ANTITRUST REGULATION WITHIN THE EUROPEAN ECONOMIC COMMUNITY

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During the past several years, American lawyers have paid considerable attention to the extra-territorial effect of American antitrust laws and decisions, and to their impact on the operations of American business abroad. Relatively ignored, however, has been another aspect of antitrust development that is certain to have a much greater influence on the conduct of American enterprises abroad: the new anti-restrictive acts and bills of various European countries and of the emerging European Common Market.

Four of the six members of the European Economic Community have already enacted working antitrust legislation. In addition, the Rome Treaty

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2. Belgium: Law for Protection against the Abuse of Economic Power, May 27, 1960, Moniteur Beige (Bel.). 22 June 1960, reprinted in 10 WIRTSCHAFT UND WETTBEWERB 704 (1960); see, e.g., del Marmol, Das belgische Gesetz gegen den Missbrauch wirtschaftlicher Macht, 10 WIRTSCHAFT UND WETTBEWERB 629 (1960); Franck, La législation belge, in LA LIBRE CONCURRENCE DANS LES PAYS DU MARCHE COMMUN, SUPPLEMENT TO 16 REVUE DU MARCHE COMMUN 9 (July-August 1959), (Report of a conference held at Caen, France, 8-10 May 1959) [hereinafter cited as CAEN CONFERENCE].


7. Italy and Luxemburg have introduced bills in their legislatures. See Guglielmetti, La législation italienne, in CAEN CONFERENCE 17; Scott-Deiters, Ein neuer Antimonop-

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establishing the Common Market contains antitrust provisions that will be vital in shaping the economic and competitive framework within which these six countries hope to achieve the objectives of this Treaty. While broad issues of history, political science, and economics underlie these objectives, this article will concern itself only with the relatively narrow but central problem of the implementation of the Community’s economic and political aims by the use of antitrust laws, and will endeavor to note some of the more significant consequences for American lawyers and businessmen of these relatively unexplored provisions.

Obviously, the merging of national markets in the Common Market offers many opportunities for the extension of restrictive economic practices. While the abolition of import tariffs and quotas between the member nations can be a liberalizing factor in the production and distribution of goods, their removal could easily lead to the expansion of local cartels and other anti-competitive forces and structures to a multi-nation Community level. With


A note on citations: Articles and material appearing in WIRTSCHAFT UND WETTBEWERB will hereinafter be cited as WuW. This comprehensive antitrust law review, while appearing in Germany and emphasizing German law, covers important European developments and includes European Communities material. In addition, it compiles reasonably comprehensive German and European Communities case reports in a continuous sequence under several headings, as WuW/E (for “Entscheidungen” or decisions); thus: WuW/E BGH (Federal Supreme Court); WuW/E BVG (Federal Constitutional Court); WuW/E OLG (Appellate District Court); WuW/E LG/AG (District Court/Municipal Court); WuW/E BKARTA (Federal Cartel Office).


4. An indication of the amount of material already produced may be obtained from 2 SECRETARIAT OF THE EUROPEAN PARLIAMENT, BIBLIOGRAPHY ON THE COMMON MARKET (1958).

For a discussion of the broader issues involved, see, e.g., HAAS, THE UNITING OF EUROPE (1958); Stein, An American Lawyer Views European Integration—An Introduction, in 1 STEIN & NICHOLSON 1; Looper, The Significance of Regional Market Arrangements, in LEGAL PROBLEMS OF INTERNATIONAL TRADE 364 (Proehl ed. 1959).

5. Aspects of this problem were among the subjects of a conference recently sponsored by the Federal Bar Association and other organizations, see [1960] INSTITUTE ON THE LEGAL ASPECTS OF THE EUROPEAN COMMUNITY (1960) [hereinafter cited as FBA INSTITUTE]. See also FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS ch. 15 (1958).

6. See, e.g., HAAS, op. cit. supra note 4, at 318; COMITÉ INTERGOUVERNEMENTAL CRÉE PAR LA CONFÉRENCE DE MESSINE, RAPPORT DES CHEFS DE DÉLÉGATION AUX MINISTRES DES AFFAIRES ÉTRANGÈRES 1956 [hereinafter cited as SPAAK REPORT]; Stein, supra note 4, at 12; WACHSUNDE INTERNATIONALE MARKT ZUSAMMENARBEIT, 9 WuW 44 (1959); GRUPPIERUNG DER AUTOMOBILINDUSTRIE IM GEMEINSAMEN MARKT, 9 WuW 277 (1959). In the case of coal and steel producers, see Berisch, Zusammenschlüsse und Kartellaktionsmassnahmen in der Montanunion, 9 WuW 548 (1959); Isay, Montanunion und Exportkartelle, 3 WuW 577 (1953); HAAS, op. cit. supra note 4, at 75-80.

7. SICTOVSKY, ECONOMIC THEORY AND WESTERN EUROPEAN INTEGRATION 20 (1958). At the same time, trade associations with a regional basis have also multiplied in divers industries, helping local industry to gain awareness of the challenges of a Common Market. See THIRD REPORT 16.
this in mind, and in a pattern surprisingly analogous to the experience of the United States, the treaty signatories favored some kind of antitrust legislation. 8

The antitrust provisions of the Rome Treaty are quite straightforward. Article 85 prohibits, with certain exceptions, 9 concerted practices and agreements, likely to affect trade between member states, the object or result of which is to restrict competition. Article 86 forbids without exception the abuse of dominant market position by entities. The general standard of anticompetitive effect used to establish violations in both articles are necessarily vague, and as in the United States, considerable administrative and judicial discretion must be employed to create a body of precedent.

Articles 87 and 88 govern the application of these standards, respectively, by calling for appropriate regulations on several obvious questions of procedure and administration, and by providing for the interim applicability of local law, to be used in consonance with articles 85 and 86, pending adoption of these regulations.

At the present stage of Common Market development two major problems under these antitrust provisions present themselves: first, the substantive content of these provisions, alone and in relation to the existence or lack of antitrust legislation in the member states; second, the proper procedure for effectuating these provisions, especially in relation to non-uniform national procedures.

I. THE SUBSTANTIVE EFFECTS OF ARTICLES 85 AND 86

The superficial resemblance between Articles 85 and 86 of the Rome Treaty and Sections 1 and 2 of the Sherman Act 10 is immediately apparent. Both the treaty and the act separate restrictive practices engendered by the exercise of monopoly power from those created by concerted activities; more important, both are programmatic and require the slow accretion of case law to become helpful guideposts. Since the United States has already passed through a great part of this accretion phase, its antitrust case law will undoubtedly be of great interest to the European bar. In fact the

9. Article 85(3). There is some question as to the significance of the phrase “null and void”:
   It is doubtful that the nullity of such arrangements is intended to be more than a presumption, as the appropriate authority may in each case grant exemption where it is established that the management will contribute to an improvement in production or distribution.
number of references by commentators\textsuperscript{11} and courts\textsuperscript{12} to our own antitrust laws is remarkable, especially in the preliminary determinations of "interstate commerce," "per se" rules of illegality as opposed to the rule of reason, and the percentages of market occupancy that indicate the existence of a monopoly.\textsuperscript{13}

The relevance of American experience is, of course, clear. The treaty concerns the economic position of six countries, but primarily as an entity. Thus it is less concerned with the play of restrictive forces entirely within a member state than between such states. To this extent, doctrines of "interstate commerce" must be developed, and a likely source is United States case law.\textsuperscript{14}

It would, however, be misleading to overemphasize this relationship. Antitrust concepts affect the economy, but they are also shaped and defined by it.\textsuperscript{15} From this point of view, the Treaty and national legislation work on a different base than do the Sherman and Clayton Acts—namely, on the syndicate and association form of doing business, which is prevalent in Europe.\textsuperscript{17} European producers associate to export competitively vis-a-vis other countries' exporters, to set uniform discounts and rebates and sizes, and to set uniform conditions of sale and of transport; in short, one might say, in order to bring order.

The procedure by which existing national antitrust legislation is enforced by some member states recognizes the resulting basic differences, for on the whole administrative agencies are utilized to examine such arrangements under legal standards probably as general as those of the Sherman Act.\textsuperscript{18} Thus we may anticipate that agreements and associations which would

\textsuperscript{11} Thus \textit{Langen, Kommentar zum Kartellgesetz}, app. 11, 474 (1958) lists a bibliography of articles concerning foreign cartel laws, and cites no less than 21 articles appearing in German periodicals since 1950 discussing American antitrust law. In addition, he cites United States decisions in aid of his analysis of the German Cartel Law and appends a lengthy excerpt from the \textit{Report of the Attorney General's National Committee to Study the Antitrust Laws}. Id. at 479. Another excellent commentary, \textit{Müller-Henneberg & Schwartz, Gesetz gegen Wettbewerbsbeschränkungen, Kommentar} (1958) [hereinafter cited as \textit{Gemeinschaftskommentar}], contains, at 80, an entire chapter on American antitrust law by Kaskel. In addition, the periodical \textit{WuW} contains what amounts to a permanent section on American antitrust developments.

\textsuperscript{12} See, \textit{e.g.}, Decision of Appellate District Court Munich, 5 March 1959 ("Tageszeitungen"), \textit{WuW/E OLG} 313 (10 WuW 437 (1960)); Decision of Federal Cartel Office, 26 June 1959 ("Melitta"), in \textit{WuW/E BKARTA} 60 (9 WuW 756 (1959)), aff'd, 4 Sept. 1959, in \textit{WuW/E BKARTA} 73 (9 WuW 835 (1959)).

\textsuperscript{13} See, \textit{e.g.}, Schwenk, \textit{Die Ride of Reason und die "per se" Regel im amerikanischen Antitrustrecht}, 7 \textit{WuW} 339 (1957); \textit{Langen, op. cit. supra} note 11, at 227-35; Biedenkopf, \textit{Vertragliche Wettbewerbsbeschränkung und Wirtschaftsverfassung} (1958).


\textsuperscript{15} See authorities cited note 67 infra.


\textsuperscript{17} See Marchal, Cartels and Agreements, Address to Study Conference on Free Competition in the Countries of the Common Market, Caen, May 8-10, 1959.

\textsuperscript{18} This is the Dutch and French approach in practice. Cf. Linssen, \textit{Massnahmen
be struck down at once in the United States because of their "probable effect" would be challenged in the Community only if they in fact produce the undesired restrictive consequences, despite the terms of the Treaty that prohibit likely anticompetitive effects. The cartel authorities of the various member states, as they are created or expand their functions, will likely restrict themselves to taking care that agreements previously approved do not bring about actual restrictions of competition. This difference is in part due to differing statutory standards, but in greater part reflects the differences in underlying economic practices.

A. Substantive Scope of Article 85

1. Restrictive trade practices prohibited by article 85. Article 85 forbids and nullifies agreements between enterprises, decisions by associations of enterprises, and concerted practices, that are likely to affect trade between member states and that intend or effect the prevention, restriction, or distortion of competition within the Common Market. Since competition within a member state is competition "within the Common Market," a restrictive practice that is likely to affect "interstate" commerce may be prohibited even though designed to restrict competition solely within one country. Thus at one stroke the provision is made applicable to local agreements, if their effect is to render a local producer less able to trade with other member states.

20. It should be recognized that this position is in indirect conflict with the position of commentators on the 'interstate commerce' effect of monopolistic power in the Common Market. Thus Spengler argues that a monopolistic position "in the Common Market" under article 86 requires a position in more than one member state. Spengler, Abgrenzung zwischen Gesetz gegen Wettbewerbsbeschrankungen und EWG-Vertrag, in GEMEINSCHAFTSKOMMENTAR 968; Spengler, Abgrenzung zwischen dem GWB und den "Vorschriften für Unternehmen" im EWG Vertrag, 8 WuW 73, 461 (1958); see Günther, Die Regelung des Wettbewerbs im Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft, 7 WuW 275, 283 (1957). Leaving aside for the moment consideration of this position as to the article 86 problem, there is nevertheless a difference in the market terminology used in the two articles; see the text accompanying notes 45 infra. But see Goldstein, in 1958 INSTITUTE 239 n.100.

This argument may not prevail if the Commission's proposed regulations are adopted. Article 5(2) thereof limits enterprises' duty to notify the Commission of restrictive acts, as listed in article 5(1), to those involving enterprises located in different member states.
Five types of practices, although not exclusive, are expressly condemned. Three are familiar Sherman Act transgressions: price fixing and the fixing of other "trading conditions"; controls on production, markets, technical development and investment; and division of markets and supply sources. One, interestingly enough, is the imposition of different conditions for various transactions involving similar goods that adversely affect competitors of the favored party, the last cumbersomely emerges as the tie-in agreement.

Price fixing, whether by vertical or horizontal agreement of competitors, is unqualifiedly prohibited; there is no exception for fair-traded goods, which constitute a large part of the consumer product market in Europe. This prohibition is particularly striking when compared to the German Cartel Law, which forbids restrictive practices generally but permits fixing the prices of fair-traded goods. Nor is an exception made for price fixing of patented goods sold by a licensee, which is another common feature of the European economy. Again, the German Cartel Law, which forbids patent license agreements extending restrictions beyond the scope of the patent monopoly, exempts restrictions on the price of the patented article.

Limitations on production, on internal technological development, and the like, are declared null and void. While such restrictions embodied in horizontal agreements between competitors would be clearly prohibited, the use of patent licenses to control production of patented goods or goods

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21. Because of the dearth of local interpretation it is unclear whether this provision relates to both first and second line injury.

22. CARTEL LAW § 16; cf. LANGEN, op. cit. supra note 11, at 147-62. See also Schwartz, Veitikale Preisbindung bei Markenwaren und Verlagserzeugnissen, in GEMEINSCHAFTSKOMMENTAR 355.

23. LANGEN, op. cit. supra note 11, at 155. See generally LÜDECKE & FISCHER, LIZENZVERTRÄGE (1957). However, Article 5(3) of the Proposed Regulations of the EEC Commission would exempt agreements between two parties involving certain aspects of direct resale price maintenance, as well as certain patent and trademark license restrictions.

24. CARTEL Law § 20.

25. CARTEL Law § 20(2) subd. 2; see note 27 infra. It may be, however, that the right to set prices can be exercised only if the particular commodity is patented, but not if an unpatented product is manufactured by a process patent. See Kronstein, supra note 2, at 292.

This formal "inconsistency" in the German Cartel Law and the Common Market Treaty is the basis of one of Spengler's main arguments against the immediate applicability of articles 85 and 86. Spengler, in GEMEINSCHAFTSKOMMENTAR 977. This particular argument, of course, minimizes the practical effect of article 85(3); see text accompanying note 33 infra.

26. For a summary review of similar prohibitions under the local law of member states, see note 36 infra. For a general discussion of producers' associations' activities and decisions, see Nissen, Beschlüsse von Unternehmensvereinigungen im Kartellrecht der Europäischen Gemeinschaften, 10 WUW 250 (1960). Nissen argues that the decisions of such associations ought not to fall within the scope of article 85 if they merely set forth the expected competitive behavior of the association, an argument not likely to be adopted by the Commission. Id. at 252.
made by patented processes should be considered a permissible exception, since such restrictions are commonly understood to be within the monopoly grant of a patent.\textsuperscript{27} However, other patent license arrangements that can not be said to fall within the patent grant, such as a provision limiting a licensee in his research efforts, or requiring the grantback of parallel or improvement licenses, may be void under this subsection.

The division of markets between competing producers is clearly prohibited.\textsuperscript{28} However, the restriction of a patent licensee to a given territory within the area of the patent monopoly would in all likelihood be regarded as a legitimate exercise of the patent monopoly itself. Nevertheless it is questionable whether a patent license would be valid under article 85 if as a condition for permitting the licensee to exploit a territory within the patent's monopoly, the licensee was compelled to agree not to sell in other territory.

No decisions or discussions have yet explored the significance of the fourth type of restraint—the use of discriminatory conditions against parties to transactions that result in a competitive disadvantage. It seems clear, however, that the whole field of price and service discrimination is opened up by this clause. Thus, even if the stultifying complexity of Robinson-Patman and the apparent acceptance of these doctrines in § 20 of the German Cartel Law, assumes a logically indefensible difference between requiring a patent licensee to produce only a limited percentage of his requirements of the patented product, and requiring him to maintain the resale price of a patented product.

Section 20(1) of the German Cartel Law also validates in general terms restrictions in licenses regarding territory, time of exploitation, type of article to be produced, and the like, which restrictions are considered within the scope of the patent monopoly. Thus these restrictions would probably be valid under the Treaty.

However, § 20(2) legitimatizes restrictions that are clearly beyond the grant of the patent monopoly and therefore would probably be invalid under the Treaty. Among these are restrictions on the price of the patented article, on standing to challenge the validity of the patent, on competition outside the market area covered by the Cartel Law, and on the use of improvements of the patented article and the grant back of improvement licenses. See Sander, \textit{Die einfache Patentgemeinschaft im GWB}, 9\textit{WuW} 499, 500-04 (1959). This approaches the problem of patent pools, which in Germany may fall within § 1 of the Cartel Law despite the legitimacy of most of their provisions under § 20. Cf. \textsc{Langen}, \textit{op. cit. supra} note 11, at 192. Article 5(3) of the Proposed Regulations of the EEC Commission, however, evinces a more tolerant approach to such patent-based restrictions.

27. Admittedly this argument, based on American patent law and antitrust doctrines and the apparent acceptance of these doctrines in § 20 of the German Cartel Law, assumes a logically indefensible difference between requiring a patent licensee to produce only a limited percentage of his requirements of the patented product, and requiring him to maintain the resale price of a patented product.

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28. For a summary review of similar prohibitions under the local law of member states, see note 36 infra.

It has even been suggested that article 85 may render only horizontal, or market-compartmentalizing, arrangements prima facie illegal. O'Brien, \textit{supra} note 8, at 127, 129. However, for an indication that national authorities will not construe article 85 so narrowly, cf. Decision of District Court Frankfurt, 13 Feb. 1959 ("Uhrenarmbänder"), in WuW/E LG/AG 137 (10 WuW 639 (1960)). In a 1958 Dutch case, an agreement between a Belgian and a Dutch firm whereby each undertook, with certain qualifications, not to export to the other's territory was deemed to violate article 85. Tuberies Louis Julien S.A. v. Van Katwijk's Papier-en Carton Verwerkende Industrien N.V., Decision of Arrondissementsrechtsbank te Zutphen, Rol. Nr. 23/58, 11 July 1958, reported in 8 WuW 779 (1958) (appeal pending). The agreement was upheld, however, but only because a Dutch statute forbids the application of these treaty provisions unless the acts complained of also violate Dutch law. Law of 5 Dec. 1957, Staatsblad No. 528 (1957) (Neth.), reprinted in 11 WuW 38 (1961).
Act\textsuperscript{20} problems is not exported to Europe, businessmen should be aware of the likelihood that individual discriminatory pricing distinctions, unencumbered by producers' horizontal agreements, will fall within the scope of article 85.\textsuperscript{30}

It is equally clear that tie-in provisions are vulnerable to both private and administrative challenge.\textsuperscript{31} The limitation to tie-in agreements covering goods or services that in fact or by commercial usage have no relation to the subject matter of the contract should not be narrowly construed. Recent discussions of this problem under German law indicate that this clause will not be considered a carte blanche for tie-in contracts, and this attitude may indicate that there is a more extensive prohibition than the face of the treaty implies.\textsuperscript{32}

In general, then, it would appear that the number of practices that can under given circumstances constitute a violation of article 85 is at least as extensive as that which is vulnerable to attack under the Sherman and Clayton Acts. Nevertheless, the underlying differences between American and European economies and market practices are reflected in the exemptions created by article 85(3). This distinction is even more vividly articulated by the enforcement structure created for the policing of these exemptions—and thus of the whole competitive system; and even more to the point, by the underlying temper of this enforcement as illustrated in the few cases that have applied the exemption provision.

2. Exemptions from article 85. The escape clause in article 85(3), to some extent a reflection of French insistence on "reasonable" competition, will unquestionably prove to be the keystone to any eventually developed Community antitrust law. The very existence of the exemption implies implementation by courts and agencies and thus ensures that competition within


\textsuperscript{30} See van Leeuwe, \textit{Les prix imposés}, in \textit{CAEN CONFERENCE} 47-48; Frankfurter Allgemeine Zeitung, Jan. 30, 1960, p. 7 (discussion of a pending German case concerning the right of major gasoline suppliers to reduce retail prices locally to meet independents' competition). There is, of course, the possibility of Commission action against discriminatory practices in fields such as agriculture and transportation, in which the Treaty gives it the assignment of promoting "constructive competition." Articles 43, 73-75. In pursuit of this assignment, the Commission recently promulgated Regulation 11, which will prohibit carriers from utilizing discriminatory freight rates based on country of origin or destination of the affected goods. For a discussion of the specific but partial applicability of articles 85-88 to transportation, see Weyer, \textit{Gelten die Wettbewerbsbestimmungen des EWG—Vertrages auch für den Verkehr?}, 11 WoW 11 (1961).

\textsuperscript{31} For a similar position on exclusive dealing agreements, see Guglielmetti, \textit{Les exclusivités de vente}, in \textit{CAEN CONFERENCE} 38. In France, exclusive dealing agreements are specifically condemned by statute. \textit{Id.} at 38-39; see Goldstein, \textit{National and International Antitrust Policy in France}, 37 \textit{TEXAS L. REV.} 188 (1959).

\textsuperscript{32} LANGEN, \textit{op. cit. supra} note 11, at 191, and material cited therein. Of course, the German experience, as does the French, rests in part on a specific statute that condemns certain types of exclusive dealing contracts. \textit{CARTEL LAW} § 18; see LANGEN, \textit{op. cit. supra} note 11 at 168-78; Goldstein, \textit{National and International Antitrust Policy in France}, 37 \textit{TEXAS L. REV.} 188 (1959).
the Common Market will be a regulated virtue.\textsuperscript{33} The exemption is so general that its interpretation is unpredictable. An otherwise null and void\textsuperscript{34} practice may be approved if it promotes economic progress while reserving to the consumer an equitable share of the resulting profit, and neither is an unnecessary restriction nor eliminates competition in a substantial part of the relevant market. This is hardly a reliable guide for prediction. "Profit" is not used in a monetary sense, but as "advantage,"\textsuperscript{35} and other important words are equally ambiguous. Thus, even more than in the application of the Sherman Act, the Community antitrust law can only take form as the national cartel authorities, the national courts, the Court of Justice, and the Commission develop a body of case law.

To search for meaningful guides in the existing national precedents of Germany, the Netherlands and France is probably premature. Nevertheless, the treaty provisions will be enforced locally, and therefore the attitude of these courts and agencies as expressed in existing case law should prove enlightening. Even a brief review of the most recent decisions in these countries indicates that the enforcement of antitrust law will not do away with reasonable restraints deemed necessary to achieve more efficient production, precisely as is expressed in article 85(3).\textsuperscript{36} As a matter of fact,
Among specific practices that have been the subject of discussion are:


2. Horizontal price fixing arrangements: see Decision of Federal Supreme Court, 14 Jan. 1960 ("Kohlenplatzhandel"), in WuW/E BGH 369 (10 WuW 347 (1960)) (a non-binding price recommendation agreement to which few adhered had no detrimental effect on competition); Decision of Federal Cartel Office, 30 Dec. 1959 ("Rohrenhersteller"), in WuW/E BKARTA 119 (10 WuW 209 (1960)).


5. Price discrimination: although no actionable discrimination was found, see the discussion in Decision of District Court Cologne, 17 Dec. 1958 ("Fahrzeugbewachung"), in WuW/E LG/AG 112 (9 WuW 574 (1959)); Decision of Appellate District Court Düsseldorf, 1 Aug. 1958 ("Mühlenkartell"), in WuW/E OLG 230 (8 WuW 702 (1958)).

6. Discriminatory conditions for entry into a trade or professional association, or for entry into contractual relations: see Decision of District Court Berlin, 3 April 1959 ("Allgemeine Ortskrankenkassen"), in WuW/E LG/AG 116 (9 WuW 578 (1959)); Decision of Appellate District Court Neustadt, 1 April 1958 ("Stromlieferungsvertrag"), in WuW/E OLG 252 (9 WuW 288 (1959)).

7. License restrictions beyond the patent monopoly: see Decision of District Court
a study of the detailed German statutory sections pursuant to which the Cartel Office may register and allow restrictive practices necessary to nationalize an industry and protect it during critical changes in the economy indicates that these national courts and agencies may at first do little more than publicize and moderate most concerted restrictive practices.

The Netherlands: The Minister of Economics has actively investigated restrictive practices, which began in 1946. These became especially intensive in 1956, when 243 price fixing arrangements were investigated, of which 115 were eliminated or modified. Investigations have been selective and no blanket prohibition has been imposed. The Minister shows particular leniency if open price competition would be ruinous to established firms. Even then, however, the prices set may be no higher than would be charged by the most efficient members of the particular competitive group.

1. The earliest cases, especially in 1946, condemned boycotts that had been used to force trade association members into specified exclusive dealing arrangements or to exclude new entrants from the market. See Decision of Jan. 13, 1953 (voiding an agreement to prohibit entry of vertically integrated firms into the trade); Decision of March 24, 1950 (voiding a boycott of certain types of partnerships); Decision of Sept. 25, 1952 (voiding an exclusive dealing agreement that limits trade to members who accept certain restrictive conditions concerning installation of heating equipment); Decision of June 16, 1958 (condemning exclusive dealing contract between milk producers and a certain group of dealers).

2. The Ministry has also considered
   (a) Market sharing arrangements: see Decision of June 3, 1954 (condemning a geographical market division).
   (c) Horizontal price fixing and minimum price arrangements: see Decision of March 3, 1952 (condemning minimum price agreement); Decision of Aug. 13, 1955 (same); Decisions of Sept. 26, 1955, and May 30, 1958 (condemning minimum price agreements unless justified by the relative economic efficiencies of each particular firm).

   These decisions, reported in the Nederlandse Staatscourant, are summarized in Linnaeus, supra note 18, at 432-38; Goldstein, in 1958 INSTITUTE 99. Dutch antitrust activity during 1959 is summarized in Mok, Die niederländische Kartellpolitik im Jahre 1959, 10 Wuu 693 (1960). Mok notes that Dutch authorities, as well as the French, have conducted much effective work in informal or preliminary negotiations with the affected enterprises. Recently a regulation was promulgated exempting certain types of exclusive dealing, supply and requirements contracts from the statute's purview. Regulation of 3 June 1960, No. 3908, reprinted in 11 Wuu 44 (1961).

The experience of the European Coal and Steel Community is perhaps less relevant because of the special considerations involving the status of these two basic products in the European economy. Daig, Verbotene und genehmigungsfähige Kartelle nach Artikel 65 des Vertrages über die Gründung der Europäischen Gemeinschaft für Kohle und Stahl (Doctoral Dissertation, mimeo., Tübingen 1957); Spaak, in FBA INSTITUTE 118. See generally EUROPEAN COAL AND STEEL COMMUNITY HIGH AUTHORITY, SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY, ch. 4 (1959); Deringer, Fünf Jahre Wettbewerb im Gemeinsamen Markt für Kohle und Stahl, 8 Wuu 614 (1958); Stein, The European Coal and Steel Community: The Beginning of Its Judicial Process, 55 COLUM. L. REV. 985 (1955); Valentine, The First Judgments of the Court of Justice of the ECSC, 20 MOD. L. REV. 596 (1957). Although the provisions of the ECSC Treaty are quite specific on the question of restrictive practices, High Authority of the European Coal and Steel Community, Treaty Constituting the European Coal and Steel Com-
The first significant discussion of article 85(3) is a decision of the German Cartel Office published in early 1959 in a case involving an application by a German licensee to register and approve a licensing agreement between it and its French licensor.\footnote{40} In granting an exclusive license under its patents for the production and sale of certain speed cutter machines in Germany, the licensor required:

1. The licensee's promise not to produce or sell competing items until three years after termination of the agreement;
2. The licensee's agreement to grant back to the licensor its improvement inventions by taking out patents thereon in the licensor's name, reserving only the right to use the improvements;
3. The licensee's agreement to mark the particular goods conspicuously with the name and certain patent markings of the licensor.

On the insistence of the Cartel Office, the licensor agreed that the second provision would cover only improvement inventions and not independent parallel inventions. Upon further negotiation, the parties agreed to limit the prohibition of the manufacture or sale of competing goods to goods produced by the particular licensed method.

The Cartel Office found that these provisions were justified by the economic and technological investment of the licensor in its patented methods—the fruit of twenty years' activity in its particular field. The licensor would not have made them available to the licensee without the right to receive back exclusive rights to improvements subject to the licensee's right to use the same, and the right to forbid competition in this particular area for a limited number of years following the licensee's use of the patent. The Cartel Office held, therefore, that these facts justified granting an exemption under Section 20(3) of the German Cartel Law, and then proceeded to a discussion of the exemption provisions of Article 85(3) of the Rome Treaty. It found that articles 85 and 86 were immediately applicable and that article 85(1) voided at least the second of the three contractual restraints. In justifying the application of article 85(3), it found that the requisites for application of the exemption were present. Economic justification was found in the marketing of a new product, advanced technological
progress, decreased prices, and improvements in quality, thus giving consumers sufficient "advantage"; in addition, the restrictions imposed in the license agreement did not restrain the licensee's freedom of action beyond that necessary to attain proper economic objectives, and because the licensee did not enjoy a dominant market position, did not exclude competition in a material part of the affected goods.\footnote{41}

Admittedly, this one decision hardly constitutes an adequate basis for determining the German, much less any other, position on the escape clause. It does, however, offer some insight into the considerations that would be deemed important in its application. The analysis necessarily depends on a factual study of the market position of the parties, the competitive position of the particular machines involved compared with that of other machines intended for the same purpose, and the definitions of such catch phrases as "relevant market," "lines of commerce," and "scope of the patent monopoly." Nevertheless, a detailed factual analysis such as might be found in a United States district court decision is entirely lacking. Thus, the value of the case as a precedent for determining the validity of similar agreements is limited. What is important, however, is the unmistakable indication given by the German Cartel Office of the approach that will be used in weighing restrictive agreements in the future.\footnote{42}

\footnote{41. In Part II of the decision, the Cartel Office discussed the significance of the three restrictions in the light of § 20 of the German Cartel Law. Speaking of the grantback requirement, the Office agreed that the competition which had been established by means of the license agreement was in part restricted by the grantback license; however, this restriction was not so material as to result in a significant worsening of competitors' ability to supply the general public with goods produced according to the most recent technological advances. In discussing the prohibition on competition after termination of the license agreement, the Cartel Office gave considerable weight to the legitimate interest of the licensor in protecting its position.}

\footnote{42. An equally important, more recent decision applying article 85(3) to an export syndicate is Decision of Federal Cartel Office ("Terrazzo"), 23 Aug. 1960, in WuW/E BKARZ 241 (10 WuW 803 (1960)). The Cartel Office there approved activities covering the Federal Republic and western Europe of a selling organization of three tile producers who produced about 10% of the German total. The agreement requires the members to do no independent selling, to turn over their entire production to the selling organization, to have no contact with purchasers, and to set uniform prices and discounts for their products in collaboration with the selling organization's management.}

The Cartel Office investigated the nature and structure of the industry, its competition, and the particulars of its production and distribution system. Pursuant to section 5 of the Cartel Law, the Office justified the selling organization because of its "rationalizing" activities, which permit the individual producers to specialize and to avoid the inefficiencies of offering a full line of all products. In addition, since many orders require the full production of more than one company, the organization coordinates the placement of orders for the most efficient production. Emphasis was also placed on the decreased selling and distributing costs of the single organization compared with individual sales divisions, and on the supervision of inventories by the central bureau. Even if these rationalizing functions did not clearly improve the product or lower prices, it was found that they at least improved the choice of available products and the ease and speed of purchase and delivery, thus satisfying the requirements of section 5 that the consumer benefit from the competitive restraints inherent in these activities. Finally, the Cartel Office determined that these rationalizing purposes could be effected only by such an organization, even though approximately 80 other producers were able to function competitively without such a grouping.

Finding the agreements prima facie violative of article 85 of the treaty, the Cartel
B. Violations of Article 86 Through the Abuse of Monopolistic Power

In contrast to their concern with restrictive agreements, European commentators have generally ignored Article 86 of the Rome Treaty, which forbids abusive exploitation of "a dominant position within the Common Market" or a material part thereof by one or more enterprises, if the exploitation could detrimentally affect trade between member states. Particular instances of such exploitation, which are listed in article 86, are similar to the examples of unlawful agreements listed in article 85(1).

The obvious reason for this neglect is the underlying economic pattern in Europe. As is well known, basic industrial production is much more diffuse in Europe than in the United States. For example, while only ten firms account for eighty per cent of United States steel production, thirty-five companies produce this percentage in the territory of the Community. Production of other industrial and durable consumer goods shows a similar market structure differential. In short, the European economy tends to be characterized by a large number of associated small producers; there are a few oligopolistic industries, but virtually no monopolies as the term is understood in the United States. 43

This situation is reflected in article 86, which does not forbid monopolies but only their abuse. 44 While the list of abuses in article 86 undoubtedly is not exhaustive, they do include predatory practices that are entirely familiar to American attorneys. The practices deemed abusive in article 86 coincide with those listed in article 85(1) and are in the main analogous to the prohibitions in Section 1 of the Sherman Act, Section 3 of the Clayton Act, and the Robinson-Patman Act. However, no escape clause exists to justify these monopolistic practices, thus illustrating a legislative concern to maintain the European market structure concept and at the same time to prohibit unqualifiedly practices sometimes justifiable under article 85(3), when indulged in by enterprises enjoying a dominant market position.

More important at this time than defining practices that may constitute abuse of a dominant position in the Common Market is the determination of what constitutes a "dominant position," what "market" is involved, what "trade" may be detrimentally affected, and what are the consequences of such prohibited acts.

It has been argued that a dominant position "in" the Common Market

Office granted an exemption under article 85(3) on the above grounds. The Cartel Office, interestingly enough, specified some of the gains to consumers: to Belgian consumers, the larger deliveries made possible by this syndicate meant a cheaper tariff rate; to Dutch consumers, a saving resulted from the use of cheaper water freights. Finally, the Cartel Office found that competition was not precluded in any substantial portion of the tile industry because other German producers, not to mention French, Italian, Swiss, Spanish, and Hungarian producers, were active in the member states.

43. Camps, supra note 33; LANGEN, op. cit. supra note 11, at 211.
44. See Abus de Puissance Economique Dominante, in CAEN CONFERENCE 52.
requires more than a dominant position in the market within one member state. Thus, such a dominant position within each of several member states by several firms, none dominant in more than one country, may not be subject to attack under article 86 unless a nonexempt concerted activity is found. On the other hand, each member state is an integral part of the Common Market, and it can be argued that the abuse of a dominant position within one state is the proper concern of article 86 if trade between member states may thereby be affected.

The meaning of "trade" is undoubtedly as broad as the concept "commerce" in the United States. Trade between the member states, however, cannot at present be given the extended interpretation accorded "interstate commerce" in the United States law, because of the much less developed integration of commerce between the member states.

Finally, as to the likelihood of anticompetitive effects, American practice under the Sherman and Clayton Acts will probably be valid precedent, since article 86 can reasonably be construed to forbid abuses that have possible, not only actual, effects on trade.

One of the few national statutes resembling article 86 is Section 22 of the German Cartel Law, which attempts to define both a market-dominating entity, and the types of abuse of market position that can bring certain sanctions into play. Both provisions offer useful precedents. First of all, "market domination" and "share of the market" are not measured by the same yardstick; a company enjoying ninety per cent of the market may find pricing and trading conditions set by energetic companies fighting to expand their ten per cent share. Therefore, mere size, contrary to United States practice, may not alone bring a company within the scope of article 86.

Second, the "market" in which a company dominates must be established, not only by geographical criteria, but also by standards of "relevant market", measured by concepts of "elasticity of demand" and other criteria well known to United States law. In this connection, it may be noted that the du Pont Cellophane case has had considerable influence on European

46. Günther, supra note 20, at 279-80.
47. Ibid.; Verloren van Themaat, in FBA Institute 99; Goldstein, in 1958 Institute 239.
48. Article 86, in the authorized translation, forbids abuses "[t]o the extent [t]o which trade between any Member State may be affected thereby" [soweit dies durch den Handel zwischen Mitgliedstaaten zu beeinträchtigen]. (Emphasis added.) See Günther, supra note 20, at 279; Schwenk, supra note 13.
commentators, who have in general praised its creation of a sophisticated methodology for dealing with this problem in a factual and elaborate manner, and for its definition of "relevant market".  

Third, the German statute makes clear what is stated only generally in article 86—that a market dominating position attained whether contractually or otherwise by an oligopolistic group of concerns is within the scope of the ban on the abuse of a dominating position. Thus, a variety of circumstances ranging from conscious parallelism to de facto domination due to tariff or quota situations can bring the sanctions of article 86 to bear on oligopolies as well as monopolies.  

In other words, the preliminary questions to be determined before applying article 86 are by no means novel. Furthermore, German courts have, in this field, adopted the same extensive factual analysis that has been adopted by United States courts in this field.  

II. THE PROCEDURAL ASPECT OF THE ROME TREATY'S ANTITRUST PROVISIONS AND THEIR RELATION TO NATIONAL PROCEDURES  

In addition to specific substantive problems, important procedural and constitutional issues have been raised by the imposition of the Rome Treaty on prior national legislation, and by the Treaty's relation to later enacted legislation. Some of these issues arise from directly conflicting provisions of law; others from the effect of certain discrepancies between the two systems. The problem is further complicated by the fact that the Community is not a genuine central political entity or structure to whose power and scope local sovereignties accommodate, but an attempted means of guiding specific activities on a voluntary federated basis.  

A. Date of Effectiveness and Present Binding Effect on Member States.  

The first and most debated problem is the treaty's date of effectiveness. That date is left in considerable doubt by the wording of articles 85 and 87, a doubt that is compounded by the fact that many parts of this lengthy treaty will require varying lengths of time to come into effect. The en-
forcement of these provisions entails the use of a Community administrative structure, which is only now being organized and which, in addition, requires the cooperation of national courts and cartel authorities, many of which do not yet have necessary statutory authority.

Some commentators, perhaps a majority, take the view that article 85 is hortatory only and has no present binding effect on national authorities. This position rests primarily on a reading of article 88, which appears to leave enforcement of these provisions to national authorities acting “in accord” with their own laws as well as with the provisions of articles 85 and 86.

Another view, that articles 85 and 86 are immediately effective and presently binding on all national authorities, has been urged by the Commission of the European Economic Community. The Commission, of course, recognizes that these provisions can presently be enforced only by national authorities, and is therefore confronted with the fact that only some of the member states have extant antitrust legislation. As a step...


60. This position is taken and explained in detail by Spengler, in GEMEINSCHAFT-KOMMENTAR 955-83. See also Honig, supra note 59; Wilberforce, Restrictive Trade Practices in the European Common Market, J. Bus. L. 120 (1958); Fabre, Les Pratiques commerciales restrictives et le Traité de Marché Commun, 5 REVUE DU MARCHÉ COMMUN 260, 264-66 (1958).


63. The European Commission rejects the view that Article 85 and Article 86 merely contain principles which still need to be worked out in detail before they become effective. The European Commission is, on the contrary, of the opinion that the Treaty already renders possible action by the Commission under Article 89 and by the competent national authorities under Article 88 against understandings and abuse of dominant positions. Nevertheless, in those states which as yet have no pertinent...
towards resolving the problems raised, the Commission has worked with governmental experts of the member states and has determined that articles 85 and 86 are not simply declarations of principle.\textsuperscript{64} 

Both views involve difficulties, since it is as troublesome to prescribe a method for implementing effective antitrust sanctions through varying national standards as it is to imagine the judging of individual cases by local courts or agencies in disregard of articles 85 and 86.\textsuperscript{65} The real problem lies in the unique nature of the whole experiment. Under such circumstances it is no wonder that European commentators and practitioners alike are in doubt as to the means of utilizing the Treaty's sanctions at this time.\textsuperscript{66} National interests understandably play a role in the debate, for the existence of effective antitrust regulation in one country is apt to result in a demand for an immediately effective community-wide antitrust law, lest other member states' citizens be unfairly preferred by the absence of local anticompetitive controls.\textsuperscript{67}

The Commission has, however, succeeded in having its position adopted at least in Germany, where the first important decision on this problem was rendered by the German Cartel Office in 1959. There it was held that the antitrust provisions of the treaty are presently binding law and must be considered by any court passing on the merits of any competitive restraint involved in an action.\textsuperscript{68} This view, which is opposed to that of the majority of commentators\textsuperscript{69} and to an earlier provisional Dutch decision,\textsuperscript{70} cites the Second Report of the Commission as part of its rationale.
In the Netherlands, a temporary law has been enacted decreeing that these Treaty provisions shall have no binding effect unless the particular restraints involved also violate Dutch law. Despite this attitude, however, there are strong indications that the Commission's position or a moderate variant of it will be adopted extensively during the interim period. For all practical purposes, therefore, American corporations planning overseas activities will have to keep in mind articles 85 and 86 and the substantive law that is already growing around these provisions.

B. Enforcement Procedures and Scope of Review

Another major problem yet to be resolved is the relationship of actions before national courts or agencies to those brought within the Community's administrative and judicial enforcement structure. The treaty provides for the submission of all disputes arising under its provisions to the Court of Justice for final determination. However, many proceedings relating to articles 85 and 86, whether administrative or judicial, will probably be brought in national forums. A national administrative agency may on its own motion position in providing in article 89 for certain specific investigations during the interim period by the Commission directly, which would have been unnecessary were these articles more than provisional statements. The court also avoided the applicability of article 177 of the treaty, which requires the submission of such issues to the Court of Justice, on the interesting but unsupported ground that this transfer requirement was not intended to apply to provisional remedies, in this case a temporary injunction. Cf. text accompanying note 84 infra.

This finding of validity conflicts directly with recent German decisions. Cf. Report, Sind Re-Importverbote sülissig, Frankfurter Allgemeine Zeitung, 17 Dec. 1960, p. 9. The Federal Cartel Office, in the German action discussed in the report, has apparently urged that the case be submitted to the Court of Justice, under article 177 of the treaty, for a final determination.

72. In a decision of 14 July 1960, reported in 10 WuW 691 (1960), the Federal Cartel Office specifically declared that it based its approval of a licensing agreement between an Italian licensor and a German licensee on article 85(3), rendering inapplicable the otherwise relevant prohibition of article 85(1). See, e.g., Announcement of Federal Cartel Office Nr. 48/58, 24 Sept. 1958, approving a license agreement between a German and an Italian company, “subject to the acceptability of these agreements pursuant to the EEC Treaty,” reported in 9 WuW 41 (1959); Decision of Federal Cartel Office, 20 June 1960, in WuW/E BKarrA 254 (10 WuW 818 (1960)); Decision of the Appellate District Court Dusseldorf (“Sarotti” IV), 21 Oct. 1958, in WuW/E OLG 262 (9 WuW 298 (1959)), discussing the effect of article 85 on otherwise permissible price fixing provisions in the case of fair traded goods; Decision of District Court Frankfurt (“Uhrenarmbänder”), 13 Feb. 1959, in WuW/E LG/AG 137 (10 WuW 639 (1960)), discussing vertical pricing restrictions within the Common Market though disclaiming the need to examine this question of applicability.

73. The Community organization is to consist of an Assembly of 142 members, at present appointed by the national parliaments but eventually to be elected directly; a twelve-member Council made up of member states’ representatives, which is to be the general decision-making body of the Community; and a full time nine-member Commission appointed with the common consent of the member governments but responsible to the Community as a whole, and charged with the actual administration of the treaty. See arts. 138, 146, 145, 157, 158, 155. A bill was presented to the Assembly on May 17, 1960, calling for direct popular elections.

See generally Stein, The New Institutions, in 1 STEIN & NICOLSON 33; Rooks, supra note 60; Valentine, supra note 56.

proceed against an enterprise that has initiated or continued forbidden restrictive practices, or that has failed to submit a restrictive practice for approval.\textsuperscript{75} Second, an enterprise may proceed against a national cartel authority for failing to approve or condemning practices or agreements that the complainant alleges are legitimate.\textsuperscript{76} Generally speaking, the appropriate proceeding would be an appeal to the local court empowered by statute to hear such cases. Third, an antitrust problem may be involved in a civil action between private parties before a local court, either as a matter of complaint or defense.\textsuperscript{77} The local appellate procedures in all such "normal" situations are a matter of local statute.\textsuperscript{78}

The proceedings that may be brought directly before the Commission of the European Economic Community and the Court of Justice are another matter. It should be recognized that the eventual role of the Commission as a transnational cartel authority has not yet been established, since the regulations that are to define the Commission's and the Court's responsibilities in assuring observance of articles 85 and 86 have not yet been promulgated. Judging by the regulations that the Commission has tentatively proposed,\textsuperscript{79} however, it is quite possible that in time and in certain areas it will be authorized to bring original proceedings.

In addition, Article 89 of the Rome Treaty gives the Commission authority in specified circumstances to proceed directly against restrictive practices. Not only is the Commission to investigate such cases on complaint of any member state, but it is authorized to proceed on its own motion, with the cooperation and official assistance of the competent authorities of the member states. The Commission may propose suitable means for dispelling a

\textsuperscript{75} This has been the common procedure in France and the Netherlands. See van Leeuwe in \textit{Caen Conference} 20. In Germany most proceedings before the Federal Cartel Office to date have been based upon applications by firms for approval or exemptions, but proceedings on the Cartel Office's own motion are of course permitted by statute in Germany as elsewhere. See \textit{Cartel Law} § 51.

\textsuperscript{76} See, in Germany, \textit{Cartel Law} § 62.

\textsuperscript{77} An interesting example of this is the \textit{Sarotti} case, Decision of Appellate District Court Düsseldorf, 21 Oct. 1958, in \textit{WuW/E OLG} 262 (9 \textit{WuW} 298 (1959)), in which the defendant, whom plaintiff sought to enjoin from selling chocolate below fair traded prices, used article 85 in an unsuccessful challenge to the validity of plaintiff's registered fair trading price schedule.

\textsuperscript{78} For a review of such appellate rights as well as an exposition of the procedural safeguards afforded the litigant in antitrust proceedings in France, Germany and the Netherlands, see Nebolsine, \textit{The "Right of Defense" in the Control of Restrictive Practices Under the European Community Treaties}, 8 Am. J. Comp. L. 433 (1959). Nebolsine also discusses the general administrative practice of the other three member states and of the United Kingdom as well as their general appellate procedure. See generally Stein & Hay, \textit{New Legal Remedies of Enterprises: A Survey}, in 1 \textit{Stein & Nicholson} 459.

\textsuperscript{79} These proposed regulations, especially articles 1, 2, 5, 6 and 7, probably go further than has been generally expected by European commentators, since they set up the Commission as an agency of primary jurisdiction in the treatment of antitrust activities defined by article 85, and of concurrent jurisdiction in the original determination of whether such activities are in fact within the general scope of these articles. \textit{Cf.} Verloren van Themaat, in \textit{FBA Institute} 113; Nebolsine, \textit{supra} note 79, at 461. The regulations are reprinted in 10 \textit{WuW} 856 (1960). Articles 1, 2, 5-7 are reprinted in the Appendix to this article.
violation, if one is found to exist; in the event of noncompliance it may render a decision concerning such violations and empower the member states to take appropriate measures against the condemned practices.\(^{80}\) This power was recently exercised for the first time, when on the request of a member of the European Parliament, an investigative proceeding was instituted in connection with an agreement reached by two Belgian associations with various producers. The agreement allegedly caused competitive injury to nonconsenting Italian producers, and in a preliminary hearing the Commission announced that the practices presumably violate article 85(1).\(^{81}\)

An additional and important role yet to be defined is that of the Court of Justice. Articles 173 and 177 of the Rome Treaty indicate which parties may come before that court and the proceedings which it may hear.\(^{82}\) While article 173 seems to limit proceedings, whether brought by a member state, by the Council or the Commission, or by private parties, to appeals from decisions of the Council or Commission, article 177 gives the court jurisdiction over certain types of appeals from any source, even those coming from national tribunals.\(^{83}\) Indeed, this article specifically provides that the Court may render an interlocutory pronouncement on treaty interpretation in cases pending before local tribunals, and requires a tribunal to seek such pronouncement if the national law allows no appeal from its decision.\(^{84}\) In addition to this competence it has been argued that the Court of Justice may be able to

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80. However, this right probably does not extend to demanding the imposition of criminal penalties by the national cartel authority. See Würdinger, Exportkartell und EWG, 10 WuW 313, 325 (1960).


82. For a detailed discussion of possible legal proceedings before the Court of Justice by the Commission or by national authorities, defense available there to individual enterprises, and actions by such enterprises against EEC or national authorities for their conduct under EEC or national laws, see Stein & May, New Legal Remedies of Enterprises: A Survey, in 1 Stein & Nicholas 459.


84. This procedure may eventually produce a substantive Community law, but is obviously being approached with caution. To the knowledge of the author, no case has yet been presented to the Court of Justice under this article. An interesting discussion on this point may be found in the Sarotti case, WuW/E OLG 262 (9 WuW 298 (1959)). At issue was the present legal effect of article 85. In addition to the issue being irrelevant because article 85 could not in any event apply—the price fixing provisions of the disputed contract were applicable only within Germany—the court on other grounds considered itself precluded from determining the issue:

The question . . . [of the immediate applicability of article 85] is one concerning an analysis of the EEC Treaty. The court can not take a position on this question in the proceeding at bar, since there is no legal recourse against its decision, pursuant to Code of Civil Procedure Section 91(a), par. 2, and in such a case the question must be put for decision before the Court of Justice of the European Economic Community, according to Treaty, Article 177, par. 3.

function as a trial court if the regulations foreseen by article 87 grant it such powers.86

Reconciliation of the provision requiring that a local action be held in abeyance while an interlocutory decision is obtained from the Court of Justice86 with the judicial procedure of member states could easily raise formidable problems. Since all lower courts have the discretion not to seek such authoritative rulings, and can be expected to exercise this discretion liberally, any efforts to create from the outset a uniform body of substantive law through national procedures will be thwarted. Further, national antitrust provisions are primarily administrative. Dubious agreements are registered with a cartel authority that approves or disapproves them. Review of this action by immediate recourse to the Court of Justice under article 177 is probably not available, although the Court may hear appeals from some of these decisions pursuant to article 173.

Whether local procedure allows such transfers or appeals is also doubtful. Under German law, for example, a decision of the German Cartel Office would be appealed administratively,87 then by complaint to the competent appellate district court,88 and thereafter by appeal to the Federal Supreme Court of Germany.89 At what point, then, is a decision to be attacked by complaint to the Community Court of Justice? Exhaustion of administrative remedies would at least require that the administrative route be traveled before a "removal," in the sense of United States collateral federal review, can be had. Yet article 177 seems to permit attacks upon administrative decisions of first instance. Since it is generally assumed that national legislation in concordance with the treaty will be enacted,90 and that national ad-

85. Nebolsine, supra note 79, at 460-61.

Finally, as a further example of the variety of proceedings now possible, it should be pointed out that the Commission may, subject to certain qualifications, be a party in antitrust cases before national tribunals. Article 183.
86. Article 177. See also Article 20 of the Protocol On The Statute of the Court of Justice Of The European Economic Community, April 17, 1957. For a discussion of the interlocutory jurisdiction of the Court under article 177, see Polach, Harmonisation of Laws in Western Europe, 8 Am. J. Comp. L. 148 (1959).
87. Cartel Law § 59; see Langen, op. cit. supra note 11, at 354.
88. Cartel Law § 62. It is worth noting that theoretically the district appellate court exercises a broader scope of review of the Cartel Office's decisions than does a United States Court of Appeals over a Federal Trade Commission order. Cf. Cartel Law § 70, which requires the reviewing court to reach a decision based on its 'independent conviction,' gained from the total result of the proceedings. See Langen, op. cit. supra note 11, at 369. See also Nebolsine, supra note 79, at 451. It remains to be seen how the district appellate courts will approach this particular function.
89. Cartel Law § 73. Apart from a group of formal defects found in lower court proceedings, listed in § 73(4), on whose existence appeal as of right may be grounded, an appeal is to be considered if (a) a question of law of fundamental significance or (b) when the development of the law or the guarantee of a uniform legal interpretation requires a decision. Section 73(2). The appellate district court in the first instance decides if these criteria are satisfied, § 73(3); however, an appeal from this court's refusal to grant leave is possible, § 74.
90. The general treaty directive is found in article 3(h), which provides that to carry out its general purposes, the activities of the Community shall include: "the approximation of their respective municipal law to the extent necessary for the functioning
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ministrative bodies will to a considerable extent be used to administer the
treaty’s antitrust provisions, any transfer requirements that the Council may
attempt to enact by regulation will have to be grafted onto national systems
that are diverse and in some instances will conflict with the requirements.91

C. Conflicts with National Procedural and Substantive Provisions

Another procedural problem of importance is the constitutional relation-
ship between the treaty and national legislation. To a still unknown extent,
new enactments will probably be needed in each member state to implement
the antitrust provisions of the treaty.92 It is by no means clear that the treaty
is self-executing, at least in countries that have no antitrust legislation. The
implied directive of the treaty, that laws consistent with its purposes be
enacted,93 is therefore of concern to most of these countries.

The effect of a later enacted, inconsistent statute must also be consid-
ered. For example, Italy is yet without antitrust legislation, although some
enactment is expected. In Italy, as in Germany, treaties and statutes are of
equal rank, with the later in time governing in case of conflict.94 May their
respective cartel authorities therefore approve arrangements that harm other
Community markets on the ground that the later enactment of a more permis-
sive statute indicates an intent to repeal or ignore inconsistent provisions of
the earlier treaty? The frequency with which applications for the approval
of export cartels or other restrictive combinations have been made before the
German Cartel Office indicates that the problem is a real one.95 The situation

of the Common Market.” See also articles 100-02, concerning the approximation of laws;
SECOND REPORT 84.

91. The Treaty does not specify which authorities in the Member States are
responsible for applying the provisions of Article 88, what procedure they are
to follow, nor what sanctions they may apply to ensure that their decisions are
respected. The legislation in force in each Member State is the determining
factor in this matter.

In those countries which possess legislation on understandings, regulations
on this point are generally adequate. In Belgium on the other hand, as well as
in Italy and Luxembourg, appropriate provisions are lacking. Since all that
is required is to designate the competent authorities and determine the procedure
to be followed and the sanctions necessary to ensure respect for decisions, it
should be possible to promulgate these provisions in a relatively short time.
SECOND REPORT 80-81.

For a discussion of the practical importance or lack thereof of this harmonization
of laws feature, see Verloren van Themaat, in FBA INSTITUTE 113; Polach, supra note
86.

92. SECOND REPORT 80.

93. Articles 3(h), 100-02. For a discussion of this complex issue of harmonization
of laws in the antitrust field, see Sprung, Die Bestimmungen über die Beseitigung von
Verzerrungen des Wettbewerbs im Vertrag über die EWG, 20 FINANZARCHIV 201
(1960); THIRD REPORT 114-17.

94. Spengler, in GEMEINSCHAFTSKOMMENTAR 957, and material therein cited. In
France, Luxembourg, and the Netherlands, however, treaties are superior to legislation
and cannot be altered by implication by the enactment of later conflicting statutes. Ibid.;
Bebr, supra note 39. Spengler and Bebr apparently disagree as to the status of such
treaties under Luxembourg law.

95. According to announcements of the German Cartel Office, as reported in WuW,
at least eight different industrial export cartel applications were made from August 1958
through December 1959.
in some of the member states and the attitude of their legislatures towards articles 85 and 86 makes a treaty-statute conflict not altogether remote.96

An even more immediate problem is an Italian antitrust bill presently before that country’s parliament.97 This bill does not include the exemptions permitted by article 85(3) of the treaty and thus will place all agreements containing possibly restrictive provisions within the regulatory authority of the Ministry of Industry and Commerce. In addition, the bill specifically exempts from its scope Italy’s many state-operated companies, which are governed by special legislation.98 In so doing it may conflict with article 90 of the treaty, which forbids giving special consideration to state enterprises if in violation of articles 85 and 86.99 If enacted, this Italian legislation may therefore be the first serious test of the Community’s ability to harmonize national economic and business theories and legislation with its own standards.100

96. See the report of a debate in the first chamber of the Dutch Parliament between M. Molenaar and Minister of Economics Zijlstra, in 9 WuW 52 (1959); Spengler, in GEMEINSCHAFTSKOMMENTAR 977.

These conflicts are intensified because in some member states commission regulations have a legal force equal to that of the treaty. Cf. 1 STEIN & NICOLSON 484 n.110, 486. This issue gains in practical importance because of the policy-creating nature of the Commission’s activities. Thus, the Commission and national experts have undertaken to make substantive interpretations of treaty provisions. It has undertaken, for example, to define the terms used in articles 85 and 86, such as “within the Common Market,” “dominant position within the Common Market,” “may affect trade,” “interstate commerce,” “probability,” and the like. THIRD REPORT 110.


98. Ibid.

99. See generally HUBER, UNTERNEHMEN DER ÖFFENTLICHEN HANDB in GEMEINSCHAFTSKOMMENTAR 886.

100. It is worth noting, however, that the Protocol Concerning Italy, signed on March 25, 1957, recognizes and makes certain allowances for the “ten year program of economic expansion aimed at correcting the disequilibria in the structure of the Italian economy.” This may mitigate the possible conflict between the proposed bill and articles 85 and 86, although the intent of the protocol seems to be mainly to mitigate the effects of the balance of payments provisions of the treaty. Articles 104-09.

An equally sharp but converse disparity existing between the recently enacted Belgian antitrust law and the Rome Treaty has been defended by Professor del Marmol, with no particular attempt at reconciliation. It cannot be denied that there is an obvious disharmony regarding cartel arrangements between the terminology of the Rome Treaty, especially Article 85 thereof, and that of Articles 1 and 2 of the Belgian Law of 27 May 1960. Pursuant to the Rome Treaty these arrangements are a priori suspect, whereas under the Belgian law they are, when entered into, in no wise yet suspect. The cartel agreements are treated exactly as are monopoly positions. This system is absolutely normal in a small country, whose industrial structure is marked by a significant number of small and medium-sized enterprises, which necessarily, barring mergers, must be afforded the opportunity to enter agreements and thus in another way than that of integration attain similar economic results as regards specialization, rationalization, common cause in export markets, etc.

Belgium intends to hold its social structure in equilibrium, and if the Law of 27 May 1960 is apparently directed at the “giants,” it is still suited, through the moderation that it shows, to aid the small and medium-sized enterprises, which generally valid economic reasons can justify the boundaries that they draw against unlimited, and thereby harmful, competition.

del Marmol, supra note 2, at 632-33 (author’s translation). This statute may also conflict with the regulations proposed by the Commission under article 87 of the treaty, since it assumes in article 28 that the national authorities shall have primary jurisdiction over exemption proceedings brought under article 85(3) of the treaty.
The same treaty-statute conflicts that may be expected in the procedural area may also become important in some fields of substantive law. The main present area of conflict is the status of national export cartels or agreements. Under Section 6 of the German Cartel Law, for example, an exemption from the prohibition of section 1 may be granted to agreements concerning exports, so long as they regulate competition only in markets outside Germany.Quite clearly such an agreement might concern exports to and the market within a member state and thus directly run afoul of article 85, although specifically authorized under the terms of the German Cartel Law. More important, even if such an agreement regulates only an overseas market, it might indirectly affect trade between the member states in violation of article 85. Certain practices, for example, price fixing of the exported product for the foreign retail market, may not even come within the scope of section 6 of the Cartel Law and may, therefore, not be subject to regulation by the Federal Cartel Office. In this situation, the Cartel Office, although unable to apply the sanctions of the German statute, should in all probability deny approval to such arrangements, relying directly on article 85.

A similar problem is caused by Section 16 of the German Cartel Law, which exempts fair-traded goods from the prohibition against retail price fixing contained in section 15. There is no such exemption in article 85. Thus, to the extent that fair-traded goods are sold in more than one member state, price fixing agreements affecting competitive trade between member states could violate article 85. Again, the wording of section 16 leaves the way open for the Cartel Office to apply article 85 directly since section 16 merely exempts these agreements from section 15.

Similar though less apparent conflicts have been noted by Professor Spengler, who has discussed the protectionist tendencies of the Dutch statute that bars the immediate applicability of articles 85 and 86 of the treaty and of a French decree, Ordonnance No. 59-248, 4 Feb. 1959, that allows small businesses to join in so-called 'societes conventionnées' in order to adjust their activities to the new demands of Common Market competition. Spengler, *Einige Betrachtungen zum Tätigkeitsbericht des Bundeskartellamtes für das Jahr 1959*, 10 *WüW* 755, 760 (1960).


For instance, by dividing an overseas market to the exclusion of exporters of other member states whose competitive ability is thus weakened, or by setting up re-import restrictions from the countries of destination to the country of origin or to any of the member states. Cf. Decision of Federal Cartel Office ("Hauer"), 3 May 1960, in *WüW/E BKARTA* 197 (10 *WüW* 583 (1960)).

Or within *CARTEL LAW* § 15, the statute generally forbidding price fixing.

Cf. Würdinger, *supra* note 80, at 324.

Similar issues may arise regarding patents. Thus, the possibility has been raised of conflict concerning patent and antitrust considerations between national laws and the Rome Treaty, and conflict between different provisions of the treaty, as between articles 85 through 90, and article 36. Cf. Spengler, in *GEMEINSCHAFTSKOMMENTAR* 971; Gotzen, *La Propriété Industrielle et les Articles 36 et 90 du Traité instituant la Communauté Economique Européenne*, 11 *REVUE TRIMESTRIELLE DE DROIT COMMERCIAL* 261 (1958).

Nor is it found in the laws of some of the other member states, notably France. Cf. Goldstein, in 1958 *INSTITUTE* 199.

See Schwartz, in *GEMEINSCHAFTSKOMMENTAR* 355.
Price fixing of fair-traded goods also affords an excellent example of the possibility of *de facto* conflict even in the absence of conflicting statutes. If this practice is not excepted from the prohibition against price fixing found in article 85 of the treaty, then the importing of such goods into a member state whose law permits fair trading, for sale to retailers or even the public at less than the fair-traded price, can not be prevented. As a result, the statutory scheme of fair trading is breached, since the imports would vitiate any effort at airtight enforcement of fair-traded prices. With the expected increasing integration of trade between the member states, such problems will arise more and more frequently.

III. CONCLUSION

American industry dealing with or in the Community market faces some very important and practical problems, since American as well as other companies will come within the scope of these general provisions of the treaty and the forthcoming regulations, which are or soon will be binding law. No structure or authority is, however, created by the treaty to test specific agreements or transactions. The Commission is not a cartel authority, and despite the extension of its jurisdiction and powers foreseen by the proposed regulations implementing articles 85 and 86, it probably will not possess the full powers of a typical national agency. There is no present supranational office or authority that is responsible in the first instance for giving approval or advice, notwithstanding the general supervision over substantive law that the Court of Justice may attain. Instead, for some time to come the application of articles 85 and 86 will be primarily the responsibility of national courts or agencies. In addition to the importance of local law in resolving a myriad problems, the role of the Commission and national authorities in procedural and substantive areas was made recently by Verloren van Themaat, Director General of the Commission's Department on Competition.

The last problem to which I would like to refer, but which I do not propose to examine in detail, is that of the implementing rules pursuant to Article 87. The ruling on competence and procedure in Article 88, according to which the national authorities are competent and the national procedures and penalties applicable for the time being, is only an interim one. The final division of competence between Court of Justice, Commission and national authorities, as well as the definitive procedure and penalties are to be laid down in an implementing ordinance pursuant to Article 87. There will therefore be gradual alteration, not only in the content of the substantive law applicable, but also in that of rules on procedure and penalties.

At the moment the substantive law of the six States is still more important than the substantive law of the Treaty, because most of the restrictive agreements are still of a purely national scope. As regards agreements coming under the Treaty of Rome, this law may be applied along with the rules of the Treaty to the extent that it is compatible with these rules. As regards procedure and sanctions, national legislation at the moment is the main source of law. In the first place, because of the regulatory force of economic facts, the role of the antitrust legislation of Member States will gradually decline, even though its
of peripheral problems, including the effect of articles 85 and 86 on private contractual litigation, it will for the present determine what applications for approval should be made and to whom. At the same time, if the regulations now proposed are enacted, it is expected that the Commission will in part supersede these national agencies and their procedures in passing on agreements and practices falling within the scope of the treaty.

American companies will thus have to be alert to determine both whether proposed business ventures in Europe will violate national or Community antitrust laws and how and when such plans must be made known to or approved by these respective cartel agencies. Once various agreements and practices have been adopted, these firms must keep in mind the possible role of treaty law and treaty organizations in judicial or administrative contests concerning these agreements or practices. As regards both procedure and substance, the guideposts available to the American attorney will not long remain vague. The complex and highly developed state of the industrial and commercial life into which the Rome Treaty was thrust demands and assures the rapid evolution of a comparably refined body of antitrust law, although it will be applied, except for private disputes, primarily through administrative procedures. The American attorney, within previously described limits, can draw considerable guidance during this period from extensive American antitrust experience, even though he should be careful to adapt this knowledge to the different bases of economic activity in the Common Market.

APPENDIX

ARTICLES 1, 2, 5, 6 AND 7 OF THE DRAFT REGULATIONS
PROPOSED BY THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY†

ARTICLE 1.

1. Agreements, decisions and concerted practices of the type described in Article 85(1) of the Treaty are forbidden without the necessity of a prior decision until the Commission has declared the provisions of Article 85(1) of the Treaty inapplicable thereto pursuant to Article 85(3). The provisions of Articles 4, 6 and 19 of these Regulations shall remain unaffected hereby.

2. The Commission can declare the provisions of Article 85(1) of the Treaty inapplicable pursuant to Article 85(3) only upon application and only effective from the date of its decision.

ARTICLE 2.

1. The Commission shall transmit immediately to the competent authorities of the Member States a copy of the applications which have been filed with it under Article 1,
para. 2. The competent authorities of the Member States shall participate in the examination of applications.

2. Subject to review of its decisions by the Court of Justice, the Commission has exclusive jurisdiction to declare the provisions of Article 85(1) of the Treaty inapplicable pursuant to Article 85(3).

ARTICLE 5.

1. Within six months after these Regulations become effective, the Commission shall be given notice of all agreements between enterprises, decisions of associations of enterprises and concerted practices in existence on the effective date of these Regulations which, within the Common Market, intend or result in (a) the direct or indirect setting of minimum, maximum or specific prices for goods or services, (b) the limiting of production, sales or investments, (c) the division of markets by territory, customer grouping or other particular methods or (d) the prevention, limitation or other regulation of imports or exports between Member States.

2. Notice shall only be given of the agreements, decisions and concerted practices described in para. 1. under (a), (b) and (c) if enterprises from different Member States are participants therein.

3. The agreements mentioned in para. 1. are not to be submitted if only two enterprises are involved therein and the agreements merely (a) restrict the freedom of a contracting party to set prices or business terms in the further distribution of goods which it obtained from the other contracting party, (b) place on a party acquiring or using patents, design patents or trademarks restrictions in the exploitation of these rights, (c) oblige a supplier to deliver certain goods exclusively to one recipient, (d) obligate a recipient to obtain certain goods exclusively from a supplier or (e) concern the exclusive agency for certain goods or services of an enterprise.

ARTICLE 6.

1. If within six months after the giving of the notice pursuant to Article 5, an application pursuant to Article 1, para. 2. is made for agreements, decisions and concerted practices of the type described in Article 85(1) of the Treaty, then in the event of the rejection of the application the prohibition of Article 85(1) of the Treaty shall not become effective before the date on which the Commission has rendered its decision pursuant to para. 4.

2. In the event that an application pursuant to Article 1, para. 2. is made within six months after the effective date of these Regulations, the notice prescribed in Article 5 need not be given.

3. In the event that an application is made pursuant to Article 1, para. 2. within three years after the effective date of these Regulations for agreements, decisions and concerted practices of the type mentioned in Article 85(1) of the Treaty which are in existence on the effective date of these Regulations and are not subject to the duty to give notice under Article 5, then in the event of the rejection of such an application the prohibition of Article 85(1) of the Treaty shall not become effective before the date set by the Commission in its decision under para. 4.

4. In the event that in a decision concerning an application mentioned in paras. 1. or 3. the Commission determines that the requisites of Article 85(1) of the Treaty are present and declines to use Article 85(3) thereof, it shall give the parties a period of not more than one year after which the prohibition of Article 85(1) of the Treaty shall become effective.

5. Article 2 is to be utilized for the applications described in paras. 1. and 3.

6. The Commission shall render its decision within three years of receipt of applications described in paras. 1. and 3.

7. The agreements, decisions and concerted practices of the type described in Article 85(1) of the Treaty, in existence at the time these Regulations become effective, for which no application has been made within the time specified in paras. 1. and 3., are prohibited without the necessity of a prior decision.

ARTICLE 7.

1. As long as no application has been made pursuant to Article 1, para. 2., the authorities of Member States, pursuant to Article 88 of the Treaty, remain competent to apply Article 85(1) of the Treaty, subject to the provisions of Article 2, para. 2., even if the periods of time allowed for the making of an application have not expired.

2. In addition, however, the Commission may in the situation described in para. 1., after hearing the competent authorities of the Member States determine by a decision that an agreement, decision or concerted practice falls within Article 85(1) of the Treaty.