1. The Drafting of Article 81 EC

The drafting history of Article 81 EC at the end of the 1950s is interesting since it reveals how the cartel prohibition on cartels caused a clash between the legal cultures of France and of Germany.

1.1. THE SITUATION IN GERMANY

Germany had enacted cartel laws as early as 1920. Although those laws did not make cartels unlawful, they did prohibit the abuse of cartel agreements (*supra*). In the early 1940s, partly as a consequence of this economic policy choice, Germany's economy had been organised on the basis of cartels rather than competition (*supra*).

At the end of the Second World War, the Occupying Powers enacted a law on decartelisation (Rasch, 1955, p. 5). The German government subsequently established a Study Commission to draft laws to safeguard competition. The Study Commission finished its work just as the discussion on the antitrust rules of the Treaty of Rome was taking place. This caused certain difficulties for the German representatives in the Treaty drafting group. Those difficulties have only recently come to light following the publication of the relevant official documents (see Schulze and Hoeren, 2000).

In order to understand the position defended by the Federal Republic of Germany during the negotiations on the Treaty of Rome, one needs to bear in mind that there was a fierce debate in Germany on the issue of which cartel legislation model should be adopted. One school of thought advocated the *Verbotsprinzip* (principle of prohibition) whereas another favoured the *Missbrauchsprinzip* (principle of abuse).

The first group, influenced by the political and economic *débâcle* of Nazi Germany, maintained that in order to safeguard individuals' rights of economic initiative it was necessary to prohibit any kind of horizontal agreement between undertakings (that is, cartels). Furthermore, that school of thought contended that the dispersion of economic power and a generalised recognition of the right of economic initiative would promote social justice (see Heinemann, 1989). From a legal point of view, according to this approach, anticompetitive agreements between companies would have no legal force. They would acquire legal force only after the agreement had been notified to a particular regulatory body (Böhm, 1956, p. 173).

By contrast, the supporters of the principle of abuse advocated laws that would prohibit cartels and deprive them of legal effect only after it had been ascertained that the agreement was illegal (Isay, 1955, p. 339).

The principle that was adopted in the 1957 German Law on competition was the principle of prohibition, subject to certain specific exemptions (Rasch, 1955). Regulation of vertical agreements fell under a different law (Article 15 and following of the *GWB*) which was not based on the principle of prohibition. The German antitrust law was approved in 1957 and entered into force on 1 January 1958, the date of the entry into force of the Treaty of Rome including its antitrust provisions.

Consequently, during the drafting of the Treaty of Rome, the Federal Republic of Germany did not have a final version of its own antitrust laws at its disposal. It could not therefore put forward a clear competition policy regarding the assessment of agreements between undertakings.

1.2. THE SITUATION IN FRANCE

As early as the 1920s, France had enacted laws regulating agreements between undertakings (see Plaisant and Lassier, 1956). At the beginning of the 1950s, it established a committee to reform Article 419 of the 1926 Penal Code, which related to agreements among firms, since this provision had proved ineffective and difficult to enforce. The Draft Law of 10 July 1952 was probably influenced by the European model dating from the first half of the 20th century, which aimed to control cartels rather than prohibit them (Hamel and Lagarde, 1954, p. 280). That model presupposed that cartel agreements between companies were not necessarily harmful for competition and that a distinction therefore had to be made between good and bad agreements (Salandra, 1934, p. 28).

Article 1 of Draft Law 9951 provided that, in principle, agreements between companies aiming to improve production and distribution in the general interest were lawful (Del Marmol, 1959, p. 86). Article 2 of Draft Law 9951 prohibited only behaviour aimed at creating monopolies or 'coalitions' or limiting or eliminating unfair competition.

The proposal was radically amended.

In its final form, Article 59 *bis* of the Decree of 9 August 1953 regulated the '*délit de coalition*', thereby expressly prohibiting all agreements the object or effect of which was to distort competition. Only two categories of agreements falling within the scope of the prohibition provided for by Article 59 *bis* were exempted:[1]

[1] In particular, Article 59 *bis* of the Decree of 9 August 1953 on the maintenance and re-

- agreements provided for by laws or regulations;[2] and
- agreements which brought about specific advantages for competition.

This meant that as early as 1952, well before the antitrust provisions in the Treaty of Rome were negotiated, France had enacted laws regulating anticompetitive agreements. What is more, those laws expressed a clear policy choice as to how agreements between undertakings were to be legally appraised.

1.3. THE DRAFTING OF ARTICLE 81 EC

During the drafting of the antitrust rules of the Treaty of Rome, the French representatives proposed a rule on the prohibition of cartels which would harmonise the national laws on price discrimination (Schulze and Hoeren, 2000, doc. 51). As far as anticompetitive practices were concerned, the proposed rule would contain the same principles as Articles 59 *bis* and 59 *ter* of the French decree of 9 August 1953 (ibid. doc. 51). This aspect of the proposal drew a distinction between good and bad agreements. This meant that anticompetitive agreements were prohibited, but specific agreements which had a beneficial effect on competition could benefit from an exemption.

By contrast, the German representatives had difficulty in putting forward a clear proposal. Moreover, since it was not yet clear how their national law would be formulated, they feared that the drafting of the Community rules on

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establishment of free competition, which regulated the délit de coalition, provided as follows: 'Sont prohibées, sous réserve des dispositions de l'article 59 *ter*, toutes les actions concertées, conventions, ententes expresses ou tacites, ou coalitions sous quelque forme et pour quelque cause que ce soit, allant pour objet ou pouvant avoir pour effet d'entraver le plein exercice de la concurrence en faisant obstacle à l'abaissement des prix de revient ou de vente ou en favorisant une hausse artificielle des prix'.

'Tout engagement ou convention se rapportant à une pratique ainsi prohibée est nul de plein droit'.

'Cette nullité peut être invoquée par les parties et par les tiers, elle ne peut être opposée aux tiers par les orties; elle est éventuellement constatée par les tribunaux de droit commun à qui l'avis de la Commission, s'il en est intervenu un doit être communiqué'.

Article 59 *ter* provided as follows: 'Ne sont pas visées par les dispositions de l'article 59 *bis*, les actions concertées, conventions ou ententes':

'1. Qui résultent de l'application d'un texte législatif ou réglementaire';

'2. Dont les auteurs seront en mesure de justifier qu'elles ont pour effet d'améliorer et d'étendre les débouchés de la production, ou d'assurer le développement du progrès économique par la rationalisation et la spécialisation'.

[2] These became well known to EC law in that they were relevant to a number of judgments in the 1990s. See *Bureau National Interprofessionnel du Cognac v. Yves Aubert*, Case 136/86, E.C.R. 1987, p. 4789; *BNIC v. Clair*, Case 123/83, E.C.R. 1985, p. 391.

cartels might conflict with it. It was in any event evident that the Treaty rules would have a considerable influence on their domestic law (ibid. doc. 62). After initial hesitation, the German representatives proposed that the principle of prohibition without exception should be accepted. They claimed that this was an indivisible proposal which could not be tampered with (ibid. p. xxvii).

When confronted with this proposal, the representatives of France and the other countries hardened their own positions, which led to a stalemate (ibid. p. xxvii). Official documents indicate that the German representatives themselves declared that 'it is impossible to impose at European level a principle (i.e. the principle of prohibition) which is the subject of discussions in Germany itself' (ibid., doc. 65).

The situation was resolved by Hans von der Groeben, the German chairman of the subgroup dealing with competition questions. He had been one of the authors of the Spaak Report, had close ties with the Freiburg Ordoliberal School and was later to become the first Director General for Competition in the Commission.

The compromise which von der Groeben proposed – and which was accepted by the parties – was a provision which prohibited anticompetitive agreements between undertakings (now Article 81(1)). It nevertheless provided for an exception to that principle and set out the conditions which must be met before the prohibition could be declared inapplicable (Article 81(3) EC) (ibid., doc. xxxi). Moreover, it was provided that 'any agreements or decisions prohibited pursuant to this Article shall be automatically void' (Article 81(2)), as was the case with Article 53 *bis* of the French decree of 1953 and the German *Notverordnung* of 1931.

In order to break the stalemate, Von der Groeben proposed to postpone the controversial decision as to how the exception provided for by Article 81(3) should be implemented. This decision would be taken in a regulation which would be enacted after the Treaty of Rome had been signed. To that end, on 28 November 1956 a draft article was prepared. After being redrafted a number of times, it became Article 83(2)(e) EC (ibid, p. xxxi).

By virtue of that compromise solution, Articles 84 and 85 EC provided that 'until the entry into force of the provisions adopted in pursuance of Article 83, the authorities of the Member States' would apply Article 81(1) and Article 81(3) EC 'in accordance with the law of their country'. In this way, the deployment of the national authorities was justified directly by provisions in the Treaty. Thus, by virtue of Article 84 EC the national authorities were competent to apply the exception provided for by Article 81(3) 'in accordance with the law of their country'. Under the terms of the compromise, the choice of whether to apply Article 81(3) according to the *Verbotsprinzip* of the *Missbrauchsprinzip* was temporarily left up to the

Member States (see Spengler (1957) as to the positions taken by the Dutch government and the French and Italian parliaments in 1957).

2. The Implementation of Article 81 EC

Although Regulation 17/62, first Regulation implementing Articles 85 and 86 of the Treaty, is no longer in force, it is essential to grasp how that regulation implemented Article 81(3) in order properly to understand the *modus operandi* of Regulation 1/03.

2.1. IMPLEMENTATION OF ARTICLE 81 EC BY REGULATION 17/62

In 1961, the drafting of the text of the first regulation adopted pursuant to Article 83 EC proved to be the subject of lively discussions because, *inter alia*, the French and the Germans continued to apply different principles to the assessment of cartels.

Regarding the formulation of the rules applying Article 81(3) EC, the German representatives claimed that Article 81(3) should be applied according to the principle of prohibition which had been introduced in the *GWB* in 1957 (Deringer, 1965, p. 9).

The French representatives, in line with the decree of 1953, supported the application of Article 81(3) according to the principle of abuse. This would entail the validity of agreements concluded by the parties until such time as an infringement of Article 81 EC had been assessed (ibid., p. 9).

Arved Derringer, the German rapporteur of the regulation, helped with the difficult task of finding a compromise between the different positions.

Under the terms of the compromise, undertakings wishing to obtain an exemption pursuant to Article 81(3) EC were required to notify agreements to a single body. By virtue of Article 9(1) of the Regulation, that body was the Commission (ibid., p. 10). This is what had been requested by the Federal Republic of Germany. This provision was flanked by the consequence that, if the request for an exemption was rejected, the agreement would be unlawful *ab initio*.[1] However, even if the agreement turned out to be illegal, Article 15(5) Regulation 17/62 provided that notification prevented fines from being imposed with regard to the period between notification and the

[1] See *Brasserie de Haecht v. Wilkin-Janssen*, Case 48/72, E.C.R. 1973, p. 77, § 25.

Commission's decision on the substance.

Furthermore, Regulation 17/62 provided, as France had requested, that existing agreements were to benefit from temporary validity until the Commission had taken a decision, irrespective of whether or not they had been notified. However, if the agreement was not notified and was prohibited by virtue of Article 81(1) EC, it would be illegal *ex tunc*, without any possibility of its being evaluated under Article 81(3) EC.

The compromise solution struck a reasonable balance between the French and German principles on how to implement Article 81. Whether the final approach would be closer to the French or German system was thus dependent on the substantive application of Article 81(1) to determine.

A strict interpretation of the prohibition established by Article 81(1) would effectively require companies to notify agreements both in order to request an exemption under Article 81(3) and to ensure immunity from fines in case the exemption was refused. Such an interpretation would therefore be tantamount to acceptance of the German principle.

A less strict interpretation of the prohibition established by Article 81(1) would represent less of an incentive to notify agreements to the Commission and would hence give rise to a system more in line with the French principle of abuse.

In fact, the Commission's practice tended towards a strict interpretation of Article 81(1) which potentially prohibited all agreements. This, in turn, broadened the potential application of Article 81(3). This practice effectively transformed Article 81(1) into a rule embodying the principle of prohibition. This meant that during the first 40 years of application of Article 81(1) (that is, until the end of the 1990s) there was a practical need, albeit not a formal requirement, to notify agreements to the Commission. Notification at least ensured that agreements would be effective for a certain time and prevented fines being imposed if the request for an exemption was rejected and the agreement thus turned out to be void by virtue of Article 81(2) EC. This approach led, at Community level, to a system similar to what was provided for by the German antitrust system. This is not a coincidence, since the Commission's practice was indeed guided by German influence, in particular that of the Freiburg Ordoliberal School.

The main reason for this influence was that in 1960 Walter Hallstein, the then President of the Commission, had been instrumental in appointing Ernst-Joachim Mestmäcker as special competition adviser to the Commission. Professor Mestmäcker was a pupil of Franz Böhm, one of the joint founders with Walter Eucken of the Freiburg School. The appointment reflected the fact that the Commission needed to create a Community competition policy (Klug, 1963, p. 171). Professor Mestmäcker kept his position from 1960 to

1970 and brought the influence of the German school of thought to bear on the interpretation of both Articles 81 and 82 EC (Zacher, 1996, p. 24).

Implementation of Article 81

3. The Drafting of Article 82 EC

The Spaak Report foresaw that the EC Treaty would include a rule prohibiting monopolistic behaviour by undertakings. Official documents show that Article 82 EC proved less difficult to draft than Article 81. This is probably because, at that time, there were no corresponding rules in the legal systems of the six founding Member States. Germany was the only Member State that had felt it necessary to insert a provision on unilateral conduct by undertakings in the law on competition (Article 22 *GWB*).

During the drafting of this provision in the Treaty of Rome, discussion concentrated mainly on how the power of individual undertakings should be limited and on whether provision should be made for the control of concentrations, as had been done in the ECSC Treaty (see Schulze and Hoeren, 2000). In the Treaty of Rome, it was ultimately decided to insert a provision dealing with the prohibition of monopolistic behaviour by undertakings. Article 82 EC strikes at the unilateral behaviour of one or more undertakings in that it prohibits the abuse of a dominant position within the common market or in a substantial part of it in so far as the abuse may affect trade between the Member States.

This prohibition operated according to the principle of abuse and no specific provision was made for merger control (*infra*). In contrast to what was provided for with respect to Article 81 EC, the Treaty allowed no exemptions from the application of Article 82.

4. The Implementation of Article 82 EC

Unlike Article 81(3) EC, Article 82 does not require any implementing measures since, as the case law has recognised, it fulfils all the conditions necessary for it to have direct effect (*infra*). Given these factors, the provisions in Regulation 1/03 relating to Article 82 are similar to those in Regulation 17/62.

Article 1 of Regulation 17/62, entitled 'Basic provision', provides in pertinent part that 'the abuse of a dominant position in the market, as prohibited by Article 82 of the Treaty, shall be prohibited, no prior decision to that effect being required'.

Article 1(3) of Regulation 1/03 reads as follows: 'The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required'.

Unlike Article 81(3) EC, Article 82 does not make any provision for granting exemption from the prohibition that it establishes. For that reason, the Community legislature has no competence to enact legislation exempting particular types of conduct from the application of Article 82.