

REGIONAL DEVELOPMENTS

European Communities*

I. Constitutional and Institutional Matters

A. NEW COMMUNITY COURT OF FIRST INSTANCE

The proposal to establish the first Community, as distinct from national, Court having only first instance jurisdiction to apply Community law, as distinct from the Court of Justice of the European Communities (the ECJ) which has first instance, review, and appellate jurisdictions was discussed in these notes in a previous issue.¹ The new court has now been created by Council Decision 88/591/ECSC, EEC, EURATOM.² It will consist of twelve judges, each of whom may be called upon to act as Advocate-General, and will sit in chambers of three or five judges (art. 2). It will be physically attached to the ECJ, in Luxembourg (art. 1). Its jurisdiction is intended to lighten the burden of the ECJ in hearing first instance cases, but is defined more narrowly than in the original ECJ proposals. It can hear:

- (i) labor disputes between the Communities and their employees,
- (ii) certain actions by undertakings and associations of undertakings against the Commission under the ECSC Treaty,
- (iii) by natural or legal persons against any Community institution alleging excess of powers (under art. 173, EEC) or failure to act (under art. 175, EEC) in matters of competition law, and (iv) actions for damages

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1. *Regional Developments: European Communities*, 21 INT'L LAW. 571, 572-73 (1988); 22 INT'L LAW. 1227-28 (1988).

2. 31. O.J. EUR. COMM. (No. L 319) 1 (1988).

associated with the above-mentioned types of proceedings, brought by the same plaintiff against a Community institution (art. 3).

The proposed jurisdiction in cases of dumping or illicit subsidies, however, is deferred for reconsideration after two years of experience have been gained of the working of the new court (art. 3(3)). Detailed consequential amendments are made to the Protocols on the Statutes of the ECJ which are annexed to the ECSC, EEC and EURATOM Treaties, and the appropriate interpretations applied to the Treaties themselves (arts. 4–10). It is expected that the new court will operate beginning in January 1989 (art. 13) and that some cases already commenced before the ECJ will be transferred to it (art. 14).

B. NEW CONVENTION ON JURISDICTION AND ENFORCEMENT BETWEEN THE EEC AND EFTA STATES

A Convention on jurisdiction and the enforcement of judgments in civil and commercial matters has been drawn up and opened for signature at Lugano on September 16, 1988.³ This Convention is intended to extend the jurisdiction and "full faith and credit" principles⁴ established between the EEC States⁵ themselves by the Brussels Convention of September 27, 1968 (as amended by later Accession Treaties, and as now applied in the national laws of the EEC States) to the Member States of the European Free Trade Association (EFTA),⁶ which have separate Free Trade Agreements, within the meaning of the General Agreement on Tariffs and Trade (GATT), art. XXIV, with the EEC, and to judicial relations between the courts of the EFTA States and those of the EEC States. The EEC is not itself a Contracting Party (i.e., on behalf of its Member States) to this Convention,⁷ which is available only to EEC and EFTA States (arts. 60, 61 and 62(1)(a)), or to other States invited with the unanimous agreement of those States (art. 62(1)(b)). It becomes effective three months after deposit of ratification instruments by both an EEC and an EFTA State (art. 61(3)). Existing conventions on these matters between any participant States are

3. The full text, with associated Protocols, Declarations and Final Act, is found at 31 O.J. EUR. COMM. (No. L 319) 9–48 1988).

4. An account of those principles is beyond the scope of these notes. For a Commentary on the Brussels Convention see, LASOR & STONE, CONFLICT OF LAW IN THE EUROPEAN COMMUNITY (1987); On the Lugano Convention, see, Stone, *The Lugano Convention on Civil Jurisdiction and Judgments*, 1988 Y.B. EUR. L.

5. Current members of the EEC are Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom, and West Germany.

6. Current members of the EFTA are Austria, Finland, Iceland, Norway, Sweden, and Switzerland.

7. Since the Lugano Convention, *supra* note 3, relates to purely civil, as well as commercial, judgments of non-EEC courts, the conclusion of agreements with non-EEC States on such matters is probably considered to be outside the EEC's "Commercial Policy" powers. These powers are contained in arts. 111–114, EEC Treaty, and outside its residual powers to attain "the objectives of the Community" contained in art. 235, *id.*

superseded (art. 55). The significance for transnational litigation in Europe if all, or a substantial number of, the eligible States ratify or accede to this Convention, is obvious.

II. Competition (Antitrust) Law

A. EXTRATERRITORIALITY AND PUBLIC INTERNATIONAL LAW

In what has been hailed as the most important decision on the "extraterritorial" applications of Community competition law (specifically art. 85, EEC Treaty) since *ICI v. EC Commission*,⁸ and as "the European *ALCOA*,"⁹ the ECJ has given its judgment in what is popularly known as the *Wood Pulp* case.¹⁰ The applicants were various producers of woodpulp established in Canada, Finland, Sweden, and the United States, and two associations of such producers; one of Finnish producers (Fincell), and one of the U.S. producers (KEA). All had been the subjects of a Commission decision¹¹ finding violations of article 85, EEC, and imposing fines, in respect of agreements, decisions, and concerted practices in the exchange of price information and the horizontal fixing of prices of woodpulp supplied by the producers to buyers in EEC Member States. In seeking annulment of that decision before the ECJ the applicants argued that: since (i) they were all established outside the EEC, and (ii) any relevant agreements, decisions, or concerted practices were made or took place outside the EEC, the EC Commission had no jurisdiction to interfere, still less to impose fines. Indeed the Commission's decision was itself contrary to public international law, which they alleged precluded a State from purporting to regulate the conduct of non-nationals outside its own territory, even if the conduct produced economic effects within that territory (the so-called "effects doctrine"); and from interfering in what probably are the internal affairs of another State. KEA also produced additional arguments: (i) that, assuming the Commission *had* jurisdiction over KEA, public international law required that jurisdiction to be exercised with great moderation, since KEA was in a position of alternative jeopardy, being also subject to U.S. antitrust law, specifically the Webb-Pomerene Act of 1918, which definitely permitted the kind of arrangement regarding U.S. exports in questions here and (ii) that KEA, a mere non-profit-making trade association had on the facts no involvement in these arrangements and practices distinguishable from those of its members, so that to punish KEA would be to punish, in effect, its members twice for the same offense (contrary to the principle of no

8. *I.C.I. Ltd. v. EC Commission des Communautés européennes*, 18 Recueil 619 (1972); 11 Common Mkt. L.R. 557 (1972) (sometimes known as the *Dyestuffs* case).

9. *United States v. Aluminum Co. of Am. (ALCOA)*, 148 F.2d 416 (2d Cir. 1945).

10. *A. Ahlstrom Osakeytio v. EC Commission (Wood Pulp)*, [1988] 4 Common Mkt. L.R. Anti-Trust Supp. 901.

11. *British Columbia Forest Prod. Ltd. v. EC Commission (Wood Pulp)*, 28 O.J. EUR. COMM. (No. L 85) 1 (1985), 42 Common Mkt. L.R. 474 (1985).

double jeopardy). Fincell and the Finnish producers also argued that in their case, the matter was exclusively regulated by the Finland-EEC Free Trade Agreement; article 23 of which, while containing competition provisions similar in wording to article 85, EEC, envisaged that those provisions could only be enforced by indirect, intergovernmental, diplomatic processes under article 27, FTA, and not by direct cease and desist orders and fines against infringers determined unilaterally by the Commission.

In a carefully worded judgment the ECJ avoided stating that the "effects doctrine" was part of Community competition law, if that doctrine is interpreted as giving a State subject-matter jurisdiction over acts done wholly abroad on the sole basis of effects within that State's territory. It did not have to decide, therefore, if that doctrine was contrary to public international law (as alleged); nor whether, if contrary to public international law, Community law (in the form of the effects doctrine) would prevail over public international law or vice versa. Instead, the Court took the view that the violative conduct consisted of two elements: the formation of the agreements, decisions, and concerts in question; and their implementation. While the formation element might have occurred outside EEC territory, that could hardly be conclusive of the jurisdiction question. Otherwise, as the Court observed, parties could always flout competition laws with impunity merely by choosing to locate the formation stage of their violating outside the jurisdiction. It was the implementation, not the formation, that was important, and here these agreements, decisions, and practices had all been implemented within the EEC, in the sense that the prices advised, announced, and horizontally fixed had all been charged there. The fact that some applicants had acted through local agents, subsidiaries, or branches was irrelevant. It is undertakings as a whole that violate article 85, EEC, not their particular local manifestations (though it is permissible to comment here that the local manifestations are useful in establishing personal, rather than subject-matter, jurisdiction if an imposed fine has to be collected by local execution procedure under article 192, EEC). It followed, in the ECJ's view, that because the agreements, decisions, and concepts in question were implemented within the EEC, the prohibited conduct itself occurred there, and not merely its effects. The Commission therefore had subject-matter jurisdiction over that conduct, without having to rely on an "effects doctrine."

KEA's first argument was rejected, on the ground that the creation of export associations within the exemption from U.S. antitrust law provided by the Webb-Pomerene Act 1918 was permitted, not mandated, under U.S. law, so that KEA and its members were not exposed to alternative jeopardy in being required to comply with Community law. Accordingly, the question of the status of the alternative jeopardy principle in either Community or public international law did not arise. On the other hand, KEA's second argument was substantially accepted by the Court, and the Commission's decision was annulled as regards KEA on that ground.

Fincell's and the Finnish producers' argument based on the Finald-EEC FTA was also rejected. Here, the ECJ might have limited itself to observing that article 23, FTA, and article 85, EEC, deal with two different kinds of anticompetitive conduct. Article 23, FTA deals with conduct capable of affecting trade between Finland and the EEC, i.e., external trade of the EEC, whereas article 85, EEC, deals with conduct capable of affecting trade between Member States of the EEC, i.e., internal trade of the EEC. Since the Commission in its decision only expressed itself to be concerned with the latter trade,¹² it was quite right to base its decision only on article 85, EEC, and to use its undoubted powers to enforce that article directly (given that there was evidence of a capacity of the conduct of these applicants to affect that intra-Community trade). It is true, of course, that the same conduct might also have affected (and no doubt did affect) EEC-Finnish trade, which would have justified the Commission in also pursuing its indirect diplomatic remedies through the FTA joint negotiating committee with the Finnish Government, had it so chosen. Its failure to do this could not by itself invalidate the procedures actually adopted under article 85, EEC, with respect to a different trade. The ECJ seems to have gone further than these arguments, in stating that article 23, FTA, envisages that both the EEC and Finland have within their legal systems rules enabling action to be taken against infringements of article 23, which the joint committee procedure, where used, is designed to activate, and in the case of the EEC these rules are articles 85 and 86, EEC, and the implementing regulations made thereunder. With great respect to the ECJ, while it is no doubt correct that article 23 does envisage the existence of such implementing "national" rules, it is difficult to see how articles 85 and 86, EEC, and their implementing regulations, can be such rules, since they are specifically concerned only with a different, intra-Community trade, as mentioned above. Indeed, it appears to be the case that the EEC simply does not have the implementing rules envisaged by article 23 (and by the analogous articles in the other EEC-EFTA State Free Trade Agreements), and while no doubt it *should* have, the attempt to make articles 85 and 86, EEC, perform this function can, it is submitted, only lead to confusing and unfortunate results. (U.S. antitrust law does not have this particular problem, since the Sherman Act of 1890, sections 1 and 2, are expressly concerned, following the commerce clause of the U.S. Federal Constitution, with *both* the internal (interstate) and external trade of the United States.) The ECJ's decision on these Finnish applications, therefore, seems perfectly correct, but to be supported by overly broad reasoning.

While the ECJ's desire to avoid unnecessary discussion of the status of the "effects doctrine" in public international law is understandable, the usefulness and likely durability of the court's distinction between conduct "implemented"

12. See *id.* at 15, para. 80.

in the EEC and conduct having "effects" in the EEC is open to query. Suppose that all the applicants in this case had been careful to sell their woodpulp only on delivery and payment terms external to the EEC,¹³ and only to wholly independent EEC distributors, rather than to agents or subsidiaries; it is not clear that they would (or should) thereby have escaped liability under EEC law, although "implementation" in the EEC would then have been very marginal. Surely competition law liability should not be avoidable by such simple devices, if, as held in this case, the place of establishment of the parties, or of the "formation" of the conduct is irrelevant. It should be emphasized again that the case is concerned with subject-matter jurisdiction, not personal jurisdiction over the applicants, which, of course, is a separate question.

B. DISTRIBUTION AND FRANCHISING AGREEMENTS

In *Erauw-Jacquery*¹⁴ the ECJ had a new opportunity to apply the principles on intellectual property licensing enunciated in the *Maize Seed* case¹⁵ to a license of plant variety rights. The ECJ held that certain sales and export bans accepted by the licensee were within the legitimate protection of the licensor's property rights as such, and so not infringements of article 85(1), EEC. Terms as to minimum prices to be charged by the licensee, on the other hand, were capable of being infringements. In *Konica*¹⁶ the Commission found that export bans, and requirements to buy up parallel imports, imposed by a distributor on wholesalers by the former's circular notice, were not mere unilateral conduct of the distributor outside article 85(1), but were agreements if the wholesalers accepted the obligation to comply, and concerted practices if there was actual compliance. The Commission also found in this case that the Channel Islands were part of EEC territory for competition law purposes, when used as a channel to supply "mainland" EEC States. The precise status of the Channel Islands with respect to various aspects of Community Law is often open to doubt.

In *ServiceMaster*¹⁷ the Commission has taken its first decision in the field of service franchise agreements, which the ECJ declared in the *Pronuptia* case¹⁸ might require different treatment from distribution franchises. The Commission

13. *E.g.*, "ex works," "free carrier" or "f.o.b. vessel" at a non-EEC port, as regards delivery, and "confirmed payment letter of credit" at a non-EEC bank, as regards payment.

14. *Louis Erauw-Jacquery Sprl. v. La Hesbignonne Société Cooperative*, 31 O.J. EUR. COMM. (No. L 29) 11 (1988), [1988] 4 Common Mkt. L.R. Anti-Trust Supp. 576.

15. *L.C. Nungesser v. EC Commission des Communautés européennes*, 16 Recueil 2015 (1982), 36 Common Mkt. L.R. 278 (1983).

16. *The Community v. Konica UK Ltd.*, 31 O.J. EUR. COMM. (No. L 78) 34 (1988), [1988] 4 Common Mkt. L.R. Anti-Trust Supp. 848.

17. *Re the Franchise Agreements of Service Master*, 31 O.J. EUR. COMM. (No. L 3321) 38 (1988), [1988] 4 Common Mkt. L.R. Anti-Trust Supp. 895.

18. *Pronuptia de Paris GmbH v. Schillgallis*, 45 Common Mkt. L.R. (1986). For notes on franchise agreements, see 21 INT'L LAW. 895, 1209 (1987).

found that it could apply many of the same principles, and granted an article 85(3), EEC, exemption to this agreement, notwithstanding a ban on the franchise from opening establishments or actively seeking customers for its cleaning and maintenance services outside its allotted territory, since it remained free to provide its services there from its "home" base on a "passive selling" basis. A similar case, *Charles Jourdan Group*,¹⁹ is also before the Commission.

C. TRANSPORT

In the field of air transport, the block exemption regulations, exempting certain classes of agreements from the application of article 85(1) pursuant to article 85(3), EEC, empowered by regulation 3976/87,²⁰ have now been enacted. They cover Scheduled Air Services and Slot Allocation at Airports Agreements (reg. 2671/88);²¹ Computer Reservation Systems for Air Transport Services (reg. 2672/88);²² and Ground Handling Services in Air Transport (reg. 2673/88).²³ Meanwhile, the Commission has sent a reasoned opinion to the Italian Government urging it to allow Aer Lingus to operate a service between Dublin and Milan;²⁴ and to the Portuguese Government urging it to abandon its discriminatory practice of subsidizing the fares charged by its national airline, TAP, on flights to the Azores and Madeira only in the case of residents on those islands who are Portuguese nationals, as contrary to article 90(1), EEC. The government then agreed with the Commission that it would subsidize all EEC nationals who were island residents. The case thus closely resembles that brought against the Spanish Government in similar circumstances²⁵ where the Commission issued a formal decision under article 90(3), EEC, requiring termination of the practice, involving the Canary and Balearic Islands residents. Finally, the Commission has imposed a fine on Sabena Airlines for abusing its dominant position in operating its Saphir computerized reservation system by excluding London European Airways from access to the system.²⁶

In the field of road, rail, and inland waterway transport, the ECJ has given its first judgment, in *ANTIB v. EC Commission*,²⁷ upholding the Commission's

19. *Charles Jourdan*, 31 O.J. EUR. COMM. (No. C 220) 2 (1988), [1988] Common Mkt. L.R. Anti-Trust Supp. 810.

20. 30 O.J. EUR. COMM. (No. L 374) 9 (1988). See these notes in 22 INT'L LAW. 1227, 1229-30 (1988) for a discussion.

21. 31 O.J. EUR. COMM. (No. L 239) 9 (1988).

22. *Id.* at 13.

23. *Id.* at 23.

24. Press Release IP(88)485; the Commission relying on the Council Decision of December 14, 1987, on Sharing Capacity and Access to Routes in Scheduled Air Services, 30 O.J. EUR. COMM. (No. L 374) 19 (1987).

25. 30 O.J. EUR. COMM. (No. L 194) 28 (1987). See notes in 22 INT'L LAW. 569 (1988).

26. 31 O.J. EUR. COMM. (No. L 317) 47 (1988).

27. [1988] 4 Comm. Mkt. L.R. Anti-Trust Supp. 677.

decision²⁸ against the practices of two associations of French inland waterway operators (barges) relating to prices and levies, taken under regulation 1017/68.²⁹

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

In *Tetra Pak*³⁰ the Commission has for the first time used article 86 (as distinct from article 85), EEC, to strike at an exclusive license, i.e., of the technology for sterilizing milk cartons. Having acquired the license from the technology's developer, when it already had 90 percent of the relevant market, Tetra Pak was able to exclude from the technology one of its small competitors, which had earlier assisted in the development. The Commission considered this exclusive acquisition and use of new technology by an already dominant undertaking to be abusive and ordered the parties to negotiate nonexclusive licenses. The case is also interesting because the Commission stated that, while it agreed that the exclusive license fell within the scope of regulation 2349/84³¹ creating a block exemption for patent license agreements, because of the absence of effective competition for Tetra Pak, it would have used its statutory powers to withdraw the benefit of that exemption in this case had the parties not accepted nonexclusivity, thereby putting them in violation of article 85(1) as well.

In *Coca Cola Export*³² the Commission found that the discount schemes operated by an Italian Coca-Cola affiliate in supplying its customers were abusive of its dominant position in the market for Cola-type soft drinks (interestingly found to be a separate market from that for soft drinks generally). The offending schemes provided for loyalty discounts for exclusive purchasing; achieved-target discounts for minimum quantities purchased based on last year's purchases; and whole-range discounts for purchases of other products from different markets. On the other hand, discounts for minimum quantities per se, or for carrying out promotional activity, were acceptable.

The *Danish Fur Breeders Association*³³ has been fined 500,000 ECU (4 m Kroner) for various violations of articles 85 and 86, EEC, relating to its practices in selling furs through its selling agency, Danish Fur Sales, which, enjoying one-third of world fur sales, was found to hold a dominant position in the EEC. The principal objection was to the requirement that members sold only through the agency, thus restricting new entrants to the market in fur auctions.

28. 28 O.J. EUR. COMM. (No. L 219) 35 (1985).

29. 11 J.O. COMM. EUR. (No. L 175) 1 (1968).

30. 31 O.J. EUR. COMM. (No. L 272) 27 (1988).

31. 27 O.J. EUR. COMM. (No. L 219) 15 (1984).

32. Press Release IP(88)615.

33. 31 O.J. EUR. COMM. (No. L 316) 43 (1988).