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ECONOMIC POLICIES AND PRACTICES

PAPER NO. 4

PRIVATE TRADE BARRIERS AND THE ATLANTIC COMMUNITY

MATERIALS PREPARED FOR THE
JOINT ECONOMIC COMMITTEE
CONGRESS OF THE UNITED STATES

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LETTERS OF TRANSMITTAL

To Members of the Joint Economic Committee:

Transmitted herewith is Study Paper No. 4 entitled "Private Trade Barriers in the Atlantic Community," prepared as an aid to increased understanding of international implications of the economic policies and institutions in the Western European industrial countries. While the paper is descriptive and analytical, its purpose is to illustrate the importance of regulating private trade barriers, particularly in view of substantial reductions in tariffs and quotas.

The paper describes and analyzes cartel laws recently enacted in the European Economic Community, and highlights the differences between laws regulating restrictive business practices of the United States and Europe. American law prohibits monopolies and cartels and is based on the concept first formulated by Adam Smith in 1776 when he wrote, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." This differs sharply from the European concept of permitting cartels and monopolies so long as they serve the public interest.

This paper was prepared by Mr. Thomas H. Boggs of the committee staff in cooperation with Dr. Vernon A. Mund, professor of economics at the University of Washington. The Joint Economic Committee gratefully expresses its appreciation for the assistance of the Office of International Restrictive Business Practices of the Department of State and the Office of Foreign Commerce of the Department of Justice.

PAUL H. DOUGLAS,
Chairman, Joint Economic Committee.

Hon. PAUL H. DOUGLAS,
Chairman, Joint Economic Committee:

Transmitted herewith is Study Paper No. 4 prepared by Thomas H. Boggs of the committee staff in cooperation with Dr. Vernon A. Mund, professor of economics at the University of Washington.

This paper describes and analyzes recent cartel laws enacted in the European Economic Community.

JAMES W. KNOWLES,
Executive Director, Joint Economic Committee.

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PRIVATE TRADE BARRIERS AND THE ATLANTIC COMMUNITY

INTRODUCTION

The grant of additional authority to negotiate reductions in tariff and nontariff barriers to trade provided by the Trade Expansion Act of 1962 opens up the possibility of increased trade and competition between the United States and the European Economic Community. However, the hope of fostering increasing trade among the nations of the Atlantic community may be frustrated if the dismantling of public tariff and nontariff barriers is not matched by progress in eliminating existing private cartels and private market allocations and in preventing new private barriers to trade from developing.

When William L. Clayton was the Assistant Secretary of State, he expressed the view that—

> goods can surmount a tariff if they pay the duty; they can enter despite a quota if they are within it, but when a private agreement divides the markets of the world among members of a cartel, none of these goods can move between the zones while the contract is in force. Clearly, if trade is to increase as a result of the lightening of governmental restrictions, the governments concerned must make sure that it is not restrained by private combinations.[1]

Since World War II, West European nations have given increased attention to the problems of cartels and business concentration. Most of these countries have adopted within the last decade national laws condemning or regulating cartels which operate within their respective economies. Moreover, the European Coal and Steel Community (1952) and the European Economic Community (1958) have adopted antitrust regulations which seek to guarantee a free market economy.

The enactment of antitrust laws is the first step in the direction of a free market economy. However, the existence of antitrust laws is a minor consideration in comparison with the administration and interpretation of these laws. What is done in the next few years with respect to cartels and concentrations will be of utmost importance to American business and to international trade in general.

The present study reports on national and regional antitrust legislation in force in the European Economic Community. It also points out problem areas of the future which may result from judicial interpretations of European antitrust laws.

RECENT ANTICARTEL LEGISLATION IN WEST EUROPEAN NATIONS AND COMMUNITIES

1. Regulation of restraints in the European Coal and Steel Community

The treaty of Paris, signed in January 1952, brought into fruition a long-sought goal urged by political leaders in Western Europe as well as the United States. It created the European Coal and Steel Community (ECSC), which established a single open market for coal

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[1] William L. Clayton, "Proposals for Expansion of World Trade and Employment," U.S. Department of State, 1945.

and steel in place of a whole series of national markets restrained by governmental and private barriers. The countries included are the Federal Republic of West Germany, France, Belgium, Luxembourg, Italy, and the Netherlands.

The Coal and Steel Community is considered the forerunner of the European Economic Community. Antitrust laws are an important part of the Paris treaty. Cartels which fix prices, control output, or allocate supplies are condemned. Mergers are regulated and firms of dominant size which "abuse their position" are penalized.

Even though cartels which restrain competition are condemned by the treaty, the High Authority—the supranational governing body of the ECSC—is empowered to authorize cartel agreements "to specialize in the production, or to engage in the joint buying or selling of specified products." Under this power, some 40 cartel arrangements had been authorized between 1952 and 1961. They range from specialization agreements for production of particular types of steel products to joint selling agreements in the coal and steel industry.

International business can find some important clues to how Common Market policies toward industrial concentrations are shaping up in three major recent decisions of coal and steel regulating bodies: one prohibits definitely the rebirth of a national cartel that would have a clearly dominant position; another requires the dissolution of a government-dominated cartel organization; the third authorizes the creation of a joint venture between EEC giants on the grounds that the combined output of the joint subsidiary will not represent a dangerously large share of the market.

The first case, handed down in May 1962, bars the rebirth of the Ruhr's Kohlensyndikat (coal producers' cartel), bringing defeat after many years to attempts by three Ruhr coal ententes and 38 Ruhr coal firms to re-erect the structure that the Allies took down stone by stone after the war. The Court based its decision on the fact that the cartel, if allowed, would control from 26 to 43.7 percent of all coal sold in the ECSC, "four times as much as the production of any other coal-mining area in the Common Market and more than double the total production in the French state-owned coal mines," the only other organization comparable in size.

In the second case the High Authority of the ECSC served notice on the Belgian Government that Belgium's official coal cartel, Directoire de l'Industrie Charbonniere, was "incompatible with the Paris Treaty and usurped the Authority's own powers.

In the third case, the Authority gave a qualified "yes" to a steel joint venture of some of the biggest EEC producers. The firms are: S.A., Cockerill-Ougree, and S.A., Forges de la Providence, of Belgium; S.A., Acieries Reunies de Burbach-Eich-Dudelange (ARBED), of Luxembourg; Schneider & Cie, Societe Metallurgique de Knutange, and Societe Miniere de Droitaumont-Bruville, of France.

The Authority has given approval to the Sidemar steel complex project of these firms, to be erected on the banks of the Ghent Canal Terneuze, near Selzaete, Belgium, with the sole proviso that the plant produce only laminated products.

The reasoning behind this subordinating clause: the Authority estimates that so long as Sidemar restricts itself to this production, it cannot endanger competition. Although many-sided financial control

by giants could be considered a competition-restricting factor, the participating firms' output of flat products, added to that of their joint subsidiary, would not be large enough to dominate the market.[2]

Cartel agreements among firms in the Coal and Steel Community for export sales are not subject to regulation. The treaty of Paris thus permits cartels in selling to third countries.

A translation of the main antitrust provisions of the Coal and Steel Community treaty appears in appendix A.

2. *Regulation of interstate restraints in the European Economic Community*

The treaty of Rome, which established the European Economic Community on January 1, 1958, carried into more complete realization the movement for European unification which began with the treaty of Paris in 1952. The political leaders—Monnet, Schuman, Spaak, de Gasperia, and Adenauer—saw clearly that a removal of trade barriers was not sufficient to insure the expansion of trade and commerce. Cartel arrangements have long been a feature of European business, and the architects of the Common Market accordingly moved to include in their plan antitrust provisions to curb monopolistic practices. The goal of these provisions is to provide that in the long run the market mechanism for "interstate commerce" will be that of competition, not that of cooperation (cartels).[3]

The main antitrust regulations of the European Economic Community are contained in articles 85 and 86 of the Rome treaty. These articles prohibit cartel agreements with respect to (*a*) market sharing and market allocation and (*b*) fixing prices or providing that sellers will match the prices prevailing in markets which they enter. They also prohibit dominant corporations from taking improper advantage of their economic power. Mergers are not regulated, and attainment of a dominant position is not forbidden. Further, agreements which improve production or distribution, or which promote technical or economic progress, or which do not eliminate competition for a substantial part of the products concerned, may be authorized.

Articles 87 through 90 also deal with antitrust regulations. Article 90 deals with public enterprises and enterprises which have been accorded special or exclusive rights. It explicitly points out that state-created monopolies come under the jurisdiction of articles 85 and 86. Articles of the Rome treaty pertinent to antitrust, as well as EEC antitrust regulations, are reproduced in appendix B.

Since discriminatory treatment of consumers or suppliers is practicable chiefly if the enterprises engaging in such conduct possess monopolistic powers by virtue of size, specialization, or cartelization, the treaty attempts to regulate both discriminatory practices (art. 85) and monopoly (art. 86). In other words, the practices forbidden in article 85, i.e., price fixing, control of production, etc., are usually practiced by the associations or firms under the jurisdiction of article 86.

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[2] "Europe's Rules of Competition," published by Business International, S. A., Geneva, Switzerland, November 1963, pp. 5–6.

[3] Spaak report, Brussels, Apr. 21, 1956 (Rapport des chefs de Delegation Aux Ministres des Affairs Etrangeres).

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Articles 85 and 86 apply only to practices or firms which affect trade between the member states. These articles do not apply to intrastate activities unless these are such as to have a substantial effect on interstate commerce. Moreover, there is no regulation of agreements which establish practices forbidden by article 85 provided these practices are to be carried out in countries outside the European Economic Community. The only discriminatory practices subject to regulation are those which affect interstate Community trade.

Although article 85 makes unlawful the prevention, distortion, or restriction of trade among member states, it allows such practices if they promote efficiencies benefiting the public interest. Article 86 prohibits enterprises from taking improper advantage of a dominant position in the Common Market, but does not forbid attainment of a dominant position.

This indicates an important difference between European and American attitudes toward antitrust. Historically, Europeans have not opposed cartels or monopolies as long as they served the public interest. Abuse of a dominant position, rather than merely having one, has been the main target of European laws. Americans, on the other hand, tend to deplore bigness itself. Our laws reflect this attitude, and our antitrust Division has prosecuted many a large company because it dominated its industry.

The American concept that monopolies are undesirable, per se, is based on the economic theory that monopolies and other anticompetitive devices tend to raise prices and prevent the optimum distribution of incomes and resources. Adam Smith, the original advocate of this classical economic theory, perhaps best summarized this in 1776 when he wrote, in the "Wealth of Nations":

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

Joan Robinson and Edward Chamberlin are among the leading present-day economists who have verified the evil effects of monopolies.

The treaty provides for implementing articles 85 and 86 by regulations adopted by the Commission. These articles are to be enforced by the imposition of fines and penalties and by other necessary procedures, and to be applied by the Commission and reviewed by the High Court of Justice.

After long months of negotiation, the Council of Ministers reached unanimous agreement and issued on January 3, 1962, regulation 17 to implement the anticartel provisions of the Rome treaty. Upon its release, the Council stated that this regulation would in effect constitute the first European anticartel legislation.

In essence, the regulation provides that all cartel agreements which affect trade between the member states must be filed with the Common Market Cartel Commission. This Commission is authorized to make investigations and to determine whether cartel agreements violate provisions of the Rome treaty, to determine whether special exceptions under articles 85 and 86 apply, and to levy fines on firms or associations of firms that violate regulation 17.

A translation of regulation 17 appears in appendix B. The important articles can be summarized as follows:

Article 1 bans agreements, decisions, and practices referred to by article 85 of the treaty, and the improper exploitation of a dominant

position as defined by article 86 of the treaty without prior decision being necessary.

Article 2 states that the Commission may conclude, upon application by firms or associations of firms, that there is no occasion for it to intervene with respect to an agreement, decision, or concerted practice under the terms of article 85. If the Commission makes such a determination, it issues a "negative certificate."

Article 4 is applicable to agreements concluded after the effective date of regulation 17 (March 13, 1962). It states that "agreements, decisions, or concerted practices must be notified (registered) with the Commission." If they are not registered, an exception cannot be granted under the provisions of article 85, paragraph 3.

Article 5 requires registration of agreements, decisions, or concerted practices covered by article 85, paragraph 1, which were entered into or engaged in prior to March 13, 1962. Those concerned who wish to avail themselves of article 85, paragraph 3, must register their agreements or practices with the Commission.

Article 7 requires that if the Commission finds an existing agreement or practice to be in violation of article 85, paragraph 1, that it ban such agreements or practices for a specified period of time. This interval is for the purpose of modifying agreements or practices. If no satisfactory modification can be made, the agreements are null and void, and the practices are banned.

Under article 9, member states remain competent to apply the provisions of articles 85 and 86. But the Commission may preempt this competence if it has begun an inquiry.

Article 15 authorizes the Commission to impose fines from $1,000 to $1 million, or up to 10 percent of the business achieved in the previous financial year by each of the firms which took part in the infringement. These fines are applicable to firms who deliberately or through negligence failed to register their agreements or practices which were determined by the Commission to be in violation of article 85, paragraph 1. They also apply to firms who countervene instructions by the Commission to obtain an exception under article 85, paragraph 3. Fines are expressed in terms of units of account which may vary from time to time. Presently the unit of account is approximately equal to the U.S. dollar.

Regulation 17 became effective on March 13, 1962. Thereafter, the Commission adopted regulation 27 of May 3, 1962, effective May 11, 1962, which sets forth the procedure to be followed for notifying (filing) and provides forms for applying for a "negative certificate" in accordance with regulation 17, article 2.

Regulation 59 replaced the original August 1, 1963, deadline with two subsequent dates: November 1, 1963, for agreements which preexisted the implementation of regulation 17 and for all agreements between more than two parties; and February 1, 1963, for filing two-party agreements entered into after the implementation of regulation 17.

Registration or notification prescribed by regulation 17 is designed to protect those who register from severe civil fines. Once agreements are registered, the parties thereto are protected from fines prescribed by regulation 17, but they are not protected from the provisions of articles 85 and 86 of the treaty. Consequently, parties are faced

with a difficult dilemma. They can attempt to hide their restrictive agreements and, if discovered, face not only dissolution under articles 85 and 86, but also heavy fines under regulation 17. They can notify the Commission of their agreements and practices giving the Commission evidence to decide whether or not such should be dissolved or modified under articles 85 and 86.

As an alternative to notification, parties can seek a negative certificate. This is a finding by the Commission that on the basis of the information known to it, there are no grounds to intervene with respect to the agreement in question under article 85, paragraph 1, or with respect to the practices described therein under article 86 of the treaty.

There are at least four serious limitations to a negative certificate. First, since the issuance of a negative certificate constitutes merely an administrative determination by the Commission, it may not divest the authorities of member states of competence to apply the provisions of articles 85 and 86. Second, in issuing the negative certificate, the Commission gives notice that its finding is based only on the information known to it when rendering its decision. Further information could afford the basis of later action by the Commission. Third, the mere filing of an application for a negative certificate does not constitute notification of an agreement. Hence, the mere application for a negative certificate does not qualify the parties for the benefits obtained by giving notification within the specified deadlines. Fourth, a negative certificate is not of the same legal weight as a finding by the Commission that an agreement or practice is exempt from the provisions of article 85, paragraph 1, because it meets the special exceptions of article 85, paragraph 3. However, the information which must be furnished by the parties for a negative certificate is virtually the same as the information which must be furnished for an exemption under article 85, paragraph 3.[4]

Agreements or practices which meet the criteria of article 85, paragraph 3, of the treaty appear to be the only types of restrictive practices that can be legally engaged in by firms or associations of firms who engage in interstate business in the Common Market. In substance, the criteria for legitimate cartels are as follows:

(1) The agreements contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress.

(2) They return to users an equitable share in the profits.

(3) They do not impose on enterprises concerned any restrictions not indispensable to the attainment of the above objectives.

(4) They do not enable such enterprises to eliminate competition of a substantial proportion of the goods concerned.

The crux of Common Market anticartel policy lies in the interpretation of these criteria. If it is difficult to obtain an article 85(3) exception, most interstate cartel agreements and practices will be outlawed. If, on the other hand, many firms or associations of firms are afforded protection by article 85(3), free competition will not be possible.

Apparently the exceptions of article 85(3) were provided to enable medium-sized firms to pool resources with competitors in expensive

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[4] See L. E. Becker, "Effect of the Common Market Antitrust Law on American Companies," Anti-Trust Bulletin, vol. VII, No. 1, January–February 1963, pp. 26–28.

research and market development programs. Hundreds of firms engage in such pools. There are four basic types:

(1) Research and development agreements—for example, Cotuplas, S.A., a pool organized in Paris in 1963 to develop better plastic-container manufacturing equipment for a group of American Can Co. licensees. Each of the nine licensees bought for cash a 5-percent participation in Cotuplas, a plastic-container manufacturing subsidy. The licensees are can companies in the United Kingdom, West Germany, Austria, the Netherlands, Sweden, Switzerland, Italy, Australia, and the United States. With the capital from each licensee, Cotuplas will be able to develop advanced machinery for the group.

(2) Distribution agreements—for example, Union Special Machine Co., of Chicago, will sell its machine tools on the German market through Germany's Durkoppwerke, A.G., under a reciprocal-distribution agreement. Union will sell the German firm's machines in the United States.

(3) Manufacturing pools—for example, Citroen and Simca, two French automobile manufacturers agreed to set up a joint venture for common manufacture of spare parts.

(4) Service pools—for example, in 1961, 14 independent European and U.S. advertising agencies grouped into the organization de Vente et de Publicite du Marche Common. This organization entered an agreement with Continental Advertising Agency, of New York, to exchange artistic productions and management personnel, and to swap or share client budgets.[5]

Article 85(3) appears to sanction these types of arrangements. Although the object of these pools may appear to be in the interest of specialization, research and development, etc., there is the danger that close association of firms in a pooling arrangement permitted by 85(3) will enable the members to engage in other prohibited cartel activities. Thus, the exceptions of article 85(3), if freely granted, may defeat the purposes of the Rome treaty.

The question unanswered by regulation 17 was the status of an agreement or practice filed with the Commission but not yet granted an exemption under article 85, paragraph 3. The Court of the European Communities in *Societe Bosch and Van Rijn* v. *de Geus*[6] stated that agreements which were filed within the specified time gained a provisional validity and were enforceable by courts of the member states. However, such provisional validity discontinues if the Commission informs the parties after a preliminary examination that their agreements are not entitled to an exemption under article 85(3). The Court indicated, moreover, that if the Commission decided that such an agreement was not valid under article 85(3) as a whole and was not entitled to approval as a result of changes made by the parties, its nullity and unenforceability could be made retroactive for a period to be determined by the Commission. This resolves the question left unanswered by regulation 17.

Finally, it should be pointed out that although regulation 17 provides for the regulation of cartel agreements and practices by a system of notification, it did not attempt to clarify or to make more specific

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[5] "Pooling for Profits," prepared by the editors of Business Europe, published by Business International, S. A., Geneva, Switzerland, August 1963, pp. 2–11.

[6] Case No. 13/16, Apr. 6, 1962.

the general language used in articles 85 and 86 of the treaty. Although it does establish a procedure—the application for a negative certificate through which parties may obtain a formal statement by the Commission as to whether their agreements or practices fall within articles 85 and 86—it was pointed out above that this procedure has serious limitations. As a result, firms engaging in interstate Common Market business were very uncertain about the types of agreements and practices they had to file. The Commission attempted to give an advisory opinion about some types of agreements which it considered clearly not within the meaning of article 85. These opinions concerned agency contracts, license contracts, patents, exclusive dealer contracts between producers and dealers, etc. These opinions were not issued until January 1, 1963, or less than 1 month before the final deadline for notification of two-party agreements.

As a result of the uncertainty as to the types of agreements which had to be notified and presumably as a result of both the limitations of negative certificates and penalties imposed by violations of regulation 17, the Commission received more than 34,000 agreements by the February 1 deadline.

As stated above, the crux of Common Market anticartel policy is the interpretation given to articles 85 and 86 of the treaty. These treaty provisions embody historical European cartel concepts. They permit cartelization and monopolistic practices provided these serve the public interest. Abuse of a dominant position rather than the position itself is the main target of article 86 as it is the main target of most national European anticartel laws.

Case precedents are not yet available to give an insight into the Commission's interpretation and application of articles 85 and 86. Perhaps the best insight comes from the laws and case material of the individual member states. The draftsmen of the Rome treaty and regulation 17 derived most of the basic treaty concepts from national laws. Moreover, if the Commission vigorously enforces the treaty provisions and regulation 17, approval by the member states will be necessary. It would be virtually impossible for the Commission to disapprove a cartel agreement between member states if the governments of such members vehemently disapproved such action and if they indicated they would not enforce on a national level the Commission's ruling.

NATIONAL LAWS OF EEC COUNTRIES, REGULATED CARTELS AND RESTRICTED BUSINESS PRACTICES [7]

Belgium

The Belgian cartel law of 1960 [8] is a successor to decree No. 62 issued in 1935. This decree brought cartel agreements under Government control in order that it could "regulate economic production and distribution." The contribution of the 1935 decree was the establishment of a Council for Economic Disputes. This Council was retained in the cartel law of 1960.

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[7] The basic source for information on the national laws is the "Guide to Legislation on Restrictive Business Practices" published by the European Productivity Agency of the Organization for Economic Cooperation and Development," vols. I–III, Paris, 1960; supplement, 1962.

[8] Belgian Chambre des Reprisentents, Annales Parlementaires, Nos. 85–87 (1959–60); 130 Moniteur Belge 4674 (June 22, 1960).

The Belgian Government does not consider agreements among enterprises as unlawful in themselves. The law only attacks "abuse" of these agreements. Abuse is defined by means of a general formula and the law omits any enumeration of specific practices.

There are two types of proceedings: informal inquiries for the purpose of determining whether or not formal proceeding should be inaugurated; or formal investigations. Article 5 states that informal inquiries are to be undertaken by the Council for Economic Disputes either when there are indications of an abuse of economic power in a particular market or upon request by the Minister of Economics. Parties are offered recommendations if the Council decides that an abuse exists. If the recommendations are accepted, the matter is settled. If the parties reject settlement, the Government can issue a cease-and-desist order.[9]

The 1960 law contains two provisions which were enacted for the purpose of harmonizing Belgian law with the Rome treaty. Article 28 provides—

> whenever the Belgian authorities have to decide by virtue of article 88 of the treaty * * * upon the permissibility of cartels and upon the abusive exploitation of a dominant position in the Common Market, such determination must be made by the authorities defined in the present law: (1) either in conformity with articles 85(1) and 86 of the treaty * * * and following the procedures prescribed by the present act; (2) or in conformity with article 85(3) of the treaty. * * *

No legal precedents provide a guideline as there has not been one action brought under the law in its 3 years of existence. Eighteen complaints have been made and one dismissed as insufficiently important to come within the law.[10]

Most of the complaints concern retailers' complaints that wholesalers or manufacturers are refusing sales. Refusal to sell is not punishable per se, and is widely practiced in Belgium. It is doubtful, according to Belgian cartel experts, that the Council will try to make a case that such refusals would harm the "general interest" of the nation.

Complaints on a larger scale involving key industries have not come to the attention of the Council.

While the Belgian Council for Economic Disputes has failed to interpret abuse and has failed to indicate what types of cartel practices will be exempt under the 1960 law, it did interpret these concepts under the 1935 decree. However, this law was directed toward trust boosting—not trust busting. Prior to 1960, cartels, in order to be legally enforceable, merely had to file a petition with the Minister for Economic Affairs showing that the agreement was assumed voluntarily and that an extension or authorization of it was in the public interest. The petition, if accepted, was published with the announcement that adverse interests should register their opposition. If opposition arose, the parties could by agreement submit their controversies to arbitrators. But if arbitration failed, the controversy was brought before the Council for Economic Disputes. According to statistics published by the Office of the Council for Economic Disputes in

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[9] Decree No. 62, art. 15.

[10] "Guide to Legislation on Restrictive Business Practices," published by the European Productivity Agency of the Organization for Economic Cooperation and Development, Paris, 1960, vol. II.

1952,[11] the total number of applications filed with the Council in the period 1935–52 amounted to 95. Some of the applications were rejected or withdrawn but agreements involving such manufacturing industries as carbonic acid; bolts, wires, and nails; chemicals, cement, etc.; bottles; rubber; glass; steel bars; rolling mills; copper sulfate, were approved under the 1935 decree. Virtually all agreements regulated by the 1935 decree have expired and currently all agreements are governed by the 1960 law.

As a result of the actions by the Council for Economic Disputes in the draft of the 1960 law, the general definition of abuse was shown by the enumeration of 12 types of practices [12] which the law forbids:

(1) Practices affecting price.
(2) Unwarranted discrimination between purchasers.
(3) Coercion of third persons not to sell or buy from certain other persons.
(4) Selling below cost.
(5) Hampering technological innovations.
(6) Quantitative limitations or qualitative alterations of production.
(7) Resale price maintenance.
(8) Division of customers.
(9) Stipulation of exclusive dealing or loyalty clauses.
(10) Tied sales.
(11) Restrictions on the volume of sales or purchases for economic purposes.
(12) Restrictive, discriminatory, or coercive measures tending to distort the distribution of primary materials for manufactured articles or credit.

Had these draft regulations been made a part of the Belgian law, a strict interpretation of abuse would have become operative. The Belgian Parliament was not willing to accept this strict interpretation of the abuse concept. The draft was modified and the 1960 law contains the same type of general definitions of abuse as found in articles 85 and 86 of the Rome treaty. Currently attention is focused on industries such as the glass, fertilizer, cement, photographic, where cartels are known to exist but which no longer have the protection of the 1935 decree. The actions taken involving these key industries will determine the enforcement policy of the 1960 law.

France

In France the origins of legal regulations concerned with cartels can be traced back to a decree of the revolutionary government issued in 1791.[13] However, the essence of the regulations which are in force is contained in a 1953 decree, supplemented by two amending decrees in 1958 and 1959.[14] These various enactments themselves supplemented older price legislation and for this reason are incorporated in price ordinance No. 45–1483 issued on June 30, 1945.

The regulations consist of two series of provisions. One relates to restrictive trade agreements or cartels, the other to restrictive trade

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[11] Stefin A. Resienfeld, "The Protection of Competition," "American Enterprise in the European Common Market—A Legal Profile," edited by Eric Stein and Thomas L. Nicholson, University of Michigan, Ann Arbor, 1960, vol. 2, ch. 10, p. 275.
[12] Ibid., 278.
[13] The decree explicitly forbade citizens carrying on the same occupation to act together in respect to their "pretended common interest."
[14] Decree No. 53–704, Aug. 9, 1953; decree No. 58–545, June 24, 1958; decree No. 59–1004, Aug. 17, 1959.

practices. Both series are a part of the criminal code and both prescribe particularly severe penalties.

The law prohibits agreements of any kind, oral, tacit, or written, between two or more parties which limit full competition by exerting an unfavorable effect on prices. In particular, agreements for market sharing, production or selling quotas, and price clauses are interpreted as within the application of the law. In addition, agreements which may in certain cases be enforced by a system of sanctions have been judged illegal.

Cartels which arise out of the application of a legislative provision or regulation are exempt from the cartel law.[15] Furthermore, cartels whose promoters are able to prove that their economic effects are to improve and extend the market for their products or to insure economic evolution by means of rationalization and specialization are granted exceptions.[16]

The second series of regulations prohibits specific practices which may be performed either by one enterprise or by a number of enterprises. They are as follows:

(1) Refusal to sell when the buyers' requests are normal.

(2) Unjustifiable commercial discrimination (price or other conditions of sale).

(3) Making the sale conditional on the purchase of other goods or of a minimum quantity.

(4) Minimum resale prices which are prohibited even for brand-name goods, subject to exemption granted by the Ministers on the request of the interested parties for good cause shown.

Cartels are exempt from control even if a prohibited situation is found to exist so long as the end result of the cartel is coordination of investments; rational utilization of labor; quality improvement; export promotion; reduction in unit costs of production. More than 40 industries have been exempt from cartel prosecution as a result of these criteria. They include steel tubes, magnesium, electric bulbs, plate glass, metal barrels, rubber conveyor belts, bicycle handlebars and wheel rims, semifinished copper goods, household soap, agricultural handtools, etc.[17]

The concept of a dominating position was unknown to French law until 1963. In 1963, an amendment was adopted similar to article 86 of the Rome treaty. Moreover, the practices which are condemned are precisely those which can most often be laid at the door of enterprises in dominant positions and are made possible and dangerous only by the dominating position of those who practice them. The concept of mergers is alien to French legislation. Finally, French law has no application to extraterritorial agreements which have no effect on the domestic market.

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[15] Art. 59 grants exceptions to cartels arising out of legislative regulations or provisions. It does not, however, automatically exempt the cartel in respect to its entire scope of operation.

[16] Art. 59 exempts cartels only if their promoters are able to prove beneficial economic effects. No special form of proof is prescribed and the decision is left in the "inner conscience" of the judges. Moreover, if both harmful and beneficial effects are indicated, the judges are supposed to base their decisions on a sort of economic profit and loss account. In some of these cases, the judges can enjoin the parties from continuing the practices which cause the harmful effects. Finally, the judges must continually watch the operation of the cartel to decide if the effects are still beneficial as outside economic conditions change.

[17] Op. cit., "Europe's Rules of Competition," p. 21.

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Since French cartel laws are a part of criminal law, the penalties can be severe and the proceedings favorable to litigation. French law requires that an enterprise make available all documents pertinent to the case—accounts, checkbooks, copies of letters, bank accounts, cost figures, and negotiable instruments are examples. However, court cases involving restrictive agreements and practices are rare in France. Most of the cases are settled by the Economic Minister after receiving advice from the Technical Commission on Combines (cartels). The Commission, consisting of 14 members, advises the Minister if an abuse is present. After the Commission's recommendations, the Minister has three choices: he can seek litigation, settlement, or dismissal.

In short, French cartel legislation can prevent concentration if enforced vigorously. It is based upon a price criteria, disallowing cartels or practices which have an artifical effect on prices. History indicates, however, that the law has not been applied with consistent vigor, at least by U.S. standards.

The French law does specifically define abuse. If the Common Market Commission disallows agreements on the basis of French statutory language, most agreements would be disapproved. However, if the Commission refuses to enforce the anticartel provisions of the Rome treaty and regulation 17, as the French Technical Commission on Combines has refused to enforce French anticartel decrees and if numerous exceptions are granted, cartel agreements and practices will not be restrained in the Common Market.

The French attitude toward enforcement may present difficulty. Without cooperation and enforcement by the member states, the decisions of the Commission will be meaningless.

Germany

The 1923 cartel ordinance was the first German law relating to freedom of competition. However, this ordinance was abandoned during the period of national socialism and a new law was not enacted until 1957. The 1957 act against restraints of competition is the law presently in force.

The 1957 law attempts to secure freedom of competition and prevent concentrated economic power from impeding competition. The law deals specifically with cartel agreements, concentrated industries, and restrictive or discriminatory practices.

All cartel agreements or resolutions are invalid unless they qualify for an exemption. Cartel agreements are those concluded on identical economic levels, and are often referred to as horizontal agreements. Only agreements or resolutions are covered by the law; concerted actions for conscious parallelism are excluded.[18]

Exceptions are provided for two categories: agreements which become effective after having been registered with the Cartel Authority and after 3 months have elapsed without objection; agreements which require explicit permission from the Cartel Authority in order to obtain legal validity.

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[18] Title 1, sec. 1: Agreements made by enterprises or associations of enterprises having common purposes and resolutions of associations of enterprises are invalid insofar as they are apt to influence by restraints of competition the production or the market conditions with respect to the trade in goods or commercial services.

Agreements relating to general delivery terms, rebates, uniform application of standards or types, and exports,[19] can be valid if registered. Agreements which require explicit permission from the Cartel Authority in order to obtain legal effect are provided for in cases of crisis caused by structural changes, rationalization of economic processes, rationalization in connection with price agreements or joint purchasing or marketing ventures, exports comprising commerce within the domestic market, imports, and, finally, in cases of exceptional necessity for prevailing reasons of the national economy and public welfare.

Vertical agreements which lack the joint purpose of cartel agreements and are concluded on different economic levels are also within the area of applicability of the law. The following agreements are prohibited: licensing and patent agreements which impose restrictions that go beyond the legal substance of the protected privilege; [20] exclusive dealing and binding agreements which restrict free competition; [21] agreements which restrict a party in its freedom to agree with third parties upon prices or conditions of trade.[22] The law also applies to resale price maintenance agreements.[23]

German legislation does not prohibit monopolies. The Cartel Authority prohibits abusive practices of market dominating enterprises,[24]

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[19] Title 1, sec. 1: Does not apply to agreements or resolutions which deal with the uniform applications of terms of trade, deliveries, or payments, including discounts. Such arrangements may not relate to prices or components of price.

Title 1, sec. 1: Does not apply to agreements and resolutions concerning rebates on goods supplied insofar as these rebates represent a genuine compensation for services and do not need a justified differential treatment from other distributors for their customers who render the same service to the suppliers in the distribution of goods. If it is evident that the agreement or resolution has harmful effects on the flow of production or trade or on adequate supply, the Cartel Authority will object.

Title 1, sec. 1: Does not apply to agreements or resolutions which deal exclusively with the uniform application of standards or types.

Title 1, sec. 1: Does not apply to agreements or resources which serve to protect or to promote exports insofar as they are limited to regulating competition in markets outside the area of applicability of this law. No permission shall be granted by the Cartel Authority, however, if the agreement or resolution or method of its execution (*a*) violates the principles which the Federal Republic of Germany has accepted international treaties with regard to trade of goods or commercial services, or (*b*) may lead to a substantial restriction of competition within the area of applicability of this law and in the interest of the preservation of competition.

Title 1, sec. 4: In the event of a decline in sales based on a lasting change in demand, the Cartel Authority may approve an agreement or resolution of the nature specified in title 1, section 1, with regard to enterprises engaged in the production, manufacture, or price of goods, if such an agreement or resolution is necessary to bring about a planned adjustment or productive capacity to demand, and if the arrangement takes into consideration the general economic situation, and of the public interest.

[20] Title 1, sec. 20, par. 1: Agreements concerning the acquisition or the use of patents, registered designs, or protected brands are invalidated if they impose upon the acquirer or licensee any restrictions in his business conduct which go beyond the contents of the said privileges; restrictions pertaining to type, scope, quantity, territory, or period of exercise of the privilege shall not be deemed to go beyond its contents.

[21] Title 1, sec. 18, par. 1: The Cartel Authority may invalidate agreements between enterprises with respect to goods or services and prohibit the application of a new similar agreement insofar as such agreements (*a*) restrain one of the parties in its freedom to use restricted goods or other goods or commercial services, (*b*) restrain one of the parties in the purchase or sale of other goods or services from or to third parties, (*c*) restrain one of the parties in the resale to third persons of the received goods, (*d*) permit one of the parties to receive goods or services not related in kind or by trade customs and thereby unfairly restrict the freedom of economic action of that party or of other enterprises; the same action may be taken insofar as the extent of such restrictions substantially restrain competition for these or other goods or services.

[22] Title 1, sec. 15: Agreements between enterprises with respect to goods or services relating to markets located within the area of applicability of the law are null and void insofar as they restrict any party to them in its freedom to establish prices or terms in contracts which it concludes with third parties in regard to the goods supplied, other goods or services.

[23] Title 1, sec. 17, par. 1: The Cartel Authority may invalidate any resale price maintenance obligation if it has ascertained that the resale price maintenance (*a*) is being abused or (*b*) the retail price maintenance has such or in connection with other restraints of competition is apt to raise the price of goods affected to avoid a lowering of such prices or to restrict production or sale of such goods. In deciding whether resale price maintenance is being abused, all economic circumstances shall be considered.

[24] Title 1, sec. 22, pars. 1 and 2: As far as enterprises have no competitors or are not exposed to substantial competition in a certain type of goods or services, it is market dominating within the meaning of this law.

and invalidates agreements as far as such enterprises misuse their position in the market by demanding artificial prices, establishing unfair terms or conditions of trade, or by imposing binding unlawful agreements upon the contracting parties.

The German Cartel Act does not provide for any measures against mergers. It does require mergers to be reported to the Cartel Authority without delay providing participating enterprises thereby achieve a market share of 20 percent or more, or one of the participating enterprises holds such a share even without the merger. The Authority may merely call the parties concerned and discuss the matter—it cannot prevent them.[25]

Certain discriminatory practices which affect market conditions are prohibited. Any threat, promise, or coercion tending to cause restrictive behavior is expressly forbidden. Moreover, the Cartel Authority may order trade associations to admit enterprises if the enterprises are discriminately refused membership.

The Cartel Authority and the Federal Cartel Court have jurisdiction over the enforcement of the Cartel Act. Violations of the act are civil offenses but most carry stiff penalties.

Applications for exceptions from the competition law are considered within the Cartel Office by semijudicial special boards and an appeal tribune. Further appeals may be taken to the Federal courts. Between 1958 and 1962, Cartel Office statistics show:

Authorized cartels	100
Applications pending for authorization	205
Existing cartels tolerated and registered	28
Cases pending	42
Cartels rejected	1
Cartel applications withdrawn	30

Although the German cartel law expressly prohibits all cartel agreements, in reality it prohibits only those cartels which are obviously harmful to free competition. The Cartel Authority, upon registration, grants permission for many cartels to operate. The cartel law also has provisions for discriminatory practices and for concentrated industries. However, these provisions are relatively weak ones and are not used very often to prevent an industry from obtaining a dominant position.

The German laws are considered the most stringent antitrust laws in the Common Market. They are also very similar to the provisions of the Rome treaty. If the Common Market Cartel Commission is limited in its enforcement of articles 85 and 86 by the attitudes and

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Two or more enterprises are considered "market dominating" in regard to a certain type of goods or services so far as no substantial competition exists in fact between them in general or in specific markets and as far as they jointly meet the requirements of par. 1.

Title 1, sec. 22, par. 4: The Cartel Authority may prohibit abuses by market dominating enterprises and may invalidate contracts. Prior to such action, the Cartel Authority shall call upon the participants to refrain from the abusive actions to which objection is made.

[25] Title 1, sec. 23: Any consolidation of enterprises shall be reported to the Cartel Authority if the result of such consolidation is 20 percent or more of the market with regard to a specific type of goods or services, or if one of the enterprises involved has such a share without the consolidation. The following transactions shall be considered as such consolidations:

(*a*) Mergers with other enterprises;
(*b*) Acquisition of the capital of other enterprises;
(*c*) Contracts providing for the use or management of plants of other enterprises;
(*d*) Acquisition or participation of any kind in other enterprises insofar as such participations held by the acquiring enterprise or by an enterprise belonging to a cartel obtains a share of 25 percent of the voting capital stock of the other enterprise.

political pressures of the member states, history portends that many cartels will continue. Even the German Government, the one most dedicated to free competition, has authorized 100 cartels.

Italy

Italy does not have a national cartel law. It is anticipated, however, that legislation will be enacted within the next 2 years.

At the present time, a report on restrictive practices is being prepared by a Parliamentary Commission of Inquiry. This report will specify the main restraints imposed upon competition by economic agreements and practices. The Commission has sent to virtually every firm in Italy a detailed questionnaire requesting information on their business practices. If a firm fails to reply or fraudulently replies, they may be subject to penalty.

Once the report is published, Parliament is expected to adopt an anticartel law similar to the Rules of Competition of the European Economic Community. Of the five draft proposals of such legislation, one has been interpreted as more lenient than the rules of competition, three about the same, and one more far reaching.

The draft law is called the Columbo plan. The proposed law prohibits any agreement or practices which may prevent, distort, or in any way restrain competition in the domestic market. It also forbids distortion of prices or delivery terms by dominant enterprises. The law establishes a Commission for the Protection of Competition with a secretariat. It also establishes courts of inquiry for violations of the law, with judicial powers. The draft law obliges agreements to be registered with the Minister of Industry and Trade.

Under the proposed law, state-owned businesses do not fall within the prohibitions imposed on private business. Since more than 30 percent of Italian economic activity is controlled by the state, some of the largest obstacles to a freely competitive economy will remain despite the passage of such a law.

Another problem besides Government ownership is the lack of competition in the underdeveloped areas of south Italy. It is most difficult to shape a single law for the economically mature regions in the north and at the same time for the slowly developing southern part of the nation.

Luxembourg

Luxembourg has no antitrust law and no legal provision for the maintenance of competition. A general statute of 1937, adopted to curb inflationary influences, however, makes conspiracies to enhance prices illegal in principle. The law has not been applied in practice. There is, at present, draft legislation being prepared which is very similar to the Common Market Rules of Competition.

The Netherlands

The Economic Competition Act of 1956 is the basis of the Netherlands cartel policy. The substance of this act may be summarized in the three central ideas of (*a*) the regulation of competition, (*b*) a dominant position, and (*c*) the general interest. The first two ideas are the subject matter of the act and the third is the test to be applied in the case of a regulation of competition or a dominant position.

In general, the concept of regulation of competition is similar to what is usually called a cartel. The act defines it as "an agreement or decision subject to civil law regulating competition between the owners of undertakings." [26] The scope of the concept may be extended in two ways. First, an agreement which does not regulate competition in itself but nevertheless affects it may be deemed to be a regulation on competition. Second, any agreements or decisions not subject to the civil law—which, in effect, mean gentlemen's agreements—may also be deemed to be regulations on competition if the purpose of the agreement is to affect competition.

The act defines a dominant market position as follows:

> A situation of law or of fact in industry involving the prepondering influence of the owners of one or more undertakings on a market for goods or services in the Netherlands. [27]

It should be emphasized from the outset that the legislature has not started from the point of view that regulations of competition or dominating market positions are contrary to the general interest. The starting point is that cartels are permitted—unless in a specific case there is some reason for taking action against such a cartel—and that those who hold a dominating economic position are free in practice unless, in a given case, it is thought necessary to lay down certain lines of conduct for them. In other words, the Netherlands Economic Competition Act constitutes a system for the control of abuses. The high degree of flexibility in the administration of the act makes the Dutch law an instrument of business cycle policy as well as a means of controlling restrictive agreements and enterprises. Accordingly, it is quite possible that the legality of a given agreement may depend on the general level of economic activity or other overall economic consideration.[28]

Any cartel or dominant industry must register with the Minister of Economic Affairs within a month of its creation. The only exceptions to this notification requirement are individual resale price maintenance agreements and agreements involving extraterritorial markets. Failure to give notice involves severe punishment.[29]

The cartel register is not open to the public although the Government is not bound to keep it secret in all circumstances. At times, the Government may publish particulars of a specific cartel. As of January 1961, there were 1,408 registered agreements.[30]

After the registration of an agreement, the Government determines whether it is a regulation of competition or a dominant economic position contrary to general interest. If a regulation of competition agreement is declared contrary to public interest, the Minister of Economic Affairs can declare the agreement nonbinding. The members of the cartel can no longer enforce their obligations against each other by

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[26] Sec. 1(1), Economic Competition Act of June 28, 1956, as amended by the act of July 16, 1958.
[27] Ibid., sec. 1(1).
[28] "Factors Affecting the United States Balance of Payments," Pt. 2, "The Common Market: New Challenges to U.S. Exports," material prepared for the Subcommittee on International Exchange and Payments of the Joint Economic Committee, 87th Cong., 2d sess., 1962, p. 148.
[29] Sec. 2, Economic Competition Act of June 28, 1956, as amended by the act of July 16, 1958.
[30] Ibid.

judgment at law. Moreover, any practice in execution or attempted execution of a regulation of competition which has been declared nonbinding is prohibited. Such prohibition is absolute for a period of 5 years.[31]

In addition to the nonbinding declaration, the Government possesses a second means of action against cartels which it regards as contrary to the general interest. It can make public the provisions of the agreement and thus create adverse public opinion toward the members of the cartel.[32]

If the Government considered that dominant position exists with consequences contrary to the public interest, instructions may be given to the individuals or corporations concerned as to the line of market conduct which they are to follow. The act specifically defines the nature of such instructions which may be divided into four classes: (*a*) The prohibition of compulsory action against entrepreneuers by means of market practices including boycotting, (*b*) instructions as to price, (*c*) an obligations to deliver, and (*d*) prescribed conditions of delivery and payment.[33] If those who occupy the dominating position do not comply with such instructions, they are subject to penalties.

Finally, it should be pointed out that Dutch legislation on competition is administered for the most part by the Minister of Economic Affairs and not by the courts. In some cases, it is possible to appeal to a court of appeals on the grounds that the ministerial decree was illegally made, but the court has no power to deal with the substance of the decree. Thus, the court can control cartel policy to a certain extent but it cannot create it.

SUMMARY

The governments of the Common Market Member States have recently adopted, amended, or proposed laws regulating cartels and monopolistic practices. While the enforcement of these laws has not been vigorous, their adoption is significant. Since the World Economic Conference of 1927, the United States has been formally encouraging European nations to control cartel agreements and other restrictive business practices. Since World War II, the United States has been successful in negotiating clauses relating to restrictive business practices in a number of friendship, commerce, and navigation treaties. The clauses normally provide for consultation when one party feels that its trade is suffering harmful effects from practices of private or public commercial enterprises of the other party which restrain competition, limit access to markets, or foster monopolistic control. Under these clauses, each party agrees to take such measures as it deems appropriate to eliminate problems caused to the other. Such a clause appears in three FCN treaties with the Common Market countries, France, Germany and Italy.

Recognition by the individual European nations and by the European Economic Community of the need for the elimination of private barriers is a vital first step. If enforcement follows, the competitive differences between the United States and the European Community will be significantly narrowed.

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[31] Ibid., sec. 5(1).
[32] Ibid., sec. 7(2).
[33] Ibid., sec. 24(1).

PROBLEM AREAS OF THE FUTURE

American antitrust laws apply to the operations of U.S. companies anywhere in the world if they restrict competition in U.S. foreign or domestic commerce. Moreover, U.S. courts have extended their jurisdiction under the Sherman Act not only to conspiracies between American and foreign enterprises, but even to certain acts by foreign combinations alone. In the *Aluminum Company of America* case [34] the court stated that

> it is settled law * * * that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that have consequences within its borders which the state reprehends.[35]

If the restrictions engaged in by foreigners outside the United States has a substantial or direct effect upon trade within the United States, the U.S. courts can take jurisdiction. In the *Imperial Chemical Industries* case,[36] the U.S. district court issued an injunction which could only be enforced by England. In issuing the injunction, the court stated:

> We feel that the possibility that the English court in an equity suit will not give effect to such a provision or decree should not deter us from including it.[37]

Finally, the Attorney General's report of March 31, 1955 stated:

> We believe that conspiracies between foreign competitors alone should come within the Sherman Act only when they are intended to and actually do result in substantial anticompetitive effects on our commerce.

U.S. laws, therefore, apply to restrictive business practices which substantially effect U.S. commerce, even though they are carried on within the Common Market. This means that firms whose business operations substantially effect U.S. commerce must abide by (1) the antitrust laws of the individual member states of the Common Market, (2) the Common Market antitrust laws, and (3) U.S. antitrust laws.

Since firms operating within the Common Market abide by three sets of antitrust laws, the similarity or dissimilarity of these laws is of paramount importance. As already pointed out, laws of the member states conform in most aspects to the laws of the Rome treaty, but there are many differences between the antitrust laws of the United States and those of the European Economic Community. U.S. laws, for example, forbid companies from acquiring market dominance through merger, but the EEC treaty and the member states' antitrust laws aim only at preventing abuse of a dominant position. This means that if a U.S. company and a European concern want to merge or establish a jointly owned subsidiary and Common Market officials approve the plan, the American company still may be prosecuted under U.S. antitrust laws. If so, the American company might be forced to withdraw and leave the way open for a non-U.S. competitor to grab the business.

Other conflicts may arise, depending upon how the Common Market treaty is enforced. For instance, if the Common Market Commission grants article 85(3) exceptions to such restrictive practices as price fixing or market allocation, since these contribute to the production or distribution of goods or to the promotion of technical

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[34] *U.S.* v. *Aluminum Company of America,* 148 F. 2d 416 (2d Cir. 1945).
[35] Ibid., p. 443.
[36] *U.S.* v. *Imperial Chemical Industries,* 100 F. Supp. 504 (S.D.N.Y. 1951), decree 105 F. Supp. 215 (S.D.N.Y. 1952).
[37] Ibid., p. 231.

and economic progress while reserving to consumers an equitable share of the profit resulting therefrom, American companies entering such agreements might be subject to fines under U.S. antitrust laws.

While American business firms have expressed concern over these possible conflicts, former Assistant Attorney General Lee Loevinger stated: [38]

> The rule of the EEC, insofar as clause 3 of article 85 is concerned, are permissive. Now, it is perfectly possible that the Commission of the EEC might permit things that would be forbidden under American laws. This is not, however, a conflict because these are not required. I have examined the EEC laws very carefully and the regulations, as well as the laws of several other countries, and with rare and unimportant exceptions, I can see no case where the laws of another country require something that our laws forbid. It is possible that the laws of other countries may permit something that our laws forbid but this is not a conflict that, it seems to me, should cause any great difficulty. If an American business complies fully with the American laws, it can be almost absolutely certain that it is going to comply with all of the requirements of any European law and it is not going to get into any difficulty.

While it is considered generally true that U.S. antitrust laws are more rigid than those of the Common Market, two very notable exceptions could develop depending upon the interpretation of article 85(3) by the Commission. For example, the Commerce Department has long been interested in an expansion of private international contracts and has encouraged licensing and investment in Europe.[39] Licensing arrangements often contain implied or explicit restraints of competition. Territorial restrictions, such as agreements not to export or import, price restrictions, tying provisions, and clauses not to protest the validity of patents are but a few examples. As Mr. Behrman stated in his testimony: [40]

> American parties to licensing agreements have difficult choices to make in deciding whether to notify the Commission of such agreements and whether they can be exempt from article 85(1) under the provisions of article 85(3).

Mr. Behrman goes on to say that—

> few U.S. companies seek advance clearance from the U.S. Government for their licensing agreements.

This implies that U.S. companies believe that these agreements are not in violation of U.S. antitrust laws. These arrangements might be prohibited by the EEC Commission if article 85(1) is strictly interpreted and, in this case, the EEC laws would be more far reaching than U.S. law.

Another example of possible conflict, depending upon the Commission's interpretation of article 85, would be its treatment of Webb-Pomerene export associations. In 1918, the Webb-Pomerene Act [41] was passed to help American firms competing in foreign markets meet the competition of foreign cartels. As stated by the Honorable Paul Rand Dixon, Chairman of the Federal Trade Commission:

> Under the Webb-Pomerene Act, American exporters are exempt from the operation of the antitrust laws so long as their export activities have no adverse effects on our domestic trade.[42]

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[38] Hearings of the Subcommittee on Antitrust, Committee of the Judiciary, Mar. 14, 1963, p. 60.
[39] Ibid., p. 34.
[40] Ibid., p. 29.
[41] 15 U.S.C. 61–65.
[42] Op. cit., hearings of the Subcommittee on Antitrust, p. 74.

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It is theoretically possible, therefore, to have a Webb-Pomerene association exempt from U.S. antitrust laws but engaging in practices in the Common Market which violate article 85 of the Rome treaty.

A second and much more serious problem than that of conflict between U.S. and EEC laws as they apply to businesses operating within the Common Market is the differences in application of these laws to businesses operating outside the Common Market. It is anticipated that the antitrust provisions of the Rome treaty will be interpreted to be applicable only to agreements or practices which affect trade within the Common Market. The laws of the member states for the most part apply only to practices or agreements which affect trade within their respective domestic markets.

U.S. antitrust laws apply to export cartels and to extraterritorial agreements. European laws may be interpreted to permit companies to participate in gigantic cartels which set prices, divide markets, destroy independent competition, etc., so long as these cartels are extraterritorial. American firms are forbidden from participating in such cartel arrangements even if they are Webb-Pomerene associations if such arrangements in any way affect U.S. commerce. This possible conflict of laws with its accompanying competitive effects has caused many people, including former Attorney General Herbert Brownell [43] to voice the opinion that the Webb-Pomerene Act should be reinterpreted or amended to give U.S. companies more freedom in their international activities.

The Webb-Pomerene Act was originally passed to help small businessmen compete internationally, but as stated by Mr. Dixon:

> There is little evidence that the small businessman whom the statute was intended to aid have found concerted action particularly helpful in selling abroad. The number of export associations registered under the act (registration is necessary in order to obtain Webb-Pomerene status) has dwindled steadily over the years, dropping to 29 in 1962.[44] Moreover, exports under the act in 1962 accounted for only 4.5 percent of total U.S. exports and from 1956 to 1961 they never exceeded 5.6 percent.

Mr. Dixon also stated that—

> It is interesting to note that it is the larger firms, not the small ones, that find the statute attractive. For example, the Electrical Export Corp. was composed of two members—General Electric and Westinghouse—and the General Milk Association has two members—Carnation and Pet.

The act provides for exemptions from U.S. antitrust laws to domestic firms which join together to penetrate foreign markets. Exemptions are granted only if—

> such association agreement or act is not in restraint of trade within the United States and is not in restraint of any domestic competition of such association (sec. 2).

The Justice Department and the U.S. Supreme Court (*U.S.* v *U.S. Alkali Export Association, et al.*, 86 Fed. Supp. 59 (1949)) interpret section 2 to mean that U.S. firms cannot enter into agreements with other U.S. firms which are not members of the Webb-Pomerene Association and also that U.S. Webb-Pomerene associates cannot enter into agreements with foreign firms if such agreements substantially effect U.S. commerce.

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[43] Joseph D. Mathewson, "Antitrust Abroad: Tighter U.S. Laws Put American Companies at a Disadvantage Overseas," Wall Street Journal, May 2, 1963.

[44] Op. cit., hearings of the Subcommittee on Antitrust, p. 74.

At one time the Federal Trade Commission stated that Webb-Pomerene associations were exempt from U.S. antitrust laws and could participate in cartel agreements with foreign firms. Its policy was stated in the Silver letter of 1924.

The advocates of liberal Webb-Pomerene treatment recommend that the Federal Trade Commission readopt its previous interpretation. They also recommend substantial amendment to the act to permit more liberal treatment for U.S. firms. Carried to its final conclusion, the end result of such a proposal would be the cartelization by European and American business firms of the emerging markets throughout the world. Such a result is certainly not in line with previous U.S. policy.

An effective international agreement to regulate private trade restraints has been sought by the United States for many years. (See app. C for summary.) Perhaps before the United States takes unilateral action as suggested by Mr. Brownell and others, another attempt should be made to obtain an effective multilateral agreement even though all previous attempts at such an agreement have ended with defeat or inaction. Three recent events have created a new optimism in the minds of many Government officials and cartel experts for an attempt to achieve such an agreement.

First, the recognition by nations of Europe and specifically by the Coal and Steel Community and the European Economic Community of the need for cartel regulations has led both American and foreign officials to believe that Europe is no longer opposed to some form of international control over cartels and other private trade agreements. Statements by leading Europeans indicate that a free market mechanism is considered preferable to a cartelized mechanism. For example, Mr. von der Groeben, Chairman of the EEC Competition Group, stated:

> Much importance is attached to the rule of competition in the Common Market. * * * In a so strongly federal structure as our European Economic Community, it is impossible to coordinate economic activity by intervention on the part of a central administration. * * * It, therefore, only remains to leave economic coordination to the workings of the market economy and to intervene only to the extent necessary to insure that the machinery can, in fact, function. I wish to make it quite clear that this will be the foremost task of the competition policy of the Common Market. * * * Other aspects of competition policy, such as sociological aims which played a great part in the history of antitrust policy in the United States, are also of greatest interest to us.

However, the fact that national and regional laws exempt export cartels and extraterritorial agreements from their competency demonstrates the recognition and necessity of international agreement if these types of cartel agreements are to be prevented.

Second, the establishment of the Organization for Economic Cooperation and Development (OECD) Committee of Experts on Restrictive Business Practices has provided both a forum and a working committee to work toward such an agreement. Already the Committee has issued its very useful "Guide to Legislation on Restrictive Business Practices." The guide is a comparison of all the cartel laws and regulations of the 20 member countries of OECD. It also provides a summary of the significant adjudicated decisions in a number of member countries. The Committee's terms of reference include:

> Review of developments in the field of restrictive business practices, both in individual countries and in international or regional organizations, such as new

legislation or application of existing legislation, and to summarize this information for appropriate use.

Examination and comparison of laws related to competition in individual countries and the basic principles underlying them and to comment upon particular problems arising from the nature or application of such laws.

Develop agreed definitions of specific business practices which may have an adverse effect on international trade and, on the basis of such definitions, review developments in this field.

Third, the passage of the Trade Expansion Act of 1962 indicated to an economically unifying Europe that the United States is ready and willing to move toward a closer trading relationship with the nations of the Atlantic community through the reduction of tariffs and the elimination of quotas and other nontariff barriers to trade. Once this step has been taken, the need for international agreement regulating restrictive business practices will be more apparent than ever before. The Congress recognizes this need. Section 252(b) of the Trade Expansion Act specifically provides that whenever a foreign country or instrumentality maintains nontariff restrictions which substantially burden U.S. commerce in a manner which is inconsistent with the provisions of trade agreements or engages in discriminatory acts (including tolerance of international cartels) or policies which unjustifiably restrain U.S. commerce, the President shall suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such countries or instrumentalities.

CONCLUSION

With the lowering of trade barriers in the Atlantic community, American business firms will face increased foreign competition. Will this competition reflect a business structure and business policy much different from that prevailing in the United States? Will the prospect of increased and unregulated competition lead to market allocations and the failure of competition and trade to respond to tariff reductions?

Negotiations for concessions in tariffs and other regulatory trade practices are about to begin. It is timely and important, therefore, to consider the trade problems which are likely to develop with freer trade. In important ways, the success of the Trade Expansion Act of 1962 will depend upon elimination of restrictive business practices and other anticompetitive devices which impair international commerce.

APPENDIXES

APPENDIX A

Articles 65 and 66 of the Treaty of European Coal and Steel Community

ARTICLE 65 (CARTELS)

1. All agreements among enterprises, all decisions of association enterprises, and all concerted practices, tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the Common Market are hereby forbidden, and in particular those tending—

(a) to fix or determine prices;

(b) to restrict or control production, technical development or investments;

(c) to allocate markets, products, customers or sources of supply.

2. However, the High Authority shall authorize agreements to specialize in the production of, or to engage in the joint buying or selling of specified products, if the High Authority finds—

(a) that such specialization or such joint buying or selling will contribute to a substantial improvement in the production or distribution of the products in question; and

(b) that the agreement in question is essential to achieve these results, and is not more restrictive than is necessary for that purpose; and

(c) that it is not capable of giving the interested enterprise the power to determine prices, or to control or limit the production or selling of a substantial part of the products in question within the Common Market, or of protecting them from effective competition by other enterprises within the Common Market.

If the High Authority should find that certain agreements are strictly analogous in their nature and effects to the above-mentioned agreements taking into account the application of this section to distributing enterprises, it shall authorize such agreements provided that it finds also that they satisfy the same conditions.

ARTICLE 66 (MERGERS)

1. Except as provided in paragraph 3 below, any transaction which would have in itself the direct or indirect effect of bringing about a concentration, within the territories mentioned in the first paragraph of Article 79, involving enterprises of which at least one is subject to the application of Article 80, shall be submitted to a prior authorization of the High Authority * * * the High Authority will define by a general regulation, drawn up after consulting the Council, what constitutes control of an enterprise.

2. The High Authority shall grant the authorization referred to in the preceding paragraph, if it finds that the transaction in question will not give to the interested persons or enterprise, as concerns the products subject to its jurisdiction, the power—

to determine prices, to control or restrict production or distribution, or to prevent the maintenance of effective competition in a substantial part of the market for such products; or

to evade the rules of competition as they result from the execution of this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

(Note.—Article 66, it may be noted, applies only to concentration made after the treaty of Paris came into effect (April 18, 1951). By the terms of article 66, a coal or steel enterprise planning to acquire another company or plant must secure prior authorization from the High Authority.)

ARTICLE 66, PARAGRAPH 7 (DOMINANT SIZE)

As far as may be necessary, the High Authority is empowered to address to public or private enterprises which, in law or in fact, have or acquire on the market for one of the products subject to its jurisdiction a dominant position which protects them from effective competition in a substantial part of the Common Market, any recommendations required to prevent the use of such position for purposes contrary to those of this Treaty. If such recommendations are not carried out satisfactorily within reasonable time, the High Authority will, by decisions taken after consulting with the interested government and under the sanctions provided for in Articles 58, 59, and 64, fix the prices and conditions of sale to be applied by the enterprise in question or draw up production or delivery programs which it must fulfill.

APPENDIX B

ARTICLES 85 THROUGH 90, ROME TREATY (ENGLISH TRANSLATION), AND REGULATION 17

ARTICLE 85: 1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in—

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

(*b*) the limitation or control of production, markets, technical development or investment;

(*c*) market-sharing or the sharing of sources of supply;

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

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

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

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of—

any agreements or classes of agreements between enterprises,

any decisions or classes of decisions by associations of enterprises, and

any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which—

(*a*) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

(*b*) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

ARTICLE 86: To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in—

(*a*) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

(*b*) the limitation of production, markets or technical development to the prejudice of consumers;

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

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

ARTICLE 87: 1. Within a period of three years from the entry into force of this Treaty, the Council, by unanimous vote upon a proposal by the Commission and after consultation of the Assembly, shall issue all appropriate regulations or directives for the purpose of the application of the principles laid down in Articles 85 and 86.

If such provisions have not been adopted within the above-mentioned time limit, they shall be enacted by the Council pursuant to a vote by a qualified

majority upon a proposal by the Commission and after consultation of the Assembly.

2. The provision specified in paragraph 1 have the purpose, in particular, of—

(*a*) assuring the observance of the prohibitions set forth in Articles 85 and 86 through the imposition of punitive or coercive fines;

(*b*) determining the particulars governing the application of Article 85, Paragraph 3, having regard for the need both of assuring an effective supervision and, at the same time, of simplifying administrative control to the greatest possible extent;

(*c*) specifying, if need be, the scope of application of Articles 85 and 86 with respect to the different sectors of the economy;

(*d*) defining the respective tasks of the Commission and of the Court of Justice in the application of the provisions envisaged in this paragraph;

(*e*) defining the relations between the provisions of national law on the one hand and on the other hand the provisions contained in this Section or issued pursuant to this Article.

ARTICLE 88: Until the entering into force of the provisions issued in application of Article 87, the authorities of the Member States shall pass on the permissibility of agreements, decisions, and concerted actions as well as on the abusive exploitation of a dominant position in the Common Market in conformity with the law of their own countries and with the provisions of Article 85, especially paragraph 3, and 86.

ARTICLE 89: 1. Article 88 notwithstanding, the Commission, upon assumption of its activities, shall watch over the observance of the principles laid down in Articles 85 and 86. At the request of a Member State or ex officio, and in cooperation with the proper authorities of the Member State obliged to render official assistance, it shall investigate the cases in which contraventions of these principles are suspected. If it finds that there has been a contravention, it shall propose appropriate means for its discontinuance.

2. If the contravention is not discontinued the Commission shall render a decision to the effect that there has been such a contravention, furnishing reasons for its finding. It may publish the decision and authorize the Member States to take the necessary remedial measures, specifying the conditions and particulars thereof.

ARTICLE 90: 1. The Member States shall not issue or retain in force any measures which contravene this Treaty, and in particular its Articles 7 and 85–94, with respect to public enterprises to which they accord special or exclusive rights.

2. Enterprises which are entrusted with the rendition of services of general economic interest or which have the character of a fiscal monopoly are subject to the provisions of this Treaty, especially the rules governing competition, to the extent that the application of these provisions does not prevent, in law or in fact, the performance of the special task imposed on them. The development of trade must not be affected to a degree which is contrary to the interest of the Community.

3. The Commission supervises the application of this article and, if necessary, addresses the appropriate directives or decisions to the Member States.

FIRST IMPLEMENTING REGULATION PURSUANT TO ARTICLES 85 AND 86 OF THE TREATY

(Regulation 17 of the Council of Ministers)

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 the said 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.

ARTICLE 4: *Notification of New Agreements, Decisions and Practices.* 1. The Commission shall be notified of any agreements, decisions or concerted practices referred to in Article 85, paragraph 1, of the Treaty which have come into being after the entry into force of the present Regulation and for which those concerned wish to invoke Article 85, paragraph 3. As long as such notification has not taken place, no decision applying Article 85, paragraph 3, may be rendered.

2. Paragraph 1 shall not be applicable to agreements, decisions and concerted practices where—

(*i*) enterprises of only one Member State take part and where such agreements, decisions and practices involve neither imports or exports between Member States;

(*ii*) only two enterprises take part and the sole effect of these agreements is—

(*a*) to restrict the freedom of one party to the contract to fix prices or conditions of trading in the resale of goods which have been acquired from the other party to the contract, or

(*b*) to impose restraint on the rights of an acquirer or user of industrial property rights—particularly patents, utility models, registered designs or trade marks—or on the rights of the person entitled, under a contract, to acquire or use manufacturing processes or knowledge relating to the utilisation or application of industrial techniques.

(*iii*) their sole object is—

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

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

The Commission may be notified of such agreements, decisions and practices.

ARTICLE 5: *Notification of Existing Agreements, Decisions and Practices.* 1. The Commision must be notified before August 1, 1962,[1] of any agreements, decisions and concerted practices referred to in Article 85 paragraph 1, of the Treaty which are already in existence at the date of entry into force of the present Regulation and in respect of which those concerned wish to invoke Article 85, paragraph 3, of the Treaty.

2. Paragraph 1 is not applicable where the said agreements, decisions and concerted practices fall within the categories referred to in paragraph 2 of Article 4; the Commission may be notified of these.

ARTICLE 6: *Decisions applying Article 85, Paragraph 3.* 1. When the Commission issues a decision applying Article 85, paragraph 3, it shall indicates the date from which the decision shall take effect. This date shall not be prior to the date of notification.

2. The second sentence of paragraph 1 shall not be applicable to the agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2, nor to those which are referred to in Article 5, paragraph 1, and of which the Commission has been notified within the time-limit fixed therein.

ARTICLE. 7: *Special Provisions for Existing Agreements, Decisions and Practices.* 1. Where agreements, decisions and concerted practices already in existence at the date of the entry into force of the present Regulation and of which the Commission has been notified before August 1, 1962, do not meet the requirements of Article 85, paragraph 3, of the Treaty, and where the enterprises and associations of enterprises concerned put an end to them or modify them so that they no longer fall under the prohibition laid down in Article 85, paragraph 1, or so that they then meet the requirements of Article 85, paragraph 3, the prohibi-

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[1] The deadline was subsequently changed to Nov. 1, 1962, for all agreements involving more than two enterprises, and to Feb. 1, 1963, for two-party agreements to which above art. 4(1) is applicable.

tion laid down in Article 85, paragraph 1, shall be applicable only for a period fixed by the Commission. A decision by the Commission pursuant to the foregoing sentence cannot be invoked against enterprises or associations of enterprises which have not given their express assent to the notification.

2. Paragraph 1 shall be applicable to agreements, decisions and concerted practices which are already in existence at the date of the entry into force of the present Regulation and which fall within the categories referred to in Article 4, paragraph 2, provided that notification shall have taken place before January 1, 1964.

ARTICLE 8: *Period of Validity and Revoking of Decisions Applying Article 85, Paragraph 3.* 1. A decision applying Article 85, paragraph 3, of the Treaty shall be granted for a specified period and may have certain conditions and stipulations attached.

2. The decision may be renewed on request provided that the conditions laid down in Article 85, paragraph 3, of the Treaty continue to be fulfilled.

3. The Commission may revoke or alter its decision or prohibit those concerned from taking certain courses of action—

(*a*) where the de facto situation has changed with respect to a factor essential in the granting of the decision;

(*b*) where those concerned infringe a stipulation attached to the decision;

(*c*) where the decision is based on false information or has been obtained fraudulently, or

(*d*) where those concerned abuse the exemption from the provisions of Article 85, paragraph 1, of the Treaty granted to them by the decision.

In the cases covered by sub-paragraphs (*b*), (*c*) and (*d*), the decision can also be revoked with retroactive effect.

ARTICLE 9: *Competence.* 1. Subject to review of its decision by the Court of Justice, the Commission shall have sole competence to declare Article 85, paragraph 1, inapplicable pursuant to Article 85, paragraph 3, of the Treaty.

2. The Commission shall have competence to apply Article 85, paragraph 1, and Article 86 of the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7, paragraph 2, have not expired.

3. As long as the Commission has not initiated any procedure pursuant to Articles 2, 3, or 6, the authorities of the Member States shall remain competent to apply Article 85, paragraph 1, and Article 86 in accordance with Article 88 of the Treaty, even if the time-limits for notification laid down in Article 5, paragraph 1, and Article 7, paragraph 2 have expired.

ARTICLE 10: *Liaison with the Authorities of the Member States.* 1. The Commission shall transmit without delay to the competent authorities of the Member States copies of the requests, applications and notifications together wih copies of the most important documents which have been sent to it with the purpose of establishing the existence of infringements of Article 85 or Article 86 of the Treaty, or with the purpose of obtaining negative clearance or a decision applying Article 85, paragraph 3.

2. It shall carry out the procedures mentioned in paragraph 1 in close and constant liaison with the competent authorities of the Member States; and these authorities may submit their views on the said procedures.

3. A Consultative Committee on Cartels and Monopolies shall be consulted prior to any decision consequent upon a course of procedure referred to in paragraph 1 and prior to any decision concerning the renewal, the alteration or the revocation of a decision applying Article 85, paragraph 3, of the Treaty.

4. The Consultative Committee shall be composed of officials competent in the field of cartels and monopolies. Each Member State shall appoint one official to represent it, who, if he is prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting called by the Commission; the session shall take place fourteen days at the earliest after dispatch of the convocation letter. This letter shall be accompanied by an exposition of the case to be considered, indicating the most important documents, and a preliminary draft of the decision shall be enclosed.

6. The Consultative Committee may render an opinion even if some members are absent and have not been replaced by another official. The result of the consultation shall be set out in a written statement which shall be attached to the draft of the decision. It shall not be made public.

ARTICLE 11: *Requests for Information.* 1. In the execution of the duties assigned to it by Article 89 and by provisions pursuant to Article 87 of the Treaty, the Commission shall have power to seek all necessary information from the

Governments and competent authorities of the Member States as well as from enterprises and associations of enterprises.

2. When sending a request for information to an enterprise or association of enterprises, the Commission shall at the same time address a copy of this request to the competent authority in the Member State in the territory of which the principal place of business of the enterprise or the association of enterprises is situated.

3. In its requests the Commission shall indicate the legal basis and the purpose of the same, and the penalties for supplying false information laid down in Article 15, paragraph 1, sub-paragraph (b).

4. Information must be supplied on request by the owners of the enterprises or by their representatives and, in the case of legal persons, of companies or of associations without legal personality, by the persons responsible for representing them according to the law or the memorandum or articles of association.

5. Where the enterprise or association of enterprises does not supply the information required within the time-limit set by the Commission, or supplies incomplete information, the Commission's request for information shall be made by means of a decision. This decision shall specify the information requested, fix and appropriate time-limit within which it is to be supplied and specify the sanctions applicable under Article 15, paragraph 1, sub-paragraph (b), and under Article 16, paragraph 1, sub-paragraph (c), and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State in the territory of which the principal place of business of the enterprise or association of enterprises is situated.

ARTICLE 12: *Enquiries by Economic Sectors.* 1. If in any sector of the economy the trend of trade between Member States, price movements, inflexibility of prices or other circumstances suggest that in the economic sector concerned competition is being restricted or distorted within the Common Market, the Commission may decide to conduct a general enquiry in the course of which it may request enterprises in the sector concerned to supply the information necessary for giving effect to the principles laid down in Articles 85 and 86 of the Treaty and for carrying out the tasks entrusted to the Commission.

2. The Commission may in particular request any enterprise or group of enterprises in the sector concerned to communicate to it all agreements, decisions and concerted practices which are exempted from notification by virtue of Article 4, paragraph 3, and Article 5, paragraph 2.

3. When making enquiries as provided for in paragraph 2, the Commission shall also request enterprises or groups of enterprises whose size suggests that they occupy a dominant position within the Common Market or within a substantial part thereof to supply any particulars relating to the structure of the enerprises and to the conduct of their affairs necessary to appraise their situation in the light of Article 86 of the Treaty.

4. Article 10, paragraphs 3 to 6, and Articles 11, 13 and 14 shall be applied *mutatis mutandis.*

ARTICLE 13: *Investigations by Authorities of the Member States.* 1. At the request of the Commission, the competent authorities of the Member States shall carry out the investigations which the Commission considers necessary under Article 14, paragraph 1, or which it has ordered by a decision taken pursuant to Article 14, paragraph 3. The employees of the competent authorities of the Member States carrying out this investigation shall exercise their powers on production of a written warrant issued by the competent authority of the Member State in the terriory of which the investigation is to be carried out. This warrant shall indicate the subject and the purpose of the enquiry.

2. The employees of the Commission may, at its request, or at that of the competent authority of the Member State in the territory of which the investigation is to be made, assist the employees of this authority in the execution of their duties.

ARTICLE 14: *Investigating Powers of the Commission.* 1. In execution of the duties assigned to it by Article 89 and by provisions laid down pursuant to Article 87 of the Treaty, the Commission may conduct all necessary investigations into the affairs of enterprises and associations of enterprises.

To this end the employees authorized by the Commission shall be vested with the following powers:

(a) to examine the books and other business documents;
(b) to make copies of, or extracts from the same;
(c) to ask for verbal explanations on the spot;
(d) to have access to all premises, land and vehicles of enterprises.

2. The employees authorized by the Commission for these investigations shall exercise their powers on production of a written warrant stating the nature and purpose of the enquiry and the penalties provided for in Article 15, paragraph 1, sub-paragraph (c), in the event of incomplete submission of the books or other business documents required. The Commission shall, in good time, advise the competent authority of the Member State in the territory of which the investigation is to take place, of this investigation, stating the name and office of the authorized employee.

3. The enterprises and associations of enterprises must submit to the investigations ordered by a decision of the Commission. The decision shall state the subject and purposes of the enquiry, fix the date when it is to begin and call attention to the sanctions provided for under Article 15, paragraph 1, sub-paragraph (c), and Article 16, paragraph 1, sub-paragraph (d), and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.

4. The Commission shall take the decisions referred to in paragraph 3 after-consulting the competent authority of the Member State in the territory of which the investigation is to be carried out.

5. The employees of the competent authority of the Member State in the territory of which the investigation is to be carried out may, at the request of this authority or of the Commission, lend assistance to the Commission's employees in the execution of their duties.

6. Where an enterprise resists an investigation ordered pursuant to the present Article, the Member State concerned shall lend the employees authorized by the Commission the assistance necessary to enable them to carry out their investigation. The Member State shall, after consulting the Commission, take the necessary measures for this purpose before October 1, 1962.

ARTICLE 15. *Fines.* 1. The Commisison may by means of a decision impose on enterprises or associations of enterprises fines of from one hundred to five thousand units of account, where, wilfully or through negligence—

(*a*) they supply false or misleading information in an application submitted pursuant to Article 2 or in a notification made pursuant to Articles 4 and 5;

(*b*) they supply false information in reply to a request made pursuant to Article 11, paragraph 3 or 5, or to Article 12, or do not supply information within a time limit fixed by a decision taken under Article 11, paragraph 5; or

(*c*) they submit in incomplete form, on the occasion of investigations carried out under Article 13 or Article 14, the books or other business documents required, or decline to submit to an investigation ordered by means of a decision taken pursuant to Article 14, paragraph 3.

2. The Commission may by means of a decision impose on enterprises and associations of enterprises fines of from one thousand to one million units of account; this last figure may be increased to 10% of the turnover of the preceding business year of each of the enterprises having taken part in the infringement where these enterprises, wilfully or through negligence—

(*a*) have infringed the provisions of Article 85, paragraph 1, or of Article 86 of the Treaty, or

(*b*) have infringed a stipulation made under Article 8, paragraph 1.

In determining the amount of the fine the duration of the infringement shall be considered in addition to its gravity.

3. Article 10, paragraphs 3 to 6, shall apply.

4. The decisions taken under paragraphs 1 and 2 shall have no penal character.

5. The fines provided for in paragraph 2, sub-paragraph (a), may not be imposed for actions taking place—

(*a*) after the notification to the Commission and prior to its decision regarding the application of Article 85, paragraph 3, of the Treaty, insofar as these actions do not go beyond the limits of the activity described in the notification;

(b) prior to the notification of, and within the framework of the agreements, decisions and concerted practices existing at the date of entry into force of the present Regulation, provided that this notification has been made within the time limits laid down in Article 5, paragraph 1, and Article 7, paragraph 2.

6. Paragraph 5 shall not apply once the Commission has informed the enterprises concerned that after a preliminary examination it considers that the conditions of Article 85, paragraph 1, of the Treaty have been fulfilled and that application of Article 85, paragraph 3, is not warranted.

ARTICLE 16: *Penalties.* 1. The Commission may by means of a decision impose on enterprises or associations of enterprises penalties of from fifty to one thousand units of account per day of delay, reckoning from the date fixed in its decision, in order to oblige them—

(*a*) to put an end to an infringement of Article 85 or Article 86 of the Treaty in conformity with a decision taken pursuant to Article 3;

(*b*) to discontinue any action prohibited under Article 8, paragraph 3;

(*c*) to supply completely and truthfully any information which it has requested by a decision taken under Article 11, paragraph 5;

(*d*) to submit to any investigation it has ordered by a decision taken pursuant to Article 14, paragraph 3.

2. When the enterprises or associations of enterprises have fulfilled the obligation which it was the object of the penalty to enforce, the Commission may fix the final amount of the penalty at a figure lower than that which would result from the initial decision.

3. Article 10, paragraphs 3 to 6, shall apply.

ARTICLE 17: *Review by the Court of Justice.* The Court of Justice shall have full jurisdiction within the meaning of Article 172 of the Treaty to adjudicate on proceedings instituted against the decisions by which the Commission has fixed a fine or a penalty; it may cancel, reduce or increase the fine or the penalty imposed.

ARTICLE 18: *Unit of Account.* For the purposes of Articles 15 to 17 the unit of account shall be that adopted for drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

ARTICLE 19: *Hearing of the Parties Concerned and of Third Parties.* 1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15, and 16, the Commission shall give the enterprises or associations of enterprises concerned an opportunity to express their views on the points objected to which have been taken into consideration by the Commission.

2. So far as the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons or associations of persons. If natural or legal persons or associations of persons who can show that they have a sufficient interest ask to be heard, their request shall be granted.

3. When the Commission intends to give negative clearance pursuant to Article 2 or to render a decision applying Article 85, paragraph 3, of the Treaty, it shall publish the essential content of the application or notification, inviting all interested third parties to submit their observations within a time-limit which it shall fix and which shall not be less than one month. Publication shall respect the justified interest of enterprises that their business secrets should not be divulged.

ARTICLE 20: *Professional Secrets.* 1. Information gathered pursuant to Article 11, 12, 13 and 14 may not be used for any purpose other than that for which it was requested.

2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States as well as their officials and other employees may not disclose matters which have come to their knowledge through the application of the present Regulation and which by their nature are professional secrets.

3. The provisions of paragraphs 1 and 2 shall not hinder the publication of general surveys or reviews not containing information relating to particular enterprises or associations of enterprises.

ARTICLE 21: *Publication of Decisions.* 1. The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.

2. The publication shall name the parties concerned and give the essential content of the decisions; the justified interest of the enterprises that their business secrets should not be divulged shall be respected.

ARTICLE 22: *Special Provisions.* 1. The Commission shall submit to the Council proposals to the effect that certain categories of agreements, decisions and concerted practices such as are referred to in Article 4, paragraph 2, and Article 5, paragraph 2, should be subject to the notification provided for in Articles 4 and 5.

2. Within one year from the entry into force of the present Regulation the Council shall examine, on a proposal of the Commission, the special provisions which might be made by derogation from the provisiosn contained in this Regulation with respect to agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2.

ARTICLE 23: *Transitional System Applicable to Decisions Taken by Member States' Authorities.* 1. Agreements, decisions and concerted practices referred to in Article 85, paragraph 1, of the Treaty to which, before the entry into force of this Regulation, the competent authority of a Member State has declared Article 85, paragraph 1, to be inapplicable pursuant to Article 85, paragraph 3, shall not be subject to the notification provided for in Article 5. The decision of the competent authority of the Member State shall be considered a decision within the meaning of Article 6; its validity shall expire at the latest on the date which the said authoity has fixed, but may not exceed a duration of three years reckoned from the entry into force of the present Regulation. Article 8, paragraph 3 shall apply.

2. The Commission shall decide in accordance with Article 8, paragraph 2, in regard to applications for renewal of the decisions referred to in paragraph 1.

ARTICLE 24: *Implementing Provisions.* The Commission shall have authority to lay down implementing provisions concerning the form, content and other details of applications submitted pursuant to Articles 2 and 3 and of the notification provided for in Articles 4 and 5, and to lay down those concerning the hearings provided for in Article 19, paragraphs 1 and 2.

The present Regulation shall be binding in every respect and directly applicable in each Member State.

APPENDIX C

Attempts of Governments To Regulate Private Restraints in International Trade

(By Dr. Vernon A. Mund, economist, University of Washington)

WORLD ECONOMIC CONFERENCE (1927)

Following World War I, the efforts of the Western nations to reduce tariffs and liberalize trade gave rise to studies on cartels and business practices as factors likely to distort international trade. The World Economic Conference, held under the auspices of the League of Nations in 1927, concluded that the League could prevent the unfavorable effects of cartels by giving publicity to such arrangements and by making continuing studies of cartel activity. The failure of the League of Nations and the coming of the great depression, however, led to the breakdown of multinational work on the cartel problem.

U.S. DEPARTMENT OF STATE PROPOSALS OF 1945

In 1945, the Department of State invited 15 other countries to meet with the United States to consider various trade problems, including restrictions imposed by private combines and cartels. The proposals contemplated:

"* * * that countries will act, individually and cooperatively, to curb those restrictive business practices in international trade which interfere with the objectives of increased production and trade, access on equal terms to markets and raw materials, and high levels of employment and real income.

"To this end, it is suggested that a special agency be established within the International Trade Organization to receive complaints concerning restrictive practices of international combines and cartels, to obtain and examine the facts which are relevant to such cases, and to advise the Organization as to the remedies that may be required.

"Enforcement against private violators necessarily rests with member governments. It will be the function of the Organization to recommend to these governments that they take action under their own laws and procedures. In the United States, enforcement would continue to be by judicial proceedings under the antitrust laws."

Upon motion of the United States, the United Nations Economic and Social Council created a preparatory committee in 1946 for a conference on the problems set forth in the Proposals of 1945.

THE HAVANA CHARTER (1948)

Close cooperation between the State Department and the United Nations preparatory committee on international trade problems led in 1948 to a meeting of 57 nations at Havana. The conference formulated proposals for improving international trade in a document designated as the "Havana Charter for an International Trade Organization."

Chapter V of the Havana charter provided that each member nation should take action to prevent business practices affecting international trade "which restrain competition, limit access to markets or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any other objectives set forth in article 1."

The failure of the national delegates to accept the complete draft measure for the Havana charter as well as the failure of Congress to give approval to it, led to the collapse of the negotiations on an international trade organization.

THE BENTON AMENDMENT OF 1951

In 1951, the United States resumed its efforts to curb private restraints on international trade. In the Benton amendment to the Mutual Security Act of 1951, Congress asked the Economic Cooperation Administration to increase its efforts to discourage cartel arrangements in foreign countries. The Benton amendment declared:

"SEC. 516. It is hereby declared to be the policy of the Congress that this Act shall be administered in such a way as (1) to eliminate the barriers to, and provide incentives for, a steadily increased participation of free private enterprise in developing the resources of foreign countries consistent with the policies of this Act, (2) to the extent that it is feasible * * * to discourage the cartel and monopolistic business practices prevailing in certain countries receivin aid under this Act which result in restricting production and increasing prices, and to encourage where suitable competition and productivity * * *" (Public Law No. 165, 82d Cong., 1st sess., 1951. Although there have been revisions in the wording of the original Benton amendment, the basic philosophy of this amendment with respect to encouraging free enterprise and discouraging monopolistic practices has been included in specific sections of succeeding acts relating to foreign aid. Most recently it was contained in sec. 601 of the Foreign Assistance Act of 1961).

THE REPORT OF ECOSOC (1953)

In 1951, the United States took further efforts with respect to international cartels by introducing a resolution in the Economic and Social Council of the United Nations calling for the creation of an intragovernmental committee to make recommendations on the prevention and regulation of private combines and cartels in international trade. The resolution was adopted, despite Soviet opposition, and a committee representing 10 countries was appointed.

The 1951 resolutions of the Economic and Social Council recommended to member states of the United Nations:

"That they take appropriate measures and cooperate with one another to prevent, on the part of private or public mommercial enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade, on the economic development of underdeveloped areas, or on standards of living. * * *"

In March 1953, the Committe submitted its report on the various types of restrictive business practices frustrating international trade. It also presented a draft agreement for the international regulation of restrictive business practices. The proposed agreement called for the establishment of an international cartel organization to conduct investigations and make recommendations. This proposal was opposed by the United States. Consequently, the articles of agreement were not adopted. The final U.S. decision was based on the premise that foreign antitrust laws had not reached the stage at which the recommendations of the proposed international body could be carried out effectively at the national level.

REGULATION OF CARTELS WITHIN THE FRAMEWORK OF GATT (1960)

In October 1947, 23 nations entered into a multilateral trade agreement designed to reduce or remove trade barriers and to expand trade. This comprehensive treaty is known as the General Agreement on Tariffs and Trade (GATT). Today there are 44 full contracting parties to the treaty.

In June 1960, the contracting parties established a continuing council for facilitating the activities o fthe GATT with headquarters in Geneva, Switzerland.

The GATT organization provides a framework for developing a common international trade policy. Various proposals have been made to establish GATT as the organization for exercising control over international cartels.

On November 5, 1958, the contracting parties to GATT adopted a resolution expressing the view that the activities of international trusts and cartels may hamper the expansion of world trade and the economic development of individual countries and that they could frustrate the removal of tariff barriers and quota restrictions. The contracting parties declared that international cooperation is needed to remove harmful restrictive practices in international trade. They also took action to set up a study group to determine procedures which should be taken.

Upon receiving the report of the group of experts appointed under the resolution of November 5, 1958, the contracting parties at their November 18, 1960, session issued the following decision and recommendations:

"DECISION OF THE CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE AT THEIR 17TH SESSION, NOVEMBER 18, 1960

"*Having considered* the report (L/1015) submitted by the Group of Experts, which was appointed under the Resolution of 5 November 1958, and related documents;

"*Recognizing* that business practices which restrict competition in international trade may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade;

"*Recognizing*, further, that international cooperation is needed to deal effectively with harmful restrictive practices in international trade;

"*Desiring* that consultations between governments on these matters should be encouraged;

"*Considering*, however, that in present circumstances it would not be practicable for the Contracting Parties to undertake any form of control of such practices nor to provide for investigations;

"The Contracting Parties—

"*Recommend* that at the request of any contracting party a contracting party should enter into consultations on such practices on a bilateral or a multilateral basis as appropriate. The party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions, and if it agrees that such harmful effects are present, it should take such measures as it deems appropriate to eliminate these effects.

"And *Decided* that—

"(a) If the requesting party and the party addressed are able to reach a mutually satisfactory conclusion, they should jointly advise the secretariat of the nature of the complaint and the conclusions reached;

"(b) If the requesting party and the party addressed are unable to reach a mutually satisfactory conclusion, they should advise the secretariat of the nature of the complaint and the fact that a mutually satisfactory conclusion cannot be reached;

"(c) The secretariat shall convey the information referred to under (a) and (b) to the Contracting Parties."

The mechanism established by the GATT decision of 1960 has not yet been used. Past experience indicates that bigovernmental consultations prior to the institution of legal proceedings are not likely to provide an effective remedy. Moreover, there is a need for the establishment of certain minimum terms of reference and a continuing arrangement for settlement before antitrust complaints arise.

A CURRENT ATTEMPT—THE OECD AND RESTRICTIVE BUSINESS PRACTICES

As an integral part of the national plan for the rehabilitation of Europe, representatives of 16 nations met in Paris in 1948 and created the Organization for European Economic Cooperation (OEEC). This Organization in 1953, in turn, created the European Productivity Agency designated to foster and encourage as increase in European productivity. In furtherance of its work, the EPA sponsored a group of experts on restrictive business practices which provided an informal forum for the exchange of information and ideas among European antitrust officials as a means of improving the effectiveness of their laws.

In 1961 the OEEC was transformed into the OECD. The scope of its functions was changed to better equip it to meet contemporary problems. The United States and Canada became members.

On December 5, 1961, the Council of the OECD established a Committee of Experts on Restrictive Business Practices. The United States participates in this Committee as a full member with representatives from the Antitrust Division of the Department of Justice, and the Department of State, generally supplemented at major meetings by the Federal Trade Commission and the Department of Commerce. The Committee of Experts is an active and valuable committee. Its terms of reference include:

"1. To review developments in the field of restrictive business practices both in individual countries and international or regional organizations, such as new legislation, or application of existing legislation, and to summarize this information for appropriate use;

"2. To examine and compare laws relating to competition in individual countries and the basic principles underlying them and to comment upon particular problems arising from the nature or application of such laws;

"3. To examine and comment upon particular problems arising from the existence of monopolies and restrictive business practices;

"4. To promote the standardization of terminology concerning restrictive business practices;

"5. To develop agreed definitions of specific business practices which may have an adverse effect on international trade and, on the basis of such definitions, review developments in this field; and

"6. To report and make recommendations as appropriate to the council on matters within the competence of the Committee."

From the terms of reference, it is obvious the Committee of Experts has an important role to play in formulating harmonious anticartel laws. Once the groundwork of the Committee has been completed, perhaps another attempt at an international cartel agreement will be able to succeed.

APPENDIX D

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