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Recent Decisions

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RECENT DECISIONS

EUROPEAN COMMUNITIES—RESTRICTIVE PRACTICES—COMMISSION OF THE EUROPEAN COMMUNITIES MAY ORDER SPECIFIC RELIEF TO CURE ABUSE OF A DOMINANT MARKET POSITION UNDER ARTICLE 86.

The United States-based Commercial Solvents Corporation (CSC) produces and sells various chemical compounds that include two nitroparaffines, nitropropane and aminobutanol, which are refinable into ethambutol, the basic element of several antituberculosis drug specialties. In 1962 CSC acquired 51 per cent of the voting stock of Istituto Chemioterapico Italiano, SpA (ICI), an Italian corporation, which until 1970 acted as a re-seller of CSC's products within the Common Market. Among ICI's customers for CSC's American-made aminobutanol was Laboratorio Chemico Farmaceutico Giorgio Zoja, SpA (Zoja), which began buying aminobutanol in 1966 for refinement into ethambutol and ethambutol-based specialties. In 1968 ICI began development of its own drug specialties similar to those produced by Zoja. ICI received governmental registration for their manufacture in November, 1969, and began production in 1970. In the spring of 1970 Zoja cancelled the remainder of its contract with ICI, finding a cheaper source for aminobutanol on the world market. Also, early in 1970, CSC announced that it would no longer supply either nitropropane or aminobutanol to the EEC, but rather an up-graded intermediate product, dextro-aminobutanol, which ICI would then further refine into bulk ethambutanol for its own use and for sale to other producers of specialties within the Community. Near the end of 1970, Zoja placed an order with ICI for aminobutanol and ICI inquired as to whether CSC would again supply crude aminobutanol. CSC replied that it would not, and Zoja found that it was unable to obtain aminobutanol elsewhere since all sources led back to CSC. Being the only manufacturer possessing the sophisticated equipment and technology necessary for the nitration of paraffin on a large scale, CSC held an effective world monopoly on the nitroparaffine market. In the precarious position of being without a source of supply for its chief raw material, Zoja applied to the Commission of the European Communities for relief, arguing that CSC and ICI had breached article 86 of the EEC Treaty, *i.e.*, that the defendants had abused their dominant market position.[1] The

1. Treaty Establishing the European Community (EEC), March 25, 1957,

Commission agreed, and imposed, jointly and severally, the following sanctions: (1) a fine of 200,000 units of account;[2] (2) under penalty of a fine of 1,000 units of account per day, ordered CSC to supply either 60,000 kilograms of nitropropane or 30,000 kilograms of aminobutanol to Zoja, as its most urgent needs, at a price not exceeding the maximum price charged for the two products; and (3) under penalty of a second fine of 1,000 units of account per day, ordered CSC to submit within two months proposals for the subsequent continuing supply of Zoja.[3] The time limits for the execution of the sanctions were extended so that CSC and ICI might appeal their case to the Court of Justice of the European Communities.[4] On appeal the companies argued that article 86 does not vest the Commission with power to order specific relief, and pointed out that the Commission had never before done so. The Court of Jus-

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article 86 provides:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject or such contracts.

The authoritative English text of the treaty may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (Office of Official Publications of the European Communities, 1973). An unofficial English text may be found in 298 U.N.T.S. 3 (1958).

2. A unit of account is not an actual currency in that it is not a means or an instrument of payment. The unit of account is rather a means of accounting used to measure the value of obligations. The value of the unit of account was not chosen arbitrarily. In 1950, seventeen European nations formed the European Payments Union (EPU). It had a unit of account ("Epunit") with a value of 0.88867088 grams of fine gold. The EPU was replaced in 1958 by the European Currency Agreement—but the same unit of account was maintained and adopted by the EEC in 1960. 2 CCH COMM. MKT. REP. ¶ 5042 (1971).

3. Laboratorio Chemico Farmaceutico Giorgio Zoja SpA v. Commercial Solvents Corp. & Istituto Chemioterapico Italiano, [1973] Official Journal of the European Communities L299/51 [hereinafter cited as J.O.], 12 Comm. Mkt. L.R. D50 (1973).

4. Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission, [1973] European Court Reports 357 [hereinafter cited as ECR], 12 Comm. Mkt. L.R. 361 (1973).

tice *held* that the Commission decision be affirmed. When an undertaking abuses a dominant market position by depriving a competitor of its sole source of raw materials, the Commission may, within the purview of article 86, order affirmative relief by requiring the undertaking to supply the competitor's continuing requirements in that raw material, and exact fines and penalties for the failure to supply. *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission*, [1974] E.C.R. 223, 2 CCH COMM. MKT. REP. ¶ 8209, 13 Comm. Mkt. L.R. 309 (1974).

Several previous cases had been decided by the Court that effectively laid the foundation for the instant opinion.[5] In 1973 the Court of Justice relied on the policy-establishing language of article 2[6] and article 3(f)[7] to emphasize the role of article 86 in ensuring a competitive market.[8] Speaking about article 86 in the *Continental Can* case, the Court said the provision applies not only to practices that prejudice consumers directly, but also to those that prejudice consumers through interference in the structure of actual competition.[9] From this clear reference to article 3(f), it is only a short step back to the broader language of article 2 which aims at "harmonious development of economic activities." The issue of the liability of a corporation domiciled outside the EEC for infringing on the competitive structure of the Common Market was settled in 1972 by the Court in the *Beguelin* case.[10] Interpreting article 85[11] the Court held that the fact that one of the undertak-

5. For an overview of Court of Justice case law through 1973 see K. LIPSTEIN, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY (1974).

6. EEC art. 2 provides: "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

7. EEC art. 3(f) provides: "for the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein . . . (f) the institution of a system ensuring that competition in the common market is not distorted . . . ."

8. Europemballage Corp. & Continental Can Co. v. Commission, [1973] E.C.R. 215, 2 CCH COMM. MKT. REP. ¶ 8171, 12 Comm. Mkt. L.R. 199 (1973).

9. [1973] E.C.R. at 245, 2 CCH COMM. MKT. REP. ¶ 8171 at 8300, 12 Comm. Mkt. L.R. at 225.

10. Beguelin Import Co. v. G.L. Import Export SA, 17 Recueil de la Jurisprudence de la Cour (Cour de Justice de la Communaute Europeenne) [hereinafter cited as Recueil] 949, 2 CCH COMM. MKT. REP. ¶ 8149, 11 Comm. Mkt. L.R. 81 (1972) (Nov. 25, 1971).

11. Article 85 sets out specific examples of monopolistic practices prohibited

ings involved in the agreement was situated in a non-Member country was no obstacle to the application of that provision, "so long as the agreement produces its effects in the territory of the Common Market."[12] But one question left for the Court in *Commercial Solvents* was the magnitude of the effect on the competitive structure of the EEC necessary before the Court would rule the practice in violation of the Treaty. If article 2's goal of promoting the harmonious development of economic activities is to be implemented, great flexibility and wide-ranging jurisdiction must be combined in the standard set out by the Court in delineating the antitrust or market regulating authority within the Common Market. Words having the sound of guidelines were set out in the *Beguelin* case,[13] but this ephemeral standard needed another decision to vitalize its vague outlines. The issue of whether the Commission may order affirmative relief has not been previously addressed by the Court.

Moving into largely virgin areas, the Court in *Commercial Solvents* set out five main issues[14] and attacked each in succession. The Court had little difficulty in deciding that CSC held a dominant position with regard to the supply of nitropropane and aminobutanol. As a strictly factual matter, the Court took notice that except for a small amount produced expensively and experimentally, the vast majority of the world's ethambutol was produced by CSC, ICI, American Cyanimid, and Zoja—but that all depended on raw materials produced only by CSC.[15] With an effective world

within the Common Market.

12. 2 CCH COMM. MKT. REP. ¶ 8149 at 7704, 11 Comm. Mkt. L.R. at 95. For a thorough discussion of the distinction between articles 85 and 86 see D. LASOK & J. BRIDGE, INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 265-78 (1973).

13. "To be incompatible with the Common Market and prohibited under Article 85, an agreement must be 'capable of affecting trade between member-States' and have 'the object or effect' of interfering with 'competition within the Common Market.'" 2 CCH COMM. MKT. REP. ¶ 8149 at 7704, 11 Comm. Mkt. L.R. at 95.

14. As seen by the Court, the issues were: (1) whether CSC and ICI held a dominant position within the meaning of article 86; (2) which market must be considered to determine the existence *vel non* of a dominant position; (3) whether, if CSC and ICI were in a dominant position in the EEC, they abused that position; (4) whether such abuse affected trade between Member States; and (5) whether CSC and ICI acted as a single economic unit. [1974] E.C.R. at 246, 247-53, 2 CCH COMM. MKT. REP. ¶ 8209 at 8818, 8818-20, 13 Comm. Mkt. L.R. at 337, 337-42.

15. [1974] E.C.R. at 248, 2 CCH COMM. MKT. REP. ¶ 8209 at 8819, 13 Comm. Mkt. L.R. at 338-39.

monopoly, CSC unquestionably enjoyed a "dominant position" within the Common Market as required by article 86. The Court next rejected CSC's contention that when the market in ethambutol is considered CSC is not in a dominant position. This was held to be a spurious argument; the raw materials market (in which CSC had a virtual world monopoly) was the proper market to consider for the purpose of the complaint by Zoja, since Zoja bought raw materials to produce ethambutol, and not ethambutol itself.[16] CSC objected that after Zoja cancelled its contract with ICI in the spring of 1970 CSC was not obligated to renew the contract to supply Zoja with either nitropropane or aminobutanol. The Court found this irrelevant, declaring that CSC would have ceased supplying Zoja in 1970 regardless of Zoja's cancellation of the contract with ICI. The Court went on to spell out CSC's abuse of its dominant position in precise detail, holding that a producer of raw materials which begins manufacturing related refined products may not withhold those same raw materials from former customers in order to eliminate competition in the market for their newly available finished products.[17] CSC then argued that refusing to supply nitropropane to Zoja would have no effect within the EEC, since tuberculosis rates are low in western Europe and Zoja is almost totally blocked from selling its specialties within the Common Market by patents held by American Cyanimid. The Court also rejected this argument, noting that although Zoja sells 90 per cent of its anti-tuberculosis drugs in developing nations with high tuberculosis rates, it ships the other ten per cent to two Com-

16. [1974] E.C.R. at 249-50, 2 CCH COMM. MKT. REP. ¶ 8209 at 8819, 13 Comm. Mkt. L.R. at 339-40.

17. In the words of the Court:

> [A]n undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers), act in such a way as to eliminate their competition which, in the case in question, would have amounted to eliminating one of the principal manufacturers of ethambutol in the Common Market. Since such conduct is contrary to the objectives expressed in Article 3(f) of the Treaty and set out in greater detail in Articles 85 and 86, it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86 . . . [1974] E.C.R. at 250-51, 2 CCH COMM. MKT. REP. ¶ 8209 at 8820, 13 Comm. Mkt. L.R. at 340-41.

munity nations.[18] The Court, however, did not rest its holding that CSC/ICI abused their dominant position on the narrow ground of the ten per cent of Zoja's specialties sold within the EEC, but rather on the 90 per cent exported out of the Community.[19] When an undertaking in a dominant position within the Common Market abusively exploits its position in such a way that a competitor within the Common Market is likely to be eliminated, "it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market . . . ."[20] Because Zoja's exports are endangered by CSC's actions, trade between Member States may be affected, as contemplated by article 86. CSC's final salvo was a two-pronged tautology concerning the relationship between CSC and ICI—since CSC did not operate within the EEC it could not be liable, and since ICI had no monopoly or dominant position (although it admittedly operated within the EEC) it also must be free of liability under article 86. Mentioning the attempt to merge Zoja into ICI, which collapsed just prior to CSC's decision to substitute dextro-aminobutanol rather than either nitropropane or aminobutanol as its exported raw material to the Common Market, the Court held that at least with respect to their dealings with Zoja, "the two companies [CSC and ICI] must be deemed an economic unit."[21] As a single unit their liability was confirmed as joint and several, but the principal fine of 200,000 units of account was halved because quicker action by the Commission in response to Zoja's complaint would have mitigated the damages.[22] The Court treated the issue of affirmative relief off-handedly, first not-

18. [1974] E.C.R. at 252, 2 CCH COMM. MKT. REP. ¶ 8209 at 8820, 13 Comm. Mkt. L.R. at 342.

19. The European Community has shown special concern for developing nations. At the time the *Commercial Solvents* litigation was progressing in the European Court of Justice, negotiations were being conducted that led to the signing of the Lome Convention in February, 1975. This convention calls for close economic and technical cooperation between the nations of the EEC and 46 ACP (African, Caribbean, and Pacific) developing nations. As parallel and contemporaneous developments, the Lome Convention and the *Commercial Solvents* reasoning indicate strong sympathetic ties felt within the Common Market toward the third world. This attitude may perhaps affect future decisions as it indirectly influenced the Court in the case at hand.

20. [1974] E.C.R. at 252-53, 2 CCH COMM. MKT. REP. ¶ 8209 at 8821, 13 Comm. Mkt. L.R. at 342.

21. [1974] E.C.R. at 254, 2 CCH COMM. MKT. REP. ¶ 8209 at 8822, 13 Comm. Mkt. L.R. at 344.

22. [1974] E.C.R. at 257, 2 CCH COMM. MKT. REP. ¶ 8209 at 8823, 13 Comm. Mkt. L.R. at 346.

ing that article 3 of Regulation 17/62[23] provides that when the Commission finds an infringement of article 86, "it may by decision require the undertakings . . . concerned to bring such infringements to an end." Since the regulation does not describe measures that the Commission may take, the Court held that "[t]his provision must be applied in relation to the infringement."[24] The Commission may, therefore, make any order reasonably designed for "bringing the situation into conformity with the requirements of the Treaty."[25]

This landmark decision is the first time that the Court of Justice has ordered a party abusing a dominant position to correct that abuse constructively, by requiring the monopolizer to sell to the complaining and injured party sufficient quantities to satisfy that party's requirements. Although not novel when compared with United States antitrust law,[26] this is one large step beyond previous decisions within the EEC.[27] The wide spectrum of remedies available under American law,[28] ranging from criminal prosecution, to administrative orders, and to civil suits where the broad powers of equity are available, has not previously been applied within the Common Market. The Commission has been limited to declaring practices unlawful, imposing fines and issuing cease and desist orders.[29] *Commercial Solvents* may well be an indication from the European Court that the American arsenal against antitrust is recognized as necessary and effective in combatting the growing problems of a more unified Community economy. Additionally,

23. Council Regulation No. 17/62, as amended by Council Regulation No. 59/62, [1962] J.O. 204, 1655, 1 CCH COMM. MKT. REP. ¶ 2401 *et seq.* (1973).

24. [1974] E.C.R. at 255, 2 CCH COMM. MKT. REP. ¶ 8209 at 8822, 13 Comm. Mkt. L.R. at 345.

25. [1974] E.C.R. at 255, 2 CCH COMM. MKT. REP. ¶ 8209 at 8822, 13 Comm. Mkt. L.R. at 345. Additionally, the Court held that supplying Zoja would place no strain on CSC since Zoja's needs would only consume approximately five or six per cent of CSC's production capacity. [1974] E.C.R. at 251, 2 CCH COMM. MKT. REP. ¶ 8209 at 8820, 13 Comm. Mkt. L.R. at 341.

26. For a recent overview and comparison of antitrust in the United States and the EEC see E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTI-TRUST PRIMER (1974).

27. For discussion see 2 CCH COMM. MKT. REP. ¶ 9644 (1974).

28. While the intricacies of United States antitrust legislation and its interpretation are beyond the scope of this comment, a contrasting consideration of American and foreign economic regulation may be found in H. STEINER & D. VAGTS, MATERIALS ON TRANSNATIONAL LEGAL PROBLEMS 903-62 (1968).

29. Jones, *American Anti-Trust and EEC Competition Law in Comparative Perspective*, 90 LAW. Q. REV. 191, 204 (1974).

the scope of the definition of what is necessary to "affect trade between Member States" as required by article 86 is stretched to include more tangential effects than in earlier cases. Refusal to sell by a market-dominating enterprise is made an abuse, although not specifically listed in the text of article 86. This may permit other practices, heretofore outside the reach of EEC antitrust law, to be classified as abuses under article 86 and brought within the regulation of the Community. It is no longer necessary for the complaining party to have sales within the Common Market, only that exports from the EEC are choked off by an abuse of a dominant position. After *Commercial Solvents* it would seem that little proof, if any, is required to show that trade between Member States is affected.[30] The Court has broadened the reach of its sanctions by effectively eliminating this defense; any party trading within the Community affects trade between Member States and may be subject to the controls of article 86 if found to be abusing their dominant position. The abuse may be by a corporation based outside the Common Market which only exports raw materials into the Community through a subsidiary. Based on the instant case, the next decision might conceivably reach the foreign corporation directly, dropping all pretenses of requiring economic unity of parent and subsidiary. One thing is certain, the scope of the authority of the Court and its interpretations of the antitrust provisions of the EEC Treaty are rapidly reaching beyond the geographical confines of the Common Market.

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30. *Commercial Solvents* clarifies the interpretation of this key phrase of article 86 much as the *Grundig-Consten* case focused on the term "competition" as used in article 85(1). *C.f.* Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission, 12 Recueil 429, 2 CCH COMM. MKT. REP. ¶ 8046, 5 Comm. Mkt. L.R. 418 (1966).