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The Role of Antitrust in Establishing a European Common Market and its Relation to the Canada/U.S. Context

by Hans Smit *

I. THE NATURE OF THE EEC

The European Economic Community (EEC) is not just a customs union in which all internal tariffs have been abolished and a common external tariff on goods imported from nonmember states has been imposed. It is much more. The EEC Treaty aims at total economic integration and contains a large number of provisions that are designed to achieve this.¹ The foundation on which the EEC is built comprises freedoms of movement of goods, of persons, and of capital. The grand design is to make the EEC into one entity for all economic purposes.²

II. THE EEC ANTITRUST REGIME

A. *Competition as the Basic Regulator*

The drafters of the EEC Treaty were confronted with the task of determining how the economic entity, once established, would be governed. Provision for extensive regulation by EEC institutions would have created obvious political difficulties. It would have encroached too significantly upon the sovereign prerogatives of the member states. Principal reliance was, therefore, placed upon the forces of the market. Competition was to be the principal regulator. But if the competition was to play the role assigned to it, proper measures should have been taken that it would not be disturbed by private anticompetitive conduct. The EEC Treaty introduced, as part of the EEC, a set of antitrust rules which protect competition.

B. *The Scheme of the Treaty*

The basic antitrust provisions in the EEC Treaty are Articles 85 and

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¹ For an article-by-article commentary on the EEC Treaty, see SMIT & HERZOGG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* (6 vol. loose-leaf).

² In further implementation of this design, the member states, on February 17 and 28, 1986, signed a Single European Act, Supp. 286 to the EC Bulletin. This Act, which provides for a number of important amendments to the Treaty, has been ratified by all member states except Ireland, where the method of ratification has led to a successful court challenge.

86.³ They outlaw, respectively, agreements and concerted practices which affect interstate commerce in restraint of competition, and abuse of a dominant position which affects interstate commerce in the Common Market. Paragraph 1 of Article 85 prohibits these agreements and concerted practices; paragraph 2 declares these agreements null and void; and paragraph 3 provides for exemption from the prohibition contained in paragraph 1 if certain conditions are met. The provision for administrative exemption by the EEC Commission marks a drastic difference from American antitrust law, under which escape from statutory prohibitions is possible only by recourse to a rule of reason.

The provision for administrative exemption led to difficulties when the Commission appeared unable to deal with the large number of requests for such exemption registered with it. In order to cope with this problem, the EC Council issued a number of regulations which authorize group exemptions.⁴ On the basis of these regulations, the Commission has issued a number of group exemptions. The two most important ones deal with distributorships and patent licensing agreements.⁵ In addition, the Commission has published a number of Communications that are in fact blanket rulings which declare Article 85(1) inapplicable to specified groups of agreements.⁶

Notwithstanding these implementing measures, a great deal of uncertainty has continued to prevail. It has been the task of the Court of Justice to address some of the major problems.

III. THE CASE LAW OF THE EEC COURT OF JUSTICE

The unqualified language of Article 85(1) and (2) and Article 86 of the Treaty, and Article 1 of Regulation No. 17/62, which declares Articles 85 and 86 to be directly applicable and provides for registration of agreements covered by Article 85,⁷ gave considerable support to the view

³ For a more elaborate discussion of these Articles, as well as Articles 87-90 dealing with implementation by the Community and the special position of public monopolies, see 2 SMIT & HERZOGG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY*, at §§ 85-90.

⁴ The following group exemptions regulations have been issued: Council Regulations No. 19/65, Mar. 2, 1965, 8 O.J. 533 (1965); Council Regulation No. 2821/71, Dec. 20, 1971, O.J. No. L 285/46 (1971).

⁵ Commission Regulation No. 67/67, eff. May 1, 1967, 10 O.J. 849 (1967), (distribution agreements); Commission Regulations No. 2779/72, eff. Jan. 1, 1973, 15 O.J. No. L 292/23 (1972), (specialization agreements); Commission Regulation No. 1983/83, eff. July 1, 1983, O.J. No. L 193/1 (1983), (exclusive distribution agreements); Commission Regulation No. 2349/84, eff. Jan. 1, 1985, 27 O.J. No. L 219/15 (1984), (patent licensing agreements); Commission Regulation No. 417/85, eff. Mar. 1, 1985 O.J. No. L 53/5 (1985) (specialization agreements); Commission Regulation No. 418/85, eff. Mar. 1, 1985, O.J. (1985), (research and development agreements).

⁶ See, e.g., Communication of May 27, 1970, 1968 A.J. No. C 75, at 3, as corrected in 1968 A.J. No. C. 84 (Aug. 28, 1968) (agreements of minor importance are not within Art. 85(1)).

⁷ Regulation No. 17/62, Feb. 6, 1962, 1962 O.J. 204, became effective on Mar. 13, 1962. It provides a comprehensive set of rules which implement the Treaty's antitrust provisions. Apart from the provision cited in the text, it provides for registration of agreements covered by Article 85 with the Commission. Registration is a prerequisite to the issuance of an individual exemption pur-

that these provisions were self-executing. The Court resolved this question differently depending on whether duly registered old or new agreements (i.e., agreements concluded after March 13, 1962) were involved. Old agreements, the Court ruled in the *Bosch* case,⁸ were provisionally valid until an appropriate authority ruled on their invalidity. New agreements, however, the Court ruled in *Haecht II*,⁹ if forbidden by Article 85(1), were invalid *ab initio*. The latter ruling, since affirmed by the Court,¹⁰ added to the stress for authoritative rulings on the substantive reach of Articles 85(1) and 86.

In leading cases on those issues, like *Bosch*¹¹ and *Grundig*,¹² the Court has stressed the role of antitrust in eliminating barriers at the frontiers of the member states. In *Bosch*, it ruled that an exclusive distributorship was granted by a German manufacturer to a French distributor. In *Grundig*, the Court specifically upheld the Commission's ruling that an absolute prohibition against parallel imports (i.e., imports into France by others who had purchased the goods from German distributors) was both prohibited by Article 85(1) and ineligible for exemption under Article 85(3).

The basic rule that private action that seeks to partition the Community into national markets is forbidden was also extended to Article 86, which forbids abuse of a dominant position. In *Sirena*,¹³ the Court ruled that it could be abuse of a dominant position to use an industrial property right to forbid imports of goods that had been put on the market of another member state by the owner of the right or with his consent. Indeed, in *Deutsche Gramophon*,¹⁴ the Court closed a potential loophole when it ruled that the owner of an intellectual property right could not prevent the importation of records it had put on the market in another member state, even though it had acted unilaterally and did not have a dominant position. Reliance on intellectual property rights for

suant to Article 85(3) of the Treaty, determines the date to which an exemption may be declared to have retroactive effect, and marks the beginning of a period during which no administrative sanctions may be imposed. Arts. 4-7, 15(b)(5)). Certain agreements of minor importance are exempt from registration. (Art. 4(2)). The Commission is granted exclusive authority to rule upon applications for exemption. Sanctions for violation of Articles 85 and 86 and decisions rendered by the Commission are prescribed. Arts. 15-16. The Commission is given extensive investigatory powers. Arts. 11-14, 20. The Court of Justice is given plenary power of review of decisions by the Commission. Art. 17.

⁸ *De Geus en Uitenbogerd v. Robert Bosch GmbH*, Case No. 13/61, Apr. 6, 1962, 8 E.C.R. 89 (1962), 1 C.M.L.R. 1 (1962).

⁹ *S.A. Brasserie de Haecht v. Wilkin-Janssen*, Case No. 48/72, Feb. 6, 1973, 19 E.C.R. 77 (1973), 12 C.M.L.R. 287 (1973).

¹⁰ 19 E.C.R. 89-90 (1973); 12 C.M.L.R. 287 at 304 (1973).

¹¹ 8 E.C.R. 89, 106-7 (1962); 1 C.M.L.R. 1, 29-30 (1962).

¹² *Consten SARL and Grundig Verkaufs-GmbH v. Commission*, Case No. 56 & 58, 12 E.C.R. 429 (1966), 5 C.M.L.R. 418 (1966).

¹³ *Sirena S.v.l. v. Eda S.v.l.*, Case No. 40/70, 17 E.C.R. 69 (1971), 10 C.M.L.R. 260 (1971).

¹⁴ *Deutsche Gramophon v. Metro-Grossmarkte*, Case No. 78/70, 17 E.C.R. 487 (1971), 10 C.M.L.R. 631 (1971).

this purpose, the Court ruled, would be incompatible with the freedom of movement of goods as assured by the Treaty.¹⁵

As demonstrated by its *Grundig*, *Sirena*, and *Deutsche Gramophon* decisions, the Court has consistently brushed aside private attempts to partition the Community into national markets by preventing importation through reliance on intellectual or industrial property rights. However, these decisions dealt with attempts to prevent importation from one member state into another. The question remains as to what the Court should do if an attempt was made to import goods from a nonmember state into a member state.

In *E.M.I.*¹⁶ and *Polydor*,¹⁷ the Court made clear that in that context more liberal rules applied. In *E.M.I.*, the Court upheld the right of the owner of a trademark in a member state to prevent imports of goods which had the same trademark from a nonmember state. In *Polydor*, the Court gave the same ruling, even though the goods had clearly been put on the market of the nonmember state (Portugal) with the consent of the owner of the intellectual property right and even though there was, at that time, a treaty between Portugal and the Community which, in terms identical to those of the EEC Treaty, provided for freedom of movement of goods.

Even in a case of intra-Community commerce, the rule against partitioning the Community into national parts is not ironclad. In *Maize-Seed*,¹⁸ the Court ruled that what it called an open licensing agreement, under which a French licensor licensed the grower's right to hybrid corn to a German licensee, could be relied on by the German licensee to prevent imports from France. The decision was based on the peculiar characteristics of the grower's right and hinged on the licensee's being "open"; i.e., not preventing parallel imports.

IV. LESSONS FOR THE CANADA/U.S. CONTEXT

Thus far, under American antitrust laws, restraints on competition by private arrangement or conduct that remains within the scope of intellectual or industrial property rights have been upheld as permissible. Even restraints that go beyond the scope of such rights have been countenanced when the courts judged them reasonably ancillary to a main lawful purpose.¹⁹ Under present law, these restraints, since intellectual and

¹⁵ For a more extensive discussion of the relationship between the Treaty's antitrust provisions and intellectual and industrial property right, see also Smit, *The Relation of Intellectual Property Rights to Cross-Border Trade in the EEC*, 11 CAN.-U.S. L.J. 69 (1986).

¹⁶ *E.M.I. Records Limited v. CBS United Kingdom Limited*, Case No. 51/75, 1976 E.C.R. 811d, 18 C.M.L.R. 235 (1976).

¹⁷ *Polydor Limited and RSO Records Inc. v. Harlequin Record Shops Limited*, Case No. 270/80, 1982 E.C.R. 329, 33 C.M.L.R. 677 (1982).

¹⁸ *L.C. Nungesser KG & Kurt Eisele v. Commission of European Communities*, Case No. 258/78, 1982 E.C.R. 2015, 36 C.M.L.R. 278 (1982).

¹⁹ *Sperry Products, Inc. v. Aluminum Company of America*, 171 F. Supp. 901, 938 (N.D. Oh.

industrial property laws typically operate territorially, may be used to prevent imports from foreign countries, including Canada, when such imports would violate the intellectual or industrial property rights of a licensor or licensee or would constitute a breach of contract or would benefit from tortious inducement of a breach of contract. Thus, for example, an American licensee or a patent owner may prevent the importation into the United States of products manufactured in Canada by a patent owner's Canadian licensee.²⁰ An exclusive American distributor under a closed distribution system of a Canadian manufacturer could prevent parallel imports from Canada by either the Canadian manufacturer or someone who purchased from a Canadian distributor who sold them to the parallel importer in breach of his obligations.²¹

If Canada and the United States are truly to liberalize trade between them, and even more, if they are to establish a union for trading purposes, presently prevailing law would have to be changed in order to suppress private arrangements or conduct that would continue to maintain barriers at the national borders.

The developments in the EEC provide, to that end, proper guidelines for appropriate regulation to be adopted between Canada and the United States. Adoption of the rules developed in the EEC would insure that private action would be unable to reinstitute barriers that truly liberalized trade while leaving appropriate freedom of action in regard to trade with nonmember states.

1959), *aff'd in relevant part*, 285 F.2d 911, 926-27 (6th Cir. 1970), *cert. denied*, 368 U.S. 890 (1961). See also *Chicago Board of Trade v. United States*, 246 U.S. 231, at 238 (1918); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, at 692 (1978). See generally BREWSTER & ATWOOD, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1981 2d ed.) §§ 7.27 & 11.01; FULGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAW* § 5.5 (3d ed. 1982).

²⁰ *Brownize v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128-9 (9th Cir. 1954); *Dunlop Co. v. Kelsey-Hayes Co.*, 484 F.2d 407, 417 (6th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974). See generally BREWSTER & ATWOOD, *supra* note 19, at § 11.10, and FULGATE, *supra* note 19 at § 8.2.

²¹ See *U.S. v. Wilson & Geo. Meyer & Co.* [Canadian Peat Moss Case], 1961 Trade Cas. (CCH) ¶ 70,020 (N.D. Ca. 1961). See generally BREWSTER & ATWOOD, *supra* note 19, at §§ 10.14, 17.10; FULGATE, *supra* note 19, at § 2.20.

