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The European Economic Community: Challenge and Opportunity, 24 J. Marshall L. Rev. 145 (1990)

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THE EUROPEAN ECONOMIC COMMUNITY: CHALLENGE AND OPPORTUNITY

SEYMOUR ROTHSTEIN AND DAVID M. ROSENBLATT*

PREFACE

Events are moving rapidly in Europe, which may require significant changes in the intended European Economic Community structure. The paper provides a basis for understanding from whence we have come and we can go forth together to observe the opportunities provided for the future. It is a challenge that all nations must face and meet.

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If our companies are asleep, it could be a disaster. . . . They should immediately start studying the situation in Europe so that they can be ready if the curtain falls.

Philip Kotler¹

In 1992, a twelve member² European Community plans to remove internal trade barriers among the members. The countries have signed a treaty³ establishing the European Economic Community ("EEC"). Some have doubts as to whether the EEC will become a reality in 1992,⁴ while others feel the EEC's birth and success is almost a certainty.⁵ While this paper will not explore the EEC's probability of success, it will explore what American business planners can do to increase their trading success within such an EEC.

Industries are already being warned about the EEC "freezing out" American business. There is concern that some European countries, through their national standards bodies, are seeking to convert their national standards into EEC-wide standards.⁶ Whether or not the EEC is adopting standards to purposely "freeze out" foreign business is a moot issue. The fact remains that American businesses whose products do not comply with EEC standards will be barred from entering the EEC. The drafts of the proposed standards for products and services are not readily available to U.S. companies.⁷ The EEC has already passed or proposed legislation

1. Mr. Kotler is a S. C. Johnson & Sons Distinguished Professor of International Marketing at Northwestern University's Kellogg Graduate School of Management. Chicago Tribune, Nov. 11, 1988, § 4, at 5, col. 4. A recent survey of major U.S. companies found that 54% were unfamiliar with Europe's transition toward a single market and even fewer were doing anything about it. Sly, *U.S. Firms Face 1992 on Shaky Ground*, Chicago Tribune, April 10, 1988, § 4, at 1, col. 2.

2. The twelve members of the EEC are France, West Germany, Italy, Belgium, Luxembourg, Britain, Greece, Portugal, Spain, Netherlands, Denmark, and Ireland.

3. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T. S. No. 1 (Cmd. 5179 - II) (official English translation), 298 U.N.T.S. 11 (unofficial English translation) [hereinafter cited as EEC Treaty]. See also B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS 19 (1986) (for a text of the Treaty Establishing the European Economic Community as Amended by Subsequent Treaties).

4. Chicago Tribune, Nov. 11, 1988, § 4, at 1, cols. 3-4.

5. Tully, *Europe Gets Ready for 1992*, FORTUNE, Feb. 1, 1988, at 81.

6. *Will U.S. Mfrs. Be Able to Crack Huge European Market in 1992?*, The Air Conditioning, Heating & Refrigeration News, Sept. 4, 1989, at 1, col. 2 (explaining that EEC-wide standards could greatly hinder U.S. manufacturers' ability to sell products in the EEC). In fact, at least some industry leaders believe that an EEC member state may be able to develop more stringent standards than the EEC has adopted and enforce these standards within their borders. *Id.* at cols. 2-3.

7. For example, proposed standards are often not available in time for U.S. companies to review and comment on them. *Id.* at 2, col. 5. Affecting the air conditioning, heating and refrigeration manufacturers was a new document on

regarding appliances,⁸ automobiles,⁹ cosmetics¹⁰ and commerce,¹¹ among other things. This broad range of legislative targets should serve as the EEC's warning that 1992 will affect all industries. Businesses which choose to adopt a wait and see attitude towards the EEC's formation may wind up significantly behind their competitors.

The EEC has the potential to provide American business with tremendous trading opportunities inherent in a very large¹² and highly advanced market. Since Europe could very well attempt to unify its market in ways that would adversely affect American industries¹³ many Administration Officials have expressed keen apprehensions.¹⁴ In the course of tearing down its own internal barriers, it has been suggested that the EEC might well erect high protective walls to keep out external competitors.¹⁵ It is useful,

methods of testing air filters which had a comment deadline of July 18, 1989, but did not appear until May, 1989. *Id.* The earlier proposed drafts never appeared. *Id.* U.S. businesses would like to see independent testing agencies, such as UL or ETL, have a voice in adopting standards for the EEC. Unless U.S. businesses have a voice, or they keep up with current regulations and standards, "it will be difficult to sell U.S. air conditioning and refrigeration products in the EC." *Id.* at 1-2, col. 4-5.

8. See Directive 84/530, O.J. EUR. COMM. (No. L300) 95 (1984) (on the approximation of the laws of the member states relating to common provisions for appliances using gaseous fuels, safety and control devices for these appliances and methods of surveillance of them).

9. See Directive 88/77, O.J. EUR. COMM. (No. L369) 33 (1988) (on the approximation of the laws of the member states relating to the measures to be taken against the emission of gaseous pollutants from diesel engines for use in vehicles).

10. See Directive 85/490, O.J. EUR. COMM. (No. L295) 30 (1985) (on the approximation of laws of member states relating to methods of analysis necessary for checking the composition of cosmetic products).

11. See Directive 86/653, O.J. EUR. COMM. (No. L382) 13 (1986) (on the coordination of the laws of the member states relating to self-employed commercial agents).

12. Farnsworth, *U.S. Explores Another '92 European Expansion*, N.Y. Times, Nov. 4, 1988, § Y, at 13, col. 3. The common market of 1992 will provide an integrated market of 324 million people. Chicago Tribune, Nov. 11, 1988, § 4, at 1, col. 4.

13. Farnsworth, *supra* note 12, at 13, col. 3.

14. Administration Officials that expressed concern include Commerce Secretary C. William Verity, Under Secretary of State John C. Whitehead, and Under Secretary of the Treasury M. Peter McPherson. *Id.* at 13, col. 3. This concern is valid because in 1987, the U.S. provided 66.4 billion dollars worth of goods and services to the European Community, more than any other nation which is not a party to the EEC Treaty. This amount is more than the total amounts of the next three largest suppliers combined, namely Japan, the Soviet Union and Brazil. Greenhouse, *The Growing Fear of Fortress Europe*, N.Y. Times, Oct. 23, 1988, § 3, at 1, col. 2. *But see* Sly, *U.S. Firms Face 1992 on Shaky Ground*, Chicago Tribune, April 10, 1988, § 4, at 5, col. 2 (suggesting American business should not fear "Fortress Europe," but rather the formidable challenge the European competitors will become in the global market).

15. See Greenhouse, *The Growing Fear of Fortress Europe*, N.Y. Times, Oct. 23, 1988, § 3, at 1, col. 2; Farnsworth, *supra* note 12, at 13, col. 3. *See also* Riemer,

therefore, to evaluate how an internally free but externally protectionist policy of the EEC could adversely affect American business. It has been said that if the EEC adopts such policies, the undue barriers will lead to tariff wars.¹⁶ Therefore, two important initial questions must be addressed. First, what should American business planners do now to lessen the effect of the possible EEC's high protective walls? Second, how can an American business enterprise use such walls advantageously to limit access by other American competitors to the market where such others have failed to foresee and act upon these problems?

There are many areas of concern for American business with respect to the EEC. This paper discusses four of the more significant areas that should be considered in the future planning of how to conduct business in the EEC. They are: (1) the structure of the EEC; (2) the antitrust laws of the EEC; (3) the industrial property laws of the EEC; and (4) the methods of doing business in the EEC.

1. THE STRUCTURE OF THE EEC

The European Economic Community Treaty was signed in Rome on March 25, 1957 by six original member States.¹⁷ The European Economic Community, or EEC, is just one of three commu-

Heard & Peterson, *Laying the Foundation for a Great Wall of Europe*, BUS. WK., Aug. 1, 1988, at 40 (stating "Europeans are likely to move further to protect their own companies and penalize outsiders" by making sure the "Europeans get the first shot at benefiting from the single market"); Tully, *Europe Gets Ready for 1992*, FORTUNE, Feb. 1, 1988, at 82 (suggesting that a unified market might bring about a more unified opposition to outsiders). But see Mosbacher *Targets East Bloc Trade*, Chicago Tribune, August 17, 1989 § 3, at 3, col. 1 (Secretary of Commerce Robert Mosbacher stating he is optimistic that the single market planned for Europe in 1992 would not be a closed fortress but open to foreign goods); Wilsher, 1992, *The Times* (London), Oct. 23, 1988, Magazine section, at 16, 20, col. 4 (suggesting that the European market will be more open than it is today, with very low opposition to outsiders).

16. See Atlas, *Common Market, U.S. Ready Talks on Trade Dispute*, Chicago Tribune, Feb. 17, 1989, § 3, at 3, col. 5 (suggesting that the U.S. has levied \$100 million in trade sanctions against Europeans due to the Common Market's ban on U.S. hormone treated meats, and that the Common Market has already approved a counter retaliation that would impose \$96.6 million in tariffs on imports of U.S. walnuts and dried fruit). See also Atwood, *The European Economic Community's New Measures Against Unfair Practices in International Trade: Implications for United States Exporters*, 19 INT'L L.J. 361, 369 (1985) (explaining that certain EEC regulations which help the EEC wage political and economic warfare cannot be avoided, even by the most cautious of U.S. businesses).

17. D. OVERTON, COMMON MARKET DIGEST 8 (1983). The original six member States of the EEC are France, Germany, Italy, Holland, Belgium and Luxembourg. Among the Treaty's original institutions were an Assembly, a Council, a Commission, a Court of Justice and an Economic and Social Committee. *Id.* at 16.

nities comprising the Common Market.¹⁸ Originally, each community had its own institutions created by its own treaty.¹⁹ Today, the unification of the three communities is complete and there is a single Court of Justice, Assembly, Council, Commission and Economic and Social Committee.²⁰

1.1 The Court of Justice

The Court of Justice²¹ is the supreme court with respect to the EEC's legal matters.²² Generally, the cases before the Court of Justice fall into one of four categories: (1) direct actions, (2) references for a preliminary ruling, (3) applications for interim relief, and (4) staff cases.²³ Although the jurisdiction of the Court of Justice is not exclusively defined by the EEC Treaty,²⁴ decisions of the Court of Justice are binding on Member States, Community institutions and all individuals. Courts of member nations may also appeal to the

18. The Common Market is comprised of the European Coal and Steel Community, or ECSC, the EEC and the European Atomic Energy Community, or EAEC. *Id.* at 1. The EEC, ECSC, and EAEC Treaties have all been amended by The Single European Act (SEA). See *Official Journal of the European Communities*, No. L 169, 29 June, 1987. See also *Treaties Establishing the European Communities*, 523-602 (abridged ed. 1987) (for a discussion of the changes the SEA made to the different treaties).

19. The ECSC Treaty of 1951 had as its institutions a High Authority, an Assembly, a Council and a Court. The EAEC Treaty of 1957 had as its institutions an Assembly, a Council, a Commission, a Court of Justice and an Economic and Social Committee. *Id.* at 16.

20. The Merger Treaty, (OJ L152/2 13.7.67) (Treaty 67/443/EEC), signed at Brussels on April 8, 1965 and brought into force on July 1, 1967 is responsible for the unification of the three communities. D. OVERTON, *supra* note 17, at 370.

21. There have been many books and articles written on the Court of Justice, its structure, its policies, its procedures and its controlling instruments. See, e.g., H. RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986); K.P.E. LASOK, THE EUROPEAN COURT OF JUSTICE PRACTICE AND PROCEDURE (1984); L.N. BROWN & F.G. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (2d ed. 1983); J.A. USHER, EUROPEAN COURT PRACTICE (1983); M. STUART, THE EUROPEAN COMMUNITIES AND THE RULE OF LAW (1977); D. LASOK & J.W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES ch. 9 (2d ed. 1976); Stuart, *Problems of the European Community — Transatlantic Parallels*, 36 INT'L & COMP. L.Q. 183 (1987) (drawing similarities and differences between the Court of Justice and the United States Supreme Court); Gordon, *The Court of Justice of the European Community*, 33 INT'L & COMP. L. Q. 409 (1984).

22. All decisions of the Court of Justice are contained in the European Court Reports (1954-ISSN 0378-7591).

23. Staff cases consist of direct actions brought by employees of Community institutions against the employing authority. An application for interim relief is an interlocutory proceeding and may be made in all direct actions. K.P.E. LASOK, *supra* note 21, at 26.

24. See, e.g., Convention of Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed by the six original Member States on September 27, 1968. A consolidated version of the Convention and the Protocol on the Interpretation of the Convention, after accession to the EEC Treaty by other current Member States, is published in O.J. EUR. COMM. (No. C 97) (1983).

Court of Justice for rulings on how to interpret the EEC Treaty.²⁵

Only official Community languages²⁶ may be used to argue before the Court of Justice. When the Court is hearing a reference for a preliminary ruling, the language used is "the language of the national court or tribunal which refers the matter to the Court."²⁷ In all other proceedings before the Court, the language of the case is selected by the applicant,²⁸ with some exceptions.²⁹

1.1.1 Direct Actions

A direct action³⁰ is one that is originally commenced before the Court of Justice.³¹ The Court has limited powers and may only hear disputes against Member States or Community Institutions.³² The Court may hear actions between Member States, between the Commission or Council and Member States, between private persons and the Commission, the Council or the Community and between the Board of Directors of the European Investment Bank and Member States or the Commission.³³

Direct actions proceed in four phases: (a) the written procedure; (b) directions and inquiries; (c) the oral procedure; and, (d) the judgment.³⁴ The written procedure contains the parties' argu-

25. D. OVERTON, *supra* note 17, at 49. See also M. STUART, *supra* note 21, at 38 (explaining there is a supremacy problem when a judge of a national court gets an interpretation from the Court of Justice which is in conflict with the national law).

26. The official languages are Danish, Dutch, English, French, German, Greek and Italian. K.P.E. LASOK, *supra* note 21, at 26. Irish can also be used before the court. Eur. Ct. Just. R. P. 29(1).

27. Eur. Ct. Just. R. P. 29(2). The Rules of Procedure do not appear to deal with the situation where the language of the referring court or tribunal is not one of the recognized languages of the Court of Justice. K.P.E. LASOK, *supra* note 21, at 26.

28. Eur. Ct. Just. R. P. 29(2).

29. See Eur. Ct. Just. R. P. 29(2)(a). See also, FERAM SpA v. High Authority, [1960] ECR 165, 170 (stating the language of the case is the language of the defendant unless the defendant is a Community institution). Thus, where the defendant is a Member State, or a natural or legal person having the nationality of a Member State, the Member State's language must be the language of the case. The applicant can choose amongst languages where the Member State has more than one official language.

30. There are a number of direct actions, including: (a) actions for annulment, J.A. USHER, *supra* note 21, at 11-27; (b) actions for failure to act, *Id.* at 27-29; (c) enforcement procedures, *Id.* at 29-33; (d) actions for damages relating to non-contractual liability, *Id.* at 33-42; (e) arbitration, *Id.* at 42-3; (f) rulings and opinions, *Id.* at 43-44; (g) ancillary and special procedures, *Id.* at 44; and (h) disciplinary powers, *Id.* at 44-45.

31. *Id.* at 7.

32. D. LASOK & J.W. BRIDGE, *supra* note 21, at 166.

33. 4 H. SMIT & P.E. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY § 5-257 (1988).

34. K.P.E. LASOK, *supra* note 21, at 29-30.

ments in writing.³⁵ Among other information, the written procedure must contain the subject matter of the dispute, the grounds on which the application is based, and the form of order sought by the applicant.³⁶ Once served with the written procedure, the defendant has a choice between lodging a defense or raising a preliminary objection.³⁷

The directions and inquiries commence at the close of the pleadings, or written procedure.³⁸ During this phase, the Court decides what further steps to take in the proceedings, such as a preparatory inquiry.³⁹ When the Court orders a preparatory inquiry, the Court, and not the parties, determine how the facts are to be investigated.⁴⁰ However, the parties are allowed to apply for certain facts to be proved by witnesses⁴¹ and may also object to witnesses,⁴² but should be wary of asking the Court to order other measures of inquiry.⁴³

35. *Id.*

36. See Eur. Ct. Just. R. P. 38 for a complete listing of what the written procedure must contain.

37. K.P.E. LASOK, *supra* note 21, at 32. A defense challenges both the admissibility and the merits of the application whereas a preliminary objection, raised pursuant to article 91 of the Rules of Procedure, challenges admissibility alone. *Id.*

A defense must be lodged within one month of service of the application. Eur. Ct. Just. R. P. 41(1). Although the Rules of Procedure fail to set forth a time limit in which a preliminary objection must be filed, it must be filed within one month. This is to safeguard against the scenario where the applicant moves for a default judgment, pursuant to article 94 of the Rule of Procedure, and the Court may not know if the admissibility of the application is being challenged. K.P.E. LASOK, *supra* note 21, at 32. A preliminary objection must be made with a separate document. Eur. Ct. Just. R. P. 91(1). The applicant for the preliminary objection must allege that there is a total bar to proceeding with the action, such as the Court lacking jurisdiction. *Id.* at 33.

38. *Id.* at 30.

39. *Id.* Although the Court carries out factual inquiries, the Court may order a preparatory inquiry. See Eur. Ct. Just. R. P. 44. The preparatory inquiry is performed by an appointed Chamber. Eur. Ct. Just. R. P. 46. The object of the preparatory inquiry is to put the Court in a position to make a finding of fact. K.P.E. LASOK, *supra* note 21, at 36. However, the preparatory inquiry itself does not usually result in a finding of fact. *Id.*

The Court specifies to the Chamber what issue or issues of fact are to be determined. *Id.* The Chamber may conduct the preparatory inquiry in one of the following manners: (a) the personal appearance of the parties; (b) a request for information and a production of documents; (c) oral testimony; (d) experts' reports; or (e) an inspection of the thing or place in question. Eur. Ct. Just. R. P. 45(2). See generally J.A. USHER, *supra* note 21, at 187-216; K.P.E. LASOK, *supra* note 21, at 34-37 for a further discussion on preparatory inquiries.

40. J.A. USHER, *supra* note 21, at 190.

41. Eur. Ct. Just. R. P. 47.

42. Eur. Ct. Just. R. P. 50.

43. See Case 110/75 Mills v. European Investment Bank, [1976] E.C.R. 1613 (applicant's request that the bank should disclose a report on his superior gave rise to a question of privilege and was denied because the Chamber concluded that the report added nothing to what was already known from the evidence);

The oral procedure consists of the presentation of the Report for the hearing, the oral argument before the Court, and the delivery of an opinion by the Advocate-General.⁴⁴ Although this is the general rule followed by the Court, there is a dichotomy between article 18 of the EEC Statute of the Court and article 54 of the Rules of Procedure which is determinative of when witnesses will be heard.⁴⁵

The judgment, in addition to other information,⁴⁶ must contain a summary of the facts, the grounds for the decision, and the operative part of the judgment, including the decision as to costs. There is no requirement that a case proceed to judgment.⁴⁷ However, the method the party uses or the parties use to prevent the case from proceeding to judgment may affect the parties.⁴⁸ Although there is no route of appeal from a judgment by the Court, there are two ways to seek a review of a judgment.⁴⁹

1.1.2 References for a Preliminary Ruling

A reference for a preliminary ruling⁵⁰ is an interlocutory step

Case 51/65 ILFO v. H.A. [1966] E.C.R. 87 (applicant's request of appointment of an expert denied because no evidence had been offered to justify the measure).

44. J.A. USHER, *supra* note 21, at 218.

45. Article 18 of the EEC Statute of the Court expressly includes the hearing of witnesses and experts in its definition of oral procedure. In contrast, article 54 of the Rules of Procedure treat the oral procedure as a separate stage which begins after the hearing of witnesses and experts, which takes place during the preparatory inquiry. In practice, the simpler the case, the more likely the witnesses will be heard on the same day as that set for the hearing of the oral argument. J.A. USHER, *supra* note 21, at 218. In complex cases, the separation between these two stages is more apparent. *Id.* See generally K.P.E. LASOK, *supra* note 21, at 37-43; J.A. USHER, *supra* note 21, at 217-41 for further discussion of the oral procedure.

46. See Eur. Ct. Just. R. P. 63 for a complete listing of what the judgment must contain.

47. See, e.g., Eur. Ct. Just. R. P. 77-78.

48. See J.A. USHER, *supra* note 21, at 262-65 (drawing a distinction between settling a case and withdrawing a case).

49. First, the Rules of Procedure permit the Court to review its decision if the decision prejudices the rights of a third party. Eur. Ct. Just. R. P. 97. To apply for the review, the third party must: (a) specify the judgment contested; (b) state how that judgment is prejudicial to the rights of the third party; and (c) indicate the reasons why the third party was unable to take part in the original case. *Id.*

Second, a party may seek to have a judgment revised if a new fact is discovered which is a decisive factor and which was unknown both to the Court and the party applying for the revision at the time of the judgment. See Eur. Ct. Just. R. P. 98-100. The application for revision must be made "within three months of the date on which the applicant receives knowledge of the facts on which the application is based." *Id.* at 98.

50. See K.P.E. LASOK, *supra* note 21, at 46-56; J.A. USHER, *supra* note 21, at 45-53 for a detailed analysis of references for preliminary rulings.

in the proceedings before a national court or tribunal⁵¹ designed to obtain a ruling from the Court on a point of Community law which has arisen in the course of litigation between parties.⁵² This interlocutory step enables the Court to ensure uniform interpretation and application of Community law while also permitting a national court⁵³ to seek and obtain authoritative guidance on Community law before proceeding.⁵⁴ The Court only rules on questions of Community law and the national court or tribunal retains the power to decide any other issue of law or fact relevant to the dispute between the parties.⁵⁵ The referring body is not free, however, to ignore the Court's ruling on Community law.⁵⁶

The national court or tribunal may elect to send the Court as much information as possible, such as its findings of fact and national law,⁵⁷ an explanation of why it was led to make the reference, and why it considers an answer by the Court to be necessary to render a judgment.⁵⁸ If there is no element of Community law which the referring court or tribunal could usefully apply to the dispute before it, the Court may decline to reply to the reference for a preliminary ruling.⁵⁹

1.1.3 Application for Interim Relief

An application for interim relief must be made by separate document⁶⁰ and must "state the subject matter of the dispute, the circumstances giving rise to urgency and the factual and legal grounds for establishing a *prima facie* case for the interim measures applied

51. It is essential to know what constitutes a court or tribunal. J.A. USHER, *supra* note 21, at 45. The nature of a body's jurisdiction, whether civil, criminal or administrative, is not dispositive of the question of whether the body is a court or tribunal. Cf. Case 82/71 *Pubblico Ministero v. SAIL* [1972] E.C.R. 119 at ¶ 5. Rather, a body will be considered a court or tribunal if it "is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. . . [and which it is] under a legal duty to try." Case 138/80 *Borker* [1980] E.C.R. 1975 at ¶ 4.

52. J.A. USHER, *supra* note 21, at 45.

53. A reference for a preliminary ruling is available to national courts and not to the parties appearing before the court or tribunal. *Id.*

54. K.P.E. LASOK, *supra* note 21, at 46.

55. *Id.*

56. See Case 29/68 *Milch, Fett-und Eierkontor GmbH v. Hauptzollamt Saarbrücken* (No. 2) [1969] E.C.R. 165 (the Court's interpretation binds the referring body but the latter may decide the Court's ruling was not sufficiently enlightening and thus the latter may make a further reference to the Court).

57. See Case 244/78 *Union Laitiere Normande v. French Day Farmers Ltd.* [1979] E.C.R. 2663 at ¶¶ 5-6 of the judgment.

58. See Case 244/80 *Foglia v. Novello* [1980] E.C.R. 745 at ¶ 17 of the judgment.

59. *E.g.*, Case 132/81 *Rijksdienst voor Werknemerspensioenen v. Vlaeminck* [1982] E.C.R. 2953.

60. Eur. Ct. Just. R. P. 83(3). Also, the application must comply with Rule 37 and Rule 38. *Id.* at 37-38.

for.”⁶¹ The application for interim relief has three basic parts.⁶² First, the application has a description of the dispute and the applicant's arguments.⁶³ Second, the application must display a need of urgency and a danger of serious and irreparable harm.⁶⁴ In order to grant relief, the judge must be given reasonable cause to believe that the conditions for obtaining relief have been fulfilled.⁶⁵ Third, the prayer for relief must be set out in precise terms and be clearly justified by reference to the matters set out in the body of the application.⁶⁶ Applications not made in the proper form may be rejected as inadmissible.⁶⁷

1.2 The Assembly

The European Parliament⁶⁸ exercises for the EEC the powers conferred upon the “Assembly” established by articles 137-144 of the EEC Treaty.⁶⁹ The members⁷⁰ of Parliament are “representatives of the peoples of the States”⁷¹ and do not represent the States themselves. Thus, the representatives are not subject to instructions from their respective governments.⁷² However, the members of Parliament, in appropriate circumstances, defend the interests of their particular country.⁷³

The Assembly, or European Parliament, functions in an advi-

61. Eur. Ct. Just. R. P. 83(2).

62. K.P.E. LASOK, *supra* note 21, at 172-73.

63. The purpose of this part is to show the context of the application for relief and demonstrate the applicant has an arguable case. *Id.* at 172.

64. Mere assertions without evidence or reference to materials of probative value to support the assertions do not demonstrate the danger of serious and irreparable harm. See Case 53/65R Artino Mondina SpA v. High Authority [1966] E.C.R. 17. But see Ferriere di Roe Volciano v. Commission [1983] E.C.R. 725 (preliminary assessment of one issue of fact made on the basis of statements made at the hearing). In sum, the applicant must produce relevant documents in his possession or control in addition to indicating other sources of evidence. K.P.E. LASOK, *supra* note 21, at 172-73.

65. Case 18/57A Nold KG v. High Authority [1957-1958] E.C.R. 121, 127.

66. K.P.E. LASOK, *supra* note 21, at 173.

67. See Case 731/79R II B v. European Parliament [1980] E.C.R. 829.

68. The words “European Parliament” are used interchangeably with the word “Assembly.” See generally, 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-17 to 5-78; D. LASOK & J.W. BRIDGE, *supra* note 21, at 133-45 for more detailed discussion of the Assembly.

69. Article 138, which provided for the constituents of the Assembly, lapsed on 17 July 1979 in accordance with the Council Decision and Act of 20 September 1976 on Direct Elections. B. RUDDEN & D. WYATT, BASIC COMMUNITY LAWS 76 (2d ed. 1986).

70. In 1969, pursuant to Art. 175 of the EEC Treaty providing for actions before the Court of Justice to seek remedies for illegal Community action, the Parliament, through its President, sought to have direct election of its members. 1 G. MYLES, EEC BRIEF, ch. “Parliament,” at ¶ 13.

71. EEC Treaty, *supra* note 3, at art. 137.

72. 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-23.

73. *Id.* at 5-24.

sory and supervisory capacity and is not a legislative body.⁷⁴ In its supervisory role, the Assembly possesses a power of censure over the Commission.⁷⁵ Also, in its supervisory role, the Assembly has the power to ask questions.⁷⁶ Finally, when the Assembly discusses the annual general report submitted to it by the Commission,⁷⁷ the Assembly's supervisory functions are enhanced.⁷⁸ In its advisory role, the Assembly has a right to be consulted on major policy proposals in the EEC.⁷⁹

1.3 The Council

The Council⁸⁰ is an institution of the Community which is made up of one representative of the government of each of the Member States.⁸¹ The Council's power and functions are derived from articles 145-154 of the EEC Treaty, with some changes.⁸² The Council members represent their respective Member States, unlike other Community Institutions.⁸³ However, the Council must also act in accordance with the provisions of the EEC Treaty,⁸⁴ which can sometimes present a conflict of interests problem for its members.⁸⁵

Article 145 of the EEC Treaty mandates that the Council coordinate "the general⁸⁶ economic policies of the Member States"⁸⁷

74. D. LASOK & J.W. BRIDGE, *supra* note 21, at 138.

75. See 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-68. Article 4 of the EEC Treaty permits a "two-thirds majority of the votes cast, representing a majority of the members of the Assembly," to force the entire Commission to resign and be replaced. *Id.* The mere existence of the power of censure, even without being introduced in the Assembly, can have important consequences. *Id.* at 5-69.

76. EEC Treaty, *supra* note 3, at art. 140. This allows the Assembly to keep abreast with current Community developments. D. LASOK & J.W. BRIDGE, *supra* note 21, at 139.

77. See EEC Treaty, *supra* note 3, at art. 143.

78. D. LASOK & J.W. BRIDGE, *supra* note 21, at 139.

79. See, e.g., EEC Treaty, *supra* note 3, at arts. 43, 54, 56, 87. The Council may consult the Assembly after receiving a proposal from the Commission or the Commission may consult the Assembly as it is drafting proposals. D. LASOK & J.W. BRIDGE, *supra* note 21, at 139.

80. See EEC Treaty, *supra* note 3, at arts. 145-154; 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-79 to 5-156; D. LASOK & J.W. BRIDGE, *supra* note 21, at 118-132 for a more detailed discussion of the Council of the EEC.

81. Merger Treaty, *supra* note 20, at art. 2; D. LASOK & J.W. BRIDGE, *supra* note 21, at 118.

82. Articles 146, 147, 151 and 154 were repealed and replaced by the Merger Treaty, *supra* note 20. See B. RUDDEN & D. WYATT, *supra* note 69, at 78-81.

83. 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-82 to 5-82.1.

84. EEC Treaty, *supra* note 3, at art. 145.

85. 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-82.1, 5-94.

86. Although the word "general" is not in the German version of the Treaty, its absence is of no significance. *Id.* at 5-95.

and grants the Council the "power to take decisions."⁸⁸ To the extent the Council exercises its power to take decisions for the benefit of the Community, the Council seems to be a supreme body.⁸⁹ Otherwise, however, the Council is not a supreme body⁹⁰ and its actions are not binding.⁹¹

1.4 The Commission

Articles 155 to 163 of the EEC Treaty were originally devoted to the power and function of the Commission.⁹² However, this has changed.⁹³ Commissioners are appointed by common accord of the governments of the Member States for a four year renewable term.⁹⁴ The Commissioners cannot seek or take instructions from any government or from any other body.⁹⁵ There are a variety of ways a Commissioner's term may end.⁹⁶

Article 155 of the EEC Treaty imposes the general duty of ensuring the proper functioning and development of the common market on the Commission.⁹⁷ The Commission's duties can be classified as follows: (a) initiator and exponent of Community policies;

87. See EEC Treaty, *supra* note 3, at arts. 103-109, 116 for more detailed rules on the coordination of the general economic policies of the Member States.

88. The term "decisions" is used in a broad sense. 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-94. While some authors maintain this power grants the Council a position of supremacy over other Community Institutions, others disagree, partially due to article 162. *Id.* This article provides that "[t]he Council and the Commission shall consult each other and shall settle by common accord the methods of their cooperation." EEC Treaty, *supra* note 3, at art. 162.

89. 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-94. See also Case No. 166/78 Gov't of the Italian Republic v. Council, [1979] E.C.R. 2575 (Member State was not estopped from attacking a Council measure even though the Member State's representative voted for it).

90. 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-95.

91. See generally EEC Treaty, *supra* note 3, at art. 189, § 1.6 (explaining that decisions are binding upon those to whom they are addressed but that recommendations and opinions have no binding force).

92. See Hallstein, *European Economic Community Commission: A New Factor in International Life*, 14 INT'L & COMP. L.Q. 727 (1965) (discussing the Commission's function and role in the external relations of the Community in addition to the control of the Commission, as given by former president of the Commission, Dr. Walter Hallstein).

93. Articles 156-163 of the EEC Treaty were repealed by the Merger Treaty. B. RUDDEN & D. WYATT, *supra* note 69, at 82. Articles 9-18 of the Merger Treaty relate to the Commission. *Id.* at 82-84.

94. Merger Treaty, *supra* note 20, at art. 11. Only nationals of Member States may serve as Commissioners. *Id.* at art. 10.

95. Merger Treaty, *supra* note 20, at art. 10.

96. A Commissioner's term ends by normal expiration, voluntary retirement, death, through compulsory retirement, and through a motion of censure on the whole Commission passed by the Assembly. Merger treaty, *supra* note 20, at arts. 12-13; EEC Treaty, *supra* note 3, at art. 144.

97. EEC Treaty, *supra* note 3, at art. 155.

(b) executive of the Community; and (c) guardian of the Treaties.⁹⁸

1.5 The Economic and Social Committee

The Economic and Social Committee ("Committee"), governed by articles 193 to 198 of the EEC Treaty, is designed to give the most important economic and social groupings an opportunity to participate in Community operations.⁹⁹ Although the Committee must be consulted by the Council or Commission in some instances¹⁰⁰ and may be consulted on all matters of economic and social policy,¹⁰¹ its opinions are advisory only.¹⁰² Therefore, in sum, the power of the Committee depends on the quality of its opinions.¹⁰³

1.6 The Nature of European Economic Community Law

EEC law is comprised essentially of primary law and secondary law. Primary law is comprised of the EEC Treaty along with agreements supplementing or amending the EEC Treaty, such as the Single European Act. Secondary law consists of binding legislative acts

98. 1 G. MYLES, *supra* note 70, ch. "Commission," at 3-18. The Commission functions as initiator and exponent of the Community policy in that it formulates recommendations and delivers opinions on matters dealing with the EEC Treaty. *Id.* at 3-19. However, the real significance of this part of the Treaty is that it authorizes the Commission to act where such action is not authorized by Community law. *Id.* Although the Council has the ultimate power to adopt or reject the Commission's proposals, the Commission is still quite powerful. *Id.* at 3-20. This is because the Council adopts the proposal by a majority but may only amend the proposal unanimously. *Id.* Otherwise, the Council just fails to come to a decision. *Id.*

Also, although the Commission functions as executive of the Community, *Id.* at 3-21, its executive functions are not similar to an executive branch of government in a country governed under the separation of powers principle. 4 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-163.

Finally, in functioning as guardian of the Treaties, the Commission acts as a watchdog, ensuring due application of all Community laws by all parties. 1 G. MYLES, *supra* note 70, ch. "Commission," at 3-24. In this context, the Commission's greatest power is that of obtaining information. *Id.* This is because preventing people from breaking rules is easier than curing the problems caused once the rules are broken. *Id.*

99. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-653.

100. See, e.g., EEC Treaty, *supra* note 3, at art. 198. Failure to consult the Committee leaves the resulting decision open to attack before the Court of Justice, due to the violation of a substantial formal requirement. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-670.1. See also EEC Treaty, *supra* note 3, at art. 173. Consequently, the Court of Justice may issue a declaratory judgment under article 174 that the decision or act is void. See *Id.* at art. 174.

101. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-653. If the Council or Commission considers it necessary to have the Committee's opinion, they must afford the Committee at least 10 days to respond. EEC Treaty, *supra* note 3, at art. 198. If the Committee fails to respond, further action of the Council or Commission is not barred. *Id.*

102. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 5-653.

103. 1 G. MYLES, *supra* note 70, ch. "Economic and Social Committee," at 4-12.

taken by EEC institutions.¹⁰⁴

Secondary law includes regulations, directives, and decisions. Article 189 of the EEC Treaty provides that the Council and Commission shall make regulations, issue directives, and take decisions. A regulation is directly applicable in all Member States and binding in its entirety.¹⁰⁵ A directive is binding on the Member States to which it is addressed as to the result to be achieved.¹⁰⁶ However, a directive leaves the Member States to choose the method for achieving the desired results.¹⁰⁷ Finally, a decision is binding in its entirety upon those to whom it is addressed.¹⁰⁸ The Commission and Council also have the power to make recommendations and deliver opinions, but these have no binding force.¹⁰⁹

2. EEC ANTITRUST LAW

2.1 Background

All methods of doing business have potential antitrust liability. Therefore, businesses should be familiar with the EEC antitrust laws. Most Europeans feel the economic competition of the United States would be ideal to emulate, and thus it is not surprising that the EEC "has heavily borrowed from the American antitrust experience."¹¹⁰ However, the EEC faces many problems in implementing their dreams. Some Member States of the EEC, such as Italy, have no current antitrust laws although most member States have antitrust laws, such as Germany and France.¹¹¹ Should national laws and the EEC laws be applied concurrently? If so, alleged anti-competitive conduct would be tested under both EEC and national laws. What happens if conduct is not prohibited by national laws but is prohibited by the EEC laws?¹¹² Probably, the EEC laws will prevail and the conduct will be deemed anti-competitive.¹¹³ If the conduct is permitted by the EEC but not permitted by national laws, there can be larger problems.¹¹⁴

104. See Appendix A for an illustrative chart detailing the process of EEC legislation.

105. EEC Treaty, *supra* note 3, at art. 189.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Jones, *American Antitrust and EEC Competition Law in a Comparative Perspective*, 90 L.Q.R. 191, 193 (1974). See also Dara, *Antitrust Law in the European Community and the United States: A Comparative Analysis*, 47 LA. L. REV. 761 (1987).

111. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-14 to 3-15.

112. See generally Jacobs, *Civil Enforcement of EEC Antitrust Law*, 82 MICH. L. REV. 1364, 1367 (1984).

113. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-23.

114. See Jacobs, *supra* note 112, at 1367.

Articles 85 through 89 are the EEC's antitrust laws. Articles 85 and 86 are the substantive antitrust laws and Articles 87, 88 and 89 prescribe how the antitrust laws are to be executed. The antitrust provisions apply to all aspects of the EEC's economic life with four exceptions.¹¹⁵ First, anti-competitive conduct of coal and steel industries is covered by Articles 65 and 66 of the ECSC Treaty. The EEC Treaty, in Article 232(1), gives deference to the ECSC Treaty in these areas. Second, anti-competitive conduct in the atomic energy industry is governed by the Euratom Treaty, which is referred to in Article 232(2) of the EEC Treaty. Third, Article 42 of the EEC Treaty states that the Council can determine the extent to which the antitrust provisions apply to agriculture. The Council has set guidelines for this determination.¹¹⁶ Finally, the Council has declared that the antitrust provisions of the EEC treaty do not apply to transportation.¹¹⁷

2.2 Substantive EEC Antitrust Law

The entire substantive EEC antitrust laws are contained in Articles 85 and 86 of the EEC Treaty.¹¹⁸ Also, many similarities can be seen between the United States' Sherman Act and the antitrust

115. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-10 to 3-13.

116. See Regulation 26/62, J.O. Comm. Eur. 993 (1962), amended by Regulation 49/62, J.O. COMM. EUR. 1571 (1962).

117. Regulation 141/62, O.J. COMM. EUR. 2751 (1962).

118. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-10. EEC Treaty Article 85 provides as follows:

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

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

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

(c) share markets or sources of supply;

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

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

2. Any agreements or decisions prohibited pursuant to the Article shall be automatically void.

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

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

— any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to pro-

provisions of the EEC Treaty.¹¹⁹

2.2.1 EEC Treaty Article 85(1)

Article 85 is split into 3 sections. Article 85(1) is concerned with consensual arrangements or concerted practices of economically independent forces.¹²⁰ Section 1 declares incompatible with the common market and prohibited three kinds of practices: (1) all agreements between undertakings,¹²¹ (2) all decisions of associations of undertakings, and (3) all concerted practices of undertakings provided that they (1) are likely to affect commerce between Member States and (2) have as their object or consequence prevention, restriction, or distortion of competition within the common market.¹²² Thus, a violation of section 85(1) occurs if there is the existence of an agreement or concerted practice between two or more enterprises resulting in restriction of competition in the Common Market.¹²³

Acts which have a remote possibility of affecting commerce are not "likely" to affect commerce.¹²⁴ However a heightened degree of probability is not required.¹²⁵ Whether a specific agreement restricts competition and appreciably affects trade among Member

moting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

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

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

EEC Treaty Article 86 provides as follows:

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

Such abuse may, in particular, consist in:

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

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

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

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

119. See, e.g., Jones, *supra* note 110, at 193; Dara, *supra* note 110, at 761.

120. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-96.

121. The EEC Treaty leaves the term "undertakings" undefined.

122. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-81.

123. Ward, *The Economic Unity Doctrine in the EEC: A Limited Exemption to Article 85 of the Treaty of Rome*, 9 FORDHAM INT'L L.J. 373, 378 (1986).

124. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-107 to 3-108.

125. *Id.*

States is a question of fact, requiring an analysis of the entire economic context in which the agreement operates.¹²⁶

Agreements, decisions, and concerted practices which "affect commerce between Member States" both directly and indirectly fall within the scope of section 1 prohibitions.¹²⁷ This is evident from the language used in *Grundig & Consten v. Commission* when the Court of Justice stated "it is especially important to know whether the agreement, directly or indirectly, actually or potentially, is capable of jeopardizing the freedom of commerce between Member States."¹²⁸ Any confusion the Court may have created with the words "especially important" was clarified in *Societe Technique Miniere v. Maschinenbau Ulm GmbH*.¹²⁹ The Court stated that when determining whether an agreement, decision or concerted practice was within the purview of article 85 "it is necessary to know whether it is capable of partitioning the market in certain products between Member States and of thus rendering more difficult the economic interpenetration sought by the Treaty."¹³⁰ Thus, both direct and indirect effects of commerce between Member States are within the scope of article 85.

However, the international reach of the Common Market's legislative jurisdiction is a lingering and unsettled question. At least one scholar points out that the preponderant view appears to be that the Common Market may properly legislate to reach conduct abroad that is designed to cause consequences within it.¹³¹ Thus, for example, if two American companies divide the Common Market into two territories and agree not to sell in each other's territory, it will probably fall within article 85. Therefore, commerce between Member States may be affected even when all enterprises involved in the anti-competitive practice and the place where the agreement is reached and/or executed are outside the Common Market.

2.2.2 EEC Treaty Article 85(2)

Section 2 declares that agreements prohibited by Article 85 are void.¹³² Only the parts of the agreement that violate Article 85 are

126. Coleman & Schmitz, *The EEC Patent Licensing Regulation — Practical Guidelines*, 42 BUS. L. 101, 102 (1986).

127. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-108.

128. *Grundig & Consten v. Commission*, Cases Nos. 56/64 and 58/64, July 13, 1966, 12 Rec. 429 (1966), Common Mkt. Rep. (CCH) ¶ 8046, 5 COMMON MKT. L. REV. 418 (1966) (emphasis added).

129. Case No. 56/65 June 30, 1966, 12 Rec. 337 (1966), Common Mkt. Rep. (CCH) ¶ 8047, 5 COMMON MARKET L. REV. 357 (1966).

130. *Id.* (emphasis added).

131. See 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-115.

132. See EEC Treaty, *supra* note 3, at art. 85(2).

void. This is referred to as the "partial nullification doctrine."¹³³ However, if the void parts cannot be separated from the agreement, the entire agreement is declared void. This is referred to as the "doctrine of transformation."¹³⁴ Whether the void parts are separable is a question of EEC law, not national law.¹³⁵ Courts consider the decisive test to be whether the parties agreed, or would have agreed, that the valid part of the agreement would survive the void part of the agreement.¹³⁶

2.2.3 EEC Treaty Article 85(3)

Section 3 is the built in "rule of reason" of Article 85. Even if an agreement falls within the language of Section 1, the agreement may still be valid if one proves the agreement also falls within the language of Section 3. This is referred to as an "exemption."

The Commission can grant exemptions if the agreement (1) contributes to the improvement of production or distribution of goods or to the promotion of technical or economic progress, and (2) leaves consumers a proper share of resulting benefits, without (3) imposing restrictions on the parties which are not indispensable to achieving these objectives, or (4) giving the parties the possibility of eliminating competition in regard to a substantial part of the goods concerned.¹³⁷ Regulation 17/62,¹³⁸ article 9(1) states that only the Commission may grant exemptions. Denial of an exemption may be reviewed on appeal by the Court of Justice.¹³⁹ On appeal, the undertaking, *i.e.*, the party appealing, has the burden of proving all four conditions.¹⁴⁰ Thus, an exemption, "negative clearance,"¹⁴¹ or "comfort letter" from the Commission basically states that although an agreement violates Section 1, the Commission will bless the agreement because the pro-competitive effects outweigh the anti-competitive effects. Exemptions and negative clearances are not binding on courts but they are persuasive.

133. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-140 to 3-141.

134. *See Id.* at 3-138

135. *Id.*

136. *Id.*

137. *See* EEC Treaty, *supra* note 3, at art. 85(3).

138. Regulation 17/62, J.O. COMM. EUR. 204 (1962), Common Mkt. Rep. (CCH) ¶ 2401 (March 13, 1962), amended by Regulation 59/62, J.O. COMM. EUR. 1655 (July 11, 1962) and Regulation 118/63, J.O. COMM. EUR. 2696 (November 8, 1963) [hereinafter Regulation 17/62].

139. Dara, *supra* note 110, at 771.

140. *Id.*

141. A negative clearance is a final act in which the Commission states that article 85(1) does not apply to a specific agreement under the particular facts known to it. Coleman & Schmitz, *supra* note 126, at 105. Also, the Commission may issue a less formal "comfort letter" which informs the parties that article 85(1) does not seem to apply to a notified agreement or that an exemption under article 85(3) would seemingly be available. *Id.*

Registration is required for all arrangements for which exemption pursuant to article 85(3) is sought and the Commission cannot grant an exemption without this.¹⁴² The Commission may only give an exemption retroactive effect back to and including the date of registration.¹⁴³ Thus, it is advantageous to register new arrangements before they become effective.

The Commission and Court of Justice have already dealt with a series of cases involving applications for exemptions and negative clearances. The doctrine of economic unity has evolved from this series of Commission decisions and Court of Justice judgments. This doctrine emphasizes the existence of economic unity in exempting practices between undertakings from the prohibitions of article 85.

In *Christiani & Nielsen*,¹⁴⁴ the Commission held that a parent company cannot compete with its subsidiaries. The Commission granted a negative clearance on the ground that the agreement effected "only a division of labor within the same economic entity" and therefore did "not have the object or effect of preventing, restricting, or distorting competition."¹⁴⁵ It has been suggested the better rationale in this case would have been the finding of only one "undertaking."¹⁴⁶

Only a year after *Christiani & Nielsen*, in *Kodak*,¹⁴⁷ the Commission used this "better rationale" and granted negative clearance. *Kodak* concerned a request by the European subsidiaries of the American Eastman Kodak Corporation for a negative clearance with respect to their sales conditions in Europe.¹⁴⁸ Once the Commission found the subsidiaries were lacking economic autonomy, it concluded that only one enterprise was concerned.¹⁴⁹ In granting the clearance, the Commission stressed the absence of an agreement or concerted practice between two or more enterprises or undertakings.¹⁵⁰

When faced with a similar issue in *Beguelin Import Co. v. S.A.G.L. Import-Export*,¹⁵¹ the Court of Justice followed the analysis of *Christiani & Nielsen* rather than *Kodak*. In *Beguelin Import Co.*, a Japanese producer of lighters had Beguelin, a Belgian com-

142. See Regulation 17/62, *supra* note 138, at arts. 4(1), 5(1).

143. See *Id.* at art. 6(1).

144. 12 O.J. EUR. COMM. (No. L 165) 12 (1969).

145. *Id.*

146. See 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-98.

147. 14 O.J. EUR. COMM. (No. L 153) 14 (1970), Common Mkt Rep. (CCH) ¶ 9378 (June 30, 1970).

148. Ward, *supra* note 123, at 383.

149. *Id.* at 384.

150. *Kodak*, 14 O.J. EUR. COMM. (No. L153) 25.

151. 1971 C.J. Comm. E. Rec. 949, 11 COMMON MKT. L. REV. 81.

pany, as its exclusive distributor for Belgium and France.¹⁵² Beguelin then assigned its rights to distribute in France to its wholly owned French subsidiary.¹⁵³ The District Court of Nice asked¹⁵⁴ the Court of Justice if the transfer of the exclusive distributorship violated article 85. The Court found the parties could not possibly compete, stating:

Article 85(1) prohibits agreements which have as their object or effect an impediment to competition. This is not the position in the case of an exclusive sales agreement when in fact the concession granted under that agreement is in part transferred from the parent company to a subsidiary which, although having separate legal personality, enjoys no economic independence.¹⁵⁵

Thus, the "economic unity doctrine" was formed.

Questions remains as to the scope of this doctrine. However, factors which point towards economic unity are the complete ownership of capital (e.g. wholly owned subsidiaries) and the parent company's power to control the subsidiary's management.¹⁵⁶

2.2.4 Article 85 Compared to Section 1 of the Sherman Act

Both Article 85 of the EEC Treaty and the Section 1 of the Sherman Act forbid only activities performed by two or more persons or entities. The United States Supreme Court and the Court of Justice agree that wholly owned subsidiaries and their parent companies cannot violate the Sherman Act or the EEC Treaty, respectively.¹⁵⁷ However, for a conspiracy, the Supreme Court has required clear and convincing evidence of "conscious parallelism,"¹⁵⁸ while the Court of Justice has been satisfied with a lesser degree of proof, at least in the presence of parallel behavior.¹⁵⁹

2.2.5 EEC Treaty Article 86

Article 86 outlaws abuse of a dominant market position. Because national barriers had been large enough to significantly impede the development of enterprises into "large" enterprises,

152. *Id.* at 951, 11 COMMON MKT. L. REV. at 83.

153. *Id.*

154. This was done pursuant to article 177 of the EEC Treaty.

155. 1971 C.J. Comm. E. Rec. 949, 958, 11 COMMON MKT. L. REV. 81, 95.

156. Ward, *supra* note 123, at 390-91.

157. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) ("the very notion of agreement in Sherman Act terms between a parent and wholly owned subsidiary lacks meaning"); *Beguelin Import Co. v. S.A.G.L. Import-Export*, 1971 C.J. Comm. E. Rec. 949, 11 COMMON MKT. L. REV. 81.22

158. See, e.g., *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) (the Supreme Court has "never held that proof of a parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense").

159. Dara, *supra* note 110, at 775.

monopolization of a market was not an imminent danger.¹⁶⁰ Thus, monopolization or attempts to monopolize were not outlawed by the EEC Treaty.¹⁶¹ In fact, an important goal of the EEC Treaty was to eliminate national barriers in order to permit the development of enterprises of a size that would bring the benefits generally associated with large enterprises to the Community.¹⁶² Although national courts have been applying article 86 increasingly,¹⁶³ the Court of Justice is the ultimate judge of what is an abuse of a dominant market position.¹⁶⁴

The Court of Justice has stated that an enterprise has a dominant position when it has "the power to prevent effective competition" in a substantial part of the relevant market.¹⁶⁵ As a general rule, abuse of this amount of power, regardless of how the requisite market control was acquired,¹⁶⁶ is a violation of article 86. Thus, the grant of a patent by a Member State is taken into account when determining whether the owner has a dominant position.¹⁶⁷ However, owning industrial property does not necessarily imply a dominant position because the dominance must be in a "substantial part" of the Common Market.¹⁶⁸ Information such as the "existence and position of manufacturers or distributors distributing similar or substitute goods must also be considered."¹⁶⁹ Also, in addressing the issue of what constituted "abuse" as per article 86, and of much interest to assignees of patents, the Court of Justice said "[t]he fact that the selling price of a patented product is higher than that of a non-patented product coming from another Member State does not necessarily constitute abuse."¹⁷⁰ The Court of Justice then blurred the already illegible line in *Deutsche Grammophon GmbH v. Metro-SB Grossmarkte GmbH & Co. KG* when it stated "[t]he price level of

160. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-244.

161. *Id.*

162. *Id.*

163. *Id.* at 3-245.

164. *Id.*

165. See *Sirena S.r.l. v. Eda GmbH*, Case No. 40/70, Feb. 18, 1971, 17 Rec. 69 (1971), Common Mkt. Rep. (CCH) ¶ 8101, 10 COMMON MKT. L. REV. 260 (1971); *Deutsche Grammophon GmbH v. Metro-SB Grossmarkte GmbH & Co. KG*, Case No. 78/70, June 8, 1971, 17 Rec. 487 (1971), Common Mkt. Rep. (CCH) ¶ 8106, 10 COMMON MKT. L. REV. 631 (1971).

166. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-255.

167. *Id.*

168. Article 86 of the treaty states that an abuse may be in an undertaking with a "dominant position within the common market or in a substantial part of it. . . ." EEC Treaty, *supra* note 3, at art. 86.

169. *Sirena S.r.l. v. Eda GmbH*, Case No. 40/70, Feb. 18, 1971, 17 Rec. 69 (1971), Common Mkt. Rep. (CCH) ¶ 8101, 10 COMMON MKT. L. REV. 260 (1971).

170. *Parke, Davis & Co. v. Probel*, Case No. 24/67, Feb. 29, 1968, 14 Rec. 81 (1968), Common Mkt. Rep. (CCH) ¶ 8054, 7 COMMON MKT. L. REV. 47 (1968); *Deutsche Grammophon GmbH*, Case No. 78/70, June 8, 1971, 17 Rec. 487 (1971), Common Mkt. Rep. (CCH) ¶ 8106, 10 COMMON MKT. L. REV. 631 (1971).

a product is not in itself necessarily indicative of an abuse of a dominant position within the meaning of Article 86, but it can be a decisive indication when it is particularly high and is not justified by the facts.”¹⁷¹ Thus, the Court has given the practitioner vague language to work with that may only become more concrete with the addition of more case law.

2.2.6 Article 86 Compared to Section 2 of the Sherman Act

In determining violations of Article 86 or Section 2, the Court of Justice and the Supreme Court, respectively, use basically the same analysis.¹⁷² Each court defines the relevant product market, the relevant geographic market, and then assesses the power of the alleged violator within the market.¹⁷³ Thus, as in United States law, the party that is able to define the relevant product and geographic markets most advantageously and persuasively is likely to prevail.

The Court of Justice seems inclined to use the interchangeability of products as the test for determining the product market.¹⁷⁴ In *Continental Can Co. v. Commission*,¹⁷⁵ the Court of Justice reversed the Commission's imposition of sanctions for the alleged monopolization of the light metal can market used to preserve fish and meat. The Court reasoned that there was no proof “that competitors in other fields in the market for light metal containers cannot, by a mere adaptation, enter this market with sufficient strength to form a serious counterweight.”¹⁷⁶ Thus, the Court of Justice seems to look at entry barriers when considering antitrust monopolization violations, just as the Supreme Court does.¹⁷⁷

However, the interchangeability test may be inadequate when courts attempt to apply it to goods with more than one use. The Court of Justice had occasion to do this in *Hoffman-La Roche v. Commission*.¹⁷⁸ The Commission charged Hoffman-La Roche with violating article 86 with respect to the vitamin market. Hoffman-La Roche raised the defense that certain vitamins could be used for industrial purposes as antioxidants.¹⁷⁹ The Court of Justice, due to

171. See *Deutsche Grammophon GmbH*, Case No. 78/70, June 8, 1971, 17 Rec. 487 (1971), Common Mkt. Rep. (CCH) ¶ 8106, 10 COMMON MKT. L. REV. 631 (1971); 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-265.

172. See generally Dara, *supra* note 110, at 777-88.

173. *Id.* at 782.

174. Dara, *supra* note 110, at 777.

175. Case No. 6/72, 1973 E.C.R. 215, 1973 COMMON MKT. L. REV. 199.

176. 1973 COMMON MKT. L. REV. at 227.

177. See *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) (discussing entry barriers).

178. Case No. 85/76, 1979 E.C.R. 461, 3 COMMON MKT. L. REV. 211 (1979).

179. 3 COMMON MKT. L. REV. at 271 (1979).

the inadequacy of the interchangeability test in this situation, failed to address the issue directly and chose to rely on other aspects of the case to affirm the Commission's decision.¹⁸⁰

The Court of Justice, just like the Supreme Court, also requires defining the geographic market. So far, the Court takes into account the geographic area in which the product is marketed and the incidence of the product within the Common Market as a whole.¹⁸¹ On the other hand, the Supreme Court's determination of a geographic market is affected by accounting for the areas in which competition is eliminated.¹⁸²

Finally, the Court of Justice has held that "a position of economic strength . . . which enables it to prevent effective competition . . . by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"¹⁸³ is a high enough degree of economic power to trigger the application of article 86. The Court has held that many factors can be taken into account when determining whether a degree of economic power is sufficient to trigger an article 86 violation.¹⁸⁴ The Court has held that an extensive and efficient sale network¹⁸⁵ and an industrial property right,¹⁸⁶ among other things, can be relevant indicia of the existence of monopoly power. On the other hand, the Supreme Court has defined monopoly power as "the power to control prices or to exclude competition."¹⁸⁷ Additionally, in order to trigger section 2 of the Sherman Act, specific intent to monopolize, as opposed to "growth or development as a consequence of a superior product, business acumen, or historic accident" must be shown.¹⁸⁸

2.3 Execution of EEC Antitrust Law

Article 87 of the EEC Treaty gives the Council the power to adopt whatever rules are appropriate, either in the form of directives or regulations, to further the principles embodied in Articles 85 and 86.¹⁸⁹ Article 87 provides that the Council, unanimously, shall adopt all appropriate rules within three years after the Treaty

180. See *Dara*, *supra* note 110, at 778.

181. See *id.* at 778-79.

182. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357-59 (1963).

183. *United Brands v. Commission*, Case No. 27/76, 1978 E.C.R. 207, 227, 1 COMMON MKT. L. REV. 429, 486-87 (1978).

184. See generally *Dara*, *supra* note 110, at 779.

185. *Hoffman-La Roche*, 1979 E.C.R. 461, 3 COMMON MKT. L. REV. 211 (1979).

186. *Huhin Kassaregister AB v. Commission*, Case No. 22/78, 1979 E.C.R. 1865, 3 COMMON MKT. L. REV. 345, 373 (1979).

187. *United States v. E. I. du Pont de Nemours*, 351 U.S. 377, 391 (1956).

188. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

189. 3 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-294.

becomes effective. Although the first regulation for application of articles 85 and 86, namely Regulation 17/62, addresses many important issues, it does not contain all provisions appropriate for the implementation of articles 85 and 86.¹⁹⁰ However, the makers of the Treaty were wise enough to have a provision for the Council, by a qualified majority, to continue to adopt rules after the three year period. In order to fill in the gaps during the interim period, articles 88 and 89 contain transitional law.¹⁹¹ These articles provide for enforcement of articles 85 and 86 while the Council is drafting a more elaborate and detailed set of rules.¹⁹² In fact, article 88 provides that the rules are effective only "[u]ntil the entry into force of the provisions adopted in pursuance of article 87."

Articles 88 and 89 gave Member States full power to conduct investigations and make reasoned findings of violations of articles 85 and 86. However, Regulation 17/62 gives the Commission full power to apply articles 85(1) and 86 and exclusive power to apply article 85(3) and leaves Member States only limited power to act, and then only until the Commission has initiated a proceeding.¹⁹³

Pursuant to article 89, the Commission may only investigate upon request of a Member State or upon its own motion. Regulation 17/62 allows the Commission to request information from authorities of the Member States and from enterprises,¹⁹⁴ to visit enterprises and check books and records,¹⁹⁵ and to conduct general investigations of particular sectors of the economy.¹⁹⁶ Although it seems the Commission can do no wrong during an investigation, all investigations are subject to limitations and formalities that the Commission must comply with.¹⁹⁷

A private person or corporation cannot instigate an investigation. Although this apparent limitation seems insignificant because

190. *Id.*

191. *Id.* at 2-314.

192. *Id.* However, it is not reasonable to construe article 88 to be effective until all measures ever to be based on article 87 had been adopted. *Id.* at 3-318. A reasonable construction of article 88 is that it shall continue in effect until an implementing measure based on article 87 provides for proper administrative and enforcement procedures. *Id.* at 3-318 to 3-319. Since Regulation 17/62, *supra* note 138, provides such procedures, article 88 should have lost its effect as of March 13, 1962. However, the text of article 88 is incorporated into article 9(3) of Regulation 17/62, and therefore, the article is not yet totally obsolete.

193. 3 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-329.

194. Regulation 17/62, *supra* note 138, at art. 11.

195. *Id.* at art. 14.

196. *Id.* at art. 12.

197. See generally 3 H. SMIT & P.E. HERZOG, *supra* note 33, at 3-333 to 3-339 (discussing that the Commission may only conduct "necessary" investigations, potential problems with unreasonable search and seizures in addition to other privileges, and the Commission's basis to provide a legal basis and purpose for the requested information).

the Commission has found reason to investigate on its own motion after complaints of private persons or corporations,¹⁹⁸ it is not.¹⁹⁹ Even if the Commission eventually prevails and a fine is imposed, the Commission has no jurisdiction to compensate the victim who prodded the Commission to initiate the investigation.²⁰⁰ Any damages that the injured party may receive will result from a proceeding in a Member State's court.²⁰¹

2.4 Implications of the Antitrust Laws

The main objective of the EEC Treaty is to promote the free movement of goods.²⁰² The purpose of free movement of goods is to promote competition which, in turn, increases economic efficiency.²⁰³ Enterprises that even indirectly affect commerce within the Common Market are subject to antitrust scrutiny, even if all enterprises involved in the anti-competitive conduct and the place where the agreement is reached and/or executed are outside the Common Market. Therefore, to ensure economic efficiency, the EEC seems to be moving in the direction of a "commerce clause" analysis, where almost anything can and will be found to affect trade between Member States. In fact, although there are no clear indications that the Court of Justice has accepted the "effect doctrine,"²⁰⁴ it has been suggested that the Commission seems to have adopted the "effect doctrine," under which "an agreement, wherever made, that may reasonably be expected to have substantial effects in the common market infringes Article 85(1)."²⁰⁵ Thus, many unsuspecting corporations have already been thrown into the Common Market melting pot and should be wary of the antitrust laws.

Also, although similar in some respects, the differences in the American and EEC antitrust statutes reflect the difference in the philosophies of the two systems.²⁰⁶ The EEC must be flexible, in order to achieve the integration of many national markets into one.

198. *Id.* at 3-331.

199. *See* Jacobs, *supra* note 112, at 1367.

200. *Id.*

201. *Id.*

202. *See* EEC Treaty, *supra* note 3, at art. 3 (stating the activities of the Community shall include, among other things, "the elimination . . . of customs duties and of quantitative restrictions on the import and export of goods").

203. Waelbroeck, *Competition, Integration and Economic Efficiency in the EEC from the Point of View of the Private Firm*, 82 MICH. L. REV. 1439, 1445 (1984); *see also* Dara, *supra* note 110, at 790 (stating the EEC Treaty aims to create an integrated common market combined with economic development).

204. VerLoren van Themaat, *The Impact of the Case Law of the Court of Justice of the European Communities on the Economic World Order*, 82 MICH. L. REV. 1422, 1437 (1984).

205. V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 29 (3d ed. 1986).

206. Dara, *supra* note 110, at 788.

Thus, the EEC antitrust provisions cannot impose criminal sanctions as the Sherman Act can. Second, under the Sherman Act, once it is found that an agreement violates the prohibitions set by the statute, it may only be saved if the pro-competitive effects outweigh the anti-competitive effects.²⁰⁷ However, in the EEC, exemptions can be granted under article 85(3) for economic reasons other than a net positive effect on competition. Third, the Sherman Act prohibits attempts to monopolize whereas the EEC Treaty only outlaws the abuse of a monopolistic market share. Thus, again there is a situation where a certain restriction on competition is considered *necessarily* harmful in the U.S. but may be tolerated in the EEC as long as it promotes economic efficiency. Fourth, the EEC has a *de minimis* rule which states that agreements between parties which control only a negligible share of the market are not covered by article 85 due to the economic weakness of the parties.²⁰⁸ The U.S. does not have a *de minimis* rule. Fifth, and perhaps most significant when considering the different philosophies of the U.S. and the EEC is that the EEC has no "per se" rule. Although the per se rule in the U.S.²⁰⁹ is not as prevalent as in years past, it is still valid. In sum, the flexibility of the EEC antitrust provisions as compared to the Sherman Act is a two edged sword.

Furthermore, although an injunction can be ordered against a violator of the EEC antitrust provisions, as far as damages are concerned, businesses are in a no win situation. They may be fined by the Commission and Court of Justice for violating the EEC Treaty, but a violation of the EEC Treaty resulting in a loss to the business is not compensable, unless the business proceeds independently. In addition to the apparent fairness in redressing one who has been unlawfully injured, permitting private damages would lead to more vigorous enforcement of the antitrust provisions.²¹⁰ However, the EEC has not taken this route. Therefore, without fundamental changes in law, and attitudes among the Member States, it is doubtful that private enforcement of actions in Europe will be effec-

207. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (stating "the Rule of Reason . . . focuses directly on the challenged restraint's impact on competitive conditions").

208. *Volck v. Vervaecke*, Case No. 5/69, 1969 E.C.R. 295, 1969 COMMON MKT. L. REV. 273. Because the Court of Justice failed to indicate the exact share of the market under which the *de minimis* rule could be invoked, the Commission issued the Notice on Minor Agreements, O.J. [1970] C 64/1, which in its amended form, as amended Dec. 29, 1977, O.J. [1977] C 313/3, basically exempts from the prohibitions of article 85 agreements which affect no more than 5% of the market, with a few other conditions. See *Dara*, *supra* note 110, at 769-71 (explaining the other conditions and giving a more detailed explanation of the *de minimis* rule).

209. See *e.g.*, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (price fixing is per se illegal under the Sherman Act).

210. *Jacobs*, *supra* note 112, at 1367.

tive.²¹¹ Thus, it may be a gamble for a small corporation to enter and compete in the EEC as they may not have a big enough "warchest" to file an independent suit.

Perhaps, in striving for economic efficiency, the EEC sought to give certain advantages to large, well established corporations because it viewed them as the ones that had survived the competition in other parts of the world and therefore, were the most economically efficient. The doctrine of economic unity would seem to coincide with this. It seems the doctrine would encourage direct investment in the EEC by large corporations to form wholly owned subsidiaries in which the management of the subsidiary is controlled by the corporation. Ownership and control of management by a large efficient company could only breed economic efficiency and help streamline the multitude of national markets into one.

3. EEC INDUSTRIAL PROPERTY LAW

3.1 Background

Intellectual property protection in the United States does not provide protection against intellectual property raiders in foreign lands, including the EEC. Thus, United States businesses which plan to make goods and services available in the EEC must appropriately protect their goals and services with patents, trademarks, copyrights, and know-how. There are different avenues of protection available.

3.2 Patent Prosecution

Currently, there are three ways for American business to protect patentable inventions in the EEC.²¹² First, one may file a national application directly in each country where protection is desired. Second, one may file nationally and/or under European Patent Convention ("EPC")²¹³ via the Patent Cooperation Treaty

211. *Id.* at 1371.

212. SCHWAAB & THURMAN, INTERNATIONAL PATENT LAW: EUROPEAN PATENT CONVENTION & PATENT COOPERATION TREATY I-12 (1980).

213. The European Patent Convention was signed in Munich on October 5, 1973 [hereinafter EPC]. See also K. HAERTEL, EUROPEAN PATENT CONVENTION 19 (V. Vossius trans. 1980). The EPC went into effect on October 7, 1977. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.6. Article 133(2) of the European Patent Convention states that:

Natural or legal persons not having either a residence or principal place of business within the territory of one of the Contracting States must be represented by a professional representative and act through him in all proceedings established by this Convention, other than in filing the European patent application; the Implementing Regulations may permit other exceptions.

EPC, *supra*, at 133(2); K. HAERTEL, *supra*, at 81. Thus, a U.S. national could file an EPC application directly but must appoint a professional representative

("PCT").²¹⁴ Third, one may file directly in the European Patent Office²¹⁵ under the European Patent Convention.²¹⁶ Also, the Community Patent Convention ("CPC")²¹⁷ provides hope²¹⁸ for an additional procedure to prosecute patent applications. These avenues and potential avenues of patent prosecution attempt to unify national patent laws²¹⁹ and thus, do not entail the abolition of national patent systems.²²⁰

3.2.1 Direct National Filing

As a general rule, direct national filing is no longer popular with entities seeking patent protection in the EEC. The obvious advantage to national filings is that one need not worry if a country has acceded to the EPC or PCT; thus protection can be gained in all EEC nations individually. However, the disadvantages of national filings often outweigh the advantages. First, if protection is desired in five or more EEC nations it is generally less expensive to file via the PCT or EPC. This is due to the high filing costs and high translation costs associated with numerous national filings.²²¹ Second, because the major goal of the EEC is to remove all internal barriers which restrict the movement of goods and services, national protection in one EEC nation may not be adequate protection if another entity is importing infringing goods from another EEC nation.

3.2.2 Patent Cooperation Treaty Filings

The PCT is a purely procedural international agreement which provides for the filing of patent applications on the same invention

within a short period of time (usually approximately two months) which is set by the European Patent Office. A "professional representative" must either appear on the EPO list of representatives or be an attorney entitled to represent a client before the Patent Office of his own country which must be a Contracting State. U.S. corporations with an established place of business within the EEC may also be able to file under the EPC.

214. The Patent Cooperation Treaty [hereinafter PCT] concluded at Washington on June 19, 1970, was amended on October 2, 1979, was modified on February 3, 1984, and is effective January 1, 1985.

215. The European Patent Office [hereinafter EPO] is located in Munich and has a branch office in The Hague. The official languages of the EPO are French, English and German. SCHWAAB & THURMAN, *supra* note 212, at I-16.

216. The European Patent Convention was signed in Munich on October 5, 1973. K. HAERTEL, *supra* note 213, at 19.

217. The Community Patent Convention [hereinafter CPC] was signed at Luxembourg on December 15, 1975 and is published in 1976 O.J. EUR. COMM. (No. L 17) 1 (1976). See also 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.19.

218. The CPC has not yet taken effect. *Id.* at 6-216.7.

219. See, e.g., 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.19.

220. *Id.* at 6-216.8.

221. On average, at this time, to file nationally costs approximately \$2,000 per country, which includes translation and attorneys fees.

in a number of nations.²²² The PCT enables the U.S. applicant to file one "international application." The application can be filed in English in the United States Patent Office ("U.S.P.T.O."),²²³ which is an official "Receiving Office." The Receiving Offices function as the filing and formalities review organization for international applications. The application is then acknowledged as a regular national filing in as many member nations to the PCT²²⁴ as the applicant designates. The application receives the benefit of the U.S. national application filing date, which is generally earlier for U.S. applicants.

The U.S. applicant or national then has the option of the U.S.P.T.O. or the European Patent Office ("EPO") to act as an International Searching Authority (ISA). The ISA conducts a prior art search of the inventions claimed in the international applications by searching at least the minimum documentation defined by the PCT.²²⁵ The ISA is responsible for checking the content of the title and abstract.²²⁶ The ISA also generates a Search Report²²⁷ which contains a listing of those documents found to be relevant and identifies the claims in the application to which they are pertinent. However, no judgments or statements as to patentability are made by the ISA.²²⁸ The U.S. applicant receives a copy of the cited prior art from the ISA, which in this instance is the U.S.P.T.O.. Subsequently, processing continues before the International Bureau (IB).

The IB maintains the master file of all international applications and acts as the publisher and central coordinating body under the PCT. Normally, the applicant has two months from the transmittal date of the Search Report to amend the claims by filing an amendment directly with the IB.²²⁹ After the expiration of 18

222. SCHWAAB & THURMAN, *supra* note 212, at I-8.

223. *See* PCT, *supra* note 214, at art. 10.

224. Of the twelve EEC members, Spain, Greece, Portugal and Ireland cannot be designated as nations where protection is desired with the use of a PCT filing. West Germany, Luxembourg, Great Britain, and the Netherlands may be covered either nationally or under the EPC via the PCT application. One cannot get national protection in France, Italy, and Belgium via the PCT, but protection in these nations via the PCT is available due to their accession to the EPC. Denmark may be protected nationally via the PCT but not under the EPC via the PCT because it has not acceded to the EPC. However, as of January 1, 1990, Denmark belongs to the EPC.

225. *See* PCT, *supra* note 214, at arts. 15-16 and PCT rule 34 for a discussion of the international search, the ISA, and minimum search requirements.

226. *See* PCT rules 37.2 and 38.2.

227. This is usually done about 16 months after the priority date. *See* PCT rule 42 (stating the time limit for the Search Report "shall be 3 months from the receipt of the search copy by the International Searching Authority, or 9 months from the priority date, whichever time limit expires later").

228. *See* PCT rule 43.9.

229. *See* PCT, *supra* note 214, at art. 19 and PCT rule 46.

months from the priority date of the application, the IB may publish the international application, the Search Report, and any amendment that may have been made.²³⁰ A copy of this publication is sent to all the Designated Offices ("DO's").²³¹

The applicant must send to each DO, whether it be a national DO or a regional DO, a copy of the international application, the required translations, and the filing fees within 20 months of the priority date.²³² However, DO's may unilaterally grant additional time to applicants, but may not shorten the time afforded to applicants.²³³ Once at the respective DO's, applicants may amend their applications.²³⁴ Then, each DO acts independently to determine the patentability of the application based upon its own specific national or regional laws.²³⁵

Finally, an applicant may wish to obtain the benefits of delaying the entry into the national stage until the 30th month. This objective is achieved by filing a demand for an international preliminary examination²³⁶ with the appropriate International Preliminary Examining Authority (IPEA)²³⁷ within 19 months of the priority date. "The objective of the international preliminary examination is to formulate a preliminary and *non-binding* opinion of the questions whether the claimed invention appears to be novel, to involve an inventive step (to be non-obvious), and to be industrially applicable."²³⁸ All nations or regions for which the preliminary examination is desired must be "elected" in the demand.²³⁹ A copy of the International Preliminary Examination Report is sent to the applicant and to the IB, which sends copies of the report to each elected office.

3.2.3 European Patent Convention Filings

The principal purpose of the EPC is to enable those parties who wish to seek patent protection in a plurality of European countries²⁴⁰ to file one single application covering all desired nations designated by the applicant.²⁴¹ The ultimate goal is for each of the

230. PCT, *supra* note 214, at art. 21.

231. *Id.* at art. 20.

232. *Id.* at art. 22.

233. *Id.* at art. 22(3).

234. See PCT, *supra* note 214, at art. 28 and PCT Rule 52.

235. PCT, *supra* note 214, at art. 27(5).

236. See generally *id.* at arts. 31-42.

237. The appropriate IPEA for U.S. applicants is the U.S.P.T.O. PCT, *supra* note 214, at art. 34.

238. *Id.* at art. 33.

239. *Id.* art. 31(4)(a).

240. Currently, all 12 members of the EEC have ratified and acceded to the EPC except Portugal, Denmark, and Ireland.

241. SCHWAAB & THURMAN, *supra* note 212, at I-3 to I-4.

member countries to adopt in its national law the same substantive law of patents set forth in the EPC.²⁴² The European patent does not result in the existence of one single unitary patent covering the whole of the territories of the designated countries, but rather leads to a "bundle" of national patents.²⁴³ Each national patent is governed by the same provisions as a national patent granted directly in the country concerned.²⁴⁴

3.2.4 Potential Community Patent Convention Filings

The EPC helped unify that part of patent law that relates only to the grant of patents.²⁴⁵ However, for the EEC to fully integrate economically, the patent laws of the Member States must be unified beyond what was accomplished by the EPC.²⁴⁶ This is because the existence of differing national patent laws may arbitrarily influence the location of industrial activities.²⁴⁷ Also, it has been argued that in the absence of a community patent, owners of inventions will not be *compelled* to take out patents in all EEC Member States, resulting in the restriction of competition in some parts of the EEC but not in others.²⁴⁸ Furthermore, national patent laws are an impediment to the free flow of goods between Member States,²⁴⁹ a concept essential to the EEC. Thus, unification of the national patent laws of the EEC Member States is not only a goal in itself, but it is also a condition precedent to the free movement of patented goods in the EEC.²⁵⁰

The Court of Justice recognized the importance of this goal as a condition precedent to the free movement of patented goods when it stated:

The national rules relating to the protection of industrial property have not yet been the subject of unification within the Community. In the absence of such unification, the national character of the protection of industrial property and the variations between the different laws on the subject are liable to create obstacles both to the free circulation of the patented products and to competition within the Common Market.²⁵¹

242. *Id.* at I-4.

243. Octrooibureau Los en Stigter, *Manual for the Handling of Applications for Patents, Designs and Trade Marks Throughout the World*, supp. 36 (1978) [hereinafter *Manual for World Patents*].

244. EPC, *supra* note 213, at art. 2(2); K. HAERTEL, *supra* note 213, at 28.

245. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.19.

246. *Id.*

247. *Id.*

248. *Id.* at 6-216.20.

249. *Id.*

250. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.25.

251. Parke Davis & Co. v. Porbel, Case No. 24/67, 14 Rec. 81, 83, 1968 COMMON MKT. L. REV. 47, 49 (1968).

The first step towards this goal was the signing of the Community Patent Convention ("CPC") on December 15, 1975 in Luxembourg. Although not yet ratified,²⁵² the CPC is closer to becoming a reality with the ratification of the EPC.

The CPC will require ratification of all the EEC countries.²⁵³ The basic institution of the CPC will be the EPO, which has already been established by the EPC.²⁵⁴ However, in addition to the EPO, the CPC provides for a Patent Administration Division to keep special records of Community Patents, and Revocation Divisions and Boards,²⁵⁵ among other things.²⁵⁶

A CPC patentee will have the right to prevent others from making, using, or selling a patented product.²⁵⁷ The patentee can also prevent importation of such products for these purposes.²⁵⁸ The CPC also gives the patentee rights to prevent third parties from committing acts similar to what is commonly known as contributory infringement and inducing infringement.²⁵⁹ The CPC does not grant the patentee the right to prevent acts done privately and for noncommercial purposes or experimental acts, in addition to other acts.²⁶⁰ National courts will have jurisdiction over matters relating to infringement of these rights.²⁶¹

3.3 Copyrights

Copyright protection for authors who are Member State nationals in EEC nations is available merely by publication and without formalities such as notice and deposit of copies of works. Protection in EEC member nations and other foreign nations was not easily available to U.S. authors until recent legislation was passed.

252. See SCHWAAB & THURMAN, *supra* note 212, at II-1; United States Trade-mark Association, International Bulletin Vol. 44, No. 15, at 1-2, May 9, 1989.

253. See CPC, *supra* note 217, at art. 94. The EPC did not require ratification by all EEC countries. See EPC, *supra* note 213, at art. 169; K. HAERTEL, *supra* note 213, at 100.

254. SCHWAAB & THURMAN, *supra* note 212, at II-5. EPC, *supra* note 213, at arts. 10-25 establish the EPO. See also K. HAERTEL, *supra* note 213, at 30-7.

255. CPC, *supra* note 217, at arts. 7-13.

256. See generally SCHWAAB & THURMAN, *supra* note 212, at II-5 to II-6 (for a list of other institutional provisions the CPC will have).

257. *Id.* at II-9.

258. *Id.*

259. See CPC, *supra* note 217, at art. 30.

260. SCHWAAB & THURMAN, *supra* note 212, at II-10 to II-11.

261. *Id.* at II-13.

3.3.1 The Berne Convention

The Berne Convention Implementation Act of 1988,²⁶² which became effective on March 1, 1989,²⁶³ amends Title 17 of the United States Code dealing with copyrights. Although the price was costly as the U.S. had to abandon its formalities in acceding to the Berne Convention,²⁶⁴ becoming a member nation to the Berne Convention will benefit the U.S. in two basic ways. First, adherence to the convention establishes copyright relations between the U.S. and twenty-four countries with which it had no copyright relations.²⁶⁵ This will help the U.S. voice its opinion in the effective establishment and management of international copyright policy,²⁶⁶ and perhaps policies on copyright law that will evolve in the EEC. Second, and of more immediate importance for U.S. copyright claimants currently seeking protection in EEC nations, the U.S. copyright claimant will no longer need to employ the "back door" procedure for obtaining copyright protection in Berne Convention nations.²⁶⁷ Because the Berne Convention only protects works of non-Berne nationals in Berne nations if the work is published simultaneously in both a Berne and non-Berne nation,²⁶⁸ U.S. copyright claimants previously had to publish simultaneously in, for instance, Canada. This difficult and expensive procedure is no longer necessary.

3.4 Trademarks

Currently, businesses seeking trademark protection in EEC Member States must file a separate application in each country, ex-

262. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101 et. seq. (1988) [hereinafter 1988 Act]). The 1988 Act contains thirteen sections. Currently, there are 79 members that have acceded to the Berne Convention with the Soviet Union and the Peoples Republic of China being the most notable exceptions. Strauss, *Don't Be Burned By Berne: A Guide to the Changes in the Copyright Laws as a Result of the Berne Convention Implementation Act of 1988*, 71 J. PAT. OFF. SOC'Y 374, 374 (1989).

263. 1988 Act, *supra* note 262, at § 13(a).

264. The U.S. copyright laws needed to be restructured to conform to the Berne Convention requirements. "The central feature of the Berne Convention is its prohibition of formalities." 134 CONG. REC. H3082 (daily ed. May 10, 1988) (statement of Rep. Kastenmeier). The previous feature distinguishing United States copyright law from those of the nations that had acceded to the Berne Convention was the U.S.'s emphasis on formalities, i.e. notice and registration. 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 17.01[B][1] (1989). Thus, the limitation or elimination of formalities of the new law is its most important revision. *Id.*

265. Strauss, *supra* note 262, at 378.

266. *Id.*

267. *Id.*

268. Berne Convention of 1886, September 9, 1886, art. 3(1)(b). *See generally* S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 §§ 5.16-18 (1987).

cept Benelux, which covers Belgium, the Netherlands and Luxembourg. The businesses must be aware of what, if anything, certain words or expressions may mean in other languages. Although presently there are no uniform requirements and standards for the registration, enforcement and licensing of trademarks and service marks, the EEC's Council has taken a large step in that direction.

3.4.1 *The Council's Directive*

The Council took the first step towards the establishment of a Community Trade Mark (CTM) on December 21, 1988, when it issued a Directive instructing its Member States to harmonize their national trademark laws by December 28, 1991.²⁶⁹ The CTM will probably be operational by 1992.²⁷⁰

The Directive is aimed at reducing the effect of the national application of trademark law when it would restrict the free flow of goods within the EEC.²⁷¹ Article 1 of the Directive provides that trademarks, service marks, collective and guarantee or certification marks will be registerable in all Member States. Article 2 of the Directive lists what a mark can consist of.²⁷² Article 9 provides for cancellation due to non-use after a five year period. Article 10 provides that a prior registrant cannot bar the use of a confusingly similar mark registered subsequent to its own if it has been used for five years with the earlier registrant's knowledge. In addition to other reasons, a mark may be refused registration or cancelled under articles 3 and 4 of the Directive if there is an "earlier" mark.²⁷³ Finally, article 6.2 provides that common law rights will not be displaced by the CTM but they will be limited in territory.

269. United States Trademark Association, *International Bulletin* Vol. 44, No. 15, p. 1, May 9, 1989 [hereinafter USTAIB].

270. *Id.*

271. *Id.* at 1-2.

272. A mark may consist of any sign capable of being represented graphically, including words, personal names, designs, and product and packaging shapes, provided they are capable of distinguishing the applicant's goods or services from those of others. *Id.* at 2. This may cause some problems, especially in the United Kingdom where neither the shape of goods nor their packaging can be registered as a trademark per se. *Trademarks-Harminization Directive and Proposals for a Community Trademark*, EC-US BUSINESS REPORT, Vol. I, No. 5, Oct. 1, 1989 at 8. (available at authors' office) [hereinafter EC-US]. Under the Directive, objects previously unregistrable in the United Kingdom, such as the shape of a Coca-Cola bottle, would become registerable. *Id.*

273. "Earlier" marks are those with a [P]riority, filing or registration date prior to that of the mark which have protection in the [E]EC, an [E]EC member state, the Benelux Trade Mark Office, or under international arrangements (e.g. Madrid) which have effect in a member state; or are considered 'well known' under Article 6bis of the Paris Convention in a member state.

USTAIB, *supra* note 269, at 2.

Currently, the EEC is working on a draft of the Regulation which would govern CTM's. This proposed Regulation is independent of the Directive. The draft provides that a CTM issue only if the mark is available for registration in all Member States.²⁷⁴ However, rejection of an application due to prior rights in one or more Member States does not defeat the applicant's right to register, but it does force the applicant to convert the application to a "bundle" of national applications.²⁷⁵ Also, national rights could be transferred by the owner to the CTM register.²⁷⁶ Finally, marks are slated to be valid for 10 years.²⁷⁷ There are a few obstacles the EEC must overcome in establishing a CTM. First, the EEC must establish the location for a CTM²⁷⁸ office and official language(s) of the CTM.²⁷⁹ Second, although the draft of the regulation does not provide for one, the EEC must consider a Community Trade Mark Court of Appeals to ensure uniform application of the laws and to avoid forum shopping.²⁸⁰ Speedy compliance by Member States may make the CTM a reality by 1992.²⁸¹

3.5 *Licensing Industrial Property*

Although articles 30-34 contain seemingly absolute language, they are not intended to deprive the Member States of all power to restrict imports and exports.²⁸² As to intellectual property, article 36 of the EEC Treaty provides that the free movement of goods shall not preclude "prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the protection of industrial and commercial property," if not an arbitrary discrimination or disguised restriction on trade between Member States. In attempting to define with more precision the areas article 36 leaves to the Member States to regulate, the Court of Justice has looked at the Treaty as a whole.²⁸³ Thus, as the Court of Justice has held on numerous occasions, article 36 enables Member States to enforce

274. *Id.* at 3.

275. *Id.*

276. *Id.*

277. *Id.*

278. The leading contenders where the office may be located are Madrid, London and Rome. EC-US, *supra* note 272, at 8.

279. USTAIB, *supra* note 269, at 4.

280. *Id.* Forum shopping may create a problem because the draft provides that venue in infringement matters may be found in the country where the acts are either threatened or occurring. *Id.*

281. Spain has already adopted a new trademark act which took effect on May 12, 1989. *Id.* at 5.

282. 1 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-156.5 to 2-156.6. Clearly the intent to take away all regulatory powers is absent since, for example, the Treaty did not transfer national sovereignty over public health and safety to the Community, even though this could be done under article 100. *Id.*

283. *Id.*

their national laws for the protection of patents, trademarks, copyrights and other commercial property but only within the limitations of other Treaty provisions.²⁸⁴

3.5.1 *The Commission's Industrial Property Licensing Regulation*

Even though article 36 gives no Community body the power to enact measures more closely defining the terms in it, the Commission issued a regulation on the licensing of intellectual property in July, 1984.²⁸⁵ The Regulation took effect on January 1, 1985, expires on December 31, 1994,²⁸⁶ and exempts license agreements which meet certain qualifying criteria from the purview of some of the EEC's antitrust laws.

3.5.1.1 Scope of the Regulation

The Regulation's scope is limited in a number of important ways. First, the Regulation may only exempt agreements between two enterprises.²⁸⁷ Thus, even if an agreement falls within the Regulation, the agreement is not subject to article 85(1) but is still subject to article 86, which is the antitrust provision prohibiting an abuse of a dominant market position by one or more enterprises. Second, the Commission may withdraw the benefit of the block exemption when it finds that an exempted agreement has certain effects that are incompatible with the conditions established in article 85(3) of the EEC Treaty.²⁸⁸ Third, pure sales agreements are not covered by this exemption²⁸⁹ but may be covered by exemptions for

284. *Consten & Grunden v. Commission*, Cases Nos. 56 and 58/64, July 13, 1966, 12 Rec. 429 (1966), Common Mkt. Rep. (CCH) ¶ 8046, 5 COMMON MKT. L. REV. 418 (1966). See also *Deutsche Grammophon GmbH v. Metro-SB Grossmarkte GmbH & Co., KG*, Case No. 78/70, June 8, 1970, 17 Rec. 487 (1971), Common Mkt. Rep. (CCH) ¶ 8106, 10 COMMON MKT. L. REV. 631 (1971) (manufacturer of records in one Member State could not prohibit the re-import of records he had voluntarily exported to another Member State by asserting a violation of the first Member State's national copyright laws); *Sirena S.r.l. v. Eda GmbH*, Case No. 40/70, Feb. 18, 1971, 17 Rec. 69 (1971), Common Mkt. Rep. (CCH) ¶ 8101, 10 COMMON MKT. L. REV. 260 (1971) (licensee of trademark in one Member State cannot prevent the importation into that country of products made by a different licensee in another Member State).

285. Regulation No. 2349/84, O.J. EUR. COMM. (No. L 219) 15 (1984), Comm. Mkt. Rep. (CCH) ¶ 2747 (1984) [hereinafter Regulation 2349/84].

286. Regulation No. 2349/84, *supra* 285, at art. 14.

287. *Id.* at art. 1(1).

288. *Id.* at art. 9. Specifically, the Commission can withdraw an exemption when the licensor does not have the right to terminate the exclusivity granted to the licensee despite the licensee's failure to exploit adequately the patent or the licensee's refusal to meet unsolicited demand from outside its territory without valid reason. *Id.* at art. 9(3)-(4). Perhaps this is because these situations do not benefit the public.

289. Regulation No. 2349/84, *supra* note 285, at art. 9.

exclusive distribution agreements.²⁹⁰ Fourth, the Regulation does not apply to licensing agreements entered into in connection with joint ventures.²⁹¹ Finally, although the Regulation applies to mixed patent and know-how licenses provided the communicated know-how is secret and permits a better exploitation of the licensed patents,²⁹² it does not apply to pure know-how license agreements.²⁹³ Other exemptions may apply to pure know-how license agreements.²⁹⁴ The know-how must be "necessary"²⁹⁵ for achieving the objects of the licensed technology. Thus, the know-how need not be less important than the patented aspects of the technology but must just be connected with the patent.²⁹⁶

3.5.1.2 Substance of the Regulation

The Regulation divides licensing clauses into three groups. The "permitted list" consists of clauses that may infringe article 85(1) but are exempt from its purview. The "white list" consists of clauses that are common to patent license agreements but generally do not infringe article 85(1) and are worthy of exemption in those cases where they do infringe. The "black list" describes clauses that generally restrict competition and will prevent the granting of a block exemption.

The "permitted list" allows for two restrictions on the licensor and five restrictions on the licensee. A licensor may be restricted from granting other licenses²⁹⁷ or from itself exploiting the licensed invention.²⁹⁸ The licensee may be restricted from exploiting the li-

290. See Commission Reg. (EEC) No. 1983/83, O.J. EUR. COMM. (No. L 173) (June 30, 1983).

291. Regulation No. 2349/84, *supra* note 285, at art. 9.

292. *Id.* at art. 1(1).

293. *Id.* It was estimated in 1979 that 25% of all international technology licenses were straight know-how licenses and another 42% were mixed patent/know-how licenses. Rosen, *Licensing Restrictions in the U.S. and the European Economic Community*, 55 ANTITRUST L.J. 383, 394, app. A (1986) (appendix contains the *Comments of the American Bar Association Section of Antitrust Law with Respect to Issuance by the Commission of the European Communities of Regulations or Guidelines Applicable to the Licensing of Know-How*).

294. The exemption for pure know-how licenses was accomplished via a commission Regulation, No. 556/89 of November 30, 1988. See O.J. EUR. COMM. (No. L61) 1 (1989). The draft basically follows the model of the block exemption for patent licensing agreements.

295. *Id.* Earlier drafts of the Regulation had required the know-how to be "ancillary" to the licensed patent, but this requirement was dropped. Coleman & Schmitz, *supra* note 126, at 111. It has been suggested that this was done so that the relative importance of the patent and the know-how will not affect the block exemption. Coronas, *The European Commission's Approach to Know-How Licensing: A Critical Commentary*, 33 INT'L & COMP. L.Q. 181 (1984).

296. Coleman & Schmitz, *supra* note 126, at 111.

297. Regulation No. 2349/84, *supra* note 285, at art. 1(1)(1).

298. *Id.* at art. 1(1)(2).

censed invention in the territories reserved for the licensor.²⁹⁹ Also, a licensee may be prohibited from manufacturing or using the licensed product in the territories reserved for other licensees.³⁰⁰ However, the licensee is not precluded from *selling* in another licensee's territory. This is probably because the only way the licensee could compete, considering transportation costs, is if he could make the product at a lower cost than the licensee of the area he is importing into. Thus, this permitted action by the licensee would tend to increase the economic efficiency of the EEC. Further, a licensee may be required to use the licensor's trademark, provided the licensee is permitted to identify itself as the manufacturer.³⁰¹ Further, the licensee may be prohibited from implementing an "active sales" policy³⁰² in territories licensed to other licensees.³⁰³ Finally, a "passive sales" restriction may prohibit a licensee from accepting unsolicited offers from the territories of other EEC licensees for a five year period.³⁰⁴

The "white list" contains eleven clauses³⁰⁵ common to licensing agreements that will not be considered in violation of article 85(1). Clauses permitted are ones which: (1) require the licensee to procure goods or services from the licensor or its appointee if such products or services are "necessary" for a technically satisfactory exploitation of the licensed product; (2) require the licensee to pay a minimum royalty or produce minimum quantities of the licensed product; (3) restrict the licensees technical field of use; (4) restrict the licensee from exploiting the patent after the termination of the agreement insofar as the patent is still in force;³⁰⁶ (5) restrict the licensee from granting sublicenses or assigning the license; (6) require the licensee to mark the goods with the patentee's name; (7) require the licensee not to divulge know-how given by the licensor, even after the license has expired; (8) impose an obligation on the

299. *Id.* at art. 1(1)(3). This basically means that a licensee may be prohibited from making, using or selling the licensed invention where the licensor has patent protection and has not granted any licenses. Coleman & Schmitz, *supra* note 126, at 112.

300. Regulation No. 2349/84, *supra* note 285, at art. 1(1)(4).

301. *Id.* at art. 1(1)(7).

302. An "active sales" policy includes advertising specifically directed at territories licensed to other licensees or the establishment of a branch or the maintenance of a depot in such a territory. *Id.* at art. 1(1)(5).

303. *Id.*

304. *Id.* at art. 1(1)(6). The five year period begins to run as soon as the product is placed on the EEC market for the first time by the licensor or one of its licensees. Coleman & Schmitz, *supra* note 126, at 112.

305. The eleven clauses are listed in Regulation No. 2349/84, *supra* note 285, at art. 2(1).

306. This only applies to patents, and therefore, it is unclear whether a licensee may be prevented from exploiting know-how after the termination of an agreement. Coleman & Schmitz, *supra* note 126, at 113.

licensee to help stop and prosecute infringements without relinquishing the licensee's right to challenge the validity of the licensed patent; (9) impose an obligation on the licensee to maintain minimum quality, provided it is necessary for the technically satisfactory exploitation of the licensed invention; (10) impose an obligation on the licensor and licensee to exchange experiences gained in exploiting the licensed invention and to grant mutual licenses for improvements and new applications on a non-exclusive basis; and (11) impose an obligation on the licensor to grant the licensee terms as favorable as terms that other licensees may receive.

The "black list" contains eleven clauses that are not part of the Regulation's block exemption and are thus subject to article 85(1). Article 3 of the Regulation, or the "black list," prohibits clauses which: (1) prohibit challenging the licensed patent;³⁰⁷ (2) continue a license beyond the expiration of patents existing at the time of the license,³⁰⁸ although royalties may be charged for the continued use of know-how;³⁰⁹ (3) restrict competition between the parties as to research and development, manufacture, use or sales, with some exceptions;³¹⁰ (4) charge royalties on products not entirely patented or manufactured by a licensed process, or charge royalties for the use of know-how in the common domain, with some exceptions;³¹¹ (5) limit the quantity of a product which may be produced;³¹² (6) restrict prices;³¹³ (7) restrict customers;³¹⁴ (8) impose an obligation to assign improvements or new patent applications;³¹⁵ (9) impose an obligation to take a license under patents which the licensee does not want in order to get a license under patents the licensee wants;³¹⁶ (10) prevent the licensee from placing its product in the market of another licensee for more than 5 years;³¹⁷ and (11) require a licensee, without good reason, to refuse to sell in his terri-

307. Regulation No. 2349/84, *supra* note 285, at art. 3(1).

308. *Id.* at art. 3(2).

309. Fugate, *Antitrust Aspects of International Patent and Technology Licensing*, 5 J.L. COM. 433, 448 n.98 (1985).

310. Regulation No. 2349/84, *supra* note 285, at art. 3(3). The exceptions are those that are provided for in article 1.

311. *Id.* art. 3(4). Charging royalties may be extended past the expiration date of a patent or the entry of know-how into the public domain to help the licensee make payments. Fugate, *supra* note 309, at 448 n.100.

312. Regulation No. 2349/84, *supra* note 285, at art. 3(5).

313. *Id.* at art 3(6).

314. *Id.* at art. 3(7).

315. Regulation No. 2349/84, *supra* note 285, at art. 3(8).

316. *Id.* at art. 3(9). This can be done, however, if the other patents, products or services are "necessary" for a technically satisfactory exploitation of the licensed invention. *Id.*

317. *Id.* at art. 3(10). Compare with *id.* at art. 1(1)(6) (permitting a clause preventing a licensee's product from being placed in another licensee's market for up to 5 years).

tory to those who would market in another territory, or to make it difficult for such persons to obtain products from other resellers within the EEC.³¹⁸

3.5.1.3 Notification Under the Regulation

The Regulation generally requires, via the procedure enounced in article 4, that the parties to a licensing agreement must notify the Commission of their agreement if it does not exclusively contain clauses described in the "white list" and/or the "permitted list."³¹⁹ Agreements that contain clauses described only in the "permitted list" and/or the "white list" and no clauses described in the "black list" are automatically exempt from the ambit of article 85(1) but are still subject to the purview of article 86.³²⁰

Since 1962, only about 10% of the agreements notified to the Commission have been ruled on due to limited staff and resources.³²¹ Even if the Commission rules on your notification, it will take at least 10 months, and yet can take as long as 4 years; on average it takes about 2 years for a ruling, depending on the complexity of the case.³²² Therefore, the notification procedure is something that businesses should try to avoid.

3.6 Implications

The PCT simplifies foreign filings of patent applications and reduces the costs by avoiding duplication of multiple filings and search efforts.³²³ Additionally, by postponing the requirement for filing translations of an application until after the search results are known, the applicant who decides not to continue prosecution of his application in several initially designated countries is afforded further savings.³²⁴

The EPC affords the U.S. applicant advantages over direct national filings. First, the general school of thought is that if protection is desired in five or more countries, EPC filings are more economical. This is because the application is filed in English, and presumably the applicant has already filed in the United States. Second, once the patent issues, the applicant pays to translate *only the claims* into languages of the nations providing protection. Not only is it less costly to translate only the claims as opposed to the

318. *Id.* at art. 3(11).

319. Coleman & Schmitz, *supra* note 126, at 118-19.

320. *Id.* at 118.

321. *Id.* at 105.

322. Answer to Parliamentary Question No. 173/85, 28 O.J. EUR. COMM. (No. C 255) 27 (1985), [1985] Common Mkt. Rep. (CCH) ¶ 10731.

323. SCHWAAB & THURMAN, *supra* note 212, at I-8.

324. *Id.*

entire application, but this cost is only incurred once the application is allowed. Thus, in addition to deferring possible translation costs, the EPC filing method gives the applicant a much greater chance of recouping the translation costs, since the issued patent presumably has a value. Third, while infringement of an EPC patent is tried in courts, issues of validity are determined by the EPO. Thus, the defense of invalidity in a patent infringement suit may prove less effective because courts will not generally stay the infringement determination pending the outcome of the validity issue at the EPO. This may be invaluable to the plaintiff alleging patent infringement.

However, the EPC applicant must be aware of a potential pitfall of EPO filings. If an application is rejected under the seemingly higher patentability standards used by the EPO, the applicant cannot register nationally. Thus, all national rights in EPC countries would be lost.

The CPC provides a potential avenue for prospective patentees in EEC countries. The doctrine of exhaustion³²⁵ enounced in the CPC basically states that after a first valid sale within the Common Market, a patented product or a product manufactured by a patented process will circulate freely throughout the EEC insofar as patent law is concerned³²⁶ because the patentee has "exhausted" his rights. The doctrine of exhaustion only applies to intra-EEC trade³²⁷ and does not apply to products manufactured and sold under a compulsory license.³²⁸ Thus, a CPC patentee will still be entitled to prevent goods from abroad from being introduced into the EEC, even if they originate in a territory where a parallel patent is in force.³²⁹ This seems justified³³⁰ because a CPC patentee who fails to manufacture the patented product or put the patented process to use within the EEC risks others receiving compulsory licenses for lack or insufficiency of exploitation.³³¹ The "requirement" of maintaining manufacturing facilities within the EEC

325. The doctrine of exhaustion is contained in article 32 of the CPC and states:

The rights conferred by a Community patent shall not extend to acts concerning a product covered by that patent which are done within the territories of the contracting states after that product has been put on the market in one of these states by the proprietor of the patent or with his express consent, unless there are grounds which, under Community law, would justify the extension to such acts of the rights conferred by the patent.

The "rights conferred by a Community patent" are basically listed in article 29 of the CPC. CPC, *supra* note 217, at art. 29.

326. See 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.41.

327. *Id.*

328. CPC, *supra* note 217, at art. 46.

329. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.41.

330. *Id.* at 6-216.42.

331. See CPC, *supra* note 217, at art. 47.

seems quite protectionist as it may force the production of a patented invention inside the Common Market at a cost higher than that which would be incurred if the patentee were allowed to manufacture the product outside the EEC and import into the EEC.³³² Thus, patent licensing becomes quite important.

Patent licensing agreements in the EEC are the subject of much controversy and confusion.³³³ However, the Commission's licensing Regulation helped clarify matters.³³⁴ The Commission generally permits exclusive licenses covering the entire EEC when they involve "the introduction and protection of a new technology in the licensed territory"³³⁵ or the "introduction and protection of a new process for manufacturing a product which is already known"³³⁶ subject to a subsequent decisions by the Court of Justice.³³⁷ Territorial restrictions within the EEC relating to the manufacture, use, sale, or advertising of the licensed goods are permitted as long as parallel patents protect the licensed products in the restricted territories.³³⁸ However, the EEC fears that territorial restraints coupled with know-how licensing may be used as a subterfuge to create cartels.³³⁹ Customer restrictions generally fall outside the Regulation and therefore, are not exempt from article 85(1).³⁴⁰ However, field of use restrictions for technical fields are acceptable.³⁴¹ Also, clauses which prohibit licensees from the manufacture, sale, or development of competing products fall outside the block exemption.³⁴² Further, although price recommendation is not prohibited, price fixing does not fall within the Regulation's block exemption.³⁴³ Finally, prohibitions on maximum quantities,³⁴⁴ licensee estoppel,³⁴⁵ the tying of unpatented products to pat-

332. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.42.

333. See Fugate, *supra* note 309, at 450 (explaining the courts are trying to strike a balance between antitrust enforcement and patent protection).

334. See generally Marks, *Patent Licensing and Antitrust in the United States and the European Economic Community*, 35 AM. U.L. REV. 963 (1985).

335. See Regulation 2349/84, *supra* note 285, at art. 1(2).

336. *Id.*

337. See Marks, *supra* note 334, at 976.

338. See Regulation 2349/84, *supra* note 285, at art. 1.

339. Rosen, *supra* note 293, at 407.

340. Marks, *supra* note 334, at 981.

341. *Id.*

342. Regulation 2349/84, *supra* note 285, at art. 3. However, a minimum purchase requirement, explicitly permitted under article 2 of the Regulation, coupled with a best efforts clause is seemingly indistinguishable from a non-competition clause. Marks, *supra* note 334, at 983. The Commission will undoubtedly have to evaluate the effects in such cases. *Id.*

343. Regulation 2349/84, *supra* note 285, at art. 3(6).

344. *Id.* at art. 3(5). See also Marks, *supra* note 334, at 985 (explaining that the quantity limitations apply only to maximum quantities, not minimum quantities).

345. Regulation 2349/84, *supra* note 285, at art. 3(1).

ented products in licensing,³⁴⁶ package licensing,³⁴⁷ and other clauses³⁴⁸ are not within the Regulation's block exemption. Thus, not only should businesses avoid the use of "black list" provisions in their licensing agreements, they should attempt to stay within the clauses on the "permitted list" and "white list" when drafting their agreements to avoid the requirement of notifying the Commission.

The Court of Justice has also played a large role in EEC industrial property matters. In *Centrafarm v. Sterling Drug, Inc.*,³⁴⁹ the Court removed internal barriers to trade associated with the existence of national patents.³⁵⁰ The Court held that allowing a patentee the right granted to him by a Member State to prohibit the marketing, in that Member State, of a product protected by the patent and put on the market in another Member State by the patentee or with his consent would be incompatible with the goal of free movement of goods for the Common Market enounced in the EEC Treaty. In other words, if it is less expensive to produce the product in Member State X and transport it into Member State Y than it is to just produce the product in Member State Y, the patentee cannot prevent the importation of the patented goods from X to Y even if patent protection exists in Y provided the products were produced in X by the patentee or with his consent. The Commission was unable to attack this type of action under the antitrust laws because the conduct involves only one party, and therefore article 85(1) is inapplicable. Also, the ownership of a patent does not necessarily confer a dominant position.³⁵¹ However, once again, the Court of

346. Marks, *supra* note 334, at 988.

347. Regulation 2349/84, *supra* note 285, at art. 3(9).

348. See generally Marks, *supra* note 334, at 990-92 (discussing how the exemption generally applies or does not apply to grantback requirements, royalties, and the duration of royalties).

349. 1974 E. COMM. CT. J. REP. 1147 [1974 Transfer Binder], Common Mkt. Rep. (CCH) ¶ 8246.

350. 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.53. It should be noted that article 30 of the EEC Treaty only prohibits "restrictions of imports . . . between Member States." The Court of Justice has construed this phrase to be inapplicable to countries outside of the EEC. See *E.M.I. Records Ltd. v. CBS*, Case No. 51/75, June 15, 1976, 1976 E.C.R. 861, Common Mkt. Rep. (CCH) ¶ 8350, 18 COMMON MKT. L. REV. 235 (1976); *E.M.I. Records, Ltd. v. C.B.S. Gramofon*, Case No. 86/75, June 15, 1976, 1976 E.C.R. 871, Common Mkt. Rep. (CCH) ¶ 8351, 18 COMMON MKT. L. REV. 235 (1976); *E.M.I. Records, Ltd. v. C.B.S. Schallplatten GmbH*, Case No. 96/75, June 15, 1976, 1976 E.C.R. 913, Common Mkt. Rep. (CCH) ¶ 8352, 18 COMMON MKT. L. REV. 235 (1976) (freedom of movement rules do not address themselves to imports from abroad). However, there are a few exceptions. The exceptions generally pertain to conventions and treaties negotiated between the EEC and third countries. Even if the language of the convention or treaty is similar to that of article 30, the Court of Justice tends not to construe these treaties in the same way as article 30. See 5 H. SMIT & P.E. HERZOG, *supra* note 33, at 6-216.30.

351. See *Id.* at 6-216.26.

Justice's decision reflected the importance of the free movement of goods within the EEC.

Also, the Court of Justice has not approved restrictions on imports when goods are imported from a Member State where no patent protection existed into a Member State where protection existed,³⁵² unless the imports were manufactured by an unrelated third party.³⁵³ However, because a business selling its products in a country where no patent protection can be obtained is not likely to receive the price for them that would be available where patent protection is possible, the patentee is deprived of some of the normal rewards of its patents. Thus, the Court of Justice subsequently held that a German business with a patent on a pharmaceutical product in the Netherlands could prevent a Dutch wholesaler from importing, into the Netherlands, the same product, manufactured in the United Kingdom under a compulsory license imposed by British law.³⁵⁴ The Court reached this decision for two basic reasons. First, the products were manufactured in the United Kingdom without the consent of the German business. Second, the compulsory license the Dutch business was using prevented the German business from setting the conditions under which its products could be manufactured in the United Kingdom and thus prevented it from reaping the rewards of its patent. Although similar to the *Centrafarm* facts, *Centrafarm* is distinguishable in that the parallel imports had been manufactured by a business that held a negotiated license as opposed to having a compulsory license. Thus, it seems the Court of Justice will give greater emphasis to economic factors for patentees in future cases.

The United States achieved market integration two centuries ago with the commerce clause of the Constitution.³⁵⁵ The EEC has market integration as their primary goal. Provided there is mutual trust and understanding between the parties,³⁵⁶ international agreements can help the EEC accomplish their goal. The Commission has sought fit to specifically exclude from its Regulation on licensing block exemptions certain license clauses that can and have

352. *Merck & Co. v. Stepfar BV*, Case No. 187/80, July 14, 1981, 1981 E.C.R. 2063 (patent owner in the Netherlands not entitled to prevent importation of pharmaceutical product "Moduretic" marketed in Italy, where no patent protection existed for the product).

353. See *Parke, Davis & Co. v. Prubel*, Case No. 24/67, February 29, 1968, 14 Rec. 81, Common Mkt. Rep. (CCH) ¶ 8054, 7 COMMON MKT. L. REV. 47 (1968).

354. See *Pharmon BV v. Hoechst AG*, Case No. 19/84, July 9, 1985, 1985 E.C.R. 2281.

355. U.S. CONST. art. I, § 8.

356. See Herold & Knoll, *Negotiating and Drafting International Distribution, Agency, and Representative Agreements: The United States Exporter's Perspective*, 21 INT'L LAW. 939, 983 (1987).

been defended from antitrust attack in the U.S..³⁵⁷ Thus, some valid defenses to alleged violations of U.S. antitrust laws will fail as defenses in the EEC if they do not promote market integration. Therefore, businesses desiring to compete in the EEC must consider all possible strategies when deciding the best methods for introducing their products into the EEC market while at the same time staying within the law.

4. METHODS OF CONDUCTING BUSINESS WITHIN THE EEC

4.1 Background

There are a few scenarios as to what may occur in the EEC.³⁵⁸ First, the EEC may flop, which is unlikely. Second, the EEC may achieve its goals by 1992, which would surprise many. Finally, the EEC may achieve some of its goals by 1992 and continue to experience growing pains for several years thereafter until its ultimate goals of total market integration and economic efficiency are achieved.

The desire of the Member States to obtain the obvious advantages the EEC would afford them with respect to tariff wars and economic efficiency will pull the nations together to form the EEC. The question is: "When?" Due to the great task of harmonizing the national laws to conform to the EEC Treaty, total integration will probably not take place by 1992. However, the third scenario, one of partial integration by 1992, seems to be imminent. Thus, the basic feeling is that U.S. businesses should have access to the Common Market, but the question is what vehicle is best for businesses to use in order to access the market.

4.2 Right of Establishment and Freedom to Provide Services

The right of establishment³⁵⁹ and the freedom to provide services³⁶⁰ complement not only the free movement of workers³⁶¹ but also the free movement of goods as the cornerstone to the EEC.³⁶² The right of establishment is the right of a natural person or a com-

357. See generally Marks, *supra* note 334, at 974-92.

358. See generally *supra* notes 1-10 and accompanying text for ideas concerning the possible paths the EEC might take.

359. Article 52 of the EEC Treaty provides for the right of establishment. Articles 53 through 58 also deal with the right of establishment. See EEC Treaty, *supra* note 3, at arts. 52, 53-58.

360. Article 59 of the EEC Treaty provides for the freedom to provide services. Articles 60 through 66 also deal with the freedom to provide services. *Id.* at arts. 59, 60-66.

361. Articles 48 through 51 of the EEC Treaty govern the free movement of workers. *Id.* at arts. 48-51.

362. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 223 (1985).

pany to settle in a Member State and to pursue economic activities therein.³⁶³ In contrast, the freedom to provide services permits a person established in one Member State to provide services in another Member State.³⁶⁴ Although drawing a distinction between the right of establishment and the freedom to provide services has drawn criticism,³⁶⁵ minor legal differences in treatment exist and therefore, the concepts are treated separately.

4.2.1 *Right of Establishment*

The right of establishment ensures not only the freedom to establish a business or practice in another Member State, but also the freedom to pursue such activity under the same conditions as are applied to nationals of the Member State concerned.³⁶⁶ Article 52 grants the right of establishment to the "nationals of a Member State."³⁶⁷ However, Article 58 is of more interest to international businesses because it grants the right of establishment to companies³⁶⁸ which are "formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the community."³⁶⁹ Thus, Article 58 mandates companies fulfill two requirements as a prerequisite to enjoying the right of establishment.³⁷⁰

363. D. WYATT & A. DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 182 (1980).

364. *Id.* Thus, for example, this is what enables a doctor established in France to treat a client in Belgium.

365. See 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-517 to 2-518 (criticizing the distinction and opining that the different treatment afforded to the right of establishment may be due to the fact that it involves a change of residence and may therefore impose a burden upon governmental services such as education and public health and welfare); D. WYATT & A. DASHWOOD, *supra* note 363, at 182 (stating there is a lack of economic basis for the distinction and that there may be difficulties in classification). Even the Court of Justice has noted that a comparison of Articles 48 (free movement of workers), 52 (right of establishment), and 59 (freedom to provide services) shows "that they are based on the same principles both in so far as they concern the entry into and residence in the territory of Member States of persons covered by Community law and the prohibition of all discrimination between them on grounds of nationality." *Procureur du Roi v. Royer*, Case No. 48/75, [1976] E.C.R. 497, 2 COMMON MKT. L. REV. 619 (1976).

366. GORMLEY, *supra* note 362, at 227.

367. EEC Treaty, *supra* note 3, at art. 52.

368. The right of establishment of a company is not a prerequisite to the company bringing suit within the EEC. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-640.

369. EEC Treaty, *supra* note 3, at art. 58. This language is not intended as a reference to resolve conflict of law issues. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-643.

370. See generally 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-643 to 2-644. Once the Article 58 requirements are fulfilled, a company should be treated the same way as an individual for the purposes of establishment. *Id.* at 2-541.

First, a company must be formed in accordance with the laws of a Member State to enjoy the right of establishment. The drafters of the EEC Treaty required this to ensure that companies benefiting from the right of establishment have a direct link to the legal system of a Member State.³⁷¹

Second, a company must have its registered office,³⁷² central administration³⁷³ or principal place of business³⁷⁴ within the community. The second requirement ensures that the company has a factual link to the community.³⁷⁵ Although both requirements are necessary to enjoy the right of establishment, they need not be satisfied in one Member State.³⁷⁶

In sum, companies based outside the EEC can, for example, enter the EEC by incorporating a subsidiary³⁷⁷ in accordance with the laws of a Member State and have the subsidiary's registered office in the same State or another Member State.³⁷⁸ This would enable the subsidiary to conduct business throughout the EEC and have secondary establishments³⁷⁹ in any Member State.³⁸⁰ These seemingly liberal requirements place few limits on the establishment of companies controlled from outside the EEC. However, for a variety of reasons,³⁸¹ companies planning to conduct business within the EEC should not wait too long to establish themselves in the EEC.

371. *Id.* at 2-643.

372. "The registered office of a company is located at the place designated as such in the incorporation papers of the company." *Id.* at 2-644.

373. "The central administration of a company is located where the company organs issue the decisions that are essential for the company's operation." *Id.*

374. "The principal place of business is the place where the company has its principal operational facilities." *Id.*

375. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-644.

376. *Id.* Therefore, a company incorporating in France with its central administration in Greece fulfills the right of establishment requirements.

377. A subsidiary is a legally independent entity which is separate from its parent company. *Id.* at 2-540.

378. *Id.* at 2-645.

379. Secondary establishments basically consist of branches or agencies. *Id.* A branch is distinguished from an agency in that the managers of a branch have a certain degree of independence. *Id.* at 2-540 to 2-541. Setting up secondary establishments may have additional requirements. *See generally id.* at 2-645 to 2-646.

380. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at at 2-645.

381. Many steps could be taken which would deny access to foreign controlled companies. First, Article 56 could be invoked to exclude foreign-controlled companies on the grounds of public policy. *Id.* at 2-645. Second, national requirements concerning the formation of corporations may be unified. *Id.* The unification may include a rule that only companies which are partially or exclusively controlled by nationals of Member States may be validly incorporated. *Id.* Companies already conducting business within the EEC need not be concerned with these possibilities unless they are given retroactive effect.

4.2.2 Freedom to Provide Services

Free movement of services between Member States may occur in a variety of different manners. First, and most common, a person from one Member State will temporarily travel to another Member State to provide a service.³⁸² An example of this would be a lawyer travelling to another Member State to represent a client.³⁸³ Second, the person seeking the service may travel to another Member State.³⁸⁴ Third, a scenario where neither the provider of services nor the person seeking services would move is possible.³⁸⁵

The freedom to provide services may benefit persons as well as companies.³⁸⁶ Nationals and companies must be established to enjoy the benefits of the freedom to provide services.³⁸⁷ A company whose registered office is situated inside the EEC, but whose central administration or principal place of business is not, satisfies this requirement if their activities have "an effective and continuous link with the economy of a Member State, excluding the possibility that this link might depend on nationality, particularly the nationality of the partners or the members of the managing or supervisory bodies, or of persons holding the capital stock."³⁸⁸ If this were not required, companies having only a nominal factual basis in the EEC would be unduly favored.³⁸⁹

382. *Id.* at 2-650.

383. The Commission and Council have both come to the opinion that freedom to provide services could be affected for lawyers. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at January, 1984 supplement 68. The Commission and Council opined this even though there are no uniform rules on legal education. *Id.* Accordingly, a Directive required all Member States, by March 22, 1979, to permit lawyers from other Member States to provide services within the Member State. Council Directive of March 22, 1977, 1977 O.J. EUR. COMM. (No. L. 78) 17.

As a practical matter, a lawyer from one Member State will know less about the law of the Member State he is travelling to. D. WYATT & A. DASHWOOD, *supra* note 363, at 204. Thus, for court appearances, Member States may require the lawyer from another Member State to act in conjunction with a local lawyer. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at January, 1984 supplement 69. Therefore, it is possible this Directive will be used almost exclusively in matters concerning EEC law. D. WYATT & A. DASHWOOD, *supra* note 363, at 204.

384. 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-650.

385. *Id.* An example of this would be where a laboratory in one Member State was asked to provide an analysis and report on a sample mailed from another Member State. *Id.*

386. *Id.* at 2-657.

387. See D. WYATT & A. DASHWOOD, *supra* note 363, at 199; 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-657.

388. General Programme for the Abolition of Restrictions on the Freedom to Provide Services, December 18, 1971, 1962 J.O. COMM. EUR. (No. 2) 32, Common Mkt. Rep. (CCH) ¶ 1546.

389. See 2 H. SMIT & P.E. HERZOG, *supra* note 33, at 2-657.

4.3 Direct Foreign Investment

U.S. companies should consider direct investment in the EEC as one feasible alternative for entering the Common Market. U.S. companies have already directly invested \$127.8 billion in the EEC.³⁹⁰ However, direct investment has its problems.

A large problem for the U.S. investor is how to ensure maximum protection of an investment with the current state of insider trading law in the EEC.³⁹¹ In April, 1987, the Commission adopted a proposal which aimed to establish uniform legislation coordinating insider trading regulations among the Member States.³⁹² Currently, only the United Kingdom, France and Denmark have enacted official insider trading statutes,³⁹³ while other EEC nations have proposed legislation³⁹⁴ or have left insider trading unregulated.³⁹⁵ Thus, the paucity of national insider trading statutes could make implementation of the Commission's proposal difficult.

Additionally, ensuring maximum protection may be difficult because enforcement of the Commission's proposed directive is a major weakness.³⁹⁶ The result is that businesses may only seek to enter the Common Market via the direct foreign investment route if uniform deterrence of insider trading can be established throughout the EEC.³⁹⁷

If a business decides to use the direct foreign investment route, the geographic area in which to invest within the EEC must be considered. U.S. real estate analysts consider Paris, Amsterdam and Brussels to be top cities for investments.³⁹⁸ The different considerations which made analysts choose Paris,³⁹⁹ Amsterdam,⁴⁰⁰ and

390. Sly, *U.S. Firms Face 1992 on Shaky Ground*, Chicago Tribune, April 10, 1988, § 4, at 1, cols. 4-5. England has had \$50.2 billion invested in it, followed by West Germany at \$23.3 billion, the Netherlands at \$14.8 billion, and France at \$12.3 billion. *Id.* All other countries in the EEC are below the 10 figure mark. *Id.*

391. See Note, *Toward the Unification of European Capital Markets: The EEC's Proposed Directive on Insider Trading*, 11 FORDHAM INT'L L.J. 432, 433 (1988).

392. Proposal for a Council Directive Coordinating Regulations on Insider Trading, COM(87) 111 final, at 3; Common Mkt. Rep. (CCH) ¶ 10,880, at 12,126 (May 21, 1987).

393. Note, *supra* note 391, at 438. Germany has introduced a set of voluntary rules prohibiting the exploitation of insider information. *Id.*

394. Belgium, the Netherlands, and Ireland have proposed legislation on insider trading. *Id.*

395. Italy, Greece, Portugal, Spain, and Luxembourg have left insider trading unregulated. *Id.*

396. *Id.* at 449.

397. Note, *supra* note 391, at 451-52.

398. Kerch, 1992 — *U.S. Discovers Europe*, Chicago Tribune, July 2, 1989, § 16, at 1, cols. 3-5.

399. Once a lease is signed in France, increases by law are limited to the inflation rate. *Id.* at 2, col. 6.

Brussels⁴⁰¹ as the top cities for investment will weigh differently with each particular investor. Also, an investor may find none of the three cities to be attractive and choose another alternative.

4.4 Mergers

A merger occurs when two or more entities which were formerly independent are brought under common control.⁴⁰² This commonly occurs where company A acquires a controlling percentage of the shares in company B.⁴⁰³ Certain types of mergers may adversely affect competition⁴⁰⁴ and therefore, the EEC has sought to regulate mergers.

There is no article in the EEC Treaty giving the Commission specific power to control mergers.⁴⁰⁵ However, the Commission has used the antitrust laws of the EEC to prevent mergers. The Commission has decided that article 85 is inapplicable to mergers,⁴⁰⁶ but the validity of this decision is far from clear.⁴⁰⁷ The Commission has successfully used article 86 to nullify mergers where there

400. At about \$20 per square foot, Amsterdam provides the lowest rents in the EEC. *Id.* at col. 5.

401. The central location of Brussels will become increasingly important as 1992 comes closer. *Id.* at 1, cols. 3-5.

402. D. WYATT & A. DASHWOOD, *supra* note 363, at 316.

403. *See Id.*

404. Mergers amongst actual or potential competitors and between an entity and its major supplier or consumer are most likely to adversely affect competition. D. WYATT & A. DASHWOOD, *supra* note 363, at 316.

405. KLUWER, MERGER CONTROL IN THE EEC 221 (1988); D. WYATT & A. DASHWOOD, *supra* note 363, at 316.

406. *See Banks, Mergers and Partial Mergers Under EEC Law*, 11 FORDHAM INT'L L.J. 255, 258 (1988) (explaining that the Commission has concluded article 85 to be inapplicable to mergers).

407. *See Philip Morris Inc./Rothmans International PLC.*, Bull. EC 3-1984 point 2.143. On Appeal, *British American Tobacco Company Ltd. v. Commission and R.J. Reynolds Industries Inc. v. Commission* (Joined Cases 142/84 and 156/84), judgment dated 11/17/87, not yet reported (where the Court of Justice stated the "main issue in these cases is whether and in what circumstances the acquisition of a minority shareholding in a competing company may constitute infringement of Article 85 and 86 of the Treaty"). *Id.* at ¶ 30 of the Judgment (emphasis added). The Court later went on to state:

Since the acquisition of shares in Rothmans International was the subject matter of agreements entered into by companies which have remained independent after the entry into force of the agreements, the issue must be examined first of all from the point of view of Article 85.

Id. at ¶ 31 of the Judgment. Thus, the scope of similar cases that may fall within Article 85 is limited in two important respects. First, the Court gives a reminder that the case at issue concerned the acquisition of only a minority shareholding in a competitor. KLUWER, *supra* note 405, at 271. Second, the Court examined the case under Article 85 at least partially because the companies agreed to remain independent after transfer of the shares. *Id.* *See generally id.* at 263-79 (for a comprehensive discussion of *Philips* and its implications).

would be an abuse of a dominant market position.⁴⁰⁸ The Court of Justice has upheld the Commission's theory that Article 86 applies to mergers.⁴⁰⁹ Since the antitrust laws of the EEC Treaty are used to prevent or divest certain mergers, one must see how they apply to each type of merger.

4.4.1 International Mergers

The Court of Justice stated that:

[E]very agreement must be assessed in its economic context and in light of the situation on the relevant market. Moreover, where the companies concerned are multinational corporations which carry on business on a world-wide scale, their relationships outside the Community cannot be ignored. It is necessary in particular to consider the possibility that the agreement in question may be part of a policy of global cooperation between the companies which are a party to it.⁴¹⁰

Thus, to comply with the policy set by the Court, the Commission is likely to assert it has jurisdiction over mergers which take place outside the EEC yet have a direct and substantial effect on competition within the EEC.⁴¹¹

A company outside the EEC may be a party to an international merger which falls within the EEC's antitrust laws. This may happen if: (1) a non-EEC enterprise acquires an EEC enterprise; (2) an EEC enterprise acquires a non-EEC enterprise; or (3) two non-EEC enterprises merge.

4.4.1.1 Non-EEC Enterprise Acquires EEC Enterprise

The acquisition of an EEC enterprise by a non-EEC enterprise was the situation the Court of Justice confronted in *Continental Can*.⁴¹² The U.S. based manufacturer of metal containers, Continental Can, was the majority shareholder of SLW, which was found to have a dominant position in the supply of tins for meat and fish

408. See *Continental Can Co., Inc.*, O.J. EUR. COMM.(L 7/25) (1972), Common Mkt. Rep. (CCH) ¶ 9481, 1972 COMMON MKT. L. REV. at 11.

409. See *infra* Section 4.4.1.1 text and accompanying notes (explaining that the Court of Justice annulled the Commission's decision but agreed that Article 86 applied to certain mergers).

410. *Philip Morris Inc./Rothmans International PLC.*, Bull. EC 3-1984 point 2.1.43. On Appeal, *British American Tobacco Company Ltd. v. Commission and R.J. Reynolds Industries Inc. v. Commission* (Joined Cases 142/84 and 156/84), judgment dated 11/17/87, not yet reported, ¶ 40.

411. See Commission's Eleventh Report on Competition Policy, 1981, point 34 (stating "[t]he EEC Treaty's rules on competition apply to restrictive or abusive practices by undertakings situated in non-member countries where their conduct has an appreciable impact within the common market").

412. *Europemballage Corp. & Continental Can Co., v. Commission*, Case No. 6/72, [1973] E.C.R. 215. See Banks, *supra* note 406, at 266-74 for a detailed discussion of the history and implications of *Continental Can*, in addition to the legislative reform it brought about.

products and metal caps. Continental Can desired to acquire TDV, which made all tins for meat and fish products and half the metal caps in the Netherlands. Continental Can agreed with TDV to incorporate Europemballage in Delaware⁴¹³ and transfer to it Continental Can's interest in SLW. Once incorporated, Continental Can would induce⁴¹⁴ Europemballage to make an offer to TDV shareholders. Europemballage purchased shares of TDV, increasing its holdings from 10 percent to 91 percent of TDV's capital.

The Commission decided that Continental Can abused its dominant market position on the German market through its majority owned subsidiary, SLW. Even though the Court of Justice annulled the Commission's decision,⁴¹⁵ they upheld the Commission's view that Article 86 applies to certain mergers.⁴¹⁶ During the proceedings before the Court of Justice, Continental Can averred that the Commission had no jurisdiction over Continental Can because it did not have a registered office in the EEC. Continental Can also asserted that the actions of its subsidiary could not be imputed to it and that the entity which committed the alleged abuse, Europemballage, was not the same as the entity which held the dominant position, SLW. In rejecting all of these arguments, the Court of Justice opined:

It is certain that Continental caused Europemballage to make a take-over bid to the shareholders of TDV in the Netherlands and made the necessary means available for this. . . . Community law is applicable to such an acquisition, which influences market conditions within the Community. The circumstance that Continental does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community law.⁴¹⁷

The Court imputed the dominant position of SLW to Continental Can. Thus, the Court set the tone for future mergers by stating that when an entity external to the EEC, having a subsidiary within the EEC with a dominant market position, acquires an EEC competitor of its EEC subsidiary, Article 86 applies as if a wholly intra-EEC merger had occurred.⁴¹⁸

The *Continental Can* decision resolved some issues concerning the acquisition of an EEC company by a non-EEC company. How-

413. Europemballage was to have offices in New York and Brussels.

414. Continental Can also provided funds for Europemballage to make an offer.

415. The Court of Justice annulled the Commission's decision due to lack of an adequate product market definition, *Europemballage Corporation and Continental Can Co. v. Commission*, Case No. 6/72, [1973] E.C.R. 215, 247-49.

416. The Court of Justice upheld the Commission's view that Article 86 applied to certain mergers. *Id.* at 245.

417. *Europemballage Corporation and Continental Can Co. v. Commission*, Case No. 6/72, [1973] E.C.R. 215, 1973 COMMON MKT. L. REV. at 199, ¶ 16.

418. See KLUWER, *supra* note 405, at 248.

ever, the decision did not address the situation in which the non-EEC acquiring company has no EEC branch or subsidiary. It is conceivable that such a company could have a dominant position in the EEC as a result of its exports to the EEC. However, in this scenario, there is no EEC subsidiary through which an abuse of a dominant market position could be imputed to the parent company. Realizing this potential loophole for harmful mergers, the Commission drafted a regulation, which has not yet been adopted by the Council, stating, in pertinent part:

Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, *at least one of which is established in the common market*, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market in so far as the concentration may affect trade between Member States.⁴¹⁹

Thus, it is likely that this loophole for non-EEC companies without EEC subsidiaries will be closed.

4.4.1.2 EEC Enterprise Acquires Non-EEC Enterprise

There are three basic scenarios in which an EEC enterprise could acquire a non-EEC enterprise.⁴²⁰ First, the non-EEC enterprise could have a competing subsidiary in the EEC. Second, the non-EEC enterprise may not have a subsidiary in the EEC but it may have substantial exports to the EEC. Third, the non-EEC enterprise may lack both a subsidiary in and exports to the EEC but may be a potential entrant to the EEC market.

In the first two scenarios, the Commission would have jurisdiction via the *Continental Can* decision. The Commission may then assert the dominant enterprise⁴²¹ was attempting to abuse its position in violation of Article 86. Finally, in the third scenario, the Commission could apply Article 86 because the *Continental Can* case covers mergers by dominant enterprises even if it only affects potential competition.⁴²²

419. Article 1(1) (emphasis added). The merger control regulation was first proposed in 1973, (O.J. EUR. COMM. (C 92/1) (10/31/73)) and, subsequently, amended proposals were put forward in 1982, 1984, and 1986 (O.J. EUR. COMM. (C 36/3) (2/12/82), O.J. EUR. COMM. (C 51) (2/23/84), and O.J. EUR. COMM. (C 324/5) (12/17/86) respectively). See generally KLUWER, *supra* note 405, at 280-93 (discussing the Commission's proposed merger control regulation and what the Commission may do if its proposal is not adopted).

420. *Id.* at 249.

421. The dominant enterprise could be either the EEC or non-EEC enterprise.

422. See KLUWER, *supra* note 405, at 249 (for an interpretation of *Continental Can*).

4.4.1.3 Merger of Two Non-EEC Enterprises

There are two basic situations in which mergers between two non-EEC enterprises could fall within the ambit of the EEC's anti-trust laws.⁴²³ First, each merging enterprise could have a subsidiary in the EEC, at least one of which has a dominant position. Second, neither enterprise may have a subsidiary in the EEC but they both may have substantial exports to the EEC.

The first scenario would permit the Commission to treat the merger as one taking place between the subsidiaries in the EEC.⁴²⁴ If the second scenario occurred, the Commission could claim jurisdiction over the merger but it is unlikely the Court of Justice would uphold such a decision.⁴²⁵ Additionally, the Commission would also face the potentially serious problem of how to enforce its order.⁴²⁶

4.4.2 Inadequacies of the EEC's Control of International Mergers

One might think that Article 86 is an effective way to police mergers. However, since *Continental Can*, the Commission has not condemned a single merger.⁴²⁷ Additionally, Continental Can's agreement with TDV resulted in such an obvious dominant market position that the Commission could not ignore it. Since *Continental Can*, the Commission has stated that as little as 40 percent is enough to establish a dominant market position,⁴²⁸ yet Article 86 is still unable to effectively control harmful mergers.⁴²⁹

It is generally agreed that Article 86 is a horrendous merger control tool.⁴³⁰ First, it can only be used where one enterprise al-

423. See *id.*

424. This is what the Commission did in *Philip Morris Inc./Rothmans International PLC*. Bull EC 3-1984 point 2.1.43. On Appeal, British American Tobacco Company Ltd. v. Commission and R.J. Reynolds Industries Inc. v. Commission (Joined Cases 142/84 and 156/84), judgment dated 11/17/87, not yet reported. This was an arrangement between a U.S. company and a South African company both having subsidiaries in the EEC. The Commission found the fact the parties had their corporate headquarters outside the EEC immaterial.

425. KLUWER, *supra* note 405, at 250.

426. *Id.*

427. Banks, *supra* note 406, at 273.

428. Commission's Tenth Report on Competition Policy, ¶ 150 (1981) (stating "[a] dominant position can generally be said to exist once a market share to the order of 40% to 45% is reached"). Additionally, in its current proposed merger control regulation, the Commission stated that if a merger accounts for less than 20 percent of the market, there is a rebuttable presumption that the merger is compatible with the Common Market. See Article 1, Commission's proposed merger control regulation, first proposed in 1973, (O.J. EUR. COMM. (C 92/1) (10/31/73), and subsequently amended in 1982, 1984, and 1986 (O.J. EUR. COMM. (C 36/3) (2/12/82), O.J. EUR. COMM. (C 51) (2/23/84), and O.J. EUR. COMM. (C 324/5) (12/17/86), respectively).

429. See Banks, *supra* note 406, at 273-74; KLUWER, *supra* note 405, at 251.

430. See *id.* at 289 (stating "Article 86 has proved to be hopelessly inadequate as an instrument of merger control"); Banks, *supra* note 406, at 273 (stating "it

ready possesses a dominant market position.⁴³¹ Second, it only polices those mergers that are so extreme they *eliminate* competition.⁴³² Third, it does not confer the power to block a merger before it occurs,⁴³³ although the Commission could block a merger through the use of interim measures, preserving the *status quo* pending a final decision.⁴³⁴ Fourth, it does not mandate prior notification of proposed mergers.⁴³⁵ Finally, it does not provide for exemptions for reasons not connected to competition,⁴³⁶ although the Commission's proposal does.⁴³⁷ Therefore, the end result of all of this is that advising clients on how to conduct mergers is a formidable task.⁴³⁸

cannot be disputed that as an instrument for merger control, the Article 86 weapon leaves much to be desired").

431. *Id.*

432. *See id.* at 274 (emphasis added).

433. *Id.* However, the problem of only being able to attack mergers after they occur rather than in the negotiation or planning stage is lessened to the extent that Article 85 applies to mergers (referring to the *Philips Morris/Rothmans* case). KLUWER, *supra* note 405, at 251.

434. The Court of Justice announced that:

The Commission must also be able, within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No. 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings. The powers which the Commission holds under Article 3(1) of Regulation No. 17 therefore include the power to take interim measures which are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist.

Camera Care Ltd. v. Commission, Case No. 792/79 R, [1980] ECR 119, ¶ 18, 1 COMMON MKT. L. REV. 334, ¶ 18. Thus, the Commission has the power to order interim measures in merger cases which appear likely to result in an infringement of Article 86. KLUWER, *supra* note 405, at 251. The Commission will grant interim measures if:

(a) there is a reasonably strong *prima facie* case that there has been a violation of the competition rules of the Treaty;

(b) interim measures are urgently needed; and

(c) the interim measures are needed to avoid a situation which is likely to cause serious and irreparable damage to the party seeking adoption of the measures, or the failure to adopt the measures would be intolerable to the public interest. *Id.* at 252.

435. Banks, *supra* note 406, at 274. Currently, only Italy is opposed to compulsory notification of mergers which would result in a concentration of the market above a certain threshold. KLUWER, *supra* note 405, at 282.

436. *Id.*

437. Mergers which are "indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community" are exempt from the Commission's proposed merger control regulation. Article 1(3) of the merger control regulation, first proposed in 1973, (O.J. EUR. COMM. (C 92/1) (10/31/73)) and, subsequently, amended proposals were put forward in 1982, 1984, and 1986 (O.J. EUR. COMM. (C 36/3) (2/12/82), O.J. EUR. COMM. (C 51) (2/23/84), and O.J. EUR. COMM. (C 324/5) (12/17/86) respectively)).

438. Banks, *supra* note 406, at 309.

4.5 Joint Ventures

A joint venture is, in essence, a partial merger.⁴³⁹ International joint ventures serve to spread the risks of trading or investing abroad, facilitate technology transfers, help overcome national restrictions on and prejudices against foreign investment, and allow for international economic integration and efficiency.⁴⁴⁰ Joint ventures may bring desirable economic results and thus, there is no duty to notify the Commission regarding any joint venture in which one partakes.⁴⁴¹ Although optional, notifying the Commission gives the participants to a joint venture certain advantages.⁴⁴² However, if possible, it is advantageous to structure your joint ventures to fall within the block exemption granted to research and development joint ventures.⁴⁴³

4.5.1 Research and Development Joint Ventures

Research and development joint ventures can enhance the technological competitiveness of the EEC. Previously, businesses were apprehensive to engage in R & D joint ventures. This is because national courts cannot grant an exemption under article 85(3).⁴⁴⁴ Thus, a joint venture successfully challenged in a national court under article 85(1) is void under article 85(2) and its ultimate validity cannot be determined until the Commission can rule on the possibility of an individual exemption under article 85(3).

4.5.1.1 Commission's Regulation of R & D Joint Ventures

In order to promote this technological competitiveness, on December 19, 1984, the Commission adopted its Regulation on R & D cooperation agreements.⁴⁴⁵ The Regulation basically provides that R & D joint ventures fall within the ambit of article 85(3). The

439. See *id.* at 255.

440. Davidow, *Special Antitrust Issues Raised by International Joint Ventures*, 54 ANTITRUST L.J. 1031, 1037 (1985).

441. See Hawk, *Counseling Partners in a U.S. - Foreign Joint Venture and U.S. Antitrust Jurisdiction in International Trade*, 54 ANTITRUST L.J. 1083 (1985).

442. The advantages of notification are: (1) the preclusion of fines from the period following notification; (2) legal certainty; and (3) the manifestation of a cooperative spirit. *Id.* See generally *id.* at 1083-87 (for a discussion of each of these advantages and an explanation of the circumstances in which notifying the Commission of a joint venture is wise).

443. *Id.* at 1085.

444. Regulation 17/62 (EEC) of the Council, J.O. COMM. EUR. (No. L 13) 204 (1962) art. 9(1) ("Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty").

445. Commission Regulation (EEC) No. 418/85 of Dec. 19, 1984 on the application of article 85(3) of the EEC Treaty to categories of R & D agreements, O.J. EUR. COMM. (No. L 53) 5 (1985) [hereinafter R & D block exemption].

immunity from article 85(1) granted by the R & D block exemption is effective from March 1, 1985 to December 31, 1997.⁴⁴⁶

4.5.1.1.1 Scope of the Regulation

The scope of the R & D block exemption is limited. First, the exemption only applies to integrated R & D joint ventures,⁴⁴⁷ applied research joint ventures,⁴⁴⁸ and basic research joint ventures.⁴⁴⁹ As defined, research and development excludes manufacturing.⁴⁵⁰ Second, once found to be within one of the above three categories, the R & D joint venture must also meet certain threshold tests to be eligible for the block exemption. The exemption is conditioned upon: the existence of a detailed program for the joint venture;⁴⁵¹ the parties having equal access to the results;⁴⁵² the free exploitation of the results, if relating to basic research;⁴⁵³ the limitation of joint exploitation to results that are "decisive" for application to manufacturing;⁴⁵⁴ the limitation that outside contractors who manufacture the joint venture's products supply them

446. *Id.* at art. 13.

447. An integrated R & D joint venture includes the dimension of developing research results into new products, goods, or processes. Recent Development, *Emerging International Antitrust Perspectives on Research and Development Joint Ventures*, 16 L. & POL'Y IN INT'L BUS. 1181, 1182 (1984) [hereinafter Recent Development]. Article 1(1) of the R & D block exemption grants exemptions to those joint ventures that undertake "joint research and development of products or processes and joint exploitation of the results of that research and development." R & D block exemption, *supra* note 445, at art. 1, sec. (1)(d). Exploitation of the results is defined to include manufacturing products or processes that result from R & D, or the licensing of the intellectual property rights of such products or processes. See R & D block exemption, *supra* note 445, at art. 2(d); Recent Development *supra*, at 1205 n.156.

448. An applied research joint venture focuses on research results with specific commercial applications. Recent Development, *supra* note 447, at 1182. Article 1(1) of the R & D block exemption grants exemptions to those joint ventures that undertake "joint exploitation of the results of research and development of products and processes jointly carried out pursuant to a prior agreement between the same undertakings." R & D block exemption, *supra* note 445, at § (1)(b).

449. A basic research joint venture seeks to gain knowledge from knowledge. Recent Development, *supra* note 447, at 1182. Article 1(1) of the R & D block exemption grants exemptions to those joint ventures that undertake "joint research and development of products or processes excluding joint exploitation of the results, in so far as such agreements fall within the scope of Article 85(1)." *Id.* at 1205. "Exploitation of the results is defined to include manufacturing products or processes that result from R & D, or licensing of intellectual property rights relative to such products or processes." *Id.* at 1205 n.156. See also R & D block exemption, *supra* note 445, at art. 1(d).

450. R & D block exemption, *supra* note 445, at art. 2(a).

451. *Id.* at art. 2(a).

452. *Id.* at art. 2(b).

453. *Id.* at art. 2(c).

454. *Id.* at art. 2(d).

only to joint venture participants;⁴⁵⁵ and the requirement that non-joint venture manufacturers have requirements contracts with the joint venture participants.⁴⁵⁶ Once the agreement has met these threshold requirements, the portions of the agreement that would otherwise restrict competition are exempt provided they are enumerated in the R & D block exemption.⁴⁵⁷ However, research and development joint ventures containing obligatory clauses that are not enumerated in the R & D block exemption can still receive exempt status provided proper written notification is sent to the Commission and the Commission does not oppose the exemption within six months.⁴⁵⁸

4.5.1.1.2 Duration of the Regulation

The duration of the R & D block exemption depends on the type of joint venture involved. If the joint venture participants are not competing manufacturers of products capable of being improved or replaced by products that result from the research and development, a block exemption as to basic and applied research lasts for the duration of the joint venture agreement.⁴⁵⁹ However, if the joint venture exploits the results of the research and development, then the manufacturing of the products are exempt from article 85(1) for a period of five years from the time the products are first marketed in the EEC.⁴⁶⁰ If the parties to a joint venture are competitors and the participants' market share is less than 20 per-

455. R & D block exemption, *supra* note 445, at art. 2(e).

456. *Id.* at art. 2(f).

457. *Id.* at art. 4. Clauses which provide that: the parties will not undertake independent research; the parties will not contract with third parties to undertake independent research; exclusive dealing arrangements for manufacture exist; territorial restrictions on manufacturing exist; manufacture of products is restricted to specific technical fields within the scope of the joint venture; territorial marketing restrictions for a period of up to five years exist; and cross-licensing agreements between the parties exist are exempt from the ambit of article 85(1). *Id.*

458. *See id.* at art. 7(1), 7(3). If a Member State opposes the exemption of an agreement's clause that is not specifically enumerated, the Commission must oppose the exemption. *Id.* at art. 7(5). The Commission may withdraw its opposition at any time. *Id.* at art. 7(6). However, if the Commission's opposition was forced by a Member State requesting the opposition, the Commission must consult the Advisory Committee on Restrictive Practices and Dominant Positions before withdrawing opposition. *Id.* If the Commission withdraws an opposition, the exemption applies: from the date of notification, if the opposition is withdrawn because the participants have shown the Commission that the joint venture meets the conditions of article 85(3); or from the date of amendment, if the opposition is withdrawn because the participants have amended the agreement so that the conditions of article 85(3) are met. *See id.* at arts. 7(7), 7(8).

459. *Id.* at art. 3(1).

460. R & D block exemption, *supra* note 445, at art. 3(1).

cent at the time the agreement was signed,⁴⁶¹ the R & D block exemption's duration is the length of the agreement.

4.5.1.1.3 Miscellaneous Provisions

The R & D block exemption contains miscellaneous provisions which may prove important. First, an escape clause provides that the Commission may withdraw the exemption's protective shield where the agreement is incompatible with the spirit of article 85(3).⁴⁶² Second, provided the Commission does not object, any R & D joint venture which previously received a negative clearance can receive an exemption by merely communicating such a desire to the Commission.⁴⁶³ Finally, trade secrets obtained by the Commission in connection with a decision whether to oppose an exemption will not be disclosed.⁴⁶⁴

4.5.1.1.4 Implications of the R & D Regulation

United States entities desiring to implement R & D joint ventures with EEC entities have the choice of incorporating within the U.S. or the EEC. Under U.S. legislative reform,⁴⁶⁵ Congress sought to reduce the business community's uncertainty concerning the application of antitrust laws to R & D joint ventures.⁴⁶⁶ To ensure certainty, the legislation explicitly provides that potential antitrust challenges to R & D joint ventures will be adjudicated under the rule of reason.⁴⁶⁷ Although this seems to provide multinational R

461. See Recent Development, *supra* note 447, at 1207 n.170, 1216 n.227 and accompanying text (explaining that the 20 percent limit might actually be a condition precedent to an exemption).

462. R & D block exemption, *supra* note 445, at art. 10. Activities which are particularly suspect to withdrawal of an exemption are: substantial restrictions on R & D activities within a field; restrictions on the access of third parties to the market for joint venture products; failure of the joint venture to develop products, without an "objectively valid" reason; and the production by the joint venture that have no substitutes in the Common Market. *Id.*

463. *Id.* at art. 7(4).

464. *Id.* at art. 12.

465. On October 11, 1984, President Reagan signed into law the National Cooperative Research Act of 1984. Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 42 U.S.C. § 4301 et seq.). The National Cooperative Research Act of 1984 "provides explicit congressional recognition of the fact that joint R & D activity will generally encourage competition, and that such competition should not be inhibited by unclear antitrust standards." S. Rep. No. 427, 98th Cong., 2d Sess. 3 (1984).

466. *Id.* at 4.

467. Section 3 of the National Cooperative Research Act of 1984, *supra* note 465, provides:

In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person in making or performing a contract to carry out a joint research and development venture shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition,

& D joint ventures with no new incentive to incorporate in the U.S.,⁴⁶⁸ the legislation has its benefits. A multinational joint venture is shielded from treble damage awards in private antitrust challenges provided it discloses itself to the Department of Justice and the Federal Trade Commission.⁴⁶⁹

On the other hand, incorporating in the EEC has virtues also. Under EEC law, those agreements meeting the EEC's R & D block exemption safe harbor standards are exempt from challenges under article 85(1).⁴⁷⁰ Thus, the agreements are automatically exempt from the Commission's scrutiny and are not even subject to a rule of reason type analysis. Additionally, this change removes the burden of having to seek an individual exemption from the Commission. A further advantage is that the multinational R & D joint venture is no longer in a state of limbo if challenged in a national court while awaiting an individual exemption decision from the Commission.

Multinational R & D joint venture agreements which cannot meet the safe harbor standards are afforded no advantage by the R & D block exemption.⁴⁷¹ Joint ventures with competitors as participants that do not meet the 20 percent market test remain suspect to article 85(1) challenges and must prove that they meet article 85(3)'s exemption criteria if challenged. Thus, the multinational R & D joint venture incorporating in the EEC and desiring the block exemption must undergo Commission scrutiny, making EEC incorporation viable only for those agreements meeting the R & D block exemption's safe harbor standards.⁴⁷² This is a deterrent to incorporating in the EEC.⁴⁷³

In sum, the legislation of both Congress and the Commission reflect compromises. Although Congress has disclosure requirements, they did offer protection from treble damages in private antitrust challenges. The Commission compromised in a different way by conditioning the availability of a block exemption upon the

including, but not limited to, effects on competition in properly defined, relevant research and development markets.

Id.

468. See Recent Development, *supra* note 447, at 1220-21 (explaining the application of the rule of reason to antitrust challenges to R & D joint ventures does not represent a significant change from the past).

469. *Id.* at 1221.

470. The agreements could still be challenged as violative of article 86, which prohibits the abuse of a dominant market position.

471. Recent Development, *supra* note 447, at 1221.

472. *Id.* at 1222. The R & D joint ventures this would typically include are those amongst non-competitors (firms expanding into new fields) and those amongst competitors whose total market share in the Common Market does not exceed 20 percent. *Id.*

473. *Id.*

competitive status of the agreement's participants. Thus, the parties to each particular agreement must weigh the pros and cons of incorporating in both locations.

4.6 Overall Business Implications

Companies should get a foothold in the EEC as soon as possible and hope that any unification of national requirements concerning the formation of corporations is not retroactive.⁴⁷⁴ Product oriented companies should ensure they are "established" and service oriented companies should ensure they meet the requirements to be able to provide their services throughout the EEC.

Direct foreign investment is a viable method for penetrating the EEC market for those companies not concerned with the potential effects of insider trading. However, there are other considerations that must be weighed.⁴⁷⁵

Mergers are another viable method for penetrating the EEC's market. Companies partaking in mergers should be wary of their vulnerability to the EEC's antitrust laws, which apparently have worldwide reach. This includes article 86, which prohibits the abuse of a dominant market position, and to a certain extent article 85.⁴⁷⁶ Also, mergers require no notification, but that may soon change if the Commission's proposal is adopted.⁴⁷⁷ Potential parties to a merger should identify which of the three categories of international mergers⁴⁷⁸ they fit into and work from there.

Joint ventures should be strongly considered, particularly in the R & D field due to the Commission's Regulation in this area⁴⁷⁹ and recent U.S. legislation.⁴⁸⁰ Decisions with respect to R & D joint ventures will center around where to incorporate. In general, those R & D joint ventures that can satisfy the safe harbor standards of the EEC's R & D block exemption are wise to incorporate in the EEC. Those that cannot meet the safe harbor standards should in-

474. See *supra* note 24 and accompanying text for an explanation of how current and potential legislation could deny EEC access to foreign controlled companies.

475. See generally *supra* section 4.3 for a discussion of direct foreign investment.

476. See *supra* note 407 regarding the *Philip Morris/Rothmans* case and the applicability of article 85 to mergers.

477. See generally *supra* section 4.4.2 for a discussion of the inadequacies of the EEC's merger controls.

478. See *supra* sections 4.4.1.1, 4.4.1.2, and 4.4.1.3 for a discussion of each type of international merger a non-EEC business may get involved with.

479. See generally *supra* section 4.5.1.1 for a discussion of the Commission's regulation of R & D enterprises.

480. See generally *supra* section 4.5.1.1.4 for a discussion of the implications of R & D regulations.

corporate in the U.S. and take advantage of the legislative shield from treble damages.

5. CONCLUSION

The EEC will become a reality on December 31, 1992, or shortly thereafter. Many corporations have already entered the common market. These companies should vigorously protect their intellectual property rights and other rights within the EEC. Those corporations which have not entered the common market should consider doing so. Failure to enter the market soon may diminish corporate opportunities within the market. Corporations seeking to enter the market should not only consider different methods of entry, but also how to protect products and services once they are being distributed throughout the EEC.

The EEC may be a nightmare for those corporations ill prepared to conduct or protect business according to EEC law. However, the EEC represents a great market for those who do know how to conduct and protect their business according to EEC law. A knowledge of EEC law should not only help to keep one abreast of competitors, it should help one to surpass competitors. Plan now for the future.

APPENDIX A

THE PROCESS OF COMMUNITY LEGISLATION

