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THE CONTROL OF MERGERS AND TAKEOVERS IN THE EC

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INQUIRY INTO CORPORATE TAKEOVERS IN THE UNITED KINGDOM

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ROBERT PRINGLE

THE DAVID HUME INSTITUTE

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INQUIRY INTO CORPORATE TAKEOVERS IN THE UNITED KINGDOM

The David Hume Institute has been commissioned by the Joseph Rowntree Foundation to conduct an Inquiry into the issues raised by Corporate Takeovers in the U.K. This paper is the fourteenth of a series presenting the results of research undertaken in the course of the Inquiry, and also submissions of opinion received from individuals and organisations which are thought to be of wide general interest. The Institute hopes in this way to keep the public informed of work in progress. It is expected that the Final Report will be published in June 1991.

A note on the Institute and a list of its publications appear at the end of this paper.

The Institute has no collective views on any public policy question and is not committed to the views of any of its authors.

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Executive Director

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Table 3: Mergers and takeovers in industry by nationality of parties (from same EC country, different EC countries or an EC and a non-EC country; per cent in brackets)

Year	National	EC	International	Total
1982/83	59 (50.5)	38 (32.5)	20 (17.0)	117
1983/84	101 (65.2)	29 (18.7)	25 (16.1)	155
1984/85	146 (70.2)	44 (21.2)	18 (8.7)	208
1985/86	145 (63.7)	52 (23.0)	30 (13.3)	227
1986/87	211 (69.6)	75 (24.8)	17 (5.6)	303
1987/88	214 (55.8)	111 (30.0)	58 (14.1)	383
1988/89	233 (47.4)	197 (40.0)	62 (12.6)	492

Source: See Table 1

In the latest two year period in particular, large EC companies appear to have switched the thrust of their takeover activity sharply towards the internal EC market: whereas in 1985-87 there were nearly three times as many purely national mergers as there were EC mergers, by 1988-89 there were only 20 per cent more national mergers than EC mergers. Purely national mergers accounted for less than half the total of all mergers in the latest period, compared with 70 per cent in 1983-84.

The merger activity has been spread widely across the entire range of EC industry (Table 4); the largest number took place in the chemical industry, followed by food, paper, mechanical engineering and machine tools. These sectors accounted for 71 per cent of all takeovers. But more significant is the proportion of large firms in the sector that were involved; this is known for the chemical sector, where virtually all the 25 largest EC firms were active, and three firms were involved in more than three large takeovers each. In the food sector, half of the 25 largest food and drink firms took part - in most cases acquiring other relatively large companies. The EC 19th Competition report commented that "the aim of the large chemicals undertaking was to strengthen their position in the Community market". On food, it commented that "the structure of competition in the food industry appears to have deteriorated" (Table 5):

> "Everything points to the fact that this industry is engaged in intensive preparations for the completion of the internal market and for competition from multinational undertakings, chiefly in the USA. As these acquisitions mainly involved large firms, there is undeniably some concentration taking place, in view of the very modest growth in the market overall. Since barriers to trade persist, the degree of concentration in this industry is generally higher nationally than at Community level. In most member states, there is a decline in the number but an increase in

the size of firms. That is why a close watch should be kept on restructuring which, whilst certainly necessary for the completion of the internal market and to cope with strong competition from third countries, can nevertheless lead to restrictions on competition". (19th report, page 219).

Table 4: National, community and international mergers in the community

Sector*	National			EC			International			Total		
	1986/ 1987	1987/ 1988	1988/ 1989	1986/ 1987	1987/ 1988	1988/ 1989	1986/ 1987	1987/ 1988	1988/ 1989	1986/ 1987	1987/ 1988	1988/ 1989
1. Food	39	25	35	11	18	27	2	8	14	52	51	76
2. Chem.	38	32	37	27	38	56	6	15	14	71	85	107
3. Elec.	33	25	23	6	4	18	2	7	6	41	36	49
4. Mech.	21	24	31	8	5	17	2	9	7	31	38	55
5. Comp.	2	2	3	-	1	-	-	-	1	2	3	4
6. Meta.	15	28	16	4	9	13	-	3	6	19	40	35
7. Trans.	15	3	7	6	9	6	-	3	1	21	15	14
8. Pap.	17	24	32	7	6	26	1	4	3	25	34	61
9. Extra.	8	9	11	1	2	5	-	1	3	9	12	19
10. Text.	4	11	11	2	2	7	-	1	2	6	14	20
11. Cons.	13	21	20	3	12	19	3	-	-	19	33	39
12. Other.	6	10	7	-	5	3	1	7	3	7	22	13
TOTAL	145	214	233	75	111	197	17	56	62	303	383	492

* Key:

Food: Food and Drink

Chem: Chemicals, fibres, glass, ceramic wares, rubber

Elec: Electrical and electronic engineering, office machinery

Mech: Mechanical and instrument engineering, machine tools

Comp: Computers and data-processing equipment

Meta: Production and preliminary processing of metals, metal goods

Trans: Vehicles and transport equipment

Pap: Wood, furniture and paper

Extra: Extractive industries

Text: Textiles, clothing, leather and footwear

Cons: Construction

Other: Other manufacturing industry

Source: See Table 1

Table 5: Breakdown of national, community and international acquisitions of majority holdings by sector and combined turnover of firms involved > 1000, > 10 000 millions ecus - 1988-89

Sector[1]	National[2]		Community[3]		International[4]		Total	
Sector*	>1	>10	>1	>10	>1	>10	>1	>10
1. Food	30	-	21	7	12	7	63	14
2. Chem.	31	8	45	20	14	7	90	35
3. Elec.	17	3	15	9	9	7	41	19
4. Mech.	20	3	12	2	7	-	39	5
5. Comp.	3	-	-	-	1	1	4	1
6. Meta.	10	-	10	2	6	-	26	2
7. Trans.	7	4	5	3	1	1	13	8
8. Pap.	20	-	19	2	3	-	42	2
9. Extra.	10	5	4	3	4	1	18	9
10. Text.	5	2	4	-	2	-	11	2
11. Cons.	5	1	11	3	-	-	16	4
12. Other.	5	3	2	2	3	-	10	3
TOTAL	163	29	148	53	62	24	373	106

1 * Key See Table 4, note 1
2 Mergers of firms from the same Member State.
3 Mergers of firms from different Member States.
4 Mergers of firms from Member States and third countries with effects on the Community Market.

More generally, the Commission commented that:

> "The overall increase in mergers, acquisitions and joint ventures and the rise in the number of minority acquisitions and cross-frontier operations involving major industrial firms all indicate that the degree of concentration will generally continue to strengthen. While this can improve the competitiveness of Community firms in both Community and national markets, it must not lead to restrictions on competition within the Community. The regulation on merger control adopted by the Council therefore constitutes an essential means of preventing the damage that such mergers could inflict on competition". (page 226).

Mergers also increased rapidly in the services sector as shown in Table 6.

Table 6: Mergers and acquisitions in distribution, banking and insurance

	Distribution	Banking	Insurance	Total
1984/85	34	18	15	67
1985/86	33	25	12	70
1986/87	49	35	28	112
1987/88	57	78	40	175
1988/89	58	83	33	174

Motives

There has been a remarkable change in the motives given for mergers, as shown in public statements about the transactions monitored by the Commission. The dominant motive in 1985-86 was given as "restructuring and rationalization", whereas by 1988-89 by far the most important motive was "strengthening of market position" followed by "expansion" while restructuring had sunk to insignificance. Though partly no doubt merely a change of fashion and language, this change was also an understandable response to swings of the business cycle. In 1985, industry was still coming out of the recession of the early 1980s - in many countries the worst since the 1930s - and was still in the midst of a sharp adjustment to the far-reaching changes in relative prices created by the oil shock of 1979-80 and the sudden growth in competition from newly industrial countries (NICs) as well as Japan. Rationalization, i.e. reduction of excess capacity in many fields, was therefore still a dominant motive; companies were taking an essentially defensive posture (this was the era of "Euro-sclerosis"). In the late 1980s, by contrast, industry was riding the crest of what was by then the longest peacetime expansion of the world economy since World War II, and the confident European mood was further boosted by the plans for 1992. The stated motives for mergers had accordingly become more aggressive and expansionary (Table 7).

Table 7: Main motives for mergers (% of total)

Motives	1985-86	1988-89
Rationalisation, restructuring	35.0	2.8
Expansion	18.1	23.3
Complementarity	14.4	7.9
Strengthening of market position	11.3	31.5
Diversification	12.5	5.3
R&D	2.5	-
Other	8.3	29.1
TOTAL	100.0	100.0

Source: Table 1

The low rating accorded to "diversification" as a motive in both periods suggests that many large companies throughout the EC have been impelled by competitive forces to specialize on a narrower range of products and services - and this change of strategy towards a sharper focus on a company's "core activities" may well be an important force behind the wave of acquisitions, though one not fully captured by these data.

Causes and Characteristics of Europe's Merger Wave

Corporate executives and other participants in the European merger boom of the 1980s agree on its main causes. These include the following:

* heightened national and international competition leading to a fundamental restructuring of many industries
* the prospect of the removal of internal barriers to European trade in the early 1990s
* the revolution in communications allowing many goods and services which had previously served local markets to be traded internationally
* rapid changes in consumer tastes forcing producers to get closer to their customers
* capital market conditions allowing a huge increase in corporate borrowing
* a new determination by some governments to encourage international growth of their national companies (often state-owned)

The 1992 Single European Market programme itself was a response to international competition and to the realization that European industry was falling behind its US and Japanese competitors - not to mention some NICs such as South Korea. The 1992 programme marked a turning point for business enterprises because for the first time it became widely accepted throughout the Community that only by unleashing competitive forces within a larger market could Europe hope to regain competitiveness - rather than by industrial policies or economic planning, whether at the national or Community levels. The big post-war debate between state direction and market competition was settled decisively in favour of competition - and Europe's industrialists took their cue accordingly. They realized that governments would not stand in their way; everywhere, merger policy (where it existed at all) became permissive.

The frequency of international takeovers involving European firms in the 1980s was on a quite different scale to anything previously experienced in Europe. It is true that merger waves have often tended to occur simultaneously in the leading industrial countries and to that extent the international character of the merger boom was predictable, but never had Continental European companies engaged in cross-border acquisitions on a comparable scale. Table 8 shows the international mergers in the six original EC countries in the seven years 1966-73 (JACQUEMIN and JONG, quoted in COSH, HUGHES and SINGH, 1989). The number is minuscule compared with the

number of domestic mergers during the period. By contrast, the data compiled by M & A International suggest that German firms conducted 189 acquisitions abroad in 1990 alone (215 in 1989), compared with a reported 1,412 deals within Germany; i.e. one in eight deals involved a non-German firm. Comparison of Table 8 with Table 10 confirms the massive scale of the upsurge in activity (eg: 16 international mergers involving German firms in 1973 compared with 477 deals in 1990).

Table 8: International mergers in the EC 1966-73

Year	West Germany	France	Italy	Netherlands	Belgium	Luxembourg
1966	22	19	13	16	24	6
1970	24	22	12	13	22	7
1971	22	24	11	12	24	7
1973	16	26	7	13	22	16

Source: Jacquemin A and de Jong H (1976) Corporate Behaviour and the State, The Hague: Nijhoff

One question raised by this internationalization of merger activity beyond its traditional concentration in the US and UK is whether it signals the emergence of an international market in corporate control [3]. The answer at this stage is almost certainly "no" and it is doubtful whether it even makes sense to talk of such a market existing at the European level; the legal, political, cultural and fiscal obstacles make this at best a highly segmented market. Even more important than the barriers between countries is the fact that such a market can be said to exist only in a few countries, notably the UK.

Financial Deregulation and the Boom in Foreign Direct Investment (FDI)

One of the most powerful causes of the international merger boom was the growth of new financial markets. Cross-border trading in company shares increased rapidly, more and more companies sought a listing on several stock markets and large sums could be raised at short notice in the capital markets to finance international acquisitions. This liberal supply of finance plainly facilitated mergers in the 1980s. Related to these financial factors as a contributory cause was the remarkable increase in FDI flows, concentrated among the major industrial countries. The major capital exporters were the US and UK - which still held the lead in terms of the stock of overseas direct investment in 1980 - joined later in the decade by Japan, Germany and other industrial

3 The internationalisation was not confined to Europe: expenditure on acquisitions abroad by Japanese companies amounted to 59 per cent of domestic expenditure on acquisitions in 1988 [Bannock]

economies. The major destinations of FDI flows were the United States - well in the lead in the first half of the decade - followed by the UK and Germany. Japanese FDI, which rose from about $6 billion a year to more than $50 billion a year over the decade, was directed increasingly towards Europe towards the end of the period (having previously been concentrated almost exclusively on Asia and the US). The national statistics of FDI flows normally include acquisitions of controlling interests in foreign companies as well as investment in "greenfield sites".

The motives behind FDI are different from those usually said to justify domestic mergers. Direct investment in developing countries has often been motivated by the need to secure supplies of raw materials or more recently the attraction of relatively inexpensive labour, but FDI into industrial countries has always been dominated by another motive, i.e. market access. That this was the leading motive behind the build-up of FDI in the 1980s was confirmed by a survey of leading multinational corporations in the main source countries in 1984. [4] Arguments from economies of scale - a common justification for domestic mergers - are not important motives for foreign direct investment.

Equally, economists have usually analysed FDI flows in terms of their costs and benefits to the balance of payments and economic growth, of both home and host countries; it is only with the increase in the scale of cross-border European acquisitions and the abandonment of all direct controls on such flows that they now are examined from the point of view of competition policy or as a branch of industrial organization theory. But the opportunities offered by such investment and the fears to which it may give rise - of loss of autonomy and alien control - can often be understood more readily if it is viewed as traditional foreign investment. Moreover, all cross-border acquisitions in the EC are in effect takeovers (sometimes hostile) of a company in one country by a company in another. Because the legal framework for a European company does not yet exist, there cannot be a true "fusion" of two partners into a company with a new legal personality transcending both of them. Thus in lumping together so-called "EC" mergers and "domestic" mergers the Commission is really mixing apples and oranges: the so-called "EC" mergers have more in common with traditional FDI flows than with domestic mergers as this term is understood in most European countries.

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4 Foreign Direct Investment 1973-87, a survey by the Group of Thirty, 1984 (page 30).

A General Theory?

A more general theory of the causes of the international "merger wave" of the 1980s, one that leaves room for both the industrial organization and foreign investment approaches, has been suggested by de Jong. On the basis of an analysis of similar merger waves in the past he concludes that the key factors are variations in trade penetration and price stability:

> "It is noteworthy that these periods of hectic merger activity (1890-1905, 1918-29, 1958-73, 1983 onwards), were characterized by two significant features. First, a higher than average rate of growth, and a higher than average level of the share of international trade in the gross domestic products of the Western world economies, increasing the competitive pressure on firms.... Secondly, ... eras of relative price stability: during the four periods of merger activity mentioned earlier, the five-year moving average of the consumer price level deviated by not more than 5 per cent from the average in the OECD area. In contrast, other periods (the 1930s, 1940s and 1970s for example) were characterized by sharply inflationary or deflationary tendencies".
>
> "Thus, it can be established that rapid trade growth, more intense competition, relative price stability, and intercontinental merger waves, occurred together".

The causality runs from fast trade growth to intensified (international) competition to intensified merger activity:

> "In each of the four periods of hectic merger activity, it was the pressure of enhanced national and international competition, reflecting the rise of buyers' markets, decreasing transport and communications costs, technological progress and the international spread of companies, which led to the efforts to restructure the organisation of firms and markets. The urge to merge is fed by the need to compete".[5]

In addition, de Jong identified an industry-specific market cycle at work. In this cycle, "the firms constituting those industries innovate and expand, organize output and distribution, and cope with the uncertainties peculiar to their trades". Structural adjustments are made in reaction to changing competitive pressures but firms are

---

5 H.W.de Jong, "Mergers and Competition Policy" in Merger and Competition Policy in the European Community, by Alexis Jacquemin et al, edited by P.H.Admiraal, Basil Blackwell, Oxford, 1990, page 42-43.

aggressive organisations: even when long-term prospects worsen, some firms will "make a virtue of necessity, strategically positioning themselves in an offensive stance in case the cycle revives":

> "The restructuring of industries is therefore simultaneously both a defensive and offensive affair, a reaction to preceding events and an anticipation of future developments. However, the turmoil accompanying the market cycle's course usually increases the uncertainties and confusions to such an extent that rational decisions become difficult to take... In some cases, exceptional organisers may seize the opportunity to establish a dominant firm with a long-term commanding monopoly position".[6]

On this view of the underlying causes of merger activity, competition policy is needed basically as a corrective to prevent or remedy the creation of dominant positions and maintain competitive markets.

This more general theory disposes of a number of partial explanations, such as those that focus on the motives of management or institutional factors such as fiscal changes, and it clashes also with some "free market" explanations in terms of efficiency gains. Such partial explanations cannot account for the world-wide movements in merger activity.

Explanation and the Rationale for Policy

The search for such a general explanation is important for policy, as otherwise policy may be directed at purely temporary phenomena. The number of partial explanations is nearly endless and it is impossible to establish their relative importance. According to de Jong, where policies have had, as their general goal, such criteria as the public interest, or consumer welfare, they have not made much impact. The reasons are plain. First, markets move too fast for government regulations to keep up. Secondly, competition policy of this kind, and especially merger policy, is inevitably caught in the crossfire of the interest groups concerned. Vague criteria leave wide discretion to the authorities, either to do nothing at all (as in the Netherlands) or to promote national champions (as in France), He, therefore, concludes that the "protection of the competitive process" should be the "single and unique goal of competition policy". This approach fits closely into the continental tradition as exemplified earlier by Ludwig

6 de Jong, op cit. page 46

Erhard's struggle with the German industrial establishment to set up the Cartel Office (ERHARD, 1958). Judged at least by its intent and ostensible justification, the EC merger regulation scores high marks by this standard.

The European Merger Wave and 1992

One strand of the merger debate centres on the question of whether mergers are necessary to achieve the benefits promised by the single market programme. Has the recent merger wave been "justified" by the need to prepare for 1992? In a recent paper, Geroski and Vlassopoulos concluded a survey of EC merger activity with the verdict that, viewed as a response to 1992 and the "single European market", the pattern of activity was " hardly impressive" (GEROSKI and VLASSOPOULOS, 1990, page 45). Data available to them showed that most firms chose domestic partners with which to merge; when they did look abroad their choice often settled on a partner outside Europe, and merger activity was concentrated in sectors that did not need massive restructuring, such as food.

In the light of more recent evidence than was available to them, a more positive view seems indicated, though in the absence of a full-scale analysis by industry this must remain impressionistic. In the last two years European companies have focussed their attention on the European market. In particular, the vast majority of international acquisitions by German companies have been of companies in other EC countries. And France has bought even more heavily into other EC countries. The United Kingdom, with its open market in corporate assets has also become the main destination in the EC for acquisitions by the United States and Japan. Meanwhile, as the UK reduced its own foreign investment at the end of the 1980s so it has greatly increased the share of the total going to Europe. The overall focus of world FDI flows on Europe has sharpened.

Europe continued to exercise a strong pull on FDI flows in 1989-90. Data compiled by Acquisitions Monthly show that cross-border acquisitions of EC companies increased further from 1989 to 1990, with German companies attracting by far the largest number of overseas purchasers in both years, but the UK attracting the largest amount of acquisitions by value.

CHAPTER 1 THE GROWTH OF MERGER ACTIVITY

This introductory chapter draws on the data on mergers compiled by the EC and reported in the annual reports on competition policy - the latest available being the 19th report. This series has several drawbacks, the most important of which is that it is confined to mergers and takeovers where at least one of the parties is among the top 1,000 companies in the Community. Even among this limited sample, it may not be complete, as the Commission has obtained its information from the specialist press. Nevertheless, it has the great advantage of providing a consistent series over a reasonably long period of merger and takeover activity among large companies with significant macro-economic effects, which is the prime focus of this inquiry.

It is no surprise that a very rapid rise in mergers involving large companies took place in the 1980s (the EC reports explicitly state that the data includes data on the acquisition of majority holdings, because in most continental languages these are not synonymous with a "fusion" in which one or both parties lose their legal personality) [1]. The upward trend accelerated in the latter part of the decade - reaching a climax in the two years 1987-88 and 1988-89 (Table 1). From other sources it appears that activity was maintained at a high level in 1990 (Tables 9 and 10).

Table 1: Mergers in the community (number)

Year	Industry	Services	Total
1982-83	117	-	-
1983-84	155	-	-
1984-85	208	67	275
1985-86	227	70	297
1986-87	303	112	415
1987-88	383	175	558
1988-89	492	174	666

Sources: Nineteenth Report on Competition Policy and "Horizontal mergers and competition policy in the EC", EC, May 1989.

The number of mergers in services increased faster than that in industry during the period, reflecting the above-average growth in the services sector generally, but industry still accounted for two-thirds of all recorded mergers in 1988-89, when 492 mergers took place, compared with 227 three years previously.

1 For a typology of amalgamations, see page 38

Table 2: Breakdown of mergers in industry by size (combined turnover)

Year	Under ECU 1 billion	ECU 1-10 billion	Over ECU 10 billion	Total
1983/84	47	*85	n.a.	155
1984/85	93	*92	n.a.	208
1985/86	94	*108	n.a.	227
1986/87	134	140	31	303
1987/88	115	207	61	383
1988/89	119	167	106	492

Source: See Table 1

* Over ECU 1 billion

Not only did the total number of mergers involving large companies double in those three years but among these the number of industrial "mega-mergers" with combined sales over ECU 10 billion [2] also jumped sharply, rising from 31 to 106 in the two years to 1988-89, as shown in Table 2. By 1988-89 there were almost as many mergers over ECU 10 billion as there had been mergers over ECU 1 billion three years previously. In 1988-89 these very large mergers accounted for over one-fifth of all recorded industrial mergers in this sample. This increase resulted partly from the increase in the size of the leading firms in an industry due to takeovers reported in previous years: whereas in 1987-88 only one takeover in six represented a combined turnover of more than ECU 10 billion, the proportion rose to more than one in five the following year.

Breaking down the data into what the Commission calls "national", "EC" and "international" mergers (Table 3) shows that although mergers between companies from the same member state still predominated in 1988-89, the fastest-growing component was Community mergers, i.e. the takeover of an enterprise in one member state by an enterprise in another member state. These Community mergers had accounted for only 18-25 per cent of all mergers from 1983-84 to 1986-87, but jumped to 30 per cent in 1987-88 and 40 per cent in 1988-89, exceeding the previous peak year for the relative importance of Community mergers, 1982-83.

2 1 ECU = £0.69 (25.3.1991)

Table 9: Cross-border acquisitions of EC companies: THE SELLERS

Target Country	Total 1989		Total 1990	
	Value £	No	Value £m	No
UK	17,248	236	13,855	304
Italy	2,328	151	2,346	158
France	2,678	258	3,882	291
Spain	2,157	155	3,685	194
Germany	2,589	452	4,252	477
Netherlands	1.040	119	3,318	174
Denmark	451	39	807	94
Eire	155	16	358	18
Portugal	250	25	149	38
Belgium	911	68	838	116
Luxembourg	n/a	3	n/a	7
Greece	8	8	n/a	6
TOTAL	29,824	1,533	33,468	1,877

Source: Acquisitions Monthly/AMDATA

Table 10: Cross-border acquisitions of EC companies: THE ACQUIRORS

Bidder Country	Total 1989		Total 1990	
	Value £	No	Value £m	No
EC				
France	5,470	220	5,817	329
UK	2,615	342	4,249	294
Belgium	82	42	1,722	52
Germany	3,152	116	731	109
Denmark	273	71	201	24
Sub-total	11,592	791	12,720	808
Other Countries				
Canada	238	21	1,837	9
US	10,040	198	2,153	199
Sweden	680	86	6,679	152
Japan	515	45	1,729	53
Switzerland	1,337	117	958	132
Finland	333	65	653	56
Norway	34	12	312	28
Others	5,055	198	8,427	440
Sub-total	18,232	742	20,748	1,069
TOTAL	29,824	1,533	33,468	1,877

Source: Acquisitions Monthly/AMDATA

The share taken of this by EC companies buying other EC companies fell back in 1990, but this reflected the diversion of German investment towards the newly-liberated provinces of East Germany. All other countries increased the value of their cross-border EC acquisitions in 1990 to over $10 billion. And there was a spurt of EC acquisition by Scandinavian countries, mainly in anticipation of the opportunities (and competitive threats) posed by the 1992 programme. If this is taken into account, it can be seen that there was a massive wave of pan-European M&A activity in 1989-90. By contrast, purchases of EC companies by the United States - by far the largest non-EC investor in terms of the outstanding stock - fell dramatically in 1990, and the value of Japanese acquisitions of EC companies was little more than that of Belgium in 1990 despite a rapid increase from a low base. This data reinforces other evidence that European companies are looking increasingly to expand by acquisition in other European countries. Even the UK, which traditionally invests heavily in North America and Commonwealth countries, spent £4.2 billion acquiring other EC companies in 1990, second only to France among fellow EC members.

"The final tally for cross-border purchases for 1990 worked out at £33.5 billion for 1,877 deals and represented a growth of 12 per cent in value over 1989 and 22 per cent in number", stated Acquisitions Monthly. The journal added that figures for 1991 were expected to be lower "but evidence of softening in previously entrenched continental European ownership structures could throw up one or two big surprises".

This evidence, though impressionistic, supports the view that the surge in EC merger activity has been prompted largely by companies deciding to strengthen their competitive position for "1992".

Effects of the Merger Boom

Turning to the economic effects of the European merger boom, little evidence is available on the extent to which concentration within the EC has increased; nor is there much to be gained by simply comparing the sectors where merger activity has been most intense with those industries expected by the EC Commission to show greatest scope for economies of scale and rationalisation in the context of 1992 [7]. True, there seems little overlap between these; but a much more detailed study of individual industries would be required to establish whether or not recent mergers have increased productive efficiency.

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7 See European Commission, 1989

However, if the typical cross-border EC deal still has more in common with a foreign direct investment aimed at gaining access to new markets and "information synergies" rather than with a (horizontal) merger within one legal jurisdiction, which is often aimed at removing a competitor, then there should at least be a presumption not only that the corporate managers who decided on the investment had a rational strategy - or at least one they could defend before their own board - but also that the effect was to increase competition rather than reduce it. It may be the case, as Davis has suggested, that the usual arguments for merger are weaker in the case of international mergers. Where a merger is motivated by traditional rationale - say, to achieve economies of scale - the acquiring firm will confront higher risks and more severe difficulties in improving the performance of the new combined firm than in the case of domestic mergers; first, the acquiring firm is likely to be less well-informed about the market overseas than local producers; secondly, there are the difficulties in managing cross cultural firms.

For such reasons, successful foreign acquisitions have different objectives, to do essentially with market access. They are:

"those that bestow foreign market intelligence and perhaps some reputation on a product" made in the home country. The classic case is where a manufacturer with an internationally tradeable product buys a foreign distributor with knowledge of the local market. In this case, " the synergies expected of cross-border mergers are much more likely to accrue than 'traditional' synergies that have been cited as justification for merger" (DAVIS, 1990). In these cases Davis offers persuasive arguments for expecting cross-border European deals to be successful in realising the objectives of corporate managers, and for expecting the 1992 programme to yield substantial benefits:

> "While firms in Europe who have some genuine source of competitive advantage will generally benefit from the 1992 effects, it is also the case that the weak firms will still often have something to offer them, in the form of established distribution links and market momentum that makes entry of good products much easier. The deals that could be effective in making 1992 work are those that match the distribution strengths of some companies with the production strength of others. They will be the connection of potential 1992 losers with the firms that have the technology to wipe them out. The value is created in preserving their strengths for some useful purpose".[8]

8 See Davis, op cit, page 62

He warns, however, that "the merger of large companies with each other - market leaders in all the different countries - may have benefits too, although these benefits are likely to be a source of interest to the competition policy authorities".

Putting these various perspectives together, a three-dimensional view of the EC merger boom of the late 1980s would see it as a rational response to heightened competition and trade at a time when international bank and capital market finance became available on an unprecedented scale; that this merger process was likely to have positive effects, on balance; but that some firms could use these opportunities to establish monopoly positions. Moreover, despite the lowering of some barriers, many barriers to entry of firms to new markets remained - such as differences in national tax, legal and accounting systems - and economic integration was far from being complete. This is made clearer by a review of the mechanisms that have traditionally controlled the incidence of mergers and takeovers in continental European countries.

CHAPTER 2: NATIONAL MECHANISMS OF CONTROL

National stereotypes are as unhelpful in this field as in any other. It is sometimes suggested, for example, that the low level of mergers and takeovers in Germany and their relative frequency in Britain reflects certain national characteristics. But Germany was the main European centre and origin of industrial cartels and combinations, whereas Britain has been known for much of its history as the home of small family businesses and competitive business conditions. In the period up to 1914, efforts by industrialists to maintain prices by combinations generally failed in England whereas they succeeded in Germany. As a classic study of British industry states:-

> "During the pre-war period (World War I) the combination movement proceeded much further in America and Germany than in England. Abroad, in the coal, iron and steel and engineering industries as well as in the newer trades like oil, motor-car and canned-meat production, large concerns were built up by a process of combination, and most industries were also honeycombed with agreements in restraint of free competition. There were many examples of combination in England; but in the staple trades with which this book is mainly concerned independent family businesses remained the typical form of organization. Where combinations were numerous, as in the iron and steel trade, the most effective of them were vertical in character. The persistence of competitive conditions in British industry has been variously explained. The main reason is probably to be found in the free trade policy of the country on the one hand, and in the dependence of most of the staple industries on foreign markets on the other. These conditions made a policy of price control impracticable for groups of producers in most industries, and so weakened the inducement towards the formation of monopolies." [9]

Far-reaching and contrasting changes have taken place both in the UK and in Germany since this was written in the 1930s. In Britain, industrial concentration has vastly increased, partly through public takeovers and partly through public policies favouring nationalisation, mergers and rationalisation (policies influenced by UK economists' admiration for Continental "planning" and industrial self-discipline!). In Germany, since World War II, competitive markets have been buttressed by laws and institutions

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9 British Industries and Their Organisation, by G.C.Allen, Longmans, Green and Co 1933.

deliberately designed to guard against "the tendency of German industry towards monopolies" [ERHARD, 1958, page 105]. But both changes resulted from specific historical circumstances.

The present situation is that while takeovers - particularly hostile bids - through the stock market mechanism are far more frequent in the US and UK than in continental Europe, the mechanisms that historically have controlled the incidence of take-overs in the EC are currently being eroded by changes in corporate attitudes and world financial market integration [10]. True, there remains a qualitative difference between the open Anglo-Saxon markets in corporate assets and the still essentially closed systems of corporate governance in continental Europe and Japan. However, most industrialists expect hostile takeovers to become more frequent in continental Europe in the next decade. The evolution of EC's competition policy and its efforts to reduce barriers to takeovers could make a decisive difference as to whether one model of corporate governance or the other gains a "dominant position" - or whether different systems will continue to flourish despite moves towards economic integration. As this subject has already been much discussed, only a brief account will be given here (See, for example, BISHOP, GARDNER and FAIRBURN and KAY).

Historical Traditions and Long-termism

The reason for the relatively low incidence of takeovers (through the stock market) in most other EC countries and Japan have more to do with their corporate structures and economic histories than with public policy. Among these are the closer relationship between banks and industry, the much smaller number of companies that are quoted on stock exchanges, the prevalence of cross-shareholdings within groups and between them, restrictions of rights attached to different classes of shares (notably voting rights), the greater importance of family-owned firms and the deep-rooted connections that most companies have with their local communities and local authorities.

As mentioned in Chapter 1, there is still nothing approaching an EC "market" in companies. This is far from saying that there are no ownership changes that are not in effect forced onto existing owners - and in that sense are "hostile takeovers". Such changes are negotiated, however, behind closed doors (this secrecy, objectionable to the British and US traditions, is creeping into the EC merger control procedures, as discussed in Chapter 3). They can be made necessary by a range of factors, including

10 In the UK the number of bids monitored by the Takeover Panel averages about 250 a year; by contrast there were only 35 in France last year (the most active EC market).

a loss of confidence by banks and other creditors/institutional investors in the existing management or an attractive approach to the banking sharholders by another company. Nevertheless, even in these cases, all parties will usually endeavour to reach a cooperative solution, in contrast to the UK and US, where boardroom infighting is regarded as normal.

In continental countries corporate executives still expect greater job security than in the UK or US; indeed, they can be seen as imprisoned in their given duties and "vocation". There is only a small market in executive talent - as in many other aspects of economic life, such as housing. Just as the norm in Germany is still for one family to stay in one house for at least 20 years, so in corporate life - people's identity is defined by their deep and often life-long ties to their job and geographical region. These structural differences across a wide range of market sectors demonstrate that the system of corporate governance has roots deep in the structure of society. But obligations are attached to these rights; as in the somewhat comparable Japanese system these norms impose strong discipline, by community pressure and other means which are overlooked by British advocates of the system and which would almost certainly be resisted in the UK and US as infringements of individual freedom and individual property rights. Just to take one example, there remains a suspicion of geographical or job mobility in Germany whereas in Britain and America such mobility is esteemed.

Of course, even in the UK, corporate structures are more stable than one would gather by a reading of some of the literature on takeovers; most hostile bids fail. Of the 237 proposals investigated by the take-over panel in 1988, 32 resulted in opposed bids of which only 13 succeeded. In 1989 only 11 succeeded compared with an estimated 1,244 domestic acquisitions among larger companies and 30,000 business transfers in total (BANNOCK, 1990). However, despite their small numbers, many surveys have shown that hostile takeovers have far-reaching effects on the business climate; surveys in 1990 showed that executives of large corporations placed the threat of a takeover as second only to general competitive pressures as a factor in forcing corporate restructuring in the UK economy. This supports the view that the threat of takeover does impose a discipline on UK management - while also supporting the view that competition is not in itself strong enough to discipline management.

Changes in ownership are far more likely to be followed by the replacement of senior executives and board members in the UK than in the other countries: 71 per cent of directors in the target firms in a panel studied by FRANKS and MAYER resigned after a contested bid (39 per cent after an uncontested bid). In Germany, by contrast,

dismissal is normally only acceptable to public opinion if the person concerned has been involved in a scandal. Whether greater security for British managers would make them more willing to engage in long-term investment is questionable; they would clearly require alternative disciplines and incentives would clearly be required.

If it is correct to attribute the differing role of stock-market takeovers in the UK on the one hand and most other countries on the other to deep-seated differences in patterns of ownership and historical development, it is unlikely either that, whatever the EC policy, Europe will suddenly be opened up to British predators or that Britain will somehow adopt a German-style corporate structure. But the rapid increase in international mergers and acquisitions as outlined in the previous chapter is gradually eroding the barriers that formerly seemed insurmountable and the 1990s are likely to witness more public cross-border takeovers, including opposed bids, though most large companies will continue to prefer forming alliances with other firms. Indeed, some German lawyers have argued persuasively that the statutory and regulatory barriers to mergers and takeovers in Germany are already much lower than most British observers realize.[11] Possible restriction of competition both through mergers or takeovers and through cartels will thus continue to be a real danger in the 1990s.

Trends in Merger Policy

Insofar as merger policy itself has had an influence, it has in recent years basically been permissive throughout the western world, although there were some signs in 1989-90 of a greater political sensitivity to large mergers. In Europe, the argument has been that mergers are necessary to reap the economies potentially available from the Single Market while in the United States they have been defended partly on traditional "free market" grounds and partly as a pragmatic response to foreign competition. In all leading countries that have merger policies, the 1980s saw a retreat from the attempt to define clear and consistent criteria of what mergers are, or are not, in the public interest, whether in terms of market power, "dominant position", excess return on capital or any other criteria, in the face of the rapid growth of international competition across the entire range of traded goods - and the growth in the proportion of all goods and services that are tradeable.

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11 See "Obstacles to foreigners are nothing but a myth", by Dr Hans-Jochen Otto, Financial Times, February 20, 1991.

The United States

Merger policy was clearly permissive throughout the 1980s, and the crucial actor involved is the US Department of Justice which, under the key Celler-Kefauver Amendment of 1950 to the 1914 Clayton Act, is charged with responsibility of challenging a merger or proposed merger if it believes it may be against the public interest. From 1968 to 1982 the guide-lines under which the Department of Justice operated instructed mergers to be challenged if they resulted in certain levels of concentration and market share and the only argument was about the definition of the market to be applied in any case. In 1982 new guide-lines were issued by Reagan appointee William Baxter embodying an economic approach geared exclusively to consumer welfare, with no room for social or political values, such as protecting small business or local control [12]. Methodologically, there was, at the same time, a switch from historic to forward-looking "what.....if?" calculations of the size of the market, to include specifically calculations of the ease of substitution on the demand side, supply-side switching and the availability or potential availability of imports from other regions. Using this method, markets that appeared concentrated when employing the former guide-lines based on actual market share often fell below the threshold where attention was directed at potential entrants and future markets. Also, efficiency gains were specifically to be taken into account. From the time that this so-called "economists' approach" was adopted, few mergers were challenged. This was the theory of the "night-watchman state" applied to competition policy.

In 1990, a regional and local backlash developed against this minimalist Reagan-Bush laissez-faire policy, which had ushered in an unprecedented surge of mega-buck take-overs.

The EC

Only two countries have a tradition of effective merger policies - Britain and Germany - though some others have recently introduced merger legislation and the situation is changing quickly.

Current UK policy is described in detail in other papers in this series. Suffice to say here that the "Tebbit Doctrine" of June 1986 opened an era of laissez-faire. The Fair Trading Act is benevolent towards mergers, which have to be shown to be likely to act against the public interest to justify intervention. As in the US, the OFT also looks at

12 See Hay and Nydam, op cit.

potential competition, e.g. from imports, so that in an open economy like Britain's it will remain very difficult in most markets to demonstrate restriction of competition. That is why many small countries have given up any attempt at merger control.

In Germany, aware of Germany's cultural predisposition in favour of mergers and cartels and the historic record, the post-war architects of West Germany's economic policy took their inspiration from the US Sherman Act of 1893 which outlawed collusion and monopoly, and the Clayton Act of 1914 banning horizontal takeovers where "the effect of such acquisitions may be substantially to lessen competition". Their overriding concern was to prevent the re-emergence of cartels and monopolies. German policy is intended to prevent any undertaking from acquiring a "dominant position", using market share criteria plus an additional turnover threshold. The task of the Federal Cartel Office (FCO) is to prevent concentration and ensure competitive markets, with any appeal against its decisions going to court. The FCO itself is a quasi-court with powers to search for and seize relevant material (COOKE, page 88).

The FCO is obliged to prohibit mergers that result in or strengthen a dominant position. If it finds that a market is dominated, the FCO may prohibit a merger either before it takes place or within one year of notification of the merger. (In addition there is a Monopolies Commission which issues regular reports on trends in business concentration but does not undertake investigations). The FCO's findings can be and sometimes are overturned by the Economics Ministry but exemption can be granted only after the Cartel office has announced its decision. From 1973 to 1990 there were only six such cases. However, even in Germany where the competitive standard is most clearly enshrined in legislation, and although the FCO is notified of virtually all proposed mergers, it rejects very few. Between 1974, when merger control was instituted, and 1983 only ten cases were denied (LENEL, quoted by COOKE, page 90).

In France, where the state has traditionally actively shaped the industrial structure, legislation aimed at controlling concentration was introduced for the first time in 1977 (Act No 7-806 of 19 July 1977). The criteria are again based on the concept of abuse of a dominant position, but there is a defence in terms of efficiency and social benefits. Moreover, the Competition Council can initiate an inquiry only at the request of Government and when the Government does initiate an examination, it is under no obligation to accept the recommendation of the Council. In recent years, the French government has actively encouraged mergers and takeovers, especially of foreign firms, to strengthen French industry.

Other EC Countries

In other EC countries there was, until very recently, either little attempt to control mergers by public policy (Italy, Greece, Spain) or they have been generally encouraged, as in the Netherlands and Denmark. Where there has been an attempt to monitor behaviour, it has been directed at anti-competitive conduct and abuse of monopoly power rather than the mere existence of monopoly power.

Conclusions

Three main conclusions may be drawn from this brief review:

1. Germany and Britain are the only EC countries to have strong legislation controlling mergers; in practice, Germany appears to be the only EC country in which public policy has recently placed any effective barriers to merger activity.
2. There appears to be little correlation between merger activity and merger regulation, since merger activity is high in some countries where it is ostensibly regulated (US, UK) and low in others where it is only lightly regulated (Scandinavia, and much of the rest of the EC).
3. Cross-border public takeovers including opposed bids, are likely to become more frequent and acceptable to public opinion in continental European countries.

CHAPTER 3: MAIN FEATURES OF EC MERGER POLICY

The mergers regulation adopted on December 21, 1989, which came into force on September 21, 1990, was designed to be "the cornerstone of competition policy in this area" and to make "a substantial contribution to the successful completion" of the single European market. This chapter summarizes the main provisions of the regulation, suggests reasons why the competitive standard was chosen as the criterion for assessment and reviews the lessons to be learnt from the first few months of experience with the regulation in effect. But first we describe how the regulation was "sold" to the corporate sector.

The positive role that mergers would play in the necessary restructuring of European industry was stressed repeatedly by Commission spokesmen. The regulation was intended essentially to facilitate those mergers that would not impede competition. The announcement, made at the time the regulation was put into effect, referred to the "wave of mergers" in European industry (as described in Chapter 1 [13]), adding:

> "Whilst many of these do not raise any difficulties, we need to ensure that they do not result in any lasting damage to the process of competition - a process that lies at the heart of the common market."

The need for mergers was stressed repeatedly by Sir Leon Brittan, Vice President of the Commission responsible for competition policy:

> "As we move towards the completion of the Community's internal market, the future structure and competitiveness of European industry depend largely on companies' plans for mergers, acquisitions and other lasting forms of cooperation... [14]

Although Sir Leon disavowed any prejudice for or against mergers, he made it clear that the regulation was designed to meet the needs of industry in the run-up to 1992. This was understandable in view of the complaints from industry about the uncertainty surrounding merger policy following the ruling by the European Court in the case of BAT and R.J. Reynolds that could be interpreted as bringing concentrations within the scope of Article 85 (prohibiting anti-competitive agreements). This uncertainty had provided the original impetus to the relaunching of the proposed merger regulation in 1988 by Peter Sutherland, Sir Leon's predecessor as competition commissioner. At a

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13 See Press Announcement, EC, 1989.

14 Brittan, 1990

time when mergers were taking place at a rapid pace, companies were coming to the Commission for advice and clearance under Articles 85 and 86 (Article 86 is on the abuse of dominant positions). Sir Leon not only sought to supply this demand, but engaged in some competitive marketing of his own.

His appeal to the corporate world certainly engendered a new element of "regulatory competition" among Europe's regulatory authorities and national capitals were put on notice that they had a jurisdictional battle on their hands, though this was stoutly denied on all sides, all under the neutral cover of the need to "protect" the competitive process:

> "We have no view about whether mergers are good or bad or about whether a given merger is likely to succeed or fail. That is for companies and their shareholders to decide. My task is to discover which mergers threaten competition. They will be stopped. All others will proceed." [op cit]

Europe's companies were assured that they would gain: "All mergers with a Community dimension will benefit from the one-stop-shop regime" . Moreover, the Commission "would listen carefully to the reactions of industry and its advisers in its further work on the regulation":

> "The Community has the merger policy which it needs as we move into the single market with all the restructuring of industry which that entails". [op cit, page 30]

Whether "the Community has the merger policy which it needs", as Sir Leon claimed, is of course a matter of opinion. But before moving to an assessment, it is first necessary to summarize the main provisions of the merger control regulation and explain the reason for the central role accorded to the prevention of monopoly power.

Summary of Main Provisions

1. The regulation[15] covers not only full mergers ("fusions") but also share mergers (takeovers which do not result in the dissolution of either company - see page 38), i.e. all forms of merger and acquisition, including public takeover bids, whether hostile or agreed, other types of share acquisitions and assets purchases, as well as any other transaction by which direct or indirect control of the whole or part of an undertaking is acquired. It does not cover "cooperative" joint ventures and a special notice now draws a distinction between cooperative joint ventures and "concentrative" joint ventures; the latter fall within the regulation.

15 The full text is reproduced in Appendix II

2. A merger will have a Community dimension and will therefore be subject to notification and examination by the Commission in accordance with the regulation if:

(a) the aggregate world-wide turnover of all the firms involved is more than ECU 5 billion (approx £3.5 billion); and

(b) the aggregate Community-wide turnover of each of at least two of the firms involved is more than ECU 250 million (approx £175 million); unless each of the firms involved achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state.

(These thresholds are due to be reviewed in 1993 - four years after adoption of the regulation - when the Council of Ministers will decide, by qualified majority, whether to agree to the substantial reduction of thresholds that the Commission will then propose).

For banks and other financial institutions, see Appendix II.

3. A merger with a Community dimension must be notified to the Commission before it is put into effect and within one week of the conclusion of an agreement, announcement of a bid or the acquisition of a controlling interest. (The large amount of information required to be filed within this time-scale is one of the main practical problems in complying with the regulation; officials are alleviating the burden in various ways, notably by stressing to companies the importance of pre-notification guidance, at which they can discuss well in advance and in confidence whether the merger or takeover will in fact require notification at all). The merger must not be put into effect before it has been notified or for three weeks thereafter - and the Commission can put back the deadlines if insufficient information is received to complete notification procedures. Exception is made for a duly notified public bid, which may be implemented provided the bidder does not exercise the voting rights or does so "only to maintain the full value of those investments" and on the basis of a derogation granted by the Commission. (Article 7). Where the Commission finds that a notified concentration falls within the regulation, it must publish the fact of notification, together with the names of the parties, the nature of the concentration and the economic sectors involved.

4. The Commission must examine every merger within strict time limits: one month to decide whether to open proceedings; four months to conclude proceedings if these are initiated. It will decide whether or not a merger falls within the scope of

the regulation and, if so, whether or not it is "compatible with the common market". It may attach conditions and obligations to its decisions; these are intended to ensure that the companies comply with any commitments they entered into with the Commission to modify their original merger proposal.

5. The appraisal is made on competition grounds. The Commission must take into account:

(a) the need to preserve and develop effective competition within the common market in view of the structure of the markets concerned and actual or potential competition from companies inside or outside the EC.

(b) a variety of other considerations mentioned in the following clumsily-drafted and contentious clause:

> "The market position of the undertakings concerned and the economic and financial power, the opportunities 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 immediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition".

The merger will be deemed incompatible with the common market if it "creates or strengthens a dominant position as a result of which competition would be significantly impeded". If it does not create or strengthen a dominant position the merger will be declared compatible with the common market.

6. Fines of up to 10 per cent of the firms' aggregate turnover can be imposed for failure to notify a merger in due time or for non-compliance with the Commission's rulings.

7. In principle, mergers and takeovers with a Community dimension fall within the exclusive competence of the Commission. Once cleared by the Commission, a merger may generally not be prohibited or subjected to conditions by national merger control authorities. "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension". Sir Leon Brittan claimed this would bring far-reaching benefits to companies in the "large majority" of cases where the Commission would quickly clear a proposed merger:

"They will benefit from a one-stop shop, where there is one analysis by one authority on the basis of competition criteria which takes one month and is binding throughout the Community" [Brittan, 1990].

There are two exceptions to this rule. First, member states may intervene in a merger to protect "other legitimate interests" which are not, or at least not yet or not fully, subject to Community rules. Three examples are given: public security, media plurality and prudential rules, but these are not exhaustive "as it is impossible to foresee all legitimate national interests" (Brittan, op cit, page 23).However, the member state may not take any measures before the Commission has decided whether the interest claimed is compatible with Community law. Secondly, the regulation allows the Commission to refer a merger to the national authorities of the country concerned so that national competition law may be applied if it finds that a claim by a member state that the merger threatens to create or strengthen a dominant position in a "distinct market" within its territory is justified. This clause was included at the insistence of Germany which was reluctant to cede total control to the Commission even above the (high) thresholds. But the Commission may find the application to be unfounded and it is hoped that the provision will be applied infrequently.

Also, at the request of a member state, the Commission may examine a merger which does not have a community dimension , where intra-community trade would be affected and a dominant position created. This provision was intended to help member states which had no effective merger control system. (Holland has asked the Commission to vet mergers below the threshold since it long ago gave up any attempt to control mergers itself.)

8. The regulation repeals implementing regulations for Articles 85 and 86 of the Treaty of Rome in respect of concentrations. In effect, the Commission is denied the powers and procedures needed to apply the Treaty rules effectively, while the national courts may not apply Article 85 on restrictive practices and agreements (Brittan, op cit, page 25). However national courts may apply Article 86 on abuse of dominant positions - it does not require implementing regulations - and thus governments or companies may challenge the Commission's policy in the courts.

9. The authorities of member states are to be closely involved in an "Advisory Committee" of the Commission and the regulation also makes provision for "due process rights" for the actual parties to the proceedings - i.e. the companies have the right to reply to any allegations made by the Commission. Third parties may

also take part in the proceedings by responding to the Commission's invitation to comment which will be made in every case by means of a publication in the Official Journal.

10. The policy decisions made under the regulation are a matter for the Commission, voting on a 9-8 majority basis, subject to judicial review by the Court of Justice and political scrutiny by the European Parliament.

The Competitive Standard

The regulation enshrines the competitive standard - defined essentially as the prevention of monopoly power through mergers - and so long as Sir Leon Brittan is competition commissioner, the assessment of notified mergers will focus on the competition test to the exclusion of other considerations, although the regulation leaves some scope for other considerations. The fact that the merger regulation was steered through the rapids of Commission politics and the staff organized and the initial cases decided under the auspices of a Commissioner dedicated to the single test of competition will undoubtedly have a long-lasting effect on European competition policy.

In retrospect, in the circumstances of the late 1980s there was never much chance that mergers would be required to pass other tests - the alternative was simply not to have an EC merger control system. Indeed, the reason a merger regulation had not been adopted in the 17 years since the Commission first issued a draft directive stemmed from member states' refusal to cede power in an area that was particularly important, though for different reasons, during the 1960s and 1970s to most EC national governments. France, the UK and Italy feared it would interfere with economic planning and industrial policy; Germany that it would lose control over its own strict application of the competitive standard. Indeed, Germany's reluctance to cede control made it doubtful until the last moment whether the regulation could be agreed - and then it insisted on the so-called "German clause" described above.

There are several reasons why competition inevitably became the yardstick for appraising notified mergers. First, although the Treaty of Rome does not mention mergers, the cornerstones of its competition policy (Article 85 and Article 86) are themselves dedicated to the protection of the competitive process; it needs to be remembered that cartels rather than mergers have historically been the principal private sector threat to competition in continental Europe, so that the founders of post-war Europe looked to the US anti-trust Sherman Act as their guide. Even in Britain it was

only with the Monopolies and Merger Act of 1965 that the Government was empowered to refer mergers to the Monopolies Commission - whose name was changed to Monopolies and Mergers Commission only in 1973. Secondly, the two countries with the most developed policies on the control of concentrations, Germany and the UK, had always used competition as the criterion, though in Germany the verdict of the Cartel Office can be overturned by the Ministry of Economic Affairs and this criterion is modified in Britain from time to time by broader public interest considerations - and the whims of particular ministers. Thirdly, the only conceivable alternative - i.e. a policy to "strengthen European industry" or develop "European champions" - was hardly practical politics in the conditions of the late 1980s, when strongly market-oriented governments were in power in most EC countries, when the fashion for "indicative planning" and industrial policies had ebbed, when Eastern Europe was throwing off the burdens of four decades of state planning, and when Europe's economic establishment had concluded that intensified internal competition was the only route to greater international competitiveness. This was not the moment for the European Commission to hijack merger policy in pursuit of industrial, regional and social policies.

Nevertheless, the references in the regulation to considerations in addition to competition - notably to technical and economic progress and "social cohesion" - leave scope for an interpretation on "public interest" lines. The merger policy is not set in concrete. Under another competition commissioner, the recommendations going to the full commission could differ significantly from those made by the present competition directorate. Even keeping within the competition standard, experience in the US and elsewhere has shown that changing views on whether "the market" for a product or services should be defined broadly or narrowly make all the difference in the world to whether a merger is allowed or barred.

What is clear also is that the creation of a new centre of decision-making for large mergers with a new set of guide-lines creates pressures to ensure consistency both in terms of the allocation of cases between national and EC authorities and in terms of the criteria for vetting mergers. The probability of consistency in decision making is presumably lower at the EC level than in Germany or the UK because of the larger scope for political intervention in the merger vetting process, the relative lack of experience and precedents and the absence of an independent cartel office or monopolies agency. In time, however, as a body of precedents is built up, the scope for inconsistent decisions will be reduced - and there is an irreducible political element in all systems of control of mergers and cartels.

Perhaps the most crucial stage of all is the decision whether to open proceedings. In particular, in the case of a hostile takeover bid, the decision to open proceedings itself may often kill the bid since the bidder will frequently not be able to wait four months while the Commission conducts its appraisal. Being taken by the Commission as a whole, this initial decision involves widespread consultation including the legal service, other services and the President's office. This all takes place behind closed doors, in contrast to the more public (if still basically political) referral procedures in the UK and Germany.

The Regulation in Practice - The First Six Months

Since September, 1990 Sir Leon Brittan's office in DG4 has been busy putting the merger control regulation into effect and examining the first cases. Lawyers and other professionals involved in advising companies on mergers, mainly in Brussels, report that the staff at the Commission are competent and helpful - particularly in pre-notification guidance when companies are allowed time to discuss the case in confidence with officials before actually filing the forms required. But no really difficult cases have emerged yet. In particular, there have been no cases involving "national champions" and no contested mergers. What has become clear is that the Commission has already found room within the ambiguities of the wording of the regulation to lay claim to jurisdiction over a wide range of corporate tie-ups.

Between the introduction of the regulation and end-March, 1991, 22 mergers were notified to the Commission. By March, 14 of these had been cleared, 2 referred for detailed examination (2nd stage), 2 were found not to qualify (i.e. not to fall within the regulation), and 1 was rejected as incomplete; 3 remained under study, i.e. within the one-month period within which the Commission must determine whether to initiate proceedings. If the rate of notification during this initial period were maintained, the Commission would examine about 50 cases a year, in line with its expectations but well in excess of the expectations of some member states.

The decisions on whether to clear a concentration or initiate proceedings have occasioned no surprises as yet and appeared not to differ in outcome from what would have been expected from examination by the UK Office of Fair Trading. The two cases where the Commission initiated proceedings - both involving subsidiaries of Fiat, one in computers and the other in batteries - raised prima facie competition issues requiring investigation. However, no really large or difficult cases had emerged.

Nevertheless, experience during this initial 6 month period already raised some difficult issues. One illustrates the different expectations of Continental and English practice. The first few decisions, where mergers were cleared ,were not publicly released. They were communicated to the companies concerned and, on request, to their professional advisers - and even they had difficulties obtaining the document. (The document itself of about 6-8 pages, briefly examines both the jurisdictional issues and economic issues and is of course of public interest as an act of official policy). The reason for not making them public was the need to protect confidential information about the company, but this requires only that the company be given an opportunity to check the document before publication. Following representations by the UK these decisions are now made publicly available, and the UK is determined to keep the process as transparent as possible in future.

More important than this issue, which can charitably be put down to normal teething troubles, were the complex questions relating to the scope and definition of the regulation itself. These so-called jurisdictional issues should not to be confused with jurisdictional problems of another sort which Sir Leon Brittan was also concerned about, i.e. the potential conflict between EC and non-EC merger control authorities. In this case the term refers mainly to the need to ensure consistency of treatment, i.e. first of all whether the case falls within the regulation or not.

Three difficult jurisdictional issues of this sort emerged in the first few months:

First, joint ventures; the problem here is to distinguish between "concentrative" joint ventures, which fall within the regulation (and so are not subject to national authorities), and "cooperative" joint ventures which may be examined under Article 85 (and also by national authorities). The regulation states that a joint venture that performs all the functions of an autonomous entity "which does not give rise to co-ordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture", shall constitute a concentration within the regulation. In one case - Renault buses and cars - the Commission held a concentration to be partly of one type and partly another. The essence of the matter is whether the two parties withdraw from the market of the joint venture as producers or traders. If they do, it is a concentration within the scope of the regulation and can be cleared as such. The Commission's decisions in this case and in the case of the joint venture between Union Carbide and Mitsubishi in the market for carbon, graphite and related products, which was cleared, suggests that there will be scope for companies to present joint ventures as concentrations and fall within the scope of the regulation. In the case just referred to,

which was the first Commission decision reached under the regulation involving two non-EC companies, Mitsubishi had bought a 50 per cent stake in Union Carbide's carbon business, the UCAR Carbon company, and its 19 international subsidiaries, but the Commission ruled that control of UCAR rested neither with Mitsubishi nor Union Carbide and that neither remained active in the market. It was therefore a "concentrative" joint venture compatible with competition policy, with "no significant impact in the Community".

Secondly, there is a question about the definition of a controlling interest. The issue here is to determine objectively when one company exerts a decisive influence on another. In a case involving an ICI subsidiary, where ICI's interest was increased from 50 per cent to 100 per cent, the Commission ruled that this constituted a merger because 50 per cent did not necessarily provide control. Again, therefore, it fell within the regulation (it was cleared within one month).

Thirdly, and perhaps most important, is the definition of a group for purposes of the turnover calculation. Article 5 basically says that the turnover of subsidiaries should be added to the parent for this purpose where the latter has a controlling interest. In the UK, this stage is regarded as being reached at the 51 per cent shareholding level. But in the proposed takeover of Arjomari by Wiggins Teape, the Commission said that a minority holding was sufficient when in practice it constituted control - for instance, if at the latest general meeting, the shareholder was in a position to exercise a majority holding, then its turnover should be consolidated. In this case Arjomari itself was too small to qualify under the regulation, but the Commission initially claimed jurisdiction on the grounds that the turnover of one of its shareholders which had a minority interest was large enough to bring the case within its jurisdiction. In the event, the Commission found that the combined turnover was not large enough, but nevertheless this interpretation, if applied in future, will have the effect of greatly bringing down the thresholds established in the regulation and potentially of bringing many more mergers within the Commission's jurisdiction.

Regulatory Competition

On the basis of these three examples, it seems that, if the merger regulation is judged by its effect in stimulating competition among merger authorities, it has been successful - for national authorities have been put on the alert by the Commission's empire-building. Whether this "regulatory competition" - much admired by some theorists of regulation - is benefiting the individual EC consumer is an open question. Certainly the Commission

appears to be probing the limits of jurisdiction beyond the fairly narrow boundaries laid down during the negotiations preceding adoption, at the insistence of Germany and the United Kingdom.

In the process DG4 is cultivating a good image among companies and their expert merger advisers who have come to expect that they can receive an understanding hearing. It will be all the more attractive for them to direct their energies to the Commission rather than national authorities, because of the opportunities for quick clearance and the flexibility explicitly provided for in the regulation, where there are several references to the possibility of "modifications" being made by the undertakings concerned in a merger to comply with the competition policy, e.g. in Article 8.2.

In these circumstances, whether Sir Leon Brittan's main objective of the "one-stop shop" will be realised is also an open question. Sir Gordon Borrie has insisted that the Office of Fair Trading will examine all mergers within the Regulation and see whether national issues are raised. UK officials say they will be ready to make use of the possibility of requesting referral (under the so-called "German clause"), but this is likely to be resisted by the Commission and the UK Government has not made any such request so far. Then there is the possibility of conflict also on the "other legitimate interests" clause which will enable governments to prohibit mergers passed by the Commission (but only on grounds other than competition).

These problem areas have emerged before the Commission has found any concentration to be "incompatible with the common market", and before it has had to consider a significant contested merger or mergers involving "Euro-champions" or "national champions". Nor is there any case evidence yet either to support or to weaken the concerns of those who hoped (or feared) that the regulation left too much scope for considerations other than that of preserving competition to be taken into account and influence the Commission's decisions. By common consent, Sir Leon has set up an efficient shop with competent, qualified staff but it has yet to deal with a really difficult customer.

Conclusions

1. The EC merger policy has in effect brought about a liberalization of the policy environment facing large EC firms because the establishment of a one-stop shop is likely over time to make it easier to implement agreed mergers; this will depend, however, on the one-stop shop winning its own competitive struggle with the

existing national 'shops'. Perhaps the largest liberalizing impact will be in southern Europe where the state had in the past always played the key role in shaping industrial structure.

2. The policy has left scope for non-economic considerations such as technical and economic progress and 'social cohesion' to be taken into account in the appraisal process as well as in decisions to initiate proceedings. Within the economic criteria, there remains scope for debate about employment effects and similar considerations.

3. The policy may have to some extent facilitated takeovers of EC companies by non-EC companies, by offering the latter also the possibility of "one-stop shopping" (subject to the proviso that the one-stop shop concept prevails), whereas previously, non-EC companies sometimes had to obtain clearance from several EC governments.

4. National merger authorities, such as the MMC and the Cartel Office have not been greatly affected in the short run by the EC legislation, but if it were to be followed by a spate of mega-mergers, all of which were cleared by the Commission, then they clearly would be. In these circumstances governments with a strong commitment to their well-established mechanisms would certainly tighten their control and insist on their regulators playing a key role.

5. The control legislation has possibly made it more difficult for a hostile takeover bid to be made for a large EC company, because of the delaying tactics now available to target companies; as the UK is the only large EC country with an open market in corporate assets, in practice this would imply that the policy has made large UK companies less vulnerable to hostile foreign takeovers - it is even possible, for example, that Nestlé would not have succeeded in its takeover of Rowntree if the regulation had been in effect and if Rowntree had been quick to use the delaying tactics open to target companies ("quick" here means within a few days and less than one week). However, in the case of "closed" markets such as those of southern Europe and Germany, the loosening of capital market structures are influences in the other direction - towards opening their markets to takeovers.

6. Having being determined by the needs of companies together with the new impetus to Community-building provided by the 1992 programme, the adoption

of the merger regulation has raised anew but has not resolved the fundamental question of whether the EC's policies generally are designed to serve the interests of companies, of governments, or those of the individual citizen.

The answer to that question will depend not primarily on merger policy but rather on all the other policies the EC needs to put in place to reduce barriers to entry and subsidies and to make a reality of its stated ambition to create a competitive marketplace in Europe. In itself the competitive standard enshrined in the merger regulation will make only a limited contribution to creating competitive markets in Europe. But in conjunction with other policies, its influence could be far-reaching.

CHAPTER 4: THE CHALLENGE TO THE TAKEOVER CODE

The purpose of codes of practice governing takeovers and of takeover legislation is to ensure fair treatment of shareholders during the course of a bid; neither the UK's "City Code on Takeovers and Mergers" nor the proposed EC legislation in this field is concerned with broader policy issues. In particular, takeover legislation is quite distinct from policy towards mergers and merger regulation. In the European Commission, this separation is recognized in the fact that takeover legislation is the responsibility of the company law directorate (DG 15) whereas merger control, discussed in previous chapters, is the responsibility of the competition policy directorate (DG 4).

In order to define more precisely the scope of the takeover code and the difficulties facing the proposed EC directive, it is necessary to draw distinctions between several types of corporate reconstruction or amalgamation, even though these are frequently lumped together under the general rubric of "merger". For most Anglo-Saxon economists, the terms "merger" and "takeover" have become synonymous. But this is not the case in other countries, where they are viewed as quite different forms of amalgamation - even without bringing in the further complication of the "hostile takeover". The underlying reason for this difference in perspective is to be found in the different approaches to commercial activity, with the continental tradition laying much greater stress on the specific statutory regulations governing different types of commercial activity by contrast with the Anglo-Saxon preference for maximum freedom of action and flexibility. The primacy accorded to the legal framework in continental countries, with the concomitant stress on stable structures, in contrast to the value attached to freedom of action (within a given framework) and the ability to adjust to changing circumstances, in the United Kingdom, is reflected even in the language used to describe mergers, as shown below.

The differences between Britain and its partners over the proposed takeover legislation provides a vivid current example of the difficulty of drafting rules satisfactory to both traditions.

MAIN TYPES OF CORPORATE AMALGAMATION

ASSET MERGERS (in French "fusion") have taken place in most countries since the 1930s, if not before, and may be of two types:
(i) without formation of a new company. In this type of merger, one company loses its identity: all the assets and liabilities of the company are transferred to another company and the company being taken over is dissolved, without going into liquidation; its shareholders are issued with shares in the acquiring company;
(ii) where a new company is formed to absorb the assets and liabilities of two or more existing companies, all of which lose their legal personalities.
DIVISIONS occur when the assets and liabilities of an existing company are transferred to several other companies - the existing company being dissolved
TAKEOVERS, or "shares mergers", are a phenomenon mainly of the past 30 years and vary greatly in frequency from one country to another: although economically this may be the equivalent of an assets merger, they are legally quite different, since the company whose shares are acquired remains in existence and there is no transfer of its assets or liabilities to the acquiring company. Neither the acquiring company nor its target need be public limited companies with shares quoted on a stock market. In short, takeovers change the ownership of an on-going company, whereas mergers transfer the whole business of a company to another, and the former company is dissolved. While both forms of expansion serve the same purposes - expansion, rationalization, strengthening of market power, economies of scale - the former may be reversed at lower costs by divestment, given a supply of would-be purchasers.
A TAKEOVER BID is an offer to the holders of securities carrying voting rights in a company (or convertible into such securities) to acquire their securities for a consideration in cash or other securities for the purpose of acquiring control of the company (or consolidating control), and the offer being made conditional upon sufficient offerees accepting it to achieve the offeror's objectives. The relevant company in determining whether the UK Takeover Code applies is the offeree company: the UK Code applies to offers for all listed and unlisted public companies resident in the UK and some private companies.

One implication of the above definitions is that EC MERGERS are not possible at present - all cross-border amalgamations are takeovers. This is because "fusions" are possible only within a given legal jurisdiction. European mergers will be possible only when it is possible to register a "European" company - i.e. when there is a European company statute.

The EC's Approach to Takeover Legislation

The need to harmonize the law governing takeover bids was mentioned in the EC White Paper on the single European market and the subject was first discussed in 1988 and a draft for a "13th company law directive" was presented in January 1989. This was then redrafted after discussion by a working party and by the European Parliament and a new draft was presented towards the end of 1990. The British government does not view the new draft as satisfactory and anticipates considerably more negotiation. However, the Commission still hopes that a directive can be adopted in 1992 for implementation in 1993.

The following brief summary is based on text of the draft directive published in the Bulletin of the European Communities (Supplement 3/89).

1. The scope of the directive applies only when the target company is a public limited company (Article 1).

2. To ensure equal treatment of all shareholders, the directive fixes a threshold at which there is an obligation to launch a takeover bid - at not more than one third of the voting rights - though the supervisory authority may grant exemptions. To avoid purely speculative partial bids and to protect minorities, the offeror will be obliged to make a bid for all the shares in the company (Article 4). However, this article does not apply when the offeree company is a small or medium-sized company as defined in Article 27 of Directive 78/660/EEC on annual accounts and is not quoted on a stock exchange; in these circumstances the offeror is not required to make a general bid (Article 5).

3. The bidder must bring to the notice of shareholders an offer document setting out all the terms of the bid, the circumstances in which the offer could be withdrawn and the closing date for acceptances (Articles 10-13). Provision is also made for shareholders to receive a report giving the view of the target company's board on the offer (Article 14)

4. Member states are required to designate a supervisory authority to police the takeover rule - how this is done being left to member states. In cases of cross-frontier bids, responsibility (under the first draft) is assigned to the authority of the member state in which the offeree has its registered office (Article 6).

5. The original draft made clear that the objective was to ensure a basic level of protection for the addressees of takeover bids and that member states had the right to introduce more far-reaching or detailed provisions in their law; it also stated

that member states may introduce a reciprocity clause into their national law preventing bids from companies in countries outside the EC which erected barriers to foreign companies acquiring control of their companies. It stated however, that it would be "premature" to introduce such a reciprocity clause at EC level for "the situation within the Community is not as open as one may think"!

6. Member states are enjoined to adopt the laws, regulations and administrative provisions necessary to comply with the directive.

UK Criticisms

At the time of writing (March 1991) there were still many areas which either were not covered at all in the directive or where there was widespread uncertainty about the effect that particular provisions, if enacted, would have. It was clear that the directive would result in effect in the Takeover Panel being put onto a statutory basis, though it is left to member states to designate a relevant "supervisory authority" and this body is allowed considerable discretion. The Panel would be obliged to give reasons for the use of its discretion, and appeals against its decisions (possible even now to the UK courts) would be given much more scope. The EC directive itself would presumably be implemented by statute, and the rulings of the designated "supervisory authority" would be open to challenge in both national and European courts.

But there was confusion about how the supervisory authority would be designated in the case of cross-frontier bids. The latest draft at the time of writing stated that the choice of appropriate supervisory authority should normally be determined by the location of the place where the securities of the target company "were first admitted to trading". But would this extend, for instance, to Eurobond issues - in which case Luxembourg might often be designated as the relevant supervisory authority, in view of its role as a listing centre for Eurobonds, even if the company had no securities listed in Luxembourg at the time the bid was made and no business activities in Luxembourg. It was not even clear whether the target company needed to have its registered office in the EC - one interpretation of the draft suggests that a bid by one US company for another US company listed on the London stock exchange could be subject to supervision by the UK Takeover Panel!

But quite apart from the many areas of confusion and uncertainty, there is deep-seated concern in the UK about the entire approach of the Commission - and this will be difficult to change because it fits in with the EC's general approach to financial market regulation. The main problem for the UK is not that the EC directive, when adopted, might require the UK Panel to be put onto a statutory basis; since the 1986 Financial Services Act

the UK Panel has close links with statutory bodies anyway - it can report infringements of the code to the securities regulators (The Securities Association, which in turn is authorized by a statutory body, the Securities and Investment Board). The main "constitutional" concerns of this sort are, first, that a rule-based system such as that proposed by the Commission - even if in many ways the specific rules are derived from the UK's Code - is unlikely to be effective in practice and, secondly, that adoption of such legislation would undermine the authority of the UK regulators, making the UK Panel just a stopover on the way to the courts. The extent of their concern was underlined when in December 1990 the Panel issued a toughly-worded public statement about the 13th company law directive; this is reproduced in Appendix III.

The UK regulatory system, evolved over 20 years, is based on a small number of general principles and a large number of rules derived from them. As MANSER states, the ten general principles constitute the "basic guide-lines" for the Panel's action:

> "In the changing and continually evolving circumstances of take-over activity, they have paramount importance. The rules which derive from them may be amended, enlarged, waived, or even set aside in the face of practical experience; but in all this the general principles are a guide to the direction the Panel can take and, equally important, they are the parameters beyond which the Panel may not go." (HOP No 21)

This integrated approach - embodying in one institution the "constitutional", "legislative" and "decision-taking" stages of law-making without the full apparatus of the courts - allows the Panel to perform efficiently in terms of the needs of the market-place, including notably the protection of minority shareholders. Any such regulatory system has three features: speed of decision-making, flexibility of operation, and certainty of outcome. No two companies are the same, and no two takeover situations are identical - so while general principles are essential to guide decision-making, there is no compulsion to apply all the detailed rules in every case. Equally, given the rapid development of new financial techniques and instruments, new takeover tactics may be developed by a bidder which do not infringe any of the existing rules but which the Panel finds unacceptable by reference to its general principles.

By contrast, the EC draft directive, as briefly outlined above, embodies a set of rules which go too far in terms of attempting to cover all cases in advance and not far enough in terms of assuring sufficient protection of shareholders' rights.

Thus in the UK view, the EC draft is deeply flawed in three key respects: its overall approach, which promises neither sufficient discipline on bidders nor adequate flexibility to adjust to market conditions; its technical drafting (for instance, in the crucial Article 4, where there appears to be no effective control over the terms of the mandatory bid offer, so that in effect there would be nothing to prevent a bidder reducing the price offered to minority shareholders once he had gained control); and in provisions for its implementation. Above all, the directive as drafted is thought unlikely to achieve its main aims: to guarantee equal treatment of all shareholders and to enable all shareholders of a company to make a properly informed assessment before deciding whether to accept a bid.

In the UK's view, it would be preferable to start with agreement in the EC on a code of conduct and general principles - leaving member states free to implement it in their own way. For those countries without takeover legislation, such an EC directive could be useful, while the UK could continue to apply its highly developed and tested system. At present only France has full takeover legislation, and this was passed only last year. Is it necessary, ask the UK regulators, to introduce EC legislation to harmonise practices in this field when it "could entail the destruction of the essential features of a regulatory system that is needed and works well in the one member state where bids are relatively common, for the sake of theoretical harmonisation, the need for which has yet to be demonstrated" (see Panel's statement, Appendix III)?

The conclusion of the Panel statement was uncompromising:

> "The Panel therefore seeks both radical changes in the text of the Directive to safeguard the essential features of the UK's regulatory system and delay in further consideration of the Directive...."

Towards Statutory Regulation?

1. Two propositions follow from the above:-

(i) EC investors generally do need better protection from being in effect swindled by corporate raiders and this need will continue to grow as European capital markets are opened up and ownership structures gradually loosen. Even in the past few years the share of cross-frontier takeover bids naturally coming under the jurisdiction of the UK regulators has fallen as takeovers have gradually become more widely accepted in Europe. Though the vast majority of these are agreed bids, such bids still require supervision.

(ii) The London model of practitioner-based, largely voluntary, self-regulation cannot be exported, partly because it is thought to be incomprehensible to foreign governments and partly because it is thought to be impracticable to discipline overseas markets without statutory authority. As David Calcutt, the Panel's Chairman, has suggested, in other countries "the notion of an independent watch-dog staffed largely by the practitioners whom it monitors might be laughable" (see interview in Financial Times, February 19, 1990):

"I can quite understand that the Germans, for example, may have a great deal of difficulty in seeing that there are any benefits in a non-statutory system".

2. If these two propositions are accepted and if there is no other, more acceptable, model of regulation - and none has been proposed - it follows that the regulation of takeovers in Europe will be based on statute, and will leave scope for appeal to the national or European courts.

The Scope for Delaying Litigation

Given experience elsewhere, and notably in the United States and Australia, where contested takeovers are common, this must inevitably imply that takeover legislation will be followed by tactical litigation. This can be initiated right at the outset of a bid - for example, the defence can reach for an injunction to restrain circulation of the bidder's offer document, on an alleged infringement of the rules. Similar opportunities for delaying tactics present themselves at each stage of the process. This results in a takeover timetable which has to be open-ended. However, while the larger scope for judicial review will certainly delay and possibly frustrate many hostile bids, it is questionable whether such delay will always be against the interests of all the shareholders in both companies - if, as evidence suggests, shareholders in acquiring companies on average lose from takeovers.

Conclusions

The Takeover Panel has done an excellent job monitoring the City's behaviour during takeovers. Given the backing of the UK Government, the City will probably be able to delay adoption of the EC directive, and its implementation in the UK - possibly for several years. But even if all the virtues claimed for the City's system were true - and doubtless most of them are - the international trend points towards the adoption of more formal legal procedures and practices in the regulation of financial markets. To put the UK's

system onto a statutory basis would certainly throw sand into a very well-oiled machine - but that is what may have to happen. Those who believe it is too easy to mount hostile takeovers of British companies will welcome the change.

CHAPTER 5: THE NEED FOR COMPLEMENTARY POLICIES

Conclusions on specific subjects - such as the takeover code - are appended at the end of the relevant chapter; this section brings together the main strands of the discussion.

This paper has aimed to describe and explain the development of EC policies - at the Community level - towards corporate mergers and acquisitions. Two quite distinct sets of policies are involved: first, the monitoring and vetting of large cross-frontier acquisitions, to determine which are compatible with the common market and which are not; and secondly, the development of rules of conduct to govern the behaviour of market participants during the course of corporate takeovers of European companies. The first set of policies has the single objective of ensuring the maintenance of competitive conditions and market structures in the EC; the second has the single purpose of protecting the interests of shareholders in the course of takeovers. The link between the two is that both involve policies that may lead to official intervention in private property rights.

The mechanism for the control of mergers is at a more advanced stage of development than the rules of conduct in takeovers. A set of rules and criteria for assessing mergers has been agreed and is in force; since September 1990 enterprises planning to merge have been able to discuss their plans with qualified staff from the Commission and are obliged to notify the Commission and supply the information required to enable the Commission to conduct an inquiry, if it decides to open proceedings. The takeover legislation, by contrast, remains in draft form and some member states, such as the UK, are demanding far-reaching revisions in the draft. But even the merger control system remains in its infancy. The practical implementation of the policy has only just begun, it has not had to deal with a contested takeover, or with any really difficult cases involving powerful political interests.

The main influences shaping the development of the merger control system eventually put in place (after 17 years of fruitless discussion) were the following:

1. The existing systems and criteria employed by those member states with traditions of merger control legislation, i.e. Germany and Britain. As both of these give primacy to the test of competition in merger appraisal, it was always unlikely that

the EC legislation would adopt a different test, since this would have put it in head-on conflict with well-established systems that enjoy their governments' support.

2. Economic and business trends towards the end of the 1980s. Not only were cross-frontier acquisitions of EC companies increasing very rapidly, raising questions about the risks of growing industrial concentration at the EC level and possible threats to competitive market structures, but firms themselves were demanding clearer guidance at both national and EC levels as to which mergers would be permitted and which banned (even under the old competition policies under Articles 85 and 86).

3. The climate of opinion at the time, which was disposed to encourage reliance on free market forces and intensified competition to spur firms to greater efficiency, and was disposed to discourage reliance on industrial policies, intervention and central state planning.

4. The ambitions of the European Commission, which seized the opportunities presented by the surprising public-relations success of the 1992 programme for the so-called completion of the internal market, to propose fresh initiatives in many fields designed to give it greater influence, combined with the determination of a new British competition commissioner, Leon Brittan, who knew what he wanted and how to sell it - both to governments and to business.

The merger control system has already made a significant contribution to the economic development of the EC by offering firms the promise of quick clearances of unobjectionable merger plans - even involving very large companies with macro-economic effects - and in the longer term greater clarity in the criteria and greater consistency in the outcome.

The main uncertainty surrounds the extent to which the decision-making process will be distorted by political intervention not just in the final stage when the Commission as a whole decides by majority voting whether to clear a merger or not, but perhaps more important at the stage when it decides whether to initiate proceedings, since the decision to do so could well kill many proposed mergers, particularly hostile takeovers. If the element of political horse-trading is perceived to loom large, then the net effect of the new policy will be to increase uncertainty facing European business rather than diminish it.

There are also likely to be a number of jurisdictional battles with national competition authorities. This tension is part of the day-to-day politics of the Community in a large number of fields and doubtless in the long run a workable division of labour will be arrived at. But again, the uncertainty could be damaging to business.

But the biggest question of all is whether this apparatus of control will end up serving the interests of the European corporate state - companies and governments - or the interests of the individual consumer. In other words, even if business interests are furthered, will consumers have any reason to support the policy?

The success of the EC's approach to merger control will depend not on merger policy itself but on whether it is adequately complemented by a wide range of other policies to create competitive markets in Europe. These include items such as the reform of CAP, reduction in industrial subsidies and state aids, opening up of the public procurement market, vigilance in preventing collusive behaviour, and reduction in other barriers to entry. The fact that many of these barriers have their roots in the varying traditions and ownership patterns of different countries means that it will be difficult to produce "a level playing field" where producers of goods and services compete on equal terms. But many barriers to entry are artificial and result from policy. Only when barriers to trade and entry of new firms are reduced further will the merger control system achieve its potential contribution to the welfare of European consumers.

References:

ALLEN.G.C 1933 British Industries and Their Organisation, Longmans, Green & Co.

BANNOCK.G. 1990 The Takeover Boom: An International and Historical Perspective, Graham Bannock, The David Hume Institute.

BISHOP.M. 1990 National Merger Regulations in the EC, Continental Mergers are Different: Strategy and Policy for 1992, London Business School.

BRITTAN.L. 1990 The Development of Merger Control in the E.E.C. Competition Law, Hersch Lauterpacht Memorial Lectures, February 1990

COOKE 1986 Mergers and Acquisitions, Terence E. Cooke, Basil Blackwell.

COSH, HUGHES & SINGH. 1989 Openess, Innovation and Share Ownership: The Changing Structure of Financial Markets, Wider Working Papers, World Institute for Development Economics Research of the United Nations University, October 1989.

DAVIS.E. 1990 Synergies and the Motivations for Corss-Border Mergers in Continental Mergers are Different: Strategy and Policy for 1992, London Business School.

ERHARD.L. 1958 Prosperity through Competition: The Economics of the German Miracle, Ludwig Erhard, Thames and Hudson.

EUROPEAN COMMISSION, 1989 Horizontal Mergers and Competition Policy in the EC, May 1989

FAIRBURN & KAY 1989 Mergers & Merger Policy, James A Fairburn & John Kay, Oxford University Press.

FRANKS & MAYER 1990 Capital Market and Corporate Control: A study of France, Germany and the UK, Julian Franks and Colin Mayer, London Business School and City University Business School, Mimeo.

GEROSKI & VLASSOPOULOS 1990 European Merger Activity: A Response to 1992 in Continental Mergers are Different: Strategy and Policy for 1992, London Business School.

HAY & NYDAM 1989 Merger Policy in the US, by George Hay with the assistance of Rod Nydam in Mergers and Merger Policy, James Fairburn and John Kay, Oxford University Press.

JACQUEMIN.A. 1990 Merger & Competition Policy in the European Community, Alexis Jacquemin et al, De Vries Lectures in Economics, Blackwell.

JENSEN 1989 The Eclipse of the Public Corporation, Michael C. Jensen, Harvard Business Review, September - October 1989.

KAY.J. 1990 Mergers in the European Community, in Continental Mergers are Different: Strategy and Policy for 1992, London Business School.

MANSER.W.A.P. 1990 The UK Panel on Takeovers & Mergers: An Appraisal, Hume Occasional Paper No.21

MONTAGNON.P. (ED) 1990 European Competition Policy, Edited by Peter Montagnon, The Royal Institute of International Affairs, Pinter Publishers.

MORGAN.E.V. 1987 Monopolies, Mergers and Restrictive Practices: UK Competition Policy 1948-87, Professor E.Victor Morgan, The David Hume Institute, Hume Paper No7.

Appendices

Appendix 1: Recent Developments

Appendix 2: Text of Merger Control Regulation

Appendix 3: The Takeover Panel and the 13th Company Law Directive

APPENDIX I
RECENT DEVELOPMENTS

Michael Reynolds

(Reproduced by kind permission of the author and Acquisitions Monthly)

Source: Michael Reynolds. Resident Partner, Allen & Overy, Brussels.
Speech on: "EEC Merger Law", at conference on "Acquiring in Europe", organised by Acquistions Monthly, London Marriott Hotel, March 1, 1991.

MERGER CONTROL REGULATION - DEVELOPMENTS

NOTIFIED	PARTIES	CLEARED	PROCEEDINGS OPENED
4.10.90	Renault/Volvo	7.11.90	
19.10.90	AG/AMEV	21.11.90	
30.10.90	ICI/Tioxide	28.11.90	
8.11.90	Arjomari Prioux/Wiggins Teape	10.12.90	
15.11.90	Promodes/Dirsa	17.12.90	
20.11.90	Cargill/Unilever	20.12.90	
26.11.90	Mitsubushi/Union Carbide	4.1.90	
3.12.90	Matsushita/MCA	10.1.90	
7.12.90	AT&T/NCR	21.1.90	
10.12.90	Magneti/CEAC		21.1.90
10.12.90	Alcatel/Telettra		21.1.90
21.12.90	BNP/Dresdner Bank	4.2.91	
4. 1.91	Baxtner/Nestle/Salvia	6.2.91	
7. 1.91	Fiat/Ford New Holland	conditionally	
21. 1.91	ASKO/Omni		
22. 1.91	Digital/Kienzle		
23. 1.91	Aerospatiale/MBB		
6. 2.91	Tetra Pak/Alfa Laval		
6. 2.91	Kyowa/Saitama		

To date, there have been 19 notifications to the Commission under the Merger Control Regulation. Twelve proposed mergers have been cleared by the Commission, and proceedings have been opened in two cases. Of the clearances, nine were cleared on the grounds that, although falling within the scope of the Regulation, they did not raise serious doubts as to compatibility with the common market. One, Arjomari Prioux/Wiggins Teape Appleton was found not to meet the threshold criteria laid down in the Regulation, whilst another, Baxter/Nestlé/Salvia, was granted clearance because the Commission came to the conclusion that it did not constitute a "concentration" for the purposes of the Regulation. The Fiat/Ford New Holland merger has been approved subject to conditions which will be announced after the closing date of the agreement between Fiat and Ford.

Article 6 of the Regulation, which sets out the options available to the Commission following a notification, provides as follows:

ARTICLE 6

"Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within

the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

(c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to it compatibility with the common market, it shall decide to initiate proceedings.

2. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay."

RENAULT/VOLVO

This transaction was authorised partly on Article 6 1(a) grounds and partly on Article 6 1(b) grounds.

Briefly, the deal involves the creation of joint management committees for R&D, production, purchasing and co-operation with third parties. As regards cars, Renault will exchange 20 per cent of its shares in return for 25 per cent of the shares of Volvo Car Corporation. As regards trucks and buses, Renault will exchange 45 per cent of Renault Vehicules Industriels in return for 45 per cent of the shares in Volvo Trucks Corporation. The Commission decided that the parties cooperation on cars would not constitute a concentration within the meaning of Article 3 of the Merger Regulation. The Commission took the view that the low level of share exchange between the parties, the proportionate sharing of profits and losses, the structures of the Committees and the Shareholder Agreements prohibiting the increase of shareholdings above 25 per cent, indicated that a situation whereby one party gained sole control over the other or whereby a situation of common control making it impossible for each party to act independently would not be created. "Control" within Article 3, paragraph 3 of the Merger Regulation requires "the possibility of exercising decisive influence on an undertaking".

The Commission, however, concluded that the notified operation involving trucks and buses/coaches did constitute a concentration with a Community dimension. The high level of share exchange would result in almost equal sharing of profits and losses, creating a situation of common interest and common control. The operation will involve the integration of all activities, from development to production and purchasing and lead to reciprocal dependency between the two parties.

However, the Commission concluded that the concentration would not create or strengthen a dominant position as a result of which effective competition would be significantly impeded., On examination of the bus and truck markets, the Commission found that the combined market share of Renault and

Volvo would not prevent effective competition from other major suppliers. The truck and bus operation was therefore declared compatible with the Common Market.

AG/AMEV

This decision was taken pursuant to Article 6 1(b) of the Merger Regulation.

The transaction involves the acquisition by Group AG and AMEV of joint control by way of share purchase of two newly created joint ventures to be called AMEV/VSB 1990 NV and AG 1824, SA Compagnie Belge d'Assurance Generales. The joint ventures will control all the interests and activities of AMEV and Group AG, which will continue as holding companies only.

The Commission came to the conclusion that the notified operation fell within the scope of the Merger Regulation but that it did not raise serious doubts as to its compatibility with the Common Market.

In this case the Commission had to consider the basis of calculation of turnover for insurance companies. If the turnover of AG's and AMEV's insurance activities were to be calculated by excluding the turnover realised by the group companies active in the real estate sector then the aggregate worldwide turnover of both groups in 1989 would have been 4903 million ECU. However, if the turnover of real estate companies were included, the world-wide turnover would be 5053 million ECU, which would bring the operation within the scope of Merger Control Regulation. The parties argued that real estate investments are inherent in insurance activities and that they should not therefore be taken into account in calculation or turnover as the special rule laid in Article 5 3(b) of the Regulation applies. The parties argued that there is a legal obligation for insurance companies to invest the required premiums and that it would be arbitrary to treat the turnover from real estate differently from the turnover from other investment categories.

The Commission rejected this argument. The Commission's view was that Article 5 3(b) did not constitute a special threshold for insurance companies, but only a special method of calculation of turnover. This did not exempt them from the general rule stated in Article 5. The Commission's view was that for the purposes of the thresholds laid down in Article 1, the aims and methods of generating turnover are immaterial.

However, the Commission decided that the merger did not raise doubts as to compatibility with the Common Market. Although the combined group will rank among the top fifteen European insurance groups and will be the second largest participant in the Benelux market, the Commission cleared the merger on the grounds that each party is only a minor competitor in the home market of the other.

ICI/TIOXIDE

This decision was taken under Article 6 1(b) of the Merger Regulation. The Commission decided that the transaction did constitute a concentration within the terms of the Regulation but that it did not raise serious doubts to its compatibility with the Common Market.

The transaction involved ICI acquiring Cookson's 50 per cent shareholding in Tioxide Group PLC. Prior to the transaction, ICI held the other 50 per cent of the share and would therefore acquire the whole of the share capital of Tioxide.

The Commission decided that the operation would constitute a concentration within the meaning of Article 3 1(b) of the Merger Regulation. By acquiring the whole of the share capital of Tioxide it was quite clear that ICI would obtain "control" of the company for the purposes of the Regulation. The Commission considered the effect of the transaction on the markets for titanium dioxide and paints. ICI is one of the worlds largest manufacturers of paints and is Tioxide's largest customer. Tioxide currently supplies the major part of ICI's titanium dioxide requirements for its European paint business. The Commission found that there was no horizontal overlap between ICI and Tioxide and that the transaction should not have the effect of narrowing down or limiting access to the markets affected. It therefore concluded that the acquisition of sole control of Tioxide by ICI would not create or strengthen a dominant position in the paints market and that it did not raise any serious doubts as to its compatibility with the common market.

ARJOMARI PRIOUX/WIGGINS TEAPE APPLETON

The Commission's decision in this case was based on Article 6 1(a) of the Regulation. The decision is of interest in that it provides insight into how the Commission is likely to interpret the test applicable to the inclusion of the turnovers of parent companies for the purposes of assessing whether a proposed merger falls within the scope of the Regulation. It was found that the operation did not fall within the scope of the Regulation because the combined turnover of the two firms did not meet the ECU 5000 million threshold required for operation of the Regulation.

The Arjomari Prioux/Wiggins Teape Appleton transaction is to be carried out in two stages. Firstly, Arjomari will transfer to one of its wholly owned subsidiaries most of its assets, liabilities, and undertakings. Secondly Arjomari will transfer to Wiggins Teape almost its entire shareholding in that subsidiary in exchange for 39 per cent of Wiggins Teape's ordinary shares. The remainder of Wiggins Teape's shares are in diverse ownership. Both Arjomari and Wiggins Teape are involved in the manufacture of paper and its wholesale supply through paper merchants. Wiggins Teape is in addition also engaged in the the manufacture and sale of pulp.

The Commission found that Arjomari would acquire control of the undertaking within the meaning of Article 3 of the Regulation as it would hold 39 per cent of Wiggins Teape's shares while the remainder of Wiggins Teape's shares would be held by around 107,000 other shareholders, none of whom would own more that 4 per cent.

However, the Commission found that the turnovers of Groupe Saint Louis, which is the largest shareholder in Arjomari, and Pechelbronn, which in turn is the largest shareholder in Groupe Saint Louis should not be taken into account, Groupe Saint Louis having exercised 45.19 per cent of the voting rights present or represented at the last general meeting of Arjomari. This was not sufficient to establish that it had the power of control over Arjomari referred in Article 5(4) b of the Regulation. The Commission therefore excluded the turnovers of Groupe Saint Louis and Pechelbronn from the calculation; turnover relevant to the concentration consequently did not exceed the ECU 5000 million threshold necessary to bring the Regulation into operation.

PROMODES/DIRSA

This decision was reached on the basis of Article 6 1 (b) of the Regulation.

The transaction involved the acquisition of 99.92 per cent of Distribuciones Reus SA (DIRSA) by Distribuidora Internacional de Alimentacion (DIA) a Spanish subsidiary of Promodes. The Commission carried out a town by town survey in Northern Spain to assess the impact of DIA's takeover of DIRSA's 895 supermarkets in that area. DIA already owned 362 shops, of which 17 were hypermarkets, in that area prior to the deal.

The Commission found that the transaction would not create or strengthen a dominant position and therefore declared it compatible with the Common Market.

CARGILL/UNILEVER

This decision was reached on the basis of Article 6 1(b) of the Regulation.

Under the terms of the deal, Cargill PLC will acquire United Agricultural Merchanting Limited (UAM), the UK agricultural merchanting division of Unilever. The Commission found that the merger would constitute a concentration under the terms of the Regulation, but that it would not create or strengthen a dominant position as a result of which competition would be significantly impeded.

The Commission examined the horizontal and vertical effects of the concentration of the agricultural merchanting sector in the UK, and found that the new company would not obtain a market share exceeding 20 per cent in any affected market and that the barriers to entry were very low. The concentration was therefore declared compatible with the Common Market.

MITSUBUSHI/UNION CARBIDE

This decision was reached on the basis of Article 6 1(b) of the Regulation.

The Commission concluded that the notified operation fell within the scope of the Regulation, but did not raise serious doubts as to its compatibility with the Common Market.

This decision is of interest in that it is the first involving a joint venture as opposed to a merger or acquisition. It was also the first Commission decision reached under the Regulation involving two non EEC companies. The notification concerned an agreement between Mitsubushi and Union Carbide whereby Mitsubushi would purchase a 50 per cent interest in Union Carbide's world wide carbon business consisting of UCAR Carbon Company (UCAR) and its 19 subsidiaries. Four of the UCAR subsidiaries would be owned 50 per cent by each of the parties and then rights would be transferred back to UCAR.

The Commission concluded that the notified operation fell within the scope of the Regulation, but did not raise serious doubts as to the compatibility with the Common Market.

The Merger Regulation applies to "concentrative" joint ventures, but not to "cooperative" joint ventures. The Commission found that the operation constituted a "concentration" within the meaning of Article 3 1(b) of the Regulation. UCAR will be jointly controlled by the two parent companies, each party owning half the capital and having the right to appoint half of the management board. In respect of certain matters, all of which are related to the need to protect the value of the shareholders' investment, UCAR will require the consent of both parent companies. The Commission commented that the joint venture will be "an autonomous economic entity", it being economically independent of its parent companies and responsible for its own commercial policy.

The Commission found that the joint venture did not have as its object or effect the coordination of the competitive behaviour of the undertakings involved, Union Carbide not retaining any interest in the carbon and graphite market other than its share in UCAR. It will therefore be withdrawing from UCAR's markets. Mitsubushi has a market share of 12 per cent in Japan and a market share of .01 per cent within the EEC. The agreement between the two companies provide that Mitsubushi will withdraw from the joint venture markets and keep its Japanese investments limited and held as financial investments rather than for commercial reasons.

The Commission decided that the merger would not have significant effects on the relevant markets within the European Community. Even if Mitsubushi was capable of transferring its market share to UCAR the addition would be negligible (0.01 per cent). As Mitsubushi operated as a mere trading company, its loss as a competitor would have no impact on the EC markets. The Commission felt that there would be no significant strengthening of UCAR via the trading expertise of Mitsubushi as UCAR already has a dense and complete distribution network in Europe and worldwide. The commission also commented that there was no indication that the withdrawal of Mitsubushi as a trading company would endanger the possibility of other Japanese producers selling their products on the EC markets as they already do. The Commission also found that the position of Mitsubushi in upstream markets, in particular calcined nedle petroleum coke was not dominant; these markets are competitive with unrestricted access by competitors.

MATSUSHITA/MCA

This decision was adopted on the basis of Article 6 1(b) of the Regulation.

The notification concerned the acquisition of the whole of MCA Inc (MCA) by Matsushita Acquisition Corp, a subsidiary of Matsuschita Electrical Industrial Co Ltd (MEI). Matsushita is one of the major producers of consumer audio and video equipment, whilst MCA is one of the worlds seven largest producers of motion picture films. The Commission's investigation centred on the "conglomerate" aspect of the merger, namely the linkage between Matsuschita's "hardware" (video and audio equipment) and MCA's "software" (motion picture films and recorded music). MEI is strong in video equipment and holds a significant market share within the community in video recorders and related products. MEI's market share in VCR's amounts to 15% community wide and from 7 per cent to 34 per cent according to the Member State in question. VCR's produced within the Community under the VHS standard are produced under the licence of MEI or in joint ventures with MEI. MCA has a market share of around 10 per cent of the community's motion picture film production. It also manufactures and distributes recorded music with a market share below five per cent in the EEC.

The Commission found that MCA's principal competitors all have financially strong shareholders or parent companies and that the linkage of the financial resources of MEI with MCA's activities would not raise serious doubts as to the compatibility of the merger with the common market.

The Commission found that in the current relevant markets, the "hardware-software" linkage was unlikely to lead to the creation or strengthening of a dominant position as there was a sufficient supply of motion picture films and recorded music for every major technical standard or format used for broadcasting, home videos and video systems and cinemas. The Commission found it necessary, however, to consider the future developments in the markets.

The Commission considered the likely impact of HDTV (High Definition Television) and related products. The commercial success of such a product may at least partly depend on the availability of software. Consumers will be willing to buy new products only if an adequate quantity of new software is available. This is especially true when the introduction of advanced hardware parallels the creation of a new technical standard or format.

The Commission felt that on the assumption that there will be competing HDTV standards (there are at present two standards under development, one Japanese and one European) it was very likely that MCA as a subsidiary of MEI would be one of the first software companies to offer motion pictures under the technical standard format of MEI's video equipment. However, the Commission commented that there was only one other major video equipment manufacturer linked with a competitor of MCA (Sony and Columbia Pictures) MCA and Columbia together take a share of 16 per cent of consumer video entertainment products in the community. None of the other significant software companies are

linked with an important consumer electronics company. These software companies will have complete freedom as to whether and under which format they will offer motion pictures. There would, therefore, remain a sufficient number of other software companies which could offer filmed entertainment under competing formats.

The Commission decided, therefore, that the proposed concentration did not raise serious doubts as to compatibility with the Common Market. In its Press Release it did comment, however, that it would ensure that it remains fully informed about future developments in the sector and would pay particular attention to the maintenance of competitive conditions.

AT&T/NCR

This notification was the first to be received by the Commission in the context of a contested takeover bid. The proposed merger was granted clearance on the basis of Article 6 1(b) of the Regulation.

AT&T has made a takeover bid for all the shares of NCR Corporation. Both companies are incorporated in the USA.

The Commission's assessment was based principally on the "vertical" and "conglomerate" aspects of the merger. Although NCR is not one of the major overall producers of hardware in the Community, it has strong position in the financial and retail work stations markets (automatic teller machines, electric points of sale, electronic cash registers). AT&T carries out a wide range of activities in markets which are linked, mainly upstream to the work stations business. One of the most important of these is the control of the source of the UNIX operating system software, which AT&T licenses very widely. The "conglomerate" aspect considered by the Commission mainly concerned the possible technical compatibility between AT&T's telecommunication and computer networking and NCR's workstations.

The Commission found that the UNIX operating system was readily available to competitors of AT&T and NCR. The Commission stated that it would pay particular attention to the maintenance of this aspect of current competitive conditions, while declaring the operation compatible with the common market under the Regulation.

MAGNETI-MARELLI/CEAC

This, along with the Alcatel/Telettra case, is one of only two cases in which the Commission has decided to open proceedings under the Regulation. The decision to open proceedings in this and the Alcatel/Telettra case was announced on 21st January. The Commission has four months from the date of opening proceedings in which to reach a formal decision in the two cases.

The Magneti-Marelli/CEAC merger involves the acquisition by Magneti-Marelli (part of the Fiat Group) of control over 50.1 per cent of CEAC's equity capital. CEAC is Compagnie Generale l'Electricite (CGE)'s subsidiary in the electric batteries sector. CGE will maintain a 48.3 per cent share in CEAC's

capital. It would appear that the Commission's decision to open proceedings was due to the high combined market shares for the new group in the retail market for starter batteries and the market for stationary batteries in France.

ALCATEL/TELETTRA

This proposed merger involves the purchase by Alcatel (in which CGE holds a 61.5 per cent stake) of a 62.9 per cent share in the equity capital of Telettra from Fiat which will retain a 25 per cent in Telettra. Telettra is Fiat's telecommunications subsidiary.

The Commission's preliminary assessment is that the proposed merger would lead to high combined market shares for the new group on the markets for transmission equipment in Spain. The markets for transmission equipment (telecommunications equipment other than switching and cables) had a value of more than 600 million ECU in Spain in 1989.

Appendix II
Text of Merger Control Regulation (EEC) No. 4064/89 of 21 December 1989

THE COUNCIL OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3(f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';

Whereas this system is essential for the achievement of the internal market by 1992 and its further development;

Whereas the dismantling of internal frontiers is resulting and will continue to result in major corporate re-organizations in the Community, particularly in the form of concentrations;

Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;

Whereas, however, it must be ensured that the process of re-organization does not result in lasting damage to competition; whereas the Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it;

Whereas 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 to be incompatible with the system of undistorted competition envisaged in the Treaty;

Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;

Whereas the provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State;

Whereas the scope of application of this regulation should therefore be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension; whereas, at the end of an initial phase of the implementation of this Regulation, these thresholds should be reviewed in the light of the experience gained;

Whereas a concentration with a Community dimension exists where the aggregate turnover of the undertakings concerned exceeds given levels worldwide and throughout the Community and where at least two of the undertakings concerned have their sole or main fields of activities in different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has

substantial operations in at least one other Member State; whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there;

Whereas the arrangements to be introduced for the control of concentrations should, without prejudice to Article 90(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors; whereas, in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them;

Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to preserve and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a;

Whereas this Regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market;

Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it;

Whereas the Commission should have the task of taking all the decisions necessary to establish whether or not concentrations of a Community dimension are compatible with the common market, as well as decisions designed to restore effective competition;

Whereas to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary; whereas in the interests of legal certainty the validity of transactions must nevertheless be protected as much as necessary;

Whereas a period within which the Commission must initiate a proceeding in respect of a notified concentration and a period within which it must give a final decision on the compatibility or incompatibility with the common market of a notified concentration should be laid down;

Whereas the undertakings concerned must be accorded the right to be heard by the Commission as soon as a proceeding has been initiated; whereas the members of management and supervisory organs and recognized workers' representatives in the undertakings concerned, together with third parties showing a legitimate interest, must also be given the opportunity to be heard;

Whereas the Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information;

Whereas, for the purposes of this Regulation, and in accordance with the case-law of the Court of Justice, the Commission must be afforded the assistance of Member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to appraise concentrations;

Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments; whereas the Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 172 of the Treaty;

Whereas it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a durable change in the structure of the undertakings concerned; whereas it is therefore necessary to exclude from the scope of this Regulation those operations which have as their object or effect the coordination of the competitive behaviour of independent undertakings, since such operations fall to be examined under the appropriate provisions of Regulations implementing Article 85 or Article 86 of the Treaty; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures;

Whereas there is no coordination of competitive behaviour within the meaning of this Regulation where two or more undertakings agree to acquire jointly control of one or more other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets;

Whereas the application of this Regulation is not excluded where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration;

Whereas the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice;

Whereas the Member States may not apply their national legislation on competition to concentrations with a Community dimension, unless the Regulation makes provision therefor; whereas the relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise than by this Regulation; whereas the Member States concerned must act promptly in such cases; whereas this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies;

Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States' taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

Whereas concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States; whereas, however, the Commission should have the power to act, at the request of a Member State concerned, in cases where effective competition would be significantly impeded within that Member State's territory;

Whereas the conditions in which concentrations involving Community undertakings are carried out in non-member countries should be observed, and provision should be made for the possibility of the Council's giving the Commission an appropriate mandate for negotiations with a view to obtaining non-discriminatory treatment for Community undertakings;

Whereas this Regulation in no way detracts from the collective rights of workers as recognized in the undertakings concerned,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 22 this Regulation shall apply to all concentrations with a Community dimension as defined in paragraph 2.

2. For the purposes of this Regulation, a concentration with a Community dimension where;

(a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million, and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this regulation by the Council acting by a qualified majority on a proposal from the Commission.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to preserve 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;

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities 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 immediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. 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.

3. A concentration which creates or strengthens a dominant position as a result of which competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge, or

(b) one or more persons already controlling at least one undertaking, or

– one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by other means, direct or indirect control of the whole or parts of one or more other undertakings.

2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1(b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b).

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the poss ibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned, or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the sale of all or part of that under taking or of its assets or the sale of those securities and that any such sale takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies justify the fact that the sale was not reasonably possible within the period set;

(b) control is acquired by an office holder according to the laws of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies, as last amended by Directive 84/569/EEC, provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations

1. Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of Article 1(2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of the products and the provision of services falling within the undertakings' ordinary activities after the deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, as regards Article 1(2)(a), one-tenth of their total assets.

As regards Article 1(2)(b) and the final part of Article 1(2), total Community-wide turnover shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with Community residents and the total sum of those loans and advances.

As regards the final part of Article 1(2), total turnover within one Member State shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with residents of that Member State and the total sum of those loans and advances;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and the final part of Article 1(2), gross premiums received from the Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the turnover of an undertaking concerned within the meaning of Article 1(2) shall be calculated by adding together the respective turnover of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly;

- owns more than half the capital or business assets, or
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
- has the right to manage the undertakings' affairs;

(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the right or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the turnover of the undertakings concerned for the purposes of Article 1(2);

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

(c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

2. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. For the purposes of paragraph 2 a concentration as defined in Article 1 shall not be put into effect either before its notification or within the first three weeks following its notification.

2. Where the Commission, following a preliminary examination of the notification within the period provided for in paragraph 1, finds it necessary in order to ensure the full effectiveness of any decision taken later pursuant to Article 8(3) and (4), it may decide on its own initiative to continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect.

3. Paragraphs 1 and 2 shall not impede the implementation of a public bid which has been notified to the Commission in accordance with Article 4(1) by the date of its announcement, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to paragraph 4.

4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1, 2 or 3 in order to prevent serious damage to one or more undertakings concerned by a concentration or to a

third party. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

5. The validity of any transaction carried out in contravention of paragraph 1 or 2 shall be dependent on a decision pursuant to Article 6(1)(b) or 8(2) or (3) or by virtue of the presumption established by Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 or 2.

Article 8

Powers of decision of the Commission

1. Without prejudice to Article 9, each proceeding initiated pursuant to Article 6(1)(c) shall be closed by means of a decision provided for in paragraphs 2 to 5.

2. Where the Commission finds that following modifications by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2), it shall issue a decision declaring the concentration compatible within the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion laid down in Article 2(3), it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by a separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings concerned is responsible or where it has been obtained by deceit, or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

6. In the case referred to in paragraph 5, the Commission may take a decision pursuant to paragraph 3, without being bound by the deadline referred to in Article 10(3).

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission which shall

1. equality of treatment and opportunity for all shareholders in takeover bids
2. adequate information and advice to allow shareholders to assess the merits of the offer
3. no action which might frustrate an offer by a target company during an offer period without shareholders being allowed to vote on it
4. the maintenance of fair and orderly markets in the shares of the companies concerned, throughout the period of the offer

THE 13TH COMPANY LAW DIRECTIVE

The European Community's proposed Directive on takeover bids, first adopted by the Commission in December 1988, aims to harmonise national systems regulating takeovers and to introduce competent authorities in all Member States to perform this role.

As currently drafted, the Directive threatens the three key features of the Panel system - speed, flexibility and certainty. Flexibility is shorthand for the primacy of the General Principles and the capacity to modify the Code quickly and responsively. Certainty refers to the willingness of the market to rely on Panel rulings both before and after transactions are announced and the freedom from time-consuming and costly litigation. It is the view of the panel that prevention is better than cure.

As it stands, the proposed Directive would be implemented by statute. Hence the ruling of the competent authority could be open to national and European legal challenge. This would, the Panel believes, inevitably lead to an increased risk of tactical litigation during the course of takeovers and would mean not only delay and expense, but also the loss of flexibility and certainty that the Panel's ruling were final. The strengths of the current UK system could be lost within this framework.

TACTICAL LITIGATION

Outside the UK, contested takeovers are common in Australia and the United States. In both these countries the Courts are often involved. The defence seldom hesitates to reach for an injunction to restrain circulation of the bidder's offer document, for example, on the basis of an alleged failure to comply with technical information requirements. Similar opportunities for delaying tactics present themselves at each

stage of the process. This results in a takeover timetable which has to be open-ended - a situation against the interests of both shareholders and of defending management and employees.

Although the Directive lays down that takeovers should be completed within a finite timetable, the system of regulation it proposes would enable parties to take each other or the competent authority to court. Delaying litigation could become a much-used defence tactic.

Currently the Panel is recognised by the Courts as subject to judicial review, but the circumstances in which this can be invoked are strictly limited. The Courts have indicated that - in the public interest - the market should be able to rely on decisions the Panel takes during the course of takeovers and that accordingly such decisions should not be liable to reversal by the Courts. The Panel is not itself a statutory body but is supported by a number of bodies whose powers are backed by statute.

FLEXIBILITY

The Panel's flexibility is based upon its ability to interpret the specific rules of the Code in the service of its broader principles. The major advantage of the Panel's principle-based system is that, if necessary, it can allow the spirit of the Code precedence over a specific rule. Flexibility is important because takeover techniques are constantly changing. Practitioners can be ingenious in finding ways around precisely drafted regulations.

THE FUTURE

An amended version of the Commission's original proposal is currently being considered by the European Council. Despite the amendments made to the original draft, the Panel remains convinced that the draft is unworkable as it stands. Whereas the proposed Directive has been changed so that the behaviour of the competent authority would now be governed by General Principles, the behaviour of interested parties in any transaction remains subject to precisely drafted Rules.

Although it remains the Commission's intention that the Directive shall allow for the continuation of a Panel-style system, it is clear that the current text does not achieve this.

Within the European Community (the United Kingdom excepted) public company takeovers remain a relatively rare phenomenon. In these circumstances, it is hard to see how it can be in the public interest to press ahead to implementation of the Directive

inform the undertakings concerned that a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned, or

(b) it shall refer the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken where:

(a) as a general rule within the six-week period provided for in Article 10(1), second subparagraph, where the Commission has not initiated proceedings pursuant to Article 6(1)(b), or

(b) within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures pursuant to Article 8(2), second subparagraph, (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the three months referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has taken no decision on referral in accordance with paragraph 3 or taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measure strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.

10. This Article will be reviewed before the end of the fourth year following that of the adoption of this Regulation.

Article 10

Time limits for initiating proceedings and for decisions

1. The decisions referred to in Article 6(1) must be taken within one

month at most. The period shall begin on the day following the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.

That period shall be increased to six weeks if the Commission receives a request from a Member State in accordance with Article 9(2).

2. Decisions taken pursuant to Article 8(2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.

3. Without prejudice to Article 8(6), decisions taken pursuant to Article 8(3) concerning notified concentrations must be taken within not more than four months of the date on which the proceeding is initiated.

4. The period set by paragraph 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation pursuant to Article 13.

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the judgment.

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b) or (c) or Article 8(2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed declared compatible with the common market, without prejudice to Article 9.

Article 11

Request for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States, from the persons referred to in Article 3(1)(b), and from undertakings and associations of undertakings.

2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 14(1)(b) for supplying incorrect information.

4. The information requested shall be provided, in the case of undertakings, by their owners or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, by the persons authorized to represent them by law or by their statutes.

5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14(1)(b) and 15(1)(a) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

Article 12

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary pursuant to Article 13(1), or which it has ordered by decision pursuant to Article 13(3). The officials of the competent authorities of the Member States responsible for conducting those investi gations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State within the territory of which the investigation is to be carried out. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State within the territory of which the investigation is to be carried out, officials of the Commission may assist the officials of that authority in carrying out their duties.

Article 13

Investigative powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To that end the officials authorized by the Commission shall be empowered:

(a) to examine the books and other business records;

(b) to take or demand copies of extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized to carry out the investigations shall exercise their powers on production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14(1)(c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform, in writing, the competent authority of the Member State within the territory of which the investigation is to be carried out of the investigation and of the identities of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it shall begin and state the penalties provided for in Articles 14(1)(c) and 15(1)(b) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.

5. Officials of the competent authority of the Member State within the territory of which the investigation is to be carried out may, at the request of that authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking or association of undertakings opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to carry out their investigation. To this end the Member State shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings fines of from Ecu 1,000 to 50,000 where intentionally or negligently:

(a) they omit to notify a concentration in accordance with Article 4;

(b) they supply incorrect or misleading information in a notification pursuant to Article 4;

(c) they supply incorrect information in response to a request made pursuant to Article 11 or fail to supply information within the period fixed by a decision taken pursuant to Article 11;

(d) they produce the required books or other business records in incomplete form during investigations pursuant to Articles 12 or 13, or refuse to submit to an investigation ordered by decision taken pursuant to Article 13.

2. The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they;

(a) fail to comply with an obligation imposed by decision pursuant to Article 7(4) or 8(2), second subparagraph;

(b) put into effect a concentration in breach of Article 7(1) or disregard a decision taken pursuant to Article 7(2);

(c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not take the measures ordered by decision pursuant to Article 8(4).

3. In setting the amount of a fine, regard shall be had to the nature and gravity of the infringement.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings concerned periodic penalty payments of up to Ecu 25,000 for each day of the delay calculated from the date set in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision pursuant to Article 11;

(b) to submit to an investigation which it has ordered by decision pursuant to Article 13.

2. The Commission may by decision impose on the persons referred to in Article 3(1)(b) or on undertakings periodic penalty payments of up to ECU 100,000 for each day of the delay calculated from the date set in the decision, in order to compel them:

(a) to comply with an obligation imposed by decision pursuant to Article 7(4) or 8(2), second subparagraph, or

(b) to apply the measures ordered by decision pursuant to Article 8(4).

3. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of Articles 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Articles 4(3), 18 and 20, the Commission and competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 7(2) and (4), 8(2), second subparagraph, and (3) to (5), 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision to continue the suspension of a concentration or to grant a derogation from suspension as referred to in Article 7(2) or (4) may be taken provisionally, without the persons, undertakings and associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of the business secrets.

4. Insofar as the Commission and the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a legitimate interest and especially members of the administrative or management organs of the undertakings concerned or recognized workers' representatives of those undertakings shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation.

2. The Commission shall carry out the procedures set out in this

regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Articles 8(2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23.

4. The Advisory Committee shall consist of representatives of the authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the facts, together with the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 14 days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take due account of the legitimate interest of undertakings in the protection of their business secrets and of the interest of the undertakings concerned in such publication taking place.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(2), where conditions and obligations are attached to them, and to Article 8(2) to (5) in the Official Journal of the European Communities.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Jurisdiction

1. Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Article 9(2) or after referral, pursuant Article 9(3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9(8).

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication.

Article 22

Application of the Regulation

1. This Regulation alone shall apply to concentrations as defined in Article 3.

2. Regulations No. 17, (EEC) No. 1017/68, (EEC) No. 4056/86 and (EEC) No. 3975/87 shall not apply to concentrations as defined in Article 3.

3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, insofar as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).

4. Articles 2(1)(a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which the proceedings defined in Article 10(1) may be initiated shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.

6. Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1(2) have been reviewed.

Article 23

Implementing provisions

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time limits pursuant to Article 10, and hearings pursuant to Article 18.

Article 24

Relations with non-member countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a non-member country.

2. Initially not more than one year after entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to Community undertakings, in

the terms referred to in paragraphs 3 and 4, as regards concentrations in non-member countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a non-member country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable treatment for Community undertakings.

4. Measures taken pursuant to this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Entry into force

1. This Regulation shall enter into force on 21 September 1990.

2. This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 December 1989.

For the Council
The President
E. Cresson

THE TAKE OVER PANEL AND THE 13TH COMPANY LAW DIRECTIVE

The following is the text of a statement issued by the Takeover Panel in December 1990.

"The Panel... has provided the speed, certainty and flexibility of control that the particular activity required... It would be a matter of profound concern if a uniquely effective system of regulation, well tried in the course of some 5,000 cases over twenty years, should be lost."

["The UK Panel on Takeovers and Mergers: An Appraisal", W A P Manser, Hume Occasional Paper No 21, August 1989]

INTRODUCTION

The Takeover Panel which administers the City Code on Takeovers and Mergers, was set up in 1968. It was originally proposed by the Governor of the Bank of England and the Chairman of the Stock Exchange in response to growing concern about the interests of shareholders following a number of controversial takeovers. Since then its composition and powers have evolved with experience and changing circumstances.

The Code is designed to ensure good business standards and fairness to shareholders during takeover bids. It is not concerned with the commercial or financial takeovers. Nor is the Code concerned with matters such as competition policy, restrictive trade practices, regional policy, employment or consumer issues. The regulatory powers of the Panel are thus strictly limited. It does not take a view on public policy issues such as whether or not it is in the public interest to make takeovers more difficult.

In short, the Panel was set up to act as referee - to see fair play for all shareholders and to safeguard London's reputation as a fair and open market.

THE PANEL

The Panel's members are senior representatives of those financial and business institutions which are affected by corporate takeovers, and of the other relevant regulatory organisations. Together they provide the broadest possible spectrum of opinion and a high degree of expertise in judging the conduct of takeovers. In addition, the Governor of the Bank of England appoints an independent Chairman, three independent Deputy Chairmen and two lay members.

The day-to-day work of the Panel is carried out by its Executive, headed by a Director General, usually a senior merchant banker on secondment. Some of the executive's full-time staff are permanent, providing an essential element of continuity. These are joined by lawyers, accountants, stockbrokers, civil servants and others on two-year secondments.

The Executive monitors every takeover, checking that all documents and announcements issued, and actions taken, comply with the Code. As well as dealing with announced bids, the Executive also handles many queries about the possible effects of the Code on prospective transactions. Many of these enquiries need a swift response to allow the potential bidders to meet the Code's strict timetable once a bid has been announced - designed to limit disruption to the business of the company being bid for. The full Panel can be convened, if necessary at short notice, to deal with an appeal against an Executive ruling, or to rule on a particularly complex or important issue.

The Panel is widely recognised as fulfilling its important regulatory functions with efficiency and fairness.. Since 1968 it has handled some 5,500 announced offers plus half as many cases where, in the event, no offer was ever announced. In the year to March 31 1990, the Panel examined 230 public takeovers or merger proposals - the equivalent of one for every working day.

THE CODE

In any takeover the Panel looks for a fair balance between the interests of the bidding company and the defending company and their shareholders. The spirit of the Code is expressed in a number of General Principles which describe good standards of commercial behaviour.

The Rules of the Code are all specific expressions of these General Principles. Since it is impracticable to devise Rules to cover every possible situation, the Executive is given wide discretion to take account of particular circumstances. It can impose more stringent requirements, or relax certain provisions as necessary. All those involved in takeover activity know that the spirit of the Code as well as the precise wording of the Rules must be followed.

THE CRITERIA

The criteria used by the Panel in its rules and decision making can be summed up as being to ensure:

in its current form. To do so could entail the destruction of the essential features of a regulatory system that is needed and works well in the one member state where bids are relatively common, for the sake of a theoretical harmonisation, the need for which has yet to be demonstrated.

The Panel therefore seeks both radical changes in the text of the Directive to safeguard the essential features of the UK's regulatory system and delay in further consideration of the Directive until it becomes clear, as it is not at present, that a Directive is essential for completion of the internal market.

December 1990

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