

Community Topics

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**Ensuring fair
competition in the
European
Community**

by Emmanuel M. J. A. Sassen

Member of the Commission of the European Communities



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Ensuring fair competition in the European Community

On July 1, 1968, the last tariff barriers between the six member states of the European Economic Community were removed. Tariffs and quotas, the traditional instruments of mercantilism, trade wars and the quest for national self-sufficiency, disappeared. Labour and capital can now move freely within the Community. National markets which for decades were self-contained are becoming increasingly exposed to competition, as new competitors emerge in the member states and as competitors from outside the Community seek to profit from the opportunities offered by the large European market.

An additional factor has been the speeding up of technical progress, reflected in a shortening of the time-span between the moment of innovation and that of industrial application. In the nineteenth century it took about 100 years from the discovery of the principle of the steam engine to its commercial application. For the telephone and photography it took about 50 years. The time-lag in our era has shortened to five years for the splitting of the atom and for cybernetics and to three years for semi-conductors.

The Community's competition policy should take account of modern technical developments and their impact on the Common Market's economy. Its competition policy must be more than a mere "anti-trust", policy whether directed against restrictive agreements or monopolies. True, bans on restrictive agreements and on abuses of dominant market positions provided for by the Common Market rules of competition are important and permanent components of competition policy. Care must be taken that the actions of firms or governments do not undo the Commission's aims and achievements in freeing trade from the artificial barriers and distortions set up by restraints of competition. Consumers and businessmen alike expect the Common Market to improve living standards. This expectation, in addition to the political desire for European unification, was one of the main motivations for concluding the Community Treaties.

But our hopes will not be fulfilled unless firms in the Common Market really compete with each other as tariff, tax and legal barriers to the formation of a single home market are gradually removed. Only competition can ensure optimum use of the factors of production, maintenance and strengthening of European firms' competitiveness on world markets and – beyond the purely economic objectives – the safeguarding of freedom in a way consistent with the Community's social objectives.

The Commission's record

The Commission is determined to apply the bans on restraints of competition whenever the need arises. It made this clear in July 1969 when in two cases it imposed heavy fines under Article 85 of the Rome Treaty, which deals with infringement of the rules of competition. One decision related to the international quinine agreement, the other to concerted price-fixing for aniline dyestuffs by manufacturers from the Community and two non-member countries (see Annex 1).

The instruments of Community competition policy – the ban on restrictive agreements and prohibition of abuse – correspond to those provided by American anti-trust law. The mere pursuit of a "prohibition policy" would, however, not enable the Commission to cope adequately with the actual situation of firms in the Common Market. The integration process and technological progress require firms to make far-reaching adjustments almost daily. Even the reorganization of entire industries may be needed.

The second important task of those in charge of Community competition policy is therefore to help firms to adapt themselves. It is not the Commission's task to force a company's management to take measures of adaptation. Nor is it our task to arrange cooperation between firms or to help finance adaptation investment. We must use other means of helping firms to bring about the necessary adaptation.

Policy on restrictive agreements

One of the ways in which a firm can adapt itself to new market conditions is by cooperating with other firms. Cooperation may, to quote a few examples only, take the form of specialization agreements, joint purchasing or selling arrangements, joint research and development, and licensing or exclusive-dealing agreements (see Annex 2).

The European Treaties' rules of competition apply to all these forms of cooperation. The rules forbid as a matter of principle all restraints of competition which impair trade between member states; but they exempt forms of cooperation whose overall economic effects are likely to be beneficial. Obviously the opportunities for adaptation made available to firms through cooperation depend on how these rules are interpreted and applied. Here competition policy must provide assistance wherever it is required and justified.

The Community's competition policy should be based on an approach consistent with economic reality. It would be inconsistent with current economic conditions in Europe if

we held that every reduction in the number of independently operating firms necessarily entailed less competition. From the angle of pure logic, this theory looks convincing, but it is not compatible with the current structure of many economic sectors in the Community. Agriculture is an obvious example, but so are retail trade or those markets where many small firms vie with a few giants. In such a situation small firms, if operating independently, may be too small to matter to the big companies; but cooperation may enable them to challenge their powerful rivals.

Here is a practical example from the Commission's experience. Europe's marine-paint market is shared by the big international groups and a large number of small manufacturers. The big groups operate sales agencies in all major ports, so that the purchaser can be offered the same product everywhere. This selling point, of great importance for paint repair work for instance, is not available to the small manufacturers and so their ability to compete is restricted. As a result, a number of small firms from several countries thought of offsetting this disadvantage by jointly developing paints, laying down quality standards and selling under the same trade mark. This project should transform small firms of merely local importance into serious competitors for the international groups; the Commission accordingly authorized it because it expects that it will bring keener competition.

Effect on market

This example shows how our assessment of various forms of cooperation depends on the effect the agreements are likely to have on actual market trends. An agreement's effects on the market may vary fundamentally according to the market context. For this reason we feel that mere knowledge of the terms of an agreement is not a sufficient basis for a decision on the application of the Community's rules of competition. Market analysis is essential to a Community competition policy.

A predominantly economic approach such as this must influence the definition of "restraint of competition" and consequently the scope of Community law on restrictive agreements. If the effect of an agreement on the market is what matters, it stands to reason that the rules of competition should apply only to agreements that appreciably influence market conditions. Accordingly, the Commission concentrates on the really important cases. This approach is also in the interest of firms in the Common Market, and particularly for the large number of small firms. But it also

benefits the economy as a whole, since concentration of the Community's work on a smaller number of cases facilitates the development of case-law.

At present firms are entitled to know as soon as possible what Community competition law prohibits and permits – what is clearly forbidden, and what may conceivably be authorized.

We are trying to clarify our competition policy in two ways. We devoted the first few years after Community competition law came into force mainly to laying the foundations by passing implementing provisions. We are now trying to increase each year the number of decisions on different kinds of restrictive agreements; more decisions were issued in 1968 than in any previous year since the start of European integration. We choose particular cases so that a decision on them clarifies the situation for the greatest possible number of similar cases. An example of this working method is the recent Commission decision on exclusive dealing agreements. This has made it possible to settle by a simplified procedure another 1,100 agreements which have been notified to the Commission. The decision also clarifies how exclusive-dealing agreements for sales in non-member countries are to be legally assessed in the future.

Bloc exemptions

The second way the Commission is trying to clarify its competition policy is based on the possibility, provided by the EEC Treaty, of granting block exemptions from the ban on restrictive agreements. The Commission has already granted a bloc exemption for certain exclusive-dealing agreements, and we shall try to do the same for other forms of cooperation. We are now considering the possibility of granting bloc exemptions for agreements on

- uniform use of standards or types;
- research and development;
- specialization;
- joint buying or selling, and
- certain licensing agreements.

We are considering whether the Commission could facilitate the conclusion of such agreements by withdrawing the notification requirement. We are also trying to find out if general criteria can be established to determine whether a restraint is "appreciable"; this would enable the Commission to adopt regulations that would exclude cases of negligible restraint from the scope of the rules of competition.

This work is running into great difficulties. No experience is yet available on the effects of such general measures

on agreements of the kinds just described. It is proving extremely difficult to formulate general rules exempting certain forms of cooperation that are comprehensive enough to make exemption a meaningful proposition and yet not so comprehensive as to include agreements which do not justify exemption.

This is a new area of the law on restrictive agreements. We have moved into it because traditional policy cannot adequately handle today's situation in the Common Market. Pressures of technological and other developments compel European business to seek out new methods of research, production and marketing and Community competition policy to break new ground.

Policy on mergers

Our policy on industrial mergers is determined by our concept of the future structure of European business. It also depends, of course, on the legal opportunities provided for the Commission under the European Treaties.

The structures of European markets must satisfy two conditions. There should be enough independent firms to ensure effective competition. At the same time, however, these firms should be large enough to solve problems of research, production and marketing. Each firm must decide for itself whether to seek the right scale of operations through internal growth or through amalgamations. In any event, since the beginning of European integration a steadily increasing number of firms seem to have been choosing the merger method. At present hardly a day passes without the press reporting new mergers or merger negotiations. Most of these companies seem to be responding to the growing pressure of competition on the European and world markets. Generally these firms do not want to restrict competition, but to improve their competitiveness and to adapt themselves to the new scale of the market. In these cases, a reduction in the number of independent firms can intensify competition. Such mergers are in harmony with the objectives of Community competition policy for, to use a quotation from the United States Supreme Court which aptly describes the Commission's policy, "It is competition, not competitors, which the Act protects."

Cross-frontier mergers

At present there are few mergers between firms from different member countries. Most mergers take place between companies of the same nationality, or between a firm from a member state and a firm outside the Community. The Commission is working hard to eliminate the obstacles –

especially in the area of tax and company law – to cross-frontier mergers. Unfortunately, some recent cases show that the governments of some member countries prefer to restructure industries in a national framework and therefore use pressure to prevent multinational arrangements.

This trend is a matter of concern. Mergers between firms from different member states could speed up the integration of markets. In addition, the Common Market, not national frontiers, should be the framework for the development of new market structures. If a firm wants to combine with another firm to boost its productivity, it should in general be able to choose the partner whose production range or marketing system makes the best match. The economic success of the Community depends on optimum allocation of the factors of production.

In a few industries, however, additional mergers between certain firms would endanger workable competition. The European Treaties bind the Community to act if competition is distorted. We construe Article 86 of the EEC Treaty, which prohibits "the abuse of a dominant position", to mean that a merger which eliminates effective competition constitutes a case of abuse and is consequently prohibited.

At present, as national markets are more and more exposed to competition, including competition from firms outside the Community, workable competition is threatened on only a few markets. Thus the Commission has so far had no occasion to apply Article 86 to a merger.

The Commission is in a stronger position over mergers in the coal and steel industry, because the European Coal and Steel Community Treaty allows them only if they are authorized by the Commission.

As these industries are passing through a period of structural reform, we have in the past endorsed most plans for cooperation and concentration. But we realize that the maintenance of effective competition between a small number of competitors in the coal and steel industries – particularly the latter – will pose an increasingly difficult problem.

Conclusion

Our aim is to make the Community's economy strong and efficient. The European Economic Community has provided us with a great opportunity to achieve this objective. As integration spreads to an ever larger number of markets, it releases stimuli which can have a creative effect, provided the free play of market forces is safeguarded. This is why the task of ensuring free and undistorted competition has a key position in the European Treaties. Those in charge of the Community's competition policy bear the great responsibility for accomplishing this task.

Annex 1: Commission's first fines for violation of the rules of competition

The Commission in July 1969 imposed its first fines ever under the Economic Community's anti-trust law. They totalled nearly \$1 million, and affected two major cartels.

One concerned the six major quinine producers in the Community, all members of the "International Quinine Agreement". The other concerned a group of ten dyestuffs producers, four of them with headquarters outside the Community. Most of the firms have already appealed to the Community's Court of Justice.

Quinine cartel

The agreement between the quinine producers, held by the Commission to be restrictive, concerned six companies holding a dominant position on the European and world quinine markets. It covered the manufacture and distribution of quinine used by the pharmaceuticals and food industries, and quinidine, a drug used to treat heart diseases.

The parties to the agreement were the Dutch company, Nederlandse Combinatie voor Chemische Industrie NV (Nedchem), fined \$210,000; two German companies, Boehringer Mannheim GmbH and Buchler und Co, fined respectively \$190,000 and \$65,000; and three French companies, Société Chimique Pointed-Girard SA and Société Nogentaise de Produits Chimiques, each fined \$12,500, and Pharmacie Centrale de France, fined \$10,000. The fines were set in relation to each company's market position and its responsibility for the infringements.

In 1960, at the instigation of Nedchem and Boehringer, the largest of the six manufacturers, these companies had agreed to coordinate their purchases of raw materials and sales of quinine on all markets. Changes in raw material supply in 1962 ended the joint purchasing arrangements, but the sales agreements became more important. The manufacturers agreed to charge common prices for quinine and quinidine in all countries. In 1964 they raised their selling price by about 50 per cent, despite some reluctance on the part of Nedchem; and these prices were applied by all six companies until February 1965.

The six companies also agreed to protect their home markets against imports from other member countries and established export quotas for all countries. The French companies were not permitted to manufacture quinidine.

Article 85(1) of the Common Market Treaty specifically outlaws all these practices. The companies involved sought and obtained legal advice to this effect, but continued the infringement, took precautions to keep the agreements secret

and instructed their members to destroy any compromising documents.

From 1965, market developments prevented the strict application of the agreement. There was a sudden, unexpected increase in demand and a shortage of cinchona bark from which quinine is extracted. The American military authorities, who had disposed of most of their strategic quinine stockpile, reappeared on the market as a large purchaser because of events in Vietnam. (Quinine is the only remedy for certain types of malaria.) As a result, both cinchona bark and quinine prices rose. They reached a peak in mid-1966, dropped back to the prices agreed for early 1965, and then resumed their climb; the upward trend was still continuing in 1969.

In mid-1966, following a large increase in the selling price to the United States, the U.S. Senate Anti-trust Monopolies Subcommittee held hearings. After publication of the Subcommittee's findings in 1967, the European Commission opened its investigation of the companies headquartered in the Community; it was this investigation which led to the imposition of the fines in July 1969.

Dyestuffs cartel

The Commission's investigations into the second cartel, composed of ten major dyestuffs manufacturers, was started on the basis of information supplied by trade organizations of industrial users. They disclosed that the manufacturers had made uniform and virtually simultaneous price increases in January 1964, January 1965, and October 1967.

The companies are: Badische Anilin- und Soda-fabrik AG (BASF), Casella Farbwerke Mainkur AG, and Farbenfabriken Bayer AG, all of Germany; Société française des matières colorantes SA (Francolor) of France; Aziende Colori Nazionali Affini Spa (ACNA) of Italy; SA Ciba, J.R. Geigy SA, and Sandoz SA, all of Switzerland, and Imperial Chemical Industries Ltd (ICI) of the United Kingdom. Together these companies account for 80 per cent of the Community dyestuffs market.

All but ACNA were fined \$50,000. ACNA was penalized less heavily because it was not party to the 1965 price increase and because it was instrumental in preventing the increase planned in 1967 from being applied on the Italian market.

The Commission said the price-fixing agreement had restricted trade within the Community by:

- covering all products imported and sold in Community countries by these companies, their subsidiaries and representatives.
- preventing users from gaining anything by importing from suppliers in other member countries, since prices on their home markets increased at the same rate and on the same date in other countries.

It held the parent companies, not their subsidiaries or representatives, responsible for the violation of the Community's competition rules.

Annex 2: Commission's criteria for permissible business agreements

In a statement defining its policy on trading and research agreements between firms in the Six, the Commission announced in July 1968 that it welcomed cooperation among small and medium-sized companies if this enabled them to work more rationally and increase their productivity and competitiveness on a larger market. It considered the encouragement of cooperation of this kind as part of its task. Cooperation among large firms could also, in the Commission's view, be economically justifiable and compatible with the Community's competition policy.

The Commission authorizes agreements if the total market share of the participating companies is too small to cause an appreciable restraint of competition in the Common Market or to hamper trade between the member states. The Commission does not specify the permissible share of the market which may be involved; this depends on a number of factors, including the nature of the industry and products involved, and the availability of substitutes for the products concerned.

Although the Treaties' rules on preventing distortion of competition are becoming more important as economic integration of member states advances, it is also becoming crucial for firms to adapt themselves to the Common Market and to keener competition on world markets. One major way in which adaptation can be facilitated is by cooperation between firms. To encourage this, and to dispel uncertainty about its positive attitude, the Commission statement set out the forms of cooperation between firms which in its opinion do not contravene Article 85(1) of the EEC Treaty and Article 65(1) of the ECSC Treaty. The statement was intended to make it easier for businessmen to know which agreements do not need to be notified to the Commission for "negative clearance".

Eight types

In interpreting and applying the provisions of the Paris and Rome Treaties on competition, the Commission regards the following eight categories of agreement as permissible:

1. Agreements whose sole object is an exchange of opinion or experience; joint market research; joint preparation of statistics and calculation models.

There may, however, be a restraint of competition where concrete recommendations are made, or where conclusions induce at least some of the firms to behave identically on the market. Where there are special intermediary bodies to register orders, turnover, investment and prices, it would be

wrong to assume automatically that the rules of the Treaties are waived, particularly on an oligopolistic market for similar products.

2. Agreements whose sole object is cooperation in accounting; joint provision of credit guarantees; joint debt-collecting associations; joint business or tax-consultancy agencies.

The Commission stated that debt-collecting associations which also fix or influence prices may, however, restrict competition. Application of uniform conditions by all participating firms and joint comparison of prices could constitute cases of concerted practices. The use of standardized printed forms must not be combined with an understanding or tacit agreement on uniform prices, rebates or conditions of sale.

3. Agreements whose sole object is the joint implementation, placing and sharing out of research and development projects among the participating firms.

The mere exchange of research experience and results, the Commission stated, serves for information only and does not restrict competition. It therefore need not be mentioned expressly. If, however, firms restrict their own research and development (R&D) activity or the use of the results of joint work so that they do not have a free hand for R & D outside the joint projects, this can constitute an infringement of the rules of competition.

Where firms do not carry out joint research work, contractual obligations or concerted practices binding them to refrain from research work of their own, either completely or in certain sectors, may result in a restraint of competition. The sharing out of sectors of research without an understanding providing for mutual access to the results is regarded as a case of specialization that may restrict competition. So too are undertakings to manufacture only products developed jointly.

There may also be a restraint of competition if certain participating firms are excluded from the exploitation of the results, either entirely or to an extent not commensurate with their participation, or if the granting of licences to non-participants is expressly or tacitly excluded.

4. Agreements whose only object is the joint use of production facilities, of storage facilities and of transport equipment.

There may be a restraint of competition if the firms go beyond organizational and technical arrangements and agree on joint production.

5. Agreements whose sole object is the setting up of working partnerships for the common execution of orders, where the participating firms do not compete with each other over the work to be done, or where each of them by itself is unable to execute the orders.

If, however, the absence of competition is based on concerted practices, there may be a restraint of competition. Where the firms participating in an association do normally compete with each other, there is no restraint of competition if the firms cannot execute the specific order by themselves because they lack experience, specialized knowledge, adequate capa-

city or financial resources. Nor is there a restraint of competition if it is only by setting up an association that the firms can make a promising offer. There may, however, be a restraint of competition if the firms undertake to work solely in the framework of an association.

6. Agreements whose sole object is joint selling arrangements or joint after-sales and repair service, provided the participating firms are not competitors over the products or services covered by the agreement.

The Commission pointed out that often small or medium-sized firms competing with each other sell jointly, but that this does not entail an appreciable restraint of competition.

7. Agreements whose sole object is joint advertising.

If the agreement prevents the participants from themselves advertising, there may be a restraint of competition.

8. Agreements whose sole object is the use of a common label to designate a certain quality, where the label is available to all competitors on the same conditions.

There may be restraint of competition if the right to use the label is linked to obligations regarding production, marketing or price formation, for instance when the participants are obliged to manufacture or sell only products of guaranteed quality.

Dominant positions

The statement added that the Commission intended to establish, by means of suitable decisions in individual cases or by general notices, the status of the various forms of cooperation in relation to the provisions of the Rome Treaty. But it could not at that time make a general statement on the application of the Rome and Paris Treaties to the abuse of dominant positions within the Common Market or within a part of it.

As a general rule, firms need no longer apply to the Commission for negative clearance for the eight types of agreements listed. Nor should it be necessary for the legal situation to be clarified through a Commission decision on an individual case. This means that notification will no longer be necessary for agreements of this type. In cases of doubt firms are free to apply for negative clearance.

Specific cases

The Commission statement cited three recent cases in which it approved the agreements involved, and which illustrate the principles underlying its attitude to cooperation between firms.

1. Alliance de Constructeurs français de Machines-outils

The aim of this agreement is to create a joint exporting service for the company's nine members, and the Alliance's sole activity is business negotiation. The members of the Alliance are small and medium-sized firms. Their total turnover accounts for a little more than 10 per cent of total French output.

The Commission stated that a joint export service does not conflict with the objects of the EEC Treaty, if the service acts merely as a joint market prospection agency for non-

competing products and does not constitute an intermediate stage in distribution. It also took the view that the commitment by each Alliance member neither to manufacture nor to sell machines liable to compete with those manufactured by other members did not constitute a restraint of competition because this was the formal expression of a *de facto* situation which already existed before the Alliance was set up, and because the market for machine-tools is tending to encourage specialization. Furthermore, the members represented only an insignificant part of the EEC market for machine-tools. These three factors combined caused the Commission to issue a negative clearance in this case.

2. Socemas

The Société commerciale et d'Etudes des Maisons d'Alimentation et d'Approvisionnement à Succursales (Socemas) is a French trading and research company set up to facilitate cooperation between about 60 food-retailing chain stores. One of its aims is to prospect foreign markets in order to purchase on favourable terms on behalf of member firms.

The Commission's approval shows that it regards Article 85 of the Treaty as applicable to agreements between purchasers in the same way as the Article is to those between sellers. Negative clearance was granted because the activity of SOCEMAS in EEC countries other than France was not on a sufficiently large scale to entail appreciable restraints of competition. An additional factor was that its activity has not increased in recent years.

This decision represented a first step towards solving problems of competition related to cooperation between firms engaged in trading.

3. ACEC-Berliet

The aim of this joint research and development agreement between S.A. Ateliers de Constructions Electriques de Charleroi (ACEC), of Brussels, and the Société Automobile Berliet, of Lyons, is the design and marketing of a new type of bus with an electrical transmission system.

When a marketable prototype has been designed under the cooperation arrangements, it is agreed that ACEC will supply the electrical transmission system and Berliet the mechanical parts of the vehicles. In the Common Market, however, ACEC will be free to deliver its transmission systems to only one manufacturer in each of the four other member countries, in addition to Berliet in France and to Belgian users.

The Commission accepted this agreement, although it contains certain restraints of competition, because it considered the restraints indispensable to obtain economically desirable results from the agreement – in particular, improved production and technical progress. The exemption from the Rome Treaty ban was for five years.

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