Patent Licensing: A Case Study on Antitrust Regulation within the European Economic Community

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PATENT LICENSING: A CASE STUDY ON ANTITRUST
REGULATION WITHIN THE EUROPEAN
ECONOMIC COMMUNITY

by

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INTRODUCTION

Until the recent letdown for Community spirit and thus in
the tempo of the European Economic Community's various
activities,1 the enforcement of the antitrust law of the Treaty
of Rome2 was among the most vigorously debated plans of
the Commission. An active program of enforcement on a
reasonable theoretical foundation is without doubt one of the
urgent needs of the Community organization.3 Whether the

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1 For an interesting speculation on the future of the EEC after
  the reversals of January, 1962, see Shonfield, After Brussels, 41

2 The Treaty for the Establishment of the European Economic
  Community (March 25, 1957) was officially promulgated in Dutch,
  French, German and Italian. An authorized translation published
  by the Secretariat of the Interim Committee for the Common Market
  and Euratom (1957) appears at 298 U. N. T. S. 14 (1958); see also
  the translations in 50 Am. J. Int'l L. 865 (1957); IV European
  Yearbook 413 (1958).

3 Hallstein, America and Europe: A New Initiative 6 (Address,
  April 12, 1962) in Challenge and Opportunity: Lectures on United
procedures so far adopted by the Council of Ministers and
the Commission will meet the requirements of such a pro-
gram is the subject of this study. It describes in detail the
regulatory framework created by the Council of Ministers’
Regulation Number 17, the Commission’s Practical Guide,
its short-lived November 9, 1962 Announcement and its cur-
rently effective December 21 Announcement. The more criti-
cal features of the Commission’s enforcement policy are
evaluated from the point of view of their compatibility with
Regulation 17 and to a lesser extent with Article 85 of the
Treaty. The current jurisdictional problems between Com-

Europe (1962); von der Groeben, Competition in The Common Mar-
ket, Supp. to 4 Bulletin of the European Economic Community

4. The following enactments or announcements of these two bodies
are discussed herein:

Council of Ministers:

Regulation Number 17, 5 Journal Officiel des Communautés Euro-
péennes [hereinafter “J. O. C. E.”] 204, 21 February 1962, as
amended to postpone deadlines for notification, Regulation Number
59, 5 J. O. C. E. 1655, 25 July 1962; English version published as

Commission:

Guidance Number 27, 5 J. O. C. E. 1118, 10 May 1962, imple-
menting Regulation 17; English version in Commerce Clearing House,
Common Market Reporter, Par. 2651 ff. (1963);

Guide Pratique Concernant Les Articles 85 Et 86 Du Traité Insti-
tuant La C. E. E. Et Leurs Règlements D’Application (1962);
English version reprinted as Practical Guide Concerning Articles 85
and 86 of the Treaty Establishing the EEC and Their Implementing
(1963) [hereinafter cited as “Practical Guide,” referring to the
English version unless otherwise specified];

Announcements of November 9, 1962, 5 J. O. C. E. 2627, 9 No-

vember 1962, as corrected, 5 J. O. C. E. 2687, 13 November 1962
(actually a series of four announcements);

Announcements of 21 December 1962, 5 J. O. C. E. 2922, 24 De-
cember 1962 (appended to Regulation 153); English translations of
both groups of announcements in Ladas, The Deadline of January 1,
1964 for Industrial Property Agreements, 8 Antitr. Bull. 85 (1963);
Forrow, Developments Under The Common Market Antitrust Regu-
lated, are beyond the scope of this paper\textsuperscript{4a} except for a short summary needed for an evaluation of the latter Announcement. Finally, certain practical difficulties in the use of the self-policing concept that lies at the heart of all antitrust regulation at Community level are explored. The many references to the German Cartel Law\textsuperscript{5} and commentaries are explained by the clear dependence of Community law, especially in its patent and licensing aspects, upon these sources.\textsuperscript{5a} While the focus is upon patent and know-how licenses, hopefully the discussion will be relevant to many problems of business behavior.

**THE GENERAL ANTITRUST REGIME AT COMMUNITY LEVEL**

The statutory and regulatory scheme of the Community antitrust structure is by now well-known and will not be elaborately presented here. In brief, Articles 85 and 86 of the Rome Treaty\textsuperscript{6} contain the substantive antitrust legislation of a "federal" nature governing commerce in the emerging Common Market in uneasy conjunction with a variety of national statutes.\textsuperscript{7} These articles, short as they are, leave no doubt

\textsuperscript{4a} Buxbaum, Incomplete Federalism: Jurisdiction Over Antitrust Matters in the European Economic Community, 52 Cal. L. Rev. 56 (1964).


\textsuperscript{5a} See, e.g., Scheuermann, Book Review, 12 Int. & Comp. L. Q. 1436 (1963) on this dependence; for another view as to the reasons, see Weiser, Antitrust Policy and Industrial Property In The European Economic Community, 38 N. Y. U. L. Rev. 496, 514-15 (1963).

\textsuperscript{6} The best translation of these provisions may be found in Riesenfeld, The Protection of Competition, in II Stein and Nicholson, American Enterprise in the Common Market: A Legal Profile 197, at pages 200-203 (1960) [hereinafter "Stein & Nicholson"].

\textsuperscript{7} Scores of articles have been published discussing the antitrust laws, regulations and policies of the European Economic Community. Most of those discussing Regulation 17 are descriptive in nature. A bibliography of the more comprehensive discussions may be found in Riesenfeld, Antitrust Laws in the European Community: A Sequel, 50 Calif. L. Rev. 829, fns. 13 & 14 at page 830 (1962). Other
that the prohibition of anti-competitive arrangements is to be a matter of considerable discretion, within the broad limits established in Article 85(3). This provision, which applies only to restrictive practices and not to abuses of monopolistic power, permits the exemption of agreements meeting certain general criteria from the absolute prohibition contained in the first two paragraphs of the article. Article 87 allowed the Council of Ministers, acting upon a proposal of the Commission, to decide how these substantive provisions should be applied. Not unexpectedly, the Council in Regulation No. 17 decided that the grant or denial of Article 85(3) exemptions should be left exclusively to the Commission.

That regulation and the procedures established since its enactment have made the exemption application the basis for the Community's antitrust enforcement program. This respectable feat was accomplished by requiring that the Com-

recent bibliographies include 18 Record 308 (1963); Supplement to Callmann, Industrial Property and Trade Regulation In The European Common Market, 49 V. L. Rev. 462, at page 476 (1963) (especially on patent and trademark law).


There are several more extensive works on the general subject. An important German language commentary on the EEC antitrust law has been appearing serially in the publication Wirtschaft und Wettbewerb, and will be cited hereinafter as "Deringer Commentary, EEC Treaty," with the specific Treaty or Regulation ("VO") article, the annotation paragraph number ("Anmerkung") and its location in the mentioned periodical, cited as "WuW." For similarly detailed English language coverage, see Oberdorfer, Gleiss and Hirsch, Common Market Cartel Law (1963), based upon Gleiss and Hirsch, Kommentar zum EWG-Kartellrecht (1962). See also the already mentioned Common Market Reporter of Commerce Clearing House, which devotes considerable space to antitrust matters.

mission be notified of any agreement for which the parties seek to obtain an exemption\(^8\) or a so-called negative attestation.\(^9\) The latter, a formal decision that the agreement submitted is not subject to Article 85 at all, may come to be significant once various types of arrangements have been reviewed and their status established; for the next few years, however, the exemption procedure will be the more important. Indeed, while the regulation gives the Commission ample powers of direct investigation, its energies have been directed almost solely to perfecting the self-policing scheme. For the present at least, it is the working of the notification process and its relation to substantive antitrust law that require elaboration.

In general, unless the Commission was notified of existing restrictive arrangements by November 1, 1962 or February 1, 1963, the parties thereto can no longer obtain an Article 85(3) exemption.\(^10\) "New" agreements, executed after March 13, 1962, also can qualify for exemption only upon notification,\(^11\) but it may be that there is no such time limit for their submission.\(^12\) In either case no one seriously expects participants in outright price fixing, production fixing or market dividing schemes to notify them. The perpetrators of such conspiracies could not gain from doing so, since these arrangements ordinarily would not qualify for exemption.\(^13\) The only

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\(^8\) Articles 4 and 5, Regulation 17.

\(^9\) Article 3, Regulation 17. For the first publication of requests for such negative attestations, see 6 J. O. C. E. 1853, 4 July 1963. Both applications concern restrictions upon parties outside the Community.

\(^10\) Article 4, Regulation 17. The first date is for multi-party agreements; the second for two-party ones. Regulation 59, 5 J. O. C. E. 1655, 25 July 1962, amending Regulation 17.

\(^11\) Article 5, Regulation 17. The regulation went into effect on that date.

\(^12\) See the discussion in Buxbaum, \textit{op. cit., supra}, note 4\(a\), at page 71.

\(^13\) This paper will not consider the effect of Article 15(2) of Regulation 17 upon the decisions of enterprises involved in flagrant anticompetitive practices to end them. That is irrelevant to the problem of voluntary notification.
agreements of which the Commission can expect to be notified with any consistency are distribution agreements, perhaps some trade association articles or rules peripherally involving competitive issues, and of course patent and know-how licenses.  

The importance of the last can hardly be overemphasized. European and American experience with these agreements, with their direct effect upon industrial structure and economic performance as well as upon their participants' social conduct, and with their aggressive and sometimes distorted use of private law concepts warrants that careful consideration be paid them. Today when European industrial enterprises, spurred by the Common Market they are thus developing, are coalescing informally and formally on a scale never

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14 Reports as to the first date indicate that approximately 920 multi-party cartel agreements were notified, including important arrangements in the food, chemical, textile, construction and metals industries. See 6 Bull. E. E. C. 15 (No. 4, April 1963); 15 Neue Juristische Wochenschrift [hereinafter "NJW"], Number 50, December 1962, at v. In a talk before the Antitrust Section of the New York State Bar Association, at its 86th Annual Meeting (New York, January 24, 1963), Dr. Verloren van Themaat, Director General of the Commission's Department on Competition, stated that almost 50% of these involved exclusive distributorship arrangements (many multi-party) and 25% licensing agreements. Ninety per cent of them were "old" (before March 13, 1962) contracts. These figures might be compared with the experience of the German Federal Cartel Office, which in its first full year of operation, 1958, was notified of 190,856 price maintenance provisions (about half thereof in the automotive parts field), 153 license agreements (mainly patent licenses) and 99 cartel arrangements falling under Paragraphs 2-7 of the German Cartel Law. In addition, the Cartel Office instituted over 500 investigations or proceedings on its own motion, while another 427 ran at the Land level. The Cartel Office's staff included at least 50 professional members. See Bericht des Bundeskartellamtes über seine Tätigkeit im Jahre 1958 Sowie über Lage und Entwicklung in Seinem Aufgabengebiet, [hereinafter "BKA Rep. 1958"], Deutscher Bundestag, 3d Session, Drucksache 1000, at pages 12-38.

before witnessed, the potential effects of the misuse of patents and other industrial property rights to achieve trade restrictive ends are serious. This circumstance alone justifies reasonable enforcement of the antitrust legislation applicable to such arrangements. While Commission enforcement attitudes are to some degree tied to manpower questions, they are also related to the degree of formalism with which the Commission may limit its very extensive jurisdictional powers. It seems appropriate, therefore, critically to examine present indications of its expected activities in this particular field, and to inquire further whether an extensive and realistic enforcement program in fact is being initiated.

As has been mentioned, the Commission has an ample array of powers at its disposal, larger than that held by either the Department of Justice or the Federal Trade Commission. Indeed, a complete discussion of Regulation 17 would begin not with the notification and exemption mechanism but with the provisions for the investigation both of economic sectors

16 Current indications of this trend may be found in the occasional reports entitled "Interpenetration" in the unofficial daily Bulletin "Europe," Agence Europe (Luxembourg), and in the trade journals. Relations created by licensing agreements do not generally appear in such reports.

For at least partly descriptive studies of industrial organization and structure in various of the member states, see, e.g., Arndt, ed., Die Konzentration in der Wirtschaft (3 vols., 1960) (esp. König, Kartelle und Konzentration, Vol. I at page 303); Houssiaux, Le pouvoir de monopole (1958); Sheahan, Promotion And Control of Industry In Postwar France (1963), esp. C. 14.

17 See, e.g., The Economist, October 20, 1962, page 313.

18 The Commission's Department on Competition had approximately 40 attorneys on its staff as of January 1, 1963, and has sought authorization to double that number. This was apparently refused by the Council. See 5 Bull. E. E. C. 27 (No. 8, Aug. 1962).

19 For some indications of footdragging at least by industry in the notification of apparently notifiable agreements, see Bowes, Views of European Lawyers, APLA Bull. 496 (1962); see also Armengaud, Comment on The Judgment Rendered by the Court of Justice of the E. E. C. in the case De Geus v. Bosch and Van Rijn, 7 Antitr. Bull. 897, 905 (1962).
and of suspected particular violations.\textsuperscript{20} In connection with either, for example, the Commission can obtain access to a firm's books and other "professional documents," obtain copies, demand verbal explanations of such records, and for non-cooperation or false information impose fines ranging from $100 to $500,000.\textsuperscript{21} Its decision that Article 85 or 86 has been violated can result not only in cease and desist (or modification) orders, but directly in monetary penalties. Violations of these articles and of the Commission's orders can be met by daily fines of $50 to $1,000 or by single penalties ranging to $1,000,000 or 10% of the offender's annual turnover, whichever is greater.\textsuperscript{22} In general, however, scant attention has been paid to at least the first part of this group of powers,\textsuperscript{23} and the Commission itself has relegated this entire aspect of its activities to the background.\textsuperscript{24} The notification and exemption procedure already described remains the first step in the Community's regulatory agency approach to antitrust enforcement.

Assuming the efficacy of the notification system, recent developments nevertheless justify some expression of doubt about the treatment of license agreements within this structure. Article 4(2) of Regulation 17 (Article 5 in the case of

\begin{footnotes}
\item 20 Articles 3, 11, 12 and 14, Regulation 17.
\item 21 Article 14, Regulation 17.
\item 22 Articles 15 and 16, Regulation 17.
\item 24 See 5 Bull. E. E. C. 29 (No. 8, Aug. 1962); although along with exemption applications the Commission does give priority to investigation of suspected violations. At present, however, it seems these will have to be carried out through the manpower of the national cartel agencies, such as these are. See Linssen, The Antitrust Rules of the European Economic Community, 18 Record 289 (1962), at pages 299-300. An idea of the Commission's activity in Article 89 examinations may be gleaned from E. E. C., Commission, Fifth General Report on the Activities of the Community 78-79 (1962).
\end{footnotes}
“old” arrangements) deletes the requirement of a present notification as a prerequisite for an exemption in the case of certain types of so-called “minor” agreements. According to the clause pertinent to this discussion, Article 4(2)(ii)(b), the notification requirement is not imposed upon arrangements which are executed by only two enterprises if their sole effect is to “impose restraints upon the rights of any person acquiring or using industrial property rights—particularly patents, utility models, registered designs or trademarks—or on the right of any person entitled by contract to acquire or use manufacturing processes or knowledge relating to the utilization or application of industrial techniques.”

As to such restrictive agreements an application for exemption may be made at any time in the future. The Commission is empowered if not required to apply Article 85(3) no matter when the notification occurs, so long as one precedes the exemption request.

This special regime can be understood only if the issue of notification is distinguished from the substantive problem of exemption criteria under Article 85(3). Thus the Commission itself early emphasized that freedom from the notification prerequisite did not guarantee a later exemption from the antitrust proscription, even if the agreements fitting within the somewhat vague contours of Article 4(2) of the regulation might in general correspond to those likely to win an exemption. Indeed, Article 7(2) of Regulation 17, which

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25 These “restrictive” provisions should be distinguished from restrictive provisions which are “inherent in the patent.” These are generally considered outside the scope of Article 85 of the treaty entirely, a conclusion which is critically examined in a paper shortly to be published by the writer, Restrictions Inherent In The Patent Monopoly.


permits amendment of “bad” though non-notifiable agree-
ments so that they might qualify under Article 85(3), would
make no sense if all non-notifiable restrictions were assured
an exemption.\textsuperscript{28} The purpose of Article 4(2) was to save the
Commission from an avalanche of relatively pedestrian mar-
keting arrangements while it struggled with more important
issues. Later, many of these arrangements might qualify for
exemption; for the time being, the problem was to defer their
examination. That the provision was a temporizing one only
may be inferred from Article 22 of the regulation. Presum-
ably inserted by either the Council or Commission during the
last private amendment procedure after the public discussion
of the draft regulation by the consulting European Parlia-
ment had ended,\textsuperscript{29} this article calls for the Commission to
promulgate explicit “classes” of agreements or provisions of
which it should be notified even if they presently fit within
Article 4(2).\textsuperscript{30} At the same time, however, the Commission

\textsuperscript{28} See Françon, Les ententes et les monopoles selon le Traité
de Rome, \textit{supra} note 26, at 382; text \textit{infra}, note 68.

In connection with this entire problem of notification, Deringer,
Inhalt und Auswirkungen der ersten Kartellverordnung der Eu-
ropäischen Wirtschaftsgemeinschaft, 6 Gewerblicher Rechtsschutz und
Urheberrecht, Auslands- Und Internationaler Teil [hereinafter
"GRUR AIT"] 283 (1962) at page 294, and footnote 82, has made the
perhaps self-evident but important point that the notification “obli-
gation” must be viewed from the wording of the entire agreement;
even one provision not exempt under Article 4 requires that the
Commission be first notified if an Article 85(3) exemption is going
to be sought.

\textsuperscript{29} Cf. European Parliament, Session of October 19, 1961 and the
Regulation there proposed, in \textit{II Europäisches Parlament, Ver-
handlungen, Ausführliche Sitzungsberichte} No. 46, page 281 (1962); see Kaul, Zur Ammeldung von Ausschliesslichkeits-
und Vertriebsbindungen nach dem EWG-Kartellrecht, 8 Aussenwirtschaftsdienst
des Betriebs Beraters [hereinafter “AWD”] 156, 158 and notes 8 &
9 (1962).

\textsuperscript{30} Article 22(1): “The Commission shall submit to the Council
proposals for making certain categories of agreements, decisions,
and concerted practices such as are referred to in Article 4, para-
gragh 2, and Article 5, paragraph 2, subject to the notification pro-
vided for in Articles 4 and 5.” Cf. the Commission’s conclusion not
to extend to certain international restrictive practices the duty to
was empowered to ease its exemption application workload in the future by another clause of Article 22, which would have it propose to the Council special provisions as to “minor” restrictive arrangements, provisions more liberal in their treatment of such arrangements than is the present regulation.  

The Two Commission Announcements

Acting apparently under this rather ambiguous and vaguely worded second proviso of Article 22 (but without submitting its declaration for Council approval), the Commission on November 9, 1962 announced an interesting if disquieting “letter of intent” which for a time bid fair to equate the concepts of notification and exemption after all. In this Announcement the Commission tentatively declared that it intended for a period of three years automatically to grant an Article 85(3) exemption to any patent license provision between two parties involving: (1) tie-in arrangements necessary for the technically proper use of the patent; (2) mutual obligations to grant non-exclusive rights under improvement or “new use” inventions; or (3) a licensor obligation not to grant rights under the patent to others (i.e., an exclusive license) so long as the licensee was free to grant notify presently non-notifiable items, despite Article 22, reported in 16 NJW ii (No. 18, May 2, 1963).

Contra is Françon, Les ententes et les monopoles selon le Traité de Rome, supra note 26 at pages 384-6, stating that this was a hidden attempt to ensure that compulsory notification would become the rule over a period of time. It seems, however, that the developments of November and December, 1962 indicate otherwise. See also, Bernini, Problèmes concernant l’application de l’Article 85, no. 3 du Traité C. E. E. à certaines catégories d’accords restreignant la concurrence, 78 Journal des Tribunaux 345, 349 (1963).


5 J. O. C. E. 2627, 9 November 1962, as corrected November 13, 1962, id. at page 2687. This was in the form of four separate announcements, two dealing with vertical distributorship restraints, two with patent licensing. With each, one involved criteria for exemptions under Article 85(3), the other the original applicability of Article 85(1).
sublicenses that would themselves either be unrestricted or merely add restrictions not going beyond those rights "inherent within the patent itself" or beyond items (1) and (2) above, always providing that the licensee and its sublicensees together not occupy a market dominating position in the sense of Article 86 of the Treaty. In addition, the Commission intended to adopt the position that patent license clauses in respect of the following: (1) limiting the licensee to manufacture, use or sale only; (2) in its volume of production of patented products or products manufactured with a patented process; (3) in its use of processes to certain technical areas; (4) as to the duration or territory of the license; (5) in the grant of assignments or sublicenses; (6) or requiring it to adopt certain markings on its wares, were not restrictive arrangements within the meaning of Article 85(1), apparently whether or not a dominant market position under Article 86 was involved.34 As to this latter point, while admittedly not dominant position as such, but only its abusive exploitation, is prohibited by Article 86, it does seem that Article 4(2) of the regulation was never intended to exempt licenses between or with one of such dominant parties from the notification system. Yet this is exactly what the November 9 Announcement purported to do. It refused automatic exemption to market dominating enterprises only in the case of sublicenses. By necessary implication exempt licensee restrictions remained so, even though the licensor imposing them enjoyed such a market dominating position. Perhaps to mitigate this stand, the benefits of the Announcement were not extended to licenses of unpatented know-how,35 although the


35 See the complaint made against this limitation in Gleiss and Hootz, Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs- und Patentlizenzverträge, 17 Betriebs Berater [hereinafter "BB"] 1304 (1962). More generally, see Ladas, Legal Protection of Know-How, 7 PTC J. Res. & Ed. 397 (1963).
latter are assimilated to patent licenses in Article 4(2) of the regulation.36

This entire approach had been presaged in the Practical Guide which the Commission issued in July of 1962.37 That document interpreted Article 4(2) to cover restrictive arrangements going beyond the content of the patent monopoly so long as these were not "unrelated" to the exploitation of the monopoly. Examples of unrelated restrictions included "unjustified" tie-in provisions, prohibitions against the manufacture of unpatented competitive items, agreements extending beyond the duration of the patent and the like. It has been suggested that the list might even include grant back provisions and non-challenge covenants, since formally speaking these are not related to the exploitation of the granted rights;38 the first, because it relates to other patents, the second, because it is not needed to make the patent function, in the way a technical tie-in clause, for example, might. On the other hand, restrictions "inherent in the patent mo-

36 The Regulation originally proposed to the European Parliament and Council of Ministers by the Commission, which also did not require notification of certain "less dangerous" agreements, did not include exchanges of unpatented know-how in this group: Article 5, in Appendix, Buxbaum, Antitrust Regulation Within The European Economic Community, 61 Col. L. Rev. 402 (1961), at page 429; see the proposal to change this article so as to include non-patented secret processes in the Report of the Internal Market Committee to the European Parliament, which became the basis for the Parliament's consideration of Regulation 17, Bericht (Deringer) im Namen des Binnenmarktausschusses, Eur. Parl., Sitzungsdoekumente No. 57 (September 7, 1961) par. 101 at page 25. For criticisms of this omission, see Van Notten, Know-how Licensing In The Common Market, 33 N. Y. U. L. Rev. 525 (1963).

37 See the description thereof, supra, note 4.

38 Deringer, Inhalt und Auswirkungen der ersten Kartellverordnung der europäischen Wirtschaftsgemeinschaft, supra, note 27, at page 294. See same, Commentary, EEC Treaty, VO No. 17 Art. 4, Anmerkung 18, 13 WuW 91 (1963). (The English translation by the Commission Secretariat, supra, note 4, hides this possible difficulty, since it uses the much broader phrase, "relating to the utilization or application of industrial techniques.") This may explain the specific exemption of at least mutual non-exclusive grant back clauses attempted in the November 9 Announcement.
opoly,” according to the Practical Guide, would not only be exempt from notification, but would not even fall within Article 85(1) in the first place. This interpretation, of course, does follow the wording of Article 4(2) of the regulation, and raises the “inherent rights” concept to a central position in any discussion of patent licensing despite its absence from Article 85. In any event, with this previous interpretative document in hand, the November 9 Announcement is understandable.

More interesting is the sequel of events since November 9. Moved by motives not yet made clear, the Commission on December 21, 1962 issued a second Announcement, attached to Regulation 153 which concerned a simplified notification form for certain exclusive dealing contracts, that moved to yet another stand on patent licenses. It abandoned the proposed method of regulating licenses by means of automatic and abstract Article 85(3) exemptions for the time being.

39 See Campbell, Common Market: Recent Changes and Notifications, supra, note 32; Gleiss and Hootz, Keine Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs- und Patentlizenzverträge, 16 NJW 230 (1963). Another possible reason, that many of the provisions first declared exempt did not fall under Article 85(1) in the first place, is suggested by the Commission’s response to a Parliamentarian’s question, 6 J. O. C. E. 141, 26 January 1963. This is surprising in view of the additional listing, in the first set of Announcements, of restrictions also deemed outside the scope of that provision.

40 Regulation 153, 5 J. O. C. E. 2918, 24 December 1962 (the two Announcements are appended to this Regulation at pages 2921 and 2922; they were published on December 24, 1962 but promulgated December 21). For English translations, see Forrow, Developments Under The Common Market Antitrust Regulations, XVIII Bus. Lwr. 791, at page 802 (1963); 12 Int. & Comp. L. Q. 688 (1963). They are summarized in Ladas, The Deadline Of January 1, 1964 For Industrial Property Agreements, supra, note 4; and in Committee on Foreign Law, Report, Current Legal Developments in the European Economic Community, 18 Record 329 (1963).

41 Gleiss and Hootz, Keine Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs- und Patentlizenzverträge, supra, note 39; Campbell, Common Market: Restrictive Trading Agreements, 107 Sol. J. 42 (1963). For a prediction that such group exemptions would not be workable, see Becker, Effect of The Common Market
and announced instead a larger list of contract clauses that were deemed not even to be within the scope of Article 85(1). The list is divided into five groups, depending upon the rationale for finding Article 85(1) inapplicable, but is followed by an across-the-board limitation on this immunity that has proved highly upsetting to industrial circles because of its uncertain reach. The first and longest group of provisions is deemed outside Article 85(1) because each is “inherent within the patent monopoly.” It comprises (as illustrations and not solely) the following licensee restraints:

1) A restriction to one or more of the types of exploitation (manufacture, use or sale) contemplated by patent law;

2) A restriction (a) of the manufacture of the patented product or (b) of the use of the patented process—to a given technical area;

3) A quota restriction concerning number of produced items or usages;

4) A restriction of the patent’s use as to (a) duration (shorter license period than the patent); (b) territory (geographical or by firm); and (c) person (prohibition of assignment or sublicensing, etc.).

The second “group” covers merely the licensee’s obligation to use appropriate trademark or trade name markings of the licensor, justified by the legitimate interest of the patentee in showing that the protected product has its source in the invention, and seemingly qualified by permitting the licensee to add its own product marks thereto. Because of this justification, it is doubtful that a similar obligation im-


42 Gleiss and Hootz, Keine Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs- und Patentlizenzverträge, supra, note 39.

posed when the product is manufactured under a licensed process would be valid.\textsuperscript{44}

The third group comprises tie-in arrangements justified by the indispensability of the tied item to the technically unobjectionable use of the invention. A tie-in directly to a source of the tied item, be it the licensor or a third party, is only permitted if objective specifications concerning the coerced product cannot be established.\textsuperscript{45} The stated rationale for the Commission's approach is the conclusory remark that no competition worthy of protection can be restrained by such provisions. This conclusion is difficult to understand. Most likely it merely means that the competition offered by a producer of inferior competitive supplies which cannot accomplish their very purpose and which harm some property right of the patentee is not worthy of protection; this is innocuous enough but begs the basic question: How "open" is this exemption and is such an open-end exemption compatible with practicable enforcement measures. The essential justification for this "group" is more likely Article 85(1) itself, which as an illustrative transgression lists agreements which "condition the conclusion of contracts upon the acceptance by the other contracting parties of additional goods or services, which, neither by their nature nor by commercial usage, have any connection with the object of these contracts."\textsuperscript{46} By negative implication, therefore, properly "related" tie-in provisions might be legitimate; a conclusion unfortunately weakened by the fact that patent licenses apparently were not thought of in connection with this clause.\textsuperscript{47}

\textsuperscript{44} See Baumbach-Hefermehl, Wettbewerbs- Und Warenzeichenrecht 1366 (8th ed. 1960).

\textsuperscript{45} It will be difficult to police this "objectivity," since the licensor's conclusion that these standards are met effectively precludes Commission scrutiny in most cases.

\textsuperscript{46} The translation is that by Riesenfeld, The Protection of Competition, in II Stein & Nicholson, \textit{supra}, note 6, at page 200.

\textsuperscript{47} See Wohlfarth, Everling, Glaesner and Sprung, Die Europäische Wirtschaftsgemeinschaft, Kommentar zum Vertrag 245-6 (1960).
The fourth group concerns provisions as to exchange of information about the use of the invention, or the parties' mutual obligation to grant non-exclusive licenses of improvement or application inventions. The Commission claims that such obligations can have no restrictive consequences so long as the licensee retains the right of passing on the new know-how to third parties and has continuing access to the licensor's further experience and inventions. This inclusion of grant back provisions may have been thought necessary because conceptually they are not restrictions inherent within the patent. Practically speaking, however, both grant backs and tie-in clauses might be better scrutinized on individual applications for exemption than immunized in this a priori fashion.

Finally, the licensor's promise not to license others or not to use the invention are also deemed outside Article 85, because at the present level of the Community's development these provisions cannot affect trade between member states, quite apart from the question whether such clauses intend or

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48 This emphasis comports with the insistence of the German Cartel Office that grant back provisions not become an indirect means of concentrating improvements in a given field in the hands of one party or otherwise assisting the formation of patent pools; cf. BKA Rep. 1959, supra, note 43, at page 45. See also, as to the pooling of patents in the context of a cartel formed to rationalize the members' productive capacity, under § 5 of the German Cartel Law, Application of Superphosphat-Industrie-Gemeinschaft, in 9 WRP 158 (1963); id. at page 297 (denied).

49 See the discussion text accompanying footnotes 33 to 39, supra.

50 Paragraph 20 of the German Cartel Law has also been narrowly interpreted as to grant backs. See Bundeskartellamt, Bericht über seine Tätigkeit . . . 1961 . . . , Deutscher Bundestag, 4th Sess., Drucksache IV/378 [hereinafter "BKA Rep. 1961"] at page 58; BKA Rep. 1959, supra, note 43 at page 45. Since the German Federal Cartel Office's practice is still the only significant source of experience—in this particular field—for the Commission, it is not unlikely that its decisions will continue to be important for the student of the developing Community antitrust law. Schapiro, The German Law Against Restraints of Trade—Comparative And International Aspects, 62 Col. L. Rev. 1, 201 (1962), is the best study in English of this statute.
effect restraints on competition. This explanation draws an analogy to the assignment of a patent, which would clearly be outside the scope of Article 85. In fact, the very use of the analogy indicates that these licensor inhibitions were specifically listed not because they pose an antitrust situation, but because they are restrictions upon the licensor, and therefore cannot be restrictions—upon the other party—inherent in the patent monopoly!\textsuperscript{51}

The large sweep of this declaration of inapplicability is considerably narrowed, however, by the cryptic provisions that patent pools, cross-licensing and multiple parallel licensing cannot obtain these benefits; and that in any event, the attitudes of other competent authorities, especially courts, cannot be prejudiced by the Announcement. As has been explained elsewhere,\textsuperscript{52} this latter limitation is probably required by Regulation 17 in any event, due to the complex division of competences contained in Article 9 thereof. The former, on the other hand, is the Commission’s own invention. In addition, the Announcement is not intended to affect the interpretation of Article 4(2)(ii)(b) of the Regulation, presumably even by the Commission. This would seem to follow from the non-binding nature of the whole Announcement, which is not a decision of the Commission and which produces no legal effect except perhaps to limit the Commission’s future discretion to some as yet undetermined degree.\textsuperscript{53} A more immediate problem is the legitimacy of the two Announcements under both the Treaty and the Council of Minister’s


\textsuperscript{52} Buxbaum, Incomplete Federalism: Jurisdiction Over Antitrust Matters in the European Economic Community, \textit{supra}, note 4a.

Regulation. The November 9 Announcement is now history, but a return to its scheme of automatic exemptions seems likely, and it is therefore analyzed in detail. An understanding of its weaknesses and theoretical limitations may again be useful in the foreseeable future.

The Situation Created by the Announcements

Although Article 87 of the Treaty of Rome foresees the issuance of implementing regulations by the Council of Ministers, acting upon the initiative of the Commission,\footnote{54} and although the celebrated \textit{Bosch} case\footnote{55} before the Court of Justice of the European Communities generally validated the overall scheme of the first major implementing Regulation, Number 17, that Regulation by no means has been approved or even tested in all of its parts. Certain questions as to its legitimacy, not to mention that of the recent Commission actions, are therefore still open.\footnote{56} It is more than likely, of course, that the Court of Justice will not incline to strike down the Commission’s evaluation of its own power in this

\footnote{54} In general, the Commission’s role in the promulgation of legislation is limited to initiating recommendations upon which the Council of Ministers then acts. Article 155. See generally, Stein, The New Institutions, in I Stein & Nicholson, \textit{supra}, note 6, at pages 33, 39-40.


\footnote{56} What the Court settled in the \textit{Bosch} case was that an exclusive (nationwide) franchise granted by a German firm to an exclusive dealer in each of several Member States was not \textit{ipso facto} null and void under Article 85(2) before March 13, 1962; its status thereafter depended upon the action of the Commission against it, following either notification or failure to notify. The content (as of then relatively unexplored) of the exempt-from-notification provisions was not—even by indirection—approved by this case; let alone the substantive and procedural implications of the November 9 and December 21 Announcements.
regard. Nevertheless, a complaint by a member state, if not by a private party, against either the Commission's claim of jurisdiction under the Regulation or its substantive antitrust views is a matter to be seriously considered; and such a step is still conceivable, despite the consultations that undoubtedly took place before at least the second of the recent Announcements was promulgated.


58 Article 173: "The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, it shall be competent to give judgment on appeals by a Member State ... on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power."

Article 175: "In the event of the Council or the Commission in violation of this Treaty failing to act, the Member States ... may refer the matter to the Court of Justice with a view to establishing such violation." See generally, Wohlfarth, Everling, Glaesner & Sprung, Die Europäische Wirtschaftsgemeinschaft, Kommentar Zum Vertrag 489-97 (1960); II von der Groeben and von Boeckh, Kommentar Zum EWG-Vertrag 124-41 (1960).

59 Article 10 of Regulation 17 provides for the establishment of a Consultative Committee on Cartels and Monopolies (a committee of Member State officials) to be consulted before any decision is reached concerning a negative attestation or Article 85(3) exemption or non-notified Treaty infringement. See Schwartz, Implementing The Anti-Trust Sections Of The Rome Treaty, supra, note 22, at pages 40-41. It has not yet, apparently, been convened to collaborate on the exemptions already applied for; see Bulletin "Europe," No. 1573, June 10, 1963, page 4.

So far as this Committee is concerned, the Commission did convene such a meeting in October of 1962, to discuss the substantive content and development of the non-notification categories in Article 4 of Regulation 17; cf. 5 Bull. E. E. C. 27 (No. 12, December 1962); presumably this concerned the November Announcement. See also Indemans, Het Colloquium Te Brussel, 11 Sociaal-Economische Wetgeving [hereinafter "Soc. Ec. Wet."] 182 (1963).
The November 9 Announcement seems to suggest that exemptions under Article 85(3) were available without notification. This suggestion necessarily assumes the debatable power of granting other than individual exemptions. The latter power should be examined first. Group exemptions as such are compatible even with a procedure requiring notification, and their legitimacy deserves separate discussion as a matter in itself. At first glance, of course, the December 21 Announcement seems to retract that of November 9 and to substitute in its place the equally novel procedure of *a priori* declarations of the non-applicability of Article 85. The Commission, however, has left the door open for the return of such general exemption declarations by leaving for a later decision the appropriate disposition of pools, cross-licenses and multiple parallel licenses that contain any of the provisions to which Article 85 is deemed not to apply. A full discussion of the legality of either procedure thus is needed to understand the position of license agreements under the Community's antitrust legislation.

According to the first Announcement, the Commission intended, for a period of three years, to apply the general Article 85(3) exemption, to all of the specified types of agreements. Since Article 8 of the Regulation purports to require

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60 Since a "decision," according to Article 139 of the Treaty, binds the specific addressee named therein, it is hard to understand how any general disposition of these three types of licensing arrangements can be by that route.

61 "It is intended to declare the provisions of Article 85(1) of the Treaty inapplicable, pursuant to par. (3) thereof, to the following groups of agreements concerning a restriction of the economic freedom of action of the partners to patent license agreements for a period of three years from the day of the publication of the decision in the Official Journal of the European Communities: . . ." First Announcement concerning the application of Article 85 of the Treaty to certain Patent License Agreements, 5 J. O. C. E. 2627, 9 November 1962 (author's translation).

62 This should not be confused with the permissive requirement that Article 4(2) agreements which may not presently fit the exemption criteria of 85(3) must be submitted by January 1, 1967, in
all exemptions to be limited in time, it seems clear that the “three years” qualification referred to the duration of the exemption, and the latter could have been granted though the Commission had not been notified of the particular agreement. In that case, however, the Commission must also have intended to equate non-notification with exemption, as well as indirectly to add to the non-notifiable list of Article 4(2) some provisions (such as non-exclusive grant backs) which probably did not fit within that list originally. This created a very confusing situation. Any restrictive provision exempted by the Announcement and not covered by Article 4(2) would have been prohibited and void after three years, since the possibility of obtaining a normal exemption would have vanished with the expiry of the time limit for notification. The Commission would then have been forced to continue granting “automatic” three year exemptions indefinitely to avoid the automatic applicability of 85(1). The only alternative would have been to subject these arrangements each time to a case by case review before extending the exemption period. The compatibility of either approach with Regulation 17 is extremely doubtful.

Even before the November 9 Announcement was issued, it was conceivable that the Commission would not be notified of many license agreements by their signatories, but at least these parties would be taking a calculated risk in so acting. Restrictions that did not go beyond those “inherent in the patent monopoly” could be justified by the explicit assurance of the Practical Guide—and inferentially by Article 4(2) order to be exemptible after correction. Article 7(2), as modified by Council Regulation No. 118/63, 6 J. O. C. E. 2696 (Nov. 7, 1963). See the discussion infra.

63 Article 8(1): “A decision to issue a declaration under Article 85, paragraph 3, of the Treaty shall be valid for a specified period and may have certain conditions and stipulations attached.”

64 There are some such clauses or Article 7 of the Regulation has very little application.

65 “Those competitive restraints, on the contrary, which are inherent in the industrial property right, do not fall under Article 85(1), because they are not voluntarily agreed upon by the parties
itself—that these clauses were not within Article 85 in the first place. Those that fit Article 4(2) and did not resemble the major transgressions illustrated in the Practical Guide, that is, licensee restraints other than such "unrelated" ones as unjustified tie-ins and extra-patent manufacturing prohibitions, could also be safely left unnotified—but only until January 1, 1964, now January 1, 1967. From then on, however, parties thereto run the risk of finding out that these "old" agreements might not be exempted under Article 85(3) after all, at a time when it is too late to alter them under Article 7 of the regulation.

This article was adopted to give parties to pre-1962 restrictive arrangements an opportunity to delete their objectionable parts and still to obtain an exemption therefor which in the Commission's discretion could be retroactive to as early as March 13, 1962. This benefit was available to agreements of which the Commission should be notified, in which case notification had to occur by February 1, 1963 at the latest. It is also available to agreements with non-notifiable, Article 4(2), aspects; these must be corrected and then nevertheless submitted, by January 1, 1967. Parenthetically, it should again be stressed that the very wording of Article 7 conflicts with the later efforts automatically to exempt (or to read out of Article 85) all non-notifiable restrictive provisions.

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but result directly from the [patent] law. Article 4(2)(ii)(b) does not, therefore, cover them." Practical Guide, supra, note 4, at page 16 (German ed.; author's translation).


67 Regulation 17, Article 7(1), as amended by Regulation 59, supra, note 4. The effect upon third parties, and upon municipal courts and agencies, of such an examination is discussed in Deringer, Commentary, EEC Treaty, VO No. 17 Art. 7, Anmerkungen 1-7, 13 WuW 183-84 (1963).

68 Article 7(2): "Paragraph 1 shall be applicable to agreements . . . which fall within the categories specified in Article 4,
In any event, when Regulation 17 was first enacted, license agreements were subject to all of the described risks. In fact, nothing in the Regulation expressly placed restrictions inherent in the patent monopoly outside the reach of Article 85 in the first place, although this is the only logical inference permitted by the complex structure of Article 4. Any doubt remaining on that score was put to rest by the Practical Guide. In a sense this whole development is open to question, since nothing in the wording or policy of Article 85 compels or invites this "inherent restrictions" approach. Support for the concept is often sought in the German Cartel Law, but a careful reading of Section 20 thereof indicates that, on the contrary, the Section represents a legislative policy decision to except "inherent restraints" from the otherwise applicable antitrust proscription. Again, nothing in Regulation 17 clearly indicated the content of this "inherent in the patent" rubric. That vague concept has now been given

paragraph 2 . . ."; see note 28, supra. For the motives that led to an extension of the original 1964 deadline, see 6 J. O. C. E. 2163 (1963).

69 See e.g., Schumacher, Die Durchführung der Artikel 85 und 86 des Rom-Vertrages, supra, note 26; Becker, Effect Of The Common Market "Antitrust" Law on American Companies, supra, note 7.

70 "Contracts respecting the acquisition or the use of patent, utility models, or exclusive rights in brands are invalid to the extent that they impose upon the assignee or licensee any restrictions in his dealings which exceed the scope of the statutory privilege; restrictions concerning the mode, extent, quantity, territory or period of the exercise of the privilege do not exceed the scope thereof." (Translation by Riesenfeld, The Protection of Competition, in II Stein & Nicholson, supra, note 6, at pages 223-24.)

71 The Government's "Explanation" of the proposed statute, Begründung Zu Dem Entwurf Eines Gesetzes Gegen Wettbewerbsbeschränkungen, Deutscher Bundestag, 2d Sess., Appendix I to Drucksache No. 1158 (22 January 1955), reprinted in Müller-Henneberg & Schwartz, Gesetz Gegen Wettbewerbsbeschränkungen, Kommentar 1057 (1958) makes this clear in its opening comments on Section 20 (then Section 15):

"In the framework of this second part the statute must also consider the problem of the extent to which abusive exploitation of a monopoly granted by an industrial property right should be countered." Id. at page 1089.
substance by the December 21 Announcement, along lines foreseen by the commentators and critically evaluated elsewhere.\textsuperscript{72}

Finally, nothing in the regulation indicated which of the non-notifiable restraints were likely to obtain an Article 85(3) exemption. In part this was traceable to the desire of the Council of Ministers, and perhaps of the Commission, to leave the entire correlation indefinite.\textsuperscript{74} Also, even assuming that most agreements not notifiable could be exempted, there was no bright line between notifiable and non-notifiable agreements, let alone between non-notifiable exempt and non-notifiable non-exempt ones. This line was partially supplied by the Practical Guide, which at least illustratively staked out the notification territory.\textsuperscript{75} The converse of the proposition, that non-notifiable provisions would either be exempt or not even within Article 85(1), was first suggested by the ephemeral November 9 Announcement; and has now been more forcefully stated by that of December 21, at least as to two of the three typical patent license provisions that were of doubtful status.\textsuperscript{76} If this discussion properly characterized

\textsuperscript{72} See, e.g., Schumacher, Die Durchführung der Artikel 85 und 86 des Rom-Vertrages, supra, note 26; Deringer, Die erste Durchführungsverordnung zu den Artikeln 85 und 86 des EWG-Vertrages, supra, note 23. Cf., however, Koch, The European Economic Community, 6 PTC J. Res. & Ed. 97, 102 (Special Conference Issue, 1962).

\textsuperscript{73} Buxbaum, Restrictions Inherent In The Patent Monopoly, supra, note 25.

\textsuperscript{74} Cf. Practical Guide, supra, note 4, at pages 16, 19, 23 (German ed.).

\textsuperscript{75} At least by negative implication, since an illustrative list of non-related and therefore notifiable license restrictions is set forth ibid. These include license restrictions extending in time beyond the duration of the patent, requirements that the licensee procure raw materials from the licensor not needed for the proper technical use of the patent, and prohibitions against the manufacture of products not covered by the patent claims. Ibid.

\textsuperscript{76} Even within the framework of the December 21 Announcement there exist practical difficulties, however. For example, how does one reconcile the requirement that no restriction is immunized which extends beyond "the patent's" duration with the immunization of non-exclusive grant back clauses? And see discussion, supra, note 45.
the regulatory structure, it seems apparent that at least in the case of single, one-directional patent licenses, notification would primarily have occurred only for those permitting the licensor to fix the price at which the licensee was to sell products claimed by, or produced by processes claimed by, the former's patents.\(^7\) If these enactments nevertheless do not solve the Commission's regulatory workload problems, that is only because its declaration of the inapplicability of the second Announcement to cross and parallel licensing and the like is unrealistic even for the minor leagues.

The Commission has thus built a large edifice upon a regulation of the Council of Ministers that is not only silent about these described approaches, but is to date itself untested in these very aspects. The most important unsettled issue is whether Regulation 17 permits a wholesale approach to exemptions or to negative attestations. Does Article 85(3) permit this method of granting exemptions? Does Article 85(1) allow the grant of negative attestations \textit{en masse} that is used in the December 21 Announcement? In general, it may also be asked whether the substantive decisions made by the Practical Guide and both Announcements are appropriate under the Regulation. Although as already mentioned, these are problems for the Court of Justice to resolve, some comments on them may not be out of order here. The perhaps inordinate emphasis on general exemption procedures under Article 85(3) despite the withdrawal of the November 9 Announcement is justified by the continuing attraction this approach seems to have for the Commission.\(^8\)

\(^7\) See Kronstein, "Cartels" Under The New German Cartel Statute, 11 Vand. L. Rev. 271, 292 (1958). There may be a distinction, however, between unpatented products produced by means of a patented apparatus, and unpatented products produced directly by means of a patented process, if as seems to be the case in Germany, the protection of the process patent extends to these products; see Reimer, Patentgesetz Und Gebräuchsmustergesetz 253-58 (2d ed. 1958); Lieberknecht, Patente, Lizenzverträge Und Verbot Von Wettbewerbsbeschränkungen 223-24 (1953).

\(^8\) The December 21 Announcement seems to favor the use of general exemptions in the consideration of agreements not fitting its
AUTOMATIC AND GROUP EXEMPTIONS

To the extent that Regulation 17 of the Council of Ministers is claimed as a separate source of authority for the Commission's originally proposed approach, it too, of course, could no more survive a challenge of Treaty conflict than could the Commission's own Practical Guide or Announcements. Nevertheless, the earlier argument as to the surprising use made of the Regulation by these items implies that they might be found wanting when tested against the Regulation itself. Its only grant of authority to issue general exemptions is contained in Article 22, and this as already explained relates to categories for notification purposes, not for exemptions; further, it delegates no legislative authority to the Commission. On the contrary, other articles of the Regulation tend to confirm that the notification procedure is essential to all exemption activity. Thus Article 21, requiring the publication of decisions taken pursuant to Article 8 (the issuance of an exemption), specifically requires the naming present criteria of legality; see also Horton & Picarda, Notifiable Common Market Transactions, CXIII Law J. 559 (1963).

79 This would be pursuant to Articles 22 and 24 thereof; see text accompanying footnotes 28 to 32, supra.


81 Article 22(2) (in the translation of Regulation 17 prepared by the Commission Secretariat and printed as Supplement to 5 Bull. E. E. C. (No. 2, February 1962)) provides: "Within one year from the entry into force of the present Regulation the Council shall examine, on a proposal of the Commission, any special provisions which could be made in derogation from the provisions contained in this Regulation with respect to the agreements, decisions and concerted practices referred to in Article 4, paragraph 2, and Article 5, paragraph 2." To the extent the November 9 (and possibly the December 21) Announcement purported to base its "en masse exemptions" on Article 22, it contravened the requirement that these be Council provisions. See Campbell, Common Market: Restrictive Trading Agreements, supra, note 41.

of the parties concerned. This could hardly have been accomplished if the automatic exemption granted by the first Announcement was to be obtained without application; yet this seems to be the suggestion of the Practical Guide, which states that the parties could obtain the 85(3) exemption without formal notification. While this refers to notification per se rather than to an application for exemption, the latter is generally made by notifying the Commission of the agreement for which exemption is desired. Indeed, Form B, the notification form, is at the same time an application for exemption. In addition, Article 19 requires a hearing before an 85(3) exemption can be granted, open not only to the parties but to interested third parties—hardly compatible with

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21(1): "The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8."

21(2): "The publication shall name the parties concerned and give the essential content of the decisions; the justified interest of the enterprises that their business secrets should not be divulged shall be respected."

The statement in the Practical Guide on this point reads as follows:

"These categories [the non-notifiable ones] may dispense with the formal requirement of notification. While a notification is always possible . . . it is not necessary

(a) because the parties concerned can obtain a declaration of the Commission according to Article 85, paragraph 3 even without formal notification . . ." Page 16, German ed.

While this refers to notification rather than the application for an Article 85(3) exemption, the latter application is generally made by notifying the Commission of the agreement, since Form B, the notification form, in essence contains this application. Regulation 27, 5 J. O. C. E. 1118, 10 May 1962.

Regulation 27, 5 J. O. C. E. 1118, 10 May 1962.

19(1): "Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the enterprises or associations of enterprises concerned an opportunity to express their views on the points objected to which have been taken into consideration by the Commission."

19(3): "When the Commission intends to . . . render a decision applying Article 85, paragraph 3, of the Treaty, it shall publish the essential contest of the . . . notification, inviting all interested third parties to submit their observations within a time-limit which it shall fix and which shall not be less than one month. Publication
a procedure that would not require the emergence of the contracting parties.\footnote{7} Conclusive is the remainder of this Article 19(3), which provides that the published notice of the hearing shall contain the notification giving rise to the requested exemption. This of course indicates that an exemption can only be granted upon particular request by specified parties.\footnote{8}

It seems, therefore, that the Practical Guide was misleading in intimating that exemptions might be issued without application.\footnote{9} Even if the first Announcement required applications for the issuance of the there-promised exemptions, it would be unduly generous to find there a requirement of a separate application for each particular contract. At best the Announcement merely required application for exemption of groups of agreements at a time, a concept that must be tested against Article 85 itself, where it is first mentioned and defined.

Article 85(3) of the Rome Treaty authorizes the granting of exemptions not only to individual agreements or concerted practices, but to "groups" or "categories" of agreements between enterprises, agreements between associations of enterprises, and concerted practices. How general may a group or category be and still qualify for one exemption? At the outset it should be stressed that the Treaty does not state

\begin{quote}
shall respect the justified interest of enterprises that their business secrets should not be divulged."
\end{quote}


\footnote{8} That is, that exemption applications under Article 85(3) could only be considered upon notification, and that such notification could not be circumvented by the "general exemption" of the November 9 Announcement.

\footnote{9} Verloren van Themaat, Address to Antitrust Section of New York State Bar Association, New York, January 24, 1963; see Deringer, Inhalt und Auswirkungen der ersten Kartellverordnung der Europäischen Wirtschaftsgemeinschaft, \textit{supra}, note 28, at page 287.
that the exemption procedure must begin with a party application. The text should therefore be interpreted so as to be compatible with other procedures; for example, one that would allow the Commission on its own motion to apply Article 85(3) to a specific agreement known to it. From that point of view, the breadth or generality of the items exempted at any one time is a neutral matter. Indeed, the fact that even groups of “concerted practices” can be exempted might lend some weight to a relatively broad interpretation of “group.” When only agreements are involved it could be argued with merit that “group” should logically mean identical agreements between, for instance, one manufacturer and his stable of wholesalers, or at most identical agreements used by all members of a particular trade association for each one’s distribution structure. Therefore, a broader interpretation would at best be another choice as against an equally defensible narrow one. When concerted practices are involved, however, it is admittedly more difficult to conceive of a group thereof in the same narrow sense. This phrase, after all, deals with consciously parallel conduct; even in the singular this is already a group of practices in the sense of being conduct (although perhaps of a unilateral kind, such as fixing a particular price) indulged in by several parties. On the other hand, even here one can posit groups of parallel practices; for example, the following of prices fixed for a variety of products by the leader in that particular market.


The wording of the phrase thus seems to be an inadequate basis for determining the breadth of the exemption.\textsuperscript{93}

Much more important, and seemingly a conclusive reason for adopting a narrow interpretation, is the requirement that the exemption can only be granted when certain substantive criteria are met by the agreement or practice, or groups thereof. Known as the two positive and two negative criteria, and cumulatively required, they are that the agreement aid the production or distribution of goods or technical or economic progress generally, that it allow consumers to benefit from these advantages, that it only include restrictions indispensable to effect such goals, and that it not eliminate as much as a substantial proportion of the relevant competition.\textsuperscript{94} It is difficult to imagine how a determination that these criteria are satisfied could ever be made on the basis of the mere wording of an agreement, not to speak of a group thereof, in the absence of (a) an examination of the economic setting of the parties and products involved in the agreement,\textsuperscript{95} (b) a review of the entire agreement, not just the anti-competitive portions thereof, since this may—especially with patent licenses—provide relevant information as to market positions;\textsuperscript{96} and (c) investigation into the use of similar re-

\textsuperscript{93} The question did not seem to concern most writers before the promulgation of Regulation 17.

\textsuperscript{94} For an earlier review of the nature of these requirements and their applicability to specific arrangements, see Buxbaum, Antitrust Regulation Within The European Economic Community, \textit{supra}, note 36, at pages 409-14; del Marmol, Rapport Introductif Concernant Les Règles De Concurrence Applicables Aux Entreprises A l'Interieur Du Marché Commun, No. 510, Ligue Européenne de coopération économique (1957).


straints by other firms in the particular market. All of this is compatible with exemptions for groups of agreements or practices only if "group" be properly defined. For example, the Commission might well exempt an identical group of non-exclusive licenses granted to a variety of licensees by one patentee not dominant or substantial in his relevant market; indeed, this is a very common type of business situation and a fairly limited investigation should suffice to establish the innocuous nature of such a group of agreements.

These criteria, however, can hardly be deemed satisfied when the exemption is granted simply because the agreements, in the abstract, are limited to a particular form of restraint. To refer again to a previous discussion, we might consider one of the three provisions for which the November 9 Announcement proposed an automatic exemption and which has now, in somewhat narrower form, been declared entirely legitimate by the December 21 Announcement: The tie-in requirement that the licensee purchase from the licensor or another compulsory source presumably unpatented supplies necessary to the technically proper use of the patent. Admittedly the exemption (and even more the immunity) is a narrow one and is sanctioned to some degree by Article 85(1) itself, yet abusive or illegitimate readings are not unknown. If the licensee or all licensees together are the major users of the supplies, then a patent license or group thereof contain-


98 See text accompanying footnotes 45 to 47, supra.

99 See International Business Machines Corp. v. United States, 298 U. S. 131 (1936); see also Consent Decree, United States v. International Business Machines Corporation, CCH Trade Cases Par. 68,245 (S. D. N. Y. 1956).
ing this requirement will eliminate competition for a substantial part of this market, since the licensor's competitors in the manufacture of these supplies, assuming they are not on an approval list, would be prevented from selling them to the licensees. Again, if a rational licensee would use only the licensor's or other specified supplies in any event, because only thus would the patented process or apparatus operate, the tie-in clause would not be needed to achieve the assumed technological advantages inherent in the entire transaction.\footnote{Cf. Switzer Bros. v. Locklin, 297 F. 2d 39 (7th Cir. 1961); Stearns v. Tinker & Rasor, 252 F. 2d 539 (9th Cir. 1957). For a typical earlier case, compare Vulcan Mfg. Co. v. Maytag Co., 73 F. 2d 136 (8th Cir. 1934) (questioned in the Stearns case, above, at page 604).}

Again, a license making available to the licensee a cheaper method of manufacturing its present product line, and requiring such a tie-in, would not necessarily give to ultimate consumers a fair share of the resulting advantages if the licensee were not pressed by its competition to pass on cost savings in the form of lower prices.\footnote{For the proper definition of "advantages" under Article 85(3), cf. BKA Rep. 1959, supra, note 43, at page 169; see Buxbaum, Antitrust Regulation Within The European Economic Community, supra, note 36, at pages 410, 413-14.} These are not 'a parade of imaginary horribles'; each is a readily conceivable occurrence; yet under the Commission's Announcements the provision is to some degree legal and in any event need not be submitted. One may leave aside the larger question whether this formalistic approach is compatible with the overall policy or aim of antitrust regulation\footnote{See Mitchell, Unterschiedliche Behandlung im Sinne des §26, Abs. 2 GWB, 12 WuW 387 (1962).} and still conclude that the whole categorization concept used in these Announcements may yet be found to conflict with the Treaty.\footnote{Section 57 of the British Patents Act of 1949, 12, 13, & 14 Geo. 6, c. 87, following prior law in forbidding tie-in practices, other than of parts needed to repair the patented product, offers an instructive contrast. See Meinhard, Inventions, Patents And Monopoly, 277-280 (2d ed. 1950). The statute does not contain the "technical
its automatic exemption policy, implied the use of a "group" exemption approach that was too broad for Article 85(3).104

Even if the automatic exemptions promised by this Announcement were to have been obtainable only upon specific application, and only for groups of agreements narrow enough to satisfy Article 85(3), it would still have been in conflict with Regulation 17. The Announcement obviously and consciously promised in advance of any hearing to grant an exemption to an applicant if the license agreement read as the Announcement specified.105 This of course would have made any Article 19 hearing a useless procedure, as the only objections an interested third party might have to such agreement were rejected in advance. In fact, since such parties could object to a proposed exemption under Article 19 and

need" exception, yet no untoward consequences seem to have resulted. Ibid.

The danger that this exception can be abused is illustrated by the German Bundesgerichtshof [hereinafter “BGH”] Decision of October 16, 1962, in 17 BB 1396 (1962).

Even more difficult problems will undoubtedly arise, not from ordinary restrictions, but from efforts to exploit combination patents by licensing the combination only upon purchase of a separately unpatented component. Cf. the concern expressed in BKA Rep. 1959 supra, note 43, at page 45. In American legal experience the overhead trolley, dry ice and radio tube situation, for example, are examples. See McCormack, Restrictive Patent Licenses and Restraint Of Trade, 31 Col. L. Rev. 743 (1931); Director & Levi, Law and the Future: Trade Regulation, 51 NW. U. L. Rev. 281 (1956), at page 291.

104 For a suggestion that group exemptions are still likely, but only after a new Council regulation can be enacted, see Horton and Picarda, Notifiable Common Market Transaction, supra, note 78.

105 The First Announcement, 5 J. O. C. E. 2627, 9 November 1962, provided:

"It is intended to declare the provisions of Article 85(1) of the Treaty to be inapplicable, pursuant to paragraph (3) thereof, to the following groups of agreements concerning the restriction of the economic freedom of action of the partners to license agreements for a period of three years beginning with the day of the publication of the decision in the Official Journal of the European Communities . . .". (Author’s translation, from the German version.)
could appeal a refusal of their objection to the Court of Justice pursuant to Article 173(2) of the Treaty, they should have been equally free to appeal directly against the effect on them of the November 9 Announcement, even though the exemption involved was not directly addressed to any one person. Finally, even if the Commission intended merely to promulgate a general guideline, that in the absence of objections thereto it would deem these particular provisions automatically entitled to an exemption, a serious conflict with the regulation would still have remained. Article 8(3), on the revoking of exemptions, specifies that changes in the de facto situation (presumably the market or economic context) or abuses of the exemption are grounds for its revocation.

The Announcement, however, treated the de facto situation as irrelevant, and was content to base exemptions upon the formal and generalized phrasing of any license agreement rather than to evaluate the agreement in context. Perhaps a case could be made for this approach were these provisions legitimate, no matter what the ambient market situation, but then these would not be Article 85 violations in the first place. That “automatic immunity” determination, at the heart of the December 21 Announcement, creates its own problems, even without accounting for these others. It therefore seems

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107 These limits on the continued validity of the once-granted exemption are stressed by Schumacher, Die Durchführung der Artikel 85 und 86 des Rom-Vertrages, supra, note 26, at page 482.

108 This approach is defended in Gleiss and Hootz, Keine Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs- und Patentlizenzverträge, supra, note 39. For a generally contrary view to that in the text, and an argument for the compatibility of such group exemptions with Regulation 17, see Schlochauer, Die Anwendung von Wettbewerbsregeln der Europäischen Wirtschaftsgemeinschaft, supra, note 85.

109 The second part of the November 9 Announcement also evinced an intention to declare certain provisions valid and not even within
reasonable to conclude that the first Announcement and the regulation were in conflict.\textsuperscript{110}

**The December 21 Announcement and the Division of Powers**

This Announcement purports to rule as outside the reach of Article 85(1) all agreements containing restrictions inherent in the patent monopoly, as well as a minor list of essentially analogous restrictions. In doing so, it relies upon the negative implications of the decision of the Council of Ministers, in Regulation 17, to exempt certain agreements from the requisite of notification. If the there listed, otherwise restrictive items are exempt from notification, then the even less restrictive, "inherent" provisions must not even be within Article 85 in the first place.\textsuperscript{111} The Council's power to take this step\textsuperscript{112} is, however, a matter separate from the Commission's power to do so. Although the Announcement claims not to prejudice the position of national authorities in judging these restrictions, its effort to read technically justified tie-ins, mutual grant backs and other restrictions, out of Article 85 does in an acute way raise the troublesome question of the division of jurisdiction between the Commission and national courts and agencies, a question that Regulation 17, in a very complex fashion, attempts to resolve, and one which has been explored in detail elsewhere.\textsuperscript{113}

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\textsuperscript{110} So much is hinted by Gleiss and Hootz, Keine Gruppenfreistellungen nach EWG-Kartellrecht für Alleinvertriebs- und Patentlizenzverträge, supra, note 39.

\textsuperscript{111} See, e.g., the reading given Article 4(2) of Regulation 17, in this context, in Schumacher, Die Durchführung der Artikel 85 und 86 des Rom-Vertrages, supra, note 26, at page 481.

\textsuperscript{112} See Riesenfeld, The Protection of Competition, in II Stein & Nicholson, supra, note 6, at pages 334-36.

\textsuperscript{113} See Buxbaum, Incomplete Federalism: Jurisdiction Over Antitrust Matters In The European Economic Community, supra, note 4a.
In summary of that exploration, it seems fair to say that no matter what the scope of Article 9 of the regulation, which is the jurisdictional keystone, national authorities remain competent at least to initiate or hear proceedings involving restrictive practices in a considerable range of situations. Admittedly this potential competence might be dismissed as a hollow formality in view of the trend toward centralizing the enforcement of all "interstate" cases within the Commission. Nevertheless, this power can at the least force respondent-parties into making specific—and public—application for negative attestations. They cannot rely anonymously upon the mass clearances, purportedly granted by the December 21 Announcement, to bar national proceedings, since it does not qualify as a "particular proceeding" in the sense of Article 9(3). Even if a national decision against a contracting party could still and potentially be reversed by a timely application of the losing respondent for an 85(3) exemption, this notification would now be an individual act. Further, it would now occur in the face of a statement to the Commission that at least one of the national authorities deems the arrangement in this context violative of Article 85(1), a statement that conceivably could affect the Commission's attitude on the exemption request, not to speak of a negative attestation.

The tortuous harmonization of competing jurisdictional claims necessarily engendered by Article 9 highlights the doubtful fit of mass non-applicability declarations into the

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114 See Schumacher, The Procedure For Giving Effect To Articles 85 and 86 Of The European Economic Community Treaty, in I Cartel and Monopoly in Modern Law 363 (1961), at pages 374-75.

115 Article 19(3), Regulation 17.

116 Even the "minor" agreements spared immediate notification by Article 4(2) can be forced into notification and application for either an exemption or a negative attestation by the commencement of proceedings against them by a national cartel authority. The right of the latter to take this step is specifically mentioned in Article 9(3) of the Regulation.
Treaty and Regulation 17 scheme of things. The Commission's rights of take-over and of preclusion vis-à-vis national authorities seem to posit, at most, individual attestations. General abstract negative attestations, which is what the second Announcement creates, can actually mean nothing more, in the face of these continuing if modestly exercised national powers, than an attempt to do again what was tried by Regulation 17 and the Announcement of November 9 in the first place: A listing of provisions excused from the duty of notification and promised an automatic Article 85(3) exemption.

PROBLEMS OF PRACTICE

Legal and logical problems are not the only ones raised by present enforcement concepts. The viability and efficiency of the described system in practice, especially as applied to patent licenses, are also matters of some controversy. There are difficulties in this area, and they arise from the inherent shortcomings of a self-policing structure; in other words, from the concept of "voluntary" and essentially public notification.

One of the most pressing difficulties, especially in licensing cases, is the conflict between contracting parties as to the fact of notification. It should be obvious from a review of familiar restrictive provisions like price fixing of patented products, tie-in arrangements, mutual cross-licenses in limited territories, exclusive grant back clauses and others, that legitimate disputes exist concerning their validity under antitrust principles, and certainly whether the Commission should be

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117 See, e.g., Schibel, Bemerkungen zu den Absichtserklärungen der EWG-Kommission, supra, note 53.
118 VerLoren van Themaat, Current Antitrust Developments in the European Common Market, supra, note 53, at page 444.
119 Compare Janss, Oudemans & Wolterbeek, Der Einfluss der Wettbewerbsregeln des EWG-Vertrages auf die gewerblichen Schutzrechte, 63 GRUR-AIT 276 (1961).
notified of agreements containing them.\textsuperscript{120} Notification in many instances will not, after all, be to the mutual benefit of the parties, either because of the substantive decision expected from the Commission or merely because of the publicity given to notifications. So long as the interests of both parties are substantially identical, not only when their license agreement is executed but throughout its duration, there should be no significant practical problems arising from the notification process. As it happens, however, contracting parties need not be unanimously for notification for it to occur. In the regulation implementing Regulation 17, the Commission states that less than all participants may notify it of an agreement and apply for exemption.\textsuperscript{121} While this conflicts vaguely with the form of Article 4(1) of Regulation 17,\textsuperscript{122} the conflict is a semantic one only, and it is generally assumed that unilateral notification is possible.\textsuperscript{123} Therefore, as soon as either the legal evaluation of the agreement by the parties, or their business aims diverge, the notification process can become not only a source of argument, but a tool in the hands of one party against the other. A party wishing to avoid a clearly illicit contract may notify the Commission of it, threaten to invoke an existing termination right unless notification is effected, refuse to supply necessary supporting data to the Commission, and so on.\textsuperscript{124}


\textsuperscript{121} Article 1, Regulation 27, 5 J. O. C. E. 1118, 10 May 1962.

\textsuperscript{122} Which states that the Commission shall be notified of any agreement for which “those concerned” wish to invoke Article 85(3).


\textsuperscript{124} As a matter of public policy, there are of course times when a coerced “voluntary” notification of certain practices can be an aid to antitrust enforcement. Cf., e.g., P. L. 87-831, 76 Stat. 958, 87th Cong. 2d Sess., 1962, providing for the filing with the Patent Office of any agreement settling an interference proceeding, and making
The most vivid example of such pulling and hauling is afforded by a notifiable Article 7 license—an "old" agreement, not qualifying for an 85(3) exemption, that before February 1963 could have been modified and submitted to the Commission for a retroactive exemption, but was not. If the licensor asserts the agreement is completely outside Article 85(1), and the licensee believes the contrary, some subtle but effective forms of leverage could come into play. The restrictions causing the dispute presumably benefit the licensor, which wishes to retain them. If the licensee wishes to avoid the license, one way to try to do so is to notify the Commission of the agreement without applying for an 85(3) exemption. It has been argued that Article 7 requires unanimity for this step, but, in fact, it is only the agreement's modification that, of course, needs mutual consent, not the notification. And the leverage lies in a notification made before any effort to change the agreement is suggested.

both the agreement and any patent involved in the interference unenforceable. Any abuse of these settlements, discussed in Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U. S. 806 (1945), and see In the Matter of American Cyannamid Company, F. T. C. Docket 7211 (1963) at page 12 (agreement in 3 CCH Trade Reg. Rep. Par. 15,587 (1961)), is effectively countered by this combination punch, which at one and the same time increases the Antitrust Division's chances of reviewing such agreements and makes evasion of the duty to notify very risky.

Whether this act will merely push restrictive settlements to a pre-interference negotiation stage is another matter. See Kronstein, Arbitration Is Power, 38 N. Y. U. L. Rev. 661, 688 (1963).

125 See the discussion in text accompanying footnotes 65-68, supra.

126 Ladas, The Deadline Of January 1, 1964 For Industrial Property Agreements, supra, note 4, at page 98.

127 In addition, Article 7 allows not only outsiders, but all parties that did not expressly assent to the notification—not the modification—to avoid the binding effect of a Commission exemption. The practical result may be the same for parties agreeing to the change; yet if the change makes the agreement into the non-notifiable type, a later change of mind by one of the parties about applying for an exemption could occur and be effected.

See also the exposition on this point of outsiders and former parties in Deringer, Commentary, EEC Treaty, VO No. 17 Art. 7, Anmerkungen 4-6, 13 WuW 183-84 (1963).
If this occurs, the Commission would have to declare the agreement null and void, the time for requesting exemption having long since expired. It has no power to apply Article 85(3) on its own motion in any event, at least under the Regulation 17. (The Treaty, of course, is neutral on this point and would permit the grant of exemptions *sua sponte.*\(^{128}\)) If the licensor, faced with this *fait accompli,* itself makes the application, assuming it is still timely, the licensee could at the subsequent hearing thereon take the position and support it with economic evidence that an exemption was not in order;\(^ {129}\) it owes no good faith obligation to the other party to help save the contract.\(^ {130}\)

Consider the problem of licensed patents subsequently held or felt to be invalid. Ordinarily a licensee is estopped to challenge the validity of these patents.\(^ {131}\) May it not, however, use the notification procedure to achieve the same result—its freedom from the license? In fact, the tactical possibilities here bear a startling resemblance to anti-estoppel

\(^ {128}\) An interesting test of this point may arise when a private complaint against an agreement is filed by a private party under Article 3 of the Regulation, and the Commission is of the opinion that an exemption under Article 85(3) would be appropriate. Presumably the respondent would be invited to submit an application for one; of course, this presupposes that a timely application were still possible.

\(^ {129}\) Since Article 8 requires that the grant be limited in time and subject to renewed consideration when renewals are requested, such a licensee would in effect have a “locus poenitentiae” on one or more occasions in the future.

\(^ {130}\) Deringer opines that the parties to an agreement are not subject to a good faith duty to participate in the legalizing of the agreement under Article 7. Commentary, EEC Treaty, VO No. 17 Art. 7, Anmerkung 5, 13 WuW 184 (1963).

efforts under the *Sola* doctrine, 132 with one difference. Instead of taking its chances and proving to a court's satisfaction that some restrictive provision in the agreement is illegal, the licensee can put a substantial part of the obligation upon the Commission. The burden of proof seems to lie on the party claiming the exemption. 133 Perhaps much the same result could be accomplished in the United States by a complaint to the Antitrust Division; but the differences in procedures, attitudes and available relief should be obvious.

What of a provision that the parties, being of the opinion the agreement contains at most non-notifiable restrictions, agree not to notify the Commission thereof, under sanction of termination or even damages in the event of breach? Or a provision to submit to private arbitration any dispute about notification? 134 Apart from the inability of a threat of termination to protect the licensor from its licensee's possible desire to challenge the patents involved, can such bootstrap provisions bind the parties not to exercise what is not so much a right, but a duty of compliance under Regulation 17? 135

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133 Dr. Verloren van Themaat, the Commission's Director General for Competition, has been cited to this effect. Becker, Effect Of The Common Market "Antitrust" Law On American Companies, *supra*, note 7, at page 23.


135 Notification is not, of course, strictly speaking required at all, but only if the benefits of a possible exemption are desired. What is bothersome is the emphasis on enforcement through self-policing in a context where the avoidance thereof by the participants is so easy.

Possibilities for evasion, while they may in time prove unreliable, exist throughout this structure: Mutual termination of old agreements, to be replaced by new ones not subject to the present notification deadlines; fragmentation of agreements by purposes and by parties; where interests coincide, the deletion of objectionable
Whether or not a state authority would restrain a licensor in such a case from imposing these sanctions upon the offending party, could the Commission exercise, if not the direct power of striking these clauses, then the indirect one of threatening a finding of invalidity unless the provisions were voluntarily cancelled?

Conclusion

It seems that, even limiting ourselves to the possible, it has not been achieved in the present arrangement. But many of the shortcomings, as to which this description and critique carp, evidence only growing pains. A beautiful regulatory scheme cannot be expected to arise full-blown, nor does there exist a deus ex machina to create the general agreement which could be unambiguously elaborated in that regulatory scheme.

All in all, and despite the inferences that the earlier part of this review may engender, the problem is not so much one of draftsmanship as a choice of structures. It might be suggested that the substantive law promulgated in Article 4(2) of the regulation and in the December 21 Announcement, not to mention the short-lived one of November 9, can lead to the spreading of anti-competitive restraints upon commerce in the Common Market, and evidences a trend toward non-enforcement of the Community's charter of competition in an important area. The present review, however, seems to indicate that some of the enforcement difficulties already being encountered lie in the unwieldy structure the Commission has imposed upon itself. The Commission clearly still needs, clearly cannot be expected already to have, the political consensus as well as the physical means to be non-ambivalent as legislator, active as investigator, resolute as prosecutor or provisions, continued in practice. Discussions with advisors to enterprises facing these problems have revealed a wide range of notions of appropriate action in response to the enactments discussed in this paper.
consistent as judge. In addition, it still shows signs of being blown in all directions by the winds of dogma. Yet the voluntary honor code self-policing concept of notification not only reflects these failings, but aggravates them by merging these four separate functions in one body and one procedure. Thus it may tend to bring about an enforcement attitude made up of formal activity and agility only. So far at least, and to some extent for these reasons, antitrust enforcement has not kept pace with the industrial and commercial changes taking place in the arriving Common Market.

POSTSCRIPT

The preceding manuscript was completed as of September 1, 1963. In February of 1964 the Commission reopened the question of group exemptions on a different plane, proposing to the Council of Ministers that the latter enact a regulation authorizing the grant of group exemptions by way of separate Commission regulations. European Parliament Document No. VI/Commission (1964), as reported in Agence Internationale D'Information Pour La Presse, Daily Bull. No. 1785 [Euratom & Common Market], page 4 (March 4, 1964). This

136 See Linssen, The Antitrust Rules of the European Economic Community, supra, note 24, at page 299. Whether the Commission could have embarked upon any more stringent course is, of course, doubtful, as the statement in the text itself intimates. See the conclusions of Riesenfeld, Antitrust Laws in the European Economic Community: A Sequel, supra, note 7, at page 842; Zellentin, Der Wirtschafts- Und Sozialausschuss Der EWG Und Euratom 170-173 (1962); and in a slightly different context, Bebr, Judicial Control Of The European Communities 210 (1962). And in a wider arena, see Lichtheim, The New Europe (1963), esp. pages 73-78, and 182-198.


propose, which is now being considered by the consulting European Parliament, seems to hew closely to the jurisdictional features of Regulation 17.

1) Only the Commission is to be competent to enact such group exemptions, which are to be for a limited period, but renewable.

2) They may be retroactive in nature, even to a date prior to the date of notification (when, for example, such a group exemption is enacted for a group of “old,” already submitted agreements).

3) A *locus poenitentiae* corresponding to Article 7 of Regulation 17 is provided for bilateral agreements, although the correction of agreements benefiting therefrom must occur within specified time limits and must be submitted to the Commission.

4) Changes or rescissions of such exemptions can only follow a hearing and can only be prospective in operation.

5) Close coordination with the national authorities is provided. (See generally Deringer & Tessin, Gruppenausnahmen im EWG-Kartellrecht in Aussicht, 10 AWD 71 (1964)).

This is not the occasion for detailed comment on the proposal. Certain significant features, however, should be noted. The key problem, what is a proper group or category, is not mentioned. As a consequence, although the proposed Council regulation is phrased as nothing more than an extension of Regulation 17, it in fact conflicts with that Regulation to almost the same degree as did the subordinate and short-lived November 9 Announcement—and for about the same reasons: those explored above in the text accompanying footnotes 105 through 118. For example, hearings and third party objections are a meaningless formality, if the parties, whose agreements are to obtain exemption, are not identified. It
seems that they need not be, since the Commission specifically need not be notified of the individual agreements to which it is granting a categorical exemption.

This formalistic approach to the exemption of agreements by their wording is, of course, the most important problem. It raises again the possibility of a conflict with Article 85(3) itself, as discussed above in the text accompanying footnotes 90 through 104. It is interesting to compare the steady trend of American decisions away from formal typology, as exemplified, perhaps, by White Motor Co. v. United States, 372 U.S. 253 (1963) and Simpson v. Union Oil Company of California, 84 S.Ct. 1051 (1964). If these decisions are of any value as a guide to the concededly different European scene, they would appear to underline the need for the kind of market and economic studies mentioned in the text.

If, on the other hand, the Commission were to utilize such criteria, the result would be adjudication in a legislative context. The outcast firms denied the group exemption, for example, might well demand more reasoned decisions from the Commission than an exemption regulation could contain, and procedurally would be in a good position to appeal such “regulations” to the Court of Justice. It seems that Article 85(3) is too fact-oriented, and properly so, comfortably to allow for the suggested procedure. To the extent the group exemption regulations, however, were appropriately narrow and conservative, they would be superfluous, for in all likelihood the affected agreements would then not violate Article 85(1) in the first place.