

Fordham International Law Journal

Volume 7, Issue 3

1983

Article 1

EEC Competition Actions in Member States' Courts – Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law

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EEC Competition Actions in Member States' Courts – Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law

John Temple Lang

Abstract

It seems likely that the need for protection against private claims for damages will cause more corporations to notify the Commission of their agreements and practices so as to obtain exemptions or, if appropriate, negative clearances. Whether this will cause a net increase in the Commission's workload is not clear, since there will be a concomitant decrease in the number of cases dealt with by the Commission. The Commission could try to solve any problem of increasing workload by proposing a directive to harmonize national laws and procedures in a way which would encourage plaintiffs to bring claims in national courts rather than to the Commission, and by adopting or proposing a directive to harmonize national laws and procedures in a way which would encourage plaintiffs to bring claims in national courts rather than to the Commission, and by adopting or proposing the adoption of group exemptions under article 85(3) for less restrictive agreements.

EEC COMPETITION ACTIONS IN MEMBER STATES' COURTS—CLAIMS FOR DAMAGES, DECLARATIONS AND INJUNCTIONS FOR BREACH OF COMMUNITY ANTITRUST LAW

*John Temple Lang**

I. PART I

A. Authorities Showing That Claims for Compensation and Injunctions for Breach of Community Antitrust Law Can Now Be Brought in National Courts

1. The Case Law of the Court of Justice

The question whether national laws should give a right to an injunction or compensation or both in appropriate cases for loss caused by an infringement of articles 85 and 86 of the Treaty of Rome¹ (Treaty or EEC Treaty) has not come directly before the Court of Justice of the European Communities. Case law, however, provides some clear indications of the Court's likely position on the question.

The leading case on the constitutional law of the European Economic Community (EEC or Community) and the nature of the Community legal system is *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration*,² in which the Court, speaking of the rights of individuals under Community law, wrote:

These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty

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1. Treaty establishing the European Economic Community, Mar. 25, 1957, arts. 85, 86, 298 U.N.T.S. 3, 47-49 (unofficial English translation), 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation). [hereinafter cited as EEC Treaty].

2. 1963 E. Comm. Ct. J. Rep. 1, [1961-1966 Transfer Binder] *COMMON MKT. REP.* (CCH) ¶ 8008.

imposes in a clearly defined way upon individuals as well as upon the Member States and upon the Institutions of the Community . . . [t]he vigilance of individuals to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of Member States.³

In *Belgische Radio en Televisie v. SV SABAM*,⁴ a case that concerned the powers of national courts to decide the lawfulness of certain contracts under articles 85 and 86, the Court said:

As the prohibitions of Article 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard. To deny, by virtue of the afore-mentioned Article 9 [of Regulation 17/62], the national courts' jurisdiction to afford this safeguard, would mean depriving individuals of rights which they hold under the Treaty itself.⁵

In the same case Advocate General Mayras said:

[W]here civil or commercial courts . . . have to judge disputes between individuals . . . the Court has only to give a decision on the civil consequences of that infringement: nullity or termination of the contract, grant of damages to the injured party. . . . [I]t is true that private persons can invoke the rights which they hold by virtue of Articles 85 and 86 before their national courts and that the latter have power to recognise their enjoyment of them⁶

In a case involving the duties under article 86 of an Italian television monopoly, the Court said, "[e]ven within the framework of Article 90, therefore, the prohibitions of Article 86 have direct effect and confer on interested parties rights which the national courts must safeguard."⁷

3. *Id.* at 12-13, [1961-1966 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8008, at 7214-15.

4. 1974 E. Comm. Ct. J. Rep. 51, [1974 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8268.

5. *Id.* at 62-63, [1974 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8268, at 9185-22.

6. *Id.* at 72-74, [1974 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8268, at 9185-29 to 9185-31.

7. *Ex parte Sacchi*, 1974 E. Comm. Ct. J. Rep. 409, 430, [1974 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8267, at 9185-4.

In a case concerning the lawfulness of selective distribution agreements,⁸ the Court expressly referred to the holding in *SABAM* and relied on the language in that opinion.⁹

In *Camera Care Ltd. v. Commission*,¹⁰ the Court held that the Commission had power to adopt interim or interlocutory decisions to preserve the status quo during its administrative procedure "in cases proved to be urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption or which is intolerable in the public interest."¹¹ The fact that this is a power to be used to prevent serious and irreparable damage to a complainant company or individual demonstrates that articles 85 and 86 are laws for the protection of private persons and firms and private interests, and not solely laws for the protection of the public interest or the Community.

In a case concerned with the recovery of taxes which had been imposed by a member state contrary to a directly applicable rule of Community law,¹² the Court said:

It follows from the judgments of 16 December 1976 in the *REWE* and *Comet* cases (Case 33/76 and Case 45/76 (1976) ECR 1989 and 2043 respectively) that, applying the principle of cooperation laid down in Article 5 of the EEC Treaty, it is the courts of the Member States which are entrusted with ensuring the legal protection which subjects derive from the direct effect of the provisions of Community law. In the present state of Community law and in the absence of Community rules concerning the contesting or the recovery of national charges which have been unlawfully demanded or wrongfully levied, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to safeguard the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature and that under no circumstances may they be so adapted as to

8. *Anne Marty S.A. v. Estée Lauder S.A.*, 1980 E. Comm. Ct. J. Rep. 2481, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8713.

9. *Id.* at 2501, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8713, at 8573.

10. 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645.

11. *Id.* at 131, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645, at 7644.

12. *Amministrazione delle Finanze dello Stato v. MIRECO S.A.S.*, 1980 E. Comm. Ct. J. Rep. 2559, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8694.

make it impossible in practice to exercise the rights which the national courts have a duty to protect . . .¹³

This judgment illustrates that national courts have a duty to provide effective remedies in accordance with national law rules on procedure for loss due to any infringement of Community law. Since the whole range of national remedies must be made available to a plaintiff suing for breach of Community law, actions for declarations must be permitted where national law provides for them. However, the two principal remedies in practice will be damages and injunctions.

2. National laws

In 1966, the Commission published a study on the remedies provided by national law for losses caused by infringements of articles 85 and 86.¹⁴ The study dealt only with the then six member states of the Community. It considered the right to compensation, injunctions and enforcement of injunctions by *astreintes* (periodic penalty payments) and publication of judgments.

The study was detailed and it does not seem appropriate to paraphrase it here. The authors concluded that all forms of private remedies were available under all the national laws.¹⁵ The only point on which some doubt was expressed, a point of special significance in German and Dutch law, was whether articles 85 and 86 should be regarded as laws for the protection of individuals and private interests.¹⁶ It is submitted that this question has been answered by the Court's judgments referred to above, and by the judgments of the national courts discussed below.

The Commission has not updated the 1966 study, and no comparable official study of the laws of the four new member states (Denmark, Greece, Ireland and the United Kingdom) has been published. However, it is possible to say certain things about the national laws of some of the new member states.

13. *Id.* at 2574-75, [1979-1981 Transfer Binder] *COMMON Mkt. REP.* (CCH) ¶ 8694, at 8318-19.

14. *La réparation des conséquences dommageables d'une violation des articles 85 et 86 du Traité instituant la CEE, serie concurrence No. 1 (1966)* [hereinafter cited as *Commission study*].

15. *Id.*

16. *Id.*

According to the national laws of Ireland, Scotland¹⁷ and England, an action may be brought for an injunction or damages, as may be appropriate, for breach of a statutory duty. This is possible if the proper interpretation of the statute is that it is not merely a law for the protection of the public interest, but rather is also intended to protect, and provide a remedy for, private plaintiffs. This same issue arises under Dutch and German law, and should be answered in the same way: articles 85 and 86 are laws for the protection of individual interests as well as for the protection of the public interest. The Court's judgment in the *Camera Care* case,¹⁸ the judgments of the Bundesgerichtshof in the *BMW* case,¹⁹ and of the House of Lords in *Garden Cottage Foods v. Milk Marketing Board*²⁰ make that clear. That general language of the Court quoted above, to the effect that articles 85 and 86 create rights which national courts must safeguard, could hardly be explained on the basis that these rights can be pleaded only by defendants and not by plaintiffs.

Since it is now clear that an action for breach of statutory duty may be brought, the alternative possibilities are mentioned only for completeness. Moreover, the action for breach of a statutory duty appears to correspond most closely to the rights of action in the other member states in which the law seems fairly clear. These latter rights of action are, in essence, a claim for loss caused by an unlawful act. According to French law, for example, the well-developed case law interpreting articles 1382 and 1383 of the Civil Code, all infringements of law constitute faults sufficient to give rise to delictual (tortious) liability, provided the law encompasses individual interests as well as the general interest.²¹ Before the *Garden Cottage Foods* case discussed below, some lawyers had thought that no action for breach of statutory duty would lie for a violation of articles 85 and 86 because Regulation 17²² provided an alternative remedy by way of complaint to the injured party.²³ The *Garden Cottage Foods* judgment seems to show that this argument

17. For a discussion of Scottish law, see W. GLOAG & R. HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND 488-89 (8th ed. 1980); D. WALKER, CIVIL REMEDIES ch. 59 (1974).

18. 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645.

19. Judgment of Oct. 23, 1979, Bundesgerichtshof, W. Ger., 1980 Wirtschaftrecht 392.

20. [1983] 2 All E.R. 770 (H.L.).

21. CODE CIVIL [C. CIV.] arts. 1382, 1383 (83e ed. Petits Codes Dalloz 1983) (Fr.).

22. Regulation 17, 5 J.O. COMM. EUR. 204 (1962).

23. *Id.*

has been rejected by the House of Lords in the United Kingdom. It is submitted that this is correct: Regulation 17 gives no right to compensation or any other remedy for an injury suffered prior to the date of the Commission's decision.

The laws of Ireland, Scotland and England apparently allow an action to be brought for conspiracy to cause harm by unlawful means.²⁴ This action would apply to infringements of article 85, which are always committed by two or more enterprises; but it would not normally apply to infringements of article 86 in which only one enterprise is normally involved. Furthermore, even if more than one enterprise were involved, article 86 would not apply if the parties did not enter into an agreement—a necessary element for an action in conspiracy. Nevertheless, a plaintiff might have difficulty if the principal purpose of the unlawful agreement was, for example, a patent license or a joint venture, and the loss caused to him was only an incidental result of the agreement. In the case of a collective boycott, however, or any exclusive agreement, no difficulty would seem to arise because the exclusion of the plaintiff would be a direct and necessary result of the agreement.

“Causing loss by unlawful means” may also be a tort, which would encompass a loss caused by infringement of either article 85 or 86.

In *Application de Gaz v. Falks Veritas*,²⁵ the possibility of regarding infringements of articles 85 and 86 as a new kind of tort was raised judicially in the United Kingdom.

Yet another possibility is that, where appropriate legislation so provides, compensation, rather than an injunction may be awarded.²⁶

In Ireland, it seems probable that the Constitution requires the courts to give rights of action for injunctions or damages even where a right has been infringed (such as a constitutional right or a right under Community law) for which no other recognized right of action exists.²⁷

24. See, e.g., *Daily Mirror Newspapers Ltd. v. Gardner*, [1968] 2 Q.B. 762; *Brekkes Ltd. v. Cattel*, 1971 All E.R. 1031 (Ch. 1970).

25. [1974] 3 All E.R. 51, 58 (C.A.).

26. See, e.g., *The United Kingdom Supreme Court Act, 1981*, § 50. For the Irish Law, see B. McMAHON & W. BINCHY, *IRISH LAW OF TORTS* 592-94 (1981).

27. *O'Brien v. Keogh*, 1978 Ir. R. 144; *Meskeil v. Coras Iompair Eireann*, 1973 Ir. R. 121, 132-33 (Sup. Ct. 1972); *Byrne v. Ireland*, 1972 Ir. R. 241, 279 (Sup. Ct. 1971); *Macauley v. Minister for Posts and Tels.*, 1966 Ir. R. 345.

3. Case Law of National Courts

The relevant case law of national courts consists of eight reported cases from five countries, of which all but two were decided since the autumn of 1979. The decisions suggest that claims can be made in national courts.

The most recent, and perhaps the most important of the national court cases, is *Garden Cottage Foods Ltd. v. Milk Marketing Board*, decided by the House of Lords in the United Kingdom in June 1983.²⁸ The Milk Board revised its market arrangements and decided to appoint only four distributors to export butter in bulk from the United Kingdom, thereby cutting off supplies to Garden Cottage Foods. Garden Cottage Foods claimed a violation of article 86 and a breach of statutory duty, and sued for an injunction requiring the Board to resume supplies.

There was substantial argument as to whether it was possible to assert a claim for damages. The trial judge decided that the parties could make such a claim and thereby receive adequate relief.²⁹ The Court of Appeal held that the trial judge erred in refusing to issue an injunction solely because each member of the court felt doubt, in varying degrees, on the question whether damages could be awarded.³⁰ Sir Sebgag Shaw expressed considerable misgivings as to whether a remedy in damages lies for a contravention of article 86 of the Treaty.³¹ Lord Denning M.R. thought that it was not altogether certain.³² May L.J., though less doubtful than the Master of the Rolls as to the availability of a remedy in damages, considered that the contrary was certainly arguable.³³ The Court of Appeal therefore granted an injunction.

The House of Lords decided that the Court of Appeal should not issue an injunction because appellate courts should not interfere with the trial judge's discretion, and because it is not "seriously arguable" that a remedy in damages is unavailable.³⁴ The case really focused on the powers of appellate courts, but Lord Diplock, speaking for a 4 to 1 majority, said:

28. *Garden Cottage Foods Ltd. v. Milk Mktg. Bd.*, [1983] 2 All E.R. 770 (H.L.).

29. *Id.* at 772.

30. *Id.* at 777.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 778-79, 780.

[Article 86] was held by the Court of Justice of the European Communities in *Belgische Radio en Televisie v SABAM* Case 127/73 [1974] ECR 51 at 62 to produce direct effects in relations between individuals and to create direct rights in respect of the individuals concerned which the national courts must protect. This decision of the Court of Justice as to the effect of art. 86 is one which S 3(1) of the European Communities Act 1972 requires your Lordships to follow. The rights which the article confers on citizens in the United Kingdom accordingly fall within S 2(1) of the 1972 Act. They are without further enactment to be given legal effect in the United Kingdom and enforced accordingly.

A breach of the duty imposed by art. 86 not to abuse a dominant position in the Common Market or in a substantial part of it can thus be categorised in English law as a breach of a statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the Common Market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.

...
 [I]n the light (a) of the uniform jurisprudence of the [European Court of Justice,] of which it is sufficient to mention the *Belgische Radio* case (which I have already cited) and the subsequent case of *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989, which was to the same effect as respect the duty of national courts to protect rights conferred on individual citizens by directly applicable provisions of the treaty, and (b) of S 2(1) and 3(1) of the European Communities Act 1972, I, for my own part, find it difficult to see how it can ultimately be successfully argued, as the board will seek to do, that a contravention of art. 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty; but since it cannot be regarded as unarguable that is not a matter for final decision by your Lordships at the interlocutory stage that the instant case has reached.³⁵

Dissenting on the procedural issues, and favoring the grant of an injunction, Lord Wilberforce said:

It can I think be accepted that a private person can sue in this country to prevent an infraction of article 86. This follows from

35. *Id.* at 775, 777.

the fact, which is indisputable, that this article is directly applicable in member states. The Court of Justice of the European Communities has moreover decided in *Belgische Radio en Televisie v SV SABAM* Case 127/73 [1974] ECR 51 at 62, para. 16, in connection with art. 86 that it is for the national courts of member states to safeguard the rights of individuals. Since art. 86 says that abuses of a dominant position are prohibited, and since prohibited conduct in England is sanctioned by an injunction, it would seem to follow that an action lies, at the instance of a private person, for an injunction to restrain the prohibited conduct. But can he recover damages? Your Lordships, I understand, regard the contrary as "unarguable" or indeed "quite unarguable," a bold proposition in the fact (sic) of doubts expressed by the learned Lords Justices and one whose confidence I do not share. So far as the Community is concerned, art. 86 is enforced under Regulation 17/27 February 1962 by orders to desist (art. 3), and if necessary by fines (art. 15), and the Court of Justice has similar powers on review. Fines are not payable to persons injured by the prohibited conduct, and there is no way under Community law by which such persons can get damages. So the question is whether the situation is changed, and the remedy extended, by the incorporation of art. 86 into our law by S 2 of the European Communities Act 1972. To say that thereby what is prohibited action becomes a tort or a "breach of statutory duty" is, in my opinion, a conclusionary statement concealing a vital and unexpressed step. All that S 2 says (relevantly) is that rights arising under the EEC Treaty are to be available in law in the United Kingdom, but this does not suggest any transformation or enlargement in their character. Indeed the section calls them "enforceable Community rights," not rights arising under United Kingdom law. All that the relevant cases (*Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989 and *Amministrazione delle Finanze dello Stato v Sas Mediterranea Importazione, Rappresentanze, Esportazione, Commercio (MIRECO)* Case 826/79 [1980] ECR 2559) tell us is that it is for national laws to designate the appropriate courts having jurisdiction, and to establish the procedural conditions. Does this enable national laws to define the remedy? There is of course nothing illogical or even unusual in a situation in which a person's rights extend to an injunction but not to damages; many such exist in English law. Community law, which is what the English court would be applying, is, in any case, sui generis and the wording used in art. 86, "prohibited" and "so far as it may affect trade between Member States," suggest that this may be such a case, the purpose of this article in

the treaty being, so far as necessary, to stop such practices continuing. No doubt there are arguments the other way; I am certainly not contending for reverse unarguability, but I regret that this House should take a position on this point, which was only skeletally argued in an interlocutory proceeding. It seems to me, with respect, and I am supported by Lord Denning MR, to deserve consideration in greater depth, and, if I may invoke *American Cyanamid Co. v. Ethicon Ltd.* [1975] I A11 ER 504 at 510, [1975] AC 396 at 407 the court should not in an interlocutory proceeding "decide difficult questions of law which call for detailed argument and mature consideration."

If this is right, and the company's right to damages is an uncertain one, that would be, in itself, a strong ground for not leaving the company to recover hypothetical damages at the trial but for granting an injunction. But I will now consider the position on the assumption that such a right to damages does exist. Should the company be left to this claim? There are here two relevant considerations. In the first place, there can be no doubt that the primary remedy against a prohibited act is an injunction against continuance of it.³⁶

To summarize therefore, a majority of the House of Lords has declared that it is not "seriously arguable" that the right to damages does not exist for a breach of article 86, and a unanimous Court of Appeal has issued an injunction for a breach of that article. There is nothing in the reasoning of either court to limit the conclusions to article 86, or to the United Kingdom. In spite of the procedural complexities of the case, one may reasonably conclude that national courts of EEC member states may award both compensation and injunctions in appropriate cases for breaches of articles 85, 86 and 90.

In an earlier English High Court case, an *ex parte* interlocutory injunction was granted to restrain British Sugar from refusing to supply, contrary to article 86.³⁷

Less recent than, but just as important as, the *Garden Cottage Foods* case is the judgment of the Bundesgerichtshof in the *BMW*

36. *Id.* at 783-84.

37. See *James Budgett & Sons Ltd. v. British Sugar Corp.*, 1979 Eur. L. Rev. 417. Under the British Resale Prices Act, 1976, § 35(3), breach of certain provisions of that Act on restrictive prices rise to civil liability for breach of statutory duty; see also *Chelmsford Motors Ltd. v. Esso Petroleum Co.*, 1979 Comm. Mkt. L.R. 73 (1978).

case in 1979.³⁸ The plaintiff imported BMW cars into Germany from Belgium where they were cheaper. The defendant (the BMW company in Belgium) instructed its Belgian dealers not to supply the plaintiff—a clear violation of article 85. The Bundesgerichtshof held that the plaintiff could recover damages, stating:

Article 85 of the EEC Treaty does not, of course, confer on a person whose freedom to compete has been affected by an agreement prohibited under that provision the right to institute civil proceedings. However, like Article 1 of the Law Prohibiting Unfair Competition, Article 85 of the EEC Treaty must be considered a law for the protection of the injured party within the meaning of Article 823(2) of the Civil Code at all events where the prohibited impairment of the freedom to compete—in this case the supply ban—is aimed directly at the person concerned (citations omitted). Consequently, the principles embodied in Article 32 of the Code of Civil Procedure apply to local, and hence international, jurisdiction also with regard to such actions. . . .

The aim manifest in the defendant's conduct must also be deemed to have helped bring about circumstances that constitute the above-mentioned restrictions on competition. Neither a boycott nor an infringement of Article 85 of the EEC Treaty giving rise to the payment of damages can be held to exist without the measure being intended to affect adversely the competitive situation of a specific competitor. In the present case, the aim of the measures taken by the defendant was, as the appeal court found, to isolate the plaintiff from its Belgian suppliers and hence to influence its competitive position on the domestic market.³⁹

As discussed below, this judgment appears to imply that according to German law, a breach of article 85 would not give rise to a claim for damages unless the unlawful conduct is anticompetitive and directed against a specific victim. This would suggest that exploitative (as distinct from anticompetitive)⁴⁰ conduct contrary to

38. Judgment of Oct. 23, 1979, Bundesgerichtshof, W. Ger., 1980 *Wirtschaftrecht* 392. In the Commission study, *supra* note 14, it was concluded that compensation would be available under German law only if the plaintiff were excluded from the Common Market or from an important part of it. *Id.* at 24.

39. Judgment of Oct. 23, 1979, Bundesgerichtshof, W. Ger., 1980 *Wirtschaftrecht* 392 (unofficial translation).

40. Temple Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 *FORDHAM INT'L L.F.* 1, 18-36 (1979).

article 86 might not be actionable, and that, for example, a price fixing agreement not directed at a particular victim but against consumers generally might not be actionable either. There is nothing in the Treaty which would make either of these results necessary or appropriate, so that if indeed they are the position in Germany, they are due to the rules of German law, and one would not necessarily expect the same limitations to be found elsewhere.

What judges take for granted is often as well established as law which is debated at length by litigants. In *Cadbury Ireland Ltd. v. Kerry Cooperative*,⁴¹ the plaintiffs claimed that they were entitled to buy large quantities of milk from the defendants on the basis of certain contracts, and claimed damages for breach of article 86 because of defendant's refusal to supply at a satisfactory price. The judge rejected the claim under article 86, on the ground that the facts did not constitute an infringement of article 86. However, the court assumed without question that if an infringement had been committed, damages would have been available as a remedy.⁴²

Two Belgian court decisions have arrived at similar results. The first case was decided in 1964.⁴³ Three firms agreed to combine their tug boat operations in the port of Antwerp in order to eliminate price and other competition between them and establish a virtual monopoly. They also agreed to give favorable prices to customers who agreed to deal only with them. A fourth corporation subsequently entered the market, and during court proceedings asserted that the agreement to charge higher prices to its customers was contrary to articles 85 and 86. The court ordered the three firms to cease their discriminatory pricing agreement and awarded damages against them.⁴⁴

In the second Belgian case,⁴⁵ decided in 1979, the court granted an injunction on the basis that a price fixing agreement was contrary to article 85. The court ordered several Belgian publishers to refrain from making the supply of books to the plaintiff supermarkets dependent on the plaintiffs' promises to fix prices.⁴⁶

41. See 1981 Dublin U.L.J. 94.

42. *Id.* at 94-99.

43. *Union de Remorquage et de Sauvetage v. Schelde Sleepvaartbedrijf*, 1964 Comm. Mkt. L.R. 251.

44. *Id.*

45. *GB-INNO-BM v. Elsevier-Sequoia*, 29 Comm. Mkt. L.R. 258 (1980), discussed in Kon, *Article 85, Para. 3; A Case for Application by National Courts*, 19 COMMON MKT. L. REV. 541, 558-59 (1982).

46. 29 Comm. Mkt. L.R. 258, 265 (1980).

The Regional Court in Amsterdam has granted preliminary injunctions in two recent cases.⁴⁷ In 1979, the court ordered re-suspension of certain supplies when it appeared that the defendant had infringed article 86. The exclusive importer of French-language newspapers into the Netherlands, owned by the French firm Hachette, was prohibited from terminating supplies to a distributor, even for the purpose of distributing them itself.⁴⁸

4. Attitude of the Commission

In reply to a question in the European Parliament in 1973, the Commission said that it considered that "actions for damages brought by injured customers against firms that have violated Articles 85 and 86 of the EEC Treaty could provide useful support for [the Commission's] own measures to combat such infringements."⁴⁹

In a number of cases before the Court of Justice in which the question has arisen incidentally, the Commission has submitted in written argument that individuals and firms may claim compensation or injunctions in national courts for infringements of articles 85 and 86.

The Commission's statement to the parties in the *Camera Care* procedure, after the judgment already cited, is a general statement of the policy which the Commission intended to adopt in exercising its powers to order interim measures. In this statement the Commission said: "[I]n general parties should consider whether a similar remedy may not be available from a national court before applying to the Commission—particularly if the national procedures are cheaper or the order more easily policed."⁵⁰

All of this clearly implies that the Commission believes that plaintiffs have remedies in national courts, and that in each case the circumstances must be evaluated to determine whether a national court can give a satisfactory remedy.⁵¹

47. *Van Gelderen Import v. Impressum Nederland*, 1981 *Nederlandse Jurisprudentie* 405; see also *Brinkhof v. Nederlandse Spoorwegen*, 1970 *Comm. Mkt. L.R.* 264 (preliminary injunction granted).

48. *Van Gelderen Import v. Impressum Nederland*, 1981 *Nederlandse Jurisprudentie* 405.

49. 26 O.J. EUR. COMM. (No. C 67) 54 (1983) (reply to question 519/72 from Mr. Vredeling).

50. C. KERSE, *EEC ANTITRUST PROCEDURE* 322 app. 1 (1981).

51. See Temple Lang, *The Powers of the Commission to Order Interim Measures in Competition Cases*, 18 *COMMON MKT. L. REV.* 49, 58-59 (1981). Paines says that the Com-

A draft opinion of a section of the Economic and Social Committee on the Commission's *Twelfth Report on Competition Policy* in July 1983 said:

It would be desirable to recommend to complainants (corporations and/or importers injured, consumers' associations, trade unions) to apply to the administrations and/or the courts for Member States The Commission should take steps to publicise the national remedies available for individual plaintiffs (firms, workers, consumers etc.) where Community competition law is breached. If need be, the Commission should frame proposals to ensure effective and uniform implementation of Community competition legislation by all national courts.⁵²

5. Books and Law Review Articles

Many of the published comments addressing the question whether national courts can award damages and injunctions were either written before, or fail to discuss, the most important judgments on the point, which were reduced in 1979 and subsequent years. In spite of this, a majority of writers favor a right of action, although showing more caution than is necessary or appropriate now as a result of the judgments above.⁵³

mission's power to order interim measures is "almost a dead letter" because, in his view, the failure to exhaust national remedies would be a sufficient reason for the Commission to refuse a request for interim measures. Paines, *Enforcing EEC Competition Law in English Courts*, 1983 LAW SOC'S GAZETTE 272. This has never been said by the Commission in its statement in *Camera Care* or elsewhere and there are some circumstances at least in which a national court could not give an adequate remedy—e.g., if an injunction was needed in more than one member state. See Temple Lang, *Community Antitrust Law—Compliance and Enforcement*, 18 COMMON MKT. L. REV. 335, 344-50, 352-54 (1981); *infra* notes 61-78. The Commission's first interim decision was adopted in 1982, Distribution system of Ford-Werke AG, O.J. EUR. COMM. (No. L 256) 20 (1982), and its second in 1983, ECS/AKZO interim measures, O.J. EUR. COMM. (No. L. 252) 13 (1983).

52. COMM'N OF THE EUR. COMMS., TWELFTH REPORT ON COMPETITION POLICY (1983).

53. See, e.g., D. BAROONOS, D. HALL & J. JAMES, *EEC ANTITRUST LAW* 135 (1975); C. BELLAMY & G. CHILD, *COMMON MARKET LAW OF COMPETITION* 107-08 (2d ed. 1978); J. CUNNINGHAM, *THE FAIR TRADING ACT 1973* at 416-17 (1974); DE ROUX & VOILLEMOT, *LE DROIT DE LA CONCURRENCE DES COMMUNAUTÉS EUROPÉENNES* 244-47 (1976); A. GLEISS, *COMMON MARKET CARTEL LAW* ¶¶ 441-43 (3d ed. 1978); J. GUYENOT & C. D'EVERGNEE, *EUROPEAN ANTITRUST LAW OF THE COMMON MARKET* ¶¶ 159, 172, 305 (1976); C. KERSE, *EEC ANTITRUST PROCEDURE* 266-77 (1981); B. McMAHON & W. BINCHY, *IRISH LAW OF TORTS* 9 (1981); E. MESTMACKER, *EUROPAISCHES WETTBEWERBSRECHT* 569 (1974); R. PLAISANT, R. FRANCESCHELLI & J. LAISSIER, *DROIT EUROPÉEN DE LA CONCURRENCE* 324 (1978); J. SALMOND, *LAW OF TORTS* 37 (17th ed. 1977); J. TEMPLE LANG, *THE COMMON MARKET AND COMMON LAW* 474-82 (1966); U. TOEPKE, *EEC COMPETITION LAW* 22, 681, 806 (1982); THIESING-SCHRÖTER-HOCHBAUM, *LES ENTENTES ET LES POSITIONS DOMINANTES DANS LE DROIT DE LA CEE* 111, 133-36,

6. Practice

A number of claims for substantial sums in damages have been settled, without publicity, in the last few years. It is likely that there are a number of cases that resulted in unreported settlements. However, no statistics are available. Some companies have applied for exemptions under article 85(3) primarily or exclusively to ensure that they could not be liable to pay compensation to anyone injured as a result of their activities. There are also some companies that take into account contingent liabilities to pay damages when formulating and auditing their annual accounts.

B. *Considerations of Legal Principle and of Policy*

Articles 85 and 86 are directly applicable and create rights and duties on which national courts must act. Logically, this must mean that firms and individuals injured as a result of infringements of articles 85 and 86 have a right to sue, and not merely that agreements which are contrary to those articles are invalid and unenforceable. Moreover, articles 85 and 86 in their entirety are directly applicable, not merely article 85(2). Articles 85 and 86 can be used, in appropriate cases, as defenses. For example, it can always be pleaded in an action on a contract that the contract is void under article 85(2) or unlawful under article 86. There is no rational basis for saying that the articles can be used only by defendants and not by plaintiffs, unless it is thought that the articles are not laws for the protection of individual interests. For the reasons given above,

251-52, 456 (1977); J. VAN DAMME, *LE POLITIQUE DE LA CONCURRENCE DANS LA C.E.E.* 290-92 (1980); M. WAELBROECK, *4 LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENNE* ¶ 107 (1972); Emmerich, in Immenga/Mestmäcker, *GWB, Gesetz gegen Wettbewerbsbeschränkungen, Kommentar* 1283-1309, 1312-13 (1981); Grehan, *EEC and Irish Competition Policy and Law*, 1983 *RABELS ZEITSCHRIFT* 22, 57-62; Huntley, *The Protection of Trading Interests Act 1980: Some Jurisdictional Aspects of Enforcement of Antitrust Laws*, 30 *INT'L & COMP. L.Q.* 213, 218-21 (1981); Jacobs, *Jurisdiction and Enforcement in EEC Competition Cases*, in *id.* at 204, 213-15; Paines, *supra* note 51; Rew, *Actions for Damages by Third Parties under English Law for Breach of Article 85 of the EEC Treaty*, 8 *COMMON MKT. L. REV.* 462 (1971); Staines, *The Right to Sue in Ireland for Violation of EEC Rules on Competition*, 2 *LEGAL ISSUES OF EUR. INTEGRATION* 53 (1977); Temple Lang, *Community Antitrust Law—Compliance and Enforcement*, 18 *COMMON MKT. L. REV.* 335 (1981); Toepke, *Schadensersatz bei EWG—Kartelluerstößen*, 5 *RECHT DER INTERNATIONALER WIRTSCHAFT* 279 (1976); Warner, Panel Discussion, *reprinted in ENTERPRISE LAW OF THE 80's*, at 232-33 (F. Rowe, F. Jacobs & M. Joelson eds. 1980).

and on the basis of other indications in Community antitrust law,⁵⁴ it seems clear that articles 85 and 86 do protect individual interests. They can therefore be used either as a shield or as a sword.

It is sometimes said that Community antitrust law is for the protection of competition, not of competitors, and in principle this is true. Nevertheless, the two aims are not mutually exclusive, and the statement should not be used to exclude the possibility of claims for damages by competitors in appropriate cases, just as in United States antitrust law.⁵⁵

54. Certain provisions of the Community Regulations dealing with competition cases protect the rights of enterprises injured by suspected violations of articles 85 and 86, and so suggest that those articles are intended to protect those rights. These provisions are:

1. Regulation 17, article 3(2) (b): natural or legal persons who claim a legitimate interest may apply to the Commission to ask for a finding that there has been an infringement of articles 85 and 86, and to ask the Commission to bring it to an end, Regulation 17, art. 3(2)(b), 5 J.O. COMM. EUR. 205-06 (1962).
2. Regulation 17, article 19(2), gives natural or legal persons who show a sufficient interest a right to be heard by the Commission. *See also* Regulation 99, arts. 5, 7, 6 J.O. COMM. EUR. 2263 (1963); *Id.* art. 19(2), 5 J.O. COMM. EUR. 210.
3. Regulation 17, article 19(3), obliges the Commission, when it proposes to make a decision favorable to the enterprises which are parties to the agreement or behavior in question, to invite all interested third parties to submit their observations, Regulation 17, art. 19(3), J.O. COMM. EUR. 210.
4. Regulation 99/63 obliges the Commission, when it considers that there are insufficient grounds for a complaint under article 3(2) of Regulation 17, to inform the complainants of its reasons and give them an opportunity to submit further comments in writing, Regulation 99, 6 J.O. COMM. EUR. 2263 (1963).
5. Regulation 19, article 7 allows any natural or legal person claiming a legitimate interest to ask the Commission to withdraw the benefit of a regulation adopted in accordance with Regulation 19, i.e. a group exemption under article 85(3), Regulation 19, art. 7, 6 J.O. COMM. EUR. 2263 (1963).

See also Regulation 1629, art. 1, 12 J.O. COMM. EUR. (No. L 209) 1 (1969); Regulation 1630, arts. 5, 6, 7, 12 J.O. COMM. EUR. (No. L 209) 11 (1969) (transport regulations); Regulation 1017, arts. 10, 11, 26, 11 J.O. COMM. EUR. (No. L 175) 1 (1968); Regulation 26, art. 2(3), 5 J.O. COMM. EUR. 62 (1962) (agriculture regulation).

There have been a number of cases under articles 85 and 86 before the Court that involved directly or indirectly the protection of the interests of enterprises which were injured by the violation of those articles. Some important examples are *Hugin Kassaregister A.B. v. Commission*, 1979 E. Comm. Ct. J. Rep. 1869, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8524; *Tepea B.V. v. Commission*, 1978 E. Comm. Ct. J. Rep. 1391, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8467; *United Brands Co. v. Commission*, 1978 E. Comm. Ct. J. Rep. 207, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429; *Commercial Solvents Corp. v. Commission*, 1974 E. Comm. Ct. J. Rep. 223, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8209. The most important example, already mentioned, is *Camera Care Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645. There have been, of course, many decisions of the Commission which involved the interests of third parties who were injured by violations of Community competition law.

55. Temple Lang, *EEC Competition Policies: A Status Report*, in ENTERPRISE LAW OF THE 80's, 18, 35-37 (F. Rowe, F. Jacobs & M. Joelson eds. 1980).

If either damages or an injunction are available, in appropriate cases, for infringement of articles 85 and 86, there does not appear to be any basis in Community law for the contention that the other remedy should not be available. The Court has said that although Community law has not introduced any new procedures into national law, the whole range of the existing remedies under national laws must be available to any plaintiff relying on a Community law rule having direct effects.⁵⁶

Article 5 of the EEC Treaty obliges member states, including the courts of member states, to "take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks" ⁵⁷ This includes a duty to protect the rights of individuals and firms under directly applicable rules of Community law, and a duty to help the Commission enforce Community law against enterprises which infringe it, provided that there is no risk of conflicting decisions.⁵⁸

Clearly the Court generally favors the recognition of rights under Community law in national courts, and favors the enforcement by national courts of those rights. Articles 85 and 86 are among the few articles of the Treaty which impose duties on private corporations rather than state authorities. Since claims for injunctions and damages can be made against the state for breach of

56. REWE v. Hauptzollamt Kiel, 1981 E. Comm. Ct. J. Rep. 1805, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8766; Lee v. Minister for Agriculture, 1980 E. Comm. Ct. J. Rep. 1495, 1508, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8676; See also Garden Cottage Foods Ltd. v. Milk Mktg. Bd., [1983] 2 All E.R. 770 (H.L.).

57. EEC Treaty, *supra* note 1, art. 5(2).

58. Walt Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8056. In *Lord Bethell v. SABENA*, a judgment of the High Court in England dated June 14, 1983, Mr. Justice Parker said that it was not appropriate to ask the Court of Justice whether articles 85 and 86 oblige member states to provide a remedy whereby the rights of individuals under those articles may be adequately enforced. He said that if the state has not provided a remedy, there is none. Even if the failure to provide the remedy is a breach of the state's obligations, that fact cannot affect a plaintiff's rights. With respect, that opinion ignores the fact that the obligation to provide a remedy for a breach of a directly applicable rule of Community law is itself directly applicable, and so binds national courts without any need for implementing national legislation. Even in the absence of such legislation, therefore, a national court could and should grant the full range of remedies given by national law, in appropriate cases. The view expressed by Mr. Justice Parker is inappropriately dualist.

Community law, *a fortiori* they can also be made against private corporations.

The Commission has an interest in encouraging actions in national courts to enforce articles 85 and 86, and indeed to enforce Community law generally. The Commission is short of staff, and has many important duties in addition to enforcing articles 85 and 86 in individual cases. Some article 85 and 86 cases are of relatively little economic importance, however vital they may be to the parties involved.

Since the Commission has no power to award damages, a claim for damages made in a national court in contrast to a complaint to the Commission avoids duplication of proceedings and is likely to be more economical from a societal viewpoint. Private antitrust actions would ensure that cases which could be properly litigated in the national courts are so litigated. Accordingly, the Commission would be free to concentrate on large, important or difficult cases.

Companies that are aware they can be successfully sued for damages for antitrust infringements by their competitors or customers are more likely to comply voluntarily with Community law than if they only risked possible fines imposed by the Commission. The risk of having to fight claims for compensation or injunctions will discourage firms from behavior the lawfulness of which is doubtful. It would also discourage the practice of continuing with an obvious violation until the Commission puts an end to it.

In short, more frequent claims in national courts for damages and injunctions in antitrust cases would decentralize the enforcement of Community antitrust law, and make it more effective.⁵⁹

59. Temple Lang, *Antitrust Law in the European Community—Division of Powers*, Cambridge Lectures Canadian Institute for Advanced Legal Studies (1983); Temple Lang, *Compliance with the Common Market's Antitrust Law*, 14 INT'L LAW. 485, 488-89 (1980). In the EEC antitrust claims are for single damages, not treble damages as in the United States. Nevertheless some facts and comments on the significance of treble damage actions in the United States are of interest for comparison. By 1978 between 94% and 96% of all U.S. antitrust cases filed each year were private actions, NAT'L ECON. RESEARCH ASSOC., A STATISTICAL ANALYSIS OF PRIVATE ANTITRUST LITIGATION: FINAL REPORT (1979), although many of these were based on suits previously brought by the government. United States courts have described treble damage actions as "a bulwark of antitrust enforcement." *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 755 (1977) (Brennan, J., dissenting) (a paramount role in the enforcement of the fundamental economic policy). *See generally* H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1954); NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 396 (2d ed. 1970) ("[t]he fear of treble damage actions is one of the most

C. Why Have There Not Been More Claims?

Although a majority of European lawyers appear to believe that claims in national courts are possible, relatively few have been brought. This may be partly due to mere caution. Attorneys and their clients were probably reluctant to assert such claims until someone else had successfully done so. There are, however, more important reasons:

1. multiple damage actions do not exist in the EEC;
2. contingent fees do not exist in the EEC, and even successful plaintiffs do not always recover their lawyers' fees from the defendant;
3. class actions are far less common, and can be brought in much more limited circumstances than in the United States;
4. it is less expensive and easier to complain to the Commission under the very simple procedure under article 3 of Regulation 17 than to bring proceedings in a national court. The Commission has more specialized knowledge of Community antitrust law than most national courts, and has Community-wide powers to gather evidence. The Commission is regarded as a forum which is sympathetic to complainants;
5. a Commission decision, or even Commission action commencing an investigation or a procedure against the defendant company, would give the plaintiff considerable help in obtaining a favorable settlement of a claim for damages;
6. in England, the defendants' right to refuse to produce self-incriminating documents in discovery proceedings may make it

potent influences in securing compliance with antitrust"); KAYSER & TURNER, ANTITRUST POLICY 257 (1959) ("private suits are . . . the most effective way of policing the multitude of comparatively local and insignificant violations that will tend to escape the glance of federal enforcement authorities, or that even if noticed do not merit the expenditure of limited enforcement resources"); 1955 DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMISSION TO STUDY THE ANTITRUST LAWS ch. 8, at 380 ("[t]he private suit has become an increasingly important method of enforcing the antitrust laws"); ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENT 254 (1975): A REVIEW OF RESTRICTIVE TRADE PRACTICES POLICY, CMO. 7512, at (1979) (calls treble damage actions "a notably powerful provision." "The treble damage has exceeded its architects' wildest expectations as an aid to governmental enforcement, with over 1400 such suits having been commenced in 1978 as compared to 228 in 1960. Close to 3000 of such cases are presently pending in the federal courts"); Handler, *Antitrust*-1978, 78 COLUM. L. REV. 1363, 1427 (1978) (private enforcement is "[t]he strongest pillar of antitrust,"); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); OECD, MARKET POWER AND THE LAW 164-68 (1970).

difficult for plaintiffs to get the evidence they need in claims under articles 85 and 86;⁶⁰

7. no *parens patriae* claims for damages seem to be possible under the laws of any of the EEC member states;
8. private claims for injunctions and damages for breach of national antitrust laws are not common. It is felt that antitrust is best left to specialized tribunals.

Nevertheless, it seems likely that in a number of cases the defendants have made settlements in order to avoid publicity and other claims by potential plaintiffs similarly placed, so that the number of claims made may be greater than appears in the law reports.

II. PART II

A. Complaints to the Commission as an Aid in Obtaining Compensation in a National Court: the Rights of a Complainant

Article 3 of Regulation 17 gives individuals and corporations claiming a "legitimate interest" a right to complain to the Commission if they believe that there has been in infringement of articles 85 or 86.⁶¹ Any corporation which had or was likely to have a claim for damages or for an injunction in a national court would have a "legitimate interest." If the Commission thinks it appropriate, the complaint is investigated, and if the Commission decides to begin a formal procedure, a statement of objections is sent to the corporations against whom the complaint is made.

Article 6 of Regulation 99/63 says that if the Commission considers that, on the information in its possession, there are insufficient grounds for accepting the complaints, it must inform the complainants of its reasons, and fix a time within which they may comment.⁶²

In *GEMA v. Commission*,⁶³ the Commission had written a letter in accordance with article 6, explaining why it considered there were insufficient grounds for the complaint. The Court held

60. *In re Westinghouse Uranium Contract*, 1978 A.C. 547; see *British Leyland v. Wyatt Interpart*, 1979 F.S.R. 583; Philip, 1981 *LEGAL ISSUES EUR. INTEGRATION* 49. On this point it seems that a plaintiff in an English court may have fewer rights to obtain compulsory disclosure of documents than a plaintiff in courts of other member states.

61. Regulation 17, art. 3, 5 *J.O. COMM. EUR.* 204, 205-06 (1962).

62. Regulation 99, art. 6, 6 *J.O. COMM. EUR.* 2263 (1963).

63. 1979 E. Comm. Ct. J. Rep. 3173, [1978-1979 Transfer Binder] *COMMON MKT. REP.* (CCH) ¶ 8568.

that the Commission had not failed to act, since the letter was sufficient to define the Commission's position for the purposes of article 175, and since a complainant is not entitled to obtain a formal decision on the existence of the infringement.⁶⁴

It seems clear that a complainant may use article 175 if necessary in order to obtain the letter required by article 6 of Regulation 99. It also seems clear that such a letter is not a decision, and therefore cannot be challenged under article 173.⁶⁵ Whether there is a right to pursue the matter once the complainant has replied to such a letter is less clear.

In *Lord Bethel v. Commission*,⁶⁶ another letter which substantially rejected a complaint was challenged. The Court held that since article 175 entitles an applicant to obtain only an act addressed to him, it does not entitle a complainant to go before the Court on the ground that the Commission has not adopted measures addressed to the parties to the alleged infringement.⁶⁷

It seems, therefore, that after the complainant has been given a chance to reply to an article 6 letter, it generally has no right to insist on obtaining a formal decision which it can appeal, even if the complaint has not been accepted.

The complainant, however, apparently may go before the Court if the Commission adopts a decision addressed to the parties to the agreement or practice complained of and such decision pertains to the substance of the complaint. In *Metro SB Grossmärkte GmbH v. Commission*,⁶⁸ Metro complained about the distribution agreements of another firm. The Commission adopted a decision addressed to the parties to the agreements that exempted the agree-

64. *Id.* at 3189-91, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8568, at 8255-58.

65. Temple Lang, *Community Antitrust Law—Compliance and Enforcement*, 18 COMMON MKT. L. REV. 335, 346 (1981). *Cf.* Regulation 1017, art. 11(3), 11 J.O. COMM. EUR. (No. L 175) 1 (1968). The defendant in a claim for damages would probably be able to compel the plaintiff to produce any letter written under article 6 and such a letter would almost certainly be helpful to the defendant, although of course it would not be binding on the national court. However, a defendant who relied on this rule might bring down a Commission investigation on his head.

66. 1982 E. Comm. Ct. J. Rep. 2277, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8858.

67. *Id.* at 2290-91, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8858, at 8101-03.

68. 1977 E. Comm. Ct. J. Rep. 1875, 1901, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7848.

ments under article 85(3).⁶⁹ The Court said that Metro had standing to challenge the validity of the decision under article 173. In doing so, the Court used words which now seem too broad, in light of the later judgments in the *GEMA* and *Lord Bethell* cases. It said that complainants "should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests."⁷⁰ These words seem applicable only when a decision has been adopted by the Commission, although the complainant has no right to compel the Commission to do so.

The Commission adopted a practice that if a complainant requests a decision on his complaint, in sufficiently serious or important cases, a decision addressed to the complainant will be adopted, which he can then challenge under article 173, if the conditions of that article are fulfilled.⁷¹ This was accomplished in *Demo Studio Schmidt v. Commission*.⁷² The plaintiff complained to the Commission about the refusal of the Revox firm to admit him into its distribution system. The Commission, in a letter stating "its final position," gave reasons and rejected the complaint.⁷³ The plaintiff then applied to the Court to have the rejection annulled. The Advocate General pointed out that the letter was to be regarded, in content and in form, as a decision and that the Commission regarded it as a decision and not as a mere "administrative letter."⁷⁴ The Advocate General, based on broad arguments about the need for judicial control and the *Metro-Grossmärkte* judgment, concluded that the challenge to the letter was admissible because it constituted a decision addressed to the plaintiff.⁷⁵ The Court agreed.⁷⁶

It seems, therefore, that the Commission generally has a legally enforceable duty to act on a complaint, and that if it does not do so it can be obliged only to write a letter explaining why, in its

69. *Id.* at 1904, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7851.

70. *Id.* at 1901, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7848.

71. So stated by the Commission in Case 146/80, *Armstrong Patents v. Commission* (later withdrawn and never decided).

72. *Demo Studio Schmidt v. Commission*, Case 210/81 (Oct. 11, 1983) (holding that the application to challenge the decision was admissible, but rejecting it on its merits).

73. *Id.* at ____.

74. *Id.* at ____.

75. *Id.* at ____ (opinion of Advocate General Rozes).

76. *Id.* at ____.

opinion, there are insufficient grounds for accepting the complaint. The Commission has never said that it would not accept a complaint because it could be satisfactorily dealt with by a national court, and it is not clear whether it would be entitled to refuse to deal with a complaint on that ground.

Under most national laws a citizen or corporation has no standing to sue a public authority that declines to act on a complaint submitted to it, and there is no obvious reason why a complainant should have standing in such circumstances under Community antitrust law. It seems reasonable that a complainant should have no right to bring his complaint to the Court directly under articles 173 or 175 when he can do so indirectly, by bringing proceedings against the parties to the allegedly unlawful practice in a national court. The national court may then refer a question of Community law to the Court under article 177, if it is necessary to do so, and the Commission will intervene before the Court as *amicus curiae*. Alternatively, the national court itself may ask the Commission to investigate the case further, if there is a compelling reason to do so.

It is submitted that the Commission may, in appropriate cases, decline to act on a complaint, even one which it thinks is well-founded, if it could be adequately dealt with by a national court. If this view is correct, *a fortiori* the Commission may properly decline to deal with a complaint that could be dealt with by a national court and that the Commission did not consider sound, without rejecting the complaint in a formal, challengeable decision.

In other words, a complainant is not deprived of judicial remedy if he fails to persuade the Commission to act on his complaint, although he obtains it by a different procedure, through a national court. Even though the administrative role of the Commission under Community law is more important than, for example, the role of the Department of Justice in the United States (it is in fact nearer to that of the Federal Trade Commission), the ultimate control of EEC antitrust law is a judicial control. In a Community based on the rule of law, this is as it should be.

This overall result is also satisfactory for another reason. If both the Commission and the national courts enforce EEC antitrust law, as they undoubtedly do, the Commission's role should be to concentrate on cases which appear to be important to the Community, or those that are not within the purview of one national court. The roles of the Commission and national courts should comple-

ment each other in a way which should lead to the most effective and economical enforcement of EEC antitrust law. It would probably *not* be conducive to effective enforcement if the Commission was compelled to litigate before the court every complaint that it found unconvincing.

If the plaintiff is suffering serious losses and needs a temporary injunction in several member states to protect him, he is not likely to obtain a series of appropriate injunctions, in a reasonable time and at a reasonable cost, from a series of national courts. Essentially, only the Commission can help such a plaintiff satisfactorily. It is therefore of interest that the Court in *Camera Care*⁷⁷ appeared to say that the Commission's refusal to use interim measures may have to be in a form that could be challenged before the Court. For the reasons just given, there might be a distinction between (1) cases in which interim measures were requested (in which the Commission might have a duty to reject a request for interim measures by a formal decision, so as to allow review by the Court, at least where no single national court could deal satisfactorily with the matter), and (2) cases in which no interim measures were requested and in which the complainant could expect to be adequately protected by a national court if he could prove his case (in which circumstance the Commission would have no duty to adopt a rejection which the complainant could challenge).

Because the law remains unclear, a well drafted complaint to the Commission should explain, if appropriate, why the complainant cannot expect a satisfactory remedy from a national court, or why it is suggested that the case is of sufficient importance to justify the Commission taking action. In due course, the complainant should request a formal decision rejecting the complaint if the Commission is inclined to reject it; and, if desired, should request interim measures. A complaint of this type could be made simultaneously with proceedings in a national court if any such proceedings seem useful. No doubt a well-advised complainant's lawyer will also try to present the complaint in such a way that the Commission will be persuaded to make findings of fact or law that are likely to be helpful to the complainant in later proceedings for

77. *Camera Care Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645; see Temple Lang, *The Powers of the Commission to Order Interim Measures in Competition Cases*, 18 COMMON MKT. L. REV. 49 (1981).

compensation in a national court. A complainant should also seek a ruling to establish that it has a "legitimate interest" to safeguard its position.

It is, however, clear that a complainant *never* needs to exhaust national remedies before he complains to the Commission.⁷⁸

If the Commission acts on a complaint and the corporations involved put an end to the agreement or practice complained of, the Commission has no obligation to adopt a formal decision ruling that it was unlawful,⁷⁹ even though such a decision would be helpful to the complainant in a later claim for damages.

A complainant whose complaint is pursued by the Commission has essentially the same role, in the Commission's procedure, as an intervenor who becomes involved in a case initiated by the Commission or by a third party. As a matter of principle, the position of a third party with interests adverse to those of the parties to the agreement or practice being examined probably should not depend on whether it has made a complaint or whether it has intervened in a procedure begun some other way. The position of an intervenor is discussed below.

B. *What Complaints Can Be Dealt With Satisfactorily Only By the Commission?*

The Commission has never published an official policy statement setting out its priorities as an antitrust enforcement authority. It has repeatedly stated, however, that ending allocation and division of markets is one of its principal objectives. Export bans and other efforts to divide the EEC, however, are normally infringements which could be dealt with by the national courts in the member state from which exports are being prevented. It has been suggested that the Commission should give priority to the following kinds of cases:

1. cases of economic importance, especially those involving horizontal cartels, concentrated industries or basic raw materials, and where profit levels in the industries appear to be high;

78. *Merkur-Aussenhandels-GmbH v. Commission*, 1973 E. Comm. Ct. J. Rep. 1055, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8243.

79. *Deutscher Komponistenverband e.V. v. Commission*, 1971 E. Comm. Ct. J. Rep. 705, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8143.

2. cases involving governments and state enterprises, which are less likely to be satisfactorily dealt with by national cartel authorities or by national courts;
3. under article 86, cases involving anticompetitive behavior (rather than exploitative abuses) and in particular anticompetitive behavior having long-term or structural effects, such as mergers and joint ventures;
4. cases in which effective long-term remedies, especially structural remedies, are likely to be possible if infringements are found to have been committed.

In other words, it has been suggested that the Commission should give priority to ensuring effective competition in the future.

Even if national laws on the rights of plaintiffs were clarified and perhaps harmonized in the foreseeable future, there will be certain types of cases which cannot be satisfactorily dealt with by national courts or national antitrust authorities. The Commission would normally be a more appropriate forum than a national cartel authority or a national court in the following situations:

1. if the corporations said to have infringed the Treaty were in two or more member states, or if economic investigations, discovery of documents or preliminary injunctions or other legal remedies were needed throughout the Community or in several member states;
2. if the interest of the Community in the case was substantially greater than that of any one member state or than that of the complainant;
3. in cases where the economic issues raised were difficult or the final remedy needed was complex or far-reaching or needed to be uniform or effective throughout the Community—for example, cases involving the application of article 85 to air and water transport;
4. in merger or joint venture cases where it is essential to have only one decision in force, to avoid conflicting decisions at the national level, and because such cases may involve divestiture. If divestiture in more than one member state is necessary, a decision of the Commission is needed; even if divestiture in only one state is needed, it is still serious enough and difficult enough as a remedy to justify the Commission dealing with it in most if not all cases. In any case, the rules of procedure of national courts do not now provide for procedures appropriate to divestiture;
5. in cases in which an exemption under article 85(3) was to be given or had to be seriously considered, since only the Commission can give such a decision under Regulation 17;

6. in cases involving governments, state enterprises and state measures;
7. in important test cases, where the economic issues might be beyond the resources of an individual plaintiff to deal with adequately (test cases are particularly important because class actions are often impossible);
8. in cases where a Community fine is appropriate.

C. *Interventions in Community Procedures by Potential Plaintiffs*

Where the proceedings are before the Commission or the Court, a potential plaintiff in a national court seeking damages or an injunction may have an interest in intervening, whether or not it has initiated the proceedings by a complaint,⁸⁰ to try to get the Commission or the Court to take a position helpful to it.

To make a complaint, a "legitimate interest" must be shown; to be heard by the Commission as an intervenor, a "sufficient interest" is needed.⁸¹ Article 93 of the Rules of Procedure of the Court simply says that the intervenor must show his "interest."⁸² No significant difference between these phrases has emerged. It seems that in general any direct and practical interest in the outcome of the case is sufficient for all three purposes. A potential plaintiff who alleges losses as the result of an unlawful agreement or practice and requests compensation demonstrates a sufficient interest.

The Commission does not usually issue a formal ruling on whether a corporation is entitled to complain or intervene as of right. If it allows the intervention, the Commission is not obliged to make a ruling on the question.⁸³ However, a corporation wishing to intervene should always make a formal request to do so and should specify the basis for its "interest." A corporation which has complained or intervened, having the right to do so, probably has standing to challenge any later decision of the Commission pertaining to the subject matter of the complaint or intervention, even if the decision is not addressed to it.⁸⁴

80. Temple Lang, *The Position of Third Parties in EEC Competition Cases*, 1978 EUR. L. REV. 177.

81. *Id.* at 178-79, 182-84.

82. 25 O.J. EUR. COMM. (No. C 39) 1, 22 (1982), 2 COMMON MKT. REP. (CCH) ¶ 4843, at 4043.

83. *Deutscher Komponistenverband e.V. v. Commission*, 1971 E. Comm. Ct. J. Rep. 705, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8143.

84. Article 173 gives an intervenor a right to challenge the validity of a decision not addressed to it only if the decision is "of direct and individual concern" to the intervenor. EEC Treaty, *supra* note 1, art. 173. It seems that if a corporation has an interest sufficient to

If the Commission intends to adopt a decision favorable to the corporations primarily involved in the agreement or practice, it must publish a notice of its intention to do so in the Official Journal.⁸⁵ The same thing may (but need not) be done if an "administrative letter" to the corporations involved is intended to be sent. The notice provides third parties, with interests adverse to those of the corporations primarily involved, an opportunity to make submissions. They may do so whether or not they have previously complained.

If a third party has an interest sufficient to give it a right to intervene in the Commission's procedure, the Commission must provide the information necessary to enable the intervenor to present its case. This obligation is subject only to prohibition against disclosing the business secrets of the corporations primarily involved.⁸⁶ Thus, the intervenor must know what case the Commission is making, and what reply has been made by the corporations primarily involved, if the Commission's view is adverse to them. In each case, the intervenor needs to know the evidence relied on, in order to present its case. Intervention may therefore put the intervenor in possession of extremely helpful documents that it would not have otherwise obtained, or that it would not have obtained without difficulty in discovery procedures. It seems that any documents that the Commission can properly give to an intervenor during the Commission's procedure may be used by the intervenor in later national proceedings.⁸⁷

The procedural rights of intervenors in the Commission's proceedings are not entirely clear. In principle, it seems that if the Commission did not give an intervenor the documents that it needed to adequately present its case, or did not allow the intervenor adequate opportunity to make its arguments, the intervenor could challenge the validity of the Commission's final decision on those grounds.⁸⁸ In practice, the Commission gives complainants

entitle it to intervene, the decision is likely to be "of direct and individual concern" to it, at least in most cases.

85. Regulation 17, art. 19, 5 J.O. COMM. EUR. 204, 210 (1962).

86. See *infra* notes 86-95 and accompanying text.

87. The Community law rules on business secrets limit the information which the Commission may disclose. They do not seem to limit what private parties can do with information properly disclosed by the Commission to them during the Commission's procedure.

88. Article 19 of Regulation 17 and article 5 of Regulation 99 oblige the Commission to give persons with a "sufficient interest" an opportunity to make known their views. Regulation 99, art. 5, 6 J.O. COMM. EUR. 2263 (1963); Regulation 17, art. 19, 5 J.O. COMM. EUR.

and intervenors a copy of the statement of objections sent to the defendant, and makes available to them the documents in the Commission's possession, excluding only material which the defendant claims is protected by the rules on "business secrets." Problems might arise if it was important for the intervenor's case to comment on the documents which the defendant said were "secret." It seems, but is not clear, that if the defendant's documents are within the definition of "business secrets," the intervenor has no right to see them, despite their importance. The rules on business secrets override the procedural rights of even a corporation with an unquestionable right to intervene. However, even the business secrets rules are overridden by the defendant's rights when the Commission needs to rely on the business secrets of an intervenor against the defendant.⁸⁹ However, it seems that the rules on business secrets allow the purpose for which the documents are needed to be weighed against the arguments for secrecy. A document considered to be "secret" might have to be disclosed to the intervenor if it were vitally important to do so. If the principal issue in a case is the lawfulness of an agreement, the complainant certainly needs access to that agreement. In appropriate cases, the difficulty could perhaps be solved by disclosing an otherwise secret document to the intervenor's lawyers on a "professional advisers only" basis.⁹⁰ It seems that an intervenor could not challenge under article 173 of the EEC Treaty a ruling by the Commission that defendants' documents were business secrets and could not be disclosed to the intervenor.⁹¹ However, it is unlikely that an intervenor would make such a challenge, as it would delay the Commission's procedure.

In order for a third party (complainant or intervenor) to have the right to challenge before the Court a decision favorable to the firms involved, it is helpful if the third party intervened in the

204, 210 (1962). This must necessarily imply that the intervenor is adequately informed about the case on which he may wish to express views.

89. *Hoffmann-LaRoche & Co. v. Commission*, 1979 E. Comm. Ct. J. Rep. 461, 510-14, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527, at 7538-40; *Musique Diffusion Francaise S.A. v. Commission*, Case Nos. 100/80 to 103/80, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880; *see Distillers Co. v. Commission*, 1980 E. Comm. Ct. J. Rep. 2229, 2295-98, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8613, at 7273-76.

90. *See National Carbonising Co.*, 19 O.J. EUR. COMM. (No. L 35) 6, 8-9 (1976).

91. *IBM v. Commission*, 1981 E. Comm. Ct. J. Rep. 2639, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708. If an intervenor failed to challenge a ruling that he could not see documents, he could probably argue in later proceedings to annul the Commission's final decision that the refusal to disclose was a procedural fault serious enough to invalidate the decision. It would always be difficult for an intervenor to prove that a document which by definition he had not seen should not be regarded as really secret.

Commission's procedure.⁹² If the Commission had ruled that such a party had a right to intervene, it would be difficult to contest that party's standing to challenge the decision. It is not clear, however, whether intervention in the Commission's procedure is a prerequisite for standing to challenge the decision under article 173. On the one hand, the Regulations could not take away a right given by article 173 to challenge any decision which is "of direct and individual concern" to the corporation wishing to challenge it. On the other hand, it is clearly undesirable that a corporation should make arguments for the first time before the Court that should have been made during the Commission's procedure. The better view is that a corporation wishing to claim its rights under article 173 must have shown ordinary diligence in the earlier stages, since article 19 of Regulation 17 is specifically designed to give third parties an opportunity to object before the Commission makes a decision,⁹³ at a time when any evidence they produce can be fully investigated. In theory, if a corporation produced sufficiently persuasive arguments before the Court that it had failed to produce earlier, the Commission might be led to withdraw its own decision, in which case the corporation would have caused both the Commission and the parties to the agreement or practice unnecessary expense and delay. Therefore, firms that may suffer from agreements or practices which the Commission proposes to approve would be wise to intervene in the Commission's procedure when the Commission publishes a notice of its intention to grant a favorable ruling.

If the third party does not challenge the Commission's decision before the Court, he is bound by it, provided it is a decision under article 85(3).⁹⁴ If the decision is merely a negative clearance,⁹⁵ it is not formally binding on the third party if the latter can produce new evidence. The third party, however, might be estopped from producing such evidence if it were available to him at the time the Commission published its notice and adopted its decision.

92. *Metro Grossmärkte v. Commission*, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435.

93. Regulation 17, art. 19, 5 J.O. COMM. EUR. 204, 210 (1962).

94. Under article 189, decisions are binding on the parties to whom they are addressed, which would not normally include a complainant or intervenor. However, if a complainant or intervenor did not challenge a decision which it had a right to challenge under article 173, it could not be heard to say later that the decision was invalid. If it could not challenge it under article 173, it could not challenge it under article 184 either, since article 184 applies only to regulations. See EEC Treaty, *supra* note 1, arts. 173, 184, 189.

95. See *infra* text accompanying note 113.

The potential plaintiff therefore, at least if it has complained or intervened in the Commission's procedure, may have rights to go before the Court in four different types of proceedings:⁹⁶

1. in proceedings brought by the parties to the agreement or practice to annul a Commission decision wholly or partly unfavorable to them. In such a situation the potential plaintiff will intervene on the side of the Commission in what would be in the United States a government suit;
2. in proceedings brought by the potential plaintiff, to annul a decision of the Commission favorable to the parties to the agreement or practice. In such a case the latter can be expected to intervene on the side of the Commission;
3. in proceedings brought by the potential plaintiff against the Commission requiring it to "define its position" on the plaintiff's complaint against a cartel or dominant corporation; again, the parties to the alleged infringement may intervene on the Commission's side;
4. in a case referred to the Court of Justice by a national court under article 177 of the EEC Treaty, at least if the national procedural rules allow the intervention.

96. The following are examples of Community antitrust cases before the Court in which there have been interventions adverse to the interests of the corporations primarily involved. *IBM v. Commission*, 1981 E. Comm. Ct. J. Rep. 1857, 2639, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708; *Camera Care Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645; *Distillers Co. v. Commission*, 1980 E. Comm. Ct. J. Rep. 2229, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8613; *van Landewyck v. Commission*, 1980 E. Comm. Ct. J. Rep. 3125, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8687; *Miles Druce v. Commission*, 1973 E. Comm. Ct. J. Rep. 1049; *Tepea B.V. v. Commission*, 1978 E. Comm. Ct. J. Rep. 1391, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8467; *Metro-Grossmärkte v. Commission*, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435; *National Carbonising v. Commission*, 1975 E. Comm. Ct. J. Rep. 1193; *Groupement des Fabricants de Papiers Peints v. Commission*, 1975 E. Comm. Ct. J. Rep. 1491, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8335; *Istituto Chemioterapico Italiano S.p.A. v. Commission*, 1973 E. Comm. Ct. J. Rep. 357, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8209; *Consten S.A. v. Commission*, 1966 E. Comm. Ct. J. Rep. 299, 382, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7684.

The following examples of interventions are of special interest, though not all concern antitrust cases: *Ford-Werke v. Commission*, 1982 E. Comm. Ct. J. Rep. 3091; *Société anonyme Générale Sucrière v. Commission*, 1973 E. Comm. Ct. J. Rep. 1465 (both cases involving interventions by consumer organizations); *AM&S Eur. Ltd. v. Commission*, 1982 E. Comm. Ct. J. Rep. 1575, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757 (intervention by the Consultative Commission of the European Bars and Law Societies in a case involving attorney-client privilege); *Chris Int'l Foods v. Commission*, cases 91/82 and 200/82 (intervention by non-Member States of the Community, the Commonwealth of Dominica and other countries, in a case involving movement of Latin American bananas within the EEC).

III. SOME SPECIFIC QUESTIONS ABOUT POSSIBLE EFFECTS OF COMMUNITY LAW ON PRIVATE CLAIMS

A. Protection Against Claims: Defenses Given by Community Law

It has been concluded that claims for injunctions and damages are possible in national courts for losses caused by infringements of Community antitrust laws. Certain defenses are available under rules of Community law (apart from any defenses available under national law) against such claims. They are:

- (a) Legislative defenses:
 - (1) exemption or special treatment for the industry;
 - (2) group exemptions under article 85(3);
- (b) Community law defenses applicable to the individual agreement or practice:
 - (1) commission action;
 - (2) state action;
 - (3) efforts to influence state or community action;
 - (4) provisional validity.

1. Legislative defenses

There are Community measures that largely exempt certain industries from the normal operations of articles 85 and 86, or that provide special, less stringent treatment under those articles. The most important exemptions under the EEC Treaty are for agriculture and certain kinds of transport.⁹⁷ These exemptions are to be construed strictly.⁹⁸ In addition, there are legislative group exemp-

97. See EEC Treaty, *supra* note 1, arts. 42, 48; Regulation 1630, 12 J.O. COMM. EUR. (No. L 209) 11 (1969) (transport); Regulation 1629, 12 J.O. COMM. EUR. (No. L 209) 1 (1969); Regulation 1017, 11 J.O. COMM. EUR. (No. L 175) 1 (1968); Regulation 141, 5 J.O. COMM. EUR. 2753 (1962); Regulation 26, 5 J.O. COMM. EUR. 62 (1962) (agriculture).

98. See *Nungesser v. Commission*, 1982 E. Comm. Ct. J. Rep. 2015, 2058-60, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8805, at 7539-40; *Coöperatieve Stremsel en Kleurselabriek v. Commission*, 1981 E. Comm. Ct. J. Rep. 851, 869-70, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8709, at 8485-86; *FRUBO v. Commission*, 1975 E. Comm. Ct. J. Rep. 563, 582-83, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8285, at 7271. As Commission decisions *see also* *Cane Sugar*, 23 O.J. EUR. COMM. (No. L 39) 64 (1980); *Cauliflowers*, 21 O.J. EUR. COMM. (No. L 21) 23 (1978); *Mushrooms*, 18 O.J. EUR. COMM. (No. L 29) 26 (1975).

tions under article 85(3) that exempt from article 85(1) and 85(2), without notification to the Commission, all agreements that come within their terms.⁹⁹ If a defendant can show that his agreement falls within the terms of such an exemption, the plaintiff could succeed only if the benefit of the group exemption has been withdrawn by the Commission from the agreement in question. This can be done by individual decision if the particular agreement, although falling within the terms of the group exemption, "has effects which are incompatible with article 85(3)."¹⁰⁰

National courts may apply and interpret Community legislation of these kinds, subject to article 177 of the EEC Treaty.¹⁰¹ In other words, they decide whether the individual agreement fulfils the requirement of the group exemption. In reaching a decision, the national courts may consider the views expressed by the Commission or by Commission officials in correspondence as to the interpretation or application of the legislation in question to the facts of the particular case.

2. Defenses Given by Community Law in Individual Cases

a. Commission Action

Individual exemptions under article 85(3), negative clearances and administrative letters are the kinds of Commission action that need to be considered.

Under the explicit language of Regulation 17, only the Commission can grant an exemption under article 85(3).¹⁰² A national court cannot do so, even if the Commission has been notified of the agreement or the agreement falls under article 4(2).¹⁰³

A decision of the Commission granting an exemption under article 85(3) for the period during which the infringement of article

99. These group exemptions may be adopted by the Commission under Regulation 19, 8 J.O. COMM. EUR. 533 (1965). Examples of group exemptions are Regulation 67, 10 J.O. COMM. EUR. 849 (1967) on exclusive dealer agreements (which has now expired and been replaced by Regulation 1984, 26 O.J. EUR. COMM. (No. L 173) 5 (1983)); Regulation 1983, 26 O.J. EUR. COMM. (No. L 173) 1 (1983); Regulation 2903, 20 O.J. EUR. COMM. (No. L 338); Regulation 2779, 15 J.O. COMM. EUR. (No. L 292) 23 (1972); Regulation 2743, 15 J.O. COMM. EUR. (No. L 291) 144 (1972); Regulation 2821, 14 J.O. COMM. EUR. (No. L 285) 46 (1971) on specialization agreements.

100. Regulation 19, art. 7, 8 J.O. COMM. EUR. 533, 535 (1965).

101. EEC Treaty, *supra* note 1, art. 177.

102. *See* Regulation 17, 5 J.O. COMM. EUR. 204 (1962).

103. *See id.*

85(1) occurred is a complete defense to a claim for damages for that loss, provided that the restrictive features of the agreement or practice were adequately described in the notification. Such an agreement is on balance beneficial.¹⁰⁴ It has been formally declared to be lawful. Anyone injured by it would almost certainly have standing to challenge the exemption decision under article 173 of the EEC Treaty, and could intervene to oppose the granting of the decision during the Commission's procedure.¹⁰⁵ If they do not challenge the validity of the decision, it is in effect binding on them.

Since an exemption decision under article 85(3) is binding unless successfully challenged, it seems that it would deprive a plaintiff, suffering loss as a result of the agreement or practice, of its right to sue even if the loss resulted directly from an abuse of the exemption,¹⁰⁶ unless the exemption were to be revoked retroactively.

If an agreement has been duly notified to the Commission, or falls under article 4(2) of Regulation 17, an exemption which is retroactive up to the date of notification can be given at any time, even after loss has resulted and a claim has been made.¹⁰⁷ The disadvantage, for the parties to the agreement, of relying on this is the uncertainty as to whether the Commission will give the exemption for the agreement without requiring any amendments to it. The Commission has always taken the position that an exemption can be given only if *all* the clauses in the agreement can be exempted in the circumstances in which they operate, so that one unacceptable clause would make the whole agreement ineligible for exemption unless the clause was amended or removed.¹⁰⁸ Even an administrative letter saying that the whole agreement appeared to be eligible for exemption could not bind the Commission to grant such an exemption retroactively or at all. Moreover, there is always

104. See *Consten S.A. v. Commission*, 1966 E. Comm. Ct. J. Rep. 299, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046; Temple Lang, *European Community Antitrust Law and Joint Ventures Involving Transfer of Technology*, in 1982 FORDHAM CORPORATE LAW INSTITUTE 203, 245 (B. Hawk ed. 1983).

105. Regulation 99, arts. 5, 7, 6 J.O. COMM. EUR. 2263 (1963; Regulation 17, art. 19, 5 J.O. COMM. EUR. 210 (1962); *Metro-Grossmärkte v. Commission*, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435; Temple Lang, *The Rights of Third Parties in EEC Competition Cases*, 3 EUR. L. REV. 177 (1978).

106. Regulation 17, art. 8(3)(d), 5 J.O. COMM. EUR. 204, 207 (1962).

107. Regulation 17, art. 6, 5 J.O. COMM. EUR. 204, 206 (1962).

108. *Id.* art. 7.

the possibility that an intervenor may produce evidence or arguments that cause the Commission, or its officials, to take a wholly different view of the case.

Even if an exemption is given, in many cases it cannot be given for the period before the date of the notification,¹⁰⁹ and it seems that an exemption does not prevent a claim for damages for any loss by the agreement before notification, if the agreement were acted upon before then.¹¹⁰ It is therefore important to notify the Commission of any agreements before they are acted upon, if there is any risk that acting on them may cause loss to third parties. In some circumstances it would be wise to notify the Commission of the agreement even before it is signed, if the parties are likely to act on it before then.

Under article 8 of Regulation 17, the Commission may revoke an individual exemption under article 85(3), may amend it, or prohibit specific acts.¹¹¹ However, this power has never been used. A revocation, amendment or prohibition could, according to the legislation, be retroactive if the exemption had been obtained by deceit, was based on incorrect information, or was "abused," or if the parties committed a breach of any obligation attached to the exemption. The power could be invoked, without retroactive effect, if any of the facts pertinent to the granting of the exemption are altered. In such a case, the defense to a claim by a third party could be valid but subject to the effect of the later decision.

It is extremely important to stress that if the Commission has not been notified of an agreement to which article 85(1) applies, the fact that it is otherwise eligible for an exemption is irrelevant, and the plaintiff can recover (unless the agreement falls under article 4(2) of Regulation 17). Thus, the position of a plaintiff is relatively simple, much simpler than in a case under the rule of reason in United States law.¹¹² In effect, if the Commission has not been

109. *Id.* art. 6. *But see id.* art. 4.

110. *See* Musique Diffusion Francaise S.A. v. Commission, Case Nos. 100/80 to 103/80, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880; Temple Lang, *Community Antitrust Law—Compliance and Enforcement*, 18 COMMON MKT. L. REV. 335, 350-52 (1981); *infra* note 126.

111. Regulation 17, art. 8, 5 J.O. COMM. EUR. 204, 207 (1962).

112. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 173, 175 (1977) (rule of reason). *See also* Hawk, *EEC and U. S. Competition Policies—Contrast and Convergence*, in ENTERPRISE LAW OF THE 80'S 39, 50 (F. Rowe, F. Jacobs & M. Joelson eds. 1980) (comparing European and United States law).

notified of the agreement, the defendant has accepted the risks involved¹¹³ and the plaintiff has all the advantages of dealing with a per se violation. It also means that it may be extremely important for a potential plaintiff to discover, as soon as possible after filing his complaint with the Commission, whether the Commission has been notified of the agreement.

The notice to third parties in which the Commission is obliged to announce its intention, subject to third parties' comments, of granting favorable decision does not usually distinguish between an exemption under article 85(3) and a negative clearance. A negative clearance is also a formal decision, but one merely ruling that, on the basis of the facts in the possession of the Commission, there are no grounds under article 85(1) or article 86 that warrant Commission action.¹¹⁴ A negative clearance has a limited value in providing legal security. It cannot prevent a private plaintiff from producing additional evidence which was not before the Commission, at least if circumstances changed or if facts emerged which had not been known to the plaintiff at the time the Commission's notice was published, or if the evidence concerns facts which occurred after that time. A plaintiff might be estopped from producing evidence in civil proceedings after a negative clearance was granted, in view of the fact that he could have presented the information to the Commission before the clearance was given. Such estoppel would be a question of national law. A complainant cannot be estopped from bringing facts to the attention of the Commission, since a citizen cannot be estopped from informing a public authority of facts that require the authority to enforce the law. It is also not clear whether a negative clearance might be binding on a national court in the absence of any new evidence, but the point is probably academic; there will always be some new evidence. It seems to follow that a negative clearance will always be helpful but is not an absolute defense to a claim for compensation. The corporations which notify the agreement to the Commission, therefore, have an interest in getting an exemption rather than a negative clearance. It also follows that a practice that might be thought to fall under article 86 cannot receive an absolute defense from the Commission,

113. See *Musique Diffusion*, Case Nos. 100/80 to 103/80 [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880.

114. Regulation 17, art. 2, 5 J.O. COMM. EUR. 204, 205 (1962).

since such practice can only be the subject of a negative clearance—there is nothing in article 86 corresponding to article 85(3).

In practice, however, some negative clearances are based on a much more thorough explanation of the facts, and therefore on a much more thorough consideration by the Commission, than others. A thoroughly considered negative clearance would not likely be reversed unless very significant change in the circumstances occurred after it had been granted. Corporations seeking a negative clearance, therefore, have an interest in making certain that the facts (including any arguments for the application of article 85(1) or article 86) are explained as fully as possible to the Commission. They may also have an interest in ensuring that the Commission's notice of its intention to grant a negative clearance, and the negative clearance itself, are as thorough and as broadly drafted as possible, so as to maximize any available estoppel effect on potential plaintiffs.

A practice has been adopted by which the services of the Commission (i.e. officials of the Commission not acting on the authority of the Commission) issue "administrative letters" instead of negative clearances or exemptions, provided the letters are satisfactory to the parties to an agreement. The intent to issue such a letter is now, in some cases, announced in a notice in the Official Journal under circumstances somewhat similar to that which must precede a negative clearance or an exemption. Since an administrative letter is not a decision, it cannot bind any party. It is, however, an expression of the opinion of Commission officials to which a national court should give some weight.¹¹⁵ It is not clear how much extra weight should be given to such a letter as a result of prior publication of a notice. Presumably, prior publication may create the same kind of estoppel effect as a notice of a negative clearance. It may well create less. Since a letter is not a decision and has no binding effect on anyone (and could not be challenged before the Court), a plaintiff might well argue that it had no obligation to

115. *L'Oréal N.V. v. De Nieuwe A.M.C.K.*, 1980 E. Comm. Ct. J. Rep. 3775, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8715; *Lancome S.A. v. Etos B.V.*, 1980 E. Comm. Ct. J. Rep. 2511, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8714; *Marty v. Estée Lauder S.A.*, 1980 E. Comm. Ct. J. Rep. 2481, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8713; *Procureur de la République v. Giry*, 1980 E. Comm. Ct. J. Rep. 2327, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8712 (the "perfume" cases).

object to the writing of such a letter, and therefore was not in any way estopped from later disputing any conclusion reached by the official who signed it. The effect, if any, of such a letter, also depends on whether it says that article 85(1) does not apply, or that in the writer's opinion article 85(3) applies. If it said that article 85(1) does not apply, the national judge may, if he agrees, deal with the matter. If, however, article 85(1) applies, the national court has no power to give an exemption under article 85(3)¹¹⁶ or to act as if an exemption had been given, and the parties must go back to the Commission for an exemption. The Commission is not bound by such a letter¹¹⁷ and is free to give or refuse an exemption later, following the normal procedure. The writing of a letter does not eliminate the corporations from the responsibility to notify the agreement formally¹¹⁸ and the exemption, if given, can be retroactive only to the date of formal notification, even if the administrative letter was written before that date. An administrative letter, therefore, is not a defense in a claim for compensation.

b. State Action and Efforts to Influence State Action

Another possible defense which needs to be considered concerns state action. Official action of any state that falls short of legal compulsion cannot be a defense to an action for compensation, although it might be a reason for mitigating a Commission fine. One must next distinguish between action by a member state of the European Community (or by a public authority of such a state) and by a non-member state. The EEC Treaty has the effect of prohibiting member states from adopting measures obliging, facilitating, encouraging or purporting to authorize or approve any corporation to infringe, *inter alia*, articles 85 and 86.¹¹⁹ Any such action, there-

116. Regulation 17, art. 9(1), 5 J.O. COMM. EUR. 204, 207 (1962).

117. *FRUBO v. Commission*, 1975 E. Comm. Ct. J. Rep. 563, 582, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8285, at 7271. The fact that administrative letters are *not* written on behalf of the Commission has recently been made more clear. A national judge is not necessarily bound to adjourn proceedings merely because an exemption has been sought for an agreement the validity of which is in issue before him, but he should do so if necessary to avoid the risk of conflicting decisions. *Walt Wilhelm v. Bundeskartellamt*, 1969 E. Comm. Ct. J. Rep. 1, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8056.

118. For a rather similar situation, see *Distillers Co. v. Commission*, 1980 E. Comm. Ct. J. Rep. 2229, 2262-64, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8613, at 7254-55.

119. EEC Treaty, *supra* note 1, arts. 5, 90; *Openbaar Ministerie of the Kingdom of the Netherlands v. van Tiggle*, 1978 E. Comm. Ct. J. Rep. 25, 47-48 (Advocate General

fore, is an infringement of the Treaty by the member state, and the corporation addressed can and should refuse to obey the measure in question on this ground (unless the corporation has notified the Commission of the practice and obtained an exemption in the ordinary way). If the corporation obeys the unlawful measure and, therefore, commits an infringement of article 85 or 86, it seems that the state action, since it could not legalize the corporation's behavior, cannot be a defense to a claim against the corporation for compensation. It is true that the injured party might also have a claim against the state.¹²⁰ But even if this were so, it would not deprive the injured party of its claim against the corporation that had, without valid authorization, infringed articles 85 and 86. The defendant corporation might have a right to be indemnified by the state in such circumstances.

In the case of compulsion (as distinct from non-binding pressure) by a non-member state of the Community, it would be reasonable to suppose that a defense would be available, if the measure required the defendant to commit the antitrust violation.

The only other possible defense which needs to be considered here is the defense of efforts to influence government or Community action. It has been suggested that it is lawful under article 85 for enterprises to come together and collaborate in good faith for the sole purpose of influencing government or Community action. In other words, there is something like a *Noerr-Pennington*¹²¹ exception in Community law. Since the EEC is a democratic Community and fundamental rights principles are part of Community law,¹²² this is probably correct in a broad sense. However, even if it is so, the exception would not apply if the government measure

Capotorti); G.B.-INNO-B.M. v. A.T.A.B., 1977 E. Comm. Ct. J. Rep. 2115, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8442; Waelbroeck, *La Constitution européenne et les Interventions des Etats membres en matiere économique*, in LIBER AMICORUM PIETER VERLOREN VAN THEMAAT 331, 335 (1982).

120. See Amministrazione delle Finanze dello Stato v. MIRECO S.A.S., 1980 E. Comm. Ct. J. Rep. 2559, 2574-75, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8694, at 8318-19. There would be a claim against the state only if the loss could be said to have been caused by the state measure, which would be the case if the state had ordered an infringement but not if it merely encouraged or approved it.

121. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961).

122. See, e.g., *Levin D.M. v. Staatssecretaris*, 1982 E. Comm. Ct. J. Rep. 1035, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8821; *Hauer v. Land Rheinland-Pfalz*, 1979 E. Comm. Ct. J. Rep. 3727, 3744, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8629, at 7449; *Rutili v. Minister for the Interior*, 1975 E. Comm. Ct. J. Rep. 1219,

sought would itself infringe any rule of Community law, in particular article 90. Nor would it apply if the alleged campaign was merely a disguise for a concerted effort to influence competitors' behavior directly.

What may appear to be a state measure on, for example, maximum or minimum prices or on restricting market entry, may be merely the agreement of the undertakings involved "clad in the formal garb of measures of public law."¹²³ If the state measure is in reality governmental approval or adoption of a restrictive agreement (or the result of a restrictive agreement) between enterprises, without sufficiently thorough, independent and objective assessment in the public interest, the state measure must be prohibited by either article 90 or article 5. Such an agreement is a state-approved cartel, and falls under article 85. The legality of a price fixing agreement has nothing to do with whether the price fixed is reasonable. There may be difficult problems in distinguishing between individual lobbying and a coordinated attempt to get official support for a restrictive agreement. In addition, problems of evidence may arise as to the extent to which a state authority has merely "rubber stamped" the recommendation of a cartel, or of a dominant state-owned or other privileged enterprise. If the regulated enterprises suggest their own restrictive regulation and the state authorities adopt it, both may violate Community law. The state must often depend on the enterprises in question for information, and may consult them before deciding on its own policy. However, a state can always consult large enterprises individually and may consult with trade associations (on facts, not on desiderata) only if large numbers of small enterprises make this necessary. Member states have a duty not to sacrifice Community law to administrative convenience.¹²⁴

1232, [1975 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8322, at 7778; *Nold v. Commission*, 1974 E. Comm. Ct. J. Rep. 491, 513; *Einfuhr-und Vorratstelle v. Köster Beradt & Co.*, 1970 E. Comm. Ct. J. Rep. 1161, 1174, [1971-1973 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8127, at 7451; *Internationale Handelgesellschaft MbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E. Comm. Ct. J. Rep. 1125, 1146, [1971-1973 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8126, at 7418, 7433; *see also National Panasonic (U.K.) Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 2033, 2056, [1979-1981 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8682, at 8067; *Prais v. Commission*, 1976 E. Comm. Ct. J. Rep. 1589.

123. *van Tiggele*, 1978 E. Comm. Ct. J. Rep. 25, 48 (Advocate General Capotorti).

124. *DePeijper*, 1976 E. Comm. Ct. J. Rep. 613, [1976 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8353.

c. Provisional Validity

For completeness, the doctrine of provisional validity must be mentioned. It applies only to agreements which were entered into before the EEC rules became applicable to them. This may be either in 1963 when Regulation 17 came into force or on the accession of one of the new member states to the Community, if the Treaty became applicable because of accession (for example, because it caused the agreement for the first time to affect trade between member states). Provisional validity also applies only if the agreement was duly notified to the Commission within the appropriate time limit, or is exempt from the need to notify, and if the Commission has not indicated that it is unlikely to give an exemption under article 85(3).¹²⁵ If these conditions are fulfilled, a national court must treat the agreement provisionally as if it were valid.

B. Protection Against Claims: Antitrust Compliance Programs

The adoption of a satisfactory and thorough antitrust compliance program, if it is done on the corporation's own initiative and before the Commission's procedure has begun, may be grounds for reducing a fine.¹²⁶ It cannot affect the amount of any compensation payable, but the adoption of an effective program may ensure that compensation is never paid. A program may also tend to show that it was contrary to the corporation's policy to take part in restrictive agreements. Furthermore, if genuine doubt existed as to whether a particular corporation was a party to an antitrust violation, the fact that it previously adopted an antitrust compliance program might help to prove that it was not such a party.

From the corporation's point of view, antitrust compliance programs are *more* necessary in Europe than in the United States, because European businessmen are in general *less* aware of the risks

125. *Vereniging des Boekhandels v. Eldi Records*, 1980 E. Comm. Ct. J. Rep. 1137, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8646; *DeBloos v. Bouyer*, 1977 E. Comm. Ct. J. Rep. 2359, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8444; *Brasserie de Haecht v. Wilkin & Janssen*, 1973 E. Comm. Ct. J. Rep. 77, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8170; *Portelange S.A. v. Smith Corona Marchant Int'l*, 1969 E. Comm. Ct. J. Rep. 309, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8075.

126. See *National Panasonic, O.J. EUR. COMM.* (No. L 354) 28 (1982).

of violating antitrust laws. (From the individual businessman's standpoint, compliance programs may be less necessary in Europe than in the United States, because jail sentences are not imposed for infringing Community law). Satisfactory compliance programs may save auditors' fees as well as costs to the corporation in fines, compensation and the time spent by executives investigating and contesting claims and negotiating settlements. The scope and content of a Community antitrust law compliance program is in general similar, but *not* identical to, a United States antitrust compliance program. A United States program does *not* make a Community program unnecessary. The main differences result from the facts that:

1. Community law prohibits "exploitative" abuses;¹²⁷
2. Community law is stricter on territorial protection;
3. Community law causes certain antitrust consequences to result from unilateral action;¹²⁸
4. Community antitrust law fines are often higher than fines under United States antitrust law;¹²⁹
5. if no exemption has been sought, clauses in restrictive agreements may be invalid as a result of article 85(2), even if the agreement could have obtained an exemption under article 85(3).¹³⁰ Therefore, to ensure that an agreement is valid, it may be essential to notify the Commission even if it appears certain that the Commission will not object to it. This is important in relation to joint ventures,¹³¹ patent and know-how licenses,¹³² and other forms of cooperation, that in principle are entirely legitimate, but that may include restrictive clauses;

127. See Temple Lang, *supra* note 40, at 18-31.

128. See Regulation 67, art. 3, 10 J.O. COMM. EUR. 849 (1967); Regulation 1983, art. 3(d), 26 O.J. EUR. COMM. (No. L 173) 1 (1983); Ford, O.J. EUR. COMM. (No. L 256) 20 (1982); see also *infra* note 160.

129. See, e.g., *Musique Diffusion*, Case Nos. 100/80 to 103/80, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880.

130. See *id.*, in which the court stressed that failure to notify is not omission of a mere formality but the result of a deliberate choice of one kind of risk rather than another.

131. Temple Lang, *European Community Antitrust Law and Joint Ventures Involving Transfer of Technology*, in 1982 FORDHAM CORPORATE LAW INSTITUTE 203, 207, 215 (B. Hawk ed. 1983).

132. See Johannes, *Technology Transfer under EEC Law—Europe Between the Divergent Opinions of the Past and the New Administration*, in 1982 FORDHAM CORPORATE LAW INSTITUTE 65 (B. Hawk ed. 1983).

6. the threshold of dominance under article 86 is lower (i.e. more corporations are "dominant") than the threshold of monopoly under section 2 of the Sherman Antitrust Act.¹³³ This is so both because article 86 applies to narrow markets¹³⁴ and because the threshold of dominance involves lower market shares than in the United States;
7. a European antitrust compliance program should deal with national antitrust laws as well as Community antitrust law.

A Community law antitrust compliance program, if it is properly drafted, should require the Commission to be notified of all agreements which might fall, or might in changed circumstances fall, under article 85(1). The program will also require an application for negative clearance to protect the practices of dominant or possibly dominant companies thought to violate article 86.¹³⁵ Notification is often essential to ensure protection against claims for damages.

C. Community Fines and Claims for Compensation

Fines may be imposed by the Commission for breach of articles 85 and 86 if the breach is intentional or negligent.¹³⁶ In appropriate cases, these fines may reach 10% of the total turnover of the corporation fined. In the case of a claim for damages or an injunction, the plaintiff would have to prove neither intent nor negligence, unless either was a necessary element in an action for breach of statutory duty or the equivalent under national law, which does not seem to be the case.

The better view is that neither the likelihood of private claims for compensation nor the amount of any compensation likely to be

133. See, e.g., *Hoffman LaRoche & Co. v. Commission*, 1979 E. Comm. Ct. J. Rep. 461, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527.

134. *Hugin Kassaregister AB v. Commission*, 1979 E. Comm. Ct. J. Rep. 1869, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8524; *B.P. v. Commission*, 1978 E. Comm. Ct. J. Rep. 1513, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8465; *General Motors Continental v. Commission*, 1975 E. Comm. Ct. J. Rep. 1367, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8320.

135. *Hoffmann LaRoche & Co. v. Commission*, 1979 E. Comm. Ct. J. Rep. 461, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527.

136. Regulation 17, art. 15(2), 5 J.O. COMM. EUR. 204, 209 (1962). See *BMW (Belgium) S.A. v. Commission*, 1979 E. Comm. Ct. J. Rep. 2435, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8548; *Miller Int'l Schallplatten v. Commission*, 1978 E. Comm. Ct. J. Rep. 131, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8439.

awarded should affect the amount of any fine imposed by the Commission.¹³⁷ The Commission believes that such damages can be recovered in appropriate cases. Accordingly, fines imposed by the Commission are based on the assumption that damages will be payable. Compensation does not constitute a penalty, so the question of a double penalty does not arise if a firm which infringes articles 85 and 86 pays a fine as well as damages. Even if every potential plaintiff sued (an extremely rare possibility), or if class actions were possible, the aggregate loss to all the plaintiffs (which would be the measure of the compensation) might be different from the benefit to the defendants. The benefit, if it were measurable, might indicate *prima facie* the minimum amount of the fine. Although the analogy is not exact, criminal penalties under national laws are not affected by the likelihood that compensation will also be payable by the accused. In the United States, fines as well as treble damages are imposed for antitrust violations. Treble damages by definition are partly punitive, and are recovered by persons injured by antitrust violations. It is reasonable for corporations engaging in deliberately unlawful behavior to pay a fine as well as damages if they have caused losses to others. Only corporations that act deliberately or negligently can be fined. Moreover, only those that act deliberately are likely to be fined the full amount of the profit they made, provided such figure may be accurately determined. This result is reasonable particularly because Community antitrust law does not authorize fines on directors or executives involved in antitrust violations (still less allow them to be put in jail as in the United States). Indeed, since compensation by definition cannot punish or deter if it is limited to loss actually caused to others, fines should be in addition to, and not in lieu of, compensation.

It appears likely that claims for even single damages often might be larger than the increased fines currently imposed by the Commission in serious cases. The full amount of compensation will be payable even if the violation is not a well-known or well-established infringement, and even if the violation is not particularly serious from the Community point of view.

137. The leading case on the fining policy of the Commission is *Musique Diffusion*, Case Nos. 100/80 to 103/80, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880. The Commission is, however, obliged, when imposing fines, to take account of any fine imposed under national antitrust law of a member state in respect of the same conduct.

D. *Interim Measures, "Serious and Irreparable Damage" and Compensation in National Courts*

The Commission has power to order interim measures (in effect, preliminary injunctions) to prevent "serious and irreparable damage" to the corporation requesting the measures during the course of the Commission's procedure.¹³⁸ If compensation can be obtained in national courts, the question arises what damage is nevertheless "irreparable" and so justifies interim measures. While the law is not yet clear, some comments may be useful.

If compensation would be available and would be an adequate remedy, interim measures from the Commission are not necessary for the protection of the complainant. In these circumstances, interim measures would not be appropriate unless the Community's interest in adopting them is separate from the interest of the complainant. At least in the majority of cases, the public or Community interests in protecting competition cannot be adequately compensated by damages.

Nevertheless, it may be that interim measures should be ordered if the balance of all the interests involved is such that they are preferable to subsequent damages. The interests to be considered include those of the complainant and the corporation said to be infringing Community antitrust law, the interests of third parties (customers or suppliers of either party and consumers), and the general public or Community interest. The Court did not say in the *Camera Care* case that the Commission should balance these interests, but it appears that the Court itself balances them in exercising its own powers.¹³⁹ It may be that neither the Community interest nor the complainant's interest would by itself necessitate interim measures. However, if both the Community and the complainant would benefit from interim measures, such measures could be ordered even if damages would be available to the complainant and other injured parties in similar positions. Since class actions for damages are generally not possible under the national laws of mem-

138. *Camera Care Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645; C. KERSE, *EEC ANTITRUST PROCEDURE* 125-30 & app. 1 (1981); Temple Lang, *The Powers of the Commission to Order Interim Measures in Competition Cases*, 18 COMMON MKT. L. REV. 49 (1981).

139. See *Camera Care*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645.

ber states, interim measures may be preferable to a series of actions in national courts.

The fact that in given circumstances the Commission is not obliged to adopt interim measures does not necessarily prevent the national courts from adopting them. The national law rules governing the issuance of preliminary injunctions are not necessarily identical to the Community law rules. (No doubt the Court will look at rules of national law for guidance, but those rules are different in each member state).

If it is clear that damages are not available to the complainant in the national courts and if the conditions for interim measures are otherwise fulfilled, the Commission should adopt them. This might occur even if the national courts in question should award damages, for example, even if it could be shown that their failure to do so was a breach of the duties of the member state in question to protect private rights under directly applicable rules of Community law.

More difficult questions arise if damages may be awarded by the appropriate national courts, but are not an adequate or a satisfactory remedy for the injury suffered by the complainant. The most common example of this is where the allegedly unlawful conduct prevents the complainant from carrying on a particular line of business. It is often impossible to calculate the loss of business the complainant has suffered, the profits it would have made from that business, or the amount of goodwill it would have acquired for the future. It is therefore impossible to calculate how much compensation should be awarded. This is a significant reason for the imposition of interim measures. Most national courts would award preliminary injunctions in these circumstances, and it is submitted that the Commission may also do so. If the complainant will cease trading, or will be unable to enter the market, without the imposition of interim measures, such measures are required. In addition, if the complainant posts a bond to protect the defendant corporation from loss if interim measures are awarded but the defendant ultimately wins the case, such protection favors the use of interim measures.¹⁴⁰ It may also be important that a new market is opening up and that the complainant should not be excluded from it at the

140. *National Carbonising*, 18 O.J. EUR. COMM. (No. L 35) 6 (1975); *National Carbonising Co. v. Commission*, 1975 E. Comm. Ct. J. Rep. 1193; Temple Lang, *L'affaire National Carbonising*, 1977 *CAHIERS DE DROIT EUROPEEN* 506.

crucial formative stage, even if it could subsequently enter provided the claim was successful.¹⁴¹ It would also be an argument for the adoption of interim measures by the Commission that the latter had obtained important evidence in favor of the complainant that was not already in the possession of the complainant.

If it is clear that a preliminary injunction would be available from a national court and would be an entirely satisfactory remedy, it is submitted that the Commission is not obliged to adopt interim measures.

E. The Duties of National Courts in Private Claims for Breach of Community Antitrust Law

When a national court hears a private claim for an injunction or damages for breach of Community antitrust law, it is obliged not only to grant the plaintiff the relief it requests, insofar as the relief is appropriate, but also to ensure compliance with Community law. This seems to be a reasonable deduction from article 5 of the EEC Treaty and from the Court's decision in *Walt Wilhelm v. Bundeskartellamt*.¹⁴² Community law is public law and public policy, and the national court must address any issue arising under Community law even if the parties do not. A national court may discharge its duty by sending the papers to the Commission, or to the national antitrust authority that is also responsible for enforcing Community antitrust law.¹⁴³ It may refer a question of Community

141. This argument was strongly made in a case which was finally settled without a formal decision. See IGR Stereo Television-Salora, COMM'N. OF THE EUR. COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64 (1982). In that case there was a patent controlled by and licensed to all the German stereo television producers, who had decided to grant licenses to nonmembers of the patent-owning corporation only after a certain date and for a limited number of receiving sets. The complainant, a Finnish manufacturer (Salora), was therefore refused a license until after the first wave of consumer purchases of the new stereo television sets was over. After it had complained to the Commission, Salora was granted a license by the holders of the patent. See *id.* This is one of the EEC's antitrust bottleneck monopoly cases.

In cases where interim measures are needed to allow a new competitor onto the market, it is submitted that they are justified, if the other conditions are fulfilled, to restore the status quo, if the status quo before the infringement was that new competitors could enter the market.

142. 1969 E. Comm. Ct. J. Rep. 1, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8056.

143. EEC Treaty, *supra* note 1, art. 5; Regulation 17, art. 9, 5 J.O. COMM. EUR. 204, 207 (1962). National antitrust authorities, such as the Bundeskartellamt or the British Mo-

law to the Court under article 177 of the EEC Treaty, or it may, if national procedures make it appropriate to do so, consider the Community interest in any order it issues.

F. How Far Can the Commission Provide Evidence to a Plaintiff to Enable it to go Before National Courts?

There may be cases in which the plaintiff's principal reason for complaining to the Commission rather than suing in a national court is the hope that the Commission, by using its inspection powers, will obtain important evidence not available under national discovery procedures. If the Commission obtains such evidence, the question then arises whether the Commission must continue with its own procedure even if national proceedings would otherwise be wholly satisfactory, or whether the Commission may relieve itself of the case by giving the evidence in question to the potential plaintiff for its use in national proceedings.

The question turns primarily on certain provisions of Regulation 17. Article 20 provides: "Information acquired as a result of the application of Articles 11, 12, 13 and 14 [the Commission's powers to obtain information, inquire into economic sectors, and carry out on-the-spot searches] shall be used only for the purpose of the relevant request or investigation."¹⁴⁴ As already explained, the Commission may have a duty to give a complainant documents obtained through the use of the Commission's powers, if it is necessary or appropriate to enable the complainant to make its case properly to the Commission. If this is done, the complainant could use the documents in national proceedings. Under article 20, however, the Commission could not give the documents to the complainant *merely* to enable it to pursue its private claim. The question remains whether there are any circumstances in which the Commission could properly regard proceedings brought by a private plaintiff in a national court as being in the Community interest, so that those proceedings could be regarded as a continuation or implementation of the Commission's investigation, for the purposes of article 20.

nopolies and Mergers Commission, may have the right to refer questions to the Court under article 177. See EEC Treaty, *supra* note 1, art. 177.

144. Regulation 17, art. 20, 5 J.O. COMM. EUR. 204, 211 (1962).

The better view seems to be that national court proceedings brought by a private plaintiff cannot be regarded in this way. The "competent authorities" of member states may act on behalf of the Commission and the Community under Regulation 17 and indeed under the Treaty itself,¹⁴⁵ and national courts may be "the competent authority" in a member state whose laws so provide. Nevertheless, in proceedings for damages where no injunction is sought, the national court is concerned only with private interests. Where an injunction is sought, however, the argument regarding the national court as acting in the Community interest might be stronger. It would be more reasonable to consider national courts as acting in the Community interest if the courts believed it possible and necessary to ensure that any settlement or order protected not only the plaintiff's interests but the Community interest as well. This might be the position in states where antitrust law is primary or exclusively enforced by the courts rather than by an administrative authority. But in most states, courts adjudicating private claims rarely consider that they have power to go outside the terms of reference of the plaintiff's claim. The more complex the remedy sought, the more likely it is that the national courts of most member states would leave the claim to an administrative authority. Indeed, if the plaintiff has not proposed a remedy which takes the Community interest into account, it is difficult to see how the court could devise a satisfactory solution without assistance.

The Commission might make the documents available to the relevant national antitrust authority (as it would normally do), if it was sufficiently certain that the authority would enforce Community law. Providing the documents to the appropriate authority would always be legitimate, but it would not follow that potential plaintiffs would obtain possession of them.

It is probably undesirable to prevent the Commission from giving evidence to a complainant rather than continuing its own procedure if there is no reason in the Community interest to do so. If the law is as described above, either the plaintiff is deprived of available evidence which would be valuable to him, and thus has to seek it through national discovery procedures, or the Commission

145. EEC Treaty, *supra* note 1, art. 88; Regulation 17, arts. 9(3), 10, 13, 5 J.O. COMM. EUR. 204, 207-08 (1962); Temple Lang, *Community Antitrust Law Compliance and Enforcement*, 18 COMMON Mkt. L. REV. 335, 354-59 (1981).

has to continue with an unnecessary procedure the principal result of which is to make the evidence available (indirectly, in the reasons for the decision) to the plaintiff, enabling him to pursue his claim for damages. It would obviously be more economical if the Commission were free to make the evidence available to the plaintiff.

In the perhaps unlikely event of the Commission making available to a complainant documents that, although valuable to it when claiming damages, were unrelated to the Commission's procedure, it seems that no claim could be made against the Commission under article 215 of the EEC Treaty if the complainant could reasonably have been expected to obtain the documents independently through discovery proceedings in the national courts.

*G. Business Secrets and Professional Secrecy:
the Position of a Potential Plaintiff*

Article 214 of the EEC Treaty prohibits all members and officials of Community institutions from disclosing "information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components."¹⁴⁶ This language is repeated in substance in article 20 of Regulation 17. Breach of this prohibition would make the Community liable to pay compensation "in accordance with the general principles common to the laws of the Member States" for any damage caused.¹⁴⁷

Articles 19 and 21 of Regulation 17 require the Commission, when publishing notices of its intention to adopt decisions, and in its decisions, to have regard for the legitimate interests of enterprises in the protection of their "business secrets."¹⁴⁸ Under article 20, information obtained pursuant to Regulation 17 may be used only for the purposes for which it was obtained.¹⁴⁹

Under the Commission's Staff Regulations, each official is legally required to "exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties; he shall not in any

146. EEC Treaty, *supra* note 1, art. 214.

147. *Id.* art. 215.

148. Regulation 17, arts. 19, 21, 5 J.O. COMM. EUR. 204, 210-11 (1962).

149. *Id.* art. 20, 5 J.O. COMM. EUR. 204, 211 (1962).

manner whatsoever disclose to any unauthorised person any document or information not already made public."¹⁵⁰ An official may be required to pay for any damage suffered by the Commission as a result of his serious misconduct in the performance of his duties.

Normally, the Commission accepts the view of enterprises which claim that specified information is protected from disclosure by these provisions. No difficulty arises or seems likely to arise in connection with publication in decisions or advance notices of the Commission's intention to adopt decisions favorable to the enterprises concerned. The Commission can avoid including the information in question in the published documents, without thereby affecting the rights of third parties to object to the Commission's proposed decision. In certain cases, the Commission has published decisions with figures omitted from the text.

The problem is more difficult where there are two parties with adverse interests involved. Either the complainant (or intervenor) or the enterprise against which the complaint is made may submit information to the Commission that it regards as secret. The Commission's duty to hear both parties fully makes it necessary to give each party an opportunity to comment on the submissions of the other as fully as possible. Therefore, the Commission in such circumstances (unless the party whose secrets are in question consents to their disclosure) might have to rule whether the information in question could properly be disclosed to the other party. A ruling permitting disclosure could probably be challenged before the Court.¹⁵¹ The Commission cannot use before the Court, or take into consideration in its decision, any information on which the defendant has not had an opportunity to comment.¹⁵² Accordingly, disclosure of the secrets of the complainant to the Commission is of little use.

Similar problems may arise in antidumping procedures before the Commission, and in antitrust proceedings before the Court of Justice in which companies with adverse interests are involved,

150. Commission's Staff Regulations, Reg. 31, 45 J.O. COMM. EUR., 1385 (1962).

151. The question has never risen directly, but see *IBM v. Commission*, 1981 E. Comm. Ct. J. Rep. 2639, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708.

152. *Musique Diffusion*, Case Nos. 100/80 to 103/80, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880; *Hoffmann LaRoche & Co. v. Commission*, 1979 E. Comm. Ct. J. Rep. 461, 510-14, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527, at 7538-40.

normally as a result of the intervention by the company in proceedings to which the Commission is a party. Article 93(4) of the Rules of Procedure of the Court allows the court, on the application of a party, to refuse to disclose "secret or confidential" documents to an intervenor.¹⁵³

There is no complete and authoritative definition of secrets for the purposes of any of these provisions, and there is no reason to draw distinctions between them. Article 214 prohibits disclosure of "in particular information about undertakings, their business relations or the components of their costs."¹⁵⁴ Clearly not all "information about undertakings" is secret. The Court has not yet given any guidance as to the meaning of business secrets or professional secrecy, but it would probably look to national laws for precedents.

At this stage in the development of the law, all cases must be considered on their own facts. The pertinent facts would include the exact nature of the information, the value and importance to the enterprise of keeping it secret, and the reasons why it is sought to be disclosed.

It seems that the law protects from disclosure both information that would be valuable to competitors and information that, if revealed, would be damaging to the corporation. Most secret information is of the former kind. Secrets include:

1. technical information and know-how;
2. financial information, turnover in specialized areas or lines of business, discounts and rebates; and
3. the identity of suppliers, customers and licensors.

In general, business secrets relate specifically to individual companies, and not to the industry in general. Information already published, or which the company is obligated to publish, cannot be treated as secret. Nor is information secret if already disclosed by the company or otherwise available to third parties who have no obligation to keep it secret. In general, information which could legitimately be obtained by an outsider would not be secret. The scope of the Commission's discretion to disclose documents to a complainant that would be available to that complainant through discovery procedures in national courts is also unclear.

153. 25 O.J. EUR. COMM. (No. C 39) 1, 22 (1982).

154. EEC Treaty, *supra* note 1, art. 214.

The Commission sometimes prepares a non-confidential summary of confidential information to enable the other party to comment on the substance of the information in question. In addition, the Commission sometimes aggregates the sales of the other competitors to prevent the corporation receiving the aggregated figures from knowing the precise market share of any one of its competitors.

Information is *not* "secret" merely because it would be damaging evidence against a particular corporation in a national antitrust proceeding or in a private suit for damages.

The identity of a complainant can not usually be kept secret from the enterprise complained against. However, complainants sometimes ask that the complaint be kept secret initially, for fear of reprisals (which, if they occurred, would almost always themselves be unlawful¹⁵⁵).

The question arises what rules about disclosure of business secrets should be applied in national courts in proceedings for breach of Community law, insofar as the national courts may order discovery of documents by either party. The answer seems to be that national courts will apply their own national law rules, even though these may differ from the Community law rules summarized above. There does not seem to be any legal basis on which national courts could apply the Community law rules by analogy in proceedings for damages or an injunction. If anomalies result, they can only be dealt with by legislation either at the state or Community level.

H. *Claims Against Member States Which Are Responsible for Restrictive Agreements: Articles 5 and 90 and Potential Plaintiffs*

It has already been mentioned that articles 5 and 90 of the EEC Treaty prohibit member states from enacting or maintaining in force any measure which is contrary to articles 85 and 86, among other articles, even in the case of publicly-owned corporations and corporations to which the state has given special or exclusive

155. Temple Lang, *supra* note 40, at 36-38. Reprisals would also be contrary to national laws on conspiracy to injure. Cf. Regulation 3017, art. 8, 22 O.J. Eur. Comm. (No. L 339) 1 (1979) (protection against dumped or subsidized imports into the European Community).

rights.¹⁵⁶ There is a strictly limited exception to this rule in article 90(2), which need not be discussed here.¹⁵⁷

Article 90 is directly applicable. It creates rights which national courts must enforce against any state measure intended to obligate, authorize or encourage a public enterprise to infringe articles 85 and 86.¹⁵⁸ It is submitted that because articles 85 and 86 are directly applicable, article 5 accords the same rights *a fortiori* when public enterprises are not involved. The national court of the state in question must give an effective remedy against the state or the authority in appropriate cases, as well as against other corporations involved.¹⁵⁹ This means that if a state measure provides, for example, that only members of a trade association are entitled to enter a particular market, as a means of ensuring self-regulation by the association concerned, the state is liable to pay damages to a nonmember of the association because the state has purported to impose a market entry cartel. Similarly, if the state grants an official authorization on condition that the recipient buy certain goods only from sources within the state, the national courts must declare the condition to be invalid and unlawful under Community law, and award damages to any alternative supplier who has suffered as a result.

In view of the very clear language of the Court that national courts must give an effective remedy if national measures interfere with private rights protected by Community law,¹⁶⁰ no sovereign immunity defense would be permitted by Community law even if such a defense would otherwise be available under national law.

I. *Arbitration of Private Damage Claims Under Articles 85 and 86*

Defendants in proceedings for damages under articles 85 and 86 will wish to avoid publicity to avoid claims by other plaintiffs similarly situated. If the claims cannot be settled, the defendants may want to have them dealt with by arbitration without publicity.

156. See EEC Treaty, *supra* note 1, arts. 5, 90.

157. See *id.* art. 90(2).

158. *Ex parte Sacchi*, 1974 E. Comm. Ct. J. Rep. 409, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8267.

159. *Amministrazione delle Finanze dello Stato v. MIRECO S.A.S.*, 1980 E. Comm. Ct. J. Rep. 2559, 2574-75, [1979-1981 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8694, at 8318-19.

160. See *id.*

It has thus far been generally assumed, apparently without much critical analysis, that no Community public policy exists to prevent the arbitration of private claims for breach of Community antitrust law. Presumably, this is assumed because Community antitrust law matters are not criminal.¹⁶¹ The Commission has never formally questioned this view, although the Community interest in private claims is obvious, especially if the claim is for an injunction rather than damages. Since the Court of Justice ruled in 1982 that most private arbitration tribunals are not required or even permitted to refer questions of Community law to the Court under article 177 of the EEC Treaty,¹⁶² the Community interest is not necessarily protected in arbitration proceedings, as it should be in national courts. This ruling supports the proposition that private claims for breach of Community antitrust law may not be referred to arbitration. However, certain other questions are discussed below on the assumption that some or all claims may lawfully be referred to private arbitration, or that Community antitrust issues will arise in cases which have been lawfully referred to private arbitration.

Some questions about arbitration under Community antitrust law have arisen because of unofficial claims of well-established arbitration systems in European non-member states. These questions have arisen primarily in relation to arbitration between parties to agreements which are contrary to EEC antitrust law. However, similar problems could perhaps arise if claims or counterclaims for damages for breach of EEC antitrust law were heard by arbitrators, or if a party to an unlawful agreement tried to recover money paid on the basis of the agreement. The questions arose because it has been said that under these arbitration systems, the arbitrators would enforce an agreement even if it was incompatible with Community antitrust law. This comment is surprising and does not seem well considered for several reasons:

1. an agreement to refer a dispute to arbitration in order to avoid the application of a rule of Community antitrust law would be contrary to public policy in EEC member states, as would an

161. Regulation 17, art. 15(4), 5 J.O. COMM. EUR. 204, 210 (1962), says that fines are not of a criminal law nature.

162. *Nordsee Deutsche Hochseefischerei v. Reederei Mond Hochseefischerei Nordstern*, 1982 E. Comm. Ct. J. Rep. 1095, [1981-1983 Transfer Finder] COMM. MKT. REP (CCH) ¶ 8822.

- agreement not to claim rights given by Community antitrust law;
2. the comment ignores the general principle of private international law that an agreement should not be enforced if it is unlawful under the law of the place where it is to be performed.¹⁶³ If, therefore, an agreement were to be performed in the Community, an arbitration tribunal in a non-Community country could not ignore Community antitrust law without infringing the general principle just mentioned. It also appears that damages should be awarded, regardless of where the arbitration is conducted, for loss caused by a breach of Community antitrust law committed in the Community;
 3. if an arbitration tribunal did enforce a contract which was contrary to Community antitrust law, its award would be unenforceable in the member states of the Community, since enforcement would be contrary to the obligations of member states under the Treaty.¹⁶⁴

In practice, however, plaintiffs claiming damages for Community antitrust law violations would not use an arbitration system unless they were satisfied that the law was to be correctly applied. Problems would likely arise only if the claim was made in the course of arbitration proceedings concerned with other issues.

This background explains the cautious attitude of the Commission towards arbitration awards. The relevant legal rules can be briefly summarized as follows:

Arbitration clauses are not in themselves restrictive of competition. Nevertheless, they may result in restrictions of competition because:

1. arbitrators may act on understandings between the parties that are restrictive, and that have not been expressed in writing in the arbitration clause of the agreement;
2. arbitrators may treat agreements or practices that do not comply with articles 85 and 86 of the EEC Treaty as lawful, even in circumstances in which Community law applies. In such circumstances, a plaintiff claiming damages for breach of articles 85 and 86 might be prevented from recovering;

163. See A. DICEY & J. MORRIS, *CONFLICT OF LAWS* 760 (8th ed. 1967).

164. See EEC Treaty, *supra* note 1, art. 5; COMM'N OF THE EUR. COMMUNITIES, TENTH REPORT ON COMPETITION POLICY 27-28 (1981).

3. arbitrators sometimes make awards that restrict competition between the parties, even where the original agreements were not inherently restrictive;
4. the possibility of being brought before an arbitrator for an alleged violation of a vaguely worded agreement might cause enterprises to interpret and act on the agreement in such a way as to avoid any risk of being accused of violating it, and thus cause them to avoid normal competitive practices.¹⁶⁵

The possibility that an arbitration clause might restrict competition arises primarily where the arbitration concerns a pre-existing agreement between the parties. However, arbitration in practice is more likely to give rise to restrictive arrangements between the parties if the plaintiff is claiming that the other party has engaged in dumping or predatory pricing or in acts of unfair competition.

More generally:

1. Parties are not free to achieve indirectly through arbitration what they could not legally do by agreement.¹⁶⁶ The decisions of arbitrators appointed by agreement between the parties or to whom a controversy has been referred by agreement cannot have a higher

165. See IFTRA Aluminum, O.J. EUR. COMM. (No. L 228) 3 (1975).

166. Parties to a contract are not free to create exemptions from rules of Community Law. *Nordsee Deutsche Hochseefischerei v. Reederei Mond Hochfisherei Nordstern*, 1982 E. Comm. Ct. J. Rep. 1095, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8822; *Broekmeulen v. General Practitioner Registration Comm.*, 1981 E. Comm. Ct. J. Rep. 2311, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8773; *Dansk Supermarked A/S v. Imerco A/S*, 1981 E. Comm. Ct. J. Rep. 181, 195, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶8729.

All arrangements to submit disputes to arbitration are the result of an agreement made at some stage, whether before or after the dispute arose. Therefore, the award is always the *result* of an agreement between the enterprises concerned. It could also be regarded as a decision of an association of enterprises, the association being for the purpose of resolving disputes, if for no wider purpose. Since arbitration awards contrary to article 85 cannot be enforced in the Community, it could be said that if an enterprise complies with such an award it does so voluntarily, and as a result of an agreement to do so.

It is true that in most cases the Commission has no more reason to attack an arbitral award with which it disagrees than it has to attack a decision of a lower national court which it believes to be erroneous. But in the case of arbitration, it is important, because the parties have voluntarily submitted to arbitration, to be able to ensure that they have not thereby evaded the law that the Commission can reasonably expect will normally be correctly applied by the national courts.

Even if the Commission has no power to attack arbitration awards as such, the Commission clearly has power to attack the agreement on which the arbitration was based, on the ground that it has resulted in a restriction of competition.

status than an agreement or a "decision by an association of enterprises."

2. An arbitration award cannot supercede a decision of a national court of a member state in the same or similar controversy. The Commission is not bound by a decision of a national cartel authority, and cannot be bound by an award of an arbitration tribunal. Moreover, such an award cannot prevent the Commission from enforcing Community competition law.

3. A national court decision or an arbitration award cannot confer rights on a company that, if exercised, would be incompatible with Community law. Therefore, if a court decision or an award contrary to Community competition law (or, for example, to Community rules on freedom of movement of patented or trademarked goods) cannot *enable* a company to do something which it could not otherwise legally do under Community law, such a decision or award is even less likely to *compel* it to do something which it could not do legally under Community law.

4. The Commission reserves the right to take action against enterprises acting on or trying to enforce an agreement which is contrary to Community competition law. The Commission would certainly have to reserve the right to challenge the legality of an award, as well as the lawfulness of the agreement in question, if the parties had deliberately chosen an arbitrator, a forum or an applicable law under which Community law would not be followed.

J. *The Effects of Unilateral Action Making a Restrictive Agreement Unlawful Under Article 85*

If article 85(1) applies to a restrictive agreement, the Commission may nevertheless exempt that agreement under article 85(3). However, the agreement may be made ineligible for exemption, or an individual or legislative exemption may be made inapplicable, by the unilateral action of one party to the agreement. In practice, unilateral action sufficient to make article 85(3) inapplicable is usually a measure to maintain resale prices or interfere with imports or exports from one EEC member state to another.¹⁶⁷ This

167. Regulation 67, art. 3, 10 J.O. COMM. EUR. 849 (1967); Regulation 1983, art. 3, 26 O.J. EUR. COMM. (No. L 173) 1 (1983); Ford-Werke, O.J. EUR. COMM. (No. L 256) 30 (1982); Tepea B.V. v. Commission, 1978 E. Comm. Ct. J. Rep. 1391, [1977-1978 Transfer

means that the action of one party to the agreement can make the agreement void under article 85(2) and can expose all the parties to actions for damages by firms injured by the unlawful agreement. In these circumstances, the parties to the agreement that were not involved in the unilateral action would probably have a right of indemnification against those who were involved.¹⁶⁸ This right of indemnification is accorded provided the parties became joint tortfeasors only as a result of the unilateral act and provided that the agreement would have been exempt but for the unilateral action. It seems that all the parties to the agreement could probably be sued by the injured third party. More difficult questions may arise concerning causation, however, if the claim is for loss caused by the unilateral action rather than by the unlawful agreement as such.

K. Incentives for Defendants to Settle

The possibility of claims for damages by third parties creates an incentive for defendant corporations to settle cases brought by the Commission. This is because by settling they usually make it unnecessary for the Commission to adopt a decision ruling that unlawful conduct has occurred and, in article 86 cases, that the defendant occupies a dominant position. Such a decision greatly helps a plaintiff in a claim for damages because it relieves him from having to prove that an infringement has been committed or that the defendant is dominant. If there is no decision, the defendant can point out that, by ceasing the conduct complained of, it did not concede dominance or unlawful conduct, and the plaintiff is obliged to prove its case. It is therefore likely that in the future, fewer relatively hopeless cases will be argued until the Commission is compelled to make a formal decision where third parties have suffered loss as a result of the conduct and can be expected to sue.

For the same reasons, defendants have an incentive to settle with complainants before the Commission has adopted a decision,

Binder] COMMON MKT. REP. (CCH) ¶ 8467; *EMI v. CBS*, 1976 E. Comm. Ct. J. Rep. 811, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8350; *Advocaat Zwarte Kip, O.J. EUR. COMM.* (No. L 237) 12 (1974); *Consten S.A. v. Commission*, 1966 E. Comm. Ct. J. Rep. 299, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046.

168. H. MCGREGOR, *DAMAGES* ch. 16 (14th ed. 1980).

since the defendant's bargaining position is stronger before a decision has been adopted. In addition, the Commission may be more likely to accept a settlement with the defendant if the complaint has been withdrawn or satisfied.

More generally, of course, the likelihood of claims for damages creates an extra incentive for defendants to settle because the cost of losing in the end is higher. If the defendant genuinely expects to prevail, however, this may provide an extra reason to litigate the case.

To put this in perspective, over 90% of all cases now dealt with by the Commission result in settlements without formal decisions. The figures for each year are given in the *Annual Reports of the Commission on Competition Policy*. In 1982, for example, 479 cases were settled informally without decisions.¹⁶⁹

L. *Claims by Public Authorities for Damages*

Public authorities are from time to time seriously overcharged as a result of collusive tendering for public works and public supply contracts, or unlawful agreements as to which corporation will tender bids. Since it will now become generally recognized that public authorities may recover compensation in such circumstances, it is to be expected that the auditors of public authorities will criticize any authorities which do not make claims for compensation in appropriate circumstances.

M. *United States Corporations Wishing To Enter European Community Markets*

United States businessmen often discover that, in spite of Community antitrust law, markets in Europe are more cartellized than corresponding markets in the United States, and that it is sometimes difficult for United States corporations to obtain access to markets in the Community. The availability of damages and injunctions in national courts provides United States corporations with new ways of ensuring full participation in European markets, from which they may now be unlawfully excluded.

¹⁶⁹. COMM'N OF THE EUR. COMMUNITIES, TWELFTH REPORT ON COMPETITION POLICY (1983).

IV. COMMUNITY INSTITUTIONS AND NATIONAL COURTS

A. Courses of Action Open to a National Court

According to the circumstances, a national court faced with a claim for damages or an injunction under article 85 or 86 may:

1. decide that the case falls within the Regulations on transport or on agricultural agreements, and that it should be dealt with in accordance with the appropriate procedure;
2. decide that the case falls under a group exemption under article 85(3);
3. decide the questions of fact and of law itself;
4. treat the agreement as valid under the doctrine of provisional validity.

In connection with any of the above courses of action, the national court may, and a final court of appeal must, refer any question of Community law (as distinct from questions of the application of Community law to the facts) to the Court of Justice under article 177 of the EEC Treaty if a ruling on the question is necessary to enable the national court to render a judgement.¹⁷⁰

The national court may also adjourn the case to allow the Commission to decide whether there has been a breach of Community law and, if appropriate, to deal with all the remedies except damages.¹⁷¹ This includes cases where:

1. the national court considers that the Commission should investigate the circumstances fully; for example, if evidence needs to be obtained in several member states which would not be available under national discovery procedures;
2. the court wishes the Commission to decide whether an individual exemption under article 85(3) should be granted (assuming that the Commission has either been notified of the agreement

170. See EEC Treaty, *supra* note 1, art. 177.

171. Kon detects "a tendency, although by no means a policy" of English courts, but not German courts, to adjourn national proceedings pending determination by Community institutions. Kon, *Article 85, ¶ 3: A Case for Application by National Courts*, 19 COMMON MKT. L. REV. 541, 557 (1982). Presumably in cases where national courts are more confident of reaching the correct result themselves, they will be less likely to adjourn. *But see* Steindorff, *Article 85, ¶ 3: No Case For Application by National Courts*, 20 COMMON MKT. L. REV. 125 (1982).

- or does not require notification, since a national court cannot give such an exemption and cannot act as if one had been given);
3. the court believes that the case is one of great difficulty, controversy or complexity, or involves evidence in other member states, or where the appropriate remedy is complex (e.g. divestiture), and will have to apply in several member states. In such cases it might be more efficient and more economical for the whole case to be dealt with by the Commission, subject to review by the Court of Justice, rather than by national courts with the guidance of the Court of Justice on points of Community law;
 4. the court has been informed that the Commission is already dealing with the case and wishes to avoid duplication of effort and the risk of conflicting decisions. The Commission has power to deprive a national antitrust authority of jurisdiction over the Community law aspects of a case by beginning a Commission procedure,¹⁷² but this does not deprive a court of jurisdiction over private claims;¹⁷³
 5. a Community fine imposed by the Commission seems appropriate.

B. *The Relationship Between the Commission and National Courts*

In a case referred to the Court of Justice by a national court under article 177, the only issues before the Court pertain to Community law. Therefore, the Commission may submit arguments to the Court only on those points of law. It may not submit evidence or arguments as to the application of the law to the facts of the particular case. This does not exclude the possibility of a Brandeis brief giving general economic, social or technical background, but it does exclude evidence specifically related to the issues of fact to be decided by the national court. The role of the Commission in an article 177 case is, therefore, quite different from its role in its own procedure, in which it investigates and makes findings of fact, and applies the law to the facts, exercising a certain amount of discretion in the application of article 85(3).¹⁷⁴

It is sometimes suggested that the Commission should intervene in national court proceedings between private parties, either

172. Regulation 17, art. 9, 5 J.O. COMM. EUR. 204, 207 (1962).

173. *Belgische Radio en Televisie (BRT) v. SABAM*, 1974 E. Comm. Ct. J. Rep. 51, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8268.

174. Compare EEC Treaty, *supra* note 1, art. 85(3) with *id.* art. 177.

to argue that a question should be referred to the Court of Justice, or to allow the Commission to deal with the case, or to argue in favor of some particular interpretation of Community law. However, even if the national rules of procedure permitted such intervention by the Commission, there are several objections:

1. it is for the national court to decide whether a question of Community law needs to be referred to Luxembourg under article 177 of the EEC Treaty. This depends on how the national judge views the case, and the Commission has no role in helping him to decide the case before him;
2. it would be inappropriate and even improper for the Commission to take sides in a dispute before a national court (as distinct from merely making submissions on a point of law) unless it had investigated the matter in accordance with Regulation 17 and its own procedure—at which point it should adopt a decision in the usual manner and allow the national court to draw conclusions from it if appropriate;¹⁷⁵
3. the Commission, in the exercise of its own powers, is not subject to¹⁷⁶ and could not be bound by any findings of fact or of Community law made by a national court. Therefore, it would seem odd for the Commission to argue such a point before such a court;
4. issues of Community law arising in proceedings before national courts are to be dealt with by them and by the Court of Justice.¹⁷⁷ The only role provided by the Treaty for the Commission is as an *amicus curiae* before the Court of Justice.¹⁷⁸ Certainly, the Commission should not seek to persuade a national court to decide a question of Community law *without* referring it to Luxembourg;
5. the Commission does not have the considerable amount of manpower which would be needed to intervene frequently in cases before national courts;

175. *Walt Wilhelm v. Bundeskartellamt*, 1969 E. Comm. Ct. J. Rep. 1, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8056.

176. EEC Treaty, *supra* note 1, arts. 164, 183; *Granaria, B.V. v. Hoofdprodukschap voor Akkerbouwprodukten*, 1979 E. Comm. Ct. J. Rep. 623, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8553; *Commission v. Council*, 1971 E. Comm. Ct. J. Rep. 263, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8134; *Humblet v. Belgium*, 1960 E. Comm. Ct. J. Rep. 559, 568, 2 COMMON MKT. REP. (CCH) ¶ 5242.45.

177. EEC Treaty, *supra* note 1, art. 177.

178. Article 20, Statute of the Court of Justice, 298 U.N.T.S. 147, 152.

6. in the civil law systems in eight of the ten EEC member states, precedential value of a national court judgement is not as significant as it would be in a common law system. Accordingly, the need for the Commission to intervene in order to obtain a favorable precedent is less;
7. unlike the United States Department of Justice, the Commission does not *need* to appear before any court to enforce Community antitrust law.

C. The Plaintiff's View of the Relative Merits of Complaints to the Commission and Proceedings in National Courts

An enterprise which believes it has suffered or is likely to suffer loss as a result of an infringement of articles 85 and 86 may either complain to the Commission, or bring proceedings for an injunction and compensation in one (or more than one) national court, or both.

The advantages of complaining to the Commission are:

1. it can be done informally and inexpensively. However, the better-documented and better-argued a complaint is, the more likely it is to be acted upon. A complaint, once made, may need to be pursued, and the legal costs of pursuing it may not be very different from the cost of proceedings in a national court;
2. the complaint may get the Commission to itself prosecute the case at relatively little cost to the complainant;
3. the Commission has powers to obtain documents which, if fully used, would be more likely to produce valuable evidence than discovery or the equivalent in many national courts. If it is thought that the defendant may destroy incriminating documents, a surprise investigation by the Commission is preferable to a discovery order from a national court. A complainant might receive from the Commission documents which it could subsequently use in claiming damages. This is important because a plaintiff's rights to discover in some EEC member states are considerably less than in the United States;
4. a cease and desist order of the Commission, or an interim measure of the Commission, will apply throughout the Community. A corresponding permanent or temporary injunction of a national court would have little effect outside the state to which the court belonged;
5. a formal decision of the Commission ruling that an infringement of article 85 or article 86 had been committed, if not challenged

before the Court of Justice or if upheld there, would subsequently be treated in practice as conclusive by a national court. However, the Commission is *not* required to adopt a formal decision merely for the purpose of facilitating private claims for compensation. If the Commission is satisfied that an infringement has ceased and that neither a fine nor a cease and desist order is needed, it will not normally adopt a decision;

6. an unsuccessful complainant before the Commission cannot be ordered to pay the defendant's legal costs;
7. a knowledgeable complainant can influence the terms of a Commission cease and desist order or a settlement between the Commission and the defendants at a relatively low cost;
8. under Community law a complainant may intervene in a case before the Court of Justice between the Commission and the parties to an antitrust violation.¹⁷⁹ He, therefore, still has a voice at the final judicial stage of the case. This is not quite as important as it might seem, however, because the Court has no jurisdiction to re-write a Commission decision, but only to annul it wholly or in part, and to vary the amount of a fine.¹⁸⁰ Consequently the complainant's role before the Court is essentially limited to supporting the Commission's decision.

The advantages of proceedings in a national court are:

1. only a national court can award compensation. The Commission has no jurisdiction to do so. This is the most important reason for choosing a national court;
2. national courts in some countries can issue injunctions *ex parte*. It appears that the Commission has no power to do so. Also, some national courts issue, or can issue in appropriate circumstances, temporary injunctions much more quickly than the Commission is likely to grant interim measures;
3. the Commission has no power to award attorney's fees to a successful complainant, and even a complainant who wins before the Court cannot recover his legal expenses in connection with the administrative procedure. The attorneys' fees of an application to a national court may be much less than the fees charged for several visits to the Commission in Brussels;

179. EEC Treaty, *supra* note 1, art. 173.

180. *See id.* art. 174.

4. it is possible to continue a claim under national antitrust law or unfair competition law with a claim under Community law in a national court. This cannot be done in a complaint to the Commission;¹⁸¹
5. the availability of compensation from a national court may mean that damage caused by a punitive infringement of articles 85 and 86 is not "serious and irreparable" so as to justify the Commission ordering interim measures. The prerequisites for the Commission's interim measures may be stricter than those for an injunction in some national courts. The Commission orders interim measures only if it considers that "a reasonably strong prima facie case" has been shown,¹⁸² but in England, for example, only an "arguable" case is necessary.¹⁸³ In the three and a half years after the Court confirmed that the Commission has power to grant interim measures, only two decisions ordering interim measures have been adopted by the Commission.¹⁸⁴ On this question the Community law is not yet clear;¹⁸⁵
6. it is submitted that the Commission may properly decline to deal with a complaint that could be satisfactorily dealt with by a national court,¹⁸⁶ although the Commission has never said so. If this is correct, and if the Commission began to refuse to deal with complaints on this ground, there might be little point in making certain kinds of complaints to the Commission. Certainly, a complaint should include a statement of the reasons why the complainant claims that it cannot expect to obtain a satisfactory result from a national court;

181. See EEC Treaty, *supra* note 1, arts. 177-182 (describing the jurisdiction of the Court of Justice).

182. C. KERSE, EEC ANTITRUST PROCEDURE 322 (1981) (statement of the Commission on interim measures). See also *Distribution System of Ford-Werke AG*, 25 O.J. EUR. COMM. (No. L 256) 20 (1982).

183. See C. KERSE, EEC ANTITRUST PROCEDURE 266-67 (1981).

184. *Ford-Werke*, O.J. EUR. COMM. (No. L 256) 20 (1982). This decision was the subject of cases 229/82R and 228/82R. *Ford v. Commission*, 1982 E. Comm. Ct. J. Rep. 3091 and *Akzo Chemie*, O.J. EUR. COMM. (No. L 252) 13 (1983), COMMON MKT. REP. (CCH) ¶ 10,517. But see *British Sugar-Berisford*, COMM'N OF THE EUR. COMMUNITIES, TWELFTH REPORT ON COMPETITION POLICY 82-83 (1983); *IGR Stereo Television and Amicon-Fortia-Wright*, COMM'N OF THE EUR. COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 63-64, 73-74 (1982).

185. See Temple Lang, *The Power of the Commission to Order Interim Measures in Competition Cases*, 18 COMMON MKT. L. REV. 49 (1981).

186. A number of cases in which claims for compensation or injunctions could be brought before national courts are cases in which there is no real community interest, and which a national court would deal with easily.

7. under the law of Ireland and England, the penalties for breach of an injunction granted by a court include imprisonment for contempt of court.¹⁸⁷ Breach of a Commission decision involves only fines on the company.

D. The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters¹⁸⁸ (Convention) provides for reciprocal enforcement of judgments between member states of the Community and lays down a number of rules concerning the jurisdiction of national courts. Some of these rules would apply to tort (*ex delicto*) claims for damages for breach of Community anti-trust law. The pertinent rules under the Convention are, in brief, as follows:

1. the defendant may be sued where it is domiciled;¹⁸⁹
2. the defendant may be sued in tort in the courts of the state where the event causing the harm occurred;¹⁹⁰
3. if the dispute arises out of the operations of a branch, agency or other establishment, the defendant may be sued where it is situated;
4. if there are several defendants, they may be sued in the courts of a state where any one of them is domiciled;¹⁹¹
5. preliminary injunctions ("provisional, including protective measures," interlocutory injunctions, measures en référé, kort geding, etc.) may be applied for in any contracting state even if another state has jurisdiction as to the substance of the claim;¹⁹²

187. 9 HALSBURY'S LAWS OF ENGLAND §§ 88-94 (Lord Hailsham ed. 4th ed. 1974).

188. 26 O.J. EUR. COMM. (No. C 97) 1 (1983) [hereinafter cited as Convention]. For the Protocol on the interpretation of the Convention by the Court of Justice, see *id.* at 24. See also the Reports by Mr. P. Jenard on the Convention and on (among other things) the Protocol, and the Report of Professor Schlosser on the Convention, both in 22 O.J. EUR. COMM. (No. C 59) (1979).

189. Convention, *supra* note 188, art. 2. The choice of law rules for determining domicile are in *id.* arts. 52, 53.

190. *Id.*, art. 5(3).

191. *Id.*, art. 5(5). See *Somafer, S.A. v. Saar-ferngas*, 1978 E. Comm. Ct. J. Rep. 2183, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8516; *De Bloos v. Bouyer*, 1977 E. Comm. Ct. J. Rep. 1497, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8444.

192. Convention, *supra* note 188, art. 6(1).

6. a judgment shall not be recognized if it is contrary to public policy in the state in which recognition is sought.¹⁹³

In a leading case on jurisdiction in tort cases under the Convention, *Bier v. Mines de Potasse d'Alsace*,¹⁹⁴ the Court of Justice interpreted the clause which gives jurisdiction to the court of the state "where the harmful event occurred."¹⁹⁵ The plaintiff, a Dutch horticultural firm, claimed to have been injured by the French defendant's dumping of saline waste into the Rhine River. The defendant's acts causing the damage occurred in France, while the damage to the plaintiff occurred in the Netherlands. The Court said that the phrase quoted applied to *both* places and that the plaintiff could sue in either state.¹⁹⁶

This principle would also apply to a restrictive agreement or practice, prohibited by articles 85 and 86, that was made or acted on in one state but caused damage in another. It seems to follow that injunctions or the equivalent can also be obtained in either state, subject to national law rules.

The primary purpose of the Convention is to enable judgments given by national courts of each member state to be enforceable without difficulty in all other members states. This is provided for by Title III of the Convention.¹⁹⁷

E. *Who May Sue and for What? National Law Questions and "Mixed" Questions of Community Law and National Law*

In principle, if claims may be made for losses caused by an infringement of articles 85 and 86, anyone who has suffered such a loss, provided that it is sufficiently direct, may make such claims. There does not seem to be any reason in Community law to say that only some of the provisions of those articles are for the protection of private rights. Potential plaintiffs would, therefore, include both customers and competitors of the parties to the unlawful agreement

193. *Id.* art. 27(1); see COMM'N OF THE EUR. COMMUNITIES, TENTH REPORT ON COMPETITION POLICY (1981).

194. 1976 E. Comm. Ct. J. Rep. 1735, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8378.

195. *Id.* at 1748, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8378, at 7822.

196. *Id.*, at 1749, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8378, at 7822.

197. Convention, *supra* note 188, Title III.

or practice, and suppliers in the case of abuse of dominant buying power (monopsony). Claims could be brought for loss caused by both exploitative, anticompetitive and reprisal abuses. Specifically, claims could be brought for loss due to:

1. an unlawful boycott or refusal to supply goods or services;
2. loss of sales or of opportunities to sell due to unlawful exclusive agreements, fidelity rebates, tying clauses, joint ventures supplying raw materials or components¹⁹⁸ or any other exclusionary practice;
3. price fixing or the unfairly high prices of a dominant seller;
4. discriminatory prices;
5. predatory pricing which damages competitors;
6. unfairly low prices paid by a dominant buyer;
7. onerous terms in supply contracts or, in the case of a dominant buyer, purchasing contracts;
8. market sharing agreements, especially where prices are lower in other member states, and all agreements and practices interfering with parallel imports into the member state where the plaintiff operates;
9. the use of patents and trademarks to interfere with parallel imports where this is the result of an unlawful agreement.¹⁹⁹

Because article 86 prohibits exploitative abuses as well as anticompetitive ones, the range of claims which may be made is certainly wider than under United States antitrust law.

In the case of an unlawful takeover, merger or joint venture, it might be easier and better for a plaintiff to get an injunction to prevent the transaction from proceeding, which would benefit everyone, rather than seeking compensation, which would benefit only the plaintiff. The absence in Europe of class actions for compensation makes it even more appropriate to grant injunctions rather than compensation. Also, the difficulty of calculating how much loss has been caused by an infringement (quite apart from uncertainty as to the rules of law determining the amount of the loss recoverable) may make it preferable in many cases to award injunctions when they are otherwise appropriate.

198. Temple Lang, *European Community Antitrust Law and Joint Ventures Involving Transfer of Technology*, in 1982 FORDHAM CORPORATE LAW INSTITUTE 203, 230-33 (B. Hawk ed. 1983).

199. *Keurkoop v. Nancy Kean Gifts*, Case No. 144/81, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8861.

Injunctions will also no doubt be sought by companies which are being taken over. If a plaintiff desires an injunction, he will have to decide whether to sue in a national court or to ask the Commission to make the order he wishes. A plaintiff seeking compensation can only obtain it by proceedings in a national court.

In the present state of Community law, it is primarily national law rules that govern the recovery of damages or the grant of an injunction in any given situation.²⁰⁰ For several reasons, however, these questions are not governed only by national law rules. First, neither procedural nor substantive national rules may make it impossible in practice to exercise the rights which national courts have a duty to protect.²⁰¹ It is too soon to say exactly what minimum rights must be protected by national courts, but by definition this minimum is determined by Community law, not by national law.²⁰² Second, under national laws an action for breach of statutory duty will lie only for injury within the scope of the statute. That scope, in the case of articles 85 and 86, is a question of Community law to be determined ultimately by the Court, just as the question whether articles 85 and 86 are laws for the protection of individual interests is in the first place question of Community law. Therefore, both the minimum and the maximum extents of the protection given to private plaintiffs seem to be in the first instance questions of Community law. This means that the Court may have opportunities to clarify the extent of the substantive protection which should be given by national courts of member states even without any harmonization directive. Presumably the Court, to decide the points of Community law just referred to, may look at the national law on recovery of damages for breach of statutory duty. The failure of a national law to protect a plaintiff who was entitled to protection under Community law, or in circumstances in which he was entitled to protection, would presumably be a breach of the obligations of the member state under the Treaty.

200. *MIRECO*, 1980 E. Comm. Ct. J. Rep. 2559, 2574-75, [1979-1981 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8694, at 8318-19.

201. One rule of national law which would gravely interfere with the effective enforcement of plaintiff's rights is the English rule allowing a defendant to refuse to produce documents on the grounds that they might expose it to fines under Community law. *See In Re Westinghouse Uranium Contract*, 1978 A.C. 547.

202. J. TEMPLE LANG, *THE COMMON MARKET AND COMMON LAW* ch. 17 (1966).

The reference to users and consumers (*utilisateurs*) in article 85(3), and the fact that the Commission has suggested in written submissions to the Court that consumers may sue, would support the view that ultimate consumers may sue for losses which they have suffered even if they had not bought directly from parties to the infringement.

However, the *BMW* judgment of the Bundesgerichtshof²⁰³ suggests that in German law the plaintiff can recover only if his injury was a direct and primary result of the antitrust violation.²⁰⁴ This raises both standing to sue and causation issues.

Even if under existing national law rules, Community law or a future directive, only plaintiffs directly injured by an unlawful agreement or practice could sue, the number of potential claimants would still be large.

It does not seem that in Community law there is any need for a plaintiff to prove any injury to the public interest. Any such requirement would be inconsistent with the *Camera Care* judgment of the Court.²⁰⁵ There is no distinction in Community law between *per se* and other infringements, so that no rule based on such a distinction could be applied in the Community.²⁰⁶

Subject to the overriding questions of Community law just mentioned, to answer the questions when may a plaintiff sue for loss caused by an infringement and for which infringements may he recover, it would be necessary to look at the national laws of the ten member states of the Community, on both procedural and substantive matters. Of particular relevance to examine would be:

1. standing to sue, especially of indirect purchasers and consumer and other representative organisations;
2. causation and directness of injury and the nature of the injury which can be sued for;
3. whether intention or negligence must be proved;
4. measure of damages (availability of compensation for loss of profits, decreased revenue, increased costs, consequential loss of business and increased costs that might have been passed on to the plaintiff's customers);

203. See *supra* notes 38-39 and accompanying text.

204. See *id.*

205. See *Camera Care Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645.

206. ABA, ANTITRUST LAW DEVELOPMENTS 265-67 (1975).

5. if a claim against a state authority for a breach of article 5 or article 90 is planned, the rules relating to claims or injunctions against the state.

It is submitted that Community law may already imply criteria in relation to the above matters. Other relevant national laws would concern:

1. prescription (limitation) including whether the claim arose when the infringement occurred or when the damage was suffered;
2. national law requirements for temporary or permanent injunctions, if either is needed or may become necessary, and whether injunctions imposing positive duties such as the duty to supply goods or services, are possible;
3. national law rules on *in pari delicto* and unclean hands;
4. whether the national court's injunction can have any extra-territorial effect in other member states of the Community;
5. indemnity and contributions between defendants and the basis for determining the amount of any contributions that might be recoverable;
6. discovery and limitations on the duty to disclose documents, including the principle against self-incrimination and restrictions on the powers of national courts to order production of documents physically situated in other member states;
7. class actions;
8. recovery by a successful plaintiff of his attorney's fees and expenses;
9. when injunctions will be thought more appropriate than damages, and vice versa;
10. estoppel due to the plaintiff's failure to produce evidence to the Commission during the Commission's procedure.

F. *The Significance of National Law Questions*

Differences among the national law rules of the ten member states of the European Community on the national law questions listed above are important because unfavorable national law rules may make it impossible in practice to exercise the rights that it is believed that the Treaty gives to plaintiffs. If this is indeed the position, the question arises whether the national law rules themselves infringe the obligations of the state under article 5 of the EEC Treaty to provide an adequate remedy for infringement of Community law. The differences among national law rules are also impor-

tant for potential plaintiffs, because they may influence its choice of the state in which it will bring its proceedings. Such differences among national laws, therefore, may have to be harmonized by means of a Community directive.

A summary of the national laws of the ten present member states of the Community on all these subjects, or even some of the principal differences among them, is outside the scope of this Article. Moreover, the national laws do not seem to be very clear on many of the subjects.²⁰⁷ Most of the case law on breach of statutory duty or the equivalent concerns simpler cases of physical injury.

It may be useful, however, to make a few brief comments, by way of example, on the national laws of three of the larger member states on one important topic, discovery.

G. *Example of Discovery: French, German and English Law*

Article 142 of the new French Code of Civil Procedure allows one party to ask for evidence in the possession of the other.²⁰⁸ If the evidence is withheld, the court may order it to be produced at the request of the party wishing to use it. This corresponds to a discovery procedure, with the important qualification that the court itself must be satisfied that the request for production is justified.²⁰⁹ The party seeking production must persuade the court that its request is justified without the help of interrogatories, which do not exist in French civil procedure.

Under paragraphs 142 to 144 of the German Zivilprozessordnung, the judge has wide powers to order disclosure and production of documents to the Court, and therefore to the other party.²¹⁰ However, the parties have no means of compelling disclosure to them of documents held by the other side. All they can do is persuade the judge that the court needs to see the documents in question, for example, when the document to be produced is important in deciding the amount of the damage suffered by the plaintiff.

In English law, discovery is governed by Order 24, Rule 1 of the Supreme Court Rules.²¹¹ Interrogatories are permitted. The

207. In connection with injury to direct purchasers in English law, see, e.g., H. MCGREGOR, *DAMAGES* 116-21 (14th ed. 1980).

208. Nouveau code de procedure civile art. 142 (75e ed. Petits Codes Dalloz 1983) (Fr.).

209. *Id.*

210. Zivilprozessordnung ¶¶ 142-44 (W. Ger.).

211. Rules of the Supreme Court, 1965, Ord. 24, r.1.

plaintiff may apply for an order for discovery before commencing proceedings. After the action has commenced, discovery of documents in the hands of each party is automatic.²¹²

The differences between these three procedures should not be exaggerated, but it will be seen that they result from different conceptions of the role of the judge. Under the German procedure, the judge has an active, indeed decisive, role in determining how the proceedings should develop. The English procedure is adversarial and the judge has less discretion to manage the case.

Lawyers of potential plaintiffs may conclude that in most circumstances the English discovery procedures are likely to be more helpful to them than the corresponding procedures in France and Germany, but much will depend on the facts of the case, and on the operation of the rule *In Re Westinghouse Uranium Contract*.²¹³

The example of discovery procedures also illustrates how difficult it is likely to be to harmonize national procedural rules, since any harmonization proposals are likely to encounter different major premises about how court procedures should be organized. This is emphatically not to suggest that harmonization is too difficult and not worth attempting, but merely to warn against expecting quick results if it is undertaken.

H. *Tax Treatment of Damages Recovered and Compensation Paid*

The tax treatment of damages recovered by a successful plaintiff in an antitrust claim in the Community is purely a question of the national tax law applicable. Since there is no punitive element in damages in Europe, the only important question which might arise is whether the damages should be treated as income or as compensation for loss or destruction of capital. If this question arose under the applicable tax law, it would have to be determined by the nature of the plaintiff's claim.

Compensation, unlike fines, appears to be fully deductible for an unsuccessful defendant in all EEC member states for the same reason; namely that there is no punitive element in damages for antitrust infringements in Europe.

212. *Id.*

213. *In Re Westinghouse Uranium Contract*, 1978 A.C. 547.

I. *Possible Future Community Measures To Harmonize National Law Rules on Private Actions*

If vagueness on national laws on some or all of the subjects listed above unduly discourages plaintiffs, or if the differences between the national laws of member states on those subjects prove to be sufficiently large, it may be necessary to consider a Community directive to bring about clearer and more uniform rules. Such a directive could be adopted under article 87, which expressly contemplates measures "to determine the relationship between national laws and the provisions contained in [Community antitrust law] or adopted pursuant to this Article."²¹⁴ It can be seen from this article that many if not all of the rules of national law referred to have some "relationship" with Community antitrust laws or procedural rules.

Such a measure could be adopted by a qualified majority of the Council. A harmonization measure which did not fall under article 87 (for example, because it was concerned only with national laws and not with their relationship with Community antitrust law) could be adopted by unanimous vote under article 100, if it were considered that the national laws directly affected the establishment and functioning of the EEC, or under article 235. As there is nothing in article 87 to limit the national laws which may be "related" to Community antitrust law, it is submitted that a comprehensive harmonization directive could probably be adopted under article 87, but of course this would depend on exactly what was dealt with. In addition, regulations (as distinct from directives) dealing with the questions of Community law discussed in this Article might be thought useful.

If a measure to harmonize national rules on some or all of these topics were thought desirable, it would be complex and difficult to draft, particularly in connection with procedural matters. It would not be easy to harmonize such national rules for some types of private actions and not for others, or to integrate a harmonized rule into different national bodies of law on procedure. The history of the Convention on Judgements shows how difficult and slow the drafting of even a desirable and essentially technical arrangement can be.

214. EEC Treaty, *supra* note 1, art 87.

It is perhaps useful to say that there seems to be no possibility of multiple damages being made available for breach of Community antitrust law. Opinion in Europe is highly opposed to multiple damages, and (except probably in Germany) opinion does not regard infringements of EEC antitrust law as seriously as antitrust violations are regarded in the United States. The reasons for a harmonization measure, therefore, would be to: 1) clarify the law, 2) give uniform remedies throughout the Community, 3) minimize the reasons for forum shopping, and 4) improve and rationalize the enforcement of Community antitrust law by ensuring that the Commission does not need to deal with cases which could, if the law were clarified, be satisfactorily and more economically dealt with by national courts. These are substantial reasons, but they do not necessitate a top priority effort, nor would they result in a major shift in enforcement activity away from the Commission, as the possibility of treble damages would do.

However, even though treble damages are not likely to be made available, if it were Community policy to promote private suits, a Community directive to clarify the national law rules would be needed. In the absence of such a directive, it may take a while before private actions become a really effective element in overall enforcement of Community antitrust law. But a relatively small number of clear judgements from higher courts or from the Court of Justice could transform the picture.

J. Importance of Private Claims for Infringements of Community Antitrust Law

On the assumption that the view expressed here correctly states the present law, it is to be expected that plaintiffs will soon make much more use of their rights to sue for compensation (and, when appropriate, for declarations and injunctions) in national courts than they have done in the past. Indeed they have already begun to do so. Of the eight national court cases cited at the beginning of this Article, six date from 1979 or later.²¹⁵

A directive making it clear that actions for compensation, declarations and injunctions could be brought in national courts, and harmonizing national law remedies for breaches of Commu-

215. See *supra* notes 28-48 and accompanying text.

nity antitrust law, would substantially improve the general level of compliance with Community antitrust law.

Private actions in which plaintiffs would ask national courts to apply articles 85 and 86 would have several important effects on the general level of enforcement of and compliance with those articles.

First, private actions provide an extra deterrent, heighten awareness of Community antitrust laws and ensure greater respect for them without using the Commission's or the national cartel authorities' scarce manpower.

Second, private actions would ensure that simple cases were dealt with without involving the Commission, and that the Commission could confine itself to large, important or difficult cases, or cases with multinational elements or requiring extensive investigation, or in which Community fines are appropriate, i.e. cases in which private parties could not bring successful or appropriate claims in national courts.

Third, since enterprises will know that they can be successfully sued by competitors or customers, they will be more likely to respect Community law than if the only risk came from possible fines imposed by the Commission, which is known to have a very small staff.

Fourth, the likelihood of having to pay compensation to competitors or customers will be a risk sufficiently immediate to be in the minds of a firm's lawyers and auditors. Auditors should treat possible or probable claims for damages in the same way as any other contingent liability. They certainly need to be aware of them when carrying out normal audits.²¹⁶ In appropriate cases lawyers and auditors will have a professional duty to warn their clients that they are violating articles 85 and 86 and that they are likely to have to pay compensation or to face injunctions as well as risking Commission action.

Fifth, the risk of having to fight claims for compensation will discourage firms from behavior the lawfulness of which is doubtful. It would also discourage the practice of continuing with an obvious violation until the Commission puts an end to it.

Decentralization of the enforcement of Community antitrust law, as a result of frequent private claims in national courts, would

216. Temple Lang, *Community Antitrust Law-Compliance and Enforcement*, 18 *COMMON MKT. L. REV.* 335, 360-62 (1981).

substantially alter the present practice and operation of the law, and greatly improve compliance levels.

Indeed, if as seems likely, private claims in national courts become common and widespread, a whole new era of much more general and effective compliance and enforcement will come about, since Community antitrust law will no longer be enforced only by the Commission.

If it seems that there are many uncertainties and some unsatisfactory features of the present situation, it must be remembered that the era of private antitrust claims is only just beginning in the Community. No doubt the law will be clarified and weaknesses will be remedied, if necessary by Community legislation.

It seems likely that the need for protection against private claims for damages will cause more corporations to notify the Commission of their agreements and practices so as to obtain exemptions or, if appropriate, negative clearances. Whether this will cause a net increase in the Commission's workload is not clear, since there will be a concomitant decrease in the number of cases dealt with by the Commission. The Commission could try to solve any problem of increasing workload by proposing a directive to harmonize national laws and procedures in a way which would encourage plaintiffs to bring claims in national courts rather than to the Commission, and by adopting or proposing the adoption of group exemptions under article 85(3) for less restrictive agreements.