

EC Policies — Pluses, Minuses

Does EC policy encourage, discourage licensing? Question gets critical, practical examination

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I shall attempt to answer this question from the viewpoint of an industrial advisor who has observed the genesis of policies in the Common Market and participated in the dialogue between industry and the Commission and governments, which has resulted in international treaties and legislative acts of the European Economic Community.

The answer cannot be a simple yes or no. It is obvious that in any appraisal of political events there is a spectrum of positive and negative points that need to be evaluated.

Let's first select the more important EC policies that are relevant to our subject. I suggest we deal with three broad issues:

- EC policies to remove barriers to trade in the Community and to foster free-world trade.
- EC policies to promote research and innovation in the Community.
- EC policies to promote the transfer of technology.

POLICIES TO REMOVE TRADE BARRIERS

The first issue can be dealt with briefly. But it is the essential basis, since market integration within the Common Market and free-trade relations with countries outside are the prerequisite for progress in innovation and the transfer of technology. The success of the Common Market depends on the faithful and systematic execution of the principles laid down in the Treaty of Rome, Article 2:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, as increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Follow the Articles of the Treaty establishing the customs union, the elimination of quantitative restrictions between member states, the agricultural market, the rules on competition and state subsidies, the approximation of laws. All of this has evolved and contributed to what the Commission in earlier days had called an "industrial policy" of the Community. The ambitious goal of

creating a coherent and efficient industrial policy in the Common Market has been dwarfed by the economic difficulties of the 1970s and by the national egoisms that slowed the approximation of economic national policies in the EC.

But there is no doubt that all of the industries in the member countries have benefited from the Common Market. This is even true for today's crisis industries that would be even worse off without the Common Market. Let's remember that each crisis industry has a long record of considerable national subsidies that were given for understandable reasons, but they kept units of production alive that in reality were no longer competitive.

The Common Market has gone a long way in removing internal trade barriers, and it has established privileged trade relations with the European countries of the EFTA group. Also, there is the preferential treatment for a great many development countries by the Lome Treaty, and as far as trade with the rest of the world is concerned the Community is a relatively liberal partner.

Look Back

Still, we must admit that the Common Market is far from complete and that there are many risks and problems along the road. Sometimes, it is useful to look back to an earlier stage of development in order to appreciate the present.

In 1970, the List-Gesellschaft sponsored a colloquium in Frankfurt am Main of industrialists and university professors and representatives of the Commission to discuss the challenge and chance of industry in European market integration. The entire proceeding was published.* There were reports from almost a dozen industries relating to the experiences with European economic and industrial integration. These reports were all positive and hopeful. The second day of the colloquium was devoted to singling out those areas which, in the opinion of the participants, were to be given high priority for integration and harmonization efforts. These areas were the capital markets, company law, and taxes.

Of those three areas, very little progress has been made in the past 14 years in the fields of company law and taxation. We have had a number of harmonization directives in company law, but there is no *Societas Europae*, a genuinely European company form that alone would allow mergers of different nationality. Industry has tried to compensate for this lack of a suitable instrument by solutions based on national laws. There is ample evidence that these alternative solutions are inadequate. Also very little

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progress has been made in harmonizing tax law with the sole exception of the system of turnover taxation. For the rest, we depend also within the Community on bilateral agreements on double taxation.

This may show that the degree of economic integration and harmonization of laws must still improve in order to meet the requirements set out by an industrial policy of the Common Market.

Industrial Property Rights

In the field of industrial property rights, we have done relatively well: The European Patent System is functioning successfully although we have not yet succeeded in having the Luxembourg Convention on the Community Patent ratified and put into force. The chances of having a Common Market Trademark within the next few years appear to be good.

What we really need in the Community are new political impulses allowing closer integration at a faster rate. Mitterand's speech in European Parliament a few days ago was such an impulse when he indicated that one should no longer use a de facto-unanimity rule in the Council of Ministers in important matters where the Treaty does not require unanimity.

I think it is fair to say that the basic direction of EC policies as to the internal market and to the position of the EC in world trade is correct and encouraging. There are deficiencies and dangers, but they can be overcome. The signs point to more exchange of goods and technology.

POLICIES TO PROMOTE RESEARCH, INNOVATION

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The second issue is closely related to the issue of licensing and technology transfer. What is done in the Community to encourage innovation and to foster cooperation in research and development?

The Commission has started a number of initiatives to promote innovation in selected technical areas. For example, the Council of Ministers approved the ESPRIT program in February 1984. This elegant formula is the abbreviation for the rather prosaic "European Strategic Program for Research and Development in Information Technology."

ESPRIT is a new instrument to foster research cooperation among European electronic industries. It does not refer to subsidies of current individual research but requires agreement on new research projects in five areas. It is a 10-year program that comprises in the first five years a financial input of 1.5 billion units of account. These will be paid half by the Community and half by the participating companies, research institutes and universities.

Another proposal is called BRT or BRITE. It stands for Basic Research for Industrial Technology in Europe. This is a four-year plan for projects in 10 different technical fields with a finance volume of 270 million u.a. again on a 50/50 cost-sharing principle.

Biotechnology

Two weeks ago, the Commission announced plans to fund and run a multi-annual research program in biotechnology. The 50% Community input is planned to be 90 million u.a. The program will comprise coordinating

the actions and programs between member states and of personnel training. It will concentrate on specific research areas in plant life, nutrition, industrial use of agricultural raw materials, and developments in the drug field.

The general orientation of the Commission in suggesting these and similar research programs is to improve the innovation capacity of Europe in technologies that will play a fundamental role in the development of industrialized societies. The Commission wants to improve innovation capacity where it seems that Europe is at the moment less innovative and productive than its main technological competitors, the United States and Japan. The Commission points out in one of its basic documents* that the governments of the United States and Japan provide major governmental support for research and development intended to be of direct benefit for their industries.

It is also said that there is a lack of coordination among governments of the member states of the Community in their national research and development support programs thereby allowing duplication and waste of efforts. Furthermore, it is said that cooperation between industry and universities in Europe is still far from optimal.

The following guidelines can be deduced from the document describing Community initiatives.

- The Community should only support technological research of a pre-competitive character, i.e. the research undertaken should only go so far as to create benefits which can be equally exploited by a number of firms in competition with each other at the product development and marketing stage. Harmonization and standardization aspects are important here.

- The Community should only undertake projects for which the combination of human and financial resources at Community level gives an "added value."

- A proper coupling should occur between Community initiatives and the market. Hence, applications of commercial value should be foreseen before work is started. In other words, the research undertaken must be research that industry really needs but cannot undertake without financial support.

- The fact that an industry is in trouble or declining is not in itself a justification for Community assistance. Community initiatives should therefore focus on those areas where technological and other social-economic factors will create a reasonable possibility for a major improvement in productivity or competitiveness but where industry and national actions are insufficient.

- The Community should not simply subsidize research but should act as a catalyst concentrating on selective actions that can benefit industry widely and hence have a multiplier effect through a relatively modest financial contribution ("seed money").

Project Management

As to the management of projects, the predominant principle is the share cost contract research where the Community will finance not more than 50% of the cost. Priority will be given to projects undertaken by participants from more than one member state. Although the

*Commission of the European Communities, COM(83) 350 final as of June 20, 1983—Proposal for a COUNCIL DECISION adopting a multi-annual research and development programme of the European Economic Community in the field of basic technological research (presented by the Commission to the Council).

research projects are of precompetitive nature, the results will be hopefully of commercial value. Access to and exploitation of results and the dissemination of these results must be carefully regulated. In this respect, the Commission has spelled out the following principles:

- The rights to exploit any industrial property resulting from work under the programs will in the first place reside with the contractor who makes the invention.

- Preferential access to "foreground information" (information generated under the contract) and to "foreground patents" (patents for inventions made or conceived under the contract) should be granted under appropriate terms in order of priority to:
 - Other participants in the sub-program if required for the execution of their own contract.
 - Other participants in the sub-program.
 - Other enterprises established in the Community if their own R&D results cannot reasonably be applied otherwise.
 - Other enterprises established in the Community.

The Commission has the further responsibility, particularly important in such a program, to ensure that the results are properly exploited to the benefit of the whole Community and its industry within a reasonable time period. The contractual provisions giving effect to this requirement will be based on the principles set out in document COM(83)18.

Special attention will be given to a wide publication of project opportunities and to the widest possible integration of small and medium enterprises.

No doubt, these initiatives are an important new development of Community action. The basic necessity for promoting innovation in key areas of technology is beyond doubt. The initiatives taken are a good start. It is obviously too early to evaluate these initiatives, which still have to stand their test. Yet, I should like to say a word of warning. There are indications that in some circles these initiatives are accompanied by a very high level of expectation. For this reason, a critical view may be beneficial even at this very early stage.

Since the sums involved in the three examples I have briefly described are relatively modest, the first critical question would be whether everything has been done to improve and strengthen the existing resources of promotion of research and development and innovation on the national levels. In this respect, there is no evidence of a serious effort of trying to coordinate research planning among member states. All measures avoiding double work and fostering coordinated concentration in certain research areas would increase efficiency without really adding costs.

Stimulate Activity

The second critical question is whether on the national and Community levels enough has been done to stimulate industry's own research activity. I believe that incentives — such as — tax benefits and financial aids for researchers' salaries to make research efforts in general more attractive to enterprises are likely to be more productive than the direct funding of research projects.

Also on the Community level, a participation of less than 50% of the Community may very well be the better stimulus.

As to the methods employed, we have the eternal prob-

lem of who should be allowed to select and define the research projects. I am sure that the men and women who are working on these projects as Community officials or on special assignment for research project task forces have a high qualification and the best of intentions. Still, they do not have the background and orientation of researchers bearing responsibility in universities or in industry. They try to formulate research projects on the basis of suggestions they have received by a method that resembles the public tender. The experts advising them represent specific institutional or company interests. Their influence cannot be free from self-interest.

The final decision on a research project may very well be dictated by very personal views or by a compromise of differing positions. I wonder how we can prevent this situation from deteriorating into a self-service of interested parties, which will very well give them satisfaction but turn out to be expensive and of little return for the Community as a whole.

I shall be glad if such skepticism will turn out to be unjustified. But there are some grounds to maintain such skepticism for the time being.

EC POLICIES TO PROMOTE TECHNOLOGY TRANSFER

In this chapter on innovation an important aspect of EC policy is joint research and development. The Commission has published an updated draft group exemption on R&D cooperation agreements in January of this year. This draft will not be the last version; as a matter of fact, the Commission intends to send an amended draft to the member states in view of dealing with it in a meeting of the Consultative Committee on Cartels and Monopolies in July 1984.

It is uncertain to what extent the Commission will amend the draft in view of the criticism that had been raised primarily from industrial circles. For the time being, we have to base ourselves on the version published in January. The approach of the Commission toward exempting R&D cooperation agreements is disappointing because the regulatory impact is too heavy. The exemption according to the January draft does not apply to any agreement if one of the three actually or potentially leading enterprises in the sector to which the R&D program relates to is a party to the agreement. The exemption applies to agreements which extend cooperation to the production of products only if the aggregate turnover of the participating companies does not exceed 500 million units of account.

The German Industry Federation has made a survey of existing R&D cooperation agreements among 16 leading companies in the major fields of technology. All of these companies have a turnover above 500 million u.a. These companies report 220 R&D cooperation agreements of which half are made with partners having a total turnover of less than 500 million u.a. The important message of the survey is, however, that 80% of all agreements include also cooperation in the production stage.

The survey clearly shows that in order to make the group exemption productive in promoting innovation it must include the production stage and it must be applicable to large and small companies alike. For this reason UNICE in a position paper of March 8, 1984, has criticized the Commission proposal as a step backward

and not acceptable in its present form.

The philosophy of the group exemption would also have negative consequences for future Commission decisions screening individual notified agreements.

Draft Group Exemption

In turning to the third chapter dealing with technology transfer itself, the central subject is the draft group exemption on patent licensing, which has caused uncertainty and annoyance over long years.

The latest draft (84/CC1) is dated March 1984 and was debated in the Consultative Committee on Cartels and in its session on March 27 and 28, 1984. This draft is a considerable step ahead compared to earlier drafts, particularly the one distributed to member governments in September 1983. It can be said that the March draft for the first time seriously took into consideration the main arguments that governments and industry had used in attacking earlier drafts.

As to the most crucial issue of the group exemption—the exemption of the exclusive territorial license—the March draft would exempt such licenses in the relationship between the licensor and the licensee and vice-versa without conditions attached. As to the relationship between two or more licensees and the contractual interdiction of direct exports from one territory into another territory, the draft uses the analogy of Regulation 83/83 of exclusive distributorship. That regulation allows banning of active sales behavior in other territories but not of passive sales behavior.

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Government and industry have been critical, saying this would be in contradiction to the right inherent in the patent. It is likely that the Commission will review this particular point. As a matter of fact, the Commission at the moment is redrafting the document in a sincere attempt to have the entire draft based on a broader consensus. This review will include many other important parts of the draft.

It would be at this moment somewhat careless to play the role of the prophet as to the particulars. But it seems that there is a good chance that the group exemption will become a document providing legal security and having no prejudicial impact on the further evolution of the law of licensing in the Community.

I hope that this will come true. It would bring the Common Market in line with the international standard in applying antitrust to licensing and in particular with the more modern thinking of licensing and antitrust in the

U.S.A. The new Assistant Attorney General in charge of the Antitrust Division, Paul McGrath, in an address delivered on April 5, 1984, said:

Patent licenses, including those that restrict a licensee's competitive conduct or affect products outside the scope of the patent, should not be viewed as inherently suspect or per se unlawful under the antitrust laws. Patent licenses should be subjected to antitrust scrutiny that is no harsher than that employed for a transaction involving any other type of asset. The lawfulness of patent licenses should be based on a factual economic analysis, and licenses should be deemed unlawful only when their overall effect is anticompetitive. Toward this end, the President has proposed legislation, Titles III and IV of the National Productivity and Innovation Act, that would ensure that intellectual property licenses are not condemned under the antitrust laws or under the misused doctrine without appropriate consideration of their procompetitive benefits.

This is a continuation of the policy outlined earlier under Attorney General Baxter, where Mr. Lipsky reviewed critically the so-called nine No-Nos in licensing.

To sum up: Although we have no certainty, an acceptable version of the group exemption on patent licensing seems to be on the way. This would amount to an important and positive shift in EC policy in the field of licensing.

So, my answer to the question "Is Licensing Encouraged or Discouraged by EC Policy?" is an answer which differentiates from field to field and is almost impossible to put into a summary. EC policies in their effect on licensing are not free of discouraging aspects. But altogether they are not counterproductive either.

I shall close by mentioning two details that allow an optimistic view for the future.

The Commission endeavors to develop a strategy to safeguard and improve patent protection in the field of biochemistry and biogenetics and has asked industry for consultations. And second, the negotiations between Spain and the Community have successfully solved the patent issue: Spain will adhere to the European Patent Conventions and bring its own national law in line. Also for a transitional period after the accession of Spain to the Community, when for certain products equality is not yet given, products manufactured under license in Spain may not freely circulate in the rest of the Community. The Commission has accepted in this particular case an exception to the rule of the free circulation of goods. This is an example that even very difficult issues can at times be brought to balanced solutions.