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# International Operations: Current Antitrust Environment

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THE U.S. AND FOREIGN antitrust environment, with respect to international operations, is a broad subject indeed. Accordingly, this comment will only touch upon the major trends as they seem to be developing.

Broadly speaking, in Europe, we are fully into the age of Schlieder. Willy Schlieder, the Common Market's Director of Competition, is in full charge, and the patterns that seem to be developing are representative of his views. Developments of significance are taking place in the field of industrial pricing by dominant companies. Many of the attacks against certain business practices are against foreign firms not based in the Common Market, and this fact should not be overlooked.

In the German area, the Cartel Authority is taking a hard-nosed approach on acquisitions of German companies by foreign firms, so that for acquisitions of any magnitude by large outside firms, absent special circumstances, the door has finally been closed. The German Cartel Authority is also developing its view of joint ventures and is attacking even more forcefully the matter of industrial pricing by companies which are dominant in the field.

In the United States, there have been no dramatic developments of general interest. There have been some indications by at least one key official of the Department of Justice that, in his *personal* view on proposed projects with the Soviet Union, where

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Mr. King has previously authored for the *Journal* a comment dealing with the "marriage and divorce" of American and Japanese corporations. *See* Comment, *Corporate Divorce — Japanese Style*, 6 CASE W. RES. J. INT'L L. 250 (1974). The present comment is the text of a speech delivered on October 27, 1975, in Washington, D.C., at the fall meeting of the MAPI International Operations Council II.

The views expressed herein are those of the author and not necessarily those of TRW.

one U.S. enterprise is competing with another, they may exchange price information, but this has not been crystallized into a formal pronouncement.[1] Moreover, this same antitrust official indicated, in a dicussion involving the application of the U.S. antitrust laws to joint ventures between competing foreign and U.S. firms with respect to the Soviet Union, that in some instances there might be circumstances where the size of the project, or other special facts such as cost and risk, might justify a sympathetic Department of Justice view of a particular joint venture. But it should be emphasized that these were the *personal* views of the particular official and should not be taken as a basis for corporate action. The *Gillette* case,[2] which involved a challenge to the acquisition of a foreign firm by a U.S. company, is now being settled by a proposed consent judgment, which is unusual in its terms. The *Westinghouse-Mitsubishi* case,[3] involving a Department of Justice challenge to a massive licensing arrangement, still has not gone to trial.

In the developing world, antitrust laws are few and far between, but there are many regulations which delimit the possible perimeters of licensing arrangements, particularly between U.S. parents and foreign subsidiaries. These regulations are worthy of mention.

In Australia, a comprehensive antitrust law has been passed.[4] In Canada, the first phase of a new antitrust law with teeth will probably go into effect before the end of the year.[5] A second wave of amendments strengthening Canada's legislation in the antitrust area is expected shortly.[6]

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[1] *See* comments of Douglas Rosenthal, Assistant Chief, Foreign Commerce Section, U.S. Department of Justice, at Meeting of Advisory Committee on East/West Trade, June 11, 1975, particularly at 95, 102-103, 105-106, and 108-109.

[2] United States v. Gillette Co., 40 Fed. Reg. 27265 (1975); 5 TRADE REG. REP. (1976-1 Trade Cas.) ¶ 60,691, at 67,996 (D.C. Mass. Dec. 30, 1975); 5 TRADE REG. REP. (1975-2 Trade Cas.) ¶ 60,651, at 67,838 (D.C. Mass. Dec. 30, 1975). *Infra* notes 7, 13, at 125, 126.

[3] United States v. Westinghouse Electric Corp., Mitsubishi Electric Corp., and Mitsubishi Heavy Industries, Ltd., 1974-2 Trade Cas. ¶ 75,312, at 97,999 (N.D.Cal. Feb. 15, 1974); 1973-2 Trade Cas. ¶ 74,712, at 95,148 (N.D.Cal. Sept. 7, 1973); 1973-1 Trade Cas. ¶ 74,361, at 93,678 (N.D.Cal. Feb. 5, 1973); *appeal dismissed*, 419 U.S. 811 (1974).

[4] Trade Practices Act (1974).

[5] Combines Investigation Act/CAN. REV. STAT. c. 23 (1970), as amended by Bill C-2. Further amendments are still in drafting stage.

[6] *Id.*

## I. Industrial Property Rights

### *EEC*

In looking at this subject, at least five fundamental points should be considered in connection with the evaluation of license agreements under the EEC's competition rules:

(1) No violation of the EEC rules exists unless trade between two or more member states is affected;

(2) Economically insignificant restraints on trade would not be deemed a violation;

(3) Even if a violation of Article 85(1) of the Rome Treaty[7] would otherwise exist, in appropriate cases, an exemption can be given by the Commission under Article 85(3);

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[7] Treaty Establishing the European Economic Community, done at Rome, March 25, 1957, 298 U.N.T.S. 11, 1 CCH Comm. Mkt. Rep. ¶ 151, at 201.

Article 85 of the Treaty reads:
1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;

(b) the limitation or control of production, markets, technical development or investment;

(c) market-sharing or the sharing of sources of supply;

(d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

(e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.
3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:

— any agreements or classes of agreements between enterprises,

— any decisions or classes of decisions by associations of enterprises, and

— any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:

(a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

(b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned. 298 U.N.T.S. 11, 47-48; 1 CCH Comm. Mkt. Rep. ¶¶ 2005, 2031, 2051, at 1631, 1657, 1661. A full discussion of the impact of Articles 85 and 86 on Common Market antitrust law is found in Deringer, *Current Trends of EEC Competition Policy*, 8 J. Int'l L. & Econ. 203 (1973). Article 85(1) and its development in Common Market case law are discussed in Note, 6 Cornell Int'l L. J. 163 (1973).

(4) If trade between two or more member states is likely to be affected in an economically significant fashion, the EEC Commission may well consider Article 85(1) applicable even to an agreement where the licensee, or both the licensor and the licensee are established outside the Common Market;

(5) In certain cases individual clauses may be declared illegal even though such a clause would, in principle, be permitted. Thus, a requirement that the licensee manufacture a certain quantity might, in an individual case, be designed to preclude the licensee from manufacturing a competing product, or have that effect.

The following are two clearly established trends:

(1) With respect to transfer of technology, the Commission is determined to consider the licensor and licensee as actual or potential competitors, and thus to condemn under Article 85 all clauses which do not relate to the essence of the property right, fairly narrowly defined, and which at the same time restrict the ability of the licensee and the licensor to compete freely.

(2) With respect to enforcement of industrial property rights (whether patents, trademarks or others), the Commission will do what it can to limit such enforcement that would be contrary to the rules of the Rome Treaty on the free circulation of goods, principally contained in Articles 30 and 36.[8]

In a recent case[9] concerning an exclusive patent and know-how license agreement between a French and German firm, the Commission restated its position with respect to license agreements. The Commission, in analyzing the exclusivity clause, said that the restriction on the freedom of the licensor to grant other licenses in the territory was "not of the essence of the patent" and the prohibition of its unauthorized use.[10] Thus it was a clause

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[8] Article 30 of the Treaty reads:

Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States. 298 U.N.T.S. 11, 26; 1 CCH COMM. MKT. REP. ¶ 321, at 451. Article 36 of the Treaty reads:

The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States. 298 U.N.T.S. 11, 29; 1 CCH COMM. MKT. REP. ¶ 351, at 463.

[9] Re Kabelmetal's Agreement, [1975] 2 C.M.L.R. D40, [1975] O.J. L222/34 (E.C. Comm. — 75/494, 18 July 1975).

[10] *Id.* O.J. at L222/36 and 37.

prohibited under Article 85(1) if an appreciable restraint on competition existed. Here the Commission found that the exclusivity was necessary to encourage the licensee to make the large initial investment and facilitate his orderly entry into the market. Furthermore, the license was limited in time since it would expire in 1977. Therefore, the Commission granted an exemption.

In sum, an exclusive license would not be valid if an appreciable restraint on competition resulted from strength of the patent, or from the market share held by the licensee or other exclusive licensees of the patent. Exclusivity is more likely to be permitted if it concerns only manufacturing or if the exclusivity is limited in time and substantial interbrand competition exists.

The trend is toward having the rules of the Rome Treaty and the free circulation of goods prevail over the enforcement of industrial property rights.[11] The right of the patent holder to bring an infringement suit to stop direct imports from his licensees into a territory which the patent holder meant to reserve for himself is still not prejudged by any court decision, although the Commission is, I understand, in favor of having the rules of free movement of goods prevail. Thus, ownership of a patent in another EEC country perhaps can still be used to prevent direct exports by licensees. But export prohibitions are not allowed in license agreements with respect to exports to EEC countries. Furthermore, export prohibitions might not be allowed with respect to non-EEC countries if, as a result of special circumstances, trade between member states was affected.

## II. Acquisitions

### *United States*

#### (A) *Foreign Acquisitions Under the U.S. Antitrust Laws*

In the early summer of 1967, Gillette acquired Braun A.G., a West German company. Gillette was at that time engaged in the manufacture of wet shaving equipment, and Braun was engaged in the manufacture of electric shaving equipment. Braun had a licensing and marketing agreement with the Ronson Company covering the licensing and distribution of Braun electric shavers in the United States.

The Department of Justice in 1968 said that the acquisition

[11] *See generally* Glaser, *Restrictions on Competition in Patent Licenses and Their Treatment Under American and German Law*, 9 TEX. INT'L L. J. 51 (1974), for a similar treatment of industrial property rights by German antitrust law.

"substantially lessened" competition under Section 7 of the Clayton Act.[12]

Gillette had over 50 percent of the safety razor blade market in the wet shaving market and Braun was in the dry shaving market. Gillette contended that the two markets were not directly competitive.

The Department of Justice persevered and, since that time, the case has been pending. In June 1975, the parties agreed on a proposed consent decree for settling the case.[13]

Under this decree, Gillette agreed to form a new corporation to produce and market electric shavers in the United States. Gillette and Braun agreed to give the new company their shaving instrument technology and know-how as well as Braun's U.S. patent rights.

Gillette and Braun have agreed to give the capital, manpower, and business services needed to make the new company operative. In addition, they are to supply Braun supervisory and technical personnel. Gillette must invest $2.5 million in the new company. The new company must reinvest all earnings and pay no dividends for 5 years. After 4 years, Gillette must divest itself of all interest in the new company.

Gillette was forbidden for a 10-year period from making any acquisitions in the dry or wet shaving equipment market without prior approval from the Justice Department and the court.

This is the most recent case in which the right of the Department of Justice to intervene in a foreign acquisition was recognized, although here there was no final judicial determination of the merits of the case, and there was a real question as to how much effect the acquisition had on competition in the United States. The government alleged that Braun was eliminated as a potential competitor in the U.S. shaving instrument industry and argued that Gillette's position in the industry would be enhanced by the acquisition. The settlement was entered into by Gillette, despite the fact that there was no firm evidence (in Gillette's view) that Braun was planning an independent entry into the U.S. electric shaving market. Moreover, there was an open question as to whether, since Braun was in the dry shaving equipment market and Gillette was in the wet, Gillette's acquisition would

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[12] Clayton Act § 7, 15 U.S.C. § 18 (1970), formerly ch. 25, § 7, 38 Stat. 631 (1914).

[13] United States v. Gillette Co., *supra* note 2.

have "substantially lessened" competition in the market in which Gillette was operating.

The settlement did call for Gillette to keep the non-electric shaver parts of Braun's business in the United States and throughout the world. (In the original complaint the government had asked that Gillette divest itself of Braun altogether.)

In my opinion, since the case was not litigated to a judicial conclusion, it does not represent definitive precedent on this general subject matter. It was terminated by a consent decree tailored to the facts of the particular case at hand.

(B) *Acquisitions in Germany*

In late 1974, the German Cartel Authority forbade the acquisition of the German company Karl Hahn GMBH by Johnson & Johnson, a U.S. company. Hahn was a German manufacturer of tampons and had 80 percent of the relevant market. There were two other producers in the German market. Hahn's revenue from its sale of tampons was six times as high as its main competitor, and nine times as high as the next competitor.

The Cartel Authority laid great emphasis on the fact that Johnson & Johnson had great financial power and know-how. In addition, the two firms combined to have great financial resources and strong common research potential.

The Cartel Authority held that, as a result of the acquisition, the barriers for entrance of other competitors into the market would be increased and that chances in the future for the revival of any competition were dim. With this in mind, the Cartel Authority asked for the divestiture by Johnson & Johnson of Karl Hahn. The case is now on appeal.

This was the first attempt by a multinational company to enter Germany via the acquisition route after the passage of the amended German cartel law.[14] It is felt that in refusing this, the Federal Cartel Authority hopes to avoid subsequent acquisitions of other German companies by foreign firms.[15]

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[14] The original German Cartel Law, Law Against Restraints of Competition, was passed on July 27, 1957, [1957] BGB1. I, 1081. It was amended in 1965, [1965] BGB1. I, 1363, and again in 1973, [1973] BGB1. I, 917. The existing Cartel Law (i.e., the fully amended Law of July 27, 1957) is found at 3 CCH COMM. MKT. REP. ¶¶ 23, 501-23, 516, at 23, 501-23, 511-3. For a full discussion of the unamended Law of July 27, 1957 see Schapiro, *The German Law Against Restraints of Competition — Comparative and International Aspects*, 62 COLUM. L. REV. 1, 201 (1962).

[15] For a general discussion of merger control in Germany, *see* Brun, *Anti-*

### (C) *Acquisitions in Common Market*

The Commission authorized a merger of steel companies in the United Kingdom where both companies were engaged in the manufacture of, among other things, wire products.[16] The Commission found that merger would not deter competition in the market for steel products. This had to be reviewed by the Commission because it involved the coal and steel industry. Otherwise, there would have been no prior Commission review and clearance.

Thus far, there is no merger control regulation which has been adopted by the EEC, even though there have been several attempts to secure the adoption of one.[17] The Commission is having a hard time getting the member states to agree on the proposed terms.

It should be noted, however, that despite the inability of the Commission to get an agreement between the member states on a merger regulation, the EEC has successfully asserted its ability to control mergers under Article 86[18] of the Rome Treaty in the *Continental Can* case.[19]

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*trust Policy in Europe: The Emergence of Strict Enforcement?*, 8 J. WORLD TRADE L. 475, 483 and 484 (1974).

[16] Commission Decision of December 5, 1974 (not published) authorizing the acquisition by British Steel Corporation of controlling interest in Johnson & Firth Brown Ltd. The Court of Justice rejected a demand for an injunction or a stay of the execution of the Commission's decision in its decision of January 16, 1975; Johnson & Firth Brown Ltd. v. E.C. Commission, [1975] 1 C.M.L.R. 638; [1975] E.C.R. 1 (Eur. C.J. — 3/75 R.I., 16 Jan. 1975).

[17] The Proposed Concentration Regulation is treated in Comment, *The EEC's Proposal for a Regulation on the Control of Concentrations Between Undertakings*, 8 J. INT'L L. & ECON. 267 (1973).

[18] Article 86 of the Treaty reads:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

(b) the limitation of production, market or technical development to the prejudice of consumers;

(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

(d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract. 298 U.N.T.S. 11, 48-9; 1 CCH COMM. MKT. REP. ¶ 2101, at 1681.

[19] Europemballage and Continental Can Co. v. Commission, Court of Justice

## III. Joint Ventures

The EEC Commission is showing a marked and increasing concern over the potential anticompetitive effects of joint ventures. There is a new tendency on the part of the Commission to scrutinize all joint ventures which involve actual or potential competitors, particularly in an oligopolistic market.[20]

The rules applicable to joint ventures can be summarized as follows:

(1) The Commission's general approach is that joint ventures cannot be used to pursue goals which would be illegal if they were the object of a contractual arrangement.

(2) When a joint venture implies cooperation between two companies which might otherwise be competing, it implies a reduction in the numbers of market participants, and is therefore objectionable.

(3) If there is a close relationship between the activities of the parent companies and those of the joint venture, particularly if they are operating in the same competitive markets, there is likely to result a series of anticompetitive effects, which the Commission calls "group effect." This group effect concept describes the tendency of the parents which cooperate at the level of the joint venture to extend this cooperation to other markets not covered by the joint venture.[21]

The net result of the Commission's activity would seem to

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of the European Communities, Case No. 6/72, Feb. 21, 1973; J.O. C68/72 (Aug. 21, 1973); 2 CCH Comm. Mket. Rep. ¶ 8171, at 8279-3 (1973). *See* Adler and Belman, *Antimerger Enforcement in Europe — Trends & Prospects*, 8 J. Int'l L. & Econ. 31 (1973); Guyenot, *The Continental Case: A European View*, 8 J. World Trade L. 107 (1974); Guyenot and Lunt, *The Continental Can Decision and the Birth of European Antitrust Laws*, 2 Anglo-Am. L. Rev. 69 (1973); Hurwitz, *The Impact of the Continental Can Case on Combinations and Concentrations Within the Common Market*, 25 Hast. L. J. 469 (1974); Kyros, *Common Market Merger Policy: Sources and Development*, 14 Va. J. Int'l L. 501 (1974); Note, *Common Market, Antitrust*, 15 Harv. Int'l L. J. 333 (1974); Note, *The Emergence of a Common Market Merger Control Policy: The Aftermath of the Continental Can — The Proposed EEC Merger Control Regulations*, 7 Cornell Int'l L. J. 131 (1974); Comment, Haubert, *Continental Can — New Strength for Common Market Antitrust*, 11 San Diego L. Rev. 227 (1973); Comment, Coleman, *European Economic Community Antitrust Law: The Continental Can Decision — Forerunner of New European Anti-Merger Policy*, 47 Tul. L. Rev. 829 (1972); Recent Decisions, 6 Vand. J. Transnat'l L. 669 (1973). *See generally* Brun, *supra* note 16.

[20] *See generally* Schwartz and Wellman, Jr., *The Rule of Reason in EEC Antitrust: Efficiency Enhancement Through Integration by Agreement Among Competitors*, 12 Va. J. Int'l L. 192 (1972).

[21] *See* Note, Treacy, *Common Market Antitrust Law: Jurisdiction: Limitations Imposed by Article 85(1) of the Treaty of Rome*, 6 Cornell Int'l L. J. 163, 177-9 (1973).

make it exceedingly difficult for bigger companies to cooperate in the form of a joint venture.

Currently the Commission is reviewing the *Carbon Black* case — a joint venture involving Phillips Petroleum Company and Cities Service Company.[22] The result is expected to be negative from industry's standpoint. The decision will no doubt elaborate the Commission's views on the general subject of joint ventures, and these may be expected to be quite restrictive, at least where companies with strong market positions are involved.

Obviously, with regard to joint ventures, the Commission's policies will be applied in different ways, depending upon the activity of the joint venture, which may be engaged in research, distribution, joint production, or a combination of these.

## IV. Distribution

There is a trend toward holding that a problem is created under Article 85(1)[23] with even relatively minor restrictions on the ability of a distributor to set prices as he wishes on out-of-state sales, or to arrange his own distribution network, if, for one reason or another, the agreement falls outside the 1967 Block exemption on Exclusive Distribution Agreements.[24] But this problem will be sympathetically reviewed by the Commission, if a request for an exemption is filed.

In short, the Commission seems quite willing to condemn a distribution agreement when the grounds for violation are not overwhelmingly convincing, and then to grant an exemption without requiring a particularly heavy burden of proof as to whether the requirements for an exemption are satisfied. The result of this trend, if indeed it exists, is that more and more frequently the Commission becomes an agency engaged in the regular supervision of business activity under the conditions imposed in the exemption.

## V. Territorial Restrictions

The Commission frowns on territorial restrictions, whether in distribution agreements, license agreements, sales conditions, or elsewhere. Essentially it wants the member states of the EEC

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[22] The Commission's statement of objections in the *Carbon Black* case was summarized in 1586 *Europe* (a daily Brussels publication) 8 (Sept. 11, 1974).

[23] *Supra* note 7.

[24] Regulation No. 67/67 of the EEC Commission of March 22, 1967. *See also* 1 CCH Comm. Mkt. Rep. ¶ 2727, @ 1881.

to become a single trading bloc.[25] It is succeeding to a considerable extent in establishing this principle. Thus a problem arises for companies which engage in agreements or concerted practices that tend to prevent the flow of goods across the boundary of one EEC state to another, or for a dominant company that does virtually anything to restrain imports or exports. The *GM* case now before the Court of Justice is an illustration of this latter point.[26]

GM was thought to be using its position, as the sole issuer of Belgian Certificates of Conformity for GM cars circulating in Belgium, in order to discourage outsiders from making unofficial imports into Belguim. GM was charging more for inspecting and certifying such unofficial imports.

As the Commission succeeds in establishing its views on the matter of a unified trade bloc, it can concern itself with the more traditional problem of competition viewed in the traditional antitrust way, such as threats to market structure which may come through joint ventures or mergers.

## VI. PRICING

### (1) *Germany*

#### (a) *Merck Case*

Early in 1974, the Federal Cartel Authority brought a proceeding against Merck alleging it abused its dominant position by charging prices for its special product, vitamin B-12, two to three times as high as prices charged by other manufacturers of the same product. The Cartel Authority seemed to be concerned with the question of why Merck did not adapt its prices to the far lower prices of its competitors, although it had been losing market shares during the last years. The approach of the Federal Cartel Authority was that any price substantially higher than those of competitors is to be presumed an abuse (of the producer's dominant market position) if the producer in question cannot give a convincing justification of its price policy. There was no clarification of exactly what arguments could be used in justifying a price difference. This case is currently pending on appeal before the Supreme Civil Court of Germany.

[25] *See* Note, *Common Market Antitrust Law: Jurisdiction: Limitations Imposed by Article 85(1) of the Treaty of Rome*, 6 CORNELL INT'L L. J. 163 (1973). *See generally* Deringer, *supra* note 7.

[26] Re General Motors Continental NV, [1975] 1 C.M.L.R. D20, [1975] O.J. L29/14 (E.C. Commiss. — 75/75 EEC, 19 Dec. 1974).

(b) *Hoffman-La Roche*

In mid-1974, the German Cartel Authority ordered Hoffman-La Roche to decrease its price for valium by 40 percent and librium by 35 percent. In its decision,[27] the Federal Cartel Authority stated that it regarded Hoffman-La Roche as market dominant, since it believed that there was no price competition for Hoffman-La Roche. As evidence that no price competition existed, the Federal Cartel Authority indicated that Hoffman-La Roche had not changed its prices since the period of 1960 to 1963, even though some competitors had gained substantial market shares. It said that Hoffman-La Roche should have decreased its prices to defend its market share, or to increase its share. Hoffman-La Roche's defense was that during a period of over 12 years, in spite of rising costs and inflation and increases in the quality of the product, the price had been maintained. The Federal Cartel Authority also inferred the market dominant position of Hoffman-La Roche by virtue of its large profits and sizeable expenditures for research and development. In the Cartel Authority's view, Hoffman-La Roche would not have been able to make such expenditures for research and development if it had not been able to recover from high prices in a non-competitive market.

The Cartel Authority also found a misuse of dominant position in the form of a price differential between the Hoffman-La Roche products sold in Germany and the same products sold in other member states of the Common Market. It also questioned the allocation of Hoffman-La Roche's worldwide expenses to its sales in Germany. Finally, in its decision, the Cartel Authority ordered Hoffman-La Roche to reduce its prices, effective January 1, 1975.

The *Hoffman-La Roche* decision has been appealed to the Berlin Court of Appeals, and this decision is expected before thè end of November.[28]

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[27] Hoffman-La Roche & Co. AG v. Dolder AG, [1975] II BGE 237 (BG, 7 June 1974).

[28] The Berlin Court of Appeals sustained the German Cartel Authority in its holding that Hoffman-La Roche had misused its dominant position but reduced percentage-wise the alleged overprice. The decision of the Court of Appeals is being appealed to the German Supreme Court. The retroactivity feature of the German Cartel Authority's decision was deleted and any downward price adjustments will only become effective upon final disposition of the case by the German Supreme Court. The decision of the Berlin Court of Appeals has not yet been published.

### (2) *EEC*

The Commission has taken a great interest in the matter of pricing. This has been because the member states of the Community have extracted a promise from the Commission that it will use antitrust rules so as to keep prices down. Since that time, there have been a number of investigations aimed at lowering prices. The targets for these investigations include Hoffman-La Roche,[29] IBM,[30] the oil companies, and the French publishing house, Hachette. The weapons used have been the anticartel provisions of Article 85, and the provisions of Article 86, which limit the activities of dominant companies.[31] Under Article 85, the Commission may move against horizontal cartels, restrictive sales conditions, or other means that tend to keep prices up, particularly if they impede the ability of a party in one member state to compete with a party in another.[32]

## VII. Abuse of Dominant Position

Generally, the Commission is looking closely at the behavior of dominant companies. In particular, the Commission seems to want to use Article 86 to control the behavior of dominant companies with regard to pricing and sales conditions.[33]

The Commission is looking into the practice of the Hoffman-La Roche Company in employing its bargaining force in certain product markets to enlarge its market share in other markets.[34] The Commission is also charging United Brands with refusing to supply traders unless they bought bananas exclusively from United Brands, and selling at abnormally low prices to eliminate competitors.[35]

In the IBM case, the Commission is conducting an investigation in order to determine whether there is a need for controlling

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[29] *Supra* notes 27 and 28.

[30] *Infra* note 36.

[31] *Supra* notes 7 and 13.

[32] *See generally* Brun, *supra* note 15, at 486-90.

[33] *See* Adler and Belman, *supra* note 19.

[34] *Supra* notes 27 and 28.

[35] United Brands has since been fined $1,200,000 by the Commission for such practices and was ordered to stop them. The *Chiquita* case, as it is known, has not been published in the Official Journal. The case is being appealed to the High Court of Justice.

the behavoir of companies which compromise the ability of other companies to establish themselves as serious competitors.[36]

The new trend in regard to the control of dominant companies under Article 86 of the Rome Treaty is for the Commission to pursue any market practice of a dominant company, engaged in by virtue of its dominant position, when that practice is unfair, or where it works to the detriment of any class.[37]

GENERAL OBSERVATIONS

(1) In a humorous vein, it may be said that the United States, perhaps in fulfillment of its export drive, has been exporting its antitrust theology overseas.[38] Joel Davidow, head of the Foreign Commerce Section of the U.S. Antitrust Division, has just spent 6 weeks in the Common Market in an office next to that of Willy Schlieder, the EEC's antitrust chief, and consultations and exchanges were close. An FTC man spent considerable time in Australia, working with the Australian authorities on their new antitrust legislation. Groundwork for exchanges between the German Cartel Authority, and U.S. antitrust people is on the way to becoming formalized, probably within the next year or so. Not only ideas and concepts are exchanged, but also information on subjects of common interest. What does all this mean over the long haul for the foreign or U.S. businessman? It may mean that if he is charged in one country he may also be charged in others. For example, currently, antitrust lawyers from the member states and the EEC meet four times a year to exchange information and discuss actions pending or planned. The *Hoffman-La Roche* case is an example, where the company was charged successively in the United Kingdom, EEC, and Germany. In effect, this exchange of information, ideas, and concepts means a transnational approach toward antitrust. This applies particularly in the case of companies which are not indigenous to the areas involved, and which are not indigenous to the community. This is also true in Germany, where the Cartel Authority has used Hoffman-La Roche and Merck to take some new initiatives, and where it

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[36] The opening of the IBM investigation was reported in 1568 *Europe* 4 (July 26, 1974).

[37] *See generally* Brun, supra note 15.

[38] For a comparison of EEC and United Kingdom antitrust developments with American antitrust law as found particularly in Section 7 of the Clayton Act, see Adler and Belman, *supra* note 19.

used the *Carl Hahn* and *Johnson & Johnson* cases to assert its views on the correct interpretation of the new anti-merger law.[39]

(2) In the EEC, the authorities are primarily interested in industrial property, joint ventures, and pricing. New and significant changes are developing for these areas. In the view of the EEC, any company with a dominant position warrants close scrutiny by the antitrust authorities lest it abuse that dominant position.[40]

(3) In Germany, the antitrust authorities are applying their new law[41] very restrictively where joint ventures and acquisitions are involved. Moreover, there are major initiatives in the pricing area involving two foreign firms. The thrust of these initiatives is that foreign firms may have to retain staff economists to justify their prices.

(4) In Japan and the United States there have really not been any dramatic new developments in the antitrust field. The *Gillette* case[42] is settled but what, if anything, is its general significance? Suffice to say that it did not write any new law. The *Westinghouse-Mitsubishi* case[43] involving licensing restrictions still has not gone to trial, although the judge charged with hearing it said he wants to press ahead. It has been said that the U.S. antitrust laws do not prohibit the exchange of price information by U.S. firms competing for business with the Soviet Union and that, where special factors exist, it may be possible for competitors to enter into joint ventures for very large foreign projects. But these views have not as yet been formalized into coherent official pronouncements. The air in this area is still cloudy and caution remains the watchword.[44]

(5) In the developing world, the problem the U.S. businessman faces concerns primarily the conditions under which he transfers his technology to his foreign licensee. Throughout the developing world, there are restrictions which apply to the transfer of technology, and these restrictions are growing. They represent

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[39] *Supra* notes 27 and 28 respectively.

[40] *Supra* notes 33 and 37.

[41] *Supra* note 14.

[42] United States v. Gillette Co., *supra* note 2.

[43] United States v. Westinghouse Electric Corp., Mitsubishi Electric Corp., and Mitsubishi Heavy Industries, Ltd., *supra* note 3.

[44] For a general discussion of current U.S. antitrust law with regard to multinational corporations, including comments on both the *Gillette* and *Westinghouse-Mitsubishi* cases, see Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L. J. 16 (1974).

a part of the changing environment in which U.S. businessmen are dealing. They apply, to a greater or lesser extent, whether the technology transferred is patents, know-how, trademarks, or technical services. Further, the application of these restrictions depends on (A) whether the royalty can, in fact, be paid; (B) whether it is deductible for tax purposes; and, (C) in Brazil, at least, whether it constitutes a remittance of profits. In addition, the terms on which the license can be entered into are closely framed. Are there restrictions on exports? Are there grant backs? Does the licensee waive the right to challenge the licensor's patent? How are disputes to be settled under the license agreement? All of the foregoing matters restrict the U.S. licensor's freedom of action in such countries as Brazil,[45] Argentina,[46] the Andean Code Countries,[47] Mexico,[48] and other parts of the developing world. They are part of the U.S. businessman's course of instruction in these areas. He must not fail to heed them.

[45] *See* Law #5,722 of 1971 (Industrial Property Code) and Normative Act #15, issued on September 11, 1975 by the National Institute of Industrial Property of Brazil (INPI) dealing with license agreements between foreign firms and Brazilian firms.

[46] *See* 1974 Transfer of Technology Law (Law 20, 794), which replaced a previous law enacted in 1971.

[47] Regulations restricting licensors are set forth in Andean Pact Decision 24, adopted by Venezuela on September 26, 1973 and published in Gaceta Official No. 1620 Extraordinario of November 1, 1973, Decree No. 63, regulating same, dated April 28, 1974 and published in Gaceta Official No. 1650 Extraordinario of April 29, 1974, and Decree No. 746, dated February 11, 1975 and published in Official Gazette No. 30, 623 of February 15, 1975. 11 INT'L LEGAL MATS. 126 (1972).

[48] *See* Law for the Registration of Transfer of Technology and Use and Exploitation of Patents and Trademarks, adopted by the Mexican Congress on December 28, 1972 and published in the Federal Bulletin of December 30, 1972.