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REGIONAL DEVELOPMENTS

European Communities*

I. Constitutional and Institutional Matters

A. PROPOSED COMMUNITY COURT OF FIRST INSTANCE

If Community law can be analogized to U.S. federal law as having, to some extent, the relationship to the national laws of Community Member States that U.S. federal law has to U.S. state laws (more accurately, perhaps, the relationship that federal law *would* have to state laws if the United States Constitution consisted only of the Commerce Clause), then the Court of Justice of the European Communities (ECJ) corresponds to the United States Supreme Court, as the Supreme "Federal" Court of the Communities. But the analogy rapidly breaks down, not least because the ECJ has first instance jurisdictions,¹ and until now has had no equivalents of United States Federal District Courts or Courts of Appeal beneath it in a "Community" judicial hierarchy. It is the sole Community court, and beneath it are the national courts of the Member States, which correspond more precisely to U.S. state courts. However, as mentioned in a previous issue,² the Single European Act (SEA)³ permits the creation of a Community Court of First Instance,⁴ which would perform something of the role of a Federal District Court, in Community law. The ECJ's own proposals for the setting up of such a court, in the form of a draft Council Decision, have now been published in *Common Market Law Reports*.⁵

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 169, 170, 171, 173, 175 & 178, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

2. *Regional Developments: European Communities*, 21 INT'L LAW. 571, 572-73 (1987).

3. BULL. EUR. COMMUNITIES Supp. 2/86, reprinted in 25 I.L.M. 506 (1986) [hereinafter SEA].

4. *Id.* arts. 4, 11 & 26; EEC Treaty, *supra* note 1, art. 168A; Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, art. 32d, 260 U.N.T.S. 140 [hereinafter ECSC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, art. 140A, 298 U.N.T.S. 167 [hereinafter EAEC Treaty].

5. 51 Common Mkt. L.R. 185 (1988) [hereinafter Draft Decision].

Under these proposals the new court would sit, like the ECJ, in Luxembourg,⁶ in a number of separate chambers,⁷ and would have jurisdiction to hear: 1. labor disputes between the Communities and their employees; 2. actions by natural or legal persons (but not by Member States) against Community institutions alleging excess of powers (under Article 173, EEC) or failure to act (under Article 175, EEC)⁸ in matters of competition law and trade protection against dumping or illicit subsidies;⁹ together with any associated actions for damages.¹⁰ The ECJ would exclusively retain its existing first instance jurisdiction in all other matters.

B. LEGAL BASIS OF COMMUNITY LEGISLATION

In *E.C. Commission v. E.C. Council, Re Generalized Tariff Preferences*¹¹ the Commission and the Council had disagreed as to the appropriate legal basis for Council legislation giving effect to the GTP system. The Commission had argued for article 113, EEC, which empowers legislation in the field of Community commercial policy by a qualified majority vote in Council. The Council had argued for article 235, EEC, which confers residual and general legislative powers, but requires unanimity in Council. Finding that unanimity could not be achieved anyway, however, the Council purported to legislate on a qualified majority basis, but without specifying in the preamble to the Regulation precisely which Treaty article was the empowering source. The Commission challenged the validity of the Regulation before the ECJ, and won on both points. The Court held that: 1. the proper basis for this Regulation was article 113, not article 235, on the principle that where a more specific empowering source was available, it should be used, notwithstanding that it imposed different legal or political constraints from those of a more general source; 2. the Preamble to Community legislation is an important part of the text of the legislation, and in particular must specify as exactly as possible the empowering source, or other legal basis, under which the legislation purports to be made. Failure to comply renders the legislation invalid. This judgment would seem to create a new ground for challenging the constitutionality of Community legislation.

6. *Id.* art. 2(1).

7. *Id.* art. 2(2).

8. Same results under the equivalent articles of the ECSC Treaty, *supra* note 4.

9. Draft Decision, *supra* note 5, art. 3(1).

10. *Id.*, art. 3(2).

11. 29 O.J. EUR. COMM. (No. C. 121) 8 (1986); 51 Common Mkt. L.R. 131 (1988).

II. Competition (Antitrust) Law

A. AIR TRANSPORT AND COMPETITION¹²

The gap left in the implementation of the basic competition provisions of the EEC Treaty (articles 85 and 86) in the field of air transport by the adoption of implementing regulations in all other fields has been finally closed by the enactment by the Council, on December 14, 1987, of a legislative package designed to bring air transport fully into the regulatory structure by which Community competition law, and the rules on freedom to provide services, can be enforced, especially by the Commission. This is, of course, in addition to the Commission's inherent enforcement powers under the Treaty, which it had already begun to deploy.¹³ The principal statute in the package is Regulation 3975/87 on the Application of the Rules of Competition to Undertakings in the Air Transport Sector,¹⁴ which entered into force on January 1, 1988. This resembles Regulations 1017/68 (on road, rail, and inland waterway transport)¹⁵ and 4056/86 (on maritime transport)¹⁶ in the similarity of its basic enforcement provisions to those in the original Regulation 17/62 (on general enforcement powers),¹⁷ that is, especially with reference to the Commission's powers to investigate, issue cease and desist orders, and impose fines and penalties for violations. Like Regulation 5056/86, and unlike Regulation 1017/68, it fortunately does not contain its own definitions of prohibited activities, relying instead simply on the prohibitions of articles 85-86, EEC. Unlike Regulation 4056/86, its own list of special exemptions from those prohibitions is limited to those for certain agreements designed to achieve purely technical improvements or cooperation (article 2). The brief Annex provides a nonexhaustive list of such types of agreement.

The separate Regulation 3976/87¹⁸ (another part of the package) empowers the Commission to enact "block exemption" regulations giving effect to article 85(3), EEC (such regulations to remain effective until January 31, 1991—article 3) and lists nonexhaustively many matters that the Council considers the Commission "may" exempt under Article 85(3). The Commission has announced¹⁹ that it has drafted three regulations to

12. See previous discussions of this topic in *Regional Developments: European Communities*, 21 INT'L LAW. 571, 577; 21 INT'L LAW. 1205 (1987); 22 INT'L LAW. 570-71 (1988).

13. See sources cited *supra* note 12.

14. 30 O.J. EUR. COMM. (No. L. 374) 1 (1987).

15. 11 O.J. EUR. COMM. (No. L 175) 1 (1968), 11 J.O. COMM. EUR. 302 (1968).

16. 29 O.J. EUR. COMM. (No. L 378) 4 (1986).

17. 5 O.J. EUR. COMM. (No. L 13) 204 (1962), 2-5 J.O. COMM. EUR. 87 (1959-62).

18. 30 O.J. EUR. COMM. (No. L 374) 9 (1987).

19. Press Release IP(88)234.

be made under this power. These will cover agreements between air transport undertakings concerning: 1. joint planning and coordination of capacity, revenue sharing, tariff consultation, and slot allocation at airports; 2. provision of ground handling services; and 3. (computerized) time-tabling and ticket-reservation systems.

The Council's legislative package is completed by Directive 87/601/EEC on Fares for Scheduled Air Services between Member States²⁰ and Decision 87/602/EEC on Sharing Capacity and Access to Routes in Scheduled Air Services between Member States.²¹ These are addressed to Member State Governments, rather than air transport undertakings, and are designed to force governmental regulatory practices into conformity with the new competitive mode. The Federal Republic of Germany has declared, for the removal of doubt, that this whole package does not apply to Land Berlin.²²

A distinctive feature of this legislative package is that all these provisions only apply to "international air transport between Community airports."²³ Excluded therefore are: 1. transport between airports in the same Member State; and 2. transport between Member State and non-Member State airports. Since restrictions or abuses affecting both these types of transport may, in certain circumstances, be capable of affecting trade between Member States, and hence be prohibited by articles 85-86, EEC, the Commission would have to proceed against such violations by using its inherent enforcement powers under article 89, EEC.²⁴

Meanwhile the Commission has continued its proceedings against thirteen Community airlines, which it began in 1986 under its inherent article 89, EEC powers, but has informed the airlines that as of January 1, 1988, it will use its new Regulation 3975/87 powers, as regards violative agreements and practices formally continuing to exist after that date.²⁵

B. MARITIME AND INLAND WATERWAY TRANSPORT

In *Re Maritime Transport between Italy and Algeria*²⁶ Italy has been authorized by the Commission to ratify its Maritime Transport Treaty

20. 30 O.J. EUR. COMM. (No. L 374) 12 (1987).

21. 30 O.J. EUR. COMM. (No. L 374) 19 (1987).

22. 30 O.J. EUR. COMM. (No. L 374) 26 (1987).

23. Reg. 3975/87, art. 1, 30 O.J. EUR. COMM. (No. L 374) 1 (1987); 3976/87, art. 1, 30 O.J. EUR. COMM. (No. L 374) 9 (1987); see also Dir. 87/601, art. 1, 30 O.J. EUR. COMM. (No. L 374) 12 (1987); Dec. 87/602, 30 O.J. EUR. COMM. (No. L 374) 19 (1987).

24. EEC Treaty, *supra* note 1. See also sources, *supra* note 12.

25. Press Releases IP(87)343, IP(87)614.

26. Dir. 87/475/EEC, 30 O.J. EUR. COMM. (No. L 272) 37 (1987), 51 Common Mkt. L.R. 603 (1988).

with Algeria as complying with both the Community's ratification of the UN Convention on Liner Conferences²⁷ and with (Community) Regulation 4055/86 on Freedom to Provide Services in Maritime Transport.²⁸ In *Re Hyundai Merchant Marine*²⁹ the Commission has opened proceedings in relation to alleged illicit subsidies from the Korean Government constituting unfair pricing practices affecting the EEC-Australia liner trade, in what appears to be the first proceedings taken under Regulation 4057/86 on Unfair Pricing Practices.³⁰

Supplementing Regulation 1017/68 on Competition in Road, Rail and Inland Waterway Transport,³¹ the Council has enacted Directive 87/540/EEC on Access to the Occupation of Carrier of Goods by Waterway in National and International Transport and on the Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications for this Occupation.³² Thus, freedom to provide competitive services in this sector is enhanced.

C. CONCENTRATIONS (MERGERS AND TAKEOVERS)

In its historic judgment in the *Continental Can* case³³ in 1973, the ECJ held that article 86, EEC (prohibiting the abuse of a dominant position) could be used by the Commission as the basis for intervention, under its Regulation 17/62³⁴ enforcement powers, to prevent a takeover bid or merger where one party thereto already enjoyed dominance in the relevant market and the resulting concentration would (deliberately?) remove a competitor of that party from the market. (On the facts, the ECJ found, however, that the Commission had failed to establish by the evidence the existence of a dominant position. Nevertheless, the judgment was sufficient to cause Continental Can to abandon the bid, and to agree, in effect, to a divestiture order with the Commission). That ruling was somewhat unexpected in some quarters, since the wording of article 86, EEC, gives no hint (unlike the correlative article 66, ECSC) that it is concerned with concentrations. It also created a certain procedural difficulty for both the Commission and undertakings party to an impending concentration, in that article 86, unlike article 85, EEC, contains no power whereby the

27. Reg. 954/79, 22 O.J. EUR. COMM. (No. L 121) 1 (1979), 13 I.L.M. 910 (1974).

28. 29 O.J. EUR. COMM. (No. L 378) 1 (1986).

29. 30 O.J. EUR. COMM. (No. L 308) 3 (1987), 51 Common Mkt. L.R. 389 (1988).

30. 29 O.J. EUR. COMM. (No. L 378) 14 (1986).

31. *Supra* note 15.

32. 30 O.J. EUR. COMM. (No. L 322) 20 (1987).

33. *Europemballage Corp. v. E.C. Comm'n*, 1973 Comm. Ct. J. Rep. 215, 12 Common Mkt. L.R. 199 (1973).

34. *Supra* note 17.

Commission can exempt from its provisions concentrations that might fall within the ECJ's interpretation of article 86, but which might be considered highly desirable, from the public interest or market integration point of view, on other grounds.

In what may also come to be regarded as a landmark decision, the ECJ has not held, in *British-American Tobacco v. E.C. Commission* (also known as the *Philip Morris* case),³⁵ that article 85 may also be relied on by the Commission in certain circumstances as the basis for intervening in a potential concentration, for example, (*in casu*) where one undertaking acquired or increased an equity holding (of shares) in a competitor, even where no party had a dominant position in the relevant market (so that article 86 would be unavailable), and the resulting holding was not such as to give the holder a controlling interest in the competitor.

In this case, initially Rembrandt (R) wholly owned Rothmans Tobacco (Holdings) (RTH), which itself had a controlling interest in Rothmans International (RI). In 1981 R sold 50 percent of its holding in RTH to Philip Morris (PM) by an agreement the terms of which gave each party first refusal on any disposal of RTH shares by the other party and the right to appoint half the RTH board, but which excluded PM from any information concerning RI's competitive position in markets where RI and PM were competitors. Nevertheless the applicants, and others, who were also competitors of RI and PM complained to the Commission, which took the view that the agreement violated both articles 85 and 86, EEC.³⁶ After negotiations with the commission, R and PM made a new agreement under which PM abandoned its RTH holding in exchange for a direct (but noncontrolling) holding in RI, rights of first refusal, but no board seats. The Commission approved the new agreement, but the applicants still objected to it; and when the Commission rejected their objections as unfounded, they sued for judicial review of that decision before the ECJ in the present action. The Court accepted the applicants' contentions that any acquisition by one party of shares in a competitor might, on the facts, amount to an agreement prohibited by article 85, EEC, even if it were not an abuse of dominance prohibited by article 86, EEC. This would be particularly likely where the acquisition gave the first party legal or de facto control of the second, but it could also occur on the acquisition of a mere minority holding as here (less than 25 percent), where the acquisition had the object for the future, or actual present effect (or the risk of such an effect), of producing some coordination between the two parties

35. *British-Am. Tobacco Co. v. E.C. Comm'n*, 27 O.J. EUR. COMM. (No. C 178) 3 (1984); *R.J. Reynolds Indus. v. E.C. Comm'n*, 27 O.J. EUR. COMM. (No. C 195) 4 (1984) (supported by Philip Morris and Rembrandt Group intervening), 51 Common Mkt. L.R. 24 (1988).

36. Press Release IP(84)120, 40 Common Mkt. L.R. 40 (1984).

restrictive of competition between them. Each case had to be considered on its own facts, in the light of the surrounding economic context and the structure of the market. While the Commission had to be especially vigilant in such cases, nevertheless there was sufficient evidence in this case on which the Commission could properly find, as it had done, that there was no restrictive intent or (significant) effect. Moreover, in the absence of such object or effect, and with no competitor actually removed from the market, there could be no abuse of any dominance, and so no need for the Commission to enquire whether any party was dominant, for article 86 purposes. The Court would not therefore interfere with the Commission's decision.

Thus, although the Commission won on the facts, the significance of the judgment lies in that henceforward *all* acquisitions of shares (or other interests) in a competitor, however minor, are suspect from the article 85, EEC point of view. Legal security would dictate, therefore, that they should all be notified to the Commission, and a negative clearance or an article 85(3) exemption sought. Lack of a dominant position will not be an adequate defense in such a case. It is true that *British-American Tobacco* involved elaborate overall corporate structure agreements between two main participants, but there is nothing in the judgment to suggest that piecemeal acquisitions of shares from various transferors in ordinary stock exchange dealing could not also fall into the doctrine, since each transfer involves an agreement, and each agreement might be made with a restrictive object on the part of one of the parties (does article 85, EEC require the "object" of an agreement to be shared by all the parties to it?), or might have a restrictive effect when taken together with other similar agreements all having one party in common.

An interesting immediate application of the *British-American Tobacco* doctrine involved some of the participants in the original *Continental Can*³⁷ case, namely Carnaud and Schmalbach-Lubeca.³⁸ Here Carnaud (C), a French manufacturer of, inter alia, metallic beverage cans, sought to acquire 66.6 percent of the shares in Sofreb (SO), another French manufacturer of such cans, from Sacilor (SA). The remaining 33.4 percent of SO shares were held by Schmalbach Lubeca (SL), a German subsidiary of Continental Can (CC), acquired in the 1972 maneuvering. SL complained to the Commission, and also obtained an interim injunction from the French national court preventing further dealing in SO shares pending the Commission's finding. SL's ground of complaint was that C's acquisition of the controlling interest in SO shares would be likely to lead,

37. *Supra* note 33.

38. Press Release IP(88)14, 51 Common Mkt. L.R. 262 (1988).

through CC's control of SL (the minority shareholder) to coordination restrictive of competition between C and CC in the relevant market where C was substantial and CC possibly dominant (exactly the sort of situation the Commission had intervened in with the same parties back in 1972); therefore the C-SA deal was prohibited by article 85, if not article 86, EEC. The Commission substantially accepted this argument. At this point C offered to buy SL's minority holding in SO as well, if the Commission would approve. The Commission did approve, on the basis that C, by acquiring the whole of SO, did not significantly increase its market share even though it deliberately eliminated a competitor, where as it did remove the danger of C-CC collusion, and made C, on balance, better able to compete with CC, the market leader, than either C or SO had been previously.

The case is instructive in a number of ways. First, SL was legally able to rely on its own (i.e., its parent's) market strength to block an acquisition by a competitor. Second, SL, as minority shareholder, was thereby able to force the would-be majority shareholder, C, to buy out the whole minority interest as the price of acquiescence in the majority acquisition. Third, SL was able to do this by relying on the threat of its own (in effect) collusion with its competitor, C, if its minority interest was bought by C. SL appears therefore to have achieved its goals by considerable finesse. From the point of view of the public interest in concentrations, the outcome is probably the desirable one, and the Commission's approach is therefore to be welcomed. The case shows that the British-American Tobacco doctrine gives the Commission a subtle and flexible tool for intervention in concentrations, with power to approve or disapprove according to nice appreciations of market realities; a useful alternative to the difficult search for dominance and abuse entailed in the use of article 86, EEC, in this context.

Another important recent case on concentration is *Re British Airways and British Caledonian's Merger*.³⁹ Since this involves the merger of two competing airlines, it is the first concentration case in which the Commission could use its power under Regulation 3975/87.⁴⁰ As the price of approving the merger from the point of view of articles 85 and 86, EEC, the Commission was able to extract significant undertakings binding upon the merged entity, additional to those given to the U.K. Monopolies and Mergers Commission, designed to produce a compensating increase in competition between the new airline and its other competitors, actual and potential.

39. Press Release IP(88)131; 51 Common Mkt. L.R. 258 (1988).

40. *Supra* note 14.