



European Communities Press and Information

Background Note

London Office
23 Chesham Street SW1
Telephone 01-235 4904

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Restrictive trade practices and Common Market law

(Text of a statement made in London on April 14, 1972,
by Dr. Willy Schlieder, Director-General for Competition,
Commission of the European Economic Communities)

Competition policy plays a major role in realizing the aims of the Common Market. The opening and integration of the markets gives new incentives to firms to improve their productivity and efficiency which will in turn increase economic and technological progress in the Community. During the last ten years the exchange of goods between Member States has considerably increased, as well as the establishment of subsidiaries over the borders, transborder participation and international cooperation of all kinds. For the consumer, this development means, in general, a larger choice and better supply of goods and services.

The Commission's policy on competition pursues several aims. The first is, of course, to maintain competition by applying the competition rules of the Treaties. In so far it has the same function as a national policy controlling restrictive practices or the behaviour of enterprises in a dominant position. It aims to achieve the optimum use of production factors while safeguarding the interests of the consumer.

Unifying the market

Another objective is related to the task of creating one Common Market. The Commission must ensure that the abolition of trade barriers and other restrictions between Member States are not replaced by private trade barriers. If the objectives of the Community are to be realized, action must be taken against agreements and practices that threaten the unity of the Common Market.

Fair competition

There is a second objective related to the creation of a Common market: to ensure f a i r competition. Open frontiers within the Community are acceptable only if all undertakings face equal conditions. This means excluding legal or practical discrimination in the form of state monopolies with a commercial character, and preventing state aids from distorting competition within the Common Market.

In applying Article 85, the Commission's aim is not only to break up agreements incompatible with the Treaty but also to grant exemption to cooperation agreements which are economically sound. In principle all agreements that fall under the general ban of Article 85 par. 1 can be exempted if the specified conditions are fulfilled, i.e. if the agreement contributes to the improvement of production or distribution or to the promotion of technical or economic progress.

In many cases, the parties concerned voluntarily agree to put an end to restrictive arrangements or to adapt them to the rules. The result may be a formal decision of the Commission granting an exemption under Article 85 par. 3, ("negative clearance"). Or the case may simply be closed. The Commission has full discretion - subject only to the control of the Community's Court at Luxembourg - to decide what position it will take.

Guidance from case law

Although it is difficult to generalize, if individual decisions taken by the Commission are examined, certain guide-lines emerge.

Horizontal agreements between producers or dealers to allocate markets, customers or quotas have never been exempted. An attempt by the German steel industry to obtain authorization for a system of quotas failed last year. Price-fixing agreements affecting trade between Member States have also hardly ever been allowed. In the Quinine case, there was an agreement designed primarily to protect home markets within the Community. In this case the Commission imposed fines amounting to approximately \$500.000. In the Dyestuffs case no formal price agreement was proved but concerted practices resulted in almost simultaneous price increases. Here again the participants were heavily fined, but this case is under appeal of the Court.

Also forbidden are horizontal agreements between firms of only one Member State if they fix prices or the conditions of resale of imported or exported goods (Dutch cement traders association case and Dutch paint and varnish export association case).

Arrangements protecting national markets by way of collective agreements establishing exclusive reciprocal commercial relations in one member state have also very little chance of obtaining an Article 85, par. 3, exemption (Belgian tiles manufacturers' and traders' association case and the German tiles manufacturers' association case. The second agreement concerned an aggregated rebate system).

Exemptions

Exemptions are granted if the disadvantages that result from a restrictive trade practice are counterbalanced by advantages to the general interest. But in many cases the Commission has not accepted that such counterbalancing advantages exist, e.g. in a recent case concerning a joint sale agency of German cement producers which fixed prices and quotas in relation to exports to the Netherlands. A less strict line was adopted by the Commission with regard to joint sale agencies for fertilizers. In these cases the Commission issued negative clearances as the agreements did not concern exports to other member states. The Commission's Directorate-general for competition is at present examining whether the joint sales in the home markets and in third countries result in a de facto protection of the respective home markets within the EEC.

A negative clearance was also given to SAFCO, an export association of French canned food producers which were small and practically unable to compete independently with bigger firms outside their country.

Especially for small and medium-sized firms cooperation is sometimes the best way to profit from all the opportunities the Common Market offers. The Commission has therefore taken a number of steps to facilitate cooperation between enterprises in cases where this is in the general interest.

First, it has published a list of types of cooperation which are not restrictive and therefore not prohibited under Article 85, such as the joint use of certain facilities concerning stocks, service or transport, joint book-keeping and market research, joint advertising and cooperation of non-competitors selling through a joint sales agency.

Second, the Commission has made a policy declaration according to which agreements do not come under Article 85, par. 1 if their economic importance is negligible. This has been defined in terms of market share (not more than 5%) and aggregated annual turnover of all members of the cartel (not more than \$15 million or \$20 million where agreements among trading companies are concerned).

Block exemptions

Based on the Commission's stand in the Grundig-Consten case, regulation no. 67/67 exempts sole distributor agreements en bloc if the parties respect certain conditions and do not provide for a total territorial protection of the sole distributor.

The Commission has recently received power from the Council to grant block exemptions for other types of agreements, e. g. agreements on specialization, agreements on standards and the limitation of production to certain types, sizes and qualities as well as agreements about joint research. The draft regulation for block exemptions in some of these areas will be communicated to the member states in the very near future. If the block exemptions come into force before entry, the British Government will be consulted on the draft.

With regard to vertical agreements between producers and dealers the Commission has accepted certain restrictions under Article 85, par. 3, and rejected others. In the Omega watch case, it accepted the restriction of sales to a limited number of dealers only, given the specific marketing conditions of Omega watches. This will also be valid for restrictions on sales in comparable situations. Direct and indirect export prohibitions were disallowed in the Kodak case.

Some recent developments

In 1971, the Commission reached 19 anti-trust decisions, considerably more than in any previous year. The most interesting of these decisions are first those concerning the application of Article 85 to licence agreements in the field of commercial property rights and know-how and second those concerning the application of Article 86 to abuse of dominant positions in the market.

The merging of different national markets into a common market cannot be complete unless technology is included. This raises complicated issues.

Patents, trade marks and copyright

In the Parke-Davis case the Community 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 harmony with this view of the Commission, the Court held, in the landmark decision of Deutsche Grammophon v. Metro of June 8, 1971, that it is 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 based this conclusion on Article 36 of the Treaty. Article 36 permits prohibitions or restrictions in respect of imports, exports or transit of goods which are justified in order to protect industrial or commercial property. But such prohibitions shall not, says Article 36, "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 if the product has been put into circulation lawfully and there is no Parke-Davis situation. 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 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 a 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 maintain the isolation of national markets and in effect to prevent the Common Market from operating. 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.

In 1971 the Commission took two decisions referring to licence agreements known as the Burroughs/Geha and Burroughs/Delplanque cases. The licensed product concerned is a new carbon paper 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 pre-requisite 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 par. 1. Exclusivity restricts the ability of a patentee to exploit the patent and thus limits the access of non-licensees to the new technology.

Future decisions will give us further clarification 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 anti-trust 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 inventor is an important element in anti-trust considerations.

If, from an economic point of view, an obligation is indispensable in order to make a licensing arrangement effective and to assure the effectiveness of the patent concerned in accordance with the law on patents, the Commission will normally conclude that there is no restraint of trade. Any restriction beyond that limit may fall under Article 85, par. 1, if it has an appreciable effect on competition and trade between member states.

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 fact that licensor and licensees sell the product (under different trademarks) everywhere in the Common Market. In other cases exclusive production licenses may fall under Article 85, par. 1, especially if the patented products account for a high percentage of the relevant market.

If Article 85, par. 1, applies, the final judgment on the validity of any particular restrictive covenant will be tested according to the standards of Article 85, par. 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) Article 85, par. 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, par. 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, par. 3 exemption will not be granted.

This concept permits the reconciliation of the objectives of the patent system and of anti-trust enforcement. Its application may lead to the result that exclusive production licences can more easily be justified than the exclusivity clause in agreements providing an obligation for the licensee to license future patents or know-how in favour of the licensor ("grant-back").

The Commission will in the very near future make decisions on two other licence 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, cover a "grant-back" obligation and an export restriction imposed on a Japanese licensee.

"Dominant position"

In 1971 the Commission took the first steps to apply Article 86. The two decisions concerned were rather different in nature. The GEMA decision illustrates what kind of conduct may be judged to be an "abuse" of a dominant position. The Continental Car case deals with the application of Article 86 to mergers.

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

The GEMA case

The GEMA, a German company representing authors of music in order to exploit their copyrights, occupies a dominant position in Germany for it has no competitors. The decision mentioned a number of abuses practised by GEMA vis-à-vis the owners of the copyright, their own members, the editors of music, the producers of records and the importers of records and sound-recording equipment into Germany.

Although complicated, the GEMA decision is economically and even socially an important one. With regard to owners of copyrights, the Commission found that there was discrimination 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 charter of the association tied up members in such a way that they could not in practice authorize 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 copyright. 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 obligation to go to arbitration 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. GEMA originally appealed against the Commission's decision but the appeal has been withdrawn.

The Continental Can case

Special attention to the competition policy of the Commission has been drawn by the Continental Can decision. The Commission held that Continental Can's acquisition of a Dutch competitor constituted an abuse of a dominant position.

In 1966 the Commission in a memorandum on the problem of concentration already 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 behaviour.

Not that mergers as such are criticized, but rather the elimination of actual or potential competition through mergers with competitors. 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 behaviour 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 behaviour. 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 behaviour 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 them 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 1 of this year, is a landmark in the history of EEC anti-trust enforcement.

When Britain joins

Let me add a few words about what happens once Britain enters the Common Market:

The Accession Treaties stipulate that the competition rules laid down in the ECSC and EEC Treaties, as well as their implementing regulations, will be applicable to the enlarged Community by January 1, 1973 to all restrictive practices falling under these rules by the fact of the accession. Transitional arrangements will, however, cover situations already existing on that date and which become by the act of accession incompatible with Community rules.

Agreements, decisions and concerted practices between undertakings concluded after January 1, 1973 to which Article 85 EEC Treaty or Article 65 ECSC Treaty are applicable will have to be notified to the Commission in conformity with the regulations existing in the Common Market. For those that are in existence on January 1, 1973, a transitional disposition lays down that they must be notified by July 1, 1973, if they fall under Article 85, and by April 1, 1973, if they fall under Article 65.

Articles 86 and 66, as well as the implementing decisions to Article 66 will be applicable to mergers and the abuse of a dominant position as from January 1, 1973; this means that especially with regard

to the field covered by the ECSC Treaty all operations that result directly or indirectly within the enlarged Community in an industrial concentration between undertakings, one of which at least falls under Article 80 of the ECSC Treaty, will have to ask for prior authorization by the Commission.

Article 86 does not, on the other hand, by the provisions that are now in force, demand any prior notification of mergers.

With regard to goods that fall under the ECSC Treaty, it must be borne in mind that in application of Article 60 of this Treaty undertakings must publish the price lists and sales conditions they use in the Common Market. This provision will come into force by January 1, 1973.

To conclude this summary I should like to stress that competition policy has become an important feature of EEC policy and that its role is likely to continue undiminished after the enlargement of the Community. I am convinced that a good policy of this kind serves the interests of industry and commerce as well as the interests of consumers.