Large Mergers*

The second factor leading to the adoption of the Regulation was the perceived need to ensure "one-stop" vetting (expert appraisal) of large concentrations in the EC. Prior to the Regulation's adoption, mergers of transnational companies were potentially subject to review by a number of EC competition authorities, both at the Commission and the Member State levels. This, of course, resulted in significant ambiguity as to jurisdictional authority as well as potentially conflicting results. Article 21 of the Regulation addresses this issue in the following way:

> 1. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this regulation [for mergers exceeding the minimum turnover criteria laid down by the Regulation and thus having a "Community dimension"].
> 2. No Member State shall apply its national legislation on competition to any consideration [concentration] that has a Community dimension [within the meaning of the Regulation].[10]

A concentration, as defined by the Regulation,[11] exists—and applicability of article 85 of the Treaty by the Commission is therefore excluded—not only when an actual merger takes place, but also, inter alia, when there is a creation of a concentrative joint venture, or as when two or more undertakings agree to acquire joint control of one or more other undertakings, with the object and effect of, sharing among themselves such an undertaking or the assets, even if the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration.

As defined by the Regulation, a concentration will have an EC dimension, and thus in principle fall within the exclusive jurisdiction of the Commission where: (i) the aggregate worldwide turnover of all the undertakings concerned is more than 5 billion ECUs and (ii) the aggregate EC-wide turnover of each of at least two of the undertakings concerned achieves more than two-thirds of its aggregate EC-wide turnover within *one and the same* Member State.[12] There is, however, a commitment to review, and in principle reduce, these ceilings by a qualified majority in the Council, within four years (by the end of 1993).[13]

10. Merger Control Regulation, *supra* note 4, art. 21, 33 O.J. EUR. COMM. (No. L 257) at 24.
11. *Id.* art. 3, at 17.
12. *Id.* art. 1, at 16.
13. *Id.*

About fifty to sixty concentrations with an EC dimension look likely to come annually within the Regulation on the basis of the present turnover criteria. Obviously, this number will increase significantly if, as expected, the turnover criteria laid down by the Regulation are significantly lowered in four years' time. The principle of one-stop merger vetting intended by the Regulation is, however, subject to three exceptions provided for by the Regulation itself, as well as to limits arising from the fact that articles 85 and 86 of the Treaty are superior to the Regulation.

B. Exceptions to the Principle of "One-Stop Merger Control"

1. *The "German Clause"*

The so-called "German clause" is embodied in article 9 of the Regulation. Under that article, the Commission may refer a merger that has an EC dimension to the competent authorities of a Member State if, in substance, the Member State concerned informs the Commission at the start of the vetting procedure, that the proposed concentration threatens to create or to strengthen a dominant position that would significantly impede effective competition in a market within the Member State if the market presents all the characteristics of a distinct market, be it a substantial part of the Common Market or not.

If the Commission agrees with the Member State's finding, it may deal with the case in order to maintain or restore effective competition in the market concerned, or refer the case to the competent authorities of the Member State with a view to the application of that State's national competition law. If, on the other hand, the Commission is of the opinion that no distinct market exists, it shall rule to that effect, but that decision may be overruled, on appeal from the Member State, by the Court of Justice. The Regulation does however provide that the continuation of this very significant exception to one-stop merger vetting shall be reviewed—and possibly phased out—in four years time (i.e., at the same time as that provided for a review and possible lowering of the turnover criteria defining a concentration with an EC dimension).

2. *The "Dutch Clause"*

Under this clause, embodied in article 22, paragraph 3, of the Regulation, a concentration that has no EC dimension, as defined by the Regulation, may, at the request of the competent authorities of the Member State concerned, be vetted by the Commission. If the Commission finds that the concentration—though not having an EC dimension—creates or strengthens a dominant position, with the result that effective competition would be significantly impeded within that Member State's territory, the Commission may apply to that concentration the means provided for by the Regulation to safeguard competition if the concentration affects trade between the Member States.

3. *The "National Legitimate Interest" Clause*

Under this clause, embodied in article 21 of the Regulation, even if the Commission approves a concentration having an EC dimension, an individual Member State "may take appropriate measures . . . compatible with the general principles . . . of Community law"[14] if, notwithstanding the Commission's verdict, the Member State is of the opinion that the concentration threatens its other legitimate (noncompetition) interests. The Regulation gives a nonexclusive list of such legitimate noncompetition interests: these are public security, plurality of the media, and prudential rules.

The Member State must communicate to the Commission any other public interest invoked *before* it applies the measures designed to protect such interests. Within one month of the date of notification, the Commission then must decide whether it recognizes the public interest invoked as a "legitimate interest" for the purposes of the Regulation. If the Commission's decision is negative, the Member State can, of course, challenge the decision before the Court of Justice.

In a speech on February 9, 1990, Sir Leon Brittan, vice-president of the Commission responsible for competition policy and financial institutions, gave the following examples of circumstances in which the legitimate interest clause may apply:

> [The legitimate interest clause will apply] if, as a result of a merger above the regulation's thresholds, a Member State finds itself with an arms manufacturer in the hands of a group which also supplies to unfriendly foreign governments, or with one person or company owning too many publications, radio stations or television channels, or with a person or company who is unfit and improper owning a financial institution.[15]

4. *Exclusionary Effect of Articles 85 and 86*

Finally, besides the three exceptions provided for by the Regulation itself, a major area of uncertainty with regard to one-stop merger control results from the fact that articles 85 and 86 of the Treaty have direct effect and cannot be phased out by the Regulation since they are embodied in the Treaty itself, which is in the constitution of the EC. This could create a major problem because the threshold for application of article 85 of the Treaty (if *Philip Morris* is interpreted as meaning that it is applicable to certain types of concentrations) and for the application of article 86 of the Treaty is much lower, in legal terms, than the turnover criteria laid down by the Regulation.

To resolve this quandary, the Regulation provides that regulation 17[16] (the regulation laying down the powers of the Commission in competition cases) will not apply to a concentration as defined by the Regulation, regardless of whether

14. *Id.* art. 21, at 24.
15. Speech by Sir Leon Brittan at Cambridge, England, on the development of merger control in EEC competition law (Feb. 9, 1990) (Hersch Lauterpacht Memorial Lectures, Cambridge, transcript at 22) [hereinafter Conference Transcript].
16. Council Regulation No. 17/62, O.J. Eng. Spec. Ed. 1959-62, at 87.

such concentration has an EC dimension (that is, regardless of whether it must be vetted by the Commission or by the competent national authorities). This explains why the Regulation and the guidelines for its application presently being issued by the Commission—DG IV—in effect duplicate a number of provisions that are found in regulation 17, because this latter regulation is explicitly not applicable to concentrations.

The provision that regulation 17 is not applicable to concentrations as defined by the merger control directive, even if they have no EC dimension, means, in effect, that third parties will probably not be able to challenge a concentration authorized by the national control authorities on the ground that it is contrary to article 85 of the Treaty. Indeed, as stated by the Court of Justice in its judgment of April 30, 1986, in *Ministère Public v. Asjes and Others* (*Nouvelles Frontières*),[17] national courts have no authority to declare void an agreement or concerted practice on the ground that it is contrary to article 85, paragraph 1 of the Treaty, as long as the rules implementing article 85 have not been adopted pursuant to article 87 (which they had not been at this time for the airline sector, with which the case was concerned).[18]

It is precisely regulation 17 that embodies the implementing rules of article 85 contemplated by article 87. As a result, by providing that regulation 17 will not be applicable to a concentration—whether or not having an EC dimension—the Regulation in effect makes it impossible for a competitor or an unsuccessful suitor in a hostile takeover battle to challenge on the basis of article 85, a decision taken by the national competition authorities in respect of a concentration as defined by the Regulation.

If the decision has been taken by the Commission (in the case of a concentration having an EC dimension), the only avenue open to the unsuccessful competitor or suitor is to challenge the decision of the Commission directly before the Court of First Instance.[19] Yet, it is only in very exceptional circumstances that the court might agree to hear such an appeal since the competitor concerned would face the uphill task of demonstrating that it has a sufficient "title and interest" within the meaning of article 173, paragraph 2 of the Treaty.[20]

The Regulation does, in fact, provide for a general right of audience for any natural or legal person "showing a sufficient interest"[21] during the vetting

17. [1986] E. Comm. Ct. J. Rep. 1425.

18. *See also* Ahmed Saeed Flugreisen v. Silver Line Reisebüro GmbH [1989] E. Comm. Ct. J. Rep. 803.

19. *See* art. 3.1.c. of the Council Decision 88/591/EEC/ECSC/Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, 32 O.J. EUR. COMM. (No. C 215) 1 (1989).

20. Treaty, *supra* note 5, art. 173 para. 2 states: "Any natural or legal person may, under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him."

21. Merger Control Regulation, *supra* note 4, art. 18, 33 O.J. EUR. COMM. (No. L 257) at 23.

procedure before the Commission. However, the onus will remain with that party, if it wants to challenge the Commission's decision, to prove that it has sufficient interest to raise such an action under article 173, paragraph 2 of the Treaty.

The position is very different if the competitor or rejected suitor decides to invoke article 86 of the Treaty or challenge a concentration before the national courts. Indeed, as recognized by Sir Leon Brittan himself in his aforementioned speech in Cambridge, February 1990, the national courts may, at the request of an aggrieved third party, "apply article 86 to a concentration since that article does not require any implementing legislation (contrary to article 85) to be directly effective (and directly applicable by the national courts)."[22] The Court of First Instance very recently confirmed this position in the *Tetra Pak* case,[23] stating that an exemption from the prohibition of article 85.1 on the basis of article 85.3 does not exempt the parties from the prohibition contained in article 86. Thus, in the words of Sir Leon Brittan,

> [T]here is no way of completely ruling out litigation probing the Commission's policy . . . [since] articles 85 and 86 apply (or at least may apply) to certain concentrations (covered by the Regulation) and no Regulation can abrogate the Treaty and the interpretation placed upon it by the European Court of Justice. . . . What I can offer is the Commission's commitment to implement the Regulation fully and fairly in the light of its stated policy objectives: competition in the single market; merger analysis based on examination of markets as they really operate, and clear demarcation between the competence of the Commission and that of the Member States.[24]

II. Proposed Directive on Obstacles to Takeover and Other General Bids[25]

There is, of course, little point in having a new merger control regulation at the EEC level if a situation continues to exist whereby companies in some Member States are in effect immune to mergers or takeovers except on the most amiable of basis. Very significant differences continue to exist in this respect between the various Member States.

A. Current Obstacles to Takeovers in the EC

The obstacles to takeovers and other general bids that exist in certain Member States can be divided into two general categories: (1) Structural hindrances to takeovers; and (2) National Regulations.

22. *See* Conference Transcript, *supra* note 15, at 25. *See also* speech by Sir Leon Brittan before the EC Chamber of Commerce in New York (26 March 1990) (transcript at 13) [hereinafter Brittan speech].

23. Case T-S1/89, Tetra Pak Rausing S.A. v. Commission, 10 July 1990 (not yet reported in E. Comm. Ct. J. Rep.).

24. Conference Transcript, *supra* note 15, at 25–26.

25. Commission amended proposal for a thirteenth Council Directive, COM(90) 416 final of 14 September 1990, on company law, concerning takeover and other general bids, 33 O.J. Eur. Comm. (No. C 240) 7 (1990) [hereinafter Draft Takeover Bids Directive].

1. *Structural Hindrances to Takeovers*

The first category of obstacles concerns the structural hindrances resulting from the different ways in which capital markets have developed in individual Member States. Thus, for example, it is well-known that only a very small number of German companies are incorporated as public companies limited by shares, and an even smaller number are publicly quoted on the stock markets. It is also well-known that the *allfinanz* German banks have traditionally been a much larger source of finance for German industry than public issues of shares and bonds. This situation is diametrically opposed to that existing in the United Kingdom.

Obviously it is very difficult, and undesirable, for Brussels-based bureaucrats to attempt to harmonize these structural differences, which have grown historically over a number of years, for reasons that are extremely complex. However, what Brussels may not be able or willing to do by introducing yet another set of fresh regulations, the market forces may well succeed in doing.

Thus, for example, the second banking directive[26] and its accompanying directives on own funds[27] and on credit ratios[28] will make it much more onerous—albeit over a period of years—for the *allfinanz* German banks to keep, let alone increase, the significant holdings that they presently have in many sectors of German industry.

Another possible source of change may lie in the draft investment services directive,[29] which provides that credit institutions holding customers' shares on deposit will no longer be allowed to treat these shares as fungible with their own portfolio. This may put a question mark over the continuation of the present practice whereby German banks exercise—or at least can exercise—the voting rights attached to the shares held on deposit for their customers (*Depotstimmrecht*).

2. *National Regulations*

The second category of obstacles concerns the national regulations that fail to prohibit or to limit the extent to which a potential target company can keep its shares or part thereof in friendly hands or acquire them itself, either directly or indirectly. The Dutch and the German companies have for many years displayed great ingenuity in this field.

One of the best known techniques is the Dutch foundation (*stichting*), by which a nonprofit foundation is set up for the purpose of maintaining the identity

26. *See* Second Banking Directive, *supra* note 1.

27. Council Directive 89/229/EEC of 17 April 1989 on the own funds of credit institutions, 33 O.J. EUR. COMM. (No. L 124) 16 (1989).

28. Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions, 32 O.J. EUR. COMM. (No. L 386) 14 (1989).

29. *See* Draft Investment Services Directive, *supra* note 2.

of the company. The directors of the foundation are chosen from the company's close allies. The foundation, which is fiscally transparent, thereafter underwrites a large issue of preferential shares of the company. Scripts (*bewijzen*) representing the right to the dividends payable on the shares are thereafter sold to investors, but the voting rights remain attached to the shares and therefore cannot be exercised by the investors themselves, but only by the foundation that is legally the owner of the shares.

B. Proposed Takeover Directive

Recognizing the undesirable effect of such limitations on legitimate takeover activity, the Commission has sought to eliminate them through proposed Council directives on the subject. The Commission has presently made progress on its thirteenth draft Council directive on company law concerning takeovers and other general bids, which had its first reading in the European Parliament in January 1990. Two key features of the draft takeover bids directive are:

- the limitation of the powers of the potential target company to put in place poison pills (including sale of assets and increase in capital or acquisition of its own shares either directly or through a subsidiary) once a bid is launched;
- the imposition of an obligation to launch a bid on all outstanding shares once a maximum holding of 33.3 percent of the voting rights has been acquired by the offeror, together with its consolidated subsidiaries, as well as by any persons acting on the offeror's behalf or in concert with him.

Furthermore, the Commission has indicated that it will amend its proposal for a fifth company law directive[30] to:

- restrict the issue of nonvoting preference shares;
- abolish the possibility in a company's bylaws to restrict the voting rights that may be exercised by any one shareholder;
- abolish powers in a company's bylaws giving certain shareholders the exclusive rights to propose the appointment of all directors.

Obviously, the final adoption of these draft or proposed directives, and their actual transposition in national law, is still some way off.

The scope of these draft or proposed directives—at least initially—may well be more limited than initially expected. Thus, for example, as a result of an amendment adopted by the European Parliament, the Commission has amended the initial text of the draft takeover bids directive in order to allow Member States to restrict its scope of application to shares in publicly quoted companies only (whereas the Commission's initial proposal envisaged the application of the directive to all shares in public companies, including shares in companies not

30. Commission amended proposal for a fifth Council Directive on company law, concerning the structure of sociétés anonymes, 26 O.J. Eur. Comm. (No. C 240) 2 (1983).

quoted on a stock exchange). The Commission has, however, provided for a five-year review period in order to assess the effect of such a restricted application.[31]

It is therefore all the more interesting to note that independently of the Commission's initiatives in this field, pressures are being brought to bear, in particular in the Netherlands and in Germany, to remove some of the existing restrictions on shareholders' rights. For example, in the Netherlands, as a result of pressure brought to bear on the Amsterdam stock exchange authorities by institutional investors and by shareholders associations, in the wake of one of the few unfriendly takeovers ever seen in the Netherlands, the Amsterdam stock exchange authorities eventually succeeded in curbing, inter alia, the use that can be made of foundations as a way of discouraging takeover bids. This success came after stiff opposition from both large Dutch companies and from Dutch trade unions.

Such individual challenges will likely become much more frequent as shareholders become increasingly restive to these kinds of restrictions and as more and more investors, including insurance companies and pension funds, are allowed or able to acquire shares in companies located in other Member States. This new acquisition ability is a result both of the 1988 directive on free movement of capital, effective since July 1, 1990,[32] and more importantly, of recent Commission initiatives aimed at removing the restrictions presently imposed on institutional investors, such as insurance companies, usually in the name of assets matching, regarding the assets in which they can invest their reserves.[33]

III. The Extraterritorial Application of EEC Competition Law and the Issue of Reciprocity

A. The Extraterritorial Application of EEC Competition Law

For years, many Member States have repeatedly complained that U.S. courts applied U.S. competition law to situations that largely lay outside the United States. It is striking to see, now that the EC is putting muscle in its own competition policy, how this policy, too, reaches if need be to non-EEC based companies.

Since the celebrated judgment of the Court of Justice in the *Wood Pulp* case handed down on September 27, 1988,[34] it is clear beyond a doubt that agreements or concerted practices entered into anywhere in the world may run afoul

31. Draft Takeover Bids Directive, *supra* note 25, art. 1.

32. Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the EEC Treaty, 31 O.J. Eur. Comm. (No. L 178) 5 (1988) [hereinafter Free Movement of Capital Directive].

33. *See infra* notes 44 & 45.

34. Ahlström v. Commission, [1988] E. Comm. Ct. J. Rep. 5193.

of EEC rules on competition even if entered into between companies that are all based outside the EC. It is therefore equally clear that a concentration between, for example, two large U.S. multinationals can have an EC dimension and hence become subject to review by the Commission pursuant to the merger control Regulation, if the turnover criteria laid down by the Regulation are fulfilled. Thus, a situation could arise in which a concentration authorized in the United States is nonetheless held up, or at least significantly delayed, by action taken by the Commission (if the concentration has an EC dimension) or by the competent authorities of one Member State (if, for example, the German clause is applied).

In a speech held in New York in March 1990 before the EC Chamber of Commerce, Sir Leon Brittan expressed the Commission's position as follows:

> I should stress that the Community's rules on jurisdiction in competition cases apply to mergers as well. In consequence any concentration, wherever conceived or born, involving any undertakings, wherever located, must be notified if it meets the threshold requirements. If the significant amount of business within the Community required by the thresholds occurs, the merger will engage our jurisdiction. Any remedies ordered by the Commission as a result of proceedings under the Regulation will take account of the interests of foreign states, including of course the U.S. Nevertheless, to use the jurisdictional language of our Court of Justice, there can be no doubt that if mergers which are liable to have a significant impact on the competitive structure of our market are implemented in our territory, our jurisdiction will be engaged and we shall exercise it to safeguard competition in the Community market.[35]

Short of a bilateral agreement between the United States and the EC to avoid conflicting decisions in the competition field, a development that Sir Leon Brittan has called for, but which is surely unlikely to materialize in the immediate future, one can foresee some field days in the years to come for competition lawyers on both sides of the Atlantic. The Minorco/Goldfields and the BAT/Holyake/Farmers battles of recent years could be in for a reverse performance, with the use of delaying tactics taking place this time on the European side of the Atlantic.

B. Reciprocity in EC Legislation

Reciprocity has been a recurring theme in all EEC 1992 financial legislation since it was first introduced in the original proposal for the second banking directive. It remains an issue in nearly all the pending or adopted legislation directly or indirectly affecting mergers within the EC.

1. *Position under the Merger Control Regulation and the Second Banking Directive*

The merger control regulation deals with the issue of reciprocity in article 24, entitled "relations with non-Member countries." It is understood that this article was introduced in the Regulation at the insistence of France.

35. Brittan speech, *supra* note 25, at 14-15.

I would tend to agree with Sir Leon Brittan when he said in his New York speech that "this is emphatically not a reciprocity clause"[36] though I would add the words "at least for the time being." Indeed, under the Regulation, to quote from Sir Leon's New York speech:

> [T]he handling of individual cases will not be affected by any consideration of whether the merger in question would have been permitted in the country of origin of any of the companies involved. Member States are merely entitled to inform the Commission of general difficulties encountered by their undertakings in respect of concentrations in a non-member country. The Commission will report to the Council and make appropriate recommendations. If it appears that a non-member country does not afford Community undertakings treatment comparable to that which the Community affords its undertakings, the Commission may ask the Council for a negotiating mandate with a view to obtaining such a comparable treatment for Community undertakings. [37]

These provisions are certainly far removed from those inserted even in the final version of the second banking directive. In particular, the provision stating that "measures taken (by the Commission pursuant to this article) shall comply with the obligations of the Community or of the Member States[38] . . . under international agreements, whether bilateral or multilateral" goes much further than the equivalent article of the second banking directive, namely article 9, which reads as follows: "Measures taken pursuant to this article shall comply with the Community's obligations, under any international agreement, bilateral or multilateral, governing the taking up and pursuit of the business of credit institutions." The same language has been inserted in the proposed investment services directive.[39] As one can see, no reference is made there to the Member States' obligations under any bilateral or multilateral agreement.

2. *Points Under the Draft Takeover Bids Directive*

The draft takeover bids directive embodies a very different approach to the reciprocity issue by leaving this question to be addressed by the individual Member States on a purely bilateral basis. The recitals of the draft takeover bids directive explain the reason for this approach with a great degree of candor:

- Certain recent events have raised the question whether the directive should introduce a reciprocity clause towards bidders from third countries.
- The need for such a clause has been emphasized by those who say that in general it is easier for a company from a third country to take control of an EC company than the opposite.
- The situation within the Community is not as open as one may think. Indeed, company law in several Member States also allows companies to adopt a range of defensive measures to ensure that control of the company

36. *Id.* at 15.
37. *Id.*
38. Merger Control Regulation, *supra* note 4, art. 24, 33 O.J. EUR. COMM. (No. L 257) at 25.
39. Draft Investment Services Directive, *supra* note 2, art. 7.7.

remains in the hands of friendly shareholders. These defensive measures are very widely used in some Member States. As a consequence the conditions in which a takeover bid is carried out vary considerably between Member States.

- Against this background, and given the lacunae which exist within the Community, it would be premature to introduce a reciprocity clause now at Community level. For the time being and until subsequent harmonization, Member States may introduce such a clause into their national law, bearing in mind their international commitments.[40]

This patchwork approach to the reciprocity issue in the various EEC financial directives (merger control regulation; draft takeover bids directive; second banking directive; and draft investment services directive, not to mention the 1988 directive on the free movement of capital will no doubt lead—or at least could lead—to some surprising results.

True, a takeover of a European company by, for example, a U.S. company resulting in a concentration with an EC dimension will not be stopped in the name of reciprocity. But, the Member State in which the European target company is incorporated will be free to allow that company to introduce poison pills frustrating the bid, since it is not bound to apply the provisions of the draft takeover bids directive limiting the use of such poison pills by the companies incorporated in its territory if they are on the receiving end of a bid from a non-EEC company.

Similarly, the U.S. financial adviser of the prospective offeror (including a European branch or a European subsidiary of that U.S. financial adviser) could find itself restricted in its ability to assist its U.S. client to make the bid in the first place. This restriction can result from a finding by the Commission that says the United States does not give national treatment to EC financial advisers operating in the United States in similar circumstances. Yet, the draft takeover bids directive expressly requires the offeror, whether or not it is incorporated in the EC, to "be represented either by a qualified person authorized to deal on the Community financial markets or by a credit institution authorized within the Community."[41]

3. *Points Under the Free Movement of Capital Directive*

The same, incoherent situation can arise in respect of the freedom to transfer the funds necessary to finance the acquisition or the freedom to repatriate the proceeds of assets sales. Indeed, "[i]n their treatment of transfers in respect of movements of capital to and from third countries, the Member States [must only] endeavor to attain the same degree of liberalization as that which applies to

40. Draft Takeover Bids Directive, *supra* note 25, recital no. 21.
41. *Id.* art. 9.

operations with residents of other Member States. . . . ''[42] Furthermore, this obligation of best effort ''shall not prejudice the application to third countries of domestic rules or Community law, particularly any reciprocal conditions, concerning operations involving establishment, the provisions of financial services and the admission of securities to capital markets.''[43]

Viewed against this background, there would appear to be little doubt that the issue of reciprocity could flare up again in the future across the whole range of financial transactions involving U.S. or Japanese firms on the one side and European firms on the other side, and this even if the Uruguay Round is successfully completed in the coming months (following the impasse reached in Brussels in December 1990) and if it covers financial services.

IV. The Move Towards a Single European Currency

European companies and pension funds have in many countries often been forced by their local regulators to invest their reserves in designated categories of assets. Usually, these regulations have imposed a substantial level of investment in local shares or bonds, especially bonds issued or guaranteed by the national governments. The standard justification for these requirements is the necessity to match assets and liabilities in the same currency. Budgetary considerations have, of course, very often been the real justification for these restrictions.

The second directive on non-life insurance, already adopted and in force for large risks,[44] the second directive on life assurance, adopted but not to enter into force until May 20, 1993,[45] and the proposed directives (some far advanced along the European legislative process), dealing with life insurance companies and pension funds,[46] go a long way towards scrapping these restrictions.

Obviously, the further the progress towards a European single currency, or more realistically, towards a system of fixed parities, the more difficult it becomes for national regulators to justify these restrictions by the necessity to match liabilities and assets in the same currency. The move towards a European currency also implies important limitations on the ability of national regulators to require banks, insurance companies, pension funds, and the like to insist on investing a significant proportion of their reserves in government bonds. Indeed,

42. Free Movement of Capital Directive, *supra* note 32, art. 7.1 para. 1.

43. *Id.* art. 7.1 para. 2.

44. Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, 31 O.J. EUR. COMM. (No. L 172) 1 (1988).

45. Second Council Directive on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, 33 O.J. Eur. Comm. (No. L 330) 50 (1990).

46. A pension fund directive expected to have been proposed by the Commission by the end of 1990, see ''Advance 1992'' of March 1990, p. 5, is now anticipated in early 1991.

the move towards a single European currency—or at least towards fixed parities between the various national currencies—not only implies a prohibition on individual Member States to finance their deficit at will by borrowing from their national central bank (instead of raising taxes), but also implies the prohibition of attempts to reach the same result indirectly, by obliging local banks, insurance companies, and the like, to stuff their portfolio with bonds issued by the national government or by the local authorities.

These twin developments, coupled with the momentous developments that have taken place in the EEC tax field in June 1990 due to the adoption of three very important tax measures[47] after a deadlock of more than twenty years, and the likely adoption of additional EEC-wide tax measures in the near future[48] as a result of this breakthrough, look set to change fundamentally the ways in which acquisitions and mergers will be financed and put together in the years to come.

47. *See* Convention 90/463/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 33 O.J. EUR. COMM. (No. L 225) 10 (1990); Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 33 O.J. EUR. COMM. (No. L 225) 6 (1990); Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, 33 O.J. EUR. COMM. (No. L 225) 1 (1990).

48. See in particular the proposal (as yet unpublished in O. J. EUR. COMM.) for a directive suppressing withholding tax on payment of interest and royalties between companies belonging to an international group.