EEC Antitrust Law and Licensing

A discussion of important EEC law and policy with references to source articles in Les Nouvelles

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Since the beginning of 1977, there has been a heightened interest in the antitrust law and antitrust policy of the European Economic Community. It is always difficult for those of us who have been interested in the subject for many years, to realize that there are intelligent and well-informed people — an implied requirement for membership of LES — who have had no real need to study the subject.

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However, as the activities of our members are worldwide this is not surprising, as the subject has only become of practical importance in the last few years. In this short paper I shall try to give a brief outline of the subject by referring to articles that have appeared in that important journal in the licensing field — *Les Nouvelles* — in the last three years. I will also refer to certain Regulations (laws of the EEC), the text of which can be found in the appendixes of almost any textbook dealing with the subject of European antitrust law.

The European Economic Community was established by the Treaty of Rome in 1957. The Rome Treaty was in many ways meant to be the constitution of a new political entity. The "government" of the EEC is provided by the Council of Ministers and the Commission of the EEC. The latter is effectively the civil service of the community, although it has a degree of executive power which has no counterpart in any governmental system with which most of us will be familiar.

Court of Justice

The final responsibility for interpretation of the Rome Treaty is the function of the European Court of Justice. However, the commission often takes decisions which effectively interpret the Treaty. Some of these decisions have been appealed to the European Court of Justice which has reversed, modified or approved the commissions' holdings. Many holdings of the commission, which are effectively administrative law decisions, have never been appealed and we do not yet know the views of the European Court of Justice on certain aspects of the commission's antitrust policy.

The Rome Treaty contains a number of articles which are significant to the development of the community's antitrust policy. The most important of these are Articles 36, 85 and 86. The meaning of these are discussed in *Les Nouvelles* in June 1974,[1] March 1975,[2] June 1975,[4] and December 1975.[3]

The first step for implementing Articles 85 and 86 was the passage of Regulation 17 of 1962. This contains 21 articles and by its very length and complexity, it is not easy to follow. It attempted to lay down a procedure by which many industrial Property License Agreements had to be notified to the commission in Brussels. This regulation is the foundation stone on which the commission has developed its antitrust policy. Basic to this policy is that Industrial Property License Agreements containing questionable clauses have to be notified to the commission for the purpose of seeking an exemption from Article 85 (1) under the terms of Article 85 (3) which sets out the conditions for exemption. Notification means that there will be temporary relief from fines which the commission can impose on parties operating an agreement held to be an infringement of Article 85 (1). The regulation is discussed in *Les Nouvelles* in June 1974,[1] March 1975,[2] and June 1976.[4] It is important to stress that regulations are meant to be binding law in all the Member States.

The Regulation became effective in March 1962 and was followed on December 24, 1962 by a notice appropriately called the "Christmas Message of 1962." This is a much shorter document which set out the commission's attitudes to a variety of clauses which commonly occur in patent license agreements, and indicated that there was no need to notify such agreements where they contained only those clauses, as these were then regarded as acceptable. This was not a regulation but only an Announcement and it has not yet been withdrawn. However, because of decisions of the commission in the early 1970's, many experts consider that it is now in practice a dead letter. Certainly in terms of current official thinking, it is very generous in stating what type of clauses in patent licence agreements were exempt from notification and hence were permissible. The fact that it has not been followed by the commission but has never been withdrawn is one of the principal reasons why there has been so much uncertainty as to the policy of the commission in recent years.[5]

There have been numerous judgments by the European Court of Justice in the last 10 to 15 years dealing with Industrial Property Rights and some important

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case law has been developed. According to a recent Working Paper of the Commission the important cases in this field decided by the Court are as follows:

Grundig and Consten v. EC Commission
Parke, Davis & Co. v. Probel
Sirena v. Eda
Deutsche Grammophon GmbH v. Metro-SB-Grossmarkte GmbH
Van Zuylen Freres v. Hag A.G.
Centrafarm v. Sterling Drug
Centrafarm v. Winthrop
EMI v. CBS
Terrapin v. Terranova

The full text of these decisions can be found in various series of Law Reports. However, they have all been discussed in various ways and from different viewpoints in many issues of *Les Nouvelles* and the reader's attention is particularly directed to the articles referred to in Citation 6. Some of the Court's decisions have led to intense debate in legal circles. There were strong criticisms of some of them at the time they were given. This is not surprising when it is realized that in Europe an attempt is being made to develop a body of law in a space of 15 years, which in other countries has developed over a much longer period.

DECISIONS OF THE COMMISSION

Generally speaking, these decisions by the Court of Justice have not dealt with the type of detailed provision which appears in specific clauses of patent license agreements. They have dealt with more fundamental issues. At present, only the commission has given any substantial guidance as to what may be permitted in the detailed clauses of a patent license agreement.

After the Christmas Message of 1962, there were some public indications as to the commission's views, but probably the next important step was the publication of four decisions in 1972, which can be shortly identified as follows:

Burroughs/Delplanque
Burroughs/Geha
Davidson Rubber Co.
Raymond/Nagoya

There are comments and articles in various issues of *Les Nouvelles*[7] on these decisions. They all dealt with patent license agreements which had been notified to the commission for negative clearance or exemption.

There are two decisions dealing with trademarks in 1974 and 1975, which the commission thinks are significant in the development of policy toward patent license agreements. These are:

Advocaat Zwarte Kip
Sirdar v. Phildar

Apart from these, there are two reported cases in 1975 on patent license agreements which have been extensively discussed in *Les Nouvelles*, these being *Kabelmetal v. Luchaire* and *Bromgemaling v. Heidemaatschappij.* The only other significant case is *AOIP v. Beyrard* which is explained in the March 1976 issue of *Les Nouvelles.*[9] Once again all these commission decisions have been published in many series of Law Reports.

THE PROPOSED REGULATION FOR A GROUP EXEMPTION FOR PATENT LICENSE AGREEMENTS

Thus, by late 1976, there had been a series of decisions giving some guidance as to acceptable licensing practices in Europe but no new pertinent regulation since 1962. There was also a measure of uncertainty caused by the fact that the Christmas Message of 1962 was not being followed, but had never been withdrawn. Those of us who have been following the development of this aspect of law in Europe knew that there was under consideration a proposed new regulation which would be a Block Exemptions for Patent License Agreements. There have already been Block Exemptions for other types of agreements, which might otherwise have been notifiable under Regulation 17 of 1962.

The commission's powers to issue a Block Exemption had been given to it by a regulation of the Council of the European Economic Community in 1965 (Regulation 19/65). This may be difficult to follow but to explain it in another way, we can say that Regulation 19/65 was an enabling regulation by the Council of Ministers authorizing the commission to issue Block Exemption Regulations for various categories of agreements. The regulation of 1965 has received little public attention in recent years and it is very important to note that it is the commission and not the Council of Ministers which has the power to issue the proposed new regulation for a Block Exemption for Patent License Agreements.

In November 1976, the proposed new Block Exemption Regulation for Patent License Agreements was sent to the Member Governments in the form of a preliminary draft. It was unofficially published in various journals in the next few months, including the issue of *Les Nouvelles* for March 1977, at page 9. The same issue of *Les Nouvelles* contains an informative article by Aaron N. Wise and Axel P. Seyler on the meaning of the proposed regulation, with extensive footnotes setting out how many of the detailed proposals are based on the decided cases referred to above. The preliminary comments by LES International to the commission are also set out in the central news section.

The preliminary draft has been the subject of much discussion and comment in the last few months as many members are aware! In this short article, I will not discuss the criticisms that have been made of the preliminary draft, but it is accurate to say that comment has been largely hostile.

The further procedure that has to be employed before the Block Exemption Regulation can become law is laid down in Regulation 19 of 1965. This is a very short document and should be consulted by anyone who is interested in understanding what procedures will have to be followed before the present proposal can become law. Certainly the commission has many hurdles to surmount before a Final Draft can become law. The commission has welcomed comments from interested bodies and individuals on its preliminary draft. In no way has there been any attempt to push through the new regulation. However, the importance of the new regulation may well have been underestimated by many of our members. If it becomes

law, it will clearly set the pattern for allowable licensing practices in Europe for many years to come. Other countries in other parts of the world will also undoubtedly consider the European "guidelines" in deciding on the contents of any similar laws or regulations for themselves.

THE COMMON MARKET PATENT CONVENTION

There is one international treaty which may be very relevant. This is the Common Market Patent Convention which is a proposal for one patent for the European Economic Community. Once again this has been considered in *Les Nouvelles*.[10] There is a serious question as to whether the proposed restrictions on exclusivity and export bans in the Block Exemption Regulation fall within Article 85 (1) of the Treaty of Rome at all in view of Article 43 of the Common Market Patent Convention.

Let me conclude this "Plain Man's Guide" by apologizing to any of my fellow authors whose contributions to previous issues of *Les Nouvelles* I have not mentioned. It has been difficult to pick out from the mass of material that has been published, the correct articles to refer to. However, as some of my own contributions have not been mentioned, there has been no intentional bias!

It must be emphasized that the Statute and Case Law on EEC Antitrust Policy in the field of Patent Licensing is not extensive. It is not difficult to follow and there is not too much material to be studied. The problem is that it has developed very rapidly and there is a large area of uncertainty on a number of important issues.

By all means consult the "experts" in considering what to do in any particular situation. However, a few hours study with the aid of the appendixes of one of the many textbooks on EEC antitrust Law and the articles in *Les Nouvelles* referred to above, will enable any licensing executive to be more than familiar with the background of the subject.

In any event, while further case law, especially from the European Court of Justice could be of substantial assistance, it must nevertheless always be remembered that the EEC is an *economic* community. Whil new developments may delimit areas of uncertainty, in the last resort it is the economic context and implications of each agreement that will be decisive in determining the validity of its provisions. The context and implications are likely to be different with each agreement, and those involved in this area of law must learn to apply the principles distilled from decided cases to new sets of facts as they arise, and be prepared to reach a different conclusion if the facts warrant it.

The final important conclusion is that each issue of *Les Nouvelles* should be retained. What other journal is there where all the case law in this field has been discussed from so many different viewpoints in an easily digestible form? Each issue contains very useful information which may not be of interest to all readers at the time of publication, but may need study in the future.

NOTES

1. Common Market Countries Licensing Structures, 20-20 Foresight, H.C. Donkers, June 1974, p. 112.
2. Conflicts: Property Rights, EEC Law, W. Alexander, March 1975, p. 16.
3. Industrial Property Rights and the EEC Treaty, F.A. Mann, December 1975, p. 231.
4. European Community Law — 1975, M. Burnside, June 1976, p.92.
5. A.U.S. Company Licenses into Europe, H.C. Donkers, December 1974, p.218.
6. After 15 years of EEC Antitrust Law, G.J. Weiser, December 1976, p.217. Landmark Decision by EC Court, G.J. Weiser, December 1976, p.253. Conflicts: Property Rights, EEC Law, W. Alexander, March 1975, p.14. The Ten Most Important Cases Governing the Law of Licensing in the EEC, M.B. Finnegan, September 1974, p.200. See also citation.[1]
7. EEC Antitrust Law and Japanese, M. Burnside, September 1975, p.113. see citation[8], the article by M.B. Finnegan and citation[1] at p. 115.
8. Exclusive Licenses in the EEC, J.W. Barrett, March 1976, p.37. European Community Law — 1975, M. Burnside, June 1976, p. 92; see citation[1] at p.116.
9. *AOIP v. Beyrard*,M.B. Finnegan and B.C. Brunsvold, March 1976, p.69. After 15 Years of EEC Antitrust Law, G.J. Weiser, December 1976, p.217.
10. European Patent for the Common Market, A. McClellan, June 1976, p.103; see also citation[7] the article by M. Burnside.