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THE IMPLEMENTATION OF THE RULES OF COMPETITION OF THE EUROPEAN ECONOMIC COMMUNITY*

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INTRODUCTION

ONE of the most important prerequisites for the realization of the goals of the European Economic Community and of its rules of competition[1] lies in the implementation of Articles 85 and 86 of the underlying Treaty.[2] These provisions form the nucleus of the Treaty's rules of competition. They provide the legal means for the promotion of the economic order of the Community by securing freedom of competition through its uniform regulation. The contents and scope of the rules of competition to be applied in the Common Market were not merely extracted from the legal systems of the signatory states, but were designed (partly without reference to any existing prototype) to form an independent legal system with its own dogmatics and scheme. It is understandable, therefore, that, in the light of the abundant legal problems to be solved, and out of consideration for the special economic interests of the treaty partners in Article 85 and 86, only the ground rules of a supranational regulation of competition could be agreed upon at that time. The shaping of the rules in detail was reserved to the directives to be published by the Council of the Community. The first regulation directed toward the implementation of these articles was issued by the EEC Council of Ministers in Regulation Number 17 on February 6, 1962, at the instance of the EEC Commission.[3]

Article 1 of Regulation 17 declares that the agreements, decisions and concerted practices referred to in Article 85(1) of the Treaty are prohibited, no final decision by a Community or national authority being required. On the other hand, an exemption of a restrictive practice falling within the scope of Article

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* This article is adopted from *Die Anwendung von Wettbewererbsregeln der Europäischen Wirtschaftsgemeinschaft*, 18 Juristenzeitung 105 (1963) by the same author.

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1. *Cf.* Schlochauer, *Die Anwendung von Wettbewerbsregeln der Europäischen Wirtschaftsgemeinschaft*, 18 Juristenzeitung 105 (1963)

2. The "Rome Treaty" [hereinafter cited as EEC Treaty] was signed March 25, 1957 and has been in effect since January 1, 1958.—For a comparison between Articles 85 and 86 of the Rome Treaty and Sections 1 and 2 of the Sherman Act see Buxbaum, *Antitrust Regulation Within the European Economic Community*, 61 Colum. L. Rev. 402, 404-06 (1961); see appendix following this article for the text of these provisions.

3. See 5 Amtsblatt der Europäischen Gemeinschaften 204 (February 21, 1962). As to the Contents of the Regulation see 5 Bulletin der Europäischen Wirtschaftsgemeinschaft 67 (1962); Commission of the European Economic Community, *Die erste Stufe des Gemeinsamen Markts*, Report on the Implementation of the Treaty (January 1958—January 1962) [hereinafter cited as Report] 60; Campbell, *Regulations as to the Implementation of Articles 85 and 86 of the Rome Treaty*, Int'l & Comp. L. Q. 1027 (1962).—See generally Seidl-Hohenveldern, *The First Draft Regulation of the Common Market on Restrictive Practices*, 1961 J. Bus. L. 132.

85(1) from this prohibition can only be obtained through a declaration of non-applicability under Article 85(3). Article 6 of Regulation 17 provides for the granting of such a declaration by the EEC Commission. Theoretically this procedure is preferable to a system of legal exemptions, which approaches the "Missbrauchs-prinzip" (*i.e.*, a system of market regulation in which control is exercised only upon the finding of abuse of market position). In practice, however, it has led to an overburdening number of applications for declarations under Article 85(3).

I. General Objectives

The attainment of the objectives of the EEC will have far-reaching effects on the structure and the functioning of the national economies of the Member States. Although there was much to be said for putting into effect on the same date the measures provided for in the Treaty,[4] it was agreed not to attempt to realize all of the Treaty's objectives at once.[5] Upon consideration of the effects of these measures, a transitional period of twelve, or in some circumstances up to fifteen years was provided for by the Treaty.[6] During this period, which consists of three stages,[7] the economic integration of the Member States is to be gradually effected. The result of the step-by-step realization of the Treaty's goals is that the commands and obligations set out in the EEC Treaty become binding not all at the same time, but that each category of these provisions comes into force upon reaching the appropriate stage of integration.[8] All measures set out for each stage of the transitional period must be introduced and carried out together, so that all sectors of the economy are covered as uniformly as possible.[9] Only at the end of the transitional period will the objectives of the Treaty be fully realized.

In a number of cases the application of the Treaty's principles requires the enactment of more concrete measures, in the form, *inter alia*, of regulations by the Markets' authorities of each stage of integration. In contrast with this gradual implementation is the Treaty's prohibition against any activity inimical to integration.[10] This provision imposed an immediate obligation on the Member States to cease any action likely to impede or jeopardize the integration process. Thus, Member States are enjoined from taking steps which, measured by the Treaty's objectives, would impair the status quo as of the effective date of the

4. See von der Groeben—von Boeckh, 1 *Kommentar zum EWG-Vertrag* 23 (1958)
5. Von der Groeben—von Boeckh, *supra* note 4, at 23.
6. EEC Treaty art. 8.
7. As to the development in practice during the first phase of implementation of the Treaty, see Report, *op. cit. supra* note 3, at 18.
8. See generally *Das Verhältnis des deutschen Kartellrechts zu den kartellrechtlichen Vorschriften des Vertrages über die Gründung der Europäischen Wirtschaftsgemeinschaft*, Legal Opinion—[hereinafter cited as Rechtsgutachten]—presented by the Institute for International and Foreign Trade Law, Frankfurt on Main, 7 Schriften des Instituts für ausländisches und internationales Wirtschaftsrecht Frankfurt am Main 12 (1958).
9. Von der Groeben—von Boeckh, *supra* note 4, at 24. EEC Treaty art. 5(2).
10. EEC Treaty arts. 12, 31, 53, 62, 76.

Treaty. Specific provisions supplementing this prohibition are to be found elsewhere in the Treaty.[11]

The parties in adhering to the Treaty aim at the economic integration of their national markets in a Common Market.[12] To this end, it is expressly stipulated that customs duties and quantitive restrictions on importation and exportation of goods be eliminated, that a common custom tariff toward third countries be established, that the obstacles to the free movement of persons, services and capital be removed, and that a common agricultural and transport policy be inaugurated and social services be coordinated.[13]

Since the signing of the Treaty, the general programs outlined by the EEC Commission for the removal of limitations on the free movement of persons and services have been partially executed. These programs consisted of three sets of directives issued by the Council of Ministers. The first, issued in February 1964, sought the abolition of travel and residence restrictions imposed on citizens of the Member States. It aimed at achieving the freedom of establishment and free supply of services in the wholesale trade as well as in intermediary activities in trade, industry and the crafts. Reinsurance and retrocession were also covered.[14] The second set, issued in July 1964, was concerned with the actualization of free movement of persons and services for independent endeavors in certain processing and manufacturing activities in industry, the crafts and mining, including the extraction of gravel and sand.[15] The last supplementary directive set out the details for transitory measures in the processing and manufacturing fields.[16] Set out in particular were the conditions under which diplomas, examination certificates and other qualifying certificates were to be mutually recognized. The Member States were to comply with the three sets of directives by the end of 1964.

The economic objectives of the Common Market can be prejudiced through activities other than those emanating from a Member State. Agreements in the private sector of the economy, concerted practices and the exploitation of market dominating positions can produce the same or similar effects. True, such agreements and practices may lack the binding force of public enactments, but economic pressure, through the exercise of private market power, can be a meaningful substitute for public sanction. It follows that renunciation alone by Member States of protectionistic measures is not a sufficient guarantee for a free economic community. Market positions favored by such protectionistic activities forbidden to the States by the Treaty should not be allowed to be maintained through the use of economic power by the private sector. To be fully

11. These prohibitions are described and discussed in detail in Rechtsgutachten, *op. cit. supra* note 8.
12. EEC Treaty art. 2.
13. EEC Treaty art. 3. See Ipsen—Nicolaysen, *Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts*, 17 Neue Juristische Wochenschrift 964 (1964).
14. See 7 Amtsblatt der Europäischen Gemeinschaften 845 (April 4, 1964).
15. See 7 Amtsblatt der Europäischen Gemeinschaften 1871 (July 23, 1964).
16. See *id.* at 1863.

and absolutely effective a policy directed toward the organization of a free economic community must arrange itself against private restrictive practices.[17] The rules of competition in the EEC Treaty are directed to this end.[18] They are designed to protect the building of the Common Market from disruptions caused by cartels or market dominating enterprises. And while this aspect of the provisions is of particular importance in the formative period, they have a second function of a general and permanent nature: the protection of competition in the market from frustration by private restrictive trade practices, one of the Treaty's general goals.[19] This double function demonstrates the important role of the rules of competition in the structure of the Common Market.[20]

II. Gradual Implementation and Scope of Regulation

The realization of the Common Market raised a serious question in regard to the provisions governing cartels. Did these provisions enter immediately into full force with the Treaty or would they become effective only at a later date? This question, which led to well-known controversies among commentators[21] has two important aspects.

It cannot be maintained that Articles 85 and 86 of the Treaty were of no legal force before the issuance of the directives suggested by Article 87. The implementation of Articles 85 and 86 prior to that time is provided for, within certain limits, in Article 88. However, the provisions regulating cartels could not enter into full force until the issuance of the implementing directives. In its decision of April 6, 1962, in the *Bosch* case the Court of Justice of the European Communities[22] stated that the provisions of Articles 88 and 89 prevent complete application of Article 85. In Article 85, the prohibition of paragraph 1 and the possibility of a declaration of non-applicability contained in paragraph

17. *Cf.* Report, *op. cit supra* note 3, at 56.
18. EEC Treaty arts. 85-86.
19. See EEC Treaty art. 3(f).
20. As to the significance of the antitrust rules for the joint system of the Common Market, see especially Kronstein, *The Significance of the Provisions Concerning Restraints of Competition within the Total Perspective of the European Coal and Steel Community Treaty and the European Economic Community Treaty* (Reports on Supranational and National European and American Law, presented to the International Conference on Restraints of Competition at Frankfurt on Main, edited by the Institute for International and Foreign Trade Law in Frankfurt on Main), 1 Cartel and Monopoly in Modern Law 111 (1961). See also Buxbaum, *Patent licensing: A Case Study on Antitrust Regulation within the European Economic Community* 9 Antitrust Bull. 103—111 (1964); Deringer, *Europäisches Wettbewerbsrecht im Werden*, 6 Die Aktiengesellschaft 189 (1961); von der Groeben, *Wettbewerb im Gemeinsamen Markt*, 16 Europa-Archiv 643 (1961); Günther, *Harmonisierung der Wettbewerbsbedingungen: Voraussetzung der Wirtschaftsunion*, 19 Der Betriebs-Berater [hereinafter cited as BB] 3, 4 (1964); Spaak-Jaeger, *The Rules of Competition within the European Common Market*, Law & Contemp. Prob. 485 (1961); Thiesing, *Rules Governing Competition Within the European Regional Communities*, Law & Contemp. Prob. 464 (1961); Wolf, *Zum Kartellrecht der EWG*, 12 Wirtschaft und Wettbewerb [hereinafter cited as WuW] 645 (1962).
21. See von der Groeben—von Boeckh, *op. cit. supra* note 4, at 258; Rechtsgutachten, *supra* note 8, at 8.
22. See Legal Affair No. 13/61, published in Gewerblicher Rechtsschutz and Urheberrecht (Auslands- und Internationaler Teil) 307 (1962); WuW, *op. cit. supra* note 20, at 524 (Entscheidungssammlung EWG/MUV 48).

3 form an unseparable unity. The Court reasoned that it would be contrary to the principle of legal certainty to declare certain agreements void before it could be decided which agreements were covered by Article 85 in its entirety. On this point, the Court stated: "An opposite interpretation would lead to the intolerable consequence that these cartel agreements would first have been void for several years without any authority having established the fact, and that subsequently this nullity would be revoked with retroactive effect." A change in this legal situation has been brought about by the issuance of Regulation 17 which sets out rules of procedure governing the measures to be taken by the EEC Commission in the implementation of the anti-trust provisions of the Treaty. It stipulates in Article 1 that "agreements, decisions and concerted practices referred to in Article 85(1) of the Treaty and the abuse of a market-dominating position within the meaning of Article 86 shall be prohibited, no prior decision to this effect being required." The Treaty provided that the effective date of Regulation 17 was March 13, 1962.[23] From that date, the prohibitions expressed in Articles 85(1) and 86 were applicable without the requirement of any decision to that effect. Thus, the decision of the Court of Justice of the European Communities in *Bosch* and Regulation 17 have solved an important problem concerning the application of the anti-trust provision of the EEC Treaty.

There is, however, still another equally important problem for which there has been no authoritative decision to silence the commentators' discussions. Neither the *Bosch* decision nor Regulation 17 addressed themselves to the scope of the cartel prohibition. The Court in *Bosch* declined on procedural grounds to decide the principal question, whether the export prohibition agreement involved fell within the scope of Article 85(1). From the wording of Regulation 17 it is not clear whether the prohibitions contained in Articles 85(1) and 86 should be effective to the fullest extent during the transitional period or whether they should be effectuated gradually, in accordance with the step-by-step realization of the Common Market. This question is different from the one discussed above. The former concerns the effect of the Treaty's provisions on agreements and practices which fall within their scope. The question at hand, however, is to determine to which agreements and practices the provisions are actually applicable in the various stages of the transitional period. The EEC Treaty does not specifically answer this question. In resolving it, therefore, the general principles set out by the Treaty for the building of the Common Market must be taken into consideration. These do not contemplate a full-scale application of a common market policy at once, but a step-by-step development of such a policy. It follows that the Treaty's provisions governing competition should not be interpreted as fully applicable from the very enactment of the Treaty. It is not likely that where the general economic policies of the Member States are to be assimilated gradually, the rules of competition should be implemented immediately with the utmost stringency. In this connection it is important to take into consideration

23. EEC Treaty art. 191.

the dual function of the Treaty's rules of competition.[24] During the transitional period these rules are only applicable to the extent to which they attempt to protect the building of the Common Market against disruptions caused by powerful private interests. On the other hand, they will come into full force, as principles of a uniform economic policy, at the end of the transitional period and the realization of the Common Market. Thus, the actual importance of Articles 85 and 86 lies in the protection afforded the step-by-step integration process and its end results against disruptive measures of the private sector. Therefore, the prohibitions laid down in the articles are at present effective insofar as they come to grips with private activities equivalent in substance and effect to such public intervention as the Treaty directly prohibits. This results not only in the prohibition of such private economic measures as contain restraints of competition beyond the status quo at the effective date of the Treaty, but also prohibits, consistent with the objectives of the Treaty and the above mentioned relation between the rules of competition and the step-by-step development of the Common Market, agreements and restrictions which replace public intervention without actually impairing the status quo. It would be meaningless to remove governmental restrictions while allowing the frustration of this process by private measures.[25]

In accordance with the provisions of the Treaty organizing the construction of the Common Market in several stages, the EEC Commission need only concern itself at the present time with gross violations of the provisions of Articles 85(1) and 86. The more the Common Market develops through the removal of customs and quota barriers, the more rigorously will the Commission have to proceed against anti-competitive activities. Such a procedure, however, involves the risk that private enterprises will not be able to determine for themselves the exact moment on which the progress in the integration of the Common Market turns a previously permissible restraint of competition into a proscribed one. In view of the emphasis placed by the Court of Justice in the *Bosch* decision[26] on the principle of legal certainty, suitable measures to eliminate the above mentioned uncertainty will have to be taken.

III. Declaration of Non-Applicability

The primary procedure of the EEC Commission is the declaration of non-applicability under Article 85(3).[27] The declaration has the effect of law and precludes the application of Article 85(1). Declarations extending to categories of agreements, decisions and concerted activities are also provided for in Article 85(3),[28] and therefore, although Regulation 17 makes no provision for such

24. *Cf. supra* pt. I, par. 3, this article.
25. See Rechtsgutachten, *supra* note 8, at 27.
26. See *supra* note 22.
27. See Deringer, *The Distribution of Powers in the Enforcement of the Rule of Competition Under the Rome Treaty*, 1 Common Market L. Rev. 30 (June, 1963).
28. See Gleiss, *Gruppenfreistellungen vom EWG-Kartellverbot in Sicht*, 17 Neue Juristische Wochenschrift 958 (1964).

group exemptions, the possibility of declarations for such categories of private arrangements should not be excluded. Such an exclusion would require an express ruling in the light of the provisions of Article 85(3). It may be assumed that the "declaration according to Article 85(3) of the Treaty" mentioned in Articles 6, 8, 9 and 10 of Regulation 17 pertains also to the categories of agreements, decisions and concerted activities,[29] if the other formal and material prerequisites for such a declaration are met.

Under Article 9(1) of Regulation 17, the power to issue a declaration under Article 85(3) is vested solely in the EEC Commission. Procedurally, such a declaration requires a notification in accordance with Article 4(1) of the Regulation.[30] It is questionable whether this requirement applies also to those agreements, decisions and concerted practices enumerated in Article 4(2) which are exempted from Article 4(1). It must be assumed that the exemption applies only to the general duty to notify, and that declarations of non-applicability always require a notification, which, of course, is also possible under Article 4(2).[31] A declaration for categories of agreements can only be issued if the categories consist exclusively of agreements, decisions and concerted practices brought to the attention of the Commission.

The declaration of non-applicability under paragraph 3 of Article 85 has the effect of precluding application to the practices therein mentioned of the prohibition of paragraph 1. Therefore, the mere fact of the existence of a condition proscribed by paragraph 1 cannot of itself give rise to a presumption of its invalidity under paragraph 2 or to the possibility of sanctions or claims for compensatory damages. However, the force of national cartel prohibitions will not be limited by a declaration under Article 85(3). This should follow from the wording of the provision which avoids mention of "permission" and speaks only of the "non-applicability" of Article 85(1).[32] It is stated in Article 9(3) of Regulation 17 that "as long as the EEC Commission has not initiated any procedure pursuant to Articles 2, 3 or 6 [of the Regulation], the authorities of the Member States shall remain competent to apply their national law in harmony with Articles 85(1) and 86 in accordance with Article 88 of the Treaty."

The declaration of non-applicability under Article 85(3) binds the Commission in principle and can be revoked by it only through compliance with the narrowly defined provisions set out in Article 8 of Regulation 17, namely, an

29. See European Parliament, Stellungnahme zu dem Vorschlag einer Verordnung über die Anwendung von Artikel 85(3) des EWG-Vertrages auf Gruppen von Vereinbarungen, Beschlüssen und aufeinander abgestimmten Verhaltensweisen, 7 Amtsblatt der Europäischen Gemeinschaften 1275 (May 27, 1964).

30. See also Newes, *New Antitrust Developments in the Common Market*, CCH Common Market Rep. p. 15, ¶ 115 (June 1962).

31. See Merkblatt der EWG-Kommission zu Artikel 85 und 86 des EWG-Vertrages und ihren Durchführungsverordnungen. It contains in its 2d part (III) and in the 3d part (VII) detailed remarks concerning the formalities to be observed in application of the antitrust rules or in case of invocation of their protective function.

32. See Schumacher, *Das Verfahren zur Durchführung der Artikel 85 und 86 des EWG-Vertrages*, Cartel and Monopoly in Modern Law, *op. cit. supra* note 20, at 347-48.

important change in circumstances, infringement of a stipulation of the declaration, abuse of the declaration or procurement of the declaration through false information.

Although the practical effect of the declaration of non-applicability is that of a permission, it must be regarded as a decision in the sense of Article 189(4) of the Treaty.[33] A declaration under Article 85(3) can therefore be appealed to the Court of Justice of the European Communities according to Article 173(2).[34] Any natural or juristic person affected directly and specifically by the decision is entitled to bring the claim; this may include competitors who would resist a declaration of non-applicability for a category of practices. The courts of the Member States, however, cannot themselves decide the validity of a declaration, but must seek in the event of a dispute a preliminary finding of the Court of Justice of the European Communities according to Article 177(1b) of the Treaty. This applies also to courts not of the last instance in spite of the wording of Article 177(3), because, in contrast to the interpretation of Community law itself, review of the legality of acts done by Community organs is reserved to the supranational Court.[35]

The declaration of non-applicability seems usable in principle also during the transitional period, for, under the terms of Article 8(1) of Regulation 17, the declaration may be given only for a definite period and may be revoked or altered if conditions leading to the granting of the clearance have substantially changed. Such a change may be the attainment of a different state of development of the Common Market itself, if the effects of arrangements in the private sector depend on a particular state.[36] The declaration of non-applicability, however, is not suited in all cases to the attainment of the goals determined upon for the transitional period. The declaration presupposes the existence of one of the factual situations set out in Article 85(1). Frequently, however, there are agreements, decisions, and concerted practices which do not fall within the scope of Article 85(1) in the formative period of the Common Market.[37] Furthermore, Article 85(3) sets out additional prerequisites—improvement in production or distribution of goods or advancement of technical or economical progress while reserving to users a fair share in the profit—which, related to the factual patterns considered, may not be manifest in the transitional period.

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33. See von der Groeben—von Boeckh, 2 Kommentar zum EWG-Vertrag 175 (1960).

34. As to actions pursuant to Article 173(2) EEC-Treaty see Diag, *Die Gerichtsbarkeit in der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft*, 83 Archiv des öffentlichen Rechts 132, 164 (1958). With regard to corresponding provisions of the European Coal and Steel Community Treaty, see Schlochauer, *Die Gerichtsbarkeit der Europäischen Gemeinschaft für Kohle und Stahl*, 3 Archiv des Völkerrechts 385, 400 (1951/52).

35. See Gottschlich, *Nachprüfbarkeit von EWG-Entscheidungen durch den Europäischen Gerichtshof im Verfahren der Vorabentscheidung*, 10 Aussenwirtschaftsdient des Betriebsberaters 43 (1964).

36. See Buxbaum, *Incomplete Federalism: Jurisdiction Over Antitrust Matters in the European Economic Community*, 52 Calif. L. Rev. 56 (1964).

37. *Cf. supra* pt. I, par. 2, and pt. II, par. 2, this article.

IV. Negative Clearance

A second procedure available to the EEC Commission is the negative clearance under Article 2 of Regulation 17,[38] a procedure not provided for in the EEC Treaty itself. It was, however, permissible to create it in the implementing regulation, since it does not interfere in and of itself with the rights of those subject to the Community law. Articles 19 and 21 of the Regulation designate the negative clearance as a "decision," but such a "decision" is undoubtedly not equivalent to the "decision" referred to in Article 189 of the Treaty. "Decisions" in the formal sense of that Article are "binding in every particular upon those to whom it is addressed." But the negative clearance lacks such external binding force. The Commission, upon application by participating enterprises or associations of enterprises, merely establishes under Article 2 of the Regulation that "according to information it has obtained, there are, under Article 85(1) or Article 86 of the Treaty, no grounds for it to intervene with respect to an agreement, decision or practice."[39] The clearance, therefore, amounts to formalized legal advice that the Commission does not intend to take action under Articles 85(1) or 86 on certain submitted facts.[40] A binding decision is not rendered as to whether the factual pattern in all respects falls outside the Treaty prohibitions or that the Commission in its discretion has chosen not to act.

It is not clear from the wording of Regulation 17 whether the negative clearance is meant for isolated cases only or also for groups of agreements, decisions and practices. Although Article 2 of the Regulation refers to intervention with respect to "an" agreement, "a" decision or "a" practice, it is questionable whether this implies application only to an actual isolated case. Neither the tenor of the Treaty nor policy grounds can justify such a limited interpretation. From the third term used in Article 2 of the Regulation: "a practice" it follows that the singular form can be adopted by a number of persons in a number of isolated cases. Similarly, an interpretation of "an agreement" as meaning a certain type of agreement would not be contrary to the wording of the Article. The same reasoning applies to "a decision." Such an interpretation does not expand the authority of the EEC Commission beyond its limits. A negative clearance concerning certain standardized groups of agreements, decisions or practices does not interfere more with the rights of the parties involved than a negative clear-

38. See Deringer, *Inhalt und Auswirkungen der ersten Kartellverordnung der Europäischen Wirtschaftsgemeinschaft*, Gewerblicher Rechtsschutz und Urheberrecht (Auslands- und Internationaler Teil) 283, 285 (1962); Schlieder, *Die Anwendung der Artikel 85 und 86 des EWG-Vertrages nach dem Erlass der ersten Durchführungsverordnung*, 17 BB 305, 308 (1962). See also Merkblatt der EWG-Kommission, *op. cit. supra* note 31, at 2d part (II, IV) and 3d part (VII).

39. The first negative clearance ruling dated March 11, 1964, was published in 7 Amtsblatt der Europäischen Gemeinschaften 915 (1964). See comment by Gleiss & Hirsch, *Das erste Negativattest der EWG-Kommission*, 17 Neue Juristische Wochenschrift 1604 (1964).

40. See Deringer, *supra* note 38, at 285; Schlieder, *supra* note 38, at 308. Both argue that the negative clearance is "more than mere information" or "no informal information." This corresponds with the special regulation which, however, does not principally touch the character of the negative clearance as an information.

ance applied to a single case. On the contrary, it would thus be possible for the parties concerned to get a decision on their application at an earlier time. The requirement of an application by the parties concerned remains in the case of a negative clearance concerning a category of activities. This limits the possibilities of the application of this form of procedure.

Regulation 17 does not address itself specifically to the binding force of a clearance on the EEC Commission itself, and does not mention the possibility of a revocation. From the wording of Article 2 of the Regulation, however, it is clear that the Commission is at liberty to intervene when the information forming the basis for the issuing of the clearance proves to be untrue or incomplete, or when the underlying circumstances have changed after the granting of the clearance. The "information . . . obtained" by the Commission as the basis for the negative clearance, as mentioned in Article 2 of the Regulation, includes especially the development stage of the Common Market. This stage is decisive for the establishment of the effects of the agreements, decision or practices with which the negative clearance deals. An advancement in development affects basically the grounds on which the negative clearance has been granted. The principles of legal certainty and legal clarity therefore call for an express reference in the negative clearance to the fact that it is based upon the developmental stage and to the possibility of a revocation in case of a change in the underlying factual pattern. On the other hand, although still an open question, the Commission should not be able to disregard a given clearance in case of a change in legal opinions rather than in factual circumstances. One reason for this conclusion is the fact that the negative clearance is to be granted by a formal procedure, which calls for a publication of the application and the guarantee of a hearing for all parties involved and interested. Another justification for holding that the Commission be bound by its clearance opinion, is to be found in Article 15(1a) of Regulation 17. This punishes the supplying of false or misleading information—which could include incompleteness on a basic issue—with fines ranging from one hundred to five thousand units of account.[41]

While the EEC Commission is bound to its opinion given in a negative clearance, this opinion is by no means conclusive for the cartel authorities of the Member States. The issue involved in a negative clearance is the desire of the EEC Commission to intervene in a particular case, for which the legal significance of the factual pattern is merely a preliminary question. However, if the Commission has initiated a clearance procedure, the national authorities are limited to that extent in applying Articles 85 and 86 of the Treaty by the provision of Article 9(3) of Regulation 17. Since this provision does not apply to the courts of the Member States, their competence in these matters is not restricted by a clearance.[42] A negative clearance has no binding effect in a

41. A unit is fictitious EEC money roughly equivalent to one U.S. dollar. Oberdorfer, Gleiss & Hirsch, Common Market Law ¶ 459 (1963).

42. See Deringer, *supra* note 38, at 286. Concerning the delimitation of competencies

lawsuit before a national court, and its validity and interpretation will have little influence on the result of such a lawsuit. As provided by the Treaty, it is therefore not possible in such cases to request an adjudication by the Court of Justice of the European Communities.[43] However, the existence of a negative clearance may be an important indirect factor in lawsuits before national courts. For instance, the clearance may lead to the ruling out of any intentional fault of the applicant.

For the purpose of attacking the issuance of a negative clearance or the failure to issue the same, there is available the action to set aside a decision as provided in Article 173(2) of the Treaty, or the "Untätigkeitsklage," similar to "writ of mandamus," mentioned in Article 175 of the Treaty.[44] The former would attempt to void a negative clearance, the latter to compel the EEC Commission to act. In an action based upon Article 173(2) of the Treaty, three questions arise. First, is the negative clearance a "decision" in the sense of Article 173(2) of the Treaty? Second, does it "directly and individually" concern the competitor who in most cases will be the complainant? Third, should the negative clearance be declared void—which would be the normal result of such an action if the Court decides in favor of the plaintiff—even though it may be considered to have created an estoppel during its existence in favor of the party to whom the clearance was granted? This would rule out fault of these parties, which excludes the possibility of imposing sanctions or fines and rules out damage claims.

The "Untätigkeitsklage," if requested by a competitor, raises another problem. According to the provisions of the Treaty, the object of such a suit is to compel an action addressed toward the plaintiff. In the case of a negative clearance, however, the desired action would be addressed toward the receiver of the clearance. A solution may lie in the interpretation of Article 175 of the Treaty so that it covers all such actions which directly and individually concern the plaintiff.[45]

The negative clearance seems to be applicable not only to isolated cases, but also to groups of parallel agreements, decisions and practices for which at least a temporary exemption from the prohibition of Article 85(1) of the EEC Treaty has been asked. It appears to be a very useful means for the gradual implementation of the rules of competition of the Treaty, especially during the transitional period.

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between the Court of Justice of the European Community and National Courts, see Hay, *Federal Jurisdiction of the Common Market Court*, 12 Am. J. Comp. L. 21, 30 (The Supremacy of the Community Court) and 35 (Treaty Law in National Courts) (1963). See also Buergenthal, *The Private Appeal Against Illegal State Activities in the European Coal and Steel Community*, 11 Am. J. Comp. L. 325 (1962).

43. EEC Treaty art. 177.

44. See Daig, *supra* note 34, at 177. As to the law on the European Coal and Steel Community Treaty, *cf.* Schlochauer, *supra* note 34, at 402, 407.

45. *Cf.* von der Groeben—von Boeckh, *op. cit. supra* note 33, at 141.

V. Interpretative Declarations

A further possibility available to the Commission in the application of Articles 85 and 86 is an interpretative declaration, according to which certain categories or forms of agreements, decisions and practices affecting competition are exempted from the prohibition of Article 85(1) for a definite term of the transitional period. Such an interpretative declaration is to be distinguished from the declaration of non-applicability under Article 85(3). The interpretative declaration is not an exemption from the prohibitions but a finding that the factual pattern under consideration does not constitute a violation. The interpretative declaration differs also from the negative clearance. Not only is there a finding of no grounds for intervention—a matter being basically in the discretion of the Commission—but also that there is an absence of a factual pattern falling within the scope of Article 85(1).

A declaration as above alluded to is not provided for in the Treaty or Regulation 17. Nor can such a declaration readily be placed among any one of the categories of legal acts enumerated in the Treaty.[46] It does, however, closely resemble the "opinion" provided for therein. The "opinion" is a statement of views in all matters covered by the Treaty which has no legal force and can be delivered as the Commission finds necessary, since no application or formal procedure is required pursuant to the general authorization of the Treaty.[47] If an interpretative declaration is not to be equated to an "opinion," it may be treated as an informal statement of the Commission, to be sure a modus operandi not provided for by the Treaty, but one which requires no special authorization, since it interferes neither with the rights of other Treaty bodies or of the Member States, or those of enterprises covered by the Community law.

An interpretative opinion would be a legal opinion of the Commission but not a legally binding order. The binding effect of the declaration on the Committee itself would have to be determined by the general principles concerning legal advice and waivers. A declaration which later proves erroneous, although revocable under general principles of law, would be effective as a defense for the activity until its revocation. The principle of estoppel (Vertrauensschutz) would prevent establishing guilt or imposing sanctions. When inquiring into the binding effect of interpretative declarations of the Commission on the other organs of the Community, one should avoid the misleading term "authentic interpretation." An "authentic interpretation" has the same binding force as the rule of law interpreted, and therefore can only be enunciated by those organs of the Community empowered to alter the law itself. This authority is not solely within the competence of the Commission. Therefore, the Commission through such an

46. EEC Treaty art. 189. The enumeration of legal acts in Article 189 is not conclusive. See von der Groeben—von Boeckh, *op. cit. supra* note 33, at 166; Everling, *Die ersten Rechtsetzungsakte der Organe der Europäischen Gemeinschaften,* 14 BB 52, 53 (1959).

47. EEC Treaty art. 155.

interpretative declaration cannot infringe upon the freedom of interpretation of the Council or the Court of Justice.

The binding force of an interpretative declaration on the authorities and courts of the Member States is not provided for in the Treaty and is not to be presumed. One may only question whether the competence of the national authorities to make their own interpretation of Articles 85 and 86 is narrowed by an interpretative declaration of the Commission under the terms of Article 9(3) of Regulation 17. This competence exists only so long as the Commission has not initiated a procedure pursuant to Articles 2, 3 or 6 of Regulation 17. However, grave considerations weigh against an analogous application of the provision of Article 9(3) of Regulation 17 to the issuance of an interpretative declaration. The three situations delineated in Article 9 concern proceedings regulated by law under which the Commission adjudicates specific cases or defined categories of specific cases. It would be reasonable to rule out parallel proceedings by the national authorities. The interpretative declaration is not grounded in actuality and does not result from a factual investigation. Therefore the competence of the authorities of the Member States as outlined in Article 9(3) would in no way be limited by an interpretative declaration. The legal position of the courts of the Member States is similar to that existing under the negative clearance, namely, they are not bound by the declaration. Consequently, the interpretative declaration in and of itself offers no ground to request a preliminary decision from the Court of Justice under the Treaty.[48] However, if the interpretative declaration is bound up in a controversy before a national court, the question raised may be submitted to the Court of Justice.[49] Submission of the question is obligatory only when the national court is a court of last resort. To be distinguished from this problem—as in the case of negative clearance—is the actual effect of an interpretative declaration of the Commission. The national courts must consider, in following an erroneous declaration (for example in an action for damages) whether the declaration has precluded damages for fault. The absence of actionable fault, however, does not exclude the possibility of injunctive relief.

An action to set aside an interpretative declaration before the Court of Justice of the Communities according to Article 173 is not possible, since such a declaration lacks the character of a "decision." However, according to Article 175, an "Untätigkeitsklage" could possibly be brought compelling the Commission to act in a manner other than that set out in its declaration. Further, the possibility of a claim for damages against the Community itself should not be excluded, if an interpretation of the Commission proves erroneous, since it is possible that no fault, and consequently no damages, could be attributed to the competitor who has followed the interpretation.

Because of its wide range of inherent possibilities, the interpretative decla-

48. EEC Treaty art. 177.
49. *Ibid.*; see Buxbaum, *supra* note 36, at 74-80.

ration of the Commission should prove an important tool in the gradual implementation of the Treaty's rules of competition.

VI. Problem of Delay

One other problem area remains to be discussed. There is a considerable period of time between the notification of a cartel agreement (aimed at a declaration of non-applicability) or the application based on Article 2 of Regulation 17 (aimed at a negative clearance) and the decision on such notification or application. During this period, economic activities related to the restrictive trade practices involved could already have been put into effect.

The fines for infringing Article 85(1) or 86 of the Treaty provided for in Article 15(2a) of the Regulation may not be imposed, according to Article 15(5a) of the Regulation for actions taking place "after the notification to the Commission and prior to its decision regarding the application of Article 85(3) of the Treaty, insofar as these actions do not go beyond the limits of the activity described in the notification."[50] In accordance with Article 15(6) of the Regulation, the fines may be imposed "once the Commission has informed the enterprises concerned that after a preliminary examination it considers that the conditions of Article 85(1) of the Treaty have been fulfilled and that application of Article 85(3) is not warranted."[51] In the absence of such notice, the notification under Article 4 of the Regulation will insulate the notificant from fines but has no further consequences. In particular, it does not affect the civil law interpretation of the activities involved. Expenses incurred by the applicants in the expectation of a declaration of non-applicability cannot be claimed, even if the duration of the procedure is excessively long. Furthermore, the insulation from fines does not alter the principle that such restraints of competition which have to be notified are basically prohibited and can only be legalized by a decision provided for in Article 85(3) of the EEC Treaty.

Since there is no provision parallel to that of Article 15(5) of Regulation 17 concerning the period between application for and decision on a negative clearance, the legal problems involved here are basically different. It has been concluded therefrom that, in contrast to Article 15(5) of the Regulation, the imposing of fines in these cases would be allowed, the Commission retaining the discretion to refrain from doing so.[52] There is, however, much to be said for a corresponding application of Article 15(5) of the Regulation in cases where an application for a negative clearance is under consideration.[53] The similarity of facts and proceedings in both cases, as well as the fact that the applicant for a negative clearance assumes his activities to be lawful while the notificant under Article 4 of the Regulation assumes his practices to be prohibited, are strong

50. See Newes, *supra* note 30, at 17, ¶ 119.
51. The Commission of the European Economic Community first implemented this provision in dealing with the production and marketing of gravel by numerous Dutch, Belgian and German enterprises.
52. See Schlieder, *supra* note 38, at 308.
53. See Deringer, *supra* note 38, at 286.

arguments for this conclusion. The application has no effect on the consequences under civil law of the activities which form the subject of the application. This follows directly by an *argumentum a majore ad minus* from the fact that a negative clearance, once it has been granted, does not affect the consequences under civil law whatsoever. A delay in the decision on the application for a negative clearance does not generally entitle the applicant to conclude that the Commission will tacitly tolerate the practices concerned. If, therefore, he already has incurred expenses in trying to obtain the clearance, he cannot claim any compensation in the event of a subsequent rejection. It seems advisable that the EEC Commission expressly refer to this legal situation in a form attached to the acknowledgment of the application for a negative clearance.

APPENDIX

TREATY OF ROME

Article 85

(1) Incompatible with the Common Market and prohibited are all agreements between or among enterprises, decisions of associations of enterprises and concerted practices which are apt to affect adversely trade between member states and which have as their purpose or effect a prevention, restriction or distortion of competition within the Common Market, in particular:

(a) direct or indirect fixing of purchase or sales prices or of other terms and conditions of doing business;
(b) limitation or control of production, distribution, technical development or investments;
(c) allocation of markets or sources of supply;
(d) application of unequal terms to parties furnishing equivalent considerations, whereby they are placed at a competitive disadvantage;
(e) subjecting the conclusion of contracts to the condition that the other parties to them accept additional goods or services which are unrelated to the subject matter of the contract either by their nature or by commercial custom.

(2) Agreements or decisions prohibited by this Article are null and void.

(3) The provisions of paragraph (1) may, however, be declared inapplicable to any of the following:

—agreements or categories of agreements between or among enterprises,
—decisions or categories of decisions of associations of enterprises,
—concerted practices or categories thereof,

which contribute to the improvement of production or distribution of goods or to the promotion of technical or economic progress, while reserving to consumers an equitable participation in the resulting profit, and which do not

(a) subject the enterprises concerned to restrictions which are not indispensable to the achievement of these objectives, or
(b) open up possibilities to the enterprises concerned to eliminate competition for a substantial portion of the goods involved.[1]

Article 86

Incompatible with the Common Market and prohibited is the abusive exploitation by one or more enterprises of a dominant position in the Common Market or in a substantial part thereof, to the extent to which trade between member states is apt to be adversely affected thereby.

Such abusive practices may consist, in particular, of the following:

(a) direct or indirect imposition of unfair purchase or sales prices or of other terms and conditions of doing business;
(b) limitation of production, distribution or technical development to the detriment of consumers;
(c) application of unequal terms to parties furnishing equivalent considerations, whereby they are placed at a competitive disadvantage;

1. Oberdorfer, Gleiss & Hirsch, Common Market Cartel Law (1962) at 1-2.

(d) subjecting the conclusion of contracts to the condition that the other parties to them accept additional goods or services which are unrelated to the subject matter of the contract either by their nature or by commercial custom.[2]

REGULATION 17

Article 1—BASIC PROVISION

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.

Article 2—NEGATIVE CLEARANCE

At the request of the enterprises or associations of enterprises concerned, the Commission may find that, according to the information it has obtained, there are, under Article 85, paragraph 1, or Article 86 of the Treaty, no grounds for it to intervene with respect to an agreement, decision or practice.

Article 3—ENDING OF INFRINGEMENTS

(1) If, acting on request or *ex officio*, the Commission finds that an enterprise or association of enterprises is infringing Article 85 or Article 86 of the Treaty, it can by means of a decision oblige the enterprises or associations of enterprises concerned to put an end to such infringement.

(2) A request to this effect may be submitted by:

(a) Member States;

(b) Natural and legal persons and associations of persons, who show a justified interest.

(3) Without prejudice to the other provisions of the present Regulation, the Commission, before taking the decision mentioned in paragraph 1, may address to the enterprises or associations of enterprises concerned recommendations designed to put an end to the infringement.[3]

2. *Id.* at 69.
3. *Id.* at 86, 95, 99-100.