european community BACKGROUND INFORMATION

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BACKGROUND INFORMATION

RESTRICTIVE TRADE PRACTICES AND COMMON MARKET LAW

The recent European Commission case in which the American-owned Continental Can company was ordered to divest itself of a Dutch competing company which it had acquired has pinpointed the complicated issue of restrictive trade practices in Common Market law.

In a recent address in London, Dr. Willy Schlieder, the European Communities Director General for Competition, explained some of the details of that law.

He emphasized that competition policy plays a major role in realizing the aims of the Market. During the last ten years, he said, the exchange of goods between member states had increased considerably, and there had been a profusion of transborder subsidiaries and other forms of international business cooperation. This development meant a greater choice and a better supply of goods and services for the consumer.

Dr. Schlieder then outlined the aims of EC competition policy. The first aim was to maintain competition by applying the competition rules of the Rome treaties, and by controlling restrictive practices or the behavior of enterprises in a dominant position. The intention was to

achieve optimum use of production factors while safeguarding the interests of the consumer.

A second aim, Dr. Schlieder said, was imperative if a common market was to be achieved: the Commission had to ensure that the trade barriers and other restrictions between member states that were removed were not replaced by private trade barriers. Open frontiers within the Community would be acceptable only if all enterprises faced equal conditions. This meant excluding legal or practical discrimination in the form of state monopolies with a commercial character and preventing state aid to industry from distorting competition.

Although the Commission moved, in principle, against all agreements incompatible with the Rome treaties, it could and did grant exemption to cooperation agreements which were "economically sound".

In most contravention cases, Dr. Schlieder said, the parties concerned voluntarily agreed to end restrictive arrangements or to adapt them to the rules; but the Commission had full discretion, subject only to the control of the Community's Court in Luxembourg, to decide what position it would take.

Case Law Sets Guidelines

Certain jurisprudential guidelines emerge from recent case decisions.

Horizontal agreements between producers or dealers, with a view to allocating markets, customers or quotas, have never been exempted. An attempt by the German steel industry to obtain authorization for a quota system failed last year. Price-fixing agreements affecting trade between member states are rarely permitted. In a case involving quinine, an agreement to protect home markets within the Community was rejected;

the Commission imposed fines totaling approximately $500,000. In a 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. Also forbidden are horizontal agreements between firms of only one member state if they fix prices or resale conditions for imported and exported goods. Arrangements protecting national markets by use of collective agreements establishing exclusive reciprocal commercial relations in a single member state have also very little chance of winning exemption.

Exemptions are granted, Dr. Schlieder said, if the disadvantages that result from a restrictive trade practice are counterbalanced by advantages to the general interest. For instance, a more flexible line was adopted by the Commission with regard to joint sale agencies for fertilizers. The Commission gave exemption to agreements on these lines because they did not concern exports to other EC member states. Dr. Schlieder's Directorate General is currently examining whether joint sales in home markets and in third countries result in de facto protection of these EC home markets.

In another case, exemption was given to an export association of French canned food producers because all the firms involved were small and, for practical purposes, unable to compete independently with bigger firms outside France. Dr. Schlieder said the EC Commission had taken a number of steps to facilitate cooperation between enterprises in cases where this was in the general interest. It had published a list of types of cooperation which are not restrictive and those not prohibited under Article 85 of the second Rome Treaty, such as the joint use of facilities concerning stocks, services, or transport, joint bookkeeping and market research, or joint advertising and cooperation by non-competitors selling through a joint

sales agency.

The Commission has also ruled that agreements are not excluded under Article 85 if their economic importance is negligible. Negligible importance is defined as meaning not more than 5% of a market and/or an aggregate annual turnover for all members of a cartel of $15 million —$20 million in some cases.

Block Exemptions

The Commission was recently empowered by the EC Council to give certain block exemptions: there have been two agreements on specialization, and accords on standards or on the limitation of production to certain types, sizes and qualities of a product, as well as agreements concerning joint research.

With regard to vertical agreements between producers and dealers, Dr. Schlieder said, the Commission has accepted certain restrictions and rejected others. In a case concerning Omega watches, it accepted the restriction of sales to a limited number of dealers only; but in a case involving Kodak, direct and indirect export prohibitions were disallowed.

During 1971, the Commission reached 19 anti-trust decisions, considerably more than in any previous year. The most interesting of those decisions, Dr. Schlieder said, concerned license agreements in the field of commercial property rights and knowhow and agreements permitting abuse of dominant positions in a market.

In a case involving Parke-Davis, the Community Court ruled that a Dutch patent holder for antibiotics could prevent imports into the Netherlands of similar patented products from Italy where they had been freely sold in the absence of any patent protection of pharmaceuticals in that country. The Court decided that unrestricted importation of the Italian antibiotics would have challenged the essence of the Dutch patent. The Court ruled 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. Differences in origin and purpose between various patents, trademarks and copyrights are critical in defining the subject matter of the different types of property rights which are protected by the Rome treaties; but they have no relevance to the basic question of whether the national character of industrial property rights is or is not a reason for forbidding the free circulation of protected goods within a common market, Dr. Schlieder said.

He said the Commission would continue to apply Article 85 wherever enterprises, through agreements or concerted practices or by virtue of a dominant position, use industrial property rights to preserve the isolation of national markets -- in effect, to prevent the common market from operating. Two court decisions have prohibited the use of trademarks to restrain trade between member states. This jurisprudence does not apply if the parties exercise patent or trademark or similar rights 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 license agreements known as the Burroughs/Geha and the 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.

The Commission has ruled that an exclusive license can be a restraint of trade under Article 85, because it restricts the ability of a patentee to exploit the patent and thus limits the access of non-licensees to the new technology. The Commission has rejected the

notion of basing anti-trust considerations on the patentee's right to be excluded. This right describes the legal position of the patentee and the licensees but cannot, the Court has ruled, be used as an argument to justify restrictions that the licensor wishes to accept for himself. The Court has also indicated that the reservation of a reasonable reward to the inventor is also 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 ensure 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, Dr. Schlieder said. If Article 85 applies, the final judgment of the validity of any particular restrictive covenant will be tested according to certain standards:

Firstly, does the license agreement contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress guaranteeing to the consumers an equitable share of the profit?

If the answer to this question is "yes" -- which, Dr. Schlieder said, would normally be the case -- and the agreement does not eliminate competition for a substantial part of the product market, the next question will be:

Are the restrictions in the agreement indispensable to such improvements or to such promotion? The answer to this, he said, would be the crucial test for the exclusivity clause. If there were less restrictive ways to exploit the patent in the existing competitive situation, exemption would be refused.

Dr. Schlieder said that this concept permitted the reconciliation

of the objectives of the patent system and of antitrust enforcement. Its practical result was that exclusive protection licenses could more easily be justified than the exclusivity clause in agreements providing an obligation for the licensee to license future patents or know-how in favor of the licensor -- what is known as "grantback".

Commission rulings are due soon on two other license cases. One concerns agreements between the American firm Davidson Rubber and Common Market licensees, the other an agreement between a French licensor and the Japanese firm Nagoya Rubber. These decisions will cover a "grantback" obligation and an export restriction imposed on a Japanese licensee.

The Continental Can Case

Last year the Commission took the first steps to apply Article 83 of the second Rome treaty, on mergers. This article outlaws abuse of a dominant position within the Common Market or within a substantial part of it. Jurisprudentially, the two most interesting cases concerned the American company, Continental Can, and GEMA, a German company representing composers of music which occupies a dominant position in Germany because it has no competitors for the exploitation of music copyright.

The Commission found that GEMA was discriminating against citizens and companies of other EC member states. Foreign music publishers and German publishers depending on foreign companies were, for example, not admitted to membership in GEMA. In its ruling, the statutory 20-year period before a composer could hope to get payments out of the GEMA 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 or

for records imported or reimported into Germany by dealers, if copyright fees have already been paid in Germany or elsewhere in the Common Market.

GEMA filed an appeal against the Commission's ruling, but later withdrew it.

In the Continental Can case, the Commission held that the American company's acquisition of a Dutch competitor constituted an abuse of a dominant position.

As early as 1966, a Commission memorandum on concentration had already expressed the opinion that any attempt to monopolize could be an abuse in the sense of Article 86, and said that Article 86 would not be applied only to cases of market behavior.

Explaining this, Dr. Schlieder said that it was not mergers as such that were being criticized, but rather the elimination of actual or potential competition through mergers with competitors. Furthermore, the application of Article 86 did not depend on a finding that the dominant position had been used in any way whatever to achieve this forbidden result. It was sufficient if a result incompatible with the purposes of the Rome Treaties was due to an action taken by an enterprise in a dominant position.

According to the Commission, enterprises are in a dominant position when their scope for independent behavior is such that they can make their decisions without paying any real attention to competitors, buyers or suppliers. The Commission has ruled that this may occur if either their share of the market or their market share coupled with their technical knowledge, raw materials and capital, enable them to determine prices or to control production or distribution in a substantial part of the market.

Dr. Schlieder said that the Continental Can decision, which asked the company to submit divestiture plans before July 1 of this year, was a

landmark in the history of EC anti-trust enforcement.

Commenting on imminent British membership in the Community, Dr. Schlieder said that the accession treaties for the four new member states stipulated that the competition rules laid down in the Rome Treaties, as well as the implementing regulations, would be applicable to the enlarged Community as of January 1, 1973, in regard to all restrictive practices defined by those rules. Transitional arrangements would, however, cover situations already existing which become incompatible with Community rules by the act of accession.