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The Antitrust Provisions of The Treaty of Rome*

David R. Fryer

The Treaty of Rome was signed on March 25, 1957, and the European Economic Community (EEC) entered into operation on January 1, 1958. Six states are parties to the Treaty: France, The Federal German Republic, Italy, Netherlands, Belgium, and Luxembourg.

The aim of the Community is expressed in article 2 of the Treaty.

> It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.[1]

The Community therefore depends on the establishment of a common market for the realization of its aim. Instead of relying merely on the removal of tariffs and quotas on trade between Member States, as would be appropriate in the case of a customs union, the Treaty envisages in addition, both the gradual approximation of the economic policies of the Member States, and the establishment of a uniform customs wall surrounding the Community from within which the Member States will pursue a common commercial policy toward non-member states.

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To achieve its aims, the Treaty provides for an international executive designated as the Commission. The Commission is charged with implementation of the Treaty provisions, subject to control by the Council. The Council provides the link between the Community and the national governments of the Member States; it is through the Council that policy decisions are made. Although the Commission's function is to initiate and develop proposals whereby the objectives of the Treaty may be attained, these proposals must normally be placed before the Council for policy decision.

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* This article is based on the transcript of a lecture delivered by the author at Western Reserve University School of Law. It purports to be no more than a guide to the more important antitrust provisions of the Treaty. Numerous contentious problems are, therefore, ignored.

1. There is no official English text of the Treaty of Rome [hereinafter referred to as Treaty]. The translations of the articles of the Treaty and of Regulation 17, as quoted in this article, are taken from an unofficial text which is Crown Copyright and which is reproduced by kind permission of the Controller of Her Majesty's Stationary Office in London.

The provisions of the Treaty apply to all aspects of industry, commerce, and services within the Community, subject to certain specific exceptions the most important of which is the production and distribution of coal and steel which falls within the terms of the Treaty Establishing the European Coal and Steel Community. This Community entered into operation on July 25, 1952.[2]

In view of the size of the markets involved, the impossibility of foreseeing all the economic measures that may become necessary in these markets, and the recognition of political realities, the Treaty is essentially a framework treaty. For example, many portions of the Treaty are confined to statements of principle which may require further implementation, either by regulations and directives of the Council, or by legislation enacted by Member States.

The Treaty provides few "dirigistic" powers permitting direct Community intervention in the processes of the market to cope with economic fluctuations or imbalance since it is intended that the market will be governed by its own auto-mechanism relying on the forces of normal competition. In the absence of such regulatory powers, it was therefore imperative that the drafters of the Treaty should establish a climate in which competition could flourish. Consequently, the Treaty contains many provisions directed to the removal of obstacles to, and the protection of, workable competition. Clearly, the removal of tariffs and quotas on trade between Member States would not achieve the aim of the Treaty if enterprises were free to substitute their own arrangements, or if Member States were free to enact measures or follow policies designed to perpetuate the status quo. Thus, to achieve the aim of the Treaty, account must be taken of monopolistic and market-sharing practices, and it is necessary to subject enterprises to rules protecting competition to insure that dual prices do not replace customs duties, to prevent dumping, and to prevent the replacement of quotas by market-sharing arrangements.

Article 3 of the Treaty states that the rules designed to protect competition are intended to insure that the aims expressed in article 2 can be achieved; however, the suppression of anti-competitive practices is not regarded as an end in itself, but rather as part of the broader economic purpose of the Treaty. The consultative procedures prescribed by the Treaty, and the fact that the provisions of the Treaty are to be enforced by administrative bodies lend support to the view that economic considerations will play a major part in the application of these rules protecting competition.

The enforcement and supervision of the rules protecting competition

2. The Treaty was signed on April 15, 1951. For rules protecting competition within this Community see articles 65 and 66.

are entrusted to the Commission[3] which is composed of nine members, each of which is head of a particular department. The department primarily concerned with the enforcement of the rules of competition is the Department of Competition which is divided into two branches: one dealing with anti-competitive measures by Member States, and the other with anti-competitive arrangements involving enterprises. Decisions under the rules are rendered by the full Commission.

Although the Treaty contains provisions designed to prevent Member States from disturbing the processes of free competition, this survey will be confined to those provisions which have particular reference to activities of enterprises. These provisions, articles 85 to 90, may be regarded as the antitrust law of the Community.

Restrictive Agreements — Article 85

In brief, article 85 is an anti-cartel provision. Article 85(1) prohibits certain restrictive trading agreements and concerted practices; article 85(2) declares such prohibited agreements to be null and void; article 85(3) provides for the exemption of certain agreements and practices which would otherwise fall within the prohibition of article 85(1), if they satisfy certain conditions and have prescribed beneficial effects.

Article 85(1)

Article 85(1) declares:

> The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market. . . .

In attempting to decide whether any particular trading arrangement violates this general prohibition, it should be noted that the text gives rise to many difficulties of interpretation, some of which are still unresolved.

To fall within the prohibition of article 85(1), an arrangement must involve at least two enterprises; it is therefore important to determine the correct interpretation of the term "enterprise." It has been suggested that it is unlikely that arrangements between a parent company and its subsidiary would fall within the provisions of this article, though whether such arrangements involve two enterprises will probably be decided in light of economic realities and the degree of *de facto* control and auton-

3. Article 89 requires that the Commission shall insure the application of the principles laid down in articles 85 and 86.

omy enjoyed. Decisions rendered by the Court of Justice in 1962 under the European Coal and Steel Community Treaty have held a wholly-owned subsidiary and its parent to be one enterprise even though the subsidiary was treated as a distinct legal entity for tax purposes.[4] Although these decisions may provide some guidance to the interpretation of article 85, the degree of control which must exist before the notion of separate enterprises is excluded still remains unclear. Even greater doubt surrounds the status of arrangements existing between two subsidiaries. In one view, it is argued that arrangements between two wholly-owned, or even controlled, subsidiaries of the same corporation should be treated in the same way as arrangements between two branches of the same corporation, *i.e.*, as involving one enterprise. Another approach would determine the number of enterprises involved on the basis of whether the actual business decisions were made by the subsidiaries themselves, or directed from above. Under this approach, if the two subsidiaries act on instructions from the common parent in entering into the agreement, such arrangements would be treated as involving but one enterprise.

It is probable that joint ventures in which both participating companies must give their approval for important decisions will be regarded as involving two enterprises. In view of these unresolved problems of definition, it would appear safer for the time being to treat all such arrangements as though they involve two or more enterprises, unless the contrary clearly appears.

Although article 85(1) is primarily directed to horizontal agreements between competing enterprises, as exemplified by the term "concerted practices," vertical as well as horizontal arrangements may fall within its prohibition. The article lists a number of typical anti-competitive practices which are usually found in vertical arrangements, namely, tie-in clauses and discriminatory terms of sale.[5]

Decisions of Associations.—The reference to "decisions of associations" in article 85(1) takes account of the existence in certain industries of associations of manufacturers and distributors, which may make "recommendations" as to prices and output and thus may resort to blacklisting. In this connection, it should be noted that article 85 applies to tacit cartel arrangements as well as to those reduced to writing. The term "concerted practices" is probably intended to prohibit conscious parallelism — common conduct entered into in the absence of legal obligations (agreements) or relationships (associations).

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4. Mannesmann A.G. v. High Authority of the Coal and Steel Community, Case No. 19/61, July 13, 1962, Ct. of Justice; Kleckner Werke A.G. v. High Authority of the Coal and Steel Community, Case No. 17/61, July 13, 1962, Ct. of Justice.

5. Treaty art. 85, para. 1(d), (e).

Effect on Trade.—One of the most important requirements which must be present before an arrangement can be prohibited under article 85(1) is that the arrangement must be likely to affect trade between Member States. Arrangements between firms situated in a single Member State which have an effect only on intrastate trade are not prohibited. Such arrangements must be dealt with, if at all, under the national antitrust laws of the state involved. However, as the Common Market economy becomes more integrated, it is more likely that an effect on interstate trade will be discovered. For example, an arrangement involving firms in a single Member State could have interstate effects if it regulated or prohibited imports or exports between Member States, *i.e.*, by dividing markets to stop exports to other Member States. Also, arrangements which permit exports but prohibit re-imports, or which provide for joint buying in another Member State would have interstate effects.

It should be appreciated, of course, that arrangements may affect trade between Member States and fall within the prohibition even though they include participants from non-member states. This is of particular relevance to American corporations which have business relations with enterprises in the EEC. The prohibition of article 85 may apply both to arrangements entered into by a subsidiary established within the Community, and to arrangements entered into by an American corporation with enterprises situated in the community for the establishment of a distribution network, or for the manufacture and sale of goods under license. Whether the prohibition applies in any particular case will, of course, depend on the facts. It is clear, however, that an awareness of, and compliance with, the antitrust provisions of the Treaty is essential to American corporations which seek to uphold such contractual relationships.

Divergent terms in the four authorized texts of the Treaty have caused difficulties of interpretation with respect to the required effect on trade. The French, Italian, and Dutch texts imply that the arrangement need only be "capable" of affecting trade (*"susceptibles d'affecter"*). But since the enforcement agencies will probably be initially concerned only with practices which have a clear-cut relation to interstate commerce, reliance ought to be placed on the German text which requires that the arrangement should be "likely" to affect trade. The German, Dutch, and Italian texts also imply that the effect must be prejudicial, and in view of the broad economic purposes underlying the antitrust provisions of the Treaty, it seems likely that "adverse effect" will be read into the text.

Object or Result.—Arrangements can only be prohibited by article 85(1) if they have the prescribed anti-competitive effect. The arrange-

ment must have the "object or result" of preventing, restricting or distorting competition within the Common Market. It appears that "object" and "result" are determined in light of existing and foreseeable circumstances. However, it has been suggested that "object" should be established by reference to the agreement as a matter of construction, and that "result" should be determined only after detailed investigation.

Common Market.—According to the Commission, the term "Common Market" refers to a geographical unit.[6] This means that the repercussions of the arrangement on competition must be felt within the geographical limits of the Common Market. On this basis, arrangements relating solely to the export trade of one Member State with countries outside the Common Market are not prohibited.

Typical Practices.—In addition to enacting the general prohibition discussed above, article 85(1) lists certain typical practices[7] which may fall within the general prohibition. This list is indicative and not exhaustive. There is no presumption that the listed practices are likely to have an adverse effect on trade between Member States; this must be determined on the particular facts.[8] Furthermore, it is not clear whether there is a presumption that the listed practices prevent, restrict, or distort competition, although it is considered unlikely that a per se approach will be adopted. On this matter, the Commission has shown a desire to proceed pragmatically.

In the last analysis, whether an arrangement is prohibited depends on whether it is likely to have a prejudicial effect on trade between Member States, and has the object or result of preventing, restricting or distorting competition within the Common Market. Fortunately, the Commission has further clarified the scope of article 85(1) by stating officially that exclusive distributorship agreements involving commercial agents and certain patent licensing agreements are outside the prohibition of article 85(1).

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6. E.E.C. Commission Third General Report No. 140, 1960; Bulletin No. 38, May 1959.

7. Article 85(1) lists the following practices:

(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions.

[In Part I of its Practical Guide concerning articles 85 and 86 and the relevant regulations, published in September 1962, the Commission suggested that typical examples would be rebates, discounts and terms for deferred payment.]

(b) the limitation or control of production, markets, technical developments or investment.

[The Practical Guide suggests as examples: the allocation of production quotas and the fixing of maximum production capacity.]

(c) market-sharing or the sharing of sources of supply.

[The Practical Guide instances agreements to sell only in a given area or to provide for mutual respect of national markets.]

(d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage.

[This would be the case if certain customers were granted unjustified advantages to the

8. E.E.C. Commission Third General Report No. 140, 1960.

Exclusive Distributorships

In its second statement[9] concerning the application of article 85(1) to exclusive distributorship agreements, the Commission outlined the procedure it would adopt in dealing with requests for exemption under article 85(3) and applications for negative clearance with respect to exclusive distributorship agreements when one party to the agreement is a commercial agent. In such cases, the Commission intended to give favorable consideration to applications for negative clearance. However, this statement has since been superseded by a further statement[10] (published December 24, 1962) which attempts a comprehensive definition of the term "commercial agent." This statement makes it plain that exclusive agency contracts made with a commercial agent in which the agent agrees, for a specified part of the Common Market territory, to negotiate transactions on behalf of another enterprise, to conclude transactions in the latter's name and for the latter's account, or to conclude transactions in his own name and for the latter's account, are not within the prohibition of article 85(1). Accordingly, no question of negative clearance arises. The statement emphasizes that the contracting party designated as a commercial agent must actually be such by reason of his functions, and must not undertake or engage in the activities of an independent merchant. This would be the case if provision were made expressly or tacitly for the assumption of the financial risk involved in the sale or performance of the contract. Except for the case of *del credere* guarantee, it is not a function of a commercial agent to assume any of the risks involved in the transaction. He is likely to be regarded as an independent merchant if he is required to keep, as his own property, considerable stocks of goods covered by the contract; or if he is required to organize, maintain, or guarantee substantial and free service to customers at his own expense, or does in fact do so; or if he can or does determine prices or terms of business.

The Commission takes the view that contracts for exclusive representation concluded with commercial agents do not restrict competition within the Common Market since in the commodity market the com-

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detriment of the competitive position of other customers. For the prohibition to apply, two competitors must be treated differently; there is no prohibition against unequal conditions of trade as applied to parties who are not in competition with one another.]

(e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

[This covers the typical tie-in clause whereby customers or suppliers are obliged to buy or sell some other merchandise simultaneously or to accept or provide some other service unconnected with the original merchandise or service.]

9. 113 *Official Gazette of the European Communities* 2628 [hereinafter cited as *Official Gazette*].

10. 117 *Official Gazette* 2687.

mercial agent only plays an auxiliary part, and works according to the instructions and interest of the enterprise for which he is acting. He is neither buyer nor seller, but seeks out buyers or sellers for the benefit of the other party to his contract. The latter actually does the buying or selling, and is consequently not out of the picture as a competitor. In the particular market in which commercial agents offer their services, the commitment to work exclusively for one employer for a certain period of time results in a limitation of supply on that market; the commitment of the other party to make him the exclusive agent for a specified territory involves a limitation of demand on that market. Nevertheless, the Commission regards these restrictions as resulting from the special obligation to protect each other's interests which exists between the commercial agent and his principal.

It should be noted that exclusive distributorship agreements involving independent merchants are not removed from the scope of article 85(1). But, whether such an agreement falls within the prohibition will depend on the facts of the particular case.

Patent Licensing Agreements

In its second statement[11] relating to patent licensing agreements, the Commission proposed to except certain restrictions imposed on the licensee in individual contracts from the prohibition of article 85(1). On December 24, 1962, however, the Commission issued a further statement[12] extending and superseding the contents of the prior statement. Consequently, clauses in patent licensing agreements which impose obligations on a licensee are not within the prohibition of article 85(1) insofar as these obligations are an integral part of the licensor's rights under the patent monopoly. Thus, obligations may be imposed on a licensee limiting the methods of exploitation provided for by patent law, limiting manufacture of the patented product or use of the patented process to certain technical applications, limiting the quantity of products to be manufactured, or limiting exploitation. Exploitation may be limited either in time,[13] space,[14] or as to person.[15] The statement expressly declares that the listed obligations on the licensee do not represent an exhaustive definition of restrictions which can be regarded as falling within the scope of the rights conferred by the patent. The statement also removes from the prohibition of article 85(1) obligations on the

11. 113 *Official Gazette* 2628.

12. 139 *Official Gazette* 2922.

13. *E.g.*, a license of shorter duration than the patent.

14. *E.g.*, a regional license for a portion of the territory for which the patent is granted, or limited to one place of exploitation.

15. *E.g.*, limitation on the licensee's power of disposal, by a prohibition on assignment or the granting of sub-licenses.

licensee to mark the product with an indication of the patent. The Commission has stated[16] that this type of obligation serves the patentee's legitimate interest in insuring that the product is clearly shown to owe its origin to the patented invention, and does not restrict competition since the licensee may also affix distinguishing marks of his own choice on the protected article. Obligations on the licensee to maintain quality standards, or to procure certain products that are indispensable to the correct technical exploitation of the patent are also removed from the prohibition of article 85(1). Obligations of this type are imposed to prevent a technically improper exploitation of the invention, and as in the first case do not restrict competition. However, all of these obligations are outside the prohibition of article 85(1) only insofar as they are imposed on the patent licensee. On the other hand, the only obligations on the licensor removed from the prohibition of article 85(1) by the statement are those in which the licensor agrees: (1) not to authorize any other person to utilize the invention, and (2) not to utilize the invention himself. The Commission does not feel that the first type is likely to affect trade between Member States. The second type is essentially an assignment of rights.

The statement also provides that agreements concerning the communication of know-how acquired during the utilization of the invention, or the granting of licenses relating to improvements, or new uses, are outside the prohibition of article 85(1); however, obligations accepted by the licensee in this connection are valid only if they are not exclusive and the licensor has assumed similar obligations. The licensee's acceptance of such obligations does not restrict competition so long as he can transmit such know-how, grant licenses to third parties, and participate in know-how and experience acquired by the licensor in the future. These are the only reciprocal obligations excluded by the statement from article 85(1).

It is important to note the exact limits of the declaration of inapplicability comprised in the statement of December 24, 1962. It does not include clauses in patent licensing agreements other than those expressly removed from the prohibition of article 85(1). Therefore, article 85(1) will continue to apply to clauses in patent licensing agreements such as those which are expressed to endure beyond the term of the patent, or those which impose a prohibition on exports. Moreover, the declaration of inapplicability does not extend to multiple parallel licenses, reciprocal licenses, agreements concerning joint ownership of patents, patent pending arrangements, or the utilization of other industrial property rights such as trademarks or know-how. As a result, it is an open question as to whether the Commission will regard obligations of the types listed in the statement as being outside the prohibition of article 85(1) when they

16. 139 *Official Gazette* 2922.

are contained, for instance, in a trademark license agreement.[17] The application of article 85(1) to all such agreements must at present be determined by the general principles of applicability.

As a result of the Commission's statements, commercial agency and patent license agreements which come within the categories described therein, are outside article 85(1). All other agreements must be scrutinized in light of the broad prohibition and the particular practices specified in article 85(1) to determine whether they fall within its terms.

REGULATIONS 26 AND 141

Before considering the nature and scope of article 86, it should be noted that the range of goods and services to which articles 85 and 86 originally applied has been significantly amended by Regulations 26 and 141.

Regulation 26[18] provides that articles 85 to 90 of the Treaty shall apply to all agreements, decisions, and practices referred to in articles 85(1) and 86 dealing with the production of, or trade in, the products listed in Annex II of the Treaty, *i.e.*, agricultural produce. Regulation 26(2) provides, however, that article 85(1) shall not apply to those arrangements which form an integral part of a national market organization, or which are necessary for the attainment of the objectives set out in article 39 of the Treaty.[19] In particular, it does not apply to arrangements between farmers or farmers' associations belonging to a single Member State, relative to the production or sale of agricultural produce, or the use of joint storage, treatment, or processing facilities for agricultural produce in the absence of any obligation to charge a specific price, unless it is specifically found that the effect is to eliminate competition. The Commission decides which arrangements fulfill the requirements for exemption under Regulation 26(2).

Regulation 141[20] provides that implementing Regulation 17 shall not apply to agreements, decisions, and concerted practices relating to transport which have the object or effect of fixing the cost or conditions of carriage, of limiting or regulating offers of carriage, or of dividing traffic markets; nor shall it apply to dominant positions in the traffic market within the meaning of article 86.[21] This Regulation, which accordingly exempts transport from the provisions of articles 85 and 86, recognizes the necessity for modified rules of competition related

17. In paragraph III of the Statement issued on December 24, 1962, the Commission stated that a decision would eventually be made on this question.

18. Regulation 26 was made on April 4, 1962 and amended by Regulation 49, art. 1.

19. These relate to the establishment of the Community's agricultural policy.

20. Effective March 13, 1962.

21. Regulation 141, art. 1.

to the special nature of transport. Rail, road, and river transport are exempt only until December 31, 1965; before that date the Commission must submit new proposals to protect competition in these fields.[22]

Dominant Position — Article 86

Article 86 declares:

> To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited. . . .

The prohibition in this article takes the form of "abuse" legislation. It does not prohibit the attainment of a dominant position, nor provide for prior authorization of concentrations, but prohibits dominant enterprises from taking improper advantage of their position. Moreover, it is subject to the important qualification that it applies only to the extent that the improper exploitation affects trade between Member States. The abuse of a dominant position in a single state may involve the abuse of a dominant position within a substantial part of the Common Market, but to come within the prohibition, it must also be shown to affect trade between Member States. It is possible, therefore, that such action could escape the prohibition, but this would depend on the facts in each case. But, as the Common Market economy becomes more integrated, interstate effects will probably be more readily discovered. If the abuse has no interstate effects, it must be dealt with under national law, if at all. In a particular case, the abuse may arise from restrictive agreements, in which case the provisions of article 85(1) would also apply. However, a cartel which may be unobjectionable under article 85(1) could fall within the prohibition of article 86 if it had a dominant position and abused it.

Dominant Position

The Treaty contains no definition of the term "dominant position," although by analogy with article 66(7) of the European Coal and Steel Community Treaty it may be interpreted as "not subject to substantial competition." It may depend on whether more than fifty per cent of the market is in the hands of the enterprise or enterprises involved. The Commission will probably consider the comparative importance of the firm in the Common Market in relation to a particular product or service. Additionally, the existence and importance of competitors inside and outside the Common Market, and the opportunities available to

22. Regulation 141, arts. 2, 3.

customers to substitute other products are important factors for consideration.

Improper Practices

The exact interpretation of the terms "substantial" and "improper advantage" remains unclear. The term "action" would no doubt include the acquisition of competing firms by stock purchase, mergers, or agreements. It should be noted, however, that article 86, unlike article 85 which applies only where two or more enterprises are involved, is applicable to situations where just one enterprise is involved. As in the case of article 85(1), the general prohibitory clause is followed by an indicative and non-exhaustive list of practices in which misuse of a dominant position may be discovered. Such improper practices may consist of:

> (a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;
> (b) the limitation of production, markets or technical development to the prejudice of consumers;
> (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage;
> (d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

Article 86 is therefore of similar structure to article 85(1), and the same general problems of interpretation and relationship arise between the various clauses.

The first two practices listed under article 86 include abusive action by dominant enterprises in which artificial scarcities or other misuses of economic power are utilized in cases where the enterprises involved are not acting in pursuance of agreements or in concert with other enterprises. The specific examples listed in article 86 are appropriate to cover situations in which an enterprise with dominant market power exacts terms for its own benefit from its suppliers or customers, as opposed to situations in which terms are imposed on another party which must be observed in that party's dealings with third parties.

It will be seen that the elastic terminology of article 86 affords wide scope for action by the Commission. But article 86 is limited to some extent by the terms of articles 90(1) and 90(2) which provide special treatment for enterprises charged with the management of services of general public interest or possessing the characteristics of fiscal monopolies. Although action of the type prohibited by article 86 may usually have a greater impact on the economy than the arrangements prohibited by article 85(1), it is considered that at this early stage in

the implementation of the antitrust rules, the Commission will be more concerned with infringements of article 85(1), especially in view of the volume of work entrusted to it in connection with the registration of agreements.[23] The Commission has given little guidance as to the correct interpretation of article 86. It is anticipated that action under article 86 will be taken largely as a result of complaints by private informers, such as injured competitors or minority stockholders in firms acquired by dominant enterprises.

Article 86 contains no provisions corresponding to articles 85(2) and 85(3). Activities falling within article 86 are prohibited and no question of nullity arises. There is no possibility of obtaining a dispensatory declaration of the type provided by article 85(3).

ENFORCEMENT

Having considered the scope of articles 85(1) and 86, it is appropriate to consider what provision is made for their observance. Under article 89 of the Treaty, the Commission is required to ensure the application of articles 85 and 86. The Commission may act either ex officio, or on complaint by a Member State or private informer; it must also investigate all cases of alleged infringement. If the Commission discovers an infringement of articles 85 and 86, it may render a decision requiring the enterprises concerned to put an end to such infringement. But, before rendering such a decision, the Commission may make recommendations to the enterprises designed to put an end to their infringement.[24]

Penalties

Articles 11 and 14 of Regulation 17 give the Commission wide powers to demand information in the execution of its duties and to conduct investigations into the affairs of enterprises. In the event of noncompliance, the Commission may make a decision setting a time limit for compliance, specifying the sanctions applicable under articles 15 and 16 of the Regulation. Article 16 empowers the Commission, in accordance with a decision rendered by it under article 3, to impose daily penalties on infringing enterprises in order to require them to put an end to infringements of articles 85 and 86. The Commission is also empowered under article 16 to impose daily penalties in order to require infringing enterprises to supply information requested by decision,[25] or to submit to an investigation ordered by a decision.[26] Fines may be imposed

23. Regulation 17 provides for the registration of agreements contravening art. 85(1) of the Treaty.

24. Regulation 17, art. 3(3).

25. Regulation 17, art. 11.

26. Regulation 17, art. 14.

upon enterprises for wilful or negligent submission of false information to the Commission, either in connection with registration or when duly requested by the Commission; or for wilful or negligent refusal to supply information or to submit to investigation.[27]

The Commission may by decision impose fines of from one thousand to one million units of account[28] on enterprises which have wilfully or negligently infringed upon the provisions of article 85(1) or article 86 of the Treaty.[29] This penalty applies to each of the enterprises which took part in the infringement, and it may be increased to ten per cent of the turnover for the preceding business year. Therefore the Commission must give reasoned decisions so that questions of Treaty interpretation may be determined, if necessary, by the Court of Justice under article 177 of the Treaty; or to enable enterprises to appeal from decisions affecting them to the Court of Justice under article 173. Recommendations made by the Commission under Regulation 17(3) are not, however, appealable to the Court under article 173.

Before imposing the fines and penalties provided for in Regulation 17(15) and 17(16), the Commission must request the Consultative Committee on Controls and Monopolies comprised of experts from each Member State to render an opinion.[30] It is intended that this procedure will insure uniformity and provide a safeguard against abuse. Under Regulation 17(17), the Court of Justice is given full jurisdiction to adjudicate an appeal from decisions of the Commission fixing a fine or penalty, and it may cancel, reduce or increase such fine or penalty.

Hearing

Regulation 17(19) requires that before the Commission may come to a decision on questions involving the grant of negative clearance, the termination of infringements of articles 85 and 86, the grant of a dispensatory declaration under article 85(3), the retroactive exemption of modified agreements, the revocation of article 85(3) exemption, or the imposition of fines and penalties, an opportunity must be provided for the enterprises involved and interested third parties to be heard.

Regulation 17(24) gives the Commission authority to introduce implementing provisions concerning the hearings provided for in articles 19(1) and 19(2) of Regulation 17, and in accordance with this authority Regulation 99 was made effective from August 30, 1963. Regulation 99 ensures that hearings will be conducted on uniform principles and that enterprises will be informed of their rights and the grounds of

27. Regulation 17, art. 15.

28. A unit of account is the gold value of the U.S. dollar of 1958.

29. Regulation 17, art. 15(2).

30. Regulation 17, arts. 10(3) to 10(5).

complaint against them. Such enterprises are given an opportunity, in common with other persons who can establish a justified interest, to present their point of view in written representations to the Commission.[31] Regulation 99(4) provides that in reaching a decision, the Commission may only consider the grounds of complaint in which the parties involved have had an opportunity to express their views. In addition to the submission of written representations, Regulation 99(7) provides that enterprises may request that their views be developed orally before the Commission, and the Commission must agree to such request if it proposes to impose fines or penalties on such enterprises, or if the parties establish sufficient grounds for an oral hearing. Enterprises may employ any representative approved by the Commission to state their case.[32]

It will be seen from the above that the Commission is well equipped to deal with infringements of articles 85 and 86. It is relevant to consider, therefore, what action should be taken by enterprises whose activities appear to be prohibited by articles 85 and 86.

Alternatives for Contravening Enterprises

If it is considered that the activities of the enterprise contravene article 86, the only alternative is either to modify or terminate the activities so that the prohibition is no longer applicable, or to continue with the contravention, if it is of a continuing nature. However, by so doing the enterprise may incur the risk of sanctions in the event of the contravention being brought to the notice of the Commission. The gravity of the contravention and its duration would be taken into account by the Commission when imposing fines under Regulation 17.[33] If the parties wish to confirm their view that article 86 does not apply in a particular case, they may request a negative clearance from the Commission under Regulation 17(2). In effect, this clearance is a statement by the Commission that it sees no reason, on the basis of the available information, for intervention under article 86.[34] However, a negative clearance is only of persuasive authority in municipal courts.

Enterprises whose activities appear to contravene the prohibition of article 85(1) will be concerned not only with the possibility of sanctions with respect to the contravention, but also with the consequences of nullity. Additional courses of action are, however, open to them in view of the provisions of article 85(3) and the enforcement and registration procedures introduced by Regulation 17.

31. Regulation 99, arts. 1-3.

32. Regulation 99, art. 9(2).

33. Regulation 17, art. 15(2).

34. There is no prescribed form for applying for negative clearance under article 86 of the Treaty.

If it is clear to the parties to an agreement that the agreement is not subject to the prohibition of article 85(1), no action need be taken. It will not be subject to the prohibition if it is an agreement of the type which the Commission has expressly excluded from the prohibition,[35] or further, if it does not satisfy the general conditions of applicability prescribed by article 85(1). In many instances, however, the parties will not be able to determine with any certainty whether article 85(1) applies. It will be remembered that article 85(2) declares that arrangements falling within article 85(1) shall be null and void. By virtue of article 1 of Regulation 17[36] when read in conjunction with the decision of the Court of Justice in *Bosch and Van Rijn v. De Geus*,[37] all agreements falling within article 85(1) and not duly notified to the Commission are, subject to certain exceptions, null and void with respect to any period of operation after March 13, 1962, the effective date of Regulation 17.

Notification for Grant of Exemption

Three broad courses of action are available to the parties to an agreement which appears to fall within article 85(1). The parties may either discontinue or modify the agreement, or proceed with it in spite of the prohibition; or the parties may apply to the Commission for a grant of exemption under article 85(3). If the agreement is in fact prohibited by article 85(1), and the parties wish to sustain it free from liability of sanctions and the consequences of nullity, their only course is to apply for a dispensatory declaration under article 85(3). The Commission has sole power to grant exemption under article 85(3),[38] and before exemption can be granted the agreement must be notified to the Commission.[39] Notification is, however, not compulsory. If the parties think that their agreement may possibly be subject to article 85(1) and may be entitled to exemption under article 85(3), they should apply to the Commission for a dispensatory declaration by filing Form B prescribed by Regulation 27.

The procedure for notification depends on the date on which the agreement came into force. Agreements in force on March 13, 1962 for which article 85(3) exemption is required should have been notified by the dates prescribed in article 5 of Regulation 17, as amended.

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35. See Statements on exclusive agency and patent license agreements, *supra* notes 9-12.

36. Regulation 17, art. 1 provides: "The agreements, decisions and concerted practices referred to in Article 85, paragraph 1 of the Treaty and any abuse of a dominant position on the market within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to this effect being required; Articles 6, 7 and 23 of the present Regulation shall not be affected by this provision."

37. Case No. 13/61, April 6, 1962, Ct. of Justice.

38. Regulation 17, art. 9(1).

39. Regulation 17, art. 4(1).

Agreements duly notified to the Commission will be presumed temporarily valid until and unless the Commission refuses to grant exemption under article 85(3). Timely registration of agreements in force on March 13, 1962[40] is of crucial effect since if article 85(3) exemption is granted, the decision granting exemption would have retroactive effect to a date even earlier than the date of notification, and presumably even back to March 13, 1962.[41] Thus, it would be possible for a grant of exemption under article 85(3) to validate the agreement for the whole period of its operation after March 13, 1962. There is no need for the agreement to be validated for any earlier period in view of the decision in the *Bosch* case. Moreover, article 7(1) of Regulation 17 provides that this same retroactive effect can be obtained for agreements which, although in their original form did not satisfy the requirements of article 85(3), have been modified at the suggestion of the Commission to conform to such requirements. It should be noted, however, that such retroactive validation of modified agreements is ineffective against persons who have not expressly agreed to the registration. If the Commission refuses to grant an exemption under article 85(3) to a duly notified agreement in force on March 13, 1962, such agreement would be null and void for the whole period of its operation subsequent to that date. Nevertheless, it should be noted that the Commission may not levy fines for infringements of article 85(1) with respect to activities within the period subsequent to notification, whether or not article 85(3) exemption is subsequently granted.[42] Nor may it levy fines with respect to any period of prohibited activity prior to notification if the agreement was notified by the due dates.[43] This immunity from fines applies so long as the parties' activities remain within those described in the notification, and so long as the Commission has not informed the parties in a preliminary opinion that a grant of exemption under article 85(3) would be unwarranted.[44] These preliminary opinions which are issued pursuant to article 15(6) of Regulation 17 are in the nature of cease and desist orders. Agreements in force on March 13, 1962 which violate article 85(1) and which were not registered by the dates prescribed, are automatically null and void as from March 13, 1962 without any decision being necessary. This flows from the decision in the *Bosch*[45] case and article 1 of Regulation 17. Hence, it is no longer possible to apply for a grant of article 85(3) exemption with respect to these agreements.

40. The deadline was November 1, 1962 for agreements to which more than two enterprises take part; it was February 1, 1963 for bipartite agreements.

41. Regulation 17, art. 6(2).

42. Regulation 17, art. 15(5)(a).

43. Regulation 17, art. 15(5)(b).

44. Regulation 17, art. 15(6).

45. Case No. 13/61, April 6, 1962, Ct. of Justice.

Parties to such agreements which have not been notified should, therefore, take steps to terminate them by mutual consent and enter into new agreements which should be notified to the Commission.

Agreements entered into after March 13, 1962 and subject to article 85(1) are automatically null and void from the date of their inception, unless and until they are notified. Under article 9 of Regulation 17, the Commission has exclusive power to grant article 85(3) exemption, and under the terms of article 4 of Regulation 17 notification is a prerequisite to the grant of a dispensatory declaration. Such arrangements should be registered before or as soon as possible after they come into force. If and when an article 85(3) exemption is granted, such arrangements may be validated retroactively, but exemption affords only retroactive validity from the date of registration; the agreement cannot be validated for any earlier period.[46] If, therefore, an agreement is in operation for some period prior to registration, it will be prohibited and null and void for the period between its inception and its registration, even if the Commission grants exemption under article 85(3). Thus, if an agreement which may potentially satisfy the requirements for article 85(3) exemption is not registered, it is automatically null and void for the entire period of its operation prior to its eventual registration.

Registration Procedure

In view of the possibility that the Commission may refuse to grant article 85(3) exemption, it is particularly important to notify agreements made subsequent to March 13, 1962 as soon as possible after they come into force. In the event of such refusal, the agreement is presumed to be subject to the prohibition of article 85(1) for the whole period of its operation. It should be noted that once such an agreement has been registered, whether before or after it has come into operation, and whether or not article 85(3) exemption is eventually granted, the Commission may not levy fines with respect to activities which occurred during the period subsequent to registration; however, the Commission may levy fines in respect of any period of prohibited activity prior to registration.[47] This immunity from fines for activities which occurred during the period subsequent to registration applies so long as the parties' activities remain within those described in the registration, or so long as the Commission has not informed the parties in a preliminary opinion that a grant of exemption would be unwarranted.[48] Article 4(2) of Regulation 27 requires that notifications for the purpose of obtaining a grant of exemption under article 85(3) be filed on Form B, the con-

46. Regulation 17, art. 6.

47. Regulation 17, art. 15(5)(a).

48. Regulation 17, art. 15(6).

tents of which are specified in Regulation 27. One or more of the parties involved in an agreement may notify the agreement to the Commission on Form B and may argue that the agreement is not subject to article 85(1); or the parties may argue that if the agreement is so subject, it is entitled to a grant of exemption under article 85(3). A notification which merely requests that an exemption be granted under article 85(3) does not constitute an admission by the parties that the agreement is subject to article 85(1). Although the Form requires considerable information as to the parties' business operations, it is imperative that the arguments adduced in support of either the inapplicability of article 85(1), or entitlement to article 85(3) exemption should be carefully and fully set forth, in view of the danger of the Commission refusing to grant article 85(3) exemption on the basis of the information provided, and the right of the parties to appeal the decision of the Commission to the Court of Justice.[49] Notification involves considerable publicity, and the decisions reached by the Commission must be published,[50] although safeguards are provided to protect business secrets.[51] It is understood that the certainty of publicity has deterred many enterprises from registering their agreements.

Exclusive Distributorships.—A simplified registration procedure has, however, been established under Form B1 for certain exclusive distributorship agreements.[52] This simplified procedure requires only that the name, status, and address of the notifiant be stated, together with a description of the goods subject to the agreement, the name and address of the distributor, and the date of the contract. Provision is also made under Form B1 for block notification of standard contracts; in this event the Form must state the number of standard contracts concluded at the time of notification. However, this Form is only appropriate for bipartite exclusive distributorship agreements under which unilateral or mutual restrictions are accepted by the parties as to the exclusive purchase and/or supply of specific goods for resale within a defined territory in the Common Market. The Form requires the applicant to certify that no mutual restrictions as to the distribution of competing goods manufactured by the parties have been established; that the agreement does not prevent dealers or consumers from obtaining the goods subject to the contract from other distributors or dealers in the Common Market; that the distributor is not prohibited from supplying the goods to clients outside his defined territory; and that the contract imposes no obligations on the distributor as to resale price maintenance. A notification on Form B1 is equivalent

49. Treaty art. 173.
50. Regulation 17, art. 21.
51. Regulation 17, art. 20.
52. Regulation 153, amending Regulation 27.

to notification on Form B so far as immunity from penalties is concerned. Parties entitled to give notification on Form B1 may, if they wish, notify in the usual way on Form B. It will be seen that few enterprises will be entitled to use Form B1. A favorable decision by the Commission on a notification under Forms B or B1 is of conclusive validity in the municipal courts of the Member States.

Negative Clearance.—Article 2 of Regulation 17 provides that the Commission may issue a negative clearance when an agreement is notified on Form A. Such a clearance is merely an expression of opinion by the Commission that there is no reason to take action against the agreement under article 85(1) on the basis of the available information. Notification on Form A is in no way equivalent to notification on Forms B and B1, and such a clearance is only of persuasive authority in municipal courts. There is a right of appeal to the Court of Justice against the Commission's refusal to grant such a clearance.[53] Notification on Form A is likely to be of use only to enterprises who are reasonably confident that their activities fall outside article 85(1), and merely require confirmation of that opinion. In other cases there seems to be no purpose in notifying on Form A; equal publicity is given to the Commission's decision as in the case of Form B notification, and the information required is equally comprehensive. Though Forms A and B can be submitted simultaneously, a declaration that article 85(1) is inapplicable can be obtained in a proper case under Form B notification. Moreover, the use of Form B can guard against a finding that article 85(1) applies, since such a notification can lead to the grant of a dispensatory declaration under article 85(3).

ARTICLE 85(3)

Parties to arrangements falling within article 85(1) will, of course, be concerned to know whether the arrangement is likely to satisfy the terms of article 85(3) which provide as follows:

> Nevertheless, the provisions of paragraph I may be declared inapplicable in the case of:
> — any agreement or classes of agreements between enterprises,
> — any decisions or classes of decisions by associations of enterprises, and
> — any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:
> (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
> (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

The Commission must grant exemption if the conditions of article

53. Treaty art. 173.

85(3) are fulfilled. In setting out reasons in justification of a grant of exemption, parties should attempt to show that the effect of their agreement is to improve product quality or distribution, to coordinate inventories, to take advantage of bulk contracts, to reduce costs, or to introduce new technical processes. They must show that an equitable share in the resulting profit is reserved to users, and that the benefits derived from the agreement are not restricted to the participants. For this purpose, evidence of price reductions, the production of new articles, and improvements in availability and service would be appropriate to show a benefit to consumers. The parties should explain why the restrictions contained in the agreement are essential to the attainment of such benefits.

In order that the Commission may determine whether the agreement enables the participants to eliminate competition with respect to a substantial proportion of the goods concerned, it will be necessary to provide detailed information as to the economic position of the enterprises involved. Evidence as to the number of independent enterprises offering identical or similar products or services and the quantity of products offered will be relevant. The Commission will base its decision on economic considerations and will, no doubt, take account of the size of the enterprises involved, their turnover in the particular product or service, and their share of the total production or supply of services in the relevant sector, the importance of trade between Member States in that sector, and the degree of competition which the agreement permits between the participants and between non-participants. The Commission can require that the participants supply any information which it requires for this purpose. In accordance with article 8 of Regulation 17, a decision to give a dispensatory declaration under article 85(3) is to be valid for a specified period, normally three years. During the specified period, the agreement cannot be impugned under article 85(1), and no fines can be imposed for activities during that period. The Commission may, however, revoke or vary its decision in the event of a fundamental change in the factual situation, or upon an infringement of a condition attached to the decision, or upon the grounds that a decision has been procured on the basis of false information.

In its first statement dealing with patent licensing agreements,[54] the Commission proposed to grant to certain categories of such agreements, group exemption under article 85(3) for a period of three years. It will be remembered, however, that in its second statement dealing with patent licensing agreements,[55] the Commission proposed to treat certain restrictions imposed on the licensee in individual contracts as being alto-

54. 113 *Official Gazette* 2628.

55. *Ibid.*

gether outside the prohibition of article 85(1). In its subsequent statement of December 24, 1962, the Commission declared that the prohibition of article 85(1) would be inapplicable to all the clauses in patent license agreements which were referred to in the first and second statements. Thus, the clauses specified in the first statement for which group exemption was originally envisaged, are now altogether outside the prohibition of article 85(1).

In its first statement[56] concerning exclusive distributorship agreements, the Commission proposed to grant group exemption under article 85(3) to certain categories of such agreements for a period of three years. In view of the provisions of article 87(2)(c) of the Treaty, which provide that the Council shall have jurisdiction to make regulations and directions, it was doubted whether it was within the legal power of the Commission to grant group exemptions under article 85(3) without the necessity of prior notification. The Commission now proposes to submit a regulation to the Council which would establish a procedure for granting such group exemptions. It is, however, instructive to examine the exclusive distributorship agreements which were the subject of the Commission's proposals for it is likely that blanket exemption will be afforded to them at a future date, and the concepts of the proposed group exemption are reflected in Regulation 153 which provides for the use of the simplified Form B1.

In order to qualify for exemption, the enterprises involved must not occupy a dominant position within the meaning of article 86, and the agreements must be bipartite for the exclusive purchase and/or supply of specific goods for resale in a defined part of the Common Market. It appears, however, that a network of distributorships would not be objectionable provided each is bilateral and complies with the other stipulated conditions. The agreements must contain no reciprocal restrictions on the distribution of competitive products manufactured by the parties, and must provide that the restrictions contained therein are not enforceable against third parties. This is intended to prevent parties from resorting to national law which might give an exclusive distributor a right of action against persons importing the same goods into his territory. The agreement must not contain any clauses more restrictive than those listed in parts A and B of the statement. It is interesting to note from the listed clauses that the Commission regarded it as permissible to impose obligations on the distributor not to make, distribute, or act for the duration of the contract as a representative for products which are directly competitive to those to which the contract relates, and not to advertise the product under contract in his own name outside the territory allocated to him. Moreover, the statement envisaged that obligations

56. *Id.* at 2627.

could be imposed on the distributor as to after-sales service and the giving of guarantees, provided the distributor was to make these services available to users of the products within his territory, even if they had not been obtained through him.

It must be emphasized that as the Commission has withdrawn its group exemption proposals, the categories discussed in the preceding paragraph have no legal significance at present. They are referred to merely to illustrate the Commission's attitude and as an aid in forecasting future developments.

Exclusive distributorship agreements are only entitled to special treatment if they involve commercial agents, although parties to those exclusive distributorship agreements which satisfy the requirements of Regulation 153 may, of course, take advantage of the simplified registration procedure by filing Form B1. In other cases the agreements should be notified in the usual manner on Form B. However, Form B1 will not be appropriate if the agreement contains resale price maintenance provisions.

Agreements Exempt from Notification

This survey has so far ignored the special provisions contained in Regulation 17 exempting certain categories of agreement from notification. It is important to consider them at this point.

The exempted categories are listed in article 4(2) of Regulation 17. The effect of Regulation 17 is to exempt these agreements from the general rule that agreements falling within article 85(1) must be notified, or incur the sanction of nullity in default of notification. These agreements must be regarded as conditionally valid, since, even though they may fall within the prohibition of article 85(1), they are not to be treated as null and void by municipal courts for want of notification to the Commission. It is not, however, intended that these agreements shall be permanently exempted from the general rules of notification, and article 22 of Regulation 17 expressly provides for proposals to be submitted by the Commission to the Council to bring certain categories of these agreements within the ambit of the general rules.

Article 4(2) of Regulation 17 defines the agreements as follows:

> Paragraph I shall not be applicable to agreements, decisions and concerted practices where:
>
> (1) enterprises of only one Member State take part and where such agreements, decisions, and practices involve neither imports nor exports between Member States;
>
> (2) only two enterprises take part and the sole effect of these agreements is:
>
> (a) to restrict the freedom of one party to the contract to fix prices or conditions of trading in the resale of goods which have been acquired from the other party to the contract, or

(b) to impose restraint on the exercise of the rights of any person acquiring or using the industrial property rights — particularly patents, utility models, registered designs or trade marks — or on the exercise of the rights of any person entitled, under a contract, to acquire or use manufacturing processes or knowledge relating to the utilization or application of industrial techniques;

(3) their sole object is:

(a) the development or the uniform application of standards and types,

(b) joint research to improve techniques, provided that the result is accessible to all parties and that each of them can exploit it.

It appears that the inclusion of agreements specified in article 4, paragraph 2(1) in the category of agreements exempt from notification is of little value, since such purely national agreements which do not affect imports or exports between Member States have only intrastate effects, and consequently are outside the prohibition of article 85(1). Their inclusion in article 4 is, therefore, immaterial.

To claim relief under category 2(2)(a), only two enterprises must participate; but, whether they are located in different Member States is immaterial. The goods concerned must have been acquired from the other party to the contract. This category would be useful insofar as resale price maintenance agreements are concerned were it not for the words "sole effect." Relief can therefore be claimed only if the agreement imposes no additional restriction, such as a prohibition on exports.

The term "sole effect" similiarly restricts the scope of category 2(2)(b), since it is rare to find a patent licensing agreement which contains no restrictions on sale or distribution. This category should, however, be considered in light of the Commission's statement of December 24, 1962, removing certain clauses in patent licensing agreements from the scope of article 85(1). Nevertheless, the category still has some relevance, for it applies also to agreements involving industrial property of all types, and not merely to patents. It would appear that restrictions imposed on the grantee of such rights which result directly from the grantor's exercise of his industrial property rights will be entitled to relief. This would include restrictions as to territory, duration, and quantity. The Commission intends to consider the position of restrictions of similar nature to those specified in its statement of December 24, 1962, which are included in industrial property agreements but do not relate to patent licenses. It may be that such restrictions will be declared to be outside article 86(1). In that event this category of exemption would become superfluous.

Agreements which fall into the above categories are not to be treated as null and void for want of notification. Such agreements, whether in force on March 13, 1962 or entered into subsequently, may, at the option of the parties, be notified to the Commission at any time to secure a declara-

tion that article 85(1) does not apply, or to obtain a grant of exemption under article 85(3). It is not possible to claim a grant of exemption unless and until they are notified. In spite of their conditional validity, the Commission may investigate such agreements at any time and hold that they contravene article 85(1).[57]

Regulation 17 draws a distinction between exempt agreements in force on March 13, 1962 and those entered into subsequently. Agreements of the latter type, if notified and granted article 85(3) exemption, may receive the benefit of a retroactive exemption effective from the date on which the agreement satisfied the requirements of article 85(3). This may be earlier than the date of notification, and may in fact cover the whole period of the agreement's operation.[58] If, however, article 85(3) exemption is refused, the agreement will be regarded as prohibited from its inception. No fines can be imposed for the period of activity after notification.[59] If on the other hand, the agreement is challenged by the Commission before it is notified and is found to be within article 85(1), fines can be imposed for the period prior to notification, unless the Commission finds that the agreement fulfilled the requirements of article 85(3) during that period.

Agreements in force on March 13, 1962, if notified, may similarly receive the benefit of a retroactive exemption under article 85(3) with an immunity from fines for the period after notification. Additional benefits may, however, be obtained for such agreements if they are notified prior to January 1, 1967. In the first place, no fines may be imposed for any period prior to notification.[60] If not notified by that date, the immunity from fines applies only to the period subsequent to notification. Second, duly notified agreements may be entitled to a retroactive grant of exemption under the provisions of article 7 of Regulation 17. Under this article, agreements which are duly notified to the Commission, and which do not meet the requirements of article 85(3) in their original form may be terminated or modified to meet these requirements. In such event, retroactive validity may be given to the agreement as modified.[61]

Reference has been made throughout this survey to the sanction of nullity with respect to agreements prohibited by article 85(1). The municipal courts of the Member States are required to give effect to the provisions of the Treaty in any suit, and in case of conflict between the

57. Regulation 17, art. 9(2).

58. Regulation 17, art. 6(2).

59. Regulation 17, art. 15(5)(a).

60. Regulation 17, art. 15(5)(b).

61. The due date for notification provided by Regulation 17, art. 7(2) was originally January 1, 1964, but was amended to January 1, 1967 by Regulation 118/63, made on November 5, 1963.

municipal law and the Treaty, the Treaty provisions shall prevail. If, therefore, an agreement is challenged in a municipal court on the grounds of its invalidity under article 85(1), the municipal court will determine whether the agreement does in fact violate article 85(1). If it does, the court will declare the agreement to be null and void. The rights of the parties will then depend on the appropriate municipal law which will govern questions such as severability and the recoupment of payments made under the agreement. A finding of nullity could, therefore, have a serious effect in cases where a substantial credit balance is outstanding, or where valuable technical information has been transmitted. However, the municipal courts have shown some reluctance to declare agreements invalid under article 85(1) in the absence of further clarification of the scope of the prohibition by the Court of Justice in its exercise of interpretative jurisdiction under article 177 of the Treaty.

CONCLUSION

It is clear that the Commission is now entrusted with effective powers to protect competition within the European Economic Community, and enterprises whose activities fall within its jurisdiction must take steps to acquaint themselves and comply with the provisions of articles 85 and 86 or incur the risk of penalties, thereby disturbing their normal contractual and business arrangements. It is equally obvious that the Commission will encounter considerable difficulty in satisfying itself of the correct interpretation of the Treaty provisions. In view of the paucity of intrepretive decisions by the Court of Justice, and the reluctance of the Commission to clarify the scope of article 85(1) and particularly article 86, it would be premature to forecast at the present time the probable trend of administrative action. The Commission has stated that it wishes to proceed pragmatically, and it seems likely that the vague scope of article 85(1) and the dragnet created by the notification requirements will bring restrictive arrangements to the notice of the Commission in such numbers that the Commission will use the information so provided as a basis for future statements of principle. It should be remembered, however, that a more favorable attitude toward cartels has prevailed in Europe in the past than has existed in the United States. Therefore, it is submitted that economic considerations will significantly influence the Commission, particularly in the granting of exemptions under article 85(3).