

EUROPEAN COAL AND STEEL COMMUNITY  
EUROPEAN ECONOMIC COMMUNITY  
EUROPEAN ATOMIC ENERGY COMMUNITY

COMMISSION

**First Report**  
on  
**Competition Policy**

(annexed to the "Fifth General Report  
on the Activities of the Communities")

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## INTRODUCTION

In its "Resolution concerning the Rules on Competition and the position of European Enterprises within the Common Market and in the World Economy" of 7 June 1971, the European Parliament asked the Commission to make each year a special report on the development of competition policy. As the present report is the first such report submitted by the Commission, as a result of the Resolution, it gives an outline of competition policy as a whole and its development since its inception.

The Commission is pleased to note the interest shown by the Parliament in the problems raised by competition policy, which is an important means for achieving the aims of the Treaties. The Treaties establishing the European Communities laid down that the Community institutions have to see to the establishment, maintenance and observance of normal competitive conditions in the markets for coal and steel and, as regards the other sectors of economic activity, the setting-up of a system which will ensure that competition is not distorted within the Common Market.

Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the *sine qua non* for a steady improvement in living standards and employment prospects within the countries of the Community. From this point of view, competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society.

At both Community and national levels, competition policy endeavours to maintain or to create effective conditions of competition by means of rules applying to enterprises in both the private and public sectors. Such a policy encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the consumer. In this respect, the Commission is not only concerned with increasing by means of the rules of competition the quantity of goods available for consumption, but is also taking action to promote better information for consumers and to bring about the harmonisation of laws and the removal of technical barriers to trade, in order to provide the best possible opportunities for establishing a genuine common market.

The Commission would also like to underline the importance it attaches to competition policy as a means of fighting inflation, especially now, since inflation presents in many respects a structural obstacle to adaptation. Competition policy also contributes considerably to the better use of labour, since ill adjusted structures which are encouraged by inflation give rise to under-utilisation of the labour potential within the Community and to under-payment of skilled workers.

Broadly speaking, the action of the Community and of the Member States in the Field of competition policy should be directed along converging lines. Although it is evident that the competition policy of the Community must be directed towards the creation and proper operation of the common market, its effectiveness would, nevertheless, be considerably improved if it were carried out in conjunction with more active competition policies at the national level and with the removal of certain obstacles to the free play of the market in various sectors, such as the fixing of prices and the placing of orders by public authorities, as the Commission has emphasized in its Memorandum on Industrial Policy.

Finally, the Commission's competition policy cannot operate in isolation independent of efforts being made in other fields. The first Programme of Medium-term Economic Policy outlined



the links to be established between competition policy and certain structural policies. Thus, competition policy and regional policy must work together in order to bring about competitive conditions, where these do not yet operate fully, thus making possible the harmonious development of activities throughout the Community.

The role assigned to the Community institutions with regard to competition policy by the Treaties establishing the European Communities consists especially in bringing into operation and defining precisely the rules of competition as applied to enterprises, in the implementation of the provisions regarding state aid and in the modification of state monopolies of a commercial nature.

With regard to rules of competition applicable to enterprises, the Community's policy must, in the first place, prevent governmental restrictions and barriers—which have been abolished—from being replaced by similar measures of a private nature. Agreements on quotas as well as agreements for the purpose of dividing the Common Market into regions, or of dividing up or fragmenting markets by other means are in flagrant contradiction to the provisions of the Treaties. Economic integration will never be fully achieved if agreements and concerted practices of this kind are not resolutely opposed. Indeed, they could even prejudice the degree of integration already achieved. Moreover competition policy must ensure fair competition so that enterprises operating within the Common Market can, in general, benefit from the same conditions of competition. If the policy of modifying state monopolies of a commercial nature and systems of state aids is unsuccessful the functioning of the Community could in the long-term be placed in jeopardy, since the economy and the political forces of the Community will not permit the opening up of internal frontiers unless competitive conditions are not distorted. State aids which take account of the Community's interest and which are necessary from the point of view of structural policy do not conflict with the principle of fair competition. They are in fact one of the conditions for a smooth development of economic life within the Community.

Nowadays, enterprises can participate freely in the Common Market in almost all sectors where technical barriers to trade have lost their importance and where the nature of the products and services offered enables them to be marketed throughout the Market as a whole. Nevertheless, the integration process is far from complete. Some enterprises still direct their sales efforts exclusively to their home markets. That is why the Commission particularly encourages cooperative efforts between small and medium-sized enterprises to establish themselves in markets other than their own.

Most enterprises, however, are taking advantage of the increased potential offered by the Common Market for the sale of their output. Statistics of the increase in intra-community trade show this in an impressive manner. The number of subsidiaries set up in other countries and the cases of cooperation between enterprises from different Member States have also increased in recent years.

This development has led to an increase in the range of products offered on the market and consequently to a wider choice for consumers. Although the intensity of competition, relative to the present level of integration can be considered to be generally satisfactory for the purpose of making the benefits of the Common Market available to consumers, it should be noted that prices to the ultimate consumer still vary considerably in some cases. These price differences may be explained partly by differences in value added tax rates, and partly by structural differences in trade and by price interventions on the part of Member States. Differences in the habits of consumers and in income levels continue to exist among various Member States.

In spite of the undeniable successes brought about by integration, it must be recognized that the tendency still exists in some economic sectors to maintain separate national markets by the use of prohibitions on export and by invoking industrial and commercial property rights. Since the parties concerned have never been able to justify such serious restrictions on competition, the Commission has always been opposed to attempts in this direction. The possibility of invoking industrial and commercial

property for market—sharing purposes has, in the opinion of the Commission, been reduced considerably by the case law developed by the European Court of Justice.

The examination of a large number of cases has been satisfactorily concluded by the Commission, the latter's purpose being to take decisions in typical cases.

In 1971, nineteen decisions, including those on procedure, were handed down under the terms of Articles 85 and 86 of the EEC Treaty, and twenty decisions were handed down under the terms of Articles 65 and 66 of the ECSC Treaty. Several of these decisions concerned questions which had not been raised before. This was particularly true of the first cases in applying Article 86 of the EEC Treaty, and also of the first decisions relating to the compatibility with Article 85 of the EEC Treaty of certain contractual clauses, often found in agreements about patent licences and technical know-how.

The Commission believes that, by giving an overall picture of the subject, this report will also provide information for industry and commerce on the kind of restrictions on competition and business practices which are prohibited by the rules of competition : the circumstances under which it would be advisable to notify the Commission of agreements that restrict competition : and finally, the conditions necessary to obtain exemption from the prohibition.

The Commission's decisions, the Court's judgments and the communications and regulations concerning the rules of competition applicable to enterprises, all point to certain features of the Community's competition policy which deserve special mention, namely :

1. Restrictions on competition and practices which jeopardize the unity of the Common Market are proceeded against with special vigour. Cases in point are agreements on market—sharing by dividing areas, agreements to allocate customers, and collective exclusive dealing agreements. Agreements which indirectly result in concentrating demand on certain producers are also prohibited. As for exclusive dealing agree-

- ments, these must not prevent distributors and consumers from obtaining goods in any Member State on the terms customary in that State;
2. Enterprises engaging in restrictions on competition which are forbidden and who are thereby seriously damaging consumers' interests must expect heavy fines;
  3. The Commission is firmly opposed to the abuse of dominant positions in the Common Market. Subject to contrary interpretation of the provision by the Court of Justice, the Commission will also apply Article 86 of the EEC Treaty to mergers entered into by enterprises in a dominant position to the prejudice of consumers;
  4. The Commission is determined to reinforce the competitive position of enterprises by exempting by means of regulations or individual decisions, positive forms of cooperation from the ban on cartels. This applies particularly to cooperation between small and medium-sized enterprises, which can often only compete effectively with larger enterprises by means of this sort of cooperation;
  5. The Commission does not apply the Article 85 prohibition to restrictions on competition which (according to criteria which it has made known) have no appreciable effect on the Common Market.

Competition policy is not limited to the need for enforcing respect for the rules of competition on the part of enterprises. It must also show clearly the Community's interests in the fields of state aid and of state monopolies of a commercial nature.

Developments during the last ten years have shown that Member States have increasingly made use of state aid as an instrument of economic policy. The increasing liberalization of international trade and integration within the Community have meant that there is less scope than in the past for conventional measures of protection. Furthermore, increased competition and more rapid technological changes have revealed structural weaknesses in a number of sectors and regions of the Community. Neither the national public authorities concerned nor the insti-

tutions of the Community can remain indifferent to these weaknesses, either for economic or social reasons.

Although other means of action sometimes provide more appropriate remedies for the problems which arise (whether relating to infrastructures, social policy measures for facilitating occupational training and mobility etc.), state aid must be considered as a necessary instrument of structural policy.

Even though the operation of market forces is an irreplaceable factor for progress and the most appropriate means of ensuring the best possible distribution of production factors, situations can nevertheless arise when this in itself is not enough to obtain the required results without too much delay and intolerable social tension. When the decisions of the enterprises themselves do not make it possible for the necessary changes to be made at an acceptable cost in social terms, then recourse to relatively short-term and limited intervention is necessary in order to direct such decisions towards an optimal economic and social result. The purpose of such aids must be to re-integrate the sectors and regions benefiting from them within a practicable and efficient system of competition while reducing the social cost of change, without, however, permanently tying up resources which could be used more effectively elsewhere.

The overall approach underlying the Treaty rules on aid reflects this fact for while they support a choice of a system where competition is not distorted by aid which reduces the scope of free circulation or militates against a better allocation of factors of production, they also allow, with the Commission's approval, certain broadly defined categories of aid to be applied by the Member States.

In its approach to state aid, the Commission is essentially guided by three principles.

Unilateral state aid must be brought back into line with Community policy for the solution of the problems in question, otherwise it will only lead to costly rivalry, reciprocal neutralization of national policies, or even a transfer of the difficulties of one Member State to another, thereby creating fresh difficulties at Commu-

nity level. In this respects, it is especially important that the amount of aid to be granted should be appropriate to the gravity of the problems it is intended to deal with, as seen not only from a national point of view but from that of the Community as a whole. The Commission thus regards its action as something making for coordination and efficiency without which serious tensions would develop within the Common Market.

To be justifiable, such aid must also contribute effectively towards an improvement in regional and sectoral structures within the Community, while doing the minimum harm from the point of view of competition. Whether aid is granted to regions or to sectors, it must be clear that the objective is to place enterprises benefiting from such aid in a position to compete on the market on their own.

This means that the aid granted should have certain characteristics. It should be of a sufficiently temporary nature, even tapering off so as to encourage the necessary changes and it must not impede permanently the best allocation of production factors. Aid intended to preserve the existing structure or to provide operational facilities is therefore, in general, excluded. Aid granted to enterprises should not be so large as to cover the enterprises concerned against most of their operational risks. It should be granted to enterprises or production centres whose development and restructuring (taking developments in the sector concerned into account) are likely to enable them to compete successfully on the market. It is necessary that such aid be as transparent as possible, not only to enable the Community institutions to appreciate its effects and the public authorities as well as local authorities to access the cost involved, but also to ensure that the enterprises themselves properly evaluate their true competitive situation.

Finally, the Commission, when examining national initiatives, must never lose sight of the social and human factors involved, which may justify aid beyond what is required by strictly economic reasoning. Such considerations may lead the Commission to approve aid the effect of which is simply to lessen the impact of inevitable changes. Here again, aid must be granted as

part of wider innovations which plan for other measures for the basic solution of the social problems involved. To this end, it is possible to use means other than aid, such as measures to build up parts of the infrastructure or to speed up occupational training and retraining of workers.

The Commission is endeavouring to win acceptance of these guide-lines with regard to both regional and sectoral aid.

If regional aid, when adequate, is one of the essential instruments for balanced regional development, which is one of the objectives of the Treaty of Rome, it should also be noted that it has given rise to competition between Member States which has tended to upset the very balance it was aimed at by increasing the cost of carrying out plans undertaken and by preventing the regions with the greatest disadvantages from benefiting from the necessary priorities. Coordination of regional aid granted in central regions has helped to achieve substantial success in 1971, through introducing the rules needed to eliminate the counter-productive results of regional aid.

In certain cases, sectoral aid requires that the principles of coordination and harmonization of state aid be laid down, in order to ensure not only effective competition but also a better ordered structural development within the Community. It should be noted, as has already been emphasized, that national initiatives often take into account purely national situations and objectives, while experiences suffered in common have created similar difficulties throughout the Community, and that aid granted by one Member State can have adverse consequences for its partners. The initiatives taken by the Commission in this respect in the textile and ship-building sectors have shown how such problems can be solved.

The system of control of state monopolies of a commercial nature, as laid down in Article 37 of the EEC Treaty, is not yet completed. The Commission's view is that the best solution in this case would be to remove exclusive monopoly rights in order to eliminate any possibility of discrimination. In so far as this has not yet been achieved, Member States intend with certain exceptions to put an end to such monopolies in the very near future.

As regards state commercial monopolies which still remain by reason of their correlation with developing common policies, the Commission has been able to remove the more important discriminations.

The development of mergers and take-overs in the Common Market can only be discussed superficially because of the lack of comparative statistical data. The tendency towards concentration has intensified since 1966. International interpenetration has also increased steadily. In order to obtain accurate data on concentration, the Commission has launched a wide series of studies on the development, causes and effects of concentration; these studies should be completed by the end of 1973.



**Part one**

**The Community's competition policy  
regarding enterprises**

## Introductory remarks

Within the framework of the Community's medium-term economic policy<sup>1</sup> and in accordance with the guidelines in the Memorandum on the Industrial Policy of the Community,<sup>2</sup> the Commission has gradually defined its policy on cartels and monopolies.

In order that enterprises may be better informed as to the actions which are permitted and those which are forbidden, the Commission has, wherever possible, ruled on typical cases of prohibited and permitted restrictions on competition in the field of horizontal agreements (Chapter I, point I), vertical distribution systems (Chapter I, point II) and licence agreements (Chapter I, point III).

There are special rules with regard to the conduct of enterprises in a dominant position. The abuse of a dominant position is prohibited (Articles 86 of the EEC Treaty and 66(7) of the ECSC Treaty.) Mergers and takeovers of enterprises can, according to Commission policy, also constitute an abuse within the meaning of Article 86. Under the ECSC Treaty, mergers and takeovers of enterprises must be submitted for prior authorization (Article 66). The present report gives a survey of decisions made under Article 66 of the ECSC Treaty and Article 86 of the EEC Treaty (Chapter I, point IV).

In order to ensure that the rules of competition are respected, the Commission has imposed fines in several cases or made its decisions subject to certain stipulations and conditions (Chapter I, point IV).

When applying the ban on discrimination to which enterprises of the coal and steel industries are submitted (Article 60 of the ECSC Treaty), the Commission endeavours to take changes in market conditions into account (Chapter I, point VI).

Up to the end of the transitional period, i.e. 1 January 1970, enterprises were obliged to respect the regulations on dumping in intra-Community trade (Article 91 of the EEC Treaty). This report gives details of experience gained by the Commission in the application of this provision of the Treaty (Chapter I, point VII). Following the systematic account of decisions made by the Commission in Chapter I, Chapter II is devoted to a review of the implementing regulations which have been put into operation for the purpose of enforcing the rules of competition of the Treaties. There is also a description of the Commission's communications and of a number of general problems arising out of the implementation of the rules of competition.

<sup>1</sup> The Council, Second Programme of Medium-term Economic Policy, Chapter II, Sec. 11, *OJ* No. L 129, 30 May 1969, p. 23 and 24.

<sup>2</sup> The Commission, Memorandum on the Industrial Policy of the Community, Part II, Chapter II, p. 137 to 183.

## CHAPTER I

### MAIN POLICY DEVELOPMENTS

#### § 1. - Horizontal Agreements prohibited and forms of cooperation permitted under Article 85

During the past years, the Commission has systematically pursued its efforts with regard to the implementation of Article 85 of the EEC Treaty and of Article 65 of the ECSC Treaty, in order to put an end to agreements which were contrary both to the system of competition and market unity, while at the same time defining the limits laid down by the Community's competition rules for cooperation among enterprises.

#### PROHIBITED HORIZONTAL AGREEMENTS

1. Respect for the cartel prohibition laid down by Community law has been fully assured by the decisions to impose fines taken in recent years by the Commission. Practices incompatible with Article 85 have been indicated not only by prohibition decisions but also by those decisions granting negative clearance or exemption which reveal restrictions on competition that have been eliminated or modified at the request of the Commission in order to allow Article 85(3) to apply. Although clear breaches of the competition rules laid down in the Treaties should, in principle, be the object of a prohibition decision and, if necessary, of the imposition of fines, the elimination of practices incompatible with the principle of competition has enabled certain cases to be closed without further action. This method was adopted chiefly to avoid the preparatory work and procedural delays required for the preparation of decisions once the Commission's views were clearly established, or when a decision would not have added in any way to existing administrative case-law. This was particularly the case with the price-fixing and quota agreements, joint selling agencies and conditions of sale.

Although decisions made in this context do not easily fit into a general pattern, since each case has to be treated according to its particular characteristics, some guidelines can be drawn from a series of decisions handed down by the Commission. This is particularly true for market-sharing, price-fixing and the allocation of quotas where, up to the present, there has not been a single case where exemption has been granted. This was also the case for systems protecting national markets which result, for example, from collective reciprocal-dealing agreements for purchases and sales within a member state, from agreements for aggregated rebates without the inclusion of purchases from other member states, and from national cartels fixing resale prices for imported products or fixing selling prices for exported products.

#### *Market-sharing agreements and quotas*

2. Market-sharing agreements are particularly restrictive of competition and contrary to the achievement of a single market. Agreements or concerted practices for the purpose of market-sharing are generally based on the principle of mutual respect of the national markets of each Member State for the benefit of producers resident there. The direct object and result of their implementation is to eliminate the exchange of goods between the Member States concerned. The protection of their home market allows producers to pursue a commercial policy—particularly a pricing policy—in that market which is insulated from the competition of other parties to the agreement in other Member States, and which can sometimes only be maintained because they have no fear of competition from that direction. The fixing of delivery quotas in relation to total sales, combined in some cases with a compensation scheme to ensure that the quotas are respected, means that the members of the group give up any possibility of obtaining an advantage over their competitors by applying an individual sales policy. Maintenance of the equilibrium as fixed by the quotas directly endangers intra-Community trade as soon as the sales quotas are applied to one or more markets within the Community.

3. It is the Commission's opinion that, in principle, exemption from the prohibition cannot be considered for market-sharing agreements. The elimination of a competitor from the market—either in whole or in part—cannot be justified objectively on economic or technical grounds or in the interests of the consumer. This principle was illustrated by the decision made in the case of *Tuberries Julien/Van Katwijk*<sup>1</sup> prohibiting a typical

<sup>1</sup> Commission Decision of 28 October 1970, OJ No. L 242, 5 November 1970, p. 18.

market-sharing agreement between the two enterprises. The market-sharing had been arrived at in the following manner. One enterprise was completely banned from selling on the market of the partner, while the other voluntarily limited its exports on the basis of an agreement which the judgments rendered by the national courts had declared to be obligatory in all respects on the contracting parties.

Similarly, a decision was made and fines were imposed in the case of the International Quinine Agreement.<sup>1</sup> The decision condemned what the contracting parties called a gentleman's agreement made for the purpose of protecting national markets within the Common Market for the benefit of the respective members of the countries concerned and of preventing the other members from exporting to those countries.

4. The Commission had previously intervened on a number of occasions against market-sharing. The first intervention in this context in the case of *Cleaning Products*<sup>2</sup> led to the immediate abandonment of a reciprocal agreement safeguarding the respective markets of Belgian and Dutch producers which had been supported by prohibitions on export imposed on their respective customers. This case concerned a type of agreement which is so obviously contrary to Community rules of competition that in every similar case investigated the enterprises concerned terminated their agreements or concerted practices at the instance of the Commission before formal action was necessary. This was particularly the case with a market-sharing agreement concluded for *construction equipment* between members of an association of enterprises who gave up their right to export to a Member State in favour of one single enterprise that had obtained a corresponding undertaking from the producers of that State. The other case was that of the agreement not to export semi-finished metallic products.<sup>3</sup>

This was an agreement between manufacturers of a Member State for the purpose of preventing deliveries on their internal market from other Member States. Reciprocal protection of national markets was also practised by the national groups of the *International Cable Development Corporation (ICDC)*<sup>4</sup> and its affiliated firms. These concerted practices were immediately terminated by the cable manufacturers as a result of the Commission's investigations into the market for insulated high-tension electric

<sup>1</sup> Commission Decision of 16 July 1969, *OJ* No. L 192 of 5 August 1969, p. 5.

<sup>2</sup> 8th General Report on the Activities of the Communities, No. 64.

<sup>3</sup> 1st General Report on the Activities of the Communities, No. 52 and 53.

<sup>4</sup> Bulletin No. 5-69, Chapter VI, Sec 6.

cables. The terms included a prohibition on investment or participation and, in addition, agreeing to forego all advertising in the countries of the other manufacturers as well as refusing, in principle, delivery to buyers in the countries of the other manufacturers or supplying them at more favourable conditions than those obtaining in their country. A further example of a case being disposed of without a formal decision by the Commission was that concerning an agreement made by most of the main European producers of sheet glass. This agreement was based on the mutual respect of the national markets of the members and the existing level of export sales of sheet glass. Moreover, the concerted practices between Italian and German producers on the restriction of trade between the respective markets of the members of the group, by the conclusion of delivery agreements between producers which implicitly excluded all direct exports,<sup>1</sup> were brought to an end.

5. The decision on negative clearance handed down by the Commission in the case of *Christiani and Nielsen*<sup>2</sup> confirmed that a wholly owned subsidiary which has no economic independence is not in a position to conclude restrictive agreements, as defined in Article 85, with the parent company exercising complete control over it. In these conditions, restrictions imposed on the subsidiary company with regard to operating only in the country where it is situated could only be considered as a division of tasks within the economic organisation of the group as a whole.

As regards relations between a number of subsidiaries situated in different countries of the Community, the decision handed down in the case of *Kodak*<sup>3</sup> laid down that the identical nature of the conditions of sale of the companies of the group established in the Common Market cannot be considered as an agreement or a concerted practice either between the parent company and its subsidiaries or between the subsidiaries themselves. Since the subsidiaries concerned are completely and exclusively dependent on the parent company, which in fact exercises control by giving the former precise instructions to be complied with, it is not possible for the subsidiaries to act independently of each other in matters governed by the parent company.

On the other hand, it was considered that restrictions imposed on third parties, in this case export prohibitions imposed on resellers by the

<sup>1</sup> Ibid. No. 8-70, Part Two, Chap. I, Sec 8 and 9 and 4th General Report on the Activities of the Communities No. 28.

<sup>2</sup> Commission Decision of 18 June 1969, OJ No. L 165 of 5 July 1969, p. 12.

<sup>3</sup> Commission Decision of 30 June 1970, OJ No. L 147 of 7 July 1970, p. 24.

various subsidiaries of the group,<sup>1</sup> fall under the prohibition laid down in Article 85.

### *Price-fixing*

Joint price-fixing of goods sold in the Common Market is also likely to affect adversely trade between Member States and seriously restrict competition.

6. In the *Quinine* case, the agreement of prices and rebates applied not only to exports to non-member States, but also to exports to unreserved markets within the Community and was, therefore, an additional guarantee in respect of deliveries to reserved territories where they were authorized on an exceptional basis in spite of the principle of territorial protection. This enabled the contracting parties to avoid any threat to their internal price levels and also to maintain the equilibrium of the market. These agreements to fix prices and to protect national markets are mutually complementary and constitute, therefore, an obstacle to trade since they prevent buyers from benefiting from the competitive market conditions which would have prevailed had there been no such agreements. Similarly, in the case of *Sheet Glass* the restriction on trade, by the application of the principle of reciprocal respect of national markets, was achieved by national groups of producers mutually agreeing the prices and conditions which would apply in the markets of their partners, thus eliminating any incentive for customers to import.

7. The decision of the Commission imposing fines in the *Dyestuffs* case<sup>2</sup> involved concerted practices applying to a uniform and almost simultaneous increase in prices within the Common Market. Since their purpose was the application by all the enterprises taking part of an identical increase in price at almost identical dates and for the same classes of products—if not for all the countries affected by the increase—these concerted practices directly fixed the selling price of the various dyestuffs marketed by each enterprise within the Common Market. These breaches were all the more serious since practically all the enterprises selling the dyestuffs within the EEC—where they accounted for more than 80% of the market—participated in the concerted practices so that the effects were felt particularly strongly by a large number of industries using dyestuffs.

<sup>1</sup> See *infra*, p. 61.

<sup>2</sup> Commission Decision of 24 July 1969, OJ No. L 195, 7 August 1969, p. 11.

8. The prohibition of cartels also covers agreements concluded between enterprises of one and the same Member State for the purpose of fixing prices and resale conditions for imported products or for fixing prices and selling conditions for products of their own manufacture as regards their exports to markets within the EEC. Such agreements eliminate all possibility of price competition between members of the cartel so that—where their share of the market is not negligible—competition within the Common Market is restricted and trade between Member States affected by the resultant bias against imported and exported products.

Thus, negative clearance was given by the Commission in the case of *Vereniging van Vernis- en Verf-fabrikanten in Nederland (VVVF)*<sup>1</sup> only after the elimination of the obligation to respect minimum selling prices and other conditions of sale and delivery for exports within the Community. These had been previously agreed to by an association, of which practically all the Dutch enterprises manufacturing and exporting paints and varnishes were members, so that a considerable part of the supplies of the products concerned in the Common Market were offered at uniform prices and conditions.

9. The decision taken in 1971 in the case of *Vereniging van Cementhandelaren (VCH)*<sup>2</sup> illustrates the Commission's position regarding national agreements on prices and resale conditions for imported products. Even collective action among enterprises in any one of the Member States which aims to introduce on the markets of that State a system of uniform prices and selling conditions for products which, for the most part, are imported from other Member States, is likely to prejudice the establishment of a single market. There is little chance that such agreements can be exempted from the prohibition of cartels as there is nothing to show, except in very special cases, that the elimination of competition between traders would be more likely to ensure regular supplies to the market on more favourable conditions than competition itself.

In the case in question, the Commission was of the opinion that the opening of the Dutch market to unrestricted imports of cement from the other Member States was not sufficient. This had already largely been achieved by the abandonment of reciprocal exclusivity between traders and suppliers and by the removal of all obstacles to genuine competition between manufacturers by giving up joint fixed prices and selling conditions. In

<sup>1</sup> Commission Decision of 25 June 1965, OJ No. L 168, 10 July 1969, p. 22.

<sup>2</sup> Commission Decision of 16 December 1971, OJ No. L 13, 17 January 1972, p. 34.



view of the price control exercised by the wholesalers, this could only have a limited effect on Dutch cement consumers.<sup>1</sup> Indeed, so long as organized trade maintained a system of fixed prices and, to a certain extent, recommended prices, the advantages which should be passed on to the consumers from competition between manufacturers and importers on the Dutch markets were not likely to materialize.

10. The negative clearance in the case of *ASPA (Association Syndicale Belge de la Parfumerie)*<sup>2</sup> was only granted after removal of those clauses which were contrary to the terms of Article 85. The clauses particularly concerned were those obliging the members of the group to fix resale prices and to ensure the observance of such prices by successive sellers: the clause requiring that all members of the group should abide by and compel the retailers to abide by exclusive concessions and the use of official distribution channels: and the clause which provided for boycotting by means of collective suspension of deliveries to retailers who had failed to fulfil the obligations imposed on them. This collective system of control appreciably restricted the possibilities of competition among the various brands of products originating in the Community and imported on the Belgian market. It was likely to interfere with imports within the Common Market as a result of the restrictions on the freedom of resellers to obtain supplies of products coming under the regulatory system mentioned above unless they were obtained through the official distribution channels.

The Commission also adopted a decision imposing fines as regards agreements and concerted practices on the *German scrap iron market*<sup>3</sup> which were clearly prohibited by Article 65 (1) of the ECSC Treaty.<sup>4</sup> These agreements and practices hindered or distorted normal competition in the Common Market, in so far as sources of supply of the raw materials were concerned, by instituting among enterprises of the iron and steel industry

<sup>1</sup> See reply to written question No. 574/70, OJ No. C 44 of 7 May 1971, p. 6. The enterprises and associations of enterprises had voluntarily cancelled the Noordwijk Cement Agreement (NCA) on 31 December 1970 thereby giving up joint fixing of prices and uniform trading conditions on the Netherlands markets. They asked for exemption in favour of a transitional system which provided for a temporary modified quota system. The proceedings concerning this request are still pending in view of the need to examine the new situation thus created. Furthermore the *VCH Contract* which was initially the essential element of the notification made by the Vereniging Cementhandelaren and which introduced exclusive reciprocal relations among the manufacturers of the NCA and the members of the VCH was cancelled in 1967.

<sup>2</sup> Commission Decision of 30 June 1970, OJ No. L 148, 8 July 1970, p. 9.

<sup>3</sup> Commission Decision of 21 January 1970, OJ No. L 29, 6 February 1970, p. 30.

<sup>4</sup> Opinion of the High Authority of 24 February 1960, OJ No. 17, 12 March 1960, p. 594/60.

a system of buying quotas which brought about a limitation of demand which would have reduced prices. They also fixed uniform maximum prices in order to eliminate competition of any kind among the parties concerned with regard to the supply of scrap.

### *Joint selling agencies*

11. By means of joint selling agreements, producers grant to a common agent the right to sell their products—generally on an exclusive basis—in all markets or on certain specified markets. The producers allocate among themselves, in predetermined proportions, the total quantity of products to be sold and offer these products on the market through their joint/selling agency at uniform prices and conditions of sale. Any variations in receipts from sales according to the markets and the categories of the products may be compensated by a system of equalization so as to ensure that all the members of a group receive the same final price per unit delivered. The exclusivity enjoyed by the joint selling agency, the apportioning of delivery quotas and the fixing of prices prevent any competition among the members of the group who have, therefore, neither the incentive nor the capability to develop individual selling activities for their products at prices freely determined according to quantity and destination. At the same time, buyers are deprived of a choice between several sources of supply and have no way of stimulating price competition among the different producers.

12. The Commission's position with regard to joint selling agencies was laid down in the decisions on the joint selling agreements concluded in Belgium and in France by producers of nitrate fertilizers in the case of *Cobelaz - Producteurs de synthèse, Cobelaz-Cokeries et CFA* ("*Comptoir français de l'azote*").<sup>1</sup> These decisions show that negative clearance was granted only

<sup>1</sup> Commission Decisions of 6 November 1968, *OJ* No. L 276, 14 November 1968, p. 29. To these decisions should be added others concerning similar organizations in Italy for the sale of Chemical Fertilizers, in the case of the *SEIFA* (Commission Decision of 30 June 1969, *OJ* No. L 173, 15 July 1969, p. 8) and in France for the export of phosphate fertilizers in the case of *SUPEXIE* (Commission Decision of 23 December 1970, *OJ* No. L 10, 13 January 1971, p. 12. In the case of *BELGAPHOS*, the parties concerned decided to dissolve the company as a result of remarks made by the Commission concerning some of the clauses (4th General Report No. 28, *EC Bulletin* No. 8-70, Part Two, Chap. 1, point 10). The Commission's case law with regard to joint selling agreements and equalization of sales prices, when they refer to sales within the Common Market, has been confirmed by this case where the enterprises had kept their individual freedom to sell individually and to fix prices, but subsequently proceeded to an equalization of profits. In this way trade between the Member States was no longer affected so that negative clearance could be given (by the Commission).

after the system of joint selling was altered by the parties at the request of the Commission, so that the agreements no longer fell under the general ban on cartels.

With this object in view, the system of joint selling was restricted to the national markets and to the markets outside the EEC. Joint selling agencies no longer interfere in any way with exports to countries of the Common Market since such exports can only be carried out by the producers themselves or their dealers. Agreements no longer include provisions likely to discourage either direct deliveries by the producers or resale by intermediaries in the other countries of the Community. In particular, the freedom of buyers to import and export within the Common Market cannot be restricted by prohibiting the resale of the products outside the national territory or by the granting of loyalty discounts. The conditions under which certain quantities of products are placed at the disposal of the joint selling agency may not be such as to deprive individual members of the right to determine the quantities which they wish to export themselves. Equalization of selling prices on the home markets and export prices to countries outside the Common Market is likely to discourage exports by individual members of the group to countries within the Common Market and cannot therefore be allowed.

13. On the other hand, when giving these negative clearances to certain joint selling agencies, the Commission decided to proceed in due course with a new examination of all such cases in order to gain precise knowledge of the development of the situation in this field.<sup>1</sup> The Commission is at present making enquiries and undertaking investigations in order to see that, independently of the removal of the explicit restrictions on exports to other Member States, the maintenance of national joint selling agencies does not lead to a *de facto* protection of internal markets incompatible with the competition rules of the Treaty.

14. In 1971, the intervention of the Commission in the case of *CIM-FRANCE*<sup>2</sup> led French cement producers to amend their agreement in order that their joint selling agency was no longer responsible for exports to the

<sup>1</sup> See Commission replies to written questions No. 158/70 of 8 August 1970 OJ No. C 133, 5 November 1970, p. 3, 226/70, 26 August 1970, OJ No. C 141, 27 November 1970, p. 13 and 443/70 of 14 January 1971, OJ No. C 26, 23 March 1971, p. 18.

<sup>2</sup> EC Bulletin No. 1-72, Part Two, Chap. I, Sec. 4.

countries of the Common Market. As the activities of this selling agency, which was concerned exclusively with exports, are now limited to sales to markets outside the Community, they are no longer likely to restrict competition within the EEC. On the subject of agreements made by enterprises established within the Community with a view to exporting to third countries, the Commission had already made its position clear by giving negative clearance in the case of *Dèca* ("Dutch Engineers and Contractors' Association").<sup>1</sup> This is a group made up of four Dutch enterprises with the object of organizing cooperation among its members to undertake construction and public works outside the Community. In view of the facts known to the Commission, there was nothing to show that cooperation among these enterprises for exports to markets outside the Community would have any effect on competition within the Common Market.

15. An export sales agency was however the object of a prohibition decision in 1971, in the case of *Nederlandse Cement-Handelsmaatschappij (NCH)*.<sup>2</sup> This agency grouped together a large number of German cement producers and completely eliminated competition between them in the Benelux export market, particularly in the Netherlands which relied heavily on imports. Although this joint selling agency did indeed help in improving distribution, the Commission considered that the disproportion between the results obtained and the means employed—that is to say, the complete elimination of competition among the producers on export markets resulting both from the exclusive selling rights given to the joint selling agency and from the rules on prices and quotas—was such as to exclude any possibility of exemption from the prohibition on cartels. Even if the centralization of sales could bring about reductions in sales costs, it should not be forgotten that; in the case of individual competition and marketing, the manufacturers concerned would not need to take over all the functions carried out by the selling agency since part at least of these functions could be handled by the wholesale trade. The absence of an appropriate marketing link could only be attributed to the existence of a joint selling agency which by excluding imports prevented the distribution network from fulfilling its potential to expand. Furthermore, some distribution functions could have been carried out just as well by an independent distributor without a centralized agency fixing quotas and prices and without exclusive links with producers.

<sup>1</sup> Commission Decision of 22 October 1964, *OJ* No. 173, 31 October 1964, p. 2761/64.

<sup>2</sup> Commission Decision of 23 December 1971, *OJ* No. L 22, 26 January 1972, p. 16.

16. Where joint selling agencies for the products covered by the ECSC Treaty are concerned, the High Authority had to define for each case two limits within which joint sales could be authorized. First, the joint selling agencies could not be of such importance as to restrict competition within the Community more than was absolutely necessary. Second, these agencies had to be sufficiently large and organized in such a way as to improve distribution of the products concerned.<sup>1</sup> Taking into account the development of the market structures the Commission published a notice recently<sup>2</sup> which states that, with regard to competition, agreements on joint selling have one special feature in that they remove, generally, speaking, all price competition among the members of the group. As against specialization agreements, joint selling agreements encourage the alignment of prices at the highest level of costs and, consequently, the maintenance of the least efficient units. Quite often the disadvantage is that the structure of the selling agency created by the agreement on joint selling does not, as is the case with independent enterprises, permit sufficient flexibility in adapting to changes in demand.

Joint selling agreements may tend to improve distribution but they are not generally of decisive importance for production and do not normally constitute a means of achieving industrial reorganisation. In view of the fact that the expected improvements had not materialized, the Commission refused to extend the authorization granted in 1967 for the *Laminated Steel Joint Selling Agency* of the German iron and steel industry. The agreements which were finally authorized were essentially concerned with both specialization and rationalization, each enterprise selling, with some exceptions, its own products independently within the framework of the groups, set up for rationalization purposes.<sup>3</sup>

17. These various decisions clearly show the Commission's attitude towards joint selling agencies, where such agencies regulate the behaviour of a large proportion of producers on the markets concerned and where they may very well jeopardize the effectiveness of competition. As against this, the Commission has already made clear in its Notice on Cooperation<sup>4</sup> that joint selling carried out by small or medium-sized enterprises, even when competing with one another, very often do not result in an appreciable restriction of competition.

<sup>1</sup> 6th General Report on the Activities of the Community (1958); Volume I, p. 79-80.

<sup>2</sup> General Guideline on the Policy of Competition in Iron and Steel Structures, Sec 8, OJ No. C 12, 30 January 1970, p. 5.

<sup>3</sup> Bulletin No. 9-71, Part Two, Chap. I, Sec 14, see above page 39.

<sup>4</sup> Sec II 16.

This position of the Commission was illustrated in its decision in the case of *SAFCO (Société Anonyme des Fabricants des Conserves alimentaires)*.<sup>1</sup> For the first time, a joint export selling agency which was also responsible for exports to countries within the Common Market was granted negative clearance because of the small size of the enterprises concerned. In view of the competitive situation on the markets of the Community for these products, a situation which was characterized by the wide range of similar products competing in both quality and price, it was considered desirable from the point of view of competition policy that new and increased export activity should take place by regrouping small producers of a local or purely national market, in the face of competition from several larger enterprises. In this case, the Commission noted that it was only by means of such cooperation that enterprises were able to organize the export of their products to markets outside their normal spheres of activity.

18. The Commission also showed in the *Alliance de Constructeurs français de Machines-Outils*<sup>2</sup> case that Article 85 is not opposed to the setting up by small and medium-sized enterprises of a joint marketing agency on foreign markets. Such an agency leaves to its members the right to fix their selling prices but also includes a non-competitive undertaking underlining a pre-existing specialization in the production of its members and encouraged by the situation on the market. The maintenance of this product specialisation is necessary to strengthen the links of confidence which will make the proper functioning of the joint marketing service possible *and to prevent the coming into being of supplementary agreements and concerted practices, with special references to prices*. As the Commission has set forth in its Notice on Cooperation, the setting-up of a joint selling agency does not present a restriction on competition when the member enterprises are not in competition with one another for the products covered by the agreement.

#### *Collective exclusive reciprocal dealing*

19. Collective obligation for exclusive purchasing from specific manufacturers or importers, or for exclusive deliveries to certain buyers within a Member State can also give rise to very serious restrictions on competition likely to affect trade between Member States. Where the obligations are reciprocal these collective exclusive dealing agreements can result in the splitting of an otherwise unified market into two separate parts, one made

<sup>1</sup> Commission Decision of 16 December 1971, OJ No. L 13, 17 January 1972, p. 44.

<sup>2</sup> Commission Decision of 17 July 1968, OJ No. L 201, 18 August 1968, p. 1.

up of manufacturers adhering to the agreements and their recognized clients, and the other of the producers not adhering to the agreement and the clients who have not been selected. This artificial division of the market of a Member State, which is the result of such exclusive reciprocal engagements, means that the market as a whole is never open to producers of the other Member States, and that buyers of the Member States itself can never choose from among all the goods available within the Common Market.

When, as is generally the case, the manufacturers who are parties to such agreements within a Member State hold a strong position in the market and where the selected clients represent a major part of the distribution network of the market concerned, these agreements tend to isolate certain sectors of the economy of the Member States within the Community.

20. As the Commission declared in its recommendation on Article 3 of Regulation No. 17 in the case of the *Pottery Convention*<sup>1</sup> the agreement constituted in principle a closed selling circuit aimed at assuring outlets for the member manufacturers rather than promoting the efficient utilization of the products concerned or improving their distribution. In view of their serious effect on imports, such restrictions on competition were in any case not indispensable to achieve the objectives of the agreement. This opinion of the Commission was not fundamentally changed by making the system more flexible through the elimination of the obligation of exclusive buying imposed on customers, so long as the agreement maintained the obligation of member manufacturers to respect technical standards which had not been laid down by any regulatory bodies and to sell only to buyers who could meet certain conditions, even if these buyers already fulfilled the legal requirements laid down for the exercise of their profession. The agreement nevertheless continued to present an obstacle to the opening up of the market concerned to imports from other member countries. Even if all the producers of the Common Market had the possibility of adhering to the agreement, they were presented with the alternative of submitting to the restraints of a private organization or of being excluded from a large part of the distribution network, while certain categories of buyers were still excluded from receiving direct deliveries from the member manufacturers. For these reasons and as a result of the Commission's criticisms, the *Pottery Convention* was terminated in 1971 as was also a similar agreement, the *Stoneware Convention*, which had been concluded for regulating the distribution of tiles on the Belgian market.<sup>2</sup>

<sup>1</sup> Bulletin No. 5-64, Annex II, 7th General Report on the Activities of the Community No. 67.

<sup>2</sup> Bulletin No. 12, 1971, Part Two, Chap 1, Sec 3.

21. Undertakings of mutual exclusivity between manufacturers and dealers are often the extension at the distributive level of agreements between manufacturers for fixing quotas and prices. By establishing such exclusive trade relations with buyers, the producers party to the agreement tend to shield themselves from competition from other suppliers.

The Commission intervened on a number of occasions against this type of agreement. In the case of *Gravier (gravel)*<sup>1</sup> a number of Belgian, German and Dutch producers undertook to deliver exclusively to Belgian and Dutch trading groups which in their turn undertook to obtain supplies exclusively from the producers concerned. This arrangement was completed by the territorial sharing of markets among the groups of traders and provisions for the alignment of prices. In the "*water-beaters*" case, the exclusive obligation, undertaken between manufacturers and importers on the one hand and the Belgian wholesalers on the other, were reinforced by the express prohibition of re-import and export as well as by fixing prices and discounts. The agreement on quotas and prices between Belgian, German and Dutch producers for the sale of *Silica*<sup>2</sup> on the Dutch market was also strengthened by exclusive buying agreements with traders and the joint fixing of minimum prices by sellers. This also applied to an agreement concluded by Belgian, German and Dutch producers to fix quotas for deliveries to the Dutch market of *Cement and Clinker*<sup>2</sup> which included the fixing of uniform prices and selling conditions.

22. The intervention by the Commission led to the cancellation of the agreements notified to it concerning quotas, prices and collective obligations of exclusivity. This was also the case for *Paper*,<sup>3</sup> *Camping material*,<sup>4</sup> *Timber from the North*,<sup>5</sup> *Agricultural Machinery*,<sup>6</sup> and *Sanitary Installations*.<sup>7</sup> Another agreement of this type was cancelled in 1971 following the Commission's intervention. This agreement was concluded between Belgian and Luxembourg manufacturers for the sale of *Steel Tubes*<sup>8</sup> on the Belgian market and fixed quotas for deliveries in respect of each one of the member enterprises and also imposed uniform selling

<sup>1</sup> 8th General Report on the Activities of the Community No. 63 and 65.

<sup>2</sup> 9th General Report on the Activities of the Community No. 56 and 57.

<sup>3</sup> 9th General Report on the Activities of the Community, No. 53, h

<sup>4</sup> First General Report on the Activities of the Community, No. 54.

<sup>5</sup> 2nd General Report on the Activities of the Community, No. 29.

<sup>6</sup> 3rd General Report on the Activities of the Community, No. 37.

<sup>7</sup> 4th General Report on the Activities of the Community, No. 28.

<sup>8</sup> Bulletin No. 9/10-71, Part-Two, Chap 1, Sec 14.



conditions. The clauses involved seriously limited the possibilities of competition among the members and adversely affected trade between Member States by preventing the Luxembourg member of the group from developing sales on the Belgian market. Furthermore, the undertaking by the Belgian wholesalers who had signed the standard contract with the manufacturers to obtain supplies exclusively from members of the group closed a considerable part of the Belgian market to manufacturers from the other Member States.

23. Protection of a national market can also be obtained by means of a horizontal agreement among importers of different brands of goods in one Member State with a view to creating or guaranteeing full territorial protection for their individual exclusive dealing agreements.

Following the Commission's intervention, based on Article 85, in the case of *RAI - Comaube* ("De Rijwielen- en Automobiel-Industrie" and the "Chambre Syndicale du commerce Automobile de Belgique"),<sup>1</sup> the associations of importers and distributors of automobile spare parts and accessories released their respective members from their obligations under horizontal agreements setting up full territorial protection of their individual exclusive dealing agreements with foreign suppliers, or guaranteeing the full territorial protection laid down in the contract. It is for this reason that members of the associations were obliged to respect the right to exclusive purchases registered in the name of another member and could not undertake parallel import of products registered in this way nor resell products thus imported. The two associations had also come to an agreement concerning intra-Benelux trade under the terms of which members were not allowed to export to the other country a product for which an exclusive selling concession had been granted in favour of the member of the other association.

#### *Aggregated rebate cartels*

24. Isolation of an economic sector of a national market within the Community can also occur even where exclusive agreements have not been made between producers and buyers, as a result of agreements among producers of a Member State where such agreements grant to the buyers in that State rebates, the rates of which are fixed jointly in relation to the total purchases made during the period under consideration from all the producers who are parties to the agreement. A cumulative

<sup>1</sup> 4th General Report, No. 28, Bulletin No. 7-70, Part Two, Chap 1, Sec 5.

system of rebates encourages buyers to obtain rebates at the highest possible rates by concentrating their purchases on the national producers and, therefore, not taking offers from other suppliers into consideration even if these offers are more favourable. This way of attracting custom restricts sales possibilities of foreign producers on the market concerned and producers from other Member States in particular. An artificial obstacle, collectively imposed, makes access to the market of a Member State more difficult and is prejudicial to the establishment of a single market within the Community.

This is illustrated by the Commission's decision in the case of *Ceramic Tiles*.<sup>1</sup>

This occurs, in any case, when members of the manufacturers group represent an important part of the national production and when the buyers with whom they are dealing represent an appreciable part of the distribution network for the sale of their products on the market so that the possibilities for outlets on the market to suppliers from other Community countries are considerably restricted. In this case, no exemption from prohibition could be granted. Indeed, the Commission was of the opinion that the advantages that could have resulted from the implementation of the agreement on the level of the products' distribution or on the activities of the participating manufacturers were not such as to compensate the disadvantages resulting from the artificial protection of a national market to the detriment of products of a competitive nature offered by producers of the other Member States.

#### PERMITTED FORMS OF COOPERATION

25. In parallel with the elimination of situations that are incompatible with competition and the unity of the market, the Commission has pursued its policy in recent years of encouraging cooperation between enterprises where this can produce favourable economic results and maintain effective competition within the Common Market. To this end, the Commission has endeavoured to define, by a double series of measures (one of which is individual and the other general), those agreements which do not come under the prohibition and those which do come under such a ban but which are entitled to exemption.

<sup>1</sup> Commission Decision of 29 December 1970, *OJ* No. L 10, 13 January 1971, p. 15.

The Commission adopted a large number of *individual decisions granting negative clearance* where it was shown that the agreements which had been submitted did not restrict competition within the Common Market, so that it was not necessary for the Commission to intervene under Article 85.

Thus the intention regarding a certain number of types of agreements has been clarified in the light of the provisions of Article 85 and the individual cases examined. In order to indicate its favourable attitude towards cooperation, particularly between small and medium-sized enterprises, and also to dispel the uncertainty that still exists with regard to forms of cooperation which do not come under the ban on agreements, the Commission endeavoured to explain, in more general terms, by means of its *Communication concerning Cooperation between Enterprises* those forms of cooperation which do not normally involve any restriction on competition.

Most of the individual decisions of negative clearance arising from the examination of the terms of the agreements have shown that they do not entail any restriction on competition within the meaning of Article 85 because the situation of the market and the position of third parties on the market are not appreciably affected.

In its *Communication concerning Agreements of Minor Importance*, the Commission laid down quantitative criteria for the general definition of cases of this kind. Agreements between enterprises which are limited by their minor position on the market and by their limited economic and financial potential are, in general, incapable of appreciably affecting either the intensity of competition or the freedom of choice of third parties.

The main part of this activity is, however, at present based on the definition of conditions for block exemption under the terms of Article 85(3) within the framework of the proposed exemption regulations. In recent years, particular forms of cooperation have been exempted from prohibition through a series of *individual exemption decisions* where the agreements fulfilled the necessary conditions. Exemption is normally granted for each separate case since it cannot be decided on without the particular characteristics of the agreements and their effects on the market being studied. It is for this reason that the decisions so far published do not allow for the formulation of premature generalizations, since the conditions for exemption can only be defined for each separate case. It is only in certain fields that certain types of

agreement—to the extent that their characteristics can be placed within a general delimitation—can be eligible for *Block Exemptions*. Certain general considerations emerge as to the possible of authorizing certain categories of agreement concerning standardization, specialization, research and development as well as the use of the results obtained, and the Commission has therefore been authorized to draft regulations for block exemption in this area. Several important individual decisions were also handed down in these matters, and the results of these are being examined with a view to defining the conditions under which general solutions can be found and put into operation. In other fields, specific decisions are still necessary so that the situation is clarified by proceeding from case to case.

### *Specialization agreements*

26. Favourable results from the point of view of the economy as a whole can be obtained by means of specialization agreements, and the Commission, considering that such agreements are desirable, has encouraged those which have been submitted for exemption, as is shown in the decisions made under the terms of Article 85 of the EEC Treaty in the cases of *Jax-Peter*, *Clima Chappee-Buderus*<sup>1</sup> and more recently in the case of *Sopelem-Langen*.<sup>2</sup>

Cooperation of this kind between enterprises of a certain size, restricts competition within the Common Market and, in view of their position on the Community markets, is likely to affect trade between Member States. The basis of specialisation agreements is the agreed allocation of production between the parties, accompanied by mutual obligations on each party to supply the other exclusively with the products in which he specialises for sale in the territory of the other party. Such agreements prevent a member producer from recommencing the manufacture of a product given up in favour of another producer or from marketing directly under his own mark in the territory of another producer the product in which he specialises. The consumers, therefore, no longer have the possibility of stimulating competition between the products of manufacturers participating in the agreement.

27. Such agreements do, however, provide a means of obtaining specialization which contributes to lower costs by the setting up of

<sup>1</sup> Commission Decision of 22 July 1969, *OJ* No. L 195, 7 August 1969, p. 175.

<sup>2</sup> Commission Decision of 20 December 1971, *OJ* No. L 13, 17 January 1972, p. 47.

long production runs and a better utilization of available production capacity by the concentration of effort on a limited number of products. The obligation of reciprocal supply gives each party, in spite of the specialization of their production, the possibility of continuing to offer for sale to their customers a complete range of products, while the fact that each party represents its partners in the group within the territory in which it has a sales network at its disposal facilitates the marketing of the products concerned. The agreements concerned also generally aim at promoting among the members of the group a more highly developed technical cooperation, thus creating the motive force for standardization and rationalization, for example by means of exchange of information and indeed by jointly working out new products. The specialized enterprises are thus able to offer improved and better adapted products at more advantageous prices.

28. The Commission has not failed to recognize, however, the limitations of this useful trend, limitations which the decisions adopted have already underlined. The essential condition for granting exemption to such agreements is that the specialization shall not compromise the effectiveness of competition in such a way that the parties to the agreements can utilize the savings in costs for their exclusive profit instead of sharing them fairly with their customers. Even if the real advantages obtained for the customers are not immediately apparent when the agreement is examined, there must nevertheless be established with sufficient probability that any such advantages will accrue in the future as a result of the progressive development of the specialization, thus enabling the parties to achieve a reduction in selling price—a result which will be encouraged by the pressures of competition. Although such agreements may enable the parties thereto to strengthen their position on the market, they must remain subject to effective competition from other manufacturers established in the Common Market or distributing goods similar to those covered by the specialization agreement. Competition at the distribution level must also be ensured by allowing intermediaries to make parallel imports of the specialized products covered by the agreements.

The individual decisions adopted in this context already provide an impression of the kinds of specialization agreements which will be entitled to block exemption by the Commission,<sup>1</sup> with a view to making

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<sup>1</sup> Council Regulation (EEC) No. 2821 of 20 December 1971 concerning the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, *OJ* No. L 285, 29 December 1971, p. 46.

possible the conclusion of agreements which conform to the rules of competition. To this end, the regulation to be adopted will define clearly the admissible clauses which are normally indispensable for the required cooperation.

On the other hand, a specialization agreement cannot be authorized under the terms of Article 85(3) even if the advantages implied by the agreement cannot be obtained by other means, when it reduces the number of suppliers to a figure below the minimum required to maintain effective competition. Article 85(3)(b) excludes any exemption for agreements which give the contracting parties the possibility of eliminating competition for a substantial part of the products concerned.

29. The case *FN - CF* (Fabrique Nationale d'Armes de Guerre - La Cartoucherie Française) which also resulted in an exemption decision granted by the Commission in 1971,<sup>1</sup> was characterized by the important positions occupied by the contracting parties in the market of the products which were the object of the agreement. It was also typical in that the specialization on the main lines of production agreed to by the parties also involved the inclusion of clauses on joint research and development of new products which were likely to be incorporated in the respective production of each partner to the agreement (the obligation to specialize in the case in question covers the future production programmes of the parties to the agreement). Each party was to be responsible for the representation of its partner in the territories where it had the most highly-developed sales network, i.e. France and the French territories for the CF and Benelux, Germany and Italy for the FN.

The mutual grant of exclusivity on sales and purchases covered by the agreement was considered in this instance to be a restriction on competition which was indispensable if the favourable effects of the agreement were to be achieved. Indeed, as far as the mutual sales exclusivity was concerned, it could not reasonably be expected that the parties to the agreement should renounce their right to all the benefits from sales in their own territory of products manufactured by the other party within the framework of the joint technical and development system envisaged by the agreement.

A number of requirements were appended to the exemption decision in order to permit the Commission to verify the effective implemen-

<sup>1</sup> Commission Decision of 28 May 1971, OJ No. L 134, 20 June 1971, p. 6.

tation of the specialization measures as well as the effects of these measures, the reduction of selling prices and the maintenance of effective competition on the market for the specialized products, taking into account a possible increase in the market share of the parties to the agreement. At present the position is that although both the FN and the CF are important within the Community (and in the Benelux countries in particular), the Commission notes that they are nevertheless still subject to the competition of other large EEC cartridge manufacturers and to competition from imports from countries outside the Common Market.

30. Specialization agreements have also played an important part in the implementation of the ECSC Treaty, the High Authority also having encouraged such agreements when they had been submitted for authorization in accordance with the terms of Article 65(2) of that Treaty. The Commission's policy also takes into account the fact that<sup>1</sup> the purpose of specialization is generally to coordinate rationalization and expansion of the production of different iron and steel products, although, where the enterprises concerned are important, this can result in restrictions on competition within the Common Market which can affect the mechanism of competition.

This basic and fundamental position held by the Commission was illustrated by the decisions made in 1971 authorizing the setting up of four groups for *rationalization in the German iron and steel industry*<sup>2</sup> which were intended to replace the selling agencies for rolled steel, and for which an extension of the authorization given in 1967 had been refused by the Commission. The agreements, which had been authorized in view of the specific situation of the Community's steel markets are essentially directed towards production specialization and should make it possible to find adequate solutions to restructuring problems which are apparent in the German iron and steel industry. In view of the fact that the giving up of certain lines of production and of new investments in certain sectors presents serious risks which vary according to product and are very difficult to evaluate, the Commission agreed that specialized agreements could contain possible quantitative financial or equalization measures between the enterprises concerned for certain specified products. It should be emphasized that the Commission did not

<sup>1</sup> Guidelines on competition policy relating to the structures of the iron and steel industry, *OJ* No. C 12, 30 January 1970, p. 5.

<sup>2</sup> Commission Decision of 27 July 1971, *OJ* No. L 201, 5 September 1971, p. 1.

authorize production quotas, allotting percentages of the group's production to each individual enterprise in respect of each one of its products, such quotas having originally been envisaged in the agreements concerning the four rationalization groups. The main effects of these quotas would have been to fix permanently the respective shares of each enterprise within the group and this would have been contrary to any genuine improvement in production.

The Commission therefore authorized only those agreements which were essential for achieving the desired rationalization effects and which were no more restrictive than necessary to achieve the objective of specialization and rationalization. Furthermore, the authorizations were subject to a series of conditions designed to ensure that these effects will in fact be achieved and that more severe restrictions on competition will not occur. At the same time, the conditions ensured that the independence and autonomy of the enterprises concerned on the common market for steel will not be compromised by personal links or restrictive practices between the enterprises and the groups or by practices with third parties particularly within the framework of association of enterprises.

*Agreement on joint research and development  
and utilisation of results*

31. Efforts made in pure and applied research determine the competitiveness of enterprises and the possibilities of development of the economy as well as the pace of technological innovation. That is why the Commission has tried to remove, within the Common Market, obstacles to the cooperation of enterprises in research and development within the limits of the rules of competition laid down in the EEC Treaty.

To the extent that they do restrict competition, agreements between small and medium-sized enterprises concerning joint research and development only, do not generally present any particular danger to competition. It is rather at the stage of utilization of the results of research that problems with regard to the law on cartels may arise. The Commission will, therefore, have to examine, on the basis of individual decisions already adopted as well as decisions to be adopted, the conditions under which certain categories of agreements on research and development of products and processes up to the stage of industrial application as well as utilization of the results obtained, including provisions regarding the use of industrial property rights and of secret



technical know-how,<sup>1</sup> can be exempted from the prohibition. The regulation which the Commission is authorized to adopt should define the limits laid down by Community law on cartels for cooperation in research and development which it considers necessary for the purpose of ensuring the possibilities of technical and economic development and the competitive capability of enterprises in an enlarged market but which must not allow restrictions of competition, such as the sharing or protection of national markets.

32. The Commission's first decision concerning an agreement on *joint research* was made in the case of *Eurogypsum*.<sup>2</sup> This is an association, the aim of which is to promote, on a European scale, the development of the plaster and gypsum industry. To achieve this aim, it carries out joint studies and research on questions of interest to the industry, and disseminates the results of the research carried out. The granting of negative clearance was made possible because the joint research activities carried out and financed in common had neither the object nor the effect of restricting competition. The parties were not prevented from carrying out research individually and the articles of agreement did not contain any discriminatory conditions as regards entry into the association and representation therein. The association did in fact publish the results widely.

This concept was confirmed by the Commission in its Notice on Cooperation between Enterprises,<sup>3</sup> the terms of which made clear that agreements arrived at for the purpose of undertaking joint research do not generally restrict competition on condition that the enterprises are not restricted as far as their own research activities are concerned, and that the results of the joint research are made available to all participants in proportion to their participation. In principle, third parties must not be excluded from access to the results of joint research, although the constitution of a joint research organization justifies the obligation not to grant licences to third parties unless there is prior joint agreement on the part of the contracting parties to do so or unless this is reached by a majority vote.

<sup>1</sup> Council Regulation (EEC) No. 2821 of 20 December 1971 concerning the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, *OJ* No. L 285, 29 December 1971, p. 46.

<sup>2</sup> Commission Decision of 26 February 1968, *OJ* No. L 57, 5 March 1968, p. 9.

<sup>3</sup> Notice on agreements, decisions and concerted practices, concerning cooperation between enterprises 11/3, *OJ* No. C 75, 27 July 1968, p. 3.

Particular circumstances may, however, arise in the case of some agreements for joint research which distinguish them from the usual cases envisaged by the Commission in its notice on cooperation. This notice concerns, in particular, cooperation agreements between small and medium-sized enterprises. In the case where large enterprises take part in this type of agreement, something which the Commission considers as a possibility, the notice referred to above should only be taken with certain reservations. As was already stated in the Commission's notice, reservations can arise even on agreements which do not impose restrictions as regards the utilization of the results of the joint research and even if the contracting parties have not excluded the possibility of carrying out research individually since they would not be expected to undertake such research because of the cost involved or because of lack of success in the past.

33. The decision recently handed down in the *Henkel-Colgate*<sup>1</sup> case gave the Commission the opportunity to underline this viewpoint. It held that the prohibition of Article 85(1) could apply to joint research by two large enterprises with world-wide markets and with a very strong position on the Community markets which are characterised by their oligopolistic structure and great technical homogeneity of products offered, as well as by particularly intensive and costly advertising, which makes penetration of the market very difficult for other manufacturers who wish to compete. In these conditions, the position of manufacturers in the market and their possibilities of expansion are largely determined by the degree of technical progress and innovation, so that competition in the field of research is extremely important. A supplier can gain an advantage over his competitors in such a market only by improving the quality and use of his products by means of research, and by showing by advertising that these products are a technical improvement on those of his competitors. This means that an agreement which excludes the other contracting party from such advantages appreciably restricts competition between the two parties and in the market so that, as regards the position of the parties in Community markets, this is likely to restrict intra-Community trade. The clause according to which licences to third parties can only be granted by agreement between the contracting parties has not given rise to a ruling which is different from that concerning the research agreement itself. The clause in itself does not bear the stamp of a restriction on

<sup>1</sup> Commission Decision of 23 December 1971, OJ No. L 14, 18 January 1972, p. 14.

competition and is only of secondary importance since it is the normal consequence of the setting up of a joint research organization with the object of gaining new knowledge jointly.

By its decision, the Commission granted this agreement the exemption provided for in Article 85(3), since the joint research in the field of textile detergents did not include any restriction at the level of production and distribution of the products manufactured on the basis of the results of the joint research. The two parties will in fact have access to the results of the joint research and development (patents and know-how) on the same conditions and will be able to use them without limitation. Each party will have the right to obtain from the research company (which is their joint subsidiary) licences for all countries on payment of a maximum royalty of 2%. In order to prevent the joint research from exceeding the limits of the agreement in practice and also to ensure that the research does not lead to market sharing or to concerting the production and sales policies of the two parties, the Commission made its decision subject to certain conditions. These were that the enterprises must keep the Commission informed on their policy regarding licensing, patents and know-how resulting from the joint research, and must also provide information concerning the acquisition of share holdings or the establishment of personal links between both groups.

34. The agreement between *ACEC - Berliet*,<sup>1</sup> which had also benefited from an exemption decision, was a special case. This agreement was for technical cooperation and joint research and development, and was concluded with the object of developing a new type of electrically powered bus. It was characterized by the fact that two enterprises, each of which specialized in one aspect of the product, agreed to carry out joint research. This was likely to increase the possibility of a useful result being obtained. The Commission had considered that the non-competitive clause (prohibition of cooperation with third parties in the field covered by the agreement) and the undertaking concerning exclusivity (supplies of complementary products needed for the manufacture of the finished product resulting from the joint development) were an indispensable and justified measure of protection which would enable the two firms to profit from their investments. In addition, the clause limiting the number of buyers of the new electrical propulsion system was considered a necessary condition for ensuring the profitability of the new product. A decisive element in the Commis-

<sup>1</sup> Commission Decision of 17 July 1968, *OJ* No. L 201, 12 August 1968, p. 7.

sion's assessment was the fact that the concentration of the manufacture of the new products to a limited number of producers (apart from the fact that these would compete with the manufacturers of buses provided with mechanical propulsion) would not be likely completely to prevent competition between them, as their respective possibilities for selling on all markets of the Community were in no way restricted.

35. The limits which the rules of competition impose on joint research and developments agreements with regard to the utilization of the results obtained were also set forth in an *Opinion* published by the Commission in 1971 concerning a case which had been submitted to it<sup>1</sup>. The Commission opposed the methods envisaged for the utilization of the results of the joint research which gave each party favoured treatment in respect of royalties relating to licences on its main market and granted it a preferential territorial position which was inadmissible. The Commission also pointed out that in order to ensure the free movement of goods within the Common Market, patents and technical knowledge obtained as a result of joint research could not be utilized for the purpose of preventing imports into a Member State of products manufactured by one of the parties with the help of results obtained through joint research and put into circulation in another Member State.

#### *Joint advertising, joint use of quality labels, standardization*

36. As the Commission has stated in its Notice on Cooperation between Enterprises,<sup>2</sup> joint advertising as such does not constitute a restriction on competition if the participating enterprises are not prevented from carrying out their own publicity. As, in the case of joint research it cannot of course be excluded that, contrary to the general case which the Community had in mind in its Notice, joint advertising by enterprises of a certain size might come under the general ban. Such a situation can arise when a market is characterized by an oligopolistic structure where advertising as a means of competition plays a decisive role.

Joint advertising which aims at drawing the attention of buyers to certain classes of products, is generally linked with associations for standards which establish a common quality label guaranteeing to

<sup>1</sup> Bulletin No. 5-71, Part Two, Chap. 1, Sec 7.

<sup>2</sup> Sec II, 7 and 8.

customers that the quality of a product bearing such a label is up to established standards. The Commission has also stated that, in general, agreements on the use of a common label do not restrict competition if competitors, whose products satisfy the required quality conditions, may use the labels on the same terms as the members themselves.

37. The Commission's position in this matter was illustrated by the decision in the *ASBL pour la promotion du tube d'acier soudé électriquement* (for the development of electrically soldered steel tube).<sup>1</sup> The Commission granted negative clearance, noting that the members of the association remained free to carry on individual publicity for their own products and that the possibility of using the joint quality label and of membership of the association was open to all producers meeting the quality standards laid down objectively.

A restriction on competition may arise, however, if the use of the label is linked with obligations concerning production and marketing, when, for example, the participating enterprises, because of an agreement or a concerned practice, are not free to fix prices or when they are obliged to manufacture or sell products of guaranteed quality only.

This qualification expressed in the Commission's Notice on Cooperation found application in the case of *Vereniging van Vernis-Verffabrikanten in Nederland (VVF)*,<sup>2</sup> where negative clearance was granted only after the removal of the obligation on the part of members to respect minimum prices and other conditions of sale fixed by the group for their exports within the Common Market, and after confirming that the obligation to export under official trade names only those products which could satisfy the minimum quality requirements leaves the member producers free to export other products.

By means of these decisions, the Commission showed that paragraph 1 of Article 85 is not opposed to the efforts of associated producers to improve the quality of their products by means of certain measures of standardization which include the use of a common trade mark and making them known through joint advertising, on condition that competition between the parties to the agreement or access of other producers to the agreement is not excluded.

<sup>1</sup> Commission Decision of 29 June 1970, *OJ* No. L 153, 14 July 1970, p. 14.

<sup>2</sup> Commission Decision of 25 June 1969, *OJ* No. L 168, 10 July 1969, p. 22.

38. As was shown in the case of *Transocean Marine Paint Association*,<sup>1</sup> an exemption from the general ban on cartels is also not to be excluded when cooperation agreements in this field result in an appreciable restriction on competition. This association consisted of medium-sized producers each established in a different country, of which five were within the EEC, and was set up with the intention of developing certain marine paints by utilizing their joint technical knowledge. The members agreed to manufacture paint of the same quality and to sell it under the same trade mark in order to make themselves more competitive with the biggest international groups on the market. Sales were organized in such a manner that each member had to guarantee, in its main area of activity, regular supplies of products of the same quality and sold under the common trade mark, so that buyers would be able to obtain, whenever they required it and in a large number of countries marine paints of identical quality. In this case, the Commission authorized for a launching period a flexible system of geographical division which provided each member with a privileged competitive position, since deliveries to countries where other members were established could only be made by means of a system of reciprocal compensatory commissions. This arrangement did not in fact exclude exports, so that a corrective factor remained in respect of possible artificial differences in prices charged by the members to the detriment of consumers.

39. Certain problems concerning competition may arise from agreements which are concerned solely with the *uniform application of standards and types*. Since agreements of this kind need not be notified in accordance with Article 4(2) Section 3a of Regulation No. 17, the Commission was never made aware of them. As the effectiveness of these agreements is linked with the obligation on the part of participating enterprises to manufacture or sell only those products or parts of products which have been the object of jointly fixed standards, types, kinds, dimensions and categories, they may come under the general ban on cartels. In general, such agreements do, however, help in rationalizing production by means of a better utilization of production capacity and of the improvement of supply conditions due to the increased interchangeability of the products concerned to the benefit of the consumer. Such agreements will, however, only provide the possibility of eliminating competition and present real advantages for the consumer to the extent that they do not provide a means of

<sup>1</sup> Commission Decision of 27 June 1967, OJ No. K 163, 20 July 1967, p. 10.

restricting or removing price competition as well as competition relating to conditions and quality among the participants to the agreement. The Commission will obviously take this into account when determining the conditions under which block exemption can be granted for certain types of agreement in the field of standardization.<sup>1</sup>

#### *Agreements for joint purchasing*

40. It must be admitted that agreements for joint purchasing, even when the purchasing enterprises are not competing with each other, may lead to restrictions on competition between buyers. Fundamentally, as a result of the decision made in the case of *Socemas*,<sup>2</sup> the Commission considered that the prohibition on agreements was applicable to agreements between buyers in the same way as to those between sellers.

On the other hand, purchasing groups established by commercial enterprises may be an appropriate means of allowing the retail trade access to foreign supply markets and thus overcoming difficulties inherent in their size, in the face of integrated forms of distribution with regard to obtaining advantageous prices and other purchasing conditions which can be passed on to the consumers. But the creation of powerful purchasing groups should be avoided, or at least be kept under control, in view of the repercussions they could have on the position of suppliers. The determination of the overall position on the market of the participating enterprises and the economic power of their aggregate requirements in relation to supply in the various markets concerned is therefore the main problem to be faced if effective competition within the Common Market is to be preserved.

41. In the case in question, the granting of negative clearance was based on the fact that the activities of the "Société française de coopération d'entreprises commerciales" (French company for cooperation among commercial enterprises) in the other countries of the EEC had not reached proportions sufficient to cause significant restrictions on competition and noticeable effects on trade within the Community. The purchases abroad by the participating enterprises, made through the intermediary of their joint purchasing agency, represented a very

<sup>1</sup> Council Regulation (EEC) No. 2821 of 20 December 1971 concerning the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices, OJ No. L 285, 29 December 1971, p. 46.

<sup>2</sup> Commission Decision of 17 July 1968, OJ No. L 201, 12 August 1968, p. 4.

small part of the market for each of the products concerned, so that the concentration of demand had only slight effect on the position of the suppliers on the various markets in question.

This decision constitutes only a first stage in the solution of problems which arise in so far as the compatibility of joint purchasing agreements with the rules on competition is concerned and in the definition of the limits within which such agreements can be permitted.

### *Rationalizing Participation in Fairs and Exhibitions*

42. The Commission also had to deal with competition problems caused by regulations connected with exhibitions with regard to advertising and sales activities of producers and their dealers as well as the effect of these regulations on the organization of large fairs and specialized exhibitions. The regulations on exhibitions often restrict the freedom of exhibitors to take part, either directly or indirectly, for a given period in activities of this kind other than those organized periodically by the association itself.

In the case of the *Expositions Européennes des Machines-Outils* (EEMO),<sup>1</sup> the Commission had already given its views on the applicability of Article 85 to restrictions of this type. In view of the need to rationalize participation in fairs and exhibitions and of the trend, which is often uneconomic, for the proliferation of this type of activity, these restrictions were granted exemption. The limitation on the participation of exhibitors in other similar types of activities is a rationalization factor in the trend towards a concentration of specialized exhibitions. This concentration provides the opportunity of a periodic comparison of practically all the machine-tools concerned in one and the same place and thus assists the marketing of these items in the interests of consumers.

43. However, competition, between manufacturers or their agents as well as the activities of the organizers of fairs and exhibitions should not be restricted to such an extent as to hinder the development of the advantages offered by such concentration. The decision handed down in 1971 in the case of the *Comité Européen des Constructeurs de machines textiles* (CEMATEX)<sup>2</sup> is of interest, for it shows that the rules on exhibi-

<sup>1</sup> Commission Decision of 13 March 1969, *OJ* No. L 69, 20 March 1969, p. 13.

<sup>2</sup> Commission Decision of 24 September 1971, *OJ* No. L 227, 8 October 1971, p. 26.



tions as conceived and applied for a number of years brought about an excessive concentration of exhibitions by large manufacturers and sellers of textile machinery within the Common Market. In the case of machine tool exhibitions, organized every odd-numbered year, the prohibition imposed on exhibitors from participating in other fairs every other year was permitted. In the case of textile machinery exhibitions, held every four years, the right to participate in other exhibitions of this kind every two years was guaranteed at the request of the Commission. The adoption of this solution enables competition to be maintained at a proper level, and the period of prohibition could reasonably be considered as essential in view of the high cost and technical difficulties in exhibiting and the rate of technical progress in the production of this type of equipment.

It is worth mentioning that these decisions concerned exhibition of capital goods and are without prejudice to decisions which may be made in the field of exhibitions of consumer goods. Indeed, the arguments set out above on the basis of Article 85(3) may not necessarily apply to the same extent.

## § 2 - Adaptation of Distribution systems to the rules on competition

44. Since the Commission's position in this matter has been fully explained, adaptation to the conditions of competition and market unity with regard to measures taken by enterprises for organizing the distribution of their products can usually be brought about without the need for formal procedures.

The first case to be considered is that of exclusive dealing contracts, the legal position of which in relation to Article 85 had been established by the *Grundig-Consten* case and by Regulation No. 67/67. In some cases of refusal to adapt, procedures have to be set in motion to bring about the removal of export prohibitions which enable different prices to be charged in different countries. The Commission also gave its attention to categories of exclusive dealing agreements which are not covered by the block exemption regulation, and to problems raised by the penetration of new markets.

There is also the question of conditions of sale imposed by enterprises. Here, the Commission clearly established, in the *Kodak* case, that conditions of sale may not lead to partitioning of national markets at different levels of distribution. The same applies, as in the *Agfa-*

*Gevaert* case, to clauses intended for resale price maintenance in certain member countries and, in accordance with the *Omega* decision, to restrictive undertakings by resellers which ensure a system of selective distribution in the Common Market. The Commission's efforts in 1971 were directed to making the principles obtained from these test cases generally applicable by ensuring that the enterprises concerned removed or change their general conditions of sale in accordance with these decisions.

#### EXCLUSIVE DEALING AGREEMENTS

45. During the first stage in the application of the rules on competition set out in the EEC Treaty, the problem of exclusive dealing agreements was in the foreground of the Commission's competition policy. Special attention was given to these agreements because their frequent occurrence in economic activity, combined with the notification system introduced by Council Regulation No. 17/62, gave rise to a formidable problem of filing and documentation regarding these agreements. The attention given to the exclusive dealing agreements was fundamentally due to the fact that such agreements are particularly likely to create obstacles with regard to the integration of national markets into a single market, to the extent that they guarantee to the holder of the concession not only the exclusive right to obtain supplies direct from the manufacturer but also to be the only distributor allowed to introduce the relevant products into the territory allocated to him.

46. Absolute territorial protection granted by the manufacturer is achieved through prohibiting all resellers in the other areas to export into the area allocated to the concession holder. The resulting partitioning of the concession holder's market precludes the possibility of parallel imports. It is precisely this possibility which, in the Commission's view on competition policy, should constitute a corrective factor for excessive prices imposed by an exclusive concession holder and should be an element of price harmonization in a unified market having the same features as a single domestic market. The possibility of parallel imports helps to ensure that users will have a fair share of the advantages accruing from exclusive dealing. The contracting parties must not, therefore, be allowed to restrict the freedom of users and intermediaries to obtain the product concerned from other resellers within the Common Market at more favourable conditions than those granted by the exclusive concession holder in his own area.

47. The problems arising from this type of agreement, under the terms of Article 85 of the EEC Treaty, were resolved in principle by a decision of the Commission in the *Grundig Consten* case,<sup>1</sup> which was confirmed in its essential points by the ruling of the Court of Justice.<sup>2</sup> Both the decision and the ruling showed that the exclusive dealing agreement concluded between the German manufacturer and his distributor for the sale of these products in France was an infringement of the principle of cartel prohibition and could not be exempted because absolute territorial protection was combined with the concession of exclusivity. Regulation No. 67/67/EEC<sup>3</sup> on block exemption which authorises, without requiring notification, bilateral agreements for exclusive dealing which satisfy the conditions laid down in the Regulation, especially the condition stipulating that parallel imports shall not be prevented, has to a large extent solved the problem of the massive number of cases faced by the Commission.<sup>4</sup> Indeed, the combination of the test decision confirmed by the Court of Justice and of the block exemption enabled the Commission to dispose of a large number of notifications relating to exclusive dealing agreements by means of a simplified procedure, either because they fulfilled the conditions laid down in Regulation 67/67 or because they had been adapted to that end by the enterprises themselves. It is, of course, the role of the Commission to carry out a check on agreements which, although they may satisfy the conditions laid down in the regulation, might in some way prove incompatible with Article 85(3), and if necessary to issue a decision. This could occur where it is shown that the exclusive concession holder had taken advantage of the exemption granted by charging excessive prices for the products by the concession.<sup>5</sup> Agreements which do not meet the conditions laid down in Regulation No. 67/67 and which are still subject to the normal notification procedure, must be examined case by case.

<sup>1</sup> Commission Decision of 23 September 1964, *OJ* No. 161, 20 October 1964, p. 2545/64.

<sup>2</sup> Judgment of the Court of Justice of 13 July 1966 in the cases of 56 and 58/64, *OJ* No. 170, 29 September 1966, p. 3015/55 *Jurisprudence of the Court* No. XII, p. 429.

<sup>3</sup> Regulation (EEC) No. 67/67 of 22 March 1967 on the application of paragraph 3 of Article 85 of the Treaty to categories of exclusive dealing agreements, *OJ* No. 57, 25 March 1967, p. 849/67.

<sup>4</sup> See First General Report on the Activities of the Communities in 1967, p. 60, and Second General Report on the Activities of the Communities in 1968, pages 43 and 44.

<sup>5</sup> Article 7 of Regulation No. 19/65 and Article 6 of Regulation No. 67/67.

As the Court of Justice has clearly reaffirmed in a recent ruling,<sup>1</sup> an exclusive dealing agreement falls under the prohibition referred to in Article 85 of the Treaty when it prevents either *de jure* or *de facto* the re-export by the distributor of the products concerned to other Member States, or the import of such products from other Member States into the protected area, for distribution by persons other than the concession holder. The Court underlined the fact that this last condition is fulfilled when the concession holder is in a position to prevent parallel imports from other Member States into the concession area by a combination of the terms of the agreement and the effects of national laws on unfair competition.

48. The Commission will continue to ensure that these principles are observed in all cases, of exclusive dealing arrangements involving absolute territorial protection, whether they become known as a result of notification, examination, or the lodging of a complaint. In its reply to written questions, submitted in the European Parliament, and concerning the differences in price of motor vehicles of the same make in various Community countries,<sup>2</sup> the Commission stated that it was using all the means placed at its disposal by Community law to remove those restrictions on competition which, on the basis of the Commission's previous practice, are prohibited under Article 85, and thus is using its influence to reduce excessive price differences; In recent years, the Commission has succeeded in removing most of the export prohibitions which have been brought to its notice. Of approximately 30 000 cases concerning exclusive dealing agreements initially notified, 4 500 of which contained export prohibitions, only about 1 500 are still pending. Enterprises that have not seen fit to give up, of their own accord, the export prohibitions incorporated in their agreements for exclusive dealing, include several producers of perfume in addition to manufacturers and importers of motor cars.

49. The Commission considers that a simple protection (agreements not involving absolute territorial protection) is in general sufficient to enable the concession holder to work the market intensively. As it

<sup>1</sup> Judgment of the Court of Justice of 25 November 1971 in case No. 22/71 (Béguelin Import Co), *OJ* No. C 9, 3 February 1972, p. 7.

<sup>2</sup> Written questions No. 506/69 of 10 March 1970, *OJ* No. C 72, 17 June 1970, p. 1, No. 247/70, 9 September 1970, *OJ* No. C 138, 18 November 1970, p. 13, No. 393/70, 11 December 1970, *OJ* No. C 20, 3 March 1971, p. 13, *OJ* No. 429/70, 8 January 1971, *OJ* No. C 22, 9 March 1971, p. 7.

had previously pointed out,<sup>1</sup> the temporary authorization of an absolute territorial protection might be envisaged for exclusive dealing agreements intended to enable a new producer to break into the market concerned. Until now, however, there has been no need for the Commission to decide on such a case.

The Commission shares the views of the Economic Committee of the European Parliament on this subject.<sup>2</sup> Support for such an exception to the principle of the incompatibility of absolute territorial protection can be found in a previous ruling of the Court of Justice<sup>3</sup> which allows for a more flexible attitude to those restrictions on competition required to assist an enterprise in penetrating a market on which it is not yet represented. In its decision in the *Transocean Marine Paint Association Case*,<sup>4</sup> concerning a cooperation agreement between small and medium-sized enterprises, the Commission had already authorized, for a limited period, a certain amount of territorial protection considered necessary to enable each of the members of the association to develop, in an initial period, intensive action concentrated on the market in the country in which the member of the group was established.

As regards exclusive dealing agreements between enterprises of minor importance, the Court of Justice confirmed its previous ruling<sup>5</sup> in a recent judgment.<sup>6</sup> This shows that an exclusive dealing agreement between parties of minor importance on the market of the products concerned need not come under the prohibition, although this does not necessarily exclude from prohibition agreements envisaging full territorial protection.

50. Moreover, in addition to bilateral agreements for exclusive dealing relating to trade between Member States, and concluded between manufacturers for particular territories within the Common Market, there is a series of exclusive dealing agreements that are not covered

<sup>1</sup> First General Report on the Activities of the Communities in 1967, p. 61

<sup>2</sup> Report made on behalf of the Economic Committee on the Rules of Competition and on the position of European enterprises within both the Common Market and world-wide economies (Rapporteur Mr Berkhouwer), European Parliament documents of session 1969-70, 2 February 1970, Doc. No. 197, p. 13-44.

<sup>3</sup> Ruling of the Court of Justice of 30 June 1966 in case No. 56/65 (Société Technique Minière/Maschinenbau Ulm GmbH), OJ No. 170, 29 September 1966, p. 3013/66, Vol. XII, p. 337.

<sup>4</sup> Commission Decision of 7 July 1967, OJ No. 163, 20 July 1967, p. 10.

<sup>5</sup> Judgment of the Court of Justice of 8 July 1969 in the case 5/69 (Volk/Vervaecke), OJ No. C 105, 14 August 1969, p. 15 *Recueil* No. XV, 4, p. 295.

<sup>6</sup> Judgment of the Court of Justice of 6 May 1971 in the case 1/71 (Cadillon/Höss), OJ No. C 76, 27 July 1971, p. 9, *Recueil* No. XVII, 4, p. 351.

by the definition in Council Regulation 19/65/EEC<sup>1</sup> and for which, therefore, the Commission is not empowered to adopt block exemption regulations. Unlike agreements covered by Regulation 67/67/EEC, the above agreements are not very numerous.

51. With regard to exclusive dealing agreements for exports to non-member countries the situation was defined by the negative clearance granted by the Commission in the *Rieckermann/AEG-Eloterm* case.<sup>2</sup> This test decision made it possible to settle by a simplified procedure, most of some 1 100 notifications or requests for negative clearance for this type of agreement, nearly half of which had been submitted by one and the same enterprise.<sup>3</sup> The Commission considered that such an exclusive dealing agreement concluded with an exporting enterprise which was not organized for selling within the Common Market, could not appreciably restrict competition within the latter. The exclusive concession to sell in a non-member country may have as a counterpart a prohibition on selling in other countries, including Common Market ones. Such a prohibition only excludes a potential selling operation, which in any case is not very likely. In its first decision, adopted under the terms of Article 85, relating to the *Grosfillex-Fillistorf* case,<sup>4</sup> the Commission had already considered that there was no case for intervention against the prohibition, imposed on the Swiss sales concession holder by the French producer, from re-exporting to the Common Market the products to which the agreement related. Indeed, re-export of products from non-member countries to the Common Market is to all intents and purposes impossible since it would entail customs duties being imposed twice.

52. A systematic study of two other groups of exclusive dealing agreements which are not covered by Regulation No. 67/67 was undertaken in 1970 since, although there were not many of them, no test decision had yet been handed down. They involved not only agreements between enterprises of one Member State with regard to resale within that State, but also exclusive dealing agreements covering all the Common Market countries.

<sup>1</sup> Council Regulation No. 19/65/EEC of 2 March 1965 concerning the application of Article 85(3) to categories of agreements and concerted practices, *OJ* No. 36, 6 March 1965, p. 533/56.

<sup>2</sup> Commission Decision of 6 November 1968, *OJ* No. L 276 of 14 November 1968, p. 13.

<sup>3</sup> Second General Report on the Activities of the Communities in 1968 p. 48.

<sup>4</sup> Commission Decision of 11 March 1964, *OJ* No. 58 of 9 April 1964, p. 915/64.

The Commission holds the view that with very few exceptions national exclusive dealing agreements are not likely to affect trade between Member States, so that they will only exceptionally fall under the prohibition in Article 85(1).

There still remains the question of exclusive dealing agreements where the area allocated to the concession holder covers the Common Market as a whole : In such cases it is necessary to examine the extent to which such agreements are likely to restrict competition and affect trade between Member States, taking into account the established flow of goods within the Common Market. In both these fields, systematic study of the existing notifications<sup>1</sup> should enable test decisions to be made.

As for exclusive dealing agreements between competing enterprises, the Commission has excluded them from the application of Regulation 67/67<sup>2</sup> because it considered that they jeopardized competition. There is a risk of market sharing when, as pointed out by the Economic Committee of the European Parliament,<sup>3</sup> competing producers and manufacturers mutually grant to each other exclusive distribution of their products. So far, the Commission has exempted reciprocal obligations of exclusive supplying between producers only within the framework of specialization agreements.<sup>4</sup>

#### OTHER SYSTEMS OF DISTRIBUTION

53. The Commission has also considered export prohibitions included in general conditions of sale and other similar measures which lead to the partitioning of markets with respect to the distribution of goods. Individual enterprises or groups of enterprises which constitute an economic entity may wish to carry out a marketing policy, and more particularly a price policy, which differentiates according to the particular market in which it is applied. Their sales policy will be such as to ensure that only those products are offered on the different national markets as will have been supplied by enterprises established in those Member States. In this way they can adopt different prices and condi-

<sup>1</sup> Only national agreements concerning exports and imports are notifiable under the terms of Article 4 paragraph 2, No. 1 of Regulation No. 17.

<sup>2</sup> Article 3a of Commission Regulation No. 67/67/EEC and point 5e of Council Regulation No. 19/65/EEC.

<sup>3</sup> Report made on behalf of the Economic Committee on competition rules p. 13.

<sup>4</sup> *ibid* p. 36 above.

tions since, when they charge relatively high prices in a Member State, they need not fear that dealers and consumers in that country will satisfy their requirements by purchasing in another Member State where the same products are offered more favourably.

As regards the partitioning of national markets by way of export prohibitions contained in general sales conditions, the Commission has applied the same principle as that which formed the basis of its policy regarding exclusive dealing agreements. This applies particularly to measures taken by enterprises to protect from any outside interference the system of resale price maintenance existing in certain Member States. The maintenance of competition between recognized resellers of different Member States with respect to products covered by selective distribution systems established in the Common Market has also been assured.

#### *Export Prohibitions contained in General Sales Conditions*

54. The Commission's attitude towards export prohibition clauses in general sales conditions has been illustrated<sup>1</sup> by the negative clearance granted in the *Kodak* case following the adoption of new uniform sales conditions for the companies of the group established within the Common Market<sup>2</sup>. Originally, these conditions contained a clause whereby the companies forbade their customers to export or resell the supplied products for export. These conditions restricted competition within the Common Market and adversely affected intra-Community trade, since they resulted in the isolation of the market of each Member State and protected the prices charged on each of the markets from competition from one or more Member States.

It follows that, in order that the prohibition under Article 85 (para. 1) should not be applied, the products concerned must be capable of being exported or resold for export within the EEC at prices freely determined by the parties involved in these operations, so that they may be subjected to competition from resellers in the various Member States. The Commission's aim is to prevent excessive prices by ensuring that demand in a Member State can be satisfied by supplies from

<sup>1</sup> The Commission had already previously obtained the removal of export prohibitions contained in the general sales conditions of the subsidiaries of *N.V. Philips' Gloeilampenfabrieken* in the Common Market countries. See EC Bulletin No. 4/1969, chapter VI, Sec 5.

<sup>2</sup> Commission Decision of 30 June 1970, OJ No. L 147 on Uniform Sales Conditions, see page 16 above.



another Member State under more favourable conditions if at all possible. To bring this about the resellers, at all levels of distribution, must be free to take advantage of any price difference in a neighbouring country in order to buy their products there at lower prices. In the Commission's view, this possibility of curbing prices by imports of products of the same brand is an essential element for the alignment of prices in the various countries of the Common Market.

*Clauses designed to protect National Resale Price  
Maintenance Systems*

55. The Commission took the same view with regard to clauses intended to protect national resale price maintenance systems which are likely to bring about the partitioning of markets within the Community.

Purely national systems of resale price maintenance do not generally come under the Community law prohibiting cartels. To the extent that they are limited to compelling retailers in a Member State to respect certain prices for the resale within that State of products supplied by a manufacturer established on that market or by a concession holder appointed for that territory, trade between Member States will not, generally, be affected within the meaning of Article 85 of the EEC Treaty. That is why the Commission considers that the question of vertical resale price maintenance is essentially a matter of national competition policy. The Commission ensures, however that intermediaries and consumers are enabled to obtain supplies of the product concerned at the most favourable prices and wherever they choose within the Community.<sup>1</sup>

With this in view, the Commission pointed out in the *Agfa-Gevaert* case<sup>2</sup> that the fact that a system of vertical resale price maintenance was authorized in a Member State in no way constitutes a sufficient reason for not applying the prohibition referred to in Article 85 (para. 1) to measures intended to make them watertight, that is to say measures which prevent the sale in the country concerned of products imported

<sup>1</sup> See reply to written question No. 247/71, OJ No. C 115 of 13 November 1971, p. 5.

<sup>2</sup> EC Bulletin No. 2/1970, Part 2, Chapter I, Sec 5. The companies of the Agfa-Gevaert Group having given up the restrictions in question for the sale of their products within the Common Market and the result of the Note of Objection received by them, an injunction decision by the Commission under the terms of Article 3 of Regulation No. 17 became superfluous. At the same period, and also in the photographic products sector, Zeiss-Ikon-Voigtländer similarly altered their general sales conditions.

at prices below the price level fixed by resale price maintenance. Other clauses which may be covered by the provisions of Article 85(1) are those prohibiting exports, re-exports or re-imports and which are intended to preserve the price system operated within a Member State. The same was also considered to apply with regard to systems of fixed re-export prices under which all foreign customers are obliged to charge for re-exports those prices fixed by resale price maintenance in the country for which the exports were intended.

When examining this case, the Commission considered that these measures could not be exempted where the products were of the same manufacture and were marketed in the different Common Market countries at different prices and resale conditions through distribution companies belonging to the group. In these circumstances, restrictions on exports could only serve to protect those national markets where the enterprises are able to impose resale prices from the disruption of their discriminatory sales policy which could result from parallel imports.

Although national systems of resale price maintenance authorised by some national legislations were not directly implicated, the Commission's intervention with regard to measures intended for protecting them by isolating national markets within the EEC was not without repercussions on the systems themselves.<sup>1</sup> This has already led many manufacturers to give up national resale maintenance completely.

### *Selective Distribution Systems*

56. The Commission has likewise ensured the possibility of parallel trade flows between Member States in the case of selective distribution systems based on quantitative criteria and guaranteed by restrictive undertakings on the part of exclusive dealers and approved retailers.

In the *Omega* case,<sup>2</sup> the restriction on competition did not derive from the fact that approved distributor status was granted only to those who satisfied certain requirements regarding expert knowledge and equipment, but from the limitation of the number of authorized sellers in proportion to the expected level of sales in the relevant area. As this limitation also concerns the reselling for export within the Common Market, it is likely to affect trade between Member States. Another

<sup>1</sup> Third General Report on the Activities of the Communities, p. 60.

<sup>2</sup> Commission Decision of 28 October 1970, OJ No. L 242 of 5 November 1970, p. 22.

restriction upon competition within the meaning of Article 85 is the condition in appointed retailers distribution contracts, which enforces at retail level the selective distribution system established between the manufacturers and the exclusive dealers against reselling to distributors other than the appointed retailers. This restriction limits the number of sales points for the products concerned which are exported from one Member State to another.

Restriction upon competition can have appreciable effects on market conditions when a system of exclusive distribution is applied throughout, the Community by enterprises holding a strong position in the particular section of the market and when it has the effect of excluding a large proportion of retailers possessing the required qualifications from reselling such products. Exemption from the prohibition under Article 85 (para. 3) may be granted, as it was in this case, if the products concerned highly technical and relatively highly priced, and for which after sales service and guarantee are of particular importance. In this case, the Commission considered that, in order to avoid any deterioration in the distribution of the products concerned, it was essential to provide the appointed retailers with a turnover high enough to encourage them to make a genuine effort in sales promotion and service. Admission to the ranks of appointed retailers for all those retailers who, within the Common Market, have the necessary knowledge and equipment demanded by Omega to sell Omega watches would have reduced the sales of each of them to only a few units per annum.

In order to be exempt, however, systems of exclusive distribution must be free from restrictive undertakings by exclusive dealers and appointed retailers which hinder competition at the distribution stage and are likely to partition trade among Member States. In other words, they may not be organized on a territorial basis in opposition to the aims of the Common Market. Thus the Commission, in authorizing the agreements which form the basis of the sales organization for Omega watches within the Common Market, first made sure that the appointed retailers could in future obtain supplies from any of the manufacturer's exclusive importers in the EEC, and that they were free to export to other Common Market countries by selling to other appointed retailers or to consumers at freely determined prices. In the Commission's opinion, the possibility of parallel trade flows for the products concerned, although limited to arrangements between exclusive dealers and appointed retailers and between the latter and the consumer, would tend to reduce the prices charged in the various Member States. The marked differ-

ences in price which might still exist in certain cases would be bound to encourage concession holders to seek to buy on better terms in neighbouring countries.

57. The matter of principle raised by export prohibition and other measures having a similar effect having thus been settled, the Commission then sought to get the enterprises concerned to remove or amend the restrictive clauses in their sales conditions to the extent that the latter affect intra-Community trade. To this end, the Commission undertook a systematic examination of all outstanding notifications relating to general sales conditions which include this type of provision.

In all the cases examined to date in this field, approximately 120 have been settled because the notified sales conditions were either removed or amended satisfactorily as a result of the Commission's intervention.

### **§ 3 - Application of Article 85 to agreements concerning industrial and commercial property rights**

58. The question of the relation between the Community rules of competition and national laws protecting industrial and commercial property rights raises a number of complex and fundamental problems. The most important of these is how to reconcile the exercise of rights provided for by national laws within the Community with observance of the conditions of competition and the unity of the market which are essential for the attainment of the Common Market and economic union. This is particularly the case with trade mark law and patent law, both of which present the risk of being used by enterprises to maintain national frontiers by assuring absolute territorial protection to trade mark or patent owners or their licensees.

It is also necessary to determine which clauses in agreements concerning industrial and commercial property rights are admissible under Article 85 of the EEC Treaty, bearing in mind the specific purpose of the protection rights and their function in a system of competition and a unified market. While ensuring adequate remuneration for inventions and avoiding obstacles to the application of patented knowledge and to the communication of secret know-how, it is nevertheless necessary to establish a genuine common market for branded goods, either patented or incorporating secret know-how without unjustifiably limiting the possibilities of competition and the free movement of goods among Member States.

The Court of Justice, in harmony with the views of the Commission, has held that industrial and commercial property rights may not be used as a means of partitioning national markets. The law on this point, already well established as regards trade marks, has recently been extended to one of the exclusive rights akin to copyright. For the first time the Commission has expressed in two decisions relating to patent licensing and know-how agreements its opinion on clauses frequently found in such contracts. These decisions are additional to an earlier official announcement and to several findings on individual cases.

## THE PRINCIPLE OF TERRITORIALITY AND COMMUNITY LAW ON COMPETITION

### *Principle of Territoriality*

59. The recognition of the so-called "principle of territoriality", which enables the holder of exclusive national rights to prohibit the reimport of authentic products which have been put into circulation in another Member State, would result among other things in enabling the holders of exclusive rights to prohibit parallel imports of protected products, and thus to share or partition the national markets within the Common Market. Apart from the fact that this principle is not expressly stated by the laws of the Member States, and is, in these States, not upheld in most of the case-law relating to trade mark rights, its validity being recognized and upheld only in a few judgements concerned with patent law handed down by the higher courts, the principle gives rise to reservations with regard to its compatibility with the Treaty establishing the EEC. The national nature of such protection is likely to create an obstacle to the free movement of goods and to the Community's system of competition.

60. In its observations submitted to the Court of Justice in a number of interlocutory appeals by national courts with regard to the interpretation of the rules on competition of the EEC Treaty, the Commission has always held the view that the principle of territoriality, deriving from the application of national law concerning intellectual, industrial and commercial property does not permit the partitioning of markets within the Community.

The Court of Justice has already given its decision in several rulings on questions concerning the compatibility of the exercise of

exclusive industrial and commercial property rights with the provisions of the EEC Treaty on the free movement of goods and on competition. Two of these judgments concern trade mark law (*Grundig v. Consten and Sirena v. EDA*) and another patent law (*Parke, Davis*). The Court considered that, even if Article 36 allows prohibitions or restrictions with regard to the free movement of goods which are justified for the protection of industrial and commercial property, it can only accept derogations in this respect insofar as they are justified for the purpose of safeguarding rights constituting the specific objective of such property. The Court also stated that, although the existence of these rights is not affected by the Treaty, the exercise of these rights may, nevertheless, fall under the prohibitions laid down in Articles 85 and 86. The exercise of an exclusive right with a view to preventing the reimportation of the original products was considered contrary to the rules of competition when it is the object, the means or the consequence of an agreement (Article 85), or when it constitutes an abuse of a dominant position (Article 86), provided that the conditions for the application of these rules are fulfilled. The Court recognized in its latest judgment in this matter (*Deutsche Grammophon v. Metro*) that, independently of any agreement restricting competition or of any dominant position, the exercise in this way of an exclusive right akin to copy-right is contrary to the Treaty rules on the free movement of goods.

### *Trade Mark Law*

61. As regards trade mark law, it is clearly recognized that the partitioning of the Common Market by means of trade mark rights is fundamentally contrary to the Community system of competition and is therefore inadmissible. The Commission's prohibition decision and the Court of Justice ruling in the *Grundig-Consten* case<sup>1</sup> established that recourse to trade mark rights cannot be used to prevent parallel imports and to introduce thereby absolute territorial protection. Since the prohibition of the exclusive dealing agreement would have been ineffectual if the licence holder had been able to continue to use the trade mark for the same purpose as that intended by the prohibited agreement, the decision deprived the licence holder of the ability to enforce the rights deriving from national laws on trade marks in order to oppose parallel imports.

<sup>1</sup> Judgment of the Court of Justice of 13 July 1966 in joint cases 56 and 58/64, OJ No. 170 of 29 September 1966, p. 3015 *Recueil*; 1966 p. 429.

62. On the basis of these findings, general limits were fixed by Regulation No. 67/67/EEC<sup>1</sup> on the exercise of industrial property rights within the framework of exclusive dealing agreements. Exclusive dealing agreements which do not grant absolute territorial protection only benefit from the block exemption if the contracting parties do not exercise their industrial property rights with a view to preventing parallel imports of the products covered by the contracts which are lawfully marked and put on the market.

63. When granting an exemption in the *Transocean* case<sup>2</sup> in favour of a cooperation agreement creating a collective trade mark for the purpose of guaranteeing the identical quality of the products as well as their interchangeability, the Commission also anticipated the abusive use of trade mark rights. It stated that the conditions for the use of a collective trade mark registered by several producers in their respective countries within the Common Market should not prevent imports from other Member States into the country of each producer of the products covered by the agreement and manufactured by other producers.

64. In the *Remington Rand Italia* case,<sup>3</sup> the Commission challenged and succeeded in ending the use of trade-mark rights based on an assignment agreement with the intention of preventing parallel imports of lawfully branded goods from other Common Market countries. This use of trade-mark rights was not concerned with the prevention of imitations but rather with proving the assignee with absolute territorial protection, an objective that is not part of the true function of a trade-mark.

65. In a ruling handed down recently in the *Sirena v. EDA* case,<sup>4</sup> the Court of Justice confirmed this view by declaring that Article 85 is applicable where trade-mark law is invoked to prevent the importation of products originating in different Member States which bear the same trade-mark because their owners have acquired the use or the ownership of the trade-mark by virtue of agreements concluded between them or of agreements concluded with third parties. Pointing out that the exercise of trade-mark rights was particularly likely to lead to partition-

<sup>1</sup> Article 3, (b)(1) of Regulation No. 67/67/EEC.

<sup>2</sup> Commission Decision of 27 June 1967, OJ No. 163 of 20 July 1967, p. 10.

<sup>3</sup> Third General Report on the Activities of the Communities in 1969, No 37; EC Bulletin No. 8/1969, Chapter V, point 5.

<sup>4</sup> Judgment of the Court of Justice of 18 February 1971 concerning case 40/70, OJ No. C 33 of 7 April 1971, p. 11 Volume XVII, 1, p. 69.

ing of the market, and taking into account the relative value of the elements protected by the trade-marks, the Court considered that the juxtaposition of assignments to different users of national trade-mark rights for one and the same product, if it led to the renewal of closed frontiers between Member States, could bring about a situation falling under the prohibition of Article 85.

#### *Patent Law*

66. As regards patent law, the Court ruling in the *Parke, Davis* case,<sup>1</sup> has now established that a patent holder does not infringe the provisions of Articles 85 and 86 of the Treaty by using his exclusive right to prohibit the introduction into the area covered by his patent of a product manufactured by a third party in another Member State where there is no patent protection. In such a case, if the imported product could circulate freely, the specific purpose of the patent would be jeopardized since there has been no remuneration for the invention. This ruling, however, only concerns a very specific case.

#### *Exclusive Rights akin to Copyright*

67. In the recent case of *Deutsche Grammophon v. METRO SB Grossmärkte*,<sup>2</sup> the Court held that the principle of territoriality invoked by the owner of an exclusive right for sound recordings in order to prohibit the marketing in a Member State of products originating in another Member State was contrary to the provisions of the Treaty concerning the free movement of goods. There was, therefore, a violation of the principles laid down in Articles 30 et seq. of the EEC Treaty and also, insofar as the conditions of application provided for were fulfilled, a violation of the prohibitions under the terms of Articles 85 and 86 if the use of the exclusive right to put the protected products on the market has the effect of preventing imports from other Member States in which these products have been lawfully sold by the owner of the right himself or by a third party with the owner's consent. The decision delivered in this case concerns an exclusive right similar to copyright of the manufacturer of records. From the arguments in the Court's findings, the Commission concluded that the Court's decision also applies to other exclusive industrial and commercial property rights, e.g. patents.

<sup>1</sup> Judgment of the Court of Justice of 29 February 1968 concerning case 24/67, OJ No. C 42 of 6 May 1968, p. 1. Volume XIV, p. 81.

<sup>2</sup> Judgment of the Court of Justice of 8 June 1971 concerning case 78/70 OJ No. C 65 of 29 June 1971, p. 14, *Recueil* XVII, 5, p. 487.



68. This ruling represents an important development in the Court's previous case-law in the field of industrial and commercial property rights, the significance of which could very well be a vital factor in several fields of Community activity. Apart from Article 36, Articles 85(1) and 86 are still applicable so that the Commission has a basis upon which to act, within the framework of the procedures laid down in Regulation No. 17, against enterprises which, by means of agreements restricting competition or by means of concerted practices, or as holders of dominant positions, use their rights to share or to partition national markets and thereby hinder trade between Member States.

#### DETERMINATION OF THE CLAUSES ADMISSIBLE IN PATENT AND KNOW-HOW LICENSING AGREEMENTS

##### *Announcement on patent licensing agreements*

69. In 1971, the Commission handed down its first decisions on patent and technical know-how licensing agreements. In its *announcement on Patent licensing Agreements*,<sup>1</sup> the Commission had already given a first interpretation of Article 85(1) and its application to a number of clauses which are frequently met in certain patent licensing agreements. This announcement dealt with the simple form of licensing agreements only, since a general appreciation was not possible for agreements on patent pools, reciprocal licensing and multiple parallel licensing. This announcement listed certain limitations imposed on the licensee which are inherent in the exercise of the industrial property right itself and which do not, therefore, fall among the prohibited agreements. This applies particularly when the exercise of the right is limited to a specified territory (within the territory covered by the right), a specified duration (within the period covered by the patent), or a specified quantity or volume.

##### *Communications on Individual Cases*

70. The Commission also set out its views in a number of communications regarding individual cases, regarding certain restrictive clauses to be found in patent licensing agreements notified to it.

71. Thus the Commission challenged and obtained the removal, before any decision had been taken, of clauses included in patent sub-

<sup>1</sup> Announcement of the Commission of 24 December 1962; OJ No. 139 of 24 December 1962, pp. 2922/62.

licences granted by two enterprises which had cross-licensed each other, resulting in an obligation for the sub-licensees to buy from one of the sub-licensors material needed in the patented processes. The Commission was of the opinion that this was a case of an illicit extension of the patent monopoly, since the material involved was not covered by the patent, neither was it essential for the technically perfect application of the patented processes. This is the sine qua non condition advanced by the Commission in its communication of 1962 for considering as non-restrictive the imposition of quality standards or, where these cannot be ascertained according to objective criteria, of obligations to procure supplies with regard to the protected products or semi-finished products, raw materials as well as auxiliary materials.<sup>1 2</sup>

72. Finally, the Commission raised objections concerning the provisions of a licensing agreement concluded between a producer from a non-member country and a licensee, one part of whose territory covered by the licence was situated within the EEC. The provisions of this agreement included restrictions on production and sale of patented products for a period *beyond the term of validity* of the licensing agreement and of the patent itself.<sup>3</sup> The 1962 Communication considered as non-restrictive of competition only those limitations on the period of exploitation by the licensee which were within the period covered by the patent.<sup>3 4</sup>

#### *Decisions on Patent and Know-how Licensing*

73. For the first time, the Commission has given, by means of formal decisions, its views on the relation between industrial property rights and the laws of competition. In 1971, two decisions were handed down under Article 85 concerning patent and know-how licensing agreements. The cases concerned were those of *Burroughs-Delplanque* and *Burroughs-Geba*.<sup>4</sup>

74. The Commission pointed out that the granting of a patent licence for *specified areas* and the prohibition against granting *sub-licences* cannot be considered as restrictions on competition. Indeed, a patent gives its owner the exclusive right to manufacture the products covered by

<sup>1</sup> Ninth General Report (1966) point 53, paragraph g); Bulletin No. 5/1966, Chapter III, Sec 10.

<sup>2</sup> See Communication referred to above; Sec I/C and IV; 3rd. paragraph.

<sup>3</sup> EC Bulletin No. 8/1970, Part 2, Chapter I, Sec 8.

<sup>4</sup> Commission Decisions of 22 December 1971, *OJ* No. L 13 of 17 January 1972, pp. 50 and 53.

the invention. The owner can, by granting licences for a specified area, transfer the use of the rights arising from these patents. Similarly, the owner of a patent is also the only person who can authorize the use of the exclusive rights with regard to the invention. In its Notice of 1962, the Commission has held that such commitments are not restrictive on competition since they only involve partial retention of the legal monopoly embodied in the patentee's exclusive rights vis-a-vis the licensee who is authorized to use the invention.<sup>1</sup>

75. The same applies with regard to the obligation on the part of the licensee to produce the patented products in *sufficient quantity* to satisfy demand, and to follow the *specified quality standards* in accordance with the technical instructions of the licensor, because they are obligations which serve the sole purpose of permitting sufficient and technically adequate exploitation of the rights that the patents confer on their owner.

76. A non-exclusive licence granted to use the trade-marks of the licensor was not considered to be a restriction of competition, particularly since the licensee may also affix other trade-marks to the products manufactured under licence. The same is true when the licensee is under an obligation to use a *distinctive sign* to identify the products. In these cases, such an obligation has no other purpose than to facilitate the control of the quality and quantity of the products manufactured under licence. In its Communication of 9162, the Commission had already laid down that the obligation of the licensee to affix an indication of the patent to the products was in the legitimate interests of the patentee in that the patented products should bear evidence that they are protected by a patent. This cannot restrict competition, if the licensee may also affix trade-marks of his own choice.<sup>2</sup>

77. The obligation on the part of the contracting parties to communicate to one another *technical improvements* cannot be considered as a restriction on competition either. The Commission has already made it known that undertakings concerning the communication of experience gained in the exploitation of the invention, or concerning the granting of licences for improved and applied techniques do not have a restrictive effect on competition when they are not exclusive to the licensee and provided the licensor has accepted similar undertakings.<sup>3</sup>

<sup>1</sup> See Communication 1962, Sec I/A and IV, paragraph 1.

<sup>2</sup> Communication 1962, Sec I/B and IV, paragraph 2.

<sup>3</sup> Communication 1962, Sec I/D and IV, paragraph 4.

78. On the other hand, as regards *exclusive rights* granted to licence holders for the manufacture and distribution of the patented products, the Commission held that these could not be considered as being outside the scope of Article 85. The conditions under which this Article applied were not considered as being fulfilled in the countries in respect of which there had been a decision because in these cases market conditions were not appreciably affected (i.e., the exclusivity related only to manufacture, while all the licensees and the licensors were free to sell the easily transportable patented products in the Common Market as a whole; and because of the small market share of the licensee in the area assigned to him). It should be noted, however, that where the owner of a patent undertakes to restrict the exercise of his exclusive rights to a single enterprise in the assigned area, thus conferring upon that single enterprise the sole right to exploit the invention and to prevent other enterprises from exploiting it, he loses the freedom to enter into agreements with other applicants for licences. The exclusive character of such a licence may amount to a restriction of competition and thus fall within the category of prohibited agreements in so far that it has an appreciable effect on market conditions.

79. In order to enable *know-how* to be marketed, the Commission decided that it would not consider a restriction on competition the obligation—often included in know-how contracts—not to divulge the know-how and not to use the latter after the termination of the agreement. Secrecy is the essence of technical know-how relating to industrial processes which are not protected by the laws on industrial property. Secrecy is, in fact, a necessary condition for enabling the owner to pass such know-how on to other enterprises for the purpose of full exploitation prior to it becoming public property.

80. These first decisions on patent and know-how licensing agreements are the most recent steps of a long-term development since the Commission first laid down its views on the implications of the prohibition of Article 85 (para. 1) with regard to clauses included in such agreements. These decisions are the result of the analysis of the contents of some 500 notified licensing agreements. The analysis was carried out in order to determine the clauses which most often occur in these contracts, and the restrictions imposed in connection with the exercise of industrial property rights and the transfer of know-how, which are covered either by the protection inherent in the patent rights or are necessary to maintain the secrecy of know-how, or do not restrict competition even though they do not arise essentially from the rights given by the

patent or know-how. Other decisions will soon follow, some of which will make it possible to define the conditions under which the granting of an exemption under paragraph 3 can be considered to be fulfilled despite the presence of a restriction on competition within the meaning of Article 85 (para. 1). These decisions will be used to examine the possibility of block exemption by the Commission, under Council Regulation No. 19/65, for bilateral agreements concerning the acquisition or exploitation of industrial property rights and know-how.<sup>1</sup>

#### **§ 4 - Application of Article 86 of the EEC Treaty and Article 66 of the ECSC Treaty to the abuse of dominant positions and mergers**

81. In 1971 the Community's competition policy which, during the first decade had concentrated on the application of rules concerning agreements, entered the phase of application of Article 86 of the EEC Treaty. As a result of the considerable efforts made to define the interpretation and application of this important provision, and following a constant supervision of the market with a view to finding out whether there were threats of abuse of dominant positions, the Commission took its first two decisions in the *Gema* and *Continental Can Cy* cases. These decisions demonstrate the Commission's desire to deal simultaneously with two aspects of the applicability of Article 86, namely, the control of abuse on the market and the restriction of the free choice of consumers by means of mergers by which an enterprise in a dominant position practically eliminates competition by taking over a competing enterprise. In accordance with the general objectives of the EEC Treaty, the Commission's intervention aims at preventing enterprises in a dominant position from putting difficulties in the way of the establishment of a system which ensures that competition is not distorted within the Common Market or from threatening its very existence.

The Commission is following closely developments in several sectors with oligopolistic structures and in other sectors where concentration is increasing. This systematic supervision enables the Commission to intervene, where necessary, in cases of mergers which lead to restrictions on the consumer's freedom of choice incompatible with the Treaty's rules on competition.<sup>2</sup>

<sup>1</sup> Council Regulation No. 19/65/EEC of 2 March 1965 on the application of Article 85, paragraph 3 of the Treaty concerning classes of agreements and concerted practices; *OJ* No. 36 of 6 March 1965, p. 533/63.

<sup>2</sup> See the Commission's reply to written question No. 373/71 of 26 October 1971, *OJ* No. C 16 of 19 February 1972, p. 3.

### *The GEMA case*

82. Article 86 regarding abuse of a dominant position was first applied in 1971. The *Gesellschaft für musikalische Aufführungs und mechanische Vervielfältigungsrechte (GEMA)*,<sup>1</sup> a society dealing with author's rights with regard to musical works, which has a virtual monopoly on the German market, was obliged to put an end to its abusive practices vis-a-vis suppliers and users of music and to remove all obstacles to the establishment of a single market for authors, composers, and music publishers, as well as for music users and performing rights societies. The Commission insisted that these breaches of Article 86 should cease in accordance with the objectives of its competition policy.

83. GEMA was prohibited from restricting the economic liberty of authors, composers and music publishers. This freedom was being curtailed by GEMA's rules and regulations and indeed by its operations, to such an extent that its members were to all intent and purposes tied for life to the society and were being prevented from granting the use of their rights to any other society. With a view to restoring economic freedom to authors, composers and music publishers established in Germany, the Commission's decision provided each member of GEMA with the right to:

- (a) resign at the end of each year and recover his full rights;
- (b) split the rights enjoyed according to country and the different forms of exploitation (e.g., general performing rights, broadcasting rights, mechanical reproduction rights etc.), so that each member could choose freely the society to which he would concede his rights, in relation to the royalties which the societies fix for the administration of the various classes of rights.<sup>2</sup>

84. The abolition of the exclusive concession of copyright by a member to his society would have contributed to the freedom of choice sought by authors and composers. But it would also have had an unfortunate consequence in that it would place individuals in an unfavourable position for negotiating on the market with powerful music users (such as broadcasting, television and recording companies). Since

<sup>1</sup> Commission Decision of 2 June 1971, OJ No. L 134 of 20 June 1971, p. 15.

<sup>2</sup> At the request of GEMA, the Commission is at present examining the question of the extent to which the freedom to split rights should be increased in the event of the minimum time limit for affiliation being increased to a period in excess of one year, as there exists an interdependence between the period and the scope of affiliation.

this could have brought about a reduction in the income of composers, the Commission preferred not to insist upon abolition, but instead to improve the rights of members vis-a-vis their society on the lines laid down in the decision. This decision in any case does not affect the cultural and social activities of GEMA.

85. The primary aim is to promote the freedom of supply of individual musical works in Germany by providing authors, composers and music publishers with the right to call upon the services of different authors' rights societies. The development of a free market as in the supply of musical works should in itself contribute to the establishment of a certain measure of competition between the various societies by opening national markets to societies established elsewhere within the Community.<sup>1</sup>

<sup>1</sup> These conditions are at present either fulfilled or about to be fulfilled. See Commission's reply to written question No. 349/71 of 12 October 1971, OJ No. C 125 of 18 December 1971, p. 8.

The market in the Community for the services consisting of the financial management of copyright with regard to musical works showed, characteristics which justified the Commission in undertaking the examination of the conditions under which it operated with view to an assessment in the light of the Community's rules of competition. The existence of *de facto* monopoly (in the case of GEMA and comparable companies in France, Belgium and the Netherlands), of a *de jure* monopoly (as in the case of a company operating in Italy) exercised by performing rights societies within the various Member States, the agreed limitation of the direct activities of all the societies to their own defined areas, and the existence between them of reciprocal exclusive dealing agreements for the use of their material resulted in composers, authors or music publishers established in a Member State being obliged to make use of the services of the societies in that State — the management by an individual author of his rights being in practice impossible in most cases.

The similarity in the situations prevailing in other Member States had led the Commission to proceed, at the same time as the action taken in the GEMA case, against the "*Société des Auteurs, Compositeurs et Éditeurs de Musique*" (SACEM) and the "*Société Belge des Auteurs, Compositeurs et Éditeurs de Musique*" (SABAM). These two societies have already amended some of their rules and regulations which had been questioned, and other amendments are to be introduced in the near future. The "*Bureau voor Musikauteursrechten*" (BUMA) fell into line without the Commission having to commence official proceedings in the matter. GEMA, for its part, withdrew its appeal to the Court of Justice against the Commission's decision. With regard to the "*Società Italiana degli Autori Editori*" (SIAE), the Commission by a decision in accordance with Article 11, paragraph 5 of Regulation No. 17 (Commission Decision of 9 November 1971, OJ No. L 254 of 17 November 1971, page 15), requested the society to supply the necessary information so that the normal procedure could be followed.

At the same time, the Commission instituted proceedings under Article 8 on reciprocal exclusive dealing agreements concluded between the performing rights societies. Those clauses in the contracts which involved a restriction on competition and which did not meet the condition for exemption, have either been removed as a result of the Commission's intervention, or are due to be removed shortly.

86. Furthermore, by virtue of the Commission's decision, GEMA can no longer discriminate against nationals of other Member States, grant special terms to some of its members, or artificially maintain national groupings of enterprises.

The freedom of composers, authors and music publishers to circulate within the Community, which was the object of the decision adopted by the Commission, was also jeopardized by discrimination between nationals of a country and nationals of other Member States who are unable to become full members of GEMA with all the financial consequences which this implied. Moreover, the payment of fidelity bonuses out of funds subscribed to by all the members of the GEMA and other performing rights societies, was made to certain members only to the detriment of others, particularly those who were nationals of other Member States. It was also found that GEMA, by its policy prevented the establishment of a single market for the services of music publishers. Its Articles were such that the activities of the German music publishers in the other Member States were rendered more difficult, and the same applied to the activities of music publishers of other Member States who wished to carry out their activities in Germany. As a result, GEMA artificially maintained groups of national publishers thus preventing composers and authors from making a free choice with regard to publishers within the Community.

87. The Commission also prohibited certain abusive practices of GEMA vis-a-vis the use made of musical works which was likely to restrict trade recordings both in Germany and other Member States,

- (a) by causing an unjustifiable increase in the cost of the manufacture of records in Germany through the contractual extension of copyright so as to include unprotected works;
- (b) requiring, in the case of the import or re-import of records into Germany by independent dealers, an additional royalty, whereas records sold in Germany by the manufacturers are subjected only once to payments in respect of copyright;
- (c) demanding from importers a higher royalty on the sale of tape recorders than that paid by national producers.

From now on, GEMA cannot claim royalties for musical works which have fallen into the public domain, and imported recordings will in future be subject to the same royalties as those due on those manufactured in Germany. These discriminatory practices, which constituted an abuse of a dominant position, were diametrically opposed



to the objectives of the Commission's competition policy since they made parallel imports more difficult, when these should in fact provide a corrective to an unjustified disparity between prices in the different Member States of the Community.

88. The significance of the GEMA case goes well beyond the case itself, since it defines the implementation of Article 86 in cases where an enterprise in a dominant position such as GEMA must not carry on practices when they result in an abuse of the position which the company holds in its markets. GEMA had an absolute monopoly in Germany since there were no competitors.

It is precisely this situation which makes abuse possible. According to a previous opinion,<sup>1</sup> there is abuse of a dominant position when the holder of the position exploits it in order to obtain advantages which would not have been possible had there been effective competition.

The decision notes that the practices in question would not have been accepted by the partners in the market if GEMA had not held a dominant position, and that the practices could have been imposed on the partners had there been effective competition. The question as to whether or not a practice constitutes an abuse within the meaning of Article 86 when it is carried out by an enterprise in a dominant position cannot be settled by specific sets of rules. The problem must be solved on the basis of the objectives of the EEC Treaty.<sup>2</sup> The decision in the GEMA case underlines the fact that Article 86 aims at preventing enterprises in dominant positions from putting difficulties in the way of setting-up a system intended to ensure that competition is not distorted in the Common Market.

#### *The Continental Can Company case*

89. It has been common knowledge since 1966 that the Commission understands Article 86 to apply to those cases of mergers and take-overs which constitute an abuse within the meaning of this provision. In its Memorandum on "the Problem of Concentration in the Common Market",<sup>3</sup> the Commission stated that the merger of an enterprise holding a dominant position with another enterprise so that a monopoly situation

<sup>1</sup> A problem of concentration in the Common Market, Surveys, Competition series, No. 3, 1966, Part III, paragraph 4, 22 and 24.

<sup>2</sup> The problem of concentration in the Common Market, Surveys, Competition series, No. 3, 1966, Part III, paragraph 4, 22 and 24.

<sup>3</sup> Survey, Competition series, No. 3, Brussels 1966, p. 26.

is brought about by the removal of any remaining competition on the market in question, may in itself constitute an abuse within the meaning of Article 86.

90. Since the rules of competition in the ECC Treaty aim at ensuring a system of undistorted competition to be set up under the terms of the Treaty (Article 3, para. f), the exploitation of a dominant position can, therefore, be considered as abusive if it prevents competition.

91. During 1971 the Commission, for the first time, put into practice this interpretation by giving a decision under Article 86 in the Continental Can Company case.<sup>1</sup> This decision lays down that the merger of an enterprise in a dominant position with a competing enterprise is an abuse within the meaning of Article 86 if it restricts the freedom of choice of consumers in such a manner as to be incompatible with the competition system laid down in the Treaty.

The Continental Can Company, an American packaging Company, through its Belgian subsidiary, the *Europemballage Corporation SA*, acquired control of the largest German producer of packaging and metal closures, *Schmalbach-Lubeca-Werke AG*, and later acquired a majority holding in the Dutch Company, *Thomassen & Drijver-Verblifa NV*, the leading manufacturer of packaging material in Benelux. In the opinion of the Commission, the situation arising from these mergers in the market for light metal containers in the north-west region of the Common Market, constituted an abuse of a dominant position within the meaning of Article 86.

92. With regard to the existence of a *dominant position* held by an enterprise, the decision, confirming the terms of the memorandum, considers that a dominant position is characterized by the fact that those in such a position are able to take decision without taking their competitors, buyers or suppliers into account. The domination of a market is not solely defined by the share of the market held by enterprises, but by their share of the market combined with the availability of technical knowledge, raw material or capital.

In the Continental Can Company case, the Commission took into account not only the share of the market held by the group, but also

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<sup>1</sup> Commission Decision of 9 December 1971, OJ No. L 7 of 8 January 1972, p. 25.

the group's advantages over most of its competitors resulting from its size and economic, financial and technological importance particularly:

- (a) its technological predominance, particularly through patents and technical know-how;
- (b) the wide range of its output and the geographical spread of its factory and warehouses;
- (c) the availability of the required machinery for production and application of metal containers;
- (d) the possibility of obtaining capital from the international markets.

Added to the large share of the market, these factors gave the Continental Can Company room for independent action which conferred on the company a dominant position on the German market for light-weight containers for preserved meats, fish and shell-fish, as well as on the market for metal closures. It should be noted that, as regards competition by substitution, the factors restricting the interchangeability of the products concerned with other comparable products—especially in the case of light-weight metal containers as compared with other packaging material for certain uses, as well as the different machinery for each type of packaging—restricted the possibility of changing over to another type of packaging.

At the same time, the Court of Justice, in several rulings,<sup>1</sup> gave its opinion on the concept of a dominant position within the meaning of Article 86. The Court considered that the existence of a dominant position within the Common Market, or within a substantial part of the Common Market, was clearly established when the enterprise concerned, either on its own or jointly with other enterprises of the same group, could hinder effective competition in large part of the market, taking into account the possible existence of producers marketing similar types of goods and their position on the market.

93. With regard to *abuse* of a dominant position, the principle has been established that a situation which is incompatible with the terms of Article 86 of the Treaty arises if an enterprise, which holds a dominant position on the market, attempts to strengthen that position *by means of merger* with another enterprise, so that any competition which might have remained on the market, whether effective or potential, despite the

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<sup>1</sup> Judgments 24-67 (Parke-Davis), 40-70 (Sirena against Eda) and 78-70 (DGG against Metro), No. C 42 of 6 May 1968, p. 1 *Recueil* 1968, p. 81, *OJ* No. C 33 of 7 April 1971, p. 11, *Recueil* 1971, 1, p. 69 and *OJ* No. C 65 of 29 June 1971, p. 14, *Recueil* 1971, 5, p. 487.

initial dominant position is *practically eliminated* in a substantial part of the Common Market for the products concerned. The acquisition by an enterprise in a dominant position of a large competing enterprise constitutes an industrial operation which results in an irreversible change in the supply structure, since a return to a competitive situation between them in their joint field of action becomes impossible. In its decision, the Commission noted that the Continental Can Company had abused the dominant position which it held in a substantial part of the Common Market by taking over one of its main potential competitors, thus strengthening its own dominant position in such a manner as practically to eliminate any existing competition for the packaging products concerned.

94. As for the consequences of a breach of Article 86, Article 3 of Regulation No. 17 empowers the Commission to issue a decision binding on the parties concerned to end such a breach. In this case, the merger had an unfavourable influence on competition in that it restricted excessively the possibility for the users to choose certain packaging materials on the main markets of north-west Europe. This freedom of choice had been limited by the merger which constituted abuse, and was to be restored by action to dissolve the merger. In view of the nature of the measures to be taken and their incidence, an appropriate time limit was set to enable the enterprise concerned to submit proposals to the Commission on the matter.

*Prior authorization of mergers under  
Article 66 of the ECSC Treaty*

95. The Commission is unable to give prior authorization for a merger unless it is satisfied that the proposals by the enterprises concerned will not result in the prevention of effective competition or the avoidance of the rules on competition laid down in the Treaty.

It is therefore up to the Commission to assess each request for authorization and to decide whether the conditions for authorization are met, taking into account the size of similar enterprises established within the Community and the conditions created by world competition.

96. In recent years, the coal market has witnessed changes which have had a definite influence on the conditions under which mergers of coal mining enterprises should be assessed. Thus, for example, the Commission authorized the transfer of mining capital to the Ruhr

kohle AG,<sup>1</sup> which now controls approximately 90% of the coal output in the Ruhr basin. Such a large concentration could not have been authorized but for the fact that coal has lost its long-standing dominant position in the energy supply market and has become only one of many sources of energy in competition with oil and, to an increasing degree, natural gas. On the energy supply market, a coal mining enterprise, whatever its size, is no longer able to avoid effective competition.

This does not necessarily apply to the market for coking-coal and coke for the steel industry since these products are considered as essential raw materials.

Here too, the Commission considered that the pressure applied on the market by prices and quantities of the output of non-member countries as well as the powerful position of iron and steel manufacturers as customers were likely to prevent producers of coking-coal in the Community, regardless of the size of the enterprises, from deviating appreciably from the price levels in international trade. Nevertheless, the Commission in order to provide everyone with equal opportunities for obtaining supplies of coking-coal from the Ruhr, ensures that all consumers of coking-coal in the Common Market have equal access to sources of production.

97. In its "*General outlines of a competition policy relating to the structures of the iron and steel industry*",<sup>2</sup> issued in 1970 the Commission considered that, bearing in mind previously existing structures, the need for rationalization, technological developments and international competition, the development, by means of the re-grouping of enterprises towards an oligopoly of about a dozen large groups or independent enterprises, the largest of which would be allowed up to 13% of the Community's output of crude steel; fitted in with the maintenance of effective competition within the Common Market and with an improvement in the competitiveness of the enterprises.

At the time, the Commission believed that this threshold of 13%, which was naturally subject to review but corresponded at that time to 13 or 14 million tons per enterprise or group, would not be likely to stop the necessary restructuring process and could even lead to new re-groupings.

<sup>1</sup> Commission Decision of 27 November 1969, Third General Report, p. 38.

<sup>2</sup> *OJ* No. C 12 of 30 January 1970, p. 5.

The Commission therefore decided to authorize the merger of two Belgian enterprises, *Cockerill-Ougrée-Providence* and *Espérance-Longdoz*,<sup>1</sup> two German enterprises, *Salzgitter and Peine*,<sup>2</sup> joint control of *Acéries de Pompey* by a group of French and German iron and steel enterprises,<sup>3</sup> the merger of the two French enterprises *Creusot and Loire*,<sup>4</sup> the merger of the two Luxembourg and German enterprises *Arbed and Rochling*,<sup>5</sup> merger of the two Italian enterprises *Fiat and Piombino*,<sup>6</sup> and numerous mergers of lesser importance for the improvement of the industrial and commercial structure of the enterprises concerned.

Requests for authorization under Article 66 have often presented the Commission with the problem of mergers between enterprises of which one at least fell under the terms of the ECSC Treaty, but where the real effects of the merger were felt not in the steel sector but in sectors outside the scope of the ECSC Treaty. This was the case with regard to the setting-up of the *Mannesmannröhrenwerke* (steel tubes)<sup>7</sup> by *Thyssen and Mannesmann* and of the joint control of *Citroën by Fiat and Michelin* (motorcars).<sup>8</sup>

The Commission's practice has been direct its analysis to the market for the products concerned and to authorise a merger under Article 66 of the ECSC Treaty only if the operation could be considered as compatible with the EEC competition rules. In the case of enterprises being jointly set up or controlled, an assessment would naturally have to be made from the point of view of Article 85 of the EEC Treaty and Article 65 of the ECSC Treaty respectively as to the nature of the restrictions on competition which go beyond those inherent in the operation itself.

<sup>1</sup> Commission Decision of 31 July 1969, EC Bulletin No. 9-10/1969, Ch. V, point 14.

<sup>2</sup> Commission Decision of 5 July 1970, EC Bulletin No. 8/1970, 2nd. part, Ch. I, Sec 16.

<sup>3</sup> Commission Decision of 30 September 1970, EC Bulletin No. 12/1970, 8th part CH. 1, Sec 5.

<sup>4</sup> Commission Decision of 27 October 1970, EC Bulletin No. 12/1970, 2nd part, Ch. 1 Sec 5.

<sup>5</sup> Commission Decision of 11 June 1971, EC Bulletin No. 8/1971, 2nd part, Ch. 1, Sec 18.

<sup>6</sup> Commission Decision of 7 July 1971, EC Bulletin No. 9-10/1971, 2nd. part, Ch. 1, Sec 17.

<sup>7</sup> Commission Decision of 21 January 1970, EC Bulletin No. 3/1970, part 2, Ch. 1, point 5.

<sup>8</sup> Commission Decision of 6 February 1970, EC Bulletin No. 4/1970, part 2. Ch. 1, point 6.

## § 5 - Measures to enforce the rules on competition

98. In 1969 the Commission imposed for the first time fines for breaches of Article 85 of the EEC Treaty. In its decision concerning the *Entente internationale de la quinine*,<sup>1</sup> the Commission had to assess the gravity of the breach committed and noted that the enterprises had deliberately violated the terms of the Treaty, and this had been proved by the fact that the parties concerned had endeavoured to keep the agreements secret. The seriousness of the breach was increased by the harmful economic effects resulting from the accumulation of restrictions to competition by means of a limitation of output, price fixing, limitation of outlets and market sharing. Finally, the Commission took into account the large part of the market held by the enterprises concerned. The amount of the fines imposed on the six enterprises concerned varied according to each enterprise's position on the market and the degree of its responsibility. The fines ranged from 10 000 to 210 000 units of account.

In its ruling of 15 July 1970,<sup>2</sup> the Court of Justice confirmed the Commission's application of the criteria used for the assessment of the seriousness of the breach and for fixing the amount of the fine, and underlined the fact that fines were imposed "in order to stop illicit action and prevent its repetition".

In its decision relating to "Dyestuffs"<sup>3</sup> the Commission, in assessing the gravity of the offence, took into account the fact that the enterprises concerned had severely restricted competition and that this was particularly serious in view of the fact that they were all very large firms supplying more than 80% of the dye stuffs within the Common Market. The fines imposed by the Commission range from 40 000 to 50 000 units of account. The appeals lodged by the enterprises in this case have not yet resulted in a ruling by the Court of Justice.

In its decision, handed down in 1970, based on Article 65 of the ECSC Treaty concerning agreements and concerted practices on the German Market for scrap iron,<sup>4</sup> the Commission imposed fines based on

<sup>1</sup> Commission Decision of 16 July 1969, OJ No. L 192 of 5 August 1969, p. 5.

<sup>2</sup> Ruling of the Court of Justice of 15 July 1970 in the cases No. 41-69 (*ACF Chemiefarma versus the Commission*), No. 44-69 (*Buchler versus the Commission*) and 45-69 (*Boehringer versus the Commission*); OJ No. C 130, 27 October 1970, p. 3, *Recueil* 1970, 6, p. 661, 733 and 769.

<sup>3</sup> Commission Decision of 24 July 1969, OJ No. L 195, 7 August 1969, p. 11.

<sup>4</sup> Commission Decision of 21 January 1970, OJ No. L 29, 6 February 1970, p. 30.

the above considerations. The fines imposed ranged from 1 000 to 29 000 units of account.

99. In 1971 the Commission imposed for the first time a fine for contravention of the Commission's right of investigation. The fine amounted to 4 000 units of account (the maximum for this type of breach being 5 000 units of account), as a penalty for the incomplete presentation of books and other documents requested by the Commission.

Although the competition rules in the EEC and ECSC Treaties do not expressly provide for the publication of such decisions, the Commission nevertheless published its decisions concerning the imposition of the fines, with the exception of the last case (fine for contravention of the Commission's right of investigation). In its ruling of 15 July 1970 relating to the case No. 41-69 (*ACF Chemiefarma versus the Commission*), the Court confirmed the Commission's action and noted that "the publicity thus given to the decision may contribute to an increasing respect for the Treaty's competition rules".

100. In the following decisions to allow agreements, the Commission imposed certain obligations on the enterprises concerned which enable the Commission to check whether the exemption conditions are being properly fulfilled :

- (a) the "*Transocean*"<sup>1</sup> decision obliged the parties concerned to communicate details of all supplementary agreements made under the terms of the general agreement which had already been authorized;
- (b) The "*Transocean*" and "*Fabrique Nationale—Cartoucherie Française*"<sup>2</sup> decisions provide for reports to the Commission at regular intervals on the activities covered by the agreement, including the development of production, sales, prices and market shares.
- (c) The *Omega*,<sup>3</sup> *Eemo*,<sup>4</sup> *Cematex*<sup>5</sup> decisions bound the parties to report any case of expulsion or refusal to grant membership for the purpose of avoiding discrimination against either members of the agreement or third parties;

<sup>1</sup> Commission Decision of 27 June 1967, *OJ* No. L 163, 20 July 1967, p. 10.

<sup>2</sup> Commission Decision of 28 May 1971, *OJ* No. L 134, 20 June 1971, p. 6.

<sup>3</sup> Commission Decision of 28 October 1970, *OJ* No. L 242, 5 November 1970, p. 22.

<sup>4</sup> Commission Decision of 13 March 1969, *OJ* No. L 69, 20 March 1969, p. 13.

<sup>5</sup> Commission Decision of 24 September 1971, *OJ* No. L 227, 8 October 1971, p. 26.



- (d) The *Henkel-Colgate*<sup>1</sup> decision obliged the enterprises to keep the Commission informed of their policy relating to patent licensing and know-how, and to notify the Commission without delay of any links or participation established between the enterprises of both groups, and of all interests acquired by the enterprises of both groups in non-member enterprises.

With regard to the application of the ECSC Treaty, the Commission makes use of its powers to impose obligations and conditions by its decisions allowing agreements. This practice is also followed as regards authorization of mergers under Article 66 for the purpose of clearly establishing the permissible limits of concentration and of ensuring that they are not exceeded by means of financial, private and contractual links with enterprises outside the merged undertakings.

#### **§ 6 - Definition of the prohibition of discrimination (application of Article 60 of the ECSC Treaty)**

101. The application of Article 60 in accordance with the decisions taken by the High Authority in 1953 has raised many problems, both in the past and in the present. The conditions obtaining in the energy supply and steel markets require that enterprises in the coal and steel industries should be able to adapt themselves more smoothly to these conditions than is permitted by the present rules.

While remaining true to the general principle of the ECSC Treaty and Article 60 thereof the Commission is at present attempting to define new implementing rules which would enable enterprises to make some of the necessary changes. The Commission will have to take the appropriate measures after referring the matter to the Consultative Committee and the Council of Ministers.

The method chosen is to use the power granted to the Commission under Article 60 to make decisions, after consultation with the Consultative Committee and the Council, to define discriminations practices without reference to the obligation to publish prices.

Such a definition would also permit, where necessary, to modify the extent and from of the obligation imposed on enterprises to publish

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<sup>1</sup> Commission Decision of 23 December 1971, OJ No L 14, 18 January 1972, p 14

their prices and conditions of sale (Article 60(2a)), and to adapt the provisions on alignment of prices (Article 60 (2b)) to the proposed changes concerning the obligation to publish prices.

102. According to present rules,<sup>1</sup> the "application of unequal conditions to comparable transactions" (Article 60 (1)) is defined in relation to the obligation to publish price lists and selling conditions (Article 60 (2a)). Any departure from the published prices constitutes discrimination when it cannot be justified by the seller either because the transaction concerned does not fall within the category of transactions shown in the price list, or that all comparable transactions have been treated similarly.

The definition which the Commission intends to give of "comparable transactions" would sever the link which exists at present between the ban on discrimination and the obligation to publish prices. Any deviation from the published price lists would then no longer be a breach to the ban on discrimination. In this way, it would be easier for enterprises to adapt market conditions.

The proposals which the Commission has submitted to the Consultative Committee and to the Council of Ministers provide for an autonomous definition of comparable transactions. The proposals must therefore define the exact criteria of comparability as regards buyers, products sold and other essential characteristics of the transactions.

#### *Buyers*

103. On the basis of various provisions of the ECSC Treaty (the progressive establishment of conditions which in themselves will ensure the most rational distribution of production, the task of the institutions to ensure that all comparably placed consumers in the Common Market have equal access to the sources of production, and the general ban on discrimination) and especially Article 60 itself, the Commission considers that transactions must be considered comparable when the buyers are in a comparable position, which is the case when buyers are competing among themselves. Any application of unequal conditions would mean that some buyers are favoured and others are placed at a disadvantage with regard to competition. It is generally agreed that buyers are in competition with each other to the extent to which they come up against each other on their sales markets.

<sup>1</sup> Decision of the High Authority No. 30-53 concerning practices prohibited by Article 60(1) of the Treaty of the European Coal and Steel Community, in the form of a Communication published by the High Authority in *OJ* of 24 December 1963, No. 2980/63 to 2982/63 (Annex 1).

Situations can arise, however, where, for technical reasons or because of the distances involved, competitive relations exist to a limited extent only, or indeed do not exist at all, so that for legal reasons and in the interest of an efficient implementation of the ban on discrimination, the matter cannot be left to the judgment of the sellers. That is why the Commission proposal extends the concept of comparability of transactions to those buyers who produce similar or identical goods or exercise the same commercial functions.

The proposed rules would enable enterprises to differentiate in their prices and conditions of sale between determined categories of buyers. Their adaptation to market conditions would thus be facilitated.

### *Products*

104. For transactions to be considered comparable, they must concern identical or similar products.

### *Essential characteristics of transactions*

105. Comparability of transactions also depends on other factors. Since transactions may be considered as non-comparable only when they show an appreciable difference, the proposals provide for the definition of the essential characteristics and important differences.

It should be noted that these essential characteristics include the quantities sold and the period of delivery and supply. These are essential elements of the definition of "comparable transactions" as attempted by the Commission.

The other new provisions envisaged by the Commission relate to the obligation to publish prices and follow from the proposal for an autonomous definition of "comparable transactions".

The Consultative Committee has already been consulted and the Council of Ministers is in the process of being consulted.

## **§ 7 - The Commission's policy on dumping (application of Article 91 of the EEC Treaty)**

### *Introduction*

106. In order to establish "a system which insures that competition is not distorted within the Common Market" (Article 3(f)), it is not sufficient to counter restrictions on competition; it is also necessary to

prevent excessive competition between enterprises. Genuine dumping constitutes such an excess. It occurs when an enterprise exports a product at lower prices than the normal price of the product in the exporting country, thus causing serious damage to the corresponding national industry in the importing country.

That is why the chapter in the EEC Treaty on competition also includes provisions regulating intra-Community dumping. These provisions fall into two categories : repressive action in the form of proceedings following a complaint (Article 91(1)) : and preventive action in the form of the "boomerang" system introduced by Article 91(2).

In relations between the present six Member States of the EEC the application of the provisions of Article 91 came to an end at the expiry of the transitional period of the Treaty, i.e. since January 1970. On the other hand, since similar provisions with appropriate implementing regulations are likely to come into force, within the framework of an enlarged Community, it would seem advisable to give some details of Commission practice in this matter.

107. Article 91 reads as follows :

" 1. If, during the transitional period, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised within the Common Market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorise the injured Member State to take protective measures, the conditions and details of which the Commission shall determine.

2. As soon as this Treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect. The Commission shall lay down appropriate rules for the application of this paragraph."

It should be noted that paragraph I, which sets out the procedure for lodging complaints and the action to be taken by the Commission

is applicable only during the transitional period. Paragraph 2, which lays down that, as from the entry into force of the Treaty, re-exports from one Member State to another can be admitted free of duty has lost all practical significance since customs duties and quotas were completely abolished between the Member States on 1 January 1970.

The reason why the authors of the Treaty of Rome considered that dumping practices between the Member States presented a temporary problem, which would solve itself during the transitional period, was set out as follows in the Report on the Messina Conference of 1956 : "An enterprise can only practice dumping on other markets to the extent to which its own national market is protected. The simultaneous and reciprocal removal of obstacles to trade within the Common Market will tend to eliminate the problem automatically. These effects will not, however, be felt fully during the transitional period."<sup>1</sup>

### *The application of Article 91(1)*

#### *Principles*

108. Article 91(1) entrusts the Commission with the power to intervene at the request of a Member State or of any other interested party when dumping is practiced within the Common Market. This is, in fact, a "repressive" procedure in two stages. In the first stage, when the Commission notes that dumping practices exist, it issues at first a recommendation to those responsible for the dumping with a request that the latter should be brought to an end. In the second stage, where dumping nevertheless continues, the Commission authorises the Member State which is prejudiced to take the necessary protective measures.

This procedure, which can only be set in motion following a specific request, always requires the intervention of the Commission and excludes, therefore, any possibility for the Member States to take unilateral anti-dumping measures against their partners.

Since the Treaty gave no precise definition of "dumping practices" and envisaged no regulation for defining this concept, the Commission, after having consulted the competent authorities of the Member State, laid down in a directive to its staff in 1961 setting out the principles of the policy to be followed on this subject.<sup>2</sup>

<sup>1</sup> Report of the Heads of Delegations to the Ministers for Foreign Affairs—Intergovernmental Committee set up by the Messina Conference—Brussels—21 April 1956, p. 54.

<sup>2</sup> These internal directives were summarized in the Fifth General Report on the Activities of the Community, No. 49.

It is of particular importance that the Commission, using Article VI of GATT as a basis, decided to put into operation the procedures laid down in Article 91(1) of the Treaty in cases where the Commission established that exports of a specific product to the market of a Member State were carried out at prices that were lower than the normal value of the product concerned in the exporting Member State, thus causing, or being very likely to cause, serious damage to the corresponding national industry of the Member State directly concerned.

*Cases where the procedure has been applied*

109. During the twelve years that Article 91 has been applied, the Commission examined 40 cases of presumed dumping practices between Member States. Official action according to the Treaty was, however, justifiable in only 26 cases.

Of these 26 formal complaints 10 were submitted to the Commission through the permanent representatives of the Member States, while the other 16 were submitted by the enterprises themselves (6 cases) or through their professional groups (10 cases).

The complaints originated in the following countries :

Germany : 3

France : 6

Italy : 3

Benelux : 14 (6 originating in Belgium, 2 in the Netherlands, 1 in Luxembourg and 5 jointly submitted by the three countries within the framework of their economic union).

The investigation of these 26 cases had the following results :

In 11 cases the existence of wrongful dumping practices could not be proved and the complaints were rejected as unfounded.

In the remaining 15 cases where the Commission's intervention was justified, 3 necessitated that a recommendation be forwarded to the originators of the dumping,<sup>1</sup> while the procedure laid down in Article 91(1) did not have to be applied in the other 12 cases, as the parties concerned had voluntarily put an end to the wrongful practices before the conclusion of the investigation.

<sup>1</sup> These recommendations were addressed to a French enterprise on 5 August 1960, to a German enterprise on 3 May 1961 and to another German enterprise on 7 July 1964. The recommendations were not made public.

In spite of their non-compulsory nature, the three recommendations were immediately followed by the cessation of the dumping practices so that the second stage of the procedure provided for in Article 91 (1) did not have to be initiated.

All told, of the 50 EEC enterprises accused of dumping practices, 35 (16 German, 9 Italian, 6 French, 3 Belgian and 1 Dutch) had in fact practiced operations of this kind.

The table below the number of complaints submitted to the Commission annually from 1958 to 1969 (I) together with the number of complaints considered justified (II).

Year	I	II	Year	I	II
1958	1	1	1964	2	1
1959	5	3	1965	1	—
1960	5	4	1966	—	—
1961	5	1	1967	1	—
1962	4	4	1968	—	—
1963	2	1	1969	—	—

The dumping practices established included 10 cases relating to chemical products, three relating to foodstuffs and two cases relating to medical products.

#### *Methods of investigation*

110. It was not considered necessary to lay down regulations for the procedure to be followed in order to apply Article 91(1).

As a general rule, the investigation of complaints was carried out in the following manner.

Upon receipt of the request and after verifying whether it was possible to apply the provisions of Article 91(1), the enterprises concerned were notified by the Commission of the details of the complaints made against them, and were informed of the chief arguments advanced by the plaintiffs, and were requested to give their views on the matter by a fixed date (generally three weeks). Where necessary, the plaintiffs,

were asked at the same time to supply additional information. In some cases, either the plaintiffs or the defendants were given the opportunity to explain their point of view orally.

In the case of four complaints and in order to speed up the proceedings, the Commission organized meetings between the opposing parties. All these meetings were not only attended by the parties concerned, sometimes with their legal advisors, but also by the representatives of the national authorities of the countries of the parties concerned. In order to safeguard the confidential character of the meetings, no official minutes were prepared.

Furthermore, the interested national authorities were, in all cases, informed by the Commission each time that a complaint against dumping had been received by an enterprise of their country (except where the plaintiffs had stated that their national authorities had already been informed). The national authorities were also informed of complaints lodged against an enterprise of their country. In several cases, the national authorities took an active part in the investigation.

### *Conclusions*

111. Experience gained during the investigations of the 26 complaints submitted to the Commission in application of Article 91(1), has shown that the wording of the provision, together with the guiding principles adopted by the Commission in 1961, were a sufficient legal basis for stopping dumping practices between Member States during the transitional period.

The informal and flexible methods used for the investigation of complaints have proved quite satisfactory.

The results obtained give an indication of the strong influence on enterprises exerted by the "moral pressure" of a complaint submitted to the Commission. In no case did Article 91(1) have to be fully applied; and recommendations had to be issued in three cases only. Most of the enterprises which had in fact carried out dumping practices preferred to end these during the investigation and before they were officially requested to do so by the Commission.

As will be seen in the table in paragraph 109, the forecast of the Treaty's authors concerning the progressive disappearance of intra-Community dumping with the achievement of a customs union were amply justified. Most of the complaints submitted to the Commission were made during the first half of the transitional period.



## *Application of Article 91(2) of the Treaty*

### *General*

112. Article 91(2) places at the disposal of EEC enterprises an anti-dumping instrument which has the effect of a boomerang since it enables them to return the goods wrongfully exported at low prices to the market of the originator of the dumping, without being liable to customs duties and quantitative restriction.

The purpose of this new system, which does not exist in any national or international legislations,<sup>1</sup> is of a preventive nature since it faces the enterprise exporting at dumping prices with the possibility of having the goods concerned returned to its own market at prices close to those of the initial export and leading to considerable disruption of the market.

### *Implementation*

113. Article 91(2) expressly laid down that the Commission should draw up appropriate rules for the application of the system in question.

The problems, most of them technical ones, raised by the implementation of the system, have been studied in cooperation with governmental dumping experts and customs experts of the Member States. The opinions of the private sector were also taken into account. These studies have resulted in the adoption by the Commission of a regulation,<sup>2</sup> which entered into force on 15 April 1960, and which defined the field of application of Article 91(2), the necessary conditions under which the goods concerned might benefit from this system, and the formalities to be completed upon reimportation.

This fairly technical regulation endeavours to respect as far as possible the automatic character of the system for reimporting free of duty laid down in Article 91(2). That is why no provision was made for authorization before reimportation as it was considered that this should be determined only by the economic interest of the reimporter.

It is up to the reimporter to assess whether differences between prices on the home market of the originator of the dumping and the lower

<sup>1</sup> This was later included in Article 17 of the Stockholm Convention instituting the European Free Trade Association (EFTA).

<sup>2</sup> Regulation No. 8 of 11 March 1960, *OJ* No. 21 of 25 March 1960, p. 597 (amended by Regulation No. 13 of 15 March 1961, *OJ* No. 25 of 8 April 1961, p. 585).

prices charged on the export market are sufficient to justify returning the goods to the country of origin, taking transport costs into account.

It should be noted that, in order to facilitate the application of Commission Regulation No. 8 by the customs administrations, the competent authorities of the Member States have adopted a number of specific implementing measures.

#### *Application of the procedure*

114. Cases in which the "boomerang" system has been used are not known to the Commission, nor, in general, to the Member States, since no prior authorization is required to benefit from the system.

There is little doubt, however, that such cases must be extremely rare because the use of Article 91(2) is faced *a priori* with purely commercial obstacles arising from the difficulties for the injured party not only of becoming the owner of the goods sold at dumping prices but also of reselling them in their country of origin.

#### *Conclusions*

115. It would seem that the effect of Article 91(2) is one of appreciable prevention, and that the very threat of a "return dumping" has been enough to prevent a number of prejudicial practices of this kind being carried out. This is confirmed by the limited number of complaints submitted to the Commission under Article 91(1).

## CHAPTER II

### THE INSTITUTIONAL AND REGULATORY FRAMEWORK OF THE IMPLEMENTATION OF THE RULES ON COMPETITION APPLICABLE TO ENTERPRISES

116. On 13 March 1972, the Council Regulation No. 17/62,<sup>1</sup> namely the "First Implementing Regulation of Article 85 and Article 86 of the EEC Treaty", will have been in force for 10 years.

This regulation was amended and completed by a series of Council Regulations concerning:

- exemption from compulsory notification;
- application of Article 85(3) to categories of agreements;
- terms and conditions under which Article 85 and 86 apply to agricultural products and to transport by rail, by road and by waterway.

For its part, the Commission issued implementing regulations on the form, contents and other details concerning applications and notifications as well as hearings of the parties concerned or of third parties.

From 1 January 1973 and subject to a transitional period expiring on 1 July 1973, the whole of this derived law will be fully applicable to agreements, decisions, concerted practices and to the abuse of dominant positions which by virtue of accession of new Member States fall within the scope of Articles 85 and 86.

It is therefore worthwhile:

- recalling the main objectives and scope of the regulations;
- briefly commenting on the application of these regulation;
- indicating in which fields these regulations could be completed in the next few months.

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<sup>1</sup> Council Regulation No. 17, *OJ* No. 13 of 21 February 1962, p. 204, amended by *OJ* No. 58 of 10 July 1962, p. 1655, *OJ* No. 162 of 7 November 1963, p. 2696 and *OJ* No. L 285 of 29 December 1971, p. 49.

**§ 1 - Objectives and scope of implementing Regulations adopted  
by the Council and the Commission for the application of Articles 85 and 86**

*Regulation No. 17/62<sup>1</sup>*

117. When drawing up Regulation No. 17, the Commission considered that it was of primary importance, in accordance with the terms of Article 87(2b) of the Treaty of Rome, to:

“determine the methods for applying Article 85(3), bearing in mind the need to ensure effective supervision and to simplify administrative control to the greatest possible extent.”

To this end, Regulation 17/62:

— recalls that agreements, decisions and concerted practices referred to in Article 85(1) are null and void if they do not meet the conditions laid down in Article 85(3), which has as consequence that the Commission cannot declare that the prohibition referred to in Article 85(1) is not applicable. The Commission can, on its own initiative, declare that an agreement is prohibited and can also impose fines and periodic penalty payments for the purpose of enforcing the ban;

— lays down that in order to benefit from the declaration of inapplicability the agreements referred to in Article 85(1) must be notified to the Commission, unless they are exempted therefrom under Article 4(2) of Regulation No. 17/62 as amended by Council Regulation No. 2822/71.<sup>2</sup> Such relief may also stem from block exemption regulations adopted by the Commission. The only block exemption regulation issued by the Commission up to now concerns bilateral agreements for exclusive dealing (Regulation 67/67).<sup>3</sup> The chief consequence of a failure to notify is that the prohibited agreements may not be authorized for the period prior to the notification, even though they fulfil the conditions laid down in Article 85(3) for that period. Furthermore, enterprises are also liable to the imposition of fines for breaches of Article 85 for the period prior to notification. It should be pointed out that Council Regulation No. 1017 concerning the application of Articles 85 and 86 in the field of transport by road, rail and waterway does not lay down compulsory notification, except in the case of agreements intended to reduce disturbances arising from the transport market structure. On the other hand, the Regulation provides for an “objection procedure” following voluntary notification;

<sup>1</sup> See note on the preceding page

<sup>2</sup> EEC Regulation No. 2822 of 20 December 1971, *OJ* No. L 285, 29 December 1971, p. 49.

<sup>3</sup> EEC Regulation No. 67/67 of 22 March 1967, *OJ* No. 57, 25 March 1967, p. 89.

— lays down the powers of investigation of the competent authorities and guarantees the respect for the right of defence (hearings, professional secrecy), and of the right of the third parties concerned (publication of the contents of requests prior to the granting of exemptions under Article 85(3) of negative clearances, hearings and publication of decisions);<sup>1</sup>

— organises liaison between the national authorities and the Commission by the carrying out of procedures and provides for consultation of the Advisory Committee before a decision is taken; the Advisory Committee is composed of Member State officials competent in matters of agreements and dominant positions.

### *Block exemption*

118. Article 85(3) provides for the prohibition laid down in Article 85(1) being declared inapplicable to certain categories of agreements. It was necessary therefore that the Council and the Commission define the terms and conditions for granting such block exemptions.

The implementation of block exemptions is carried out in two stages:

- The Council defines those categories of agreement which could benefit from the terms of Article 85(3) and empowers the Commission to adopt regulations for block exemptions;
- Being thus empowered, the Commission defines more precisely those categories of agreements which could benefit from exemption and adopts regulations after consulting the Advisory Committee on Restrictive Practices and Monopolies.

To date, the Council has adopted the following empowering regulations:

- Regulation No. 19/56<sup>2</sup> on bilateral exclusive dealing agreements and bilateral contracts linked with the acquisition or utilization of industrial property rights and rights connected therewith;
- Regulation No. 2821/71 which concerns:
  - (a) The application of standard and patterns,

<sup>1</sup> See also Regulation No. 27 of 6 February 1962, *OJ* No. 35, 10 May 1962, p. 1118, amended by *OJ* No. L 189, 1 August 1968, p. 1, and by Regulation 96/63/EEC of 25 July 1963, *OJ* No. 127 of 20 August 1963, p. 2268, and, in the field of transport, Regulations No. 1629/69 and 1630/69 of 8 August 1969, *OJ* No. L 209, 21 August 1969, p. 1.

<sup>2</sup> EEC Regulation No. 9/65 of 2 March 1965, *OJ* No. 36, 6 March 1965, p. 533.

- (b) Research and development of products or processes up to the industrial application stage, as well as the exploitation, including the provisions relating to industrial property rights and undisclosed technical knowledge,
- (c) Specialization, including agreements necessary to its realisation.

For its part, the Commission has adopted to date one block exemption regulation i.e. Regulation No. 67/67. This regulation concerns bilateral agreements on exclusive selling, exclusive purchasing, or exclusive selling or purchasing commitments in so far as the participating enterprises belong to at least two Member States.

### *Competition rules applicable to agriculture, transport and ECSC products*

#### *Production of, and trade in, agricultural products*

119. In Regulation No. 26/62,<sup>1</sup> the Council, in implementation of Article 42 of the EEC Treaty, laid down that both the rules in Articles 85 to 90 and the relative implementing regulations are applicable to this sector. It was, however, specified that Article 85(1) does not apply to agreements which form an integral part of a national organization of the markets, or which are necessary for the attainment of the objectives set out in Article 39. In this connection, it was provided that, under certain conditions, Article 85(1) would not apply to agreements between farmers or between farmers' associations (Article 2(1) of Regulation No. 26).

#### *Transport by road, rail and waterway*

120. Council Regulation No. 141 of 26 November 1962<sup>2</sup> lays down that Regulation No. 17 shall not apply to those agreements, decisions and concerted practices in the transport section which aim at, or result in the fixing of prices and conditions in respect of transport, the limiting or control of transport offers, or the sharing of transport markets. This inapplicability of Regulation No. 17 was limited in time as regards transport by rail, road or waterway, but not as regards sea and air transport.

<sup>1</sup> Regulation No. 26 of 4 April 1962; OJ No. 30 of 20 April 1962, p. 993, amended by OJ No. 53 of 1 July 1962, p. 1571.

<sup>2</sup> Council Regulation No. 141 of 26 November 1962, OJ No. 124 of 28 November 1962, p. 2751, amended by OJ No. 210 of 11 December 1965, p. 3141, and OJ No. 306 of 16 December 1967, p. 1.

In Regulation No. 1017,<sup>1</sup> which lays down the conditions for applying Articles 85 and 86 to transport by rail, road and waterway, the Council confirmed the application of the rules on competition to transport, while at the same time laying down terms and conditions different from those laid down in Regulation No. 17. This was for the purpose of taking into account the incidence of measures adopted within the framework of a common transport policy, as well as the effect of the specific characteristics of this sector. Thus Regulation No. 1017 provides for the non-application of the prohibition of agreements, the sole aim and effect of which were the joint application of technical improvements or technical cooperation. Moreover, this regulation lays down exemption from the prohibition for the grouping of small and medium-sized enterprises for the purpose of joint financing or acquisition of transport material and equipment directly linked with the supply of transport and needed for the joint utilization by the groupings in so far as the total capacity of the groupings as well as the individual capacities of the member enterprises do not exceed certain tonnages.

As indicated above, the procedures for implementing this Regulation differ slightly from those provided for in Regulation No. 17, with particular reference to the lack of compulsory notification. The same applies to the ways of liaison with the Member State authorities. Subject to the exclusive competence of the Commission, they provide for the possibility of a supplementary examination at Council level, prior to a Commission decision, of any matter of principle which a Member State wishes to raise with regard to the common transport policy and which it considers to be connected with the particular case under Commission consideration.

### *European Coal and Steel Community*

121. Article 65, which corresponds to Article 85 of the EEC Treaty, has not given rise to implementing regulations. As regards Article 66, this sets up a control of mergers or take-overs and its implementation is based on two regulatory decisions,<sup>2</sup> one of which defines the means of control which provide "the power to determine the actions of the enterprise",<sup>3</sup> and the other which defines, by means of quantitative criteria, those concentration operations which, because of their relatively minor importance, are relieved from the obligation of prior authorization.<sup>4</sup>

<sup>1</sup> Council Regulation (EEC) No. 1017/68 of 19 July 1968, *OJ* No. L 175, 23 July 1968, p. 1.

A third regulatory decision (Decision No. 26-54 of 6 May 1954; *OJ* of the H.A. of 11 May 1954, p. 35) concerning the Commission's right to information Decision No. 24/54 of 6 May 1954; *OJ* of the H.A. of 11 May 1954 p. 345.

<sup>4</sup> Decision No. 25/67 of 22 June 1967; *OJ* No. 154 of 14 July 1967, p. 11.

### *Special transitional system resulting from the accession of new members*

122. As stated in the introduction to this chapter, a transitional period of six months (from 1 January 1973 to 30 June 1973) is laid down for the purpose of adapting those agreements which existed on 1 January 1973 and fell within the scope of application of Article 85(1) by virtue of accession (this delay concerns: Article 5(1), Article 7(1) and (2), Article 15 (2a), Article 14, (6°) of Regulation No. 17, Article 4(1) (1) and (2) of Regulation No. 19, Article 5 of Regulation No. 67/67, Article 2 and Article 21(6°) of Regulation No. 1017/68).

Under Article 65 of the ECSC Treaty, this period of adaptation is three months.

### **§ 2 - Lessons to be drawn from the application of the Regulations**

123. The first question which arises is that of the meaning of the system of "compulsory notification". In this connection, it is important not to lose sight of additional precisions brought to the extent of the application of this obligation both by the block exemption regulations (to date Regulation No. 67/67) and by the regulation amending Article 4(2) of Regulation No. 17 (Regulation No. 2827/71). To these should be added Commission Notices.

Account should also be taken of the legal consequences which the Court of Justice has attached to the notification procedure with regard to the provisional validity of the agreements.

In this connection, the Court of Justice ruled as follows in cases Nos. 23-61,<sup>1</sup> 10-69<sup>2</sup> and 43-69<sup>3</sup>:

— Agreements and decisions falling within the terms of Article 85(1) which had existed when Regulation No. 17/62 entered into force and which had been notified at the proper time in accordance with Article 5 of Regulation No. 17, are not null and void unless the Commission decides that they may not benefit from the terms of

<sup>1</sup> Ruling of the Court of Justice of 6 April 1962 in case 13-61 (*De Geus v. Bosch and Van Rijn*); *OJ* No. 33 of 4 May 1962, p. 1082, *Recueil* 1962, p. 89.

<sup>2</sup> Ruling of the Court of Justice of 9 July 1969 in case 10-69 *Portelange v. Smith Corona Merchant International*; *OJ* No. C 105 of 14 August 1969, *Recueil* 1969, p. 309.

<sup>3</sup> Ruling of the Court of Justice of 18 March 1970 in case 43-69 (*Bilger v. Jehle*); *OJ* No. C 41 of 4 April 1970, *Recueil* 2, 0. 127.



Article 85(3) or from the application of Article 7(1) of Regulation No. 17 (Case No. 13-61);

- Agreements and decisions falling within the terms of Article 85(1) which had existed when Regulation No. 17 entered into force, and which had to be notified are null and void as from the date of the entry into force of Regulation No. 17 if they had not been notified at the proper time (Case No. 13-61);
- Any agreement duly notified must be considered valid so long as the Commission has not refused to grant the exemption provided for in Article 85(3), or has not applied Article 15(6)<sup>1</sup> of Regulation No. 17/62 (Case No. 10-69);
- Any agreement which need not be notified and which, therefore, has not been notified, remains valid so long as it has not been declared null and void (Case No. 43-69).

It follows from the above that the obligation to notify agreements which, by reason of their perceptible effect within the Common Market, must give rise to an investigation and to an individual decision permits an effective supervision. In addition, far from being just a burden on enterprises, it provides the latter, in view of the provisional validity deriving therefrom, with the legal security needed for the development of their activities without, however prejudicing the principle of prohibition in the event that the Commission should refuse at a later date to grant the benefits of Article 85(3) to an agreement falling under Article 85(1).

The notification system is not sufficient, however, to ensure the full application of the rules on competition. The Commission must also carry out regular supervision of market development in order to find and, where necessary, suppress non notified restrictive practices. In this, the Commission acts either upon receipt of formal or informal complaints, or on the basis of information gained from economic and financial documents.

124. *The powers of investigation and enquiry* provided for in Articles 13 and 14 of Regulation No. 17 enable the Commission to supervise, in liaison with the competent national authorities, the respect of Articles 85 and 86 by enterprises. This cooperation has proved very successful.

It is worth pointing out that the Commission for the first time in 1971 was obliged to request information from enterprises by means of decision,<sup>2</sup>

<sup>1</sup> Article 15(6), lays down that the Commission may communicate to enterprises that a first examination reveals that their agreements fall under the terms of Article 85(1) and are not likely to benefit from Article 85(3).

<sup>2</sup> Commission Decision of 1 February 1971; OJ No. L 34 of 11 February 1971, p. 13; OJ No. L 161 of 19 July 1971, p. 2.

and to impose fines on a particular enterprise for submitting incomplete documentation for verification.<sup>1</sup>

Article 12 of Regulation No. 17 provides for the possibility of carrying out *inquiries into sectors of the economy*. To date, the Commission has twice made use of this Article:

- In the margarine sector, the inquiry lasted three years. During the inquiry, restrictions practised by the enterprise in a dominant position were suppressed (bonuses for exclusive purchase);
- In the brewery sector, an enquiry is at present being held for the purpose of assessing the incidence of the "brewery contracts" system.

General and frequent recourse to inquiry into sectors of the economy is not possible, partly because of the basic conditions to be fulfilled and partly because of the heavy administrative work involved.

125. Recourse to *block exemptions* encourages cooperation among enterprises by simplifying the administrative formalities which enterprises must fulfil and by giving them the necessary legal security, within the limits laid down.

On the other hand, while providing for the possibility of putting an end to abuses of exemption by enterprises, this procedure relieves the competent authorities from the duty of having to examine large numbers of requests thus enabling them to concentrate on the examination of particularly serious restrictions on competition which require either prohibitions or individual authorization decisions.

As regards the ECSC, Decision No. 24/54 which defines the control components of enterprises by listing the economic means of mergers or take-overs, has made possible a progressive application of Article 66 and has provided the Commission with invaluable experience regarding methods used in regrouping enterprises.

### § 3 - Regulations to be adopted

126. In application of Regulations Nos. 19/65 and 2821/71, the Commission intends to adopt regulations providing for:

- an extension of the term of validity of Regulation No. 67/67,

<sup>1</sup> EC Bulletin, No. 11/71, Part Two, Chap. I, Sec. 5.

- exemption for agreements connected with the acquisition and utilization of industrial property rights, and similar rights,
- block exemptions with respect to standards, research, and development, and specialization.

The Commission will shortly submit to the Council a draft of a regulation on the prescription for the proceedings and executions of decisions within the framework of Council Regulations Nos. 11, 17 and 1017. This regulation is being proposed following the rulings of the Court of Justice in cases Nos. 41-69, 44-69 and 45-69.<sup>1</sup>

As it had indicated during the parliamentary debates of 7 June 1971, on the draft resolution on the Berkhouwer Report,<sup>2</sup> the Commission is examining both the legal feasibility and the possible contents of a draft regulation to be submitted to the Council providing for control of concentrations of a certain size.

#### **§ 4 - Commission Notices on the application of Article 85 of the EEC Treaty and Article 65 of the ECSC Treaty**

127. The Notice is a general measure by means of which the Commission gives its opinion on matters of principle raised by the application of European competition law. Such is the case of Notices which inform the economic circles concerned of the types of agreement which, according to the Commission, do not come within the scope of application of Article 85, particularly:

- the Notice of 1962 on patent licensing contracts<sup>3</sup> and the Notice of 1968 on cooperation among enterprises,<sup>3</sup> both of which list several agreements or clauses which, by their subject are unlikely to restrict competition, and
- the Notice of 1970 on agreements of minor importance<sup>3</sup> which, by referring to two cumulative quantitative criteria, namely, market

<sup>1</sup> Rulings of the Court of Justice of 15 July 1970 in cases 41-69 (*Chemiefarma v. the Commission*), 44-69 (*Buchler v. the Commission*) and 45-69 (*Boehringer v. the Commission*); *OJ* No. C 130, 27 October 1970, p. 3, *Recueil* 1970, 6, pages 661, 733 and 769.

<sup>2</sup> European Parliament, Resolution on the Rules on Competition and the Position of European Enterprises in the Common Market and in the world economy, *OJ* No. C 66, 1 July 1971, p. 11.

<sup>3</sup> *OJ* No. 139 of 24 December 1962, p. 2922; amended *OJ* No. L 75 of 29 July 1968, p. 3 *OJ* No. C 84 of 28 August 1968, p. 14.

share (5%) and aggregate turnover (15 million units of account for production, 20 million units of account for distribution), provides in actual fact an administrative case law which has been gradually developed by the Commission<sup>1</sup> and confirmed in a number of rulings of the Court of Justice.<sup>2</sup> This case law has established that an agreement between enterprises is not prohibited under the terms of Article 85 unless it perceptibly restricts competition and trade between Member States.

128. With regard to the ECSC, the Commission published, in 1970, the "General Guidelines on a Competition Policy in relation to the Structures of the Iron and Steel Industry" in which it stated that there was no danger to the maintenance of effective competition from mergers which did not exceed 13% of the total Community output of crude steel.<sup>3</sup> This is the synthesis of experience gained, since the entry into force of the ECSC Treaty in 1952, into an important sector of the Community's economic life.

#### § 5 - General problems arising from the application of Community law on competition

##### *The relation between competition rules governed by Community law and national law (Supremacy of Community law)*

129. The Court of Justice of the European Communities has laid down that the EEC Treaty creates a legal order to which the Member States are subjected, and that its application may not vary from one State to another as a result of measures based on national law. Thus the Court of Justice has established the principle of full and uniform application of Community law from which results its supremacy over national law.

In the field of European competition law directly binding upon enterprises, this supremacy of Community law must be assured since national law on agreements varies considerably from one legal system to another and also in relation to Community law. Both German and French legal

<sup>1</sup> Commission Decision of 11 March 1964 "Grosfillex-Fillistorf"; OJ No. 58 of 9 April 1964, p. 915.

<sup>2</sup> Rulings of the Court of Justice of 30 June 1966, in case 56-65 "Société technique minière v. Maschinenbau Ulm"; OJ No. 170 of 29 September 1966, p. 3013, *Recueil* 1966, p. 337; of 13 July 1966 in cases 56 and 58-66 "Grundig-Consten v. the Commission", OJ No. 170 of 29 September 1966; p. 3015, *Recueil* 1966, p. 429; of 9 July 1969 in case 5-69 and "VSI v. Vervaeke", OJ No. C 105 of 14 August 1969, p. 15, *Recueil* 1969, 4, p. 295.

<sup>3</sup> OJ No. C 12 of 30 January 1970, p. 5; cf. *infra*, p. 90.

systems are based on the principle of prohibition, while the Belgian, Luxembourg and Dutch legal systems are based on the principle of abuse which aims at suppressing agreements and dominant positions which are against the general interest. Italy has as yet no specific legal system with regard to agreements.

In its ruling of 13 February 1969 in case No. 14-68,<sup>1</sup> the Court of Justice held that the application of the EEC competition rules does not exclude, in principle, the application of the laws of the Member States, but that, in the event of conflict, Community law shall prevail. The Court also established that, failing a regulation adopted under the terms of Article 87(2e) which would provide otherwise, national authorities may intervene against an agreement by applying their domestic law, even where the procedure concerning the compatibility of such an agreement with Community law is laid before the Commission for consideration. While accepting the parallelism of procedures concerning one and the same agreement, the Court underlines the fact that a decision reached as a result of national proceedings may not override a Commission decision.

Should a Commission decision precede a national one, then "the national authorities are bound to respect its effects". If, on the other hand, a Commission decision occurs after a national decision and is "in conflict with the effects of the decision handed down by the national authorities, then it is up to the latter to take the appropriate measures".

### *Cumulative Sanctions*

130. The very fact that one and the same restrictive agreement may be the subject of two parallel procedures, namely a Community and a national one, raises the problem of the imposition of double fines. In the case mentioned, the Court of Justice ruled on the question and stated that "if, subject to full and uniform application of Community law, the possibility of a double procedure was bound to lead to cumulative sanctions, then a general requirement of equity, to be found in Article 90(2) of the ECSC Treaty implies that any previous repressive decision should be taken into account when determining the sanctions to be applied".

The problem of possible compensation for sanctions resulting from the cumulative application of Community law and of the law of a Member State has not yet arisen in practice. It did arise, however, in the case of the "*International Quinine Agreement*" where cumulative sanctions result

<sup>1</sup> Ruling of the Court of Justice of 13 February 1969 in case 14-68 (Bayer AG); OJ No. C 30 of 7 March 1969, p. 2, *Recueil* 1969, 1, p. 1.

from the application of both Community law and American anti-trust laws. The Commission<sup>1</sup> was of the opinion, however, that there were in this case two separate infringements and that, consequently, there was no cause for granting the compensation claimed.

*The application of the competition rules to enterprises of  
non-member countries*

131. The full and uniform application of Community law means that enterprises having their seats in non-member countries are also subject to Community law if they carry out prohibited practices within the Common Market. The Commission recently illustrated this principle by imposing, for the first time, fines on several enterprises of non-member countries which had participated in concerted price increases within the Common Market. (See decision on *Dyestuffs* mentioned previously). This decision was challenged before the Court of Justice, and the Court will shortly rule on this aspect of "extra-territorial application of the Community rules on competition".

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<sup>1</sup> Commission Decision of 25 November 1971 (Bohringer); OJ No. L 282 of 23 December 1971, p. 46.

**Part two**

**Competition policy with regard to State  
intervention vis-a-vis enterprises**

## Preliminary notes

Within the framework of competition policy, State intervention vis-à-vis enterprises stems from three series of provisions relating to:

- (a) State aid,
- (b) public enterprises,
- (c) the adjustment of monopolies.

A description of Community action vis-à-vis State intervention will be given in the above order.



## CHAPTER I

### STATE AID

Although based on common principles, Community action regarding aid takes place within the framework of two distinctive Treaties, namely, the Treaty of Rome and the Treaty of Paris.

#### SECTION 1 APPLICATION OF THE PROVISIONS OF THE EEC TREATY

##### § 1 - General

132. Article 92(1) lays down the incompatibility with the Common Market of State aid fostering certain enterprises or productions that adversely affect trade by distorting or threatening to distort competition.

Paragraphs 2 and 3 of the same article, however, provide that certain fairly broadly defined categories of aid are, or can be, considered compatible with the Common Market.

This concept of the Treaty is based on the following:

The Community's action involves the setting up of a system which ensures that competition is not distorted in the Common Market (Article 3 (f) of the Treaty). Such a system constitutes an essential factor of economic growth. It assumes that enterprises operate on the markets by their own means and that State aid must not reduce the scope of the free movement of goods or compromise the optimum distribution of production factors.

Nevertheless, intervention by the States represents a necessary instrument of structural policy when the operation of the market by itself does not make it possible (or at least not within acceptable time-limits) to attain

certain objectives of development justified for the sake of better quantitative or qualitative growth or when it leads to intolerable social tension.

That is the reason for exemption provisions applied to the principle of incompatibility which enable the Community authorities to act in a basically realistic manner in their control over aid, and to authorize actions which will contribute to the attainment of the general objectives laid down in Article 2 of the Treaty.

Member States cannot, of course, grant aid outside the control of the Community, a control that is generally exercised by the Commission (in practice, with the help of the Member States), and in certain cases, by the Council. The Commission will, therefore, intervene whenever national aid is likely to be harmful to the interests of nationals of other Member States without providing in return a generally improved operational balance or a more active growth for the Community as a whole.

133. State aid generally means a conflict of interests between the recipient economic agents and their competitors in other Member States who find themselves placed in a less favorable position on the Community markets than that which they would have held in the absence of such aid.

In addition, unilateral initiatives which do not take into account, at least approximately, common objectives can only lead to a waste of means within a common market from the point of view of both national and Community interests. Conflict between objectives and measures drawn up essentially within national contexts may very well result in a reciprocal neutralization of national policies, or in a shifting of difficulties from one Member State to another, or even in new difficulties arising.

It is inevitable that Member States will be better informed of nationally anticipated "gains" arising from their own decisions rather than from their negative counterpart at Community level, and that they will tend to underestimate any reaction which their decisions may trigger off on the part of their partners, thus rendering the operation costly all round. Experience has shown that Member States cannot always be immediately and fully aware of the Community perspective in the matter, such perspective nevertheless guaranteeing effectiveness and a saving in national initiatives.

134. The ultimate objective of Community aid action is, in fact, to reintroduce this Community perspective and to ensure that the aims of each Member State take its partners' interests into account, that they come within the context of a smooth economic growth of the Community as a whole, and that they contribute to its achievement. Where competition

alone is not enough to bring about the desired structural development and where additional State aid is required, both the need and the means chosen to deal with the particular situation should be evaluated at Community level.

Community action with regard to aid must not, therefore, be treated as a confrontation between unrealistic "principles of competition" and the need to promote orderly structural changes, since it tends to make an essential contribution to the latter by being a factor of effectiveness and better control rather than a disturbing element in national initiatives.

135. Difficulties facing Community action are met at various levels.

In the first place, and this is inevitable, perfect economic rationalization cannot easily be applied to State aid. While directing national action towards rationalization, account must nevertheless be taken of the social and political necessities which it must satisfy.

Secondly, the Community, in view of the means provided by the Treaty, can only act in cases where national aid is harmful to the economic activities of other Member States. The Community does not have the necessary powers to intervene in cases of aid which, without fulfilling the conditions of incompatibility provided for in Art. 92, (1), are just ineffective.

This is shown in cases where important financial aid continues to be granted for out-of-date activities, when it could be better used in more promising and dynamic sectors, the development of which might even be hampered by financial contributions indirectly resulting from such aid. Generally speaking, it is often difficult to convince Member States that alternative solutions to those planned by them are more advisable, even where such alternative solutions are more promising from a Community point of view for settling problems.

136. The control of aid granted also meets with technical difficulties, which the Commission is trying to remove gradually and which are caused by the insufficient transparency of both the means of action and their effects.

The "components of aid" forming part of certain actions on the part of the Member States cannot always easily be identified (State participations, the working out of certain infrastructures, etc.).

Other initiatives are taken at such a diffuse level that their control presents serious practical difficulties (initiatives on the part of certain decentralized local authorities of which not even the central authorities

themselves are always aware). The form of some types of aid makes it difficult to evaluate their incidence (State guarantees for loans contracted by certain enterprises, certain tax exemptions etc.). It is difficult to unravel the sectorial and regional consequences of the application of some systems of aid of an excessively general nature, as it is also difficult to isolate sectorial consequences resulting from aid systems for regional development.

137. Furthermore, the Commission's influence regarding aid is exerted for the moment more by "reaction" to successive national initiatives rather than by Community action proper. The latter is rendered difficult by the institutional and political problems involved and the differing situations facing each Member State, so that very often a variety of solutions is called for. Wherever possible, national aid will be provided within a Community framework, and although this cannot ensure absolute coherence, it at least enables costly reciprocal neutralization or the shifting of difficulties from one Member State to another to be avoided.

138. Finally, efforts towards an overall concept of regional and sectorial structural problems in the Community, of their relative seriousness to Member States, and the required initiative to be undertaken, do not always progress as fast as could be wished. It is indeed difficult to develop such a concept at Community level when it does not always exist even at national level, or, if it does exist, then only vaguely. Moreover, this implies a high level of awareness of both the solidarity and the interdependence of national interests which do, in fact, exist already.

The Commission is thus deprived of a reference system which would facilitate its assessment of the legality of the aims and methods of the Member States' intervention. Such a reference system, which implies an increasing measure of coordination between national structural policies and the setting in motion of appropriate Community action, must gradually be achieved in line with progress made towards economic and monetary union. But the smooth operation of the Community requires right now a certain coherence between the Member States' structural initiatives pursued by means of aid. At the present state of progress of the Common Market, the impact of such initiatives on the equilibrium of the Member States is all too evident for the concept to be exclusively unilateral.

Even in the absence of a more general concertation, the Commission must therefore act pragmatically in developing the aims and priorities which are justified in the common interest, so that those initiatives which could weaken Community cohesion and provoke serious confrontations may be excluded.

139. This pragmatic action constitutes, at present the main instrument for bringing to light common views on structural intervention and for reducing, by means of arbitration, partitioning and rivalry which may exist between the various national policies. The time-limits and transitional periods still required for the achievement of a genuine Community coordination of such policies should not be a reason for slowing down action as required by the Treaty and failing which, the necessary convergence would become more remote. In addition, if progress achieved in obtaining a genuine Community strategy on structural problems will increase the effectiveness of action taken, coordination in the matter of State aid will also create a favorable climate for working out and applying this strategy.

## § 2 - General regional aid systems

140. It is in the matter of aid for regional development that Community control has had to face the more serious obstacles. It is in this field that 1971 has been a real turning point.

### PROBLEMS

141. Technical progress, economic growth and an increasing intensity in both international and Community competition have caused, and indeed have required, great changes in economic activity and in the structure of employment. These changes, particularly felt in certain regions, were not sufficiently aimed at reducing disparities in income and employment among regions. A greater awareness of these disparities renders them less bearable than in the past to the populations in the less-favoured regions.

At the same time, while the development of the Common Market has altered certain attitudes, more enterprises are deciding to consider all the possibilities offered within the geographical area of the Community rather than to stay within national limits for placing new investments. The various regions of the Community are therefore increasingly competing with each other to attract investments. Hence the considerable increase in the number of zones to which regional aid had formerly been restricted and the higher rate of intervention which often involved mutual outbidding.

142. The negative consequences of this development are obvious.

National initiatives for regional development are becoming more and more costly. Part of the aid granted at present only achieves reciprocal neutralization with unjustified profits for the benefiting enterprises as the only counterpart. In fact, this process of outbidding cannot appreciably

affect the aggregate flow of investments, which, at Community level, can be mobilized for the purpose of regional development.

The rate of aid and the means employed no longer correspond to the relative seriousness of the situation in the various regions when assessed at Community level. The choice of the location of investments tends to be made at the expense of the less-favoured regions and against the distribution of activities required by the common interest.

Regional aid systems are often of a very general nature so that it is difficult to determine beforehand its incidence and therefore its compatibility. All industrial sectors can benefit from such aid systems. In order to attract investments, the advantages offered often exceed the compensation for material inconvenience imposed on the benefiting enterprises as a result of the particular choice of location it is hoped to bring about. Under cover of worthwhile regional objectives, artificial sectoral development can be brought into being which, in some sectors, may produce harmful effects from the common interest point of view.

These are the negative consequences which must be removed in the interest both of greater effectiveness of regional policies and of healthier competition, while bearing in mind that regional aid, properly and carefully applied, constitutes one of the essential instruments of regional development and enables a greater balance to be achieved in the growth of the various regions, which is one of the objectives of the Treaty of Rome and also one of the prior conditions for greater and more thorough integration.

The Commission pursues these objectives:

- (a) by seeking, together with the Member States, an overall solution for coordination of regional aid,
- (b) by taking up a position on specific questions relating to certain State aid systems.

#### THE SEARCH FOR A COORDINATION SOLUTION

143. In 1968, the Commission had proposed a pragmatic method to the Member States, i.e. prior notice of significant cases of general regional aid systems, by means of which the Commission, in accordance with Articles 92 *et seq* of the EEC Treaty, would be able to assess the effects of such systems upon competition and trade, and to give an opinion on their compatibility with the Common Market. In this way:

- (a) the systems' transparency would have been improved by the knowledge of the geographical and sectoral location of the main investments benefiting from aid;

- (b) the amount of aid actually granted could have been more accurately assessed;
- (c) outbidding with regard to regional aid would have been considerably reduced by this very confrontation. This might have given rise to a better "Community attitude" on the part of Member States towards the main problems (the ascertaining of the most urgent regional and sectoral problems and fitting them into a common framework of priorities).

144. Certain States rejected this approach and, rather than basing themselves on individual cases in order gradually to arrive at a basis for coordination, preferred a more systematic and allround approach founded on the aid systems themselves. In fact, the two solutions are, in the long run, complementary rather than alternative. The examination of individual cases was bound in time to result in a coordination of aid systems, while the latter could not be fully effective without individual cases being examined, if only for the purpose of control.

Consequently, the choice of the method did not matter. The Commission had favoured the solution of individual cases, mainly for practical reasons, such as speed of implementation, flexibility, and the avoidance of a challenge to the aid systems.

The Commission therefore sought another solution that would coordinate and adjust the aid systems themselves.

What was needed was to make the systems more transparent, to make their territorial and sectoral aspects more specific, and to slow down outbidding by fixing a ceiling of aid intensity, at least for the more industrialized regions of the Community (called "central regions"). All the Member States cooperated in the preparation of the coordination solution, and a general consensus of opinion (as a result of work carried out in implementation of the provisions of Article 92 *et seq.* of the EEC Treaty, which lasted two years) was reached on the principles that were to govern such a solution.

145. On 23 June 1971, the above principles were included in a Commission Communication<sup>1</sup> in which the Commission informed the Council that, as from 1 January 1972 and within the framework of the mission assigned to it by the Treaty's provisions, it would apply these principles to general systems of regional aid already in force, or due to enter into force, in the

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<sup>1</sup> OJ No. C 111 of 4 November 1971, p. 7.

central regions of the Community. The Commission considered it desirable that the Member States undertake to abide by these principles in applying their regional aid systems. On 20 October 1971, the governments of the Member States, meeting within the Council, adopted a "First Resolution on General Regional Aid Systems"<sup>1</sup> in which they, in fact, gave this undertaking.

146. The principles for coordinating general aid systems, as laid down in the Communication of the Commission of 23 June 1971, are given below:

#### *Gradual implementation*

147. Gradual implementation mainly concerns the territorial scope of application, which, at first, will be limited to the regions designated as "central regions". These include the Community as a whole with the exception of Berlin, the "Zonenrandgebiet" (a strip of territory a few dozen kilometers wide along the eastern borders of the German Federal Republic, the "Mezzogiorno", and one third of France (West and South West).

The zones thus excluded are called "peripheral regions" and an appropriate solution for them will be worked out, taking the specific problems of each region into account.

If this division into "central" and "peripheral" regions does not follow rigorously scientific criteria, it corresponds, nevertheless, to fairly well defined situations with regard to both regions:

- (a) The "peripheral" regions correspond mostly to large geographical areas which are far from the consumer and industrial centres of the Community. In these regions, agriculture is still important, living standards are still relatively low, and unemployment is still an acute problem. In view of the seriousness of the other problems to be solved and the many handicaps to be overcome, the effects of aid in these regions do not cause too much worry.
- (b) The "central" regions are generally fairly industrialized even if sometimes rather out-of-date, and face as a result serious reconversion problems. Since they have a well-developed infrastructure and are geographically close to one another, it is in these regions that the effect of outbidding is most felt.

<sup>1</sup> OJ N° C 111 of 4 November 1971, p. 1.



Even in the "central" regions, coordination can only gradually be carried out. A transitional period of one year has been laid down to this end from the date of implementation of the coordination policy, i.e. 1 January 1972.

#### *Aspects covered by coordination*

148. The coordination and adaptation of general aid systems concern four basic aspects, namely, a single ceiling for the aid intensity, transparency of aid, regional specificity, and sectoral repercussions. They can only gradually be put into operation. The necessary technical work is proceeding, with regard to some of these aspects, such as improved transparency of some forms of aid or the drawing up of a procedure aiming at grasping the sectoral effects of regional aid.

#### *The single intensity ceiling*

149. In the Community's "central" regions, Member States must respect a single intensity ceiling when applying regional aid to a given investor for a given investment. This ceiling, which enters into force on 1 January 1972 and which takes into account all cumulative regional aid regardless of form, is fixed at 20 % of the investment in net grant equivalence calculated on the basis of a common method for aid evaluation.

In order to compare various forms of aid and the different aid systems of the Member States, it is necessary that this method, which is based on the relative amount of aid granted as against the amount invested, should only take aid after taxation into account, i.e. the net grant equivalent remaining to the beneficiary after deduction of profits tax. The result is that the maximum amounts calculated by this method are considerably lower than the nominal aid rates envisaged in general aid systems which do not take this taxation into account.

Since the trend in "central" regions should be towards a reduction in the amount of aid, the level of the ceiling will be re-examined at the end of 1973, taking into account experience gained and adjustments made with regard to existing aid systems for the purpose of more effective transparency. The fixing of a single ceiling does not mean that the granting of aid is justified in every central region zone. Only those regions (or, within them, certain clearly-defined zones) where the socio-economic situation justifies the granting of aid may benefit from it. Below this ceiling, which represents an upper limit, the Commission will see to it that the Member States vary the intensity of the original aid in relation to the characteristics of the region concerned, and where necessary, in relation to sectoral needs.

Furthermore, notwithstanding the limit of 20 %, the Commission may waive the ceiling on the basis of supporting social and economic evidence which must be supplied beforehand. These derogations must be applied on an exceptional basis and will be the subject of periodic communications from the Commission to the Council.

#### *Transparency of aid*

150. Respect for the ceiling implies that it should be possible to determine the relative percentage of all aid granted to an investment in relation to the total amount of the investment by applying a common evaluation method worked out with the assistance of experts from the Member States. This method brings to light two categories of aid, namely:

- (a) Transparent aid based on investment and for which it is possible to calculate the relation between the investment and the amount of aid from which it benefits;
- (b) Non-transparent aid for which no calculation of this relation is possible.

Bearing in mind this definition of aid transparency and the respect for the principle according to which transparency is an essential requirement for the coordination and evaluation of general aid systems, the Member States have undertaken to cease introducing further non-transparent aid to take advantage of changes in, or renewal of, existing systems to give them effective transparency, and also to cut out aid, the non-transparency of which cannot be remedied. Experts are now working on these questions.

#### *Regional specificity*

151. This concerns a differentiation, according to nature, acuteness and urgency, of regional development problems which the public authorities are trying to work out.

Since the concept of regional specificity is directly linked with the drawing-up of a Community regional policy, no more precise provisions than those contained in the Treaty could at present determine those Community regions where aid is justified to varying degrees and those where such justification does not exist. The Commission must, therefore, within the framework of these provisions, examine each case separately in order to see if a situation which a Member State wishes to remedy justifies such aid, and also if the intensity of the aid is adapted to the seriousness of the situation. Furthermore, the following principles must be followed:

- (a) regional aid must not cover the entire national territory of a Member State, with the exception of the Grand Duchy of Luxembourg, which is considered as a single region.

- (b) general aid system must clearly define, either geographically or by means of quantitative criteria, the delimitation of regions, or of zones within such regions, which are to benefit from aid;
- (c) Except where growth points are concerned, regional aid may not be granted to isolated geographical spots having practically no influence on the growth of a region;
- (d) Aid intensity should be adapted to the nature, seriousness and urgency of the problem;
- (e) The graduation and variation in the rates of aid according to area and region must be clearly indicated.

#### *Sectoral repercussions*

152. It is in the goods and services sectors that the effects of regional aid on competition and trade are most felt. But all industrial sectors, without distinction, may normally benefit from general regional aid systems and it is difficult to evaluate the particular influence of such aid on different sectors.

It is necessary, therefore, to work out a method which will make it possible to grasp the sectoral incidence of regional aid, since the latter can raise problems at Community level. Such a method, which is at present being worked out, may consist of an examination in three stages, namely:

- (a) a general statistical survey showing the main sectors where problems may arise, since statistical indices show that they are particularly affected by the application of regional aid and by intra-Community trade;
- (b) A similar statistical survey, by branch, within the sectors which have been defined;
- (c) Finally, an additional survey taking into account qualitative and other indices, which cannot as yet be quantified for the sectors or branches concerned by means of the above quantitative surveys.

#### *Supervision of coordination*

153. Since coordination and adjustment of regional aid systems is progressive, supervision is essential not only to ensure gradual implementation, but also to evaluate the real results of the coordination and, where necessary, to improve the application methods.

The Commission carries out supervision by means of *a posteriori* communications submitted to it concerning the most significant cases of

application, in accordance with a procedure guaranteeing secrecy, which will be worked out in cooperation with Member States' experts.

The results of this procedure will be periodically studied with senior national officials dealing with aid. An annual report will be submitted by the Commission to the Council and other Community institutions concerned.

Coordination of regional aid systems in the "central" regions constitutes a first stage towards the elimination of outbidding with regard to aid, a problem concerning which the European Parliament has shown its preoccupation in its resolution on the rules on competition and on the position of enterprises within the Common Market and within the world economy.<sup>1</sup> Coordination should make it possible not only to maintain more effective competition, but also to bring about a closer relation between regional aid and the relative seriousness, at Community level, of regional difficulties which must be solved. The resulting restriction on aid to the "central" regions should increase the effectiveness of initiatives for the benefit of "peripheral" regions where the problems are much more acute.

#### THE COMMISSION'S POSITION IN SPECIFIC CASES

154. The principles of coordination have been established by the Commission in application of Articles 92, *et seq* of the Treaty. In its normal management of these provisions, the Commission was led to assert some of these principles even before they had been laid down for general application. Some of the aid projects examined by the Commission in 1971 illustrate this.

##### *Investment grants in the German coal sector*

155. On 17 February 1971, the Commission handed down a decision, in accordance with Article 93(2,1) of the EEC Treaty which requested the Federal Republic of Germany to put an immediate end to non-selective investment grants in the North-Rhine Westphalia region, as provided for in paragraph 32 of the "Kohlegesetz" of 15 May 1968.<sup>2</sup>

These investment grants, amounting to 10%, had been introduced in 1968 by German law together with a series of measures for reorganizing the coal industry in order to slow down the economic decline of the regions affected by the coal crisis, and to find other employment for those who had lost their jobs as a result of the closing down of a number of coal mines.

<sup>1</sup> OJ N° C 66 of 1 July 1971, p. 11.

<sup>2</sup> OJ N° L 57 of 10 March 1971, p. 19.

This encouragement to set up or enlarge enterprises other than those concerned with coal was intended to create new possibilities of employment and a diversification of structures that had formerly been too dependent on the mining industry.

At that time, the Commission had raised no objections to the granting of aid for a period limited to two years. In view of the continued deterioration of coal marketing conditions, in view of the exceptional increase in colliery stocks, in view of the unfavourable developments of revenue indices in relation to the rest of the Federal territory, and in view of the need to create 2000 new jobs during this period, the Commission considered that such regional aid could be agreed to even with regard to rich and industrial areas, since it was intended to prevent these regions suffering from serious social and economic problems as a result of the recession in an industry which held a determining position in the structures of these regions.

In any case, the application of aid was considered satisfactory, since it showed that:

- (a) considerable efforts had been undertaken at the same time for the reorganization of the sick benefit sector;
- (b) the aid was transparent, i.e. measurable in advance in relation to the investment and included selectivity mechanisms. Since the grant was made by means of tax deduction, only profit-making enterprises (therefore competitive ones) could benefit;
- (c) In view of the fact that, despite the problems to be faced, the regions concerned had been industrialized for a long time and therefore exerted a certain attraction on potential investors, the intensity of aid remained lower than the maximum granted to less developed regions;
- (d) Finally the benefiting coal mining regions were clearly and fully defined.

156. This aid, which was originally intended to last two years, was extended by Parliament until 1 January 1972.

The Commission opposed this extension, since it considered that the conditions referred to above were no longer fulfilled, in view of the stability achieved in the coal sector and the satisfactory development of the economic and employment situation in the North-Rhine Westphalia Land. Over a period of two years, several dozen thousand jobs had been created, unemployment had almost vanished in the main coal mining regions, and the coal crisis, even if not completely resolved, had been considerably mitigated. Continuing aid throughout the regions concerned would not only have been contrary to the common interest, there was in fact no

obvious reason for it. Indeed, it could have been harmful to less favoured zones still existing in the coal mining regions.

The Commission's attitude was not purely negative. Without questioning the need for extending the period of aid in coal mining regions outside the North-Rhine Westphalia Land, where other regional problems arose in addition to those connected with the coal mining recession, the Commission was of the opinion that a non-selective application of aid in this Land was not justified in the absence of precise objectives and of a general plan for reorganizing coal mines, taking into account results already achieved by the granting of investment aid, and also that one of the most industrialized and prosperous regions of the Community was concerned. Such an extension of aid would have resulted in increasing the disparities between the different regions of the Community and was, therefore, incompatible with the principle of the Common Market.

This was the first time that the Commission formally opposed the application of a general aid system with special reference to regional specificity, that is to say that it considered that the region was not entitled to benefit from the regional derogations laid down in paragraph 3 of Article 92 of the EEC Treaty in view of the economic and social conditions prevailing there.

157. The Commission's decisions which obliged the Federal Republic to put an immediate end to the non-selective granting of aid, nevertheless left open the possibility of selective aid limited to zones or localities of the North-Rhine Westphalia Land in which they were justified because of economic or social difficulties.

The German Government accepted the decision and finally proposed the following selection criteria to the Commission:

- (a) Zones in which more than 20% of industrial employment is in coal mines and in which the gross domestic product per inhabitant is below the average for the Land by no less than 10%;
- (b) Zones in which collieries were negatively reorganized (closing down of mines) before 31 December 1971.

In view of the law's objectives in this matter, the Commission considered that these criteria were satisfactory. The first two criteria make it possible to identify those zones where coal mining still played an important role and where the consequences of the recession in this industry had not yet completely been eliminated. The third identified those zones where the creation of new jobs was still necessary as a result of labour being released through the closing down of mines.

*German aid for the purpose of reducing the purchasing cost  
of industrial sites*

158. In order that the principle of coordination may be respected, particular attention must be paid to aid which, by its nature, is in general non-transparent. As already mentioned, efforts are being made to reduce this non-transparency. The Commission is at present keeping a careful eye on aid which takes the form of price reduction for equipment bought by investors. Such is the case with reduced purchase prices for industrial sites. The local authorities can often grant such aid, which is also State aid within the meaning of Article 92 of the EEC Treaty, and falls therefore within the context of the coordination solution.

159. An example of aid in the form of a reduction in the purchasing price of sites is that of the German draft law on the sale at reduced prices of land belonging to the Bund. According to this draft law, land, whether or not built up, may be sold at prices of up to 30% below its true value, subject to its being used for setting up, extending, reconverting or rationalising enterprises. When adopting this measure, the German government expressed the hope that it would encourage the Länder and local governments to allocate more generously the many sites in their possession for the setting up of new enterprises. When expressing a favourable opinion on this kind of aid, the Commission took into account the fact that the fixing of a limit for price reductions made this aid transparent. The Commission also saw to it that such aid be granted only in zones where it was recognized that regional aid systems were justified. In addition, the Commission insisted, in so far as regulations were adopted for similar purposes at local authority level, that the same degree of transparency and specific regional application be respected.

Measures similarly taken by four Länder (Bavaria, Hesse, Rhine Westphalia, and the Saar, which provide for tax exemption on land transfers in favour of investors acquiring industrial sites, fall within the above-mentioned context. Aid for land acquisition takes the form of tax aid, but since the tax rate is known, the aid operation can be considered transparent. When deciding on these measures, the Commission has insisted that such aid should not be granted outside those zones where regional aid systems were admissible.

*Dutch regional aid systems*

160. A very important change in Dutch policy concerning regional aid systems has taken place in the sense of greater regional specificity.

The main feature of the Dutch regional structure is the existence, alongside regions which have need of development or reorganization, of an exceptional industrial and demographic concentration within a very limited geographical area, namely the Randstad. This feature has been a dominant factor in the direction taken by the regional intervention policy of the Netherlands since the beginning, but this direction was further accentuated by the changes which have taken place.

Together with the suspension of the grants for aid in favour of new investments, in both the industrial and services sectors, in certain development and conversion areas (which will make possible the greater concentration of budgetary means available for the development of other regions), the Dutch government decided to grant aid to enterprises in the Randstad which either moved or extended into the provinces of Groningen, Friesland, Drenthe or Overijssel, where the situation was much less favourable. The Commission naturally favoured these changes.

#### *The Belgian Draft Law on Economic Expansion*

161. The Belgian Draft Law on Economic Expansion was submitted to the Commission at the end of 1969, and gave rise to a number of objections from the point of view of both the principle for coordinating regional aid systems and the principles applicable to other categories of intervention.

This draft law, as its title indicates, does not exclusively refer to a system of general regional aid, but constitutes a complex system of measures (including regional as well as sectoral aid systems) which aim at developing the economy of the country as a whole. It was intended that this draft law should replace previous regional aid laws (the laws of 18 July 1959 and 14 July 1966).

At the draft law stage, the Commission noted that it was not in a position to estimate the real scope of the aid envisaged, because the implementing regulations with regard to both methods and field of application of the aid concerned were still lacking. It was not possible, therefore, to verify regional specificity of regional aid or to check whether the aid was adequate as regards the difficulties to be solved. The same applied to sectoral aid since there was no indication in the draft law with regard to those sectors most likely to benefit from it.

In such cases, a presumption of incompatibility exists with regard to both regional and sectoral aid since, once a draft law is enacted, it can be applied without precisions concerning all points raised, being given and without the Commission being able to estimate the incidence of aid on trade and competition within the Community.



162. In June 1970, the Commission was, therefore, led to initiate the procedure laid down in Article 93(2) of the EEC Treaty.<sup>1</sup> This meant that the Belgian government was automatically refused permission to put the proposed aid systems into operation until such time as the Commission had taken a final decision.

At the same time, the Commission decided to subject recognition of the compatibility of sectoral aid with the principle of the Common Market to prior examination of significant individual cases of application. This requirement was based on two considerations. Firstly, the draft law laid down that sectoral aid should be granted to sectors outside the geographical zones for which aid could be granted. This meant that the possibility of granting regional specificity to this sectoral aid was excluded in advance. Secondly, discussions with the Belgian authorities had shown that the latter could not envisage prior determination of benefiting sectors without interfering with the flexibility of the measures which the Belgian government had tried to achieve. On the other hand, the absence of sectoral and regional specificity would have given this sectoral aid the character of general aid incompatible with the principles of the Common Market. In order to avoid the suppression of such aid, the only solution was that of prior examination of individual cases.

This condition was accepted by the Belgian government, which also undertook to communicate to the Commission the draft regulations needed for the application of the proposed aid measures, in particular those which defined the zones in which regional aid would be applied.

The draft law became the Law on Economic Expansion of the 30 December 1970 and entered into force on 1 January of the following year.

163. The Belgian government, however, extended the term of validity of the previous decrees for the implementation of the Laws of 1959 and 1966, which had been rescinded upon the entry into force of the new law. This made possible the application of regional aid in zones in which the need for such aid was no longer apparent in view of the social and economic development in recent years.

As a result, the Commission continued with the procedure and gathered the opinion of interested third parties.<sup>2</sup> The Belgian government

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<sup>1</sup> The initiation of this procedure does not imply prior rejection of the draft law submitted to the Commission for examination. Its purpose is only to enable a detailed examination to be made by the Commission in cooperation with all the Member States concerned, and to ensure that the application of the proposed measures does not create practically irreversible situations.

<sup>2</sup> OJ No. C 32 of 6 April 1971, p. 3.

endeavoured to find a solution which was compatible with the provisions of the Treaty. These efforts led to the drawing up of a draft amendment to the law which altered the delimitation criteria of zones in which regional aid may be granted. On the basis of this amendment, the Belgian government submitted a draft to the Commission which defined the new zones and which included the socio-economic criteria and justifications leading to their selection. This delimitation is at present being examined by the Commission, which will take a decision on the question by applying the principles of the coordination solution.

### § 3 - Sectoral aid-systems

#### GENERAL PROBLEMS

164. In general, the evaluation of sectoral aid systems raises less serious problems than that of general regional aid systems, because their field of application and scope is more clearly defined. These systems do not, however, exhaust the question of the sectoral incidence of State aid.

Regional aid, which is usually general and a stimulant, does not result, in every sector, in a genuine compensation of the handicaps facing enterprises because of their particular location. Thus, either as a result of the more or less voluntary intentions of national administrations or as a result of the utilization by industrialists of the possibilities which are offered, the granting of aid can bring about sectoral effects which must be carefully examined. Otherwise, the control of sectoral initiatives only could be evaded. Hence, the importance attached to the drawing up of a method for examining sectoral effects as provided for by the coordination solution for regional aid.<sup>1</sup>

Systems also exist which are based on the need to "modernize", "adapt" and "foster the growth" of the national economy. Such systems are likely to be applied to all enterprises, regardless of sectoral or regional location. Because of the lack in specificity, these systems cannot legally benefit from the Treaty's exemption provisions, since they obviously cannot be evaluated *a priori* by the Commission. Initiatives undertaken within the framework of coordination of general regional aid systems must therefore be followed up in order to make the necessary adjustments which will make the above systems more specific or more subject to preliminary control.

<sup>1</sup> See p. 126, item 4.

165. Moreover, sectoral aid must be supervised to ensure that certain criteria, which in fact apply to all types of aid, are respected. These criteria should ensure that the aid does a minimum of harm to competition and has a maximum effectiveness with regard to the balanced development of the Community. Such aid must:

- be of a selective nature and only be granted to enterprises or to productions, the development and reorganizing of which justified the presumption that they will be competitive in the long run, having regard to the expected development of the sector concerned;
- be of a sufficiently temporary or even degressive nature in order to stimulate the dynamism of beneficiaries. It must foster the necessary adaptations and make it clear to the parties concerned that the artificial situation arising from the granting of aid cannot continue indefinitely. Unless it is intended to compensate competition distortions at Community level, which are created by measures adopted in non-member countries, purely conservatory aid outside reorganization programmes and aid for the operation of plant must be excluded. Economic social progress cannot allow, in the long run, an unreasonable protection of sectors facing difficulties. Aid systems must therefore be such as to avoid preventing indefinitely the optimum allocation of production factors. They must either speed up structural changes or only slow down such changes temporarily, and this only until the necessary reconversion solutions have been found;
- be as transparent as possible, in order that the Community institutions may easily evaluate their true incidence and effectiveness with regard to the aims to be attained, in order that the public authorities may be in a position to measure accurately the cost involved, and in order that the enterprises concerned may assess the true situation;
- be of a form well adapted to the objectives in view and, in so far as the choice between various methods is possible, adopt those that have the least effect on intra-Community competition and the common interest.

These principles are in direct line with those favoured in the medium-term economic programmes and in the report on "the Rules on Competition and the Position of Enterprises within the Common Market and the World Economy",<sup>1</sup> which was submitted to the European Parliament by its Economic Committee on 2 February 1970.

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<sup>1</sup> Report by Mr. Berkhouwer (doc. No. 197) paragraphs 41, 42, 44 and 45.

166. As already emphasized above, national initiatives too often take strictly national objectives and situations into consideration. This misunderstanding of the Community context may lead to errors of appreciation with regard to the economic data covering the branch in question and to extremely negative distortions of competition. As regards sectoral aid, here too a coherence of national initiatives must be sought in order to achieve optimum Community development.

It is, therefore, necessary to oppose national aid which may cause difficulties in another Member State, or may unduly prevent equal development, by artificially maintaining or developing certain production capacities. Failing this, such aid is only a waste of resources from the common interest point of view.

The Common Market results in a symbiosis of national economies. Difficulties which justify the granting of sectoral aid in one Member State are often also encountered in other Member States, since they are caused by a common economic development. In some branches, this phenomenon has already been noted, although the aims, form and intensity of aid granted are not necessarily always identical, since the structures and difficulties of the branches concerned are not always the same in all the Member States.

When such situations arise, the Commission does not act by "reaction" alone to the national initiatives undertaken successively. When the Commission is in a position to formulate an accurate diagnosis of the negative development noted or forecast in a particular sector, a development which would in all probability lead to national action on the part of the Member States, it tries to forestall matters and develop a "Community framework" within which national initiatives should take place. Such a "framework" should include the main guidelines of the industrial aims to be attained as well as details of the means to be used for this purpose and which would be favourably viewed by the Commission when dealing with an aid project for the sector concerned. The Member States will, of course, be properly advised of the contents of the Community "framework". The Commission naturally shares the view that such a formula must not be considered as an encouragement to professional circles to ask for and to public authorities to promote in all Member States this type of aid, since the need for it may not be apparent in all the Member States.

In other branches, the development of the Common Market has led, in fact, to largely identical situations (e.g. shipbuilding and film production). Here, the Commission must try to work out a genuine Community aid system. This is in fact a strengthened form of the action referred to

above, which should also include the methods and intensity of aid applied to the Community as a whole.

#### RECENT POSITIONS TAKEN UP BY THE COMMISSION

167. Certain of these aims of a general order have, in recent years, been illustrated by positions adopted by the Commission. Other quite important Commission positions on agriculture or transport will not be considered here, since they cannot be separated from the context of common policies specific to these sectors and within which the purpose aimed at can be more clearly understood. In this connection, the Fifth General Report on the Activities of the Communities should be referred to.

#### *Shipbuilding*

168. Shipbuilding is one of the few industries to benefit from production aid throughout the world.

This has led to a genuine "aid rush" during the period 1960-1970 for which there are several reasons.

As against other industries, shipbuilding cannot be protected by conventional commercial policy measures (customs duties and quantitative restrictions) without prejudicing shipbuilders who carry out their business on markets where competition is extremely active. The export of ships, therefore, also involves the export of certain manufactured products which are incorporated in the ships and which could, as such, not easily be exported without encountering certain obstacles, especially customs duties. Fostering an increase in tonnage by lowering prices of ships and by maintaining freight prices at a low level could also be to the advantage of economies which are largely dependent upon seagoing trade.

Thus, thanks to aid, some non-member countries have been able to build up an important, and in one particular case, a dominating position on the world market. This situation could not be ignored by the traditional shipbuilding countries of Western Europe, because of the regional and social considerations arising from the location of a number of shipyards. Their reactions were also motivated by shipping and industrial policy considerations, since shipbuilding, being essentially an assembly industry, considerably influences the economy as a whole.

It would have been better to normalize the competition conditions on a world-wide basis rather than to adopt national protection measures which are bound to foster outbidding in the matter of aid. This was done within the OECD, which groups the world's main shipbuilding countries, but the

effective results of this work have only started to show themselves in 1971. In the meantime, measures had to be taken in Europe, and in the Community in particular, both at national and at Community levels. Since 1972, to aid traditionally granted in France and Italy was added aid granted in Germany, followed by aid granted in the Netherlands and in Belgium from 1967 onwards.

For its part, the Commission submitted to the Council, in 1965, a draft directive concerning the granting of aid to shipbuilding with a view to correcting distortions of competition on the international shipbuilding market. This directive was only adopted by the Council in July 1969.<sup>1</sup> It fixed the ceiling of national aid granted to shipbuilding at 10% of the selling price, a percentage which corresponded to the prejudice suffered by the Community shipyards as a result of distortion of competition.

This directive was due to expire at the end of 1971. Nevertheless, it provided that the Commission could, before the date of expiry, submit a report on the international situation to the Council together with any necessary proposals for measures to be taken later. The submission of a new draft directive will have the effect of extending the term of validity of the original directive until 30 June 1972.

169. The directive of 1969 achieved its aims, which were to protect the Community shipbuilding industry and harmonize aid granted within the Community.

Although the Community shipbuilding industry had suffered a recession until 1967, the position, in quantitative terms, had improved slightly by 1969 and stabilized after that. The improvement is more marked in qualitative terms, as the European industry has specialized, in recent years, in the construction of ships of greater value added adapted to the requirements of modern maritime transport.

Action taken to compensate distortions of competition was accompanied by structural measures intended to speed up the adaptation of the sector to the new market conditions and to technical progress. Because of the results obtained and as a positive result of the 1969 directive, there has been a relative improvement in the Community's position.

The balance-sheet with regard to the harmonization of specific aid within the Community is equally satisfactory.

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<sup>1</sup> OJ No. L 206 of 15 August 1969, p. 25.

In the early stages the situation was quite erratic, with aid exceeding 30 % of the selling price in France and Italy, while elsewhere no aid was granted at all. Since 1967, the situation has tended to become more balanced, the figure for national aid dropping, within a few years, to around 10%, with the exception of Italy where the figure was still higher. Since the beginning of 1971, a downward alignment has been recorded, and now the average fluctuates around 5%, here again with the exception of Italy, where the figure for aid still hovers around the maximum rate of the 10% fixed by the directive. In some Member States, however, there are general aid systems which are to a large extent granted for shipbuilding and which, added to the specific aid, appreciably affect prices for ships.

Efforts within the OECD for normalizing competition conditions on the international market have resulted in two OECD Council resolutions being successively adopted on 30 May 1969 and 16 December 1970 respectively, which laid down the optimum credit conditions for the export of ships, a ceiling which was not to be exceeded. The last arrangement had an important effect in reducing export credit aid, since the rates of interest for this particular export credit had to remain below the figure of 7.5%. In addition, the OECD took action in order to arrive rapidly at an overall agreement which would result in the progressive abolition of all forms of aid to the industry. The need for protection on the part of the Community shipping industry is therefore no longer so great.

170. In view of the above, the Commission proposed to the Council in 1971 the adoption of a new directive which would be valid for three years, but which would differ from the previous one on the following points:

- (a) The ceiling of aid would be lower than the one set previously. Export credit aid would be limited in accordance with the provisions laid down by the OECD (minimum rate at 7.5%, deposits 20%, duration 8 years) whilst other aid would be limited to 5% of the selling price in 1972, 4% in 1973 and 3% in 1974. Because of the uncertainty in the world economy since the summer of 1971, this degressive trend could be interrupted, if necessary, by a decision of the Council. A general review clause is also provided for;
- (b) Within the Community limits for aid, account would be taken of export credit facilities and guarantees against rises in cost. In this way, another step forward would be taken to place the various Community shipyards on an equal footing with regard to governmental support by taking measures other than those relating to specific aid for the sector under consideration.

### *The textile industry*

171. This traditional industry has in recent years had to face serious structural difficulties which have a threefold origin, namely:

- (a) technological development is changing or likely to change production and marketing conditions in the sector;
- (b) the relatively small rate of growth in domestic demand;
- (c) the development of certain productions in the developing countries and the basic tendency towards the progressive opening up of world-wide textile markets.

Because of its importance with regard to employment and exports, this industry had received particular attention on the part of most of the Member States in their industrial policy. Aids, which up to a few years ago were still limited, have tended to increase. Their aim was mainly to help the industry to adapt itself to the new market requirements and to technical advance. This tendency to intervene could become even stronger in order to tackle the effects of the increasingly liberalized commercial policy which the Community and its partners may adopt.

Due to lack of coordination, initiatives, adopted at individual rather than at Community level, may lose their effectiveness and adversely affect trade and competition within the Community. Competition in textiles is quite lively in the Community, and trade has reached a very high level and is rising consistently. Although adaptation problems have common features in the Community as a whole, they can nevertheless differ from country to country, according to the level of adaptation which has been reached in these countries. Furthermore, in spite of the close interdependence of the various branches of the textile industry, the problems facing the different branches are not always equally acute.

172. On 30 July 1971, the Community undertook the task of coordinating national aid to the textile industry, and therefore, of preventing in time any risk of aid escalation. Basing its action on assessing powers conferred on it by Community provisions on aid, the Commission pointed out to the Member States a number of limits and requirements to which aid must be subjected. The object was not to encourage Member States to intervene in favour of the textile industry (in some cases there was no need for such intervention) but simply to direct the drawing up of measures to be applied where certain States considered intervention essential. Furthermore, while laying down the manner in which it would assess aid to the textile industry, this Communication does not replace the Commission's position regarding



each individual case of aid requested by virtue of the powers conferred on the Commission by the EEC Treaty.

In its general guidelines, the Commission's first object has been to limit State interventions to certain forms of aid to the exclusion of any other. This exclusion refers particularly to aid which directly affects price formation and which is consequently likely appreciably to affect trade and competition in as sensitive a sector as that of textiles. This applies to all aid to production and operation.

On the other hand, the Commission has been favourably disposed towards certain categories of aid, provided certain conditions were met. Such is the case with aid which fosters joint action for the development of research or the improvement of short-term forecasts with a view to mitigating particularly marked cyclical activity fluctuations on the textile market. It is also the case of aid for adjusting textiles structures in order to facilitate the elimination of excessive capacity for encouraging conversion of certain marginal activities towards activities outside the sector itself, and finally to foster horizontal concentration or vertical integration of enterprises.

The Commission was more restrictive with regard to aid for investments for the purpose of the sector's internal modernization or reconversion, since such aid would seriously affect the competitive position between the beneficiaries and their competitors. Consequently, it is the Commission's view that the granting of such aid should meet a number of criteria. It should be motivated by particularly serious and acute social problems, its application should be strictly limited to those activities which are affected by serious adaptation problems, its aim should be to restore in the short term a satisfactory level of competitiveness to the beneficiaries, it should in no case lead to an increase in capacity, and, finally it should take into account not only the national situation of the industry and its branches, but also the Community's situation.

173. It should be noted that, in its decision of 27 May 1970<sup>1</sup> concerning an Italian draft law aiming at reshaping, reorganizing and converting textile industry, the Commission had already been led to apply some of the principles referred to above by opposing the granting of aid to the textile industry in the form of an exemption of direct income tax owed by the enterprises concerned, and by emphasizing the need for the branches to be defined by taking both national and Community excessive capacities into consideration.

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<sup>1</sup> *OJ* No. L 128 of 12 June 1970, p. 33.

### *The film industry*

174. This sector has had to face a difficult situation for a long time, as a result of competition from certain non-member countries (a large proportion of the revenue from films comes from the Common Market) and from other types of leisure activities. In addition, Member States attach considerable importance to the sector as a means of information and culture. Finally, economically speaking, the film industry is a fairly important activity, as is shown by an annual Community turnover of approximately 600 million u.a. and by providing employment to approximately 200 000 people. As a result, every Member State with a film industry has felt the need to intervene on its behalf.

The Commission wishes to take the sector's particular characteristics into account while at the same time trying gradually to eliminate the most important differences in aid granted by various Member States.

175. With this in view, the Commission first tried to align aid granted by the various Member States, both in respect of rate and form.

Aid to exports which producers of certain Member States used to receive on the basis of revenue earned in other Member States has been abolished. The same applies to import duties on films which have brought about discrimination against Community films. Furthermore, the national production aid systems have been brought into line, so that their bases and rates are similar in France, Italy and Belgium, and this alignment will shortly include Germany.

The Commission also tried to obtain from each Member State the assurance that the benefits of national aid will be available to the productions of other Member States. Indeed, cooperation at Community level, which has taken shape by co-financing and co-production of films, cannot develop harmoniously within the framework of partitioned national systems. A certain liberalization of national aid systems has already been achieved with regard to short-length films and to tax rebates to cinema owners, so that, where such systems exist already, aid is granted independently of the nationality of the films shown provided that they are produced in a Member State.

The Commission has recently held discussions with Member States in order to examine possibilities which exist in this respect and to determine methods for generalizing the opening of national aid to Community production as a whole. This would facilitate the growth of a sector which, within the framework of the Common Market, must broaden its financial basis as regards both production and marketing.

### *Aircraft production*

176. In those Member States with an aircraft industry, this sector presents similar characteristics due to the lack of national adaptation to the requirements of world-wide competitiveness, and to the very considerable appeal for governmental support.

This support is generally provided in the form of aid for research and development of prototypes. Such aid consists of financial support repayable only in the event of the commercial success of the prototypes for which aid had been granted.

The Commission is studying the problem of industrial development in the aircraft sector. Its conclusions should include guidelines and proposals for government aid. Intra-Community cooperation in this sector would, in fact, be facilitated and strengthened by concertation of future aircraft production programmes. Such concertation deals particularly with the importance and methods of governmental financial supports. It would enable aid to be aligned to the extent considered desirable, and would help in seeking the most efficient type of State intervention.

177. It is with this in view that aid for research and development could include the following measures:

- (a) alignment of the intervention rates of States cooperating in each project for the purpose of establishing a solid basis for cooperation between enterprises benefiting from such aid;
- (b) extension of aid for research and development to investments, initial tooling and equipment for production;
- (c) aid granted should not be such as totally to relieve the benefiting enterprises of their financial, technical, or commercial responsibilities, and should include an obligation of repayment in all cases where the marketing of the prototype makes this possible.

178. With regard to aid other than that for research and development, European aircraft constructors who are facing strong competition from non-member countries have, on several occasions, submitted the problems of their sector to the Community's authorities and suggested the need for intervention to go beyond the stage of research and development.

In this field, a machinery which would provide constructors with credits on similar terms in all the Member States would reduce the considerable cost of financial assets arising from the setting up of production and marketing structures.

Credit granted should:

- (a) be offered at interest rates comparable to those of competing sectors in non-member countries;
- (b) be on a long-term basis in order to enable constructors to sell on the world market at competitive prices and conditions;
- (c) benefit in the first place those products resulting from cooperation.

The proposals which the Commission will formulate on the basis of these preliminary guidelines will be examined with the Member States for the purpose of providing this sector, within a coordinating Community framework, with the means that will enable it to accede to an industrial and commercial size capable of competing on the world market.

### *Sulphur*

179. Since 1968, the Sicilian regional authorities have intervened financially in order to cover by means of subsidies the operation deficits in the sulphur sector.

This activity, which was protected until 1968 by safeguard measures under Article 226 of the EEC Treaty, had been in deficit for a considerable number of decades due to the competition from other producer countries where the deposits of sulphur were more competitive (Mexico and Canada). Sulphur is also a by-product of natural gas refining and this "inevitable" production also weighs heavily on the market.

For a long time, the Italian authorities believed that they could limit the annual running deficit of sulphur mines, or even eliminate it altogether, by reorganizing the industry. In view of the regional situation, they considered that it was in any case necessary to maintain the activity of these sulphur mines for a period long enough to enable new industries to be set up in the zones concerned. From 1968-1969 onwards, world sulphur prices have collapsed. The annual deficit of the Sicilian sulphur mines is now in the region of 15 to 20 thousand million lire, and this has more clearly shown up the lack of competitiveness of Sicilian sulphur and the urgent need for encouraging alternative and economically sound activities.

180. Aware of the urgency of this problem, the Commission undertook an examination of aid measures which had been submitted to it by the Italian authorities. This aid only serves to extend the life of an activity which is in deficit and cannot achieve a proper balance. Since such aid alone cannot solve the social and regional problems raised, it can only be authorised to the extent that it maintains employment in zones for the time needed for setting up alternative activities with all possible speed.

The Commission insisted, therefore, that the responsible Italian authorities should accelerate the setting up of these alternative activities and give priority to those which would ensure a high level of employment. In this context, the Italian government, while informing the Commission in April 1971 of the measures recently undertaken by the Sicilian region with regard to the sulphur mines, had not provided sufficient assurances.

In recent discussions with the Commission, the Italian authorities have, however, given further details that will make it possible for measures which, taken simultaneously with aid granted to the sulphur industry, will eliminate in the long run an abnormal situation from the point of view of competition as well as from that of a genuine solution of the social and economic problems raised.

*Aid financed by para-fiscal taxation imposed on imported products*

181. Certain aid granted by Member States is financed by means of para-fiscal taxes which are imposed not only on domestic products but also on products imported from other Member States. In general, the tax is levied on the same products which benefit from the aid or on by-products thereof.

From a purely national point of view, the levying of a tax and the granting of aid represent in fact a simple redistribution of revenue within one and the same sector. As regards intra-Community trade and competition, such systems raise important problems. Since the tax is also levied on products imported from other Member States, the direct competitors of those benefiting from aid contribute to this financing.

In addition, the automatic application of resources obtained from a para-fiscal tax raises a double problem. On the one hand, national parliamentary budgetary control of resources allocated for aid is generally lacking, and this may lead to aid systems of an intensity which exceeds the objectives or which may no longer be essential. On the other hand, the more enterprises of other Member States increase their sales in a particular Member State, the greater will be their contribution to an aid which is essentially intended to serve the interests of their own competitors. This means that the protective effect of aid increases in relation to the efforts of exporters.

Another serious inconvenience of this machinery lies in the fact that it generally suggests the need for an additional control at frontiers between the Member States, since the levying of the para-fiscal tax imposed on imported products takes place most frequently at the frontiers and is collected there by the customs authorities.

It is for this reason that the Commission considers that systems of aid financed by para-fiscal taxes on products imported from other Member States have a protective effect which exceeds the effect of the aid itself.

182. This point of view was confirmed by the Court in its ruling<sup>1</sup> which rejected the appeal by the French government with the object of cancelling the Commission decision of 18 July 1969<sup>2</sup> concerning the French aid system to the textile sector.

In its decision, while admitting the compatibility of aid which, both in form and objective, met the real need for the modernization and reorganization of the sector, the Commission was of the opinion that the financing of aid by means of para-fiscal taxes levied on imported Community products also had a protective effect which exceeded the purpose of the aid itself. It decided, therefore, that the system should no longer be applied since it affected competition and trade to an extent far in excess of what was indispensable and that, in any case, it was contrary to the common interest.

183. Following this ruling of the Court, the French government decided that it would no longer subject products imported from other Member States to the tax on textile products. For its part, the Commission, in January 1971, requested the Member States to abolish similar systems which might still apply there, or at least to alter them in such a way as to make them compatible with the provisions of the EEC Treaty, so that products imported from other Member States should not be subjected to such taxes. The Commission has studied action taken as a result of this request. Although certain systems are still under discussion, it should nevertheless be noted that action undertaken has led Member States either to adjust the system already in existence (France has in fact suspended its system of subsidies for paper pulp which had been financed by a para-fiscal tax), or to cease introducing new systems which would be contrary to the principles laid down by the Community institutions.

#### *Aid to enterprises in difficulty*

184. The Commission has been informed of various aid systems for industrial enterprises in difficulty, which certain Member States have either

<sup>1</sup> Ruling of the Court of Justice of 25 June 1970 in case 47-69; *OJ* No. C 97 of 29 July 1970, p. 8.

<sup>2</sup> *OJ* No. L 220 of 1 September 1969, p. 1.

introduced or intend to introduce for various reasons, such as the maintenance of unemployment particularly when the economic situation clearly shows that a number of structural deficiencies exist.

The Commission is not generally opposed to the introduction of such intervention insofar as it is sufficiently exceptional and in so far as:

- (a) aid granted is within the framework of a sufficiently well-defined reorganization programme as to represent an effective contribution to the reorganization of the enterprises or regions concerned;
- (b) the field of sectoral or regional application where it is granted is defined with sufficient precision to enable its effect on competition and intra-Community trade to be assessed.

185. In this connection the Commission had to apply these principles in a Belgian case.

Since 1968, the Belgian government has granted credits to enterprises with serious profitability problems and which, as a result of the situation, could not obtain help from public or private credit bodies on the terms usually followed by such bodies.

The aid was first granted within the framework of a convention concluded on 9 May 1968 between the Belgian government and the "Société Nationale de Crédit à l'Industrie" (SNCI), which was acting on behalf of the government. The Commission was informed of this agreement in December 1970 only. The ceiling for the intervention by the SNCI was set at 800 million Belgian francs. Within this limit, the SNCI advanced the necessary funds for the granting of credits, and the State guaranteed the SNCI against any possible failure of the benefiting enterprises by drawing on budgetary credits. When the amount covered by the convention became exhausted at the end of 1969, other credits were granted to the enterprises in difficulties, but these credits were granted directly by the State out of the Ministry of Economic Affairs budget.

186. This aid had to be considered incompatible with the Common Market since:

- (a) as with all aid to enterprises in difficulty, it affected competition and trade by preventing the consequences of the normal play of the market through artificially keeping enterprises alive which could encumber the structure of sectors facing adaptation difficulties and which, in order to stay on the market, might act in such manner as seriously to disturb the market;

- (b) it fell within the framework of general aid systems and was, therefore, likely to help all enterprises, regardless of sector or geographical location. It was therefore impossible for the Commission to assess its effect;
- (c) its aim was essentially conservatory in that the purpose was to prevent the closing down of enterprises, and leading to unemployment. No definite undertaking was required from the recipients of the credits as regards an effort at adaptation that would enable the enterprises to resume a position which would be competitive.

In its decision of 15 December 1971,<sup>1</sup> the Commission therefore decided that Belgium had to put an immediate end to the granting of such credits to enterprises in difficulty, and this either within the framework of the convention with the SNCI or as an item in the budget of the Ministry of Economic Affairs.

#### § 4 - Aid to export

187. The advantages which Member States provide for their enterprises with regard to exports are, in fact, a form of aid. In so far as it concerns relations with non-member countries, such aid must at first be examined within the context of Article 112 of the EEC Treaty which provides for aid alignment to the extent required for the purpose of ensuring that competition among Community enterprises is not distorted and also, where necessary, within the context of Article 92 if this aid indirectly affects intra-Community trade and competition.

Aid granted for sales in other member countries falls under Article 92. In this case, the Commission maintains a consistent position according to which such aid is incompatible with the general principles of a common market in which a customs union has been achieved in 1968. It is more especially incompatible with the free movement of goods and services when a Member State artificially develops its sales in its partner countries while exempting its domestic market from the effects of the aid granted. Such aid cannot benefit from any exception whatsoever and this applies to any form of aid, including its intensity, reasons or ultimate objective.

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<sup>1</sup> OJ No. L 10 of 13 January 1972, p. 22.



188. Thus the Commission had, in the past, insisted that Member States having price guarantee systems with regard to claims of enterprises resulting from export operations should cease to apply them in intra-Community relations in so far as they affect competition and intra-Community trade. Similarly, the Commission had also secured the suppression of preferential rates, in these relations, by the Belgian and French central banks for claims re discounts of French and Belgian exporters.

This position of the Commission has in fact been confirmed by the Court of Justice<sup>1</sup> in a decision concerning French rediscount rates. On the basis of the Court's ruling, the Commission requested the Italian Government to suppress, in its intra-Community relations, all aid granted to exporters in the form of a preferential rate for the financing of medium-term credits. Following this request, the Italian authorities informed the Commission, in April 1971, that they had decided, by means of a ministerial order addressed to the Mediocredito, to stop applying this mechanism in their relations with other Member States.

## SECTION 2 — APPLICATION OF THE PROVISIONS OF THE ECSC TREATY TO STATE AID FOR THE IRON AND STEEL INDUSTRY

189. With regard to State aid for the iron and steel industry, and as the result of an appeal lodged by the Dutch Government before the Court of Justice against the position adopted by the Commission with regard to aid granted by the French Government under the "Plan professionnel de la sidérurgie",<sup>2</sup> the Commission was led to define its position on the delimitation between the prohibitions of Article 4(c) and the provisions of Article 67 of the ECSC Treaty.

The Commission then restated its position, which was confirmed in the conclusions of the Advocate General, namely that the prohibition under Article 4(c) of the ECSC Treaty concerns aid granted solely to the coal and steel industry or in a discriminatory manner in favour of this industry.

In fact, the ECSC Treaty only achieves a partial integration limited to the coal and steel sectors. The Member States are still responsible for

<sup>1</sup> Ruling of the Court of Justice of 10 December 1969 in the joint cases 6 and 11-69, OJ No. C 19, 13 February 1970, p. 7, *Recueil*, 1969, p. 523.

<sup>2</sup> See also, Ruling of the Court of Justice of 6 July 1971 in case 59-70; OJ No. C 94 of 24 September 1971, p. 4.

their country's general economic policy as clearly indicated in Article 26.<sup>1</sup> This implies that Member States may continue to take general measures in favour of their economic and industrial development, including the coal and steel sectors, provided that such measures do not favour them more particularly. There is special advantage only when the competence of the Member States is exercised in a discriminatory manner, that is to say, if the aid granted to coal and iron and steel enterprises is more advantageous than that allowed in similar situations to other analogous sectors.

190. Nevertheless indiscriminate exercise of competences left to the States must be viewed under the terms of Article 67 of the ECSC Treaty, this Article having been specially designed to solve problems arising out of partial integration. When Member States act in the exercise of the powers still held by them and which do not come under the ECSC Treaty, it should at least be possible to remedy certain appreciable effects which that action can have on the conditions of competition in the sectors falling within the scope of the Treaty of Paris.

It is, therefore, the Commission's duty to examine aid granted by the Member States to their iron and steel industries in order to decide whether such aid is compatible with the provisions of Article 4(c), and possibly the manner in which such aid should be evaluated with regard to the provisions of Article 67(2) and (3) of the Treaty. The provisions of the latter Article do in fact lay down that any action by a Member State which is likely appreciably to affect conditions of competition in the coal and steel industries must be notified to the Commission.

191. The Commission therefore expects to be informed beforehand of aid granted to the iron and steel industry and its method of application. In view of the lack of information provided by the Member States, the Commission has had to intervene on several occasions in order to obtain from the governments concerned a systematic notification of the required information, including information concerning aid previously granted. The Commission has, however, found that information provided by some Member States on aid granted was often missing or incomplete, and this in spite of repeated Commission reminders. The Commission therefore decided, in December 1971, to summon two particular Member States to submit their observations under the terms of Article 88(1) with regard to non-observance on their part of the obligations under Article 86(1).

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<sup>1</sup> See also, Ruling of the Court of Justice of 23 February 1961 in case 30-59; OJ No. 17 of 7 March 1961, p. 454, *Recueil* 1961, p. 1.

## CHAPTER II

### PUBLIC ENTERPRISES

192. The State's participation in economic activities by means of intermediary enterprises, partially or wholly controlled by the public authorities, has for a long time been an important component of the economic system. The EEC Treaty in no way prejudices the system of ownership in Member States.

The Commission enforces the respect of several of the Treaty's provisions, which regulate the activities of the Member States as regards private and public enterprises. More particularly, as far as public enterprises as well as a number of private enterprises owning special or exclusive rights are concerned, the Commission sees to the application of Article 90(1) of the EEC Treaty which forbids Member States to enact or to preserve measures which are contrary to the terms of the Treaty.

In order that the Commission may carry out its duty in this field, it is necessary that it have detailed knowledge of the public sector which takes recent developments into account. It also requires a re-examination of the relationship between the State and the public enterprises in the light of the Treaty's rules. These are the tasks which the Commission is to undertake in the immediate future.

193. The Commission has already carried out a preliminary study on one aspect of State participation in economic activities, namely competition between public and private enterprises. The results of this study are being examined by the Commission departments concerned.

194. The question of the direct applicability of Article 90(2) was raised in 1971. Subject to certain conditions being fulfilled, this Article provides for an exemption from the Treaty's rules for enterprises responsible for administering a service in the general economic interest and for fiscal mono-

polies. The Court of Justice ruled<sup>1</sup> that since the application of this article carried with it the need to assess the requirements incorporated in the particular duties of the enterprises concerned and, in addition, to safeguard the Community interest; and since such an assessment draws attention to the general economic and political objections pursued by Member States under the Commission's scrutiny, the exemption in question is not at present likely to create individual rights which national courts will have to safeguard.

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<sup>1</sup> Ruling of the Court of Justice of 14 July 1971 in case 10-71, *OJ* No. C 103 of 16 October 1971, p. 7.

### CHAPTER III

## THE ADJUSTMENT OF NATIONAL COMMERCIAL MONOPOLIES

195. Article 37 of the EEC Treaty imposes on the Member States with national commercial monopolies the duty of adjusting these monopolies in order that, at the expiry of the transitional period, all discrimination should be abolished among nationals of the Member States with regard to supply and outlet conditions.

As a result of experience gained by the Commission in this field during the transitional period it appeared that the incidence on imports from Member States of differences with regard to the final aim of a particular monopoly (fiscal purpose, protection of national production, assurance of supplies, etc.) is in most cases essentially the same. The *raison d'être* of an exclusive right to import and to sell on the national market is to enable a monopoly to fix the limits and terms on which foreign products will be admitted on the market.

In its decision—taking, the monopoly is above all pursuing a fixed objective, and it will be easily understood that the true scope for marketing foreign products (i.e. foreign products which would have been available in the absence of the monopoly's control) is only taken into consideration by the monopoly in so far as they do not hinder the attainment of the said objective.

196. Thus it had been found that several provisions governing the operation of monopolies, as well as measures taken by the monopolies themselves, have a discriminatory effect on the conditions of supply and marketing of goods to the detriment of foreign suppliers. To give but a few examples, mention should be made of the clear refusal to import, of quantitative restrictions of imports, of the imposition of more onerous marketing conditions for imported products than those applied to national products, or of conditions which are discriminating against the advertising of foreign

products or against information to imported products as far as retailers are concerned.

The purpose of the granting of exclusive exporting rights may differ, but the discriminatory effects are the same. By reserving this right or by granting exclusive rights to an enterprise or other body, the State generally aims either at supplying the domestic market on a priority basis or at selling at varying conditions according to whether the products are sold on domestic or on foreign markets. In both cases, the result is discrimination in supply conditions against who nationals of other Member States use the products in question.

197. Following a number of recommendations addressed by the Commission to the Member States concerned by virtue of Article 37(6) of the EEC Treaty, the Member States have carried out certain adjustments to their monopolies during the transitional period. In the recommendations sent by the Commission to three Member States (France, Germany and Italy) on 25 November and 22 December 1969, and relating to 12 monopolies in these States, the Commission noted however that, in most cases, the exclusion of all forms of discrimination covered by Article 37 has not yet been assured.

In its recommendations, the Commission emphasized the fact that Article 37 which falls under the sub heading relating to the free movement of goods, and more particularly the Chapter concerning the removal of quantitative restrictions between Member States, aims at obtaining by the end of the transitional period, for products subject to a national monopoly of a commercial nature (or a similar system), the same results as those obtained for other products in application of Articles 30 to 34, that is to say, the free movement of goods.

The Commission also emphasized the fact that Article 37 is not restricted to demanding the removal of discriminations, which are the direct result of provisions applicable to the products of a monopoly, but aims at excluding discriminations that could still occur at the end of the transitional period and that could result from the special powers which the monopolies have with regard to the importation, and marketing on their domestic markets and exportation of certain products. This could also apply to their exports.

Generally speaking, the Commission was of the opinion that the best solution for reaching this result would be the abolition of the exclusive rights available to monopolies. The Commission therefore recommended that France and Italy, with reference to the monopolies on potash, basic

slag, matches, gunpowder and explosives on the one hand, and to the monopolies on lighters, flints, salt, cigarette paper and matches, on the other, should abolish the exclusive rights granted to these monopolies for importing, exporting or marketing these products insofar as trade between Member States is concerned.

It should also be recalled that the Commission has accepted the concept according to which Article 37(1) is directly applicable. The consequence of this direct applicability is that, in the absence of full monopoly adjustment, the national provisions which are incompatible with Article 37 can no longer be invoked.

It must however be stressed that, so long as a State harbouring monopolies refrains from declaring (in such form as it may consider appropriate) that nothing prevents the introduction of a system of free movement in the sector concerned, Article 37(1) stands in danger of continuing to lack real effect. Unless such action is taken by States, the attainment of the objective of Article 37(1) will be left to individuals as for example in cases where the matter of a State refusing to admit certain imports is taken to court. The Commission therefore considers that the Member States concerned, should in practice allow individuals to exercise their rights under Article 37(1) by taking the necessary measures in accordance with the obligation imposed on them by Article 5 of the EEC Treaty.

A number of special problems were raised in certain other cases.

198. This applied to the French petroleum system, not only because, as opposed to other application cases of Article 37, trade in petroleum products in France is not carried out by a single enterprise or body but by a fairly large number of enterprises which have received a special authorization to carry out trade and are subject to public authority control. In addition, big disparities still exist between the policies of the various Member States, particularly as regards commercial and energy policies. This has led the Commission to recommend that France amend or abolish certain discriminatory measures against nationals of other Member States in the matter of a limitation on unrefined petroleum imports originating in other Member States and on refined petroleum products from the same States, by encouraging the marketing of national unrefined petroleum and refined petroleum products on the French market. As regards a whole series of other provisions which allow the public authorities to bring about such discrimination, the Commission requested the French Government to see to it that all discrimination with regard to supply and marketing between nationals

of the Member States should be excluded when the above provisions are applied.

199. In the case of alcohol monopolies (which exist in France and in Germany) a particular problem arises from the application of Article 37(4) of the EEC Treaty according to which a monopoly of a commercial nature which includes a set of rules intended for facilitating the marketing of agricultural products, must apply the rules of Article 37 in that it ensures equivalent guarantees of employment and standards of living of the producers concerned, taking into account the possible adaptation by them and necessary specialization. In its recommendations addressed to the two governments, the Commission tried to take into account the problem which the absence of a common organization of the markets of ethylic alcohol of agricultural origin in the matter of the exclusion of discrimination required by Article 37. Although the Commission requested France and Germany to take the necessary measures for abolishing all discrimination between nationals of the Member States as regards ethylic alcohol of non-agricultural origin, brandies and spirits, it also pointed out those measures which the two Governments could either maintain or adopt for the purpose of safeguarding the basic objectives pursued at present by the national market organizations in both countries.

200. With regard to manufactured tobacco, no recommendations were made in 1969 to the two countries possessing a monopoly (France and Italy). This was due to the fact that a special procedure had been followed. It should be recalled that the French and Italian governments had undertaken to remove at the earliest possible date existing discriminations and to put end by no later than 1 January 1976 to exclusive rights in the matter of wholesale importation and marketing. This was done in February 1970 when the regulation on the establishment of a common organisation of the market for unmanufactured tobacco was adopted.

201. The adjustments of the different monopolies and other systems can be summarized as follows:

In almost all cases which raise no particular problems, the governments concerned formally promised the Commission that they would remove exclusive importation and marketing rights possessed by their monopolies as soon as possible. The abolition in the near future of the Italian *salt* and *cigarette paper* monopolies has been announced within the framework of the present Italian tax reform. The abolition of the *lighters'* monopoly was the object of a decree of 20 April 1971 which completely reorganized



this sector by introducing a manufacturing tax on lighters. This decree also provides for the abolition of the monopoly on *flints* which will enter into force on 21 April 1972.

The undertaking to abolish exclusive rights also referred to the monopoly on *matches* although no date has yet been set.

In France, a thorough reform of the *gunpowder and explosives* monopolies has already led to the setting up of a competing public enterprise.

The French Government has also committed itself to abolishing the exclusive rights of the monopoly on *matches* and to obeying the recommendation of the Commission with regard to the *potash* monopoly, but in the latter case only in so far as composite potash fertilizers are concerned. With regard to pure potash and potassium salts, the French Government emphasizes the importance of agricultural and regional development requirements in defending the retention of a monopolistic system. Similar arguments are put forward with regard to basic slag.

The provisions of the French *petroleum system*, referred to above, which led to discrimination among nationals of the Member States have been amended by the French Government in accordance with the Commission's recommendation.

Both the French and the Italian Governments have informed the Commission that they have adopted all the necessary measures which will enable them to meet the undertakings of February 1970 to abolish all existing discrimination with regard to the *manufactured tobacco* monopolies.

Finally, where the alcohol monopolies are concerned, measures have been taken by the German Government, following the Commission's recommendation. For its part, the French Government has announced repeatedly adoption in the near future of certain measures, although has not yet fulfilled its commitment.

It should be pointed out, however, that the problem, in this sector, of the introduction of free movement still remains despite the adoption of measures which the Commission believe, in its recommendations, were indispensable. The full adjustment of these monopolies is conditional upon the common organization of the market for ethylic alcohol of agricultural origin. Since ethylic alcohol of non-agricultural origin cannot be distinguished, either physically or chemically, from alcohol of agricultural origin, any liberalization of non-agricultural alcohol might jeopardize the operation of the national organization of the agricultural alcohol market. It can be

claimed that the very *raison d'être* of these monopolies will automatically disappear with the establishment of a common organization of the market for alcohol of agricultural origin.

202. The Commission is analysing the various reactions of the Member States to its recommendations, and will re-examine the cases where particular problems are raised, in order to decide whether a particular case requires a procedure for infringement under the terms of Article 169 of the EEC Treaty should be engaged.

## **Part Three**

### **The development of concentration within the Community**

### **Preliminary remarks**

203. Empirical research on concentration enables the Commission to base its competition policy on a thorough knowledge of the structures of the economic branches under consideration. In Europe, there is as yet no coherent and systematic information on changes which take the form of the setting up of new firms, of changes in the size of firms or plants, of mergers and of the closing down of firms. It is at present not yet possible, on the basis of official European statistics or of the official national statistics of the Member States, to carry out a comparative European analysis on the situation, development, causes and effects of mergers. That is why the Commission drew up, in 1970 and 1971, a wide programme of studies, details of which are given in the chapter below. The last chapter comprises some general data on concentration operations between 1966 and 1970 among the member countries as well as between the Community and non-member countries. These data will help to bring to light the essential pattern of the concentration process.

#### **§ 1 - The Commission's analytical study programme on concentration**

##### *Purpose of the studies*

204. By limiting the studies on concentration to a small number of sectors only, the studies on concentration initiated by the Commission in 1970 represent a first step in throwing some light on the reality behind Europe on competition. In order to fill the gaps in statistical information available, the services of research institutes and of Member State experts were sought. The period under review ranges from 1962, the year in respect of which a census of European industrial activities provided some comparable data on concentrations at European level, to 1970. The guarantee that the information obtained will indeed be coherent and systematic is based a uniform methodology worked out by the Commission departments and imposed on the research institutes and experts engaged in the studies.

205. The aim of the studies on concentration is characterized by a four-stage programme.

- (a) The first stage consists of a description of the present level and development of mergers.
- (b) The second stage will require a study of the causes, and more particularly, the effects of economic concentration in Community countries.
- (c) An appropriate choice of the economic data relating to the input, production, and output of the individual firms will, in the third stage, enable a definition to be given of the logical pattern of the merger process. To quote only a few examples, is it true that control of supplies determines market power in selling? Does the concentration process in a given sector begin with investment? Does the concentration process follow specific patterns in different sectors? Is it possible to define "types" of concentration processes grouped by criteria such as technology or product characteristics?
- (d) The fourth stage will see efforts to determine whether concentrations in a particular sector provide conclusions concerning the predictable situation in the future as regards competition.

Whether this programme of studies can be carried out and achieved in the four stages will depend not only on the possibilities available to the research institutes and national experts for overcoming the difficulties in obtaining statistical data, but also on the availability of staff and financial means at the disposal of the Commission.

#### *Methodology to be applied*

206. In order to put into practice the methodology developed by the Commission for studies on concentration, it was necessary to adopt a pragmatic approach in the matter. This required the following four steps, in each of which the final aim, i.e. to obtain comparable European statistical data on concentration was of primary importance:

- choice of sectors to be studied;
- preparation of a framework which will enable the research institutes to use the results of the studies on a uniform basis;
- drawing up of a catalogue definitely fixing the choice and definition of the factors for measuring concentration, that is to say, the groups, units, and variables to be taken into account. For this purpose the definitions of the "Office statistique des Communautés Européennes" have been used as far as possible;

— determination and justification of indices of concentration to be drawn up with aid of the studies envisaged.

207. Three considerations govern the choice of sector. Firstly it was important that the range of branches cover, in each Member State, as large as possible a section of industrial activity. On the other hand, it was necessary to see to it, even if this meant sacrificing extensive coverage, that the homogeneity of sectors should be safeguarded as much as possible, that is to say, in official statistical terminology, that clearly defined sub-groups based on manufactured products should be taken into consideration. It was then necessary to find those groups in which concentration analysis would be of particular interest, that is to say those sectors in which the degree of concentration was high, medium or low. Finally, the probability of obtaining statistical data for those sectors rather than for others also played a part.

208. At present, the programme of studies concerns the following sectors classified according to the nomenclature adopted by the "Office statistique des Communautés Européennes" (NICE):

23: Textile industry

Sub-sectors studied:

- 232 — Processing of textiles by wool processing machinery
- 233 — Processing of textiles by cotton processing machinery
- 237 — Hosiery

27: Paper industry and manufacture of paper articles.

31: Chemical industry

Sub-sectors studied:

- 313.1 — Specialized manufacture of pharmaceutical products in bulk or packed
- 313.2 — Manufacture of photographic products (photographic films, discs and paper and secondary products)
- 313.5 — Manufacture of household products (polishes, wax-polishes and products for metal polishing, etc.)

36: Construction of non-electric machines

Sub-sectors studied :

- 361 — Construction of agricultural machinery and tractors
- 362 — Construction of mechanical office equipment

- 364.1 — Construction of textile machinery and accessories
- 366.3 — Construction of machines for the mechanical preparation of construction equipment
- 366.4 — Construction of civil engineering equipment and equipment for narrow-gauge industrial railways
- 366.5 — Construction of lifting and maintenance equipment
- 37: Electro-technical construction
  - Sub-sectors studied:
    - 375 — Construction of electrical, radio, television, electro-acoustic apparatus
    - 376 — Construction of electrical household appliances
- 38: Construction of transport equipment
  - Sub-sector studied:
    - 385.1 — manufacture of bicycles, motor-cycles and mopeds

209. *Table 1* gives some structural data for 1962 (beginning of the period under review) (number of persons employed and turnover for these sectors and the selected sub-sectors in percentages of the total number of persons employed and the aggregate turnover of the industry) as well as the concentration rates of the sub-sectors (share of persons employed by the eight largest enterprises in percentages of the total number of persons employed in the sub-sector).<sup>1</sup>

No attempt to interpret this table will be made here. The purpose of the table is only to provide a fairly modest quantitative illustration of the economic importance and the different levels of concentration in the sectors chosen for the Commission's studies on concentration, in respect of the year serving as a basis for the studies.

210. The aim of the system of classification worked out for the quantitative part of the sectoral analysis is not only to enable a comparison and use of the results obtained to be made, it should also provide the Commission with the possibility of making use of statistical material on concentration which is already available elsewhere.

211. The research institutes and national experts in charge of the studies are required to present the quantitative results of the concentration analysis obtained for each sector in the following form:

1. Definition and delimitation of the branches

<sup>1</sup> Data is not available for the German Federal Republic.

2. Firms, units of economic activity and number of persons employed
  - 21.1 Firms and number of persons employed, totals and in order of importance
  - 21.2 Units of economic activity and number of persons employed, totals and in order of importance
3. Fully owned capital, aggregate gross wages and salaries
  - 31.1 Firms and fully owned capital, totals and in order of importance
  - 32.1 Firms and aggregate gross wages and salaries, totals and in order of importance
4. Turnover, net value of production, gross added value on the cost factors, cash-flow, gross investments and net profits
  - 41.1 Firms and turnovers, totals and in order of importance
  - 41.2 Units of economic activity and turnover, totals, and in order of importance
  - 42.1 Firms and net value of production, totals and in order of importance
  - 42.2 Units of economic activity net value of production, totals and in order of importance
  - 43.1 Firms and gross added value on the cost factors, totals and in order of importance
  - 43.2 Units of economic activity, gross added value on the cost factors, totals and in order of importance
  - 44.1 Firms and cash-flow, totals, in order of importance
  - 45.1 Firms and gross investments, totals and in order of importance
  - 45.2 Units of economic activity and gross investments, totals and in order of importance
  - 46.1 Firms and net profits, totals, and in order of importance
5. Imports and Exports
  - 51.1 Total imports of firms from the different Member States, from the EEC as a whole and from all non-member countries
  - 52.1 Total exports of firms to the different Member States, to the Community as a whole and to all the non-member countries



Table 1—Structural data and concentration ratios

Sectors <sup>a</sup>	Structural data <sup>1</sup>					
	G		F		I	
	(a)	(b)	(a)	(b)	(a)	(b)
23 <i>Textile Industry</i>	5.0	4.3	7.2	6.4	10.7	7.9
232	0.7	0.7	1.5	1.7	2.6	2.2
233	1.4	1.1	1.9	1.5	2.7	2.0
237	1.2	0.8	1.3	0.9	2.1	1.4
27 <i>Paper-cardboard</i>	1.6	1.8	1.7	2.1	1.4	1.8
31 <i>Chemical industry</i>	4.1	6.2	4.0	6.4	4.2	7.7
313.1 } 313	0.9	1.1	1.5	2.4	1.4	2.5
313.2 }						
313.5 }						
36 <i>Construction of non-electrical equipment</i>	9.4	8.6	5.3	6.0	5.1	6.0
361	0.6	0.8	0.5	0.6	0.3	0.5
362	0.5	0.4	0.4	0.4	0.5	0.6
364.1 → 364	0.5	0.4	0.2	0.2	0.6	0.7
366.3 } 366	1.5	1.5	0.7	1.0	0.5	0.7
366.4 }						
366.5 }						
37 <i>Electro-technical construction</i>	8.0	6.4	5.2	5.2	4.5	5.0
375	3.0	2.1	1.4	1.5	0.3	0.5
376	0.8	0.8	0.4	0.4	0.3	0.5
38 <i>Construction of transport equipment</i>	5.8	6.9	9.6	9.5	7.3	8.7
385.1 → 385	0.2	0.1	0.2	0.3	0.5	0.6
2/3 <i>Manufacturing industries</i>	76.3	81.5	74.5	82.6	80.3	83.6
<i>Industries</i>	100.0	100.0	100.0	110.0	100.0	100.0
<i>Total of sub-sectors (three digit classification)</i>	12.9	11.6	11.7	13.0	13.2	14.0
<i>Total of sectors (two digit classification)</i>	33.9	34.2	33.0	35.6	33.2	37.1

(a) Labour employed in % of industries

(b) Turnover in % of industries

<sup>1</sup> OSCE (European Communities Statistics Office) Studies and Enquiries, 2, 1969; Final results of the 1963 industrial census p. 110 et seq.<sup>2</sup> LOUIS PHILIPS, *Effects of Industrial Concentration: A cross-section analysis for the Common Market*, Amsterdam-London 1971, Statistical Appendix, p. 185 et seq.<sup>3</sup> Sectors defined in the "Nomenclature des industries établies dans les Communautés Européennes" (NICE). Data is only available for the three digit classification positions.<sup>4</sup> Industries—Manufacturing industries and mining industries + Building and civil engineering + electricity, gas and water.

of the selected sector groups for 1962

Structural data <sup>1</sup>						Concentration ratios <sup>2</sup>			
N		B		EEC		Percentage of persons employed in the eight largest enterprises			
(a)	(b)	(a)	(b)	(a)	(b)	F	I	N	B
6.4	5.0	9.3	9.0	7.0	5.7	—	—	—	—
1.0	0.8	2.1	2.6	1.4	1.3	22	24	33	31
2.4	1.7	2.4	2.3	1.9	1.5	24	23	42	36
1.1	0.6	1.4	0.9	1.4	0.9	12	7	40	15
1.8	2.4	1.7	1.8	1.6	1.9	—	—	—	—
4.5	6.9	3.5	5.0	4.1	6.5	—	—	—	—
1.0	1.4	1.4	1.9	1.2	1.8	22	24	48	61
5.1	4.0	3.7	3.5	6.9	6.9	—	—	—	—
0.1	0.1	0.2	0.3	0.5	0.6	42	21	41	69
0.4	0.4	—	—	0.4	0.4	84	94	81	—
—	—	0.4	0.3	0.4	0.3	35	44	43	70
0.6	0.5	1.1	1.0	1.0	1.1	21	30	33	59
7.0	6.2	4.7	3.8	6.3	5.7	—	—	—	—
6.7	5.9	1.0	0.7	2.2	1.8	51	47	98	85
—	—	0.2	0.1	0.5	0.6	39	55	57	50
8.4	10.7	5.5	7.6	7.2	8.2	—	—	—	—
—	—	0.2	0.2	0.2	0.2	52	65	46	60
73.6	80.1	73.9	80.0	76.3	82.0	—	—	—	—
100.0	100.0	100.0	100.0	100.0	100.0	—	—	—	—
15.1	13.8	12.1	12.1	12.7	12.4	—	—	—	—
33.2	35.2	28.4	30.7	33.1	34.9	—	—	—	—

- |      |   |   |
|------|---|---|
| 6.   | Degree of concentration   |   |
| 61.1 | Growth in the number of firms   |   |
| 61.2 | Growth in the number of units of economic activity                                  |   |
| 62.1 | Average value of the variable per firm and per person employed                      | } For the variables<br>21, 31, 32,<br>41, 42, 43,<br>44, 45, 46<br>respectively |
| 62.2 | Average value of the variable per unit of economic activity and per person employed |   |
| 63.1 | Variation coefficients for firms  |   |
| 63.2 | Variation coefficients for units of economic activity                               |   |
| 64.1 | Gini coefficients for firms   |   |
| 64.2 | Gini coefficients for units of economic activity                                    |   |
| 65.1 | Linda indices for firms   |   |
| 65.2 | Linda indices for units of economic activity  |   |
| 66.1 | Concentration ratios for firms  |   |
| 66.2 | Concentration ratios for units of economic activity                                 |   |
| 67.1 | Herfindahl-Hirschman indices for firms  |   |
| 67.2 | Herfindahl-Hirschman indices for units of economic activity                         |   |
| 68.1 | Entropy indices for firms   |   |
| 68.2 | Entropy indices for units of economic activity                                      |   |

212. The drawing up of a list of definitions of variables and the choice made with regard to the indices of concentration should be considered in the perspective of coordinated research on concentration. Moreover, a thorough and scientific analysis of the situation and development, as also of the causes and effects of economic concentration requires a wide-range of data and of measurement processes.

It is evident from the different mathematical principles applied in the various methods of calculation for the purpose of measuring concentration, that no concentration measurement can provide an answer to all the questions raised by competition policy. Each of

the known methods for measuring concentration brings certain aspects to the fore while neglecting others. Thus, in every case concentration should be measured by a variety of methods.

Finally, statistical reality does not permit the limitation of studies to only one or two measurements of concentration. Since existing statistics differ considerably from one sector to another and from one country to another (for example, there exists sometimes individual data only while in other cases only data by order of magnitude are available) the means for calculating concentration indices are also variable. In order to obtain at least one or two comparable indices of inter-sectorial or inter-regional concentration, recourse must be had to the greatest extent possible, to the whole available range of calculation methods.

213. In view of the need for extensive information with regard to concentration analysis, the methodology worked out by the Commission's departments represents a minimum programme only. Thus, the required data do not make it possible directly to evaluate financial inter-penetrations of the vertical concentration process. In addition, the tertiary sector, which is becoming increasingly important, has had to be omitted from the present choice of sectors. From the point of view of available statistics, the required data should be considered as a maximal programme. It follows, and this has been clearly shown in previous studies, that changes must be made with regard to the definitions in the course of the studies and it will not be possible to take certain variables into consideration.

#### *The present state of progress*

214. In order to bring the studies of concentration to a successful conclusion, two obstacles must be overcome, namely the problem of statistical information and that of the cost involved. As regards the problem of statistical information, it is necessary to know whether the research institutes in the various member countries are able to collect the necessary basic statistical material. The problem of cost is one of the limitations set by the Commission's financial capabilities. The criteria regarding statistical material and cost cannot be considered separately.

In order to take these criteria into account during the studies on concentration, the programmes of studies and the estimates of cost of the Member States' research institutes were to be submitted for detailed

examination by the Commission in 1970. The results of this analysis are:

The sub-division of the variables by firms and units of economic activity could give rise to serious difficulties in the various sectors. Whether this applies to all variables will emerge in the course of the studies.

The figures on average cost per sectoral group as indicated by the various research institutes shows considerable differences. In this case considerable differences can be noted from one sector to another. The textile industry and the construction of non-electrical machinery head the list.

215. On the basis of the results of this preliminary study, a study programme was prepared in 1971, the details of which are given in *Table 2*.

Table 2—Studies on concentration being undertaken or envisaged by the Commission with indications of the probable date of completion

Group of sectors NICE classification	Probable date of completion				
	Germany	France	Italy	Nether-lands	Belgium
23 Textile industry	1972	1972	1972		1972
27 Paper industry and manufac- ture of paper articles	1972	1972	1972		
31 Chemical industry	1973	1973	1972	1972	1972
36 Construction of non-electrical equipment	1973	1972	1973		
37 Electro-technical construction	1973	1973	1973	1972	1973
38 Construction of transport equipment	1972	1973	1972	1972	

It follows that the possibility of obtaining statistical material which takes into account the cost involved for the research institutes, and the financial possibilities of the Commission will be limited to six

groups of sectors to be studied in respect of the "large" countries of the EEC, namely Germany, France and Italy, and three groups of sectors to be studied in respect of the "small" member countries, namely Belgium and the Netherlands.

216. The present programme of studies represents only a first step in an attempt to describe and analyse concentration in the Community. The Commission considers, however, that this first step is needed to arrive at economically valid conclusions on concentration within the Common Market.

**§ 2 - Some orientation data concerning international interpenetration and concentration trends in the Community between 1966 and 1970**

*The statistics of international operations in the EEC  
used as basic material*

217. The present attempt to arrive at some orientation data concerning international inter-penetration and concentration trends in the Community is based on a systematic evaluation of cross-frontier acquisitions of holdings and on the setting up of subsidiaries as published in the specialized press. The basic statistical data represents, therefore, only a sample of all the international operations undertaken by enterprises within the EEC between 1966 and 1970.<sup>1</sup> The absolute figures given in the following tables should, therefore, be interpreted with extreme caution. As far as the question of knowing whether the presentation of structures and developments reflects reality to a sufficiently large extent is concerned, this depends on the degree to which the sample examined is sufficiently representative. It is not possible to give general indications on this subject. This question will be raised later when dealing with the interpretation of results.

218. Another reason why the present study can only be considered as a first attempt to trace international inter-penetrations and concentration trends within the Community is that:

— all data on transactions at purely national level are lacking;

<sup>1</sup> In relation to the data published in the "Memorandum on Industrial Policy" (the Community's industrial policy, Memorandum of the Commission to the Council, Brussels 1970, p. 89 et seq.), the number of samples has been increased as a result of additional studies. The general conclusions are, however, essentially the same.

- each operation is evaluated in the same way, that is to say, no differentiation between “large” and “small” cases is made;
- data on concentration is not sub-divided into horizontal, vertical and diagonal mergers (conglomerate);
- research on the causes of resulting structures and trends is not possible.

219. In spite of all the necessary reservations concerning the significance of the basic statistical material, the Commission is publishing the results of this study. In the first place, this is being done because better material is not available at present. Moreover, the Commission considers the publication of even approximate information is better than none at all.

#### *International operations in the EEC from 1966 to 1970*

220. *Table 3* lists international operations for the period from 1966 to 1970, in the Community, totals and sub-division by type of operation.

221. The types of operation include:

- acquisitions of Holdings, i.e. international financial acquisitions of an enterprise by at least one enterprise from another Member State, the range of possibilities stretching from minority acquisitions to the takeover of the capital of one enterprise by another;
- the setting up of joint subsidiaries which includes the setting up of new enterprises in one of the Member States by at least two enterprises, one of which is of a different nationality;
- the setting up of simple subsidiaries by means of which an enterprise from a non-member country or from a member country sets up a subsidiary in another member country.

In addition to the listing of the number of international operations by type, *Table 3* also indicates the number of participations in the operations. These figures show how many times enterprises have participated in international transactions. This does not necessarily mean that different enterprises are involved in each case. A particularly active enterprise may have participated several times in different international operations in the same year.

Table 3—Type and number of participations in international operations within the EEC from 1966 to 1970

Year	Types of operations						Aggregate of operations		Operations in number of participants		
	Acquisitions of holdings		Setting up of joint subsidiaries		Setting up of simple subsidiaries		Number of operations	Number of participations	Unilateral operations	Bilateral operations	Multilateral operations
	Number of operations	Number of participations	Number of operations	Number of participations	Number of operations	Number of participations					
1966	254	535	315	959	781	781	1 350	2 275	781	461	108
1967	228	468	299	840	830	830	1 357	2 138	830	444	83
1968	241	485	292	888	890	890	1 423	2 263	890	435	98
1969	265	525	324	946	989	989	1 578	2 460	989	472	117
1970	327	642	345	977	1 199	1 199	1 871	2 818	1 199	576	96



222. As regards the sub-division of international operations in relation to the number of participants, it should also be noted that:

- unilateral operations and the setting up of simple subsidiaries are one and the same operation;
- bilateral operations include the acquisitions of holdings and the setting up of joint subsidiaries by two participating enterprises;
- multilateral operations include all international transactions between three or more participating enterprises.

223. The data in *Table 3* show that international activity among EEC enterprises has developed constantly and with increasing growth rates during the period under review. Taking the figure 100 as a standard for international operations in 1966, one arrives at figures of 101 for 1967, 105 for 1968 and 117 for 1969, to reach a figure of 139 for 1970. Among the types of operation, the setting up of simple subsidiaries (or unilateral operations) shows, without exception, the most important growth rate (154 for 1970 against 100 for 1966). The trend has not been constant for other types of operation. It should be noted, however, that the increase in the acquisition of holdings has been more marked than that for the setting up of joint subsidiaries. Bilateral operations have also tended to increase, whereas multilateral operations have been clearly regressive.

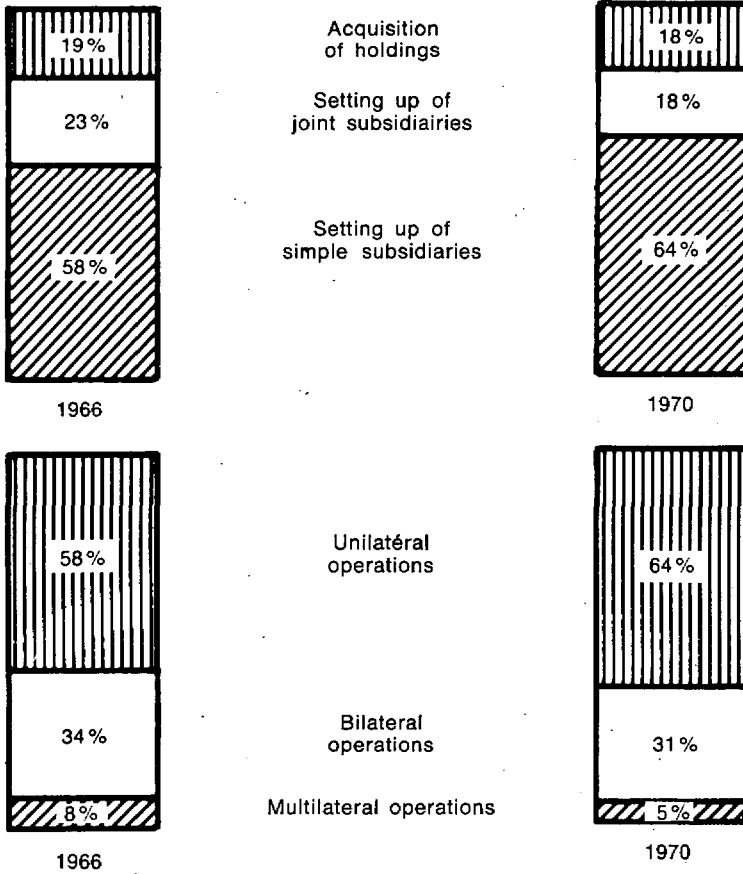
224. The observations concerning multilateral operations are confirmed by the reduction in the average number of participants per international operation. Whereas in 1966, 2.11 enterprises were concerned in the acquisition of holdings and 3.04 enterprises were concerned in the setting up of joint subsidiaries, these figures for 1970 dropped to 1.96 for acquisitions and 2.83 for joint subsidiaries respectively.

225. The structure of economic operations in the EEC has not changed in essence during the period under review (see *Graph 1*). The classification in percentages of the various types of operation has remained the same in spite of differences in rate of development over a period of time.

As far as types of operation are concerned, it is the setting up of simple subsidiaries that predominates, and this is followed by the setting up of joint subsidiaries and the acquisition of holdings.

Graph 1

Structure of international operations in the EEC, classified by type of operation - 1966 and 1970



With regard to international operations sub-divided by numbers of participants, unilateral operations are increasing their lead followed by bilateral and multilateral operations.

226. A conclusion can already be drawn from these general data. It is clear that international inter-penetration has continued to increase in the EEC between 1966 and 1970. Linked with this are concentration processes, although to a lesser degree. This is shown by the increasing total of the number of cases of the acquisition of holdings and the setting-up of joint subsidiaries.

*Sub-division by region of international operations in the EEC*

227. In the first phase with regard to the sub-division of international operations in the EEC by region, the three forms of operation and the operations as a whole have been split according to participation of firms of EEC countries and of non-member countries (see *Table 4*).

As far as the number of operations is concerned, the share of non-member country firms in all forms of operation during the whole of the period under review (with the exception of the setting up joint and simple subsidiaries in 1968) was nearly twice that of the share of Member State firms.

228. With reference to the number of participations in international operations, enterprises of non-member countries predominate in the setting up of simple subsidiaries. On the other hand, as regards the acquisition of holdings and the setting up of joint subsidiaries, the "participation-frequency" of Member State firms is higher. Where the acquisition of holdings in the EEC is concerned, there were always approximately two member country firms for one non-member country firm. In the case of the setting up of joint subsidiaries in the EEC, the corresponding rates have moved from three EEC participants between 1966 and 1968 to two in 1969 and 1970,

229. During the period under review, operations carried out solely between Member State firms registered a marked growth as compared with operations carried out in the EEC with the participation of non-member country firms.

Table 4—Sub-division by region of international operations and forms of operations in EEC countries and non-member countries from 1966 to 1970

Year	Number of operations								Number of participations in the operations							
	Participations		Setting up of joint subsidiaries		Setting up of simple subsidiaries		Total		Participations		Setting up of joint subsidiaries		Setting up of simple subsidiaries		Total	
	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC
1966	33	67	34	66	35	65	35	65	67	33	72	28	35	65	58	42
1967	34	66	33	67	37	63	35	65	68	32	72	28	37	63	57	43
1968	32	68	41	59	42	58	40	60	68	32	72	28	42	58	59	41
1969	40	60	35	65	39	61	38	62	71	29	68	32	39	61	57	43
1970	35	65	34	66	39	61	38	62	67	33	69	31	39	61	56	44

N.B. in percentages of the respective forms of operation. EEC — operations solely between Member State firms. NMC — operations in which non-member country firms participated.

On the other hand, with regard to the number of participations in international operations, the proportion of non-member country enterprises increased during the period under review (see *Graph 2*). It is true that the growth rate of intra-Community transactions was higher in comparison with non-member country participations, for the setting up of joint subsidiaries, and, to a lesser extent, for participations as such.

230. The period under review is too short and the basic statistical material too limited to draw conclusions from the results so far obtained as regards an increased activity of member country firms in international operations carried out in the EEC as compared with non-member countries. Certain implications, however, do point in this direction.

231. Before going into a more detailed regional analysis of the basic statistical material, certain remarks concerning methodology become necessary in order to avoid errors of interpretation with regard to the results. So far, there was some measure of certainty in presuming that any differences in the sampling of the basic materials in relation to reality were evenly distributed for all the cases studied.

Structural data and trends would in this case come very close to reality. On the other hand, it is fairly certain that, if more or less all international operations are included in the sampling relating to the Benelux countries, and, with few exceptions, relating to France, there are considerable gaps in the basic data for Germany and Italy. A comparison of the nature and frequency of international operations in the various member countries can therefore only be made with reservations.

232. The regional sub-division of international operations according to form of operation in the different member countries does not give rise to reservations of the same magnitude (see *Table 5*).

Both for 1966 and 1970, the picture is the same, namely the international setting up of simple subsidiaries is the most frequent type of international operation. On the other hand, with regard to the acquisition of holdings and the setting up of joint subsidiaries, the places held by the Benelux countries and the "large" three member countries are reversed. Thus international acquisitions were more frequent in Germany, France and Italy than in the Benelux countries. In the latter, the setting up of joint subsidiaries played a much more important part, while, especially in Germany, such operations were relatively few.

Graph 2

**Growth of international operations in the EEC from 1966 to 1970**

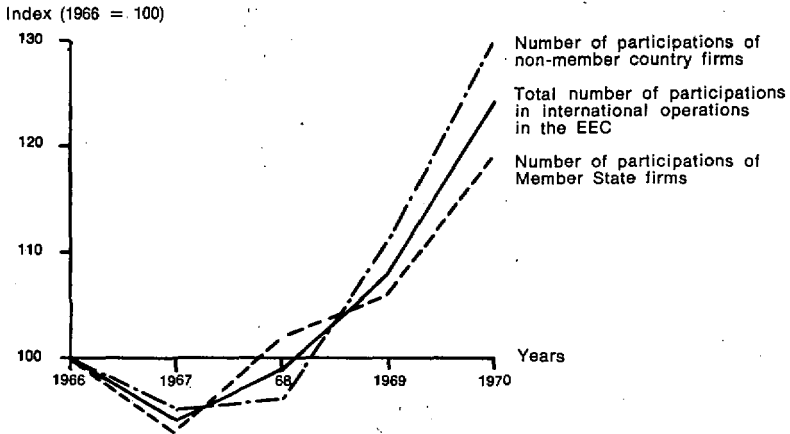
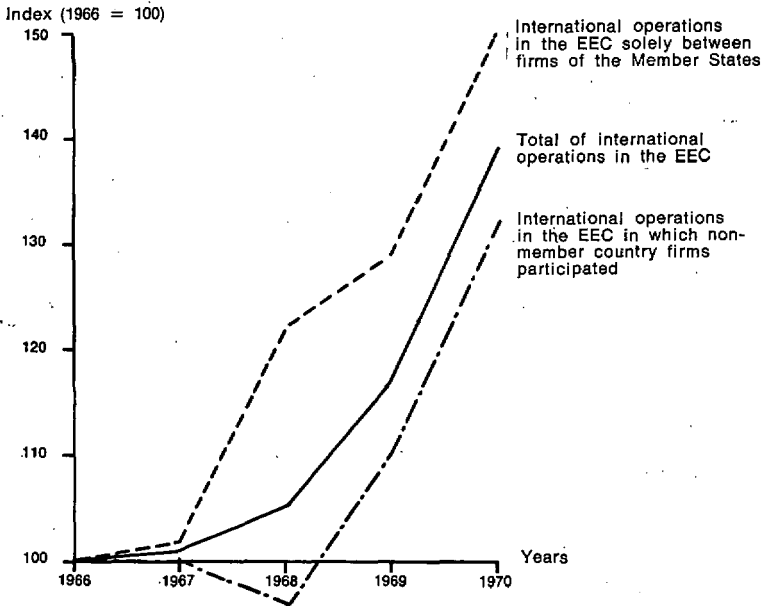


Table 5—Sub-divisions by region of international operations according to their form in the Member States of the EEC in 1966 and 1970

Form of operation <sup>1</sup>	1966							1970						
	G	F	I	N	B	L	EEC	G	F	I	N	B	L	EEC
Acquisition of holdings	22	25	20	14	15	15	19	18	25	19	19	11	10	18
Setting up of joint subsidiaries	12	21	18	35	29	32	23	11	22	17	21	20	26	18
Setting up of simple subsidiaries	66	54	62	51	56	53	58	71	53	64	60	69	64	64
Total	100	100	100	100	100	100	100	100	100	100	100	100	100	100

<sup>1</sup> in % of the total number of operations.

233. The above-mentioned reservations are fully valid with regard to the sub-division of international operations among Member States listed in *Graph 3*. The fact that it is necessary to have reservations concerning the structural data is also reflected in the results of an initial attempt at regional weighting of basic data. Based on the empirical observation that if absolute values change in time, the structures remain stable at least from a medium-term point of view, the data used were taken from the European Industrial Census of 1963. When weighting the number of operations with the share of the various Member States in the total number of firms, the order of the countries in terms of the frequency of international operations in their territories would be as follows for 1966 as well as 1970: Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

234. Conclusions regarding the development of international operations in the Member States are somewhat more certain. The largest increase was recorded in France (index 100 in 1966 to index 160 in 1970) followed by Germany, Luxembourg, Belgium, Italy and the Netherlands in that order.

235. The sub-division by region of the number of participations in international operations enables the share of non-member country firms to be determined (see *Graph 4*). According to the data available in 1966 and in 1970, it was the American firms in the EEC which most frequently intervened in international operations. Disregarding participation of member country firms the intervention of British and Swiss firms come next, followed by the remainder of the non-member countries, Scandinavian firms, and, in 1970, Japanese firms.

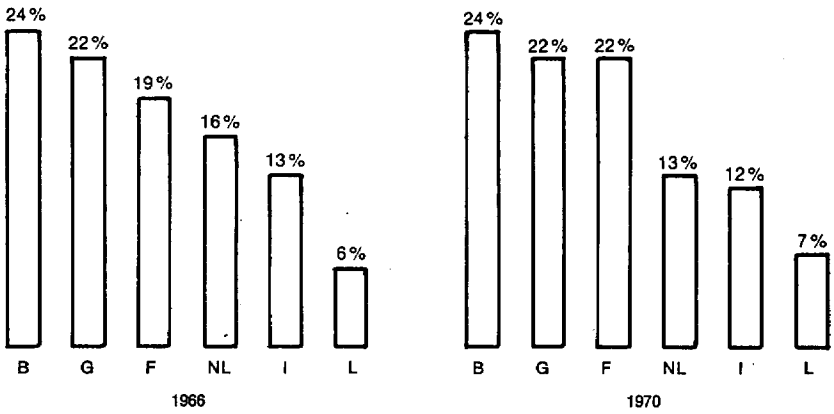
With regard to the development between 1966 and 1970, Germany, Great Britain and Switzerland have all moved up one place in the classification, whereas Italy, the Netherlands and Belgium have all dropped one place. There is no change in the order for the other countries.

236. In order to give a more detailed outline of the situation and development of international inter-penetration between Member State firms and the non-member country firms, details of inter-penetration by par-



Graph 3

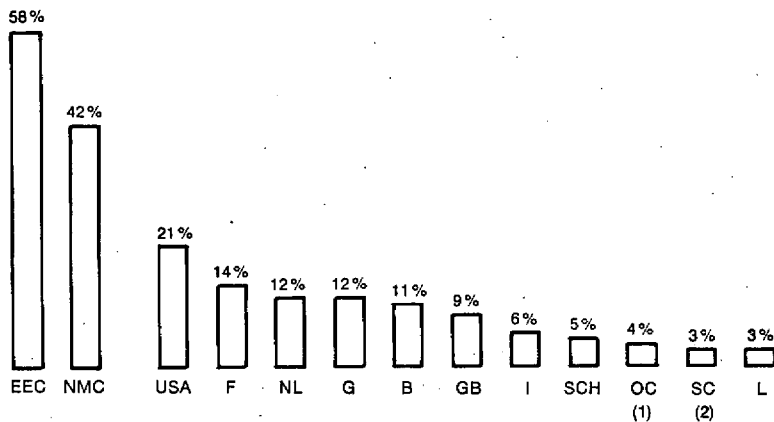
**Structure by region of international operations in the EEC  
in 1966 and 1970**



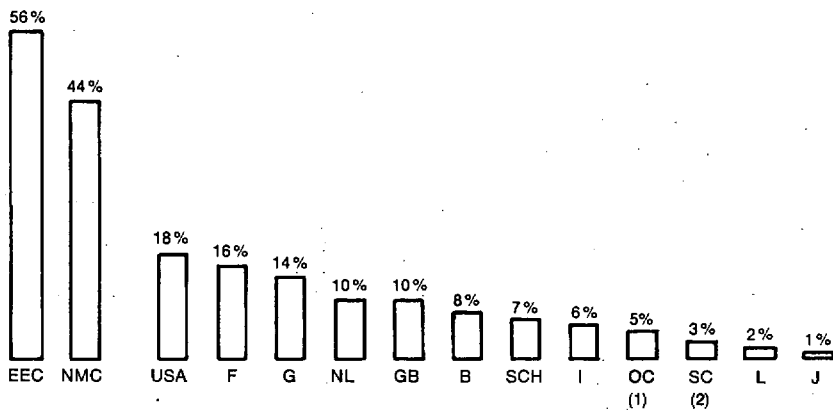
Graph 4

Structure by region of the number of participations in international operations in the EEC in 1966 and 1970

1966



1970



(1) OC = other non-member countries.  
 (2) SC = Scandinavian countries.

ticipation in bilateral operations have been tabulated according to the nationality of participating firms for both 1966 and 1970 (see *Table 6*).

On average, taking the whole of the period under consideration, the percentage of participation in bilateral operations with firms of other Member States only was 55% for German firms, 52% for French firms, 43% for Italian firms, 48% for Dutch firms, 61% for Belgian firms and 71% for Luxembourg firms.

237. Classified in order of percentage of participation in bilateral operations within the EEC, the countries of origin of the three main partners were:

- (a) for German firms: the United States, the Netherlands and Belgium in 1966 and France, the United States and the Netherlands in 1970;
- (b) for French firms: the United States, Belgium and Great Britain in 1966 and the United States, Germany and Great Britain in 1970;
- (c) for Italian firms: the United States, France and Switzerland for both 1966 and 1970;
- (d) for Dutch firms: the United States, Great Britain and Germany in 1966, and the United States, Germany and Belgium in 1970;
- (e) for Belgian firms: France, the United States and the Netherlands in 1966, and the Netherlands, France and the United States in 1970.

If the bilateral operations of Luxembourg firms are ignored, the group of the three main partners contains eight times as many firms from non-member countries in 1966 as against only seven times as many in 1970. It seems, therefore, that firms from the Member States have taken a more active part in bilateral operations within the Community.

*Sub-division by sector and region of international operations  
within the EEC*

238. In order to reduce to the greatest extent possible the margin of error when carrying out a sectorial analysis of international operations within the EEC, and to increase as far as possible the number of cases per sector, a detailed sub-division per branch had to be abandoned and a more general evaluation of seven economic branches had to be undertaken.

Table 6—Sub-division by region of participations<sup>1</sup> in bilateral operations within the EEC according to the nationality of the participants, in 1966 and in 1970

Bilateral operations between countries originating in	Firms originating in the EEC countries							Firms originating in non-member countries							Total	
	G	F	I	N	B	L	Total	GB	SC <sup>2</sup>	S	US	J	OC <sup>3</sup>	Total		
Germany with the firms of —	1966	—	11	3	14	13	1	42	10	2	7	37	0	2	58	100
	1970	—	24	3	17	8	2	54	9	3	12	19	<sup>4</sup>	3	46	100
France with the firms of ...	1966	11	—	7	12	20	2	52	12	1	7	25	0	3	48	100
	1970	21	—	6	5	11	2	45	13	2	8	26	1	5	55	100
Italy with the firms of ...	1966	7	17	—	7	7	1	39	9	3	14	25	0	10	61	100
	1970	7	15	—	5	7	5	39	9	3	9	33	0	7	61	100
Netherlands with the firms of ...	1966	15	13	2	—	14	0	44	22	2	5	25	1	1	56	100
	1970	24	8	3	—	17	2	54	12	2	7	24	1	0	46	100
Belgium with the firms of ...	1966	15	25	4	15	—	5	64	5	0	5	22	1	3	36	100
	1970	12	19	6	20	—	3	60	7	0	5	19	3	6	40	100
Luxembourg with the firms of ...	1966	11	16	6	22	6	—	61	6	0	16	11	0	6	39	100
	1970	11	14	14	14	4	—	57	4	4	17	14	0	4	43	100

<sup>1</sup> in % of the total number of participations. <sup>2</sup> SC — Scandinavian countries. <sup>3</sup> OC — other non-member countries. <sup>4</sup> — less than 1%.

The sectorial structure of international operations in 1966 and in 1970 are given in *Graph 5*. International operations have, in each case, been the most numerous in the metallurgy industry and the least numerous in the energy sector (with particular reference to the petroleum industry). The second place in forms of frequency of operation was taken by the services. Whereas the "other manufacturing industries" (rising from fourth to third place) and the foodstuffs industry (rising from sixth to fifth place) both rose by one place between 1966 and 1970, the chemical industry (dropping from third to fourth place) and the textile industry (dropping from fifth to sixth place) both dropped by one place during the same period.

239. During that period (see *Table 7*), the highest growth rates for international operations were recorded in the European foodstuffs industry. A large increase in international operations was also recorded in the services and in "other manufacturing industries" (publishing, the paper industry, the glass industry, the leather industry, the footwear industry, the furniture industry, etc.) as well as in the textile industry. The figures regarding metallurgy and the chemical industries remained fairly constant during the period under review. The number of international operations in the energy sector decreased appreciably.

Table 7—Development of international operations within the EEC by economic sector from 1966 to 1970 (1966 = 100)

Year	Metal-lurgy	Energy	Chemical industry	Textile industry	Other manu-facturing indus-tries	Food-stuffs industry	Services	Total
1966	100	100	100	100	100	100	100	100
1967	84	89	110	113	138	143	96	101
1968	94	100	108	100	106	162	122	105
1969	98	73	112	126	122	202	149	117
1970	116	62	105	139	152	272	195	139

240. With regard to the different branches of industry an attempt has been made, similar to the procedures used for regional sub-division, to

Graph 5

**Sectorial structure of international operations within the EEC  
in 1966 and in 1970**  
(in percentages)

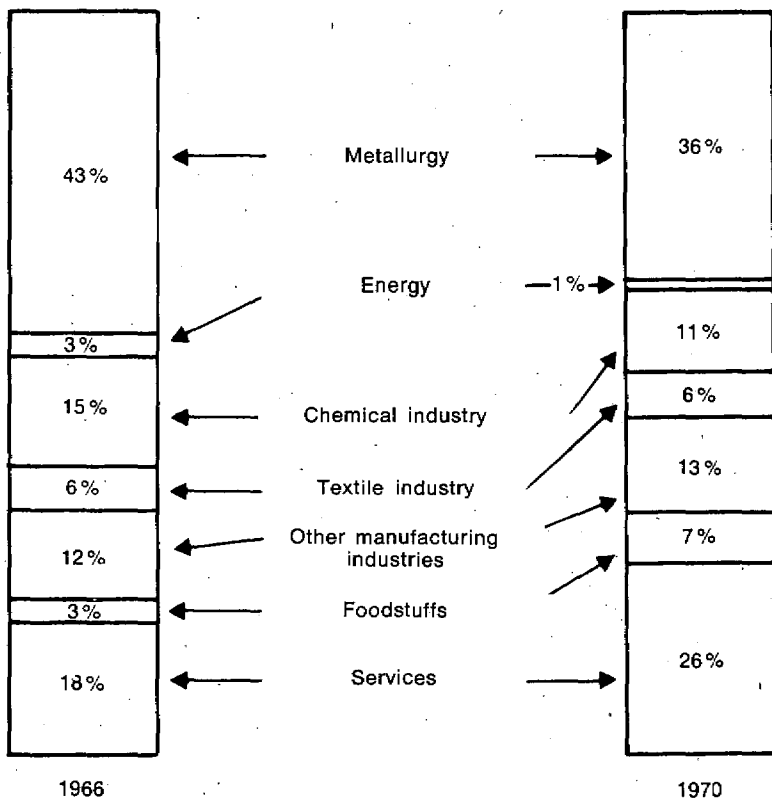


Table 8—Sub-division by regions and sectors of international

Structure by region	1968						
	G	F	I	N	B	L	EEC
	<i>Economic</i>						
Metallurgy	29	20	11	16	22	2	100
Energy	29	13	16	18	16	8	100
Chemical industry	15	22	20	18	22	3	100
Textile industry	21	15	12	9	39	4	100
Other manufacturing industries	26	21	15	12	24	2	100
Foodstuffs	15	21	17	17	24	6	100
Services	10	17	9	19	25	20	100
Total	22	19	13	16	24	6	100
	<i>Structure</i>						
Metallurgy	56	44	38	43	40	15	43
Energy	4	2	3	3	2	4	3
Chemical industry	10	17	23	17	14	8	15
Textile industry	5	4	5	3	9	4	6
Other manufacturing industries	14	13	14	9	12	5	12
Foodstuffs	2	4	5	4	3	4	3
Services	9	16	12	21	20	60	18
Total	100	100	100	100	100	100	100

operations within the EEC in 1966 and 1970 (in percentages)

	1970						EEC
	G	F	I	N	B	L	
<i>sector</i>							
	29	23	13	13	19	3	100
	31	17	17	13	22	0	100
	20	24	13	12	28	3	100
	27	20	12	15	22	4	100
	24	28	8	12	25	3	100
	26	20	14	20	18	2	100
	19	18	9	14	23	17	100
	24	22	12	13	22	7	100
<i>by sector</i>							
	42	38	40	34	30	17	36
	2	1	2	1	1	0	1
	10	12	13	11	15	5	11
	6	5	6	6	6	3	6
	13	17	10	12	15	6	13
	7	6	8	10	6	2	7
	20	21	21	26	27	67	26
	100	100	100	100	100	100	100



weight the number of international operations with the number of firms operating in a particular sector. Here again, it was necessary to have recourse to the results of the European Industrial Census of 1963. For 1970, even after weighting, the metallurgy industry would still retain its first place. The second place would be taken by the chemical industry, followed by the energy sector, other manufacturing industries, the foodstuffs industry and the textile industry. The true part played by international operations in the various branches of the economy is probably better reflected by this method rather than by the operations percentage classification according to sectorial groups. Failing better statistical material, a more detailed examination of the problem cannot be undertaken.

241. With regard to the sub-division by sector and by region of international operations within the EEC in 1966 and 1970, reference should be made to *Table 8* which represents a synthesis of the regional and sectoral analysis of basic data.

#### *Synthesis of results*

242. Any synthesis of the main results of this study must concentrate on the following points:

- between 1966 and 1970 there has been a net increase in international inter-penetration and trends towards concentration in the EEC;
- structures underwent limited changes only. This was true for the types of operation as well as for regional and sectorial sub-division of international operations within the EEC;
- certain factors tend to show that the activities of firms in the Member States with regard to international operations are on the increase as against non-member country firm activities.

243. Finally, the fact should once more be emphasized that the present analysis of international operations within the EEC is only a first attempt of a very limited nature. More accurate information can only be provided when a representative basic documentation has become available, when operations in the Member States can be included, and when the sub-division of operations in "small" and "large" cases will be possible. The possibilities of arriving at this result are very limited however. The other line of action which the Commission has undertaken in order to arrive at better conclusions concerning the situation and development of concentration within the Community by means of quantitative sectorial studies may be more promising.

## **Part Four**

### **Consumer protection**

## Preliminary remarks

The Commission's competition policy under the EEC Treaty is an essential means for increasing the effectiveness and smooth operation of the economic system, for promoting economic growth and for ensuring to the greatest possible extent that demand will be met. This does not only mean an increase in the offer of consumer goods, but also a continued improvement in quality. Competition policy fosters such improvements by encouraging innovation. In order that the consumer may fully benefit from the effects of the Common Market, and this is for him the one condition for viewing Europe as a reality, the Commission endeavours actively to promote the protection of, and provide information to the consumer. This action is intended to make the consumer more fully conscious of the part he has to play and capable of making an intelligent choice in the market, and also to protect consumer's rights and health.

It is clear that the vital activity of keeping the consumer informed should increasingly be carried out by consumers' associations. To be effective, the latter's activities should increasingly be coordinated at Community level, and here too the Commission has its part to play.

The Commission has, especially since the setting up of a consumer department whose task it is to study these questions, undertaken a number of activities which reflect its point of view in favour of a coordinated and effective consumer policy.

This policy had been worked out in cooperation with the consumer's contact committee and covers essentially the field detailed below.

### § 1 - Study of the Common Market's effects on consumers

244. *Price* differences still exist within the Common Market. This was shown in the latest investigation carried out on retail prices by the Statistical Office of the European Communities in 1970. These differences are not necessarily in contradiction with the concept of the integration of markets since appreciable price differences exist also within national markets.

In so far as these price differences are caused by infringements of the competition rules of the Treaty and especially by agreements on market-sharing, the Commission has used its competition policy to correct such differences. Thus, in 1970, several hundred exclusive dealing agreements were adapted to the Treaty's competition rules, and in 120 cases concerning other distribution systems, export prohibitions were removed.

Price differences will, however, continue to a large extent because, in many cases, they are based on structural differences between the various markets (taxation, earnings and consumer habits for example). The sellers take these different factors into account especially taxation rates—when they fix their prices in order to adapt them to the particular characteristics of each market.

245. Nevertheless, with regard to certain products listed in *Table 9*, the price differences are relatively small. These prices are taken from the figures in the latest census of 1970. This census which was carried out in large and medium-sized towns of the six EEC countries and included representative retail shops, concentrated on articles which are of particular value to the consumer or which play an important part in intra-Community trade or in trade with non-member countries.

Table 9<sup>1</sup>

Products	G	F	I	N	B	L
Pigmeat (cutlets)	116	100	126	104	104	100
Cooked ham	123	100	120	103	112	119
Whisky, selected brands <sup>2</sup>	100	112	109	101	113	102
Dress material, pure virgin wool guaranteed Wool Mark. Width 140 cm	100	102	111	114	113	104
Vacuum cleaners (with normal accessories) selected makes and models	109	100	116	111	114	113
Medium play 45 small-track records : two popular and fashionable songs, selected makes	110	105	106	100	104	106
Razor blades, selected brand	103	108	108	105	100	108

<sup>1</sup> In this Table and in those which follow, prices have been converted into indices based on the lowest price.

<sup>2</sup> For selected branded articles it is the manufacturers brand and not the marketing one which has been taken into consideration in order to ensure better price comparison.

Each article has been very accurately described in order that the prices of articles of similar quality may be noted in each sample store in every one of the six member countries so that full comparability of prices between Member States may be obtained and an objective idea of the true position may be given.

For other products, such as those listed in *Table 10*, the price differences are quite important.

Table 10

Products	G	F	I	N	B	L
Soluble coffee, selected brands	157	100	194	108	102	106
Blankets of synthetic fibre (220 × 240 cm) normal brands	174	100	117	137	152	187
Saucepans (Ø 20 cm) selected brand	116	172	100	118	148	122
Electric light bulbs, selected brands	178	106	141	134	116	100
Portable radios, current brands	100	167	155	129	143	111
Men's shirts in poplin cotton	169	179	168	100	110	140

246. One of the causes of price differences is *taxation*. For this reason, it was thought worthwhile analysing gross prices (i.e. including tax) and net prices (excluding TT<sup>1</sup>) in the six countries in respect of products retailed in November 1970. In 1970, all countries, with the exception of Italy, had introduced value added tax, but each country has its own rates, thus France applies four different tax rates rising from 7.5% (reduced tax) to 33.3% (higher tax), whereas the taxes applied in the three other countries vary from 5.5% to 11% in Germany, 4% to 12% in the Netherlands and 4% to 8% in Luxembourg. The following tables are based on prices including only VAT.

Finally every country applies its own system of taxation. While in France beverages are taxed in the same way, Italy applies different rates in different cases.

<sup>1</sup> TT — Turnover Tax.

In Italy where value added tax will be introduced in July 1972 only and in Belgium where it has come into force on 1 January 1971, there exist a great number of rates of VAT, which are difficult to assess. In these two countries a cascade type turnover tax had still been applied at the time of the study. The rates of tax for these two countries include therefore the turnover tax, which was levied at the retail level as well as the import equalization tax.

In order to examine the effect of the turnover tax on the price level in November 1970 comparable articles were divided into sub-groups e.g. all passenger cars were put in one and all meat products in another sub-group. As these sub-groups are relatively homogeneous, the rate of VAT or the turnover tax for all articles of one sub-group is the same. The gross-prices were converted into index prices on the basis of the lowest prices. The same was done with the net prices.

The tax charge has different effects in the different sub-groups.

Concerning meat and meat products, except canned meat, the differences between the net prices from one country to another are practically the same as those between gross prices i.e. taxation has practically no bearing.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	5.5	7.5	3.3	4	7	2
Price difference (tax included)	118	105	109	111	113	100
Price difference (tax excluded)	115	100	108	110	109	101

<sup>1</sup> in %.

The same is true for tyres and car spare parts.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	11	23	9.5	12	7.75	8
Price difference (tax included)	132	114	100	115	114	102
Price difference (tax excluded)	130	102	100	112	116	103

<sup>1</sup> in %.

On the other hand the prices for motor cars show on average a certain alignment, if taxes are disregarded.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	11	33.3	10.5	12 <sup>2</sup>	18.5	8
Price difference (tax included)	107	121	108	122	108	100
Price difference (tax excluded)	106	100	107	111	100	102

<sup>1</sup> in %.

<sup>2</sup> In the Netherlands in addition to the 12% tax, a special consumer tax of 15% is levied; this has been taken into account in calculating the indices for that country.

Taxation had had a definite incidence on the differences in Community prices for radios and sound producing equipment.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	11	33.3	13.5	12	31	8
Price difference (tax included)	100	138	107	120	119	125
Price difference (tax excluded)	100	115	105	119	100	128

<sup>1</sup> in %.

Taxation is not the only factor explaining considerable price differences for furniture and floor-coverings when comparing net prices in the different countries.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	11	23	9.5	12	14.5	10
Price difference (tax included)	127	129	100	124	119	112
Price difference (tax excluded)	131	121	100	127	119	117

<sup>1</sup> in %.

This was even more true for consumable household articles (detergents, cleaning powders) for which the differences between the net prices are greater than the differences between the gross prices.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	11	23	7	4	19	8
Price difference (tax included)	114	130	102	139	105	100
Price difference (tax excluded)	117	120	107	151	100	105

<sup>1</sup> in %.

The analysis from the taxation angle which has been made for sectors grouping a number of products can also be made for certain *significant products taken alone*. Thus the price of normal quality radios shows the incidence of taxation on price levels.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	11	33.3	9.5	12	31	8
Price difference (tax included)	100	167	155	129	143	111
Price difference (tax excluded)	100	139	157	128	121	144

<sup>1</sup> in %.

Disregarding tax, it is France and not Italy that offered the most expensive radios. In addition, the price disparity between the cheapest and the most expensive countries has decreased.

For dish-washing detergents in plastic containers (545 g) for example, there are considerable differences in price even before tax, which proves that taxation is not the only factor explaining these differences.

	G	F	I	N	B	L
Tax rates <sup>1</sup> (VAT or TT)	11	23	8.5	4	13	8
Price difference (tax included)	203	183	100	107	220	230
Price difference (tax excluded)	201	162	100	111	190	232

<sup>1</sup> in %.



Furthermore, each market has its own particular structures and characteristics, which explains why a *refrigerator* of current make is sold cheaper in Germany than in France or the Netherlands even when taxation is not taken into account.

	G	F	I	N	B	L
Tax rates <sup>1</sup>	11	23	9.5	12	21.5	8
Table top refrigerator, 140 litres, current make (one star)						
Price difference (tax included)	100	132	103	120	112	118
Price difference (tax excluded)	100	119	104	119	102	122

<sup>1</sup> in %.

It should be noted that there is a definite levelling of prices excluding tax which is not apparent in the prices inclusive of tax.

Furthermore, the consumer habits vary from one country to another. This explains why German consumers, who consume a relatively small quantity of bread, accept higher prices for this commodity.

For normal types of bread, it should be noted that taxation sometimes increases price differences, and sometimes decreases them.

	G	F	I	N	B	L
Tax rates <sup>1</sup>	5.5	7.5	3	4	0	2 <sup>2</sup>
Price difference (tax included)	157	121	114	100	100	121
Price difference (tax excluded)	161	117	115	100	104	124

<sup>1</sup> in %.

<sup>2</sup> Reduced temporarily to 2%.

Thus the difference between prices excluding tax in Belgium and Germany is 61% while the difference between prices inclusive of tax is only 57%.

This comparison between prices inclusive of tax and those exclusive of tax emphasizes the incidence of taxation on price differences.

247. *The standard of living of consumers has risen considerably since the entry into force of the Treaty of Rome.*

— Since that date, all the member countries have considerably increased their trade with their Community partners. In 1968, the volume of intra-Community trade was \$6 790 million and that of imports from non-member countries was \$16 150 million. In 1970, the volume of intra-Community trade had risen to \$42 800 million while imports from non-member countries had reached \$45 621 million. Thus, the share of intra-Community imports of gross imports had risen from 30% in 1958 to nearly 50% in 1970. Competition had thereby been stimulated and the consumer had benefited from a considerable increase in the quantity and range of products at his disposal.

— National accounts show that total *household expenditure* within the Community had trebled (+ 211%) between 1959 and 1971. Even if one takes the rising prices into account, this means that the volume of private consumption had nearly doubled (+ 96%) in the same period.

It is interesting to show the contribution of the Common Market in favour of the consumer by comparing the household expenditure figures with those of the United States and Great Britain in the period from 1959 to 1970.

*Percentage growth rate of private consumption from 1958 to 1970*

	The Community	United States	Great Britain
Current prices	+ 189	+ 113	+ 104
Net prices	+ 92	+ 35	+ 38

In 1970, the annual consumption expenditure per inhabitant for the various Community countries was \$1 645 for Germany, \$1 711 for France \$1 093 for Italy, \$1 359 for the Netherlands, \$1 590 for Belgium and \$1 650 for Luxembourg.

As against the national annual income per inhabitant, these figures represent approximately 70% for Germany and the Netherlands, 76% for Belgium and France, 78% for Luxembourg and 79% for Italy. The relatively high proportion of consumption expenditure in Italy may

possibly be explained by the fact that the national income per inhabitant is lower. On the other hand, it would seem that the propensity to save money is more marked in Germany and in the Netherlands than in the other Community countries.

Since the standard of living has risen, *the structure of private consumption* for all the Community countries has also developed since the establishing of the Common Market. The proportion of certain expenditure has diminished. Thus, while expenditure for food and clothing represented more than half the total household expenditure of the Community in 1959, this category of expenditure has at present dropped to around 40% (1970). In Italy, such expenditure initially represented about 60%, but has since fallen to 51%. Other expenditure such as "transport and communication", on the other hand, have increased from about 7% to 10%.

Furthermore, the structure of private consumption in various countries is influenced by *consumption habits* which differ from country to country. For example, the German consumer spent relatively more on furniture in 1970 than his French counterpart (13% as against 8%). On the other hand, the French consumer spent a considerable part of his budget on "personal health and hygiene" (11% against 4% in Germany).

The considerable increase in intra-Community trade and, therefore, of products on the market, as well as the rise in the standard of living have resulted in an appreciable improvement in the conditions of the consumer in the Common Market between 1958 and 1971.

## § 2 - General information for the benefit of the consumer

248. Above all it is important to impress upon the parties concerned and particularly the consumers themselves the importance of the part they have to play in our economy and to keep them informed of the advantages offered by a Common Market to the consumer.

Among the Commission's activities in this field meetings held with those responsible for TV consumers' programmes of the six Member States and with the consumers' representatives are of vital importance. Three meetings were held in 1970 and 1971 in Brussels, Berlin and Rome respectively.

The accelerated growth and diversification of production, with their inevitable consequences for the natural environment, and also the growing importance of advertising result in the consumers requiring more and more objective information and protection in order to adapt themselves to constantly changing situations with regard to the economy and the markets. This need is greater for those whose income level is fairly low and whose educational level is also lower. Television can no doubt play an important part in providing this kind of information. It is for this reason that the meetings were organized. They were based on films and working documents and their purpose was to reveal the best method of presentation and argumentation to inform and increase the awareness of the television audience on subjects interesting the consumer in general or subjects linked with the life and work within the Community so that the participants could exchange views on their experiences.

The Commission also provides information to the consumer and other interested circles by means of symposia, publications, booklets and information stands at fairs and exhibitions.

### **§ 3 - Participation in the work of international organizations**

249. The Commission is taking an active part in the work of certain international organizations for the information and protection of the consumer. The Council of Europe and the OECD are attaching increasing importance to these questions. The Council of Europe has just finished a study, begun in 1968, on misleading advertising. A second report concerning the education and information of the consumer is being prepared. Finally, another working party has begun the study of unfair or misleading contract clauses. The OECD is about to complete the report on labelling and comparative testing of products, and will shortly undertake a study of the safety of products and of consumer credit.

In addition to the work of these two international organizations, the International Standardization Organization (ISO) is responsible for preparing and recommending standards for many products of interest to the consumer and has carried out studies directly concerning the consumer on quality labels corresponding with certain standards, of the use of labels for information purposes and of the working out of standards for comparative tests.

#### § 4 - Taking consumer interests into consideration in Commission proceedings

250. The *harmonization of laws* which is being carried out within the framework of the general programme for the *elimination of technical barriers* of 28 May 1969, raises problems concerning the protection of the consumer's health, the defence of the economic interests and the provision of information.

In the *foodstuffs field*, work is being carried out on a variety of products, such as extracts of coffee and tea, yeasts, various sauces, bakery, confectionery, beer, ice-cream, baby foods, starches and starch flour and pesticide residues, irradiated foods, additives to animal feedingstuff and DDT.

The defence of the consumer's interest is especially concerned with the appellation, composition and specific purity of products as well as with the problem of additives. These data should figure on the labels, should be accurate and provide all the information required by the consumer.

As regards additives, their use should be reduced to a minimum and be confined, where necessary, to certain fixed proportions.

As regards labelling, the work of harmonizing national food laws is being carried out pragmatically and product by product. Because of this, there is a need for the drawing up of a model directive which will give the consumer full, clear and intelligible information. This work will be continued in 1973 in cooperation with the acceding countries.

It should be noted that, in the meantime, directives are already leading to improved labelling by the abolition of codes and signs which cannot be understood by the consumer, or by giving time-limits for perishable goods rather than the date of manufacture, as well as by adding instructions for use.

If the work carried out by the Commission in this field is important in view of the fact that it concerns directly the consumer's health, the work being carried out on products other than foodstuffs is equally important. This is the case for example of directives adopted for the motor vehicle sector with regard to air pollution, noise, brakes, steering systems and interior fittings of vehicles which have been the subject of a draft directive submitted to the Council. Mention should also be made of a directive regarding textile appellation. The consumers of the six Member States well in the future find on *textile* products every-

where the same appellations and exact data on the fibre composition. In addition, a label giving cleaning or washing instructions, an indispensable complement with regard to appellation labelling for the information of the consumer, may be the subject, at the appropriate time, of Community action.

251. The problem of *hire purchase* is also of great significance to the consumer. Indeed, the consumer should be in a position to compare the different offers on the market and to make his decision in full knowledge of the true cost of the credit offered to him. It is well known that a nominal annual rate of interest corresponds to a real rate of interest which is considerable higher. The possibility of including an indication of the real annual rate of interest in all such contracts has also been examined.

Furthermore, the consumer must increasingly be protected from abuse through door-to-door sales. He should be given, for example, a period of seven days in which to think things over in order to enable him to cancel his hire purchase contract if he so wishes.

During the three meetings held with Member State governmental experts in the last three years, the Commission defined and clarified the extent and scope of this matter for the consumer. This study of importance will be continued on a broader basis, taking into account the various legal aspects, with particular reference to private international law, bankruptcy law and the law on guarantees.

## **Annex**

## LIST

of *general measures* (Council Regulations and Commission Regulations, Regulatory Decisions and Notices), *individual Decisions* of the Commission and rulings of the Court of Justice relating to the application of articles 85 and 86 of the Treaty establishing the European Economic Community (EEC) and of Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC).\*

### REGULATIONS, REGULATORY DECISIONS AND NOTICES

#### I—Regulations and Notices of General Application

##### 1. Regulations implementing Articles 85 and 86 of the EEC Treaty.

Regulation No. 17 of the Council <sup>(1)</sup> of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty modified and completed by Regulation No. 59 <sup>(2)</sup>, No. 118/63 EEC <sup>(3)</sup> and No. 2822/71 EEC <sup>(4)</sup>

<sup>(1)</sup> OJ No. 13 of 21 February 1962, p. 204.

<sup>(2)</sup> OJ No. 58 of 10 July 1962, p. 1655.

<sup>(3)</sup> OJ No. 162 of 7 November 1963, p. 2696.

<sup>(4)</sup> OJ No. L 285 of 29 December 1971, p. 49.

Regulation No. 27 of the Commission <sup>(1)</sup> of 3 May 1962

First Regulation implementing Council Regulation No. 17, modified by Regulation (EEC) No. 1133/68 <sup>(2)</sup> (Form, content and other details concerning applications and notifications)

<sup>(1)</sup> OJ No. 35 of 10 May 1962, p. 1118.

<sup>(2)</sup> OJ No. L 189 of 1 August 1968, p. 1.

Regulation No. 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No. 17

OJ No. 127 of 20 August 1963, p. 2268.

##### 2. Regulations implementing Article 85 (3) of the EEC Treaty in specific fields.

Regulation No. 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices

OJ No. 36 of 6 March 1965, p. 533.

\* All references are to the French editions



Regulation No. 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements

OJ No. 57 of 25 March 1967, p. 849.

Regulation (EEC) No. 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices

OJ No. L 285 of 29 December 1971, p. 46.

### 3. Commission Notices

Notice on exclusive dealing contracts with commercial agents

OJ No. 139 of 24 December 1962, p. 2921.

Notice on patent licensing agreements

OJ No. 139 of 24 December 1962, p. 2922.

Notice on agreements, decisions and concerted practices in the field of cooperation between enterprises

OJ No. C 75 of 29 July 1968, p. 3  
Rectification O.J. No. C 84 of 28 August 1968, p. 14.

Notice on agreements, decisions and concerted practices of minor importance which do not fall under Article 85(1) of the Treaty establishing the EEC

OJ No. C 64 of 2 June 1970, p. 1.

## II—Transport

Regulation No. 141 of the Council <sup>(1)</sup> of 26 November 1962 exempting transport from the application of Council Regulation No. 17, modified by Regulations No. 165/54/EEC <sup>(2)</sup> and No. 1002/67/EEC <sup>(3)</sup>

<sup>(1)</sup> OJ No. 124 of 28 November 1962, p. 2751.

<sup>(2)</sup> OJ No. 210 of 11 December 1965, p. 314.

<sup>(3)</sup> OJ No. 306 of 16 December 1967, p. 1.

Regulation (EEC) No. 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway

OJ No. L 175 of 23 July 1968, p. 1.

Regulation (EEC) No. 1629/69 of the Commission of 8 August 1969 on the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and notifications pursuant to Article 14(1) of Council Regulation (EEC) No. 1017/68 of 19 July 1968

OJ No. L 209 of 21 August 1969, p. 1.

Regulation (EEC) No. 1630/69 of the Commission of 8 August 1969 on the hearings provided for in Article 26(1) and (2) of Council Regulation (EEC) No. 1017/68 of 19 July 1968

OJ No. L 209 of 21 August 1969, p. 11.

### III—Agriculture

Regulation No. 26 of the Council of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products, modified by Council Regulation No. 49 of 29 June 1962

OJ No. 30 of 20 April 1962, p. 993.

OJ No. 53 of 1 July 1962, p. 1571.

### IV—Coal and Steel

#### 1. Regulatory Decisions

Decision No. 24/54 of 6 May 1954 laying down in implementation of Article 66(1) of the Treaty a regulation on what constitutes control of an undertaking

OJ of the HA of 11 May 1954, p. 345.

Decision No. 26/54 of 6 May 1954 laying down in implementation of Article 66(4) of the Treaty a regulation concerning information to be furnished

OJ of the HA 11 May 1954, p. 350.

Decision No. 25/67 of 22 June 1967 laying down in implementation of Article 66(3) of the Treaty a regulation concerning exemption from prior authorisation

OJ No. 154 of 14 July 1967, p. 11.

#### 2. Notice

General guideline on competition policy in iron and steel structures

OJ No. C 12 of 30 January 1970, p. 5.

## DECISIONS ON INDIVIDUAL CASES

#### 1. Concerning Articles 85 and 86 of the EEC—Treaty

Decision of 11 March 1964 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Grosfillex-Fillistorf*

OJ No. 58, April 1964, p. 915  
IP (64) 66, 23 March 1964  
Bulletin 6-64, Ch. II, sec. 28  
7th (EEC) General Report (1964)  
sec. 67 (1964) C.M.L.R. 237

Decision of 1 June 1964 on an application for negative clearance under Article 2 of Council Regulation No. 17 *BENDIX-Mertens & Straet*

OJ No. 92, 10 June 1964, p. 1426  
IP (64) 100, 2 June 1964  
Bulletin 7-64, Ch. III sec. 32  
8th (EEC) General Report (1965)  
sec. 59 (1964) C.M.L.R. 416

- Decision of 30 July 1964 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Nicholas Frères-Vitapro*  
 OJ No. 136, August 1964, p. 2287  
 IP (64) 136, 3 August 1964  
 Bulletin 9/10-64, Ch. II, sec. 42  
 8th (EEC) General Report (1965)  
 sec. 60 (1964) C.M.L.R. 505
- Decision of 23 September 1964 on a proceeding under Article 85 of the Treaty *Grundig-Consten*  
 OJ No. 161, 20 October 1964,  
 p. 2545  
 IP (64) 149, 25 September 1964  
 Bulletin 11-64, Ch. II, sec. 3  
 8th (EEC) General Report (1965),  
 sec. 62 (1964) C.M.L.R. 489
- Decision of 22 October 1964 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Dutch Engineers and Contractors Association (DECA)*  
 OJ No. 173, 31 October 1964,  
 p. 2761  
 IP (64) 165, 28 October 1964  
 Bulletin 12-64, Ch. III, sec. 6  
 8th (EEC) General Report (1965)  
 sec. 61 (1965) C.M.L.R. 50
- Decision of 8 July 1965 on a proceeding under Article 85 of the Treaty *D.R.U.-Blondel*  
 OJ No. 131, 17 July 1965, p. 2194  
 IP (65) 134, 12 July 1965  
 Bulletin 9/10-65, Ch. II, sec. 6  
 9th (EEC) General Report (1966)  
 sec. 61 (1965) C.M.L.R. 182
- Decision of 17 September 1965 on a proceeding under Article 85 of the Treaty *Hummel-Isbecque*  
 OJ No. 156, 23 September 1965,  
 p. 258 p. 2581  
 IP (65) 161, 23 September 1965  
 Bulletin 11-65, Ch. I, sec. 3  
 9th (EEC) General Report (1966),  
 sec. 62 (1965) C.M.L.R. 242
- Decision of 17 December 1965 on a proceeding under Article 85 of the Treaty *Jallate-Voss and Jallate-Vandeputte*  
 OJ No. 3, 6 January 1966, p. 37  
 IP (66) 4, 10 January 1966  
 Bulletin 3-66, Ch. III, sec. 8  
 9th (EEC) General Report (1966),  
 sec. 63 (1966) C.M.L.R. — D1
- Decision of 27 June 1967 on a proceeding under Article 85 of the Treaty *Transocean Marine Paint Association*  
 OJ No. 163, 20 July 1967, p. 10  
 IP (67) 103, 7 July 1967  
 Bulletin 9/10-67, Ch. VI, sec. 7  
 1st General Report (1967), sec. 48  
 (1967) C.M.L.R. — D 9
- Decision of 26 February 1968 of an application for negative clearance under Article 2 of Council Regulation No. 17 *EUROGYPSUM*  
 OJ No. L 57, 5 March 1968, p. 9  
 IP (68) 43, 7 March 1968  
 Bulletin 4-68, Ch. III, sec. 5  
 2nd General Report (1968), sec 28  
 (1968) C.M.L.R.—D 1
- Decision of 17 July 1968 on a proceeding under Article 85 of the Treaty *Alliance de Constructeurs français de machines-outils*  
 OJ No. L 201, 12 August 1968,  
 p. 1  
 P-46 July 1968  
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 28 (L968) C.M.L.R.—D 23

- Decision of 17 July 1968 on a proceeding under Article 85 of the Treaty *S.O.C.E.M.A.S.*  
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2nd General Report (1968) sec. 28 (1968) C.M.L.R.—D 28
- Decision of 17 July 1968 on a proceeding under Article 85 of the Treaty *A.C.E.C.-Berliet*  
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2nd General Report (1968), sec. 28 (1968) C.M.L.R.—D 35
- Decision of 6 November 1968 on a proceeding under Article 85 of the Treaty *Cobelaz-Urines de Synthèse*  
*OJ* No. L 276, 14 November 1968, p. 13  
IP (68) 185, 14 November 1968  
Bulletin 1-69, Ch. V, sec. 6  
2nd General Report (1968), sec. 28 (1968) C.M.L.R.—D 45
- Decision of 6 November 1968 on a proceeding under Article 85 of the Treaty *Cobelaz-Cokeries*  
*OJ* No. L 276, 14 November 1968, p. 19  
IP (68) 185, 14 November 1968  
Bulletin 1-69, Ch. V, sec. 6  
2nd General Report (1968), sec. 28 (1968) C.M.L.R.—D 68
- Decision of 6 November 1968 on a proceeding under Article 85 of the Treaty *C.F.A.*  
*OJ* No. L 276, 14 November 1968, p. 29  
IP (68) 185, 14 November 1968  
Bulletin 1-69, Ch. V, sec. 6  
2nd General Report (1968), sec. 28 (1968) C.M.L.R.—D 57
- Decision of 6 November 1968 on a proceeding under Article 85 of the Treaty *Rieckermann/AEG-Elotherm*  
*OJ* No. L 276, 14 November 1968, p. 25  
IP (68) 184, 14 November 1968  
Bulletin 1-69, Ch. V, sec. 7  
2nd General Report (1968), sec. 28 (1968) C.M.L.R.—D 78
- Decision of 13 March 1969 on a proceeding under Article 85 of the Treaty *European Machine Tool Exhibitions*  
*OJ* No. L 69, 20 March p. 13  
IP (69) 41, 15 March 1969  
Bulletin 5-69, Ch. VI, sec. 4 (1969) C.M.L.R.—D 1
- Decision of 5 May 1969 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Convention Chauxfourniers*  
*OJ* No. L 122, 22 May 1969, p. 8  
IP: none  
Bulletin 7-69 Ch. V, sec. 3 (1969) C.M.L.R.—D 15
- Decision of 18 June 1969 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Christiani & Nielsen*  
*OJ* No. L 165, 5 July 1969, p. 12  
IP (69) 116, 1 July 1969  
Bulletin 8-69, Ch. V, sec. 6 (1969) C.M.L.R.—D 36

- Decision of 25 June 1969 on a proceeding under Article 85 of the Treaty *V.V.V.F.* OJ No. L 168, 10 July 1969, p. 22  
IP (69) 131, 22 July 1969  
Bulletin 9/10-69, Ch. V, sec 13  
(1970) C.M.L.R.—D 1
- Decision of 30 June 1969 on a proceeding under Article 85 of the Treaty *SEIFA* OJ No. L 173, 15 July 1969, p. 8  
IP (69) 123, 8 July 1969  
Bulletin 9/10-69, Ch. V, sec. 13
- Decision of 16 July 1969 on a proceeding under Article 85 of the Treaty *International Quinine Agreement* OJ No. L 192, 5 August 1969, p. 5  
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(1969) C.M.L.R.—D 41
- Decision of 22 July 1969 on a proceeding under Article 85 of the Treaty *Clima-Chappée/Buderus* OJ No. L 195, 7 August 1969, p. 1  
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(1970) C.M.L.R.—D 7
- Decision of 22 July 1969 on a proceeding under Article 85 of the Treaty *Jaz—Peter* OJ No. L 195, 7 August 1969, p. 5  
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(1970) C.M.L.R.—D 129
- Decision of 24 July 1969 on a proceeding under Article 85 of the Treaty *Dyestuffs* OJ No. L 195, 7 August 1969,  
p. 11  
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Bulletin 9/10-69, Ch. V, sec. 12  
(1969) C.M.L.R.—D 23
- Decision of 5 December 1969 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Pirelli S.p.A.—Société Dunlop* OJ No. L 242, 24 December 1969,  
p. 41  
IP (69) 212, 15 December 1969  
Bulletin 2-1970, Ch. I, sec. 5
- Decision of 30 June 1970 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Kodak* OJ No. L 147, 7 July 1970, p. 24  
IP (70) 111, 2nd July 1970  
Bulletin 8-1970, Ch. I, sec. 15  
(1970) C.M.L.R.—D 19
- Decision of 30 June 1970 on an application for negative clearance under Article 2 of Council Regulation No. 17 *ASPA* OJ No. L 148, 8 July 1970, p. 9  
IP (70) 110, 1st July 1970  
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(1970) C.M.L.R.—D 25
- Decision of 29 June 1970 on an application for negative clearance under Article 2 of Council Regulation No. 17 *Electrically—welded steel tubes* OJ No. L 153, 14 July 1970, p. 14  
IP (70) 112, 2 July 1970, Ch. I,  
sec. 12 (1970) C.M.L.R.—D 31
- Decision of 28 October 1970 on a proceeding under Article 85 of the Treaty *Julien-Van Katwijk* OJ No. L 242, 5 November 1970,  
p. 18  
IP (70) 187, 30 October 1970,  
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(1970) C.M.L.R.—D 43

- Decision of 28 October 1970 on a proceeding under Article 85 of the Treaty *OMEGA*  
*OJ* No. L 242, 5 November 1970, p. 22  
 IP (70) 186, 30 October 1970  
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 (1970) C.M.L.R.—D 49
- Decision of 23 December 1970 on a proceeding under Article 85 of the Treaty *Supexie*  
*OJ* No. L 10, 13 January 1971, p. 12  
 IP (71) 3, 6 January 1971  
 Bulletin 2-1971, Ch. I, sec. 8  
 (1971) C.M.L.R.—D 1
- Decision of 29 December 1970 on a proceeding under Article 85 of the Treaty *Ceramic tiles*  
*OJ* No. L 10, 13 January 1971, p. 15  
 IP (71) 1, 4 January 1971,  
 Bulletin 2-1971, Ch. I, sec. 9  
 (1971) C.M.L.R.—D 6
- Decision of 1 February 1971 on a proceeding under Article 85 of the Treaty and Article 11, section 5, of Council Regulation No. 17 *C.I.C.G.-Z.W.E.I./Z.P.U*  
*OJ* No. L 34, 11 February 1971, p. 13 (1971)  
 C.M.L.R.—D 23
- Decision of 28 May 1971 on a proceeding under Article 85 of the Treaty *F.N./C.F.*  
*OJ* No. L 134, 20 June 1971, p. 6  
 IP (71) 100, 2 June 1971  
 Bulletin 8-1971, Ch. I, sec. 15
- Decision of 2 June 1971 on a proceeding under Article 86 of Treaty *GEMA*  
*OJ* No L 134, 20 June 1971, p. 15  
 IP (71) 103, 7 June 1971  
 Bulletin 11-1971, Ch. I, sec. 16
- Decision of 28 July 1971 on a proceeding under Article 85 of the Treaty and Article 15, sec. 1 of Council Regulation No. 17 *S.A. Raffinerie Tirlemontoise*  
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 IP (71) 176, 16 September 1971  
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- Three decisions of 18 June 1971 on a proceeding under Article 85 of the Treaty and Article 11, sec. 5 of Council Regulation No. 17 *Inquiry into market for beer*  
*OJ* No. L 161, 19 July 1971, pp. 2, 6, 10  
 IP (71) 126, 28 June 1971  
 Bulletin 8-1971, Ch. I, sec. 17
- Decision of 2 July 1971 on a proceeding under Article 85 of the Treaty and Article 11, sec. 5 of Council Regulation No. 17 *Asphaltoid-Keller, SA*  
*OJ* No. L 161, 19 July 1971, p. 32  
 IP-(71) 176, 16 September 1971  
 Bulletin 9/10-1971, Ch. I, sec. 15
- Decision of 24 September 1971 on a proceeding under Article 85 of the Treaty *CEMATEX*  
*OJ* No. L 227, 8 October 1971, p. 26  
 IP (71) 184, 1 October 1971  
 Bulletin 11-1971, Ch. I, sec. 4.
- Decision of 9 November 1971 on a proceeding under Article 86 of the Treaty *S.I.A.E.*  
*OJ* No. L 254, 17 November 1971, p. 15
- Decision of 25 December 1971 on a proceeding under Article 85 of the Treaty *Boehringer*  
*OJ* No. L 282, 23 December 1971, p. 46

Decision of 9 December 1971 on a proceeding under Article 86 of the Treaty *Continental Can*

OJ No. L 7, 8 January 1972, p. 25  
IP (71) 239 of 13 December 1971  
Bulletin 2-1972, Ch. I, sec. 27  
(1972) C.M.L.R.—D 11

Decision of 16 December 1971 on a proceeding under Article 85 of the Treaty *V.C.H.*

OJ No. L 13, 17 January 1972,  
p. 34  
IP (71) 250 of 22 December 1971  
Bulletin 2-1972, Ch. I, sec. 25  
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Decision from 16 December 1971 on a proceeding under Article 85 of the Treaty *S.AFCO*

OJ No. L 13, 17 January 1972,  
p. 44  
IP (72) 2 of 7 January 1972  
Bulletin 2-1972, Ch. I, sec. 23  
(1972) C.M.L.R.—D 83

Decision from 20 December 1971 on a proceeding under Article 85 of the Treaty *SOPELEM/LANGEN*

OJ No. L 13, 17 January 1972,  
p. 47  
IP (72) 4 of 17 January 1972  
Bulletin 2-1972, Ch. I, sec. 24

Decision from 22 December 1971 on a proceeding under Article 85 of the Treaty *Burroughs-Delplanque*

OJ No. L 13, 17 January 1972,  
p. 50  
IP (71) 253 of 27 December 1971  
Bulletin 2-1972, Ch. I, sec. 32  
(1972) C.M.L.R.—D 67

Decision from 22 December 1971 on a proceeding under Article 85 of the Treaty *Burroughs-Geba*

OJ No. L 13 17 January 1972,  
p. 53  
IP (71) 253 of 27 December 1971  
Bulletin 2-1972, Ch. I, sec. 22  
(1972) C.M.L.R.—D 72

Decision from 23 December 1971 on a proceeding under Article 85 of the Treaty *Henkel-Colgate*

OJ No. L 14, 18 January 1972,  
p. 14  
IP (72) 3 of 7 January 1972  
Bulletin 2-1972, Ch. I, sec. 21  
Commerce Clearing House, Vol.  
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Decision from 23 December 1971 on a proceeding under Article 85 of the Treaty *N.C.H.*

OJ No. L 22, 26 January 1972,  
p. 16  
IP (72) 5 of 7 January 1972  
Bulletin 2-1972, Ch. I, sec. 26  
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## 2. Relative to Article 65 of the ECSC Treaty<sup>1</sup>

### (a) *Coal*

Decision No. 19/57 of 26 July 1957 authorising joint purchase of fuel by wholesale coal dealers operating in Southern Germany (the validity of this Decision has been extended)

*OJ* No. 24 of 10 August 1957, p. 352.

Decision No. 44/59 of 4 November 1959 concerning the authorisation of joint sales of coal fuel from the Lorraine and Saarbergwerke AG mines by the "Union charbonnière sarro-lorraine, société par actions franco-allemande-Saar-Lothringische Kohlenunion, deutsch-französische Gesellschaft auf Aktien" Saarbrücken and Strasbourg (the validity of this Decision has been extended)

*OJ* No. 58 of 14 November 1959, p. 1147.

Decision No. 1/63 of 16 January 1963 relating to the authorisation of joint sales of fuel by certain coal undertakings in Belgium through the Comptoir belge des charbons, cooperative undertaking (Cobechar) (the validity of this Decision has been extended)

*OJ* No. 15 of 30 January 1963, p. 161.

### (b) *Steel*

Decision No. 38/67 of 21 December 1967 relating to the authorisation of agreements made between two Italian iron and steel undertakings for specialisation and joint sales and purchases

*OJ* No. L 24 of 27 January 1968, p. 16.

Decision No. 14/67 of 14 June 1967 relating to the authorisation of agreements made between Belgian and French iron and steel undertakings for specialisation and joint sales and purchases

*OJ* No. L 127 of 27 June 1967, p. 2512.

Decision No. 70/118/ECSC of 21 January 1970 relating to agreements and concerted practices on the German scrap market

*OJ* No. L 29 of 6 February 1970, p. 30.

Decision No. 71/312/CECA of 27 July 1971 concerning the authorisation of specialisation agreements for the production of rolled steel between August Thyssen-Hütte AG, Fried. Krupp Hüttenwerke AG, Theodor Wuppermann GmbH, Ibach Stahlwerke KG, Eisen- und Stahlwalzwerke Rötzel GmbH and Fürstlich Hohenzollernsche Hüttenverwaltung and of agreements relating to joint sales of hot rolled wide strip and hoop and strip by Thyssen and Wuppermann and of hoop and strip by Krupp and Rötzel

*OJ* No. L 201 of 5 September 1971, p. 1.

<sup>1</sup> Only the most recent and important Decisions are included here.



Decision No. 71/313/ECSC of 27 July 1971 authorising certain agreements made between Hoesch AG, Rhein Stahl Hüttenwerke AG, Edelstahlwerke Witten AG, Siegener AG Geisweid for specialisation and joint sales of rolled steel

OJ No. L 201 of 5 September 1971, p. 12.

Decision No. 71/314/ECSC of 27 July 1971 relating to the authorisation of agreements between Eisenwerk-Gesellschaft Maximilianshütte mbH, Klöckner-Werke AG and Stahlwerke Peine-Salzgitter AG for specialisation in the production of rolled steel products and for the setting up of an Orders Allocation Office for merchant steels and wire-rod

OJ No. L 201 of 5 September 1971, p. 19.

Decision No. 71/315/ECSC of 27 July 1971 authorising agreements for specialisation between iron and steel undertakings in South-west Germany in the production of rolled steel and in joint purchases of iron ore.

OJ No. L 201 of 5 September 1971, p. 27.

## RULINGS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Ruling (6 April 1962) in case 13/61 : request for preliminary ruling submitted by the Court of Appeal, The Hague, in re: "*De Geus v. Bosch and van Rijn*"

OJ No. 33, 4 April 1962, p. 1081. Court reports VIII, 89

Ruling (30 June 1966) in case 56/65: request for preliminary ruling submitted by the Paris Court of Appeal in re: "*Société technique minière (LTM) v. Maschinenbau Ulm GmbH MBU*"

OJ No. 170, 29 September 1966, p. 3013.  
P-40, July 1966  
Bulletin 8/1966,  
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Court Reports XII, 337  
10th (EEC) General Report  
(1967) P. 102, (59).

Ruling (13 July 1966) in joint cases 56 and 58/64: "*Grundig-Consten v. EEC Commission*". Suit for annulment of the Commission decision of 23 September 1964.

OJ No. 170, 29 September 1966, p. 3015.  
P-44, July 1966  
Bulletin 9/10-66,  
chap. VIII/CJ  
Court Reports XII, 429  
10th (EEC) General Report  
(1967), p. 102 (59).

- Ruling (13 July 1966) in case 32/65: "*Government of the Republic of Italy v. EEC Council and Commission*". Suit for annulment of Articles 1 et seq. of Regulation No. 19/65/EEC and for a declaration of inapplicability of Articles 4 (2, 2a, 2b) and 5 (2) of Regulation No. 17 and of Regulation No. 153.
- OJ No. 170, 29 September 1966, p. 3016.  
P-44, July 1966  
Bulletin 9/10-66,  
chap. VIII/CJ  
Court Reports XII, 563  
10th (EEC) General Report (1967), p. 102 (59).
- Ruling (15 March 1967) in joint cases 8-11/66: suit filed by parties to a restrictive agreement concerning cement against the EEC Commission.
- OJ No. 65, 6 April 1967, p. 1025  
IP (67) 42, 23 March 1967  
Bulletin 5/1967  
chap. VI/CJ  
Court Reports XIII, p. 93  
10th (EEC) General Report (1967), p. 103 (59)
- Ruling (12 December 1967) in case 23/67: request for preliminary ruling by the Tribunal de Haecht Commerce de Liège in re: "*Brasseries de v. Wilkin-Janssen*" (contracts for supply of beer)
- OJ No. C 4, 24 January 1968.  
P-5, January 1968  
Bulletin 2/1968,  
chap. VIII/CJ  
Court Reports XIII, p. 525.
- Ruling (29 February 1968) in case 24/67: request for preliminary ruling submitted by the Court of Appeal The Hague, in re: "*Parke, Davis & Co. v. Beintema-Interpharm and Centra-pharm*"
- OJ No. C 42, 6 March 1968, p. 1  
P-38, June 1968  
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Court Reports XIV, p. 81.
- Ruling (13 February 1969) in case 14/68: request for preliminary ruling submitted by the Court of Appeal for West Berlin, in the case of the fine served on a member of the Board of Directors of *Farbenfabriken Bayer AG, Walt Wilhelm*, and six other persons concerned
- OJ No. C 30, 7 March 1969, p. 2  
Bulletin 4/1969  
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Court Reports XIV, p. 1.
- Ruling (9 July 1969) in case 5/69: request for preliminary ruling by the Munich Appeal Court in re: "*Völk v. Vervaecke*"
- OJ No. C 105, 14 August 1969,  
p. 15  
Bulletin 9-10/1969  
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Court Reports 1969, 4, p. 295.
- Ruling (9 July 1969) in case 10/69: request for preliminary ruling by the Brussels Tribunal de Commerce, in re: "*Portelange v. Smith Corona Marchand International*" and three other companies
- OJ No. C 105, 14 August 1969,  
p. 16.  
Bulletin 9-10/1969  
Court Reports 1969, 4, p. 309.
- Ruling (18 March 1970) in case 43/69: request for preliminary ruling submitted by the Oberlandesgericht of Karlsruhe in re: "*Bilger v. Jebile*"
- OJ No. C 41, 4 April 1970, p. 8.  
Bulletin 5/1970,  
second part, chap. IV/CJ  
Court Reports XVI, 2, p. 127.
- Ruling (30 June 1970) in case 1/70: request for preliminary ruling submitted by the Oberlandesgericht of Karlsruhe in re: "*Parfums Marcel Roebas GmbH v. Helmut Bitsch*"
- OJ No. C 97, 29 July 1970, p. 11.  
Bulletin 8/1970,  
second part, chap. IV/CJ  
Court Reports XVI, 5, p. 515.

- Ruling (15 July 1970) in cases 41/69, 44/69, 45/69: suit for annulment or reformation of the Commission decision of 16 July 1969 on a proceeding under Article 85(1) of the EEC Treaty  
 — “*ACF Chemiefarma v. Commission*”  
 — “*Buchler & Co. v. Commission*”  
 — “*Boebringler Mannheim GmbH v. Commission*”
- Ruling (18 February 1971) in case 40/70: request for preliminary ruling on the interpretation of Articles 85 and 86 of the EEC Treaty, submitted by the *Tribunale civile e penale of Milan* in re: “*Sirena v. Eda*”
- Judgment (6 May 1971) in case 1/71: request for preliminary ruling on the interpretation of Article 85 of the EEC Treaty and of the regulations implementing it, submitted by the Chamber of Commerce of Lyon in re: “*S.A. Cadillon v. Firma Höss Maschinenbau K-G*”
- Judgment (8 June 1971) in case 78/70: request for preliminary ruling on the interpretation of Articles 5(2), 85 (1) and 86 of the EEC Treaty, submitted by the *Hanseatisches Oberlandesgericht of Hamburg* in re: “*Deutsche Grammophon GmbH v. Metro-SB—Grossmärkte*”
- Judgment (13 July 1971) in case 8/71: “*Deutscher Komponistenverband (DKV) v. Commission*”
- Judgment (25 November 1971) in case 22/71: “*Beguelin v. Import Export, Nice, and Marbach, Hamburg*”
- OJ No. C 130, 27 October 1970, p. 3.  
 Bulletin 9-10/1970,  
 second part, chap. IV/CJ  
 Court Reports XVI, 6, p. 661,  
 p. 733, p. 769.
- OJ No. C 33, 7 April 1971, p. 11.  
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- OJ No. C 76, 27 July 1971, p. 9.  
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 Court Reports 1971, 4, p. 351.
- OJ No. C 65, 29 June 1971, p. 14.  
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 Court Reports 1971, 5, p. 487.
- OJ No. C 94, 24 September 1971,  
 p. 6.  
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 Court Reports 1971, 5, p. 705.
- OJ No. C 9, 3 February 1972.

NB: See also the transitional provisions relating to the Rules on Competition in the Accession Agreements.