EMERGING COMMON MARKET ANTITRUST ENFORCEMENT TRENDS: A SURVEY

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A business commentator recently observed pridefully that "[t]o the list of famous U.S. exports such as ice cream, Coca Cola, jazz and the assembly line, must now be added another: the concept of antitrust."[1] However, examination of this development suggests that antitrust is one export that is proving to be a mixed blessing to United States business.

The European operations of an increasing number of United States firms have been recent targets of Common Market antitrust enforcement activity. This trend is likely to continue. The purpose of this article is to put this trend in context by surveying those areas of Common Market antitrust enforcement and policy planning likely to be most active, as well as those areas less likely to present business ventures in the Common Market with additional antitrust problems.

The focus of this article centers upon Common Market antitrust law as embodied in articles 85 and 86 of the Treaty of Rome.[2] An initial overview of the Common Market's antitrust objectives and enforcement mechanism will be followed by a survey of likely areas of present and possible future antitrust vulnerability under article 85 (two firms acting in concert to distort competition), including a special discussion of present and proposed patent licensing restrictions. Thereafter, activity deemed an abuse of a dominant position by a single firm prohibited under article 86 will be reviewed. This article also includes a discussion of the merger regulations proposed by the Common Market's antitrust enforcement authorities and a review of that group's recent study of the competitive behavior of the major oil companies. Throughout its development, this article attempts to give some guidance to United States firms regarding expected reasons for and directions of the future evolution of Common Market antitrust law.

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1. Jones, *Executive Guide to Antitrust in Europe*, HARV. BUS. REV. 106 (1976).

2. Treaty Establishing the European Economic Community, *done* March 25, 1957, 298 U.N.T.S. 14 [hereinafter cited as the Treaty of Rome]. This article will use the unofficial English translation as contained in 1 COMM. MKT. REP. (CCH) ¶ 151.

I. AN OVERVIEW OF THE COMMON MARKET'S ANTITRUST GOALS

In April, 1972, the Commission of the European Communities, which serves as the Common Market's antitrust regulatory body, issued its first annual report on Common Market antitrust policies and enforcement activities.[3] This official report and its annual successors provide essential background for analysis of enforcement trends and prediction of future evolution because they contain the Commission's interpretation of Common Market antitrust developments. In the introduction to its first report, the Commission announced that its primary goal was to promote the integration of the separate economies of member states into a unified "common market".[4] This goal is significant to antitrust law insofar as it requires the elimination of restrictive practices which interfere with that integration and favors policies which encourage firms to expand their operations throughout the Common Market.

This goal remains the paramount factor governing the application of Common Market antitrust law. Extensive implementation already has been achieved by the gradual elimination of the more overt restrictions upon the ability of firms to sell throughout the Common Market. Still, the Commission's antitrust enforcement authorities are likely to expand their regulatory horizons to more controversial areas such as promotion of greater economic self-determination. In the broad areas of market structure and behavior especially, this expansion is likely to impact heavily upon United States based multinationals with prominent market positions in Europe, since in the years ahead a highly concentrated product market, led or dominated by such multinationals, will be inviting targets for the Commission's regulatory authorities.

This development will not entail the Commission's abandonment of its traditional enforcement priorities. The Commission will remain quick to take action to remove barriers to the achievement of a truly common market such as market divisions and customer allocations along national lines or exclusive distributorships with absolute territorial restrictions. Thus, firms both foreign and local to the Common Market will continue to be confronted by Commission action if restrictions of this sort are uncovered.

3. Commission of the European Communities, FIRST REPORT ON COMPETITION POLICY (1972) [hereinafter cited as FIRST ANNUAL REPORT].

4. *Id.* at 13.

Perhaps of greater long term importance to United States business is that the Commission in the future probably will reaffirm its commitment, as revealed in its prior statements and decisions, to encourage those forms of horizontal cooperation among relatively small and medium sized firms which are likely to enhance their ability to compete with larger units, especially United States based multinationals. Indeed, the staff of the Commission recognizes that this "need to balance the benefits generated by size and sometimes by restrictive practices against the price to be paid in terms of decreased or threatened competition [is] the most delicate aspect" of the Commission's regulatory role.[5] It is in making this delicate balance that future Commission antitrust enforcement policy may appear to be more vigorously applied against United States based firms than against those based in the Common Market.

In predicting the course of Common Market antitrust enforcement, one must always be mindful of the areas and extent of enforcement which will help promote a true common market among member states. This is especially important because experience has shown that the Commission's application of its laws depends more on policy considerations than on statutory construction.[6] Because there is no right under the Treaty of Rome to bring private antitrust enforcement actions,[7] the Commission's policy considerations are not only important, they are virtually dispositive of resolution of antitrust issues.

Articles 85 and 86 of the Rome Treaty form the basic provisions of the Common Market's antitrust law. Article 85 proscribes traditional forms of collusion between or among firms, where such agreements may affect trade or distort competition. Cooperative agreements are commonly overt, and pursuant to the Rome Treaty must be filed with the Commission for review. Article 86 proscribes the abuse by a single firm of its dominant position in a portion of the Common Market. The antimonopoly premise of article 86 is a likely basis for

5. Schlieder, *Recent Antitrust Developments in the European Community*, 31 RECORD OF N.Y.C.B.A. 315 (1976) [hereinafter cited as Schlieder]. Mr. Schlieder is the EEC's Director General for Competition.

6. Hawk, *Antitrust in the EEC—The First Decade*, 41 FORDHAM L. REV. 229, 231 (1972) [hereinafter cited as Hawk].

7. There is no explicit provision in the Rome Treaty, or in the Commission regulations promulgated under it, providing for private injunctive or damage actions before the Commission or the Court of Justice. However, under article 3 of Commission regulation 17, any person may request the Commission to require the offending party to terminate an illegal practice. There is no implied right to a private action under the Rome Treaty because of the existence of this administrative remedy under article 3 of regulation 17. CROTTE, TRADING UNDER EEC AND U.S. ANTITRUST LAWS 24 (1977).

future challenges to powerful multinationals. Before describing the development of the law under articles 85 and 86, it will be useful first to review the Commission's antitrust enforcement mechanism and procedures.

II. ADMINISTRATION OF COMMON MARKET ANTITRUST LAW ENFORCEMENT

The Commission of European Communities is the major source of Common Market antitrust policy. Based in Brussels, the Commission is a semi-permanent cadre of thirteen professionals, most of whom have an economic and business, rather than legal, background. Members of the Commission are appointed by and are subject to the control of the Council of Ministers, which in turn is comprised of representatives of the cabinets of the member states. The Commission engages in prosecutorial, judicial and legislative rule making functions in much the same manner as does the United States Federal Trade Commission.

The Commission's adjudicated decisions are subject to review by the Commission's Court of Justice. The Court requires the Commission to state fully the reasons upon which it bases its decisions. If a Commission decision follows well established precedent, the reasons may be brief; however, if the decision goes well beyond established precedent, the Commission must give full account.[8]

The staff of the Commission closely follows antitrust developments in all of the industrialized nations. Moreover, the Commission staff cooperates extensively and exchanges enforcement information with United States antitrust authorities, particularly the Foreign Commerce Section of the Antitrust Division of the Department of Justice. Certain important current examples of this cooperation are noted in later discussion.

The Commission has two major enforcement sanctions. It may enter cease and desist orders. In addition, or in the alternative, it may impose penalties of up to either one million units of account[9] or ten percent of a firm's previous year's sales, in the case of willful violations such as price fixing by international cartels. Although this potential penalty is substantially greater than its equivalent under United States law, it should be noted again that the Rome Treaty, unlike

8. Foundaries Roubaix v. Foundaries A. Roux, 2 COMM. MKT. REP. (CCH) ¶ 8341.

9. A unit of account is roughly equivalent to one United States dollar. E. KINTER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 193 (1976). However, with the advent of the floating exchange rates pursuant to the Smithsonian accord, the exact exchange rate fluctuates in relation to the dollar's relative value. In 1976, one unit of account was equivalent to approximately $1.15.

United States law, does not enable parties to bring private damage actions against firms which have violated articles 85 or 86, or to receive damages incurred as a consequence. Commission antitrust enforcement is achieved primarily through voluntary compliance with Commission requests made following an investigation, rather than as a result of litigation.[10]

The Commission also may fine firms that fail to supply the Commission with relevant information in connection with an antitrust investigation.[11] While there have been few reported cases of fines, firms should nevertheless be mindful that, just as in the United States, unexcused dilatory or incomplete document production may have adverse monetary as well as tactical consequences.

Commission antitrust policy is also revealed through its power under article 85(3) to exempt restrictive agreements which would otherwise run afoul of article 85(1). Under Commission regulations, agreements within the scope of article 85 must be registered with the Commission unless the agreement falls into a category exempted from this requirement. A firm is subject to penalty if discovered to have failed to register a nonexempt agreement. Once registered, the agreement, at least in theory, enjoys provisional validity until the Commission's contrary decision issues. However, a party to the agreement may still assert the invalidity of a provision of the agreement during this period. Moreover, a contrary decision means that the agreement retroactively is deemed a nullity.

The public does not have access to agreements registered pursuant to article 85(3). Although there has been a remarkable expansion in the United States of the public's ability to obtain access to government

10. For example, in 1971, the Commission rendered twelve decisions in which it applied either article 85 or 86 while resolving 2,873 matters by informal agreement. Hawk, *supra* note 6, at 238.

11. The Commission levies such fines pursuant to article 11 of regulation 17/62. For example, the Commission on June 25, 1976, formally ordered the Dutch agency for nitrogenous fertilizers, CSV, to supply it within eighty days with data on its commercial activities and relations with manufacturers whose products it sells or face a fine of 1000 units per day for each day until the data is supplied. Interestingly, CSV asserted as the basis for its refusal to furnish the data the fact that the members of its staff authorized to supply the information were also directors of the European cartel of manufacturers of nitrogenous fertilizers, Nitrex, which was headquartered in Switzerland. CSV considered that compliance with the Commission's request for information could lead to criminal proceedings against such persons under Swiss law for disclosure to a foreign party or private organization secrets relating to a Swiss business. In the Commission's view, the fact that information has been supplied voluntarily to an international cartel governed by the law of a nonmember country in no way affects the right of the Commission to receive such information.

documents, it is unlikely that this trend will arise in the near future in the Common Market, especially with respect to agreements that are arguably confidential business arrangements.

While much of the Commission's enforcement workload is generated by agreements registered under article 85(3), complaints from other parties also have triggered the Commission's investigatory processes. The Commission encourages the filing of such complaints and has issued a special form for use by complainants seeking the initiation of a Commission investigation. Foreign firms might avail themselves of this device just as effectively as have European firms, especially by bringing to Commission attention conduct which in a similar context in other countries has already been adjudged illegal, or at least has become the subject of a governmental investigation.

Common Market antitrust law is not developed by case law alone. Article 87 of the Rome Treaty empowers the Commission to issue regulations of general applicability having the force of law. Its regulations are subject to approval by the Council of Ministers before becoming effective.[12] Also, the Commission periodically issues the equivalent of advisory opinions.

Finally, Common Market antitrust law is developed in the courts and administrative agencies of member nations. Article 17 of the Rome Treaty enables member nations to apply the standards of article 85 internally to any agreement which has not been registered with the Commission or taken under investigation by the Commission. Member nations are not empowered to grant exemptions, except through a member state's courts if an agreement is a subject of litigation before it.[13]

III. THE SCOPE OF THE PROHIBITION IN ARTICLE 85 AGAINST RESTRICTIVE CONCERTED PRACTICES

A. Threshold Considerations

Article 85, like its United States counterpart, section 1 of the Sherman Act,[14] cannot be invoked unless there is an allegation of an agreement or concerted practice.[15] However, the Court of Justice in its

12. Treaty of Rome, *done* March 25, 1957, art. 87(1), 298 U.N.T.S. 14, 49, 1 COMM. MKT. REP. (CCH) ¶ 2201.

13. *Id.*, art. 177, 298 U.N.T.S. at 76; Amsterdam Bulb, 2 COMM. MKT. REP. (CCH) ¶ 8391.

14. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

15. Article 85 provides as follows:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of under-

1972 *Dyestuffs* opinion,[16] a price fixing case, held that a concerted practice for purposes of article 85(1) can be something less than a formal agreement if it can be shown that there is a causal connection between common intent and established conduct. In the *Dyestuffs* case, the Court found that several European firms had divided the Common Market into five national dyestuffs markets having different price levels and structures. In finding a violation of article 85, the Court simply inferred that it was highly improbable that contemporaneous price increases in all five national markets could have been spontaneous rather than the result of some common understanding.[17]

In making a case under article 85, it is essential to show concerted action by two unrelated firms. Contrary to United States law, the Commission has rejected unequivocally the intra-enterprise or bathtub conspiracy doctrine, at least in cases in which the subsidiary cannot undertake economic behavior independent of the parent.[18]

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takings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

—any agreement or category of agreements between undertakings;

—any decision or category of decisions by associations of undertakings;

—any concerted practice or category of concerted practices; [*sic*] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Treaty of Rome, *done* March 25, 1957, art. 85 (1)-(3), 298 U.N.T.S. 23, 69-70, 1 COMM. MKT. REP. (CCH) ¶¶ 2205, 2041, 2051.

16. Imperial Chemical Industries, Ltd. v. EEC Comm'n, [1972] C. J. Comm. E. Rec. 619, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161, *aff'g* Dyestuffs Mfgrs., 12 J. O. COMM. EUR. (No. L198) 11 (1969), [1965-1969 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9314.

17. *Id.* at 8029.

18. Christiani & Nielson, 12 J. O. COMM. EUR. (No. L165) 12 (1969), [1965-1969 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9308; Beguelin Import Co. v. G. L. Import Export Co., 2 COMM. MKT. REP. (CCH) ¶ 8249. *See also* Centrafarm B. V. & Adriaan de

Article 85 also requires a showing of "perceptible" effect on trade between member states. In most instances this means that the firms involved, including parents or subsidiaries, must have an aggregate of $15 million sales annually if manufacturers, and $20 million if distributors or trading companies. In either case, the firms must carry on at least five percent of the business in the goods affected by the restrictions or in their substitutes in the relevant market (which need not always be the entire Common Market).[19] Price fixing occurring only in a single member state also may be covered by article 85 in that such an agreement is likely to reinforce the compartmentalization of markets on a national basis.[20]

As noted above, the Commission provides under article 85(3) for exemptions covering certain types of agreements that might otherwise be illegal under article 85(1). Exemptions under article 85(3) are often given to joint research and development efforts, specialization agreements which divide production tasks, joint advertising agreements, and occasionally joint buying agreements. Consistent with its overall policy of promoting expansion efforts by smaller or medium sized firms, the Commission is most likely to exempt joint efforts by such firms, which presumably have a greater need for them than do established multinationals.

These exemptions form an important part of Common Market antitrust law and policy, but are not generally available for public scrutiny. This is indicative of the larger problem of limited access to all that constitutes Common Market antitrust law and policy. For example, Commission and Court of Justice antitrust opinions tend to be more conclusive and less factual and analytical than their United States counterparts. Furthermore, the Commission does not publish many of its opinions.

> In short, numerous decisions affecting the welfare of European consumers are made in Brussels, yet there is no way

Peijper v. Sterling Drug Inc., [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8246. This case states as dicta that arrangements between component parts of an economic unit do not come under article 85 to the extent that such arrangements constitute a division of functions within an economic unit.

19. Notice of May 27, 1970, Concerning Agreements, Decisions and Concerted Practices of Minor Importance, 13 J. O. COMM. EUR. (No. C64) 1 (1970), [1958-1972 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9367. This de minimis provision is not binding on the Court of Justice. Furthermore, in its decision in *Advocaat Zwarte Kip*, 17 O. J. EUR. COMM. (No. L237) 12 (1974), [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9669, at 9493-11, the Commission stated that its notice was only for guidance.

20. Fabricants do Papiers Plient v. EEC Comm'n, 2 COMM. MKT. REP. (CCH) ¶ 8335. This case involved price fixing by members of a trade association of Belgian producers and importers of wallpaper.

interested scholars or citizens can review them to ascertain independently whether they are sound.[21]

B. Specific Examples of Prohibited Conduct

1. *Horizontal Market Division.* The Commission's first enforcement priority under article 85 is the policing of market sharing agreements because of their obvious anticompetitive effects as well as their obstruction of the goal of market integration. Likewise, the Commission condemns delivery and sales quotas based on total Common Market sales as practices likely to reinforce illegal market sharing arrangements.[22]

The basic prohibition in article 85 against horizontal market allocation also bars the use of patent, copyright or trademark rights under national law in an attempt to partition the Common Market with respect to trade in a given product. In the *Sirena* case the Court of Justice held that a trademark assigned by a United States manufacturer could not be used by its Italian assignee to block imports into Italy from West Germany where the goods also had been trademarked under a parallel license from the United States manufacturer.[23]

Later in 1971, the Court of Justice in *Deutsche Grammophon*[24] held that because the Rome Treaty mandated the free movement of goods within the Common Market, a West German firm could not use its sound reproduction rights to bar resales within West Germany of recordings originally delivered to a French distributor even though Deutsche Grammophon, as the record producer, had an exclusive distribution right under the German copyright act.[25] The Commission has interpreted the Court's *Deutsche Grammophon* decision as giving it a broad delegation of authority to challenge the use of industrial property rights to hinder trade across the boundaries of member states or to isolate national markets.[26]

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21. Scherer, *Secrecy, the Rule of Reason, and European Merger Control Policy*, 19 ANTITRUST BULL. 181, 194 (1974).

22. *See generally*, Commission Communication of Jan. 24, 1966, [1965-1969 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9085.

23. Sirena S.r.l. v. Eda GmbH, [1971] C. J. Comm. E. Rec. 69, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8101. *See* discussion of the *Grundig-Consten* case in text p. 20, *infra*.

24. Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkte GmbH & Co. KG, [1971] C. J. Comm. E. Rec. 487, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106.

25. The practical effect of the Commission's opinion is revealed by the fact that in the five years since the *DG* opinion, German phonograph record prices have fallen fifteen percent. Commission of the European Communities, FIFTH REPORT ON COMPETITION POLICY 14 (1976) [hereinafter cited as the FIFTH ANNUAL REPORT].

26. FIRST ANNUAL REPORT, *supra* note 3, at 70; Hawk, *supra* note 6, at 276.

2. *Horizontal Price Fixing.* Article 85 clearly prohibits price fixing when it occurs either as part of a market division scheme or among firms in more than one member state. However, article 85 only reaches price fixing in a single member state if the involved enterprises control a significant portion of the total market.[27]

Horizontal price fixing, unlike horizontal market division, is not revealed on the face of agreements filed with the Commission. Rather, as in the case of recurring United States examples, such agreements are typically clandestine and thus only come to light through an informer or by close economic analysis of pricing patterns. Although the Commission has not brought many price fixing actions, its enforcement capabilities will likely become more extensive and sophisticated as it gains experience in this area.

3. *Joint Selling Agreements.* The Commission's general position, as described in the First Annual Report, is that joint selling arrangements among competitors violate article 85.[28] In *Nederlandse Cement-Handelsmaatschappij*,[29] the Commission declared illegal the establishment by German cement producers of a joint agency for selling cement to the Benelux countries. There are, however, instances suggested in the First Annual Report where joint selling arrangements will be permitted, especially if the involved firms are small or medium sized.[30] Such agreements normally would be of the sort filed with the Commission and would therefore be subject to relatively prompt detection, if in fact a negative clearance were not sought.

4. *Joint Ventures.* Although under Commission practice the legality of a merger is measured only against the standards of article 86, joint ventures are scrutinized under both articles 85 and 86. For joint ventures:

> The crucial question is whether the cooperation of the framework of the common subsidiary is likely to restrict or lessen competition. The answer depends on the circumstances of the case. As long as the parent companies or one of them still operate in the geographic and product market of the common subsidiary, restrictions in this sense of Article 85 are probable. This may also be true in cases where the parent companies and the joint venture are present in different but economically connected markets (raw material, semi-

27. FIRST ANNUAL REPORT, *supra* note 3, at 28-30.
28. *Id.* at 31-32.
29. Hawk, *supra* note 6, at 252.
30. *See, e.g.*, SAFCO, O. J. EUR. COMM. (No. L13) 44 (1972), [1970-1972 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9487.

> finished product, final product). Even in cases where neither parent company has ever operated in the market of the joint venture, restrictive effects may be found, if we can prove a likelihood that each of the parent companies would have entered that market separately.[31]

Increased regulation of joint ventures is likely, particularly those involving large United States firms seeking to establish or perpetuate major market positions. Upon consummation, virtually all joint venture agreements, unlike price fixing agreements, are likely to be made known to the Commission as well as to the business community at large.

5. *Collective Agreements For Reciprocal Exclusive Dealing.* The reciprocal dealing arrangements challenged by the Commission typically have involved parties enjoying a substantial share of the market within a particular state.[32]

6. *Agreements For Rebate On Total Turnover.* Under article 85 the Commission also has attacked agreements by which producers in one member state agree to give the same discounts to customers at collectively fixed rates, based upon a customer's total purchases during a specified period from all of the producers who are parties to the agreement.[33]

7. *Exclusive Buying And Selling Agreements.* In *Grundig-Consen*,[34] the Commission's first major antitrust case, the Court upheld the Commission's prohibition of absolute territorial protections in

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31. Schlieder, *supra* note 5, at 328. Upon review of its previous joint venture rulings, the Commission observed that in order to determine whether article 85(3) sanctions a joint venture, the Commission must ask "whether the joint venture offers substantial objective benefits to offset the disadvantages to competition." Commission of the European Communities, SIXTH REPORT ON COMPETITION POLICY 38-41 (1977) [hereinafter cited as the SIXTH ANNUAL REPORT]. To this end, the Commission then observed that it

> will generally tend to take an unfavorable view whenever joint ventures are formed by large firms in different Member States with the object or effect of coordinating their conduct in the market. Exemption will also be refused where there is no need for close cooperation between the firms to take the form of a joint venture, as where the benefits of an agreement could be achieved by less restrictive means.

Id. at 40.

32. Hawk, *supra* note 6, at 254.

33. *Id.*

34. Etablissements Consten and Grundig-Verkaufs, GmbH v. EEC Comm'n, [1966] C. J. Comm. E. Rec. 429, [1961-1966 Court Decisions] COMM. MKT. REP. (CCH) ¶ 8046.

an exclusive distributorship agreement between a German manufacturer and its exclusive distributor for sales in France. The Court refused to permit the French supplemental trademark held by the French distributor to be used to block parallel imports from West Germany.

Thereafter, the Commission issued regulation 67/67 which granted a blanket exemption to certain types of bilateral exclusive distribution agreements complying with specified conditions, primarily the absence of any restrictions on parallel imports or reexports across member state boundaries.[35] Under article 2(1) of regulation 67/67 only two kinds of competitive restrictions may be imposed upon an exclusive dealer:

> (1) the obligation not to manufacture or distribute competing products during the life of the contract and one year thereafter, and (2) the obligation not to take positive steps—such as setting up a warehouse or advertising in another territory—to sell outside the territory.[36]

This early and strict enforcement has apparently resulted in the elimination of the majority of absolute territorial restrictions brought to the Commission's attention. Indeed, most manufacturers have modified voluntarily their exclusive distributorships in the face of this vigorous enforcement policy.[37] Moreover, future agreements of this nature are likely to be detected by the Commission staff promptly upon filing.

8. *Selective Distributorships*. Selective systems of distribution limited to a number of "approved" resellers have also come under Commission scrutiny. If a manufacturer has a strong market position, the Commission is more likely to strike the system down.[38] The

35. Regulation No. 67/67, 10 J. O. COMM. EUR. 849 (1967), 1 COMM. MKT. REP. (CCH) ¶ 2727. The Commission extended the life of regulation No. 67/67 another ten years as of December 1, 1972. 14 O. J. EUR. COMM. (No. L276) 15 (1972). *See* Draft of Regulation to Amend Regulation No. 67/67, EEC Comm'n Press Release [No. IP (72) 137], [1970-1972 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9517, at 9155. In 1976, the Commission proposed a number of amendments to regulation 67/67 to conform them to recent Court of Justice rulings. In particular, the breadth of a territory that may be subject to an exclusive dealing arrangement has been proposed not to exceed a population area of 100 million, the same limit as is proposed for exclusive patent licenses. SIXTH ANNUAL REPORT, *supra* note 31, at 19-20.

36. Osterweil, *Developing EEC Antitrust Law in the Field of Distribution Under Article 85 of the Treaty of Rome*, 8 L. & POL'Y INT'L BUS. 77, 86 (1976) [hereinafter cited as Osterweil].

37. Hawk, *supra* note 6, at 268.

38. FIRST ANNUAL REPORT, *supra* note 3, at 63-65. "An enterprise [doing business in the Common Market] which does not hold a dominant position is, of course, free to choose its customers at its own discretion." Schlieder, *supra* note 5, at 320.

Commission also distinguishes between quantitative criteria of selection, which it disfavors, and qualitative criteria based on objective and uniform grounds, generally found permissible.[39] The latter criteria may include restricting distribution to a small group of dealers who are usually experts in handling highly technical and relatively expensive products.[40]

The Commission's Competition Director, Willy Schlieder, recently reconfirmed this approach. He believes that

> it is necessary to draw a dividing line between cases in which the producer intends to insure a certain minimum standing of the marketed goods and sales outlets[,] but *not to limit the number of dealers*, and cases of quantitative selection where the producer decides, as a matter of marketing policy and *in cooperation with the dealers, to distribute his goods only through a given number of dealers and subdealers*.[41]

In Schlieder's view, the latter form of agreement limiting the number of dealers is violative of article 85(1), although it nevertheless may qualify for an exemption under article 85(3).

In 1975, the Commission clarified its policy as to selective distributorships in a case involving SABA, a subsidiary of United States based General Telephone & Electronics Co.[42] SABA, which manufactures televisions, radios and tape recorders, sells them throughout the Common Market through a network of selected independent distributors. Under the SABA plan, a qualified dealer must maintain a so called specialized shop, or if a department store, a radio and television department and repair facilities. Furthermore, a SABA-selected dealer is required to undertake various promotional activities and meet certain sales targets. The standard contracts also prevent an authorized dealer from reselling to an unauthorized dealer.

The Commission granted the SABA distribution system an exemption even though it had reservations as to the anticompetitive nature of the restrictions imposed upon the dealers. The Commission apparently viewed the agreements as helping to rationalize production and distribution, with the consumer reaping the ultimate benefit. Spe-

39. FIRST ANNUAL REPORT, *supra* note 3, at 63-64; Hawk, *supra* note 6, at 272.

40. *See, e.g.*, *Omega*, 13 J. O. COMM. EUR. (No. L242) 22 (1970), 1 COMM. MKT. REP. (CCH) ¶ 2061.86, where the Commission granted an exception to the Swiss watchmaker, Omega, whose system not only contained, based on certain objective conditions—expert knowledge and exhibition facilities, but also restricted the number of retailers in relation to the number of area prospective customers.

41. Schlieder, *supra* note 5, at 319 (emphasis in the original).

42. SABA, 19 O.J. EUR. COMM. (No. L28) 19 (1976), 2 COMM. MKT. REP. (CCH) ¶ 9802.

cifically, the Commission found "cost savings through improved production and sales planning" while the consumer also was assured of the "ready availability of high quality equipment meeting market demand and his own specific requirements," in addition to satisfactory after-sales service for these technically complex goods.[43]

The Commission, however, did impose the requirement that SABA report to the Commission each year those cases in which it refused to appoint a firm as a SABA dealer, or in which it terminated such an appointment, refused to conclude a supply contract or witheld supplies from such a dealer.[44]

The Commission also sanctioned a selective distribution system in its decision to exempt from article 85(1) the standard distributor agreements of Bayerishe Moteren-Werke AG (BMW) for distribution of its products in Germany upon receipt of proof that BMW had abandoned export prohibitions that would have applied within the Common Market.[45] The exempted distributor agreements now enable BMW to select its dealers on the basis of objective criteria such as adequate staff, business standing, repair facilities, minimum stocks and guarantees; moreover, if BMW has reasonable grounds for doing so, it may require a distributor to refrain from carrying other brands of automobiles. Although its *BMW* decision is of a specific nature, the Commission believes the holding could be of general significance at least for the distribution of automobiles because manufacturers or general importers who wish to apply or establish similar distribution systems will be able to see what kind of restraints on competition may be permissible.[46]

The limitations on selective distributorships are important to United States firms seeking to enter European markets but unwilling or unable to establish direct selling vehicles. The Commission is likely to be more tolerant of distributorship restrictions imposed by a firm seeking a toehold in the market, rather than by a firm seeking to perpetuate a major market share. At the very least, the United States firm, whether new to the market or well established, may require that its dealers meet certain reasonable minimum standards. Under the

43. FIFTH ANNUAL REPORT, *supra* note 25, at 50.

44. SABA, 19 O. J. EUR. COMM. (No. L28) 19 (1976), 2 COMM. MKT. REP. (CCH) ¶ 9802.

45. Bayerishche Motoren Werke A.G., 18 O. J. Eur. Comm. (No. L29) 1 (1975); See Commission of the European Communities, FOURTH REPORT ON COMPETITION POLICY 57-60 (1975) [hereinafter cited as FOURTH ANNUAL REPORT], for the Commission's analysis of the import of the *BMW* ruling.

46. FOURTH ANNUAL REPORT, *supra* note 45, at 57.

BMW precedent, it may even be possible to obtain advance clearance for certain forms of exclusive distributorship arrangements, especially if the product is new to European markets.

9. *Resale Price Maintenance*. As indicated by the analysis of the distributor and dealer cases such as *Grundig* and *BMW*, vertical as well as horizontal agreements come within the reach of article 85. Resale price maintenance agreements are another important category of agreements covered by article 85. Such agreements are prohibited, however, only if they have the purpose or effect of preventing, restricting, or distorting competition within the Common Market.[47]

The Commission has stated that as a general rule, resale price maintenance systems confined to a single member state are essentially a problem for the competition policy of that member state and not of immediate concern to the Commission. However, in practice, national resale price maintenance systems have been tolerated only if competing products from other member states are available.[48] Moreover, one commentator has observed that under Common Market law, "[i]t is simply neither practical nor useful to impose a retail price on one's retailers if others can purchase one's goods abroad and then undersell them domestically."[49] Because of this tendency towards market self-regulation it may well be that resale price maintenance is not likely to be a significant antitrust enforcement topic in the coming years.

10. *Price Discrimination*. The Commission has not yet held explicitly that the charging of different prices, except for adjustments required by variances in shipping and related costs, to purchasers in different member states violates article 85. Nevertheless, in an appropriate case the Commission probably would so hold because

> the Commission is clearly concerned with price disparities among goods in various Common Market countries. . . . Commission responses to questions asked by members of the European Parliament [for example] reveal the Commission's desire to examine the problem of price differentials in the automobile industry. Moreover, the Commission's *Fourth Annual Report on Competition Policy* notes that, because rising prices constitute a serious problem for all

47. Treaty of Rome, *done* March 25, 1957, art. 8(1), 218 U.N.T.S. 14, 47, 48, 1 COMM. MKT. REP. (CCH) ¶ 2005.

48. *See generally*, De Richemont, *Regulation of Resale Price Maintenance Under U.S., French, German, British and EEC Law: A Comparative Analysis*, 5 L. & POL'Y INT'L BUS. 440, 451-62 (1973).

49. *Id.* at 456.

> Community countries, the Commission has "set itself the task of examining cases of high price disparities, with the aim of applying Treaty competition rules in appropriate situations."[50]

In *Pittsburgh Corning Europe*,[51] the Commission struck down a company's use of pricing restrictions to isolate the territories of its concessionaires because the scheme was deemed to be a parallel import restriction and therefore anticompetitive, even though some concessionaries required a higher price to function in their market. This decision is seen as similar to court holdings in the United States under the Robinson-Patman Act.[52] Accordingly, the Commission may be expected to pursue obvious cases where, absent some justification such as proper freight allowances, purchasers in different countries are being charged different prices. There is no indication, however, that the Commission staff is ready to undertake challenges to basing point systems of pricing, quantity discounts or other such sophisticated but potentially injurious discriminatory pricing devices that have troubled United States enforcement authorities for three decades.

C. Patent Licensing Under Article 85

The antitrust consequences of patent licensing in the Common Market are rapidly becoming as serious as those in the United States. Today Common Market patent antitrust law is almost as well developed as that of the United States. Patent antitrust problems under article 85 have become sophisticated and complex enough to warrant extensive analysis. However, the discussion in this survey will, of necessity, simply highlight the most important considerations.

During its first decade of enforcement activity, the Commission's antitrust analysis of patent license restrictions involved a balancing of interests comparable to the "rule of reason" approach found in United States antitrust law. Several recent developments indicate, however, that the Commission now is developing an approach of "presumptive illegality" to certain types of license restrictions, and "presumptive legality" as to other restrictions. In particular, the Commission's proposed comprehensive guidelines on patent antitrust matters announced in February of 1977, which if enacted in their current form would permit certain license restrictions previously suspect, clearly indicate an attempt to bring certainty to this complex legal field.

50. Osterweil, *supra* note 36, at 102.

51. 14 O. J. EUR. COMM. (No. L272) 35 (1972), 1 COMM. MKT. REP. (CCH) ¶ 2021.432.

52. Finnegan, *The Burgeoning Development of the Common Market Competition Rules and Its Impact on International Licensing*, 27 MERCER L. REV. 519, 540 (1976).

Before reviewing the proposed guidelines, it is necessary to place them in context. Three years ago, the Court of Justice articulated a general rule in the *Centrafarm* case that a patent license provision which restricted the ability of the licensee to resell across national boundaries was illegal in virtually all circumstances.[53] Likewise, the Court held that a series of national patents may not be used to impose territorial limitations within the EEC.[54] These rulings, which are consistent with the Rome Treaty's primary objective of creating a unified common market, did not of themselves signal vigorous regulatory opposition to other forms of license restrictions.

Thereafter, however, it became possible to discern a trend toward Commission expansion of the Court's application of the *Centrafarm* "presumptive illegality" approach to a wide range of licensing restrictions. This trend continues even with the publication of the Commission's proposed guidelines because, with respect to restrictions not specifically permitted, the *Centrafarm* approach of "presumptive illegality" remains applicable and possibly reinforced. The proposed patent guidelines arguably carve out a number of pro-competition exceptions to previously announced broad prohibitions.

In the *AOIP/Beyard* case,[55] issued in December of 1975, the Commission broadly ruled that the following six provisions in the patent license under review were violative of article 85(1): 1) the parties agreed to extend the life of the patent beyond its statutory life; 2) the licensee was obligated to pay full royalties after expiration of the statutory life of the patent; 3) the licensee was prohibited from challenging the validity of the patent; 4) the parties agreed to a non-compete clause, including a restriction on competitive research and development efforts; 5) the licensee was forbidden to export the product (provision held illegal even though not enforced);[56] and 6) the licensee obtained the exclusive right to manufacture and sell the

53. Centrafarm B.V. & Adriaan de Peijper v. Sterling Drug Inc., [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8246; Van Zuylen Frères v. Hag A. G. [1974] E. Comm. Ct. J. Rep. 731, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8230.

54. Centrafarm B.V. & Adriaan de Peijper v. Sterling Drug Inc., [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8246.

55. 19 O. J. EUR. COMM. (No. L6) 8 (1976), 2 COMM. MKT. REP. (CCH) ¶ 9801. This case involved a license of patents dealing with variable resistor electrical devices.

56. *See also* the Commission's 1976 settlement in *British Broadcasting Corp.*, EEC Comm'n Press Release [No. IP (76)35], 2 COMM. MKT. REP. (CCH) ¶ 9819, where BBC agreed to remove a prohibition against a British toy manufacturer's selling television cartoon character toys manufactured under license from BBC in the Netherlands. The Commission was concerned with the fact the BBC had granted the Dutch television network a license to show its television cartoons thereby raising the presumption that BBC had established another market for these toys.

product in France. The Commission suggested, however, that an exemption for this provision could have been sought article 85(3).[57]

The Commission did grant two exemptions to license restrictions under article 85(3) contemporaneous with its *AOIP/Beyard* decision. In both cases, however, the restrictions were found to be reasonably necessary to guarantee increased production, as well as expansion of the sales base throughout the Common Market.[58]

In early 1976, the Commission's chief antitrust enforcement official provided a current summary of potentially troublesome license restrictions. They include:

> 1) no challenge clauses; 2) extension of the agreement beyond the life of the most recent patent existing at the time the agreement was made, unless there is a right for each party to give notice of termination; 3) non-compete clauses; 4) payment of royalties after the last patent expires; 5) tying agreements; 6) restrictions on the sale of the licensed product (price fixing or bulk restrictions); 7) exclusivity of sales and export restrictions which exceed the period necessary for a new product to penetrate a new market; 8) an obligation for the licensee to use the licensor's trademark; and 9) a prohibition against the use of the licensor's know-how after the agreement expires.[59]

While the proposed guidelines initially seem to relax substantially previous prohibitions against various patent license restrictions, the reality is more complex. Because of this fact, the proposed guidelines have generated considerable controversy both in Europe and in the United States. As a result, the guidelines will probably be modified in some respects before their issuance in final form in 1978. Given this controversy, United States businesses should closely monitor Commission activity for signals of possible change in the final version of the guidelines.

Perhaps the most important provision of the lengthy and complicated proposed guidelines is one that would permit licensors to establish exclusive territorial licenses under article 1, paragraphs 1 and 2. However, paragraphs 1(a) and 1(b) of article 2 of the proposed guidelines respectively provide that such licenses may be granted only

57. 19 O. J. EUR. COMM. (No. L6) 8 (1976), 2 COMM. MKT. REP. (CCH) ¶ 9801.

58. Kabelmetal-Luchaire, 18 O. J. EUR. COMM. (No. L222) 34 (1975), [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9761; Boyer AG, Leverkusen & Gist-Brocades N.V., 18 O. J. EUR. COMM. (No. C198) 2 (1975), 2 COMM. MKT. REP. (CCH) ¶ 9770.

59. Schlieder, *supra* note 5, at 317.

if the territory covered by the license has a population of less than 100 million people and if the licensor can cancel the license if the licensee fails to exploit the patent within five years. As a result of the proposal, a licensor could grant an exclusive license only in a portion of the Common Market, for example, Belgium and France. A licensor would be prohibited from granting such a license, however, in combinations of larger nations such as France and West Germany, because the total population of such territory exceeds the 100 million ceiling. This represents a significant change from current practices.

On the other hand, there are a number of significant restrictions that a licensor may impose that are not subject to the territorial limitation noted above. Under article 1, paragraph 6, of the proposed guidelines, for example, a licensor would still be able to impose field of use restrictions. A licensor could also require the licensee to purchase "certain primary products" from a designated source according to paragraph 11 of article 1. Additionally, article 1, paragraph 14, would enable a licensor to require a licensee to keep confidential the licensee's secret manufacturing processes or know-how "facilitating the use or application of manufacturing techniques".

Article 2, paragraph 2, of the proposed guidelines also would permit a licensor to impose export prohibitions upon a licensee in a given territory, but only for a ten year period and only if the annual sales of licensor and those "enterprises that are legally or economically dependent upon the enterprise involved" do not exceed 100 million units of account. A licensor would be permitted to prevent a licensee from issuing sublicenses or making assignments under paragraph 8 of article 1, to require the licensee to affix a patent trademark to the end product subject of the license under paragraph 9 of article 1.

Article 3 of the proposed guidelines enumerates many of the same prohibitions listed in the *Centrafarm* decision and the Schleider speech, discussed above. Among the most prominent are prohibitions against the use of no challenge clauses, price fixing and similar restraints on use of the licensed products, extensions of the license beyond the last patent, and certain noncompetition clauses.

The proposed guidelines also limit the use of binding arbitration to resolve license disputes. Under paragraph 1(16) of article 1 and paragraph 8 of article 2 of the proposal, the arbitration must be conducted within the Common Market; the result must be subject to appeal; and the Commission must be given two months notice before the award will be effective. There is some speculation that all of these provisions, except the last-mentioned one, may be removed from the

final guidelines. However, this would still give the Commission the effective power to veto any arbitration award found to be anticompetitive.

Procedurally, the proposed guidelines are announcements of the kind of license agreements that are likely to be cleared by the Commission pursuant to its authority in article 85(3) of the Rome Treaty. According to paragraphs 1 and 3 of article 4, the exemptions of the proposed guidelines would apply prospectively to a particular agreement six months after the Commission receives notice of the agreement, unless the Commission objects within that time. The prospective application of the exemptions would not be affected by the fact that the agreement was executed either before or after the effective date of the guidelines. Thus, the proposed guidelines do not compel the Commission to approve various patent license provisions; rather, the Commission may still consider any particular license restriction in the specific context in which it arises. Obviously however, the guidelines are likely to be accurate indicators of the Commission's response in most cases.

The development of these proposed guidelines suggests a continuing Commission regulatory concern for patent antitrust problems. Both United States and EEC patent antitrust law are developing in a direction that is expanding the rights of licensees. In particular, the United States firm seeking to license an important product or process with restrictions upon the conduct of the licensee is sure to face close scrutiny from the Commission, and perhaps from licensees as well during negotiations. The fact that the Commission under its proposed guidelines will play an increasing role in approving licensing agreements should not be ignored.

In December of 1975, the member nations of the Common Market signed the Luxembourg Convention establishing the concept of a single Community patent granted jointly for all the member states of the Common Market.[60] Essentially, the agreement provides that, after a transitional period, a patent grantee will have the choice of relying on either national patents governed by national law with limited territorial effect, or the Community patent governed by a body of law contained in the Luxembourg Convention. Infringement actions based on a Community patent will still be brought in national courts. The effects of the Community patent do not, however, extend to the territory of a member state where there is a prior national patent or patent application.

60. Luxemborg Convention on Community Patent, 19 O. J. EUR. COMM. (No. L17) 1 (1976). *See*, EEC Comm'n Press Release (No. 156), 2 COMM. MKT. REP. (CCH) ¶ 9797.

IV. THE SCOPE OF THE PROHIBITION IN ARTICLE 86 AGAINST A FIRM'S ABUSE OF ITS DOMINANT POSITION

Because it may be used to challenge industry structure as well as conduct, article 86 is likely to be in the forefront of future Commission staff antitrust enforcement priorities. Article 86 prohibits the abusive exploitation of a dominant position in the Common Market or a substantial part thereof.[61] With this focus, article 86 carries the greatest potential for enforcement activity directed against those United States based firms which the Commission perceives as unduly influencing or dominating European markets.

Unlike article 85, there is no provision for exemptions from article 86. Three elements must be present in order to establish a violation under article 86: 1) a dominant position; 2) the abuse of that position; and 3) the likelihood of an effect on trade among member states.[62]

A. Specific Business Practices As an Abuse of Dominant Position

Article 86 neither defines "dominant position" nor indicates what might constitute a suspect share of the market. These deficiencies will continue to vex European and United States firms alike. However, it is safe to assume that any firm enjoying a fifty percent or more market share becomes vulnerable to close Commission staff scrutiny, especially if the market is characterized by a single United States firm with a large market share and several smaller European firms which have been unable to obtain more than a foothold in the market.

Article 86, however, does specify certain examples of abusive practices: 1) unfair pricing and purchasing terms;[63] 2) production

61. Article 86 provides as follows:

> Any abuse by one or more undertaking of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.

Treaty of Rome, *done* March 25, 1957, art. 86, 298 U.N.T.S. 14, 70, 1 COMM. MKT. REP. (CCH) ¶ 2101.

62. Parke, Davis & Co. v. Probel, Reese, Beintema-Interpham, & Centrafarm, [1968] C. J. Comm. E. Rec. 81, 2 COMM. MKT. REP. (CCH) ¶ 8054.

63. An example of unfair pricing terms under article 86 was revealed in the Court of

allocations which prejudice customers; 3) discrimination; and 4) tie-in arrangements. However, the definition of abusive practices was refined in *Deutsche Grammophon*[64] and *Sirena*,[65] where the EEC Court of Justice explicitly ruled that the mere holding of a patent, copyright or trademark will not alone constitute a "dominant position", and that a larger product market therefore must be examined in order to establish a violation of article 86.

The Court in *Deutsche Grammophon* did give some indication of what might constitute a violation of article 86. The Court stated that the difference between a given product price and the price when the product is reimported from another member state may constitute decisive evidence of an abuse if there is no objective justification for the price differences.[66] This inference of an abuse from evidence of unjustified price differentials is important for two reasons. First, it reflects the importance given to price equalization throughout the Common Market. Second, it indicates the Court's willingness to condemn dominant firm activities which result in price differentials.[67]

The reach of article 86 was revealed further in the Commission's decision in *GEMA*,[68] a paradigm case of abuse of a dominant position through certain business practices. In *GEMA* the Commission held that a West German organization with a musical copyright management monopoly abused its dominant position in a substantial part of the Common Market, that is, all of West Germany, by engaging in various anticompetitive practices. Several of these practices discriminated against nationals of other Common Market states, for example, discrimination against non-German importers in favor of German importers. The *GEMA* decision is important in several respects. First, the

Justice's recent decision in *General Motors Continental N. V. v. EEC Comm'n*, 2 COMM. MKT. REP. (CCH) ¶ 8320. At issue were purported excessive fees for vehicle inspection. GM's Belgian subsidiary had insisted that the inspections could only be performed by it as the manufacturer. Even though GM reduced the fees and reported overcharges prior to the Commission's investigation of the matter, the Commission found a violation of article 86. The Court of Justice reversed this aspect of the decision.

64. Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkte GmbH & Co. KG, [1971] C. J. Comm. E. Rec. 487, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106.

65. Sirena S.r.l. v. Eda GmbH, [1971] C. J. Comm. E. Rec. 69, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8101.

66. Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkte GmbH & Co. KG, [1971] C. J. Comm. E. Rec. 487, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8106.

67. Hawk, *supra* note 6, at 283.

68. GEMA, 14 J. O. COMM. EUR. (No. L134) 15 (1971), [1970-1972 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9438.

relevant geographic market for article 86 purposes was limited to West Germany, which was held to meet the criterion of a "substantial part" of the Common Market.[69] Second, in a subsequent observation as to the scope of the *GEMA* opinion, the Commission gave a broad, but somewhat circular, reading to the concept of "abuse":

> It is the [monopoly] situation which makes the abuse possible. . . . There is abusive exploitation of the market from a dominant position when the holder of the position uses the possibilities which flow from it in order to obtain advantages which he would not have obtained if there were effective competition.[70]

In its First Annual Report[71], the Commission explained that an abuse cannot be discerned in accordance with a model of predetermined conduct, but can be established only by taking into account the objectives of the EEC Treaty. The Commission commented in particular that *GEMA* underscored the fact that the aim of article 86 is to prevent firms in a dominant position from obstructing the establishment of undistorted competition in the Common Market.[72]

In the *Commercial Solvents* case,[73] the Court of Justice upheld the decision of the Commission that Commercial Solvents, a United States based multinational firm, had violated article 86 by abusing its dominant position in the market of intermediate chemical products for an antituberculosis drug, ethambutol, which it manufactured. Commercial Solvents was found to have caused its fifty-one percent owned subsidiary, ICI, to terminate sales of an essential ingredient of ethambutol to an Italian firm which manufactured ethambutol in competition with Commercial Solvents and which was unable to secure that material from any other source.

In 1975, the Commission rendered an important decision under article 86 that the United States firm, United Brands, in the marketing of its Chiquita brand bananas, had abused its dominant position in the Common Market, particularly in Germany, Denmark, Ireland and the

69. The Commission's Director General for Competition has observed that dominant positions in the Common Market as a whole are "quite rare"; thus, most interest is generally directed to the question of what part of the Community can be considered as "substantial". Schlieder, *supra* note 5, at 324.

70. FIRST ANNUAL REPORT, *supra* note 3, at 78.

71. *Id.* at 79. *See also* notes 3-8 *supra and* accompanying text.

72. *Id.* at 75-77.

73. Instituto Chemioterapico Italiano, S.p.A. Commercial Solvents Corp. v. EEC Comm'n, [1974] E. Comm. Ct. J. Rep. 223, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209.

Benelux countries.[74] Overall, United Brands was found to have maintained a forty percent share of the entire EEC banana market. The forty percent figure, however, should not be deemed the minimum share necessary to trigger article 86 interest. The Commission also found that it was the only firm in the Common Market to be fully integrated in that United Brands owned numerous plantations in tropical banana growing countries and a fleet of refrigerated banana boats, and controlled banana ripening facilities in consumer countries in the Common Market. The Commission also was persuaded that United Brands' efforts at producing price differences by means of promotional campaigns featuring its own Chiquita brand were cause for remedial action under article 86.

The Commission found United Brands abused its dominant position in the following ways: 1) it prevented its distributors from reselling green bananas (because ripe yellow bananas are perishable, only green bananas can be sold to medium or long distance customers); 2) it charged significantly different prices at different Common Market ports; 3) it charged unfairly high prices to customers in Germany, Denmark and the Benelux countries; and 4) it refused for two years, for no objectively valid reason, to supply one of its main Danish customers. Because the Commission believe United Brands' violations to be serious, it levied a one million unit of account fine on the company. Additionally, United Brands was required to file reports with the Commission on the status of its compliance with the various prohibitions of the decision.[75]

In its Fifth Annual Report, the Commission stated:

> The importance of this decision lies in the fact that the Commission investigated a firm's entire marketing policy in light of Article 86, not so as to attack its commercial dynamism and economic performance, since this is not the purpose of Article 86, but because a dominant firm has an obligation not to indulge in business practices which are at variance with the goals of integrated markets and undistorted competition in the common market.[76]

The Commission further defined "abuse of dominant positition" under article 86 in its 1976 decision in *Hoffman-La Roche and Co.*[77]

74. United Brands, 5 COMM. MKT. REP. (CCH) ¶ 9800. For extensive discussion of this case, see Swan, *The EEC United Brands Decision: Can Chiquita Banana Find Happiness in Europe?*, 7 CALIF. W. INT'L L. J. 385 (1977).

75. United Brands, 5 COMM. MKT. REP. (CCH) ¶ 9800, ¶ 9782.

76. FIFTH ANNUAL REPORT, *supra* note 25, at 59.

77. F. Hoffman-La Roche, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9583, *appeal pending*.

There, the Swiss based pharmaceutical firm was found to have held a dominant position with regard to seven types of common vitamins, and to have abused that position by entering into a number of exclusive or preferential supply contracts with many of the Common Market's major bulk vitamin users which add the vitamins to their own medicines, foods and foodstuffs. According to the Commission's press release, Hoffman-La Roche virtually cornered this market for vitamins by use of the exclusive supply contracts, foreclosing its chief competitors from access to this market.[78] The Commission also found that the Hoffman-La Roche contracts violated article 86 because they provided for so-called "fidelity rebates" based on the share of the customer's requirements purchased from Hoffman-La Roche and not on differences in the costs related to the quantities supplied.[79]

The *Hoffman-LaRoche* and *United Brands* cases demonstrate that the Commission is becoming more agressive in its use of article 86. This trend is likely to continue. One can expect future Commission investigative activity under article 86 to concentrate on the activities of United States firms for at least two reasons. First, certain European markets are dominated by United States based multinationals. Second, such dominance stands in the way of European economic self-determination.

A pending Commission investigation in the fertilizer industry, discussed *infra*, may signal a trend of increased investigations of the activities of United States firms doing business in Europe. It is certainly evidence of a notable evolution in Commission antitrust enforcement policy as the Commission delves into more sophisticated, "second-generation" antitrust problems.

Evidence of this evolution of enforcement policy, with its apparent concern over the role of multinationals in the European economy, may also be seen in the Commission's survey of multinational companies. While this survey was not conducted by the Commission's

78. European Community Information Service, Release No. 25/1976 (June 11, 1976).

79. This violation, though, is premised on the fact that Hoffman-La Roche already had a dominant position, and that this too was mere abuse of it. The Commission's determination follows a similar ruling of the Court of Justice in its 1975 sugar cartel decision. FIFTH ANNUAL REPORT, *supra* note 25, at 26-28, Suiker Unie UA v. Comm'n [1975 Transfer Binder] COMM. MKT. REP. ¶ 8334. In addition, the Court of Justice's determination in the sugar cartel case that an abuse of dominant position illegal under article 86 is shown where any firm exploits its dominant position to force dealers to channel their exports to specific consignees or areas and to oblige their customers to accept these restrictions, thus limiting the dealers' and, indirectly, their customers' markets. *Id.* at 28.

antitrust authorities, it does support the thesis that United States based multinationals play a major role in the European economy. However, at the same time, a clear inference from the report is that compilation of more data is necessary before the Commission can make informed judgments as to whether and what type of structural changes are necessary in particular industries.

The report noted that in three countries, the United States, Britain and Germany, are located the headquarters of sixty percent of all the world's multinational corporations.[80] More importantly, the report revealed that the 1,202 United States multinationals responding to the Commission's survey reported a 1973 "turnover" or gross sales of 737 billion units of account, compared with 516 billion for the 2,493 EEC multinationals.[81] As a result of this disparity, the authors of the report concluded by asking whether this is not a clear indication of the approach to adopt regarding the regulation of multinationals in Europe.

> [T]he figures would certainly appear to lend support to an idea frequently expressed in Community circles—that the development of European transnational companies should be promoted in order to counterbalance multinationals based outside the Community. "Multinationals based outside the Community" is becoming an increasingly tortuous, if diplomatically necessary, euphemism for designating the power of American multinationals.[82]

Not only does the Commission now have the incentive to increase enforcement activities under article 86, it is also beginning to have the capability to do so. Now that the Commission has reduced the backlog of agreements filed for review and has curbed such traditional abuses as horizontal market divisions under article 85, the Commission staff will be able to concentrate its efforts in new directions.

The fertilizer investigation[83] referred to previously, is illustrative of this apparent new direction in enforcement, and warrants discussion in some detail. The Commission began its investigation as a result of charges by European phosphate fertilizer companies that their United States competitors, who benefit from low cost raw materials, have been able to sell fertilizer in Europe at a lower cost than European producers. In particular, the European firms claimed that United States

80. This report has been made available to some segments of the European press. This analysis is based upon an account in 322 EUROPE REPORT 6 (weekly ed. June 12, 1976).

81. *Id.* at 6.

82. *Id.*

83. FOURTH ANNUAL REPORT, *supra* note 46, at 80-81.

phosphate producers charged United States fertilizer firms $15 per short ton for phosphate rock, while selling it to Common Market firms for $35 per short ton. The European firms also claim that United States companies have offered them access to cheap rock under conditions designed to obtained control over them.[84]

As a first step in its investigation, the Commission has requested through the United States State Department that the United States Justice Department supply it with information verifying the phosphate rock pricing disparities alleged by the European fertilizer firms. The Justice Department's Foreign Commerce Section is likely to work closely with the Commission staff in this matter because the Foreign Commerce Section is currently conducting a massive federal grand jury investigation of the entire United States fertilizer industry.

That investigation resulted in numerous indictments in July, 1976, charging five major producers of potash, an ingredient of most fertilizers, with conspiring to coordinate potash production, prices and exports in United States and Canada.[85] Although the defendants in that case were acquitted, other aspects of the investigation, including the operation of alleged international cartels, are still being presented to grand juries and may result in further indictments. In turn, if the Common Market authorities can remedy the alleged abuses of which the European fertilizer companies complain, the European market shares, United States firms exporting to the Common Market surely will be reduced substantially.

The importance to United States firms of the Commission investigation is twofold. First, it concentrates strictly on the United States firms. Second, it reveals that United States and Common Market authorities are working closely on an informal basis to develop a major antitrust case. In light of the fertilizer investigation, it is possible that the nonferrous metals, uranium and pharmaceutical industries, among others, may be subject to similar treatment by the Commission. These industries are already under close regulatory scrutiny in the United States for allegedly maintaining international cartels. Other industries are also under scrutiny simply because they are highly concentrated. If the Common Market were to conduct parallel or follow-up investigations, the United States based producers would surely be among the primary targets.

84. 117 U.S. EXPORT WEEKLY A-12 (August 3, 1976) (BNA).

85. U.S. v. Amax Inc., 5 TRADE REG. REP. (CCH) ¶ 45,076. On May 6, 1977, a federal district court judge acquitted three of the defendants in the criminal case.

B. Mergers as an Abuse of Dominant Position under Article 86

At present, European firms and even United States based multinationals may undertake routine acquisitions without challenge by the Commission. This will soon change, however, if the Commission enacts its proposed merger restraint policy, which would result in curtailing acquisitions of independent European firms by United States based multinationals.

Currently, article 86 is of limited utility in controlling mergers, because its provisions only apply after the merger has taken place and only if the merger is found to be an abuse of dominant position.[86] In the Common Market a merger cannot be blocked before consummation as it can in the United States, although the Commission can institute proceedings immediately after consummation and consequently need not await the accumulation of evidence showing an actual adverse competitive impact. As they stand now, articles 85 and 86 are properly perceived as insufficient "for a systematic merger control which is necessary to assure workable competition"[87] within the European Community.

Continental Can[88] was the Commission's test case for its theory that article 86 can be applied to challenge acquisitions made by a firm already enjoying a dominant position. The Commission has not challenged any merger as an illegal combination under article 85. Notably, the Commission picked an acquisition by a United States based multinational to establish its theory.

This case stemmed from Continental Can's plan to merge its German subsidiary, the largest producer of light metal cans in continental Europe, with a Dutch firm which was the largest producer of containers in the Benelux countries. While the Court of Justice overruled the Commission's findings as to the facts of the case, particularly its findings dealing with relevant product markets, the Court did approve the Commission's decision that article 86 may be used to challenge changes in market structure as well as abusive practices. The

86. Moreover, merger enforcement has not been vigorous in spite of a wave of mergers among Common Market firms in the last decade because of political and economic factors, including the French government's interest in protecting its expansion-minded corporations and the opinion of many EEC officials that "border crossing mergers" tend to reduce a chauvinistic tendency among executives of the merging companies. Scherer, *Secrecy, the Rule of Reason, and European Merger Control Policy*, 19 ANTITRUST BULL. 181, 182, 184 (1974).

87. Schlieder, *supra* note 5, at 327.

88. Europemballage Corp. & Continental Can Co. v. EEC Comm'n, [1973] C. J. Comm. E. Rec. 77, [1970-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

Court in essence held that article 86 could prevent enterprises from achieving through merger that which they were not permitted under article 85 to accomplish by way of agreement.[89]

Finally, the Commission's opinion in *Continental Can* is noteworthy because it states in general terms the Commission's view as to what constitutes a "dominant position" under article 86:

> Undertakings are in a dominant position when their scope for independent behavior is such that they can act without making substantial allowance for competitors, buyers or suppliers. This is the case when, owing either to their share of the market, or their share of the market coupled with the situation in connection or respect of technical knowledge, raw materials, or capital, they are able to determine prices or control production or distribution of a significant share of the products in question.[90]

The emphasis in *Continental Can* focused on the vast technological and financial resources of the acquiring firm, on its multinational character and the consistent market leadership it has exhibited. This emphasis suggests

> a concern for sheer size—and inconsistent modes of market behavior—which may be incompatible with the kind of marketplace the Commission is attempting to build. This factor of overall size is one which may emerge as an independent aspect of Commission policy.[91]

C. *The Proposed Regulation of the Control of Mergers*

In its Third Annual Report, the Commission expressed its belief that "the time has come for the European Community to take powers to exercise more systematic control over mergers."[92] Under current law, mergers can only be challenged insofar as they manifest the requisite abuse of dominant position. Moreover, the Commission,

89. Since *Continental Can*, the Commission has issued a Proposed Concentration Regulation, to be discussed in the next section of this article, which seeks to lessen the Commission's burden in merger cases. The proposed regulation requires merger prenotification and gives the Commission the effective power to block mergers prior to consummation in some cases. *See generally*, Note, *EEC Antitrust—An Exercise in Prior Restraint*, 7 L. & POL'Y INT'L BUS. 143, 151-52 (1975).

90. This is an unofficial Commission translation reprinted in Van der Esch, *Abuse of a Dominant Position in Community Law*, FORDHAM UNIVERSITY LAW SCHOOL, CORPORATE LAW INST., INTERNATIONAL ANTITRUST 132 (1974).

91. Note, *Common Market Merger Policy: Sources and Development*, 14 VA. J. INT'L L. 501, 518 (1974).

92. Commission of the European Communities, THIRD ANNUAL REPORT ON COMPETITION POLICY 33 n.29 (1974) [hereinafter cited as THIRD ANNUAL REPORT].

even after *Continental Can*, can do very little to prevent United States firms from continuing to make acquisitions of major European businesses.

This does not mean, however, that the Common Market is ready to import in its entirety section 7 of the Clayton Act.[93] Indeed, the Commission still recognizes that acquisitions may often be the only practicable way of restoring desired competition in a market otherwise completely dominated by a firm with a high rate of internal growth.[94] However, it is the European firm, rather than the United States firm, that is likely to benefit from this position.

As a result of its concerns about mergers leading to concentration in the Common Market, the Commission, on July 20, 1973, sent to the Community Council for approval a proposal for a regulation governing the "Control of Concentrations between Undertakings".[95] The main provisions are as follows:

1) Concentrations which give the power to hinder effective competition are incompatible with the Common Market. Concentrations on a smaller scale which do not give such power are not caught by this rule as long as they do not exceed certain quantitative limits. In making these determinations, competition in the world market must be considered.
2) Concentrations which are indispensable to the attainment of an objective given priority treatment by the Community may be held not to be incompatible with the Common Market.
3) Concentrations (including joint ventures) involving firms with aggregate sales of 1,250 million of units of account are subject to prior notification, after which the Commission has three months during which it may initiate proceedings.
4) Legal transactions which have taken place in connection with a concentration which is declared incompatible with the Common Market are not void.

During 1974 and 1975, the Council's Working Party on Economic Questions deliberated upon the proposed merger regulation. According to the Commission, its 1975 deliberations were deferred, however, until the outcome of the June referendum in the United Kingdom as to

93. Clayton Act of 1914, ch. 323, tit. III, 38 Stat. 730 (codified in scattered sections of 15, 18, 29 U.S.C.).

94. THIRD ANNUAL REPORT, *supra* note 92, at 33 n.29.

95. *Id.* at 33.

whether to continue its membership in the Common Market.[96] Council discussions have been "concentrating on the definition of the scope of the regulation and the criteria set out in article 1," set forth above.[97] During 1976, the Council's Working Party met on March 23 to consider the proposed merger regulation; no action was taken at this meeting. This fact indicates that the proposed merger regulation probably will not be adopted in the near future.

The crucial provision of the proposed regulation is article 1, which prohibits mergers which "give the power to hinder effective competition."[98] Assuming the proposed regulation is enacted into law, the real issue is how that standard will be applied, particularly in view of the requirement that the merger's effect on the world market must be considered. It does seem certain, however, that proposed article 1 will be applied to the relative disadvantage of major United States firms. Aquisitions by powerful United States multinationals can be challenged under proposed article 1 because of being perceived as giving the firm "power to hinder effective competition". Moreover, article 1, in its concern for the impact on the world market, would sanction defensive mergers by European firms consummated on the ground of affording more vigorous and efficient competition to United States based competitors. As a simple example, if article 1 were enacted, it is extremely unlikely that the Commission would permit General Motors to acquire Fiat (United States antitrust law notwithstanding), whereas Fiat and British Leyland might be encouraged to combine to confront General Motors with greater competition on a worldwide basis.

D. The Commission's Special Oil Industry Investigation

The Commission's Special Oil Industry Investigation[99] gives further indication of its increased concern for the consequences of the conduct and structure of markets dominated by large United States multinationals.

On December 15, 1975, the Commission released the findings of its two year investigation of the behavior of the major oil companies in the Common Market during the period of the Middle East oil crisis, October, 1973, to March, 1974. The purpose of the investigation was

96. FIFTH ANNUAL REPORT, *supra* note 25, at 15 n.8.

97. *Id.*

98. THIRD ANNUAL REPORT, *supra* note 92, at 32.

99. Report by the Commission on the Behavior of the Oil Companies in the Community During the Period from October 1973 to March 1974 (1975) [hereinafter cited as Oil Report] (copy on file with CALIF. W. INT'L L. J.).

to determine exactly what the oil companies did during the oil crisis and whether such conduct violated the EEC's rules of competition, specifically articles 85 and 86. The focus of the Commission's investigation was on the Netherlands and Italy, which traditionally had excess refining capacity and which accordingly were sources of supply to countries with insufficient refining capacity, especially Germany. The report gave indications as to what sort of oil company conduct might be challenged in the future. The Commission also announced that it contemplates further investigation and possible action in a number of areas.

In its December 21, 1973, press release announcing the investigation, the Commission stated:

> Refusal by the big [oil] companies to supply the independent distributors in an equitable manner may give rise to an application of the competition rules of the Treaty and in particular Article 86 thereof.
>
> The same holds good for practices which consist in the big companies applying to their trading partners different conditions for the provision of equivalent services or subjecting the signature of contracts to the acceptance by their partners of extra services.[100]

The press release proved to be an accurate indicator of the Commission's findings and concerns. The Commission concluded that, as a result of the oil shortage, Common Market oil refiners "in general saw their position strengthened to such an extent that, collectively, they acquired a dominant position in the oil market."[101] The refiners achieved this dominance because, owing to the oil shortage, customers had no alternate sources of supply. As a result, during the shortage each of the companies with refining capacities in a given country became the sole and "imposed" supplier of refined products to all of those dealers and consumers who were its traditional customers.[102]

Of long-term importance is the Commission's stated concern about the behavior of the big oil companies even though the oil shortage has abated. Any future Commission investigations or enforcement action affecting the Common Market oil refining industry probably will focus on the following three areas.

1. *Joint Ventures.* In its Fifth Annual Report, released five months after issuance of the oil shortage report, the Commission

100. *Id.* at 2.

101. FIFTH ANNUAL REPORT, *supra* note 25, at 17-18.

102. *Id.*

summarized its apprehension as to the anticompetitive impact of the joint ventures pervading the industry:

> Whether in the case of actual joint ventures, exchanges of refining capacities or transfers of products, the large companies are limited by an extensive network of relationships which, even if there are good historical and economic reasons for them, constitute nonetheless a factor in strengthening their solidarity and consolidating their position.
>
> The Commission will remain alert to the posibility that, by forging more and more of these links, the companies might create together a situation which would limit the scope for effective competition.[103]

Nevertheless, five major European oil companies, Societe Nationale Elf-Acquitaine, Cie. Francaise des Petroles (both of France), Veba AG of Germany, Petrofina S.A. of Belgium and Ente Nationale Idrocarbori of Italy recently have informed the Commission that they propose, subject to Commission approval, to cooperate on pricing policy, oil exploration and energy conservation in order, among other reasons, to improve price structures and profitability.[104] The Commission's response to this request should be an important indication of the future of antitrust policy not only with respect to the oil companies, but also as to other combinations proposed in response to market dominance by other larger multinationals.

2. *Price Discrimination Among Member States.* The Commission believes that the reliance of international oil firms on certain customary systems for publishing price data, for example *Platt's Oilgram*, which the Commission specifically mentioned, "raises some real problems concerning the correctness of prices."[105] This observation arose in the context of the Commission's concern over possible

103. *Id.* at 16.

104. Wall Street Journal, Sept. 15, 1976, at 20, col. 2.

105. Oil Report, *supra* note 99, at 123. According to the Commission,

> [u]nlike the world-wide commodities, such as copper or sugar, the prices of oil products are not quoted on any international exchange, and the Platt's Oilgram quotations, although unofficial, have acquires [*sic*] some significance as a market indicator. They are used extensively by oil companies in determining their transfer and sale prices. Governments have also taken quotations into consideration when determining their prices for oil products.

Id. at 115. The Commission observed further that

> [e]very effort is undoubtedly made to ensure that the data used in the compilation of Platt's Oilgram quotations are absolutely up to date, but the actual criteria for interpreting the data given and the means of determining the daily quotations are unknown, as indeed are the sources of the information themselves.

Id. at 123.

abuses in transfer pricing, that is, the intracompany price that the vertically integrated oil company "charges itself" during the several transactions from the oil field to the gas pump. The Commission insists upon accurate pricing so that it can determine whether there is any unwarranted difference in price between oil sold by one firm in two member nations. According to the Commission,

> [i]t is this disparity between real costs and transfer prices which gave rise to accusations against the oil companies that they were operating price systems which were so complex that they could cover up any form of manipulation. Indeed all the systems which they operate certainly do lack clarity and logic, permitting uncheckable calculations to be made.[106]

3. *Suppression Of Independent Firms.* In the course of its investigation, the Commission gave special attention to the possibility of abuse of single firm dominance by certain companies in their relations with independent dealer-customers.

> The Commission takes the view that, during the crisis, all the large oil companies individually were in a dominant position, at least in respect of their traditional customers, who had no access to suppliers other than those with whom they had done business. A refusal to sell to such customers can constitute an abuse forbidden by Article 86 since it may affect trade between Member States, which is certainly the case when a sizeable purchaser/dealer is in danger of being squeezed out of the market, a development which would mean appreciable change in the pattern of supply of oil products in a substantial part of the common market.[107]

This concern is clearly an attempt to prevent small or medium sized European businesses from being crippled or destroyed by the major European oil refineries, most of whom are affiliates of major vertically integrated United States oil companies.

The Commission's Report, however, concluded that transfer prices of crude oil and refined products had virtually no effect on market prices at the time of the Middle East oil crisis. Ultimately, the Commission determined that

> it is in the terms under which the various companies supplying the market obtain their supplies that the factors governing price levels in the times of crisis, as in time of market stability, are to be found.

106. *Id.* at 132.
107. *Id.* at 151.

> As regards crude oil, the major companies, which for a long time have had an almost exclusive control of Middle East oil, have established very close relationships with producer countries and, despite the gradual disappearance of concession oil, still benefit directly or indirectly from privileged purchasing conditions in countries where production costs are in any case the lowest. With respect to crude oil then, the other companies are subject from the outset to a handicap which is felt at all steps right up to the finished product.[108]

4. *Other Investigations.* As a follow-up of its investigation, the Commission also expressed its intent to make inquiries into the kerosene and naptha product markets because of perceived oligopolies and oligopsonies.[109] The Commission also plans to make further inquiry into the oil companies' public supply contracts with electricity companies.[110]

5. *Limitations On The Scope Of Future Enforcement Action Affecting The Major Oil Companies.* In spite of its concerns, the Commission's Report on the Oil Companies ultimately does not reveal pronounced hostility towards the big oil companies, even those based in the United States. The Commission appears satisfied simply to exercise an increased supervisory role with the aim of preserving the smaller nonintegrated firms. Indeed, the Commission seems to have taken a somewhat "hands off" attitude towards the major oil firms.

> It also emerges from this report that during the crisis the dissimilar actions by member states were aimed at the urgent introduction of measures and gave the impression of an "every man for himself" approach, which was scarcely in the Community spirit.
>
> During the same period because of their international standing and experience, the oil companies made an important contribution to alleviating for the countries of the Community, the serious repercussions on their suppliers of the decisions taken by the oil producing countries.
>
> This same crisis served, in fact, to highlight how effective and indispensable their influence is, and to bring home to economic observers and to the general public the power wielded by these large companies and the limitations of any attempt at state intervention.[111]

108. *Id.* at 128.
109. FIFTH ANNUAL REPORT, *supra* note 25, at 21.
110. *Id.*
111. Oil Report, *supra* note 99, at 153.

It thus may be that major United States oil companies, at least in the near future, need not expect the Commission to demand the sort of radical structural changes now being promoted in the United States by the Congress and by the Federal Trade Commission. Nonetheless, the Commission may attempt to curb specific oil company practices that hinder the development of European competitors.

V. CONCLUSION

The Common Market's antitrust enforcement mechanism is now approaching maturity. Many of the obvious, "first generation" abuses such as territorial restrictions in licensing agreements are now being eliminated. In the process, the Commission has developed, at least in certain areas such as licensing and distribution, a rational and reasonably predictable enforcement policy.

As a result, the Commission can now devote greater investigative and enforcement efforts to the more sophisticated "second generation" problems presented both by restrictive practices or conduct and by the very structure of product markets themselves. The oil company and fertilizer investigations are illustrative. So, too, is the development of the proposed regulation on control of mergers. Also noteworthy is the increased cooperation among antitrust officials of the Common Market, the United States, and other OECD nations. However, as indicated in both the multinational and the big oil studies, the primary obstacle to second generation policy development is the logistical one of information access and data reduction.

The conclusion appears inescapable that future Commission enforcement activity will impact more heavily than before on United States business for at least two reasons, especially as more cases are brought under article 86. First, United States based multinationals still include some of the most potent private economic organizations in Europe and, unlike a number of their French and British counterparts, have long operated throughout the entire Common Market. Second, the Commission's interest in the development of a Common Market and, in particular, its concern for the need of smaller firms to develop greater competitive resources, reflects the European Community's apparent desire for greater economic self-determination. If this self-determination can be achieved only at the expense of United States based multinationals, then the Commission is likely to respond accordingly.