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THE COMMON MARKET: A PRIMER FOR ROCKY MOUNTAIN LAWYERS

By JOHN A. MOORE*

I. WHY IS THE COMMON MARKET IMPORTANT?

There has been a great deal of comment in the past year about the Common Market. It has occasioned debates in the United States Congress and in parliaments around the world. What is it that is causing so much attention? We know that Europe is more prosperous and that the Market is trying to lower internal tariffs. But why should this be of such concern? After all, the nations of the world, and particularly those of the Atlantic community, have been raising and lowering tariffs for centuries and are constantly entering into one scheme after another related to trade. What is so special about the Common Market development?

A few figures may suggest the answer. The Common Market is not just another tariff arrangement, dealing with a limited aspect of the world's economy. The six nations now full members of the Market—France, Germany, Italy and the Benelux countries—have a population of 180 million people. Many of the new African states are associated with the Market, having formerly been colonies of member nations.¹ Greece has become an associate member; Great Britain is applying for full membership.² In what is called the "extended Common Market," which includes the nations that are very likely shortly to become associated in one way or another, there are about 250 million people. This is far greater than the present population of 185 million in the United States and 214 million in the Soviet Union.³

These countries and the United States will contain 90% of the industrial capacity of the free world. The steel capacity of these nations will soon be as large or larger than ours, and will dwarf that of Russia. Their automotive and electrical production greatly exceeds Russia's and is second only to the United States. Most importantly, the extended Market nations represent an enormous consumer market whose buying power could well come to equal that of the United States, which is still by far the greatest single market in the world. As an example, the present six Market countries now account for one-third of the total world imports of farm products, in spite of the fact that they produce 78% of their own agricultural needs.⁴

The prosperity of these countries is astonishing. From being largely in ruins at the end of the war, the six nations have advanced to where their present average annual increase in industrial pro-

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¹ In 1962 there were 17 associated States, and a number of States and Colonies in other parts of the world are also associated with the Market. European Community Information Service, *The Facts* 4 (Brussels-Luxembourg, 1962).

² Convention with Greece of July 9, 1961, effective November 1, 1962. See Table, *Status of Common Market Membership and Association*, CCH Common Mkt. Rep. ¶ 9009.

³ Population figures derived from Porter, *Time For A Giant Step*, Life 102 (April 20, 1962).

⁴ European Community Information Service, *The Common Market* (Brussels - Luxembourg, 1961); see also Porter, *supra* note 3.

duction is 8%, compared with 3% in the United States. In the three years 1958, 1959 and 1960, the Common Market nations piled up an almost unbelievable total 25% advance in industrial production.⁵

The world knows the industry of these countries is booming. Equally remarkable, but less well known, is the employment situation. Not only is there full employment in most parts of Europe, but there is chronic overemployment in many areas. In Germany it is common for labor scouts to stand outside the factories in the evenings attempting to solicit workers to change jobs by offers of interest-free loans or rent free apartments, as well as increases in salaries. It is said that in one instance, a manufacturer was so desperate to increase his work force he actually bought an entire separate business, closed down its operation and moved the workers to his plant. Thousands of Southern Europeans are employed in the more industrial north, and the situation may well be on the way to solving the chronic unemployment problems of Southern Italy and Greece.

With all this development, the impact of the new community of nations is just beginning to be felt. In 1960 the national income of the six member countries was only \$180 billion dollars, as compared with \$503 billion income in the United States.⁶ A few moments consideration of these figures makes it clear that the Market may well develop into a third industrial and population concentration in the world comparable in size and economic power to the United States and to Russia, and far exceeding in economic power the numerically larger nations of China and India.

The peculiar impact of the Common Market legal structure is that it has to a great degree caused the European boom to accelerate at these rates, and it holds the key to concentrating these forces into an effective political force.

The basic economic objectives of the Market are well known. The members are creating a vast, single internal market by reducing and eliminating tariff and quota barriers among the Common Market countries, and by creating a common external tariff appli-

⁵ *Ibid.*

⁶ European Community Information Service, *The Common Market* (Brussels — Luxembourg, 1961).

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cable to all other outside countries. Less well known are the Market's efforts to create common economic policies for all member countries through common rules and institutions, and its revolutionary efforts to insure the free movement of persons, capital, firms and services among the countries.

For anyone who has had to try to get a job permit in a foreign country as an alien, or who has attempted to enter a particular profession or business in another country, this last point of free movement is almost the most startling. The Common Market is well on the way to the time when a worker from any Common Market country may move to another country and work there without restriction, and to the point where a business enterprise may be set up freely in any of the Common Market countries by an entrepreneur from any other member country.⁷

Finally, all of the economic progress should not disguise the fact that the aims of the Market are essentially political. Its founders definitely wanted to end the era of separate nation-states and to lay a foundation for Europe as a single political entity. They chose economic steps as their first practical goal, but their vision extends to Europe as a tightly-knit, strong and democratic force in the free world.⁸

The implications of this political goal, distant as it may be, are not lost on the governments of the United States and Russia. The preamble to the Treaty of Rome which created the Market expresses it this way:

His Majesty the King of the Belgians, the President of the Federal Republic of Germany, the President of the French Republic, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands,

DETERMINED to establish the foundations of an ever closer union among the European peoples,

RESOLVED by common action to ensure the economic and social progress of their countries by eliminating the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their people,

RECOGNIZING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

DESIROUS of strengthening the unity of their economies and of ensuring their harmonious development by diminishing both the disparities between the various regions and the backwardness of the less favored regions,

DESIROUS of contributing, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

⁷ See discussion in *The Facts*, *supra* note 1; and in *The Common Market*, *supra* note 4.

⁸ See documents collected in European Community Information Service, *Political Unity in Europe* (Washington, D.C. 1962).

INTENDING to strengthen the links which bind Europe and overseas countries and desirous of ensuring the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by the establishment of this combination of resources to strengthen the safeguards of peace and liberty and calling upon the other peoples of Europe who share their ideal to join in their efforts,

HAVE DECIDED to create a European Economic Community. . . .

"One Europe" might well tip the balance of power dramatically to the West.

II. WHAT DOES THIS MEAN TO U. S. ECONOMICS?

Our country is the world's leading exporter of goods and the Common Market is the second greatest exporter in the world. The trade between these areas is enormous. One-third of all of our 20 billion dollars in exports goes to the extended Common Market, and the trade back and forth is growing daily. This of course was one great impetus behind the Trade Expansion Act, proposed by the administration and passed by Congress in 1962, to allow the President to reduce many U.S. tariffs drastically, including authority to reduce tariffs by over 50% or to eliminate them entirely in some circumstances in trade with the Common Market.⁹ Our trade philosophy assumes that we must continue to trade with Europe at an ever increasing pace.

The Market is both a challenge and an opportunity to the United States. With lowered tariffs, our manufacturers and farmers see in Europe an area of tremendous consuming power with growing needs where American products can be sold. At the same time, they face the challenge or threat of European goods being sold here free, or partially free, of protective tariffs. American concerns fear the lower labor costs in Europe, although they often forget that our workers are still considerably more productive than European workers because of advanced technology, and they often are not aware that labor costs are constantly increasing in Europe, with the demand for labor and with rising standards of living.¹⁰

III. WHAT CONCERN HAS THE ROCKY MOUNTAIN LAWYER WITH THE MARKET?

We are prone to think in the Rocky Mountain region that all of this is most interesting, but it really has almost no impact on our life here. This is inaccurate from at least two angles. For one thing, recent surveys indicate that exporting is a \$200 million part of Colorado's economy, that 146 firms in Colorado export and that 26 engineering firms have done overseas engineering work, while a great many more have an interest in obtaining such work.¹¹

⁹ Trade Expansion Act of 1962, P.L. 87-794, Title II (October 11, 1962).

¹⁰ 18 Report on Western Europe, *Europe As A Competitor* (Chase Manhattan Bank, June-July 1962); CCH Common Mkt. Rep. ¶ 9015.

¹¹ Governor, State of Colorado, *Export Directory, Colorado, U.S.A.* (1961); University of Colorado, 35 Colo. Bus. Rev. No. 9 (Sept. 1962).

While Colorado leads the Rocky Mountain states, neighboring states also have substantial export trade. That of Kansas and Nebraska exceeds that of Colorado.¹²

The engineering aspect is particularly striking in Colorado. Engineering services are our single greatest dollar export, although we do export about \$48 million in various manufactured goods yearly, and Colorado's share of total annual national agricultural exports is about \$82 million. Overseas engineering, exclusive of U.S. work, is about a \$50 million aspect of our economy, which is just about what the entire skiing industry brings into Colorado each year. As to people involved, surveys show that 28,430 workers in Colorado alone are directly or indirectly engaged in the manufacturing and agricultural export business.¹³

IV. WHEN DOES THE INLAND LAWYER HAVE TO DEAL WITH THE MARKET?

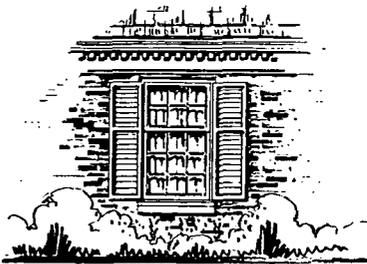
These figures indicate a second point—there are many occasions when a Rocky Mountain lawyer will have to know something about the Market. A client may be selling goods to the Common Market either directly or through exporting firms. It may wish to set up a plant in Europe for manufacturing. It may have licensing or royalty arrangements in the Common Market countries. It may be planning to furnish engineering services in a Common Market country, or services which involve purchases of items in the Market to go to an engineering job site in some other country. Another aspect of importance is where a client already has operations in a country that is proposing to associate with the Market, the most notable example being Great Britain. To these examples must be added the variety of legal problems which exporting, importing and transportation firms have.

V. WHAT IS THE COMMON MARKET FROM A LAWYER'S POINT OF VIEW?

If an attorney has any of these problems, or may have them, a few basic facts are essential. The official name of the Market is the European Economic Community, which is a special legal relation-

¹² Colo. League of Women Voters, *Your Stake In World Trade* (1962).

¹³ *Supra*, note 11.



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ship among the six members, created by the Treaty of Rome.¹⁴ Of possibly less practical importance, but equally interesting in the whole picture, are similar structures called the European Coal and Steel Community, and Euratom, the European Atomic Energy Community. *The lawyer must realize that the treaties creating these communities create an entirely new set of legal rules and obligations, many of which will be directly binding on his clients.*

The European Economic Community, or EEC, is administered by an Executive Commission composed of nine members acting entirely independently of the governments of the six member nations. This group implements policy under the Treaty of Rome, and proposes new rules which must be adopted by a Council of Ministers, which comprises one member from each of the member governments. Until recently the Council of Ministers acted only on unanimous vote, but as of January 1, 1962 a weighted voting system came into effect whereby France, Germany and Italy have four votes, Belgium and the Netherlands two votes each, and Luxembourg one vote. As a consequence, most decisions, though not all, can be made on the basis of 12 of these 17 votes. These decisions bind the countries whose ministers dissent.¹⁵

The EEC also has a court—the Court of Justice of the European Communities—which hears cases involving law of the Common Market and the Coal and Steel and Euratom Treaties. The judgments of the court are not appealable. They have the force of law in the Community, where they are directly enforceable on private persons, firms and governments, as well as on the executives and personnel of the EEC. This court is extremely active, having handed down many important decisions since first becoming operative under the Coal and Steel Treaty.

The people of the six countries are represented more directly in an organization called the European Parliament, composed of 36 members each for France, Germany and Italy; 14 for Belgium and the Netherlands; and 6 for Luxembourg. Members are drawn from the Parliaments of the respective countries, although eventually they will be directly elected by the voters. The Parliament has very little direct power, but it may cause the Executive Commission to resign in a body by a two-thirds vote, and it can also put parliamentary questions to which replies are obligatory.

These institutions dramatize a new era in modern legal history. The three new communities have by treaty delegated authority over certain aspects of their economic lives to a supranational governing organization in which they participate. The legal result is a pattern of laws transcending boundaries and imposed in addition to conventional application of internal law and conflict of law rules. The contrast to traditional international law is particularly striking. Rules based ultimately on a normal international law device—the treaty—now are applied directly to private parties, and these parties have full standing under such rules.

¹⁴ Signed March 25, 1957; effective January 1, 1958.

¹⁵ Treaty of Rome, art. 148 (1958); *The Facts*, *supra* note 1 at 7. Certain votes of 12 must include four countries.

VI. WHAT ARE A CLIENT'S PRIMARY LEGAL PROBLEMS IN THE MARKET?

Notwithstanding all of this, it is still true that at this time a client's chief legal concern will be with the laws of the country or countries where it plans to operate. The EEC's chief importance will be its economic impact on these countries, but more and more the legal structure of the Market is coming to be of an importance almost equal to the national laws.

Most business decisions which have something to do with the Common Market are preceded by some sort of survey, its scope depending on the business planned. If a question of sales or manufacture of products is involved, this may cover the market potential of the countries, raw material and parts availability, present tariff barriers, labor availability, competition, the wage and tax structures of the countries involved, and special incentives which may be offered by the national or local governments. Surveys of this kind may be conducted through market research organizations or directly by company representatives. In either case, it is important to get as close to the foreign situation as possible, in order to have an accurate picture. For this reason some authorities advise using European rather than American analysts.

Incentives for location in a particular area are less important than they were a few years ago. However, valuable tax reductions, low cost loans and favorable plant site arrangements may still be made in some areas. Also not to be neglected are the advantages of locating in one of the free port areas or even in a low tax country outside the Common Market, such as Switzerland.

Having decided generally where and what it wishes to do, the client may turn to the attorney to find out how to do it and stay on the right side of the law. Then the problem is one of legal planning very much resembling what must be done in the United States, except that there will constantly be new and surprising answers to the old questions, and one will encounter a considerably greater problem of obtaining reliable information and advice than is available in the U.S.

An elementary check list of problems to consider might be:

1. The need for *business permits* and *registration* to do business.
2. The *legal form* in which to do business, whether as a branch of an American company, as an American or a non-European foreign corporation subsidiary of your client, or as a European subsidiary.
3. The impact of *income and other taxes* on your client, and especially unfamiliar taxes such as the one which is very common in Europe called the Turnover Tax. This is a transaction tax, in effect like a continuing series of sales taxes imposed at rather low percentages, but levied every time goods and component parts change hands.
4. Problems of obtaining *labor* and dealing with the generally greater array of *social legislation* in Europe covering hiring and other employment problems.

5. *Import and export permits and tariffs.*
6. *Antitrust and unfair competition* legislation, both national and Common Market.
7. Questions concerning *repatriation of funds and profits, and currency controls.*
8. *Local legal arrangements*, such as may be involved in leases, transportation, billing and distribution.

The list could be expanded, but generally, if a lawyer is alert to following up differences in treatment of these problems in different countries, he will undoubtedly find he is asking the right questions.

VII. SOURCES OF INFORMATION AND ADVICE

The more serious problem is where to get the answers. The American lawyer will no doubt be inclined to depend on his own efforts to try to obtain as accurate information as he can, turning to others when necessary.

One problem here is that the inland lawyer will normally be depending almost entirely on secondary written sources. That is, he will be looking at tax and commercial services which abstract the laws of the countries involved, articles in books, pamphlets and periodicals, and results of investigations by other lawyers. Rather rarely will he, at least at the start of his work, be able to examine first-hand the statutes or regulations of the countries involved.¹⁶

Our own Department of Commerce is an enormous help in this work, since it has an entire branch devoted to helping businessmen in their foreign dealings. This is also true of the foreign consular corps in this country, which is delighted to give advice on doing business in countries represented. Special publications in the export field and materials produced by trade associations and other businesses will be a great help.

In many instances, the Rocky Mountain lawyer may feel he should turn to another lawyer more skilled in this field. For years it has been customary for a few firms in New York, Washington, Chicago and some of the Texas cities to have experts in transactions of this kind to help American lawyers. These men are still doing this and there are probably more of them with more knowledge than ever before. However, the pattern for the local lawyer is changing. He is tending more and more to rely on his own efforts and not on the advice of a few specialized lawyers in this country.

On the other hand, he usually and wisely will finally turn to lawyers in other countries to double check his findings and to alert him to problems he could not have found. This is particularly true where there is a question of actually locating in a foreign country, or, of course, when forming a foreign subsidiary or entering into leases and purchases and other transactions governed exclusively by foreign law.

¹⁶ However, both the Univ. of Denver and Univ. of Colo. Law School libraries, in recognition of the growing need, have collected certain very useful materials and have plans to expand their acquisitions.

Dealing with foreign lawyers raises a special problem. The practice of law naturally differs a great deal from country to country. Many European lawyers practice in a very traditional way, which consists largely of having specific questions put to them by clients and answering with specific written opinions, point by point. These practitioners often are not accustomed to giving the daily free-wheeling, broad scope of legal business advice that American concerns have come to expect from their lawyers.

It is important to know this and to be able to find lawyers who are practicing more in a pattern like ours, to help the American client. This sort of lawyer definitely exists, but he is not always easy to find. A great help in this, and also in direct advice, can come from the foreign offices of a few American law firms who maintain resident partners in Paris, Brussels, Rome and other chief centers in the European community. In addition, a number of American trained lawyers have located in these centers, specializing in giving advice to American firms entering the Common Market. These lawyers typically are extremely helpful since they recognize the problems of the American concern, but also know the European picture, have several languages available, and know when to employ local European lawyers for problems they cannot handle. Certainly not to be overlooked are the international accounting firms which maintain offices in every major center and which are extremely useful sources of local tax and other information, as well as being needed for more traditional accounting work.

What about written legal materials? Not long ago there was very little available dealing with a lot of the more practical aspects of these problems. However, now there is an ever-increasing volume of reliable material. Several loose-leaf services are available on the tax structures of foreign countries. There are many miscellaneous law review and other legal journal articles which are often very good,¹⁷ and there are several institutes producing annual volumes covering a broad range of problems in this field. Books are being written in many fields, one of the more comprehensive being the Harvard Law School studies in international taxation, producing, though not rapidly, thorough one nation single volume studies of tax structure. A new and quite helpful development is the publication in 1962 of an American loose-leaf service dealing exclusively with Common Market law and called "Common Market Reporter."¹⁸ Many volumes deal specifically with the Market and are too numerous to mention here. However, of great significance are the periodic publications of the Market authorities, especially the Official Journal of the European Communities and the Bulletin of the European Economic Community, both published in Luxembourg.

VIII. PROBLEM AREAS

The Rocky Mountain lawyer, trying to assemble some useful advice for his client, now has a lot of material before him and is

¹⁷ Many of these are readily available to most lawyers. For example, publications by American Bar Ass'n Sections covering antitrust, business law, tax and comparative law, articles in the N.Y.U. and So. Calif. tax institutes annual volumes, and the A.B.A. Journal.

¹⁸ Commerce Clearing House.

prepared to give the advice and to point out areas where he feels his conclusions should be checked by foreign counsel. It might be helpful to highlight just a few special problem areas.

A. *Jurisdiction and Judgment*

The American lawyer will discover that some of his deeply rooted concepts of jurisdiction may have to be readjusted. Speaking only of Europe, several countries of the Common Market have the rule that a plaintiff may obtain jurisdiction over a case by seizing property of the defendant in the country, although the defendant is not personally present. So far this corresponds with our *in rem* procedure. However, in Europe the court often may give a judgment as to the *entire amount* of the claim, regardless of the amount of property attached, instead of limiting the judgment as an American court would do. Then, through treaties or other arrangements for reciprocal enforcement, the judgment may be taken to another country and enforced without a new trial.

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Perhaps equally startling to an American lawyer is the idea in Germany that shares of a GmbH (which is a corporate form corresponding somewhat to our closely held corporations) are considered to have their situs in the country where the corporation is formed, rather than where the certificates physically are, or where the owner may be found. This causes problems in the normal parent-subsidiary relationship since, for example, a Colorado corporation with a GmbH subsidiary in Germany may itself be sued *in rem* by seizure in Germany of the shares of the GmbH.

B. Employee Relations

Generally speaking, social legislation in the Common Market countries attempts to do much more to protect the employee than the more *laissez faire* legislation tradition in America, eroded as some may feel the latter is. European codes will often specify long periods of notice for terminating a worker, and may allow him substantial amounts in the nature of severance pay or compensation for being fired.

Other laws and economic situations affect payrolls. One may think the hourly wage in Europe is comparatively low, but it is not quite so low as it may seem when one realizes that normally there must be a 25 to 30% add-on for various payroll taxes paid to the government, and as much as 100% add-on for fringe benefits necessary to attract workers.

C. Unfair Competition

In the United States we perhaps have the idea that the law of unfair competition, built up as it is largely through the common law, is rather limited in effect. However, several European countries have very elaborate codes of unfair competition which may be a help as well as a hindrance, restricting as they do the power of employees and others to hurt a client's business.

D. Antitrust

Probably the most extraordinary legal development in the Common Market has been the proliferation of antitrust laws. Traditionally, Americans viewed Europe as an antitrust heaven compared to the U.S., where the government vigorously enforces our antitrust statutes. We had the idea that cartels were considered perfectly acceptable in Europe and, therefore, many restrictive practices would be legitimate there which are outlawed here. This is no longer true. Not only has almost every European country passed some sort of antitrust legislation since the Second World War, but the Treaty of Rome contains very broad antitrust provisions which have been implemented by adoption of a comprehensive series of regulations by the Executive Commission of the EEC.

Americans will not be surprised by the prohibited practices. They are the same range of monopolistic and anti-competitive agreements and actions prohibited here. More surprising, perhaps, has been the application of these rules. Drawing upon the rather general language of the German law on restrictive practices, the German courts have, for example, construed almost any practice leading to vertical price maintenance as being illegal, even in the

absence of agreements on price maintenance or vigorous efforts to maintain prices.¹⁹

Another feature of European competition regulation is more helpful, although equally surprising to the American. This is that some of the codes or statutes will prohibit a wide range of practices, but many of these practices may be legalized by registering the arrangement with a commission, thus in effect giving the government notice of the practice and an opportunity to weigh its effects.

Under German law, registration will prevent public or private lawsuits on certain practices and will allow them to be carried on until the government may decide they should be stopped. Similarly, under EEC regulations, certain illegal agreements prohibited by the Treaty of Rome since 1959 may be made largely free of harmful effect by registration, and a request may be made that they be permitted in the future. Thus, if there is a registration or notification, fines or other damages may be eliminated to a great extent and it is possible the registrant will be allowed to continue, if the Commission determines his practice really promotes trade rather than hurting it.

E. American Tax Picture

Of course, the client will be interested in the impact of American taxes. In this area we seem to have come full circle. Only a few years ago bills were being considered by Congress to allow American corporations doing business abroad to be taxed only at the foreign rate and not the U.S. rate until repatriation of profits to the U.S. With the new administration, Congress passed in 1962 a bill which, in effect, will tax at U.S. rates even earnings of some foreign subsidiaries of American firms, which, in many situations under prior law, would have paid no American tax until return of the profits. Foreign subsidiaries taxed are chiefly sales and services subsidiaries located in so-called "tax haven" or low tax rate countries. The impact of U.S. tax is quite complicated, and one must always consider the extensive series of treaties which the U.S. has with other countries designed to prevent double taxation.

IX. CONCLUSION

American lawyers will no doubt find that they have to deal with these problems more and more in a world of larger populations and increased trade. The Common Market exemplifies an area in which what might be called supra-national law bears directly on the actions of individuals and firms. American tax treaties are another example. The Trade Expansion Act is a more traditional example of the indirect legal effect negotiations between countries can have on persons. We may well see the day when the United States enters a situation in which multi-national or supra-national law of this kind is of direct concern in our own country. In this case, no doubt, foreign lawyers looking at the American scene will be considering problems much like those facing American lawyers in the European Community today.

¹⁹ See Fed. Sup. Ct. Dec. January 14, 1960 — KRB 12/59, Reg. App. Ct., 5 Wirtschaft und Wettbewerb 347 (1960) (BGH 369); Fed. S.C. Dec. October 8, 1958 — KZR 1/58, Dist. Ct. Cologne; 28 Dec. Fed. Sup. Ct. Civil 208 (1959), 12 Wirtschaft und Wettbewerb 783 (1958) (BGH 251).