

REGIONAL DEVELOPMENTS

European Communities*

I. Competition (Antitrust) Law

A. FRANCHISE AND KNOW-HOW LICENSE AGREEMENTS

The Commission of the European Communities has published its drafts of proposed regulations creating block exemptions under article 85(3), EEC, from the prohibitions of article 85(1), EEC, for defined categories of franchising agreements¹ and of know-how licensing agreements.² The two drafts are interrelated in that the former also deals with know-how as a component of a franchise package, and contains its own definition of know-how.³ Both drafts are also related to the existing Regulation 2349/84 on Patent Licensing Agreements,⁴ especially the draft on know-how licensing, which by its terms applies to "pure know-how licensing agreements and agreements combining the licensing of know-how which is decisive for the exploitation of the license technology and of patents which are not necessary for that purpose, or the licensing of substantial know-how and necessary patents for territories including Member States without patent protection."⁵ When in force, these regulations will greatly assist in the drafting of such agreements so as to avoid violation of the competition rules.

Pending the introduction of these block exemption regulations, the Commission has issued a third⁶ individual exemption in a franchise case, *Computerland Europe*,⁷ involving the 100 franchised retail outlets of the Luxembourg subsidiary of Computerland Corporation, a California enterprise. Although finding certain clauses in the standard-form agreement restrictive of competition, the Commission was able to exempt those clauses on grounds of the advantages to consumers of Computerland's

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1. 30 O.J. EUR. COMM. (No. C 229) 3 (1987).

2. 30 O.J. EUR. COMM. (No. C 214) 2 (1987).

3. 30 O.J. EUR. COMM. (No. C 229) 3 (1987), art. 1(2)(b) and (c).

4. 27 O.J. EUR. COMM. (No. L 219) 15 (1984).

5. 30 O.J. EUR. COMM. (No. C 214) 2 (1987), art. 1(1).

6. See 21 INT'L LAW. 895, 1209-10 (1987) (notes on the earlier cases).

7. Decision 87/407/EEC, 30 O.J. EUR. COMM. (No. L 222) 12 (1987).

rationalization of distribution, uniform standards of presentation and staff-qualifications, and the strong competition from outside the scheme faced by all the franchisees. In three recent cases involving knowhow licensing, the Commission indicated its intention, absent any valid third-party objections, to grant an individual exemption to the relevant agreements.⁸

B. TRANSPORT

In the field of air transport, the Commission announced on July 31, 1987,⁹ that proceedings would continue,¹⁰ as allowed under article 89, EEC, against ten European airlines because of alleged violations of article 85(1), EEC, by agreements and practices relating to revenue pooling, capacity sharing, and tariff consultations. These airlines were given until September 14, 1987, to supply any further information for the Commission to take into account in reaching a decision on these allegations. At the same time, the Commission initiated proceedings against three other airlines, Iberia, Luxair, and TAP, not parties to the original investigation.

The Commission now takes decisions in the broad area of maritime transport. One decision taken under the general implementing regulation, Regulation 17/62, and not under the specific maritime regulation, Regulation 4056/86,¹¹ is *Baltic International Freight Futures Exchange Ltd. (BIFFEX)*.¹² After examination, the Commission found that BIFFEX's rules and regulations, drawn up in the light of the Commission's recent decisions in the *Commodity Terminal Market* cases,¹³ did not violate article 85(1), EEC, and so granted them negative clearance. Significant factors influencing this positive view were the transparency of the membership conditions, the existence of a fair appeals procedure, and the absence of any fixing of commission rates among members of the exchange, all of whom are engaged in the market in ocean freight futures contracts. The decision stressed that, while freight is a service, this market exhibited features closely analogous to a commodity futures market.

In *Spain (Canary and Balearic Islands' Transport)*¹⁴ the Commission considered complaints against the Spanish Government and relevant state-

8. Rich Products, Jus-rol, 30 O.J. EUR. COMM. (No. C 209) 3 (1987); Elopak, Metal Box, ODIN Developments, 30 O.J. EUR. COMM. (No. C 215) 3 (1987); Enichem, ICI, European Vinyls, 30 O.J. EUR. COMM. (No. C 217) 2 (1987).

9. Press Release IP(87)343.

10. *Noted in* 21 INT'L LAW. 577. 1205-07 (1987).

11. 30 O.J. EUR. COMM. (No. L 378) 4 (1987); whereas Regulation 17/62 is found at 13 O.J. EUR. COMM. 204 (1962). *See* 21 INT'L LAW. 1208 (1987) on the application of Community competition law to maritime transport. *See generally* Decision 87/475/EEC, *Re* Maritime Transport between Italy and Algeria, 30 O.J. EUR. COMM. (No. L 275) 37 (1987) (applying Decision 77/587/EEC, and Regulations 954/79 and 4055/86 to that trade).

12. Decision 87/408/EEC, 30 O.J. EUR. COMM. (No. L 222) 24 (1987).

13. Decisions 87/44-7/EEC, 30 O.J. EUR. COMM. (No. 19) 18-30 (1987).

14. Decision 87/359/EEC, 30 O.J. EUR. COMM. (No. L 194) 28 (1987).

owned transport undertakings, Iberia and Transmediterranean, to the effect that under Spanish law,¹⁵ Spanish nationals who were residents of the Canary and Balearic Islands provinces of Spain received state-subsidized rebates on the regular passenger fares on scheduled air and sea transport between the islands and the Spanish mainland. The Commission found that: the restriction to Spanish national residents discriminated on grounds of nationality prohibited by article 7, EEC; the undertakings questioned were of the kind mentioned in article 90(1), EEC: the Commission was empowered to issue this decision directly against the Spanish Government under article 90(3), EEC; and declared the government in breach of its EEC Treaty obligations, and required it to rectify the situation within two months. This action is another example of the Commission's using its competition law powers under article 90(3) to give direct orders to a Member State government to desist from involvement in a violation, rather than merely suing for a declaratory judgment under article 169, EEC.¹⁶ The case is interesting in that the basic violation here was of article 7, EEC, and not of articles 85 and 86, EEC, with which proceedings under article 90, EEC, are more usually concerned.¹⁷

C. INSURANCE

The Commission stated,¹⁸ following the judgment of the European Court of Justice (ECJ) in the *German Fire Insurance Case*,¹⁹ and discussed with the Comité Européen des Assurances, that it would consider whether a block exemption regulation, exempting certain categories of agreements in the insurance sector from the prohibition of article 85(1), EEC, was justified. Meanwhile, parties should notify the Commission of their agreements for an individual exemption under article 85(3), EEC. In *Re Agreements of the Irish Insurance Federation*²⁰ the Commission announced its intention (subject to third-party comments) to grant such an exemption to agreements fixing maximum rates of commission payable by insurers to intermediaries (brokers and agents), as being in the public interest.

15. Decree-Law No. 22/62 of June 14, 1962; Law No. 46/81 of Dec. 29, 1981; Royal Decree No. 3269/82 of Nov. 12, 1982.

16. See 21 INT'L LAW. 574 (1987) (discussion of the legal liability of Member State governments in competition proceedings).

17. But art. 90, EEC, does not extend to violations of the provisions on the free movement of goods between Member States, arts. 30-36, EEC. Hence, for an alleged violation by the Irish Government of art. 30 in respect of the exclusive use of Irish cement in Irish public works contracts, the Commission has recently proceeded under art. 169, EEC; see Ireland (Cement Public Procurement Policy), Press Release IP(87)302.

18. Press Release IP(87)270.

19. *Verband der Sachversicherer v. EC Commission*, Case 45/85, The Times, Feb. 7, 1987. See 21 INT'L LAW. 1210-11 (1987) (notes on the recent cases on insurance in relation to the Community rules on competition and freedom to provide services).

20. 30 O.J. EUR. COMM. (No. C 120) 5 (1987); 50 Comm. Mkt. L.R. 450 (1987).

D. ABUSE OF A DOMINANT POSITION (CONTRA TO ARTICLE 86, EEC)

Important contributions to the delineation of the concepts of "undertaking" and "relevant economic market" have been made by the ECJ in recent cases. *Metro-SB-Grossmarkte v. E.C. Commission*²¹ is the latest in the saga of Metro's litigious attempts to be allowed to sell SABA products although excluded from SABA's selective distribution scheme.²² SABA is a member of the giant electronics group, Thompson-Brandt (TB), and Metro alleged that SABA's refusal to supply Metro abused SABA/TB's alleged dominant position in consumer electronics, which should have caused the Commission to refuse an article 85(3), EEC, exemption to SABA's scheme. The evidence showed that each corporation, like SABA, in the TB group pursued its own marketing and distribution policy, often in competition with other members of the group. The Court held that the relevant market to determine the existence of dominance must be the market in which SABA's products, not all TB group products, were sold, unless counter-evidence of group policy coordination existed not merely at the capital structure level, which was established, but also at the marketing and distribution levels, which was not. In other words, on such facts, SABA was to be regarded as an undertaking separate from the TB group as a whole and from the other members of the group. Although the case involves Metro's right to challenge SABA's article 85(3), EEC, exemption, the decision will no doubt prove instructive on "pure" article 86, EEC, disputes.

The "relevant market" theme was further developed in *British Leyland v. E.C. Commission*.²³ In Europe a vehicle manufacturer must obtain "type-approval" (TA) for the use of its products on the roads of a given Member State from that State. Thereafter the manufacturer must certify that imports of its products into that State conform to the TA before they can be legally driven there. British Leyland (BL) originally obtained U.K. TA for its cars in both right-hand drive (rhd) (the U.K. norm) and left-hand drive (lhd) (the Continental norm) versions. BL subsequently allowed some of the lhd TA to lapse, although it could easily have renewed it at minimal cost. Would-be importers of BL cars complained of BL's abuse of a dominant position in not facilitating (re)imports of its own-manufactured cars. BL responded by arguing (inter alia) that it held no dominant position in the highly competitive European or U.K. car markets. The ECJ held that, on these complaints, the relevant economic market was not cars in general, but certificates of TA conformity for

21. [1987] 1 Comm. Mkt. L.R. 118.

22. See, e.g., *Metro-SB-Grossmarkte v E.C. Commission (No.1)*, Case 26/76, 6 Eur. Ct. Rep. 1875 (1977), and the table of relevant Commission decisions cited there and in the instant case.

23. [1987] 1 Comm. Mkt. L.R. 185.

imported BL cars, a market in which BL necessarily dominated since by law only it could issue such certificates. Someone who already owned a BL car and wished to import it into the U.K. was not comforted by the observation that one could instead buy a different car in a competitive market. Thus, BL's various practices in allowing the lhd TA to lapse, charging excessive or discriminatory prices or causing long delays for the certificates they did issue, and discouraging dealers from seeking such certificates, abused that dominant position, contra to article 86, EEC.

In *Basset v. SACEM*²⁴ the ECJ held that a copyright management society did not abuse its undoubted and legally conferred dominant position in the exploitation (on behalf of the owners) of copyrights in phonograms by charging disothèques a fee for the license to play phonogram records subject to the society's control. The fee expressly included both a "performance fee" and a "mechanical reproduction fee." The copyright owner or agent is entitled to decide the basis and amount of the fee, provided that the fee is not excessive (which would be abusive, contrary to article 86, EEC), nor discriminatory against imported records (which would be contra to article 30, EEC). The mere fact that a "mechanical reproduction fee" is not charged in the state of origin of the imported records is irrelevant by itself.

The Commission, using its emergency powers derived from the *Camera Care Case*²⁵ made an interim order preserving the commercial status quo in *Re Boosey & Hawkes (B&H)*.²⁶ B&H had a dominant position in the manufacture of brass band musical instruments in the U.K. Their largest customer, Gabriel's Horn House (GHH) and a specialist instrument repairer, RCN, jointly formed a new manufacturing company, BBI, to compete with B&H. B&H then refused further supplies to GHH and RCN, thereby endangering their commercial existence. This action constituted the emergency that enabled the Commission to order B&H to resume supplies, pending a decision on GHH's and RCN's claim that B&H's refusal to supply was an abuse of its dominant position. The case is analogous in these respects to the original *Camera Care Case*.

E. COMMISSION POWERS OF INVESTIGATION

The Commission's powers of investigation of suspected competition law violations, principally contained in article 14 of Regulation 17/62²⁷ as interpreted in the case law, are well-known to be wide; some might say,

24. [1987] 3 Comm. Mkt. L.R. 173.

25. 1 Eur. Ct. Rep. 119 (1980); [1979-1981 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8645.

26. Decision 87/500/EEC, 30 O.J. EUR. COMM. (No. L 286) 36 (1987).

27. 13 O.J. EUR. COMM. 204 (1962).

draconic. Such investigations may or may not be initiated by a formal Commission decision (article 14(3)). Non-compliance by the investigatee undertaking with a *decision* to investigate exposes it to twin liabilities: to be fined for its recalcitrance, under article 15(1)(c), and to make a periodic penalty payment for each day the recalcitrance continues thereafter, under article 16(1)(d), of Regulation 17/62. Officials of the competent (i.e., competition enforcement) authority of the relevant Member State *may* assist the Commission if so requested (article 14(5)). The Member State, however, *must* assist when an investigation launched by decision is opposed by the investigatee (article 14(6)). Such a situation is well illustrated by the recent Commission investigation into the affairs of Hoechst AG,²⁸ a West German corporation alleged to have fixed prices and quotas for PVC and polyethylene. Although initiated by a duly notified decision, Hoechst refused to submit to the investigation. When the Commission requested the assistance of the competent German authority, the Bundeskartellamt ((BKA) i.e., the Federal Cartel Authority), Hoechst obtained an interim order from the competent German administrative tribunal restraining the BKA from assisting the Commission. Not surprisingly, the Commission imposed the maximum daily penalty of 1,000 ECU per day on Hoechst for each day of its refusal and is preparing to impose the lump sum fine under article 15(1), for which the maximum is 5,000 ECU for each violation. This action, of course, is quite distinct from the question of any ultimate fine that may be imposed for a substantive violation of the competition rules if eventually established, which could be as high as ten percent of the Hoechst group's worldwide turnover (article 15(2) of Regulation 17/62). Meanwhile the Commission has commenced action against the Federal Republic of Germany before the ECJ under article 169, EEC, for a declaratory judgment that the order restraining the BKA, and the BKA's non-assistance, places the Federal Republic in breach of its EEC Treaty obligations.

II. Internal Market Harmonization

A. PRODUCT LIABILITY

The U.K. has now implemented the EEC Directive on Liability for Defective Products,²⁹ by means of Part I of the (U.K.) Consumer Protection Act 1987, which comes into force on March 1, 1988. The U.K., using options available under the Directive, has excluded agricultural

28. *Re Hoechst Investigation*, Press Release IP(87)58.

29. Directive 85/374/EEC, 28 O.J. EUR. COMM. (No. L 210) 29 (1985); see 21 INT'L LAW, 898 (1987) (notes on the Directive).

(including fishery) products and game,³⁰ and has avoided setting an overall financial limit to a defendant's liability on any one set of claims, but has included the controversial "state of the art" or "development risks" defense,³¹ which can severely limit the consumer's rights to recovery. In the same statute the U.K. has created (by Part II of the Act) a new generalized criminal offense of failure to comply with "the general safety requirement" in the supply of goods.³² The Act has also considerably extended the liabilities (by Schedule 3 to the Act), at both civil and criminal law, of designers, suppliers, employers and others towards employees and workers with respect to products and substances used in the workplace.³³ By Parts II and IV of the Act the powers of the enforcement authorities in respect of these criminal aspects have been markedly increased.

B. CUSTOMS COMMODITY DESCRIPTION AND CODING SYSTEM

The Community has formally adopted, on behalf of all of its Member States, the International Convention on the Harmonized Commodity Description and Coding System (1983),³⁴ which is about to replace the Brussels Convention on Customs Nomenclature (1950) as the basic system used by Community customs authorities. The new Convention is confidently expected to enter into force generally on January 1, 1988, on achieving its required minimum of seventeen Contracting Parties. In fact, adoption by some twenty-five Contracting Parties, including the twelve Community Member States, is expected by that date.³⁵ In any event, the Community will begin using the Combined Tariff and Statistical Nomenclature and the TARIC system under the Convention as from January 1, 1988.³⁶

III. Community Commercial Policy and External Relations

A. DUMPING AND SUBSIDIES

In enacting Regulation 1761/87,³⁷ amending its basic antidumping and subsidy regulation, Regulation 2176/84,³⁸ the Community strengthened

30. Directive 85/374/EEC, *supra* note 27, § 2(4), provided no industrial process has yet been applied.

31. *Id.* § 4(1)(e).

32. This part of the Act came into force on Oct. 1, 1987.

33. These provisions, which amend the (U.K.) Health and Safety at Work Act 1974, Part I, especially § 6, are expected to come into force on March 1, 1988.

34. Decision 87/369/EEC, 30 O.J. EUR. COMM. (No. 198) 1 (1987) (text of Convention annexed).

35. Press Release IP(87)382.

36. Regulation 2658/87, 30 O.J. EUR. COMM. (No. L 256) 1 (1987); Announcement on Entry into Force of the Convention, 30 O.J. EUR. COMM. (No. L 277) 40 (1987).

37. 30 O.J. EUR. COMM. (No. L 167) 9 (1987).

38. 27 O.J. EUR. COMM. (No. L 201) 1 (1984).

the earlier regulation by taking powers to impose antidumping duties on products finally assembled *within* the Community when assembly seems to occur only in response to actual or threatened antidumping duties on the like products finished outside the Community. In blocking this loophole, the Community claims to be acting well within the GATT rules, following the lead of the U.S., which recently adopted similar provisions.³⁹

B. ILLICIT COMMERCIAL PRACTICES

In the third proceeding under Regulation 2641/84 on illicit commercial practices,⁴⁰ *IFPI's Complaint Re Indonesian Pirate Cassettes*,⁴¹ the Commission accepted that the complainant established a prima facie case of an illicit practice on the part of Indonesia, in failing to provide Community holders of copyrights in sound recordings effective means of protecting themselves against widespread piratical copying of their recordings inside Indonesia for commercial purposes. The Commission has accordingly launched an investigation under article 6 of the regulation.

C. COMMUNITY REPORT ON U.S. TRADE BARRIERS

In this Report⁴² the Community has drawn up a detailed and lengthy indictment of U.S. practices that it considers to be unjustified or illegal barriers to international trade. Items are arranged under the headings: Tariff and other Import Charges; Quantitative Restrictions and Import Surveillance, (Other) Customs Barriers; Standards, Testing, Labeling, and Certification; Public Procurement; Export Subsidies; Intellectual Property (especially the use of the Tariff Act 1930, section 337); Use of Countervailing and Anti-Dumping Duties; Trade Act 1974, section 301; Export Controls and Technology Transfer Restrictions; the Semiconductor Agreement; Repair and Servicing Practices; and Tax Barriers. Where appropriate, a GATT panel will hear complaints; otherwise the normal procedures of bilateral and multilateral negotiation will be used to try to persuade the U.S. to mend its ways in the matter of restricting free trade.

39. Preamble to Regulation 1761/87, *supra* note 35; Press Release IP(87)51.

40. 27 O.J. EUR. COMM. (No. L 252) 1 (1984). See 21 INT'L LAW. 899, 1211-12 (1987) (notes on the previous proceedings).

41. 30 O.J. EUR. COMM. (No. C 136) 3 (1987); Press Release IP(87)188; [1987] 3 Comm. Mkt. L.R. 547.

42. Press Release IP(87)139.