

RECENT ANTITRUST DEVELOPMENTS IN THE EUROPEAN COMMUNITY

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## INTRODUCTION

European competition law is often directly compared with American anti-trust law and for superficial reasons this makes perfect sense.

The Treaty of Rome was written about twenty years ago with the central purpose of creating a close economic union among the States of Western Europe. The overriding emphasis was fostering economic growth. This can be contrasted with the environment which produced American anti-trust legislation where a large industrial community had grown virtually unchecked.

On the other hand, the two bodies of law show more similarities than one might expect, especially if one takes into account the decisions of the European Commission and the European Court. These decisions, of course, reflect the changing economic background. In twenty years since the creation of European competition law the Community has developed economically and industrially. This is not to say that we now have competitive situations that are the same as in America, but in many ways our problems have become similar and the European approach to anti-trust policy has tended naturally towards the adoption of similar solutions.

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Certainly, the most delicate aspect of our regulatory role is the 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. We try to resolve this problem not in abstracto but on a case-by-case basis. For this purpose, the Commission has issued about a hundred decisions in individual cases. To this number we have to add some forty rulings of the European Court dealing with competition law. Many of these cases have involved American companies. This fact, however, should not give rise to any apprehension. Under European competition law all enterprises are treated in a uniform and non-discriminatory fashion, regardless of whether they are established within or outside the Community.

Today, most of the questions concerning cartels can be considered as solved. I shall therefore confine myself to a few specific problems: industrial property rights, the application of Article 85 to selective distribution systems, the analysis of Article 86, and the problems of merger control and joint ventures.

#### I. INDUSTRIAL PROPERTY RIGHTS

Since my last address to the New York Bar Association, almost exactly three years ago, there have been a number of very important events in EEC anti-trust law affecting patents and trademarks.

A real landmark has been the adoption of the European Patent Convention. It provides for the setting up of a European Patent Office, which will open its doors for business in Munich in about two years' time. The European Patent Office will be able to grant - on a single application - a patent valid in each of the Convention countries. Within this framework, special rules will apply to the EEC under the Community Patent Convention, signed on December 15, 1975, at Luxembourg. The essential difference between a European patent and the Community patent is this: The European patent, being effectively a national patent, is in the main subject to national law. The Community patent is governed by the body of law contained in the Convention.

To illustrate what this means in practice: The European Patent Convention enables a member country to provide that a European patent shall be effective there for a shorter term than 20 years and to deny the effect within its territory of a European patent for chemical, pharmaceutical or food products. Such reservations will not be available under the Community Patent Convention.

Article 93 of the Community Patent Convention provides that no provision of the Convention "may be invoked against" the application of any provision of the EEC Treaty. In other words, Articles 85 and 86 of the EEC Treaty will apply to the exercise of rights conferred by the Community patent.

US anti-trust laws seem to have no precedence over US patent laws, whereas EEC anti-trust law has precedence over both national and Community patent law in case of conflict.

In recent years, we have had a number of cases which involved exclusive licences to exploit patents and know-how in a Member State of the EEC. In three of them, we have held the grant of an exclusive licence to infringe Article 85. We recognize that normally there is no obligation upon a patentee to grant licences, and if he does grant licences he is free to choose the number of licensees entitled to exploit his invention. Our aim is to preserve the patentee's freedom of choice.

It is not an automatic or per se rule that exclusive licences infringe the EEC anti-trust laws. We always have to decide whether there is an appreciable effect on trade between Member States. This involves consideration of a number of factors, such as the size and importance of the parties, the significance of the invention and so on. Furthermore, in holding some exclusive licences to infringe Article 85 (1), we recognize that there may be good reason for licences to

be exclusive, for example, where a licensee has to make a substantial investment in a new plant. In such cases, the Commission has a discretionary power to grant exemption and in two of the cases I have mentioned, Davidson Rubber and Kabelmetal Luchoire, exemptions were granted.

Those two cases serve as tests for a so-called bloc exemption; for the Commission plans to enact such a bloc exemption on patent licensing agreements. This exemption will also deal with know-how because treating patent licences without treating know-how would be impractical : eight out of ten patent licensing agreements contain know-how aspects.

By that group exemption a large part of exclusive patent licences will become definitely authorized. Its contents are still subject to discussion within the Commission. But it seems likely that the following restrictions will not be permitted:

- no-challenge clauses;
- extension of the agreement beyond the life of the most recent patent existing when the agreement was made unless there is a right for each party to give notice of termination;
- non-competition clauses;
- payment of royalties after the expiry of the last patent;
- tying agreements;
- restrictions on the sale of the licensed product (price fixing or bulk restrictions);

- exclusivity of sales and export restrictions which exceed the period necessary for a new product to penetrate a new market;
- obligation for the licensee to use the licensor's trade mark;
- prohibition against use of the licensor's know-how after expiry of the agreement.

The case of AOIP v. Beyrard involved a licence which had no time limit and could be extended unilaterally by the inventor, Mr. Beyrard, simply by lodging new improvement patents. This was capable of being used as a device for keeping the licence alive. Royalties were calculated on sales of electrical equipment incorporating the original invention, and were payable even after the relevant patent had expired. Royalties were even payable on sales by the licensee of competing equipment, or equipment which he had invented or developed himself. The licence produced the result that, upon the expiry of the patents under which the original licence was granted, AOIP would have to continue paying royalties on their equipment, whereas a third party would have been able to manufacture and sell equipment of this type without paying royalties, because the original invention had passed into the public realm.

Raymond Nagoya was another decision which involved an exclusive licence. The Commission decided the licence did not infringe Article 85 (1), because the likelihood of importation into the EEC of the licensed product was so small that it could be disregarded. However, in cases where importation or re-importation of licensed products is commercially viable, a restriction on sales in the EEC imposed by licence on an enterprise based outside the EEC could infringe our anti-trust laws.

Another type of exclusive arrangement is exemplified by our preliminary decision in the case of Bronbemaling v. Heide- maatschappij. In that case a Dutch firm of civil engineers applied for a patent covering a method of reducing the level of the water table. A number of its competitors opposed the application and the opposition resulted in the grant of licences to each of them. However, the grant was subject to the condition that the patentee should not grant any other licences without consent of two of the licensees. In effect, it appears to be a case in which a number of engineering companies have agreed among themselves to decide which, if any, of their competitors shall be allowed to enter a particular line of business. The case has yet to proceed to a final decision.

I would like to add a few words on the Centrafarm case which also involved trademarks.

Centrafarm, a Dutch firm, bought supplies in Britain of a drug manufactured under patent and marketed under the trademark "Negram" by Sterling Winthrop Group Ltd. The result for Centrafarm was a suit for patent infringement and a suit for trademark infringement. The case was referred to the European Court which opted for the principle of exhaustion of rights. It held that the nature of the patentee's rights entitled him or his licensee to put the goods into circulation for the first time. Having done so, the patent rights could not be invoked to prevent the resale of the goods; nor could parallel patent rights in other EEC countries. The Court applied the same rule in settling the trademark issue.

The main thrust of the judgment was under Article 30-36 of the Treaty of Rome. These are not anti-trust provisions as such; they govern the free movement of goods and are designed to achieve the integration of the Common Market. Nevertheless, whatever one calls them, it is now clear that these Articles forbid a certain type of anti-competitive behaviour - the use of industrial property rights to exclude competing goods from an EEC country. In this respect they complement Article 85 of the Treaty.

You are right if you deduce from what I have so far said that Community law will allow export or import restrictions under specific and narrowly defined conditions only; in general it is suspicious of them.

This raises the question as to import bans for goods from third countries. Since the Community is open to world trade, the Commission is not favourably disposed towards such import bans, above all if they separate the Community on the one hand and states with a similar economic structure on the other hand, such as the United States, Canada or Japan.

The Commission, however, is aware of the problem of licensing agreements with countries having a completely different economic structure, e.g. the state trading countries. Since their export policy is sometimes determined by the overriding aim of acquiring foreign currency without regard to their costs of production, it is clear that a patentee in the Community, whether he be a European or, for instance, an American, ought not to have to face competition from any licensee of his who markets goods under those circumstances. I cannot give you a definite answer as to how the Commission will resolve this problem; but I want to assure you that the Commission will find an answer which will recognize the legitimate interests of the patentee. In the meantime, I recommend that such restrictions should be notified to the Commission.

Returning to the trademark issue for the moment, it was entirely predictable that the Court would rule in favour of Centrafarm. The product they imported was genuine Negram. The mark indicated the true origin of the product, and that is the prime function of a trademark. However, within the last

two years there have been a number of cases in which the same or a similar mark has covered different products of different manufacturers. Two of these cases - Advocaat Zwarte Kip, and Sirdar-Phildar - were Commission decisions under Article 85 of the Treaty. Both involved agreements not to compete. However, in the Kaffee Hag case there was no contractual link between the owners of the trademark rights. The German company had lost its rights to the trademark in Luxembourg when its Belgian subsidiary was sequestrated. Nevertheless, the European Court decided that the Treaty provisions for the free circulation of goods entitled the German company to sell its brand of coffee in Luxembourg under the mark "Hag", which in Luxembourg was owned by a Belgian company. The discussion to which this judgment has given rise covers a very broad field, but it is beyond the scope of this paper to indicate even the main points at issue.

## II. SELECTIVE DISTRIBUTION SYSTEMS

In the area of distribution we have been focussing our attention recently on agreements between producers and dealers which establish selective distribution networks. Such systems are characterized by the fact that the sale of products at the different stages of distribution is limited to appointed dealers only. The criteria by which enterprises may be admitted as authorized dealers can rest on either qualitative or quantitative tests or on a combination of both. These criteria are generally fixed by the producer and enforced through

contractual obligations imposed on his trade partners.

Selective distribution systems give rise to two questions in relation to Article 85:

- First, to what extent are they caught by the general ban on cartels provided for in Article 85 (1) ?
- Secondly, when and under what conditions can they benefit from an exemption under Article 85 (3) ?

As to the first question, it is necessary to draw a dividing line between cases in which the producer intends to ensure a certain minimum standing of the marketed goods and the 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 wholesalers and subdealers.

In a recent decision (SABA), the Commission stated that limitations of the kind mentioned above are compatible with Article 85 (1), where

- the appointment of dealers is based on uniform qualitative criteria which are objectively necessary to ensure an adequate distribution of the products concerned and
- they are applied without discrimination to all interested dealers.

Whether a qualitative test is really necessary to ensure an adequate distribution depends mainly on the nature of the product. In the SABA case which concerned the distribution of advanced electronic equipment for domestic leisure purposes, the Commission held that the criteria relating to the technical knowledge required of the dealer and of his staff, participation by wholesales in the establishment of the producer's distribution and service network, the suitability of trading premises and the quality of customer service were not restrictive in the sense of Article 85 (1). It found, however, that the SABA agreements included other conditions which were not justified by the needs of adequate distribution. These conditions concerned the conclusion of six monthly supply contracts, the achievement of an adequate turnover and the acceptance of supply targets, all restrictions within the meaning of Article 85 (1).

An enterprise which does not hold a dominant position is, of course, free to choose its customers at his own discretion. Our competition rules do not provide for a general prohibition on discrimination or refusal to deal. In most cases of selective distribution, however, the choice of those enterprises which are supplied by the manufacturer is not a matter of unilateral decision, but the consequence of mutual discussion between the producer and the dealers concerned. The latter are willing to accept the requirements of the manufacturer only on condition that the manufacturer itself respects the conditions of appointment and refrains from supplying "outsiders".

We therefore find either contractual obligations or concerted practices in the sense of Article 85 (1).

The Commission has been particularly reluctant to grant exemption under Article 85 (1) for selective distribution systems. Any limitation on sales between manufacturers and main distributors, between main distributors and ultimate customers, are justifiable only if they result in substantial advantages for the consumer in particular in a downward trend in prices in the various Member States. Generally, an exemption will be considered only when dealers, apart from their function as distributors, perform certain services that necessarily depend on constant close cooperation between producer and seller. Moreover, the nature and the extent of the restrictions imposed on the parties concerned have to be taken into account.

In the BMW case, the Commission has considered the specific economic and technical factors of the case. It underlined that

- a motor car is an expensive product of great technical complexity which need repair services and that constant checks are therefore necessary;
- the requisite after-sales service must be of high quality not only in order to satisfy the individual needs of each driver in the proper functioning of his vehicle, but also, as a matter of general public interest, in order to ensure road safety and environmental protection;

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- the quality of this service is best assured when manufacturer and seller have a close relationship of mutual confidence and this would be difficult to achieve if manufacturers had to maintain trading relations with too many dealers.

The Commission finally held that such advantages were in some considerable measure in the interest of consumers and could not be achieved to the same extent or with equal chance of success by other means.

In both cases the Commission took care to ensure that the selective distribution system did not inhibit advantageous sales to consumers through enterprises operating at low prices. BMW and SABA have both been obliged to submit annual reports setting out all cases of refusal to appoint a dealer or of withdrawal of such an appointment.

### III. ANALYSIS OF ARTICLE 86

#### 1) Dominant Position

Article 86 does not define what a dominant position is. It is therefore the task of the Commission and of the Court of Justice to develop suitable criteria which are flexible enough to fit the various kinds of domination.

In its "Memorandum on concentration of enterprises in the Common Market" of 1965, the Commission said :

"It is primarily a matter of economic power, namely the capability of exerting an influence on the market that is substantial and also in principle foreseeable for the dominant enterprise. This economic ability of a dominant enterprise influences the market behaviour and the economic decisions of other enterprises, regardless of whether it is used in a specific sense.

In the Continental Can case, the Commission stated:

"Enterprises are in a dominant position when they have the power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers. Such is the case where the enterprises, because of their market share or of their market share combined with availability of technical knowledge, raw materials or capital, have the power to determine prices or to control production or distribution of a significant part of the goods in question. This power does not necessarily have to derive from an absolute domination enabling the dominant enterprise to disregard the wishes of other enterprises participating in the market. It suffices that it is strong enough to ensure an overall independence of behaviour, even if there are differences in the intensity and the extent of their influence on the different submarkets."

The Commission took into account not only the share of the market held by the group but also the group's advantages over its competitors resulting from its size and its economic, financial and technological importance, particularly

- its technological predominance through patents and know-how,
- the wide range of its output and the geographical spread of its factories and warehouses,
- the availability of the necessary machinery for manufacture and use of metal containers,
- the possibility of obtaining capital from the international markets.

In the United Brand case, UBC was found to be in a dominant position as a supplier of some 40 per cent of the bananas sold in the Community and with a market share of about 45 per cent in the relevant geographic market consisting of Benelux, Denmark and Germany. The Commission stressed that UBC sold appreciably more than any other company carrying on business in the European banana market. Its two most important competitors held shares of 15-20 per cent and 10-12 per cent respectively in the part of the Community which forms the relevant market.

Besides the quantitative criteria concerning the market structure the Commission lists other elements which substantiate the dominant position of UBC. The decision takes into account, among other factors:

- the strong vertical integration of UBC's banana business from the plantation to marketing, reinforced by the fact that it also operates on other areas complementing its banana trade;
- UBC's very important position in a number of tropical banana producing countries as a result of its control over plantations and of the numerous contractual and financial links which it has in these countries;
- UBC's strong position on the world banana market where it controls about 35 per cent of the world's entire banana exports;
- UBC's ownership of a large fleet of refrigerator ships, essential for the transport of bananas from the producer countries to Europe;
- the extensive know-how UBC has acquired thanks to its research into new and better varieties;
- the great financial power and the reduced risk which UBC derives from its multinational organization and from its status as a conglomerate.

Other cases decided by the Commission did not require such a full and complete economic evaluation. In the "Sugar" case (1973), the existence of a dominant position was proved by the market share that each of the groups in question held in its "home market". These shares amounted respectively to 85 per cent, 85 per cent and 90-95 per cent. The Commission's point of view was confirmed by the Court of Justice which stated

that a market share of 85 per cent is in itself sufficient to constitute a dominant position and that further evidence was therefore not necessary.

At first sight the views of the European Court seem to differ, at least to some extent, from those of the Commission. In several rulings ("Parke Davis", "Sirena", "Deutsche Grammophon"), the Court considered that the existence of a dominant position within the Common Market or within a substantial part of it was clearly established when the enterprise concerned, either on its own or jointly with other enterprises, could hinder effective competition in large parts of the market, taking into account the possible existence of producers marketing similar types of goods and their position on the market.

I cannot see any substantial difference between the views of the Court and of the Commission. Differences in wording are due to the fact that the Commission, when taking an individual decision, has to adapt its definition to the circumstances of the given case.

According to Article 1 of the proposal for a regulation on merger control, concentrations are incompatible with the Common Market when the parties involved acquire or enhance the power to hinder effective competition in the Common Market or in a substantial part of it. This text is completed by the following words:

"The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the enterprises concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services".

2) "One or more enterprises"

Article 86 can also be applied to a dominant position held by several enterprises.

There are three possible situations:

- a) several enterprises, though legally independent, are connected in one group. They can therefore be regarded as serving one economic purpose. In such a case the market positions of the enterprises involved have to be taken together. This principle was applied in the Court's ruling in "Deutsche Grammophon", and "Commercial Solvents".
  
- b) Several firms are connected by cartel agreement, a decision of their professional association or by concerted practices. This case, too, meets the requirements of a jointly held dominant position, if the enterprises in question together have the power to hinder effective competition. In its "Sugar" decision, the

Commission found that this was true of the *Suddeutsche Zuckerverkaufs-Gesellschaft*, a joint selling organization covering certain producers in Southern Germany, and of the two Dutch sugar manufacturers CSM and S.U., which sold their products separately but applied common prices and other trading terms.

- c) Several enterprises are in an oligopolistic situation. As I see it, to constitute a jointly held dominant position, a certain parallelism of conduct among the several independent firms is required at least. It is likely that this parallelism of conduct has to be shown in the specific area where the alleged abuse takes place. A procedure still pending before the Commission against several oil companies in Holland which each had refused to supply an independent wholesaler indicates that the Commission does not, per se, exclude the application of Article 86 to parallel behaviour of enterprises in an oligopolistic market.

3) The relevant market

Following the definition which the Commission has repeatedly given in regulations, draft regulations and official notices, the relevant market includes "identical products and products which, by reason of their characteristics, their price and

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the use for which they are intended, may be regarded as similar to the consumer".

The Court of Justice, in the "Sirena" case, underlined the necessity to take into account the existence of producers marketing identical, similar or interchangeable goods. In Continental Can, the Court said:

"In fact, the question whether there is still a chance for effective competition must be evaluated by considering the specific characteristics that qualify a product as particularly suitable for satisfying a constant demand and thus less interchangeable with other products."

A critical point in many decisions is whether the dominant position concerns a relatively large market or one or more submarkets. In the Continental Can case, the Court annulled the decision for lack of a clear definition of the relevant market. In the case "Kali & Salz/Kalichemie" (Article 85) concerning simple and composed fertilizers, the Court held that there was a certain degree of interchangeability between the two products, and they therefore had to be considered as one market. These two examples show that lawyers have a good chance of contesting the validity of the Commission's market definition even if economists would go along with it, though the outcome before the Court will be as hazardous as in the U.S.

One point seems to be clear: if there can be no reasonable doubt about the market definition, the economic importance of the market is not relevant. In the General Motors case, the Court of Justice held that the delivery of certificates of conformity for cars sold outside the official distribution network - which was a very small business - was a relevant market within the meaning of Article 86.

Geographically, the dominant position must exist "in the Common Market or in a substantial part thereof". As dominant positions in the Common Market as a whole are relatively rare, most interest is generally directed to the question of what part of the Community can be considered as "substantial".

As the Court of Justice stated in the "Sugar" case, it is necessary to take into account the structure and the extent of production and consumption of the goods concerned, the patterns of conduct of sellers and purchasers, their economic possibilities, the cost of transport, the preferences of customers and consumers and the fact that a given territory is or is not isolated from other territories of the Community by natural, technical, economic or other reasons.

(4) The abuse of a dominant position

In the view of some authors the wording of Article 86 appeared to support the argument that the dominant position must have been used as an instrument for the improper behaviour. In addition to that it was argued, that "abuse" would imply the existence of the additional element of "deliberateness" and that Article 86 would concern only abusive conduct on the market.

These interpretations neglect the close links between the general aims of the Treaty and the competition rules.

According to the Commission, "Conduct of an enterprise amounts to improper exploitation if, from an objective viewpoint and in the light of the goals set forth in the Treaty, it must be characterized as misconduct. Improper exploitation by a dominant enterprise can manifest itself in conduct toward present competitors, potential competitors, suppliers, and consumers. The standard to be applied in deciding what constitutes improper exploitation must be derived from the objective of the norm in which that concept is used."

"...Consequently, neither a cartel (on account of Article 85 (3), (b) ) nor an enterprise occupying a dominant position is permitted to eliminate competition by creating a monopolistic situation."

Under this concept there is no room either for the theory of "instrument" or for that of "deliberateness." The dominant position constitutes an objective condition for taking action against certain practices which are permissible in a normal competitive situation but not for dominant firms because of the prejudice they cause to competition in general and to the interests of competitors, suppliers, customers and consumers in particular.

There is also no reason to confine Article 86 to conduct on the market and exclude from its application mergers set up within the framework of a dominant position. This viewpoint is underlined by the examples of abuses listed in Article 86(b) and was confirmed by the Court of Justice, in its "Continental Can" decision.

The decision in the "Commercial Solvents" case involved the problem of refusal to supply. The Court held that "an undertaking being in a dominant position as regards the production of a raw material and therefore able to control the supply to manufacturers of derivatives cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers), act in such a way as to eliminate their competition which, in the case in question, would have amounted to eliminating one of the principal manufacturers of ethambutol in the common market..."

Another interesting aspect to the interpretation of Article 86 was added by the decision in the "Sugar" case. One of the major features of this case was the fact that an enterprise in a dominant position had granted fidelity rebates to its customers. Both the Commission and the Court of Justice treated that as an abuse. While quantity rebates can be accepted as a means of rationalization of distribution, fidelity rebates were found to be incompatible with Article 86. The Court gave three reasons:

- The system produces the result that two enterprises which each buy the same quantity of goods from the same producer have to pay different prices where one of them has also been supplied by a second producer.
- The system of fidelity rebates curtails or even excludes the possibility of other producers competing with the dominant enterprise in the sales market.
- Fidelity rebates are likely to enhance the dominant position of an enterprise in relation to its competitors.

Another kind of price discrimination may in future require more and more of our attention. The question is to what extent a dominant enterprise can apply different prices in different parts of the common market without infringing Article 86 (c).

The European Court has ruled (DGG/METRO) that such a policy does not constitute in itself an abuse of a dominant position, but that differences in price from one Member State to another may become a determining factor of evidence for an infringement of Article 86 if they are important and not justified on objective grounds. According to the Commission this is the situation in the United Brand case. An analysis of UB's pricing activities revealed that although there were only marginal differences in shipping and handling costs between Chiquita bananas arriving at the two ports of entry (Rotterdam and Bremerhaven), prices to customers on the same conditions of sale and payment (free on rail) were drastically different. No economic justification could be found for these differences.

Apart from the aspect of price discrimination this case also involves a problem of abusive pricing. According to Article 86 (a) an abuse may consist in imposing unfair purchase or selling prices or other unfair trading conditions. The reason is that Article 86 is not only intended to assure the survival of remaining competition, but also to protect the consumer directly where competition is no longer working effectively. In the GM case the Court of Justice found that an abuse under Article 86 (a) may consist in charging a price that, in comparison with

the economic value of the service concerned is excessive. The assessment of the economic value of goods or services constitutes a delicate task that the Commission can accomplish only if it finds means of evidence, outside of a detailed analysis of the cost situation, that the price is excessive.

It has been argued that, for the purpose of Article 86, only markets characterized by the same structure and the same degree of competition could be compared with each other. In the drug markets, for example, we are confronted with a system of administered prices in some Member States and unchecked pricing practices in others. I see no reason for preventing the Commission from comparing the administered prices with the prices practiced in countries without price control if the company lives with the administered prices over a longer period of time. It is certainly not realistic to assume that the national Governments in the Community, in administering a system of price control, neglect the economic situation of the industry.

To bring suits for "overcharging," of course, constitutes a serious interference with the economic freedom of the enterprises involved. But the political decision of the legislator has to be respected. Yet, the power used under this provision by the authority ought to be handled with the greatest care in order to avoid the role of a

price commissioner. Orders to reduce prices therefore may be rare. They are acceptable only where absolute priority has to be given to the protection of the consumer.

During recent years the overall picture regarding the application of Article 86 has certainly changed drastically. Conflicts between large corporations and the Commission have become more frequent. Obviously many questions arising under Article 86 still await answers but I think that the European Commission and the Court of Justice have already provided useful guidelines to enterprises in a number of areas.

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IV. MERGER CONTROL AND JOINT VENTURES

The Commission has professed its resoluteness to make use of its power under Article 86 to oppose unlawful concentration. One should, however, keep in mind that European competition law, as it stands now, does not suffice for a systematic merger control which is necessary to assure workable competition within the common market. We have a vital interest to prevent the formation of dominant positions, for dominance means that competition is no longer effective.

The draft regulation submitted to the Council of Ministers therefore provides for extension of the powers of the Commission. It also provides for specific procedures. According to that bill:

1. Concentrations by which the enterprises involved acquire or enhance the power to hinder effective competition in the common market or a substantial part thereof, are incompatible with the common market if trade between Member States is liable to be affected. 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.
  
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.

During the debate in a working group of the Council of Ministers amendments have been suggested but there is general agreement to go ahead with the preparation of a final draft. The most controversial issues concern the problems of reconciling national industrial, social and regional policies with merger decisions taken by Community authorities, the parallel application of Community and national law in the area of merger control and the participation of Member States in the decision making process. Though I am unable to predict when the merger regulation will become law, I am confident that it will happen in a not too distant future and that this new piece of legislation will corroborate effectively the Competition policy of the Community.

In connection with the merger problem I would like to add a few remarks on the joint venture, that chameleon of the anti-trust world. The treatment of joint ventures under European competition law, constitutes one of today's most acute problems. The main question is to what extent respectively the rules on restrictive practices or those on mergers apply. We have to decide at the beginning of a procedure whether the joint venture constitutes a cartel under Article 85 or has to be considered as a merger. In the latter case application of Article 85 is excluded; action could at present be taken only under Article 86 and then only if the rather special conditions for the application of that Article to mergers are present.

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It should be noticed that the problem of joint ventures under our rules can be confined to situations where the jointly owned subsidiary constitutes a genuine economic entity. Where, on the contrary, the joint venture is only a means of pooling some of the functions of the parent companies, we are clearly in the field of restrictive practices. The Commission has confirmed this concept in many decisions related to joint selling, joint purchasing, joint research and development and joint manufacturing. Each of these cases has been examined exclusively under Article 85.

Even in the absence of particular agreements or concerted practices, we may assume that restrictive behaviour can be an automatic consequence if the parties involved in a joint venture remain competitors; we call a restrictive effect which could in such circumstances jeopardize the economic independence of the parties a "group effect."

The crucial question is whether cooperation in the framework of the common subsidiary is likely to restrict or to 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 the sense of Article 85 are probable.

This may also be true of cases where the parent companies and the joint venture are present in different but economically connected markets (raw material, semifinished 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.

When undertakings transfer all their assets to a joint venture and become management holding companies, they are no longer competitors. Such operations amount to total integration and must be regarded as concentrations. The Commission has expressed this view in the case Agfa-Gevaert and Dunlop-Pirelli, where the parent companies formed a series of joint ventures in different Member States by total transfers of assets. In its recent decision giving negative clearance in the case of SHV/Chevron, the Commission took the same view in circumstances of a partial integration, where the parties retained their own economic activities, although not in the same fields as their joint ventures.

The concept of partial integration should, however, be handled with care. In the Bayer/Gist-Brocades case the Commission objected to the establishment of jointly owned subsidiaries to which the parties wished to transfer their penicillin processing plants. The Commission found that

this arrangement would not only have given them the power to control production and investments at the raw material stage and the stage of intermediate penicillin products, but would also have had negative effects on their competitive behaviour in the markets of semi-synthetics and branded preparations, where they were actual or at least potential competitors. The parties involved have therefore replaced their initial contracts by a long-term specialization agreement that the Commission was able to exempt under Article 85 (3).

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Since I last spoke to you some years ago there have been far-reaching developments in the application of Articles 85 and 86. The Commission is gaining experience and hopefully a certain degree of maturity in its approach to the problems of competition. On the other hand, the business community has learned the importance of taking the European competition rules seriously into account.

However, I can assure you that this experience and maturity brings with it also better judgement and a sense of fair-play, and to that can be added the tight control imposed by the European Court of Justice over the acts of the Commission. Nevertheless, those doing business in the Community and having anti-trust questions will be well

advised not only to seek the best possible legal advice  
but also, if I may be permitted to say so, to take it.