Vanderbilt Law Review

Volume 19
Issue 2 *Issue 2 - March 1966*

Article 4

3-1966

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By means of an in-depth study of the decisions of the Commission technique des ententes Mr. Reboul demonstrates that the concept of antitrust enforcement in France differs greatly from the approach employed under American antitrust legislation. Pointing out that the French antitrust laws are "little known, often ignored, and easily evaded," the author concludes that the laws have done little to change the traditional French attitudes toward competition and that the failure to make a clear choice between repression and control of restrictive business practices has created inevitable difficulties in enforcement.

I. Introduction

The French antitrust laws, now more than twelve years old, resist comparison with those of the United States, and they should not be approached with the belief that any country that has adopted legislation which speaks of competition has also adopted the American attitude toward competition.

The attitude that has guided the application of the French antitrust laws seems to be the new French belief in economic expansion and active governmental intervention. The French defeat in the war discredited prewar economic doctrines which emphasized stability, and there has been an almost universal endorsement of theories of economic expansion. One commentator went so far as to attribute the economic recovery in France primarily to "the restaffing of the economy with new men and to new French attitudes."[1]

Since the war the government has intervened in the economy with price controls, nationalizations, long-range programs of economic planning, and measures of selective promotion and protection. The

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1. Kindleberger, *The Postwar Resurgence of the French Economy*, in In Search of France 156 (1963). Ehrmann, in 1957, however, described the French attitude as "a common mentality to which 'measures of protection come to look more attractive than measures of modernization, and measures of modernization less repelling than measures of expansion.'" Ehrmann, Organized Business in France 322 (1957), quoting U.N. Economic Commission for Europe, Economic Survey of Europe in 1954, at 189, U.N. Doc. No. E/ECE/194, II.E2. (1955).

French antitrust laws should be viewed as a part of this intervention. They are not weapons to strike down private agreements so as to allow competition to regulate the economy.

The aims of this postwar governmental intervention may be suggested by a brief examination of the attitudes of the French Planning Commission. The Planning Commission has endorsed all measures of expansion and has tried to make businesses expand faster than they want to. Immediately after the war, the Planning Commission focused on plans of group co-operation to modernize several basic industries: power, transportation, steel, cement, and farm equipment. It was able to exert considerable pressure since, through its influence in governmental agencies, industrial projects which it approved were able to secure investment funds and permission to import necessary materials and equipment.[2] As the initial difficulties of obtaining financing and imports diminished, the Planning Commission found itself without this leverage. At the same time, however, businessmen were accepting the idea of growth through increased investment and greater efficiency. The Commission then turned to programs of co-operation to encourage the reorganization of the structure of particular industries, and tried to develop co-ordinated plans for the whole economy. Although the commentators disagree on how much can be attributed to the work of the Planning Commission,[3] there is no doubt that the French recovery has been outstanding. There is voiced, however, a concern that the Planning Commission is in danger of automatically accepting industry suggestions,[4] and that the procedure of group consultation may tend to discourage individual enterprises which want to expand faster than an industry as a whole.[5]

Paralleling the present concepts of expansion in France is a distrust of competition and an apprehensive look back to the dismal economic performance of the thirties. That period was dominated by what the French call "Malthusianism," an economic attitude which was primarily characterized by a fear of an overproduction and a collapse in prices. To avoid this spectre, coalitions were formed to keep production low and prices high. These practices led toward economic stagnation and, with the higher prices, tended to close the world markets to French products. This foreclosure in turn, confirmed the

2. SHEAHAN, PROMOTION AND CONTROL OF INDUSTRY IN POSTWAR FRANCE 170-75 (1963).

3. Sheahan concludes that the Planning Commission has played a useful role. *Id.* at 181-89. Kindleberger considers that the change in French attitudes was more important. KINDLEBERGER, *op. cit. supra* note 1, at 156. Baum believes that the postwar record of governmental intervention has not been helpful. BAUM, THE FRENCH ECONOMY AND THE STATE 280-81 (1958).

4. SHEAHAN, *op. cit. supra* note 2, at 181.

5. *Id.* at 186.

fears of overproduction and the Malthusian measures which industrialists and agriculturists had demanded.[6]

There is a tendency in France to cite the thirties as an example of a period that relied upon competition. Although there was no directing force other than competition and concentration was unusually low, the period provided no more than a caricature of competitive behavior. Collusive agreements between businesses were widespread and governmental intervention was directed toward protecting existing businesses rather than promoting competition.[7]

Probably the methods used in the postwar governmental interventions are as important to an understanding of the French antitrust laws as French economic goals. The very multitude of the governmental interventions limits the scope of the economic investigations upon which each intervention depends and causes the government to rely upon general economic assumptions and the assistance of trade associations to implement various projects.

The nature of planning itself demands a willingness to make recommendations for industries and for the whole economy, often on the basis of fragmentary information and a series of assumptions. The Planning Commission, moreover, uses group co-operation for both the elaboration[8] and implementation of its plans.[9]

Similar methods are necessary to carry out programs of selective promotion or price control. The tax advantages provided to encourage specialization and mergers[10] and the various subsidies granted for establishment of businesses outside the Paris region[11] are based more on the belief that concentration of production and geographical decentralization are beneficial than upon an examination of the facts of each case. Similarly, with price regulation, the ceiling is determined from information submitted by sample companies, usually a small, a medium and a large company. It is only for the especially important products that agents will be sent to the individual firms to make a more detailed investigation. Furthermore, since the government is unable to discuss the establishment of a price with a very large

6. LALUMIÈRE, L'INSPECTION DES FINANCES 194 (1959), quoted in KINDLEBERGER, *op. cit. supra* note 1, at 141.

7. SHEAHAN, *op. cit. supra* note 2, at 250.

8. Hackett & Hackett note that the trade associations are the principal contact between the individual firms and the Planning Commission and the major source of data of all kinds for the committees which participate in the elaboration of the plans. HACKETT & HACKETT, ECONOMIC PLANNING IN FRANCE 172 (1963).

9. SHEAHAN, *op. cit. supra* note 2, at 178-89.

10. See VASSEUR, LE DROIT DE LA RÉFORME DES STRUCTURES INDUSTRIELLES ET DES ÉCONOMIES RÉGIONALES 381-416 (1959), Norr & Kerlan, *Taxation in France (World Tax Series)* 10/9.5-10/9.6 (1966).

11. See VASSEUR, *op. cit. supra* note 10, at 417-22, Norr & Kerlan, *op. cit. supra* note 10, at 10/9.9.

number of separate firms, it is again the trade associations which assume the active role in representing the industry.[12]

It is in the light of these procedures and economic attitudes that the French antitrust laws and the special advisory body set up to administer them will be examined.

A reading of the basic statutory prohibitions against restrictive practices gives a most misleading impression of the effect of the French antitrust laws and their enforcement by the Commission technique des ententes et des positions dominantes. The law says sweepingly that

> Subject to the provisions of article 59 *ter*, all concerted actions, agreements, ententes, express or implied, understandings, or coalitions under whatever form or for whatever reason, which have as their object or may have as their effect the restriction of the full exercise of competition by placing an obstacle in the way of a reduction of production costs or sales prices or by favoring an artificial increase of prices, are prohibited.
>
> Prohibited in a like manner are the activities of an enterprise or of a group of enterprises occupying a dominant position in the domestic market characterized by a monopoly situation or by a manifest concentration of economic power, when these activities have for object or may have as their effect the restriction of the normal functioning of the market.[13]

This language seems to make as sweeping a condemnation of restrictive practices as the Sherman Act,[14] although it is qualified by the provisions of article 59 *ter* which allows ententes to escape condemnation if it can be shown that they contribute to economic progress.[15]

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12. FRANCK, LES PRIX 60-64 (3e éd. refondue 1964).

13. Decree No. 53-704, Aug. 9, 1953, [1953] Journal Official de la République Francaise [hereinafter cited as J.O.] 7045, as amended, Decree No. 58-545, June 24, 1958, [1958] J.O. 5877, as amended, Decree No. 59-1004, Aug. 17, 1959, [1959] J.O. 8506, as amended, Law No. 63-628, July 2, 1963, [1963] J.O. 5915, art. 59 *bis* [hereinafter cited as article 59 *bis*]. The other provisions concerning horizontal agreements are contained in articles 59 *ter* and *quater* of the same decree. I have used the French word "entente" for two reasons. First, it does not have the connotations of such words as "combination," "conspiracy," or "cartel." Second, the breadth and vagueness of the term is useful. An entente could be defined as an agreement, usually of a horizontal nature, which could have an effect in a market. The word long antedates the decree of 1953 and in French it carries no connotation of legality or illegality, desirability or undesirability. An entente may be between only one or two firms but most of the ententes examined by the commission have included almost all the manufacturers of a particular product.

The various dispositions of the antitrust laws relating to vertical restrictions will not be examined in this paper except as they relate to the work of the Commission techniques des ententes. They are contained in Ordinance No. 45-1483, June 30, 1945, art. 37, [1945] J.O. 4150, as amended, Law No. 52-835, July 18, 1952, [1952] J.O. 7227, as amended, Decree No. 53-704, Aug. 9, 1953, [1953] J.O. 7045, as amended, Decree No. 58-545, June 24, 1958, [1958] J.O. 5877 [hereinafter cited as article 37].

14. Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. §§ 1-7 (1964).

15. Article 59 *ter* provides:

An examination of prior French law shows no antecedent which might have inspired article 59.[16] Furthermore, the legislative history represented by a serics of bills proposed between 1947 and 1953 shows conflicting attitudes toward competition and the establishment of an antitrust law.[17]

In 1953 following a parlimentary crisis, the government was granted the power to legislate by decree for certain limited purposes

"The provisions of article 59 *bis* do not relate to the concerted actions, agreements or ententes, or the activities of an enterprise or of a group of enterprises occupying a dominant position:

(1) Which result from the application of a legislative provision or a regulation;

(2) Which the originators are able to justify as having the effect of improving or extending the outlets of production, or of assuring the development of economic progress by means of rationalization and specialization."

The Commission often refers to the various programs that permit an entente to benefit from the exemption of article 59 *ter* as 'justifications.' "

16. FRENCH PENAL CODE art. 419 provides that "all persons:

"1. Who by false or slanderous facts willfully disseminated among the public, by offers made with the intention to disturb prices, by offers made in excess of prices demanded by the sellers themselves, by any fraudulent means whatever;

2. Or who in exercising or in attempting to exercise either individually or by a group or coalition, an action on the market with the purpose of procuring a gain which would not be obtainable by the normal interplay of offer and demand,

Shall have directly or indirectly, effected, or attempted to effect an artificial increase or decrease in price of food products, merchandise, negotiable instruments or government securities,

Shall be punished by an imprisonment of from two months to two years and a fine of from 7200 franes to 360,000 francs. The perpetrator may, furthermore, be restricted in his freedom of movement for no less than two, nor more than five years."

Article 419 has received a very limited application, usually only small local arrangements that one author has characterized as "Balzacian" have been punished. REUTER, A PROPOS DES ENTENTES INDUSTRIELLES ET COMMERCIALES, [1953] DROIT SOCIAL [hereinafter cited as DR. SOC.] 1,4. The various manoeuvres condemned by article 419 "seem to have finally been interpreted as a sort of moral disapproval condemning the most shocking procedures and results. The courts have developed on the basis of article 419 and imprecise distinction between good and bad ententes. The latter are those which use fraudulent means or exact excessive profits. The good ententes, on the other hand, can flourish under the protection of article 419, and it is clear that the most serious ententes do not risk using the manoeuvres that characterize the bad ententes. Essentially the courts have tried to develop a standard of normal conduct for a merchant. The reasonable man, normally honest and skillful, is placed in the context of ententes. It would not be paradoxical to allege that the most dangerous ententes are probably those which best conform to this standard." LOUSSOUARN & BREDIN, LA RÉGLEMENTATION DES ENTENTES: LE RECUL DU CONTROLE JUDICIAIRE, [1963] RECUEIL DALLOZ [hereinafter cited as D.] chr. 33, 33-34. Ehrmann remarked in relation to article 419 that "a highly placed official of the Ministry of Justice had explained that a modern entente would have to show an unusual amount of ineptness to invite judicial action against it." EHRMANN, *op. cit. supra* note 1, at 381. For an analysis of many of the cases which have arisen under article 419, see BLAISE, LE STATUT JURIDIQUE DES ENTENTES ÉCONOMIQUES DANS LE DROIT FRANCAIS ET LE DROIT DES COMMUNAUTÉS EUROPÉENNES 181-97, 342-57 (1964).

17. See MOREAU & MÉRIGOT, LES ENTENTES PROFESSIONNELLES DEVANT LA LOI, LA DOCUMENTATION FRANCAISE, ENTENTES ET MONOPOLES DANS LE MONDE, France No. 1736 (1953), SOULEAU, LA RÉGLEMENTATION DES ENTENTES PROFESSIONNELLES DANS LE DÉCRET-LOI DU 9 AOUT 1953, [1953] DR. SOC. 577.

and in its exercise of these powers, articles 59 and 37 were promulgated.[18]

In its first report, the Commission technique des ententes gave its interpretation of the draftsmen's intention.[19] After stressing the modest and nonrevolutionary character of the law, it said that

> Using and adapting the ideas which emerged from the long discussion and important legislative consideration, the draftsmen of the Decree of August 9, 1953 have chosen the ideas, if not the easiest, at least the simplest to put into application. Faced with the difficulty of drafting a law, the draftsmen seem to have wanted to propose to the legislature and to the country an experiment intended to introduce a new type of legislation, of which even the idea had aroused serious apprehension in important circles.[20]

The Commission has treated the laws as such an experiment and has not considered itself bound by any strong policy in favor of competition which initially might seem to be contained in the statute. It does not invariably favor competition, and is little worried by mono-

18. Law No. 53-611, July 11, 1953, [1953] J.O. 6143. This law provided, at art. 7 that the government could take measures relative to the maintenance or re-establishment of free industrial and commercial competition. Since the government had not been given the power to modify the penal law, articles 59 and 37 were inserted into the basic laws regulating prices so that the penalties for violating this ordinance would be applicable to violations of the antitrust laws. Ordinance No. 45-1483, June 30, 1945, [1945] J.O. 4150; Ordinance No. 45-1484, June 30, 1945, [1945] J.O. 4156. The validity of this legislative procedure was challenged and two articles of the Decree of Aug. 9, 1953 which related to article 37, were declared void by the Conseil d'Etat. Syndicat des grossistes en matériel électrique de la région Provence, June 18, 1958, [1958] Recueil des arrêts du Conseil d' Etat 358, [1958] D.II 656, [1958] Semaine Juridique [hereinafter cited as J.C.P.] II.107.27. Since the case did not directly concern article 59 except in relation to the sanctions which could be imposed for its violation, it might be argued that the special investigative procedure set up under artiele 59 was not affected. The argument however is without importance as six days after the decision of the Conseil d'Etat, the government issued a new decree which reproduced, with a few minor changes, the articles of the decree of August 9, 1953 which had been annulled. Decree No. 58-545, June 24, 1958, [1958] J.O. 5877. The legality of this decree has been upheld several times. *E.g.*, Nicolas, Soeiété Brandt et Société Photo Radio Club, Cour de Cassation (Ch. Crim.), July 11, 1962, [1962] Bulletin des arrêts de la Cour de Cassation, Chambre crimincIle [hereinafter cited as Bull. crim.] 504, [1962] D.II. 497, [1962] J.C.P. II. 12799. The annulment had no effect on the proccdure under article 59 as there were no criminal proccedings pending. TOUTÉE, LES ENTENTES PROFESSIONNELLES, [1960] CONSEIL D' ETAT, ETUDES ET DOCUMENTS 161, 168.

19. *Rapport de la commission technique des ententes pour les années 1954 et 1955* [hereinafter cited as first report], [1960] J.O., Documents administratifs [hereinafter cited as Doc. adm.] 1,2. (The first four reports have been reprinted in brochure no. 1193 and the latest report in brochure no. 1193-64 by the Journaux Officiels.) The President of the Commission writes a general discussion of its activities to accompany each group of cases published. Any citatiou to a report without the designation of a particular case will be in refercnce to these remarks.

20. *Ibid.*

polies or dominant firms. No matter how large a French company grows, the commission believes that the risks of abuse will usually be curbed by competition from the rest of the Common Market.

What the Commission technique des ententes seems to desire is for French businesses to improve their competitive position in the world and the Common Market. To attain this goal, the Commission has adopted two policies. First, it approves agreements among the members of an industry to institute programs of modernization. Secondly, it encourages the reorganization of the structure of French industry. Believing that French companies are almost always too small to be efficient, the Commission approves all measures toward mergers and concentration of production.

Competition may serve a useful purpose, but it is approached with distrust and frequently with the feeling that the poor economic performance of the thirties was a result of leaving the market to be regulated by competition alone. In an expanding industry, the Commission fears that competition may discourage long-range plans of investment which would be carried out if firms were allowed to join together and thus be assured that each company would temporarily retain its share of the market.[21] In a declining industry, the Commission fears that competition will lead to price wars until eventually one or two strong firms emerge, which will then try to offset their losses by exacting monopoly profits. Competition is thus relegated to the minor position of providing some limitation on prices and helping to eliminate the most inefficient firms.

This article attempts to define the criteria used by the Commission technique des ententes in judging restrictive practices and to evaluate the importance of the French antitrust laws in the French economy. The procedure before the Commission will first be considered. Next, the justifications which the Commission has accepted will be examined, since it is through an analysis of these justifications, rather than an examination of the practices disapproved by the Commission, that the economic theories of the Commission become apparent. Then, after a consideration of the prohibited practices, the relationship of the French antitrust laws to other laws which may affect competition will be analyzed. Finally, the problems of the application of the French antitrust laws, and the relationship between the Commission and the courts will be considered.

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21. The Commission has paid little attention to the problem of defining particular markets. It seems to be generally willing to accept as the relevant market that portion of one or more markets which have been tied up by the particular restrictive practice under consideration.

II. PROCEDURE BEFORE THE COMMISSION

The Commission technique des ententes,[22] a special advisory tribunal to the Minister for Economic Affairs, plays the most important role in the enforcement of article 59. Largely on the basis of an extensive documentation which has been submitted to it, the Commission formulates a series of recommendations which the Minister will consider in deciding whether to reach a settlement with an entente or to institute criminal proceedings.

After the government's attention has been initially drawn to the existence of an entente, the Service for Economic Investigations[23] conducts an extensive examination of the industry in question. These investigations, lasting several months, are carried out by two persons who visit the trade associations and most of the companies in an industry.[24] The report which is then prepared is one of the essential elements in the case and generally is accepted as its factual basis.

These administrative reports, which run from 70 to 150 pages in length and may contain various appendices, usually start with a brief description of the industry, including a summary of the technological problems, the prices charged, the volume of production, and the principal uses of the product. Then, in the most important part of the administrative report, a detailed examination is made of the

22. The members of the Commission are named by the agreement of the Minister for Economic Affairs, the Minister for Industry and Commerce, and the Minister of Justice. Six of the members are chosen from the judiciary and the administration, six represent management and labor and two are selected because of their economic knowledge. Decree No. 54-97, Jan. 27, 1954, [1954] J.O. 1004, as amended, Decree No. 59-1004, Aug. 17, 1959, [1959] J.O. 8506 [hereinafter cited as Decree of Jan. 27, 1954] art. 1. For the present membership see, Decree No. 59-1004, Aug. 17, 1959, [1959] J.O. 8506 to which should be added the names of M. Plescoff, directeur financier of the Caisse de Dépôts et Consignations and M. Blot, sous-governeur of the Crédit Foncier de France. The members of the Commission are not paid.

23. This service is part of the Direction générale du commerce intérieur et des prix one of whose most important jobs is the enforcement of the price control legislation. See generally SOULEAU, LES REGLES PARTICULIERES, DE CONSTATION, DE POURSUITE ET DE RÉPRESSION ÉTABLIES PAR *L'*ORDONNANCE n. 45-1484 du 30 juin 1945, JURIS-CLASSEUR PÉNAL, LOIS PÉNALES ANNEXES, INFRACTIONS ÉCONOMIQUES, I., 10-139.

24. The facts concerning the investigations made by the Commission and the documents such as the administrative reports, the ministerial letters conferring jurisdiction on the Commission, and the memoranda of the reporters were gathered in a series of interviews carried out in Paris in 1964. Members of the Service for Economic Investigations, and the Commission were questioned as well as executives of companies and trade associations and many of the various documents prepared during these investigations were examined.

The proceedings before the Commission are officially declared to be secret, Decree of Jan. 27, 1954, art. 19, and the publication of its opinions was only authorized in 1959, Decree No. 59-1004, Aug. 17, 1959, [1959] J.O. 8506. Because of this confidential nature and the request of some of those who have been kind enough to furnish information, precise citations will not always be given. Any citation without exact indication of authority, however, should be understood to refer to information gathered from these interviews and documents.

various trade associations, common sales agencies, stock holdings and contracts which may link the different producers. In conclusion, the question of whether there has been a violation of the antitrust laws is briefly considered. The existence of these remarks, however, should not obscure the fact that the primary purpose of the report is to provide a basic summary of the economic situation.

Next, the Minister for Economic Affairs decides whether the case should be dropped or sent to the Commission for its examination.[25] In the period from 1960 to 1964, the latter alternative was adopted in slightly more than half the cases. The Minister confers jurisdiction on the Commission by means of a letter which briefly summarizes the situation as revealed by the report of the Service for Economic Investigations, and outlines the questions which the Commission should examine.[26] This grant of jurisdiction is quite flexible, and the Commission has felt free to extend its investigations beyond the Minister's questions.[27]

The Commission, however, has felt that an insufficient number of investigations were being carried out. It noted that at the end of 1962, there were only five cases pending, four of which were re-examinations of ententes already considered,[28] and it declared that

> This situation cannot continue without inconvenience. It is surely very useful to be able to follow the evolution of the practices of ententes previously studied and to thus perfect both the recommendations for a particular case and also the case law of the Commission. It would be most unfortunate, however, if the opinions of the Commission, the appreciations

25. If the Commission has not rendered a decision within a period of six months or in case of urgency, repeated offense, or flagrant violation the Minister can transmit the case directly to the public prosecutor. Art. 59 *quater*. This power has never been used although the Commission has not often observed the six-month time limit.

26. The normal procedure is for the Minister for Economic Affairs to bring a case before the Commission, see Decree of Jan. 27, 1954, art. 4, first report 4. The Commission also has power to take a case on its own. Decree of Jan. 27, 1954, art. 4. This power has rarely been used and once when the Commisson had decided independently to take a case, it referred the case to the Service for Eeonomic Investigations for a preliminary examination. *Rapport de la commission technique des ententes pour les années 1958 et 1959* [hereinafter eited as fourth report], [1961] J.O., Doc. adm. 303, 304. The Minister of Justice, on a request of the public prosecutor, also may and occasionally has, brought a case before the comnission. Decree of Jan. 27, 1954, art. 4; see, *e.g.*, Entente dans l'industrie du savon de ménage, first report 8. Private individuals have no right to bring a case before the Commission, but cases have been considered after requests to the Commission or the Minister. *E.g.*, first report 4, Entente dans l'industrie de réparation du matériel roulant ferroviaire, fourth report 315.

27. Rapport de la commission technique des ententes pour l'année 1957 [hereinafter cited as third report], [1960] J.O., Doc. adm. 211, 212.

28. *Rapport de la commission technique des ententes pour l'années 1960, 1961 et 1962* [hereinafter cited as fifth report], [1964] J.O., Doc. adm. 9, 10. See also fourth report 304.

> and suggestions of every kind that they may contain, the action preventative or curative more than repressive that they may permit, are confined to a limited number of sectors of the national economy.[29]

Although the Commission stated that it did not plan to use its powers to initiate proceedings, it asked the Service for Economic Investigation to undertake investigations in new sectors of the economy. The Commission also requested that a larger budget be provided for the investigations of violations of the antitrust laws.[30]

The Service for Economic Investigations has expressed its awareness of this problem but noted that there were no plans for a marked increase in the less than twenty persons concerned with questions of ententes. The situation, however, does seem to have improved, and during the 1964-1965 term the Commission was scheduled to examine nine ententes, five of which were in industrial sectors which previously had not been examined.

The procedure before the Commission is based largely upon that of the French administrative courts.[31] The Commission does not remain passive and permit the government or the members of the entente under investigation to control the course of the case by a long oral presentation and the submission of numerous exhibits. Rather it actively directs the elaboration of the case and appoints a reporter to make an investigation. The modest part played by the persons actually accused of violating the antitrust laws is surprising to those who are accustomed to American antitrust suits.

The examination starts when the President of the Commission appoints a reporter[32] to make a second analysis of the industry. This investigation does not overlap the earlier administrative one, since the reporter's primary role is to analyze the factual situation exposed in the administrative report. However, he is also expected to spot check these findings and talk to the trade associations, the most important producers, and the largest clients. He will also consult with the reporter general.[33] Such consultation is necessary to preserve a certain continuity since the reporter often may have had no previous

29. Fifth report 10.

30. *Ibid.*

31. For the procedure before the French administrative courts see VEDEL, DROIT ADMINISTRATIF 382-411 (3e éd, refondue 1964).

32. Decree of Jan. 27, 1954, art. 7. The reporters are chosen among middle level governmental officials from such bodies as the Conseil d'Etat, the Inspection générale des finances and the Commissariat général aux prix. Decree of Jan. 27, 1954, art. 3.

33. The designation of a reporter general, and possibly also of an assistant, is provided for in the decree regulating the procedure of the Commission. Decree of Jan. 27, 1954, art. 3. The reporter general and his assistant have a permanent position in comparison with the regular reporters who are often named for the examination of a single case.

experience in the antitrust field.[34] The report, after briefly summarizing the factual situation as presented by the administrative report, concentrates on an analysis of whether article 59 *bis* has been violated and if so, whether the entente can be justified under article 59 *ter*.

The reporter's examination, and to a lesser extent that of the Service for Economic Investigations, is characterized by extended negotiations between the companies and the investigator. The Commission has noted that often the parties under investigation, instead of taking a firm position, prefer to listen to the reporter's suggestions in order to eliminate certain restrictive practices or to implement various programs which could contribute to economic progress.[35] In one case, the Commission said that this co-operation prompted it to make moderate recommendations, as it believed that the members of the entente would implement the promised technical programs.[36]

The reporter's memorandum is then made available to the interested parties for their comments.[37] The parties, however, have not made extensive use of this right of reply. Their comments are usually from two to five pages in length, and may only state that the reporter has fairly described the entente and the industry. When the parties' comments are received, they are sent together with the reporter's memorandum to the various governmental ministries which may be interested in the case.[38]

Before the actual meeting of the Commission, each member is sent an extensive documentation which includes all the documents discussed and a draft opinion prepared by the reporter. The members of the Commission may also consult with the reporter, but this is rarely done. The right to hold *ex parte* conversations is not unusual in French law, since judges of administrative tribunals are not bound by the type of restrictions imposed under United States rules on judicial investigation. Moreover, the reporter has the right to vote

34. The Commission has often complained about the difficulty of finding reporters. *E.g.*, first report 7. Originally a list of about forty names was established but the Commission found that most of these persons were almost permanently unavailable. *Ibid.* Now the reporters are designated on a case-by-case basis.

35. *Rapport de la commission technique des ententes pour l'année 1956* [hereinafter cited as second report], [1960] J.O., Doc. adm. 15, 16.

36. Third report 213, quoting Entente entre fabricants de verre plat, third report 218.

37. Decree of Jan. 27, 1954, art. 9. After the first few years, the administrative reports ceased to be made available officially to the persons being investigated because of the feeling that since they contained sales figures and other information about companies under investigation, they should not be made available generally to the industry. The members of the ententes, however, in general, manage to obtain a detailed knowledge of this report and often procure a copy.

38. Decree of Jan. 27, 1954, art. 10.

on the disposition of the case which he has investigated.[39]

The actual meetings of the Commission are quite brief, a case will usually be disposed of in one session of three or four hours.[40] The reporter opens with a few remarks about the industry or a summary of his memorandum. The reporter general and his assistant follow with their observations. A representative of the Minister for Economic Affairs then presents the comments of the various governmental agencies which may be interested in the case.[41] The Commission then has the discretion to call in anyone else it may find useful, including the interested parties.[42] This option, however, has been used infrequently and parties have not been heard in more than four or five cases. The refusal to grant parties the right either to an oral hearing or to observe the proceedings of a court is not unusual in French law. Before the Conseil d'Etat, for example, parties may hear nothing about their case from the time their briefs are submitted to the court until a largely formal hearing is held near the end of the case, at which the parties rarely do more than refer the court to their written memoranda.[43]

The meeting of the Commission is then open to general discussion, and finally to a consideration of the reporter's draft opinion. The decision is reached by a majority vote with the President's vote being decisive in case of an equal division.[44] In fact, the decisions are usually supported by 12 or 13 of the 15 votes.

This procedure depends very much on the studies made by the Service for Economic Investigations and the reporter. The conclusions of the reporter and reporter general would seem very influential. One will have made a detailed investigation and the other will be familiar with the development of the case. The members of the Commission are not expected to have done more than read the reporter's memorandum and possibly have skimmed some of the other documents before the fairly brief discussion at the meetings. The reporter's influence is probably also increased by the lack of clearly articulated standards under the French antitrust laws. In fact, the draft opinions are adopted 80 to 85 per cent of the time, although often extensively revised on stylistic grounds. The opinions which the Commission then renders are equivalent in length to about four typewritten pages.

39. He did not originally have this power but it was accorded in 1958. Decree No. 58-545, June 24, 1958, [1958] J.O. 5877.

40. These meetings are not open to the public. Decree of Jan. 27, 194, art. 12.

41. Art. 59 *quater*.

42. When the interested parties are called, they should appear personally and do not have the right to be represented by counsel. Third report 213.

43. Harmson, *Le conseil d'Etat statuant au contentieux*, 68 L.Q. REV. 60, 79 (1952).

44. Art. 59 *quater*, Decree of Jan. 27, 1954, art. 14.

While generally comparable to those handed down by French courts, they do not approach the detailed discussions of the legal issues and relevant facts which are usually present in the opinions in American antitrust cases. This brevity is unfortunate because it limits the use of the opinions by other companies trying to determine whether the practices in which they are engaged are legal. While the Commission's disapproval of particular restrictive practices, such as price fixing, may appear clearly, it is extremely difficult to ascertain the nature and extent of the programs favorable to economic progress which the Commission has accepted as justifications of ententes. The Commission has thus partially undercut its often expressed objective to develop a case law.[45]

The opinions are generally programs for expansion or reorganization of an industry, or that part of it represented by members of an entente. The Commission apparently does not believe that the provisions of articles 59 *bis* and *ter* call for two separate findings (one of the existence of a restriction on competition and the other of the extent of the programs which favor economic progress), and then a decision as to whether the entire entente should be condemned or approved. It seems to treat article 59 *bis* almost as a rule of jurisdiction and it has nearly always found that, in the terms of the statute, the ententes under examination have as their object, or may have as their effect, a restriction on the full exercise of competition by placing an obstacle in the way of reducing production costs or sales prices or by favoring an artificial increase of prices.

The bulk of the opinions consists of what the Commission calls an economic balance sheet[46] of the desirable and undesirable elements of the entente under consideration. The Commission will not then conclude simply that an entente is legal or illegal. Instead, an entente may be considered as justifiable for the present, but future legality will be conditioned upon its continuation of particular programs of specialization or standardization. Or, an entente may be declared illegal but be allowed a certain period in which to abolish particular restrictive practices or implement a program for the reorganization of the industry.

The opinion is sent as a recommendation to the Minister, who will decide such matters as what restrictive practices should be abandoned by the parties or what plans of technical development should be undertaken. He prepares a letter to the members of the entente telling them what they should do to avoid criminal proceedings.[47] The

45. *E.g.*, second report 16.

46. *E.g.*, first report 6.

47. See Decree of Jan. 27, 1954, art. 17. These letters, which are published along with the Commission's opinions, are often referred to as ministerial decisions although

general tone of these letters is more severe than the opinions of the Commission but there is little substantive difference.[48]

The ministerial decisions may bring the broad investigation of the Commission into clearer focus through an examination of the different programs needed for the various sectors of an industry which was considered only generally by the Commission,[49] or may add conditions generally in harmony with the Commission's recommendations such as forbidding the circulation of suggested price lists.[50] The Minister has also questioned general assumptions of the Commission in a way that should be useful in reaching a more workable body of law. For example, he has asked for a reconsideration of the need for long-term quota agreements in connection with specialization agreements.[51]

III. JUSTIFICATION OF RESTRICTIVE PRACTICES

The justifications that the Commission seeks can be roughly divided into two categories, technical and organizational.[52] The former look

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the only choice the Minister has is to reach an agreement with the entente or send the case to the public prosecutor. The Commission has never recommended criminal prosecution and the Minister has never sent a case to the public prosecutor. The public prosecutor would still be free, if the Minister requested prosecution, to reach his own decision as to what action to take, for example to prosecute the entente for the violation of another law than article 59 or to drop the case. See Ordinance No. 45-1484, June 30, 1945, [1945] J.O. 4156, as amended, Law No. 65-549, July 9, 1965, [1965] J.O. 5915, art. 19. SOULEAU, PRATIQUES ANTICONCURRENTIELLES ET AUTRES INFRACTIONS ASSIMILÉES A LA PRATIQUE DE PRIX ILLICITE, JURIS-CLASSEUR PÉNAL, LOIS PÉNALES ANNEXES, INFRACTIONS ÉCONOMIQUES, III, 166.

48. The President of the Commission has noted that there has been no difference of principle on legal or economic grounds between the Commission and the Minister for Economic Affairs. TOUTÉE, *op. cit. supra* note 18, at 170-71.

49. For example, in a case involving the manufacturers of bicycle parts, the Minister noted that the fabrication of rims was relatively concentrated, though there was an excessive number of different types, while the manufacture of handle bars was overly dispersed. Entente entre fabricants de jantes et de guidons, fourth report 310 (ministerial decision). The Commission had only noted the need for specialization and standardization in the industry. Entente entre fabricants de jantes et de guidons, fourth report 309.

50. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 313.

51. Entente entre fabricants de fils et cables électriques isolés, second report 27 (ministerial decision), Entente entre fabricants de demi-produits en métaux cuivreux, fourth report 308 (ministerial decision).

52. The Commission has not limited itself to consider only those justifications expressly mentioned in Article 59 *ter*, 2° ("having the effect of improving or extending the outlets of production, or of assuring the development of economic progress by means of rationalization and specialization"). Second report 18. It has stated that it has also allowed as justifications "the creation of conditions which favored the concentration of enterprises, . . . the improved coordination of investments, the more rational use of labor, and the improvement in the quality of products, etc." *Ibid.* The president of the Commission has remarked that the Commission had interpreted the reference to rationalization and specialization as examples of measures contributing to

toward research, standardization and specialization, and the latter toward mergers and concentration of production to form units of efficient size. Of course, there is much overlap between these two categories as, for example, a specialization agreement is a method of permitting firms, without increasing their individual sizes, to increase the scale of their production of particular products.

A second division could be made between agreements at the level of production and those at the stage of sales and distribution. While the Commission looks severely on price fixing and other agreements tying up the sales or distribution processes, the decline in competition which may result from a concentration of production facilities or a specialization agreement seems to be of no concern so long as there is some check on market power, such as the existence of one other large producer,[53] the threat of import competition,[54] the countervailing power of a large buyer,[55] or even the presence of price control.[56]

The division between technical and organizational programs, however, will be used in the examination of the justifications which the Commission has accepted under article 59 *ter*. The distinction between those agreements at the level of production and those at the stage of distribution should not be forgotten, and it will be seen that most of the justifications accepted by the Commission occur at the level of production and most of the practices which are condemned involve distribution.

The principle of allowing restrictive practices to be justified by various technical and organizational programs assumes, of course, that free competition is not the best regulator of the market. This assumption, which is fundamental to all the French post-war governmental interventions, also forms the basis of the Commission's interpretation of article 59 *ter*. The Commission seems to believe that organization of an industrial section by an entente is normally beneficial and that it should only intervene if the practices can be shown to be undesirable.

Two practical effects should also be pointed out. First, that the Commission seems to have adopted a series of assumptions, such as the desirability of concentration of production, which are not re-examined in the light of each factual situation. Second, faced with almost impossible questions, such as whether an industry would

economic progress and that it had accepted as justification any measures which lead to such an end. Toutée, *op. cit. supra* note 18, at 176.

53. *E.g.*, Entente entre fabricants de lampes électriques, second report 22.

54. *E.g.*, Entente entre fabricants de raccords en fonte malléable, fifth report 20.

55. *E.g.*, Entente dans l'industrie de réparation du matériel roulant ferroviaire, fourth report 315.

56. *E.g.*, Entente dans l'industrie des tuyaux en fonte, fifth report 29.

have made larger investments for research if there had been no entente, the Commission has not demanded a rigorous proof, but seems to have relied more on a general appreciation of whether the industry appeared to be sufficiently modern and progressive. This approach is also dictated by the procedure under article 59 which combines two relatively limited investigations, one by agents of the Service for Economic Investigations and the other by the reporter, with a brief, rapid examination of the case by the Commission.

A. *Programs for Technical Progress*

The Commission favors programs of research and development, but seems to attach more importance to specialization and standardization agreements. While great stress is placed on research, it is regarded as something which can be best accomplished by joint efforts rather than as a matter for competition. In the *Abrasives*[57] case the Commission found that the technical independence of the industry was not assured, since the largest producer used the research department of its parent, a foreign corporation, and only one French company had its own laboratory. It remarked that it would have been appropriate for the entente to have promoted an agreement of the small and medium sized firms to set up common research facilities.[58]

The *Plate Glass*[59] case would seem to provide an extreme example of this desire to achieve cooperation in research. One of the largest French corporations, Saint-Gobain, and Boussois, another large firm, accounted for about 90 per cent of the French production and were also in dominant positions in the Common Market. From information secured from a source within the industry, it appears that the reporter was aware of the important research laboratories possessed by each company, and that he was willing to concede that this technical rivalry had its advantages in preventing the industry from becoming static. However, he apparently concluded in his report that this competition had led to an excessive proliferation of special products such as insulating glass and safety glass and that it would have been preferable if the producers had used their research facilities in common to develop standardized products rather than duplicating their efforts to promote rival products destined for the same use. Though the Commission did not consider the question, the Minister declared that "it would be desirable, as far as it is compatible with the continuance of the independence of the two principle companies, to

57. Entente entre fabricants de meules et produits abrasifs agglomérés, first report 13.
58. *Ibid.*
59. Entente entre fabricants de verre plat, third report 218.

reduce to a minimum the duplication which can arise in research."[60]

While one might well adopt the attitude of the Commission technique des ententes and the Planning Commission[61] that in dispersed industries centralization of research is necessary to keep up with technical advances and international competition, the theory of the present case seems to reject the idea of any competition in research.

Standardization and specialization agreements are often directed toward the same end: to limit the number of products made by each firm so that each will be able to produce more efficiently and at a lower cost. The emphasis on specialization is partially a result of a belief that the units of French business are too small and too diversified. The role of the size of business units in economic growth will be discussed later in connection with the French attitude toward concentration and mergers.[62] It should be noted now, however, that many of the objections to the small firm are based on the lack of efficiency of production methods. Technical advances are often hampered by the attitude that manufacturers should try to preserve customers by diversifying to fill every requirement of an existing customer, rather than trying to gain new markets for a specialized line of products.[63] Specialization agreements are useful to reverse this tendency and permit larger scale production without reducing the number of firms in an industry.

In two cases involving agricultural hand tools, the Commission examined an industry in which demand had fallen sharply with the growing mechanization of agriculture. In the first case,[64] although disapproving the provisions concerning prices and quotas, it approved the efforts toward specialization and standardization. Two companies had abandoned the manufacture of forks and hooks, and, of the remaining four, there were only two, and exceptionally three firms which made each model. The measures of standardization were equally modest. The Commission noted that, following an agreement among the entente members, the number of different types of forks and hooks had been reduced from 82 basic and 165 derivative models

60. *Id.* at 220 (ministerial decision).

61. *E.g.*, for the transformation industries, COMMISSARIAT GÉNÉRAL DU PLAN, QUATRIEME PLAN DE DÉVELOPPEMENT ÉCONOMIQUE ET SOCIAL (1962-1965) at 381-82 (1962). The transformation industries include mechanical and electrical engineering and textiles which account for well over three quarters of the total output, but other businesses such as leather goods, paper, plastics, toys and even dry cleaning are also represented. HACKETT & HACKETT, *op. cit. supra* note 8, at 170.

62. See text accompanying notes 79-105 *infra.*

63. See SHEAHAN, PROMOTION AND CONTROL OF INDUSTRY IN POSTWAR FRANCE 133 (1963), VASSEUR, *op. cit. supra* note 10, at 20.

64. Ententes entre fabricants d'outils agricoles à main, third report 216.

to 74 basic and 137 derivative models.[65] With the limited number of different types of these tools and the relative ease of changing from the manufacture of one type of model to another, these measures would probably not increase the scale of production of each company. However, they would not noticeably reduce competition.

Four years later, the Commission returned to its examination of the agreements among the manufacturers of forks and hooks.[66] It found a continuation of the modest technical programs which had improved the efficiency of production. The number of models had been reduced to a total of 172, the number of producers to three, and in most cases only one firm made each model. The Commission, however, adopted a more severe attitude toward the entente stating that these technical programs, which seem wholly comparable to those examined in the earlier cases did not justify the restrictive practices.[67]

Measures of standardization and specialization would seem most useful in dispersed industries with numerous firms making practically identical products. The Commission, however, has looked for standardization and specialization in all industries. In the *Light Bulb Base*[68] case the Commission considered the legality of a specialization agreement in which three of the four producers decided that each would henceforth limit itself to the manufacture of a particular type of base. As a measure to guard against the risks of these changes, the companies had also agreed that these products would be exchanged among themselves at a special rate and sold to the public at a common price. The Commission recognized that the agreement gave each of the three a quasi-monopolistic position. This monopoly power was, moreover, increased by the fact that the fourth company was an integrated manufacturer producing essentially for its own use. However, it approved the agreement believing the measures of specialization had permitted, by efforts in retooling and technical reorganization, and in spite of the high cost of labor and raw materials, a lowering of prices nearer to those of similar foreign products.[69]

Returning again to the *Plate Glass*[70] case, the Commission listed

65. The lack of standardization in the industry has been a continuing problem and Vasseur cites an investigation carried out in 1938 which disclosed that there were 1300 models of agricultural forks and that it was estimated that if this number was reduced to 40 the production cost could be halved. VASSEUR, *op. cit. supra* note 10, at 20.

66. Entente entre fabricants de fourches et crocs, fifth report 35.

67. The change in attitude can also be attributed to the fact that the restrictive practices which the commission had condemned four years earlier had hardly been modified in the interval. *Ibid.*

68. Entente entre fabricants de culots de lamps électriques, second report 23.

69. *Ibid.* The Commission treated in a similar fashion specialization agreements between dominant companies in Ententes dans l'industrie des tubes d'aeier, fifth report 16; Entente entre fabricants de raccords en fonte malléable, fifth report 20.

70. Entente entre fabricants de verre plat, third report 218.

among the justifying factors under article 59 *ter* certain specialization agreements which had limited the production of certain special products to a single company. As well as providing another example of approval by the Commission of a further diminution of competition in an industry already dominated by two companies, this statement raises questions as to the technique by which the Commission establishes its justifications. From information gathered from members of the industry, it seems that the degree of specialization was very slight and that it had actually declined in the sixteen months preceding the examination of the case. It appears also that the reporter was well aware of these facts and pointed them out to the Commission.

An examination of the technical programs approved by the Commission shows that it has a very limited belief in competition. Its general approach seems to be to allow restrictive practices unless they can be shown to have harmful results, not to strike them down unless they can be shown to have a valid purpose.

The Commission has often held it to the credit of an entente that it has managed to create a climate of confidence favorable to increased productivity[71] or to specialization.[72] It is also willing to allow members of an industry to stablize their market shares through quota agreements as a prerequisite to the implementation of various technical programs, since it apparently believes that manufacturers often will not take the risks of programs such as specialization unless they are guaranteed a certain share of the future market through quota agreements.[73]

Beyond all questions of choice of standards, the procedure of balancing the good and bad elements of an entente create incredibly difficult factual issues. Enterprises will always allege, and in any reasonably progressive industry will be able to show, such developments as new patents, increased standardization or specialization.

The Commission has frequently said that it will isolate the contribution of the entente and will compare the entente's real effect with the situation that would probably have resulted from free

71. *E.g.*, Entente entre fabricants de fils et cables électriques isolés, second report 25.

72. *E.g.*, Entente dans l'industrie des verres d'optique médicale et de lunetterie, fifth report 31.

73. *E.g.*, Entente entre fabricants de demi-produits en métaux cuivreux, fourth report 307. See generally the article of Termont, the president of a company of French industrial consultants, who states that for specialization it is necessary that there be agreements to guarantee to cach company its share of the market and its price. *L'évolution des ententes professionnelles*, in ENTENTES, FUSIONS, ACTIONS COLLECTIVES (EXPÉRIENCES DE COLLABORATION INTER-ENTREPRISES) 32, 38 (1962). He also notes that cntentes could freely use all clauses which restrained competition when they contributed directly and essentially to the realization of goals wished by the Commission technique des ententes. *Id.* at 40, Interview in Paris, Sept. 30, 1964.

competition.[74] It has recognized that increases in demand, or pressure from large buyers may encourage economic progress.[75] Such investigations, however, are not pushed very far and one often feels, after reading the conclusions of the reporter or the opinions of the Commission, that the role of an entente in achieving a particular result is only evident if one believes that ententes are usually necessary to carry out such programs.

In an attempt to ascertain the role of ententes in the achievement of particular programs, several officers of companies and trade associations were questioned. While they emphasized the useful role of ententes in encouraging economic progress, some of their replies to specific questions were more skeptical. The Commission's statement that a certain technical program was probably made possible by an entente was questioned by one company official who did not doubt that his company would have carried out the program anyway. In another instance, an officer of a trade association said that he felt that a particular entente was not very beneficial and probably owed its justification under article 59 *ter* more to the arguing skills of the president of the trade associations than to its own merits.

The Commission seems to rely on a belief that ententes are usually helpful and may even be essential to various technical programs. It will examine the clearer examples of external influences such as a marked increase in demand[76] and consider facts such as that the non-members of the entente had carried out equally important technical programs.[77] However, it does not go beyond these limited steps and seems to base its judgment on a general appreciation of whether an industry seems sufficiently modern. Its opinions then seem to list, somewhat indiscriminately, numerous elements of justifieation for the entente.[78]

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74. *E.g.*, first report 6.

75. *E.g.*, Entente entre fabricants de fils et cables électriques isolés, second report 25.

76. *E.g.*, *id.*

77. *E.g.*, Entente entre fabricants de tuyaux en caoutchouc, fifth report 18.

78. For example in the *First Copper Products* ease, the Commission listed all the results favorable to economie progress which had been found in the course of the investigation such as the increase in production and exports, the efforts toward standardization and improvement of quality, the specialization agreements, the measures toward concentration of production and the creation of common sales ageneies. The Commission then remarked that the quotas had undoubtedly favored the specialization agreements. Entente entre fabricants de demi-produits en métaux cuivreux, fourth report 307. The text of the Commission's opinion, however, gives no indication whether the other programs could also be attributed to the existence of the quotas. An examination of the reporter's memorandum, which the Commission closely followed in its diseussion of whether the entente could be justified, seems to indicate that the Commission intended to attribute all these programs to the entente. Trouvet, *Rapport sur les ententes existant entre les fabricants dedemi-produits en cuivre et en laiton* 8-10 (1957). The reporter however believed that the increase in production was largely a result of the demand

B. *Concentration of Industry*

The Commission's opinions reflect an unqualified enthusiasm for concentration, regardless of whether an expanding or a declining industry is under consideration. They show no indication of the often expressed United States preference for small businesses and little fear of oligopolists setting prices by tacit agreement or dominating consumer choice.

French postwar economic analysis usually starts from the assumption that the units of business are too small; it wants to reverse the prewar bias in favor of the small firms.[79] An industrial study by Jean-Marcel Jeanneney, the Minister of Industry from 1959 to 1962, summarizes this attitude.

> The small firms, however, too often lagged behind possible technical progress. The reasons are intellectual and financial. New techniques are hard to find out about, to choose and to put into operation. The head of a small firm who has to keep track of everything, often lacks the time and qualifications necessary, whereas the large business can devote certain employees to the documentation of new processes, and to research and development. Since the direction of family firms is hereditary, they risk falling into incapable hands. When they need to carry out investment, they cannot tap public savings through bonds or stocks. Their owners, fearing the loss of full control of their business, often fail to use the financial help that they could obtain from banks or individuals.[80]

The solution applied to the problems of small firms has been a universal encouragement of concentration and interfirm co-operation. While a policy of economic concentration could be developed alongside a vigorous promotion of competition,[81] these two policies are often considered to be contradictory. The general attitude in France favors all interindustry agreements in order to promote more rational utilization of production facilities and for the role they may play in preparing and encouraging companies to merge.[82]

The enthusiasm for concentration and interindustry co-operation can be seen in the attitude of the Planning Commission[83] and the various measures to encourage concentration taken by the government.

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of large buyers. *Id.* at 8. Furthermore, he considered that the nature of the product limited the feasibility of its exportation. *Id.* at 2.

79. SHEAHAN, *op. cit. supra* note 63, at 240-41.

80. JEANNENEY, FORCES ET FAIBLESSES DE L'ÉCONOMIE FRANCAISE 258-59 (1956).

81. HOUSSIAUX, LE POUVOIR DE MONOPOLE 296 (1958).

82. ENTENTES, FUSIONS, ACTIONS COLLECTIVES (EXPÉRIENCES DE COLLABORATION INTER-ENTREPRISES) 77-78, 141 (1962).

83. SHEAHAN, *op. cit. supra* note 63, at 180. For the transformation industries, see COMMISSARIAT GÉNÉRAL DU PLAN, QUATRIEME PLAN DE DÉVELOPPEMENT ÉCONOMIQUE ET SOCIAL (1962-1965) at 362 (1962).

> The Fifth Plan thus proposes the establishment, or the reinforcement when they already exist, of a small number of *firms or groups of international size* capable of confronting foreign groups in the areas where competition has become established: technical autonomy, size of production and distribution units, ability to deal with different groups of customers and compete in different geographic markets, a reserve of power so as to be able to counter rapidly the appearance of new products, etc. In the majority of the important branches of industry (aluminum, steel, machinery, electrical construction, electronics, automobiles, aeronautics, chemistry, pharmaceutics, etc.) the number of these groups ought to be very limited, often reduced only one or two.[84]

The Planning Commission never seems to have asked itself whether only diseconomies of scale might result from a particular merger or whether it might be dangerous to allow a firm to reach a dominant position in the French market. With the assumption that the French firm is usually too small, the first question probably has rarely been posed. As to the second, it probably would be answered that the real problem is to insure that the units of French business are large enough to confront Common Market competition, and that any dominance in the French market would be countered by international competition.[85]

The Planning Commission relies heavily on trade associations both for the assembling of information in the development of the plans[86] and in the transmission of its recommendations to the individual companies.[87] In a discussion of the transformation industry, it said:

> Given the still very dispersed structure of most branches of this industry, the small and medium sized firms which form the largest part of the various branches are not sufficiently well equipped to deal with all the problems that they meet. They should, therefore, have recourse to collective measures, with their multiple goals and procedures: concentration or specialization agreements between companies; creation of common research departments, workshops, sales networks in France or in foreign countries; laboratories; intervention of collective financing arrangements (common surety funds, groups for collective borrowing, joint ventures for the taking of minority interests or for the financing of decentralization from the Paris region); technical centers, and centers for increased productivity.
>
> These programs may be brought about either by the companies within an industrial branch or a region, or, which is more and more frequent, by the corresponding trade association which not only assists its members as far as information (statistics, market studies and studies of the general economic situation), but also makes every effort to put at the disposition of

84. COMMISSARIAT GÉNÉRAL DU PLAN, CINQUIÉME PLAN DE DÉVELOPPMENT ECONOMIQUE ET SOCIAL (1966-1970), at I 68-69 (1965).

85. Interview with Henri Bustarret, Commissariat Général du Plan, in Paris, July 3, 1964. See Commissariat Général du Plan, *op. cit. supra* note 84, at I 68.

86. HACKETT & HACKETT, ECONOMIC PLANNING IN FRANCE 172 (1963).

87. SHEAHAN, *op. cit. supra* note 63, at 178-79.

> its members a large number of services, which usually only the larger firms can provide for themselves.[88]

Governmental enthusiasm for concentration and interindustry cooperation is also shown by the laws providing for groupements *professionnels agréés* and *sociétés conventionnées*. The creation of the former was authorized in 1955[89] to bring companies together for the purpose of rationalizing production and distribution, and to facilitate the reconversion of certain firms. These groups where set up especially to buy and close companies in difficulty which were willing to sell out. The government has encouraged them by granting tax advantages, but has also subjected them to certain surveillance.[90] Businessmen however have shown little enthusiasm and even distrust for this method of industry reorganization, and few of these groups have been created.[91] The latter are designed to help small and middle sized companies carry out a whole series of activities in common, such as developing programs of research, reducing their distribution costs, or increasing their exports.[92] Here again there is governmental supervision. The group has to submit and have approved a program so as to be able to enjoy certain tax and other advantages. These groups have had considerably more success.[93]

In conclusion, an interview of the Prime Minister, Georges Pompidou, can be cited:

> French industry should increase its efforts to create financial and industrial units which are larger than the present ones. It is necessary to proceed toward mergers, toward ententes, toward concentrations so as to create French firms of an internatonal size, of which there are practically

88. COMMISSARIAT GÉNÉRAL DU PLAN, *op. cit. supra* note 83, at 381-82. See also Boudin, "Extrait de la discussion finale" in ENTENTES, FUSIONS, ACTIONS COLLECTIVES (EXPÉRIENCES DE COLLABORATION INTER-ENTREPRISES) 164 (1962).

89. Decree No. 55-877, June 30, 1955, [1955] J.O. 6640, Decree No. 55-1369, Oct. 18, 1955, [1955] J.O. 10353, Circular, Jan. 21, 1956, [1956] J.O. 828. The decree of Oct. 18, 1956 provides at art. 5 that the "Commission technique des entcntes . . . can ask the appropriate ministers for any information on the activities of the groupements professionnels agréés. The Commission may also suggest to the Minister for Finances and Economic Affairs or to the Minister for Industry and Commerce revocation of the official approval provided for by paragraph 3 of article 4." Furthermore, the Circular of Jan. 21, 1956 states that "the groups must not act in a manner contrary to the regulations concerning ententes or to the case law of the comité [*sic*] technique des ententes." The Commission briefly discussed these dispositions in its first report, first report 7; but it has made no subsequent mention of this legislation.

90. VASSEUR, *Les formes juridiques de la collaboration industrielle*, in DIX ANS DE CONFÉRENCES D'AGRÉGATION, ETUDES DE DROIT COMMERCIAL OFFERTES A JOSEPH HAMEL 101, 104-06 (1961).

91. *Id.* at 106.

92. Ordinance No. 59-248, Feb. 4, 1959, [1959] J.O. 1754.

93. Vasseur notes that at the eud of 1960 there were 34 *sociétés conventionnées* and 14 applications were in the course of being studied. VASSEUR, *op. cit. supra* note 90, at 116.

> none at the moment. It is a fact that now the largest French companies are small, not only in comparison to American companies, but also in comparison to large Europeon firms.[94]

Several commentators have questioned the validity of the assumption that concentration has always been useful in French industry and will continue to be so. Kindleberger doubts that the general increase in the size of the family firms has been a major cause of the economic revival, and attributes it more to a change in attitude of the companies themselves.[95] Sheahan questions that large firms have all the advantages that are often attributed to them, noting that if they did and there were no discriminations against them "one would expect that a long-run test would reveal a pronounced increase in their relative role, measurable as an increase in concentration."[96] He notes, however, that this was not the case in the United States during the first half of the twentieth century where the relative positions of the largest companies did not significantly change.[97] Sheahan agrees that the inefficient fringe of small producers has been a major problem of French industry,

> but the real possibility of gain from greater market pressure to eliminate those firms which are inefficient may easily become confused with the less helpful idea that greater size automatically means superior efficiency and should therefore be promoted actively by any and all means.[98]

Houssiaux, though recognizing a need for increased concentration in France, wants it to be accompanied by a control of oligopolies so as to lead toward economic expansion and increased competition.[99] He also questions the French enthusiasm for mergers and notes that, with the number of unsuccessful mergers, this method of reorganization ought to remain exceptional.[100]

The Commission techniques des entes has shown itself hospitable toward all measures of concentration, condemning rigid quotas and price agreements when they tend to preserve small inefficient units. In its fourth report, it stated that increased concentration would have been a factor in lowering the cost of production in two cases which it had examined.

> In passing one could call attention to the contrast between this assumption

94. Pompidou, *Interview*, Entreprise, June 20, 1964, p. 43-45.
95. KINDLEBERGER, *The Postwar Resurgence of the French Economy*, in IN SEARCH OF FRANCE 130 (1963).
96. SHEAHAN, *op. cit. supra* note 63, at 245.
97. *Id.* at 245-46.
98. *Id.* at 245.
99. HOUSSIAUX, *op. cit. supra* note 81, at 296.
100. *Id.* at 324.

> favoring concentration—based after all on French economic realities—and the contrary assumption which forms the base of certain foreign legislation. One could think that this assumption ought to be revised when the commission examines ententes covering a larger geographic area, that of the Common Market, or when an excessive concentration ceases to correspond to an economic optimum and becomes a way to attain a dominant position and possibly to abuse it.[101]

With this expressed attitude, it seems likely that the Commission will not examine the merits of particular concentration agreements but rather regard them all as contributing to economic progress. It has given no indication of what it considers to be an economic optimum or when it will undertake such an investigation. Moreover, the cases in which it has examined the question of dominant position show that it is worried little by the existence of monopolies in the French market.[102] The wholehearted approval of concentration by the Commission is accompanied by a rather limited belief in competition. Although the French antitrust laws were apparently set up to promote competition, the Commission has not moved far from traditional French attitudes. There is a tendency in France, on the one hand, to cite the thirties as an example of a period that relied upon competition;[103] and, on the other, to point out that since the war an apparatus of planning, price control, selective promotion and protection has been substituted for the inactive prewar market.[104] It should be remembered, however, that the revival of competition in some industries and the excellent demand conditions have also encouraged the French economic expansion.[105]

American ideas of free competition are often considered only as a sporting rivalry and as more of a mystique than a technique.[106] According to such reasoning, a vigorous French antitrust policy would be disapproved as hindering interindustry co-operation, regarded as helpful to economic progress and essential if French businesses are to be competitive in the Common Market.

The Planning Commission rarely mentions the possibilities of competition as it apparently prefers a more consciously planned procedure of market organization.[107] As with its encouragement of concentration,

101. Fourth report 305. The two cases referred to were the Entente entre fabricants de coeurs d'aiguillages en acier moulé au manganèse, fourth report 311, and the Entente dans l'industrie de la meunerie parisieune, fourth report 316.

102. See text accompanying notes 134-50 *infra*.

103. SHEAHAN, *op. cit. supra* note 63, at 250.

104. *Id.* at 251.

105. *Ibid.*

106. MARCHAL, PRÉFACE TO HOUSSIAX, CONCURRENCE ET MARCHÉ COMMUN vii (1960).

107. Interview *supra* note 85, and see also the Planning Commission's discussion of the need for co-ordination of investments in the Common Market in which it notes

the Planning Commission seems to believe that the risk of the existence of restrictive practices can be discounted in the face of the competition from the rest of the Common Market. These observations can also be supported by the exception the Planning Commission made in the Fourth Plan for the sector of commerce where it declared that competition was to be an essential part of the reform of the distribution circuits.[108] Here there is neither the danger nor the challenge of Common Market competition.

The Planning Commission seems to attach little importance to the domestic antitrust legislation.[109] The only recent mention of the laws seems to be in the cited example, and even there attention is directed toward vertical agreements: refusal to deal, resale price maintenance, and discriminatory practices. There is no mention of the dangers of horizontal agreements. One of the committees which participated in the elaboration of the Third Plan said that the realization of mergers and specialization agreements was hindered by the existence of the French antitrust legislation.[110] However, when the committee returned to this question in its report before the Fourth Plan, it was able to note that the domestic legislation "did not provide a real obstacle to the realization of agreements which were desirable on the national level."[111] It was now concerned that the Common Market antitrust provisions would hinder structural reforms in French industries. Besides suggesting that the domestic legislation may only have a modest effect on the national economy, this statement shows a clear preference for market reorganization on a noncompetitive basis.

The Commission technique des ententes favors concentration both in industries which are expanding or which are already highly concentrated and in those which are becoming obsolescent or in which demand has permanently diminished. In the *Electric Light Mfrs.*[112]

that it would be illogical to allow a disorderly competition which would be susceptible of causing serious losses to certain companies and which would lead to overproduction in certain sectors contrary to public policy. Commissariat Général du Plan, *op. cit. supra* note 83, at 102.

108. Commissariat Général du Plan, *op. cit. supra* note 83, at 400-09. The extremely dispersed nature of this sector could also be cited as a reason for not trying to rely on the usual planning techniques. There is no indication, however, that the Planning Commission has ever decided to change its usual planning techniques because the low level of concentration may hinder their effectiveness, and the plan for commerce does not differ materially from those for other sectors. Sectors of the transformation industries, such as laundries and dry cleaning, also have low levels of concentration. For the Fifth Plan, see Commissariat Général du Plan, *op. cit. supra* note 84, at I 86-88, II 248.

109. See Interview *supra* note 85, SHEAHAN, *op. cit. supra,* note 63, at 178-79.

110. Commissariat Général du Plan, *Troisième plan de modernisation et d'équipement, Rapport général de la commission des industries de transformation* 127-28 (1958).

111. Commissariat Général du Plan, *Quatrième plan de développement économique et social, Rapport général de la commission des industries de transformation* 118 (1961).

112. Entente entre fabricants de lampes électriques, second report 22.

case the market was largely divided between Philips-Compagnie des lampes, representing fifty-five per cent of the production, and Claude Paz et Visseaux, a company which had been formed by a governmentally encouraged merger of seven small producers,[113] which accounted for thirty percent. After examining the quotas and other restrictive practices, the Commission declared that to the extent that the entente had created conditions favorable to the merger from which a lowering of the production costs could be expected, it could be regarded as having favored economic progress in the sense of article 59 *ter*. While the economic situation may have made it impossible for the seven small producers to compete with Philips, the question was not considered.

Later, in the *First Copper Products* case,[114] the Commission approved the acquisitions carried out by two of the three largest companies in the industry, and stated that this concentration and various specialization agreements between the three largest companies had favored the creation of large and modern production facilities.

In an industry which is becoming obsolescent or in which there has been a substantial decrease in demand, the Commission prefers a planned elimination of the inefficient firms rather than leaving the matter to competition. In discussing the various measures which could be taken in the hypothesis of a sharp reduction in demand, the Commission noted that it had been twice called upon to examine industries in which there had been such a decline, and said:

> Elimination of a certain number of enterprises by free competition supposes a temporary collapse of prices, susceptible to be followed by a reaction in the opposite direction if the surviving firms either are not those with the lowest cost or are in a monopolistic or ologopolistic position and can freely fix their prices . . . .
>
> In other words, the Commission has not automatically preferred a system of selection based on bitter competition and price wars; this position is normal for a body charged with applying a law which differs markedly on this point from the principles of American antitrust law. . . .[115]

Little comment need be added to this quotation, except to note that in neither of the two industrial sectors to which the Commission

113. Houssiaux states that the rôle of the *Commission technique des ententes* was the determining factor in bringing about this merger but cites no authority. Houssiaux, *op. cit. supra* note 81, at 389. The Commission only says in its opinion that the decision was reached after governmental intervention. Furthermore neither the administrative report nor the reporter's memorandum prepared before the Commission's second examination of the entente in 1964 gives any indication that the Commission had played an active role in encouraging the merger of the seven small companies.

114. Entente entre fabricants de demi-products de métaux cuivreux, fourth report 307. For the factual situation see Trouvet, *op. cit. supra* note 78, at 8-9.

115. Fourth report 305.

referred was there a company near a dominant position. Moreover, in one there was the further restraint that the industry was dependent upon a single powerful client, the French railway;[116] and in the other there was already extensive governmental regulation.[117]

A second possibility considered by the Commission is the maintenance of all the companies with a reduction in the production of each proportionate to the overall decline in demand.[118] In the *Milling*[119] case the Commission objected to such a system, using quotas and penalties, because it had hindered an evolution in the industry which could have permitted a reduction of costs by a concentration of production in a smaller number of mills. The Minister, in his decision, noted that the members of the entente, which included a majority of the millers in the Paris region, were operating at less than forty-five per cent of capacity, while the nonmembers' production exceeded seventy per cent of their capacity.[120] While the disapproval of this quota agreement is consistent with theories which favor competition, it proceeds here from a belief in concentration.

Occasionally, the Commission has shown sympathy for the argument that a limitation and division of production can manage to stabilize temporarily an industry in the event of a sharp decline in demand.[121] In the *Conveyor Belt*[122] case, however, the Commission said that the entente had failed to show that fixing quotas and recommending prices had been necessary; and that with the changes in the economic situation, the quotas should be made variable to allow changes in market shares.

The method of meeting the problem of excess supply preferred by the Commission is the "elimination of a certain number of enterprises by a somewhat authoritative selection based on criteria of productivity."[123] In the *Railway Repair Shop*[124] case, it examined an industry in which the orders from the French railway, practically the only client, had dropped by almost two-thirds during the preceding six years. After the war the French railway's supply of rolling stock was depleted and in bad condition, and necessarily it called on all its former repair shops and numerous other plants. With the reparation

116. Entente dans l'industrie de réparation du matériel roulant ferroviaire, fourth report 315.
117. Entente dans l'industrie de la meunerie parisienne, fourth report 316.
118. Fourth report 305.
119. Entente dans l'industrie de la meunerie parisieune, fourth report 316.
120. *Id.* at 317 (ministerial decision).
121. Entente dans l'industrie du savon de ménage, first report 8.
122. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 312.
123. Fourth report 305.
124. Entente dans l'industrie de réparation du matérial roulant ferroviaire, fourth report 315.

of the wartime deterioration, the utilization of larger cars, a more efficient use of rolling stock, and a drop in total railroad traffic, the number of shops declined from a high of 110 to 86 in 1948 and to 33 in 1951. The total hours worked dropped from 39.5 million in 1948 to 14.3 in 1954. In May 1954, the French railway notified the industry's trade association that the volume of work would drop to 9.4 million hours for the following year.[125] The President of the trade association then saw the situation as a choice between the elimination of certain firms by an extremely bitter competition and the closing of certain companies against the payment of an indemnity furnished by those companies which continued. The members of the trade association adopted the latter solution, and an impartial expert, M. Surleau, was chosen to decide which enterprises should be closed down. After a consultation with the various governmental bodies concerned, but apparently without attempting to either visit or contact the individual companies,[126] M. Surleau recommended that eleven of the remaining thirty-three shops should be closed and expressed his hope that these eleven would receive priority to governmental aid for reconversion and payments from the shops which continued.[127] Although noting that he was not obliged to explain the reasons for his choice, M. Surleau briefly listed the criteria he had used. He explained first that he attached less importance to a geographical convenience for the French railways than to the preservation of shops in the less industrialized regions of France, in which the re-employment of about 4,000 workers would also be more difficult. He also considered the productivity of certain particularly well equipped and organized companies; the ease of reconversion, which might encourage the preservation of the more specialized enterprises; and the prices charged by each. Finally he said that, all things being equal, the more recent entrants should be eliminated first.[128] The President of the trade association refused to accept the protests of one company that M. Surleau's conclusion be re-examined. The decision was then enforced by the French railway which wrote each of the eleven that its market would not be continued after July 1, 1955.[129] The Commis-

125. The figures were cited in a letter from an expert named by the trade association to its president. Letter from Surleau to the Président of the Syndicat des réparateurs de matériel roulant de chemin de fer, Dec. 13, 1954. [hereinafter cited as Surleau report.]

126. See Surleau report 4. Me Lussan, an attorney for one of the companies eliminated in a later civil suit for damages, explained that M. Surleau had in no way entered into contact with his client before reaching his decision as to which companies should be shut down. Me Lussan added that he did not see how the Surleau report could be considered as a serious study. Interview in Paris, Sept. 11, 1964.

127. Surleau report 5.

128. *Id.* at 3-4.

129. Letter from the Direction du matériel et de la traction, Société nationale des chemins de fer francais, Dec. 24, 1954.

sion technique des ententes unhesitatingly accepted these measures.

> Considering that it results from the investigation that the measures taken have resulted in a concentration of firms which is likely to assure more efficient operations; that these measures are based on considerations some of which are social, but others of which tend toward a better geographical and technical allocation of orders, and, in a word, to an organization more in conformity with economic progress.[130]

The Commission thus approved the action of a private trade association which, after a fairly superficial investigation, eliminated the business of one third of its members. Such solutions seem so capable of abuse that they should either be governmentally directed or at least reviewed by the Commission or the courts. The government's role here seems to have been limited to M. Surleau's consultation with certain governmental bodies and acceptance of his recommendations by the French railway. The Commission refused to examine the basis for the elimination of particular companies and said, in relation to the Mariage Company, which had provoked the investigation by a complaint to the Minister,

> Considering that without doubt the expert limited himself to indicate the general criteria which he relied upon, without stating the reason for each recommendation; and that if the Commission technique des ententes is consequently not in a position to verify the merits of the decision taken with regard to the Mariage Company in the light of the expert's criteria, it is not appropriate for the commission to make a recommendation on this point.[131]

The civil courts, however, were not willing to allow such a drastic industry reorganization. The Mariage Company in two suits recovered largely nominal damages and more importantly, finally managed to secure new orders in 1961.[132] In the first case the Cour d'Appel of Paris held that the trade association had exceeded its powers when it provoked the elimination of Mariage, thus committing a wrong which should be indemnified. The court added that the prohibitions of article 59 supported its conclusions.

As the consideration of the Commission's attitude toward concen-

130. Entente dans l'industrie de réparation du matériel roulant ferroviaire, fourth report 315.

131. *Ibid.*

132. Etablissements Mariage v. Syndicat des réparateurs de matériel roulant de chemin de fer, Tribunal Civil de la Seine, Jan. 16, 1957 (unreported), *rev'd*, Cour d'Appel de Paris, Nov. 4, 1959, [1960] J.C.P. II.11488 (note R. Plaisant), [1960] Gazette du Palais [hereinafter cited as Gaz. Pal.] I.168, [1961] Annales de la propriété indnstrielle 163. Etablissements Mariage v. Syndicat des réparateurs de matériel roulant de chemin de fer, Tribunal de Grand Instance de la Seine, Feb. 20, 1962 (unreported), *aff'd*, Cour d'Appel de Paris, Juue 11, 1963 (unreported).

tration would suggest, it is little worried by monopolies or dominant positions. The first four reports rarely seem to have examined these problems.[133] While the Commission considered, among the cases included in the latest report, several situations in which companies had dominant positions, it does not seem to have changed its attitude toward concentration. Moreover, the Commission has not interpreted the new French law directed against the abuse of a dominant position as requiring any change in its policies.[134]

In the first of these cases contained in the fifth report, the Commission examined an entente between the two dominant producers of steel pipes and a second agreement which linked these two producers with the majority of the other manufacturers.[135] In a wholly typical opinion, it disapproved of quotas and other agreements and recommended that various technical programs be increased. None of the recommendations made would however in any way have tended to separate the two largest manufacturers. It limited itself to saying, in an indirect reference to the existence of their dominant positions, that if price control was abolished and if a sharp increase in profit margins followed, or if the functioning of the entente revealed that it was impossible for new companies to enter the market, the case should be immediately brought again before the Commission.

The *Road Material*[136] case initially would seem to show a change in the Commission's position. In the fifth report, this case was cited for the proposition that the commission considered that it was "obviously desirable 'to prevent a group from obtaining a dominant position.' "[137] However, when the statement is put into context, it seems to proceed more from a partly nationalistic fear of foreign competition than any distrust of concentration. The entente had been formed between several French quarry-owners and a Belgian group, which apparently was more developed technically and had a larger production and greater financial resources. The agreement had been established with the approval of the French governmental agencies concerned in order to meet the problems created by new road building techniques and to attenuate for the French companies the

133. In one case the Commission said that in the light of the characteristics of a particular market the end of the quota agreement would probably have no effect other than to favor the formation of a biopoly. This statement, however, is contradicted by another in the case in which the Commission objected that the quotas had hindered concentration. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 312.

134. See fifth report 11.

135. Entente dans l'industrie des tubes d'acier, fifth report 16.

136. Entente franco-belge sur le marché des matériaux de viabilité, fifth report 22.

137. See fifth report 11.

consequences of the freer trade to be allowed under the Treaty of Rome.[138]

The Commission in analyzing the situation, stressed the strength of the Belgian group:

> Considering that the Belgian group, by the magnitude of its production and by the importance of its financial backing, would have, in a situation of free competition, a position much stronger than that of the French quarries; that in such a situation it would be logical to expect a realignment of market shares following not only the geographical placement of the mineral deposits, but also following direct interventions of the Belgian group in French firms in the form of mergers and other contracts; that this would be likely in the long run to reduce the degree of competition which now remains in the market; that the reduction in the number of sellers risks to operate to the detriment of the users and that, in these conditions, it is appropriate to prevent a group from obtaining a dominant position.[139]

After its examination of the good and bad elements of the entente, the Commission concluded that the agreement could not be justified in its present form. However, it felt that, in the light of the power of the Belgian group and certain discriminatory provisions of the Belgian laws and transportation regulations, any measures taken against the entente would not end the exclusion of French products from Belgian markets but only open up French markets to the foreign products. Thus, it made no recommendation except that the entente not be extended.

The more obvious argument of the Commission is that it should not recommend the elimination of those illegal measures which favor French industry if it cannot reach those which hinder French businesses in foreign countries.[140] The Commission, however, went further as it did not want the group, which already had a quasi-monopoly in Belgium, to extend its power in France. This argument would present few problems if the Commission usually objected to concentration and dominant positions, but this has rarely been the case. Moreover, the Commission seems to have been eager to see a concentration of the French companies.

Six months later in the *Cast-Iron Pipe*[141] case, the Commission apparently extended the scope of its jurisdiction as it examined the effect of a merger of two firms to form a company which accounted for ninety-five per cent of the French market. The facts of the case,

138. Entente franco-belge sur le marché des matériaux de viabilité, fifth report 22.

139. *Ibid.*

140. The Commission gives article 59 a fairly strict territorial interpretation. See *e.g.*, *Id.*, fifth report 11, but see Entente entre fabricants de futs métalliques, second report 22.

141. Entente dans l'industrie des tuyaux en fonte, fifth report 29.

however, seem to show the Commission is willing to accept all measures of concentration. Recognizing that all possibility of competition in the industry was eliminated, it said:

> Considering that if article 59 *bis* has not expressly referred to the abuse of a dominant position, article 37 of the same ordinance has expressly dealt with and prohibited the majority of abuses which can facilitate the existence of such a position; that, in the case at hand and especially because of the inevitable link which exists between the action of the entente and that of the firm in a dominant position, it is incumbent upon the Commission to examine whether the various practices in the industry lead to a situation which departs abusively from that which would be the result of a competitive market.[142]

The Commission concluded, however, that, in light of the fact, that there was competition from other types of gas and water pipes, the arrangement could be justified because of the technical programs undertaken. Although not so specified, it would appear that most of these technical programs were carried out before the merger.[143]

It is difficult to decide what alternatives the Commission really considered. Theoretically it could have recommended that the merger be undone, but it is unlikely that such a solution was seriously considered. First, the Commission has apparently not abandoned its enthusiasm for concentration. Second, the reporter had been carrying on an investigation of certain restrictive practices in the industry for about a year at the date of the merger.[144] This fact would suggest that either the companies did not feel that there was a substantial risk in not awaiting the Commission's opinion before merging, or they were confident from talks with the reporter that the Commission would not raise objections. Probably the Commission would not have felt able to go much further than to make the recommendations it did: that price control be maintained; that an investigation be made to establish a new schedule of maximum prices; and that continuation of competition between cast-iron and other types of gas and water pipes be assured.[145]

142. *Ibid.*

143. The Commission found that the investments carried out by Pont-à-Mousson (the surviving company in the merger) had permitted an important increase in production at satisfactory cost and sales prices, that exports had continued at a favorable level, and that important research and development facilities had permitted France to occupy a pre-eminent position as to quality. It would seem most unlikely that all these programs had been carried out by Pont-à-Mousson between the date of the merger, Nov. 8, 1960, and the date of the meeting of the Commission, May 19, 1961. Furthermore, as far as ratioualization and specialization, the Commission said only that new measures appeared possible following the merger. *Ibid.*

144. The case was given to the reporter on Dec. 8, 1959. Fourth report 304.

145. Entente dans l'industrie des tuyaux en fonte, fifth report 29.

In conclusion it would seem that, in spite of the *Road Material*[146] case, these three cases do not show a change in the Commission's attitude toward concentration, but at most, a greater willingness to examine mergers and dominant positions. Also, in two other cases covered by the fifth report, the Commission cited the closing of certain enterprises and the concentration of production as elements of justification.[147]

It was in this context then, that the Commission commented upon the new law[148] on abuse of dominant positions.

> This lack [of a text specifically devoted to the abuse of dominant positions] was in truth without great practical inconvenience, because on the one hand such abuses could be effectively forestalled by the application of the price control regulation . . . when adequate competition could not be maintained or re-established, and furthermore article 37 defines and permits the direct suppression of certain abuses which are precisely those which an enterprise occupying a dominant position may employ.[149]

The Commission then examined the investigations which it had already made of cases involving dominant positions. It concluded that since it might not always be possible to examine dominant positions under the prohibitions against ententes "it was pleased that the legislature had expressly extended its jurisdiction . . . ."[150]

An examination of the legislative history confirms the Commission's interpretation. The government seems to have had two reasons for proposing the law. First, the provisions relating to dominant positions were considered as forming a part of a series of dispositions designed to limit the abuses of competition and to safeguard honest firms. Thus, it was proposed to regulate sales at a loss, to modify the procedure for the repression of unfair competition and also to complete the legislation relative to the abuse of dominant positions.[151] Second,

146. Entente franco-belge sur le marché des matériaux de viabilité, fifth report 22.

147. Entente entre fabricants de faulx et faucilles, fifth report 26; Entente dans l'industrie du sel, fifth report 39.

148. Law No. 63-628, July 2, 1963, [1963] J.O. 5915, art. 3. This law added a paragraph to article 59 *bis* which states, "Prohibited in a like manner are the activities of an enterprise or of a group of enterprises occupying a dominant position in the domestic market characterized by a monopoly situation or by a manifest concentration of economic power, when these activities have for object or may have as their effect the restriction of the normal functioning of the market." Article 59 *ter* was also amended to provide that dominant positions could be justified in the same conditions as other restrictive practices.

149. Fifth report 11.

150. *Ibid.*

151. Assemblée nationale, Project de loi No. 240, 2e Session ordinaire 1962-1963, exposé général des motifs 11.

it was desired to put the French laws in harmony with article 86 of the Treaty of Rome.[152]

The legislative debates and the committee reports show little concern with the risks of abuses committed by firms in dominant positions although some speakers considered that it would be useful to have a law with respect to dominant positions.[153] One senator, however, stressed the need for such a law and pointed to a series of practices carried out by large mills in the Paris and Bordeaux regions which could quickly lead to the elimination of small local mills.[154] His concern, however, did not find an echo.

A proposed amendment would have changed "have for object or could have for effect to restrain the normal functioning of the market" to eliminate the words "could have." The sponsor of the amendment said that

> given the French industrial structure, especially in comparison to the concentration existing in certain other Common Market countries, it does not seem timely to sanction *a priori* those positions which are only dominant on a local level at a time when it has not been established that they have as effect the restraint of the normal functioning of the market.[155]

The Minister for Finances and Economic Affairs, however, did not share this concern and remarked "the criteria is not the dominant position, it is the fact either to intend or to have for effect a restraint on the normal functioning of the market and it is that which the Commission technique des ententes will determine."[156] The amendment was not adopted.[157]

Several speakers approved the fact that the French laws would be put in harmony with the Treaty of Rome.[158] The Commission technique des entes thus seems to have accurately characterized the law

152. *Id.*, exposé des motifs par article, 19.

153. *E.g.*, Jager. Avis presenté au nom de la Commission des affaires économiques et du plan, Sénat, No. 107, 2e Session ordinaire 1962-1963 at 11-12. He noted also that most of the abusive practices were already covered under French law. See also Jager's speech before the Sénat. [1963] J.O., Débats Parlementaires [hereinafter cited as Déb. Parl.], Sénat 1367.

154. Monteil, [1963] J.O., Déb. Parl., Sénat 1227.

155. Pezé, reporter for the amendment of the Commission de la production des échanges, [1963] J.O., Déb. Parl., Assemblée nationale [hereinafter cited as Ass. N.] 3123.

156. Giscard d'Estaing, [1963] J.O., Déb. Parl., Ass. N. 3123.

157. [1963], J.O., Déb. Parl., Ass. N. 3123. An amendment was also presented to the Sénat which would have required that an effective restraint on the normal functioning of the market be shown. Jager, Avis presenté au nom de la Commission des affaires énconomiques et du plan, *op. cit. supra,* note 153, at 13-14. See also his speech [1963] J.O., Déb. Parl., Sénat 1367. This amendment was not adopted by the Sénat which three times rejected the law for grounds which are unrelated to the questions considered in this article.

158. *E.g.*, Vallon, reporter for the bill, [1963] J.O., Déb. Parl., Ass. N. 3123.

as a slight extension of its jurisdiction. It was certainly not the intention of the legislature to enact a law changing the national policy towards concentration and dominant positions.

IV. PRACTICES DISAPPROVED BY THE COMMISSION

The practices which will now be examined include market sharing, agreements designed to equalize profits between groups of companies, price fixing and discriminatory pricing. For purposes of analysis of the work of the Commission, the significance of these practices is the obvious fact that they do not have as a direct result a technical or organizational program. It is in the light of this fact that the Commission judges them and decides whether or not they favor economic progress. It objects to practices which hinder technical advances or concentration but not those which may limit competition without any other immediately demonstrable, harmful effect. Thus, one quota agreement may be condemned for helping to preserve marginal enterprises in an industry[159] and another accepted as assisting specialization programs.[160]

While it could be said that almost all of the practices which will be considered in this section restrain competition, such a statement does not advance an analysis very far since most of the justifications accepted by the Commission are also anticompetitive.

A. *Sharing of Markets and Risks*

In this section agreements which guarantee firms a certain fraction of the market or which allocate the risks of profit and loss over several enterprises will be considered. The former may divide sales by means of quotas[161] or through collusive bidding on government contracts.[162] The latter include indemnities paid to firms which fall short of their production quotas[163] and arrangements designed to equalize the raw material costs of all the members of an entente.[164]

1. *Market Sharing.*—The use of quotas is a restrictive practice which the Commission has often examined and one toward which it adopts an ambivalent attitude. On the one hand, it believes that quotas

159. *E.g.*, Entente dans l'industrie et le commerce de la levure de panification, first report 9.

160. *E.g.*, Entente entre fabricants de demi produits en métaux cuivreux, fourth report 307.

161. *E.g.*, Ibid.

162. *E.g.*, Entente dans l'industrie de l'acier moulé, fifth report 37.

163. *E.g.*, Entente dans l'industrie et le commerce de la levure de panification, first report 9.

164. *E.g.*, Entente dans l'industrie du superphosphate, fifth report 18.

may be the only way to provide a sufficiently stable market for firms to take the risks of implementing various technical or organizational programs; but on the other, if the quotas are too rigid, they may either hinder such desirable programs or limit their benefits to the economy. To resolve this difficulty the Commission has distinguished between:

> "Malthusian" quotas which apply to a whole branch of an industry with a rigidity enforced by the operation of a system of penalties and indemnities tending solely to crystalize the conditions of production and sale; and the quotas which provide a support for and a way of implementing specialization agreements.[165]

The Commission dislikes rigid quotas because they prevent increases in the market shares of the most efficient firms and consequently tend to keep prices artificially high,[166] and because they may discourage concentration.[167] Here competition seems to be regarded as useful for the elimination of the most inefficient producers.[168] However, for the achievement of the positive results of a technical or organizational program, it feels quotas may often be necessary. In the *First Copper Products*[169] case it explained:

> Considering that the existence of quotas has lessened the manufacturers' fears of the economic risks of specialization and the dependence on others for their supplies; that it has permitted them to plan their investments . . . that thus the quotas have undoubtedly favored a rearranging of the structure of the industry, which seems very important in relation to the size and the characteristics of the market and which could thus be considered as favorable to economic progress.

The Commission thus reverses the United States assumption that competition will force companies to modernize. Furthermore, it said in its second report that it was an open question whether the utilization of a quota arrangement was the inevitable basis of the achieved specialization agreements.[170]

The Minister, however, has questioned the need to guarantee for a long period the market share of a firm which has concluded a specialization agreement and is in the process of adapting its investments to its new lines of production. He noted that this practice was

165. Second report 18.
166. *E.g.*, Entente dans l'industrie et le commerce de la levure panification, first report 9.
167. Fourth report 305.
168. In the case of a crisis in an industry, however, the Commission prefers a more carefully planned solution. *E.g.*, Entente dans l'industrie de réparation du matériel roulant ferroviaire, fourth report 315.
169. Entente entre fabricants de demi-produits en métaux cuivreux, fourth report 307.
170. Second report 18.

not allowed in Great Britain or in the United States, and concluded that any quotas should only be for a short period, should be variable, and should not be accompanied by unreasonable penalties.[171]

In its fifth report, the Commission indicated that it would look more closely before allowing quotas.[172] Although it still believed they might be necessary to assure particular technical programs, it cited a case in which it had decided that:

> Neither the amount of capital needed nor the technical necessities can be invoked in the drawn steel industry to justify the existence of production quotas. Thus the fluctuations in sales which may be caused by competition are not of such a nature as to hinder plans for investment and modernization.[173]

Furthermore, in several other cases included in the fifth report, the Commission said that the necessity of quota agreements to carry out various programs had not been shown and it recommended that these quota agreements be abolished.

The restrictive effect of quotas may either be aggravated by levying penalties against firms which exceed their quotas, or attenuated by permitting gradual changes in market shares. Although the Commission has occasionally allowed quotas to be enforced by penalties, these have usually been regarded as undesirable because they make quotas more rigid or increase the price of the goods sold by the firms which have exceeded their quotas.[174] When such quotas have been permitted, the Minister has insisted that they be limited to a reasonable amount such as the gross profit on the items for which quotas were fixed.[175]

As with several other restrictive practices, the Commission adopted

171. Entente entre fabricants de demi-produits en métaux cuivreux, fourth report 308 (ministerial decision). See also Entente entre fabricants de fils et cables électriques isolés, second report 27 (ministerial decision). In each case the Commission had decided that the quotas had helped make possible the implementation of programs favorable to economic progress.

172. Fifth report 13.

173. Entente dans l'industrie des aciers étirés, fifth report 36.

174. An agreement which provided for penalties to be paid to a group which would use the sums for purposes benefitting the industry in general was allowed by the commission in the *First Copper Products* case. Entente entre fabricants de demi-produits en métaux cuivreux, fourth report 307. The Commission also cited as an attenuating factor the fact that the penalties were small and thus had had little direct effect on prices. *Ibid.* This fact, however, could also be regarded as a demonstration of an entente's effectiveness. The Commission seemed to be aware of this enforcement function of penalties and said immediately after the statement quoted above that the penalties had not hindered certain firms from increasing their shares of the market or the disappearance of certain others. *Ibid.* See also Trouvet, *Rapport sur les ententes existant entre les fabricants de demi-produits en cuivre et en laiton* 5 (1957).

175. Entente entre fabricants de demi-produits en métaux cuivreux, fourth report 308 (ministerial decision).

a more severe attitude toward penalties in its latest report, and it said that penalties (for firms which exceeded their quotas) and indemnities (for those which fell short) were in themselves contrary to article 59 *bis* even if their application was purely problematical.[176] Furthermore, in the three-year period covered by the report no penalty clauses were allowed. In the *Second Copper Products*[177] case, however, the Commission allowed an agreement which provided for penalties, saying that the sums paid by the companies which had exceeded their quotas were not intended to subsidize firms which had not attained their quotas since such sums were to be paid to a group for purposes which would benefit the whole industry. It found, nevertheless, that the existing arrangement could significantly increase the price in the event of a recession and asked that it be revised so that the penalties would be less steeply progressive.

To assure compliance with quota agreements, penalties are often progressive. For example, a clause in an agreement among the manufacturers of copper products provided that the penalty would be five times as great for an excess of more than thirty per cent over the quota than one of less than fifteen per cent. In this case there was also a provision that the sanctions were to become smaller as the total industry production increased, but to become more important if there was a recession.[178]

The effect of quotas may be varied if firms with unfilled quotas either sell or give them to companies desiring to increase their production. The Commission condemns the former practice as giving a profit to firms which have performed no service and thus uselessly increasing costs.[179] The free cession of quotas is approved, however, because it gives added flexibility to quota arrangements.[180] Only a minor objection can be raised against such cessions, that is, the quotas of the firms involved will not be changed by agreements which allow variations in quotas so as to take account of changes in the volume of a firm's production since theoretically the quotas will have been observed.[181]

The Commission insists that all quota agreements be variable to

176. Fifth report 13.

177. Ententes entre fabrieants de demi-produits en métaux cuivreux, Mar. 22, 1963. This opinion will eventually be published in a sixth report of the Commission. The case, in which the Commission found that the entente was justified under article 59 *ter*, is especially interesting since it represents a retreat from several positions taken by the Commission in its fifth report.

178. Direction générale des prix et des enquêtes économiques, *Note sur les ententes existant entre les fabricants de demi-produits en cuivre et en laiton* 2 (1957).

179. Entente pour l'organisation du marché de la langouste, fourth report 318.

180. Entente fabricants de demi-products en métaux cuivreux, fourth report 307.

181. The Commission recognized this effect in the *Second Copper Products* case. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar. 22, 1963.

allow at least a gradual evolution in market shares. In the *Plate Glass*[182] case it approved a stipulation providing for a redetermination of a company's quota if it varied from its quota in two consecutive years. In another case the Minister specified that the quotas should be revised annually to take account of a firm's efforts to augment its capacity and to specialize and that all exports should be placed outside the quotas.[183] These systems of variation only attenuate the effect of quota agreements since a large change in a particular firm's production may result in a fairly small change in the corresponding quota; and the initial excess of the quota may have been penalized. In the *Second Copper Products*[184] case the reporter examined a complex variation formula, which he characterized as responding to a preoccupation of avoiding brutal fluctuations in quotas.[185] The amount by which a year's sales exceeded or fell short of the quota was first averaged with the figures for the two preceding years. The average was then multiplied by a fraction which varied according to the production of the industrial sector and the amount of the excess over the quota. Finally it was only the variable part of the quota, fifty per cent in the particular case, which was altered. From an example discussed by the reporter, it seems that in two instances the increase in the quotas represented about twenty per cent of the amount by which the quota had been exceeded.[186]

The actual effect of quotas is hard to estimate. Even if the Commission gave precise details of changes in market shares, that would not indicate whether these would have been larger without quotas. When one gets beyond the most rigid type of arrangements, it is a question of choosing an economic hypothesis; that firms need market stability to modernize or that any such agreements hinder economic progress and reduce the incentive to modernize.

In conclusion it should be recalled that the Commission's statements of the utility of quota agreements in promoting technical programs

182. Entente entre fabricants de verre plat, third report 218.

183. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 313 (ministerial decision).

184. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar. 22, 1963.

185. Dufour, *Deuxième rapport sur les ententes existant entre les fabricants de demi-produits en cuivre et en laiton* 4 (1963).

186. *Id.* at 13. This example is given in spite of the fact that the figures cited by the reporter are not always consistent and that it was necessary to assume that the quotas were not observed one year where there were no contrary indications. This latter assumption could cause significant distortion since the excess of the production over the quotas is averaged over three years.

In its second examination of the copper products industry, the Commission said that the variation of the quotas tended to encourage each firm to keep its production and its expansion in line with the industry as a whole if it wanted to preserve its share of the market or increase it. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar. 22, 1963.

has been questioned for certain industries. Moreover, the restrictive character of quotas should not be minimized even if they are not enforced by penalties. The director of a trade association in an industry which had been investigated by the Commission admitted that his hardest job was to ensure that the quotas were observed. He felt, however, that he had been successful and that the actual production closely corresponded to the quotas.

The Commission has also examined several collusive bidding arrangements which have been used to divide the large orders let out for bids by government agencies[187] or the French railway.[188] In the *Cast Steel*[189] case, although the companies apparently initially denied the existence of any agreement, an examination of the facts as set out in the administrative report leaves little doubt as to the existence of an entente. This report describes several instances in which the lowest bidders would make offers at identical or nearly identical prices and the total of their separate offers would equal the quantity desired by the French railway.[190] Other examples show that for certain products, if a company received a particular contract, it would automatically quote a high price the next time the same product was let out for bids so as to let another firm receive the order.[191] The Commission condemns such practices without hesitation although it has remarked that the gravity of a violation may be attenuated by the fact that sales have dropped sharply[192] or that the orders placed by various governmental agencies were extremely irregular.[193] It should be noted, however, that the Commission almost always manages to cite some attenuating circumstances in connection with its recommendations that criminal proceedings not be instituted.

187. *E.g.*, Entente entre fabricants de futs métalliques, second report 21.

188. *E.g.*, Entente entre fabricants de coeurs d'aiguillages en acier moulé au manganèse, fourth report, 311.

189. Entente dans l'industrie de l'acier moulé, fifth report 37. It is not clear whether the parties finally admitted that they had bid collusively. There is no indication of such an admission in either the report of the Service for Economic Investigation or the reporter. THEUREAU & BARBELET, ENTENTE DANS L'INDUSTRIE DE L'ACIER MOULÉ (1960); FOURRE, RAPPORT SUR L'ENTENTE DANS L'INDUSTRIE DE L'ACIER MOULÉ (1962). The Commission, however, has said that it will not consider justifications for restrictive practices unless the existence of an entente is admitted. *E.g.*, fourth report 306. Since the Commission considered whether the entente could be justified under article 59 *ter*, it could be assumed that the parties had admitted bidding collusively. If there was no such admission, this case does not necessarily indicate a major change in the Commission's attitude as there were other restrictive practices admitted by the members of the entente and the commission may have considered these admissions sufficient to allow it to examine the justification presented.

190. THEUREAU & BARBLET, *op. cit. supra* note 189, at 63-65.

191. *Id.* at 65-68.

192. Entente entre fabricants de futs métalliques, second report 21.

193. Entente entre fabricants de fils et cables électriques isolés, second report 25.

It would seem that collusive bidding may be much more widespread than the existence of only three cases would indicate. Interviews with members of trade associations in industries which the Commission has investigated revealed another two instances. In one a member of the trade association explained that the investigation by the Service for Economic Investigations was initiated because one of the companies bidding on a government contract accidentally enclosed with its bid a letter from the trade association telling it for how much to bid and at what price. He continued that this mistake itself probably would have caused no difficulties as the government agency concerned knew all about the entente. However, an employee of the agency sent the letter to the Service for Economic Investigations. In the other case, even after the Commission had expressly condemned the price fixing in the industry, it was admitted that each member of the entente was instructed, that, on being approached by a governmental purchaser, he should immediately telephone the trade association to find out the price and if it was a large order, the quantity which he should quote.

2. *Risk Sharing.*—The various arrangements by which a group of firms agree to share the risks of profit and loss are very much a product of the "Malthusian" theories of the thirties and as such are disapproved by the Commission. The most common type of risk sharing is the penalty and indemnity clauses. The same result can be reached through agreements which obligate firms which have exceeded their quotas to place orders with those which have fallen short.[194] Risk sharing may also take the form of indemnities which are paid to companies which have ceased all activity,[195] or of arrangements which allow companies which have shut down to sell their quotas.[196]

The Commission has examined several fairly elaborate agreements designed to equalize expenses or profits. An agreement, no longer in force, in the glass industry was designed to ensure that the members of an entente, although observing the overall quotas, would not try to sell only the articles for which there were larger profit margins. This arrangement was believed necessary because, within each category of products for which a quota was set, there would be items of greater or less profitability; and, as a practical matter, it was impossible for each member of the entente to apply his quota rigor-

194. *E.g.*, Ententes entre fabricants d'outils agricoles à main, third report 216.

195. *E.g.*, Entente dans l'industrie et le commerce de la levure de panification, first report 9. Exceptionally these indemnities have been allowed as a part of a far reaching industry reorganization. *E.g.*, Entente dans l'industrie de réparation du matériel roulant ferroviaire, fourth report 315.

196. *E.g.*, Entente pour l'organisation du marché de la langouste, fourth report 318.

ously to each individual product.[197] In another case a system was set up to equalize the costs of all the members of the entente in so far as the price of the raw materials, the cost of transportation of the finished product, the seasonal variations in sales prices, the bad debts, and the expenses of sales agents.[198]

The Commission has shown little sympathy for any of these risk sharing practices, but its attitude is not as clear cut with regard to *associations en participation.* In general, the *association en participation* is a contract between two or more companies or individuals in which they agree that either for a single project or for all of their business the total receipts and disbursements of the various members will be consolidated and the profits or losses shared according to fixed percentages. The contract is not revealed to third parties. The association has no legal identity or capacity of its own and there is no transfer of property to the association since each member agrees only to contribute the use of the property. The individual companies will continue to act and to appear as completely independent in buying and selling and generally in carrying on their business. Usually one of the members of the association will be chosen as manager, and he will act in his own name and be the only one who is known to third parties. Moreover, if the association is not considered to have been legally disclosed, the members other than the manager are only held to the terms of the contract forming the association.[199]

In the *Sickle*[200] case, the Commission condemned an *association en participation* in which profits or losses were allocated among the five members following fixed percentages and the products were sold at a common price. The Commission stated that the legal form used by the members of the entente made no difference as far as the applicability of the antitrust laws was concerned.

In the *Salt*[201] case, the Commission examined five regional ententes which were arranged so as to exclude all competition among the members of each entente. In the Midi, for example, one of the two dominant companies managed an *association en participation* and all the producers were obligated, with a very few exceptions, to sell through it. After reimbursing each producer for his costs at a fixed rate, the profits were then divided by allocating fifty-three per cent of these earnings proportionally to the quotas granted each

197. Entente entre fabricants de verre plat, third report 218, and information given by members of the industry.

198. Entente dans l'industrie de superphosphate, fifth report 18, and information given by members of the industry.

199. RIPERT & ROBLOT, TRAITÉ ÉLÉMENTAIRE DE DROIT COMMERCIAL § 860-75 (5e éd. 1963).

200. Entente entre fabricants de faulx et faucilles, fifth report 26.

201. Entente dans l'industrie du sel, fifth report 39.

producer and forty-seven per cent following another scale. The Commission recognized that these measures eliminated all competition among the members of each regional entente.[202] Because of the extremely complicated and artificial nature of the structure of the salt industry, which included measures to subsidize the producers in one region where the salt pans were uneconomical and often run as one-family businesses, the Commission only recommended a study of how competition in the salt industry could be restored.[203]

The *associations en participation* in the *Sickle* and *Salt* cases effectively eliminated competition and the Commission's disapproval would seem to have been a sound policy. In two examinations of the copper, semi-finished products industry, however, no reference was made to the various *associations en participation.*

In 1945 Tréfileries et Laminoirs du Havre (T.L.H.) and Compagnie Francaise des Métaux (C.F.M.), two of the largest French manufacturing companies, established an *association en participation* (AP1) for the manufacture and sale of certain products which constituted a significant part of the total production of the two companies.[204] The receipts and disbursements were pooled under this agreement and the profits were shared by allocating 52.406 per cent to T.L.H. and 47.594 per cent to C.F.M. In 1955 a second *association en participation* (AP2) was established between AP1 and the principal competitor, Compagnie Générale du Duralumin et du Cuivre (Cegedur). AP2 followed the same form as the first and the profits were divided: 69 per cent to AP1 and 31 per cent to Cegedur.[205] In 1957 T.L.H. and C.F.M. set up a common sales agency. In 1962 they merged,[206] but apparently AP2 continued to exist.

In the *First Copper Products*[207] case the Commission did not refer to the associations and said only that the creation of large and modern production facilities had been encouraged by specialization agreements between the large manufacturers and that these agreements were sometimes complemented by common sales or export agencies. The Minister, noting in his decision that two of the largest companies had merged their sales apparatus and had formed an *association en participation,* stated that these agreements should be called to the Commission's attention when it re-examined the en-

202. Lorge, *Rapport sur la situation des producteurs de sels au regard des dispositions du décret no. 53.704 du 9 aout 1953, relatives aux ententes professionnelles* 39-43 (1957) (administrative report).

203. Entente dans l'industrie du sel, fifth report 39.

204. Dufour, *op. cit. supra* note 185, at 21.

205. *Id.* at 22.

206. *Id.* at 25.

207. Enteute entre fabricants de demi-produits en métaux cuivreux, fourth report 307.

tente.[208] However, when in 1962 he again asked the Commission to study the industry, the Minister did not raise the question.[209] While the reporter did outline the factual situation, he gave no opinion as to the desirability of the agreements.

These associations were of major importance. The company formed by the merger of T.L.H. and C.F.M. represented 32 per cent of the market in 1962 as compared with 16 per cent for Cegedur, the other member of the association and the second largest company.[210] Moreover, the reporter said that it seemed to him that *associations en participation* were still more widespread in the industry than his report would indicate.[211] As a conclusion he noted:

> Competition seems to continue in the industry in spite of the concentration through stock ownership and the ties of all sorts between companies. This finding is not entirely paradoxical; it seems that, in spite of the interlocking interests, a certain competition exists between the executives of the companies. This rivalry among the directors, which is a cause as well as an effect of the dynamism of the industry, tends to limit in a certain measure the efforts of the entente as well as the effects of the commercial and financial ties. It also preserves a certain spirit of competition.[212]

The Commission did not examine the associations in its opinion.[213] It would seem essential, however, that the Commission examine such agreements which suppress all competition among a group of companies and eliminate the incentive for any firm to try to increase its share of the market since such a change will probably have no effect on the profits that it will receive under the agreement setting up the *association en participation.* The arrangement in the *Sickle*[214] case was condemned, but this disapproval seems to have resulted largely from the fact that one of the members wanted to withdraw and that he was ready to sell his products at prices lower than those on a common price list established by the members of the entente.

An *association en participation* moreover appears to have become an important form of entente. It has been said that to achieve cooperation between firms at the level of production or of distribution, "it seems that the form which is most satisfactory is that of the *association en participation* which, while leaving a great flexibility in the means used, permits a division for a fairly long period of profits realized following a fixed scale."[215]

208. *Id.* at 308 (ministerial decision).

209. Letter of the Secrétaire d'Etat au commerce interieur to the President of the Commission technique des ententes, Mar. 26, 1962.

210. Dufour, *op. cit. supra* note 185, at 26.

211. *Id.* at 23.

212. *Id.* at 23.

213. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar. 22, 1963.

214. Entre entre fabricants de faulx et faucilles, fifth report 26, and see text accompanying notes 301-06 *infra.*

215. TERMONT, *"L'évolution des ententes professionnelles,"* in ENTENTES, FUSIONS,

B. *Price Fixing and Discriminatory Pricing*

In the area of price fixing and discriminatory pricing a practice may be attacked both under article 59, as interpreted by the Commission, and under article 37, enforced by the courts without the intervention of the Commission.

Article 37(4) provides that it will be considered as equivalent to illegal pricing for "any person to confer, maintain, or to impose minimum prices for goods or services or minimum commercial margins either by means of price lists or through ententes, no matter what the form." This statutory wording would seem applicable both to vertical resale price maintenance and to horizontal price fixing agreements. Moreover, the preamble to the decree of August 9, 1953, states that the prohibition against fixing minimum prices applies equally to resale maintenance and to price fixing by ententes between producers.[216] There has been no attempt, however, to apply article 37(4) to horizontal price fixing agreements. This restrictive interpretation may be based on a reading of the paragraph in article 37(4) which provides that derogations may be granted in an exceptional situation such as the first marketing of a new product. Such derogations would seem applicable only in the case of vertical price fixing. There may also have been a desire to leave the control of horizontal agreements to the Commission.

The two published administrative circulars which interpret article 37[217] seem to be exclusively concerned with the problem of the imposition of resale prices. The second circular remarks that the purpose of articles 37(1)(a) and 37(4) is to maintain or re-establish competition at the level of distribution.

> Now competition which appears essentially in the establishment of prices tends to disappear as a uniform minimum price is imposed on resellers.

ACTIONS COLLECTIVES (EXPÉRIENCES DE COLLABORATION INTER-ENTERPRISES) 44 (1962).

Associations en participation represent only one of the numerous types of agreements that joint French companies. Although the questions raised by such interfirm co-operation are beyond the scope of this paper, a study by Houssiaux can be noted. On the basis of the year 1952 he found that among the 100 largest French companies there were 127 instances in which stock in one of these 100 largest companies was owned by another in the group of the 100 largest. He also noted that there were 473 interlocking directors for these 100 companies. HOUSSIAUX, LE POUVOIR DE MONOPOLE 236-40 (1958).

216. Decree No. 53-704, Aug. 9, 1953, [1953] J. O. 7045.

217. Circular, Feb. 15, 1954, [1954] J.O. 1566; Circular, Mar. 31, 1960, [1960] J.O. 3048 [hereinafter cited as Fontanet circular]. See also the translation of parts of an unpublished government memorandum prepared in answer to 35 hypothetical cases relating to artticle 37(1)(a) posed by a working group made up of representatives of French trade associations and chambers of commerce in Goldstein, *Administrative Shaping of French Refusal to Deal Legislation*, 11 Am. J. Comp. L. 515, 523-34 (1962).

> Thus the primary object of the measures under analysis is to forbid the imposition of minimum prices.[218]

This quotation shows an assumption that the only price fixing that is prohibited by article 37(4) is that of resale prices. The detailed analysis of the circular, moreover, considers only such vertical agreements. Furthermore, there are no reported cases which indicate any attempt has been made to extend the prohibitions of article 37(4) to purely horizontal agreements.

Article 37(1)(a) prohibits "habitually practicing discriminatory sales terms or discriminatory price increases which are not justified by corresponding increases in cost of supplying the product or the service." The Fontanet circular explains that a seller who charges different prices to different clients "should be ready to prove that these differences correspond to variations in cost and not simply to the nature of the business of the buyer";[219] and the practice of charging lower prices to wholesalers than to groups of retailers is condemned.[220] The circular states that "differences in prices between clients should in general be justified by differences in the quantities sold."[221] However, there is apparently no requirement that these quantity discounts be justified by actual cost savings so as not to result in favoring large buyers.

Violations of article 37 are usually investigated by the Service for Economic Investigations, although the usual criminal law procedures are not foreclosed.[222] At the conclusion of the Service's investigation, an administrative decision is made whether to drop the charges or to try, with the cooperation of the public prosecutor, to reach a compromise agreement with the person under investigation, or whether criminal proceedings should be instituted.[223] Compromise agreements are frequently reached wherein criminal proceedings will be abandoned and the party under investigation will admit his guilt, perhaps paying a fine or giving up any goods which have been seized by the government.[224] Unlike the procedure under article 59, there have

218. Fontanet Circular, introduction. The circular does say that it will not consider questions relative to ententes, but this statement seems to be a reference to the exclusion of questions relative to article 59 and not intended to limit the interpretation of article 37.

219. *Id.*, tit. II, ch. II, sec. II.

220. *Id.*, tit. II, ch. II, sec. II, § 3.

221. *Ibid.*

222. *Souleau, Les régles particulières, de constatation, de poursuite et de répression etablies par l'ordonnance n. 45-1484 du 30 juin 1945*, Juris-Classeur pénal, Lois pénales annexes, Infraetions économiques I, 10.

223. Ordinance No. 45-1484, June 30, 1945, [1945] J.O. 4156, as amended, Law 65-549, July 9, 1965, [1965] J.O. 5915, see also Decree No. 65-787, Sept. 11, 1965, [1965] J.O. 8279, Souleau, *op. cit. supra* note 221, at 90-119.

224. SOULEAU, *op. cit. supra* note 222, at 90-119.

been a substantial number of criminal proceedings under article 37[225] and it would seem that this law is beginning to take effect.

In the cases which the Commission has examined there are numerous instances where there appear to have been violations of article 37, but it has preferred to proceed under article 59. In one case the Commission said that it was not within its jurisdiction to consider whether the fixing of commissions charged fell under article 37(4).[226] Probably this hesitancy is caused by the language of article 59 *quater* which defines the jurisdiction of the Commission as the examination of "possible violations of article 59 *bis* and also the justifications which may be furnished under article 59 *ter*." While this may be a sound interpretation of the statutory wording, it would seem undesirable for two separate bodies of law on the legality of price fixing and discriminatory pricing to develop. Furthermore, the express prohibitions of article 37 would seem to exclude the possibility of justifying an agreement under the general language of article 59.[227] The opinion of the Cour d'Appel of Amiens, in a case concerning the legality of an exclusive dealing contract under article 37, lends some support to this conclusion.

> But considering that if the Commission technique des ententes could recommend the exoneration of a practice restraining competition which was a necessary counterpart of a technical program or a program favorable to economic progress, its opinion has no effect in relation to the offenses enumerated by article 37(1)(a) and article 37(4) which are already before the courts.[228]

A conflict usually will not arise in the case of horizontal price fixing since the Commission finds little justification for this practice, but several of the discriminatory rebate provisions approved by the Commission could be considered to violate article 37(1(a).

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225. See generally Souleau, *Pratiques anticoncurrentielles et autres infractions assimilées à la pratique de prix illicite,* Juris-Classeur Pénal, Lois pénales annexes, Infractions économiques, III, 3-75.

226. Affaires "Ententes professionnelles dans le domaine de la publicité," third report 220. But see Entente entre fabricants de lampes électriques, second report 22.

227. See BLAISE, LE STATUT JURIDIQUE DES ENTENTES ÉCONOMIQUES DANS LE DROIT FRANCAIS ET LE DROIT DES COMMUNAUTÉS EUROPÉENNES 360-63 (1964). It should be noted, however, that the apparently unqualified prohibition against refusing to sell contained in article 37(1) has not stopped the courts from approving exclusive dealing contracts which contribute to a sound organization of the distribution of products. Gnyénot, ETUDE JURIDIQUE ET ÉCONOMIQUE DES CONVENTIONS D'EXCLUSIVITÉ DE VENTE, [1965] Dr. soc. 1,5.

228. Nicholas et Société Brandt, Cour d'Appel d'Amiens, May 9, 1963, [1963] J.C.P. II. 13222, [1963] Gaz. Pal. I. 426, *aff'd,* Cour de Cassation (Ch. crim.), Oct. 22, 1964, [1964] Bull. crim. 591, [1964] D. II 753 (note J.-L.C.), [1964] Gaz. Pal. II. 386.

1. *Price fixing.*—The fixing of prices has been condemned by the Commission as protecting marginal enterprises and discouraging increases in the production of the more efficient firms.[229] The reasons given for opposing price fixing agreements are largely the same as those advanced to condemn rigid quota agreements. The Commission, however, has approved few price fixing arrangements. Any desirable market stability apparently should be secured by flexible quota agreements.

In the *Yeast*[230] case, the Commission condemned an agreement which included production quotas, payments to closed factories, a geographical division of the market, and price fixing. Such an entente was believed to result in a freezing of the market structure and to prevent the expansion of the better situated firms. Also, by basing sales prices on the costs of the less efficient firms, the entente gave the more efficient firms added profits which did not result from an expansion which would have been beneficial to the economy.

As with quota agreements, penalties[231] or other devices to encourage strict adherence to price lists[232] have been condemned. A distinction might be drawn between agreements which fix definite prices and those which only suggest prices. The facts of the case, however, often do not allow such a distinction to be made, and it probably should only be noted that the Commission prefers the less rigid arrangements. The Commission seems to have adopted a more severe approach toward price agreements in its fifth report. This change can be highlighted by an examination of two cases involving the rubber industry.[233] In each, the manufacturers had formed ententes which were linked with an industry-wide association, the Union professionnelle du caoutchouc.

In 1958 the Commission examined an entente among the manufacturers of conveyor belts.[234] The agreement provided for the establishment of quotas and a list of recommended prices and discounts. Although recognizing that suggested price lists were incompatible with the reductions in prices to be expected under free competition, the Commission asked only that the quotas be made more flexible, that there be efforts to make technical improvements and increase the volume of exports. The Minister, however, adopted a more

229. Entente dans l'industrie et le commerce de la levure de panification, first report 9.

230. *Ibid.*

231. Entente pour l'organisation du marché de la langouste, third report 318.

232. Entente entre fabricants de fils et cables électriques isolés, second report 25.

233. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 312, Entente entre fabricants de tuyaux de caoutchouc, fifth report 18.

234. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 312.

severe position and prohibited publication of lists of suggested prices and discounts.[235]

Two years later the Commission examined an entente between the manufacturers of rubber tubing which was set up under a contract which was practically indentical to the conveyor belt agreement.[236] In this case, however, the Commission declared that the entente had as its main purpose an elimination of price competition and that this restriction was assured principally by the use of suggested price lists. It then dismissed the attempts at justification under article 59 *ter* by remarking that the same measures had been carried out by non-members of the entente and it recommended that the entente be dissolved within three months after the ministerial decision.

The Commission, however, has not adopted a per se rule against price fixing because apparently in certain situations it sees no alternative to price agreements. In the *Crayfish Wholesalers*[237] case, an entente of buyers guaranteed fishermen a minimum price for two kinds of crayfish in exchange for the exclusive right to buy these two types. A quota agreement would hardly have been feasible, and even if instituted, would not have eliminated the fluctuations in price which depended upon the time of reaching port. The Commission recognized the need for an organization of the market to stabilize the price, guarantee the fishermen a fair price, favor the equipment of new boats and establish the basis for an extension of the domestic and foreign sales. Nevertheless, wanting to avoid practices which unnecessarily restricted competition, it recommended that the market organization be established with governmental agreement and pursuant to an ordinance relating to fishing.

In the *Optical Glass*[238] case, six producers which accounted for eighty per cent of the market had joined in an agreement providing for technical collaboration, a common sales price, and a system of discounts based on the total amount of a client's purchases from all the members of the entente. While noting that the common price list contributed to high retail prices, to abnormally large profits for the better placed firms, and to the prevention of the less well placed enterprises from being forced to give up the manufacture of certain high cost products, the Commission did not suggest an elimination of the price lists but recommended that prices be reduced within two years. This solution abandons reliance on competition to regu-

235. *Id.* at 313 (ministerial decision).

236. Entente entre fabricants de tuyaux en caoutchouc, fifth report 18, and information given by members of the industry.

237. Entente pour l'organisation du marchede la langouste, fourth report 318.

238. Entente dans l'industrie des verres d'optique médicale et de luneterrie, fifth report 31.

late the market and adopts a policy of directly acting on prices, the policy of price control. In examining the market the Commission found that retail purchasers were more concerned about having a personal confidence in their optician and his product than about the price. The opticians also followed a suggested retail price scale which allowed a 100 per cent to 200 per cent markup, and exerted no pressure on the manufacturers to lower their prices. In this situation the Commission may have concluded that competition could not be expected and that it should thus try to act more directly on the price. While this might be a sound analysis, it would seem that such a solution could be better carried out under the usual price control regulations[239] than by the time-consuming procedure under article 59. Moreover, in the case it examined immediately before the *Optical Glass* case, it had stated that, in the absence of competition resulting from a merger which concentrated ninety-five per cent of the domestic production in one firm, the sales price could only be limited by price control.[240] It thus recommended that the price regulation be continued and an investigation be made to establish a new price schedule.

2. *Discriminatory Pricing.*—The ententes examined by the Commission have frequently employed discriminatory practices, such as discount arrangements which encourage customers to purchase only from producers belonging to the entente[241] and special rates on sales between entente members.[242] The Commission has disapproved several discriminatory practices as not economically justifiable.[243] These economic criteria, however, are independent of article 37(1)(a) and have led to results which would seem to conflict with article 37(1)(a).

Probably the discriminatory practice most often considered by the Commission provide for graduated scales of rebates based upon the quantity which a customer purchases from all the members of an entente, and which have been called "rebate cartels." Initially, the Commission provides for graduated scales of rebates based upon the directed against noumembers of the entente from that in which there were no dissident firms and new entry was extremely unlikely under the particular economic conditions. In the latter case, the discount arrangements could be approved if they contributed to eliminating excessively dispersed distribution and sales networks.[244] In a case contained in the fourth report, the Minister explained that rebates

239. See generally FRANCK, LES PRIX (3e éd. refondue 1964).
240. Entente dans l'industrie des tuyaux en fonte, fifth report 29.
241. *E.g.*, Ententes entre fabricants d'outils agrioles à main, third report 216.
242. *E.g.*, Entente fabricants de culots de lampes électriques, second report 23.
243. *E.g.*, Entente entre fabricants de fourches et crocs, fifth report 35.
244. Third report 214.

based on the total purchases from entente members could help increase specialization if they were refused to all clients who abusively dispersed their orders.[245] Under the particular circumstances, he considered as objectionable the ordering of an identical product from more than two manufacturers if the article was mass produced and from more than one if it was not.

Neither the Commission nor the Minister seems to have initially considered whether rebate cartels were in violation of article 37(1)(a). The first possibility of conflict would arise in a situation in which there were foreign manufacturers. If an entente included all domestic producers, a buyer who placed all his orders with domestic producers would be charged a lower price than one who divided them among French and foreign enterprises. Other difficulties would arise from the type of discount arrangement recommended by the Minister to encourage specialization. Taking the recommendations made in the cited case, a client who made a single purchase of X units of the product from one entente member would be entitled to a discount while another who bought 3X of the same product but divided his order equally among three members would be denied one. Also a client who bought X of the article from each of two members of the entente would have his discount calculated upon 2X, while if he divided his orders among a member and a nonmember his rebate would be based on X.

In its fifth report, the Commission seemed to have abandoned the attempt to draw distinctions between the different arrangements which calculate discounts on the total amount purchased from all members of an entente and said

> The position of the commission which was initially quite subtle (see third report 214) has become more firm (see, *e.g.*, *Entente entre fabricants de linoléum*, fifth report 33) especially in the case where nonmembers of the entente are of more than a negligible importance. (*Entente dans l'industrie des verres d'optique médicale et de lunetterie*, fifth report 31). This practice which has the characteristics of a 'rebate cartel' has the 'well known result of discouraging customers from buying from nonmembers of the entente or from foreign sellers' and, moreover, is 'likely to lead to discriminatory price increases not justified by corresponding variations in cost.' (*Entente dans l'industrie du fil mousse de nylon*, fifth report 38).[246]

245. Entente entre fabricants de jantes et de guidons, fourth report 310 (ministerial decision).

246. Fifth report 13. A certain evolution can be noted in the cases. Although they all condemned the discount arrangements, the first two only cited article 59. Entente dans l'industrie de verres d'optique médicale et de lunetterie, fifth report 31; Entente entre fabricants de linoléum, fifth report 33. In the third case, however, the Commission seemed to base its disapproval equally on the tendency for these practices to discourage purchases from nonmembers, the usual ground for the Commission's condemnation under article 59, and the fact that they caused discriminatory price increases which were not

As well as apparently reversing the Commission's former position, this quotation also refers to "discriminatory price increases not justified by corresponding variations in cost," which is the test of article 37(1)(a).

In its second examination of the semi-finished copper products industry[247] the Commission, however, retreated from this position. The Minister, in his letter conferring jurisdiction on the Commission, stated that the rebate cartel had continued and that no new justifications had been advanced. He declared that this practice could contribute to excessive dispersion of orders, could hinder specialization, and could not fail to result in discriminatory price increases falling under artiele 37(1)(a).[248] The reporter, however, disagreed and stated that, in view of the well-informed clientele, the system of discounts could have no other effect than to reduce prices. He added that the practice would not be of a reprehensible character unless it was applied in a discriminatory manner to the advantage of certain customers and to the detriment of others.[249] These conclusions do not, however, answer the questions raised by the existence of foreign producers and nonmembers of the entente.

The Commission followed the conclusions of the reporter and said

> Considering that the trade discounts are a traditional way of doing business with a well-informed industrial clientèle which is concerned about the quality of the products and able to provoke competition; that the discounts consist in rebates given at the end of the year by each company to each of its clients in proportion to the total orders placed by the customer with all the producers in the entente and with the principal sellers connected with it; that although the entente discounts have as a goal to attract clients toward members of the entente, it is apparent from the investigation that in this case and especially because of their small size they have not tended to disturb the conditions of competition and cannot be assimilated to the practice of "dumping."[250]

The Commission has here adopted a line of reasoning even more questionable than its distinction between those entente discounts which encourage and those which hinder specialization. The power of the buyers is certainly important, but the argument based on the fact that the discounts have continued for a long time and are not very large seems difficult to defend. The Commission does not suggest

justified by cost differences, the criteria of article 37(1)(a). Entente dans l'industrie du fil mousse de nylon, fifth report 38. The Minister specifically referred to article 37(1)(a) in each case.

247. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar 22, 1963.

248. Letter from Secrétaire d'Etat au commerce intérieur to the President of the Commission technique des ententes, Mar. 26, 1962.

249. DUFOUR, DEUXIÉME RAPPORT SUR LES ENTENTES EXISTANT ENTRE LES FABRICANTS DE DEMI-PRODUITS EN CUIVRE ET EN LAITON 33 (1963).

250. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar. 22, 1963.

that such discounts in any way contribute to economic progress. Finally, the reference to dumping seems to be wholly irrelevant.

Another type of discriminatory pricing occurs when entente members sell to each other at a rate lower than to other purchasers.[251] This practice has been condemned as adding unnecessary costs by increasing the number of middlemen.[252] These special discounts could also be compared to the profit equalization schemes already examined. If a firm cannot profitably sell goods which it does not make without a special discount from the actual manufacturer, this manufacturer, assuming that he could otherwise sell the goods at their full price, is in effect giving up some of his normal profit to the nonproducing firm.

These special discounts often form part of specialization agreements so as to allow firms to continue to sell products which they have ceased to manufacture,[253] thus assuring themselves of a certain profit even if they lose money in selling the narrower more specialized line of products which they actually make. These practices have the same goal of stabilizing a firm's market as quota agreements. Like quotas, they may be allowed temporarily, but they should be gradually eliminated.[254]

In a few cases the Commission has disapproved discriminatory pricing without mention of the factual situation. However, when the Commission's recommendation in the *Plate Glass*[255] case is placed in the factual situation disclosed by members of the industry, a possibility of conflict with article 37(1)(a) arises. The Commission and the Minister noted in passing that the manufacturers had agreed to modify their discount system to eliminate all discrimination. It was explained, however, that in place of a complicated system of about thirty different discount scales which had once been in force, the manufacturers had agreed to adopt three different discount lists: one for the Paris region, one for cities with more than 100,000 inhabitants, and a third for those cities with less than 100,000 inhabitants. It would seem that this system, based on the arbitrary assumption that it was more difficult to sell glass in smaller cities and towns than in Paris, would not be acceptable under article 37(1)(a).

With price fixing and discriminatory pricing, the Commission disapproves those practices which hinder the implementation of technical

251. *E.g.*, Ententes entre fabricants d'outils agrocoles à main, third report 216.

252. *Ibid.*

253. See TERMONT, *op. cit. supra* note 215, at 38.

254. Ententes entre fabricants d'outils agricoles à main, third report 217 (ministerial decision).

255. Entente entre fabricants de verre plat, third report 218.

programs, concentration of industries, and lowering of prices. In the case of price fixing, the Commission's recommendations generally increase competition except in those cases where the Commission feels that competition is undesirable[256] or unworkable.[257] As far as discriminatory pricing, an analysis of the Commission's position is more difficult. The position that it took against rebate cartels in its fifth report temporarily removed the major difficulty, but the distinctions introduced in the *Second Copper Products*[258] case hardly seem acceptable under article 37(1)(a). Moreover, it does not seem that article 37(1)(a) would permit special rebates among members of an entente who have concluded a specialization agreement or discount scales based on population as in the *Plate Glass*[259] case.

V. The French Antitrust Laws and Other Legislation Affecting Competition

A consideration of the relationship between the French antitrust laws and other legislation which may affect competition should start with an examination of article 59 *ter*, 1° which states that ententes "which result from the application of a legislative provision or a regulation" do not fall under article 59 *bis*. The Commission has given a narrow construction to this exception. It has noted that it would probably never have occasion to apply article 59 *ter*, 1° directly. In such a case the restrictive practices would have been made obligatory by the legislature or the administration, and the Commission believes this fact could be easily determined without consulting it.[260] The *Freight*[261] case, however, was not far from this hypothesis. The Commission found that the provisions of the agreement were either (1) the direct result of a law or regulation or part of an agreement drawn up by the trade association which, once approved by the government, had become compulsory; or, (2) to the extent that the provisions resulted from the initiative of the entente, mere accessory clauses without direct effect on the price.[262]

256. Entente pour l'organisation du marché de la langouste, fourth report 318.

257. Entente dans l'industrie des verres d'optique médicale et de lunetterie, fifth report 31.

258. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar. 22, 1963.

259. Entente entre fabrieants de verre plat, third report 218.

260. Fourth report 306.

261. Entente entre affréteurs pour les expéditions de charbons par voies navigables, second report 20.

262. The Commission did not cite article 59 *ter*, 1° in its opinion, and, in the second report, it characterized the case as a noncompetitive situation which resulted from factors unrelated to the entente, that is, the intervention of the legislature and the government. It noted that this situation should be distinguished from the exception of article 59 *ter*, 1° for ententes whieh themselves resulted from a law or regulation. Second report 18. The Paris Cour d'Appel has stated that the French Radio was

The role of ententes in establishing provisions complementary to the legal regulation of an industry is extremely limited. In the *Milling*[263] case, the industry was subject to regulations which prohibited the opening of new mills and limited the activity of existing ones. The Commission concluded that this statute was an exception to the principle of free competition and that no additional restrictive practices should be permitted. It condemned the entente, which had contributed to a situation in which its members were operating at less than forty-five per cent of capacity while nonmembers were producing at more than seventy per cent.[264] It conceded that there could be ententes which usefully complemented an economically sound statutory regulation; but in the *Milling* case, it seemed to look with disfavor on the regulation. The Minister in his decision said that the various restrictions added by the entente were contrary not only to article 59 *bis* but also to the decrees regulating the grain market.

In the *Salt*[265] case, the Commission seems to have eliminated the possibility that restrictive practices may be justified as complementary to a legal regulation. It stated that even though the only purpose of the arrangements set up by the various ententes was to work toward the same goal as that desired by the legislature, these practices could not be considered as resulting from the application of a law. It has also refused to admit that the fact that an entente has received a certain encouragement from the government would provide a justification under article 59 *ter*, 1°.[266]

The question of the relationship between the antitrust laws and the patent and trademark laws is more complex. On the one hand, the Commission seems to believe that the mere fact that an entente is set up under an otherwise valid patent or trademark license does not in any way limit its investigation. Yet the Commission apparently attaches great importance to the existence of patent and trademark rights.

In the *Magnesium*[267] case the *Société générale du magnésium* (SGM) entered into licensing contracts with four foundries which

exempted under article 59 *ter*, 1°. Fedération nationale des cinémas francais v. Radiodiffusion-Télévision Francaise, Cour d' Appel de Paris Mar. 18, 1965, [1965]; J.C.P. II 14208, (note Lyon-Caen [1965] D. somm. 108.

263. Entente dans l'industrie de la meunerie parisienne, fourth report 316, see generally Ousset, "La concurrence imparfaite dans les industries agricoles et alimentaires," in *Les formes modernes de la concurrence* 257, 290-99.

264. *Id.* at 317 (ministerial decision).

265. Entente dans l'industrie du sel, fifth report 39.

266. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 312.

267. Entente dans l'industrie du magnésium, first report 10. The Commission does not indicate the nature of the patent which formed the basis of the licensing agreement but it seems to have concerned the alloys which were made by the foundries.

provided for reciprocal technical co-operation. The SGM also agreed to supply them with magnesium at the current price in exchange for the foundries' agreement not to buy magnesium elsewhere, to return all scrap metal and neither to buy scrap from third parties nor to resell unprocessed magnesium. Another contract with a fifth foundry, S.N.E.C.M.A., generally limited SGM's sales to the foundry's requirements in casting pieces which would later be used in machines it made. The Commission decided that it could examine these agreements and pointed out that there were other limits on patent rights drawn from the theory of abuse of monopoly, the needs of national defense, and the desire to protect public health. It concluded that although patent rights should be assured of as great a stability as possible,

> The considerations which lead to the attempt to find in each case the legal solution which best conforms to the economic well-being do not allow practices which within an entente make use of rights drawn from patent law to escape the examination of the Commission.[268]

The Commission seems to have believed that in general the restrictions were justified. However, the Secretary of the Air Force had declared that since S.N.E.C.M.A. could not sell the pieces that it cast, the manufacturers of airplane motors could procure such pieces only from a single source. He felt that in this situation the regularity of production could not be assured in the event that the single manufacturer ran into unforeseen difficulties, and there might be technical stagnation. The Commission accepted this interpretation with reservations but coneluded that, on such a question relating to the national defense, the Secretary's opinion was conclusive. The Commission did not examine the validity of the restrictive clauses in the licensing contracts between SGM and the other four foundries except to say that their provisions helped protect the members of the entente at all levels of the production; and it recommended ouly that the government should examine with the members of the entente what measures would tend to assure a supply of magnesium to users at a price low enough to favor an increase in sales.

In the *Nylon Yarn*[269] case the Commission also considered the relationship between article 59 and patents and trademarks. Again it sweepingly defined its jurisdiction:

> Even though the obligations which legally result from the existence of patents or trademarks and which concern the sales or distribution of a product are likely to limit competition, an entente set up between the holders, licensees and sublicensees of patents or trademarks cannot be

268. *Ibid.*

269. Ententre dans l'industrie du fil mousse de nylon, fifth report 38.

regarded, in itself, as constituting an entente in the sense of article 59 *ter*, 1°.[270]

A contract between the foreign holder of patents on a certain type of loom and an entente provided that if these looms were made in France they could not be sold to any but entente members or to those working exclusively for entente members. An agreement had also been reached with the principal foreign manufacturers to prevent the importation of competing looms. The Commission found that, as a result of these agreements, nonmembers of the entente had experienced great difficulties in obtaining modern equipment. It said, however, that this restrictive scheme had been forced on the entente by the foreign owner of the patents; and that if the entente had not agreed to these conditions, the introduction of these looms into France and the development of that branch of the nylon industry would have been delayed. Although it was noted that similar restrictive clauses had been made a part of new patent licenses granted by a French company which was a member of the entente, the Commission merely said that such restrictions were no longer an effective block to competition since nonmembers of the entente no longer had difficulty in buying imported machinery.

In conclusion, it would seem that the Commission's broad assumption of jurisdiction over patent and trademark agreements is balanced by its willingness to allow restrictive practices which would probably not otherwise be approved. This analysis however cannot be pursued very far since the Commission nowhere indicates expressly what importance it attributes to the existence of a patent or trademark and often does not clearly describe the patent or trademark to which the restrictive practice is tied. It should be stressed, however, that in the *Nylon Yarn*[271] case the Commission approved the actions of an entente, for the past, because they had permitted the introduction of efficient looms in France, and, for the present, because they did not constitute an effective obstacle to competition.

VI. APPLICATION OF THE COMMISSION'S RECOMMENDATIONS

Probably the first question concerns the imposition of penalties for the violation of the provisions of article 59. In theory they are very severe,[272] but in practice they have little chance of being applied.

270. *Ibid.*

271. *Ibid.*

272. The penalties include imprisonment from 2 months to 2 years and a fine of from 60 francs to 200,000 francs or one of the two. Ordinance 45-1484, June 30, 1945, [1945] J.O. 4156, as amended, Law 65-549, July 9, 1965, [1965] J.O. 5915, art. 40. Until the 1965 amendments the sanctions were imprisonment of from two to five years and a fine of from 60 francs to 3 million francs or one of the two. See also Souleau, *op. cit. supra* note 222, at 143-80.

The Commission has declared that the draftsmen's intention was not only to repress restrictive practices, but also

> to . . . [open] the way to a job more difficult, but also more positive; that is, it could be said, an education leading to if not a spontaneous at least an accepted rectification of the practices contrary to public policy.[273]

Seven years after it was established, the President of the Commission declared

> From the moment when the principles are fixed, it is the task of the Administration to assure that they are respected, this task moreover, will be facilitated by the fact that, at least it can be hoped, the persons under investigation knowing their duty, will for the most part tend to follow the law.[274]

The policy expressed in these quotations has been followed. Neither the Commission nor the Minister has ever recommended criminal sanctions, and those charged with enforcing the laws seem to feel that it would be an outrage to bring respectable businessmen before the criminal courts for violation of the antitrust laws. One high governmental official, has proposed another and perhaps a more convincing explanation, remarking that the wartime black market and price legislation, which were often accompanied with excessively severe penalties, had engendered in the courts a profound distrust of all "economic legislation." He further stated that it has been thought that, with this background, courts would be extremely reluctant to impose severe penalties for violation of the antitrust laws just as they had been reluctant to apply the penalties provided by the black market laws. Thus it was feared that criminal proceedings might well result in a large number of acquittals and the imposition of penalties which were so insignificant as to diminish the importance of the antitrust laws.

In actuality, the recommendations of the Commission are implemented through negotiations between the Minister and the members of the entente. Since the Minister's demands have not been very severe, the members of the entente have been largely willing to settle on his terms. There have been no divestitures ordered or patents required to be compulsorily licensed. The positive recommendations such as increasing research or specialization, moreover, may be desired by members of the industry. Also, with the mass of governmental intervention including price control, which is enforced by the same governmental body as the antitrust laws, it would seem to be a bad policy to disregard the Minister's requests. Presumably, however, the

273. First report 2.

274. Toutée, *Les ententes professionnelles,* [1960] Conseil d'Etat, Etudes et Documents 161, 171.

members of an entente could be obstinate enough to force the Minister to send a case to the public prosecutor.

For the implementation of its recommendations, the Commission has frequently asked the government to carry out a general surveillance of an industry which may include periodic reports to the Minister,[275] or a request to the Minister to decide, after a probationary period, whether it was appropriate to again ask the Commission for its advice.[276] The Commission has also requested the government to make studies of whether price control could be eliminated[277] and to cooperate with ententes in studying how competition could be increased.[278] It has asked for the establishment of committees to improve the relationships between manufacturers and governmental purchasers[279] or to study how to change certain traditional trade arrangements.[280] Further it has recommended that an entente be reorganized under governmental supervision.[281]

Usually there is no disclosure of the results of this governmental intervention, but a few documents were published after the *Advertising*[282] case. The Commission had examined a market tightly tied up with (1) indemnities paid to agencies who lost clients by the agencies which acquired the accounts, (2) fixed rates, (3) a professional card, and (4) a system of enforcement which included the agreement of the press not to deal with any agency which did not have the professional card. The Commission asked for the immediate abolition of these practices although agreeing to allow the continuation of the professional card until a reorganization of the structure of the business under governmental supervision could be carried out. It also suggested that a committee including representatives of agencies, the press and other media, and the clients be established. A series of ministerial letters, however, cut back these recommendations. The first proposed, as had the Commission, that a committee be established and that the granting of the professional card be made dependent only upon professional competence, morality, and, in appropriate cases, solvency.[283] With the other practices it only said that charges should

275. Entente entre fabricants de bandes transporteuses en caoutchouc, fourth report 312.

276. See, *e.g.*, fifth report 10-11.

277. *E.g.*, Entente dans l'industrie du sel, fifth report 39.

278. Entente entre fabricants de meules et produits abrasifs agglomé rés, first report 13.

279. *E.g.*, Entente entre fabricants de fils et cables électriques isolés, second report 25.

280. Affaires "Ententes professionelles dans le domaine de la publicité," third report 220.

281. Entente pour l'organisation du marché de la langouste, fourth report 318.

282. Affaires "Ententes professionnelles dans le domaine de la publicité," third report 220.

283. *Id.* at 223 (ministerial letter of Mar. 5, 1958).

be revised to correspond to the services actually rendered and that the prohibition of rebates was contrary to the provisions of article 37. These changes, he believed, would render the system of indemnities useless. The Minister, however, added that such a reform should not be a bar to compensation following the sale of a business, the provisions of a contract, or the general principles of civil liability. A year later, the succeeding Minister wrote that the recommendations of the Commission did not demand the suppression of the card but that, if it were continued, its unofficial nature should be made clear and that the newspaper trade associations should not oblige their members to deal only with holders of these cards.[284] He also noted that rates were no longer fixed and said that a committee would be appointed to study a form contract to govern the procedure of indemnification in case of termination or nonrenewal of a contract. The decree as finally promulgated referred only to a model contract for dealings between clients and agencies, and that the committee could act as arbitrator of disputes between clients and agencies.[285]

The committee proposed a form contract which was to govern in the absence of other agreements.[286] While the contract did not accept all the arguments of the industry,[287] it did adopt the idea that agencies have a right to contracts of a certain duration. The form contract provided that in absence of specific agreement or good cause, six months notice should be given before termination, and that this notice could not be given during the first six months of the contract. The Committee seems to have assumed that termination of the contract without cause and without proper notice could be the basis of a suit for damages. While the Committee probably intended, when it set up explicit provisions for termination, that indemnities between agencies be abolished, it never expressly stated such a conclusion. Furthermore, the contract is not mandatory. It would thus seem that the Commission's recommendations in the *Advertising* case were largely undercut by a governmental intervention, which only resulted in the preparation of a mild suggested contract.

VII. The Commission and the Courts

The cases which have arisen before the civil courts have been concerned with the most direct effects of restrictive practices: damage suits by companies which ententes have tried to put out of business

284. *Id.* at 223 (ministerial letter of June 25, 1959).
285. Order of Dec. 15, 1959, [1959] J.O. 12015.
286. [1961] J.O. 8633.
287. For a detailed examination of these problems and an outline of the industry's arguments see Arrighi de Casanova, "L'indemnité de 'dépossession' dans les rapports entre intermédiaires de publicité," in *Dix ans de conférences d'agrégation, Etudes de droit commercial offertes à Joseph Hamel* 459 (1961).

by various unfair means and suits to enforce contracts setting up ententes against members who contest their validity. There have apparently been no actions brought by customers on the theory that they have been charged an unreasonably high price.[288]

The cases in which recovery has been allowed against ententes which have tried to drive competitors out of business are based on the principle of freedom to engage in any commerce or industry which was established by the law of 2-17 March 1791 and the general development of the law of unfair competition on the basis of article 1382 of the Code Civil. The commentators and the cases vary in emphasizing one or the other of these two bases. Probably the most useful analysis rests on two ideas: that every entente, by its very existence, limits the liberty of commerce and that the legality of the entente should be decided in reference to the general theory of excess and misuse of power.[289]

The practices of the entente among the railway repair shops, which resulted in the elimination of eleven of the thirty-three members of the entente, are typical of the abuses condemned by this body of case law. When one of the eleven firms eliminated sued, the Cour d'Appel of Paris declared

> Considering that no matter how extensive the powers [of the trade association] are, the defense of the interests of the industry cannot be allowed to lead to the elimination of certain members to safeguard the market of the others without being contrary to the liberty of commerce and industry.[290]

The Court also referred to the Commission's opinion[291] as a confirmation of the fact that there had been an entente and it had brought about the elimination of the Mariage Company. Article 59, however, seems to have been of secondary importance as the case was largely based on the traditional law of unfair competition.[292]

Another group of cases concerned an agreement in the crayfish industry which granted to a group of wholesalers the exclusive right to puchase two types of crayfish in exchange for guaranteeing the fishermen a minimum price.[293] In one of these, a wholesaler who had been

288. See fifth report 12.

289. See Teitgen, *Note*, [1960] Dr. soc. 455, 463.

290. S.A.R.L. Mariage v. Syndicat des réparateurs de matériel roulant de chemins de fer, Cour d'Appel de Paris, Nov. 4, 1959, [1960] J.C.P. II.11488 (note R. Plaisant), [1960] Gaz. Pal. I. 168, [1961] Annales de la propriéte industrielle 163.

291. Entente dans l'industrie de réparation du matériel roulant ferroviaire, fourth report 315.

292. Me Lussan, counsel for the Mariage Company, said that he had based his arguments on art. 1382 of the Code Civil and that he felt that he could equally well have won the case before the enactment of the Freneh antitrust laws. Interview in Paris, Sept. 11, 1964.

293. See also Entente pour l'organisation du marché de la langouste, fourth report 318.

refused membership and who thus could no longer obtain these two types of crayfish was granted damages against the entente by the Tribunal de Commerce of Quimper largely on the basis of a violation of article 59.[294] The Cour d'Appel of Rennes, however, expressly refused to rely on article 59 and condemned the actions of the entente as contrary to the liberty of the wholesaler to buy and sell.[295] The Cour de Cassation based its opinion on similar reasoning and affirmed, stating that the actions of the entente had made it impossible for nonmembers to get a supply of crayfish and thus to continue their businesses.[296]

In suits to enforce the provisions of entente contracts, the courts have necessarily had to consider article 59. Several lower court cases have shown a great reluctance to hold contracts void and have given article 59 an interpretation which is not far from that given to article 419 of the Code Pénal.[297] Thus the Tribunal de Commerce of the Seine found that an agreement for a common sales agency and fixed prices was not designed to restrain competition or to affect the price.[298] This decision can partially be explained by the fact that it was handed down before the publication of any of the opinions of the Commission.[299] The Tribunal de Commerce of Rouen, however,

294. Locquin-Laurent v. Société "La Langouste," Tribunal de Commerce de Quimper, Apr. 18, 1958 (unreported). The court said "Whereas the group, in exercising a veritable monopoly uniquely in the interest of its members, in creating an advantage for them, in blacklisting the specialized wholesalers and especially Locquin-Laurent, cannot be considered as a good entente within the meaning of article 59 *ter*." The court then slightly shifted the basis of its decision in saying that the group therefore had "unlawfully restrained the commercial liberty of Locquin-Laurent and thus had unfairly competed."

295. Société "La Langouste" v. Locquin-Laurent, Cour d'Appel de Rennes, Dec. 9, 1959, [1960] Dr. soc. 454 (note Teitgen). Teitgen characterized this case as yet another example of the reluctance of French courts to apply those laws which must be interpreted in the light of economic circumstances. *Id.* at 461.

296. Société "La Langouste" v. Locquin-Laurent, Cour de Cassation (Ch. civ., sect. com. Mar. 13, 1963, [1963] Bulletin des arrêts de la Cour de Cassation, chambres civiles [hereinafter cited as Bull. civ.] III. 125, [1964] D.II.97 (note R. Plaisant), [1964] Dr. soc. 72 (note Teitgen). For a case in which a person expelled from the lobster entente recovered damages see LeBris v. Laurent, Cour de Cassation (Ch. civ., sect. com.), Mar. 13, 1963, [1963] Bull. civ. III 125, [1964] D.II.97 (note R. Plaisant), [1964] Dr. soc. 72 (note Teitgen).

297. See note 16 *supra*.

298. Glacières & Frigorifiques de Fécamp v. Glacières & Frigorifiques de l'Alimentation, Tribunal de Commerce de la Seine, July 4, 1957 (unreported), *rev'd*, Cour d'Appel de Paris, May 4, 1961, [1962] J.C.P. II.12517 (note Gendrel & Lafarge), [1962] Annales de la propriété industrielle 124.

299. The first publication of the Commission's opinions was on Jan. 14, 1960. [1960] J.O., Doc. adm. 1. The Secretary of State for Economic Affairs, however, gave a brief summary of the Commission activities in 1957 in response to a question by a member of the National Assembly. [1957] J.O. Déb. Parl., Ass. N. 4569-70.

made a similar interpretation of article 59 in 1961.[300] The court found that an agreement between two forwarding agencies which divided the market, without making any mention of prices, "obviously did not have as its intention to artificially increase prices." The court added that there was a third agency in the town and that this fact alone was enough to make untenable the idea that there was any fraudulent intention or any offense of wrongfully restraining competition. Moreover, the court noted that none of the customers had complained.

In several instances ententes have been examined both by the Commission and the Cours d'Appel. In one, an *association en participation* had been formed between the manufacturers of sickles according to which profits and losses were shared among the members according to fixed percentages. The prices were also fixed by a clause which provided that for each item sold the manufacturer was considered to have received the full amount at which the item was listed by the association, so that he would bear any discount he gave and only receive a fixed percentage of the profits on that sale.

For purposes of comparison, the opinion of the Commission will be considered first, although it was later chronologically. The Commission had little difficulty in condemning the entente for having fixed prices and for having established a monopolistic scheme which permitted it to impose the highest possible prices.[301] It noted that one of the manufacturers, M. Augé, was in a position to sell at a lower price. It was unimpressed by the measures of standardization, which it said could have been caused by the general evolution of industrial techniques rather than the action of the entente, and it added that the closing of one of the three factories which were shut down was probably inevitable because of the lack of skilled labor. Although the Commission did not specifically ask for the liquidation of the entente, the Minister's demand that the association be dissolved[302] was consistent with the Commission's recommendations.

The case arose before the courts in 1958 when M. Auge first requested to withdraw from the *association en participation* and then, following the other members' refusal, brought suit to have the association declared void on several grounds including the violation of article 59. The Tribunal de Commerce of Saint-Etienne upheld the validity of the entente.[303] The Court considered that the fixing of

300. Société de Transit & Transport Gabriel Faroult v. Sociéte de Transit & Transport Jules Roy, Tribunal de Commerce de Rouen, July 21, 1961 (unreported but summary at [1962] D. somm. 15.)

301. Entente entre fabricants de faulx et faucilles, fifth report 26.

302. *Id.* at 27 (ministerial decision).

303. Augé v. Etablissements Dorian-Holtzer, Jackson & Cie, Tribunal de Commerce de Saint-Etienne, Sept. 17, 1958 (unreported).

a common price by the members of a group that had achieved a "commercial and industrial unit" was not illegal and was "so natural" that it could not see how anyone could find any fraudulent intent. It added that the entente did not intend to increase prices or maintain them artificially, but rather to avoid serious disorders which would be prejudicial to the interests of the clients of this declining industry. In the light of this characterization of the economic situation, the case became a simple matter of contract law, and the court declared that Augé must observe his contract.

The Cour d'Appel of Lyon, however, was not willing to dismiss questions as to the entente's legality.[304] It recognized that the agreement had practically eliminated all competition among the French manufacturers. It did not feel, however, that it had sufficient information to decide whether the entente could be justified under article 59 *ter* and so appointed an expert to examine the economic situation of the industry. The expert, M. Lucien Passot, did not consider his role as limited to making a study of the legal and factual questions which would then be presented to the court.[305] Following the court's wish, he directed his efforts towards encouraging a settlement by assembling the facts and presenting them to the parties in a series of meetings, thus enabling the parties to predict the conclusions that the court would draw and thereby encouraging them to settle. During this period the expert also communicated with the Commission and was invited to attend the meeting at which the Commission examined the entente. He said that the Commission's condemnation of the entente tended to confirm his opinion concerning the more apparent aspects of the case, especially the association's monopoly position in France. These conclusions were disclosed by M. Passot at his next meeting with the parties.

M. Passot also found that M. Augé sold at prices which averaged ten per cent less than the association's list and still managed to make substantial profits. He stated that the other companies, in spite of their greater size, "could now show (supposing that was easy) that their costs were lower than those of Augé, and most importantly of all, with their higher prices the public obviously received no benefit from the entente."[306] Finally, with the mass of these facts, the four companies which wanted to uphold the *association en participation* realized that it was better to settle if only to limit their damages. By

304. Augé v. Establissements Dorian-Holtzer, Jackson et Cie, Cour d'Appel de Lyon, June 13, 1960, [1961] J.C.P. II.12103 (note Boitard), [1961] D. II. 148 (note Goré), [1961] Recuiel Sirey 195.

305. Lucien Passot was kind enough to furnish us with this information. Letter, Sept. 27, 1964.

306. *Ibid.*

allowing M. Augé to withdraw, M. Passot stated that the association was finally allowed to continue in spite of the fact that it still represented seventy-five per cent of the French production, because the existence of a nonmember would prevent abusive price increases.

With the extreme complexity of the economic studies necessary to reach a decision whether an entente is in violation of article 59 *bis* and the lack of clearly defined standards, it is probably desirable that courts appoint their own experts. This conclusion is especially appropriate in the light of the limited scope of judicial investigations in France. As M. Passot's examination actually developed, there was no conflict with the decision of the Commission. This result, of course, was partly caused by the fact that M. Passot considered that his role was primarily to encourage a settlement.

The practice of courts to proceed independently, however, means that there is a risk of conflicting interpretations of article 59. This problem raises questions of what weight will be given to a decision by the Commission in a later civil proceeding and whether the courts should ask the Commission for its advice.

Article 59 *bis* says only:

> Every undertaking or agreement relating to a practice thus prohibited is void as a matter of law. This nullity may be asserted by the parties or third persons; it cannot be asserted by the parties against third persons. Should the occasion arise, the question of nullity is determined by the courts of justice, to whom the advisory opinion of the commission, if one has been rendered, must be communicated.

The first question is whether the courts should actively seek the advice of the Commission or await its opinion when they know that it is considering the same matter. The assistance which a court might gain from such opinions, however, is limited by their brevity, and by the tendency for the ministerial decisions to add specific conditions or to reach slightly different conclusions. Although the courts do not have power to bring a matter before the Commission, it would seem most probable that such a request would be followed either by having the Commission adopt the case on its own or by having the Minister bring it before the Commission. In one instance the Commission examined a case brought before it by the Minister for Economic Affairs at the request of the Minister of Justice[307] after the consideration of the entente by a lower court.[308] The Cour d'Appel of Paris, however, did not wait for the Commission's decision before deciding

307. Affaires "Ententes professionnelles dans le domaine de la publicité," third report 220.

308. Société Agence Havas v. Société Opéra Publicité, Tribunal de Commerce de la Seine, May 28, 1956 (unreported).

the case.[309] This provoked a strong statement from the Commission that, in the interest of the sound administration of justice, the Cour d'Appel should at least have waited so that any differences would be deliberate.[310] It was willing to admit that the courts have the power to make a completely independent determination of the legality of an entente under article 59.

Reference of cases to the Commission by the courts would substantially delay the completion of judicial proceedings. The period from the start of the administrative investigation until the ministerial decision is rarely less than two years.[311] Probably the courts should not wait except where the Commission has already rendered a decision but the Minister has not reached a decision. Such a delay would be relatively brief, and it would seem undesirable for a court to consider the Commission's opinion without the ministerial decision. In the *Augé*[312] case, the Cour d'Appel of Lyon did not wait for the Commission's decision although it knew that an investigation was under way.

Several courts have considered the relationship between the courts and the Commission. While one court seems to have attached little importance to the Commission's opinion, two have considered them practically as res judicata. As has been pointed out, the Cour d'Appel of Paris in the *Mariage*[313] case granted damages although the Commission had approved the practices of the entente. Referring to the Commission's opinion, it said only that "it is appropriate to state that in the light of the opinion of the Commission technique des ententes of November 21, 1958, the entente existed and contributed to the elimination of the Mariage company."[314] The court by this reference, which at first seems to show agreement with the Commission, does not indicate whether or not it had given the opinion any weight. The question of how legality under article 59, however, seems to have been of secondary importance.

Two cases considered the Commission's opinions binding, or at least necessary for any justification under article 59 *ter*. These cases show little awareness of the procedure before the Commission or of

309. Société Agence Havas v. Société Opera Publicité, Cour d'Appel de Paris, Mar. 25, 1957 (unreported). The case is thus cited in PLAISANT & LASSIER, LES RAPPORTS DE LA COMMISSION TECHNIQUE DES ENTENTES, ANNÉES 1956 A 1959, [1962] D. chr. 31. The clerk of courts, however, has no record of the case and Me. Tinaud, counsel to the Agence Havas, has stated that the case was not appealed.

310. Third report 213.

311. See fourth report 304.

312. Augé v. Etablissements Dorain-Holtzer, Jackson et Cie, *supra* note 304.

313. S.A.R.L. Mariage v. Syndicat des réparateurs de matériel roulant de chemins de fer, *supra* note 290.

314. *Ibid.*

the basic statute. In the *Le Bris*[315] case the Cour d'Appel of Rennes quickly resolved the question of legality of the entente. Since the lower court decision, the Minister had adopted the conclusions of the Commission and ordered that the entente be dissolved, and the court declared that the Minister's act settled the question for the purpose of the civil litigation. This interpretation seems directly contrary to article 59 which says that the nullity of a prohibited practice "is determined by the courts of justice, to whom the advisory opinion of the commission, if one has been rendered, must be communicated." It also ignores the essentially advisory role of the Commission. Such an interpretation, however, might allow review of the Minister's letter as an act prejudicing the members of the entente. This theory was apparently adopted by the entente in bringing an action before the Tribunal Administratif of Rennes to annul the decision as exceeding the Minister's power. The court, however, said:

> Considering that only the judicial tribunals have jurisdiction to decide the nullity of the entente either in civil suits between members of the entente or with nonmembers, or in criminal proceedings; that the Minister's order [to dissolve the entente] is not coupled with the threat of a sanction reviewable by the administrative courts; that consequently the order is not a decison of the type reviewable in a suit to aunul the decision as exceeding the Minister's authority.[316]

In the *Le Bris* case the difference in interpretation of article 59 between the administrative and judicial courts was never resolved as the Cour de Cassation decided the appeal on a ground wholly independent of article 59.[317]

Possibly an even more dubious reading of article 59 was made by the Cour d'Appel of Paris in the Glacières[318] case, which held that an entente was illegal under article 59 *bis* but refused to consider possible justification under article 59 *ter*.

315. Société "La Langouste" v. Le Bris, Cour d'Appel de Rennes, June 15, 1961, [1961] Dr. soc. 459 (note Teitgen & Falconetti).

316. Société "La Langouste," Tribunal Administratif de Rennes, Oct. 23, 1961, [1964] Dr. soc. 74 (note Teitgen).

317. Le Bris v. Laurent, *supra* note 296. The actual proceedings were more complicated since although the Cour d'Appel of Rennes held the entente illegal under article 59, it refused damages on the ground that the plaintiff was claiming damages for his expulsion from an illegal group and that no unfair competition had been shown. It was thus the plaintiff who was appealing. The Cour de Cassation reversed since it considered the damages claimed were for the actions of the entente after the plaintiff's expulsion and it rejected the conclusion of the Cour d'Appel that there had been no unfair competition. While it might thus seem that the Cour de Cassation approved the finding of illegality on the basis of article 59, it seems clear from a reading of the case and that of the companion case, Société "La Langouste" v. Locquin-Laurent, *supra* note 296, involving the same entente that the Cour de Cassation relied wholly on theories of the liberty of commerce and unfair competition.

318. Glacières & Frigorifiques de Fécamp v. Glacières & Frigorifiques de l'Alimentation, *supra* note 298.

> If [the defendant] considered that in actuality the entente had intervened for an essential end, as he alleged, the improvement of the distribution or the development of economic progress, he must make these allegations before the Commission technique des ententes, created for this purpose by article 59 *quater*, that he has not done.[319]

This interpretation makes it essential for an entente to seek the advice of the Commission which would presumably then be considered binding; the case thus raises the same problems as the *Le Bris*[320] case. It further completely ignores the fact that private parties have no right to bring a case before the Commission. The interpretation, therefore, leaves all ententes presumptively liable in civil damage suits with only a hope of petitioning the Commission to examine the entente.

In conclusion it should be said that article 59 still has only a minor importance in the cases. The suits against ententes because of the elimination of a company from a market have been decided largely independently of article 59. Moreover, while the principles elaborated in these cases help to ensure a certain amount of commercial fair play, they do little to protect competition in itself. Suits attempting to force firms to respect the terms of a contract of an entente have necessarily obliged courts to examine questions of validity of agreements under article 59, but they have often resulted in highly questionable opinions. Some of these problems are the inevitable result of courts being faced with a new statute in an area that is also new. Two facts however ought to be noted: there apparently have been no suits by consumers to obtain damages for the actions of an entente in increasing prices[321] and the damages awarded have been small.[322] Thus it could not be said that the fear of damage suits operates to ensure compliance with the French antitrust laws.[323]

VIII. Conclusion

An attempt to evaluate the accomplishments of the Commission should be considered with reference both to the ententes which have

319. *Ibid.*

320. Société "La Langouste" v. Le Bris, *supra* note 315.

321. See fifth report 12.

322. For example in the suits brought by the Mariage company, it received 10,000 francs in the first and 20,000 francs in the second, a recovery which the counsel for Mariage considered as largely nominal. The most important result of the case was that the Mariage company started to again receive orders from the French railways. Interview, *supra* note 292.

323. The Cour de Cassation has held, moreover, in a case arising under Article 37 that private individuals cannot avail themselves of the rights, allowed under French criminal law in certain circumstances, to start criminal proceedings or to join in a criminal suit in order to recover their damages in the case of a violation of the basic laws regulating prices. This law, as amended, contains articles 37 and 59. Nicolas, Société Brandt et Société Photo Radio Club, Cour de Cassation (Ch. Crim.), July 11, 1962, [1962] Bull. crim. 504, [1962] D. II 497, [1962] J.C.P. II.12799.

actually been examined and to the Frence economy as a whole.

The Commission's opinions show that it has gradually begun to develop a coherent policy toward ententes. Those contained in the fifth report are especially important in this respect since in these cases it seems to have been less willing to admit than an entente has contributed to economic progress and it has taken a firmer position concerning such practices as rebate cartels and the use of penalties to enforce restrictive practices.[324]

It should be stressed, however, that the Commission's disapprovals have been limited to the most restrictive types of arrangements, and that many of the programs which the Commission believes to be favorable to economic progress, such as specialization agreements and the co-ordination of research efforts, restrain competition. Moreover, the establishment of these programs means that interindustry meetings will be increased and that more opportunities for the setting up of restrictive practices will be provided. On the whole, it would seem that the commission's recommendations have done little to increase competition in the industries which it has examined. The cases before the civil courts would seem to have had even less effect.

In industries which have not been directly touched by the Commission's investigations, the French antitrust laws seem to be little known, often ignored and easily evaded. Except for those persons directly concerned with the questions of ententes such as the directors of trade associations, few lawyers or businessmen have any knowledge of these laws. The antitrust laws have been disregarded in two ways. First, the following rationalization seems quite prevalent: since there is in practice neither a real threat of criminal penalties nor a risk of substantial civil liability, there is no need to eliminate restrictive practices before the Commission has made an investigation. Second, even those persons who are well aware of the antitrust laws and who declare that ententes should be absolutely legal (and that the contracts establishing them should be legally binding upon members) are not concerned by the fact that particular practices which they are using have been specifically condemned by the Commission. They believe that the ways in which their ententes are contributing to economic progress will surely be sufficient to assure their ultimate justification under article 59 *ter*.

Finally, a reading of the Commission's opinions themselves suggests various ways to evade the antitrust laws. For example, the importance that the Commission seems to have attributed to the existence of

324. The *Second Copper Products* case, however, does represent a retreat as the Commission admitted all the restrictive practices apparently because the industry seemed to be sufficiently modern and progressive. Ententes entre fabricants de demi-produits en métaux cuivreux, Mar. 22, 1963.

patent rights and its failure to examine *associations en participation* in certain cases would suggest that ententes could be set up under these forms. It could also be asked whether the Commission will disapprove other more or less sophisticated types of ententes such as open price systems which have begun to be introduced in France.

Many of these criticisms, such as the fact that the Commission has not really faced the problems raised by some of the more complicated types of ententes, reflect the inevitable difficulties in the elaboration of a type of law that is completely new in France. More serious, however, is the lack of a real threat of criminal or civil liability. Here the worst of solutions seems to have been chosen, that is, not making a clear choice between a system of repression and one of control of restrictive practices. An antitrust law which is based on the exemplary effect of a certain number of decisions should contain a substantial threat of civil liability or criminal penalties to encourage businessmen to find out about the law and follow it.

A system which is based on control should have some system of notification which would give the body applying the laws a knowledge of the number and nature of ententes. Furthermore, a system of control, it would seem, should have some streamlined procedure which would allow a fairly rapid review of restrictive practices. The time consuming procedure of investigations by the Commission which often have to be repeated to adjust to changes in an industry would seem inappropriate for a system of control.