

REGIONAL DEVELOPMENTS

European Communities*

I. Constitutional and Institutional Matters

The 1986 agreement of all Member States of the European Communities to amend and update the Basic Community Treaties, known as the Single European Act,¹ has now been implemented in the law of the U.K. by the (U.K.) European Communities (Amendment) Act 1986. The Republic of Ireland also approved the Single European Act by public referendum, as required under the Irish Constitution. The Member States are expected to complete the depositing of their instruments of ratification of the agreement in the near future, bringing the Single European Act uniformly into force in those States one month later.²

II. Competition (Antitrust) Law

A. AIR TRANSPORT AND COMPETITION

The judgment of the Court of Justice of the European Communities (ECJ) in *Ministère Public v. Lucas Asjes*³ held that, in the absence of any implementing regulation conferring specific powers of enforcement upon the European Communities (EC) Commission in relation to violations in the air transport sector, the Commission was entitled to proceed against violations (i.e., of articles 85 and 86, EEC) under its general powers conferred by article 89, EEC. As a result of that judgment, the Commission commenced formal proceedings against ten Community "national"

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1. Single European Act (SEA), BULL. EUR. COMMUNITIES, SUPP. 2/86, U.K. Command Paper Cmd. No. 9758. For a description of the contents of the SEA, see 21 INT'L LAW. 571, 571-74 (1987).

2. Art. 33(2), SEA.

3. Cases 209-213/84, 3 Comm. Mkt. L.R. 173 (1986). For a discussion of that case and its background, see 21 INT'L LAW. 571, 576 (1987).

airlines⁴ under that article. There being no precedents for a pure "general powers" procedure under article 89, the Commission initially wrote (in July 1986) to the airlines, setting out its evidence of their violations of article 85, EEC. The Commission focused in particular on price-fixing arrangements. It called attention to the *Lucas Asjes* judgment and the subsequent decision in principle of the EC Council to implement the competition rules of the EEC Treaty in the air transport sector, and required the airlines to submit within two months comments and proposals for bringing their infringing restrictions on competition to an end.⁵ At the end of the two months two airlines had still not replied, but some had sought to open immediate negotiations with the Commission to legalize their position, and some had sought a further two months' extension, which was granted.⁶ By March 18, 1987, the Commission considered that three airlines, Alitalia, Lufthansa, and Olympic Airways, had not undertaken to abandon their violations, as the remaining seven had. It therefore adopted formal reasoned decisions against them under article 89(2), EEC, rendering any relevant agreements between them a nullity⁷ and requiring them to terminate their violations under threat of penalties.⁸ These airlines, however, were permitted a further three weeks for reflection before the decisions took effect. By early April 1987 the three airlines capitulated, undertaking to abandon their most serious violations at once, and to enter discussions with the Commission on the phased elimination of the remainder.⁹ These are specifically "to limit and circumscribe the extent of revenue pooling, to eliminate all capacity sharing provisions and to permit flexible responses to passenger demand and to abandon agreements on fare types and levels."¹⁰

It should be observed that whereas the Commission chose to proceed initially only against "national" airlines of Member States, the legal prin-

4. I.e., Sabena (Belgium), SAS (Denmark), Lufthansa (Germany), Olympic Airways (Greece), Air France (France), Aer Lingus (Ireland), Alitalia (Italy), KLM (Netherlands), British Airways (U.K.) and British Caldeonian (U.K.).

5. IP Press Release 353 (1986).

6. IP Press Release 425 (1986).

7. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85(2), 298 U.N.T.S. 11, 48 [hereinafter EEC]. Notwithstanding that violative agreements were always (i.e., since 1958) in principle prohibited by art. 85(1), EEC, and therefore apparently null under art. 85(2), the ECJ decided in *Lucas Asjes*, 3 Comm. Mkt. L.R. 173 (1986), that, in the absence of an implementing regulation applicable to air transport, such agreements could benefit from the Community Law doctrine of "provisional validity" as regards their enforceability in a national court, i.e., unless and until pronounced against by a formal decision of the Commission such as was taken here.

8. IP Press Release 115 (1987).

9. IP Press Release 151 (1987).

10. *Id.*

principles involved can equally be invoked against any airline or other undertakings involved in air transport, wherever based, whose anti-competitive arrangements or practices are capable of affecting trade (in goods or services) between the Member States and which can be subjected to Community personal jurisdiction, to which, of course, airlines are inherently vulnerable. For airlines generally, the thirty-year honeymoon provided by the absence of an implementing regulation is finally over.

B. MARITIME TRANSPORT AND COMPETITION

Until now, maritime transport shared with air transport the peculiarity that, while in principle subject to Community competition law, especially articles 85 and 86, EEC, there was no regulation implementing those articles by giving detailed enforcement powers to the Commission. This situation arose from the same legislative history as still affects air transport. The basic general implementing regulation, Regulation 17/62,¹¹ was removed from effect on the transport sector by Regulation 141/62.¹² Specific implementation for road, rail, and inland waterway transport was provided by Regulation 1017/68,¹³ but this left air and sea transport unprovided for.

The United Nations Convention on a Code of Conduct for Liner Conferences 1974 (Geneva)¹⁴ caused the enactment by the Community of Regulation 954/79,¹⁵ which provides, in relation to ratifications of, or accessions to, that Convention by Community Member States, that these must be done in certain ways designed to secure: (a) some competition in intra-Community maritime trade between Community-based lines; and (b) a reasonable share of Community maritime trade to lines based in developing countries. In 1981 the Commission issued a Notice¹⁶ on the Application of article 86,¹⁷ EEC, to the Shipping Sector,¹⁸ in which it undertook, in reaching any article 86 decisions, to take account of the peculiar features of this sector. The Commission agreed, in particular, to consider the U.N. Convention and the legitimate aspirations of developing countries. In fact, the Community has shown little or no interest in enforcing its competition rules on the shipping sector until this year, no doubt because of the political sensitivities involved. As with air transport,

11. [1962] O.J. 13/204.

12. [1962] O.J. 124/2751.

13. [1968] O.J.L. 175/1.

14. 13 I.L.M. 912 (1974). This entered into force on October 6, 1983.

15. [1979] O.J.L. 121/1, 22 O.J. EUR. COMM. (No. L 121) 1 (1979).

16. I.e., an administrative statement of policy, rather than legislation.

17. Art. 86 of the EEC prohibits abuses of a dominant position.

18. [1981] O.J.C. 339/4(ii), 24 O.J. EUR. COMM. (No. C 339) 4 (1981).

however, the honeymoon is now officially ended; but it has been ended by the EC Council's enactment of a package of regulations¹⁹ designed to take account of shipping's "peculiar features," and not by an article 89, EEC, procedure.

The principal statute is Regulation 4056/86,²⁰ on the application of articles 85 and 86, EEC, to maritime transport. Many of the procedural and penal provisions are the same as, or analogous to, those in Regulation 17/62, notably the possibility for a substantive violation of a fine reaching ten (10%) percent of the violator's (worldwide) turnover for the preceding year. A special "passive exemption" procedure exists, however, under article 85(3), EEC, in addition to the usual one, whereby applicants for exemption are to be deemed retrospectively exempt ninety days after publication of the application in the Official Journal, for a period of six years, unless the Commission has objected beforehand (article 12). In addition, special exemptions exist for "technical" (i.e., standardization and efficient utilization) agreements (article 2). Exemptions also are available for liner conference agreements and conference-transport users agreements that have the specified objectives of maintaining liner routes, and that meet certain specified conditions (articles 3-7). Nevertheless, nothing exempts from the prohibition of abuse of a dominant position in article 86, EEC (article 8). All maritime transport to or from a community port is covered, except "tramp vessel services" (article 1). Presumably these are excluded on the theory that tramp contracts, being inherently ad hoc, are unlikely to restrain competition. Nevertheless, a secret cartel of tramp-ship owners could fix minimum tramp rates. Such action would therefore have to be dealt with by the Commission, as with air transport, under its general article 89, EEC, powers. When application of the Regulation is liable to produce conflict with the law or administration of a non-Member State (e.g., the U.S.A.), the Commission must at once consult with that State to attempt reconciliation of interests if possible. The Commission is empowered to negotiate any necessary agreements with such States (article 9).

Regulation 4056/86 is supplemented by Regulation 4057/86 on Unfair Pricing Practices in Maritime Transport.²¹ The latter regulation is a kind of anti-maritime-dumping measure that creates a complaints investigation procedure leading to the imposition of a "redressive duty" (article 2) on "third country shipowners" engaged in "unfair pricing practices" with cargo liners that injure Community interests (article 1). The duty is collected on Community imports carried by such shipowners. Regulation

19. Regulations 4055-4058/86.

20. [1986] O.J.L. 378/4.

21. [1986] O.J.L. 378/14.

4058/86 on Co-Ordinated Action to Safeguard Free Access to Cargoes in Ocean Trades²² has a similar protective intent. It creates a complaints procedure leading to "co-ordinated action" by the Community where "action by a third country of its agents" restricts access to the maritime trade of that country to its own, or a favored foreign, merchant fleet, injuring Community interests, other than as permitted by (a strict interpretation of) the U.N. Convention (articles 1 and 3). Coordinated action may consist of diplomatic representations, and the imposition of permit requirements, quotas, or duties on the fleets benefited (article 4). This protection may be extended to non-Community OECD States (article 8). The three above-mentioned regulations come into force on July 1, 1987.

Finally, Regulation 4055/86, on Freedom to Provide Services to Maritime Transport²³ puts the Community's own house in order by making it clear that the "freedom to provide service" provisions of the EEC Treaty, articles 55-62, apply to maritime services (article 1(3)). No Member States discrimination is allowed between nationals of other Member States, even those established outside the Community when their vessels are registered in their Member States (articles 1(1) and (2)). The protection may be extended to third country nationals established in a Member State (article 7). Existing arrangements contrary to these principles must be phased out or adjusted (articles 3 and 4). This regulation came into force on January 1, 1987.

C. FRANCHISE AGREEMENTS

Basing itself upon the ECJ's judgment in the *Pronuptia Case*,²⁴ the EC Commission has taken its first two decisions involving franchise agreements, namely *Pronuptia*²⁵ (retailing of wedding clothes) and *Yves Rocher*²⁶ (retailing of cosmetics). In both, the parties had notified their standard form of agreement, and in both, the Commission granted an individual article 85(3), EEC, exemption after certain amendments had been made. The franchisee's exclusive rights, within its defined territory, to use of the franchisor's knowhow, trademarks, logos and symbols, and registered designs and models were approved. Also approved were the franchisor's rights to monitor and control the trading methods and products sold at the franchised premises, and to restrain the franchisee from opening a competing business with territorial limits during the agreement and for

22. [1986] O.J.L. 378/21.

23. [1986] O.J.L. 378/1.

24. *Pronuptia de Paris v. Pronuptia de Paris Irmgard Schillgallis*, Case 161/84, 1 Comm. Mkt. L. R. 414 (1986), discussed in 21 INT'L LAW. 895-96 (1987).

25. [1987] O.J.L. 13/39, 30 O.J. EUR. COMM. (No. L 13) 39 (1987).

26. [1987] O.J.L. 8/49, 30 O.J. EUR. COMM. (No. L 8) 39 (1987).

one year thereafter. The franchise could advise on, but not determine, the franchisee's prices to its customers. These decisions are seen as a significant step in liberating franchises from the fear of committing competition law violations.

D. KNOWHOW LICENSE AGREEMENTS

The Commission has announced²⁷ that it intends to enact a regulation for a "block exemption" under article 85(3), EEC, for knowhow license agreements, analogous to that for patent license agreements,²⁸ in the Spring of 1988.

E. INSURANCE AGREEMENTS

The case of *Verband de Sachversicherer v. EC Commission* is dealt with below.

III. Internal Common Market Harmonization

A. INSURANCE

The ECJ has recently given a series of judgments asserting the freedom, under the EEC Treaty provisions,²⁹ of insurers legally established in a Member State to provide insurance services in other Member States on a basis of nondiscriminatory equality with those established in those other States. This freedom overrides any national laws of those other States to the contrary effect. Thus in *EC Commission v. Germany*³⁰ the Court held that requirements of the German National Insurance Supervision Law (VAG),³¹ allegedly for the protection of the insureds, to the effect that (a) an insurer offering insurance services in Germany, and (b) a lead co-insurer of risks in Germany, must have a business establishment there, were contrary to Community Law if they were established in another Member State. The second point, on co-insurance, was reaffirmed in *EC Commission v. France*³² and *EC Commission v. Ireland*³³ in respect of the national laws of those defendant States. In a different case, *EC Commis-*

27. The Times, June 2, 1987.

28. Regulation 2349/84, [1984] O.J.L. 219/15, 27 O.J. EUR. COMM. (No. L 219) 15 (1984). A draft text of such a regulation on knowhow licenses was published as Commission Working Paper COM/86/EM-1.

29. Especially articles 59 and 60, *supra* 7, at 40-41.

30. Case 205/84, 2 Comm. Mkt. L.R. 69 (1987).

31. Versicherungsaufsichtsgesetz.

32. Case 220/83, 2 Comm. Mkt L.R. 113 (1987).

33. Case 206/84, 2 Comm. Mkt. L.R. 150 (1987).

sion v. France,³⁴ provisions of French tax law permitting the temporary granting of tax credits only to insurance companies established or incorporated in France was also found contrary to Community Law, in spite of vigorous arguments by the French that this was necessary to discourage tax frauds by insurers. Finally, in *Verband der Sachversicherer v. EC Commission*³⁵ the Court upheld the Commission's contentions that (a) Community competition law, *in casu* article 85, EEC, applied directly to insurance undertakings, and (b) that mere recommendations, by the applicant association (of German insurers of fire risks to industrial property) to its members, as to the premium rates they should charge, were violations of article 85.

B. COMMERCIAL AGENTS

The EC council has enacted Directive 86/653 on Self-Employed Commercial Agents.³⁶ This requires all Member States to harmonize their national laws on such agency contracts to comply with the model specified in the directive, which is overtly designed to protect agents' interests against those of the principal. States must comply by January 1, 1990, or, in the case of Ireland and the U.K., by January 1, 1994. Ireland and the U.K. have resisted the adoption of such legislation for many years, on the economic grounds that it is an unwarranted interference with freedom of contract in an area where market forces should determine relationships, and on the legal grounds that the Common Law of Agency is totally unsuited to this kind of regulative intervention, which is based on continental European legal concepts of agency relationships.

IV. Community Commercial Policy and External Relations

A. ILLICIT COMMERCIAL PRACTICES

In the case *In re Du Pont and AKZO*³⁷ in which AKZO complained of United States action under § 337, U.S. Tariff Act, 1930, instigated by Du Pont, as an illicit commercial practice within the meaning of EEC Regulation 2641/84,³⁸ the Commission has upheld AKZO's complaint in

34. Case 270/83, 1 Comm. Mkt. L.R. 401 (1987).

35. Case 45/85, *The Times*, February 7, 1987.

36. [1986] O.J.L. 382/17.

37. *In re E.I. De Pont de Nemours and AKZO*, [1986] O.J.C. 25/2, 29 O.J. EUR. COMM. (No. C 25) 2 (1986), 1 Comm. Mkt. L.R. 410 (1986), discussed in 21 INT'L LAW. 899-900 (1987).

38. [1984] O.J.L. 252/1, 27 O.J. EUR. COMM. (No. L 252) 1 (1984).