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Application of Article 85 Paragraph 1, of the Treaty of Rome to Intrastate Exclusive Distributorship Agreements

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THE APPLICATION OF ARTICLE 85, PARAGRAPH 1, OF THE TREATY OF ROME TO INTRASTATE EXCLUSIVE DISTRIBUTORSHIP AGREEMENT: S. A. Brasserie de Haecht v. Consorts Wilkins-Janssen, 2 CCH Com. Mkt. Rep. ¶8053 (1967)

Brasserie de Haecht, a Belgian brewery, and Consorts Wilkins-Janssen, owners of a tavern located in Belgium, entered into three contracts. The tavern owners, in return for loans, agreed to obtain all their beverages from Brasserie de Haecht. When the tavern owners failed to comply with the exclusive purchasing obligation contained in the contract, the brewery brought an action before the Commercial Court of Liege for cancellation of the loan contracts.

As a defense to the action, the tavern owners alleged that the contracts were in violation of Article 85 of the Treaty of Rome (298 U.N.T.S. 11) which created the Common Market.[1] The contracts, it was urged, were "likely to affect trade between the Member States" of the Common Market; therefore, enforcement of the contracts by the National Court would be incompatible with the community. Since the contracts themselves did not deal with commerce between Member States and their likely inter-Member-State effect was minimal, the defendants admitted that the agreement would not sufficiently affect trade between Member States if considered in isolation. However, they urged the Court to consider the large number of similar contracts between other Belgian breweries and a great many Belgian distributors. The defense argued that these contracts, taken as a whole, indirectly affected commerce between Member States by preventing the Belgian distributors from selling beer from other Member States. Although both parties were Belgian, and such "brewery contracts" were expressly permitted by the Belgian legislators,[2] the

1. Treaty Article 85 provides in part:
"(1) The following practices shall be prohibited as incompatible with the Common Market: all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which are liable to affect trade between Member States and which are designed to prevent, restrict, or distort competition within the Common Market or which have this effect . . . .
(2) Any agreements or decisions prohibited pursuant to this Article shall automatically be null and void.
(3) The provisions of Paragraph 1 may however, be declared inapplicable in the case of: any agreement or type of agreement between undertakings . . . which helps to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting profit and which does not: . . . . "
2. Royal Decree No. 62 of January 13, 1935, which provides that any professional association of manufacturers or distributors vested with legal personality may seek the extention of obligations, voluntarily assumed by it, concerning production, distribution sale, export or import, to all other manufacturers or distributors belonging to the same branch of industry or commerce. Interesting, though beyond the scope of this note, is the fact that the National Court could have ruled the contracts invalid under national law, Royal Decree 1964, which limits the length of these contracts to four years. Thus, the National Court could have avoided the Common Market Issue.

National Court requested a preliminary ruling by the Court of Justice of the European Communities under the procedure set forth in Article 177.[3] It submitted to the Court of Justice this question: whether in applying Article 85, Paragraph 1 of the Treaty, the Court should consider the agreement in isolation or in terms of the whole economic and legal context.[4] It was held that exclusive dealing contracts of this type are not necessarily incompatible with the Common Market. However, such contracts may fulfill the conditions for incompatibility contained in Article 85, Paragraph 1, where "either in isolation or together with others in the economic and legal context in which they were concluded and on the basis of all the objective elements of law or facts, they are likely to impair trade between Member States and their objects or effect is to prevent, restrict, or distort competition."[5]

The plaintiff contended before the Court of Justice that the issue was whether the three conditions set forth in Article 85(1) of the Treaty of Rome were met by the contracts. The plaintiff considered the three conditions to be: (1) an agreement between enterprises; (2) that restricts trade between Member States; and (3) restricts free competition. They admitted that the contract in issue was one between enterprises but they denied that the effect of the contract was either to restrict trade between Member States or to distort competition. As to trade between States, they submitted "market impenetrability" as the key factual issue. The breweries argued that parallel imports were possible, because there were many independent taverns and no partitioning of the Belgian market; hence, ease of entry into the Belgian market by competitors from other Member States.

With reference to the issue of distortion of competition, the plaintiff contended that the agreement should be considered solely in terms of other agreements within the same network. Therefore, the Brasserie network of contracts, they argued, was too small to have any "perceptible affect."[6]

The tavern owners differed. They urged it to be essential to consider similar agreements concluded by third parties relating to similar products. They pointed out that the great number of agreements throughout Belgium created "a significant obstacle to the import of foreign beers into Belgium."[7] They cited the intent of the

3. Treaty Article 177 provides:
"The Court of Justice shall be competent to give preliminary rulings concerning:
(a) the interpretation of this Treaty; . . . Where any such question is raised before any court of law of one of the Member States, the said court may, if it considers that a decision on the question is essential to enable it to render judgment, request the Court of Justice to give a ruling thereon." (There are serious doubts as to whether Article 177 rulings are binding on the national courts at all. See Buxbam, Incomplete Federalism: Jurisdiction Over Antitrust Matters in European Economic Community, 52 Calif. L. Rev. 56, 80-89 (1964)).
4. Submission to the Court of Justice by the National Court noted in 5 C.M.L. Rev. 324.
5. 2 CCH Com. Mkt. Rep. 8053 at 7805.
6. Id. at 7808.
7. Perhaps it is unfortunate that the Court did not submit directly the question whether the foreclosure of beverages from other countries was enough to find likeliness of effect. See note on submission by the National Court, supra note 4.

Belgian legislators in creating legislation fostering "brewery contracts" in order to protect Belgian breweries from the competition of German and Dutch breweries. Therefore, they concluded that the Court must consider all the exclusive contracts in the relevant market to determine whether any one of them affected commerce in such a way as to be incompatible with the Common Market.

Both parties relied on the decision in Establissement Consten and Grundig v. EEC Commission. [8] In that case Establissement Consten, a French firm, and Grundig, a German electronics firm, entered into an exclusive distributorship contract. The French firm agreed not to sell products competing with Grundig; in return, they were appointed Grundig's exclusive sales representative in France. The Commission of the European Economic Community held that the agreement was likely to affect trade so as to meet the requirements of 85(1); therefore, it was void under 85(2). The Court of Justice affirmed in a decision which has become extremely important in the area of "affects" under Article 85(1).

Plaintiff contended that the decision stressed the "purpose" of the agreement. Therefore, an analysis of an agreement should be limited mainly to its content. The Advocate General's opinion [9] found this contention clearly erroneous. He suggested that when the purpose of the agreement does not suffice, the effect must be controlling.

Further, he distinguished the present case from Consten-Grundig because the agreement was between firms of different Member States. The Court in Grundig was not concerned with wholly intra-Member-State agreements. Therefore, he felt the fact situation was too dissimilar to be conclusive in the present case.

Another case relied on by both parties was Société Techniques Minière v. Maschinenbau Ulm GmbH. [10], involving a fact situation similar to Grundig, wherein a French retailer had an exclusive contract with a German manufacturer. Plaintiff in the present case relied on a literal reading of the opinion, contending that the opinion held that only agreements within the same network as the agreement in question should be considered. They read the opinion to hold that the question is whether the competition would be improved without the agreement in question. However, the opinion contains language which refutes both interpretations. "To fulfill this condition, [likeliness of affecting trade between Member States] an agreement must, on the basis of all the objective elements of law or of fact taken together, indicate that there is a sufficient degree of probability that it may have some influence, direct or indirect, actual or potential, on the flow of trade between Member States." [11] (emphasis added) Clearly, this language indicated that Maschinenbau Ulm does not stand for

8. 2CCH Com Mkt. Rep. 8046 (1966); noted 80 Harv. Rev. 1594 (1967); 4 C.M.L. Rev. 214 (1966-67).

9. Treaty Article 166 provides:
"The Court of Justice shall be assisted by two advocates-general.
It shall be the duty of the advocate-general to make reasoned submissions (conclusions) in open Court to the Court of Justice on matters referred to it. He shall do so with complete impartiality and independence, with a view to achieve the task assigned to it in Article 164." (i.e., ". . .ensure the observance of law in the interpretation and application of this Treaty.")

10. 2 CCH. Com. Mkt. Rep. 8047 (1966).

11. Id. at 7696.

the proposition that an agreement should be evaluated in isolation or that the quality of the "influence" is conclusive. However, it only abstractly deals with the problem in Brasserie, and, like Grundig, does not go directly to the problem of an agreement affecting intra-Member-State trade. Therefore, this language, though enlightening, does not answer the question asked by the National Court. Consequently, neither of these prominent cases were much help to the Court in Brasserie, although they were considered for their importance in blazing a trail towards an "affect" doctrine in the Common Market.

There has been a great deal of "juridical and legislative" controversy over the language of Article 85(1) requiring an agreement to be "likely to affect trade between the Member States."[12] It is felt that Grundig settled the dispute. There, the Court of Justice rejected the argument that it must be demonstrated that trade "would have developed more favorably, i.e., more intensely, without the agreement objected to."[13] Consequently, they rejected a "rule of reason" approach which involves consideration of the "harmful" or "beneficial" effects.[14] Instead, the Court held that the "affect" language was jurisdictional and little more. Just as the language of the Sherman Act in the United States, ("trade or commerce among the several states") is intended to define the jurisdiction of the Federal Government under our antitrust laws, so the words "liable to affect trade between the Member States" in the competition laws of the European Economic Community have now been construed as little more than a standard to draw the line between the powers of the community and the power of the Member States to deal with antitrust problems.[15]

In Brasserie, the Court of Justice was asked a further jurisdictional question, i.e., what must be considered in determining the jurisdiction of Article 85(1) over intra-Member-State agreements. If the agreement were the only thing to be considered, the National Court could find the effect to be so remote and indirect as to have no perceptible affect on inter-Member-State trade. Thus, the agreement would come under the jurisdiction of the national law set forth in the Royal Decree. However, the National Court was told by the Brasserie decision to examine the totality of internal brewery agreements. Consequently, the significance of the case lies in its reading of "likely to affect trade between Member States" to include not only intra-Member-State agreements which may alone affect trade, but intra-Member-State agreements which may be part of a group of similar intra-Member-State agreements which together affect inter-Member-State trade.

12. "The four Treaty texts, which pursuant to Article 248 are equally authentic, are worded differently. The Dutch rest undoubtedly requires an unfavorable influence ('ongunstig . . . beinvloeden'), while the German and Italian wording ('beeintrachtigen' and 'pregiudicare') are not quite as clear. The word 'affecter' used in the French text is most often interpreted to be neutral, as a mere influencing. It is true, however, the 'affecter' is used not only as meaning the neutral 'have an influence on,' but also in a negative sense, e.g. in the phrase 'the disease affects the organism.'" Arved Deringer, The Competition Law of the European Economic Community, at 22 (1968) [Hereinafter cited as Deringer].
13. Consten-Grundig v. E.E.C. Commission, supra at 7643.
14. See Deringer at 23.
15. See Kelleher, The Common Market Antitrust Laws: The First Ten Years, 12 Antitrust Bull. 1219, 1932.

The willingness of the Court to broaden the jurisdictional language of Article 85(1) to include contracts to be performed by the parties within one nation can be contrasted with opinions dealing with the application of Article 85(1). For example, in État Francais v. Nicoles & Société Brandt, [16] the Cour d'Appeal D'Amiens (National Court of France) found that the refusal of a French company to honor an agreement with a French retailer did not meet the requirement of Article 85(1). The National Court stressing that both parties were French residents, felt no compulsion to submit the question to the Court of Justice, since the agreement could not have any effect on trade between States. Instead, the Court concluded that the contract could only have internal effect. Finding that the agreement was not incompatible with the Common Market, the Court held that the French court had jurisdiction to enforce the agreement.

In Vereniging Van Fabukanten En Importeurs Van Berbuuksarlikelen (F.I.V.A.) v. Mertens (no. 2) [17], a similar case arose before a Dutch court. Here the signatories of the agreement were all residents of the Netherlands, wherein the products originated. The Court found that this agreement did not affect trade between Member States so as to be subject to Regulation 17 [18] implementing Article 85(1). Therefore, it refused to hold that the agreement should have been registered for notification with the Commission. The Court relied upon Article 4(2)(i) of Regulation 17, which states:

> Paragraph 1 above[19] should not be applicative to agreements, decisions and concerted practices where: (i) undertakings of only one Member State take part and such agreements, decisions, and concerted practices involves neither imports nor exports between Member States.

16. [1963] C.M.L.R. 239.
17. [1963] C.M.L.R. 329.
18. Articles 4 and 5 of Regulation 17 provide that if the parties to an agreement which violates 85(1) wish to obtain an 85(3) exemption, they must, with certain exceptions, notify the commission of the agreement. The parties may also obtain "negative clearance" under Article 2 by which the parties notify to the commission, and it finds no grounds to intervene with respect to the agreement. For a good treatment of the functioning of the commission, see, Kelleher, supra.
19. Paragraph 1 provides:
"The Commission shall be notified of any agreements, decisions of concerted practices referred to in Article 85, paragraph 1, of the Treaty which have come into being after the entry into force of the present regulation and for which those concerned wish to invoke Article 85, paragraph 3. As long as such notification has not taken place, no decision to issue a declaration under Article 85, paragraph 3, may be rendered."

The Court asserted that this language indicated that the Commission felt that intra-Member-State agreements were beyond the powers of the Commission. This case is a further example of the opinion that agreements between parties wholly within one Member State do not ordinarily meet the requirements of Article 85(1).

These two cases demonstrate a prevalent belief that most intra-Member-State agreements do not come within the Treaty of Rome. These national courts, in 1963, faced with the still new antitrust law of the Treaty of Rome, had no trouble holding that such intra-Member-State agreements could not meet the requirements of 85(1).

However, the Court of Justice in Brasserie made it clear that intra-Member-State contracts may meet the requirements of 85(1). Therefore, the line between community power and national power to deal with restraint of trade cannot be drawn at the distinction between wholly intra-Member-State agreements and inter-Member-State agreements. More important, Brasserie held that the line cannot be drawn at the effect of the individual intra-Member-State agreement, but must extend to the whole intra-Member-State economic environment.

The Dutch Court's reading of Article 4(2)(i) of Regulation 17 as drawing a line at agreements not affecting frontier-crossing commerce points is an interesting by-product of the Brasserie decision. Now the Commission may look beyond the intra-Member-State agreement itself in determining whether it involves "imports or exports between Member States." [20] If the Court had decided differently, only the effect of the agreement itself could be considered. Clearly, Brasserie shows that effect, or involvement with imports and exports, as in the language of Article 4(2)(i), [21] may be found by looking at the total "legal and economic context of the agreement." Of course, such a holding makes it more difficult for a firm to determine whether to seek notification from the Commission.

Indeed, the plaintiff argued that a broadening response to the question submitted by the National Court would lead to "legal insecurity." The plaintiff argued that parties to an agreement made wholly on an intra-Member-State basis would never know how it would be viewed under Article 85. There would be no way of knowing whether there were other similar agreements in the relevant market. It also appears that a broader ruling on this issue would make it more difficult to determine whether the agreement was covered by the national law or by Common Market cartel law.

The Advocate General, in his opinion in Brasserie, noted the obvious validity of this argument. [22] However, he pointed out that in reality, the type of firms using such agreements have available extensive market research which affords the firm an idea of the extensiveness of such agreements. In the opinion of the Advocate General, when the economic atmosphere is close to the legal limit, a firm should apply for an exemption under Article 85(3). Accordingly, the Advocate General suggested that the

20. See Deringer, supra at 24.
21. For a discussion of the apparent slight difference between "involves" and "affect", see id. at 277.
22. 2 CCH Com. Mkt. Rep. 8053 at 7809.

Commission take steps to limit the insecurity by providing adequate guidelines. The Advocate General advised the Court to postpone its decision on the contract pending the Commission's ruling on the agreement under Regulation 17, Article 6. [23] Unfortunately, the Court made no mention of the use of a Commission ruling, and apparently left to the National Court the task of deciding the validity of the contracts. [24]

CONCLUSION

The primary purpose of the Common Market is the creation of a single market leading to economic growth and an accelerated rise in the standard of living. [25] However, European economic merger will not be possible if the governmental obstacles to free trade which the Treaty of Rome seeks to remove, are replaced by private agreements. For this reason, the area of exclusive distributorships was among the first to be dealt with in an attempt to create a single market. This priority logically flows from the gradual elimination of barriers between states. In Grundig, the barriers fell whenever frontier-crossing commerce was involved. Brasserie opens the door to the elimination of barriers raised by agreements within one Member State.

There is no question that an agreement between two firms in one member nation may meet the requirements of Article 85(1) where a distributor has a unique position and manufacturers in other Member States could not find a substitute distributor. However, such cases are rare exceptions. [26] Brasserie found that jurisdiction does not have to be limited to the above situation; instead, it held that decisions under Article 85 must take into account the simultaneous existence of numerous similar agreements. Thus, more barriers to economic integration in the Common Market are eliminated and slowly, the Community is approaching the economic federalism envisioned by the drafters of the Treaty of Rome. [27]

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23. Article 6 gives retroactive affect to certain commission declarations.
24. For a discussion of the National Court's role in "harmonizing national and Treaty law", see Ebb, The Grundig-Consten Case Revisited: Judicial Harmonization of Nation Law and Treaty Law in the Common Market, 115 U. Penn. L. Rev. 855 (1967).
25. See Hahn, Exclusive Distributorship Agreements in the European Common Market: Antitrust Laws on the Move, 16 Am. U. L. Rev. 367 (1967).
26. 2 CCH Com Mkt. Rep. 8053 at 7806.
27. See Lagrange, The Court of Justice as a Factor in European Integration, 15 Am. J. Comp. L. 709 (1966-67).