RECENT APPLICATION OF EUROPEAN RULES ON COMPETITION TO FOREIGN FIRMS

by

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INTRODUCTION*

The impressive rise of foreign direct investment in Europe during the past decade has taken several forms, such as expansion of existing operations and creation of new European subsidiaries and affiliates, but most frequently it has involved acquisition of interest in companies domiciled in the European Economic Community (EEC) or entry into joint ventures with EEC enterprises.

The possible effects of such investments on the European economy in general have been discussed at length, but no clear cut conclusions have been reached. As far as competition is concerned, it has been noted that the entrance of new enterprise can have a positive effect on productivity and prices by breaking up a local monopoly or increasing competition in an oligopolistic structure, and by introducing new techniques, processes, designs, products, and services.[1]

On the other hand, several authors have stressed the fact that foreign direct investors can reduce competition by expanding abroad the dominant positions they occupy at home thereby monopolizing previously competitive markets. According to R. Caves, "direct investment tends to involve market conduct that extends the recognition of mutual market dependence -- the essence of oligopoly -- beyond national boundaries."[2]

Whatever the specific merits of this issue, given that European countries and the Authorities of the EEC wish to minimize possible detrimental effects -- and there is every indication that they are concerned about them -- they have a choice between special policies toward foreign firms, or general policies which are also applicable to foreign firms. A consistent antitrust policy falls into the latter category.

Such a policy, *a priori*, is the least discriminatory for foreign business firms and the most favorable for promoting an efficient international allocation of resources. By applying a strict antitrust policy to all firms whose conduct affects the Common Market, the European Authorities have a better chance to improve the functioning of the Common Market and the economic welfare of the Community than by adopting piecemeal discriminatory and nationalistic measures.[3]

Still, the implementation of an appropriate and purposeful European policy on competition which extends to the enterprises from non-member countries, on a fair basis, is not an easy task, because it may require a delicate tradeoff between the effectiveness of the policy and the limits imposed by international law.

It is only recently that several decisions of the Commission and the Court of Justice have somewhat clarified the issues, but these same decisions also introduced new uncertainties.

The objective of this paper will be to bring to light the most critical issues in the application of European regulation to business firms based and controlled from countries which are not members of the Community.

RECENT APPLICATION OF ARTICLES 85 AND 86 TO FOREIGN FIRMS

The problem of determining the extent to which Common Market antitrust laws appear to have extraterritorial scope arises in respect to various situations. On the one hand, a foreign firm may affect European competition directly through a branch, a subsidiary, or in more complex ways as detailed below. On the other hand, the strategies of the European firms, even if they appear to be directed toward third markets, may indirectly affect the EEC market.

This problem is examined here in the light of recent applications of the rules on competition to firms from non-member countries by the Commission and the European Court of Justice.

a. Restrictive Agreements

The text of Article 85, paragraph 1, is quite clear : it prohibits agreements and concerted practices which are likely to affect trade between Member States and which have the objective or effect of preventing, restraining, or distorting competition within the Common Market. The rule seems to have a double implication. On the one hand, agreements occurring outside the Community or initiated by foreign enterprises, but having effects within the Community, are subject to the application of Article 85 ; reciprocally, agreements occurring inside the Common Market but which have only external effects are not affected. Such a policy has some basis in the principles of international law. Following the territorial principle of jurisdiction, international law "accepts the exclusive jurisdiction of a State over its territory as the first and basic principle of jurisdiction under international law."[4]

More specifically, several writers claim that the territorial principle of the place of effect is applicable to the antitrust provisions, as long as the effect is direct and not remote.[5] Extensions of the principle of jurisdiction based on economic effects alone, however, are far from being uniformly accepted, and it is not clear whether under international law a state may validly assume jurisdiction over conduct by aliens abroad solely because of effects, even though it limits the relevant effects to ones which it determines are "constituent elements" of the offense proscribed.[6] According to "the rules of international law governing the assumption and exercise of jurisdiction in the context of anti-trust regulation," professed by the international Law Association,[7] "international law, as evidenced by the general practice of states to date, does not permit a state to assume or exercise prescriptive jurisdiction over the conduct of an alien which occurs within the territory of another state, or states, solely on the basis that such conduct produces 'effects" or repercussions within its territory." If under international law there is a controversy about the situation when the effect (a) is an inherent element of the offense, (b) is substantial, and (c) is a direct and foreseeable result of the conduct,[8] *a* *fortiori*, it is clear that the territorial principle cannot justify the application of antitrust provisions when the effect is indirect or secondary. At this point it may be useful to analyze how far, in fact, the European authorities have gone in applying their antitrust legislation to foreign enterprises.

As far as the general principles are concerned, the recent decisions and judgments of the Commission and the Court are without ambiguity. The Commission has stated that "the fact that several or all the undertakings involved have their principal head offices outside the Community is no obstacle to the application of this rule insofar as the agreements, decisions, or concerted practices have effects extending to the Common Market."[9] Similarly, the Court, in its judgment of 25 November 1971, confirms that "the fact, for one of the undertakings involved in the agreement, that it is located in a non-member country, is no obstacle to the application of Article 85 where the agreement has effects within the Common Market."[10] However, there is a vast difference between the statement of broad principles and their proper application to the complexities of the real world.

I. The imputation of the effects is an important problem for foreign enterprise. The simplest situation is, of course, one in which the foreign firm has a formal corporate presence in the Common Market, such as a branch, in which case the application of Article 85 is straightforward. The solution is not so evident when a subsidiary is involved. In the cases of Christiani and Nielsen[11] and Kodak[12], the Commission determined that the conduct of a wholly owned subsidiary which has no economic independence must be imputed to the parent company, such conduct being only a "division of tasks within the economic organization of the group as a whole."

In the "Dyestuffs" cases,[13] the Court of Justice, commenting on the arguments presented by three appellant firms whose head offices were outside the Community, held that (1) the price increases made in the market related to competition between producers operating in the Common Market, and (2) the appellants had compulsorily determined prices and other sales conditions for their subsidiaries in the Community. Its conclusion was that "even if undertakings from non-member countries act in the Community through legally separate subsidiaries, the legal separateness of such companies cannot be adduced as evidence that their behavior on the market, for the purposes of the application of the rules of competition, is not uniform."[14] Hence, foreign companies may violate the Treaty without even having a formal presence in Europe, to the extent that the conduct of their subsidiaries is attributable to the parent company.

The new Article 4 set out in the Report of The New York Conference (1972) of the International Law Association does not contradict this opinion. "A state has jurisdiction to prescribe rules governing conduct originating outside its territory if and insofar as such conduct is implemented within its territory by an employee or agent acting within the scope of his authority." An important aspect of this opinion is that neither the Court nor the Commission requires that the subsidiary be wholly owned by the parent company ; they require only that the latter be able to exercise a determinant influence on the policies of the subsidiary. In other words, the question is to determine the degree of economic autonomy of the subsidiary. It is well known that total control could be exercised through various degrees of ownership, even a minority position. Furthermore, through a chain of corporate structures, a company can control a whole set of subsidiaries, including agreements between them. One foreseeable implication is that the EEC authorities could, through this device, frequently put foreign enterprises on the spot. It must be emphasized, however, that in the judgments thus far the smallest effective participation by the parent still involved an equity of 51 percent.

Finally, one should consider the case of foreign companies without branches, subsidiaries, or affiliates in the Common Market which have merely an export association selling to Common Market buyers. It seems that such conduct might be interpreted as violating Article 85. A recent opinion of the Commission regarding the practice of restraining imports of jamanese products into the Community stated a principle expressing this broad extraterritorial reach.[15] This opinion states that arrangements between firms or associations of firms curtailing imports on the Community market of items from non-member countries, or controlling these imports (for example in terms of quantity or price), may be prohibited under Article 85, 1.[16]

This view would not be accepted by the majority of the International Law Committee which considers that while the effects (within the EEC) are certainly direct, they can nevertheless not be regarded as anything more than mere effects or repercussions of the agreement. "Such effects cannot properly be characterized as conduct occurring within (the EEC)." However, the minority of the Committee would permit the EEC to assume jurisdiction where the terms of the agreement are restricted to the Common Market or because the agreement would in practice have a decisive impact within the Market. C. Edwards has already noted, skeptically, that "when restrictive decisions are made and records are kept outside the Communities by a cartel or an international corporate combine that operates within the Common Market, the Communities will encounter difficulties akin to those that have been met by the United States in obtaining informations and applying orders."[17]

This broad application of the effects concept reaches the limits of any jurisdiction. Indeed, by relying on this concept, it would be possible to finally argue that the EEC authorities have the right to order a foreign enterprise to sell to the Community, or to forbid a boycott made by producers abroad against the purchase of European-made automobiles under a "Buy American" or "Buy Japanese" program.[18]

II. As far as the importance of the effect is concerned, the first decision of the Commission implicating a foreign firm has already examined the point.[19] Grosfillex, a French producer of plastic kitchen appliances and sanitary articles, was obligated not to distribute in Switzerland except exclusively through a Swiss distributor, Fillistorf. Fillistorf was obligated to maintain retail prices, to refrain from reexporting to the Common Market, and from making or selling any competing goods. The characteristics of the market structure has convinced the Commission that there would be only minor alterations of competition. In this case, as in several others, the Commission has then given negative clearance to the agreement.

The notion of minor importance has been clarified by two cumulative[20] quantitative criteria, namely, market share less or equal to 5 percent and aggregate turnover less or equal to 15 million units of account for production, 20 million units of account for distribution.[21] Hence, for foreign firms as well as for EEC firms, the application of Article 85, 1, is based on a rule of reason.

III. The direct or indirect nature of the effects has been examined in several recent cases by the Commission. As we have seen, it is generally accepted that Article 85 (as well as 86) differs from the American antitrust laws which are applicable to restraint of trade with foreign nations for in the European case, domestic effect must be shown. "Jurisdiction therefore cannot be based simply upon a showing of effect upon the foreign trade of the Community."[22] Furthermore, even if there is a theoretical domestic effect which is implied in the agreement, it is necessary to determine if, given the conditions of technology, competition, transportation cost and so on, this effect has practical significance.

In the Grosfillex-Fillistorf case cited above, the Commission has already determined that there was no cause for intervention against the prohibition from re-exporting to the Common Market, because such an operation was impossible as it would entail customs duties being imposed twice.

In the Rieckerman/AEG-Elothern case, the Commission stated that the exclusive dealing agreement concluded with an exporting enterprise "which was not organized for selling within the Common Market" could not appreciably restrict competition within the latter. Such a prohibition excludes only a potential selling operation, which in any case is not very likely.[23]

A still more recent case concerns patent knowhow and a license granted by the German subsidiary of the French Raymond firm, the biggest firm in its industry in the Common Market, to the Japanese Nagoya Rubber Co., which is the biggest subcontractor in the Japanese motor industry and is controlled by Toyota. The Commission accepted the argument that the exclusive natures of the license and the export ban, under which the licensee may sell only in his own territory , do not affect the competitive situation within the Common Market ; the nature of the items concerned is such that their export from Japan to the Common Market is virtually ruled out.[24]

One is tempted to conclude that "in practice, the Commission has been quite conservative in its approach to extraterritorial situations.... Even where the arrangement on its face explicitly bars sales in or reexport to the Common Market it may escape in the absence of positive proof that it will produce significant adverse effects. In contrast, a comparable restriction would clearly be subject to American law."[25] However, such a straightforward conclusion may be premature. As early as 1964, the Commission stated, in granting negative clearance to the Dutch Engineers and Contractors Association (DECA) for an arrangement to pool bids and share jobs with respect to construction projects to be carried out outside the EEC, that if the restraints outside the Common Market would have produced secondary effects within the Market, such conduct could be reached by EEC rules on competition.[26]

The recent European Sugar Industry case suggests that although the Commission will not apply the provisions to theoretical or minor effects, it will do so to indirect or secondary effects as well as to direct effects of restrictive practices.[27] In this case, the major producers in the Community have attempted to conclude a general agreement partially relating to the disposal of large surpluses on the markets of third countries.

The Community rules stipulated the payments of compensation from time to time for exports to third countries of sugar produced within the maximum quota in order to allow sugar producers in the Community to sell part of what they produce in the world market, where the price of sugar is generally much lower than that fixed within the EEC. Since the marketing year 1969-70, a system of invitations to tender has been introduced for obtaining export refunds of which the amounts vary according to the tenders submitted by the bidders. At the beginning of 1970, the principal French and Belgian producers came to an agreement among themselves on the tenders to be made : this agreement covered both the quantities to be offered for export and the amount of the refunds. As the Commission said, "in a system of tendering, competition is of the essence.... Although these invitations to tender relate to exports of sugar to countries outside the Community, it should be borne in mind that they allow the export of sugar produced inside the Community." If the refunds were granted as the result of competition, some producers rather than others would have to sell surplus quantities in other member states of the Community. "Thus, the agreement was likely to bring about a change in the quantities marketed within the Community."[28]

In short, the EEC Commission has decided to apply the antitrust provisions effectively to foreign firms. This is the case even if they are not established in the Community, for example, an association of foreign competitors restricting export trade with the EEC. The

Commission will also apply its ruling to European agreements for exports to non-member countries once an indirect (and significant) effect in the Community becomes apparent. Furthermore, the conduct of legally separate European subsidiaries which are practically controlled by a foreign parent company will be imputed to the parent company. Such situations will multiply for evident reasons. Economic life becomes increasingly interconnected, and the scope of such linkage effects also increases, through the rise of large multinational corporations. Furthermore, these corporations have a tightly controlled network of subsidiaries, affiliates, or acquired interests all over the world, and are able to tie together several national markets through intercompany trade. The consequence is that a growing number of modes of international market conducts will have at least an indirect effect on European competition and could easily, through a more or less developed set of interconnections, be attributed to firms from non-member countries. Then, by applying their policy, the European antitrust authorities run a growing risk of conflicting with international law. In any case, future EEC antitrust policies may continue to reflect the conflict inherent in implementing an effective antitrust policy while trying to avoid the exercise of an unacceptable extraterritorial jurisdiction.

IV. The Commission has several times made use of Article 85, paragraph 3, for exempting significant restraints made by foreign firms, which have contributed to improving the production or distribution of goods or promoting technical or economic progress.[29]

In the Transocean Marine Paint Association case,[30] eighteen marine paint manufacturers (thirteen from non-member countries) had agreed to cooperate with respect to research and to make a line of paints of the same quality which they sell under a common trademark. The Commission found the efficiencies produced by the arrangement to be adequate for an exemption. A similar position has been taken in the European Machine Tool Exhibition.[31]

Two problems may be mentioned in this connection. First, the exemption can be granted by the Commission only on application. This obligation of notification applies to foreign firms, and one could consider that it is a controversial extraterritorial application of the anti-trust regulations.[32] Secondly, the exemption provided by Article 85, paragraph 3, implies the use of a general "public interest criterion" involving substantial administrative discretion.

> The decision whether users get a fair share of the benefit, whether the agreement does contribute to technical progress, and whether the restrictions are indeed indispensable, cannot be objective.... The ultimate consequence would be to recognize that the Commission and the Court must make political choices.[33]

There may be a temptation to use such a vague and general exemption to discriminate systematically against foreign firms by granting the benefit of the paragraph 3 more easily to European firms. One may compare this hypothesis with the analysis made by Kanter and Sugarman, on "the British Antitrust Response to the American Business Invasion".[34] They conclude that the public interest test, used for mergers as well as for agreements, is imprecise and very broad, and left largely for Commission developments. "The Commission could have a meaningful opportunity to consider the public interest standard as a direct anti-foreign firms stand."

b. Abuse of Dominant Position

As far as the application of article 86 is concerned, the abuse of a dominant position in the Community by a firm from a non-member country can manifest itself in several different ways.

I. Although the foreign firm can have no formal corporate presence in the EEC, it could act in the Community through legally separate subsidiaries. To what extent, then, can the existence of such a legal independence be used as evidence that the behavior of these companies is distinguishable for the purposes of the application of the rules on competition ?

We have already noticed that in applying Article 85 the Court found that these undertakings could be considered as constituting the same corporate enterprise. Following a coherent approach to the problem, the Commission has adopted the same attitude for implementing

Article 86, in an action against the United States Commercial Solvents Corporation (C.S.C.) and its Italian subsidiary Istituto Chemioterapico Italiano (I.C.I.).[35] Until 1970, C.S.C. chiefly through its Italian subsidiary, I.C.I., delivered to unrelated firms in the Common Market a raw material essential for a drug whose ordinary use is for treating tuberculosis. I.C.I. sold the products to various manufacturers of the speciality, including one of the leading EEC firms in the field, ZOJA. Following the failure of a takeover of ZOJA through I.C.I., C.S.C. took various measures, mainly with the help of its subsidiary, so that ZOJA was no longer able to obtain supplies and could be eliminated from the corresponding product market.

First, the Commission has found that C.S.C. had a *de facto* world monopoly for the manufacture and sale of the relevant raw material. Hence, for determining the existence of a dominant position in the Common Market, the Commission has taken into account not merely the firm's position in that market, but the firm's power at the world level. This implies that the activities and the importance of a firm outside the Common Market might well be relevant for implementing Article 86.

Secondly, the Commission ruled that the ownership of 50 percent of the corporate capital of I.C.I. by C.S.C. and the existence of interlocking between the I.C.I. and C.S.C. Boards of Directors, showed that C.S.C. had and exercised the power of control over I.C.I.. For the implementation of Article 86, the two companies were therefore to be regarded as constituting only one economic unit. Hence, the decision to discontinue supplies so as to eliminate competition constitutes an abuse of a dominant position for the parent company as well as for the subsidiary.

This decision may be compared with the one in the famous Continental Can case.[36] The Continental Can Company, an American packaging company, through its Belgian subsidiary, the Europemballage Corporation, S.A., acquired control of the largest German producer of packaging and metal closures, Schmalbach-Lubeca-Werke, A.G., and later acquired a majority holding in the Dutch Company, Thomassen and Drijver-Verblifa, N.V., the leading manufacturer of packaging material in Benelux. In the opinion of the Commission, the situation arising from these mergers constituted an abuse within the meaning of Article 86 because "it restricted the freedom of choice of consumers in such a manner as to be incompatible with the competition system laid down in the Treaty."[37] Continental Can and Europemballage then appealed this decision to the Court of Justice.

Among their arguments, the plaintiffs declaring that the Commission in this case exceeded its powers, stated : "Articles 1 to 3 of the decision concern Continental, but since Continental is not domiciled and does not carry on any business activity in the territory of the Member States, it was not, under the general principles of international law, subject to the authority of the Commission or the jurisdiction of the Court of Justice." Furthermore, they argued, "the conduct of Continental's subsidiary |Europembalage| cannot be imputed to it without jeopardizing the basic principle of the autonomy of legal personality."

The Commission replied that "even if the so-called principle of territoriality were strictly applied, there is no doubt that the Member States (and the Community as well) have the right to apply their laws to acts taking place within their territory, regardless of the nationality of the persons committing the acts." Even though Europemballage had its own legal personality, they said, it lacked economic independence. "Europemballage's legal personality has no bearing for purposes of applying the Community's rules on competition."

The Court confirmed vigorously the latter opinion: "the fact that the subsidiary has its own legal personality is not sufficient to rule out the possibility that its conduct can be imputed to the parent company." More generally, it stated that "the fact that Continental does not have its seat in the territory of one of the Member States is not sufficient to remove this enterprise from the application of Community law." We may wonder if this indicates that even if a foreign dominant firm has no subsidiary in the Common Market but, through various practices, engages in policies which may be held as an abuse of a dominant position towards European purchasers or suppliers, it could be condemned on the basis of Article 86. That problem is dealt with further below.

II. Another important aspect of the Continental Can ruling is the wider interpretation of the concept of abuse so that it includes some forms of concentration.

Before the Court's judgment, there were two opposite doctrines. For many lawyers, Article 86 is not concerned with maintaining competitive market structure, because it permits the existence of dominant positions. It prohibits certain forms of direct misuse of power towards customers without going into the structural phenomenon of the creation or growth of the dominant position. "The second paragraph of Article 86 lists the various types of conduct by enterprises that are considered abuses... From this listing it can be inferred that practices of the type referred to in Article 86 are those having a direct effect on the market... The express reference to the prejudicial effects which the practices referred to would have for consumers, shows that the conduct concerned cannot be just an enterprise's internal structural conduct."[38]

One implication of this approach would be that the multiple forms of concentration, acquisition of interests or absorptions realized on friendly terms within the Common Market by foreign companies, would be out of the purview of the rules on competition even though these industrial operations could result in an irreversible change of the European industrial structure and in a growing domination by a group of large international firms.

On the other hand, the Commission states that since the concept of abuse is not more closely defined in Article 86, the objective which the Treaty has set for the Community must be considered first, and only then the examples of abuses given in Article 86 itself. An abuse is present where an enterprise conducts itself in a way that is "objectively" wrong in relation to the goals of the Treaty. The concept of abuse does not therefore imply that there was misconduct in violation of custom or ethics. For instance :

> It is not, for example, a question of whether plaintiffs -- as they claim -- paid a fair price to TDV shareholders ; what is important is whether plaintiffs through this acquisition virtually eliminated the actual, or at least potential, competition in these products between TDV and SLW prior to the acquisition.

Hence the Commission considers that the market structure as such has to be protected : change in the supply structure which virtually eliminates the alternate source of supply for the consumer appears to be in itself an abuse.[39]

Very clearly, the Court, although it has annulled the Commission's decision -- mainly because the relevant market was not adequately defined -- has confirmed the soundness of its interpretation :

> It can, in fact, aside from any fault, be considered an abuse if one enterprise acquires a dominant position to the point that the objectives of the

> Treaty are circumvented through a substantial alteration of the supply situation, so that the consumer's freedom of action on the market is seriously jeopardized.

The ruling expresses a neat convergence between the legal and the economic analyses.

Indeed conducts which use a given market power could be less dangerous over time for the consumer than predatory practices whose aim or effect is to modify the market structure by making the industrial environment less favorable to actual or to potential competition. "Horizontal and vertical mergers, pooling of patents, extensive advertising may be dangerous, not so much as means of exploiting the actual market power of the firm, but as means of increasing over time such a power, through changes in the market structure."[40]

For example, it would be very inefficient to prohibit a price policy which directly harms the consumer but at the same time to ignore the constitution of monopoly positions which, by their nature, transform the conditions of supply and demand in such a way that the levels of prices, of quantities produced, and of various forms of expenditures will be unfavorable to the consumer's welfare. The legal distinction between (a) a dominant position and (b) its abuse would have economic meaning only if one assumes that the firm, for mysterious reasons, will not exploit it. From an economic point of view, it is normal to hold that an abusive conduct could be present where an enterprise in a dominant position over a period of time strengthens that position to the point where the degree of domination achieved substantially hampers competition.

Given the Court's judgment in the Continental Can case, the Commission has a strong basis for controlling the industrial combination movement in the Common Market, which originates mainly from the foreign firms. It is indeed well known that the firms from non-member countries have more operations involving two or more member countries in the EEC than firms originating in member countries themselves,[41] and that it is mainly through wholly owned subsidiaries, participations and joint ventures that these foreign firms penetrate the Common Market. Once the Commission and the Court consider that a transaction, which has the direct or the indirect effect of bringing about a concentration could be submitted to Article 86, the strategies of the companies from non-member countries will be more directly in question. This situation is reinforced by the quasi-automatic imputation of the conduct of a controlled subsidiary to its foreign parent company.

A still further step in this line of thought would be to speculate that the Commission could instigate action against foreign firms which have no European subsidiaries but which occupy a dominant position and compete among themselves in the Common Market, when they decided to merge. This view, which would generally be considered as an improper extension of the territorial principle of jurisdiction, could be accepted by the Commission in the light of its attitude towards export agreements. Nevertheless, so far the European Court seems to require not only an effect within the Common Market but also conduct of the foreign firm occurring within the Market, ultimately through a subsidiary. The draft "Regulation on the Control of Concentration Between Undertakings" recently presented by the Commission takes the same approach[42] and does not apply the "theory of effects".

Indeed, the basic provision states that "any transaction which has the direct or indirect effect of bringing about a concentration between undertaking or groups of undertakings, at least one of which is established in the Common Market, whereby they acquire or enhance the power to hinder effective competition in the Common Market or in a substantial part thereof, is incompatible with the Common Market insofar as the concentration may affect trade between Member States." (Article 1).

This new regulation has also two exceptions. First, the rules do not apply where the aggregate turnover of the enterprise involved is less than 200 millions of units of account and the goods or services concerned do not account in any member state for more than 25 percent of the turnover on identical or similar goods or services. These quantitative criteria are higher than those of Article 85 (p.9). Secondly, the prohibition may be declared inapplicable to concentrations "which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community." (Article 1, paragraph 3). Even more than in the case of Article 85, paragraph 3, such an exemption presents the danger of being easily manipulated as a direct anti-foreign-firms stand. Such a public interest test involving substantial administrative discretion would introduce a dangerous discriminatory dimension into the European Antitrust Policy.

Finally, the draft regulation states that concentrations involving enterprises whose consolidated sales are over 1 billion units of accounts are subject to requirements of prior notification. This means, for example, that the rules regarding notification might include a Common Market based subsidiary of a large U.S. firm, although the subsidiary itself might fall below the sales criterion. This notification has the effect of suspending the contemplated action for three months. If the Commission does not initiate proceedings, the concentration is deemed to be compatible with the Common Market (Article 4)[43] It should be noted that size per se is the only criterion used, which is most controversial. If one looks at the Fortune list of the largest American firms, it appears that the one-hundredth has a sales amount of $1,000,400 in 1972, and the one-hundred-fiftieth, almost $1 billion. The regulation adds, however, that "where concentrations proposed by an undertaking or a group of undertakings have already reached or exceeded the amounts referred to, they shall be exempted from the obligation of prior notification, if the turnover of the undertaking the control of which they propose to acquire is less than 30 million units of account."

To conclude, the extensive interpretation of Article 86, combined with the proposed regulation on the control of concentration, opens new perspectives and new risks for the enterprises from non-member countries which act in the Common Market. In the draft regulation there is even the danger of discriminatory implementation.

SUMMARY AND CONCLUSIONS

Until 1971 European antitrust policy focused on Article 85, while Article 86, in effect, remained an empty threat in spite of many learned comments otherwise. With respect to Article 85, the activities of U.S. firms in the EEC were particularly unaffected because of two special circumstances. First, the Sherman Act has a broader scope than Article 85 in that it is applicable to all restraints of competition affecting American foreign commerce. Further, U.S. law, in contrast to Article 85 (3), makes no distinction between so-called good and bad cartels. The severity of the American law, then, may have been the primary factor in preventing U.S. firms from joining local cartel arrangements. Secondly, American-controlled enterprises operating in the EEC are linked with other affiliates outside the Common Market and are usually strong enough to remain outside cartels. The strategy of entering and expanding in the Common Market through alternative forms of business maneuvers, such as acquisition, merger and joint venture arrangements, was more or less safe during this time because of the nonapplication of Article 86.

With the Continental Can case and with the tenor of the Commission's Draft Regulation on Concentration, however, a new situation is emerging. To the extent that foreign act within the Common Market, mainly through acquisitions that tend to increase concentration, there will be stricter control by the European authorities.

Specifically, all corporate actions which either directly or indirectly enable firms to prevent effective competition in intra-EEC trade are prohibited. The list of cases is too short, as yet, to say which criteria the Commission will consider in taking action, but it is clear that a wide range of business behavior can be included. Different from U.S. antitrust rules, a general exemption is granted to concentrations involving firms with aggregate sales of less than $200 million, provided that the goods involved do not account for more than 25 percent of market share. In addition, case by case exemptions may be granted whenever other EEC objectives are at stake in technological, social, or other high priority areas, as yet unspecified. In line with the above, the new regulation provides for mandatory advance notification to the Commission of all business transactions that increase concentration involving companies whose consolidated combined sales exceeded $1 billion during the previous fiscal year. Most importantly, this includes sales of parent companies even if they operate and are incorporated outside the EEC.

This points to an important trend in EEC antitrust policy in respect to non-EEC firms. Aiming at an effective policy, it was shown in this paper that the Commission has both considerable leeway under the law, which has been affirmed by court rulings, and the will to pursue not only anticompetitive behavior of subsidiaries but also that of the foreign parent company which exercises economic control. Further, the purview of the law extends not only to enterprises which have a presence in the Common

Market but also to foreign export associations ; not only to forms of conduct which have direct effects but also forms of conduct which have secondary or indirect effects, provided these are not purely theoretical or minor.

The policy has some wider implications because of the growing interdependence of national economies through multinational corporations and their affiliations. The behavior of the large foreign firm operating on an international scale will increasingly affect, at least indirectly, the Common Market. If the European authorities are determined to implement an effective antitrust policy along the lines previously discussed, they are in real danger of frequently transgressing the limits of European jurisdiction under international law and of multiplying international conflict situations, with the companies caught in the middle.

It appears then that this situation calls for some sort of international collaboration beyond the Common Market. In fact, the Commission, like the member states, has associated itself with the work undertaken within the OECD, which is studying ways and means of drafting a code of good conduct in matters of competition for multinational enterprise and of building up fuller international cooperation to control their behavior.[44]

FOOTNOTES

*The author is Professor at the University of Louvain, Belgium, and Visiting Professor at the Graduate School of Business Administration of the University of Michigan, Ann Arbor. He would like to thank Professor Gunter Dufey and Professor Eric Stein for their constructive comments.

[1] See, for example, J.H. Dunning, *American Investment in British Manufacturing Industry* (London : Allen and Unwin, 1958), and the synthesis by J. Behrman, *National Interests and the Multinational Enterprise* (Englewood Cliffs, N.J. : Prentice-Hall, 1970), chapter 2.

[2] R. Caves, "International Corporations : The Industrial Economics of Foreign Investment", *Economica*, Feb. 1971, p.1. For a more radical view see S. Hymer and R. Rowthorn, *International Big Business, 1957-1967*, Occasional Papers, N° 24 (Cambridge : Department of Applied Economics, University of Cambridge, 1971).

[3] Of course, alternative policies such as controlling financial operations of foreign affiliates, profit allocations, etc., are not mutually exclusive and some are even complementary. As long as the financial, organizational and technological opportunities are very different for European firms as compared with foreign firms, there is a case for an industrial policy which strengthens domestic industry. But still, what we need here is a simultaneous policy of opening the opportunities for European firms, making them more competitive, and of allowing the dynamics of foreign competition to enter into the picture.

[4] See Tokyo Conference of the International Law Association, 1964, Tokyo Report 302.

[5] See R. Kruithof, "The Application of the Common Market Anti-Trust Provisions to International Restraints of Trade", *Common Market Law Review*, 1964-65, p.69 ; W. Hug, "The Applicability of the Provisions of the European Community Treaties against Restraints of Competition to Restraints

of Competition Caused by Non-Member States but Affecting the Common Market", in *Cartel and Monopoly in Modern Law*, International Conference on Restraints of Competition (Karlsruhe : C.F. Miller, 1961), p. 653.

[6]See J.A. Rahl, ed., *Common Market and American Antitrust, Overlap and Conflict* (New York : McGraw-Hill, 1970), pp. 382 ff. where the famous Alcoa case in 1945 is analyzed.

[7]International Law Association, *New York Conference*, 1972 Report, p. 30.

[8]These are the main conditions proposed by the Restatement (Second) of Foreign Relations Law of the United States, Section 18.

[9]Opinion relating to imports into the Community of Japanese products covered by the Treaty of Rome, OJ No. C111, 21 November 1972, p. 13.

[10]Case 22/71 (Beguelin Import Co.), OJ No. C9, 3 February 1972, p. 7.

[11]Commission Decision of 18 June 1969, OJ No. L165 of 5 July 1969, p. 12.

[12]Commission Decision of 30 June 1970, OJ No. L147 of 7 July 1970, p. 24.

[13]Judgments of the Court of Justice of 14 July 1972, in cases No. 48, 49, and 51 to 57/69, OJ No. C125, December 12, 1972.

[14]EEC Commission, *Second Report on Competition Policy*, Brussels, April 1973, p. 31.

[15]Commission Opinion relating to imports into the Community of Japanese Products covered by the Treaty of Rome, OJ No. C111, 21 November 1972, p. 13.

[16]See *Second Report*, op. cit., p. 26.

[17]C. Edwards, *Control of Cartels and Monopolies*, Oceana, 1967, p. 321.

[18]See, for the American case, J.A. Rahl, ed., *Common Market and American Antitrust...*, p. 391 and 392.

[19] Commission Decision of 11 March 1964, Grosfillex-Fillistorf, OJ No. 58 of 9 April 1964, p. 915

[20] The cumulative nature of the criteria has been underlined in the Decision of 23 November 1972, OJ No. L272, 5/12/1972, p. 35. (Pittsburgh Corning Europe-Formica Belgium-Hertel.)

[21] OJ of 2 June 1970.

[22] J.A. Rahl, *Common Market and American Antitrust...*, p. 101.

[23] See EEC Commission, *First Report on Competition Policy*, Brussels, April 1972, p. 59.

[24] Commission Decision of 9 June 1972, OJ No. L143, 23 June 1972, p. 31.

[25] J.A. Rahl, *Common Market and American Antitrust...*, p. 106.

[26] Commission Decision of October 22, 1964, OJ No. 173, 31 October 1964, p. 2701.

[27] Commission Decision of January 2, 1973, Common Market Reporter, 2, 9570, 6-19-73.

[28] *Ibid.*

[29] Furthermore, the arrangement must reserve to consumers a "fair share" in the resulting profit ; they must not impose on the enterprises concerned any restrictions not indispensable to the purpose, and they must not enable the enterprises to eliminate competition in respect of a substantial portion of the goods.

[30] Decision of 27 June 1967, OJ No. 163, 20 July 1967, p. 10.

[31] Decision of 13 March 1969, OJ No. 169, 20 March, p. 13. See M. Waelbroeck, "Cooperation Agreements and Competition Policy in the EEC", *N.Y.U. Journal of International Law and Politics*, 1968.

[32] See J. Stoufflet, "La compétence extraterritoriale du droit de la concurrence de la Communauté économique européenne", *Journal du droit international*, 1971, p. 498.

[33] A. Jacquemin, "The Criterion of Economic Performance in the Antitrust Policies of the United States and the European Economic Community", *Common Market Law Review*, No. 2, April 1970, pp. 218, 219.

[34] A.B. Kanter and S.D. Sugarman, "British Antitrust Response to the American Business Invasion", *Stanford Law Review* Feb. 1970, p. 433. See especially the analysis of six of America's biggest corporations which have been forced to alter their business behavior in Britain because they were found to be exercising their monopoly in a manner contrary to the public interest.

[35] Commission Decision of 14 December 1972, OJ No. Legg, 31 December 1972, p. 51, and EEC Commission, *Second Report on Competition Policy*, p. 55.

[36] Commission Decision of December 9, 1971, OJ No. L7, January 8, 1972, p. 20. Judgment of the Court of Justice of February 21, 1973, *Common Market Reports*, 2, 8171, 8283.

[37] EEC Commission, *First Report on Competition Policy*, p. 79.

[38] Arguments of the Plaintiffs in the Continental Can case, *Common Market Reports*, 2, 8287. See also R. Joliet, *Monopolization and Abuse of Dominant Positions*, Faculté de Droit de Liège, 1970, p. 293, who writes : "Article 86 is not concerned with the manner in which domination is acquired, maintained or increased -- whether by coercitive or exclusionary unilateral practices or by mergers. Its goal is not to preserve competitive processes but to ensure that market domination is not actually exploited to the detriment of utilizers."

[39] See also M. Cardon and F. Herbert, "Evolution récente de la notion d'abus de position dominante dans la CEE", *Working Paper, CRIDE*, No. 719, Louvain, 1971.

[40] A. Jacquemin, "Market Structure and the Firm's Market Power", *The Journal of Industrial Economics*, April 1972, which poses this proposition in a dynamic model of a firm having the capacity to produce gradual changes in the structure of industry.

[41]See, for example, The EEC Commission, *Second Report on Competition*, p. 173, which shows the fact that while in 1966, the foreign figure was still 1.9 times the figure for EEC internal operations, it fell to 1.7 times this figure in 1970, and to only 1.5 times in 1971.

[42]Document No. COM(73) 1210 final, Brussels, July 18, 1973.

[43]The Commission insists on the fact that the draft does not propose a system which is based on prior authorization nor does it propose general prohibition.

[44]See EEC Commission, *Second Report on Competition Policy*, p. 31, and for an analysis of the difficulties in international collaboration, see C. Edwards, *Control of Cartels ...*, chapter 17.