

European Court of Justice, 25 November 1971, Beguelin

BEGUELIN IMPORT

COMPETITION LAW

Exclusive dealing agreement and parallel import

- [Mere parallel imports not sufficient to qualify for unfair competition](#)

More especially, an exclusive dealing agreement is liable to affect trade between member states and may have the effect of impeding competition if, owing to the combined effects of the agreement and of national legislation on unfair competition, the dealer is able to prevent parallel imports from other member states into territory covered by the agreement.

The dealer may, therefore, rely on such legislation only if the alleged unfairness of his competitors' behaviour arises from factors other than their having effected parallel imports

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European Court of Justice, 25 November 1971

In case 22/71

Reference to the court under article 177 of the EEC treaty by the Tribunal de Commerce, Nice, for a preliminary ruling in the action pending before that court between

1. Beguelin import company, Brussels,
 2. S. A. Beguelin Import Company France, Paris,
- And

1. S.A.G.L. Import Export, nice,
2. Karl Marbach, Hamburg,
3. Fritz Marbach, Hamburg,
4. Gebrueder Marbach gmbh, Hamburg,

Subject of the case

On the interpretation of

- article 85 of the said treaty; and
- regulation no 67/67/EEC of the commission of 22 march 1967 on the application of article 85 (3) of the treaty to certain categories of exclusive dealing agreements (OJ no 57, p. 849; OJ (English special edition) 1967, p. 10)

Grounds

1 By judgment of 8 february 1971 received at the court registry on 29 april 1971, the tribunal de commerce, nice, has referred to the court two questions concerning the interpretation of article 85 of the EEC treaty and regulation no 67/67 of the commission (OJ of 25 march 1967, p. 849; OJ (English special edition) 1967, p. 10).

First question

2 The first question refers to agreements which have not been notified to the commission and under which a producer established in a third country grants to an undertaking subject to the law of a member state the exclusive right to distribute his products on the territory of that state.

3 The court is, in particular, asked to give a ruling whether the validity of such agreements and the extent to which they may be set up against third parties are affected by the fact that the holder of the concession, through a legal person, is merely the subsidiary, without any economic independence of its own, of an undertaking established in another member state which has itself acquired from the same producer a similar exclusive right for the territory of that state.

4 In addition, the question seeks to establish the other conditions to which the validity of the said agreements and the extent to which they may be set up against third parties are subject under the community rules.

1. Applicability of article 85 (1) of the treaty

5 a - The first question first seeks to establish whether, when a parent company established in a member state and holder of an exclusive concession granted to it in respect of two member states, grants to its subsidiary or allows it to acquire the exclusive concession in the second member state, the prohibition in article 85 (1) applies in so far as the exclusive concession covers the territory of the said state.

6 If the answer is in the affirmative, the question then seeks to establish what would be consequences of infringement of the treaty on the validity of the concession granted to the said subsidiary.

7 Article 85 (1) prohibits agreements which have as their object or effect an impediment to competition.

8 This is not the position in the case of an exclusive sales agreement when in fact the concession granted under that agreement is in part transferred from the parent company to a subsidiary which, although having separate legal personality, enjoys no economic independence.

9 Accordingly the relationship between the companies cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party.

10 b - To be incompatible with the common market and prohibited under article 85, an agreement must be one which "may affect trade between member states" and have "as (its) object or effect" an impediment to "competition within the common market".

11 The fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of that provision since the agreement is operative on the territory of the common market.

12 An exclusive dealing agreement entered into between a producer who is subject to the law of a third country and a distributor established in the common market fulfils the two aforementioned conditions when, de jure or de facto, it prevents the distributor from re-exporting the products in question to other member states or prevents the products from being imported from other member states into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers.

13 In order to determine whether this is the position, account must be taken not only of the rights and obligations arising from the clauses of the agreement but also

of the economic and legal conditions under which it operates and particularly of the existence of any similar agreements entered into by the same producer with exclusive dealers established in other member states.

14 More especially, an exclusive dealing agreement is liable to affect trade between member states and may have the effect of impeding competition if, owing to the combined effects of the agreement and of national legislation on unfair competition, the dealer is able to prevent parallel imports from other member states into territory covered by the agreement.

15 The dealer may, therefore, rely on such legislation only if the alleged unfairness of his competitors' behaviour arises from factors other than their having effected parallel imports.

16 c - Finally, in order to come within the prohibition imposed by article 85, the agreement must affect trade between member states and the free play of competition to an appreciable extent.

17 In order to establish whether this is the case, these factors must be considered in the light of the situation which would have existed but for the agreement in question.

18 It follows that, in order to determine whether a contract which contains a clause conferring an exclusive right of sale is caught by that article, account must be taken in particular of the nature and quantity, restricted or otherwise, of the products covered by the agreement; the standing of the grantor and of the grantee of the concession on the market in the products concerned; whether the agreement stands alone or is one of a series of agreements; the stringency of the clauses designed to protect the exclusive right or on the other hand, the extent to which any openings are left for other dealings in the products concerned in the form of re-exports or parallel imports.

2. Applicability of regulation no 67/67

19 Under article 1 (1) of regulation no 67/67, " it is hereby declared that until 31 december 1972 article 85 (1) of the treaty shall not apply to agreements to which only two undertakings are party " and in which an obligation is entered into between the parties in respect of exclusive supply or of exclusive purchase, or both, " for resale " .

20 Under article 2 (1) of the regulation, no restrictions on competition are to be imposed on the exclusive dealer other than those specified therein and these do not include a prohibition on re-exporting the products in question to other member states.

21 article 2 (2) of the regulation provides that " article 1 (1) Shall apply notwithstanding that the exclusive dealer undertakes " certain obligations listed in article 2 (2) Which, again, makes no reference to a prohibition on re-exporting.

22 The collective exemption conferred by regulation no 67/67 does not, therefore, apply when an agreement prohibits the exclusive dealer from re-exporting the products in question to other member states.

23 Moreover, in cases where the agreement does not contain a clause prohibiting re-export, it is to be noted that, under the terms of article 3 of the regulation, such

an agreement is likewise ineligible for the said exemption where the contracting parties " make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market ", in particular, where they " exercise other rights or take other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract " .

24 Consequently, the exercise of such rights also deprives the agreement between the grantor of an exclusive right and the grantee of the benefit of the exemption provided for under article 1 (1) of regulation no 67/67.

3. Applicability of article 85 (2) of the treaty

25 Article 85 (2) of the treaty reads: " any agreements or decisions prohibited pursuant to this article shall be automatically void " .

26 Accordingly, an agreement falling under article 85 (1) which has not been declared inapplicable under article 85 (3) as an agreement or a category of agreements becomes null and void in so far as its object or effect is incompatible with the prohibition in article 85 (1).

27 Though such an agreement, which has not been notified to the commission, but is exempt from notification under article 4 (2) of regulation no 17 of the council, (oj of 21 february 1962, (english special edition) 1959-1962, p. 87 et seq.) Remain fully effective until it has been declared null and void, this exemption extends only to certain agreements where " the only parties thereto are undertakings from one member state " or to agreements whose sole object or effect is that defined in article 4 (2).

28 The agreements in the present case satisfy neither of these conditions because one of the contracting parties is subject to the law of a third state and the object or effect of the agreement differs from those referred to in the aforementioned provisions.

29 Since the nullity referred to in article 85 (2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties.

Second question

30 In the second question, the court is asked to rule whether an " import procedure " such as that described by the national court, is incompatible with article 85 of the treaty or whether it comes within the exemption conferred under regulation no 67/67.

31 Under article 85 (1) of the treaty, the prohibition imposed by that provision is concerned with "agreements between undertakings", "decisions by associations of undertakings" and "concerted practices"only in so far as such agreements, decisions or practices affect trade between member states and have as their object or effect the discouragement of competition.

32 An import or export transaction has not as such the object or effect of interfering with competition within the meaning of article 85.

Costs

33 The costs incurred by the commission of the european communities, which has submitted observations to the court, are not recoverable.

34 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the tribunal de commerce, nice, the decision as to costs is a matter for that court.

The court

In answer to the questions referred to it by the tribunal de commerce, nice, by order of that court dated 8 february 1971,

Hereby rules:

The first question

1. The relationship between two companies one of which is economically wholly dependant upon the other cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party.

2. An exclusive dealing agreement entered into between a producer who is subject to the law of a third country and a distributor established in the common market comes within the prohibition imposed under article 85 of the treaty in cases when, de jure or de facto it prevents the distributor from re-exporting the products in question to other member states or prevents the products from being imported from other member states into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers.

The latter condition is satisfied in particular in cases where, owing to the combined effects of the agreement and of national legislation on unfair competition, the exclusive dealer is able to prevent parallel imports from other member states into the territory covered by the agreement.

3. The collective exemption conferred on certain categories of agreement by regulation no 67/67 does not apply when an agreement prohibits the exclusive dealer from re-exporting the products in question to other member states.

4. Since the nullity for which article 85 (2) of the treaty provides is absolute, the agreement concerned has no effect as between the contracting parties and cannot be set up against third parties.

The second question

5. An import or export transaction cannot as such come within the prohibition imposed by article 85 (1) of the treaty.