

Industrial Policy in the European Common Market*

The Making of Common Market Industrial Policy

The Rome Treaty deals with various aspects of industrial policy, such as the right of establishment, the freedom of capital movements, and the rules governing competition in the Common Market. The Treaty does not consider, however, the interrelationships among these provisions; nor does it contemplate the measures that would need to be taken to remove existing obstacles to the intra-EEC movement and merger of firms.

These obstacles — including legal, fiscal and financial barriers to mergers and to the establishment of subsidiaries in the partner countries — received considerable attention in the years following the publication of the Treaty. Subsequently, emphasis was given to the question of the competitiveness of European firms with their American counterparts, and especially with those having subsidiaries in Europe. This concern motivated recommendations for adopting a technological policy on the Common Market level, and found expression in the Commission's memorandum on industrial policy.¹

The Commission's memorandum considers the need to remove obstacles to mergers across the frontiers of member countries, to abolish non-tariff barriers to trade in industrial products, and to establish a common technological policy. It makes few references to anti-trust and anti-cartel policies that have been pursued on the basis of Articles 85 and 86 of the Treaty. In fact, since the EEC's

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¹ Commission des Communautés Européennes, *Industrial Policy in the Community*, Memorandum from the Commission to the Council, Brussels, 1970.

establishment, one observes a certain duality in the proposals and the actions of the Commission which, on the one hand, aim at encouraging concentration and, on the other, seek to limit market power.² This duality is not unrelated to the organizational separation of industrial, technological and scientific affairs (General Directorate III) from questions of competition (General Directorate IV). More substantially, it reflects the lack of a coherent policy on concentration and competition.

This paper will consider the measures necessary for removing existing obstacles to the full exploitation of the advantages of the large market created by the EEC's establishment; it will examine the issues related to establishing a common technological policy; and will analyze the implications these actions would have on competition in the Common Market. In connection with the last question, the requirements of a balanced policy between encouraging and restraining concentration will be discussed.

Obstacles to Organizing Production in the Common Market Context

The establishment of the EEC led to a wave of mergers in the member countries. In France and in Italy, where the degree of concentration was the lowest, the national governments actively encouraged concentration. But mergers and, to a lesser extent, cooperation agreements, took place by-and-large within a particular country rather than between countries (Table 1). Thus, the degree of interpenetration of industries in the Common Market has remained small.

Moreover, mergers, cooperation agreements, and the establishment of subsidiaries occurred much more frequently in member country-third country relationships than among the member countries of the EEC. This situation has given rise to concern, especially as a large proportion of foreign firms establishing themselves in the Common Market countries is American. Size comparisons between US and EEC firms have also figured prominently in the recommendations made to encourage concentration.

² In this connection, it may be noted that while the General Directorate dealing with industry extolled the virtues of mergers, the General Directorate on Competition began a well-publicized trust-busting campaign, reportedly intimidating at least some firms bent on joint actions (*New York Times*, January 15, 1973 and *Wall Street Journal*, April 25, 1973).

TABLE I
IMPLANTATIONS, COOPERATION AGREEMENTS, AND MERGERS IN THE
EUROPEAN COMMON MARKET, 1961-69

<i>Establishment of Subsidiaries</i>	
By member country firms	2300
By third country firms	3546
<i>Cooperation Agreements</i>	
Between national firms	1352
Between member country firms	1001
Between member country and foreign firms	2797
<i>Mergers</i>	
Between national firms	1861
Between member country firms	257
Between member country and foreign firms	820

Source: *Bulletin of the European Communities*, 1970, p. 30.

Abstracting from the alleged desirability of limiting the influence of US firms which necessarily involves a political judgment, it is apparent that the existence of obstacles to industrial operations across the frontiers of the member countries is a source of inefficiencies in the Common Market. In particular, such obstacles interfere with the establishment of optimum size units that is made possible in the large and obstruction-free market of the United States. At the same time, mergers in the national framework may make concentration across frontiers more difficult and contribute to the emergence of pressure groups affecting the actions taken by the governments of the member countries.

The question is then, what are the principal obstacles to mergers and the establishment of subsidiaries in the partner countries, and how can they be surmounted. In the following, we will consider, respectively, legal, fiscal, and financial barriers. Questions relating to technical standards and governmental purchasing will be taken up subsequently in connection with the discussion on technological policy.

Legal Obstacles

Article 58 of the Treaty requires that "companies constituted in accordance with the law of a Member State and having a registered office, central management or main establishment within the Community shall... be assimilated to natural persons being national of Member States". The Convention relating to the Mutual Recognition of Companies and Legal Persons signed in Brussels on February 28, 1968 defines the companies falling under this Article as those that have their head office (siège statutaire) in one of the member countries. The Commission also prepared three draft directives aimed at harmonizing the guarantees companies provide to their shareholders and third parties in regard to the establishment, transfer, and merger of companies. The first of these directives was issued by the Council of Ministers in March 1968³ but has thus far been implemented only in France; the second and third directives have not yet been issued by the Council.

Nor has progress been made in implementing the Commission's recommendations to provide for the transfer of the head office of a company from one country to another without change in juridical status that gives rise to legal as well as to tax difficulties. The establishment of branches and subsidiaries in a partner country also encounters legal complications and tax problems, since the branch or subsidiary becomes subject to national laws that are different from those applying to the parent company at home. Finally, apart from Italy, national legislation does not permit the absorption of domestic firms by foreign companies.

The situation contrasts with that of American firms which can centralize their European operations in a holding company situated legally, if not physically, in a country providing favorable tax treatment. This has been done with considerable success by IBM, for example, which has accomplished product-by-product specialization by its subsidiaries located in different European countries.

In view of the legal obstacles to mergers, companies of EEC member countries wishing to coordinate their operations had to

³ Première Directive du Conseil du 9 Mars 1968 tendant à coordonner, pour les rendre équivalentes, les garanties qui sont exigées, dans les Etats membres, des sociétés au sens de l'article 58 deuxième alinéa du traité, pour protéger les intérêts tant des associés que des tiers (68/151/CEE), *Journal officiel des Communautés européennes* (to be cited as J. O.) March 14, 1968, No. L 65/8-12.

have recourse to make-shift legal arrangements. In the well-known Agfa-Gevaert case, such an arrangement has led to a certain rationalization of production and sharing of markets but not to a full merger. Similar considerations apply to the relationship being established between the German Hoesch's and the Dutch Hoogovens steel producing firms whereas Fiat's minority participation in Citroën has not given rise to the production cooperation that had originally been envisaged. And although the proposed cooperation agreement among medium-sized truck producers would involve some rationalization of manufacturing in individual plants, it is yet to be seen if it would lead to common production. Last but not least, there are a number of instances where legal obstacles have frustrated attempts to establish joint operations.⁴

There are basically two solutions to the problem: harmonizing the company laws of the member countries, or establishing a legal basis for a "European company". The former would require modifying national legislation to treat companies of the partner countries in the same way as national companies. This would permit, among other things, the absorption of national companies by those of the partner countries, the transfer of the head office to another member country without change of juridical status, and the quotation of shares of companies of partner countries on national stock exchanges.

Another alternative is to create a single company law for a European company under the control of the European Court. This alternative, incorporated in the Commission's proposition presented to the Council on June 30, 1970,⁵ would make the establishment of European companies independent from national law. The shares of the company would be quoted on national stock exchanges and, subject to each member country taxing the profits earned in that country and the application of rules to eliminate double taxation, the company would be taxed where its head office is located. The Commission's proposition also deals with questions such as the constitution of supervisory and managerial boards, collective bargain-

⁴ In this regard, there has been little change since Paul Fabra described the peripeties of would-be partners in the hosiery industry of the member countries in *Le Monde*, June 29, 1966.

⁵ Proposition de règlement (CEE) du Conseil portant statut de la société anonyme européenne. (Présentée par la Commission au Conseil le 30 Juin 1970). *J. O.* October 10, 1970. No. C 124/1-55.

ing, and "Mitbestimmung" in the form of the workers electing one-third of the supervisory board of the company.⁶

While the statute on the establishment of the European company would cut across the maze of national legislation, it would create problems of its own. If the regulations applying to European companies were less strict than national legislation, these would be given unfair advantages over companies incorporated under national statutes; in the opposite case, the desirability of establishing a European company would be reduced. Differences in the rules on worker's participation create further problems, which have received considerable attention recently.

Considering also the opposition to a European statute on the part of some of the member countries, especially France, it may be an error to concentrate on this alternative at the expense of the harmonization of national legislation. An intermediate solution would involve adopting uniform provisions in national legislation for the establishment of European companies, combined with a reform of company law in the member countries.

Fiscal Limitations

Efficient resource allocation would require the harmonization of business taxes in the Common Market, since otherwise the choice of location would depend on the tax treatment of business in individual member countries. Although the Treaty of Rome does not contain specific provisions on the harmonization of these taxes, Article 100 of the Treaty may be interpreted as a mandate for harmonization.⁷

While the Commission considers the harmonization of corporate and other direct taxes as a long-term objective, there has been some movement towards greater uniformity in the direction of the so-called classic system, involving the separation of corporate and personal income taxes. This is the alternative favored in the Temple Report for the sake of removing distortions in intra-EEC

⁶ For a discussion of some of the relevant issues, see DENNIS THOMPSON, *The Proposal for a European Company*, London, Political and Economic Planning, European Series No. 13, 1968.

⁷ "The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment on functioning of the Common Market".

relationships created by the tax credit system presently in use in Belgium and France and the split rate system applied in Germany.⁸

The Commission's efforts have concentrated on avoiding the double taxation of dividends and removing obstacles of a fiscal character to mergers and to the establishment of subsidiaries within the EEC. As regards the former, with the exception of the Italy-Luxembourg relationship, there exists a network of bilateral agreements on double taxation which, however, lacks uniformity and is often ineffective. To remedy the situation, the Commission has proposed adopting a generalized withholding tax in all the member countries, but its recommendations have not yet been implemented.

The principal fiscal obstacles to mergers and to the establishment of subsidiaries by companies of different member states include payment of capital gains taxes on unrealized profits at the time of the merger and the double taxation of the profits of subsidiaries transmitted to the parent company. The Commission prepared a draft directive proposing the postponement of taxation of capital gains until such time when these are realized. A second draft directive calls for eliminating double taxation on the profits of subsidiaries through the application of uniform rules throughout the Common Market. Neither of these directives has been issued so far by the Council.⁹

Capital Markets

Under Article 67 of the Treaty, "Member States, shall, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States, and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is

⁸ A.J. VAN DEN TEMPLE, *Corporation Tax and the Individual Income Tax in the European Community*, No. 15 in the Competition: Approximation of Legislation Series, Brussels, Commission of the European Communities, 1970.

⁹ Proposition de directive du Conseil concernant le régime fiscal commun applicable aux fusions, scissions et apports d'actif intervenant entre sociétés d'États membres différents. (Présentée par la Commission au Conseil le 16 Janvier 1969). Proposition de directive du Conseil concernant le régime fiscal commun applicable aux sociétés mères et filiales d'États membres différents. (Présentée par la Commission au Conseil le 16 Janvier 1969). *J. O.* March 22, 1969, No. C 39/1-10.

invested". In the application of this Article, directives issued by the Council of Ministers in 1960 and 1962 called for relaxing foreign exchange restrictions on certain classes of capital movements. In turn, the Segrè Report¹⁰ recommended completing the liberalization of foreign exchange transactions in the EEC, modifying fiscal regulations on interest payments to ensure "tax neutrality" for capital movements, and providing equal treatment of obligations issued in member countries throughout the Common Market.

As regards the taxation of interest payments, the Commission first proposed abolishing withholding taxes but has subsequently come to favor a generalized withholding tax as in the case of dividends. It has been reported that a 20 to 25 percent range will be proposed for the member countries.¹¹ Should this recommendation be adopted, Luxembourg's existing advantages as a "tax haven" would be reduced.

But Luxembourg has further advantages by reason of the absence of restrictions on capital flows. Such restrictions were applied repeatedly during exchange rate crises in France, and have not been fully abolished. Capital controls were also imposed intermittently in Germany, although the country is in principle in favor of the free movement of capital.

Apart from the possibility of double taxation on interests and dividends and the existence — as well as the risk — of exchange controls, the lack of equal treatment of the obligations issued in the member countries obstructs the movement of capital within the Common Market. In the first place, as the admission of obligations for trading in the exchanges of the member countries is a difficult and costly process, there are still relatively few cases of multiple quotations. Second, the member countries apply formal or informal procedures to limit the issuance of obligations by other than their national companies. Last but not least, existing regulations practically exclude the purchases of obligations issued in other member countries by institutional investors such as banks, insurance companies, and pension funds.

All in all, little progress has been made so far for implementing the recommendations contained in the Segrè Report or, for

¹⁰ Communauté Economique Européenne, Commission, *Le développement d'un marché européen des capitaux*, Rapport d'un groupe d'experts constitué par la Commission de la CEE (The Segrè Report), Brussels, November, 1966.

¹¹ *The Economist*, May 19, 1973, p. 62.

that matter, since the publication of the second directive on freeing of capital movements in 1962. Yet the elimination of restrictions to capital movements, fiscal neutrality, and the equal treatment of obligations issued in the individual member countries would be necessary to establish a unified capital market in the EEC. This would in turn increase the choices open to borrowers and lessen the risks associated with operations on narrow national capital markets. As a result, existing obstacles to the interpenetration of companies on the Common Market would be reduced.

Technical Standards

We have considered so far legal, fiscal and financial obstacles to mergers and to the establishment of subsidiaries within the Common Market. The full utilization of the possibilities offered by the large market of the EEC is also impeded by national differences in technical standards which tend to segment the market for particular commodities.¹² This is because of the additional costs involved in gathering information on the technical standards (norms) of the partner countries and in adapting production to these standards, which involves foregoing some of the benefits of large-scale operations.

Article 100 of the Treaty, cited earlier, provides the legal basis for the harmonization of national legislation on technical standards. This Article is compatible with different approaches to harmonization: the adoption of identical norms throughout the Community and the acceptance of the products that meet the technical norms in effect in another member country. The former approach was adopted in the general program of the EEC on the elimination of technical obstacles to trade,¹³ while the second approach was favored by EFTA.

¹² According to the Commission's memorandum on industrial policy, "an almost inextricable network of technical obstacles arising from legislative provisions concerning safety and health, industrial standards or the regulations governing public services make a product designed to give the maximum guarantees in one member country unacceptable in another and vice-versa. The result is that a manufacturer who wishes to sell a product in the single market must often manufacture six different articles". *Op. Cit.* p. 124.

¹³ Conseil des Communautés Européennes, Programme Général du 28 Mai 1969, en vue de l'élimination des entraves techniques aux échanges résultant de disparités entre les dispositions législatives, réglementaires et administratives des États membres. *J.O.*, June 17, 1969, No. C 76/1-10.

The Common Market program on technical standards called for the adoption by January, 1971 of more than 150 directives on the application of Community-wide norms by the Council; it further contained provisions aimed at avoiding the establishment of new national norms. In effect, only eight directives were adopted by January 1971, and while the number of directives increased to twenty by the end of 1971, a further slowing-down has been experienced since. At the same time, a number of new technical norms have been adopted by the individual member countries, thereby adding to the magnitude of the task of harmonization.

This situation reflects the complexity of the problem as well as the difficulties of reaching agreement on technical standards to be applied in all the member countries. In turn, EFTA adopted a procedure involving the acceptance of products manufactured in any member country as long as they meet the standards of that country. The EFTA countries reached agreement to this effect in regard to pharmaceuticals, pressure vessels, and ship equipment.

The Commission has recently proposed a scheme that involves combining the two approaches to harmonization. In the case of pharmaceuticals, this would entail accepting the products of the member countries. In other industries, the adoption of common technical standards would be supplemented in particular instances by the acceptance of the national standards of partner countries where the product originates. According to the Commission's second memorandum on the technological and industrial policy program, the obstacles to intra-EEC trade due to differences in technical standards should be removed by 1978.¹⁴

Public Purchases

Article 7 of the Treaty provides that "any discrimination on the grounds of nationality shall hereby be prohibited" and Article 90 further specifies that "Member States shall, in respect of public enterprise and enterprises to which they grant special or exclusive rights, neither enact nor maintain in force any measure contrary to the rules contained in this Treaty..." These provisions notwithstanding, public bodies, including central, state and local gov-

¹⁴ Commission of the European Communities, Memorandum from the Commission on the Technological and Industrial Policy Program, SEC (73) 1090 final, Brussels, May 3, 1973, pp. 1-3.

ernments and public enterprises, continue to discriminate against suppliers from the partner countries. Thus, while in private industry 15-35 percent of sales are supplied by intra-EEC trade, this share rarely exceeds 5 percent in public purchases. At the same time, the share of public purchases in the sales of industrial products in the Common Market has been rising, reaching 17 percent in 1972.¹⁵

On July 26, the Council adopted several directives concerning the liberalization of public works contracts in the member countries.¹⁶ It has not yet acted however on the Commission's recommendations for the establishment of rules governing the award of public supply contracts.¹⁷ While further action in this field is planned, for the time being emphasis is given to the provision of information on public supply contracts in the member countries.

The removal of discrimination presently favoring domestic producers is of particular importance in regard to technologically advanced industries such as aircraft, space, computer and electronics. This is because such discrimination has led to the establishment of national enterprises oriented towards the domestic market, thereby foregoing the benefits of economies of scale which are of particular importance in these industries. Correspondingly, discrimination in awarding public contracts has often led to high-cost production and has retarded the development of technologically advanced industries within the EEC as compared to the United States.¹⁸

¹⁵ *Ibid.*, p. 4.

¹⁶ Directive du Conseil du 26 Juillet 1971 portant coordination des procédures de passation des marchés publics de travaux, *J.O.*, August 16, 1971, No. L/5-14.

¹⁷ *Première Communication de la Commission au Conseil* sur l'état d'ouverture des marchés publics et des marchés des entreprises chargées d'un service d'intérêt économique général en ce qui concerne les fournitures, SEC (72) 2601 final, Brussels, le 24 Juillet 1972.

¹⁸ According to the Commission's memorandum on industrial policy, "it is thus no exaggeration to say that there is no real common market — neither free internal movement of goods nor protection against third countries — for advanced technology products. This is the more serious since the advanced technology industries are precisely those whose development is, if not out of the question, at least very difficult without the support of a large, unhampered and reasonably protected internal market, in particular during the first phase of their development. In fact, the advanced technology industries suffer in Europe from permanent discrimination, compared with the traditional industries, since the latter have fully benefited from the liberalization of the international trade and from the establishment of a common market. The national support given to growth industries has not compensated for the effects of the markets remaining closed for which, moreover, it is partly to blame. If this process is not reversed, it will mean that Western Europe will be specializing, without being aware of it, or at least without desiring it, in traditional products and this will compromise her chances of expansion and her technological independence in the long term". (*Op. cit.* p. 354).

This situation has not been remedied by cooperation agreements in particular fields. In aircraft construction, cooperation did not progress beyond the bilateral stage and the various bilateral projects have had little success, in part because of limitations of the markets they were supposed to serve, and in part because of difficulties of negotiations. In turn, the failure of ELDO (European Space Vehicle Launcher Development Organization) has been explained by the lack of an appropriate coordinating organization while the prospects for ESRO (European Satellite Research Organization) are clouded by the squabble between some of the larger and the smaller member countries. Finally, the rivalry of national and Community atomic energy programs has compromised the operation of Euratom.¹⁹

Towards a Common Technological Policy

As several of these examples indicate, the difficulties facing European firms in technologically advanced industries include discrimination against partner country producers in public procurement as well as the framing of policies of research and development in a national context. At the same time, cooperation agreements in particular sectors have been hampered by the lack of a *quid pro quo* in other sectors.

To remedy these deficiencies, there would be need for a technological policy on the Common Market level that would comprise research, product development, and procurement and would cover all relevant sectors.²⁰ This is desirable not only because of the

¹⁹ "One of the obstacles to the creation of a genuine nuclear common market is the fact that research and development programmes within the Community have been uncoordinated. Member countries have reserved appropriations and public contracts for their own domestic industries, and orders placed by the electricity utilities have been awarded solely to domestic contractors. As a result, the growth of the nuclear industry within the Community has not been furthered by the abolition of tariff barriers and quota restrictions following the coming into effect of the Euratom Treaty". Survey of the Nuclear Policy of the European Communities, Com (68) 800, 9 Oct. 1968. Supplement to *Bulletin of the European Communities*, 1968 (9/10), p. 5.

²⁰ For a cogent statement to this effect, see CHRISTOPHER LAYTON, *European Advanced Technology — A Programme for Integration*. Allen & Unwin, 1968, Ch. 14.

interdependence of such activities but also for ensuring an equitable distribution of costs and benefits among the member countries.²¹

Establishing a common technological policy would involve agreeing on the objectives this policy is to serve as well as on actions to be taken to attain them. At the same time, actions by Community institutions and national governments would need to be coordinated to avoid waste and duplication, to link research and product development, and to ensure the harmonization of national interests.²²

In the field of research, Community financing of basic as well as applied research in key areas, the establishment of European-wide research institutes, and the coordination of the work in national institutes would appear desirable. In turn, the removal of discrimination in contracts by national governments and contracts by Community institutions²³ would aid product development. Finally, apart from abolishing discrimination in public procurement, the establishment of purchasing agencies on a European level would help to ensure equal treatment among firms of different countries.²⁴

These recommendations aim at rationalizing public interventions in technologically advanced industries. Their importance is put into focus if we consider the role played by the federal government in the United States at the early stage of development of these industries. Technologically advanced industries in Europe depend even more on government financing of research and development and on governmental purchases of their products. Thus, some two-thirds of European aircraft production is for military use; government-sponsored research plays a central role in the application of atomic energy; governments provide markets as well as subsidies to their computer industries; and space projects have as yet few commercial applications.

²¹ The Commission took note of the double requirements of the gradual working out of an overall view and an all-around balance of interests in its memorandum submitted to the Council in June, 1970. Note de la Commission au Conseil sur les suites à donner au §9 du Communiqué de la Haye relatif au développement technologique de la Communauté, Commission des Communautés Européennes, SEC (70) 2083 final, Strasbourg, June 17, 1970.

²² Cf. Objectives and Instruments of Common Policy for Scientific, Research and Technological Development (Communication of the Commission to the Council transmitted the 14th of June 1972) Supplement to the *Bulletin of the European Communities*, 1972 (6).

²³ Cf. Proposition de règlement du Conseil relatif à la mise en oeuvre de contrats Communautaires, Brussels, Commission des Communautés Européennes, July 18, 1972.

²⁴ On a proposal for a European armaments agency see RENÉ FOCH, *Europe and Technology: A Political View*. Paris, The Atlantic Institute, 1970, pp. 47-48.

Nevertheless, increased reliance would have to be based on private initiative in order to assure that production in technologically advanced industries takes place at a reasonable cost. This in turn requires concentration across national frontiers since otherwise economies of scale in manufacturing and in research would be foregone. The removal of obstacles to mergers and in some instances positive action on the part of governments would contribute to this goal.

Concentration and Competition

We have considered in this paper various obstacles to the interpenetration of industries in the Common Market, including legal, fiscal, and financial limitations, differences, in technical standards, and discrimination against partner country suppliers in public purchases. The removal of these obstacles would establish neutrality as far as domestic operations and operations in partner countries are concerned. We have also found that, in some technologically advanced industries, positive action would also be necessary to encourage concentration.

While a distinction has been made between the establishment of neutrality in various domains and the taking of positive measures, both of these would contribute to concentration in the Common Market. This raises the question if resulting changes in the industrial structure would come into conflict with the provisions of the Rome Treaty on competition. Article 85 prohibits "any agreement between enterprises, any decisions by associates of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition in the Common Market". In turn, Article 86 prohibits "action by one or more enterprises to the improper advantage of a dominant position within the Common Market or within a substantial part of it...".

Although Article 85 prohibits a wide variety of business agreements, Section 3 of this Article makes exception for cases when agreements "contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress...", provided that certain conditions are fulfilled. These conditions are quite restrictive; they require that users get an equitable share of the profit resulting from the improvements, that the agreement be not more restrictive than necessary, and that it

does not lead to the elimination of competition in respect of a substantial proportion of the goods concerned.

The restrictive conditions set for exempting agreements under Article 85 (3) have given rise to fears that agreements which would be advantageous from the economic point-of-view would be foregone. The Commission sought to allay these fears in stating that it is favorably disposed towards rationalization agreements among small and medium-sized enterprises;²⁵ in providing that agreements between firms accounting for less than 5 percent of the market or having a combined turnover not exceeding \$15 million do not come under Article 85;²⁶ and in making recommendations for block exemptions on certain types of agreements among small and medium-sized firms.²⁷ The recommendations for block exemptions have been accepted by the Council, authorizing the Commission to establish the conditions under which such exemptions would apply.²⁸ The block exemptions provided so far relate to exclusive dealing agreements and product specialization; those pertaining to research and licensing are in preparation.

Although these provisions ease the burden on firms under Article 85, their effects in the industrial sector of the Common Market are limited by the fact that they apply only to small and medium-sized enterprises. And while individual exemptions have been provided to some large firms, the conditions imposed are considerably more restrictive.

In turn, the Commission has reinterpreted Article 86 so that the acquisition of a firm by another firm having a dominant position in the same industry constitutes an abuse of dominant position.²⁹ This interpretation has been accepted by the Court of

²⁵ Communication relative aux accords, décisions et pratiques concertées concernant la coopération entre entreprises, *J.O.*, July 25, 1968, N. C75/3-6.

²⁶ Communication de la Commission du 27 Mai 1970, concernant les accords d'importance mineure qui ne sont pas visés par les dispositions de l'article 85 paragraphe 1 du traité instituant la Communauté économique européenne, *J.O.*, June 2, 1970, N. C64/1-2.

²⁷ For a detailed discussion see the Commission's *First Report on Competition Policy*, Brussels-Luxembourg, April 1972, pp. 39-53 as well as its *Second Report on Competition Policy*, Brussels-Luxembourg, April 1973, pp. 19-21.

²⁸ Règlement (CEE) N. 2821/71 au Conseil du 20 Décembre 1971 concernant l'application de l'article 85 paragraphe 3 du traité à des catégories d'accords, de décisions et de pratiques concertées, *J.O.*, December 29, 1971, N. L285/ 46-48.

²⁹ *The Problem of Concentration in the Common Market*, No. 7 in Competition: Approximation of Legislation Series, Brussels, 1966, p. 26. — The Commission's proposed regulation on mergers now in preparation would cover also mergers of firms that individually do not have a dominant position but the merged unit would have such a position.

Justice of the Communities, although the Court has rejected the test case presented by the Commission concerning Continental Can's acquisition of other packaging firms. According to the Court's ruling, the Commission has failed to prove that the Northern European market for meat tins, and screw-on metal caps represents a separate market rather than being part of the general metal packaging market.³⁰

The Court's ruling brings into focus the question of what is considered undue limitation on competition — whether through mergers, the establishment of subsidiaries, or agreements among Common Market firms. The Commission has defined a dominant position in terms of "the share of the market combined with the availability of technical knowledge, raw material or capital".³¹ As noted above, market share considerations importantly enter into decisions on exemptions from the prohibition of agreements among firms also.

Against considerations of market shares and the lessening of competition in general, one has to set the economic benefits of concentration. These benefits take the form of economies of scale in production that can be appropriated through the establishment of larger plants, greater product specialization, and longer production runs, as well as economies of scale in research and distribution. At the same time, the extent of economies of scale varies among industries, being of especial importance in technologically advanced industries but limited in scope in e.g. the shoe industry. Correspondingly, benefit-cost calculations on the effects of concentration may lead to quite different conclusions from one industry to another.

Conclusion

The above considerations indicate the need to develop a Common Market policy on concentration and competition. Such a policy would encompass actions aimed at establishing neutrality as regards industrial operations throughout the Common Market, a technological policy, as well as provisions for the application of rules of competition based on an analysis of the benefits and costs of lessening competition.

³⁰ *Common Market Law Reports*, Vol. XII, April 1973, Part 68.

³¹ *First Report on Competition Policy*, p. 79.

In formulating this policy, attention would need to be given to the implications of the increase in the size of the Common Market through the accession of Britain, Denmark and Iceland, the reductions of tariffs on industrial products in the Kennedy Round, and the prospective reductions of trade barriers in negotiations with the United States and Japan. In particular, the enlargement of the Common Market as well as the lowering of external tariffs reduce the dangers associated with concentration while freer trade in industrial products increases the need for mergers in order to improve the competitiveness of European industries, especially in technologically advanced industries.

In view of the increased extent of competition and the benefits of concentration, there appears to be need for adopting a generally favorable attitude on concentration in the Common Market. This would involve a liberal interpretation of Article 85 (3) on exemptions from the prohibition of agreements among EEC firms, a broad formulation of rules on block exemptions from Article 85, as well as avoiding a restrictive stance on mergers. Establishing guidelines in this area would also reduce uncertainty as regards future actions by the Commission.³²

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³² While the Commission's draft regulation on merger control aims at reducing this uncertainty, its broad formulation would allow considerable latitude for actions by the Commission (*The Economist*, August 4, 1973, pp. 51-53).