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THE APPLICABILITY OF THE GERMAN CARTEL LAW TO LICENSES OF FOREIGN PATENTS

by

RICHARD M. BUXBAUM*

The extraterritorial applicability of antitrust laws is a debatable matter under foreign statutes as well as under American legislation. Where industrial property rights are involved, an additional difficulty is introduced. One of the more complicated, unresolved problems in this area arises under Section 20 of the German Cartel Law when a patent license involves a territory outside the Federal Republic of Germany. In the usual case of a license covering a German patent, the agreement is subject to Section 20 if at least one of the contracting parties is German or has an establishment in Germany. Probably it is subject to Section 20 even when neither party is German. This conclusion is not derived so much from Section 20 as from Section 98(2), which provides that the Cartel Law applies to all restrictive practices which have their effect in the territory in which the law governs, though initiated elsewhere. Section 98(2) is in clear accord with both the strict and the defensive territorial principles of jurisdiction in international law. Therefore, an interpreta-

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1 Interestingly enough, this problem of the applicability of the Cartel Law to patent licenses has been discussed as if arising only where at least one party is German; e.g., Mayer-Wegelin, in MÜLLER-HENNEBERG & SCHWARTZ, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN, KOMMENTAR [hereinafter "GEMEINSCHAFTSKOMMENTAR"] (1958) at pages 887-895, without appreciation that the issue can arise even where both parties are foreign. Id. at page 889. (This paper was prepared before the 1963 edition of this work became available.)

2 Generally, see BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 443-477 (2d ed. 1962); and as to jurisdictional aspects in the cartel field especially, the excellent recent book by SCHWARTZ, DEUTSCHES INTERNATIONALES KARTELLRECHT 246-257 (1962). See also the com-
tion which would apply the Cartel Law to other than German parties who agree to license a German patent under unduly restrictive conditions that have their effect in the Federal Republic, seems entirely reasonable.

In contrast, however, real difficulties arise when a patent license agreement, even if between two German parties, purports in some way to restrict the competitive freedom of the licensee in a territory other than the Federal Republic of Germany. As an original proposition one might argue that restrictions concerning foreign patents cannot be judged by Section 20, since the patent right mentioned there refers only to a German patent. This proposition is suggested in a recent comment, which relies upon some dubious legislative history to justify the proposition. In fact the discussions cited in that comment do not support the authors' conclusion. Nevertheless, restrictions attached to the licensing of foreign patent rights might be adequately evaluated under Section 18, which

\[\text{ment thereon in Seidl-Hohenveldern, } \text{Völkerrechtliche Erwägungen zum Deutschen Internationalen Kartellrecht, 9 Außenwirtschaftsdienst des Betriebsberaters 73 (No. 3, March 1963).} \]

\[\text{3 Gleiss & Hootz, Bundeskartellamt ändert Verwaltungspraxis zu Lizenzverträgen über Auslandspatente, 8 Betriebs-Berater 1060 (No. 27, September 30, 1962).} \]

\[\text{4 During a committee hearing on the draft bill a Bundestag member suggested the following limitation on Section 20(1): ”Agreements concerning the acquisition or use of patents . . . which were issued for the territory within which the Basic Law applies, are valid.” A representative of the Ministry of Economics argued that every law is valid only in the territory in which the Basic Law is valid, and added that the section in any event applied only to patentees and licensees in the territory of the Federal Republic. Thereupon the limitation was withdrawn. Protokoll Nr. 158 at 16 ff., 158th Session of Bundestag Committee on Economic Policy (Ausschuss für Wirtschaftspolitik), January 14, 1957, as cited ibid.} \]

\[\text{5 To conclude from the above exchange that the undefined term ”patent,” in the present wording of the statute, ”Agreements concerning the acquisition or use of patents . . . are null and void if they impose . . .,” etc., means ”German patent,” is unjustified. The answer given to the suggested limitation did not meet the issue and specifically does not contradict the broader reading properly ascribed to the present phrasing.} \]
APPLICABILITY OF THE GERMAN CARTEL LAW

empowers the Federal Cartel Office to prohibit such vertical restraints as tie-ins, exclusive dealing and territorial restrictions, and the like.6 Under this approach, patent licenses subject to the Cartel Law by virtue of the reach of Section 98(2) could be approved or disapproved under the general criteria of Section 18. To the extent the contract provisions were no more restrictive than those which are declared immune in Section 20(2) and the last clause of 20(1), the same exemptions could be adopted by analogy in Section 18 evaluations.

From the point of view of the Federal Cartel Office, however, this is much less satisfactory than the direct use of Section 20 in conjunction with Section 98(2) because of the different legal status of the agreement under the former and Section 18. Pursuant to Section 20 all license agreements containing restrictions going beyond the "content of the legal monopoly"7 are ipso facto invalid.8 Pursuant to Section 18 these agreements are only subject to supervision for misuse; and if attacked by the Federal Cartel Office, are only voidable in futuro, not retroactively.9 Because of this factor alone, it

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6 Indeed, Section 20 is understood as a lex specialis vis-à-vis Sections 15-18, which set forth criteria for judging vertical agreements generally. See Report of the Bundestag Committee for Economic Policy, Print. No. 1158, German Bundestag, 2d Session (1957), reprinted in GEMEINSCHAFTSKOMMENTAR, supra note 1, pages 1156-1217, at page 1187.

7 Except those declared legitimate in Section 20(2).

8 See Reimer, in GEMEINSCHAFTSKOMMENTAR, supra note 1, at pages 455-56. Of course, the same result follows from Section 1, which would remain applicable to these agreements if they go beyond the mere (perhaps even unilateral) licensing of industrial property rights. Id. at page 458; see also Kellermann, Die gewerblichen Schutzrechte im Gesetz gegen Wettbewerbsbeschränkungen, 8 WIRTSCHAFT UND WETTBEWERB (hereinafter "WW") 643, 648 (1958). For a description of this journal and its role as a case reporter, as well as an explanation of the case citation method of decisions appearing therein, see Buxbaum, Antitrust Regulation Within The European Economic Community, 61 COL. L. REV. 402, 403, note 2 (1961).

9 See Schwartz, in GEMEINSCHAFTSKOMMENTAR, supra note 1, at pages 432-33, 434-35. The problems of private litigation and civil sanctions are outside the scope of this paper, except as discussed in note 41, infra.
is not surprising to find the Federal Cartel Office applying Section 20 to the licensing of foreign patents, as the above-mentioned authors complain. What turns out to be surprising, however, is that a review of the administrative decisions complained of does not at all establish the Federal Cartel Office’s position on this point. This is not to say that the agency does not in fact use Section 20 to evaluate foreign patent licenses, but the proof thereof is found in an entirely different group of decisions.

The leading case cited for this position concerned a patent license covering the Federal Republic of Germany, which included provisions restricting the licensee in its right to prosecute patent applications for improvement inventions elsewhere (as well as in Germany), to sell the claimed products outside Germany, and the like. This case clearly has no bearing on the licensing of foreign patent rights and the role of Section 20, whether or not foreign patent rights might later incidentally become an object of the parties’ agreement. The second major case used to support the above argument involved the rental of machines and the license of a process, on which patent protection had expired, for the use of the machines, coupled with certain restrictions on the licensee as to the sale of the final product outside Germany and the filing of foreign patent licenses.

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10 As it is, most of the “foreign” license agreements considered by the Federal Cartel Office are said to have come to its attention not through voluntary registration by the parties (perhaps to obtain a Section 20(3) exemption) but because the currency transaction involved required the approval of the finance authorities and these transmitted information concerning the licenses to the Federal Cartel Office. Bundeskartellamt, Tätigkeitsbericht 1958, in BERICHT DES BUNDESKARTELLAMTES 1958/1959/1960 [hereinafter “BKARTA REP.” with year], at pages 76-77. With the passage of the Aussenwirtschaftsgesetz as of September 1, 1961, the Federal Cartel Office no longer expected to obtain information concerning foreign licenses in this fashion. BERICHT DES BUNDESKARTELLAMTES ÜBER SEINE TÄTIGKEIT IM JAHRE 1961, German Bundestag, Fourth Session, Print IV/378 [hereinafter “BKARTA REP. 1961”] (1962), at page 57.

applications on improvement inventions. In neither case is the problem here under discussion even indirectly involved.

Finally a third, and on first impression more relevant case has been used by the cited authors and others as a straw man that supposedly establishes the Federal Cartel Office's above-formulated position. In this case the licensee, a foreign firm, was licensed to make and sell certain of the licensor's machines outside Germany, and was required to obtain certain parts only from the licensor and not to manufacture competitive products. What seems to have been overlooked, however, is that no patents were involved; the license was one of know-how only.

This, of course, explains the use of Section 20 in such a proceeding. Know-how, contrary to patents, is not a territorially limited property right, although its protection or even recognition depends upon and may well vary from one to the other particular municipal law. A know-how license limited to territory outside Germany can, therefore, be evaluated pursuant to Section 21 of the Cartel Law, which

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13 See especially Schapiro, The German Law Against Restraints Of Competition—Comparative And International Aspects, 62 Col. L. Rev. 1, 201, 244-45 (1962), who, however, is concerned not with the point made by Gleiss & Hootz but with the scope of Section 98 generally. This is to date the best English language review of the German Cartel Law and its interpretation, and contains an excellent commentary on Section 20 at pages 219-236. His translation of this section at page 219, however, inadvertently omits the qualifying clause at the end of Section 20(2) that the exemptions listed in that sub-section may not extend beyond the duration of the underlying patent.


15 Both Gleiss & Hootz and Schapiro, cited above, speak of this case as one involving a patent license, but it is specifically stated therein that the licensed machines were not patented. Although the license was one of know-how only, improvement inventions might of course be made; if made, they might be patentable. This bare possibility, however, would not suggest the applicability of Section 20.
adopts the applicable substantive criteria of Section 20.\textsuperscript{16} This would not raise the jurisdictional point that the section by definition involves only a property right created in and limited to the Federal Republic of Germany.\textsuperscript{17} If this be ac-

\textsuperscript{16} The constant reference in these know-how cases to Section 20, which after all concerns patents, can be confusing; in fact, of course, Section 20 is there discussed because its substantive definitions and exemption criteria are incorporated into Section 21 by reference, to the extent its different subject matter permits their application. The role of the law of the forum, of conflict of laws rules, and of party autonomy in the definition of know-how and trade secrets are by no means clear; the same could be said of the significance of Section 98(2) in this connection (SCHLOCHAUER, DIE EXTRATERRITORIALE WIRKUNG VON HOHEITSAKTEN 41 ff. (1962)). For some general guides to this area see EHRENZWEIG, CONFLICT OF LAWS 560 (1962); Schwartz, Applicability Of National Law On Restraints Of Competition To International Restraints Of Competition, in II CARTEL AND MONOPOLY IN MODERN LAW 701, 720-22 (1961).

This seems to be primarily a question of characterization. See, e.g., Godenhielm, Fragen des internationalen Privatrechts auf dem Gebiete des Patentrechts, [1963] GEWERBLICHER RECHTSSCHUTZ UND URBEBERRECHT AUSLANDS- UND INTERNATIONALER TEIL [hereinafter "GRuR AMT"] 149 (No. 4, April 1957); IV NEUMEYER, INTERNATIONALES VERWALTUNGSGEBETE 120 (1936); KEGEL, INTERNATIONALES PRIVATRECHT 78 (1960); Hug, The Applicability Of The Provisions Of The European Community Treaties Against Restraints Of Competition To Restraints Of Competition Caused In Non-Member States, But Affecting The Common Market, in II CARTEL AND MONOPOLY IN MODERN LAW 639 (1961). Concerning the questionable nature of this concept, see EHRENZWEIG, op. cit. at page 327 ff.

For a good view of national definitions of know-how, and some comment on the issues here raised, see Van Notten, Know-How Licensing In The Common Market, 38 N. Y. U. L. REV. 525 (1963) and at page 533.

\textsuperscript{17} In another context, the right resembles what is undoubtedly the reason for the failure of the Commission of the European Economic Community to extend to licenses of know-how the declaration of non-applicability of Article 85 of the Treaty of Rome to patent licenses contained in its Announcement of December 21, 5 JOURNAL OFFICIEL DES COMMUNAUTÉS EURÉPEENNES 2922 (1962) (see FORROW, Developments Under The Common Market Antitrust Regulations, XVII BUS. LWYR. 791, 802 (1963) for a brief discussion and translation). Since the proclaimed legality of the provisions listed there is based upon their being "inherent in the patent monopoly," it can hardly be extended to know-how. The barren conceptualism of this quoted phrase is a source of many difficulties; these are explored in
cepted, then it seems that at least in these three cases the Federal Cartel Office did not apply Section 20 to licenses of foreign patents under the aegis of Section 98. The "reversal" of that agency's nonexistent prior practice, if based only upon these items, would be merely the end of a sham battle.\textsuperscript{18}

A review of the license applications approved by the Federal Cartel Office from its inception to March 1, 1963, however, discloses that in at least two instances the agency has unambiguously applied Section 20 and Section 20(3) to licenses of foreign property rights, where the licensee was a foreign national. In addition, the 1960 Report of the Cartel Office removes almost all doubts as to its practice of regularly applying Section 20 to such license agreements.\textsuperscript{19}

In the first of the two mentioned cases, a German licensor was granted an exemption pursuant to Section 20(3) for a license agreement with a Finnish licensee of Finnish patent rights, even though the license additionally obligated the Finnish licensee to purchase all raw materials needed to produce the products covered by the agreement from the licensor.\textsuperscript{20} While the existence of Finnish patents is not

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\textsuperscript{18} This "reversal," cited by Gleiss & Hootz, supra, note 3, is contained in a letter quoted there and also reprinted in \textit{13} \textit{wuw} 440 (1963). The letter actually concerns only the problem discussed below; namely, the extent of the "effect" upon the German market, under Section 98(2), of a restrictive contract clause, as a preliminary step in determining whether the latter may or may not be exempt under Section 20(2) (5), which reads:

"Paragraph (1) [invalidity of restrictive provisions] does not apply . . .
5. to obligations of the . . . licensee insofar as they concern the regulation of competition in markets outside the territory to which this law applies."

\textsuperscript{19} See \textit{BKARTA REP.} 1960, \textit{supra}, note 10, at page 328.

entirely clear from the rather cryptic description of the case, the absence of a statement that Section 21 was involved leads to the inference that only industrial property rights of the type specified in Section 20 were contained in the license agreement. In the second case, a German licensor was granted an exemption pursuant to Section 20(3) for an agreement licensing an Austrian firm under a trademark registered in Austria. In perhaps four other cases is it possible that the license agreement involved covered foreign patent rights granted to a foreign licensee; all other cases reviewed at best seemed to involve unpatented know-how which of course is subject to entirely different considerations from the point of view discussed here. All in all, then, the Federal Cartel Office clearly has taken the position that license agreements with a foreign licensee, involving foreign patent rights, are to be evaluated pursuant to Section 20 rather than Section 18 of the Cartel Law.

Accepting however the applicability of Section 20, it is still necessary to discuss the significance of Sub-Section 20(2)(5) thereof. By its terms this sub-section seems to exempt any restriction imposed upon foreign commerce from the reach of the declaration of invalidity in Section 20. As a result it is often used by applicants in an effort to claim that restric-

22 Such as the following decisions: #48/58, September 24, 1958, BANZ #189, October 2, 1958; #54/58, October 15, 1958, BANZ #208, October 29, 1958; #48/59, August 15, 1959, BANZ #161, August 25, 1959.
23 Thus, only know-how seems to be involved in the following: #51/59, August 26, 1959, BANZ #168, September 3, 1959; #73/59, November 19, 1959, BANZ #230, December 1, 1959; #75/60, May 16, 1960, BANZ #102, May 28, 1960; #76/60, May 18, 1960, BANZ #103, May 31, 1960; #128/60, December 28, 1960, BANZ #4, January 6, 1961 (although this case is difficult to categorize); #2/62, January 9, 1962, BANZ #13, January 19, 1962.
24 See the text thereof, supra, note 18.
tions on foreign partners do not fall within Section 20.\textsuperscript{25} In fact, it was apparently enacted to empower a licensor to forbid the export by the licensee of products manufactured under his domestic license into countries in which the licensor has no patent protection.\textsuperscript{26} At the most it has been said to permit no greater restrictions on a licensee's foreign activities than Section 20(1) and (2) permit on its domestic freedom of competition; for instance, a prohibition on the foreign manufacture of the product covered by the German patent, where the licensor has no patent protection in that foreign country.\textsuperscript{27}

In its practice, too, the Federal Cartel Office has interpreted this automatic exemption narrowly and does not concede the applicability of Section 20(2)(5) to an agreement if the prohibition therein contained even indirectly has an effect upon domestic German commerce. In the leading case the licensee (of know-how only, for use abroad) was required to purchase all parts that could not be manufactured in the licensed country from the licensor. This, of course, meant that domestic competitors of the licensor in the manufacture

\textsuperscript{25} BKA\textsc{ta Rep.} 1961, supra, note 10, at page 58. From this discussion, indeed, it is possible to infer again that the BKA would apply Section 20 rather than Section 18, even if this is not explicitly stated.

\textsuperscript{26} BAUMBACH-HEFERMIEHL, \textsc{wettbewerbs- und warenzeichenrecht} 1367 (8th ed. 1960). The Bundestag Economic Policy Committee report, supra, note 6, at page 1188, stated in connection with the draft version of this section:

"Agreements between patentees and licensees concerning foreign markets, especially the prohibition of exports to other, patent-free countries, are customary in international practice. The prohibition of such agreements would make it materially more difficult for German industry to obtain licenses from the foreign owners of German patents."

See also BKA\textsc{ta Rep.} 1961, supra, note 10, at page 58.

\textsuperscript{27} Baruch, \textit{Zum Anwendungsbereich des GWB}, 11 \textsc{wuw} 530, 536 (1961). Prohibitions on exports are under German law permissible as part of a limited patent license; see REIMER, \textsc{patentgesetz und gebrauchsmustergesetz} 276 (2d ed. 1958).
of these parts were foreclosed from the possible favor of the licensee's orders. The Federal Cartel Office found this to be the kind of effect upon German commerce that precluded the use of Section 20(2)(5)—in this case, as incorporated by reference into Section 21.28

This view is criticized by Schwartz,29 who argues against the applicability of Section 98(2) (and thus of Section 20) if only the opportunities and thus indirectly the domestic competitive position of a competitor of the licensor are affected by the kind of restriction condemned by the Cartel Office. He bases his criticism upon the allegedly distorted use of the "relevant market" as support for the applicability of the Cartel Law to such restrictions. He argues that it is not decisive where the potential customer and supplier happen to be located, but only for what territory they are engaged in this supply and demand exchange.30 Quite apart from the differentiation between know-how and patent licenses, which is also involved here, it is not clear why the German Cartel Law should not apply even to these indirect effects upon the competitive position of a German enterprise. In this aspect Section 1 of the Sherman Act31 is fully comparable, and under it just such indirect restraints could be reviewed, as possible restraints of trade with foreign nations.32 The criticism by Schwartz would be valid if Section 98(2) of the Cartel Law did not by its terms extend as far as the Sherman Act. In fact, however, it applies "to all restraints on competition


29 SCHWARTZ, DEUTSCHES INTERNATIONALES KARTELLRECHT, supra, note 2, at pages 78-80.

30 Id. at page 80.


which have their effect within the territory for which this law is applicable;” thus it is even better suited to reach these “indirect disturbances” than, strictly speaking, is the text of the Sherman Act.\textsuperscript{33} Obviously not every possible restriction of this sort should be attacked by the antitrust enforcement authorities, but this restraint is clearly being exercised by the Federal Cartel Office in its review of these agreements. The general position of the Cartel Office therefore seems more appropriate to an active antitrust enforcement policy than does one which would reject the applicability of the Cartel Law to such agreements out of hand.\textsuperscript{34}

Even though Section 20(2)(5) does not immunize these indirect competitive restraints from the reach of Section 20, parties to such agreements are still able to turn to the exemption provisions of Section 20(3), which permits the Federal Cartel Office to approve restrictive licenses upon application, if it finds that the licensee’s freedom of action is not unfairly restricted and if these restrictions do not substantially restrain competition in “the market”. In fact the Cartel Office has been extremely generous in the use of this power, although this observation should be qualified by noting that in the administrative process preceding the decision, the more questionable contract provisions are generally modified or eliminated.

It is to this attempt to extend Section 20(2)(5), and to the relationship of this sub-section to Section 98(2), that the Federal Cartel Office’s “reversal”, hailed by Gleiss and

\textsuperscript{33} Compare with Schwartz’ use of the “geographically relevant market” (\textit{supra}, note 2, at page 80), that of BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, \textit{supra} note 32, at pages 84-85.

\textsuperscript{34} The question, to what degree restrictions of this sort may be valid under the foreign law, is beyond the scope of this paper. Their validity in that sense would not be relevant for the application of the German Cartel Law as an antitrust statute. Compare to this, however, the American concept of patent misuse, which should be influenced by the validity of the “abusive restrictions” under the foreign law. See BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, \textit{supra} note 32, at pages 141-42.
Hootz,\textsuperscript{35} is actually addressed. The relevant section of the decision reads as follows:

“Insofar as an agreement to this extent concerns obligations of the assignee or licensee relating to a protected product, the Chamber [Division Four of the Federal Cartel Office, responsible for license agreements] starts from the following considerations: Since the Cartel Law is applicable to such restrictions as have their—actual—effect in the territory where this statute applies (Cartel Law § 98(2)), not every reverse effect upon the domestic market, only potentially possible, that might in the future come into existence, in connection with restrictions imposed upon foreign licensees, will be reached by Cartel Law § 20(1), first clause; instead, effects upon the territory in which the statute is applicable must already be provable—or at least be recognizable as imminent—at the time of the review, under antitrust criteria, of the contract.”

Interestingly enough, this “actual anti-competitive effect” guideline is limited to agreements with foreign licensees, although it may be arguable that the same criterion could well be applied to agreements with domestic licensees so long as only foreign property rights were involved.\textsuperscript{36} Be that as it may, however, it seems clear that the Federal Cartel Office

\textsuperscript{35} \textit{Supra}, note 3 and 18. In fact, this “reversal” is already to be found, even if indirectly, in the Cartel Office’s 1960 report:

“Since the . . . restrictions of the foreign licensee (§98(2)) in the main do not have significant domestic effects, the Federal Cartel Office in the previously reviewed cases . . . has seen fit . . . not to proceed against these for the time being.”


\textsuperscript{36} The answer may be that given by Baruch, \textit{Zum Anwendungsbereich des GWB}, \textit{supra} note 27, at pages 530 & 535: Restrictions imposed upon a domestic licensee automatically affect German commerce, whether under section 98(2) or without such a provision—because the freedom of conduct of an enterprise to which the Cartel Law applies is thereby constrained.
has here announced a moderate approach to all "extraterritorial" agreements, not only those exemplified by Section 20(2)(5).

The significance of the quoted paragraph lies in its dependence upon Section 98(2) as the reason for requiring actual or imminent anti-competitive effects in order to justify a finding that Section 20 will apply to an agreement. This use of Section 98(2) can only be understood as a conscious attempt by the Federal Cartel Office to minimize possible conflicts of the German Cartel Law with the legislation of other countries, and in that sense would seem to apply as well to agreements concerning foreign patent rights. By no means has the Federal Cartel Office hereby expanded Section 20 (2)(5) to exempt foreign license agreements from Section 20(1); nor has it hereby expanded the substantive content of the former sub-section to immunize restrictions going beyond those generally if misleadingly accepted as inherent within the patent monopoly.37 This follows from the warning in the Office's statement that the agreement must involve obligations relating to a protected product in order for the "actual or imminent effect" test to be applied. Nevertheless, the Federal Cartel Office has now expanded the exemption criteria for licenses of foreign patents to a boundary which is probably beyond the one marking the permissible use of Section 20(3) in a purely domestic context; and incidentally has minimized the differences between the approach suggested by Schwartz and the one it uses.38

In summary, then, what is the position of these various types of license agreements under the German Cartel Law?

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37 To be exact, restrictions that are beyond the scope of 20(2), subdivisions 1-4, as well as of 20(1); e.g., exclusive grant back requirements, technically unjustifiable tying clauses and the like.

38 For a discussion of the Federal Cartel Office's continuing liberal treatment of these foreign patent license situations, see Tessin, Wettbewerbsverbote in Lizenzverträgen mit Ausländern, 18 BETRIEBSBERATER 1042 (No. 25, September 10, 1963).
1. It is probably no longer maintainable that when a foreign licensee, if not a domestic one, is granted rights under a foreign patent, coupled with restrictions possibly affecting the domestic German market, such as a duty to purchase un-patented raw materials only from the licensor, such a license is not *ipso facto* invalid pursuant to Section 20(1), unless exempted under 20(3), but is instead valid, subject only to administrative review for misuse under Section 18, with at most a prospective affirmative finding of invalidity.

2. Were such an agreement still to be administratively reviewed by the Federal Cartel Office under Section 18, the substantive criteria for exemption of Section 20(3) should still be applicable. In addition, if the agreement were automatically valid, either because the restrictions remained within the scope of the patent monopoly per 20(1) or are of the type listed in 20(2), it should be equally and automatically valid or—what amounts to the same thing—not subject to any supervision, under Section 18.

3. The only difference between the two methods of approach is in the private law consequences of *ab initio* invalidity under Section 20; it is certainly unlikely that restrictive agreements would be more generously treated under Section 18 than under Section 20. These civil consequences should not be too important to the foreign licensee, since essentially they are directed against the licensor. Nevertheless, the invalidation of a license agreement may have unpleasant side effects for the licensee, who may thereby become an infringer of the patents thought to have been licensed to him. Further, if an American company uses a German subsidiary as a patent holding company, these potential effects may become an important factor in deciding whether to act in a conservative manner and apply for a Section 20(3) ex-

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emptions or to assume that only Section 18 applies to these agreements.\textsuperscript{40}

4. Assuming Section 20 is applied to these agreements, there may be a higher threshold to the definition of “restrictions” in 20(1) when they are connected with the use of foreign property rights by foreign licensees. Specifically, a merely potential domestic effect may be considered as too tenuous to require the labelling of the provision as a restriction at all.

5. Since the preceding paragraph is based upon the communication of the Federal Cartel Office previously discussed, the caveat must be entered that the quoted passage was specifically intended only to liberalize the concept “effect back upon the domestic market” which, if existing, prevented the use of Section 20(2)(5). This section is essentially understood to apply to foreign restrictions that are coupled with a domestic license, immunizing these if they have no effect—now, no “real” effect—upon the domestic economy. Therefore, the new “potential effect alone is not a real effect” doctrine may not without more be automatically extendable to the true foreign license situation. Since the new doctrine, however, was based upon Section 98(2), the very section upon which the possible invalidity of the true foreign license also

\textsuperscript{40} Conceivably damages may be recoverable by private litigants if they fit within the rather narrow bounds of Cartel Law Section 35; the extent of the private remedy under the various sections of the Cartel Law has not yet been adequately developed. Decision of Federal Supreme Court, February 25, 1959 (“Grosshändlerverband II ‘Sanifa’”), in wuw/e/bgh 283, 9 wuw 566 (1959); Decision of Federal Supreme Court, October 26, 1961 (“Gummistrümpfe”), in wuw/e/bgh 442, 12 wuw 284 (1962). See generally Maltländer, \textit{Das Verbot horizontaler Wettbewerbsbeschränkungen und die Rechtsbeziehungen zu Dritten} 164-170, 203-254 (1963); Möhring, \textit{Das Gesetz gegen Wettbewerbsbeschränkungen in der Rechtsprechung des Bundesgerichtshofes II, 16 Neue Juristische Wochenschrift} 133 (No. 4, January 24, 1963); and for a comparative review, van den Heuvel, \textit{Civil-Law Consequences of Violation of the Antitrust Provisions of the Rome Treaty}, 12 Am. J. Comp. L. 172 (1963).
rests, it is submitted that the conclusions of paragraph 4 are reasonable.

6. Even more important, this interpretation may by analogy be extended to the substantive criteria for granting an exemption pursuant to Section 20(3), although this is mainly speculation at the present date.