

ANTITRUST IN THE COMMON MARKET: INNOVATION AND SURPRISE

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I

HISTORY AND THEORY OF COMMON MARKET ANTITRUST

In 1957, an improbable and in fact revolutionary event took place in Western Europe. Six sovereign countries, by treaty, transferred control over large sectors of their industrial economy to a supranational institution, the European Economic Community. Among the most surprising provisions of the Rome Treaty establishing this Common Market were Articles 85 and 86,¹ which are directed, roughly speaking, at the same restrictive business practices as are covered by section 1 of the Sherman Act of 1890, section 3 of the Clayton Act of 1914, and the Robinson-Patman Act of 1936.²

Article 85(1) and (2) of the Rome Treaty brand as illegal all agreements, decisions, and concerted practices of enterprises which are apt to affect commerce among the six member states of the Common Market and have as their object or effect the prevention, restriction, or adulteration of competition within the Market. Among the practices specifically enumerated in the Article are horizontal or vertical price-fixing; the limitation or control of production, distribution, technical development, and investment; the dividing of markets or sources of supply; tie-in sales; full-line forcing; and discriminatory prices or other sales conditions.

This is all encompassing and sophisticated language. Restrictive practices are to be adjudged mainly on the basis of their actual and potential effect on competition; the intent of the parties is of only secondary significance. The prohibition applies to "all concerted practices" of enterprises and "decisions" of associations, which necessarily cover tacit agreements or gentlemen's understandings and may cover more. It is also conceded by the commentators that these prohibitions may apply to business activities that are primarily confined to a single country provided they have an effect on trade among member states.

Provision is made in Article 85(3) for granting exemptions for business restrictions "which contribute to the improvement of the production or distribution of commodities or to the promotion of technological or economic progress." However, this broad exemption is qualified by three safeguards: that the restrictive arrangement result in some benefit to consumers, that it not be more restrictive than is necessary

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¹ Treaty establishing the European Economic Community, March 25, 1957, 1 CCH COMM. MKT. REP. ¶ 1-5449, 298 U.N.T.S. 14-94 [hereinafter cited as Rome Treaty, art. —].

² 15 U.S.C. §§ 1, 13, 14 (1970).

to achieve the permitted rationalization purposes, and that it not eliminate competition in respect of a substantial portion of the commodities involved.

As was set forth in Regulation 17 of the Council of the European Economic Community, effective March 13, 1962, the prohibitions of Articles 85(1) and 86 of the Treaty are immediately effective; they require no prior decision by either the judicial or the administrative arm of the Common Market to make them operative.³ Thus, a defendant in a patent or trademark infringement, unfair competition, or contract suit in a French or Dutch court may plead as a defense that the plaintiff has violated Articles 85 and 86. When it does so, the national court must either pass on that defense or refer it for resolution to the European Court in Luxembourg.

National antitrust authorities are permitted to apply Articles 85(1) and (2) and 86, but only until such time as the Commission, the administrative arm of the Common Market, has taken action. The Commission has sole authority to grant the exemption provided for under Article 85(3) of the Rome Treaty or to issue a negative clearance to the effect that a given practice is not prohibited by Articles 85(1) and (2) thereof.⁴

There was nothing in the prior legal or constitutional history of the six original members of the Common Market that would prepare one for such a bold step forward in the area of antitrust enforcement and the regulation of international trade.⁵ As of 1957, Italy had no antitrust law at all—and it still has none. Luxembourg did not adopt a law against competitive restraints until September, 1970, and no case has as yet arisen under this statute. When the Belgian Government concerned itself with antitrust, it was largely to help cartel-minded producers promote mandatory industry-wide cartels binding on dissenters; it was not until 1960 that Belgium passed a rather pallid and since unenforced statute against abuse of monopoly power. The Netherlands, a leading democratic specimen of the co-operative state, had in 1956 passed an Economic Competition Act that required the registration of cartels and authorized their scrutiny to see whether they were in the public interest. This law retained authority in the Netherlands government to require dissenting producers to join a cartel and forbade compliance with the antitrust laws of any foreign state—meaning the United States.⁶ France, which had an 18th Century

³ 1 CCH COMM. MKT. REP. ¶12401 (1962).

⁴ The commentaries on Common Market antitrust law most available to American readers are A. DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY* (1968); C. OBERDORFER, A. GLEISS & M. HIRSCH, *COMMON MARKET CARTEL LAW* (2d ed. 1971).

⁵ This history is comprehensively set forth in four volumes sponsored by SPECIAL COMMITTEE ON THE EUROPEAN COMMON MARKET, ASS'N OF THE BAR OF NEW YORK, *BUSINESS REGULATION IN THE COMMON MARKET NATIONS* (H. Blake & J. Rahl eds. 1969-1970). Shorter summaries of the German, French, Dutch, British, and Common Market antitrust laws (with bibliography) are to be found in *Timberg, United States and Foreign Antitrust Laws*, in *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* 619-716 (W. Surrey & C. Shaw eds. 1963) (Joint Comm. on Continuing Legal Education of the ALI and ABA).

⁶ *N. V. Philips*, a leading Dutch combine, had been a defendant in *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949), and the Netherlands Government had protested this on international law grounds.

Revolutionary and a Code Napoleon tradition of laws against monopolies and the cornering of markets, as of 1957 was still relying for such antitrust policy as it had on a provision of a World War II price control decree; there was a reasonably effective government policy against resale price maintenance, but on the surface very little more. And Germany, where the Occupying Powers during World War II had brought about some measure of deconcentration and decartelization, had finally passed in 1957, after a long struggle, a law prohibiting trade restraints generally, but leaving open a wide area of outright class exemptions and individually administered immunities.

Thus, at the inauguration of the Common Market the legal attitude toward cartels among the six Common Market countries, with the exception of Germany, was one either of indifference or of lukewarmness. Also raising obstacles to the adoption of a common antitrust policy was the institutional and cultural heterogeneity of the Common Market—six countries, five languages, different industrial and marketing styles, different ways of viewing the “free market” economy. The post-World War II European business community was on the whole as cartel-minded as the pre-World War II one. Although there were a few supranational firms, industry on the whole was in favor of retaining the conventional system of nationally exclusive markets. The labor movement in general tended to follow the lead of the industrialists in industry matters, with the more Marxist leaders opting for broader degrees of national and worker control of industries than their more conservative colleagues but neither group sponsoring pro-competitive policies.

Given the forces making for business restrictionism and national autarchy, what were the positive forces that created this competitive breakthrough? This question is important for more than historical reasons. It is only by measuring the relative strength of the conflicting nationalist and “European” influences at work within the Common Market that one can form any judgment concerning the direction and the tempo of antitrust enforcement within that Market. The late General de Gaulle was only the leading example of the nationally-minded business and government leaders and nationalist tendencies with which the Commission of the Common Market and its dedicated “European” staff in Brussels have had to struggle in order to achieve the anti-restrictionist aspirations of the Rome Treaty.

First, among pro-antitrust influences, the Common Market, which contemplates a free transfer of goods, services, capital, and labor across national boundaries, would be logically and economically incomplete without a complementing antitrust policy. It would do no good to abolish governmental barriers to trade, such as tariffs and quotas, if private firms could thereafter erect private trade and cartel barriers having a similar effect. For this reason, the Common Market is governed by a concept of avoiding “distortions of competition” that includes, but is much broader in scope than, the American concept of eliminating “restraints of trade.” The “distortions of competition” which the Common Market is dedicated to eliminating include not only cartels, but such diverse practices as tariffs, quotas, unequal turnover taxes, govern-

ment subsidies to exporters, discriminatory freight rates, and differing national patent and trademark laws.

Antitrust was also supported by political considerations. Antitrust (or the "free market economy," as it is called) was the democratic counterpoise to the closed, monolithic state capitalistic system sponsored by the Communists, who, in 1957, had strong voter following both in France and Germany.⁷ This is the main reason that German Chancellor Erhardt took a strong position in favor of antitrust. The "free market economy" was a political rallying cry for the middle class that would otherwise be eliminated from the scene, and for the irritated German housewife who found that trade guilds which would not permit new blood to enter the trade were costing her dearly on many of the commodities and services of which she stood in need.

There were also the businessmen, civil servants, and economists, few in number but quite influential, who followed the inspired lead of Jean Monnet. They recognized that economic union was a prelude to the political union that they felt was needed if Europe was to become a viable third force in the world community, able to stand up to the two superpowers, the U.S. and the U.S.S.R. This group also recognized the wastefulness of the cartel system which erected a price umbrella over high-cost and inefficient producers. This realization had led to the adoption, five years earlier, of the Paris Treaty establishing a European Coal and Steel Community.⁸

The European Common Market is an unmistakably European phenomenon, but it drew support and stimulation from U.S. sources. Articles 85 and 86 of the Rome Treaty were derived in part from the work of a U.S.-sponsored United Nations Committee on Restrictive Business Practices, which prepared a convention for the control of restrictive business practices in international trade, as well as detailed research reports setting forth national antitrust laws and analyzing antitrust issues and cases.⁹ The U.S. State Department, recognizing the need for greater economic and political unity in Western Europe, lent strong support to the idea of a Common Market functioning along competitive lines. Also, American businessmen interested in foreign trade and investment deplored the Balkanization and small size of European national markets; they felt that their own interests and the prosperity of Europe would best be served by the establishment of a Common Market. It is significant that Servan-Schreiber, in his appropriately named book *The American Challenge*, congratulated

⁷ In countries such as Sweden and Yugoslavia even the Socialists favored a competitive free market economy; this was a major source of friction between Yugoslavia and the more orthodox Soviet bloc.

⁸ For English translation, see Press and Information Division of the French Embassy, Treaty Constituting the European Coal and Steel Community, June 6, 1951. See also Bebr, *The European Coal and Steel Community*, 63 YALE L.J. 1 (1953); Timberg, *supra* note 5, at 661-65.

⁹ See Report of Ad Hoc Committee on Restrictive Business Practices; Analysis of Governmental Measures Relating to Restrictive Business Practices; and Texts of National Legislative and Other Governmental Measures Relating to Restrictive Business Practices, 16 ECOSOC, Supps. 11, 11A, 11B, U.N. Docs. E/2380, E/2379 & Add. 1, E/2379/Add. 2 (1953). See also 2 G. BERNINI, LA TUTELA DELLA LIBERA CONCORRENZA E I MONOPOLI 12-42 (1963); Timberg, *Restrictive Practices as an Appropriate Subject for U.N. Action*, 1 ANTITRUST BULL. 409 (1955).

American business on having taken proper advantage of the wider consumer base afforded by the Common Market and chided the national firms domiciled within Europe for not bestirring themselves and doing likewise.¹⁰

II

SUBSTANTIVE ANTITRUST LAW

Of course, in both substance and procedure, the Common Market antitrust law is a European, not an American, phenomenon. The conceptual scope of "distortions of competition," which the Common Market is trying to eliminate, is broader than the class of trade restraints that U.S. antitrust law is intended to check. However, the enforcement bite of the American antitrust law is much deeper than that of Common Market antitrust policy.

Two basic substantive differences characterize the U.S. and the Common Market antitrust laws. First, U.S. antitrust recognizes no distinction between "good" and "bad" cartels; cartels are universally bad and per se illegal. As was eloquently pointed out by Judge Learned Hand in the *Alcoa* case, U.S. antitrust law is dedicated to the political goal of avoiding monopoly power and to the social goal of a system of small business enterprises, regardless of the economic costs involved.¹¹ Common Market antitrust policy is not based on any such socio-political premises. Cartels are to be condemned primarily because they are economically wasteful and will be tolerated if they can show efficiencies in production and distribution. That is the rationale of the Article 85(3) exemption.

The other major distinction between Common Market—and also British—and U.S. antitrust approaches is the comparative attitude toward monopoly. The Western Europeans, like the British, see nothing inherently illegal in a monopoly or dominant position in a market; illegal monopolization as defined in section 2 of the Sherman Act has no counterpart in the Common Market. Thus, Article 86 of the Rome Treaty recognizes that enterprises with dominant positions may abuse their position by charging unreasonable prices or refusing to deal with customers. However, when the Commission of the Common Market decided to attack Continental Can's acquisition of a Dutch packaging company within the Common Market as an abuse of dominant position, it took most of the European antitrust commentators by surprise.¹²

Prior to the proceeding against Continental Can, a vast number of acquisitions and joint ventures had taken place in the Common Market, most of which involved U.S. firms as the acquiring firm or the moving partner.¹³ A few of these, par-

¹⁰ Servan-Schreiber's work was published in 1968 by Athenaeum Press.

¹¹ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

¹² 2 CCH COMM. MKT. REP. ¶9481 (1971).

¹³ During the period 1958 to 1965, U.S. firms made 530 acquisitions and formed 582 joint ventures in the Common Market. See statement of Chairman Dixon of the FTC in *Hearings Pursuant to S. Res. 191 Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, 89th Cong., 2d Sess. 511-15 (1966). See also Press Releases, U.S. Investments in E.E.C., 2 CCH COMM. MKT. REP. ¶¶9387 (1970), 9477 (1971).

ticularly in the computer and electronics industries, had aroused popular protest but led to no action by the Commission. On the national level, Germany's antitrust law required the reporting of mergers or acquisitions that resulted in the combined firm having more than twenty per cent occupation of the market, but this reporting provision was not effective because the German Cartel Court was unable to make the statistical determination when a merger encompassed the necessary percentage of the industry. Amendments are currently under consideration to strengthen the German law against mergers. Likewise, the European Coal and Steel Community had provisions requiring notification, and official approval, of mergers and acquisitions in the coal and steel industries, but practically all proposed mergers and acquisitions within those industries were consummated without objection from the Community. Not only were mergers justified by Common Market businessmen and officials as a method of bringing about community-wide competition, but even the Marxist-inclined labor movement favored mergers on the ground that monopolized industries would be easier, in the long run, to nationalize.

One of the EEC Commissioners has recently stated that the Commission systematically investigates mergers in twenty industries with oligopolistic structures and some forty industries characterized by increased merger activity.¹⁴ Despite this and the *Continental Can* proceeding, the current attitudes of the Commission on the monopoly problem is reflected in a recent Commission memorandum on industrial policy, the main thrust of which was the need to develop more and bigger transnational European enterprises which will combine capital and manpower on an efficient scale so as "to compete effectively in Europe and in the world markets with the giants from across the Atlantic."¹⁵ In order to develop such new multinational corporations, mergers may be both subsidized and arranged by the Community. This new merger movement, if it comes into effect, will concentrate specially on industries which are of vital importance for economic, technological, or political reasons.

It will be difficult indeed to reconcile this new industrial policy with the older Common Market competition policy. But it should be borne in mind that U.S. antimerger policy has not prevented U.S. firms from getting bigger and bigger, although it has also led them to invest in a massive wave of acquisitions within the Common Market. Also, it is difficult to maintain an effective competition policy in Europe without an international competition policy involving Europe, the United States, and Japan.

III

ANTITRUST ENFORCEMENT

In respect of administrative procedures, the Common Market deviates widely

¹⁴ See Rahl, *Common Market and European Antitrust Systems: An Overview*, 40 ANTITRUST L.J. 765, 773-74 (1971).

¹⁵ 2 CCH COMM. MKT. REP. ¶ 9354 (1970); Mestmäcker, *The Multinational Corporation*, 40 ANTITRUST L.J. 986, 987-88 (1971).

from the American approach; it has adopted enforcement procedures more consistent with the national legal systems of its member countries. Thus the Common Market relies heavily on registration procedures.¹⁶ Parties that desire to invoke Article 85(3) as a justification for business restrictions that would otherwise be prohibited by Article 85(1) are generally required to register their agreements with the Commission, if they wish to avoid the risk of retroactive liability for their past activities. When the Temporary National Economic Commission of the United States in 1939 recommended that patent license agreements be filed with the Federal Trade Commission,¹⁷ its recommendation fell on deaf ears because it was felt that such filing would carry with it an immunity for the filed agreements and was inconsistent with our selective method of antitrust enforcement. Evidently the Common Market antitrust authorities regarded the thousands of agreements that were filed with them as an educational opportunity and considered the massive job of reviewing these agreements as a worthwhile endeavor in formulating over-all antitrust policy.

The Commission of the Common Market is more amenable than are U.S. antitrust authorities to giving advisory opinions. As already mentioned, individual parties can request the Commission for so-called "negative clearances," or rulings that their restrictive agreements are not covered by Article 85(1). Also, on December 23, 1962, the Commission of the Common Market issued two important general declarations. One of these indicated that certain kinds of exclusive agency agreements would not be considered as falling within the prohibitions of Article 85(1).¹⁸ The other stated that certain restrictions and obligations could be included in patent license agreements as within the scope of the patent monopoly without violating Article 85(1).¹⁹

The Common Market's lack of a doctrinaire per se violation approach, plus its pragmatic administrative philosophy, has enabled it to eliminate consideration of a host of frequently inconsequential business restrictions that would raise problems under American antitrust law. Thus, in July, 1968, the Commission announced that it would not regard as a violation of Article 85(1) co-operation between small and medium sized enterprises involving such activities as market research, accounting practices, credit guarantees, debt collection procedures, research and development projects, joint use of production, transportation and storage facilities, joint advertising, use of common quality labels, and joint selling and repair service arrangements.²⁰ In June, 1970, the Community issued its so-called Bagatelle Notice to the effect that Article 85(1) of the Treaty would not be applied to agreements, decisions,

¹⁶ In addition, the Common Market can obtain help from the antitrust enforcement authorities of the member states and may investigate company records. It also has the power, which it has exercised, to fine companies refusing to submit their records.

¹⁷ TEMPORARY NATIONAL ECONOMIC COMM'N, FINAL REPORT AND RECOMMENDATION, S. DOC. NO. 35, 77th Cong., 1st Sess. 37 (1941).

¹⁸ I CCH COMM. MKT. REP. ¶ 2697 (1962). Exclusive agents differ from exclusive distributors in that title to the distributed goods does not pass and the agent is subject to the control of his principal.

¹⁹ I CCH COMM. MKT. REP. ¶ 2698 (1962).

²⁰ I CCH COMM. MKT. REP. ¶ 2699 (1968).

or concerted practices where (a) the co-operating parties accounted for not more than five per cent of turnover for similar products (that is, those considered similar by consumers on the basis of their properties, utility, and price) and (b) the total annual turnover of the co-operating parties was not more than \$15 million or in certain cases \$20 million.²¹ In 1971, the Community granted a group exemption under Article 85(3) for co-operative arrangements involving certain kinds of research and development, standardization, and specialization. This is in marked contrast to the American scene, where per se antitrust violation approaches frequently trigger antitrust, or Robinson-Patman, cases that have a truly minimal impact on the U.S. economy.

Another distinguishing characteristic of Common Market antitrust is the disposition of its enforcement authorities to dispose of cases informally, by allowing the parties to modify agreements and eliminate provisions that are objectionable antitrustwise. By way of contrast, U.S. antitrust enforcement agencies are more prone to launch judicial or administrative proceedings even in situations where the parties have rectified their practices prior to the institution of the proceeding.

One strong adjunct of U.S. antitrust enforcement has not yet made its way onto the European scene—the private treble damage action. However, as will be indicated, enterprises that violate Common Market antitrust norms run the risk of heavy fines and of losing some of their patent, trademark, and contractual rights.

IV

CASE DEVELOPMENTS

Given the nationalistic influences that are still at work within the Common Market, substantive antitrust standards that are more lenient than those prevailing in the United States, and administrative procedures that appear to be more relaxed than those employed in the United States, how has antitrust fared in the Common Market?

Perhaps the leading showpiece of Common Market jurisprudence is the *Grundig-Consten* case, decided by the European Court of Justice in 1967.²² In this case, Grundig, a German manufacturer of TV, radio, and sound reproduction equipment, had granted to a French distributor, Consten, the exclusive right to distribute Grundig equipment in France and the exclusive right to a trademark Grundig had registered in France. The German manufacturer had stipulated in its agreements with its Common Market distributors that they would not ship the equipment outside of their assigned exclusive territories. Both provisions were designed to prevent third persons from importing Grundig's equipment into France. The Court of Justice held that this arrangement was designed to isolate the French

²¹ 3 CCH COMM. MKT. REP. ¶ 9367 (1970).

²² *Etablissements Consten & Grundig-Verkaufs-GmbH v. E.E.C. Comm'n*, 12 Recueil de la Cour 429 [Court Decisions 1961-1966 Transfer Binder], CCH COMM. MKT. REP. ¶ 8046 (1966).

market from competition and, accordingly, distorted competition within the Common Market in violation of Article 85(1) of the Common Market Treaty.

When the European Court at Luxembourg decided that this purely vertical allocation of exclusive territories by a manufacturer to its distributors was an antitrust violation, that issue, curiously enough, was still open in the United States. In the brief he presented to the European Court, its Advocate General relied on a 1963 decision of the U.S. Supreme Court in the *White Motor* case²³ for the recommendation that it not adopt a per se rule, but rather consider the effect of exclusive territories on inter-brand competition and on market prices. The Court declined to follow its Advocate General's recommendation and held that the allocation was a per se antitrust violation.

One year later, in 1968, the U.S. Supreme Court in the *Schwinn* case held to the same effect.²⁴ Thus, the paradoxical result came about that the first major decision under the Common Market antitrust law anticipated by a year a decision not reached by the U.S. Supreme Court until the Sherman Act was seventy-eight years old. As late as March, 1972, the U.S. Supreme Court in the *Topco* case had occasion to reverse a lower court that had declined to follow its ruling in *Schwinn*.²⁵

Of course, the Common Market does not follow all the implications of the *Schwinn* case. Thus, in the recent *Omega* decision, the Commission struck down exclusive territorial restrictions but gave an Article 85(3) exemption to a system whereby Omega's general representatives could sell only through franchised dealers who in turn were forbidden to sell to non-franchised dealers.²⁶ Also, a Common Market manufacturer can impose restrictions on his distributors' promotion and advertising. Nevertheless, the mere striking down of export and import restrictions within the Common Market can have an immediate effect on price. Thus, in the recent *Agfa-Gevaert* case, the Commission held that a provision preventing parties from importing color film from Belgium into Germany violated Article 85(1).²⁷ Since the German sales price was higher than the Belgian, this meant that Agfa-Gevaert had to give up a system of resale price maintenance which it had established in Germany.

In the area of horizontal price-fixing, the Commission has recently scored two major victories. The six firms involved in the *Quinine Cartel* case (the basic investigation of which had been done by U.S. Senator Hart's Antitrust Subcommittee in Washington) were fined a total of \$500,000,²⁸ and the ten companies involved in the *Dyestuffs Cartel* case were fined a like amount.²⁹ Three of the dyestuffs firms were Swiss and one was British, evidencing a willingness on the part of the European

²³ *White Motor Co. v. United States*, 372 U.S. 253 (1963).

²⁴ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1968).

²⁵ *United States v. Topco Associates*, 405 U.S. 596 (1972), *rev'g* 319 F. Supp. 1031 (N.D. Ill. 1970).

²⁶ 2 CCH COMM. MKT. REP. ¶¶ 9346, 9396 (1970).

²⁷ 2 CCH COMM. MKT. REP. ¶ 9339 (1969).

²⁸ [New Developments Apr., 1965-Dec., 1969 Transfer Binder] CCH COMM. MKT. REP. ¶ 9313 (1969); 2 CCH COMM. MKT. REP. ¶ 9484 (1971).

²⁹ [New Developments Apr., 1965-Dec., 1969 Transfer Binder] CCH COMM. MKT. REP. ¶ 9314 (1969); 2 CCH COMM. MKT. REP. ¶ 9397 (1970).

Economic Community to enforce its antitrust law extraterritorially³⁰—quite a debatable legal position as far as most European international lawyers are concerned and one which is being appealed to the European Court.

Perhaps the most spectacular and controversial of the victories won by Common Market antitrust have been in the area of patents, trademarks, and copyrights. Prior to the Rome Treaty, the holder of any national patent or trademark right was able to exercise that right to prevent the importation into its country of any product bearing an infringing patent or trademark. Article 36 of the Rome Treaty seemed to confirm this barrier to international trade.

In a series of landmark cases, the European Court has held that Article 85, and in fact the very purpose of the Rome Treaty, prevent the maintenance of exclusive national territories for the holders of industrial property rights. Thus, in the *Sirena-Eda* decision of February, 1971, the holder of an Italian trademark (obtained from an American manufacturer) on a shaving cream was held foreclosed under Article 85(1) from invoking the trademark to prevent the importation into Italy of shaving cream from Germany bearing the same trademark (licensed to a German firm by the same American firm).³¹ The Court surmounted the difficulty that Article 85 applies only to "agreements," by pointing out that both the Italian and the German companies had acquired their respective rights to use the trademark under agreements with the American manufacturer.

In the *Grammophon-Metro* case, decided in June, 1971, a German record manufacturer tried to assert the special reproducing ("neighboring") right it had under German copyright legislation to bar the reimportation into Germany of records which it had sold into France and which were reappearing on the German market via Switzerland.³² This time the European Court conceded that neither Article 85 nor Article 86 applied, but referred to the rule laid down in Articles 30 and 34 requiring the member states of the Common Market to eliminate all quantitative restrictions on the free flow of goods among them. The Court held that there was no legal basis for protecting the "neighboring right" of the German manufacturer where the records had already been put into circulation in a foreign market (France), and that prohibiting reimportation of the records into Germany would frustrate the fundamental goal of the Rome Treaty—the creation of a single common market.

Whether the *Sirena-Eda* and *Grammophon-Metro* cases will apply to the situation where different parties have been given parallel patents in two or more European countries has not yet been adjudicated by the European Court. There is some

³⁰ The illegal acts took place within the Community; the extraterritoriality feature lay in making the Swiss and British parent firms responsible for those acts. Since this address was delivered, the European Court at Luxembourg upheld the decision of the Commission holding the Swiss and British firms liable, *see Imperial Chemical Industries Ltd. v. Commission of the European Community*, 2 CCH COMM. MKT. REP. ¶ 8161 (1972).

³¹ *Sirena S. r. l. v. Eda GmbH*, 17 Recueil de la Cour 69, 2 CCH COMM. MKT. REP. ¶ 8101 (1971). In reaching its decision, the European Court ignored a contrary recommendation of the EEC Commission.

³² *Deutsche Grammophon v. Metro-Sp-Grossmärkte*, Case No. 78/70 (Cour de Justice de la Communauté européenne, June 8, 1971), 2 CCH COMM. MKT. REP. ¶ 8106.

feeling that the Court has a basis for distinguishing between a patent on the one hand, and trademarks and neighboring rights on the other. In the *Parke, Davis* case, decided in February, 1968, the European Court held that Parke, Davis could validly assert its Dutch patent to prevent the importation from Italy into the Netherlands of certain drugs the patents on which it had licensed to a Dutch licensee.³³ But in this case there was the distinguishing point that drugs are not patentable in Italy. Had the drugs been imported into the Netherlands from a country (for example, Germany) where the importing party held a patent license from Parke, Davis, the argument could well have been made that the patent monopoly had been exhausted by the first sale in Germany and that, consistently with the premise of a single common market, the Dutch patent could not be invoked to bar the drug from the Netherlands. This may be where the Common Market law on parallel patents will come out, though some of the European commentators disagree.³⁴

CONCLUSION

Neither in the Common Market nor in the United States can a mere summary of administrative and court decisions indicate how effective antitrust has been in creating a more competitive economy. In evaluating the European Common Market achievement, it will help to remember that the establishment of the Common Market (more detailed than, but comparable to, the U.S. interstate commerce clause) and the adoption of Articles 85 and 86 of the Rome Treaty took place only fifteen years ago. In the United States, despite a common language and common legal heritage, it was not until thirty-five years after the adoption of the federal Constitution that a consummate judicial politician, Chief Justice Marshall, was able in *Gibbons v. Ogden* to establish the legal foundations of the U.S. common market.³⁵

The U.S. Sherman Act prohibitions against trade restraints and monopolies were founded on an English legal tradition going back to the 14th Century. The Act, which was passed unanimously, was the reflection of a popular antagonism toward trusts that had already led to the passage of a dozen state "Sherman Acts"; by 1898, two-thirds of the states had such laws.³⁶ Yet the federal government lost five of the first six Sherman Act cases it brought in the District Courts. Nobody looking at the *U.S. Steel* case of 1920³⁷ and the *International Harvester* case of 1927,³⁸ the expanding role of the regulated industries, the writings of Galbraith³⁹ and

³³ *Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm, & Centrafarm Cos.*, 14 *Recueil de la Cour* 81 [Court Decisions 1967-1970 Transfer Binder] CCH COMM. MKT. REP. ¶ 8054 (1968).

³⁴ For informative discussions of the problem, see Alexander, *Industrial Property Rights and the Establishment of the European Common Market*, 9 COMM. MKT. L. REV. 35 (1972); Wertheimer, *The Principle of Territoriality in the Trademark Law of the Common Market Countries*, 16 INT. & COMP. L.Q. 630 (1967).

³⁵ 22 U.S. (9 Wheat.) 1 (1824).

³⁶ MARKETING LAWS SURVEY, STATE ANTITRUST LAWS (Works Progress Adm'n 1940).

³⁷ *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

³⁸ *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

³⁹ J. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1956); J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967).

Berle,⁴⁰ and the statistics of oligopoly, concentration, and administered prices in the United States can arrive at an optimistic evaluation of the effectiveness of its anti-trust enforcement. Considering the difficulties created by Western Europe's diverse legal traditions and prior history of toleration of cartel practices, it can safely be said that the legal articulation of an antitrust policy for the Common Market has been truly impressive.

⁴⁰ A. BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* (1954).