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Cover Page Footnote

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ANTITRUST IN THE EEC—THE FIRST DECADE

BARRY E. HAWK*

SINCE 1945 there has been a significant increase in foreign legislation dealing with restrictive business practices.¹ This trend is most evident in Western Europe where the Common Market,² West Germany,³ and the United Kingdom⁴ have created a substantial body of statutory, judicial and administrative rules. Of particular importance to American firms doing business abroad are the antitrust policies of the Common Market.⁵

Developments in Common Market antitrust law within the last year portend serious potential problems for American companies doing business in or with Common Market nations. For example, in recent decisions

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1. This trend is in marked contrast with the pre-World War II era when antitrust legislation was rare outside the United States and Canada. For an analysis of the reasons for this development see C. Edwards, *Control of Cartels and Monopolies 1-13* (1967) [hereinafter cited as Edwards].

2. The European "Common Market" is a general term covering three supranational institutions: the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The ECSC was created by the Treaty of Paris in 1951 (Treaty Instituting the ECSC, April 18, 1951, 261 U.N.T.S. 140 [hereinafter cited as Treaty of Paris]), the EEC by the Treaty of Rome in 1957 (Treaty Establishing the EEC, March 25, 1957, 298 U.N.T.S. 3; 1 CCH Comm. Mkt. Rep. ¶ 151 et seq. (1957) [hereinafter cited as Treaty of Rome]). Euratom was created in 1957 (Treaty establishing the Euratom, March 25, 1957, 295 U.N.T.S. 259), and is relatively unimportant from an antitrust point of view. The Common Market originally consisted of six countries: Belgium, France, Italy, Luxembourg, Netherlands and West Germany. On January 1, 1973, Denmark, Ireland and the United Kingdom became members; during a six-month transition period, the EEC competition rules will not apply to the new entrants. See generally A. Deringer, *The Competition Law of the European Economic Community* (1968) [hereinafter cited as Deringer]; C. Oberdorfer, A. Gleiss & M. Hirsch, *Common Market Cartel Law* (2d ed. 1971) [hereinafter cited as Oberdorfer]; *Common Market and American Antitrust* (J. Rahl ed. 1970) [hereinafter cited as Rahl]. J. Cunningham, *The Competition Law of the E.E.C.: A Practical Guide* (1973).

3. See generally 3 *Business Regulation in the Common Market Nations* (H. Blake ed. 1969).

4. See generally R. Wilberforce, A. Campbell & N. Elles, *The Law of Restrictive Trade Practices and Monopolies* (2d ed. 1966); Rhinelander, *British Antitrust Laws*, 40 *Antitrust L.J.* 827 (1971).

5. The majority of United States-based multinational foreign investment is in Western Europe. See R. Vernon, *Sovereignty at Bay* (1971).

the Commission of the European Communities (Commission) invalidated an American firm's acquisition of a Dutch concern on antitrust grounds,⁶ and the Court of Justice (Court) held parent firms outside of the Common Market liable for price fixing as a result of sales by their wholly-owned subsidiaries within the Common Market.⁷ These decisions, as well as the holdings in other recent cases involving the licensing of industrial property rights⁸ may well tend to inhibit continued foreign expansion by American firms, particularly multinationals.

The purpose of this article is to summarize the existing state of Common Market antitrust law, with emphasis on developments within the last year. The focus of analysis will be Articles 85⁹ and 86¹⁰ of the Treaty of Rome and their application to the conduct of private firms. Such a review is particularly timely for two reasons. First, in April 1972 the Commission issued its first annual report on its policies respecting competition (*Report*).¹¹ Second, a number of highly significant decisions and regulations have been rendered since the *Report*.

6. Continental Can Co., 2 CCH Comm. Mkt. Rep. ¶ 9481 (EEC Comm'n 1972). This decision is now on appeal to the Court of Justice.

7. Imperial Chem. Indus. Ltd. v. EEC Comm'n, 2 CCH Comm. Mkt. Rep. ¶ 8161 (EEC C.J. 1972).

8. See, e.g., Sirena S.r.l. v. Eda GmbH, 2 CCH Comm. Mkt. Rep. ¶ 8101 (EEC C.J. 1971); Davidson Rubber Co., 2 CCH Comm. Mkt. Rep. ¶ 9512 (EEC Comm'n 1972). See also text accompanying notes 247-300 *infra*.

9. Article 85(1) of the Treaty of Rome provides in part: "The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market . . ." 298 U.N.T.S. 3, 47-48, 1 CCH Comm. Mkt. Rep. ¶ 2005.

10. Article 86 states in part: "To the extent to which trade between any member states may be affected thereby, action by one or more enterprises to take improper advantage 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 hereby be prohibited." *Id.* at 48-49, 1 CCH Comm. Mkt. Rep. ¶ 2101.

11. Premier rapport sur la politique de concurrence (1972) [hereinafter cited as *Report*]. To date no official or unofficial English translation is generally available. All citations herein refer to the official French version (author's translation). The *Report* contains both a brief summary of the law as well as the Commission's position on a number of antitrust issues. The *Report* is divided into four chapters: 1) competition policy with respect to private enterprises; 2) competition policy in the area of member state controls over or interventions into the market, such as state regional and industrial subsidies, governmental enterprises and state monopolies; 3) the preliminary results of an empirical study of market concentration in the Common Market; and 4) consumer questions. The *Report* also contains a brief summary of the enforcement of the anti-dumping provisions of Article 91 of the EEC Treaty. *Id.* at 89-96.

The first section of the *Report*, dealing with private firms, comprises almost one-half of the document and is the most relevant to American firms doing business abroad. The other sections will not be discussed in this article.

I. EEC COMPETITION POLICY

A. *The Underlying Principles*

The principles underlying the enforcement of EEC antitrust laws merit special and careful attention, since application of these laws depends more on policy considerations than on statutory construction. The most recent statement of these principles can be found in the Introduction to the Commission's *Report*,¹² where two general goals are clearly set forth: integration of the separate economies of member states into a unified "common market," and promotion and protection of "competition." A third objective, which can be gleaned from the body of the *Report* and from prior Commission rulings and pronouncements, is the encouragement of certain forms of horizontal cooperation among small and medium-sized firms in order to enhance their ability to compete with larger units.

Single market integration, and the elimination of restrictive practices which interfere with that integration, is the first principle of EEC antitrust law, and is basic to the treaty objective of a "common market."¹³ Both the Commission and the Court of Justice have been severe in their treatment of private arrangements, such as territorial restrictions coincident with national boundaries, which create obstacles to trade between member states or which operate to isolate national markets.¹⁴ This policy is two-edged: on one hand, the Commission and the Court have not hesitated to strike down obstacles to integration;¹⁵ at the same time, the Commission has adopted affirmative policies the effect of which is to encourage firms to expand their operations throughout the Common Market.¹⁶

12. *Id.* at 11-20.

13. "Concerning the competition applicable to enterprises, Community policy in the first place must prevent the substitution of state restrictions and obstacles to trade which have been abolished, by private measures with similar consequences. Agreements for quotas and agreements which have as their object the division of the Common Market into regions, the sharing of customers and splitting of the market in other ways are in flagrant contradiction with the provisions of the treaties. Economic integration is condemned to remain partial if agreements or concerted practices of this kind are not energetically opposed." *Id.* at 13.

14. See, e.g., *Etablissements Consten and Grundig-Verkaufs-GmbH v. EEC Comm'n* [1961-1966 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8046 (ECC C.J. 1966), in which the Court invalidated the restrictions in an exclusive distribution agreement confining dealers within national lines. See also text accompanying notes 210-11 *infra*.

15. The Commission stated in the Report that in the future, special priority in enforcement will be given to restrictions which interfere with single market integration, for example, market divisions, customer allocations along national lines, agreements having the effect of concentrating demand on particular producers and exclusive distributorships with absolute territorial restrictions. Report, *supra* note 11, at 16.

16. For example, in the Report, the Commission stated: "But the process of integration

Continued use of EEC antitrust provisions as a tool of Common Market economic and political policy can be expected, and in the future enforcement of EEC antitrust laws, integration policy will play a much greater role than the literal construction of relevant antitrust provisions.¹⁷

The second principle underlying the enforcement of EEC antitrust law is the promotion and protection of competition. In the *Report*, the Commission emphasized that it is pursuing an *active* competition policy.¹⁸ That is, it intends to use antitrust enforcement as a positive tool to promote competition, and not merely as a weapon against anti-competitive conduct.

Of course, the enforcement of EEC antitrust law must be viewed against the background of possibly conflicting policies among the member states as to the economic direction of the EEC—that is, whether emphasis should be placed on a free or on a planned (“*dirigiste*” or “*indicative*”) economy.¹⁹ While the conflicting philosophies of the member states ultimately do influence the direction of Common Market policy, the *Report* indicates that the Commission, at least, has opted for a basically capitalist or free enterprise system, albeit modified, with antitrust as an intervening government control necessary to assure continued competition in the market place.²⁰ The free market system envisioned by the Commission is “modified” in the sense that economic values are not the sole criteria of the Commission’s competition policy. To be sure, the Commission in the *Report* did set forth a number of economic arguments in support of a free market policy, such as more efficient allocation of resources, improvements

is far from being completed. Certain enterprises continue to make their sales efforts exclusively in their own national markets. That is why the Commission particularly encourages the efforts at collaboration of small and medium-sized enterprises to penetrate markets other than their own.” *Report*, supra note 11, at 14. According to the Commission the competitive position of firms will be reinforced by exempting from certain of the antitrust rules some forms of cooperation between firms which give rise to a positive increase in trade (for example, cooperation between small and medium-sized firms which frequently cannot effectively compete with larger firms except by cooperation). Moreover, the prohibitions of Article 85 will not be applied to restrictions having no perceptible effect on the Common Market in accordance with the quantitative criteria promulgated by the Commission. *Id.*

17. See generally Deringer, *A Practitioner Looks at the German and EEC Rules As Applied to Acquisitions, Mergers and Joint Ventures*, in *Current Legal Aspects of Doing Business in Europe* 64, 65 (L. Theberge ed. 1971); Mestmeäcker, *The Multinational Corporation—A Panel Discussion*, 40 *Antitrust L.J.*, 986-89 (1971).

18. See *Report*, supra note 11, at 11.

19. See Rahl, supra note 2, at 30-33.

20. As Heilbroner, among others, has predicted, Western Europe appears destined to retain a basically capitalist economy at least in the near future. See R. Heilbroner, *Between Capitalism and Socialism* (1970).

in technology, and promotion of full employment.²¹ However, the Commission also expressly acknowledged that "social" and "human" demands sometimes require a modification of results otherwise mandated on purely economic grounds.²² This recognition of non-economic values is especially evident in the Commission's attempt to regulate member-state aid to an industry or to a particular depressed region within a member state.²³ It is difficult to determine from the *Report* and from the Commission's decisions to date the exact weight of non-economic factors in the evaluation of private firm conduct. However, it is hardly an exaggeration to conclude that the temper of the United States Supreme

21. See Report, *supra* note 11, at 11-12, where the Commission stated: "[C]ompetition is the best stimulus to economic activity as it guarantees to those taking part in it the widest possible liberty of action. An active competition policy carried out in accordance with the provisions of the Treaties . . . facilitates this evolution; by reason of the interplay of decentralized decision-making mechanisms, [competition] enables enterprises to obtain a continuously improving efficiency which is the basic condition for the constant improvement in standards of living and possibilities of employment within the countries of the Community. Understood in this sense, competition policy is an essential means of assuring a high degree of private and collective needs in our societies.

....

"The Commission also seeks to underline the importance which it attributes to competition policy as an instrument in the struggle against inflation, more particularly in its present phase, inasmuch as inflation in a number of aspects gives rise to structural rigidities. Competition policy also makes an important contribution to the realization of fuller employment: the maintenance of ill-adapted structures which give rise to inflation brings about a veritable under-utilization of work potential in the Community and under-remuneration of skilled workers."

22. "While the play of the market is an indispensable element of progress and the most appropriate instrument for assuring the best possible allocation of the means of production, nevertheless situations exist where the market alone cannot attain certain desirable objects of development within an acceptable period of time or without intolerable social tensions." *Id.* at 17.

23. For example, the Commission explained: "When the spontaneous decisions of enterprises do not permit the necessary adaptations to occur on their own at an acceptable social cost, it is then necessary to proceed to state interventions limited in scope and time with a view to orienting these decisions of enterprises toward the economic and social ideal." *Id.*

Structural policies, notably sectional and regional policies, are additional considerations in the development of an overall economic policy: "[C]ompetition policy as carried on by the Commission cannot develop within a closed circle, independently of efforts carried on in other fields. The first program of medium-term economic policy has moreover sketched the relations which should be guaranteed between competition policy and certain structural policies." *Id.* at 13. These structural policies usually involve member state aid either to industries or to geographic regions, such as southern Italy. The Commission has recognized that structural and competitive policies are not always consistent and must be reconciled. "It is equally necessary that [state] aids efficiently contribute to the improvement of sectional and regional structures of the communities which is their justification, while at the same time having the least adverse effect from the point of view of competitors." *Id.* at 18.

Court's *Appalachian Coals* decision²⁴ informs the application of EEC antitrust law.

A third objective of EEC antitrust is the encouragement of cooperation among Common Market firms in order to increase their ability to compete against larger firms or units.²⁵ This can be seen in the Commission's permissive stance toward many horizontal agreements involving small and medium-sized firms.²⁶ While this policy is clearly discernible in the *Report* and in Commission action, the existence of two related and more controversial policy considerations cannot be so easily verified. These are the promotion of concentration generally, including growth by mergers, and an anti-American (or anti-multinational firm) bias. As to the first, recent action by the Commission indicates that it may be having doubts about the wisdom of promoting concentration, and that any importance that such a policy may have had in the past is now being closely reexamined by the Commission.²⁷ The extent to which such a shift in policy may raise inconsistencies with the encouragement of cooperation among small and medium-sized firms is unclear at this point.²⁸

The assertion that the Commission's actions exhibit an anti-American bias has a certain validity, although the use of terms such as "bias" tends

24. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) ("[A] close and objective scrutiny of particular conditions and purposes is necessary in each case. . . . The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it." *Id.* at 360).

25. See Commission Notice of July 3, 1968, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9248, where the Commission stated: "The Commission welcomes cooperation among small and medium-sized enterprises where such cooperation enables them to work more economically and increase their productivity and competitiveness on a larger market." *Id.* at 8517.

The Commission now operates the Bureau de Mariage, which advises small and medium-sized companies looking for corporate "brides" on the complex rules and problems of international mergers or cooperative ventures. CCH Euromarket News, No. 198, Oct. 31, 1972, at 4.

For a criticism of this encouragement of horizontal cooperation, at least insofar as it reflects a favorable attitude toward economic concentration, see Markert, *Antitrust Aspects of Mergers in the EEC*, 5 *Texas Int'l L.F.* 32, 66-70 (1969). See generally Note, *Horizontal Integration of the Common Market Economy: Recent Decisions and Communications by the Commission of the European Communities*, 6 *Texas Int'l L.F.* 259 (1971).

26. See text accompanying notes 217-20 *infra*.

27. See text accompanying notes 301-25 *infra*. Such a policy does, however, continue to play an essential part in the enforcement of the ECSC provisions. See note 72 *infra*.

28. The Commission can be expected to delineate its position on larger mergers and concentration in future decisions. In the meantime, the Court of Justice's upcoming decision in *Continental Can Co.*, 2 CCH Comm. Mkt. Rep. ¶ 9481 (EEC Comm'n 1972), a case involving the acquisition of a Common Market firm by a larger American-based concern, should help to clarify the issue.

to give a distorted impression of the Commission's true position. While claims of anti-American (or anti-multinational firm) sentiment are not expressly supported by the language of the *Report*, or by Commission action or Court of Justice decisions,²⁹ it is probable that the competitive disadvantages of smaller EEC firms vis-à-vis large international and multinational firms, particularly those based in the United States, have been a significant consideration in many Commission decisions and policies,³⁰ particularly in Common Market merger policies.³¹ On the other hand, United States-based multinationals have at times also benefited from Commission action.³² Suffice it to say that the European awareness (or fantasy) of an "American challenge"³³ to European industry has had and will continue to have ramifications on Common Market antitrust policy. However, it must be noted that the Commission may not now be so sure that the best response to that "challenge" is the creation of concentrated industries within the EEC.³⁴

B. Administration and Enforcement

The Commission of the European Communities, headquartered in Brussels, combines administrative and judicial functions and is the principal, although not ultimate, force in the direction of Common Mar-

29. The Commission's selection of Continental Can's acquisition of a Dutch concern as its test case for applying Article 86 to acquisitions does add fuel to claims of anti-American bias. See *id.* The Commission recently announced that it is also investigating an "information exchange" operated by five of Continental Can's licensees. See *N.Y. Times*, Sept. 21, 1972, at 67, col. 1.

30. See, e.g., SAFCO, 2 CCH Comm. Mkt. Rep. ¶ 9487 (EEC Comm'n 1971); Transocean Marine Paint Ass'n., [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9188 (EEC Comm'n 1967). The Commission has recognized that investment in the EEC by multinationals and American firms has both benefits and disadvantages: "There are many advantages and disadvantages offered by American investments. They spread economic prosperity and technological progress. They act as an incentive for many European enterprises. This progress, however, does not benefit Europeans primarily. In many cases, in the areas of employment, research, defense, or international trade . . . the policies of the new enterprises remain subject to the decisions of industrial, and even political, headquarters outside the European continent." Commission Announcement of Aug. 18, 1970, 2 CCH Comm. Mkt. Rep. ¶ 9387, at 8843 (1970).

31. Commission Memorandum to the Governments of Member States, Dec. 1, 1965, pt. 1, ¶ 6, CCH Comm. Mkt. Rep. No. 26 (separate print).

32. For example, Colgate-Palmolive was permitted to enter into a joint venture with the second largest textile detergent firm in the EEC. See Henkel/Colgate, 2 CCH Comm. Mkt. Rep. ¶ 9491 (EEC Comm'n 1971).

33. This phrase was coined by J.-J. Servan Schreiber in his book *The American Challenge* (1969).

34. A policy of concentration is pursued in the ECSC, where oligopolistic structures are encouraged. See note 72 *infra*.

ket antitrust policies.³⁵ The importance of the Commission cannot be exaggerated, particularly in view of the fact that both the Court of Justice and the Council of Ministers have generally followed the Commission's recommendations and policies.³⁶ The Commission's chief enforcement weapons are the power to enter cease and desist orders in individual cases, and the power to impose penalties up to one million units of account, or up to 10 percent of a firm's previous year's sales in the case of wilful or negligent violations.³⁷

Heavy fines have been imposed by the Commission in three cases, two of which involved international cartels engaged in "hard-core" restraints. In 1969, fines ranging from \$10,000 to \$210,000 were imposed by the Commission on defendants in the *Quinine* case.³⁸ The amount of fines was based on three criteria: the duration and gravity of the restraint (price fixing, a limitation on production and market sharing), deliberateness on the part of defendants (shown by their attempts to keep the agreement secret) and the market power of the defendants.³⁹ The Court of Justice

35. The Commission is subject to the control of the Council of Ministers, which is composed of representatives of the cabinets of the member states. In 1962, the Council issued Regulation 17, which as amended and supplemented, sets forth the basic procedure and rules under which the Commission acts in antitrust matters. See Regulation Implementing Articles 85 and 86 of the Treaty, 1 CCH Comm. Mkt. Rep. ¶ 2401 (1962) [hereinafter cited as Reg. 17]. The European Parliament, made up of delegations from the legislatures of the member states, discusses questions of policy and exercises some authority over the finances of the EEC, but is primarily an advisory body with little lawmaking power.

The officials and administrative agencies of the member states also play a part in the enforcement of the EEC antitrust laws; they assist in investigations and have the authority to prosecute Treaty violations. The Commission said in the Report that it found their cooperation "excellent." Report, *supra* note 11, at 104. Further, the national courts may apply the EEC provisions in private litigation and they frequently refer questions of treaty interpretation to the Court under Article 177 of the Rome Treaty. See 298 U.N.T.S. 3, 76-77, 2 CCH Comm. Mkt. Rep. ¶ 4655; Rahl, *supra* note 2, at 46-47.

36. The Court, sitting at Luxembourg, has jurisdiction to review the decisions of the Commission as well as interpretations of EEC and ECSC Treaty provisions on reference from member state courts. Treaty of Rome, art. 177, 298 U.N.T.S. 3, 76-77, 2 CCH Comm. Mkt. Rep. ¶ 4655.

37. See Reg. 17, arts. 15, 16 & 18, 1 CCH Comm. Mkt. Rep. ¶¶ 2541-52, 2571. See generally Oberdorfer, *supra* note 2, ¶¶ 451-56. Regulation 17 speaks in terms of "unit of account" which is the approximate equivalent of one U.S. dollar. The Commission itself does not have authority to collect the fines, but must rely on member-state authorities in the case of a recalcitrant defendant. To date, all defendants have paid the fines, with one exception. One of the defendants in the *Quinine* case, discussed below, has refused to pay its fine of \$200,000 and the Commission has requested the Dutch Finance Minister to intercede on its behalf. See N.Y. Times, Aug. 30, 1972, at 47, col. 2; cf. text accompanying notes 38-40 *infra*.

38. International Quinine Cartel, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9313 (EEC Comm'n 1969).

39. *Id.* at 8684-86.

affirmed the imposition of all but one of these fines, and sanctioned the Commission's three criteria.⁴⁰ In July 1972, the Court, in the *Dyestuffs* judgments,⁴¹ affirmed fines ranging from approximately \$14,000 to \$50,000 against ten defendants for price fixing.

These decisions, together with recent Commission announcements, signal a stiffer enforcement policy, with resort to more severe fines. The Commission made special mention in the *Report* of its intention to impose heavy fines in the case of restraints which cause serious harm to consumer interests.⁴² Thus, firms engaging in "hard-core" horizontal restraints such as market sharing and price fixing may face far larger penalties under the EEC than are presently possible under American antitrust law, with its maximum \$50,000 fine on an individual or corporate defendant.⁴³ The Commission can also be expected to impose heavy fines on defendants who repeat conduct already declared unlawful or who resist Commission efforts at enforcement. For example, the Commission has begun a second investigation of the dyestuffs industry with respect to price increases in 1972.⁴⁴

The Commission is also empowered to impose fines for failure to

40. *ACF Chemiefarma N.V. v. EEC Comm'n*, [1967-1970 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8083 (EEC C.J. 1970). The largest fine of \$210,000 was reduced to \$200,000. The Court emphasized that the fines were intended to deter future violations as well as to penalize past practices. *Id.* at 8200.

41. *E.g.*, *Imperial Chem. Indus. Ltd. v. EEC Comm'n*, 2 CCH Comm. Mkt. Rep. ¶ 8161 (EEC C.J. 1972), *aff'g Dyestuff Mfrs.*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9314 (EEC Comm'n 1969). Again, the gravity of the restraint and defendants' market power (85%) were considered in assessing the fairness of the fines. 2 CCH Comm. Mkt. Rep. at 8062. In November 1972 the Commission announced that it intended to fine a United States-based glass insulating material manufacturer 100,000 units of account for its system of discriminatory prices among member states. See *N.Y. Times*, Nov. 30, 1972, at 27, col. 1.

42. See Report, *supra* note 11, at 16.

43. Under the EEC provisions, fines may not be imposed on individuals. See Reg. 17, arts. 15 & 16, 1 CCH Comm. Mkt. Rep. ¶¶ 2541, 2551.

44. See *The Economist*, Aug. 29, 1972, at 13, col. 3. The question of cumulative sanctions under Common Market laws and the antitrust laws of third-party countries was raised in *Boehringer Mannheim GmbH v. EEC Comm'n*, [1967-1970 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8085 (EEC C.J. 1970), where the Court of Justice stated that cumulative sanctions resulting from the application of both EEC and American antitrust law were permissible on the rationale that defendants' conduct constituted separate breaches of both laws. Thus, a set-off would not be allowed. *Id.* at 8248. The problem of cumulative sanctions imposed by EEC and member state authorities has not yet arisen in practice. Report, *supra* note 11, at 108. However, the Court of Justice in *Walt Wilhelm v. Bundeskartellamt*, [1967-1970 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8056 (EEC C.J. 1969), did state that if "the possibility of a dual prosecution were to result in a cumulation of penalties, general considerations of equity . . . imply that in determining a penalty, account shall be taken of any prior penal sanction." *Id.* at 7867. See also *Boehringer Mannheim GmbH*, 2 CCH Comm. Mkt. Rep. ¶ 9484, at 9037 (EEC Comm'n 1971).

comply with its investigation and discovery requests. Such a fine was imposed for the first time in 1971 when a defendant made an incomplete presentation of requested books and documents.⁴⁵ This too may indicate a growing self-confidence on the part of the Commission in the antitrust area that is sure to lead it to take strong steps to assure thorough and complete investigations in the future.

Commission enforcement is not limited to the issuance of formal decisions in individual cases. In the great majority of situations, investigations result in voluntary compliance with Commission requests for modifications or cancellations of practices and provisions.⁴⁶ Moreover, the Commission also promulgates regulations and issues policy "communications" setting forth its views on antitrust questions.⁴⁷ This extra-judiciary action of the Commission must be seen in light of its broad authority to issue negative clearances and exemptions. This authority operates in two ways. First, the Commission can grant "negative clearances"⁴⁸ from Articles 85 and 86 in individual cases.⁴⁹ It also issues policy notices which amount to informal blanket negative clearances, such as its communication concerning agreements without a quantitative "perceptible effect" on inter-member-state trade,⁵⁰ and its communication concerning certain cooperative arrangements between small and medium-sized firms.⁵¹ Second, the Commission has the power to exempt a restrictive agreement from the prohibitions of Article 85(1) if it serves to improve the production or distribution of goods or to promote technical or economic progress, and allows consumers a fair share of the resulting profit, provided that the restrictions are indispensable to these

45. A fine of \$4,000 (of a maximum \$5,000) was imposed. See Report, *supra* note 11, at 85.

46. For example, in 1971 the Commission rendered 12 decisions in which it applied Articles 85 and 86. On the other hand, 2,873 matters under the EEC Treaty were concluded without formal decision, usually after modification of the provisions of agreements to conform with Articles 85 and 86. See *Cinquième Rapport Général sur l'activité des Communautés* 101 (1971).

47. A "communication is a measure of general scope by means of which the Commission expresses its opinion on questions of principle raised by the application of European competition law." Report, *supra* note 11, at 106.

48. "At the request of the enterprises or associations of enterprises concerned, the Commission may find that, according to the information it has obtained, there are, under Article 85, paragraph 1, or Article 86 of the Treaty, no grounds for it to intervene with respect to an agreement, decision or practice." Reg. 17, art. 2, 1 CCH Comm. Mkt. Rep. ¶ 2411.

49. See, e.g., *Raymond-Nagoya*, 2 CCH Comm. Mkt. Rep. ¶ 9513 (EEC Comm'n 1972).

50. Commission Notice of May 27, 1970, 2 CCH Comm. Mkt. Rep. ¶ 9367 (1970).

51. Commission Notice of July 23, 1968, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9248 (1968). See also Commission Communication of Dec. 29, 1962, 1 CCH Comm. Mkt. Rep. ¶ 2697 (1962).

objectives and do not eliminate competition with respect to a substantial part of the market.⁵² As with negative clearances, both individual⁵³ and blanket⁵⁴ exemptions have been granted. The chief advantages of the blanket exemption procedure are twofold: first, they reduce the administrative burdens of the Commission; secondly, firms whose agreements fall under a blanket exemption are relieved of the duty to notify the Commission of the terms of their agreements,⁵⁵ and can therefore avoid the expensive and time-consuming procedure of obtaining an individual exemption.⁵⁶ It can be expected that the number and scope of blanket exemptions will increase, and that in this respect compliance with Common Market antitrust rules will become more certain and less time-consuming.

As a general rule, an official notification to the Commission of new restrictive agreements is necessary to bring the Commission's power to grant exemptions into play.⁵⁷ The partial concurrent jurisdiction of

52. Treaty of Rome, art. 85(3), 298 U.N.T.S. 3, 48, 1 CCH Comm. Mkt. Rep. ¶ 2051. For an excellent criticism of the Commission's exercise of the power see Schwartz & Wellman, *The Rule of Reason in EEC Antitrust: Efficiency Enhancement Through Integration by Agreement among Competitors*, 12 Va. J. Int'l L. 192 (1972).

53. See, e.g., *CEMATEX*, 2 CCH Comm. Mkt. Rep. ¶ 9460 (EEC Comm'n 1971).

54. To date the only blanket exemption is Regulation 67/67, which exempts bilateral vertical exclusive dealing and selling arrangements and requirements agreements which do not contain certain restrictions, particularly bans on parallel imports. Application of Article 85, Paragraph 3, of the Treaty to Groups of Exclusive Distributorship Agreements, 1 CCH Comm. Mkt. Rep. ¶ 2727 (1967) [hereinafter cited as Reg. 67/67]. In July 1972, the Commission proposed a regulation giving blanket exemptions to certain kinds of specialization agreements between firms having less than 10% of the market. See Commission Press Release of July 14, 1972, 2 CCH Comm. Mkt. Rep. ¶ 9517 (1972). Blanket exemptions are also being considered by the Commission with respect to standardization agreements, joint research and development agreements and the exploitation of research efforts as it relates to industrial property rights and trade secrets. See Report, *supra* note 11, at 46, 100.

55. Reg. 67/67, 1 CCH Comm. Mkt. Rep. ¶ 2727. See notes 57-64 *infra* and accompanying text.

56. Under the blanket exemptions covering certain distributorships, the Commission may later withdraw the exemptions in an individual case where the results of the agreement are found to be incompatible with Article 85(1). See Reg. 67/67, 1 CCH Comm. Mkt. Rep. ¶ 2727.

57. Reg. 17, art. 4(1), 1 CCH Comm. Mkt. Rep. ¶ 2431. There are currently some classes of agreements which are relieved entirely from the notification requirement and which remain provisionally valid until declared illegal by the Commission. First, Regulation 17 itself provides that certain agreements need not be reported to the Commission: for example, agreements between firms of only one member state which do not involve imports or exports between member states; bilateral vertical resale price agreements; and certain bilateral agreements involving industrial property rights. Reg. 17, art. 4(2), 1 CCH Comm. Mkt. Rep. ¶ 2431. In addition, agreements covered by blanket exemptions need not be notified in order to be provisionally valid. Reg. 67/67, 1 CCH Comm. Mkt. Rep. ¶ 2727. See Report, *supra* note 11, at 98-99.

member-state courts over EEC antitrust questions raises some problems in connection with the notification requirements. Article 85(2) of the Treaty of Rome⁵⁸ makes "null and void" any agreement prohibited by Article 85(1). While it is often a national court which pronounces an agreement "void" under Article 85 in a suit involving the agreement,⁵⁹ such a court must recognize any exemption made by the Commission.⁶⁰ National courts themselves have no power to exempt agreements⁶¹ and two rules preserve a party's right to exemption when not yet granted by the Commission. First, whenever the Commission has "initiated a proceeding" as to an agreement, a national court may not adjudicate its legality.⁶² Second, certain agreements⁶³ are accorded "provisional validity" if they have been registered with the Commission or for some reason have been exempted from notification under Regulation 17.⁶⁴

As the Commission pointed out in the *Report*,⁶⁵ it relies primarily upon the notification requirement of Regulation 17⁶⁶ in its antitrust law enforcement. However, the Commission feels that the notification requirements are not sufficient to assure complete enforcement of the competition rules.⁶⁷ Formal and informal complaints, as well as the study of economic and financial information independently obtained, enable the Commission to complete a regular surveillance of market conditions, in order to discover unreported restrictive practices. The Commission's power to undertake independent investigation by industrial sector has been exercised in only two instances,⁶⁸ and the Commission does not contemplate frequent or general resort to industry-wide investigations because of their administrative costs and the difficulty in completing long-term intensive analyses.⁶⁹

Finally, there is an increasing trend toward detailed supervision by

58. 298 U.N.T.S. 3, 48, 1 CCH Comm. Mkt. Rep. ¶ 2031.

59. See Treaty of Rome, art. 88, *id.* at 49, 1 CCH Comm. Mkt. Rep. ¶ 2251.

60. Reg. 17, art. 9(3), 1 CCH Comm. Mkt. Rep. ¶ 2481.

61. See *id.*, art. 9(1).

62. *Id.*, art. 9(3).

63. For example, those existing before the effective date of Regulation 17.

64. See, e.g., *Blume v. Van Praag*, [1961-1966 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8017, at 7337-38 (Belg. Com. Ct. 1962). Cf. *Parfums Marcel Rochas Vertriebs-GmbH v. Bitsch*, 2 CCH Comm. Mkt. Rep. ¶ 8102, at 7124 (EEC C.J. 1970). With some exceptions, this provisional validity is lost following an unfavorable Commission decision, thus exposing the parties to the risk of private action for past as well as future conduct.

65. Report, *supra* note 11, at 98, 102-04.

66. See note 57 *supra*.

67. Report, *supra* note 11, at 104.

68. The Commission recently completed a three year study of the margarine industry, and is currently investigating restrictive practices in the brewery industry. *Id.* at 104.

69. *Id.*

the Commission over exempted agreements in order to monitor their actual anticompetitive effects. For example, in *Henkel/Colgate*⁷⁰ the parties were obliged to advise the Commission of the policy which they would follow in regard to patent and technical licenses, and to indicate immediately to the Commission any interlocking directorships or other participations between firms of the two groups and any participation by the two groups in other firms.

In sum, the administration of EEC antitrust rules has been greatly simplified over the last ten years, and the backlog of its notified agreements has been greatly reduced. The Commission can now devote more time and energy to the enforcement of Article 85 against "hard-core" restrictive practices, such as price fixing and market sharing, and of Article 86 against dominant firms, and perhaps against mergers. This new phase of Commission enforcement should be marked by the imposition of heavier penalties, reflecting the Commission's growing self-assurance in antitrust enforcement.

II. RULES CONCERNING RESTRICTIVE BUSINESS PRACTICES OF PRIVATE FIRMS

Both the European Economic Community⁷¹ and the European Coal and Steel Community⁷² have antitrust provisions. Articles 85 and 86 of

70. 2 CCH Comm. Mkt. Rep. ¶ 9491 (EEC Comm'n 1971). See also *MAN/SAVIEM*, 2 CCH Comm. Mkt. Rep. ¶ 9494 (EEC Comm'n 1972); *CEMATEX*, 2 CCH Comm. Mkt. Rep. ¶ 9460 (EEC Comm'n 1971); *Transocean Marine Paint Ass'n* [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9188 (EEC Comm'n 1967); Report, *supra* note 11, at 86.

71. Treaty of Rome, arts. 85 & 86, 298 U.N.T.S. 3, 47-49, 1 CCH Comm. Mkt. Rep. ¶¶ 2005, 2101.

72. Treaty of Paris, arts. 60, 63, 65, 66, 261 U.N.T.S. 140, 189-91, 193-205. Article 65 prohibits agreements "tend[ing] . . . to prevent, restrict or impede the normal operation of competition" within the ECSC. 261 U.N.T.S. at 195. It does not require a possible effect on inter-member state-trade, unlike Article 85(1) of the EEC. The Commission, which has exclusive enforcement jurisdiction, has granted exemptions for joint buying and selling arrangements and specialization agreements on grounds similar to those of Article 85(3). Report, *supra* note 11, at 34-35.

Article 66 deals with mergers and acquisitions. It requires that approval from the Commission be obtained for any merger or acquisition ("concentration") which involves at least one firm engaged in the coal or steel business in the Common Market. 261 U.N.T.S. at 199-205. Article 66 expressly provides for approval of mergers which do not give rise to the power to control prices, production or distribution, or to prevent effective competition in a substantial part of the product market. Art. 66(2), *id.* at 199. See Report, *supra* note 11, at 82.

The Commission distinguishes between mergers in the coal industry and those in the iron and steel industries. It takes the position that all mergers in the coal industry should be approved because of the effective competition of other energy sources (such as oil and gas) and the powerful position of certain purchasers. *Id.* at 82-83. With respect to the

the EEC are the most important, both because of their scope and because the EEC covers the entire range of markets, as compared with the ECSC, which is limited to the coal and steel industries.⁷³

iron and steel industry, the Commission encourages mergers in order to establish an oligopolistic structure within the industry in which there would be approximately twelve major groups of enterprises with a maximum of 13% of the market for any one firm. This policy toward concentration in the iron and steel industry is based on existing structures within the industry, the need for rationalization and technological evolution, and international competition. *Id.* at 83. See generally Mueller, *The Policy of the ECSC Toward Mergers and Agreements*, 14 *Antitrust Bull.* 413 (1969).

Article 66 also provides for regulation of firms having a dominant position; under such control prices, conditions and terms of sale, production, and delivery by such firms may be regulated. Art. 66(2), 261 U.N.T.S. at 199.

Article 60 of the ECSC prohibits certain forms of price discrimination. 261 U.N.T.S. at 189-93. There is no such provision under the EEC treaty. In the Report the Commission conceded that the applications of Article 60 in the decisions taken since 1953 have created numerous difficulties. Report, *supra* note 11, at 87-89. The principal defect has been an over-rigidity which has prevented firms in the coal and steel industries from making desirable adaptations to changing market conditions. Under present regulations price discrimination is connected with the obligation to publish price lists and conditions of sale. Departures from published prices constitute discrimination unless they can be justified either on the ground that the transaction in question was not within the category of goods laid down in published price lists or on the ground that the price deviation was applied in all comparable cases.

The Commission has proposed to the Council of Ministers substantial changes in the regulations. The primary thrust of these changes is the elimination of the present connection between discrimination and publicity and the presumption of discrimination arising from the mere departure from published price lists. These proposals are intended to permit a greater adaptation to conditions in the coal and steel industries. The new proposals, outlined briefly in the Report, also attempt to provide an autonomous definition of a comparable transaction laying down precise criteria of comparability in three areas: purchases, products sold and other essential characteristics of transactions. *Id.* These Commission proposals indicate a growing disenchantment in the Common Market with an overly rigid price discrimination prohibition scheme. This disenchantment and the new proposals may well result in a more permissive stance toward price discrimination in the coal and steel industries.

73. In addition to the coal and steel industries, the Common Market provides for special competition rules in the areas of agriculture and transport. With respect to agriculture, Article 85 and the regulations thereunder apply in principle; however, certain exceptions are made, such as agreements for the integration of a national marketing organization and agreements for agricultural exploitation or associations of agriculturalists. See Report, *supra* note 11, at 100. Similarly, Regulation 17 is not applicable to agreements, decisions and concerted practices within the transport sector which have as their object or effect the fixing of prices and conditions of transport, limitation or control of supply of transport or the division of markets. The non-application of Regulation 17 is unlimited in time in the case of maritime and air navigation but is limited in the case of rail, road and water transport. *Id.* at 100-01. In 1968, the Council of Ministers adopted a different set of competition rules with respect to the transport sector. For example, Regulation 1017 provides that the prohibition does not apply to agreements whose sole object and effect is a common application of technical improvements or technical cooperation; also,

A. *Article 85: Restrictive Concerted Practices
in the EEC*

Article 85, which corresponds roughly to section 1 of the Sherman Act,⁷⁴ prohibits "agreements," "concerted practices," and "decisions of associations of enterprises" which may affect trade between member states and which have the object or effect of preventing, restraining or distorting competition within the Common Market.⁷⁵ Without limiting this general prohibition, the article mentions specific types of proscribed restrictions, such as price fixing, market sharing, tying arrangements and agreements limiting production. Article 85(1) has been applied to vertical as well as horizontal agreements, and to the supply of services as well as goods. Its prohibitions are subject to the Commission's power to exempt under Article 85(3).⁷⁶

In this section, the requirements of concerted action and effect on inter-member-state trade will be discussed, followed by separate treatment of various sorts of business arrangements, grouped into the general categories of horizontal arrangements, vertical arrangements and industrial property rights.⁷⁷

1. "Agreement" or "Concerted Practice" Requirement

Like section 1 of the Sherman Act, Article 85 does not come into play unless there has been some "agreement" or "concerted practice." In July 1972, the Court of Justice in the *Dyestuffs* judgments⁷⁸ took a broad view of this requirement, in affirming the Commission's finding of price fixing in violation of Article 85. The conduct in *Dyestuffs* centered around three series of price increases in 1964, 1965 and 1967. With a few exceptions,⁷⁹ all the increases covered dyestuff products sold in each of the member states. Within the Common Market, the dyestuffs market was divided or "compartmentalized" into five national markets with

exemption is provided for groups of small and medium-sized enterprises whose object is financing or common acquisition of vehicles. Council Reg. 1017/68, Application of the Rules of Competition to the Rail, Road, and Inland Waterway Transport Sectors, 1 CCH Comm. Mkt. Rep. ¶ 2761 (1971).

74. 15 U.S.C. § 1 (1970).

75. 298 U.N.T.S. 3, 47-48, 1 CCH Comm. Mkt. Rep. ¶ 2005. See note 9 supra.

76. 298 U.N.T.S. 3, 48-49, 1 CCH Comm. Mkt. Rep. ¶ 2051. See note 10 supra.

77. The Report does not discuss the first two requirements. It does treat separately the business arrangements as grouped in the three categories in the text.

78. E.g., *Imperial Chem. Indus. Ltd. v. EEC Comm'n*, 2 CCH Comm. Mkt. Rep. ¶ 8161 (EEC C.J. 1972), aff'g *Dyestuffs Mfrs.*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9314 (EEC Comm'n 1969). The Court affirmed the imposition of fines ranging from \$40,000 to \$50,000 against ten dyestuff manufacturers.

79. For example, the 1965 price increase was not applied in the French market because of a government price freeze then existing in France. See *id.* at 8028.

different price levels.⁸⁰ The defendant manufacturers were of considerable size and controlled 80 percent of the market as a whole.⁸¹

The arguments advanced by each party in *Dyestuffs* were basically those ordinarily raised in connection with "conscious parallelism" under section 1 of the Sherman Act. Briefly, the Commission argued that the first proof of the concerted character of the price increases was the identity of the prices of each manufacturer in each country, the near identity of the products covered by the increases and the proximity (or simultaneity) of the timing of the increases. The Commission contended that the price identities and parallel conduct could not be explained solely by the oligopolistic nature of the market, and that they were implausible without prior concert among the manufacturers.⁸² The defendants responded that price leadership and the oligopolistic structure of the industry were sufficient to explain price identities and parallel behavior.⁸³

The Court of Justice acknowledged that a "concerted practice," as used in Article 85(1), is something less than a formal agreement. It reasoned that "concerted practices" was made a separate category by the authors of the Treaty of Rome

to prevent the prohibitions of Article 85, relating to anti-competitive actions, from being circumvented by enterprises that might, while following a common policy according to an established plan, act in such a way as to leave no trace of a written document that could be called an agreement.⁸⁴

The Court then pointed out that some objective manifestation of the intent of the participants must be shown before a parallel course of conduct could be considered a concerted practice within the terms of the Treaty provision.⁸⁵ Moreover, said the Court, alleged concerted conduct, unlike an express agreement, "cannot be entirely dissociated, in its very conception, from the actual effect it has on the conditions of compe-

80. The Court noted that these differing price levels could not be explained by differences in costs and charges imposed on the manufacturers in the varying member states. See *id.* at 8029-30.

81. *Id.* at 8027.

82. In its argument, the Commission discussed "concert" in the following terms: "It is not necessary that the parties should draw up a plan in common with a view to adopting a certain behavior. It suffices that they should mutually inform each other in advance on the attitude they intend to adopt, in such a way that each can regulate his action in reliance on his competitors behaving in a parallel manner." *Id.* at 8017.

83. *Id.*

84. *Id.* at 8036.

85. *Id.* The Court said: "The mere fact that there is a common, parallel, or concordant course of conduct by enterprises on the market is obviously not sufficient to establish the existence of a concerted practice within the meaning of Article 85, paragraph 1. It is also necessary that this conduct not be the result, or at least the main result, of the structure and the economic conditions of the market." *Id.* (emphasis deleted).

tion within the Common Market.”⁸⁶ Thus, for a concerted course of action to be adjudged unlawful under Article 85(1), “there must be a causal connection between this common intent and the established conduct.”⁸⁷

It follows that mere “conscious parallelism” is not conclusive evidence of the unlawful concert. However, the Court also explained that the parties’ common intent “could, in a given case, be inferred from all the elements of fact obtained regarding the conduct of the enterprises”⁸⁸ The Court did not make it entirely clear under what market and structural conditions parallel behavior would support a finding of concerted practice. It did say that a concerted practice might be found where parallel behavior permitted the parties to seek noncompetitive price levels and to freeze the status quo to the detriment of the free movement of goods among member states,⁸⁹ but this articulation does not really serve as a more workable criterion.

In *Dyestuffs*, the Court’s determination of the “concerted practice” issue basically took the form of inquiring whether the uniform conduct could be explained or conceived as resulting “spontaneously” from independent decisions or only as a result of prior concert. The Court lumped together the three sets of price increases and found them to reveal the existence of “an overall strategy in which the producers took part in full consciousness”⁹⁰—in American parlance, a continuing conspiracy. The 1964 price increases were effective immediately, while the 1965 and 1967 increases were announced a few weeks in advance. The Court spotlighted the use of prior price announcements as a vehicle to eliminate the uncertainty which would ordinarily follow an increase in price by one competitor, and concluded that this parallel pricing behavior was not spontaneous.⁹¹

The Court also rejected defendants’ contention, for failure of proof, that the oligopolistic structure of the market and inevitable price leadership accounted for the parallel behavior. First, the Court found that the

86. *Id.* The Court examined the facts underlying the Commission’s holding that the dyestuff manufacturers had acted in unlawful concert, and also considered the characteristics of the dyestuffs market, in keeping with its test that conscious parallel behavior, to be unlawful, must not be chiefly the result of market conditions. See *id.* at 8038. It agreed with the Commission that the concerted action could not be dissociated from an overall plan to restrict competition. *Id.* at 8048.

87. *Id.* at 8036.

88. *Id.*

89. *Id.* at 8047.

90. *Id.* at 8045.

91. “Can such perfect synchronization in the way things developed be explained by a simple mutual exchange of information . . . ? [W]ithout a true concert of action the operation could not have been carried out under such conditions.” *Id.* at 8043.

dyestuffs market was not an oligopoly "of the classic type," and that the manufacturers were powerful enough to create more than a negligible risk that some would refuse to follow a competitor's announced price increase.⁹² Second, the compartmentalization of the Common Market into five national markets having different price levels and structures made improbable spontaneous price increases on all national markets.⁹³

The Court's analysis in *Dyestuffs* indicates that it may well follow a course similar to that of the American courts by adopting a broad and flexible approach to the "concerted practice" requirement of Article 85. Certainly its approach to that requirement will not be restricted either by the definitions of an "agreement" existing at contract law, or by differences as to the meaning of the language of the Treaty.⁹⁴ Thus, *Dyestuffs* provides the Commission with a flexible and powerful enforcement weapon under Article 85.⁹⁵ This development can be particularly important to United States-based firms which are engaged in European markets characterized by "price leadership." As *Dyestuffs* indicates, such firms run substantial risks of violating Article 85 where: (1) announcements precede price increases; (2) price increases, made throughout a product line and in differing areas, appear improbable without further explanation; and, (3) the market is not an oligopoly in the strict sense.

The similarity of *Dyestuffs* to the American approach to section 1's conspiracy requirement requires a few comments, although a detailed analysis is not within the scope of this article. *Dyestuffs* articulates the problem in terms of "spontaneity" and non-spontaneity or concert. It is questionable whether this concept is an improvement over terms such as independence and interdependence. On the other hand, the *Dyestuffs* concept of "parallel behavior" may be more helpful than the American "conscious parallelism," to the extent that *Dyestuff's* terminology reduces the importance in the inquiry of a competitor's "consciousness" of a fellow competitor's conduct or anticipated reaction. The Court apparently excluded this "consciousness" from its analysis, or put conversely, such "consciousness" is permissible and does not constitute evidence of a

92. *Id.*

93. *Id.*

94. While this latter remark may strike many American antitrust practitioners as commonplace, it is perhaps more important in the Common Market where several commentators, in interpreting the concert requirement, have emphasized the language differences and translation difficulties in Article 85(1). See, e.g., Oberdorfer, *supra* note 2, ¶ 9.

95. Article 85 may now cover parallel conduct which would not violate the antitrust laws of member states. For example, the German courts refused to find, under West German cartel law, a conspiracy based upon much the same conduct as in *Dyestuffs*. See 17 Antitrust Bull. 311 (1972).

"concerted practice."⁹⁶ Whether the Court's distinction between the permitted "taking into account" of competitors' actions and the prohibited "cooperation" and "coordinated course of action" is an advance over the semantic imbroglio engendered under section 1 of the Sherman Act remains to be seen.

A second problem under the "agreement" or "concerted practice" requirement of Article 85 concerns the "bathtub conspiracy," or intra-enterprise doctrine—that is, the possibility of a "conspiracy" between two separate legal entities within one larger organization. In contrast to the American position,⁹⁷ the Commission has firmly rejected the intra-enterprise doctrine—at least where the subsidiary cannot take economic measures independent of the parent.⁹⁸ Where independence is lacking, the agreements are considered no more than "a division of labor within the same economic entity."⁹⁹ As economic independence appears to be the sole criterion under Article 85, this leaves open the possibility that a subsidiary, even wholly-owned, operating with some degree (as yet unascertained) of economic dependence from its parent conceivably could be found to engage in a "concerted practice" with its parent under Article 85. The Commission's rejection of the intra-enterprise doctrine was approved by the Court of Justice in *Béguelin Import Co. v. G.L. Import Export Co.*¹⁰⁰

2. Effect on Inter-Member-State Trade

Article 85 requires the possibility of an effect on trade between member states.¹⁰¹ This requirement has been applied to reinforce the goal of single market integration, and the Court has framed the issue as whether a challenged restriction jeopardizes "freedom of trade between the Member States" so as to prejudice the "realization of the objectives of a single market between States."¹⁰²

96. See 2 CCH Comm. Mkt. Rep. ¶ 8161, at 8037.

97. See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). See generally Parsons, *Developments in the Doctrine of Intra-Enterprise Conspiracy*, 39 *Antitrust L.J.* 968 (1970).

98. Christiani and Nielsen, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9308, at 8659 (EEC Comm'n 1969).

99. *Id.* See generally Forcione, *Intra-Enterprise Conspiracy under the Antitrust Regulations of the Common Market*, 25 *Bus. Law.* 1419 (1970).

100. 2 CCH Comm. Mkt. Rep. ¶ 8149 (EEC C.J. 1971). See Joliet, Note, *Les rapports entre l'action en concurrence déloyale et l'article 85 du Traité de Rome*, 8 *revue trimestrielle de droit européen* 427, 429-30 (1972) [hereinafter cited as Joliet]; notes 213-14 *infra* and accompanying text.

101. Treaty of Rome, art. 85(1), 298 U.N.T.S. 3, 47-48, 1 CCH Comm. Mkt. Rep. ¶ 2005.

102. *Etablissements Consten and Grundig-Verkaufs-GmbH v. EEC Comm'n*, [1961-1966

The decisions concerning this requirement can be understood only in light of the single market goal. Thus, while the requirement bears some similarity to the interstate commerce requirement of the Sherman Act, the Court and Commission have adopted a more substantive approach than the more purely jurisdictional construction given to the interstate commerce clause.¹⁰³ On one hand, the Common Market requirement is applied more severely. For example, indirect as well as potential effects have brought Article 85(1) into play,¹⁰⁴ and the required effect has almost been presumed in cases involving certain "hard-core" restraints such as price fixing.¹⁰⁵ On the other hand, restraints having no appreciable effect on inter-member-state trade may be lawful even though they extend across member-state boundaries and are of a type that would clearly be condemned under American law.¹⁰⁶

In order to encourage small firm cooperation, the Commission in 1970 issued a policy statement that the inter-member-state effect must be "perceptible" in order to come within Article 85.¹⁰⁷ A "perceptible" effect does not exist unless the firms involved (or their parents and subsidiaries) aggregate \$15,000,000 worth of business annually, if manufacturers, and \$20,000,000 if trading companies, in any goods. In either event, the firms must carry on at least 5 percent of the business in the goods affected by the restriction or their substitutes in the relevant market. This policy statement does not preclude granting a negative clearance to a group which exceeds the stated figures where the Commission finds a very slight effect on inter-member-state trade.

The effect requirement has not been applied, therefore, in an entirely consistent fashion. This is not surprising in view of its substantive or non-jurisdictional role. It is also not surprising that the Commission has been criticized for adopting an overly liberal construction of the require-

Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8046, at 7652 (EEC C.J. 1966). For other formulations of the test, see *Cadillon v. Firma Höss, Maschinbau KG*, 2 CCH Comm. Mkt. Rep. ¶ 8135 (EEC C.J. 1971); *S. Technique Minière v. Maschinbau Ulm GmbH* [1961-1966 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8047 (EEC C.J. 1966).

103. See *Cobelaz-Synthetic Prods. Mfgs.*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9265 (EEC Comm'n 1968); *Dutch Eng'rs and Contractors Ass'n*, 1 CCH Comm. Mkt. Rep. ¶ 2412.31 (EEC Comm'n 1964).

104. See, e.g., cases cited note 102 *supra*.

105. See, e.g., *Imperial Chem. Indus. Ltd. v. EEC Comm'n*, 2 CCH Comm. Mkt. Rep. ¶ 8161 (EEC C.J. 1972).

106. In one case the Court stated that an exclusive distributorship with territorial restrictions coincident with national boundaries fell outside 85(1) because the market share involved (less than 1% of sales) was too small to influence trade and therefore did not interfere with single market integration. *Völk v. Etablissements J. Vervaecke s.p.r.l.*, [1967-1970 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8074 (EEC C.J. 1969).

107. Commission Notice of May 27, 1970, 2 CCH Comm. Mkt. Rep. ¶ 9367 (1970).

ment. Perhaps in response to such criticism, the Commission stated in 1972 that it has no intention of adopting a narrow interpretation of the requirement and that indirect effects will continue to be sufficient under Article 85(1).¹⁰⁸

B. *Horizontal Restraints*

The Commission makes a general distinction between "hard-core" horizontal restraints ("Prohibited Horizontal Agreements") such as price fixing, and "soft-core" horizontal restraints ("Types of Permitted Cooperation") such as joint research and specialization agreements. The hard-core restraints consist of restraints which would generally be considered per se violations of section 1 of the Sherman Act: market sharing, quotas, price fixing, joint selling agreements, collective agreements for reciprocal exclusive dealing and agreements for rebates on total turnover.¹⁰⁹ The per se analogy can be misleading in that the American antitrust concept of per se restraints¹¹⁰ does not really parallel the analysis which goes into a finding that an agreement violates Article 85(1). In fact, the power to exempt restraints under the conditions of Article 85(3) would appear, at first glance, to preclude a per se analysis à l'américain and to call for a general rule-of-reason approach.¹¹¹ Nevertheless, the Commission may be evolving a per se approach toward some of the hard-core restraints, just as the American courts have done.¹¹² While the Commission pointed out in the *Report* that it is difficult to formulate general rules because of the particular circumstances of each case, it did acknowledge that "certain lines of thought become apparent from a series of measures taken by the Commission."¹¹³ The Commission further stated that it is difficult to conceive of granting exemptions to certain of the hard-core restraints, notably market sharing, price fixing, quotas, and

108. See Commission Response to Question No. 29/72, 2 CCH Comm. Mkt. Rep. ¶ 9514 (1972).

109. See Report, supra note 11, at 24-39.

110. The per se rule was first applied in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), to a price fixing conspiracy. The rule in effect carves out exceptions to the rule of reason analysis established in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

111. See A. Deringer, supra note 2, ¶ 140. Some commentators have argued that a rule of reason is employed in making the initial determination under Article 85(1) whether the requisite effects are present. See, e.g., A. Campbell, *Restrictive Trading Agreements in the Common Market* 51 (1965); R. Joliet, *The Rule of Reason in Antitrust Law* 116-45 (1967). These authors rely in part on the Commission's early decision in *Grosfillex*, 1 CCH Comm. Mkt. Rep. ¶ 2412.37 (EEC Comm'n 1964).

112. See Report, supra note 11, at 24-31, 36-40. See generally Note, *Horizontal Integration of the Common Market Economy: Recent Decisions and Communications by the Commission of the European Communities*, 6 Tex. Int'l L.F. 259 (1971).

113. Report, supra note 11, at 25.

attempts to protect national markets by exclusive reciprocal dealing agreements, joint selling agreements, discriminatory rebate systems and by national agreements relating to resale prices of imported products or sales prices of exported products.¹¹⁴ To the extent that these types of horizontal agreements are never exempted under Article 85(3), they might be considered per se unlawful, at least as a general rule of thumb. It must be remembered, however, that the "perceptible effect" or inter-member-state trade limitation may permit the granting of negative clearances even to hard-core horizontal restraints. To this extent, there is a built-in limitation to the per se concept in Common Market antitrust law.

1. Prohibited Horizontal Agreements

a. *Market Sharing and Quotas*

The Commission takes a very strong stand against market sharing agreements because of their obvious anticompetitive effects and their ability to obstruct single market integration.¹¹⁵ It also condemns delivery and sales quotas based on total sales as reinforcements of the market sharing arrangement.¹¹⁶ As mentioned above,¹¹⁷ the Commission stated in the *Report* that in principle, exemptions for market sharing agreements cannot be envisaged because an agreement or practice resulting in the simple elimination of a competitor in one market could not satisfy the conditions of Article 85(3), particularly the improvement of competition and the advancement of consumer interests.¹¹⁸ This per se type approach is consistent with prior Court of Justice decisions¹¹⁹ as well as with the Commission's practice of insisting on the abandonment of market sharing agreements before formal proceedings are actually instituted.¹²⁰ It can be expected, therefore, that the Commission will continue to treat market

114. *Id.*

115. *Id.*

116. *Id.* See Commission Communication of Jan. 24, 1966, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9085 (quota system for distribution of cement held unlawful).

117. See text accompanying note 114 *supra*.

118. Report, *supra* note 11, at 26.

119. See, e.g., *ACF Chemiefarma N.V. v. EEC Comm'n*, [1967-1970 Transfer Binder] 2 CCH Comm. Mkt. Rep. ¶ 8083 (EEC C.J. 1970).

120. In the Report, the Commission listed several examples of this successful informal enforcement. See Report, *supra* note 11, at 26-27. For example, at the insistence of the Commission, one international cable manufacturer abandoned the following group of restraints: market sharing, prohibitions on investment, advertising in other territories, and refusals to deliver in other territories. See *id.* For prior Commission action see, e.g., Commission Communication, Jan. 24, 1966, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9085 (1966); Commission Communication of Oct. 5, 1965, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9066; Commission Communication of Apr. 20, 1965, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9024 (1965).

sharing agreements with severity, particularly where the markets are coincident with member-state boundaries.¹²¹

b. *Price Fixing*

Price fixing agreements have been severely condemned by the Commission, because of their anticompetitive effects and their adverse effect on inter-member-state trade.¹²² In the *Report*, the Commission discussed price fixing in three situations: (1) as part of a market-division scheme; (2) among firms in more than one member state; and (3) among firms within one member state.¹²³ In the first two situations, neither the Commission nor the Court has hesitated to apply the prohibition of Article 85(1), while refusing to grant exemptions under Article 85(3).¹²⁴ The third situation includes agreements among firms within one member state to fix either the resale prices (and conditions) of products imported from other member states,¹²⁵ or prices (and conditions) of products manufactured by them and exported to other member states.¹²⁶ Such agreements do not violate Article 85(1) unless the parties have a significant proportion of the total market, and where they do violate that provision, exemptions may be granted in exceptional circumstances.¹²⁷ Thus, the possibility, albeit small, is raised in the *Report* that price fixing arrangements will be treated somewhat more leniently than market sharing, at least where all the parties are in one member state. While the

121. Many, if not most, of the challenged market sharing agreements fell into this category of reciprocal protections of home markets. See, e.g., *Semi-Products Metalliques*, noted in *Report*, supra note 11, at 26.

122. *Id.* at 28.

123. *Id.* at 28-31.

124. See, e.g., *ACF Chemiefarma N.V. v. EEC Comm'n*, [1967-1970 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8083 (EEC C.J. 1970) (market division and price fixing); *Imperial Chem. Indus. Ltd. v. EEC Comm'n*, 2 CCH Mkt. Rep. ¶ 8161 (EEC C.J. 1972) (price fixing in five of the member states).

125. For example, in *Vereeniging van Cementhandelaren*, 2 CCH Comm. Mkt. Rep. ¶ 9492 (EEC Comm'n 1971), the Commission held unlawful an agreement among the members of the Dutch Cement Association which set common resale prices and conditions of cement products imported into the Netherlands from West Germany and Belgium, where such imports were substantial with respect to the Dutch resale market.

126. For example, in *V.V.V.F.*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9312 (EEC Comm'n 1969), a negative clearance was granted only after the parties, a group of Dutch paint manufacturers, gave up a provision in their agreement whereby minimum sale prices and other conditions of sale and delivery of exports were to be identical.

127. The Commission stated: "There are few chances that such agreements could benefit from an exemption . . . since, except in very exceptional circumstances, nothing suggests that the suppression of competition at the negotiating stage would be more successful than competition itself in guaranteeing a regular market supply in the most favorable economic conditions." *Report*, supra note 11, at 29-30.

Commission does not so argue,¹²⁸ a difference in treatment might be justified in this situation on the ground that market sharing directly and more seriously interferes with the goal of single market integration than does price fixing.

While the Commission has not fully delineated what constitutes price fixing under Article 85, it has adopted a broad definition under the parallel provision of the ECSC.¹²⁹ For example, in *German Scrapiron Market*,¹³⁰ the Commission declared unlawful a joint purchase agreement among steel manufacturers used to establish purchase quotas and maximum uniform purchase prices for the purpose of reducing price competition in the supply of scrap iron. It is likely that the same broad approach will be taken toward price fixing under Article 85.

In sum, the Common Market's attitude toward horizontal price fixing is substantially similar, at least in result, to American antitrust law.¹³¹

c. Joint Selling Agreements

The Commission's general position, as described in the *Report*, is that joint selling arrangements among competitors violate Article 85 and will not be granted an exemption.¹³² This position is well illustrated by its decision in *Nederlandse Cement-Handelsmaatschappij*,¹³³ where a group of German cement producers had created an exclusive sales agency covering exports of cement from West Germany into the Benelux countries, particularly the Netherlands. The Commission found that certain improvements in distribution resulted from the sales agency, but refused to grant an exemption, primarily because the restrictions were broader than those necessary to bring about the improvements.¹³⁴

128. The Commission in its discussion of market sharing agreements in the *Report* did not distinguish between agreements limited to one member state and agreements involving firms in different member states.

129. See Treaty of Paris, art. 65, 261 U.N.T.S. 140, 194.

130. 11 EEC J.O. 30 (1970).

131. Cf. A. Neale, *The Antitrust Laws of the U.S.A.* 33-40 (2d ed. 1970).

132. See *Report*, supra note 11, at 31-36. Joint selling arrangements usually consist of agreements among producers to grant exclusive sales rights over their products to a common sales agency. The producers allocate sales according to predetermined delivery quotas; prices and conditions are uniform; and differences in sales receipts, varying with the markets or product category, can be resolved by a system of equalization which assures each of the parties an identical final price for each unit delivered. *Id.* at 31.

133. 2 CCH Comm. Mkt. Rep. ¶ 9493 (EEC Comm'n 1971).

134. As the Commission summarized the case, "If the centralization of sales can bring about certain reduction in sales costs, it is nevertheless to be considered that in the case of competition and individual commercialization, the producers would not have to assume the whole of the functions undertaken by the joint selling agency, but a part of them at least could be taken on by the wholesale trade. The absence of an appropriate commercial echelon could be attributed only to the existence of the joint selling agency which—by

Despite the strong language condemning joint selling arrangements, and prior decisions in which the Commission has refused to grant exemptions,¹³⁵ the Commission's recognition of distribution improvements indicates that it may be more willing to exempt joint selling arrangements than is the case with price fixing and market sharing arrangements. Indeed, in the *Report* the Commission expressly stated that joint selling arrangements will be permitted in three situations. The first two occur where the arrangements are limited to internal markets or to exports occurring solely outside the Common Market.¹³⁶ These situations are not true exceptions, in that such agreements could qualify for negative clearances because they have no perceptible effect on inter-member-state trade. In order to qualify for the negative clearance, however, the joint selling agreements must not contain provisions which discourage either direct deliveries from producers or resale by distributors in other member states. For example, the methods for determining the quantity of goods to be placed at the disposition of the joint selling agency must not deprive the parties of the power to determine the amount of goods to be exported individually.¹³⁷ That is, even joint selling arrangements in the permitted two situations may have unwanted effects on inter-member-state trade. The Commission acknowledged this danger in the *Report*, and it is presently engaged in a new examination of joint selling arrangements. Consequently, the Commission may take a less permissive stance toward even those joint selling arrangements which are limited to exports outside the Common Market or to sales within one member state.¹³⁸

Joint selling arrangements among small or medium-sized firms are also generally permitted as long as they do not constitute a significant restriction on competition. A recent Commission decision illustrates this relatively lenient approach. In *SAFCO*,¹³⁹ a negative clearance was granted to a joint selling arrangement created by a group of six small French producers of preserved food for exports both within and without

excluding negotiated imports—prevented the distribution networks from finding true opportunities for expansion. Moreover, certain distribution functions could also have been carried on, without a central sales organization with agreements for quotas and fixed prices and without the establishment of exclusive arrangements with the producers, by the functioning of an independent distributor." Report, supra note 11, at 34.

135. See id. at 33-34.

136. Id. at 32.

137. Id.

138. The Report states at 33: "The Commission is at the present time conducting observations and enquiries in order to assure itself whether, independently of the suppression of express prohibition affecting export trade between Member States, the maintenance of joint selling arrangements within such States does not lead to a de facto protection of home markets incompatible with the competitive objects of the treaty."

139. 2 CCH Comm. Mkt. Rep. ¶ 9487 (EEC Comm'n 1971).

the Common Market. The producers had less than 15 percent of the market and faced effective competition from a substantial number of enterprises of larger size and dimension. The market was also characterized by a large variety of products similar in quality and competitive in price. The Commission reasoned that the agreement was necessary in order to permit the French firms to compete outside their home French market. While this last factor is mentioned in the *Report's* summary of *SAFCO*,¹⁴⁰ it is unclear whether it is a necessary condition for the granting of a negative clearance.

d. *Collective Agreements for Reciprocal Exclusive Dealing*

Reciprocal exclusive dealing agreements among suppliers and buyers have been severely condemned by both the Commission and the Court of Justice. Such agreements present a serious obstacle to the Common Market goal of single market integration,¹⁴¹ and no exemptions have been granted. Moreover, reciprocal exclusive dealing arrangements often contain other highly restrictive provisions, such as production quotas, delivery quotas and price fixing provisions. The Commission asserts in its *Report*, perhaps with a note of irritation, that these arrangements have occurred quite frequently in the Common Market and the Commission has had to intervene frequently to terminate them.¹⁴²

The reciprocal exclusive dealing arrangements challenged by the Commission have generally involved parties having a substantial share of the market within a particular member state. The Commission expressly mentioned this fact in the *Report*,¹⁴³ but did not explain its position toward a situation where either the manufacturers or distributors do not have a "preponderant position" in their market. This creates some ambiguity because the express mention of the factor of "preponderant position" raises the possible implication that manufacturers and distributors enjoying less of a market position may be permitted to engage in reciprocal exclusive dealing arrangements. Such an implication would be un-

140. *Report*, supra note 11, at 35.

141. *Id.* at 36. "The artificial dividing up of a market within one Member State resulting from reciprocal exclusive undertakings brings it about that the whole of the Market is not open in any case to producers from other Member States and, in addition, that the purchasers in that Member State cannot choose among all suppliers situated within the Common Market." *Id.*

142. *Id.* at 37.

143. The Commission stated: "When, as is generally the case, national manufacturers within a member state hold a preponderant position of the total and the recognized customers represent the greater part of the distribution network on the market, they are of such a kind as to maintain the isolation of certain sectors of the economy of Member States within the Community." *Id.* at 36.

fortunate, because the anticompetitive effects of horizontal exclusive reciprocal dealing arrangements are so obvious and devoid of economic justification that they should not be permitted, regardless of the market position of the parties involved.

In the *Report* the Commission also discussed a more subtle form of horizontal exclusive dealing arrangement—the horizontal boycott or concerted refusal-to-deal arrangement resulting from a system of standardization. Under such an arrangement, manufacturers agree to conform to certain technical standards while distributors and others in the distribution chain agree to purchase only those products which meet the technical standards and specifications. While the Commission has not declared that all such arrangements are unlawful, it has inquired into the artificiality or quality of the technical standards.¹⁴⁴

e. Agreements for Rebate on Total Turnover

The Commission has also condemned under Article 85 agreements among producers in one member state to give discounts to customers at collectively fixed rates, based upon the total purchases during a specified period from all of the producers who are parties to the agreement.¹⁴⁵ In *Ceramic Tile*,¹⁴⁶ the only Commission decision to date on such rebate agreements, the Commission condemned an arrangement on the ground that it encouraged customers to concentrate their purchases on home market producers rather than considering possibly more favorable offers from other suppliers. In addition to its obvious anticompetitive effects, this type of arrangement also interferes with the Common Market goal of single market integration, especially where all the parties to the agreement are to do business in only one member state. It should be noted that the producers in *Ceramic Tile* had 99 percent of the market in West Germany. Unfortunately, neither in *Ceramic Tile* nor in the *Report* does the Commission clearly explain what weight it gives to the

144. See *id.* at 36-37. The criteria used in this inquiry have not been detailed. The Commission condemned one standardization arrangement in the following terms: "[T]he agreement maintained the obligation for the producer parties to respect technical standards which have no public character and to sell only to purchasers who satisfied certain conditions even if they already fulfilled the conditions laid down by the statutory standards of their profession. The agreement continues to be an obstacle to the opening of the Market to supplies from other Member States: even if all the producers of the Common Market were in practice entitled to be parties, they are given the alternative of either submitting to the constraints of a private organization or of being excluded from an important part of distribution channels, while certain categories of purchasers remain excluded from direct delivery by the producer parties." *Id.* at 39.

145. *Id.* at 39-40.

146. Association of Ger. Mfrs. of Ceramic Wall and Floor Tile, 2 CCH Comm. Mkt. Rep. ¶ 9409 (EEC Comm'n 1971).

relative market strength enjoyed by producing parties within the member states.¹⁴⁷ However, the Commission did state that undue interference with single market integration exists where the producer parties represent an "important part" of production in the particular state and when their regular customers constitute an appreciable part of the distribution network.¹⁴⁸ The context in which the Commission alluded to this problem is significant, for it appears to view such arrangements primarily as dangers to the goal of single market integration, while placing little emphasis on the anticompetitive aspects of such arrangements. Thus, rebate arrangements which would not significantly affect inter-member-state trade or would not result in the isolation of single markets might be treated with relative leniency by the Commission.

2. Permitted Forms of Cooperation

The Commission has been comparatively tolerant toward other forms of horizontal arrangements, such as joint research and development, specialization agreements, joint advertising and others. The Commission stated in the *Report* that this leniency is part of its policy of encouraging cooperation between enterprises when that cooperation produces favorable economic effects and permits effective competition to continue within the Common Market.¹⁴⁹ In effectuating this policy, the Commission has gone quite far in detailing the different types of horizontal arrangements that will be given negative clearances or exemptions. For example, a blanket negative clearance has been issued covering certain cooperative arrangements particularly among small and medium-sized firms which are thought to promote efficiency and strengthen the participants.¹⁵⁰ Blanket exemptions are being considered in a number of other areas, notably with respect to agreements concerning specialization, standardization, and research and development.¹⁵¹ It is more difficult to

147. See Report, *supra* note 11, at 39.

148. The Commission stated in the Report: "This situation arises in every case when the producer parties represent an important part of [a member state's] production and when the total of their regular customers constitutes an appreciable part of the distribution network through which the sale of the products in question on the market comes about, so that the possibilities of outlets for suppliers coming from other countries of the Common Market are significantly restrained." *Id.* at 39-40.

149. *Id.* at 40. See generally Note, Horizontal Integration of the Common Market Economy: Recent Decisions and Communications by the Commission of the European Communities, 6 *Tex. Int'l L.F.* 259 (1971).

150. Commission Notice of July 3, 1968, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9248 (1968). This clearance covers, *inter alia*, agreements for the exchange of market data, cooperation respecting credit information and accounting, common quality standards and labeling, joint advertising, joint research and development, joint use of facilities, and other joint projects among competitors unable to carry them out alone.

151. See Report, *supra* note 11, at 46, 100.

extrapolate general rules from the Commission's treatment of requests for individual exemptions, because such decisions are dependent upon the facts of each case.¹⁵² Consequently, as the Commission remarked in the *Report*, the decisions taken together do not lend themselves to hasty generalization.¹⁵³ With this caveat in mind, the Commission proceeded to articulate its position with respect to specific horizontal arrangements, including specialization agreements, research and development agreements, joint advertising, common trade marks and standardization, joint purchasing agreements, and participation in industrial fairs and exhibitions.

a. *Specialization Agreements*

From as early as 1969, the Commission has not only permitted specialization agreements¹⁵⁴ but has actually encouraged their use.¹⁵⁵ This positive policy toward specialization agreements received added impetus in 1972 from the *Report*, Commission decisions and a Commission proposal to promulgate a blanket exemption covering certain types of specialization agreements between small firms.

The Commission recognized that anticompetitive effects are inherent in the production sharing and reciprocal exclusive supply provisions in specialization agreements.¹⁵⁶ These restrictions hinder the parties from recommencing production of that part of the product line which each has renounced in favor of the other. The Commission concluded, however, that the anticompetitive effects are outweighed by economic benefits, particularly cost reductions resulting from longer manufacturing runs and more efficient utilization of available productive capacity, the ability to offer a more complete product line, simplification of the sales effort, and the promotion of technical cooperation which leads to desired standardization and rationalization.¹⁵⁷ In sum, the Commission's encouragement of specialization is based on the premise that it can result in more competitive prices and more suitable products.¹⁵⁸

152. See *id.* at 41.

153. See *id.*

154. A "specialization agreement" is one in which each party agrees to concentrate (usually exclusively) on certain products while obtaining (usually exclusively) from the other the products on which the other is concentrating.

155. See, e.g., SOPELEM/Langen, 2 CCH Comm. Mkt. Rep. ¶ 9488 (EEC Comm'n 1971); Jaz-Peter, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9317 (EEC Comm'n 1969); Clima Chappée-Buderus, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9316 (EEC Comm'n 1969). As to the asserted benefits of specialization agreements see R. Harrod, *The British Economy*, ch. 4 (1963).

156. Report, *supra* note 11, at 42.

157. *Id.* at 41-43.

158. *Id.* at 42. This policy may also rest on the encouragement of cooperation among smaller firms to help them compete against large firms.

In the *Report*, the Commission outlined four conditions, peculiar to specialization agreements, which must be present in order for them to be exempted.¹⁵⁹ The first and most essential condition for exemption is that the cost economies be passed on to the consumers, usually through lower prices.¹⁶⁰ Where a specialization agreement is examined at a time when consumer advantages are not yet observable, an exemption will be granted only where there is a "sufficient probability" that continued specialization will result in a reduction of prices.¹⁶¹ Second, the parties must remain subject to effective competition from other manufacturers.¹⁶² Third, the specialization agreement must not prohibit distributors from making parallel imports of the specialized products. That is, competition at the distribution level must not be restrained and imports of the specialized products from one member state to another must not be prohibited.¹⁶³ Fourth, the agreement must not reduce the number of suppliers below the minimum necessary for the maintenance of effective competition.¹⁶⁴

The Commission has also permitted certain restrictive provisions deemed ancillary and necessary to specialization agreements which meet the above four conditions.¹⁶⁵ This comparatively lenient attitude has continued since the publication of the *Report*. For example, in *Lightweight Papers*¹⁶⁶ the Commission exempted a specialization agreement, together with a number of ancillary provisions, among firms enjoying 15 percent to 50 percent of Common Market production in relevant markets. Because anticompetitive effects can result from both the specialization agree-

159. The Commission stated that its decisions in individual cases had already broadly outlined these conditions. In any event, the *Report's* summary has weight of its own as a statement of Commission policy as of April 1972, since prior Commission decisions do not bind it in any stare decisis fashion.

160. *Id.* at 42-43.

161. *Id.*

162. The Commission has construed this requirement liberally in the few relevant decisions to date. For example in FN-CF, 2 CCH Comm. Mkt. Rep. ¶ 9439 (EEC Comm'n 1971), the parties enjoyed a substantial and significant position within the Common Market in general and in the Benelux countries in particular. Despite this market position, the Commission exempted the specialization agreement after finding that the parties remained subject to competition by other manufacturers of cartridges in the EEC, as well as to competition from imports from outside the Common Market.

163. *Report*, supra note 11, at 43.

164. *Id.*

165. An example is an agreement for reciprocal exclusive dealing and a provision for joint research and development of new products (that is, the extension of the specialized agreement to a future manufacturing program). FN-CF, 2 CCH Comm. Mkt. Rep. ¶ 9439 (EEC Comm'n 1971). See *Report*, supra note 11, at 43-44. Also in FN-CF, each party agreed to represent the other in those territories where it had the more developed sale network. See 2 CCH Comm. Mkt. Rep. ¶ 9439 (EEC Comm'n 1971).

166. 2 CCH Comm. Mkt. Rep. ¶ 9523 (EEC Comm'n 1972).

ment itself and from ancillary restrictions, the Commission has begun to condition the granting of an exemption on the parties' willingness to submit to continued supervision over the operation of the agreement.¹⁶⁷

Finally, in early 1972 the Commission proposed a blanket exemption covering certain types of specialization agreements between firms having less than 10 percent of the market and combined sales of less than 150 million dollars.¹⁶⁸ The proposed exemption would extend to specified ancillary provisions, including a provision not to enter into specialization agreements involving the same or similar products with other firms, supply restrictions with minimum quality specifications, exclusive requirement provisions (unless purchase is possible from a third party under more favorable conditions), and provisions concerning customer and guarantee service and maintenance of inventory and replacement parts. This proposed blanket exemption is consistent with the Commission's desire to promote horizontal cooperation among small and medium-sized firms.¹⁶⁹

b. *Joint Research and Development Agreements*

The Commission has not only permitted joint research and development, but has actually encouraged it. This encouragement is based on the Commission's position that fundamental and applied research determines the competitive ability of firms and plays an important role in economic development and technological innovation.¹⁷⁰ This favorable attitude was evidenced in the 1968 *Eurogypsum* case,¹⁷¹ where the Commission granted a negative clearance to a joint research and development program of an association of European plaster and gypsum producers. The Commission described its position in greater detail in the *Report*. Again, it made a basic distinction between small and medium-sized firms on the one hand and larger firms on the other. With respect to the former, research and development agreements will be permitted under the three conditions set

167. Id. See Report, supra note 11, at 49.

168. Commission Notice of July 14, 1972, 2 CCH Comm. Mkt. Rep. ¶ 9517 (1972).

169. Specialization agreements have received similar favorable treatment under Article 65 of the ECSC where the Commission is encouraging a restructuring and rationalization of the European steel industry. See Report, supra note 11, at 44-45.

170. See id. at 45-46. See also Treek, Joint Research Ventures and Antitrust Law in the United States, Germany and the European Economic Community, 3 N.Y.U.J. Int'l L. & Pol. 18 (1970); Waelbroeck, Cooperation Agreements and Competition Policy in the E.E.C., 1 N.Y.U.J. Int'l L. & Pol. 5, 10-12 (1968) [hereinafter cited as Waelbroeck].

171. [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9220 (EEC Comm'n 1968). The association permitted individual research and contained no discriminatory conditions respecting eligibility or representation within the association. The results of the research were made widely available by the association. The Commission noted that the comparatively low growth of the plaster industry was due to the lack of adequate scientific research, including costly technological studies. Id.

down in the Commission's 1968 communication relating to cooperation between enterprises:¹⁷² (1) there must be no restrictions on individual research; (2) the results of the joint research must be made available to all parties to the extent of their participation; and (3) third parties must not, in principle, be excluded from access to the results of the joint research (although parties may agree not to grant licenses to third parties except by majority vote or common accord). Other restrictive and arguably ancillary provisions may have to be eliminated from otherwise valid research and development agreements. For example, territorial limitations have been disapproved on the ground that patents and technical information resulting from joint research may not be used to prevent inter-member-state trade.¹⁷³

With respect to larger firms, more stringent criteria will be applied. Unfortunately, the Commission has not detailed the criteria either in the *Report* or in any individual decision, other than to intimate that such agreements among larger firms may not be permitted even though the above three conditions exist.¹⁷⁴ The two reported decisions which have involved larger firms indicate, however, that the Commission may not be too severe and that larger firms may also be treated leniently. The most recent Commission decision, and the most important to United States-based companies, is *Henkel/Colgate*,¹⁷⁵ where the Commission exempted

172. See Commission Notice of July 3, 1968, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9248; Report, *supra* note 11, at 47.

173. See *id.* at 49. The Commission in one case opposed an exploitation plan which granted to each partner in his home market a system of favorable royalty rates for licenses which secured for him a preferential territorial position.

174. The Report reads at 47: "[I]t may happen that the circumstances of a special character which surround certain agreements for joint research distinguish them from the normal case envisaged by the Commission in its communication on co-operation; that [communication] was particularly aimed at cooperation agreements concluded between small and medium-sized enterprises while announcing that in the case where large enterprises participate in such agreements, the same assessment of them cannot be made without some reservations. It may be so even if the agreements apparently impose no restrictions concerning the exploitation of the results of the joint research and even if the parties do not exclude the possibility of continuing to conduct individual research, seeing that in practice one cannot expect them to do so having regard to its cost or to past ill-success."

175. 2 CCH Comm. Mkt. Rep. ¶ 9491 (EEC Comm'n 1971). An earlier decision involving larger firms is *ACEC-Berliet*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9251 (EEC Comm'n 1968). See Report, *supra* note 11, at 34-35. In *ACEC-Berliet*, the Commission granted an exemption to a joint research agreement involving the development of a new type of bus with an electrical transmission. Each party was to specialize in one part of the problem and the overall agreement was somewhat of a hybrid joint research-specialization agreement. Three restrictive provisions were approved as ancillary and necessary to the agreement. A non-competition clause prohibiting cooperation with other parties in the area covered by the agreement, and an exclusive purchase requirement

a joint research agreement between two major textile detergent manufacturers. The absolute size and market position of both parties were substantial: they ranked second and fourth within the Common Market where the top four firms had 80 percent of the market. In the world market overall, the parties ranked third and fourth. Colgate-Palmolive of the United States and Henkel of West Germany agreed to establish a separate corporation in Switzerland to carry out research that both had been doing separately prior to the agreement. Both parties were to have equal access to the results of the research and the agreement contained no restrictions on the production or distribution of products resulting from the joint research effort. The Commission decided first that the research agreement was subject to the prohibition of Article 85(1). In doing so, it relied on the broad world-wide presence of the parties, the powerful although not dominant position within the oligopolistic structure of the industry within the Common Market, the substantial homogeneity of the products and the presence of intense and costly advertising which created barriers to entry.¹⁷⁶ The Commission next reasoned that the growth of manufacturing firms in such an industry was determined by technical progress and innovation to such an extent that competition in the area of research played an extremely important role.¹⁷⁷ The Commission exempted the agreement because it contained no restrictions on production or distribution, both parties had equal access to the results and exploitation of the research and each had the right to secure from the research company a manufacturing and selling license for all countries on payment of a royalty with a maximum of 2 percent.¹⁷⁸

of certain accessory products were considered necessary to protect the investment of each party. A clause limiting the number of purchasers of the new electrical transmission system was considered necessary to assure that production would be profitable. In the Report, the Commission stated that the determining element in ACEC-Berliet was the fact that concentration of production in a limited number of manufacturers did not prevent full competition among them because nothing would prevent them from selling within the whole Common Market. *Id.* at 49. For further discussion, see Waelbroeck, *supra* note 170, at 10.

176. 2 CCH Comm. Mkt. Rep. ¶ 9491, at 9056-57.

177. See Report, *supra* note 11, at 47-48. In the Report, the Commission summarized this aspect of Henkel/Colgate as follows: A supplier in this market could not gain an edge on his competitors except by improving product quality through research and by advertising the differences between the technically-improved products and those of his competitors. As a result an agreement excluding such a possible advance could significantly restrain competition between the parties, and be of such a kind, in light of their position on the Community markets, as to distort intra-Community commerce. Report, *supra* note 11, at 47-48.

178. 2 CCH Comm. Mkt. Rep. ¶ 9491, at 9057-58. An ancillary provision conditioning licensing of the research results on mutual approval of the parties was also permitted. *Id.* As the Commission explained: "Such a clause has not, in itself, a restrictive effect on competition, for it is merely the natural consequence of conducting joint research and of

The Commission is now studying the possibility of a blanket exemption for certain types of research and development agreements, including provisions relating to the utilization of industrial property rights and trade secrets.¹⁷⁹ Such a regulation would fix the limits of cooperation necessary to assure technical and economic development and to increase the competitive capacity of firms within an enlarged market without the cooperation being used as a vehicle for market sharing or protection of home markets.¹⁸⁰

In sum, Common Market policy toward joint research and development ventures both between small firms and those between larger firms is founded on the Commission's judgment that research and development play a highly significant role in competition. This role is particularly important in industries characterized by product homogeneity, high advertising costs which create barriers to entry, and technical innovation. The Commission's encouragement of joint research ventures may also indicate an awareness of the massive research and development undertaken by American firms. That this awareness does not necessarily lead to an anti-American bias in the competition policy of the Common Market can clearly be seen from the Commission's decision in *Henkel/Colgate*, involving a large United States-based multinational which had already obtained the rank of fourth place within the Common Market in the field of textile detergents.¹⁸¹ The consideration of the world-wide position and power of United States-based multinationals as a factor in Commission decisions¹⁸² can be seen, not as a bias on the part of the Commission, but rather as a simple recognition of their overall size and power, which is certainly relevant to the Commission's inquiry.

c. *Common Advertising, Common Trademarks
and Standardization*

The Commission stated in the *Report* that the use of joint advertising and common trademarks does not by itself constitute a restraint on com-

the fact that such research results in the joint collection of information." Report, supra note 11, at 48. The Commission also provided for continuing supervision over the operation of the joint research agreement. The parties agreed to advise the Commission of their present and future policies respecting patent licenses and technical information agreements arising from joint research as well as any relevant acquisitions and establishment of other relations between them. 2 CCH Comm. Mkt. Rep. ¶ 9491, at 9058.

179. In December 1971 the Council of Ministers gave the Commission the power to promulgate regulations in the area of research and development agreements. See Council Reg. 2821/71, 2 CCH Comm. Mkt. Rep. ¶ 9517, at 9155 (1971).

180. Report, supra note 11, at 49.

181. 2 CCH Comm. Mkt. Rep. ¶ 9491 (EEC Comm'n 1971).

182. See id.; Continental Can Co., 2 CCH Comm. Mkt. Rep. ¶ 9481 (EEC Comm'n 1971).

petition.¹⁸³ This position is consistent with the Commission's 1968 announcement concerning cooperation among small and medium-sized firms.¹⁸⁴ Joint advertising is permitted so long as the participating firms are free to advertise individually. Use of a common label or trademark is permitted where all competitors whose products satisfy the quality requirements have equal access to the common label or trademark.¹⁸⁵ Restrictive provisions beyond joint advertising and common use of a trademark, such as price fixing and exclusive dealing provisions, have been struck down by the Commission with no hesitation.¹⁸⁶

The Commission's generally permissive stance toward joint advertising and common trademarks is qualified in one respect. In the *Report*, the Commission noted that joint advertising by major competitors may be prohibited in oligopoly markets where advertising plays a determining competitive role.¹⁸⁷ On the other hand, the Commission continues to rely on its earlier decision in *Transocean Marine Paint Association*,¹⁸⁸ where it approved cooperation agreements which resulted in significant restrictions on competition. The *Report's* summary of that decision is noteworthy as the most recent official interpretation. In *Transocean*, five EEC and thirteen foreign medium-sized firms agreed to manufacture marine paints to the same quality standard and to sell them under the same trademark in order to increase their competitiveness against large international groups operating in the market. Each agreed to provide a regular supply of the products in his home market so that purchasers could obtain marine paints of identical quality in various countries. The agreement also contained various territorial limitations which resulted in geographical market sharing and the protection of each member's home territory.¹⁸⁹ In the *Report*, the Commission described these restrictions

183. Report, supra note 11, at 49-50. For a discussion of the advantages of large-scale promotion, see J. Bain, *Industrial Organization* 202-04 (2d ed. 1968). See also Rahl, supra note 2, at 293-300.

184. Commission Notice of July 3, 1968, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9248.

185. Report, supra note 11, at 49-50. The Commission cited its decision in ASBL, 2 CCH Comm. Mkt. Rep. ¶ 9380 (EEC Comm'n 1970), as an illustration. In ASBL a negative clearance was granted to an association formed to promote electrically-soldered steel tubes, where the members remained free to advertise individually, and where use of the common trademark and eligibility for the association were open to all manufacturers achieving objectively determined standards of quality.

186. See V.V.V.F., [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9312 (EEC Comm'n 1969), where the Commission conditioned the granting of a negative clearance on the cancellation of such provisions. See also Report, supra note 11, at 50.

187. See id. at 49-50.

188. [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9188 (EEC Comm'n 1967).

189. 1) Only Transocean paints could be exported to a contract state without prior

as a "flexible system of geographical market sharing which enabled each member to have a privileged competitive position,"¹⁹⁰ but it nevertheless concluded that this system did not in fact prevent exports, and that there was a corrective available for artificial price differences among the members.¹⁹¹ The Commission's analysis in the *Report* indicates that it intends to construe *Transocean Marine Paint Association* narrowly, and that its application may be limited to situations where cooperation is necessary to enable smaller producers to compete against large international groups and the restrictive provisions are of limited duration.

The *Report* also indicates the Commission's concern with the anti-competitive effects arising from standardization or normalization agreements; that is, agreements concerning the uniform application of standards and types.¹⁹² Standardization agreements are not subject to the notification requirement of Regulation 17,¹⁹³ and the Commission has not had a full opportunity to familiarize itself with them. According to the Commission, such agreements are desirable in that they generally encourage rationalization of production through better utilization of capacity and improvements in supply conditions arising from the increased interchangeability of products.¹⁹⁴ On the other hand, the effectiveness of standardization agreements is usually tied to an obligation on the part of the parties to manufacture and sell only those products which conform to the standards commonly agreed upon. In the *Report* the Commission concluded that standardization agreements will normally restrict competition only to the extent that they afford an opportunity to restrain or eliminate competition between the parties with respect to price, terms and conditions of sale, or quality. The Commission is presently considering a blanket exemption for standardization agreements and the conditions under which an exemption will be given.¹⁹⁵

d. *Joint Buying Agreements*

The Commission's policy toward joint buying agreements is still in the formative stages. In the *Report* the Commission reaffirmed the

approval of the resident member; 2) in the event of export, the resident member received a compensatory or pass-over commission determined as a percentage of the invoice; and 3) members agreed not to manufacture marine paints under subcontract for non-members without prior consent of the member primarily concerned with filling the order. [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9188, at 8398 (EEC Comm'n 1967).

190. Report, supra note 11, at 51.

191. Id.

192. Id. at 51-52.

193. See note 57 supra and accompanying text.

194. Report, supra note 11, at 51-52.

195. Id. at 52. The Commission was given the authority to promulgate such a blanket exemption in December 1971. See Council Reg. 2821/71, 2 CCH Comm. Mkt. Rep. ¶ 9517, at 9155 (1971).

principle laid down in the 1968 *S.O.C.E.M.A.S.*¹⁹⁶ decision that the prohibitions of Article 85 apply to joint buying agreements. However, the Commission further stated that such agreements may be appropriate to enable smaller retailers to compete for supplies vis-à-vis integrated competitors.¹⁹⁷ Consequently, great emphasis will be placed upon the market power of the parties and their economic power in relation to that of available suppliers as the determining criteria of prohibition under Article 85. Beyond this, the Commission did not detail its future position toward joint buying agreements.¹⁹⁸

e. *Rationalization Agreements Concerning Participation in Fairs and Exhibitions*

The Commission has had occasion to deal with restrictive provisions concerning participation in industrial fairs and exhibitions. European trade fairs ordinarily prohibit participants from exhibiting in any other exhibition during a certain period. In 1969, the Commission in *European Machine-Tool Exhibitions (EEMO)*,¹⁹⁹ granted an exemption to such a prohibition, reasoning that it contributed toward a desirable concentration of specialized industrial trade fairs, which benefited customers by placing almost the entire supply of machines in one place. The restriction on participation in other fairs may not be absolute in time, and the Commission appears to have evolved a two year limitation rule, whereby a ban on participation in other fairs in alternate years is permitted.²⁰⁰ *EEMO* concerned exhibitions of productive goods as opposed to consumer goods. The Commission stated in the *Report* that different rules may be applied to exhibitions of consumer goods.²⁰¹

C. *Vertical Agreements*

The EEC competition policy was first detailed in the area of vertical exclusive distributorships. This came about with the Court's decision in *Grundig-Consten*²⁰² in 1966, followed by the Commission's Regula-

196. [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9250 (EEC Comm'n 1968).

197. Report, supra note 11, at 53. In the Report, the Commission emphasized that a negative clearance was granted in *S.O.C.E.M.A.S.* because the amount of business involved was insufficient to have a perceptible effect on inter-member-state trade. See *id.* It should also be noted that the members of the group in *S.O.C.E.M.A.S.* were not obliged to buy exclusively through the association.

198. "This decision [*S.O.C.E.M.A.S.*] constitutes only a first step in the solution to the problems posed by the compatibility of the joint purchasing agreements with the competition rules and the definition of the limits within which they will be permitted." *Id.*

199. [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9295 (EEC Comm'n 1969).

200. In *CEMATEX*, 2 CCH Comm. Mkt. Rep. ¶ 9460 (EEC Comm'n 1971), a four-year limitation was in effect reduced to the two-year or alternate-year limitation.

201. Report, supra note 11, at 54.

202. *Etablissements Consten and Grundig-Verkaufs-GmbH v. EEC Comm'n*, [1961-1966 Transfer Binder] ¶ 8046 (EEC C.J. 1966).

tion 67/67²⁰³ which exempted certain of these agreements.²⁰⁴ The *Report* summarizes the history of the Common Market treatment of such agreements, and outlines the present Commission position with respect to other types of distribution arrangements which restrain trade—particularly sales conditions which prevent exports or imports between member states, resale price maintenance and selective systems of distribution.

It should be noted that, since 1962, the Commission has taken the position that Article 85 does not apply to arrangements with "commercial agents."²⁰⁵ The Commission reasons that since an agent is not independent from the manufacturer, no agreement "between enterprises" arises within the language of Article 85(1).²⁰⁶ The Court has accepted this distinction between independent merchants and agents.²⁰⁷ The 1962 Commission notice set forth criteria to determine the status of an agent, with emphasis placed on the assumption of service obligations and price responsibilities.²⁰⁸

1. Exclusive Buying and Selling Agreements

Exclusive distribution agreements were given first priority in the Commission's enforcement policy because of their frequency in practice, the administrative backlog caused by the notification requirement and the tendency of many exclusive distribution agreements to interfere with the goal of single market integration by establishing absolute territorial protection usually coincident with national boundaries.²⁰⁹ In *Grundig-Consten*²¹⁰ the Court prohibited absolute territorial protections in an

203. 1 CCH Comm. Mkt. Rep. ¶ 2727 (1967).

204. The literature on Grundig-Consten and exclusive distributorship is the most extensive in the area of Common Market antitrust law. See, e.g., Dam, *Exclusive Distributorships in the United States and the European Economic Community*, 16 *Antitrust Bull.* 111 (1971); Buxbaum, *The Group Exemption and Exclusive Distributorships in the Common Market—Procedural Technicalities*, 14 *Antitrust Bull.* 499 (1969).

205. Commission Notice of Dec. 24, 1962, 1 CCH Comm. Mkt. Rep. ¶ 2697 (1962).

206. This is consistent with the Commission's rejection of the intra-enterprise doctrine. See text accompanying notes 97-100 *supra*.

207. See, e.g., *Italy v. EEC Council and Comm'n*, [1961-1966 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8048 (EEC C.J. 1966).

208. See Commission Notice of Dec. 24, 1962, 1 CCH Comm. Mkt. Rep. ¶ 2697 (1962). See generally, Oberdorfer, *supra* note 2, ¶ 45.

209. Absolute territorial protection exists where distributors or other resellers are confined to a territory, usually that of a single member state, as where a French exclusive distributor of a German manufacturer is restricted from re-exporting the product to West Germany and the French distributor can block "parallel imports" of the product by other distributors into France.

210. *Etablissements Consten and Grundig-Verkaufs-GmbH v. EEC Comm'n* [1961-1966 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8046 (EEC C.J. 1966).

exclusive distributorship agreement between a German manufacturer and its exclusive distributor for sales in France. Under this agreement, the French distributor attempted to block parallel imports of Grundig radios from West Germany into France on the asserted basis that the imports violated the trademark rights in France held by the exclusive distributor.²¹¹ Subsequent to the Court's ruling in *Grundig-Consten*, the Commission issued Regulation 67/67 which granted a blanket exemption to certain types of bilateral exclusive distribution agreements complying with specified conditions, primarily the absence of any restrictions on parallel imports or re-exports across member state boundaries.²¹² This strict Common Market policy against absolute territorial protections was reaffirmed in 1971 in *Béguelin Import Co. v. G.L. Import Export Co.*,²¹³ where the Court of Justice stated that Article 85 also applies to bans on parallel imports which result from the distributor's reliance on member-state unfair competition laws, and that Regulation 67/67 is not available in such a situation.²¹⁴

211. See *id.* at 7628.

212. 1 CCH Comm. Mkt. Rep. ¶ 2727. Regulation 67/67 applies, *inter alia*, to agreements in which 1) only two enterprises, located in different member states, are parties; 2) an exclusive obligation to purchase or an exclusive selling right in a specified area of the EEC or a combination of both are contained; and 3) the distributor is not bound by any restrictions other than agreements not to manufacture or deal in competing products and agreements not to solicit customers or establish branches or warehouses outside the contract territory. The exemption does not apply where competing manufacturers appoint each other as exclusive dealers. The Commission may withdraw an exemption in a particular case if certain anticompetitive effects take place.

Regulation 67/67 was originally set to expire on December 1, 1972, but the Commission intends to extend its validity for another ten years. See Commission Notice of July 14, 1972, 2 CCH Comm. Mkt. Rep. ¶ 9517.

213. 2 CCH Comm. Mkt. Rep. ¶ 8149 (EEC C.J. 1971). In *Béguelin Import Co.* a Japanese manufacturer gave an exclusive distributorship to a Belgian firm with the contract territory covering Belgium and France. The Belgian firm then established a wholly-owned subsidiary in France as the exclusive distributor there. The Japanese manufacturer also established an exclusive distributorship in West Germany. Following the parallel import of the products into France from West Germany, the French distributor (and its parent) brought an action against the importer and the West German distributor under French unfair competition law, which is unique among member-state laws in that it prohibits parallel imports into the contract territory even where the agreement establishing the exclusive distributorship does not expressly provide for absolute territorial protection. See *Joliet*, *supra* note 100, at 432-33. The court at Nice referred the question of the availability of Article 85 as a defense to the Court of Justice. The Court answered broadly that Article 85 applies to all bans on parallel imports even where the ban rests both on restrictions in the agreement itself and on member-state unfair competition legislation. See 2 CCH Comm. Mkt. Rep. ¶ 8149, at 7554.

214. It is unclear whether the agreement did contain provisions restricting exports by the West German distributor and *Béguelin Import Co.* may well indicate that Article 85

This early and strict enforcement has apparently resulted in the elimination of the majority of absolute territorial restrictions brought to the Commission's attention.²¹⁵ Most manufacturers have voluntarily modified their exclusive distributorships in the face of this enforcement. Swift Commission action can be expected in those industries where the Commission believes restrictions still exist.²¹⁶

A more flexible Commission position toward absolute territorial protection exists in the case of new entrants and small firms.²¹⁷ The Commission reasons that such protections may be necessary for a limited time in some circumstances to facilitate entry into a market.²¹⁸ The Commission relies on two Court of Justice opinions to support its own special position toward territorial protections for small firms. In the 1969 *Völk*²¹⁹ case the Court stated that Article 85(1) did not apply where the parties had less than 1 percent of the total sales in the market. And in 1971, the Court stated that Article 85(1) did not apply where the parties to the agreement had a weak position in the protected market.²²⁰ While it is difficult to determine the limits of this tolerance from the opinions of the Court or from the Commission's *Report*, the flexible position of the Court and Commission toward restraints benefiting small

will be applied (and an exemption under Regulation 67/67 denied) where the exclusive distributor's attempt to block parallel imports rests solely on member state unfair competition law. See *Joliet*, supra note 100, at 431-36.

215. Approximately 30,000 exclusive distributorship agreements have been notified to the Commission and 4,500 of them contained export restrictions. As of April 1972 there were about 1,500 remaining. See *Report*, supra note 11, at 57.

216. In the *Report*, the Commission singled out automobile manufacturers and importers and perfume manufacturers for special attention among the enterprises which have not yet abandoned export restrictions. *Id.* The Commission in the last few months has increased the pressure on a number of large auto producers, including BMW, Peugeot and Citroën, by initiating proceedings against them under Article 85. BMW has already agreed to modify its agreements. See *CCH Euromarket News*, No. 194, Oct. 3, 1972, at 5-6.

217. *Report*, supra note 11, at 57-58.

218. The Commission relied to some extent on the Court's decision in *Société Technique Minière v. Maschinenbau Ulm GmbH*, [1961-1966 Transfer Binder] *CCH Comm. Mkt. Rep.* ¶ 8047 (EEC C.J. 1966). For a discussion of this pre-Grundig-Consten case, see *Deringer*, supra note 2, at 471; *Fulda*, *The Exclusive Distributor and the Antitrust Laws of the Common Market of Europe and the United States*, 3 *Tex. Int'l L.F.* 209 (1967).

In the *Report*, the Commission also cited its decision in *Transocean Marine Paint Ass'n*, [1965-1969 Transfer Binder] *CCH Comm. Mkt. Rep.* ¶ 9188 (EEC Comm'n 1967), as an example of its new-entrant exception to the general prohibition. *Report*, supra note 11, at 58.

219. *Völk v. Etablissements J. Vervaecke s.p.r.l.*, [1967-1970 Transfer Binder] *CCH Comm. Mkt. Rep.* ¶ 8074 (EEC C.J. 1969).

220. *Cadillon v. Firma Höss, Maschinenbau KG*, 2 *CCH Comm. Mkt. Rep.* ¶ 8135 (EEC C.J. 1971).

firms is consistent with the general Common Market policy of encouraging small and medium-sized firm cooperation.

As mentioned above, Regulation 67/67 deals only with certain bilateral exclusive distribution agreements.²²¹ Three general types of exclusive distributorship arrangements do not fall within the definition of Regulation 67/67 and therefore cannot qualify for a blanket exemption.²²² Exclusive distributorship agreements for exports to countries outside the Common Market are not covered by the blanket exemption, but the Commission has routinely granted negative clearances to such agreements on the ground that they do not significantly affect competition within the Common Market.²²³ The Commission has been quite permissive toward export agreements and has invariably found that potential effects on Common Market trade either do not exist or are too remote.²²⁴ In the *Report*, the Commission cited with approval its early decision in *Grosfillex*²²⁵ where it approved an exclusive distribution agreement between a French producer and a Swiss distributor, under which the latter was prohibited from re-exporting the products back into the Common Market. The Commission reasoned that such re-exports would be rare in light of the double customs duty which would be imposed.

The remaining two types of exclusive distributorship agreements which do not fall under Regulation 67/67 have not yet been the subject of formal decisions. Exclusive agreements involving enterprises of only one member state which relate to resales within that state are said in the *Report* to affect inter-member-state trade only rarely and thus will rarely be prohibited under Article 85.²²⁶ Commission policy toward the third type of agreement—exclusive distributorships where the contract territory covers the entire Common Market—has not yet been formulated beyond the statement that the Commission will consider the anticompetitive effects on inter-member-state trade and the need for a channel of supplies into the Common Market resulting from such an agreement.²²⁷

221. See 1 CCH Comm. Mkt. Rep. ¶ 2727. See note 212 supra and accompanying text.

222. Their exclusion results from the limited language of the Council of Minister's regulation enabling the Commission to promulgate Regulation 67/67. See Council Regulation 19/65, 1 CCH Comm. Mkt. Rep. ¶ 2717 (1965).

223. See, e.g., Rieckermann/AEG-Elotherm, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9267 (EEC Comm'n 1968).

224. See notes 328-31 infra and accompanying text.

225. [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 7020 (EEC Comm'n 1964); *Report*, supra note 11, at 59. The Commission in *Grosfillex* also observed that large numbers of similar products competed and were available in the Common Market. See generally Fulda, *The First Antitrust Decisions of the Commission of the European Economic Community*, 65 Colum. L. Rev. 625, 625-59 (1965).

226. *Report*, supra note 11, 59-60.

227. *Id.* at 60.

Finally, exclusive distributorship agreements may provide for relative, rather than absolute, territorial protection. In such an agreement, exclusive selling rights are given in the contract territory, but parallel imports are not proscribed.²²⁸ The Commission considers these limited agreements to be subject to the provisions of Article 85(1), but it has granted exemptions in several cases.²²⁹ Such limited agreements may also be exempted under Regulation 67/67, and the question whether the Commission's application of Article 85(1) is proper is now largely moot.²³⁰

2. Export Restrictions, Resale Price Maintenance and Selective Distributorships

According to the *Report*, the Common Market goal of single market integration has been threatened by EEC-wide firms who isolate national markets by adopting different pricing and other business policies in each member state.²³¹ This fragmentation of the EEC into individual member-state markets is reinforced by restrictions imposed on the distribution level, such as export prohibitions as a condition of sale from manufacturers to distributors. These restrictions permit producers to set variable prices and conditions in each member state without fear that suppliers or consumers in that state can satisfy their requirements in another member state. The Commission views such restrictions as serious a danger to single market integration as the absolute territorial protections in the exclusive distributorship agreements condemned in *Grundig-Conssten*.²³² Commission enforcement against export prohibitions has been strict.²³³ The Commission bases its strict enforcement policy in part on the purely economic need to avoid excess prices in each member state by assuring competition on the reseller level throughout the entire Common Market.²³⁴

228. *Id.* at 60-61. For example, dealers outside the contract territory are not prevented by export prohibitions from supplying customers in the contract territory.

229. See, e.g., D.R.U.-Blondel, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9049 (EEC Comm'n 1965).

230. See Deringer and Tessin, *Commercial Agency and Distribution Agreements under E.E.C. Antitrust Law*, in *Commercial Agency and Distribution Agreements* 104, 108-10 (van Gerren and Lukoff, eds. 1970).

231. See *Report*, *supra* note 11, at 60-61.

232. *Id.*

233. For example, in *Kodak-Pathé*, 2 CCH Comm. Mkt. Rep. ¶ 9378 (EEC Comm'n 1970), negative clearance was granted only after the Kodak group agreed to drop from its sales contracts a provision under which Kodak's direct customers were prohibited from exporting the products supplied or reselling them by export to other member states.

234. The *Report* states at 62: "In accordance with the Commission's views, this possibility of correcting by means of imports the prices applied for products of the same brand is an indispensable element for permitting equalization of prices in the Common Market countries."

This emphasis on the necessity of competition on the reseller level throughout the Common Market and its corollary prohibition of restrictions on exports and re-exports across member-state boundaries is also evident in the Commission's policy toward resale price maintenance (RPM).²³⁵ At first glance the Commission seems to adopt a very lenient position toward RPM. RPM systems solely confined to a single member state are said to be essentially a problem for the competition policy of each member state and generally not the concern of Common Market competition policy.²³⁶ This abstention is founded, in the *Report* at least, on the highly questionable premise that purely national RPM systems do not significantly affect inter-member-state trade.²³⁷ However, this attitude toward national RPM is not as broad as it at first appears. National RPM systems will be tolerated only if competing products from other member states are available. That is, vertical RPM agreements may not contain clauses forbidding the export, re-export or re-import of the same goods. Similarly, in the case of exports, a system of imposed prices which forces all foreign customers (i.e., foreign to the national RPM state) to respect the final sales prices imposed in the country of export will probably be struck down by the Commission.²³⁸ Moreover, it is doubtful whether exemptions under paragraph 3 of Article 85 will be given to such export-import prohibitions, particularly where differing national RPM systems are established throughout the Common Market and kept isolated through export or parallel import prohibitions.²³⁹ The Commission reasons that restrictions on imports cannot serve any purpose other than artificially protecting the national RPM systems where prices can be fixed at a relatively high level unaffected by parallel imports.²⁴⁰

Because of the vulnerability of a national RPM system to such parallel imports, the Commission's policy has resulted in the dismemberment of a number of such systems.²⁴¹ Thus, national RPM systems within the

235. See generally Canenbley, *Price Discrimination and EEC Cartel Law: A Review of the Kodak Decision of the Commission of the European Communities*, 17 *Antitrust Bull.* 269 (1972).

236. Member state regulation of RPM varies greatly. See Rahl, *supra* note 2, at 207-08.

237. See *Report*, *supra* note 11, at 62.

238. While in the *Report* the Commission spoke only in terms of the possibility of applying Article 85 to these restrictions on foreign re-sellers, that possibility is more likely to be an actuality in view of the Commission's concern for market-wide competition on the reseller level.

239. The *Report* refers to the Commission's action concerning *Agfa-Gevaert*, 2 *CCH Comm. Mkt. Rep.* ¶ 9339 (EEC Comm'n 1970). *Report*, *supra* note 11, at 62.

240. *Id.* at 63.

241. The Commission itself concedes this in the *Report*. *Id.* As to the effect of the EEC policy on RPM in West Germany, see *Doing Business in Europe*, *CCH Comm. Mkt. Rep.* ¶ 30,609 (1972).

Common Market, while not directly unlawful under EEC antitrust law, may nonetheless be rendered impracticable in view of the Commission's strong enforcement policy against obstacles to single market integration.

Selective systems of distribution limited to a number of "approved" resellers have also been subject to the attention of the Commission. Although the *Report* centers on one particular case,²⁴² it does outline a more complete picture of the Commission's position than can be obtained from prior decisions. A highly significant factor, in the Commission's view, is the market position of the manufacturer. Where a manufacturer has a strong market position, the effect of a selective distribution system is the exclusion from resale of a significant proportion of retailers who fulfill objective conditions of qualification. The Commission also makes a distinction between *quantitative* criteria of selection and *qualitative* criteria based on objective and uniform grounds. Selective distribution on a quantitative basis appears to be condemned out of hand.²⁴³ The *Report* contrasts this method of selection with one where the approved distributor status is given to those satisfying certain uniform and objective requirements relating to their qualifications and sales facilities.²⁴⁴ While qualitative selection, at least by a firm with a strong position, may be subject to the prohibitions of Article 85(1), an exemption is possible where the products are highly technical, comparatively expensive and sales service and guarantees have a special importance. For example, in *Omega* the approved retailer system used by the firm was exempted because of the necessity to assure approved retailers a sufficient turnover of the expensive watches to enable them to sustain an adequate sales promotion effort and an efficient system of repairs and service.²⁴⁵ Again, however, even an exempted qualitative system may not be used as a vehicle to fragment the EEC into isolated national markets. Each approved retailer or distributor must have the freedom to obtain his supplies from any other approved retailer or distributor within the Common Market. That is, there must be market-wide competition on the retail level, albeit among a limited number of possible resellers.²⁴⁶

242. *Omega*, 2 CCH Comm. Mkt. Rep. ¶ 9396 (EEC Comm'n 1970); Report, supra note 11, at 63-65 (1972).

243. The Commission stated in its Report that the restraint on competition in *Omega* arose from a quantitative limitation on the number of resellers in each geographical area varying with the potential purchasing power of the local clientele. Id. at 63-64.

244. Id.

245. 2 CCH Comm. Mkt. Rep. ¶ 9396 at 8868.

246. In *Omega* the Commission exempted the selective distribution system only after it took steps to ensure that official approved resellers could satisfy their requirements from any exclusive importer within the Common Market, who in turn must be free to export to other member states by selling to other approved retailers or to the final consumer at prices fairly determined. See Report, supra note 11, at 64.

The central concern of Commission policy toward vertical arrangements is the securing of competition on a market-wide scale on the reseller level. This concern arises from the Commission's desire to eliminate price differences in the Common Market by bringing about single market integration. In this sense, the twin goals of competition and single market integration can be seen as two sides of the same coin. It is not surprising, therefore, that the Commission has concentrated much of its enforcement on the elimination of restrictions or prohibitions against exports, re-exports and parallel imports across member-state boundaries.

D. *Industrial Property Rights*
Under Article 85

Industrial property agreements (such as the assignment or licensing of patents, know-how and trademarks) have received separate and special treatment in the Common Market, because, under member-state law, industrial property rights can be used in ways which seriously interfere with single market integration. Patents, for example, are issued by individual nations, with the resulting monopoly extending over the particular issuing nation. This principle of territoriality has obvious potential for disruption of an integrated market.²⁴⁷

The essential problem in this area is a reconciliation between the Common Market competition policy on the one hand and the exercise of industrial property rights granted by each member state on the other.²⁴⁸ These national rights are recognized in the EEC Treaty itself in Article 36.²⁴⁹ While many commentators over the years have artfully and passionately argued that Article 36 should be given precedence over the prohibitions of Articles 85 and 86,²⁵⁰ both the Commission and the Court

247. For example, a United States-based multinational doing business throughout the Common Market could attempt to isolate each national market by taking out parallel patents in each member state and then issuing exclusive licenses in each member state. Each license would contain a restriction against imports of the patented product from outside and restrictions on each licensee against exporting outside his own territory.

248. Report, *supra* note 11, at 65.

249. "The provisions of Articles 30-34 inclusive shall not be an obstacle to prohibitions or restrictions in respect to . . . the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States." 298 U.N.T.S. 3, 29, 1 CCH Comm. Mkt. Rep. ¶ 351.

250. See, e.g., Ladas, *Assignment of Trademarks and Antitrust Law*, in *Industrial Property* 207 (1972) [hereinafter cited as Ladas]; Oberdorfer, *supra* note 2, ¶ 49; Maddock, *Know How Licensing under the Antitrust Laws of the United States and the Rome Treaty*, 2 Comm. Mkt. L. Rev. 36 (1964).

Some commentators have also relied on Article 222 of the EEC Treaty, which provides:

have reconciled such conflicts in favor of EEC competition policy and the goal of single market integration. The overriding principle increasingly followed by both the Court and the Commission is that industrial property rights under national laws may not be exercised so as to partition the Common Market with respect to trade in the covered product. Thus, as a general rule, the territorial basis of industrial property rights cannot justify absolute territorial protection. The first application of this principle occurred in *Grundig-Consten*,²⁵¹ where the Court of Justice invalidated under Article 85(1) an exclusive distributorship system in which absolute territorial protection for each national market was allocated by a West German manufacturer to each of its distributors.²⁵² With respect to the industrial property rights involved, the Court refused to permit use of the French supplemental trademark held by the French distributor to block parallel imports from West Germany. Following *Grundig-Consten* the Commission issued Regulation 67/67,²⁵³ which excludes from the blanket exemption covering exclusive distributorship agreements under which industrial property rights are used to prevent parallel imports into the contract territory.

While the general principle enunciated in *Grundig-Consten* arose in a situation involving other restrictions which partitioned the market, the Court in 1971 reaffirmed the principle in two cases where industrial property rights were the principal means of partitioning. These decisions confirm the precedence of single market integration over the exercise of national industrial property rights, at least as to trademarks and copyrights. This precedence is based on both Articles 85 and 86 and on other Treaty provisions prohibiting interference with the free movement of goods in the Common Market.²⁵⁴

In *Sirena*²⁵⁵ the Court stated that a trademark assigned by an American

"This Treaty shall in no way prejudice the system existing in Member States in respect of property." 298 U.N.T.S. 3, 88, 2 CCH Comm. Mkt. Rep. ¶ 5261. See, e.g., Oberdorfer, *supra* note 2, ¶ 49. An excellent critical summary of the various arguments can be found in Rahl, *supra* note 2, at 249-57.

251. *Etablissements Consten and Grundig-Verkaufs-GmbH v. EEC Comm'n*, [1961-1966 Transfer Binder], CCH Comm. Mkt. Rep. ¶ 8046 (EEC C.J. 1966). See notes 210-11 *supra* and accompanying text.

252. A number of restrictions assured this protection, including: nationally-delineated exclusive distributorships; assignment to distributors of territorially-defined rights in a trademark supplemental to "Grundig" and common to a multi-country market; right of reversion to Grundig of supplemental trademark upon termination of a distributorship; and agreements by distributors not to re-export. See Rahl, *supra* note 2, at 261-71; Körner, *Territorial Protection of Industrial Property Rights*, 2 N.Y.U.J. Int'l L. & Pol. 35 (1969).

253. 1 CCH Comm. Mkt. Rep. ¶ 2727. See note 212 *supra*.

254. See text accompanying notes 261-64 & 269-72 *infra*.

255. *Sirena S.r.l. v. Eda GmbH*, 2 CCH Comm. Mkt. Rep. ¶ 8101 (EEC C.J. 1971).

manufacturer may not be used by its Italian assignee to block imports into Italy from another member state (West Germany), where the goods had also been trademarked under a parallel license from the American manufacturer. The Court reasoned that Article 85 comes into play where a trademark right is invoked to prohibit imports if the trademark owners (here, the Italian and West German licensees) control the trademark rights under an agreement between them or agreements with third parties. While it can be argued that the decision in *Sirena* is limited by its procedural posture²⁵⁶ and by other facts on the record,²⁵⁷ the language of the opinion is quite general and will probably not be interpreted narrowly either by the Commission or the Court.²⁵⁸ It has also been argued that the Court in *Sirena* and *Grundig-Consten* did not intend to prohibit all territorial restrictions incident to trademark licensing, but only those where the industrial property rights are used as a means of "arbitrary discrimination" or as a "disguised restriction of trade" as proscribed by Article 36.²⁵⁹ It is doubtful whether this argument will be accepted by the Court in the face of the Common Market goal of single market integration. That distinction is probably not recognized by the Commission, which has consistently maintained a strong stance against all absolute territorial limitations.²⁶⁰

In 1937, the American firm Mark Allen assigned its Italian rights to the trademark "Prep" for shaving cream to Sirena, an independent firm. Sirena used the trademark for its own products and subsequently renewed the trademark on its own behalf. When Mark Allen's German licensee began shipments of Prep into Italy, Sirena filed infringement suits against the importers and retailers. The Italian court then requested the Court of Justice to rule whether Articles 85 and 86 constituted a defense to the action.

256. In theory, the Court in deciding reference cases from national courts under Article 177, 298 U.N.T.S. 3, 76-77, 2 CCH Comm. Mkt. Rep. ¶ 4655, merely states general abstract principles and does not apply those principles or rules to the facts of the particular litigation.

257. For example, large price differentials existed between the German Prep and Sirena's Prep in the Italian market. 2 CCH Comm. Mkt. Rep. at 7106.

258. See Alexander, *Industrial Property Rights and the Establishment of the European Common Market*, 9 Comm. Mkt. L. Rev. 35, 42-44 (1972) [hereinafter cited as Alexander].

The Court in *Sirena* also distinguishes between the industrial property rights themselves and the exercise of those rights in contravention of Articles 85 and 86. 2 CCH Comm. Mkt. Rep. at 7111. Whether this distinction will prove to be a useful tool in reconciling Article 36 with Articles 85 and 86 remains to be seen.

259. See Ladas, *supra* note 250, at 209.

260. For this reason, trademark licensors should take little comfort from the Commission's 1967 decision in *Transocean Marine Paint Ass'n*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9188 (EEC Comm'n 1967), where the Commission did permit a horizontal group to use a common trademark throughout the Common Market, together with absolute territorial protections of limited duration. The Commission takes a rather limited view of this case and appears somewhat uncomfortable with the decision. See notes 188-97 *supra* and accompanying text.

The second 1971 decision in which the Court accepted the Commission's general position against the use of industrial property rights to partition the Common Market involved sound-reproduction rights. In *Deutsche Grammophon*,²⁶¹ a reference case, the Court stated that the EEC Treaty rules providing for free movement of goods within the Common Market prohibited a West German firm from using its sound-reproduction rights to bar resales within West Germany of recordings originally delivered to a French distributor. Deutsche Grammophon had argued that Article 85(1) was inapplicable in this case because the French distributor was its own subsidiary and there could, therefore, be no "concerted practice" as contemplated by the Treaty provision.²⁶² Perhaps to avoid the difficulties raised by this argument, the Court went beyond the provisions of Article 85(1) to rest its prohibition on a number of Treaty provisions which mandate the free movement of goods and which establish "the essential goal of the Treaty, which is to merge the national markets into a single market."²⁶³

The Commission has interpreted *Deutsche Grammophon* as giving it wide latitude in enforcement against the use of industrial property rights to hinder inter-member-state trade, or to isolate national markets.²⁶⁴

The situation with respect to patents is not so definite at first glance. In *Parke, Davis and Co. v. Centrafarm*,²⁶⁵ the only decision dealing directly with patents and parallel import bans, the Court stated that the Dutch exclusive patent licensee of an American licensor was not barred by 85(1) from blocking imports into the Netherlands from Italy where patents could not be granted for pharmaceutical products. While the parties and the intervenors (several member-state governments and the Commission) dealt with broad questions of parallel licensing, the issue before the Court was a narrow one. The Court reasoned that the exercise of national rights to block imports from another member state where patents cannot be granted over the product in question did not involve agreements entered

261. *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, 2 CCH Comm. Mkt. Rep. ¶ 8106 (EEC C.J. 1971). Deutsche Grammophon, as the producer of sound recordings, had an exclusive distribution right under the German copyright act.

262. *Id.* at 7186-87.

263. *Id.* at 7192. The Court's opinion is not a paradigm of clarity on this point, and Articles 3(f), 5(2), 36, 85, 86 and the second half of the Treaty in general are also mentioned. See 7 Tex. Int'l L.F. 516, 519 (1972).

264. Report, *supra* note 11, at 70. See Alexander, *supra* note 258.

265. [1967-1970 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8054 (EEC C.J. 1968). As in *Sirena*, the case reached the Court on reference from a national court, in this case the Dutch court in an infringement suit brought by Parke, Davis.

into by the patent-holder or his licensee.²⁶⁶ However, the Court, in dictum, did agree with the Commission's position that parallel licensing arrangements which contain export restrictions may under Article 85(1) constitute an unlawful partitioning of the Common Market, as long as the agreement or "concerted practice" requirement is met.²⁶⁷

The Commission regards *Parke, Davis* as a "rather peculiar case" and the *Report* distinguishes it on the grounds that: (1) the invention was not patentable in the exporting country (Italy); and (2) neither the Dutch exclusive licensee nor the American licensor received any financial or economic benefit from the Italian exporter.²⁶⁸ The first ground is perhaps ill-considered, for application of Article 85 should not, and the effects on single market integration do not, change where the Italian manufacturer acts under an Italian patent granted independently from *Parke, Davis*. The Commission's second ground is the controlling factor, although it should be noted that the Commission framed this factor in terms of financial and economic benefits to the patent holder rather than in terms of an "agreement" between the patent holder and the Italian manufacturer.

The Court's past acceptance of the Commission's position in the area of industrial property rights and partitioning of the market make it likely that the Court will extend *Sirena* and *Deutsche Grammophon* to patents, either under Articles 85 and 86 or under the broader "free movement of goods" approach of Articles 3(f), 5(2), 30, 36 and the second half of the Treaty in general.²⁶⁹ Increasingly strict enforcement activity from

266. The Court stated: "A patent of invention, viewed by itself and apart from any agreement of which it might be the subject, does not belong in any of [Article 85(1)'s] categories, but results from a legal status granted by a State for products meeting certain criteria, and thus avoids the elements of contract or concert required by [Article 85(1)]." *Id.* at 7825.

267. *Id.*

268. See *Report*, *supra* note 11, at 69.

269. See note 263 *supra*. The Court in *Sirena* suggested a hierarchy of industrial property rights with trademarks distinguished from other rights on the ground that the rights and interests protected by the trademark are more often of less value than those protected by a patent. See 2 CCH Comm. Mkt. Rep. ¶ 8101 (EEC C.J. 1971) at 7115. This distinction introduces the possibility that patent licensing territorial limitations may be treated more leniently than those contained in trademark licenses.

It should be noted that the *Report* fails to comment on the Commission's present view of its 1968 announcement concerning the validity of know-how and trademark licenses granted by Scott Paper to a wholly-owned subsidiary in Belgium and a half-owned subsidiary in Italy. See [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9263 (EEC Comm'n 1968). Under Article 85(3) the Commission exempted provisions restricting each of the licensees from selling goods bearing the trademarks outside its contract territory. The exemption was given only after assurances that the wholesalers to whom the goods were

the Commission can be safely predicted, therefore, and the dominance of Community law over member-state law should continue even in this sensitive area of national industrial property rights.²⁷⁰ The effectiveness of this enforcement will vary according to whether the "free movement of goods" approach, Article 85, or Article 86 is used. Article 85, which requires an "agreement" or "concerted practice," may be the Commission's least effective weapon of the three.²⁷¹ Article 86 has no "agreement" requirement, but it does require an abuse of a "dominant position." The Commission has stated that the mere holding of a patent does not by itself constitute a dominant position and that a broader relevant product market must be examined.²⁷² This last consideration limits somewhat the effectiveness of Article 86. The "free movement of goods" approach, on the other hand, has neither of these limitations and is quite broad on its face. This approach may be the Commission's most effective weapon in combatting the use of industrial property rights to partition the EEC. The *Report's* interpretation of *Deutsche Grammophon* as giving the Commission wide latitude in enforcement indicates that the Commission is fully aware of the potential of this approach. Increased use of the "free movement of goods" approach can be expected, therefore, particularly if the Court takes a restrictive view of the requirements of Articles 85 and 86.

The last two years have witnessed an increasingly detailed Commission policy toward other aspects of patent and know-how licensing. In this area the Court has not reviewed any of the Commission policies. In 1962 the Commission issued an announcement relating to patent license agree-

resold could not be prevented, even by invoking trademark rights, from selling anywhere in the EEC.

270. The EEC problem of isolation of national markets through industrial property rights could be mitigated by the establishment of a Common Market patent system. See the Draft Convention for a European System for the Grant of Patents, 2 CCH Comm. Mkt. Rep. ¶ 5503 (1971), and the Draft Convention Relating to a European Patent for the Common Market, 2 CCH Comm. Mkt. Rep. ¶ 5751 (1970). See generally Alexander, *supra* note 258, at 45-47.

271. For example, it would not apply where a single licensor (such as a United States-based multinational) took out parallel licenses in each member state and continued to manufacture and sell the patented product itself. The immunity from the application of Article 85 would be complete only if the manufacturer or its agents comprised the entire distribution chain. That is, the sale of the product anywhere along the chain (except the ultimate sale to the consumer) would trigger the application of Article 85 with respect to any restrictions on the reseller's ability to obtain the patented product from a source outside its own member-state territory. See generally Rahl, *supra* note 2, at 271-310; Wertheimer, *Licensing Agreements under E.E.C. Antitrust Law*, 114, 125-29 (van Gerren and Lukoff eds. 1970).

272. See notes 306-07 *infra* and accompanying text.

ments under Article 85.²⁷³ In this notice the Commission announced that Article 85 would be interpreted to exclude a number of patent license restrictions, for example, territorial limitations within the national grant, minimum or maximum quantity limitations and time limitations.²⁷⁴ The Commission in the *Report* pointed out that the notice is limited to "simple licenses," thereby excluding from its relatively permissive reach multiple parallel licensing and reciprocal license agreements or patent pools.²⁷⁵

Since 1971 the Commission has formulated in greater detail its policy toward patent license restrictions. These enunciations appear both in individual decisions and in the *Report*. The following ancillary patent license restrictions have been considered generally permissible by the Commission: territorial limitations within one member-state;²⁷⁶ quantity and quality limitations;²⁷⁷ prohibitions on sublicenses;²⁷⁸ nonexclusive grant-back provisions;²⁷⁹ quality controls and exchange of information;²⁸⁰ agreements not to divulge know-how to third parties beyond the patent period;²⁸¹ nonexclusive licenses to use the licensor's trademark;²⁸² and agreements on the part of the licensee to place on the product marks identifying it as manufactured under the licensor's patent.²⁸³ The licensee may be obligated to purchase products, semi-products, raw materials or auxiliary materials from the licensor only where such materials are indispensable to secure a technically perfect use of the patented process. In other words, such materials must be technically indispensable in order to assure a standard of quality which can be established in accordance with objective criteria.²⁸⁴

On the other hand, the Commission has disapproved the following restrictions: exclusive grant-backs,²⁸⁵ agreements not to contest the validity

273. Commission Notice of Dec. 24, 1962, 1 CCH Comm. Mkt. Rep. ¶ 2698 (1962).

274. For a list of permissible restrictions, see Rahl, *supra* note 2, at 229-30.

275. Report, *supra* note 11, at 70.

276. *Id.* at 70-71.

277. *Id.*

278. Burroughs-Delplanque, 2 CCH Comm. Mkt. Rep. ¶ 9485 (EEC Comm'n 1971). See also Burroughs-Geha-Werke, 2 CCH Comm. Mkt. Rep. ¶ 9486 (EEC Comm'n 1971).

279. Cases cited note 278 *supra*.

280. See Raymond-Nagoya, 2 CCH Comm. Mkt. Rep. ¶ 9513 (EEC Comm'n 1972); see notes 294-98 *infra* and accompanying text.

281. Burroughs-Delplanque, 2 CCH Comm. Mkt. Rep. ¶ 9485 (EEC Comm'n 1971).

282. Report, *supra* note 11, at 72.

283. *Id.* The obligation imposed on the licensee to place the licensor's mark is permitted only where the licensee has the right to impose his own marks in addition to the licensor's mark. *Id.*

284. *Id.* at 71.

285. Cf. Raymond-Nagoya, 2 CCH Comm. Mkt. Rep. ¶ 9513 (EEC Comm'n 1972).

of the patent except under special circumstances;²⁸⁶ and manufacture or sale restrictions beyond the patent period.²⁸⁷ Nonexclusive grant-backs are permitted only where the licensor undertakes similar obligations.²⁸⁸

The Commission also stated in the *Report* that other decisions will follow in which the conditions for an exemption under Article 85(3) will be further delineated.²⁸⁹ One such decision has been rendered and it is highly significant in its indication of present Commission thinking with respect to patent licensing and Article 85. In *Davidson Rubber Co.*,²⁹⁰ an American patentee entered into a series of three exclusive parallel patent and know-how licenses with West German, French and Italian firms. The patent license agreement gave each of the European firms the exclusive right to manufacture and sell automobile armrests in their respective national territories. Despite the parties' deletion of provisions restricting parallel imports,²⁹¹ the Commission proceeded to apply Article 85(1) to the exclusive manufacturing and sales patent license agreement.²⁹² The Commission then found, however, that the enumerated conditions for an exemption under Article 85(3) were satisfied.²⁹³ Notwithstanding the

286. Cf. *id.*; *Davidson Rubber Co.*, 2 CCH Comm. Mkt. Rep. ¶ 9512 (EEC Comm'n 1972); notes 290-93 *infra* and accompanying text. For a brief discussion of the relationship between no-contest clauses and export prohibitions, see Wertheimer, *supra* note 271, at 129-32.

287. *Report*, *supra* note 11, at 71.

288. *Id.* at 73.

289. *Id.* at 74.

290. 2 CCH Comm. Mkt. Rep. ¶ 9512 (EEC Comm'n 1972).

291. During the inquiry the parties complied with a Commission request that provisions prohibiting exports among the member countries be abandoned. *Id.* at 9142. This request was, of course, entirely consistent with the Commission's strict policy against bans on parallel imports, as seen above.

292. The Commission relied primarily on four factors: (1) the Davidson process was the most important for manufacturing automobile arm rests and the only patented process in use in Europe; (2) the number of competing processes and manufacturers were limited, with twelve other manufacturers having approximately one-third of the market; (3) the licensees had a substantial share of the market in their respective countries, 40% in France, 20% in West Germany, and 8% in Italy; and (4) automobile manufacturers themselves produced large quantities of arm rests. The Commission concluded that the exclusivity aspect of the agreements restrained Davidson and third parties from manufacturing arm rests and the effect of this restraint was to restrain competition and affect inter-member-state trade. *Id.* at 9139-40.

293. First, economic and technical progress was promoted because the Davidson process permitted mass production at lower cost in various forms and designs adapted to individual car models. Technical progress was promoted and production improved since the Davidson process permitted rational adjustment of the techniques introduced on the European automobile market to accommodate the preferences and requirements of that market. The reciprocal grant-back and know-how provisions were desirable because they assured that

exemption, *Davidson Rubber Co.* is important for its application of Article 85(1) to an exclusive patent licensing arrangement in the absence of provisions restricting parallel imports.

Another significant decision is *Raymond-Nagoya*.²⁹⁴ Raymond, the largest Common Market producer of plastic fasteners used in automobiles, granted an exclusive license to manufacture and sell plastic fasteners under its patents to Nagoya, the largest supplier of fasteners to the Japanese automobile industry. The Commission separately examined and approved six exclusionary provisions in the licensing agreement and ultimately granted a negative clearance to the entire agreement.²⁹⁵ The Commission's disposition of three of the provisions merits special comment. First, the licensing agreement prohibited Nagoya from exporting the fasteners outside of its sales territory in the Far East. The Commission found that this export prohibition would not affect trade "within the Common Market" because it was highly unlikely that Nagoya would in fact ship fasteners to customers in the Common Market.²⁹⁶ In this respect *Raymond-Nagoya* can be seen not so much as a patent license decision but rather as one in the line of cases dealing with export prohibitions outside the Common Market which are seen to have little or no perceptible effect on trade within the Common Market.²⁹⁷ Second, the exclusivity aspect of the manufacturing and sale patent license was considered outside the prohibition of Article 85(1) because its only effect was the elimination of "potential competitors" in the Far East who would not have been in a better position than Nagoya to deliver the products to the Common Market. The third restriction was an agreement on the part of Nagoya not to challenge the validity of the Raymond patent. The Com-

improvements would be fully exploited by the licensees. Second, automobile manufacturers were said to derive a fair share of the profit resulting from this progress because of the availability of a newer, improved product, adapted to their individual needs, and offering greater safety and more comfort. Third, the restrictions were essential to induce the licensees to make the necessary investments to develop the process and adapt it to the requirements of the European market. The Commission felt they would not have done this absent the restrictions. Fourth, the restraint on competition was held not to be excessive. The licensees had only one-third of the market and were free to sell the product outside of the territory for which they were especially responsible. *Id.* at 9141-42.

294. 2 CCH Comm. Mkt. Rep. ¶ 9513 (EEC Comm'n 1972).

295. Quality controls and exchange of information provisions were deemed necessary for the proper exploitation of the invention and know-how. The Commission also upheld Nagoya's agreement to give Raymond a nonexclusive license for any patents for, improvements to, or modifications of the Raymond method, as well as for any patents, utility models or designs that Nagoya might obtain outside of Japan in the field of fasteners. *Id.* at 9148.

296. *Id.* at 9146-47.

297. See Grosfillex, 1 CCH Comm. Mkt. Rep. ¶ 2412.37 (EEC Comm'n 1964).

mission stated that as a general rule such agreements were prohibited by Article 85(1). The general rule was not applied, however, on the ground that Nagoya's contesting of validity would aid only the position of competing third enterprises and consumers in the Far East without any effect on the supply and demand relationships within the Common Market.²⁹⁸

The Commission's conclusion that the Japanese licensee Nagoya would not and could not sell to or manufacture in the Common Market appears to have colored the entire decision, and *Raymond-Nagoya* may indicate a tolerance on the part of the Commission toward international licensing agreements where a Common Market producer is the patentee-exporter to a foreign country, at least where re-exports back into the Common Market do not appear significant or likely.

The Commission is presently studying the possibility of a blanket exemption for certain agreements relating to industrial property rights and know-how.²⁹⁹ Promulgation of such a regulation would hopefully go far toward resolving many of the complex and conflicting aspects of industrial property rights under EEC antitrust rules.³⁰⁰

E. *Article 86 of the EEC*

Article 86 of the EEC prohibits the abusive exploitation by one or more enterprises of a dominant position in the Common Market or a substantial part thereof.³⁰¹ No exemptions are permitted. Three elements must be present in order to have a violation under Article 86: (1) a dominant position; (2) the abuse of that position; (3) the likelihood of an effect on inter-member-state trade.³⁰² In this respect Article 86 is similar to section 2 of the Sherman Act which, at the present time, does not condemn monopoly power alone but requires some voluntary conduct.³⁰³ Article 86 does not define a "dominant position" but it does give examples of abusive practices.³⁰⁴ Until 1971 there were no in-depth interpretations of Article 86

298. 2 CCH Comm. Mkt. Rep. ¶ 9513, at 9147.

299. Report, *supra* note 11, at 74. See generally Wertheimer, *supra* note 271, at 135-36.

300. The preceding section has emphasized the most recent developments in this area, rather than a detailed analysis and critique of the Commission's pronouncements and decisions, and of the Court's opinions concerning industrial property rights. For an excellent analysis of this area (up to 1970) see Rahl, *supra* note 2, at 244-310.

301. 298 U.N.T.S. 3, 49, 1 CCH Comm. Mkt. Rep. ¶ 2101.

302. *Parke, Davis and Co. v. Probel Co.*, [1967-1970 Transfer Binder] Comm. Mkt. Rep. ¶ 8054, at 7825 (EEC C.J. 1968).

303. See, e.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (*per curiam*).

304. Article 86 lists: (1) unfair pricing and purchasing terms, (2) production limitations which prejudice customers, (3) discrimination, (4) tie-in arrangements. See generally

by either the Commission or the Court.³⁰⁵ But in 1971 enforcement under Article 86 accelerated, and a number of important rulings have been rendered since then.

The Court has stated that the holding of a patent, copyright or trade mark does not by itself constitute a "dominant position" and that a larger product market must be examined.³⁰⁶ In this respect the Court of Justice's definition of the relevant product market parallels the approach taken by the American courts under section 2 of the Sherman Act in cases involving patents where the relevant market is usually not limited to the patented product alone.³⁰⁷ The Court in *Deutsche Grammophon* and *Sirena* did not go beyond these statements concerning the elements of a dominant position and the definition of a relevant market, although it did give some indication of its thinking with respect to the nature of an abuse under Article 86. In *Deutsche Grammophon*,³⁰⁸ the Court stated that the differences between an imposed price and the product price when it is reimported from another member state may constitute decisive evidence of an abuse where there is no objective justification for the price differences. This inference of an abuse from evidence of price differences is important for two reasons: first, it reflects the importance given to price equalization throughout the Common Market; second, the drawing of an inference of abuse from unjustified price differentials may indicate the Court's willingness to condemn dominant firm activities which result in price differentials.

Article 86's application was delineated more fully by the Commission in two recent decisions—*GEMA*³⁰⁹ and *Continental Can*.³¹⁰ Initiation of

Deringer, supra note 2, ¶¶ 520-59; de Jong, The Position of the Dominant Firm in a Changing Economy, 6 Comm. Mkt. L. Rev. 371 (1969).

305. In 1966 the Commission issued a study on the "Problem of the Concentration of Enterprises" which proposed that Article 86 be applied to mergers and acquisitions involving a dominant firm. EEC Commission, Problem of Concentration of Enterprises in the Common Market 3, 26 et seq. (1966). The Commission position has been severely criticized by many commentators. See, e.g., Burki, Le problème de l'abus des positions dominantes des grandes entreprises dans le marché commun (1968); Deringer, supra note 2, ¶ 523; R. Joliet, Monopolization and Abuse of Dominant Position 241 (1970); Oberdorfer, supra note 2, at 207.

306. *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, 2 CCH Comm. Mkt. Rep. ¶ 8106 (EEC C.J. 1971) (copyrights); *Sirena S.r.l. v. Eda GmbH*, 2 CCH Comm. Mkt. Rep. ¶ 8101 (EEC C.J. 1971) (trademarks).

307. See, e.g., *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

308. *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, 2 CCH Comm. Mkt. Rep. ¶ 8106, at 7193 (EEC C.J. 1971).

309. *GEMA*, 2 CCH Comm. Mkt. Rep. ¶ 9438 (EEC Comm'n 1971).

310. *Continental Can Co.*, 2 CCH Comm. Mkt. Rep. ¶ 9481 (EEC Comm'n 1971). In

these two actions was a conscious result of the Commission's desire to deal with what it considers two separate aspects of Article 86: the control of abusive behavior on the market, and the restriction of consumer freedom arising from mergers in which a dominant enterprise takes control of a competitive enterprise.³¹¹ This dual enforcement has resulted from the Commission's increasing attention to oligopolies and concentration trends through mergers in certain industrial sectors within the Common Market, and these recent actions presage a much greater use of Article 86 by the Commission.

The Commission's decision in *GEMA* concerned the first target of its Article 86 enforcement policy—the abuse of a dominant position through certain business practices. Such an application of Article 86 might be termed traditional, and, unlike the application of Article 86 to mergers and acquisitions, is accepted at least in theory by all commentators. In *GEMA* the Commission held that a West German organization with a monopoly of musical copyright management in that country abused its “dominant position” in “a substantial part” of the Common Market (West Germany) by engaging in various practices, many of which discriminated against nationals of other Common Market member states.³¹² Similar types of musical copyright monopoly situations existed in France, Belgium, the Netherlands and Italy. These national monopolies, together with *GEMA*, entered into reciprocal exclusive agreements which resulted in a national fragmentation of the Common Market.³¹³

The Commission's decision in *GEMA* is important in several respects. First, the relevant geographic market was limited to West Germany, which was considered a “substantial part” of the Common Market.

July 1972, a third proceeding under Article 86 (as well as under Article 85) was initiated against major sugar producers. See Commission Notice of July 24, 1972, 2 CCH Comm. Mkt. Rep. ¶ 9522 (1972).

311. Report, *supra* note 11, at 74-75.

312. *GEMA*, through its by-laws, was said to have “abused” its position by (1) outright discrimination against nationals of other member states, (2) the imposition of nonessential obligations on *GEMA* members (particularly, the requirement that *GEMA* receive copyrights for all works and for the entire world), (3) the prevention of an EEC-wide market for the services of music publishers through a refusal to admit other member state nationals to full membership rights in *GEMA*, (4) the extension of copyright to nonprotected works, and (5) discrimination against independent importers as compared to German producers. *GEMA*, 2 CCH Comm. Mkt. Rep. ¶ 9438, at 8751-53 (EEC Comm'n 1971).

313. Article 86 proceedings were commenced at the time of the *GEMA* case against the French (*SACEM*) and Belgian (*SABEM*) companies. These two companies modified their agreements to comply with Commission requests. The corresponding Dutch company (*BUMA*) made the same modifications without any official Commission action. See Report, *supra* note 11, at 76 n.2.

However, the Commission's analysis of market definition is not so complete as one might hope, and few criteria are given. Second, the Commission adopted a very broad definition of "abuse." As it explained in the Report:

It is the [monopoly] situation which makes the abuse possible. . . . There is abusive exploitation of the market from a dominant position when the holder of the position uses the possibilities which flow from it in order to obtain advantages which he would not have obtained if there were effective competition.³¹⁴

The Commission explained that an abuse cannot be discerned in accordance with a model of predetermined conduct, but can be established only by taking into account the objectives of the EEC treaty. *GEMA*, it said, underscored the fact that the aim of Article 86 is to prevent firms in a dominant position from obstructing the establishment of undistorted competition in the Common Market.³¹⁵ While these comments may not be as specific as counsel might desire, they do indicate that the Commission has adopted a broad and non-technical definition of an abuse. At the very least, the Commission does not feel bound by the examples of abusive practices given in Article 86 itself.³¹⁶

*Continental Can Co.*³¹⁷ was the Commission's test case for its theory that Article 86 can be applied to acquisitions by a firm already enjoying a dominant position. This decision and its theory are now on appeal to the Court where arguments were heard in September 1972. In *Continental Can*, the Commission applied Article 86 against an acquisition by Continental Can, through a wholly-owned subsidiary (Europem-ballage), of a Dutch packaging concern. Continental Can was already doing business within the Common Market, particularly through its West German subsidiary (SLW). The Commission found a violation of Article 86, reasoning that Continental Can had abused its dominant position in West Germany through the horizontal acquisition of a potential competitor.³¹⁸

In addition to the application of Article 86 to acquisitions, *Continental Can* is highly significant in many respects. First, "dominant position" is

314. *Id.* at 78.

315. *Id.* at 79.

316. For discussion of the concept of "abuse," compare R. Joliet, *Monopolization and Abuse of Dominant Position* 247-52 (1970) with Edwards, *supra* note 1, at 309. See also Deringer, *supra* note 2, ¶¶ 510-29; Oberdorfer, *supra* note 2, ¶ 207.

317. *Continental Can Co.*, 2 CCH Comm. Mkt. Rep. ¶ 9481, at 9029 (EEC Comm'n 1971).

318. For criticism of the Commission's decision, see 5 N.Y.U.J. Int'l L. & Pol. 357 (1972). See generally Bienaymé, *L'application de l'article 86 du Traité de Rome dans la décision "Continental Can Company,"* 8 revue trimestrielle de droit europeen 65 (1972).

further delineated. The Commission in *Continental Can* defined "dominant position" in two ways: (1) as the ability "to take independent lines of conduct" to act "without much regard for competitors, buyers, or suppliers;" and (2) in the more familiar terms of power to fix prices or control production or distribution. Under the second definition, the power was said to arise from market share alone, or in combination with access to technical knowledge, raw materials or capital.³¹⁹ These general definitions are more meaningful in light of the evidence used to establish the dominant position of Continental Can and its West German subsidiary. The Commission used the more facile and, to American lawyers, more familiar market-share approach, under which it held that market shares varying from 50 percent to 90 percent in West Germany were sufficient to constitute a dominant position.³²⁰ In addition, the Commission relied upon Continental Can and SLW's economic, financial and technical resources as evidence of a dominant position. These resources included Continental Can's absolute size, its technical experience and market size which assured maintenance of its significant lead in patents and know-how, its European-wide system of licensing, its control of essential production machinery, and its access to the international capital market as the world's largest metal container manufacturer.³²¹ The Commission's consideration of this last factor is comparable to a deep pocket theory.

The Commission's approach to the relevant markets is also significant. As in *GEMA*, the Commission recognized West Germany as the geographic market without any detailed analysis or discussion. On the other hand, the scopes of the relevant product markets are analyzed in some detail.³²² Thus, SLW was held to have a dominant position in Germany in the specified product markets.³²³ It is beyond the scope of this article to enter into the complexities, and the mysteries, of product market definition. Suffice it to say that the same difficulties face the courts on both sides of the Atlantic.

In *Continental Can*, an abuse of the dominant position was said to oc-

319. 2 CCH Comm. Mkt. Rep. ¶ 9481, at 9029.

320. *Id.* at 9029-30. The commentators have disagreed on the concept of "dominant position." For example, compare R. Joliet, *Monopolization and Abuse of Dominant Position* (1970) (economic power) with Deringer, *supra* note 2, ¶ 525 (market shares alone). For a third formulation, see Samalden & Druker, *Legal Problems Relating to Article 86 of the Rome Treaty*, 3 Comm. Mkt. L. Rev. 158 (1965) (predominant influence).

321. 2 CCH Comm. Mkt. Rep. ¶ 9481, at 9029-30.

322. *Id.* at 9025-29.

323. The product markets included: light containers for canned meats, light containers for canned fisheries products and metal lids for glass jars. SLW's share in the three product markets were respectively, 70-80%, 80-90%, and 50-55%. *Id.* at 9029-30.

cur where there is a horizontal acquisition of one of a firm's actual or potential competitors within the relevant product and geographic market.³²⁴ While there was some geographical overlap in the operation of the acquired Dutch firm and the West German SLW, the Commission viewed the Dutch firm primarily as a potential competitor of SLW. The Commission stated that the acquired firm was large enough to compete with SLW and that the lack of actual competition was due mainly to restrictive agreements among the parties.

Should the Commission's position be upheld by the Court, increasing Commission activity under Article 86 against acquisitions can be expected.³²⁵ This could, of course, have serious repercussions on expansion by United States-based multinational firms. For example, a multinational firm operating in the Common Market may be found to have a dominant position under Article 86 even though its market share does not approach the percentages necessary for a finding of monopoly power under section 2 of the Sherman Act. The possibility of exposure to Article 86 is increased by the finding in *Continental Can* that a multinational's "dominant position" may be found to exist in only one member state of the Common Market and that the world-wide resources available to a multinational may be considered in the determination of a "dominant position."

III. *Extraterritorial Effect*

Unlike the Sherman Act, Articles 85 and 86 contain no "foreign commerce" clause³²⁶ and relate only to effects "within the Common Market."³²⁷ Thus, the Commission has taken a very permissive attitude toward agreements concerning *exports* from Common Market member states.³²⁸ In a number of cases the Commission has approved export agreements which contain prohibitions on re-imports into the EEC on the finding of a lack of a secondary effect on trade within the Common Market. For example,

324. *Id.* at 9032.

325. If the Court should hold that Article 86 does not cover acquisitions, the Commission would probably seek legislation to remedy the gap in enforcement. See Report, *supra* note 11, at 105.

326. The extraterritorial scope of Article 86 of the EEC and Articles 65 and 66 of the ECSC has not been decided by either the Commission or the Court.

327. Article 85 requires, in addition, an effect on inter-member-state trade.

328. See, e.g., *Grosfillex Co.*, 1 CCH Comm. Mkt. Rep. ¶ 2412.37 (EEC Comm'n 1964); *V.V.V.F.*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9312 (EEC Comm'n 1969); *Rieckermann/AEG-Elotherm*, [1965-1969 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 9267 (EEC Comm'n 1968). For a criticism of these decisions, see *Oberdorfer*, *supra* note 2, at 40-42. See also *Rahl*, *supra* note 2, at 106.

in *Raymond-Nagoya*,³²⁹ the Commission granted a negative clearance to a patent licensing agreement between a French producer and a Japanese licensee which restricted sales of the patented products to the Far East. The Commission reasoned that it was highly unlikely that the Japanese licensee would or could import back into the Common Market. Thus, with respect to exports outside the Common Market, Professor Rahl's conclusion that adverse secondary effects on competition are not readily presumed, and that small effects will be tolerated,³³⁰ continues to describe Commission policy.

As to agreements involving *imports* into the Common Market, the Commission has adopted a broad approach to extraterritoriality.³³¹ In *Dye-stuffs*,³³² the Commission argued that Article 85 applied to conduct on the part of non-EEC nationals which occurs outside the Common Market and which has the proscribed effects within the EEC. However, the Court avoided this issue by finding that the wholly-owned subsidiaries' price-fixing activities constituted conduct within the EEC and then held that the parents, located outside the EEC, were liable for those activities where the subsidiaries were not independent from the parents.

The Commission's position in *Dyestuffs* parallels American antitrust with respect to extraterritorial effect. In *United States v. Alcoa*,³³³ Judge Learned Hand applied the Sherman Act to conduct of foreign nationals occurring entirely outside the United States where such conduct had some effect on United States import trade. The "effects" doctrine of *Alcoa*, and the consequent application of United States antitrust to foreign nationals engaged in activities abroad, has been criticized by many European³³⁴

329. 2 CCH Comm. Mkt. Rep. ¶ 9513 (EEC Comm'n 1972). See notes 294-98 *supra* and accompanying text.

330. See Rahl, *supra* note 2, at 106.

331. Under the nationality principle, the Common Market could apply its antitrust provisions to conduct of member state nationals wherever such conduct occurs. Thus, resort to the "effects" doctrine discussed below is not needed. See Restatement (Second) of Foreign Relations § 30 (1965).

332. E.g., *Imperial Chem. Indus. Ltd. v. EEC Comm'n*, 2 CCH Comm. Mkt. Rep. ¶ 8161 (EEC C.J. 1972).

333. 148 F.2d 416 (2d Cir. 1945) (on certification and transfer from the United States Supreme Court for lack of a quorum of qualified justices). Judge Hand also required that the proscribed foreign conduct be "intended" to produce the effects on imports. *Id.* at 444. The Restatement substitutes "direct and foreseeable result" for Alcoa's "intent" requirement as a necessary element for United States jurisdiction over conduct abroad. Restatement (Second) of Foreign Relations § 18, comment f, at 50 (1965). Cf. *United States v. General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949).

334. See, e.g., Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 *Brit. Y.B. Int'l L.* 146, 159-60 (1957); Mann, *The Doctrine of Jurisdiction in International Law*, 111 (*Hague Academy*) *Recueil des Cours* 1, 100-08 (1964); Verzijl, *The*

and American³³⁵ commentators. Some observers, therefore, might view the Commission's apparent espousal of the effects doctrine, or a modified version thereof, as somewhat ironic. Irony would probably not describe the reaction of a non-EEC multinational held subject to Common Market antitrust laws, even though its only contact with the Common Market was imports into the EEC. Unless the Court reverses, or member states exert political pressure to cause a shift in Commission policy, some extraterritorial application of the EEC provisions can be expected.³³⁶

IV. Conclusion

In the ten years since the promulgation of Regulation 17 in 1962, EEC antitrust has become a well developed reality which now presents significant problems to firms doing business in or selling to Common Market countries. In that comparatively short time, the skeleton outlined in Article 85 has been fleshed out through a series of Court decisions and Commission decisions, announcements and regulations. This has been particularly true with respect to vertical exclusive distributorships, many hard-core horizontal restraints such as price-fixing and market sharing, and agreements which restrict imports, exports and re-exports among or between member states. To date, Commission policy under Article 85 has not been so fully formulated in other areas—notably standardization agreements, joint buying arrangements and certain industrial property licensing restrictions. The end of the first decade also witnessed the beginning of enforcement under Article 86.

United States-based multinationals have urged the relaxation of American antitrust rules on the ground that enforcement of American antitrust law places them at a competitive disadvantage in the international marketplace vis-à-vis their foreign competitors who allegedly operate without similar constraints.³³⁷ One premise of this argument is the ability of foreign

Controversy Regarding the So-called Extraterritorial Effect of the American Antitrust Laws, 8 *Nederlands Tijdschrift voor Internationaal Recht* 3 (1961).

335. See, e.g., Rahl, *supra* note 2, ch. 7; Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 *Am. J. Int'l L.* 558 (1967); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 *Yale L.J.* 639 (1954). For an extensive bibliography, see H. Zwarenstejn, *Some Aspects of the Extraterritorial Reach of the American Antitrust Laws 167-72* (1970).

336. For example, in October 1972 the Commission announced that it was investigating voluntary trade quotas or "self-limitation" agreements entered into between American and Japanese firms importing into the Common Market. In the United States a consumers' group has challenged under the Sherman Act the voluntary steel quota agreements covering steel imports into the United States. *Consumer's Union Corp. v. Rogers*, Civ. No. 1029-72 (D.D.C., filed May 24, 1972).

337. See, e.g., the remarks of Senator Philip Hart in 118 Cong. Rec. 11494-97 (daily ed.

competitors to form cartels and enter into other cooperative arrangements without being subject to liability under foreign antitrust laws. The actual development of foreign antitrust may reduce, if not negate, the cogency of this argument. In the second decade, enforcement of EEC antitrust will be carried out by a Commission which appears to have grown increasingly self-confident in the antitrust area. Much of this confidence is justified by the Court's over-all acceptance of Commission positions and approaches. Both the Commission and the Court have generally adopted a non-formal approach to antitrust that is in some ways similar to approaches under American law. For example, the Commission has often employed concepts developed under American antitrust, particularly in the area of product market definition, conscious parallelism and the "effects" doctrine of extraterritoriality. Indeed, the American antitrust savant may often be in a better position to predict the results of the decision-making process under EEC antitrust law than his European counterparts who have sometimes overemphasized formal treaty interpretation. In this respect, the civil law tradition of *la doctrine* does not appear to have played a significant role in the development of EEC antitrust rules, and the entry of two common law countries in 1973 may further reduce that role.

That the Commission appears more antitrust-oriented than any of its constituency (with the possible exception of West Germany), and that it often relies on American concepts, does not mean that the rules and results will be the same under American and EEC laws. For example, EEC antitrust is now more permissive with respect to mergers and certain forms of horizontal cooperation while it is stricter with respect to certain patent licensing restrictions and perhaps price leadership situations. Differences result from the following factors: (1) the EEC goal of single market integration, which does not exist in the United States; (2) differing political, economic and social values and premises underlying the shared goal of promotion of competition; (3) the Common Market's greater awareness of or emphasis on international competition; (4) a different resolution of close questions involved in determining whether a restraint is justified in a particular situation; and (5) differences in statutory requirements, particularly the requirement of an effect on inter-member state trade.

The growing self-confidence of the Commission may also engender more open conflicts with the policies of member state governments in areas such

July 24, 1972), reprinted in 573 BNA Antitrust and Trade Reg. Rep. A-16 (1972). The Nixon administration recently completed a study under the direction of Secretary of Commerce Peter Peterson which resulted in tentative proposals, among others, to relax the antitrust rules with respect to United States-based multinationals. Wall St. J., Jan. 13, 1972, at 1, col. 6.

as industrial property rights, state, regional and sectoral aids, national RPM systems and foreign agreements to restrict exports into the Common Market. While some conflicts will result from the more obvious dichotomy between rights under national laws and the EEC goal of single market integration, others will arise from the fact that the Commission appears to have embraced more completely the role of competition in its political economic philosophy.

As to future developments, increasing use of blanket exemptions can be expected. This should provide more detailed rules with respect to a number of horizontal and vertical restrictions, notably those concerning standardization agreements, specialization agreements, joint research and development agreements and the exploitation of research efforts as it relates to industrial property rights and trade secrets. It should also render compliance less expensive and time-consuming and permit the Commission to devote greater time and energy to other enforcement areas. One of these areas will be hard-core horizontal restraints (such as market sharing, price fixing and reciprocal exclusive dealing) where severe fines will be imposed.³³⁸ A second area includes restrictions which interfere with single market integration—for example, bans on parallel imports purportedly based on industrial property rights. The Court's opinion in *Deutsche Grammophon* gives the Commission an enforcement weapon under the general treaty objective of free movement of goods which appears markedly more potent than Articles 85 and 86 with their respective limiting requirements of a "concerted practice" and "abuse" of a "dominant position." A third area of potential enforcement will be product markets characterized by price differentials among the member states. Such differences should operate as a red flag to the Commission in its enforcement of both Articles 85 and 86.³³⁹

Lastly, and perhaps most importantly for United States-based multinationals, the second decade of EEC antitrust may very well be characterized by Commission activity against concentrated industries and mergers involving large firms. This activity should come swiftly if the Court upholds the Commission's application of Article 86 to acquisitions by dominant

338. Reportedly the Commission is considering imposing fines of over 1,000,000 units of account against each of several sugar firms for violations of Articles 85 and 86. *London Times*, Dec. 7, 1972, at 26, col. 5.

339. A recent study prepared for the Commission indicated that price differences for the same products in the six original EEC member states are often "quite enormous." Manufacturers' pricing and marketing strategies were identified as the main cause for these differences. The Commission cautioned consumers that these price differences will persist "as long as the considerable structural differences in the (national) distribution systems and competitive conditions remain and as long as price levels are determined by manufacturers." *CCH Euromarket News*, No. 198, Oct. 31, 1972 at 4-5.

firms. On the other hand, enforcement will be delayed if the Commission is compelled to request amended legislation.

Recent Commission action, especially its decision in *Continental Can* and its ongoing survey of concentration trends in the Common Market, indicates that the Commission may be having doubts about the wisdom of promoting concentration in the EEC. The enforcement activity potentially resulting from such a change in policy should not be obscured by the much heralded EEC encouragement of cooperation among small and medium-sized firms. This encouragement rests on the Common Market's desire to increase the competitive abilities of smaller European firms vis-à-vis larger firms, including United States-based multinationals.

While increasing enforcement against mergers and concentrated industries may require modification of the policy of fostering small and medium-sized firm cooperation, the competitive disadvantages of smaller EEC firms vis-à-vis larger international and multinational firms will continue to be a significant consideration in many Commission decisions and policies. This should not be taken as an indication of anti-American bias as such, in that United States-based multinationals have also benefited from Commission action. European awareness (or fantasy) of an "American challenge" to EEC industry has had and will continue to have an influence on Common Market antitrust policy. The Commission no longer seems so certain, however, that the best response to that "challenge" is the promotion of concentrated industries within the EEC.