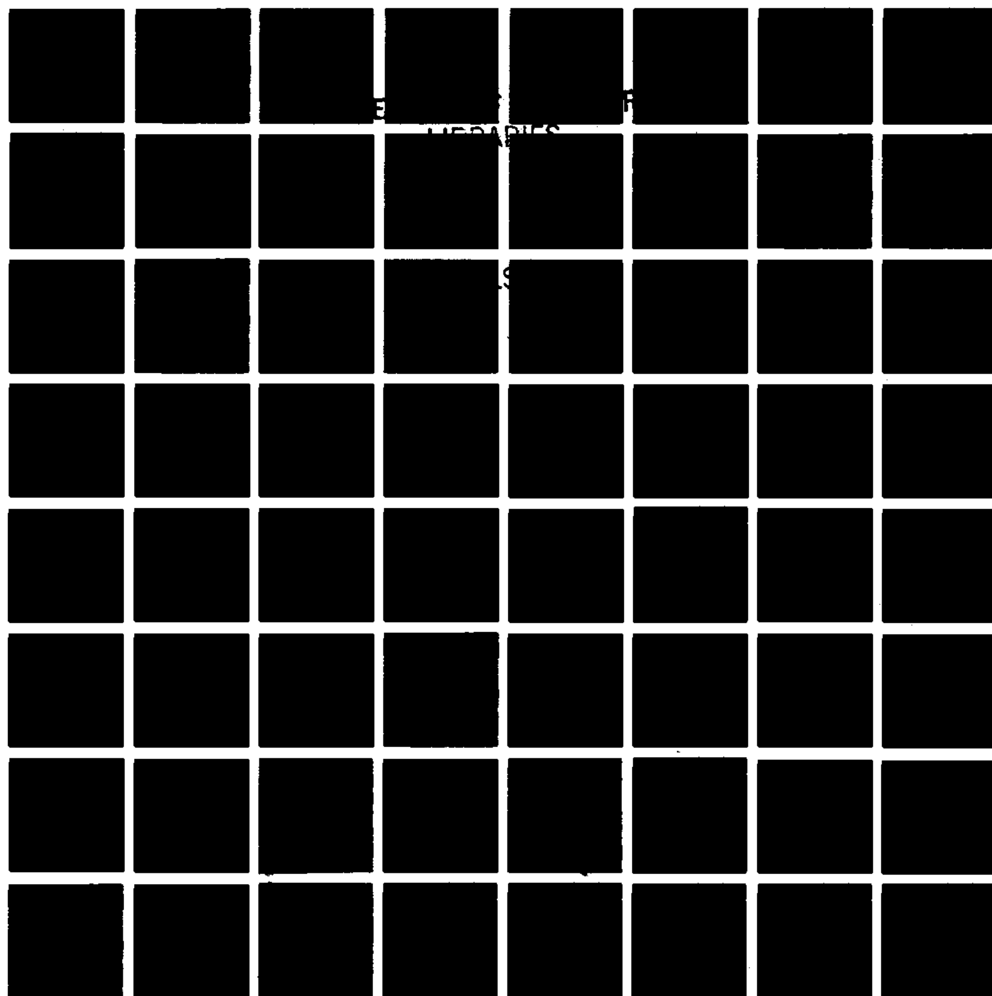
The European Community's Competition Policy



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The European Community's Competition Policy

The founders of the European Community had as one of their major objectives the creation of a "common market". In other words, they sought, by removing tariff and quota barriers between the Member States, to set up a vast market of 250 million consumers in which goods and services would move freely and in which firms would be able to compete on an equal footing.

A free market situation of this kind, it was believed, would bring benefits to consumers and producers alike. The latter would no longer be discriminated against by national trade protection measures while the former, thanks to this open competition, would enjoy a wider choice of goods at "competitive" prices.

The European Community's competition policy is designed to ensure that the open competition objectives of the European Treaties are upheld and that the Common Market, as its name implies, remains an integrated trading area in which the prices paid by consumers are not distorted by artificial factors such as trade restrictions, market sharing arrangements, monopolies, etc.

As a "common" policy, EEC competition policy is administered by the Community institutions. Decisions on competition are taken, however, by the European Commission whose powers in this field are clearly set out in the Community treaties and in subsequent implementing legislation adopted by the Council of Ministers. The Treaties also draw the line between those areas of competition governed by Community competition law and those covered by national legislation.

The Commission is politically responsible to the European Parliament for its decisions on competition and reports to the Assembly once a year on its activities in this field. The Commission's decisions may also be reviewed by the Court of Justice of the European Communities—notably when firms appeal against decisions they consider to be ill-founded. Court rulings can thus make an important contribution towards ensuring fair competition within the Common Market.

The basic aims

EEC competition policy is intended to serve as an instrument to help strike the right balance between those restrictions on competition which are permissible or even desirable as a means of creating an enlarged common market and those restrictive practices which actually impede the integration of markets and should, therefore, be eliminated. As such it has three basic objectives:

— The first is to help create and maintain a single, common market for the benefit of business and consumers. Simply removing frontier barriers is not enough if goods and services are to be traded freely throughout the Community. Rules have to be made and enforced to ensure that firms do not set up cartels which in effect create new barriers that are no less protective for being invisible.

— The second objective of competition policy is to prevent large companies abusing their economic power. Here it must make sure that the power to take decisions which affect us all is dispersed over a large number of independent units to the benefit of the economy as a whole. Where this is not the case and firms can evade the constraints of normal competition by concentrating their production facilities and eliminating their chief competitors, the rules on competition must prevent these firms from taking advantage of their dominant position and must endeavour to restore a balance of power.

— The third objective is to induce firms to rationalise production and distribution and to keep up with technical and scientific developments. In this way, competition policy can help to bring about optimum distribution of economic activity within the Community thus making Community firms more competitive in the international market place. By obliging firms to keep their business policies and strategies under constant review, competition policy also contributes to the fight against inflation. It keeps the market flexible and exerts downward pressure on prices by creating a competitive environment.

In practical terms, the European Treaties [1] provide the instruments with which to cope with different market situations:

— Article 85 of the EEC Treaty and Article 65 of the ECSC Treaty enable action to be taken against agreements and concerted practices which hinder the normal free-play of competition;

— Article 86 of the EEC Treaty enables direct action to be taken against firms which take advantage of a dominant market position;

[1] These are the European Economic Community (EEC) Treaty, the European Coal and Steel Community Treaty (ECSC) and the European Atomic Energy Community Treaty (EAEC), known as the Euratom Treaty.

— Article 66 of the ECSC Treaty enables action to be taken against mergers which would prevent the maintenance of effective competition in the coal and steel industries.

Outside these sectors, the EEC Treaty does not provide systematic pre-merger control and the Commission has therefore made a proposal for a regulation, now before the Council, which would give it powers in this field.

The Treaty provisions have been put into effect by implementing regulations, the most important of which is Regulation No. 17. Some of these regulations are procedural, but others are of a more fundamental nature. The block exemption regulations, for instance, determine the Commission's policy on specified categories of agreement between firms.

One interesting feature of Community legislation on competition is that agreements liable to fall within the scope of competition rules must be notified before they are put into effect. The Commission can thus state in advance whether they are consistent with the principles of the common market.

Although Community competition policy developed quietly in the early stages, it has gradually built up a coherent body of legislation, and businessmen are now becoming familiar with the obligations they incur when organising their distribution networks, or issuing patent licenses, etc.

Prohibited agreements and practices

The letter and the spirit of the law

Article 85 of the EEC Treaty covers agreements and practices which hinder the free-play of competition:

"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."

The prohibition in Article 85 extends both to Community firms and to firms outside the Community, to the public sector and to the private sector. The necessary, and sufficient, condition is that the effect of these agreements, decisions or practices should prevent or restrict competition somewhere in the common market and be capable of affecting trade between Member States.

To enforce the prohibition, the Council issued a regulation in 1962 (Regulation No. 17) making it compulsory for firms to notify agreements liable to infringe the rules, if they wished to be granted exemption.

The Commission may either prohibit an offending agreement, in which case it is automatically void, or it may exempt it from the prohibition or state that the facts available to it reveal no need for action (negative clearance). As the concept of a restrictive agreement depends on changing economic conditions, the Commission has considerable discretion when considering agreements:

"which contribute 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 do 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."

Exemption may be given to firms either by an individual decision relating to a specific agreement or by virtue of a block exemption for a given category of agreements.

Unnotified agreements may be investigated either in response to a complaint or at the Commission's own initiative.

Where the Commission decides to prohibit an agreement, it may impose a fine; failure to comply may be punished by periodic penalty payments depending on the duration of the offence.

In the last few years the Commission has had to deal with large numbers of individual cases. In its decisions, it has endeavoured to define more clearly the borderline between what is and what is not allowed. Individual Commission decisions can thus be used as precedent and each firm can look at them before entering into an agreement

with another firm—a wise precaution given that the Commission in the past has meted out particularly severe treatment to firms which have entered into agreements which were manifestly incompatible with Community rules on competition. It has generally taken a more lenient line in cases for which there was no precedent. In May 1974, to take just one example, it prohibited the restrictive practices of the main hollow glass manufacturers in the EEC who were working under the IFTRA agreements, but imposed no fine, since the type of restrictions in this case had not been considered in a Community decision and it was not obvious to the firms concerned that their conduct infringed the Treaty.

The Commission has no intention of impeding healthy cooperation between firms and accordingly, it has given its express authorisation to certain types of agreement. In all, the Commission has already taken an impressive number of decisions prohibiting a wide range of restrictive practices. In order to get a proper idea of the scale of the Commission's work in this field, we should also include the mass of agreements that have been voluntarily terminated or amended, and the thousands of cases of action relating to exclusive dealing agreements.

Commission action

Of the prohibitions issued by the Commission, a large number have concerned *market-sharing agreements,* agreements which strike at the very principle of a common market and which have been prohibited by the Commission since 1964.

A landmark decision in this field involved an international quinine cartel (1969), and was the first case in which the Commission actually imposed fines. Six European manufacturers, Chemie Farma in the Netherlands, Boehringer and Buchler in Germany, and Pintet-Girard, Nogentaise and Pharmacie Centrale in France—accounting for 50 per cent of the world and 80 per cent of the Community market—had set up price maintenance and quota arrangements enabling them to keep exclusive control over their respective domestic markets. More recently, the Commission imposed fines totalling more than 9 million units of account [2] on the main EEC sugar manufacturers who were accused of having divided the Community market between themselves since July 1968, each respecting the other's territory. However, most of the firms challenged the Commission's findings and took matters to the European Court of Justice, where the fines were substantially reduced.

The Commission has also treated very firmly *price-fixing agreements* which eliminate price competition in the Community. A noteworthy case

[2] One unit of account (u.a.) = £0,416667.

here was the dyestuffs cartel (1969): ten firms which between themselves had cornered almost the entire EEC market in dyestuffs (accounting for more than 80 per cent of sales) had raised Common Market prices by equal amounts at virtually the same time. This was the first case in which firms with their head offices outside the Community were fined.

The Commission has also taken a close look at joint *selling agencies*, for the exclusive selling rights given to such agencies, the allocation of supply quotas and the mutual alignment of selling prices in effect preclude competition between the members of the agency and thus deprive customers of any real choice. Some agencies have, however, been given negative clearance by the Commission, but only after the joint sales arrangements have been altered in such a way that their effects were felt only within a single Community country or in non-Community countries. Other agencies have been simply prohibited.

Another object of the Commission's vigilance has been agreements instituting *collective obligations to purchase* exclusively from specified manufacturers or importers (solus agreements) or to *supply exclusively* to certain purchasers within a given member country. The reason for its opposition to practices of this type is that the reciprocal exclusive commitments have the effect of subdividing a market into two perfectly segregated submarkets: the member manufacturers and recognised customers on the one side and outsiders on the other. The implications, particularly for the consumer, are all too clear, especially as reciprocal commitments of this kind are generally accompanied by stipulations

as to quantities and prices. The Commission has intervened in many such cases. One of the most recent examples was in 1974, when the Commission broke up an agreement on the Dutch record market which embraced, on the one side, twenty or so manufacturers and importers forming the Nederlandse Vereniging voor Grammofoonplaten Importeurs (NVGI) and on the other side, some 1,600 retailers belonging to the Nederlandse Vereniging voor Grammofoonplaten Detailhandelaren (NVGD).

Industrial property rights

The Commission—consistently supported by the Court of Justice—has always opposed the use of commercial or industrial property rights as a means of market protection. However, it is not easy to draw a distinction between measures which are justified and those which infringe the rules. As the Commission has argued: "while ensuring adequate remuneration for intervention and avoiding obstacles to the application of patented knowledge and to the communication of secret know-how, it is nevertheless necessary to establish a genuine common market for branded goods, either patented or incorporating secret know-how, without unjustifiably limiting the possibilities of competition and the free movement of goods among Member States". What, therefore, has to be verified in each case is whether the restrictive clauses in an agreement are necessary to safeguard the rights constituting the commercial or industrial property.

The Community line on *trademark rights* was set out for the first time in the Commission decision and the Court of Justice judgment in the Grundig-Consten case (1966). In this case, it was decided that trademark rights should not be relied upon to protect a national market by preventing another distributor from importing products bearing the same trademark. This was extended by the DGG v. Metro judgment (1971) to rights akin to copyright, in this case the rights which in Germany protect record manufacturers. Another Court judgment on Centrafarm (1974) applied the same principles to patent rights.

The year 1971 saw the Commission's first decisions on *patent licenses and know-how agreements*. In a Notice on patent licensing agreements, dated 24 December 1962, the Commission had already offered a tentative interpretation of how regulations on restrictive agreements should apply to a number of clauses commonly included in licensing agreements. However, there are still points which remain to be settled here, and a number of clauses require more precise definition, in particular those covering export restrictions, field-of-use restrictions, restrictions on duration, non-competition restrictions and quantitative output restrictions.

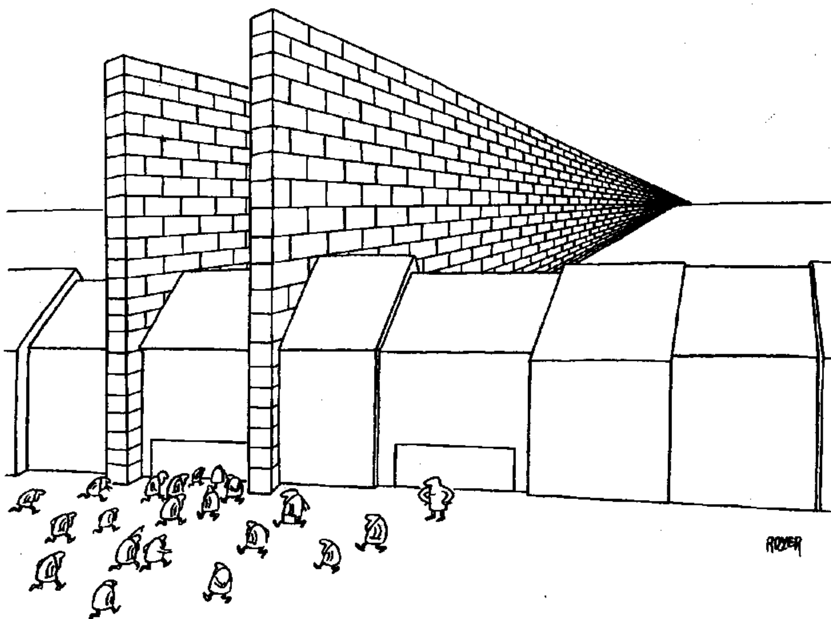
Exclusive dealing and selective distribution

Of all the stages whereby raw materials are transformed into articles used in the home, distribution is probably the one where distortion of competition is most readily obvious to the consumer, and this was one of the first fields in which the Commission was active.

The Grundig-Consten case in 1964-1966 was an excellent example. Both the Commission and the Court of Justice concluded that the *exclusive dealing* agreement between the German manufacturer (Grundig) and the French distributor (Consten) was prohibited under Article 85 of the EEC Treaty. The territorial protection given to the exclusive dealer had the effect of fragmenting the market and of making parallel imports impossible. The general principles having been established, the Commission decided, in March 1967, that it should not be necessary for firms to consult it over and over again to check on the compatibility of their proposed distribution agreements with Community rules, and issued a block exemption regulation (No. 67/67) listing the kinds of clause which could not be included in such agreements without invalidating them (such as the obligation not to manufacture or distribute competing products, or to refrain from establishing branches, or maintaining distribution depots outside the allotted territory), and indicating the types of agreement qualifying for exemption under the Regulation. Firms were consequently released from the obligation to notify agreements which were within the scope of the Regulation, although the Commission naturally retains the right to check for any abuse of these exclusive dealing agreements.

As an illustration of the Commission's vigilance, let us take a recent example (December 1972). A 60,000 u.a. fine was imposed on WEA-Filipacchi Music SA, which had forbidden its distributors to export its light music records from France, particularly to Germany, where these records were distributed by its subsidiary, WEA GmbH. Hamburg. In the absence of this ban, French distributors might well have been tempted to gain a foothold on the German market, on which records sold at a much higher price.

For certain kinds of exclusive dealing agreement not qualifying under the block exemption regulation, the Commission has continued to add details to the general requirements through individual cases. For instance, it has granted negative clearance to agreements which, although they contained clauses open to objection, were on certain accounts nevertheless beneficial to the consumer (safety, efficiency of aftersales service, etc.) in such a way as to offset their restrictive effects. A typical example was the Goodyear-Euram case concerning an exclusive dealing agreement between two firms, in the same country, on sales within that country. Euram Italiana SpA, had concluded an



exclusive dealing agreement with Goodyear Italiana SpA, a subsidiary of Goodyear International, an American corporation. The agreement made Euram the sole distributor in Italy of Vitafilm, a PVC manufactured by Goodyear Italiana. Certain clauses of the agreement had the effect of restricting competition, but the Commission nevertheless waived the basic prohibition because the agreement enabled Goodyear, whose main business was manufacturing tyres, to concentrate its packaging film sales on a single distributor and enabled Euram to improve its supplies to supermarkets.

Still in the field of selective distribution, the Commission's Kodak decision (1970) endorsed, in principle, an arrangement which limited the sale of products at the distribution stage to authorised dealers selected for their technical qualifications. The Commission agreed that photographic goods needed to be sold "by trained personnel on premises where storage and display facilities and business arrangements are satisfactory". Nevertheless, it warned Kodak against relying on commercial considerations of this sort to withhold approval from otherwise eligible retailers or to ban or restrict exports by its approved distributors.

In the Omega case, the Commission approved a selective distribution system based on the principle of a restricted number of retailers

in each geographical area, the idea being to ensure that approved retailers could reach sales figures with would encourage them to make real promotion efforts and to stock a wide range of models. But the Commission stipulated that these retailers should be free to buy from whichever exclusive importer in the EEC they chose and should also be free to export to other common market countries.

More recently, the Commission authorised the selective distribution agreements operated by the German car manufacturer BMW. These agreements favour close cooperation between manufacturer and dealer in the interests both of the motorists and of general road safety. In the perfume industry, because of the nature of the market and of the fact that clauses inhibiting cross-frontier trade had been deleted from the agreements, the Commission decided not to take action on the selection of sales points made by two French manufacturers, Christian Dior and Lancôme.

Authorised forms of cooperation

It is clear from the cases reviewed above that, in line with the principles laid down in the Rome Treaty, the Commission has constantly opposed practices whose aim is to restrict competition and trade in the Community. The examples cited above also show that the Commission has made use of its broad discretionary power to exempt certain agreements under Article 85 (3) which allows agreements to be authorised if, while containing clauses which would normally be prohibited, they enable other central objectives of the Treaty to be attained, such as economic development, technical progress and the improvement of services offered to the consumer.

Once individual case experience had enabled certain principles to be worked out, Commission and Council were in a position to lighten the administrative burden on firms operating in the Community by making it unnecessary for them to apply for authorisation in every single case. One step in this direction has already been mentioned: Regulation No. 67/67, which obviates the need for notification of certain exclusive dealing agreements and gives a very precise statement of the tests to be satisfied if these agreements are to escape the blanket prohibition on restrictive agreements.

But there is also Regulation No. 2821/71 of 20 December 1971, which deals with agreements concerning *the application of standards or types, research and development and specialisation*. So far, the Commission has adopted only one implementing Regulation giving a block exemption for specialisation agreements (December 1972). Here, too,

the object is to raise the productivity and competitiveness of firms, and particularly, as can be seen from the upper limits set on turnover and market share, of small and medium-sized firms.

In addition to these two EEC Council Regulations granting block exemption from the general prohibition on restrictive agreements, there have been two Commission Notices, one on cooperation agreements and the other on agreements of minor importance.

The Notice concerning *Cooperation Agreements* is designed primarily to assist small and medium-sized firms. Without denying the value of certain agreements between major firms, the Commission aims to help small business "to work more rationally, and increase their productivity and competitiveness on a larger market". The list of forms of authorised cooperation in this Notice, which was published on 29 July 1968, is not exhaustive (and there are certain reservations as regards industries with a high degree of concentration): it includes exchange of information, joint market research and other studies, financial cooperation, joint utilisation of production facilities and storage and transport equipment, joint advertising and the use of common labels.

In June 1970, the Commission published its Notice on Agreements of Minor Importance; these also escape the general prohibition. Even more than the first one, this second Notice is designed to help small and medium-sized business since a restrictive agreement is regarded as of minor importance if the products involved account for no more than 5 per cent of the volume of business effected with these or similar products on the relevant market and if the aggregate annual turnover of the firms party to the agreement is no more than 15 million u.a. (20 million u.a. for commercial undertakings).

However, these two Notices, to which must be added two others published in 1962, one on exclusive agency contracts with commercial agents and the other on patent licensing agreements, have no binding force, so in case of doubt individual firms are free to seek the Commission's opinion under a formal procedure.

Dominant positions and mergers: keeping an eye on the giants

Abuse of a dominant position

Anti-competitive agreements between two or more firms are forbidden; but the elimination of competition as a result of the strategy of a

single firm occupying a dominant position in a given market is just as repugnant to the philosophy of the Treaty. Article 86 expresses this clearly:

"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 connections with the subject of such contracts."

Let us take the Commercial Solvents case. On the world market, Commercial Solvents Corp. (CSC) enjoys what is in effect a monopoly for the manufacture of certain basic chemical products used in manufacturing an antituberculosis drug. Until 1970, CSC was selling its products through independent distributors and through its Italian subsidiary, Istituto Chemioterapico Italiano. In Italy, Laboratorio Chimico Farmaceutico Giorgio Zoja SpA, one of Europe's largest manufacturers of this drug, was an important customer of Istituto Chemiotherapico. In 1970, CSC decided that its subsidiary would henceforth manufacture the drug itself and began supplying to it only those quantities of the basic product required for its own manufacturing activities. Zoja was thus deprived overnight of all access to the basic products, for at the same time, CSC had taken steps to block supplies from other sources. Zoja complained to the Commission in April 1971. The Commission investigated the affair and concluded that the refusal to supply Zoja was likely to drive one of the few remaining manufacturers off the market and was an abuse of a dominant position. CSC and Istituto Chemioterapico were ordered to reopen supplies to Zoja immediately.

A second ruling, that given by the Court in the Continental Can case, has had particular legal and political significance. Continental Can, a large American manufacturer of metal containers, acquired control of Germany's largest producer in this field, Schmalback-Lubeca-Werke AG, through its Belgian subsidiary, Europemballage Corpora-

tion SA. It then acquired a majority shareholding in the Dutch firm Thomassen & Drijver-Verblifa NV, the leading manufacturer of packaging material in Benelux. The Commission decided that "the situation arising from these mergers on the market for light metal containers in the north-west region of the common market constituted an abuse of a dominant position within the meaning of Article 86".

When the case came up before the Court of Justice, the Court annulled the Commission's decision on the grounds that the Commission had not adequately defined the relevant market, but it upheld the Commission's interpretation of Article 86. This judgment made available major new opportunities for merger control: certain mergers may now be held to involve abuse of a dominant position.

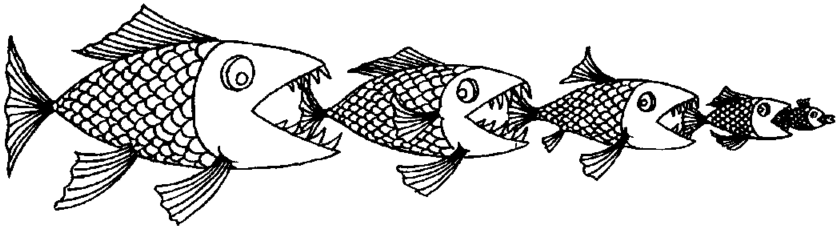
The Commission recently issued another important decision finding that United Brands Co. was guilty of abuse for the purpose of Article 86 of the EEC Treaty in respect of sales of its Chiquita branded bananas in the common market. Since it considered that the dominant position held by United Brands placed it under an obligation to refrain from adopting certain practices which separate markets and distort competition, the Commission subjected the company's entire marketing strategy to scrutiny. Another significant point in the Commission decision was its finding that there was abusive pricing: United Brands had been charging its various customers different prices for equivalent transactions and had imposed selling prices that were unfair in comparison with the economic value of the goods and services it was supplying. The Commission's aim in taking the decision it did was to make it clear that the prohibition of discriminatory and unfair pricing in Article 86 was to be taken seriously.

Merger control

Major firms with annual sales of 200 million u.a. or more account for 50 per cent of the aggregate sales of industry in Europe and for as much as 30 per cent of total industrial employment (1973 figures). Europe's fifty largest firms alone account for 25 per cent of Europe's total sales.

The degree of concentration is particularly high in Germany and the United Kingdom. In the UK, the hundred largest industrial firms now have a share of almost half of the total turnover of manufacturing industry in the country.

In a number of industries, the degree of concentration is very high indeed. In 1971, for instance, the four largest firms accounted for 90 per cent or more of all European production in the flat-glass, ball-bearings and matches industries and between 80 per cent and 90 per



cent of production of steel tubes and electronic date-processing equipment. In razor blades and television tubes, the four largest firms in the Community took more than 90 per cent of the market, while the figure for electric light bulbs lay between 80 and 90 per cent. Finally, the four largest groups manufacturing high-power turbo-generators represented between 80 and 90 per cent of total production capacity in Europe.

This then is the context in which the Commission's endeavours to introduce premerger control must be seen.

In April 1974, Mr. Albert Borschette, member of the Commission with special responsibility at that time for competition policy, put it this way: "The speed-up in the trend towards mergers which has been seen in most industrialised countries over the last ten years has also occurred within the Common Market. The increasing liberalisation of international trade encourages firms to adapt to the larger markets. At the same time, the multinational companies play an increasingly important part on the world market, as the increase in international trade enhances the possibility of international investment. It is essential, however, to keep a check upon a development of this sort, to prevent it from leading to the creation of monopolies."

The Treaty establishing the European Coal and Steel Community confers explicit premerger control powers on the Commission in the coal and steel industries. As a result, the European Commission was able to take action in 1973 against the Thyssen group, one of the major groups in the German steel industry. August Thyssen-Hütte AG, which already had a controlling interest in a firm of the Mannesmann group, decided to diversify by acquiring a majority shareholding in Rheinstahl AG. The Commission gave its blessing to the operation since the enlarged Thyssen group would not be in a position to step up its market power to any excessive degree as compared with that of its principal competitors. However, to enhance the various groups' independence of each other and to ensure that competition was preserved in an

industry dominated by giant companies, the Commission ordered Thyssen to reduce its influence in the Mannesmann group to such an extent that Mannesmann could once again take decisions on an independent basis.

Outside the coal and steel industries, no control along these lines is possible. All that the Commission can do, under Article 86 as construed in the Continental Can case, is to act after the event, and then only where the merging firms already hold a dominant position. Hence the Heads of State or of Government meeting in Paris in December 1972 called for the formulation of measures to ensure that mergers affecting firms established in the Community are compatible with the Community's socio-economic goals, and the maintenance of fair competition as much within the common market as in external markets... In July 1973, the Commission, duly encouraged, sent the Council a proposal for a Regulation "on the control of concentrations between undertakings" (the merger control regulation).

The first point to be made here is that the Commission proposal does not take over the prior authorisation principle of the ECSC Treaty. What is proposed is "a system where incompatibility with the common market must be established case by case after assessment by the Commission of whether the concentration is liable to hinder effective competition in the common market". Article 1 of the regulation proposed by the Commission begins as follows:

"Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof is incompatible with the common market in so far as the concentration may affect trade between Member States."

- Mergers are not regarded as incompatible where the aggregate turnover of the merging firms is less than 200 million u.a. and the goods or services involved do not account in any Member State for more than 25 per cent of the market; mergers which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community are also excluded.

- Merger operations will have to be notified to the Commission in advance where the aggregate turnover of the merging firms was not less than 1,000 million u.a. in the previous business year (unless the acquired firm has a turnover of less than 30 million u.a.).

- Other mergers may be notified to the Commission on an optional basis. Subject to review by the Court of Justice, the Commission decides whether a merger is or is not compatible with the common

market rules, regardless of whether the notification made was mandatory or optional.

The Council had still not come to a decision on the proposed regulation.

Public intervention

But competition policy is not just a matter of making sure firms stick to a set of rules; a further aim is to safeguard the common interest in situations involving state aids, state monopolies of a commercial character and nationalised undertakings.

Public aids as an instrument of structural policy

State aids to firms, industries or regions beset by special difficulties are an increasingly popular instrument of economic policy. One result of the growing liberalisation of international trade and Common Market integration is that traditional forms of trade protection have been robbed of a good deal of their effectiveness. Keener competition and accelerated technological development have also brought to the surface important structural weaknesses in a number of Community industries and regions. The energy crisis which blew up in late 1973 has aggravated these. For both economic and social reasons, public authorities at national and Community level have been obliged to intervene increasingly in the economic process.

The clauses in the EEC Treaty relating to aids—Articles 92 to 94—reflect the general situation and the need that is felt to attempt to find remedies. The Treaty opts for a system where competition is not distorted by aids which may hamper free movement or jeopardise the optimum utilisation of production factors: these aids are therefore declared incompatible with the common market. On the other hand, the Treaty provides that, with the Commission's agreement, certain types of aid defined in broad terms may be granted by the Member States: these exceptions are set out in Article 92 (2) and (3).

In the decisions which it has issued on national aids, the Commission has been guided by three main principles:

— national aids must be compatible with the general Community interest;

— they must make an effective contribution to improving the structures of a given industry or region while encroaching as little as possible on competition;

— national measures may be justified not only on purely economic grounds but also by social and human requirements.

The Commission's policy is to defend these general notions as regards all the various categories of aid.

Let us take regional aids first. If they are efficient, these aids are one of the indispensable tools for achieving that balanced regional development which is one of the objectives of the Treaty of Rome. While a broad-based regional development policy must be promoted both in the Community as such and in the individual countries, it nevertheless remains necessary to prevent the Member States from outbidding each other, for this would jeopardise that very equilibrium which they are aiming for, making their work all the more costly and preventing the poorest regions from being given the priority which they deserve.

By coordinating regional aids, the Commission has endeavoured since 1971 to enhance the effectiveness of regional aids while at the same time ensuring improved conditions within which firms may compete.

In 1975, the Commission adopted principles of coordination applying to all the regions of the enlarged Community; as there are now greater variations in the requirements made, account can be taken of the wide variations in the nature of problems arising in different parts of the Community.

Aids to individual industries tend to pose less formidable problems in that their field of application and their scope are more clearly defined. Regional and general schemes of aid can, however, have implications for individual industries as well. In certain industries, the Commission may even take the lead and establish a Community framework for national aids, as the criteria governing the granting of these aids apply in general terms to all aids. It is particularly important that aids should be selective, so as to distort trade between Member States as little as possible whilst promoting the balanced development of the Community as effectively as possible. Any operation involving the extension or reorganisation of the recipient firm or production unit must, then, hold out the prospect that it will one day be able to fend for itself unaided.

Assistance designed purely to keep the firm out of the receiver's office, not backed by reorganisation schemes, must therefore be excluded; the same applies to operational aids. Aids must be of a temporary and degressive nature so as to constitute an incentive to managements to intensify their own efforts. They must lend themselves to reasonably accurate assessment and measurement and be well adapted to their objectives so that the effects on competition can be minimised.

Likewise, account has to be taken of the social objectives of national measures, especially in safeguarding employment.

The fullest illustration of these principles can be found in shipbuilding. The Council approved a Directive on state aids to the shipbuilding industry on 10 July 1975, the culmination of several years of attempts to find a Community solution to the problem. The main provisions made by the Directive are the termination of all production aids by the end of 1975, the application of international arrangements on marketing subsidies, a procedure for notifying investment aids in shipyards and, finally, a consultation procedure on rescue operations.

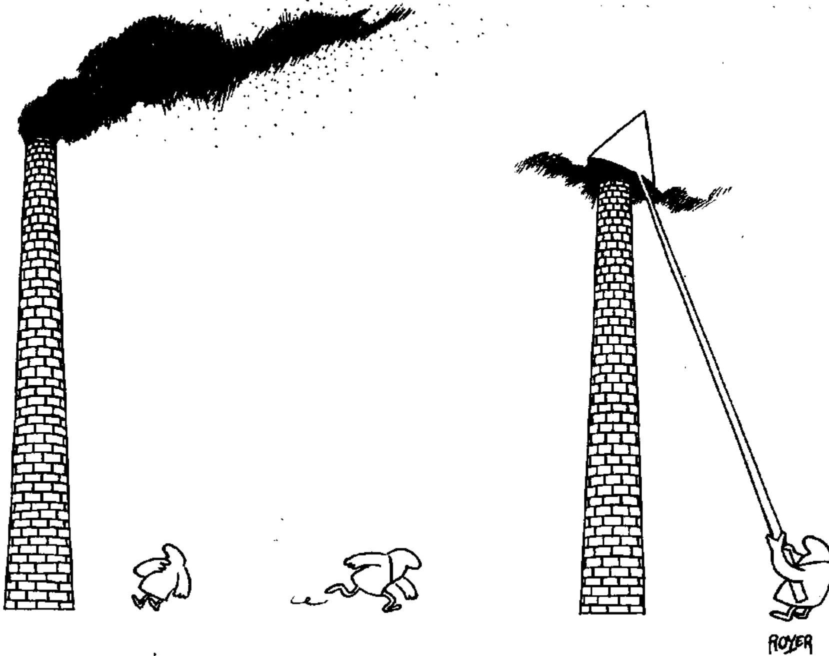
The Directive thus constitutes a further step towards removing distortions of competition in the industry, with due regard for the need to maintain a sound and competitive shipbuilding industry in the Community.

Community authorities are also paying attention to aids to the *protection of the environment.* In a Recommendation made on 3 March 1975, the Council recalled that application of the "polluter pays" principle meant that undertakings must bear the cost of any measures required to cut the pollution and discomfort they caused to a tolerable level. However, state aids may still be granted in exceptional cases.

At the same time, in response to measures introduced by certain governments to assist firms in carrying out the investments required by new environmental protection standards, the Commission sent a memorandum to the Member States setting out the principles on which it would henceforth be assessing the compatibility of these aids with the common market. Firstly, the costs otherwise to be borne solely by the firms involved must be of such a nature as to put them in difficulty and provoke socio-economic problems in a particular region or industry. Secondly, the aids must be designed to help the recipient firms adapt to the new conditions imposed on their operating methods; thus they are normally available for existing firms only. New firms must satisfy environmental requirements without state financial assistance.

In view of the deterioration of the environment in the Community, it is in the common interest for Member States to be assisted in rapidly introducing tighter standards and the Commission therefore informed them that, between 1975 and 1980, it would take a favourable view of schemes which, without being confined to specific industries or regions, were nevertheless aimed at helping existing firms to finance additional investment entailed by new environmental standards; the aids must, however, remain below fixed ceilings which would gradually be reduced over the relevant period.

Finally, *general aid schemes* are in use practically everywhere in the Community and tend to be implemented more generously in times of economic difficulty. These are blanket schemes, benefiting any firm, wherever its plant is located and whatever the industry it belongs to.



Because they are not specific, these aids cannot in legal terms qualify for any of the exceptions allowed by the Treaty; in economic terms, there is no way in which the Commission can assess their effects on competition and trade within the Community.

Nevertheless, the Commission is aware that the Member States may wish to intervene in industry when the need arises, without being confined within predetermined sectoral or geographical limits. To take account of this and at the same time to satisfy the requirements of the Treaty, the Commission has to be in a position to verify, before they are granted, whether these aids satisfy real economic and social needs, whether they form part of a scheme for improving the structures of the recipient firms and whether their effect will not be to create difficulties for the Community (for example, by generating surplus capacity in certain industries). The Commission therefore requires the Member States to inform it in advance either of the industrial or regional programmes under which these general aids are to be granted or, in the absence of such programmes, of significant cases where assistance is given to individual firms.

As regards state aids to firms in difficulty, the Commission has always taken the same line: they are permissible only if they fall within

clearly defined reorganisation programmes, making an effective contribution to improving the viability of the recipient firms. The scope of the aids—i.e. which industries they affect, and in what regions—must be precise enough for the Commission to be able to appraise their effects on structures and trade in the Community. None the less, the Commission has decided that the unprecedented economic situation currently facing the Member States constitutes a valid ground for relaxing the severity of its approach for a time. On 28 May 1975, for instance, it cleared a Danish law establishing a fund to support certain firms which, although structurally sound, had run into difficulties because of the recession. The Commission took account of the fact that assistance from the fund would be temporary (ending on 1 July 1976) and demanded prior notification of the most important individual cases.

State ownership

State aids are not the only form of public intervention in the economy. States may also go into business themselves, through public undertakings or commercial monopolies.

The Commission's approach to public monopolies is clearly defined. Since 1962, it has initiated proceedings in a series of cases concerning the eighteen monopolies which at that time were operating in the Community: in France, there were the monopolies for matches, potassium, gunpowder and explosives, petroleum products, bessemer slag, newsprint and alcohol; in Italy, monopolies dealt in matches, bananas, flints, lighters, cigarette papers, salt, quinine and tobacco; in Germany, matches and alcohol were government monopolies. Article 37 of the Treaty of Rome is quite clear: "Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended (31 December 1969) no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States." A number of exceptions are, however, allowed; for example where a monopoly has been set up by an international treaty (this was the ground for authorising the German matches monopoly), where it is designed to make it easier for farmers to dispose of their produce or to obtain for them the best return, or where it receives special authorisation from the Commission; there are also exceptional cases set out in Article 36 of the Treaty (public morality, public policy, public security, etc.).

The proceedings initiated by the Commission against those Member States which refused or omitted to adjust their monopolies have brought about a considerable improvement in the situation, but the objective

of Article 37 has not yet been fully attained. The Commission also addressed recommendations to Member States operating monopolies when Denmark, Ireland and the United Kingdom joined the Community. Although the new Member States themselves had no state monopolies of a commercial character, their accession to the Community entailed new adjustments, currently being made, to the arrangements in France, Germany and Italy.

The German and French alcohol monopolies deserve special mention. The adjustments made there in response to Commission representations have not had radical effects. In the absence of a common organisation of the market in alcohol in the EEC, the Commission has so far been content with the gradual changes made by the two governments and with the extent to which trade has been liberalised as a result. The recent judgment of the European Court of Justice in the Charmasson case (December 1974) nevertheless led the Commission to order France and Germany to remove all restrictions on free trade in the relevant goods.

The problem posed by the existence of public undertakings is also, at least in theory, a simple one. Although the Treaty of Rome is explicitly neutral as regards the rules governing the system of property ownership in the Member States, Article 90 states that "in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty". Public enterprises are thus subject to the same obligations as any private firm, including the obligation to comply with the general rules on competition.

The rather special link between governments and public enterprises can have the effect of concealing anti-competitive practices or other practices which might affect trade between Member States. Governments should not be allowed to give public undertakings assistance incompatible with the common market, for example by acquiring holdings carrying no right to remuneration or by in any other way putting in funds which are little more than disguised subsidies. But the general rule in Article 90 of the Treaty does admit of exceptions. Article 90 (2), for instance, states that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the general rule insofar as the application of the rule does not obstruct the performance of the particular tasks assigned to them. But even then, the development of trade must not be affected. The point on which issue can be taken here, then, is the concept of "general economic interest" mentioned in the Treaty. In 1971, the European Court of Justice held that here, as elsewhere, Community authorities alone were entitled to "decide whether measures or practices

contrary to the rules of the Treaty affected the development of trade and, if so, whether trade was affected to an extent contrary to the interest of the Community".

Conclusion

This is how the Commission's Fifth Report on Competition Policy sums matters up:

"In times of economic difficulty, competition policy must continue to make its influence felt alongside all the other Community policies. Its function is to preserve a situation in which the structural changes that are needed can take place. Although competition policy can make only an indirect contribution to solving the economic difficulties now besetting the Community—and then only if it achieves its objectives—there can be no solution without it..."

"The Commission considers that the proliferation of state aids as a means of mitigating economic difficulties and their social consequences carries with it the risk of preserving industrial structures that have failed to adapt to circumstances. Restrictive agreements offer no real solution to the crisis either..."

"In the matter of state aids (...) the Commission [keeps] a close watch on the situation to ensure that the effect of the assistance [is] not simply to transfer from one Member State to another the difficulties it [is] intended to resolve or alleviate, and that it actively [helps] to solve structural problems rather than merely masking them..."

"As regards restrictive agreements and abuse of dominant positions, the Commission has taken action against attempts to divide the market, to prevent price decreases or to aggravate the rigidity of certain markets."

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