Chapter X

The Protection of Competition

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I. INTRODUCTION—SCOPE, BACKGROUND, AND INTERPRETATION OF THE PROVISIONS FOR THE PROTECTION OF COMPETITION IN THE E.E.C. TREATY

A. SCOPE AND ORGANIZATION OF THE PERTINENT ARTICLES

I. PLACE OF THE REGULATIONS WITHIN THE TOTAL STRUCTURE OF THE TREATY

One of the most important and widely publicized aspects of the Treaty Establishing the European Economic Community is its protection of competition in the Common Market. Since the publication of the texts of the respective international agreements,¹ a veritable flood of literature on that subject has emerged in the Community countries as well as abroad, and a host of controversies has arisen over the significance and import of the controlling clauses.²

The pertinent articles differ greatly in structure and are distributed and arranged over various portions of the Treaty, as a

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¹ The Treaty establishing the European Economic Community is one of the group of international agreements signed in Rome on March 25th, 1957. It is supplemented by the Convention relating to certain Institutions common to the European Communities, of the same date, and a number of protocols.

² See the bibliography in part IV, notes 580 and 634 infra.
consequence of the fact that the play of the forces of competition in the market may be channelized and affected by different modes and measures of governmental action as well as by arrangements and other practices of private enterprises. However, this dispersal of the regulations and the multitude of interference types envisaged must not becloud the essential unity of purpose and interconnection of the various segments of the total scheme.

The E.E.C. Treaty is divided into six principal parts dealing, consecutively, with the Principles (Articles 1–8), the Bases of the Community (Articles 9–84), the Policy of the Community (Articles 85–130), the Association of Countries and Territories Overseas (Articles 131–136), the Institutions of the Community (Articles 137–246), and, finally, General and Concluding Provisions (Articles 210–248). Articles bearing on the protection of competition are found primarily in the First, Second, and Third parts of the Treaty.

The most comprehensive and specific set of provisions on the subject is placed in Part Three, Title I, Chapter I of the Treaty, and bears the telling sub-heading “Rules of Competition.” It deals with restrictive practices by private or public enterprises (Articles 85–90), dumping (Article 91), and public subsidies (Article 92). It must not be overlooked, however, that the provisions of this chapter are supplemented by important articles in other parts or chapters of the Treaty.

In the first place, Part One of the Treaty, which establishes the governing principles of and for the Community, specifies, in Article 3, the principal activities of the Community for the accomplishment of its task and lists, in a catalogue of eleven programmatic items, the following two:

(f) The establishment of a system which safeguards the competition within the Common Market against adulterations; . . .
(h) The harmonization of the provisions of national laws to the extent required for an orderly functioning of the Common Market. . . .

The particular position in the Treaty, as well as the broad phraseology of this provision, makes it clear that one of the basic objectives and tenets of the Common Market is the achievement of a market order which is free from “falsifications” due to discriminatory or otherwise unduly restrictive practices whether imposed by governmental mandate or initiated by private action.3

3 Moreover, it should be noted that the proscription of any discrimination on national
Again, since Part Two regulating the Bases of the Community focuses primarily on the structural pattern of the Common Market as created by the gradual abolition of reciprocal territorial barriers restricting the freedom of inter-market trade, employment or mobility of workers, and movement of capital, only such interference with competition is dealt with in that connection as stems from quantitative restrictions or government monopolies entailing discriminations on a territorial or local basis. The Treaty aims at the ultimate elimination of all quantitative restrictions on imports and exports impinging on inter-market trade; but Article 36 excepts prohibitions against, and restrictions of, the importation, exportation, or transit of goods, justified by reasons of public morals, order, and safety, of the protection of the health and life of persons and animals, of the preservation of plants, of the conservation of natural treasures having an artistic, historical, or archeological value, or of the protection of industrial or commercial property. Nevertheless the Article specifies that such prohibitions and restrictions must “not constitute a means of arbitrary discrimination or a disguised restriction on the commerce among the Member States.”

Article 37, similarly, ordains a transformation of existing state trade monopolies in such a fashion that at the end of the transitional period any discrimination among nationals of the Member States is eliminated with respect to conditions governing supply to, or procurement from, such monopolies. This provision is declared to apply to all institutions by which a Member State exercises, in law, or in fact, a direct or indirect control, direction, or discernible influence over importation or exportation among Member States. It also applies to monopolies conferred by a Member State upon other legal entities.

2. THE RULES OF COMPETITION FOR ENTERPRISES IN PARTICULAR

As has been stated before, the core of the Treaty provisions for the protection of competition in the Common Market are con-
tained in Articles 85–90. While the last of these articles deals primarily with public enterprises and enterprises which have been accorded special or exclusive rights, the first five contain rules governing the market conduct of enterprises in general. Since the following discussions deal primarily with their significance and application, the full text of these Articles is set out for the convenience of the reader:

ARTICLE 85

(I) Incompatible with the Common Market and prohibited are all agreements between enterprises, all decisions of associations of enterprises and all concerted practices which are apt to affect the commerce between Member States and which have as their object or effect the prevention, restriction or adulteration of competition within the Common Market, and especially those which consist in—

(a) fixing directly or indirectly the purchase or sales prices or other conditions of transacting business;
(b) limiting or controlling the production, distribution, technical development or investment;
(c) dividing the markets or sources of supply;
(d) applying unequal conditions for equivalent goods or services vis-à-vis other contracting parties, thereby inflicting upon them a competitive disadvantage;
(e) conditioning the conclusion of contracts upon the acceptance by the other contracting parties of additional goods or services, which, neither by their nature nor by commercial usage, have any connection with the object of these contracts.

(2) The agreements or decisions prohibited according to this article are void.

(3) However, the provisions of paragraph (1) may be declared inapplicable to:

any agreement or category of agreements between enterprises,
any decision or category of decisions of associations of enterprises, and
any concerted practice or category of concerted practices,

which contribute to the improvement of the production or distribution of commodities or to the promotion of

4 The wording of the translations is by the author. No satisfactory English translation is in print. The difficulties of an adequate rendition in English of the provisions of the Treaty are formidably enhanced by the fact that there are substantial divergencies between the four controlling texts. See infra passim.
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Technological or economic progress, while reserving an appropriate share of the resulting profit to the consumers and without:

(a) imposing on the enterprises involved any restrictions not indispensable for the attainment of these objectives, or
(b) enabling such enterprises to eliminate competition in respect of a substantial portion of the commodities involved.

ARTICLE 86

(1) Incompatible with the Common Market and prohibited is the abusive exploitation of a dominant position in the Common Market or a substantial part thereof by one or several enterprises to the extent that it is capable of affecting the commerce between Member States. These abusive practices may consist especially in:

(a) fixing directly or indirectly the purchase or sales prices or other conditions of transacting business;
(b) limiting or controlling the production, distribution, technical development or investment;
(c) applying unequal conditions for equivalent goods or services vis-à-vis other contracting parties, thereby inflicting upon them a competitive disadvantage;
(d) conditioning the conclusion of contracts upon the acceptance by the other contracting parties of additional goods or services which, neither by their nature nor by commercial usage, have any connection with the object of these contracts.

ARTICLE 87

(1) Within a period of three years from the entry into force of this Treaty, the Council, by unanimous vote upon a proposal by the Commission and after consultation of the Assembly, shall issue all appropriate regulations or directives for the purpose of the application of the principles laid down in Articles 85 and 86. If such provisions have not been adopted within the above-mentioned time limit, they shall be enacted by the Council pursuant to a vote by a qualified majority upon a proposal by the Commission and after consultation of the Assembly.

(2) The provisions specified in paragraph (1) have the purpose, in particular, of:

(a) assuring the observance of the prohibitions set forth in Articles 85 and 86 through the imposition of punitive or coercive fines;
(b) determining the particulars governing the application of Article 85, paragraph (3), having regard for the need both of assuring an effective supervision and, at the same time, of simplifying administrative control to the greatest possible extent;

c) specifying, if need be, the scope of application of Articles 85 and 86 with respect to the different sectors of the economy;

d) defining the respective tasks of the Commission and of the Court of Justice in the application of the provisions envisaged in this paragraph;

e) defining the relations between the provisions of national law on the one hand and on the other hand the provisions, contained in this Section or issued pursuant to this Article.

ARTICLE 88

Until the entering into force of the provisions issued in application of Article 87, the authorities of the Member States shall pass on the permissibility of agreements, decisions and concerted actions as well as on the abusive exploitation of a dominant position in the Common Market in conformity with the law of their own countries and with the provisions of Articles 85, especially paragraph (3), and 86.

ARTICLE 89

(1) Article 88 notwithstanding, the Commission, upon assumption of its activities, shall watch over the observance of the principles laid down in Articles 85 and 86. At the request of a Member State or ex officio, and in cooperation with the proper authorities of the Member State obliged to render official assistance, it shall investigate the cases in which contraventions of these principles are suspected. If it finds that there has been a contravention, it shall propose appropriate means for its discontinuance.

(2) If the contravention is not discontinued the Commission shall render a decision to the effect that there has been such a contravention, furnishing reasons for its finding. It may publish the decision and authorize the Member States to take the necessary remedial measures, specifying the conditions and particulars thereof.

ARTICLE 90

(1) The Member States shall not issue or retain in force any measures which contravene this Treaty, and in par-
ticular its Articles 7 and 85-94, with respect to public enterprises to which they accord special or exclusive rights.

(2) Enterprises which are entrusted with the rendition of services of general economic interest or which have the character of a fiscal monopoly are subject to the provisions of this Treaty, especially the rules governing competition, to the extent that the application of these provisions does not prevent, in law or in fact, the performance of the special task imposed on them. The development of trade must not be affected to a degree which is contrary to the interest of the Community.

(3) The Commission supervises the application of this article and, if necessary, addresses the appropriate directives or decisions to the Member States.

B. GENESIS OF THE RULES PROTECTING COMPETITION AND THE PROBLEMS OF THEIR INTERPRETATION

When the governing texts of the Treaty were published, it became evident to the students of the subject that the chapter on the rules governing competition would create perplexing and far-reaching problems. The doubts and controversies prompted by the phrasing and arrangement of the pertinent articles concerned not only the exact types of restrictive practices falling within the purview of these regulations, but also their relation to the existing laws governing the subject in the Member Countries and their status prior to their implementation as envisaged by the Treaty.

The complexities of proper interpretation are greatly augmented by the fact that the four governing versions of the text vary only too often in significant nuances of style and vocabulary, with the result that the proper construction cannot safely rely on the phrasing of a particular clause in only one language, and that any textual interpretation must always take account of the composite meaning conveyed by the four instruments.

Unfortunately, the task of interpretation finds precious little guidance or assistance in the actual minutes or exposés of the draftsmen, inasmuch as they have not been put into print. To be sure, some commentators have had access to the preparatory materials for the purpose of publishing essential passages. But not much

5 According to Article 248 of the Treaty, the German, French, Italian, and Dutch texts are each equally authentic and equally binding.

6 Le Marché Commun et l'Euratom, 10 Chronique de Politique Étrangère 399 (Brussels 1957).
can be gleaned therefrom; moreover, in the case of Articles 85–91, the drafters consciously chose phraseology of a certain vagueness in order to facilitate possible agreement.\(^7\)

Undoubtedly the richest source of interpretive clues among the documents preceding the final formulation of the Treaty is the famous Spaak Committee Report\(^8\) which constituted the tentative blueprint for the Common Market. The idea of such an institution emerged in the wake of the wreck of the plans for a European Defense Community and stemmed from the belief that the economic arena furnished better prospects for European integration than the political sphere. The Council of Europe, the Common Assembly of the European Coal and Steel Community, and the governments of the Benelux countries supported efforts in that direction as early as 1954, and the German government arrayed itself with these forces by a memorandum of 1955. As a result, the Foreign Ministers of the E.C.S.C. countries, meeting in Messina in 1955, agreed upon the activation of such a plan and appointed an intergovernmental committee under the chairmanship of Dr. Spaak, then Belgian Minister for Foreign Affairs, to work out a suitable scheme for the creation of a common market. The labors of the Committee resulted in a report which was published in April 1956 and accepted by the following conference of the Foreign Ministers in Venice as the basis for the final negotiations of the Treaty.\(^9\)

The Report, after commenting briefly on the advantages of a European common market, stated at the outset that the creation of such a market required a "converging action following three main lines of approach," of which one consisted in the establishment of "normal conditions of competition" through elimination of all protective barriers compartmentalizing the European economy and another in the assurance of normal conditions of competition by remedying the effects of state interventions and monopolistic situations.\(^10\)

In elaborating on the second point, the Report emphasized that,

\(^7\) *Id. at 482*, referring to a document drafted by the secretariat of the Intergovernmental Conference.

\(^8\) *Comité Intergouvernemental créé par la Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères [hereinafter cited as Spaak Report] (Brussels, April 21, 1956).*

\(^9\) *See the official commentaries in Appendix (Anlage) C to Bundestagsdrucksache 3440, Deutscher Bundestag, 2. Wahlperiode 1953, Verhandlungen des Deutschen Bundestages, 2. Wahlperiode 1953 (1957).*

in view of the custom of enterprises to form cartels with the ensuing monopolistic practices and possibilities of discrimination and market division, it was necessary to impose rules of competition upon the enterprises in order to prevent virtual dismemberment of the market through discriminatory pricing, dumping, and market divisions. In addition it was necessary to curtail all state intervention undertaken for the purpose of favoring national enterprises (and thus with "the purpose and effect of adulterating competition") rather than in the general interest and for the increase of over-all production. Moreover, for the achievement of a truly competitive market, it was also necessary to ascertain and, so far as feasible, to correct the incidences which flowed for competition from the disparity of state legislation in general.\textsuperscript{11}

It followed that the control of the standards of competition among enterprises, the curtailment or elimination of subsidies and similar measures, and the provision of counter-measures against distortions as well as possible harmonization of state legislation were among the principal actions needed to establish a common market and to make it function.\textsuperscript{12}

These rather general observations of the Spaak Report were, later therein, followed by a more detailed outline of the rules of competition in conjunction with an over-all study of "a policy for the common market."\textsuperscript{13}

In turning first to the rules applicable to the enterprises, the Report focused on two main problems—that of discrimination and that of monopoly. The authors of this section were fully aware of the fact that these two problems were overlapping and that, in the absence of public measures to that effect, discriminatory treatment of consumers or suppliers is practicable chiefly if the enterprises engaging in such conduct possess monopolistic powers by virtue of size, specialization, or cartelization. An intervention in case of discrimination, therefore, was considered warranted and necessary when a consumer is virtually compelled to submit to the terms of his supplier, or vice-versa, and suffers a competitive disadvantage from discriminatory treatment. In addition, it was urged that monopolistic situations and practices needed curbing if they contravened the fundamental objectives of the common market, as is the case in the event of a division of markets, restriction of produc-

\textsuperscript{11} Id. at 16 and 17.
\textsuperscript{12} Id. at 23.
\textsuperscript{13} Id. at 53.
tion or technological progress, or capture or domination of the market for a product by a single enterprise. It was recognized, however, that purely local practices, which did not affect commerce between the states, did not need to come within the purview of the Treaty. A comparison of the form of the final Treaty, as outlined before, with the Spaak Report demonstrates clearly that the latter exerted a substantial influence on the former and, therefore, is a valuable guide to its interpretation.

In addition to the Spaak Report, guides to a solution of problems of interpretation created by the Treaty may be found in the documents and in the discussions which, though following the formulation of its text, formed part of the ratification procedures in the Community countries. Apart from the parliamentary debates in the different countries, an official commentary, appended by the German government to the text of the Treaty in the course of the ratification procedures in the German parliament, deserves attention.14

In ascertaining the meaning and effect of the Treaty sight should also not be lost of the fact that its provisions relating to restrictive business practices were not the first venture into the field of international regulation of restrictive business practices and that previous efforts and experiences were undoubtedly in the mind of the draftsmen. This applies with particular force to the analogous provisions in the Treaty establishing the European Coal and Steel Community,15 but may also be true with respect to the chapter on restrictive business practices in the abortive Havana Charter for the proposed International Trade Organisation.16

Most of all, the views of the draftsmen must have been in-

14 Schriftenreihe zum Handbuch für Europäische Wirtschaft 223 (Der Gemeinsame Markt) 1957.

2. (b) the practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and
(c) such commercial enterprises, individually or collectively, possess effec-
fluenced by the development of legislation against anti-competitive practices in the various Member Countries, especially Germany, France, and the Netherlands. For that reason, as well as because the regulations of the Treaty are superimposed upon the various national measures of this type, individual national legislation will be discussed prior to a detailed study of the scope and effect of the pertinent articles in the Treaty.

II. THE PROTECTION OF COMPETITION
UNDER THE NATIONAL LAWS OF
THE COMMUNITY MEMBERS

A. GERMANY

I. HISTORICAL ANTecedENTS OF THE LAW AGAINST
RESTRAINTS OF COMPETITION OF 1957

a. The Period Prior to the Allied Occupation

(1) Developments before the passage of the Cartel Ordinance of 1923. Germany evolved special legislation for the protection of competition and the control of cartels and other restrictive business practices only in the wake of World War I. Prior to that time illegality, if any, of combinations in restraint of trade or monopolistic practices had to be based on the general principles of law, especially those deduced from the German Civil Code.17

To be sure, prohibitions of certain injurious types of restrictive trade practices go back to the early sixteenth century. But they...
remained sporadic and ineffective. In the mining industry restrictive and monopolistic practices were actually authorized and encouraged or even imposed by governmental action. The liberalistic ideas and tendencies of the nineteenth century brought about in Germany, as in other countries, the recognition of the two great, though polar, principles of freedom of trade and freedom of contract. The former principle was proclaimed in Germany in a basic code regulating the exercise of trades and professions, the Gewerbeordnung of 1869. The rise in Germany of numerous cartel agreements as an aftermath to the economic depression of 1873 brought the import of this legislation for the legality and enforceability of restrictive agreements into sharp focus. In two famous decisions, rendered toward the end of the nineteenth century, the Supreme Court of Germany held that the principle of freedom of trade as laid down in the Gewerbeordnung did not bar the self-protection of manufacturers and distributors against ruinous competition. It thus opened the gate for the celebrated differentiation between "good" and "bad" cartels, holding agreements of the first type to be valid and judicially enforceable.

World War I and the period of scarcity following it entailed a brief period of economic regulation against excessive price increases which was formally terminated in 1926. Moreover, the trends toward the abolition of the old capitalistic market order and the erection of a planned economy that accompanied the collapse of the Imperial Regime produced publicly controlled compulsory cartel organizations in the coal and potassium industries (1919), and subsequently a similar arrangement was introduced in the German match manufacturing industries (1930). Any general regulation of the status of cartels, however, had to wait until four years after the War.

(2) From the Cartel Ordinance of 1923 to the Nazi regime. In 1923 finally, the government, pressed by public opin-

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18 See Isay, op. cit. supra note 17, at 5 and 81.
19 Id. at 13, 15, and 83.
20 German Supreme Court, June 25, 1890, 28 Entscheidungen des Reichsgerichtes in Zivilsachen [hereinafter cited as RGZ] 238; German Supreme Court, Feb. 4, 1897, 38 RGZ, 155.
21 Cf. the comments by Isay, op. cit. supra note 17, at 32; Kronstein & Leighton, supra note 17, at 302; Schwartz, supra note 17, at 626–31.
22 Isay, op. cit. supra note 17, at 37.
23 Id. at 34 and 35.
24 Id. at 36.
enacted the famous Ordinance Against Abuse of Economic Power, the so-called Cartel Ordinance, which remained the principal basis of German law on that subject until the advent of Nazism. This measure refrained from an outright prohibition of combinations in restraint of trade and provided merely for the suppression of certain abusive practices and a limited governmental supervision.26

The Ordinance applied, with one exception, only to cartels, syndicates, and similar arrangements, defined (in Section 1) as "agreements and resolutions which establish obligations with reference to the modes of production or marketing, the application of conditions of doing business and the calculation or charging of prices." Accordingly, it governed only horizontal arrangements between independent enterprises, entered into for the purpose and with the intent of influencing market conditions.27 As a result purely vertical price maintenance schemes, that is, price fixing agreements between a single manufacturer, or wholesaler, and one of his customers, or all of his customers separately, did not fall under the sweep of the Ordinance. Price maintenance arrangements enforced by cartels, however, were covered by the statutory provisions.28

The Ordinance required the agreements and resolutions governed by it to be in writing and declared void any such agreements or resolutions which the parties thereto promised to observe by giving their word of honor or making similar solemn assurances. It attempted to forestall an excessive stranglehold of cartels on the market by four types of legal devices specified primarily in Sections 4, 8, 9, and 10. The first of the indicated Sections empowered the Minister of Economics to intervene for the protection of the national economy or the public welfare and to:

1) institute proceedings for the complete or partial cancellation of the cartel agreement in the newly created Cartel Court, or
2) subject it to an unconditional right of withdrawal by its members, or
3) establish censorship over all of its actions.

26 Leading German commentaries on the Ordinance of 1923, as amended, are LEHNICH-FISCHER, DAS DEUTSCHE KARTELLGESETZ (1924); ISAY-TSCHIERSCHKY, KARTELLVERORDNUNG (1925); MÜLLENSIEFEN-DÖRINKEL, KARTELLRECHT (3rd ed. 1938). For an English discussion of the pertinent provisions and their application, see Kronstein & Leighton, supra note 17.

27 For a detailed discussion of the cartel concept as developed by the German Supreme Court: MÜLLENSIEFEN-DÖRINKEL, op. cit. supra note 26, at V, 11.

28 See the references in MÜLLENSIEFEN-DÖRINKEL, op. cit. supra note 26, at V, 12.
Section 8 gave each cartel member the right to withdraw from the cartel whenever there was an important reason for such step.

Section 9 subjected cartel actions forfeiting deposits or imposing boycotts or similar sanctions to a preliminary authorization by the presiding judge of the Cartel Court, whose decision was subject to review by the whole bench.29 This tribunal also had jurisdiction over contested withdrawals by cartel members pursuant to Section 8.

Finally, Section 10 permitted the Cartel Court to authorize aggrieved parties to rescind contracts with cartels, combines, or trusts, where the conditions of doing business or the pricing practices were apt to threaten the national economy or the public welfare in exploitation of a dominant market position. Contracts concluded under identical conditions, after such determination by the Cartel Court, were declared void ab initio.

Section 10 was thus the only provision in the Ordinance which was applicable, not only to cartels in the technical sense, but also to other organizations with a dominant market position, such as trusts and combines. The Section, however, was of little practical significance since in the case of cartels the right of intervention under Section 4 was more comprehensive and more direct. An amendment of 1933 further increased the advantage of a reliance on Section 4 by eliminating the necessity of a proceeding in the Cartel Court and authorizing the Minister of Economics to pronounce immediately the total or partial nullity of cartel agreements or resolutions of the specified type.30

The actual application of Sections 4, 8, and 9 produced difficult questions of interpretation and economic policy and has evoked retrospective censure by respected students of the field.31

The most comprehensive and most perplexing of the provisions mentioned was the requirement of administrative or quasi-judicial authorization for boycotts and similar exclusionary measures, imposed by cartels for the enforcement of discipline against defecting members or for extension of the organization to outsiders. The Cartel Court considered as measures needing prior approval all

29 Section 9, para. 4, authorized the Minister of Economics to confer jurisdiction over the initial determination of the propriety of exclusionary measures of cartels operating only in individual German states or parts thereof to local authorities instead of leaving it with the presiding judge of the Cartel Court.
31 See especially Kronstein & Leighton, supra note 17; Schwartz, supra note 17, at 639ff.
bars excluding an enterprise from customary business dealings.\textsuperscript{32} Authorization was to be refused if the contemplated action entailed a threat to the national economy or the public welfare or constituted an undue restriction of his freedom of action in the economic field for the party involved. The Cartel Court deemed such situation to be present if the boycott sought the expulsion of a competitor from the market, but not, at least according to later decisions,\textsuperscript{33} if it merely aimed at pressure to make him join the cartel. Unauthorized action by the cartel entitled the aggrieved party to damages and injunctive relief in the ordinary courts of justice. An amendment of 1932, however, predicated such remedy upon prior declaration by the Cartel Court of a violation of Section 9.\textsuperscript{34}

The power of partial or total cancellation of cartel agreements in the interest of the national economy or public welfare, entrusted to the Minister of Economics by Section 4, permitted theoretically an even more radical and flexible governmental intervention, both before and after the abolition of judicial review in 1933. However, it is doubtful whether any really effective use was ever made of this possibility.\textsuperscript{35} At any rate, the mere fact that an agreement was annulled did not render it void or illegal with retrospective effect.\textsuperscript{36}

Beginning with 1930 the Cartel Ordinance was supplemented by a series of enactments designed to implement the deflationistic policies of the government by either facilitating or ordaining a lowering of the price level. Accordingly, an emergency decree by the President of the Republic in 1930 authorized the government to invalidate price fixing agreements, whether in form of horizontal arrangements or of vertical agreements between a manufacturer or wholesaler and individual retailers, if they either constituted an obstacle to economical production or distribution of goods and services or entailed an unwarranted restriction on the freedom of action in the market.\textsuperscript{37} Pursuant to the powers under this decree, the government invalidated agreements between a supplier and his purchaser which obligated the latter to observe specified pricing practices with respect to goods of another type or from another

\textsuperscript{32} Müllensiefen-Dörinkel, op. cit. supra note 26, at VIII, 5.
\textsuperscript{33} Id. VIII, 6; Kronstein & Leighton, supra note 17, at 310.
\textsuperscript{34} Law of June 14, 1932, c. VI, art. 1, [1932] RGBI. 285, 289; Müllensiefen-Dörinkel, op. cit. supra note 26, at VIII, 31 and 35.
\textsuperscript{35} Kronstein & Leighton, supra note 17, at 313.
\textsuperscript{36} Müllensiefen-Dörinkel, op. cit. supra note 26, at VI, 8.
\textsuperscript{37} Emergency Decree of July 26, 1930, c.5 §§ 1-5, [1930] RGBI. 311, 328; See Müllensiefen-Dörinkel, op. cit. supra note 26, IV, 26.
source or with respect to services rendered in connection with the supplied goods. Price fixing arrangements relating merely to the goods purchased thus remained unaffected and valid.\(^{38}\)

In 1931 the government ordered a lowering by 10% of all prices set in vertical price fixing agreements pertaining to trademark-protected goods.\(^{39}\) A further lowering by 10% of prices set in all price fixing agreements, whether of the horizontal or the vertical type, was prescribed by a subsequent ordinance of the same year.\(^{40}\)

As a result German law of this period outlawed directly only a very limited type of restrictive agreements, and, in general, pursued a case-by-case approach to abuse control. Invalidity or tortiousness of certain agreements, however, could be based, in especially oppressive cases, upon the Statute Against Unfair Competition or the general provisions relating to invalidity of legal transactions (Section 138) and anti-social infliction of injury (Section 826) of the Civil Code.\(^{41}\)

(3) *Developments in the Third Reich.* The radical change in governmental philosophy and policy which occurred with the advent to power of the Nazi leaders in 1933 left cartels undisturbed at first, but in the course of time transformed them into instruments of the totalitarian regime and, finally, in 1943 practically suppressed them. Little could be gained from tracing this development in detail, but a few major stops on the road are worth discussing.

A statute of 1933, amending the Cartel Ordinance, abolished the need of judicial proceedings for the total or partial invalidation of cartel agreements by the Minister of Economics under Section 4 and extended the permissibility of boycotts and exclusionary measures against enterprises managed by unreliable persons.\(^{42}\) At the same date a further statute was enacted which provided for the compulsory cartelization of enterprises or the compulsory extension of cartels to outsiders if the Minister of Economics deemed it to be in the interest of the enterprises concerned, the economy as a whole, and the public welfare.\(^{43}\) In connection with such measures, the Minister was also empowered to re-define the rights and duties

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38 Id. XV, 12 and XV, 18.
39 For the text of the decree: id. IV, 29.
40 For the text: id. IV, 32.
41 See in this connection Kronstein & Leighton, supra, note 17, at 325; Schwartz, supra note 17, at 632.
42 See supra note 30 and Müllensiefen-Dörinkel, op. cit. supra note 26, at III.
43 For the text: see Müllensiefen-Dörinkel, op. cit. supra note 26, at IV, 11.
of the cartel members. Moreover, the Minister was authorized to prohibit the establishment of new enterprises or the expansion of existing facilities in a market if such action appeared to be necessary in view of the exigencies of this branch of the industry and the national economy as a whole. This statute, which formed the basis for approximately sixty actual governmental interventions in the period between 1933 and 1938, served as a model for similar legislation in Belgium and the Netherlands.

In December 1934 the Government prohibited all increases of prices controlled by private price-maintenance schemes, and in 1936 the establishment of a general price-stop followed. In addition, the Commissioner for Prices issued an Ordinance Relating to Price Maintenance Agreements or Recommendations for Goods Sold Under Trademarks, of Oct. 27, 1937, which did empower him to declare such agreements terminated and illegal. As a consequence cartels lost all functions in price policies and became more and more semi-public instruments for market regulation. In 1943 their total replacement by government agencies was completed.

b. The Interlude of Allied Legislation

Following the surrender by Germany, Allied policy turned toward a de-concentration of the German industry and a suppression of cartels. The so-called Potsdam Agreement of August 2, 1945, contained a paragraph which provided:

At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentrations of economic powers as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements.

For details: id. IV, 74 and XV, 85. The Ordinance was superseded by another ordinance relating to price-maintenance arrangements of November 23, 1940, [1940] RGBLI, 1573.

For further references: Isay, op. cit. supra note 17, at 63; Schwartz, supra note 17, at 642.
This agreement was implemented by separate enactments of the Control Powers, in consequence of the impossibility of reaching an understanding between the Soviet and the Western Powers.

In the three Western Zones the pertinent policies were carried out by two types of action. On the one hand there were special de-concentration proceedings against particular giant combines in the coal and steel industry, the chemical industry, the motion picture industry, and in banking, initiated on the basis of individual legislation. These proceedings aimed at and, in part, accomplished an at least temporary restructuring of the particular sectors of the German economy. On the other hand, in each of the three Western Zones the military occupation authorities, in 1947, also enacted general legislation for the curtailment of restrictive business practices. The laws for the American and British Zones were alike. They were patterned after the antitrust legislation in the United States, but were much more detailed and specific in their prohibitions and, in certain respects, went considerably beyond the thrust of the American original. The French law was considerably less detailed and somewhat more tolerant towards cartels.

The pertinent legislation was kept in force and in Allied hands even after the creation of the Federal Republic of Germany in 1949, by virtue of a specific reservation of such power in section 2b of the Occupation Statute of that year. The termination of the occupation regime in 1955, pursuant to the so-called Paris agreements, returned to Germany "the full authority of a sovereign state over its internal and external affairs." It was agreed between Germany and the three Allied Powers that until repeal or amendment, in accordance with the German Basic Law, legislation enacted by the Occupation Authorities should remain in force.

See Schwartz, supra note 17, at 646.

For the U.S. Zone and Bremen: Law No. 56, Military Government Gazette, Germany, United States Area of Control, issue C, at 2 (1947); for the British Zone: Ordinance No. 78, 16 Military Government Gazette, Germany, British Zone of Control 412 (1947). The catalogue of anticompetitive practices in art. V, Sec. 9(c) is of particular interest as it served as a model for subsequent European legislation.


The reserved powers covered "Decartelisation, Deconcentration [and] Nondiscrimination in Trade Matters"; for a reprint of the text, see 43 AM. J. INT'L. L. SUPP. 172 (1949).

and specific provisions were stipulated for the status of the coal mining and iron and steel industries and for the completion of the liquidation of the German Dye Trust.\textsuperscript{59}

The Allied legislation against the concentration of economic power, accordingly, remained valid and applicable by German authorities until the entry into force on January 1, 1958, of the new Law Against Restraints of Competition, promulgated on July 27, 1957. As a result, the German Ministry of Economics, as well as the German courts, were confronted with many difficult questions of interpretation regarding the validity or legality of cartels or other activities in restraint of trade, challenged under Laws Nos. 56, 78, and 96. Generally speaking, the German authorities, in construing the applicable legislation, looked to American precedents and practices for guidance and thus had to familiarize themselves with non-indigenous notions and traditions. It was therefore recognized by the interested and responsible quarters as early as 1952 that there ought to be a prompt replacement of the Allied enactments by a modern German law which, combining the experiences both under the Cartel Ordinance of 1923 and under the Allied Law Against Concentration of Economic Power, would produce a social market-order suitable to the political and economic climate in the young republic and in harmony with the basic tenets of German judicial administration.\textsuperscript{60}

\textsuperscript{59} Id. arts. 9 and 11. A special chapter pertaining to decartelization and deconcentration, contained in the 1952 version of the Convention, was deleted in 1954; see 49 Am. J. Int'l. L. Supp. 69 ff. (1955).

\textsuperscript{60} The government bill which finally, and after considerable modification, became law in 1957 was first introduced in the German Parliament in 1952. Two prior government projects both drafted in 1949 failed because the first of them proceeded too much on a policy of state intervention, while the second one was unacceptable to the Occupation Powers as leaving too much freedom to cartelization. For a history of these drafts see the General Report by Dr. Hellwig in the Report on the Draft Law against Restraints of Competition of the Committee for Economic Policy, \textit{Schriftlicher Bericht des Ausschusses für Wirtschaftspolitik (21. Ausschuss) über den Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen}, Deutscher Bundestag, 2. Wahlperiode, zu Drucksache 3644, 1 et seq. (1957).
2. THE ERA OF LAW AGAINST RESTRAINTS OF COMPETITION OF JULY 27, 1957

a. Character and Scope in General

(1) Background and basic structure of the Law. The promulgation on July 27, 1957, of the new Law of Competition marked the conclusion of a prolonged and bitter controversy between two opposing schools of thought. One, advanced in particular by the German National Association of Manufacturers (B.D.I.), harked back to the dogma of freedom of contract and the traditional differentiation between good and bad cartels and opposed any legislative intervention except for the purpose of curbing abuses; the other, represented by the German Minister of Economics, proceeded on the teachings of the neo-liberalist doctrine and advocated a policy of prohibiting, at least in principle, any restrictive arrangements, especially those of a horizontal type, with provisions for dispensation in exceptional cases. Ultimately the latter approach was adopted. However, by way of compromise, concessions had to be made in form of a lengthy catalogue of classes of enterprises exempted outright from the regulation of the act and of a number of exceptions and possible dispensations from the prohibition against restrictive arrangements if the same are entered into for particular purposes or under special circumstances.

The new Law, which aims at a comprehensive regulation of the law relating to restrictive business practices, is arranged in

61 The original governmental bill was transmitted to the German House of Representatives (Bundestag) on June 13th, 1952, and was transferred to its Committee on Economic Policy, following a general debate on June 26th, 1952. Preoccupation with other matters prevented the completion of the deliberations prior to the end of the legislative period. Early in 1954 the German Government decided to re-introduce the bill in the Second Parliament. The Senate (Bundesrat) voted in favor of a number of modifications, and the bill, with the observations of the Government on the changes proposed by the Senate, did not reach the House of Representatives until January 1955. It was finally passed by that body on July 3rd, 1957 and by the Senate, July 19th, 1957.


64 Commentaries on the new Law are KAUFMANN, RAUTMANN, STRICKRODT, U.A., Frankfurter Kommentar zum Gesetz gegen Wettbewerbsbeschränkungen (1958);
six main titles containing, consecutively, provisions for the substantive law of restraints of competition; sanctions; administrative agencies charged with the application of the act; procedure; exempted categories of enterprises; and transitional and concluding matters. The two titles laying down the operative rules and the exemptions therefrom obviously constitute the core of the new legislation. Title One, specifying the various restrictive practices envisaged by the Law, divides its subject in turn into six chapters, dealing with: (1) cartels, (2) other restrictive agreements, (3) enterprises with dominating market power, (4) additional restrictive or discriminatory practices, (5) codes of competition, and (6) formal requirements and civil sanctions.

As can be inferred from this list, the Law focuses on, and differentiates among, four principal classes of restrictive practices —restrictions in the form of arrangements or resolutions of the horizontal type (cartels); restrictive agreements of vertical character; abusive exploitation of a monopoly or oligopoly; and, finally, discriminatory and coercive practices not falling within the aforementioned three categories.

(2) Cartel agreements and cartel resolutions

(a) Section 1 of the Law. Section 1 of the Law announces the basic policy toward cartels:

Agreements between enterprises or associations of enterprises, concluded for the accomplishment of a common purpose, and resolutions of associations of enterprises are invalid to the extent that they are apt to affect the production or the market conditions for the commerce in goods or occupational services by means of restraints of competition. This does not apply where this Law provides otherwise.

As indicated by the “does-not-apply” clause and as mentioned before, the principle of invalidating cartel agreements and decisions is limited by far-reaching exceptions and provisions for executive dispensations.

Generally speaking, in the cases of the statutory exceptions the cartel agreements and resolutions falling within their scope are either valid if properly filed with the Cartel Office or become

Laenen, Kommentar zum Kartellgesetz (3d. ed. 1958); Müller-Gries, Kommentar zum Gesetz gegen Wettbewerbsbeschränkungen (1958); Müller-Henneberg, Schwartz, Gesetz gegen Wettbewerbsbeschränkungen, Kommentar (1958); Rasch, Wettbewerbsbeschränkungen, Kartell- und Monopolrecht (1957).

65 Restraints of Competition Law § 9 (2). In only one case—that of cartel agreements
valid upon expiration of three months from such filing, unless the office raises objections for specified reasons within such period. The Cartel Office subsequently may declare them to be invalid if such action is necessary to suppress abuses of market power gained through the statutory privilege. Conversely, in the cases of permissive dispensation by the Executive, the cartel agreements and resolutions subject thereto need prior authorization to be valid and are rendered invalid by the expiration of the period of authorization without renewal or by revocation of the authorization based on the grounds specified by the Law.

(b) Statutory exceptions. The statutory exceptions encompass five categories of cartel agreements or resolutions which are deemed to exert no, or only relatively minor, restraints on competition in domestic markets. These five classes are agreements and resolutions which

1) serve merely for the protection and promotion of exports without regulation of competition in domestic markets (pure export cartels); or

2) provide for uniform methods of stating specifications for goods and services or of itemizing prices (without price fixing) in industries where prior inspection is not feasible (quotation cartels); or

3) provide for uniform application of the general terms of doing business, delivery, or payment, including discounts (conditions cartels); or

4) regulate rebates which represent genuine compensation for services rendered and do not entail discrimination between different levels of distribution or between customers on the same level who, in taking delivery, perform the same services to their suppliers (rebate cartels); or

or decisions regulating uniform methods of stating specifications for goods and services or of itemizing prices without fixing prices or price components—does the Law refrain from making filing a condition for their validity, although prompt filing is imposed as duty upon the parties. Id. § 9(2).

60 Restraints of Competition Law §§ 2(3), 3(3) and 5(1), governing the validity of conditions cartels, rebate cartels and rationalization cartels.

61 Id. §§ 12; see also § 3(4).

62 Id. § 11(1).

63 Id. § 11(5).

64 Id. § 6(1).

65 Id. § 5(4).

66 Id. § 2(1).

67 Id. § 3(1).
5) regulate uniform application of standards or types (standardization cartels).\textsuperscript{74}

In the case of the rebate cartels, the Cartel Office may base its initial objection on the ground that it is evident that the agreement or resolution in question has harmful effects on the course of production or trade or on supplying consumers adequately or, in particular, that it renders the entry into a trade on a given level of distribution more difficult. Moreover, initial objection or subsequent intervention may be rested on the fact that market participants have shown that they are subject to discrimination by reason of the agreement or resolution in question.\textsuperscript{75}

(c) Categories of cartel agreements and resolutions. In addition, the Law enumerates six categories of cartel agreements and resolutions, the validity of which depends on previous executive authorization (authorization cartels). These dispensations are provided for on the theory that the cartel agreements or decisions of the particular type, though normally exerting undue restraint on competition, may be desirable in view of special conditions or emergencies in the particular industry or in the interest of the national economy as a whole.

These cartel agreements and resolutions for which authorization may be obtained cover the cases in which the particular action

1) is taken, in response to a decline in sales based on a permanent change in demand, by enterprises engaged in the production, manufacture, or processing of goods, provided that the agreement or resolution is needed for an orderly adjustment of the productive capacity to market conditions and that the regulation takes the national economy as a whole and the general welfare into account (structural crises cartels);\textsuperscript{76}

or

2) constitutes regulation which serves to rationalize economic processes and is apt substantially to enhance the productivity or profitability of the enterprises involved in technological, administrative, or organizational respects, and thus to improve their capacity to satisfy demand, provided that the advantages of the rationalization are reasonably propor-

\textsuperscript{74} Id. § 5(1).

\textsuperscript{75} Id. §§ 3(3) and 3(4).

\textsuperscript{76} Id. § 4.
tionate to the restraint of competition effected thereby (simple rationalization cartels); \(^{77}\) or

3) effectuates rationalization in conjunction with price fixing or the establishment of common agencies for procurement or marketing (syndicates), provided that the goal of rationalization cannot be achieved in any other way and that the rationalization is desirable in the public interest (rationalization cartels of higher order); \(^{78}\) or

4) serves to protect and promote exports in cases in which regulation affects commerce in goods and services in domestic markets, provided, and to the extent, that it is required to safeguard the intended regulation of competition in foreign markets (export cartels affecting domestic commerce); \(^{79}\) or

5) regulates solely imports into the area governed by the Law and is confined to situations where the German consumers of the imports are confronted with no or only insubstantial competition (import cartels); \(^{80}\) or

6) does not fall within the aforementioned categories, but where a restraint of competition is necessary for exceptional reasons of the paramount interest to the national economy and the general welfare or where there is an immediate danger threatening the survival of the major part of the enterprises in a branch of industry, provided that there is no, or no timely, possibility that other legislative or economic measures can be taken and that the restraint of competition is apt to avert the danger (emergency cartels). \(^{81}\)

In the first five of these classes, the Cartel Office is entrusted with the grant or denial of applications for authorization. The emergency powers which become operative in the sixth category, however, are reserved to the Federal Minister of Economics. The Law surrounds the exercise of the discretion of the Cartel Office or the Minister of Economics, in the disposition of applications for grants or renewals of authorizations, with a number of additional special formal or substantive safeguards other than the conditions

\(^{77}\) Id. § 5(2). Cartels providing for rationalization through specialization may be authorized only if the specialization does not foreclose competition in the market.

\(^{78}\) Id. § 5(3).

\(^{79}\) Id. § 6(2).

\(^{80}\) Id. § 7.

\(^{81}\) Id. §§ 8(1) and 8(2).
mentioned above. A detailed discussion of them seems, however, unnecessary.

Cartel agreements and resolutions which are valid either because they fall within one of the five statutory exceptions or because they belong to one of the six classes for which prior authorization by the Cartel Authority may be secured and they, in fact, have been so authorized, are, nevertheless, subject to a right of withdrawal for important cause by any of the participants. The Law specifies that an important cause is deemed to be present in particular if the freedom of economic action of the person asserting such right is either curtailed to an undue degree or impaired by discriminatory unequal treatment in comparison with that of the other participants.

(3) Vertical restrictive agreements. The second chapter of Part I of the Restraints of Competition Law deals with the validity of restrictive agreements of the vertical type, such as contract provisions for resale price maintenance, exclusive dealing, ties, and the like. In appraising the scope of this regulation, one must keep in mind at the outset that it is supplemented by a special chapter dealing with restrictive practices by an enterprise or enterprises possessing dominant market power.

(a) Treatment of agreements imposing resale prices or other contractual terms. The Law differentiates the treatment of agreements imposing resale prices or other contractual terms from that of other vertical restrictive stipulations. The basic rule with respect to the former is contained in Section 15 which provides:

Agreements between enterprises with respect to goods or occupational services which apply to domestic markets are void to the extent that they restrict one of the parties thereto in its freedom to determine prices or other terms in the contracts which such party may conclude with third parties in regard to the goods so supplied, other goods or occupational services.

This general proscription of vertical price fixing is, however, rendered inapplicable to the most common cases of resale price

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82 Id. §§ 2(2), 3(2), 3(3)1-3, 5(3) last sentence, 6(2) last sentence, 7(2), 8(3), 11, 12.
83 Id. § 13(1).
84 Ibid.
85 Id. §§ 15-21.
86 Id. §§ 22-24.
87 Id. § 15.
maintenance agreements covering trademarked or brand goods (as
defined by the Law) or products of publishing houses. In defining the
exact scope of this exception with respect to trademarked or
brand goods the Law requires that they be subject to price competi-
tion by similar goods of other producers or dealers. Furthermore, the exception applies only to the goods or publications which are supplied by the enterprise imposing resale price maintenance, but it extends to arrangements with legal or economic force and permits stipulations for the imposition of the same obligation upon subsequent customers down to the resale to the ultimate consumer. The concept of trademarked or brand goods is broadly defined and includes all products which the enterprise imposing resale maintenance guarantees to supply in identical or improved quality and which carry on their body, wrapping, or container a mark identifying their origin (whether consisting in a designation of the firm, a word, or picture).

The resale price maintenance contracts for trademarked goods are not valid unless filed with the Cartel Office accompanied by complete information concerning all imposed resale prices or margins of profit. The Cartel Office may institute proceedings to de-
clare a price-fixing agreement inoperative, either with immediate ef-
fect or beginning at a specified future date, and to prohibit execution of a new price-fixing stipulation of similar content, if: the condi-
tions for its validity are not, or no longer, fulfilled; its enforcement engenders abuse; or the price-fixing agreement by itself or in com-
bination with other restraints of competition is apt to increase the price for the protected goods, prevent a reduction in their price, or curtail their production or distribution in a manner not justified by general economic conditions. As the wording of this provision shows, the authority of the Cartel Office to invalidate price-fixing agreements is neither exclusive of, nor coextensive with, the power of ordinary courts of justice to hold agreements of that type void or unenforceable in controversies between particular parties because the conditions of their validity were not met at the time they were concluded or subsequently ceased to be fulfilled.

88 Id. § 16(1), 1 and 2.
89 Id. § 16(2).
90 Id. § 16(4).
91 Id. § 17(1).
92 LANGEN, op. cit. supra note 64, § 17, 2; Schwartz in MÜLLER-HENNEBERG, SCHWARTZ, op. cit. supra note 64, § 17, 20.
(b) Exclusive dealing; tie-ins; use of resale restrictions. In addition, the Law specifies four other types of vertical restrictive agreements which, while not proscribed or rendered void on principle, may nevertheless call for an intervention by the Cartel Office whenever they have certain specified undesirable effects.\(^93\) The four categories so envisaged are contracts between enterprises with respect to goods or occupational services which impose upon one of the parties thereto:

1. restraints in the free use of the goods supplied, other goods or professional services, or
2. restraints in the procurement of other goods or services from third parties or in the supply thereof to third parties, or
3. restraints in the resale of the goods supplied to third parties, or
4. obligations to receive goods or occupational services which are not connected therewith by nature or commercial custom.

The Cartel Office may intervene in these types of agreements and declare the stipulations of the indicated content to be inoperative, either with immediate effect or to begin at a specified future date, to the extent that such restrictions limit unfairly the freedom of economic action of a party to the contract or of a third enterprise and that their scope impairs substantially the competition in the market for these or other goods or occupational services.

(c) Restrictions attached to the transfer or licensing of patents, other rights of industrial property or technological know-how. The Law contains special regulations applicable to restrictions placed on the assignee or licensee of patents, utility models, or other rights of industrial property as well as to restrictions imposed in connection with the sale or lease of non-patented inventions, manufacturing processes, blueprints, and similar technological know-how.\(^94\)

The basic rule is contained in Section 20(1) which provides:

Contracts respecting the acquisition or the use of patents, utility models, or exclusive rights in brands are invalid to the extent that they impose upon the assignee or licensee any restrictions in his dealings which exceed the scope of

\(^93\) Restraints of Competition Law §18(1) and (2).
\(^94\) Id. §§ 20, 21.
the statutory privilege; restrictions concerning the mode, extent, quantity, territory or period of the exercise of the privilege do not exceed the scope thereof.

But this principle is qualified by a catalogue of five types of restrictions which do not come within the purview of Section 20(1), if they do not exceed the duration of the statutory industrial property right which is the object of the assignment or license. These restrictions are:

1. limitations of the assignee or licensee, in so far and as long as they are justified by an interest of the assignor or licensor in a technically unobjectionable exploitation of the object of the statutory privilege;
2. obligations of the assignee or licensee with respect to the price charged for the protected article;
3. obligations of the assignee or licensee to exchange experiences or to license improvement or new use patents, provided that there are corresponding obligations of the patentee or licensor;
4. obligations of the assignee or licensee not to contest the validity of the statutory right involved;
5. obligations of the assignee or licensee to the extent that they relate to the regulation of competition in non-domestic markets.

In addition, the Cartel Office may authorize the conclusion of agreements, otherwise invalid under Section 20(1), if neither the freedom of economic action of the assignee or licensee or of other enterprises is unfairly restricted nor the extent of the restrictions substantially impairs competition. Cases of this type are, for example, assignments or licenses of process patents coupled with the obligation of the assignee or licensee to procure the necessary materials from the assignor or licensor.

The statute provides expressly that the regulations regarding cartels remain applicable, evidently in order to provide for cases where the restrictive agreements pertaining to patents and similar rights possess cartel elements, that is, horizontal features.

The same rules apply with respect to agreements concerning the

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95 Id. § 20(2).
96 Id. § 20(3).
98 Restraints of Competition Law § 20(4).
sale or lease of non-patented inventions, manufacturing processes, blueprints and technological know-how.\textsuperscript{99}

(4) Abuse of dominant market power. The Law contains a special regulation concerning the situation where a single enterprise or a group of enterprises enjoys a position of dominance in the market.\textsuperscript{100} In such a case the Cartel Office is given the power to intervene in order to curb two types of anticompetitive practices if they amount to an abuse of dominant market power.

The two types of practices which may, under proper regard for all circumstances, be deemed to constitute an abuse of market dominance are:

1) the demand or offer of prices or the insistence on terms and conditions in the conclusion of contracts for goods or service;

2) the condition in the conclusion of contracts for goods and services that the other party take other goods and services unrelated by nature or commercial custom.\textsuperscript{101}

The possible intervention by the Cartel Office in the case of such abuse consists in a prohibition of the objectionable practices and an invalidation of the respective contractual clauses.\textsuperscript{102}

The Law ascribes dominant market power to a single enterprise insofar as it is subject to no, or no substantial, competition in regard to certain goods or services. Two, or several, enterprises are deemed to dominate the market insofar as, for factual reasons, there exists no substantial competition between them with respect to a certain category of goods or occupational services or in particular markets and insofar as they, cumulatively, are subject to no, or no substantial, competition with respect to these items.\textsuperscript{103} Where the several enterprises form a combine, the Cartel Office may take action against each individual constituent.

In addition,\textsuperscript{104} the statute imposes a duty to notify the Cartel Office in cases of merger, acquisition of the assets or production facilities of other enterprises, management contracts, or acquisition of controlling stock in other enterprises if the resulting combination or one of the participating enterprises prior to the combination is in control of a share of the market in certain goods or services totalling or exceeding 20%.

\textsuperscript{99} Id. § 21.
\textsuperscript{100} Id. § 22.
\textsuperscript{101} Id. § 22(3).
\textsuperscript{102} Id. § 22(4).
\textsuperscript{103} Id. §§ 23(1) and (2).
\textsuperscript{104} Id. § 23.
If the Cartel Office, upon such notification, thinks that the combination results in, or increases, dominant market power, it may initiate the necessary inquiries. The original government draft had subjected the combination of enterprises under particular conditions to a prior authorization by the Cartel Office. In the course of the parliamentary proceedings this requirement was reduced to a mere duty of notification.

(5) Other restrictive or discriminatory practices. The restrictive practices envisaged by the Law in Sections 1–8 (cartel agreements and resolutions) and in Sections 15–21 (vertical agreements) are of a direct and contractual or formal character. Since objectionable restrictions of competition may also result from indirect and non-contractual or non-formalized action, whether concerted or individual, the statute supplements the aforementioned provisions by a proscription of various additional restrictive practices not falling within the categories outlined so far, especially with a view to shielding outsiders. Moreover since cartels and enterprises with dominant or privileged status in the market are in a particularly sensitive position, the Law subjects their business transactions to special standards of fair and impartial dealing.

The final formulation of the Sections of this Chapter was the product of considerable parliamentary change in the original government bill, and thus the resulting organization of the material into four categories of prohibitions appears somewhat haphazard.

1) Section 25 (1) prohibits resort to pressures or incentives for the purpose of inducing evasions of the statutory limitations.

"Enterprises and association of enterprises, may neither threaten or inflict damages nor promise or grant advantages to other enterprises for the purpose of inducing them to a conduct which may not be the subject of a contractual undertaking, either because of a statutory mandate or an order issued pursuant to this Act."

2) Section 25(2) proscribes coercion of outsiders which compels them to participate in permitted, though restrictive, practices.

"Enterprises or associations of enterprises may not coerce other enterprises to:
1. accede to a cartel agreement, trade association, or cartel resolution within the meaning of §§ 2 to 8, 29 . . . of this Act;

106 Id. § 24.
107 See the observations by LANGEN, op. cit. supra note 64, in his prefatory comments in ch. 4.
2. form a combination within the meaning of this Act with another enterprise;
3. pursue parallel conduct in the market for the purpose of restricting competition."

Accordingly, while conscious parallelism as such is not within the statutory bans, coercion thereto is taboo.

3) Section 26 (1) is directed against secondary boycotts, providing that

"... enterprises and association of enterprises may not, in order to harm particular competitors, induce other enterprises or associations of enterprises to impose boycotts with respect to supply or procurement."

4) Section 26 (2), finally, rounds out the list of "may-nots" by a mandate to the effect that

"... enterprises with dominant market power, cartels within the meaning of §§ 1 to 8, ... [listing certain special Sections of the Act] and enterprises which engage in resale price maintenance within the meaning of § 16 [and certain special Sections] may not unfairly hinder other enterprises, whether directly or indirectly in their business activities, usually open to similar enterprises, or discriminate, whether directly or indirectly between similar enterprises without adequate objective reasons."

This catalogue of prohibitions is followed by a concluding Section 107 which empowers the Cartel Office to order the admission of an enterprise into a trade association where the exclusion amounts to an unfair discrimination entailing competition disadvantages.

(6) Codes of fair competition. The Law authorizes trade associations to establish codes of fair competition for the purpose of combatting unfairness in the economic contest between members of the same section of commerce or industry. 108 The Cartel Office keeps a separate register for such codes and exercises a certain degree of supervision over the legality of the provisions of the codes thus filed for registration. 109 Observance of such registered rules of competition may be the subject of stipulations among the interested parties without running afoul of the general invalidation of cartel agreements. 110

Whether or not a prohibition against, or insistence upon, par-

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107 Restraints of Competition Law § 27.
108 Id. §§ 28 (1) and (2).
109 Id. §§ 28 (3), and 31.
110 Id. §§ 29.
particular business practices amounts to a legitimate rule of fair competition may often depend upon a careful case-by-case determination.\textsuperscript{111}

(7) \textit{Exemptions and separate regulations for particular industries.} The Law contains exemptions of varying breadth as well as separate regulations for particular trades and industries.\textsuperscript{112} The sectors of the economy thus set apart cover transportation and communications,\textsuperscript{113} agriculture,\textsuperscript{114} central banking and industries operated as public monopolies,\textsuperscript{115} insurance,\textsuperscript{116} and public utilities in the field of energy and water supply.\textsuperscript{117}

The exemptions differ greatly as to their range. They may extend to all provisions of the Law\textsuperscript{118} or only to particular Sections thereof, especially to Sections 1 and 15-18,\textsuperscript{119} to Sections 1, 15, and 18,\textsuperscript{120} or solely Sections 1 and 15.\textsuperscript{121} The details are too complex to warrant discussion in this survey.

b. \textit{Administration; Sanctions and Liability for Infractions}

(1) \textit{Scope and distribution of administrative responsibilities.} As has been pointed out, the basic invalidations by the Law of cartel agreements and of vertical agreements that restrict a recipient of goods or services in his freedom to contract in regard thereto with third parties, are tempered by broad exceptions and possibilities of dispensation, coupled with a prohibition against abuses. Similarly, enterprises with dominant market power are subject to certain standards and control against abuses.

As a result the Law had to establish both an elaborate administrative machinery and a number of formal requirements (such as reduction of agreements to writing, filing thereof with the Cartel Authority, and, in appropriate cases, entry in a special register) for the purpose of operating or facilitating the policing of the system.

Apart from the authorization of emergency cartels, which is reserved to the Federal Minister of Economics,\textsuperscript{122} the administrative

\begin{footnotesize}
\begin{enumerate}
\item Langen, \textit{op. cit. supra} note 64, comments § 28, I, 2.
\item Restraints of Competition Law pt. V.
\item Id. § 99.
\item Id. § 100.
\item Id. § 101.
\item Id. § 102.
\item Id. § 103.
\item Id. §§ 99(1) and 101.
\item Id. § 99(2) (high sea, coastal, and river navigation and port facilities).
\item Id. §§ 100, 103 (agriculture and public utilities).
\item Id. § 102 (insurance and financing institutions).
\item See text to note 81 supra.
\end{enumerate}
\end{footnotesize}
responsibilities for the proper application of the law are entrusted to the "Cartel Authority." Because of the political structure of the Federal Republic of Germany, the exercise of the powers and functions of the Cartel Authority are distributed among a new federal administrative agency, the Federal Cartel Office, and the top authorities for economic matters in the states constituting West Germany.

The Federal Cartel Office has exclusive jurisdiction over crises cartels, export and import cartels, resale price maintenance agreements, enterprises with dominant market power, mergers and assimilated transactions, as well as matters involving the federal railway and postal services.\(^{123}\) The Federal Cartel Office likewise has jurisdiction where the effects of the conduct influencing the market, of the restraints of competition or discriminations, or of the rules of competition extend beyond the boundaries of an individual state; otherwise the latter matters are left to the state authorities.\(^{124}\)

The Law gives the Cartel Authority broad investigatory powers\(^{125}\) and establishes elaborate procedural rules for administrative proceedings,\(^{126}\) administrative rehearings\(^{127}\) and judicial review of administrative decisions.\(^{128}\)

(2) **Penalties and tort liability for infractions.** Since the Restraints of Competition Law is essentially a regulatory and police measure, it is obvious that its effectiveness depends upon the availability of appropriate forms of compulsion. Accordingly, the Law provides for a system of fines to be imposed as penalty for the intentional disregard of the invalidity of certain types of agreements or resolutions, as specified in the various statutory provisions, or for the intentional violation of statutory prohibitions, as well as for the intentional or negligent disregard of the invalidity of an agreement or resolution flowing from an administrative declaration to that effect, and for the intentional or negligent violation of administrative orders or requirements.\(^{129}\) In addition, the Law penalizes intentional furnishing of false or incomplete information for the purpose of obtaining an authorization or avoiding an objection,\(^{130}\) and intentional inflicting of injuries on others because they

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\(^{123}\) Restraints of Competition Law §§ 44(1), (a), (b), (c) and (e).

\(^{124}\) Id. § 44, (1), (a), (d) and 3.

\(^{125}\) Id. §§ 46 and 47.

\(^{126}\) Id. §§ 51–58.

\(^{127}\) Id. §§ 59–61.

\(^{128}\) Id. §§ 62–75.

\(^{129}\) Id. § 38(1), 1, 8, 2, 4, 5, and 6.

\(^{130}\) Id. § 38(1), 7.
have prompted orders by the Cartel Authority or exercised their right of withdrawal from a cartel.\textsuperscript{131}

This catalogue of types of conduct penalized by fine is supplemented by a most important clause relating to the imposition of fines as penalty for mere recommendations. Such sanction is incurred in two cases. One is the intentional participation, by means of recommendations, in the violations specified above; the other consists of recommendations which effectuate an evasion of statutory prohibitions or orders of the Cartel Authority by means of parallel conduct.\textsuperscript{132} The Law, however, excepts recommendations of prices or price calculations, made by associations of enterprises to their members, if these recommendations have the purpose of creating competitive conditions vis-à-vis big enterprises or big combines and if such recommendations are expressly designated as non-binding and are not enforced by social, economic, or other pressure.\textsuperscript{133}

Undoubtedly some of the most important, but also most perplexing, problems in the administration of the new law will relate to the bearing of its provisions on the tort liability of enterprises engaging in restrictive practices.\textsuperscript{134} Generally speaking, this question will be governed by the interaction between the general principles of tort liability, established by the German Civil Code, and the various provisions relating to the invalidity or proscription of certain practices by the Restraints of Competition Law. The Law contains only one specific Section in this connection,\textsuperscript{135} which in part duplicates and in part enlarges an analogous section of the Civil Code.

The German Civil Code establishes three broad categories of conduct which entail liability in tort:

1) intentional or negligent and illegal inflicting of injury to the life, health, liberty, property or other absolute right of another;\textsuperscript{136}

\textsuperscript{131} Id. § 38(1), 9.
\textsuperscript{132} Id. § 38(2), first and second sentences.
\textsuperscript{133} Id. § 38(2), third sentence.
\textsuperscript{134} See in this connection especially: Gleiss & Kracht, Missbrauchsbestimmungen des GWB als Schutzgesetz, 12 NEUE JURISTISCHE WOCHENSCHRIFT [hereinafter cited as NJW] 971 (1959); Spengler, Zivilrechtliche Auswirkungen des Kartellgesetzes, 10 WIRTSCHAFT UND WETTBEWERB [hereinafter cited as WuW] 410, at 417 (1960). Schramm & Klaka, Das Deliktrecht im Gesetz gegen Wettbewerbsbeschränkungen, 4 WETTBEWERB IN RECHT UND PRAXIS 75 (1958); Benisch in MÜLLER-HENNEBERG, SCHWARTZ, op. cit. supra note 64, § 35(2)-(5).
\textsuperscript{135} Restraints of Competition Law § 35.
\textsuperscript{136} BÜRGERLICHES GESETZBUCH § 823, para. 1.
2) intentional or negligent violation of a statute, enacted for the purpose of protecting another; 137
3) other intentional and unethical inflicting of injury on another. 138

The Restraints of Competition Law duplicates and enlarges the second of these categories by imposing tort liability upon any contravention of any provision of the Law or of any order issued by the Cartel Authority or a court of review pursuant to the Law, insofar as such provision or order has the purpose of protecting another, and by providing for the recovery of exemplary damages in case of disobedience of a mandate ordering admission of the plaintiff into a trade association. 139

The question as to which provisions of the Law or orders by the Cartel Office or a court of review will be deemed to have the purpose of protecting another in the position of the plaintiff is liable to involve difficult policy considerations and cannot be answered with certainty at this stage. At any rate, the possibility of liability under the other two broad tort categories specified in the Code must be kept in mind, especially in view of the fact that an established and operating enterprise is recognized as a basis for an absolute right within the meaning of the Civil Code, Section 823 I, which is protected against intentional or negligent illegal invasion. However, the problem as to which restrictive practices may be deemed to be "illegal" and not merely "invalid" conceivably will have to be answered by applying the same tests that determine the protective purpose of the statutory provision or order invalidating them. A conclusive answer must likewise await further decisional clarification. Finally, it must be noted that the Law Against Unfair Competition of June 9, 1909, may furnish additional grounds for tort liability.

c. Initial Judicial and Administrative Experience

(1) Categories of administrative operations. It goes without saying that an act as broad and complex as the new Restraints of Competition Law is bound to produce countless practical uncertainties and controversies 140 and that its actual scope and

137 *Id.* § 823, para. 2.
138 *Id.* § 826.
139 Restraints of Competition Law § 35.
140 A complete bibliography of the ceaseless flood of articles and comments published
significance will depend on gradual administrative, judicial, and doctrinal classification.

A great deal about the initial experiences with the new Law can be gleaned from the first two annual reports of the Federal Cartel Office which were published in 1959 and 1960. As could be expected, the principal activities of the Federal Cartel Office, as well as of the state cartel authorities, consisted in the processing and, where appropriate, scrutiny of the vast number of notifications and registration statements submitted pursuant to the various mandates of the Law, in the examination of applications for authorization, as required for various categories of cartels or patent licenses containing restrictive clauses and assimilated stipulations, and in the investigation of the notifications relative to mergers and assimilated forms of economic concentration. Thus the Federal Cartel Office, during the first two years of its activities, received 144 notifications, or applications for authorization, of cartel agreements permitted by the Law under the conditions specified in Sections 2–7, and registration statements of 203,109 vertical price-fixing stipulations communicated by 1,056 firms. Ten additional notifications, or applications for authorization, of cartel agreements were submitted to state authorities, and the Federal Minister of Economics received three petitions for authorization under the general interest clauses of Section 8.

Of course, a substantial portion of the work load of the cartel in the various learned or trade journals is practically impossible and hardly of interest to the non-German reader.


142 Report for 1959, supra note 141, at 96. The breakdown shows that 36 of these 144 notifications or applications were petitions for authorization of rationalization cartels with price agreements or common sales or purchase agencies under § 5(3), while another 48 were filings of export cartels without regulation of competition within Germany pursuant to § 6(1). The remaining 70 items involved all of the other seven allowed categories of cartels.

143 Id. at 114. In addition, the Federal Cartel Office received 94 applications for authorization of patent and trade secret licenses containing restrictive stipulations, while 158 further licenses or assimilated agreements were submitted to it for examination. Id. at 43 and 118.

144 Id. at 97.

145 Report for 1958, supra note 141, at 2. One of these petitions involved the short-lived Coal-Fuel Oil Cartel which, inter alia, aimed at a restriction of the competition between oil and coal as industrial fuel, in order to protect the German coal industry against further increase of its existing dangerous overproduction. The petition was granted on February 17, 1959.
THE PROTECTION OF COMPETITION

authorities consisted also in proceedings for the suppression of suspected violations of the statutory prohibitions or of suspected abuses. During the first two years the Law was in effect the Federal Cartel Office initiated 859 investigations of suspected violations, while state authorities instituted 824 such proceedings. In each instance by far the greatest number of cases concerned violations of the general ban against horizontal agreements in restraint of trade. In addition the Federal Cartel Office commenced 323 investigations of suspected abuses, primarily of vertical resale price maintenance agreements.

(2) Particular judicial or administrative decisions. In the course of the first two and one-half years of operation of the Law a number of important issues have come before the courts and administrative agencies. The High Court of Germany rendered its first leading opinion clarifying various basic aspects of the new Law in October 1958 in a suit between the two well-known rival manufacturers of eau de cologne, 4711 and Johann Maria Farina. The former distributed its products under a genuine system of retail price maintenance agreements, while the latter did not operate under such an arrangement but published retail prices for its products on its price lists, bills of sale, brand labels, and advertisements. 4711 considered this practice of its competitor as a violation of the Restraints of Competition Law and the Law Against Unfair Competition and brought an action for a permanent injunction. The Court held that plaintiff was entitled to the relief prayed for. In reaching this result the Court considered the interrelation of Sections 15, 16(1), 16(4), and 38 of the Law and came to the conclusion that the invalidity laid down by Section 15 in general terms for vertical restrictive agreements extended to resale price maintenance agreements for articles sold under trademarks or manufacturers' brands, and that the exception provided for in Section 16(1) applied only to agreements properly registered with the Federal Cartel Office in accordance with Section 16(4). It held further that "invalidity" implied at the same time a "prohibition." Consequently, Section 38(2), prohibiting recommendations

140 Report for 1959, at 125, 126.
141 Ibid. The Federal Cartel Office started 424, and the state authorities 546, proceedings against purported § 1 violations.
142 Id. at 122. Abuse proceedings under § 17 totaled 189.
143a For a good survey see Klaue, Zwei Jahre Rechtsprechung zum Gesetz gegen Wettbewerbsbeschränkungen, 6 WuW 319 (1960).
which effectuate evasions of statutory prohibitions through uniform conduct, covered recommendations of retail prices, if they were publicized in such a way as to be generally observed by the merchants, as was found by the court below to be the case in the controversy before it. Having arrived at the determination that retail price recommendations of the type in question were *illegal*, the Court addressed itself to the further question of whether violations of the statutory mandate entitled a private party and, in particular, a competitor to relief. It held that the prohibitions of Sections 15, 16, and 38 (2) amounted to a law aiming at the protection of others within the meaning of Restraints of Competition Law, Section 35 and that therefore an intentional or negligent contravention constituted a private tort for which a competitor or other injured party could seek redress by way of damages or injunction.  

Another important decision by the High Court involving the Restraints of Competition Law likewise dwelt on the private law ramifications of the Law. It arose out of a discriminatory refusal to an enterprise of membership in a trade association. Such action constitutes an abuse against which the Cartel Authority may proceed upon petition of the aggrieved party by virtue of a special provision in the Law to that effect. The Court held that the Law, by providing an administrative remedy in the public interest, did not mean to deprive the aggrieved party of redress in the ordinary courts. It held further that the regulation of Section 27 amounted to a law aiming at the protection of the excluded enterprise, thus entitling the latter to mandatory relief in cases of intentional or negligent contravention, pursuant to Section 35 of the Restraints of Competition Law, and not merely in cases of intentional and unethical action, pursuant to Section 826 of the German Civil Code.

A series of pioneering judicial decisions settled basic procedural matters, such as the jurisdiction over, and the proper procedure in, private controversies involving application and interpretation of

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150 See text to notes 135 and 139 *supra*.
151 The court held further that retail price recommendations relating to merchandise sold under trade marks or brands are entitled to registration with the Federal Cartel Office if they are “factually” binding and that, upon such notification, the practice becomes permissible. The court also ruled, upon a cross-complaint for declaratory judgment by defendant, that the mere designation of the specified retail prices as “non-obligatory standard prices” does not remove the ban of the law.
153 Restraints of Competition Law § 27.
the new Law.\textsuperscript{154} Others dealt with important questions of substantive law, particularly with difficult aspects of resale price maintenance. Thus the Court of Appeals of Frankfurt rendered a lengthy opinion laying down the various conditions which must be met by a manufacturer's retail price maintenance scheme in order to be enforceable against a price-cutting non_signer,\textsuperscript{155} while the Court of Appeals of Munich decided whether a publisher who had established a resale price maintenance system was entitled to discontinue delivery to one of his dealers without running afoul of the statutory prohibition against discrimination by enterprises with dominant market power.\textsuperscript{156}

The Federal Cartel Office likewise passed on many fundamental questions, for example, on the authorizability of certain cartel types\textsuperscript{157} and the invalidation of exclusive-dealing agreements.\textsuperscript{158}

Of course, the comprehensiveness and novelty of the Law will call for a great deal of judicial or administrative clarification for a long time to come.\textsuperscript{159} Some of the decisions mentioned here will be discussed further in connection with the problem of the private law consequences under national legislation of violations of the articles in the E.E.C. Treaty proscribing specified anticompetitive practices by private enterprise.


\textsuperscript{157} See the decision of the appeals division authorizing the aggregate-volume rebate-cartel of the wallpaper industry, 9 WuW 455 (1959). For a discussion of current problems in the administration of the Law, see \textit{Bericht des Bundeskartellamtes über seine Tätigkeit im Jahre 1959}, Deutscher Bundestag, 3. Wahlperiode, Drucksache 1795 (1960).

\textsuperscript{158} See the decision of the appeals division authorizing the aggregate-volume rebate-cartel of the wallpaper industry, 9 WuW 756 (1959). The two annual reports of the Federal Cartel Office, \textit{supra} note 141, contain detailed discussions of the many problems of interpretation that the Office had to face in the administration of the Law.

\textsuperscript{159} For a recent important decision by the German Supreme Court involving the concept of a cartel agreement within the meaning of the Restraints of Competition Law § 1 see Judgment of BGH of Oct. 26, 1959, 31 BGHZ 105; for a most important decision clarifying when mere recommendations constitute prohibited circumventions of the Law see Judgment of BGH of Jan. 14, 1960, 13 NJW 723 (1960); 10 WuW 347 (1960).
B. France

I. Development of French Law Relative to Restrictive Business Practices Prior to the Legislation of 1953

a. Period Prior to 1945: The Regime of Article 419 of the Penal Code

(1) Development until World War II. French law governing restrictive business practices is the product of rather late growth. During the nineteenth and the first part of the twentieth century there existed only limited concern about the curbing of such activities and, at some periods between the two world wars, concentration and cartelization were even fostered officially, especially by administrative action. As a result, the French approach to the protection of competition, whether viewed from a factual or legal aspect, is quite complex and rather difficult to describe. For reasons which will become apparent, the evolution of French law can be divided into three major periods.

The traditional liberalistic tendencies of French decisional law and legal doctrine until comparatively recently made the courts quite hesitant to interfere with business practices. A statute of March 2–17, 1791, had liquidated the medieval restrictions on the access to professional and commercial life and proclaimed freedom of trade. The Code Napoléon a little later elevated freedom of


161 For the text see [1789–1830] Sirey, Lois Ann. 92,
contract to a cardinal principle of the French legal system.162 Where these two liberties clashed, the courts were perplexed and floundering.

The chief statutory basis for resolving the dilemma was to be found in Article 419 of the Penal Code of 1810, creating the crime commonly designated as distortion of the price level (*altération des prix*). Otherwise some isolated provisions and general principles developed by the courts had to serve the purpose.

Until its revision in 1926, Article 419 of the Penal Code proscribed and penalized "the raising or depressing of the price level for victuals, merchandise or public securities above or below that which would have flown from natural and untrammeled competition" through two major types of conduct: either (a) "intentional dissemination in the public of false or calumnious facts, the making of offers topping the price asked for by the sellers themselves, or any sort of fraudulent ways or means," or (b) "by combination or coalition among the principal holders of the same type of merchandise or victual, aiming at not selling it or not selling it except at a specified price." In applying this section, especially in respect to combinations, the courts vacillated from period to period, reflecting the changing moods of the times.163 At first the courts favored a broad construction. Thus the statutory terms "victuals" and "merchandise" were held to include transportation,164 and the actual raising or lowering of the price level was not considered critical if the purpose of the combination was the attainment of such results.165 The passage of the law of 1884, establishing full freedom of association,166 was deemed to be a legislative recogni-

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162 CODE CIVIL art. 1134.
163 For a detailed analysis see Moreau in Moreau et Mérigot, op. cit. supra note 160, at 38.
165 As early as 1850 the Supreme Court of France declared in a case involving an agreement between local merchants and ship captains stipulating for discriminatory freight charges against outsiders "that in a commercial matter it is not necessary that the decision which finds the perpetration of a coalition declare expressly that the result of the combination was a raising or lowering of the price level of goods so long as the whole of the decision is to that effect," Gombaud c. Petit, [1850]. D. I, 212.
166 [1884] D. IV, 129. Arts. 2 & 3 thereof provided: "The trade unions or associations, even of more than twenty persons exercising the same profession, similar trades or connected professions concurring in the manufacture of specified products, may be established freely without governmental authorization." "The trade unions have as their exclusive object the study and the protection of economic, industrial, commercial and agricultural interests."
tion of the principle that trade associations and combinations for economic purposes were not illegal per se and resulted in, or at least strengthened, a doctrinal and decisional trend of differentiating between "good" and "bad" cartels. Combinations of manufacturers were found not to be illicit even where they engaged in price-fixing, division of markets, or restriction of production, and the French Supreme Court went along in sanctioning such holdings. As a consequence the provisions of Article 419 of the Penal Code appeared more and more an anachronism, and a revision of the law relative to status of combinations was felt to be in order. In 1926 an amendment became reality, and the pertinent section was overhauled. In its new and current form, Article 419 penalized the effectuation of, or the attempt to effectuate, an artificial rise or fall of the price level for victuals, merchandise, or public or private securities (a) by specified or other fraudulent maneuvers or (b) by individual or concerted action on the market with the purpose of obtaining a profit which would not result from the natural play of demand and supply. Actually, the new law, apart from closing certain gaps relative to attempts and individual action, engendered little change. Combinations were held illegal only in infrequent and comparatively minor cases of local character which, as Professor Reuter has so aptly put it, smacked of a setting borrowed from a Balzac novel.

Illustrative of and analyzing this trend are especially the long annotation by Professor Percou to a decision of May 3, 1911 by the French Supreme Court in Gaillard et autres c. La Renaissance, [1912] D. I, 33, 39, and the opinion by Justice Michel-Jaffard in the same case, id. at 40. This case involved a combination of plate glass cutters and polishers providing for cooperation in production and standardization of pricing practices. See, for instance, the decision of the Appellate Court of Nancy of 1902 in the matter of the Comptoir Métallurgique de Longwy, involving a combination of the principal foundries in Lorraine providing for common purchases, production quotas, fixed sales prices, etc., discussed by Moreau in Moreau et Merigot, op. cit. supra note 160, at 41, and by Plaisant and Lassier, op. cit. supra note 160, at 9 and 13. E.g., in the case of Gaillard et autres c. La Renaissance, supra note 167. For the legislative history see Moreau in Moreau et Merigot, op. cit. supra note 160, at 42.

"Anyone (1) who by means of false or calumnious facts disseminated intentionally in the public, or by offers thrown on the market with the purpose of disturbing the quotations, or by offers topping the prices demanded by the sellers themselves or by whatever other fraudulent ways and means; or (2) who by perpetrating or attempting to perpetrate an action on the market, whether individually or in concert or coalition and with the purpose of securing a profit not resulting from the natural play of supply and demand, directly or through a middleman effectuates, or attempts to effectuate, an artificial rise or fall of the price for victuals, wares, or public or private securities, shall be punished with imprisonment ... or a fine. ..."

The economic crisis of the thirties and the impact of World War II resulted in a further strengthening of the status and role of the cartels.

In France, as in most other countries, there was a widespread belief that the great depression was caused by over-production and consequent disorganization of the market and that the cure was to be found in a strict self-regulation by the various branches of industry and commerce. As a result, the government between 1935 and 1938 proceeded to foster or even require cartellization in a number of industries and trades and obtained power to do so in a number of other instances. The sugar industry, shoe manufacturing, high sea fisheries, the potassium industry, and the export trade are perhaps the most important instances of such action.

(2) World War II. World War II brought a complete transition to a controlled economy in the form of the authoritarian corporative state which lasted until the establishment of the Fourth Republic and was formally terminated by a statute of

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173 See, e.g., Messageries Royales et Générales c. Guérin, supra note 164, holding that art. 419 permits the institution of a prosecution by the injured competitor coupled with the recovery of damages.

174 See, e.g., Gombaud c. Petit, supra note 165.

175 See, e.g., Gaillard et autres c. La Renaissance, supra note 167.

176 For a detailed discussion of this phase of French legislation see Moreau in Moreau et Mérigot, op. cit. supra note 160, at 63–75.


182 The two main legislative enactments establishing the framework for this action were the Law of July 11, 1938 regarding the organization of the nation in time of war, [1939] D. IV, 209 (especially arts. 46 and 49), and the Law of Aug. 16, 1940, regarding the provisional organization of industrial production, [1940] D. IV, 253; see Noyelle, L'économie dirigée selon la loi du 16 août 1940, 7 Collection Droit Social 4 (1941); Teitgen, L'organisation provisoire de la production industrielle et les principes du droit public français, 9 Collection Droit Social 2 (1941); Personnaz, Les Groupements d'importation et de répartition, 18 Collection Droit Social 23 (1943).
Yet, there still survived numerous semi-official trade associations which had been formed during the crises and wartimes and which appeared to be ripe for liquidation. This was accomplished by a decree of 1949 and a regulation of 1950 implementing it. However, this action failed to make a clean sweep. The government retained certain compulsory combinations and sub-combinations with official functions, especially in the steel industry and the coal import trade, and, as a consequence, found itself involved eventually in a protracted controversy with the High Authority of the European Coal and Steel Community.


For details see European Coal and Steel Community, High Authority, FOURTH GENERAL REPORT, 147 (1956); FIFTH GENERAL REPORT, 130, 157 (1957); SIXTH GENERAL REPORT II, 93 (1958). The facts, as gathered from these reports and inquiries by the author, are as follows: In November 1944 the shortage of both coal and foreign currency prompted the organization of a private non-profit corporation, styled A.T.I.C. (Association technique de l'importation charbonnière), which included as members the major importer-consumers and representatives of the professionally recognized importer-distributors, the latter being organized in two trade associations called, respectively, G.P.I.R. (Groupement professionnel des importeurs revendeurs) and G.P.I.R.T. (Groupement professionnel des importeurs revendeurs par voie terrestre). Subsequently, in 1944 and early in 1945, the Ministry of Industrial Production charged A.T.I.C. with certain public functions. Its activities were placed under the supervision of a government commissioner and the State was entitled to nominate the president of the corporation. The nationalization of the French coal mines by the Law of May 17, 1946 ([1946] D. IV, 230) entailed a further strengthening of the prerogatives and functions of A.T.I.C. Meanwhile the government also had undertaken a re-definition of the functions of the various cartel-agencies of the steel industry by regulation of June 28, 1947 (J.O. 6234). A corporation called C.P.S. (Comptoir français des produits sidérurgiques) was recognized as the joint sales agency of the steel industry, in charge of the allocation of orders, as well as the delivery terms. Another corporation called O.R.C.I.S. (Office de réparation des combustibles pour l'industrie sidérurgique) was placed in charge of the coal industry's procurement, having a monopoly with respect to all plants using at least 100 tons per month. A.T.I.C. henceforth was composed of the two importer-distributor organizations mentioned above, and a few of the largest consumers, such as O.R.C.I.S., the Electricité de France and the Société Nationale des Chemins de Fer. By Decree No. 57-46 of January 24, 1948 (J.O. 791) it was established that both the purchase and transport, until delivery to its destination, of foreign coal could not be effectuated except through an association of importers, the reciprocal obligation to be regulated by agreement between the government and the association; and in consequence of this provision A.T.I.C. on April 7, 1948 was placed in charge of these functions. In 1952 in order to conform with the French law of 1952 regarding price-fixing and in anticipation of the impending establishment of the European common market for steel, the steel industry changed the status of the C.P.S. into a trade association, with mainly statistical functions. The structure and functions of A.T.I.C. and its components, however, remained unchanged. As a result the High Authority felt that this setup in the French coal industry was inconsistent with the Treaty and entered into protracted negotiations with the French government. The French govern-

The recoil from the system of the corporative state launched by the Vichy government brought a return to the free market economy. Nevertheless, this change-over was slow, beset with difficulties, and by no means complete. Certain sectors of the French economy, especially in the fields of banking, insurance, production and distribution of electricity and gas, and coal mining were withdrawn partially or totally from private enterprise by means of the famous nationalization decrees of 1945 and 1946. In the remaining areas retention of price control remained unavoidable at first. The war, of course, had necessitated in France, as elsewhere, the introduction of rationing and price controls. The latter was accomplished by a series of price freezing decrees which culminated in the codification of October 21, 1940. The restoration of the Free French government was followed in 1945 by the enactment of a new comprehensive price control ordinance which reproduced a great portion of the provisions of the prior legislation.

The Ordinance of June 1945, which since its passage has been the object of a steady stream of amendments, defines and penalizes, in Article 36, a lengthy array of types of action labeled as “illicit pricing practices.” This catalogue is followed, in the subsequent article, by the enumeration of additional categories of prohibited conduct, lumped together under the common designation of “offenses assimilated to illicit pricing practices.” The latter list in-

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186 See Hamel and Lagarde, Traité de Droit Commercial 37, 887 (1954) and the Laws of Dec. 2, 1945 (banking), April 25, 1946 (insurance), April 8, 1946 (gas and electricity) and May 17, 1946 (coal mining).
187 Law for the modification, completion and consolidation of price legislation, [1940] Sirey, Lois, Décrets etc. 1654.
cludes a variety of restrictive or discriminatory business practices. In the course of time it has been considerably expanded and has come to constitute the actual core of French legislation safeguarding economic competition.180

Article 37 of the Ordinance of June 1945, as originally enacted, proscribed three categories of restrictive business practices, committable by dealers, manufacturers, or artisans:191 (a) the refusal to sell disposable stock-in-trade or to render feasible services; 192 (b) arbitrary discrimination in the hours for the sale of different kinds of merchandise or for the rendition of different types of services; 193 and (c) tie-in clauses or quantity restrictions.194 In addition, the ordinance specified a general crime of speculative hoarding, committable either by persons other than merchants, artisans, or growers with respect to any kind of commodity, or by mer-

180 Some of the infractions classified as “offenses assimilated to illicit pricing practices” cannot be considered as restrictive or discriminatory business practices, but merely as actions apt or calculated to thwart the maintenance and enforcement of price controls. Thus art. 37(1)(d) prohibits the failure to produce certain business records promptly upon request by the authorities. Conversely, some of the actions, proscribed under the rubric of illicit pricing practices may perhaps under certain circumstances assume a restrictive flavor, particularly the offense specified in art. 36(8) and styled as intervention of a new (i.e., noncustomary) middleman. For a discussion of the elements of this type of infraction see Souleau, Prix, ENCYCLOPÉDIE DALLOZ, Répertoire de Droit Criminel 675 at 680 (1954).

190 As Professor Reuter has pointed out and illustrated so lucidly, the French price control system originally was conceived as an autonomous arrangement designed to determine ceiling prices. Yet quickly and to a steadily increasing extent it had to concern itself with the mechanics of the competitive process and to combat and proscribe certain restrictive practices while, on the other hand, its administration on occasion necessitated resort to “dirigistic” and concentrative techniques, 16 DROIT SOCIAL I, 10 (1953).

191 Actually the three categories specified were incorporated from a prior decree of January 30, 1940, [1940] Sirey, Lois Ann. 1394.

192 Art. 37(1)(a): “To withhold products destined for sale by refusing to fill orders of purchasers within the limits of disposability or to refuse the filling of orders for the rendition of services within the limits of available means, so long as such orders do not possess an abnormal character and the sale of these products or the rendition of these services are not prohibited by special regulation or subject to conditions which are not met.”

193 Art. 37(1)(b): “Absent the applicability of any special regulation, to restrict the sale of certain products or the rendition of certain services to certain hours of the day, although the establishments or shops involved remain open for the sale of other products or the rendition of other services.”

194 Art. 37(1)(c): “Absent the applicability of any special regulation, to condition the sale of any product or the rendition of any service upon either the simultaneous purchase of other products or the purchase of a required quantity or the rendition of another service.” It may be mentioned in this connection that exclusive dealing contracts (as distinguished from tying clauses) were restricted in duration to a period of ten years by a statute of October 14, 1945, [1945] Sirey, Lois Ann. 1378, cf. Hémard, Les Contrats commerciaux in ESCARRA ET Rault, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT COMMERCIAL 66 (1953).
chants, artisans, or growers with respect to commodities or goods foreign to their authorized trade or occupation. 195

In 1946 196 this list of offenses assimilated to illicit pricing practices was lengthened by inclusion of a prohibition against individual as well as concerted or collective action aiming at the thwarting of price control through threats or effectuation of withdrawal from activity as a dealer, manufacturer, or artisan. In 1947 further additions to and modifications of illicit pricing practices and offenses assimilated thereto were made. Thus, tying of an exchange of goods or services, outside of personal or family needs, to the sale of products, the rendition of services, or the offer of such sale or rendition was declared to be a further illicit pricing practice. 197 Moreover, the definition of the offense of speculative hoarding of inventory as committable by growers, manufacturers, or merchants were identified and expanded and the catalogue of Article 37 was lengthened to conform to that change.

In 1952, at a time when the enactment of general cartel legislation was a much debated issue, the government decided to propose immediate and separate measures against concerted price-fixing. The result was the passage of Law No. 52-835 of July 18, 1952, which added to the catalogue of offenses assimilated to illicit pricing practices in Article 37 of the Ordinance of 1945 a new clause to that effect. It prohibited the imposition and maintenance of minimum prices by means of organized or collective action, except with respect to articles protected by a trademark or within the limits of governmental dispensation. The Law provided specifically that it should cease to be operative upon the enactment of a general law on the subject of business combinations. 198

In addition, the return of a relative abundance of goods necessitated the outlawing of a business practice which was deemed to permit large scale suppliers an undue advantage over their small competitors: the sale with gratuities. A statute of March 20, 1951, prohibited and penalized sales coupled with the distribution of gratuities of all sorts such as other merchandise, coupons, etc. 199

195 Ord. of June 30, 1945, arts. 37(2) and 45 in conjunction with arts. 41-44.
198 Law No. 52-835 of July 18, 1952 [1952] D. IV, 259. For a detailed discussion of its history and significance see Mazard, Prix imposés et prix d'entente, 16 Droit Social 129 (1953).
2. THE PERIOD SINCE 1953: CARTEL LEGISLATION OF 1953 AND ITS SEQUELS

The year 1953 brought a special and more general regulation of the activities of combinations of enterprises. It constituted the climax of and, in a real sense, the anticlimax to, the long series of attempts during the preceding thirty years to obtain comprehensive parliamentary action determining the legal status of cartels and similar combinations.\(^{200}\) The sharp conflict between the two chambers about the scope and content of such legislation early in 1953 prompted the Laniel government to forego reliance on parliamentary action and to resolve the impasse by using the emergency powers in the economic field conferred upon the government by Law No. 53–611 of July 11, 1953, for economic and financial rehabilitation.\(^{201}\) The result of this decision was the passage of Decree No. 53–704 of August 9, 1953, relative to the maintenance or re-establishment of free competition in industry and commerce.\(^{202}\) Formally this Decree added a new section entitled “Maintenance of free competition” to the Price Control Ordinance of 1945 (composed of Articles 59 bis, ter, and quater) and amended Article 37 thereof which (as discussed above) defines and punishes offenses assimilated to illegal pricing practices.

The new Article 59 bis prohibits, with qualifications subsequently specified, “all concerted actions, agreements, express or implied understandings, or combinations under whatever form or for whatever reasons, that have as objective or may have as result the restraint of the full exercise of competition by hindering the lowering of costs or sales prices or by facilitating an artificial rise of the prices.”

Article 59 ter, however, exempts two categories of cases from this prohibition: (a) those in which the otherwise prohibited action was taken in compliance with a statute or regulation, and (b)
those in which the actions could be justified as resulting in an improvement or extension of the markets for the production or as assuring the development of the economic process through rationalization and specialization.

Agreements and undertakings thus proscribed are declared void as a matter of private law, but the participants are barred from invoking the nullity against third parties. In addition, engaging, or inducing to engage, in prohibited combinations was specifically included in the catalogue of offenses assimilated to illicit pricing practices.

In order to assure the proper application and enforcement of the new regime, the Decree established a special administrative agency entitled Commission Technique des Ententes and composed of 12 members, of whom six were to be chosen from high-ranking judicial or administrative officers, four from business organizations, and two from the National Committee for Productivity. This body is given investigatory powers and charged with the responsibility of ascertaining whether or not violations of the terms of the ordinance have occurred and to initiate prosecution in case of such finding. Further implementation regarding the proceedings of and before the Commission was left to an administrative regulation which was issued on January 27, 1954. Moreover, by Circular of March 31, 1954, the Ministry of Economic Affairs issued a detailed commentary explaining and construing the cartel provisions of the Decree of 1953. This Circular, though not possessing the force of law, has had decisive effect on the subsequent practice.

In addition to the new discipline of cartel activities the Decree of 1953 amended some of the existing prohibitions of restrictive practices. Thus, the offense constituted by a refusal to deal was slightly re-phrased and enlarged by a new interdiction of habitual discriminatory price increases not justified by cost differentials. Similarly, the scope of the prohibition against the main-

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203 Art. 59 bis. paras. 2 and 3.
204 Art. 37(3), as revised.
205 Art. 59 quater.
207 Secrétariat d'Etat aux Affaires Economiques, Direction Générale des Prix et des Enquêtes Economiques, Circulaire No. 65, entitled Instruction portant commentaire des dispositions du décret no. 53-704 du 9 août 1953 relatives aux ententes professionnelles.
208 The new definition of the offense (art. 37(1)(a)) reads as follows: “To refuse the filling of orders by purchasers of products or for the rendition of services within the limits of feasibility, so long as these orders do not present an abnormal character,
tenance of minimum prices was expanded in several respects and the exceptions clarified.\textsuperscript{209} It should be noted, in particular, that now all vertical fixing of minimum prices, whether by an individual manufacturer employing the proscribed methods or by collective action, are condemned by the law. These two categories of infractions and their various elements formed the content of an elaborate administrative commentary, published by Circular of February 15, 1954.\textsuperscript{210}

In 1955, apart from a further addition (concerning formalities to be observed in sales on credit and installment sales) to the catalogue of offenses assimilated to illicit pricing practices,\textsuperscript{211} the government issued an important decree which again fostered and strengthened cartelization.\textsuperscript{212} By the terms of this enactment, government authorization could be obtained for the formation of enterprise combinations, with national or regional scope, for the purpose of plant rationalization or conversion. In addition, such combinations were enabled to obtain direct subsidies of various types, and contributions to them by the member enterprises were declared to be tax deductible.

In 1958 the Council of State held that the Laniel government had lacked the powers for the imposition of penal sanctions for engaging in restrictive combinations.\textsuperscript{213} As a result, the provisions of the Decree of 1953 had to be re-enacted. This step was taken

emanate from good faith offerers and the sale of the products or the rendition of services are not prohibited by law or administrative regulation, as well as to engage habitually in discriminatory price increases which are not justified by cost differentials." For a detailed comparison between the new and the old elements of the offense, see Barbry and Plaisant, \textit{Libre concurrence et ententes industrielles}, [1954] D. I, 67, 70.

\textsuperscript{209}The new definition of the offense (art. 37(4)) has the following form: "[It is unlawful] for any person to confer, maintain or impose a minimum character upon the price of products and rendition of services or upon the commercial mark-ups, either by means of tariffs or price lists or by virtue of combinations, whatever may be their nature or form.

"This subsection does not apply in cases where the products or services are the object of a dispensation granted by joint order of the Minister for Economic Affairs, the Minister of Commerce and the Minister having a particular interest in the matter. This dispensation, which in any event must be of limited duration, may be granted particularly in view of the novelty of the product or service; of the exclusiveness derived from a patent, a license of exploitation or the deposit of a utility model; or of an advertising campaign for the purpose of launching."

\textsuperscript{210}For the complete text see [1954] D. IV, 96.
by Decree No. 58-545 of June 24, 1958. While in most respects it was merely a textual reproduction of the prior decree, it made some minor changes in the composition and procedure of the Commission Technique des Ententes and inserted some additions in the definitions of the offenses constituted by a "refusal to deal" or by discriminatory price increases. The former crime is now committed only by a failure to fill normal and bona fide orders within the limits of feasibility and under conditions conforming with commercial usages. The latter infraction now consists in the habitual resort to discriminatory sales terms or price increases not justified by corresponding augmentations in the costs of procurement or service.

A decree of August 17, 1959 introduced some further modifications in the size and composition of the Commission Technique des Ententes, eliminated some unnecessary formalities in the procedure and, above all, provided for the publication of annual reports including the decisions of the Minister and the opinions of the Commission.

3. THE RESULTING CURRENT PICTURE

a. General Summary

From the foregoing discussion of the legislative developments in France, it can be concluded that at least one line of her economic and juristic policies has taken the course of protecting workable and working competition against restraints and impairments flowing from an untrammeled adherence to the principle of freedom of contract. Legislative enactments and decisional developments have combined in the suppression of certain agreements, whether of the horizontal or the vertical type, as restrictive, discriminatory, or abusive. On the other hand, it cannot be said that there exists a uniform and clear-cut policy against combinations in restraint of


215 The italicized words are the amendments.


217 The commission is now composed of fourteen members. Its president is a Councillor of State, a justice of the Court of Cassation, or a senior judge of the Court of Accounts; five members are selected from the members of the Council of State or the judiciary; six members are chosen by reason of their professional competency; and two members are elected because of their economic expertise.
trade or monopolization. To be sure, cartels and similar combinations have been subjected to an ever-increasing control and curbing of manifest abuses. But they still enjoy a wide area of toleration and legitimate action and, above that, there are many conditions or sectors of the economy in which the government considers combinations and their discipline as salutary and in the public interest with the attendant grant of privileges and subsidies. As a result, the situation is not free from paradoxes and dilemmas.

As a matter of positive law, the main statutory sources for the suppression of restrictive, discriminatory, or abusive business practices are to be found in Article 419 of the Penal Code and Articles 37 and 59 bis, ter and quater of the Price Control Ordinance of 1945, as amended. Conversely, legislative bases for the fostering or aiding of combinations are widely dispersed and quite obscure.

b. Currently Existing Prohibitions and Their Interrelation

(1) Article 419 of the Penal Code and the general principles of law. Article 419 of the Penal Code and the general principles of law based upon it, as well as upon the proclamation of the freedom of trade, still serve as the ultimate palliatives against unabashed and abusive restraints of competition and are invoked by the courts, with increased liberality, to vindicate the interests of consumers or obstinate competitors or to relieve unwilling participants.

Thus, the Court of Cassation not long ago upheld a judgment by the Court of Appeals of Paris which condemned the blacklisting of a perfume store owner by the trade association of perfume manufacturers on account of violations of his resale price maintenance obligations and awarded damages to the boycotted plaintiff. Likewise, the courts have held invalid and unenforceable agreements by bakeries prohibiting supplying of grocery stores and other retailers or home delivery services.

For a recent forceful advocacy of the necessity and advantages of cartels in manufacture or export trade by a government official charged with economic administration see Teissédre, Les groupements d'exportateurs: Effort d'adaptation au Marché Commun, 1958 REVUE DU MARCHÉ COMMUN 404 (No. 8); for a more resigned appraisal see Mérigot, Les données économiques du problème de la législation des ententes en France, in Moreau et Mérigot, Les ententes professionnelles devant la loi, op. cit. supra note 160, at 7.


However, the main sources of judicial or administrative action are now the detailed provisions codified in the Price Control Ordinance of 1945, as amended, especially in Articles 37(1)-(5) and 59 bis and ter.

(2) Particular restrictive practices prohibited by Ordinance No. 45-1483. As has been discussed in the previous section in connection with the development of French law relative to the protection of competition, Ordinance No. 45-1483, as currently applicable, contains in Article 37 a catalogue of specifically proscribed restrictive practices. This list has been lengthened and modified in details by a series of enactments passed since the original enactment in 1945, especially by Decree No. 53-705 for the preservation or re-establishment of free commercial and industrial competition and Decree No. 58-545, re-enacting it with slight modifications. The most important of these prohibitions are those against (a) discriminatory refusal to deal (Article 37(1)(a) first branch); (b) habitual discriminatory price increase (Article 37(1)(a) second branch); (c) discriminatory restriction of store hours with respect to particular commodities or services (Article 37(1)(b)); (d) tie-ins (Article 37(1)(c)); and (e) fixing of minimum resale prices (Article 37(4)).

The list shows that French law contains no special provision against exclusive dealing (requirement) contracts as such, apart...
from the above-mentioned statute of 1943, which restricts their duration to ten years. Accordingly, it has been held that an agreement whereby a retailer has obligated himself vis-à-vis a manufacturer to procure all his requirements of a particular class of merchandise from the latter is unaffected by the Decree of 1953 and enforceable. Conversely, the courts likewise have held that grants of exclusive territorial franchises for the sale of particular products, stipulated between a manufacturer and certain dealers, do not constitute an undue discriminatory refusal to sell within the meaning of the Decree of 1953 and that they are enforceable, by quasi-delictual action, even against third parties disregarding such arrangement. Where, however, the producer or wholesaler has not established a system of exclusive distributorships, his failure to supply customers without legitimate cause falls within the notion of a discriminatory refusal to sell, proscribed by the Decree of 1958. The interpretative Circular of February 15, 1954, mentioned above, is in accord with these results.

The aforementioned prohibition against the fixing of minimum resale prices or minimum mark-ups is very broad in its scope. It clearly applies to all types of vertical arrangements, whether by means of formal or informal, express or tacit, understandings or by means of price lists of schedules and regardless of whether they emanate from a single person or combination. The notion of minimum prices and mark-ups includes the cases where no variations are permitted. Exemptions may be granted by orders of the appropriate Ministers. The decree lists as proper instances de-

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228 See supra note 194.
233 Circular of February 15, 1954, Section II, A. Plaisant and Lassier, Les ententes industrielles sous forme de sociétés ou d'associations, JURIS-CLASSEUR DES SOCIÉTÉS, 178 at 9 (1955) suggest that art. 37(4) does not apply to resale price maintenance pursuant to a horizontal agreement. Even if this were correct, such agreements still would be prohibited by articles 59 bis and 37(3).
234 See the statements to that effect in section IIB of the Circular.
mands by producers of patented articles or products meeting special standards as to quality or dimensions.

(3) *The general prohibition against concerted restraints of trade.* It goes without saying that the most important portion of the French law for the protection of competition consists in the generalized prohibition of concerted practices in restraint of trade and the establishment of a special administrative machinery for the investigation of possible violations.\(^{235}\)

Article 59 *bis* of Decree No. 45-1483, as inserted by the Decree of 1953, proscribes in general terms "all concerted actions, agreements, express or tacit understandings, or coalitions, in whatever form and for whatever reason, which have as their object or may have as their effect a restraint of the free exercise of competition, by hindering the lowering of the costs or prices or by favoring an artificial rise of the prices." While the scope of this prohibition is very broad, nevertheless it must not be overlooked that, as Circular No. 65 of March 31, 1954,\(^{236}\) emphasizes, its terms outlaw concerted restraints of the full exercise of competition only if they are susceptible of a deleterious effect on the price level. Actions of this type are, in particular, voluntary limitation of production or sales, sanctions against exceeding sales quotas fixed in advance, division of primary materials or orders among the cartel members, and division of customers according to geographical criteria.\(^{237}\)

Moreover, the law provides for exemptions. The latter are based either on special legal authorizations or upon the ground that the measures in question have the effect of improving and extending the outlets for the production or of assuring the development of economic progress through rationalization and specialization.\(^{238}\)

In order to facilitate the ascertainment and proper appraisal of the rather complex economic factors which determine the applicability of the law, a special advisory administrative tribunal, called Commission Technique des Ententes, is established. It is in charge of the formal investigations which are initiated either upon the request of the Minister of Economic Affairs or upon the Commission's own motion.\(^{239}\) It holds hearings which, however, are not open to the pub-
lic.\textsuperscript{240} Its opinions which are advisory in nature must be based on stated findings and may contain recommendations concerning the practices under examination.\textsuperscript{241} Originally the opinions of the Commission and the decisions of the Minister were considered confidential and not published. Decree No. 59-1004 of August 17, 1959,\textsuperscript{242} however, provided for the publication of comprehensive annual reports by the Commission, including, by way of appendix, the individual ministerial decisions and the opinions of the Commission. The Decree specified that this mandate included the period of operation prior to its enactment. Accordingly, the Commission has now published three reports covering the period of the years 1954–1957.\textsuperscript{243} In addition, the Minister of Economic Affairs gave a detailed summary of the experience during the first three years in reply to a parliamentary inquiry addressed to him in January 1957.\textsuperscript{244}

According to the information imparted by these sources, the Commission, during the period from April 9, 1954 to January 31, 1958, made a final disposition in fourteen cases referred to it, of which thirteen terminated in formal opinions.\textsuperscript{245} In a number of these proceedings the Minister of Economic Affairs, acting upon the advice of the Commission, proposed to the parties the measures deemed necessary to re-establish a sufficient degree of competition. So far as it can be deduced from the reports, in every instance where apposite, his suggestions were accepted and carried out. As a result, all proceedings reported for the indicated period had terminated amicably.\textsuperscript{246}

In the course of these thirteen interventions, the Commission and the Minister had the opportunity to crystallize the principles guiding the application of the law, that is principles for the determination of whether a concerted action of the defined “anticompetitive”

\textsuperscript{240} Decree No. 54-97 of Jan. 27, 1954, art. 12, [1954], D. IV, 86.
\textsuperscript{241} Id. art. 15.
\textsuperscript{242} Supra note 216.
\textsuperscript{243} J.O., Documents Administratifs, Nos. 1, 2, and 11 (1960). The first two reports are discussed by Plaisant and Lassier, Les trois premières années d’une politique des ententes, [1960] D. I, 61.
\textsuperscript{244} Assemblée Nationale, 1957, No. 4987, J.O., Oct. 19, 1957, at 4369.
\textsuperscript{246} See Section III in the reply of the Minister of Economics to the parliamentary inquiry of 1957, supra note 244, and the two reports of the Commission, supra note 245.
character has been engaged in, and whether such conduct is exempt from the prohibition in view of the over-all beneficial effects.\textsuperscript{247} In developing the criteria for the solution of the latter issue the Commission developed the approach of preparing "a veritable economic balance sheet."\textsuperscript{248} Practices without ultimate advantages for the national economy and the consumers are condemned,\textsuperscript{249} while restrictive practices which, under existing conditions, tend to result in improvement of the market structure or technological progress are condoned, at least for the near future.

As the Minister and the Commission in its annual reports underscored, the criteria established by the Commission are essentially constructive. The Commission has endeavored not to tend toward a systematic suppression of cartels, but to obtain the approbation of the interested parties for its formulae of technical progress and general interest. For that reason it has favored agreements for concentration and specialization, at least as long as no danger of monopoly results.

Under the provisions of the Decree No. 45-1483, as amended, the courts possess jurisdiction to pass on the validity or invalidity of restrictive arrangements independent of the Commission and the courts are under no duty to refer such questions to the administrative tribunal. Nevertheless the courts may seek or take cognizance of the opinion of Commission, without, however, being bound by its conclusions.\textsuperscript{249a}

\textsuperscript{247} See the comments to that effect in the reply of the Minister of Economic Affairs to the parliamentary inquiry of 1957, supra note 244, and the discussion by the Commission in the three reports supra note 245. See also the discussion of this new body of decisional law by Durand, \textit{op. cit. supra} note 206, and Plaisant and Lassier, \textit{op. cit. supra} note 243.

\textsuperscript{248} See Sec. V, B in the reply of the Minister, \textit{supra} note 244.

\textsuperscript{249} The response lists four types of effects which have led to the condemnation of the respective restrictive practices: (a) alignment of a common sales price on the basis of the highest costs in the branch; (b) crystallization of industrial or commercial positions which hamper the chances of the best placed enterprises for further advance, (c) creation of a factual monopoly for the benefit of a single distributor which renders the customers closely dependent upon a single merchant and does not permit them to discuss usefully either the price or the quality of service, (d) establishment of lists of minimum prices or discriminatory pricing practices.

\textsuperscript{249a} See the discussion to that effect in \textit{Rapport de la Commission Technique des Ententes pour l'année 1957}, J.O. Documents Administratifs No. 11, at 212 (1960).
C. The Netherlands


a. The Period Before and During the German Occupation

(1) The Entrepreneurs' Agreements Act of 1935. The Netherlands entered the era of special legislation with respect to cartels only as a result of, and in defense against, the demoralization of the markets produced by the great depression of the thirties. Up to that time few domestic cartels were operative in the Netherlands and their activities were not thought to call for legislative intervention. However, the cut-throat competition in the fight for survival during the depression changed the picture and was thought to create a legitimate need for market organization by means of cartels and, in appropriate cases, their compulsory extension to outsiders.

The first measure of this kind was the Entrepreneurs' Agreements Act, passed in 1935. Influenced by the then contemporary German legislation, which on the one hand provided for the curbing of cartel abuses but on the other hand authorized compulsory extension of cartels to outsiders by administrative order, the Dutch law took a twofold approach.

Article 2 empowered the Minister of Economic Affairs, upon application by the industry, to render entrepreneurs' agreements, as defined by the Act, binding on outsiders whenever, in his judgment, such agreements were, or might be, of predominant significance to the economic conditions in that particular branch of the economy, and if the public interest required such extension. Conversely, Article 6 enabled the Minister to invalidate entrepreneurs' agreements, as defined by the Act, if such action was required in the public interest.

During the period of the applicability of the Act, between 1935


\[251\] See note 43 supra.

\[252\] Entrepreneurs' Agreements were cartel agreements and resolutions of enterprises engaged in the field of commerce and manufacture, excluding agriculture and fisheries, concerning business dealings.
and 1941 there were 38 applications for compulsory extension, eight of which were granted, fifteen rejected, and those remaining discontinued. There was no case of invalidation under this Act.253

(2) The Cartel Ordinance of 1941, as amended in 1943. The Act of 1935 was superseded by the Cartel Ordinance of November 5, 1941, enacted under the aegis of the German Occupation Authorities.254 This Ordinance extended the regulation and supervision of cartels and assigned vast powers in that respect to the Secretary General in the Ministry of Commerce, Trade, and Navigation.

The pivotal concept of the ordinance was that of “trade regulations,” defined, after an amendment in 1943,255 as “provisions for the regulation of competition between persons who conduct an enterprise in any branch of commerce or trade and of whom at least one is domiciled in the Netherlands; such provisions for the regulation of competition including also provisions for the regulation of financial obligations connected with a regulation of competition applicable to the participants.” 256

The Ordinance required reduction to writing of all regulation of trade, as thus defined, if arrived at after its entry into force, as well as communication of all existing or subsequently established trade regulations to the Secretary General.257 Moreover it subjected their establishment, ambit of bindingness, validity, content, and execution to vast substantive powers lodged in the Secretary General. On the one hand, he was given authority either to render existing trade regulations obligatory on outsiders, whether with or without attachment of conditions, 258 or to issue trade regulations de novo with obligatory force for all members of a trade or industry.259 On the other hand, he was empowered to:

1) supplement, alter or invalidate, in whole or in part, trade regulations;

254 Verordnung der Generalsekretäre in den Ministerien für Handel, Gewerbe und Schiffahrt und für Landwirtschaft und Fischerei über das Kartellwesen, [1941] Verordnungsblatt für die besetzten Niederländischen Gebiete 881.
255 Id. as amended by Verordnung der Generalsekretäre in den Ministerien für Landwirtschaft und Fischerei und für Handel, Gewerbe und Schiffahrt, wodurch die Kartellverordnung abgeändert und ergänzt wird [hereinafter cited as Cartel Ordinance], [1943] Verordnungsblatt für die besetzten Niederländischen Gebiete 111.
256 Id. § 1 (3).
257 Id. § 2 (1) and (3).
258 Id. § 3.
259 Id. § 4.
supplement, alter, or invalidate, in whole or in part, resolutions for the execution of trade regulations;
3) take measures for the execution of trade regulations;
4) take measures for the administration of organisations or institutions entrusted with tasks connected with the execution of trade regulations.\textsuperscript{260}

The Ordinance provided expressly that no one was permitted to use legal or economic means for the purpose of restricting others in their freedom of action relative to matters envisaged by the invalidated trade regulation or resolution for its execution and entitled anyone with a legitimate interest in the maintenance of such freedom of action to the recovery of actual or exemplary damages.\textsuperscript{261}

Moreover an amendment of 1943\textsuperscript{262} entrusted the Secretary General with special powers over persons or enterprises which, by reason of factual elements or their legal status, exert a substantial influence upon market conditions. The Secretary General was authorized to give directions to such persons or enterprises relative to the conduct to be pursued by them with respect to market conditions, if, in his opinion, they exercised their influence to the injury of the general welfare, the interests of the economy as a whole, a branch of industry, or another person or enterprise.

The Secretary General was given broad investigatory powers for the execution of his functions.\textsuperscript{263}

The administration of this law during the German occupation is of little interest for present purposes, as the whole economy was placed upon a totalitarian basis, and there was little room for cartel practices as such. Nevertheless the provisions of the Cartel Ordinance are of significance because they remained the basis for the status of cartels after the liberation and after the end of the economy of scarcity which required extensive controls, especially in the area of pricing.\textsuperscript{264}

b. From the Liberation to the Enactment of the Act of 1956–1958

Toward the end of 1948 the Dutch economy returned to normalcy and cartel policy again became an issue of importance. Although a draft of a new Law on Economic Competition was prepared by

\textsuperscript{260} Id. § 6(z).
\textsuperscript{261} Id. § 7(3) and (4).
\textsuperscript{262} Id. § 7a.
\textsuperscript{263} Id. § 8.
\textsuperscript{264} Cf. Verloren van Themaat, \textit{Het Kartelbeleid Sinds de Bevrijding}, 1 Sociaal-Economische Wetgeving 129 (1952).
the Dutch Government as early as 1950, the course of parliamentary action on the substantive aspects of the law was not completed until June 28, 1956, and the passage of final statute providing for procedural implementation and putting the act into actual operation had to wait until July 16, 1958.

Meanwhile the Cartel Ordinance of 1941-1943 remained the basis for governmental intervention against restrictive practices by cartels and enterprises with dominant market power. But whereas at the time of its enactment the main thrust of this Ordinance stemmed from its provisions for compulsory cartelization and the executive assurance of market regulations, its center of gravity now shifted to the sections aiming at the protection of the market from undue interference.

The Dutch Government resorted to this ordinance as early as 1946 when it rendered three decisions for the invalidation of clauses in cartel agreements which restricted the resale trade in automobile tires to garages, to the exclusion of other retailers. The next intervention of this type occurred in 1948 when the government invalidated a clause in the cartel agreement for the illumination and electro-technical industry, requiring wholesalers to order products from Dutch manufacturers exclusively through the medium of agents. It was, however, only from the beginning of 1950 that the government had to, and did, intensify its intervention for the supervision of and curbing of abuses by cartels.

There had been a tremendous increase in the number of cartels, registered under Section 2 (3) of the Cartel Ordinance in the period between 1950 and 1956. In 1950 the number of cartels was. For a discussion of the 1950 draft: Verloren van Themaat, Enkele Juridische Aspecten van de Evolutie der Kartelpolitiek, 14 Economie 203 (1950); Ameringen & Brabers, Voorontwerp Economische Mededinging, 1951 Naamloze Vennootschap 187; Advies van de Sociaal-Economische Raad betreffende het Voorontwerp wet Economische Mededinging, Tweede Kamer (2. Chamber), Document No. 3295, No. 4, Session 1953/54; Verloren van Themaat, Netherlands, in Friedmann, Antitrust Laws, A Comparative Symposium 258 at 265 (1956).
with national scope in the Netherlands amounted to 455; in 1956 it reached a total of 850.\(^{272}\) In addition in 1956 there existed 1,000 registered cartels with regional or local character. As a result of the active government policy no substantial growth in the spread of cartels was observable after 1956.

In order to cope with the increasingly burdensome task and to place the necessary intervention on a more democratic basis, the Cartel Ordinance was implemented and supplemented by other acts and regulations, and, in addition, informal procedures adapted to particular purposes were worked out. Thus the Royal Decree of July 16, 1949,\(^{273}\) established a permanent Commission of the Economic Council to perform advisory functions in administering the Cartel Ordinance. It was replaced with a Commission for Trade Regulations, established by a decree of the Minister of Economic Affairs of May 25, 1950,\(^{274}\) with the task of rendering advice in the invalidation or compulsory extension of trade regulations. In May 1951 the duties of communicating trade regulations to the proper public officials were made the subject of a detailed administrative order,\(^{275}\) and a new statute of the same year authorized the Minister to suspend provisions in trade regulations until the completion of the final determination.\(^{276}\) Finally, investigation and prosecution of infractions against the Cartel Ordinance became more active as a result of measures taken in 1950 and 1951.\(^{277}\)

On the basis thus provided, the Minister for Economic Affairs, between the beginning of 1950 and November 1956, conducted and completed 41 formal proceedings for the purpose of determining whether "there existed an occasion for invoking the powers granted in the Cartel Ordinance," especially those given by Section 6 (partial or total invalidation of cartel agreements), Section 3 (extension of cartels to outsiders), or Section 7a (orders regulating the conduct of enterprises with dominant market power).\(^ {278}\)
In the majority of the cases involving the invalidation of provisions in cartel agreements, the parties voluntarily amended the questioned provisions and thereby obviated a need for actual intervention. In a substantial number of proceedings, however, all or some of the regulations investigated were actually declared to be enforceable, while a few investigations were closed because it became evident that there was no cause for action or because the agreements in question were terminated. At least once the Minister for Economic Affairs has used his power under Section 7a; he ordered the Milk Homogenization Enterprises of Amsterdam, Utrecht, and surroundings, to supply lawfully established grocers in these cities with packaged milk products for resale. On the other hand, the Minister so far has never used his power to extend cartels to outsiders, and he has rejected an application to that effect.

In assessing the scope and effectiveness of the Dutch policy against abuses by cartels, the appraisal must not be based only on the results of these half a hundred formal proceedings. They produced a body of decisional law on the basis of which the Minister for Economic Affairs was able to deal with similar abuses by other cartels on a more informal basis without request for advice from the Commission for Trade Regulations. In fact the number of these informal settlements is many times that of the formal proceedings. As a result the latter type of investigation is resorted to only in cases (1) which present new questions of principle, (2) which involve cartels of a complicated character where it appears desirable to offer the interested parties the opportunity of clarifying by means of hearings the concrete consequences, and (3) where no agreement with the cartel in question can be reached or where the cartel as well as the Minister for various reasons prefer a formal procedure.

For a recent example, see the elimination of four types of restrictive practices agreed upon by the cartel of the construction industry, after they were found objectionable in an investigation, Decision of March 2, 1960, [1960] Nederlandse Staatscourant No. 45, at 7.

Cf. the survey (status of 1956) by WIJSEN, DEVELOPMENTS IN CARTEL LEGISLATION AND CARTEL POLICY IN THE NETHERLANDS 5 (Mimeo. 1957).


Application of Association of Brakefluid Manufacturers for extension of their cartel to outsiders; rejected by Decision of March 20, 1957, [1957] Nederlandse Staatscourant No. 57.

See the statements to that effect in the discussion of the actual practice under the Cartel Ordinance by the Ministers concerned in the "Memorandum of Reply" of April 13, 1955, Second House, Doc. No. 3295 No. 7, Session 1954–1955, at 2 (1955), and the summary by Verloren van Themaat, Het Kartelbeleid in de Eerste Ambtsperiode van Minister Zijlstra, 5 SOCIAAL-ECONOMISCHE WETGEVING 1 [1957].
Formal proceedings are often broad in scope, and the decisions terminating them are detailed and carefully reasoned. In summarizing the substantive principles which can be deduced from the case law thus developed, the ministers concerned with the administration of the Cartel Ordinance have isolated the following eight categories of cartel practices which have called for official intervention in the public interest:

1) The unconditional exclusion of enterprises or groups of enterprises from the supplying or procuring of goods or services, whereby such enterprises (for example, co-operatives or department stores) are seriously hampered in exercising a particular commercial function in the same manner as other enterprises (complete boycott of particular enterprises or particular types of enterprises);

2) The conditioning of the admission of enterprises to the supplying or procuring of goods or services upon the consent of a cartel agency, without providing that the determination of whether or not the consent should be given should be made pursuant to rules of admission that are acceptable from the viewpoint of general economic policy and susceptible of being tested objectively (arbitrary action with respect to the access to a market);

3) The coercion of enterprises or groups of enterprises, either by actual exclusion or threats of exclusion from the supplying or procuring of goods or services, for the purpose of gaining compliance with stipulations in trade regulations, where such coercion does not possess utility which—from a community point of view—balances the harm flowing from the compulsion for the person subjected thereto (coercive compliance);

4) The requirement that supply be obtained through specified channels of distribution whereby an efficient and adequate provisioning of the trade or the general public may be hampered (rigidifying methods of distribution);

5) The restriction of the extent of production to a quantity smaller than the demand which reasonably can be expected (limitations on production);

6) The regulation of production in such measure that individual producers are deprived of their chance of increasing

their share in the total production (freezing of individual positions);
7) The fixing of uniform minimum prices:
when there was no reason to assume that a minimum price
regulation was necessary in the particular area; or
at a level or by a method of calculation amounting to an
obstacle to economically warranted competition (price-
freezing);
8) The making of regulations of various kinds with respect to
public bids where the same are an obstacle to economically
warranted competition or effectuate price increases.
While this catalogue was meant to be neither complete nor
inexorable (as the Ministers were careful to point out),285 it serves
as a valuable guide to the principal practices deemed to constitute
abuses.

2. THE ECONOMIC COMPETITION ACT OF
1956–1958

a. General Characteristics and Scope

Basically the new Economic Competition Act of 1956–1958286
continues the pattern of the Cartel Ordinance of 1941 and utilizes
the practical experience gained under the previous cartel legisla-
tion. Again the Act can be classified as so-called "abuse legisla-
tion,"287 and, like its predecessor, it provides for three large cat-

286 Id. at 2.
287 See the statement to that effect, op. cit. supra note 284, at 3.
egories of measures: (a) the compulsory extension of cartels to outsiders, 288 (b) the invalidation, in whole or in part, of cartel agreements deemed to be in conflict with the general welfare, 289 and (c) the regulation of the conduct of enterprises with dominant market power. 290 Despite the continuance of the established approach, however, the new Act provides for some new methods of control and incorporates a vast number of changes in detail and technical modifications.

Most of all, the new legislation aims at the replacement of the broad and untrammeled powers of the government under the Cartel Ordinance of 1941–1943 by a regulation more consonant with the standards required by the rule of law. 291 Accordingly, the new Act circumscribes carefully the forms of, and grounds for, public intervention and possible exemptions and dispensations and subjects the administrative determination to judicial review by the Tribunal of Appeal in Industrial Matters, created in 1954. 292 In addition, it redefines its scope of applicability by replacing the former central term of “trade regulation” with a newly created concept, designated as “competition regulation,” which in some respects is broader in scope as it covers all sectors of economic activity and not only trade and industry in the narrow sense. Conversely, in other respects it is narrower as it is restricted to legally enforceable agreements and resolutions for the regulation of competition. 293 The statute provides, however, that its applicability may be extended, by general executive order, either in toto to designated agreements or resolutions which merely affect competition 294 or, as far as apposite, to designated written arrangements regulating or affecting competition which are not legally binding in character. 295 Furthermore, publicity is introduced as a new type of sanction, both against competition arrangements deemed to be, or to be applied, in conflict with the public interest and against uses of economic power deemed to be in conflict with the public interest. 296 Last, although not least, the new Act introduces, for

288 Economic Competition Act arts. 6–9.
289 Id. art. 10–15, 19–23.
290 Id. arts. 24–27.
291 See the comments to that effect in the Explanatory Memorandum of 1953 by the responsible Ministers of State, 2d House, Doc. No. 3295-2, at 7 (1953–54).
292 Economic Competition Act art. 33.
293 Id. art 1(1), defining competition regulation as “agreement or resolution, pursuant to private law, which constitutes a regulation of competition among owners of enterprises.”
294 Id. art. 1(3).
295 Id. art. 1(4).
296 Id. arts. 19(1)(a) and 24(1)(a).
the first time, the possibility of invalidating competition agreements of specified types of character by means of generic regulation, though not without allowance of dispensations.297

As under the regime of the former Cartel Ordinance, as modified in 1950, the Minister of Economic Affairs is assisted in the administration of the Act by a special advisory board, now styled the Economic Competition Commission.298 It consists of a minimum of twelve regular members who may be supplemented, if deemed necessary, by a number of extraordinary members. Consultation of the Commission is compulsory in formal proceedings for the issuance of generic or specific orders for the supervision or suppression of restrictive practices as authorized by the Act,299 as well as for the grant of dispensation from generic prohibitions.300

b. Particular Regulations of the New Act

(1) Duty of registration and reduction to writing. Like the prior law the new Act requires communication to the Minister of Economic Affairs of all competition regulations within the meaning of Article 1 (1) as well as of such agreements, resolutions, and understandings to which the application of the Act has been extended, either *in toto* or as far as apposite, by administrative regulation pursuant to Article 1 (3) and 1 (4).301 The contents of the notification are determined by administrative regulation.

The duty of communication is imposed upon (a) the owners of enterprises which are subject to the regulation and have their seat in the Netherlands, (b) those persons who in addition to the owners are parties to the agreement or have participated in the resolution based on private law, (c) those who have obligated themselves in writing to execute the regulation or to perform the duty of communication.302 Upon request by the Minister, which may be made at any time, such persons must also submit information as to which enterprises are then subject to a specified regulation.303

Because of the broad scope of the definition of competitive regulation, the Act authorizes the Minister of Economic Affairs, where appropriate, in conjunction with another Minister interested

297 *Id.* arts. 10–15.
298 *Id.* art. 28.
299 *Id.* arts. 5(2), 7(1), 20(1), 25(1), 25(3), 27(3).
300 *Id.* art. 13(1).
301 *Id.* art. 2(1).
303 *Id.* art. 3.
in the matter, to establish general exemptions or, upon application, to grant individual dispensation from the duty of communication.\textsuperscript{304} Such exemption \textit{must} be established for competition regulations which do not apply to competition in the Netherlands.\textsuperscript{305}

Non-observance of the provisions for communication is a misdemeanor.\textsuperscript{306} In addition, the Act authorizes the government to enact general executive decrees which deprive designated competition regulations of their enforceability if they are not reduced to writing and communicated in accordance with Article 2 within one month from the time they have come into existence.\textsuperscript{307} The reason for this provision is the opinion of its draftsmen that penal sanctions may not suffice to guarantee the proper and timely communication of the more important competition regulations.\textsuperscript{308} A similar rule existed under the Cartel Ordinance of 1941–1943.\textsuperscript{309}

(2) \textit{Extension to outsiders.} Like its two predecessors, the new Act provides for the compulsory extension of existing competition regulations, in whole or in part, to outsiders.\textsuperscript{310} In contrast to the Cartel Ordinance of 1941–1943, however, such exten-

\begin{itemize}
\item $\textsuperscript{304}$ Id. art. 4.
\item $\textsuperscript{305}$ Id. art. 4(1), last sentence. Exercising the powers granted by, and executing the mandates of, art. 4, the appropriate Ministers of State issued an order on June 3, 1960, providing for dispensation from the duties under art. 2, para. 1, for the following five classes of competition regulations:
\begin{enumerate}
\item those that are not in force for more than one month except where there is a stipulation for express or implied prolongation;
\item those concluded by a supplier and a customer whereby the prices are fixed at which the customer may resell the goods obtained from the supplier;
\item those among retailers in milk, milk products, and special milk products, as defined in art. 2, para. 1, of the Order establishing the Trade Organization of the Retail Trade in Milk and Dairy Products, aiming at the rationalization of the local supply of these goods;
\item those which do regulate no other matters concerning economic competition except: (1) the joint purchase of goods; (2) the obligation of a supplier to supply specified goods, whether within a designated territory or not, exclusively to one customer; (3) the obligation of a customer to procure specified goods, whether within a designated territory or not, exclusively from one supplier; (4) the obligation of an agent for certain goods or services to represent exclusively one principal, whether within a designated territory or not; (5) the obligation not to exercise a specified trade or business, whether within a designated territory or not, provided that these stipulations are part of an agreement of employment or for the transfer of an enterprise which includes such trade or business; (6) the production, distribution, or procurement of goods abroad as well as the rendition or utilization of services abroad; (7) international transportation, so far as such regulation of competition covers one or more natural or juristic persons domiciled abroad;
\item those which do not regulate economic competition within the Netherlands.
\end{enumerate}
\end{itemize}
sion is no longer authorized unless one or more of the enterprises affected thereby make an application to this end. It requires, in addition, (a) that in a particular branch of the economy the number or the aggregate market share of the enterprises which are subject to the regulation sought to be extended, according to the judgment of the Minister of Economics, exceed substantially the number or the aggregate market share of the other enterprises and (b) that the interest of that branch of the economy, consistent with the general welfare, demands such action. The period of the compulsory extension is limited to a maximum of three years. The law authorizes the Ministers to provide for general exemptions or, upon application, to grant individual dispensations from the regulations thus extended to outsiders. Such exemptions or dispensations may be subject to limitations or conditions. The dispensations may be modified or revoked, subject, however, to judicial review.

In consequence of such compulsory extension of a competition regulation to outsiders, the latter are bound by its terms and stipulations, such judicially enforceable obligation existing vis-à-vis any party having a legitimate interest in its performance.

Under the conditions as developed in recent years, the government saw no reason to resort to the use of similar powers under the previous law and rejected applications from the industry requesting it to do so. Nevertheless, attempts to obtain compulsory extension of cartels to outsiders are being made even now, and, at any rate, the provisions in the new Act constitute an important reserve power.

(3) Invalidation of restrictive agreements and resolutions. Like the prior law, the new Act makes provision for governmental action terminating or suspending, in whole or in part, the enforceability of restrictive agreements or resolutions deemed to

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311 Id. art. 7.
312 Id. art. 6(1).
313 Id. art. 6(2).
314 Id. art. 6(2).
316 Id. art. 8(2).
318 Id. arts. 8(3) and 33(1)a.
319 Id. art. 9.
319 See, e.g., the rejection by the Minister of Economic Affairs in March, 1957 of the application by the Association of Brakefluid Manufacturers, Veremfa, for the compulsory extension of their "brakefluid convention" to outsiders, [1957] Nederlandse Staatscourant No. 57, at 5.
319 See, e.g., the notifications regarding the pending application by two trade associations of opticians for the compulsory extension of a resolution by their principal officers limiting the permissibility of discounts, [1959] Nederlandse Staatscourant No. 64, at 13; No. 109, at 3.
be in conflict with the public interest. While, however, the former
two Cartel Ordinances authorized such decrees only in individual
proceedings, the new statute, following a suggestion of the Social
Economic Council made in 1951, authorizes the issuance of general
executive orders for the generic invalidation of certain classes and
types of restrictive clauses in agreements and resolutions in addition to individual intervention with respect to particular agree-
ments or resolutions.

Generic invalidation of stipulations, in competition regulations,
of a specified nature or effect may be ordered when such measure
appears to be necessary in the public interest. The invalidation
lapses after five years, unless revoked prior to the expiration of
such period. The issuance or revocation of an order containing
a generic invalidation requires previous consultation of the Eco-

nomic Competition Commission. Though, generally speaking,
such generic invalidation applies to all clauses in conventions and
resolutions falling within its scope, whether then in existence or
thereafter agreed upon, the Act envisages the grant of exemptions.
Accordingly, such general order may contain an authorization,
pursuant to which the Minister, upon application, may render the
same inapplicable to a competition regulation subsequently agreed
upon which has been submitted in draft form in conjunction with
such request; and in case of such authorization the Minister may
grant an exemption also with respect to an existing competition
regulation, provided that an application to that effect was sub-
mitted before the generic invalidation went into force. Such
exemptions may be coupled with restrictions and conditions and are
subject to modification or revocation. When an application for
an exemption from a generic invalidation has been rejected or such

\[320\] Economic Competition Act arts. 10-15.
\[321\] Id. arts. 19-23.
\[322\] Id. art. 10(1) and (4).
\[323\] Id. art. 11(1). The request for advice must be published in the Nederlandse Staatscourant, Economic Competition Act art. 11(2). For the first example see [1959] Nederlandse Staatscourant No. 52, containing notice to the effect that the Minister for Economic Affairs, in conjunction with the Minister of Justice, has consulted the Com-

mission on the question of whether a generic invalidation should be decreed of clauses in competition regulations which govern the imposition of sanctions for the infraction of a regulation without providing for a number of specified guaranties as to the impartiality of the disciplinary tribunal and the fairness of the proceedings.

Another request for advice relating to a generic invalidation of vertical resale price maintenance agreement was made on March 3, 1960, and published March 8, 1960, [1960] Nederlandse Staatscourant No. 47, at 7.

\[325\] Economic Competition Act art. 12(1).
\[326\] Id. art. 12(2).
\[327\] Id. art. 12(3) and (4).
exemption has been modified or revoked, the Minister may suspend the enforceability of the clauses involved until final determination of the question whenever in his judgment there exists an important ground for such action.\textsuperscript{327}

In case a generic invalidation of certain specified provisions in competition regulations has been decreed in accordance with the Act, any conduct tending to ignore or circumvent such measure is prohibited and made punishable.\textsuperscript{328} Where the generic invalidation results only in partial invalidity of an agreement, the parties thereto may withdraw from the remaining portion within a month from the time that the order in question has become applicable to such agreement.\textsuperscript{329}

In providing for individual invalidation, in whole or in part, of particular competition regulations by special proceedings,\textsuperscript{330} the new Act retains substantially the pattern developed under the previous law. Thus the Minister may take such action only after an advisory opinion by the Economic Competition Commission has been rendered upon hearing the affected and other interested parties.\textsuperscript{331} In case of urgency the Minister may suspend the regulation in question until a final determination on the invalidation has been reached.\textsuperscript{332} The invalidation may be conditional.\textsuperscript{333} Ignoring or circumventing such invalidation or suspension is prohibited and punishable.\textsuperscript{334} Partial invalidation entitles the parties to timely withdrawal from the whole.\textsuperscript{335}

Invalidation of an individual competition regulation is authorized by the Act if, and to the extent that, such regulation or its application, in the judgment of the Minister of Economic Affairs and other appropriate Ministers, conflicts with the public interest.\textsuperscript{336} The Act refrains from prescribing any more precise or detailed standards for the intervention by the authorities and, in particular, avoids any catalogue of proscribed categories or types of competition regulation. Rather the matter is left purposely to the develop-

\textsuperscript{327} Id. art. 12(6).
\textsuperscript{328} Id. arts. 15(1) and 41(1). Similar rules apply with respect to conduct tending to ignore or circumvent suspension orders issued in conjunction with the denial, modification or revocation of an exemption from a generic invalidation. Economic Competition Act arts. 12(8) and 41(1).
\textsuperscript{329} Id. art. 14.
\textsuperscript{330} Id. arts. 19–23.
\textsuperscript{331} Id. art. 20.
\textsuperscript{332} Id. art. 23(1).
\textsuperscript{333} Ibid.
\textsuperscript{334} Id. arts. 22, 23(5), 41(1).
\textsuperscript{335} Id. art. 21.
\textsuperscript{336} Id. art. 19.
ment of decisional law through a case-by-case approach.\(^{337}\) As a result, the administrative policies developed and articulated under the regime of the Cartel Ordinance will remain controlling, at least for the near future.\(^{338}\)

(4) Suppression of abuses of economic power. Since invalidation, whether generic or individual, is an appropriate remedy only in the case of binding arrangements, the Act provides for additional forms of governmental intervention against certain uses of "positions of economic power" not resting on binding agreements or resolutions where such uses are deemed to be in conflict with the public interest.\(^{339}\) Accordingly, "position of economic power" is defined broadly as "factual or legal relationship in the economy which results in a dominant influence of one or several owners of enterprises upon a market for goods or services in the Netherlands."\(^{340}\)

In contrast to American law or the Coal-Steel Community Treaty, the Dutch Act neither prevents nor controls excessive concentrations of economic power as such nor authorizes steps for their dissipation.\(^{341}\) It merely provides for measures to curtail abuses, by empowering the authorities to impose certain duties or rules of conduct upon the persons deemed to possess such power. The Act authorizes four types of orders which may be issued in such cases,\(^{342}\) those which

(a) require abstention from activities tending, by legal or factual means, to induce designated owners of enterprises to pursue specified conduct in the market concerned;

(b) require the supply of specified goods or the rendition

\(^{337}\) See the comments to that effect in the Memorandum of Reply of 1955, 2d House, Doc. No. 3295-7, at 4 (1955).

\(^{338}\) A survey of the guiding principles was recently released, in mimeographed form, by the Dutch authorities. A German translation thereof is printed in 6 WuW 428 (1959). For an instance of a recent invalidation, based on Economic Competition Act, art. 19, of an agreement among the store owners in a shopping center whereby they obligated themselves for a period of 50 years neither to conduct nor to permit the conduct of competing businesses in such stores, see [1959] Nederlandse Staatscourant No. 65, at 5 and 6. The Minister deemed such exclusive arrangements to be in conflict with the public interest for the reason that its duration was excessive and, in view of the lack of other stores in the vicinity, apt to hamper a sound development of the distribution pattern needed by the neighborhood.

\(^{339}\) Economic Competition Act arts. 24–27. For the necessity and functions of this type of intervention, consult especially Memorandum of Explanation of 1953, 2d House, Doc. No. 3295, at 9 (1959).

\(^{340}\) Economic Competition Act art. 1(1).

\(^{341}\) See the comments to that effect in the Memorandum of Reply, 2d House, Doc. No. 3295-7, at 7 (1955).

\(^{342}\) Economic Competition Act art. 24(1),b(1º)–(4º).
of specified services to designated persons against cash and, in the absence of other mandates to that effect, at the cash price and the terms for delivery of goods or rendition of services that are usual in the market involved;

(c) contain rules concerning the price for specified goods or services;

(d) contain rules concerning the terms for the delivery of specified goods or the rendering of certain services and the payment therefor, including rules which prohibit the limiting of buyers in their right to dispose of the goods purchased, or the conditioning of the delivery of specified goods or the rendering of specified services upon the purchase or sale of other goods or the acceptance or rendering of other services or the performance of certain activities.

The maximum period during which such orders may remain in force is five years. Their issuance requires prior consultation of the Economic Competition Commission. Compliance can be enforced by any person who has a legitimate interest in their observance. In cases of urgency the Minister of Economics may issue temporary orders of that kind while hearings before the Commission are in progress.

Intervention of this type has been resorted to on various occasions in the past, and there is good reason to believe that the pertinent articles of the Act will be frequently resorted to.

D. Belgium

I. Historical Antecedents of the Law Against Abuse of Economic Power of May 27, 1960


(1) Statutory development. Belgian law relating to restrictive business practices prior to 1935 followed a course of development which was, at first, identical with and, subsequently, at

343 Id. art. 24(2).
344 Id. art. 25.
345 Id. art. 26.
346 Id. art. 27.
347 See, for instance, the recent investigation concerning resort to the powers under art. 24 for the purpose of suppressing the boycott of a wholesale grocery store by cigar manufacturers, initiated at the instigation of competing wholesale dealers of tobacco products, [1959] Nederlandse Staatscourant No. 91, at 4.
least parallel to that occurring in France. Thus, as a result of the annexation and incorporation of Belgium by the French in 1795, the celebrated Decree of March 2–17, 1791, establishing freedom of trade was rendered (and still is) applicable in that country; Article 419 of the French Penal Code of 1810, defining the crime of the “distortion of the price level,” discussed before, likewise extended to the Belgian provinces and remained in force even after their separation from France in 1815 and their independence from the Netherlands in 1831.

The enactment of the Penal Code of 1867 did not engender any substantial change in the situation. Article 311 of that Code subjected to punishment “persons who by fraudulent means of any kind have maneuvered the rise or fall of the price for victuals, goods or notes and securities.” That prohibition was supplemented, if not in fact superseded, by an Act of July 18, 1924, “for the suppression of illicit speculation in victuals and goods or notes and securities” that expanded the ambit of unlawful manipulations of the market and differentiated two distinct classes of proscribed conduct, only one being fraudulent. The new Act penalized those

348 For discussions of Belgium law relative to restrictive practices in general, or certain phases thereof, see especially: Del Marmol, Le traitement juridique des contraintes économiques, 71 Journal des Tribunaux 453 (1956); Del Marmol, Le boycott commercial en droit privé, Annales de la Faculté de Droit de Liège (1956); Del Marmol, La liberté du commerce en droit belge, 68 Journal des Tribunaux 65 (1955); Del Marmol, La réglementation juridique des ententes industrielles en Belgique, 10 Annales de droit et de Sciences Politiques 3 (No. 39, 1950); Del Marmol, Les ententes industrielles en droit comparé, in Collection d'Études de la Revue de la Banque, at 93 (1950); Del Marmol, La réglementation juridique des ententes industrielles, Revue de Droit International et de Droit Comparé, No. spécial 125 (1950); Del Marmol, Protection contre les abus de la puissance économique, 13 Revue de la Banque 65 (1949); Del Marmol, Rapport sur le boycott commercial en droit privé belge, 10 Travaux de l'Association H. Capitant 101 (1959); Haesaert, Prix imposés, in 1932 Pandectes Périodiques 566; Limpens, Prijshandhaving Buiten Contract bij Verkoop van Merkartikelen (1943); Limpens and Van Ryn, La responsabilité du tiers complice de la violation d'un contrat, 5 Revue Critique de Jurisprudence Belge 85 (1957); Machiels, Des conventions de monopole, 70 Journal des Tribunaux [hereinafter cited as Journ. des Trib.] 40 (1955); Van Bunnem, Effets à l'égard des tiers de quelques conventions conclues par autrui, 71 Journal des Tribunaux 245 (1956); Van Hecke, De bescherming tegen misbruiken van de economische macht, 1948 Rechtskundig Weekblad 625. For discussion by non-Belgian authors see Ententes et Monopoles dans le Monde, Benelux II, Belgique et Luxembourg, in La Documentation Française, Notes et Études Documentaires, Nos. 1777, 1778 (1953); Benz, Kartellentwicklung und Kartellpolitik in Belgien, in Jahn and Junckerstorff, Internationales Handbuch der Kartellpolitik (1958); Strauss and Wolff, Kartellrecht, in 4 Schlegelberger, Rechtsvergl. Handwörterbuch, 614 at 642 (1933); Webers, Contrôle de Internationale Kartels 52 (1957).


350 See Del Marmol, La liberté du commerce en droit belge, 68 Journ. des Trib. 65 (1953).
who by fraudulent means of any kind have maneuvered or attempted to maneuver, or maintained or attempted to maintain, the high or low level of prices for victuals or goods or notes and securities; or who, even without fraudulent means, have voluntarily maneuvered, maintained or attempted to maintain, in the national market, an abnormally high level of prices for victuals or goods or notes and securities, whether by prohibitions or agreements aiming at the fixing of minimum or maximum sales prices or by restrictions on the production or free circulation of products.\textsuperscript{381}

Owing to the limitations in scope of the second clause (which is confined to activities aiming at \textit{abnormally} high or low price levels) and of the need for complex economic tests implicit in such restriction, this statutory regulation has remained without great practical significance.\textsuperscript{382}

Further important legislation in the field of restrictive practices was enacted in 1934 when Royal Decree No. 55 of December 1934 (for the protection of producers, merchants, and consumers against certain activities tending to adulterate the normal conditions of competition) sweepingly provided for cease and desist orders against acts contrary to honest usages in matters of commerce and industry, whereby a merchant, manufacturer or artisan . . . generally impairs or attempts to impair the ability to compete of his competitors or any of them. . . . \textsuperscript{383}

This provision actually is one of the chief statutory bases of judicial intervention against restrictive practices. However, the courts have granted relief thereunder only sparingly and in especially strong cases.

Finally in 1946 the Price Control Decree of May 14 of that year expressly prohibited tying agreements entered into or demanded “under abusive exploitation of a situation of scarcity or need.”\textsuperscript{384} Again the courts have taken a narrow view of the

\textsuperscript{381} 2 \textsc{Servais and Mechelynck, les codes en vigueur en Belgique} 678 (29th ed. 1957).

\textsuperscript{382} Cf. \textsc{Del Marmo!, op. cit. supra} note 350, text at n. 22. Similarly, a legislative decree of 1945 “for the suppression of infractions against the regulations for the supply of the country” proscribes “pricing practices in excess of the normal prices” with respect to products, materials, victuals, goods, or animals and vests the courts with full powers to determine the abnormal character of the challenged prices.

\textsuperscript{383} 2 \textsc{Servais and Mechelynck, op. cit. supra} note 351, at 673.

\textsuperscript{384} Id. at 686. In addition Belgium, like other European countries, has special legisla-
statutory qualification and have held that in the absence of such exceptional conditions, tying clauses are unobjectionable.\(^{355}\)

(2) \textit{The trend of the case law.} Generally speaking, the Belgian courts like (or perhaps even more than) their French counterparts have been reluctant, if not loath, to invoke either the general principles of civil law or the statutory provisions listed in order to interfere with restrictive agreements, whether of the horizontal or vertical type, and have shown increasing willingness to lend their arm for the enforcement of restrictive vertical agreements even against their disregard by third parties with knowledge thereof. Thus in the case of resale price maintenance agreements it has come to be the recognized principle that a manufacturer who sells his products with the stipulation that his customers must resell the same either at a fixed retail price or by requiring further resale price agreements, and who diligently watches over the observance of this arrangement, may recover damages on quasi-delictual grounds from a third party who markets the products at a lesser amount with knowledge of the manufacturer's price system.\(^{356}\) The manufacturer is entitled to keep the distributors in line by circulars and other means of publicity.\(^{357}\) But the courts have considered it to be an unfair trade practice subject to be enjoined where competing retailers collectively tried to coerce a manufacturer to exclude a price-cutting retailer from his dealership although the resale price maintenance scheme theretofore had not been consistently enforced.\(^{358}\) In the cases of exclusive dealing arrangements, especially regional sole distributor franchises, similar trends are discernible, and courts have protected the dealer against injury re-

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\(^{355}\) For an important recent case discussing the bases and scope of this doctrine see Office Belge des Ventes c. S. A. Philips (Ct. of App. Bruxelles, May 13, 1958), 74 Journ. des Trib. 253 (1956), with note by Van Bunnen; for surveys of the doctrinal and decisional developments see especially Limpens, Prijshandhaving Buiten Contrat Bij Verkoop Van Merkartielen (1943); Del Marmol, La liberté du commerce en droit belge, 68 Journ. des Trib. 65, at 69 (1953); Van Bunnen, Effets à l'égard des tiers de quelques conventions conclues par autrui, 71 Journ. des Trib. 245, at 248 (1956); Del Marmol, Rapport sur le boycottage commercial en droit privé belge, 10 Travaux de l'Association H. Capitant 101, at 142 (1959).

\(^{356}\) See e.g., M.P.c.B. (Ct. of App. Bruxelles, 1956), 71 Journ. des Trib. 718.


sulting from invasions of his territory by others with knowledge of his exclusive rights. However, the courts have been hesitant about giving the same protection against a competitor to a manufacturer who required his customers to obtain from him all their needed supply of a certain commodity.

Similar willingness has been shown by the Belgian courts to condone, and give judicial remedies to, cartels and similar horizontal agreements whether for the fixing of prices, the division of markets, or the regulation of production, provided that such concerted action falls short of the conduct proscribed by the penal statutes mentioned before. Even group boycotts are held to be unobjectionable, at least as long as they are the sanction for price-cutting or other violations of proper market behavior.

b. The Cartel Decree of 1935

In the throes of the great depression of the mid-thirties, Belgium, like her neighbor the Netherlands, followed the example of Germany and enacted legislation for the compulsory extension of cartels and similar trade associations to outsiders. Royal Decree No. 62 of January 13, 1935, “authorizing the establishment of economic regulation of production and distribution” specified the conditions under which, and set up the procedures by which, “any professional association of manufacturers or distributors vested with legal personality may seek the extension of obligations, volun-

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361 See the discussion by Del Marmol, La liberté du commerce en droit belge, 68 Journ. des Trib. 65, at 67 (1953); Del Marmol, La réglementation juridique des ententes industrielles en Belgique, 10 Annales de Droit et de Sciences Politiques 3 (1950).

arily assumed by it, concerning production, distribution, sale, export or import to all other manufacturers or distributors belonging to the same branch of industry or commerce."

In order to accomplish such purpose, the association must address a request to that effect to the Minister for Economic Affairs. The request must be accompanied, *inter alia*, by evidence showing that the obligation sought to be extended was assumed voluntarily by manufacturers or distributors representing the indisputable majority of interest in that branch of industry and commerce and that the extension is in the general interest. The request, if deemed proper, is thereupon published in the *Moniteur Belge* with the announcement that adverse interests should register their opposition. If there is such opposition, the parties are invited to submit their controversy to a single arbitrator or to a board of arbitrators. If arbitration fails to materialize, the controversy is brought before the Council for Economic Disputes, an administrative tribunal especially created for such purpose by the Decree of 1935. If there is no valid opposition, or if the arbitrator or arbitrators or the Council for Economic Disputes render a favorable opinion, the King may grant or reject the request; if the arbitrator or arbitrators or the Council are adverse to the request, the King must reject it. The obligations thus extended to outsiders also bind new manufacturers and distributors. If such obligations limit production, importation, or exportation, no new manufacturer may enter the market without special royal authorization upon advice by the Council for Economic Disputes, specifying, if apposite, the amount of products or materials which the applicant may manufacture, import, or export.

This Decree which seems to be still in force despite the new legis-

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364 Decree No. 62, 1935, art. 1, para. 2.
365 Decree No. 62, 1935, art. 1, para. 3 (c).
366 Decree No. 62, 1935, art. 2.
367 Decree No. 62, 1935, art. 4.
368 Decree No. 62, 1935, art. 5.
370 Decree No. 62, 1935, art. 19, para. 1.
371 Decree No. 62, 1935, art. 19, para. 3.
372 Decree No. 62, 1935, art. 20, para. 1.
373 Decree No. 62, 1935, art. 20, para. 2-4.
lation against abuse of economic power of 1960 has apparently been applied cautiously and judiciously. According to statistics published by the Office of the Council for Economic Disputes in 1952, the total number of applications filed with the Council in the period from 1935 to the beginning of 1952 amounted to 95. Sixty-two came from associations of manufacturers, while the remaining thirty-three stemmed from associations of distributors. The majority of them were either rejected or withdrawn, but a substantial number of applications by manufacturers' groups were successful and entailed the compulsory extension of the obligations assumed by them to outsiders in a variety of industries. While most of these regulations have expired and have not been renewed, there may still be a few industries subject to regulation under this Decree.

2. THE LAW OF MAY 27, 1960, FOR PROTECTION AGAINST THE ABUSE OF ECONOMIC POWER

a. Evolution of Legislative Proposals to Curb Monopolistic Power

As early as 1937 the Belgian Government was concerned over abuses of monopolistic power and the lack of adequate legal bases for proceeding against the abuses. A tentative draft-bill was perfected and, in 1938, submitted to the Permanent Legislative Committee; but the political events culminating in the outbreak of World War II prevented further progress.

See the conclusions to that effect by Moreau, op. cit. supra note 363 at 25, and the comments by Verhaegen, op. cit. supra note 369, at 535.

Reproduced in Moreau, Ententes et Monopoles dans le Monde, Benelux, II Belgique et Luxembourg, Deuxième Partie, 20 at 26 (DOCUMENTATION FRANÇAISE, NOTES ET ETUDES, No. 1778) (1953).

Between 1935 and 1941 the ratio of applications by distributors’ associations and those by manufacturers' associations was 27 to 38; between 1941 and 1952 it decreased to a ratio of 6 to 24. One of the main reasons for this apparent disparity has been seen in the fact that the possible closure of the market against newcomers under art. 20 applied only to manufacturers.

So far no application by associations of distributors for extensions to outsiders has ever met with success.

A report submitted in 1952 by the staff of the Council for Economic Disputes to the Central Economic Council listed 15 manufacturing industries which had been subject to economic regulation under the Decree of 1935, viz. carbonic acid, bolts, bottles, wire and nails, rubber, glass panes, steel bars, special glasses, water meters, cups, copper sulphate, rolling mill rolls, compressible tubing, road equipment, pressed cork.

For a survey of the status in 1954, see I Baudhuin, CODE ÉCONOMIQUE ET FINANCIER 1587 (1954).

For a discussion of the various Belgian drafts of legislation for the protection against abuses of economic power see Moreau, Ententes et Monopoles dans le Monde;
After the liberation, in January 1947, Representative Duvieusart and some of his colleagues introduced a bill for the protection against abuses of economic power, which aimed at a broad and comprehensive regulation of that subject. The proposed legislation was divided into two chapters, of which the first dealt with the protection of private interests, while the second was devoted to the supervision of economic power and the protection of the public interest against abuses. In the protection of private interests the proposal differentiated in turn between that accorded to cartel members against excessive or unwarranted disciplinary measures imposed by the organization and that made available to outsiders or other third parties with respect to unduly restrictive practices. In the part providing for official intervention in the public interest the proposed legislation established procedures for ascertaining whether certain organizations had acquired dominant market power. In case of affirmative findings the public authorities were authorized to control further economic concentration in the hands of the enterprises so designated and to suppress their restrictive practices deemed to be injurious to the public interest, if necessary by dissolution. The bill provoked violent attacks from the spokesmen for industry and was subjected to extensive criticism in professional journals. As a result, no further parliamentary action followed.

M. Duvieusart, having become Minister for Economic Affairs in 1947, proceeded to the preparation of a government bill with the same objectives, but taking account of some of the objections leveled against his former proposal. A draft of the proposed legislation was completed in 1951 and transmitted for advice to the Central Council for the Economy. The latter approved the bill in 1952 making, however, significant suggestions for amendments. The government draft as submitted resembled the original Duvieusart bill of 1947 in differentiating between abuses by cartels vis-à-vis third parties and practices contrary to the public interest. But

Benelux, II Belgique et Luxembourg, Deuxième Partie, 38-56 (in Documentation Française, Notes et Études, No. 1778, 1953); Günther, Belgische Kartellpolitik, 5 WuW 242 (1955), Belgian Senate, Doc. No. 21 (1957-1958); Belgian Senate, Doc. No. 216 (1958-1959).

For the text of the bill see Belgian Chamber of Representatives, Doc. No. 123 (1946/1947).

See especially Del Marmo, Protection contre les abus de la puissance économique, 1949 Revue de la Banque 65.

The text of the draft is reproduced by Moreau, op. cit. supra note 380, at 65.

The text of the opinion of the Central Council for Economy is reproduced by Moreau, op. cit. supra note 380, at 49.
it differed, on the one hand, by the restriction of government investigations to cases where serious indications of abuses exist as well as the omission of restrictions on mergers and other forms of concentration, and, on the other hand, by inclusion of provisions for abuses of preponderant economic power by public entities and against implementation of the then proposed International Trade Organization. The Central Council for the Economy, in recommending modifications, suggested, in particular, the elimination of the section dealing with abuses vis-à-vis cartel members and of the chapter on Belgian cooperation in the international repression of restrictive business practices. Following this advice the government in 1953 perfected a new text of the proposed legislation and submitted it to the Council of State. The latter raised several questions and objections, especially because of the violation of the principle of the separation of powers.

As a result, the government proceeded to a further revision of the proposed legislation and submitted it again, on June 26, 1956, to the Council of State. The draft as transmitted was based squarely upon a policy which does not deem combinations or concentrations of economic power to be evils in themselves but calls for public intervention only in cases of abuses. Accordingly, it refrained from declaring cartel agreements to be invalid or illegal and rejected the introduction of a cartel register.

The first part of the proposed legislation contained definitions of the two pivotal concepts of the contemplated regulation: “economic power” and “abuse.” The former was defined as “power possessed by a natural or juristic person, acting individually, or by a group of such persons, acting in concert, to exert, within the territory of the Kingdom by means of industrial, commercial, agricultural or financial activities, a preponderant influence upon the supply of the market with goods or capital or upon the price or quality of particular goods and services.” “Abuse” was declared to be committed, “whenever one or more private persons possessing such economic power inflict harm upon the public interest by means of practices which adulterate or restrict the normal play of competition or which hamper either the economic freedom of producers, distributors or consumers or the development of production or trade.” The general definition of abuse was followed, by way

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385 For this phase of the development see Belgian Senate, Doc. No. 21 (1957-1958).
386 Belgian Senate, Doc. No. 21, at 5-7.
387 Draft-Bill art. 1.
388 Draft-Bill art. 2, para. 1.
of example, by an enumeration of twelve types of practices especially apt to have the proscribed effect.\textsuperscript{389}

The two definitions were followed by a series of provisions regulating the procedures for the ascertainment and suppression of abuses of economic power within the meaning of the law. The proposed legislation envisaged and differentiated two types of proceedings.\textsuperscript{390} One, aiming at the ultimate suppression of uncovered abuses, was to be of a formal nature, conducted with full investigatory powers of the officials in charge thereof and culminating in a veritable hearing before an administrative tribunal. The other was designed to be more of preliminary and informal character, conducted without broad investigatory powers of the officials in charge thereof and terminating in a report of the findings without a special hearing stage. The administrative tribunal intervening in the hearing stage was to be the Council for Economic Disputes, created by the Cartel Decree of 1935, while the actual investigation was to be entrusted to a newly established official at the Council for Economic Disputes, the Commissioner in charge of investigations of abuse of economic power. The formal procedures were to be initiated upon complaint by persons claiming to be injured by practices constituting abuse of economic power, upon request of the Minister for Economic Affairs, or upon the Commissioner's own motion. Upon conclusion of the hearing, the Council for Economic Disputes was to render a reasoned advisory opinion as to whether an abuse was established and to propose appropriate remedies. If the Minister accepted the finding of an abuse, two courses of action were to be open to him.\textsuperscript{391} Either he might proceed in an amicable fashion and communicate recommendations for the termination of the practices in question or he might procure a royal decree determining the existence of an abuse and imposing upon the perpetrators the measures required for eliminating the abuse. Disobedience was to entail penal sanctions.

\textsuperscript{389} Draft-Bill art. 2, para. 2. The twelve categories of presumptively abusive practices were: (1) practices tending to raise, maintain, or lower price levels; (2) unwarranted discrimination between purchasers; (3) coercion of third persons not to sell to or buy from certain other persons; (4) selling below cost; (5) hampering improvement or operation of technical processes or inventions; (6) quantitative limitation or qualitative alteration of the production; (7) resale price maintenance; (8) division of customers; (9) stipulation of exclusive dealing or loyalty clauses; (10) tied sales; (11) restrictions of the volume of sales or purchases for economic purposes; (12) restrictive, discriminatory, or coercive measures tending to distort the distribution of primary materials, manufactured article, or credit.

\textsuperscript{390} See Belgian Senate, Doc. No. 21, at 43 (1957-1958).

\textsuperscript{391} Government Draft arts. 7 and 9.
The Council of State, in passing on the draft, suggested a number of substantive changes and a rearrangement of the articles mainly for purposes of clarification. Perhaps the most significant modifications suggested were the elimination of the enumeration of the twelve categories of practices constituting presumptively an abuse of economic power and the insertion of special provisions for the exemption of the State, its territorial subdivisions, the public entities, and other agencies of public interest subject to the authority or control of one of the Ministers of State.

The government accepted these recommendations and deposited a revised draft, following the Council of State proposal, with the Senate in November 1957. The bill lapsed, however, as a result of the end of the parliamentary session.

b. Genesis and Structure of the Law of May 27, 1960

On June 9, 1959, the government deposited a new bill with the Senate and, after it was passed by that body, introduced it in the same form in the Chamber of Representatives on December 16, 1959. The Chamber of Representatives likewise adopted the government bill under rejection of several amendments proposed by members of the House on May 18 and 19, and the bill became law on May 27, 1960. The new statute incorporates the substance and structure of the government bill of 1957, but it is changed in some respects for the purpose of greater efficiency and streamlining, and the former absolute exemption with respect to public or quasi-public entities has been replaced by a more qualified rule. In deriving the ultimate form of the proposal the government had before it, and to a large extent followed, the views of the Central Council for the Economy and of the Council of State.

The new legislation repeats the definitions of economic power and abuse contained in the 1957 draft. Thus, the actual law, like the final form of the 1957 proposal, defines abuse by means of a general formula and omits any enumeration of specific practices. Likewise, as before, provision is made for two types of initial proceedings to be conducted by or under the supervision of a newly appointed

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393 Id. at 5 ff.
Commissioner for investigations of abuses of economic power at the Council for Economic Disputes. These proceedings are either informal inquiries for the purpose of determining whether or not a formal prosecution shall be instituted or formal investigations. Again, the latter are to be initiated either upon complaint by injured parties or upon request of the Minister of Economics, but the Commissioner is now given the power of refusing to proceed upon complaint by private parties if he deems it to be inadmissible or unfounded. If, as a result of the preliminary investigation, the Commissioner or the Minister for Economic affairs concludes that the proceedings shall be pursued further, the case is transferred to the Council for Economic Disputes for hearing before one of its special trial divisions. As proposed before, the opinion of that tribunal is advisory only. If the Minister for Economic Affairs accepts its findings of an abuse of economic power, he must, under the new law, proceed in an amicable fashion and make such recommendations as he deems appropriate for discontinuance of the objectionable practices. If the parties accept the recommendations, the matter is settled by an agreement. If the parties fail to follow the recommendations, even after a more formal reiteration, or if they neglect to perform the agreement, the Minister may obtain a formal royal decree issuing a cease and desist order. If the abuse is committed by a juristic person which has been proceeded against previously, the royal decree may, in addition to the measures required to terminate the new abuse, add some special sanctions designed to curb existing or the acquisition of further economic power.

Perhaps the two most important new provisions of the act are inserted for the purpose of harmonizing the Belgian law with the mandates and the policy of the European Economic Community Treaty. Thus, a new Article 28 prescribes: "Whenever the Belgian authorities have to decide, by virtue of Article 88 of the Treaty Establishing the European Economic Community, ratified by the Law of December 2, 1957, upon the permissibility of cartels and upon the abusive exploitation of a dominant position in the Common Market, such determination must be made by the authorities defined in the present law: (1) either in conformity with Articles

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397 Art. 5. Inquiries of this type are initiated by the Commissioner either when there are serious indications of an abuse of economic power in a particular market or upon request by the Minister.
398 Art. 4.
399 Art. 14.
400 Art. 15.
85 (1) and 86 of the Treaty and following, the procedure prescribed by the present act; (2) or in conformity with Article 85 (3) of the Treaty and following the procedure provided for in Article 14, paragraph 8 et seq. with the exception of the three years' limitation.” Furthermore, because of the fact that the European Economic Community Treaty contains, in Article 90, special rules with respect to public and quasi-public entities, the exemption contained in the former bill is changed so as to empower the King to regulate the scope and mode of the applicability of the new statute to such entities by royal decree. 401

E. ITALY

I. HISTORICAL EVOLUTION OF THE ITALIAN LAW RELATIVE TO ANTICOMPETITIVE PRACTICES


Italian law, in its current state, contains no comprehensive special legislation for the control or suppression of anticompetitive practices that is actually enforceable. Rather the chief statutory bases for legal action in this field consist of the articles contained in Book V, Title X of the Civil Code of 1942, entitled “Of the Regulation of Competition and Consortia,” as supplemented by applicable articles pertaining to the law of contracts and torts and the Penal Code.402 This condition results from, and is explainable

401 Art. 27.
402 For recent general works dealing with the legal protection of competition in Italy, see especially Ascarelli, Teoria della Concorrenza e dei Beni Immateriali (2d ed. 1957); Ghiron, La concorrenza e i consorzi (in Vassalli et al., Trattato di Diritto Civile Italiano, Vol. 10) (reprinted 1954); Toni and Ferrara, Die Konsortien im italienischen Recht in Jahn-Junckerstorff, Internationales Handbuch der Kartellpolitik, 285 (1958); for older books or articles treating the subject see Ascarelli, Consorzi Volontari tra imprenditori (2d ed. 1937); Ascarelli, Le Unioni di imprese, 33 Riv. del Dir. Comm. 152 (1935); Salandra, Il Diritto delle Unioni di Imprese (1934); Ascarelli, Note preliminari sulle intere industriali, 1933 Rivista Italiana per le Scienze Giuridiche 90; De Sanctis, Das Recht der Kartelle und anderen Unternehmenszusammenfasungen in Italien (Kartell und Konzernrecht des Auslandes, Ed. R. Isay, issue 4) (1928); Strauss-Wolf, Kartellrecht: Italien in 4 Rechtsvergleichendes Handwörterbuch für das Zivil-und Handelsrecht (ed. Schlegelberger) 650 (1932); Ricca-Barberis, I sindacati industriali e la giurisprudenza, 1 Riv. del Dir. Comm. 458 (1903). For the treatment of particular aspects, see especially Santini, La vendita a prezzo imposto, 6 Riv. Trim. di Dir. e Proc. Civile 1042 (1952); Franceschelli, Importazioni libere in zona di esclusiva e concorrenza sleale, 3 Riv. di Dir. Ind., I, 97 (1954); La Lumia, Ancora su importazioni libere 4 Riv. di Dir. Ind., I, 5 (1955).
by, the difficulties of adapting the Italian legal system and economic structure to the sharp change in political philosophy attending the abolition of the Fascist corporative state.

Prior to the advent of Fascism, the Italian legislator had felt little need for special interference with cartels and other restrictive arrangements, apart from the general limitations on freedom of contract contained in the Civil Code of 1865 and certain sections of the Penal Code of 1888. The latter penalized interference with freedom of trade through violence or threats and the production of a rise or fall of the prices in public markets or exchanges through the spreading of false news or use of other fraudulent means. Conspiracy by five or more persons to commit such offenses was likewise punishable.

As a result of the absence of specific norms governing the legality of cartels or other restrictive combinations and because of the unwillingness of the Italian courts to deduce rules for the protection of competition against private restraints from the legislation establishing freedom of trade, it became recognized that cartels and similar arrangements are legal and enforceable as long as they do not engage in practices proscribed by the Penal Code or have particularly aggravated effects. The leading precedent which established the course which was followed subsequently by the courts was the decision of the Court of Cassation of Naples of May 26, 1903, in the case of Algranati ed altri c. Ferro, Cobianchi ed altri. In that controversy some members of a cartel had brought a damage action against other members because of alleged violation of certain obligations mutually assumed by them. The de-
fendants claimed that agreements such as the one in question were invalid under Italian law and that therefore they were not responsible for any breach of contract. The Court of Cassation, affirming to that extent the detailed decision of the court below, held to the contrary. The high tribunal rested its result on the ground that, apart from the narrow and inapplicable sections of the Penal Code, Italian law contained no positive prohibition against concerted action by producers or distributors and that it was not for the judiciary to arrogate to itself the essentially legislative function of regulating the new phenomenon of joint economic action. Moreover, the Court felt that "in the case of honest cartels, the gains and savings achieved by them" might enure to the benefit not only of the members, but also of the employees and, in the long run, the consumers.

In consequence of this determination, which was much discussed in contemporary legal periodicals, courts and textwriters accepted the position that cartels and similar anticompetitive arrangements were not prohibited in principle and that judicial intervention was apposite only in case of outright infractions of the Penal Code or other special circumstances. As a result, courts and doctrinal efforts occupied themselves primarily not with the permissibility of cartels and similar combinations, but rather with their exact juristic nature and the reciprocal rights, obligations, and remedies of their members as well as of third parties engaging in business transactions with them.

The Italian government likewise not only condoned such restrictive combinations by failing to take legislative action for the control or suppression of their activities, but actually fostered their existence by creating a few compulsory cartels in certain industries by special legislation.

410 See the detailed survey by Ricca-Barberis, I sindacati industriali e la giuris­ prudenza, 1 Rivista di Dir. Comm. 458 (1903).
411 For details see De Sanctis, op. cit. supra note 402, 42; Ascarelli, Note preliminari sulle intese industriali, 1933 Riv. Ital. per le Scienze Giuridiche, at 103, 169; Ascarelli, Le unioni di imprese, 33 Riv. di Dir. Comm. 152, at 155 (1935).
412 These problems have been the subject of an overwhelming mass of technical controversies among Italian legal writers. For discussions under the aegis of the old civil code, see especially Salandra, Il Diritto delle Unioni di Imprese (Consorzi e Gruppi) (1934); Ascarelli, Consorzi Volontari tra Imprenditori (2d ed. 1937); Carnevali, Natura giuridica dei consorzi industriali, 37 Riv. di Dir. Comm. I, 1 (1939); Franceschelli, I Consorzi Industriali (1939); Betti, Società commerciale costituita per finalità di consorzio, 39 Riv. di Dir. Comm. II, 335 (1941).
413 For the early growth of Italian cartels, see Pitigliani, The Development of Italian Cartels Under Fascism, 48 Journ. Pol. Econ. 375 at 377 (1940).
b. The Fascist Cartel Legislation and the Regulation of the New Civil Code of 1942

(1) Compulsory cartels: the Act of 1932. The Fascist tenets of the "corporative state" and a totalitarian economy prompted an even increased predilection for cartels, coupled with an effort of converting them, to a varying extent, into instruments of the state and of governmental policy. This manifested itself in further creations of compulsory cartels and, in 1932, in the passage of a statute "concerning the establishment and the operations of consortia among enterprises engaged in the same branch of economic activity." The new Act provided for the formation, by royal decree, of compulsory cartels among enterprises, belonging to the same branch of the economy, for the purpose of regulating production and competition and for the coordination of compulsory cartels servicing interconnected branches of the economy. Government action of this type was predicated upon a request to that effect either by 70 percent of all the enterprises in a particular industry controlling 70 percent of the aggregate output or, in the absence of the requisite number, by firms controlling together 85 percent of the total output. In the case of agriculture the requirements were somewhat less stringent. In addition, the government had to find that granting such request was in the interest of the national economy and tended to achieve a more rational technological or economic organization of the production. The Act provided in detail for close supervision of the cartel activities by the government as well as by the corporative body representing the particular sector of the economy. It regulated, in addition, various aspects of the internal organization and legal status of such compulsory cartels. Actually, the law was never applied, as a decree envisaged by it for its implementation was never enacted. Rather the government

414 For a survey of the status of compulsory cartels in Italy and the governmental attitude toward their establishment, see the exposition by Mussolini of the bill of 1932 regulating the formation and organization of compulsory cartels, reprinted in [1932] Le Leggi 753.
415 Compulsory Cartelization Act, 1932, art. 2 (a).
416 Compulsory Cartelization Act, 1932, art. 2 (b).
417 Compulsory Cartelization Act, 1932, arts. 6 and 7.
418 Compulsory Cartelization Act, 1932, art. 5.
419 Compulsory Cartelization Act, 1932, art. 12.
proceeded, as before, with the establishment of compulsory cartels by individual legislation.\textsuperscript{422}

Formation of compulsory organizations (consortia) by special statute or decree occurred not only in industry and commerce but also in the agricultural sector of the economy, there, however, more frequently on a local basis.\textsuperscript{423} Subsequent legislation in 1938,\textsuperscript{424} 1939,\textsuperscript{425} and 1942,\textsuperscript{426} however, profoundly changed the status and structure of the agricultural consortia, whether voluntary or compulsory, by supplementing them with, and incorporating them into, a completely totalitarian organization of Italian agriculture.\textsuperscript{427}

(2) \textit{Voluntary cartels: legislation of 1936–1937.} Voluntary cartels, likewise, became of increased governmental interest under the sweep of Fascist legislation. Already the Compulsory Cartelization Act of 1932 had required voluntary cartels regulating the economic activities of their members to transmit their charters and by-laws to the authorities and, in addition, had authorized a considerably further-reaching supervision for voluntary cartels representing seventy-five or more per cent of the national production.\textsuperscript{428} A decree of 1936,\textsuperscript{429} converted into statute law in 1937,\textsuperscript{430} extended the imposed publicity and provided for communication to the secretariat of the appropriate corporations of annual balance sheets and detailed reports. Whenever the dis-

\textsuperscript{422} See Ascarelli, \textit{Teoria della Concorrenza e dei Beni Immateriali} 126 (2d ed. 1957); Pitigliani, \textit{op. cit. supra} note 413, at 385.

\textsuperscript{423} See Pitigliani, \textit{op. cit. supra} note 413 at 396. For instance, a statute of July 18, 1930, [1932] Le Leggi 660, established a compulsory consortium of the grape growers on the island of Pantelleria, the "Consorzio viti vinicolo de Pantelleria." The subsequent insolvency of this consortium created difficult problems regarding its amenability to the bankruptcy act, Tribunale di Trapani, 1954, [1954] Foro Italiano [hereinafter cited as Foro It.] 1, 1493.

\textsuperscript{424} Law of June 16, 1938, No. 1008 for the unification of the provincial economic entities in the field of agriculture, [1938] Le Leggi 819.


\textsuperscript{426} Law of May 18, No. 566, reorganization of the economic entities for agriculture and the Agrarian Consortia, [1942] Le Leggi 530.

\textsuperscript{427} The final organization as completed by the law of 1942 consisted of diverse National Entities designed to act as an auxiliary arm of the Ministry of Agriculture and of the Provincial Agrarian Consortia charged both with regulatory and commercial functions. The latter were re-transformed into regular agricultural cooperatives by the Legislative Decree of May 7, 1948, No. 1235, concerning the organization of the agrarian consortia and the Italian federation of agrarian consortia, Gazzetta Ufficiale, Oct. 16, 1948, No. 242 (supp.)

\textsuperscript{428} Compulsory Cartelization Act, 1932, art. 10.

\textsuperscript{429} Royal Decree of April 16, 1936, No. 1296, [1936] Le Leggi 684.

\textsuperscript{430} Law of April 22, 1937, No. 961, [1937] Le Leggi 582. The exposition of the bill given by the Minister of Corporations contained a list of the 91 cartels operating during the end of 1936.
closures indicated the appositeness of such action, the Minister for Corporations was empowered to issue directives for modification of the cartel activities. Moreover, the public authorities could delegate appropriate functions to the cartels. The law, however, applied only to cartels of national importance.

(3) The regulation of the new Civil Code of 1942. The Civil Code of 1942 attempts to subject the whole field of lawful competition and the limitation thereof by private transactions to a comprehensive, though fairly broad, regulation. It provides in general that agreements which restrict competition must be susceptible of written proof, must be limited to a defined area or activity, and must not exceed a period of five years. It supplements this general rule with more detailed provisions governing cartels with a common organization for the coordination of production and trade (consortia) differentiating, in turn, between such consortia without and with external activities. The Code lists a number of conditions as to form and content which must be complied with by the contracts establishing such consortia and contains a number of other articles concerning legal status and internal functioning of the cartels. In contrast to ordinary agreements in restraint of trade, whether vertical or horizontal, which are limited to a maximum period of five years, organized cartels may be established for a period not exceeding ten years.

The Code also includes provisions dealing with the establishment of compulsory cartels and with the necessity for government authorization and supervision. However, these sections are currently not applicable as their entry into force was postponed.

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431 CIVIL CODE 1942, Bk. V, Title X, arts. 2595-2620.
432 CIVIL CODE 1942, art. 2596.
433 For a discussion of the distinction between simple cartels (falling under the rule of art. 2596) and "cartels, between several entrepreneurs exercising identical or connected economic activities, having as their object the regulation of these activities by means of a common organization" (falling under the rules of art. 2602 ff.), see ASCARELLI, TEORIA DELLA CONCORRENZA E DEI BENI IMMATERIALI 72, 86, 89, 91 (2d ed. 1957).
434 CIVIL CODE 1942, arts. 2606-2611, 2612-2615.
435 CIVIL CODE 1942, art. 2603.
436 CIVIL CODE 1942, arts. 2605-2611.
437 CIVIL CODE 1942, art. 2604, cf. Ascarelli, op. cit. supra note 433, at 89, who deems the differentiation unjustified so far as it discriminates between simple and organized cartels.
438 CIVIL CODE 1942, arts. 2616, 2617.
439 CIVIL CODE 1942, art. 2618.
440 Decree, March 30, 1942, No. 318, for the application and implementation of the Civil Code, art. 111, [1942] Le Leggi 380.
until the issuance of a special decree to that effect which has not been enacted as yet. As no operative prior regulation existed on the subject, Italy at present lacks any special machinery for the control of anticompetitive practices apart from the ordinary courts of justice.\textsuperscript{441}

Italian law likewise made no provision to curb economic concentration by horizontal or vertical integration. In fact, the trend toward a monopolistic or oligopolistic structure in all of Italy's basic industries was greatly accentuated by the operations of the Istituto per la Ricostruzione Industriale which, since its creation in 1933,\textsuperscript{442} has achieved financial control of the state over a substantial portion of the industry of the country.\textsuperscript{443} In the case of enterprises endowed with a legal monopoly the Code imposes a duty to contract with any potential customer and without discrimination; \textsuperscript{444} but this rule does not cover factual monopolists.\textsuperscript{445}

2. \textbf{THE PRESENT STATE OF ITALIAN LAW GOVERNING ANTICOMPETITIVE PRACTICES AND PROPOSALS FOR REFORM}

\textbf{a. Current State of Italian Law Governing Anticompetitive Practices}

The collapse of the Fascist regime and the formal suppression of the agencies of the corporative state \textsuperscript{446} did not result in an immediate drastic change of the law with respect to illegality or supervision of anticompetitive practices.

To be sure, the new Constitution of 1947, in Article 41, has elevated freedom of private economic initiative to an Italian civil right.\textsuperscript{447} But the actual scope of this liberty, vis-à-vis legislative action, as well as its immediate impact on the administration of justice in private controversies involving the legality or validity of anti-

\textsuperscript{441} Cf. Ascarelli, \textit{op. cit. supra} note 433, at 127.
\textsuperscript{442} Legislative Decree No. 5 (1933), converted into a statute by Law No. 512 (1933), [1933] Le Leggi 49, 560.
\textsuperscript{444} Civil Code 1942, art. 2597.
\textsuperscript{445} Ascarelli, \textit{op. cit. supra} note 433, at 43 ff.
\textsuperscript{446} Legislative Decrees of August 9, 1943, No. 721, [1943] Le Leggi 473, and of Nov. 23, 1944, No. 362.
\textsuperscript{447} Italian Constitution art. 41: “Private economic initiative is free. It cannot be employed so as to be incompatible with social utility or in a way that inflicts injury to human safety, freedom or dignity. The law determines the appropriate programs and controls to the end that public and private economic activity may be directed and coordinated toward social goals.”
competitive arrangements, is controversial \(^{448}\) and needs clarification by decisional practice.\(^{449}\) Apparently this Article does not prevent the establishment of compulsory cartels where such action is deemed to be in the public interest.\(^{450}\) At any rate, generally speaking, the permissibility or enforceability of restrictive practices, whether concerted or not, still depends primarily on the provisions of the Penal Code of 1930 and of the Civil Code of 1942, particularly its sections governing contracts, torts, and unfair competition.

The present Penal Code of 1930, like its predecessor, contains only fairly narrow prohibitions, such as the imposition of penalties on the dissemination of false news or the employment of other stratagems for the purpose of affecting the market price of goods or securities \(^{451}\) and on the direct interference with the freedom of industry and commerce by way of violence practiced on objects or by fraudulent means.\(^{452}\) Nevertheless, it has been concluded that concerted boycotts, though short of a violation of the Penal Code, may constitute a tort.\(^{453}\)

In general, however, Italian law condones restrictive agreements, whether of the horizontal or vertical type, and enforces them, at least \textit{inter partes}. Thus, stipulations for resale price maintenance and the grant of exclusive territorial distributorships have been held legitimate and enforceable between the parties.\(^{454}\) The Italian


\(^{449}\) The new Italian Constitutional Court has considered the limits which legislative action may place on the liberty guaranteed by art. 41 and \textit{vice versa} in several cases; see decision no. 29 of Jan. 26, 1957, [1957] \textit{Giur. It. I}, 432 (upholding the constitutionality of public health legislation); decision no. 50 of Apr. 13, 1957, [1957] \textit{Giur. It. I}, 642 (upholding the constitutionality of export or import restrictions); decision no. 103 of July 8, 1957, [1957] \textit{Foro It. I}, 1139 (upholding the constitutionality of price control legislation).


\(^{451}\) \textit{Penal Code} 1930, art. 501.

\(^{452}\) \textit{Penal Code} 1930, art. 513.


courts, however, have been reluctant to provide remedies against third parties acting in disregard of such arrangements. Some recent authors have questioned this attitude and argued in favor of outsider liability.

b. Proposals for Further Antirestrictive Practices

Legislation

Italy, like other countries, has witnessed, in recent years, several proposals for more extensive legislation for the suppression and control of anticompetitive practices. Thus, in 1950 the Italian Government submitted to Parliament the draft of an “Act Containing Provisions for the Supervision of Cartel Agreements.” The proposal was never debated and lapsed as a result of the dissolution of Parliament in 1953. In March 1955 two members of Parliament, the Hon. Malagodi and Bozzi, introduced a new bill containing “Norms for the Protection of the Freedom of Competition and Trade.” It was much more ambitious in scope and provided not only for the filing of restrictive agreements with a newly established administrative board, but prohibited outright restrictive practices for the purpose of achieving unjustified price increases to the injury of consumers. Again the end of the parliamentary session entailed the lapse of this bill. On March 12, 1959, Representatives Malagodi, Bozzi, Cortese, and Alpino introduced a revised bill containing “Norms for the protection of the freedom of competition and trade,” which considerably enlarged the scope of exclusive dealership arrangements is settled by decisions too numerous to cite and is implied by the cases cited infra, note 455.


See in particular Santini, La vendita a prezzo imposto, 6 Riv. Trim. di Dir. e Proc. Civ. 1042, 1063 ff. (1952); Ligi, La disciplina della concorrenza e il contratto di agenzia con esclusiva in una interessante fattispecie, 3 Riv. di Dir. Civile 106 (1957), and Ligi, Note, [1957] Foro It. I, 588, all with copious references.

The text of the bill is reproduced in 4 Riv. Trim. di Dir. e Proc. Civ. 752 (1950), preceded by a critical discussion by Professor Ascarelli, Sul progetto di legge “antitrust,” id. at 742.

The text of the bill is reproduced in 1 Riv. di Dir. Civ. 369 (1955), preceded by a critical discussion by Professor Visentini, Un progetto di legge antitrust, id. at 358.
of the prohibitions and regulations of the previous proposal.\textsuperscript{459}

Later in 1959 the Government itself prepared a Draft Bill for the protection of the freedom of competition\textsuperscript{460} which is reputed to have good prospects of being adopted in the near future. It contains comprehensive prohibitions against restrictive understandings among entrepreneurs and abuse of dominant market power, requires communication of cartel agreements to the Minister for Industry and Commerce, and establishes a special administrative and judicial machinery for its enforcement.

The principal prohibition of the bill extends to all “understandings among entrepreneurs which, by means of contracts, accords or concerted practices, or by means of clauses in charters, general or regulatory provisions, or resolutions of consortia or associations of enterprises, are capable of hampering, falsifying or limiting in any way the competition in the domestic market.” Following the example of the E.E.C. Treaty the bill specifies that the prohibition applies in particular to “understandings that

1) fix, directly or indirectly, purchase or sales prices or other contractual terms;
2) limit or control production, outlets, technical development, or investments;
3) divide markets or sources of supply;
4) apply, in commercial dealings, unequal conditions to similar or equivalent goods or services;
5) condition the conclusion of contracts upon the acceptance of supplementary goods or services which neither by their nature nor by commercial usage are connected with the contracts themselves.”\textsuperscript{461}

This broad interdiction of collective restraints is followed by a prohibition against abuse of dominant market power, circumscribed as “manipulating, in the market for particular goods or services, the price, the conditions of delivery, or the flow of supply in such fashion as to subject the consumers or particular categories of enterprises to unjustified burdens or restrictions.” Dominant market power is deemed to exist when the respective enterprises, either by themselves or as a result of combinations, understandings, or accords, are not subject to efficient competition in the internal mar-

\textsuperscript{459} The bill is reprinted in [1959] Foro It. IV, 154, preceded by comments of Ligi, and in 8 Riv. di Dir. Ind., I, 193 (1959), preceded by comments signed G. G., \textit{id.} at 189.

\textsuperscript{460} For the text of the draft bill see Testo definitivo del disegno di legge per la tutela della libertà di concorrenza, [1960] Foro It. IV, 30.

\textsuperscript{461} \textit{Id.}, art. 1.
The bill specifies that certain transactions as such are not considered to be understandings within the meaning of the law. It includes in that list "mergers of associations, concentration of shares, management and agency contracts even though they provide for exclusive dealing, assignments or licenses of patents, except, in the case of licenses, agreements that provide for reciprocal exclusive licensing or contain additional clauses which by themselves perform anticompetitive functions." The bill requires communication to the Minister of Industry and Commerce of all understandings, whether formalized or oral, that regulate the production or the commerce of the parties thereto.

For the proper enforcement of the law a new administrative body, called Commission for the Protection of Competition, is established. It is composed of eighteen members, chosen from specified government departments and persons with the requisite economic or legal expertise. Upon request by the Minister of Industry and Commerce, it conducts investigations for the purpose of ascertaining whether there are (communicated or non-communicated) illegal understandings in operation or whether abuses of dominant market power are being committed. It advises the Minister of its findings and suggests measures which should be adopted.

If the Commission finds that there is an illegal understanding or abuse of dominant market power, the Minister may issue a warning to the parties involved and demand cessation of such conduct. If the parties comply, no further governmental action will be taken and they will not be subject to the penalties imposed by the law upon participation in prohibited understandings or abuse of dominant market power. If the parties fail to comply, the Minister may institute proceedings for declaratory judgment in a newly established special division of the District Court of Rome for the purpose of establishing the illegality of the understanding or the abuse of dominant market power. In case the special division makes a finding to that effect, proceedings for penalties will be instituted.

Actions for declaratory judgment of the type described are also made available to all other interested parties provided their intention of initiating such proceedings was duly communicated to the Minister at least three months prior thereto. Compliance by the...
enterprises with a warning by the Minister is no bar to the latter proceedings.

Determination of the illegality of an understanding or of the abuse of dominant market power by the special division of the District Court of Rome is also required whenever such issue arises in civil, criminal or administrative proceedings. If necessary, such other proceedings must be discontinued until such determination. It is *res judicata* vis-à-vis all interested parties.466

F. LUXEMBOURG

As might be expected in view of the relative size and industrial structure of the country, as well as its close economic and legal ties with Belgium, Luxembourg has not enacted any special legislation with respect to restrictive business practices.467 In fact, as the home of one of the largest steel producers in the world, the well-known ARBED (Aciéries Réunies de Burbach-Eich-Du Delange), Luxembourg was also the seat of the powerful continental European Steel Cartel, the Entente Internationale de L'Acier, which in turn was the pivot of the notorious International Steel Cartel.468

Luxemburgian law, as a result of the political history of the Duchy, still stems to a large extent from the French legislation between 1791 (proclamation of freedom of trade) and 1815469 and belongs to the French family of legal systems. Many of Luxembourg's more recent statutes and decrees, however, are copies or adaptations of Belgian acts. Thus the Penal Code of the Duchy was borrowed from its western neighbor in 1879470 and, accordingly, contains, in Article 311, an identical prohibition against fraudulent production of price rises and falls as governs in Belgium.471 Similarly, a Grand Ducal Decree of January 22, 1936,472

466 Id., arts. 11-16.
467 About the Luxemburgian law relating to restrictive business practices, see especially Metzler, Mêlanges de Droit Luxembourgeois, 58 ff., 260 ff. (1949); Ententes et Monopoles dans le Monde: Benelux II, Belgique et Luxembourg (DOCUMENTATION FRANÇAISE, Notes et Études Documentaires, No. 1778) 69 ff. (1953).
468 About the E.I.A. and the International Steel Cartel, see Hexner, The International Steel Cartel (1943); Metzler, op. cit. supra note 467 at 59; Lister, Europe's Coal and Steel Community 181 (1960).
469 Accordingly the French Civil Code of 1804 as well as the Commercial Code of 1807 are both in force in Luxembourg.
471 Similarly, a Grand Ducal Decree of May 31, 1938, against illegal speculation in victuals, goods, and securities, repeated the somewhat broader formula of the Belgian law of July 18, 1924 on the same subject discussed *supra* part II, sec. D. See Huss, Le boycottage en droit luxembourgeois, 10 Trav. de Ass. H. Capitain 176 (1956).
472 Grand Ducal Decree of January 15, 1936, as amended by Grand Ducal Decree of
enacted for the purpose of "protecting producers, merchants and consumers against certain activities tending to falsify the normal conditions of competition," replaced the major part of a prior law against unfair competition, the new provisions being modeled after the Belgian Ordinance on that subject of 1934. 473

While the decree against unfair competition, following the Belgian model, contains a broad and general prohibition against the infliction of harm, or the attempt to inflict harm, to the competitive capacity of a competitor, Luxemburgian courts, like their Belgian counterparts, seem to have used this provision only haltingly for the curbing of anticompetitive practices and have condoned cartels and similar restrictive arrangements. 474 Resale price maintenance agreements are held to be valid and enforceable not only inter partes, but also, on the theory of quasi-tort or unfair competition, against price-cutting outsiders. 475 The validity of exclusive dealership arrangements likewise seems to be beyond question. 476

In the field of concentrations it is worth noting that Luxembourg, in 1929, enacted particular legislation aiming at the encouragement of the formation of holding companies, that is, corporations created for the purpose of acquiring and exploiting financial participation in other enterprises, by according them exemption from corporate income taxes and other fiscal advantages. 477 Moreover, an enabling act of 1937 authorized the issuance of special government regulations for the purpose of modifying the general corporation and holding companies law, so far as applicable to holding companies acquiring or having acquired stock in foreign

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473 See the discussion of the Belgian ordinance, supra sec. D. In contrast to the Belgian ordinance, the Luxemburgian decree contains, in the list of particularized offenses, a special prohibition against sales accompanied by free gifts or trading stamps, first outlawed by Grand Ducal Decree of May 9, 1934 [1934] Pas. Lux. 343.

474 See Metzler, op. cit. supra note 467, at 58. It has been suggested, however, that the Grand Ducal Decree of 1936 against unfair competition, as well as the law of May 11, 1936 guaranteeing the freedom of association, provides sufficient sanctions against boycotts, especially those having the purpose of coercing outsiders to adhere to a cartel, Huss, op. cit. supra note 471 at 178.

475 Thus, ARBED has granted exclusive global distributorship for its products to the Comptoir Métallurgique Luxembourgeois [COLUMETA].

corporations having a value of at least one billion Luxemburgian francs, and of providing for a special tax status for such companies.\textsuperscript{478}

In order to comply with the mandates of the E.E.C. Treaty, the Luxemburgian government contemplates the introduction of legislation necessary for the implementation of its provisions.

III. THE PROTECTION OF COMPETITION IN THE EUROPEAN COAL AND STEEL COMMUNITY

A. FUNDAMENTAL ASPECTS OF THE LEGAL FRAMEWORK OF THE EUROPEAN COMMON MARKET FOR COAL AND STEEL

I. ORGANIZATION OF THE EUROPEAN COAL AND STEEL COMMUNITY

a. Historical Background

Without going into the complex political and economic reasons which prompted the establishment of the European Coal and Steel Community by the six nations participating therein,\textsuperscript{479} suffice it to say that it was conceived as the first great step toward economic integration of continental Western Europe, taking the form of a common market in a basic sector of the economy, \textit{i.e.}, the coal and steel industries. The initial public impetus came from a declaration of the French Government on May 9, 1950, which proposed “to place the combined coal and steel production of France and Germany under a common High Authority in an organization open to other European Countries.”\textsuperscript{480} The governments of the Federal Republic of Germany (with the approval of the Allied High Commission), of Italy, and of the Benelux countries accepted these

\textsuperscript{478} Act of Dec. 27, 1937, art. 1(7), [1937] Pas. Lux. 224. In exercise of the power so delegated the government, on Dec. 17, 1938, issued two decrees, one of which governed the corporate actions necessary for the acquisition by a holding company of the stock of a foreign corporation valued at a billion francs or more, while the other regulated the tax status of holding companies of that size, [1938] Pas. Lux. 505 and 511.

\textsuperscript{479} For a discussion of the varied causes and the background of the creation of the E.C.S.C., see in particular RIEBEN, \textit{DES ENTENTES DE MAÎTRES DE FORGES AU PLAN SCHUMAN} 314 (1954); HAUSSMANN, \textit{DER SCHUMAN-PALN IM EUROPÄISCHEN ZWIEBLICH} 7 (1952); REUTER, \textit{LA COMMUNAUTÉ EUROPEENNE DU CHARBON ET DE L'ACIER} 23 (1953); RACINE, \textit{VERS UNE EUROPE NOUVELLE PAR LE PLAN SCHUMAN} 25 (1954); DIEBOLD, \textit{THE SCHUMAN PLAN} 8 (1959); LISTER, \textit{op. cit. supra} note 468, at 3 (1960).

\textsuperscript{480} The text of the whole declaration is reproduced in Rapport de la Délégation Française sur le Traité et la Convention Signés à Paris le 18 Avril 1951 (published by the French Ministry for Foreign Affairs) at 9 (1951).
principles, and beginning with June 20, 1950, a conference of delegates under the chairmanship of Mr. Monnet worked out the details of the Treaty.\footnote{For an account of the progress of the work of the conference which stretched over a period of nine months see Racine, \textit{op. cit. supra} note 479 at 76-96; cf. also Schuman, \textit{Origines et Elaboration du Plan “Schuman,” 3 Cahiers de Bruges} 266 (1953).} The draft was completed in March 1951 and the Treaty was signed on April 18, 1951.\footnote{The treaty was drafted in French and, accordingly, has only one authoritative text. The original and a German translation are published in [1952] BGBI. II, 447. An English translation was published by the High Authority. Art. 56 of the Treaty was modified in 1960 by the procedure applicable to so-called “little amendments” which is established by art. 95, para. 3, of the Treaty. The text of the new art. 56 is published in [1960] Journal Officiel des Communautes Européennes [hereinafter cited as "J’Off."] 781.} Upon ratification by the member states it went into force on July 23, 1952.\footnote{[1952] BGBI. II, 978. For a brief survey of the parliamentary debates preceding the individual ratifications, see Racine, \textit{op. cit. supra} note 479 at 102-116; Mason, \textit{The European Coal and Steel Community, Experiment in Supranationalism} 10-33 (1955); Diebold, \textit{op. cit. supra} note 479, at 78-112.} 

b. Structure and Organs of the European Coal and Steel Community

The “basis” of the European Coal and Steel Community is a “common market for coal and steel”\footnote{\textit{E.C.S.C. Treaty} arts. 1, 2 and 4.} which is subject to comprehensive and, with qualifications, exclusive economic powers vested in four Community organs, in accordance with the detailed and complex provisions of the Treaty. The exact juridical qualification of the Community and Community organs has evoked a voluminous, but largely semantic, debate, prompted in part by the fact that the Treaty itself, in one place, uses the phrase “supranational.”\footnote{See the discussion, with survey of the copious literature, by Mathijsen, \textit{Le Droit de la Communauté Européenne du Charbon et de l’Acier} 144-156 (1958); note, in addition, De Visscher, \textit{La Communauté Européene du Charbon et de l’Acier et les Etats Membres, 2 Actes Officiels du Congrès International d’Études sur la C.E.C.A.} [hereinafter cited as Actes Officiels] 7, at 31 (1957); Catalano, \textit{Le fonti normative della Comunità Europea del Carbone e dell’Acciaio, 2 id.} 117, at 120; Delvaux, \textit{La notion de supranationalité dans le traité du 18 Avril 1951, créant la C.E.C.A., 2 id.} 225; Münch, \textit{Délimitation du domaine du droit des communautés supranationales par rapport au droit étatique interne, 2 id.} 271, at 274.} The four Community organs, under whose aegis the life of the market is placed, were originally named the High Authority, the Common Assembly, the Special Council of Ministers, and the Court of Justice.\footnote{\textit{E.C.S.C. Treaty} art. 7.} Upon establishment of the E.E.C. and Euratom in 1957, the Common Assembly was replaced by a single assembly for the three communities, styling itself the European Parlia-
mentary Assembly, and the Court of Justice was transformed into a common Community organ.487

Without going into the details of the respective attributes and jurisdictions of the four organs, it may be indicated, in a general way, that the High Authority is envisaged as the principal executive and regulatory agency of the European Coal and Steel Community; conversely, the Parliamentary Assembly exercises general supervisory and extremely limited embryonic legislative powers, while the Special Council of Ministers, in its role as a Community institution, apart from separate responsibilities for certain organizational and budgetary matters, is established mainly as a body charged with the clearance of actions by the High Authority involving major policy determinations and with the maintenance of harmony between national and Community policies.488 The Court, of course, is the chief instrument for preserving the legality, under the Treaty, of the conduct of the Community organs, the member states, and the enterprises subject to the Community law.489

2. CHARACTER AND EXTENT OF THE DISCIPLINE OF THE COMMON MARKET FOR COAL AND STEEL

a. Basic Orientation of the Market

The E.C.S.C. Treaty, in Articles 2–5, spells out the fundamental law of the Community by fixing its objectives and tasks, as well as designating the basic rules for the creation, administration, and orientation of the Common Market.490 While the ultimate goals

488 About the institutional aspects of the E.C.S.C. see, in particular, Reuter, La Communauté Européenne du Charbon et de l’Acier (1953); Matter, Rechtsgrundlagen und Praxis der Montanversammlung, 7 NJW 218 (1954); Mason, op. cit. supra note 483 at 34–52; De Visscher, op. cit. supra note 485 at 20. In actual practice the Council of Ministers has tended to function more as a representation of the divergent national interests than as a Community apparatus, and more as a policy-making agency than as a brake on the High Authority; see the comments by Reuter, Les interventions de la Haute Autorité, 5 Actes Officiels 7, 69.
and aspirations of the Community may be of a social and political character, its route is determined on the basis of a predominantly economic conception: that of a coherent and non-compartmentalized, under normal conditions spontaneously functioning, effectively competitive market.491 Accordingly, Article 4 enumerates four categories of actions by member states that are recognized as incompatible with a common market for coal and steel and therefore abolished and prohibited within the Community, in the manner specified by the provisions of the Treaty, viz.:

(a) import and export duties, or extractions with an equivalent effect, and quantitative restrictions on the movement of coal and steel;
(b) measures or practices discriminating among producers, among buyers or among consumers, especially with reference to prices, delivery terms and transportation rates, as well as measures or practices which hamper the buyer in the free choice of his supplier;
(c) state subsidies or aids, or special charges imposed by the state, in any form whatsoever;
(d) restrictive practices tending towards the division or the exploitation of the markets.

These provisions designed to blueprint the proper market mechanism are surrounded by definitions of the Community goals (Article 3) and mandates for Community action (Article 5) which, inter alia, direct the Community institutions to "assure to all consumers in comparable positions within the common market equal access to the sources of production," 492 and to "assure the establishment, the maintenance and the observance of normal conditions of competition and not to interfere directly with the production and the operation of the market except when the circumstances require action." 493

These precepts, including the fundamental prohibitions enshrined in Article 4, are not mere programs, but directly controlling rules

491 About the economic conceptions and policies enshrined in the treaty see Rapport de la Délégation Française, supra note 480 at 72, 91; Krawielicki, Das Monopolverbot im Schuman Plan (1952); Haussmann, op. cit. supra note 479 especially 10 and 52; Reuter, Les interventions de la Haute Autorité, 5 ACTES OFFICIELS 7; comments by Dupriez, id. at 223; Demaria, Le système des prix et la concurrence dans le marché commun, 6 ACTES OFFICIELS 7, at 32; Allais, Le système des prix et la concurrence dans le marché commun de la C.E.C.A., 6 Id. 143, at 153.
492 E.C.S.C. Treaty art. 3(b).
493 E.C.S.C. Treaty art. 5, para. 2, cl. 3.
of conduct 494 that became operative immediately upon the initiation of the respective common markets for each of the three categories of products: (a) coal, iron ore, and scrap, 495 (b) steel, 496 and (c) special steels. 497 Consequently they must be constantly taken into consideration in the application of the other provisions of the Treaty. 498

b. Built-In “Dirigistic” Safety Valves

Although the basic orientation of the market discipline is that of a “tempered liberalism,” 489 the framers of the Treaty realized full well, in the light of past experiences, that the scope and structure of the market for coal and steel, as well as its susceptibility to technological or cyclical changes, rendered it unrealistic to rely on an unshackled spontaneous market mechanism as the exclusive device for the achievement of the Community aims. They felt a need for empowering the Community institutions to resort, on a supranational level, to public interventions of varying character and severity. 500 Accordingly, they inserted in the Treaty a “hierarchy” of allowable “dirigistic” measures, either for the purpose of promoting the maintenance, improvement, and expansion of the means of production or for the purpose of controlling the production or consumption in periods of oversupply or shortages, 501 subject always to the aggregate of basic limitations deriving from Articles 2–5. 502

c. Treaty Provisions Implementing the Basic Orientation

As the normal basis of the European Coal and Steel Community is a coherent competitive market, freed from compartmentalization...
or other protectionistic interferences by the national governments, as well as from restrictive or discriminatory practices by its enterprises themselves, the Treaty has not been content with the broad formulae laid down in Articles 2–5, but has implemented them with more specific regulations relating to pricing practices,\(^{503}\) to cartels and concentrations,\(^{504}\) and to interferences by the member states with the competitive process,\(^{505}\) which will be discussed in greater detail below.\(^{506}\)

The intellectual origin of the provisions against restrictive practices and concentrations has been the subject of conflicting theses and conjectures. It is not clear whether regulations of that type were envisaged in the working papers distributed by the French delegation to the other conferees at the beginning of negotiations or whether they were inserted into the draft only at a later stage.\(^{507}\) To be sure, a well-informed French author has spoken of an "anti-cartel conception" as the basis of the Schuman plan;\(^{508}\) but other sources have asserted that the provisions in question were due to the German influence, either upon the insistence of the Occupation Authorities, who wished to anchor the effects of their decartelization and deconcentration policies vis-à-vis the German coal and steel combines into the framework of the Treaty, or because of the economic philosophy of the Adenauer government.\(^{509}\) At any rate, the other powers agreed on the need for such stipulations, though in advance of their own national legislation, in order to safeguard the competitive mechanism of the market.\(^{510}\) In fact, the structure and phraseology of Article 65 show more the imprint of contemporary Belgian and French legislative techniques than the paternity of German draftsmanship.\(^{511}\)

\(^{503}\) E.C.S.C. Treaty art. 6o.
\(^{504}\) E.C.S.C. Treaty arts. 65, 66.
\(^{505}\) E.C.S.C. Treaty art. 67.
\(^{506}\) As the E.C.S.C. Court of Justice has frequently emphasized, the implementing provisions must not be construed as if standing by themselves, but must be interpreted and applied together with the norms of arts. 2–5 as a whole, if need be under reconciliation of the somewhat divergent objectives specified in art. 3. See the authorities cited supra notes 490 and 494.
\(^{507}\) See Racine, op. cit. supra note 479, at 83, 93.
\(^{508}\) See Racine, op. cit. supra note 479, at 94.
\(^{509}\) See the discussion by Haussmann, op. cit. supra note 479, at 10, 150. Actually, it appears that only art. 66 and its formulation (concentrations) was the source of special concern to the Occupation Authorities and the subject of special difficulties and negotiations. See Entwurf eines Gesetzes gegen Wettbewerbs-Beschränkungen, Deutscher Bundestag, 1st Elective Period, Doc. No. 3462, Annex r, at 18 (1952).
\(^{510}\) Rapport de la Délégation Française supra note 480, at 91, 92 (1952).
\(^{511}\) See infra part A, sec. 2.
d. **Coverage of the Market Discipline**

Since the European Coal and Steel Community, in its very nature, aims at only a partial or, more exactly, segmental economic integration, the extent of the coverage of the market discipline raises important issues. (1) The types of products to which the market extends are defined in three special Annexes to the Treaty, and include iron and manganese ore, scrap, pig iron and steel ingots, semi-finished products, and finished iron or steel products, such as rails, beams, wire rods, and sheets. (2) Enterprises subject to, and entitled to the Court’s protection by reason of, the market discipline are the coal and steel producers within the European territories of the member states and also, but only with reference to the provisions regulating restrictive practices and concentrations, enterprises and organizations engaging in commercial distribution excepting sales to domestic consumers or artisans.512 (3) The market discipline is not restricted to private enterprises but binds nationalized enterprises, such as the French coal mining industry, as well. The Treaty does not affect the power of the member states to regulate enterprise ownership according to their own standards.513

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**B. Protection of Competition Against Collective Restraints or Adulterations by Enterprises**

**I. Nature and Extent of Protection**

**a. Sources and Types of Anticompetitive Actions and Practices in General**

(1) **Sources of proscribed actions and practices.** Since a spontaneously functioning competitive market is deemed to be, under normal conditions, the best means for achieving the Community objectives, the Treaty endeavors to shield the competitive process against various kinds of deleterious impairment. Such interference may either stem from outside sources, *i.e.*, “measures” by the member states or the Community organs, or come from within,

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512 E.C.S.C. Treaty arts. 79, 80. For details see especially Grassetti, Roblot, Daig, Lagrange, van Hecke and Weber, *La Communauté et les entreprises*, 4 *ACTES OFFICIELS* 7 ff. Associations of Community enterprises, as specified in arts. 78, 80, may be formed and are subjected to certain rights and duties by virtue of art. 48. They may resort to the Court of the European Communities for judicial relief within the limits available to individual enterprises, E.C.S.C. Treaty art. 33, para. 2.

i.e., "practices" by the market enterprises themselves. The Treaty contains more or less detailed provisions directed against various impairments from both classes of sources, \(^514\) but this section deals only with anticompetitive practices by enterprises in the market.

(2) Types of anticompetitive practices of enterprises envisaged by the Treaty. The Treaty classifies anticompetitive conduct of enterprises under four main headings: (a) collective restraints or adulterations of competition, \(^515\) (b) concentrations or abuses of monopolistic power, \(^516\) (c) discriminations, \(^517\) and (d) pricing practices, dictated by monopolistic aspirations or unfair for other considerations. \(^518\) The legal sanctions against, and the powers of the Community organs with respect to, practices falling within one of these classes may vary substantially, according to what particular category is involved.

Unfortunately, however, it is easier to state the difference in labels than to indicate the exact content of each of these categories which have fluid boundaries and may overlap in numerous circumstances. As a result, the interrelation between the various parts of the Treaty relating to anticompetitive practices by enterprises has been the subject of much uncertainty and discussion. \(^519\) There is no escape from the conclusion that the Treaty has not followed sharply defined and consistent criteria of classification, but has approached the protection of competition in a pragmatic and rather unsystematic way, \(^520\) leaving it to practice and theory to weld the dispersed provisions into a coherent and workable scheme. This applies with particular force to the differentiation between the

\(^{514}\) Impairment may also result from practices by enterprises not subject to the market discipline. In such case the Treaty by its very nature is confined to indirect and limited counter-measures, e.g., as specified in art. 63.

\(^{515}\) E.C.S.C. Treaty arts. 4(d), 65.

\(^{516}\) E.C.S.C. Treaty art. 66 (1-6) and (7).

\(^{517}\) E.C.S.C. Treaty arts. 4(b), 60 (1) (2).

\(^{518}\) E.C.S.C. Treaty art. 60 (1) (1).


\(^{520}\) To the same effect Reuter, op. cit. supra note 519, at 202.
b. Treaty Provisions Against Restraints and Adulterations by Enterprises

(i) Text of the pertinent Treaty provisions

(a) Article 4 (d):
The following are recognized to be incompatible with the common market for coal and steel, and are, therefore, abolished and prohibited within the Community under the conditions specified in this Treaty:
(d) restrictive practices tending towards the division or the exploitation of the markets.

(b) Article 65(1)-(3):
1. All agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, tending, directly or indirectly, to hinder, restrict or adulterate the normal operation of competition within the common market are prohibited, and in particular those tending:
(a) to fix or determine prices;
(b) to restrict or control production, technical development or investments;
(c) to divide markets, products, customers or sources of supply.

521 Most authors seem to agree in the conclusion that the criterion which differentiates an accord creating a cartel within the meaning of art. 65 from an agreement constituting a concentration within the meaning of art. 66 lies in the retention of independent power over the management of their affairs by the principal parties to the transaction, see Krawielicki, op. cit. supra note 519, at 55; Bayer, op. cit. supra note 519, at 372; Reuter, op. cit. supra note 519, at 216, 217; Roblot, Les relations privées des entreprises assujetties à la C.E.C.A., 17 Droit Social 561, at 571, 575; Prieur, op. cit. supra note 519, at 809; but contra Demaria, Le système des prix et la concurrence dans le marché commun, 6 Actes Officiels 7, at 103, n. 24 (1957): "What seems to distinguish essentially the concentration from the cartel is the policy pursued and not the property arrangement or the mode of the accord." Professor Reuter defines concentration as "an operation which places two or more enterprises under a common control over the entirety of their affairs."

522 About the overlap between the prohibitions of art. 60 and art. 65 see Reuter, op. cit. supra note 519, at 218. Another question, much discussed in the early stages of the common market, concerned the problems as to how far the High Authority may establish price controls to counteract the effect of existing cartels in the coal and steel market. See the references in Mason, The European Coal and Steel Community 85, n. 33 (1955).

523 The French text is "fausser," which may be rendered in English as "falsify" or "adulterate." Some translations have employed the expression "distort." In this discussion "adulterate" is used as the nearest English equivalent.
2. However, the High Authority shall authorize agreements to specialize in, or to engage in joint buying or selling of, specified products, if the High Authority finds:

(a) that such specialization or such joint buying or selling will contribute to a substantial improvement in the production or distribution of the products in question;

(b) that the agreement involved is essential to achieve these results, without being more restrictive in character than is necessary for that purpose; and

(c) that it is not capable of giving the interested enterprises the power to determine prices, or to control or limit the production or marketing of a substantial part of the products in question within the common market, or of withdrawing them from effective competition by other enterprises within the common market.

If the High Authority should find that certain agreements are strictly analogous in their nature and effects to the above-mentioned agreements, taking into account in particular the application of this section to distributing enterprises, it shall likewise authorize such agreements, provided that it finds that they satisfy the same conditions.

Authorizations may be granted subject to specified conditions and for a limited period. In that case the High Authority shall renew authorizations once or several times if it finds that at the time of renewal the conditions stated in paragraph (a) to (c) above are still satisfied.

The High Authority shall revoke or modify an authorization if it finds that as a result of a change in circumstances the agreement no longer satisfies the conditions specified above or that the actual consequences of the agreement or its application are contrary to the conditions required for its approval.

Decisions granting, renewing, modifying, denying or revoking an authorization shall be published together with the reasons therefor; the restrictions specified in the second paragraph of Article 47 shall not apply in such cases.

3. The High Authority may obtain, in accordance with the provisions of Article 47, any information necessary for the application of this article, either by a special request addressed to the interested parties or by a general regulation defining the nature of the agreements, decisions or practices which must be communicated to the High Authority.
(2) **Scope and interpretation.** In analyzing the significance and scope of the controlling text it might be worth noting at the outset that its general scope, apart from reflecting clearly the influence of the Havana Charter, resembles most the contemporary French statutory provisions and drafts. The Commissariat au Plan, which played such an important part in the preparation of the plan subsequently announced so dramatically by Mr. Robert Schuman, was at the same period engaged in the drafting of domestic legislation for the suppression of anticompetitive practices. That work culminated in the government bill for the control of cartels, no. 9.951, which was introduced in Parliament three days after the publication of the Schuman proposal. Other legislative proposals of similar character were introduced at the same time by representative Henri Teitgen, who later assumed an active role in the Common Assembly, and by the members of the socialist party. In comparing the tenor and phraseology of these drafts with the formulation of Article 65 the great similarity between them becomes strikingly discernible. Especially the notion of protecting competition against adulteration (fausser), which is employed in the E.C.S.C. Treaty, can be found not only in the Belgian and Luxemburgian legislative language, as noted before, but occurs likewise in the French discussions of that period.

In analyzing the range of the prohibition it is worth noting that it consists (a) of a general clause which proscribes all agreements, decisions, and other concerted practices which "tend," directly or indirectly, to hinder, restrict, or adulterate the normal operation of competition in the common market, and (b) of a catalogue of three special categories of practices, that is, price-fixing, restriction or control of production, technological development, or investment, and division of markets, products, customers, or supplies.

The exact elements of the practices proscribed by the general clause and the significance of the addition of the catalogue of specifically named practices have been the subject of numerous

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525 Reprinted in Moreau, *op. cit. supra* note 524, at 121.
528 See supra Part II, sections D and E.
529 See especially the counter-project of the Commission of Economic Affairs of the National Assembly, reprinted in Moreau, *op. cit. supra* note 524, at 124.
doubts and controversies. Thus the meaning of the phrase "tend to" has been much debated, and in particular there seems to be a question of whether the specific practices listed are meant to be per se violations for which anticompetitive tendency needs no further proof. At any rate, there seems to be agreement that the practices enumerated are proscribed only if they relate to and affect the common market. Price-fixing of pure export cartels is not prohibited. Another important controversy pertains to the applicability of Article 65 to vertical agreements. While Professor Reuter has advanced the thesis that Article 65 covers only horizontal agreements, Dr. Krawielicki, Professor Roblot, and Dr. Daig have argued for its application to vertical agreements. The High Authority seems to tend toward the latter view. In response to an inquiry by a member of the Common Assembly relative to the grant by the collieries of France and the Saar of an exclusive sales franchise to a Belgian coal distributor, it declared that such agreements might fall under the prohibitions of Article 65.

It is, however, most important to note that the prohibitions of Article 65(1) are not all absolute in character. Article 65(2) empowers the High Authority to authorize specialization agreements with respect to specified products and arrangements establishing joint purchase or sales agencies and analogous agreements provided that such arrangements have particular beneficial effects and do not result in excessive control over the market. Cartels or other restrictive agreements which have been entered into after the initiation date of the common market for the particular type of product (new cartels) are not effective until authorization has been obtained. Whether such authorization has retro-

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530 See especially Krawielicki, Das Monopolverbot im Schuman Plan, 12 (1952); Reuter, La Communauté Européenne du Charbon et de l’Acier, 209 (1953); Roblot, Les relations privées des entreprises asujetties à la Communauté Européenne du Charbon et de l’Acier, 17 Droit Social, 561, at 570; Roblot, Droits et Devoirs des Entreprises, in 4 Actes Officiels 28 (1958); Daig, Discussion, id. 332, at 334.

531 Krawielicki, op. cit. supra note 530, at 22; Reuter, op. cit. supra note 530, at 211, 237; Roblot, Les relations privées etc., op. cit. supra note 530, at 572. Accordingly, the High Authority refused to interfere with the so-called Bruxelles Entente, the export cartel of West European steel producers, see Rosen, The Brussels Entente: Export Combination in the World Steel Market, 106 U.P.A.L.Rev. 1079 (1958); Di Cagno, La disciplina delle intese e delle concentrazioni nel trattato istitutivo della C.E.C.A., 3 Riv. di Dir. Civ. 758, at 764 n. 34 (1957).

532 Krawielicki, op. cit. supra note 530, at 12; Reuter, op. cit. supra note 530, at 210; Roblot, Les relations privées etc., op. cit. supra note 530, at 571; Roblot, Droits et devoirs etc., op. cit. supra note 530, at 28; Daig, op. cit. supra note 530, at 335.


534 See supra notes 495-497.
active effect is controversial. Cartels and other restrictive agreements which existed at the date of the initiation of the common market for the particular product remained unaffected by the prohibition of Article 65(1) until August 31, 1953, and even after that time and until the actual rejection of an application for approval, if such application was filed prior to the date indicated. The High Authority has used this power of authorization, as well as that of a modification thereof, in a substantial number of cases both in the coal and the steel sector.

(3) Discrimination as anticompetitive practice. Of particular complexity and importance is the question as to the circumstances under which discriminatory actions by enterprises are deemed to be anticompetitive practices and therefore prohibited. At the outset it must be recalled that Article 65 constitutes only a segment of the intricate and balanced market discipline of the Treaty and that it must be read in context with the broad prohibitions of Article 4(b) and (c), as well as with the special regulation of pricing in Article 60 and the provision against the abuse of a dominant position in the market in Article 66(7). Accordingly, prohibited discriminatory practices may consist not only in the imposition of unequal terms on purchasers in comparable positions (as under the American Robinson-Patman Act), but also in the unwarranted refusal to deal with particular parties, especially

See Roblot, Les relations privées etc., op. cit. supra note 530, at 573, n. 69 (with references).


Decision of the European Court of Justice 1-58, 10 WUW 70 (1960).


Reprinted p. 297 supra.

Art. 60(1) provides:

"Pricing practices contrary to the provisions of Articles 2, 3 and 4 are prohibited, and in particular:

—unfair competitive practices, in particular purely temporary or purely local price reductions which tend toward the acquisition of a position of monopoly within the common market;

—discriminatory practices involving within the common market the application by a seller of unequal conditions to comparable transactions, especially according to the nationality of the buyer.

After consulting the Consultative Committee and the Council, the High Authority may define the practices covered by this prohibition."

Pursuant to the power given to it by paragraph 2 of this section the High Authority, in 1953 and 1954, issued regulations defining certain "differentiations" in sales terms as discriminatory, Decision No. 30-53 modified by Decision No. 1-54, [1953] J'Off. 109, [1954] J'Off. 77.
where such action rests on criteria or motives which aim at, or result in, effects inconsistent with the spirit and objectives of the common market.

An illustrative example of a suppression of the latter type of discrimination occurred in 1956 in connection with the authorization of three sales cartels for corresponding groups of coal-mining corporations in the Ruhr district. The applicants had stipulated that the cartel would supply only such wholesale distributors who—inter alia—(a) had sold at least 40,000 tons of solid fuel in their territory during the preceding year, (b) had procured at least 12,500 tons of the solid fuel sold from the cartel, and (c) had procured at least 25,000 tons of the solid fuel sold from the Ruhr coal mines. The High Authority, however, while approving the other conditions, refused to authorize the third of these requirements for the reason that it would entail a discrimination both between the wholesale distributors and against the coal producers outside the Ruhr district. The Court of Justice sustained this decision. It held specifically that discriminatory practices within the meaning of Article 4 of the Treaty may at the same time constitute anticompetitive practices within the meaning of Article 6(1) of the Treaty and that therefore stipulations of such character were not capable of being authorized under Article 6(2).

2. SANCTIONS AGAINST AND ENFORCEMENT OF THE TREATY PROHIBITIONS

a. Enforcement by Community Agencies

(1) Text of governing provisions. The Treaty itself, as well as the Convention on Transitional Provisions, includes various

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641 High Authority decisions Nos. 5-56, 6-56, 7-56, [1956] J’L Off. 29, 43, 56. These three separate sales cartels (named Geitling, Präsident and Maussegatt) were established as successors to a comprehensive cartel of the whole Ruhr coal mining industry known as GEORG, which was dissolved in 1956. An attempt to reestablish an analogous cartel—failed because of the opposition of the High Authority, see supra note 538. An appeal against the decision is pending, [1960] J’L Off. 1181.


sections regulating the sanctions against violations and the enforcement of the prohibitions against anticompetitive practices by enterprises. The most important ones are Article 64(4) and (5) of the Coal-Steel Treaty and Section 12, paragraphs 1–3 of the Transitional Convention.

Article 65(4) provides:

Agreements or decisions prohibited by virtue of Section 1 of the present article shall be null and void and may not be invoked before any tribunal of the member states.

The High Authority shall have exclusive jurisdiction, subject to review by the Court, to pass on the conformity of such agreements or decisions with the provisions of this article.

Article 65(5) adds:

The High Authority may impose upon enterprises:
which have concluded a void agreement;
which have applied or attempted to apply, by way of arbitration, forfeiture, boycott or any other means, a void agreement or decision or an agreement for which approval has been refused or revoked;
which have obtained an authorization by means of information known to be false or misleading; or
which engage in practices contrary to the provisions of Section 1,
fining and daily penalties not to exceed twice the proceeds from the actual turnover of the products which were the subject of the agreement, decision or practice contrary to the provisions of this article; however, if the purpose of the agreement is to restrict production, technical development or investments, this maximum may be raised to 10 percent of the annual turnover of the enterprises in question, in the case of fines, and 20 percent of the daily turnover in the case of daily penalties.

Section 12 of the Transitional Convention specifies further:

Any information about the understandings or organizations referred to in Article 65 shall be communicated to the High Authority under the terms of Section 3 of the said article.

In those cases where the High Authority does not grant the authorization provided for in Section 2 of Article 65, it shall fix reasonable time limits at the expiration of which the prohibitions provided for in Article 65 shall come into effect.
In order to facilitate the liquidation of the organizations prohibited under Article 65, the High Authority may name receivers who shall be responsible to it and shall act under its instructions.

(2) Intervention by Community agencies. As the quoted text of the Treaty and the Convention on Transitional Provisions indicates, the High Authority has the exclusive responsibility for the direct enforcement of the prohibitions of Article 65. It possesses extensive investigatory powers and may impose fines and daily penalties, as well as compel the dissolution of prohibited organizations by the appointment of receivers. The decisions of the High Authority are directly enforceable in the member states, in accordance with the procedure governing the execution of local instruments. Its decisions are subject to review by the Community Court of Justice. Cases have come before the High Authority either following an application or on its own initiative. In a number of cases where authorization has been sought, it was granted only after lengthy negotiations involving substantial revision of the original agreement. In some instances authorization of particular provisions has been denied.

b. Sanctions by Virtue of the Legal Systems of the Member States

(1) Controlling Treaty provisions. One of the most difficult problems in the application of the provisions against anti-competitive practices by enterprises subject to the discipline of the Coal-Steel Community Treaty is the question as to the possible legal consequences of violations according to the individual legal systems of member states. Article 65 itself contains only two


545 Depending upon the measures taken by the High Authority review will be available either in proceedings for annulment, under art. 33 para. 2 of the E.C.S.C. Treaty, or in proceedings for full review, under art. 36 of the Treaty. In proceedings of the latter type which are available against monetary sanctions and penalties the Court may not only reverse their imposition but also reduce their amount, cf. Acciaierie Laminatoi Magliano Alpi v. High Authority, Docket No. 8-56, 3 Rec. 179 (1957). In cases of a failure to intervene, injured third parties might proceed against the High Authority in a damage action based on administrative tort under E.C.S.C. Treaty art. 40.


547 See the action by the High Authority vis-à-vis the three Ruhr coal sales cartels, discussed supra.

548 For European discussions of this question see especially Bayer, *Das Privatrecht*
mandates in that respect. On the one hand, it ordains that agreements and decisions violative of Article 65(1) are absolutely void and incapable of being invoked in any tribunal of the member states. On the other hand, it provides that the High Authority and, on review, the Court of Justice have the sole jurisdiction over determinations of the conformity of agreements and decisions with the rules of Article 65.549

Accordingly, it is clear that national tribunals may not lend their arm to the enforcement of anticompetitive agreements and decisions by parties thereto and must refer the matter to the High Authority if in such controversy the enforceability is contested. More difficult, however, is the question of whether and in what way national courts may grant affirmative relief to third parties claiming to be aggrieved by anticompetitive practices by others. Since Article 65 reserves the determination of the illegal character of challenged agreements, decisions, or concerted practices550 to specified Community agencies, it has been held that national courts are barred from issuing temporary injunctions.551 The issue arose in consequence of a resolution of the Coal Distribution Cartel for the Upper Rhine Region, adopted in 1953, according to which coal consumers of annual amounts of 30,000 tons and more were to procure their supply directly from the cartel instead of buying from wholesale distributors. The new arrangement caused disadvantages not only for the excluded wholesale dealers, but also for the consumers as it deprived the latter of certain quantity discounts. Therefore eight large consumers and four wholesalers of coal brought suit for a temporary injunction on the ground that the execution of the cartel resolution violated Article 65 of the Coal-Steel Community Treaty. The court ruled that the complaint was subject to dismissal for the

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549 Art. 65(4) para. 2. In addition art. 41 provides that only the Court of Justice may decide on the validity of actions of the High Authority, if such validity is challenged in a litigation pending before a national tribunal.

550 Art. 65(4) para. 2 does not mention concerted practices in addition to agreements and decisions, but this omission apparently is only an oversight of the draftsmen.

reason that Article 65 required a decision by the High Authority on
the merits and that prior to such determination a national court
could not grant temporary relief.552

(2) Implementation and supplementation by national
laws. The rule that deprives a national tribunal of jurisdiction for
determining whether or not an enterprise has engaged in anti­
competitive practice does not, of itself, bar such a court from imposing
civil liability on any enterprise either after the High Authority has
found the same to be in violation of the prohibitions of Article 65
or if such violation is not contested. The Treaty is silent as to the
possible tort liability for contraventions against Article 65. Thus
the questions arise as to whether the national legal systems may
attach and actually have attached civil liability to the perpetration
of the anticompetitive practices as defined and prohibited by the
Treaty.

There is nothing in the general policy of the Treaty which would
support a conclusion to the effect that a member state is forbidden
to declare a violation of the prohibitions of Article 65 to be a tort
rendering the perpetrator liable in damages, so long as the imposi­
tion of such liability is not discriminatory.553 The problem therefore
reduces itself to the question whether the national legal systems
actually should be interpreted that way. The answer, of course, may
vary according to which one of the six national legal systems is
involved.

In German law, for instance, liability in damages of a violator of
the mandates of Article 65 (1) conceivably could be based on one of
four broad and overlapping categories of torts:

1) intentional or negligent invasion of the absolute right of a
person to his established and conducted enterprise (Civil
Code, Section 823 I); 554

552 Actually the court requested a determination by the High Authority, but the latter
replied that its investigation was still in process. The High Authority, in fact, did not
approve the cartel until 1957, and then only after drastic structural changes, Decision
No. 19-57, July 26, 1957, [1957] J’L OFF. 352. For the subsequent history of the status
of this purchase cartel see E.C.S.C. High Authority, EIGHTH GENERAL REPORT
192 (1960).

553 Accord Reuter, LA COMMUNAUTé EUROPEENNE DU CHARBON ET DE L’ACIER 214
(1953); Matthies, Das Recht der Europäischen Gemeinschaft für Kohle und Stahl
und die nationalen Gerichte der Mitgliedstaaten, 9 JURISTENZEITUNG 305, at 307
(1954); Stein dorff, Der Begriff der Preisdiskriminierung im Rechte der EGKS, 21
ZEITSCHR. F. AUSL. & INT. PRIVATRECHT 270, at 317 (1956); Roblot, Les relations
privées des entreprises assujetties à la C.E.C.A., 17 DROIT SOCIAL 561, at 567 and 574
(1954).

554 About this tort under German law see 2 RGR Kommentar zum BGB § 823 Anm.
intentional or negligent violation of a law enacted for the protection of others (Civil Code, Section 823 II);
3) intentional and unethical infliction of damages (Civil Code, Section 826);
4) unethical business conduct for purposes of competition (Law against Unfair Competition, 1909, Section 1).

Similarly, in France, Belgium, and Luxembourg such liability would result if engaging in anticompetitive practices contrary to the Treaty were deemed to fall within the sweeping contours of tortious conduct marked by the French Civil Code, Articles 1382 and 1383.555

There is some judicial authority supporting such results. In Germany the District Court of Stuttgart, in the aforementioned decision of 1953,556 stated, by way of dictum, that a cartel action, taken in violation of Coal-Steel Community Treaty Article 65, entitles injured parties to damages under Sections 823 I and 823 II of the German Civil Code. A similar conclusion was reached by the District Court of Essen in an order of November 4, 1953.557 That case arose as a consequence of a resolution of the then-existing six sales agencies for Ruhr coal which decided to discontinue the direct supplying of wholesale coal dealers having an annual sales volume of less than 48,000 tons. An aggrieved dealer brought suit for declaratory judgment to the effect that the challenged action entitled him to damages. The Court conceded that damages could be demanded if the action in question violated the prohibitions of Article 65 and continued the proceedings until a determination of this question by the High Authority.558

However, more recent and authoritative judicial authority has shown reluctance to consider every prohibition of the Treaty to be a law for the protection of others within the meaning of Section 823 II of the German Civil Code. In a far-reaching decision of April

9 (10th ed. 1953). For recent decisions by the German Supreme Court see 12 NJW 479 (1959); 12 NJW 934 (1959).
556 This conclusion is adopted as correct by Roblot, op. cit. supra note 553, at 574, text at n. 75; see in general Roubier, Théorie générale de l'action en concurrence déloyale, 1 Rev. Trin. de Dr. Comm. 541 (1948).
557 Supra note 551.
558 8 Betriebs-Berater 991 (1953).
559 The decision is criticized on that score by Spengler, Abgrenzungsfragen aus der Übergangszone zwischen Kartell- und Montanunions-Recht, 4 WuW 753, at 768 (1954).
560 The High Authority declared the prohibitions to be inapplicable and its determination was sustained by the Court of Justice, see supra note 537.
14, 1959, the German Supreme Court held that the prohibitions against price discriminations, contained in Articles 4(b) and 60(1) of the Coal-Steel Community Treaty, do not constitute laws for the protection of the injured customers or competitors within the meaning of Section 823 II of the German Civil Code. A similar question confronted the Court of Appeals of Celle in a suit instituted by a wholesale dealer in lignite against the sales subsidiary of a lignite producer as a result of the latter’s determination to discontinue a direct supply of the plaintiff and to accord exclusive sales franchises to other dealers. The Court left open the question of whether the plaintiff was entitled to relief in a national tribunal as a result of a violation of Coal-Steel Community Treaty Article 4b and determined the litigation on the basis of the provisions of the German Law against Restraint of Trade, in particular those governing enterprises with dominant market position.

The latter Court thus proceeded on the theory that the national laws against anticompetitive practices remain applicable to the enterprises subject to the discipline of the Coal-Steel Community Treaty so long as there is no conflict between the two sets of rules. Absence of tort liability under national law for violations of the prohibitions of Article 6 accordingly would not mean freedom from any liability, if, and to the extent that, such conduct is also in contravention of national legislation.

C. Protection Against Economic Concentration and Misuse of Dominant Market Power

1. Control of New Concentrations

a. Genesis and Purpose of Article 66

As has been mentioned before, the Treaty includes not only prohibitions against cartelization and concerted practices (Article 65) but, in addition, contains provisions designed (a) to curb new concentration of economic power through total or partial integration of enterprises (Article 66(1-6)), and (b) to suppress misuses of dominant market power by enterprises which have or acquire such position (Article 66(7)).

Provisions for administrative control of misuses of dominant market power, such as are contained in the last section of Article 66, were traditional with some of the European antitrust legislation and could be found in the German Cartel Ordinance of 1923 and the Dutch Cartel Ordinance of 1941, as amended in 1942. Their inclusion in the market discipline of the Treaty, therefore, was not novel.

Limitations on economic concentration by integration, however, were unknown to European cartel legislation and were inserted in the framework of the Treaty, at least in a large measure, it seems, upon the insistence of the Allied Occupation Authorities in Germany who desired a legal palliative against future untrammeled reconcentration in the German coal and steel industry, which had been subjected to drastic deconcentration just at the time of the negotiations of the Coal-Steel Community Treaty.

The Treaty did not aim at a re-structuring of the common market as it existed at the time the Treaty became operative, but it subjects any new concentration of enterprises to the control of the Community agencies, thus forestalling the formation of giants with market power deemed to be excessive.

b. Method and Scope of Control

(1) Form of control in general. Article 66(1) of the Treaty requires prior approval by the High Authority for every transaction which, directly or indirectly, effectuates within the common market a concentration, as understood by the Treaty, involving at least one enterprise that is engaged in coal or steel production or in distribution except retail trade. Article 66(2) makes it mandatory for the High Authority to grant such approval, unless the ensuing concentration gives the enterprises involved excessive power over the market according to a set of criteria specified by the Treaty. The High Authority is empowered by Article 66(1) to determine, by way of regulation, the factors which constitute control for the purposes of a concentration within the meaning of that Article. Moreover, the High Authority, by way of regulation, may also exempt

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562 See supra part II, sections A and C.
563 See supra text at note 509. For a discussion of the deconcentration of the West German coal and steel industry under Allied High Commission Law No. 27 of May 16, 1950 (AHC Off. Gaz. No. 20, 299) and the interrelation between this program and the negotiation and ratification of the E.C.S.C. Treaty see Office of the U.S. High Commissioner for Germany [FINAL] REPORT ON GERMANY, 1949-1952, at 108-113 (1952); Office of the U.S. High Commissioner for Germany, 6TH QUARTERLY REPORT, 83 (1951); 7TH QUARTERLY REPORT, 15, 52, 109 (1951).
certain types of transactions resulting in concentration from the requirement of prior approval if their effects are certain not to be harmful to competition (Article 66(3)). The High Authority has issued regulations both as envisaged by Article 66(1) and Article 66(3).

(2) Concept of concentration within the meaning of Article 66; scope of applicability. Unfortunately Article 66 does not contain a direct definition of the concept of concentration. However, it is possible to glean its criteria from various elements of that complex provision. Accordingly, a concentration within the meaning of the Treaty (a) occurs "between enterprises," one of which must be a producer of or wholesale dealer in coal and steel products, (b) is the direct or indirect effect, within the common market territory, of an operation consisting in the act of a person or enterprise, or a group of persons or enterprises, (c) is accomplished by merger, acquisition of stock or assets, loan, contract, or other means of control. The essence of concentration, then, is the establishment of a common control over the equipment or management of an enterprise subject to the general discipline of the Treaty and that of another enterprise operating in the common market. The concept includes cases of both horizontal and vertical arrangements.

The High Authority, with the advice of the Council of Ministers, has issued a detailed regulation specifying the proprietary or contractual arrangements which, under appropriate factual conditions, may confer power to control production, pricing investments, procurement, sales, or distribution of profits and thus constitute elements of control as envisaged in the definition of concentration. The acquisition of stock by banks in connection with the formation of corporations or the issuance of new stock for purposes of resale does not constitute control as long as the right to vote such shares remains unexercised.

Article 66 (I) requires previous approval for "operations" effecting concentration. The question has been posed whether concentrations resulting from an operation of law, such as intestate succession, are included within this term or whether it is equivalent with, and limited to, the concept of transaction. Authors who have taken the former view have pointed out that in any case the acceptance of the inheritance may be subject to prior approval. The controversy obviously will require final resolution by the Court.

Apart from exceptions no longer material, the regime of the Treaty applies only to new concentrations, i.e., operations taking effect after the date at which the Treaty went into force. The requirement of prior approval, moreover, affects only transactions subsequent to the promulgation of the pertinent regulation.

(3) Conditions for refusal of approval. The grant of the approval is mandatory unless the High Authority finds that the contemplated concentration affords the participants excessive market power with respect to products subject to its jurisdiction. That condition is deemed to exist if the parties are capable either (a) of determining the price, of controlling or restricting the production or distribution, or hindering the maintenance of an effective competition, in a significant part of the market for such products, or (b) of escaping the Treaty rules governing competition, especially through the establishment of an artificial position of privilege which affords a substantial advantage in the access to sources of supply or outlets.

The Treaty provides expressly that the High Authority, in making the requisite determination, is bound to observe the basic principle of non-discrimination and therefore to take account of the size of other enterprises of the same type operating in the Community, to the extent that it considers justified in order to avoid or correct disadvantages which flow from a disparity in competitive position.

In practice the High Authority has exercised its powers over concentrations with extreme caution and in a restrained case-by-case approach. Up to the present it has seen no occasion for refusing any of the applications processed so far. As a result the Common As-

669 REUTER, op. cit. supra note 566, at 216; Roblot, op. cit. supra note 566, at 575. Contra KRAWIELECKI, op. cit. supra note 566, at 57. That author, however, concedes that a concentration by operation of law may be subject to the High Authority's power of deconcentration under art. 66 (5) (2).
671 Art. 66 (2) para. 1.
672 Art. 66 (2) para. 2.
673 See the survey in the High Authority, EIGHTH GENERAL REPORT OF THE ACTIVITIES OF THE COMMUNITY, 203 (1960). For an exposé of the criteria applied by the High Authority in the disposition of applications for authorization of concentrations see its reply to the written interpellation No. 21-60 [1960] J'L OFF. 1078.
Assembly has pressed for the development of a more articulate and energetic policy in that field. The pending application for authorization of a concentration reuniting August Thyssen Hütte AG and Phoenix-Rheinrohr AG (the two most important enterprises carved from the former Thyssen combine), however, has met with considerable opposition from the High Authority.

c. Enforcement and Sanctions

Article 66 accords the High Authority broad powers of investigation and of enforcing the observance of the discipline of the Treaty with respect to concentrations. Article 66 (5) differentiates between two categories of concentrations accomplished in contravention to the provisions of the Treaty: (a) those which are irregular because they lack the requisite prior authorization but for which such authorization would have been mandatory; (b) those which are illegal because they result in excessive market power as defined by Article 66 (2).

In the first alternative the primary sanctions consist of fines imposed upon the persons responsible for the operation. The maximum amounts of these fines are fixed by Article 66 (6). Only if the fines remain unpaid, may the High Authority proceed to deconcentration of the enterprises involved in the irregular concentration.

In the second alternative the High Authority must first make a finding as to the excessive market power resulting from the concentration. After a hearing which permits the interested parties to present their arguments the High Authority may order the steps appropriate for severing the concentration and restoring the normal conditions of competition, such as divorcement, dissolution, and divestiture. In case of non-compliance with its mandates the High Authority itself may proceed to the execution of the measures specified, by making the appropriate orders or requesting the appointment of a receiver.

The determinations of the High Authority are subject to the usual review by the Community Court, with the qualification, however, that there is an appraisal de novo on the issue of excessiveness of the resulting market power.

574 The policy of the High Authority has been reviewed in two successive reports on the concentration of enterprises in the Community by members of the Common Assembly for the later's Commission: viz. by Mr. Henry Fayat, Common Assembly, Doc. No. 26 (1956–1957) and by Mr. Lapie, Common Assembly, Doc. No. 16 (1957–1958).
575 Art. 66 (4).
576 Art. 66 (5).
577 Art. 66 (5) para. 2.
In the case of unauthorized concentrations the Treaty refrains from ordaining nullity *ab initio*, as it does in the case of cartels and other restrictive agreements.

2. CONTROL OF THE CONDUCT OF ENTERPRISES WITH DOMINANT MARKET POWER

Since Article 65 applies only to collective practices and since Article 66(1-6) concerns only new concentrations, the framers of the Treaty felt that additional safeguards for the competitive mechanism of the market were necessary with respect to anticompetitive practices by single enterprises with dominant market power which had attained this status either by unassailable pre-Treaty concentration or had acquired or were going to acquire it in a manner other than by concentration. As has been mentioned before, such approach corresponds to significant precedents in European cartel legislation.

Accordingly, Article 66(7) grants the High Authority additional powers over enterprises in the coal and steel industry, whether public or private, which by reason of legal or factual circumstances possess a dominant position with respect to their products in a significant part of the common market. If such enterprises engage in practices which are inconsistent with the basic policies of the Coal-Steel Community Treaty, such as the principle against non-discrimination, the High Authority may address appropriate recommendations for remedying the situation to the enterprise in question.578

If the latter persists in its conduct, the High Authority may impose upon it specific rules for doing business.

D. PROTECTION AGAINST GOVERNMENT INTERFERENCE

As has been pointed out above in Section B, 1a(1), the Treaty not only protects the common market against anticompetitive practices by *enterprises* but also liberates and shields it from *governmental* measures that interfere with the forces of competition. One of the bases of action by Community organs in such cases, though somewhat perplexing in scope and modest in thrust, is Article 67.

578 A famous instance of a recommendation under art. 66(7) was that of July 11, 1953, [1953] J'l Off. 154, directed to the Oberheinische Kohlenunion, the exclusive distributor for South and Southwest Germany of coal produced in the Ruhr, Saar, Lorraine and Aix-la-Chapelle districts. It recommended to take all measures proper to prevent practices contrary to art. 4. The addressee was a cartel which possessed a dominant position in the market, but held a lease on life until the termination of proceedings under art. 65 by virtue of sec. 12 of the Convention on Transitional Provisions, see *supra* text at note 537. See also notes 551 and 557.
This article concerns itself with "measures of member states that are capable of exerting substantial influence upon the competitive conditions in the coal industry." The Treaty differentiates between two great classes of such measures:

(a) those which are capable of producing severe economic imbalance by significantly augmenting the differences in production costs in a manner other than by increasing productivity;

(b) those which decrease the differences in production costs by according special advantages to or imposing special burdens upon domestic coal and steel enterprises as compared with other domestic industries.

In cases of interferences of the latter type the High Authority is authorized, after having consulted with the Council and the Consultative Committee, to address the appropriate recommendations to the respective state.\(^{578a}\)

Another and seemingly much more comprehensive and effective source of power for the Community organs is Article 88 of the Treaty. It authorizes the High Authority to initiate certain proceedings and take certain measures whenever it finds that a member state has failed to live up to its treaty obligations and, in particular, to observe the sweeping mandates of Articles 2–4. The High Authority has resorted to the procedure under Article 88 in two cases involving official, or officially sanctioned, organisms possessing a monopoly over coal imports, the Office Commercial du Ravitaillement in Luxembourg and A.T.I.C. in France. The former controversy became moot when the Luxemburgian government rescinded the provisions governing the importation of solid fuels.\(^{578b}\) The A.T.I.C. dispute is still in the stage of negotiations between France and the High Authority\(^{578c}\) and has involved the latter in a damage suit brought by a Belgian dealer on the ground that the High Authority has failed to perform an official duty.\(^{578d}\)

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\(^{578a}\) For a more detailed discussion of the purpose and scope of Article 67, see Reuter, \textit{op. cit. supra} note 566, 196.


IV. THE PROTECTION OF COMPETITION IN THE EUROPEAN ECONOMIC COMMUNITY

A. THE PROTECTION OF COMPETITION WITHIN THE GENERAL FRAMEWORK OF THE COMMUNITY STRUCTURE

I. FUNDAMENTAL ASPECTS OF THE GENERAL EUROPEAN COMMON MARKET

a. From the European Coal and Steel Community to the European Economic Community

(1) Functional and institutional changes in Community organization. When the governments of the six nations forming the European Coal and Steel Community decided to take the long step from a partial economic integration, restricted to the coal and steel industry, to a general economic integration encompassing the whole field of production and distribution, by the establishment of a new European Economic Community, it became clear that the pattern of the Coal-Steel Community Treaty would have to be significantly modified, both as to functional and institutional aspects. While a detailed comparison of the legal framework of the two communities would go far beyond the scope of this discussion, it is necessary to underscore a few basic likenesses and differences.

There is no question that the architects of the new European Economic Community relied heavily on the experience and structure of the European Coal and Steel Community as the starting point for their blueprint. As Professor Reuter has put it so adroitly: “In

579 For the background of this decision, see supra Introduction.
a large measure E.E.C. is an extrapolation of the European Coal and Steel Community.”

Both organizations are fashioned as Communities of the member nations; both Communities depend upon the institution of a common market, i.e., a market freed from all national barriers, at least against a free circulation of goods as a principal means for the attainment of the community goals.

However, while the common market is the “basis” and sole mechanism of the Coal-Steel Community, the E.E.C. Treaty adds the gradual approximation of the economic policies of the member states as an additional instrument of E.E.C. Moreover, the common market of E.E.C. is surrounded by a uniform customs wall and developed by a common commercial policy vis-à-vis other nations, while the Coal-Steel Community does not provide for such an arrangement. Conversely, only the Coal-Steel Community Treaty accords the Community agencies extensive “dirigistic” or regulatory powers over the market in circumstances where economic developments render a reliance on its auto-mechanism unfeasible.

The E.E.C. Treaty does not duplicate this scheme and entrusts the Community, acting through the Council of Ministers, only with few and narrowly circumscribed direct powers of economic control.

Needless to say, these changes in function were caused not only by the differences in economic structure and magnitude of the two markets, but also, and perhaps primarily, by the realistic respect of the drafters for national sensitivities, the resurgence of economic liberalism, and certain other developments in the general political climate. The same considerations produced corresponding modifications in the institutional framework. The framers of the new Treaty avoided provocative terms such as “supranational” or “High

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581 Reuter, op. cit. supra note 580, at 8.
583 About the relativity of the notion of a common market, see also Carstens, op. cit. supra note 580, at 460.
585 E.E.C. Treaty art. 2. While, accordingly, the economic policies of the states are to be “harmonized,” but, generally speaking, remain within the province of the individual states, a more extensive integration is adopted with respect to foreign commerce. It is to become a matter of Community policy at the end of the transitional period, E.E.C. Treaty, art. 111. See Carstens, op. cit. supra note 580, at 495, 497, and 507, but contrast the skeptical comments by Reuter, op. cit. supra note 580, at 9.
590 E.g. E.E.C. Treaty art. 103.
591 See the discussion by Reuter, op. cit. supra note 580, at 9 and 11.
Authority” and strengthened the participation of both the Council of Ministers and the Assembly, transforming at the same time the role of the Commission. 592

(2) Changes in the normative technique of the respective treaties. The difference in scale of the two markets and the impossibility of foreseeing and providing with precision all economic measures that might become necessary in the larger setting, no less than the exigencies of political realities, resulted also in a significant change in the normative technique employed by the framers of the E.E.C. Treaty from that utilized by the draftsmen of the older instrument. The E.E.C. Treaty, much more than the Coal-Steel Community Treaty, is merely a “framework treaty.” 593 In many of its portions it is confined to a stipulation of programs and principles, leaving the implementation to further normative procedures by the Community agencies, in particular by the Council of Ministers. In other words, the E.E.C. Treaty is of much lesser normative “density” than its counterpart of more ancient vintage. Accordingly, the E.E.C. Treaty relies to a much greater extent than the Coal-Steel Community Treaty on legislative or, at least, quasi-legislative action by the Council 594 which, as the case may require, is either directly applicable to individuals or requires further concretization by legislation on the part of the Member States. 595 Corresponding to this change in normative technique is a significant modification in terminology evident from a comparison between Coal-Steel Community Treaty, Article 14, and E.E.C. Treaty, Article 189. The latter expressly adds the further categories of “regulations” and “directives” to the categories of decisions, recommendations, and opinions defined by the former.

b. Legal Characteristics of the Common Market

(I) Unification without uniformization. The legal nature of the Common Market depends in the first place and most of

590 See Soulé, op. cit. supra note 580, at 98 (comparison of the respective functions of the Councils of Ministers, of the High Authority, and of the Commission), 100 (comparison of the roles of the Assembly); Reuter, op. cit. supra note 580, at 310; Catalano, op. cit. supra note 580, at 19–32. For the position of the Court of Justice, see Daig, Die Gerichtsbarkeit in der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft mit vergleichenden Hinweisen auf die Europäische Gemeinschaft für Kohle und Stahl, 83 Arch. Öff. R. 132 (1958).

591 Reuter, op. cit. supra note 580, at 161.

592 See Reuter, op. cit. supra note 580, at 161; Meibom, Die Rechtsetzung durch die Organe der Europäischen Gemeinschaften, 14 Betriebs-Berater, 127 (1959); Everling, Die ersten Rechtsetzungsakte der Organe der Europäischen Gemeinschaften, 14 Betriebs-Berater, 52 (1959).

593 E.E.C. Treaty art. 189, paras. 2 and 3.
all on the character and degree of integration of the Community which it serves. As has been stated before, the objective of the Treaty of Rome is the achievement of European integration on a predominantly economic rather than on a primarily political level. Thus, the European Economic Community "is founded upon a customs union," 596 entailing a fusion of the markets included therein, but without exhausting itself solely in that feature. Rather the Common Market, as instituted, is to evolve under the aegis of a common and unified commercial policy 597 and of harmonized policies of the Member States covering other economic matters. 598 In other words, in the latter respects the individual Member States retain their separate though greatly tempered jurisdictions. 599 Accordingly, the Common Market is conceived as a unified but, speaking legally, not uniform market.

The fusion of the markets is to be achieved by a successive removal of all internal barriers against (a) the free exchange of goods, 600 (b) the mobility of the labor force, 601 (c) the exercise of a trade by citizens of the other Member States, 602 (d) the right to work of non-resident citizens of the other Member States, 603 and (e) the transfer of capital from one Member State to another. 604 The Common Market includes agriculture, but the Treaty establishes a separate discipline for that sector. 605 The coherence of the Common Market is safeguarded by provisions for a common transportation policy. 606 However, the Treaty has not unified the currency of the Member States.

(2) Reliance on the auto-mechanism of the market. The discipline of the Common Market, especially after the expiration of the transitional period, is inspired by a liberalistic approach. 607 The market is to be shaped by its own auto-mechanism as governed by the forces of normal competition. Therefore, the framers of the Treaty concentrated primarily on the removal of obstacles to, and

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596 E.E.C. Treaty art. 9.
597 E.E.C. Treaty art. 110, para. 2, art. 111 (T); see Carstens, op. cit. supra note 580, at 495-500.
598 E.E.C. Treaty arts. 2, 104, 145; see also art. 103 (policies regarding cyclical fluctuations) and art. 105 (policies regarding currency questions).
600 E.E.C. Treaty arts. 12-17, 30-37.
602 E.E.C. Treaty arts. 52-58.
605 E.E.C. Treaty arts. 74-84.
606 See Reuter, op. cit. supra note 580, at 11.
the protection of, sound competition. Only a few cautious provisions permit direct Community intervention in the processes of the market. The establishment of the European Investment Bank, formed by the Member States, and the creation of the European Social Fund may be cited as mild forms of "dirigistic" tendencies. Powers to take more drastic measures are conferred only with vague contours in the matrix of the provisions for the development of concordant policy by the individual states with respect to cyclical fluctuations.

2. PATTERN OF THE PROTECTION OF COMPETITION IN THE E.E.C. TREATY

a. Structure and Interrelation of the Treaty Provisions in General

Since the European Economic Community relies so preponderantly on the competitive auto-mechanism of the Common Market for its progress and the achievement of its aims, the framers of the Treaty took particular pains in providing for appropriate conditions and safeguards needed to assure a proper functioning of the competitive process.

Not only does Article 3 (f) specify that one of the principal activities of the Community consists in "the establishment of a regime which assures that competition in the Common Market is not adulterated," but this program is implemented by a series of detailed provisions to that effect. It may even be, as Professor Reuter claims, that the drafters have belabored this subject too much and that their afterthoughts have resulted in defective formulations.

Theory and arrangement of the Treaty proceed on the basis that such deleterious restraints or adulterations of competition may result either (a) from anticompetitive practices engaged in by private or public enterprises operating in the market, or (b) from direct and open restrictions or discriminatory burdens imposed, or competitive advantages granted, by the Member States, or (c) repercussions on the market structure of existing or contemplated differences and inequalities in the general legal systems of the Member States. Accordingly, the Treaty contains not only regulations per-

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610 E.E.C. Treaty art. 103.
611 See Reuter, op. cit. supra note 580, at 8.
tain to anticompetitive practices by enterprises, but, in addition, an array of provisions dealing with anticompetitive measures by the Member States relating to public enterprises or enterprises with special franchises, dumping, state subsidies, discriminatory exactions, and harmonizations of the legal systems.

This list shows in stark relief that the anticompetitive practices by enterprises are only one facet of the total legal framework designed to assure a common market with a truly competitive mechanism and that the major preoccupations of the framers of the Treaty focused on the distortions of the competitive process resulting from specific measures of the Member States or from the repercussions of the divergencies in the different national legal systems. Needless to say, the comprehensive scope of the provisions and, at the same time, delicate task of protecting competition in the Common Market is reflected in the activities and attitudes of the Community agencies.

b. Protection of Competition and Protection Against Discrimination

Protection of competition and protection against economic discrimination are twin policies, although, on occasion, they may come into perplexing conflict, as any person familiar with American antitrust law will confirm. It is, therefore, no surprise that the Treaty intertwines the two principles. However, it does not lay down a broad proscription of all discriminations of an economic nature. On the one hand, it elevates the prohibition against discrimination on grounds of nationality to one of the cardinal principles of the Community and reiterates it specifically with respect to state measures relative to (a) the supply of consumers by commercial state monopolies and (b) activities of public enterprises and enterprises with

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613 E.E.C. Treaty arts. 90 and 37.
614 E.E.C. Treaty art. 91.
615 E.E.C. Treaty arts. 92-94.
620 E.E.C. Treaty art. 37(1).
special franchises. On the other hand, the Treaty contains only a few cautious prohibitions against other discriminatory practices of economic import, that is, prohibitions against the imposition of discriminatory business terms on sellers or buyers either by enterprises acting in concert or by enterprises with dominant positions in the market.

c. Comparison of the Protection of Competition in the E.E.C. and Coal-Steel Community

In comparing the structure and form of the protection of competition in the E.E.C. Treaty with that of the Coal-Steel Community Treaty, a few basic points become evident. On the one hand, the pattern and formulation of a number of the respective provisions in the two Treaties have many common traits and, accordingly, present analogous problems of interpretation and application. On the other hand, there are marked fundamental differences. The E.E.C. Treaty, because of the comprehensive scope of the market and the abstention from vesting vast overriding powers over the market in the Community organs, focuses much more than the Coal-Steel Community Treaty on all facets of a balanced basis for competition. Conversely, the E.E.C. Treaty attributes a somewhat more modest range to the principle of non-discrimination and deletes all barriers against economic concentrations, confining itself merely to the control of abuses of monopoly power.

B. THE PROTECTION OF COMPETITION AGAINST COLLECTIVE ANTICOMPETITIVE CONDUCT OF ENTERPRISES

I. STRUCTURE, APPLICABILITY, AND SCOPE OF THE PROHIBITION AGAINST COLLECTIVE ANTICOMPETITIVE PRACTICES

a. Structure of the E.E.C. Treaty, Article 85

The E.E.C. Treaty, Article 85, following the example of the Coal-Steel Community Treaty, Article 65, contains a specific pro-

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621 E.E.C. Treaty art. 90(1).
622 E.E.C. Treaty art. 85(1) (d).
623 E.E.C. Treaty art. 86(c).
624 See Reuter op. cit. supra note 580, at 12.
625 For the text, see supra part I, Sec. A, 1.
626 For the text, see supra part III, Sec B, a (1).
hibition against collective anticompetitive conduct by enterprises. A comparison between the two Articles shows unmistakably that the former is an extrapolation of the latter. Both Articles proscribe collective anticompetitive action in the nature of "agreements between enterprises, decisions by associations of enterprises and concerted practices"; both Articles designate the anticompetitive character of the prohibited conduct with the terms "hinder, restrain or adulterate . . . competition"; both Articles are couched in the form of a general clause followed by a list of specific categories of anticompetitive practices; both Articles, finally, envisage exemptions from the prohibition. But there are numerous significant differences in the two provisions relating to (1) the formulation of the general clause, (2) the classes of anticompetitive practices specifically enumerated, and (3) exemptions.

(1) **Formulation of the general clause of the prohibition.** While the Coal-Steel Community Treaty, Article 65(1), encompasses all enterprise actions of the specified collective nature which "tend," directly or indirectly, to be anticompetitive within the Common Market, the general clause of E.E.C. Treaty, Article 85(1), applies to the defined collective enterprise actions only if they (a) are capable of affecting [adversely] the commerce among the Member States and (b) have the designated anticompetitive character within the Common Market "as their object or effect." In other words, the prohibition of Article 85(1) covers only such collective conduct of anticompetitive purpose or effect which is not purely intra-national but adversely affects commerce between Member States within the Common Market. It is perhaps worth noting in passing that the E.E.C. Treaty does not refer to "normal competition" as its predecessor does but merely to "competition" pure and simple.

(2) **Specified categories of anticompetitive conduct.** The E.E.C. Treaty, as compared with the Coal-Steel Community Treaty, expands the number and, in part, the scope of the categories of anticompetitive practices. The addition of the adverb "adversely" is based on the German, Italian and Dutch version of the controlling texts. It is not required by the French version. However, the Commission's Directorate General for Competition and the government experts on restrictive practices seem to endorse the reading given in the text. Whether a given practice is capable of affecting commerce among the Member States must be determined on the basis of the indications available at the time that decision is made, E.E.C. Commission, Third General Report No. 140 (1960). According to the Commission and the government experts, the term "common market" refers to it as a geographical unit, 1959 Bulletin of the European Economic Community, 38 (No. 2, May 1959); E.E.C. Commission Third General Report No. 140 (1960).
competitive practices specifically listed following the general prohibitory clause. The Coal-Steel Community Treaty lists only three special classes of such practices, price-fixing, limitations of production, technological development, or investments, and division of markets or sources of supply. The E.E.C. Treaty adds two further categories: (a) discriminations against customers in comparable positions, with resulting competitive disadvantages for them, and (b) the insistence on tying clauses not warranted by the nature of the tied-in matter or commercial custom, apparently following the example of the analogous provisions of a French ordinance. 629

Under the E.E.C. Treaty, as under the Coal-Steel Community Treaty, there exists the problem as to the correct relationship between the elements of the general prohibitory clause and the definitions of specified anticompetitive practices in the catalogue following it. It seems to be beyond question that the enumerated practices are proscribed only if they are capable of affecting adversely the commerce between Member States. 629a It is, however, an open question whether, in addition, it must be shown that they have an anticompetitive character as their object or effect, or whether such nature is conclusively presumed for the classes singled out by the Treaty. The answer must await further clarification in practice. 629b

(3) Possibility of exemptions from the prohibition. Following the example of Coal-Steel Community Treaty, Article 65(2), and of the French cartel decrees of 1953–1958, the E.E.C. Treaty provides for exemptions from the sweeping prohibition of Article 85(1). 630 These exceptions cover those agreements between enterprises, decisions of associations of enterprises, and concerted practices of enterprises, which the framers of the Treaty deemed to be capable of an over-all salutary effect. Accordingly, authorization of an exemption is predicated on the fulfillment of four cumulative conditions, namely, that the agreements, decisions or practices in question

(a) contribute to the improvement of the production or distribution of products, or to the promotion of technical or economic progress;

629 Ordinance No. 45-1483, art. 37(a) and (c) as amended. See supra note 188 and text at that note; cf. also Fabre, Les Pratiques commerciales restrictives et le Traité de Marché Commun, 1958 REVUE DU MARCHÉ COMMUN, 260 (No. 5).
629b See infra, text at note 654.
630 E.E.C. Treaty art. 85(3).
(b) leave an equitable share of the resulting gain to the consumers;
(c) refrain from subjecting the enterprises involved to restraints which are not indispensable for the attainment of those goals;
(d) do not give those enterprises the power of eliminating competition for a substantial portion of the products in question.

It would seem, therefore, that the E.E.C. Treaty employs greater latitude in the matter of exemptions from the prohibition against collective anticompetitive practices than the Coal-Steel Community Treaty which accords such privilege only to a few designated categories of cartel agreements.

Moreover, the former Treaty permits greater flexibility in the administration of the exemptions than the latter, which requires the High Authority to grant approval to cartel agreements whenever the delineated standards are met and confines the High Authority to a case-by-case procedure. According to E.E.C. Treaty, Articles 85(3) and 87(2)(b), the dispensation seems to be discretionary, and its availability may be determined in detail by general regulations, including regulations which accord blanket exemption in advance to specified categories of restrictive agreements or practices deemed to meet the requisite standards.

Until the issuance of these general regulations, the appropriate authorities of the Member States are empowered to decide on the applicability of the exemptions, apparently by following a case-by-case approach. Finally, it should be noted that the prohibitions of Article 85(1) apply to agricultural products only to the extent that will be determined by the Council.

b. The Problem of Immediate Applicability

E.E.C. Treaty, Article 87, requires the Council to issue regulations for the purpose of implementing the prohibitions and dispensations provided for in Article 85. In particular such regulations should pertain to:

632 The German Cartel Office has employed the power flowing from art. 88 in connection with art. 85(3) and has granted a temporary dispensation for restrictive patent licensing agreements. Bundeskartellamt, Bericht über seine Tätigkeit in Jahre 1959, Deutscher Bundestag, 3. Wahlperiode, Drucksache 1795, 55 (1960). For one of these decisions see Federal Cartel Office, Adjudication Division, Order of Feb. 19, 1959 (thread-cutting machinery), 9 WuW 259-305 (1959).
1) measures of constraint appropriate to assure the observance of the prohibitions;
2) the details governing the application of the provision for possible exemption;
3) the scope of applicability of Article 85 with respect to particular branches of the economy;
4) the delineation of the relative functions of the Court and the Commission in the application of these regulations;
5) the determination of the relation between the national legal systems and the rules governing competition contained in either the Treaty or the implementing regulations.

In view of the importance and the scope of the regulations so envisaged a veritable literary battle has been fought as to whether or not the prohibitions and possible dispensations provided in Article 85 constitute directly and immediately applicable rules of law, even prior to the issuance of the regulation under Article 87.

There is little point in reviewing the arguments pro and con or in discussing the many nuances of the divergent views advanced, but a brief survey of the practical developments and of the present status of the issue should be useful.

The controversy over the legal status of the rules governing competition of enterprises in Article 85 and the following articles precipitated lengthy debates in the Dutch Parliament on the occasion of the ratification of the E.E.C. Treaty. The government took the position that the interrelation of the various provisions in these articles warranted the conclusion that the rule of Article 85(2), which declared agreements or decisions prohibited by that article to be null and void, did not become operative until the enactment of the regulations envisaged by Article 87. This position was enshrined in a bill purporting to execute Article 88 of the Treaty. The bill was enacted into law on December 5, 1957. It provides that arrangements regulating competition, as mentioned in E.E.C. Treaty, Article 88, shall be unexceptionable and no misuse of a dominant position in the Common Market, as mentioned in said Article, shall be deemed to be made so long as, and to the extent that, the appropriate Dutch authorities have not interceded by virtue of the Cartel Ordinance of 1941 or the Economic Competition Act of 1956. The applicability of the Act was limited to a period beginning with the entry into force of the E.E.C. Treaty and ending with the issuance of the regulations under Article 87.

The constitutionality of this legislation was drawn into issue in 1958 in a much-noted litigation pending in the District Court of Zutphen. Plaintiff and defendant had entered into an agreement dividing between them the Belgian and Dutch markets for a particular product. Upon the entry into force of the E.E.C. Treaty, the defendant, a Dutch corporation, claimed that the agreement had become null and void and refused further compliance. Plaintiff sued for specific performance. The Court granted the relief prayed for.

224 (1957); Verloren van Themaat, Fünf Grundsätze der europäischen Wettbewerbspolitik, in 2 Europäische Wirtschaft 335 (1960); Weebers, Karselectrole op de Europese Gemeenschappelijke Markt, in 35 De Naamloze Vennootschap 86 (1957); Thiesing in 1 Groeben-Beech, Kommentar zum EWG-Vertrag, comments to art. 85 (1958); Wohlfahrts-Everling-Glaesner-Sprung, Kommentar zum EWG-Vertrag comments to art. 85 (1960).


636 Staatsbl. (No. 528, 1957).

It held that the act of December 5, 1957, supported the complaint and that the act was not invalid because of inconsistency with the Treaty since Article 85(2) could not be considered to be directly applicable prior to the issuance of the regulations under Article 87.\(^638\)

In Germany the problem of the immediate and direct applicability of Article 85(1) and (2) was raised in two suits to enjoin violations of retail price maintenance systems brought by manufacturers against retailers.\(^639\) In both cases, however, the courts saw no necessity for passing on the issue since they found that the price-fixing schemes in question did not adversely affect commerce between the Member States. The German Cartel Office, however, has held that Article 85(1) and (3) is immediately applicable and must be considered in applications to the Cartel Office for approval of patent licenses with restrictive clauses, submitted under Section 20(3) of the German Restraints of Competition Act.\(^640\)

The position of the German Cartel Office was endorsed by the government experts on cartels (who studied the principal problems arising from Articles 85–90 in a series of conferences convened by the staff of the Commission), as well as by the latter body itself and by the Parliamentary Assembly.\(^641\) According to the conclusions

\(^{638}\) The judgment was appealed to the Court of Appeal at Arnhem, 6 Ned. Tijdschr. v. Intern. Recht 408.


\(^{641}\) As of May 1, 1960 seven conferences of the national cartel experts had been held. The first of them met on Nov. 18–19, 1958 and was followed by others taking place on Jan. 15–16, 1959; April 14–15, 1959; June 29–30, 1959; October 8–9, 1959; December 15–16, 1959; March 16–17, 1960. These conferences have deliberated consecutively: upon the effect of articles 85 and 86; the functions of the national authorities and the Commission under articles 88 and 89 in the present enforcement of the rules on competition; the cases falling within the categories specifically listed in art. 85(1); the characteristics of a dominant position; the impact of existing or proposed national procedures on the procedures to be followed on the Community level; the effect of art. 90 on the position of public enterprises and enterprises operating under a public franchise; the procurement of requisite data. For the conclusions reached see Communauté Economique Européenne, Commission, PREMIER RAPPORT GÉNÉRAL, III, 59 ff. (1958); DEUXIÈME RAPPORT GÉNÉRAL, 85 (1959); THIRD GENERAL REPORT, III, 32–38 (1960); BULLETIN OF EUROPEAN ECONOMIC COMMUNITY, Engl. ed. 26 (No. 1-58), 37 (No. 2-59), 47 (No. 3-59); French ed. 24 (No. 1-59), 40 (No. 1-60), 38 (No. 2-60), 39 (No. 4-60). For résumés of the conclusions of the first three conferences of the national experts see 9 WuW 445 (1959); for information on the succeeding four conferences see EUROPE, EURATOM & MARCHE
reached by these authorities the wording and the interrelation of the various pertinent articles have the result that

1) the prohibitions of Article 85(1) and the provision for dispensations of Article 85(3) are immediately and directly operative legal rules;

2) the national authorities, under Article 88, and the Commission, under Article 89, are jointly charged with their current application, the principal responsibility for this task resting with the national authorities;

3) the Member States are obligated to designate the proper agencies for, and to regulate the applicable procedure in, the performance of the functions entrusted to the national authorities by Article 88.

As Italy, Belgium, until May 27, 1960, and Luxembourg had no legislation sufficient to constitute a compliance with their duty in that respect, the Commission addressed a letter to these three governments inviting them to take the necessary steps.

The Commission has taken great pains to point out that its position has no necessary bearing on, and leaves still unsolved, the question of whether the illegality and invalidity of the prohibited practices, as established by Article 85(2), can be invoked prior to

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Commun, Daily Bulletin No. 446 (June 27, 1959); No. 528 (Oct. 16, 1959); No. 577 (Dec. 14, 1959); No. 624 (Mar. 15, 1960).

642 Art. 88 provides: "Until the time when the regulations issued under Article 87 go into effect, the authorities of the Member States pass on the permissibility of collective practices and on the misuse of a dominant position in the Common Market in conformity with the law of their countries and the provisions of Article 85, in particular paragraph 3, and of Article 86."

643 Art. 89 provides: "(1) Without prejudice to Article 88, the Commission, from the assumption of its functions, shall watch over the execution of the principles laid down in Articles 85 and 86. Either upon request by a Member State or upon its own initiative, and in conjunction with the appropriate authorities of the Member States which are bound to render official assistance, it shall investigate the cases in which infractions of these principles are suspected. If an infraction be found it proposes the measures appropriate to terminate the same. (2) If the infraction does not cease the Commission shall find the existence of such infraction in a reasoned opinion. It may publish that decision and authorize the Member States to take the measures necessary for remedying the situation, specifying their terms and details."

644 The Italian legislature, when authorizing ratification of the E.E.C. Treaty, empowered the government to issue the decrees "necessary ... to effectuate the measures provided by article ... 89 ... [and] to accord, consistent with the combined content of articles 85 and 88 of the E.E.C. Treaty, the dispensations envisaged by art. 85(3) of said Treaty," Law No. 1203 of Oct. 14, 1957, Gazzetta Ufficiale No. 317 of Dec. 23, 1957 (supp. ord. 2).

646 Bulletin de la Communauté Économique Européenne 27 (No. 1-58). In the interest of uniformity the Commission has expressed preference for the designation of administrative agencies as appropriate authorities for the performance of the functions under art. 88. C.E.E., Commission, Deuxième Rapport Général 88 (1959).
an intervention by the appropriate authorities under Articles 88 and 89. In other words, the issue which was actually before the District Court in Zutphen is still unresolved and requires ultimate clarification by the Court of Justice.

c. Scope of the Prohibitions

As might be expected, the broad formulae of the prohibitions of Article 85(I) have shown, and are bound to show in the future, a marked proclivity to spawn delicate problems of interpretation respecting their scope. The Council sensibly has hesitated to issue the supplementary regulations envisaged by Article 87. As far as the broader contours are concerned, however, a prevailing trend of opinion is in the state of crystallization with a reasonable prospect of governing the practice.

Generally speaking, the conduct of enterprises in order to fall under the proscription of Article 85(I) must possess three characteristics. It must:

1) be capable of adversely affecting the commerce between member states;
2) be of collective nature;
3) possess anticompetitive characteristics within the meaning of the governing provisions.

(1) Capability of adversely affecting the commerce between Member States. It has been observed before that only conduct which is capable of adversely affecting the commerce between Member States falls under the prohibition of the Treaty. Practices which remain wholly intra-national in their effect remain outside the regulation of Article 85.

Conversely, restrictive agreements which cover only the foreign commerce of a Member State without producing anticompetitive repercussions in the domestic market, and which for that reason may be permissible under national cartel laws, are nevertheless prohibited by the Treaty if they are capable of affecting the...
commerce of other nations. Export cartels, consequently, are no longer immune unless the effect of their operations does not spill over into the area of the Common Market. 649

(2) Types of collective action reached by the prohibitions. Although the wording of the prohibitions of Article 85(1) is not entirely free from ambiguity, there seems to be a widespread acceptance, both in doctrine 660 and in practice, 661 of the interpretation which does not restrict their application to horizontal arrangements but includes those of a purely vertical character. As has been pointed out before, a similar construction prevails for the analogous provision of the Coal-Steel Community Treaty. 652 An opposite conclusion would outlaw vertical restrictive agreements only if they are concluded by an enterprise possessing dominant market power.

As a result of the prevalent view, price maintenance schemes, tying agreements, exclusive dealing and requirement contracts, etc., may fall under the sweep of Article 85(1). The prohibition applies, however, only if such agreements are of an anticompetitive character within the meaning of Article 85 and if they are capable of adversely affecting the commerce between Member States. The latter element usually will be absent if such agreements, as frequently is the case, are confined to the national market. 653

(3) Anticompetitive character within the meaning of Article 85(1). Finally, collective practices are prohibited only if they have anticompetitive character as defined in Article 85(1). The general clause considers practices as anticompetitive if they have "the object or effect of hindering, restraining or adulterating competition" within the Common Market. Ordinarily, therefore, a finding of the presence or absence of this element will depend on an eco-


650 Verloren van Themaat, op. cit. supra note 649, at 227 (1957); Günther, Die Regelung des Wettbewerbs im Vertrag zur Gründung der Europ. Wirtschaftsgemeinschaft, 7 WUW 275, at 280 (1957); Schwartz, E.W.G.-Vertrag und vertikale Bindungen, DER MARKENARTIKEL 317 (1959); but see Guglielmetti, Les exclusivités de vente, in LA LIBRE CONCURRENCE DANS LES PAYS DU MARCHÉ COMMUN (Journées d'études de Caen, May 8–10, 1959), 1959 REVUE DU MARCHÉ COMMUN, 38, at 41 (Suppl. to No. 16).

651 See the decisions by the two German courts, supra note 639, and the decisions by the German Cartel Office in the thread-cutting machinery case and their licensing agreements, supra notes 632 and 640.

652 See supra part III, text at notes 532 and 533.

653 See the discussion of this point by Günther, Marketing und Preisbindung der zweiten Hand, 9 WUW 843, at 847, 848 (1959).
nomic analysis of the pertinent market conditions. Whether, how­
ever, such procedure is needed even in those classes of cases which
are specifically enumerated is subject to considerable doubt. The
government experts on cartels apparently have not reached a definite
agreement on that point.654

Particular doubts have been voiced about the status of exclusive
dealer franchises, whether territorially circumscribed or not, and of
requirement contracts.655 It is not clear whether or not such agree­
ments or certain types of them are included within the special cate­
gory of Article 85(1)(c), covering the division of markets or
sources of supply. If not, such arrangements would be considered as
anticompetitive only on the basis of their object or their likely effect
on the market. At any rate, frequently they should constitute proper
instances for a dispensation under Article 85(3) and Article 88.

2. ENFORCEMENTS: SANCTIONS AT PUBLIC
AND PRIVATE LAW

a. Sanctions at Public Law

The enforcement of the prohibitions of Article 85 by public au­
thorities has already been discussed in various respects. Basically the
Treaty of Rome adopts a system of decentralization, at least until
the issuance of regulations under Article 87. It differs sharply in
this respect from the regime of the Coal-Steel Community Treaty
which vests the exclusive jurisdiction to determine the existence of a
violation of its anticartel provisions in the High Authority.656 The
national authorities, whether administrative agencies or courts im­
posing penalties, employ their own methods of procedure and sanc­
tions, so far as made applicable, but they determine the legality or
illegality of the conduct in issue by reference to the prohibitions and
dispensations of Article 85(1) and (3).

The form and scope of judicial review are likewise determined by
the national legal systems,657 with the qualification, however, that
relevant questions as to the interpretation of the Treaty must be
resolved by the Court of Justice prior to a decision of a national
court of last resort.658

654 See the report on the 5th meeting of the government cartel experts, BULLETIN
OF THE EUROPEAN ECONOMIC COMMUNITY, Germ. ed. 46 (No. 4-59), 49 (No. 5-59).
655 See the report by Guglielmetti, Les exclusivités de vente, at the Caen meeting,
and the discussion thereof, op. cit. supra note 650, at 41 and 54; see also Schwartz,
op. cit. supra note 650.
657 Nebolsine, The 'Right of Defense' in the Control of Restrictive Practices under
the European Community Treaties, 8 AM. J. COMP. L. 433 at 444 (1959).
658 E.E.C. Treaty art. 177.
b. Private Law Consequences of Violations

Unquestionably the most perplexing problems in the application of the Treaty rules on competition for enterprises concern the private law consequences of infractions. Generally speaking, such consequences may be of two principal types:

1) unenforceability (invalidity) of a proscribed transaction;
2) civil liability in tort for the proscribed practice (whether or not constituting a transaction).

(1) Invalidity of anticompetitive agreements. Article 85(2) declares flatly: "Agreements and decisions which are prohibited by this article are absolutely void." Despite the categorical nature of this clause, its meaning and effect have been the object of violent arguments, as was pointed out in the previous section.\(^{659}\)

The heart of the conflict as it remains\(^{660}\) concerns the question of whether this section applies unqualifiedly under the regime of Articles 88 and 89, *i.e.*, prior to the issuance of regulations under Article 87, or whether during this period agreements remain enforceable as long as the appropriate authorities have not determined their illegality on the combined basis of Article 85(1) and (3).\(^{661}\) If unenforceability can be predicated only on an intervention by the appropriate authorities, the further question arises as to whether a finding of a violation by these authorities depends exclusively on an extremely delicate interpretation of the Treaty. No conclusive solution can be suggested until the Court of Justice has spoken.

(2) Tort liability for participation in anticompetitive practices. Even greater mystery surrounds the question as to the possible tort liability of enterprises which actively participate in collective restrictive practices. Like Article 65 of the Coal-Steel Community Treaty, Article 85 and the following Articles of the E.E.C. Treaty contain no direct rules on the civil responsibility attendant upon infractions. Hence the answer must depend on the complex and delicate issue of how the Treaty discipline governing the competition of enterprises is interlaced with the general fabric of national law.

Certainly the indicated enigma will plague the profession until the issuance of regulations under Article 87. Whether that Article empowers the Council to determine the matter on a supranational level is difficult to predict. Article 87(2) (e) envisages the adoption

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\(^{659}\) See supra text at note 634.

\(^{660}\) See supra text at note 646.

\(^{661}\) See the careful analysis of the various positions and arguments by Schumacher, *La politique de la CEE en matière d'ententes*, 1959 *REvue du Marché Commun* 207.
of rules “for the purpose of defining the relation between the national legal systems on the one hand and the provisions contained in, or enacted pursuant to, the article.” This may imply that the Council could specify whether or not violations constitute a tort under national laws. If such an interpretation were rejected, the Treaty provisions relative to the harmonization of the national legislation 662 might be the proper avenue for reaching uniformity.

Prior to such action, however, the situation is quite perplexing. If the view is followed that the transitional regime of Articles 88 and 89 requires intervention by the public authorities before the prohibitions of Article 85(1) can be invoked by private parties, no tort liability for violation under national laws could ensue, except after disregard of such repressive action. Conversely, if the position is taken that the invalidity of collective anticompetitive transactions can be invoked by private parties directly and immediately, it would be consistent to conclude that the same rule applies to the assertion of illegality. Whether, however, such illegal conduct actually amounts to a tort which entitles injured private parties to redress is a further question which still would require additional analysis of both the nature of the Treaty provisions and the basis of tort liability under national laws.

In Germany, for example, as has been pointed out before,663 tort liability in such cases conceivably may be rested on four statutory grounds (Civil Code, Sections 823 I, 823 II, 826, and Law Against Unfair Competition, Section 1), among which the second is the most important one. It predicates liability in damages upon any culpable violation of a “law, enacted for the purpose of protecting a third party.” The question thus reduces itself to the issue of whether Article 85 is such a law or whether it is merely a regulation enacted in the interest of guaranteeing a sound market policy. Since the German Supreme Court has differentiated in that way even with respect to various sections of its own national Restraint of Competition Act 664 no answer to the problem can safely be predicted at this time.

662 E.E.C. Treaty arts. 100–102. For a good discussion see Bärmann, Die Europäischen Gemeinschaften und die Rechtsangleichung, 14 JURISTENZEITUNG 553 (1959).
664 Thus the German Supreme Court has based tort liability vis-à-vis competitors on the establishment of unregistered resale price maintenance schemes (Eau de Cologne case, decision of Oct. 8, 1958, 13 BETRIEBS-BERATER 1075, at 1079 (1958)) and on discriminatory exclusion from a trade association (decision of Feb. 25, 1959, 14 BETRIEBS-BERATER 356, 357 (1959)). Conversely, it has denied the quality of “a law enacted for the protection of a third party” to the provisions of the Restraint of Competition Law governing requirement contracts (decision of Oct. 20, 1959, 14
It must clearly be understood, however, that a position according to which a violation of the provisions of Article 85 is not a tort in and by itself by no means compels the conclusion that all such conduct is immune from civil responsibility. Rather, liability will be entailed if such practice constitutes a private wrong by the separate standards of national law.

C. PROTECTION AGAINST MISUSE OF DOMINANT MARKET POWER

I. SCOPE AND EFFECT OF ARTICLE 86

a. Scope of Prohibition

Like the Coal-Steel Community Treaty (in its Article 66(7)) the E.E.C. Treaty (in Article 86) includes a special prohibition against the abusive exploitation of a dominant position within the Common Market or a significant part thereof by one or several enterprises, with, however, the important qualification that this injunction applies only to the extent that such misuse is “capable of adversely affecting the commerce among the Member States.”

Again, as in Article 85(1), the general clause of the prohibition is followed by a catalogue of four types of practices in which such misuse may consist in particular. These practices are:

1) the direct or indirect imposition of inequitable purchase or sales prices or other business terms;
2) the limitation of production, outlets, or technical development to the prejudice of the consumers;
3) the application, vis-à-vis other parties in business deals, of unequal terms for equivalent goods or services, thereby inflicting upon them competitive disadvantages;
4) predicating the conclusion of contracts upon the condition that the other parties accept supplementary goods or services which neither by their nature nor business usage are related to the object of these contracts.

The Commission and the government experts on cartels, at their 5th Conference on restrictive practices of enterprises, studied the criteria and data by which the existence of a dominant position ought to be determined. It was decided to embark on a statistical inquiry covering various economic sectors in which special conditions exist, such as the public utilities field, banking and insurance; see the reports in BULLETIN OF THE EUROPEAN ECONOMIC COMMUNITY, Germ. ed. 46 (No. 4-59), 49 (No. 5-59); EUROPE, DAILY BULLETIN, EURATOM & MARCHE COMMUN No. 528 (Oct. 16, 1959).
As can be seen, therefore, Article 86 in its structure is quite analogous to Article 85(I). Accordingly, the same general problems as to the interrelation of the various clauses arise.\textsuperscript{666} There is, however, one important difference. Article 86 does not provide for dispensation from the prohibition. Nevertheless, it should be noted that Article 87 does authorize the issuance of regulations "for the purpose of defining the scope of applicability of Article 86 for particular branches of the economy."\textsuperscript{667}

\textbf{b. Practical Significance}

Article 86 can hardly be expected to be of paramount practical significance especially if, as commonly assumed, Article 85(I) is to be construed to apply to purely vertical restrictive agreements falling within the categories specifically defined in that article. In such cases Articles 85 and 86 will be largely overlapping.

Nonetheless, it would be a grave mistake to conclude that there cannot or will not be important types of situations in which Article 86, particularly its general clause and its first two classes of specially proscribed practices, will furnish the only palliative against anti-competitive actions by enterprises with dominant market power. This will be the case, in the first place, in all instances where such enterprises create artificial scarcities or in other ways misuse their economic power, without acting by means of agreements or in concert with other enterprises. In the second place, the special classes defined in Article 85(I)(a) and Article 86(a) resemble one another only in a most superficial fashion and actually cover quite different matters. To be sure, both may relate to purely vertical

\textsuperscript{666} See the conclusions to that effect reached at the 5th Conference of government experts on cartels, \textit{Bulletin of the European Economic Community}, Germ. ed. 49 (No. 5-59).

\textsuperscript{667} A possible limitation of the applicability of art. 86 flows from the special provision of art. 90(2). Art. 90(1) prescribes in general terms that the Member States shall not take or retain measures in conflict with this Treaty and, in particular, with arts. 7 and 85 to 95 in respect to public enterprises or enterprises to which they have accorded special or exclusive rights. Art. 90(2), however, adds the following qualification: "Enterprises charged with the management of services of general public interest or possessing the character of a fiscal monopoly are subject to the provisions of this Treaty, especially the rules of competition to the extent that the application of these provisions does not prevent, legally or factually, the performance of the tasks conferred upon them. The development of trade must not be impaired in a degree which contravenes the interest of the Community." The interpretation of Art. 90(1) and (2) has been the subject of study by the Commission's Directorate General for Competition and the government experts on restrictive practices and of discussions with the Member States, E.E.C. Commission, \textit{Third General Report III}, 37 (1960); \textit{Bulletin of the European Economic Community}, Germ. ed. 50 (No. 5-59); Engl. ed. 38 (No. 4-60).
stipulations relating to prices and other business terms. But Article 85(1)(a) concerns the fixing of prices or business terms which the other party to the agreement must observe in its dealings with third persons, while Article 86(a) applies to bargains which the enterprise with dominant market power is able to exact from its suppliers or customers for its own benefit.

2. SANCTIONS AGAINST, AND PRIVATE LAW CONSEQUENCES OF, MISUSE OF DOMINANT MARKET POWER

Little needs to be added with reference to the sanctions against, or the private law consequences of, misuses of dominant market power. In every important respect the situation is parallel to that existing relative to the collective restraints on competition.

Until enactment of the regulations under Article 87 the national authorities and the Commission are jointly responsible for the suppression of misuses of dominant market power. Although Article 86 declares flatly that the misuse defined thereby is prohibited, the questions of whether, under the regime of Articles 88 and 89, agreements constituting such misuse are unenforceable without previous intervention by the authorities and whether practices falling under that article render the perpetrator liable in tort under national laws will require answers depending on the same considerations and reaching the same results as were discussed in the previous part of this chapter.

D. PROTECTION AGAINST DUMPING

The treaty provisions against anticompetitive practices and measures, especially as contained in Articles 85–90, are supplemented by Article 91 which establishes a separate regime for the suppression of dumping, applicable during the transitional period. According to Article 91(1), if the Commission, upon request by a Member State or an interested party, finds that a private enterprise or public entity engages in dumping practices within the Common Market, it shall direct a recommendation to cease and desist to the responsible person or persons. If the parties persist in the dumping prac-

668 The Commission and the national authorities have worked out a consultation procedure which must be followed prior to any decision under Articles 85 and 86 on the national level, E.E.C. Commission, Third General Report III, 36 (1960); Bulletin of the European Economic Community, French ed. 49 (No. 1-60); Bericht des Bundeskartellamtes über seine Tätigkeit im Jahre 1959, Deutscher Bundestag, 3. Wahlperiode, Drucksache 1795, at 57 (196).
practices, the Commission shall authorize the injured Member State to take the appropriate countermeasures as determined by the Commission.

In order to arrive at a proper application of the mandates of Article 91(1), the Commission, on June 25 and 26, 1959, convened a conference of government experts from the six Member States. As the Treaty does not expressly define the term dumping practices, it was decided to utilize the definition given in General Agreement on Tariffs and Trade (G.A.T.T.) Article VI as a suitable working basis.

Article 92(2) establishes a further palliative against dumping, by making it unattractive for the parties to engage in such practices because of a device described as "boomerang." Article 92(2) provides that, from the entry into force of the Treaty, goods that have been produced or have been in free circulation in one country and have been exported to another country may not be subject to customs duties, quantity restrictions or equivalent measures, if they are re-imported to the country from which they were exported. The details are left to a regulation of the Council. The pertinent regulation was issued on March 11, 1960.
