EEC Antitrust and Japanese

The effect on Japanese companies of the growth of antitrust policy of EEC

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First, I shall give you some background on the EEC's competition policy. What the Commission is trying to do is very much influenced by the European attitude to restrictive trade practices.

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The following two quotations will provide an apt illustration of this.

"We recommend that no action should be taken which would deprive an individual producer of the power to prescribe and enforce resale prices for goods bearing his brand . . . We therefore recommend that steps be taken to render illegal the application of sanctions which extend beyond the remedies open to an individual producer for any breach of resale price maintenance conditions."[1]

"It has been held too often to require elaboration that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable."[2]

The first quotation is taken from the report of an official inquiry in Great Britain in 1949. The second is from a United States Supreme Court decision in 1956 and refers to a U.S. Statute of 1890.

In other words, in the United Kingdom, horizontal and vertical price fixing were legal in 1949 although in many respects they had been outlawed in the United States many years before.

Many European countries have no long history of antitrust or competition law as in the United States. The type of trade practice that was permissible in Europe may be vividly illustrated by a short account of the activities of the British Motor Trade Manufacturers Association before 1956. This trade association undertook to enforce prices laid down individually by its member motor vehicle manufacturers. A private court procedure was provided. On notification to the Association that a retailer had departed from a fixed price, he was summoned before a Price Protection Committee. Proper notice was given and the offender could be represented by a lawyer. If he were found guilty he could be fined or placed on a stoplist.

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The latter penalty was a very drastic one as no manufacturing member of the B.M.T.M.A. could thereafter supply goods to such a retailer. There was a right of appeal but this was only to another Committee of the Association. Great care was taken to see that the procedure was fair and as judicial as possible but there was thus provided a private Court regulating trade practices of an entire industry.

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It was with a history and attitude as this that the Commission of the EEC, through its directorate dealing with Competition, began to develop a Competition policy for the EEC. Although the Community came into being in 1958, it is fair comment to say that it is only in recent years that it has begun to put teeth into its Competition Policy. In the industrial field, as distinct from the Common Agricultural Policy, the Commission is now developing its Antitrust Policy with tremendous energy.

PRONOUNCEMENTS BY THE COMMISSION ON ANTITRUST POLICY

As far as industrial property is concerned, early signs were that the Commission's attitude would be a liberal one. Thus, on December 24, 1962, the Commission published a Notice called the Christmas Message[3] setting out a number of conditions that could occur in a patent license agreement which they felt would not offend Article 85 — the competition clause. This has never been repealed, but many authorities will now say that for practical purposes, it is dead and has no real value.

The reason for this primarily lies with the group of decisions given by the Commission in 1972.

Before discussing these, and to put the importance of industrial property rights in perspective, I shall refer to the Annual Reports[4] issued by the Commission on Competition Policy. These are now issued annually. The First Report, however, was not issued until 1972. We now have the Second Report and also the Third. If you will look through the First and Second Reports, you will find that very little space is given to industrial property rights and their abuses. There are much broader issues that the Commission has considered.

Since we are concerned with problems in the licensing and transfer of technology, we are naturally preoccupied with industrial property matters but we must try and keep our own specialty in the broad perspective.

Having said this, it must be pointed out that the introduction to the First Report on Competition policy says:

"The Commission's competition policy took on a new dimension during 1972. At a time when the Community is preparing to achieve the gradual ap-

proximation of the Member States' economic policies, it is more than ever necessary that the Commission should see to it that the fundamental rules of the Treaty are observed, and, in particular, that effective competition between undertakings is maintained."

DECISIONS ON PATENT LICENSES IN 1972

In 1972 the Commission gave decisions in four cases dealing with allowable clauses in patent license agreements. They were very much test cases taken by the Commission for the purpose of giving guidelines to patentees and their licensees. They contradicted or nullified the Christmas Message or Notice of 1962 without formally saying so. These cases are:

A. Raymond & Co.'s Agreement[5]

Davidson Rubber Co.'s Agreement[6]

Burroughs A.G. and Etablissements L.[7]
Delplanque et Fils' Agreement

Burroughs A.G. and Geha-Werke[8]
G.m.b.H.'s Agreement.

I am afraid that to deal with these decisions, it is necessary to become very legalistic. However, what the Commission was trying to do with these four cases was to lay down certain principles.

Article 85

Before coming to these decisions, we must examine in a little more detail Article 85. This Article first says that agreements that distort competition are void. However, it then goes on to say in a subsection (3) that if such an agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, it may be declared exempt from the prohibition of Article 85. On the other hand, the Commission may consider an agreement and conclude that it never comes within the prohibition of Article 85 at all. In this case, it is given "negative clearance".

The agreement of A. Raymond & Co.[5] involved a licensing contract between Raymond — a French Company — and Nagoya Rubber Co. Ltd. of Japan.

This was an agreement that had been registered under Article 85(1) because it might distort competition with the request that it be given approval — what the Commission calls exemption under Article 85(3). It contained a variety of clauses of a type with which we are all familiar.

Raymond had certain patents; it licensed these to Nagoya. There were clauses dealing with improvements made by Nagoya.

The Commission first obtained certain changes in the agreement and then gave it negative clearance under Article 85. Their important conclusions can be summarized as follows:

(1) A patent licensing contract should not require the licensee to assign to the licensor the property in any improvements or modifications it may make. In other words, a grant back clause by the licensee for all improvements or modifications is illegal.

(2) In certain cases the grant of an exclusive license to exploit a patent in a given territory may offend against Article 85.

(3) A licensee's undertaking not to challenge, while the license is in force, the validity of the industrial property rights which are the subject of the license is in principle a restriction on the licensee's freedom of action which is not permissible. That is, the doctrine which we call licensee estoppel, the obligation on the licensee not to challenge the validity of the licensed patents, was declared unacceptable. This is in line with the decision in *Lear v. Adkins*[9] in the United States with which some of you will be familiar.

In discussing exclusive licenses, the Commission said only that since the exclusive license was from Raymond to Nagoya for areas outside the Common Market, it would not affect competition within the Common Market. It did not say that an exclusive license for the Common Market was *per se* acceptable.

Davidson Rubber

The other case we will go into here is the Davidson Rubber Company case. This was an agreement between an American Company and certain companies within the Common Market. Again, it was a patent licensing and know-how agreement. In their original form, the contracts gave exclusive manufacturing and selling licenses within parts of the Common Market. The exclusive selling parts of the agreements were struck out at the request of the Commission. They then considered those parts of the contracts which gave licensees exclusive manufacturing rights. Broadly, they said such exclusive manufacturing rights were forbidden under Article 85. However, in this particular instance they would give them exemption under 85(3) because the licensees needed some exclusivity to develop their respective markets and there were also a number of competing products.

I will not discuss the details of the other two cases in this group of four decisions, but broadly I hope you have a picture of the way these four decisions began to shape up the Community's policy on patent license agreements. You will also have seen the detailed type of reasoning in which the Commission will engage — the uncertainty with which one is faced when there has been no formal repeal of the Christmas Message of 1962.

Now, a word of warning. Let us assume that you have patents in a number of Common Market countries. You grant licenses under, say, the French patent and the British patent to different licensees. In the French license, you say nothing about the British patent. You simply grant the licensee the right to manufacture and sell under the French patent. Such an agreement may be acceptable to the Commission. It contains no prohibition against selling outside of France. However, you will probably be completely wrong if you assume that you can prevent your licensee selling in England. Apart from the rationale of the cases we have just considered, you will see that this is really no longer possible because of some recent decisions of the European Court of Justice and the EEC Commission.

EXTRA-TERRITORIAL POWERS OF THE COMMISSION

I shall now deal with the extraterritorial powers that the Commission, rightly or wrongly, believes that it possesses.

In other words, what control it may attempt to exercise on companies which do not have a place of business in the EEC.

The *Transocean Marine Paint Association*[10] consists of medium-size enterprises, which, each in their own country, produce marine paints of identical composition and market them under a common trademark. Each member is allotted a certain territory in which he sells his own products and those of other members and together they form a worldwide marketing network, competing with large multinational paint manufacturers.

The members exchange technical know-how, give each other preferential treatment on patent licensing, and submit to quality control. In effect, they pool the results of their research.

In 1967, the Commission decided that this was a cartel which enhanced competition because it enabled smaller firms to enter a market dominated by larger chemical companies. They granted an exemption from the prohibition against anti-competitive practices of Article 85 for a period of five years. When this exemption came up for renewal in 1973, one of the new conditions that the Commission wanted to impose was, in effect, a demand for a notification of all mergers involving one of the members, without any lower limit of size or market share, and even of mergers between firms neither of which operates within the Common Market.

In 1973, the Association had 20 members of whom about one-third were established in the Common Market. Other members of the Association were established all over the world including South Africa, Thailand, Malaysia, Hong Kong and Japan. The Japanese member Nippon Paint accounted for 60 percent of the turnover in marine paints of the Association.

Protest

Members of the Association who carried on business within the Common Market were prepared to comply with the Commission's request for information in regard to any mergers in which they might be involved, but this attempt to require this information from members in other parts of the world has been protested. The Commission is asking for details of all mergers in which the Japanese member might engage, whether these are in the field of marine paint or not.

The Commission has argued that there is a real risk that a member may engage in activities outside the Community which may adversely affect the competitive situation within the Common Market — in which case the Commission would be justified in withdrawing the exemption of the cartel from the application of its Competition laws.

I do not think the case has yet been finally decided but you may think if the Commission has its way, that this is too high a price to pay for a sales volume your client or company may obtain in the EEC.

The next case is called the *Franco-Japanese Ballbearings Agreement.*[11] On the Japanese side, it involves, among others, Nippon, Seiko Kaishu, NTN Toyo Bearing Co. Ltd., Koyo Seiko Co. Ltd. and Nachi Fujikoshi Ltd.

As reported, the case deals with agreements between the French and Japanese ball bearing manufacturers, the Japanese Association being the Japan Bearing Industrial Association.

There was a series of meetings and an exchange of letters, and as a result the Commission concluded there had been an "agreement" by the Japanese manufacturers to raise the list prices of the ball bearings that they exported to France. The underlying purpose of the price increases was to bring the Japanese prices more into line with those of the French manufacturers — at least this was the conclusion reached by the Commission. The Commission, therefore, said that this restricted competition in France. They also said that there was the additional possibility that trade with other member states of the EEC might be affected.

Extent of Powers

Having come to these conclusions, the Commission considered the extent of its powers to make orders against foreign companies and Associations. In other words, the Japanese companies concerned and the Japan Bearing Industrial Association and here, from your viewpoint, is the seriousness of their findings.

Measures imposed on Japanese undertakings by the Japanese authorities cannot be considered by the EEC as a breach of Article 85 — an anti-competitive practice which they can forbid. Likewise, of course, trade agreements between the EEC and Japan. However, the Commission states that it has powers to forbid Japanese companies to have an agreement or undertaking of this nature in two situations.

a) Where it is made between a Japanese trade association in concert with the appropriate European association — in this case the French association.

b) Where it is made between Japanese undertakings themselves.

This last conclusion is from your viewpoint, the most serious one. Stripped down to its simplest form, if two Japanese companies agree with each other that, for example, only one of them will export to the EEC, the Commission feels that it has the power to forbid the agreement, if it affects competition with the Common Market.

Recent Decision

This is a very recent decision; it was given on November 27, 1974. There is another even more recent one where the decision was given on January 8, 1975. This involves the *French and Taiwanese Mushroom Packers.*[12]

Apparently, Taiwan and France are respectively the first and second largest producers of first-quality preserved mushrooms in the world. The agreement complained of was in respect of a joint sales policy in Germany. The precise details of the agreement are unimportant, but it was made between the Taiwan Mushroom Packers United Export Corp. of Taipeh, which is the national trade association representing all Taiwan exporters and five of the principal French Producers.

The Commission concluded that it was in breach of Article 85 because it was likely to affect trade between the member states in such a way as to jeopardize the aim of a single Common Market.

Once again, they said that they had the power to consider agreements entered into by undertakings outside the Common Market to the extent that the effects of the agreement extend to the territory of the Common Market.

As practical men, I hope you are thinking how did the EEC come to investigate these two cases and what penalties did the parties suffer as a result of the Commission's findings — apart from the prohibition against the continuation of the agreements.

The case involving Ball bearing manufacturers was started on the initiative of the Commission itself. The case concerning mushrooms arose from a complaint filed with the Commission by a Belgian mushroom manufacturer.

In the ball bearing case, no one was fined. In the mushroom packers case, the French companies were fined but not the Taiwanese Mushroom Packers. The Commission concluded that they would not fine the latter because they were unlikely to have been aware, when they negotiated the agreement, of the opinion of the Commission regarding the extra-territorial jurisdiction of the Commission and of Community competition law.

Thus, if this type of agreement is brought to their attention again, they may apparently levy a fine on a Company or Association on the other side of the world.

Two Questions

This brings up two fascinating legal questions:

(1) How can the Commission properly secure jurisdiction over foreign companies who have no seats or places of business within the EEC and who refuse to recognize their jurisdiction?

(2) If a foreign company is fined, how can the fine be enforced if that company or association has no assets within the area of the European Economic Community?

Regretfully, I believe that a discussion of these is outside the scope of this paper.

THE EFFECT ON NATIONAL JURISDICTIONS OF THE ROME TREATY

There is no European Court System as such, but one may have a proceeding started before the Commission of the EEC, by the Commission itself. This may have been effectively started by a private party because of a complaint lodged by a private party, but it is the Commission who is, so to speak, the prosecutor. Let me illustrate this by reference to the cases referred to already. Thus, all the cases mentioned in Section 8 were cases which the staff of the Commission themselves had instituted. On the other hand, in the case referred to as *Advocaat Zwarte Kip*, a private trader in Belgium had asked the Commission to start proceedings — he had lodged the complaint. The Commission's ruling can be appealed to the European Court of Justice. The other way in which a matter can be brought into the Common Market's legal system is by means of a reference under Article 177. This can only happen if one of the Courts of the Member State concerned decides it needs a ruling on a point of law. There is no right on the part of a party in a legal proceeding in a member state to go to the European Court of Justice directly.

I can explain this by reference to two English cases. When the United Kingdom joined the Common Market, legislation was passed making Community law binding on the British Courts. If there is any conflict between English law and Community law, the latter overrides English law.

A French Company called Application des Gaz[13] designed and drew a gas cartridge or can suitable for fueling domestic camping equipment. They granted to an English Company the exclusive right to manufacture these cans of gas in the United Kingdom. They also granted another English Company, Veritas, a license to make a similar container or can, but of a different shape, on a royalty basis. After some time, Veritas began producing cans of the same shape as those for which the French Company had given an exclusive license to the other English Company. The French Company therefore sued Veritas for copyright infringement. Had the United Kingdom not become part of the European Economic Community, this was all that the court proceedings could have amounted to. However, because of British membership in the EEC the dispute may take on a very different character. What the defendants — Veritas — have said is that the French Company and their exclusive licensees are engaging in an illegal agreement or concerted practice under Article 85 of the Rome Treaty, so as to prevent competition. They have also said that they are attempting to enforce an illegal monopoly under Article 86. In other words, membership in the EEC may turn a simple dispute on copyright infringement into an Action involving antitrust considerations, which have hitherto not really been necessary to consider in dealing with agreements relating to the transfer of technology or the licensing of industrial property in the United Kingdom. These defenses or objections are going to be tried by the British Courts on the basis of EEC law.

In another case, two British companies, Aero Zip Fasteners and Lightning Fasteners Ltd., sued the English subsidiary of a Japanese Company, YKK Fasteners (U.K.) Ltd.[14] for patent infringement. The defendants YKK pleaded that relief should not be given against them by the English Courts because the plaintiffs, the English Companies, were in breach of Articles 85 and 86 of the Rome Treaty. In other words, another example of the assertion of an antitrust defense in an English patent infringement action.

However, what is much more significant about this is the other steps taken by the Japanese company.

Four months after the Japanese company had raised the defense in the English Courts, a complaint of violation of EEC competition law was lodged at Brussels by some of their affiliated companies and the Commission of the EEC had initiated proceedings against the parent company of one of the English plaintiffs. Whether the patent infringement action in England had prompted the Japanese company to start the proceedings in Brussels is unclear. However, it does show that in a dispute relating to industrial property — the transfer of technology — you may be exposed to proceedings both in the National Courts of a member state and also before the EEC Commission in Brussels. I think it is outside the scope of this talk to discuss the conflicts of law problems that may occur. I suggest the lawyers among you may care to consider the possible complexities, but I will not deal with them now.

The only other English case I want to mention is to illustrate how a case may effectively be transferred by a National Court to the European Court of Justice. This involved a dispute between EMI Records Ltd. and CBS United Kingdom Ltd. and was only heard on March 13, 1975.

EMI sued CBS for trademark infringement by the use of the word "Columbia" on phonographic records. The judge said that in English law, they were clearly entitled to relief. However, in EEC law he was uncertain as to the answer. He therefore granted to EMI an interlocutory or interim injunction and directed that all further proceedings in the English Courts should be stayed while a reference was made to the European Court of Justice under Article 177.

To summarize, we can see three effects on a national jurisdiction because of membership in the Common Market.

(1) In a dispute involving industrial property rights, there may be an attack or defense based on antitrust considerations arising out of Common Market law.

(2) If you become a party to a dispute in a National Court, this may indirectly cause proceedings to be started against you by the Commission of the EEC.

(3) A National Court may consider that a dispute involves considerations which can only be decided by the European Court of Justice and not by the Court itself.

IMPORTANT RECENT DECISIONS BY THE ECJ

Having dealt with some cases showing how a National Court may be affected by the overriding effect of Community law, I now shall look at some important recent decisions of the European Court of Justice and the EEC Commission which deal with Industrial Property Rights.

The way that Community law has developed in this field is by a series of decisions given by the Commission or the European Court of Justice. Developments have been very rapid and the three cases I shall refer to are all ones that were decided in 1974. They are all considered to be important by the experts and have been the subject of hot debate as to their real meaning. How far have they cut down the rights of a patent or trademark owner to exercise the rights the law has allowed him?

In the Centrafarm case[15], Sterling Drug Inc. of New York held patents in various countries including Holland and Great Britain for a particular drug. Parallel licenses were granted under these patents to various subsidiaries. In Great Britain the drug was produced and sold by their English subsidiary at a relatively low price. Partly this was due to governmental controls in Great Britain. The Dutch subsidiary charged a much higher price for its manufactured product. Centrafarm therefore bought the drug wholesale in Great Britain and sold it in Holland. They were sued for infringement of the Dutch Patent and the European Court of Justice was asked to give a ruling as to whether the exercise of the right to prevent the imports under the Dutch patent was permissible under Common Market law — particularly Article 36, because clearly the free movement of goods within the Common Market was impeded.

The Court said:

> "The existence, in national laws on industrial and commercial property, of provisions that the right of a patentee is not exhausted by the marketing in another member-State of the patented product, so that the patentee may oppose the import into his own State of the product marketed in another State, may constitute an obstacle to the free movement of goods.
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> "While such an obstacle to free movement may be justifiable for reasons of protection of industrial property when the protection is invoked against a product coming from a member-State in which it is not patentable and has been manufactured by third parties without the consent of the patentee or where the original patentees are legally and economically independent of each other, the derogation to the principle of free movement of goods is not justified when the product has been lawfully put by the patentee himself or with his consent, on the market of the member-State from which it is being imported e.g., in the case of a holder of parallel patents.
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> "If a patentee could forbid the import of protected products which had been marketed in another member-State by him or with his consent he would be enabled to partition the national markets and thus to maintain a restriction on the trade between the member-States without such a restriction being necessary for him to enjoy the substance of the exclusive rights deriving from the parallel patents."

In short, the ECJ has developed further the principle of the exhaustion of the patent rights and has interpreted in a restrictive way, Article 36.

Unanswered Question

The important question which has not been answered is what may happen when, for example, a third party manufactures a product in one Common Market country where there is no patent and imports it into another where there is patent protection. I am thinking of the situation where the patentee deliberately did not take out a patent in the country where the product was manufactured because he could not afford it or did not think it worthwhile. The answer to this may be bound up with the proposed Common Market Patent Convention.

In the case of *Van Zuylen Freres v. Hag A.G.,*[17] Hag A.G. of Germany had originally registered the trademark Hag in a number of European countries. Through a series of changes, the position by 1971 was that the trademark Hag had been held in Belgium by, what used to be, a Belgian subsidiary of the German company. However, in 1944 this Belgian subsidiary had become completely independent. Its property had been seized by the Belgian government and eventually transferred to Van Zuylen. The German company began to import into Belgium its own product with the trademark Hag. They were sued for trademark infringement. Applying Article 36, the Court said this could not be used to prevent the marketing in Belgium of a product legally bearing a trademark in another member-State for the sole reason that the identical trademark existed in Belgium.

Basis for Decision

Thus two products coming from wholly different sources can circulate freely in Belgium. The big debate in this case is the real basis of the Court's decision. In the Hag case, the Court referred to the *common origin* of both trademarks. This common origin is very remote. It goes back prior to 1944 and the German and Belgian

trademark owners were by 1973 separate companies. There are many people who argue that the European Court of Justice would really have given the same decision even if there had been no common origin.

In the last case here, *Advocaat Zwarte Kip,*[16], is similar to the Hag case. It also concerned trademarks. The Belgian trademark owner wanted to prevent the import into Belgium of a liqueur from Holland which bore the identical trademark. The trademarks in Belgium and Holland were owned by different companies but it was held that the arrangements by which the trademarks had different owners were deliberately made many years ago. In other words, there had been an illegal agreement under Article 85. This was a decision by the Commission of the EEC, not by the European Court of Justice. There are a number of very interesting practical points that one can see from looking at the legal procedures which were followed by the parties, but I cannot really discuss them here. The net result is that once again, products will circulate in Belgium with identical trademarks on them and coming from different manufacturers.

EUROPEAN PATENT CONVENTIONS

As you will know there are now under consideration in Europe, two new Patent Conventions.

The first of these is called the European Patent Convention or Euro I. It was signed in Munich in December 1973. Its prime purpose is to simplify the examination of patent applications in Europe and, if you apply for a patent in this way, you will eventually obtain individual patents in a large number of European countries. The second is known as the Common Market Patent Convention or Euro II. This has not yet been signed. There was supposed to be a conference to settle and sign the Common Market Patent Convention in 1974, but this conference was postponed. It will now take place in November-December 1975. By the second Convention you will obtain one patent in all the Common Market countries.

The prime purpose of the First Convention is to simplify the obtaining of patents. It is also stated that this is the purpose of the Common Market Patent Convention. Calculations have been made to show that it will be cheaper to obtain a Common Market Patent than individual patents in all the nine countries. However, many experts think that it will not be cheaper to obtain a Common Market patent than to obtain national patents in, say , the four largest Common Market countries.

This second Convention has, in my opinion, another purpose. It has a political aim in that it is hoped it will help to integrate the Common Market countries. It will help to break down the barriers between the member-States. For this reason I have always thought that the important part of the Convention is the so-called economic clauses dealing with the licensing, assignment and working of the Common Market Patent. These are the ones that require careful study. They reflect the same philosophy that is behind the interpretation given to Articles 36 and Article 85.

In the previous draft there was a Clause 3 which, in effect, said that if you wished to obtain a Common Market Patent, you *must* do this for all the Common Market countries. This clause has been objected to by more than one government for several reasons. The costs of obtaining patent protection for such a large area is high for a small manufacturer who may only want protection in two or three countries. Thus, at the conference in November 1975, it will be proposed that this clause should be modified so as to permit an Applicant to obtain a Common Market Patent in only some of the member-States.

What troubles me is the relationship between such a modification of the Common Market Patent Convention and the policy that the Commission of EEC is now developing in respect of Articles 36 and 85. They may be inconsistent in the sense that a Common Market Patent for only some of the countries will hinder the political aim of making the Community one economic whole in which trade barriers between member-States have been broken down.

However as the Convention is still only a draft and it is unlikely that the European Patent Office will open before 1978, it is only a possible worry to consider for the future.

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16. Re Advocaat Zwarte Kip, [1974] C.M.L.R., D79.
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NOTE: C.M.L.R. refers to Common Market Law Report — an English publication. All the cases cited in this way can be found in other series of Law Reports.