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Recent Antitrust Developments in the European Economic Community

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Members of the Bar of the City of New York have devoted a considerable amount of thought to the understanding and interpretation of the EEC antitrust rules. Their written contributions—apart from the efforts of filling in forms in order to notify restrictive trade practices to the Commission—are not less important. I appreciate therefore the opportunity to speak to you about recent antitrust developments in the EEC.

The purpose of the Community is to establish an ever closer union between the European peoples and to assure steady expansion, balanced trade and fair competition. To that end it has to establish a system ensuring that competition shall not be distorted in the Common Market. There is a close relationship between this task and the elimination of trade barriers between Member States.

Antitrust policy aims in the first place at efficiency in the economic process and at defending the consumer's interests. EEC competition policy must in addition to this traditional role of antitrust ensure that the abolished trade barriers and restrictions, previously imposed by state legislation and acts of Governments, are not replaced by private trade barriers. If we would not fight vigorously against agreements and practices threatening the unity of the market, the objectives of the Community could not be realized. Another aim of the competition policy of the Community is to guarantee fair competition. Open frontiers within the Community are only acceptable for businessmen and politicians if all enterprises face equal conditions.

That means for example adjusting commercial state monopolies in a way that excludes legal or practical discriminations. Upon request of the Commission, Member States have abolished most of the existing commercial state monopolies. Where such monopolies still subsist they will either be abolished or adjusted in the forseeable future. Some years ago, it was for example impossible to buy German or Dutch cigarettes in France or Italy, as those markets were reserved to the national tobacco industry. Today you will find in these countries all current brands of cigarettes.

Considerable progress has also been achieved in the area of state subsidies. Member States increasingly use regional incentives and subsidies in favor of certain branches of industry as an instrument of their structural policy. In trying to direct investments to their territory, Member States in the past outbid each other with regional incentives. This favored shopping around on the investor's side, decreased the efficiency of regional policies

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and led to distortions of competition. In October of last year, the Member States adopted a proposal of the Commission to limit the ceiling of regional incentives in the central regions of the Community to 20% of the value of a given investment. The Member States also agreed on certain principles. Regional assistance must, for example, be proportionate to the particular difficulties of the region concerned. You can imagine how far the Commission will have to interfere with national policies which, so far, have developed independently.

Recent developments in the field of antitrust demonstrate the firm intention of the Commission to apply effectively Articles 85 and 86 of the Rome Treaty and the equivalent rules of the Treaty for Coal and Steel. I can only highlight some features of this policy.

Before doing this let me make a few remarks on the degree of economic integration which has been accomplished so far.

Most enterprises take advantage of the opportunities offered by the Common Market. Statistics on the increase of trade between Member States are impressive. The number of subsidiaries founded across the internal borders and the amount of cooperation between enterprises from different Member States have also increased in recent years. Perhaps the Europeans did not discover Europe until after some American multinational enterprises did, but they are now well on their way. Yet, we are far from having completed the process of integration. Especially medium-size firms are in many cases not able or not sufficiently organized to seek customers outside of their home markets. And in some important branches of industry invisible trade barriers subsist for there are still politically motivated preferences of public investors for home made goods and services. But generally competition is intensive enough to induce the harmonization of prices and to pass a part of the benefit of the Common Market on to the consumers.

Where consumer prices still differ from country to country explanations can often be found in different rates of the added value tax, structural differences in trade or different pricing policies of Member States. On the other hand, we observe enterprises carving up the markets by imposing artificial trade barriers on buyers. It is consequently one of the essentials of the EEC antitrust policy to oppose strongly any agreement or concerted practice tending to infringe upon the principle of the unity of the Common Market.

EEC antitrust has been shaped by regulations of the Council of Ministers and of the Commission, by policy declarations and by more than fifty antitrust decisions of the Commission as well as over twenty rulings of the European Court in Luxembourg. Many cases have been settled without a formal decision when the members of a cartel put an end to violations or adapted their agreements to the EEC antitrust rules after an intervention by the Commission.

Within the next month we shall publish for the first time a report on EEC competition policy. It may be a useful instrument for businessmen and even for members of the Bar seeking guidelines as to the different aspects of EEC antitrust enforcement.

The Commission and the European Court have never developed a doc-

trine of *per se* violations. In theory, any restraint of trade may be outweighed by positive effects as described in Article 85, Section 3 of the EEC Treaty, *i.e.*, may contribute to the improvement of production or distribution or to the promotion of technical or economic progress. However, certain types of agreements have little chance of obtaining an exemption under Article 85, Section 3.

Horizontal agreements between producers or dealers to allocate markets, customers or quotas never have been exempted. The effort of the German steel industry to get an authorization for a quota-system failed last year. Price-fixing agreements affecting trade between Member States have also practically no chance of survival. This is also true for all agreements establishing exclusive reciprocal commercial relations between producers and dealers, or for systems under which competitors aggregate their rebates.

As to exclusive distributor agreements and other vertical restrictive practices involving producers and dealers, the Commission continues to apply the principles set forth in the *Grundig, Kodak, Agfa-Gevaert* and *Omega* cases prohibiting various restrictions on exports between Member States and certain types of selective selling. Very recently it attacked two automobile producers for applying export prohibitions between Member States. Except for a very limited number, all agreements notified to the Commission which contained export bans have been modified in a way to enable them to benefit from the general exemption of Regulation 67/67, granting exemption to a category of exclusive distribution agreements. This means that these agreements leave open to dealers and consumers the possibility of buying goods in any of the Member States under normal conditions.

Let me now turn to licenses of industrial property rights.

The merging of six national markets (and, soon, ten national markets) into a single Common Market makes it necessary to facilitate the free marketing of technology across the borders. There have always been tendencies to use industrial property rights to carve up the Common Market.

In the *Parke-Davis* case the European Court ruled that a Dutch patent holder for antibiotics could prevent imports into the Netherlands of such patented products from Italy, where they had been freely sold in the absence of any patent protection of pharmaceuticals in that country. The free importation of the patented antibiotics would have impaired the essence of the Dutch patent. Nevertheless, the Commission argued in this case that a national patent should not be invoked in order to forbid the importation of a product which was put into circulation in one of the Member States either by the patent-holder himself or with his consent.

In full harmony with this position, the Court held, in the landmark decision of *Deutsche Grammophon* v. *Metro* of June 8, 1971, that it was illegal to use a copyright law of a Member State in order to prevent the marketing in that Member State of phonograph records which were sold in another Member State by the owner of the copyright or with his consent. The Court reached this conclusion in applying Article 36 of the Treaty. Article 36 permits prohibitions or restrictions in respect of importations, exportations or transit of goods which are justified in order to protect industrial or com-

mercial property. But such prohibitions—says Article 36—shall not "constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States."

The Court stated that the objective of a unified Common Market could not be achieved if industrial property rights could be invoked merely because they were still national in character. As I see it by this decision the so-called "territorial principle" has been abolished for all industrial property rights. Patents, trademarks and copyrights are certainly different in their origin and purpose. These differences are of importance in defining the subject matter of the different types of property rights which are protected by the Treaty. But these differences are of no importance at all when we have to answer the question of whether the national character of industrial property rights is a reason to forbid the free circulation of protected goods within the Common Market. Since some authors question the applicability of the *Deutsche Grammophon* v. *Metro* ruling to patent law, I hope that the Court may soon have an opportunity to clarify the situation.

Independently of the interpretation of article 36 by the European Court, the Commission will continue to apply Articles 85 and 86 where enterprises through agreements, concerted practices or by virtue of a dominant position use industrial property rights in order to keep the Common Market separated along national boundaries. The principles developed in the *Grundig* case and in the *Sirena* ruling of the Court, prohibiting the use of trademarks to restrain trade between Member States, have not become obsolete. This jurisprudence is consistent with Regulation 67/67 which does not apply if the parties exercise patent or trademark or similar rights in order to prevent dealers or consumers from buying protected products lawfully put into circulation in any part of the Community.

On December 22, 1971 the Commission for the first time took two decisions referring to license agreements. These are the *Burroughs/Geha* and *Burroughs/Delplanque* cases. The licensed product is a new carbon black paper which is produced in Italy, France and Germany. Both licensees, the French firm Delplanque and the German firm Geha, received non-exclusive production licenses for some patents and exclusive production licenses for others. There are no territorial restrictions on sales: licensor and licensees sell the licensed products everywhere in the Common Market on a non-exclusive basis. The market share of the product amounts to about 10% in France and Germany.

In order to give guidelines to industry the Commission emphasized that in the case of a non-exclusive patent and know-how license the following obligations shall not be treated as restraints:

1. *The obligation to grant no sublicenses except to wholly dependent companies.* The reason for this is obvious: only the owner of a patent right can authorize the exploitation of the patent. As far as know-how is concerned, the secret can only be guaranteed if the know-how is not communicated to third parties without the consent of its "owner."

2. *The obligation to keep the know-how secret.* The Commission permits

this obligation, even for the time after the agreement has ended, as a prerequisite for commercializing know-how.

3. *The obligation imposed on the licensee not to use the know-how after the termination of the agreement.* This has been accepted with some hesitation as it is difficult not to use knowledge. But it is one of the conditions of commercializing know-how in order to stimulate its communication.

4. *The obligation to produce the licensed products in sufficient quantities and to follow the technical instructions of the licensor.* These are deemed to be necessary to allow quantitatively sufficient and technically unobjectionable use of the right granted to the patentee.

5. *The obligation to mark the products fabricated under the license so that their origin can be detected.* This has been accepted in order to allow the licensor control of the quality and quantity of the products.

6. *The obligation to settle disputes by arbitration.* Another important statement in the *Burroughs* decisions concerns the validity of exclusive licenses. The Commission held that an exclusive production license could be a restraint forbidden under Article 85, Section 1. Exclusivity restricts the ability of a patentee to exploit the patent and thus limits the access of non-licensees to the new technology.

Further decisions will give us further explanation of the philosophy underlying this statement and the possible impact on license agreements. But we may already say this: the Commission rejects the idea of basing antitrust considerations on the patentee's right to exclude. This right describes the legal position of the patentee and the licensees but cannot be used as an argument to justify restrictions the licensor wants to accept for himself.

And a second statement can be made: the reservation of a reasonable reward to the investor is an important element in antitrust considerations defining, from an economic point of view, the strictly necessary obligations to make licensing possible and to assure the use of the patent as described in the patent legislation. Any obligation beyond that limit may fall under Article 85, Section 1, if it has an appreciable effect on competition and trade between Member States.

The reward to the inventor therefore has no preestablished content in terms of per se permissable restrictions outside of the "no-restraint list" of the Commission. This list will, of course, be worked out in further detail on the occasions of future decisions.

In the *Burroughs* cases the Commission issued negative clearances, as there were no appreciable effects on competition. It reached this conclusion considering the small market share of the parties to the agreement as well as the important fact that licensor and licensees sell the product (under different trademarks) everywhere in the Common Market.

Contrary to the *Burroughs* decisions, the Commission may in other cases bring exclusive production licenses under Article 85, Section 1, especially if the patented products account for a high percentage of the relevant market.

If Article 85, Section 1 applies, the final judgment on the validity of the exclusive covenant will be tested according to the standards of Article 85, Section 3. The first question in this context will be:

Does the license agreement (not the exclusivity!) in the particular case contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress preserving to the consumers an equitable share of the profit?

If the answer to this question is "Yes" (this will normally be the case) and the agreement does not eliminate competition for a substantial part of the product market (clause (b) of Article 85, Section 3), the next question will be: Are the restrictions in the agreement indispensable to such improvements or to such promotion (clause (a) of Article 85, Section 3)? The answer to this question will be the crucial test for the exclusivity clause. If there are less restrictive ways to exploit the patent in the existing competitive situation, the Article 85(3) exemption will not be granted.

This concept permits a conciliation between the objectives of the patent system and the aim of antitrust enforcement. Its application may lead to the result that exclusive production licenses can more easily be justified than the exclusivity clause in grant-back arrangements.

The Commission will in the very near future decide two other license cases. One concerns agreements between the U.S. firm, Davidson Rubber, and Common Market licensees; the other, an agreement between a French licensor and the Japanese Nagoya Rubber Co. These decisions will, among other problems, treat the grant-back obligation and restrictions imposed on licensees outside the EEC.

Before I turn to the cases applying Article 86 of the EEC treaty, let me make a few remarks on other recent decisions relating to Article 85 and on possible legislation providing for class exemption under Article 85(3).

In 1971 the Commission reached 19 antitrust decisions, considerably more than in any year before, and on rather important issues. For the first time, an enterprise was fined for providing false evidence to the Commission in an antitrust case. Also, several horizontal cartels between producers and dealers were declared to be unlawful.

The Commission also continued grant exemptions under Article 85(3) and to issue negative clearances for agreements held to improve the competitive situation or to have no appreciable effect on competition. A negative clearance was even granted for a joint selling agreement (*SAFCO* case) involving small firms.

In studying these decisions you will find little inclination to adopt rigid attitudes. There is a clear-cut tendency to favor positive types of co-operation, to tolerate minor restraints, and to apply firmness in cases of major restraints and any obligations contrary to the unity of the common market.

Two decisions may be of specific interest to U.S. lawyers. In the *Henkel/Colgate* case, a joint research agreement was accepted as lawful under Article 85(3), though the market share of the two enterprises was important. The joint research, however, was held to be an appreciable restraint of competition, in spite of the fact that no obligation was agreed to other than the

joint research. The freedom to go on with independent research work in the area covered by the agreement would be of no practical value, said the Commission, because the parties agreed to license the joint research company with respect to research results achieved independently.

The second decision involves a recent manifestation of the EEC *Quinine* cases, in which the Commission refused, in fixing fines, to take into account fines imposed in the American *Quinine* cases. The total fines imposed by the Commission equalled $500,000. This decision may be of special interest to students of conflicts of law, especially penal law.

Under special legislation of the Council of Ministers the Commission has power to provide for class exemptions within the framework of Article 85(3). We shall try to adopt such provisions this year for agreements tending to favor the specialization of small- and medium-sized firms. Whether we can do something to grant class exemption for certain types of restrictions in patent and know-how license agreements, is still an open question.

Let me now turn the page to comment on Article 86. Apart from some marginal remarks of European Court when answering questions of interpretation submitted to it by national civil courts, until recently only a few official statements were made concerning this Article.

In 1971 the Commission started to apply Article 86 by reaching two decisions, which were very different in nature. The *GEMA* decision illustrates what kind of conduct may be judged to be an "abuse" of a dominant position. The *Continental Can* case deals with the application of Article 86 to mergers.

Article 86 declares illegal the abuse of a dominant position within the Common Market or within a substantial part of it.

In the *GEMA* case, little effort was necessary to show that the German counterpart of ASCAP occupied a dominant position. GEMA is the only company in Germany representing authors of music in order to exploit their copyrights. The Commission merely said that GEMA occupies a dominant position in Germany, a substantial part of the Community, for it has no competitors.

The decision mentions a number of abuses in the behavior of GEMA vis-à-vis the owners of the copyrights, their own members, the editors of music, the producers of records and the importers of records and sound-recording equipment into Germany.

It is a rather complicated, yet economically and even socially, an important decision. With regard to owners of copyrights, the Commission found discriminations against citizens and companies of other Member States. Foreign editors and German editors depending on foreign companies were, for example, not admitted to ordinary membership.

Furthermore, the character of the association tied up members in such a way that they could not think of authorizing other companies to exploit their rights. GEMA paid a premium for membership fidelity and did not allow splitting up the copyrights according to the field of use but demanded a total transfer of the right. The Commission's decision entitled the copyright owners to authorize different companies to exploit different categories of the rights, *i.e.*, radio stations, editors, film or record producers.

The statutory 20-year period before a composer of music could hope to get payments out of the pension fund was reduced to five years, the waiver of ordinary jurisdiction was outlawed and the vesting of pension rights was upheld in cases of cancellation of membership. GEMA is also no longer entitled to collect money for parts of records which do not involve copyrights and for records imported or re-imported to Germany by dealers, if copyright fees have already been paid for such records in Germany or elsewhere in the EEC.

The Commission will have to take similar decisions this year with regard to other associations like GEMA in other Member States. The *GEMA* decision was appealed but the appeal has been withdrawn.

Because the *Continental Can* case is under appeal to the European Court, I shall limit my remarks concerning it.

As you may know, the Commission ruled last year that Continental Can's acquisition of a Dutch competitor constituted an abuse of a dominant position. As early as 1966, the Commission in a memorandum on the problem of concentration expressed the opinion that an attempt to monopolize a market could be an abuse in the sense of Article 86. It refused to limit Article 86 only to cases of market behavior. As any action by the occupant of a dominant position may come under Article 86, structural changes of the market are not excluded.

Not the merger as such is criticized, but the elimination of actual or potential competition in merging with a competitor. The acquisition by an enterprise in a dominant position of a competitor, resulting in further reducing competition, may have exactly the same adverse effects as the examples of abusive behavior described in clause (b) of Article 86 (the limitation of production markets or technical developments to the prejudice of consumers). As it can hardly be denied that the freedom of choice to the consumer is essential for competition, the elimination of this choice as well as its further reduction by a dominating enterprise can prejudice the interests of consumers. There is no economic or other reason to limit Article 86 to market behavior. The examples set forth in clause (b) of Article 86 show this clearly.

Furthermore, the application of Article 86 does not depend on a finding that the dominant position has been used in any way whatever to achieve the disapproved result. It is sufficient if a result incompatible with the purposes of the Rome Treaty is due to an action of an enterprise in a dominant position.

The Commission's decision defines the dominant position of Continental Can with regard to a given product market and a given geographical area, although Article 86 does not specifically require such definition. It is of interest to note that the Commission's finding does not concern the entire packaging market but only the product markets for packaging meat and fish and certain metal closures for glass jars.

According to the Commission, enterprises are in a dominant position when their scope for independent behavior is such that they can take their decisions without paying substantial attention to competitors, buyers or suppliers. This may occur if either their share of the market or their market

share coupled with their technical knowledge, raw materials or capital, enables him to determine prices or to control production or distribution in a substantial part of the market.

The *Continental Can* decision, which asked the company to submit divestiture plans before July 1st of this year with respect to its Dutch acquisition, is certainly a landmark in the short history of EEC antitrust enforcement. There is no doubt that antitrust has become an important feature of EEC policy and that its role is likely to continue undiminished after the enlargement of the Community.