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**Policy on competition
in the EEC**

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Policy on competition in the European Economic Community

INTRODUCTION

After more than three years' experience with the implementation of the Treaty of Rome ⁽¹⁾ it would seem to be an appropriate moment to review the main lines along which policy on competition has developed in the European Economic Community (EEC). An appraisal of this nature must be primarily concerned with the progress made in establishing the customs union, for it is on this that the Community is based (Article 9). The aim is the gradual elimination of customs duties, the reduction of quantitative restrictions in trade between the Member States and the progressive establishment of common and uniform external duties. The main purpose of the customs union is, then, the complete liberalization of trade between the Member States with all that this entails for the freedom of economic activity within the Community as a whole.

(1) Treaty establishing the European Economic Community (EEC) of 25 March 1957, entered into force on 1 January 1958; Articles not otherwise specified are Articles of the EEC Treaty.

The following abbreviations are used :

Spaak Report = Report by heads of Delegations to Foreign Ministers, 21 April 1956 (Intergovernmental Committee established by the Conference of Messina), Brussels, 1956 (in French and German).

First General Report = EEC, Commission, First General Report on the Activities of the Community (1-1-58 - 17-9-58), Brussels, 17-9-58 (in English).

Second General Report = ditto (18-9-58 - 20-3-59), Brussels, 31-3-59 (in English).

Third General Report = ditto (21-3-59 - 15-5-60), Brussels, May 1960 (in English).

Cartel and Monopoly = Cartel and Monopoly in Modern Law, Reports on supranational and national European and American Law, presented to the International Conference on Restraints of Competition at Frankfurt on Main, June 1960, Vols. I and II, in English (and French or German). (Institut für ausländisches und internationales Wirtschaftsrecht Frankfurt am Main edit.), Karlsruhe 1961.

Von der Groeben, von Boeckh = Kommentar zum EWG-Vertrag in zwei Bänden, by *von der Groeben* and *von Boeckh*, Vol. I, Baden-Baden, Bonn, Frankfurt 1958.

Müller-Henneberg, Schwartz = Gesetz gegen Wettbewerbsbeschränkungen, Kommentar, by *Müller-Henneberg* and *Schwartz*, Cologne, Berlin 1958.

Woblfarth, Everling, Glaesner, Sprung = Die Europäische Wirtschaftsgemeinschaft, Kommentar zum Vertrag, by *Woblfarth, Everling, Glaesner* and *Sprung*, Berlin, Frankfurt 1960.

Baumbach-Hefermehl = Wettbewerbs- und Warenzeichenrecht, Kommentar, 8th edition by *Hefermehl*, Munich, Berlin 1960.

At the end of 1961 substantial progress will have been made in establishing this customs union: duties will have been reduced by at least 35 % (in agriculture) or 40 % (in industry), and in addition the rates shown in the common external tariff will be more readily appreciated as a result of the negotiations in GATT⁽¹⁾, the talks on compensation and the general round of tariff negotiations proposed by the former US Under-Secretary of State and present Secretary of the Treasury, Mr. *Dillon*. These rates will be clear evidence of the Community's liberal trade policy vis-à-vis the outside world. Where individual Member States with high external tariffs have complied with the recent recommendation of the European Parliament that autonomous reductions in customs duties should be made to meet developments in the economic situation and applied to trade with non-member countries — this can be done under the terms of Article 24 — or where they in future comply with these recommendations, it means that these Member States are going beyond their contractual obligations in the promotion of greater freedom of trade between the Community and the other members of GATT.⁽²⁾ By the end of this year, too, all quantitative restrictions on imports and exports are to be removed (speed-up decision of 12 May 1960, Articles 34 and 45 of the Treaty). These steps entail the firm and irrevocable establishment of the customs union as the core of the Community.

By itself, however, this development will not suffice to establish a Common Market in the economic sense — it will not bring about the integration of the domestic markets of the six economies. To guarantee the free movement of persons, goods, services and capital it is not sufficient to abolish customs duties and quotas. The Treaty therefore requires that, over and above the customs union, a genuine economic union be evolved to ensure that the opportunities of integration offered by the customs union may be exploited to the full and are not replaced by other measures in restraint of trade. As the traditional barriers between the six economies are progressively whittled down, it becomes increasingly clear what differences in economic structure, policy and legislation have grown up in a century and more of industrialization. These differences would lead to serious distortions and would prevent the gradual establishment of the conditions characteristic of a single domestic market. Therefore a genuine economic union inevitably requires that the economic policies of the Member States be progressively co-ordinated [Article 2 and Article 6 (1)], and in particular a common policy on competition evolved.

(1) General Agreement on Tariffs and Trade of 30 October 1947.

(2) On 22 March 1961 the French Council of Ministers approved a number of customs reductions to be made in the light of economic developments. Subsequently an across-the-board 5 % reduction of the rates in operation at the end of 1957 was made on 1 April 1961 vis-à-vis non-member countries, provided, however, that the rates fixed for the EEC common external tariff were not undercut thereby. In addition, a further 5 % reduction of the 1957 rates has been made for a number of important products and this too applies, subject to the above-mentioned proviso, in trade with non-member countries. The total reduction of duty on these products therefore amounts to 10 %.

THE FOUNDATIONS OF THE COMMUNITY'S POLICY ON COMPETITION

The obligation under the Treaty to establish rules governing competition

Even before there was a Treaty, the founders of the Community were faced with the central problem of who was to be entrusted with co-ordinating the economic plans of the vast multitude of firms and persons concerned in the various individual markets constituting the Common Market. The answer was unambiguous: not a number of European planning officials unable to cope with so complex a problem, but fair competition, based on performance and governed by statutory rules. (1)

This decision of fundamental importance is reflected in several points in the Treaty. Article 3 lays down not only that a customs union be established (sub-paragraphs a and b), that common policies for certain economic sectors be introduced (sub-paragraphs d and e) and that steps be taken to co-ordinate the economic policies of the Member States (sub-paragraph g), but it also requires the "abolition, as between Member States, of the obstacles to the free movement of persons, services and capital" (sub-paragraph c), "the establishment of a system ensuring that competition shall not be distorted in the Common Market" (sub-paragraph f), and "the approximation of municipal law (in the Member States) to the extent necessary for the functioning of the Common Market" (sub-paragraph h). In the Preamble, the Contracting Parties recognize the need "to guarantee fair competition".

(1) See for instance Spaak Report, pp. 16 to 18 : "The exclusion of competition from non-member countries is particularly harmful to the expansion of production and to the improvement of the standard of living; it provides both opportunities and incentives to cut out internal competition as well. In a large economic area obsolete methods, which mean high prices and low wages, cannot be maintained because sound competition will constantly force firms to make investments for rationalization and modernization; they will not be viable without such progress."

The Report goes on to say that the establishment of a common market requires purposeful action of three kinds:

"As a result of the creation of normal conditions of competition and of the harmonious evolution of the economies involved, it will be possible gradually to aim at the abolition of all protectionist measures which today impede external trade and are the cause of the disrupted state of the European economy.

Rules of competition must guarantee normal conditions of competition in order to meet the effects of State interventions and monopolies. There must be a common policy to remedy balance-of-payments difficulties where these are likely to fetter economic expansion.

In addition the Common Market requires, over and above the fusion of existing production capacities, that new opportunities be opened up through aid to underdeveloped areas and the use of hitherto idle labour; where necessary firms and workers must be supported in their efforts to change over to more productive work; finally the factors of production themselves, capital and labour, must as a result of these measures be free to move.

The Treaty, then, is founded on the principle that the course of economic events in the Community is to be guided by competition.⁽¹⁾

Fair competition, to be protected from distortion, is the organizational principle of the Common Market⁽²⁾; its establishment is intended — in the words of Article 2 — “to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between the Member States”.

There are two main groups of provisions which serve to establish the competitive system in Europe and to give it content. The first group is intended to make competition possible within the Community. This group comprises, first, the provisions on the gradual elimination of customs duties as between Member States (Articles 12 to 17) and of quantitative restrictions on exports and imports (Articles 30 to 37),

(1) See *von der Groeben* in *von der Groeben, von Boeckh*, p. XIV; *von der Groeben*, “The Cartel Legislation of the EEC in the Light of Two Years’ Experience”, in *Cartel and Monopoly*, Vol. I, p. 63 (65, 66); *von der Groeben*, “Die Europäische Kartellverordnung — ein wichtiger Schritt zu einer europäischen Wettbewerbspolitik”, in *Betriebsberater* 1961, p. 1; see also other publications, e.g. *VerLoren van Themaat*, “Competition and Restrictive Trade Practices in the European Economic Community”, lecture to the Federal Bar Association in Washington, D.C., on 11 February 1960, pp. 3 and 4 (stencilled); *Schumacher*, “Der Unternehmer und die Wettbewerbsordnung im Gemeinsamen Markt”, in *Vorträge auf der Jahreshauptversammlung des Fachverbandes Stahlblechverarbeitung e.V.*, 5 June 1959, p. 11 (17), Hagen 1959; *Günther*, “Die Regelung des Wettbewerbs im EWG-Vertrag”, *Wirtschaft und Wettbewerb* 1957, p. 275 (276, 293); *Cosciani*, *Problemi fiscali del mercato comune*, p. 39, Milan 1958; *Rueff*, “Une mutation dans les structures politiques : Le marché institutionnel des Communautés européennes”, *Revue d’économie politique* 1958, special number, p. 1 (6 et seq.); *Koch*, “Das Verhältnis der Kartellvorschriften des EWG-Vertrages zum Gesetz gegen Wettbewerbsbeschränkungen”, in *Betriebsberater* 1959, p. 241; *Franceschelli*, *Trattato di diritto industriale*, Vol. I, pp. 638-644, Milan 1960; *Baumbach-Hefermebl*, p. 1490; *Kronstein*, “The Significance of the Provisions Concerning Restraints of Competition within the Total Perspective of the ECSC Treaty and the EEC Treaty”, in *Cartel and Monopoly*, Vol. 1, p. 131 (132-134); *Plaisant, Lassier*, *Ententes et Marché Commun*, pp. 9-11, Paris 1959; *Houssiaux*, *Concurrence et Marché Commun*, pp. 5 et seq., 165-167, Paris 1960; *Rodière*, “The Prohibition against Restraints of Competition Contained in Article 85, paragraph 1 of the European Economic Community Treaty, and its Private-Law Consequences (Article 85, paragraph 2)”, in *Cartel and Monopoly*, Vol. I, p. 273; *Steindorff*, “The Provisions against Restraints of Competition in the European Community Treaties and the National Law”, in *Cartel and Monopoly*, Vol. I, p. 191 (193); *Hug*, *Wirtschaft und Recht* 1960, pp. 172 (190, 191, 194); *Hug*, in *Cartel and Monopoly*, Vol. II, p. 639 (653).

(2) Accordingly, the EEC Commission says on p. 59, sec. 78 of its First General Report : “The aim of the Treaty is not only to stimulate competition by the suppression of the obstacles to international trade, but to establish a system of fair and healthy competition as the indispensable condition for the achievement of the rational division of economic activities and for ensuring an equitable basis of operations for the productive forces”. Cf. also European Parliament, Bericht im Namen des Ausschusses für Fragen des Binnenmarktes der Gemeinschaft über die Oeffnung der Märkte und die Wettbewerbsregelung, rapporteur : representative Darras, Document No. 51/1959, p. 17; also representative Illerhaus in the European Parliament, Débats, session d’octobre 1960, No. 32 de mars 1961, p. 253 (254).

and those on the establishment of a common customs tariff (Articles 18 to 29); secondly, the provisions on the free movement of workers (Articles 48 to 51), the right of establishment (Articles 52 to 58), the free supply of services (Articles 59 to 66) and the free movement of capital (Articles 67 to 73); thirdly, the provisions on the co-ordination of policies relating to economic trends and monetary policies, which is to preserve the general equilibrium between the economies of the Member States (Articles 103 to 109); fourthly, the rules on the abolition or adaptation of State aids which distort competition (Articles 92 to 94) and on taxation (Articles 95 to 99); and fifthly, the provisions on the approximation of such legislative and administrative provisions of the Member States as may lead to distortions of competition (Articles 100 to 102).

Whereas these provisions create the conditions for effective competition which are not related to the actions of those who are competing, that is to say the conditions intended *to make competition possible*, the second group of provisions have as their purpose *to maintain existing competition* in a viable state, that is to say to regulate that part of competition which depends on the actions of those who are competing. The Treaty therefore rightly describes this group of provisions as "rules governing competition". They comprise, first, European legislation against restraints of competition (Articles 85 to 90), supplemented by the prohibition of discrimination on grounds of nationality (Article 7), and, second, European legislation on dumping (Article 91).

This survey of what may be called the Community's economic constitution would, however, be incomplete if no mention were made of several other groups of Treaty rules which serve to round off or to modify the competitive system of the Common Market.

The Treaty modifies the competitive system in the *agricultural* sector (Articles 39 to 47) and — to a lesser extent — in the *transport* sector (Articles 74 to 84). The special aspects of the Community's agricultural and transport policy cannot be dealt with in this essay.

The provisions concerning the Community's *social policy* are one of the factors rounding off the competitive system inasmuch as they give it a specifically social slant. In Article 117 the Member States declare that they are agreed "to promote improvement of the living and working conditions of labour so as to permit the equalization of such conditions in an upward direction". They consider that this will result, first from the functioning of the Common Market, which will favour the harmonization of social systems, secondly from the procedures provided for under the Treaty, and, thirdly, from the approximation of legislative and administrative provisions [Article 117(2)]. This means that the EEC Commission must promote close collaboration between Member States, particularly in matters relating to employment, labour legislation and working conditions, occupational training and social security (Article 118). Further, men and women workers are to receive equal remuneration for equal

work (Article 119). Lastly, the Treaty has established a European Social Fund to promote employment facilities and the geographical and occupational mobility of workers (Articles 123 to 128).

A further complementary element in the system is provided by the *regional policy* which the Treaty renders possible and in fact encourages. Thus, State aids may for instance be granted to promote the economic development of regions where the standard of living is abnormally low or where serious underemployment exists [Article 92 (3a)]. In considering transport rates and conditions the Commission must take into account the requirements of a suitable regional economic policy and the needs of underdeveloped regions as well as the problems of regions seriously affected by political circumstances (Article 80 (2); cf. also Article 82).

The Treaty has also established a European Investment Bank, whose task it is "to contribute to the balanced and smooth development of the Common Market" (Article 130). For this purpose it is one of the Bank's functions to facilitate the financing of projects which will open up less developed regions.

These and other measures are part of a regional policy intended to improve the economic and social structure of such areas. Not only will idle or uneconomically employed forces be channelled into more productive use, and certain conditions of competition, especially those resulting from State investment policy, brought more fully into line, but also those effects of competition which increase prosperity will be more equally distributed.

The foregoing has shown how closely the several elements of the competitive system are related to each other and to measures, introduced as part of the Community's social and regional policies, which play a part in shaping the competitive system. This connection must be constantly borne in mind in the following appraisal of policy on competition in the narrower sense of the word, that is to say of policy on State aids and taxation which distort competition, on the approximation by the Member States of provisions which lead to restriction of competition, on private restrictions on competition and on dumping.

What the competition policy of the Community is to achieve

From what has been said above it appears that the task of competition policy in the Community is a twofold one : first, this policy must establish on the various markets of the Community a situation in which competition is neither distorted nor perverted. Such measures may not create any artificial advantage or disadvantage for any competitor. Secondly, care must be taken to ensure that the competition thus rendered possible can in fact take place, that is to say, that it shall not be possible for it to be abolished, restricted or rendered unfair by measures on the part of the competitors themselves.

This definition of the task to be accomplished is in itself sufficient to show that neither the creation of genuine conditions of competition nor the protection of existing competition can as a rule be accorded priority in time or pride of place. The Treaty is based on realization of the fact that not only State but also private measures can paralyze competition and that they can do so not only in isolation or vicariously but also cumulatively, so that both sets of rules must be applied in complementary fashion.

We speak of the *vicarious effect* of State and private restrictions of competition where, for instance, an internal duty which had been making competition across the frontiers impossible or had greatly restricted it is then replaced by a cartel which proceeds to redivide the nascent common market into national sales or production markets. Another case in which State distortion of competition is replaced by private restriction of competition occurs when enterprises in a Member State whose sales have so far been favoured by a temporary exemption of their products from a tax to which competing foreign products were subject decide, after the cessation of such State aid, to supply their products only to those dealers who no longer deal in competitive products from abroad. Such exclusive dealing clauses would wholly or in part cancel the added competition which was the main purpose of all the efforts made to eliminate fiscal aid.

State and private restrictions on competition have a *cumulative effect* if, for instance, competition within the Community, already hampered and distorted by the continued existence of internal duties, is in addition restricted by a quota cartel which fixes the quantities of imports from one Member State to another. Such cases of cumulative restrictions on competition by State and private measures will remain very frequent, at least during the transition period. Economically and legally there is no reason why such private restrictions of competition should be treated differently from those, referred to above, which take the place of State distortions of competition.

Conversely, the elimination of private restrictions on the movement of goods and services across frontiers will not establish common markets if such private restrictions can be replaced or supplemented by State restrictions on trade with identical or similar effects, that is to say if privately negotiated cartel quotas for imports into the other Member States are replaced or supplemented by State restrictions on imports.

Finally, there are State and private restrictions on competition in the Common Market which neither replace nor supplement private or State restrictions of competition. For instance, competition in any one market may be impeded either by a customs duty only or by a cartel dividing the market. Clearly, because they impede trade between the Member States, such restrictions with *isolated effect* cannot be treated differently from the restrictions with vicarious or cumulative effect.

Numerous other practical examples could be quoted to prove the same thing over and over again : the interdependence and reciprocal effect of all measures influencing competition. Once we understand this we can draw an important conclusion from

it : measures in the various fields of competition policy must always be considered in their context. Fiscal policy, aid policy, cartel policy, anti-dumping policy and policy for the approximation of legislation must not be devised or carried out in isolation. Care must be taken so to harmonize the measures taken under the Treaty provisions for the promotion and regulation of competition, as regards both substance and time, that they will not impede or cancel, but on the contrary supplement one another ; new gaps must not be allowed to develop, but a European system of competition should be created.

From this there follow quite a series of conclusions. For one thing it shows why the cartel provisions of the Treaty were drawn up not merely as programmes⁽¹⁾ but as *direct and immediately applicable law*⁽²⁾. Therefore they can and must be enforced now and not only at the end of the transition period. The more progress is made in the elimination of State restrictions on trade across frontiers, the more urgent will it be to prevent private restrictions on competition intended to slow down the effects of this action for the promotion of competition. It is therefore the opinion of the EEC Commission that State and private distortions of competition must be counteracted with equal firmness and on the same principles.⁽³⁾

In practice this means — and this is the second conclusion to be drawn from what has been said above — that the Commission uses the *authority* conferred on it by the Treaty to guarantee the uniform and equal application and implementation of the Treaty in the interest of the Community, its Members and all concerned (cf. Article 155).

(1) E.g. *Strickerodt*, "Die Wettbewerbsregeln für den Gemeinsamen Markt", in *Der Betrieb*, 1957, supplement No. 9 of 3-7-1957; *Weebers*, Kartel-contrôle op de Europese gemeenschapelijke markt, de Naamlooze Vennootschap, 1957, p. 86; *Spengler*, Die Wettbewerbsregeln der EWG (Bundesverband der deutschen Industrie), Cologne, 1957; *Spengler*, in *Müller-Henneberg, Schwartz*, Notes 4-8 Appendix to sec. 101, No. 3; *Marmo*, "Intese consortili e Comunità economica europea", in *Foro italiano* 1958, IV, p. 170; *Carbone*, "Le regole di concorrenza nel mercato comune", in *Collected lectures : Comunità economica europea*, p. 109, Milan 1958.

(2) See EEC Commission, First General Report, pp. 62-63; European Parliament, Resolution of 15 January 1959, *Journal officiel des Communautés européennes*, p. 165 = *Wirtschaft und Wettbewerb* 1959, p. 657; see also the Second Cartel Conference of the government experts of the Member States of 15/16 January 1959, *Wirtschaft und Wettbewerb* 1959, p. 445. Cf. Further publications such as *Günther*, supra p. 6, note 1, pp. 278, 287-288; *Thiesing*, in *von der Groeben, von Boeckh*, Introductory remarks 11 to 15 to Articles 85 et seq.; *Koch*, supra p. 6, note 1, pp. 241-242. *Capotorti*, "Sull'efficacia delle regole di concorrenza applicabili alle imprese della Comunità economica europea", in *Rivista di diritto internazionale* 1959, p. 3 (7-20); *Everling*, in *Wohlfarth, Everling, Glaesner, Sprung*, Note 11 to Article 85; *Baumbach-Hefermebl*, p. 1491 et seq.; with certain limitations also *Steindorff*, "Das Verbot von Wettbewerbsbeschränkungen in der Anfangszeit der EWG", in *Betriebsberater* 1958, p. 89; *Coing, Kronstein, Schlochbauer*, Das Verhältnis des deutschen Kartellrechts zu den kartellrechtlichen Vorschriften des EWG-Vertrages, Frankfurt, 1958; *Kronstein*, supra p. 6, note 1, pp. 138 and 141.

(3) This principle of the Commission's policy on competition has been unanimously approved by the Council of the EEC; see Third General Report, p. 106.

Clearly, the national authorities cannot cope with this task in isolation, and conversely the Commission could not fulfil its function without close collaboration with the competent national authorities.

From the need to co-ordinate and integrate the Community's policy on competition there follows, thirdly, the need for a corresponding internal *organization of the Commission*. To take this into account responsibility for all questions of cartels, monopolies, dumping, State aids, taxes and approximation of legislation is allocated to one out of the Commission's nine Directorates General, known as the Directorate General for Competition and divided into four Directorates which deal with the matters referred to above. Of the nine members who form the actual Commission, one is responsible for the work of the Directorate General for Competition; he has the support of two further members of the Commission. There is also close collaboration with the Directorates General responsible for external trade policy, general economic policy, the freedom of establishment and the free movement of goods and services.

At times there has been misunderstanding of both the meaning of the powers and competences which the Treaty has conferred on the Community's institutions and of the purpose of the substantive Treaty provisions on competition. Again and again the Commission — and the Treaty — are said to have a leaning towards dirigism or even a planned economy and the bureaucratic centralism which this entails. It is often stated that the European Economic Community is an instrument of planned economy or at least of dirigism, hardly compatible with a liberal economic order because of its institutional machinery and its rules on the conditions and practice of competition. It is said that free trade could be more easily achieved in a liberal system of world trade or perhaps in a loose association such as a free trade area, than in an economic union which is more rigid in its organization and its law.

To say this is completely to misunderstand the situation. Just as for instance the Federal Republic of Germany does not compromise the free market economy character of its economic system when it permits public intervention where balanced conditions must first be created to make competition possible or to promote it, or where social friction must be eliminated, so no major market economy such as the European Economic Community can be put into practice unless the prerequisites for competition are created. Genuine, fair competition does not develop automatically; often its external conditions have to be created by the means discussed and its continued existence secured by binding rules⁽¹⁾.

(1) Cf. Spaak Report, pp. 18-19 :

"Under the given economic circumstances an expansion of the markets and of competition alone will not be sufficient to ensure the most rational division of labour or the most favourable rate of expansion.

It must first be remembered that certain enterprises, by virtue of their size or by virtue of agreements, are able to discriminate, to divide markets and to engage in other practices which distort competition. There must therefore be rules of competition, binding upon enterprises,

It follows that the Treaty provisions discussed above and the relevant measures taken by the EEC Commission are neither dirigist nor characteristic of a planned economy ; on the contrary, it is their purpose to make competition function ever more efficiently and to keep it in operation as a co-ordinating instrument of the market economy. The entire competition policy of the Commission serves this double purpose and it is to this end alone that the Treaty and the regulations issued under it lay down the external conditions of competition⁽¹⁾. Accordingly the powers and competence of the Commission are very limited and can in no way be compared with the wide authority of those who control a dirigist or planned economy. These powers are further restricted by the Community's federative structure. This prevents excessive centralization but guarantees fruitful and realistic collaboration with the national executive authorities.

After this survey of the general principles underlying the EEC Commission's policy on competition, we must now sketch the measures it has taken to put this policy through. We will first deal with the measures to abolish distortions of competition caused by the State and then discuss the steps taken to give effect to the rules of competition.

THE IMPLEMENTATION OF POLICY ON COMPETITION

State aids which distort competition

The level start that should be made by competitors — and consequently their entire position in the market — can be so influenced by aids that it is no longer possible, or not possible without some reservation, to speak of genuine competition based on individual effort⁽²⁾. Therefore Article 92 declares any aid which distorts or threatens

in order to prevent double pricing from taking the same effect as customs duties, dumping practices from endangering sound production and a division of markets from replacing the present customs barriers.

Secondly, we face the fact that various States are intervening very effectively in favour of enterprises in their own country. A distinction must here be made between aids which are in the general interest and aimed at expanding production and others which have as their aim or their effect the distortion of competition.

But even if measures to favour or protect domestic production are left out of consideration, the effects of differing statutory and administrative provisions on conditions of competition remain to be studied. This difficult problem requires a careful analysis and adequate measures to remedy the differences found."

(1) See *von der Groeben*, *The Cartel Legislation of the European Economic Community in the Light of Two Years' Experience*, in *Cartel and Monopoly*, Vol. I, p. 63 (65-67).

(2) There still is a considerable lack of literature on this subject. On the relevant articles see *Thiesing* in *von der Groeben, von Boeckh*, Notes on Art. 93-94; *Everling* in *Wohlfarth, Everling, Glaesner, Sprung*, Notes on Articles 92-94, citing further material in Note 6 to Article 92; *Obermolte*, *Aussenwirtschaftsdienst Betriebsberater* 1961, p. 68.

to distort competition to be incompatible with the Common Market to the extent to which it adversely affects trade between Member States.

This basic prohibition laid down in Article 92 (1) is made subject in paragraph 2 of the same Article to three statutory exceptions and in paragraph 3 to four further exceptions at the discretion of the Commission or the Council of Ministers in each individual case.

The aids permitted by the law are in the first place social aids to individual consumers, such as subsidies to schools to reduce the price of milk supplies to school-children, or subsidies to health resorts to reduce the cost of cures taken by patients in the lower income groups. The second category of aids which come under Article 92 (2) are aids granted to remedy damage caused by natural calamities or other exceptional events — for instance the Fréjus disaster — and certain aids granted to the economy of certain regions of the Federal Republic of Germany affected by the division of Germany such as the areas along the zonal border and Land Berlin⁽¹⁾.

Amongst the admissible aids there are those granted in favour of economically underdeveloped regions, for instance Sicily ; aids to promote important projects of common European interest or to remedy a serious disturbance of the economy of a Member State ; and lastly aids intended to facilitate the development of certain activities (e.g. the film industry) or of certain economic regions, provided that such aids do not change trading conditions in a manner that would be contrary to the common interest.

This latter provision is frequently invoked in practice. To understand such aids as constituting merely some initial financial aid for building up certain activities or supporting certain regions would be giving too narrow an interpretation to this provision. The emphasis should be on economic interpretation in each case. In the experience of the Commission the three following criteria must be carefully observed. Such aids must be : selective, i.e. granted only to those who really need them ; decreasing, i.e. constantly tapering down, thereby compelling the recipient to make an effort of his own ; and temporary, i.e. available for a limited period only. Naturally aid of this kind must never serve to create a competitive advantage.

In co-operation with the Governments of the Member States the Commission first made a survey of existing aid regulations and then studied them. So far proceedings concerning existing systems of aid or projected aid operations have been initiated in more than ten cases, and some of these have already been concluded. Several measures have in consequence been rescinded, such as the price equalization fund for rubber in the Federal Republic and aids to certain branches of the French textile industry.

Other proceedings are nearing their conclusion, such as the cancellation of tax reliefs for the purchase of Italian motor-cars in Italy, which lead to distortions of competition to the disadvantage of non-Italian makes.

(1) For more details see *Everling*, *supra* p. 12, note 2, Note 10 to Article 92.

A further group of aids gives rise to particularly serious transition difficulties because of the close interplay of economic, social and political problems. They include in particular State aids for shipbuilding in France and Italy. In this field the joint efforts of the Commission and the Governments have at least already produced the result that both countries have worked out rehabilitation programmes on the basis of which it may be expected that these branches of industry will become competitive in the foreseeable future and that the subsidies will as a result be abolished.

Altogether the preparatory work so far done by the Commission has shown that aids to industry granted in the six Member States do not always distort competition as much as is frequently believed. Naturally the degree to which existing aid systems are effective also depends on the extent of trade liberalization reached among the Member States. The more the other trade barriers are reduced, the more noticeable will the aid be with which a State promotes the competitive situation of its industry. Therefore the Commission is being particularly careful to ensure that the improved competition which is already beginning to be noticeable in the Community shall not be nullified by the grant of new aids or — perhaps even more important in the immediate future — by measures intended to bypass the legal definition of aid.

Taxes which distort competition

Here again, the steps taken by the Commission are intended to ensure that the beneficial effects of the reduction of customs, quota restrictions and aids shall not be cancelled by tax measures of similar effect and that the existing tax barriers, that is to say the taxes which impair or distort competition in the Community, shall be gradually removed. ⁽¹⁾

To take *indirect* taxation in international trade first, it can be said that goods exported are usually granted exemption from indirect taxes (drawback) and that a compensatory charge is placed on imported goods in order to put them on the same tax footing as competing home products. Articles 95 to 97 accept this principle of taxation in the country of destination. In its practical application, however, there arise such difficulties of calculation, particularly from the system of a multi-stage turnover tax with cumulative effect which exists in five Member States, that there is no way out but to fix the compensatory charges on imports and drawbacks on exports by average rates. This leads to distortions of competition ⁽²⁾ for those goods which

⁽¹⁾ Cf. *Cosciani's* thorough treatment of the subject, *supra* p. 6, note 1, *passim*; *Neumark*, *Die budgetären und steuerlichen Aspekte einer wirtschaftlichen Integration*, Den Haag, 1953; for repercussions of taxes on competition, see also *Schmölders*, "The Principle of Competition in Tax and Finance Policies", in *Cartel and Monopoly*, Vol. II, pp. 509 et seq.; in connection with the Treaty, see *Fischer-Menshausen* in *von der Groeben, von Boeckh*, introductory remarks to Articles 95-99, and bibliography; also, *Sprung* in *Wohlfarth, Everling, Glaesner, Sprung*, Notes to Articles 95-99.

⁽²⁾ For more details see *Jansen*, "Die Steuern im Gemeinsamen Markt", in *Vorträge auf der Jahreshauptversammlung des Fachverbandes Stahlblechverarbeitung e.V.* on 5 June, 1959,

would in effect have to carry a tax burden above or below that affecting average goods. Moreover, this system is open to abuse because it enables Member States to protect their domestic markets from foreign competition by means of excessive compensatory charges or to grant what amounts to export aids through excessive drawbacks, thereby distorting competition in the markets of the remaining Member States. Though Articles 95 and 96 prohibit abuse of this kind, it is very hard to prove because of the difficulty of calculation.

After the Commission has repeatedly had to deal with cases of this nature, the Council of Ministers, acting on the Commission's proposal, set up on 21 June 1960 a consultation procedure for taxation measures in this field. The Member States have undertaken to notify the Commission two months in advance before promulgating any proposed increase of compensatory charges or rates of drawback and to make such changes for technical tax reasons only. Meanwhile, however, some steps initiated before this agreement and therefore not covered by it have been carried out and have, in the view of the Commission and the Member States affected, led to considerable distortions of competition; they are the subject of proceedings which are still pending.

Lastly, both in domestic and in international trade, the system of cumulative taxes, that is to say of taxes imposed at each processing and sales phase, favours the integrated firms, which are as a rule large, whilst it puts the small firms at a disadvantage. Therefore — in cases where tax savings are of importance — this system of taxation offers a strong incentive for vertical integration and thereby for the concentration of enterprises and all that means for competition, the middle classes and the entire economic system of the Community⁽¹⁾.

In view of this lack of neutrality which numerous indirect taxes show in their effect on competition, the Treaty lays down in Article 99 that the Commission shall consider in what way indirect taxation can be "harmonized in the interest of the Common Market". It is therefore not a question of whether but only of how harmonization is to be put into effect. The founders of the Treaty already recognized that it was necessary.⁽²⁾ Harmonization does not mean that the tax systems must be made uniform, but only that they must be mutually adapted to the extent that this is necessary to make them neutral from the point of view of competition and thus to bring the tax systems into line with the competition system of the Community. Three factors call particularly for consideration: differences in the burden of taxes in the Member States, the differences in distribution of this burden between direct and indirect taxes in the various Member States and differences in the tax structure of the Member States.

p. 21 (24-25); in great detail *Mesenberg*, *Die umsatzsteuerliche Behandlung der Ein- und Ausfuhr in den Staaten der EWG*, Bonn 1960; *Mesenberg*, "Umsatzsteuern und Gemeinsamer Markt", *Aussprache* 1959, p. 99; for thorough treatment see *Willgerodt*, "Umsatzsteuern und Handlungsoptimum im Gemeinsamen Markt", *Ordo* 1958, p. 63; *Regul*, "Wirtschaftsintegration und Steuersysteme", *Finanzarchiv*, Vol. 16 (1955), p. 313.

(1) For greater detail, see *Willgerodt*, *supra* p. 14, note 2, pp. 83 et seq.

(2) Cf. e.g. Spaak Report, pp. 64 et seq.

Clearly, this is an extremely difficult⁽¹⁾ task, which will therefore need a great deal of time and can only be achieved in close co-operation with the Governments of the Member States. As a first step, several working parties of the Commission have been instructed to study the problems in greater detail. The first results of these studies are already available. In addition, the Commission has set up an academic committee composed of leading financial experts from the six Member States and one from the United States.

The Treaty contains only one specific provision concerning *direct* taxation (Article 98). There is, however, unanimous agreement that studies in this field and a subsequent harmonization of direct taxes with a distorting effect on competition can be based on Articles 100-102.⁽²⁾ For direct taxes, too, can "distort the conditions of competition in the Common Market and thereby cause a state of affairs which must be eliminated" (Article 101); provisions on direct taxation, too, can "have a direct incidence on the establishment or functioning of the Common Market" and may therefore require adaptation (Article 100).⁽³⁾

As a first step the Commission has then begun comparative studies of the existing situation with regard to individual direct taxes in general and various branches of the economy. Enquiries cover the movement of capital, taxation of agricultural and industrial enterprises, depreciation provisions, trade and the insurance system. This has shown that at a later date a number of modifications will be necessary; it is not possible to discuss them in the space of this essay.

To sum up, it may be said that the long-term aim of the Treaty's tax provisions is to bring about a taxation system which is neutral from the point of view of competition and therefore consonant with it. Until this goal is obtained the Commission supervises, so far as possible, the observance of Articles 95 to 97, which forbid distortions of competition to the disadvantage of imports or in favour of exports. This twofold mandate is clearly expressed in Articles 95 to 102.

The approximation of provisions restraining competition

What has been said about the need to harmonize tax provisions which lead to distortion of competition within the Community, shows the considerable importance attaching to the approximation of legislation if the most uniform possible conditions of competition are to be established. Articles 100 to 102, as well as some specific provisions

⁽¹⁾ For the experience gained in the Benelux countries see *Jansen*, supra p. 14, note 2, p. 27.

⁽²⁾ *Schulze-Brachmann*, "Die direkten Steuern und die Doppelbesteuerung aus der Sicht der EWG", *Betriebsberater* 1960, pp. 62 (63); *Jansen*, supra p. 14, note 2, p. 28.

⁽³⁾ For details and examples see *Schulze-Brachmann*, supra note 2, pp. 62-63; for a general discussion on distortion of competition through income tax and company tax see *Schmölders*, supra p. 14, note 1, *passim*.

(e.g. Article 220), state that the contracting parties look upon the approximation of legislation as an essential means to create a genuine European economic union⁽¹⁾.

In the present context of creating legal conditions of competition which are as uniform as possible⁽²⁾ the Commission has taken action not only in tax legislation but also in the following fields: industrial property rights, the public tender system, legislation on foodstuffs, veterinary legislation and company law.⁽³⁾

In connection with *industrial property rights* the free exchange of goods — and therefore international competition — may be impaired in various ways, e.g. because industrial property rights are restricted to the territory of the State which has granted them. For instance the legal differences in the Member States make it possible, for similar or overlapping property rights relating to patents, trade-marks or models and designs to be held by different persons in different parts of the Community. This means that the import of a product lawfully manufactured or distributed in one Member State can be prevented in another on the ground of an infringement of the property right, because in that State the same right is held by someone else.

Whereas in this case one of the prerequisites for international competition is lacking, there are others where they exist but are so dissimilar as to produce an impediment to international trade. For instance an invention, a trade-mark or a model may be protected in several Member States whereas it may be free to the general public in others. In the former, therefore, competition is restricted by the industrial property right, but not in the latter.⁽⁴⁾

There is all the more reason for satisfaction, then, when we find that good progress has been made in this field. On the basis of detailed preliminary studies by several working parties and after consultations with the Under-Secretaries of State responsible for this field in the various Member States, a beginning is to be made this year with

(1) For more details cf. *Strauss*, *Fragen der Rechtsangleichung im Rahmen der europäischen Gemeinschaften*, Frankfurt 1959; *Malintoppi*, "Il ravvicinamento delle legislazioni come problema di diritto internazionale", *Rivista di diritto internazionale* 1959, p. 239 (248-261); *von der Groeben*, "Die EWG und das nationale Wirtschaftsrecht", in *Sociaal-economische wetgeving, Europa-edition*, 1960, p. 1 (11 et seq.); *Tbiesing* in *von der Groeben, von Boeckh*, *Introductory remarks and observations to Articles 100-102*; also in great detail: *Everling* in *Wohlfarth, Everling, Glaesner, Sprung*, *Introductory remarks and observations on Articles 100-102*, and bibliography.

(2) For more detail see *Mesenberg*, "Zur Frage des Abbaues von Wettbewerbsverfälschungen und -verzerrungen in den EWG-Staaten", in *Betriebsberater* 1961, p. 141.

(3) For more detail see *Third General Report*, pp. 119 et seq.

(4) These questions and the problem of the approximation of legislation in this field are treated in greater detail in *von der Groeben*, *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 1959, p. 629; *Froschmaier*, *International Comparative Law Quarterly*, Supplementary Publication No. 1, (1961), p. 58; *Ladas*, *Gewerblicher Rechtsschutz und Urheberrecht* 1960, pp. 389, 485, 551; cf. also other sources referred to in these works.

the elaboration of three international conventions : a convention on European patent law, one on a European trade mark law and one a law on models and designs.

Progress has also been made towards *standardizing the system of awarding public contracts*. In this sector, which is of outstanding economic importance, the award of contracts is to be cleared of any discrimination against firms from other Member States.

Preparatory work for the approximation of legislation in the field of the quality, composition, packaging and labelling of *goods*, especially foodstuffs, is also well advanced. Varying provisions in this sector can lead not only to differing production costs and thus to a distortion of competition, but they can also prevent or impede expansion across the frontiers and cheaper mass production, thereby stunting the growth of competition on the various markets of the Community.

In *other* sectors of interest to competition policy preparatory work for the approximation of legislation will take much longer, as it has done in the field of tax legislation. This applies in particular to the approximation of *company law*.

It is not possible within the scope of this essay even to sketch the manifold repercussions of these provisions on the conditions and practice of competition in the Common Market. The institutions of the Community and of the Member States are faced with an enormous, long-term legislative task for the completion of which they will above all require the collaboration of scholars, for whom numerous and interesting fields of research are thus opened up.⁽¹⁾

Private restrictions on competition

Since 31 October 1960, when the Commission, acting in accordance with Article 87, submitted to the Council its *first draft regulation* (Bulletin 8/9/60, Section 16) for the application of the rules laid down in Articles 85 to 90 of the Treaty⁽²⁾, discussion on the content and form of the Common Market's cartel legislation has become more intense and more impassioned than ever and not only in the institutions of the Community which are working out the Draft⁽³⁾, but also the public circles con-

(1) Cf. *Zweigert*, "Die Rechtsvergleichung im Dienste der europäischen Rechtsvereinheitlichung", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1951, p. 387; *Strauss*, *supra* p. 17, note 1, *passim*; *Malintoppi*, *supra* p. 17, note 1; *Bärmann*, "Die Europäischen Gemeinschaften und die Rechtsangleichung", *Juristenzeitung* 1959, p. 553. For the approximation of national legislation against unfair competition, see below, pp. 28 et seq.

(2) Published in *Wirtschaft und Wettbewerb* 1960, pp. 856-867, with the EEC Commission's explanatory memorandum.

(3) The Economic and Social Committee of the EEC was the first institution to submit its views, which it did on 28 March 1961 (document CES 45/61 with Annex); cf. also the report of its Section for Economic Questions, dated 14 March 1961, rapporteur : representative *Malterre* (document CES 37/61); the draft is at present under discussion in the European Parliament's Internal Market Committee, rapporteur : representative *Deringer*. See *inter alia* his preliminary and second drafts for a Committee report of January and May 1961, documents APE 5041 and 5690.

cerned⁽¹⁾ and in writings on the subject.⁽²⁾ It is both understandable and useful that this should be so. For the subject at issue concerns not subordinate matters of detail, but the first further elaboration of the Treaty's rules on competition and consequently the future cartel policy of the Community. It appears opportune at this moment to set forth the basic ideas upon which the draft regulation and the Commission's cartel policy rest and to survey what has been done thus far to implement this policy. There is no need in this context to deal with a series of individual problems concerning the interpretation of Articles 85 to 90, on which the Commission⁽³⁾, its representatives⁽⁴⁾ and writers on the subject⁽⁵⁾ have already commented in detail.

(1) E.g. *Fack*, "Der erste Akt im europäischen Kartellrecht", *Frankfurter Allgemeine Zeitung* No. 264 of 10 Nov. 1960, p. 13; *Hellmann*, "Erster Schritt zur EWG-Wettbewerbspolitik", *Der Volkswirt* No. 46 of 12 November 1960, p. 2504; *Drouin*, *Le Monde* of 24 February 1961, pp. 1 and 14.

(2) *Von der Groeben*, "Die europäische Kartellverordnung — ein wichtiger Schritt zu einer europäischen Wettbewerbspolitik", in *Betriebsberater* 1961, p. 1; *Mengoni*, "Progetto di regolamento per l'applicazione degli artt. 85 e 86 del Trattato del MEC", in *Rivista delle società* 1960, pp. 1205-1206; *Samkalden*, "Aantekeningen bij de Ontwerp-Kartellverordening van de Europese Commissie", *Sociaal-economische wetgeving, Europa*, 1961, pp. 269 et seq. and 301 et seq.; *Weyer*, "Der Vorschlag der EWG-Kommission für eine erste Durchführungsverordnung zu den Artikeln 85 und 86 des EWG-Vertrages", in *Wettbewerb in Recht und Praxis* 1961, p. 61; *Spengler*, "Verspricht das EWG-Kartellrecht ein Faktor der Europäischen Integration zu werden? Der Betrieb 1961, p. 123; *Lassier*, "Droit d'établissement et règles de concurrence dans le Marché Commun", *Le droit européen* 1961, p. 12 (16 et seq.); *Plaisant*, "La C.E.E. et le projet de règlement relatif aux règles de commerce", *Revue du Marché Commun* 1961, p. 13.

(3) First General Report, pp. 59 et seq.; Second General Report pp. 19 et seq.; Third General Report, pp. 109 et seq.

(4) *Von der Groeben*, supra p. 12, note 1, pp. 63 (70 et seq.); *VerLoren van Themaat*, supra p. 6, note 1, pp. 15 et seq.; *VerLoren van Themaat*, "Europees mededingingsrecht in ontwikkeling", *Sociaal-economische wetgeving, Europa*, 1960, p. 108; *VerLoren van Themaat*, "Aktuelle Probleme der EWG-Wettbewerbspolitik", *Vortrag vor der Deutschen Gesellschaft für Betriebswirtschaft* on 4 March 1961 in Wiesbaden, pp. 7 et seq. (stencilled); *Schumacher*, "La politique de la C.E.E. en matière d'ententes", *Revue du Marché Commun* 1959, p. 207; *Schumacher*, *Sociaal-economische wetgeving* 1959, p. 395; *Schumacher*, "The Procedure for Giving Effect to Articles 85 and 86 of the European Economic Community Treaty", in *Cartel and Monopoly*, Vol. I, p. 363.

(5) See among *Belgian* writers *del Marmol*, *La protection contre les abus de puissance économique en droit belge*, pp. 452 et seq., Liège 1960; *Suetens*, "De mededingingsregeling voor ondernemingen in het Verdrag", *Rechtskundig weekblad* of 17 January 1960; *van Hecke*, "The Prohibition against Discrimination in the European Economic Community Treaty", in *Cartel and Monopoly*, Vol. I, p. 341.

See among *Dutch* writers *Bos, Baardman*, "De kartelbepalingen van het E.E.G.-Verdrag", *Zwolle* 1960; *Blaisse*, "De E.E.G. en het kartelbeleid", *Sociaal-economische wetgeving* 1958, p. 261; *Brijnen, Wertheimer*, "De interpretatie van de kartelbepalingen in het E.E.G.-Verdrag", *Sociaal-economische wetgeving* 1957, p. 253; *Van Gelderen*, *Nederlands tijdschrift voor internationaal recht* 1958, p. 366; *VerLoren van Themaat*, "De kartelpolitiek in de E.E.G.", *Sociaal-economische wetgeving* 1957, p. 224.

The *substantive cartel* law of the Community is packed into two general clauses, Articles 85 and 86. Article 85 (1 and 2) lays down a general prohibition which automatically renders all cartels null and void. Any agreements, decisions or concerted practices which restrict competition and are likely to impair trade between Member States are prohibited and are null and void. This is the rule; in individual cases and subject to certain conditions an exemption may be granted by means of an administrative act and in this way such privileged agreements and decisions can be given validity in private law.⁽¹⁾

Article 86 contains a general prohibition of the abuse of dominant positions within the Common Market or within a part of it by one or more enterprises, to the extent to which trade between Member States may be impaired thereby. Whereas, therefore, Article 85 prohibits in principle any restriction of competition by agreement, Article 86 does not affect the existence of enterprises which dominate the market but only forbids the abuse of the power thus given them.

Article 86, then, does not put a brake on any economically justified trend towards the optimal size of enterprises or towards industrial mass production in large units. The intention of this provision is rather to cut out interference with competition even where it does not come from agreements or concerted practices — Article 85 deals with these — but where it stems from a dominant position which may well have

See among *French* writers *Clément*, "The Problem of Delimiting Competence to Act between the Commission of the European Economic Community and the Individual National Cartel Authorities", in *Cartel and Monopoly*, Vol. I, p. 395; *Houssiaux*, *supra* p. 6, note 1, pp. 86 et seq., 158 et seq.; *Lagrange*, "Judicial Review of Decisions of Cartel Authorities", in *Cartel and Monopoly*, Vol. II, p. 909; *André Marchal*, "Les ententes et les concentrations dans le Marché Commun", *Revue du Marché Commun* 1959, p. 357; *Plaisant, Lassier*, *supra* p. 6, note 1, *passim*; *Reuter*, "Ententes et cartels", *Revue du Marché Commun* 1959, p. 46; *Rodière*, *supra* p. 6, note 1.

See among *German* writers *Deringer*, "Zwei Jahre europäische Kartellpolitik", *Europäische Wirtschaft* 1960, pp. 43 et seq. and 66 et seq.; *Everling* in *Wohlfarth, Everling, Glaesner, Sprung*, notes on Articles 85-90; *Günther*, *supra* p. 6, note 1; *Baumbach-Hefermehl*, notes pp. 1489-1509; *Koch*, *supra* p. 6, note 1, *Kronstein*, *supra* p. 6, note 1; *Schwartz*, "EWG-Vertrag und vertikale Bindungen", *Der Markenartikel* 1959, p. 317; *Seidl-Hohenveldern*, "Kartellbekämpfung im Gemeinsamen Markt und das Völkerrecht", *Aussenwirtschaftsdienst, Betriebsberater* 1960, p. 225; *Spengler* in *Müller-Henneberg, Schwartz*, notes in Annex to sec. 101 No. 3; *Spengler*, "Nationales und übernationales Kartellrecht im EWG-Vertrag", *Der Markenartikel* 1960, p. 881; *Steindorff*, *supra* p. 6, note 1.

See among *Italian* writers *Ascarelli*, *Teoria della concorrenza e dei beni immateriali*, pp. 160-171, Milan 1960; *Balladore Pallieri*, "Il mercato comune italiano e la legislazione italiana antimopolistica", *Diritto internazionale* 1959, pp. 407 et seq.; *Capotorti*, *supra* p. 10, note 2, pp. 20-25; *Catalano*, *La Comunità economica europea e l'Euratom*, p. 148, Milan 1957; *Franceschelli*, "The Restrictions on Competition That Can Be Exempt from the Prohibition of Article 85, paragraph 1, of the European Economic Community Treaty (Article 85, paragraph 3) and the Procedure for Obtaining Exemption", in *Cartel and Monopoly*, Vol. I, p. 297; further references by the same author, *supra* p. 6, note 1, p. 647, note 15.

(1) See also *VerLoren van Themaat*, "Erklärung vor der Fachlichen Gruppe für Wirtschaftsfragen des Wirtschafts- und Sozialausschusses der EWG am 4. Januar 1961", *Europe* No. 72 of 25 January 1961, p. 1 (2).

developed naturally in the course of competition. Another aim is to prevent enterprises from using mergers to evade the prohibition of cartels laid down in Article 85 and thus to dominate the market to the detriment of competition.

It cannot be denied that the provisions of Article 86 are not quite sufficient to deal with the problems of market domination in an economic system based on the principle of fair and undistorted competition. At bottom the difficulty is to be found in the monopolistic or, much more frequently, the oligopolistic situation in the markets themselves, that is to say in the fact that the individual enterprises can fix their own prices which therefore become part of their market strategy. This may lead to undesirable consequences, such as generally excessive prices, excessive production capacities and so to misinvestment, price rigidity, automatic price increases after wage increases and so on. The greater the significance of the economic branches affected, the more disturbing is the influence which these developments exert on the attainment of the aims of the Common Market.

For these reasons it is of particular importance that the competition policy of the Community should not encourage economically unjustified concentrations of enterprises and that it should limit the bounds within which existing oligopolies can apply their market strategy. The former aim would be served if for instance tax, company and patent law, were rendered more neutral in their effects on competition the latter perhaps by a resolute reduction of external customs tariffs applicable to the markets concerned. Measures of the second type would require exact knowledge of how competition functions in these markets.⁽¹⁾

Experience gained in the interpretation and implementation of Articles 85 and 86 has shown that effective application of these provisions will depend on the passing of a number of *regulations*. In Article 87 the Treaty itself requires that appropriate regulations shall be issued with a view to the application of the principles contained in the two general clauses, and it confers upon the Council of Ministers authority to legislate in this field.

The main *purpose* of this first regulation is to ensure that the law is uniformly applied in all Member States, to establish predictability of law for all concerned and, finally, to create the technical conditions under which the Commission can pursue an effective cartel policy. In what way does the draft regulation endeavour to meet this threefold purpose?

To begin with it repeats the *principle of prohibition* which is laid down in Article 85 (1). Article 1 of the draft lays down that agreements, decisions and concerted practices of the type referred to in Article 85 (1) are forbidden without need of any prior decision.

(1) See also *von der Groeben*, *supra* p. 12, note 1, pp. 67-69.

That is the legal situation until the Commission has by a decision declared, under the terms of Articles 85 (3), that the provisions of Article 85 (1) are inapplicable. The Commission can make such a decision only when called upon and the decision is effective only from the date it is enunciated [draft Article 1 (2)]. The Commission alone is competent to make such a decision [draft Article 2 (2)].

Therefore restrictions of competition within the meaning of Article 85 (1) can take effect only if they meet the requirements of Article 85 (3) and if the Commission has permitted them by issuing a statement of non-applicability.

This principle, according to which an explicit statement of non-applicability is required, is modified in two ways.

In the first place for those cartels and vertical restrictions on competition *already in existence* at the time the Regulation enters into force and for which an *application* for the issue of a statement of non-applicability has been submitted within a certain period, the prohibition contained in Article 85 (1) takes effect only from the date fixed by the Commission in a decision rejecting the application. This provision, which is intended as a *transition arrangement* for existing restrictions on competition, delays the effect of the prohibition expressed in Article 85 (1) until the Commission has reached a decision — provided the enterprises concerned submit an application within the time-limit fixed.

Secondly, those cartels and restrictions of competition which have come into being *after* the entry into force of the Regulation and in respect of which an *application* for a statement of non-applicability has been filed, are temporarily not regarded as prohibited unless within six months after receipt of the application the Commission objects in writing (draft Article 4). Such restrictions on competition therefore automatically become temporarily admissible six months after the application has been filed provided that the Commission has not raised an objection during this period ; the application remains subject to rejection at a later date.

So much for the exceptions. The rule, that is to say the direct and immediately effective prohibition contained in Article 85 (1), applies therefore to all restrictions of competition which impair trade between Member States and in respect of which no application for permission has been filed.

In the case of certain especially important categories of existing cartels, the draft regulation also provides for *obligatory notification* (draft Article 5). This is intended to ensure that the Commission shall obtain as speedily as possible a full picture of these cartels, which may be particularly harmful to the Common Market. Other types of cartels and vertical restrictions on competition are, however, not subject to notification.

This brings me to the *enforcement* of the rules of competition. Where the Commission finds that the provisions of Articles 85 or 86 have been infringed, it can send the enterprises concerned a recommendation to put a stop to the infringement

[draft Articles 8(2)]; if necessary the Commission can adopt a decision compelling such enterprise to cease the infringement [draft Article 8(1)].

In addition, the draft regulation empowers the Commission to obtain *information* (draft Article 9) and to institute *inquiries* (draft Article 11). The Commission is empowered to impose *finés* from 100 up to 5 000 units of account (dollars) for an infringement of the obligation to notify laid down in Article 5 of the draft, and for incorrect applications for a statement of non-applicability or for an infringement of the rules laid down in its Articles 9 and 11 imposing an obligation to furnish information, to submit records and to tolerate inquiries (draft Article 12). The Commission can also, in order to enforce notification in conformity with Article 5 of the draft, the furnishing of information (Article 9) or the toleration of inquiries (Article 11), and the observance of its decisions in conformity with Article 8(1) of the draft, impose *penalties* from 50 to 1 000 units of account for each day of delay (draft Article 13).

In addition, this draft contains a series of provisions most of which are of a *procedural* nature; they govern in particular co-operation between the Commission and the competent authorities in the Member States, which is of such importance. The authorities of the Member States take part in the examination of applications for a statement of non-applicability [draft Article 2(1)] and must be consulted before the Commission takes a decision or makes a recommendation in conformity with Article 8 of the draft. Under Article 4 (2b) of the draft the competent authority in a Member State can, by means of a reasoned submission, also require an application for the issue of a statement of non-applicability to be turned down [draft Article 4 (2)]. So long as no application for permission is filed, the authorities of the Member States are responsible for applying Article 85(1). It will be seen, therefore, that only the absolutely necessary powers are vested centrally in the Commission.

Article 17 of the draft deals with the question of *publication*: the Commission can publish decisions in which it finds that Article 85(1) or Article 86 has been violated or in which it declares the provisions of Article 85(1) to be inapplicable.

So much for the essential contents of the draft regulation. A few words remain to be said about the *concept underlying the rules on competition* as well as the draft, in short on the economic system, the progressive development of which it is the purpose of the European cartel law to serve. For, as with any other piece of legislation, the rules on competition laid down in the Treaty and in the draft regulation can be properly understood, interpreted and applied only if there is clarity concerning the purposes they serve. These can be no more than partially understood by the reader who limits himself to a study of the several provisions taken in isolation. Here as elsewhere the aims of the Treaty must be borne in mind when the provisions are interpreted.

It has been shown in the first part of this essay that, and why, the Treaty has entrusted to competition the function of guiding, co-ordinating and stimulating economic

activities in the Common Market.⁽¹⁾ To make and to keep competition workable the fundamental provision of Article 3 lays down that internal customs duties and quotas shall be abolished, freedom of economic activity in various fields put into effect and a system established which will protect competition in the Community against distortion. This is the purpose served by the set of rules discussed above, which prescribe the creation of the external conditions requisite for competition. Lastly the groups of rules contained in Articles 85 to 90 and in Article 91 also serve this purpose. They regulate the external circumstances governing international competition by laying down the limits of the competitors' freedom of economic action in the field of contracts (by the basic prohibition of contracts which restrict competition) and in the field of competition (by the prohibition of certain measures which have the practical effect of limiting it, and of dumping).

To sum up, it can be said that the rules governing competition — consonant with the constitutional principles of the Member States — reflect the economic order established by the Treaty, an order which is both liberal and social in character.

This order is liberal in that the rules on competition secure and promote the *individuals freedom of economic activity*. Such freedom of activity means that the individual has access to the market, is free to compete with other suppliers and can choose in his dealings between several suppliers or consumers.⁽²⁾

The economic order of the Common Market deserves to be called social because the rules governing competition protect *fair competition as a permanent element in the market economy*, indeed as the mainspring of the economically most fertile system, and thereby make an outstanding contribution to the general prosperity and to the Community as a whole. In addition the Treaty provides for a series of supplementary social measures, such as the improvement and adaptation of the social systems in the Member States (Articles 117 to 122), the establishment of an European Social Fund to improve opportunities of employment for workers in the Common Market (Articles 123 to 128), as well as several opportunities for regional policy intended to make possible a speedier raising of the standard of living in those regions which are economically backward (cf. Article 92 (2a, c and 3a c) or *dub-para a* of Article 130).

Clearly, the aims implicit in the rules governing competition cannot be attained overnight — nor equally in relation to all types of international restrictions on competition — because the starting positions in matters of economic, legal and

(1) Cf. above pp. 5-6 et seq. with indications in notes 1 respectively.

(2) Cf. also *von der Groeben*, loc. cit. supra p. 12, note 1, p. 64; *Hallstein*, Address to the International Conference on Restraints of Competition, in *Cartel and Monopoly*, Vol. II, p. 1009 (1010); *Deringer*, supra p. 18, note 3, p. 8; *Rueff*, supra p. 6, note 1, pp. 8 to 9; *Koch*, supra, p. 6, note 1, p. 241; *Baumbach-Hefermehl*, Introductory remark 4 and note 25, pp. 1490 and 1502; *Kronstein*, supra p. 6, note 1, p. 137; *Rodière*, supra p. 6, note 1, p. 273; *Thiesing* in *von der Groeben, von Boeckh*, Introductory remark 9 to Articles 85 et seq.; *Weyer*, supra p. 19, note 2, p. 61; *Hug*, supra p. 6, note 1, pp. 190 and 191; *Hug*, in *Cartel and Monopoly*, Vol. II, p. 639 (653).

cartel policy differ greatly in the six Member States. It is of course true that, unlike a customs tariff or a quota restriction, a private restriction on competition cannot be gradually, quantitatively reduced over a certain period. Since the several State and private restrictions of competition cannot be gradually reduced *pari passu* with one another in respect of time and content, and therefore no gradual adaptation to progressively increasing competition is possible, the Commission is here face to face with a major dilemma of its cartel policy during the transition period. If, nevertheless, such action as is possible is to be taken to meet this need for a competition policy attuned to both spheres, the existing restrictions on competition will have to be classed according to the extent of their effect on international trade within the Community, and the resulting groups will have to be accorded correspondingly longer or shorter adaptation periods. Priority will have to be given to the abolition of those types of cartels whose effects resemble those of customs duties and quotas, that is to say those which prevent or impede the establishment of common markets. They include in particular international price, quota and cartels dividing the Common Market as well as export and import cartels regulating trade between Member States. ⁽¹⁾

A few words remain to be said on the Commission's activity with regard to *concrete cases* coming under cartel legislation. We must note in the first place that inquiries under Article 89 into concrete cases giving reason to suppose that Article 85 or Article 86 is being infringed have increased in number. The Commission has held meetings with the appropriate officials of the cartel authorities in the Member States to discuss individual cases and, by facilitating co-operation with these authorities who share with the Commission the task of dealing with these matters, to speed up the process of inquiry.

Official inquiries have so far been held by the Commission in 26 cases, distributed over all branches of trade and industry. In 11 cases inquiries were started at the request of governmental authorities, in 8 cases as a result of complaints lodged by enterprises or associations and in 7 cases the step was taken *ex officio*.

In two cases the enterprises concerned have completely ceased the practices complained of and in one case there has been a partial cessation. In a further case the proceedings have been dropped. Four proceedings were consultative and nineteen are still pending.

In addition, the Commission is inquiring into a number of further cases where it is not yet certain whether there is adequate reason to suspect an infringement of Article 85 or Article 86.

Two of the successfully concluded proceedings concerned a delivery stop imposed by a manufacturer in one Member State against a dealer in another under pressure from the dealers' association of that second Member State. The action taken by the Commission and the national authorities concerned has led to the cancellation of the delivery stop.

(1) Cf. also *VerLoren van Themaat*, *supra* p. 19, note 4, p. 7.

In another case the Commission's intervention has had the provisional result of a horizontal and vertical cartel in one country no longer denying access to its domestic market to manufacturers from other Member States.

The proceedings which were dropped concerned the refusal on the part of a publisher of a trade journal to publish advertisements of manufacturers from another Member State. The inquiry has shown that neither the conditions referred to in Article 85 nor discrimination on grounds of nationality (Article 7) were present in this particular case.

The consultation proceedings had become necessary because a national cartel authority had to find on the compatibility with Article 85 of two licence contracts, a cartel contract and a re-export prohibition. In the case of the re-export prohibition, action by the national authority (the Bundeskartellamt in Berlin) was the result of a civil dispute brought before the Oberlandesgericht in Frankfurt. This court had, in conformity with section 90 (1) of the Federal German law against restrictions on competition, notified the Bundeskartellamt of the dispute. In accordance with section 90 (2) of the Federal German law against restrictions on competition, the Bundeskartellamt, having consulted experts, informed the Commission that in this case the re-export prohibition constituted an infringement of Article 85 (1).⁽¹⁾

In addition to the above, there has been co-operation with cartel experts from the various countries over an inquiry carried out with the purpose of discovering *dominant positions in the market*. This inquiry covered four important sectors of the economy.

Moreover, in connection with the preparation of reference material on the competition situation to be used primarily in an effort to uncover infringements of Article 85, a beginning has been made with an inquiry into price movements and intra Community trade in several products.

Dumping and unfair competition

Article 91 (1) of the Treaty empowers the Commission to issue recommendations to the originator of any dumping practices which it finds to exist within the Common Market.⁽²⁾ In October 1960 a second conference of dumping experts employed by the Governments of the Member States and the Commission met in

(1) This problem is treated in greater detail by *Schwartz*, supra p. 19, note 5, pp. 322 and 326; *Lutz, Basson*, *Der Markenartikel* 1961, p. 103.

(2) There is a considerable shortage of contemporary research into matters of dumping. On the rules contained in the Treaty see *Everling*, *Der Betrieb* 1960, p. 999 with further bibliography in note 3; *Everling*, *Der Betrieb* 1960, p. 1147; a description of the various dumping laws is contained in *GATT, Anti-Dumping and Countervailing Duties*, Geneva, 1958; *Eckert*, *Das Dumping in der nationalen Gesetzgebung und in internationalen Verträgen*, thesis, Tübingen 1960, with further bibliography pp. 9 et seq.

Brussels and went fully into the scope of this provision. The experts were agreed that Article 91 (1) can be applied only if a product is exported at less than its "normal value" and if material injury is thereby caused to the corresponding industrial sector in a Member State (cf. Article VI of GATT).

It follows from this that dumping can be stopped in various ways : by remedying the injury caused by eliminating the export price difference or by the complete stoppage of any exports into the injured country.

A recommendation simply to stop exports to the injured country is out of the question for two reasons : it would be in conflict both with the Treaty's aim to encourage trade among the Member States and with Article VI of GATT.

Likewise, a recommendation to an exporter to remove the difference between his domestic price and his export price would at best be compatible in exceptional cases with the Treaty aims and the purpose of Article 91 (1). The Treaty does not prohibit double prices, that is to say it does not prevent exporters from adopting the prices of competitors in an export market even though in so doing they may undercut their own domestic prices. In such a case exporters merely take their price from the market, that is to say they adapt themselves to the market situation and in exercising their freedom of competition, which is guaranteed by the Treaty, they are following normal competitive practice. Even the Treaty establishing the European Coal and Steel Community, which in contrast to the EEC Treaty forbids price discrimination [Articles 4 (b) and 60 (1)], lays down explicitly in Article 60 (2b) that enterprises shall always be entitled to align their quotations on the lower prices charged by competitors.⁽¹⁾ Moreover, in a competitive economy based on social principles the fixing of a low consumer price cannot be condemned in itself, at least so long as dumping by the exporter does not cause any substantial injury to foreign competitors. This it will not do in general if exporters quote a price on the export market which is lower than the price they demand on the domestic market but above or equal to the price quoted by competitors on the export market.

Therefore the main question to be considered by an enterprise affected by a charge of dumping, or in applying Article 91 (1) (like Article VI of GATT) in a way which will not unduly impede international competition and trade, will be whether foreign competitors have suffered substantial injury through an abnormally low export price. If so, a recommendation could be made to the exporter merely to ensure that his products are no longer supplied to consumers abroad at a price lower than that obtaining in the importing country, if the price in that country is below that at which the exporter sells his products on his domestic market. Naturally the import duties charged by the importing country and any other differences influencing the comparability of these prices must be taken into consideration.

(1) Cf. *Mestmäcker*, "The Prohibition against Discrimination in the European Coal and Steel Community Treaty" in *Cartel and Monopoly*, Volume 1, p. 323 (326, 330 et seq.) ; with special reference to dumping see *Eckert*, *supra* p. 26, note 2, pp. 118-119.

So far the Commission has brought 11 cases under Article 91 (1). Six of these concern the chemical industry, three the foodstuffs industry and two the medical instruments industry. Six applications have been made by trade associations, two by injured enterprises and three by official authorities of the Member States. In these complaints a total of 26 enterprises have been cited as originators of dumping practices.

The proceedings have led to the following results : in four cases no action was taken because either the complaint was unfounded from the outset or it lost its justification during the proceedings as a result of a change in the factual situation. In two cases the plaintiffs withdrew their complaint finally and in two others provisionally. In two cases the complaint has given rise to the despatch of a recommendation to one of the enterprises against whom the complaint had been brought, whereas the complaint against the other enterprises was rejected, having lost its justification during the proceedings as a result of a change in the factual situation. In one case the complaints are still under consideration.

In the light of present experience the proceedings in connection with dumping have been successful. In most cases the practices complained of were stopped after a simple oral discussion between the Commission and the parties concerned. This is the reason why so far recommendations have been addressed to only two enterprises.

To sum up, it may be said that the Commission does not pursue its anti-dumping policy in isolation but regards it, in the same way as its cartel policy, as an integral part of the Community's policy on competition and endeavours to implement it in this light. If fair and honest competition is to be kept alive not only must restraints on competition be countered but also excesses in competition must be prevented. Real dumping constitutes such an excess, it is a type of unfair, dishonest competition which up to now has received very little attention from lawyers and other experts. To counteract it is therefore one of the Commission's important tasks from now until the end of the transition period. In this the Commission is favoured by the fact that dumping within the Common Market will of necessity become gradually more difficult as barriers to trade are abolished and the characteristics of a domestic market develop within the Community.

Whereas therefore the practical importance of unfair competition through dumping practices is gradually diminishing in the Community, the question of what *other competitive practices* in the nascent European markets of the Community must be regarded as *unfair* is constantly gaining in practical significance.

Many enterprises are already faced with the need to extend their *advertising* to the territories of the other Member States of the EEC. This gives rise to the problem of how to evolve the most effective international publicity without coming into conflict with the law on unfair competition, some aspects of which vary greatly from one Member State to another. This applies in particular to misleading, comparative and high pressure advertising.

Corresponding problems arise in connection with what is known as competition by obstruction (*Behinderungswettbewerb*). It seems that a ruling is needed on what constitutes unfair competition by obstruction or cut-throat methods in international trade.

The Treaty does not provide any direct answer to those and other questions connected with legislation against unfair competition. It merely contains provisions on the *freedom* of competition in the supply of goods and services across frontiers, but says nothing about the *fairness* of competition except for the anti-dumping provisions of Article 91, which settle only one side of the problem. By therefore merely protecting international competition against restrictive but not against unfair practices, the Treaty regulates only *one* aspect of the struggle between those who are competing, but they must conform with the rules against unfair competition applicable in each individual state.

However, the absence of a European law against unfair competition does not mean that the differences between the national legislations on this subject must continue to exist for ever. The Treaty opens up another path which will in the course of time make it possible to judge fairness and honesty in international competition by standards of law which are as uniform as possible and so to provide protection for such methods: this, under the terms of the Treaty, can be done by approximation of municipal legislation against unfair competition, whether such legislation is based on statute law or jurisprudence or both. Under Article 100 the Council, acting on a proposal of the Commission, issues directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market (see also Article 101).⁽¹⁾

In the field of legislation against unfair competition, as in others, the Commission has taken preliminary steps to execute this long-term task, seeking in this way to do everything that can be done from this angle to maintain the efficiency of the international competition which is emerging. In several Member States the possibilities of establishing uniformity in municipal legislation against unfair competition are being considered.⁽²⁾

Here again the co-operation of scholars is indispensable. For it is a prerequisite of progress towards the unification of law that the existing legislation, jurisprudence and writings in the Member States dealing with the various aspects of unfair competition should be systematically collected and compared. So far there

(1) Of course the six Member States can also, as they are proposing to do for the law on patents, trade-marks and designs and models — see above page 17 — conclude a State Treaty in which they lay down the rules which are to govern the appraisal of problems of competition.

(2) Cf. the German Federal Minister of Justice *Schäffer*, "Unlautere Werbung im Gemeinsamen Markt", *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 1960, p. 285; *von Gamm*, "Angleichung des Wettbewerbsrechts in der EWG", *Neue Juristische Wochenschrift* 1960, p. 2127.

are no studies in comparative law covering the whole of this field.⁽¹⁾ Doubtless this difficult task will take some time. In return, a carefully prepared approximation of legislation in this field will one day lead to enterprises in all Member States being subject to approximately equal rules on fair competition in domestic and international trade. This would constitute a further important step towards the practical implementation of the European system of competition which is one of the objectives of the Treaty.

⁽¹⁾ For a short review of this problem, including the law at present applicable in the Member States, see *Saint-Gal*, "Unlauterer und parasitärer Wettbewerb", *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 1956, p. 202.

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