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Compliance with the Common Market's Antitrust Law

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Compliance with the Common Market's Antitrust Law

Fines

The Commission of the European Communities has power to impose fines equal to up to 10 percent of the turnover of the corporations concerned.[1] In practice, fines have been much smaller: mostly approximately 1 percent or less of the world turnover of the corporations involved (higher percentages of course of EEC turnover). Fines have not been calculated primarily by reference to turnover. The largest fine imposed by the Commission on a single corporation, as confirmed by the Court, was 850,000 EEC units of account (then approximately United States dollars 1.25 million). This was for three separate (though related infringements of Article 86).[2]

The Court in several cases has considered two related questions: is it reasonable to fine corporations for conduct that was not obviously contrary to the general words of Article 86, and how far is it a defence to show that a corporation, though it knew what is was doing, did not know it was illegal under Community law?

Regulation 17/62 Article 15 allows fines to be imposed only if the unlawful behavior is committed "intentionally or negligently". The Court confirmed fines on commercial solvents and on various sugar companies although refusal to supply and fidelity rebates had not previously been held to be contrary to Article 86.[3] In *United Brands* the Court said that the corporation had prohibited resale of unripened bananas, imposed discriminatory prices and delivered less than the amounts ordered, causing strict partitioning of national markets which an experienced and well-informed corporation like United Brands knew or should have known violated Article 86.[4] In *Hoff-*

[1]Regulation No. 17/62, Article 15.

[2]In *United Brands* discussed *infra* note 4.

[3]Joined Cases 6 and 7/73, Commercial Solvents v. Commission, 1974 E. Comm. Ct. J. Rep. [hereinafter cited as E.C.R.] 223: Case 40/73 and others, Sugar Cartel, 1975 E.C.R. 1663 at 1976-2002.

[4]United Brands, 1978 E.C.R. 207 at 308. United Brands had argued not only that it had not known that its conduct was an abuse contrary to Article 86 but in particular that it did not know that it was dominant.

mann-La Roche[5] the Court pointed out that corporations could use the negative clearance procedure in order to clarify the scope of Article 86 and protect themselves from fines, and that fidelity rebates were sufficiently clearly contrary to the specific clauses of Article 86 and to Article 3(f) of the EEC Treaty,[6] especially as the concepts of dominance and abuse are found in national laws of member states. Again the Court referred to the fact that Hoffmann-La Roche was a large corporation accustomed to doing business throughout the EEC.

In *Miller International* the Court held[7] that the fact that a corporation had not been advised by its lawyer that an export ban would infringe Article 85 was not a defense to a fine. The Court said that the corporation "could not have been unaware" that the export ban had as its object the restriction of competition between its customers, and that this being so it was not necessary to establish whether the corporation actually knew it was infringing Article 85. Sufficient intention had been proved. However in *General Motors*[8] the Court held, in effect, that where a corporation did not know (and could not reasonably be blamed for not having known) that its price was excessive, and when it corrected the error at once when it was discovered, there was no violation of Article 86.

Therefore the principle is that if a corporation actually knows that it is restricting competition or exploiting those with whom it deals, it is acting intentionally, and there is no need to prove that it also knew it was acting contrary to the treaty.

By giving the general definition of abuse the Court in *Hoffman-La Roche* went far to eliminate whatever uncertainty there may have been about the scope of Article 86 in relation to anticompetitive abuses. However, no precise

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[5]Hoffmann La Roche v. Commission, 1979 E.C.R. ¶¶ 128-147.

[6]Article 3(f) states that the activities of the Community must include "the institution of a system ensuring that competition in the Common Market is not distorted."

[7]Case 19/77, Miller Int'l Schallplatten v. Commission, 1978 E.C.R. 131 at 152: *see* Commission decision *Kawasaki*, O.J. EUR. COMM. (No. L 16/9) 1979: *cf.* United States v. United States Gypsum Co, 98 S. Ct. 2864 (1978) discussed in Handler, *"Antitrust 1978,"* 78 COLUM. L. REV. 1363, 1395-1402 (1978).

Although it has been argued by various corporations that they had reasonably believed that they were not dominant, that there would be no effect on interstate trade, and that what they were doing was not a concerted practice or an abuse, the Court has never thought it necessary to consider the evidence for the reasonableness of these beliefs. This seems to imply that provided the corporation knows what it is doing in fact, the reasonableness or otherwise of its belief that its conduct is not prohibited by EEC antitrust law is irrelevant both to the question of infringement and to liability for fines. The principle therefore seems to be as stated in the text: this is confirmed by the opinion of the Advocate General in Cases 32, 36-82/78, BMW v. Commission who said that in Miller International "the Court decided that one who has adopted or accepted a clause which he must have known had as its object the restriction of competition within the Common Market must be held to have intentionally committed an act prohibited by the Treaty, whether or not he was conscious of infringing the prohibition contained in Article 85." The Advocate General also understood the judgment in *Miller* as ruling that a legal opinion that the conduct was lawful was not a mitigating factor in the circumstances of that case. This opinion is in effect confirmed by the judgment of the Court in BMW v. Commission, 1979 E.C.R. ¶ 44.

[8]Case 26/75, 1975 E. Comm. Ct. J. Rep. 1367.

indications have yet been given as to the level at which monopoly prices become so high as to be "unfair" and unlawful. It is suggested that they are unlawful only if they would be unreasonable and out of all proportion to the value given, i.e. when the dominant enterprise should have known that it was exploiting monopoly power.

It should be stressed that, apart from exceptional circumstances such as the *General Motors* case, intention or negligence are relevant only to the fine and not to the question whether an abuse has been committed, which is an objective question.[9]

In its *United Brands* decision[10] the Commission said that the amount of the fine should be considered "in the light of the high profits achieved by [United Brands] as a result of its pricing policy." In its briefs to the Court the Commission explained that "it is extremely important that enterprises should not be led to believe that they can practice abusive pricing and expect to make a profit even if they have to pay a fine." In its *Kawasaki* decision the Commission, while admitting that "the amount of profit directly attributable to the export prohibition cannot be determined precisely,"[11] went on to indicate the total sums involved if parallel imports had reduced prices by 10 percent and by 2½ percent, "the least which could reasonably have been expected in the medium term." In its Statements of Objections in other cases, the Commission has expressly said that to the extent that the profit from unlawful behavior can be estimated, it may be appropriate that the profit made (or the cost imposed on others) should from the basis for determining the amount of the fine.

At least in cases where the corporations knew that what they were doing was unlawful under the treaty, it seems reasonable that in future the fine on each corporation should, subject to all other relevant factors, be approximately equal to the profit made or the cost imposed. It would clearly be a guarantee of an ineffective antitrust law if fines were consistently less than the profits derived from clearly unlawful behavior. Restrictive practices and abuses of market power are not crimes under Community law, but they

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[9]Hoffman La Roche, 1979 E.C.R. ¶ 91: the Advocate General said that abuses are not committed only when market power is used to commit them and cited *Continental Can,* Case 6/72, Continental Can, 1973 E. Comm. Ct. J. Rep. 215. "There is abuse where an undertaking in a dominant position influences the structure of competition by its acts. [In] the present case . . . it is possible to assume an objective concept of abuse . . . unequal treatment of purchasers in no way presupposes the exercise of market power."

[10]O.J. EUR. COMM. (No. L 95/1) 18 April 9 1976: *see* United Brands, 1978 E. Comm. Ct. J. Rep. at 307 & 308 where the Court merely said that "the amount of the fine imposed does not seem to be out of proportion to the gravity and duration of the infringements (and also to the size of the undertaking)."

[11]O.J. EUR. COMM. (No. L 16/9) 16 January 23 1979. But it is not difficult to imagine cases of collusive tendering, for example, where it might be possible to determine fairly accurately the extent to which prices had been raised by agreement. In such a case the fine should probably be equivalent to the amount of the excess, if that was less than 10% of the annual turnover of the enterprises in question.

should not be allowed to pay, either. The power of the Commission to fine up to 10 percent of turnover must be exercised, among other things, in the light of the benefits obtained by the corporations. The fact that the calculation cannot be done with precision does not mean that it should not be done at all. It could not be argued that the amounts of fines should be taken out of the air when a rational basis is available.

In the future, as EEC antitrust law becomes progressively clearer and better known, it is likely to be appropriate for the Commission to fine consistently more often and more heavily than in the past. By comparison the *Bundeskartellamt* deals with many more cases and fines more often than the EEC Commission.[12]

The Commission's policy of relating fines to the profits obtained from unlawful conduct in appropriate cases will imply larger and more precisely calculated fines in future. This will mean more elaborate and closely reasoned arguments in Commission decisions and Statements of Objections about the appropriate amount for the fine and the factors to be considered in relation to it. Although the Court has never yet increased a fine imposed by the Commission and has often reduced fines imposed, the Court's attitude toward fines is not a lax one.

Enforcement Authorities' Manpower

One of the most striking facts about Community antitrust law, for a United States antitrust lawyer, is that enforcement is carried out in practice so largely by the EEC Commission, and that the Commission has an extremely small staff for the purpose. The lawyers and economists in the directorate responsible for Restrictive Practices and Monopolies number twenty-eight: other directorates deal with antitrust investigations, transport, patent, knowhow and trademark licenses, mergers, energy, coal and steel, and state subsidies. The entire professional staff of the Competition Directorate General (119 lawyers and economists) is smaller than that of the German *Bundeskartellamt*. (The Antitrust Division of the Department of Justice and the Federal Trade Commission each has over 300 antitrust lawyers). The Commissions's investigation directorate is much less aggressive than its opposite numbers in the United States. Although the Commission's antitrust

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[12]The *Bundeskartellamt* between April 1975 and April 1976 imposed fines in 371 cases amounting to DM40 million: Brault, *Current Developments in Competition Policies,* 1977 ANTITRUST BULL. 164. During 1978 the BKA instituted formal procedures in about 740 new cases and imposed fines in 17 cases. The EEC Commission has adopted 106 decisions in 1971-1978 inclusive under the EEC Treaty, and imposed fines in 18 cases during that period. The Commission in 1978 took 30 decisions under the EEC and European Coal and Steel Community Treaties (and settled nearly 200 informally). The Commission in 1978 imposed a fine in only one EEC case: *Kawasaki,* O.J. EUR. COMM. No. (L 16/9) January 1979. However Dr. Markert of the *Bundeskartellamt* considered that little could be achieved by giving member states EEC law enforcement powers over mergers: XX ANTITRUST BULL. 107 (1975) at 129.

staff will certainly have to be enlarged on the accession of Greece and on the accession, now probable, of Spain and Portugal, it is clear that it will still be small to deal with a market which, without the three future member states, already contains 256 million people and is thus some 25 percent larger than the United States.

It is therefore obvious that EEC antitrust law is less extensively enforced than United States antitrust law. This conclusion is not significantly modified by the fact that EEC law has group exemptions by legislation and a notification procedure: many serious and important cartels are not notified, and have to be discovered just as they do in the United States.

There are a number of reasons why EEC antitrust law enforcement has so far been left largely to the Commission. But the important point for United States practicing lawyers to grasp is that this is certain to change. EEC antitrust law in the future will be more and more enforced by decentralized means, not because the Commission will reduce its activities or contract its role, but because those of other bodies will expand. This will have very important results for practitioners. EEC antitrust law has now become (or will at least very soon become) clear enough for a decentralized enforcement to be feasible.

Although this paper will consider some of the probable developments arising from the Commission's shortage of manpower and the need for more effective enforcement, it is necessary to stress that the Commission has already taken and is taking some big antitrust cases. The *Quinine Cartel Case*[13] involved three big corporate groups: the *Dyestuffs Cartel Case*[14] involved a total of seventeen such groups including several Swiss and one United States corporation. The *Sugar Cartel Case*[15] involved seventeen sugar producers. At present, the Commission is involved in a procedure against most of the world's aluminum corporations and a number of other parties, some thirty-five in all. The Commission is also engaged in a series of cases against almost the whole European paper industry. The Commission would indeed prefer to concentrate its efforts more and more on such large and important cases. Because of the nature of the Commission's procedure, it is possible for the Commission to handle such cases more simply and with less manpower than would be needed in the United States, and in a way which offers less scope for delaying tactics by the defendant corporations.

Complaints

A feature of the Commission's work in recent years has been the increasing number of complaints by corporations and even individuals alleging viola-

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[13]Cases 41, 44, 45/69, Chemiefarma *et al.* v. Commission, 1970 E.C.R. 661, 735, 769.

[14]Cases 48, 49, 51, 52, 53, 54, 55, 56, 57/69, ICI *et al.* v. Commission, 1972 E.C.R. 619, 713, 745, 787, 845, 851, 887, 927, 933.

[15]Joined Cases 40/73 and others, Suiker Unie *et al.* v. Commission, 1975 E.C.R. 1663.

tions of Articles 85 and 86. Complaints are provided for by the regulations on procedure, and complainants have certain procedural rights.[16] More and more corporations are using EEC antitrust law as a means of preventing themselves being denied supplies of essential goods by dominant firms or shut out of markets by exclusionary practices.

The rights of a complainant to raise the matter before the Court if the Commission does not deal with its complaint have been clarified, at least in part, by the *Metro-SABA* case.[17] Metro a supermarket chain, had complained to the Commission about being excluded from a selective distribution system set up by SABA. The Commission required SABA to alter some features of its agreements, and then gave SABA an exemption under Article 85(3) for the agreements in their amended form, expressly rejecting some of Metro's arguments. It was clear that Metro had an interest sufficient to form the basis of its complaint. The question arose whether Metro had standing to attack the decision of the Commission addressed to and in favor of SABA. The Court ruled that Metro had the necessary standing and said:

> It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2) (b) of Regulation No. 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests.

This seems to mean that a corporation which makes a complaint to the Commission has a right to go to the Court when the Commission does not take action, as well as when the Commission takes a decision which does not fully satisfy the complainant.

It is hoped that this ruling does not imply that in the future the Commission would have no right to decline to act on a well-founded complaint on the grounds that it did not appear important enough to be dealt with by the Commission's scarce resources of manpower and that a satisfactory remedy was available to the complainant in a national court or from a national cartel authority (assuming that this was so). Unless the Commission's antitrust staff is greatly enlarged, the Commission in future cases may be compelled to refuse to act on complaints simply because it has other priorities as a matter of enforcement policy.

Private Antitrust Actions in National Courts

So far there have been surprisingly few claims for damages for violations of Articles 85 and 86. But it seems clear that firms injured by agreements or practices contrary to these articles can sue for damages successfully, and in

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[16]Lang, *The Position of Third Parties in EEC Competition Cases,* 3 EUROPEAN L. REV. 177 (1978).

[17]Case 26/76, Metro-SB-Grossmärkte v. Commission, 1977 E.C.R. 1875: Dinnage, Locus Standi *and Article 177 EEC: the Effect of Metro-SB-Grossmärkte* v. *Commission,* 4 *European L. Rev.* 15 (1979). *See* now Case 125/78, GEMA v. Commission.

appropriate cases could also obtain other remedies. A study in 1966 concluded that this was possible under the laws of all the original six member states.[18] The Court in several cases has given support to this view, saying that "even in the framework of Article 90 (antitrust rules on state monopolies) the prohibitions of Article 86 have direct effect and confer on interested parties rights which the national courts must safeguard."[19] In Ireland and the United Kingdom damages for violations of Article 85 can almost certainly be recovered in actions for conspiracy, and for violations of both Articles 85 and 86 in actions for breach of statutory duty.[20] In the latter type of action the question arises whether Articles 85 and 86 are laws of a kind intended to protect individuals and individual corporations or only to protect the general interest, in German terms whether they constitute a *Schutzgesetz.* Article 85(3) suggests and there are dicta of the Court that confirm that the two articles should be regarded as protecting individuals' interests as well as the general interest.[21]

Apart from whatever uncertainty may still exist as to whether damages can be recovered for injury resulting from violations of Articles 85 and 86, plaintiffs tend to complain to the Commission rather than suing in national courts because it is cheaper and easier, and because a Commission decision (or even commencement of a Commission procedure) will later facilitate a settlement or make a favorable judgment more likely. Clearly, defendants in actions of this kind have many reasons for settling claims made to avoid publicity, and to prevent the plaintiff intervening in proceedings before the Commission or the Court.

Since the Commission is short of manpower in antitrust matters, it would be glad to see straightforward cases dealt with by civil actions in national courts as far as possible.[22] The Commission in briefs to the Court has several times referred to actions of this kind.

The question arises whether civil actions for Community antitrust law

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[18]*La Réparation des Conséquences Dommageables d'une Violation des Articles 85 et 86 du Traité Instituant la CEE,* EEC Commission (1966).

[19]Case 155/73, Sacchi (the Biella Television Case), 1974 E.C.R. 409, 430, 432: Case 127/73, BRT v. SABAM, 1974 E.C.R. 51, 62-63: *see also* Case 51/76, Verbond van Nederlandse Ondernemingen (VNO) v. Inspecteur der Invoerrechten, 1977 E.C.R. 113, 127-29: Case 45/76, Comet BV v. Productschap voor Siergewassen, 1976 E.C.R. 2043, 2052-54.

[20]Lang, THE COMMON MARKET LAW, (1966) pp. 474-82: *see* BAROUNOS HALL & JAMES, EEC ANTITRUST LAW (1975) 131-36 (who discuss only breach of statutory duty and not conspiracy): Rew, *Actions for Damages by Third Parties under English Law for Breach of Article 85 of the EEC Treaty,* 1971 COMMON MARKET L. REV. 462 (breach of statutory duty only considered).

[21]Article 85(3) itself speaks of the interests of consumers: Case 36/65, Italy v. Council, 1966 E.C.R. 389, 407: Case 48/69, I.C.I. v. Commission, 1972 E.C.R. 619, ¶¶ 67, 116-117: Case 6/72, Continental Can v. Commission, 1973 E.C.R. 215, ¶ 26: joined Cases 6 and 7/73, Commercial Solvents v. Commission, 1974 E.C.R. 223, ¶ 32: Cases 41/73 R and others, Suiker Unie v. Commision, 1973 E.C.R. 1465 (intervention of Italian consumers' organization): Case 26/76, Metro-Grossmärkte v. Commission, 1977 E.C.R. 1875, ¶¶ 13, 21, 46-48.

[22]Reply to Question No. 519/72 from Mr. Vredeling in the European Parliament, O.J. EUR. COMM. 67/54, August 17, 1973.

violations would be significantly more common if the national laws were harmonized on the basis of a Community directive. Certainly this would clarify the law and encourage such actions. However, it must be remembered that (partly because lawyers' contingent fees are not allowed in Europe) plaintiffs are less aggressive in Europe than in the United States, and class actions are much less common. Double or treble damages, if provided for under a Community directive, would encourage private actions.[23] Although in the nature of things such actions by individual consumers cannot be expected, such actions by public authorities (when e.g., overcharged as purchasers), or by competitors injured by exclusionary practices, would add considerably to the effectiveness of enforcement of Community antitrust law. Actions by consumer organizations might also be possible. (The standing of such bodies to intervene in antitrust cases before the Court has been established.[24] A directive harmonizing national laws and creating rights to multiple damages would probably be the single largest step forward in improving compliance with Community antitrust law. Such a directive would no doubt state how far decisions of the Commission and of national antitrust authorities, and judgments of the Court, would be evidence of the facts stated in them and of violations of Community law. If this was the law, the Commission would have to be careful when determining when to settle a case informally and when to facilitate private plaintiffs by adopting a formal decision.

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[23]"The fear of treble damage actions is one of the most potent influences in securing compliance with antitrust": NEALE, THE ANTITRUST LAWS OF THE U.S.A. 396 (2d ed. 1970): "private suits are . . . the most effective way of policing the multitude of comparatively local and insignificant violations that will tend to escape the glance of federal enforcement authorities, or that even if noticed do not merit the expenditure of limited enforcement resources": KAYSEN & TURNER, ANTITRUST POLICY (1959) 257: "such proceedings have a vital role to play in aiding understaffed Government agencies to enforce antitrust prohibitions throughout the nation": [1955] DEP'T OF JUSTICE, REP. OF THE ATT'Y GEN'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS, ch. VIII at 380: "The private suit has become an increasingly important method of enforcing the antitrust laws": ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENT 254 (1975): A REVIEW OF RESTRICTIVE TRADE PRACTICES POLICY (cmnd 7512, 1979, London) calls treble damage actions "a notably powerful provision." "The treble damage has exceeded its architects' wildest expectations as an aid to governmental enforcement, with over 1,400 such suits having been commenced in 1978 as compared to 228 in 1960. Close to 3,000 of such cases are presently pending in the federal courts": Handler, *Antitrust-1978,* 78 COLUM. L. REV. 1363, 1427: private enforcement is "[t]he strongest pillar of antitrust", Loevinger, *Private Action — The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL. 167 (1958): OECD, MARKET POWER AND THE LAW 164-68 (1970).

One important limitation on the scope for private antitrust litigation in Europe is the limited rights to obtain discovery of defendants' documents under the national procedural rules of most EEC member states. Broadly, only Ireland and the United Kingdom give plaintiffs rights as extensive as those in the United States. Another is the fact that lawyers' contingent fees are not permitted in Europe.

In the United Kingdom in 1978 the Post Office has recovered £9 million from certain cable manufacturers: A REVIEW OF RESTRICTIVE TRADE PRACTICES POLICY (cmnd 7512, 1979, London) ¶ 5.47.

[24]Cases 41-48/73, 111-114/73, Sugar Cartel Case, 1973 E.C.R. 1465.

Until a Community measure providing for double or treble damages is introduced, private actions are unlikely to become a significant means of enforcing Community antitrust law *independent of* public enforcement procedures. However, even if no such measure is introduced soon, complaints to enforcement authorities followed by private claims against corporations which have previously been found by Community institutions or by national cartel authorities to have violated Articles 85 and 86 can certainly be expected to become more and more common.

Harmonization of national antitrust laws (not necessarily adoption of a uniform law) would be desirable for another reason. At present, in particular in Italy which has no national antitrust law, the legal regime applicable to a corporation engaged in interstate trade contrasts with that applicable to a corporation which is not so engaged. Similar but less drastic differences between Community law and national law exist in the other member states.[25] This is likely to produce economic anomalies. It would also greatly simplify doing business throughout the EEC if the antitrust laws in all the member states were as similar to one another, and as similar to Community antitrust law, as possible.

Should the likelihood of private claims for damages affect the amount of any fine being imposed by the Commission? The better view is that it should not. Commission fines are not now based on the assumption that no damages will be paid: indeed the Commission believes that such damages can be recovered in appropriate cases. Damages are not a penalty (at least if they are not multiple damages) and so technically there would be no question of a double penalty. Even if every potential plaintiff sued (which is impossible normally) the aggregate loss to the plaintiffs, which would be the measure of damages, might be different from the benefits to the defendants, which would indicate prima facie the amount of the fine. Although the analogy is not exact, criminal penalties under national laws are not affected by the likelihood that compensation will also be payable by the accused. In the United States fines are imposed for antitrust violations as well as treble damages, themselves by definition partly punitive, which are recovered by corporations injured by antitrust violations. It is not unfair that corporations which deliberately go in for behavior which is unlawful (and only corporations which act deliberately or negligently can be fined, and only those which act deliberately are likely to be fined the full amount of the profit they make) should end up worse off (and not merely no better off) if they have caused losses to others.

This is so in particular as Community antitrust law does not authorize fines on directors or executives involved in antitrust violations (still less allow them

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[25]For comments on the main developments in national antitrust policies in the EEC member states, see THE ANNUAL REPORTS OF THE COMMISSION ON COMPETITION POLICY: EIGHTH ANNUAL REPORT (1979) ch. III, and p. 13.

to be put in jail as in the United States). Indeed, as compensation by definition cannot punish or deter if it is limited to loss actually caused to others (or to profit made at the expense of others), fines should be additional to, and not instead of, compensation. A company could perhaps insure against the risk of having to pay damages, though it could probably not insure against the risk of being fined. Whether a company could deduct fines or damages for tax purposes depends on national tax laws: in most countries, they probably could not.

More Widespread Compliance, and More Efficient Enforcement?

The length of time taken by the Commission to make a decision probably does not strike a United States antitrust lawyer, who is accustomed to more complex cases and procedures, as particularly long. It varies on average between one and two years from the commencement of the procedure. This includes a considerable amount of time for translation of documents into all the EEC official languages. However, there is a big backlog of cases and some cases are dealt with only after years of waiting.

Recently Commission officials have tried to increase efficiency by asking complainants, when it seemed reasonable to do so, to give fuller details and background information in their complaints. Substantial corporations advised by experienced lawyers can fairly be asked to produce fully documented complaints.

For some time officials of the Commission's Competition Directorate General have also dealt with some relatively less important cases by writing letters saying in effect that on the basis of the information available the Commission sees no reason to take action against the addressee's agreements. This is the nearest thing which exists to the Department of Justice Business Review Procedure. Such letters are not normally discussed with the Commission's legal service or with the Advisory Committee of representatives of national cartel authorities. Third parties (unless they have approached the Commission themselves) are not given any opportunity to object to such letters, or to any other informal settlement procedure. (Third parties would be notified by a notice in the EEC Official Journal of the Commission's intention to adopt a negative clearance or an exemption under Article 85(3)).

The effect of such letters is merely to assure the parties to a notified agreement that unless further facts come to the Commission's notice, it does not intend to take any action. Even a letter stating that the official signing it considers that an agreement can be exempted under Article 85(3) does not commit, bind or estop the Commission,[26] but an assurance by letter is often

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[26]Case 71/74, Frubo v. Commission, 1975 E.C.R. 563, 582. *See* Cases 255/78, 1-3/79, Guerlain and others.

sufficient for the parties, at least if it confirms that Article 85(1) is inapplicable. It is less satisfactory if Article 85(1) applies and if the agreement is void under 85(2) unless a formal exemption is given: presumably a formal exemption under 85(3) would be needed to prevent the parties being liable to pay damages if the other circumstances made them liable.

Overall enforcement of Community antitrust law could be made more efficient in the future by enforcement by the national cartel authorities, all of which have power to enforce Articles 85 and 86. However so far they have rarely done so. Not all of these authorities are active and those which are active are already overworked. Some have not got the necessary staff of lawyers and economists for the job. In the past some authorities may have been discouraged by the knowledge that the Commission could deprive them of jurisdiction by itself taking up the case,[27] and not all the national authorities have all the legal powers which they would need if they were independently to enforce Community law fully and efficiently.[28] However, the national authorities have a duty to carry out investigations when requested to do so by the Commission, and could be called on to do so under Article 5 EEC

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[27]Regulation no. 17/62, Article 9: *see* Case 48/72, de Haecht (No. 2), 1973 E.C.R. 77.

[28]Regulation no. 17/62, Article 13. As to the three new member states, BAROUNOS, HALL & JAMES, EEC ANTITRUST LAW 293 (1975) argue that in the United Kingdom the Restrictive Practices Court has no power under United Kingdom law to exercise the powers given to it by Article 9(3) of Regulation no. 17/62. However, they do not discuss whether any other United Kingdom body might have this power, and they give no reason for saying that any United Kingdom legislation is necessary. Article 9 is directly applicable, and Article 9 says that the authorities of member states have power to apply Article 85(1) and Article 86. No legislation has been passed in Denmark, Ireland or the United Kingdom to amplify this power or to create special procedures for enforcing it. (However, Denmark has adopted an act on control of compliance with the EEC's regulations on monopolies and restrictive practices, Stat. No. 505 of November 29th 1972 authorizing the Danish Monopolies Authority (*Monopoltilsynet*) to investigate firms when asked to do so by the Commission). The national antitrust authorities in Denmark, Ireland and the United Kingdom have never enforced Article 85 or 86, since they were first entitled to do so in January 1973. The Danish authority has an international section which deals with EEC matters, which has seven officials with legal or other appropriate qualifications: the Irish Restrictive Practices Commission staff includes one lawyer and one economist: *see* Walsh, *Restrictive Business Practices in the Republic of Ireland: Legislation and Administration,* XIX ANTITRUST BULL. 803 (1974): the United Kingdom Office of Fair Trading (which is not the only antitrust body in the United Kingdom but which is the body which deals primarily with EEC matters) has had until recently 10 lawyers and 8 economists. In the original six member states, the *Bundeskartellamt* is by far the largest and most active national antitrust authority. 58 lawyers and 48 economists work full time for the *Bundeskartellamt.* Before Regulation 17/62 came into force in 1962, the BKA granted an exemption under Article 85(3) in six cases. Since then the BKA has taken no further action to apply Article 85-86. No national legislation has been enacted in Germany to give the BKA power to enforce or to impose sanctions for breaches of Articles 85-86. However German antitrust law and EEC antitrust law are in many respects similar, so that the BKA achieves results similar to those under EEC law merely by applying German law.

Treaty. Clearly they have power to enforce Articles 85 and 86.[29] Since national authorities have no power to give exemptions under Article 85(3), they would act only in cases where it was clear that no such exemption could be given.

Until now national courts and cartel authorities have tended to adjourn cases when points of EEC antitrust law arose, to await the decision of the Commission or the Court. In future the Commission may call on national antitrust authorities to deal with cases involving violations of Community law which it believes they could handle effectively.

Another reason to expect more widespread compliance with Community antitrust law in future is the fact that if a corporation is found to have violated Community antitrust law, that finding greatly increases the probability of national antitrust proceedings for the same or similar behavior, and certainly greatly increases the probability of actions for damages for the same behavior. Such actions for damages might not necessarily be in the courts of a member state of the EEC. It is not difficult to imagine cases in which a ruling of the EEC Commission or the Court would greatly help a plaintiff in a United States triple damages action, even if he was suing in respect of behavior committed in the United States and contrary to United States antitrust law.

Observance Due to Corporations' Annual Audits

Community law is likely to be more effectively observed in future due to corporations' annual audits. Auditors must take into consideration the contingent liabilities of corporations. These may include fines for violations of Community antitrust laws, damages in civil actions by plaintiffs injured by violations, and e.g., invalidity of patent licenses, distribution agreements and long term supply contracts. It could also involve problems with joint ventures.

Under the second and fourth EEC directives on corporation law[30] all the important corporations of Europe, both large and closed, will be obliged (many for the first time) to publish audited accounts on a standardized basis. These accounts must provide for liabilities and charges to cover losses and debts which are likely to be incurred. If the auditor has made any qualifications in his report, that fact must be disclosed and the reasons given and his report must be published in full. The writer believes that more and more

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[29]Regulation no. 17/62, Article 9(3): Waelbroeck in MÉGRET, LOUIS, VIGNES & WAELBROECK, 4 LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENNE, 152-79 (1972): EEC COMMISSION, SIXTH REPORT ON COMPETITION POLICY ¶¶ 110-15 (1977).

[30]SECOND COUNCIL DIRECTIVE ON COMPANY LAW, O.J. EUR. COMM. (No. L 26/1) January 31, 1977 and FOURTH COUNCIL DIRECTIVE, O.J. EUR. COMM. (No. L 221/11) August 14, 1978.

accountants will refuse to take the risk of certifying accounts without asking questions about possible antitrust law violations, European corporations will become more and more aware of the rules of Community antitrust law, and less and less willing to run the risks of infringing them. In fact it is surprising that accountants have so far been so willing to certify, without verification, accounts of corporations which have no antitrust compliance programs. Claims against accountants are less common in Europe than in the United States, but they are certainly possible.[31] Lawyers are naturally not willing to certify that a corporation has no contingent liabilities under EEC antitrust law, except after extensive investigation.

In my view, unless an auditor can persuade the corporation's lawyer to take the responsibility of certifying that there are no such contingent liabilities, (as distinct from merely certifying that he knows of none) the auditor should in order to avoid criticism of his audit procedures either demand to see the corporation's antitrust law compliance program, or have his own checklist of questions on possible contingent liabilities arising out of EEC antitrust law violations.

Similar but sometimes more serious problems can arise in the context of take over bids and public issues where lawyers, accountants and banks have to certify that the corporation in question has no contingent liabilities undisclosed or not fully provided for. Merely giving the client a text of Articles 85 and 86 and asking if the corporation might have infringed them is insufficient (and might be professional negligence where the auditor was aware of facts which should have alerted him to a possible antitrust law violation).

If the auditor knows there is no company antitrust law compliance program, the question whether he may properly refrain from making any inquiries of his own at all (other than a general inquiry not referring to antitrust law in particular) must obviously depend on the circumstances.

The first task which an auditor may have in connection with EEC antitrust law is to identify areas which could give rise to contingent liabilities.

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[31] It would also be more unusual in Europe than in the United States of America for a director who knew of an antitrust violation but failed to reveal it (or to terminate it) to be made personally liable for any loss resulting. But this is possible under national law in the EEC in certain circumstances. *See* on the related problem of class actions, Fisch, *European Analogues to the Class Actions: Group Action in France and Germany,* 27 A.J. COMP. L. 51 (1979).

There are no comprehensive agreements between the lawyers' and accountants bodies in Europe as to the answers to be given by lawyers to auditors' questions about possible contingent liabilities under antitrust laws, corresponding to the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (1976). See Markesinis, *The Not so Dissimilar Tort and Delict,* 1977 L.Q.R. 89: in the United Kingdom, Hedley Byrne v. Heller (1964) A.C. 465: Midland Bank Trust v. Hatt Stubbs & Kemp (1978) 3 W.L.R. 167: "Accountants Liability to Third Parties—the *Hedley Byrne* Decision" (1965). *Institute of Chartered Accountants Members Handbook.*

EEC law clearly makes unlawful in certain circumstances:

- arrangements with competitors for price fixing, exchange of price information, understandings on price leadership, collusive tendering;
- export bans, using patents and trademarks to divide up the Common Market, and other restraints on intrabrand competition;
- total requirements contracts, fidelity rebates, full line forcing and other exclusionary practices and restraints on inter-brand competition;
- charging excessive prices, imposing unfair or onerous conditions in contracts where bargaining power is seriously unequal;
- refusal to supply competitors and boycotts;
- joint ventures and profit sharing;
- certain clauses in patent, trademark and knowhow licenses;
- non competition clauses in sales of a business;
- mergers and acquisitions of competing companies.

If in the course of an audit an auditor became actually aware that the corporation had such arrangements or practices, he could not always escape liability for negligence by arguing that he could not be expected to know that these could be, according to the circumstances, contrary to EEC antitrust law. He would thus be bound to make further detailed inquiries.

In the course of a normal audit an auditor is much more likely to come across some of these things than others. He would normally or certainly be aware, for example, of fidelity rebates, joint ventures, acquisitions and mergers, and sales of a business. He would also be aware of the existence of exclusive distributorship agreements and patent licenses, and of high prices being charged for particular commodities.

Even if therefore an auditor is not thought to have any duty to make any general inquiry about compliance with EEC antitrust law, therefore, an auditor can hardly avoid being put on notice, more or less clearly according to the circumstances, of some possible EEC antitrust law violations. An auditor might also become aware of such matters in the course of activities other than an audit, for a company he was later auditing.

Presumably, an auditor should be able to recognize the most common principal circumstances in which a possible EEC antitrust law violation might have occurred, should he come across them. Otherwise he may fail to make detailed inquiries where it would be appropriate or necessary to do so.

Both EEC fines and actions for damages would normally involve smaller sums than those claimed in United States treble damage actions. However, EEC fines are potentially much larger than United States fines for antitrust infringements, and in addition the cost to a corporation if patent licenses or distribution contracts were held to be unlawful and so under Article 85(2) "automatically void" might be very large indeed. Even without the introduction of treble damage actions in Europe, therefore, there can be no justification for regarding liabilities resulting from EEC antitrust law as minor matters not requiring specific inquiry by auditors.

Further Legislation

One possible means of reducing the Commission's load of individual cases is by further legislation, and in particular by further group exemptions under Article 85(3). However, apart from the group exemption for patent licenses and the amendment of the exemption for exclusive distribution contracts, this possibility is limited in importance by the terms of Regulation No. 19/65 which gives the Commission power to adopt group exemptions. This applies only to agreements to which not more than two corporate groups are parties, and is also limited as to the subject matter of the agreements which can be exempted. In the next few years, group exemptions for trade mark licenses, knowhow licenses and licenses of other industrial and commercial property licenses can be expected, but only after the Commission has first gained sufficient experience with a series of individual decisions on the type of license in question. Apart from licensing problems, it is difficult to believe that further legislation could usefully contribute to solving the problems of e.g., joint ventures or abuses of dominant positions. Some further legislation on procedural questions is possible and indeed perhaps desirable to strengthen the powers of the Commission and to clarify the rights of the defense.

Investigations by the Commission

This paper does not deal with the Commission's procedures, but it seems worth mentioning the development which is to be expected. It is certain that the Commission will soon be compelled to fine for failing to give information during investigations, or for giving incorrect information to Commission inspectors. So far, in cases where inspectors have been told e.g., that important and recent documents no longer exist, the Commission has been able to get copies from other sources without difficulty. It is however open to the Commission, after having given the corporation an opportunity to make its case, to adopt a decision giving reasons for finding as a fact that the corporation has the missing documents or facts in its possession or available to it. Such a decision could be appealed to the Court, where no doubt the issue would involve a straight conflict of evidence. It is clear therefore that the limits of the Commission's tolerance will soon be reached in this respect, and that decisions obliging corporations to supply information, and fining them for failure to produce it, are to be expected.

Another development which is to be expected is the compilation and publication of a book of instructions for Commission inspectors, corresponding roughly to the U. S. Department of Justice *Grand Jury Manual,* setting out what the Commission believes its inspectors can and should do in particular circumstances. This would both clarify the Commission's view of its inspectors powers and duties and clarify the rights of corporations being investigated.

Lawyers' Professional Privilege

The powers of the Commission under Regulation 17/62 to inspect and copy documents relating to a suspected infringement of EEC antitrust law have been litigated surprisingly little.[32] The question whether and if so how far Community law recognizes an immunity for documents passing between lawyers and their clients has not come before the Court. Regulation 17/62 is silent on the point, although when the proposal for that Regulation was under discussion the European Parliament recommended that lawyers and auditors *(experts comptables)* should be expressly given the right to refuse to disclose information protected by "professional secrecy."

The national laws in Ireland and the United Kingdom are based on the same principle as in the United States: certain documents are privileged wherever they may be, unless the privilege is waived by the client. Broadly, the national laws of the original six member states are based on different principles: clients' documents in the lawyer's possession are immune from disclosure, (and the lawyer has a corresponding duty to withhold them), and the rights of the defense and the right to secrecy of confidential correspondence give immunity from disclosure for certain communications both to and by a lawyer about legal matters and especially current legal proceedings.[33] In all member states there is a rule to the effect that the immunity does not apply if the documents in question are involved in the commission of a crime or if there is strong evidence that the lawyer himself has acted illegally.

The Commission has recognized this immunity in a reply to a question asked in the European Parliament:

> Article 14 of Council Regulation No. 17/62 empowers the Commission to check and copy all correspondence and other business papers of a firm or association of firms, including papers prepared for it by outside lawyers and legal consultants.
>
> Community competition legislation does not provide for any protection for legal papers. But the Commission, wishing to act fairly, follows the rules in the competition law of certain Member States and is willing not to use as evidence of infringements of the Community competition rules any strictly legal papers written with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defense of the firm or association of firms concerned. When the Commission comes across such papers it does not copy them.
>
> Subject to review by the Court of Justice, it is for the Commission to determine the nature of a given paper. . . .[34]

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[32]There is little difficulty in litigating such matters. Acts of the Commission in the course of its procedure which have legal effects may be challenged before the Court: *see* however Case 8/71, Deutsche Komponistenverband, 1971 E.C.R. 705, Case 125/78, Gema v. Commission, 1979 E.C.R. Article 173 EEC Treaty lays down strict time limits for challenging Community actions. It is not clear how far the failure to challenge such an act at the time can estop the corporation concerned from challenging the validity of a decision of the Commission arrived at on the basis of evidence improperly obtained if no challenge was made at the appropriate time.

[33]CONSULTATIVE COMMISSION OF THE BARS AND LAW SOCIETIES OF THE MEMBER STATES OF THE EUROPEAN COMMUNITY, Edward, THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN THE NINE MEMBER STATES OF THE EUROPEAN COMMUNITIES.

[34]O.J. EUR. COMM. (No. C 188/30) August 7, 1978, question No. 63/78.

Several comments are appropriate:

- The Commission has accepted the principle that it is legal documents which are protected, irrespective of where they are found, as well as documents relating to the defense.
- Although it is not entirely clear, the immunity recognized by the answer covers only documents written by or to a lawyer. The position of other documents is left open.
- Under the existing Community legislation, there is no provision for any third party (whether a national judge, the head of a national bar or a member or official of the Court) to decide whether a given document is privileged. Nor could any such person be given this task by legislation unless the rules to be applied were clarified. Clearly the client company itself cannot be the final arbiter of whether its documents are privileged.[35] Nor, in particular because the law is not clear, can it be left to the corporation's lawyer to decide definitively what documents are privileged.
- The Commission would only recognize as immune documents written to or by the lawyer in his capacity as legal adviser (as distinct from documents written to or by him as financial adviser, director, experienced friend or secretary of a trade association or of a cartel, and as distinct from documents deposited with the lawyer for safe keeping and not for the purpose of obtaining advice). Nor would the Commission recognize the documents as immune if the lawyer was helping his client to do something which was reasonably clearly contrary to Community law.[36] (If there is real doubt as to whether a given course of action is legal, it can and should always be brought to the notice of the Commission).
- The immunity would be recognized only if the lawyer is professionally qualified and effectively subject to professional ethics and discipline. Two members of the Commission's legal service have written that "in the context of a future comprehensive and balanced solution of all the issues involved there seems to be no reason to treat salaried lawyers employed by their client differently from independent lawyers in professional practice, provided that they are effectively subject to similar rules of professional ethics and discipline."[37]

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[35]Commission decision *AM & S Europe Ltd.*, O.J. EUR. COMM. (L 199/31) August 7, 1979 (later appealed to the Court: Case 155/79).

The question who should determine whether a document is to be regarded as protected from being used is entirely separate from the question whether the Commission's Competition Department should be reorganized so as to separate the adjudicating and the prosecuting tasks, as is done in the Federal Trade Commission and the German Federal Cartel Office.

[36]*See* Edward, *Confidentiality and Privilege in the EEC Context*, NEW L.J., December 14, 1978, p. 1208.

[37]Ehlermann & Oldekop in DUE PROCESS IN THE ADMINISTRATIVE PROCEDURE, published by F.I.D.E. (*Fédération Internationale pour le Droit Européen*), Copenhagen 1978.

- It would greatly help to clarify the position, and to ensure the framing and acceptance of clear rules on immunity, if it was expressly accepted by the lawyers' organizations of all member states that it is contrary to professional ethics and a matter for disciplinary action for a lawyer to help his client to make arrangements which are reasonably clearly contrary to Community law. This arises in particular if the efficacy of the arrangements depends on their not being disclosed, or not being fully disclosed, to the Commission.[38]
- The extent to which communications with salaried lawyers should be regarded as protected depends on the regime of professional ethics and discipline, if any, which is applicable. In many situations this is by no means clear, and it is not primarily the Commission's job to clear it up.

If the Commission's inspector looks briefly at the documents and makes no copy of them because he considers them privileged, the Commission cannot use the documents subsequently.

Apart from the citizen's fundamental right to legal advice, the Commission's support for the principle of privilege is largely based on the knowledge that lawyers are in general the allies of the Commission in ensuring that the law is obeyed. Therefore, there is a public interest in ensuring that lawyers are free to advise their clients, in writing if necessary, against violating Community law. It seems clear that in Europe such advice has often been disregarded in the past. The problem of EEC antitrust law enforcement (as with antitrust enforcement elsewhere) has not been to inform the lawyers

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[38]Lawyers in the Community should also explicitly accept that they have a duty not to help their clients commit breaches of the laws of other member states on e.g., tax and exchange control. If this was not so, clients wishing to evade or otherwise break the law of their own state would be encouraged to seek the advice of lawyers of other member states (who under the directive on lawyers' services would be free to give it: Council Directive of March 22nd 1977, O.J. EUR. COMM. (No. L 78/14) March 26 1977.) This would hardly be desirable.

The Commission would ask for professional disciplinary action to be taken against a lawyer who had deliberately helped his client to break Community antitrust law, and it might also refuse to allow him to appear in antitrust hearings. It would of course have to consider whether privilege could be extended to lawyers whose professional organizations refused to accept the ethical principle stated in the text.

The question of how far documents passing between a lawyer and his client should be immune from disclosure to a public authority must be considered in the context of the other rules and practices involved. In particular, it may depend partly on the extent of the powers of the authority concerned, and the duties and disciplines to which lawyers are subject under their professional rules. The Commission is willing in principle to clarify and where necessary to improve its procedure and in particular to clarify the rights of the defense. But this should be done in such a way as to maintain the balance between the interests of defendants and the public interest in enforcement of rules of competition law.

The national laws of the nine member states differ on the question of immunity of lawyer-client documents from disclosure, and Community law will therefore not necessarily be the same as any one national law. A rational solution which takes account of the legitimate need for confidentiality in obtaining legal advice, while allowing effective law enforcement and ensuring that the immunity cannot be abused or wrongly granted, needs to be worked out. Lawyers' organizations such as the *Commission Consultative des Barreaux de la Communauté Européenne* (which has already studied the problem) will, it is very much hoped, soon contribute to working out such a solution. Clearly a Community solution needs to be found to avoid differentiation between lawyers in different member states.

what the law is, but to convince the clients that they would be wiser to obey it, (and perhaps to get clients to consult their lawyers in the first place). Consulting a lawyer *before* the trouble starts is less common in Europe than in the United States.

A New Community Tribunal in Competition Cases?

The Court has been concerned with the increase in its present and future workload, due to an increasing number of cases under the EEC Treaty (of course, not only or primarily antitrust cases), the accession to the Community of three new member states (Denmark, Ireland and the United Kingdom) and the probable accession of three more (Greece, Spain and Portugal), and the Court's new jurisdictions under international conventions related to the Community such as the Community Patent Convention and the Convention on Enforcement of Judgments.

Among the measures the Court has suggested to solve this problem is the setting up of a new tribunal which would be, in effect, a court of appeal from the Commission in (among other kinds of cases) antitrust matters. This would make the Court into a court of final appeal only on points of law. The new tribunal would be a tribunal of final appeal on all questions of fact.

This proposal would have to be considered officially by the other Community institutions and indeed by the national parliaments, since it would involve amending the EEC Treaty.

This proposal is quite separate from the suggestion, which has often been made unofficially,[39] that the Commission's roles of prosecuting and adjudicating should be separated and put into the hands of different Commission officials, with appropriate powers and duties. This could of course be done without any amendment of the treaties.

It would be premature and pointless to speculate about the final outcome of these two proposals which, though prompted by different motives, might produce some of the same results, and indeed would almost certainly not both be necessary.

However, the adoption of either proposal would certainly bring about one important result, which is in any event likely to occur gradually. More and more emphasis is likely to be placed in the future, both by the Commission and by private lawyers, on facts, economics and evidence. The habit of European defense lawyers of making statements of fact without substantiating them by evidence, in particular by quantitative evidence, is certain to decline as EEC antitrust cases become more complex and turn more and more on the application of principles to facts rather than the establishment of principles.

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[39] *See, e.g.*, Davidow, *EEC-Fact Finding Procedures in Competition Cases: An American Critique*, 14 Comm. Market L. R. 175, 187 (1977): Walsh, Restrictive Business Practices in Ireland: Legislation and Administration, XIX ANTITRUST BULL. 803, 845-46 (1974): Markert, *EEC Competition Policy in Relation to Mergers*, XX ANTITRUST BULL. 107 at p. 129 (1975).

Practical Comments

- Do not allow your clients to retain restrictive contractual clauses which they do not need and do not enforce. It is no defense to say that e.g., an export ban is not enforced. Its mere existence will discourage exports: clauses that are always obeyed never need to be enforced, but they are the *most* objectionable clauses from the viewpoint of an antitrust authority.
- Do not listen to a European lawyer or anyone else who advises you to write restrictive clauses and not to notify them, because "everyone does it." The risks of not notifying are increasing all the time, and you are liable to your client for professional negligence if you do not advise him that he must not only notify restrictive agreements but also bring anticompetitive and exploitative behavior to the attention of the Commission as well. Community antitrust law is not now significantly different in scope from United States antitrust law.
- Do not allow your clients to fool themselves that "the Commission would never apply EEC antitrust law to our industry"—or to our company, or to this kind of joint venture. Everyone can comply, but nobody is exempt.
- Do not allow your clients to think that they will make more money if they go ahead, even if they ultimately have to pay a fine. The Commission is setting out to relate fines to profit made from the infringement, and your client may have to pay damages as well. For continuing violations, the Regulation on limitation period[40] does not begin to run until the violation has ended, and then it runs for five years. Fines are imposed in respect of all the years during which the violation occurred.
- Do not allow your clients to believe that practices which are clearly violations of United States antitrust laws are, for some reason, lawful in the EEC. Certainly, do not allow them to believe this merely because there has not yet been a case decided by the Commission, or by the Court, exactly like your client's. It may be that many lawyers tell the Commission things they do not believe and would not tell their clients, but it seems that many people are simply refusing to believe things that seem obvious to the best informed and most objective lawyers around.

Above all:

Notify your agreements to the Commission and disclose possible abusive practices to it. Notifying and disclosure, *provided* it is done fully and frankly:

ends the risk of fines;

establishes your good faith;

gets your version of the story on the Commission's file first;

improves your chances of getting an informal settlement and so avoiding publicity and a decision which would be evidence in an action for damages;

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[40]Regulation no. 2988/74 concerning limitation periods, O.J. EUR. COMM. (No. L 319/1) November 29, 1974.

enables you to get an exemption under Article 85(3) which is retroactive to the date of notification;

gives some protection against enforcement by national cartel authorities (since nothing inhibits them from enforcing 85(1) against a cartel which cannot benefit from 85(3) because it was never notified);

notification may end the risk of being found to have violated national antitrust law, if an exemption is given;

ends the risk of actions for damages and invalidity of agreements if you get an exemption under Article 85(3), which would be a defense in respect of the period to which it related.

Even though an agreement may be obviously beneficial, notification is still always necessary.[41]

JOHN TEMPLE LANG

[41] Registration even of beneficial agreements is also necessary under United Kingdom law: A REVIEW OF RESTRICTIVE TRADE PRACTICES POLICY (Cmnd 7512, 1979, London) ¶¶ 5.9, 5.47.

Appendix

Lang, *The Procedure of the Commission in Competition Cases,* 14 COMM. MKT. L. REV. 155 (1977) at 165-66. Insofar as the Commission has referred to turnover it has usually been turnover in the EEC and in the "relevant market," not world turnover, which has been taken into account. Details may be of interest.

Case	*Year of Commission's decision*	*Amount of fine(s) (u.a. = units of account)*	*Fine as confirmed by the Court*
Chemiefarma and others (Quinine)	1969	210,000 u.a.	200,000 u.a.
		190,000 u.a.	180,000 u.a.
		65,000 u.a.	55,000 u.a.
		2 × 12,500 u.a.	No Appeal
		10,000 u.a.	No Appeal
B.A.S.F. and others (Dyestuffs)	1969	8 × 50,000 u.a.	Confirmed
		40,000 u.a.	30,000 u.a.
Commercial Solvents	1972	200,000 u.a.	100,000 u.a.
WEA Filipacchi	1972	60,000 u.a.	No appeal
Pittsburgh Corning	1972	100,000 u.a.	No appeal
Suiker Unie and others (Sugar Cartel)	1973	1,500,000 u.a.	600,000 u.a.
		2 × 1,000,000 u.a.	100,000 u.a.
		500,000 u.a.	880,000 u.a.
		2 × 700,000 u.a.	100,000 u.a.
		400,000 u.a.	80,000 u.a.
		300,000 u.a.	annulled
		2 × 200,000 u.a.	40,000 u.a.
		2 × 800,000 u.a.	200,000 and 240,000 u.a.
		600,000 u.a.	150,000 u.a.
		3 × 100,000 u.a.	annulled
Deutsche Phillips	1973	60,000 u.a.	No appeal
General Motors	1974	100,000 u.a.	Annulled
Belgian Wallpaper	1974	135,000 u.a.	Annulled
		120,000 u.a.	
		36,000 u.a.	
		67,500 u.a.	
Preserved Mushrooms	1975	2 × 32,000 u.a.	No appeal
		26,000 u.a.	
		2,000 u.a.	
		8,000 u.a.	
United Brands	1975	1,000,000 u.a.	850,000 u.a.

(continued)

Appendix (continued)

Case	*Year of Commission's decision*	*Amount of fine(s) (u.a. = units of account)*	*Fine as confirmed by the Court*
Miller International	1976	70,000 u.a.	Confirmed
Theal (Tepea) Watts	1976	2 × 10,000 u.a.	Confirmed
Vegetable Parchment	1977	3 × 25,000 u.a. 2 × 15,000 u.a. 10,000 u.a.	No appeal
Hugin	1977	50,000 u.a.	Annulled
BMW	1977	150,000 u.a. 5 × 2,000 u.a. 3 × 1,500 u.a. 39 × 1,000 u.a.	Confirmed
Kawasaki	1978	100,000 u.a.	No appeal

All these fines relate to substantive violations, not to giving incorrect information or daily "fines" to enforce compliance. The Commission would normally know turnover figures even where they were not disclosed in its decision.