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French and EEC Competition Law:
GATT and U.S. Foreign Trade
Policy Post-1992

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I. INTRODUCTION

From the end of World War II until the late 1970s, the United States was the undisputed leader in international commerce. It was the number one creditor nation in the world and exported its goods all over the globe without having to worry unduly about competition. This rosy picture lulled American business into a comfortable somnolence as it seemed that the United States could sell its goods no matter what the quality or conditions of sale, without having to make much of an effort.

The world has changed radically in the last fifteen years or so. Today, we are no longer the number one creditor nation; at least not by several yardsticks of economic productivity. Our economic supremacy is no longer within easy reach, largely due to the unrelenting competition by the very same nations which we helped to restore to a sound economic basis after World War II and which may have learned only too well from our teachings. We are now the number one debtor nation in the world. Among the industrialized nations, we have slipped several steps from number one in terms of quality of life, including social and economic growth.¹

It has taken American business an inordinate amount of time to

¹ According to David M. Gordon, professor of economics at the New School of Social Research in New York, the United States economy is sliding rapidly into Third World status. David G. Gordon, Times Board of Economists: U.S. Sliding To Third World Status, L.A. TIMES, Sept. 8, 1991, § D (Business), at 2, col. 1. Professor Gordon bases his conclusion on the following seven features of the U.S. economy: "Dramatically increasing inequalities in income and wealth; [c]hronic foreign trade deficits (with heavy reliance on agricultural and raw materials exports); [s]tagnant productivity growth; [v]ast surplus pools of low-wage and relatively unskilled workers; [t]he existence of a large underclass with few regular ties to the formal market economy; [r]elatively high rates of infant mortality; and . . . phlegmatic or declining popular participation in . . . political process." Id. See also USA TODAY, July 10, 1991, § B (Money), at 4 (reporting that the United
adjust to the new world conditions and to actively seek the export business instead of expecting to be sought after. For example, the auto-makers in Detroit refused for twenty years to see the writing on the wall: quality finally emerged as the predominant factor in the sale of automobiles. Today, one of the disturbing factors is a difficult-to-overcome perception by consumers that the quality of American goods has slipped to the status of Japanese pre-World War II "junk" goods; the difference being that our "junk" is expensive while Japan's pre-war "junk" was cheap.

This article will focus on the text of the new French Competition law of December 1, 1986, then broadly will compare its provisions with the provisions of Articles 85 and 86 of the Treaty of Rome which created the European Economic Community (EEC). In turn, this article will then examine the post-1992 United European role in the General Agreement on Tariffs and Trade (GATT), given the very powerful French agricultural interests, as well as many other national vested interests. Will a united position by the EEC (the European partners whose negotiators are involved in the currently stalled Uruguay Round) have a negative impact on GATT and, accordingly, on adverse influence the Foreign Trade Policy of the United States? Can we come forth with cooperative arrangements between the EEC and the U.S. for the export of agricultural products, meat and other foods? What will happen with Intellectual Property rights or the transfer of technology which may constitute one of the largest business factors of the developed world in the years to come? Finally, should we envision a major role for the arbitral tribunal provided for in GATT and contemplated by the original ITO (International Trade Organization), established in Havana in 1947?

States was the only major industrialized nation to suffer a drop in its standard of living in 1990.

As foreign economies grew and started exporting to the U.S., putting a premium on quality and economy, American domestic product consumption went down. The U.S. must compete within its own market and should have done a better job of "conquering" foreign markets. As long as basic production remained in the U.S., the country offered a large enough market to keep productivity and income indexes high. As business kept pushing production of basic goods of the U.S. to foreign countries, which created unemployment and lower-salary "service" positions, American businesses were not prepared to aggressively seek "exports" as an outlet for manufactured goods.

2. See, for example, recent GM, Ford and Chrysler ads stressing quality and safety, if not economy. E.g., Newsweek, Nov. 11, 1991, inside cover (Chrysler advertisement emphasizing quality, safety and economy!).

3. The so-called Havana Charter was not implemented as a result of the "iron curtain" descending on the Soviet empire and its satellites in 1948.

Prior to ITO, the dispute resolution mechanisms of trade agreements prior to World War II provided only a limited remedy—the right to convene formal negotiations with the other party. With the hoped-for advent of ITO, a decision-making body was to be implemented which had the power to make third-party
This is a modest contribution made to provide an understanding of at least one key European line of economic thinking.\(^4\) This article also suggests how America may benefit if it takes to heart the lessons demonstrated and heeds the warning signs that are all too apparent including the comments and advice over the past several years of many American thinkers in and out of academia.

I have chosen France as the subject for this article. It serves as an example of a powerful European nation breaking out of the political constraints of a totally managed economy created as a result of the World War II cataclysm. France has since progressively embraced a form of managed free market, and adopted the 1985 Law on Competition,\(^5\) now supplanted by the Order of December 1, 1986, which commits France to the adoption of a free market economy consistent with the objectives of the European Community.

II. THE NEW FRENCH LAW ON COMPETITION

This section provides comments and analysis of the Decree of December 1, 1986.\(^6\)


4. I take it upon myself to dispense with most footnotes except those that identify a direct quote or those which are necessary to identify a particularly important case or a supporting source relating to this survey. Little, if anything, is all that original in most contemporary writings about a subject as lively as this one. See, Harold M. White, Jr., The Private Law of Space An Evolutionary Imperative, in III AMERICAN ENTERPRISE—THE LAW, AND THE COMMERCIAL USE OF SPACE 3 (1986) citing with approval, Rodolphe de Seife, Star War or Star Peace: The Impact of International Treaties on the Commercial Use of Space, in I AMERICAN ENTERPRISE—THE LAW, AND THE COMMERCIAL USE OF SPACE 73 (1986).

Be that as it may, I remain convinced that citing scores of authors for every proposition, many of which may be in the public domain of international legal thinking, ignores the fact that these authors, in turn, rely on dozens of other scholars sharing in the common market of intellectual inquiry in this most dynamic field.

I have, instead, chosen to append to this article a fairly voluminous bibliography from which has been culled much of what is expressed herein. A fair amount is also based on my own observations and experience in the private international law practice for over three decades, both in Washington and in Paris.

Finally, while I take responsibility for any failings, omissions and errors in this article, I would like to take this opportunity to thank my colleagues, Professor A. Samuel Oddi, for his thoughtful comments in the area of intellectual property problems, and Professor Joel Swift for his support. The contribution of my student research assistants, Steve Katz, L3, and particularly, Gregory A. Brown, L2, is acknowledged. I would be remiss not to mention Ms. Judy Fredholm and Ms. Jenny Oleson, our faculty secretaries, for their generous cooperation.

5. 1985 J.O. (L) 7853.

6. This part of the article is primarily based on a memorandum entitled “Comments
A. Historical Overview

The French Revolutionary Government proclaimed the freedom of commerce and industry by the Act of 1791. During the same period, citizens engaging in like commercial activities were forbidden to unite to protect their common economic interests. This put an effective end to the Guild system which had controlled production and trade since the Middle Ages. A few years later, Article 419 of the Napoleonic Penal Code of 1810 made it a crime to promote "the rise or fall of the price of goods or merchandise or of public securities above or below the price which the natural and free course of competition would determine."

The modern basic philosophy of French economic regulation was outlined in the Decrees of June 30, 1945. These Decrees, amended at least 25 times since their introduction, addressed specific preoccupations brought about by the horrendous destruction wrought by World War II and the German Occupation.

Price Ordinance No. 45-1483, issued June 30, 1945, set up a comprehensive system of price controls. Antitrust legislation was not enacted at that time. Rather, such legislation was introduced in 1953 and promulgated by Decree of the Government amending Price Ordinance No. 45-1483. However, in 1958 the Conseil d'Etat (Council of State) judged the decree to be ultra vires and therefore null. Nonetheless, the 1953 Decree was reenacted by the government under the basic powers conferred to it by the then existing Constitution.

The amended Price Ordinance dealt, among other things, with restrictive practices. Articles concerning such practices included: Article 37(1)(a), prohibiting refusal to sell; Article 37(1)(c), prohibiting tying practices; Article 37(4), prohibiting resale price maintenance; and Articles 50 and 51, prohibiting anticompetitive agreements and abuses of dominant position. In addition, Title II of Act No. 77-806 provided for a mechanism of merger control by authorizing the Minister of the Economy to proceed against "concentrations," meaning mergers and acquisitions "which would prevent competition in the market."

For a number of years it became evident, at least from the industry's viewpoint, that a general rewriting of these rules was required to...
bring French law on competition in agreement with modern economic thinking. Eventually, legislation on the “transparency of charges” was added to the body of competition rules in existence up to 1985:8

1. The Act of July 1, 1985 provided that financial institutions would be subject to the same rules as other economic undertakings. It also amended Article 89 of the Act No. 84-46 of January 24, 1984 which gave the Banking Commission jurisdiction to establish the existence of unlawful agreements attributable to financial institutions and impose appropriate penalties.

2. Act No. 84-937 of October 23, 1984 provided for limits to industry concentration and established rules to “ensure the financial transparency and pluralism of newspaper publishing houses.” A Commission on Press Transparency and Pluralism was to be “responsible for implementing the Act and for the imposition of penalties . . . .”

3. The Circular of May 22, 1984 established, by way of commentaries on the provisions of the Act of December 27, 1973, guidelines for the retail trades and craft industries relating to discrimination and restrictive charges. This was a response to the inter-trade agreements reached between producers and distributors in 1983.

Previously, the French Parliament had enacted Article 1 of Act No. 63-628 of July 2, 1963, forbidding loss-leader sales.

Section 37 of La Loi Royer (the “Royer Act”), also known as Act No. 73-1193 of December 27, 1973, which aimed to protect small businesses, strengthened the prohibition against discriminatory pricing practices previously contained in Section 37 of Price Ordinance No. 45-1483. This section outlawed “direct or indirect price discrimination and [made] it an offense for buyers to seek, or knowingly accept, discriminatory pricing advantages.”

Act No. 77-806 of July 19, 1977 set forth the procedures to be followed by the Competition Commission and the Minister of Economics. It gave them initial jurisdiction to oversee agreements reached between producers and distributors. Additionally, it created an Arbitration Board, made up of practitioners, to settle disputes.

Liberal reform has finally come to pass in France! The result is a set of substantial modifications which affect institutional structures and change the legal rules of competition and the sanctions penalizing their infraction.

Will the new French effort, in harmonizing its law on competition with the rules of the European community, have an impact on European Community trade policy in restoring France to its aspired leader-

ship position? In a broader sense, will French economic thinking
influence the world economy due to the positions likely to be taken by
European negotiators during various future GATT discussions?

Never before has it been more important for Americans to realize
that the world is, in fact, a global village. We must actively participate
in the running of that village lest it be run in a manner which is not to
our pleasing, as many have predicted over the past several decades.

B. The Decree of December 1, 1986

The new decree/order\(^9\) (hereinafter the “Decree”) is not a com-
plete code of competition law since it was impossible to achieve a com-
plete synthesis of the law in the short time period allotted to the
experts. A brief overview of the key points of Decree #86-1309 of
December 29, 1986 is as follows:

The heading of the first section of the Decree reads “The Freedom
of Pricing.” The Decree Order #45-1483 of June 30, 1945 which re-
lated to pricing is abrogated. In its stead, the new Decree states that
the basic economic principle of any free society is that “prices are
freely determined by the interplay of competition.”

Decades of state interventionism no doubt required that the
French be reminded of a rule which its economic operators had never
forgotten or ignored. In any event, even the bureaucrats whose job it
was to supervise the activities of the economic operators were often
constrained, against their own convictions, to apply texts which they
knew to be unrealistic. The fact that, apparently, reason has finally
triumphed over inertia should be applauded.

This general rule of freedom, however, is limited by two excep-
tions. The first exception, possibly a permanent one, is that the gov-
ernment may regulate prices each time when, in a sector or geographic
zone, competition is limited because of monopoly, endemic difficulties
of restocking, or by law. The Decree preserves the continued regula-
tion of taxicabs, electricity, gas, pharmaceutical products and books.
The second exception provides for government intervention when the
economy is affected by a crisis, exceptional circumstances, a public dis-
aster or a totally abnormal situation of the market in any particular
sector. Since, under French law the government can, at any moment,
modify all existing legislative enactments in order to protect the pub-
lic interest, it might not have been necessary to provide for these
exceptions.

Title II of the Decree\(^10\) creates a new agency, the Council on Com-
petition. The original draft of the new Decree defined this Council as

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10. Jean Donnedieu de Vabres, Les Institutions Chargées De La Mise En Oeuvre Du
an independent "authority." This definition, which existed already in
the law of December 30, 1985, has since disappeared from the text.
The decision of the French Constitutional Council, dated January 23,
1987, declared that the Council on Competition is of a "non-jurisdic-
tional" nature. The composition of the Competition Council and its
rules of operation show the intent of the Decree's authors to guaran-
tee its independence, to strengthen its consultative role to the govern-
ment and to insure its authority.

Title III of the Decree is entitled "Of Anticompetitive Practices." Decree 86-1243 of December 1, 1986 distinguishes collective from indi-
vidual practices and readopts the important innovation contained in
the reform of December 30, 1985: the abusive exploitation of "eco-
nomic dependence."11 Equally innovative is the decriminalization of
certain individual practices such as unjustified discriminatory con-
ditions of sale or purchase, the unjustified refusal to sell, and tie-in
sales.12

By virtue of basic legal principles of French law, the matters cur-
rently on the dockets should be nonsuited by the extinction of the
public action since the victims in these cases have recourse to the ap-
propriate civil or commercial jurisdictions. Complaints not yet acted
upon as of the time of the Decree's effectiveness should, therefore, be
rejected by a refusal to indict.

A substantive innovation of import is the awarding of oversight ju-
risdiction to the courts, as guardians of the citizens' freedoms, over the
investigatory actions of government agents. However, the Council on
Competition retains the power to stop violations and impose economic
sanctions when necessary.

The initial draft of the Decree provided for an appellate procedure

11. A similar concept was articulated by Justice Murphy in his majority opinion in
United States v. Yellow Cab Co., 332 U.S. 218 (1947). According to the Court, an
unreasonable restraint on trade "may result . . . from a conspiracy among those
who are affiliated or integrated under common ownership . . . . The corporate
interrelationships of the conspirators, in other words, are not determinative of
the applicability of the Sherman Act. The statute is aimed at substance rather
than form." Id. at 227. Despite the logic of this opinion, Yellow Cab was recently
overruled by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752
(1984)(holding the so-called "intra-enterprise conspiracy" doctrine insufficient
grounds to establish a violation of Section 1 of the Sherman Act).

Economic dependence was also espoused as the theory for violation of U.S.
antitrust law in Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978)(en
banc), cert. denied, 439 U.S. 946 (1978), wherein Sears, Roebuck & Co. was ac-
cused of manipulating its distributors by way of large scale exclusive dealing ar-
rangements. However, a jury verdict for Oreck was reversed 6-2 by the Second
Circuit Court of Appeals. Id.
before the Court of Appeals in Paris to review the Council on Competition's "decisions." However, the Council of State\textsuperscript{13} opposed such control over a decision of an administrative "authority" by a judicial magistrate. Accordingly, the draft was then amended to provide that the decisions of the Council on Competition would be subject to an appeal to the Council of State. The text of the law, nevertheless, re-adopted the procedural system originally proposed by the experts, but Parliament referred the matter to the Constitutional Council for a ruling on its constitutionality.

It should be noted that the Council of State, in issuing its decision of annulment based on the \textit{ultra vires} reach of the Decree of October 25, 1977 relating to the previous Commission on Competition, stated:

\begin{quote}
Considering that it results from the preceding that the Commission on Competition has the character of an administrative agency[,] the organizational and operational rules of which do not flow from the judicial power as claimed erroneously by those requesting resort to the "penal procedure" of Article 34 of Constitution, but, as a matter of principle, flow from the regulatory power by virtue of Article 37.\textsuperscript{14}
\end{quote}

However, it is not on that issue that the Constitutional Council voided the transfer of litigation involving decisions of the Commission on Competition to the Court of Appeals in Paris. Rather, it made this decision because the right for an individual to request and obtain a deferment of the implementation of the decision appealed from constitutes a basic guarantee of the rights of defense, and this opportunity was being denied by the proposed recourse to the Court of Appeals.

Title IV deals with piercing the corporate veil and anticompetitive practices. Title V deals with economic concentration. Title VI covers investigatory measures, and the last title, entitled "Miscellaneous Provisions," contains an enumeration of previous amended or abrogated texts and provides that the Council of State will determine the terms of the applicability of this Decree.

III. THE COUNCIL ON COMPETITION

A. Membership

The former "Commission" on Competition was chaired by a member of the Council of State having at least the rank of Counsellor of State, a member of the Supreme Court, or a member of the Court of Claims having at least the rank of Master Counsellor. In addition, the Commission had five members drawn from the Council of State, the Court of Claims or the Judiciary, six members chosen because of their professional competence and two members appointed because of their economic expertise. The fourteen Commission members were named

\textsuperscript{13} Conseil d'Etat, i.e., the French Administrative Law Supreme Court.

\textsuperscript{14} Lebon 136 (1981).
for a renewable term of five years. The Decree of November 23, 1968 did not significantly change this membership which had been in force since January 27, 1954.

The new legislation, however, provides that the "Council" on Competition have sixteen members. Seven are to be chosen from among the highest judicial and administrative officers. Four members should be outstanding experts on economic matters or specialists in the area of competition and consumer protection. The remaining five should be professionals who are currently active or who have had extensive experience in the area of production, delivery of services, or the liberal professions, or be from the ranks of artisans. The Government names a Commissioner who is to state the official governmental position to the Council. He is appointed by the Economics Minister.

B. Operation

The standard operating procedure consists of rules on the meetings of the Council on Competition, its jurisdiction, its investigations and its deliberations. By virtue of Article 4, the Council may sit in plenary session, either by panels or by permanent committee (commission), it being chaired by a president and two vice-presidents. The President of the Council on Competition decides (Article 22) which matter will be brought before the permanent committee without a prior report. Before the expiration of two weeks from the time of notice, the parties may ask that the matter be submitted to the Council.

In regard to the jurisdictional scope of the Council on Competition, the old "Commission" had jurisdiction by virtue of its office, was given jurisdiction by the Minister of Economics and Finances, or had jurisdiction resulting from an inquiry or judicial action. The law of July 19, 1977 added to the above methods of acquiring jurisdiction the option for territorial collectives, professional organizations, syndicates, and consumer organizations—approved in accordance with the provisions of Article 46 of the law of December 27, 1973—to invest jurisdiction in the Council. The Prime Minister could also invest the Council with jurisdiction by virtue of the provisions of Article 8 in Decree No. 77-1189 of October 25, 1977. Article 8 provided that the Economics Minister or the Minister in charge of a particular economic sector could, by virtue of the provisions of Article 10 of the Decree of July 19, 1977, give the Council on Competition jurisdiction over any scheme, action or activity, involving economic concentration.

Thus, while the Council on Competition (Article 11) may be called upon by the Minister of the Economy to act in specific matters, it may also assert jurisdiction ex officio. Additionally, the Council can acquire jurisdiction by request from the undertakings, territorial collectives, professional or labor organizations, approved consumer
organizations, the Chamber of Agriculture, the Chamber of Crafts or the Chambers of Commerce and Industry.

Article 16 of the Decree of December 26, 1986 provides that the Council must report to those Administrative authorities named in the appendix to the Decree any jurisdiction asserted within their area of competence. The Council, however, cannot assert jurisdiction over matters which date back more than three years if no official action has been taken tending to result in an inquiry or findings, or the imposition of sanctions with regard to such activities (Article 27).

C. Advisory Powers

The Council on Competition has advisory powers which, depending on the case, are optional or mandatory. It is charged with the evaluation of the impact of legislative and regulatory texts on competition. The Council may issue recommendations in advance of the issuance of such texts, in order to reduce any negative effect on competition that might result from their adoption.

1. The Optional Consultation

Article 5 provides that the government and parliamentary committees may seek the advice of the Council on Competition regarding any question relating to competition, and more generally, on any legislative proposal, insofar as it concerns the committees. The Council may also be seized of any matter upon the request of an independent administrative agency, territorial collective, professional or labor organization, approved consumer organization, or the Chamber of Commerce and Industry. Finally, Article 26 of the Decree outlines the option of civil, commercial or penal jurisdictions or administrative agencies to ask for the advice of the Council. Any advice given pursuant to these directives may not be published until after a decision of exoneration has been handed down or a judgment on the substantive issue has been issued.

It is useful to note that in a case before the Correctional Tribunal of Paris, the expression “anticompetitive practice” has been defined as aiming only at those infractions to the legislation relating to anticompetitive agreements and dominant positions. Article 26, which implicitly incorporates this definition, applies to such consultation only with respect to Articles 7 and 8 exclusively.

2. The Mandatory Consultation

The Council on Competition must be consulted by the government

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on all legislative or regulatory proposals concerning the following three areas:
—subjecting the exercise of a profession or access to a market to quantitative restrictions;
—establishing exclusive rights in certain zones of economic activity; and
—imposing uniform pricing or conditions of sale practices.
The clearance must be requested in advance and is mandatory in the case of any decree proclaiming exemptions by categories (Article 10).

D. The Council's Jurisdiction Over Anticompetitive Practices

The new Decree reinvokes the prohibition of Article 50 of the law of July 14, 1977 regarding agreements and activities of an undertaking or group of undertakings, having a dominant market position, when these activities have the objective or effect of interfering with the normal functioning of the market. The law has added another prohibition involving “[t]he abusive exploitation of the state of economic dependence in which a supplying or purchasing entity finds itself when it does not have an equivalent solution at its disposal.” This notion appeared in French economic law at the time of the issuance of the law of December 30, 1985. It was not defined then and the new Decree does not define it either. This task has, therefore, been left to case law.16

1. Investigation in Cases of Anticompetitive Practices

a. Normal Procedure

Article 19 states that “[t]he Council, first of all, may declare the unsuitability of the forum upon motion if it finds that the facts stated do not come within its competence or are not sufficiently backed by relevant evidence.” The previous text did not contain any such provision. It does not appear that this finding of lack of jurisdiction is appealable.

A second possibility, also provided for in the Decree, is the refusal to continue the prosecution of a case. The substance of Article 20 covers a situation that is different from the one anticipated by Article 19. In such a case, it may be that neither of the conditions which lead to a finding of lack of jurisdiction is satisfied, but the Council may nevertheless decide that there is no reason to pursue the matter.

Let us assume that the Council has been informed of a matter or has, on its own initiative, taken this matter up. Several scenarios may arise:

a) If the facts appear to the Council to be of such a nature as to

16. Id.
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justify the application of Article 17, it forwards the file to the Prosecu-
tor of the Republic. This tolls the Statute of Limitations.

The second sentence of Article 419 of the Penal Code is abolished. As a consequence, any penal infraction covered by the ordinance will trigger the opening of an inquiry.

b) In an emergency, the Council on Competition has the power to take injunctive measures, but only if the practice complained of has a serious and immediate impact on the general economy, the economy of a special sector, the interest of consumers, or the complaining un-
dertaking. The Council's decision may provide for the suspension of the particular practice as well as an injunction to the parties to return to the status quo ante (Article 12). Such injunctions may be enforced by pecuniary sanctions.

c) Without waiving the emergency measures, the Council brings the complaint to the attention of the interested parties (Article 21) as well as the government Commissioner.

In such a case, the parties have two months (instead of one month) to present their comments. The report is then sent to the parties, the government Commissioner and the interested Ministers. Another two months' extension is then given to the parties to present a brief which the Council must study within the fifteen days preceding the hearing.

The hearing is not public. Only the parties and the government Commissioner may attend. The parties may ask for a hearing by the Council. They may be represented or assisted by counsel.

Unfortunately, the text specifies that the General Rapporteur and the Rapporteur may be present at the deliberations, albeit without any participatory voice, even though the procedure is termed "fully adver-
sarial." One of two things will happen. Either the Rapporteurs will be present but silent, in which case their presence is useless, or the General Rapporteur and the Rapporteur will bring to the Council, at a critical time of its most important deliberations prior to its decision, elements of a decisive weight without the other parties having had an opportunity to discuss their relevance or even know of their existence. The latter case is a derogation of the principle of the "fully" adversarial character of the procedure and an attempt to diminish the rights of the defense. Nonetheless, it is otherwise quite clearly improved when compared to the previous procedure.

b. Simplified Procedure

The simplified procedure was provided for by Article 55 of the law of July 19, 1977. Under the previous law, the parties had the option of asking for a remand before the Commission in order to let the case follow the normal procedure. The normal procedure itself had been the object of many judicial decisions. However, defendants did not use that opportunity since the maximum penalty provided for in the sim-
plified procedure was lower than the risks resulting from the normal procedure. The new procedure provided for in Article 22 of the new law raises the same problems.

The maximum pecuniary fine, initially set at 100,000 French Francs and then 200,000 French Francs by the provisions of Article 86 of Law No. 80-30 of January 18, 1980, is now 500,000 Francs. Thus, it is not very likely that the parties will choose the option offered them by the Ordinance and, thus, ask that the matter be sent back to the Council on Competition by invoking application of the normal procedure.

2. Deliberations and Decisions of the Commission

The Council deliberates in plenary hearing, either by one of the panels or by the permanent Committee. However, the Ordinance did not specify the quorum needed for a valid plenary session or a panel. This is now specified in Article 5 of the Decree. Decisions are arrived at on a majority basis. In the case of a tie, the chairperson of the particular meeting will cast the decisive vote.

During a hearing, the Council may hear any person whose testimony would add to the inquiry (Article 25). At its conclusion, the Commission issues sanctions and injunctions (Article 11), refers the matter to the Public Prosecutor, or takes conservatory measures (see above). These decisions are eventually published in the Official Bulletin on Competition, Consumer Protection and Fraud Prevention.

The Council may order an end to any anticompetitive practices complained of within a specific time frame or impose other special conditions. It may also impose monetary fines if the injunctions are not obeyed. The Permanent Committee makes the finding that the Council's injunctions have not been obeyed (second sentence, Article 13).

The maximum sanction for an undertaking, as specified in the third clause of Article 13, is five percent of the gross income, exclusive of taxes, earned in France during the last closed financial year. If the offender is not an undertaking, the maximum is 10 million Francs. The decision is then sent to all interested parties and the appropriate Minister. The time for appeal is two months. However, the appeal does not toll the course of the action.

It is to be noted that the "Commission" on Competition gives advice, while the "Council" "orders", "imposes fines," "issues and spells out injunctions." It does not, however, "condemn."

E. The Council's Jurisdiction in Matters Involving Economic Concentration

The law of July 19, 1977 created a control mechanism over economic concentration. The word "control" was not in the law, but the
definition of what could be “monitored concentration” constituted a very broad umbrella covering different situations.

Article 39 of the Ordinance adopts, with one minor modification, the text of Article 4 of the law which it replaced. The circular of February 14, 1978 even specified that certain franchising or licensing operations and exclusive distribution contracts could be subjected to monitoring. The new text does not provide these specific details, but one should remember the provisions of the previous texts.

With respect to the monitoring of concentrations, the ordinance has adopted the same procedure provided for in the previous law. This procedure provides for the voluntary notification to the government of concentrations or plans of concentration.

It is important to note seriatim:
— the conditions of control;
— the procedure of notification.

1. The Market

The concentration which may be subject to monitoring is only that which affects the domestic market.

2. The Limitations

The prior law provided two assumptions for control. It could be exercised only if the business volume in the domestic market by the suspected undertaking during the calendar year preceding the concentration was in excess of:

(a) for the totality of the undertakings, forty percent of the national market involving goods, products or services of the same or substitutable nature; or

(b) for at least two of the contracting parties or groups of affected undertakings, and for each one of them, twenty-five percent of the national consumption of goods, products or services which cannot be substituted.

The new floors referred to above apply when two factors are present:

(a) More than twenty-five percent of the sales, purchases, or other transactions in the domestic market of goods, products or substitutable services, or a substantial portion of such a market have a total exceeding 7 billion francs of business (net of taxes); and

(b) at least two of the undertakings which are parties to the concentration have had a business volume totaling at least 2 billion francs (net of taxes).

The notion of non-substitutable goods has thus been replaced by the size of the undertakings as shown by their sales volume. Article 27 of the Decree specifies that the business volume which is taken into
account, in order to apply Article 38, is the one that is achieved in the domestic market by the undertakings involved and is understood to be the difference between the global business volume before taxes of each of the enterprises and the accounting value of their direct exports, or those made through agents, to foreign countries.

One of two things must occur. Either the floor is not reached, and notification is not necessary, or the floor is reached and the parties have the choice to notify or to not notify. The procedure for notification consists of five events.

1. **Notice is given to the Minister of the Economy by an affected undertaking.**

   Article 40 specifies that this notice may be subject to a number of conditions. Silence for two months constitutes acceptance. The delay is extended to six months if the Minister notifies the Council on Competition. The Circular of February 14, 1978 listed some specifics on the contents of the notification. These are adopted in the text of Article 28 of the new Decree.

2. **Notification of the Council**

   In case of notification of a concentration, the Minister of the Economy alone has the option, though not the duty, to inform the Council on Competition of the plan or the act of concentration. If the Minister does so, she will advise the parties accordingly (Article 29). The Minister must exercise the option to involve the Council within two months, since the running of this delay means a tacit acceptance.

   In the absence of jurisdiction by the Council, it may not give any advice. In the absence of advice, the Minister in Charge of the Economy and the Minister in charge of the affected economic sector may not issue injunctions or more generally follow the provisions of Article 42.

   Absent notification, jurisdiction of the Council may be obtained; however, it may be obtained only after the expiration of a delay of three months given to the undertakings in which they are to notify the Council following application of Article 40 provisions.

   By application of Article 16 provisions of the Decree, the Council on Competition advises the administrative authorities of any jurisdiction coming within their field of competence. These authorities have a delay of two months in which to submit their comments. The administrative authorities are the Committee on the Stock Exchange, the National Committee of Information and Freedoms, the Mediator of Cinema, the Committee on Regulated Markets of Goods, the Banking Committee, and the National Committee of Media and Freedoms.

3. **Advice of the Council**

   The third phase involves the conclusion by the Council. The Council investigates whether the planned concentration or concentration
improves the economic progress sufficiently in order to attenuate the negative effects on competition. The Council will take into account the competitiveness of the involved undertakings with respect to the international competition. It attaches to its report the comments of the administrative authorities it has consulted.

4. Information of the Parties

Before making a decision, the Minister sends a draft (to which is attached the advice of the Council) to the interested parties. These parties are given a deadline by which to make their comments.

5. The Ministerial Decree

After the above deadline, the Minister may, by decision based on the record (in one or more steps), issue injunctions which order the undertaking not to proceed any further with the plan. If the operation has already been undertaken, the Minister may order the undertaking to reestablish the status quo ante, or take any such measure designed to insure the maintenance, or restoration, of sufficient competition.

The foresight which went into the creation of this system which, at every procedural stage, has the parties closely participate in the formulation of the impending decision, is most commendable.

F. Powers of the Chair

The Chair of the Council of Competition has such powers as flow from the provisions of the various articles of the Decree. The Chair decides whether a matter will be submitted to the Permanent Committee without a prior report (Article 22), and establishes the number and the make-up of the panels. She may refuse the release of information which may jeopardize any business secrets (Article 23). In addition, she has the power to forward cases to the appropriate civil or commercial jurisdictions in order to establish the liability of the author of the infractions cited in Article 36 of the Ordinance.

IV. ANTICOMPETITIVE PRACTICES

A. Practices Tending to Exclude Competition or to Establish Dominance

Prohibited conspiracies and the abuse of dominant position will be subject to the solutions adopted earlier that continue to guide the authorities in charge of ensuring that the rules of competition are followed. The examples given in Article 7 do not exactly duplicate those which had been given in the text of old Article 50. The latter gave, as examples, actions which would tend to restrain, block, or deviate from the rules of competition. These examples included creating obstacles for the lowering of prices, net sale or resale prices, favoring the artificial raising or lowering of prices, impeding technical progress and limiting the free play of competition by other undertakings.
The new list, however, addresses itself to limiting access to the market or the free exercise of competition by other companies, creating obstacles to the free market, fixing prices by artificially raising or lowering them, limiting production, outlets, investments or technical progress, and allocating markets or sources of goods. In any event, the previous case law continues to apply.

The text of Article 8, which forbids the abuse of dominant position, deserves particular comment. Two distinct situations are contemplated. One is already known, while the other one is new (at least since the law of December 30, 1985).

1. Abusive Exploitation of a Dominant Position

Article 3 of Law No. 63-628 of July 3, 1963 prohibited activities of an undertaking, or a group of undertakings, exercising a dominant activity when these activities "have as their object, or may have the effect of, the contravening of the normal functioning of the marketplace." The notions of "concerned market," "obvious concentration of economic power," and "dominant position" have become part of positive law. There existed then a text and the burgeoning case law of the European Community could have served as a guide.17

The abuse of the dominant position within the Common Market assumed, and still assumes, the convergence of the following:
- the existence of a dominant position by one or more undertakings;
- the existence of a market in which the suspected activity takes place;
- the abuse of the exploitation of this dominant position; and
- the impact on commerce between Member States.

Under French domestic law, it is sufficient that the abusive exploitation take place within the domestic market or a substantial part thereof. The Decree gives a number of examples illustrating abusive exploitation assuming that the seller is in the "dominant" position. These include refusal to sell, tie-in sales, and discriminatory conditions of sale.

2. Abusive Exploitation of the State of Economic Dependence

Such a situation presupposes a different type of "domination," a state of economic dependence. The second sentence of Article 8 as-

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sumes the two situations of when the dependent enterprise is a client and when the dependent enterprise is a seller. It is necessary to look for examples of these two situations in order to define the parameters of this activity.

a. The Dependent Undertaking is a Customer

The conditions for illegal behavior by the selling enterprise appear to be:
— the existence of products owned by the seller which the customer needs;
— the practice of price or retailing arbitrarily imposed;
— an independence of action on the part of the seller regarding the customer; and
— the absence of an equivalent solution. On this point the case law will have to clarify the determinant factors. In industrial matters, the notion of equivalence is easier understood on the level of distribution.

It seems logical to conclude that if the customer is in a state of "economic dependence" vis-à-vis its supplier, the latter is not in a state of economic dependence vis-à-vis the customer. This would be the case when, as far as the supplier is concerned, the new customer would not be in a position to affect the volume of the supplier's sales or the importance of its profits in a significant way.

The above would be the situation of the industrialist needing a chemical product of a specific nature owned by the manufacturer. More generally, it might be the situation of a customer whose survival, or even whose competitive situation with respect to its rivals, would be endangered by the abusive exploitation in which the supplier would engage.

Examples of abusive exploitation given in the text include refusal of sale, tie-in sales, and conditions of discriminatory sales. These different examples are examined later.

b. The Dependent Undertaking is the Supplier

This scenario illustrates the case of dependence with respect to "large wholesalers." The conditions of illegality of the behavior of client enterprise were difficult to delineate in that hypothesis.

A "large distributor" tries to obtain a better competitive situation than the one his rivals have. It tries to obtain the most favorable prices or better conditions of delivery or payment. It bases its requirements on the fact that the supplier would severely suffer from a reduction or elimination of its purchases.

It is, in any event, impossible to force a distributor to market a product. In the past, the problem has not been resolved in a satisfac-
tory manner. Article 37 of the “Royer” Law prohibited the practice of “prices and discriminatory conditions of sale which are not justified by the corresponding differences in the net prices of the delivery or service.” Additionally, Article 38, which was most rarely applied, forbade the action of “all resellers who tried to obtain or to knowingly accept, any advantages in violation of the provisions of Article 37.”

The law of December 30, 1985 eliminated those two articles and replaced them with the following language: “... [t]o practice with respect to an economic partner, to ask him or obtain from him discriminatory prices or conditions of sale, or gifts in kind or in money under conditions which would affect competition.” This text was similar to the previous text.

The new rule is aimed at a pre-existing contractual situation. It forbids:

the abusive exploitation by an undertaking, or a group of undertakings, of the economic dependence status in which a supplier customer finds itself, who does not have an equivalent solution, particularly when the distributor cuts off the commercial relations which existed before for the only reason that its business partner refuses to subject itself to unjustified commercial conditions.

This is defined as “differential treatment.”

The conditions of this abusive exploitation of the economic dependence in which a supplier finds itself vis-à-vis the distributor seem to be the following:

- the existence of a state of economic dependence between the supplier and the distributor to the latter’s profit;
- the existence of pre-existing commercial relations between the supplier and the distributor;
- the insistence by the distributor to subject the seller to unjustified commercial conditions; and
- the cessation of commercial relations based on the sole ground of the refusal to accept these unjustified commercial conditions.

B. Anti-competitive Practices Aimed At by the Prohibition

Article 59 which became Article 51 of the Decree of June 30, 1945, abolished by the new text, provided that “Article 50 does not deal with concerted actions, agreements or understandings, including the activities of an undertaking or a group of undertakings which occupy a dominant position:

1. When they result from a legislative text or regulation;

2. To the extent that their authors may justify them when their intended effect is the assurance of economic progress, particularly by increasing productivity.”

The new text which springs from the prohibition of “friendly understandings,” reiterates the provision concerning agreements resulting from the application of a regulatory or legislative text. It also
provides some precision on the limits of the second sentence by re-
producing the text of the third sentence of Article 85 of the Treaty of Rome. Finally, it provides for exemptions by categories.18

The result of the totality of these provisions is that four categories of "practices" are not considered to be illegal. These include:

— those which are not aimed at by Articles 7 and 8 of the Decree;
— those that are included in Articles 7 and 8, but which are exempt from the prohibition by the text of clause 1 of Article 10 of the Decree;
— those which are prohibited by Articles 7 and 8, but which are exempt from the prohibition by virtue of the text of the second sentence of Article 10 of the Decree; and
— those "contracts" which will be exempt by decree after positive opinion from the Council on Competition.

The above provision seems to exclude "large undertakings." It seems, therefore, that to create a discrimination between economic operators is left to the discretion of the administration since no definition is given of what constitutes a "small" or "average" enterprise. This is regrettable, particularly in light of the fact that the economic regulation tends to consider groups of corporations and not only individual undertakings.

Will a corporation which is completely controlled by one or several "large enterprises" be considered "small" or "average" if one looks only to the amount of its capital, the number of its employees or its business volume as criteria? Or, will it be subject to an amalgam with the "large undertakings" in the category to which the mother corporation belongs?

Further, the proposed liberalization can be drastically reduced by the administrative power. In fact, the text does not call for a mandatory consultation with the Council on Competition. The De-

18. Paragraph 3 Article 85 of the Treaty of Rome basically provides:

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings;
— any decision or category of decisions by associations of undertakings;
— any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

cree, as stated in Article 10, will be issued upon the conforming advice of the Council. Consequently, if the Administration intends to refuse its approval of a proposed contract, it will not have to get any “conforming advice” from the Council. It is only if the Council feels that the agreements have “as an object to improve the management of the undertakings” that they can be recognized as satisfying the conditions imposed by Article 10. They must, however, then also be approved by the Council. In other words, the regulatory role of the Council starts only after an initial favorable decision by the Administration. If the initial decision is unfavorable, the Council does not have to be consulted since its advice would then not be “in conformance.”

1. Legislative or Regulatory Texts

The “legislative” texts constitute a clearly defined category of “texts.” The regulatory texts started a controversy which led to an extensive interpretation of the reach of the word “regulatory.” The new ordinance seems to limit this broad interpretation to “a regulatory text taken for its application.” This seems to exclude circulars or ministerial letters.

2. Development of Economic Progress

The necessity of involving users in the benefit of the agreement, as provided by Article 85(3) of the Treaty of Rome, has been required, in French domestic law, by several opinions issued by the Technical Commission.

The Decree of December 1, 1986 adds two conditions: one which forbids “the possibility to eliminate competition for a substantial part of the products involved,” and one which requires “the sufficiency of the tie” between the alleged economic advantages and the incriminating practices. These two negative conditions are in the text of the third sentence of Article 85 of the Treaty of Rome. The case law of the Brussels Commission (ECC) will, therefore, be important in the understanding of the advantageous economic character of an agreement which may conceivably be within the prohibition.

21. There also, we talk about a requirement, examples of which can be found since 1955. They include Avis Abrasives and Molds, Dec. 17, 1955; Avis, Manufacturer of electrical insulated cables, Jan. 19, 1957; Avis antislipping devices for cars, June 8, 1978 (link was deemed insufficient, and in any event “the users or consumers had not received any benefit”).
22. E.g., Case 242/87, Commission of the European Communities v. Council of the European Communities, 1989 E.C.R. 1425, 1 C.M.L.R. 478 (1989); Case 45/86, Re
3. Exemptions

Certain categories of agreements, particularly when their objective is to improve the management of small or medium business firms, may be recognized as meeting these conditions following a decree issued after conforming advice from the Council on Competition is received. It seems that this involves certain types of contracts, particularly contracts of selective distribution, defined for the first time by the French Supreme Court in the well-known decisions of November 3, 1982. The text of the Decree does not give the procedure to be followed by small or medium firms desiring to obtain the benefit of an exemption decree.

Will the administrative decision permitting such an agreement be binding on the tribunals which, if everything else fails, would have to examine its conformity with the requirements of Article 10? Undoubtedly, it will be binding since we refer to an agreement issued "by decree." It would have been unlikely to see consular magistrates, criminal tribunals or, eventually, common law tribunals (which may be called on to decide issues involving commercial firms when these issues are peripheral to conflicts involving trademarks or patents) find agreements to be illegal when validated by the regulatory power. On the other hand, the courts might declare agreements not submitted to the procedure for exemption by groups to be valid.

Finally, the text of Article 26, paragraph 2, provides "the Council being consulted by the jurisdictions on the anticompetitive practices defined in Articles 7 and 8, and involved in the matters within their jurisdiction. . . ." It would seem then that the tribunals would have concurring jurisdiction with the Council on Competition and have the authority to decide whether these activities fall within the prohibited or the exempt category.

C. Sanctions

The text of Article 52 of the Decree of June 30, 1945 provided that, after getting the advice of the Commission, the Minister could, except in an emergency, repeat offense or flagrant violation:
— forward the file to the Prosecutor in order to apply the provisions of the Decree or Article 419 of the Penal Code;
— offer a friendly settlement as provided for in Article 33; or
— impose a fine with or without publication (Article 53, at the end).

Delicate procedural problems were bound to arise. These were the

subject of a seminal analysis by Professor Decocq. Of course, Article 419 of the Penal Code has now become part of history.

1. **Nullity, Monetary Sanctions and Injunctions**

   Article 9 states that any agreement, convention, or contractual clause is void when it involves a prohibited practice under Articles 7 and 8. This decision may be made by the Council, or by any competent jurisdiction which is called on to look into the practices which are the subject of the complaint.

   The Council has the ability to impose immediate monetary damages (Article 13). If the offender is an undertaking, the maximum is five percent of the gross business volume, ex taxes, in France during the last fiscal year. If the offender is not an undertaking, the maximum is 10 million francs.

   The publication of the Council's decision may be ordered at the expense of the affected person (Article 13, last paragraph). Further, the Council may also issue injunctions. These do not have a penal character.

2. **Entering into Prohibited Agreements**

   The text provides for an aggravated offense which comes within the jurisdiction of criminal tribunals. Article 17 provides for a jail sentence of six months to four years and a fine of 5,000 to 500,000 francs, or one of those penalties, in a very specific case of "when a natural person fraudulently takes a personal and determining part in the creation, organization or implementation of the practices condemned by Articles 7 and 13."

   The above-referenced text will undoubtedly create several problems. The first problem arises with the interpretation of the adverb "fraudulently." It is evident that the authors of the Decree of December 1, 1986, which decriminalized the infractions of economic legislation, wanted to make an exception for cases involving particularly grievous infractions. The threat, implicit in the adverb, should not fail to have a salutary effect on any possible excesses. This is the assumption behind the provisions at the end of Article 11.

   A second difficulty which may arise is that civil and criminal tribunals have, with the Council on Competition, concurrent jurisdiction which permits them to determine whether the practices submitted to them are prohibited by the provisions of Articles 7 and 8, and equally, whether these practices come within the prohibitions of paragraphs 1

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and 2 of Article 10. Assume that, in conformance with the provisions of Article 11 of the Decree, the Council on Competition forwards the file to the Prosecutor for indictment and prosecution of the actors as provided in Article 17. In such a case, the Prosecutor is not thereby deprived of the authority to investigate the allegations in the file.

The criminal tribunals obtain jurisdiction under the terms of Article 17 only after the exhaustion of procedure before the Council. In fact, Article 26 provides that the civil, commercial, or penal jurisdictions should consult with the Council. If they may consult the Council, it means that they would have to wait for the Council's advice before they could rule on this matter, even though the advice would not be binding on them. This advice will constitute, as do the "letters of classification" issued by the Commission in Brussels, a factual element which the jurisdictions may take into account in making their decision.

3. Return to the "Status Quo Ante"

Independent of these "classic" administrative or judicial sanctions, Article 43 of the Decree provides for a sanction of exceptional gravity. It has consequences which are no less exceptional. In case of an abusive exploitation of a dominant position—and the text adds, "or of a state of economic dependence,"—the Council on Competition may "ask the Minister in charge of the Economy to enjoin, together with the Minister whose sector is affected, to 'modify' to 'complete' or to cancel" all agreements and all acts by which economic concentration is achieved... "even if these acts are the object of the procedure provided for in the present title." This sanction may apply not only to firms which have gone ahead with a concentration since the issuance of the Decree even if the acts are the object of the procedure provided for in the present act, but also to all concentrations conceived and implemented before the issuance of the Decree, since no limit on the affected concentrations is set.

4. Action of the Prosecutor, the Minister or the Chair Before Civil and Commercial Jurisdictions

One innovation has been to give the Prosecutor, the Minister and the President of the Council on Competition the option to prosecute before civil and commercial jurisdictions discriminatory practices, refusal of sales, and tie-ins. As a result, once a complaint is filed with the Minister—and there are many—the administration may start the judicial procedure.

The Prosecutor, the Minister, and the Chair of the Council on Competition may then have their opinion known to those jurisdictions. It seems that this situation calls into effect the power of the
requesting parties to denounce these procedures and ask all three au-
thorities to intervene.

It can be important to inform the tribunals of the opinion of the
Prosecutor, the Minister, or the President of the Council on Competi-
tion. As well, it is important to permit the Council to take, by virtue
of Article 12 provisions, the conservatory measures which may be
asked for by the complaining parties in the case of anticompetitive
practices.

In the case of restrictive practices, the President of the Council, the
Minister and the representative of the Public Ministry, may, in accord-
ance with the last paragraph of Article 36, ask the judge to issue a
judicial order.

V. RESTRICTIVE PRACTICES

Restrictive practices are named in Title IV of the Decree. Title IV
also includes a provision for the piercing of the corporate veil in rela-
tionships between professionals.

The doctrine designates the following practices under the name of
individual practices in contrast to the agreements or actions of under-
takings in position of absolute, or relative, domination: information to
the consumer; sales with discounts; various forms of refusal to sell; the
necessity to bill; loss sales; the communication of lists and conditions
of sale; the practice of imposed prices; the illegal use of public domain;
and illegal competition of associations or cooperatives of business
firms or administrations. The following is a quick look into these vari-
ous chapters *seriatim*.

A. Consumer Information

Article 28 deals with the relationships between professionals and
consumers. The right of publication of prices to the consumer is as-
sured by marking, ticketing, posting or any other appropriate means.
The latter category includes, for instance, the delivery of notices.

Several regulations specifically aimed at these practices have been
published. It would be useless to attempt to give an inventory here.
Article 28 of the Decree refers, as to marking, ticketing or posting, to
the applicable “regulations issued by decree of the Minister in charge
of the Economy, after consultation with the national Consumers’
Council.” Violations of these regulations are punishable by the impo-
sition of fifth class misdemeanor fines.

One should note that the obligation to inform the consumer also
includes eventual limitations of the contractual liability and any other
special conditions of the sale. The reference to the eventual limita-
tions of contractual liability seems peculiar, particularly when under
French law, since they are only permitted in transactions between
professionals within the same specialty. Moreover, the EEC Directive of July 25, 1985, “relating to the coordination of legislative regulatory and administrative provisions of the Member States in matters of liability due to defective products,” became applicable in France as of July 31, 1988, unless France proceeded to an elaboration of its regulations of matters dealt with in this Directive.

B. Sales with Discounts

The law of March 20, 1951, amended several times, dealing with immediate or deferred discounts, is abrogated. The new text impliedly authorizes discounts between professionals since the prohibition applies only to offers of sales or the sales themselves, offers of services or services to consumers. This prohibition does not apply to minor objects, services of little value or samples.

The text of the Decree delves into minute specificity (Articles 23 to 25) and provides for seven percent of the net price TTC if the latter is lower or equal to 500 francs or 30 francs plus one percent of the net price defined above if the latter is over 500 francs. This value, in any event, may not exceed 350 francs. It means TTC departure at point of production for items produced in France, or francs and customs paid at the French border for imported items.

This wealth of detail is understandable. One must distinguish between “small items” or “services of little value” which are mentioned in the second paragraph of Article 29 dealing with samples.

Samples must show the notice, “Sample—may not be sold,” written in a legible, indelible and visible manner. “Minor items” and “services of little value” are authorized within the parameters which have been outlined. The marking must be apparent and indelible, but the reference to “normal position of utilization” has disappeared. In addition to these exceptions, there are also exclusions.

The provisions of Article 24 of the Decree provide that the following actions are not considered as discounts:

- the normal maintenance of the product;
- the after-sale services and the availability of warehousing; and
- the rendering of services which are usually given for free if these services are not the subject of a contract for consideration and are without mercantile value.

The non-observance of this new regulation is subject to the penal provisions provided for fifth class misdemeanors. This regulation is more liberal than the old one, even though the principle of prohibition has been maintained.

C. The Refusal to Sell

The refusal to sell was formerly dealt with in Article 37.1(A) of the Decree of June 30, 1945. Several examples of refusals of sale are mentioned in the text of the new Decree.

The old incriminating action provided for certain conditions to be met. This included that a request of normal character be made in good faith and a refusal be made by a third party owning available products, as long as the sale was not forbidden by regulation.

The notion of "unavailability" of the materials gave way to legal unavailability. Thus, the contract of selective distribution may be used in such a way as to make unavailable the goods to which they refer. One should clearly distinguish, as the Supreme Court has done, the exclusive concession contract from the selective distribution contract.

The exclusive concession contract has, for a long time, permitted the distributor to successfully pursue for illegal or disloyal competition the third party, who not being a distributor, could obtain, often thanks to a parallel distribution network which was not controlled by the franchisor, a product without the permission of the distributor. The above scenario has occurred frequently, particularly in the case of large foreign firms tied to exclusive French importers. The third parties would obtain products which were part of the exclusive import agreement from other countries of the Common Market. The exclusive distributor would then start a claims procedure before a consular jurisdiction to put an end to the situation which, in effect, eroded the monopoly which had been granted to him. Since the Supreme Court (Cour de Cassation) decision of February 16, 1982 in Mitsubishi, these actions are no longer considered by national tribunals to be violations.

In contrast, the commercialization of products under a selective distribution contract constitutes an act of illegal competition because it harms the commercial network of the franchisor as well as the interests of the consumer. As a matter of fact, the selective distribution contract assumes a whole set of reciprocal obligations to which the parties subscribe, and this in the interest of the final user. As soon as the totality of these conventional contractual arrangements has been harmed, the consumer's interest is no longer protected.

Decisions rendered by the commercial tribunals, the tribunals of Great Instance and the Courts of Appeal give numerous examples of the selective distribution contract situation. If the selective distribution contracts are subject to a decree of exemption, or in the absence of a decree of exemption, they are found to be within the conditions

26. Court of Poitiers, Lanvin v. Hyvernat; Court of Nimes, Nina Ricci, Givenchy, Dior, Lanvin, Jean Marc, Sinan v. Auchan; Court of Grenoble, Court of Lyon, Court of Rennes, Court of Toulouse, etc . . . .
imposed by Article 10, paragraph 2. Previous case law may continue to apply.

The conditions of a prohibited refusal to deal flow from the enumeration of Article 36. The text has implicitly adopted the previous provisions, but has justifiably replaced the notion of "unavailability" by express reference to Article 10. In other words, the Decree of December 1, 1986 only contemplates the judicial unavailability which may result either by virtue of existing agreements which are exonereated by paragraphs 1 or 2 or because of an exemption by category resulting from a decree issued after conforming advice by the Council on Competition. However, the refusal to deal under Article 36 cannot be the object of an aggravating circumstance.

More serious is the refusal to deal as defined in Article 8. It is subject to the preexistence of a position of absolute or relative dominance, and the abusive exercise of this dominance by the person refusing to sell.

There remains, however, the scenario of a violation of civil character. In this scenario, there would be an "aggravated" refusal which would justify the recourse of forwarding the file to the Prosecutor of the Republic for the application of Article 17 in the case of "fraud" in the creation, the organization or the implementation of such practices.

Finally, there remains the prohibition of the refusal to sell to a consumer (Article 30) without legitimate reason. Article 6 of the Decree states that such violations are subject to the sanctions provided for fifth class misdemeanors.

Article 30 contemplates other prohibitions previously the subject matter of Article 37.1(c) of the Decree of June 30, 1945. In fact, Article 30 assimilated the practice of illegal pricing to the fact of conditioning the sale of a product, either to the sale of another product, the rendering of another service, or the purchase of a specific quantity of one product or another service. The sanction is a fifth class misdemeanor. The new text incorporates Article 37.1(c), but limits its application to relationships between professionals and consumers.

D. The Obligation to Bill

Bills are accounting items which are created at the time of a transaction between professionals. They evidence a purchase, the rendering of services or a sale, and record transactions between businesspersons. A merchant is not obliged to give a bill to a consumer.

The Decree of June 30, 1945 (Articles 46 to 49) contained a heavy arsenal of constraints. The new text is much simpler. A new requirement is nevertheless imposed on merchants and manufacturers, namely the stating of "all discounts, kickbacks or takebacks, the principle of which is established and the amount of which can be deter-
mined at the time of the sale or the rendering of services, regardless of the date of settlement.”

Decree #86-1309 provides that originals or copies will be kept for a period of three years. This timeframe is shorter than the commercial Statute of Limitations, and the duration of fiscal prescription. It appears to be insufficient.

Wanting to stress to violators the gravity of such an infraction, the drafters of the Decree have not referred back to another Article providing for penalties. Article 31 is immediately specific in that a fine of 5,000 to 100,000 Francs may apply when an infraction has occurred.

E. Sales at a Loss

The law of July 2, 1963 prohibited, in its first Article, “the domestic resale of all goods at a lower price than its actual purchase price including the business volume taxes involved in this resale.” The doctrine, case law and regulations have for the past twenty years looked at these practices as being misleading.

The exceptions to the prohibition provided for in Article 1 remain since the previous law has not been abolished. These violations carry a penalty of from two months to two years in jail and a fine of 60 to 200,000 francs, or only one of the penalties.

Article 32 of the ordinance modifying the Law of July 2, 1963 is more precise with respect to the minimum level of a loss sale. The purchase price must be increased by the volume of business tax, the specific taxes relating to the sale and, eventually, the cost of transportation. The fines are reduced and range from 5,000 to 100,000 francs.

F. The Publication of Price Schedules and Conditions of Sale

The openness of the market requires that economic operators know the actual conditions under which sales and purchases by their competitors are made. This openness was assured by the provisions of paragraph 2, Article 37 of the law of December 27, 1973, which was then abolished by the law of December 30, 1985.

Paragraph (g) was added to the text of Ordinance No. 45-1483 of June 30, 1945. This provision, subjecting violators to penal sanctions, was the following: "5—By all producer[s], wholesaler[s] or importer[s] to refuse to reveal to any retailer who will ask for it his price list and the conditions of sale. This publication will be made by whatever

27. Referring to that objective is the comment of the Letter of the Distribution of December 1986, and the reference which is made therein to “all upon bill” evoked by the Commission of Production - Distribution - Service of CNPF directed by Sylvain Wibaux. The New Economist, Nov. 21, 1986, at 60.
means and trade usages [which] are followed in their particular profession.”

Article 33 specifies, in addition, that the conditions of sale include the conditions of payment and, eventually, the discounts and rebates. Finally, the ordinance added a sentence referring to the transfer of certain services which are normally rendered by the seller at the expense of the distributor. This sentence states that “[t]he conditions under which the distributor will be paid in return for specific services must be stated in writing.”

G. The Practice of Mandatory Sale Prices

This practice is forbidden under severe penalties for which fines range from 5,000 to 10,000 francs. The practice of suggested retail prices, however, was not forbidden. In fact, it was provided for in the language of Article 3(b) of the ordinance of June 30, 1945, although this ordinance has since been abolished.

The current situation remains unchanged. The practice of suggested retail prices is not prohibited. However, it would be wise to point out to retailers that the prices which are given to them are “purely advisory.”

H. Illegal Utilization of the Public Domain

The last two subsections of this list show with what care the experts analyzed the totality of the problem of certain unfair practices that affect the retail trade. These practices deviate considerable quantities of goods and services to the prejudice of small or medium enterprises. This subsection will examine the illegal utilization of the public domain. The competition to which merchants are subjected by associations, cooperatives of undertakings or the administration is the subject of the next subsection.

Mercantile associations were frequently upset by sales made on the public way by individuals who did not follow the fiscal and social obligations incumbent upon merchants. The regulation of January 3, 1965 subjected street sales to specific constraints. Its aim was to maintain normal competition, while respecting the freedom of trade. This law has not been abolished, but Article 37 of the new law extends the area of its application. It now applies to an offer for sale, to every person. This seems to include the agricultural producer who has been exonerated of the constraints of the law of January 3, 1969 for the sale of the product of his own operation. Additionally, as far as the public domain is concerned, the public governmental domain, as well as local collectives and their public establishments are included. Infractions are punished by the fines provided for fifth class misdemeanors.
I. Illegal Competition of Associations or Cooperatives of Undertakings or Administrations

The cooperatives of enterprises or administration are consumer cooperatives. As is usual with cooperatives, they sell their members the goods which they buy or produce. They may distribute the profits which result from these activities on a prorated basis to the purchasing consumers. However, they may also donate all or part of the profit to charitable organizations.

The legal rules under which these corporations operate are found in the law of May 7, 1917. This text of good intentions quickly became an instrument of unfair competition since the cooperatives do not limit their activities to sale to their members, but sell to outsiders as well.

Statutory mentions were called for under the terms of Article 7 of the law of September 10, 1947. However, they referred to formal constraints and left too much freedom to other forms of unfair competition under which the merchants suffered.

In 1979 (Circular of March 10, 1979), after nearly thirty years, the public officials decided again to fight certain practices by the cooperatives. This was the first time that cooperatives had been obliged to show in their rules the normal forms of offers of sales when selling or offering services to non-members. Finally, the fiscal services could then reestablish a balance between these economic operators by subjecting them to the same constraints.

Infractions are punished by the fines provided for fifth class misdemeanors. However, the Decree is not specific as to which of the managers will be subjected to these penalties. It would have been a good idea to have been more precise.

In addition, commercial firms which are the victims of unfair competition from such cooperatives may file for a cease-and-desist action. Moreover, they may file for damages and interest under the provision that proof as to the "usual" character of these "sales" or "offers of sale" must be made.

Finally, it would be logical that from now on undertakings which are mandated to sell to these cooperatives and which, under the provisions of the ordinance of June 30, 1945, were subject to claims based on Article 37 1(A) in the case of refusal of sales, to demonstrate as a defense, that the claimant, not having amended its by-laws to conform with the Decree of December 1, 1986, acted in bad faith.

J. Procedures for the Finding of Economic Violations

In abolishing Ordinance 45-1484 of June 30, 1945, which concerned the finding of economic infractions, the new Decree puts an end to more than forty years of exorbitant powers given to government agents. These powers, in theory, if not always in practice, resulted in conferring to government agents a freedom of initiative and investigation even greater than that enjoyed by the offices of the judicial police in charge of violent criminal investigations.

In 1945, the objective was to uncover various economic criminals; people resorting to fraud and profiteers of the black market who were operating in an economy which was seriously unbalanced. The text had been used, however, for over forty years, even when the exceptional circumstances which led to its inception no longer existed. This is probably because when the government asserts excessive powers granted to it, it is rare that it will abandon them. One should, therefore, applaud the effort to make the procedure of investigations of economic violations in agreement with the rules of common law, even if these rules are not necessarily followed entirely.

The most important reform in this domain is the necessity for investigators wanting to proceed in searches and seizures to obtain a warrant from a judge in advance. Henceforth, investigators must obtain authorization from a judge acting upon a formal request made by the investigators. In accordance with the spirit of the Decree and the literal text, it would seem that this is not a mere formality since the judge “must verify” that the request for authorization submitted to him is made in good faith. Once the authorization has been given, no appeal is possible, except an appeal to the Supreme Court which, strangely enough, is made in accordance with the rules of the Code of the Penal Procedure.

These regulations seem to prohibit the making of a request for retraction, for instance, by the party who is the subject of the inquiry (Article 48). The text of Article 48 calls for two observations. First, the authorizations may be more easily granted in practice to the extent that there will not exist in the judiciary, and within each jurisdiction, a sufficient number of magistrates who are conversant with the practice of economic law. The judge who is to give the authorization will face government agents who are increasingly specialized in that area. These agents may very well exert undue influence on the judge insofar as the interpretation of certain statutory texts is concerned.

In any event, it seems that government agents may not proceed to a search simply in order to control the merchants’ activities. They must have, at the very least, certain indications or indices, possibly rumors, which may lead to the conclusion that certain firms are acting in violation of the rules of competition provided by the Decree.

A second observation concerns the drafting and ordering of the
texts, since Article 48 is preceded by Article 47. This order indicates that the investigators may enter any premises, property or means of business transportation, require the production of books, bills and other documents and gather, upon notice or on-the-spot, all information and all justification. They may even ask the authority on which they depend that an expert be designated to proceed to any necessary adversarial expertise (a power which is not, properly speaking, novel).

One may, therefore, wonder if Article 47 brings forth a principle giving total freedom of investigation to government agents, and that Article 48 only introduces a restriction on the possibility to proceed to such searches and seizures without having first obtained judicial authorization. Does not the power to "accede to all business areas" mean a search within the meaning of Article 48? Is there not a conflict?

Must we interpret the statutory texts of Article 47 to mean that the government agents may, without judicial authority, but with the authorization or the consent of the person regulated or visited, collect such information? On the other hand, one would need a judicial authorization each time it was necessary to proceed to a "real investigation." The line distinguishing a simple visit (or search) from an investigation will be difficult to establish. In any event, as soon as an investigation has been started upon judicial authorization (Article 48), the President of the Council on Competition must be immediately informed of the existence of this investigation. He may propose that the Council take the matter under advisement immediately.

Once the Council takes a matter under advisement, one or several rapporteurs will be designated to examine the matter. The rapporteur, playing a role similar to that of an investigative magistrate, will define the orientation of the inquiry and designate the agents of the government involved who are subject to interrogatories. The investigators may have access to all documents or elements of information which are in the hands of the government and the public collectives. They need not worry about professional secrecy.

Obstruction of the investigative power of government agents is punishable by imprisonment of two to six months and/or a fine of 5,000 to 50,000 francs. There is no specificity regarding whether the fine will be imposed on the corporation or only on the natural persons representing it. Absent such specificity, we must deduce that it is the natural persons who must pay the fine without the possibility of reimbursement by the corporation.\textsuperscript{30}

Finally, we must note an important reform brought about by Article 46. Article 46 provides that the various minutes of the activities made within the framework of the inquiry will constitute proof unless

contrary evidence is produced. Previously, under the Ordinance of 1945, these same minutes were proof of authenticity until proven false, at least insofar as the material fact finding by the government was concerned. However, the procedure of alleging falsehood is a dangerous one. It was certainly of such nature to discourage the regulated persons from challenging the correctness of these minutes.

Article 31 of Decree 86-1309 of December 29, 1986 practically adopts the terms of Article 7 of Ordinance 45-1484. In particular, it is stated that the minutes must be drafted “in the shortest delay.” The case law has always left the definition of the “shortness” of the delay to the discretion of the courts. It is, thus, that a delay of several days to several months\(^3\) and even 18 months\(^3\) has been considered as satisfying the requirements of “brevity” insofar as a particular activity was concerned. The length of delay depended upon the degree of difficulty in drafting the appropriate minutes.

One must, therefore, conclude that since the new text has adopted the same language, the same jurisprudential solution fully pertains. On the other hand, the new text still provides for the “relevant” person but not for the “delinquent” person. This was a very revealing gap in the drafting of the old Article 7 of Ordinance 45-1484. One was delinquent as soon as the government attested to the violation (signed the minutes). No further mention is made in the scenario wherein the “delinquent” could not be identified. While the sentence itself disappeared from the new draft, it seems logical that the government may draft factfinding memoranda against “unknowns.”

Article 32 concerns memoranda which are made in connection with a “search” and a “seizure.” These memoranda are usually connected with the authorization of the judge. They must be made on the spot.

Finally, an interesting protective provision is that the seized documents may not be held against the interested person until they have been given back or until the interested persons have had a chance to read them. The corporate managers are, in fact, not computers. It seems normal to give them a certain delay in which to think before they must explain the contents and the breadth of the documents even if they have been taken from the files of the corporation.

K. Conclusions

French businessmen should rejoice in noting that the reform they had hoped for has finally come. The new rules of the economic game will not fail to bring the remedies necessary to enable businesspersons to defend their positions in the universe of furious competition. They

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31. One delay of seven months was even permitted (Cass. crim. 16 July 1980; J.C.P. IV, No. 372 (1980).
will undoubtedly complain, however, that no amnesty has been provided for the benefit of corporate managers who were investigated and sentenced under the previous penal provisions.

They will find out that rather than disappear, the refusal of sale claim will remain a weapon for the retailers and an obstacle to the producer's decision to freely choose the method of distribution of their products. The previous text made refusal of sale an infraction.

Is the new state of affairs much more liberal? Not necessarily, because, under the terms of the new Decree, there are six refusals of sale. They are as follows:

— the simple refusal by an undertaking in a dominant position (Article 8);
— the refusal aggravated by fraud and issued by one undertaking—or several undertakings in a dominant position (Articles 8 and 17);
— the simple refusal against an undertaking in an economic dependence relative to the person refusing the sale (Article 8);
— the refusal aggravated by fraud against an undertaking in economic dependency in relation to the person refusing the sale (Articles 8 and 17);
— the refusal against a consumer (Article 30); and
— the refusal without justification of Article 36.

Article 62 of the old Ordinance, which legitimized the refusal of sale when the merchandise was for export, has not been maintained.

It is clear that the right of defense has been highly scrutinized. The decision of the Constitutional Council, resulting in an absence of a moratorium on an execution (which is the result of any appeals to the Court of Appeals of Paris), proceeds from the same concern. We may note, at this point, that the new French rules of domestic competition tend to follow the competition principles of the European Community. The executive, the legislative and the regulatory powers have been quiet. The word is now to the judicial power.

VI. EEC—ARTICLES 85 AND 86 OF THE TREATY OF ROME

A. Introduction and Overview of EEC Law on Competition

Following the 1957 creation of the European Coal and Steel Community (ECSC) by the Treaty of Paris, the European Economic Community (EEC), from its inception that same year, has adopted a fundamental policy that competition shall be maintained. To effect this policy, the EEC adopted, among others, Articles 85 and 86 of the
In that same year, EURATOM, the European Atomic Energy Community was created. All three treaties were heavily influenced by French thinking. This French influence has lessened over the years to the benefit of German resurgence.

According to the Commission of the European Communities, EEC competition policy has three fundamental objectives. First, the EEC seeks to create and maintain a single market for the benefit of both consumers and business. Second, it aims to prevent large businesses from engaging in anticompetitive behavior. Lastly, the EEC supports effective production, distribution and technological development. The European antitrust philosophy is strongly pro-consumer, while still protective of the Community's interests. This results in a pragmatic approach to cooperative agreements which enhances exports to countries outside the EEC.

In early 1991, the now outgoing Commissioner on Competition, Sir Leon Brittan, stated that all efforts would be made to match the Coal and Steel Treaty regulations with the enforcement practices of the Treaty of Rome. It should be noted that the Coal and Steel Treaty ends in the year 2002.

Another important regulatory rule that was created in early 1962 by the Council of Ministers is the so-called Regulation 17, which implements and expands on Articles 85 and 86 of the Treaty of Rome. Regulation 17 gives jurisdiction on a variety of issues involving the enforcement of the Economic Community (EC) Competition Law. It also gives important powers to the Competition Directorate General of the Commission. In addition to pre-merger notifications which are mandatory under the Treaty of Rome, Regulation 17 provides for general investigative powers by the Commission.

The Commission may grant individual exemptions for limited periods of time under Article 85(3), but it is interesting to note that the Commission may still prosecute under Article 86. It is even more interesting to note that the Commission under Regulation 17, may revoke individual exemptions. These actions are usual retroactive.

"Negative clearances" have come into being as a result of Regulation 17. These clearances permit business concerns to clear any activity which may be prosecutable under Article 85(1). It should be noted that while an individual exemption assumes a possible violation of Ar-

36. It is interesting to note that, insofar as investigations are concerned, while communications with outside lawyers constitute confidential written communications, in-house memoranda are not exempt from disclosure nor are communications with non-EC Counsel. American lawyers, therefore, should be careful to get licensed by the EC in order to protect their clients and the confidentiality of their documents.
article 85(1), it merely declares its inapplicability under the provisions of Article 85(3). A negative clearance, however, denies any violation or potential violation of Article 85(1). In any event, the decisions of the Commission, or at least summaries of the publication of decisions, are made public with an effort to avoid undue publicity of possible trade secrets and other possible harm that might occur to the industry concerned.

Exclusive dealing methods of distribution have been noted under Regulation 67, published in 1967, as being one of the first of group exemptions which were granted because of the rash of publications at the time of Regulation 17's adoption. Regulation 67 has now been replaced by Regulation 1983/83. It is understood that competition law under the EC rules will not require a manufacturer to compete with its agents. Therefore, some exclusive dealing arrangements may be legal and fall outside the scope of the prohibitions of Article 85(1). The main concern, it would seem, insofar as the EC is concerned, is the benefits derived by consumers, assuming that the exclusive dealing agreements are themselves beneficial to trade.

It is pretty much established that single firm violations of Article 85(1) do not come within those prohibitions. There must be at least two parties. The term "considered practices" is broadly defined as any kind of informal cooperation between undertakings.

An interesting case involved the French importers of certain parts made by Grundig outside Consten which had an exclusive arrangement with Grundig. Consten sued the maverick importer in the French courts on the basis of violation of French unfair competition law. The defense was that the Grundig/Consten contract was void under Articles 85(1) and 85(2). During these proceedings, Grundig tried to get Article 85(3) exemptions for a host of exclusive dealing agreements. This is why the Court of Appeals of Paris stayed the proceedings under French law in the Consten case. The Commission found the entire agreement to be prohibited by Article 85(1) and denied an 85(3) exemption. The Commission stated that absolute territorial protection in France from the competition of parallel imports of Grundig products was in violation of the Commission's policy and the intent of Article 85(1). This decision was upheld by the Court of Justice because, while Grundig could penetrate the French market by means of an exclusive retail arrangement, the retailer would not be

37. EEC law defines 'undertaking' as a functionally independent economic entity which includes profit and nonprofit organizations, partnerships and sole proprietorships. This, therefore, excludes agreements between parent corporations and subsidiaries.

38. Consten and Grundig v. Commission, 1966 E.C.R. 299. This was a vertical restraint case and the decision was issued prior to the Commission Regulation 67/67.
protected from competition by other Grundig sellers. One item to note here is that, under the Court of Justice's opinion, absolute territorial distribution rights are not necessary in order to give the protection or benefits conferred by trademarks. Therefore, a company cannot exercise its rights under French trademark law by using GINT (a trade name adopted by Grundig) as a trade and competition barrier.

B. Articles 85 and 86 of the Treaty of Rome

The Rome Treaty is composed of six parts with a total of 250 Articles. The most important ones for our purposes are Articles 85 and 86.

Articles 85 and 86 are the foundation of EEC competition law. Article 85 prohibits agreements and practices which, directly or indirectly, restrict or distort competition within the Common Market. Article 86 prohibits abuse of a dominant position by one or more firms, to the extent that such abuse may affect trade between Member States. Both articles have been readily enforced by EEC authorities, producing fines which in some cases have exceeded several million dollars.

In connection with the prohibitions of Article 85, it is important to remember that as a rule, relatively extensive market analysis of the impact of restrictive agreements on competition is the norm. In the same context it is good to note, in a general manner, that there are certain "per se" approaches to this analysis.

This "per se" rule of law is basically the substance of Article 86. It should be noted that under Regulation 17 there are no exemption powers granted to the Commission as far as Article 86 is concerned. The law involving dominant positions and affecting the impact of mergers has been the subject of a number of Commission and court decisions. One of the most important of these decisions is *Europeanbal-late Corp. and Continental Can Co. v. Commission* (1972).39

There appears to be a tendency to increase the level of fines on the European level with respect to antitrust violations, primarily in the area of horizontal restraints. There may be more enforcement activity insofar as compliance with the injunctions of Articles 85 and 86 are concerned.

1. Organizational Structure

The EEC treaty has been implemented by creating the European Parliament ("Assembly"), the Council, the Commission, and the Court of Justice. The first of these institutions, the European Parliament, is comprised of delegates from each Member State. The European Parliament exercises an essentially advisory and consultative

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function. With respect to competition policy, the European Parliament renders advisory opinions, issues advisory reports, and exerts some influence upon the Commission by way of written and oral questioning.

The second EEC institution, the Council, consists of one delegate from each Member State. The Council is the main legislative body of the EEC. By way of Article 87 of the Treaty of Rome, it is entrusted to adopt and promulgate appropriate regulations to enforce Articles 85 and 86. However, the Council can only do so after the Commission has made such a proposal and has consulted with the European Parliament.

The Commission, which is headquartered in Brussels, has fourteen members appointed by the Member States. With more than 8,000 employees, it is the main administrative body of the Community. It is concerned with the enforcement of Articles 85 and 86. The Commission has wide powers both of investigation and of enforcement. Its primary function is to implement and execute Council decisions. In addition, the Commission has the duty to submit proposals to the Council, which ordinarily can act only on a proposal from the Commission.

Finally, the European Court of Justice sits in Luxembourg. It consists of thirteen judges appointed by the Member States. Its role is to interpret and enforce the competition rules of the EEC, as well as competition law issues referred to it by national courts. The Court of Justice is assisted by six Advocates General. The Court's primary function is to interpret EEC law which includes competition rules. It has jurisdiction to review decisions taken by the Commission and to issue preliminary rulings on questions of interpretation relating to EEC law referred to it by national courts.

2. The Jurisdictional Limits of EEC Competition Law

The jurisdictional scope of the application of EEC competition law is subject to geographic limitations. Under Article 85, anticompetitive practices are prohibited only to the extent that they occur within the Common Market or affect trade between Member States. The same jurisdictional limits hold true for dominant positions under Article 86.

The test to apply in order to determine whether a practice falls within the jurisdictional scope of Articles 85 or 86 is unclear. In its famous **Dyestuffs** decision, the Commission ruled that such jurisdictional matters may be based on the "effects" a given restrictive practice produces within the EEC.**40** The Court of Justice, however, in a subsequent appeal, held that it was not necessary to look at "effects" because the challenged practices had been carried out by foreign firms

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within the Common Market.\textsuperscript{41} Thus, although the Court affirmed the \textit{Dyestuffs} decision, it is questionable whether jurisdiction may be based on effects in the absence of conduct within the Common Market.

Rather, the Commission and the Court of Justice have relied on the "unity of group" doctrine to justify action against non-EEC firms. By way of this theory, the Commission and the Court of Justice have attributed responsibility to non-EEC companies for the restrictive acts of their subsidiaries within the EEC.\textsuperscript{42}

Therefore, despite the absence of any concrete test of jurisdiction, arrangements restricting trade between the EEC and third countries may fall within the scope of Articles 85 or 86.\textsuperscript{43} As a general rule, restrictions on import competition entering the Common Market have been objectionable to the Commission.\textsuperscript{44}

Illegal tying in contravention of Article 86 can only be overcome if the manufacturer demonstrates that its conduct was motivated by product safety concerns.

The EEC adopted Regulation 2641/84 of the Council of the European Communities (CEC) to strengthen a common European commercial policy in order to protect itself against illegal or unwanted commercial practices from outside undertakings. As Professor Zoller\textsuperscript{45} points out, this is essentially an adaptation of Section 301 of the United States Trade Act of 1974,\textsuperscript{46} which gives the President the authority to retaliate against unfair trade practices of foreign governments.

We have in the making a substantial body of business competition law for Europe as a result of the EEC Treaty, the EFTA Treaty and the bilateral 1973 EFTA-ECC Treaties. It is likely that the future holds, through a political process, one enforcement system of these various rules.

\textsuperscript{41} Case 48/69, Imperial Chemical Industries Ltd. v. Commission, 1972 E.C.R. 619.
\textsuperscript{42} E.g., Case 6/72, Europemballage and Continental Can v. Commission, 1973 E.C.R. 215; Case 6/73, Commercial Solvents v. Commission, 1974 E.C.R. 223; Case 85/76, United Brands v. Commission, 1979 E.C.R. 461. It would seem that the application of this theory is in response to the tendency by the American judiciary to extend the reach of the U.S. antitrust laws beyond the territorial confines of the United States.
\textsuperscript{43} See, The Commission's comments on the "Application of the competition rules to non-Community undertakings" in ELEVENTH REPORT ON COMPETITION POLICY, Nos. 34-42. On cooperation between the Commission and the antitrust authorities of non-member states see TWELFTH REPORT ON COMPETITION POLICY, No. 157.
\textsuperscript{44} For a summary of these cases, see Jean-Francois Bellis, \textit{International Trade and the Competition Law of the European Economic Community}, 16 COMMON Mkt. L. REV. 647 (1979).
\textsuperscript{46} 19 U.S.C. § 2411 (as amended in 1984).
3. EEC and National Competition Laws: Their Relationship

The EEC Treaty confers rights and imposes duties upon private individuals as well as the Member States themselves. Articles 85 and 86 are commonly called "directly applicable" provisions in that they are among the group of EEC provisions which create rights and obligations for private individuals.47

As a rule, in an instance where EEC law and the national law of a Member State are in conflict, EEC law prevails.48 Accordingly, national courts are required to refuse enforcement of provisions of national law which conflict with EEC law.49 However, Articles 85 and 86 do not preclude the application of national competition law provided that the national law does not prejudice application of EEC law.50

Not unlike the American assertion of its jurisdiction in trade matters extending beyond the territory of the United States, the Commission has also in accordance with the court's rulings, decided that activities which in one way or another restrict trade between third countries and the European Community may come within the scope of Articles 85 and 86.51 The emphasis seems to be that any interpretation by a national court should not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.

The current problem with the competition rules of the Rome Treaty is that a number of activities are subject to exemption from the applications of Articles 85 and 86. For our purposes, the more important ones are the steel industry and agriculture.

Not all agricultural "associations" enjoy automatic exemption or special treatment from competition rules under Regulation 26/62 if they artificially, albeit indirectly, distort competition.52 The arrangements between European aluminum producers with Eastern European trade agencies to channel aluminum produced in the East through an EEC intermediary were found, in late 1984, to be in violation of Article 85(1). This started the trend of finding government

52. Milchfoerderungsfonds, 1985 O.J. (L 35) 35.
agencies not to be exempt from conspiracies which might prove harmful to competition.

Broadly speaking, any agreements which tend to share markets or allocate quotas which do not in effect promote agricultural productivity or the standard of living for the European community are not exempt from the applications of 85(1). Of necessity, one can only allude to general principles.

Now, more than ever, while financial hard times may not be a legitimate defense to a finding of anticompetitive practices by an undertaking, it may mitigate the amount of fines imposed. Fines were usually substantially higher than the fines American companies faced in the U.S.

Mergers and acquisitions, of course, have always been of special interest to the French competition authorities, including the Minister of the Economy and Finance and the Competition Council.

To go into any more detail than has been currently provided here would be too involved for the purposes of the Article. Many of the cases have already been analyzed and are reported by scholars and trade journals. One might say, adopting a multitude of caveats, that the tendency, to put it bluntly, of the European Community is to protect the European Community. It would seem that trade practices which would be unfair within the European Community might not necessarily be unfair when they involve export to third countries. On the other hand, where the arrangements involve the importation of products from third countries and tend to distort competition they will readily be held to violate Article 85(1). For instance, in the relatively recent Mushroom case in which the French and Taiwanese mushroom producers had agreed to price fixing and market sharing, the Commission did not hold them as being exempt, even though they might have fit in the agricultural group exemption discussed earlier.

C. EEC—Enforcement

The powers of the Commission are very broad. They include ordering the termination of violations, granting negative clearances and exemptions and imposing fines.

The term "undertaking" is not defined by the EEC Treaty, but it seems to refer to almost any legal or natural person carrying on activities of an economic or commercial nature. A "decision" of the Commission...
mission is binding in its entirety on those to whom it is addressed. A statement to the effect that, just as the federal system in the United States puts an end to local state law in the area of competition, so does Community law put an end to national laws within the EEC, is far too sweeping. Thus, where local law may derogate from European Community law, one must distinguish between when the individual states act in their regulatory activity ("Act of government") and when they act as parties to a scheme resulting in unfair competition.57

The EEC competition law, as it relates to consumer warranties, may be summarized as follows:

1. The manufacturer's warranty that either discriminates against parallel imports or discourages consumers from purchasing the product in another Member State violates Article 85(1) because it has the effect of partitioning national markets. For these reasons, a manufacturer's warranty offered in the Common Market must be honored on an EEC-wide basis, with the exception that the warranty need not be honored in a Member State in which a warranty is not offered by the manufacturer.

2. A manufacturer's warranty that discriminates broadly against an entire class of retailers, some of whom are necessarily parallel importers, violates Article 85(1).

3. A distributor does not violate Article 85(1) by providing warranty coverage supplementary to that of the manufacturer's warranty or by providing other concessions to consumers that are designed to discourage the purchase of parallel imports, unless in providing such additional coverage or service the distributor discriminates against parallel imports in the application of the manufacturer's standard warranty.58

EEC Bloc Exemption 123/85 should not cover franchising rules which are often arbitrary and anticompetitive in nature.59

For better or worse, the European Community Court seems to follow essentially the basic rules on competition outlined in the U.S. courts' interpretations of the Sherman Antitrust Act and its much criticized siblings, the Robinson-Patman, the Clayton, and the Federal Trade Commission Acts.60

The Commission's decisions and the EC Court's judgments seem to be moving in parallel. Both emphasize their attacks on the anticompetitive impact of cartels such as sharing markets, coordinating production, and price-fixing. Yet, they show considerable flexibility when facing industry cooperation required in helping problem industries or promoting economic progress.

The European Commission has been said to lack the motivation to enforce EC competition rules in areas of shipping. The European Shippers Council (ESC), the leading shipper's organization, announced that it would take its case to the European Court of Justice if the Commission failed to act decisively within the next two months (by February 1, 1992). The Shipping Conferences which are an authorized cartel for international sea operations should not be allowed to extend their rate fixing and coordination practices to EC rail and road activities.61

The Commission wants to apply the competition rules as widely as possible, even in many industries where they have not historically been applied. These areas include banking, franchising, the dairy industry and perhaps air transport. At the same time, the Commission seems willing to be quite pragmatic in permitting cooperation, especially in sectors like banking which are, in any event, feeling strong new competitive pressures.

The Commission is showing a similar pragmatism in dealing with new industries, particularly with respect to cooperation within such enterprises. At the same time, it seems to be mindful of the relative weakness of many EEC industries compared to their competitors in the U.S. and Japan. There is some suggestion that competition policy may be used to give a helping hand to EEC partners in industrial cooperation arrangements.

The question remains of how to apply competition rules to new fields which have not been charted, such as franchising and know-how licensing. There may be a trend to interpret less strictly the application of Article 85(1) and, thus, reduce the necessity of constant applications for exemptions under Article 85(3).

The competition rules increasingly seem to involve the automatic application of specific doctrines to particular types of agreement. Although this is often done under the theoretical exemption of Article 85(3), the degree of economic analysis in particular cases is relatively slight. The Court will apparently not be very demanding in requiring the Commission to make a detailed economic analysis in every case. A

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61. 61 ATRR 1540, at 588 (Nov. 7, 1991).
rule of thumb may suffice.\textsuperscript{62}

Since 1988, there has been an evident willingness to attack horizontal cartels, even when some of the participants were leaders of the European industry with close ties to European governments. There have been fewer reports of cases concerning obstacles to parallel trade, presumably because fewer suppliers are trying to prevent these sellers from trading across the frontiers. On the other hand, there are more cases involving the application of Article 86 where the dominance arises because of an unusual set of circumstances. In such cases, the Commissioner showed itself able to intervene effectively and quickly in disputes between business rivals.\textsuperscript{63}

A recent development in EEC law is underfoot. The seven EFTA countries negotiated an agreement with the EC to create an EEA (European Economic Area). The EEA agreement, not yet signed, establishes a nineteen-nation free trade area as of January 1, 1993. EFTA is to set up a supranational agency, similar to the European Commission, to enforce rules similar to those of the Treaty of Rome, particularly Articles 85 and 86. The EEA agency and the European Commission are to cooperate in all phases in the control of anticompetitive behavior. The EC Commission will continue to be subject to judicial oversight by the European Court of First Instance and the European Court of Justice. However, the EEA agreement creates a new judicial system, paralleling the EC system, but made up of EC and EFTA judges.\textsuperscript{64}

I applaud the September Executive Agreement between the European Community and the United States which provides for cooperation and the sharing of information in the area of antitrust violations. Given the traditional French position within the EC, which seems to be that "all i's should be dotted and t's be crossed," it is interesting to speculate whether this agreement will be implemented without French and English objections.\textsuperscript{65}

\textsuperscript{63} Id.
\textsuperscript{64} See, 61 ATRR 1540 at 588, (Nov. 7, 1991).
\textsuperscript{65} In fact, at the writing of this article, the French have filed a complaint on Dec. 16, 1991 with the European Court of Justice in Luxemburg accusing the European commission of acting \textit{ultra vires} because it did not follow the procedural route which, according to the French, it had to follow under Article 228 of the Treaty of Rome. But, given the German commitment to supervise these enforcement procedures and antitrust matters, it is doubtful that the French, even with the help of the British, can overcome the implementation at the EC level of the Executive Agreement between the U.S. and the EC.

These negotiations are underway within the European Community setting up a twelve nation bloc unifying the political and monetary practices by the year 2000. When such a unity pact is signed, it will be on a par with the Treaty of Rome of 1957 in setting the course toward political unification stemming from the economic unification.
D. Conclusions

A consumer-oriented policy helps control a free market economy run amok. Totally free market is incompatible, in the long run, with competition because it eventually results in a monopoly, or at least an oligopoly. Much of this can be seen in the airline business where, as usual, we went from one regulatory extreme to the other. 66

The Commission has shown itself able to enhance its own powers by concentrating energy and resources effectively. In the merger cases which arose in the summer of 1988, the Commission demonstrated that it could master the facts and intervene very rapidly.

There is a continued reliance on a detailed legislative text rather than on generalized principles. Group exemption regulations concerning know-how licensing and franchising were adopted, and the member states were under strong pressure to agree to the adoption of the regulation giving the Commission explicit powers to review mergers. It is questionable whether detailed legislation is the best means of proceeding when compared to the adoption of a more realistic general policy interpretation of Article 85 (1).

In line with the consumer protection concern cited above, the ever-increasing disparity between the consumers and the traders worries the EC, particularly the regulators in France and the United Kingdom who are now aiming at the areas of “unfair” or “sharp” trade promotion practices which affect the poorest segment of the consumer population. French and English regulations focus on the disparity in power between the traders and the consumers, as a recent public statement indicates that “[b]ehind legislation of this type lies the principle that the law should recognize certain basic ethical values of society—such as promoting honesty, openness, and fair dealing, and preventing exploitation.” 67 This philosophy, which is shared to a large extent by the

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66. It might be well to remember that, historically, the airline industry begged for regulation in order to survive back in the late 1930s when the Civil Aeronautics Act of 1938 was adopted under the leadership of American Airlines and my good friend, Howard Westwood, then a young associate with Covington and Burling. Then, as is typical with American regulatory agencies, the Civil Aeronautic Board wound up in the opposite direction, namely that of overregulation. It is a shame that the Carter administration seemed to think that a simplistic deregulation approval, as advocated by Alfred Kahn, would be the answer to over and microregulation when, at least to me, the answer lies somewhere in between. There has got to be some regulation to permit continued competition. Total absence of regulation results in monopolistic behavior, while overregulation stunts an industry’s growth. This is pretty elementary stuff!

67. Sir Gordon Borrie, the Director General of the U.K. Office of Fair Trading, in a speech delivered Oct. 22, 1991; see also, 61 ATRR 1540 at 593 (Nov. 7, 1991). What used to be the underpinnings of American antitrust officials’ policy when I served in the Antitrust Division of the Department of Justice seems to have been eloquently absent in the last twelve years or so in the minds of our competition officials, possibly with a qualified exception as to the FTC.
French, should have an impact on EEC competition enforcement.68

The adoption of the ECU, the uniform monetary unit under the European monetary system, sets the stage to an eventual political union pushed by Germany. To some extent this union is opposed by France because France wants to retain the national identity of the members of the Community in the political area. For other reasons, England also takes a negative position to such a new Europe. Whether we like it or not, German dominance of the European economy will undoubtedly eventually prevail, with some modifications and concessions to satisfy the French. By and large, there is less desire, at least from anecdotal evidence, to make the British happy at all costs. There is enough feeling among Europeans that while Britain may choose to stay outside a political alliance in Europe, it will sooner or later have to join unless it wants to fall between the crevices of the Atlantic trade. The United States will take the lead, hopefully, to create a Western Hemisphere Trade Zone. Eventually, it may be possible to have Europe cooperate with the Western Hemisphere without resorting to any destructive tradewars. At that point, the European and Western Hemisphere Trade Areas will form a quasi-global trade bloc. This, in turn, will be the only way to influence the Asian trade policies to integrate with the world trade bloc on a more realistic and less aggressive basis.

Finally, given the uncertainties brought about by the collapse of Eastern European bloc and the reluctance of the French and the British to enter into a political federal union in Europe, it would appear that a single European economic authority is not yet a fact, and certainly won't be by the end of 1992.

VII. UNITED STATES ANTITRUST POLICY

A. Historical Background of the U.S. Antitrust Laws

The antitrust movement in the United States was first led by the Grangers. The Grangers, or "Patrons of Husbandry" as they were called, were founded two years after the American Civil War. Their goal was to further the social and educational needs of farmers. The Grangers, however, soon became involved in political and economic activities. By the mid 1870s, the Grange had reached its height of popularity. By this time, at least one of every ten American farmers had

68. This consumer concern was also at the core of the New Deal reforms. Curiously enough, the federal regulatory agencies seemed to have been encouraged by the Nader consumer activism to abandon their "public interest" stance which was mandated by their organic statutes. Now the agencies think of themselves as "judges" in an adversarial proceeding in which counsel for the protagonists fight to prove their case. This is a departure from the agencies' role which the last administrations have uniformly applauded, albeit to the detriment of the public!
been brought within its ranks. Thus, the antitrust movement had clearly conservative underpinnings.

As the Granger movement grew in popularity, monopolies became more and more unpopular. Railroads were particularly unpopular. In fact, the Grangers' anti-monopoly campaign was principally directed at achieving government regulation of the railroads. The traditional Granger theme was that monopolies were dangerous to liberty, and that the only cure was regulation by law. Railroads were considered to be extortionate and "dangerous to republican institutions."\(^{69}\)

The Grangers were succeeded by reformers with much broader interests than railroad regulation. These reformers attacked banks, public utility companies and other exclusive institutions. But an ever increasing amount of scrutiny was placed on combinations of industrial firms, which became known as "trusts."

Trusts, it was said, threatened liberty, because they caused government corruption, enjoyed protective privileges, drove out competitors and victimized consumers. The public wanted a law to destroy the power of trusts. This, of course, was a very broad mandate. The political parties recognized the trust problem soon after public sentiment against trusts began to grow. The major parties did not want to appear to be the champions of the trusts. The Republican Party, however, had a particularly compelling need to condemn trusts. Despite a rural tradition, the Republicans had achieved the reputation of being "the party of the rich."

Congress began to deal with the trust problem in January, 1889. An antitrust bill was sponsored by the aging, yet prominent Republican Senator, John Sherman, who wanted to leave one more monument to himself. Sherman, in a short period of time, began to establish a sort of personal jurisdiction over the matter. His bill was not intended to destroy all combinations, but only those which the common law had always deemed illegal.

The Senate Judiciary Committee, however, took the antitrust problem out of Senator Sherman's hands by producing a bill of its own. The Committee's draft was quite similar to Sherman's original bill, yet Sherman, out of pride, condemned the bill as being ineffective in dealing with trusts. However, Sherman voted for it. As a matter of courtesy, it now bears his name.

The bill passed the Senate by fifty-two votes to one. After subsequently passing the House of Representatives, President Harrison signed the bill. It became law on July 2, 1890.\(^{70}\)

On September 26, 1914, the Federal Trade Commission Act became

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69. PERIAM, THE GROUNDSWELL 286 (1874).
law, with the purpose of preventing "unfair methods of trade." The Federal Trade Commission Act was followed by the Clayton Act, which was enacted on October 15, 1914 "to supplement existing laws against unlawful restraints and monopolies. . . ." The Robinson-Patman Act and the Hart-Scott-Rodino Acts were added subsequently to further bolster antitrust enforcement.

B. Antitrust Enforcement in the U.S.

The United States antitrust laws are administered and enforced by the Antitrust Division of the Department of Justice and the Federal Trade Commission (the FTC). The Justice Department is unique in that it alone is charged with the enforcement of the criminal provisions of Sections 1 and 2 of the Sherman Act. The Justice Department or the FTC may enforce the provisions of the Clayton Act. Additionally, the FTC has authority under Section 5 of the Federal Trade Commission Act to enjoin "unfair methods of competition" by issuance of a "cease and desist" order. Section 5 has been interpreted broadly by the courts to allow the FTC to move against business practices which contravene antitrust policy, particularly that of the Sherman Act. In addition, state attorney generals and private individuals comprise the third tier of antitrust enforcement in the United States. The Antitrust Division of the Justice Department is headed by an Assistant Attorney General. The Antitrust Division is not only responsible for enforcing the Sherman and Clayton Acts, but may also intervene in proceedings before federal administrative agencies involving antitrust policy.

Violations of Sections 1 and 2 of the Sherman Act may be enforced in either civil or criminal proceedings. Criminal proceedings can result in imprisonment of individuals of up to three years, while a criminal fine of $250,000 and a fine of up to one million dollars are available against individual corporations respectively. Over eighty percent of government cases never go to trial but, rather, are settled by way of voluntary "consent" decrees or orders.

The FTC is headed by a Chairperson, and the Chairperson, along with four Commissioners, is appointed by the President, with the ad-

76. Criminal Fines Enforcement Act of 1984; But see 57 ATRR 458 (1989)(Congress may increase fines up to $350,000 for individuals and $10 million for corporations.)
vice and consent of the Senate. They serve staggered terms of seven years. No more than three members of the FTC Commission may be members of the same political party. Commission proceedings are tried before an administrative law judge. The findings of the administrative law judge are reviewed by the Commission. The Commission may either issue a cease-and-desist order or dismiss the complaint. Appeal from a Commission order may be taken directly to the appropriate Court of Appeals. The Court of Appeals, however, must approach the FTC's factual findings with a great deal of deference.

The Antitrust Division has left to the FTC the enforcement of the price discrimination provisions of the Robinson-Patman Act. In other areas of enforcement, there is a substantial overlap in jurisdiction. As a result, the two agencies have developed a “liaison” system in order to avoid duplicative investigations. Critics of governmental antitrust enforcement have focused on the deficiencies in policy planning and case selection at both the Justice Department and the FTC. In sum, most critics have urged adoption of a more systematic planning policy. While we should try to normalize the antitrust laws on an international level, it would be a good step forward in simplifying our own antitrust rules and regulatory practices to discourage anticompetitive trade arrangements within the United States. The fragmentation of regulatory activities on state and municipal levels is a deterrent only to doing business within the United States!

Given the decrease in antitrust enforcement by the federal government in recent years, a third level of antitrust enforcement has become particularly important. This is enforcement by state attorney generals and private parties. A state may recover damages which it sustains directly or it may sue on behalf of natural persons in its capacity as parens patriae. It also may seek injunctive relief without need of showing damage to its “business or property.”77 Moreover, private parties can seek treble damages, court costs and attorney's fees in addition to equitable relief.78

To constitute a defense under the Sherman Antitrust Act in the United States, anticompetitive activities must be compelled by the state acting in its sovereign capacity.79 This means that one must distinguish between the regulatory activities of government and its actions in a proprietary capacity engaging in a scheme to impair competition with other parties.80

In *Cantor v. Detroit Edison,* the Court maintained that it had “never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law.” Next, the court in *Exxon Corp. v. Governor of Maryland* stated that the “[conflict with the federal antitrust statutes] ... cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the state’s power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implication of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to pre-empt the power of the Maryland legislature to enact the law.”

The proposition that a state system of regulation, as a “state action,” is not within the reach of the antitrust laws is followed by the Court’s holding in *California Retail Liquor Dealers v. Midcal Aluminium.* It held that a state’s plan for wine pricing violated the Sherman Act because it constituted a resale price maintenance scheme traditionally held by the Court to illegally restrain trade. One may assume that the rationale in this case was that prices were being set by private parties rather than by the state.

So, what happens when a state acts, not in its regulatory capacity, but rather in a proprietary way like a business? This well-known distinction in administrative law cases has found its way into the tortured rationales used by the courts in finding an exemption, or refusing it, depending on a particular state activity. There are municipal business activity cases which hold that a municipality is not exempt from the reach of the antitrust laws unless there is an adequate state mandate, meaning that the legislature contemplated the kind of municipal action complained of.

The see-saw in judicial opinions in this country has, to some extent, been paralleled in the EC. However, by providing specific exemptions in the Rome Treaty, the problem is somewhat simplified for the European Court of Justice. Many member nations of the EC operate state monopolies such as ones involving tobacco or liquor which are not, per se, incompatible with the provisions of Articles 85 and 86.

The Treaty of Rome is the Constitution of the EEC. In comparing EEC and U.S. law (the Rome Treaty with the reach or impact of the

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84. 445 U.S. 97 (1980). The two-prong test for state immunity enunciated therein was most recently cited as controlling in Berger v. Cuyahoga County Bar Ass’n, 775 F.Supp. 1096 (N.D. Ohio 1991), relying on the *Parker* doctrine as cloaking the local bar associations under the “state action” doctrine.
Sherman Act), one cannot ignore a fundamental difference. The Sherman Act hardly rates constitutional deference by the courts. One would think that when a state runs a business, it should be subjected to the same strictures as other businesses insofar as the impact on competition is concerned. Things are not that simple, particularly when one considers the European tradition of state monopolies in certain areas. Accommodations are, therefore, made whereby the state monopoly may market a foreign product either on a license basis or as sole distributor of the product such as cigarettes.

While the question of state monopolies has not been faced by the Supreme Court, we do have several cases involving municipal business activity cases. These cases hold that a municipality is not automatically exempt from the reach of the antitrust laws unless there is an "adequate state mandate," meaning the "legislature contemplated the kind of [municipal] action complained of."85

The rationale of requiring a clear state mandate by the legislature to shield a municipality from the reach of the antitrust laws has been confirmed in Community Communications v. Boulder.86 This case holds that a mere expression of neutrality by the State is not sufficient to make a case for "clear" state mandate. It is of interest to note that in this case the municipality actually sought to promote competition!87

Pre-emption and exemption are distinct concepts. The former relates to issues arising under the supremacy clause and is rarely found by the Supreme Court in the absence of a "clear and manifest" congressional mandate.88 In contrast, exemption does not involve any federalism issue.89 For want of a rational approach, the whole relationship between State/Municipal and Federal statutes has been thrown into a morass of confusion. To that extent, we might benefit from the adoption of an exemption similar to Article 85(3) of the Rome Treaty, as adopted by the New French antitrust law.

Finally, to all this is added the confusion generated by the GTE Sylvania case.90 This case ruled that a manufacturer may restrain

86. 455 U.S. 40 (1982).
87. In the Boulder case, the municipal regulation was designed to enhance competition, an exemption specifically recognized by the EEC Treaty. The rather clumsy response to Boulder by the U.S. Congress has been the adoption of the Local Government Antitrust Act of 1984 [98 Stat. 2750 (1984), amended by 15 U.S.C. §§ 34-36 (1988)] which has needlessly complicated the issue by permitting overzealous state legislators to enact legislation which purports to decide the reach of the federal statute. One glaring example is that of the Illinois legislature, not known for its forward-looking policy, rushing to enact Public Act No. 83-929, passed in Nov. 1983.
competition with its own product (e.g., vertical/intrabrand competition).

C. Conclusions

One would think that the United States would focus more actively in the proliferation of cartel-like activities that have been relatively undisturbed here in the last ten years or so. It would seem to me that certainly the European Community, the United States including Canada, at this point, and, hopefully, the Western Hemisphere in the future, should enter into agreements to supervise the activities of cartels.

I hate to belabor the point, but I believe commercial law in the U.S. should be federalized. It makes no sense to have fifty diverse interpretations of antitrust laws which are not only federal but also state laws. The proliferation of self-annointed private attorney generals is not in the best interest of the consumer or, for that matter, the businessperson.

Since 1984, case law has done little to instill any respect for the domestic reach of the antitrust statutes. One former antitrust attorney-general in charge of the Antitrust Division under the Reagan Administration declared in a private discussion at an ABA Section meeting that since the division did not think that the strict enforcement of antitrust statutes was very productive in a vital and competitive free-market, it would try to refrain from prosecuting cases that are best left to the private sector. The rationale in his statement was that private treble damage suits should be sufficient to inhibit antitrust violations by industry. There goes the current United States enforcement of antitrust laws!

Whether this type of thinking, which was fashionable during the years of the Reagan administration, will continue into the 1990s and beyond is something to watch for in the future. My own crystal ball is too cloudy to let me prognosticate at this juncture.

The EEC rules are similar to Parker v. Brown's dictum, which provides that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it by declaring that their action is lawful." However, the EEC experienced a similar flux in enforcement to that of the United States.

The EEC Court of Justice has not ruled that a state legislation was incompatible with the EC Rules on Competition even when the activity affects corporate decision-making because the Court of Justice has ruled that anticompetitive state legislation does not come within the

parameters of Articles 85 and 86 of the Rome Treaty. A Member State in its economic regulatory capacity does not violate either Article 85 alone or in combination with Article 5.93

Pre-emption is in the wind, particularly with more reliance in the terms of Article 85 of the Treaty of Rome that Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of the treaty." What sort of regulations would then fall within the prohibition of Article 85?

A partial answer to that question is that the EEC has adopted a differentiation between regulatory and business activity,94 going along with Parker's second dictum now repudiated in the U.S. The EEC position is even clearer since the Cognac case.95

As pointed out elsewhere in this article, it is likely that within the next five years all, if not most, European countries including the various members of the former Soviet Union will have joined such a European entity. At such time, it will present a formidable market with over 350 million people as opposed to the 250 million between Canada and the United States. This is one more reason why the United States should push its foreign trade policy towards a Western Hemisphere trade association even though, with all the countries in South America, the Western Hemisphere will barely match the European market. I would foresee then, once this is done, a normal fusion and cooperative agreement between the Western Hemisphere market and the European market. It should be obvious that adversarial fights between the European and the Western Hemisphere would constitute economic suicide. It is absolutely essential for American businesspersons to replace the short term thinking of so-called "bean counters" and "bottom line" executives and replace it with a long term view of what the future holds.

The Council on Competition is in many ways similar to our Federal Trade Commission. Again, the idea of using excess agricultural supplies to feed the world's poor, rather than spend additional tax monies to store food which eventually rots, is something that should be explored. It would, at least for the time being, provide an answer to what up to now has been done by national subsidies. While, in a sense, we still would be talking about subsidies these would be via a United Nations agency which would buy these goods at world market prices for distribution to starving nations.

The ruthless competition of greed which is benefiting the top non-involved executives has to be restructured to incorporate some minimal social concerns. These concerns include respect for pension sys-

93. Marenco, supra note 57.
tems and minimal welfare concerns of the workers who participate to a limited extent in the future of the company. The obscenity of multimillion dollar executives who bankrupt a corporation, put thousands of people out of jobs, and then use their golden parachutes to land another job in another company in which they have no personal vested interest, enabling them to bankrupt, with impunity, that company as well, is one of the reasons why we are not doing well in our international competition. The adversarial relationship between management and labor has to be replaced by a cooperative spirit which benefits all. There must be some kind of loyalty that goes from the management to the workers in order to elicit some reciprocal loyalty from the workers to their companies. Having elevated greed to the rank of national virtue coupled with the American myth of administrative and executive infallibility for the past dozen years, we must reevaluate our national priorities. This includes our ability to compete in the domestic as well as the global marketplace. This means that we have to cease blaming others for our shortcomings and, consistent with our free-trade philosophy, find ways to improve our competitive position without reducing our country to a Third World status by the unabashed exploitation and downgrading of our work force. I, for one, do not believe that by being reduced to excel in what I call a "pimping" economy (read "service" economy), we can compete successfully in the World Market.

VIII. GATT

A. Introduction and Overview

In February of 1946, the United Nations Economic and Social Council resolved to hold an international conference on trade and employment matters which would draft a convention establishing an International Trade Organization (ITO).96

A preliminary draft of the Convention was produced by the Preparatory Committee, which met in London in 1946 and Geneva in 1947. The United Nations Conference on Trade and Employment was held in Havana from November, 1947 to March, 1948. It adopted the text of the Charter for the International Trade Organization (ITO).97 In addition, the conference established an Interim Commission for the ITO (ICITO), consisting of fifty two countries. ICITO set up an Executive Committee which met several times. By 1950, however, it became clear that the Havana Charter was not going to be accepted by

96. Much of the historical background has been culled from McGovern, International Trade Regulation §§ 1.11-1.14 (2d ed. 1986).
the United States. Accordingly, all efforts to establish the ITO were abandoned.

During the interim, however, members of the Preparatory Committee, along with several other countries, engaged in tariff negotiations amongst themselves. On October 30, 1947, twenty-three countries signed an act authenticating the text of the General Agreement on Tariffs and Trade (GATT). The text contained detailed provisions for acceptance of GATT but these were not used. Rather, the eight principal participants in the negotiations concluded a Protocol of Provisional Application, by which they agreed to apply GATT subject to various conditions.

The GATT imposes four principal obligations on the contracting parties: (1) to accord most-favored-nation status to other parties in respect to most other areas of trade regulation; (2) to observe maximum tariff levels; (3) to limit the use of non-tariff trade barriers; and (4) to make special procedures for dispute resolution. The General Agreement does not address the issue of institutional arrangements because the document was intended to be a transitional instrument. Instead, institutional arrangements were left to future development. Besides the General Agreement, there are over 160 principal constitutive texts of GATT.

The most notable of GATT's activities have been the eight so-called "rounds" of negotiations which have been held to-date: Geneva (1947); Annecy (1949); Torquay (1950); Geneva (1956); the Dillon Round (1960-61); the Kennedy Round (1964-67); the Tokyo Round of Multilateral Trade Negotiations (beginning September 1986) and the current Uruguay Round. The first six "rounds" were aimed at reducing tariff levels. Each succeeded in the adoption of new schedules of tariff concessions. The Kennedy Round was the first to extend its scope beyond tariff questions. Following the wake of the Kennedy Round, the Tokyo Round was the first to seek the elimination or reduction of non-tariff barriers to trade. The Tokyo Round led not only to traditional tariff reductions, but also to the adoption of various separate "codes." The most recent of the rounds, the Uruguay Round of Multilateral Trade Negotiations, has been stalled but now appears

99. These "principal participants" included Belgium, Canada, the Republic of China, France, the Netherlands, the United Kingdom, and the United States.
102. Some, but not all, GATT contracting parties subscribed to these codes. Code top-
to be reviving. While no agreements have been concluded at this round, it is hoped that Member Nations\textsuperscript{103} will come to a resolution on several troublesome international trade issues. The most troubling of these issues include the so-called "agricultural" and "intellectual property" problems.

B. GATT: Free Market/Unfair Competition—U.S. and EEC Positions

1. The Agricultural Problem

The agricultural problem can be traced back to the 1951 \textit{U.S. Dairy Quotas} case in which the United States Congress\textsuperscript{104} breached the GATT General Agreement by imposing illegal quotas on dairy products. GATT proceedings were initiated a month later in order to secure removal of the illegal quotas. Direct enforcement failed. In 1955, the United States secured a waiver\textsuperscript{105} exempting its agricultural restrictions from GATT. The dairy quotas, together with other U.S. agricultural trade restrictions, are still in effect today.

The list of other countries in breach of GATT rules continued to grow into the late 1950s and early 1960s. Even members with liberal trading policies, such as the Scandinavian countries, sought exemption for certain agricultural products.\textsuperscript{106}

The breakdown in enforcement of agricultural trade involved a GATT rule which was itself a compromise to the principles of free trade. The draftsmen of GATT had assumed that member nations would manage and support agricultural prices vis-à-vis protective pricing. Accordingly, Article XI:2 of GATT was drafted to allow for protective price-supports. Governments, however, were required by GATT to limit domestic production to that of the import market share.

As indicated above, this rule broke down. In order to satisfy farm income goals, a large quantity of agricultural production was required. These large quantities of production invariably generated tremendous surpluses. In turn, governments were forced to dump the surpluses on the export market at prices below the prevailing market price. As could be expected, large agricultural surpluses and dumping activity created hostility between member nations. Accordingly, many na-
tions, including the United States, instituted trade barriers violative of the GATT General Agreement with respect to agriculture.

The EEC's highly protectionist Common Agricultural Policy (CAP) created another hurdle for GATT in the area of agricultural trade in the early 1960s. Through CAP, the EEC instituted a new type of trade barrier called the "variable levy," a floating customs duty which guaranteed that tariffs paid by importers would be higher than the uniform price supports paid to all EEC farmers. In short, the EEC claimed complete autonomy over agricultural trade policy. Despite a multitude of negotiations between the U.S. and the EEC, the "variable levy" is still in full force today. Thus, given current EEC policy and the host of agricultural exemptions discussed above, GATT's enforcement powers in the area of agriculture are aptly described as negligible.

2. The Intellectual Property Problem

As with agriculture, chronic problems exist in the area of intellectual property rights. The intellectual property problem centers around the unintended transfer of technology from the economies of the industrialized nations to the economies of developing and newly industrialized nations. Intellectual property is "intangible wealth." Without safeguards, it is easily appropriated and reproduced. In fact, losses to United States industry alone have been estimated to be as high as $61 billion per year.

In industrialized countries, intellectual property rights are protected by patent, copyright, trademark and a variety of other types of legislation. Such legislation does not exist, or is not enforced, in many developing or newly industrialized countries. Therefore, the intellectual property solution centers on devising a mechanism for protecting the industrialized nations' intellectual property rights within the lesser developed countries. Without such a mechanism, the developing and newly industrialized countries will continue to reap a windfall at the expense of the industrialized world.

The GATT is virtually silent as to intellectual property issues. The first effort to bring the issue to the forefront of GATT negotiations was made by the United States during the Tokyo Round in the late

107. Much of this portion of the introduction was from Professor Hudec's excellent book, supra note 104.


However, it was not until 1986 that the United States, with support from the European Communities, persuaded the full GATT membership to include the Uruguay Round Ministerial Declaration\textsuperscript{111}, a mandate for negotiations on trade-related aspects of the intellectual property problem.

As a result of this mandate, a GATT working group on trade-related aspects of intellectual property (TRIPs) was established. On October 28, 1987, the United States presented to the TRIPs working group a proposal\textsuperscript{112} for GATT intellectual property agreement. This proposal contemplated the use of a separate GATT code as the means of implementing an intellectual property framework. It also provided for an independent GATT dispute resolution mechanism to settle intellectual property conflicts. However, the United States' proposal was not adopted by GATT.\textsuperscript{113}

3. Progress of the Uruguay Round and Possible Outcomes

The GATT Secretariat and the various trade ministers held a Midterm Review of the progress of current negotiations in December 1988 in Montreal. The review was successful to the extent that the ministers became more deeply engaged in the substance of the negotiations. However, the ministers where unable to conclude the Midterm Review on schedule or reach agreement in several subject areas, including agriculture and intellectual property. Equally disappointing is that the Brussels Ministerial, hosted by the European Communities from December 3-7, 1990, was plagued by stalled negotiations. The agricultural group, in fact, never began earnest negotiations.\textsuperscript{114}

C. Conclusions

With the growth of mega-transnational corporations and multinational conglomerates having only a national flag for convenience purposes, it becomes necessary to envision antitrust regulation on a more global scale. Thus, the recent executive agreement by the United States to cooperate in the area of merger and acquisitions with EC is a good thing!


113. In response to the Omnibus Trade and Competitiveness Act of 1988, the United States has also undertaken direct bilateral negotiations coupled with the threat of unilateral economic sanctions.

114. See, Bello and Hudec, \textit{supra} notes 101 and 104, respectively.
Based on these events, it appears that little progress will be made in the agricultural area, unless Germany convinces its EC partners to become somewhat more flexible on the government support issue. While the Uruguay Round is replete with disagreement, no area has proved more troublesome than agriculture. Moreover, the United States is likely to insist that its current agricultural restraints remain in place. Thus, it appears highly unlikely that the Agriculture Negotiating Group will reach any significant agreement.

On the other hand, negotiations on the intellectual property issue have engendered a great deal of optimism. Debate continues in the GATT Working Group on trade-related intellectual property (TRIPs) on a variety of macro, as well as micro, issues. In fact, the TRIPs agreements appear likely to become the principal achievement of the Round for the industrialized countries. Given the recent United States “fast track” extension and an indication by the German government advocating some flexibility on agricultural issues, agreement on some of the issues discussed above appears more hopeful. With a little luck, one may expect an agreement to be struck and negotiations concluded in the not-too-distant future.

Article 24 of the GATT which is to facilitate trade among GATT factions, clashes with the Treaty of Rome. This in a sense creates barriers between the EC and the rest of the world. The EFTA Treaty of 1959, bringing Britain into the European sphere, seemed to close the gap with Article 24. Britain eventually joined the ECC after De Gaulle’s resignation removed France’s veto. EFTA is a continuing entity. Its treaties bind its signatories with the EEC. Articles 65 and 66 articulate the rules governing competition in the Coal and Steel Community by “enterprises” as defined by Article 80.

While the Paris Treaty of 1957 aims at maintaining competition and condemns any activities which might distort, directly or indirectly, such competition, it permits the authorization of certain agreements and activities (upon clearance by the Commission). This authorization is allowed for a limited time period and is subject to revocation, following a determination that the activities: (1) are designed

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115. The agriculture issue has been met with worldwide resistance. The U.S., EC, Japanese, Korean, Latin American, and South American negotiators have all come to an impasse on the issue.
116. These restraints, include, but are not limited to peanuts, sugar, and dairy products.
117. Under the United States Constitution, the President does not require authorization from Congress to enter into trade negotiations. However, as the Uruguay Round agreements will require U.S. implementing legislation, the President is dependent on congressional support. With the “fast track” procedures, Congress has agreed in advance to vote promptly (within ninety legislative days) on any implementing bill submitted by the President.
118. Negotiations in the area of tariff reduction also appear to be fruitful.
to improve the coal and steel production and distribution, (2) do not exceed the bounds necessary to achieve this result, (3) do not permit the unilateral exclusion of price, production of a substantial percentage of the products involved, and (4) do not prevent effective competition in the coal and steel market.

GATT's objective to create a positive free market atmosphere around the globe is not ascertainable at this time. It then becomes readily apparent that GATT's efforts will be substantially hampered by an ineffective regulation of anticompetitive practices by trader nations. If it is true that in order to have a free market one must have free competition, it is equally true that unregulated free markets and competition inevitably result in monopolies, at worst, and in oligopolies, at best, particularly in the basic industries. It is, therefore, imperative that measures be adopted on a multilateral basis to ensure that commercial practices which distort competition and impede the free market are not allowed to flower.

This, in a nutshell, is the thrust of the various antitrust and unfair competition laws in the United States, Canada, the EEC and its member states. A cooperative approach to implement these laws to ensure an effective regulation of anticompetitive practices is necessary. There are some signs that such a cooperation among the United States and the EEC is indeed being implemented.119

IX. U.S. FOREIGN TRADE POLICY: QUO VADIS?

A. Background and Overview

A survey of the effects of the new French competition law and its place in the context of French economic policy, as well as its possible impact, in conjunction with German, U.K. and other European domestic laws, on the decisions by the European Community must be taken into consideration by American International Trade planners. To allow the European Community to wind up as a competitor instead of as an ally would constitute a monumental failure of U.S. Trade diplomacy. In my opinion, President Bush missed a golden opportunity to reinstate the United States in its leadership role by suggesting, in his recent European tour, that NATO be converted into an economic union instead of clinging to outmoded thinking in terms of military defense! The lack of vision by this administration is appalling. It has

119. At press time, a special ABA Committee, chaired by Professor Barry E. Hawk of Fordham, issued a draft report recommending substantial changes to harmonize U.S. law with that of its trading partners. I have only had an opportunity to read the report cursorily and find myself to be in complete agreement with its summary recommendations. A copy of the two-volume report may be obtained from the ABA at a cost of $50. The Introduction and Recommendations have been reprinted by BNA's Antitrust & Trade Regulation Report of Feb. 6, 1992.
not seized the opportunity to promote the free market doctrine by convincing our European allies to consider an economic union to be at least as important, if not more important, than a military union.

Ironically, what is saving the American foreign trade outlook, at least to some extent at this point, is that European competition, by and large, will be slowed down by domestic problems created by the downfall of the Soviet regime and the satellite regimes in Eastern Europe, creating unprecedented social and economic problems for the heretofore prosperous European nations. This is not unlike the experience of this country with the uncontrolled influx of millions, often "undocumented," aliens who have little understanding of the host country's political philosophy and social policy. It will take a number of years for an orderly integration of these new social forces to be complete, with sometimes very painful episodes. Both the United States and the "new" Europe will emerge as somewhat different from the western countries to which we have grown accustomed. In Europe, the political orientation may not be quite as "pro-American" as it was before, regardless of the billions of dollars we are pouring, or talking about pouring, into the recovery of the newly liberated nations. Once the incorporation of Eastern Europe into the community is finished and some modicum of economic affluence is restored to those parts, then the "new" Europe will represent a formidable adversary.

It will be up to our politicians and businesspersons, assuming that they are wise and astute enough, to create a cooperative free market in which Europeans and Americans will work side by side to create a better world.20

B. The Impact of U.S. Antitrust Laws on GATT

It is axiomatic that by removing government barriers to free trade, monopolization will occur, unless there is some regulation of the "free market" forces. Therefore, this calls for regulation of the market, primarily to ensure that the very same barriers to trade formerly created

120. Why is it not possible to create an international agency which would buy—at free market prices—agricultural products to be distributed to the World's starving masses? Farmers (at least I am told by my friends) may think that subsidies are a form of charity: this would avoid any such stigma. I would support that Third World regimes be forced to devote their scarce resources to buy food for their people before being allowed to spend billions on armaments. The current expenditures for arms by Third World countries is obscene. See, e.g., WORLD MILITARY AND SOCIAL EXPENDITURES, (1987-88 12th ed.) and (1991 14th ed.), World Priorities, Inc., Washington, D.C.; Michael Gartner, Military costs are high—in lives, dollars, missed opportunities, USA TODAY, July 9, 1991 ($880 billion spent for military in 1990); and George D. Moffet III, THE CHRISTIAN SCIENCE MONITOR, Apr. 24, 1992.
by governmental entities are not now re-erected by private businesses to the detriment of the consumers.

Congress, which is closest to the people, may be tempted, for short-term domestic political reasons, to enact legislation designed to protect its constituents against what is perceived as inimical foreign trade practices. With elections always around the corner, it is difficult for the House to act in a statesmanlike manner except in true national emergencies. The Senate is only slightly more removed from these constraints but is even more subject to the influences of moneyed lobbies, as was experienced in the rash of S&L scandals. This is why one would hope that the Executive would assume its legitimate leadership role and create a foreign trade policy that it could persuade Congress to adopt for the benefit of the American people as a whole. Thus, the propensity of Congress to legislate on a spur-of-the-moment approach is often noxious to the long-range economic health of the nation. The constant threat by members of Congress to arrogate to themselves the constitutional prerogative of conducting foreign affairs, which includes trade, is not a good omen for the future. Congress does not trust the GATT to do the job and winds up, given half a chance, micromanaging the various trade agreements.

By the same token, the adversarial stance by the Executive vis-à-vis Congress is not healthy for this country either. The top people are riddled with personal conflicts. One begins to wonder, sometimes, whether the so-called Foreign Trade Policy benefits the nation or the best-heeled lobbyists with access to the moneyed corporate executives on loan to the Executive Branch. In a broader sense, one could say that the Executive, on the whole, favors a fairly traditional free market concept based on reciprocity unless, for reasons which are unfathomable, it chooses not to apply the reciprocity rule or seems to play favorites with the "most favorite nation" rule, such as it does with China (apparently to be "feared") or Russia (which can be made to jump through hoops and be patronized).

Turning to the question of whether arbitration has a broader role to play in the future, it does us well to remember that, under the EEC rules, private claims of damages are left to the national courts. Articles 85 and 86 are quite clear on that issue. However, Article 85(2) provides a basis for private claims—to be heard by the national courts—by stating that agreements which violate antitrust laws of the Treaty of Rome are void and unenforceable.

As noted, the EEC Commission enforces decisions by decrees. The European Court of Justice (ECJ), in turn, usually deals with alleged anticompetitive arrangements in line with its jurisdiction over appeals from Commission decrees. It is good to note at this point, that actions in which the Commission, on behalf of the EEC, is a party are not arbitrable.
The United States Supreme Court may also question whether leaving cases involving antitrust claims exclusively in the hands of arbitrators is compatible with the public policy aims of American antitrust laws. In *Mitsubishi*\(^{121}\), the court assumed that arbitral tribunals would apply the U.S. antitrust law if it were rational to do so. The court indicated that if the arbitrator read the choice of law clause to mean that Swiss law was to be applied, totally displacing United States law, even where it would otherwise apply by virtue of the statute, it would deem such an award unenforceable as against public policy.

Determining when American antitrust law will apply "otherwise" is difficult in an international context. I believe that an arbitrator applying Swiss law would probably follow American antitrust laws more readily than many American courts. Although Articles 85 and 86 of the EEC Treaty contain important and far-reaching substantive antitrust provisions, they do not address arbitrability. Moreover, arbitrability is not a concern of EEC law in general. Nevertheless, the problem of the arbitrability of antitrust claims under EEC law should be resolved.

To achieve any of the reforms needed for the survival of a cooperative European and Western Hemisphere trade activities, we must implement an intensive and rational objective education policy both domestically and with our trade partners. Individuals within these trade blocs have to be given viable alternatives which preserve both domestic and GATT objectives. For a period of time, it seems that subsidies will have to be permitted, but not in random fashion. Rather than directing the trading nations in a hostile expansion of trade within a fierce competitive adversarial stance, these subsidies should be tolerated and turned into positive channels to enable the individual farmer to survive, whether in Europe, the United States, Canada or Mexico. It will be a long time before nationhood is abolished, if ever. The economic backbone of any nation is its farmers and real goods producers.

With the demise, real or imagined, of the ideological and political East-West conflict, we still face the so-called North-South confrontation. This is a potentially lethal conflict between the have and the have-not nations.

It might be beneficial to revisit the spirit which led to the drafting of International Trade Organization Charter at the Havana Conference in 1948. Must we dismiss the concept which led to the creation of the International Monetary Fund (IMF) or the World Bank fund to promote global trade and commercial policies?

As pointed out by Professor Zoller, remedies which are unilateral and poorly designed to combat unfair or illicit trade practices of for-

eign states have a negative impact on GATT today. This is the adversarial stance that one would hope could be overcome in order to ensure cooperation between the United States, its Western Hemisphere partners and the Europeans within the EEC.

The fact that the Commission of the European Community feels that section 301 of the United States law is "potentially inconsistent" with provisions of the General Agreement On Tariffs and Trade (GATT) did not prevent the Commission from claiming that it has achieved a middle ground between section 301 and GATT by the creation of an exhaustive list of illicit or unfair practices. This, of course, is an unattainable objective. Despite some semantic differences between the European regulations and section 301 of the United States Trade Act of 1974, the results achieved by both pieces of legislation are the same. Both are unilateral and adversarial. They are operative without a prior breach, or international noncompliance, by a foreign state having occurred.

The solution may well lie in regional and inter-regional cooperation. The Western Hemisphere trade bloc and European trade bloc could cooperate rather than competing for markets on this planet.

The type of organization, be it GATT, a resurrected ITO or some other similar international or inter-regional mechanism, is of great importance to the Midwest farmer. The fact that the North American continent constitutes the bread basket of the world (akin to the role of Egypt in the days of the Roman Empire!) makes it imperative that a free market and a free trade approach to feeding the world be maintained.

As a major grain exporter, we must keep our roads to international trade clear of interference and petty parochialism. This means, however, that we also have to cooperate with the farmers in Canada and elsewhere in the Western Hemisphere. Aside from farm products, there are the dairy products and meat areas to be considered. Beef exports from Argentina must be encouraged in order to get that nation back on its feet. A method has to be found which will permit Mexico, Argentina, Brazil and the other Latin American countries, as well as Canada and the United States to cooperate rather than compete. This is not possible without some kind of government management of agricultural trade. On a broader scale, before a viable Western Hemisphere Trade bloc can be created, we must see that local

122. Zoller, supra note 45.

123. Commission Regulation 2641/84 (CEC) of 17 September 1984 was designed to strengthen a common European commercial policy to protect the community against illegal or unwanted commercial practices. This is essentially an adaptation of section 301 of the United States Trade Act of 1974 giving the president authority to retaliate against unfair trade practices of foreign governments. See, 19 U.S.C. § 2411 (1974)(amended 1984).
wages in the impoverished countries are raised to a level substantially equivalent to our own so as to prevent the exploitation of the working masses for the benefit of a few greedy individuals.

By the same token, the same process will be implemented in Europe. For the time being, the 1992 time fuse has been defused because of the problems brought about by the integration of East Germany into the New Germany, for instance. There are sufficient problems for the EEC partners to mull over for the next few years to try to integrate the rest of eastern Europe. In the short run, this means that 1992, to some degree will be nowhere as formidable, as was feared by many Americans for several years. However, within the next ten years or so, if we do not find a method of cooperating, the European trade bloc will present such a formidable entity that it would become the single most powerful economic power on this planet. It could almost dictate its terms to the rest of the trading nations. This, in turn, will result in protectionist isolationism. In the long run, we will have lost the economic battle by becoming involved in costly and suicidal trade wars. The resulting world-wide depression would make the Depression of the 1930s look like a picnic!

A bridge has to be built between the European and the Western Hemisphere blocs. Since the people of these two blocs have everything in common including their core cultural heritage and legal systems, I should think that ways might be found for reasonable people within these blocs to cooperate to the benefit of the people in both blocs rather than to engage in a suicidal economic warfare. Between the European bloc and the Western Hemisphere bloc, there would be unlimited possibilities to eventually bring in Japan and the Pacific Rim along acceptable terms, and ultimately the Third World. Additionally, the periodic hunger and famine which devastate whole continents, such as Africa, and cause the starvation of millions of innocent people could be alleviated, if not prevented. Such starvation is an obscenity in a World where excess food and other basic goods are produced and wasted!

This, of course is predicated, to some extent, on the premise that we secure promises from governments in developing countries to adopt forms of government which are not inimical to their own people. Otherwise, these continents will just drain from the Western Hemisphere and the European bloc resources which are badly needed within the blocs themselves. This is something that the people in the developing Third World, wherever located, must realize. Of course, it must be noted that within the two major economic blocs, the European bloc and the Western Hemisphere bloc, there are "Third World" countries which have to be brought up to par before these two blocs can worry about bringing the rest of the world to quality levels of existence on a par with the industrialized world.
X. CONCLUSION

It is ironic that the American businesses which thrived and the American private enterprise system which prospered under the tenets of the antitrust laws which regulate competition have abandoned the laws which they caused to be enacted during the economic hard times of a hundred years ago. We seem content to let things happen and somehow hope to repair them, in the near and maybe not-so-near future on an ad-hoc basis. We still stalk the globe as if we were number one in all areas and as if the money in our coffers were plentiful. This is patent wishful thinking. Surely, a country that has billions to distribute around the world and yet does not find it possible to spare millions to save its own cities and its own farmers has misplaced priorities. The old adage of taking care of oneself before taking care of others is irretrievably intertwined with ensuing economic policies. This notion seems to have escaped the American planners of international trade politics, while it is something that the Europeans do not forget.

The European nations learned some time ago that there was something to be said for certain types of economic regulations such as tough antitrust laws, particularly when they affect the domestic consumer. Thus, the Treaty of Rome Articles 84 and 85 laid the ground work for economic policy designed to gain primacy for Europe and the international markets while at the same time trying to spare the domestic consumers as much grief as possible.

To some extent, the talk about free trade as if it were a reality, and the free market as if it were really in existence, creates a strange environment for a successful and vital economy. National economies have been managed ever since people of an organized society started trading with their neighbors. Things have not changed all that much in 1991. To a great extent, the economy is still being managed despite protestations to the contrary by our leaders. The only difference these days is that very often our economy is managed to the detriment of the American investor and consumer for the immediate monetary advantage of a small clique of self-seeking money-hungry business piranhas who have no personal stake in the businesses they run and put their short-term private interests ahead of those of the nation.

The downfall of the Soviet Regime's hegemony over Eastern Europe is creating unprecedented social and economic problems for the prosperous European nations, not unlike our experience with the uncontrolled influx of millions of Third World immigrants. It will take a while for integration to be completed. It will be painful both here and in Europe. Once incorporation of Eastern Europe in the European Community is accomplished and some modicum of economic affluence is restored to those parts of Europe, the European Community will represent a formidable and awesome competitive adversary. Whether
our politicians and businesspersons are wise enough to create a cooperative market in which Europeans and Americans are going to be working side by side to create a better world remains to be seen.

Questions concerning the rising Pacific powers remain. Japan, Taiwan, South Korea, Hong Kong and Singapore are already the key players in that area. Australia and New Zealand find themselves in the middle between the Western and Asiatic blocs. To some extent, this affects the French Pacific Territories (Tahiti, New Caledonia, French Polynesia) and our own fiftieth state, Hawaii.

One would think that the so-called Pacific “Rim” will use Australia and New Zealand as a bridge to meaningfully communicate with the Western Hemisphere. India, the Philippines, and South East Asia, as a whole, represent enormous opportunities for economic expansion for everyone’s benefit if the nations learn to play by cooperative rules designed to create a “kinder and gentler” “New World Order,” borrowing the current rhetoric of our political leaders.

I have chosen France as an example of a totally managed economy trying to break out of the political cocoon created by the World War II cataclysm to the more recent times when it embraced a form of (albeit managed) free market economy. This economy was created by the adoption of the 1985 Law on Competition and the December 1, 1986 Decree and Ordinance.

A relatively complete, if brief, survey of the effects of the new law and its place in the context of French economic policy assessing its impact on the European national laws on competition, particularly on how it may affect decisions by the European Community of which the European nations are becoming more and more an integral part, is in order. Will the modest French effort in creating this new competition law have an impact on the European community and, in a broader sense, on the world economy, possibly through the positions taken by Europe during the various GATT negotiations which will continue to take place? Never before has it been more important for Americans to realize that the world is, in fact, a global village and we must participate actively in the running of the village before that village runs us and maybe not to our pleasing, as many have predicted.

President Bush missed the opportunity to urge the transformation of NATO into an Economic Trading area. It is a shame. The Europeans, somewhat patronizingly, have allowed the U.S. to remain on as a mercenary force to be used against some shadow enemy. This is not our proudest moment. We can, and indeed we must, do better!
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