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Common Market Antitrust Law: Jurisdiction: Limitations Imposed by Article 85(I) of the Treaty of Rome

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NOTES

COMMON MARKET ANTITRUST LAW: JURISDICTION: LIMITATIONS IMPOSED BY ARTICLE 85(1) OF THE TREATY OF ROME

Article 85(1) of the Treaty of Rome[1] prohibits restrictive agreements and practices which have the object of distorting competition within the Common Market and which are likely to affect trade between the Member States. When properly analyzed these twin conditions are seen to embody three requirements which must be satisfied before a particular restraint becomes violative of Article 85(1): (1) the restraint must have as its object or effect the distortion of competition; (2) it must touch upon competition within the Common Market; and (3) it must touch upon interstate trade.[2] Requirements (2) and (3) are jurisdictional; they point to the effects that a restraint must produce within the Common Market before Community tribunals can proceed against those responsible for it. Requirement (1), on the other hand, embodies the substantive criteria of Community cartel law.

This note is not concerned with the ways in which restrictive agreements and practices can be found to satisfy Requirement (1). Rather, the object of its inquiry is to explore the legal meaning of the jurisdictional requirements of Article 85(1) with particular emphasis on their significance for the extraterritorial applicability of Common Market antitrust law. Requirement (2), the "domestic effects" clause, defines the scope of the Commission's territorial jurisdiction over restraints which satisfy the criteria of Requirement (1). Requirement (3), the interstate trade clause, insures that the restraint is a proper subject for Community, as opposed to Member State, cartel law.

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1. Treaty Establishing the European Economic Community, *done* March 25, 1957, 298 U.N.T.S. 11. An unofficial English translation is set forth together with the official French and German texts at 1 CCH COMM. MKT. REP. ¶ 2005 (emphasis added):

> Article 85(1): The following practices shall be prohibited as incompatible with the Common Market: all agreements between undertakings, all decisions by associations of undertakings and all concerted practices *which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common Market* or which have this effect. . . .

2. Interstate trade, in the context of Common Market antitrust law, refers to trade between Member States.

I

REQUIREMENT (3): IMPAIRMENT OF TRADE BETWEEN THE MEMBER STATES

A. The Basic Issue

For the Commission to have jurisdiction to proceed against parties responsible for an alleged distortion of competition it must be found that the suspect restraint touches upon interstate trade.[3] To grasp the legal significance of this "touching" requirement, there must first be a basic familiarity with the ways in which interstate trade may be affected by an illegal cartel. Thus, the abstract concepts "distortion of competition" and "interstate trade" must be considered in the context of the world of commerce; moreover, the facts which will indicate their presence and character must be identified.

A restrictive practice or agreement is reflected in the conduct of the enterprises which are parties to it.[4] Interstate trade refers to the actual movement of goods in commerce and also to the potential channels along which such goods might move; it involves actual and potential trading relationships between trading partners located in different Member States.[5] The basic issue is whether the suspect restraint is likely to result in an impairment of interstate trade. The analytical problem is to articulate the mechanisms by which a cartel, operating through the conduct of its members, can produce effects on the members' actual and potential trading relationships that will be sufficient to empower

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3. Recall that the actual language of the Treaty, *supra* note 1, requires that the suspect restraint be "liable to *affect* trade between Member States" (emphasis added). It is to be kept in mind that the interstate trade clause is primarily a jurisdictional requirement. This is in marked contrast to the role played by its American cousin in the Act of July 2, 1890 (Sherman Act), 15 U.S.C. § 1 (1964). The interstate trade (and commerce) clause in American antitrust law has considerably more substantive clout by comparison.

4. The "domestic effects" clause also requires that we identify the actual market manifestations of distortions of competition. There, however, the emphasis will be on locating the situs of the distorted activity. Here we are concerned with the effects of the restraint on the conduct of the parties involved insofar as that conduct is capable of affecting interstate trade.

5. The concept of "trade" can be viewed as pointing either to the exchange of goods, or to trading relationships, or to both. The judicial treatment of the interstate trade clause in the Community tribunals has focused principally upon the freedom of parties to develop trading relationships. The "interstate" qualification raises additional problems. Interstate trade might be construed to refer to those goods which move across national boundaries, or it might be taken to mean relationships between trading partners located in different Member States, or both. It is not clear from the cases that one interpretation has been chosen to the exclusion of the others by Community tribunals. However, as with the interpretation of "trade," the primary emphasis seems to have been on trading relationships rather than movement of goods.

the Commission to act upon the issue of the cartel's permissibility under Article 85(1).

B. The Grundig-Consten Single Market Test

The Court of Justice, in *Consten and Grundig v. E.E.C. Commission*,[6] gave this formulation of the test to be applied in ascertaining whether a particular restraint is likely to affect trade between the Member States:

> In this connection, it is especially important to know whether the agreement directly or indirectly, actually or potentially, is capable of jeopardizing the freedom of trade between Member States in such a manner as to prejudice the realization of the objectives of a single market between States.[7]

A convenient starting point in attempting to analyze the meaning of the single market test as applied in a particular factual situation is to isolate the market sector involved.[8] Once the relevant market sector has

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6. Consten and Grundig v. E.E.C. Commission, [1961-1966 Transfer Binder: Court Decisions] CCH Comm. Mkt. Rep. ¶ 8046, 5 Comm. Mkt. L.R. 418 (Eur. Ct. of Justice 1966) [hereinafter cited as *Grundig-Consten*].

7. Consten and Grundig v. E.E.C. Commission, [1961-1966 Transfer Binder: Court Decisions] CCH Comm. Mkt. Rep. ¶ 8046, at 7652, 5 Comm. Mkt. L.R. 418, 472 (Eur. Ct. of Justice 1966). In Société Technique Minière v. Maschinenbau Ulm GmbH, [1961-1966 Transfer Binder: Court Decisions] CCH Comm. Mkt. Rep. ¶ 8047, at 7696, 5 Comm. Mkt. L.R. 357, 375 (Eur. Ct. of Justice 1966) (emphasis added), the Court used an alternative phraseology, saying that "it is necessary to know whether [the restraint] is capable of *partitioning the market* in certain products between Member States and of thus rendering the *economic interpenetration* sought by the Treaty more difficult." It is apparent that the Court's intention in the early years of Community cartel law was to use Article 85(1) as a tool to help achieve economic interpenetration. Although this is an important objective for the EEC, it is not the traditional aim of American antitrust statutes, *i.e.*, regulation of competition. It will be seen that the standards sired by the single market objective do not function particularly well when applied to restraints which are designed to provide a competitive advantage but which are not concerned with national boundaries.

8. In *Grundig-Consten*, a German manufacturer of radios, Grundig, conferred exclusive distributorship rights upon the French distributor, Consten. Because the Commission has adopted a quantitative standard of perceptibility, so as to exclude from the prohibitions of Article 85(1) agreements whose effects are insignificant, it makes a difference whether the relevant market sector is narrowly or broadly defined. *Notice of May 27, 1970, Relating to Agreements, Decisions and Concerted Practices of Minor Importance Not Coming Within Art. 85(1)*, 2 CCH Comm. Mkt. Rep. ¶ 9367 (Engl. transl. & summary 1970). The quantitative standards of perceptibility set forth in the Commission announcement are grounded in the Court of Justice's decision in Volk v. Vervaecke, [1967-1970 Transfer Binder: Court Decisions] CCH Comm. Mkt. Rep. ¶ 8074, at 8086, 8 Comm. Mkt. L.R. 273 at 282 (Eur. Ct. of Justice 1969):

> [A]n agreement does not come within the prohibition of Article 85(1) where, in view of the weak position of the parties on the market of the products in question, its effect on the market is insignificant.

Thus, the agreement in *Grundig-Consten* would be more likely to impair the freedom of interstate trade in Grundig radios than it would if trade in all radios, or in electronic devices generally, were taken to be the pertinent sector. Without addressing itself specifically to this issue, the Court in *Grundig-Consten* opted for the narrow interpretation, focusing its inquiry on trade between Germany and France in Grundig products.

been isolated it is necessary to identify the potential trading partners for that sector, and then group them according to geographical location.[9] The factual inquiry comes into critical focus when it seeks to identify the effects of the restraint on the freedom of potential trading partners to engage in interstate trade.[10] The terms of the exclusive distributorship agreement in *Grundig-Consten* were such as to give Consten absolute territorial protection.[11] All French enterprises other than Consten were prohibited from importing Grundig radios into France; simultaneously, Consten was barred from re-exporting to other Community States. Hence, as a result of the restrictive agreement, a number of potential trading partners in different Community States were not free to deal with each other.

The freedom of potential trading partners to deal with one another is simply one indication of their freedom to engage in interstate trade. As a result of the *Grundig-Consten* holding the following may be viewed as the minimal requirement: there can be no freedom to engage in interstate trade where potential trading partners are prevented from dealing with one another.

According to the *Grundig-Consten* test, impairments of freedom of trade between the Member States become violative of the interstate trade clause when they erect a barrier to the realization of a single market between the Member States. For this determination, it is necessary to compare the trading freedom of potential partners, as affected by the suspect restraint, with what that freedom would be if the goal of economic interpenetration were a reality. Looking again to the *Grundig-*

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9. On the *Grundig-Consten* facts, enterprises which might potentially deal in Grundig radios include the manufacturer, distributors, and retailers. It is not clear from the decision whether it is necessary to consider consumers, manufacturers, and distributors of component parts, or others less directly connected with the distribution of the products involved. Geographically, the relevant parties included the German manufacturer, Grundig; the French distributor, Consten; other French distributors; and German retailers.

10. The actual working of the *Grundig-Consten* test, *supra* note 7 and accompanying text, requires an impairment of "freedom of interstate trade," which is to be determined through the application of the single market standard. Use of the phrase "freedom to engage in interstate trade" does not alter the criteria that are to be applied; it merely gives the concept a specific referent. Freedom of interstate trade is identical to the freedom of potential trading partners to engage in interstate trade.

11. In S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen, [1967-1970 Transfer Binder: Court Decisions] CCH COMM. MKT. REP. ¶ 8053, 7 Comm. Mkt. L.R. 26 (Eur. Ct. of Justice 1967), the Court gave explicit recognition to a principle silently applied in *Grundig-Consten*, namely that an agreement must be considered together with all the other agreements that surround it. Grundig had entered into similar exclusive distributorship arrangements with firms in the other Member States.

Consten facts, in a single, Community-wide market Grundig and other Community sellers of its radios would be free to deal with all French buyers; similarly, Consten would be free to export the Grundig product to buyers in other Member States. But, as a result of the exclusive distributorship agreement, the French market in Grundig radios was partitioned off from the rest of the Community. Accordingly, the agreement was held to be likely to impair trade between the Member States.[12]

An analysis of the *Grundig-Consten* decision, while helpful in illustrating the ultimate factual issues which underlie the practical application of the single market test, contributes little to the resolution of the most significant issue raised by the test articulated therein: *What kinds of limitations on trading freedom will prejudice the realization of a single, Community-wide market?* For the answer to this question, which is really an exploration of the criteria locked within the concept of a single market,[13] we must turn to an examination of post *Grundig-Consten* case law.

C. Post Grundig-Consten Case Law: Expansion of the Single Market Concept

A thorough examination of post *Grundig-Consten* case law reveals that few opportunities arose for the application of an expanded single market test. In almost every instance in which the Commission found an impairment of trade between the Member States, it also could find that the restraint *absolutely* prohibited a party from dealing with some potential trading partner in another Member State.[14] It is with regard to the few cases in which the Commission faced horizontal restraints

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12. Where the restrictive agreement prevents potential trading partners from dealing with one another, as was the case in *Grundig-Consten*, an *absolute barrier* is raised to the economic interpenetration contemplated by the single market test.

13. As long as the single market test remains the sole standard by which to measure the impact of a particular restraint on interstate trade, the kinds of interferences that will contravene the interstate trade clause will be determined by the criteria which find expression under the single market test. Thus, the expansion of Commission jurisdiction under the interstate trade clause can be seen as an expansion of the concept of a single market.

14. This result is not surprising in light of the Commission's statement that primary emphasis during the first ten years of Community competition policy was on restraints which jeopardized the unity of the Common Market. *Commission Report on Competition Policy*, 2 CCH Comm. Mkt. Rep. ¶ 9507 (1972). As a result of this ordering of priorities, agreements designed to regulate competition in the Common Market without partitioning it along national boundaries were given less attention. It is also significant that most of the cases during this period involved vertical restraints in which one party to the agreement was expressly given some measure of territorial protection.

that the single market test began to betray the presence of additional criteria within it, criteria that would enable the Commission to exercise its jurisdiction over agreements that were considerably less restrictive of trading freedom than the exclusive distributorship restraints held to be violative of the interstate trade clause under *Grundig-Consten*.[15]

In the *European Machine-Tool Expositions* case,[16] the Trade Association CECIMO promulgated rules which had the effect of impairing interstate trade in machine tools.[17] The potential trading partners included manufacturers located in virtually every Community State, on the one hand, and their potential customers, located throughout the Common Market, on the other. The exhibition ban imposed by the Association Rules upon its members made it more difficult for these producers to cultivate contacts and conclude transactions with potential buyers in geographically distant areas of the Community. This, in turn, made interstate trade in machine tools less feasible, thereby satisfying the conditions of the interstate trade clause.[18]

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15. In its decision not to challenge a suspect restraint involving the Kodak group, Commission Decision of June 30, 1970, 2 CCH COMM. MKT. REP. ¶ 9378, 9 Comm. Mkt. L.R. D19 (Comm'n of the EEC 1970), the Commission refused to proceed against parties involved in a vertical restraint which effectively limited the volume of goods that could be sold to potential buyers in other Member States. By including in all of their sales contracts a prohibition on exportation of goods to markets outside the Common Market, the Kodak companies were curtailing the freedom of buyers to decide for themselves the quantity of goods that they would purchase. The Commission failed to view this as prejudicial to the realization of a single market between States, even though the goods would be sold once within the Community on their way to foreign markets.

16. Commission Decision of March 13, 1969, [1965-1969 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9295, 8 Comm. Mkt. L.R. D1 (Comm'n of the EEC 1969) [hereinafter cited as *Machine-Tool*]. Virtually all the leading manufacturers of machine tools in Europe, including those from non-Community countries, belong to the Trade Association *Comité Européen de Coöperation des Industries de la Machine-Outil* (CECIMO). The Association's rules provide, *inter alia*, that members of CECIMO who chose to exhibit their products in the Association's biennial Trade Fair (EEMO) were prohibited from exhibiting at other fairs held during that year in other Common Market countries. Although held to be in violation of Article 85(1), the agreement qualified for an exemption under the provisions of Article 85(3) and was therefore allowed to stand. For an English translation of Article 85(3), together with an explanation of its significance for Common Market antitrust law, see 1 CCH COMM. MKT. REP. ¶¶ 2051, 2061.

17. Interstate trade was also held to be impaired in the trade exposition sector. By prohibiting machine tool manufacturers (*i.e.*, the Association's members) from dealing with fair organizers in Community States other than that in which the Association's biennial Trade Fair was held, the rules of the Trade Association CECIMO raised an absolute barrier to interstate trade and were therefore capable of being reached under the *Grundig-Consten* formulation of the single market test.

18. By limiting the freedom of manufacturers to participate in the other trade fairs the agreement did not directly prevent these producers from dealing with potential customers in other Member States. However, the added burdens placed on the manufacturer wishing to transact business with buyers located in other areas of the Common Market (as a result of his having chosen to participate in the EEMO) could be said to

The contribution of the *Machine-Tool* holding to the expansion of the *Grundig-Consten* single market test is more easily understood when formulated in general terms. After *Machine-Tool,* a suspect restraint is vulnerable to Commission jurisdiction if it serves to increase the logistical difficulties of a party wishing to transact business with potential trading partners located some distance away.

A comparison of the obstacles to economic interpenetration raised in *Machine-Tool* with those presented by agreements such as the one in *Grundig-Consten* leads to the conclusion that either the *Grundig-Consten* test has been given expanded meaning,[19] or that a new test has been developed to deal with the horizontal restraints. This latter possibility seems to have been erased, however, by the Commission's language in *Machine-Tool*:

> The obstacles to the providing of services with respect to the organization of fairs and expositions and to transactions relating to machine tools between the countries of the Common Market are therefore capable of jeopardizing directly free trade between Member States *in such a way as to be detrimental to the realization of the objectives of a single market between the States.*[20]

In the *International Quinine Cartel* case[21] the various agreements and concerted practices resulted in four distinct restraints, conveniently catalogued as market protection, market sharing (export quotas), limitation of production, and price fixing. The market protection agreement,

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restrict his freedom to engage in interstate trade. As a direct consequence of the Association's rules, it became necessary for sellers to undertake costly procedures for the purpose of promoting exposure and facilitating contacts in order to reach buyers that could have been reached with less difficulty had the sellers been permitted to exhibit at other fairs. The barrier to economic interpenetration was less than absolute, yet the Commission found that it sufficiently threatened the realization of a single market.

19. The test may be said to have been expanded in the sense that, after *Machine-Tool,* less of a restraint on freedom to participate in trade between the Member States was required before the Commission would be competent to exercise its jurisdiction over a particular cartel.

20. Commission Decision of March 13, 1969, [1965-1969 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9295, at 8629, 8 Comm. Mkt. L.R. D1, D9 (Comm'n of the EEC 1969) (emphasis added).

21. Commission Decision of July 16, 1969, [1965-1969 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9313, 8 Comm. Mkt. L.R. D41 (Comm'n of the EEC 1969) [hereinafter cited as *International Quinine*]. The six enterprises involved held a dominant position on the European Common Market as well as on the world market. The restrictive agreement covered the manufacture and distribution of two quinine products, providing for a uniform price increase of fifty percent in 1964, protection of the three home markets against exports from other members of the cartel, institution of export quotas with respect to the three unprotected markets within the Community, and limitation of the French members to the production of only one of the quinine products. The Commission found that the firms agreed to continue their restrictive practices despite expert legal advice warning that their actions were illegal under Article 85(1). The case marked the first time that the Commission had elected to impose fines (ranging from $10,000 to $210,000) because of the serious nature of the violations.

in which each of the six producers agreed not to export into the national territories of the other producers, placed a direct restraint on the freedom of the manufacturers to deal with potential trading partners in other Member States, thereby violating the interstate trade clause.[22] Similarly, the export quotas[23] and limitation of production provisions[24] were capable of raising an impenetrable barrier to trade between potential trading partners in different States. Thus, with respect to three of the restraints, the Commission was able to find a jurisdictional basis under the interstate trade clause without simultaneously expanding the single market test. The price-fixing agreement, however, posed a more difficult problem.

The simultaneous increase of prices by the same amount for similar products manufactured by the six members of the cartel may have had an effect on the trading position of potential customers in the unprotected countries, but it is clear that this aspect of the restrictive agreement, considered apart from the other restraints, did not erect an insurmountable barrier to trade between any potential trading partners. It may be said that the pricing agreement removed from potential purchasers the opportunity to shop around for the best possible price and, in that sense, amounted to a restraint on freedom to engage in interstate trade. Even so, it is difficult to see how an impairment of this nature could satisfy the criteria of the single market test.[25]

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22. This is a simple application of the *Grundig-Consten* test to a restraint which raises an insurmountable barrier to economic interpenetration in the quinine products sector.

23. Pursuant to the agreement, a party who found his market position slipping in the unprotected countries could prevent the other producers from exporting freely into such markets until an equalization of quantities was reached. Although none of the parties had exercised his right to equalization of quantities, the system was considered to be likely to impair trade between the Member States.

24. The prohibition preventing the French enterprises from producing any quinidine amounted to a direct and complete bar to their freedom to deal in quinidine with buyers in other States.

25. Irrespective of whether the manufacturers decided to raise prices simultaneously, purchasers in Belgium, Luxembourg, and Italy would of necessity have to buy quinine products from manufacturers in other Member States. The only curtailment of trading freedom which stemmed from the pricing agreement involved the buyers' freedom to select which seller to deal with, but inasmuch as there were no sellers of quinine in the unprotected Member States the restraint did not raise any significant barrier to economic interpenetration. The only negative effect the agreement could possibly have had with respect to interstate trade would have been a reduction in demand for quinine products, which would have resulted in a decrease in volume of trade in that sector. Yet, in *Grundig-Consten*, this test was specifically rejected as a criterion under the interstate trade clause:

> Thus the fact that an agreement helps to bring about a considerable increase in the volume of trade between Member States is not sufficient to preclude the

In ruling that the pricing agreement was capable of affecting trade between the Member States, the Commission could have been giving effect to any one of three principles. First, there is language in the opinion which suggested that the price-fixing aspect of the cartel was not considered apart from the other restrictive practices.[26] On this basis the holding of the case could be interpreted to mean that it is the combination of price-fixing and market protection agreements that is violative of the interstate trade clause.[27]

A second way of looking at the Commission's holding is to recognize a judicial expansion of the single market test. By curtailing the freedom of buyers to choose between the different brands of quinine products—by effectively neutralizing price considerations—the pricing agreement prejudiced the realization of a single market between the Member States. However, this could be true only if the concept of a single market encompassed notions of a market in which there was active competition between sellers. To introduce into the single market notion criteria which measure the freedom of purchasers to engage in interstate trade according to the breadth of choice offered by sellers with whom they may otherwise freely transact business, would be to give the single market test an expanded meaning and new significance.[28]

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possibility that such agreement can "affect" trade within the meaning [of the single market test].

Consten and Grundig v. E.E.C. Commission, [1961-1966 Transfer Binder: Court Decisions] CCH COMM. MKT. REP. ¶ 8046, at 7652, 5 Comm. Mkt. L.R. 418, 472 (Eur. Ct. of Justice 1966).

26. These agreements on prices and on the protection of national markets, which complemented each other, erected barriers to trade and prevented buyers from obtaining the benefits they would have enjoyed in a competitive situation that was free from agreements.

Commission Decision of July 16, 1969, [1965-1969 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9313, at 8682, 8 Comm. Mkt. L.R. D41, D68 (Comm'n of the EEC 1969).

27. The principal objection to this construction of the Commission's ruling is that the market protection restraint was itself capable of impairing interstate trade; consideration of the pricing agreement in connection with the protection scheme is merely repetitive and amounts to a denial that pricing agreements are capable of producing negative effects of their own. It is therefore better to conclude that nothing authoritative was said about the effect of the pricing agreement.

28. In the *Henkel-Colgate* case—Commission Decision of December 23, 1971, 2 CCH COMM. MKT. REP. ¶ 9491, — Comm. Mkt. L.R. — (Comm'n of the EEC 1971)—the Commission had before it a joint research and development agreement between an American firm, Colgate-Palmolive, and a German firm, Henkel, the third and fourth largest firms in the world engaging in the manufacture and distribution of laundry soaps and detergents. Henkel products are manufactured and distributed by companies in four different countries; Colgate laundry soaps and detergents are manufactured and distributed by Colgate subsidiaries in three countries. Pursuant to the agreement, a joint research and development company was to be established in Switzerland. The Commission found an impairment of interstate trade where the sole curtailment of freedom

Third, it is reasonable to conclude from an examination of the decision that the Commission has developed a new standard for measuring the potential effects of pricing agreements on interstate trade. This result follows from the Commission's statement that the agreements

> . . . concern all the Member States of the Community and they must be considered as capable of threatening the freedom of international trade in quinine and quinidine in a manner detrimental to the *proper functioning* of the Common Market.[29]

D. The Dyestuffs Case

In *Imperial Chemical Industries, Ltd. v. E.E.C. Commission*,[30] the Court of Justice affirmed the Commission's ruling that the concerted practices in which I.C.I. had participated had resulted in adverse effects on trade between the Member States. Unlike the pricing agreement in *International Quinine*, the *Dyestuffs* restraint was unaccompanied by other clearly illegal restrictive practices and, accordingly, the *Dyestuffs*

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amounted to the imposition on potential buyers in other Member States of the necessity of choosing between Procter & Gamble and Unilever soaps on the one hand, and soaps produced by Henkel and Colgate-Palmolive on the other. Presumably the choice involves an impairment of freedom because the goods sold by the latter companies were placed on the market following tainted commercial efforts at the production stage (by reason of the firms' agreement to pool resources for purposes of research and development). *See* note 56 and accompanying text, *infra*. It is difficult to discern in *Henkel-Colgate* how freedom to engage in interstate trade has been affected, and assuming that that problem is capable of being overcome, how the realization of a single market has been prejudiced. In light of not only the Commission's neglect to dwell upon the interstate trade issue, but also its apparent haste to grant an exemption under Article 85(3), *Henkel-Colgate* cannot be relied upon with confidence as standing for any proposition concerning the interstate trade clause.

29. Commission Decision of July 16, 1969, [1965-1969 Transfer Binder: New Developments] CCH Comm. Mkt. Rep. ¶ 9313, at 8682, 8 Comm. Mkt. L.R. D41, D67 (Comm'n of the EEC 1969) (emphasis added). That this "proper functioning" test represents a new approach to dealing with restraints under the interstate trade clause is buttressed by the language quoted at note 26, *supra*, to the effect that by denying buyers the benefits they would have had in a market free from restrictive agreements the restraint had the effect of impairing interstate trade.

30. Imperial Chemical Industries, Ltd. v. E.E.C. Commission, 2 CCH Comm. Mkt. Rep. ¶ 8161, — Comm. Mkt. L.R. — (Eur. Ct. of Justice July 14, 1972), *aff'g* Commission Decision of July 24, 1969, [1965-1969 Transfer Binder: New Developments] CCH Comm. Mkt. Rep. ¶ 9314, 8 Comm. Mkt. L.R. D23 (Comm'n of the EEC 1969) [hereinafter cited as *Dyestuffs*]. The case marked the first time that a prohibition was extended beyond Community boundaries to companies with headquarters in non-Member nations. The Commission found that ten manufacturers of dyestuffs from the United Kingdom, Switzerland, Germany, France, and Italy, together with their subsidiaries in various Member States, had adopted concerted pricing practices for goods which they sold within the Common Market. Having ruled that the concerted price increases amounted to a distortion of competition within the meaning of Article 85(1), the Commission then found that the restraint had impaired interstate trade, that it produced the requisite domestic effects, and that it was therefore capable of being struck down. The Court of Justice affirmed the Commission decision, which had been appealed by the British firm I.C.I., and the enterprises were fined the equivalent of $50,000 each.

facts provide a context more conducive to examination of the special issues raised in connection with the application of the interstate trade clause to price-fixing.[31] It is clear that the concerted price increases had no effect on the freedom of the potential trading partners to transact business with each other; pricing practices do not normally erect an absolute barrier to economic interpenetration. However, by neutralizing the price factor, the concerted practice effectively robbed buyers of a principal ground for distinguishing between available brands. In this way the restraint imposed limitations on the buyers' freedom to select suitable trading partners. Do these limitations amount to the restraint of freedom to participate in interstate trade? Is the realization of a single, Community-wide market threatened? It could reasonably be found that since a primary factor in what motivates buyers to look to foreign (other Member State) rather than domestic sellers had been nullified, the restrictive practice impaired buyers' freedom to engage in interstate trade.[32] In seeking to evaluate this impairment for purposes of the single market test, it will be helpful to recall the precedents which might apply.

Insofar as the barrier to economic interpenetration raised by the concerted price increases was appreciably less than absolute, the *Grundig-Consten* case is of little value as a precedent. Similarly, the concerted practice could not be struck down under the market protection, market sharing, or production limitation restraints of the *International Quinine* case, since these also involved obstacles which precluded certain groups of potential trading partners from dealing with each other. Nor would the pricing practices be violative of the single market test under the ruling in *Machine-Tool.* The *Dyestuffs* restraints did not operate to increase the logistical difficulties of the buyer wishing to transact business with sellers located some distance away.[33] However, depending

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31. The market sector under investigation in the *Dyestuffs* case involved trade in various coloring products. Insofar as the concerted price increases amounted to a horizontal restraint the Commission was obliged to consider trade in all brands of dyestuffs. The potential trading partners included British, Swiss, German, French, and Italian manufacturers and their subsidiaries on the one hand, and buyers throughout the Common Market on the other. The single market test in this context requires focusing on the freedom of the *buyers* to engage in interstate trade.

32. The difficulty of applying the "freedom of interstate trade" standard to facts such as those in *Dyestuffs* is a clear indication that the *Grundig-Consten* test may not be well-suited to measuring all types of restraints. In the *Dyestuffs* case, the Commission faced for the first time in a major case a restrictive practice not designed to partition the Common Market along State boundary lines.

33. In the dyestuffs industry, there are great logistical problems associated with the

upon the interpretation given to the Commission's position regarding the pricing agreement, it is possible to find in *International Quinine* a ruling of precedential value. If it is concluded that the Commission could not meaningfully have considered the pricing aspect of the case apart from the other restraints, then the concerted practices in *Dyestuffs* present a case of first impression. If, however, *International Quinine* is seen as embodying an expanded single market test, or if it is regarded as having set forth a new standard for the evaluation of restraints under the interstate trade clause, then the *Dyestuffs* practices may be reached in accordance with the earlier holding.[34]

The *Dyestuffs* tribunals, faced with the choice of applying an expanded single market test, formulating a new test, or even giving support to the new test which is arguably presented in *International Quinine*, responded by not giving explicit recognition to any test. In the Commission decision it was held that interstate trade was likely to be affected not only because the practices applied to all goods sold within the dyestuffs sector (those being imported from other Member States as well as goods produced domestically), but also by reason of the uniform and simultaneous nature of the price increases. The Commission emphasized that the intended purpose of the concerted practices was to prevent users from switching suppliers. The Commission equated this intent with an intent to prevent users from importing dyestuffs from other Member States.[35] Note that the Commission did not seem to be concerned as much with obstacles to economic interpenetration between the Member States as it was disturbed by the tendency of the concerted practices to regulate the channels that trade in the dyestuffs sector would follow. This was supported by the observation that many of the producers were active in each of the national markets.

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decision of a buyer to purchase from a foreign manufacturer; the pricing agreement however, did nothing to increase these difficulties. This is in contrast to *Machine-Tool*, where the agreement required sellers to undertake costly procedures for promoting exposure and facilitating contacts in order to reach buyers that could have been reached with less difficulty had the sellers been permitted to exhibit at other fairs.

34. The *Dyestuffs* price increases, like those in *International Quinine*, deprived buyers of the opportunity to shop among competitive brands for the best price. Whether this violates criteria locked within the concept of a single market or the same criteria under a new test, the fact of a violation under principles enunciated in *International Quinine* remains.

35. The Commission's position on this issue is set forth in Commission Decision of July 24, 1969, [1965-1969 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9314, at 8692, 8 Comm. Mkt. L.R. D23, D30 (Comm'n of the EEC 1969). The Commission also rejected the argument raised by the manufacturers that, because of the special nature of the dyestuffs industry, intra-Community trade in that sector was impossible.

In affirming the Commission's ruling, the Court of Justice likewise considered the incriminating feature of the pricing practices to be their mollifying effect on the buyers' propensity to consider switching to another supplier. The Court's language indicated that new criteria were being applied.[36] The price increases "could have an adverse effect on the conditions under which the trade in dyestuffs between Member States takes place."[37] The practices served to "strengthen market positions"[38] already acquired. Finally, and perhaps most significantly, the practices "helped to 'cement' further the division of national markets, to the detriment of *truly free trade* in dyestuffs within the Common Market."[39]

Whether or not these criteria are held to be features of the single market test or part of some other test is not of crucial import; in either case they are criteria to be considered in applying the interstate trade clause. What is significant about these formulations is that they bring into the concept of "unimpaired trade between the Member States" criteria which had previously been absent. Although the Court maintains contact with the older test,[40] it shifts its focal point slightly from the "interstate" aspect of trade to criteria in the concept of "truly free trade within the Common Market." The change in emphasis allows the Commission, with the Court's implicit approval, to exercise jurisdiction over restrictive agreements and practices which impose no limitations on

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36. [I.C.I.] maintains that the uniform price increases could not impair trade between Member States, since despite the substantial differences between the prices applied in the various States, consumers have always preferred to purchase their dyestuffs on the domestic market. . . . [H]owever, . . . the concerted practices, which were designed to maintain the partitioning of the market, *could have an adverse effect on the conditions under which the trade in dyestuffs between Member States takes place.* The enterprises applying these practices intended, at the time of each price increase, to reduce to a minimum the risk of a change in the conditions of competition. The uniform and simultaneous nature of the price increases served mainly to prevent customers of the various enterprises from switching suppliers and *to strengthen market positions* thus acquired. In this way it also helped *to "cement" further the division of traditional national markets, to the detriment of truly free trade* in dyestuffs within the Common Market.

Imperial Chemical Industries, Ltd. v. E.E.C. Commission, 2 CCH COMM. MKT. REP. ¶ 8161, at 8030, — Comm. Mkt. L.R. — (Eur. Ct. of Justice July 14, 1972) (emphasis added).

37. *Id.*

38. *Id.*

39. *Id.* (emphasis added).

40. Note how the Court tries to find a partitioning along *national* boundaries. The facts of the case, however, defy such an exclusive characterization. A more realistic analysis reveals a partitioning of the market along *traditional* channels of commercial intercourse.

the freedom to participate in *interstate trade.* The Commission is still bound to find an impairment of *freedom of trade,* but without the further qualification that *interstate trade* be impaired.

The ultimate significance of this development, in terms of its effect on the expansion of Community law jurisdiction, is that for Community law to apply, it need only be found that channels of trade within the Common Market have been subjected to private regulation. This requirement is less stringent than the requirement that the restraint raise significant barriers to economic interpenetration between the Member States. For the non-Community enterprise this signals the beginning of a new phase in Community cartel law, a period in which activity of a "foreign trade" nature will no longer be shielded from the provisions of Article 85(1), irrespective of whether or not it operates to inhibit interstate trade.

II

REQUIREMENT (2): COMPETITION WITHIN THE COMMON MARKET

A. The Basic Issue

At this juncture it would be prudent to recall that it is not the purpose of this investigation to discuss the substantive antitrust law which has evolved as a consequence of judicial interpretation of Requirement (1), the clause requiring a "distortion of competition within the Common Market."[41] Rather, the focal point of the inquiry will be to explore the meaning given by Community tribunals to the territorial component of the clause, namely the requirement that a restraint have effects on "competition *within the Common Market.*"[42] There are two problems to be dealt with in interpreting the "domestic effects" clause. First, the concept of "competition" must be examined and its essential features identified; and secondly, criteria must be found which indicate when competition may be said to be within the Common Market.[43] Be-

41. The precise language of Article 85(1), *supra* note 1, makes illegal restrictive agreements and practices "which are designed to prevent, restrict or distort competition within the Common Market or which have this effect."

42. In the discussion of the three requirements which constitute Article 85(1), *supra* note 1 and accompanying text, the requirement that competition *within the Common Market* be restrained was Requirement (2). It is referred to throughout this section as the "domestic effects" clause.

43. That the "domestic effects" clause sets forth abstract legal criteria and not a straightforward factual standard is apparent from its inability to provide, by itself, a clear answer to such questions as whether the condition is satisfied where competition is restrained between a Common Market firm and a non-Community firm.

cause these issues have received only scant attention in the case law to date, and because of the complexity of the interpretive problems involved, it will be helpful to consider the following analytical framework.

Competition is distorted when a commercial effort is shielded to some degree from market forces which, had they been allowed to influence the effort, would have encouraged maximization of quality and efficiency and minimization of price.[44] Any marketed good comes to the market as the fruit of a bundle of separate commercial efforts, which correspond roughly to the various stages in the history of the product. Competition may be distorted with respect to any of these efforts. The different commercial efforts represented by a final product may be undertaken by the same firm, or by different firms; they may all be carried on at one location, or they may occur at several different locations. When competition is distorted with respect to any of the commercial efforts required for production and distribution of a given product, the quality and price of that product are likely to be affected. Hence, competition in a particular market sector refers to the competitive nature of the various commercial efforts aimed at preparing the products in that sector for sale. When the Commission suspects that competition in the sector is distorted, it must find that one or more of the commercial efforts of one or more competitors[45] has been protected from market pressures that

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44. This is not meant to be an authoritative definition of the concept of competition; nor is it to be understood as representing the definition used by Community tribunals. Its sole purpose is to provide a starting point from which to examine the problem of identifying to what activity the Commission refers when it rules that competition has been distorted. This problem is the initial hurdle that must be overcome in order to reduce "competition" to its geographical situs.

45. When a vertical restraint is under consideration, such as that found in the *Grundig-Consten* case, [1961-1966 Transfer Binder: Court Decisions] CCH COMM. MKT. REP. ¶ 8046, 5 Comm. Mkt. L.R. 418 (Eur. Ct. of Justice 1966), competition may be restrained at several levels. If the market sector is narrowly defined to be Grundig radios, then competition may be found to be distorted at the distributorship level; it is the commercial effort of the distributor Consten that has been artificially relaxed. Note that "distortion of competition" in this context manifests itself in *one* of the competitors having an unfair advantage. This means that the Commission may find that competition is distorted by examining the commercial efforts undertaken by just one competitor. Similarly, by asuming an expanded definition of the pertinent market sector, *e.g.*, radios of all brands, the Commission could find a distortion of competition by looking solely to the commercial efforts undertaken by the manufacturer Grundig. Yet it would not be necessary to find distortion at the production level to assess Grundig, because as one of the parties to the restrictive agreement it is responsible for the effects of the agreement on the commercial efforts undertaken by Consten, and may be reached on that basis. In its decision in Béguelin Import Co. v. G.L. Import-Export Co., 2 CCH COMM. MKT. REP. ¶ 8149, 11 Comm. Mkt. L.R. 81 (Eur. Ct. of Justice 1971), the Court of Justice held that a Japanese manufacturer participating in an exclusive distributor-

would otherwise influence that effort. Thus, when it turns to the application of the "domestic effects" clause, the Commission has already made a judgment about the competitive nature of the suspect commercial effort. Having appropriately separated it from the bundle of other commercial efforts represented by the final product and having identified the firm responsible therefor, the Commission must next ascertain whether or not the tainted commercial effort was undertaken within the territorial confines of the Common Market. With these findings in mind the Commission may then decide whether the restraint has affected "competition within the Common Market" within the meaning of Article 85(1).

B. The Minimal Domestic Sale Requirement

At the very least, the "domestic effects" clause requires that goods which are the subject of a restrictive agreement be destined for sale on a market within the territorial borders of the EEC. This follows from the Commission's decision in the *DECA* case,[46] where it was held that restraints which are designed to provide Common Market firms with a competitive advantage in markets lying outside Community boundaries are excluded from the reach of Article 85(1).[47] In light of the above

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ship agreement with a Belgian import company would be subject to the application of Article 85(1) prohibitions if the agreement had its effects within the territory of the Common Market.

46. *Re* the Rules of the D(utch) E(ngineers) and C(ontractors) A(ssociation), Commission Decision of October 22, 1964, 1 CCH Comm. Mkt. Rep. ¶ 2412.31, 4 Comm. Mkt. L.R. 50 (Comm'n of the EEC 1964). The purpose of the DECA group's rules was to facilitate for its members the procurement of construction contracts outside of the Common Market. It was found that the rules required the collaboration of the participants only in markets outside the territory governed by the Treaty of Rome and that they in no way produced effects within the Common Market. The decision reflects the hesitance of the Commission in its early days to stretch its jurisdiction in antitrust matters to the fullest permissible extent. Taken literally the words "competition within the Common Market" would seemingly apply to the commercial efforts of firms domiciled within the Community, irrespective of the destination of the goods or services involved. The fact that restraints such as the one in *DECA* would not be likely to affect interstate trade may have influenced the Commission in its decision. Another factor would be the natural inclination to apply competition rules lightly where exports are involved.

47. In a series of vertical agreement cases, the Commission was concerned with whether an agreement conferring exclusive rights by a firm domiciled within a Member State upon a non-Community firm would be likely to affect competition within the Common Market. In the early *Grosfillex* case, Commission Decision of March 11, 1964, 1 CCH Comm. Mkt. Rep. ¶ 2412.37, 3 Comm. Mkt. L.R. 237 (Comm'n of the EEC 1964), the Commission held that an exclusive distributorship given by a French firm to a Swiss firm would probably not violate the domestic effects clause because the tainted commercial effort on the part of the Swiss firm would not be likely to affect a product to be sold within the Common Market. This reasoning was amplified in the

analysis of the meaning of "competition," the *DECA* domestic sale criterion would be expressed as follows: The Commission has found that, at some point in the history of the product being considered, one of the commercial undertakings from which the product is descended was tainted by a lack of unrestrained competition. The product itself is therefore tainted. When the product is placed for sale on one of the markets in the EEC, where it will compete with other untainted products, competition within the Common Market is affected. To apply Article 85(1), the Commission, under the domestic sale test, need only find a tainted commercial effort somewhere in the history of a product which is sold within the Common Market.[48] However, it is by no means clear from examination of the case law under Article 85(1) that the *DECA* test is the *sole* criterion to be applied under the "domestic effects" clause.

C. Tainted Commercial Efforts Within the Common Market

If one were to look at the factual bases underlying the vast majority of cases in which it was found that "competition within the Common

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recent *Raymond-Nagoya* case, Commission Decision of June 9, 1972, 2 CCH Comm. Mkt. Rep. ¶ 9513, 11 Comm. Mkt. L.R. D45 (Comm'n of the EEC 1972), where the Commission implied that competition within the Common Market would be affected only if Nagoya, the exclusive Japanese licensee of the French licensor, Raymond, were to export its products into the Common Market. Another way in which a vertical agreement involving goods destined for sale outside the Common Market could be found to produce the requisite domestic effects was explored in the *Rieckermann* case, Commission Decision of November 6, 1968, [1965-1969 Transfer Binder: New Developments] CCH Comm. Mkt. Rep. ¶ 9267, 7 Comm. Mkt. L.R. D78 (Comm'n of the EEC 1968). In *Rieckermann*, the German manufacturer AEG-Elotherm granted an exclusive distributorship to the German exporter, Rieckermann, for the AEG products destined for sale on the Japanese market. The decision points out that, since Rieckermann was prohibited from buying equipment destined for export to Japan from AEG-Elotherm's competitors, competition within the Common Market (in the form of the commercial efforts undertaken by AEG-Elotherm) could possibly be distorted. No such effects were found however. The crucial distinction between *Rieckermann* on the one hand, and *Grosfillex* and *Raymond-Nagoya* on the other, is that in *Rieckermann*, the goods were to be sold once within the Common Market on their way to an ultimate sale in Japan.

48. It can be seen from this formulation that it is important to determine whether the domestic sale test is the sole criterion contained within the "domestic effects" clause, or whether it merely states a minimal condition that must be satisfied before the further requirements of the clause may be considered. Assuming that it is the sole criterion, the *DECA* test would enable the Commission to reach non-Community firms whose tainted commercial efforts were carried on completely outside the Common Market, simply by finding that the effort contributed to the production or distribution of a product that was destined to be sold within the Common Market. There are other issues, however, that would arise in connection with the *DECA* test. For example, would it be necessary that the firm undertaking a tainted commercial effort *know* that the article was destined for sale in the Common Market? It would also have to be found, of course, that the agreement or practice which shielded the tainted commercial effort from natural market forces was likely to affect interstate trade.

Market" had been affected, it would appear that, beyond the minimal domestic sale criterion, a showing that the tainted commercial efforts had in fact taken place within the Common Market was required. Indeed, for most of the cases the requirement could have been so strong as to necessitate the undertaking of imperfect commercial efforts within the Common Market by Common Market firms.[49] Yet the decision in the *Machine-Tool* case[50] suggests that tainted commercial activity of non-Community firms would also be prohibited.[51] The Commission's response to a written question expressing concern about restrictive agreements which involved American and Japanese companies and which were the subject of a United States Department of Justice prosecution indicated that the Commission could intervene only when "the agreements have an effect on the conduct of these enterprises in the Common Market."[52] The obvious question posed by these developments is to what extent must the firm's conduct take place within the Common Market? At this stage in the development of Community cartel law, the question has hardly been approached. Accordingly, it will be helpful to consider, in terms of the preceding commercial efforts analysis, some of the problems which are likely to force the Community tribunals to develop new criteria.

Assuming that the "domestic effects" clause requires that a firm's conduct within the Common Market be affected by a distortion of competition,[53] may the requirement be met if the commercial effort

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49. The *Grundig-Consten* case, [1961-1966 Transfer Binder: Court Decisions] CCH COMM. MKT. REP. ¶ 8046, 5 Comm. Mkt. L.R. 418 (Eur. Ct. of Justice 1966), would be a good example of a vertical restraint meeting this standard.

50. Commission Decision of March 13, 1969, [1965-1969 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9295, 8 Comm. Mkt. L.R. D1 (Comm'n of the EEC 1969).

51. Hypothetically, if the Commission were to focus on the competitive relationship between a large Swiss manufacturer, whose acumen and resources allowed it to carry on substantial sales activity outside the exposition circuit, and a small French producer, struggling to break into the market and needing to capitalize on every opportunity for exposure, it could find that the restrictive agreement had the effect of distorting competition between the two firms. If the added market pressure created by the French firm and others like it being permitted to exhibit their machine tools at local expositions, is prevented from influencing the Swiss manufacturer's commercial efforts, then those efforts are not likely to be carried on in a fully competitive spirit. It is not made clear in the decision which of these tainted efforts would need to be carried on inside the EEC before the agreement could be found to have effects on "competition within the Common Market."

52. Commission Response to Written Question No. 226/70, 2 CCH COMM. MKT. REP. ¶ 9402, at 8880 (1970). The United States prosecution referred to is United States v. Westinghouse, Case No. 2095, TRADE REG. REP. ¶ 45,070 (1970).

53. It always remains a possibility that the Commission will adopt a liberal approach with respect to its competence and require only that the "affected" product be sold within the Common Market.

which is found to be tainted was carried on outside the Community?[54] Another problem involves the number of competitors whose conduct within the Common Market must be affected. Where the restraint is in the form of a vertical agreement, competition is distorted by one firm's being granted an advantage over its competitors. The Commission need only consider the commercial efforts of one firm in order to determine whether or not the restraint affects competition in the Common Market.[55] The situation is different, however, if a horizontal restraint is under investigation. Because this form of restrictive agreement is typically made by competing enterprises, the Commission could conceivably require that the restraint affect the commercial efforts of both parties to the agreement, and that the tainted efforts of each party be undertaken within the Common Market.

In the *Henkel-Colgate* case[56] both of the competitors carried on substantial amounts of activity within the Common Market. Assuming that the Commission would find Henkel guilty of imperfect commercial effort at the production level as a result of the joint research and development agreement, would it be precluded from applying Article 85(1) if Colgate-Palmolive were less active in the contract territory?[57] These and other

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54. In the factual context posed by the *Machine-Tool* case, it is possible that the restrictive agreement would affect the Swiss manufacturer's commercial efforts only at the production stage. If these efforts were undertaken in Switzerland, would commercial efforts carried on in the Common Market at the distribution level, even if untainted, be enough to satisfy the requirements of the "domestic effects" clause? Or must the imperfect commercial effort itself be undertaken within the Common Market before the agreement may be said to have the requisite "domestic effects"?

55. *See* note 45 *supra.*

56. Commission Decision of December 23, 1971, 2 CCH COMM. MKT. REP. ¶ 9491, — Comm. Mkt. L.R. — (Comm'n of the EEC 1971). The Commission found that the agreement had the effect of eliminating competition between the parties in the field of research. *See* note 28 *supra.* It also found that by agreeing to the joint utilization of the research, the contracting parties gave up "the possibility of competing with one another on the market by making effective use of the improvements in production resulting from individual research to gain an advantage over the other party." 2 CCH COMM. MKT. REP. ¶ 9491, at 9056-57, — Comm. Mkt. L.R. — at — (1971). Thus, it is the commercial efforts undertaken by Henkel at the production level and the corresponding efforts undertaken by Colgate-Palmolive that the Commission finds to be marked by imperfect competition. On the facts of the case, each of these efforts was carried on within the Common Market. As a result, the Commission found that the conditions of the "domestic effects" clause had been satisfied. Although it also found that the agreement was capable of impairing trade between the Member States, the parties were allowed to pursue the restraint, since it qualified for exemption under Article 85(3).

57. If, for example, Colgate had agreed not to sell its products within the Common Market, on the understanding that Henkel would refrain from selling its products in one of Colgate's favorite markets, would competition within the Common Market be affected? Or if Colgate carried on its production in the United States and did not have subsidiaries in the Common Market for distribution purposes, would the relaxing of competition be an effect on competition "within the Common Market"? In Commission

problems depend for their answers upon further refinement of competition policy by the various Community organs. Until that time the best that can be done is to frame the issues in a manner conducive to identifying and understanding the problems faced by the decision-makers.

D. The Dyestuffs Case

In the *Dyestuffs* case[58] the Court of Justice upheld the Commission finding that certain concerted practices with respect to pricing had the effect of restricting competition between ten producers of coloring materials. Yet before the practices could be held to violate the prohibitions of Article 85(1), it had to be found that they affected competition within the Common Market. In arriving at the conclusion that competition in the dyestuffs industry was distorted, the Commission had to isolate and identify the various commercial efforts that had been, or were intended to be, tainted.

As a result of the concerted price increases, manufacturers were freed from the necessity of having to keep prices at a competitive level in order to maintain their market positions.[59] The effects of this artificial freedom would presumably be reflected in a relaxation of commercial effort at the various stages of production and distribution which were under the manufacturer's control.[60] In the case of the six Community-established producers, the imperfect commercial efforts were carried on entirely within the EEC. But with respect to the three Swiss producers and I.C.I. (United Kingdom), some of the tainted efforts must have been carried on outside of Community boundaries. The decisions do not specify which of I.C.I.'s commercial efforts were within and which were without

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Decision of July 30, 1964, 1 CCH Comm. Mkt. Rep. ¶ 2412.46, 3 Comm. Mkt. L.R. 505 (Comm'n of the EEC 1964) the Commission held that an agreement between a British firm and a French firm pursuant to which each agreed not to engage in intrabrand competition in the other's territory affected competition within the Common Market. However, a negative clearance was granted on the ground that the effects were imperceptible. It is not clear that the same result would have been reached, *i.e.*, that Community competition would be affected, if the agreement had involved interbrand competition.

58. Imperial Chemical Industries, Ltd. v. E.E.C. Commission, 2 CCH Comm. Mkt. Rep. ¶ 8161, — Comm. Mkt. L.R. — (Eur. Ct. of Justice July 14, 1972).

59. If a manufacturer wished to increase his share of the market he would have to become more competitive with respect to quality and customer service. The Commission held that even though competition was not restricted at these levels, freedom of competition in regard to pricing was distorted and that was sufficient to satisfy the standards of Article 85(1).

60. Because of the peculiar nature of the dyestuffs sector, the manufacturers tended to control most, if not all, of the stages of production and distribution.

the EEC, but it must be presumed, because of the presence of I.C.I. subsidiaries in several of the Member States, that its activities within the Common Market were substantial.[61] On these facts the Commission held, and the Court of Justice affirmed, that the restrictive practices affected competition within the Common Market. How is that holding to be defined?

It is obvious that the minimal domestic sale criterion is satisfied by the *Dyestuffs* case facts. Prices were increased for coloring materials that were sold within the Common Market to Community buyers. But it cannot be assumed that this finding alone would meet the requirements of the "domestic effects" clause.[62] Because the Commission did not identify the factors contributing to a nexus between the distorted competition and the territory of the EEC that were the most important in enabling it to hold that competition had been affected within the Common Market, we are reduced once more to speculation.[63] Was it enough that the Commission could find tainted commercial efforts carried on within the Community by German, French, and Italian producers? If so, the "domestic effects" clause could be satisfied in the case of horizontal as well as vertical restraints without examining the commercial efforts of all the competitors involved. If not, the problem would be one of determining how much of I.C.I.'s imperfect commercial effort was carried on within the confines of the EEC before I.C.I. could be fined. If, for example, I.C.I. did not have subsidiaries in the various Member States, would the fact that its tainted efforts contributed to the manufacture of products sold in the EEC be sufficient to bring the firm within the Commission's grasp, assuming that the tainted efforts of I.C.I.'s competitors were undertaken within the Common Market? Greater certainty in answering these questions will have to await future decisions.

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61. The same must be true of the Swiss firms, although the opinions were not precise on this issue. The subsidiaries may have been involved in production; it is almost certain that they were responsible for distribution and customer service.

62. Neither the Commission nor the Court explicitly so held, and the facts make it clear that domestic sales were not the only connection that existed between the tainted commercial efforts and the Common Market.

63. The critical issue in the *Dyestuffs* case, as far as the extraterritorial competence of the Commission to fine I.C.I. was concerned, involved the extent to which the prohibited price-fixing conduct took place within the Common Market. The Court held that I.C.I. was guilty because it carried on its share of the concerted practices within the EEC and because these practices affected competition there. The Court did not consider whether or not this basis for holding I.C.I. would be sufficient if I.C.I.'s tainted commercial efforts were carried on completely outside of Community boundaries.

III

CONCLUSION

It was early established that the interstate trade clause was basically jurisdictional, its chief function being to separate the respective realms of application of Community and Member State antitrust law.[64] As the Commission expanded its jurisdiction under the interstate trade clause, the single-market standard formulated in *Grundig-Consten* began to betray the presence of criteria which have traditionally belonged to substantive antitrust law. The Commission gradually shifted the focal point of its inquiry from the freedom of firms to participate in interstate trade to their freedom to trade in an atmosphere of unrestrained competition. The *Dyestuffs* holding sealed this transition with the formulation of the truly free trade standard.[65]

Irrespective of any "substantive" criteria it may be said to contain, the interstate trade clause serves primarily to define the sphere of Common Market cartel law within the exclusive jurisdiction of Community, as opposed to Member State, tribunals. Article 85(1) becomes operative when a distortion of competition within the Common Market touches upon interstate trade. Under the *Dyestuffs* case, this "touching" requirement is satisfied if the restraint tends to regulate trade along established channels of commercial intercourse, thereby cementing further the division of national markets. The facts of the *Dyestuffs* case, however,

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64. "The purpose of the concept of 'agreements liable to affect trade between Member States' is to separate the respective fields of application of Community Law and of national law in the matter of cartel law." Consten and Grundig v. E.E.C. Commission, [1961-1966 Transfer Binder: Court Decisions] CCH COMM. MKT. REP. ¶ 8046, at 7652, 5 Comm. Mkt. L.R. 418, 472 (Eur. Ct. of Justice 1966).

65. Imperial Chemical Industries, Ltd. v. E.E.C. Commission, 2 CCH COMM. MKT. REP. ¶ 8161, at 8030, — Comm. Mkt. L.R. — (Eur. Ct. of Justice July 14, 1972). To apply the principles outlined in the *Dyestuffs* case the Commission must examine the effects produced by a particular restraint on competition *as mirrored in the breadth of selection faced by potential buyers.* The theory is that if competition is unrestrained there will be greater interbrand diversity with respect to price, quality, and service, and purchasers will be more likely to switch brands. Inquiry into the choice faced by Common Market buyers parallels very closely the sort of examination undertaken in connection with the *substantive* component of Article 85(1), Requirement (1) (the distortion of competition clause). The parallel is so close that it may become difficult to differentiate the substantive from the jurisdictional criteria.

Under the distortion of competition clause, the Commission is seeking to determine whether Common Market buyers have the best possible selection, *i.e.*, that which would result from unrestrained competition between competing producers and distributors. Under the interstate trade clause, using the *Dyestuffs* case's "truly free trade" standard, the Commission is looking at the same facts, and is likewise searching for maximum selectivity. In order to measure a buyer's propensity to switch brands, the inquiry must ultimately turn to the quality of the competitive efforts underlying the various brands placed on the market.

indicate that the crucial factor is the effect of the restraint on the propensity of traders to undertake new trading relationships; the requirement that the market be divided along national boundaries has become less significant. To the extent that this partitioning requirement ceases to be the most important criterion under the interstate trade clause, Article 85(1) will enjoy increased applicability to practices which, although intended to give certain enterprises a competitive advantage, were not designed to preserve the division of the Common Market into separate national markets.

Requirement (2), the "domestic effects" clause, requires that a suspect restraint be found to produce effects on competition within the Common Market before Community tribunals can have jurisdiction to examine the legality of the restraint under Article 85(1). At the very least, this means that the goods involved must be destined for sale on a market within the territorial borders of the EEC. However, no decision has held that this minimum "domestic sale" requirement is the only criterion that must be satisfied under Requirement (2). Indeed, when the cases are properly analyzed, it becomes apparent that the jurisdiction of Community tribunals may well be circumscribed to a significantly greater degree.

Though the cases to date have given scant attention to the issue, it appears that competition within the Common Market is affected when some imperfect commercial activity relating to the production and distribution of a product destined for sale in the Common Market takes place within the EEC. A number of problems are raised by this formulation, but these must remain unanswered for the time being. For the non-Community firm interested in doing business in Europe, the resolution of these issues will result in the establishment of important guidelines for the conduct of future business activity. Accordingly, a basic understanding of the problems which will be faced by Community tribunals in the near future is indispensable.

Michael E. Treacy