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Continental Can--New Strength for Common Market Anti-Trust

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Multinational corporations take heed, for the Court of Justice of the European Communities has decided a case which promises to be a landmark in Common Market anti-trust law—Europemballage Corp. & Continental Can Co. Inc. v. EEC Commission. Although finding for Continental Can on the facts, the court broadly interpreted the European Economic Community Treaty, thus giving to the Community's executive and administrative body, the Commission, broad but ill-defined power to oversee and perhaps control mergers. This power is derived from Article 86 of the Treaty which prohibits the abusive exploitation of a dominant position within the Common Market.

3. The Commission has the watchdog function of implementing and enforcing the EEC Treaty. In structure it resembles the Federal Trade Commission to the extent that it has both executive and quasi-judicial powers. Thus, it may issue binding decisions which are subject to review only by the Court of Justice, the highest tribunal in the Common Market. See Art. 155, EEC Treaty, 298 U.N.T.S. at 71, 2 CCH Comm. Mkt. Rep. ¶ 4471.
4. The full text of Article 86 is:
   Any improper exploitation by one or more undertakings of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall be prohibited, in so far as trade between Member States could be affected by it.
   The following practices, in particular, shall be deemed to amount to improper exploitation:
   (a) the direct or indirect imposition of any unfair purchase or selling prices or of any other unfair trading conditions;
   (b) the limitation of production, markets or technical development to the prejudice of consumers;
   (c) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a competitive disadvantage.
   (d) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which by their nature or according to commercial practice have no connection with the subject of such contract.
Whether that statute applies to bar mergers when the result of the merger would be to substantially obstruct competition was the core controversy in the case. The court held that any activity of a dominant firm may be abusive when it in fact obstructs competition. In so holding, the court has given any multinational enterprise which is or contemplates doing business in the Common Market reason to pause and consider the extent to which its conduct could be prohibited.

Articles 85 and 86 are the only anti-trust provisions in the EEC Treaty. The former prohibits all agreements and concerted practices which are designed to restrict or distort competition within the Common Market, or which have that effect.\(^5\) The latter interdicts the improper exploitation by one or more enterprises of a dominant market position. These provisions were made operational through the measures and structures of Council\(^6\) Regulation 17.\(^7\)

Because the Continental Can case was limited to construing Article 86, this inquiry will be similarly restricted. Attorneys for multinational corporations will be concerned with three important questions:

1. Can Article 86 be effectively enforced?
2. Since on its face, the Article applies only to firms in a dominant position, at what point in the market does a firm become dominant?

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5. The text of Article 85 is:

1. The following practices shall be prohibited as incompatible with the Common Market: all agreements between undertakings and all concerted practices which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. [Examples omitted.]

2. Any agreements or decisions prohibited pursuant to this Article shall automatically be null and void.

3. The provisions of paragraph 1 may, however, be declared unapplicable in the case of:
   — any agreement or type of agreement between undertakings,
   — any decision or type of decision by associations or undertakings, and
   — any concerted practice or type of concerted practice which helps to improve the production or distribution of goods or to promote technical or economic progress, whilst allowing consumers a fair share of the resulting profit and which does not:
     (a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives;
     (b) enable such concerns to eliminate competition in respect of a substantial part of the goods concerned.


6. The Council is the principal policy and lawmaking body of the EEC. See Art. 145, EEC Treaty, 298 U.N.T.S. at 69, 2 CCH COMM. MKT. REP. ¶ 4401.

3. What type of market conduct or situation does the statute prescribe?

This comment attempts to answer these questions.

**ENFORCEABILITY OF ARTICLE 86**

The efficacy of any prohibitive legislation depends, in part, on the nature and severity of the sanctions which it imposes. Article 3 of Regulation 17 obliges an offending firm to terminate any infringement upon Treaty Article 85 or 86. No structure to enforce the divestiture of an abusive merger is detailed, however. The absence of such a structure has been considered by some commentators to prevent the Commission from using Article 86 to forbid mergers. According to that argument, the failure of Regulation 17 to specifically provide for divestiture requires reference to the general provisions of Treaty Article 222. Because that latter Article safeguards the laws of the member states regarding property rights, unless authorized by the law of the relevant nation, no divestiture may be had. Thus, Article 86 is viewed by some as a paper tiger—a statute of limited enforceability.

This viewpoint does not reckon with the decision of the Court of Justice in *Establissements Consten & Grundig-Verkaufs-GmbH v. EEC Commission.* In that case the court rejected the argument that Treaty Article 222 prevented the Commission from ordering the cessation of a patent right infringement under Article 3 of Regulation 17. It held further that the Community’s competition system does not permit the use of rights flowing from the laws of member states for purposes contrary to Community cartel law. Although neither Grundig-Consten nor Continental Can dealt with a divestiture order under Article 86, the holding in the former

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10. Article 222 of the EEC Treaty states: “This Treaty shall in no way prejudice existing systems and incidents of ownership.” 298 U.N.T.S. at 88, 2 CCH COMM. Mkt. REP. ¶ 5261.
11. 2 CCH COMM. Mkt. REP. ¶ 8046 (1966).
12. Id. at 7654.
reveals that the court will probably have little difficulty upholding a divestiture designed to further the goals of the EEC Treaty.  

Having determined that Article 86 can effectively be enforced, to what conduct does it apply? A partial description by the Court of Justice appeared in Parkes-Davis and Co. v. Probel:  

For an act to be prohibited, it is thus necessary to find the existence of three elements:  

[1] the existence of a dominant position,  
[2] an improper exploitation of it,  
[3] and the possibility that trade between member-States may be affected by it.  

Because that case dealt primarily with an Article 85 violation, the court did not discuss or define the term "dominant position." The first official action based on Article 86 appears in the Commission decision Re GEMA, wherein a number of practices were found to be abusive of a dominant position. Finally, on December 9, 1971, the Commission decided Re Continental Can Co., the first application of Article 86 to a merger situation.  

FACTS OF THE CONTINENTAL CAN CASE

Continental Can Company (Continental) is an American-based multinational corporation which primarily manufactures metal containers, other packaging materials, and machines for the manufacture of such containers. In February 1969, Continental ac-

15. Id. at 59.
17. These practices included: (1) discriminating against citizens of other member-States; (2) imposing unneeded obligations on its members; (3) preventing the establishment of a single market in the supply of publishing services; (4) extending copyright protection to non-copyright works; (5) discriminating against independent importers. Id. at D58-D59.
19. There are two subsequent Commission decisions applying Article 86 to non-merger situations. In Laboratorio Chimico Farmaceutico Giorgio Zoa SpA v. Commercial Solvents Corp. & Instituto Chemioterapico Italiano, 12 Comm. Mkt. L.R. D50 (1973), appeal docketed, 16 E.E.C. J.O. C36/5, the Commission decided that a monopolist supplier of a raw material violates Article 86 when, for the purpose of eliminating competition, it ceases to supply that material to one of its principal users. The other decision, Re the European Sugar Cartel, 12 Comm. Mkt. L.R. D65 (1973), held that an oligopoly violates Article 86 when it displays abusive uniform market conduct.
quired the majority of the outstanding shares in Schmalbach-Lubeck-Werke AG (Schmalbach), a German manufacturer of light metal containers, other containers, and sealing machines.\(^2\) By the end of 1969, Continental held 85.8 per cent of its subsidiary's shares.\(^2\)

Desiring to increase its European holdings, Continental planned to merge with its Dutch licensee, Thomassen & Drijver-Verblijf N.V. (Thomassen), also a manufacturer of metal containers and other packaging.\(^2\) To effect the merger, the parties agreed in February, 1970, that Continental would transfer its shares in Schmalbach to a holding company which would then offer to acquire the shares of Thomassen. For its part, Thomassen's management agreed to recommend to its stockholders that they accept the offer.\(^2\) Thus, on February 20, 1970, Continental established the Europemballage Corporation (Europemballage), incorporated in Delaware as its wholly owned subsidiary to which all of Continental's interests in Europe (including Schmalbach) were transferred.\(^2\) In March, Europemballage offered to purchase Thomassen. This offer was accepted and in April, Europemballage acquired 91.07 per cent of the outstanding shares in Thomassen.\(^2\)

The Commission perceived a possible violation of Article 86 of the Rome Treaty and the next day initiated an intra-Commission proceeding against Europemballage and Continental Can. These proceedings culminated in a finding that Continental, through its subsidiary Schmalbach, had a dominant position in the German market of metal containers used for meat and fish products and for metal caps used for jars, which market is a "substantial part" of the Common Market within the meaning of Article 86. The Commission went on to find that the merger eliminated, as a practical matter, potential competition in the foregoing markets. This was held to constitute an abuse of a dominant position, which affected trade between member states of the Common Market. On this basis, then, the Commission held that under Article 3 of Regula-

\(^{21}\) Id.
\(^{22}\) Id. at 9021.
\(^{23}\) Id. at 9023.
\(^{25}\) Id.
\(^{26}\) Commission Decision, 2 CCH COMM. MKT. REP. ¶ 9481 at 9022.
tion 17, Continental was obliged to terminate its infringement of Article 86 and to submit a proposal for so terminating to the Commission.27

Europemballage and Continental appealed the decision to the Court of Justice assigning numerous points of error. These may be loosely broken into categories of procedure and substance. That the procedural questions were merely minor skirmishes is revealed by the summary manner in which the court disposed of them.28 The true controversy in the case concerned the substantive objections. Broadly put, they are: (1) whether Article 86 applies when an enterprise in a dominant position strengthens that position by merger, to the substantial detriment of competition in the market; (2) if so, whether the facts in this case constitute a violation of the statute.

On its face, Article 86 is mute regarding the first question (i.e. applicability at all), and since a resolution of the controversy may be achieved only through interpretation, statutory construction became a central and hotly contested point. To facilitate understanding, the interpretations of each party are briefly summarized. Continental Can urged a narrow, literal interpretation of Article 86.29 Its position consisted of seven points:

1. The very wording of the statute, especially when compared to the European Coal and Steel Community (ECSC) Treaty, reveals a legislative intention that Article 86 not apply to bar mergers.
2. Because Article 86 does not prohibit the existence of a dominant position, but only the abusive exploitation thereof, even a monopoly is permitted and legalized.
3. A mere increase in market share is permissible.
4. Reference to general provisions of EEC Treaty is impermissible.
5. A broad interpretation would leave Article 86 meaningless, since any type of conduct could be abusive.
6. A causal relationship must exist between the market dominance and the abusive exploitation thereof.
7. The appropriate policy consideration is to enable Community enterprises to compete with those from third states.

27. Id. at 9033.
28. As procedural error were cited objections to jurisdiction, notification of the matters in the complaint, discrepancy in the appellation of the defendant, deficiency of process, and inappropriate designation of the official language. See Europemballage & Continental Can v. Comm'n, 12 Comm. Mkt. L.R. at 219-22.
Urging a broad interpretation of the statute, the Commission rejoinder is as follows:30

1. The basic aims of Treaty are to ensure competition.
2. Article 86(b) together with Article 3(f) constitute a broad mandate to prohibit the effect of prejudice to consumers.
3. A change in structure of competition which reduces the consumer's market alternatives is an effect which is prohibited as prejudicial.
4. Because it is the effect of reducing competition that is abusive, neither the type of conduct nor the existence of a causal relationship between the dominance and that conduct is relevant to proving an abuse.

Interpretation of Article 86: The Opposing Views Discussed

Because it embodies all the significant points of the strict construction of Article 86, Continental's argument is particularly cogent. Had it been accepted by the court, Article 86 simply would not bar mergers. American multinationals could then have freely pursued European acquisitions, at least so long as they did not actually coerce a merger.

Continental opened its case by attempting to prove that the drafters of the EEC Treaty did not intend the Treaty to apply to mergers. Continental pointed out that nothing in the text prohibits acquisitions or other combinations. Noting that examples frequently reveal legislative intent, the multinational's attorneys found no bar to mergers from the list of abuses following the text. Those examples, which basically prohibit unfair pricing, blacklist- ing, and commercial blackmail, appear to refer only to conduct in the market. Since a merger is merely a change in the internal structure of a corporation, an intention to control mergers cannot logically be inferred from the statute.31

Furthermore, argued Continental, comparison with the very detailed anti-concentration measures found in Article 66 of the ECSC32 Treaty further evidences the legislators' intent not to re-

32. The European Coal and Steel Community was instituted in 1951 to establish a common market in coal and steel commodities, and to suppress duties and prevent cartels and concentrations in those commodity markets.
strict mergers. Because the EEC Treaty does not grant to the Commission the power to forbid mergers, and because the ECSC provisions were well known to the drafters of the EEC document, the logical conclusion of this argument is that the form and content of Article 86 reflect a deliberate and conscious choice not to prohibit combinations.

Continental additionally asserted that Article 86 prohibits only the abuse of a dominant position; hence, dominance itself is implicitly permitted. Moreover, since the statute does not distinguish between degrees of dominance, even a monopoly is permitted and legalized. It follows, concluded Continental, that a mere merger, the only effect of which is to increase the firm's market share (i.e. its dominance) cannot be abusive. Since Advocate-General Karl Roemer concurred with Continental, none of the foregoing contentions may be lightly dismissed.

The Commission responded by relying on the principles and objectives of the EEC Treaty. In particular, it cited Article 3(f) which announces as a fundamental purpose "the institution of a system ensuring that competition in the Common Market is not

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33. Article 66 of the ECSC Treaty provides in part:

1. [A]ny transaction which would have in itself the direct or indirect effect of bringing about a concentration ... shall be submitted to a prior authorization of the High Authority ... .

2. The High Authority shall grant the authorization ... if it finds that the transaction ... will not give ... the power:

---to determine prices, to control or restrict production or distribution, or to prevent the maintenance of effective competition in a substantial part of the market for such products; or

---to evade the rules of competition as they result from the execution of this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets . . . .

7. [T]he High Authority is empowered to address to public or private enterprises which, in law or in fact, have or acquire on the market ... a dominant position which protects them from effective competition in a substantial part of the common market any recommendations required to prevent the use of such position for purposes contrary to those of this Treaty . . . .


34. Continental's Pleadings, supra note 29, at 5.

35. Id. at 6-9.

36. Under Article 166 of the EEC Treaty, the Advocate-General is appointed by the Court of Justice for the purpose of making impartial conclusionary summaries which take the form of recommendations to assist the court in interpreting and applying the Treaty. See 298 U.N.T.S. at 74, 2 CCH COMM. MKT. REP. ¶ 4607.

distorted. It reasoned that since a merger reduces the number of competitors in the supply market, the acquisition of a competitor by an enterprise in a dominant position is a prejudicial limitation of a market and is thus prohibited.

Continental asserted that such general reference to the goals of the Community is impermissible, noting that Article 3 is not law, but merely a program provision. Impliedly that the specific controls the general, the corporation challenged the Commission's reliance on Article 3 by noting that Article 85(3) exempts certain agreements from the general prohibitions of Article 85(a), thus specifically permitting and condoning restraints. Furthermore, because Article 86 contains no similar provision for exempting beneficial practices, a broad interpretation would render the latter statute meaningless. That is, assuming a particular merger may be beneficial to all concerned, including consumers, it would still be prohibited if a mere increase in market share is per se abusive. The absence of a provision for legalization in such a situation suggests that Article 86 must be narrowly construed to apply only to truly abusive combinations.

A broad interpretation would have the undesirable consequence of removing all limits on Article 86. In urging this view, Continental argued that if increased market share is itself abusive, then any action which leads to such an increase is potentially within the ambit of the statute. The resulting uncertainty in the law demands a strict interpretation.

Continental's last two pleadings were more technical than interpretive, in the sense of applying law to fact. The corporation's attorneys urged that there must exist a causal relationship in which the dominant position be the means by which the combination was effected. Adoption by the court of this view would mean victory for Continental, since the Commission never alleged that Conti-

38. 298 U.N.T.S. at 16, 1 CCH COMM. MKT. REP. ¶ 171.
40. For text of Article 85, see note 5, supra.
41. Continental's Pleadings, supra note 29, at 10-11.
42. Id. at 11-12.
43. Id. at 15-16.
44. Id. at 2a.
nental used its market strength to force the merger with Thom-

Finally, Continental summoned the policy consideration of en-
abling Community enterprises to combine for the purpose of en-
abling them to better compete vis-à-vis the rest of the world. In
light of stiff competition from the Metal Box Company, Ltd. of
Britain and American Can Co., Continental found the merger nec-

The Commission found that no causal relationship need exist
before the statute could be invoked. Although the use of the posi-
tion as an instrument is relevant in examples (a), (c), and (d)
of Article 86, even internal operations are prohibited under exam-
ple (b) when the result is prejudicial to the consumer. As the
law interdicts end results, not means, whenever the market struc-
ture is changed in the direction of reducing competition, the result-
ing constriction of consumer choice is a violation of Article 86(b).

At this point, reference to the opinion of Advocate-General Roe-
mer is appropriate. Concluding that the Commission decision
must be annulled as being without basis in Article 86, he embraced
strongly almost every point in Continental’s argument. Roemer
pointed out that a broad interpretation obstructs the basic require-
ment of certainty in the law. That is, the test under the narrow
view of direct prejudice to consumers is more precise than mere
impairment of choice which may lead to prejudice. In sum, the
Advocate-General’s recommendation was a ringing endorsement
of Continental’s strict interpretation.

INTERPRETATION BY THE COURT

The court posed the initial question to be whether Article 86 ap-
plies only to behavior which has a direct detrimental effect on the
market, hence consumers, or whether it also covers changes in a

corporation’s internal structure which lead to serious impairment
of competition in the Common Market. Internal changes, such
as mergers, increase the size and economic power of a firm; hence

47. For text of Article 86, see note 4, supra.
50. Id. at 207-08.
51. Id. at 223.
the court could find no basis for distinguishing them from overt practices on the market.\footnote{52}{Id.}\ Thus, the door was opened; if Article 86 protected competition at all, it would have to apply to structural alterations such as mergers.

In determining that the statute shelters competition, the Court of Justice emphatically rejected the contentions of both Continental and the court’s own Advocate-General. Invoking the spirit and objectives of the EEC Treaty, the court stated with unusually strong language:

By providing for the establishment of a system that will protect competition within the Common Market from distortion, Article 3(f) demands a fortiori that competition must not be eliminated. This requirement is so essential that if it did not exist numerous provisions of the Treaty would be futile.\footnote{53}{Id. at 224.} (emphasis added)

Thus the court easily disposed of the argument that reference to the goals of the Community is impermissible and that comparison to the ECSC Treaty must be made.

The court proceeded to read Articles 85-90 as a unit to achieve the principles of Article 3, stating that Article 86 is to prevent enterprises from achieving through merger what they could not accomplish under Article 85 (i.e. by way of cartel). In short, the court held that the purpose of the Treaty is to ensure that competition not be distorted and that neither Article 85 nor 86 may be interpreted to contradict either each other or those basic principles which they serve.\footnote{54}{Id. at 225.}

Finding, then, that the meaning of Article 86 is to promote competition, the court held:

There may therefore be abusive behaviour if an undertaking in a dominant position strengthens that dominant position so that the degree of control achieved substantially obstructs competition, i.e. so that the only undertakings left in the market are those which are dependent on the dominant undertaking with regard to their market behaviour. . . . [T]he undertaking may be abusive and prohibited by Article 86 of the Treaty, regardless of the means or the methods whereby it has been achieved, if it has the effects described above.\footnote{55}{Id. at 225.} (emphasis added)

In dicta, the court continued:

\footnote{52}{Id.}\ \footnote{53}{Id.}\ \footnote{54}{Id. at 224.}\ \footnote{55}{Id. at 225.}
In fact, apart from any fault, it may be regarded as abusive if an undertaking has such a dominant position that the objectives of the Treaty are frustrated by a substantial change in the supply structure seriously jeopardising the consumer's freedom of action in the market; this is necessarily the case if competition is almost eliminated. Although such a restrictive condition as the elimination of all (emphasis original) competition need not be fulfilled in all cases, if the Commission bases its decision on such an elimination of competition it must give reasons that are sufficient in law to justify it or at least must prove that competition was so substantially impaired that the remaining competitors could not constitute an adequate counterweight.  

Notable is the word "may" in the holding for it indicates that the court is not formulating a per se rule, but will investigate the facts and circumstances of each case to determine whether the obstruction of competition is an abuse.

**"DOMINANT POSITION" NOT DEFINED BY THE COURT**

It is especially important that neither the concept of dominant position nor substantial obstruction of competition are adequately defined by the court. Since these terms are not self-defining, much uncertainty and conflict will persist until either the court or the Commission clarifies them.

An attempt to define dominant position appeared in the Commission decision regarding Continental Can:

> Enterprises are in a dominant position when it is possible for them to take independent lines of conduct and this enables them to act without much regard for competitors, buyers, or suppliers. . . . This possibility does not necessarily have to result from an absolute dominance . . . .

By these terms, a powerful, non-monopolistic market position is correctly perceived to be dominant. The difficulty is that the Commission considers "independent" conduct to be the test. Such market independence has usually been the classic economic description of a monopoly. Thus, because the Commission's definition offers an inappropriate test, it does not adequately resolve this semantic problem.

If it is assumed that dominance and competition are mutually exclusive, when the court speaks of dominant position it really does not mean absolute dominance but rather a strong relative economic position which falls short of the ability to control the be-
behavior of other firms on the market (i.e. the presence of a competitive counterweight). Comparison to the ECSC Treaty and to the German Law Against Restraint of Competition supports this analysis.

In addition, it must be emphasized that Article 86, by its own terms, applies to an oligopoly as well as to a single firm. This fact has been underscored in the Commission decision Re the European Sugar Cartel. In that proceeding the Commission held that two corporations which display almost identical market behavior will be treated as a single unit. The size and market conduct of that unit will then be considered in determining whether the unit has a dominant position.

Because the Court of Justice declined to discuss what is meant by "dominant position," no truly definitive statement can be made. However, to be safe, the American multinational corporation should concern itself with Article 86 when either (1) by itself or through subsidiaries or (2) by participation in an oligopolistic structure it achieves a very strong position in a market which is nonetheless still competitive (i.e. wherein no individual firm is able to control the market behavior of another firm).

60. According to section 7 of Article 66 a firm has a dominant position when it is free from effective competition. 261 U.N.T.S. at 203-05.

61. Section 22 of the German Law Against Restraints of Competition of July 27, 1957 provides:

(1) Insofar as an enterprise has no competitor or is not exposed to any substantial competition in a certain type of goods or commercial services, it is market-dominating within the meaning of this Law.

(2) Two or more enterprises are deemed market-dominating insofar as, in regard to a certain type of goods or commercial services, no substantial competition exists in fact between them in general or in specific markets, and they jointly meet the requirements of subsection (1).


62. I.e., "Any improper exploitation by one or more undertakings . . . ." (emphasis added) 298 U.N.T.S. at 48, 2 CCH COMM. MKT. REP. ¶ 2101.


64. Id. at D104.

65. The market conduct of a subsidiary will be imputed to its parent when that parent owns greater than fifty percent of the outstanding stock. Apparently, direct orders from the parent to the subsidiary are not required in order for the behavior to be imputed; the mere potential for control will suffice. Europemballage & Continental Can v. Comm'n, 12 Comm. Mkt. L.R. at 221. See also Imperial Chemical Industries Ltd. v. EEC Comm'n, 11 Comm. Mkt. L.R. 557, 628-29 (1972).
Any Type of Conduct Held Potentially Abusive

It is of greatest importance to recognize that while Continental Can deals with the applicability of Article 86 to a merger situation, the language of the holding is not so restrictive. Because the court prohibited any activity which substantially obstructs competition, this is much more than an anti-merger case. The range and scope of the type of conduct which it embraces is limitless. It is thus conceivable that the acquisition of a new patent, factory, land, etc. may be barred. The only limitation on Article 86 is that the effect of the conduct must reduce competition. The extent to which this will in fact restrict the Article will depend on to whom the statute is addressed and how much market control is too much.

The meaning of the term “substantially obstruct competition” will determine what is to be prohibited. Unhappily, that concept is ambiguous because the modifying description is not precise. Dependence on the dominant undertaking suggests at least three market situations: (a) subsidiary relationship wherein the parent owns at least 50 per cent of the capital; (b) virtual monopoly, or (c) oligopoly. In the broader context of obstructing competition (a) and (b) may be regarded as having the same effect because when the situation described in (a) exists the behavior of the subsidiary will be imputed to the parent. Hence both (a) and (b) shall be treated as a monopoly situation. That the achievement of a monopoly or near monopoly obstructs competition cannot seriously be disputed. Hence, it is at least certain that conduct which has the effect of creating a monopoly is prohibited by the Continental Can decision.

Oligopoly restricts competition in the sense that the incentive to compete and the substantive areas of competition are reduced. A major characteristic of this form is mutual interdependence among the firms in the market. Interdependence could be a reasonable interpretation of “dependence” in light of the applicability of the statute to “one or more undertakings” and the Commission decision in Re The Sugar Cartel. Oligopoly, therefore, could properly be prohibited under Article 86. Whether the establishment of an oligopoly is indeed proscribed will depend on

67. See especially the language commencing with “i.e. so that the only undertakings . . . ” in the text accompanying note 55 supra.
68. See note 65 supra.
70. Id. at 402.
how widely the court will interpret "substantial obstruction," and whether as a practical matter, oligopoly can and should be regulated.

The failure of the court to particularize the concepts "dominant position" and "substantially obstructing competition" may well have been more than mere oversight. By not defining the former, the possibility arises that dominance in the form of monopoly may itself violate Article 86. To wit, by prohibiting conduct which obstructs competition, the court implicitly forbids monopoly (which is, after all, the absence of competition). At the very least, a precedent has been established upon which a future court could rely in explicitly outlawing monopolies. Likewise, it would appear that even oligopoly could be taboo if the remainder of the firms in the market are dependent on that oligopoly. Because the court has prohibited a corporation from eliminating effective competition, Article 86 has been imbued with true anti-trust capabilities. Thus, it appears legally possible for the Commission to pursue any permissible remedy against a firm which already has no competition. This is true cause for concern to the multinational corporation, because no new action need be taken by it; a dominant market position itself could subject the firm to legal action. While such an interpretation is not suggested from the face of the statute, it is certainly within the ambit of the language used by the court.71

**Commissions Reversed on the Facts**

Although the court accepted the Commission’s interpretation of Article 86, it accepted Continental’s version of the underlying facts. Basically the Commission failed to carry its burden of proof.72 An evaluation of the correctness of the court’s decision on the facts is beyond the scope of this inquiry. Our interest is in the discussion of the relevant market.

The Commission found that Schmalbach had between 70 to 80 per cent of the German market in cans for meat products, 80 to 90 per cent in cans for fish products, and 50 to 55 per cent in metal closures (jar and bottle caps) other than crown corks.73 Conti-

71. See text accompanying note 56 supra.
72. That the Commission has the burden of proof may reasonably be inferred from the text to which note 56 refers.
nental urged that the Commission ignored the proper market, which market included direct competition from other manufacturers, self-manufacture of cans by present customers, and competition from substitute containers and preserving methods.\textsuperscript{74} When this larger market is considered, argued the corporation, Continental does not have a dominant position.

The court found that the Commission had indeed chosen the wrong market. In framing the issue, it said:

In considering the dominant position of Schmalbach Lubeca-Werke and the consequences of the merger in question, the delimitation of the market concerned is of crucial importance, for the possibilities of competition can only be considered in the light of the characteristics of the products in question, which reveal them to be particularly suited to satisfying a constant demand and interchangeable with other products only to a small extent.\textsuperscript{75}

The court went on to find that because other competitors in the light metal containers industry could readily produce fish and meat cans, a serious counterweight existed. More importantly, the court demonstrated that the outer boundary of the relevant product market is the point at which the product in question is no longer interchangeable with other products for satisfying the same purpose.

Although pleased with the court's interpretation of Article 86, the Commission was less enthusiastic about this description of the relevant market. In fact, the Commission found those requirements so exacting that it believed Article 86 would have only limited application in the future.\textsuperscript{76} At the same time, it reiterated its intention to establish a system of prior control over mergers.\textsuperscript{77}

Another criticism of the court's view is that the test of product interchangeability and cross-elasticity of demand is too broad.\textsuperscript{78} The test must encompass practical indicia such as public recognition of a viable submarket or the product's peculiar characteristics if it is to reach mergers between firms of a smaller scale.\textsuperscript{79}

It must be remembered, however, that EEC competition law is evolving rapidly; Continental Can is just the first case in Common

\textsuperscript{74} Continental's Pleadings, \textit{supra} note 29, at 22.
\textsuperscript{77} Such controls are expected to be similar in form to the provisions of Article 66 of the ECSC Treaty. That is, certain mergers would be submitted to the Commission prior to their execution. They would be considered authorized only if the Commission did not bar them within a stated period of time. See Europe, EEC Press Release No. 1210 (new series) 3–4 (Jan. 27, 1973).
\textsuperscript{78} Comment, \textit{supra} note 9, at 840.
Market history to apply Article 86 to a merger. Many commentators had thought that Article 86 did not prevent concentration per se, but merely proscribed the wrongful use of a dominant position to effect changes in the market.\(^8\) The court proved them wrong. As the Common Market becomes familiar with anti-trust law, it is reasonable to expect further refinements in the concept of relevant market.

**CONCLUSION**

The holding of the *Continental Can* case is that an abuse of a dominant position under Article 86(b) may well require the existence of five elements:

1. **Defendant in dominant position.**
   Dominant position means strong relative economic position which falls short of the ability to control the behavior of other firms. (i.e. presence of counterweight in the market.)

2. **Substantial obstruction of competition.**
   Meaning the creation of a monopoly or possibly an oligopoly, depending on how one interprets this concept.

3. **Within a relevant market.**
   Which is that market comprised of the commodities reasonably interchangeable by consumers or users for the same purpose.

4. **The use of any means or method.**
   No longer need the dominance itself be exploited to constitute an abuse. The effect of obstruction itself is prohibited.

5. **Possible affect on trade.**
   Between the member-States of the Community.

In formulating this prima facie case, it must be recalled that the court did not define either "dominant position" or "substantial obstruction." All that may said with confidence is that any type of conduct may be abusive. This alone, however, makes the case significant, because even if all mergers are eventually controlled by a device other than Article 86, the statute, through *Continental Can* will continue to forbid all other conduct which obstructs competition.

What advice, then, for the multinational corporation? Very little it would seem. By announcing broad prohibitions in undefined terms, the court has created more questions than answers. Because

of the vagueness of the holding, the best advice for a firm is to consult the Commission for its opinion prior to executing additional expansion.81 Beyond that, the only guidelines are economic terms. The more closely a firm's behavior approximates monopoly, the greater its risk of violating the statute. At a lesser market position, the gray area of interpretation renders the multinational's European venture a case of innocents abroad.

WM. H. HAUBERT II

81. To this extent, the court has, through the vagueness of its language, created for the Commission an informal means of prior control over mergers.