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James D. Myers

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# EEC Antitrust Law: Its Development and Philosophy with Special Attention to Intellectual Property Rights

by James D. Myers\*

## I. Introduction

What follows is concerned with the antitrust law of the European Common Market or the European Economic Community (hereinafter referred to as the EEC), its development and philosophy. It is becoming increasingly important for American businessmen and lawyers to have a basic knowledge of EEC law not only because the EEC is now the world's largest trading block, but also because many U.S. multinationals operate under EEC law in Europe. The purpose of this article is to provide the American entrepreneur and attorney with a fundamental understanding of the sort of commercial activities that may and may not be legally entered into in the EEC. Accordingly, this discussion will not be overly legalistic or technical. Instead, it will consider the general background, development, and organization of the EEC. The underlying philosophy or spirit of its creation, which continues to pervade its administration in all areas, will also be examined. If these basic concepts are recognized and understood, they can provide significant insight into particular situations that arise, legal gymnastics notwithstanding.

In addition, this article will review the particular provisions of the Treaty of Rome that form the substantive bases for the EEC's antitrust law and how these provisions have interfaced in practice with the industrial property rights created by member states' laws.

## II. The Organization and Goals of the EEC

The EEC was originally established by a series of treaties among six nations: France, Germany, Italy, Belgium, the Netherlands and Luxembourg.<sup>1</sup> The first treaty, the Treaty of Paris,<sup>2</sup> created a common market

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\* Partner, Bell, Seltzer, Park & Gibson, P.A., Charlotte, N.C.; B.S., Ch. E. 1963, J.D. 1972, University of South Carolina.

<sup>1</sup> Treaty Establishing the European Coal and Steel Community, *entered into force* July 25, 1952, 261 U.N.T.S. 140 [hereinafter cited and referred to as Treaty of Paris]; Treaty Establishing the European Atomic Energy Community, *entered into force* Jan. 1, 1958, 298 U.N.T.S. 1969; Treaty Establishing the European Economic Community, *entered into force* Jan. 1, 1958, 298 U.N.T.S. 11 [hereinafter cited and referred to as Treaty of Rome]. These six original nations

limited to coal and steel through establishment of the European Coal and Steel Community. Thereafter, it was the Treaty of Rome<sup>3</sup> that extended the common market basically full-scope into all general areas of intra-Community commerce.

The broad goals and purposes of the EEC are set forth in the early portions of the Treaty of Rome (hereinafter referred to as simply the "Treaty"):

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of standards of living and closer relations between the States belonging to it.<sup>4</sup>

These ultimate goals, to achieve collective economic growth and to better the collective standard of living throughout the EEC, reappear time and time again, in spirit and substance, both in the specific provisions of the Treaty and subsequent interpretive regulations and decisions.

To gain further insight into the development of the EEC and its workings, it is well to reflect on the status of Western Europe at the time the Treaty was drafted: post-war rebuilding was well on its way and national hopes for the future were brightening. However, world economics had drastically changed, and nations that had once held positions of dominance found themselves faced with the challenge of discovering a means for economic survival. New large global superpowers foreshadowed any real likelihood of individual economic success. The member nations accordingly acknowledged as a reality that economic growth and prosperity, or even survival, were apparently possible only through collective efforts toward common goals.<sup>5</sup> The Treaty of Rome was the result.<sup>6</sup>

The Treaty sought to accomplish these common goals by eliminating intra-Community trade barriers, accompanying customs duties, quantitative trade restrictions, and other particular measures tending to impede trade.<sup>7</sup> Additionally, the Treaty sought to promote "the institution of a system ensuring the competition in the common market is not distorted,"<sup>8</sup> by including articles which proscribed certain anticompeti-

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were later joined by three new member states: Great Britain, Denmark and Ireland. Treaty of Accession, *entered into force* Jan. 1, 1973, \_\_ U.N.T.S. \_\_. Three other nations have applied, and are currently negotiating, for membership: Greece, *see* Bull. E.C. 6/75, point 1201; Portugal, *see* Bull. E.C. 3/77, point 1.1.1; and Spain, *see* Bull. E.C. 7/8/77, point 1.1.1.

<sup>2</sup> Treaty of Paris, *supra* note 1.

<sup>3</sup> Treaty of Rome, *supra* note 1. For a general treatment of the historical background and evolution of the Treaty of Rome, *see* P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (2d ed. 1975).

<sup>4</sup> Treaty of Rome, *supra* note 1, art. 2.

<sup>5</sup> *See generally* K. SAVAGE, THE STORY OF THE COMMON MARKET (1970).

<sup>6</sup> Though the EEC system is the creature of a treaty, it operates within member states, and is therefore international law working internally in individual member states.

<sup>7</sup> Treaty of Rome, *supra* note 1, art. 3(a).

<sup>8</sup> *Id.* art. 3(f).

tive practices.

To effectuate the goals of the Community, the Treaty also provided for four bodies: an Assembly, a Council, a Commission, and a Court of Justice,<sup>9</sup> each of which would serve a separate and important function.

The Assembly,<sup>10</sup> or the European Parliament as it is often called, is a formal body made up of delegations from the legislative bodies of the member states. It convenes in Strasbourg where it conducts inquiries and considers questions of policy. The Assembly has no real lawmaking power, however. The Council of Ministers<sup>11</sup> usually sits in Brussels, and it consists of representatives from the cabinets of the member states. The Council exercises the basic legislative powers<sup>12</sup> of the Community and issues regulations and guidelines for the application of the Treaty. However, the Commission drafts proposed regulations and opinions and forwards them to the Council.<sup>13</sup> The Assembly and the Council are in effect secondary bodies insofar as the visible administration of the EEC and its laws are concerned.

The next body, the Commission,<sup>14</sup> headquartered in Brussels, is relatively small (thirteen members with at least one representative for each member state),<sup>15</sup> yet it has the substantial job of actually administering the law of the Treaty. Specifically, the Commission is empowered by the Treaty to ensure that the Treaty's provisions are properly applied, to formulate recommendations or deliver opinions on matters relating to the Treaty, to have its own power of decision in initial stages of Treaty law proceedings, and to exercise particular powers conferred on it by the Council, such as issuing regulations in pertinent areas.<sup>16</sup> Qualitatively, the Commission does have a relatively strong administrative and investigative staff, although it is admittedly small in number compared to its large area of responsibility. Included in this staff is a "Competition Directorate" which is particularly concerned with the application of the antitrust provisions. The normal procedure for the passage of legislation begins with a proposal initiated by the Commission.<sup>17</sup> This is followed by consultation with the Assembly,<sup>18</sup> and if approved, adoption by the Council.<sup>19</sup>

The fourth of the administrative bodies is the Court of Justice, or the European Court of Justice as it is often called, which is headquar-

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<sup>9</sup> *Id.* art. 4.

<sup>10</sup> *Id.* art. 138(2). The Assembly has 431 members.

<sup>11</sup> *Id.* art. 146.

<sup>12</sup> See Treaty of Rome, *supra* note 1, art. 146 for a description of the breadth of powers which the Council enjoys.

<sup>13</sup> Treaty of Rome, *supra* note 1, arts. 149, 155.

<sup>14</sup> *Id.* art. 157.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* art. 155; see also art. 189.

<sup>17</sup> *Id.* arts. 155, 152, 21(2).

<sup>18</sup> *Id.* art. 137.

<sup>19</sup> *Id.* arts. 145, 152.

tered in Luxembourg. It may sit as a full court of nine judges, or in panels of three or five.<sup>20</sup> Jurisdiction is given under the Treaty to make preliminary rulings concerning the interpretation of the Treaty, to rule on the validity and interpretation of acts of the institutions of the Community, to interpret statutes derived from the Treaty, to review Community questions and decisions arising from national courts or tribunals of member states,<sup>21</sup> and to review the decisions of the Commission and the Council.<sup>22</sup>

The activities, regulations, and rulings of the Commission and the Court take on further significance when one considers that the Treaty specifically sets forth the particular force and effects of the various types of pronouncements made by these two bodies.<sup>23</sup> In particular, article 189 provides:

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.<sup>24</sup>

### III. An Overview of the Treaty's "Antitrust" Provisions

Articles 85 and 86 are the basic "antitrust" provisions of the Treaty which deal with restrictive business practices. Their full text appears in the footnote below.<sup>25</sup> The framework of the articles as well as their de-

<sup>20</sup> *Id.* art. 165.

<sup>21</sup> *See* Treaty of Rome, *supra* note 1, arts. 169, 170, 171.

<sup>22</sup> *Id.* art. 173.

<sup>23</sup> *Id.* art. 189.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* arts. 85, 86. Art. 85 provides:

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

tailed language should be examined carefully, particularly article 85.

Article 85 nominally prohibits agreements, decisions and concerted practices which accomplish various restrictive results. Such agreements, decisions or practices must also have as their object or effect the prevention, restriction or distortion of competition within the Common Market.<sup>26</sup> While such prohibited agreements, decisions or practices shall be "automatically void," the provisions of the article just outlined may be declared inapplicable if certain conditions are met.<sup>27</sup> These conditions are set out in article 85(3) and include the improvement of the production or distribution of goods, or promotion of technical or economic progress. In addition, these benefits must be shared with consumers. Article 85 thus prohibits, but it also excuses.

Whereas article 85 addresses matters of specific conduct of businesses while in the Community, article 86 speaks more to structure. In its most fundamental terms, article 86 prohibits abuses by those with dominant positions in the market.<sup>28</sup> More specifically, article 86 proscribes the following actions by those enjoying considerable market power:

- (1) the imposition of inequitable terms on a trading partner<sup>29</sup>
- (2) the limitation of output to the detriment of consumers<sup>30</sup>
- (3) price discrimination<sup>31</sup> and
- (4) the use of tying clauses.<sup>32</sup>

It should be borne in mind, however, that the list offered by the article is

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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.

Art. 86 provides:

Any abuse by one or more undertakings 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 contracts.

<sup>26</sup> *Id.* art. 85.

<sup>27</sup> *Id.* art. 85(3).

<sup>28</sup> *Id.* art. 86.

<sup>29</sup> *Id.* art. 86(a).

<sup>30</sup> *Id.* art. 86(b).

<sup>31</sup> *Id.* art. 86(c).

<sup>32</sup> *Id.* art. 86(d).

exemplary and is by no means exhaustive. Moreover, recent cases have indicated that less malevolent conduct than that described, conducted by firms in a dominant market position, may lead to article 86 difficulties.<sup>33</sup>

Aside from the problem of ascertaining what type of conduct might run afoul of article 86, the practitioner is also faced with the challenge of determining what is "dominant market position." The article does not offer a definition of this vital term. However, recent case law suggests that a position of "dominance" may have been reached by one enjoying as little as forty percent of the market.<sup>34</sup>

Because it sets forth implementation procedures for articles 85 and 86, Regulation 17 should be read as a complement to the basic antitrust articles of the Rome Treaty. It requires notification of new<sup>35</sup> and existing<sup>36</sup> agreements, decisions, and practices.<sup>37</sup> The purpose of the regulation is to "ensure effective supervision"<sup>38</sup> of the Community's antitrust laws as well as to give undertakings an opportunity to know whether they are in violation of article 85(1) or article 86.<sup>39</sup> The EEC system is basically an "illegal until authorized" system.<sup>40</sup> In other words, until an agreement or practice has been notified, it is considered invalid.<sup>41</sup>

There are three procedures by which the Commission may deliver decisions. The first is negative clearance,<sup>42</sup> a process whereby firms apply to the Commission hoping that it will find article 85(1) inapplicable. The Commission may also render an infringement decision. In this case, the Commission takes the initiative, and finds an infringement under article 85 or 86. It then "require[s] the undertakings or associations of un-

<sup>33</sup> *Re Continental Can Co.*, Decision of the Commission, Dec. 9, 1971, J.O. COMM. EUR. (No. L7) 25 (1972), 11 Comm. Mkt. L.R. D11 (1972); *see also* *Europemballage Corp. and Continental Can Co. v. Commission des Communautés européennes*, [1973] C.J. Comm. E. Rec. 215, 11 Comm. Mkt. L.R. 199 (1973).

<sup>34</sup> *United Brands Co. v. Commission of the European Communities*, Decision of the Court, Feb. 14, 1978, 21 Comm. Mkt. L.R. 429 (1978), [1977-78 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

<sup>35</sup> Reg. 17, art. 4; J.O. COMM. EUR. (No. L13) 204 (1962) [hereinafter Reg. 17].

<sup>36</sup> *Id.* art. 5. *See* *Robert Bosch and Another v. Kleding-Verkoopbedrijf De Geus en Vitdenbogerd*, Decision of the Court, April 6, 1962, [1962] C.J. Comm. E. Rec. 91, 1 Comm. Mkt. L.R. 1 (1962), [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8003.

<sup>37</sup> For a discussion of what constitutes an agreement or practice, *see* *Re Cartel in Quinine*, Decision of the Commission, July 16, 1969, J.O. COMM. EUR. (No. L192) 5 (1969), 8 Comm. Mkt. L.R. D41 (1969); *Re Cartel in Aniline Dyes*, Decision of the Commission, July 24, 1969, J.O. COMM. EUR. (No. L195) 11 (1969), 8 Comm. Mkt. L.R. D23 (1969); *Imperial Chemical Industries, Ltd. v. Commission des Communautés européennes*, [1972] C.J. Comm. E. Rec. 619, 11 Comm. Mkt. L.R. 557 (1972).

<sup>38</sup> Reg. 17, preamble.

<sup>39</sup> *Id.*

<sup>40</sup> Such a practice is alien to the American jurisprudential requirement of actual controversy, but it is characteristic of the Community's pragmatism.

<sup>41</sup> *See* *Brasserie de Haecht v. Wilkin* (No. 2), [1973] C.J. Comm. E. Rec. 77, 12 Comm. Mkt. L.R. 287, 293 (1973). *See also* *Brauerai A. Bilger Söhne GmbH v. Jehle and Another*, Decision of the Court, Mar. 18, 1970, 13 Comm. Mkt. L.R. 382 (1974:1), [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8076.

<sup>42</sup> Reg. 17, art. 2.

dertakings concerned to bring such an infringement to an end.”<sup>43</sup> The third possibility is an exemption decision. After a party has submitted its agreement for notification, the Commission may grant an exemption pursuant to article 85(3).<sup>44</sup> In practice, most businesses apply concurrently for negative clearance under article 85(1) and for an exemption under article 85(3). Article 8 of Regulation 17 expressly limits the time span of any exemption issued, however. Thus, even if one receives an article 85(3) exemption, it “shall be issued for a specified period and conditions and obligations may be attached thereto.”<sup>45</sup> Any exemption issued is renewable under Regulation 17, article 8(2).<sup>46</sup>

If one does not receive negative clearance for an exemption, review of the Commission’s decision may be made by the Court of Justice.<sup>47</sup> This provision is especially important when a fine has been assessed under article 15 of Regulation 17. Fines may amount to one million units of account, or more; however, they “shall not be imposed in respect of acts taking place: (a) after notification to the Commission and before its decision in application of article 85(3). . . .”<sup>48</sup> Therefore, notification is encouraged by reducing the potential fine which may be assessed against an undertaking. If a company has already paid a fine, some “set-off” may be allowed. However, the amount of “set-off” allowed is dependent on whether the sanction was imposed by a member or non-member state.<sup>49</sup>

Among other pronouncements of the Commission relevant to anti-trust matters are Regulation 19 and the so-called “Christmas Message of 1962.” Regulation 19 of 1965<sup>50</sup> empowers the Commission to issue regulations authorizing block exemptions applicable to certain categories of activities.<sup>51</sup> Activities covered by such a regulation may be conclusively considered exempted under article 85(3), without the necessity of individual submissions. These block exemptions “shall be made for a specified period. . . . [Any exemption] may be repealed or amended where circumstances have changed with respect to any factor which was basic to its being made.”<sup>52</sup> Pursuant to Regulation 19 of 1965, the Commission issued Regulation 67 in 1967.<sup>53</sup> Regulation 67 is an example of a block exemption which applies to certain categories of bilateral exclusive-dealing agreements. Among other things, that Regulation listed cer-

<sup>43</sup> *Id.* art. 3.

<sup>44</sup> *Id.* art. 9(1). See *Re Cartel in Quinine*, *supra* note 37.

<sup>45</sup> Reg. 17, art. 8(1).

<sup>46</sup> Article 8(2) of Regulation 17 provides that “[a] decision may on application be renewed if the requirements of Article 85(3) of the Treaty continue to be satisfied.”

<sup>47</sup> Treaty of Rome, *supra* note 1, art. 173; Reg. 17, art. 17.

<sup>48</sup> Reg. 17, art. 15(5).

<sup>49</sup> *Boehringer Mannheim GmbH v. Commission des Communautés européennes*, [1972] C.J. Comm. E. Rec. 1281, 12 Comm. Mkt. L.R. 864 (1973).

<sup>50</sup> Regulation 19/65, 36 O.J. EUR. COMM. 533 (1965).

<sup>51</sup> *Id.* art. 1.

<sup>52</sup> *Id.* art. 2.

<sup>53</sup> Regulation 67/67, 57 O.J. EUR. COMM. 849 (1967).



tain restrictive clauses common to exclusive-dealing arrangements, which were accorded exemption from article 85(1) for about a five year period.

On December 24, 1962, the Commission issued a nonbinding Announcement known as "The Christmas Message" on patent license agreements<sup>54</sup> giving some indication of the considerations by which it would be guided in interpreting the prohibition of article 85(1) with regard to clauses often found in certain patent license contracts.<sup>55</sup> The effect of the Announcement was that as long as contracts did not contain restrictions other than those resulting from the enumerated clauses, the Commission would not consider them as falling within the prohibition of article 85(1).<sup>56</sup> Thus, the incentive for seeking negative clearance would be removed in these instances. In addition, the need for a Commission determination of legal position in individual cases would be rendered unnecessary.<sup>57</sup> "The Christmas Message" was initially given considerable weight in commercial thinking as an authoritative statement of permissible conduct in the Community. Subsequently, it became apparent through a series of decisions that the Commission and the Court of Justice themselves were no longer following the announced guidelines in all respects.<sup>58</sup> The decisions reveal that the Commission is of the opinion that a territorial limitation, by whatever means, of the licensee's selling rights falls within the prohibition of article 85(1), provided its effects are noticeable. However, such a limitation of manufacturing rights would, in principle, escape the prohibition.<sup>59</sup> Not surprisingly, the Commission has recently indicated that it will soon replace "The Christmas Message" guidelines.<sup>60</sup>

Finally, article 30<sup>61</sup> of the Treaty has recently achieved substantive

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<sup>54</sup> J.O. COMM. EUR. 2922 (1962).

<sup>55</sup> *Id.* § I.

<sup>56</sup> *Id.* § III. See generally Note, 52 NOTRE DAME LAW. 957, 990-93 (1977).

<sup>57</sup> However, this is not tantamount to a "block exemption." J.O. COMM. EUR., *supra* note 54, at § III.

<sup>58</sup> Re the Agreements of Burroughs AG and Etablissements L. Delplanque et Fils, Commission Decision of Jan. 1, 1972, [1972] J.O. COMM. EUR. (No. L13) 50, 11 Comm. Mkt. L.R. D67 (1972), [1970-72 New Developments] COMM. MKT. REP. (CCH) ¶ 9485; Re the Contract of Burroughs AG and Geha-Werke GmbH, Commission Decision of Jan. 17, 1972, J.O. COMM. EUR. (No. L13) 53 (1972), 11 Comm. Mkt. L.R. D72 (1972), [1970-72 New Developments] COMM. MKT. REP. (CCH) ¶ 9486; Re the Agreements of the Davidson Rubber Co., Commission Decision of June 23, 1972, J.O. COMM. EUR. (No. L143) 31 (1972), 11 Comm. Mkt. L.R. D52 (1972), [1970-72 New Developments] COMM. MKT. REP. (CCH) ¶ 9512; Re the Agreement of A. Raymond & Co., Commission Decision of June 23, 1972, J.O. COMM. EUR. (No. L143) 39 (1972), 11 Comm. Mkt. L.R. D45 (1972), [1970-72 New Developments] COMM. MKT. REP. (CCH) ¶ 9513.

<sup>59</sup> This latter principle may not apply in more complex situations upon which the Commission had previously reserved its judgment: patent pools, cross-licensing and multiple parallel licenses. J.O. COMM. EUR., *supra* note 54, at § II. See, e.g., Re the Agreements of Henkel & Cie GmbH and Colgate-Palmolive Co., Commission Decision of Jan. 1, 1972, J.O. COMM. EUR. (No. L14) 14 (1972), [1970-72 New Developments] COMM. MKT. REP. (CCH) ¶ 9491.

<sup>60</sup> Draft Regulation of the Commission, Mar. 20, 1979, 24 Comm. Mkt. L.R. 478 (1979). The new regulation will take effect Jan. 1, 1980. *Id.* at 489.

<sup>61</sup> "Quantitative restrictions on imports and all measures having equivalent effect shall,

importance and has been applied by the Court of Justice on several occasions<sup>62</sup> to condemn practices seemingly allowed under members' national laws to protect national industrial property rights. A detailed discussion of this area appears below.

#### IV. American and EEC Antitrust Law Compared

Since this discussion is aimed primarily at American lawyers with a general awareness of U.S. antitrust law, it is useful at this point to compare and contrast the major thrust of U.S. antitrust law with that of the EEC. While there are some similarities between the U.S. and EEC competition law both in form and philosophy, the reader should be aware that there are also some substantial variations. This is especially true with respect to goals and practices under the two systems. As a result, one may anticipate differences in attitude and outcome. A brief comparison of the U.S. and EEC antitrust systems, their heritages and workings is in order.

##### *A. The Histories, General Goals and Workings of the Two Systems*

The Sherman Act<sup>63</sup> and the American antitrust laws evolved in the late nineteenth century in the era of large combinations of companies or trusts in the railroad and oil industries. Growth had reached the point that a very few trusts virtually controlled these basic industries; entry by new firms and effective competition were nearly impossible. There was a genuine concern that a few powerful trusts would soon control the economy, if they did not already. The Sherman Act, enacted in this environment, was used as the primary tool to break up these trusts.<sup>64</sup> Thereafter, the government established enforcement policies utilizing the Act which were aimed at preserving a competitive marketplace. Thus, it is clear that among the main goals of American antitrust are the preservation of ease of entry by new firms into any field or industry and the assurance that competition will always be present, along with its attendant benefits.

Congress drafted sections 1 and 2 of the Sherman Act in very general language,<sup>65</sup> in order that they might apply to a wide range of activities having anticompetitive effects. Indeed, these provisions have been

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without prejudice to the following provisions, be prohibited between Member States." Treaty of Rome, *supra* note 1, art. 30.

<sup>62</sup> See Van Zuylen Freres & Adriaan de Peijper v. Hag A.G., Decision of the Court, July 3, 1974, [1974] C.J. Comm. E. Rec. 731, 14 Comm. Mkt. L.R. 127 (1974); Centrafarm B.V. v. Sterling Drug, Inc., Decision of the Court, Oct. 31, 1974, [1974] C.J. Comm. E. Rec. 1147, 14 Comm. Mkt. L.R. 480 (1974); Centrafarm B.V. v. Winthrop B.V., Decision of the Court, Oct. 31, 1974, [1974] C.J. Comm. E. Rec. 1183, 14 Comm. Mkt. L.R. 480 (1974).

<sup>63</sup> Act of July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1-7 (1976). See generally Lacey, *Antitrust and Foreign Commerce: Reach and Grasp*, 5 N.C.J. INT'L L. & COM. REG. 1 (1980).

<sup>64</sup> See, e.g., *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>65</sup> Sherman Act, *supra* note 63.

applied over the years to many different types of activities. Thus a substantial body of detailed antitrust case law has developed.

In the course of interpreting and applying the American antitrust laws, the U.S. courts have supplemented these vaguely worded statutes. Not the least important product of these judicial actions is the well known "rule of reason."<sup>66</sup> Under this concept a particular activity, although it might appear to run afoul of the literal provisions of the anti-trust laws, may still be adjudged proper, if the activity does not produce a substantial anticompetitive result and is no more restrictive than reasonably necessary.<sup>67</sup>

Despite the appeal of a very broad application of the "rule of reason," the courts soon recognized that some classes of behavior should be summarily condemned. These practices, such as price fixing, had such inherently pernicious effects that, even assessed for all results and influences, they would be held improper under any application of the "rule of reason." For these classes of activities, a procedural shortcut, the *per se* rule of illegality, dispensed with otherwise detailed and unnecessary analyses under the "rule of reason."<sup>68</sup>

On their face, articles 85 and 86 of the Treaty of Rome would appear to directly parallel sections 1 and 2 of the Sherman Act. However, when the history and purpose of the EEC system are closely analysed, the apparent identity loses much of its significance.

As may be recalled, a principal goal of the EEC was to integrate the separate economies of the member states into a strong central market system. Accordingly, any activity that serves to thwart this basic goal to any appreciable degree is almost without exception deemed undesirable and illegal. This has also been the feeling with respect to activities that tend to restrain the free flow of commodities between and among member states.<sup>69</sup> On the other hand, if the challenged activities have enhanced intra-member trade and fortunes, the activities have typically not been the subject of prosecution. This result pertains regardless of the existence of other apparently noncompetitive effects that would not be allowed under American antitrust law. The EEC approach has been more concerned with reaching an overall beneficial economic outcome than with isolated instances of temporarily reduced competition.

Another principal goal of the EEC is the protection of competition within the Community to allow internal competition to serve as an impetus for commercial growth among member nations. In general, this goal is one shared with the U.S. system. However, in the EEC the goal has been more actively pursued by EEC bodies. For example, in the interest of promoting competition, the EEC Commission has encouraged various

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<sup>66</sup> 221 U.S. 1.

<sup>67</sup> *See* 221 U.S. at 65.

<sup>68</sup> *See* *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

<sup>69</sup> *See* the later discussion of particular cases herein for specific examples.

forms of technology exchanges among small and medium-sized businesses and sanctioned otherwise questionable mergers to allow fledgling businesses to thrive and thereafter become competitive in the Community (and internationally).<sup>70</sup>

With respect to the substance of antitrust provisions, EEC antitrust law obviously provides more specific guidance than does its American counterpart. In the EEC the practitioner may draw on Treaty provisions, specific regulations and opinions of the Council and the Commission, and related procedural devices through which advisory opinions may be obtained. Such specificity is predictable considering the civil law heritage of many members of the Community and the active nature of its members' national courts. Furthermore, the prevailing Community trend for practical approaches to reach desired results without a compulsion to maintain symmetry of legal theory has had an influence.

### *B. Article 85 of the Treaty Compared with Section 1 of the Sherman Act*

Like section 1 of the Sherman Act, article 85(1) of the Treaty is literally concerned with prohibiting agreements or combinations that have a substantially adverse effect on competition. Furthermore, as in the case of the Sherman Act, nuances in application and interpretation of the language of article 85 have had a substantial effect on its real thrust and effect.

For example, the EEC Commission and Court have taken the general language in article 85(1), referring to the effect on trade between members states and restriction of competition within the Common Market, and used it to selectively excuse activities that might otherwise seem improper.<sup>71</sup> Article 85 is concerned with intra-Community commerce and not with extra-Community activities, except those that do have ultimate anticompetitive effects within the Community. The basic thrust of the article is thus to prohibit restrictive practices "which may effect trade *between* Member states."<sup>72</sup> (Emphasis added). In comparison, at least in some cases, the American antitrust laws affirmatively seek to exercise jurisdiction over "foreign commerce."<sup>73</sup>

As in the Sherman Act, the provisions of article 85(1) ostensibly prohibit all restrictive agreements. Yet, under article 85(3) the Commission is given the power to grant exemptions. This provision has been likened to the United States' "rule of reason" approach. However, it is more like a "second chance" by which the accused party (or the party seeking exemption) may yet escape prohibition of its activities under article 85(1) even after there has already been a determination that its activities do

<sup>70</sup> See Rahl, *European Common Market Antitrust Laws*, 40 ANTITRUST L.J. 814-15 (1971).

<sup>71</sup> See Wolf & Montauk, *Antitrust in the European Economic Community: An Analysis of Recent Developments in the Court of Justice*, 18 SANTA CLARA L. REV. 349, 364 (1978).

<sup>72</sup> Treaty of Rome, *supra* note 1, art. 85.

<sup>73</sup> See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

unduly diminish competition. This first level of applicability as to affecting and diminishing Community competition probably more closely approximates our "rule of reason."

*C. Article 86 of the Treaty Compared with Section 2 of the Sherman Act*

Article 86 of the Treaty is generally comparable to section 2 of the Sherman Act, yet article 86 does not prohibit the actual *existence* of monopoly power; instead it prohibits "abuse of a dominant position"<sup>74</sup> where "it may affect trade between Member States."<sup>75</sup> There is no clear guidance in article 86 as to how closely "dominant position" approximates a classic monopoly position, yet in one of its decisions the Commission has given general directions as to what constitutes a "dominant position":

Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate the decisionmaking power of their partners. It is sufficient that they be strong enough as a whole to ensure to those undertakings an overall independence of behavior, even if there are differences in intensity in their influences on the different partial markets.<sup>76</sup>

Regarding the question of what constitutes "abuse" of a dominant market position, the text of article 86 offers an illustrative list of prohibited practices.<sup>77</sup>

Note that article 86 does not have an exemption provision as does article 85. However, the Commission does from time to time issue applicable Notices that relate to particular acts that at least at the time of issuance are deemed not to come within the Treaty prohibitions and the Commission may also grant selective negative clearances.

## **V. The Status of Nationally Exclusive Intellectual Property Rights in the EEC**

In America predictable conflict arises between the antitrust laws and exclusive rights granted under other federal laws regarding the exploitation of industrial or intellectual properties. United States' law recognizes various exclusive rights in the areas of patents, trademarks and copyrights that may initially appear to lessen competition and generally

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<sup>74</sup> Treaty of Rome, *supra* note 1, art. 86.

<sup>75</sup> *Id.*

<sup>76</sup> Re Continental Can Co., Decision of the Commission, Dec. 9, 1971, J.O. COMM. EUR. (No. L7) 25 (1972), 11 Comm. Mkt. L.R. D11 (1972).

<sup>77</sup> Treaty of Rome, *supra* note 1, art. 86.

conflict with the avowed purpose of the antitrust laws.<sup>78</sup> Accordingly, in the United States there exists a fairly delicate balance as to how far exclusivity and dominance may be exercised with respect to intellectual property rights. One must remember that these rights arise from grants under the same national system of laws as do our antitrust laws.

In the EEC the conflict is even more complex. The Community must try to resolve the tensions between the exclusive property rights granted under the national laws of the Member States and the antitrust provisions of the Treaty, binding the entire Community. In particular, the EEC must ensure that exclusive intellectual property rights may be exercised within the Community as granted under Member States' law, and yet see to it that the Community's ultimate goals of commercial unity and the abolition of intra-Community trade restrictions are promoted.

The Treaty does not offer much help in resolving the conflict. Article 36 of the Treaty superficially seems to sanction the possibility of trade prohibitions or restrictions where "the protection of industrial and commercial property"<sup>79</sup> is involved. Article 36 also states: "Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination as a disguised restriction on trade between Member States."<sup>80</sup> Article 222 of the Treaty adds the further thought: "The Treaty shall in no way prejudice the system existing in Member States in respect of property."<sup>81</sup> It might therefore appear from the language of the Treaty that all industrial or intellectual property rights created in Member States would be left intact and readily enforceable, even to the point of barring intra-Community commerce, so long as such enforcement would not amount to "artificial discrimination" or "disguised restriction."

Such is not the actual outcome, however, because once again the Treaty's goal of unity is the final determinant. Indeed, article 5 of the Treaty states that Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."<sup>82</sup> The following discussion of the significant cases before the EEC Court of Justice in this area illustrates the interplay of property rights with antitrust in the Community.

Two of the first EEC cases regarding intellectual property rights were *Consten & Grundig-Verkaufs-GmbH v. EEC Commission*<sup>83</sup> and *Parke, Da-*

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<sup>78</sup> This is hardly to say that the exercise of American intellectual property rights in connection with related agreements, management and ownership is exempted from antitrust scrutiny.

<sup>79</sup> Treaty of Rome, *supra* note 1, art. 36.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* art. 222.

<sup>82</sup> *Id.* art. 5.

<sup>83</sup> Decision of the Court, July 13, 1966, [1966] C.J. Comm. E. Rec. 429, 5 Comm. Mkt. L.R. 418 (1966).

*vis & Co. v. Probel*.<sup>84</sup> In the *Grundig* case, Grundig of Germany had granted to Consten, as its licensee, certain exclusive rights in France. These rights included the permission to register and maintain the Grundig trademark, *GINT*, in France. Thereafter, a third party bought authorized Grundig equipment in Germany and sought to market it under the *GINT* mark in France at a lower price. Consten then sought to block such importation and marketing by asserting infringement of the French *GINT* trademark.

In its analysis of the situation, the European Court found the distributorship and license arrangement to constitute an "agreement" subject to scrutiny under article 85(1) of the Treaty—regardless of its vertical nature and of the fact that the arrangement included provisions relating to national industrial property rights. The Court concluded that the prohibitions of article 85(1) in effect preempted national intellectual property rights, or at least the *exercise* of such rights, when the effect of the exercise through an agreement was to prevent, restrict or distort competition within the Common Market.<sup>85</sup>

A similar situation was involved in the *Parke, Davis* case, but with a different outcome. Here, Parke, Davis held a Dutch patent covering a drug product and sought to enjoin the drug's importation into the Netherlands from Italy, where the drug could not be patented. The Court again reasoned that while the language of the Treaty did not preclude the existence of national industrial property rights, the exercise of such rights could amount to activity prohibited by articles 85 or 86 of the Treaty.<sup>86</sup> The Court then made a technical examination of the situation and found no violation since it could neither find an "agreement" to bring into play an application of article 85(1) nor any abusive exploitation of a dominant position to bring article 86 into play.

These two early decisions seemed to indicate that in most cases national industrial rights would be honored by the European Court, and that concern was warranted only where licenses of intellectual property were involved. Subsequent cases proved this to be an oversimplification.

One of the next significant cases in this area was *Sirena S.r.l. v. Eda S.r.l.*<sup>87</sup> In *Sirena*, long before the existence of the Rome Treaty and the creation of the Common Market, an American company had registered the mark, *PREP*, in Italy and thereafter transferred its registration to Sirena of Italy. The same American company permitted a German entity to use the *PREP* mark in Germany. The controversy arose later

<sup>84</sup> Decision of the Court, Feb. 29, 1968, [1968] C.J. Comm. E. Rec. 81, 7 Comm. Mkt. L.R. 47 (1968).

<sup>85</sup> Consten & Grundig-Verkaufs-GmbH v. EEC Commission, *supra* note 83. What is interesting to note is that Grundig eventually bought out Consten completely and there was thereafter no problem under art. 85.

<sup>86</sup> 7 Comm. Mkt. L.R. 47.

<sup>87</sup> Decision of the Court, Feb. 18, 1971, [1971] C.J. Comm. E. Rec. 69, 10 Comm. Mkt. L.R. 260 (1971).

when the German entity began to sell the trademarked product in Italy at a much lower price.

Although the Court did not find any dominant position involved that could trigger application of article 86, the Court did go back and find the twenty-year-old transfer of the trademark and the Italian registration to be an agreement to be scrutinized under article 85(1).<sup>88</sup> The Court came to this conclusion despite the fact that the agreement was entered into long before the effective date of the Treaty. The Court explained that it found the effects of the agreement still extant.<sup>89</sup> So characterized, the Court concluded that the arrangement did have the effect of reestablishing trade separation and distortion of competition and denied any ban on importation into Italy.<sup>90</sup>

Decided soon after *Sirena* was *Deutsche Grammophon GmbH v. Metro SB Grossmarkte GmbH & Co. KG*.<sup>91</sup> *Deutsche Grammophon* (hereinafter referred to as DG) manufactured phonographic records in Germany and held the German equivalent of a copyright on the records. DG records were sold in France through a DG-authorized and wholly-owned French subsidiary. A third party, Metro, thereafter acquired DG records indirectly from the French subsidiary and sought to market them in Germany at a lower price than was charged by DG. DG sought to block this with an injunction authorized by German law.<sup>92</sup>

In considering this situation, the European Court first ruled that while article 36 of the Treaty did indeed acknowledge the existence of national rights, such rights could be used to restrict intra-Market imports and exports *only* to the extent that they were justified to protect the "specific object" of the particular intellectual property.<sup>93</sup> The Court did not find this arrangement one designed to protect the "specific object" of such rights, although the Court did not expound on what such "specific objects" would be.<sup>94</sup> Furthermore, the Court laid the foundation for an "exhaustion" doctrine based on the premise that the first authorized entry in the market of a product protected under some industrial property right exhausted that right for all countries and prevented the property-right owner from thereafter imposing territorial restrictions based on such right.<sup>95</sup> The Court then found an article 85(1) subject agreement in the parent/subsidiary situation, and struck down the arrangement between them without finding dominance under article 86.<sup>96</sup>

The next prominent case involving the status of national intellectual

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<sup>88</sup> 10 Comm. Mkt. L.R. at 272.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 273.

<sup>91</sup> Decision of the Court, June 8, 1971, [1971] C.J. Comm. E. Rec. 487, 10 Comm. Mkt. L.R. 631 (1971).

<sup>92</sup> DG, 10 Comm. Mkt. L.R. at 634.

<sup>93</sup> *Id.* at 657.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 659.



property rights in light of Community antitrust law was *Van Zuylen Freres v. HAG, A.G.*<sup>97</sup> A German company, HAG, A.G., at one time owned a Belgian subsidiary to which it had transferred a Belgian trademark registration for the mark *HAG* prior to World War II. Afterwards, in connection with reparation-related procedures, the HAG Belgian subsidiary became a separate, unrelated company and commenced marketing coffee under the *HAG* mark in Belgium and Luxembourg. HAG, A.G. thereafter began to export its coffee into Belgium and Luxembourg under the same mark. An action for trademark infringement was brought by the HAG Belgian company's distributor to halt such importation.

The Court's resolution of the issues was less than compelling. The Court acknowledged that since there was no agreement present as in *Deutsch Grammophon*, article 85(1) technically did not apply.<sup>98</sup> Nonetheless, the Court considered the situation as one in which the "specific object" of the property rights involved was not the primary concern of the protection sought. Instead, it found that the concern involved and the effect sought amounted to simple market restriction, an outcome forbidden by the Treaty.<sup>99</sup> As further explanation, the Court developed a "common origin" doctrine, to the effect that where the disparate parties had previously acquired their interests in the subject matter through common lineage, subsequent competing sales could not be banned through the exercise of national industrial property rights.<sup>100</sup> This doctrine also carried with it certain overtones of the previous "exhaustion" doctrine. The *HAG* decision has been widely criticized as directly contrary to a trademark's "specific object" of correctly informing the public as to the true sources of goods.

Next came the pair of *Centrafarm* cases.<sup>101</sup> In the patent-related action,<sup>102</sup> Sterling Drug had sought to enforce certain national patents relating to pharmaceuticals against Centrafarm, which had purchased authorized drugs in one country and sought to resell them in another. The Court, left with no other technical procedural violations available, found article 30 with its general abolition of measures restricting imports applicable.<sup>103</sup> In addition, the Court found the activity was not excused by article 36 just because of the national industrial property rights in-

<sup>97</sup> Decision of the Court, July 3, 1974, [1974] C.J. Comm. E. Rec. 731, 14 Comm. Mkt. L.R. 127 (1974).

<sup>98</sup> 14 Comm. Mkt. L.R. at 143.

<sup>99</sup> *Id.* at 144.

<sup>100</sup> *Id.*

<sup>101</sup> *Centrafarm B.V. and Adriaan de Peijper v. Sterling Drug, Inc.*, Decision of the Court, Oct. 31, 1974, [1974] C.J. Comm. E. Rec. 1147, 14 Comm. Mkt. L.R. 480 (1974) [hereinafter cited as *Centrafarm I*]; *Centrafarm B.V. and Adriaan de Peijper v. Winthrop B.V.*, Decision of the Court, Oct. 31, 1974, [1974] C.J. Comm. E. Rec. 1183, 14 Comm. Mkt. L.R. 480 (1974) [hereinafter cited as *Centrafarm II*].

<sup>102</sup> *Centrafarm I*, 14 Comm. Mkt. L.R. at 480.

<sup>103</sup> *Id.* at 503.

volved. In particular, the Court reasoned that the activity under scrutiny was not directed to the "specific object" of the property right.

The Court went on to define the proper "specific object" for patents as ensuring the owner's exclusive right to manufacture and *initially* circulate his product, either directly or through licensed third parties. The Court did not, however, see such "object" as precluding the importation of products previously manufactured by the owner or introduced with its consent elsewhere.<sup>104</sup> Not finding such specific object served here, the Court declined to uphold the existence of any infringement.<sup>105</sup>

In its discussion of the issues raised in the *Centrafarm* patent case, the Court indicated that intra-Market imports could be restricted because of infringement with national patents only when: (a) the product originated from a nation in which it could not be patented and where it had been manufactured without the consent of the patentee (as in *Parke, Davis*); or (b) where the product was covered by national patents in both concerned nations and such patents were originally and presently owned by truly separate and independent owners.<sup>106</sup>

The second *Centrafarm* case<sup>107</sup> was related to the trademark aspects of the patent action previously outlined. With respect to trademarks the Court employed a "specific object" theory similar to the one applied in the patent context. The Court defined a proper "specific object" of a trademark right as ensuring the owner of the trademark of the exclusive right to use the mark for a first marketing of the product and protecting it against competition that could abuse its goodwill and trade reputation.<sup>108</sup> However, the Court found that protection of products under the trademark in subsequent introduction elsewhere was not a proper "specific object."<sup>109</sup> Accordingly, no relief was granted on the trademark infringement claim. Unlike the *Centrafarm* patent-related case, the Court declined to give any positive guidelines as to how national trademark rights could be utilized to limit imports.

The next important case regarding intellectual property rights was *E.M.I. Records Ltd. v. CBS (United Kingdom) Ltd.*<sup>110</sup> The trademark involved, *COLUMBIA*, had arisen from a common American source that had long previously registered it worldwide and thereafter made various transfers of registrations and uses in different countries. As it turned out, E.M.I. held all registrations and rights in the EEC countries, while CBS (U.S.) held U.S. and other extra-EEC rights. E.M.I. sought to enjoin CBS's German subsidiary from importing and marketing records in Ger-

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 504.

<sup>106</sup> *Id.* at 503-04.

<sup>107</sup> *Centrafarm II*, 14 Comm. Mkt. L.R. 408.

<sup>108</sup> *Id.* at 509.

<sup>109</sup> *Id.* at 509-10.

<sup>110</sup> Decision of the Court, June 15, 1976, 18 Comm. Mkt. L.R. 235 (1976), [1976 Transfer Binder, Court Decisions] COMM. MKT. REP. (CCH) ¶ 8350.

many which bore the mark originating from extra-EEC sources. Here the Court was not affected by any "common origin" factually present and granted the relief sought, finding that there was no article 30 danger present adversely affecting *intra-Market* free flow of goods and that there was no intra-Market interest adversely affected by the extra-Market goods being enjoined from import.<sup>111</sup>

Some authorities view the *E.M.I.* case as severely limiting *Sirena* and the common origin doctrine. Nonetheless, it is submitted that the primary concern of the Court in *E.M.I.* was the welfare of the Community's interests, which indeed it is charged with by the Treaty.

Another trademark-related action, *Terrapin (Overseas) Ltd. v. Terranova Industrie C.A. Kapferer & Co.*,<sup>112</sup> followed. The parties were admittedly unrelated. Terranova of Germany owned registrations for *Terra* marks for component building products, while Terrapin sought to import into Germany prefabricated building structures under the mark *Terrapin*. Under these circumstances, the Court held that national trademark rights could be used to preclude such imports in the interest of avoiding confusion ("specific object"), conditioned on the absences of a common origin, any real connection between the parties, and any disguised interest of restricting competition.<sup>113</sup>

These cases are generally considered to be the most significant decisions of the EEC Court involving the continued effects of national industrial or intellectual property rights. There are also a number of other significant opinions of the Commission and the Court involving the propriety of specific provisions contained in licenses of such property rights which the reader would be advised not to overlook.<sup>114</sup>

Obviously, much of the above controversy between national industrial property rights and the antitrust provisions of the Treaty would be avoided if there were single forms of intellectual property rights for the entire EEC. While these have not yet been substantively accomplished, a form of International Trademark Registration is available which, with its inclusion of some EEC countries, does go far toward procedurally consolidating trademark registration interests. Also, a Community-wide trademark registration system is being formulated.<sup>115</sup> In addition, there has been some discussion of a Common Market patent to be incorporated into the various international and European patent systems and conventions now in force. However, there are several provisions in the

<sup>111</sup> 18 Comm. Mkt. L.R. at 265.

<sup>112</sup> Decision of the Court, June 22, 1976, 18 Comm. Mkt. L.R. 482 (1976), [1976 Transfer Binder, Court Decisions] COMM. MKT. REP. (CCH) ¶ 8362.

<sup>113</sup> 18 Comm. Mkt. L.R. at 505-06.

<sup>114</sup> See generally Koch, *EEC Commission Policy on Licensing Agreements*, ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE, INTERNATIONAL ANTITRUST 215 (B. Hawk ed. 1974), for a discussion of some of these cases.

<sup>115</sup> See McKie, *Patent Cooperation Treaty: A New Adventure in the Internationality of Patents*, 4 N.C.J. INT'L L. & COM. REG. 249 (1979).

proposed system that may present further conflict.<sup>116</sup>

## VI. Conclusion

Anyone attempting to forecast whether a particular business practice runs afoul of the Treaty's anticompetitive provisions would do well to first consider whether the practice will likely lessen or adversely affect intra-Market trade. If it will, then the practice should be considered highly suspect, even if it otherwise appears to be a proper exercise of national industrial property rights or an activity legal under U.S. or other countries' antitrust laws.

The Treaty has an admittedly single interest and object—the betterment of the Community countries and their economies. Such interest and object are expressly to be served by the administrative bodies of the Community, the Commission and the Court of Justice, even at the expense of apparent theoretical inconsistencies.

Furthermore, the published pronouncements of these bodies should be read closely and should not be accorded weight beyond the particular facts actually considered by the bodies in making their decisions. Finally, the makeup and philosophies of the bodies change as time passes. There appears to be less reluctance by the Community's bodies to eschew precedent than in U.S. courts. What may have been allowed previously may well be struck down in the future without any particular warning, especially if such a decision then appears to be in the better interests of the Community and its member states.

## Question and Answer Period

*Question:* How is a charge of anticompetitive activity initiated in the European Community?

*Mr. Myers:* An interested party files a series of forms with the Commission. Almost anyone involved in the industry may bring a charge of anticompetitive activity; in fact, an individual or corporation may request a determination of the legality of its own activity.

*Question:* May a private party competitor bring an action under articles 85 or 86 or trigger action by the Commission?

*Mr. Myers:* The European Community and the Treaty do not provide for treble damage actions or purely private party actions under the antitrust provision. However, the private party may institute an investigation by the Commission which may result in a fine or injunction.

*Question:* Is it possible to grant a single licensing company an exclusive patent license covering the entire community where the licensee is given the exclusive right to resell and sell throughout the market under patents owned by the licensor in all member states?

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<sup>116</sup> *Id.*

*Mr. Myers:* Probably not. It might have been authorized by the Commission's Christmas message of 1962; however, neither the Commission nor the Court has really followed that informal pronouncement. There is presently pending a proposal which would provide a blanket exemption concerning a number of provisions that occur typically in patent, trademark, technology and know how transfers. Although details have not been ironed out, the proposal seems to allow exclusive licensing agreements and probably would allow this, if and when it is finally enacted.

*Question:* Does the exhaustion doctrine apply where the licensor's intent is not to restrict trade with the European Community, but merely to make his license royalty proportionate to the number of separate patent or patent trademark rights used in the European Community? In other words, can the initial royalty be recomputed based on the number of separate rights used?

*Mr. Myers:* Certainly, you can have and hold patents in each of the member states of the Community and so long as you are only concerned with activities within each member state you can exact royalties for each patent. Problems arise, however, where a product is introduced in one member state and then a patent owner seeks to limit the licensee to marketing in that state through the use of multiple patents. The general philosophy of the Treaty and the Community prohibits this type of arrangement. The exhaustion doctrine surely comes into play under these circumstances.

*Question:* Has the increase of overseas European business interests influenced European Community antitrust?

*Mr. Myers:* I don't think it has. The Commission and the Court of Justice have consistently applied the Treaty's antitrust provisions and the antitrust laws in general.