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Community Rules of Competition

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COMMUNITY RULES OF COMPETITION

I. INTRODUCTION

Since the inception of the European Economic Community (EEC) in the 1957 Treaty of Rome,[1] the Member States have recognized that activities to restrict competition and abuses of dominant positions in business could seriously hinder the free flow of goods and services and the creation of a common market within the Community. The Treaty of Rome provides that one activity of the Community shall be "the institution of a system ensuring that competition in the Common Market is not distorted."[2] Articles 85 and 86 form the basis of this system. Article 85 contemplates control of cartels and concerted anticompetitive practices. Article 86 concerns abuses of dominant positions or monopolies. The European Communities Council, the principal legislative body of the EEC, is required to promulgate regulations[3] effecting the principles of articles 85 and 86. The Commission, the chief executive body of the EEC, is directed to apply those regulations and to investigate and control possible infringements.[4] Decisions of the Commission may be appealed directly to the Court of Justice.[5]

After a period of adjustment and organization for the Community, the Council in 1962 adopted Regulation 17/62,[6] the initial implementation of articles 85 and 86. The Regulation provides that violations of those articles are punishable by fines[7] and penalties.[8] In addition to the Commission's enforcement of the competition rules, Regulation 17/62 authorizes the Member States to take action if the Commission has not instituted proceedings.[9]

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1. Treaty Establishing the European Economic Community (EEC), March 25, 1957. The authoritative English text of the treaty may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (Office of Official Publications of the European Communities,1973). An unofficial English text may be found in 298 U.N.T.S. 3 (1958).

2. EEC art. 3(f).

3. EEC art. 87.

4. EEC art. 89. The Commission may also issue regulations pursuant to authority delegated by the Council. *See* note 43 *infra.*

5. Council Regulation No. 17/62 [hereinafter cited as Reg. 17/62], *as amended by* Council Regulation No. 59/62, art. 17, [1962] Official Journal of the European Communities 204, 1655 [hereinafter cited as J.O.], 1 CCH COMM. MKT. REP. ¶¶ 2401-2634.

6. *See* note 5 *supra.*

7. Reg. 17/62, art. 15. The Court of Justice may cancel, reduce, or increase a fine or penalty imposed by the Commission. Reg. 17/62, art. 17.

8. Reg. 17/62, art. 16.

9. Reg. 17/62, art. 9(3).

II. IMPLEMENTATION OF ARTICLE 85

The most important of article 85's three sections is 85(1), which designates prohibited activities.[10] A violation of that section results from an agreement, a decision of an association,[11] or a concerted practice that includes more than one "undertaking"[12] and that has an effect on inter-Member trade. In addition, the activity in question must have the object or effect of preventing, restricting, or distorting competition within the Community. Agreements or decisions of associations may be written or oral,[13] but if an oral agreement exists that cannot be proved, then the "concerted practice" provision can often be used to find a violation. The *Analine Dyes Cartel* case[14] (*Dyestuffs* case) turned on such a use: price increases by ten dyestuffs manufacturers were held to violate article 85(1), and the existence of an agreement did not have to be proved.[15] Although conscious parallelism and price leadership are not prohibited by article 85(1)[16] the similarity in method, manner, and substance of the price increases by the manufacturers led the Court of Justice to conclude that such practices are concerted.[17]

Article 85(1) applies only to trade between Member States, leaving regulation of intrastate trade to competition law of the Member States.[18] For instance in the *Cobelaz Agreement (No. 1)* decision,[19]

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10. EEC art. 85(1) provides in part:

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . ."

11. An example of an "association of undertakings" as referred to in article 85(1) is the trade association.

12. Although not defined in the Treaty of Rome or regulations, "undertaking" seems to include all legally recognized types of economic units, such as individuals carrying on a business, partnerships, companies, corporations, statutory bodies, government authorities carrying on a business, charities which are trading, cooperative groups, etc. J. CUNNINGHAM, THE COMPETITION LAW OF THE EEC 47 (1973) [hereinafter cited as CUNNINGHAM].

13. Omega Watches Decision, 9 Comm. Mkt. L.R. D49 (1970).

14. Imperial Chemical Industries Ltd. v. Commission, 18 Recueil 619, 2 CCH COMM. MKT. REP. ¶ 8161, 11 Comm. Mkt. L.R. 557 (1972).

15. 2 CCH COMM. MKT. REP. ¶ 8161 at 8026-27, 11 Comm. Mkt. L.R. at 632.

16. *See generally* J. CUNNINGHAM, RESTRICTIVE PRACTICES AND MONOPOLIES IN EEC LAW 18 (1973); Note, *Uniform Pricing in Concentrated Markets: Is Conscious Parallelism Prohibited by Article 85(1) of the Treaty of Rome?*, 7 CORN. INT'L L.J. 113 (1974).

17. 2 CCH COMM. MKT. REP. ¶ 8161 at 8027, 11 Comm. Mkt. L.R. at 622-23.

18. For a summary of Member State competition law see 1 CCH COMM. MKT.

Belgian fertilizer manufacturers established a joint sales office to handle their sales within Belgium and in non-member nations. Because each manufacturer was free to decide what quantity to sell in other Member States, inter-Member trade was not affected and no violation occurred.

Concerning agreements, decisions of associations, or concerted practices among operations in countries outside the Community, the Commission has ruled that when the effects of the actions were felt within the EEC, the foreign enterprises could be fined.[20] In simpler words, the Commission holds that jurisdiction is present whenever the requirements for a violation are otherwise met. The Court of Justice, however, has yet to accept such a liberal extraterritorial approach.[21] The Court of Justice has upheld, however, the "economic unity" or "enterprise entity" test, whereby acts of subsidiaries located within the Community are attributable to non-EEC parent companies.[22] The economic unity test also is applied in article 85 cases to determine if more than one undertaking is involved. For example, in the *Christiani & Nielson N.V.* decision,[23] a Danish company agreed not to compete in the Netherlands with its Dutch subsidiary, and the subsidiary agreed not to compete in countries where the parent or another subsidiary was operating. The Commission saw the division of markets simply as a distribution of functions within the same economic unit.

The effect of the agreement, decision of associations, or concerted practice must not only be upon inter-Member trade and competition, but also be appreciable.[24] The rule is known as the

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REP. ¶ 2003.03 (1971) and CUNNINGHAM, note 12 *supra*, at 36-38.

19. 7 Comm. Mkt. L.R. D45 (1968).

20. Analine Dyes Cartel Decision, 8 Comm. Mkt. L.R. D23 (1969).

21. In the appeal of the Analine Dyes Cartel Decision, *supra* note 14, by Imperial Chemical Industries, Ltd. (ICI), a member of the cartel located outside the EEC, the Court of Justice avoided affirming the reasoning of the Commission by holding that actions of ICI's subsidiaries within the EEC were attributable to ICI (economic unity or enterprise entity theory). Consequently, ICI was considered to have acted within the Community and thereby subject to article 85(1). Imperial Chemical Industries Ltd. v. Commission, 18 Recueil 619, 2 CCH COMM. MKT. REP. ¶ 8161, 11 Comm. Mkt. L.R. 557 (1972).

22. *See* note 12 *supra* and Beguelin Import Co. v. G. L. Import Export S.A., 17 Recueil 949, 2 CCH COMM. MKT. REP. ¶ 8149, 11 Comm. Mkt. L.R. 81 (1971).

23. 8 Comm. Mkt. L.R. D36 (1969).

24. The operative definition of "appreciable" was established by the Commission in *Notice Concerning Minor Agreements* (1970), 1 CCH COMM. MKT. REP. ¶ 2700 (1971). The Notice provides that if the products to which the agreement, decision, or concerted practice relates do not exceed 5 per cent of the market and if the total annual turnover of the undertakings involved does not exceed 15

doctrine of *effet sensible*, [25] exemplified by the Commission's ruling in the *SOCEMAS* decision.[26] SOCEMAS was a cooperative import agency established by a group of French food chain stores. In one year, the imports arranged by SOCEMAS amounted to only 0.1 per cent of the store's turnover, and SOCEMAS' imports from other EEC nations never exceeded one per cent of any one Member State's production.[27] Consequently, SOCEMAS did not produce any "noticable effects" upon inter-Member trade.[28] Agreements that do not pass the qualitative standards set by the Commission may still be viewed as having no appreciable effect, but must be considered individually.[29]

Article 85(1) indicates five types of restraint upon competition that are prohibited.[30] This list, however, is not intended to be exclusive. For example, a profit-pooling scheme in the *Belgaphos* decision[31] was held to fall within article 85(1). A useful reference in determining whether an activity restricts competition is the Commission's *Notice on Agreements, Decisions, and Concerted Practices Concerning Cooperation between Enterprises*,[32] which lists seventeen kinds of activity that the Commission does not consider as restricting competition.[33]

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million "units of account" (or 20 million in the case of non-manufacturing undertakings), the agreement does not fall within article 85(1). A "unit of account" is fixed at 0.88867088 grams of fine gold equivalent to one American dollar until the 1971 devaluation. *Id.* at ¶ 5042.01.

25. The phrase means "an effect which can be felt."

26. SOCEMAS Decision, 7 Comm. Mkt. L.R. D28 (1968).

27. 7 Comm. Mkt. L.R. at D28.

28. 7 Comm. Mkt. L.R. at D28.

29. This refers to the process known as "negative clearance." *See* notes 38-40 *infra* and accompanying text.

30. Article 85(1) prohibits in particular those agreements, decisions, and concerted practices which:

"(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

31. Belgaphos Decision, 2 CCH COMM. MKT. REP. ¶ 9382 (1970).

32. 1 CCH COMM. MKT. REP. ¶ 2699 (1971).

33. Because some of the 17 activities may fall within article 85(1) under certain circumstances, negative clearance should be sought. For instance, an exchange of information about orders, turnover, investment, or prices may consti-

The Commission may impose substantial fines for infringements of article 85(1) whether the infringements were intentional or due to negligence.[34] Furthermore, the Commission is empowered to impose penalties on firms that continue an infringement after a formal Commission decision has required its termination.[35] There also may be parallel fines or penalties levied for the same activities by Member States.[36] In addition, article 85(2) declares that "[a]ny agreements or decisions prohibited pursuant to this Article shall be automatically void." The procedure is termed "avoidance". When it is possible to sever an agreement into distinct, independent parts, only those parts of the agreement infringing upon article 85(1) will be avoided.[37]

Since the consequences for violating article 85(1) are serious, most companies want to know whether their proposed actions come within the terms of the article. Regulation 17/62 allows the Commission to review a proposed action and state whether that particular activity is within the scope of article 85(1).[38] A declaration favorable to the undertaking is called a "negative clearance."[39] In addition to individual negative clearances, the Commission has issued four notices that are commonly referred to as "bloc" negative clearances, although they are nonbinding on bodies other than the Commission.[40]

If an agreement, decision of an association, or concerted practice is refused negative clearance and is ruled to be prohibited by article 85(1), the action may still qualify for exemption under article 85(3). An exemption will be granted if the agreement, decision, or

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tute infringements of 85(1) because restraint of competition may occur in oligopolistic situations relating to homogeneous products. 1 CCH COMM. MKT. REP. ¶ 2699 at 1848 (1971).

34. Reg. 17/62, art. 15. Fines may range from 1,000 to 1,000,000 units of account as defined in note 24 *supra*, or 10 percent of the undertaking's turnover in the last financial year, whichever is greater. For a multi-product firm, the latter penalty can be particularly serious.

35. Reg. 17/62, art. 16. For each day the infringement is continued after the date fixed by the Commission decision, the Commission's fine may range from 50 to 1,000 units of account as defined in note 24 *supra*.

36. Imperial Chemical Industriés Ltd. v. Commission, 18 Recueil 619, 2 CCH COMM. MKT. REP. ¶ 8161, 11 Comm. Mkt. L.R. 557 (1972).

37. *See, e.g.*, Société Technique Minière v. Maschinenbau Ulm GmbH, 12 Recueil 337, 2 CCH COMM. MKT. REP. ¶ 8047, 5 Comm. Mkt. L.R. 357 (1966).

38. Reg. 17/62, art. 2.

39. *See, e.g.*, Kodak Decision, 9 Comm. Mkt. L.R. D19 (1970); Grosfillex Decision, 3 Comm. Mkt. L.R. 237 (1964).

40. CUNNINGHAM, *supra* note 12, at 78.

concerted practice improves the production or distribution of goods or promotes technical or economic progress, if consumers are allowed a fair share of the benefits, if there are no unnecessary restrictions, and if competition is not eliminated.[41] To procure an exemption, the Commission must be notified concerning the existence of an anticompetitive agreement[42] unless the agreement falls within a "bloc" or "group" exemption[43] or within one of the categories excused by Regulation 17/62 from the obligation to notify.[44]

III. IMPLEMENTATION OF ARTICLE 86

A. *Abuse of a Dominant Position*

For a violation of article 86 to occur one or more enterprises must abuse a dominant position within the EEC or a substantial part of the EEC, and that abuse must be capable of affecting inter-Member trade.[45] Neither article 86 nor Regulation 17/62 defines "dominant position", but the concept is analyzed by James Cunningham, who delineates three criteria for that determination:

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41. EEC art. 85(3) 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 of 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."

42. Reg. 17/62, art. 4.

43. Article 85(3), *supra* note 41, provides not only for individual exemptions but also categorical exemptions. The Council has issued two regulations conferring on the Commission the power to make exempting regulations in respect of five categories of agreements. Council Regulation 19/65, 1965 J.O. 533, 1 CCH COMM. MKT. REP. ¶ 2717 (1971); Council Regulation 2821/71, 1 CCH COMM. MKT. REP. ¶ 2729 (1973). The Commission has exercised its authority for two of the five categories. Commission Regulation 67/67, 1967 J.O. 849, 1 CCH COMM. MKT. REP. ¶ 2727 (1973) (exclusive distributorship agreements); Commission Regulation 2779/72, 1 CCH COMM. MKT. REP. ¶ 2731 (1973) (specialization agreements).

44. Reg. 17/62, art. 4(2).

45. EEC Art. 86 provides in part: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."

(1) the ability to influence the market significantly; (2) the ability to act independently of the reactions of others; and (3) the realization by the firm that it is in a dominant position and able to exercise a significant influence.[46] Article 86 indicates potentially abusive practices as unfair prices or terms, production restrictions, discriminatory dealings, and irrelevant tying arrangements.[47] A 1966 Commission study[48] includes price cutting, either for the purpose of eliminating a weaker competitor who cannot withstand a long period of sales below cost or for the purpose of forcing a merger on an unwilling party or a merger on unfavorable terms, as an abusive practice. An "undertaking" is defined as in article 85.[49] A minimum size for a "substantial part" of the Common Market has yet to be established; there is no requirement, however, that the "part" span the borders of more than one Member State.[50] In addition, the effect upon inter-Member trade may be actual[51] or potential.[52]

B. *Mergers*

Neither article 85 nor article 86 specifically refer to mergers, reflecting the traditional lack of antimerger sentiment in the EEC.[53] Nevertheless, a 1966 Commission memorandum,

46. CUNNINGHAM, *supra* note 12, at 102.

47. EEC art. 86 provides in part:

"Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

48. Commission Memorandum, *Concentration of Firms in the Common Market*, 2 CCH COMM. MKT. REP. ¶ 9081 (1966).

49. *See* note 12 *supra*.

50. *See, e.g.*, GEMA (No. 1) Decision, 10 Comm. Mkt. L.R. D35 (1971).

51. GEMA (No. 1) Decision, 10 Comm. Mkt. L.R. D35 (1971).

52. Continental Can Co. Decision, 2 CCH COMM. MKT. REP. ¶ 9481, 11 Comm. Mkt. L.R. D11 (1972).

53. An exception is article 66 of the European Coal and Steel Community (ECSC) Treaty which requires prior Commission approval for any merger involving one or more firms engaged in the coal and steel industry within the EEC. Treaty Establishing the European Coal and Steel Community, April 18, 1951, article 66. The authentic English text may be found in TREATIES ESTABLISHING THE

Concentration of Firms in the Common Market,[54] considered the application of these articles to mergers. The report stated that article 85 was not suited for controlling mergers but that an "abuse" under article 86 was committed by the elimination of competition through a merger, and if a firm in a dominant position were involved, article 86 might apply. In 1971, the Commission applied this theory and ruled that the Continental Can Company, a United States corporation, violated article 86 by acquiring, through a subsidiary holding company, Europemballage Corporation, a Dutch enterprise, Thomassen & Drijver-Verblifa N.V. (TDV).[55] The Commission found that Continental Can occupied a dominant position in a substantial part of the EEC market for light containers through its German subsidiary, Schmalbach-Lubeca-Werke (SLW), and that the purchase of TDV was an "abuse" of that position because it resulted in the elimination of potential competition for the containers in a substantial part of the Common Market.[56] On appeal to the Court of Justice,[57] the decision was reversed on its facts; however, the Court affirmed the Commission's conclusions of law.

Recognizing the inadequacy of an article not designed to control mergers being used for such purposes (*i.e.*, one of the merging parties must be in a dominant position before the merger, or an article 86 abuse cannot occur), the Commission undertook the formulation of a regulation for the systematic control of mergers using article 3(f) as the primary legal basis.[58] The final draft of the proposed merger control regulation was issued July 18, 1973.[59] If approved, it would render unnecessary the strained reasoning of the *Continental Can* decision, which derived merger control from an article never designed for such a use. Much broader than article 86, the proposed regulation provides that concentrations that in-

EUROPEAN COMMUNITIES 13 (Office for Official Publications of the European Communities, 1973). An unofficial English text appears in 261 U.N.T.S. 140, 199-205 (1957). For a summary of merger control under the ECSC Treaty see Markert *Antitrust Aspects of Mergers in the EEC*, 5 TEXAS INT'L L.F. 32, 27-46 (1969).

54. *See* note 48 *supra*.

55. Continental Can Co. Decision, 2 CCH COMM. MKT. REP. ¶ 9481, 11 Comm. Mkt. L.R. D11 (1972).

56. 2 CCH COMM. MKT. REP. ¶ 9481 at 9029-30, 11 Comm. Mkt. L.R. at D13.

57. Europemballage Corp. and Continental Can Co. v. Commission [1973] European Court Reports 215 [hereinafter cited as E.C.R.], 2 CCH COMM. MKT. REP. ¶ 8171, 12 Comm. Mkt. L.R. 199 (1973).

58. EEC art. 3(f) provides for "the institution of a system ensuring that competition in the common market is not distorted."

59. 2 CCH COMM. MKT. REP. ¶ 9586 (1973).

clude at least one enterprise within the Common Market and that create the power to hinder effective competition, are incompatible with the Common Market.[60] The new regulation would not entirely reject the EEC's traditional pro-merger attitude as even large concentrations are exempted when they are "indispensable to the attainment" of Community objectives.[61] In addition, mergers among small and medium-sized firms are exempted in order to be competitive on the world market.[62]

IV. Recent Decisions of the Court of Justice

A. *Istituto Chemioterapico Italiano, SpA and Commercial Solvents Corp. v. Commission*[63]

The case of *Istituto Chemioterapico Italiano, SpA (ICI) and Commercial Solvents Corp. (CSC) v. Commission* provides a recent example of how a violation of article 86 is established. The Court upheld an earlier decision of the Commission[64] that CSC, an American firm, had violated article 86 by abusing its dominant position in the market of intermediate chemical products for an antituberculosis drug, ethambutol. The intermediate products required for the manufacture of ethambutol and related specialities are nitropropane and aminobutanol, for which CSC had a world monopoly. ICI is an Italian chemical firm 51 per cent owned by CSC, and, until 1970, ICI sold CSC-manufactured aminobutanol to Laboratoria Chemiro Farmaceutico Giorgio Zoja, SpA (Zoja) and other drug manufacturers. In 1970 ICI began to produce ethambutol and ethambutol-based specialities. Shortly thereafter, CSC decided for commercial and technical reasons to stop supplying nitropropane and aminobutanol to the EEC nations and to provide ICI with another intermediary, which ICI could still process into bulk ethambutol specialties. On the world market, Zoja could not obtain aminobutanol from any company other than CSC, and CSC would not sell; consequently, Zoja was eliminated as a major manufacturer of ethambutol and as a competitor of

60. 2 CCH Comm. Mkt. Rep. ¶ 9586 at 9303 (1973). *See* Note, *The Emergence of a Common Market Merger Control Policy: The Aftermath of Continental Can—The Proposed EEC Merger Control Regulation*, 7 Corn. Int'l L.J. 131, 140-47 (1974).

61. 2 CCH Comm. Mkt. Rep. ¶ 9586 at 9303 (1973).

62. 2 CCH Comm. Mkt. Rep. ¶ 9586 at 9303 (1973).

63. [1974] E.C.R. 223, 2 CCH Comm. Mkt. Rep. ¶ 8209, 13 Comm. Mkt. L.R. 309 (1974).

64. ICI Decision, 12 Comm. Mkt. L.R. D50 (1973).

CSC-ICI. Zoja subsequently requested the Commission to institute proceedings against CSC and ICI for infringements of article 86. The Commission agreed and ordered CSC to supply Zoja with the necessary quantities of aminobutanol and to submit proposals for supplying Zoja in the future.[65] CSC and ICI filed applications for annulment of the decision, and the judgment of the Court of Justice was handed down pursuant to the joinder of the two cases.

CSC submitted that it could not be held responsible for any activities of ICI because the requirement of the economic unity test[66] was not met. According to the *Analine Dyes Cartel* case,[67] for the acts of a subsidiary to be attributed to the parent company, there must be: (a) power of the parent company to direct the subsidiary and (b) the actual exercise of the parent's control to such an extent that the subsidiary does not determine its behavior on the market in an autonomous manner.[68] Although the companies might have acted independently, the Court held that "as regards their relations with Zoja the two companies must be deemed an economic unit"[69] for purposes of determining liability.

To determine whether an article 86 violation existed, the Court examined the following questions: (1) which market to consider, (2) whether there was a dominant position within the meaning of article 86, (3) whether there had been an abuse of such a position, and (4) whether such abuse might have affected trade between Member States.

1. *Market to be Considered.*—The applicants contended that the Commission had used only the market for ethambutol to determine whether an abuse of a dominant position existed.[70] The Court held, however, that the Commission had correctly examined that narrow market only to gain perspective of the effects of the alleged misconduct in the entire raw materials market (nitropropane and aminobutanol), the market that must be considered for article 86 purposes.[71] The Court then rejected the applicants' argument that

65. 12 Comm. Mkt. L.R. at D62.

66. *See* notes 22, 23 *supra* and accompanying text.

67. Imperial Chemical Industries Ltd. v. Commission, 18 Recueil 619, 2 CCH COMM. MKT. REP. ¶ 8161, 11 COMM. MKT. L.R. 557 (1972).

68. 2 CCH COMM. MKT. REP. ¶ 8161 at 8031, 11 Comm. Mkt. L.R. at 629.

69. ICI & CSC v. Commission, [1974] E.C.R. 223, 254, 2 CCH COMM. MKT. REP. ¶ 8209 at 8821, 13 Comm. Mkt. L.R. 309, 344 (1974).

70. Ethambutol is only part of a larger competitive market in largely interchangeable anti-tuberculin drugs.

71. [1974] E.C.R. at 249, 2 CCH COMM. MKT. REP. ¶ 8209 at 8819, 13 Comm. Mkt. L.R. at 339.

it was impossible to distinguish the market in a necessary raw material from the market in which the end product was sold.[72]

2. *Dominant Position.*—The applicants disputed the Commission's findings that in the Common Market CSC-ICI held a dominant position over the raw material necessary for the manufacture of ethambutol on the grounds that other substitute raw materials were available. The Court found, however, that the alternative processes were either too experimental or insufficiently productive to satisfy Zoja's demand. Hence, a dominant position was occupied.[73]

3. *Abuse of the Dominant Position.*—The Court ascertained that CSC-ICI refused to supply Zoja in order to reserve raw materials for its own manufacture of derivatives. Since Zoja is a major competing manufacturer of these derivatives, and CSC-ICI is the only source of the requisite raw materials, the refusal to supply was an attempt to eliminate competition by a major competitor; this was held to be an abuse of a dominant position within the meaning of article 86.[74]

4. *Effect on Trade between the Member States.*—The applicants argued reasonably that primarily the world market was affected by the refusal to sell, because Zoja sells 90 per cent of its production outside the Common Market. But the Court interpreted article 86 to prohibit abuses that may directly or indirectly prejudice EEC consumers by impairing the competitive structure decreed by article 3(f) of the EEC Treaty.[75] Therefore, the Court declared that Community authorities must consider all the effects of the alleged practices on the competitive structure of the EEC without distinguishing between production intended for sale within the EEC and production intended for export.[76] The Court then held that when a business in a dominant position within the EEC has abused its position in such a way that a competitor in the Common Market is likely to be eliminated with repercussions on the competitive structure within the EEC, it does not matter

72. [1974] E.C.R. at 249, 2 CCH COMM. MKT. REP. ¶ 8209 at 8819, 13 Comm. Mkt. L.R. at 339.

73. [1974] E.C.R. at 248, 2 CCH COMM. MKT. REP. ¶ 8209 at 8818-20, 13 Comm. Mkt. L.R. at 338.

74. [1974] E.C.R. at 251, 2 CCH COMM. MKT. REP. ¶ 8209 at 8819-20, 13 Comm. Mkt. L.R. at 340-41.

75. [1974] E.C.R. at 252, 2 CCH COMM. MKT. REP. ¶ 8209 at 8820-21, 13 Comm. Mkt. L.R. at 342.

76. [1974] E.C. R. at 252, 2 CCH COMM. MKT. REP. ¶ 8209 at 8821, 13 Comm. Mkt. L.R. at 342.

whether the violative conduct relates to the competitor's exports or to its intra-Community trade.[77]

B. *Ex Parte Sacchi*[78]

In addition to its interpretation of article 86, *Sacchi* construes a less well-known provision of EEC competition law, article 90.[79] The Italian Government had granted a television monopoly to Radio Andizione Italiano (RAI), which included the monopoly on televised advertising and prohibited any person or enterprise from receiving for retransmission audio-visual signals transmitted from Italy or any other nation. Giuseppe Sacchi, who owns an unauthorized cable television relay company (Telebiella) was brought before the Tribunale of Biella for refusing to pay license fees on television relay receivers. The Italian court doubted the legality of the fee should the RAI monopoly be contrary to the EEC Treaty. Therefore, the Tribunale referred numerous questions regarding articles 86 and 90 to the Court of Justice for preliminary interpretation. Sacchi argued that under article 90(1) RAI was a public enterprise granted special or exclusive rights by a Member State but nonetheless subject to the rules of the EEC Treaty. Not contending that RAI might be subject to article 90(2), Sacchi posited that RAI had violated article 90(1) by abusing its dominant position within the meaning of article 86. He also asserted that since by definition the monopoly involved the elimination of competition, abuse of dominant position arose from the mere existence of the monopoly.[80]

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77. [1974] E.C.R. at 252-53, 2 CCH COMM. MKT. REP. ¶ 8209 at 8821, 13 Comm. Mkt. L.R. at 342.

78. [1974] E.C.R. 409, 2 CCH COMM. MKT. REP. ¶ 8267, 14 Comm. Mkt. L.R. 177 (1974).

79. EEC art. 90 provides in part:

"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

80. [1974] E.C.R. at 423, 2 CCH COMM. MKT. REP. ¶ 8267 at 9184, 14 Comm. Mkt. L.R. at 194.

The Court did not agree with Sacchi's latter argument but did leave open the possibility that the national court might find abuse under article 86. The Court insisted that nothing in the EEC Treaty, including article 86, prevents Member States, for noneconomic considerations in the public interest, from removing radio and television transmissions from the field of competition by conferring on one or more establishments an exclusive right to conduct them.[81] Although a Member State may establish a monopoly for proper reasons and may place an enterprise in a dominant position, that enterprise cannot abuse the position.[82] The Court suggested that, if they were true, accusations made before the national court regarding unfair charges or conditions on users and discrimination in advertising policies would be abusive of a dominant position.[83] In addition, the Court held that the prohibitions of article 86 directly affect cases such as this and confer on interested parties, like Sacchi, directly enforceable rights that the national courts must safeguard.[84]

C. *Belgische Radio en Televisie v. SABAM* (BRT-I)[85]

In *BRT-I*, the Court of Justice faced an article 86 case complicated by several questions of jurisdiction. The case arose out of proceedings brought in 1969 before the Tribunal de premiere instance of Brussels by Belgische Radio en Televisie (BRT) and Societe Belge des Auteurs, Compositeurs et Editeurs (SABAM) against the N.V. Fonior Company to prevent the latter from reproducing a song, the copyright of which had been assigned to SABAM and BRT by the composer and script writer. The Brussels court considered two questions regarding the interpretation of article 86: (1) whether an undertaking such as SABAM, which enjoys

81. [1974] E.C.R. at 429, 2 CCH COMM. MKT. REP. ¶ 8267 at 9185-3, 14 Comm. Mkt. L.R. at 203.

82. [1974] E.C.R. at 430, 2 CCH COMM. MKT. REP. ¶ 8267 at 9185-3,4, 14 Comm. Mkt. L.R. at 203-4.

83. [1974] E.C.R. at 430, 2 CCH COMM. MKT. REP. ¶ 8267 at 9185-4, 14 Comm. Mkt. L.R. at 204.

84. [1974] E.C.R. at 430, 2 CCH COMM. MKT. REP. ¶ 8267 at 9185-4, 14 Comm. Mkt. L.R. at 204.

85. The facts, issues, and views of the parties are contained in the judgment of January 30, 1974 (BRT-I), [1974] E.C.R. 51, 2 CCH COMM. MKT. REP. ¶ 8268, 14 Comm. Mkt. L.R. 238 (1974), where the Court decided to hear the opinion of the Advocate-General with regard to the merits of the case. The judgment on the merits was handed down March 27, 1974 (BRT-II), [1974] E.C.R. 313, 2 CCH COMM. MKT. REP. ¶ 8269, 14 Comm. Mkt. L.R. 282 (1974).

de facto monopoly power over authors' rights in a Member State, should be considered as constituting an abuse of a dominant position under article 86 because it requires the assignment of all copyrights without distinction; and (2) whether abuse of a dominant position exists when an enterprise such as SABAM stipulates that an author shall assign his present and future rights, and in particular when that enterprise may continue to exercise the assigned rights for five years following the withdrawal of the members without having to account for its actions.[86] For preliminary interpretations of the relevant EEC Treaty provisions, referral was made to the Court of Justice.

Before the Court of Justice could answer the questions of the Brussels court, a jurisdictional complication had to be solved. On its own motion[87] in June 1970 the Commission had initiated a procedure in regard to possible article 86 violations by SABAM.[88] The Commission objected to the articles of the association's contracts dealing with the global assignment of copyrights, to the discrimination by SABAM against nationals of other Member States, and to the duration (five years) of the control over rights after the withdrawal of a member. According to Regulation 17/62, the "authorities of the Member States" are bound to refrain from all action in the competition law area if the Commission is conducting procedures or investigations under the Regulation.[89] The question then was whether the Brussels court was a national "authority" within the meaning of Regulation 17/62; if it was, then the substantive questions referred to the Court could not be answered as the Brussels court would have to stay its proceedings. The Court began its analysis by stating that the prohibitions of articles 85 and 86 produce direct effects in relations between individuals and, therefore, create directly enforceable rights in those individuals that national courts must safeguard. To use the Regulation 17/62 prohibition to deny national courts the jurisdiction to afford this protection, the Court asserted, would mean depriving individuals of rights that they hold under the EEC Treaty itself.[90] The Court

86. [1974] E.C.R. at 54, 2 CCH COMM. MKT. REP. ¶ 8268 at 9185-16-17, 14 Comm. Mkt. L.R. at 243.

87. *See* Reg. 17/62, art. 3.

88. [1974] E.C.R. at 53, 2 CCH COMM. MKT. REP. ¶ 8268 at 9185-16, 14 Comm. Mkt. L.R. at 242.

89. Regulation 17/62 article 9(3) restrains national authorities from interfering in Commission investigations initiated under articles 2, 3, or 6.

90. [1974] E.C.R. at 63, 2 CCH COMM. MKT. REP. ¶ 8268 at 9185-22, 14 Comm. Mkt. L.R. at 271.

then held that even though the phrase "authorities of the Member States"[91] includes such entities as the Brussels court, national courts could not be exempted from giving judgment when a direct effect of article 86 was pleaded.[92]

Three months later the Court ruled on the substantive questions referred by the Belgian court.[93] The Court held that if an undertaking such as SABAM imposed on its members obligations that were not absolutely necessary for the attainment of its objectives and, thus, encroached unfairly upon a member's freedom to exercise his copyright, then the action could constitute an abuse.[94] The Court noted that the national court, if abusive practices were found, would determine whether and to what extent they affected the interests of authors or third parties concerned in order to decide the validity and effect of the contracts (or certain provisions of the contracts) in dispute.[95] The Belgian court also asked whether SABAM could qualify as an "undertaking entrusted with the operation of services of general economic interest,"[96] and thereby come under article 90(2), which permits, under certain circumstances, derogation from the rules of the EEC Treaty.[97] The Court ruled that an enterprise to which the Member State has not assigned any task and that manages private interests, including intellectual property rights protected by law, could not be an undertaking as envisaged in article 90(2).[98]

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91. Reg. 17/62, art. 9(3).

92. [1974] E.C.R. at 63, 2 CCH COMM. MKT. REP. ¶ 8268 at 9185-22, 14 Comm. Mkt. L.R. at 271.

93. [1974] E.C.R. at 313, 2 CCH COMM. MKT. REP. ¶ 8269, 14 Comm. Mkt. L.R. at 282.

94. [1974] E.C.R. at 317, 2 CCH COMM. MKT. REP. ¶ 8269 at 9185-38, 14 Comm. Mkt. L.R. at 283-84.

95. [1974] E.C.R. at 317, 2 CCH COMM. MKT. REP. ¶ 8269 at 9185-38, 14 Comm. Mkt. L.R. at 283-84.

96. BRT-I, [1974] E.C.R. 51, 54, 2 CCH COMM. MKT. REP. ¶ 8268 at 9185-17, 14 Comm. Mkt. L.R. 238, 243 (1974).

97. EEC art. 90(2) quoted in note 79 *supra*.

98. BRT-II, [1974] E.C.R. 313, 318, 2 CCH COMM. MKT. REP. ¶ 8269 at 9185-38, 14 Comm. Mkt. L.R. 282, 284 (1974).