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Antitrust Under the Treaty of Rome†

Introduction

A comparison of antitrust under the Treaty of Rome with antitrust in the United States leads to the conclusion that there are more (and very important) differences than there are similarities. Some of the major differences will be described in summary fashion.[1]

I. Definition of Antitrust Laws

In comparing the so-called antitrust laws of the EEC and the United States our terms and the frame of reference must first be defined. The European Economic Commission enforces three treaties. We are concerned here only with Articles 85 and 86 of the Treaty of Rome. We are not discussing the other treaties or the national laws of the member countries.

A major difference between the EEC laws and United States laws is that there is a single statute in the EEC—Articles 85 and 86 of the Treaty of Rome.

It is a common practice in discussing the United States antitrust laws to refer to the Sherman Act as if there was only one statute to consider. However, in fact, the very definition of the term "antitrust laws" has been the subject of disagreement. Since the Sherman Act was enacted in 1890, Congress has enacted more than seventy so-called antitrust statutes. The United States Supreme Court has split five to four in defining "antitrust" statutes. Thus, the majority has ruled that Sections 1 and 2 of the Robinson-Patman Act were antitrust laws, but Section 3 was not.[2]

The statutes mentioned do not comprise all of the antitrust laws, but are

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[1]For a detailed discussion on this subject, see JAMES A. RAHLS, COMMON MARKET AND AMERICAN ANTITRUST (McGraw Hill, 1970) and Barry E. Hawk, *Antitrust in the EEC-First Decade,* FORDHAM L. REV., Vol. XLI, Dec. 1972.

[2]Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958).

only the framework for a substantial body of judicial decisions and administrative adjudications. These decisions are not mere interpretations of the statutes, but are in effect legislation, since the congressional language is vaguely worded, and it was left to the courts and to the Federal Trade Commission to perfect the legislative intent.

One must further consider the great number of exemptions from the antitrust laws which apply to specified types of agreements or transactions, and to entire industries or broad categories of activities. For example, exemptions have been granted in the transportation field, including air, water, and land transportation, in communications, insurance, agriculture, banking, and labor.

II. Enforcement

In the United States there are two different systems of enforcement—the courts and an administrative agency. These have concurrent jurisdiction, and both may proceed against a company at the same time for the same conduct. There are ninety-six district courts and eleven courts of appeals, so business often has to live for years under conflicting court decisions until finally the Supreme Court states what the law is.

The method of enforcement of the EEC antitrust laws can be described as an administrative proceeding with judicial review by one court—the High Court of Justice. The EEC Commission is broadly similar to the Federal Trade Commission, except that judicial review may be had in any one of eleven circuit courts of appeals, and review by the Supreme Court is not a matter of right. Often the Supreme Court declines to review an FTC decision until conflicts arise between circuit courts.

Another similarity between the EEC and FTC is that both Commissions have the power to conduct investigations and hearings, to issue cease and desist orders, and to levy fines.

But there is a substantial difference between the two systems relative to the attitude of the respective courts to the Commission subject to their authority. In the United States the Supreme Court almost always affirms FTC decisions. In the EEC the High Court of Justice has not hesitated to overrule the Commission. For example, in the early days the Commission adopted the position that Article 85(1) prohibited all appreciable restrictions of competition regardless of their market significance. However, the Court held that restraints must be examined in their actual market context and to be prohibited must be shown to have a significant adverse effect on competition in the relevant market.

The problem of overlapping or concurrent jurisdiction is present in the EEC as in the United States. EEC member states which have antitrust laws may enforce them so long as the decisions are compatible with EEC decisions or principles. However, where national decisions prove incompatible with a Commission decision, the national authorities must respect Commission authority.

Thus there is a measure of overlapping jurisdiction as there is in the United States, and both the EEC and the national state may impose fines on the same person for the same conduct.[3] Also similar to United States laws, the EEC may impose a penalty even if the conduct would be lawful under national law.

A further major difference between the EEC and United States systems is that enforcement of EEC decisions is entirely civil, and only against corporations. Individuals cannot be fined or sent to jail, as they are under the Sherman Act. Also, there is no EEC provision for private treble damage actions.

A major criticism of the Sherman Act is that businessmen are subject to punishment *ex post facto,* for conduct which was legal at the time of the acts. When the Supreme Court declares a new rule or overrules an old decision, the decision is applicable to everyone who engaged in such conduct *before* the new decision, even though it was lawful at the time. Businessmen are thus subject to fines, imprisonments and treble damages, retroactively.

The method of enforcement by the EEC is to endeavor to obtain compliance, and when it has to make an interpretation of conduct as to which there was no rule, it affords everyone an opportunity to comply.

III. Advisory Opinions

Another complaint which American businessmen have against the United States antitrust laws is that there is no way a businessman can ascertain in advance whether or not a proposed course of action is legal or illegal. While the Department of Justice and the Federal Trade Commission may confer with United States companies, and will often insist on examining, before they become finalized, nascent agreements that may have anti-competitive effects, neither has authority to render a binding opinion or to approve any agreement or course of action in advance.

The Treaty of Rome contains an exemption provision which gives the Commission the exclusive power to administer it and to grant negative clearances. Under the Commission's procedures, parties to an agreement must notify the Commission in order to obtain such clearance. The Commission may grant either individual or blanket exemptions. Where blanket exemption has been granted to a class of agreements, parties to such agreements are not required to notify the Commission.[4]

IV. Rule of Reason—Sherman Act Section 1

Article 85(1) of the Rome Treaty is similar to Section 1 of the Sherman Act

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[3]Wilhem v. Bundeskartellamt, 15 Recueil de la Jurisprudence de la Court 1969-1, CCH COMM. MKT. REP. ¶ 8056 (1969).

[4]Regulation 17.

to the extent that both broadly prohibit agreements or concerted practices which restrain trade or competition. A major difference is that Article 85(3) provides specific exemptions if:

(a) the agreement contributes to improved production or distribution, or to technical or economic progress;
(b) the public receives a "fair share" of the resulting gains;
(c) the restriction does not exceed what is "essential" to achieve these benefits; and
(d) it does not "eliminate competition in respect of a substantial portion of the products in question."

These exemptions would qualify as a Rule of Reáson approach. Years ago the United States courts occasionally spoke of a Rule of Reason but it is now seldom mentioned. It is difficult to maintain there is a Rule of Reason when the United States Supreme Court has ruled that football is subject to the Sherman Act, but baseball is not. A Circuit Court of Appeals judge once remarked facetiously that those Supreme Court decisions seemed to depend upon the shape of the ball and the way it bounces.[5]

Nor can it be said that the United States antitrust laws protect the consumer or the public interest when the Supreme Court has held illegal an agreement between two parties to restrain a third party from gouging the public by charging unreasonably high prices.[6]

V. Monopoly—Sherman Act Section 2

Section 2 makes attempts to monopolize and monopolization illegal. Article 86 of the Treaty does not attack monopoly or dominant position as such. It adopts a different philosophy by prohibiting only an abuse of a dominant position. In consequence there is not likely to be any attempt in the EEC to break up large firms like I.B.M. and A.T.&T.

In determining whether a company occupies a dominant position, the High Court has taken a broad view of the relevant product market. It has ruled that the market must be clearly defined, and that the Commission must show that there has been a substantial elimination of competition.

VI. Mergers and Acquisitions

The Commission at first adopted a legal interpretation that Article 85 as a rule does not reach corporate mergers and acquisitions, nor the formation of joint venture companies. In general, the Commission indicated that mergers

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[5]BURNS, ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS (Central Book Company, Inc., Brooklyn, New York, 1969, page XVIII).

[6]Albrecht v. The Herald Co., 390 U.S. 145 (1968).

and joint ventures were to be dealt with only under Article 86 to the extent that they involve abuse of a dominant market position. This position appears to have been modified, with the commission's statement that it still encourages mergers in high-technology fields in order to improve the competitiveness of European industry on world markets, while discouraging mergers in the consumer-oriented industries.

In the *Continental Can* case[7] the High Court interpreted Article 86 as giving the Commission the authority to prevent mergers. However, the problems of defining the relevant market, then proving a substantial effect on competition appears to have imposed obstacles of such a character that the Commission has not instituted any other proceedings to prevent mergers.

In 1974 the Commission proposed a new regulation which would require prior approval of all mergers or takeovers above a certain size. However, this regulation has not been approved by the Council of Ministers.

In the area of joint ventures, the Commission allowed two competitors to form a joint marketing subsidiary and distinguished such a permanent merger from a temporary agreement not to compete, which would have violated Article 85. Applying Article 86 standards it ruled that the two companies together did not have a dominant position after the merger. In the United States if an agreement by two competitors to have a joint marketing agreement would violate Section 1 of the Sherman Act, formation of a joint marketing subsidiary would probably be held a violation of both Section 1 and Section 7 of the Clayton Act.

This is an area where there is a definite conflict between United States and EEC law. A United States Court or the FTC might prohibit a merger between American and European firms even though it is lawful in Europe.

VII. Extraterritorial Scope

A principal difference between the EEC and American law is that the EEC has no "foreign commerce" clause. The extraterritorial scope of the Treaty is limited to conduct occurring outside the Common Market which causes the prohibited *internal* effects. Conduct *inside* the Common Market which causes only external effects cannot be reached.

In the *Dyestuffs Cartel* case,[8] the High Court upheld the Commission finding of price-fixing violations against one British and three Swiss firms which were domiciled outside the Common Market, but had subsidiaries in the Common Market. It held the foreign parents legally responsible for effects inside the Common Market, rather than the local subsidiaries. Here the basic theory of jurisdiction is not very different from that used by a United States court in the *Swiss Watch* case.

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[7] 2 CCH COMMON MARKET REP. ¶ 8173, 8283 (1973).
[8] 2 CCH COMMON MARKET REP. ¶ 8161 (1972).

An American Webb-Pomerene Association selling to Common Market buyers, but not "established" in the Common Market, might violate Article 85 despite a Webb-Pomerene exemption under American Law.

VIII. Intra-Corporate Conspiracy

Violations of Article 85 like Section 1 of the Sherman Act require two or more persons to an agreement or understanding. In the United States there has been considerable criticism of what has been described as the "bathtub" conspiracy, or "intracorporate" conspiracy. The United States courts have ruled that a parent corporation and a wholly-owned subsidiary are two persons, and that an agreement between them may violate the Sherman Act, but that the *same* agreement or conduct is legal if the subsidiary is only a division of the parent instead of a separate corporation.[9]

The EEC has specifically rejected this concept. Instead it looks at the whole enterprise, and if the subsidiary cannot take economic measures independent of the parent, they are considered as a single enterprise.[10]

It is possible that if the EEC followed the United States law in the *Dyestuffs* case, the foreign parents *might* not have been held liable for acts of their local subsidiaries. However, the general approach of the EEC has been toward substance, and not form, and is more realistic.

IX. Patents, Trademarks, Know-How, Joint Research

In 1962 the Commission stated that Article 85(1) did not prohibit certain restrictions in unilateral patent licenses of a type which it regards as within the scope of the patent grant, including: limitations as to the field, quantity, or territory of use (except that it cannot restrict imports into other states); specifications of standards or restrictions of sources of supply if "indispensable for a technically proper utilization of the patent"; grant-back of licenses or improvement patents and know-how, provided the grant-back licenses are non-exclusive and the licensor is mutually obligated; exclusive license agreements; and other provisions. In the United States the policy of the Department of Justice is quite different. It is constantly attacking field of use restrictions and restrictions on the source of supply.

The Commission encourages joint research and development, rather than discouraging it as the United States does. While its policy is aimed at helping small and medium-sized firms, it has been lenient with large firms and granted an

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[9]Kiefer-Stewart Co. v. Joseph E. Segram & Sons, 340 U.S. 211 (1951).

[10]Beguelin Import Co. v. G.L. Impore Export Co., 2 CCH COMMON MARKET REP. ¶ 8149 (1971).

exemption to the second- and fourth-ranked firms of a textile detergent, where the top firm had eighty percent of the market.

In the United States the Department of Justice is opposed to joint research by large firms, and has forced the automobile manufacturers to stop their joint research for methods of reducing pollution caused by emissions from automobile engines.

X. Conclusion

From the foregoing, a clearcut conclusion emerges, so far as members of the bar are concerned: Lawyers practising and businesses operating in the nine member countries of the Common Market have a much easier task in conforming to EEC "antitrust laws" than their counterparts in the United States.