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## European Communities

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# REGIONAL DEVELOPMENTS

## European Communities\*

### I. Constitutional and Institutional Matters

#### A. COMMUNITY LAW AND NATIONAL LAW

The Court of Justice of the European Communities (the ECJ) had a further opportunity to demarcate the respective spheres of competence of community law and national law (of a Community Member State) in *Demouche v. Fonds de Garantie Automobile*.<sup>1</sup> There, the original claimant had been injured in France by a car registered and insured in West Germany, driven by a West German national who was unlicensed to drive at the time. Under relevant Community legislation, Directive 72/166/EEC, each Member State was required to set up or designate a national bureau representing automobile insurers established within the State, and to ensure that these national bureaux, by collective agreements and arrangements between themselves, operate the "Green Card" scheme. This provides minimum automobile insurance cover for vehicles while driven in Member States other than the State of registration of the vehicle,<sup>2</sup> through claim- and loss-sharing arrangements between insurers represented through their bureaux. Pursuant to the various national legislative or regulative measures taken in compliance with the Directive, the national bureaux had made a Uniform Agreement and a Supplementary Agreement in implementing the scheme laid down in the Directive. However, on this occasion a dispute had arisen between the French and West German bureaux

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1. 1 COMMON MKT. L.R. 544 (1989).

2. Which is evidenced by a document to be carried on the vehicle while "out-of-state," called a "green card," although frequently neither green nor a card.

as to which of them, on the facts, was liable under the terms of the Agreements to pay the claimant and to recover from the relevant insurer if possible. The national court trying the dispute considered that the Agreements, being clearly intended to give effect to the Directive, must be construed in the light of the Directive, but found itself in some doubt as to the correct interpretation of the Directive on the point in issue. The court therefore sought a preliminary ruling from the ECJ on a point of community law, under the procedure laid down in article 177, EEC. The ECJ, however, held itself incompetent to receive the reference under article 177 on the ground that what was in issue was the construction of the Agreements, which were ordinary contracts between ordinary commercial parties, and therefore not subject to community law. The issue should be decided by reference only to the (national) law governing the contracts and only a national court could decide which law that was, and what it required in the present case. That the contracts were meant to give effect to requirements of community law did not by itself make them community instruments capable of being the subject of a judgment on community law by the ECJ. The general principle behind this judgment, that not every response to community legislation, or implementation of a community policy, becomes thereby subject to community law, is therefore some answer to those critics who detect in the ECJ a tendency constantly to expand the realm of community law at the expense of what an American would call "states rights."

#### B. RIGHTS OF COMMUNITY NATIONALS AND THIRD-PARTY COMPLAINTS

In addition to the specific procedures provided by community law (for example, relating to anticompetitive or abusive behavior, unauthorized Member State subsidies, and dumping, unfair subsidies, or illicit commercial practices originating in non-Member States),<sup>3</sup> whereby interested parties claiming to have been injured in some way by the acts complained of may motivate the EC Commission to investigate, and possibly to take action against the perpetrators, the Community has just introduced a new "Form for Complaint of Failure to Comply with Community Law,"<sup>4</sup> of completely general scope and application in any such alleged failure of compliance. While not limited to such cases, it is envisaged that the new form will be particularly useful to the Commission in bringing rapidly to its attention defaults by Member States' governments in implementing community rules on the free movement of goods and provision of services across frontiers, especially where these prejudice the creation of the "single internal market" after 1992.

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3. See *Regional Developments: European Communities*, 21 INT'L LAW. 899, 1211 (1987); 22 INT'L LAW. 575 (1988); 23 INT'L LAW. 565 (1989).

4. 32 O.J. EUR. COMM. (No. C 26) 6 (1989); 54 COMMON MKT. L.R. 617 (1989).

## II. Competition (Antitrust) Law

### A. THE CONCEPT OF AN UNDERTAKING

The entities capable of violating Community competition law, apart from Member State governments in certain respects, are "undertakings," a term not defined in the relevant legislation but the subject of continuing judicial interpretation. In *Corinne Bodson v. Pompes Funèbres des Régions Libérées*,<sup>5</sup> certain French local government bodies, which are charged under French Law with the provision of public funeral services, delegated performance of these services exclusively to the defendants (PFRL) in exchange for promises that defendants would only charge the "customers" prices within a range fixed by the municipalities.

The ECJ held that this agreement could not violate article 85, EEC,<sup>6</sup> since although PFRL was an undertaking, the municipalities were not, *insofar as* they were acting as public authorities discharging public functions, as here. However, as public authorities, they *were* capable of violating article 90(1), EEC,<sup>7</sup> which is not limited to the behavior of (Member State) national governments; and they would be in such violation here if, for example, they had fixed the maxima in their price ranges too high, thereby permitting PFRL to abuse its dominance, through its exclusive access to the "public funeral" market, by charging excessive prices, contrary to article 86, EEC.<sup>8</sup> It should be noted that this judgment leaves open the possibility that a municipal government or other public body could be found to be an undertaking *insofar as* it was engaged in purely commercial or private activity, and not in discharging public duties, and this seems to have happened to some extent with respect to Belgian public water authorities in the case *NAWEA-ANSEAU*.<sup>9</sup>

In *Vereniging van Vlaamse Reisbureaus v. Sociale Dienst*<sup>10</sup> the ECJ held that agreements between holiday tour operators on the one hand, and travel agents who actually concluded the travel and accommodation contracts with the clients on the other, were agreements between undertakings capable of violating article 85(1), EEC. The operators and agents had argued that the travel agents merely performed as agents for, or as auxiliaries of, the operators for the purposes of

5. 31 O.J. EUR. COMM. (No. C 157) 5 (1988), [1988] 4 COMMON MKT. L.R. ANTI-TRUST SUPP. 569.

6. Which *inter alia* prohibits anticompetitive agreements between undertakings.

7. Which, broadly speaking, prohibits Member State governments from assisting or encouraging undertakings to violate the competition rules.

8. Which prohibits abuses of a dominant position by an undertaking.

9. 25 O.J. EUR. COMM. (No. L 167) 39 (1982); *IAZ Int'l Belgium SA v. Commission of the European Communities*, 1983 E. Comm. Ct. J. Rep. 3369, 41 COMMON MKT. L.R. 276 (1984).

10. [1989] 4 COMMON MKT. L.R. ANTI-TRUST SUPP. 213; *see infra* text accompanying note 21.

making contracts between the clients and the operators, and were not therefore separate undertakings, but merely part of the undertaking of the relevant operator. The ECJ rejected this argument, pointing out that the travel agents normally acted for a great many operators simultaneously, frequently made bookings not involving operators at all, and to some extent gave the clients impartial advice on the choice of a tour; these functions indicated they had an economic status independent of the tour operators they served. This case is therefore in line with previous ECJ judgments on the status of "agents" as separate undertakings,<sup>11</sup> but it does serve further to clarify relationships in the transport field.

## B. DISTRIBUTION, FRANCHISING, AND LICENSING AGREEMENTS

In the period under review the Community has enacted its promised "block exemption" regulations on franchise agreements and know-how licensing agreements, that is, Regulations 4087/88<sup>12</sup> and 556/89,<sup>13</sup> respectively. Both regulations, like all "block exemption" regulations, have the effect of exempting agreements, decisions, and practices falling within the terms specified therein from the prohibition of article 85(1), EEC, pursuant to the exempting power provided for in article 85(3), EEC. There is no space here to go into the detail of these rather technical enactments. Suffice it to say that Regulation 4087/88 follows the general principles laid down by the ECJ in the *Pronuptia*<sup>14</sup> Case, and Regulation 556/89 follows as far as possible the principles already adopted for patent license agreements, in Regulation 2349/84,<sup>15</sup> with necessary adjustments for the different characteristics of know-how.

## C. TRANSPORT

The ECJ had once again to review the compatibility of the national regulation of air transport with EC competition law, in *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs*<sup>16</sup> (the *Silver Line Case*). As is well-known, air tariffs are generally fixed by bi- or multi-lateral agreements between the airlines and the States concerned, and the airlines are only licensed to overfly or land in a State when acting according to agreements to which that State was a party, or which it approved. Consequently, actual rates for substantially the same journey can vary according to the place of issue of the ticket. Here ASF and Silver Line were two Frankfurt travel agents who sold

11. Especially *Suiker Unie* (The Sugar Cartel Case), 1975 E. Comm. Ct. J. Rep. 1663.

12. 31 O.J. EUR. COMM. (No. L 359) 46 (1988), [1989] 4 COMM. MKT. L.R. ANTI-TRUST SUPP. 387.

13. 32 O.J. EUR. COMM. (No. L 61) I (1989).

14. *Pronuptia de Paris GmbH v. Schillgallis*, 1986 E. Comm. Ct. J. Rep. 353, 45 COMMON MKT. L.R. 414 (1986).

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

16. 32 O.J. EUR. COMM. (No. C 122) 4 (1989), [1989] 4 COMMON MKT. L.R. ANTI-TRUST SUPP. 486.

tickets to customers wishing to fly from Frankfurt to Tokyo which were issued in Lisbon for Lisbon-Frankfurt-Tokyo flights, these being actually cheaper than Frankfurt-Tokyo tickets issued in West Germany. However, West German law mandated that only (the dearer) tickets issued in West Germany could be sold there. ZBUW, an anti-unfair-competition association, obtained an injunction against the travel agents, which was ultimately the subject of an article 177, EEC, reference from the Federal Supreme Court to the ECJ.

In a comprehensive judgment the ECJ considered the entire variety of ways in which both governmental and private regulatory practices could violate the EC rules. As regards article 85(1), EEC, it held that a distinction must now be drawn between alleged violations affecting flights internal to a Member State or between a Member State and a non-Member State, on the one hand, and flights between Member States on the other. The former were still governed by the principles enunciated in the *Nouvelles Frontières*<sup>17</sup> case, that is, they could be proceeded against directly by a Member State competition authority under article 88, EEC, or by the EC Commission under article 89, EEC. Absent such process, they should be deemed provisionally valid in a national court. The latter had no provisional validity; if in violation of article 85(1), EEC, as now implemented by Regulation 3976/87, they were automatically void under article 85(2), unless exempted under article 85(3) as applied by, for example, Regulation 2671/88.<sup>18</sup>

As regards article 86, EEC, an airline or airlines might have a dominant position where the relevant market was economically feasible transport between two points. Such tariff agreements as mentioned above could be violative abuses of that position by the airlines (though not the governments) concerned: if, for example, they imposed unfair prices or conditions on competitors (too low a price) or consumers and travel agents (too high a price), regardless of governmental requirement or encouragement. In the absence of a relevant implementing regulation (as in this case) and of any Commission action under article 89, EEC, "it was for the competent national administrative or judicial authorities to draw the consequences of the applicability of that prohibition" (i.e., contained in article 86).<sup>19</sup>

The reference to "judicial authorities" in the above quotation from the judgment is particularly interesting. It strongly suggests that ordinary national courts can grant or refuse injunctions on the basis of article 86 violations directly, under article 88, EEC. Until now the orthodox view, based on the ECJ's judgment in *BRT v. SABAM*,<sup>20</sup> has been that the national "authorities"

17. *Ministère Public v. Lucas Asjes*, 1986 E. Comm. Ct. J. Rep. 1425, 3 COMMON MKT. L.R. 173 (1986); see *Regional Developments: European Communities*, 21 INT'L LAW. 578 (1987).

18. 31 O.J. EUR. COMM. (No. L 239) 9 (1988); see *Regional Developments: European Communities*, 23 INT'L LAW. 563 (1989).

19. See paragraph 42 of the judgment.

20. *Belgische Radio en Televisie v. SABAM*, 1974 E. Comm. Ct. J. Rep. 313, 14 COMMON MKT. L.R. 239 (1974).

empowered to act by article 88 are limited to national competition enforcement agencies, that is, administrative authorities. The overt recognition that article 86 violation may consist of purely anti-consumer-interest behavior is also interesting, many economists taking the view that such behavior is procompetitive, not anticompetitive, as tending to attract new entrants and to create contested markets.

Finally, as regards governmental involvement with such agreements and practices, Member State governments which required or facilitated article 85(1) or article 86 violations by airlines could themselves be found to be in breach of their legal obligations under articles 3, 5 and 90(1), EEC, thereby, *whether or not* the Commission had already commenced the procedure against them laid down in article 169, EEC, or had issued a decision requiring them to cease and desist under article 90(3). They were, however, entitled, in such a case to raise a defense analogous to the defense available to undertakings (*in casu*, the airlines) under article 90(2), that is, the entrustment of a task of general public interest. In the case of air transport regulation, safety and technical considerations could clearly be used in this way, if objectively established as requirements. These points on Member State governmental liability were substantially also made by the ECJ in the *Vereniging van Vlaamse Reisbureaus case* mentioned above.<sup>21</sup>

Two new regulations lay down procedures for relevant communications, complaints, applications, and (administrative) hearings, that is, Regulation 4260/88 with respect to proceedings under Regulation 4056/86 on Maritime Transport,<sup>22</sup> and Regulation 4261/88 with respect to proceedings under Regulation 3985/87 on Air Transport.<sup>23</sup>

Finally, Sir Leon Brittain, the EC Commissioner responsible for competition policy, announced that the Commission would press forward with deregulation of air transport in the EC so that by 1992 Member State governments should no longer be involved at all with fixing air tariffs, and by 1993 most of the recent block exemption regulations implementing article 85(3), EEC,<sup>24</sup> to allow airlines to adjust to deregulation, could be repealed. He warned, however, that the EC would not tolerate the "merger mania" that followed air transport deregulation in the USA: proposed airline mergers and takeovers would have to be notified to, and closely scrutinized by, the Commission under its powers to enforce articles 85(1) and 86, EEC, in the public interest.<sup>25</sup>

21. See *supra* text accompanying note 10.

22. 31 O.J. EUR. COMM. (No. L 376) 1 (1988).

23. 31 O.J. EUR. COMM. (No. L 376) 10 (1988).

24. See *Regional Developments: European Communities*, 23 INT'L LAW. 563 (1989).

25. Brussels symposium on air transport policy, reported in *The Times* (London), April 28, 1989.