European Court of Justice, 13 July 1966, Grundig v Consten

TRADEMARK RIGHTS – CARTEL PROHIBITION

Authorisation of national trademark registration

- **Agreement concerning national registration of GINT trademark, which results in unlawful obstacles for parallel imports, is prohibited under article 85(1)EC.**

The applicants maintain more particularly that the criticized effect on competition is due not to the agreement but to the registration of the trademark in accordance with French law, which gives rise to an original inherent right of the holder of the trademark from which the absolute territorial protection derives under national law. Consten's right under the contract to the exclusive user in France of the GINT trademark, which may be used in a similar manner in other countries, is intended to make it possible to keep under surveillance and to place an obstacle in the way of parallel imports. Thus, the agreement by which Grundig, as the holder of the trademark by virtue of an international registration, authorized Consten to register it in France in its own name tends to restrict competition. Although Consten is, by virtue of the registration of the GINT trademark, regarded under French law as the original holder of the rights relating to that trademark, the fact nevertheless remains that it was by virtue of an agreement with Grundig that it was able to effect the registration. That agreement therefore is one which may be caught by the prohibition in article 85(1). The prohibition would be ineffective if Consten could continue to use the trademark to achieve the same object as that pursued by the agreement which has been held to be unlawful .

Exervising trademark rights in violation of competition law

- **Exercising trademark rights in order to set obstacles for parallel imports, is not in accordance with the community rules on competition, which do not allow the improper use of trademark rights in a way that would frustrate the community's law on cartels.**

Articles 36, 222 and 234 of the treaty relied upon by the applicants do not exclude any influence whatever of community law on the exercise of national industrial property rights. Article 36, which limits the scope of the rules on the liberalization of trade contained in title i, chapter 2, of the treaty, cannot limit the field of application of article 85. Article 222 confines itself to stating that the 'treaty shall in no way prejudice the rules in member states governing the system of property ownership'. The injunction contained in article 3 of the operative part of the contested decision to refrain from using rights under national trademark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under article 85(1). The power of the commission to issue such an injunction for which provision is made in article 3 of regulation no 17/62 of the council is in harmony with the nature of the community rules on competition which have immediate effect and are directly binding on individuals. Such a body of rules, by reason of its nature described above and its function, does not allow the improper use of rights under any national trade-mark law in order to frustrate the community's law on cartels.

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European Court of Justice, 13 July 1966

Judgment of the Court of 13 July 1966. - Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community. - Joined cases 56 and 58-64.

In joined cases 56 and 58/64

56/64 - etablissements Consten S.a.R.L., having its registered office at Courbevoie (Seine), represented by j . Lassier, advocate at the Cour d' Appel, Paris, with an address for service in Luxembourg at the chambers of J. Welter, avocat - avoue, 6 rue willy-goergen,

58/64 - Grundig-verkaufs-GmbH, having its registered office at Fuerth (Bavaria), represented by its managing director, max Grundig, assisted by h . Hellmann and k . Pfeiffer, of the cologne bar, with an address for service in Luxembourg at the chambers of a . Neyens, avocat-avoue, 9 rue des glacis,

Applicants,

Supported by the government of the Italian republic, represented by a . Maresca, minister plenipotentiary and assistant head of the legal department of the ministry of foreign affairs, acting as agent, assisted by p . Peronaci, deputy advocate-general of the state, with an address for service in Luxembourg at the Italian embassy, 5 rue Marie Adelaide,

Intervener in cases 56/64 and 58/64,

The government of the federal republic of Germany, represented by u . Everling, ministerialrat, and h . Peters, regierungsrat, with an address for service in Luxembourg at the chancery of the embassy of the federal republic of Germany, 3 boulevard royal,

Intervener in case 58/64,

V

Commission of the European economic community, represented by its legal advisers, g . Le tallec (case 56/64) and j . Thiesing (case 58/64), acting as agents, with an address for service in Luxembourg at the secretariat of the legal department of the european executives, 2 place de Metz,

Defendant,

Supported by
Firma willy leissner, having its registered office in Strasbourg, represented by c . Lapp, of the Strasbourg bar, with an address for service in Luxembourg at the chambers of h . Glaesener, notary, 20 rue glesener,
Unef, a limited liability company governed by french law having its registered office in Paris, represented by r . Collin, advocate of the cour d' appel, paris, and by p.a . Franck, advocate of the cour d' appel, brussels, with an address for service in luxembourg at the chambers of e . Arendt, avocat-avoue, 6 rue willy - goergen,
Interveners,

Subject of the case

Application for annulment of the decision of the commission of 23 september 1964 under article 85 of the treaty (iv/a-00004-03344 ' Grundig - Consten ');

Grounds

The complaint relating to the designation of the contested measure

The applicant Consten pleads infringement of an essential procedural requirement since the text of the contested measure is described in the official journal as a directive, whereas a measure of this type cannot be addressed to individuals .
Where a measure is directed to specifically named undertakings, only the text which is notified to the addressees is authentic . The text in question includes the words ' the commission has adopted the present decision '.
This submission is therefore unfounded .

The complaints regarding violation of the rights of the defence

The applicant Consten complains that the commission violated the rights of the defence in that it failed to communicate to it the content of the complete file .
The applicant Grundig makes the same complaint, in particular with regard to two notes from French and German authorities which the commission took into account in reaching its decision .
The proceedings before the commission concerning the application of article 85 of the treaty are administrative proceedings, which implies that the parties concerned should be put in a position before the decision is issued to present their observations on the complaints which the commission considers must be upheld against them. For that purpose, they must be informed of the facts upon which these complaints are based . It is not necessary however that the entire content of the file should be communicated to them . In the present case it appears that the statement of the commission of 20 December 1963 includes all the facts the knowledge of which is necessary to ascertain which complaints were taken into consideration . The applicants duly received a copy of that statement and were able to present their written and oral observations . The contested decision is not based on complaints other than those which were the subject of those proceedings .
The applicant Consten maintains that the decision is also vitiated by violation of the rights of the defence in that it did not take account of the principal submissions made by it to the commission, in particular of requests for further inquiries .
In non-judicial proceedings of this kind the administration is not required to give reasons for its rejection of the parties' submissions .
It does not appear therefore that the rights of the defence of the parties were violated during the proceedings before the commission .
This submission is unfounded .

The complaint concerning the inclusion in the operative part of the decision of the finding of infringement

The German government supports the submission that there was an infringement of an essential procedural requirement on the ground that the finding that an infringement of article 85 of the EEC treaty had not been committed should have been included solely in the preamble to and not in the operative part of the decision .
That finding constitutes the basis of the obligation of the parties to terminate the infringement . Its effects on the legal situation of the undertakings concerned do not depend on its position in the decision .
This complaint therefore does not disclose any legal interest requiring protection and must consequently be rejected .

The complaints concerning the applicability of article 85(1) to sole distributorship contracts

The applicants submit that the prohibition in article 85(1) applies only to so-called horizontal agreements .
The Italian government submits furthermore that sole distributorship contracts do not constitute ' agreements between undertakings ' within the meaning of that provision, since the parties are not on a footing of equality . With regard to these contracts, freedom of competition may only be protected by virtue of article 86 of the treaty .
Neither the wording of article 85 nor that of article 86 gives any ground for holding that distinct areas of application are to be assigned to each of the two articles according to the level in the economy at which the contracting parties operate . Article 85 refers in a general way to all agreements which distort competition within the common market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels . In principle, no distinction can be made where the treaty does not make any distinction .
Furthermore, the possible application of article 85 to a sole distributorship contract cannot be excluded merely because the grantor and the concessionnaire are not competitors inter se and not on a footing of equality . Competition may be distorted within the meaning of article 85(1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties . For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy . This

applies all the more, since, by such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the consumer or user, contrary to the general aims of article 85 .
It is thus possible that, without involving an abuse of a dominant position, an agreement between economic operators at different levels may affect trade between member states and at the same time have as its object or effect the prevention, restriction or distortion of competition, thus falling under the prohibition of article 85(1).
In addition, it is pointless to compare on the one hand the situation, to which article 85 applies, of a producer bound by a sole distributorship agreement to the distributor of his products with on the other hand that of a producer who includes within his undertaking the distribution of his own products by some means, for example, by commercial representatives, to which article 85 does not apply . These situations are distinct in law and, moreover, need to be assessed differently, since two marketing organizations, one of which is integrated into the manufacturer's undertaking whilst the other is not, may not necessarily have the same efficiency . The wording of article 85 causes the prohibition to apply, provided that the other conditions are met, to an agreement between several undertakings . Thus it does not apply where a sole undertaking integrates its own distribution network into its business organization . It does not thereby follow, however, that the contractual situation based on an agreement between a manufacturing and a distributing undertaking is rendered legally acceptable by a simple process of economic analogy - which is in any case incomplete and in contradiction with the said article . Furthermore, although in the first case the treaty intended in article 85 to leave untouched the internal organization of an undertaking and to render it liable to be called in question, by means of article 86, only in cases where it reaches such a degree of seriousness as to amount to an abuse of a dominant position, the same reservation could not apply when the impediments to competition result from agreement between two different undertakings which then as a general rule simply require to be prohibited .
Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between member states might be such as to frustrate the most fundamental objections of the community . The treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers . Article 85(1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process .
The submissions set out above are consequently unfounded .

The complaint based on regulation no 19/65 of the council

The applicant Grundig raises the question whether the prohibition in article 85(1) was applicable to the agreement in question before the adoption of regulation no 19/65 of the council concerning the application of article 85(3) to certain categories of agreements .
This submission was relied upon by the applicant for the first time in the reply . The fact that this regulation was adopted after the application was brought does not justify such delay . In fact, this submission really amounts to a claim that before the adoption of the regulation the commission should not have applied article 85(1) since it lacked the powers to grant exemptions by categories of agreements .
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In view of the fact that the situation in question existed before regulation no 19/65 was adopted, the regulation cannot constitute a fresh issue, within the meaning of article 42 of the rules of procedure, capable of justifying the delay in indicating it .
The complaint is therefore inadmissible .

The complaints relating to the concept of ' agreements which may affect trade between member states '

The applicants and the German government maintain that the commission has relied on a mistaken interpretation of the concept of an agreement which may affect trade between member states and has not shown that such trade would have been greater without the agreement in dispute .
The defendant replies that this requirement in article 85(1) is fulfilled once trade between member states develops, as a result of the agreement, differently from the way in which it would have done without the restriction resulting from the agreement, and once the influence of the agreement on market conditions reaches a certain degree . Such is the case here, according to the defendant, particularly in view of the impediments resulting within the common market from the disputed agreement as regards the exporting and importing of Grundig products to and from France .
The concept of an agreement ' which may affect trade between member states ' is intended to define, in the law governing cartels, the boundary between the areas respectively covered by community law and national law . It is only to the extent to which the agreement may affect trade between member states that the deterioration in competition caused by the agreement falls under the prohibition of community law contained in article 85; otherwise it escapes the prohibition .
In this connexion, what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between member states in a manner which might harm the attainment of the objectives of a single market between states . Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may ' affect ' such trade in the abovementioned manner . In the present case, the contract between Grundig and Consten, on the one hand by preventing undertakings other than

Consten from importing Grundig products into France, and on the other hand by prohibiting Consten from re-exporting those products to other countries of the common market, indisputably affects trade between member states . These limitations on the freedom of trade, as well as those which might ensue for third parties from the registration in France by Consten of the GINT trade mark, which Grundig places on all its products, are enough to satisfy the requirement in question.
Consequently, the complaints raised in this respect must be dismissed .

The complaints concerning the criterion of restriction on competition

The applicants and the German government maintain that since the commission restricted its examination solely to Grundig products the decision was based upon a false concept of competition and of the rules on prohibition contained in article 85(1), since this concept applies particularly to competition between similar products of different makes; the commission, before declaring article 85(1) to be applicable, should, by basing itself upon the ' rule of reason ', have considered the economic effects of the disputed contrast upon competition between the different makes . There is a presumption that vertical sole distributorship agreements are not harmful to competition and in the present case there is nothing to invalidate that presumption . On the contrary, the contract in question has increased the competition between similar products of different makes .
The principle of freedom of competition concerns the various stages and manifestations of competition . Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of article 85(1) merely because it might increase the former .
Besides, for the purpose of applying article 85(1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition .
Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision .
It thus remains to consider whether the contested decision was right in founding the prohibition of the disputed agreement under article 85(1) on the restriction on competition created by Grundig products alone . The infringement which was found to exist by the contested decision results from the absolute territorial protection created the said contract in favour of Consten on the basis of French law . The applicants thus wished to eliminate any possibility of competition at the wholesale level in Grundig products in the territory specified in the contrast essentially by two methods .
First, Grundig undertook not to deliver even indirectly to third parties products intended for the area covered by the contract . The restrictive nature of that undertaking is obvious if it is considered in the light of the prohibition on exporting which was imposed not only on Consten but also on all the other sole concessionnaires of Grundig, as well as the German wholesalers .
Secondly, the registration in France by Consten of the GINT trade mark, which Grundig affixes to all its products, is intended to increase the protection inherent in the disputed agreement, against the risk of parallel imports into France of Grundig products, by adding the protection deriving from the law on industrial property rights . Thus no third party could import Grundig products from other member states of the community for resale in France without running serious risks .
The defendant properly took into account the whole distribution system thus set up by Grundig . In order to arrive at a true representation of the contractual position the contract must be placed in the economic and legal context in the light of which it was concluded by the parties . Such a procedure is not to be regarded as an unwarrantable interference in legal transactions or circumstances which were not the subject of the proceedings before the commission .
The situation as ascertained above results in the isolation of the French market and makes it possible to charge for the products in question prices which are sheltered from all effective competition . In addition, the more producers succeed in their efforts to render their own makes of product individually distinct in the eyes of the consumer, the more the effectiveness of competition between producers tends to diminish . Because of the considerable impact of distribution costs on the aggregate cost price, it seems important that competition between dealers should also be stimulated .
The efforts of the dealer are stimulated by competition between distributors of products of the same make .
Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the community, it is therefore such as to distort competition in the common market .
It was therefore proper for the contested decision to hold that the agreement constitutes an infringement of article 85(1). No further considerations, whether of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads borne by Consten) or of the corrections of the criteria upon which the commission relied in its comparisons between the situations of the French and German markets, and no possible favourable effects of the agreement in other respects, can in any way lead, in the face of the abovementioned restrictions, to a different solution under article 85(1).

The complaints relating to the extent of the prohibition

The applicant Grundig and the German government complain that the commission did not exclude from the prohibition, in the operative part of the contested decision, those clauses of the contract in respect of which there was found no effect capable of restricting compe-

tition, and that it thereby failed to define the infringement .
It is apparent from the statement of the reasons for the contested decision, as well as from article 3 thereof, that the infringement declared to exist by article 1 of the operative part is not to be found in the undertaking by Grundig not to make direct deliveries in France except to Consten . That infringement arises from the clauses which, added to this grant of exclusive rights, are intended to impede, relying upon national law, parallel imports of Grundig products into France by establishing absolute territorial protection in favour of the sole concessionnaire .
The provision in article 85(2) that agreements prohibited pursuant to article 85 shall be automatically void applies only to those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself . The commission should, therefore, either have confined itself in the operative part of the contested decision to declaring that an infringement lay in those parts only of the agreement which came within the prohibition, or else it should have set out in the preamble to the decision the reasons why those parts did not appear to it to be severable from the whole agreement .
It follows, however, from article 1 of the decision that the infringement was found to lie in the agreement as a whole, although the commission did not adequately state the reasons why it was necessary to render the whole of the agreement void when it is not established that all the clauses infringed the provisions of article 85(1). The state of affairs found to be incompatible with article 85(1) stems from certain specific clauses of the contract of 1 April 1957 concerning absolute territorial protection and from the additional agreement on the GINT trade mark rather than from the combined operation of all clauses of the agreement, that is to say, from the aggregate of its effects .
Article 1 of the contested decision must therefore be annulled in so far as it renders void, without any valid reason, all the clauses of the agreement by virtue of article 85(2).

The submissions concerning the finding of an infringement in respect of the agreement on the GINT trade mark

The applicants complain that the commission infringed articles 36, 222 and 234 of the EEC treaty and furthermore exceeded the limits of its powers by declaring that the agreement on the registration in France of the GINT trade - mark served to ensure absolute territorial protection in favour of Consten and by excluding thereby, in article 3 of the operative part of the contested decision, any possibility of Consten's asserting its rights under national trade-mark law, in order to oppose parallel imports .
The applicants maintain more particularly that the criticized effect on competition is due not to the agreement but to the registration of the trade-mark in accordance with French law, which gives rise to an original inherent right of the holder of the trade-mark from which the absolute territorial protection derives under national law .
Consten's right under the contract to the exclusive user in France of the GINT trade mark, which may be used in a similar manner in other countries, is intended to make it possible to keep under surveillance and to place an obstacle in the way of parallel imports . Thus, the agreement by which Grundig, as the holder of the trade-mark by virtue of an inter - national registration, authorized Consten to register it in France in its own name tends to restrict competition .
Although Consten is, by virtue of the registration of the GINT trade-mark, regarded under French law as the original holder of the rights relating to that trade-mark, the fact nevertheless remains that it was by virtue of an agreement with Grundig that it was able to effect the registration .
That agreement therefore is one which may be caught by the prohibition in article 85(1). The prohibition would be ineffective if Consten could continue to use the trade-mark to achieve the same object as that pursued by the agreement which has been held to be unlawful .
Articles 36, 222 and 234 of the treaty relied upon by the applicants do not exclude any influence whatever of community law on the exercise of national industrial property rights .
Article 36, which limits the scope of the rules on the liberalization of trade contained in title i, chapter 2, of the treaty, cannot limit the field of application of article 85 . Article 222 confines itself to stating that the ' treaty shall in no way prejudice the rules in member states governing the system of property ownership '. The injunction contained in article 3 of the operative part of the contested decision to refrain from using rights under national trade - mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under article 85(1). The power of the commission to issue such an injunction for which provision is made in article 3 of regulation no 17/62 of the council is in harmony with the nature of the community rules on competition which have immediate effect and are directly binding on individuals .
Such a body of rules, by reason of its nature described above and its function, does not allow the improper use of rights under any national trade-mark law in order to frustrate the community's law on cartels .
Article 234 which has the aim of protecting the rights of third countries is not applicable in the present instance . The abovementioned submissions are therefore unfounded .

The complaints concerning the failure to hear third parties concerned

The applicants and the German government state that article 3 of the operative part of the contested decision applies in fact to the whole distribution of Grundig products in the common market . In so doing it is said that the commission exceeded its powers and disregarded the right of all those concerned to be heard .

The prohibition imposed upon Grundig by the abovementioned article 3, preventing its distributors and sole concessionnaires from exporting to France, constitutes the corollary to the prohibition on the absolute territorial protection which was established for the benefit of Consten . This prohibition thus does not exceed the limits of the proceedings which culminated in the application of article 85(1) to the agreement between Grundig and Consten . Furthermore the contested decision does not directly affect the legal validity of the agreements concluded between Grundig and the wholesalers and concessionnaires other than Consten, but it confines itself to restricting Grundig's freedom of action as regards the parallel imports of its products into France .

Although it is desirable that the commission should extend its inquiries as far as possible to those who might be affected by its decisions, the mere interest in preventing an agreement to which they are not parties from being declared illegal so that they may retain the benefits which they derive de facto from the situation which results from that agreement cannot constitute a sufficient basis for establishing a right for the other concessionnaires of Grundig to be called automatically by the commission to take part in the proceedings concerning the relationship between Consten and Grundig . Consequently this submission is unfounded .

The complaints concerning the application of article 85(1)

The conditions of application

The applicants, supported on several points by the German government, allege inter alia that all the conditions for application of the exemption, the existence of which is denied in the contested decision, are met in the present case . The defendant starts from the premise that it is for the undertakings concerned to prove that the conditions required for exemption are satisfied .

The undertakings are entitled to an appropriate examination by the commission of their requests for article 85(3) to be applied . For this purpose the commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of the exemption but must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances .

Furthermore, the exercise of the commission's powers necessarily implies complex evaluations on economic matters . A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the commission deduces therefrom . This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based .

The contested decision states that the principal reason for the refusal of exemption lies in the fact that the requirement contained in article 85(3)(a) is not satisfied .

The German government complains that the said decision does not answer the question whether certain factors, especially the advance orders and the guarantee and after-sales services, the favourable effects of which were recognized by the commission, could be maintained intact in the absence of absolute territorial protection .

The contested decision admits only by way of assumption that the sole distributorship contract in question contributes to an improvement in production and distribution . Then the contested decision examines the question ' whether an improvement in the distribution of goods by virtue of the sole distribution agreement could no longer be achieved if parallel imports were admitted '. After examining the arguments concerning advance orders, the observation of the markets and the guarantee and after-sales services, the decision concluded that ' no other reason which militates in favour of the necessity for absolute territorial protection has been put forward or hinted at '.

The question whether there is an improvement in the production of distribution of the goods in question, which is required for the grant of exemption, is to be answered in accordance with the spirit of article 85 . First, this improvement cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities . These advantages are generally indisputable and show the agreement as in all respects indispensable to an improvement as understood in this sense . This subjective method, which makes the content of the concept of ' improvement ' depend upon the special features of the contractual relationships in question, is not consistent with the aims of article 85 . Furthermore, the very fact that the treaty provides that the restriction of competition must be ' indispensable ' to the improvement in question clearly indicates the importance which the latter must have . This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition .

The argument of the German government, based on the premise that all those features of the agreement which favour the improvement as conceived by the parties to the agreement must be maintained intact, presupposes that the question whether all these features are not only favourable but also indispensable to the improvement of the production or distribution of the goods in question has already been settled affirmatively . Because of this the argument not only tends to weaken the requirement of indispensability but also among other consequences to confuse solicitude for the specific interests of the parties with the objective improvements contemplated by the treaty .

In its evaluation of the relative importance of the various factors submitted for its consideration, the commission on the other hand had to judge their effectiveness by reference to an objectively ascertainable improvement in the production and distribution of the goods, and to decide whether the resulting benefit would suffice to support the conclusion that the consequent restrictions upon competition were indispensable . The argument based on the necessity to maintain intact all arrangements of the parties in so far as they are

capable of contributing to the improvement sought cannot be reconciled with the view propounded in the last sentence . Therefore, the complaint of the federal government, based on faulty premises, is not such as can invalidate the commission's assessment .
The applicants maintain that the admission of parallel imports would mean that the sole representative would no longer be in a position to engage in advance planning .
A certain degree of uncertainty is inherent in all forecasts of future sales possibilities . Such forecasting must in fact be based on a series of variable and uncertain factors . The admission of parallel imports may indeed involve increased risks for the concessionnaire who gives firm orders in advance for the quantities of goods which he considers he will be able to sell . However, such a risk is inherent in all commercial activity and thus cannot justify special protection on this point .
The applicants complain that the commission did not consider on the basis of concrete facts whether it is possible to provide guarantee and after-sales services without absolute territorial protection . They emphasize in particular the importance for the reputation of the Grundig name of the proper provision of these services for all the Grundig machines put on the market . The freeing of parallel imports would compel Consten to refuse these services for machines imported by its competitors who did not themselves carry out these services satisfactorily . Such a refusal would also be contrary to the interests of consumers .
As regards the free guarantee service, the decision states that a purchaser can normally enforce his right to such a guarantee only against his supplier and subject to conditions agreed with him . The applicant parties do not seriously dispute that statement .
The fears concerning the damage which might result for the reputation of Grundig products from an inadequate service do not, in the circumstances, appear justified .
In fact, UNEF, the main competitor of Consten, although it began selling Grundig products in France later than Consten and while having had to bear not inconsiderable risks, nevertheless supplies a free guarantee and after-sales services against remuneration upon conditions which, taken as a whole, do not seem to have harmed the reputation of the Grundig name .
Moreover, nothing prevents the applicants from informing consumers, through adequate publicity, of the nature of the services and any other advantages which may be offered by the official distribution network for Grundig products . It is thus not correct that the publicity carried out by Consten must benefit parallel importers to the same extent .
Consequently, the complaints raised by the applicants are unfounded .
The applicants complain that the commission did not consider whether absolute territorial protection was still indispensable to enable the risk costs borne by Consten in launching the Grundig products on the French market to be amortized .
The defendant objects that before the adoption of the contested decision it had at no time became aware of any market introduction costs which had not been amortized .
This statement by the defendant has not been disputed .
The commission cannot be expected of its own motion to make inquiries on this point . Further, the argument of the applicants amounts in substance to saying that the conessionnaire would not have accepted the agreed conditions without absolute territorial protection . However, that fact has no connexion with the improvements in distribution referred to in article 85(3).
Consequently this complaint cannot be upheld .
The applicant Grundig maintains, further, that without absolute territorial protection the sole distributor would not be inclined to bear the costs necessary for market observation since the result of his efforts might benefit parallel importers .
The defendant objects that such market observation, which in particular allows the application to the products intended for export to France of technical improvements desired by the French consumer, can be of benefit only to Consten .
In fact, Consten, in its capacity as sole concessionnaire which is not threatened by the contested decision, would be the only one to receive the machines equipped with the features adapted especially to the French market .
Consequently this complaint is unfounded .
The complaints made against that part of the decision which relates to the existence in the present case of the requirements of article 85(3)(a), considered separately and as a whole, do not appear to be well founded .
Since all the requirements necessary for granting the exemption provided for in article 85(3) must be fulfilled, there is therefore no need to examine the submissions relating to the other requirements for exemption .

The complaint concerning the failure to grant a conditional exemption

The applicant Grundig, since it considers that the refusal of exemption was based on the existence of the absolute territorial protection in favour of Consten, maintains that the commission should, under article 7(1) of regulation no 17/62 of the council, at least have allowed the sole distributorship contract on condition that parallel imports were not impeded and that, in the absence of such conditional exemption, the operative part of the decision goes beyond the statement of reasons given as well as the object of the decision - the prohibition of absolute territorial protection .
The partial annulment of the contested decision renders any further discussion of the present complaint unnecessary .

Decision on costs

Under article 69(3) of its rules of procedure, where each party succeeds on some and fails on other heads the court may order that the parties bear their own costs in whole or in part . Such is the case in the present instance .

The costs must therefore be borne on the one hand by the applicants and the intervening governments of the Italian republic and the federal republic of Germany, and on the other hand by the defendant and the intervening companies Leissner and UNEF.

Operative part

The court

Hereby :

1 . Annuls the decision of the commission of the European economic community of 23 September 1964 relating to proceedings under article 85 of the treaty (iv-a/00004-03344, ' Grundig-Consten '), published in the official journal of the European communities of 20 October 1964 (p.2545/64), in so far as in article 1 it declares that the whole of the contract of 1 April 1957 constitutes an infringement of the provisions of article 85, including parts of that contract which do not constitute the said infringement;

2 . Dismisses the rest of applications 56/64 and 58/64 as unfounded;

3 . Orders the applicants, the defendants and the intervening parties each to bear their own costs .