

# After 15 Years of EEC Antitrust Law

*Significant decisions to date give form to EEC law, and writer reviews apparent directions*

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In EEC antitrust law, the broad outline of the horizon has now been cast. Over the past 15 years, decisions of the Court of Justice of the EEC and of the Commission punctuated by recent decisions have defined the perimeter of the law.



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This note touches on some of the significant aspects of the law rather superficially; it defers for later publication in *Les Nouvelles* and in other journals a more thorough analysis of these decisions and of their implications, especially on business arrangements involving United States corporations and their related companies in and outside the EEC.

The body of law is substantial, sophisticated, and complex. It spans the period from 1962, the effective date of Regulation 17 Implementing Articles 85 and 86 of the Treaty of Rome<sup>1</sup> to landmark decisions in 1976.<sup>2</sup> The law touches on a great variety of business practices. This note groups select aspects of certain important decisions in two: those dealing with licensing arrangements and those involving the use of a national right of a Member State to control imports into that country.

In *Beyrard*<sup>3</sup> a noteworthy decision, the Commission held numerous practices to be in violation of Article 85 (1) and (2). These were the exclusivity manufacturing and sale clauses of a patent license, an indirect export prohibition to countries where the licensor *Beyrard* had no patent protection, a prohibition to challenge the validity of the patents, noncompetitive clause in relevant markets, the provisions calling for the payments of royalties beyond the life and on subject matter not coming under the licensed patents, when the licensee uses his own developments or that of third parties. The Commission deferred to subsequent proceedings a ruling on a joint venture agreement between the parties and that relating to its foreign patent rights.

An obligation not to challenge the validity of a patent license imposed on a licensee has been held improper in *Davidson Rubber Co.*<sup>4</sup> The clause has not been approved in subsequent decisions.

An exclusive patent license comes within Article 85 (1) under earlier decisions of the Commission. Upon revisions of the agreements, exclusive manufacturing licenses have

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been held to qualify for an exemption under Article 85 (3) when other objectionable clauses were removed and the conditions of Article 85 (3) fulfilled.

Significant in *Beyrard* is that the license was an intrastate agreement between two parties within the same country of the EEC, in contrast to the prior cited cases involving exclusive patent licenses covering interstate agreements. The restrictions imposed on AOIP, the licensee were so serious that the inter-Community trade and competition therein, were affected, thus fulfilling the conditions of Article 85 (1).

Particularly noteworthy is the holding regarding the royalty provisions. The obligation to pay royalties beyond the life of the most recent patent in effect when the agreement was made to extend to later expired or not used patents, was found to be improper. The manufacturing costs of the licensee are increased without economic justification, the Commission ruled. It is significant, however, that the licensee did not have the right to cancel the agreement.

As to improvement patents which were part of the basic patent package licensed, the Commission held that its decision did not prevent the licensor from being allowed to grant a realistic royalty, if the National Court where the patents were being litigated would find them to be used by AOIP. What the Commission found improper was the flat royalty rate imposed across the board on the basic patents and also on the improvement patents rather than a royalty corresponding to the value of the latter relative to the former. This is the first ruling of the Commission on the value of improvement patents in a licensed package.

A determinative factor in the decision was the economic importance of the subject matter of the agreement: automatic starter rheostats for electric motors, extensively used in all industries which use medium- and high-powered motors and that these manufactured devices were the only ones commercially successful. The devices faced competition on the domestic market and outside the French market, and though the share of the French market was modest, exports amounted to about 18%. These economic factors played an important role in the decision.

The decision arose from a complaint filed in 1971 by AOIP to the Commission prior to notification, made by *Beyrard* to the Commission in 1973, of the agreements entered into in 1951 and 1953. The parties were ordered to forthwith desist from the practices held illegal. In *Kabelmetal*,<sup>6</sup> the agreement having been notified belatedly, the Commission ruled that the prohibition of Article 85 (1) applied for the entire period from the effective date of Regulation 17 to March 13, 1974, the date on which the agreement was revised to comply with the Commission requests, which then made its ruling effective as of that date.

Under *Brasserie de Haecht*,<sup>7</sup> which overruled the con-

cept of provisional validity of an agreement upon notification to the Commission,<sup>8</sup> the agreement is void as of its effective date. Whether the entire agreement is invalid or only the clauses held to violate Community law, is a matter of National law.<sup>9</sup>

Thus, in the licensing of patents these and other decisions of the Commission have shed a most helpful light on what practices are likely to be proper and those for which an exemption is to be sought if the legal consequences of Article 85 (2) is to be minimized and freedom from fines from the Commission desired. It is essential, however, to note that the business circumstances and economic effects caused by the agreement are determinative as to whether Article 85 (1) and (3) are met.

The law has significantly evolved also in the area of the relationship between the National and the Community laws. To what extent injunctions will be granted by asserting a National law to control interstate trade has been the subject of important decisions. These involve not only Articles 85-86 but also Articles 30-36. Attempts to control imports by actions of patent or trademark infringement was the subject of landmark decisions of the Court recently. In *Terrapin v. Terranova*,<sup>10</sup> the Court established the conditions under which a trademark owner in one Member State can enjoin the import of goods legally bearing the same or a confusingly similar mark from another Member State. The Court held that an injunction against such imports should be upheld under Articles 30 and 36, first sentence, where three conditions are fulfilled: The respective marks must have originated independently. This element distinguishes the case over *Koffie Hag*<sup>11</sup> where the products bearing two identical marks originated from the splitting or severing a single trademark, although the owners at the time of the suit were legally and economically independent.

Secondly, there must be no agreement between the parties which restricts competition. Such agreement subjects the arrangement to Article 85 and was found to be present in *Sirena*<sup>12</sup> and in *Sirdar-Phildar*.<sup>13</sup>

Thirdly, there must be no legal or economic ties between the two parties from which it can be found that the product has been lawfully marketed in another Member State by the owner himself or with his consent. Thus *Centrafarm v. Winthrop*<sup>14</sup> are distinguished. In these above-cited cases preceding *Terrapin* either Article 85 and/or Article 30 were found to be infringed, the exception of Article 36 was deemed not to apply.

The landmark *Terrapin* case follows other landmark decisions, the *EMI Records v. CBS* cases.<sup>15</sup> The court held that the owner of the mark in all Member States is entitled to enjoin the imports of products bearing the same mark, from a country from outside the EEC, in that instance, the U.S. In the EMI cases, the EMI and CBS marks had a common origin, which would have precluded an injunction under the *Koffie Hag* rule. Yet the Court held that the practices in question, even if they constitute a measure having a equivalent effect to a quantitative restriction, do not come under Articles 30 and 36 because they do not affect the free movement of goods between the Member States.

Two findings in these decisions are significant. Articles 85 and 86 were found by the Court not to be infringed, contrary to the Commission's position. Secondly, the Court noted that the public in the Community would not

be prejudiced since CBS products would still enter the EEC either with the mark obliterated or under a different mark.

It is not patent or trademark laws only which are sought to be used to seek to enjoin the imports from another Member State. In a decision this year, the Court denied the State and an exclusive importer the right to prevent the imports of a product (the tranquilizer Valium) from another country of the EEC by enforcement of national legislation, in this case regulations governing access to a master file on the drug.<sup>16</sup> The Court following substantially the Commission and Centrafarm's position, held the measures a violation of Article 30 and not an exception justified by Article 36. The case is consistent with *Dassonville*,<sup>17</sup> where a lack of a certificate of authenticity of origin for imported whiskey could not prevent imports for an authentic product lawfully marketed in the exporting country. Likewise, *Sterling Drug Inc.* could not prevent the imports by *Centrafarm* in a patent infringement action for the product Negram since the product was lawfully marketed in the exporting country or with the consent of the owner of the right.<sup>18</sup>

These and other significant rulings of the Commission and decisions of the Court are giving some form to the law. The Commission is gaining experience and hopefully a certain degree of maturity. On the other hand, the business community appears to be taking the EEC antitrust law more seriously.<sup>19</sup>

#### NOTES

1. For a detailed analysis of the Regulation, see *Weiser*, Freedom of Competition in the European Community: An Analysis of the Regulations Implementing the Antitrust Provisions, 6 PAT., T.M. & COPYRIGHT J. OF RESEARCH & EDUC. 20 (1962). Also, *Weiser*, The Joint Venture in the EEC, U. of Pa., Vol. III No. 4, p. 421, Feb., 1963, and *Weiser*, Antitrust Policy and Industrial Property in the European Community, N.Y.U., Vol. 38, No. 3, p. 496, May, 1963.

2. Citations are provided to the Commerce Clearing House, Common Market Reporter, (CCH Com. Mkt. Rpt.). The writer, however, often relies on other sources, primarily on primary documents in the official language supplied by the Court of Justice or other agencies of the EEC, to which reference will be made as is appropriate.

3. *AOIP v. Beyrard*, Commission Decision December 2, 1975, CCH ¶9801.

4. *Davidson Rubber Co.*, Commission Decision June 9, 1972, ¶9512 and *Raymond-Nagoya*, Commission Decision June 9, 1972 ¶9513.

5. In *Burroughs v. Geha-Werke* and in *Burroughs v. Delaplanque*, the agreements were found not to come within Section 1 since the restrictions on commerce were not significant enough. December 1971, ¶9486 and ¶9485.

6. *Kabelmetal v. Luchaire*, Commission Decision, July 18, 1975 ¶9761.

7. *Brasserie de Haecht v. Wilkin Janssen*, Court of Justice, Feb. 6, 1973, ¶8170.

8. *De Geus v. Bosch*, Court of Justice, April 6, 1962, ¶8003.

9. *Societe Technique Miniere v. Maschinenbau Ulm GmbH*, Court of Justice, June 30, 1976, ¶8047 and *Consten and Grundig-Verkaufs-GmbH v. EEC Commission*, Court of Justice, July 31, 1966 ¶8046.

10. *Terrapin v. Terranova*, Court of Justice, June 22, 1976, ¶8362.

11. *Van Zuylen Freres v. Hag A. G.*, Court of Justice, July 3, 1974, ¶8230.

12. *Sirena S.r.l. v. Eda GmbH*, Court of Justice, February 18, 1971, ¶8101.

13. *Sirda-Phildar*, Commission Decision, May 16, 1975, ¶9741.

14. *Centrafarm v. Winthrop*, Court of Justice, October 31, 1974, ¶8247.

15. *EMI Records v. CBS Schallplatten GmbH*, Court of Justice, June 15, 1976 case 96/75, ¶8352; *EMI Records v. CBS United Kingdom*, case 51/75, ¶8350 and *EMI Records v. CBS Grammofoon AS*, case 86/75, ¶8351.

16. *Exparte Adriaan de Peijper*, Court of Justice, May 20, 1976 ¶8353.

17. *Public Prosecutor v. Dassonville*, Court of Justice, July 11, 1974, ¶8276.

18. *Centrafarm v. Sterling Drug*, Court of Justice, October 31, 1974, ¶8246.

19. Dr. W. Schlieder, Director General for Competition, European Communities, Address, March, 1974.