

Article 85 of the EEC Treaty has been widely viewed as having more limited potential application to mergers and acquisitions. The EC Commission's position on this issue has been that the Article 85 is applicable only to minority shareholdings and associated relations between competing companies that allow one to influence the competitive behaviour of the other.¹⁰ The decision of the European Court of Justice in the Phillip Morris/Rothman's case, however, has been perceived as having left open the possibility of broader application of Article 85 to merger or acquisition agreements.¹¹ In this case, the Court upheld an earlier finding of the EC Commission permitting a partial transfer of shares in a company under Article 85. The decision of the Court, however, did not rule out the possible application of Article 85 to transfers of majority as well as minority ownership.¹²

The applicability of the EEC Treaty competition provisions to mergers has allowed the EC Commission to become an important player in merger control in the EC. The Commission, for a number of years, has followed a policy of scrutinizing major mergers and acquisitions taking place within the Community. In addition, firms engaged in large cross-border mergers or takeovers have often attempted to obtain prior clearance from the EC Commission to avoid the threat of intervention by the Commission after completion of the arrangement.

Nevertheless, there remained a number of important obstacles to effective merger control by the Commission. In particular, broad overlap existed between the authority of the Member States and the EC Commission with respect to the control of mergers. With the development of the Commission as an important player in this area, companies often had to obtain separate approval for mergers from both the Commission and the relevant Member States. In addition to increasing the cost of mergers, this often made it necessary for parties to mergers to deal with authorities from two or more jurisdictions, each having a different approach to the analysis of mergers. For example, in order to obtain approval for a merger between British Airways and British Caledonian, the two companies were required to amend their agreement first in response to objections raised by the U.K. Mergers and Monopolies Commission, and later, in response to objections raised by the EC Commission.¹³