

European Court of Justice, 8 June 1971, Deutsche Grammophon Gesellschaft v Metro



v



PHONOGRAM PRODUCER RIGHTS

Exhaustion – Free movement of products

- The exercise of an exclusive right to prevent the marketing of products distributed with the consent of the holder of the right in another member state is in conflict with the free movement of products.

If a right related to copyright is relied upon to prevent the marketing in a member state of products distributed by the holder of the right or with his consent on the territory of another member state on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the treaty, which is to unite national markets into a single market .

That purpose could not be attained if, under the various legal systems of the member states, nationals of those states were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between member states .

Consequently, it would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a member state, in such a way as to prohibit the sale in that state of products placed on the market by him or with his consent in another member state solely because such distribution did not occur within the territory of the first member state .

Abuse of dominant position

- Mere exercise of an exclusive right not sufficient to constitute a dominant position; the power to impede the maintenance of effective competition over a

considerable part of the relevant market also required

A manufacturer of sound recordings who holds a right related to copyright does not occupy a dominant position within the meaning of article 86 of the treaty merely by exercising his exclusive right to distribute the protected articles. Since that article requires that the position to which it refers should extend to a "substantial part "of the common market this further requires that the manufacturer, alone or jointly with other undertakings in the same group, should have the power to impede the maintenance of effective competition over a considerable part of the relevant market (...).

- Difference in price may be decisive factor to determine abuse

For it to fall within article 86 a dominant position must further be abused. The difference between the controlled price and the price of the product reimported from another member state does not necessarily suffice to disclose such an abuse; it may however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse .

Source: <http://eur-lex.europa.eu>

European Court of Justice, 8 June 1971

(R. Lecourt; A. M. Donner en A. Trabucchi; R. Monaco (rapporteur), J. Mertens de Wilmars, P. Pescatore, H. Kutscher)

In case 78/70

Reference to the court under article 177 of the EEC treaty by the hanseatisches oberlandesgericht Hamburg for a preliminary ruling in the action pending before that court between

Deutsche grammophon gesellschaft Gmbh, Hamburg,
And

Metro-sb-grossmaerkte gmbh and company kg, represented by the company metro-sb-grossmaerkte gmbh, Hamburg,

Subject of the case

On the interpretation of the second paragraph of article 5, article 85 (1) and article 86 of the EEC treaty,

Grounds

1 By an order of 8 October 1970, which was received at the court registry on 7 December 1970, the hanseatisches oberlandesgericht, Hamburg, referred to the court of justice, under article 177 of the treaty establishing the European economic community, certain questions on the interpretation of the second paragraph of article 5, article 85 (1) and article 86 of the treaty .

The first question

2 In the first question the court is asked to rule whether it is contrary to the second paragraph of article 5 or article 85 (1) of the EEC treaty to interpret articles 97 and 85 of the German law of 9 September 1965 on copyright and related rights to mean that a German undertaking manufacturing sound recordings may rely on its exclusive right of distribution to prohibit the marketing in the federal republic of Germany of sound recordings which it has itself supplied to its French

subsidiary which, although independent at law, is wholly subordinate to it commercially.

3 Under article 177 the court, when giving a preliminary ruling, is entitled only to pronounce on the interpretation of the treaty and of acts of the institutions of the community or on their validity but may not, on the basis of that article, give judgment on the interpretation of a provision of national law. It may however extract from the wording of the questions formulated by the national court those matters only which pertain to the interpretation of the treaty, taking into account the facts communicated by the said court.

4 It is clear from the facts recorded by the hanseatisches oberlandesgericht, Hamburg, that what it asks may be reduced in essentials to the question whether the exclusive right of distributing the protected articles which is conferred by a national law on the manufacturer of sound recordings may, without infringing community provisions, prevent the marketing on national territory of products lawfully distributed by such manufacturer or with his consent on the territory of another member state. The court of justice is asked to define the tenor and the scope of the relevant community provisions, with particular reference to the second paragraph of article 5 or article 85 (1).

5 According to the second paragraph of article 5 of the treaty, member states " shall abstain from any measure which could jeopardize the attainment of the objective of this treaty ". This provision lays down a general duty for the member states, the actual tenor of which depends in each individual case on the provisions of the treaty or on the rules derived from its general scheme.

6 According to article 85 (1) of the treaty " the following shall be prohibited as incompatible with the common market : all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market ". The exercise of the exclusive right referred to in the question might fall under the prohibition set out by this provision each time it manifests itself as the subject, the means or the result of an agreement which, by preventing imports from other member states of products lawfully distributed there, has as its effect the partitioning of the market.

7 If, however, the exercise of the right does not exhibit those elements of contract or concerted practice referred to in article 85 (1) it is necessary, in order to answer the question referred, further to consider whether the exercise of the right in question is compatible with other provisions of the treaty, in particular those relating to the free movement of goods.

8 The principles to be considered in the present case are those concerned with the attainment of a single market between the member states, which are placed both in part two of the treaty devoted to the foundations of the community, under the free movement of goods, and in article 3 (g) of the treaty which prescribes the institution of a system ensuring that competition in the common market is not distorted .

9 Moreover, where certain prohibitions or restrictions on trade between member states are conceded in article 36, the treaty makes express reference to them, providing that such derogations shall not constitute " a means of arbitrary discrimination or a disguised restriction on trade between member states " .

10 It is thus in the light of those provisions, especially of articles 36, 85 and 86, that an appraisal should be made as to how far the exercise of a national right related to copyright may impede the marketing of products from another member state .

11 Amongst the prohibitions or restrictions on the free movement of goods which it concedes article 36 refers to industrial and commercial property . On the assumption that those provisions may be relevant to a right related to copyright, it is nevertheless clear from that article that, although the treaty does not affect the existence of rights recognized by the legislation of a member state with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the treaty . Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property .

12 If a right related to copyright is relied upon to prevent the marketing in a member state of products distributed by the holder of the right or with his consent on the territory of another member state on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the treaty, which is to unite national markets into a single market .

That purpose could not be attained if, under the various legal systems of the member states, nationals of those states were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between member states .

13 Consequently, it would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a member state, in such a way as to prohibit the sale in that state of products placed on the market by him or with his consent in another member state solely because such distribution did not occur within the territory of the first member state .

The second question

14 In the second question the court is asked to rule whether a manufacturer of sound recordings abuses his exclusive right of distributing the protected articles if the selling price imposed is, within the national territory, higher than the price of the original product reimported from another member state and if the principal performers are tied to the record manufacturer by exclusive contracts .

The expression "abuses his right" contained in this question refers to the abuse of a dominant position within the meaning of article 86 of the treaty.

15 That article prohibits "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between member states".

16 It is clear from this provision that the action prohibited by it presupposes the existence of a dominant position within the common market or in a substantial part of it. A manufacturer of sound recordings who holds a right related to copyright does not occupy a dominant position within the meaning of article 86 of the treaty merely by exercising his exclusive right to distribute the protected articles.

17 Since that article requires that the position to which it refers should extend to a "substantial part" of the common market this further requires that the manufacturer, alone or jointly with other undertakings in the same group, should have the power to impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence of any producers marketing similar products and to their position on the market.

18 If recording artists are tied to the manufacturer by exclusive contracts consideration should be given, inter alia, to their popularity on the market, to the duration and extent of the obligations undertaken and to the opportunities available to other manufacturers of sound recordings to obtain the services of comparable performers.

19 For it to fall within article 86 a dominant position must further be abused. The difference between the controlled price and the price of the product reimported from another member state does not necessarily suffice to disclose such an abuse; it may however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.

Decision on costs

20 The costs incurred by the government of the federal republic of Germany and the commission of the European communities, which have submitted observations to the court, are not recoverable. 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 national court, costs are a matter for that court.

Operative part

The court

In answer to the question referred to it by the hanseatisches oberlandesgericht, Hamburg, pursuant to an order of that court of 8 October 1970, hereby rules:

1. It is in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a member state, in such a way as to prohibit the sale in that state of products placed on the market by him or with his consent in another member state solely because such distribution

did not occur within the territory of the first member state.

2. (a) A manufacturer of sound recordings who holds an exclusive right of distribution under national legislation does not occupy a dominant position within the meaning of article 86 of the treaty merely by exercising that right. The position is different when having regard to the circumstances of the case he has the power to impede the maintenance of effective competition over a considerable part of the relevant market.

(b) The difference between the controlled price and the price of the product reimported from another member state does not necessarily suffice to disclose an abuse of a dominant position; it may, however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.