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COMMON MARKET · EURATOM · COAL & STEEL COMMUNITY

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BACKGROUND INFORMATION

DRAFT OF COMMON MARKET'S FIRST ANTITRUST REGULATION

At a press conference in Brussels on November 8, 1960, Hans von der Groeben, a member of the Commission of the European Economic Community, explained the draft of a first regulation under Article 87 of the EEC Treaty (cartel regulation). This first regulation, which contains a number of substantive and procedural provisions, is intended to be a major step toward the enforcement of Articles 85 and 86. (For text of Treaty articles referred to, see addendum.)

Rules for New Cartels

The draft confirms that the prohibition laid down in Article 85(1) shall apply directly to all agreements, decisions or concerted practices (in short, cartels) established after the regulation becomes effective. Consequently, no party to a new cartel will be able to invoke the exemption granted under Article 85(3) unless the Commission has explicitly declared the provisions of Article 85(1) to be inapplicable. Such a declaration is not made unless requested, and it takes effect from the date of decision only. To prevent a belated decision of the Commission from causing delay in putting a permissible cartel project into practice, the following system has been devised: either the Commission objects to the project within six months, when the enterprises concerned can demand from the Commission an early and reasoned decision under Article 85(3) (from which appeal can be made to the Court of Justice), or the Commission does not raise any objection within six months, when the cartel may operate provisionally until the Commission has reached a final decision. If in this decision the Commission eventually rejects the request for the application of Article 85(3), the cartel must cease to operate or be adapted to the requirements of Article 85(3).

Under the draft, exemption will be granted for a limited time only, but it can be extended provided the conditions required by Article 85(3) continue to apply. In certain cases exemption can be prematurely revoked, this applies in particular where it has been obtained fraudulently or by incorrect statements.

In order to insure uniform application of the law, the draft confers on the Commission the exclusive competence - subject to acceptance by the Court of Justice - to declare the provisions of Article 85(1) to be inapplicable, or in other words to grant exemption from the prohibition of cartels laid down by the Treaty. For the rest, the draft does not affect the competence vested in the national authorities under Article 88 of the Treaty to proceed against prohibited cartels.

Rules for Existing Cartels

A provisional arrangement is envisaged for cartels already in existence when the regulation comes into effect. This is necessary because not all member states have provided a procedure by which a national administrative authority could be requested to grant an exemption under Article 85(3) of the Treaty. This provisional arrangement will, moreover, enable the Commission to collect information on existing cartels so that it may investigate their importance for the establishment of the Common Market and decide on their compatibility with the Treaty.

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The draft regulation therefore makes it compulsory for certain types of existing cartels to be registered. Registration with the Commission must be effected within six months of the entry into force of the regulation. So as to remove any doubts on what cartels are subject to compulsory registration, the draft lists the following characteristics:

1. All cartels which have as their object or result the regulation of imports and exports among the member states,
2. Any cartels which embrace enterprises from at least two member states and have as their object or result within the Common Market - the direct or indirect fixing of minimum, maximum or fixed prices for goods or services; the restriction of production, sales or investments; the sharing of markets within the Common Market by areas, customers or other characteristics.

The following are not subject to compulsory registration: price maintenance contracts, license contracts, and agreements for exclusive dealing. This means that a large number of restrictions on competition which come under Article 85(1) are not subject to registration.

An exemption under Article 85(3) can be applied for in respect of all cartels registered. If such an application is made within six months, the prohibition under Article 85(1) is suspended. Where the Commission eventually rejects the application, it will grant the cartel a period in which to adjust itself to the rules or to dissolve itself. On the expiration of this period the prohibition under Article 85(1) will take effect. Cartels where the application envisaged in the draft is not made expose themselves to the legal risks involved in an infringement of the Treaty. If they fall within the provisions of Article 85(1), they are null and void, and no previous decision by the Commission is required. Old cartels not subject to registration will be considered provisionally compatible with Article 85, provided an exemption under Article 85(3) is applied for within three years. This relatively long period will enable the Commission to deal with the most important cartels first. It does not, however, mean that the cartel prohibition is held up until expiration of the time periods. The Commission may well decide at an earlier stage that a cartel is not compatible with Article 85(1).

Penalty Provisions

The draft contains further provisions enabling the Commission to carry out its own investigations in close cooperation with the member states. The legitimate claims of those concerned to enjoy the protection offered by the law have been taken very fully into account.

The regulation authorizes the Commission to impose fines and penalties. Fines ranging from 100 to 5,000 units of account (each unit is equal to \$1) can be imposed where the compulsory registration of old cartels is disregarded, where applications contain false or distorted statements, where information is given incorrectly or not within the stipulated period, or where, in the case of investigations, business records are not fully supplied or an investigation that has been ordered is resisted. By fixing penalties, the Commission can prevail upon enterprises to register as required, to submit complete and correct information, and to accept investigations ordered as part of a decision. Penalties ranging from 50 to 1,000 units of account may be fixed for each day of delay.

The first regulation does not yet provide sanctions in respect of infringements of Articles 85 and 86; nevertheless, the Commission can oblige enterprises to cease any violation of these articles once it has been established. Compliance with such a decision is enforced by means of penalties. In the case of action brought against any decision of the Commission to impose a fine or penalty, the Court of Justice is fully authorized to investigate the decision in accordance with Article 172 of the Treaty. It can rescind, reduce or increase the fine or penalty imposed.

Coordination With National Governments

The regulation is designed to insure the continuance of the present close cooperation between the Commission and the cartel authorities in the member states. Before the Commission takes a decision, it must consult the national authorities, who are also kept informed during the proceedings of any applications submitted and of any important administrative acts of the Commission. Finally, the regulation contains provisions on secrecy and on what decisions of the Commission may be published.

The first draft does nothing to anticipate the possible issue of further provisions on competence and procedure. No decision has yet been taken as to whether and in what way a consultative committee is to be brought into the cartel procedure. A later regulation will deal inter alia with the imposition of fines for infringements of Articles 85 and 86.

With regard to the application of Article 86, the regulation provides the same powers to put an end to any infringement and the same authority to order investigation, revision, or sanctions as in the case of Article 85. This shows that Article 86 is considered no less important than Article 85. Nevertheless, it is left to the institutions of the Community to issue detailed regulations under Article 86, taking into account the difference between Article 85 and Article 86, inasmuch as the latter does no more than prohibit the abuse of a dominant position on the market.

Adherence to Article 86 can be enforced through decisions taken by the Commission.

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Texts of the pertinent articles of the EEC Treaty referred to above:

Article 85

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;

(b) the limitation or control of production, markets, technical development or investment;

(c) market-sharing or the sharing of sources of supply;

(d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

(e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

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

any agreements or classes of agreements between enterprises,
--any decisions or classes of decisions by associations of enterprises, and
--any concerted practices or classes of concerted practices which contribute

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to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:

(a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

(b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Article 86

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

(b) the limitation of production, markets or technical development to the prejudice of consumers;

(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

(d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

Article 87

1. Within a period of three years after the date of the entry into force of this Treaty, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall lay down any appropriate regulations or directives with a view to the application of the principles set out in Articles 85 and 86.

If such provisions have not been adopted within the above-mentioned time-limit, they shall be laid down by the Council acting by means of a qualified majority vote on a proposal of the Commission and after the Assembly has been consulted.

2. The provisions referred to in paragraph 1 shall be designed, in particular:

(a) to ensure observance, by the institution of fines or penalties, of the prohibitions referred to in Article 85, paragraph 1, and in Article 86;

(b) to determine the particulars of the application of Article 85, paragraph 3, taking due account of the need, on the one hand, of ensuring effective supervision and, on the other hand, of simplifying administrative control to the greatest possible extent;

(c) to specify, where necessary, the scope of application in the various economic sectors of the provisions contained in Articles 85 and 86;

(d) to define the respective responsibilities of the Commission and of the Court of Justice in the application of the provisions referred to in this paragraph; and

(e) to define the relations between, on the one hand, municipal law and, on the other hand, the provisions contained in this Section or adopted in application of this Article.

Article 172

The regulations laid down by the Council pursuant to the provisions of this Treaty may confer on the Court of Justice full jurisdiction in respect of penalties provided for in such regulations.