(7)

A COMMON MARKET OVERVIEW
OF THE COMPETITION
PROBLEM IN THE 70's

EMBARGOED:
FOR RELEASE AT
2:00 p.m., CST
March 27, Saturday

Speech file

Dr. Hermann Schumacher
~~Director~~ Director,
Division of
General Competition
Policy,
Common
Market
Commission,
Brussels

Presented
Before
American
Bar Association
National
Institute
on Legal
Aspects of
Doing Business
in Europe,
Sheraton-Chicago
Mar. 27, 1971

A COMMON MARKET OVERVIEW OF THE COMPETITION PROBLEM
IN THE SEVENTIES

The subject I am to discuss covers the time between the end of the transitional period of the Treaty of Rome and the likely end of the period in which the economic and monetary union is to be established. This, therefore, is a second transitional period which will also - I hope - see the enlargement of the European Communities and the creation of a single treaty for all three of them - the European Economic Community, Euratom, and the European Coal and Steel Community.

During the transitional period under the Treaty of Rome the first thing that had to be done was to enact the statutory provisions necessary to implement Articles 85 and 86. The most important instrument here was Regulation No. 17 of 6 February 1962, which created the very basis for carrying out investigations and enforcing decisions. It was followed by a large number of implementing provisions, for agriculture by Regulation No. 26, and for transport by Regulation No. 1017/68 and additional implementing regulations.

.../...

Legislative action has not yet been completed. Work is in hand, for instance, on a regulation introducing a period of limitations for proceedings in respect of acts that are punishable by fines.

Enlargement of the European Communities will naturally call for new transitional provisions, but these pose no special problems here.

The situation in respect of the rules of competition will be more difficult, however, if heavily industrialized European countries enter into association agreements with the European Communities. For these countries will hardly be prepared to comply with a decision by the Commission or the Court of Justice of the European Communities without being represented on those bodies. But, should special bodies be created for the purpose, it would be difficult if not impossible to avoid differing interpretations of the text of one and the same law, and this would do nobody any good.

The knottiest problems, though, are those that are liable to arise when the task of merging the Treaties is

.../...

tackled. What is to become of the prohibition of discrimination laid down by Article 60 of the ECSC Treaty? There is also the clause in the EEC Treaty which requires that trade between Member States must be likely to be affected before certain practices can be prohibited. This provision is not found in the ECSC Treaty. Should it be abolished for other sectors as well, for instance for the whole energy sector or perhaps for the raw material sector generally? Special attention will also have to be paid to the question of whether supervision of mergers, expressly provided for in Article 66 of the ECSC Treaty, should be prescribed for the other sectors too, and, if so, what shape it should take.

So much for legislation. Where work on individual cases is concerned, exclusive dealing agreements occupied the centre of the stage at first - if only because of the large number of notifications received. But these agreements were of particular importance for practical reasons as well, for they were a special stumbling-block in the way of establishment of the

.../...

Common Market in so far as they gave a dealer the guarantee that it was only through him that the products concerned could be obtained in the area he had been allocated. This guarantee was effected by obliging not only wholesalers but also retailers not to export the products, an arrangement which involved what was called absolute territorial protection. The Commission's decision in the Grundig-Consten case, which was confirmed by the Court of Justice of the European Communities in all essential points, makes it clear that absolute territorial protection is inadmissible. This problem was largely solved through block exemption Regulation No. 67/67, which permits exclusive dealing agreements that are of the type described in the regulation and in particular do not involve absolute territorial protection. In the seventies, we shall only need to see that firms actually comply with these rules.

Unusually difficult questions arise in the field of licensing and knowhow agreements. They were thoroughly discussed following an analysis of the content of almost

500 notifications. The only Commission decision that has so far dealt with these problems is the one concerning Grundig-Consten.

The Court of Justice of the European Communities set out its views on some basic questions in its judgment in the Grundig-Consten case, again in the Parke, Davis judgment, and above all in the Sirena judgment of 18 February 1971. A further case is now before the Court.

The Directorate-General for Competition is working on a large number of cases in this field. We can therefore expect that this set of problems will be clarified comparatively soon in the seventies. As Mr Newes will be talking about this in the afternoon I want to be brief. I only wish to emphasize that, as the national markets become progressively integrated into the Common Market and economic union, licensing agreements will take on special importance. Trade mark law and also patent law, in particular, are time and again misused to maintain the national frontiers by arranging for absolute territorial protection. Where several firms are parties to such market-sharing, and where there is proof of the

.../...

existence of agreements or concerted practices for the purpose of market-sharing, I do not doubt that Article 85 is applicable. To avoid any misunderstanding however, I must say that, in my opinion, allocation to a patent licensee of a specific area within which to operate is admissible. However, once a product has been legally put into circulation it must be able to move freely within the Common Market. The only exception to this is when the product has been manufactured by a firm without a licence to do so in a part of the Common Market where the patent is not protected. If this product were also to move freely, the existence of the patent would be jeopardized.

Trade mark law, on the other hand, cannot warrant territorial restrictions as it only relates to the affixing of a distinctive mark. This has been made clear by the Sirena judgment.

Abuse of a dominant position where such a position exists is another reason for challenging such market-sharing arrangements based on industrial property rights. This too follows from the Sirena judgment.

.../...

In my view, competition policy in the next few years will very largely be a matter of working on this set of problems and generally applying the results obtained.

Where horizontal agreements are concerned, forecasts are very difficult to make. Work is in hand on all important cases of this type. There is no predicting what we shall be faced with here.

I nevertheless wish to give a brief outline of four sets of problems which will be of particular importance.

Firstly, there is the concept of concerted practices, a matter currently before the Court of Justice of the European Communities in connection with the Commission's dyestuff decision. Great significance attaches to the interpretation of this concept, for the prohibition of restrictive agreements increasingly leads firms to concert their behaviour only by word of mouth or in another "informal" manner. In proceedings instituted under the rules prohibiting restrictive agreements the parties would then claim that their identical behaviour was prompted purely by the conditions on the market

.../...

You in the United States have ample experience of this problem. The decisive question here is not how the concept "concerted practices" is defined but how charges of concerted practices can be made to stick - in other words, what requirements the evidence must satisfy in order to be valid. The Court of Justice's judgment will therefore be of very great importance for the Community's policy on restrictive agreements.

Secondly, I should like to say a few words on the problem of corporate groups. Through its decisions in Christiani & Nielsen and Kodak the Commission made it clear that agreements between a parent company and its wholly owned subsidiary cannot restrict competition, since these firms cannot be considered as entering into competition with each other. The points yet to be clarified include, in particular, the degree of control which still provides just sufficient grounds for assuming that there is no competition between two firms.

In this connection it should also be noted that, at the moment, a tendency is emerging for horizontal agreements to be partly replaced by the setting up of joint

.../...

subsidiaries. Where the parent companies operate in the same field as the joint subsidiary they then concert their policies via this subsidiary. There have been no Commission decisions on the subject so far, but the problem is certain to arise soon. In such a case it will, in my opinion, not be possible to say that competition cannot take place between these parent companies. On the contrary, I am inclined to believe that such cases may fall under Article 85. But this is probably a subject which Mr Deringer will discuss in greater detail this afternoon.

The problem of corporate groups also played a role in the dyestuff case. Here, the Commission considers it proved that action was concerted between the parent companies. The result was that the wholly owned subsidiaries put up their prices in accordance with instructions from the parent company. The Commission therefore considered that the responsibility lay with the parent companies and imposed fines on them. Where these parent companies were not based in the Common Market, the Commission served the decision on one of their

.../...

subsidiaries. Here the question necessarily arises whether the groups may plead the legal independence of the subsidiary although its policy is controlled by the parent company. I hope that the Court of Justice will soon rule on this point.

Thirdly, there are the specialization agreements. Many medium-sized firms can adjust to the larger market only if they specialize. The Commission has authorized several such agreements, and further decisions are in preparation. These decisions will form the basis of a ~~block~~ group exemption arrangement and so will facilitate this type of cooperation. The same is true of agreements on standards and types.

Fourthly, I should like to refer to agreements on joint research and development and on exploitation of the results of such cooperation. As outlined by the Commission in its notice of 29 July 1968 on agreements, decisions and concerted practices relating to cooperation between enterprises, cooperation in the field of research and development may generally not be considered as

.../...

restricting competition, in contrast to the obligation to do no research work in sectors where in actual fact no joint research is being carried out. Here, the problem for competition lies in agreements on exploitation of the results of research. Given the great importance that attaches today to research and development, we shall have to see whether cooperation of this type can be facilitated by block exemption. Some preparatory decisions have already been taken.

Last but not least, I should like to say a few words on industrial ~~combination~~ concentrations, a particularly importan problem.

The Commission realizes that adjustment to the Common Market will call for many more ~~combinations~~ concentrations, especially across frontiers. But it is also alive to the need to prevent the establishment of monopolies on the market - in other words, to safeguard workable competition. The Commission feels that all the possibilities available under the Treaty must be taken advanta of in order to call a halt to such monopolistic development. It is prepared to regard such cases as an abuse

.../...

by enterprises of a dominant position on the market. A case involving this question is now pending. ~~Work is in hand on a decision to this effect.~~ However, I do not wish to go into details here, since Mr Deringer will discuss this matter, too, in the afternoon. I hope that in interpreting Article 86 the Court of Justice will follow the Commission, so that we shall not be too late in opposing cases of ~~combination~~ concentrations that jeopardize ~~the~~ the effectiveness of ~~workability of~~ competition. Here we realize that Article 86 too is only an incomplete instrument, and that legislative measures will become indispensable in this decade. But we cannot just wait until this legislative work has been done.

The account I have given of the action taken in individual cases would be incomplete if I did not emphasize that the part of our activities which involves the issue of authorizations will shrink more and more in the seventies. For one thing, the work we have done so far has enabled many points to be clarified, and for another, the old notifications will have been fully dealt with. Even at the present stage, all new notifications and requests are processed immediately.

.../...

On the other hand, there will be an increase in the cases where clandestine agreements are challenged. Careful observation of the market in the past twelve years has made it possible to detect a whole string of such agreements. Today, interpretation of Article 85(1) has reached a stage where firms should, in general, no longer find it difficult to see for themselves whether they infringe it. So, if they disregard these rules, they will have to expect fines, on the lines of what happened in the quinine and dyestuff cases.

Lastly, it should be noted that, as the economic and monetary union takes shape, there will be more and more instances of agreements and practices affecting trade between Member States within the meaning of the Treaty. This means, however, that the Community's competition law gains in importance while national law is losing in importance. I do not know whether Professor Rahl will discuss this aspect. Since competition policy is a part of economic policy, it is a perfectly natural process. As you see, there will be no lack of problems in the seventies!

- - - - - -