

# Violation of EC Antitrust Policy May Be Costly

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Active enforcement of policies is high priority; communications may not be privileged

Many licensing restrictions are generally familiar with the idea that some agreements have to be notified to the Commission of the European Communities and also that undertakings may be fined for violations of the "antitrust law" of the EC (European Market). A purpose of this paper is to evaluate briefly the level of fines that have been imposed in recent years for certain antitrust violations. It will be obvious that fines may be heavy, and this should act as an incentive to companies to obey the law and to reach agreements — using the word "notify" in a very general sense — if this will help to avoid the possibility of being fined. This provision is important since some forms of objectionable behavior are simply not permissible whether or not there is a notified agreement that is notified.

In discussing the enforcement powers of the Commission Market authorities, I shall concentrate on procedural aspects and will deal with the Commission's powers to demand information and to enter business premises unannounced to search for information. Important issues with respect to their powers of enforcement are then:

1. Information obtained by the Commission may have to be communicated to officials of all the Member States.

2. Communications with lawyers who are not qualified to practice before the Courts of the Member States may not be subject to professional privilege.

## FINES

Article 15 (2) of Regulation 1762

is as follows:

1. The Commission may by decision impose on undertakings in breach of undertakings fines of from 100 to 1,000,000 units of account, or a sum in excess thereof but not exceeding 1% of the turnover in the preceding business year of each of the undertakings participating in the infringement unless either voluntarily or negligently enter into Article 9(1) or Article 9(2) of the Treaty, or if they commit a breach of any obligation imposed pursuant to Article 9(1). In fixing the amount of the fine, regard shall be had to the gravity and to the duration of the infringement.

Table 1 substantially repeats for itself, a non-competitive behavior is not a criminal offense but can lead to significant fines.

As will be seen later, there are two types of fines and those just referred to are fines for substantive violations of Article 8(1) or Article 9(1) of the Rome Treaty. Fines may also be imposed for procedural violations in withholding information from the Commission, but these will usually be of a much lower order.

## THE ENFORCEMENT POWERS OF THE COMMISSION

This term has been chosen deliberately to emphasize that we shall be considering not only the procedural aspects of notifying agreements to the Commission but the much broader question of how the Commission enforces Commission Market antitrust policy. The basic law or regulation is Regulation 1762 and comprises 25 articles, and parts of it are quoted in this paper. If an agreement is to be notified to the Commission it is done on the Commission's Form A/B. There is a complementary note giving advice on completing the form. Any third party wishing to complain of

the activities of another company can do so on its Form C.

Many investigations start off because of a complaint by a disgruntled third party. The possibility of a third-party complaint is important, because it may alert Commission Market antitrust enforcement officials. Potential or actual offenders should be well aware of that.

## REQUESTS FOR INFORMATION AND SEARCHES

Of course, a search is carried out to obtain information, but this heading is used because in EC language, a request for information presents a company with very different problems from those arising out of a search that can be carried out without prior warning and in the absence of legal advisors. The most pertinent articles of Regulation 1762 are as follows:

Article 11 — Requests for information.

Article 12 — Inquiry into sectors of the economy.

Article 13 — Investigations by application of Member States.

Article 14 — Investigation powers of the Commission.

Article 15 — Fines.

Article 16 — Financial penalty payments.

Article 20 — Professional secrecy.

## ARTICLE 11 — REQUESTS FOR INFORMATION

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member

\* European Council, Daily Note/Morphy & Prosser, 18/10/80, London.

COMPANY	FINES	DATE OF DECISION	
Monsiezon	11 million Ecu	April 1984	Price fixing cartel and production quotas. Part of polypropylene cartel.
I.C.I.	10 million Ecu	April 1984	Price fixing cartel and production quotas. Part of polypropylene cartel.
Hoechst	9 million Ecu	April 1984	Price fixing cartel and production quotas. Part of polypropylene cartel.
Shell	9 million Ecu	April 1984	Price fixing cartel and production quotas. Part of polypropylene cartel.
Styrolen Bark DAM BASF Tobip	3.75 or 2.5 million Ecu	April 1984	Price fixing cartel and production quotas. Part of polypropylene cartel.
Edizione Piana SpA	7 million Ecu	December 1983	Price fixing and production quotas. Flat glass cartel in Italy.
Societa Italiana Vetro Siv SpA	4.7 million Ecu	December 1983	Price fixing and production quotas. Flat glass cartel in Italy.
IGI	4 million Ecu	March 1983	Tying sales of unperforated nails to perforated guns.
British Sugar	3 million Ecu	July 1983	Refusal to supply bulk sugar to a competitor.
Solvay	3 million Ecu	1984	Persepolis cartel. Market division.
British Plaster Board	3.0 million Ecu	December 1983	Permeating imports of Spanish plasterboard into England.
Spanish Fur Breeders Cooper. Assoc.	0.8 million Ecu		Controlling marketing of furs.
Gaslec Products S.A. (Belgium)	0 million Ecu	July 1987	Prevention of parallel exports.
Daily Group v. Quilten Case	200,000 Ecu	February 1983	Refusal to supply for export.
Tippos	400,000 Ecu	July 1987	Refusal to supply for export.
14 Chemical Companies	22.5 million Ecu	December 1983	Price fixing and production quotas in PVC cartel.
17 Chemical Companies	20 million Ecu	December 1983	Price fixing and production quotas in GPPS cartel.

1 Ecu equals approximately 1.1 U.S. dollars.

Table 1

States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(a) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law or by their constitution shall

supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision

shall specify what information is requested, its appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 13(1)(b) and Article 14(1)(b) and the right to have the decision reviewed by the Court of Justice.

It will be seen that there is a two-stage procedure. Initially, a request for information is sent to an undertaking (subsection 2). If this is not complied with (subsection 3) there will be a formal decision ordering that the information is supplied. There is no element of surprise and ample opportunity to consider the best limits of reply. What fines may be imposed for non-compliance are discussed later but fines only become due after the Commission has taken a formal decision that the information is required.

#### Privilege Against Self-Incrimination

The Commission's powers of investigation under Article 13 have been considered very recently by the European Court of Justice in the Case of *Orban v Commission of the EC* (Case 24/82) and not yet reported. *Orban* objected to the Commission's request for various documents against a number of grounds. One of those grounds was that a search under Article 14 had already taken place and that fuller action under Article 13 was therefore inappropriate. Most of their objections were discussed, but the Court attempted to draw a distinction between questions that might lead to self-incrimination.

The Court has already recognized the importance of retaining that right is a fair hearing, which the Court regarded as a fundamental principle of the Community legal order, could not be intractably compromised in connection with prior investigations, which might be decisive in obtaining evidence establishing unlawful conduct on the part of undertakings.

Accordingly, although, in order to preserve the useful effect of Article 11 (2) and 13(1) Regulation No. 17, the Commission was entitled to compel an undertaking to provide all necessary information relating to facts of which it might have knowledge and to disclose to it, as

necessary, the documents relevant thereto which it had in its possession, even if the latter might serve to establish, against it or against another undertaking, the existence of anti-competitive conduct, the Commission nevertheless could not, by a decision requiring information, intrude the undertaking's right to a fair hearing.

Thus, the Commission could not impose upon an undertaking the obligation to give answers by virtue of which it would have to admit the existence of the infringement (but was the Commission's responsibility to prove. This may be a distinction without a difference in that the Commission may simply have to be more careful in the way its questions are phrased.

#### What is Information?

Article 13 refers to "request for information." The complete texts of documents may have to be produced. Information on their contents may be insufficient.

Thus, in *Académie Mining & Smelting Europe Limited v Commission* (Case 29/79) (1982) CMLR 264 at 222 the Court stated:

(1) In Article 13 and in the regulation, therein it provided that the Commission may obtain "information" and undertake necessary investigations, in the purpose of proceeding in respect of infringements of the anti-competitive Article 101 in particular respect the Commission is required production of business records, that is to say, documents concerning financial activities of the undertaking, in particular to establish compliance with these rules. It must communicate between lawyer and client but, in view of their confidential and written, written category of documents referred to in Article 13 and 14 (1) (b) (1) (b), such documents which their contents may demand are, in Article 14(1)(b) (1)(b), those whose disclosure is "crucial" "necessary" in order that it may bring to light infringement of the law in order to competition in the principle that the Commission must and can the undertaking concerned or a third party, whether in regard to its intention to decide whether or not a document may be produced to it.

#### ARTICLE 14—SEARCHES, ANNOUNCEMENT AND UNANNOUNCED

It is the possibility of this procedure that may cause considerable surprise and worry to many companies. Article 14 reads as follows:

Investigating powers of the Commission

1. In carrying out the duties assigned to it by Article 13 and by the provisions referred to in Article 17 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings to the extent authorized by the Commission as empowered in order to examine the books and other business records.

20. In the copies of its extracts from the books and business records.

21. It may also use information on the spot.

22. It may enter any premises, land and means of transport in accordance.

23. The officials of the Commission authorized for the purpose of these investigations shall enjoy the same powers of production of an undertaking in writing specifying the subject matter and purpose of the investigation, and the persons responsible in Article 13 (1) in a case where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made while investigation and of the grounds of the authorized visit.

24. Undertakings and associations of undertakings shall be subject to investigations conducted by officials of the Commission. The documents shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the grounds provided for in Article 13(1)(a) and Article 14 (1)(a) and the right to have the decision reviewed by the Court of Justice.

25. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

26. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or

of the Commission, under the officials of the Commission in carrying out their duties.  
5. Article 10 authorizing, appears an investigation without consent in this Article, the Member States consent that all the necessary assistance should be provided by the officials authorized by the Commission to enable them to make their investigations. Member States shall, after consultation with the Commission, take the necessary measures to this end in Article 10(c), para 192.

The wording of Article 10 is adequate in plain and contemplates two types of search. There are searches where a Commission official simply produces an authorization (sub-section 2) and the undertaking has the right to refuse admission, and there are searches that have been preceded by a formal decision (sub-section 3). Until 1977 the Commission had used its powers to enter decisions only infrequently (see *The Elements of Supreme EEC Competition Investigations under Article 14(b)* of Regulation 17 by Julian Lindley, *European Law Review*, February 1983, paragraph 3).

In general, visits by appointment with the inspectors using undercover investigators proved an adequate last resort method. Even where surprise was considered essential visits were usually made under the noncooperative procedure. Decisions were taken only where there had been a refusal to cooperate on a voluntary basis.

This policy has undergone a marked change in the last few years. Since January 3, 1979, investigations by decisions have been made at 22 undertakings. In almost all cases there was no prior warning.

Several factors account for this development. First the least is an increasing tendency on the part of firms and their advisors to resist any investigation of their activities. Legal advisors know that simple undertakings have no obligatory effect. While such awareness of Community law is to be welcomed, it would be naive to suppose that in a wider world companies with something to hide will forgo the chance offered by the procedure to deny access to incriminating documents.

Firstly for noncooperation can only

be imposed after a decision has been taken. In practical terms the difference between a search carried out on the basis of an authorization and one carried out after a decision has been taken, may not be significant. If the undertaking refuses admission to the investigators, the difference is important as will emerge later in this paper.

The search powers are extensive. As just stated, no notice need be given and the investigators can simply present themselves at the business concerned and produce their authority. The investigators do not have to wait for the arrival of the lawyers of the company, whose presence they are searching. The European Court of Justice first considered such a search in *National Panasonic v. Commission* (Case 106-24) (1980 ECR 2033, (1980) 5 CMLR 329), where the timetable of events can be summarized as follows:

On 27 June 1979, an approximately 10 a.m., two officials of the Commission, duly authorized agents, arrived without prior notice at Panasonic's sales office in Slough and notified the division of the undertaking of a Commission decision of 22 June 1979 authorizing an on-the-spot investigation of all the company's documents. The assistant to Panasonic's managing director asked these officials to wait the arrival of the undertaking's solicitor who had traveled from Norwich. The officials replied they had full authority to commence the investigation immediately. The inspectors, therefore, began at 10:45 a.m. in the absence of the Panasonic's solicitor who only arrived three hours later. The inspection lasted approximately seven hours. At about 5:30 p.m. the Commission's agents left Panasonic's offices with copies of several documents and notes they had made.

The inspection cannot be postponed to enable consultation with the company's legal advisors. This, in the official explanatory note on investigations under Article 10, is clearly stated:

"The undertaking may consult a legal adviser during the investigation. However, the presence of a lawyer is not a legal condition for the validity of the investigation, nor

must it unduly delay or impede it. Any delay pending a lawyer's arrival must be kept to the strict minimum and shall be allowed only where the management of the undertaking simultaneously undertakes to ensure that the business records will remain in the place and state they were in when the Commission officials arrive." The officials' acceptance of delay in this conditional sense, there could bring it indeed from entering into and remaining in occupation of offices of their choice. If the undertaking has an in-house legal service, Commission officials are instructed not to delay the investigations by awaiting the arrival of an external legal adviser."

Although this power of unannounced search has been part of statute law since 1962, it was little used until 1979. In *National Panasonic* the Commission stated that an unannounced search had been carried out in 26 years since 1971. Panasonic stated it was unaware of any of these searches because there was no published decision. The official report makes interesting reading: "As regards the Commission's practice, Panasonic states that it could obviously not be aware of unpublished decisions. In any case, it is necessary to point out that 18 of the 24 decisions mentioned by the Commission were taken in or about June 1979 with regard to manufacturers or exclusive distributors of electronic equipment, in other words within the same context and during the same period as the decisions concerning Panasonic, whereas some of the six other decisions seem to have been taken early in 1979. The argument advanced by Panasonic therefore remains wholly valid."

#### *Kohlen v. Pirelli v. Search*

The Commission's powers to investigate companies suspected of antitrust violations were the subject of an important decision by the European Court of Justice on September 23, 1989, in *Kohlen AC v. Commission* (Case 40-87) 225/89. Commission investigators were refused access to the offices of Steinhilber on the basis that they needed a search warrant from a German court. Fischer referred to his his-



obligation of professional secrecy.

5. The protocols of paragraphs 1 and 2 shall not prevent publication of general information in respect of which the communication is made in particular undertakings or situations of professional secrecy.

Thus, it is not desired to request for information to state that the information requested contains business secrets or is subject to the obligation of professional secrecy. This does not mean that the lawyer-client privilege is not applicable. However, as will be seen more clearly later in this paper, all Member States may receive communicated information.

Professional secrecy has a very different meaning in some Member States of the Common Market than does the concept of the lawyer-client privilege as understood in a common-law country. Note that Article 28 refers to the obligation to maintain confidentiality on the part of "the competent authorities of the Member States." This will be discussed later.

#### Legal Professional Privilege/Legal Confidant

There are no special provisions in the Rome Treaty or Regulation 1762 as to lawyer-client privilege, and analysis of this privilege is not easy because of the different practices in different Member States.

The leading case is *A.M. & S. v. Europe Limited v. Commission Case 1979 (1982) ECR 375, 1982 2 CMLR 261*. The case was on *Choiis* (1985-86), 9 Fordham Int. L.J. In general, communications between an independent lawyer, qualified in a Member State and his client are protected by professional privilege. There are many unanswered questions on the full scope of the privilege, but it is believed that the following observations are correct:

1. Communication from and to an in-house lawyer (an employee) are not protected.

2. The lawyer must be qualified to practice in one of the Member States.

3. However, communications, with, for example, an English lawyer practicing in Belgium are privileged.

4. The privilege is not restricted to the period after "commitment" of proceedings. In other words, preliminary advice on a possible infringement of Community law is protected.

5. A summary of legal advice prepared by a non-lawyer and communicated to another member of a company is not subject to professional privilege.

#### Non-Common Market Lawyers

In view of the growing number of companies from outside the Common Market who are setting up business within the Common Market, the extent to which communications with "foreign" lawyers are subject to privilege is becoming increasingly important. In *A.M. & S. v. the Commission*, the issue was not really considered directly in that there was extensive analysis of the extent to which a lawyer qualified to practice in one Member State could claim privilege if he was working from an office in another Member State. In the Court's decision, the following passage occurs:

...it is clear that where, although not by the light of the binding provisions of the written communications of law must necessarily be considered, in so far as they are not based on independent legal assistance to practice in professional Member State, as a confidant and/or that passed beyond the Commission's power of investigation under Article 14 of Regulation 17.

This has been interpreted broadly as stating that absence of an E.C. qualification means there is no privilege.

#### Confidentiality of Information

In discussing the subject of confidentiality one has to consider the circumstances in which confidential information is communicated to the Commission and the obligations of the Commission to maintain secrecy of information so obtained. However, the Commission does not have statutory power in carrying out certain duties and has to consult authorities in the Member States so that information communicated to Brussels is effectively communicated to officials in all the Member States.

Professional secrecy is dealt with

under Article 28 sub-section 2 which is set out above.

Published decisions of the Commission and business secrets and Community officials who breach any confidentiality provisions run the risk of disciplinary action (in this connection see *Libertati Report on Competition Policy 1986*, points 58-61).

There is no indication of any dissatisfaction with procedures used within the Commission to maintain obligations of professional confidentiality and not to reveal business secrets. The long, complementary note that accompanies Form A will refer to Section VIII in secrecy:

#### VIII. Secrecy

Article 176 of the Treaty and Article 28 and 29 of the Regulation No. 17 require the Commission and Member States to maintain information of the kind covered by the obligation of professional secrecy. On the other hand, Article 176 of the Regulation requires the Commission to publish a summary of your application, should a need to proceed, following the relevant decision, in the publication, that concerned, shall have regard to the legitimate interest of undertakings in the protection of their business secrets. Under 176, in this connection, it is to be noted that proceedings would be held at all any of the information you are asked to supply may be published in information developed in other cases, please put all such information in a second series with each page clearly marked "Business Secret". In the principal annex, under any attached heading, state "Business Secret" or "Should be secret", in the second series upon the effect of hearings and interviews) and give the information you deem suitable have published, together with any reasons for this. Do not attach the fact that this communication has to publish a summary of your application.

Before publishing an item in this series, the Commission will show the undertaking concerned a copy of the proposed text.

#### The Cartel Committee

The problem arises because of the necessity to communicate information to all the Member States. The

fact of communication to all Member States of any request for exemption is very clear, when such a request is made on the relevant official form (Form A/B). This clearly states:

"This form and cover must be supplied in 12 copies (one to the Commission and one for each Member State).

Regulation 17 provides for the setting up of an Advisory Committee on Restrictive Practices and Monopolies in Article 10 paragraphs (1)(H):

**1. Action with the assistance of the Member States.**

1. The Commission shall help with financial aid the competent authorities of the Member States a copy of the application and write them together with copies of the corresponding documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or obtaining negative clearance in a matter of application of Article 85(1).

2. The Commission shall carry out the procedure set out in paragraph 1 in close and constant liaison with the competent authorities of the Member States, such authorities shall have the right to compare their views upon that procedure.

3. An Advisory Committee on Restrictive Practices and Monopolies, shall be constituted prior to the taking of any decision following upon a pro-

cedure under paragraph 1, and of any decision concerning the general application or enforcement of the decision pronounced in the final stage of the Treaty.

4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official representative of its government that attending may be replaced by another official.

It is often difficult to obtain information on the working procedures within the Advisory Committee, and indeed it would be improper for certain types of information to be revealed to third parties in respect of these working practices. However, the Committee is composed of "officials competent in the matter of restrictive practices and monopolies." The official who attends on behalf of a Member government may vary depending upon the issues and cases to be discussed, but the members of the Advisory Committee must be provided with a summary of the case and copies of all the relevant documents.

It is believed that members of the Committee receive copies of all documents and therefore have made available to them all confidential information that has been submitted to the Commission. The Advisory Committee meets periodically in Brussels, but the advice

they give to the Commission is not part of any published decision.

## CONCLUSIONS

The European Economic Community has only been in existence since 1958. In 1972, three new Member States (Great Britain, Denmark and Ireland) joined the Community. In 1980, Greece, Spain and Portugal became members. Active enforcement of its antitrust policy has a high priority, and this has become more important in the last 10 years.

Companies must be aware that there is a possibility of significant fines in respect to behavior found to be anticompetitive. They must also be aware of the powers of the Commission to obtain information needed to enforce this antitrust policy. Any search of Company premises by Commission investigators can only be carried out within the Common Market, and as non-European companies increasingly set up a manufacturing base or sales office inside the Common Market, they must remember this possibility. They must also remember that communications with professional advisers who are not qualified to practice law within the Common Market are probably not privileged and they may therefore be at a disadvantage as compared with many European companies.