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Competition Policy in the EEC

by Dr Ingo Schmidt, Berlin *

Article 2 of the Treaty of Rome describes the task of the European Community as to encourage stability and growth "by establishing a Common Market and by progressively approximating the economic policies of Member States".

As a means of achieving these economic goals Art. 3 of the Treaty on the one hand mentions the progressive approximation of the economic policies of Member States — a very laborious process of institutional integration which is characterised by the abandoning of economic autonomy in favour of *common* goals — and on the other hand the creation of a Common Market, which is to be brought about, inter alia, by the removal of any obstacles to the free movement of goods, the free movement of individuals and capital as well as eventually the establishment of identical competition conditions (so-called functional integration)¹.

If functional integration is to be pushed by competition, the question of the European Community's guiding principles for competition is immediately raised.

Guiding Principles for Competition Policy

In the Common Action Programme for the Second Stage² the EEC Commission, by making reference to the dynamic competition concept of John Maurice Clark, has outlined its ideas on competition as quoted below: "In economic terms, competition — even if it is imperfect — satisfies the needs of buyers and consumers to a very high degree. The more intensive the competition, the stronger are first incentive and necessity for industry and trade to use the existing production, distribution, rationalisation and improvement possibilities with a view to giving optimum satisfaction to the consumers. Thus, competition secondly also serves the technological and economic progress. Third, it counteracts the upward cost and price drift tendency; in particular it reduces the

danger of costs being passed on to the prices. Fourth, competition results in a more equal distribution of profits among the different sectors of the economy and lessens the danger of continuing misdirected capital expenditure.

Moreover the competitive system must ensure the greatest possible degree of personal freedom for all members of the economic and social life. Competition means that producers, dealers and consumers have a possibility of choosing. The task of competition policy is to guarantee this choice."

Shaping of Competition Policy

It will have to be examined below whether and to what extent the policy of the European Commission has come up to these guiding principles. In its First Report on the Development of Competition Policy published in 1972 the EC declared itself for two principles regarding the concrete shaping of its competition policy³:

□ In accordance with Art. 2 of the Treaty of Rome restraints on competition and practices must not be directed against the amalgamation of national markets, i.e. the type of transnational merger across the borders, for instance, is regarded as particularly desirable and deserving furtherance in the interest of functional integration. For similar reasons of integration policy e.g. certain exclusive distribution agreements have been exempted.

□ The second principle is that effective competition is maintained and encouraged, because it presents the best incentive to an adjustment. The EC sees the critical limit to the promotion of concentration and co-operation in the maintenance of market structures which guarantee the operation of effective competition. The question of maintaining and safeguarding competitive market structures therefore becomes the crucial

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¹ For a distinction between institutional and functional integration see Jürgensen/Predöhl, in: Handwörterbuch für Sozialwissenschaften, Band 3, Stuttgart, Tübingen, Göttingen 1961, p. 371 ff.

² EWG-Kommission, "Memorandum der Kommission über das Aktionsprogramm der Gemeinschaft für die zweite Stufe", Brüssel 1962, p. 23 ff.

³ Cf. Europäische Kommission, "Erster Bericht über die Entwicklung der Wettbewerbspolitik", Brüssel/Luxemburg 1972, p. 16 (called Competition Report later on).

question against which the industrial policy of the EC has to be measured⁴.

Essentially it is Articles 85 and 86 of the Treaty of Rome which form the basis of the European competition policy. Art. 85 involves a general ban on horizontal and vertical agreements, Art. 86 a ban on the abuse of a dominant position in the Common Market; other than Art. 66 of the ECSC Treaty, the Treaty of Rome does not provide for any merger control⁵.

Control of Contractual Arrangements

In the field of cartel policy with respect to horizontal and vertical agreements within the meaning of Art. 85 (1) of the Treaty of Rome the EC has tried, in the past years, to expose its position regarding competition policy by means of test decisions and negative clearances in individual cases as well as communications and group exemption regulations, and it has been relatively successful in this respect. The Competition Report published in 1972 points out that a task of competition policy⁶ is to prevent that "the removed governmental restrictions on trade and trade barriers are replaced by private ones. Quota agreements and arrangements aiming at a division of the Common Market by areas, groups of customers and other features, as a rule run counter to the provisions of the Treaties." If such agreements and practices are not fought against energetically, the functional integration will remain incomplete.

The Commission further states that, in spite of undeniable integration successes, it should be borne in mind "that some industries continue inclined to keep the national markets apart also in future by bans on exports that are imposed on the trade or by making reference to industrial property rights. Since the companies involved have never been able to put forward reasons justifying such serious restraints on competition, the Commission has always opposed such efforts. According to the Commission the possibility of referring to industrial property rights for the purpose of market division has been considerably limited in general by the decisions passed by the European Court of Justice."⁷

As regards the guiding principles of effective competition, which the EC has professed, the

validity of the arguments for promoting co-operation will be examined below:

□ The first communication of the EC on agreements relating to co-operation between enterprises dates from 1968 and is largely based on the German Co-operation Primer⁸. However, it avoids the latter's essential mistake only to go by the criterion of the legal obligation; in accordance with the "Folgetheorie" on which Art. 85 of the Treaty of Rome is based, it rather takes the market effects as a criterion.

□ The communication the EC issued in 1970 concerning bagatelle or petty cases which do not appreciably affect competition may also be unobjectionable on the whole⁹; for the exemption only applies if the agreement does not cover more than 5 p.c. of the turnover and, in addition, is confined to enterprises whose total annual turnover does not exceed 15 mn accounting units.

□ The group exemption regulation governing exclusive distribution agreements dating from 1967¹⁰ may also be judged positively on the whole, since it has shown that it is this kind of agreement – at least for a limited period of time – that is a suitable instrument in particular for small and medium-sized companies to gain a footing on foreign markets and thereby push the European economic integration. Later on, however, this argument loses its validity.

□ In December 1971 the European Council of Ministers authorised the European Commission to issue a group exemption regulation for specialisation cartels, agreements on uniform standards and types as well as research and development (R & D) agreements from the obligation to notify them with the EC, apparently based on a kind of assumption that these agreements generally fulfil the pre-condition of an exemption according to Art. 85 (3) of the Treaty of Rome¹¹:

□ The exemption of specialisation agreements is likely to be unobjectionable insofar as the circle of those covered by the arrangements is limited to enterprises whose annual turnover does not exceed 200 mn accounting units; furthermore the products covered by specialisation must not account for more than 15 p.c. of the turnover in a substantial part of the Common Market.

□ The exemption of agreements on uniform standards and types does not appear to be unobjectionable. The EC seems to fail to appreciate

⁴ See Zöllner, "Die Konzentrationspolitik in der EWG", in: "Die Konzentration in der Wirtschaft", Bd. 2, published by Helmut Arndt, Berlin 1971, p. 355 ff., 385 ff.; with further literature references.

⁵ No more than reference is made to Articles 60, 65, and 66 of the ECSC Treaty.

⁶ Cf. Competition Report, op. cit., p. 13.

⁷ Competition Report, op. cit., p. 15; cf. Sirena Case, in: Amtsblatt der Europäischen Gemeinschaft (ABIEG) C 33 of 7. 4. 1971, p. 11, and Deutsche Grammophon Case, in: ABIEG C 65 of 29. 6. 1971, p. 14.

⁸ In: ABIEG C 75 of 29. 7. 1968, p. 3 (so-called European Co-operation Primer).

⁹ In: ABIEG C 64 of 2. 6. 1970, p. 1 (so-called "Bagatellverordnung"-regulation governing bagatelle or petty cases).

¹⁰ Regulation No. 67/67, in: ABI No. 57 of 25. 3. 1967, p. 849.

¹¹ Regulation No. 2821/71, in: ABIEG L 285 of 29. 12. 1971, p. 46; Regulation No. 2822/71, in: ABIEG L 285 of 29. 12. 1971, p. 49, and Regulation No. 2779/72, in: ABIEG L 292 of 21. 12. 1972, p. 23.

here that the establishment of uniform standards and types, often highly commended by certain quarters, definitely can be an instrument that may be used to restrict competition quite considerably; to illustrate the dangers to competitive behaviour, one has only to think of the case of transforming a heterogeneous, loose oligopoly into a homogeneous, tight oligopoly with the aid of standardisation.

☐ The exemption of co-operation in the field of R & D seems especially objectionable. The EC advances the argument of adjusting the company sizes to the conditions of the Common Market which require inter-company co-operation. It holds the opinion that agreements on joint R & D, even if restraining competition, are not so dangerous in general as to make a notification necessary. The German Antitrust Authority feels that such reasoning completely misunderstands the concept of dynamic effective competition, according to which innovative competition is one of the major parameters of action on the market, which many economists even regard as more important and essential to the competition process than the traditional parameter of action price.

Control of Dominant Positions

Art. 86 of the Treaty of Rome prohibits the abuse of a dominant position in the Common Market. When the EC emphasises in its Competition Report¹² that it proceeds vigorously against companies taking unfair advantage of dominant positions one cannot but call this statement euphemistic; for the EC so far has instituted only four proceedings under Art. 86 of the Treaty of Rome.

In the proceeding against the "Gesellschaft für musikalische Aufführungsrechte" (GEMA)¹³ the EC regarded the following points as abuse of GEMA's factual monopoly position in Germany as an essential part of the Common Market:

- ☐ discrimination against citizens of other Member States;
- ☐ tying the members to GEMA in an unnecessary manner;
- ☐ preventing the creation of a uniform market for services of music publishers;
- ☐ contractual extension of the copyright law to unprotected works;
- ☐ discrimination against the independent importers of records vis-à-vis record producers;
- ☐ discrimination against importers of sound and video recorders vis-à-vis the German makers of such devices.

¹² See Competition Report, op. cit., p. 16.

¹³ GEMA Case, in: ABIEG L 134 of 20. 6. 1971, p. 15.

The Commission has refused to accept the possible objection that its decision impairs cultural and social functions, emphasising that the decision aimed at strengthening the authors vis-à-vis the market dominating GEMA.

At the end of last year, the European Commission rendered two further decisions, fining an abuse of dominant position under Article 86 of the Treaty of Rome:

The Commission imposed fines in the amount of 9 million accounting units on 16 European sugar companies, who had wished to ensure the control of the national markets by import and export agreements as well as by artificially dividing the sugar markets into markets for human and animal foods. This decision has not only been based on the ban on cartels incorporated in Article 85, but also on the prohibition of abuse of dominant position under Article 86 of the Treaty of Rome. The companies are accused of having forced importers to adopt a certain distribution policy or to restrict imports. Loyalty bonuses are said to have prevented domestic processors from buying on foreign markets. The motto of the European sugar plants had been "Everyone sells on his own market", the Commission held.

Also end-1972, the European Commission fined the Italian subsidiary of the US Commercial Solvents Corp. 200,000 accounting units for a refusal to sell; thus, Article 86 of the Treaty of Rome has been used for the first time to impose an obligation to contract. The company was ordered to deliver 60,000 kg of nitropropane and 30,000 kg of aminobutanol to an Italian customer within two months. The two substances involved are raw materials which are indispensable for the production of tuberculosis drugs. If Commercial Solvents Corp. does not comply with this term, a fine of 1,000 units of account for each day of delay will be imposed on it. For the first time the European Commission has fixed daily penalty payments in order to enforce its orders.

Control of Corporate Concentration

Although Art. 86 of the Treaty of Rome — other than Art. 66 of the ECSC Treaty — *expressis verbis* does not provide for any merger control, the EC in 1965 already suggested in its study on the problem of corporate concentration¹⁴ that it thought Art. 86 of the Treaty of Rome applicable to two types of concentrations, viz.

- ☐ if, "a company by cut-throat competition or by other practices takes advantage of its domi-

¹⁴ EWG Kommission, "Das Problem der Unternehmenskonzentration im Gemeinsamen Markt", Studien Reihe Wettbewerb Nr. 3, Brüssel 1966, p. 21-27.

nant position in order to force another enterprise into accepting a merger against its will or at unfavourable conditions", and

☐ if "a merger between the dominating company and another enterprise, by which competition which otherwise would continue on the market is eliminated, . . . creates a monopoly situation".

In other words, the EC regards certain forms of mergers, in which an already market dominating company is involved, as a prohibited abuse of a market dominating position in the Common Market or a substantial part thereof. These conditions are reflected in the decision issued against the Continental Can Co.¹⁵ at the end of 1971.

The US packaging corporation Continental Can first acquired control over Schmalbach-Lubeca via its Belgian subsidiary Europemballage. Schmalbach-Lubeca is the largest German metal packaging and closure manufacturer. Then Continental Can acquired a majority interest in the leading packaging material maker of the Benelux countries (Thomassen & Drijver-Verblifa N.V.). According to the EC, the situation resulting from this merger on the light metal packaging market in the North Western EEC area fulfilled the requirement of an abuse of a market dominating position within the meaning of Art. 86 of the Treaty of Rome.

A prerequisite of the presence of a market dominating position is that a company is able to act without any particular regard to competitors, buyers or suppliers, the Commission holds. In the Continental Can Case the EC, when diagnosing the market dominating position, also took into consideration the acquired market shares as well as the lead the group has with respect to most of its competitors, which results from its size and its economic, financial and technical status, mainly:

- ☐ the technological lead due to ownership of patents and technical know-how;
- ☐ the extensive production programme and the geographical distribution of manufacturing facilities and warehouses;
- ☐ the machinery necessary for making and equipping metal packagings; as well as
- ☐ the possibility of turning to the international capital market.

The EC held that the condition of abuse as outlined in Art. 86 of the Treaty of Rome was fulfilled in that a company already holding a market

dominating position consolidates its dominance by a merger with another corporation in such a manner that competition for the products in question, which would have continued actually or potentially irrespective of the original market dominating position, is virtually eliminated in a major part of the Common Market (aspect of safeguarding and cementing a market dominating position).

It remains to be seen whether the European Court of Justice will follow this interpretation of Art. 86 of the Treaty of Rome; in any case this kind of merger control can only be regarded as an ultimate remedy. For to maintain effective competition as an anonymous control mechanism it is necessary that merger control operates long before a market dominating position emerges, rather than intervene when an already existing dominant position in the Common Market or a major part of it is safeguarded and strengthened by further concentration moves.

Merger Control Provisions

Although the European Parliament in 1970 explicitly requested that for "mergers as a result of which a specific market share or certain sizes are exceeded" an EC objection proceeding should be instituted, the Commission on its part has not yet given any direct views on the problem of controlling the concentration process¹⁶. Comments made by and talks with members of the Directorate-General for Competition of the EC illustrate, however, that the EC aims at adopting a merger control provision during the process of the still outstanding amalgamation of the three European Treaties: Treaty of Rome, EURATOM Treaty, and ECSC Treaty; the question will then be raised whether the pre-merger control of Art. 66 of the ECSC Treaty should be extended to all other branches of industry or whether the coal and steel sector will remain subject to special laws, whilst the other industries will be covered by a more lenient form of merger control. Such a frequently discussed solution is likely to pose problems with a view to the ban on discrimination (unequal treatment of industries), however.

In view of the differing views on competition policy in the enlarged community of 9 Member Countries, it will only be possible to achieve the required unanimity for establishing a European merger control provision and a European anti-trust authority, if the partly quite strong resistance to US holdings and investments in some Member Countries is channelled politically (merger control also as an instrument against the swamping of European industry by foreigners).

¹⁵ Continental Can Case, in: ABIEG L 7 of 8.1.1972, p. 25. Cf. Competition Report, op. cit., p. 87 et seq.

¹⁶ Zohlnhöfer, op. cit., p. 385, with pertinent references.