

## THE ENFORCEMENT OF COMPETITION LAW AND ANTI-DUMPING LAW WITHIN THE EUROPEAN COMMUNITY

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### 1. Introduction

Australia's trade and economic relations with the European Community (EC),<sup>1</sup> have, for a number of years, been characterised by tensions and ill-feeling. Much of the blame for the crisis in Australian farming has been placed on the EC with its subsidised exports which are alleged to be competing unfairly in markets that have traditionally been supplied by Australia.<sup>2</sup> The tensions and ill-feeling came to a head in 1979 when Australia invoked the complaints procedure within the framework of the General Agreement on Tariffs and Trade (GATT) with respect to EC refunds on sugar exports.<sup>3</sup> For its part the EC maintains that Australia has adopted excessively protectionist attitudes on, for instance, imports of automobiles and shoes, using Article XIX: GATT as a pretext. The fact remains that each side needs the other. Australia's vital role as a supplier of industrial raw materials such as coal, iron ore and uranium to the EC is well recognized in Brussels and one would expect the EC to continue to be the second largest market (after Japan) for Australian exports for sometime to come.

It is not, however, the purpose of this article to assess the future prospects for trade relations between Australia and the EC. That subject has been dealt with elsewhere.<sup>4</sup> Rather it is the purpose of this article to examine how trade is regulated within the Common Market. It will be necessary, first, to examine the legislative process within the EC. Since there are a number of useful introductory texts on the institutions and legislative processes within the EC,<sup>5</sup> this aspect will only be dealt with briefly. The main part of the article will be concerned with the scope and application of those areas of EC law most likely to be of concern to Australian undertakings trading within the Common Market, namely competition law and anti-dumping law. Particular attention will be paid to the procedures adopted by the EC Commission in enforcing both competition rules and anti-dumping rules.

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1. There are, in fact, three European Communities, namely, the European Coal and Steel Community, which came into being in 1952, the European Economic Community (colloquially known as the Common Market) and the European Atomic Energy Community (colloquially known as Euratom), which both came into being in 1958.
2. See, for example, the editorial in *The Australian* of 26 April 1984.
3. The GATT Panel held that the EC sugar marketing system constituted a form of subsidy which was subject to Article XVI: 1 GATT. However, export subsidies for agricultural products are permitted provided these subsidies are not used to obtain more than an equitable share of world markets: Article XVI: 3 GATT. In the light of all the circumstances the Panel was not in a position to reach a definite conclusion that the increased EC share had resulted in the EC 'having more than an equitable share of world export trade in that product'. For a report of the Panel's findings, see *Re Refunds of Exports of Sugar: Australia v. The European Communities* [1980] 2 C.M.L.R. 238.
4. See, for example, A. Burnett, *Australia and the European Communities in the 1980's* (1983).
5. The following standard works may be found useful: P.S.R.F. Mathijsen, *A Guide to European Community Law* (1975); D. Lasok and J.W. Bridge, *An Introduction to the Law and Institutions of the European Communities* (1976); and T.C. Hartley, *The Foundations of European Community Law* (1981).

## 2. The Legislative Process Within the European Community

It is generally recognized that EC law is a new category of law, neither national nor international, creating an autonomous legal order. The basic rules are contained in three Treaties<sup>6</sup> which together comprise so-called 'primary' Community law, whereas regulations, directives, decisions and other legal instruments enacted on the basis of the Treaties and implementing their objectives are regarded as 'secondary' Community law. Community law is separate from the national laws of the Member States although it is applied by the national courts. The Member States of the EC have like the Australian States limited their sovereignty within a restricted area and have no power to amend or repeal Community law. In the event of a conflict Community law overrides national law, and its interpretation, in the last resort, lies within the exclusive jurisdiction of the Court of Justice of the European Communities (European Court).

Primary as well as secondary Community law contains legal rules which, in addition to imposing obligations upon Member States, confers rights and, in some cases, imposes obligations on individuals which are enforceable at law. An abundance of scholarly literature exists which examines this concept of 'direct effect' and it is unnecessary here to attempt any detailed analysis.<sup>7</sup>

There are three principal centres of decision-making in the Community — the Council of Ministers, the Commission and the European Parliament. Legislation is the responsibility of the Council of the European Communities (to give it its official title) which consists of delegates of the Member States, each State being represented by a member of its government. Most matters are decided by a 'qualified majority' vote as defined in Article 148(2) of the EEC Treaty. However, since 1966 a constitutional convention (the so-called 'Luxembourg Compromise') has operated according to the terms of which, majority voting should not be used if the vital interests of one or more Member States are at stake, but rather, negotiations should continue until a compromise acceptable to all is reached. The Council represents the national interests and it attempts to produce a synthesis of ten different national positions.

The other main decision-making centre of the EC is the Commission. It is a body of fourteen people, two each appointed by the governments of the four largest countries (the Federal Republic of Germany, France, Italy and the United Kingdom) and one each appointed from the smaller countries (Belgium, Denmark, Greece, Ireland, Luxembourg and the Netherlands). The Commissioners are totally uninstructed by their governments and take decisions on a supranational or European basis. It is customary for portfolios to be allocated to Commissioners who are assisted by a large support staff based in Brussels. Each Commissioner's portfolio covers a number of departments known as Directorates-General. Directorates-General are subdivided into Directorates which, in turn, are further subdivided into Divisions. The Commission takes decisions by a simple majority vote.

It can be seen, therefore, that in the legislative process there are two main forces embodied in two different institutions: the European interest embodied in the Commission and the various national interests embodied in the Council. The Commission is responsible for initiating legislation. Commission proposals for new legislation are sent to the Council, which in turn sends them to the European Parliament. Under the Treaties, the Parliament exists to provide an element of democratic accountability for the decision-making processes of the Community. It exists to be consulted on a number of issues; it is *not* there to legislate.

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6. The full text of the Treaty establishing the European Economic Community is to be found in Vol. BII of Sweet & Maxwell's *Encyclopedia of European Community Law*. This Treaty is also known as the Treaty of Rome and is the only one which will be examined here.

7. For a consideration of the concept, see J.A. Winter, "Direct applicability and direct effect: two distinct and different concepts in Community law" (1972) 9 *C.M.L. Rev.* 425 and T.C. Hartley, *supra* n.5, Chap.7.

It is clearly lacking a firm place in the institutional structure of the Community and this absence of a real role perhaps accounts for the apathetic turnout by voters in the recent European elections.<sup>8</sup> It has been suggested that if the Commission were to be appointed by the Parliament this would add a genuine element of democratic control and accountability to the institutions of the EC;<sup>9</sup> however, this would require amendments to the Treaties themselves, which in the present political climate seems unlikely.

Once the opinion of the Parliament has been received the proposal, which may at this stage be amended by the Commission, is examined by a working group of national officials. Finally, the proposal together with the report of this working group goes to the Council for final approval.

According to one recent report there are some 500 measures pending before the Council at the present time.<sup>10</sup> One such measure attracting a lot of attention both within and outside the Community is the so-called 'Vredeling' Directive (named after the former Commissioner for Employment and Social Affairs). According to the terms of the amended proposal recently submitted by the Commission to the Council,<sup>11</sup> at least once a year, the management of a parent undertaking in a group shall be obliged to forward general but explicit information giving a clear picture of the activities of the parent undertaking as a whole, to the management of each of its subsidiaries in the Community, with a view to the communication of this information to the employees' representatives.<sup>12</sup> Furthermore, where the management of a parent company proposes to take a decision concerning the whole or a major part of the parent or of a subsidiary in the Community which is liable to have serious consequences for the interests of the employees of its subsidiaries in the Community (for example, a plant closure), it shall be required to forward precise information to the management of each subsidiary concerned in good time before the final decision is taken with a view to the communication of this information to the employees' representatives.<sup>13</sup>

The Directive if it takes effect in its present form would only apply to an Australian corporation having in the Community one or more establishments when a total of at least 1,000 workers is employed in the Community by the undertaking as a whole.

### 3. The Enforcement of Competition Law and Anti-Dumping Law by the Commission

The EC Commission is not only responsible for initiating legislation; it is also responsible for ensuring that Member States and individuals comply with Community law. In this part attention will focus on the enforcement of two areas of Community law that are likely to be of interest to Australian undertakings trading in the Common Market, namely competition law and anti-dumping law.

8. At 60% the average European turnout was 2% lower than in 1979. In the United Kingdom the turnout was only 32%. For a report and analysis of the European elections see *The Economist* 23 June 1984, at 31.

9. R. Dahrendorf, "Law and Politics in the European Community", in *The Lord Fletcher Lectures 1979-1982* (1983), at 28. For an examination of two different proposals for the restructuring of Community institutions see (1983) 8 *E.L. Rev.* 394. The Draft Treaty on European Union proposes a bi-cameral EC legislature with the Parliament as its lower house and the Council of Ministers as a 'senate' representing national interests. The Commission would be transformed into a government responsible to the Parliament.

10. *The Economist*, *supra* n.8, at 29.

11. The full text of this amended proposal is to be found at [1984] 1 C.M.L.R. 732. It would seem that the U.K. is likely to veto the revised draft now awaiting a decision of the Council. See *European Law Letter*, Oct., 1983.

12. Article 3, Draft Vredeling Directive.

13. Article 4, Draft Vredeling Directive.

### (a) The Competition Rules

The main principles of these rules can be stated in a few sentences. Article 85(1) of the EEC Treaty prohibits agreements between undertakings whose object or effect is a restriction or distortion of competition within the Common Market and which may affect trade between Member States. Article 85(3) provides that Article 85(1) may be declared to be inapplicable to certain agreements — broadly, those which are in the public interest and are not unduly restrictive. Article 86 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the Common Market or a substantial part of it in so far as it may affect trade between Member States. These provisions are roughly the equivalents of sections 45 and 46 of the *Trade Practices Act* 1974 (Cth.) They are enforced by the Competition Department of the Commission, Directorate-General IV (D.G. IV).

The primary Regulation implementing Articles 85 and 86, Council Regulation 17/62<sup>14</sup> came in to force on 13 March 1962. By virtue of this Regulation, the Commission may order an undertaking to terminate an infringement of the competition rules and for a deliberate or negligent infringement may impose fines of up to ten percent of an undertaking's turnover for the previous year. The proceedings leading to such orders are administrative.

It is important to remember that Article 85(2) provides that 'any agreements or decisions prohibited pursuant to this Article shall be automatically void', and that Article 1 of Regulation 17/62 provides that all agreements, decisions and concerted practices contrary to Article 85 'shall be prohibited, no prior decision being required'.

#### (i) The Registration of Restrictive Agreements

Before discussing the actual decision-making process followed by the Commission in competition cases, it should be noted that it is possible to request the Commission to issue a decision called a 'negative clearance' whereby the Commission declares that, based on the facts in its possession, there are no grounds under Article 85(1) or Article 86 for action on its part against the agreement or practice in question.<sup>15</sup> Applications for negative clearance are generally combined with a notification seeking an exemption under Article 85(3) because only by filing a notification does one secure immunity from fines if the application for negative clearance fails.<sup>16</sup>

Notification does not, however, confer provisional validity or interim protection, as does notification of exclusive dealing conduct to the Trade Practices Commission under section 93 of the *Trade Practices Act* 1974 (Cth). If an exemption under Article 85(3) is refused then those provisions falling within Article 85(1) are void *ab initio*, notwithstanding the notification.<sup>17</sup>

The Commission has been severely criticised for its delay in reaching a decision on applications for negative clearance or exemption.<sup>18</sup> The Commission has attempted to meet this criticism by increasing the value of so-called 'comfort letters'.<sup>19</sup> A letter of this kind is

14. (1962) 5 J.O. 204; [1959-1962] O.J. 87.

15. Article 2, Regulation 17/62.

16. Article 4(1), Regulation 17/62.

17. Case 48/72, *Brasserie de Haecht v. Wilkin-Janssen* (No. 2) [1973] E.C.R. 77.

18. In its Eighth Report, Session 81-82, 23 February 1982 (HL) the House of Lords Select Committee on the European Communities found that the shortest time for obtaining an exemption was 18 months and the longest 15 years. The shortest time for obtaining a negative clearance was 19 months and the longest 18 years. In the majority of cases no decision is reached and a great many applications/notifications have lain dormant without being dealt with at all. It was pointed out that this delay creates intolerable problems in financing and initiating new trading ventures.

19. See Notice pursuant to Article 19(3), Regulation 17/62 concerning an application for negative clearance IV/30477- *Europages* (1982) O.J. C343.

informal and states that the Commission is closing its file. It is not a negative clearance and does not bind the Commission.<sup>20</sup> To increase the legal value of these letters, the Commission now gives interested third parties an opportunity to submit comments prior to publication of a Notice in the *Official Journal of the European Communities* that the case has been closed.

In processing applications for exemption the Commission attempts to settle cases by deleting anti-competitive clauses and suggesting pro-competitive ones to replace them until the document is in an acceptable form. If the unacceptable clauses are edited out in this way no formal decision is taken although the Commission may publish a brief summary of the case in its *Annual Report on Competition Policy*. The Commission has announced that it proposes in future, to settle cases which satisfy the tests of Article 85(3) by means of simplified exemption decisions.<sup>21</sup>

It is also making greater use of the power invested in it by the Council pursuant to Regulation 19/65<sup>22</sup> to make block exemptions for certain categories of exclusive dealing agreements and for certain agreements dealing with intellectual property rights, and pursuant to Regulation 2821/71<sup>23</sup> to make block exemptions for certain types of specialization agreements. Unlike 'comfort letters' these block exemptions have legal force and an agreement which is drafted so as to come within the terms of a block exemption is automatically exempt without the need for notification. So far the Commission has adopted seven Regulations granting block exemptions, Regulation 67/67<sup>24</sup> for exclusive dealing agreements, Regulation 1983/83<sup>25</sup> for exclusive distribution agreements, Regulation 1984/83<sup>26</sup> for exclusive purchasing agreements, Regulations 2779/72<sup>27</sup>, 2903/77<sup>28</sup> and 3604/82<sup>29</sup> for certain types of specialization agreements, and Regulation 2349/84 for patent licensing agreements.<sup>30</sup> A draft regulation relating to selective distribution and servicing agreements in the motor vehicle sector is in the course of preparation.<sup>31</sup>

### (ii) Procedures Leading to a Decision

The two most common ways in which the Commission obtains information relating to possible infringements of the competition rules are as a result of notifications and applications for negative clearance, and as a result of complaints. The Commission is obliged to investigate the circumstances which give rise to a complaint, and if the complaint is well-founded the Commission must secure the termination of the infringement, if necessary by an appropriate decision.<sup>32</sup> The Commission's procedures leading to a decision will be dealt with in two parts. First, the Commission's fact-finding procedures will be examined and then attention will focus on the procedures at the hearing itself.<sup>33</sup>

20. See the judgments of the European Court in the *Perfumes* cases, namely Cases 253/78 and 1-3/79, [1980] E.C.R. 2327; Case 37/79, [1980] E.C.R. 2481; and Case 99/79, [1980] E.C.R. 2511.

21. *Eleventh Report on Competition Policy* (1982), point 15.

22. (1965) J.O. 533; [1965-1966] O.J. 35.

23. (1971) J.O. L285/46; (1971) O.J. 1032.

24. (1967) J.O. 849; (1967) O.J. 10.

25. (1983) O.J. L173/1.

26. (1983) O.J. L173/5.

27. (1972) J.O. L292/23; (1972) O.J. 80.

28. (1977) O.J. L338/14.

29. (1982) O.J. L376.

30. (1984) O.J. L219/15.

31. *Eleventh Report on Competition Policy* (1982), point 12; *Twelfth Report on Competition Policy* (1983), point 16.

32. Article 155 of the EEC Treaty. Article 6 of Regulation 99/63.

33. On this subject see generally C. Kerse, *EEC Antitrust Procedure* (1981).

Directorate A within D.G.IV is responsible for inspections and documentation. On the spot inspections may be carried out pursuant to Article 14 of Regulation 17/62 which empowers inspectors to:

- examine the books and other business records;
- take copies or extracts from the books and other business records;
- ask for oral explanations on the spot;
- enter any premises or land and means of transport belonging to undertakings.

The power to enter the business premises of undertakings is exercisable without any previous notice to the undertaking concerned.<sup>34</sup> The power is similar to that contained in sub-section 155(2) of the *Trade Practices Act* 1974 (Cth). Such investigations are carried out pursuant to a decision of the Commission which requires the undertaking to submit to the investigation. Resistance may result not only in fines pursuant to Article 15 of Regulation 17/62 but also in compulsory execution of the investigation pursuant to Article 14(6).

There is no mention in Regulation 17/62 of any right on the part of the undertaking to refuse to incriminate itself. This is not surprising since the whole object of Regulation 17/62 is to bring to light infringements of the competition rules. Regulation 17/62 is, however, also silent on the question of legal professional privilege. The law on this subject was recently settled in the *A.M. & S.* case<sup>35</sup> which is worth considering in some detail since it involved a European subsidiary of an Australian corporation, C.R.A. Limited.

C.R.A. has an English subsidiary, A.M. & S. (Europe), which operates a zinc smelter at Avonmouth in England. On 6 July 1979 the Commission took a decision requiring A.M. & S. to submit to an investigation at its premises at Bristol and Avonmouth.<sup>36</sup> In the recitals to the decision the Commission stated that it had obtained precise and corroborated evidence that showed that the largest European, Canadian and Australian producers of zinc and zinc concentrates decided in 1964 to introduce a producer price which was independent of the quotations on the London Metal Exchange by buying and selling through a subsidiary set up for the purpose and based in Switzerland. The Commission alleged that the producers held regular meetings at which prices were fixed. Changes in price were on each occasion announced by one of the producers and were then followed by the other participants contrary to Article 85.<sup>37</sup> Pursuant to this decision, two investigators from D.G. IV arrived unannounced on 25 July 1979 at the Bristol headquarters of A.M. & S. and proceeded to carry out an investigation.

Acting on the advice of its lawyers, the company's representatives refused to hand over documents which would have been protected by legal professional privilege under English law. The matter finally came before the European Court which held that a general principle of law existed in all Member States ensuring confidentiality of written communications between lawyer and client provided that such communications were made for the purpose and in the interests of the client's right of defence, and further that they emanated from independent lawyers entitled to practise in a Member State. The protection covers all written communications exchanged after the initiation of proceedings under Regulation 17/62 and earlier written communications which had a relationship to the subject matter of the procedure.<sup>38</sup> Thus, A.M. & S. could withhold documents relating to the giving and

34. The Commission's power to order surprise visits was upheld by the European Court in Case 136/79, *National Panasonic (U.K.) Ltd. v. Commission* [1980] E.C.R. 2033.

35. Case 86/78, *A.M. & S. (Europe) Limited v. Commission* [1979] E.C.R. 897.

36. (1979) O.J. L199/31.

37. Details of this zinc cartel are reported in *The National Times*, June 13-18, 1977.

38. *A.M. & S. (Europe) Limited v. Commission*, *supra*, n.35, at para. 23. The formal findings of the European Court are set down in numbered paragraphs or motifs. The zinc producers which were party to this cartel have recently been fined \$US 2.5 million by the Commission. For a report see the *Australian Financial Review* 9 August 1984 at 3.

receiving of advice from its independent English solicitors, but was obliged to hand over documents relating to the giving and receiving of advice from its 'in-house' lawyers and its Australian solicitors.

The Commission has issued a statement<sup>39</sup> following the judgment in *A.M. & S.* rejecting the idea that it might exercise administrative discretion by extending privilege to correspondence between undertakings and some in-house lawyers. As regards independent lawyers from non-Community countries, the Commission considers it necessary to negotiate agreements based on reciprocity with certain countries with a view to extending legal privilege in Community law to their independent lawyers. The Commission is to submit proposals to the Council for opening such negotiations.

By far the majority of cases do not involve visits by inspectors from Directorate A. The Commission's fact-finding is instead undertaken by formal requests for information pursuant to Article 11 of Regulation 17/62 which states that '... the Commission may obtain all necessary information ...' A refusal to supply information requested in an Article 11 letter may lead to the Commission taking a formal decision under Article 11(5) and imposing fines.

Once the fact-finding part of an investigation is completed the file is passed either to Directorate B or to Directorate C. Directorate C covers mergers and the licensing of intellectual property. Directorate B covers distribution agreements, cartels, joint ventures and abuse of a dominant position. Under present procedures, the Commission is required to deliver to the accused undertaking a Statement of Objections raised against it.<sup>40</sup> The facts are often highly complex so that Statements of Objections tend to be long and very detailed. The undertaking is required to submit in writing its comments on the objections raised against it.<sup>41</sup> This is normally followed by an oral hearing.<sup>42</sup> In law, the only persons whom the Commission *must* hear are those whom it intends to fine, but in practice any person who requests a hearing and is an 'interested party' within the meaning of Regulation 99/63 will be given an oral hearing. This is not, as between the undertaking and the Commission, an adversarial procedure.

Until 1 September 1982 the presiding officer was the Director responsible for the Commission Directorate which was dealing with the case. However in response to a considerable amount of criticism,<sup>43</sup> the Commission decided to create the post of Hearing Officer with effect from 1 September 1982<sup>44</sup> to contribute to the objectiveness of the hearing itself and of any subsequent decision. While the Hearing Officer belongs to D.G. IV, to ensure his independence in the performance of his duties, he has the right of direct access to the Member of the Commission with special responsibility for competition policy. The Commissioner may in turn submit the Hearing Officer's opinion to the Commission to ensure that the Commission is fully informed when taking a decision.

An adversarial element only enters into the oral hearing if a complainant against the accused undertaking is present in which case the complainant is given an opportunity to put forward its argument, to which the undertaking will then reply. Proceedings customarily open with a statement by the Commission's *rapporteur*. The undertaking's representative is then invited to develop its defence. The parties may have Counsel to assist them at the hearing.<sup>45</sup>

39. (1983) Bull. EC, No.6, point 2.1.60.

40. Article 2(1), Regulation 99/63.

41. Article 3, Regulation 99/63.

42. Articles 7-10, Regulation 99/63.

43. See, e.g. H.L. Select Committee Report, *supra*, n.17. The Select Committee endorsed proposals for the establishment within D.G.IV of an independent person at Director level to preside over the oral hearing.

44. *Notice on procedures for applying the competition rules of the EEC and ECSC Treaties*, (1982) O.J. C251.

45. Article 9(2), Regulation 99/63.

After the oral hearing the Commission draws up the Minutes which set out the essential content of the statements made by each person heard.<sup>46</sup> The Minutes are sent to the persons concerned to be read and approved by them and then become part of the record. The Commission's procedure culminates in a decision which must be fully reasoned<sup>47</sup> and must adequately prove the infringements alleged.<sup>48</sup> Decisions of the Commission may be appealed to the European Court.<sup>49</sup>

### (b) The Anti-Dumping Rules

There are no longer any tariff or quota barriers to trade between the Member States of the Community (with the exception of Greece, whose last industrial barriers come down at the end of 1985). The Commission vigorously opposes any attempts by Governments to erect new non-tariff trade barriers that favour a home country's goods and services at the expense of other Community suppliers. But the Commission is not only concerned with trade within the Community. The Member States have surrendered their sovereignty to deal with matters relating to external trade to the Commission which imposes a common external tariff on all goods entering the Common Market and investigates all complaints relating to dumping.

Since the economic recession began, dumping has become more widespread throughout the world. The EC Commission has been especially concerned to ensure that dumping does not occur in the Common Market, and has recently been required to investigate numerous allegations of dumping.<sup>50</sup> Provision for anti-dumping proceedings is made in Regulation 3017/79,<sup>51</sup> which took effect on 1 January 1980 and purports to comply with the provisions regarding dumping agreed between the various trading countries of the world in the context of GATT. The principle enunciated in Article 2 of the Regulation is that a duty may be imposed when goods are sold for export at a price which is lower than the price in the exporter's own home market. In dumping terminology the home market price is called 'normal value'. Before a duty may be applied, however, it is necessary for the Commission to establish not only that the product is being dumped, but also that the dumping has caused or threatens to cause material injury. The anti-dumping duty cannot exceed the amount necessary to eliminate what is known as the 'margin of dumping', the difference between the normal value and the export price.

The relevant Directorate-General within the Commission concerned with enforcing the anti-dumping rules is Directorate-General I (D.G.I.). Proceedings in anti-dumping cases begin with a written complaint by a person, usually a trade association, representing the whole or a major portion of the total Community production of the product concerned.<sup>52</sup> After consultation, and assuming the evidence justifies it, proceedings will be formally initiated by an announcement in the *Official Journal*, which sets out a summary of the case.<sup>53</sup> Following the initiation of a procedure it is for the Commission to investigate the facts. The file is usually entrusted to a small team within D.G. 1 which visits the European industry to check particularly on the allegations of material injury. Further, it seeks with the consent of the undertaking concerned and the government of the country in question,<sup>54</sup> to visit the exporter's premises and inspect the relevant records. While the Commission has no

46. Article 9(4), Regulation 99/63.

47. Article 190 of the EEC Treaty.

48. See generally Cases 4073 etc., *Suiker Unie and Others v. Commission* [1975] E.C.R. 1663.

49. Article 173 of the EEC Treaty.

50. On this subject, see generally J. Cunnane and C. Stanbrook, *Dumping and Subsidies* (1983).

51. (1979) O.J. L.339/1.

52. Article 5(1), Regulation 3017/79.

53. Article 7(1), Regulation 3017/79.

54. Article 7(2)(b), Regulation 3017/79.

power to force an exporter to disclose information, it will probably not be in an exporter's interest to be unhelpful since the Commission will in that event decide the issue on whatever evidence is available and the only evidence available may be that given by the complainant. The defendant undertaking is permitted to put forward its views on the complaint in writing and request that a hearing take place at which it can put forward its views orally — the so-called 'confrontation meeting', which the European complainants, exporters and importers attend together, and which is presided over by a representative of the Commission.<sup>55</sup> Duties may be avoided by the giving of undertakings as to price acceptable to the Commission.

Anti-dumping duties are imposed by the Council of Ministers, not the Commission, and can in due course be the subject of appeal to the European Court, but the Court is unlikely to intervene except in the case of an *ultra vires* act by the Commission. The difficulty for undertakings concerned in the importation of products subject to the duty, is the nature of the instrument imposing the duty, namely an EEC regulation which is a legislative act rather than an administrative decision addressed to individuals as in competition cases. Article 173 of the EEC Treaty provides that the European Court shall review the legality of acts of the Council and the Commission; however, under Article 173(2) an appellant must be able to show that the regulation imposing the duty is not of general application but of direct and individual concern or the case will be inadmissible.

In *Japanese Ballbearings*,<sup>56</sup> the European Court held that the Japanese companies' claims were admissible and they succeeded on the legal issues raised. There were, in fact, only four major Japanese producers to whom the duty might apply and the Court held that the regulation constituted a decision with respect to those producers. Since that ruling, the Commission appears to have avoided drafting anti-dumping regulations in a way which might indicate individual application of the measure. The recent *Alusuisse* decision<sup>57</sup> seems to have severely restricted the circumstances in which judicial review of anti-dumping measures may be possible. The European Court held that since the regulations in issue imposed an anti-dumping duty on *all* imports of the product in question, they were of general application and the action was therefore inadmissible.

#### 4. Conclusion

The majority of Australian undertakings trading in the Common Market will probably never directly feel the impact of EC law at all. However, for some who for example, wish to appoint distributors, or enter into long-term supply agreements, or joint ventures or grant licences of their European intellectual property rights, there is a new dimension of legal rules to be taken into account.

As far as Community law is concerned the Commission has jurisdiction to make orders against, or impose fines upon, undertakings situated outside the Community where the conduct of the undertaking concerned has the requisite effect within the Community.<sup>58</sup> From the point of view of European competition policy it would seem reasonable for the Commission to rely upon this 'effects doctrine'. If foreign companies are free to conduct themselves as they see fit without regard to the effects of competition within the EC, it becomes a relatively simple matter for transnational undertakings to circumvent Articles 85 and 86 of the EEC Treaty. Whilst a presence within the Community is unnecessary as a jurisdictional element for the application of the competition rules and the anti-dumping rules, seeking extra-territorial jurisdiction poses problems in the gathering of evidence and

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55. Article 7(6), Regulation 3017/79.

56. Cases 113 and 118-121/77, [1979] E.C.R. 1185.

57. Case 307/81, *Alusuisse Italia S.p.A. v. Council* [1983] 3 C.M.L.R. 388.

58. Cases 48/69 etc., *I.C.I. and Others v. Commission* [1972] E.C.R. 619.

in enforcement. Thus, the powers of search that the Commission has concerning investigations into suspected infringements of the competition rules can effectively only apply within Member States of the EC. If an undertaking without a presence in the EC is fined, there is the practical problem of enforcing the fine. If a parent company outside the Community engages in conduct that infringes the competition rules it seems quite likely that the Commission would be able to enforce the fine against the parent by the seizure of assets of a subsidiary within the Community.<sup>59</sup>

In an often quoted passage on the Common Market, Lord Denning M.R. said:

All this shows that the flowing tide of Community law is coming in fast. It has not stopped at the high water mark. It has broken the dykes and banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water.<sup>60</sup>

Undertakings that do get caught in the 'incoming tide' of EC law very quickly realize how strong the currents are.

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59. Case 6/72, *Europemballage Corporation and Continental Can Company v. Commission* [1973] E.C.R. 215 at 241-242.

60. *Shields v. Coomes* [1978] 1 W.L.R. 1408 at 1416.