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A Primer on Production and Dominant Positions under E.E.C. Competition Law

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I. Introduction

A. Philosophy and Objectives of E.E.C. Competition Policy

In contrast with American antitrust policy, which is often said to be its major antecedent, the competition policy of the European Economic Community has a two-fold purpose.

First and foremost, Community competition policy is an instrument of *creation* of a unified "common market." It is being used to break down the traditional system of separate national markets and to create a single Community market in which national frontiers are not barriers to trade in any way.

Secondly, and only secondarily, Community competition policy is concerned with the *operation* of the market, in terms of maintaining free competition in the commercial life of the Community in what might, for want of a better expression, be called an "Adam Smith sense."

Most of the case-law which has come down so far has been concerned with the *market-creation* dimension of Community competition policy.

Thus, *Grundig-Consten*,[1] the first great case of E.E.C. competition law, was concerned with the theretofore ubiquitous practice of confining national distributors to their national territories by means of contractual restraints on exports.

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[1]*Grundig-Verkaufs GmbH and Etablissements Consten S.A.* v. *E.E.C. Commission*, Court of Justice Cases Nos. 56/64 and 58/64, Recueil XII-4, 429 (1966). CCH COMMON MARKET REP. para. 8046 (Transfer Binder 1961-1966).

Likewise, the recent *Sirena*[2] and *Deutsche Grammophon*[3] cases focused on uses of industrial property rights to achieve territorial insulation, commonly known as "absolute territorial protection," for national territories within the E.E.C.

In the same vein was the *Netherlands Cement Association*[4] decision last November. A restrictive agreement which extended over the entire territory of a Member State was deemed, *ipso facto,* to be a barrier to the economic "inter-penetration" sought by the Rome Treaty, because the agreement tended to "isolate" the national market.

In each of these seminal cases, the Community authorities were using competition policy to reduce the role of national frontiers as barriers to trade, *i.e.,* to *create* a unified "common market."

While the Community authorities also pay lip service to the goal of "Adam Smith style" free competition in the *operation* of their market, the extent to which they really believe in it seems open to question.

Europe, to date, has seen very little of the across-the-board trust-busting attacks on business which are familiar in the United States. Witness the recent Justice Department application to break up I.B.M.

This is because the purposes of anti-trust law in the Community and in the United States are different.

The Community authorities are still trying to *create* a larger market and break down territorial barriers.

In the States, by the time anti-trust law came in about eighty years ago, a "common market" already existed amongst the several States, and the primary need was to attack the monopolistic abuses of raw capitalism.

This is not to say that the Community authorities will not come eventually to an American-type competition law, where bigness is always looked at askance, and anything in derogation of the pure competition model of classical economics is regarded as invidious, but they are not there yet.

The point of this for the present subject is that, except as arrangements between firms relating to production might lead to market compartmentalization, and especially restrict trade across national frontiers, Community competition law on the production level is relatively undeveloped.

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[2]Sirena S.R.L. v. Eda S.R.L., Court of Justice Case No. 40/70, Recueil XVII, 1971, 69 (1971), 2 CCH COMMON MARKET REP. para. 8101.

[3]Deutsche Grammophon Gesellschaft MbH v. Metro-SB-Grossmarkte GmbH & Co. K.g., Court of Justice Case No. 78/70 (June 8, 1971), 2 CCH COMMON MARKET REP. para. 8106, 1971 Common Market Law Reports (hereinafter "C.M.L.R.") 631.

[4]Vereeniging van Cementhandlaren v. Commission, Court of Justice Case No. 8/72 (October 17, 1972), 1973 C.M.L.R. D16.

Indeed, most of the cases which have come down so far have dealt with arrangements at the selling or marketing level, because it is on this level that the goal of having a true "common market" must first be realized.

Lest the case for the dichotomy between the *market creation* and the *market operation* dimensions of Community competition policy be overstated, it should be pointed out that the maintenance of fair and equal competition also has a role in creating a unified European market.

Dr. Willy Schlieder, Chief of the Commission's Competition Directorate, has recently said:

> There is a second objective related to the creation of a Common Market: to ensure *fair competition*. Open frontiers within the Community are acceptable only if *all* undertakings face equal conditions. This means excluding legal or practical discrimination in the form of state monopolies with a commercial character, and preventing state aids from distorting competition within the Common Market.[5]

In line with this comment, the Commission is moving fairly rapidly in several areas to ensure that conditions for fair and equal competition across national boundaries shall exist. Nonetheless, the thrust of nearly all of the Commission's actions has been, one way or another, related to the trade-across-national-frontiersissue, which remains *the key issue* in E.E.C. competition law.

Community competition policy on the production level is subject to an added element of weakness, almost amounting to schizophrenia, in the sense that, side by side with the avowed goal of maintaining pure competition in the operation of the market, the Community authorities have proclaimed themselves in favour of promoting concentration of enterprises, and co-operation between enterprises.

Their purpose is to allow companies to adapt to the larger European market, and to meet challenges from outside the market, especially the threat of the multinational companies, most vividly characterized as *le défi Americain.*

Resolution of the cross-purposes embodied in, on the one hand, encouraging co-operation and development of sizeable enterprises and, on the other, calling for free competition, is very difficult. It will probably never be accomplished in a systematic way; rather, it will come on a case-by-case basis, as competing interests are balanced in the pragmatic style one has come to expect from the E.E.C.

Nonetheless, one general approach the Commission is already taking is

[5]Schleider, *Curbing Restrictive Practices in the Community,* EUROPEAN COMMUNITY, Sept., 1972, p. 5.

allowing various forms of co-operation, *e.g.*, joint production, joint research, etc., among small and medium-sized enterprises, but more closely scrutinizing the same activities when undertaken by the industrial giants.

Examples of this approach in action are the *de minimis* notice,[6] the notice on co-operation between enterprises[7] and the specialization exemption notice,[8] all of which are restricted in their availability to the smaller enterprises. These are discussed *infra*.

A variant of the same theme is reflected in the following quotation from the 1966 notice of the Commission relating to concentration among enterprises:

> While the Commission will . . . work for the elimination of artificial barriers that prevent European enterprises from coming together in a way that would increase productivity, it will use its powers under the E.E.C. Treaty and Council Regulation No. 17 to oppose any form of combination that would lead to the *monopoly* of a market.[9]

Thus, while companies can concentrate their resources in certain ways in order to operate on a Europe-wide scale, they must watch out when they get near the monopoly stage.

An example of this approach in action is *Continental Can*,[10] also covered *infra*.

B. Limitations of the E.E.C. Competition System

1. INHERENT LEGAL LIMITATIONS

Both Articles 85 and 86 have significant limitations in their scope and application.

The wording of Article 85 makes it clear that a conjunction of three elements is needed before the Article applies:

i. an agreement or concerted practice between enterprises which
ii. affects trade between member states and
iii. prevents, restricts or distorts competition.

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[6]Notice of May 27, 1970, Relating to Agreements, Decisions and Concerted Practices of Minor Importance, Official Journal (hereinafter "J.O.") No. C 64, June 2, 1970, p.1, 2 CCH COMMON MARKET REP. para. 9367.

[7]Notice Concerning Agreements, Decisions and Concerted Practices in Co-operation Between Enterprises, J.O. C 75, July 28, 1968, p.3, CCH COMMON MARKET REP. para. 9248 (transfer binder).

[8]Regulation on Specialization Agreements, J.O. No. L/292, Dec. 29, 1972.

[9]Information Memorandum on Concentration of Firms in the Common Market, No. P-1/66, CCH COMMON MARKET REP. para. 9081 (transfer binder) at p. 8172.

[10]*Continental Can Co.*, J.O. No. L7, Jan. 8, 1972 (Commission Decision). Decision of European Court, under the title Europemballage Corp. & Continental Can Co., Inc. v. Commission, Court of Justice Case. No. 6/72 (Feb. 21, 1973), 2 CCH COMMON MARKET REP. para. 8171, A very interesting commentary on this case, and all the relevant court papers, is A.H. Hermann, Continental Can Company v. Commission of the European Communities, London, 1973.

In the case of Article 86 there is needed:

i. a dominant position within a substantial part of the Common Market which is
ii. abusively exploited in a way which
iii. adversely affects trade between member states.

Although the E.E.C. case law teaches that it is often the "spirit," rather than the letter, of the Treaty which must govern,[11] legally speaking, these elements are prerequisite to application of each of the articles. This must mean that the articles are not of universal application, and do not cover all restrictive practices.

2. LIMITED JURISPRUDENCE

The body of case law and regulations which has been developed under these Treaty provisions is also fairly limited. To date there are relatively few things which are clearly problem areas under the competition rules.

Moreover, there has been almost no development of *per se* illegalities, as we know this concept in the United States.[12] This is the notion that certain things are *per se* unlawful no matter how one does them.

Rather, Community law teaches one to weigh the impact of restraints in their economic context. If the impact is significant, a problem may exist; otherwise, probably not.

3. ENFORCEMENT LIMITATIONS

The legal arsenal of the Commission for enforcement of the competition rules is limited. To be sure, practices which fall within Articles 85 or 86 are prohibited, and in certain cases void, and Regulation 17 gives the Commission power to impose fines and make cease and desist orders.

Nonetheless, one sees neither in the Articles, nor in Regulation 17, nor the case law, the development of a wide range of weapons vested in the hands of the Commission, to ensure free and open competition in the nature of the heavy artillery which the American authorities have.

With the exception of the recent *Commercial Solvents/Zoja* case,[13] in which the Commission ordered a company in a dominant position to sell to its competitor on pain of a fine for each day it delayed in doing so, the Commission has not yet displayed the power in general to order parties affirmatively to do certain acts, as distinguished from the purely negative power of telling parties not to do things.

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[11]*See* point 22 of the Court's judgment in *Continental Can,* which appears (without numerical identification) as the sixth paragraph of p. 8299 of the CCH translation.

[12]But cf., Béguelin Import Co. v. G.L. Import Export Co., Court of Justice Case No. 22/71 (Nov. 25, 1971), 1972 C.M.L.R. 81.

[13]*Zoja-CSC-ICI,* J.O. No. L 299/51, Dec. 14, 1972, 1973 C.M.L.R. D 50.

In the *Continental Can* case,[14] the Commission confined itself to ordering Continental to terminate the violation of law caused by acquisition of a competitor. To this end, Continental was required to "submit proposals to the Commission" within six months of the decision for ending the violation.

Although a "proposal" for divestiture was obviously what was sought by the Commission, presumably the Commission, itself, doubted it had the power to order divestiture outright under the rather limited powers granted to it by Article 3 of Regulation 17.

Thus, in general, it seems fair to say that the Commission cannot really force a company to compete in the E.E.C. if it does not wish to do so. In any case, purely unilateral decisions of this nature lack the requisite element of an agreement or concerted practice under Article 85.

The one way the Commission has been able to force parties to take affirmative steps is by conditioning clearances and exemptions on the parties' agreeing to amend or accommodate their restraints to conform to the Commission's policies on certain points. This becomes a kind of horse-trading negotiation.

4. PRACTICAL LIMITATIONS

The practical limitations on enforcement should not be overlooked. Among these are the sheer enormity of the Commission's tasks, as both policeman and judge in its competition policy, the limitations of staff and resources, the bureaucratic nature of the machinery, and the delicate political framework within which policies are elaborated and decisions taken.

The "mountain of paper" involved in the operation of the bureaucracy is illustrated by the Commission's requirement that the Form A/B, which is the form for making notifications under Article 85, be submitted in seven copies.[15] The Commission, in its turn, is required to transmit copies of notifications to each of the cartel authorities of the Member States, along with copies of "the most important" documents lodged with the Commission upon notifications.[16] With the enlargement of the Community one could expect the copy requirement for the notification forms to be raised to ten.

Before the Commission decides any case, it must refer its proposed decision to the Consultative Committee, composed of the representatives of the Member State cartel authorities for an advisory opinion. This takes time and can give rise to political difficulties.

[14]*Supra*, note 10.

[15]Commission Reg. 27, Article 2 J.O. No. 35, May 10, 1962, subsequently amended in other respects.

[16]Council Reg. 17, Art. 10. J.O. No. 13/62 p. 204, subsequently amended in other respects.

C. The Practical Approach to Competition Policy

Although the competition rules deserve to be considered in connection with most transactions which have effects on E.E.C. commerce, the preceding definition of objectives and limitations suggests the rules are far from an everpresent threat to doing business in Europe.

Certainly, E.E.C. competition law has far less impact on daily business life in Europe than the "old fashioned" national laws of the Member States regulating investment and prescribing the form and manner of doing business.

The practical way for the non-specialist to approach this subject is to become familiar with the principal problem areas, so that potential problems can be identified as they arise. In most cases, a course can be steered around the problems; when a problem must be met head-on, it is wisest to seek expert advice.

The latter admonition applies as well to non-specialist lawyers as to laymen. Not unlike American anti-trust law, the E.E.C. competition rules are deceptively simple in statement, but very difficult to apply. The "feel" for what is going on, which the specialist practitioner obtains from living with the rules in a wide variety of situations, can often be of more help than study of the "black letter" law.

II. A Survey of the Case Law Applicable to Producers Under Article 85

A. Cartels Limiting Production and Imposing Quotas

Cartels limiting production, allocating markets, fixing prices and the like are the classic *bêtes noire* of anti-trust authorities everywhere, and the E.E.C. has begun to move in this field.

In the *Quinine Cartel,*[17] the most important producers of quinine and quinidine in the Common Market had arranged by a secret "gentlemen's agreement" to reserve their national markets to one another through a system of supply and export quotas and special prices for certain territories.

Certain members of the cartel have also agreed not to produce quinidine at all, thus leaving to the German and Dutch members of the cartel, a virtual monopoly of E.E.C. quinidine manufacture.

The Commission investigated this cartel, found it unlawful, and imposed fines on the parties ranging from $10,000 to $210,000.

[17]*International Quinine Cartel,* J.O. No. L192, Aug. 5, 1969, CCH COMMON MARKET REP. para. 9313 (transfer binder).

To the same effect is the *Sugar Producers Case*[18] decided by the Commission last January. Twenty-two firms were found to have cartelized the market by assuring control of the market in each country for the local producers. One of the firms in that case was fined slightly more than \$1,500,000, and the aggregate of fines on all the parties was in excess of \$9,000,000.

These cases of "bad cartels" limiting production are to be contrasted with those of "harmless cartels," such as the *Belgian Limeburners* case,[19] and "good cartels" such as the *Transocean Marine Paint* case.[20]

In *Limeburners,* the Belgian makers of natural cement agreed in 1936 with the Belgian makers of artificial Portland cement, not to enter the Portland cement field in exchange for payments of indemnities by the Portland cement-makers. They also agreed to limit the amount of natural cement produced.

Technically, this was a restraint of trade, but the natural cement industry had declined to such pathetically small proportions by the time this case was decided in 1969, the Commission found no restriction of competition.

In *Transocean Marine Paint,* several rather small marine-paint makers formed a cartel governing production and sale of special marine paints. The cartel gave the members privileged positions on their national markets. Among other things, if a member in one country sold into another member's national territory, he had to pay the local member a commission.

Despite the "market carve-up" aspect of this cartel, the Commission exempted it under Article 85(3), because it was thought that it might lead to better production and distribution of this paint, and in the end benefit consumers.

B. Reservation of National Markets

Notwithstanding *Transocean,* which is an exceptional case, attempts to reserve national markets to local producers are generally very dangerous, whatever the device used.

To cite another blatant example, consider the *Julien-Van Katwijk* case[21] between the leading manufacturers of cardboard tubes in Belgium and the Netherlands.

The Dutch firm agreed not to sell the goods at all in Belgium, in return

[18]*Re* The European Sugar Cartel, decided Jan. 2, 1973. 1973 C.M.L.R. D 65.

[19]*Limeburners Agreement,* J.O. L122, May 22, 1969, CCH COMMON MARKET REP. para. 9303 (transfer binder).

[20]*Transocean Marine Paint Ass'n,* J.O. No. 163, July 20, 1967, p. 10 CCH COMMON MARKET REP. para. 9188 (transfer binder).

[21]*Julien-Van Katwijk,* J.O. L 242, Nov. 5, 1970, 2 CCH COMMON MARKET REP. para. 9395.

for the Belgian firm's agreement not to sell more than 20% of the annual requirements of the Dutch market in Holland in any year.

The Commission found this clearly invalid under Article 85(1). No exemption was possible, because the parties could not agree upon acceptable modifications of their agreement.

C. Limitations on Investment and Advertising

In the late Sixties, the Commission discovered that certain companies in the electric cable industry in Europe had agreed among themselves not to invest, or to take share-participations in companies operating within the home countries of other parties to the agreement.

The parties had also agreed neither to make deliveries into one another's national territories, nor to undercut one another's prices, nor to advertise in one another's home markets.

The Commission persuaded the parties to stop all of these practices and took great pride in publishing the result.[22] Thus, it may be assumed that the Commission has a low level of tolerance for concerted limitations on investment or advertising of this kind.

D. Reciprocal Production Agreements between Competitors

The English and Italian rubber companies, Dunlop and Pirelli,[23] prior to their merger, had a deal by which Dunlop made tires for Pirelli in France, and Pirelli made tires for Dunlop in Italy. This saved customs duty in the early years of the E.E.C., and also saved transport charges.

The Commission found no problem in allowing this arrangement, but it conditioned its approval on the parties' eliminating from their agreement certain unnecessary restrictions, such as those on the kinds of customers to whom the tires could be sold.

A general lesson which can be drawn from this case, and others like it, is that while co-operation in production has a good chance of being accepted, one should be careful with ancillary restraints put on the sale of jointly produced goods.

Indeed, as already indicated, the rules on co-operation at the production level seems to be a good deal more liberal than the rules on the selling level.

[22] *International Cable Development Corporation*, Bull. C.E.E. 5-1969, p. 36.

[23] *Pirelli S.p. A-Società Italiana Dunlop S.p. A.*, J.O. L323, Dec. 12, 1969, 2 CCH COMMON MARKET REP. para. 9336.

E. Joint Companies and Joint Ventures

Modern capital, know-how and personnel requirements are such that frequently companies are not able to enter new markets on their own, because of the magnitude of the resources which must be deployed, or the risks to be borne.

The logical answer to this is to pool resources with another enterprise by means of a joint venture contract or a joint company.

Joint venture contracts are most often used for "one-off" *ad hoc* projects, *e.g.*, construction jobs. The joint company approach involves two or more firms setting up a common subsidiary, and it is most suited to on-going, relatively permanent business operations.

Viewed in the light of the Commission's announced policy of promoting cooperation and consolidation of enterprises in the E.E.C., one would have expected that joint venture contracts and joint companies would receive a cordial reception from the E.E.C., at least for smaller companies. However, it has been unofficially reported that the Commission has a large quantity of joint company cases on the shelf, and that it intends to be fairly restrictive toward granting exemptions and clearances.[24] Thus, for the present, the joint company approach, at least between large and competing firms, remains a dangerous course of action. Probably, it should not be embarked upon without the protection of either a group exemption or specific notification.

F. Pricing in Oligopolistic Markets

The term "oligopoly"—currently much in fashion in E.E.C. competition law circles—refers to industries or markets in which there are a limited number of participants. According to the classical definition, the participants are interdependent, in the sense that none of them can take a decision affecting competition without the others being immediately affected by it, and obliged to react to it.

Thus, parallel conduct is a normal feature of oligopolies.

The general rule which seems to be emerging for oligopolies is that if parallel conduct by the members is due to independent market forces which they must follow because of economic necessity, this does not pose a competition-law problem. However, if parallel conduct is due to con-

[24]Curiously, the Commission did not reach this issue, although the facts of the case (not articulated in the official report) gave it an opportunity, in *Pittsburgh Corning Europe*, J.O. L 272, Dec. 15, 1972, 2 CCH COMMON MARKET REP. para. 9539. Readers will be interested to know that unofficial "leaks" of information from the Commission are not uncommon; *e.g.*, the results of the *Pittsburgh Corning Europe* case were published in the Brussels press before the Commission officially promulgated its decision.

certed agreement between the participants, it is very much an Article-85 matter.

This is illustrated by the *Dyestuffs Cases.*[25] Ten producers of aniline dyes accounted for 80% of sales of these products in the Common Market. All of the producers raised their prices by uniform percentages at about the same times on three occasions—in 1964, 1965 and 1967.

In the Commission's view, the increases resulted from conscious co-operation between the parties. This was deemed a concerted practice within Article 85(1) and fines were imposed.

Appeals from the Commission's decision were taken to the European Court. The Court's decision, in July, 1972, upheld the Commission on the ground that the dyestuffs producers were unable to justify their parallel conduct, on the basis of independent objective economic criteria.

According to the Court, the structure of the European dyestuffs market did not in any way make uniform price increases necessary. Rather, if there had been free competition, each party likely would have raised prices at varying amounts for different products.

This case gets into very complex economic analysis but the principles for parallel conduct seem clear.

The *Dyestuffs Cases* also afford a warning about talking to competitors. Shortly before the 1967 price increases were announced, all of the members of the cartel except one, had held a meeting in Basel, Switzerland. This fact was used to support the finding of concerted action.

G. Exclusive Production Licenses in Oligopolistic Markets

Another angle to be considered where industries are oligopolistic are *exclusive* production licenses of industrial property.

Recently, the Commission emphasized that such licenses restrict competition in the sense that they preclude licensors from granting other licenses for the same territory.[26]

Whether this makes sense is open to doubt, because an owner of industrial property has no obligation to get any license at all. Nonetheless, this is the Commission's recent and emphatic position.

Indeed, some commentators take the view that an *exclusive* production license will always be within 85(1) if the licensor is large, and there is little

[25]*Dyestuffs Cases*, J.O. No. L195, Aug. 1, 1969, CCH COMMON MARKET REP. para. 9314 (transfer binder); *aff'd* by European Court in Cases Nos. 48/69, 49/69, 51/69, 52/69, 53/69 and 54/69, decided July 14, 1972, reproduced in 2 CCH COMMON MARKET REP. paras 8161-8166.

[26]See: *Burroughs-Delplanque* and *Burroughs/Geha-Werke*, J.O. No. L13, Jan. 17, 1972, 2 CCH COMMON MARKET REP. paras. 9485 and 9486; *Davidson Rubber Co.*, J.O. L 143, June 23, 1972, 2 CCH COMMON MARKET REP. para. 9512.

competition. The author is of the opinion that the cases do not go this far, but this is such a vast subject the problem can be no more than signaled here.[27]

H. Collective Agreements among Producers and Sellers

The *Faience Convention*[28] involved reciprocal buying and selling arrangements between ten E.E.C. manufacturers and two associations of seller-distributors on the Belgian tile market.

Only certain companies could belong to this cartel, and it became a closed circle which made competition very difficult for others. At the Commission's instance, the parties ultimately were forced to cancel their agreement.

I. Common Sales Agencies

Similar to the *Faience Convention* are the several cases on common sales agencies, in which a number of producers appoint a common sales agent for a country, to market all of their products in that country at uniform prices and on a quota basis. The Commission has generally declined to accept these.[29]

The most recent case involved the sales agency for cement in the Netherlands.[30] The European Court held that fixing of resale prices by such an association, or even posting suggested guideline prices, violates Article 85(1).

This case is bound to have far-reaching repercussions for all sorts of price-fixing arrangements. For instance, it would not be much of a step to extend its rationale to bilateral contracts of resale price maintenance.

J. Joint Purchasing

To date, the only cases on joint purchasing agencies have involved wholesale and retail distributors of foodstuffs.[31] The Commission did not

[27]*Cf.*, the author's *Fundamentals of International Licensing Agreements and Their Application in the European Community*, 7 THE INTERNATIONAL LAWYER 78 (1973), reprinted in the February, 1973, number of the COMMON MARKET LAW REVIEW.

[28]*Faience Convention—See* Commission Press Release No. IP (71) 204, Oct. 20, 1971; *cf.*, text of Commission's recommendations in 1 CCH COMMON MARKET REP. para. 2741.

[29]*E.g., Central Heating*, J.O. No. L 264, Nov. 23, 1972, 2 CCH COMMON MARKET REP. para. 9535.

[30]*Supra, note 4.*

[31]*S.O.C.E.M.A.S.*, J.O. No. L 201, Aug. 12, 1968; *CCH Common Market Rep.* para. 9250 (transfer binder); *Internationale SPAR Centrale N.V.*, J.O. No. C 35, April 11, 1972. Compare the discussion of the "bark pool" in *International Quinine Cartel, supra, note* 17. *Cf.*, "Eurofima," reported in the *Times* of London, April 17, 1973, to be a new Article 86 case involving a joint purchasing agency in the railway industry.

intervene to prohibit joint purchasing, because the activities did not have a perceptible effect on trade between Member States. Nonetheless, it is as well to keep in mind that sharing of sources of supply is one of the items explicitly prohibited in Article 85(1).

K. Tying Agreements

"Tying" refers to the situation in which sale of one product is conditonal on purchase of other products. This is specifically interdicted by Article 85(1).

A producer can unwittingly fall into a tying situation when he gives a production license, which has as one of its conditions that the licensee buy his raw materials from the licensor.

This practice is likely to come under attack in the near future. As yet there has been little development of it at the E.E.C. level, although it has been prohibited in numerous instances at the national law level.

III. Admissible Forms of Agreements and Concerted Practices Under Article 85

Having sketched the major problem areas, it might be useful to turn to the things about which producers can feel fairly safe under Article 85.

Note at the outset that there are two courses which assure a safe harbour under Article 85, even if one is within a potential shoal area.

The first is to notify and obtain either a negative clearance from Article 85(1) or a specific exemption under Article 85(3). During the pendency of such a notification, the notified agreement is immune from fines.

The second course is to tailor one's agreement to fit within one of the several group notices or group exemptions which the Commission has promulgated.

A. Group Reliefs

Dealing with the group escape hatches first, there are presently five of these which deserve mention:

i. The first is the "Christmas Message" taking true agency agreements out of Article 85.[32]
ii. The second and most important, is the exemption of bilateral exclusive dealing agreements conferred by Reg. 67/67.[33]
iii. The third is the *de minimis* notice.[34]

[32] *Official Notice on Contracts for Exclusive Representation Concluded with Commercial Agents*, J.O. No. 139, Dec. 24, 1962; 1 CCH COMMON MARKET REP. para. 2697.
[33] *Commission Regulation 67/67*, J.O. No. 57, March 25, 1967, p. 849, 1 CCH COMMON MARKET REP. para. 2727.
[34] *Supra, note* 6.

iv. The fourth is the notice on co-operation among enterprises.[35]

v. The fifth is the specialization agreement exemption.[36]

A sixth relief, in the form of a group exemption for certain industrial property licensing agreements, is expected to be issued in draft form in mid-1973, but very likely it will not come into full effect before 1974.

Group exemptions are also scheduled to be issued for agreements relating to uniform applications of standards and types as well as research and development, but there is, as yet, no hint as to when these will come out or the form they will take.[37]

The current *de minimis,* co-operation and specialization notices are available only to companies of limited size.

The co-operation notice has the vice of being quite vague in its coverage; hence, it is more difficult to apply in practice than the other reliefs.

The specialization exemption, which was officially promulgated in December, 1972, promises to be a tremendously important safe-haven for producers.[38] "Specialization" is likely to be a novel term to Anglo-American lawyers, but the notion it imports is not new.

A specialization agreement is a contract whereby two or more enterprises agree that one party will specialize in production or sale of one line of goods, and the other in another line.

These contracts generally involve reciprocal supply clauses between the parties, as well as agreements not to compete with one another's "specialties."

The *Lightweight Papers* case[39] is a recent example. Five French facturers of light and thin paper, together enjoying upwards of 70% of the French and Benelux markets for their products, agreed each would specialize in a particular field of production: one took light cigarette paper, another carbon paper, another onion skin paper, etc. They co-ordinated their exports as well. A specific exemption was granted by the Commission, but the case was extraordinary in some ways because the major customers were government monopolies, such as the French tobacco monopoly, and special government regulations were involved.

While most accords of this type fall *prima facie* within Article 85(1), as as by their very nature they constitute restrictive agreements between petitors, their justification comes from the criteria of Article 85(3).

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[35]*Supra, note* 7.

[36]*Supra, note* 8.

[37]*See Council Reg. 2821 71* J.O. L 285, Dec. 21, 1971.

[38]*Cf.,* the author's *Specialization Agreements: Development of a Major Exception to the Competition Rules of The Rome Treaty,* INT'L BAR J. (NOV. 1972).

[39]*Lighweight Papers,* J.O. No. L 182, Aug. 10, 1972, 2 CCH COMMON MARKET REP. para. 9523.

The regulation on specialization contains a number of conditions for these agreements. The most important is that the group exemption for specialization will only be available to firms whose total combined annual turnovers do not exceed 150,000,000 units of account (units of account, as the term is used by the E.E.C., roughly speaking refers to pre-devaluation U.S. dollars), and when the products which are the subject of the specialization do not account for more than 10% of total Common Market volume of the same goods.

The turnovers of all affiliates and subsidiaries of the parties must be included in determining whether the 150,000,000 combined turnover test is met. Therefore, the exemption is not to be available to to companies which are members of large groups. Incidentally, the same is true of the *de minimis* notice.

B. Specific Relief

Even if an agreement does not fit into one of the five group escape hatches, the possibility of specific exemption under Article 85(3), or specific negative clearance from Article 85(1), is still available. There are numerous cases affording specific relief to producers under 85(3).

The *Henkel-Colgate* case[40] is an important, recent example. Two of the largest manufacturers in the European soap industry, which is oligopolistic, set up a joint subsidiary in Switzerland in which each company had equal shares.

The purpose of the subsidiary was to conduct the research into soap products which the parties had previously conducted separately. Any commerically usable products which came out of the research were to be licensed back to Henkel and Colgate.

The Commission found the agreement was within the Article 85(1) prohibition because it eliminated competition at the research level. Nonetheless, it granted an exemption under Article 85(3) because it felt the joint research would promote economic and technical progress.

To take another example of a specific exemption for producers, consider the specialization accord between the largest Belgian and the largest French manufacturers of ammunition.[41] Each party effectively agreed not to make products which competed with those made by the other. They also agreed to be exclusive distributors for each other within their home territories.

The agreement allowed for joint research and provided a method by

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[40]*Henkel Colgate*, J.O. L 14, Jan. 18, 1972, 2 CCH COMMON MARKET REP. para. 9491.

[41]*Ammunition Specialization Agreement*, J.O. No. L 134, June 20, 1971, 2 *CCH Common Market Rep.* para. 9439.

which newly developed products were assigned to one or the other company.

Despite the breadth of these anti-competitive provisions, which is quite shocking to those schooled in the American approach to anti-trust law, the Commission gave the exemption because it thought it would lead to a more intensive, and more rational use of the industrial equipment and sales networks of both parties.

The exemptions granted in both the *Henkel-Colgate* and the *Ammunition* cases, as well as *Lightweight Papers*, were limited as to time. During the exemption periods, the parties are required to submit periodic reports to the Commission on what they are doing, in order that the Commission may ensure the co-operation does not exceed the intended bounds.

Obviously, this reporting requirement will present a nuisance and continuing threat for the parties. The conditional nature of these Article 85(3) exemptions may suggest that one is better advised to tailor his activities to fall within a group exemption, so that contact with the Commission can be avoided altogether.

The adage, "out of sight, out of mind," deserves seriously to be kept in mind when considering notification.

IV. Article 86

Turning next to Article 86, one finds oneself in relatively virgin territory.

So far, the Commission has formally found violations of Article 86 in only four cases: *GEMA,*[42] *Continental Can,*[43] *Zoja/Commercial Solvents,*[44] and the *Sugar Cartel.*[45]

A. Structure of Article 86

Article 86 is different from Article 85 in that only one enterprise can violate 86; however, Article 86 can also strike several enterprises acting together.

Article 86 also differs from Article 85 in that anything which falls within the former is prohibited; there is no redeeming exemption as in Article 85(3).

B. Application

The major practical problems in applying Article 86 are to know what constitutes a "dominant position," and what is "abuse" of such a position.

[42] *GEMA*, J.O. No. L 134, June 20, 1971, 2 *CCH Common Market Rep.* para. 9438; supplemented, J.O. No. L 166, July 24, 1972, 2 *CCH Common Market Rep.* para 9521.

[43] *Supra*, n. 10.

[44] *Supra*, n. 13.

[45] *Supra*, n. 18.

1. DOMINANT POSITION

The first step in determining whether a dominant position exists is to identify the relevant market within the Common Market. This requires definition of the kind of goods in question and the geographic territory and customers involved.

The next step is to look at the manufacturing, sales and financial positions in the relevant market of the enterprise concerned. Ask, "is the enterprise able to 'call the shots' in the market by taking independent lines of conduct without much regard for competitors, buyers or suppliers?"

Also, "is the market share of the enterprise such that it controls production or distribution of a substantial portion of the relevant goods?"

If so, the enterprise is liable to have a dominant position; otherwise, probably not. Of course, if there is no dominant position, and no likelihood that one will be created by a particular transaction, Article 86 will not apply.

2. THE RELEVANT MARKET

Obviously, the biggest variable in this analysis is the concept of "the relevant market." The more narrowly this is defined, the more likely a dominant position will exist.

Few criteria have been elaborated to help define what constitutes the relevant market, but it is known from *Continental Can* that the products involved must be fairly generic. That is, one must take account of all products which can fulfill a particular, reasonably broad, purpose or need.

For example, one should not look for relevant market purposes at the markets for metal containers for meat or fish only, but rather at the general market for lightweight metal packaging. Likewise one cannot consider only the market for metal jar caps without also considering the market for replacements such as crown corks which will serve the same purpose. These examples were two of the rocks on which the Commission foundered in *Continental Can.*

So far as the territory of the relevant market is concerned, prior to the enlargement of the E.E.C., the Commission urged that the territories of either Benelux together, or of any one of the other original member states, should be defined as "substantial parts of the Common Market" for Article-86 purposes.[46]

Applying the Commission's reasoning to the enlarged Community, certainly a dominant position in a product field in the U.K. alone would be a substantial part of the E.E.C. for Article-86 purposes. Quite possibly, a

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[46] *See* J.O. No. C. 92, July 20, 1970.

dominant position within the ambit of Article 86 could be found upon even a substantial part of the territory of one of the larger E.E.C. countries.

3. ABUSE

On the question of what is abuse of a dominant position, some forms of abuse are detailed in Article 86, itself, but these are only examples, by no means intended to be exhaustive.

In the *GEMA* case, the Commission was dealing with a trade association which acted as a sort of clearing house for music copyrights in Germany. It had a virtual monopoly. The Commission found *GEMA* had abused its dominant position in Germany in six ways:

(i) by discriminating against nationals of other Member States,
(ii) by subjecting its members to unnecessary obligations,
(iii) by preventing the establishment of a single market for the services offered by music publishers,
(iv) by extending the copyright monopoly to unprotected works,
(v) by favouring record manufacturers and discriminating against independent importers of records, and
(vi) by discriminating against importers.

As to other forms of abuse, the *Sirena*[47] and *Deutsche Gramophon*[48] cases, from the European Court, held that the charging of excessively high prices by a company which is in a dominant position could be evidence of abuse, if the prices do not justifiably result from independent objective economic circumstances.

Thus, if a company has a dominant position in one Member State, and its prices are grossly higher there than comparable prices in other E.E.C. countries, it could be on dangerous ground and must tread carefully.

Another clear-cut form of abuse is refusal to supply. In the *Commercial Solvents/Zoja* case,[49] Commercial Solvents had a world monopoly on manufacture of an essential ingredient for making a drug used to combat tuberculosis. It refused to sell this to a former customer, because the customer had rejected a proposition for merger, and Commercial Solvents decided to go into the business itself. Effectively, Commercial Solvents was trying to starve its former customer, Zoja, out of business. The Commission found this abuse particularly serious, and imposed a fine of $200,000 plus $1000 for each day Commercial Solvents delayed in supplying Zoja.

Still another form of abuse emerged in the *Sugar Cartel* case.[50] In that

[47]*Supra, note* 2.
[48]*Supra, note* 3.
[49]*Supra, note* 13.
[50]*Supra, note* 18.

case, companies in dominat positions conditioned the sale of sugar to wholesalers on the wholesalers agreeing to resell only to certain customers and for certain uses. Since the purpose of this was to reserve the national markets to certain producers, this also was a particularly serious abuse.

4. ELIMINATION OF COMPETITION AS "ABUSE"

The last, and most interesting, form of abuse under Article 86 which needs to be considered is growth of a company to the point where virtually all competition is eliminated. It is clear from the *Continental Can* case that this can occur from merger or take over; it has not been decided whether this form of abuse can also arise from internal growth, but the implications are that it can.

To review briefly the facts in the *Continental Can* case, the American Continental Can Corporation owned 86% of the German subsidiary. The subsidiary had upwards of 70% of the German market for certain kinds of containers.

The subsidiary's position, coupled with Continental's overall size, strength, technical and financial ability, was held to be a dominant position.

Acquisition by Continental of a 91% interest in a Dutch firm, which had a sizeable position in the market for the products in the Benelux countries, was found to be an "abuse" of Continental's dominant position.

Note that the only abuse alleged by the Commission was this acquisition, so the issue in the case was purely and simply one of control of growth of companies by acquisition.

Continental appealed the Commission's holding to the European Court, and the decision came down February 21, 1973.

The Court reversed the Commission on the ground that the Commission had not fully defined the relevant market and/or proved that Continental had eliminated competition in it. However, the Court upheld the principle that acquisition or strengthening of a dominant position can be an abuse under Article 86 if it does substantially eliminate competition.

In other words, the Court said that the Commission had not adequately prepared and proven its case on the facts, but the principle that Article 86 applies to prohibit firms from becoming so big that consumers have no freedom of choice, and there is no effective competition, was upheld.

The key to applying the Commission's decision lies in defining the relevant market accurately in terms of all the products which serve a given purpose. If a firm is so dominant in a given field that it can do as it pleases with no effective competition, it is probably within Article 86 and should consider it in any action that it takes in the E.E.C.

5. ARTICLE 85: A FALLBACK POSITION

For firms not in dominant positions, Article 85 could conceivably apply to some mergers, as nearly all mergers involve agreements between enterprises in the sense of Article 85. In fact, many people have wondered why the Commission did not use 85 in the *Continental Can* case. Probably, the answer is that the Commission simply wanted to make of the case a test of the extent of its authority under Article 86.

6. COMMISSION POLICY

A hint as to how the Commission will apply its newly-confirmed powers apropos growth of companies comes from the testimony of Dr. Duisberg of the Commission's Competition Directorate before the European Court in the *Continental Can* hearing. Dr. Duisberg said that it is the policy of the Commission to encourage mergers in high-technology fields in order to improve the competitiveness of European industry on world markets, while discouraging mergers in the consumer-orientated industries.[51]

The British Department of Trade and Industry has recently made a significant contribution to thinking on this subject. Results of a recent empirical study[52] indicate that increase of the size of a firm does not help—indeed, can hinder—competitiveness, unless accompanied by an increase in plant size. In other words, conglomerate mergers do not seem to aid competitiveness.

Moreover, the study found that corporate concentrations above a certain size tend to depress trade. These conclusions may give added fuel to the Commission's position that mergers of small- and medium-sized companies are acceptable, but large mergers (except in high-technology fields, such as computers or aircraft) are not.

C. Forthcoming Developments

The Commission is presently working on a regulation which, if passed by the Council of Ministers, would require that the Commission give prior approval to all mergers and takeovers above a certain size. The approach would be similar to the procedure embodied in Article 66 of the Coal and Steel Treaty.

Such a regulation would obviously introduce a serious element of delay into mergers and takeovers, but it might be tolerable if the threshhold limit were set sufficiently high in terms of the size of the companies involved so

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[51]Reported in The Financial Times, Feb. 22, 1973, p.7.

[52]Owen, *Competition and Industrial Structure: Implications of Entry to the E.E.C.*, 10 TRADE AND INDUSTRY 586 (1973).

that only the very largest deals were covered. In any case, the form of this regulation is sure to provoke a storm when it is published.

Besidesthe up-coming merger regulation, there are three other projects relating to company concentration or affiliation presently in progress in the E.E.C. The proposed European Company Statute and the European Economic Interest Group regulation are intended to be introduced as new kings of business entities of Community, rather than Member State, charter and nationality. Their major purpose will be to facilitate intercompany mergers and ties.

An E.E.C. "Marriage Bureau" is also planned as a new institution under Community auspices. Its function will be to help bring small and medium sized companies together for mergers, specialization and co-operation of all types.

The Marriage Bureau is expected to be established relatively soon,[53] but enactment of the European Economic Interest Group regulation is considerably down road, and the European Company remains only a futuristic dream. Both of the latter presuppose prior progress in harmonization of company laws and rules on conflicts of laws, and such progress has been very slow in coming.[54]

None of these innovations, at least in the forms presently contemplated, contain exemptions from competition law, so ultimate use of any of them will presumably be conditioned on compliance with the rules of Articles 85 and 86.

Conclusion

A. Connecticut Yankees in the E.E.C.

American anti-trust lawyers will find much is familiar in E.E.C. competition law. The Community competition authorities are drawing heavily on the American experience for elaboration of the law under Articles 85 and 86, and they make no secret of the fact that the American system in several respects is a model for what they would like to achieve.

A measure of their success is that the position on mergers under Article 86 after *Continental Can* seems not far removed from the kind of broad mandate one finds in Section 2 of the Sherman Act.

In many ways, however, the differences between the American and European anti-trust systems are more striking than the similarities. The

[53]The Council of Ministers approved the creation of the Marriage Bureau (Bureau for the Amalgamation of Firms), along with the appropriation of 42,000 units of account for its commencement, on April 16, 1973. *Europe*, April 16/17, 1973, p.6.

[54]See Didier, Lukoff and Waleffe, *A Key Element in the Unification of Europe: Harmonization of Company Law*, 6 THE INTERNATIONAL LAWYER 615 (1972).

different purposes of the two systems were mentioned in the introductory part of this paper.

Another major difference arises from use of the civil law concepts and procedure in Europe. One American lawyer for Continental Can learned this to his cost when he filed a brief with the European Court, only to have it singled out and savagely dismissed as inappropos by the Court in its judgment.

Most American observers are likely to feel that United States anti-trust doctrines suffer in transit and translation when imported into Community law. This is probably attributable in part to lack of a full grounding in United States anti-trust law on the part of the Community officials responsible for applying competition law, even though a surprisingly large number of the members of the Commission's Competition Directorate and Legal Service have had some legal training in the United States.

It should also be remembered that cartel law in Europe is basically a post-war development, and still is in a relatively youthful stage, even in Germany, which has the most "advanced" system of the continental E.E.C. countries.

Another source of difficulty with the emerging E.E.C. case law is that the civil law tradition of judicial and administrative decision-making does not seem to call for the full factual development and elaborate reasoning which one finds in American decisions. Most of the European Court decisions are composed of lengthy, turgid recitations of the parties' positions and the legal issues, followed by terse, frequently enigmatic, statements of the holding.[55] It is to be hoped that advent of British judges on the Court will lead to improvements in the presentation of opinions.

On the other hand, there are many exemplary features of E.E.C. competition law, which the American system could do well to emulate. Not the least of these is the speed with which the European Court operates. Most cases are disposed of within a year of filing.

On balance, there is reason to think the system which is evolving in Europe is having a salutary effect, and is helping in the achievement of the goals of the Rome Treaty. Although only a handful of cases are decided each year, their role in causing undertakings to modify their agreements and commerical practices to conform to the evolving rules is undoubtedly significant.

The system is also beginning to have teeth, as witnessed by the dramatic increase in the sizes of fines imposed by the Commission in its most recent cases. On this score, American firms should realize that they are "fair

[55]*See, e.g.*, S.A. Brasserie de Haecht v. Wilkin & Janssen, Court of Justice Case No. 48/72 (Feb. 6, 1973), 2 *CCH Common Market Rep.* para 8170.

game"—perhaps, more than "fair game"—in the Community. Such a disproportionately high percentage of the Community's competition cases to date have involved American firms, at times one is inclined to think that the Community authorities have declared "open season" on American companies.

This is partly explainable by the fact American companies are highly "visible" in Europe. Also, as American firms are accustomed to anti-trust law, they have tended to follow the notification procedure more frequently than their European counterparts. Notification, of course, requires the Commission to take decisions on their cases. Nonetheless, American companies should not forget that they often lack the political "clout" of European-based firms, and accordingly are easy targets for "test cases."

B. A Larger Perspective

The foregoing comments on the E.E.C. system deserve to be viewed in the light of an amusing exchange related in Boswell's *Life of Samuel Johnson*. Boswell had been at church in the morning and had witnessed the extraordinary phenomenon of a woman preaching. When he told Dr. Johnson about this later that day, Johnson remarked,

> Sir, a woman preaching is rather like a dog walking on its hind legs: it is not done particularly well, but one is surprised to see it done at all.

Although the learned doctor would doubtless have quailed in royalist horror had he known of the E.E.C. and its competition policy, his analogy seems apt.