

Report on the Meeting on November 8 to 10, 1962
in the Institute for International and
Foreign Trade Law
Frankfurt/Main

The past year 1962 has brought a new development to the antitrust law of the European Economic Community; the coming into force of the regulation No. 17 and the end of the time of notification of multilateral, horizontal agreements have changed the activity of the Directorate for Competition from theoretical preliminary steps to practical administration. Besides the end of the time of notification of bilateral, vertical agreements was soon to expire; especially in this field the Directorate expected a high number of those notifications. Indeed, as the result has shown, there were 32,000.

Some special problems have arisen concerning the work of the Directorate, some of them of substantive law, some others of practical procedure. To avoid an isolation of the officials in Brussels, in spring 1962 the idea was raised that there shall be a meeting amongst a small group of scholars and officials both from the Directorate of Competition and the national cartel authorities. First, it was planned to organize that meeting with the help of several university institutes, but that forecast too much administrative work. So only the Institute

of International and Foreign Trade Law at Frankfurt/Main had been in charge of the organization, especially because it had shown ability to do that most quickly. The other institutes, such as in Milano, Paris, Brussels and Leyden, shall do similar work in the years to come.

Besides, the Institute at Frankfurt was selected because it has written already in 1958 an opinion according to which the articles 85 and 86 of the Common Market Treaty are self-executing and therefore directly applicable law in all member states, and because it worked out another opinion in 1961/62, whether a damaged person can claim damages for violation of the articles 85 and 86. That corresponds to the treble damage suit of the American antitrust laws. This question has become most essential because the treaty itself does not provide such a liability which therefore only can be derived from national laws.

The number of participants was limited to 30; they included the leading officials from the Commission of the Common Market, von der Groeben, Verloren van Themaat, Schumacher and Jaume, the Advocate General Lagrange, the presidents of the national antitrust authorities from France, Germany and the Netherlands, and scholars and lawyers from five member states.

For the selection of the topics to be dealt with priority was given to actual problems.

In the discussion on the interpretation of article 85 there were several attempts to direct that interpretation along a certain course. Sometimes it was done so by quoting American sources and alleged American practice. It transpired that those quotations often were false or misleading. Therefore it has been necessary to resume American experiences in those special fields in which corresponding problems have arisen in Europe. This introductory address was given by Professor Kronstein who dealt with four specific points:

(1) Comparable to the interstate commerce clause of the American Constitution and of section 1 of the Sherman Act article 85 is applicable to "commerce between member states". The address has shown the evolution of the interpretation of the interstate commerce clause by the Supreme Court of the United States, beginning with U.S. v. E.C. Knight (156 U.S. 1 (1895)) and ending with Klor's Inc. v. Broadway Hale Stores Inc. (359 U.S. 207 (1959)). Above all it was mentioned that the Supreme Court always has interpreted the interstate commerce clause in accordance with the economic evolution [Stafford v. Wallace, 258 U.S. 495 (1921) (per Chief Justice Taft); U.S. v. Yellow Cab Co., 332 U.S. 218 (1947)].

(2) In Europe the question is being discussed what is the relation of the antitrust provision of the Common Market Treaty to the corresponding provisions in the national laws

of the member states. There are efforts to oust the national laws by an alleged presumption of the antitrust laws of the Common Market. Professor Kronstein has shown that there were similar efforts made to escape the application of State laws at a comparable period in United States antitrust history when the federal enforcement authorities were short of personnel. [Standard Oil of Kentucky v. State of Tennessee, 217 U.S. 413 (1910) (per Justice Holmes)].

(3) In addition, Professor Kronstein has shown whether or not a violation of public policy is necessary for the application of the antitrust laws. This topic implied the rule of reason and per se doctrine.

(4) Finally, Professor Kronstein pointed out that vertical agreements, such as exclusive dealing, are covered by the anti-trust laws but that the courts allow the evidence by the defendant that the agreement is reasonable; in Europe there have been some opinions saying that article 85 is not applicable at all to such agreements.

It is very controversial whether article 85 paragraph 1 is applicable if the agreement is "likely to affect" commerce between member states or is "likely to affect harmfully" such commerce. The latter is the opinion of some American and European lawyers. This would mean that the question, whether an agreement is harmful or not, is decisive for the jurisdiction of the Commission to attach, whereas according to the first opinion there is such jurisdiction anyway and the question of

harmfulness is to be decided under article 85, paragraph 3.

This topic was dealt with by Professor Coing and Mr. Ellis, the counsel of Royal Dutch Shell.

Professor Coing based his opinion on the rules of interpretation in public international law especially as pointed out by the Permanent International Court of Justice. According to those rules the most narrow test will prevail if there are several texts in different languages; the most narrow text, indeed, is the Dutch which provides a harmful effect on commerce while the French text uses the word "affecter" only. However, if the interpretation is based on the Dutch text, that does not explain by itself, what shall be understood to be such a harmful effect. The text itself does not state the measure according to which a decision could be reached whether a restraint of trade is harmful or not. These measures must be derived - also according to the rules of interpretation in public international law - from the context. Since according to that context the natural flow of commerce is the aim of the antitrust provision of the Common Market Treaty, therefore everything must be considered to be harmful which hinders or changes such flow. Therefore, Professor Coing states that the interpretation of article 85 paragraph 1 corresponds to that of section 1 of the Sherman Act. Whether or not a restraint of trade is unreasonable must thus never be considered in paragraph 1 (but only in paragraph 3 of article 85.

Next Professor Subramanian will discuss whether the antitrust provisions of the Sherman Act can be interpreted dynamically according to the changing economic conditions. This question was dealt with already by Professor Bergin, as far as American law is concerned. Professor Subramanian came to a similar result.

This question of a dynamic interpretation led to a specific question which has arisen in the Boston market during the second half of 1962.

The Directorate for Competition receives a large number of notifications. Since every notification has had to be decided separately, this has blocked the work of the Directorate for a long time. Therefore the point was raised whether the Directorate could pass one decision on:

1. all similar agreements between one enterprise and its sales agencies, and
2. all vertical agreements of a kindred sort, such as all billing station exclusive dealing contracts, etc.

This is the problem of the so-called group exemption. Professor Bernini (University of Ferrara, Italy) and M. Jacquart (representative of the French Industry) discussed the first, but denied the second question.

Since the meeting the Commission has applied another method of ameliorating its notifications overload. A revision of the regulation 27 (regulation 153 of December 21, 1962) (Official Journal 8/29/62) provides a simplified means for the notification of bilateral vertical agreements between enterprises and sales agents. Some agreements concerning patent licenses are considered not to be covered by article 85 paragraph 1 for a certain period. On the other hand, the commission has not provided the so-called group exemptions because it has considered - as it states itself in the Official Journal 142/63 - the objections against them to be relevant.

On the last day, the presidents of the German and French antitrust authorities, Guenther and Clement, dealt with the question which enterprise shall be considered to be market dominating in the sense of article 86 of the Common Market Treaty and what constitutes an abuse of such a market dominating position. According to Guenther the difficulties in the practical application of that article are extraordinary, above all the question of evidence. He quoted the case in which the officials of his own authority were not able to find the costs of a certain commodity though they scrutinized the plant for several months. As long as this is impossible, a statement cannot be made that a certain price, alleged to be too high, is an abuse of a market dominating position. On the contrary, M. Clement was more optimistic. According to his opinion the French practice shows

that the difficulties pointed out by Guenther can be overcome. Perhaps these differences in the opinions of Guenther and Clement can be explained by the fact that in France several forms of abuse of a market dominating power have been forbidden for a long time and that therefore a long practice of handling such cases has developed (for instance, refus de vente), whereas the problem is quite new in Germany.

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