THE SECOND GENERATION OF COMPETITION LEGISLATION IN THE EEC

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Two of the most important provisions in the EEC Treaty, from the point of view of the business community, are Articles 85 and 86. These are the provisions which deal with restrictive practices and monopolies. Article 85(1) prohibits any contract or arrangement between companies or individuals which distorts or prevents competition in the common market and which affects trade between Member States. According to Article 85(2), any such agreement is automatically void. This clause introduces into Irish law a new category of void contracts. However, Article 85(3) allows certain agreements, or categories of agreements to be exempted from the prohibition in Article 85(1) if:

(i) the agreement improves production or distribution of the product involved, or contributes to technological progress;
(ii) consumers receive a fair share of the resulting benefits;
(iii) there are no unnecessarily restrictive clauses attached to the agreement; and
(iv) the agreement will not result in the elimination of competition in a particular sector.

Article 86 is concerned with monopolies or, to be precise, firms in a dominant position in the common market or a substantial part of it; a dominant position *per se* is not unlawful but the abuse of that position is prohibited. Article 85 and 86 both provide non-conclusive lists of examples of restrictive practices and abuses of dominant position, including measures which:

– directly or indirectly impose or fix purchase or selling prices or any other trading conditions;
– share markets or sources of supply;
– limit production, markets or technical development, to the prejudice of consumers;

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IBAR – Journal of Irish Business and Administrative Research, Volume 6, No. 2, October, 1984, pp 3-14.

– apply dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage.

Article 87 of the EEC Treaty is the provision which enables the Council and Commission of the European Communities to implement Articles 85 and 86 by the adoption of Regulations or Directives. This legislative power has been widely utilised by the institutions and its use can be divided into two distinct phases: 1962-1975; 1976 to the present. This paper will attempt to provide a brief survey of this legislation and will seek to illustrate its effects on Ireland. The Appendix is designed to provide a "genealogical" table of the relevant legislation.

1962-1975: Pioneering Days.

The Council first exercised its power under Article 87 in February 1962 when it enacted Regulation 17,[1] which remains the single most important legislative instrument in the field of competition law. The principal feature of the Regulation is the delegation to the Commission of significant administrative and quasi-judicial powers. Article 3 of the Regulation empowers the Commission, either on its own initiative or on foot of a complaint from an interested party, to order the termination of infringements of Articles 85 and 86. This power is most frequently used to compel parties to a restrictive practice to desist, but it has also been used to order a manufacturer to continue to supply a customer (the Zoja case[2]) and it has even been used to oblige a company in a dominant position to divest itself of its entire shareholding in a competitor company, which it had procured in a take-over. In the latter case the dominant firm, the Continental Can Co., objected to the attempt by the Commission to control mergers by way of a Decision under Article 3, and appealed successfully to the Court of Justice for the annulment of the Decision. The Court held for the plaintiffs on the merits of the case, but confirmed the principle that the Commission could use Article 3 of Regulation 17 to control mergers.[3]. The Commission's power to terminate infringements of Articles 85 and 86 is complemented by the power, established by Articles 15 and 16 of Regulation 17, to impose fines and periodic penalty payments. The fines can range between ECU 1000 and ECU 1,000,000 or up to 10% of the annual turnover of the participating enterprises. In 1979 a fine of ECU 6.9m., the largest to date, was imposed on the Pioneer Electrical Corporation of Tokyo and its European distributors.[4] In present day values this would amount to IR£5m., a sum in excess of the annual profits of all but twenty or thirty of the largest companies in Ireland.[5]

Regulation 17 also empowers the Commission to exempt restrictive

agreements from the prohibition in Article 85(1) in accordance with the criteria set down in Article 85(3). The Commission may also give a negative clearance, or a clean bill of health, to any agreement submitted to it (Article 2). As a general rule, no restrictive agreement can be exempted unless it has been notified to the Commission (Articles 4 and 5), and notification has the additional benefit of conferring immunity from fines as from the date of notification. The Regulation further empowers the Commission to seek all the information it needs to carry out its functions. It may demand documents and inspect company books and premises (Articles 13 and 14); such inspections frequently take place without notice, and are often referred to as "dawn raids". Since Accession to the EEC there has been an average of one such investigation in Ireland every year, and the Commission usually enlists the assistance of the Examiner of Restrictive Practices when carrying out investigations. Finally, Regulation 17 delegated to the Commission the power to establish rules on certain procedural matters. In Regulation 27 of 1962[6] the Commission laid down rules concerning the form and content of applications for negative clearances and notifications for exemptions. Notifications are effected by filling out Form A/B, which is available from Brussels or from the Commission's information office in Dublin. In Regulation 99/63[7] the Commission established the procedure to be followed at hearings; the Commission is obliged to give undertakings an opportunity to be heard whenever it is contemplating taking a decision affecting the interests of those undertakings.

Soon after the introduction of Regulation 17 the Commission was inundated with requests for negative clearances and notifications for exemptions, submitted in accordance with the provisions of Regulation 27 of 1962. By early 1964 nearly 40,000 agreements had been notified to the Commission; of this number the most frequently recurring varieties of agreement were exclusive distribution agreements, patent licence agreements and specialization agreements. A preliminary examination of these agreements showed that while most contained restrictions incompatible with Article 85(1), there were also positive features which complied with the exemption requirements of Article 85(3). Consequently, the Council adopted two framework or enabling Regulations which empowered the Commission to declare, by means of a Regulation, category or group exemptions for certain types of agreement. Any agreement falling within the terms of the Regulation in question would automatically receive an exemption without the requirement of having to notify the agreement to the Commission. Nevertheless, any firm with doubts about the compatibility of its contracts with the terms of a group exemption regulation would remain free to notify the Commission under Regulation 17. Council Regulation 19/65[8] empowered the

Commission to create group exemptions for exclusive distribution agreements and patent licence agreements. This led to the adoption of Commission Regulation 67/67[9] on exclusive distribution and purchasing agreements, which listed permissible restrictive clauses as well as clauses which would deprive an agreement of an automatic exemption. The Regulation was a great success; it was clear and simple to operate, and it enabled the Commission to dispose of the vast majority of notifications pending before it. A further significant reduction in the backlog of notifications occurred as a result of the implementation of Council Regulation 2821/71[10] which empowered the Commission to adopt group exemption regulations for specialization agreements and for research and development cooperation agreements. Commission Regulation 2779/72[11] on specialization agreements was enacted on this basis.

The EEC Treaty recognises, in Article 87 and elsewhere, that certain sectors of the economy require special treatment in terms of competition policy. Accordingly, Regulation 26 of 1962[12] provided for the application of Articles 85 and 86 to the agricultural sector and Regulations 1017/68[13], 1629/69[14] and 1630/69[15] provided for the application of the competition rules to transport by road, rail and inland waterway.

The final legislative measure passed in the period under review was Regulation 2988/74[16] which subjected the power of the Commission to impose fines and periodic penalty payments, and the power to enforce fines and penalties, to a limitation period: in most cases the period is five years.

It would be a mistake, however, to view the development of the competition rules solely in terms of the Regulations adopted by the Council and the Commission. Since 1962 the Commission has adopted more than 200 Decisions in individual cases and these enjoy precedent status unless, of course, they have been overturned on appeal by the Court of Justice. The judgments of the Court must also be taken into account, and there have been more than 100 rulings on competition law since the first case came before the Court in 1961. In addition, the Commission has from time to time issued Notices and Announcements in which it has indicated certain policy attitudes.[17] By and large, these notices have stated that the Commission did not consider that certain types of contracts or relationships, such as that between a principal and a commercial agent, fell under the prohibition of Article 85(1). None of these measures are legistlative instruments and most of them have been issued without prejudice to any interpretation that might be given to

them by the Court of Justice, but they should not be ignored. Indeed, the Notice on agreements of minor importance, issued in 1970 and revised in 1977, was the Commission's response to the judgment of the Court of Justice in the case of Völk -v- Vervaecke[18] in which the Court adopted the "de minimis" rule: a restrictive agreement will not fall foul of the prohibition in Article 85(1) if it has only a negligible effect on competition. Another viewpoint frequently articulated in these notices and announcements is the Commission's conviction that cooperation between small and medium sized enterprises is to be encouraged. In the European context the vast majority of Irish companies would be classified as small, and only a handful would be considered as medium sized enterprises.

1976 – To the Present: Refinement and Sophistication

After the sustained legislative activity of the 1960s and early 1970s, there followed a period of relative calm, in which the Commission's Competition Directorate General, D.G. IV, was able to observe the legislation in operation; in due course suggestions for revision or amendment of some of the legislation began to be heard. Also, the Commission was still active in formulating proposals for further legislation. There are two general tendencies to be noted in the legislation and draft legislation of this second generation of competition law. The first general feature is the gradual extension of group or category exemptions under Article 85(3) to more specialized or complex types of restrictive agreement. This has also led to a refinement of the provisions concerning category exemptions for simple, run of the mill restrictive agreements. The second noteworthy characteristic, diametrically opposed to the first, is the extension of the field of application of Articles 85 and 86 to new types of activity or to other sectors of the economy.

In chronological order the first legislative change came with the enactment of Commission Regulation 3604/82.[19] This measure repealed and substantially reenacted Commission Regulation 2779/72, which, it will be recalled, gave the benefit of a group exemption to certain types of specialization agreements; in any event the validity of the latter Regulation was due to expire at the end of 1982. Next came Commission Regulations 1983/83[20] and 1984/82[21] which repealed and replaced Regulation 67/67. However, the first proposals for the revision of the group exemption regulation for exclusive distribution agreements – arguably the most important type of agreement from the perspective of European industry – appeared in the mid 1970s. Originally, it had been intended simply to amend the existing Regulation to take account of various developments but, as a result of submissions made by interest

groups, and as a result of the Commission's enquiries into the beer and petrol sectors, two separate Regulations emerged.

Regulation 1983/83 deals with exclusive distribution agreements properly so-called, and does not differ radically from Regulation 67/67. Regulation 1984/83, on the other hand, is the innovatory enactment. It deals with exclusive purchasing agreements, and the first title contains general provisions which had been present, by and large, in Regulation 67/67. But titles 2 and 3 make special provision for beer and petrol supply agreements, known in the common law world as "solus agreements". The most pertinent feature of these two titles is that beer and petrol supply agreements will not benefit from the group exemption if the relevant agreement is concluded for longer than 5 or 10 years (depending on the circumstances). This limitation will not apply, however, where the licensed premises or service station is owned by the supplier and is let or rented to the reseller. Whatever about its effects in Europe, Regulation 1984/83 is unlikely to have a significant impact in Ireland. First, the Irish licensed trade differs from Britain and the Continent in that most outlets are owner managed. "Tied houses" are rare. Second, as far as petrol supply agreements are concerned, there has been a series of domestic measures in force which predated the limitation on the duration of solus agreements contained in Regulation 1984/83. These measures were consolidated in the Restrictive Practices (Motor Spirit and Motor Vehicle Lubricating Oil) Order, 1982.[22]

Apart from the revision of the first two group exemption regulations, the Commission has been active in the preparation of other group exemption Regulations which are likely to be adopted in the near future. These are as follows:

(a) Draft group exemption regulation on patent licence agreements.[23] This draft Commission Regulation is based on Council Regulation 19/65. As in the case of other group examption measures this Regulation will contain a list of restrictive clauses considered by the Commission to be permissible, as well as a list of clauses which will deprive a licence agreement of an atuomatic exemption. A preliminary draft of this measure, published in 1977, caused great controversy in industrial and commercial circles and was replaced by a more acceptable version in 1983. It remains to be seen what effect this measure will have in Ireland. At present Ireland is considered to be a relatively patent free industrial environment and this will remain the case unless and until Ireland ratifies the Convention on the grant of European Patents (1973) and/or the Convention for the European Patent for the Common Market (1976).[24]

(b) Draft group exemption regulation on motor vehicle distribution and service agreements.[25]

This draft Commission Regulation, published in June 1983, is also based on Council Regulation 19/65. It is a further example of the Commission's realisation of the need to make specific provision for more complex types of distribution agreements (beer and petrol supply contracts being another instance). The draft Regulation will cover agreements between motor manufacturers and principal dealers. Its entry into force should coincide, more or less, with the expiry of Protocol No. 7 of the Act of Accession, 1972. This was the measure which allowed Ireland to retain, until 1 January 1985, special protective measures applicable to the assembly and import of motor vehicles.

(c) Draft group exemption Regulation on research and development cooperation agreements.[26]

This draft Commission Regulation is based on Council Regulation 2821/71 and will exempt from the prohibition in Article 85(1) agreements which establish cooperative research and development programmes up to, but not including, the stage of industrial application. As with other group exemption Regulations it will list typical clauses which, although restrictive of competition, will also contribute to economic and technical progress by avoiding the duplication of research and development costs. The likely effect of this measure is difficult to guage, if only because the average level of corporate expenditure on research and development in Ireland is the lowest in the EEC.

Finally, there are three other draft Regulations currently pending before the Council. The first two concern the transport sector and will extend the application of Articles 85 and 86 of the Treaty to international maritime transport operations (other than bulk transports) to or from one or more Community ports,[27] and to international air transport to or from one or more Community airports.[28] These draft Regulations are quite similar in structure to Regulation 17 of 1962.

The third draft Council Regulation will be of more general application. It is concerned with the regulation of concentrations or, in plain language, merger control.[29] This measure was first mooted in 1973, following the Continental Can case, and in its present form it declares any transaction which brings about a concentration, enabling one or more undertakings to acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, incompatible with the common market. Any concentration in which the combined turnover exceeds ECU 1,000 m. must be notified to the

Commission before it can be implemented. The compatibility criteria listed in the draft Regulation should be contrasted with the turnover thresholds in the Mergers, Takeovers and Monopolies (Control) Act, 1978. In Ireland there is a notification requirement where the turnover exceeds the equivalent of ECU 4m. It seems unlikely that many Irish mergers will require Commission approval.

The Effect on Irish Companies

How will Irish undertakings be affected by the recent developments in EEC Competition law? Although it may be a generalization, the market behaviour of all but the largest Irish companies will rarely fall foul of Articles 85(1) and 86 of the EEC Treaty simply because, in European terms, their impact on competition is negligible: *de minimis non curat lex*. There is statistical support for this view: in the period between 1973 and 1980 there were 129 notifications of agreements concluded by Irish companies; of this number half were notified in 1973, the year of Irish accession to the Communities.[30] This leaves us with an average of 10 notifications per year and this figure will be reduced as the Commission enacts more groups exemption regulations. This does not mean that Irish firms can afford to ignore developments in the field of competition law; apart from the need to ensure that a firm's contracts and agreements do not infringe Article 85 and 86, there are other uses, protective or defensive in nature, to which the competition rules can be put.

First, in the event that a firm finds itself in the receiving end of a restrictive practice or an abuse of a dominant position, it can invoke the assistance of the Commission by making a complaint under Article 3 of Regulation 17. This is not merely a time-wasting bureaucratic exercise. In 1975, acting on a complaint from a Dublin based fruit importer, the Commission imposed a fine of ECU 1m. on United Brands for discriminatory pricing and refusal to supply.[31] In 1981, following a complaint by a Belfast based photographic retailer, Camera Care Ltd., the Commission imposed fines of more than ECU 75,000 on Victor Hasselblad (the Swedish camera manufacturer) and its European distributors for operating a market-sharing scheme.[32] In a related action,[33] the Court of Justice confirmed that the Commission was entitled to use Article 3 of Regulation 17 to adopt interim measures – i.e. to issue injunctions – to bring infringements of Articles 85 and 86 to an end.

Second, it is now clear that domestic courts are willing to award damages for breaches of Articles 85 and 86 of the Treaty. This was expressly

decided by the House of Lords in England in the case of Garden Cottage Foods -v- Milk Marketing Board.[34] In the Irish High Court decision in the case of Cadbury Ltd. -v- Kerry Co-op Ltd. Mr. Justice Barrington held that plaintiff's claim for damages for abuse of dominant position must fail because County Kerry could not be considered ". . . a substantial part of the common market." The fact that the ubiquitous Kerry joke has now made its way into EEC competition law should not obscure the essential point of the case: the Court did not question the fact that damages could lie for an abuse of a dominant position under Article 86.

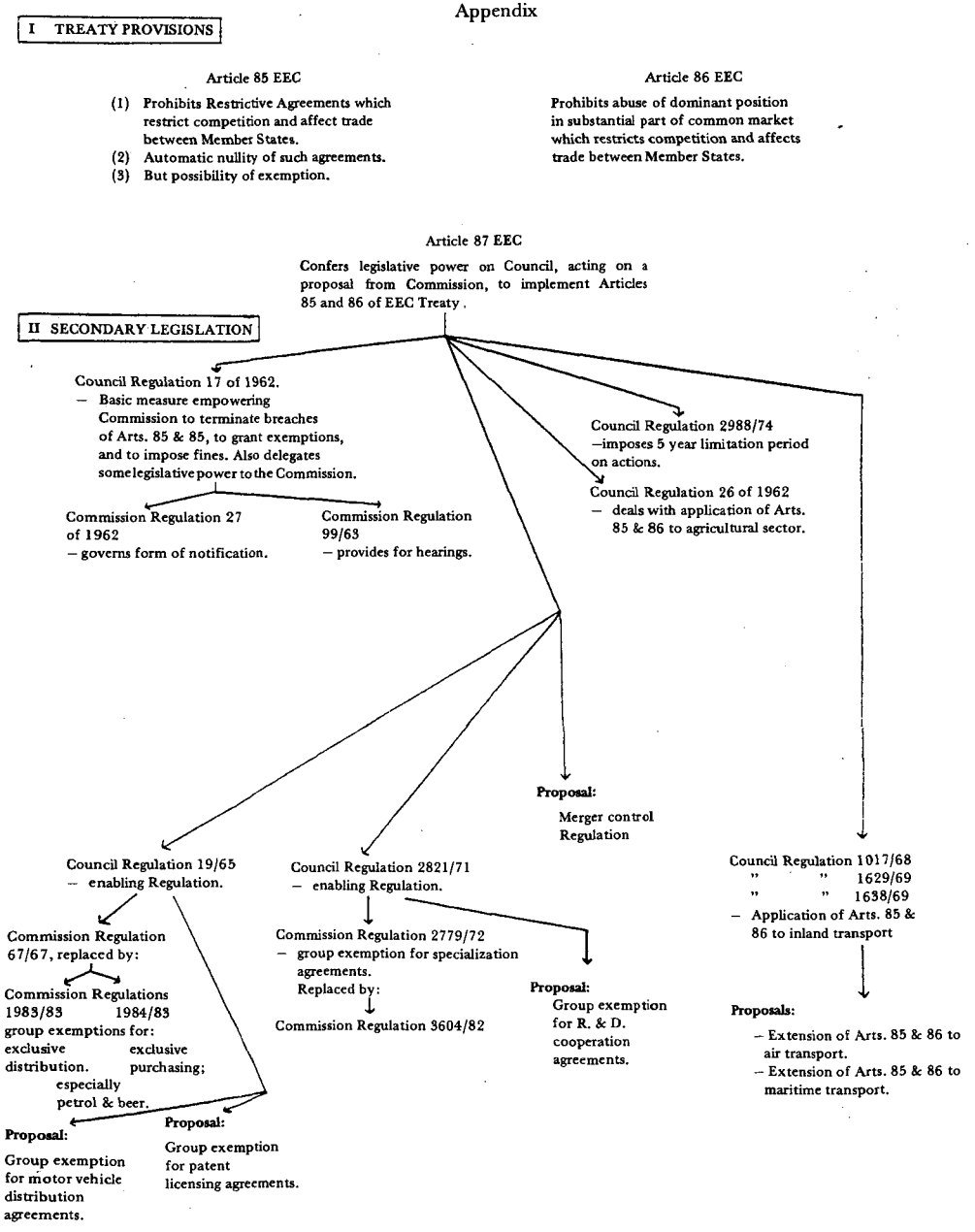
Finally, we have already noted that, unless an exemption has been secured under Article 85(3), all agreements prohibited by Article 85(1) are automatically void. It is now a reasonably common phenomenon for a company, being sued for breach of contract, to argue in its defence that the agreement was prohibited by Article 85(1), and therefore void. This plea was utilised, with limited success, in the Irish case of Aluminium Distributors Ltd. -v- Alcan Windows Ltd.[35]

FOOTNOTES

1. Official Journal of the European Communities (Special Edition 1959-1962) p. 87.
2. [1973] Common Market Law Reports D50.
3. Case 6/72, Europemballage and Continental Can. -v- Commission; [1973] European Court Reports 215.
4. Official Journal No. L 60, 5.3.1980.
5. See: Business and Finance – The Top 500, Jan. 19, 1984.
6. Official Journal (Special Edition 1959-1962) p. 132.
7. Official Journal (Special Edition 1963-1964) p. 47.
8. Official Journal (Special Edition 1965-1966) p. 35.
9. Official Journal (Special Edition 1967) p. 10.
10. Official Journal (Special Edition 1971 III) p. 1022.
11. Official Journal (Special Edition 1972, 28-30 December) p. 80.
12. Official Journal (Special Edition 1959-1962) p. 129.
13. Official Journal (Special Edition 1968 I) p. 302.
14. Official Journal (Special Edition 1969 II) p. 371.
15. Official Journal (Special Edition 1969 II) p. 381.
16. Official Journal No. L 319, 29.11.1974.
17. These notices are:

(i) Exclusive dealing with commercial agents;
Journal Officiel No. 139, 24.12.1962, p. 2921.
An English version is available in most textbooks.

Appendix


I TREATY PROVISIONS
Article 85 EEC
(1) Prohibits Restrictive Agreements which restrict competition and affect trade between Member States.
(2) Automatic nullity of such agreements.
(3) But possibility of exemption.
Article 86 EEC
Prohibits abuse of dominant position in substantial part of common market which restricts competition and affects trade between Member States.
Article 87 EEC
Confers legislative power on Council, acting on a proposal from Commission, to implement Articles 85 and 86 of EEC Treaty.
II SECONDARY LEGISLATION
Council Regulation 17 of 1962.
– Basic measure empowering Commission to terminate breaches of Arts. 85 & 85, to grant exemptions, and to impose fines. Also delegates some legislative power to the Commission.
Commission Regulation 27 of 1962
– governs form of notification.
Commission Regulation 99/63
– provides for hearings.
Council Regulation 2988/74
–imposes 5 year limitation period on actions.
Council Regulation 26 of 1962
– deals with application of Arts. 85 & 86 to agricultural sector.
Proposal:
Merger control Regulation
Council Regulation 19/65
– enabling Regulation.
Commission Regulation 67/67, replaced by:
Commission Regulations 1983/83 group exemptions for: exclusive distribution. especially petrol & beer.
1984/83 exclusive purchasing;
Proposal:
Group exemption for motor vehicle distribution agreements.
Proposal:
Group exemption for patent licensing agreements.
Council Regulation 2821/71
– enabling Regulation.
Commission Regulation 2779/72
– group exemption for specialization agreements.
Replaced by:
Commission Regulation 3604/82
Proposal:
Group exemption for R. & D. cooperation agreements.
Council Regulation 1017/68
" " 1629/69
" " 1638/69
– Application of Arts. 85 & 86 to inland transport
Proposals:
– Extension of Arts. 85 & 86 to air transport.
– Extension of Arts. 85 & 86 to maritime transport.

(ii) Patent licensing agreements;
Journal Officiel No. 139, 24.12.1962, p. 2922.
An English version is available in most textbooks.
(iii) Agreements in the field of cooperation between enterprises;
Journal Officiel No. C 75, 29.7.1968, p. 3.
An English version is available in most textbooks.
(iv) Agreements of minor importance;
Official Journal No. C 313, 29.12.1977, p. 3.
Journal Officiel No. C111, 21.10.1972, p. 13.
(v) Importation of Japanese products;
Journal Officiel No. C 111, 21.10.1972, p. 13.
An English version is available in most textbooks.
(vi) Subcontracting agreements.
Official Journal No. C 1, 3.1.1979, p. 1.
(vii) Hearings Officer;
Official Journal No. C 251, 25.9.1982, p. 2.
(viii) Comfort letters;
Official Journal No. C 343, 31.12.1982, p.4.

18. Case 5/69, Völk -v- Vervaecke; [1969] European Court Reports 295.

19. Official Journal No. L 376, 31.12.1982, p. 33.

20. Official Journal No. L 173, 30.6.1983, p. 1.

21. Official Journal No. L 173, 30.6.1983, p. 5.

22. Statutory Instrument No. 70 of 1981.

23. Official Journal No. C 58, 3.3.1979, p. 11.

24. See: Peter F. Kelly, The Effect on Ireland of The European Patent Convention and the Community Patent Convention; (1978) Journal of the Irish Society for European Law, 15.

25. Official Journal No. C 165, 24.6.1983, p. 1.

26. Official Journal No. C 16, 21.1.1984, p. 3.

27. Official Journal No. C 282, 5.11.1981, p. 4.

28. Official Journal No. C 317, 3.12.1982, p. 3.

29. Official Journal No. C 92, 31.10.1973, p. 1; *as amended by*: Official Journal No. C 36, 12.2.1982, p. 3.

30. See: Restrictive Practices Commission, Annual Reports, 1973-1980.

31. Official Journal No L 95, 9.4.1976, p. 1.

32. Commission of the European Communities, 11th Report on Competition Policy, pt. 83.

33. Case 792/79R, Camera Care Ltd. -v- Commission; [1980] European Court Reports 119.

34. [1983] 3 Weekly Law Reports 143.

35. [1980] Journal of the Irish Society for European Law 82.