

REGIONAL DEVELOPMENTS

European Communities*

I. Competition (Antitrust) Law

A. FRANCHISE AGREEMENTS

In the *Pronuptia Case*¹ the Court of Justice of the European Communities (ECJ) has given its first judgment on a franchise agreement (as distinct from an exclusive or selective distribution agreement or an intellectual property licensing agreement *simpliciter*). In an action by the franchiser for arrears of royalties the franchisee argued invalidity of the agreement under article 85, EEC, as a defense. On a reference to the ECJ the Court held: (1) Franchises may be characterized as service, production, or distribution franchises; (2) Distribution franchises, of which the instant case is an example, while sharing features with other types of distribution or licensing agreements, are *sui generis*. Distribution franchises cannot benefit, therefore, from the statutory block exemptions from article 85 invalidity that apply to those other types of agreements;² (3) On the other hand, these franchises do not infringe article 85 per se, but particular clauses in such agreements may do so. Each agreement, therefore, should be considered on its merits, subject to certain guiding principles; (4) Certain clauses are essential to the concept of franchising and are, in principle, exempt, e.g., clauses designed to ensure the use by the franchisee of the franchiser's image, trademarks, and know-how while preventing these assets from becoming available to the franchiser's com-

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1. *Pronuptia de Paris v. Pronuptia de Paris Irmgard Schillgallis*, Case 161/842, [1986] 1 E. Comm. Ct. J. Rep. 414.

2. Specifically Reg. 67/67, on exclusive distribution agreements, but the same argument applies, for example, to Reg. 1983/83 on exclusive distribution agreements; Reg. 1984/83 on exclusive purchasing agreements; Reg. 2349/84 on patent license agreements; and Reg. 123/85 on motor vehicle distribution and servicing agreements. The holding also would apply to the proposed block exemption for know-how license agreements. See *infra* note 4.

petitors. Thus, the franchiser can control the selection and design of the premises, goods supplied, advertising, and power to assign the franchise; (5) But clauses that restrict competition in ways not essential to these ends may be prohibited, e.g., clauses that partition markets between franchisees, or between franchiser and franchisee, or that fix the franchisee's prices (though prices may be recommended for guidance). The court draws a particular distinction between the franchisee's power to open another shop selling similar but nonfranchised goods in competition with the franchiser or another franchisee (which may be contractually prevented) and the franchisee's power to open another such competitive shop selling franchised goods within the criteria and control of the franchise (which must not be prevented).

Since this judgment the Commission has announced³ that it takes a "positive view" of franchise agreements in general, is making an assessment of the whole franchising field in a light of the principles enunciated by the ECJ, and will make decisions on currently pending individual franchising agreements before enacting a specific block exemption tailored for such franchise agreements.⁴

B. PATENT LICENSE AGREEMENTS

The ECJ also delivered its first significant judgment in a patent license case after the Commission's enactment of the block exemption for patent license agreements (Regulation 2349/84) in the *Windsurfing Case*.⁵ The facts, issues, and holdings are too complex to be considered in a brief note of this kind, but salient among the Court's observations are: (1) Doubt as to the scope of the licensor's patent protection in Germany; whether German protection covers the whole windsurfing sailboard unit or only the "rig"⁶ for use with a board. The licenses, containing restrictive territorial clauses, assumed the former; the Commission assumed the latter, and found, therefore, that certain clauses infringed article 85, EEC, for restricting dealing in unpatented items and fined the licensor; (2) The licensor argued that, apart from the scope-of-patent issue, the imposition of contractual limitations on the use of rigs and boards was necessary, both in the interest of sailing efficiency and user-safety. The licensor, a California corporation, especially had to be concerned with possible prod-

3. Press Releases IP(86)64 and IP(86)150.

4. The Commission also proposes to enact a block exemption for know-how license agreements, see *Commission Working Paper*, EUR. PARL. DOC. (COM No. EN-1) IV (1986).

5. *Windsurfing International v. E.C. Commission*, Case 193/83, [1986] 3 E. Comm. Ct. J. Rep. 489.

6. The equipment above the surface of the board, i.e. the mast, sail, sail-bar, joints, and rigging.

uct liability claims brought by worldwide users against it in California courts. The ECJ held that the Commission, while not authorized formally, to determine the scope of a national patent, was entitled to take a view on the available evidence as to that scope, for competition law enforcement purposes, without waiting for a definitive interpretation from the National Patent Office. Here the view taken by the Commission was not unreasonable, although given the doubt (and other considerations), the fine should be reduced. On the other hand, possible exposure to tortious liability under foreign (California) law could hardly be used to justify infringements of Community competition law (if there were infringements).

C. AGREEMENTS OF MINOR IMPORTANCE

The Commission issued a revised version of its Notice on Agreements of Minor Importance.⁷ The Notice states the Commission's policy that since agreements between parties to small undertakings, having only a small share of the relevant market, do not appreciably infringe article 85, EEC, then however restrictive the agreements may be, the Commission will not attempt to enforce article 85 against the parties. In Europe this is regarded as part of a wider *de minimis* principle; in the U.S. this policy might be regarded as an aspect of the Rule of Reason. The principal change is that maximum aggregate turnover of the participants in the preceding year (which defines exempt size) has been increased from 50 million to 200 million ECU,⁸ in line broadly with inflation since 1977, but also representing a more generous Commission attitude. The relevant market aggregate share figure remains as before at five percent maximum. Significantly, the Notice also expressly states that its provisions are without prejudice to the jurisdiction of national courts (or the ECJ) to find that an agreement infringes article 85, although covered by the Notice, which the Commission admits is possible. The policy statement contains the usual elaborate definitions of qualifying turnover and relevant market.

D. ABUSE OF A DOMINANT POSITION (CONTRA TO ARTICLE 86, EEC)

In *AKZO Chemie*⁹ the Commission imposed a record fine (in quantitative terms) of ten million ECU¹⁰ for an infringement of article 86 as a

7. [1986] 29 O. J. Eur. Comm. (No. C 231) 2 (1986); Press Release IP(86)432. The previous version was issued in 1977, 20 O. J. Eur. Comm. (No. C 313) 3 (1977).

8. European Currency Unit usually used in Community legislation to express monetary amounts, and formally defined in Regulation 3180/78, as amended by Regulation 2626/84. The ECU is very broadly comparable, much of the time, to one U.S. dollar.

9. Decision 85/609/EEC, 28 O. J. EUR. COMM. (No. L 374) 1 (1985), [1986] 3 E. Comm. Ct. J. Rep. 273.

10. See *supra* note 8.

result of AKZO's attempts to prevent a small company, ECS, from entering AKZO's dominated plastics market by deliberate predatory pricing and other abusive practices. On review of this decision,¹¹ however, the ECJ upheld AKZO's contentions that, in the course of its investigations, the Commission had wrongfully disclosed AKZO's business secrets to ECS. The Court distinguished material subject to the Commission's general obligation to observe professional secrecy in investigations, some of which might have to be shown to the other party in the interests of natural justice and due process, from the sub-class of such material, business secrets, which must never be so disclosed. The Commission's decision was annulled, but AKZO's claim for damages¹² (based on Stanley Adams's successful action¹³ against the Commission for damages in respect of losses sustained through the negligent disclosure of his name as an informant against his then employer, Hoffman-La Roche) was dismissed in view of AKZO's own conduct.

II. Internal Market Harmonization

A. PRODUCT LIABILITY

Perhaps the most important recent development in the area of product liability is the enactment of Council Directive 85/374/EEC on Liability for Defective Products.¹⁴ This Directive requires all Community Member States to amend their national laws to provide (without prejudice to existing liabilities and remedies) that producers shall be liable for their defective products without proof of intention or negligence in giving rise to the defect, where the defect has caused death, personal injury, or damage to or destruction of personal consumer-type property. "Producer" is defined to include raw material suppliers, component manufacturers, and importers (into the Community), and where the actual producer or importer cannot be identified, each supplier may be treated as the producer. The liability is not truly no-fault, as various statutory defenses, some of them related to faults, are allowed, but liability cannot be limited or excluded. Member States are allowed some options in implementing the Directive; in particular, they may specify the maximum liability of a pro-

11. *AKZO Chemie v. E.C. Commission, ECS Intervening*, Case 53/85, [1986] *The Times* 7/7/86.

12. Under arts. 178 and 215, para. 2, EEC.

13. *Adams v. E.C. Commission No. 1*, Case 145/83, [1986] 1 E. Comm. Ct. J. Rep. 506. *Cf. Adams v. E.C. Commission No. 2*, Case 53/84, [1986] 1 E. Comm. Ct. J. Rep. 506. In *No. 1* the ECJ reduced Adams's damages by 50% because of his own contributory negligence in causing the harms that he had sustained.

14. 28 O. J. EUR. COMM. (No. L 210) 29 (1985).

ducer in respect of death or personal injuries resulting from identical defects in the same items, but at not less than 70 million ECU.¹⁵

Member States are currently preparing their legislation, which must be effective by July 30, 1988. Some States will legislate in 1987. Clearly, the result will move consumers' rights in the Community closer to American patterns, but the general absence in Europe of class actions, jury trials of consumer damage actions, or contingent fees, will result in a Community regime that still will not resemble U.S. product liability closely.

III. Community Commercial Policy and External Relations

A. ILLICIT COMMERCIAL PRACTICES

In 1984 the Community enacted Regulation 2641/84 on Protection Against Illicit Commercial Practices,¹⁶ specifically to fill perceived gaps in its armory of retaliatory measures against unfair trading practices of non-Member States, especially those not covered by the existing anti-extra-Community dumping and subsidies legislation.¹⁷ The Regulation sets up procedures for Commission examination of complaints and for the ultimate taking of retaliatory trade measures, analogous to the anti-dumping procedures, in respect of "illicit commercial practices" which are defined, rather vaguely, as: "any international trade practices attributable to third countries¹⁸ which are incompatible with international law¹⁹ or with the generally accepted rules."²⁰ This definition appears wide enough to permit retaliatory trade measures against non-Member States whose attitudes to, for example, competition enforcement or intellectual property protection, are considered to fall short of internationally accepted standards.

Two cases have just arisen concerning this Regulation, both involving the U.S.A. The Regulation was first used *In re Du Pont and AKZO*,²¹ in which AKZO complained to the Commission that the order of the U.S. International Trade Commission, made under U.S. Tariff Act, 1930, section 337, to exclude from the U.S. unlicensed imports of AKZO's aramid fibers on grounds of Du Pont's allegations of infringements of its U.S. patents, was contrary to U.S. obligations, in particular, under GATT arts. III(4) and XX(d), as a failure to apply national treatment, thereby con-

15. See *supra* note 8.

16. 27 O. J. EUR. COMM. (No. L 252) 1 (1984).

17. Currently primarily contained in Reg. 2176/84/EEC and Dec. 2177/84/ECSC, 27 O. J. EUR. COMM. (No. L 201) 1 & (No. L 201) 17 (1984).

18. I.e., non-Member States of the Community.

19. The preamble makes it clear that the GATT is particularly intended.

20. Art. 2(1), Reg. 2641/84.

21. *In re United States Litigation Between E.I. Du Pont de Nemours and AKZO*, 29 O. J. EUR. COMM. (No. C 25) 2 (1986), [1986] O.J.C. 25/2, [1986] I E. Comm. J. Rep. 410.