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A SURVEY OF ANTITRUST LAW IN THE EUROPEAN ECONOMIC COMMUNITY

INTRODUCTION

When investors and commercial entities look to expand their operations into new markets, they will almost certainly consider going into the European Economic Community (EEC). Its members—West Germany, France, Italy, Belgium, Netherlands, Luxembourg, Denmark, United Kingdom, and Ireland—are among the world’s most affluent and industrialized nations. Their economies are active, their labor forces relatively well-educated, and they provide a steady demand for a wide range of products and services. But any investor or commercial entity planning to take advantage of these conditions must also consider what effects the EEC’s antitrust laws will have on its business. Any venture which is planned and executed without regard for these laws runs a serious risk of being subjected to stiff fines and serious restraints on its commercial activity.

This comment will attempt to trace the development of the EEC’s antitrust laws to date, with primary emphasis on Article 85 of the EEC Treaty and its prohibition of agreements restraining competition. These agreements include price-fixing, market allocation, and tying. EEC control of monopolies, which consists not of outlawing them as does American law, but of prohibiting their “abuse” through Article 86, will also receive some attention.

As will be seen, the fact that the EEC is primarily an economic entity, one of whose foremost goals is the promotion of economic well-being, has meant that many practices which might be viewed as anti-competitive under American antitrust

1. The first six nations were the original members; the latter three were admitted in 1973.
2. The per capita gross national products of the nine Member States are among the top thirty in the world. See F. Felix, World Markets of Tomorrow 19 (1972).
4. Id.
law are permitted when they promote efficiency or market integration.

The fact that the EEC encompasses many different languages and legal systems accentuates the emphasis on efficiency and market integration. Strict verbal and doctrinal interpretations of Community competition law take second place to interpretations advancing these two goals.\(^7\)

The difficulty of making strict interpretations in this context has led to great flexibility of Community competition law. This flexibility is, in fact, expressly provided for in Article 85.3’s exemption procedure,\(^8\) and by the use of an “appreciable” restraint concept.\(^9\) A restraint on trade, in order to be prohibited, must work a significant effect on trade between Member States. Thus agreements between small and medium-sized firms generally escape the strictures of Article 85, since their actions are deemed to have little effect on interstate trade.\(^10\)

There may be no need to show, however, an actual restraint of interstate trade where an agreement is intended to restrain competition, and the firms involved are capable of doing so, due to their market power.\(^11\) For example, vertical restraints imposed by a manufacturer upon a distributor which are capable of restricting competition between distributors can be violative of Article 85, even where horizontal competition between manufacturers may be increased.\(^12\) Furthermore, Articles 85 and 86 are violated by anticompetitive activities taking place outside the Community if they have effects within the Community.\(^13\)

Article 85 speaks of agreements between enterprises, and this has been interpreted to mean that two or more firms must agree or cooperate in order to come within its scope.\(^14\) Related

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7. See text accompanying note 53 supra.
9. See text accompanying note 208 infra.
10. Id.
11. But see C. OBERDORFER, A. GLEISS, & H. HIRSCH, COMMON MARKET CARTEL LAW 33 n. 65a (2d ed. 1971) [hereinafter cited as OBERDORFER].
firms within one enterprise are capable of restraining competition in some instances, but generally speaking, Community authorities see little possibility for real competition between related firms. In most cases, then, these firms do not violate Article 85 when they impose restrictive terms such as territorial restraints on each other.\textsuperscript{15}

Due to the infrequent use of the intra-enterprise conspiracy concept for agreements between related firms,\textsuperscript{16} and to the infrequent application of Article 86,\textsuperscript{17} which prohibits abuses of dominant position, corporate growth by internal expansion, mergers, and acquisitions is encouraged.\textsuperscript{18}

Firms need not contract to restrain competition, and Article 85 takes this into account by prohibiting agreements, decisions, and \textit{concerted practices} which restrain competition. Thus any form of cooperation, whether it be by binding contract or by consensual arrangement, violates Article 85 where it has the requisite restrictive effect on competition within the Common Market.\textsuperscript{19}

Great use is made of administrative procedures in the application of EEC competition law, and it is through these procedures that many forms of cooperation are allowed,\textsuperscript{20} including joint marketing agreements, and joint research and development agreements.\textsuperscript{21}

The industrial property area should see much change in the near future, as a result of the recent ratification of a Convention for the European Patent for the Common Market.\textsuperscript{22} This treaty will permit the creation of a Community patent office, and a uniform body of patent law will replace most of the idiosyncracies of national patent laws. The laws of the Member States have, until now, played a primary role in determining the legality of many restrictive practices accompanying the use of industrial property rights. They have been overlooked in favor of Community law only when their application

\begin{footnotes}
\item[15] See discussion of intra-enterprise conspiracy in text accompanying notes 162-85 infra.
\item[16] Id.
\item[18] See note 181 and accompanying text infra.
\item[19] See OBERDORFER, supra note 11, at 14-15.
\item[20] See discussion of negative clearances in text accompanying note 211 infra, and discussion of exemptions in text accompanying note 215 infra.
\item[21] See, e.g., note 233 and accompanying text infra.
\item[22] See note 259 infra.
\end{footnotes}
has frustrated market integration by raising national trade barriers, which is a violation of Community integration and competition policy.23

The holder of an industrial property right does not abuse a dominant position and thereby violate Article 86 merely by blocking unauthorized use of the right,24 although Community authorities have not ruled out this possibility. A patentee may, for example, abuse his dominant position where he possesses a powerful market position in the patented product, and then proceeds to gouge his customers, who have little choice but to continue to deal with him.

Article 86 has not yet been successfully applied to undo mergers and acquisitions. Community authorities require a showing that a merged firm will dominate in the marketplace—that it need take little account of its competitors and customers. Only at this point will there be the required abuse of dominant position.25 Article 86 has, in fact, seen little use by Community authorities. Only where dominant firms have used predatory practices have violations of Article 86 been found.26

Thus EEC competition law does not adhere to rigid notions as to the efficacy of pure competition as both a means to and an end embodying economic and political good, as does its American counterpart. Community law is extremely flexible in allowing practices which promote efficiency while not hindering the goal of market integration. Once the Common Market has become a final reality, Community authorities will be free to address more fully the maintenance of competition.

American and EEC Rules Compared

American antitrust law has had a strong influence on its EEC counterpart, but the American propensity for preserving competition at almost any cost has no place in the EEC.27

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23. See text accompanying note 26 infra.
24. See text accompanying note 157 infra.
25. See, e.g., text accompanying note 274 infra.
27. Compare Treaty of Rome art. 85, 298 U.N.T.S. 47-48 (1958), which allows exceptions to the prohibitions of Article 85.1 where the economic benefits to be gained outweigh anticompetitive effects, with the American concept of per se illegality for some types of agreements. See, e.g., Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899).
Antitrust law in the United States has shown itself hostile to many aggregations of private economic power, the rationale being that expressed by Madison in *The Federalist*: when any one person or group of persons holds great individual power, the likelihood of tyranny is increased, since the capability to impose one's wishes arbitrarily on others grows in proportion to the amount of unchecked power he holds.\(^8\) Thus one of the major goals in American antitrust enforcement has been to preserve diversity through competition so as to avoid economic tyranny.\(^9\)

In *United States v. Aluminum Co. of America*,\(^30\) Judge Learned Hand noted:

> . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.\(^31\)

Judge Hand continued, quoting Senator Sherman from the debates over the Sherman Act: "If the concerted powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government . . . ."\(^32\)

Monopolization is illegal *per se* under American antitrust law,\(^33\) as are horizontal divisions of markets, in which one company agrees with another not to compete in the other's territory;\(^34\) price fixing,\(^35\) group boycotts;\(^36\) and tying, where a seller who owns a patent, for example, requires his buyer to purchase an unpatented item along with it.\(^37\)

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28. *The Federalist* No. 10, at 56-57 (J. Cooke ed. 1961) (J. Madison). The antidote to this tyranny, Madison proposed, was the preservation of diversity so that there would be little possibility of clear-cut majority interests with the ability to suppress minorities. *Id.* at 62-65, 351.
30. 148 F.2d 416 (2d Cir. 1945) [hereinafter cited as Alcoa].
31. *Id.* at 429.
32. *Id.* at 428 n.1.
37. Thus, in *International Salt Co. v. United States*, 332 U.S. 392, 394-96 (1947), the Court held the defendant's practice of requiring purchasers of its patented machines to buy its salt as well to be *per se* illegal.
In contrast, there are no per se illegalities in EEC competition law. Monopolies are subject to sanction only when they abuse their dominant positions; in addition, tying and market allocation are frowned upon but occasionally approved. One commentator has considered these differences:

. . . . There has been almost no development of per se illegalities . . . the notion that certain things are unlawful no matter how one does them. Rather, Community law teaches one to weigh the impact of the restraints in their economic context. If the impact is significant, a problem may exist; otherwise, probably not. . . .

The lack of per se prohibitions, however, is not necessarily indicative of a lax concern for competition problems. Rather, it reflects the dissimilar political contexts in which each set of laws operates. The Community is still trying to create a larger market and break down territorial barriers. It is using its antitrust laws to assist in the attainment of these goals.

In the United States, on the other hand, the replacement of the Articles of Confederation with the Constitution meant that state boundaries were no longer to be used to hinder the free flow of goods between the states. Thus American antitrust law is primarily directed toward controlling the abuses of raw capitalism.

**EEC's Antitrust Rules Designed to Further Its Organizational Aims**

One of the primary aims of the EEC is to dissolve national trade barriers so as to create a Common Market. But a uni-
fied market is not an end in itself; it is a means of promoting economic development and efficiency through the more rational use of resources, and an accompanying decrease in the use of arbitrary geopolitical boundaries to restrain competition from outside those borders. Territorial trade barriers such as tariffs and national industrial property rights used to block competitive imports restrict the size of the markets to be profitably exploited, since the crossing of customs barriers adds to selling prices. Because markets are limited by such restrictions, business entities are less able to expand. The promotion of this larger Common Market among the Member States allows the commercial entities to serve a larger demand, and so take advantage of the economies of scale of the larger market.

Antitrust law in the EEC is a strong means to effectuate the combined goals of a unitary market and increased efficiency. With these goals achieved, the ultimate goal of a higher standard of living for the peoples of the Common Market States is attainable.

Problems in Integrating the Markets of the Member States into One

The integration of the national markets into a Common Market is not without its problems. There has been political conflict between the Community government and its constituents, and among the Member States themselves. Some of the problems relate to language, and others to the difficulty of melding together diverse legal systems.

These problems have resulted in slow-paced enforcement and in a mixture of sometimes conflicting objectives. There is an official community desire to promote competition—an objective not always shared by the Member Governments and powerful business interests. Furthermore, achieving market integration, a second major objective of the EEC, may require either encouraging competition or, in some cases, approving


47. Id.

48. See, e.g., OBERDORFER, supra note 11, at 66.

49. Thus, Italy, for example, has no antitrust laws. 1 CCH COMM. Mkt. Rep. 2003.034 (1973).
anti-competitive transactions such as cross-boundary mergers which promote closer ties between firms of different Member States.\textsuperscript{50} Also in conflict with the desire to promote competition is the EEC's concern with the size and success of American investment, which has led to an approving attitude toward European mergers and cooperation in specific industries.\textsuperscript{51}

As a result of the number of governments concerned with competition problems in the EEC, there may be a number of different authorities responsible for dealing with the same problem, and consequently it is sometimes difficult to know in advance which one will decide a given issue.\textsuperscript{52} Additionally, the EEC brings together legal systems, languages, and judges and lawyers from many countries. Judicial decisions must be the result of comparative studies, so as to enable the attorneys of the Member States to comprehend them. Thus verbal hair-splitting in the EEC generally takes a back seat to arguments based on integration policy.\textsuperscript{53}

\textsuperscript{50} The encouragement of cross-boundary mergers even when there are anticompetitive features to them is illustrated by recent Commission approval of a joint venture between Chevron (U.S.) and SHV (Netherlands). In its go-ahead to the firms, the Commission acknowledged that Chevron would be price fixing. Prior to the agreement, Chevron had been the sole distributor of tar products for northern Europe. What saved the agreement, in part, was the Commission's emphasis that it drew an EEC firm into the distribution of these products for the first time. \textit{Bus. Europe}, Jan. 17, 1975, at 17-18.


This concern with American success in Europe has promoted Director-General Schleider, of the EEC Commission’s Directorate General for Competition, to say that there is virtually no antitrust enforcement in the aerospace and computer fields since “[a] European computer combine . . . may be the only way to offer Europeans a choice, since IBM might otherwise preempt the market.” This concern has not, however, created a hostile, discriminatory attitude toward American firms, according to the general consensus and to the Board Chairman of Monsanto Europe SA. \textit{Wall Street Journal}, April 25, 1973, col. 3 at 31.

\textsuperscript{52} Deringer, \textit{A Practitioner Looks at the German and EEC Rules As Applied to Mergers, Acquisitions, and Joint Ventures}, in ABA International & Comparative Law Section, \textit{Current Legal Aspects of Doing Business in Europe} 65 (1971) [hereinafter cited as Deringer].

\textsuperscript{53} Id. This balancing of linguistics against substantive policy appears as well in reference to Article 85’s prohibition of “concerted practices”:

The German term for this concept . . . may literally be translated as “mutually attuned modes of conduct” and does not necessarily connote agreed-upon action. Both the German and the French “pratiques concer-
tées” would appear to exclude the application of Article 85.1 to mere conciousness of consensual element . . . [Actually, though], the term “concerted practices” is intended to reach even informal states of fact
The major institutions of the EEC responsible for the application of Community antitrust rules are the European Court of Justice, the Council of Ministers of the European Communities, and the Commission of the European Communities. The Council of Ministers is the EEC's legislative body, composed of ministers from each Member State. The Commission is the Community's executive body, charged with enforcement of Community law. It fulfills this function through judicial actions and by the promulgation of regulations and decisions. Most measures to be considered by the Council must be initiated by the Commission.

The Court of Justice functions to protect individuals against acts of the Community, and generally to assure the correct, uniform interpretation of the Treaty of Rome, which is the EEC's primary source of legal authority. It does not interpret the laws of the Member States. Only the courts of the Member States may do this. However, national courts of last resort faced with problems of interpretation of Community law must request preliminary rulings from the Court on those is-

and situations where the participants remain without commitment. An intent on the part of the participants to bind themselves legally is not required. Necessary, however, is some conduct pursuant to a conscious mutual meeting of the minds. Two (or more) enterprises must mutually adjust their future market behavior one to the other consciously and intentionally.

Oberdorfer, supra note 11 at 14.

Thus, in the Imperial Chemical case, supra note 13, at 8027, the European Court of Justice held that the term "concerted practices" encompasses: "[A] form of coordination between undertakings which, without going so far as to amount to an agreement knowingly substitutes a practical cooperation between them for the risks of competition."

54. Article 4 of the Treaty of Rome, art. 4, 298 U.N.T.S. 16, provides for the creation of an Assembly, a Council, a Commission, and a Court of Justice for the EEC.


56. Id. art. 155, 298 U.N.T.S. 71.

57. Id. arts. 169, 173, 175, 298 U.N.T.S. 75; i.e., through suits for violations of Community law.

58. Id. art. 189, 298 U.N.T.S. 78. Article 189 requires Member States, their institutions, officials, and all natural and legal persons within the Community to adhere to regulations promulgated by the Council and Commission. Regulations have the weight of national law and take effect upon issuance. 2 CCH COMM. MKT. REP. ¶ 4902.15 (1971).

Whereas regulations are applicable to groups of persons defined generally [id.], decisions bind only those parties who are directly addressed, and they do not carry the weight of law when directed to Member States, as do regulations. They are however, immediately binding on individuals. Id. at ¶¶ 902.25-.26.

59. Id. at ¶ 4472.09.


61. 2 CCH COMM. MKT. REP. ¶ 4602.11 (1976).
sues.\textsuperscript{62} They may then proceed to apply Community law. The Court of Justice also reviews actions of the Council and Commission on request of the Member States, the Commission, Council, and individuals affected by Community actions.\textsuperscript{63}

The Commission decides initially whether there has been a violation of Articles 85 or 86 of the Rome Treaty, which contains the basic antitrust provisions in EEC law.\textsuperscript{64} If it finds such a violation, the Court may issue an injunction\textsuperscript{65} or impose a fine.\textsuperscript{66} Article 85.2 declares that terms of agreements which contravene Article 85.1 are void.\textsuperscript{67} Thus the Commission may invalidate those parts of an agreement which are found to violate Article 85.1, or the whole of the agreement if the restrictive terms are inseparably bound into the whole.\textsuperscript{68}

Private plaintiffs are allowed to sue on their own initiative to invoke Article 85.2 and thus escape the terms of illegal agreements to which they are parties;\textsuperscript{69} but a private party may sue for injury due to anti-competitive practices only where the law of the Member State in which he sues confers that right.\textsuperscript{70}

\textbf{IMPLEMENTATION OF ARTICLES 85 AND 86}

EEC cartel law was initially framed by Treaty Articles 85 and 86. It has been supplemented and effected by various regulations issued by the Council.\textsuperscript{71} Regulation 17, the main imple-

\textsuperscript{62} See Treaty of Rome art. 177, 298 U.N.T.S. at 76. See also 2 CCH COMM. MKT. REP. ¶ 4656.06 (1976).
\textsuperscript{64} Council Regulation 17, art. 3, 1 CCH COMM. MKT. REP. ¶ 2421 (1971).
\textsuperscript{65} Id.
\textsuperscript{66} Council Regulation 17, arts. 15, 16, 1 CCH COMM. MKT. REP. ¶¶ 2541, 2551 (1973).
\textsuperscript{67} The text of Article 85 is reproduced in app. A infra. Cf. Grundig, supra note 12, at 7653.
\textsuperscript{68} Id.
\textsuperscript{69} See Council Regulation 17, art. 1, 1 CCH COMM. MKT. REP. ¶ 2402 (1973); W. Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS 470 (2d ed. 1973) [hereinafter cited as Fugate].
\textsuperscript{70} Suits for damages are governed by national law. 1 CCH COMM. MKT. REP. ¶¶ 2041.70, 2041.90, 2041.96 (1973).
\textsuperscript{71} Council Regulation 26, art. 2, 1 CCH COMM. MKT. REP. ¶ 935B (1975) exempts agricultural trade and production agreements "which form an integral part of a national market organization . . ." from the prohibitions of Article 85.1 of the Treaty of Rome. Council regulation 1017/68, 1 CCH COMM. MKT. REP. ¶ 2761 (1971), and Article 84 of the Treaty of Rome, do the same for sea and air transport. Antitrust regulation of public utilities is also modified by Article 90 of the Treaty: see 1 CCH COMM. MKT. REP. ¶¶ 2014.05, 2361 (1973). Coal and steel production is regulated under the Treaty Establishing the European Coal and Steel Community (ECSC), April 18, 1951, 261 U.N.T.S. 142; see 1 CCH COMM. MKT. REP. ¶ 2003.05 (1973).
menting regulation for Articles 85 and 86,\(^2\) declares both Articles positive law, and prohibits all violations without requiring prior decision by the Commission or Court of Justice.\(^3\) Article 9 of Regulation 17 distributes jurisdiction between national and Community authorities.\(^4\)

Until the Commission initiates proceedings pertaining to (1) a negative clearance,\(^5\) (2) an exemption under Article 85.3,\(^6\) or (3) a prohibition of practices under Article 85.1, national courts may apply Community law to proceedings brought initially under national cartel law.\(^7\) National authorities do not, however, have the power to grant negative clearances, nor exemptions under Article 85.3. These powers are reserved to the Commission, subject to review by the Court of Justice.\(^8\) National courts are not deprived of jurisdiction to consider pending cases involving national antitrust laws when the Commission subsequently initiates actions,\(^9\) but national antitrust authorities are forbidden to initiate suits in national courts once the Commission has initiated its own proceedings.\(^10\)

In a 1969 case, *Walt Wilhelm v. Bundeskartellamt*,\(^11\) the Court of Justice made clear that it considers Community cartel law a distinct legal order which is incorporated into the laws of the Member States, to be obeyed by their authorities, and

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\(^2\) Council Regulation 17, arts. 1-25, 1 CCH COMM. MKT. REP. ¶ 2401-2634 (1973); see Obendorfer, supra note 11, at 131-33.

\(^3\) Obendorfer, supra note 11, at 131. See also Treaty of Rome art. 189, 298 U.N.T.S. 78 (1958).

\(^4\) 1 CCH COMM. MKT. REP. ¶ 2481 (1971).

\(^5\) The negative clearance procedure outlined in Regulation 17(2), id. at ¶ 241, provides that private parties may inform the Commission of their agreements for official assurances that Articles 85 and 86 have not been contravened. Once a negative clearance has been granted to an applying party, the Commission can revoke that clearance and sue for violation of Articles 85.1 or 86 only when new factors arise in relation to the practices in question which were not known at the time of the grant. Obendorfer, supra note 11, at 141. Compare the negative clearance procedure with that for exemptions, note 76 infra.

\(^6\) The exemption procedure is an admission by the applying party that a particular practice violates Article 85.1. The Commission is authorized by Article 85.3 to exempt the practice from the rule of Article 85.1. Treaty of Rome art. 85.3, 298 U.N.T.S. 48 (1958), and by Regulation 17, art. 4, 1 CCH COMM. MKT. REP. ¶ 2431 (1971), where the practice's advantages in the form of increased efficiency, services, and lowered prices outweigh its restraint upon competition.


\(^8\) Council Regulation 17, art. 9, 1 CCH COMM. MKT. REP. ¶ 2481 (1971).

\(^9\) Tar Colors, supra note 77, at 7866.

\(^10\) Council Regulation 17 art. 9, 1 CCH COMM. MKT. REP. ¶ 2481 (1971).

\(^11\) Tar Colors, supra note 77.
supreme vis a vis national law when the requirements of Article 85 and 86 have been met. It ruled that national courts were not to frustrate the uniform application of Community law, either past or prospective. This decision allows national authorities to resolve their domestic antitrust problems without being forced to wait for the Commission to complete its actions. Nevertheless, there are many unresolved questions under EEC competition law, and to promote uniform interpretation of Community law, the Courts of the Member States are obliged to refer these issues to the Court of Justice for resolution.

APPLICATION OF ARTICLE 85

Most antitrust actions in the EEC are brought under Article 85, which prohibits practices "liable to affect trade be-

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82. Id. Thus if the Commission determined, for example, that a particular agreement violated Article 85, a national court could not subsequently contradict that determination. But see Oberdorfer, supra note 11, at 66.

83. If the Commission or Court of Justice later comes to a conclusion contrary to the national authorities, the latter must conform their actions to those taken by Community authorities. For a comment on the effects of slow Commission action due to a deluge of notifications for agreements, see Jacobs, Some Developments and Differences in the Operation of Competition Laws, 8 INT'L LAW. 544, 558-59 (1974).


There have been many more asserted violations of Article 85.1. The most recent application of Article 86 is the Commission's decision in 1975 imposing a fine of one million units of account on United Brands Corp. (UBC). UBC, a conglomerate with $2 billion in revenues worldwide, resulted from the 1957 merger of United Fruit Co. and John Morrell Co., the largest meat packer in the United States. Commission Decision of Dec. 17, 1975, 2 CCH COMM. MKT. REP. ¶ 9800. UBC is the world's leading exporter of bananas, with 35% of world markets and a 40% share of EEC banana trade, and sells under the Chiquita label. Id. at 9776.

The Commission found that UBC had abused its dominant position by:
tween Member States and which are designed to prevent, restrict, or distort competition within the Common Market or which have this effect.°

Practices Must Be Liable to Affect Trade Between Member States

The prohibition of agreements which "affect trade between Member States" could be called the EEC's Interstate Commerce Clause. It applies where the parties to the agreement trade between two Member States, for example. But even a cartel operating in a single Member State can be subjected to the proscriptions of Article 85.

a) Prohibiting its distributors from reselling green bananas, which are the only ones suitable for shipping. UBC was thus able to prevent the distributors from competing with it in sales to distributors in other areas, and also partitioned markets by this means. Id. at 9787.

b) Engaging in price discrimination toward customers in different Member States, with no objective justification therefore. UBC argued that it merely sold at prices which each market would bear. The Commission responded that the systematic application of high prices by a dominant firm could not be justified without objective differences in selling costs—i.e., tariffs and shipping costs—where it results in the partitioning of markets by placing distributors paying high prices at a competitive disadvantage with other distributors on resale in other areas. Id.

c) Charging unfair prices to some distributors. UBC occupied a dominant position, with 40% of EEC banana sales. Its main competitors, Del Monte Co., and Castle & Cooke Co., had a combined market share of only 19% of that market. Thus UBC was able to determine prices without taking substantial account of its customers, suppliers, and competitors. This was especially so since UBC had been the first to introduce aggressive marketing techniques for its branded bananas, along with new methods of ripening which required expensive, modernized facilities for shipping and storage. Because of its size, vertical integration, and multinational character, UBC was best able to afford these large investments. Id. at 9788-89.

d) Suddenly and without warning withdrawing supply to one of its major distributors which had begun to distribute bananas offered by a competitor. The refusal to deal left the distributor without adequate stocks to fulfill its agreements with its customers, and left it with unused capacity which had been expanded and modernized so as to handle UBC's bananas. The Commission viewed this practice as a warning to its distributors to sell only UBC products; it thus prevented UBC's competitors from entering markets so as to compete with UBC. Id. at 9789-90.

In determining the size of the fine, the Commission considered important the fact that the product in question was a widely consumed food item, and that UBC's receipts for EEC banana sales were over $50 million annually. It ordered UBC to allow its distributors to ship green bananas, prohibited further price discrimination, and "suggested" that UBC lower its prices 15% in certain markets. Id. at 9792.


87. This was the situation in Vereeniging van Cementhandelaren v. EEC Comm'n, [1971-73 Transfer Binder] CCH COMM. Mkt. REP. ¶ 8179 (Ct. J. 1972). In that case a cartel of Dutch cement producers and distributors sought to impose uniform quality standards and "recommended prices" on cement in the Netherlands.
The Court of Justice in *EstABLissements Consten and Grundig-Verkaufs-GmbH v. EEC Commission* interpreted this provision of Article 85. Grundig had assigned its trademark to Consten for trade in France. Anyone who sold Grundig products there without Consten's consent infringed the trademark under French law. In addition, Grundig agreed to prevent its wholesalers in other territories from selling outside those territories. In return, Consten agreed not to sell outside France. When an unauthorized French wholesaler began distributing in France Grundig products which it had purchased in Germany from an authorized German wholesaler, Consten sued for trademark infringement.

The Court found that the exclusive distributorship agreement and the use of the trademark to block imports restrained trade between Member States, since Consten and the other distributors had agreed to refrain from exporting to other Member States.

Grundig and Consten argued that the agreement had stimulated interbrand competition because Grundig's exports to France had increased. Thus, they argued, trade between Member States and competition between manufacturers had increased. Because the Commission had failed to consider the positive effects on interbrand competition, they contended, it had misjudged the agreement's overall effect on competition. The Court answered:

The principle of freedom of competition applies to all economic levels and all aspects of competition. Competition between producers is generally more apparent than competition between distributors of the same brand. This does not, however, mean that an agreement that restricts competition between distributors should escape the prohibi-

Though it disclaimed any intent to inhibit imports, the agreements were subjected to the coverage of Article 85.1 by the Court of Justice:

Under Article 85, paragraph 1, any cartel whose object or effect is to prevent, restrict, or distort competition is incompatible with the Treaty to the extent that it is capable of impairing trade between Member States. A cartel extending throughout the territory of a Member State has by its very nature, the effect of consolidating the partitioning of markets on the national level, thus preventing the economic interpenetration which the Treaty attempts to bring about.

Id. at 8412-13.
89. Id. at 7653.
90. Id. at 7652.
tion of Article 85.1, because it might strengthen competition between producers.
Furthermore, for purposes of applying Article 85.1, it is not necessary to take into consideration the actual effects of an agreement where its purpose is to prevent . . . competition. Consequently, the fact that the Commission’s decision did not analyze the effects of the agreement on competition between similar products of different brands is not in itself a defect in the decision.91

Commentators have argued that this statement was a misconceived obiter dictum since the Court had already found the requisite anticompetitive effect.92 Further, they argued that “the intended but unrealized restraint is of no significance for the law” since Article 85 is directed against anti-competitive effects, not attitudes.93

Another objection to the Grundig opinion was that the Court did away with the objective test of “actual damage” to competition and replaced it with a subjective “intent” test.94 The issue of the degree of intent necessary to constitute a violation of Article 85 created a semantic quagmire.95 Critics of the Grundig opinion argued further that a showing of some actual restraint of competition should have been required.96

But these objections are open to question. The Court of Justice had two alternatives in the case: (1) to declare the territorial restraints null and void for their restrictive effect on competition between distributors, and thus stimulate competition on that level;97 or (2) to exempt the agreement under Arti-

91. Id. at 7652-53. This reasoning follows that of Justice Fortas for the Supreme Court in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374-75 (1967): Schwinn contends . . . that the reasons which induced it to adopt the challenged distribution program were to enable it and the small, independent merchants that made up its chain of distribution to compete more effectively in the marketplace. Schwinn sought a better way of distributing its product: a method which would promote sales, increase the stability of its distributor and dealer outlets, and augment profits. But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription; because, in a sense, every restrictive practice is designed to augment the profit and competitive position of its participants. Price fixing does so, for example, so may a well-calculated division of territories.
92. OBERDORFER, supra note 11, at 33 n.65a.
93. Id. at 32.
94. Id. at 33.
95. Id. at 32.
96. Id. at 34.
cle 85.3 by balancing the positive and negative effects, thereby stimulating competition between producers. It opted for the former since the burden of proof under Article 85.3 was on Grundig to show that the agreement's benefits outweighed its proven restrictive effect on competition between distributors.

Because of its wide distribution and the nature of the particular product markets, Grundig was capable of restraining competition between distributors. It obviously intended to do so. That it may not have been entirely successful in thwarting Consten's competition made no difference, since the mere attempt to do so was apt to have discouraged parallel imports. Thus the "intended but unrealized" restraint may indeed be significant.

Similarly, the Court of Justice reaffirmed the use of a probability standard in Société Technique Minière v. Maschinenbau Ulm GmbH:

The expression "liable to affect . . ." proves that the change in trading conditions must be established directly by the facts or result from reasonable expectation and that the influence on trade must be fairly significant.

Through such cases as Grundig, Article 85 has been interpreted generally to proscribe the use by EEC or non-EEC firms of intra-Community export prohibitions requiring Community firms to keep their activities within one Member State. These

98. See Grundig, supra note 12, at 7653.
99. See id. at 7655-56.
100. See id. at 7653.
101. Id. at 7653. In its Notice on Agreements of Minor Importance, the Commission explained its "appreciable restraint" test—when parties to a restrictive agreement have a weak position in the market and cannot perceptibly restrain competition, Article 85 is inapplicable. Where the parties to the agreement account for less than five per cent of the relevant product market, and their combined sales for that product are less than twenty-million units of account (roughly equivalent to U.S. dollars, but see note 209 infra), they are presumed incapable of perceptibly altering trade within the Community. Commission Notice of June 2, 1970, [1970-72 Transfer Binder, New Developments] CCH COMM. MKT. REP. ¶ 9367, at 8794-95.
agreements are objectionable, in the view of the Commission and Court, because they partition domestic markets and thus hinder the creation of a unitary market.

An example of an agreement partitioning markets is the Kodak case, in which Eastman Kodak applied to the Commission for a negative clearance of absolute export prohibitions on its EEC subsidiaries. Kodak's distribution system was approved by the Commission only after Kodak agreed to allow the subsidiaries to trade throughout the Community.

Kodak had imposed export restraints on its subsidiaries by forcing purchasers of Kodak products to buy through the subsidiaries of their respective Member States. If the purchaser went outside his Member State to purchase Kodak products, the sale was invoiced through the subsidiary of his Member State at its price, thus preventing customers from shopping for better terms. There are, in the Court's view, very few agreements capable of restraining trade between a parent and its wholly-owned subsidiary. Thus the agreements found to restrain competition were those between the Kodak subsidiaries and their customers, not those between the subsidiaries and Kodak.

The Commission allowed Kodak to continue to restrain its EEC subsidiaries from doing business outside the Community. It reasoned that once goods have been shipped out of the Community, there is little likelihood that they will reenter, since the added transportation costs and duties will make resale in the EEC prohibitive. Thus, trade between Member States would be unaffected by the restraint on exports out of the EEC.

Extraterritorial Jurisdiction

Where one or more of the parties to a restrictive practice is domiciled outside the Community, the prohibitions of Arti-
cle 85.1 apply when the practices in question have the effect of hindering free trade within. This application of EEC law to non-domiciliaries has even been asserted in some cases on the basis of conduct occurring outside the Market which produces effects within.

American Assertion of Extraterritorial Jurisdiction. The assertion of extra-territorial jurisdiction for antitrust violations has been in controversy since United States v. Aluminum Co. of America. The Court of Appeals for the Second Circuit held Alcoa Ltd., Alcoa's Canadian subsidiary, subject to American antitrust jurisdiction for its participation in an anticompetitive international agreement. This agreement left the American aluminum market primarily in the hands of the parent corporation, Alcoa. In his opinion, Judge Hand noted the limits of American judicial power in an international context:

We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. . . . On the other hand, it is settled law—as Limited itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends. . . .

The Court required the government to show that Alcoa Ltd. intended a restraint on competition in the United States. Once this intent had been shown, the court held, the burden was on the Canadian firm to show no effect on competition. The presumption made here was that the withdrawal of competitive supply resulted in higher prices than would have existed had prices been determined by free market conditions.

American courts have maintained the reach of their jurisdiction over international agreements. In United States v. Imperial Chemical Industries, Ltd., a United States District Court ordered the revision of a patent-licensing agreement be-

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115. See, e.g., Imperial Chemical, supra note 13, at 2030-31.
116. 148 F.2d 416 (2d Cir. 1945)[hereinafter cited as Alcoal.
117. See id. at 443-45.
118. Id. at 443 (citations omitted).
119. Id. at 445.
tween a British firm and an American firm on the ground that
the agreement's allocation of American and British markets
restrained competition in the American market.\textsuperscript{121}

*United States v. Watchmakers of Switzerland Information Center, Inc.*\textsuperscript{122} involved agreements between Swiss trade asso-
ciations and various Swiss and American watch manufacturers
and distributors. An American federal district court went be-
ding beyond declaring the agreements violative of the Sherman Act,\textsuperscript{123}
and affirmatively ordered the defendant organization to void
certain Swiss contracts.\textsuperscript{124} In addition, the watchmakers were
ordered to end all restraints on exports to the United States,
even though the restrictions were in compliance with Swiss
law.\textsuperscript{125} *Watchmakers* and *Imperial Chemical* were not popular
with foreign governments, and they have drawn substantial
criticism.\textsuperscript{126}

The Advocate-General to the Court of Justice, in his opin-
ion to the Court in *Imperial Chemical Industries, Ltd. v. EEC Comm.'n*, commented that the *Watchmakers* case "was no
longer a simple application of U.S. law, but a use of coercive
measures aimed at ensuring the forcible execution of the deci-
sion outside the territory of the U.S."\textsuperscript{127} The Court of Justice in
*Imperial Chemical* distinguished between jurisdiction to
declare domestic law applicable, and jurisdiction to enforce
that application abroad. It held that the latter is within the
jurisdiction of the courts of the foreigner's domicile.\textsuperscript{128}

**EEC Assertion of Extraterritorial Jurisdiction.** The
problems of extraterritorial jurisdiction were examined in a
suit brought by the Commission against four non-EEC dye
manufacturers and six EEC firms for price-fixing.\textsuperscript{129} On three

\textsuperscript{121} Id. at 221-22.
\textsuperscript{122} 1963 Trade Cas. ¶ 70,600 at 77,414 (S.D.N.Y. 1962), modified, 1965 Trade
Cas. ¶ 71,352 at 80,490 (S.D.N.Y. 1965) [hereinafter cited as Watchmakers].
\textsuperscript{123} 1965 Trade Cas. ¶ 80,491 (S.D.N.Y. 1965).
\textsuperscript{124} Id.
\textsuperscript{125} Id. at ¶¶ 77,456-57.
\textsuperscript{126} See Fugate, supra note 69, at 50 n.28; Committee on Extraterritorial
Application of Restrictive Trade Legislation, Report of the 55th Conference of the
International Law Association 112 passim (1974). But see id. at 134. See also
Restatement (Second) of Foreign Relations Law § 18 (1965).
\textsuperscript{127} Imperial Chemical, supra note 13, at 8053.
\textsuperscript{128} Id. at 8008.
\textsuperscript{129} The Commission in the Dyestuffs cases, supra note 114, charged the follow-
ing non-EEC firms with violations of Treaty of Rome article 85: Imperial Chemical
Industries, Ltd. (U.K.), and three Swiss firms—J.R. Geigy AG, Ciba AG, and Sandoz
separate occasions over a span of four years, the prices of certain dyes had been raised by the manufacturers by the same increments and on the same days. The four non-EEC firms claimed that the Commission lacked jurisdiction over them since the price-fixing arrangement: (1) had no anti-competitive effect within the Community; (2) was executed outside the Community; and (3) was not effected in the EEC by the foreign parent companies, but by their EEC subsidiaries, who were responsible for their own actions. They argued, in effect, that they were foreigners who had committed acts on their own soil, and that these acts did not affect trade in the EEC. The Court rejected these theories.

The Commission argued that the application of an “effects test” to determine jurisdiction in this type of case had long been as accepted principle of international law. It conceded that the 1927 Case of the S.S. “Lotus” considered before the International Court of Justice, established that the assertion of extra-territorial jurisdiction is proper only when some of the “constituent elements, and especially the effects” of the violation, occur within the borders of the state asserting jurisdiction. The Commission called this the theory of “objective territoriality” because of its emphasis on objectively ascertainable states of fact in order to find jurisdiction.

The Commission argued, however, that this theory was not suited to violations of competition law because such violations, in many cases, are not the direct cause of the anticompetitive effects—as, for instance, where prices rise because the supply has been withdrawn, and not because manufacturers themselves have raised prices, as was done in the dye industry.

Nor did the Commission wish to endorse the kind of sweeping jurisdictional authority asserted in Alcoa. Its objection to


130. Id. at 8024.
131. Id. at 8006, 8009-10.
132. Id. at 8030-31.
133. And in the process, the Court of Justice presented a brief history of the law of extraterritorial jurisdiction. Id.
134. Id. at 8007-08.
136. Imperial Chemical, supra note 13, at 8008.
137. Such a state of fact might consist of the corpus delictus in a homicide case, or a price rise in a price-fixing case.
138. See Imperial Chemical, supra note 13, at 8008.
139. 148 F.2d 416 (2d Cir. 1945).
Judge Hand’s decision focused on the fact that the price of aluminum was constantly falling during the cartel’s operation, and that the alleged effect of slowing this fall was indirect and nearly impossible to show. Thus it commented in *Imperial Chemical*, one of the *Dyestuffs* cases, that Alcoa made it possible to conclude that any agreement made abroad between foreigners, which restricted competition on the American market, can be prohibited under U.S. antitrust law, however indirect, distant, or tenuous the agreement's relationship to the American market might be.

In the *Dyestuffs* cases, the Commission ostensibly opted for a narrower theory of jurisdiction situated between the strict “objective territoriality” test of the *Lotus* case and the broad “effects” test of the *Alcoa* case. It proposed that only “direct economic effects” were sufficient to confer jurisdiction where the acts in question were performed by foreigners on foreign soil. In conjunction with this test, the Commission then added that the “protection principle” of keeping economic and social order at home should be given major consideration because even conduct taking place outside the Community, when it has effects within, upsets its “public order,” represented in this case by its cartel law. Thus the Community’s order was upset not just by the acts of Imperial Chemical’s EEC subsidiaries, but also by its own conduct in giving orders to these subsidiaries.

The argument that ICI’s conduct outside the Community conferred jurisdiction in the Community’s courts, so long as there was some effect within, seems to go beyond the middle ground marked out by the “direct economic effects” test. It means that even indirect effects caused by a non-EEC supply cartel seeking to limit exports to the Community could be the subject of Community jurisdiction, providing the damage to the public order was sufficient.

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140. *Id.*
141. *Id.*
142. *Imperial Chemical* *supra* note 13.
143. *Id.* at 8008-09.
144. *Id.* at 8008.
145. The Commission qualified the application of the “protection principle” in this case, however, saying that it sought only fines against Imperial Chemical, not an injunction forcing the commission of acts outside the Community, nor a subpoena forcing the production of documents or persons from outside the EEC:

The declaration that [Imperial Chemical’s] conduct violates the Treaty
Alternatively the Commission argued that the non-EEC firms did not merely "affect" trade between Member States, but acted within the EEC by requiring their EEC subsidiaries to raise their prices. According to the Commission, the subsidiaries' act of raising prices was essentially the act of the parent companies. 146

On appeal by the dye manufacturers from the Commission's imposition of fines, 147 the Court of Justice upheld the Commission in all four Dyestuffs cases involving non-EEC firms. 148 The precise basis of its holding, however, is unclear. In answering one firm's challenges to the Commission's jurisdiction over it for acts committed outside the Community, the Court stated:

...Geigy's conduct was manifested within the Common Market. According to the... findings, the price increases took place in the Common Market and affected competition between producers operating on this market. The acts for which the fine was imposed are therefore practices carried out directly within the Common Market... The Commission's competence [over non-EEC firms for conduct outside the Community but affecting its trade] is not based just on the effects of acts committed outside of the Community, but also on an activity within the Common Market that can be attributed to Geigy. 149

The Court seemed to accept the "effects" test in attributing the price rises in the Community to the horizontal arrangement between the dye manufacturers. But the language—"practices

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146. Id. at 8007.
148. See note 129 supra.
149. J.R. Geigy AG v. EEC Comm'n, [1971-73 Transfer Binder] CCH COMM. MKT. REP. ¶ 8164 at 8143 (Ct. J. 1972). The activity referred to as within the EEC was Geigy's instructions to its EEC subsidiaries to raise dye prices—the price rises effected by the subsidiaries were attributed to the parent company as acts within the Community. Id.
carried out directly within the Common Market”—raises the issue of whether the Court was in fact speaking of acts outside the Community which affected trade within. Perhaps the Court was ignoring the “protection principle” and relying on the Commission’s alternative argument that acts of the EEC subsidiaries could be attributed to the parents as “constituent elements” of the violation taking place within the Community. By accepting the Commission’s arguments in the alternative, the Court detracted from the solidity of each. As a result, it is unclear whether non-EEC firms will in the future be subjected to Community jurisdiction solely for acts committed outside the EEC.

Thus an agreement that non-EEC businesses will not compete with EEC firms could be effected without any anticompetitive behavior in the Community, despite the fact that removal of the threat of real and potential competition within the Common Market would allow those within to raise their prices. The effect of such an agreement could be just as devastating to competition within the Community as was the Dyestuffs agreement. But the economic effects of the former would be an indirect result of the agreement, rather than a direct result of an activity within the Community. The arguments of the Commission and the Advocates-General in the Dyestuffs cases indicate that they will argue for extraterritorial jurisdiction in future cases, with the Advocate-General urging the “effects” test, and the Commission arguing both the “effects” test and the “protection principle.” The Court of Justice will ultimately have to decide which test applies in an appropriate situation.

Application of Article 85 Requires the Use of Agreements, Decisions, or Concerted Practices Between Enterprises

Once jurisdiction based on sufficient effect on trade between EEC states has been found, Article 85 requires a showing that an “agreement . . . decision . . . or concerted prac-
tice” between business entities exists. Article 85 does not apply to anticompetitive actions of single enterprises; two or more concerns must be involved for any of Article 85’s prohibitions to be invoked.153

Article 85 requires the existence of a relationship between at least two separate legal entities, each with capacity to contract and its own legal personality.154 An agreement between a buyer and seller which imposes anticompetitive terms is one type of agreement subject to control under Article 85.155

A branch or a division of an enterprise is not an “undertaking” itself unless it has the legal capacity to contract in its own name.156 Thus the Court of Justice in a 1968 case, Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm, and Centrafarm Cos.,157 held that there was no basis for Commission action under Article 85 where Parke-Davis had assigned a patent to its Dutch subsidiary and sought to prevent imports of unpatented goods into the Netherlands. The Court implied that there could be no “agreement” between a parent and its wholly-owned subsidiary within the meaning of Article 85.158

Commentators have explained the “agreements” requirement as follows:

"... Article 85.1 is not applicable to agreements between enterprises of the same concern, for the reason that economically they constitute a single unit and have no life of their own... Any competition [between] them... is not based upon their free determination as entrepreneurs, but depends upon the will of the concern’s management... [It] is merely a method of operation of the concern, and not the kind of competition protected by Article 85.1.159"

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153. See Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm, & Centrafarm Cos., [1967-70 Transfer Binder] CCH COMM. MKT. REP. ¶ 8054, at 7825 (Ct. J. 1968) [hereinafter cited as Parke Davis]. See also Conclusions of the Advocate General. Id. at 7828.
154. Oberdorfer, supra note 11, at 8.
155. See, e.g., the use by a manufacturer of restraints on its distributors from selling outside their assigned territories in Grundig, also Oberdorfer, supra note 11, at 20-21, for a discussion of the prohibition of some vertical restraints.
156. Oberdorfer, supra note 11, at 8.
157. Parke Davis, supra note 153, ¶ 8054.
158. Id. at 7825-26. See also Conclusions of the Advocate General. Id. at 7528.
159. Oberdorfer, supra note 11, at 30, adding at note 55 that this view is shared by the majority of commentators.

The authors utilize section 18 of the German Aktiengesetz (Stock Corporations
The "concern relationship" is of crucial importance in determining whether an agreement is capable of restraining competition between related firms, and it refers to absolute or nearly absolute control by one management over that of the affiliates. Where there is such control, the related companies are immune from antitrust sanctions under Article 85.

**Intra-Enterprise Conspiracy—Agreements Between Related Firms**

It is not always a simple matter to determine whether subsidiaries are mere puppets of their parent corporations, and thus whether agreements between them are outside the scope of Article 85. There are infinite shadings of independence, and it is this independence which the law of intra-enterprise conspiracy seeks to protect.

The intra-enterprise conspiracy theory was first utilized in the American cases of *United States v. Yellow Cab Co.*, to help distinguish between "undertakings" or "enterprises" on the one hand, and "concerns" on the other:

1. If a dominant and one or more dependent enterprises are joined under the uniform management of the dominant enterprise, then they constitute a concern; the individual enterprises are concern enterprises. If there is a contract of domination between enterprises or if one enterprise is integrated into the other they are to be considered under a uniform management. It is presumed that the dependent enterprise forms a concern with the dominant enterprise.
2. If legally independent enterprises are joined together under a uniform management without one enterprise being dependent on the other, then they also constitute a concern; the individual enterprises are concern enterprises.

*Id.* at 9.

160. The Court of Justice in the *Dyestuffs* cases, *supra* note 114, found such a relationship between non-EEC parent companies and their EEC affiliates:

The fact that the subsidiary has its own legal personality does not serve to rule out the possibility that its conduct is attributable to the parent company. This could be the case where the subsidiary, even though it has its own legal personality, does not . . . independently determine its own market behavior but essentially follows the instructions given to it by the parent company. If the subsidiary does not in fact have autonomy in determining its course of conduct on the market, the prohibition of Article 85.1 is inapplicable to the relationship between it and the parent company with which it forms an economic unity. Since an affiliated group so structured forms a unity, the parent company can, under certain circumstances, be held responsible.

*Imperial Chemical*, *supra* note 13, at 8031.

161. *But see* Treaty of Rome art. 86, 298 U.N.T.S. 48-49 (1958), which is applicable where a dominant concern abuses its position.

Timken Roller Bearing Co. v. United States, and Kiefer-Stewart Co. v. Jos. E. Seagram & Sons. In all of these cases, conspiracies to restrain trade between parent companies and their affiliates were found, even in Kiefer-Stewart, where the conspiracy was between Seagram and its wholly-owned subsidiary, Calvert. As the Supreme Court said in Yellow Cab,

[An unreasonable restraint of trade] may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy between those who are otherwise independent . . . . The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act.

But the use of the intra-enterprise conspiracy theory to find antitrust violations for restrictive agreements between parent and subsidiary corporations, both in the EEC and the U.S., will occur only when a normally autonomous subsidiary joins with its parent in anticompetitive conduct. Where the subsidiary is a mere appendage of a parent, there is no prohibition on cooperation unless the enterprises are dominant or monopolistic.

Thus, aside from considerations of dominance or monopoly, EEC and American antitrust policies encourage internal corporate growth.
Commentators have pointed out, however, that the Court of Justice may in future antitrust cases treat affiliated enterprises as if it does independent ones, making use of intra-enterprise conspiracy law. The 1961 Court of Justice Schrottausgleischekasse decision, in which steel companies were ordered to contribute to a “scrap equalization fund” in order to keep the price of scrap down, is cited to support this proposition. Each “enterprise” in the industry was ordered to contribute. When it came time to pay, parent companies contended that their subsidiaries were not enterprises themselves, but were instead part of the parents’ enterprises. The Court rejected this argument, saying that since each of the companies had chosen the particular legal form most advantageous to it, there was no reason to disregard this form when it proved disadvantageous to the companies.

The conclusion that this 1961 decision may pave the way for the Court of Justice to treat affiliated enterprises as it does independent ones under EEC law is dubious. This case was governed by the Treaty of Paris, which created a Common Market for the sale of coal and steel. In recent cases under the Treaty of Rome, the Court has made it clear that even where the subsidiary has some autonomy, Article 85 is inapplicable since there is no competition to be foreclosed between the two.


In Standard, the United States Supreme Court viewed Standard’s requirements contracts with its independent stations as unreasonable restraints of trade. Justice Douglas dissented, saying that the requirements contracts had allowed the small, independent station owners to remain in business. 337 U.S. at 315. Alternatively, he argued, it was Standard which had derived the greatest benefit from the contracts. But whether the invalidation of the contracts forced many independents out of business by destabilizing their supplies, or Standard felt that the requirements terms were essential, the effect of the decision may have been to encourage it to replace the independents with its own agents.

In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Court may again have encouraged Schwinn to enlarge its own distribution network so as to circumvent the Court’s disapproval of its relations with its independent distributors.

169. Oberdorfer, supra note 11, at 31.
170. Id.
171. Id.
173. The Commission reached a similar conclusion recently in levying heavy fines on Commercial Solvents Corporation (CSC, U.S.). CSC and its Italian subsidiary, Istituto Chemioterapico Italiano S.p.A. (ICI), had a near-monopoly over a base chemical used to produce an anti-Tuberculosis drug. ICI refused to sell the chemical
It appears that unless a subsidiary can act independently of its parent on most matters, the parent will be held liable for the subsidiary's illegal conduct, and without this independence there will be no possibility of a restrictive agreement or concerted practice between the parties. The theory is useful in some respects: the Commission was conveniently able to gain extraterritorial jurisdiction in some cases by holding the non-EEC parents liable for the subsidiaries' acts within the Community. But it is a positive hindrance in cases of intra-enterprise restraints solely within the Community, for purposes of applying Article 85. Only where a firm of one concern cooperates with a firm of another concern is Article 85 applicable to the parent companies. Where the cooperation is between firms of one business entity, these subsidiaries may be free to affect markets as they wish from within the corporate veil.

In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, an American case, Seagram and Calvert had held themselves out as competitors. Seagram in fact fully-owned Calvert and influenced the latter to join in a price fixing scheme for which both were forced to pay damages. Under EEC law, Seagram and Calvert would be permitted to continue in this arrangement since, in the view of the Commission and Court, there would be no competition between them capable of elimination.


174. See, e.g., Commercial Solvents, supra note 173.
175. This was the situation in the Dyestuffs cases, supra note 114, with cooperation between many non-EEC concerns via their EEC subsidiaries. See also note 159 and accompanying text supra for further discussion of concern relationships.
176. See text accompanying note 159 supra.
178. 340 U.S. at 212.
Both the EEC and the United States encourage internal growth by allowing greater latitude in setting trading conditions with subsidiaries, as opposed to independent distributors. But the EEC’s sparing use of its antimonopoly legislation, along with the fact that in no case has it used the intra-enterprise conspiracy theory to find a violation of Article 85, is by far the stronger incentive to the growth of large concentrations of economic power. This may be acceptable in light of the Community desire to promote rapid growth in its industries so as to enable them to compete in world markets. In American antitrust law, on the other hand, economic pluralism is both a goal and a central safeguard to economic and political liberty. The intra-enterprise conspiracy concept has been used quite often to promote these goals.

Concerted Practices

Article 85’s prohibition of “concerted practices . . . which distort competition . . .” refers to cooperation between enterprises. A concerted practice falls short of a binding contract or agreement, and lies somewhere between a conscious parallel-
ism on the one hand, where firms act identically, though without agreement, and a gentlemen's agreement on the other, where parties agree without creating legally binding commitments. Not all cooperation is prohibited, however. There are many cases in which Community authorities encourage cooperation by the issuance of group exemptions and policy announcements clarifying the Commission's view of certain practices. But when cooperation shades into the anticompetitive, it is prohibited. Further, a parallelism can be a concerted practice where it leads to competitive conditions that are not, considering the relevant fact, normal market conditions. This is the case where parallel conduct makes it possible to achieve price stability at a level other than that which would have resulted from competition and to strengthen acquired market position to the detriment of really free trade within the EEC. Thus, where prices for dyes produced by ten different manufacturers repeatedly rose in every EEC state at the same times and by the same increments, the inference of collusion was reasonable. Where European drug companies controlled pro-

187. Id. American courts have rejected the "conscious parallelism" concept for the purpose of proving violations of the antitrust laws. See, e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Co., 346 U.S. 537, 541 (1954). See also 1 CCH COMM. MKT. REP. ¶ 2111.25 (1973).

188. Exemptions are provided for in Treaty of Rome art. 85.3, 298 U.N.T.S. 48 (1958). The Council granted the Commission the power to exempt groups of agreements in its Regulation 19/65, 1 CCH COMM. MKT. REP. ¶ 2717 (1971).

189. See, e.g., the Notice of May 27, 1970, relating to Agreements, Decisions, and Concerted Practices of Minor Importance, [1970-72 Transfer Binder, New Developments] CCH COMM. MKT. REP. ¶ 9367, at 8793 [hereinafter cited as Notice on Agreements of Minor Importance]. In issuing the Notice, the Commission sought to promote cooperation between small and medium-sized firms. Id.

190. Imperial Chemical, supra note 13, at 8027. See also OBERDORFER, supra note 11, at 16, for the proposition that "Article 85 is directed, not against the means, but against the result, i.e., the concerted conduct. The manner of 'concerting' is immaterial . . . ."

191. Imperial Chemical, supra note 13, at 8024, 8027. A similar case was presented in the Commission Decision of July 23, 1974, [1973-75 Transfer Binder, New Developments] CCH COMM. MKT. REP. ¶ 9668, in which four major Belgian wallpaper manufacturers notified the Commission (under Article 85.3) of a limited 1962 agreement between them for the improvement of production and distribution. In seeking the exemption, they made no mention of many terms of the agreement fixing prices and general sales terms (including secret rebates to customers who purchased large quantities from the four), and group boycotts against customers who did not follow their rules. Id. at 9493-94. Upon investigation, the Commission learned of these practices and imposed a fine of 430,000 units of account, calling it "one of the most serious"
duction of the raw material for quinine, and the base chemical’s price multiplied ten times within two years,\textsuperscript{192} suspicions of conspiracy were well-founded.\textsuperscript{193}

All forms of cooperation are not viewed as conspiracies or illegal concerted practices, however. The Commission favors cooperation which utilizes resources more efficiently,\textsuperscript{194} in some cases even when that cooperation violates Article 85.1.\textsuperscript{195} But the distinction between cooperation and concerted action to restrain trade is often a fine one. The facts of \textit{United States v. Container Corp. of America}\textsuperscript{196} present a good example of this problem. The Justice Department charged that corrugated container manufacturers accounting for 90 per cent of the industry’s sales had conspired to fix prices. The essence of the cooperation was the existence of informal reciprocal agreements to release, on request, price information on individual transactions. There were no explicit agreements to set prices at fixed levels, only, ostensibly, to exchange the price information. Justice Douglas, writing for the Supreme Court, found a conspiracy to fix prices.\textsuperscript{197} Although prices were decreasing, they had been “stabilized,” according to the Court, and so decreased perhaps more slowly and with more order than they might have.

The dissent in \textit{Container Corporation},\textsuperscript{198} citing the low cost of entry into the industry, viewed that industry as competitive despite the fact that 18 manufacturers virtually controlled the market.\textsuperscript{199} Justice Marshall argued in his dissent that smaller producers would more readily use the price information to un-

\textsuperscript{192} Opening Statement by Senator Phillip Hart, Hearings on the Prices of Quinine and Quinidine Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. at 2 (1966).
\textsuperscript{194} Many such arrangements are termed “rationalization” agreements. \textit{See} \textit{OBERDORFER}, \textit{supra} note 11, at 87.
\textsuperscript{195} For example, exemptions are granted for those practices which would contravene Article 85.1, were it not for their beneficial effects. \textit{See} \textit{OBERDORFER}, \textit{supra} note 11, at 81.
\textsuperscript{196} 393 U.S. 333 (1969).
\textsuperscript{197} \textit{Id.} at 337-38.
\textsuperscript{198} Justices Harlan and Stewart joined in the dissent, written by Justice Marshall. \textit{Id.} at 340.
\textsuperscript{199} \textit{Id.} at 342-43.
dercut their competition in each transaction, than as the means of a conspiracy to match the prices of those competitors. He also pointed to the trial court's finding that when the companies stopped the price exchanges, prices remained essentially unchanged, and in a few cases actually rose.200

Assuming that exchange of price information is not per se illegal under the Sherman Act,201 nor under Article 85, the issue in such cases becomes whether the cooperation is "liable to affect trade" in a restrictive fashion.202 Had the same situation occurred in the EEC, the stabilization of prices through exchanges would more likely have been approved. While in the United States the emphasis on economic pluralism leads antitrust authorities to frown upon cooperation because of its detrimental effect on potential competition,203 EEC authorities encourage cooperation to promote "rationalization" of production and distribution.204 The Commission has declared that cooperation agreements providing for centralized invoicing and distribution, especially in oligopolistic industries, are the most

200. Id. at 344-45.
201. Id. at 337. Justice Douglas did not say that the exchange of price information is illegal per se. He said that the agreements to exchange information were the initial ingredient in determining whether a price-fixing conspiracy existed. Id. at 335. Justice Fortas concurred with the understanding that the decision did not signal per se illegality of exchange agreements. Id. at 339-40.

Agreements whose sole purpose is the joint procurement of information which the various enterprises need to determine their future market behavior freely and independently . . . do not have as their object or effect the restriction of competition. But if the . . . behavior is coordinated either expressly or through concerted practices, there may be a restraint of competition. This is in particular the case where concrete recommendations are made or where conclusions are given such a form that they induce at least some of the participating enterprises to behave in an identical manner in the market.

Id. at 1848.
204. See, e.g., the Commission's grant of an exemption under Article 85.3 for a market allocation agreement for any products which might come of joint research between the largest ammunition manufacturers in France (La Cartoucherie Francaise) and Belgium (Fabrique Nationale d'Armes de Guerre). The Commission explained that the plan, by allowing a more intensive and rational use of the parties' resources, would yield products of higher quality at lower prices, and would not eliminate competition due to the presence of other sizeable competitors. Commission Decision of May 28, 1971, [1970-72 Transfer Binder, New Developments] CCH COMM. MKT. REP. ¶ 9439.
suspect. Thus the Commission likely would have viewed the American container industry practices as relatively tame because of the lack of such centralization.

**Article 85 Does Not Prohibit All Restrictive Agreements**

The Commission's endorsement of cooperation comes in many forms. First, the Commission's use of the "appreciable restraint" theory grants small and medium-sized firms virtually unrestricted freedom. Second, the negative clearance procedure serves to reassure enterprises that their practices do not come within the prohibitions of Articles 85 and 86. Third, the Commission grants "exemptions" under Article 85.3 for admittedly restrictive practices which are accepted because they result in more efficient production and distribution, and in lower costs or higher-quality products.

The "appreciable" restraint theory was introduced as policy by the Commission in 1970, when it declared that only those practices having "perceptible" effects on third parties in the EEC were covered by Article 85. Where the enterprises in question account for less than five per cent of the relevant product market, and their annual revenues are less than fifteen million units of account, the Commission assumes that the enterprises involved are incapable of perceptibly affecting trade in the Community.

206. See, e.g., Notice on Agreements of Minor Importance, supra note 189, at 8794.
207. Council Regulation 17, art. 2, provides that at the request of concerned firms, the Commission may find that there are "no grounds for it to intervene with respect to an agreement, decision, or practice." 1 CCH COMM. Mkt. Rep. ¶ 2411 (1973).
208. Notice on Agreements of Minor Importance, supra note 189, at 8794.
209. Id. For distributors, the annual revenues must be less than twenty-million units of account. Id. A unit of account was formerly set as a fraction of a gram of gold, roughly equivalent to one U.S. dollar, and used as the Community's unit of accounting for international trade. See Regulation 17, art. 18, 1 CCH COMM. Mkt. Rep. ¶¶ 2571, 2572.01 (1973). It is now calculated daily by the Commission, according to the prevailing exchange rates of the nine EEC currencies. [1972-75 Transfer Binder, New Developments] CCH COMM. Mkt. Rep. ¶ 9739 (1975).
210. Notice on Agreements of Minor Importance, supra note 189, at 8794-95.

A corollary of the appreciable restraint theory is that there must be a restraint of either existing or potential competition. As discussed above, it is assumed that there is no competition between a parent company and its wholly-owned subsidiary. Similarly, horizontal agreements are allowed where no competition between the parties is possible. An example of this is the Commission's Decision of May 5, 1969, [1967-70 Transfer Binder, New Developments] CCH COMM. Mkt. Rep. ¶ 9303. This decision
Negative clearances for practices not restraining competition. The negative clearance procedure permits the Commission, on request, to assure private parties of its disinterest in their activities for antitrust purposes. A noted authority has stated that the negative clearance procedure allows undertakings or associations of undertakings, whenever the agreements in which they participate . . . in their opinion, provide no ground for Commission intervention under Article 85.1 (or 86) to ask the Commission to confirm this officially. . . .

Once the Commission grants a negative clearance, the concerned parties are assured that the conduct examined by the Commission will not be grounds for a fine, unless the Commission later decides on the basis of new information that the practices in question are anticompetitive.

Most of the Commission's work in the competition field comes under the negative clearance procedure, since an application for a negative clearance is a denial of any wrongdoing, while an application for an exemption under Article 85.3 is an admission of possible antitrust wrongs which are considered to be outweighed by their benefits.

involved a 1936 agreement between Belgian natural cement producers [Limeburners] and their artificial cement counterparts, which provided that the Limeburners would limit their production of natural cement in return for annual payments of 0.5% of the sales revenues for artificial cement. Id. at 8650-51. In 1962 both groups "noticed" their agreement to the Commission for a negative clearance, and the cement producers curtailed their payments to the Limeburners, claiming that the agreement was in violation of Article 85.1. Id. at 8651.

The Commission granted the negative clearance, reasoning that the Limeburners were so small and diminishing a competitive force (since the production of artificial cement is more efficient, and the end product is of higher quality than the older product), that the restriction of their production presented no threat to competition since they could provide little or none at their full capacity. Id. at 8653.

211. See notes 75-76 supra.

212. Marchini-Camia, supra note 43.

213. OBERDORFER, supra note 11, at 141. The Commission may revoke a negative clearance only on the basis of "new information" coming to its attention, i.e., the clearance is good only as to the facts of which the Commission is cognizant. See Regulation 17, art. 2, 1 CCH COMM. MKT. REP. ¶ 2411 (1973). See also United States Justice Department's Business Review Procedure, 28 C.F.R. §§ 50.6 (1975).

Regulation 17, art. 5, 1 CCH COMM. MKT. REP. ¶ 2541 (1972), provides for fines for misrepresentations in negative clearance applications. See OBERDORFER, supra note 11, at 140. National authorities are, however, deprived of competence to prosecute recipients of negative clearances by Regulation 17, art. 9. 1 CCH COMM. MKT. REP. ¶ 2481 (1971).

214. See text accompanying note 215 infra.
Exemptions—Article 85.3. Exemptions are provided for in Treaty Article 85.3,215 Council Regulation 17,216 and Commission Regulation 27.217 Once application for an exemption is made, the applying parties are immune from fines for the activities in question until and unless the Commission denies an exemption.218 Article 85.3 provides that the proscriptions of Article 85.1 can be declared inapplicable where the agreement, decision, or concerted practice (1) improves production or distribution, or promotes technical or economic progress; (2) allows consumers a fair share of the resulting benefits; (3) does not impose restrictions unnecessary to the attainment of the first two objectives; and (4) does not enable elimination of competition in respect of a substantial share of the market.219

216. 1 CCH COMM. MKT. REP. ¶¶ 2431-2501 (1971).
217. Id. at ¶ 2651 (1971).
218. See Regulation 17, art. 15, 1 CCH COMM. MKT. REP. ¶ 2541, at 1776 (1973).
219. Treaty of Rome art. 85.3, 298 U.N.T.S. 48 (1958). Article 85.3 is the analogue to the American “Rule of Reason,” whereby the courts balance the anticompetitive effects of agreements against their possible advantages. It was introduced in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Justice Brandeis explained the rule’s application in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918):

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied . . . .

The per se illegalities in American antitrust law, on the other hand, are not viewed with such favorable considerations:

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.


American courts have used the per se unreasonableness test to avoid inquiry into an agreement’s function, purpose, or effect—once the market share affected by the agreement in question is shown to be substantial (i.e., beyond de minimis), the use, e.g., of horizontal agreements to fix prices, allocate geographic markets, or to boycott—are automatically seen as illegal.

The criteria used in Common Market antitrust cases under Article 85.1 can closely approach the American tests for per se wrongs. This is true if, as argued above (see text accompanying note 91 supra), there is no need for a showing of adverse effect on trade in all cases.

Where the practice is shown to be “capable of” or “liable to” have an adverse effect on trade, and the object or aim of the practice is to have that effect, a violation of Article 85.1 will have been shown. Proof of the capability of a particular practice to have an adverse effect on trade is drawn from an analysis of the particular industry’s
Community law gives a powerful incentive to businesses to report possibly restrictive agreements to the Commission, so as to gain the possible advantages offered by the exemption procedure.\textsuperscript{220}

The granting of negative clearances and exemptions has proved a major tool in making the Commission an effective enforcement agency. These procedures encourage firms to report their agreements and so conserve much of the Commission's time, which would otherwise be spent in investigations. Cases in which applications for negative clearances and exemptions have been false or misleading have resulted in extremely heavy fines for the false reports.\textsuperscript{221} It is possible that many more of these deceptive applications have been made and remain undiscovered. But the threat of heavy fines, plus the possibility of approval under Article 85.3 for practices which could result in fines or private damage suits if unreported, may moderate the temptation to test the Commission's limited resources.

The Commission has also found other advantages to the exemption and negative clearance procedures. Especially important is the fact that in many cases it has conditioned the grant of exemptions and clearances upon the applying parties'

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\textsuperscript{220} One such advantage is immunity from suit by the Commission or national antitrust authorities once application is made. See Council Regulation 17, arts. 9(3), 15(5)(a). CCH COMM. Mkt. Rep. ¶ 2481, 2541 (1973).

willingness to modify their behavior so as to conform to Commission policies.\textsuperscript{222}

The flexibility offered by Article 85.3 has prompted the Commission to grant exemptions for (1) territorial protection agreements for exclusive distributorships;\textsuperscript{223} (2) specialization agreements (where two or more enterprises give up some of their production to another or others in return for assurance of continued supply of the goods given up);\textsuperscript{224} (3) agreements to cooperate in research and development;\textsuperscript{225} and (4) horizontal cooperation agreements providing for common marketing and storage of products.\textsuperscript{226} Article 85.1 has been declared inapplicable to these types of agreements because of the advantages conferred on the respective firms and consumers. These are not the only agreements eligible for exemption; any practice or agreement which meets the terms of Article 85.1 is eligible.\textsuperscript{227}

**Exclusive distributorships.** In 1973, the Commission granted an exemption to Bayerische Motoren Werke A.G. (BMW) for exclusive distributor arrangements in which the distributors agreed not to sell to any but authorized BMW

\[\text{References:}\]

\textsuperscript{222} Jones, *supra* note 38, at 22. In many cases the Commission and Court take special note of whether the firms they deal with are cooperative and ready to adjust to the Commission's wishes. It is on this basis in many cases that the Commission and Court determine the size of fines or the grant of exemptions and negative clearances. See, *e.g.*, note 295 infra.

The grant of an exemption or negative clearance is not without its disadvantages, however. In some cases the Commission will make the grant, but require periodic reports on the status of the specific industries and participating companies:

> Obviously, this reporting requirement will present a nuisance and continuing threat for the parties. The conditional nature of these ... 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. In my judgement, the adage "out of sight, out of mind" deserves serious consideration when one is contemplating notification.

Jones, *supra* note 38, at 26. For a similar view regarding the American business review procedure, see 44 ABA Antitrust Section 387 (1975).

\textsuperscript{223} See, *e.g.*, the exemption granted to Bayerische Motoren Werke AG (BMW), [1972-75 Transfer Binder, New Developments] CCH COMM. MKT. REP. ¶ 9701 (EEC Comm'n 1974), discussed in text accompanying notes 228-30 infra.

\textsuperscript{224} See, *e.g.*, the exemption granted to Peter-Uhren GmbH and Jaz S.A., [1965-69 Transfer Binder, New Developments] CCH COMM. MKT. REP. ¶ 9317 (EEC Comm'n 1969), discussed in text accompanying notes 231-32 infra.

\textsuperscript{225} See, *e.g.*, the exemption granted to the Transocean Marine Paint Ass'n, [1965-69 Transfer Binder, New Developments] CCH COMM. MKT. REP. ¶ 9188 (EEC Comm'n 1967), discussed in text accompanying notes 233-37 infra [hereinafter cited as Transocean].

\textsuperscript{226} Id.

\textsuperscript{227} Oberdorfer, *supra* note 11, at 50.
dealers. BMW agreed to supply only the exclusive distributors. In return, BMW required that its distributors meet minimum sales figures based on their territories, and provide service of a given quality. The Commission found that this arrangement restrained trade by preventing parallel imports and purchases directly from BMW. And by selecting a small number of authorized dealers, many who met BMW's qualitative standards were excluded. However, the exemption was granted because the Commission felt that in the case of "high quality" products, exclusive distribution systems benefit manufacturers, sales agencies, and consumers by allowing streamlined distribution. Consumers share in these benefits, the Commission reasoned, because qualified, experienced dealers and distributors with well-stocked parts inventories can provide full after-sale service. Additionally, the small number of distributors was seen as justified by the high price of the product, and the limited demand for it in each area: BMW was assured under this type of arrangement that each of its distributors and dealers would get enough business to finance the provision of high-quality service.

Specialization agreements. In 1969, the Commission granted an exemption to Jaz S.A., Paris, and Peter-Uhren, Rottweil, Germany, for a specialization and reciprocal exclusive supply agreement. By its terms, Jaz was to specialize in the production of electric clocks, Peter in large mechanical clocks. Each would supply the other exclusively in the partner's country with its product at the best price offered to third parties. In addition, each would commit itself to buy minimum quantities from the other. The Commission found that the contract restrained each party's freedom of action because it discouraged each from producing and marketing the articles in which the other specialized. Potential competition in these articles was restrained, and distributors were able to obtain the clocks only from Jaz and Peter; consequently, trade between Member States was restrained in a manner prohibited by Arti-
Consonant with the requirements of Article 85.3, however, the restrictive terms were found to be indispensable to the aims of the agreement, which were to rationalize production and yield lower prices. Thus, neither Jaz nor Peter would have relinquished its market share in either product had it not been assured a good source for the clock it ceased to manufacture. And, lastly, for the requirements of Article 85.3, the agreement would not bring about a substantial elimination of competition in the clock market. Though Jaz is France's leading manufacturer of clocks, its share of the EEC market is only five percent. Peter competes with more than 90 manufacturers in Germany and is fifth in gross sales there.

Agreements for joint marketing, research, and development. In 1967, the Commission granted an exemption to the Transocean Marine Paint Association. The Association consists of 18 medium-sized manufacturers of paints used to coat ships. The members operate in six of the nine EEC states, plus the United States, Japan, Panama, Australia, and elsewhere.

The aim of the Association, according to its members, was to allow competition with the large, international marine paint firms which can manufacture and stock coatings demanded by the ship industry. A complete stock of these paints is necessary in every port, they argued, since new coatings perform well only if they are of the same composition and quality as the ones they are to cover. Separately, the members of Transocean argued, they could not produce and stock as wide a spectrum of these products as the major firms. Thus the cooperation brought about by Transocean would allow the members to compete with large firms by making it possible to offer all of the necessary coatings in the many ports served by its members.

In addition, the Association would promote the development of special paints by collectively using the research and experience of each company. The members agreed to produce these special paints by identical formulas, selling them with uniform packaging, and under the same trademark. Further, the exemption allowed the association to require members holding patents which could increase the sales of Transocean

234. Id. at 8397-98.
members to offer licenses first to those firms. Each firm was allowed to set its own prices for Transocean paints. Each could fill orders outside its own territory, but had to pay a commission to the member established in that territory. Finally, new members could be admitted only by unanimous approval, while old members could be expelled only by a two-thirds vote. 235

The Commission found that the agreement was one whose object and effect was to restrict competition within the Community. 236 The terms of the agreement placed members exporting their paints to the territory of another member at a competitive disadvantage, since the exporters were compelled to pay commissions to the member established there. Thus trade between Member States was discouraged. In addition, the requirement that members holding patents which could be of use in the marine paint industry first offer them to Transocean members if they wished to license, restrained their freedom to look for the best terms for these licenses, and restricted the possibility that non-member firms might obtain them.

The Commission, however, found that the agreement satisfied the requirements of Article 85.3, and permitted it to stand. 237 First, the Commission pointed out that the agreement helped bring about a rationalization of production and distribution of the paints, because it eliminated duplication and enabled member firms to increase their sales by means of “contract territories”; without the agreement, each member would be forced to establish complete facilities and supplies in many

235. Id. at 8398. A similar arrangement was attempted in this country. Small and medium-sized grocery firms sought to collectively produce and market private-label goods using territorial restraints much like those in Transocean, supra note 225. Their aim was to compete with the giants of the American grocery industry. The arrangement was condemned by the U.S. Supreme Court. It said that this scheme of horizontally imposed territorial restraints was a per se illegal restraint of trade since it effectively restricted price competition. United States v. Topco Associates, Inc., 405 U.S. 596 (1972). See also Associated Press v. United States, 326 U.S. 1 (1945). In this case the Court upheld an order enjoining enforcement of an association bylaw which allowed members to veto the membership application of any competitor.

236. Transocean, supra note 225, at 8399-400.

237. Id. The Commission, while granting the exemption, imposed extensive reporting obligations on Transocean’s members. For example, changes in membership must be reported, as well as amendments to the agreement, and all decisions of the association interpreting the agreement. In addition, the members must report annually on the association’s activities and sales. Id. at 8403-04. One commentator, considering these requirements, noted, “[i]n my judgment, the adage ‘out of sight, out of mind’ deserves serious consideration when one is contemplating notification.” Jones, supra note 38, at 26.
ports so as to compete with the larger firms. The Commission held that this would constitute too large an investment and too great a risk for medium-sized firms, since they would be forced to set up branches or agencies to maintain warehouses and after-sales service. In addition, consumers benefitted from the agreement because the supply of marine paints was greater, and those who used Transocean paints would no longer be forced to carry them on board, wasting valuable cargo space. Another consideration mentioned was that the allowance of exports from one member's territory to that of another maintained some price competition despite the payment of commissions. Finally, the Commission saw the restrictive terms of the agreement as indispensable to its success because the territorial protection terms, though admittedly restraining price competition among members, induced them to promote vigorously the sale of Transocean paints by concentrating their efforts mainly in their own territories. Thus customers in each of the member's territories would be assured of regular, complete stocks, since the companies would not be stuck with excess supplies as a result of encroachments and consequent competition with others.

This was the first exemption granted for an international, horizontal agreement. Unfortunately the Commission, in its announcement of the exemption, did not discuss the market shares held by Transocean members, so as to protect confidential commercial information. As a result, it is difficult to predict with any certainty which horizontal agreements will qualify for exemptions in the future. One commentator has warned that "notwithstanding Transocean, which is an exceptional case, attempts to reserve national markets to local producers are generally very dangerous, whatever the device used." More recently the Commission has attempted to narrow the Transocean exemption, casting into doubt the future

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238. Article 85.3(a), Treaty of Rome art. 85.3(a), 298 U.N.T.S. 48 (1958), conditions the grant of an exemption on the absence of all unnecessarily restrictive terms.
239. OBERDORFER, supra note 11, at 99. Horizontal agreements are those between firms which are on the same market level, i.e., production, distribution, and sales.
240. Id.
241. Jones, supra note 38, at 23.
242. In 1973 the Commission renewed the Transocean exemption, but it added new conditions. First, it specified that members should not be forced to pay commissions for sales in another's territory; second, that it be informed not only of changes in the association's membership, but also of any interlocking directorships involving the association or its members with other trade groups or marine paint firms.
of horizontal cooperation agreements under Article 85.3.

*Group exemptions.* A variation on the exemption procedure is the use of "group" exemptions. In 1965 the Council granted the Commission the power to exempt certain *groups* or *types* of agreements which the Commission felt fulfilled the requirements of Article 85.3.243

In 1967, the Commission issued Regulation 67/67, implementing this power of group exemption, in regard to some exclusive dealing agreements.244 These exemptions were based upon the interpretations of Article 85.1 in cases heard by the Court of Justice.245 The effect of this regulation was to free the Commission of the task of individually processing an estimated thirty thousand agreements granting exclusive supply and purchase rights.246 The Commission felt that exclusive distribution agreements met the requirements of Article 85.3 because they improved distribution and allowed consumers a fair share of the resulting benefits through better service and lower prices. Regulation 67/67 exempted those agreements in which a firm of one Member State bound itself to purchase exclusively from or sell exclusively to a firm in another Member State. The group exemption did not apply, however, to the use of reciprocal exclusive supply agreements,247 nor to agreements utilizing national industrial property rights to hinder interstate trade.248 Neither did it allow the partners to block parallel imports by independent distributors.249

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It added these terms because it saw a marked trend toward concentration in this industry, and because the Japanese member accounted for sixty per cent of Transocean's sales. In addition, there were many changes in membership.

Transocean challenged the Commission's addition of the new terms before the Court of Justice on the procedural ground that it had not been afforded a sufficient hearing, and prevailed. Transocean Marine Paint Ass'n v. EEC Comm'n, [1974 Transf. Binder] CCH COMM. MKT. REP. ¶ 8241 (Ct. J. 1974).

244. 1 CCH COMM. MKT. REP. ¶ 2727 (1973).

In the *Italian Government* case it was charged that the Council had exceeded its powers in granting the Commission the right to issue group exemptions. The Court of Justice dismissed the suit.


247. See text accompanying notes 231-32 supra.
248. See text accompanying notes 264-67 infra.
In order to qualify for the group exemption, an agreement must allow the distributor to fill orders in other territories, though terms restraining the right to seek these orders actively do not disqualify it.\textsuperscript{250}

In 1972, pursuant to a new Council authorization to grant group exemptions,\textsuperscript{251} the Commission issued Regulation 2779/72,\textsuperscript{252} exempting specialization contracts\textsuperscript{253} \textit{via} Article 85.3, where the firms involved accounted for less than ten percent or 150 million units of account of the particular market agreed upon.\textsuperscript{254}

Both Regulation 67/67 and 2779/72 automatically exempt exclusive supply or purchase terms and specialization agreements fitting within their bounds, without the need for notification to the Commission.\textsuperscript{255}

\textbf{Use of industrial property rights to preserve exclusive distribution territories.} The use of commercial and industrial property rights such as patents, trademarks, and copyrights to block parallel imports and thereby preserve exclusive distribution territories has been the subject of much litigation. The usual application of Articles 85 and 86\textsuperscript{256} is complicated by the overlap of EEC Treaty Articles 30 through 37, which dictate that the free movement of goods within the EEC is essential

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\item 253. The Jaz-Peter exemption is an example of such an agreement, discussed in text accompanying notes 231-32 supra.
\item 254. These agreements are generally presumed by the Commission to be incapable of perceptibly affecting trade within the Community. See the Official Notice on Contract for Exclusive Representation Concluded with Commercial Agents, Dec. 24, 1962, 1 CCH Comm. Mkt. Rep. ¶ 2697.
\end{enumerate}
\end{footnotesize}
to the creation of a unitary market.\textsuperscript{257} It is felt within the Community that there should be neither quotas on imports from one Member State to another, nor extra "red tape" to hinder the acquisition of import permits.\textsuperscript{258} In sum, arbitrary qualitative or quantitative restrictions on imports or exports are not to be allowed within the Community.

But Article 36 of the EEC Treaty affirms the interest of the Member States in protecting their commercial and industrial property. The subjects of patent, trademark, and copyright law are primarily the domain of EEC States.\textsuperscript{259} That is, the Member States are allowed to grant artificial monopolies to patentees, copyright holders, and trademark registrants, and can protect these rights with their laws to encourage inventiveness.\textsuperscript{260} When, however, the application of national law results in the partitioning of national markets, Community law will prevail.\textsuperscript{261} The mere fact that an industrial property right is

\begin{footnotesize}
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\item[258.] Id.
\item[260.] See BELLAMY, supra note 255, at 163.
\item[261.] Three recent cases considered by the Court of Justice are helpful in understanding the status of patents, trademarks, and copyrights in the Community. In 1974, the Court issued its decision in Van Zuylen Freres (VZF) v. Hag A.G., [1974 Transfer Binder] CCH COMM. MKT. REP. ¶ 8230 (Ct. J. 1974), a suit for trademark infringement.
\end{enumerate}
\end{footnotesize}
used to block parallel imports is not viewed as an anticompetitive practice in the Community. Thus a patent holder may assign its rights to a subsidiary which is not prohibited from

Hag was the first holder of a patent for decaffeinating coffee. It set up subsidiaries to register the Hag trademark for this coffee in Belgium and Holland, and in the mid-1930's assigned it to Hag/Belgium. Id. at 9115-3. In 1944, Hag/Belgium, seized as enemy property after the war, and so no longer associated with Hag/A.G., assigned its trademark for Benelux to VZF, a coffee wholesaler. Id. at 9006. In 1972 Hag A.G. began selling in Belgium under its German Hag trademark, and VZF sued in a Belgian Court for trademark infringement. The national appellate court referred the case to the Court of Justice to determine whether Community or national trademark law should prevail. Id. The Court denied relief to VZF, holding that Community law ruled where the application of national law would have the effect of partitioning national markets. Id. at 9125. The Court concluded that "Article 36 permits derogations from the free movement of goods only to the extent that [they] are justified for [the purpose of] safeguarding rights that [are] the specific subject matter of [industrial or commercial] property." Id. at 9124 (emphasis added). The specific subject matter of a trademark is the exclusive use of the trademark for putting products on the market for the first time, and so identifying the maker of that product. Id. at 9124-5. In this case, said the Court, the maker was properly identified as Hag A.G. by its legitimate German trademark. To allow VZF to use its trademark to block Hag's imports would frustrate a basic aim of the Community—the creation of a unitary market. Id. There was no fraudulent infringement. Thus no relief was granted, even though VZF had a legitimate interest in protecting a name which had years of good will behind it, from a different product which might be mistaken for its own.

Two companion cases following closely on VZF further clarified this area—Centrafarm B.V. v. Sterling Drug, Inc., [1974 Transfer Binder] CCH COMM. MKT. REP. ¶ 8246, and Centrafarm B.V. v. Winthrop B.V., [1974 Transfer Binder] CCH COMM. MKT. REP. ¶ 8247 (Ct. J., 1974). Sterling and Winthrop were controlled by a British holding company, and held, respectively, the patents, and the trademark "Negram" for a chemical used in the preparation of pharmaceuticals. Id. at 9151-46. The patents and trademarks were registered in Britain, the Netherlands, and elsewhere. Centrafarm purchased the chemical in Britain from a Sterling-Winthrop sales subsidiary, and then sold it in Holland for twice the price (still underpricing Sterling-Winthrop). Id. Sterling sued for patent infringement, Winthrop for trademark infringement. The Court denied relief in both instances. Once again the Court cited Article 36 as its guiding light, permitting restraints on the free movement of goods within the EEC only when they are justified for protecting the specific subject matter of the right. See, e.g., id. at 9155-56. For a patent, this subject matter is the guarantee to a patentee that he will be rewarded for his creativity by assigning to him the exclusive right to use the invention. Id. Thus it would be the legitimate function of a patent to prevent the importation of identical goods if they were not eligible for a similar patent, and were produced without the patentee's consent. Id. at 9151-51. This is not the case where the parallel importer buys from a subsidiary or customer of the patentee. Once the patentee or his distributor puts the product on the market, the property right is said to be "consumed" or "exhausted," having served its specific object. Id.

Winthrop sued under Dutch trademark law, which permitted relief for unauthorized remarketing of a trademarked product, even when initially purchased from an authorized distributor. The Court of Justice, applying Community law, held that relief could be granted only where the parallel importer obtained the trademarked goods from a country in which the trademark had not been registered. Id. at 9151-66. In the instant case, said the Court, there was no deception as to the origin of the goods—the "Negram" trademark had been registered in Britain. Id. at 9151-66, 9151-67.
blocking the parallel import of goods infringing the patent.²⁴² There could be a violation of Article 86, however, where the patentee assigned the patent to a subsidiary for the purpose of blocking the parallel import of goods which did not infringe the patent, so as to protect an exclusive distribution territory.²⁴³

The earliest indication of the protection afforded holders of industrial and commercial property rights by Article 36 was the Commission’s 1962 Notice on Patent Licensing Agreements.²⁴⁴ In a sort of “group negative clearance,”²⁴⁵ the Commission said that Articles 85 and 86 did not prohibit the use of terms:

1. Limiting the right of licensees exclusively to the manufacture or sale of the patented goods, or to one of many particular exploitations of the patent;²⁶²
2. Which dictated production or sale of minimum or maximum quantities under the license;
3. Which limited the time span of the license to less than that of the patent itself;
4. Which limited the right of the licensee to grant sub-licenses only to those approved by the licensor;
5. Which restricted the use of the patent to a particular location or factory;

²⁶². See, e.g., text accompanying note 157 supra.
²⁶³. According to the Court of Justice in Deutsche Grammophon GmbH v. Metro-SB-Grossmarkte GmbH & Co. KG:
   While the difference between the imposed price and the price of the product imported from another Member State does not necessarily prove an abuse of dominant position, it can, nevertheless, because of the size of the difference and the absence of objective justification, constitute a conclusive indication of such abuse. [1971-73 Transfer Binder] CCH COMM. Mkt. Rep. ¶ 8106, at 7193 (Ct. J. 1971).
²⁶⁵. ÖBERDORFER, supra note 11, at 142-43, concludes that this was the effect of the Official Notice on Patent Licensing Agreements, 1 CCH COMM. Mkt. Rep. ¶ 1698 (1971).
²⁶⁶. Thus a license might be granted which limited one licensee to manufacture, another to distribution of the patented goods. See ÖBERDORFER, supra note 11, at 62.
6. By which the licensor granted an exclusive license by agreeing not to grant other licenses within a certain territory.\textsuperscript{267}

The most recent Commission pronouncement on patent licensing agreements reflects the Court of Justice's view that Articles 30 through 37, and 85 and 86 prohibit the use of terms in licensing agreements which cannot be justified on economic or technical grounds.\textsuperscript{268} Examples of terms which are prohibited include those which (1) require a licensor to grant absolute territorial protection to a licensee for sales in a given territory; (2) prohibit a licensee from exporting outside its territory (though the imposition of a "non-active" sales policy—of not soliciting orders outside the territory—is still allowed, as in exclusive distributorship agreements not involving patents); and (3) prevent a licensee from challenging a patent's validity.\textsuperscript{269}

These rules have been drawn from Court of Justice cases involving industrial property rights, but since there are no per se wrongs in Community law,\textsuperscript{270} there will be some exceptions. Additionally, the Court is not bound by the Commission's opinion, and though it may disagree with these rules, they serve well as general guidelines.\textsuperscript{271}

\textsuperscript{267} The Commission's latest views on patent licensing were purportedly taken from a confidential Commission report on the subject. \textit{EEC Spells Out Views On Patents and Trademarks}, XV BUSINESS EUROPE 52-53 (1975). This report may have been a forerunner of the Fourth Report on Competition Policy, recently issued by the Commission, and reported quite briefly in 333 CCH COMM. MKT. REP. EUROMARKET NEWS, June 3, 1975, at 2-3. The only mention by CCH of patent licensing was that the Commission may try to handle more such agreements by group exemptions.

The Commission apparently believes that a licensor may restrict a licensee to one of many possible exploitations of the patent only where the restraint does not appear to be the result of an agreement to restrict competition between the licensees. The existence of a restrictive agreement would most likely be presumed whenever the licensees, though able to exploit all or several technical applications, were asked to confine themselves to just one such application. XV BUSINESS EUROPE 53 (1975).

\textsuperscript{268} \textit{Id.} at 52.

\textsuperscript{269} \textit{Id.} These license terms, except one preventing challenges to patent validity, were approved by the Commission in its decision of June 9, 1972, granting an exemption to Davidson Rubber Co., [1970-72 Transfer Binder, New Developments] CCH COMM. MKT. Rep. ¶ 9512 (1972).

\textsuperscript{270} Per se wrongs are those which are unlawful no matter how one does them. Jones, supra note 38, at 22. \textit{See} note 219 supra for the use of the "Rule of Reason" and the per se test in American law.

\textsuperscript{271} The Commission's Official Notices indicate which practices it particularly dislikes, and thus those which it is most likely to move against. \textit{See Bellamy, supra} note 255, at 18. Neither suits by private parties nor by the Member States are, how-
ARTICLE 86 PROHIBITS ABUSES OF DOMINANT POSITION

Article 86, unlike Article 85, is applicable to the anticompetitive behavior of one enterprise; it can also be applied to several enterprises acting in concert, where they collectively possess a dominant position.272 In its Sugar Cartel decision,273 the Commission said that "[t]his dominating position is a result of the share of the market held by [it] . . . as well as the scope which it enjoys for independent action, which allows it to act without taking much account of . . . its competitors."274 The criteria to be used to determine whether an enterprise in fact occupies such a position are these: (1) the firm's market share for the relevant products; (2) the size of the enterprise in relation to its competitors; (3) the economic strength of its customers; (4) the extent to which there exists potential competition which will become actual competition if the enterprise in question overprices its goods, maintains poor product quality, or imposes odious terms on its customers.275

ever, barred against those who ostensibly fall within the bounds of these notices, for the Court of Justice may disagree with the Commission on these matters. Id.; Council Regulation 17, art. 9, 1 CCH COMM. Mkt. Rep. ¶ 2481 (1971); Treaty of Rome art. 88, 298 U.N.T.S. 49 (1958).

272. See OBERDORFER, supra note 11, at 110; accord, Jones, supra note 38, at 27. The Court of Justice has not, however, taken this tack in all cases of concerted practices. In neither the Dyestuffs cases, supra note 114, nor in the Quinine Cartel cases, [1967-70 Transfer Binder] CCH COMM. Mkt. Rep. ¶¶ 8083-8085 (Ct. J. 1970), did the Court utilize Article 86, despite the fact that price-fixing cartels cannot work to raise prices unless the cooperating concerns do in fact occupy powerful positions in their industries. If they do not, and attempt to withhold supplies or raise prices, their competitors will fill the supply gap and underprice them.

Only in the 1973 European Sugar Industry decision did the Commission find that Article 86 had been violated by a collective abuse of dominant position. 2 CCH COMM. Mkt. Rep. ¶ 9570 (1973)[hereinafter cited as Sugar Cartel]. And even here, the Commission applied Article 86 to only four of the seventeen firms involved. Of these, two Dutch firms which cooperated closely in their purchasing, research and development, advertising, and controlled over eighty-five percent of the Dutch sugar market, were found to have violated Article 86 by virtue of their cooperation. Id.

The gist of this application of Article 86 is that it will not suffice that many firms possess a dominant position collectively. The Commission and Court will require something more for a finding of abuse of dominant position—the abuse must be the result of more than a parallelism of conduct or gentlemen's agreement—there must be a sort of concern relationship between the firms collectively holding the dominant position. Otherwise, Article 85 can be applied to their cooperation, or Article 86 to their individual abuses of dominant position.

273. Sugar Cartel, supra note 272.

274. Id. at 9273. The Court of Justice recently decided the Sugar Cartel case. It substantially reduced the fines assessed by the Commission on the ground that the Community's regulated sugar market left little room for competition. 363 CCH COMM. Mkt. Rep. EUROMARKET NEWS, Dec. 30, 1975, at 2.

275. Continental Can, supra note 85, at 8301.
The first case of a violation of Article 86 was the 1971 Commission decision against GEMA, a German firm which monopolized the administration of copyrights on sound recordings in Germany. Monopolization, which is not a wrong per se under Community law, was not charged against GEMA. Rather, the Commission found that GEMA violated Article 86 by discriminating against non-Germans, who were not allowed to join the organization and were prevented from obtaining copyright protection. GEMA also blocked royalty payments to non-Germans and discouraged parallel imports from outside Germany of recordings distributed there initially by GEMA members. No fine was imposed, but GEMA was forced by the Commission to change its bylaws to conform to Article 86.

The Commission’s second case for violation of Article 86 was its decision against Continental Can Corporation, the world’s largest manufacturer of metal containers. In 1969,
Continental had acquired a controlling interest in the EEC's leading packaging manufacturer, Schmalbach-Lubeca Werke A.G. (SLW) of West Germany. SLW had 70 per cent of the West German market for certain packaging, according to the Commission. In 1970, Continental had acquired over 90 per cent of the stock in Benelux's largest metal container manufacturer, Thomassen & Drijver-Verblifa (TDV). Because of their relationship to Continental, TDV and SLW had primary access to Continental's technology, patents, and financial backing, which were unavailable to their competitors. The Commission found that by its acquisition of TDV, Continental had eliminated its only major potential competition in three EEC markets: meat tins, fish tins, and metal jar caps. Finding an abuse of dominant position by Continental's acquisition of its major competitors in the EEC, the Commission ordered divestiture.

Continental appealed the decision to the Court of Justice, which reversed the Commission in 1972. The Court agreed with the Commission that a dominant firm abuses its position by acquiring its competitors, especially when that expansion leaves the competitors dependent on the dominant firm for market leadership, but it was not convinced that Continental had substantially eliminated its potential competition. As is the case in American adjudications of mergers and monopolies, the major issues before the Court of Justice were the delineations of the relevant geographic and product markets.

Notes:
281. Continental Can, supra note 85, ¶ 9481 at 9032. TDV had one-hundred percent of the Benelux Market in meat and fish tins, and fifty percent of the market in jar caps. Id. at 9026-27.
282. Id. at 9033. See id. at ¶ 9500.
283. Continental Can, supra note 85, ¶ 8171.
284. Id. at 8301-02. In United States v. E.I. duPont de Nemours & Co., 361 U.S. 377 (1956), the Justice Department charged that duPont had monopolized the cellophane market in violation of section 2 of the Sherman Act, 15 U.S.C. § 2 (1970). It had seventy-five percent of this market, but argued that cellophane was part of the larger flexible wrapping materials market (glassine, wax paper, etc.), and it had just twenty percent of this larger market. The Court decided that cellophane was a part of the latter market since the other products were interchangeable with cellophane, at least functionally. There was, said the Court, a "cross-elasticity of demand" for these products, meaning that when cellophane's price rose, consumers would substitute another product for it. Id. at 400. In dissent, Chief Justice Warren argued that cellophane constituted its own submarket since duPont had intentionally kept its price very high (four to seven times the price of wax paper, glassine, and sulphite paper) and still enjoyed an explosive growth in sales. Why, asked Warren, would businessmen purchase a product so expensive if cheap substitutes were available? The answer, he said, was that the substitutes for cellophane were not equivalent substi-
ing companies will argue in their defense that the markets they affect by their mergers are very large, both geographically and in the types of products which directly compete with theirs. Therefore, merging companies argue that as they compete with firms over a wide geographic area and with a diverse range of products, their market power will diminish.

In the instant case Continental argued that meat and fish tins and metal jar caps were part of a larger container market, including those for fruits, vegetables, milk, oil, juices, and industrial products. As a result, its market share was much smaller than that portrayed by the Commission. In addition, Continental asserted that the relevant market was the whole of the EEC rather than just Benelux and northern Germany, since there were competitors in other parts of the Community.

The Court of Justice accepted both of these arguments and allowed the mergers to stand. It was not satisfied that the relevant markets were correctly defined by the Commission. The Court was not convinced that glass containers did not compete with Continental's metal products. Nor did it agree with the Commission that there were separate submarkets of fish and meat tins and jar caps. Finally, it was skeptical of the Commission's argument that there was no competition from other areas of the EEC.

Much the same problem was considered by the Court in United States v. Aluminum Co. of America, 377 U.S. 274 (1964). The Justice Department charged that Alcoa, by its acquisition of Rome Cable Corp., violated section 7 of the Clayton Act, 15 U.S.C. § 18, in that it might substantially lessen competition or tend to create a monopoly (section 7 is directed against monopolies in their incipiency). Id. at 272-73. Alcoa argued that aluminum cable, of which it was the leading producer, with about thirty percent of that market (Rome was the eighth-largest producer with about five percent), was part of the larger metal conductor market containing copper cable. Id. at 273-74. Copper cable, however, was priced much higher than aluminum, and the Court decided that copper and aluminum conductors constituted separate submarkets. Id. at 276-77. Thus the merger was disapproved on the ground that it might lead to a monopoly in the aluminum conductor submarket. Id. at 280-81.


The business community can draw comfort from this severity [of the Court] because it diminishes the likelihood of successful prosecutions under Article 86. Given the fact that the Commission is generally ill-
Later in 1972 the Commission charged a violation of Article 86 by Commercial Solvents Corporation (U.S.) and its Italian subsidiary, Istituto Chemioterapico Italiano (ICI). The charge was based on ICI’s refusal to sell to Zoja, its main Italian competitor, a chemical in which ICI had a near-monopoly. ICI argued that it did not hold a dominant position in relation to the chemical since there were substitutes, and the relevant market was the larger one for the derivative drug, not that for the base chemical alone.

The Commission rejected these arguments. Substitutes were still experimental, and most manufacturers of the drug used only ICI’s chemical. In this situation, said the Commission, it would be absurd to pretend that ICI did not hold a commanding position in the derivative market, since it controlled the base-chemical submarket. The Court was not as assertive as the Commission, but admitted that “[an] abuse of a dominant position on the market for raw materials may . . . have [anticompetitive effects] in the market on which derivatives of the raw material are sold . . . even if the market

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equipped to undertake thorough and large-scale probes into a given market, it will probably be hard put in many future cases to supply the necessary amount of evidence of market dominance to satisfy the European Court.

*Ramifications of the European Court’s Decision In The EEC - Continental Can Case, XIII Bus. Europe 66 (1973).*

Indeed, there have been no anti-merger cases argued by the Commission since the Continental Can case in 1973; see also the Commission’s approval of the Chevron-SHV joint venture, supra note 50. Another gauge of the Community’s lack of concern with concentrations is the Council’s failure to institute a system whereby the Commission would be able to require prior notification of any mergers which involve firms with sales of more than one-billion dollars annually. The Treaty Establishing the European Coal and Steel Community § 66, April 18, 1951, 261 U.N.T.S. 142, has such a requirement, so as to allow the Commission to consider the effects of such mergers before they become *faits accomplis* and thus more difficult to undo.

In a release on industrial concentration and a 1973 draft of the merger control regulation for the Council’s consideration, CCH reported that mergers and acquisitions are steadily increasing: acquisitions of more than fifty percent of a company’s stock or capital were 173 in 1962, and 612 in 1970; the rate doubled in the period from 1966 to 1970, as compared with that from 1962 to 1966. 2 CCH Comm. Mkt. Rep. ¶ 9586 (1973). One must, however, always keep in mind that Europe’s industries are not developed, in many cases, to the same extent as those in the United States: “The structure of European industry is characterized by an overwhelming majority of inefficiently small plants.” Marchini-Camia, supra note 43, at 10.


289. Id. at 9215-2. The refusal to sell came about subsequent to the breakdown of merger talks between the two firms. Id. at 9215-3 to 9215-4.

ICI further argued that since Zoja sold 90 per cent of its products outside the EEC, there was no significant effect on trade within. The Commission rejected this argument, holding that ICI's refusal to sell demonstrated an intent to force a competitor out of business. In addition, the Court held that the elimination of even potential competition is bound to have adverse effects on trade within the Community. The Court upheld the Commission and assessed a fine of 200,000 units of account against CSC and ICI.

In 1975 the Commission charged General Motors Continental, S.A. (GMC), with a violation of Article 86, which resulted in a fine of 100,000 units of account. GMC handled all legal requirements for sales of General Motors products in Belgium. It alone was able, by virtue of a Belgian statute, to obtain certificates of conformity for each car which was imported, and certificates of approval by the Belgian government as to each model. Until 1972, GMC performed these services at no charge for parallel importers of GM products. Then, in 1972, it began charging for the service, and in 1973 the fees were raised substantially, though the cost to GMC was minimal. The Commission found that GMC's Belgian dealers had a sub-

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293. Commercial Solvents, supra note 26, at 8823. The unit of account was at that time roughly equivalent to one U.S. dollar. Cf. note 209 supra.

294. GMC, supra note 85.

295. Id. The Court of Justice recently overturned the Commission's decision in this case on the ground that GMC did not abuse its dominant position. General Motors Continental S.A. v. EEC Comm'n, 2 CCH COMM. MKT. REP. ¶ 8230 (Ct. J. 1975). The Court held that there had been an insufficient showing that GMC had charged so excessively as to discourage parallel imports:

The Court did not rule out entirely the possibility that the dominant position had been abused. But it found in favor of GMC because the company had promptly reduced the fees charged for imported cars to a "real cost" level and refunded the excess prior to the Commission's investigation.

Id. at 7735.
stantial competitive advantage over the parallel importers, since the approval charges for the former were approximately $3 per car. It ruled that GMC abused its legislatively conferred dominant position by fees so disproportionate to its costs that it in effect partitioned the Belgian market, making the acquisition of GM products outside Belgium more difficult.

CONCLUSION

The highlight of EEC competition law is its flexibility to permit practices which would ordinarily be considered destructive of normal market conditions. Article 85.3 of the Treaty of Rome is a clear illustration of this feature; it permits practices such as joint marketing and exclusive supply or purchasing agreements which limit competitive opportunities, but improve production and distribution, and lower prices. Normally, exemptions under Article 85.3 are granted individually, but the Commission has in some cases resorted to group exemptions for categories of agreements.

The Commission has in fact made great use of administrative procedures such as exemptions and negative clearances, rather than relying on judicial actions to carry out its policies.

Practices most strictly discouraged under Community competition law are not, oddly enough, those which involve horizontal cooperation. Rather, those practices which erect national trade barriers to create exclusive sales or distribution territories are most heartily disapproved, since the Community is premised on the assumption that the larger international market created by the EEC will allow for the most rational use and dispersion of resources and goods,unchecked by artificial barriers such as tariffs. Exclusive sales territories would serve merely to replace old artificial barriers with new ones, whereas cooperation can in many instances allow firms to use their resources more intensively. The creation of the common market also serves to promote close relations between the Member States.

To further its policy of encouraging efficient use of resources, monopolies are not outlawed in the EEC as in the United States. The reason is that monopolies are potentially able to take advantage of economies of scale and can thus do business most efficiently. Only when they abuse their "dominant position" do monopolies violate Article 86, and the fact that this abuse has been found in so few cases indicates an
encouragement of monopolistic growth by the Court of Justice. Only where predatory practices are used do the provisions of Article 86 have any effect, in practice.

The goal of a unitary market blankets nearly every phase of Common Market antitrust law. Cross-boundary mergers and cooperation which might otherwise be viewed unfavorably are approved because they promote market integration and efficiency. Market domination is also excused, since in most cases the EEC views this, too, as an acceptable means of achieving market integration.

The purpose of these goals is to benefit consumers; however, the means used by EEC authorities to promote these benefits differ from those used by American authorities, and perhaps necessarily so. The EEC’s situation differs substantially from that of the United States because the EEC is composed of sovereign nations whose independence must be cautiously respected.

Remedies for the abuses of free-market capitalism began in the United States with the Sherman Act in 1890. The EEC’s development of antitrust remedies did not begin until 1957. As a result, antitrust law in the EEC has not fully developed a body of precedent similar to that which has evolved through 85 years of litigation in the United States.

The underlying purposes and philosophy of the EEC differ from those expressed in American antitrust law. The EEC is primarily an economic organization, and its purpose for the most part is economic progress. Indeed, the early articles of the Rome Treaty underscore the fact that one purpose of the Community is to raise the standard of living for the peoples within.296

The United States, on the other hand, is primarily a political entity with one national government and history, concerned not just with economic progress, but with order and the preser-

296. See, e.g., Treaty of Rome art. 85.3, 298 U.N.T.S. 48 (1958), which conditions exemptions partially on benefit to consumers. Cf. id., Preamble, 298 U.N.T.S. 14. One of the primary political aims of the Community—to promote closer ties between the Member States (id., art. 2, 298 U.N.T.S. 15)—has perhaps been underemphasized. The reason for this is the seeming absence of this element in Community antitrust policy. There has been some success in creating Community law to govern uniformly, e.g., through the Patent Convention discussed in note 259 supra. But the customs union concept—the means to achieving closer relations by dissolving national trade barriers—has remained the Community’s most important aspect. Cf. CCH COMM. Mkt. Rep. ¶ 162.03 (1973).
vation of political and civil liberties. The thrust of the Sherman and Clayton Acts is that of economic pluralism, counterbalancing economic interests in order to preserve political as well as economic freedom.\textsuperscript{297} In choosing between the virtues of bigness on the one hand, and of independence and competition on the other, the framers of these statutes clearly chose the latter. They believed that larger operations with their economies of scale would prevail over competitors and become complacent. Uniform thinking would then replace innovative thinking, which can exist only in a competitive environment. The authors of American antitrust law placed their faith in competition alone.

In time, the EEC may come around to this view. But for the near future, the EEC will have to develop more certain rules and the machinery to enforce them. The experience in recent years with the abuses of international cartels and giant, multi-national corporations may encourage the Member States to strengthen Community antitrust safeguards, enabling each to reach beyond its own borders in order to control abuses originating outside the EEC.

Americans should not be too critical of the apparent weakness of Community antitrust law. While American law has in some instances allowed the growth of great concentrations of economic power, it has frustrated genuine competition in many cases.\textsuperscript{298}

\textsuperscript{297} Compare the Community's use of Treaty Article 85.3 to allow any type of restrictive agreement so long as its economic advantages are seen to outweigh its anticompetitive effects, with its analogue, the American "Rule of Reason," which is not applied to those practices considered per se unreasonable restraints of trade. See note 219 supra. And note that the American counterbalancing inherent in its antitrust law requires government manipulation to maintain a balance of interests sufficient to preserve these freedoms.

\textsuperscript{298} See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945), wherein Judge Hand emphasized that Congress did not condone "good trusts" and condemn "bad" ones; it forbade all. Moreover, in so doing it was not necessarily [motivated] by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success on his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

The effects of this philosophy have been severely criticized as ignoring economic realities. Witness the Supreme Court's disapproval of a merger in United States v. Von's Grocery, 384 U.S. 270 (1966), which involved two grocery chains with combined sales of 7.5 percent of the Los Angeles retail food market, making them the second-largest chain in the area. \textit{Id.} at 272. The Court held that the increasing power of chains in the area, combined with the disappearance of single store firms due to acquisitions...
As Justice Brandeis said, the essence of every agreement is to restrain trade. Whether these restraints merely harm competitors or indeed destroy competition is a question upon which reasonable men can differ. However, the EEC rules of competition are not necessarily “worse” for their weaknesses in relation to American law. The provisions for reporting agreements to the Commission may, in fact, strengthen EEC rules. The framers of the EEC rules suited them to the organization and circumstances from whence they issued, and only time will tell which set of rules will eventually be recognized as the more successful in furthering its goals.

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and mergers, made the merger a violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (1970), by lessening competition. 384 U.S. at 274-79. Justice Stewart dissented, objecting that the Court had misused section 7 by protecting obsolescent competitors, when the statute’s aim was instead to protect competition. Competition was not lessened by the mere numerical decrease of stores, he stressed, since each did not necessarily compete effectively. Id. at 286-304.

299. See note 219 supra for the text of this statement.
Appendix A

TREATY OF ROME ANTITRUST PROVISIONS*

ARTICLE 85**

1. The following shall be prohibited as incompatible with the common market: 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 and in particular, those which

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make 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.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

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;

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(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Appendix B

ARTICLE 86*

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 of 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.
