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PO Box 3, Fairford GL7 4YF, UK

Tel & Fax (44) (0) 1451 861 464

P O Box 323, Eliot ME 03903-0323, USA

Tel & Fax (1) (207) 439 5932

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Concentrations

Where once the Official Journal was full of notifications and reports of cases under Article 85 of the EC Treaty, it now carries long lists of notified proposals for mergers, acquisitions and joint ventures. This reflects a substantial shift in the volume of cases handled by the Commission in the three main areas of competition law: cartels and monopolies, concentrations and state aids. The first category has shrunk, partly because of the system of block exemptions, which obviates the need even to notify a large (but unknown) number of cases of the kind which used to flood the Official Journal. The second and third categories are growing, though the state aid category may be expected either to decline or at least to slow down its growth when a block exemption regulation on state aids becomes law.

In the meantime, the growth of the category of concentrations means that it is perfectly possible to devote a single issue of this newsletter to mergers, acquisitions and joint ventures. The present issue, though a case in point, is not typical, since it is largely concerned with the implications of a single case. Hitherto cases before the Court of Justice on the interpretation of the Merger Regulation have been rare and, for the most part, relatively narrow in scope. But the *Glencor* case, reported in this issue, is wide, interesting and important. Many of the points of interest are discussed in the editorial note preceding the text of the report. There is, however, a point of general interest which has a bearing on comments which we have made from time to time in this column in the past: that is, how far the authorities of the European Union can control the activities of corporations operating mainly outside the Union's territory.

In the *Glencor* case, the Court discusses the question of territoriality; and this is covered in our note on page 82. But it also discusses the compatibility of European action with the principles of public international law. This was a new angle, introduced by the South African parties to the case. The Court's view was that the application of the Regulation on the control of Concentrations was "justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect within the Community" (paragraph 90 of the judgment); and the Court considered with some care the meaning, in the circumstances of this case, of the words, "immediate", "substantial" and "foreseeable". Having done so, it concluded that the application of the Regulation to the proposed concentration was consistent with public international law.

As for the argument that applying the Regulation to what was essentially a matter for the South African authorities amounted to a form of interference resulting in a conflict of jurisdictions, the Court said that, even if such a principle were known in international law, the argument must be rejected. The Court had received a letter from the South African government; but the letter, far from calling into question the Community's jurisdiction to rule on the concentration at issue, merely expressed a general preference for intervention in specific cases of collusion when they arose. The concentration did not appear likely to have dire consequences for South Africa: this did not mean that it could not have serious implications for the Community. If it did, then the Community authorities had, on the face of it, the requisite jurisdiction to put matters right. □