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Overview of European Community Law: A Primer for Businessmen and Attorneys

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OVER THE last seventeen years American business and commercial interests within the European Community have been substantial. In terms of trade, recent figures indicate that the community purchased twenty-five percent of all United States exports and the United States purchased twenty-three percent of all Community exports. If the current trade negotiations under the General Agreement on Tariffs and Trade (GATT) prove even modestly successful, the dollar value of import-export activity between the United States and the European Community undoubtedly will increase in the future. In terms of direct investment, in 1958 American business directly invested approximately 1.9 billion dollars in the original Community; in 1972 the estimated book value of direct American investments in the expanded Community of Nine was 26 billion dollars. At present, American direct investments account for approximately one-seventh of all new industrial investments within the Community.

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1. In formal terms the “European Community” comprises the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). As used in this Article, however, “European Community” will be interchangeable with the EEC (i.e., the Common Market) unless otherwise specified. The European Community presently consists of nine member states: the six original members (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands), and the three new acceding members as of 1973 (Denmark, Ireland, and the United Kingdom). Norway, which had previously signed the Treaty of Accession, vetoed entry into the Community by a popular referendum in the fall of 1972.


In view of the monetary interest reflected by these statistics, a working understanding of the Community's commercial and business laws would seem of interest to Americans investing in Europe. Accordingly, this Article is designed to highlight those aspects of the evolving body of law known as "European Community law" which are directly relevant to the American businessman and attorney having or developing business and commercial relationships within the Community. After a brief overview of the legal and institutional underpinnings of the Community, consideration is given to the following matters: (1) the specific Community laws affecting the basic forms of American business activities within the Community (i.e., import and export of goods, licensing arrangements, and the establishment of branches and subsidiaries); (2) the pervasive impact of European Community anti-trust laws on American business activities and investment endeavors within the Community; and (3) certain other areas of Community law (e.g., company and tax laws) which have a direct effect upon American business activities and investments. The Article concludes with a statement of the author's opinions concerning the probable effect of the further evolution of Community commercial and business laws on American business activities abroad.

I. TREATY OF ROME AS CONSTITUTION OF THE EUROPEAN ECONOMIC COMMUNITY

The primary positive source of Community law is the Treaty of Rome which established the Community in 1958. Despite the complexity of its

<table>
<thead>
<tr>
<th>Original Community of Six</th>
<th>Present Community of Nine</th>
<th>U.S.A.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area (thousand sq. miles)</td>
<td>449</td>
<td>3,600</td>
</tr>
<tr>
<td>Population (millions)</td>
<td>190</td>
<td>207</td>
</tr>
<tr>
<td>Civilian Labor Force (millions)</td>
<td>75.9</td>
<td>84.1</td>
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<tr>
<td>% in agriculture</td>
<td>12.1</td>
<td>4.1</td>
</tr>
<tr>
<td>% in industry</td>
<td>43.9</td>
<td>29.0</td>
</tr>
<tr>
<td>% in services</td>
<td>42.2</td>
<td>61.1</td>
</tr>
<tr>
<td>GNP ($ billion)</td>
<td>485</td>
<td>993.3</td>
</tr>
<tr>
<td>Exports (% of world total) (1972)</td>
<td>17.3</td>
<td>14</td>
</tr>
<tr>
<td>Imports (% of world total) (1972)</td>
<td>15</td>
<td>14.7</td>
</tr>
<tr>
<td>U.S. direct investment in Community ($ billion) (1972)</td>
<td>15.7</td>
<td>—</td>
</tr>
<tr>
<td>Community investment in U.S. ($ billion) (1972)</td>
<td>25.9</td>
<td>8.3</td>
</tr>
</tbody>
</table>

See note 6 supra.

9. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (effective Jan. 1, 1958) [hereinafter cited as Treaty of Rome]. As of Jan. 1, 1973, official texts of the Treaty exist in the Danish, Dutch, English, French, Gaelic (Irish), German, and Italian languages. However, only the Dutch, French, German, and Italian versions, which were signed and ratified, have legal authority. The text referred to in this study is the official English version as made available through the Office for Official Publications of the European Communities.

10. The Coal and Steel Community Treaty was the precursor to the EEC. See Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261
248 articles, which cover a variety of economic and non-economic activities, the Treaty is a skeletal form of treaty ("traite cadre"), with lacunae filled in by secondary sources of law. These secondary sources of Community law are the various regulations, directives and decisions of the Council of the Ministers and the European Commission, the decisions of the European Court of Justice, the resolutions of the European Assembly, and the general principles of law among the member states.\(^\text{11}\)

Essentially the Treaty puts forth provisions and schedules for the purpose of creating a customs union and removing internal barriers to the free movement of goods and services.\(^\text{12}\) To achieve this end the Treaty attempts to guarantee four basic economic freedoms throughout the Community: freedom of movement of goods,\(^\text{13}\) freedom of movement of labor,\(^\text{14}\) freedom of establishment and in the supply of services,\(^\text{15}\) and freedom of movement of capital.\(^\text{16}\) In support of these freedoms the Treaty proposes the establishment of common Community policies in the areas of agriculture,\(^\text{17}\) external trade,\(^\text{18}\) and transportation,\(^\text{19}\) and provides specific rules regarding competition.\(^\text{20}\) Through the establishment of these basic freedoms and common policies, the Treaty of Rome aims "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its member states.\(^\text{21}\)"

The thrust of the Treaty of Rome is "economic" in the broadest context of that term, and to understand the long-term significance of the European Community, the Treaty must not be viewed simply as a traditional international economic treaty. The Treaty is concerned not only with the movement of goods and services, but with a "bundle" of economic and non-economic activities.\(^\text{22}\) It establishes areas of Community competence not


For official English translations of the EEC, ECSC, and Euratom Treaties see Treaties Establishing the European Communities, Treaties Amending these Treaties, Documents Concerning the Accession (Office for Official Pub. of the Eur. Com. 1973).

12. See text accompanying notes 31-40 infra.
13. Treaty of Rome arts. 9-37; see text accompanying notes 31-40 infra.
15. Id. arts. 32-66; see text accompanying notes 86-98 infra.
17. Id. arts. 38-47; see text accompanying notes 41-50 infra.
18. Treaty of Rome arts. 110-16; see text accompanying notes 51-59 infra.
22. The standard English language commentary on the Treaty is A. Campbell, Common Market Law (1969) (three volumes with annual supplements). Of particular value to the American businessman and attorney is the CCH Common Market Reporter which contains commentary on the treaties and English versions of various rele-
only in direct economic matters, but also in various social and de facto political matters, many of which have a direct and immediate impact upon the lives of the two hundred and fifty million Europeans within the Community and upon American investment activities in the Community. Indeed, in its full historical and political context, the Treaty is in fact an incipient form of constitution establishing the basis for a new "governance" of Western Europe. It not only creates obligations between the member states but also establishes a separate and distinct legal order in and of itself. As evidenced by the decisional law of the European Court of Justice, the Community constitutes a legal order whose law is binding upon the member states and which in many circumstances permeates the existing legal order of each member state to become directly and immediately applicable to their nationals. The Community law takes precedence over conflicting national law, whether the conflicting national law was enacted before or after the Community law. This so-called doctrine of the supremacy of Community law has achieved a general acceptance, with certain exceptions, among the national judiciaries of the member states.


For general consideration see Bebr, Law of the European Communities and Municipal Law, 33 MOD. L. REV. 481 (1971).
Moreover, the Treaty, in terms of institutional underpinnings, has subtly introduced a full political apparatus—executive, legislative, and judicial—into a limited sphere of economic operation with the sensitivity and capacity to respond to further pressures for a deepening of the integration process.30

II. Community Laws Affecting Modes of Doing Business

The primary modes for conducting international business activities are:

(1) trade via imports and exports,

(2) licensing arrangements,

and (3) the


30. The primary governing institutions of the Community (since 1967, common to the EEC, ECSC, or Euratom) are:

(1) The European Assembly (often referred to as the “European Parliament,” but distinct from the Council of Europe) consists of 198 members selected by the various parliaments of the nine member states, with the breakdown by nationality being Italy, France, Germany, and the United Kingdom 36 members each, Belgium and the Netherlands 14 each, Denmark and Ireland 10 each, and Luxembourg 6. The Assembly, which meets monthly at Strasbourg, presently has only minimal effective political power in the Community's decision-making process. Although it has certain advisory and consultative functions and possesses a limited competence in the matter of budgetary controls, the main task of the Assembly is the rendering of standing committee reports and the questioning of members of the European Commission visiting from Brussels. Article 138(3) of the Treaty of Rome perceives the eventual direct universal election of Assembly members, though apparently this is still a distant vision.

(2) The Council of Ministers consists of any council of cabinet ministers from the member states, coming together in Brussels primarily to discuss Commission proposals. For the consideration of the more important matters of Community planning and affairs, the respective foreign ministers will meet approximately once a month. In principle, the Treaty of Rome conceives of the Council as the principle decision-making organ in the Community and it is the primary decision-maker with regard to major economic and political decisions on Community policy. In the daily operation of the Community, however, the Council often serves more as a senate, acting on various proposals submitted by the European Commission.

(3) The European Commission presently consists of thirteen members, nationals of the member states selected for their general competence and independence. Assisted by a staff of approximately 7,000 "eurocrats" centered in the Batiment Berlaymont in Brussels, the Commission is the prime initiator and formulator of Community actions and policies. Each member holds office for five years, the president and vice president being appointed for two years.

(4) The European Court of Justice is composed of nine judges (assisted by four advocates-general) sitting in Luxembourg and endeavors to ensure that "the law is observed in the interpretation and implementation" of the EEC, Euratom, and ECSC treaties. The judges are appointed for six-year terms, there being an alternative turnover or renewal of appointments for five judges and two advocates-general and four judges and two advocates-general every three years.

In addition to the above institutions, other Community organs of importance in the decision-making area are the Committee of Permanent Representatives, composed of representatives of the member states appointed by the Council of Ministers to serve as a liaison between the Council and Commission, and various types of management committees.

direct establishment of offices, branches, or subsidiaries abroad. This section will examine the effect Community laws have on these forms of doing business, particularly with regard to the specific problems posed for the American businessman.

A. Trade Measures

The basic relationship of the American exporter to the Community is preconditioned by various factors: (1) the customs union nature of the Community, (2) the special Community regime for agricultural products, and (3) the extent of the Community’s powers with respect to the establishment and maintenance of a common commercial policy.

The Customs Union. At the economic heart of the Community is the notion of a customs union.\(^3\) As required by the Treaty of Rome: “The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.”\(^4\) Complementing the Treaty’s formal concept of a customs union are its provisions eliminating quantitative restrictions and equivalent measures between the member states. Thus the twin aspects of the Community’s customs union are a common external tariff wall vis-à-vis non-member nations and the elimination of trade barriers and equivalent measures between the member states themselves.\(^5\) Consequently, American imports into any part of the Community face the imposition of a common external tariff (CET), while Community goods do not encounter such a barrier.\(^6\)

With respect to the CET, the Treaty provides that the member states can impose upon goods originating from non-member countries only those charges which are agreed upon by the Community. The level of customs duties for each year is determined by an annual consolidating regulation of the Council of Ministers. An alteration in the CET can only be enacted by a unanimous vote of the Council of Ministers; unilateral actions by the member states are prohibited.\(^7\)

Once the CET has been paid and other import formalities satisfied the goods of non-member countries (e.g., the United States) are considered “in


\(^{32}\) See Treaty of Rome tit. 1.


\(^{35}\) For consideration of the overall effect of the CET on American imports see generally European Community Information Service, The United States and the European Community: Their Common Interests (1973).
free circulation” in the Community. The term “free circulation” means that all custom duties and quantitative restrictions and measures having equivalent effect are eliminated between member states. In determining what constitutes “measures having equivalent effect,” the main factor which characterizes a measure as “equivalent” is its economic effect, and not its formal legal intent. The court has emphasized that exceptions to the Treaty of Rome’s provisions on the free movement of goods are to be narrowly construed and that these provisions apply to all “goods” (in the broadest economic context of the term) which have “originated” within the Community or which have met the requisite entry requirements. Moreover, these provisions in large part have been held directly applicable within the member states by the European Court of Justice and may be invoked by private parties before the municipal courts of the member states.

The Common Agricultural Policy. While the Treaty of Rome’s provisions concerning the free movement of goods are generally applicable to trade in agricultural products between the member states, the Treaty additionally provides for the establishment of a common Community agricultural policy (CAP). For various political and economic reasons, the CAP has been the most dynamic element of Community “supranational” activity and has resulted in genuine Community control over agricultural products within the Community.

The basic principles upon which the CAP was to be built are: (1) increase in agricultural productivity; (2) insurance of a safe standard of living for those working on the land; (3) stabilization of agricultural markets; and (4) insurance of reasonable prices to consumers. While theoretically the above principles appear capable of producing a harmonious and viable agricultural

36. See Treaty of Rome art. 10(1).
37. See Re Export Tax on Art Treasures: E.C. Comm'n v. Italy, 8 Comm. Mkt. L.R. 1, 9, [1967-1970 Transfer Binder] CCH COMM. MKT. REP. ¶ 8057, at 7881 (1969) (Eur. Ct. of Justice Case No. 7/68): “By goods . . . must be understood products which can be valued in money and which are capable as such, of forming the subject of commercial transactions.”
42. Treaty of Rome arts. 38-47.
43. It should be noted in simple political terms that in 1958 at the time of creation of the EEC, 20% of the working population of the Community was engaged in farming. In fact, as of 1972 those making their living directly from the land still constituted 14% of the total employment in the original six member states. Accordingly, the CAP was of primary import in the overall development of the Common Market. Moreover, the CAP was of particular political concern to France which has a very high proportion of farmers, such farmers wielding critical political power for the Gaullist regimes. Accordingly, agriculture was one area where France was willing to push forward on a Community level.
44. See Treaty of Rome art. 39.
policy, in practice they have proved to be conflicting. For example, the Community has not been able to reconcile the structural changes in Western European agricultural practice needed to permit optimum production and fair consumer prices with the economic demands of European farmers, many of whom are marginal farmers yet wield considerable political influence in their member states. The result has been that structural adaptations until recently have taken a backseat to the maintenance of a common price policy. Accordingly, without balanced development in structural changes, the common market organization for agriculture has generated a high price regime.45

Of particular concern to the American exporter of agricultural products is the fact that the common market mechanisms adopted to effectuate the principles of CAP are to a large extent protectionist. These mechanisms range from full price guarantees, (e.g., grain) to partial guarantees (e.g., beef), to reliance solely upon the common external tariff without any price guarantees (e.g., fats), but their common goal is to provide a predictable income to producers and distributors by means of a high price regime which discriminates against cheaper non-Community products.46 A prime example of the protectionist nature of the CAP can be seen in the market organization for grains, the prototype Community organization.47 The thrust of this common organization is in terms of a "target" price, and a variable levy which shields the Community market from foreign imports, both of which are geared to raise the import price to the target price level.48 Further inter-

46. For an attempt to ameliorate the protectionist nature of the CAP see commentary in The United States and the European Community: Their Common Interests 26-29 (1973).
48. The following definitions may prove helpful:
   (1) Common External Tariff. This is the protective tariff, which is partially special protective tariff and partially levy, which a non-Community exporter must pay to get his goods into the Community.
   (2) Target Price (Prix indicatif). This is the price level projected for a commodity at the wholesale stage in the "area of greatest deficit." This price is generally fixed at the beginning of the sowing season, although it may be seasonally adjusted to reflect storage costs. It is intended that this set price will aid the farmers in planning production and in serving as a market guide to all market users. This price is determined in the marketing centre of the Community with the least domestic supplies—political price.
   (3) Threshold Price (Prix de seuil). This is the price used as a basis for determining the levy (that is, the target price less the import price) to be imposed on an imported commodity. It is set in such a way as to bring the selling price of the commodity up to the target price. As this price is determined at the "border crossing point," account must be given to freight costs from this point to the area of greatest deficit in the Community, which, as noted, is the reference point for the target price. This would generally constitute the lowest possible import price of foreign products.
   (4) Levy. For grains, the levies on non-Community imports are set daily according to the cheapest world offers at Rotterdam.
   (5) Export Refunds (Restitution). This is the option open to member states to grant a subsidy to domestic exporters so as to keep them competitive in the world market. At maximum, it will equal the difference between the world price level and that existing in the exporting member state.
   (6) Support or Intervention Price (Prix d'intervention). This is the price at which the national intervention agencies (backed up by the Guarantee Fund) are obligated to
nal protection is afforded by a system of support buying at set "intervention prices" for domestic grains coupled with subsidies for Community exports to non-member nations. The effect of this complex and artificial market organization is generally to prevent American grains from entering the Community market at a price lower than the prevailing Community price.49

It is, however, the hope of the Community that as further advances in the area of structural reforms can be made, the CAP will be transformed into a more economically realistic farm policy, especially with regard to foreign imports. At present, the Community has embarked upon a systematic program for the 1970's to achieve the necessary structural modernization of Community agricultural practice while solving the social problems of rural areas caused by such structural reforms.50 Whether or not the Community's plans can overcome political resistance by Community farmers remains to be seen; until then the protectionist nature of the CAP will continue to be a "bête noire" for American exporters of agricultural products.

The Common Commercial Policy. A necessary corollary to the attainment of free movement of goods throughout the Community is the institution of a common Community commercial policy (CCP), that is, a common Community approach toward commercial relations with the outside world.51 Accordingly, one of the basic objectives of the Treaty of Rome has been the establishment of the CCP.52 From the point of view of the American businessman and attorney, a basic understanding of the CCP is necessary in order to determine the precise nature of the commercial relationships, present and future, which will exist between the Community, its member states, and the United States.53

The substantive content of the CCP may be divided into autonomous and contractual aspects. The autonomous aspect concerns such matters as internal Community measures affecting import and export policies and certain defensive commercial measures to be taken in cases of dumping or subsidies by non-member nations.54 The contractual aspect pertains to the negotiation

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49. For further discussion of grain market organization see Dam, The European Common Market in Agriculture, 67 COLUM. L. REV. 209 (1967).


52. See Treaty of Rome arts. 110-16.


54. The following definitions may prove helpful: (1) Export policy embraces such matters as export subsidies, export credits and guarantees, export insurance, and all other measures exercising a special effect upon exports; (2) Import policy embraces the fixing and liberalization of quotas and measures having equivalent effects; and (3) Commercial protective measures primarily consists of antidumping measures and the imposition of
and conclusion of “tariff and trade” agreements by the Community with other nations or international organizations.55

A firm definition of the outer limits of the Community’s exclusive jurisdiction under the CCP has not been rendered to date. However, a sound approach is that the CCP does in fact cover all measures that have a direct influence on the international movements of goods and services to or from the Community.56 In considering the Community’s exclusive jurisdiction under the CCP, the American businessman and attorney should be aware of the developing “constitutional” theory of “parallelism.” This view, which has been tentatively received by the European Court of Justice,57 implies that the Community possesses the same degree of competence to deal with the external affairs as it possesses in internal affairs. According to this view, any internal Community action preempts the member states from engaging unilaterally or collectively in parallel external activities.58 If this theory continues to gain acceptance, the Community, at the preemption of the member states, foreseeably will possess exclusive jurisdiction over all economic and commercial activities of the member states with the outside world. With respect to American interests, this development would require a significant readjustment in American foreign trade policy with Western Europe and the renegotiation of the commercial and economic bilateral treaties now in force with the member states of the Community.59

B. Licensing Arrangements

For multiple business and legal reasons, licensing arrangements concerning statutory and non-statutory industrial property rights constitute a major avenue by which Americans may conduct business within the Community.60
countervailing duties.


55. For example, the Community has trade agreements (inter alia) with such diverse countries as Egypt, Israel, Lebanon, Spain, Yugoslavia, and Argentina. The primary emphasis has been with Mediterranean countries; however, emphasis is presently also being placed upon further trade relations in Latin America and “third world” countries generally and with Japan. For a brief discussion see EUROPEAN COMMUNITY INFORMATION SERVICE, COMMERCIAL POLICY OF THE EUROPEAN COMMUNITY (1973).

56. See Norton, supra note 54, at 83.


60. As indicated in Jones, Fundamentals of International Licensing Agreements and Their Application in the European Community, 10 COMM. MKT. L. REV. 3, 4-7 (1973), typical advantages of licensing are: inexpensive mode of penetrating a foreign market; minimal risk (e.g., as regards foreign expropriation, labor or investment laws); simplest manner of getting started and giving one’s products exposure in a foreign country; and certain tax advantages. See generally Semmes, Protection of Inventions and Know-How in the Common Market, 37 LAW & CONTEMP. PROB. 351 (1972).
In terms of Community law applicable to licensing arrangements, two fundamental considerations arise: (1) the reconciliation of the national character of the existing industrial property systems within the Community with the broad Community objective of achieving a unified common market; and (2) the alignment of each specific licensing arrangement with the requirements of Community antitrust laws.

National vs. Community System. Unlike in the United States where industrial property rights are enforceable under federal law, patent and trademarks within the Community are governed by the respective national legal systems of the nine member states. The existence of nine separate and divergent industrial property systems within the Community creates a considerable possibility of varying treatment within the Community.61 In addition, the risk exists that undertakings will abuse the national systems "to maintain national frontiers by assuring absolute territorial protection to trademark or patent owners or their licensees."62

The Treaty of Rome's formal attempts to balance Community interests against potential abuses of the national industrial property systems are obscure. The basic objectives of the Treaty call for the establishment of a unified common market; yet, the Treaty also provides that Community law "shall in no way prejudice the rules in member states governing the system of property ownership."63 Moreover, in the section of the Treaty pertaining to the elimination of quantitative restrictions and equivalent measures with respect to the movement of goods between member states, a specific exception is made for restrictions based upon the national industrial and commercial property systems.64

The European Court of Justice, however, clarified the problem in the 1971 landmark case of Deutsche Grammophon65 by abandoning the so-called "principle of territoriality" with regard to copyrights. Deutsche Grammophon, the largest producer of sound recordings in the Community, pursuant to German retail price maintenance law had secured a relatively high price for its phonograph records in Germany. A French subsidiary of Deutsche Grammophon, because of a prohibition in France on retail price maintenance, was able to distribute the same records under the same label at a substantially lower price in France. As a result of this disparity between prices, independent German distributors, through a variety of schemes, began to import the lower priced French records and to sell them at a cut-rate price in Germany. Deutsche Grammophon brought suit before the German courts to enjoin these "parallel imports" on the ground that the

62. See EUROPEAN COMMISSION, FIRST REPORT ON COMPETITION POLICY 64 (1972).
63. Compare Treaty of Rome art. 2 with id. art. 222.
64. Such an exception cannot "constitute a means of arbitrary discrimination or a disguised restriction on trade between member states." See Treaty of Rome arts. 30-36.
German copyright law granted the producer of a record the exclusive right to reproduce and distribute his product. On appeal, the question submitted to the European Court of Justice was whether the holder of a copyright may invoke this statutory right against parallel imports of genuine goods from another member state within the meaning of article 177 of the Treaty of Rome.

The main thrust of the arguments in Deutsche Grammophon centered around the applicability of antitrust sections of the Treaty of Rome. However, apparently following the submissions of the advocate-general, the Court of Justice surprisingly based its opinion on the premise that the German copyright law violated the “free movement of goods” articles of the Treaty (i.e., articles 30-36). Finding that use of a copyright came within these articles in the same manner as an “industrial and commercial property right,” the court implied that the use of the copyright by Deutsche Grammophon constituted a measure having an “equivalent effect” to a quantitative restriction on the free movement of goods throughout the Community. Thus, the primary significance of the Deutsche Grammophon case for present purposes is that in addition to antitrust grounds, abuses of industrial property rights may be attacked on the basis of the free movement of goods section of the Treaty of Rome, even in instances where an attack under antitrust provisions of the Treaty may be impossible. The Court of Justice in the recent Sterling Drug decision has removed any doubt that the principles in Deutsche Grammophon are equally applicable to patent rights.

In a specific endeavor to facilitate a uniform approach in the area of industrial property rights, the Community is presently discussing the adoption of a Community Patent Treaty which would essentially create a unified patent law throughout the Community. This law would co-exist with the existing national patent systems, and would comprise one of the “bundle of patents” covered by a broader European Patent Treaty to be signed by the nine Community states and twelve other Western European nations. The intended effect of these two European treaties is the creation within the Community of uniform internal-market conditions for the acquisition and exploitation of patents. The European Commission is also at work devising a comparable approach in the area of trademarks.

66. Treaty of Rome arts. 85, 86.
67. See text accompanying note 37 supra.
69. One of the questions unanswered by the Deutsche Grammophon decision was whether this principle would be applicable to all types of industrial and commercial property rights. The European Commission thinks that the principle would be applicable. See FIRST REPORT ON COMPETITION POLICY, supra note 64, at 69. A recent decision of the European Court of Justice, Centrafarm BV v. Sterling Drug Inc. & Winthrop BV, 14 Comm. Mkt. L.R. 480, 2 CCH COMM. Mkt. REP. ¶ 8247 (1974) (Eur. Ct. of Justice Case No. 15/74), indicates that the Court firmly agrees with the Commission’s position.
Antitrust Considerations. Unlike the application of the free movement of goods articles of the Treaty of Rome, the basic Community antitrust provisions (articles 85 and 86) do not apply to the existence of industrial and commercial property rights, but only to the exercise of those rights pursuant to an agreement, decision or concerted practice, or to a dominant position. In a 1962 notice on patent licensing, the European Commission indicated that it considered exclusivity in a straightforward patent licensing agreement to be outside the purview of articles 85 and 86 so long as the restriction rested within the "scope of the patent." The Commission based its opinion on the "principle of territoriality." However, in recent years the Commission consciously has deviated from this broad exemptive position and the Court of Justice, in the Deutsche Grammophon case, abandoned the "principle of territoriality" as a viable doctrine. The present relationship of the Community antitrust laws to the area of industrial property rights has been elucidated in a series of decisions rendered by the Court of Justice.

In the 1966 decision of the European Court of Justice in the Grundig-Consten case the supremacy of the Community antitrust provisions over conflicting national patent statutes was affirmed. This case involved the largest producer of tape recorders within the Community, Grundig, which sold its products through wholesalers in Germany and through exclusive dealership arrangements in the other member states. In order to protect its French dealer, Consten, from the import of cheaper parallel imports, Grundig registered a second trademark in Germany in its name and in the various other member states in the name of its respective exclusive dealers. Consten sued the parallel importers for trademark infringement. The European Commission intervened, claiming that both the exclusive dealership agreement between Grundig and Consten and an ancillary agreement regarding the trademark violated the provisions prohibiting restrictive trade agreements embodied in article 85(1) of the Treaty of Rome. On appeal, the European Court of Justice substantially concurred in the Commission's conclusions. Reaffirming the supremacy of Community law over conflicting national law, the Court made clear that the exercise of the national protection provided by industrial property laws pursuant to an agreement cannot be used in an abusive manner without contravening Community antitrust laws.


A similar result was reached when a subsidiary sued for infringements upon trademark rights assigned to it by its parent corporation. In the Remington Rand case, the Italian subsidiary of Remington Rand (now Sperry Rand) sued in Italy a parallel importer of electric razors for trademark infringements on the basis of an assignment of trademark rights to it from the parent corporation. The importer filed a complaint with the Commission. The matter was settled without a formal decision by the Commission after concessions by the Italian subsidiary were made withdrawing the Italian court suit and agreeing not to use its trademark rights to impede parallel imports in the future. The case was significant because in order to establish jurisdiction in this case under article 85, the Commission devised a concept of “intra-enterprise conspiracy,” whereby the assignment of the trademark from the parent to its subsidiary was deemed an “agreement” for purposes of article 85. This concept subsequently was disavowed by the European Court of Justice; however, the Court has achieved the same results derived from the Commission's theory on the basis of different legal approaches.

78. For further discussion see Forcione, Intra-Enterprise Conspiracy Under the Antitrust Regulations of the Common Market, 25 BUS. LAW. 1419 (1970).
Sirena, the Italian producer, against parallel importers of cosmetics marked "Prep," on the grounds of trademark infringement. On the basis of article 177 of the Treaty of Rome, the Italian court submitted the question to the European Court of Justice whether the original trademark assignment could be considered an agreement prohibited under article 85. The court held that article 85 was applicable "where, by virtue of trademark rights, imports of products originating in other member states bearing the same trademark, because the owners have acquired the trademark itself or the right to use it through agreements with one another and third parties, are prevented." The court distinguished the applicability of article 86, stating that the owner of a trademark does not hold a "dominant position" in terms of article 86 "solely by reason of the fact that he is in a position to prohibit third parties from distributing, in the territory of a Member State, products carrying the same mark"; rather it must also be shown that the trademark owner possesses the power to prevent the maintenance of effective competition in a "substantial" part of the relevant market in the Community. 82

The nature of exemptions for licensing agreements from the Community's antitrust laws is somewhat unsettled. Inasmuch as the Commission's 1962 Notice on Patent Licensing agreement can no longer be safely relied upon and in the absence of a "group exemption" for such agreements, careful consideration must be given to individual exemptions conferred by the Commission. The recent decision in Re Davidson Rubber Co. 83 reflects the Commission's present position. This case evolved around the grant throughout the Community of exclusive patent and know-how licenses relating to a key process in the manufacture of cushions and armrests for automobiles by Davidson Rubber, an American-controlled corporation. Each licensee remained free to sell the products throughout the entire Community. Ancillary agreements were also entered by some licensees which tended to preserve their exclusive right within their respective national boundaries and impede exploitation of the patent. The Commission considered parts of these licensing arrangements to be violative of article 85(1) because within each given market situation they had as their object and effect a perceptible restriction of competition within the Community. Before granting a discretionary exemption under article 85(3), the Commission required that the agreements' non-attack clause be deleted and a contractual stipulation be inserted eliminating any export restraints affecting trade between the member states. The Commission did find that certain non-exclusive cross-licensing provisions relating to improvements, which required the prior consent of the

82. For further discussion see Ladas, Assignment of Trademarks and Antitrust Law —The Sirena Case of the Court of Justice of the European Communities, 62 TRADEMARK R. 566 (1972).

licensor, and the arbitration clauses to be outside the scope of article 85.84

One commentator has suggested that the following types of specific licensing provisions in light of existing Community laws and practice would be violative of Community antitrust law:85 (1) restrictions in area and in time, such as absolute territorial exclusivity of the license, a ban on exports which would affect trade between the member states, or an agreement for a duration longer than the life of the industrial property right; (2) limitations on the licensee's right to compete with his licensor or to challenge the validity of the licensor's property right, as through non-attack, non-competition, or grant-back clauses; and (3) tying arrangements which are not indispensable for a technically proper exploitation of the patent.

Observations. In assessing the development of Community law with respect to licensing arrangements, the American businessman and attorney must be aware of the general implications of the supremacy of Community law and principles over conflicting aspects of the industrial national property systems. Not only must the licensing arrangements be consistent with a uniform application of Community antitrust laws, but the exercise of industrial property rights (even absent a specific arrangement or agreement) must be compatible with the requirements of the Treaty of Rome regarding the establishment of a common market and the free movement of goods throughout the Community. In addition, specific attention must be given to the expansion of Community jurisprudence in the area of industrial property rights through the decisions of the European Court of Justice and Commission and to the developments in the final drafting of the Community Patent Treaty.

C. Right of Establishment and Supply of Services

Establishment. The term "establishment" under the Treaty of Rome is a broad and flexible concept, generally providing for the right of Community nationals and undertakings (except non-profit undertakings) to enjoy national treatment within the member states of the Community concerning all matters of economic self-employment.86 In determining the beneficiaries of the right of establishment, the Treaty of Rome makes no distinction between individuals or companies or firms. By the terms of article 58 of the Treaty, to enjoy the right of establishment a company or firm must be formed in accordance with the laws of the member states, and must have a registered office, central administration or principal place of business within the community. The right of establishment is not, however, absolute. All that is

84. For further discussion of this case and other recent cases see generally, Allen, The Present Status of Exclusive Patent Licensing Agreements in Relation to the Rules of Competition of the EEC, as Indicated by Four Recent Decisions of the EEC Commission, 19 Antitrust Bull. 81 (1974).


guaranteed is national treatment for individuals and undertakings within a
member state.\footnote{87}

Essentially, “freedom of establishment” as envisioned by the Treaty of
Rome has two fundamental components: freedom of nondiscriminatory
access to and exercise of non-salaried activities; and freedom to organize and
manage undertakings without discrimination.\footnote{88} The technical implementa-
tion of this freedom, as with the freedom to supply services, is accomplished
through directives promulgated by the Council of Ministers.\footnote{89}

Although the right of establishment has not been fully implemented to
date, the Council has issued approximately forty directives abolishing restric-
tions with regard to the right of establishment and freedom to supply
services.\footnote{90} Moreover, a recent decision of the Court of Justice indicates that
even in the absence of implementing directives, article 52 of the Treaty of
Rome, which ensures freedom of establishment, is directly applicable within
the member states as of January 1, 1970, the end of the transitional
period.\footnote{91}

To understand the right of establishment, one must distinguish between
what conceptually can be termed “initial establishment” and “secondary
establishment.” Initial establishment pertains to the initial economic entry
into an EEC member state. Secondary establishment refers to the subsequent
entry of an “initially established” individual or undertaking into another
member state (e.g., by way of a branch office or subsidiary). The Treaty of
Rome’s provision on the right of establishment is generally pertinent to
secondary establishment. Thus, a member state may set whatever restrictions
it deems necessary with regard to the initial entry of a non-EEC individual
or undertaking. It, however, can apply restrictions with regard to individuals
or undertakings “established” within the Community only to the extent that
such restrictions are equally applicable to its own nationals.\footnote{92}

Two hypotheticals may be useful in understanding the problems an
American firm may encounter under this concept of secondary establishment
(i.e., assuming initial “establishment” within the EEC is gained). First,
consider the case of an American firm incorporated under the laws of the
United Kingdom and having its registered office there. This enterprise then
wishes to set up in France, claiming that it is a Community enterprise and

\footnote{87} On freedom of establishment see generally U. Everling, The Right of Estab-
lishment in the Common Market (1964); B. Goldman, European Commercial
Law 26-35 (1973); Mégret 87-173.

\footnote{88} See Norton, The Renegotiability of United States Bilateral Commercial Treaties
with the Member States of the European Community, 8 Texas Int’l L.J. 299, 332
(1973).

\footnote{89} See Treaty of Rome arts. 54(2), (3); Programme general pour la suppression
des restrictions a la liberté d’establessement, 5 E.E.C. J.O. 36 (1962) [for English trans-
lation see 1 CCH Comm. Mkt. Rep. ¶ 1335 (1962)].

\footnote{90} See generally Maestripieri, Freedom of Establishment and Freedom To Supply

Justice Case No. 2/74). For consideration of impact of this case see Commission

\footnote{92} See Lang, The Right of Establishment of Companies and Free Movement of
accordingly a beneficiary of the right of establishment. By an initial reading of article 58 of the Treaty of Rome, such a corporate move would appear permissible. However, article 58 confers upon companies only those rights which are available to individuals. This automatically refers the reader back to article 52 of the Treaty, which speaks of “setting up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state.” Thus, the American-controlled British company, in addition to the requirements of article 58, must be “established within the territory of any member states.” The Council of Ministers has defined the term “established” to mean “having business activity (which shows) a continuous and effective link with the economy of the member state or of an overseas country or territory.” Accordingly, our British firm not only must have a registered office within the Community but also must have a “continuous and effective” economic link with the Community. There must be both a genuine legal and economic tie to the Community.

A more difficult hypothetical concerns an American firm acquiring direct or indirect control over a genuinely “established” Community enterprise. According to the French view, any foreign “controlled” undertaking, even those which are incorporated and have extensive business activities in the EEC, would be denied access to the right of establishment under the Treaty of Rome. While requirements of EEC law are contrary to the French position equating “control” with “establishment,” the political questions and implications raised by this position are very serious and may possibly precipitate a change in Community law.

Services. The Treaty of Rome requires that the “freedom to supply services” is to be fully achieved by the end of the transitional period. The concept of “services” as used in the Treaty of Rome is distinct from the general economic understanding of the term. Essentially, “services” under the Treaty of Rome denotes a residual category of economic activity covering those economic activities not expressly dealt with by the Treaty’s provisions on the freedom of movement of goods, persons, and capital. These services must be performed by a national or a company “established” in a community country other than that of the person for whom the service is intended (i.e., there must be “cross-frontier” activity). In addition, the services must be of a kind normally provided for value, that is, economic services. “Services” specifically include those services provided by industrial or commercial businesses in small craft industries and the professions. Although technical implementation of this freedom has not been achieved to date, it does appear that articles 59-66 have become fully self-executing as of the end of the transitional period.

93. See Program general, supra note 89, tit. I(d).
94. Id.
95. See Loussouarn, La condition des personnes morales en droit international privé, RECUEIL DES COURS 447, 489 (1959).
98. See generally Programme general pour la suppression des restrictions a la
III. Antitrust Laws

Community antitrust laws form the basic antitrust regulations in Western Europe. The source of legal authority for the Community to deal with antitrust matters stems directly from the Treaty of Rome, which contains a special section on the rules of competition to be applied throughout the Community. Such rules are to be directly applicable within the member states (i.e., fully self-executing). However, Community antitrust laws and regulations do not preclude the continuing existence of national antitrust laws; rather the national authorities may act when the Community has not asserted its authority or when the national rules serve objectives different from those of the Community. But Community antitrust laws and regulations are supreme: Community law requires that "conflicts between Community rules and national rules . . . should be resolved by applying the principle of the primacy of the Community rule."


100. Treaty of Rome arts. 85-94. Briefly, art. 85 pertains to restrictive trade practices; art. 86 to abuses of a dominant position; arts. 87-89 to the implementation of arts. 85 and 86; art. 90 to rules concerning public enterprises; art. 91 to transitional antidumping rules; and arts. 92-94 to rules on state aids. While the drafters of Community antitrust laws were undoubtedly astute students of the American antitrust laws, a flippant comparison of Community antitrust laws with their American counterparts is fraught with dangers. Historical and economic conditions which gave rise to the Community laws are wholly different from those which gave birth to the Sherman and Clayton Acts. The Community in its formation was faced with two major dilemmas: (1) the attainment of the capacity to achieve economies of a scale conducive to European industrial and commercial growth; and (2) the amalgamation of the separate economies of the member states, that is, the creation of a single economic market. Accordingly, Community law and practice has shown no built-in reflex against size or against large "European" business combinations (cartels). Quite the contrary, Community practice has actively encouraged mergers and combinations of genuinely "European" firms, which are conducive to overall European economic growth. See Special Committee on the European Common Market, Association of the Bar of New York, Business Regulation in the Common Market Nations (1969-70) (4 vols.); Jones, American Antitrust and EEC Competition Law in Comparative Perspective, 90 Law Q. Rev. (1974); Timberg, Antitrust in the Common Market: Innovation and Surprise, 37 Law & Contemp. Prob. 329 (1972).


Also, the European Commission has been in practice most aggressive in expanding and enforcing its antitrust powers. Treaty of Rome art. 3(f). For discussion of economic objectives behind Community antitrust policy, see D. McLachlan & D. Swann, Competition Policy in the European Community (1967); D. Swann & D. Lees, Antitrust Policy in Europe (1973). For consideration of Commission's activity in the antitrust area see generally Commission of the European Communities, Second Report on Competition Policy (1973).

The key articles of the Treaty of Rome dealing with antitrust matters are articles 85 and 86. With the exception of those special Community rules concerning agriculture and transportation, these articles are generally applicable to all sectors of the Community economy, private or public.\(^{103}\) To date, article 85 has been construed as applying exclusively to restrictive trade practices and article 86 has been used to attack abuse of "dominant positions." However, these provisions are not mutually exclusive since an abuse of a dominant position can be achieved through activities also violative of article 85(1).\(^{104}\)

A. Article 85 and Restrictive Trade Practices

*Article 85(1).* Paragraph 1 of article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market . . . ." For purposes of article 85 the term "trade" includes movement of both good and services.\(^{105}\)


105. Article 85(1) also contains certain illustrative, but not exhaustive, examples of particular restrictive trade activities which would be incompatible with the establishment of a common market, if the general requirements of art. 85(1) are met:

(a) Activities directly or indirectly fixing purchase or selling prices or any other trading conditions. Both horizontal and vertical agreements are covered and both the direct and indirect effects of such agreements are considered in determining a violation. Price information exchange agreements, while not directly constituting price-fixing, may lead to such restrictive conditions or indicate a concerted practice producing such restrictive acts. In addition, collective resale price maintenance agreements which have an intercommunity effect fall within art. 85(1). Also, agreements which do not directly obligate parties to a fixed price but set certain penalties if a recommended price is undercut, would generally be violative agreements.

(b) Activities limiting or controlling production, markets, technical development, or investment. This subparagraph is particularly broad in scope. As a general rule, any agreement, decision, or concerted practice which divides or is apt to divide markets within the Community, particularly if along national lines, will be violative of art. 85(1). Also activities ancillary to such market divisions would be condemned under art. 85. Of particular concern are specialization agreements and joint ventures in research and development which are covered by this subparagraph. In many cases, however, where the beneficial effects of such activities are significant, a specific or group exemption can be found under art. 85(3).

(c) Activities sharing markets or sources of supplies. Of particular interest here are exclusive distributorship agreements. Since early in the development of the Community antitrust laws, the Commission has been favorably disposed toward such agreements. However, if an exclusive dealership agreement provides for exclusive territorial protection, it will generally be prohibited under art. 85, because it tends to lead to divisions of markets and the impairment of the establishment of a common market. In addition, most forms of collective exclusive distributorship agreements run afoul of art. 85. Collective rebate agreements, which have an effect equivalent to collective exclusive distributorship agreements, may be treated in a similar manner for purposes of art. 85(1).

(d) Activities applying dissimilar conditions to the equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. There is a paucity of Community jurisprudence on the problem of discrimination in equivalent transactions. Certain commentators feel that art. 85(1) will not apply to such situations absent the
Notion of Undertaking. For purposes of article 85(1) the term "undertaking" is used in an economic context, and refers to any economic unit. As viewed by one legal commentator, "undertaking" embraces in principle all economic activities by individuals as well as corporations regardless of their legal form. Applying this principle to the relationship of parent companies and their subsidiaries, the European Court of Justice and Commission treat this relationship not so much from a legal standpoint as from an economic one and confer upon it the status of a single undertaking. However, the special treatment of parent and subsidiary has a two-edged effect. A genuine parent-subsidiary relationship will preclude the application of article 85(1) to the intracorporate activities of the two corporations, but at the same time it may render the parent responsible for the anti-competitive activities of its subsidiary.

Concerted Practices. The notion of concerted practices (as distinguished from formal agreements between undertakings or formal decisions of associations of undertakings) is largely inspired by American antitrust legislation, and refers to an informal combination between undertakings which knowingly substitute a practical cooperation for an actual agreement to distort competition. Accordingly, concerted practices are not necessarily conspiracy embodied in a formal agreement and may result merely from a coordination of activity which becomes apparent from the behavior of the participants. In this respect, parallel behavior, which by itself is not necessarily equivalent to a concerted practice, may constitute a strong indication of the existence of a concerted practice when it creates competitive conditions which do not correspond to normal market conditions.

Apt To Affect Trade Between Member States. Article 85(1) is only applicable to restrictive trade agreements and practices "which may affect trade between the member states." The European Court of Justice

presence of a dominant position by the undertaking so discriminating; but, this view has not been accepted by the European Commission. C. Bellamy & G. Childs, Common Market Law of Competition 75-76 (1973). While activities which discriminate in equivalent transactions on the basis of nationality are prohibited, it does not appear that nationality is the determinative criterion under this subparagraph.

(e) Activities making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements. Arguments have been made that this subparagraph pertains only to activities between two parties in imposing tying arrangements on third parties. Such a narrow view appears to find no basis under the wording of this paragraph nor under Community jurisprudence or practice.


110. See generally Korah, Concerted Practices, 36 Mod. L. Rev. 220 (1973),
deems trade between member states to be affected whenever the restrictive practice may impair, directly or indirectly, potentially or actually, the realization of a unified Common Market. Paradoxically, a practice may increase trade between member states, yet also be deemed a restrictive agreement because the actual or potential effect upon trade between the member states does not necessarily have to be prima facie an adverse one.

Object or Effect. To come within the purview of article 85(1), the agreement, decision or concerted practice must have as its object or effect either the prevention, restriction, or distortion of competition within the Common Market. Concerning this question of object or effect, the European Court of Justice has stated that “for the purpose of applying Article 85(1), it is superfluous to take account of the concrete effects of an agreement once it appears that it has the object of restricting, preventing or distorting competition.”

In an effort to provide some practical guidelines consistent with decisions of the European Court of Justice, the European Commission has formulated a de minimis rule by which restrictive trade practices having only insignificant effects within the Community are considered outside the umbrella of article 85(1). The Commission guidelines are essentially quantitative ones; however, they are based also upon the notion that the activities of the parties concerned will be outside article 85 if such parties have a weak position in the market and cannot restrain competition in any “perceptible” manner.

Negative Clearance and Notification. Pursuant to the Council of Ministers regulation 17, the basic implementing antitrust regulation of the Community, provision is made for obtaining a negative clearance, a procedure similar to seeking a no-action letter from the Federal Securities and Exchange Commission. Essentially a negative clearance is a statement by the European Commission that on the basis of the information available at the time of its decision, there are no grounds for intervening against the desired agreement, decision or concerted practice. While the negative clearance furnishes a certain degree of comfort to the enterprises involved in a questionable agreement, decision, or practice, its security is actually illusory; it is not binding upon the municipal courts of the member states and may be revised or rescinded by the Commission upon the discovery of facts unknown to the Commission at the time of its decision or upon a change in Communi-

113. Id. at 473.
ty jurisprudence. Because of a monumental backlog of applications for negative clearance, the Commission generally will act only upon requests involving sizable undertakings, typifying a broad class of agreements, decisions, or concertive practices, or concerning matters which the Commission feels are topically significant.116

Application for negative clearance is made on form A/B117 which provides both application for negative clearance under article 85(1) and for notification for purposes of an exemption under article 85(3). Confusion often arises as to the significance of the negative clearance as compared with that of notification. Negative clearance and notification are two distinct concepts and procedures. Negative clearance is a qualified statement of the Commission that in its view (as based on existing and known circumstances) article 85(1) is not applicable to the particular agreement, decision, or practice at issue. Notification forms the procedural prerequisite for an exemption under article 85(3) and presupposes a contravention of article 85(1). Thus, if an application for a negative clearance fails, or if in the future an agreement is considered violative of article 85(1) and an undertaking has made notification of the agreement for purposes of article 85(3), then it may subsequently request an exemption under this section of the Treaty of Rome.118

Inasmuch as an undertaking cannot apply for an article 85(3) exemption until such time as it has notified, it is advisable to apply for a negative clearance and to notify at the same time. In addition, an undertaking will not be subject to Community fines from the date of notification until such time as the agreement, decision, or practice is subsequently determined violative of article 85.119

Article 85(2). By the terms of article 85(2) any agreement, decision, or concerted practice violative of article 85(1) shall be automatically void. No prior decision of the Commission or Court of Justice is required for an agreement to be prohibited; such agreement shall be considered null and void ab initio. Accordingly, article 85(2) not only subjects violative agreements, decisions, or practices to Commission proceedings under regulation 17, but it also renders their contractual aspects legally unenforceable before the municipal courts of the member states.120


Prior to the recent decision of the European Court of Justice in *Brasserie deHaecht v. Wilken & Janssen (No. 2)*, various legal commentators inferred from a series of court decisions that agreements which were duly "notified" for purposes of article 85(3) were granted a "provisional validity" from the date of notification until they were finally determined to be violative of article 85. However, *Brasserie deHaecht (No. 2)* made clear that all agreements, decisions, or practices ultimately found to be violative of article 85 and which became operative after the date regulation 17 became effective do not enjoy "provisional validity." Accordingly, offending agreements, decisions, or practices, even though duly notified, will be held null and void ab initio, and the parties entering into such agreements, decisions, or practices do so at their own peril. Agreements in effect prior to the enactment of regulation 17 and duly notified in accordance with article 4 of that regulation come within the doctrine of "provisional validity"; however, such old agreements would perhaps be secure for all practical purposes from Commission action because of statute of limitations problems.

Jurisprudence of the European Court of Justice indicates that the nullifying effect of article 85(2) is applicable only to those aspects and provisions of the agreement, decision, or practice which are found to be violative of article 85(1) and not to the entire agreement, decision, or practice, provided that the offensive aspects can be severed from the whole. If a severance of this kind cannot be accomplished without destroying the substantive provisions of the arrangement, then the entire agreement, decision, or practice is null and void. The determination of which aspects or provisions are in fact severable is not within the jurisdiction of the European Court of Justice, but rather must be made by the municipal courts of the member states.

*Article 85(3).* While activities contravening article 85(1) are considered null and void ab initio, the Treaty of Rome under article 85(3) provides a basis by which violative activities may be granted a specific exemption from article 85. Essentially, article 85(3) is complementary to article 85(1) and provides a balancing test whereby if the beneficial effects of the questioned

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123. This regulation became effective March 13, 1962.
126. *Id.* at 376, [1961-1966 Transfer Binder] CCH COMM. MKT. REP. at 7696-97. As stated in one recent article: "[I]n drafting contracts, care should be taken to isolate, to the extent possible, those clauses which may be prohibited by Article 85(1) in order to permit the doctrine of severance to operate effectively and without restraint." Alef, *European Communities: The Effect of EEC Antitrust Laws on Companies Doing Business in the Common Market, 1973 TAX MANAGEMENT INT'L J. No. 2, at 7, 9.*
activity outweigh the detrimental effects then an exemption may be granted by the European Commission in its sole discretion. Effects considered beneficial by the Commission are the improvement in production or distribution of goods and the promotion of technical or economic progress within the Common Market, allowing at the same time a fair share of resulting benefits for the consumer. Effects considered detrimental by the Commission are the imposition of restrictions on the achievement of the above beneficial effects and the actual or potential elimination of competition in a substantial portion of the products involved.128

Exemptions pursuant to article 85(3) may be granted by the Commission in individual cases or for whole categories of restrictive agreements (the so-called "group" or "block" exemptions), but only for a limited time and only under certain conditions.129 Group exemptions are measures of general applicability, and accordingly one must be extremely careful in fitting an individual case within the general exemption. To date there are group exemptions for specialization agreements130 and exclusive dealership agreements,131 and group exemptions on patent licensing agreements and norms and types are expected to be promulgated by the Council of Ministers in the near future. In addition the Commission, from time to time, has issued notices setting forth the current position of the Commission with regard to certain types of restrictive practices.132 These notices have no binding legal


128. Treaty of Rome art. 85(3), reads as follows:
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
—any agreement or category of agreements between undertakings;
—any decision or category of decisions by associations of undertakings;
—any concerted practice or category of concerted practices;
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.


132. For bases of the Council's power to enact block exemption on patent licensing agreements types see Regulation 19/65, supra note 129, art. 1. For norms and types of block exemptions see Regulation 2821/71, 14 E.E.C. J.O. 285/46 (1971) (also permitting a block exemption on research and development agreements).

effect upon any of the Community institutions or upon any municipal court; however, they are indicative of the limits the Commission presently places upon the scope of article 85(1).

B. Article 86 and Draft Statute on Mergers

Article 86. Article 86 specifically prohibits any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it. Unlike under article 85, activities violative of article 86 are absolutely null and void without exception. Up until the past several years, article 86 remained a dormant article; however, since that time there has developed considerable Community jurisprudence on this article and its application to dominant positions.134

Dominant Position. The Treaty of Rome and the various regulations issued thereunder are silent as to what constitutes a dominant position; any definition must be abstracted from the decisions of the European Court of Justice and the European Commission. Clearly a dominant position is something less than an outright monopoly; yet, it also appears clear that it must be more than an oligopoly. The Court of Justice has given the following view of what may constitute a dominant position in one instance:

Since according to [article 86] the dominant position must at least extend to a 'substantial part' of the Common Market it is necessary . . . that the manufacturer, alone or together with other undertakings belonging to the same group, is in a position to prevent effective competition in a considerable part of the market in question; in this respect, the possible existence, in particular, of manufacturers who market products of the same kind and the position in the market of these manufacturers must be taken into account.135

Dominant Position Must Be Within Substantial Part of Community. "A substantial part" of the Common Market is not easily defined. From

134. Treaty of Rome art. 86 reads as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.


Community jurisprudence the German market alone or a part of the German market may constitute a substantial part of the Common Market for purposes of article 86. The Belgian, British, French, and Italian markets by themselves would also seem to satisfy this test. The borderline situations generally involve the smaller member states' markets (e.g., Ireland or Luxembourg) or a substantial part of (but not the entire) market of one of the larger member states.

**Improper Exploitation or Abuse of Dominant Position.** Mere size and a concomitant dominant position within the Community antitrust system is not per se violative of article 86. A violation of article 86 is caused by the abuse or improper exploitation of a dominant position. One working definition of an abuse of a dominant position is the use of such position "to act in an unreasonable way which, in conditions of effective competition, would be unlikely to be permitted by suppliers or customers or would not be practical in view of likely action by competitors."

**Effect upon Trade Between Member States.** To be violative of article 86 the abuse of the dominant position must be apt to affect trade between member states. This requirement is analogous to that contained in article 85(1), and no sound basis appears to exist for distinguishing the substantive content of one from the other. For practical purposes any abuse of a dominant position will generally tend to affect trade between the member states.

**Draft Merger Regulation.** After several years of gestation a Draft Regulation of the Control of Concentrations was issued by the European Commission on July 18, 1973. Unlike regulation 17, the draft merger regulation will not be an implementing regulation but will expand substantively the scope of article 86. Although the Commission has taken the firm position that the Council of Ministers has power to enact such a merger regulation, it is not clear whether the Council of Ministers possesses such power without a formal amendment of the Treaty of Rome. An early adoption of the draft regulation by the Council is unlikely.

For purposes of the draft merger regulation, the term "concentration" (and not merger) is used in order to cover a broad area of economic control, including all forms of horizontal, vertical, or conglomerate concentrations. Essentially, if a concentration confers the power to "hinder effective competition" within the Common Market, it will be deemed incompatible with the

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139. See text accompanying notes 105, 111-12 supra.
Community’s antitrust system. Concentrations having a combined annual sales revenue of less than 200 million units of accounts (one u.a. = $1.46), and which cumulatively occupy not more than twenty-five percent of the relevant market in any member state, will be exempt from the provisions of the draft merger regulation.\textsuperscript{148}

In addition to being subject to the substantive provisions of the regulation, concentrations involving undertakings with an aggregate annual turnover of one billion units of account will be subject to prior notification with the Commission: special notification provisions exist for banks, insurance companies, and financial institutions.\textsuperscript{144} Once notification is filed, the Commission has three months to halt the merger, with this period subject to extension if the information supplied with the notification is deemed incomplete. If the Commission does not commence proceedings before the end of the three-month period, it may be presumed that the notified concentration is compatible with the Community’s antitrust system.\textsuperscript{145}

C. Extraterritorial Applicability of Antitrust Laws

Of particular concern for the American enterprise is the Community’s approach toward the extraterritorial applicability of its antitrust laws. As derived from both articles 85 and 86, the European Commission may apply the antitrust laws to any anti-competitive situation which has an effect within the Common Market. Accordingly, an enterprise may be subject to EEC antitrust regulations even if not domiciled within the Community or directly doing business there. This broad extension of the subject matter jurisdiction of the Community, analogous to the outreach of American commercial law,\textsuperscript{146} dramatically increases the exposure to potential liability for American multinational firms.

The decision of the European Court of Justice concerning Imperial Chemical Industries of Great Britain illustrates the impact of the extraterritorial applicability of EEC antitrust laws.\textsuperscript{147} One of the core questions in this case was the extent of the Commission’s authority to fine a non-Community enterprise for alleged violations of Community antitrust law. ICI, which at the time of the suit was a non-Community enterprise, had been fined in 1969, along with nine other dye stuff manufacturers, pursuant to article 85(1), for price fixing. ICI challenged the Community’s jurisdiction to impose such fines merely because of the effects produced in the Community, by acts it may have committed outside the Community. ICI further asserted

\textsuperscript{143} Draft Merger Regulation, \textit{supra} note 141, art. 1.
\textsuperscript{144} Id. art. 4.
\textsuperscript{145} Id. art. 6.
that the acts in question, which may have been committed within the Community, were those of its subsidiary within the Community and not that of the parent company. In rejecting these arguments, the Court of Justice considered the acts of the subsidiary to be the acts of the parent because the subsidiary was not shown to be autonomous in determining its course of action on the market. The Court proceeded to uphold the Commission's fine inasmuch as the concerted practice in question manifested itself within the EEC. The determining factor was simply that the acts in question had an effect within the Community.\footnote{Mann, The Dyestuff's Case in the Court of Justice of the European Communities, 22 INT'L & COMP. L.Q. 35 (1972).}


Whether or not the “effects” doctrine will be used to control the activities of non-Community multinationals remains to be seen. Certainly, on a political level, the various member states of the Community are very concerned about the entire problem of foreign multinationals doing business within the Community;\footnote{Communication from the Commission to the Council, presented on Nov. 8, 1973, Multinational Undertakings and Community Regulations, [1973] BULL. E.C. Supp. No. 15.} but, as yet, no firm indication exists, in terms of Community law and practice, that article 86 (or article 85) will be used to bolster the political stance of any Community member state.\footnote{See generally Dietz, Enforcement of Anti-Trust Laws in the EEC, 6 INT'L LAW. 742 (1972).}

D. Enforcement Powers of European Commission

The procedure for enforcing Community antitrust laws, as set forth in regulation 17, is essentially an administrative process wherein the European Commission\footnote{For a discussion of the composition and function of the European Commission see note 30 supra.} possesses broad discretion to find, investigate, and prosecute violations of articles 85 and 86. In addition, subject to the ultimate review by the European Court of Justice, the Commission, through its various decisions and notices, is the primary interpreter of the broad conceptual terms contained in articles 85 and 86. Moreover, as already indicated, the Commission possesses the discretionary powers to grant or deny negative clearances and specific exemptions under article 85(3).\footnote{For comparative discussion see Kobak, Three Approaches to the Bureaucratic Dilemma: The Administration and Enforcement of the Antitrust Laws of the United States, France and the Common Market, 23 ALA. L. REV. 43 (1970).}
Complaints may come before the Commission from member states, persons or businesses having a legitimate interest, or on the Commission's own initiative. Upon determining whether the complaint states sufficient grounds for issuing a decision, the Commission possesses sweeping investigatory power to obtain all information necessary to carry out its duties under regulation 17. In making its decision, the Commission must grant the undertaking involved the opportunity to present its views on the complaint before the Commission, and any decision must be based solely on the facts upon which the parties have had an opportunity to express themselves. The Commission may sanction an offender by (a) requiring the undertaking to terminate the infringement, and/or (b) imposing periodic fines upon the undertaking for such infringements or continuing infringements. If the undertaking in question is domiciled within a member state, such decisions are directly applicable within such member states. The rules of civil procedure enforced in that member state govern the ultimate enforcement procedure.\textsuperscript{154}

IV. ADDITIONAL COMMUNITY MEASURES AFFECTING COMMERCIAL UNDERTAKINGS

In addition to the various Community measures which affect the primary modes of doing business within the Community, the Community law pertaining to the activities of commercial undertakings extends to such other matters as corporate law,\textsuperscript{155} taxation,\textsuperscript{156} labor law and social security systems,\textsuperscript{157} regional aids,\textsuperscript{158} capital movements,\textsuperscript{159} transportation,\textsuperscript{160} and bankruptcy matters.\textsuperscript{161} This section briefly analyzes the role Community law plays with respect to matters of company law and taxation.

A. Company Law

The Treaty of Rome views the harmonization of European company laws as intermeshing with the achievement of the right of establishment throughout the Community and the abolition of all barriers to the institution of a unified internal market structure.\textsuperscript{162} Moreover, this harmonization is


\textsuperscript{155} See notes 162-95 infra and accompanying text.

\textsuperscript{156} See notes 196-209 infra and accompanying text.


\textsuperscript{159} See generally EUROPEAN COMMISSION, THE DEVELOPMENT OF A EUROPEAN CAPITAL MARKET (SEGRÉ REPORT) (1966); 1 CCH COMM. MKT. REP. 1601-1782 (1974).


\textsuperscript{161} See note 187 infra.

\textsuperscript{162} The phrase "European company laws" refers to the nine respective national systems of company laws existing within the Community.
viewed as enhancing beneficial “European” corporate activity while safeguarding shareholder, creditor, and employee rights through various technical schemes and provisions for the disclosure of pertinent information to the public. The harmonization of company laws is not an end in itself, but is an additional means provided by the Treaty for insuring that its basic objectives are realized.\textsuperscript{168}

In harmonizing the company laws the decision-making organs of the Community have approached the matter in two distinct fashions. First, in instances where disparities between the company laws of the member states tend to create discriminatory barriers, the Commission and Council of Ministers have sought, typically through the use of a directive, to require the member states to amend their respective national laws so as to approximate uniform corporate law conditions throughout the Community. Secondly, in the absence of any national mechanism for facilitating desirable “European” corporate activities, the Commission has pressed either through international conventions or a Community regulation, to institute new international or Community mechanisms.\textsuperscript{164}

Company Law Directives. Under the powers granted by article 54(3)(g) of the Treaty of Rome, the Commission has presented five formally proposed directives on company laws and an additional directive on security prospectuses to the Council of Ministers for consideration.\textsuperscript{166} By its nature, a directive is addressed to the individual member states and requires them to conform their municipal laws to the requirements set forth by the directives, while leaving the member states the choice of form and methods for achieving this conformity.\textsuperscript{166} To date, only the first of the following company law directives has been adopted by the Council of Ministers.

First Directive of March 9, 1968.\textsuperscript{167} This directive pertains to the contractual capacity of companies limited by shares (both public- and private-type) companies\textsuperscript{166} and their directors, disclosure of important information regarding the company, and questions of nullity of the company.\textsuperscript{169} With respect to disclosure, this directive requires each member state to maintain a central company registry at which is to be filed such specific information as chartered documents and amendments thereto, the names of directors and company officers, the subscribed capital, and any changes in registered offices. Except for private companies, the annual balance sheet and profit

\textsuperscript{163} See generally J. RENAUD, DROIT EUROPÉEN DES SOCIÉTÉS (1969); E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS—NATIONAL REFORM AND TRANSNATIONAL COORDINATION (1971).


\textsuperscript{165} See generally EUROPEAN COMPANY LAW TEXTS (C. Schmitthoff ed. 1974).

\textsuperscript{166} See Treaty of Rome art. 189.


\textsuperscript{168} The terms “public company” and “private company” as used herein refer to the distinction employed in English company law, and not as in the United States. See generally L. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW (4th ed. 1972).

\textsuperscript{169} For discussion of the various corporate forms existing in the national systems within the Community, see generally R. PENNINGTON, COMPANIES IN THE COMMON MARKET (2d ed. 1970).
and loss account must also be filed and made available for public inspection. In addition, all corporate stationery and order forms are to bear the name of the relevant national registry and the company's register number. Each filing of required corporate information is to be publicly reported in a national newspaper.

With respect to the validity of corporate obligations, the directive establishes the principle that a third party contracting with a company should be able to rely on the act being within the objects and powers of the company, provided that the act is done by "the organs" of the company. Accordingly, acts done by the board of directors are binding upon the company, even if beyond the objects of the company, unless such acts in fact contravene the law. This curtailment of the ultra vires doctrine does not pertain to the relationship of the company to its own shareholders and directors.

With respect to the questions of company nullity, the directive compromises between conflicting views of continental corporate law. The municipal corporate laws may permit dissolution of a company on the grounds of nullity only by a court order based on certain specific grounds (e.g., the object of the company is illegal or contrary to public policy). Nullity, however, does not of itself alter the validity of any commitments entered into by or with the company, and the shareholders remain liable for any debts owed on subscribed shares to the extent that obligations to company creditors so require.

Second Draft Directive. The purpose of the Second Draft Directive is to set certain minimum requirements for the formation of companies limited by shares, increases or reductions of capital, and the distribution of dividends. The minimum standards for charter documents of a company generally conform with existing continental practice. The most significant aspect on formation is that a minimum capital of 25,000 units of account on subscriptions for a company is required. If on formation the shares are to be purchased for cash, they must be paid up to at least twenty-five percent. If the shares are issued for other valuable consideration, a valuation of this consideration and the shares issued against it must be made by an independent expert and official notification must be given of this valuation. Similar rules apply to shares issued on increase of capital.

The Second Draft Directive requires that dividends be distributable only out of realized profits and only to the extent that corporate assets exceed its authorized capital plus any non-distributable reserves. In addition, companies may not acquire their own shares by subscription. The rights of a company generally to purchase its own shares are subject, at the discretion of the member states, to the following conditions: (a) the voting rights of the shares shall be suspended; (b) where the shares are included in the balance sheet as assets, a non-distributable reserve shall be shown of the same

amount on the liability side of the balance sheet; (c) a directors' report must give full publicity relating to the acquired shares.

Any increase or reduction of authorized capital is subject to the general provision concerning minimum capital and reserve and to the requirement of a formal majority decision by a special meeting of shareholders. With respect to increases of authorized capital, the shareholders have preemptive rights unless the relevant charter documents provide otherwise. Where authorized capital is reduced for any reason except for a downward adjustment of certain assets, outstanding corporate creditors possess the right to claim repayment or additional security.

**Third Draft Directive.** The objective of the Third Draft Directive is to establish certain minimum standards for coordinating the municipal company laws of the member states with respect to internal mergers of public-type companies. This directive is essentially concerned with mergers involving the acquisition of one company by another, or the formation of a new company, or the acquisition of one company by another company which is its sole shareholder.

At present the national laws of the member states relating to these types of mergers differ considerably. The draft directive endeavors to set forth standards concerning the preparation and approval of a "merger plan," the consultation with employees regarding the legal, economic, and social impact of the merger, and the safeguarding of creditors' rights. The draft directive has been prepared in a manner to be aligned with the provisions of a proposed draft convention on international mergers in the Community.

**Fourth Draft Directive.** The thrust of this directive, which applies both to public- and private-type companies, is to establish throughout the Community uniform requirements regarding the extent of financial information that should be made available to the public by companies. The draft directive prescribes a standardized format for the balance sheet and profit and loss accounts. In addition, uniform minimum standards for coordinating different methods of valuing assets and liabilities presently in effect within the member states are set forth.

**Fifth Draft Directive.** This directive, which is perhaps the most far reaching and controversial of all the directives, is concerned with the coordination of the municipal laws of the member states with respect to the structure of public-type companies and the powers and obligations of their various corporate organs. The draft directive provides for a two-tier board comprised of a managing board responsible for managing and representing the company, and a supervisory board responsible for controlling the management organ. In addition, there is employee participation in the manage-
ment of corporate affairs for larger corporations. Also, uniform minimum standards are set regarding the annual meeting of shareholders and the appointment and role of independent auditors.178

*Draft Directive Pertaining to Prospectuses.* 179 This unnumbered draft directive requires certain information to be provided at the time of a grant of quotation. The goals of this directive are to avoid undermining the confidence of holders of European securities which would result from the dissemination of differing information about companies, and to provide effective protection for investors irrespective of where the security is quoted. This directive is applicable to all securities (i.e., shares, common stock, convertible and other debentures) admitted or introduced for official quotation on a stock exchange located within a member state. Specific provisions of this draft directive are highly complex and detailed.

*International Conventions.* The Treaty of Rome empowers the member states, “so far as is necessary,” to enter into negotiations with each other with respect to various company law related matters.180 To date the Community has taken the initiative in the following areas:

*The Convention on the Mutual Recognition of Companies.*181 The rights of a commercial undertaking to be recognized as a legal entity within the member states is essential if a company intends to do business in that state. An unrecognized company would be precluded from the right of establishment because it could not operate as a lawful entity in that jurisdiction. The Convention on the Mutual Recognition of Companies and Bodies Corporate, which though signed by representatives of the six original member states, has not yet been ratified by all the signatories and is not yet in force, endeavors to insure that companies established within a member state will be recognized in other member states. The convention attempts to reconcile two conflicting theories of corporate recognition—the incorporation theory and the “real seat” theory—by adopting the main thesis of the incorporation theory as qualified by certain exceptions rooted in the “real seat” theory. The incorporation theory premises corporate recognition upon incorporation and the maintenance of a registered office within a member state. The “real seat” theory makes a corporate recognition contingent upon the existence of a company’s central administration with a member of the Community.182 Under the compromise theory a company incorporated in one of the member states and which has its registered office in such state is entitled to recognition as of right in the other member states. However, recognition may be refused if the company has its “real registered office” outside the territorial bounds of the Community and has “no genuine link with the economy of one of the said

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180. See Treaty of Rome art. 220.


This compromise theory is ambiguous and potentially dangerous for the American enterprise doing business within the Community because the possibility exists that conflicting interpretations of the terms “real registered office” and “genuine link with the economy” among the various member states could impair the mobility of the American enterprise throughout the Community. This compromise theory is ambiguous and potentially dangerous for the American enterprise doing business within the Community because the possibility exists that conflicting interpretations of the terms “real registered office” and “genuine link with the economy” among the various member states could impair the mobility of the American enterprise throughout the Community.

**Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters.** This convention, which became operative among the original member states of the Community in 1973, attempts to provide legal security and predictability with regard to the enforcement of judgments across national frontiers within the Community. Thus, the convention is a further safeguard for creditors’ rights in Community commercial transactions. The convention prescribes a detailed system of rules regarding the assumption of jurisdiction. A supplementary convention establishing uniform standards for individual and corporate bankruptcy proceedings is presently being considered by the Community.

**Draft Convention on International Mergers.** This convention is complementary to the Third Draft Directive on the harmonization of company laws, and to a large extent the structure of the convention parallels that of the draft directive. The objective of the convention is to facilitate transnational mergers between Community enterprises, while providing adequate protection for shareholders, creditors, and employees.

**Council Regulations.** The Community has also tried to harmonize company laws through the promulgation of regulations, which are Community laws of general application and are binding and directly applicable in all member states. Examples of this approach are the Draft Regulation on the Control of Mergers, the proposed Statute for the European Company, and the Draft Regulation for European Cooperation Grouping.

**Draft Statute for the European Company.** Since the early 1960’s considerable discussion in Community circles has been given to the adoption of a statutory form for European corporations. In 1970 the European Commission produced a Draft Regulation on a European Company (S.E.), which was based to a large extent upon an earlier draft produced by a group of

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183. See Convention on the Mutual Recognition of Companies and Bodies Corporate, supra note 181, art. 3.
189. Treaty of Rome art. 189.
190. See note 188 supra and accompanying text.
distinguished European corporate law experts. As presently projected, the S.E. corporate form would be under European law and would exist side by side with the existing national corporate forms. The primary rationale behind this new corporate form is the facilitation of larger concentrations of economic power within the Community by “European” enterprises, especially small- and medium-size ones. From the point of view of the American enterprise, the draft regulation precludes any direct foreign use of the S.E. form, on the principle that it is imperative that all companies involved in the formation of an S.E. company be completely within the jurisdiction of the Community. As the S.E. may only be formed by stock companies incorporated under the laws of the member states, an American enterprise could use the S.E. form only indirectly through a wholly owned subsidiary incorporated within the Community. Other significant aspects of the S.E. are its espousal of the two-tier corporate board form and the concept of “workers’ participation.”

Draft Regulation on European Cooperation Grouping (ECG). The ECG will be a new legal vehicle under Community law primarily designed to facilitate cooperation between enterprises established under the law of different member states, regardless of their legal status or size. The ECG will be established by contract and is intended to be a flexible vehicle suitable for the temporary pooling of certain economic and commercial resources. Members of an ECG will be jointly responsible toward third parties. As with the proposed S.E., the ECG will be subject to normal tax rules. With respect to the taxation of European companies and of international mergers, the Community is presently considering a series of proposals.

B. Taxation

Governmental taxation and fiscal policies are not merely revenue-raising devices; they are used also as devices for adjusting and stabilizing national economies. In this respect, a tax policy is important to the Community from the point of view of the achievement of the basic “four freedoms” guaranteed by the Treaty of Rome, and is an essential element in the broader picture of economic and monetary union envisioned by the Community. Accordingly, as the Community progresses toward its proclaimed goal of economic and monetary union, greater emphasis is being placed upon the harmonization of the existing tax system of the member states of the Community.


194. Generally on the notion of “workers participation” or “co-determination” see Fabricus, Co-Determination in the European Company Law, in THE HARMONIZATION OF EUROPEAN COMPANY LAW 101 (C. Schmitthoff ed. 1973); Vagts, Reforming the Modern Corporation: Perspective from the German, 80 HARV. L. REV. 23 (1966).


196. See generally Communication from the Commission to Council on the progress achieved in the first stage of economic and monetary union, on the allocation of powers and responsibilities among the Community institutions and the Member States essential
Largely due to the sensitive political implications of tampering with any tax system, the Treaty of Rome did not attempt to replace the existing tax systems of the member states. Instead, the Treaty aims at a harmonization of the existing systems along Community guidelines. The specific provisions of the Treaty of Rome dealing with tax or fiscal provisions are articles 95-99. Article 95 sets forth the basic Community rule of nondiscrimination in matters of internal taxation against imports from other member states. Article 96 prohibits refunds on exports exceeding the actual taxation imposed on the goods. Article 97 is a transitional provision which imposes average tax rates in implementing articles 95 and 96 within member states still operating a cumulative, multi-stage, or cascade turnover tax system. Article 98, unlike the former articles which deal with indirect taxation, deals by negative inference with matters of direct taxation. This article specifically prohibits remissions and repayments in respect of exports to other member states, and the imposition of countervailing charges in respect of imports from member states, save with prior Community authorization. Article 99 provides the legal basis for all Community measures concerning the harmonization of national laws on indirect taxation.

**Direct Taxation.** While the Treaty of Rome is primarily concerned with matters of indirect taxation, the European Commission has also moved to harmonize the area of direct taxation pursuant to the broad powers granted by article 100 of the Treaty of Rome. The Commission's efforts are directed not toward personal income taxation, but toward corporate taxation, mainly with respect to corporate profits and dividends.

The Commission is concerned with the problem of international double taxation of dividends and interest. The Commission proposes to resolve this problem by extending and improving the existing network of bilateral conventions between the member states for the avoidance of international double taxation; the ultimate result would be a multilateral Community treaty.

To date, the Commission has also submitted several draft directives to the Council pertaining to the harmonization of existing national laws regarding taxation of mergers and similar transactions related to the taxation of parent and subsidiary companies. At present, there exist no common rules among the member states with respect to defining parent-subsidiary relationship for tax purposes, and in the case of cross-frontier mergers, a company being "absorbed" will generally suffer adverse tax consequences. The thrust behind the proposed draft directives is the facilitation of growth and modernization of truly "European" enterprises.

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197. See generally FISCAL HARMONIZATION IN COMMON MARKETS (C. Shoup ed. 1967).
200. See 12 E.E.C. J.O. C39/1 and 7 (1969). The fate of these proposals is still
With respect to the actual taxation of corporate income, the Commission favors a common system which will partially lighten the economic burden of double taxation of dividends brought about by taxing the dividend both at the corporate and the shareholder level. The solution primarily advocated for this problem is a tax credit deductible from the shareholder's tax.\(^\text{201}\) The Commission has also embarked on various other schemes (e.g., in the area of withholding tax rates) to harmonize the corporate taxation system within the Community.\(^\text{202}\)

**Indirect Taxes.** The term "indirect taxation" includes sales taxes, turn-over taxes, excise taxes, and stock capital taxes. The primary concern of the Treaty of Rome's tax provisions on indirect taxation is with respect to intra-Community imports and exports.

**Value-Added Tax (VAT).** The VAT is a noncumulative, multi-stage system whereby a tax is levied only on the net value of the products or services concerned. In general terms, the VAT is a tax on consumption levied on the utilization of goods and services by the final consumer and paid to the proper authorities piecemeal by the various intermediaries along the chain of production and distribution. At each stage the seller simply pays the difference between the tax levied on the sale and the tax he paid the suppliers when he bought the goods. While in the final analysis the burden of the VAT falls on the consumer, its main advantage lies in a proportional disbursement of the tax rate throughout the chain of production and distribution, with the resulting elimination of national tax frontiers and systems.\(^\text{203}\)

The VAT system will be established throughout the Community in various stages.\(^\text{204}\) During the first stage, the general structuring and procedure of the VAT system will be incorporated into the existing national tax structures, though rates of taxes are not harmonized in the member states.\(^\text{205}\)

undecided, although the Council of Ministers has taken note that some decision should be made as to parent-subsidiary relations before Jan. 1, 1975, and as to merger prior to Jan. 1, 1976.

\(^\text{201}\) At present, three basic systems of corporate taxation exist in the Community: the "classical"; "split-rate"; and "imputation" methods. The classical method entails corporate taxation on gross profits before dividend distribution, followed by personal income taxation on the dividends so distributed. The split-rate method is similar to the classical system, except that distributed or non-distributed profits are taxed at varying rates. The imputation method permits shareholders to offset a proportion of the corporate tax paid on the company's profits against his own income tax liability. For further discussion see the report made on behalf of the European Commission by Professor A.J. von den Tempel, *Impôt sur les sociétés et impôt sur le revenu dans les Communautés européennes, ÉTUDES SERIE CONCURRENCE NO. 15* (1970), which favors the classical system. However, the trend in the member states is toward the imputation system and the Commission appears now to favor such a position. See [1973] BULL. E.C. No. 11, at 23-24. For some of its possible effects of American investors see Taylor, *U.S. Tax Treaties and Common Market Corporate Tax Systems*, 28 TAX L. 73 (1974).

\(^\text{202}\) No Community action has been taken to date with respect to withholding taxes.


\(^\text{204}\) The first stage of the VAT system was scheduled to commence in 1970 but was postponed until 1972.

Commission has recently submitted to the Council of Ministers a draft directive fixing a common basis of assessment for the VAT.\textsuperscript{206}

\textbf{Excise Taxes.} The term excise tax generally refers to any tax on privileges, often assessed in the form of licenses or other fees. This tax is generally imposed upon various luxury-type goods. Article 99 of the Treaty of Rome provides for the harmonization of excise taxes, which presently vary considerably in number and amount throughout the Community. In 1972 the Commission proposed a series of draft directives and a draft decision on the harmonization of excise taxes. The thrust of these directives and decision is the establishment of five excise duties on tobacco, mineral oil, alcohol, wine, and beer, such duties to be applied according to the guidelines set forth in the directives. All other forms of excise duties and indirect taxation would be abolished or assimilated within the Community's value-added tax system. As yet, nothing definitive has materialized in this area.\textsuperscript{207}

The Community has also adopted guidelines on the harmonization of legal and administrative provisions governing turnover taxes applicable to passenger travel and on tax and duty exemptions on the importation of small consignments of goods to private individuals.\textsuperscript{208}

\textbf{Taxes on Authorized Capital.} Taxes on the authorized capital of undertakings continue to constitute an important source of income for most member states. To date, the Council of Ministers has adopted two directives harmonizing the rates of capital issue taxes.\textsuperscript{209}

V. CONCLUSION

The substance of this Article has briefly surveyed the major laws of the European Economic Community which affect American business within the Community. From the point of view of the American businessman and attorney, the next decade undoubtedly will produce a further development of Community commercial laws, especially as the Community moves closer toward its goal of complete economic and monetary union.\textsuperscript{210} However, the

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\textsuperscript{208} See \textit{[1972] Bull. E.C. Supp. No. 7}.

\textsuperscript{209} For discussions see \textit{[1973] Bull. E.C. No. 4}, at 27.

\textsuperscript{210} Moves to insure that the integration process will take the European Community beyond the basic customs union concept toward complete economic and monetary union (EMU) followed closely the establishment of the EEC in 1958. After a sporadic history during the 1960's, a model for EMU was finally agreed upon by the Council of Ministers structured along the lines of the Werner Plan. See Report to the Council and Commission on the Realization by Stages of Economic and Monetary Union in the Community of October 8, 1970, \textit{[1970] Bull. E.C. Supp. to No. 11}. The Council of Ministers and the member states view EMU coming about through a series of three successive stages. The first stage has already commenced. The commencement of the second stage, which was expected to be completed before the end of 1980, was expected during 1974; however, because of the internal and international difficulties the Community has delayed commencement. The third stage, which was left undefined, would result in complete EMU, \textit{i.e.}, the Community would supplant the member states in the decision-making process in the economic and monetary areas. At least theoretically, because of the interaction between political and economic decisions, the political integra-
European Community cannot be viewed simply in terms of a commercial arrangement. Rather, notwithstanding continuing political turbulence within the Community, economic necessity has stimulated a process of European integration, and this process, at least on a fundamental level, appears to be "irreversible." What is ultimately happening in Western Europe is a political commitment to control and manage the economic and monetary affairs of Western Europe on a "supranational" level—to create a union which, if achieved, can provide the underpinnings for ultimate European political integration.