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RECENT DEVELOPMENTS AND FUTURE PROSPECTS OF THE COMMON MARKET

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The Treaty creating the European Economic Community (hereinafter referred to as EEC) between Germany, France, Italy, Belgium, the Netherlands and Luxembourg, was signed on March 25, 1957, and came into force on January 1, 1958.[1] It provides for the gradual establishment of a Common Market during a transitional period of twelve years. The transitional period having ended on December 31, 1969, it is now appropriate to inquire whether, and to what extent, the purposes which the authors of the Treaty set out to achieve have, in fact, been attained.

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[1]Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [Hereinafter cited as Treaty].

What is a Common Market? The notion is not defined in the Treaty. Economists generally agree, however, that it means an area in which economic exchanges develop under the same conditions as they would develop in a domestic market.[2] This means not only that a customs union must be established, *i.e.*, that all customs, duties and other restrictive regulations of commerce between the member states must be eliminated and that a common outer tariff must be substituted for the national customs tariffs previously applicable to trade with third countries,[3] but that all barriers to trade between member countries must disappear and that the conditions of competition must be the same in all those countries. Thus, to give a few examples, it must not be significantly more difficult for a Frenchman to sell his products in Germany than in France; or for an Italian corporation to establish a branch or a subsidiary in the Netherlands than in Italy; or for a Belgian life insurance company to insure Frenchmen than Belgians; or for a German resident to acquire shares of a Luxembourg corporation than of a German one.

As can be seen from the above examples, all categories of economic exchanges have to be freed from restrictions. This includes not only imports and exports of goods, but also movement of persons, establishment of agencies, branches and subsidiaries, supply of services and capital movements. The Treaty contains elaborate provisions covering all of these items. It also prohibits restrictive trade practices and abusive exploitation of dominant positions which are apt to affect trade between member states.

In addition to freeing economic exchanges from restrictions imposed by the states or agreed to by private parties, the Treaty provides for the coordination of national economic policies and their implementation in three main areas: agriculture, transport and foreign commerce. Indeed, it was realized that it is not possible to liberalize intra-Community exchanges without coordinating national economic policies, or even replacing them with a Community policy in certain sectors. With the exception of transport policy, substantial progress has been achieved in all of the areas described above.

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[2]*See* H. VON DER BROEBER, LA POLITIQUE DE LA COMMISSION EUROPÉENNE DANS LE DOMAINE DU RAPPROCHEMENT DES LEGISLATIONE 4 (1968).

[3]*See The Contracting Parties to the General Agreement on Tariffs and Trade*, 3 BASIC INSTRUMENTS AND SELECTED DOCUMENTS, art. XXIV, § 8, at 49 (1958).

I. IMPORTS AND EXPORTS

First the problem of imports and exports of goods will be examined.[4] The Treaty provides that all import and export duties between the member states shall be abolished gradually during the transitional period. In fact, this has been effected faster than was anticipated at the time the Treaty was negotiated.[5] All customs duties between the member states were suppressed as of July 1, 1968, *i.e.*, one and a half years earlier than the Treaty provides. As a consequence, there are no more customs duties between EEC countries. There are a few import taxes left. These may have the same effect as customs duties;[6] however, the rates of these taxes are not very high, and the items to which they refer are not very important economically. These taxes, moreover, are in the process of being gradually suppressed in accordance with the Treaty.[7]

The Treaty also provides for the abolition of quantitative restrictions on imports and exports between member states prior to the end of the transitional period.[8] By the end of 1961, all quantitative restrictions on industrial goods had disappeared.[9] Since then, the restrictions that subsisted in the field of agricultural goods have gradually been removed.

Despite the elimination of customs duties and quantitative restrictions, there are still a number of existing obstacles to trade. These

[4]Treaty, arts. 9-37, at 18-30. For more details on this subject, see J. MEGRET, J. LOUIS, D. VIGNER & M. WAELBROECK, LE DROIT DE LA COMMUNAUTE ECONOMIQUE EUROPÉENNE (1970).

[5]Article 13 provides that all import duties must be progressively abolished by the end of the transitional period, *i.e.*, December 31, 1969. Article 14 establishes a detailed timetable for the removal of import duties. On May 12, 1960, the representatives of the governments of the member states decided to "accelerate" the rhythm provided for in the Treaty. 3 E.E.C. J.O. 1217 (1960). Another acceleration was decided on May 15, 1962. 41 E.E.C. J.O. 1284 (1962). On July 26, 1966, the Council of Ministers decided that the final date for the suppression of import duties would be July 1, 1968. 1 CCH COMM. MKT. REP. ¶ 232.05 (1967).

[6]Treaty, art. 9, at 18-19. The taxes are referred to as "charges with equivalent effect."

[7]A number of intricate legal problems have arisen in this connection and have had to be solved by the Court of Justice. *See* EEC Comm'n v. Republic of Italy, 2 CCH COMM. MKT. REP. ¶ 8079 (Ct. of Justice of EEC 1969); Social Fonds voor de Diamantarbeiders v. S.A. ch. Brachfeld & Sons, 2 CCH COMM. MKT. REP. ¶ 8078 (Ct. of Justice of EEC 1969); EEC Comm'n v. Republic of Italy, 2 CCH COMM. MKT. REP. ¶ 8057 (Ct. of Justice of EEC 1968); Firma Milch-, Fett-und-Eiekontor Gmbh v. Hauptzollamt Saarbrucken, 2 CCH COMM. MKT. REP. ¶ 8068 (Ct. of Justice of EEC 1968); Firma Milchwerke H. Wohrmann und Sohn KGV Hauptzollamt Bad Reichenhall, 2 CCH COMM. MKT. REP. ¶ 8065 (Ct. of Justice of EEC 1968); Federal Republic of Germany v. EEC Comm'n, [1961-1966 Transfer Binder] CCH COMM. MKT. REP. ¶ 8049 (Ct. of Justice of EEC 1968); Firma Alfons Luttickev. Hauptzollamt Saarlouis, [1961-1966 Transfer Binder] CCH COMM. MKT. REP. ¶ 8045 (Ct. of Justice of EEC 1968); Firma Waldemar Deutschmann v. Federal Republic of Germany, [1961-1966 Tranfer Binder] CCH COMM. MKT. REP. ¶ 8004 (Ct. of Justice of EEC 1962). *See also* 1 J. MEGRET, J. LOUIS, D. VIGNER & M. WAELBROECK, *supra* note 4 at 39-42, and extracts from pertinent court decisions, *id.* at 207-20.

[8]Treaty, arts. 30-37, at 26-30.

[9]This was the result of the first acceleration decision of May 12, 1960. *See* note 5 *supra*.

are due to divergencies in the requirements which the member states impose concerning the manufacture of certain products, such as safety measures, prohibition of certain food additives, health controls, etc. In the area of food products, each state has elaborate regulations as to what additives are authorized or prohibited. It is thus possible that a product which has been manufactured in conformity with French standards could not be sold in Germany because the German authorities apply different standards. Similar problems arise in connection with safety standards for electrical appliances, tractors, lawn mowers, ladders, trucks, cars and a variety of other products which are regulated in a different manner in many of the member states.

The only means of eliminating these so-called "technical obstacles to trade" is by the approximation of the national legislative and administrative provisions which fix the standards, so as to arrive at common standards applicable throughout the entire Community. Article 100 of the Treaty provides a procedure which allows the Council to respond to a proposal of the Commission and thereby to adopt directives aimed at the approximation of member states' legislations which have a direct impact on the establishment or the functioning of the Common Market. Much work is being done in this area, and the Council has already adopted a number of directives in the field of food additives, dangerous substances, automobiles, etc.[10] A "general program for the elimination of technical obstacles to trade" was adopted on May 28, 1969.[11] It established a timetable for the elimination of these obstacles and, as an interim measure, provided that member states refrain from adopting any new regulations likely to create a technical obstacle to trade without first consulting with the Commission and the other member states in order to arrive at common measures. The purpose of this provision is to prevent creation of a new obstacle to trade while work is being done to approximate legislation in a given area.

Another subject connected with movement of goods is tax

[10] *See* Council Directive of March 20, 1970, Concerning Fuel Tanks and Rear Bumpers of Motor Vehicles, 13 E.E.C. J.O. L 76/23 (1970); Council Directive of March 20, 1970, Concerning Placement and Method of Attachment of Rear Registration Plates, 13 E.E.C. J.O. L 76/25 (1970); Council Directive of June 27, 1967, Concerning the Approximation of Legislative, Regulatory and Administrative Provisions on the Classification, Labeling and Packaging of Hazardous Substances, 10 E.E.C. J.O. 427 (1967), 1 CCH COMM. MKT. REP. ¶ 3451 (1967); Council Directive of Nov. 5, 1963, Concerning the Approximation of Member State Legislation on Preservatives Used in Foodstuffs, 7 E.E.C. J.O. 161 (1964), 1 CCH COMM. MKT. REP. ¶¶ 3345-59 (1964); Council Directive of Oct. 23, 1962, Concerning the Approximation of Member State Legislation on Coloring Materials Used in Foodstuffs, 5 E.E.C. J.O. 2645 (1962), 1 CCH COMM. MKT. REP. ¶¶ 3323-41 (1962), *as amended* Council Directive of Oct. 25, 1965, 8 E.E.C. J.O. 2793 (1965).

[11] 12 E.E.C. J.O. C 76/____ (June 17, 1969).

harmonization. In Europe, contrary to the United States, a large part of government income is derived from indirect taxes. An example is turnover taxes, which are levied every time goods are transferred from one person to another. These taxes are apt to affect the proper functioning of the Common Market because they are generally assessed on the full value of the goods. The value of these goods includes the previous tax levy, hence a "snowball effect" is produced. This favors vertically integrated firms, to the detriment of smaller firms. Another difficulty of this system arises when a product is exported. The country of export will generally grant a rebate of the taxes which have been imposed on the product, while the country of import will impose an equalization tax designed to give that product the same status as if it had been manufactured locally. Because it is practically impossible to compute the exact amount of tax which must be rebated when a good is exported and which must be levied when a good is imported, governments generally use average rates. These rates are not always computed accurately. The result is that a heavier tax burden is sometimes imposed on imports than on domestic goods, or a greater rebate is granted than the initial tax imposed prior to export.

In order to eliminate these tax barriers, the Council adopted two directives providing for the institution, in all member states, of a common turnover tax system, called the "tax on value added" (hereinafter referred to as TVA).[12] Under the TVA system, the tax imposed on the occasion of a given transfer is deductible from the tax imposed on the same good at a later stage. Because of this deductibility, the "snowball effect" is avoided, and the tax is therefore competitively neutral, *i.e.*, it does not favor vertical integration. Another consequence is that the total tax burden on a given product does not depend on the number of transfers to which the product was subjected. The computation of the tax rebate to be granted when goods are exported and the computation of the equalization tax to be imposed on imports can be effected with great precision, without the necessity of using average rates.

In accordance with the directives, the tax on value added has been introduced in Germany, the Netherlands and Luxembourg.[13] It is due to

[12]Council Directive of Apr. 11, 1967, Concerning the Harmonization of Member State Laws on Turnover Taxes, 10 E.E.C. J.O. 1301 (1967), 1 CCH COMM. MKT. REP. ¶¶ 3111-17 (1967); Council Directive of Apr. 11, 1967, Concerning the Harmonization of the Member State Turnover Tax—Structure and Procedure for Applying the Common Added-Value Tax System, 10 E.E.C. J.O. 1303 (1967), 1 CCH COMM. MKT. REP. ¶¶ 3135-57 (1967).

[13]There already existed a system of tax on value added in France.

enter into force in Belgium and Italy on January 1, 1971. Under the directives, only the structure and the methods of application of the tax are harmonized. The member states are free to decide on the rates which they apply. It is provided that, at a later stage in the Community's development, uniform tax rates will be introduced.[14] The Council of Ministers will have the power to modify those rates.

The introduction of uniform rates will have two major consequences. First, it will be possible to abolish the tax barriers entirely, since there will be no need to grant rebates for exports and impose import equalization taxes. The tax will be the same in the entire Community. Goods will circulate freely; the fact that they cross a borderline within the Community will not have any special significance from the tax standpoint. The second consequence of adopting uniform tax rates will be that member states will be deprived of one of their main instruments for raising revenue. Although most of the proceeds of the tax will remain in the hands of the states,[15] they will no longer be free to independently increase or decrease the rates of this tax. It is hardly necessary to stress the revolutionary character of such a development and the importance of the encroachment on national sovereignties which it represents.

Substantial progress has also been made in the field of agricultural exchanges. This has been a very difficult matter since, in all countries, agriculture is the object of extensive protection. In the EEC countries, this protection has consisted generally of artificially maintained prices for agricultural products, the level being far above the prices of the rest of the world. This is accomplished both by restricting imports (through customs duties, special levies, import quotas, minimum import prices, etc.) and by having governmental agencies purchase excess quantities any time the market prices fall below a minimum level (the intervention price). The systems were more or less the same in all member states, but they were not applied in the same manner. Hence, there was a disparity in prices guaranteed the farmers by their respective governments. They were generally highest in Germany and lowest in France. As a consequence, it was impossible to abolish obstacles to trade between the member states without simultaneously agreeing on uniform prices for each product within the Community. Otherwise, large quantities of low-priced products would have been imported into high-priced countries.

[14]Council Directive of Apr. 11, 1967, Concerning the Harmonization of Member State Laws on Turnover Taxes, *supra* note 12, at art. 4, provides that the Commission shall submit proposals to that effect to the Council not later than the end of 1968. These proposals have not yet been adopted.

[15]Under the most recent agricultural arrangements, to be discussed *infra*, it is provided that, as of 1975, one per cent of the TVA receipts may be attributed directly to the Community.

This would have forced the governmental agencies there to purchase the surpluses of the other countries in addition to their own.

Agreement on common prices proved quite difficult, since France was competitive for most products and wanted to maintain low prices; Germany wished, for obvious internal reasons, to retain its high prices. Eventually, after long negotiations, agreement was reached on uniform prices for cereals.[16] Similar agreements were concluded in subsequent years for most of the main agricultural products, so that today, except for a few products such as horses, mutton, hemp, linen, fish and potatoes, basically all agricultural products are the object of uniform price policies decided in common by the Council of Ministers. The importance of the powers exercised by the Council of Ministers in agricultural matters is exemplified by the fact that when the ministers meet in Brussels to decide on the level of prices for a given product, it frequently happens that farmers from all the countries in the Community assemble and demonstrate in the nearby streets.

The EEC's agricultural policy has been successful to the extent that common prices have been fixed and goods can circulate freely within the Community. One may ask, however, whether it has not been too successful, at least to the extent that it was designed to protect farmers against low prices. The Community is suffering today from excess production and from growing agricultural surpluses due to the high prices which were agreed upon during the negotiations described above. Recently, the Commission has proposed a plan to arrive at a better balance between supply and demand,[17] and the Council is presently considering this plan. Since one of the Commission's proposals consists of reducing the guaranteed prices of a number of agricultural products, notably dairy products and wheat, it meets with considerable opposition from the farmers and some member states.

An important aspect of the EEC's agricultural policy is that the expenses of the price-support programs, *i.e.*, governmental purchases of excess quantities, stockpiling, sales at a loss on the world market and destruction of unusable crops, is not borne by the individual member states but by the Community as a whole. The European Agricultural Guidance and Guarantee Fund, instituted in 1962,[18] reimburses the member governments for the expenses which they incur in relation with

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[16] 2 BULL. E.E.C. 7 (1965).

[17] *Memorandum on the Reform of Agriculture in the European Economic Community*, SUPPLEMENT TO BULL. E.E.C., Jan., 1969, at 1-2, 24-26.

[18] Council Reg. No. 25, Apr. 4, 1962, Concerning Financing of the Common Agricultural Policy, 5 E.E.C. J.O. 991 (1962), 1 CCH COMM. MKT. REP. ¶ 901 (1962).

the Community farm policy. As the Community's major agricultural producer and exporter, France gets the largest share of the Fund's assistance.

The Fund is currently financed by contributions from the member governments, according to a complicated formula which was decided in 1966.[19] The formula provides, in effect, that the states which have the largest share of third country imports, *i.e.*, Germany, contribute the largest share to the Fund.[20] Last April, however, the Council agreed in principle[21] that the Fund's income would no longer be derived from state contributions. Under the new agreement, the income will come directly from the customs duties on industrial goods and the import levies on agricultural goods imported into the Community from third countries. The switch from national contributions to direct resources will be effected gradually over a four year period from 1971-1974. Thus, at the beginning of 1975, all the customs duties and import levies imposed by the member states will have to be given over in their entirety to the Community. It was further agreed that, as of 1975, one percent of the common TVA receipts would also be appropriated to the Community. Finally, in order to provide some democratic control over the Community's revenues and expenditures, the powers of the European Parliament, which until now have been purely consultative, were considerably reinforced. The Parliament will have the power to introduce amendments to the draft budget presented to it by the Council. If these amendments are modified by the Council, the Parliament may, by a vote of the majority of its members and of three-fifths of the ballots cast, modify the amendments introduced by the Council. The decision of Parliament is final.

Again, it seems unnecessary to stress the paramount importance of these decisions, which grant the Community autonomous fiscal and budgetary powers and also independent resources. Their real significance reaches far beyond the area of agricultural policy. When the agreement enters into force, the entire Community budget—and not only the European Agricultural Guidance and Guarantee Fund—will be financed by direct sources of income. As a consequence, the Community institutions—and particularly the Commission and the European

[19] Council Reg. No. 130/66, July 26, 1966, Concerning Financing of Common Agricultural Policy, 9 E.E.C. J.O. 2965 (1966), 1 CCH COMM. MKT. REP. ¶ 904 (1966).

[20] This result is obtained by having the contributions calculated proportionally to the gross imports into one member state of agricultural products from third countries.

[21] Council Decision of Apr. 21, 1970, Concerning Replacing Financial Contributions of Member States With the Community's Own Resources, 13 E.E.C. J.O. L 94/19 (1970).

Parliament, which are the most "supranationally" oriented—will be less dependent on the member states' willingness to contribute to their expenses and will have greater freedom in undertaking new projects. Also, the European Parliament, which until now had been a purely advisory body, even in financial matters, will see its powers substantially increased.

II. MOVEMENT OF PERSONS

The Treaty provides for "free movement of workers."[22] The basic idea is that nationals of one member country be allowed to go to, and work in, another member country without being subjected to any restriction or discrimination not already imposed on nationals of that country. Little need be said about this provision. Three regulations have been adopted by the Council in 1961, 1964 and 1968 respectively.[23] They provide for the gradual elimination of all obstacles to the free movement of workers, and today this freedom may be said to be effective.

In all member states, workers who are nationals of other member states are guaranteed the same rights as nationals with respect to work conditions, housing, membership in labor unions, social security, etc. Special provisions have also been adopted in order to allow workers who exercise their activities in several member states to enjoy the same social security benefits as if they worked in a single country.[24]

The Treaty also provides for "freedom of establishment," which means the freedom for self-employed persons to establish themselves durably in another country without restrictions or discriminatory requirements.[25] Corporate enterprises also receive this freedom.[26]

According to Article 52 of the Treaty, freedom of establishment was to be fully realized by the end of the transitional period. In order to effect this, the Council had the power, acting on a proposal of the Commission and after the Economic and Social Committee and the European Parliament have been consulted, to address directives to the member

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[22]Treaty, arts. 48-51, at 36-37.

[23]Council Reg. No. 1612/68, Oct. 19, 1968, Concerning Free Movement of Workers Within the Community, 11 E.E.C. J.O. ____ (1968); Council Reg. No. 15, Aug. 26, 1961, Concerning Free Movement of Workers, 4 E.E.C. J.O. 1073 (1961), *superseded by* Council Reg. No. 38/64, March 25, 1964, 7 E.E.C. J.O. 965 (1964), 1 CCH COMM. MKT. REP. ¶¶ 1031-93 (1964).

[24]*See* Council Reg. No. 3, Dec. 16, 1958, Concerning the Social Security of Migrant Workers, 1 E.E.C. J.O. 561 (1958); Council Reg. No. 4, Dec. 16, 1958, Concerning the Methods for Applying and Administering Regulation 3, 1 E.E.C. J.O. 597 (1958).

[25]Treaty, arts. 52-58, at 37-40; *see id.* arts. 59-66, at 40-42, concerning the free supply of services.

[26]*See, e.g., id.* arts. 52 & 58, at 37-38 & 40.

states.[27] Such directives have been issued for a wide range of professions. A number of activities, however, have not yet been liberalized, although the Commission has submitted proposals concerning them.[28] The difficulty stems from the fact that these activities are the subject of intensive regulations designed to protect the public. It, therefore, is not possible to liberalize them without, at the same time, approximating the rules relating to the conditions of exercise of these activities by nationals, if distortions of competition are to be avoided at all.

III. CAPITAL MOVEMENTS

All restrictions on the movement of capital between persons resident in member states and any discrimination based on the nationality or place of residence of the parties or on the place in which such capital is invested must be gradually abolished during the transitional period to the extent necessary for the proper functioning of the Common Market. Contrary to what is provided with respect to movements of goods and workers and right of establishment, the Treaty does not prescribe the total abolition of restrictions on capital movements. These must be eliminated only "to the extent necessary for the proper functioning of the Common Market."[29] The Council, acting on a proposal of the Commission, has the power to issue directives for the gradual implementation of this goal.[30]

Two directives have been adopted.[31] They provide for the elimination of exchange control restrictions on a certain number of transactions, such as direct investments, portfolio investments,[32] short-term and medium-term .commercial credits, acquisition of real estate, etc. The draft of a third directive was proposed by the Commission to the Council in 1964. It provided for the abolition of all discrimination based on the nationality or place of residence of the issuer with respect to the issuance and placement of securities on the national capital market and also with respect to the admission of such securities to the stock exchanges.

[27] *See id.* arts. 54 & 189, at 38-39 & 78-79.

[28] These include, among others, banks and financial intermediaries, insurance companies, doctors, pharmacists and lawyers.

[29] Treaty, art. 67, at 42.

[30] *Id.* art. 69, at 43.

[31] Council Directive of Dec. 18, 1962, Concerning Completing and Modifying the First Directive for the Implementation of Treaty Article 67, 6 E.E.C. J.O. 62 (1963); Council Directive of May 11, 1960, Concerning the Implementation of Treaty Article 67, 3 E.E.C. J.O. 921 (1960), 1 CCH COMM. MKT. REP. ¶¶ 1651-67 (1960).

[32] For portfolio investments in securities which are not listed on a stock exchange and for mutual fund certificates, the member states retain the ability to reintroduce or maintain certain restrictions.

Additionally, it provided that member states would abrogate all regulations restricting institutional investors from acquiring securities issued by companies of other member states. This applied to the extent that such securities offered the same guarantees as those which these institutions were authorized to acquire, were payable in local currency in the case of debt securities and were listed on a local stock exchange. This draft met with substantial opposition from the member states and, although it was extensively modified by the Commission in 1967 to take these objections into account, it has not yet been adopted.

IV. THE EFFECT OF THE EEC TREATY AS VIEWED FROM A LEGAL, COMMERCIAL AND ECONOMIC PERSPECTIVE

A. *Antitrust Law*

Articles 85 and 86 contain the Treaty's basic provisions in the field of antitrust law. According to Article 85, paragraph 1, all agreements between enterprises, decisions of associations of enterprises and concerted practices which are apt to affect trade between the member states and which have as their objective or effect the prevention, restriction, or distortion of competition within the Common Market, are declared incompatible with the Common Market and are prohibited. However, Article 85, paragraph 3, further provides that such agreements and concerted practices may be authorized if the agreement or concerted practice contributes to the improvement of the production or distribution of goods or to the promotion of technological or economic progress while reserving to consumers an equitable share in the profit resulting therefrom. In addition such agreements may neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives, nor enable such enterprises to eliminate competition in respect to a substantial proportion of the goods concerned. Article 86 provides that any abusive exploitation of a dominant position within the Common Market, or within a substantial part thereof, shall be deemed to be incompatible with the Common Market and shall be prohibited insofar as trade between member states could be affected by it.

These antitrust rules are administered by the Commission of the European Communities which may prohibit an agreement, either on its own initiative or on request by a member state or by an interested person.[33] The Commission may also exempt agreements which meet the

[33]Council Reg. No. 17, March 13, 1962, Concerning Implementing Articles 85 and 86 of the Treaty, art. 3, 5 E.E.C. J.O. 205 (1962), 1 CCH COMM. MKT. REP. ¶ 2421 (1962).

conditions set forth in Article 85, paragraph 3, and which have been registered with it.[34] Finally, the Commission may impose fines from $1,000 to $1,000,000. This last figure may be increased to 10% of the turnover of the preceding business year for each enterprise which took part in the infringement.[35]

Until recently, there had been only one decision prohibiting an agreement in which fines had been imposed.[36] However, a year ago the Commission, by two rather spectacular decisions, imposed heavy fines on several well-known EEC and foreign chemical firms which had conspired to fix prices and to allocate markets in the dyestuffs and quinine industries.[37] The Commission's decisions imposing fines came pretty much as a surprise, and caused many people to realize for the first time that the Commission's powers were not purely theoretical, but would be exercised in cases where parties to an agreement or concerted practice had knowingly violated the Treaty rules. These decisions have been appealed to the Court of Justice.

Although the Commission has authorized numerous agreements under Article 85, paragraph 3, it appears that it is most reluctant to authorize agreements which tend to allocate markets along national lines. On the other hand, the Commission has taken a lenient attitude as to agreements between firms of different member countries which tend to promote joint research and development activities, joint purchasing and selling, common manufacturing standards, common promotional efforts, etc.[38] The reason for this leniency is that such agreements favor economic integration. Therefore, if some of the clauses of the agreement are designed to grant territorial protection to the parties themselves or to third parties (such as export prohibitions, commission-sharing arrangements, sales quotas and obligations to observe domestic market prices), the Commission generally requires that they be deleted as a condition to authorizing the agreement. Indeed, the whole purpose of the Common Market would be frustrated if firms could reestablish private barriers after the member states had been obliged to abolish all other obstacles to trade.

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[34] *Id.* at arts. 4-6, 1 CCH COMM. MKT. REP. ¶¶ 2431-51 (1962).

[35] *Id.* at art. 15, § 2, 1 CCH COMM. MKT. REP. ¶ 2541 (1962).

[36] Establishments Consten v. E.E.C. Comm'n [1961-1966 transfer binder] CCH COMM. MKT. REP. ¶ 8046 (Ct. of Justice of EEC 1966).

[37] Commission Decision of Aug. 5, 1969, Prohibiting International Quinine Cartel, 12 E.E.C. J.O. L 192/___ (1969), [1965-1969 transfer binder] CCH COMM. MKT. REP. ¶ 931 (1969); Commission Decision of Aug. 1, 1969, Prohibiting Practices of Dyestuff Manufacturers, 12 E.E.C. J.O. L 195/___ (1969), [1965-1969 transfer binder] CCH COMM. MKT. REP. ¶ 9314 (1969).

[38] On this subject, see Waelbroeck, *Cooperation Agreements and Competition Policy in the E.E.C.*, 1 N.Y.U.J. INT'L L. & POL. 5 (1968).

B. Commercial Policy

The mere suppression of obstacles to intra-Community trade is not sufficient to ensure a harmonious functioning of the Common Market. If each member state pursues a different commercial policy in its relations with the outside world, diversions of traffic are bound to arise within the EEC, thus distorting competition in the Common Market.

The Treaty provides for the establishment of a common customs tariff,[39] and gives the Community institutions authority to modify this tariff either unilaterally[40] or by agreement with third countries.[41] In accordance with these Treaty provisions, several tariff cuts have been made in the common outer tariff, the most important of which resulted from the Kennedy Round negotiations which were concluded on June 30, 1967.[42] It is worthwhile observing that during the Kennedy Round, it was the Community, represented by the Commission, and not the individual member states, which conducted negotiations. However, although customs tariffs are important, they are only one of the many instruments which states may use to implement their commercial policies. In order to prevent diversions of traffic and distortions of competition, it is necessary not only to impose identical import duties on goods from abroad, but also to apply substantially the same rules with respect to import and export restrictions, export promotion measures plus anti-dumping and countervailing duties. Substantial progress has been made in all of these areas. It is to be noted that these actions are in accordance with Article 111 of the Treaty, which provides that the member states must coordinate their commercial policies so as to bring about the conditions necessary for the implementation of a common policy in the field of trade by the end of the transitional period.[43]

The question arises today, however, whether commercial agreements with third countries may still be negotiated and concluded individually

[39]Treaty, arts. 18-29, at 22-26.

[40]*Id.* art. 28, at 26.

[41]*Id.* arts. 111, 113, 228 & 238, at 58-59, 60, 90 & 92.

[42]11 E.E.C. J.O. L 305/____ (Dec. 19, 1968).

[43]Council Reg. No. 2603/69, Dec. 27, 1969, Concerning Establishing Common Export Procedure, 12 E.E.C. J.O. L 325/25 (1969); Council Reg. No. 2045/68, Dec. 18, 1968, Concerning the Introduction of Special Procedure for Supports of Certain Products from Certain Third Countries, 11 E.E.C. J.O. ____ (1968); Council Reg. No. 2043/68, Dec. 18, 1968, Concerning the Gradual Establishment of a Common Procedure for Administration of Quotas on Supports into the Community, 11 E.E.C. J.O. ____ (1968); Council Reg. No. 2041/68, Dec. 18, 1968, Concerning Common List for the Liberalization of Imports from Third Countries, 11 E.E.C. J.O. ____ (1968); Council Reg. No. 459/68, Apr. 5, 1968, Concerning Defense Against Dumping, Premiums or Subsidies by Countries Not Members of E.E.C., 11 E.E.C. J.O. L 93/1 (1968), 1 CCH COMM. MKT. REP. ¶¶ 3883-84 D (1968).

by the member states or whether they should, in all cases, be entered into by the Community as a whole. The Treaty does not provide an express answer to this question. Article 113 states that "[a]fter the expiry of the transitional period, the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, to the conclusion of tariff or trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies."[44] It provides further that "[w]here agreements with third countries are required to be negotiated, the Commission shall make recommendations to the Council, which will authorise the Commission to open the necessary negotiations."[45] Although not expressly stated in the Treaty, it is generally assumed that the Community's power to enter into trade agreements with third countries excludes the individual member states' competence in this area.[46]

In conformance with this interpretation, the Council recently adopted a decision whereby, as of January 1, 1973, all trade agreements with third countries will be negotiated and signed by the Community as a whole.[47] From 1970 until the end of 1972, member states will be authorized to conclude agreements with the Eastern Bloc countries subject to certain procedural conditions. Until now these countries have refused to recognize the EEC, so that it is practically impossible for the Community, as such, to enter into negotiations with them. However, before negotiations can start, the individual member state has to receive the Council's authorization, which is given by a qualified majority vote. The negotiations must be conducted in constant consultation with the Commission and the other EEC countries, and the agreement may not become effective before the Council has approved it by a qualified majority vote. Thus, even though the agreements which will eventually be concluded according to this procedure will be bilateral in form, in substance they will come very close to being real Community agreements.

C. Economic Policy

The adequate functioning of the Common Market demands a certain measure of coordination between the member states' economic policies.

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[44] Treaty, art. 113, § 1, at 60.

[45] *Id.* § 3.

[46] *See, e.g.*, Pescatore, *La politique Commerciale*, in LE DROIT DES COMMUNAUTÉS EUROPÉENNES 931 (W. Ganshof Van der Meersch ed. 1969).

[47] EUROPE, Oct. 20, 1969, at 4.

Otherwise, inflationary trends in one country will spread very rapidly to other countries since the inflationary country will import more goods, thus provoking an increase in the prices in the other countries. This contagion may not be stopped by the classical method of restricting imports or exports, because this would be contrary to the very notion of a customs union. Similarly, if one state adopts a tight-money policy in order to cool off its economy, investors in that state could use the freedom of capital movements to borrow in other member countries where monetary conditions are easier. These examples point out the necessity of reaching a certain measure of coordination in the economic policies of the member states.

Another reason why economic coordination is needed is the elimination of the eventuality that one member state might devalue or revalue its money independently of the others. The mere possibility of a unilateral change in the value of a member state's currency tends to discourage dealings with such a country, and therefore prevents real and complete interpenetration of the economies.

A number of decisions in the field of economic coordination were adopted in April and May of 1964.[48] These decisions provided, *inter alia*, for consultations in case of change in the value of a member state's currency,[49] for a common program for medium-term economic policy,[50] for joint action to fight inflation,[51] for consultations in the area of budgetary policy,[52] and international monetary questions.[53] However, these decisions turned out to be insufficient. The consultations were often purely formal, each member state informing the others of the decisions it intended to take, without any real discussion or possibility of influencing the other's decision. The failure of the consultation mechanism became evident in 1969 when both France and Germany had to modify the value

[48] *See* Waelbroeck, *La politique économique*, in LE DROIT DES COMMUNAUTÉS EUROPÉENNES 901 (W. Ganshof Van der Meersch ed. 1969).

[49] Declaration of the Representatives of the Governments of the Member States of May 9, 1964, 7 E.E.C. J.O. 1266 (1964).

[50] Council Decision of Apr. 15, 1964, Concerning Creating a Medium-Term Economic Policy Committee, 7 E.E.C. J.O. 1031 (1964), 1 CCH COMM. MKT. REP. ¶ 3665 (1964).

[51] Council Recommendation of Apr. 15, 1964, Concerning Provisions to be Taken Towards the Reestablishment of the Internal and External Economic Balance of the Community, 7 E.E.C. J.O. 1029 (1964), 1 CCH COMM. MKT. REP. ¶ 3605 (1964).

[52] Council Decision of May 8, 1964, Concerning Responsibility of Monetary Committee for Consultations on International Monetary Relations, 7 E.E.C. J.O. 1208 (1964). *See also* 1 CCH COMM. MKT. REP. ¶ 3662, at 2875 (1965).

[53] Council Decision of May 8, 1964, Concerning Responsibility of Monetary Committee for Consultations on International Monetary Relations, 7 E.E.C. J.O. 1208 (1964).

of their respective currencies,[54] thus denoting that economies of both countries had gone widely astray.

It is the opinion of this writer that this constituted a salutary shock, because it caused the national ministries as well as the general public to realize that the purely formal consultations which had been going on had to be replaced by a real coordination of economic policies. It was realized that in order to achieve this objective, it was necessary to provide an incentive to coordinate and a sanction in case of failure to do so. This is the central concept of the plan proposed by Mr. Raymond Barre, the French member of the Commission responsible for economic and financial affairs, at the end of 1968.[55] The plan is now being discussed intensively by the competent Community institutions. Under this plan, any member state experiencing balance of payments difficulties is entitled to receive short-term monetary assistance from the others. The maximum amount of this is proportional to the amount which the particular country agrees to contribute in case other states are in the same situation. The assistance is to be granted for a three year period and would be automatic. Its primary purpose is to discourage speculators when a member state is experiencing temporary difficulties in its balance of payments.[56]

If the short-term assistance is not sufficient, the state in difficulty may benefit from medium-term financial aid. Contrary to the short-term assistance, however, this aid is not automatic but may be subject to certain conditions to be respected by the beneficiary state. Thus, the states granting the aid may impose upon the receiving state the obligation to adopt certain specified measures of economic policy in order to restore its balance of payments.

The Barre plan represents a first step towards a full-fledged monetary union. At the Hague Summit Meeting of December, 1970, the Heads of State and of Governments of the six countries agreed that it was necessary to move beyond a mere cooperation in monetary matters and that the ultimate objective to be attained was a monetary union. Subsequently, the Commission and the governments of Germany,

[54]To make things worse, France did not even consult with the other countries, contrary to the Declaration of May 9, 1964. *See* note 49 *supra*.

[55]The plan was initially presented to the Council on December 5, 1968. EUROPE, Dec. 20, 1968 (Document No. 506). An additional memorandum further specifying some aspects was presented on February 12, 1969. *See A Plan for the Phases Establishment of an Economic and Monetary Union*, SUPPLEMENT TO BULL. E.E.C., March, 1970, at 3-14.

[56]An agreement was concluded by the Central Banks of the six member states on February 9, 1970, to institute this short term monetary assistance system. EUROPE, Feb. 17, 1970 (Document No. 561).

Belgium, France and Luxembourg each presented plans designed to arrive at this end through somewhat divergent methods. It is still too early to predict exactly what form the monetary union will adopt, or when it will be effective. One thing seems reasonably certain: as a result of the shock created by the monetary disturbances of 1969, a great deal more attention is being devoted to this problem in governmental circles than ever before. The political will exists to move ahead rapidly and it is therefore very likely that substantial progress will be achieved within the next few years.