

March 1971

## "International Antitrust": A Look at Recent Developments

Mark R. Joelson

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Antitrust and Trade Regulation Commons](#), and the [International Law Commons](#)

---

### Repository Citation

Mark R. Joelson, *"International Antitrust": A Look at Recent Developments*, 12 Wm. & Mary L. Rev. 565 (1971), <https://scholarship.law.wm.edu/wmlr/vol12/iss3/5>

Copyright c 1971 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

“INTERNATIONAL ANTITRUST”:  
A LOOK AT RECENT DEVELOPMENTS

MARK R. JOELSON\*

Recent developments involving the application of United States anti-trust law to foreign firms have provoked a search by many for a distinct, if hitherto undiscovered, discipline called “international antitrust.” In truth, the establishment of an international body of law is as elusive and distant in the case of antitrust as it is in other facets of international law. Thus, the primary concern of the American lawyer continues to be with the application and impact of national laws, usually United States law, on international business transactions. If private international law is, as has been suggested, simply the practice of local law for clients with foreign names, then it can fairly be said that international antitrust is no more than the practice of United States antitrust law for combines with exotic labels, such as *Nederlandsche Combinatie Voor Chemische Industrie*.<sup>1</sup>

Nevertheless, as recent developments attest, antitrust as a subject for international concern and cooperation has developed quite rapidly. It is no longer an esoteric and largely academic field of study but a part of everyday business transactions. Today, the American businessman is aware that he must participate and compete in the context of an international business community, an awareness that has been more keenly felt by businessmen in countries such as Japan and the United Kingdom which have been compelled to carry on overseas trade to survive. Meanwhile, our antitrust law and some foreign antitrust law, notably that of the European Economic Community, has been maturing and has become more stringent. The resulting interplay between international transactions and national antitrust policy was inevitable and is only beginning to generate sparks.

This phenomenon creates problems on two major levels. The most obvious difficulty is that posed for the international firm which must thread its operations around the world through different, and often conflicting, national antitrust policies and rules. Secondly, these differences in antitrust policy have given rise to equally thorny problems

---

\* A.B. (cum laude), Harvard University, 1955; LL.B. (cum laude), Harvard University, 1958; Diploma in Law, Oxford University, 1962; Fullbright Scholar, 1962; Member of the firm: Arent, Fox, Kintner, Plotkin and Kahn, Washington, D.C. Appreciation is expressed for the assistance of Mr. Eugene J. Meigher.

1. *United States v. N. V. Nederlandsche Combinatie Voor Chemische Industrie*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,181 (S.D.N.Y. July 8, 1970).

at the governmental level, and the responsible enforcement agencies have been forced to take steps to reduce the likelihood of conflict and to accommodate the interests of other countries.

#### DEVELOPMENTS IN THE UNITED STATES

Turning to the developments in United States law, there have been a host of recent actions that have given pause to American businessmen with overseas activities, as well as to foreign firms seeking commerce in the United States. The *BP-Sobio*,<sup>2</sup> *Litton*,<sup>3</sup> and other antimerger proceedings, the establishment of a patent unit in the Antitrust Division of the Department of Justice, and the *Westinghouse*<sup>4</sup> and *Painton*<sup>5</sup> cases are causing businessmen to view new international arrangements with some trepidation. In addition, these developments are cause for anxiety about the enforceability of *existing* patent and "know-how" licensing arrangements throughout the world.

In analyzing the recent cases, it appears that the international aspects of the cases are incidental to the enforcement of the antitrust policy involved, rather than central to it. Nevertheless, the impact of the actions on the international business community has been substantial, bringing uncertainty and confusion in their wake.

#### *Mergers*

Considerable anxiety has recently been expressed by businessmen in the United States and abroad over the spate of government antimerger actions involving foreign companies. While the government's increased activity in this sector is noteworthy, examination reveals that the government complaints in question have been more remarkable for their number than for their novelty. In large measure, the recent series of mergers cases is attributable to the maturation of basic Clayton Act, Section 7 doctrine through domestic merger cases. In addition, there is the increased emphasis which the Antitrust Division of the Department of Justice has placed on foreign competition as a valuable antidote to the ills arising from domestic concentration. As long as the Division regards existing or potential competition from abroad as

---

2. *United States v. Standard Oil Co. (Ohio)*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 72,988 (N.D. Ohio Jan. 1, 1970).

3. *Litton Indus., Inc.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,729 (FTC April 11, 1969).

4. *United States v. Westinghouse Elec. Corp.*, [Transfer Binder, U. S. Antitrust Cases Summaries 1961-1970] TRADE REG. REP. Case 2095 (N.D. Cal. April 22, 1970).

5. *Painton & Co., Ltd. v. Bourns, Inc.*, 309 F. Supp. 271 (S.D.N.Y. 1970).

one of the principal remedies against existing concentration, foreign-company acquisitions are likely to come under close scrutiny.

A review of these merger complaints shows that, with the exception of *United States v. Gillette Co.*,<sup>6</sup> their underlying legal theories were quite conventional. This is not to say that the economic effects alleged in those complaints are not the subject of legitimate controversy. But it is quite apparent that the government has not turned to novel theories when dealing with foreign-company acquisitions.

Several of the government complaints filed against foreign corporations have been premised upon commonplace theories of elimination of direct competition within the United States. An example is the Federal Trade Commission's section 7 complaint against Litton Industries for its acquisition of Triumph-Adler, a German typewriter manufacturer.<sup>7</sup> In 1965, Litton acquired Royal-McBee Corporation, at that time the second largest firm in the concentrated typewriter industry. The immediate effect of the German acquisition was to combine Litton's existing operations, which accounted for about 19.5 per cent of total typewriter sales in 1967, with those of Triumph-Adler, which was itself allegedly a significant factor in the American market.

Similarly, the government filed a section 7 suit against CIBA and J. R. Geigy, two Swiss corporations, and their American subsidiaries. The action was based upon the fact that the wholly-owned American subsidiaries were directly competing in the manufacture and sale of dye-stuffs, anti-hypertensive drugs, herbicides, and optical brightening agents in the United States.<sup>8</sup>

Potential competition theory has already begun to appear in foreign-company merger complaints, and it can be expected to play an increasingly significant role. The government suit against the British Petroleum-Sohio acquisition, for example, was predicated upon both actual and potential competition.<sup>9</sup> According to the government, both Sohio and "BP" were direct competitors in the sale of gasoline in western Pennsylvania with sales accounting for 10.3 per cent and 3.5 per cent respectively of all gasoline sales in that state in 1968. In addition, BP

---

6. [Transfer Binder, U. S. Antitrust Cases Summaries 1961-1970] TRADE REG. REP. Case 1988 (D. Mass. Feb. 14, 1968).

7. Litton Indus., Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,729 (FTC April 11, 1969). See also *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966).

8. *United States v. CIBA Corp.*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,269 (S.D.N.Y. Sept. 8, 1970).

9. *United States v. Standard Oil Co. (Ohio)*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 72,988 (N.D. Ohio, Jan. 1, 1970).

was alleged to be a potential entrant into the highly concentrated Ohio market, which was contiguous to BP's existing marketing territory, and where Sohio accounted for over 30 per cent of total gasoline sales. The significance of this last theory is reflected in the divestiture provided for in the decree settling the case. Divestiture is not to be confined to western Pennsylvania, the area of actual competitive overlap, but also is to embrace Ohio, in which Sohio is required to disgorge some of its stations. Again, the case is not novel in terms of American antitrust law, but the strong reaction in British and European business circles suggested that the international repercussions are significant, and that a fertile ground for misunderstanding exists in the antimerger area.

While the preceding cases represent a rather conventional application of merger theory, the government's suit contesting the Gillette Company's acquisition of the Braun Co. seems to illustrate a bolder application of potential competition theory. Gillette is, of course, the leading American manufacturer of safety razors and blades. Braun, prior to the acquisition, manufactured electric razors in West Germany but, pursuant to a 1954 licensing and distribution agreement with the Ronson Corp., was not permitted to sell electric razors in the United States until January 1, 1976. One of the striking aspects of the case is the government's theory as to the relevant product market, in that it embraced both wet and dry shaving instruments. While wet razors and electric razors are meant to perform identical functions, it is doubtful, as a practical matter, that to a user of blades an electric razor represents an acceptable substitute. Conversely, it is doubtful that a long-time user of electric razors can be regarded as a potential purchaser of blades. Thus, the only substantial head-on competition between wet and dry shaving instruments is in the effort to win the beginning shaver.

The validity of the government's definition of relevant product market notwithstanding, there was little basis for calling Braun a potential entrant into the United States. Under the license agreement with Ronson, which the government did not attack, Braun was barred for some time from entry into the United States market. Moreover, the relatively poor showing by Ronson with the Braun razor in the American market cast further doubt upon Braun's potential in this market, since there was no reason to expect that Braun would be more successful in marketing such a razor than would Ronson.

In sum, the government's recent merger suits involving foreign corporations have been more significant for their number than for the theories on which they were based. While *Gillette* provides an excep-

tion to the rule, the action in that case is probably in large measure attributable to the persistence of a very high degree of concentration in the shaving instrument market and to Gillette's continuing dominance of that market.

### *Licensing of Patents and Know-How*

Numerous foreign corporations have been caught up in the current government enforcement efforts with respect to license agreements, and it appears likely that developments in the law affecting the licensing of patented and nonpatented technology will have a more pervasive influence upon international commerce than will future antimerger actions. Except for the *Westinghouse* case, it can be said that the competitive consequences alleged in these cases have been entirely upon domestic commerce and that the cases have lacked the broad international flavor of the older conspiracy cases, like *Timken*<sup>10</sup> and *ICI*.<sup>11</sup> Nevertheless, firms throughout the world are today reviewing their know-how and patent license agreements which, though lawful and enforceable under foreign laws, may be void to the extent that they touch on American commerce.

In the case of the government's patent program, the private bar has received considerable assistance from the speeches of Antitrust Division officials in anticipating the kinds of licensing provisions which will be undergoing re-examination. On the other hand, the full import of the Supreme Court's holdings in *Lear Inc. v. Adkins*<sup>12</sup> and *Zenith Radio Corp. v. Hazeltine Research, Inc.*<sup>13</sup> is not so evident.

The initial phase of the government's current patent program has been to attack particular kinds of provisions frequently found in patent licenses, the lawfulness of which under the antitrust laws could be questioned without attacking the license agreements as a whole. The government's position has been most stringent with respect to restrictions imposed upon the resale of license products. In such cases the government relies upon the proposition that, since the first authorized sale of a patented article exhausts the patent monopoly,<sup>14</sup> further restrictions may not be imposed upon the purchaser by the patentee

---

10. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

11. *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

12. 395 U.S. 653 (1969).

13. 395 U.S. 100 (1969).

14. *United States v. Univis Lens Co.*, 316 U.S. 241 (1942).

seller. For example, in *United States v. Glaxo Group Ltd.*,<sup>15</sup> the government successfully argued that forbidding a licensee who has purchased the licensed product to resell it in bulk form is per se illegal. This government position against restraints on alienation is established in domestic precedents and recently received further impetus in *United States v. Arnold Schwinn & Co.*<sup>16</sup>

The Antitrust Division is also interested in developing some law in connection with a variety of similar restrictions upon manufacturer licensees where the "restraint on alienation" theory is not directly applicable. These restrictions may take the form of preventing such licensees from selling the licensed product in bulk, or through certain channels of distribution, or to certain classes of customers or in particular fields of use. As to the latter type of restriction, Assistant Attorney General McLaren has expressed the view that, while "there may be some justification for a patentee reserving for himself a well-defined field out of the various potential applications for his invention, it is difficult to see how justification can be shown for the type of restriction which divides fields of use among licensees who otherwise would compete."<sup>17</sup> There have been a number of recent cases, several in the international area, attacking licensing restrictions of this type.<sup>18</sup>

The recent complaint against the Westinghouse and Mitsubishi companies,<sup>19</sup> with its allegations of an extensive arrangement between the parties to avoid competition in various territories, is more akin to the older international conspiracy cases than to the government's other recent patent cases. In addition to the basic issue of non-competition, the complaint presents a host of interesting antitrust issues, including

15. 302 F. Supp. 1 (D.D.C. 1969). See also *United States v. Farbenfabriken Bayer A. G.*, TRADE REG. REP. (1969 Trade Cas.) ¶ 72,918 (D.D.C. Oct. 24, 1969).

16. 388 U.S. 365 (1967).

17. McLaren, *Patent Licenses and Antitrust Considerations*, PATENT, TRADEMARK AND COPYRIGHT RESEARCH INSTITUTE OF GEO. WASH. U. (1969).

18. *United States v. Ciba Corp.*, [Transfer Binder, U. S. Antitrust Cases Summaries 1961-1970] TRADE REG. REP. Cases 2058, 2059 (D.N.J. July 9, 1969), involving allegations that licensees were precluded from selling certain drugs in bulk form and otherwise than in specified combinations; *United States v. Fisons Ltd.*, [Transfer Binder, U. S. Antitrust Cases Summaries 1961-1970] TRADE REG. REP. Case 2067 (N.D. Ill. July 23, 1969), involving an alleged agreement by a British company and American pharmaceutical firms to allocate fields of sale and restrict sale of the product in bulk form. See also *United States v. Ziegler*, [Transfer Binder, U. S. Antitrust Cases Summaries 1961-1970] TRADE REG. REP. Case 2097 (D.D.C. April 24, 1970), attacking the licensing of certain process patents on conditions which restrict competition in the sale of the unpatented product resulting from the process.

19. *United States v. Westinghouse Elec. Corp.*, [Transfer Binder, U. S. Antitrust Cases Summaries 1961-1970] TRADE REG. REP. Case 2095 (N.D. Cal. April 22, 1970).

the payment of royalties on products not made under the licensed technology, territorially determined royalty differentials, and licensing of patents along national lines. Despite the furor that followed issuance of the complaint the case does not seem to hold broad ramifications for the international business community, because the Antitrust Division apparently views the *Westinghouse* case as a hard-core and long-term conspiracy situation rather than as a new departure. There are some noteworthy features in the complaint's request for relief, to which reference will later be made.

It is submitted that the largest storm cloud with respect to most international technology exchanges is created, not by the *Westinghouse* complaint, but by the uncertainty generated by the Supreme Court's decision in *Lear, Inc. v. Adkins*.<sup>20</sup> The *Lear* holding on the patent issues is important,<sup>21</sup> but, from the international businessman's viewpoint, the most significant impact of the case may stem from what it did not decide—the question of whether the transfer of nonpatented technology is adequate consideration for a royalties contract. While the Court confined itself to posing tantalizing questions about the compatibility of such agreements with patent policy, Mr. Justice Black, concurring in part and dissenting in part, flatly stated that “. . . private arrangements under which self-styled ‘inventors’ do not keep their discoveries secret, but rather disclose them, in return for contractual payments, run counter to the plan of our patent laws. . . .”<sup>22</sup> Although this issue is not peculiar to foreign trade, the effect of Mr. Justice Black's position, if adopted by the Court, could be devastating upon the massive international trade in nonpatented technology. It is interesting to note that in the one reported case in which Mr. Justice Black's position was adopted, the nonpatented information had been licensed by an American firm to a British licensee.<sup>23</sup> In that case, the district judge reasoned that, under the rationale of *Lear*, enforcement of a royalty agreement with respect to the use of unpatented technology would be contrary to our national patent law and policy.

Since *Lear*, the comments of Antitrust Division personnel indicate a reluctance to press for a rule that royalty payments in exchange for nonpatented technology are unenforceable. The government position

---

20. 395 U.S. 653 (1969).

21. The case, of course, was the death knell of the licensee estoppel doctrine. Not only is a no-contest clause in a license agreement unenforceable, but questions are now raised as to whether such clauses may be a basis for antitrust vulnerability.

22. 395 U.S. at 677.

23. *Painton & Co., Ltd. v. Bourns, Inc.*, 309 F. Supp. 271 (S.D.N.Y. 1970).

appears to be that state law can legitimately protect ideas that are valuable and rise to the level of a trade secret.<sup>24</sup> This question, however, will probably have to be ultimately resolved by the Supreme Court.

At this juncture, all that may safely be said is that for reasons of equity—giving some recognition to the inventor for his efforts—and because of the commercial significance of facilitating the exploitation of unpatented technology through licensing, it seems unlikely that the Court will adopt a rule that would put an end to such licensing. On the other hand, such licenses are likely to receive more careful scrutiny in the future. Perhaps the standards suggested by Mr. McLaren—that the idea be a genuine and valuable secret; that the license be unencumbered by any unreasonable restriction and not of excessive duration—may be adopted by the Court.

### *Related Problems*

While developments in the substantive areas of merger enforcement and licensing have generated the most comment, there have been other recent developments related to application of United States antitrust laws to foreign companies. Two procedural areas of some importance are those relating to remedies and to the proper scope of the government's investigatory powers. In some respects these problem areas are more sensitive than those previously discussed. For example, as the government extends its authority into matters involving foreign parties, its investigatory powers become more susceptible to challenge. Hence, as the government's merger and patent programs move on to more complex matters involving overseas companies the government's subpoena and civil investigative demand powers will probably be tested in this context.

The use of grand jury subpoenas to obtain documents held by a German branch of an American bank was considered in *United States v. First National City Bank*.<sup>25</sup> The Court of Appeals confirmed that a federal court has the power to require the production of documents located in foreign countries, if it has in personam jurisdiction over the

---

24. Address by Bruce B. Wilson, *Patents and Antitrust: The Legitimate Bounds of the Lawful Monopoly*, Patent Law Ass'n of Pittsburgh, Nov. 19, 1969; address by Richard W. McLaren, *Common Law Protection of Unpatented Ideas*, Symposium on Patent Law, Sept. 26, 1969. See also address by Mr. McLaren, *Competition in the Foreign Commerce of the United States*, Symposium on Antitrust and Related Issues and their Solutions in International Trade and Productive Investment, Marshall-Wythe School of Law, Williamsburg, Va., Oct. 16, 1970.

25. 396 F.2d 897 (2d Cir. 1968).

person in possession of the documents. However, as the Court of Appeals' opinion reveals, the outcome in any such case turns on delicate considerations of jurisdiction, choice of law principles, the relevant law of foreign states and acute questions of timing. In this case, the court had to balance American antitrust law, which it referred to as a cornerstone of United States economic policy, against German bank secrecy tradition (with a common law and private litigation context), an exercise which brought forth a clear result. On the other hand, had the bank been in jeopardy of criminal prosecution in the foreign state for delivering the documents, the outcome would probably have been different. Another important factor was that neither the State Department nor the German government had expressed an international interest in the matter.

The *City Bank* case is probably only the opening round in a battle over the scope of the subpoena power as it relates to documents abroad and to foreign corporations. The record in the *Gillette* case might also prove illustrative of the difficulties of obtaining documents and testimony outside the United States.

Similar questions might also be raised with respect to the government's powers under the Civil Investigative Demand statute.<sup>26</sup> The dimensions of these powers have been largely untested. However, successful resistance to this authority in domestic situations may stimulate challenges to similar investigations in the international commerce area.<sup>27</sup>

The problem of remedies also warrants special attention. Remedies in merger cases, when applied to foreign companies, may cause particular irritation abroad, because many other nations have attitudes toward mergers and acquisitions which differ from those of the United States. Even where antitrust law affecting restrictive trade practices is relatively well developed abroad, antimerger law tends to be nonexistent, embryonic, or simply unenforced. For reasons that are readily apparent, in light of the acquisition onslaught upon European business by American companies, sensitivity abroad to a United States antitrust challenge is greatest when the foreign corporation is the acquiring company. The American government has sought to alleviate this problem in recent cases by circumspectly tailoring its terms of settlement, thereby curing the alleged violation without preventing the merger. *Standard*

---

26. Antitrust Civil Process Act, 76 Stat. 548, 15 U. S. C. §§ 1311-14 (1964).

27. See *Petition of Union Oil Co.*, 225 F. Supp. 486 (S.D. Cal. 1963), *aff'd*, 343 F.2d 29 (9th Cir. 1965); *Chattanooga Pharm. Ass'n v. United States*, TRADE REG. REP. (1965 Trade Cas.) ¶ 71,524 (E.D. Tenn. Aug. 16, 1965), *aff'd* 358 F.2d 864 (6th Cir. 1966).

*Oil Co. (Ohio)* is a case in point, since divestiture was carefully limited in order to excise the alleged violation. This precision in approach may not seem remarkable until one recalls the Justice Department's general preference for stopping objectionable mergers altogether, rather than surgically removing the offending part.

While the recent patent licensing cases illustrate a wide variety of relief, the requested relief has been directed for the most part toward domestic commerce, because the alleged violations were considered to have their effects only on domestic commerce. In addition to an adjudication that there has been a violation and an injunction against the alleged violation, the stipulations commonly sought have been the extension of injunctions beyond the products involved in the complaint, mandatory licensing of all bona fide applicants, and prohibitions against the use of no-contest clauses.

The requested relief in the *Westinghouse* complaint is very sweeping and expressly concerned with international commerce. The essence of the complaint is a general understanding between the defendants providing for exchange of valuable technology in return for mutual promises not to compete with each other in specified areas. The requested relief would remedy this arrangement by compelling each to license the other nonrestrictively, thereby enabling Westinghouse to compete with Mitsubishi in Japan and Mitsubishi with Westinghouse in the United States. The noteworthy aspect of the requested relief is that the court order of reciprocal licensing would extend to the present and future Japanese patents of both parties.<sup>28</sup> Whether a court should issue so far-reaching an order involves a delicate question of fashioning relief which has to be somewhat accommodated to the public policy of the foreign states involved. It would seem that such relief, applying not only to a foreign company but also to the patent framework of another country, should be reserved for only the most aggravated violations of United States antitrust law.

#### THE EUROPEAN ECONOMIC COMMUNITY

The overseas development of antitrust law has increased in various areas as industrialized societies have come to recognize that maintenance of competition is a sine qua non of a free enterprise system. The steps taken by the Common Market hold particular interest for the

---

28. For a controversial precedent, see *United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952). See also W. L. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 87 (1958).

United States because of the economic importance of the nations participating, and also because a truly international system of antitrust is involved. Since the Treaty of Rome became effective in 1958,<sup>29</sup> it is apparent that the European Economic Community (EEC) has made some substantial strides in establishing a basic antitrust framework, and in grappling with the more thorny areas that antitrust enforcement entails.

Enforcement of the EEC's antitrust rules is delegated to the EEC Commission. The EEC antitrust rules apply to agreements and practices which tend to adversely affect trade between the member states or otherwise restrain competition within the Common Market. National antitrust laws do, however, continue to exist in the member states, and it is not yet clear in which situations the existence of the EEC antitrust law preempts application of national law. The Court of Justice of the Communities, which is vested with authority to interpret the Rome Treaty, ruled in the "dyestuff cases" that the national antitrust authorities may enforce their own laws even where an EEC action is pending against the same parties, provided that the national action in no way impairs the application of the EEC law and remedies.<sup>30</sup>

Article 85 of the Treaty of Rome prohibits, as incompatible with the Common Market, anticompetitive agreements and practices which restrict trade between the member states, including such specified acts as price fixing, production control, and market allocation. However, the EEC Commission is empowered to grant a firm an antitrust exemption from this prohibition where the latter establishes that the agreement or practice

helps to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting profit and does not:

- (a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives; or
- (b) enable such concerns to eliminate competition in respect of a substantial part of the goods concerned.<sup>31</sup>

---

29. Treaty of Rome, March 25, 1957, English translation in 1 CCH COMMON MKT REP. ¶¶ 151-5473 (1965).

30. The difficulties that will arise from application of this concept can be seen. For a detailed consideration of the preemption problem, see the excellent discussion by an official of the German Federal Cartel Office, Markert, *The Dyestuff Case: A Contribution to the Relationship Between the Antitrust Laws of the European Economic Community*, 14 THE ANTITRUST BULL. 869 (1969).

31. Treaty of Rome, art. 85 (3), March 25, 1957, English translation in 1 CCH COMMON MKT REP. ¶ 2051 (1965).

Also pertinent is Article 86 of the Treaty which prohibits firms or groups of firms from improperly exploiting a dominant economic position that they may have attained within the Common Market or a part of it. This provision has seen less use than Article 85 and, by United States antitrust standards, it appears to be saddled with some major built-in limitations because, as its terms relating to abuse of dominance indicate, it is by no means an incipency rule. Indeed, the EEC Commission recently acknowledged, in connection with the Litton acquisition of the German typewriter company,<sup>32</sup> that, unlike American law, the provisions of the Treaty of Rome offer only limited powers for dealing with merger matters. Nonetheless, there are signs that the Commission will try to apply Article 86 to a merger situation in the near future.

The EEC Commission has, through the years, been developing the framework of its antitrust law by enunciating certain general principles regarding the application of Article 85 to various types of practices. For example, the Commission ruled in 1962, that suppliers were free to enter into contracts for exclusive representation by commercial agents, without violating the prohibition of Article 85.<sup>33</sup> As this rule applied to dealings with commercial agents (*e.g.*, manufacturers' representatives) and not to those with independent merchants, this initial step did not represent a difficult antitrust judgment.

Also worth noting is the Official Notice issued by the Commission in 1962 declaring certain clauses in patent licensing agreements to be unobjectionable from the antitrust point of view.<sup>34</sup> There are several types of clauses which United States government officials have indicated an intention to attack; namely, quantity limitations and restriction of the license to specified technical fields.

Then, in 1967, the Commission set out certain exemptions which would apply to exclusive dealing arrangements with distributors and other independent parties.<sup>35</sup> The regulations issued recite that exclusive dealing arrangements relating to international commerce generally lead to an improvement in distribution effectiveness, and therefore declare as exempt the normal types of bilateral agreements providing for

---

32. See text accompanying note 7, *supra*.

33. Official Notice on Contracts for Exclusive Representation Concluded with Commercial Agents, OFFICIAL J. EUROPEAN COMMUNITIES, No. 139 (Dec. 24, 1962) in 1 CCH COMMON MKT REP. ¶ 2697 (1965).

34. *Id.*

35. EEC Reg. No. 67/67 (Mar. 22, 1967), OFFICIAL J. EUROPEAN COMMUNITIES NO. 57 (Mar. 25, 1967) in 1 CCH COMMON MKT REP. ¶ 2727 (1967).

exclusive selling or buying rights. Certain related ancillary restrictions are permitted including the obligation by the buyer not to establish a branch or distribution depot or advertise "outside the territory which is the subject" of the exclusive concession.<sup>36</sup>

On the enforcement side, two important actions by the EEC Commission have been those relating to the quinine and the dyestuff cartels. Like the United States, the Common Market authorities have taken action against Dutch, German, and French companies for agreeing to fix prices, control production and allocate markets in quinine and quinidine throughout the world.<sup>37</sup> The Commission's decision held the agreements to be unlawful under Article 85, and it assessed fines against each of the companies in the light of the market position of each company and its degree of responsibility for the infringements.

The dyestuffs case involved simultaneous price increases within the Common Market by ten major manufacturers of coloring elements. The Commission found the existence of a conspiracy which set identical prices, introduced them in the different Common Market countries at virtually the same time, and which was followed to the point that the participating manufacturers instructed their subsidiaries and representatives in identical terms. The Commission ruled that Article 85 had been violated and imposed fines on the German, French, Italian, Swiss, and British manufacturers involved.<sup>38</sup> The extension of the penalty to the Swiss and British companies represented the first time that such action has been taken against firms headquartered in nonmember countries. The Commission thought it appropriate to include these companies in the scope of its decision because the anticompetitive acts in which they had engaged were such as to affect Common Market trade.

In many respects Common Market antitrust law and enforcement are pale in terms of both severity and quantity when compared to United

---

36. Cf. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

37. EEC Comm'n Decision of July 16, 1969, OFFICIAL J. EUROPEAN COMMUNITIES No. L 192 (Aug. 5, 1969) in [Transfer Binder, 1965-1969 New Developments] CCH COMMON MKT REP. ¶ 9313 (1969). Proceedings were also opened in the German Federal Cartel Office against certain aspects of the international quinine cartel, but there was no finding of violations of the German Cartel laws within the given period. Therefore, the problem of duplication of fines with the EEC ruling was not presented. For the United States litigation, see *United States v. N. V. Nederlandsche Combinatie Voor Chemische Industrie*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,181 (S.D.N.Y. July 8, 1970).

38. EEC Comm'n Decision of July 24, 1969, OFFICIAL J. EUROPEAN COMMUNITIES No. L 195 (Aug. 1, 1969) in [Transfer Binder, 1965-1969 New Developments] CCH COMMON MKT REP. ¶ 9314 (1969).

States antitrust effort. The Common Market's antitrust development is impressive and promising, however, when viewed, not comparatively, but in context. The infancy of the European Economic Community itself, the lack of any consistent and stringent antitrust tradition on the part of a number of the member states, and the truly international character—with all the attendant problems—of the antitrust law which they are developing must be taken into consideration.

#### INTERNATIONAL COOPERATION

It is clear that worldwide intergovernmental cooperation in antitrust matters is still in an early stage of development. For some time, efforts have been made under the aegis of the United Nations to develop an international arrangement for dealing with restrictive business practices which affect international trade. However, these efforts, which began with the Havana Charter,<sup>39</sup> have thus far foundered in their ambitious attempts to create a world antitrust organization and an enforceable, internationally-accepted antitrust code. Demonstrably, the obstacles presented to the development of appropriate international institutions are formidable, ranging from the basic problem that confronts us with respect to all international organizations—the reluctance of states to yield their sovereignty to an international body—to the problem of agreeing upon and defining the antitrust improprieties, and, finally, that of formulating acceptable and effective procedures.

The more recent efforts in the area have been perhaps more realistic, in that they have focused on establishing and improving consultation, liaison, and avoidance of conflict with respect to national enforcement action. Much useful work in this regard has been initiated through the Organization for Economic Cooperation and Development (OECD). In 1967, the OECD recommended international cooperation in three areas: (1) exchange of information concerning restrictive practices; (2) notification by each country of those antitrust actions which might affect important interests of another country; and (3) coordination of enforcement actions by the individual states to the extent feasible.

The regular meetings of the Restrictive Business Practices Committee of the OECD and of its subcommittees have proved a useful forum for the exchange of information among the antitrust officials of various countries and the development of pertinent studies. Notification and consultation have also progressed as contemplated by the 1967 recom-

---

39. Havana Charter for an Int'l Trade Org., ch. V, Dep't of State Pub. 3206, Commercial Policy Series 114 (1948). See also 16 U. N. ECOSOC, U. N. Doc. 2380 (1953).

mendation. For its part, the United States has maintained liaison with overseas authorities for this purpose, often through informal means, including exchanges of visits and conferences, and in other instances through specific bilateral arrangements which are utilized reciprocally to avoid conflicts in antitrust enforcement.

Current emphasis, then, is largely on the prevention of the international misunderstanding which may and has arisen from the enforcement of antitrust policy. This is essentially a limited goal, but it is a very important one which must be pursued and attained if the more elusive solution, a widespread acceptance of antitrust principles and the international institutionalization of such principles, is ever to be achieved.