Mercer Law Review

Volume 27
Number 2 *Special Lead Articles Edition - Foreign Trade and Investment Part I*

Article 9

3-1976

The Burgeoning Development of the Common Market Competition Rules and Its Impact on International Licensing

Marcus B. Finnegan

THE BURGEONING DEVELOPMENT OF THE COMMON MARKET COMPETITION RULES AND ITS IMPACT ON INTERNATIONAL LICENSING

By MARCUS B. FINNEGAN*

Since formation of the European Economic Community (EEC), or the Common Market, by the Treaty of Rome of March 25, 1957,[1] both licensors licensing into, and licensees licensing from, the EEC have had to concern themselves more and more with the effect of the Treaty articles on licensing into and out of the Common Market. The law of competition in the Community has been undergoing increasingly rapid development and refinement.

Not surprisingly, the emerging Community law governing competition has tended increasingly to model itself on the large and intricately developed body of antitrust law existing in the United States. Perhaps this result was bound to occur when one considers that United States antitrust law had been developed through statutes, and particularly through case-by-case interpretation of the statutes, over a period of 67 years before the Treaty of Rome came into existence.

Recently, through decisions of the EEC Commission and the European Court of Justice, the adoption of American principles of antitrust law has been accelerating, and this trend probably will continue.

In spite of a tendency to follow the lead of U.S. antitrust law, there are some interesting differences in approach between the EEC and the United States. For example, the EEC judicial organs are reluctant to enforce the national character of industrial property rights whenever the effect would be to tend to maintain the national partitions between the member states, or to erect any barriers to the free movement of goods between member states. Since industrial property rights in the United States cover the entire territory of the U.S., a corresponding problem does not even exist in the United States.

The entry of the United Kingdom into the EEC in 1973 is of particular interest, since that country is the first member state to enter with a body of municipal law substantially different from the general canons of the continental civil codes. What effect EEC competition law will exert upon British municipal law and, conversely, what influence British law will have

---

* Partner in Finnegan, Henderson, Farabow & Garrett, Washington, D.C. United States Military Academy (B.S., 1949); University of Virginia (J.D., 1955); George Washington University (LL.M., 1957). President, The Licensing Executives Society-International, 1975; president, Licensing Executives Society-U.S.A., 1973-74; Professorial Lecturer in Law, George Washington University; Delegate, U.S. Dep't of State, Inter-American Working Group on Science and the Transfer of Technology, 1974-75; consultant to UNIDO. Member of the Bars of the District of Columbia, Virginia, New York, and the U.S. Supreme Court.

1. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (effective Jan. 1, 1968), *reproduced in* 1 CCH COMM. MKT. REP. ¶151 (1973).

on the future development of EEC law, are matters that are not entirely clear at present, but nonetheless charged with great importance for all licensors to, and licensees from, the United Kingdom and the EEC.[2]

I. Articles Of The Treaty Of Rome Governing Competition In The EEC

This article will offer an examination of judicial construction of articles 85 and 86 of the Treaty of Rome, as well as of regulations of the EEC Commission relevant to those articles. For convenience, this paper commences with an exposition of the Treaty articles.

To those skilled in the principles of U.S. antitrust law, the close similarity of article 85(1) to section 1 of the Sherman Act,[3] and of article 86 to section 2 of the Sherman Act,[4] will be readily apparent.

A. *Article 85; Prohibited Practices*[5]

> 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:

---

2. *See* Application Des Gaz S.A. v. Falks Veritas Ltd., 14 Comm. Mkt. L.R. 75 (1974), *and* H.P. Bulmer Ltd. v. J. Bollinger S.A., 14 Comm. Mkt. L.R. 91(1974). These cases are the first attempts by English courts to deal with articles 85 and 86 of the Treaty. Essentially it was held that the articles created two new torts in English common law, and reference to the European Court under article 177 will be passed on by the English Court of Appeal.

3. 15 U.S.C.A. §1 (Rev. 1973).

4. 15 U.S.C.A. §2 (Rev. 1973).

5. 1 CCH Comm. Mkt. Rep. ¶2005 (1973).

—any agreement or category of agreements between undertakings;
—any decision or category of decisions by associations of undertakings;
—any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

B. *Article 86; Abuse of Dominant Market Position*[6]

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

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

II. Procedures For Enforcing The Articles Governing Competition

Compliance with articles 85 and 86 is insured by:

(1) The Commission of the European Economic Community. The Commission itself may initiate proceedings under the articles, or it may act on the complaint of a member state or "natural and legal persons and associations of persons who show a justified interest."[7]

(2) Domestic courts of member states may also act pursuant to articles 85 and 86. There is some overlap between jurisdiction of domestic courts and jurisdiction of Community institutions which is best viewed by the types of cases which arise relating to competition law:

6. 1 CCH Comm. Mkt. Rep. ¶2101 (1973).
7. Reg. 17, art. 3, 1 CCH Comm. Mkt. Rep. ¶2422 (1971).

(a) The Commission, under judicial control of the Court of Justice, has exclusive jurisdiction to impose fines and penalties for Community antitrust violations. It also has exclusive jurisdiction over the granting of article 85(3) exemptions.

(b) Community and domestic national courts have concurrent jurisdiction to declare a restrictive agreement null and void applying 85(1) and 85(2), and also to declare that such an agreement is legal and not restrictive. In this situation, decisions of the Court of Justice take priority over decisions of domestic courts. In this regard, the Court of Justice, in *Wilhelm v. Bundeskartellamt*,[8] held that in cases of conflict between Community and national rules on competition, the Community rules prevail, and national authorities must respect Commission decisions relating to restrictive practices or agreements.

(c) Some cases give rise to parallel jurisdiction between the Community and its member states. That is, where some course of action violates Community antitrust law and the same activity also violates separate national antitrust laws of member states, the business concerns involved may be subject to prosecution in both jurisdictions for different offenses arising out of the same set of operative facts. The *Wilhelm* case held that there is no provision in the Treaty which prevents dual prosecutions under national and Community law so long as the national action does not frustrate the uniform application and implementation of Community law. Although under Community law "double jeopardy" is permitted, the European Court in *Boehringer Mannheim Gmbh v. E.C. Commission*[9] held that on the imposition of fines the court must consider sanctions already imposed by a member state on the undertaking with respect to the same acts. The *Boehringer* case, however, concerned an attempt to offset fines imposed by a U.S. court for customs violations. The European Court held that it had no duty to offset fines imposed by a non-member state unless the facts of the two cases are identical. While the fines imposed on Boehringer by the U.S. court concerned the same agreements as those before the European court, the latter held that the existence of the agreements is not the act for which fines were imposed, but rather that the execution of the terms of the agreements was the act fined in the EEC and that the execution differed in the two cases.

(d) Article 177 of the Treaty[10] permits national courts to refer questions of Community law that arise in the national court to the Court of Justice for preliminary rulings. Where such questions arise in domestic proceedings from which there is no appeal under

8. CCH Comm. Mkt. Rep. 7856 (1969).
9. 12 Comm. Mkt. L.R. 864 (1972).
10. 2 CCH COMM. MKT. REP. ¶4655 (1968).

domestic law, article 177 provides that those questions *must* be referred to the Court of Justice. The Court of Justice has held that it may not generally apply the Treaty to the factual case referred to it under article 177. It does clearly however, have the power to decide those questions referred to it, and only those questions, which concern interpretation of the Treaty.[11]

(3) Administrative authorities of member states may also apply articles 85 and 86 when they receive a complaint which falls within the ambit of those articles.

III. Implementation Of Articles 85 And 86 By Regulation 17

Articles 85 and 86 were implemented by Council Regulation No. 17 of February 6, 1962.[12]

Article 2 of Regulation 17[13] entitles any enterprise or association of enterprises, in doubt as to the legality of an agreement or practice under articles 85(1) or 86, to ask the Commission for a negative clearance. Issuance of such a negative clearance by the Commission signifies a decision that, based on the facts which have been notified to it, the Commission will not challenge the agreement or practice.

This negative clearance procedure enables a business enterprise to obtain a Commission ruling prior to committing itself to a course of action. It thereby removes one element of uncertainty from the decision making process of that business, and it is advantageous to both the Commission and the regulated business enterprise.

The provision for a negative clearance is separate and distinct from the exemption provision provided for under 85(3). The negative clearance procedure evidences a decision by the Commission that some agreement or activity is not violative of the antitrust provisions of the Treaty. An enterprise may, nevertheless, concurrently apply for a negative clearance and, in the alternative, an article 85(3) exemption.

The exemption procedure under 85(3) applies when some agreement or practice falls within the scope of 85(1), but for the policy reasons of 85(3) is exempted from legal sanctions. Only the EEC Commission may grant 85(3) exemptions. The procedure for obtaining the exemptions is for the business enterprise involved to notify the Commission of the agreement or practice. Notification will protect the business from being fined for violation of 85(1) and also fixes the date at which any exemption takes effect.

The Commission decisions on whether to grant the exemption are subject to review by the Court of Justice of the European Communities. That court has held, in *S.A. Portelange v. S.A. Smith Corona Marchant*

11. Volk v. Vervaecke, CCH Comm. Mkt. Rep. 8082 (1970).
12. Reg. 17, art. 3, 1 CCH Comm. Mkt. Rep. ¶2422 (1971).
13. 1 CCH Comm. Mkt. Rep. ¶2411 (1973).

International,[14] that the filing of notification for the purpose of obtaining an 85(3) exemption does not constitute an admission that article 85(1) is applicable.

Article 4 of Regulation 17[15] specifies certain agreements, decisions, and concerted practices to be exempt from the notification requirements. These are:

> (1) Where businesses of only one member state are involved, with no imports or exports between member states;
> (2) Where only two concerns take part and the only effect is to (a) restrict the freedom of one party to fix resale prices or conditions of sale or (b) restrict the rights of any person acquiring or using patent, trademark, or other industrial property rights;
> (3) Where the only object is (a) the development or uniform application of standards, or (b) joint research to improve techniques for all parties.

These exceptions to the requirement that firms wishing to obtain the exemption allowed by 85(3) must give notice to the Commission do not place the firms affected outside of the scope of 85(1). Rather, such arrangements are presumptively exempt from 85(1). Nevertheless, businesses involved in such exempt activity may comply, if they wish, with the notification requirements and receive formal 85(3) exemption, or the Commission itself may request such businesses to inform it of agreements or practices which are exempt from notification.

It may be wise for businesses to notify the Commission of agreements which marginally fall in categories exempt from notification. The European Court in *Brasserie de Haecht v. Wilkin*[16] held dispensation from notification lacks final authority; it is, rather, only an indication that the agreement is generally less harmful to the Common Market. Such agreements are subject to being held void under article 85(2) despite their apparent exemption from notification.

As the Court of Justice noted in *Brauerei A. Bilger Sohne GmbH v. Jehle*,[17] however, agreements that are exempt from notification and are not actually notified, until they are determined to be void under 85(2), are presumed to be fully valid.

When the Commission decides to grant either a negative clearance under article 85(1) or an article 85(3) exemption, it must, pursuant to article 19 of Regulation 17,[18] publish the content of the application or notification, and invite comment from other enterprises or associations of enterprises or natural or legal persons who can show a sufficient interest in the subject

14. CCH Comm. Mkt. Rep. 8090 (1970).
15. 1 CCH COMM. MKT. REP. ¶2431 (1972).
16. 12 Comm. Mkt. LR. 287 (1973).
17. 13 Comm. Mkt. L.R. 382 (1970).
18. 1 CCH COMM. MKT. REP. ¶2581 (1973).

matter. A business concern has the right to a hearing before the Commission: (1) either in applying for a negative clearance under article 85(1), or in seeking an article 85(3) exemption; (2) in a suit to enjoin violation of articles 85 and 86; and (3) in any proceeding to impose fines or penalties.

Article 14 of Regulation 17[19] gives the Commission authority to make all investigations necessary to enforce articles 85 and 86. It has subpoena and visitation powers and may, by decision, order a business enterprise to submit to investigation.

Under article 15 of Regulation 17,[20] the Commission may impose on a business enterprise fines ranging from 100 to 5,000 units of account[21] for wilfully or negligently:

> (1) Supplying false or misleading information in an application for a negative clearance or exemption;
> (2) Supplying false information in response to a Commission request for information;
> (3) Failing to supply information within the time fixed by a Commission decision;
> (4) Submitting incomplete information in an investigation;
> (5) Refusing to submit to an investigation ordered by the Commission.

The Commission may fine a business enterprise from 1,000 to one million units of account, or 10% of the turnover of that business for the preceding year, where the concern wilfully or negligently:

> (1) Violates articles 85(1) or 86; or
> (2) Violates the terms of a stipulation in an exemption granted under 85(3).

This power to fine was first applied in 1969 on a Commission finding that six drug firms conspired to fix prices and restrain competition in the European market for quinine. An aggregate fine of $500,000 was imposed.[22]

In *Re Deutsche Philips GmbH*,[23] the Commission imposed a fine of 60,000 units of account for being negligent in delaying termination of a practice which the Commission determined to be a violation of article 85(1). The practice of export prohibitions had been reviewed by the Commission without notification by the concern. Deutsche Philips, due to an internal error, continued the proscribed practice after receiving notice of

---

19. 1 CCH COMM. MKT. REP. ¶2531 (1973).
20. 1 CCH COMM. MKT. REP. ¶2541 (1973).
21. A unit of account (u.a.) is the value in currency of 0.88867088 g. of gold. Prior to December 1971 it was equivalent to one U.S. dollar. As of August 1973 it was worth 1.085 U.S. dollars.
22. International Quinine Cartel, Commission decision, July 16, 1969, J. Off. Com. Eur. No. L192, Aug. 5, 1969, *summarized*, 1 CCH COMM. MKT. REP. ¶2542.74.
23. 12 Comm. Mkt. L.R. D241 (1973).

the Commission's objection for over four years—in the Commission's opinion a "long period of time" under article 15(2)(a) of Regulation 17. The Commission stated that had the concern immediately on receiving notice put an end to the practice the question of a fine would have been disregarded.

Fines for violation of 85(1) cannot be imposed for activities occurring: (1) after notification to the Commission under 85(3), and (2) prior to the Commission decision on the exemption. The Commission in *Re Pittsburgh Corning Europe*[24] stated that notification of an arrangement to the Commission does not put an end to pre-existing violations of article 85. The Commission was empowered under article 15(5)(a) of Regulation 17 only to impose a fine for the period of violation prior to the date of notification, even though the violation continues after that date. Once the Commission has informed parties that they do not qualify for an exemption, fines may be imposed for activities coming within the scope of the notification.

The Commission may, under article 16 of Regulation 17,[25] impose daily penalties on an enterprise which fails to comply with a Commission decision. These penalties can range from 50 to 1,000 u.a. per day, and may be imposed where a concern: (1) fails to discontinue article 85 or 86 violations; (2) fails to discontinue any action prohibited by a decision revoking or modifying an exemption granted under article 85(3); (3) fails completely and truthfully to supply information required by the Commission; or (4) fails to submit to an investigation.

The Commission in *Re Copyright Fees on German Tape Recorders*[26] threatened the imposition of fines under article 11 of Regulation 17[27] where the enterprise under investigation refused to supply information requested by the Commission. The Commission stated that the information requested was necessary and that the enterprise, which had determined for itself that the agreement in question did not have any adverse effect on trade, could not legally refuse to supply the information.

Article 17 of Regulation 17[28] provides that the Court of Justice has full jurisdiction to review all Commission decisions made under articles 85 and 86. The court may cancel, reduce, or increase the fine or penalty imposed by the Commission.

In December 1972, the Commission in *Zoja v. Commercial Solvents Corporation*[29] imposed a fine of 200,000 u.a. plus 1,000 u.a. per day that Commercial Solvents failed to act on the Commission's decision. The European Court later reduced the fine to 100,000 u.a. after taking into

---

24. 12 Comm. Mkt. L.R. D2 (1972).
25. 1 CCH COMM. MKT. REP. ¶2551 (1973).
26. Commission decision, February 1, 1971, J. Off. Com. Eur. No. L34, Feb. 11, 1971, *summarized*, 1 CCH COMM. MKT. REP. ¶2502.47.
27. 1 CCH COMM. MKT. REP. ¶2501 (1973).
28. 1 CCH COMM. MKT. REP. ¶2561 (1973).
29. 12 Comm. Mkt. L.R. D50 (1972).

consideration the 18-month delay between notification and the Commission's decision. *Commercial Solvents Corp. v. EEC Commission.*[30]

More recent examples of the imposition of fines for violations of articles 85 and 86 occur in the Commission decisions of *Re The French and Taiwanese Mushroom Packers*[31] and *Re General Motors Continental N.V.*[32]

In *Re General Motors Continental N.V.*, the Commission found that General Motors Continental was guilty of abusing its dominant position under article 86 for a period of more than four and one-half months. The facts of this case are discussed in more detail in the succeeding section of this article pertaining to article 86. It is worth noting at this point, however, the European Commission's use of the fine as a means for rectifying violations of the Treaty. The Commission stated:

> An important factor in the fixing of the fine was the fact that the Commission has regularly made clear that it regards parallel imports as particularly deserving of protection in the interests of competition and of consumers in the Common Market. From the point of view of the law of competition, measures which have the effect of impeding parallel imports are just as objectionable as contractual export prohibition in distribution agreements.[33]

The Commission did, however, take into account the short duration of GM Continental's violation of article 86, when it imposed a fine of 100,000 units of account.

In *Re The French and Taiwanese Mushroom Packers*, the Commission fined the French mushroom packers for their agreement with the Taiwanese mushroom packers on the basis that it violated article 85(1) by eliminating competition through establishing quotas and providing for exchange of relevant information on sales in Germany. In its decision, the Commission stated:

> Under Article 15(2) of Regulation 17 the Commission may by decision impose on undertakings or associations of undertakings fines of from 100,000 to 1,000,000 units of account or a sum in excess thereof, but not exceeding 10 per cent. of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) or Article 86 of the Treaty. In fixing the amount of the fine regard is to be had both to the gravity and to the duration of the infringement.
>
> . . . The gravity of this infringement lies in the fact that it is completely contrary to the object of creating a single market, that it constitutes a sharing of the market accompanied by a fixing of sales prices in which

30. 13 Comm. Mkt. L.R. 309 (1974).
31. 15 Comm. Mkt. L.R. D83 (1975).
32. 15 Comm. Mkt. L.R. D20 (1974).
33. *Id.* at D29.

virtually all the producers or suppliers in business on the relevant market at the time were involved.[34]

The Commission then fixed fines based on the amount of participation by each of the individual firms involved. The fines totalled 100,000 units of account.

IV. General Substantive Law Developed Under Article 85

The Commission generally has been slow to initiate and decide actions. Only a relatively small number of cases dealing with licensing transactions have been decided under articles 85 and 86. Consequently, which licensing restrictions are safe from attack under EEC antitrust law is difficult to predict at this time. Moreover, most predictions must be made from decided cases not directly involving the transfer of rights in patents or know-how. That is, most of the EEC cases decided so far have not involved the erosion of an exclusive position of a licensor through his grant of a license. On the other hand, the erosion of exclusivity through the granting of licenses in the United States has had a generally ameliorating effect on the attack on licensing restrictions under United States antitrust law.

A. *Prohibited Practices Under Article 85(1)*

Article 85(1) is applicable to agreements between, decisions by, and concerted practices of enterprises and associations of enterprises which affect trade between member states and have as their object or effect the prevention, restriction, or distortion of competition within the Common Market. To understand article 85(1) it is necessary to determine from the decisions of the Commission and the European Court of Justice which activities have been held to constitute agreements or decisions by associations of enterprises and which activities have been found to constitute concerted practices. Furthermore, it is necessary to determine what activities affect trade between member states and what agreements have as their object or effect the prevention, restriction, or distortion of competition within the Common Market.

Under article 85(1), agreements, decisions, and concerted practices are to be judged by their effect on trade between member states, which is an objective test. All objective elements of fact or law are thus relevant in determining whether the article has been violated. The activity is evaluated in the context of the market in which the enterprise operates, and the existence of other similar activities in that market will mitigate in favor of the propriety of the action.

34. 15 Comm. Mkt. L.R. at D90.

Volk

Using the objective test of the aggregate effect on trade between member states, the Court of Justice in *Volk v. Vervaecke*[35] established the "de minimis rule." This case concerned a contract between Etz. J. Vervaecke Sprl., a Belgian electrical household appliance manufacturer, and Firma Josef Erd & Co., an applicance wholesaler in Germany. Mr. Volk, the president of Firma Josef, alleged breach of contract, and the German court referred the contract to the European Court of Justice under article 177 on the question of whether the restrictions in the contract violated article 85(1). The court held that in applying 85(1) a deciding factor must be the share of the market. The two parties each had less than 1% of their respective markets. In view of this fact, the court declared:

> [I]t is possible that even where there is absolute territorial protection an exclusive distributorship agreement does not, in view of the weak position the parties have [in] the market of the products in question within the [protected] territory . . . , come within the prohibition in Article 85, paragraph 1.[36]

Brasserie de Haecht

The Court of Justice reemphasized this position in *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen*,[37] in which it said that agreements or concerted acts may be judged by their aggregate effects and the impact of the aggregate effects on the flow of trade between member states.

Dyestuffs

One must first determine what constitutes an agreement, decision, or concerted practice. While what is an agreement may appear to be straightforward, the Court of Justice has found some tenuous relationships to constitute agreements affecting trade between member states. The Commission found in *Dyestuffs*[38] that there was a concerted arrangement among ten European dyestuffs producers to raise prices. This conclusion was based on circumstantial evidence which fell short of a showing of express arrangements among the producers.

The Commission found that there had been successive uniform price increases in various European countries, for the most part applied to the same dyes, and that these price increases had been implemented in the various countries within a short time of each other. The Commission further found that virtually identical instructions were sent by the dye manu-

35. CCH Comm. Mkt. Rep. 8082 (1970).

36. *Id.* at 8086.

37. CCH Comm. Mkt. Rep. 7799 (1967).

38. Commission decision, July 24, 1969, 12 J. Off. Com. Eur. No. L195 (1969), Aug. 1, 1969, *summarized*, 1 CCH COMM. MKT. REP. ¶2011.59.

facturers to their subsidiaries and that the various manufacturers regularly exchanged information at meetings.

In light of those findings, the Commission held that the price increases could not be explained simply by the oligopolistic structure of the dyestuffs market and decided that disciplinary action was appropriate, even absent a specific showing of formal agreements to fix prices. The evidence accepted by the Commission was of the same type that is often successfully used by the U.S. Department of Justice to establish antitrust conspiracy cases in the United States. Pursuant to article 15 of Regulation 17, nine of the companies were fined $50,000 each and one was fined $40,000.

G.I.S.A.

In *Re G.I.S.A.*[39] the Commission found that an association of plumbing supply wholesalers in the Netherlands, which established uniform price lists and conditions of purchase and sale, constituted an association of undertakings within the meaning of article 85(1). They further found that circulars issued to members implementing decisions of the association amounted to agreements between or decisions of associations of enterprises, the object and effect of which was to restrict and distort competition between member states.

The members of the association were prevented, under the threat of fine, from freely pricing or fixing the conditions of sale of their products, and, although limited to a single member state, such conduct affected the trade between member states by providing protection for a national market and prevented economic interpenetration contrary to the intention of the Treaty. The Commission further found that "agreements" of this nature were eligible for consideration for an exemption under article 85(3), although in this case the Commission had not be been notified under 85(3), and, therefore, an exemption was not considered. Under similar facts the Commission reached a like decision in *Re Vereeniging Van Cementhandelaren.*[40]

Pittsburgh Corning

What constitutes a concerted practice is also not readily definable. The Commission, in *Re Pittsburgh Corning Europe*,[41] held that accession to a discriminatory price system amounts to tacit consent and is therefore concerted action, even though such accession is acquiesced in out of fear of cancellation of the concession contract.

39. 12 Comm. Mkt. L.R. D125 (1972).
40. 12 Comm. Mkt. L.R. D16 (1971).
41. 12 Comm. Mkt. L.R. D2 (1972).

European Sugar Cartel

The Commission, in *Re the European Sugar Cartel*,[42] had occasion to outline more fully what constitutes a concerted practice. It held that the following measures constituted concerted practices:

> (a) producer-to-producer trade across frontiers to the virtual exclusion of wholesalers;
> (b) alignment of sale prices on the prices operative in the country of destination;
> (c) measures adopted with regard to distributors aimed at impeding or preventing free trans-frontier trade within the Common Market, thus compelling the distributors to observe the concerted practices adhered to by the producers; and
> (d) concerting tenders submitted for export subsidy to non-member countries.

The Commission determined that foreign suppliers of sugar were guilty of concerted practices within the meaning of article 85(1) when they sold primarily to existing sugar producers in a particular market and reinforced this practice by charging higher prices to non-sugar-producing distributors and purchasers. Furthermore, the Commission held that the sugar cartel was guilty of concerted practices by requiring its independent distributors not to sell for export to the EEC market without the permission of the producers within the EEC market and not at prices below those set by the suppliers.

The Commission further held that, where a powerful sugar refiner voluntarily refrained from exporting refined sugar to a neighboring market and sold raw sugar instead to refiners already in that market, even though the refiner was motivated by a desire not to set up sales organizations in the market, the abstention could be expected to have an inhibiting effect on the freedom of independent buyers to obtain freely the sugar they required. Accordingly, it was a concerted practice within the meaning of article 85(1).

What constitutes an agreement, decision, or concerted practice, therefore, is not completely clear. It can be presumed, however, that if two or more enterprises are involved in any arrangement that will restrict competition or trade within the Common Market, the Commission or the Court of Justice will find that an agreement, decision, or concerted practice exists. This tendency of the court to extend itself in finding an agreement to facilitate deciding questions of anti-competitive behavior is more apparent in *Parke-Davis*,[43] which is discussed below.

It is also necessary in order to understand article 85(1), to determine

42. 12 Comm. Mkt. L.R. D65 (1973).
43. CCH Comm. Mkt. Rep. 7810 (1968). *See* text *infra* at note 85.

what affects trade between member states and what constitutes a restriction of competition. To affect trade between member states an agreement does not necessarily have to concern trade *between* member states. It can consist of trade only within one member state. As was pointed out in *Re G.I.S.A.*,[44] conduct which tends to provide protection for national manufacturers and prevents economic interpenetration has an effect on trade between member states in violation of article 85(1).

Bilger Sohne

This principle was reemphasized recently by the European Court of Justice in *Brauerei A. Bilger Sohne GmbH v. Jehle*.[45] That case concerned a contract or series of contracts between brewers and those using beer in Germany. Essentially the allegation by the plaintiff was that, since all, or almost all, of the users of beer in Germany were under the exclusive distributorship contracts, these arrangements had an effect on trade between member states, because the breweries of other member states could not find buyers in Germany. The court did not decide the issue on that basis; in fact, no decision was reached, since the contract was held to be exempt from notification to the Commission. The court implied, however, that a contract may affect trade between member states, even if it is not concerned with import or export between member states.

Vereeniging

The implication in *Bilger Sohne* that domination of a market in one member state will affect trade between member states was clearly stated by the Commission in *Re Vereeniging van Cementhandelaren*.[46] In that case the Commission held that a national trade association which dominated one national market and operated a concerted pricing policy had the effect of restricting competition and affecting interstate trade. This holding was repeated by the Commission in *Re G.I.S.A.*,[47] where it held that a national wholesalers trade association, by fixing prices and conditions of sale, affected trade between member states. This association was held to affect trade, even though it dominated only 75% of the manufacturing of the product concerned in that one country.

Commercial Solvents

Recently the European Court of Justice in *Commercial Solvents Corp. v. EEC Commission*[48] discussed the phrase "between member states." The

44. 12 Comm. Mkt. L.R. D125 (1972).
45. 13 Comm. Mkt. L.R. 382 (1970).
46. 12 Comm. Mkt. L.R. D16 (1971).
47. 12 Comm. Mkt. L.R. D125 (1974).
48. 13 Comm. Mkt. L.R. 309 (1974).

case concerned an article 86 violation—abuse of a dominant position within a market. The phrase trade "between Member States" appears in article 86 and article 85, and presumably the comments of the Court of Justice in *Commercial Solvents* are applicable to both articles.

The case concerned the domination of a particular pharmaceutical product market by an American company in conjunction with an Italian subsidiary and the American company's refusal to sell the particular chemical to any competitor of its subsidiary. Commercial Solvents alleged that it could not have had any effect on trade between member states, since 90% of its subsidiary's sales were outside of the Common Market. Furthermore, the company stated that it could not sell this particular commodity in any of the Common Market countries because of conflicting patents in those countries.

The court held that the expression "between member states" is

> intended to define the sphere of application of the community rules in relation to national laws. It therefore cannot be interpreted as limiting the field of application of the prohibition which it contains to industrial or commercial activities supplying the member states.[49]

The court explained that the abuse of dominant position within the Common Market, insofar as it may affect trade between member states, covers abuse which may be directly prejudicial to consumers and also abuse which is indirectly prejudicial. The court's explanation construed and commented on the effective competitive structure envisioned by article 3(f)[50] of the Treaty.

> The Community authorities must therefore consider all the consequences of the conduct complained of for the competitive structure in the Common Market without distinguishing between production intended for sale within the market and that intended for export. When an undertaking in a dominant position within the Common Market abusively exploits its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.[51]

The implications of this reasoning for article 85(1) may be far reaching. Presumably, the Commission could find that through concerted practices

---

49. 13 Comm. Mkt. L.R. at 342.

50. 1 CCH COMM. MKT. REP. ¶171 (1973). This section of the Treaty states:

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: . . . (f) the institution of a system ensuring that competition in the common market is not distorted; . . .

51. 13 Comm. Mkt. L.R. at 342.

or agreements an enterprise in a member state can affect trade between member states by engaging in practices which can be shown to have a restrictive effect on competition outside the Common Market. The European Court thus appears to be saying that the operations of member state enterprises in their export markets may be restricted by the Treaty.

Article 85(1) applies to restraints "*within the Common Market.*" Unlike section 1 of the Sherman Act, it has no foreign commerce provision. The Commission has granted negative clearances to export cartels when their effect will not be felt within the EEC.

DECA

For example, in the *Dutch Engineers and Contractors Association (DECA)*,[52] the Commission acted for the first time on an agreement among Common Market firms concerning exports to non-member countries. Members of a Dutch organization of construction firms, acting for themselves, their associates, and their subsidiaries, agreed to cooperate on building and construction orders from outside the community whenever the value of the order exceeded 2 million guilders.

Reviewing the arrangement, the Commission adopted the position that article 85 covers services as well as goods. The Commission held, however, that the purposes and effects of the DECA agreements amounted solely to restriction of competition in markets lying outside the Common Market, to which treaty rules on competition do not apply. The Commission reiterated:

> The fact that several associated enterprises established in other member states are also part of the group in no wise changes this, for their activity under the rules is restricted solely to relations with third countries. Therefore, the object of the internal rules of the group is not to prevent, restrict or distort competition within the Common Market.[53]

The Commission has, however, exercised its power upon acts committed outside of the Common Market which affect trade within the market. In *Dyestuffs*,[54] the Commission levied fines against British and Swiss corporations which owned the Common Market subsidiaries directly involved, reasoning that those subsidiaries were acting within the "sphere of influence" of their parent companies, even though the parents were not themselves engaged in business in the Common Market.

---

52. Commission decision, October 22, 1964, J. Off. Com. Eur. No. 173, Oct. 31, 1964, p. 2761, *summarized*, 1 CCH COMM. MKT. REP. ¶2412.31.

53. *Id.*

54. Commission decision, July 24, 1969, J. Off. Com. Eur. No. L195, Aug. 1, 1969, *summarized*, 1 CCH COMM. MKT. REP. ¶2011.59.

Mertens & Straet

Earlier, in *S.A. Mertens & Straet*,[55] Bendix, a United States corporation, had entered into a distributorship agreement allowing Mertens to distribute its products without territorial restriction but reserving the right to name other distributors in any country in which Mertens distributed or to sell products directly itself. Mertens agreed to do everything necessary to protect the reputation of Bendix, to provide satisfactory service, and to maintain adequate stock of products. Mertens was permitted to set its own prices and conditions of sale and to sell products of Bendix's competitors.

The Commission in *Mertens* found the agreement not to have the effect of necessarily preventing, restricting, or distorting competition, and it granted a negative clearance. The Commission did make it clear that the nationality of one of the parties would not provide an automatic exemption from 85(1):

> The mere fact that the conceding enterprise is situated outside of the Common Market is no obstacle to application of Article 85 of the treaty so long as the agreement has effects within the Common Market.[56]

Other than the area of intellectual property, which will be discussed below, there are several distinct categories in which the Commission or the European Court of Justice have found restriction of competition under article 85(1). These areas include distribution restrictions, supply quotas, restrictive pricing policies, export/import restrictions, unilateral requirements or sole supplier contracts, and parallel import restrictions.

Cimbel

In *Re Cimbel*,[57] the Commission found that a cartel of cement manufacturers in a single member state which was operated by a separate company, of which the participants were shareholders, was guilty of numerous practices which violated article 85(1) as restrictions to competition. Among these practices were: (a) provisions of the cartel agreements relating to the fixing, distribution, and supervision of supply quotas for the Common Market; (b) the observance of uniform prices and conditions for sales in Belgium; (c) the equalization of receipts concerning the countries of the Common Market; (d) the obligation to inform the other contracting party of extensions of capacity; (e) a restriction to which the assignment of production facilities was subjected; (f) the obligation not to set up a new cement-works without the approval of all parties concerned; (g) the decisions of one of the cartel committees regarding the application of certain

55. Commission decision, June 1, 1964, J. Off. Com. Eur. No. 92, June 10, 1964, p. 1426, *summarized*, 1 CCH COMM. MKT. REP. ¶2412.42.

56. *Id.*

57. 12 Comm. Mkt. L.R. D167 (1972).

prices and conditions of sale exclusively to the approved wholesalers, manufacturers of concrete products, concrete depots, and building contractors; and (h) the granting of discounts to public enterprises.

Although these restrictions applied only to an industry within one member state, the Commission determined that the cartel had, in effect, dominated trade between member states, that it had prevented similar industries in other countries from penetrating the market in Belgium, and that it had prevented buyers and wholesalers in other countries from exploiting any price differences between their country and Belgium. The listing of restrictive practices found by the Commission provides an interesting example of the scope to which the restrictive practices portion of article 85(1) has been extended.

Deutsche Philips

The Commission outlined other restrictive practices in *Re Deutsche Philips GmbH.*[58] That decision concerned the restrictive form of agreement which Deutsche Philips imposed on the wholesalers and distributors of its electric shavers in Germany. The agreement, first of all, imposed an export ban on the German electric shaver dealers which prevented them from offering the shavers they distributed in Germany for sale in other member states, thereby preventing competition.

The agreement further restricted the German retailer from selling goods covered by the agreement to consumers in other Common Market countries at prices other than that fixed in Germany. This restriction essentially operated to extend the price fixing permitted in Germany to the other Common Market countries. Furthermore, the goods covered by the agreement included shavers which were exported by Deutsche Philips and then reimported into Germany. This reimport price-fixing provision prevented the German retailer from entering into price competition with other German retailers when reselling reimported goods in Germany.

The Commission said the fact that vertical price-fixing is allowed in a given member state "is not sufficient justification for exempting measures designed to preserve this price fixing from the scope of Article 85(1)."[59] The Commission said that, although the retailers in Germany could purchase the shavers at a lower price in other Common Market countries, they could not sell the shavers at a lower price in Germany. Therefore, the agreement was disadvantageous to consumers and was a restriction on competition.

In addition, the Commission held that the restriction on German wholesalers which provided that they could supply other wholesalers only after receiving prior written consent from Deutsche Philips, and the obligation imposed on German retailers to sell goods covered by the agreement only to consumers and to refrain from selling them to other retailers, were

58. 12 Comm. Mkt. L.R. D241 (1973).
59. *Id.* at D245.

restrictions on competition. The Commission held that such bans on horizontal supply chains had the same effect on cross-frontier trade as export bans. It thus appears that, although under article 85(1) it is permissible to impose price restrictions within one Common Market country, it is not permissible to protect such a price-fixing arrangement by a restriction preventing the sale of identical imported articles at a price lower than that set under the price-fixing arrangement.

European Glass

Recently the Commission reconfirmed its findings in *Deutsche Philips* as to the restriction on competition caused by price-fixing in *Re European Glass Manufacturers*.[60] Beginning in 1955, the glass manufacturers of Europe joined together and agreed to the standards of fair trade prescribed by the International Fair Trade Practice Rules Administration of Vaduz, Liechtenstein. These rules, in part, required the exchange of pricing systems among manufacturers, the development of a common method of calculating prices, and the adoption of a delivered-price system.[61]

The agreement was an arbitrary, voluntary set of rules designed to prevent unfair competition among competitors. The Commission, however, felt that some aspects of the agreement, while possibly preventing unfair competition, also restricted competition in violation of article 85(1). The portion of the agreement which forbade undercutting of prices in competition was held to be an illegal restriction on competition, since it eliminated price competition and ensured stable prices in all countries of the Common Market.

The Commission also proscribed the provisions prohibiting discriminatory pricing, discounts, and diversions from established price lists. It held that for a producer to communicate his pricing policy to his competitors was contrary to article 85(1). Such communication was held to eliminate the normal risk that attaches to individual action in a market and was, therefore, declared to be anticompetitive.

The Commission necessarily found that the pricing behavior under the agreement had a direct influence on export prices and the pattern of trade between member states. Since the Commission found that there was restriction of competition under the agreement, it denied the request for article 85(3) exemption.

This decision by the Commission is reminiscent of the conflict between Sherman Act antitrust law[62] and Robinson-Patman Act unfair competition law.[63] It seems, however, that in the Common Market unfair competition has lost more to antitrust law than in the United States.

60. 14 Comm. Mkt. L.R. D50 (1974).
61. The agreement is set forth in the decision. *Id.* at D52.
62. 15 U.S.C.A. §1 *et seq.* (1973).
63. 15 U.S.C.A. §13 (1973).

Gas Water Heaters

In numerous cases, distribution restrictions have been found to be restrictions on competition. In *Re Gas Water Heaters*,[64] the Commission found that an agreement restricting Belgian sales of water heaters to certain categories of distributors and users amounted to a perceptible restriction of competition under article 85(1). That case concerned an agreement between manufacturers and importers of gas water heating appliances who together accounted for 70% of the Belgian market.

In *Re G.I.S.A.*,[65] the Commission held that where a trade association required its members to reserve a minimum percentage of their annual purchases for members of another trade association of manufacturers, the object and effect of such a restriction was to distort competition within the Common Market.

Nederlandse Cement

In *Re the Nederlandse Cement-Handelmaatschappij*,[66] the Commission held that where a group of German cement manufacturers established a joint sales agency for the Benelux market and provided quotas for each manufacturer supplying that market, these acts amounted to a restriction of competition.

Potassium Salts

The Commission also found in *Re Marketing of Potassium Salts*[67] that a German company with a de facto monopoly and a French company with a statutory monopoly entering into an agreement providing for joint decisions on the quantities and qualities of salts to be exported from each country and for coordination of the delivery and distribution of the products of both companies on the world market and within the Common Market amounted to a restriction of competition.

Distributorship agreements, which compelled the distributors to resell the sugar supplied them solely to particular customers within a prescribed territory and not to market sugar from another source, were found to have as their object or effect a restriction of competition. The Commission came to this conclusion in *Re the European Sugar Cartel*.[68]

In one case, the Commission found a restriction of competition where a group of cement manufacturers in Holland, Belgium and Germany entered into an agreement under which all sales of cement over 550,000 tons were proportionately divided among the parties to the agreement.[69]

---

64. 12 Comm. Mkt. L.R. D231 (1973).
65. 12 Comm. Mkt. L.R. D125 (1972).
66. 12 Comm. Mkt. L.R. D257 (1971).
67. 12 Comm. Mkt. L.R. D219 (1973).
68. 12 Comm. Mkt. L.R. D65 (1973).
69. Re Cementregeling Voor Nederland 1971, 12 Comm. Mkt. L.R. D149 (1972).

SAFCO

Export restrictions are generally considered restrictions on competition, as was noted in *Deutsche Philips*.[70] However, in *Re SAFCO*,[71] the Commission held that where enterprises belonging to a single state form an export agency to take over their export activities, there is no restriction of competition under article 85, as long as the enterprises are small and remain in competition with each other on their home markets. This decision was an application of the "de minimis" rule. The overall portion of the market was small, and, therefore, it was concluded there would be no noticeable restriction of competition under article 85.

Edmund Isbecque

With respect to the question of whether sole source contracts act as restrictions of competition under article 85(1), three Commission decisions have provided some insight. In *Re the Agreement of Edmund Isbecque*,[72] the Commission determined that a sole supply agreement is designed to restrict competition when it concerns goods which are trademarked and which therefore give rise to consumer preferences. Essentially, the Commission said that if consumers prefer a particular trademarked item and this item is subject to a sole source agreement, there is a restriction of competition since no competition can exist for goods under that trademark. In this case the Commission granted an article 85(3) exemption, because parallel imports were permitted.

William Prym-Werke

The Commission, in *Re the Agreement of William Prym-Werke*,[73] held that an agreement between a Belgian manufacturer and a German manufacturer of sewing needles which provided that the German manufacturer would suspend production and buy its total requirements from the Belgian manufacturer was a violation of article 85(1). The Commission stated that the agreement had as its object and effect a considerable restriction of competition within the Common Market, since the German manufacturer was forbidden from manufacturing needles or buying them from third parties and was obliged to buy its total requirement of needles from the Belgian manufacturer. It was deemed a restriction of competition also because the Belgian manufacturer was obliged to deliver to the German manufacturer, at preferential selling prices, all the needles required by the German manufacturer. This arrangement, the Commission found, was lia-

70. *See* text *supra* at note 58.
71. 11 Comm. Mkt. L.R. D83 (1971).
72. Commission decision, September 17, 1965. J. Off. Com. Eur. No. 65, p. 2581, *summarized*, 1 CCH COMM. MKT. REP. ¶2061.34.
73. 12 Comm. Mkt. L.R. D250 (1973).

ble to jeopardize the freedom of trade between member states in a manner prejudicial to the attainment of the objective of a single market. Despite these findings, the Commission granted an article 85(3) exemption.

Kali And Salz

The third case in which the Commission discussed sole source agreements was *Re the Agreement of Kali and Salz A.G.*,[74] which involved an agreement between the two major German producers of potash fertilizer. The agreement required one producer to buy virtually the whole of the other's production for a period of nine years and removed virtually all competition between German potash producers selling their products to farmers and the producers of compound fertilizers. This arrangement was held to be a restriction of competition affecting trade between member states, because a significant portion of the sellers' production had formerly been exported to other member states. Not surprisingly, the Commission refused to grant an article 85(3) exemption.

The last area in which the question of restriction of competition arises is parallel imports. Parallel import restrictions arise most frequently in the field of intellectual or industrial property because of the restrictions that can be attempted by making use of the national character and the resultant restricted territorial application of patents, trademarks, and copyrights. This interesting problem will be discussed in the next section; however, there have been occasions where price restrictions rather than industrial property rights have given rise to parallel import restrictions.

Pittsburgh Corning

In *Re Pittsburgh Corning Europe*,[75] the Commission held that where a parent company adjusted its pricing policy so as to prevent cross-frontier trade between the national boundaries of its various concessionaires, it was engaging in prohibited concerted practices with those concessionaires. A company's use of pricing restrictions to isolate the territories of its concessionaires, even though some concessionaries required a higher price to function in their market, thus amounted to a parallel import restriction and was held to be anticompetitive. This result is quite similar to court holdings in the United States under the Robinson-Patman Act.[76]

Dassonville

The European Court of Justice recently held in *Procereur du Roi v.*

74. 13 Comm. Mkt. L.R. D1 (1973). *See* text *infra* at note 138.
75. 12 Comm. Mkt. L.R. D2 (1972).
76. *See* 15 U.S.C.A. §13 (Rev. 1973).

Dassonville[77] that a trading rule of a member state which, either directly or indirectly, or either actually or potentially, hindered intra-community trade was in violation of article 30[78] in that the rule had an effect equivalent to a quantitative restriction on trade.

The case was engendered by a Belgian trade rule, Royal Decree 57 of December 2, 1934. Section 1 of this decree forbids, and provides penal sanctions for, the importation of spirits bearing a designation of origin—for example, Scotch whiskey—not accompanied by an official certificate of origin. Gustave Dassonville imported Scotch whiskey from France, a country which did not require a certificate of origin, and forged the certificate. The public prosecutor then instituted proceedings against Dassonville.

This case is relevant to article 85(1) because two exclusive importers and distributors of Scotch whiskey in Belgium appended to the criminal action a civil claim for the damage to them from Dassonville's sale of illegally imported Scotch whiskey. The question of the validity of their exclusive concessionaire agreements was referred to the European Court under article 177.

The court held that the exclusive dealing agreements might have adversely affected trade and hindered competition, if the concessionaires, through the combined effects of their agreements and the restrictive trade regulation, had been capable of preventing parallel imports. In this case, however, the court found that the agreements merely authorized, or failed to prohibit, the prevention of parallel imports by the exclusive concessionaires. This characteristic of the concessionaire agreements was held not to be sufficient to render them void under article 85.

Mushroom Packers

On January 8, 1975, the European Commission rendered a decision in *Re the French and Taiwanese Mushroom Packers*.[79] That case concerned an agreement between French mushroom packers and Taiwanese mushroom packers, the purpose of which was to coordinate the volume of production of preserved canned mushrooms intended for sale in Germany. The parties to the agreement allocated numerical quotas of cartons of mushrooms forecast for sale in the German market and further agreed that the prices for mushrooms would be fixed.

The Commission held that the agreement was one between member states which had as its object or effect the prevention, restriction, or distortion of competition within the Common Market. The Commission said the

77. 14 Comm. Mkt. L.R. 436 (1974).

78. 1 CCH COMM. MKT. REP. ¶321 (1973). Article 30 provides:

Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States.

79. 15 Comm. Mkt. L.R. D83 (1975).

allocation of outlets within the Common Market, which was part of the agreement, was likely perceptibly to affect trade between member states by exerting a direct influence on trade flowing between these states in such a way as to jeopardize the attainment of the aim of a single market.

The Commission therefore held that the agreement was prohibited by article 85(1). Furthermore, the Commission could find no reason for granting an exemption under article 85(3) or for permitting the agreement to continue in effect as one concerning an agricultural product under article 2(1) of Regulation 26.[80] The Commission then proceeded to impose a fine on the French mushroom packers but did not impose a fine on the Taiwanese mushroom packers, since it believed the Taiwanese probably were ignorant of the Common Market Law at the time they entered into the agreement and they did not possess any significant assets in the Common Market.

Franco-Japanese Ball Bearings

On November 29, 1974, the Commission rendered a decision on an agreement between French and Japanese ball bearing manufacturers.[81] The purpose of the agreement was to raise the price of Japanese ball bearings imported into France and thereby aid the French ball bearing manufacturer by reducing competition.

The principal difficulty the Commission had in reaching its decision was in determining whether the agreement was one which could be prohibited by article 85(1). Since the actions taken under the agreement primarily took place in Japan, the Commission had to define which of these acts in Japan would fall under article 85(1) if they took place as a result of an agreement with an enterprise in an EEC member state. The Commission found that these were four types of measures or actions which could be distinguished and should, therefore, be differently assessed:

> (a) measures taken in pursuance of trade agreements between the Community and Japan. These are acts of external commercial policy, which as such are outside the scope of Article 85 of the EEC Treaty.
>
> (b) measures imposed on Japanese undertakings by the Japanese authorities. These measures are also outside the scope of Article 85.
>
> . . . .
>
> (c) measures resulting from agreements or concerted practices between undertakings which are merely authorized by the Japanese authorities under Japanese law. Such an authorization, while required for the measures to be lawful in Japan, would not necessarily mean that Article 85 could not apply, since it would in no way alter the fact that the undertakings concerned were free to refrain from entering into an agreement or engaging in concerted practices.

80. 1 CCH COMM. MKT. REP. ¶935B (1975).

81. Re The Franco-Japanese Ballbearings Agreement, 15 Comm. Mkt. L.R. D8 (1974).

(d) measures resulting solely from agreements, concerted practices, or decisions by associations of undertakings, entered into or engaged in either unilaterally by Japanese undertakings or in concert with the appropriate European undertakings. These measures of a private nature may also come within the provisions of Article 85. The Commission has expressly drawn the attention of undertakings to this point, by an Opinion published in the Official Journal in October 1972."[82]

The Commission finally determined that the actions taken in Japan by Japanese enterprises were solely of a private nature and were taken in concert with European enterprises. Accordingly, the agreement in question fell under the provisions of article 85(1).

It held that the raising of prices of Japanese ball bearings imported into France with the view to bringing these prices into line with those of locally manufactured bearings restricted competition within the Common Market by neutralizing the function of price competition. As the restriction of competition formed the very object of the agreement in question, the Commission felt no need to analyze its actual effects to establish that article 85(1) of the EEC Treaty was applicable.

The restriction on competition was regarded by the Commission as especially serious because of the volume of sales on the French ball bearing market and the share of this market held by the Japanese.

In completing its disposition of this case the Commission concluded that the agreement did not fall under the exemption of article 85(3), since: (1) it was not notified to the Commission and (2) even if it had been notified, the agreement did not produce any favorable results.

B. The Interplay Between Nationally Protected Property Rights And Article 85(1)

With an understanding of the scope and force of article 85(1), it is now possible to discuss the interplay between industrial property rights and the provisions of article 85(1).

Consten-Grundig

With respect to anticompetitive behavior and its effect on trade, the principles set forth in *Consten and Grundig-Verkauss-GmbH v. E.E.C. Commission*,[83] are still valid. There Grundig, a German tape recorder manufacturer, entered into an exclusive sales agreement with Consten, a French firm. The agreement gave Consten the position as the only Grundig distributor in France, and the agreement prohibited Consten from exporting Grundig's products.

To insure the exclusivity of Consten's market, Grundig assigned its

82. *Id.* at D14-15.
83. CCH Comm. Mkt. Rep. 7618 (1966).

trademark, GINT, to Consten. Consten registered the trademark in France. Consten then attempted to enforce its exclusive distributorship of Grundig products in France by suing the French company, UNEF, for trademark infringement. UNEF was purchasing Grundig products bearing the GINT trademark from a wholesaler in Germany. UNEF then imported and resold these same products in France. A ruling was sought by the French court from the Commission on whether the Grundig-Consten agreement violated article 85(1). The Commission's decision that the agreement did violate article 85(1) was then appealed to the European Court of Justice.

The Court of Justice held that the application of article 85 to exclusive distributorship agreements could not be ruled out on the ground that the supplier and exclusive distributor do not compete with each other and are on an equal footing. In other words, competition in the EEC can be distorted under article 85(1) not only through agreements that limit it between the parties but also through agreements that prevent or restrict competition that might take place between one of the parties and third parties. In this respect it is thus immaterial whether the agreement is horizontal (between parties on an equal footing with respect to economic position and function), or vertical (between parties in the manufacturing-distribution-sales chain).

The court found that the contract between Grundig and Consten, on the one hand, prevented all enterprises other than Consten from importing Grundig products into France, and, on the other hand, prohibited Consten from re-exporting such products to other countries of the Common Market. The court, therefore, concluded that the agreement unquestionably impaired trade between member states. It also found that limitations against third parties might result from Consten's registration and enforcement of Grundig's GINT trademark in France and that such limitations would tend to restore national partitions in trade between member states.

The court further concluded in applying article 85(1) that it is not necessary to take into consideration the *actual* effect of an agreement where its *purpose* is to prevent, restrict or distort competition.

Finally, the court determined that the real purpose of Consten's right to be the only enterprise in France permitted to use the GINT trademark (which could also be used in the same way in other countries) was to make it possible for Consten to control and prevent parallel imports. The agreement by which Grundig, as holder of the GINT trademark through its international registration, authorized Consten to register in France in its own name therefore had the effect of restricting competition. The registration of the GINT trademark in France served to insure absolute territorial protection for Consten, and, the court concluded, Consten should be prohibited from invoking rights stemming from the national trademark law where the effect of enforcing the rights would be to prevent parallel imports.

Although under French law, Consten, by registering the GINT trademark, became the original holder of the rights flowing from it, it could do so only because of the agreement with Grundig. Ultimately, the court found that the license agreement with Grundig was subject to the prohibition of article 85(1) and that the effect of the prohibition as to the agreement would be nullified if Consten, merely because of the national character of industrial property rights, could be permitted to use the trademark to achieve the same purpose as that intended by the license agreement that had been found to be illegal.

The *Grundig-Consten* case is thus a landmark decision in concluding that the prohibitions of article 85(1) take precedence over national laws governing industrial property rights where those property rights are exercised through an agreement between parties and the effect of the exercise can be shown to prevent, restrict or distort competition within the Common Market.

Parke, Davis

The court clarified its position on industrial property rights in *Parke, Davis & Co. v. Centrafarm.*[84] There Parke, Davis, an American company, held Dutch patents relating to antibiotics. The defendant companies marketed the same antibiotics in Holland without permission of Parke, Davis. The antibiotics sold in Holland by the defendants had been imported from Italy, where they were sold freely under Italian law which does not permit patent protection for pharmaceuticals. Defendants contended that Parke, Davis was using its Dutch patent to frustrate the purposes of articles 85 and 86 by attempting to prevent sale in Holland of a product freely available in Italy.

The court held that the existence of national patent rights was not, in itself, violative of the antitrust provisions; the exercise of a patent right would fall within 85(1) only if it were the subject of a prohibited agreement, decision or concerted practice; it would be within the scope of article 86 only if it were the subject of an abuse of dominant position. It found that neither article 85 nor article 86 prevents the holder of a patent of a member state from seeking an injunction against importation of the protected product from another member state, absent a showing of "arbitrary discrimination or a disguised restriction on trade between Member States."[85] The court found that the existence of a higher sales price of the patented product compared with the non-patented product coming from Italy was not, in itself, sufficient to show abuse of ownership of a patent.

This case is the only one in which reliance on the national character of an industrial property right to affect trade between member states by excluding parallel imports was held *not* to be a violation of articles 85 or

84. CCH Comm. Mkt. Rep. 7810 (1968).
85. Treaty of Rome, art. 36, 1 CCH COMM. MKT. REP. ¶351 (1973).

86. It can be distinguished from all but the most recent of the other industrial property-parallel import cases, because in *Parke, Davis* the court apparently could not find an agreement, decision or concerted practice under article 85(1).

Sirena

In *Sirena S.R.L. v. Eda S.R.L.*,[86] the court further delineated the scope of articles 85 and 86 with respect to industrial property rights. In 1933, an American company, Mark Allen, had registered in Italy the trademark PREP with respect to a shaving cream. In 1937 Mark Allen assigned its registration of this mark in Italy to Sirena but did not transfer any technical know-how with the assignment of the mark. Sirena marketed a shaving cream in Italy under the PREP mark. Mark Allen subsequently transferred to a German company the right to use the same mark in West Germany, and that company marketed shaving creams under the mark. The German company, through an import-export company, began to sell its products bearing the mark PREP in Italy at prices lower than Sirena's; Sirena then brought action in an Italian court to enforce its Italian trademark rights. The defendant importing company contended that articles 85 and 86 precluded Sirena from exercising its trademark rights. The Italian court then submitted to the European Court of Justice the question of the applicability of articles 85 and 86 to the case.

The European Court squarely faced the problem, stating that the treaty was silent as to the relation between the Community law on competition and national laws on industrial property rights and that:

> [S]ince the national provisions regarding the protection of industrial property rights have not yet been unified at the Community level, the national nature of this protection may create obstacles for the free movement of branded products and for the competition system of the Community.[87]

The court reaffirmed the position it took in *Parke, Davis* that article 36 permits restrictions on imports that are justified on the grounds of protecting industrial and commercial property. It commented that restrictions on imports based on rights granted by national legislatures to protect commercial and industrial property are not per se affected by articles 85 and 86, provided the restrictions do not constitute a means of arbitrary discrimination as a disguised restriction on trade between member states. The court said, however, that certain methods of exercising industrial property rights nevertheless may fall within the antitrust prohibitions.

Reasoning that trademark rights can be distinguished from other industrial property rights in that the objects of the latter are often deemed

86. 10 Comm. Mkt. L.R. 260 (1971).
87. 10 Comm. Mkt. L.R. at 272-73.

"more important and worthy of protection than the object of the former"[88] and that the exercise of trademark rights is particularly liable to contribute to the division of markets and to hinder the free movement of goods, the court concluded:

> The simultaneous assignment to several concessionaires of national trade mark rights for the same product, if it has the effect of re-establishing rigid frontiers between member-states may prejudice trade between states and distort competition in the Common Market.[89]

The court then held:

> Article 85 therefore applies where, by virtue of trademark rights, imports of products originating in other member-states, bearing the same trademark because their owners have acquired the trademark itself or the right to use it through agreements with one another or with third parties, are prevented.[90]

Finally, the court found that the owner of a trademark does not enjoy a dominant position within the meaning of article 86 merely because he can prohibit third parties from marketing products bearing the same mark in the territory of his member state. It is necessary to establish that he is in a position to prevent the maintenance of effective competition in a substantial part of the market in question to find a violation of Article 86. Moreover, the fact that a product has a higher price in one member state than in another does not per se constitute adequate proof of an abuse of a dominant position under article 86, although it can become so, nevertheless, if the relatively higher price cannot be objectively justified.

The European Court in *Sirena* had to stretch to find the "agreement" which would bring the case under article 85. Apparently, in 1937 the trademark PREP was assigned to Sirena in Italy and to another company in Germany. These agreements, although entered into more than twenty years before the Treaty of Rome, formed the court's basis for invoking article 85.

The *Sirena* case was a significant step in the direction of the European Court's determination to put principles of free trade and competition in the forefront. The next step in this direction came in *Deutsche Grammophon v. Metro*.[91]

Deutsche Grammophon

In this case, Deutsche Grammophon (DG) produced phonograph records on which it owned the equivalent of an exclusive copyright in Germany. It

88. *Id.* at 274.
89. *Id.*
90. *Id.*
91. 10 Comm. Mkt. L.R. 631 (1971).

controlled the retail prices of the phonograph records sold under the POLYDOR mark through a retail price maintenance system permitted under German law. The records were marketed abroad through subsidiaries of DG, including its virtually wholly-owned subsidiary in France, Polydor, S.A. DG concluded a license agreement with Polydor-France which gave Polydor the exclusive right in France to exploit the recordings through customary channels of trade.

The defendant, Metro, a German company, bought POLYDOR records from DG but did not observe the retail price maintenance system. DG then broke off business relations with Metro. Later, however, Metro succeeded in obtaining POLYDOR records manufactured by DG in Germany from a German wholesaler in Hamburg. Apparently these records originally had been supplied by DG to its French subsidiary Polydor-Paris. They had reached the German wholesaler through Polydor's Strasbourg branch and a Swiss company. Metro sold these records to retail customers in Germany at a price below the price fixed by DG for Germany. Apparently the DG records were sold by Polydor in France at a price well below DG's fixed price in Germany.

DG obtained a provisional injunction from the Landgericht Court in Hamburg prohibiting Metro from selling or distributing DG records in Germany under the POLYDOR mark. To support the injunction the German court relied upon the exclusive industrial property right invoked by DG under the German copyright law.

Metro appealed to the EEC Court of Justice from the decision of the German court, contending that enforcement of DG's copyright would interfere with international trade between member states and keep the prices of records in Germany artificially high, thereby contravening articles 85 and 86 of the EEC Treaty.

The court decided that the question facing it in *Deutsche Grammophon* was:

> whether Community law is infringed if the exclusive right conferred on a manufacturer of recordings by national legislation to distribute the protected products can be used to prohibit the domestic marketing of products that have been brought into the market in the territory of another member-State by this manufacturer or with his consent.[92]

The court said that the provisions of 85(1) going to agreements, decisions, or concerted practices which may affect trade and prevent, restrict, or distort competition in the Common Market may be applicable to the exclusive distributorship arrangements in *Deutsche Grammophon.* The facts necessary to establish the applicability of article 85(1) were found to include a showing that the arrangement brings about a division of the Common Market by prohibiting imports from other member states of

92. *Id.* at 656.

products duly brought onto the market in those states. The court added, however, that even if the arrangement in question did not fall within the article 85(1) requirement for an agreement or concerted practice, the inquiry does not end there. Article 5(2) of the treaty commands member states to "abstain from any measures which could jeopardize the attainment of the objectives of [the] Treaty." In light of this, the court reasoned that it must also consider whether the exercise of the protection right in *Deutsche Grammophon* conflicted with any provisions of the treaty, particularly those relating to free movement of goods.

The court then looked to article 36, which permits restrictions on movement of goods between member states when the restrictions can be justified on the grounds of protection of industrial property, provided such restrictions do not amount to "either a means of arbitrary discrimination or to a distinguished restriction on trade between the Member-States." Conceding the purpose of article 36 to be protection of industrial property rights and conceding the rights owned by Deutsche Grammophon to be analogous to copyright and covered by article 36, the court nevertheless noted that the grant of article 36 was not absolute, but rather allowed only those restrictions on the free movement of goods that are justified for the protection of the rights "that form the specific object of this property." The court said:

> If a protection right analogous to a copyright is used in order to prohibit in one member-State the marketing of goods that have been brought onto the market by the holder of the right or with his consent in the territory of another member-State solely because this marketing has not occurred in the domestic market, such a prohibition maintaining the isolation of the national markets conflicts with the essential aim of the treaty, the integration of the national markets into one uniform market. This aim could not be achieved if by virtue of the various legal systems of the member-States private persons were able to divide the market and cause arbitrary discriminations or disguised restrictions in trade between the member-States.[93]

Accordingly, the court held that an attempt by the holder of a national copyright, granted by a national legislature, to prohibit marketing in that state of products sold by him or with his consent in another member state, violated the Treaty.

The court also relied on the territorial principle that the first sale of a product protected under an industrial property right exhausts the industrial property right and prevents the owner from imposing territorial restrictions on the protected goods once they have been sold. The court determined that this principle applies to copyrights, as well as to other forms of industrial property rights, such as patents and trademarks. Moreover, the court found that the sale of the recordings to Polydor was an

93. *Id.* at 657.

effective sale because Polydor was a separate legal entity, even though a wholly-owned subsidiary of DG.

Finally, the court concluded that a manufacturer, such as DG, which has been granted an exclusive distribution right by national legislation (through industrial property rights, such as the German copyright in this case), does not have a dominant position within the meaning of article 86 merely because it exercises this right. The situation would be different, however, if it could be shown that the manufacturer and owner of the industrial property right would be able to prevent effective competition in a substantial part of the market in question. Also, a difference between the retail maintenance, or tied, price and the price of the product reimported from another member state would not justify, without qualification, a finding of an abuse of a dominant position, although it could be conclusive evidence of such an abuse, if the price differential is large and cannot be explained on an any objective grounds. This holding was deemed to be consistent with the entire line of cases dealing with industrial property rights.

The *Deutsche Grammophon* case is important for two reasons. First, it is another step in the direction that has been progressively restricting the freedom of the holder of an industrial property right to enforce that right. Secondly, *Deutsche Grammophon* clearly enunciates the theory that the European Court had been approaching through *Consten-Grundig*, *Parke, Davis*, and *Sirena*—the doctrine of exhaustion of rights. In the United States the doctrine of exhaustion of rights is applied against patent owners and results in courts' refusing to enforce agreements that restrict a purchaser's right to use or resell a patented article without any restriction once the first authorized sale has taken place. Since *Deutsche Grammophon* the European Court has continued to apply the exhaustion doctrine to cases involving national industrial property rights and their conflict with intra-Community trade and competition.

In the United States, the doctrine permits the patentee or his licensee to impose restrictions up to the time of the first sale; after title to the goods is transferred to a purchaser, however, the purchaser of the goods is permitted to avoid any restriction on his use or resale of the goods. The European Court now is applying the doctrine to all intellectual property rights granted by member states. The owner of the intellectual property right is protected in the *existence* of his right (*Parke, Davis*), but the *exercise* of his right is limited to the first sale, whether by the holder in another member state (*Sirena*) or by the holder's subsidiary in another member state (*Deutsche*).

Kaffee Hag

A recent decision of the European Court, *Van Zuylen Freres v. Hag*

A.G.,[94] must be added to this series concerning industrial property rights.

Hag A.G. was the successor to a company which had a patent on decaffeinated coffee. Hag A.G. created subsidiaries in Belgium and Holland in 1927, and the HAG trademark was transferred to the Belgian subsidiary in 1935. In 1948 the Belgian government, which had confiscated all German property in Belgium as a result of World War II, transferred the shares in Hag Belgium to a Belgian. Thereafter, Hag Belgium operated under the same trademark, HAG, and marketed coffee in Belgium and Luxembourg. Van Zuylen Freres was Hag Belgium's distributor in Luxembourg.

In 1972 Hag A.G. began marketing coffee in Luxembourg under the trademark of HAG. As an outgrowth of the resulting conflict, the issue was joined before the Tribunal of Luxembourg, which transferred the questions under article 177 to the European Court of Justice.

The court considered two questions. First, do the Community competition rules, or those relating to the free circulation of goods, prohibit the holder of a trademark from taking advantage of his legal protection in a member state to oppose the import of products which lawfully bear the same trademark in another member state?

The court held that since there was no legal, financial, technical or economic connection between the two trademark holders, article 85(1) did not apply. However, the court significantly stated:

> Since the application of Article 85 is excluded in such circumstances, the question should be examined solely in the light of the rules relating to the free circulation of goods.
>
> The provisions of the Treaty relating to the free circulation of goods, in particular Article 30, have the effect that measures restricting imports and all measures of equivalent effect are prohibited between member-States.
>
> Under Article 36, these provisions do not, however, prevent prohibitions or restrictions on imports justified by reasons of protection of industrial and commercial property.
>
> It appears, however, from that very Article, particularly in its second sentence, as well as from the context, that, while the Treaty does not affect the existence of the rights recognized by the laws of a member-State on industrial and commercial property, the exercise of those rights may nonetheless, according to circumstances, be affected by the prohibitions of the Treaty.
>
> In so far as it applies an exception to one of the fundamental principles of the Common Market, Article 36 only allows derogations from the free circulation of goods in so far as such derogations are justified by the protection of the rights which constitute the specific object of such property.
>
> Thus, in any case, the application of the laws on the protection of trade marks protects the lawful holder of a mark against infringement on the part of persons lacking in any legal title.

94. 14 Comm. Mkt. L.R. 127 (1974).

> The exercise of the trade mark right is such as to contribute to the partitioning of the markets and thus to affect the free circulation of goods between member-States, all the more so in that, as opposed to other industrial and commercial property rights, it is not subject to temporal limits.
>
> It could not therefore be accepted that the exclusiveness of the trade mark right, which can be the consequence of the territorial limits of the national laws, should be relied on by the holder of a mark with a view to prohibiting trading, in one member-State, in goods lawfully produced in another member-State under an identical mark which has the same origin.
>
> In fact, such a prohibition, establishing the isolation of the national markets, would come into conflict with one of the fundamental aims of the Treaty, the fusion of the national markets into one single market.[95]

The court found that prohibitions on trading between member states due to national trademarks violated the spirit of the Treaty.

The second question the court considered was whether the same decision would apply if the trademarked product was traded not by the trademark holder but by a third party. The court held that if the third party had lawfully acquired the trademarked product, he would be free to sell it in either of the countries.

This case clearly belongs in the series of cases in which the European Court has consistently restricted and eroded the strength of national industrial property rights. It is, of course, not inconsistent with the European Court's espousal of the doctrine of exhaustion. Although the two trademark holders were entirely independent entities and the trademark holder alleging infringement was not the one who made the first sale, the essence of the European Court's doctrine of exhaustion is that once a trademarked product is sold, its further sale cannot be restricted through the use of a member state's national industrial property law without coming into conflict with the fundamental aims of the Treaty.

Centrafarm

In October, 1974 the European Court rendered a decision which defines its position with respect to the conflict between national industrial property laws and Community law and, for the first time, applies its developing doctrine of exhaustion to patent rights. The decision was rendered in the case of *Centrafarm BV v. Sterling Drug, Inc.*[96]

Sterling Drug, Inc., a United States corporation, held national patents in Great Britain and Holland for a method of preparing a drug called acidum nalidixicum for the treatment of urinary tract infections. The trademark NEGRAM for the drug was owned in Great Britain by Sterling-

95. *Id.* at 143-44.
96. 14 Comm. Mkt. L.R. 480 (1974).

Winthrop Group Ltd. and in Holland by the latter's wholly-owned subsidiary, Winthrop BV.

Centrafarm, without the agreement of Sterling Drug, imported the drug into Holland from England and Germany, where it had been placed on the market by subsidiaries of Sterling Drug, Inc. Centrafarm marketed the drug in Holland under the same NEGRAM trademark it bore when first purchased in England; and this same trademark NEGRAM was registered to Winthrop BV in Holland.

Sterling Drug and Winthrop BV filed suit in the District Court of Rotterdam. After losing both the patent and trademark cases in the court of appeal, Centrafarm filed an appeal to the Supreme Court. Under article 177, the Supreme Court referred questions concerning the free movement of goods in the EEC and article 85 to the European Court of Justice.

The European Court adopted the same approach to these questions as the one it had used in *Hag*. It placed emphasis on the basic theme of the Treaty of Rome—the fusion of national markets into one single market. The court then based its decision with respect to both the patent issue and the trademark issue on article 30,[97] which prohibits "between member-States measures restricting imports and all measures of equivalent effect."[98]

Reiterating its interpretation of article 36 which permits "prohibitions or restrictions on imports justified on grounds of protection of industrial . . . property,"[99] the court stated, as it had in *Deutsche Grammophon*[100] and *Hag*,[101] that article 36 distinguished the effect of the Treaty on the *existence* of rights in industrial property from the Treaty's effect on the *exercise* of those rights. Once again, the court held that article 36 permitted derogation of the free movement of goods only where it was necessary to protect rights "which constitute the specific object of such property."[102] Fortunately, unlike *Hag*, where the identical reasoning was used, the court defined what it believed to be the "specific object" of patents and trademarks:

> As regards patents, the specific object of industrial property is *inter alia* to ensure to the holder, so as to recompense the creative effort of the inventor, the exclusive right to utilize an invention with a view to the manufacture and first putting into circulation of industrial products, either directly or by the grant of licenses to third parties, as well as the right to oppose any infringement.[103]
>
> . . . .

97. 1 CCH COMM. MKT. REP. ¶321 (1973).
98. 14 Comm. Mkt. L.R. at 503.
99. *Id.*
100. 10 Comm. Mkt. L.R. 631, 656-58 (1971).
101. 14 Comm. Mkt. L.R. 127, 143 (1974).
102. 14 Comm. Mkt. L.R. 480, 503 (1974).
103. *Id.*

> As regards trade marks, the specific object of commercial property is *inter alia* to ensure to the holder the exclusive right to utilize the mark for the first putting into circulation of a product, and to protect him thus against competitors who would take advantage of the position and reputation of the mark by selling goods improperly bearing the mark.[104]

The court, using a negative approach, justified the necessity for its "doctrine of exhaustion" as applied to patents:

> The existence, in national laws on industrial and commercial property, of provisions that the right of a patentee is not exhausted by the marketing in another member-State of the patented product, so that the patentee may oppose the import into his own State of the product marketed in another State, may constitute an obstacle to the free movement of goods.[105]

In applying the doctrine to trademarks the Court said:

> The existence, in national laws on industrial and commercial property, of provisions that the right of the trade mark holder is not exhausted by the marketing in another member-State of the product protected by the mark, so that the holder may oppose the import into his own State of the product marketed in another State, may constitute an obstacle to the free movement of goods.[106]

This reasoning, if not qualified, would have protected any infringer. The court, however, stated that a holder of a national patent could invoke national protection of that patent right if the infringing product came from a country where it was not patentable (*Parke, Davis*) and was manufactured there without the consent of the patentee or where the original patentees were legally and economically independent of each other.

These qualifications to the "doctrine of exhaustion" were not mentioned in the trademark portion of the decision. Indeed, for the court to remain consistent with its *Hag* decision the latter qualification could not apply to trademarks. As was pointed out in *Hag*, the qualification with respect to two independent trademark holders is not necessary, since consumer confusion as to the origin of a trademarked product can be avoided "by means other than those which would affect the free circulation of goods."[107] Presumably, the method would be to use means other than the trademark of informing the consumer of the origin of a product.

Whether the importation from a member state of a product illegally marked by a third party with an infringing mark could be opposed by the trademark holder in the importing country is an unanswered question. The

104. *Id.* at 508.
105. *Id.* at 503.
106. *Id.* at 508-09.
107. 14 Comm. Mkt. L.R. 127, 144 (1974).

exhaustion doctrine applies only to trademarks lawfully put on the market by the holder or with his consent. Logically, then, a mark illegally used could be opposed by the mark holder's exercise of his national rights.

The court also held that a sales licensee, since he has permission from the industrial property right holder to sell the product, may market and export to any member country the product protected by the national industrial property right. The court held further that price differences of the product between different member states could not justify the exercise of a national industrial property right which inhibits the free transfer of goods.

The defendant argued the necessity of maintaining control after the sale of patented drugs because of the risk to the public of their being defective. The court rejected this argument by stating that the necessary quality control measures should be taken by the national public health authorities and not through a misuse of the rules governing industrial property.

The court dismissed the application of article 85 to the case, since it could find no agreement or concerted practice affecting intra-Community trade which was not between members of the same corporate family. It thus established the principle that article 85 does not apply to agreements or concerted practices between companies which form a single economic unit, such as a parent-subsidiary relationship under which the subsidiary does not have real autonomy.

This decision is the latest, and probably the most significant, in the series rendered by the European Court which attempts to resolve the conflict between enforcement of national industrial property rights and the aim of the Rome Treaty to fuse national markets into one market. While *Centrafarm* refers to licenses of industrial property rights, it does not adequately explain the application of EEC law to such licenses.

Burroughs/Geha and *Burroughs/Delplanque*

The *Burroughs/Geha* and *Burroughs/Delplanque* decisions[108] are an effort by the Commission to clarify the applicability of EEC antitrust law to industrial property rights, with particular reference to license agreements. The German firm, Geha, and the French firm, Delplanque, obtained nonexclusive production licenses for some patents and exclusive production licenses for others; all related to the production of a new carbon black paper. The licenses did not include any territorial restrictions on sales and left both licensor and licensee free to sell the products throughout the Common Market on a nonexclusive basis though under different trademarks.

The case came before the Commission on an application for a negative clearance. The clearance was granted on a finding that there was no appre-

108. Commission decisions, December 22, 1971, J. Off. Com. Eur. No. L13, Jan. 17, 1972, pp. 50, 53, *summarized*, 1 CCH COMM. MKT. REP. ¶2412.18.

ciable effect on competition because of the relatively small share of the market held by the parties to the agreement and because the licensor and its licensees sold the product everywhere in the Common Market.

Also under the agreements, Delplanque and Geha were obliged during the period that the agreements were in force plus ten years, to keep secret the technical information supplied by Burroughs. The Commission found that this restriction on the licensees to maintain secrecy was not a violation of article 85(1) as long as the know-how did not fall into the public domain.

Of more importance in the *Burroughs* cases, the Commission set forth guidelines it would use in evaluating nonexclusive patent and "know-how" licenses in future cases. It stated that the following restrictions or "obligations" would *not* be deemed violations:

1. The obligation to grant no sublicenses, except to wholly dependent companies. This allowance acknowledges that only a patent owner can authorize exploitation of the patent, and that secret know-how can be protected only if not communicated to third parties without the owner's consent.
2. The obligation to keep the know-how secret.
3. The obligation which prevents the licensee from using the know-how after termination of the license agreement. While difficult to control, the Commission decided this was necessary to encourage communication of know-how.
4. The obligation to produce the licensed products in sufficient quantities and to follow the technical instructions of the licensor.
5. The obligation to mark the products fabricated under the license so that their origin can be detected.
6. The obligation to settle disputes by arbitration.[109]

The Commission in *Burroughs* stated, however, that exclusive production licenses could, in certain situations, fall within the article 85(1) prohibitions by restricting the ability of the patentee to exploit his patent and limiting the access of non-licensees to new technology.

The decision in *Burroughs* indicates that the Commission will accept the reservation of reasonable rewards as a proper concomitant of ownership of industrial property rights. The Commission also seems to have rejected the notion that antitrust considerations should overwhelm the property owner's reasonable efforts to exclude others from unauthorized use of the right.

The effects of Community competition law on licensing contracts were further clarified in two recent decisions of the Commission; *Davidson Rubber Co.*[110] and *Raymond-Nagoya*.[111]

---

109. *Id.*

110. Commission decision, June 9, 1972, J. Off. Com. Eur. No. L143, June 23, 1972, p. 31, CCH Comm. Mkt. Rep. [1970-72 Transfer Binder] ¶9512 (1972).

111. Commission decision, June 9, 1972, J. Off. Com. Eur. No. L143, June 23, 1972, p.

Davidson Rubber

In *Davidson Rubber*, an American firm gave an exclusive license under its process patents and know-how for manufacturing automobile arm rests to a number of European firms. The contracts contained both export prohibition agreements and grant-back clauses giving Davidson and the other exclusive licensees a license on any patents arising from the original licensee's improvements in either process or know-how.

In granting a negative clearance the Commission noted that the exclusive license was prohibited under article 85(1) because it *perceptibly* restrained trade among member states. The Commission said:

> [T]he exclusive rights—even though watered down by the provision that the contract articles can be sold freely between Member States of the EEC—which Davidson grants to each of its licensees has the effect that, besides restricting Davidson's freedom, the position of third parties, particularly manufacturers of automobile interior fittings that might wish to apply the process, is altered perceptibly because they are prevented from utilizing the process within the Common Market.[112]

The decision of the Commission established the following principles with respect to license agreements under the rules of competition of the EEC:

> 1. An undertaking by a licensee not to challenge the validity of licensed patents while the license agreement is in force is a restriction on the licensee's competitive freedom, both actual and potential, and consequently is prohibited by article 85(1) and not exempt under article 85(3).
>
> 2. The grant of an exclusive license to exploit a patent within a specified territory in certain instances may restrict competition within the meaning of article 85(1). This will be true when the patented process is the most important in a particular field and the exclusive licensees in the various territories hold a considerable share of the EEC market in the articles produced by the process.
>
> 3. When a patent owner grants exclusive licenses under its process to EEC licensees on a territorial basis, the restriction that results in any other would-be licensee's ability to exploit the patented process and know-how in such territory, and consequently on his ability to export from that territory to other parts of the EEC (even in the absence of any explicit export restrictions in the license agreement), is capable of affecting trade between member states and therefore falls under the provisions of article 85(1).
>
> 4. An exclusive licensee can be obligated to grant to the licensor and to the licensor's other licensees a non-exclusive license

39, CCH Comm. Mkt. Rep. [1970-72 Transfer Binder] ¶9513 (1982).

112. CCH Comm. Mkt. Rep. ¶9512 at 9140 (1972).

covering any improvements which the exclusive licensee may make to the patented process, if the licensor is already under an obligation to pass to its licensees all technical data and know-how which it has or may acquire relating to the process. Such an obligation, however, must not have the object or effect of noticeably restricting competition in the common market within the meaning of article 85(1).

5. A licensor may forbid its licensee to grant a sublicense without permission from the licensor without encountering a prohibition of article 85(1).

6. A provision in a patent license agreement that requires submission of disputes to arbitration will not be prohibited by article 85(1) if the agreement also provides that no clause may be invoked to prevent the sale between member states of articles covered by the agreement.

Despite this ruling, the Commission granted the clearance, because it found the agreements promoted technical and economic progress, and because none of the restrictions was found not to be indispensable to achieve the objectives of the agreement.

Raymond-Nagoya

In *Raymond-Nagoya*,[113] a German branch of the French firm, A. Raymond, gave an exclusive license under utility patents and know-how to a Japanese firm to make plastic fasteners used in automobile construction. The agreement originally contained an exclusive grant-back provision, which was modified upon intervention by the Commission to a nonexclusive grant-back of licenses.[114]

Clearance then was granted by the Commission upon a finding that competition within the Common Market was not likely to be perceptibly affected by the export prohibition binding Nagoya, since there was little likelihood the products would be exported to the Common Market without the prohibition.

This is an important decision on how the rules of competition of the EEC govern a license agreement between a company within the Common Market and a company outside of the Common Market. Under the license agreement Nagoya obtained the right to manufacture in Japan plastic attachment components for automobiles—rivets, nuts, rug buttons, plugs, and door attachment fittings, for example—that had been perfected by Raymond and which are used in the construction of cars. Nagoya also obtained the right to sell these components in Japan, Koreà, Formosa, continental China, and the Philippines. However, if the licensed products

113. CCH Comm. Mkt. Rep. ¶9513 (1972).

114. CCH Comm. Mkt. Rep. ¶9513 at 9146 (1972).

were incorporated as separate parts of Japanese cars or in the body of vehicles manufactured in Japan, they could be exported to any country in the world as part of an assembled car.

The Commission concluded under the rules of competition of the EEC that a patent licensing contract should not impose a restriction on the licensee that would require it to assign any improvements or modifications which it might make in the licensed process or product to its licensor. The original agreement between the parties had provided for such an assignment, or exclusive "grant-back," but the parties had modified the agreement to include merely a nonexclusive grant-back of improvements from the licensee, and the Commission found that such a restriction was permissible under article 85(1).

The license agreement gave Nagoya an exclusive license to exploit the patent within the Far East market, a territory outside the Common Market. The Commission found that although, in certain instances, an exclusive license within a given territory might restrict competition within the meaning of article 85(1), that was not true in this instance, particularly since the territory was outside the Common Market and could have the effect solely of eliminating potential competitors in the Far East market.

The Commission further found that a commitment by Nagoya not to challenge the validity of Raymond's industrial property rights while the contract was in force was acceptable. The Commission reasoned that if Nagoya challenged Raymond's industrial property rights in Japan, Nagoya could improve its competitive position only in the Far East. The position of third party entities thus would be improved only in Far Eastern markets, and this result would have no repercussions on supply and demand within the Common Market. Moreover, Nagoya could not be interested in challenging Raymond's industrial property rights in Germany unless Nagoya wished to start manufacturing in Europe. But Nagoya would have no interest in supplying the products covered by the license agreement to Raymond's European competitors, and there was consequently little likelihood that Nagoya ever would wish to attack Raymond's European industrial property rights, even if the no-challenge clause did not exist.

Significantly, the Commission did point out however that a no-challenge clause of this type might restrict the licensee's freedom of action in an area which is not covered by the essential character of the industrial property right. It takes from the licensee the power to challenge the validity of the contract for the purpose of reducing his royalties or to have certain restrictions removed and as such may not be valid in all contexts.

Finally, the Commission found that a prohibition on Nagoya against exporting separate plastic attachment components (not incorporated in an assembled car) as licensed products made under the licensed process to the Common Market could not noticeably influence competition within the Common Market. As the Commission pointed out, it would not make economic sense for Nagoya to try to compete within the EEC by the manufacture and sale of the *separate* attachment components. This kind of export prohibition thus was deemed not to be a violation of the provisions of article 85(1).

Reading the two *Burroughs* decisions together with *Davidson* and *Raymond-Nagoya* gives some feeling of what the Community will tolerate in the way of rewards thought to be traditional concomitants of industrial property. To reiterate what was said at the outset, however, the law is still too sparse and is undergoing too much change to allow meaningful predictions as to what settled principles will evolve, other than to say that it probably will continue to adopt American antitrust law precedents, but with exceptions here and there.

C. Automatic Nullity Under Article 85(2)

Article 85(2) renders null and void any agreements or decisions violative of article 85(1) which are not exempted under 85(3). The effect of nullity is to render the illegal contract or agreement unenforceable, such that, in an action for damages on a contract, a party may plead article 85(2) nullity as a complete defense.

Determination of nullity normally is made in a national court of a member state trying a suit over a contract or agreement. Were this the extent of action under article 85(2), however, a defendant effectively would have lost his opportunity for an exemption claim under 85(3), since national courts do not have authority to grant 85(3) exemptions. Two rules of procedure have been generated by Community courts to avoid this anomaly.

First, under article 9(3) of Regulation 17[115] if the Commission has actually initiated a proceeding against a contract or agreement, national courts are pre-empted from passing upon the validity of the argument. Second, under decisions of the Court of Justice, discussed below, it has been held that agreements registered with the Commission or agreements exempt from registration by operation of article 4(2) of Regulation 17[116] are to be considered provisionally valid until invalidity has been established. This "invalidity," it is to be assumed, means invalidity under 85(1) established by a *Community* court. There is, in short, a tendency, akin to the American doctrine of preemption by federal as oposed to state action, developing in article 85(2) jurisprudence.

de Geus v. Bosch

Litigation under article 85(2) at the Community level has been sparse but fundamental. The paragraph was first construed by a Community court in *de Geus v. Bosch*.[117] There Bosch granted a Dutch partnership an

115. 1 CCH COMM. MKT. REP. ¶2481 (1971).
116. 1 CCH COMM. MKT. REP. ¶2431 at p. 1753 (1971).
117. CCH Comm. Mkt. Rep. 7133 (1962).

exclusive license to market its refrigeration appliances in the Netherlands. The license carried an export prohibition and was similar to those granted by Bosch to all of its agents. During 1959-60 de Geus imported Bosch equipment purchased from German firms whose licenses carried the export prohibition. Bosch then brought an action against de Geus in the Court of Rotterdam.

De Geus defended, *inter alia*, asserting that the export prohibition violated article 85(1) of the Treaty of Rome and therefore was null and void under article 85(2). After an adverse decision, de Geus appealed to the Dutch Court of Appeals at The Hague. That court requested the Court of Justice of the European Communities, under article 177 of the treaty, to answer the question of nullity under 85(2).

After deciding that article 177 gave the Court of Justice concurrent jurisdiction over proper actions, whether or not the matter was res judicata with a national court, the court generally held:

> (1) Agreements violating article 85(1) in existence as of the effective date of Regulation 17 are null and void if notice required by article 5(1) of Regulation 17[118] has not been given;
> (2) Prior to the effective date of Regulation 17, agreements violating article 85(1) are NOT VALID:
>> (a) if the Commission of the EEC has been notified of their contents prior to the date specified in article 5 of Regulation 17;
>> (b) until the Commission rules on whether an article 85(3) exception is available;
>> (c) until the Commission decides whether the agreement can be modified under article 7 of Regulation 17[119] to qualify for an article 85(3) exception;
>> (d) or until the member states, in conjunction with article 9 of Regulation 17,[120] exercise their powers under article 88[121] of the treaty to decide upon the acceptability of the agreement as a matter of competition.

The effect of *Bosch* was to establish a theory of "provisional validity," whereby agreements smacking of cartels, whether or not notified under Regulation 17, will not automatically be struck down and voided either *in toto* or *ab initio*. While the problems of "provisional validity" remain quite controversial, this more relaxed view does seem to support the general Community view of competition law as an aid to concentration and expan-

118. 1 CCH COMM. MKT. REP. ¶2441 (1972).
119. 1 CCH COMM. MKT. REP. ¶2461 (1971).
120. 1 CCH COMM. MKT. REP. ¶2481 (1971).
121. 1 CCH COMM. MKT. REP. ¶2251 (1973).

sion of cross-member trade rather than as a set of strict, unmalleable standards to be employed uncritically.

Maschinenbau Ulm

Four years after *Bosch*, the court again considered article 85(2) in the *Maschinenbau Ulm* case.[122] There, Maschinenbau Ulm (MBU) granted La Technique Miniere (LTM), a French firm, an exclusive right to sell MBU grading machines in French territory. This grant included a provision requiring LTM to secure MBU's permission before importing competitive machinery, but parallel imports to serve other French consumers were not forbidden. In addition LTM retained the right to re-export the machines to territories other than those in the agreement. After delivery of six of the machines, for which MBU accepted notes, LTM asked that the notes be held until it could be determined whether the machines were suitable for sale in France. It was determined that they were, and MBU sued to enforce the contract. LTM defended, *inter alia*, upon the claim that the contract was violative of article 85(1) and therefore void under article 85(2).

The Court of Justice held that contracts scrutinized under article 85(1) are severable for purposes of article 85(2) nullity. The court said:

> This provision [article 85(2)], which is designed to ensure compliance with the Treaty, must be interpreted only in the light of its Community goal and must be limited to that framework. The *ipso jure* nullity in question applies only to the parts of the agreement that are prohibited, or to the entire agreement if it appears that those parts cannot be separated from the agreement itself.[123]

Portelange

Another decision reflecting the court's flexible approach to nullity is *Portelange v. Smith Corona Marchant*.[124] SCM granted Portelange an exclusive distributorship in Belgium and Luxembourg for its calculators and office typewriters. Later, as SCM began making copying machines, these were included by oral agreement without adding a written modification to the contract. In 1966 SCM canceled the part relating to the copiers on 90 days notice, and Portelange sued on a Belgian law dealing with unilateral cancellation of exclusive dealership contracts. SCM set up as one of its defenses nullity under article 85(2).

The Court of Justice, answering the question of nullity posed by the Belgian court, found that an "old" cartel registered under Regulation 17 is valid unless and until the Commission rules that it violates article 85(1) and does not qualify for an article 85(3) exemption. It is interesting, in

122. Societe Technique Miniere v. Maschinenbau Ulm GmbH, CCH Comm. Mkt. Rep. 7685 (1966).

123. *Id.* at 7696.

124. CCH Comm. Mkt. Rep. 8090 (1970).

terms of the flexibility accorded to article 85(2) nullity, that the rationale of *Portelange* rests upon consideration of the general principle of legal security of contracts as well as upon considerations of economic circumstances.

Bilger

In this same vein, *Bilger v. Jehle*[125] was decided. Bilger, a brewery, entered into a contract with the Jehles to be the exclusive supplier of beer for their inn. This exclusive dealership was to run beyond 1975 and was not registered with the Commission. After 1962, the Jehles began to sell other beers as well as those supplied by Bilger, and Bilger brought suit. The Court of Justice, answering the question posed by the German court, held that agreements exempt from registration under article 4 of Regulation 17 because goods do not cross the frontier of member states are valid and fully enforceable until nullity has been established by the Commission.

To this point, we have been considering the effect of article 85(2) nullity upon "old" agreements—agreements entered into before Regulation 17 implemented article 85 of the Treaty. As we have seen, the court and the Commission have preferred a flexible approach both to ease the effect of the beginning of treaty operation ("legal security") and to avoid any wrenching economic effects. It is now appropriate to turn to consideration of "new" agreements—agreements entered into after Regulation 17 took effect—to which the court has taken a much sterner approach.

Beguelin

In *Beguelin v. G.L. Import-Export Co.*[126] the court found, as to "new" agreements, that article 85(2) nullity is absolute, and that an agreement void under article 85(2) has no effect between its parties and cannot be relied on in any action against a third party.

Brasserie de Haecht

Finally, in February 1973, the court decided *Brasserie de Haecht v. Wilkin (No. 2)*.[127] There, de Haecht entered a contract with Wilkin and Janssen to be their exclusive supplier of beer, liquor, and carbonated beverages, to lease them tavern equipment, and to loan them money. When Wilkin and Janssen breached the supply agreement, de Haecht sued for damages, return of the equipment, and repayment of the loans. The Belgian court certified, *inter alia*, the question of article 85(2) nullity to the Court of Justice, which held that nullity under article 85(2) voids an

125. CCH Comm. Mkt. Rep. 8103 (1970).
126. CCH Comm. Mkt. Rep. [1971-73 Transfer Binder] ¶8149 (1973).
127. 12 Comm. Mkt. L.R. 287 (1973).

agreement as a matter of law and has retroactive effect. This decision thus offered a heightened contrast between "old" and "new" agreements, since in *Bilger v. Jehle*, the court construing an "old" agreement, said nullity could work only *de futuro*. With a "new" agreement, nullity may be *retroactive*.

This section may be closed appropriately with excerpts from the court's opinion in *de Haecht*, since it represents the latest expression of the law of article 85(2):

> As far as old agreements are concerned, certainty of law as regards contracts requires that a court cannot, particularly when an agreement has been notified in accordance with Regulation 17, establish nullity until after the Commission has made a decision under this regulation.
>
> . . . .
>
> As far as new agreements are concerned, it follows from the regulation, on the assumption that so long as the Commission has made no pronouncement the agreement can only be operated at the risk of the parties, that notifications under Article 4(1) of Regulation 17 are without suspensory effect.
>
> . . . .
>
> While these considerations are directed in particular at agreements subject to the duty to notify under Article 4 of the regulation, they also apply to agreements dispensed from notification, since such dispensation constitutes no more than an indication lacking any final authority that the agreements in question are generally less harmful to the proper working of the Common Market.[128]

D. Exemptions Under Article 85(3)

Any agreement, decision, or concerted practice may be exempted from the provisions of article 85(1) if it falls within the policy considerations of article 85(3). Such an exemption will apply if the behavior:

1. Contributes to the improvement of production or improvement of products, or to the promotion of technical progress, and
2. Allows consumers a fair share of the resulting profit.

At the same time the behavior must not:

1. Subject concerns to restrictions not essential to the affirmative objectives above, or,
2. Enable concerns to eliminate competition in respect of a substantial part of the products involved.[129]

---

128. *Id.* at 302-03.

129. *See* Notice on Agreements, Decisions, and Concerted Practices Concerning Cooperation Between Enterprises, J. Off. Com. Eur. No. C75, July 29, 1968, 1 CCH COMM. MKT. REP. ¶2699 (1971). *See also* 1 CCH COMM. MKT. REP. ¶¶2051, 2061 (1973).

All of these conditions, both affirmative and negative, must be met before an article 85(3) exemption will be granted.

The Commission has issued guidelines explaining the kinds of cooperation which will be substantial aid in qualifying for an article 85(3) exemption:

> 1. Where small and intermediate size concerns co-operate to increase economy and productivity, the Commission will look favorably on such activity. In some cases, cooperation between large concerns may also be found economically justifiable.
> 2. Where cooperation occurs between concerns whose market position is too weak to be a threat to Common Market competition or to impair Community trade, the Commission will be inclined to permit such cooperation.[130]

These considerations reflect concern by the Commission that not only is it important to protect competition within the market, but it is also important to allow enterprises the ability to compete in the world market with large international firms. The Commission has attempted to strike a balance between the two.

DRU-Blondel

The Commission first declared an article 85(3) exemption applicable in *DRU-Blondel.*[131] DRU, a Dutch firm granted Blondel, a French firm, the sole selling rights in France for DRU's enamel household goods, some of which were specially manufactured for French users. DRU agreed to forward to Blondel all requests and orders received from France. Blondel was free to establish its own sales prices and was not forbidden to export out of France.

The Commission found that because Blondel was the only company allowed to import directly from DRU, the agreement constituted a territorial restriction affecting trade between member states and therefore was within the prohibitions of article 85(1). However, the Commission found that the arrangement allowed for a less complex distribution arrangement, which in turn allowed Blondel more easily to get the products onto the French market.

This result was seen to be of benefit to the French consumer desirous of purchasing the Dutch manufactured products. The Commission noted that parallel imports of rival products were not inhibited, so prices for the products would tend to stay at a competitive level; in fact, indirect deliveries from DRU into France of the same products were not precluded by the

130. *See* Notice on Agreements, Decisions, and Concerted Practices of Minor Importance Not Coming Within Article 85(1) of the Treaty, J. Off. Com. Eur. No. C64, June 2, 1970, 1 CCH COMM. MKT. REP. ¶2700 (1971). *See also* 1 CCH COMM. MKT. REP. ¶2061 at 1663 (1973).

131. Commission decision, July 8, 1965, J. Off. Com. Eur. No. 131, July 17, 1965, p. 2194, *summarized*, 1 CCH COMM. MKT. REP. ¶2061.33.

agreement. In the Commission's view, the agreement allowed easier access by French consumers to the products at no increase in price. This was sufficient for the Commission to grant a five-year exemption from the strictures of article 85(1).

Re the Agreement of Edmund Isbecque

In *Re the Agreement of Edmund Isbecque*,[132] the Commission again granted an article 85(3) exemption. Hummel, a German firm, granted to Isbecque, a Belgian firm, the sole selling rights for tractors and farm machinery. Hummel agreed not to sell to anyone else in Belgium but did not agree to prevent indirect deliveries of its products into Belgium by third parties. Isbecque was not required to refrain from re-exporting the products to other countries and could set its own selling prices. Isbecque also undertook to have special accessories made for the machinery, which made it particularly adapted for use in the Belgian countryside.

The Commission found the agreement to be covered by article 85(1). The granting of a sole distributorship by a manufacturer in one country to a seller in another was restrictive in effect and affected commerce between member states. Nevertheless, the Commission concluded that the impact of the agreement was to increase the efficiency of production and distribution of a product of a superior nature for the uses of Belgian consumers. It found: that price discrimination was improbable, since parallel importation was allowed by the agreement; that the consumer was well served by the arrangement; and that this consumer benefit could not be better accomplished by any less restrictive approach. An exemption therefore was granted.

Transocean Marine Paint

Re the Transocean Marine Paint Association[133] concerned an agreement among several marine paint manufacturers to combine for their mutual benefit. The association members collaborated in the manufacture of paint, in the marketing of the paint under a common trademark, and in territorial division of the market. The agreement was entered into prior to the enactment of Regulation 17 and was notified to the Commission in accordance with the regulation after its enactment.

The Commission imposed an amendment to the agreement before it would grant an article 85(3) exemption. It based its decision on the fact that the association, by facilitating the marketing of paint, contributed to improving the distribution of the product. It was found that this improved

132. Commission decision, September 17, 1965. J. Off. Com. Eur. No. 156, Sept. 23, 1965, p. 2581, *summarized*, 1 CCH COMM. MKT. REP. ¶2061.34.

133. Commission decision, June 27, 1967. J. Off. Com. Eur. No. 163, July 20, 1967, p. 10, *summarized*, 1 CCH COMM. MKT. REP. ¶2061.85.

worldwide distribution provided consumers with a fair share of the benefit of the agreement in that, while not restricted to purchasing from Transocean, if the consumers chose so to purchase, they were guaranteed paint of consistent quality throughout the world.

The Commission further found that the requirements in the agreement were necessary to obtain those advantages. In particular, the requirement of territorial restrictions was found to be necessary to establish a market of worldwide proportions. The territorial restrictions were necessary for the "launching period" of the association, which at the time of the decision had been eight years. The other restrictions in the agreement, such as the restriction preventing members from selling other paints, were deemed necessary to encourage the members to intensify their efforts to promote Transocean paints. Finally, it was found that the agreement did not tend to destroy competition in a substantial portion of the Common Market, since the association members had a minor share of the market and were subject to intense competition.

The Commission also held that the exclusive use by members of the association of the particular trademark, each in his own territory, did not violate article 85(1), provided the trademark rights were not used to prevent parallel imports.

This article 85(3) exemption was renewed by the Commission in December of 1973.[134]

ACEC-Berliet

In *Re the Agreement ACEC-Berliet*,[135] the Commission granted an article 85(3) exemption to an agreement which combined the efforts of the two firms so that each could specialize in particular areas during the development of a component. The agreement also contained an emclusive-supply-sole-source clause, which also was exempted. The Commission held that the agreement was designed to allow both parties to amortize their development expenses, to more efficiently use the research effort, and, by concentrating manufacture, to provide for longer, more economical production runs of the new product. Since there was sufficient competition from foreign companies and since the consumer benefited, it was determined that the violations of article 85(1) could be exempted under article 85(3).

The Commission further found that agreements concerning the acquisition of and obligations relating to trade secrets were justified due to the confidential relationship between the parties and the mutual risk of failure. It thus held that such agreements were not restrictions on competition under article 85(1).

134. Re the Transocean Marine Paint Ass'n (No. 2), 13 Comm. Mkt. L.R. D11 (1973).

135. Commission decision, July 17, 1968, J. Off. Com. Eur. No. L201, Aug. 12, 1968, p. 7, *summarized*, 1 CCH COMM. MKT. REP. ¶2061.21.

Colgate/Henkel

The *Colgate-Palmolive/Henkel*[136] case provides another application of the article 85(3) exemption. The American firm, Colgate-Palmolive, and the German firm, Henkel, entered into a joint venture for the purpose of inventing and producing a new cleansing agent for textiles. The patents and know-how falling within the agreement were to be available to both parties without restriction.

Upon notification to the Commission to obtain an 85(3) exemption, the Commission requested that provisions for different rates of royalties for Henkel and Colgate in certain territories and a covenant restricting each concern to the geographic area within which it was traditionally influential be amended. This was accomplished, thereby putting the parties on a more or less even plane.

In evaluating the exemption request, the Commission first looked to the applicability of article 85(1). It found that the Community market share of each enterprise was significant and that the joint research undertaking was an appreciable restraint of competition. The reasoning was that the freedom to proceed with research work independently was, in the area covered by the agreement, of no practical value because the parties had agreed to license the joint research company with respect to results achieved independently. The Commission therefore found the agreement to be within the scope of article 85(1).

Applying the standard criteria for exemptions, the Commission decided that the agreement should be permitted to stand. The product which would be created by the joint efforts was determined to be a useful one, and the fact of its creation was found to be improbable absent a cooperative effort. After the amendments requested by the Commission were made, the agreement was considered not to be unduly restrictive in light of its objectives.

The granting of the exemption in *Colgate/Henkel* is another example of the Commission's readiness to allow cooperative research efforts among large firms if the standards of article 85(3) can be satisfied. There is clearly an inclination by the Commission to allow minor restrictions if they are offset by affirmative cooperation which promises to lead to results not otherwise obtainable.

William Prym-Werke

Two Commission decisions previously mentioned also have application to a discussion of article 85(3). In *Re the Agreement of William Prym-Werke KG*,[137] the Commission granted an exemption to an agreement

136. Commission decision, December 23, 1971. J. Off. Com. Eur. No. L14, Jan. 18, 1972, p. 14, *summarized*, 1 CCH COMM. MKT. REP. ¶2061.55.

137. 12 Comm. Mkt. L.R. D250 (1973). *See* text *supra* at note 73.

under which one manufacturer transferred all of its production of sewing needles to another and agreed to buy its requirement of the needles from the second manufacturer. The latter agreed to supply the former's total requirement for needles at a preferential price.

The Commission distinguished the agreement from a specialization agreement which would require reciprocal transfer of production, as in *ACEC-Berliet*, but granted the exemption nonetheless, since it found that the agreement had "favorable effects analogous to those of specialization."

Kali And Salz

The other case previously considered, *Re the Agreement of Kali and Salz A.G.*,[138] concerned a sales contract between the only two German potash fertilizer producers. The contract required one to buy virtually all of the other's production, thus removing all competition between German potash producers. The contract was held to be a restriction of competition and an article 85(3) exemption was not granted by the Commission, since becoming a sole supplier to a substantial part of the Common Market amounted to "eliminating competition in respect of a substantial part of the products in question."

The Commission's decisions in *Davidson Rubber*[139] and *Raymond-Nagoya*[140] discussed above should be noted again. In *Davidson*, the Commission stated, with regard to article 85(3), that article 85(1) may be declared inapplicable to agreements which:

> (1) do not impose restrictions that are not indispensable "to achievement of the ends of improvement in the production or distribution of products, or of promotion of technical or economic progress" while reserving for users a fair share of the resulting profit . . .
> (2) do not make it possible to eliminate competition for a substantial part of the products concerned.[141]

In *Raymond-Nagoya*, where, curiously, article 85(3) was not mentioned, the Commission bottomed the exemption on article 2 of Regulation 17.[142] The Commission simply noted its authority to grant a negative clearance when it finds no cause to intervene pursuant to article 85(1), and then it discussed at length the likelihood that goods forming the subject of the agreement would find their way back into the Common Market.

The sense that may be gained from construction of article 85(3) is that considerable flexibility exists in Community response to "anti-competitive" (under article 85(1)) agreements. If good purposes can be

138. 13 Comm. Mkt. L.R. D1 (1973). *See* text *supra* at note 74.
139. CCH Comm. Mkt. Rep. ¶9512 (1972). *See* text *supra* at note 110.
140. CCH Comm. Mkt. Rep. ¶9513 (1972). *See* text *supra* at note 113.
141. CCH Comm. Mkt. Rep. ¶9512 at 9141 (1972).
142. 1 CCH COMM. MKT. REP. ¶2411 (1973).

found and if the rewards sought are not too rapacious, the clearance may be had.

V. Abuse Of Dominant Position Under Article 86

In contrast to the relatively frequent applications of article 85 of the Treaty, there has been very little activity with regard to article 86—prohibiting "abuse of a dominant position." The Commission did not render any decisions pursuant to article 86 until 1970, and there is very little fixed law with regard to it.

Article 86 makes it unlawful for one or more business concerns to abuse a dominant position in the Common Market, or within any substantial part of it, if trade between member states is affected thereby. The elements of an article 86 violation are:

1. A dominant position;
2. An abusive exploitation of that dominant position;
3. An affect on trade within the Common Market or a substantial part of it.

It is significant to note that article 86 is made applicable by conduct rather than status; *i.e.*, a dominant market position is not a per se violation.

The first important application of article 86 came in the *GEMA* decision by the Commission.[143] *GEMA*, a German concern representing composers of musical works for the purpose of exploiting their copyrights, was an economic association formed and operated pursuant to German statutory authorization. The Commission had entered into negotiations with several European firms of this sort in an attempt to bring their practices into conformity with the Community competition rules. Of these, only GEMA had refused to modify its behavior.

Under GEMA's rules, only German nationals could obtain membership, and GEMA was the only firm in Germany that managed copyrights of musical works. GEMA's statutes provided that records sold in Germany by its members, exclusively German, must pay one set of copyright royalties, while records imported into Germany were required to pay higher royalties. GEMA also placed severe restrictions on the activities of German music publishers in other member states. It required that a composer assign all of his composition rights for the whole world to GEMA, which had the effect of preventing GEMA members from doing business with any other copyright concern in any other member state.

The Commission concluded that the activities of GEMA violated article 86. It held that a dominant position was clearly established in that GEMA held a de facto monopoly in Germany, a country which is a substantial part

143. Commission decision, June 2, 1971. J. Off. Com. Eur. No. L134, June 20, 1971, p. 15, *summarized*, 1 CCH Comm. Mkt. Rep. ¶2111.37.

of the Common Market. This dominant position was found to be used in an abusive way by:

> 1. Discriminating against nationals of other member states because they were precluded from membership in GEMA.
> 2. Imposing unjustifiable conditions on GEMA members—particularly, the requirement that members assign all copyrights to GEMA. This requirement prevented an author from doing business elsewhere in the Community.
> 3. Preventing the establishment of a single larger market for music composers and publishers. This third abuse was considered to be in direct opposition to the specific aim of the Common Market—the creation of a single economic area for all member states. The impact of the GEMA arrangement was to erect a barrier along national boundary lines.

As to the effect on trade between member states, the Commission held that the statutory provisions precluding membership in GEMA to non-German nationals, and the extra royalty imposed on records imported into Germany, demonstrated the requisite effect on trade between states to justify application of article 86.

The Commission, therefore, ordered GEMA to take steps to correct the article 86 violations within six months of the Commission decision. GEMA filed an appeal of the decision but subsequently withdrew it.

In 1973 the Commission, in *Re the European Sugar Cartel*,[144] more clearly defined the scope of article 86. This decision concerned an agreement among most of the sugar producers in the Common Market on the sale of refined sugar and the disposition of surplus. The Commission, in addition to finding the execution of the agreement to be a concerted practice in violation of article 85(1),[145] found several violations of article 86.

The first article 86 violation the Commission considered was that of a French sugar supplier who occupied a dominant position in the market in France. The supplier was depended upon by many wholesalers. The Commission found that the supplier's refusal to supply wholesalers unless they applied resale prohibitions designed to prevent exports to areas outside the control of the supplier was a violation of article 86.

The second violation concerned two major producers of sugar in one national market. The Commission held that although the producers were legally and financially independent, their systematic, close cooperation in areas of joint purchase of raw materials, adoption of production quotas, collaboration in the use of byproducts, research pooling, cooperation in market research, advertising and sales promotion, and the unifying of

144. 12 Comm. Mkt. L.R. D65 (1973).

145. *See* text *supra* at note 68.

prices and conditions of sale presented the appearance of unity. Because of this uniform conduct, the Commission considered the two producers to be a single entity for the purpose of finding a dominant position and its abuse in violation of article 86.

A third article 86 violation found by the Commission concerned a dominant national sugar producer which used threats of cutting off supplies in an effort to compel wholesalers to accede to its wishes. The primary abuse was the imposition of a contract on the wholesalers prohibiting imports by them into the national market without the consent of the national producer.

The fourth violation involved a sugar producer holding a dominant position in the market who forced his intermediaries to refuse to sell sugar from any other source. This action virtually eliminated parallel imports through those wholesalers and constituted an abusive practice under article 86.

A fifth violation concerned a loyalty discount granted by a sugar supplier in a dominant position. The discount depended not on the quantity purchased, but on the condition that all annual requirements had to be pruchased from the supplier. Since the supplier held 90-95% of the market, each wholesaler had to buy some sugar from it. The discount, though small, tended to prevent parallel imports and to strengthen the supplier's dominant position. The discount, under the circumstances, was held to violate article 86.

The Commission in *Sugar Cartel* also provided two definitions which may be useful, at least by analogy, in future cases. First, a supplier who supplies 85% of a national market dominates that market. Secondly, with reference to the facts of the case, a national market consisting of Bavaria, Baden-Wurttemberg, and parts of Hessen constitutes a "substantial part of the Common Market within the meaning of Article 86."

The Commission recently had occasion to consider an alleged violation of article 86 by a purchaser which held a dominant position. The decision, *Re Eurofima*,[146] concerned an organization which held a dominant position as the most important buyer of railroad rolling stock in the Common Market.

That organization, as a condition of contract for development of a new type of rolling stock, demanded the unlimited right to use any resulting patent rights without additional compensation. The Commission held this to be an abuse of a dominant position under article 86. The Commission did state, however, that if the contract were amended to provide for use of patent rights restricted to the buyer's needs and third party licenses under patent rights to be by agreement with, and for compensation to, the patent holder, there would be no abuse under article 86.

The most recent case concerning commercial abuse of a dominant position is *Commercial Solvents Corp. v. EEC*.[147] This case was an affirmation

146. 12 Comm. Mkt. L.R. D217 (1973).
147. 13 Comm. Mkt. L.R. 309 (1974).

by the Court of Justice of an earlier decision by the Commission, *Zoja v. Commercial Solvents.*[148]

Commercial Solvents was an American corporation which possessed a world monopoly in the supply of raw material essential for the production of a widely used drug. Commercial Solvents marketed this material in the Common Market through a 51%-owned subsidiary in Italy. To enhance the market of its subsidiary, Commercial Solvents refused to sell the material to one of its principal users in the Common Market.

First, the Commission held that, since the parent exercised dominant policy control over its subsidiary, the two corporations would be treated as one for the purpose of applying article 86. It then held that the parent-subsidiary group had abused its dominant position under article 86 by refusing to sell the material to a competitor of the subsidiary. This sudden withdrawal of an essential raw material from one of the major processors was held to amount to a serious violation of article 86. The continuation of the abuse for two years was also held to be a long time within the meaning of article 15(2) of Regulation 17.

In addition to imposing a heavy fine, the Commission imposed a mandatory injunction requiring Commercial Solvents to provide supplies to the injured party at reasonable rates.

The European Court of Justice affirmed the Commission in most respects. It found Commercial Solvents' argument—that alternative sources of the raw material were available and therefore there was no dominant position—to be unpersuasive. The alternative sources were determined to be experimental and to produce only on a small scale.

Commercial Solvents argued that the proper relevant market had not been considered by the Commission. It alleged that the correct market should have been that of anti-tuberculosis drugs and not a market consisting solely of the particular drug for which the raw material in question was supplied. The court, however, held that it was possible to distinguish the market in raw material necessary for the manufacture of the drug from the market on which the drug is sold. It held that abuse of a dominant position in the raw material market could have effects restricting competition in the market in which the derivative of the raw material is sold:

> [T]hese effects must be taken into account in considering the effects of an infringement [of Article 86] even if the market for the derivative does not constitute a self-contained market.[149]

The court, in affirming the Commission's holding, left open the question of whether it would have been an abuse of dominant position for Commercial Solvents to refuse to supply a potential customer who had not already been manufacturing the derivatives.

148. 12 Comm. Mkt. L.R. D50 (1972).
149. 13 Comm. Mkt. L.R. 309, 340 (1974).

The court also, as previsouly discussed under article 85(1), found abuse of a dominant position even though most of the material in question was sold outside the Common Market. This effect on competition within the Common Market is certainly indirect, and the court held, it need not be noticeable.

The court specifically approved the Commission's use of a mandatory injunction. The court did, however, reduce the fine imposed, since the case had been before the Commission for eighteen (18) months of the two-year period considered.

In the well-known *Europemballage*[150] proceeding, the Commission, in March 1971, filed a complaint under article 86 which, for the first time, attempted to apply prohibitions against abuse of a dominant position to a merger situation. Europemballage was an American subsidiary of Continental Can, Inc. The complaint charged:

> 1. That Continental Can, through Schmalbach Lubeca (SLW), an 86%-owned German subsidiary, had a dominant position in a substantial part of the Common Market in the field of light metal containers for meat and fish and closures for glass jars.
> 2. That Continental Can transferred its interests in SLW to Europemballage, and subsequently directed Europemballage to acquire majority control over Thomassen Drijver Verbifa (TDV), a strong Dutch competitor of Continental Can in the light metal container market. This attempted acquisition was alleged to be an abuse of a dominant position.

The Commission invoked article 3 of Regulation 17,[151] which empowers it by means of a decision to oblige enterprises to cease their infringements of articles 85 or 86. The Commission gave its definition of "dominant position," as follows:

> Enterprises are in a dominant position when their scope for independent behavior is such that they can act without making substantial allowance for competitors, buyers, or suppliers. In this event, they are in a dominant position when their share of the market, or their share of the market in conjunction with command of technical know-how, raw materials or capital, enables them to determine prices or to control production or distribution of a substantial proportion of the relevant goods.[152]

The Commission then proceeded to define broadly what constitutes an "abuse of dominant position:"

150. Continental Can Co., Commission decision, December 13, 1971. J. Off. Com. Eur. No. L7, Jan. 8, 1972, p. 25, *summarized*, 1 CCH COMM. MKT. REP. ¶2111.20.

151. 1 CCH COMM. MKT. REP. ¶2421 (1971).

152. Commission decision, December 13, 1971. J. Off. Com. Eur. No. L7, Jan. 8, 1972, p. 25.

> An enterprise or a group of enterprises in a dominant position may take improper advantage of said position by acquiring a majority holding in a competing enterprise.
>
> In the first place, the Commission considers that action taken by an enterprise on the basis of its dominant position constitutes abuse of said position when it is oblectively prejudicial to the objectives of the EEC Treaty, more particularly 'the establishment of a system ensuring that competition shall not be distorted in the Common Market' [Article 3(f)]. This is the case when the combination of an enterprise in a dominant position with another enterprise strengthens the said dominant position in such a manner as to eliminate competition for a substantial part of the relevant products.
>
> . . . .
>
> Now the acquisition by the Continental Can group of the TDV competitor enterprise, which itself holds a strong position in a market adjoining the German market, is an industrial operation leading to an irreversible change in the structure of supply which hampers maintenance of workable competition in a substantial part of the Common Market.[153]

The Commission ultimately ruled that Continental Can's acquisition of SLW constituted an article 86 violation, finding that attempts to monopolize a market or effect structural changes in the market are within the coverage of 86. Consistent with the wording of article 86, the Commission focused not on the merger itself but on the elimination of actual or potential competition.

The thrust of the decision was that the acquisition by a firm in a dominant position of a competitor, which results in diminished competition, has the effect of violating article 86(b), which prohibits exploitation of a dominant position resulting in "the limitation of production, markets, or technical development to the prejudice of consumers." Accordingly, an activity which diminishes the freedom of choice of consumers as to product utilization is to be considered a detriment to consumers within article 86.

It is worth noting that the Commission's decision did not depend on a finding that the dominant position was used in order to achieve the disapproved result. It is sufficient that the result does occur, whatever the motivations of the parties involved, and that its occurrence is attributable to the actions of an enterprise in a dominant position. This is consistent with the broader policy of the EEC competition provisions that behavior is to be judged by objective standards and its actual impact on competition rather than by subjective factors.

The Court of Justice annulled the Commission's ruling in *Europemballange Corp. & Continental Can Co., Inc. v. EEC Commission*[154] on the ground that the Commission based its decision on insufficient evidence.

---

153. *Id.*
154. 12 Comm. Mkt. L.R. 199 (1973).

However, the court accepted the doctrine of the abuse-aimed merger:

> To resolve this problem [of the applicability of Article 86 to mergers] it is necessary to resort to the spirit, structure and working of Article 86 and to the system and aims of the Treaty.
>
> . . . .
>
> In the absence of express provisions, it cannot be supposed that the Treaty, which in Article 85 prohibits certain decisions of normal associations of enterprises restricting but not eliminating competition, intended in Article 86 to permit enterprises, by merging into an organic unit, to obtain such a dominant position that any serious possibility of competition is almost eliminated.
>
> . . . .
>
> There may therefore be abusive behaviour if an undertaking in a dominant position strengthens that dominant position so that the degree of control achieved substantially obstructs competition, *i.e.*, so that the only enterprises left in the market are those which are dependent on the dominant undertaking with regard to their market behaviour.[155]

The Commission's decision prompted it to issue a draft regulation on mergers,[156] further extending the ground of the court's ruling and demonstrating a resonance between Commission and court regarding article 86, which we previously noted with regard to article 85(1).

The draft states as its basic provision:

> Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market in so far as the concentration may affect trade between Member States.[157]

Combined transactions are defined as "those whereby a person or enterprise, or a group of persons or enterprises, acquires control of one or several enterprises within the Community."[158]

The draft also would require mandatory notification to the Commission of mergers involving any entity whose combined sales exceed one billion units of account and permissive notification of other mergers where parties wish a determination of the likelihood of abuse of dominant position.

Further, broad investigatory powers would be granted both to member states and to the Commission to examine books and other records, to make copies thereof, and to enter any premises.

---

155. *Id.* at 223-25.

156. Regulation of the Council on the Control of Concentrations Between Undertakings, 2 CCH COMM. MKT. REP. ¶9586 (1973).

157. 2 CCH COMM. MKT. REP. ¶9586 at 9303 (1973).

158. 2 CCH COMM. MKT. REP. ¶9586 at 9303-2 (1973).

Powers to fine are also granted. One thousand to 50,000 units of account may be levied for: (1) supplying incorrect or misleading information and (2) refusal to submit to investigation. Moreover, the Commission would have authority to impose periodic penalty payments of from 1,000 to 50,000 units of accounts to compel obedience to Commission requests and to end infringements of article 85(1).

Finally, the draft contains an article requiring the Commission to hold under professional secrecy all information generated by investigation.

This draft, if adopted, would breathe fire into article 86, and plunge both the Commission, and, we may presume, the Court of Justice, into the complicated and burdensome task of regulating mergers, analogous to the experience of American legal organs in seeking to enforce section 7 of the Clayton Act.[159]

In the absence of any certain construction of this draft, all that can be done is to note the potential for greatly expanded regulatory power contained in the increasingly vague notion of what activity constitutes the touchstone of violation of article 86. It will be remembered that article 86 itself speaks in terms of a "dominant position."[160] In *GEMA* and *Europemballage*, "dominant position" was construed as "scope for independent behavior"[161] such that forbidden acts may be committed.

The draft regulation now would render the critical passage as "the power to hinder effective competition," which, when taken with the mandatory reporting requirement of article 4, must mean, at the least, that firms with combined sales in excess of one billion units of account will bear a presumption of application of article 86 to their activities.

The Commission's most recent decision on article 86 is *Re General Motors Continental N. V.*[162] In that case General Motors Continental, a subsidiary of General Motors, achieved a dominant position in Belgium on required inspection of imported motor vehicles.

The Belgian law required that imported motor vehicles be inspected prior to being permitted to be driven on Belgian roads. Each automotive manufacturer was permitted to appoint only one agent to perform the inspections on all of that manufacturer's automobiles in Belgium. General Motors Continental was appointed to conduct those inspections for General Motors vehicles. General Motors Continental inspected not only vehicles imported by it for sale by its distributors but also all General Motors vehicles imported by other importers and distributors.

The essence of the article 86 violation was that General Motors charged significantly more for inspection of the parallel imports than it did for inspection of vehicles imported for sale by its own distributors. Although

159. 15 U.S.C.A. §18 (Rev. 1973).

160. 1 CCH COMM. MKT. REP. ¶2101 (1971).

161. *See* J. Loyrette, *Dominant Size and Merger Under Article 86 of the Rome Treaty*, 27 BUS. LAW. 531 (Jan. 1972).

162. 15 Comm. Mkt. L.R. D20 (1974).

this price differential was in effect only from March 15, 1973, to July 31, 1973, the Commission considered it significant enough to find a violation of article 86 during that limited period.

The decision was based on four effects which the price differential caused. First, the high charge for inspection was significantly more than the cost of inspection. The Commission considered this inordinately large profit to amount to an abuse of a dominant position.

Second, there were at least twelve other firms in Belgium acting as agents for other manufacturers who carried out the same type of inspection but charged significantly less than General Motors Continental. The Commission considered this to be indicative of General Motors' abuse of its dominant position.

Third, the Commission felt that, since General Motors Continental had previously conducted inspections free of charge on vehicles which it imported, the increase in rates for parallel imports amounted to an article 86 abuse.

Fourth, and probably most significant, it was found that the high charge for inspections on parallel imported vehicles unfairly discriminated against those dealers which import or which were in a position to import new General Motors vehicles into Belgium. These independent importers were adversely affected, since the disproportionately greater inspection fee was added to the sale price, causing the independent importers to be at a competitive disadvantage with respect to General Motors Continental.

Although on the surface the abusive practices of General Motors Continental did not seem to affect trade between member states, the Commission stated that the free flow of goods was impeded by the abusive inspection charges and that it was likely to deter consumers and independent dealers in other countries of the Common Market from purchasing General Motors vehicles. Facts supporting that position were not evident from the decision.

The Commission proceeded to impose a fine on General Motors Continental in the amount of 100,000 units of account.