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OF THE

EUROPEAN COMMUNITIES

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COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

P.O. Box No. 1406, Luxembourg

Telephone	:	430 31
Telex (Registry)	:	2510 CURIA LU
Telex (Press and Legal Information Service)	:	2771 CJINFO LU
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Avenida Ricardo Lyon 1177
Casilla 10093

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Suite 707

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Chiyoda-Ku

SWITZERLAND

1211 Geneva 20 (Tel. 349750)
Case Postale 195
37-39, Rue de Vermont

TURKEY

Ankara (Tel. 276145)
13, Bogaz Sokak
Kavaklidere

C O N T E N T S

COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1977 to 1978

(order of precedence)

H. KUTSCHER, President
M. SØRENSEN, President of Second Chamber
G. REISCHL, First Advocate General
G. BOSCO, President of First Chamber
A. M. DONNER, Judge
J. MERTENS DE WILMARS, Judge
P. PESCATORE, Judge
H. MAYRAS, Advocate General
J.-P. WARNER, Advocate General
LORD MACKENZIE STUART, Judge
A. O'KEEFFE, Judge
F. CAPOTORTI, Advocate General
A. TOUFFAIT, Judge
A. VAN HOUTTE, Registrar

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First Chamber

President:	G. BOSCO
Judges:	A. M. DONNER
	J. MERTENS DE WILMARS
	A. O'KEEFFE
Advocates General:	H. MAYRAS
	J.-P. WARNER

Second Chamber

President:	M. SØRENSEN
Judges:	P. PESCATORE
	LORD MACKENZIE STUART
	A. TOUFFAIT
Advocates General:	G. REISCHL
	F. CAPOTORTI

J U D G M E N T S

of the

COURT OF JUSTICE

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COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

19 October 1977

S.A. Moulins et Huileries de Pont-a-Mousson

v Office National Interprofessionnel des Céréales

and

La Société Cooperative "Providence Agricole de la Champagne"

v Office National Interprofessionnel des Céréales

Joined Cases 124/76 and 20/77

1. Agriculture - Common organization of the market - Discrimination between producers and consumers within the Community - Prohibition - Concept

(EEC Treaty, second subparagraph of Art. 40 (3))

2. Agriculture - Common organization of the market - Cereals - Production refunds - Maize groats and meal for the brewing industry and maize starch - Difference of treatment - Not permissible - Illegality

(Regulation No. 120/67/EEC of the Council, Art. 11; Regulation (EEC) No. 665/75 of the Council, Art. 3)

3. Illegality - Consequences - Obligation of the institutions

1. The wording of the second subparagraph of Article 40 (3) of the Treaty does not refer in clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. This does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of a general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

2. The provisions of Article 11 of Regulation No. 120/67/EEC of the Council of 13 June 1967, as worded with effect from 1 August 1975 following the amendment made by Article 3 of Regulation (EEC) No. 665/75 of the Council of 4 March 1975 and repeated in Regulation (EEC) No. 2727/75 of the Council of 29 October 1975, in conjunction with Regulation

(EEC) No. 1955/75 of the Council of 22 July 1975 and the subsequent regulations which replaced it, are incompatible with the principle of equality in so far as they provide for a difference of treatment in respect of production refunds between maize groats and meal for the brewing industry and maize starch.

3. In the particular circumstances of the case, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No. 665/75 is invalid. The illegality of Article 3 of Regulation (EEC) No. 665/75 cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision was in part or in whole invalid. As the situation created, in law, by Article 3 of Regulation (EEC) No. 665/75, is incompatible with the principle of equality, it is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

N o t e

In addition to other products, starch products derived from raw cereal grains and capable of turning into alcohol during fermentation are used in the brewing of beer.

Such products are either maize groats and meal (referred to as maize gritz) manufactured by the maize industry, or starch produced by the starch industry, or other starch products (broken rice, wheat flour, etcetera).

Maize gritz are manufactured by the maize industry from maize grains by means of a purely mechanical process and the brewing industry is an important market outlet for that product.

Starch is manufactured by the starch industry which forms part of the chemical industry in so far as it uses maize as a raw material.

There are many market outlets for the products of the starch industry.

The starch industry is in competition with the maize industry and with those sectors of the chemical industry which manufacture starch substitutes from oil.

The Tribunal Administratif, Nancy, and the Tribunal Administratif, Châlons-sur-Marne, requested the Court of Justice to give a preliminary ruling on the validity of the Council regulations on the common organization of the market in cereals (Regulations (EEC) Nos. 665/75 of 4 March 1975 and 2727/75 of 29 October 1975) in so far as they provide for the abolition of the production refund previously established for the benefit of manufacturers of maize groats and meal for use in the brewing industry. The references for a preliminary ruling were made in the context of

proceedings for the payment of production refunds on maize for use in the brewing industry, which were brought against the competent national authorities by producers of maize groats and meal (gritz) who claim that the provisions which abolished the production refund in that sector while maintaining the refund on the production of maize starch constitute discrimination prohibited by the second subparagraph of Article 40 (3) of the Treaty.

The new system in fact provides for an optional refund in respect of maize intended for use in the manufacture of starch but no refund in respect of maize for use in brewing.

The second subparagraph of Article 40 (3) of the Treaty, upon which the plaintiffs in the main actions rely, provides that the common organization of agricultural markets "shall exclude any discrimination between producers or consumers within the Community".

It is of course debatable whether that provision prohibits all discrimination between different industrial or commercial sectors in the field of processed agricultural products but it is nonetheless true that the prohibition of discrimination is one of the fundamental principles of Community law.

It is therefore necessary to consider whether maize groats and meal, on the one hand, and maize starch, on the other, are in comparable situations, having regard in particular to the fact that maize starch can be substituted for maize groats and meal in the brewing of beer and that the brewing industry's choice between the two products depends essentially on the cost of supply. The two products have for a long time enjoyed equal treatment as regards production refunds and it has not been proved that objective circumstances were sufficient to justify the modification of the previous system introduced by the contested Regulation No. 665/75.

The Court concluded that to abolish the refund on the production of maize groats and meal while maintaining it on the production of maize starch is to ignore the principle of equality. However, a finding of illegality does not necessarily result in a declaration that the provision in question is invalid. The necessary steps must be taken to remedy the incompatibility of the regulation with the principle of equality.

The Court ruled that:

1. The provisions of the version of Article 11 of Regulation No. 120/67/EEC of the Council of 13 June 1967, which has been in force since 1 August 1975 following amendment by Article 3 of Council Regulation (EEC) No. 665/75 of 4 March 1975 and is set out again in Council Regulation (EEC) No. 2727/75 of 29 October 1975, together with Council Regulation No. 1955/75 of 22 July 1975 and the subsequent regulations which have replaced it, are incompatible with the principle of equality in so far as they involve a difference between the treatment of maize groats and meal for use in the brewing industry and maize starch.

2. It is for the institutions having competence in matters concerning the common agricultural policy to take the necessary steps to remedy that incompatibility.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

19 October 1977

The consortium of:

1. A. Ruckdeschel & Co.,

2. Hansa-Lagerhaus Ströh & Co.

v Hauptzollamt Hamburg-St. Annen,

and

Diamalt AG v Hauptzollamt Itzehoe

Joined Cases 117/76 and 16/77

1. Agriculture - Common organization of the market - Discrimination between producers and consumers within the Community - Prohibition - Concept

   (EEC Treaty, second subparagraph of Art. 40 (3))

2. Agriculture - Common organization of the market - Cereals - Production refunds - Quellmehl and maize starch - Difference of treatment - Inadmissibility - Illegality

   (Regulation No. 120/67/EEC of the Council, Art. 11; Regulation (EEC) No. 1125/74 of the Council, Art. 5)

3. Illegality - Consequences - Obligation of the institutions

1. The wording of the second subparagraph of Article 40 (3) of the Treaty does not refer in clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. This does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of a general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

2. The provisions of Article 11 of Regulation No. 120/67/EEC of the Council of 13 June 1967, as worded with effect from 1 August 1974 following the amendment made by Article 5 of Regulation

(EEC) No. 1125/74 of the Council of 29 April 1974, and repeated in subsequent regulations, are incompatible with the principle of equality in so far as they provide for quellmehl and pre-gelatinized starch to receive different treatment in respect of production refunds for maize used in the manufacture of these two products.

3. In the particular circumstances of the case, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No. 1125/74 is invalid. The illegality of Article 5 of Regulation (EEC) No. 1125/74 cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision was in part or in whole invalid. As the situation created, in law, by Article 5 of Regulation (EEC) No. 1125/74 is incompatible with the principle of equality, it is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

N o t e

This case is similar to Joined Cases 124/76 and 20/77 above.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

20 October 1977

S.A. Roquette Frères v French State - Administration des Douanes

Case 29/77

1. Agriculture - Monetary crisis - Finding by the Commission - Statement of reasons - Formal requirements

   Regulation No. 974/71 of the Council, Art. 1

2. Complex economic situation - Evaluation - Administration - Discretion - Judicial review - Extent thereof

3. Agriculture - Monetary crisis - Trade - Disturbances - Risk - Existence thereof - Decision of the administration - Criteria

   Regulation No. 974/71, Art. 1

4. Agriculture - Common agricultural policy - Objectives - Harmonization thereof - Community institutions - Duty

   EEC Treaty, Art. 39

1. The Commission may find that there is a risk of disturbances in trade in agricultural products merely on the basis of an appreciable fall in the rate of exchange of a currency, and may state its reasons for that finding in the form of a reference to the conditions set out in Article 1 (1) of Regulation No. 974/71.

2. Where a complex economic situation is to be evaluated, the administration enjoys a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion.

3. When deciding whether there is a risk of disturbance in trade in agricultural products, the Commission may make evaluations of a general nature, taking into consideration groups of products - either of basic products or of both basic and derived products -

and the state of the market, as well as the monetary factors resulting from the value of the currencies of the Member States.

4. The Community Institutions must secure the permanent harmonization made necessary by any conflicts between the objectives of the common agricultural policy taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made.

N o t e

This case concerns a reference for a preliminary ruling on the interpretation of Regulation No. 974/71 of the Council on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States and on the validity of Commission Regulation No. 652/76 changing the monetary compensatory amounts following changes in exchange rates for the French franc.

As, in March 1976, the French Government decided to take the French franc out of the "European currency snake", the Commission adopted the regulation at issue establishing monetary compensatory amounts on trade between France and Member States or third countries.

The plaintiff in the main action, which exports a large proportion of its output of starch products, was obliged by the Administration des Douanes (Customs Authorities) to pay compensatory amounts on its exports from 25 March 1976, the date on which the regulation entered into force.

It brought an action before the Tribunal d'Instance, Lille, for an order that no further amounts be levied and for the repayment of the sums already levied by the Administration des Douanes. That court found that a certain number of points arose concerning the interpretation of Community law and referred the following questions to the Court of Justice for a preliminary ruling:

For the institution or maintenance in force of monetary compensatory amounts, must the Commission refer to the risk of disturbances in trade, and, when there is no such risk, is it prohibited from fixing compensatory amounts?

Must the risk of disturbances be assessed at the level of the basic products or at the level of the processed products?

Are the institution and maintenance in force of the monetary compensatory amounts by Regulation No. 652/76 of the Commission compatible with the provisions of Article 39 of the Treaty of Rome, even though, having been introduced for the purpose of preventing short-term changes in exchange rates from having immediate repercussions on agricultural prices in national currency, they have, according to the Commission, disturbing effects on the unity of the agricultural market and distort competition and though, according to Roquette, they reduce the real income of French farmers?

In substance, are the regulations valid or not?

The relevant Community legislation provides that if a Member State allows the exchange rate of its currency to fluctuate by a margin wider than that permitted by the international rules in force on 12 May 1971,

(a) the Member State whose currency increases in value beyond the permitted fluctuation margin shall charge on imports and grant on exports,

(b) the Member State whose currency decreases beyond the permitted fluctuation margins shall charge on exports and grant on imports,

compensatory amounts for certain products in trade with the Member States and third countries.

Although it is for the Commission to establish that such situation exists after obtaining the opinion of the Management Committees, it may establish the risk of disturbances merely on the basis of an appreciable drop in the rate of exchange of the currency.

Referring to its earlier case-law (Case 55/75 Balkan Import-Export GmbH v Hauptzollamt Berlin-Packhof [1976] ECR 30), the Court repeated that as the evaluation of a complex economic situation is involved, the Commission and the Management Committee enjoy, in this respect, a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion.

In this case, the Court concluded that the Commission merely applied the regulations of the Council strictly.

Article 39 of the Treaty, relied upon by the plaintiff in the main action, sets out various objectives of the common agricultural policy.

The Community institutions must secure the permanent harmonization made necessary by any conflicts between those objectives taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of economic factors or conditions. If, in this case, owing to the monetary situation, preference happens to be given to the requirements of stabilizing the markets, Regulation No. 974/71 does not contravene Article 39.

The Court has ruled that consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulation No. 652/76 of the Commission of 24 March 1976.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

20 October 1977

A. Giuliani v Landesversicherungsanstalt Schwaben

Case 32/77

1. Social security for migrant workers - Social security benefits - Calculation - Apportionment - Condition - Aggregation of insurance periods

   EEC Treaty, Art. 51; Regulation No. 1408/71 of the Council, Art. 46 (3)

2. Social security for migrant workers - Social security benefits - Calculation - Residence clause - Waiver - Consequential apportionment - Not permissible

   Regulation No. 1408/71 of the Council, Arts. 10 and 46 (3)

1. Article 46 (3) of Regulation No. 1408/71 is applicable only in cases where, for the purpose of acquiring the right to benefit within the meaning of Article 51 (a) of the Treaty, it is necessary to have recourse to the arrangements for aggregation of the periods of insurance.

2. Since the waiving of residence clauses pursuant to Article 10 of Regulation No. 1408/71 has no effect on the acquisition of the right to benefit, it cannot involve the application of Article 46 (3) of that regulation.

N o t e

The issue in the main action concerns the way in which the competent German institution calculated the invalidity pension of the plaintiff in the main action, an Italian national residing in Italy, who had worked first in Italy and then in Germany.

Although the plaintiff in the main action satisfies the conditions for entitlement to a pension under German legislation alone, without the application of Article 10 of Regulation No. 1408/71 payment of that pension should have been suspended under a residence clause in that legislation. Relying upon the rule limiting the overlapping of benefits, the competent German institution calculated the pension by aggregating the Italian and the German insurance periods and carrying out an apportionment; it then adjusted that benefit in accordance with Article 46 (3) of Regulation No. 1408/71.

The plaintiff in the main action is claiming the award of a pension calculated exclusively according to the provisions of the German law.

The case was brought before the Sozialgericht (Social Court), Augsburg, which asked the Court whether it adhered to its ruling (judgment of 21 October 1975 in Case 24/75, Petroni) to the effect that Article 46 (3) of Regulation No. 1408/71 is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of a benefit acquired under the national legislation of a single Member State. Is Article 46 (3) valid in so far as it limits rights to payment which would not exist in the absence of Community law?

It is also asked whether rights to payment exist in the absence of Community law or whether such rights are acquired under the legislation of a single Member State if, in the case of a migrant worker resident in another Member State, they can be realized, by reason of national suspensory provisions, only through the waiving of residence clauses under Article 10 of Regulation No. 1408/71. That article provides that invalidity, old-age or survivor's cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

Article 51 of the Treaty is directed towards two objectives: (a) aggregation and (b) payment of benefits to persons resident in the territories of Member States.

This case concerns benefits acquired under the national legislation of one Member State alone without its being necessary to have recourse to the system of aggregation and apportionment within the meaning of Article 51.

The Court ruled that:

1. Article 46 (3) of Regulation No. 1408/71 can apply only where it is necessary to have recourse to the system of aggregation of insurance periods in order for there to be entitlement to benefits within the meaning of Article 51 (a) of the Treaty.

2. Since the waiving of residence clauses under Article 10 of Regulation No. 1408/71 does not affect the acquisition of the right to a benefit, it cannot entail the application of Article 46 (3) of the same regulation.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

25 October 1977

Metro-SB-Grossmärkte GmbH & Co. KG and Verband des SB-Grosshandels e.V. v Commission of the European Communities

Case 26/76

1. Procedure - Application for annulment - Measure confirming a previous measure - Inadmissibility

2. Procedure - Competition - Application for a finding that an infringement has occurred - Decision - Application for annulment - Admissibility
EEC Treaty, Arts. 85, 86 and second paragraph of Art. 173; Regulation No. 17 of the Council, Art. 3(2)(b)

3. Competition - Dominant position on the market - Concept
EEC Treaty, Art. 86

4. Workable competition - Concept
EEC Treaty, Arts. 3 and 85

5. Competition - Selective distribution system - Permissible - Conditions
EEC Treaty, Art. 85

6. Competition - Forms of competition - Prices and other factors - Selective distribution - Increase in the number of networks - Review by the Commission
EEC Treaty, Art. 85

7. Competition - Selective distribution system - Appointed resellers - Check that the conditions for appointment are satisfied - Permissible
EEC Treaty, Art. 85(1)

8. Competition - Wholesalers - Retailers - Separation of functions - Permissible
EEC Treaty, Art. 85

9. Competition - Wholesalers - Obligation to promote sales - Permissible

10. Competition - Non-specialist wholesalers - Obligation to open a specialized department - Obligation concerning turnover - Permissible

1. An application directed against a measure which is merely a confirmation of a previous measure, so that annulment of the confirmatory measure would follow from annulment of the previous measure, must be considered as devoid of purpose and accordingly inadmissible.

2. It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation No. 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is dismissed either wholly or in part, to institute proceedings in order to protect their legitimate interests. Such persons must accordingly be considered to be directly and individually concerned, within the meaning of the second paragraph of Article 173, by the decision of the Commission.

3. Shares of between 5 and 10% of a market in highly technical products which nevertheless appear to the majority of consumers to be readily interchangeable rule out the existence of a dominant position unless exceptional circumstances obtain. The fact that the quality of a product should encourage distributors to include it in the range which they offer does not in itself constitute a factor capable of permitting the producer to operate to any great extent without having to take account of the attitude of his competitors and, consequently, to secure a dominant position; rather, it constitutes one means of competition amongst others. This also applies to the fact that other producers have adopted or are preparing to adopt systems for the distribution of the goods at issue similar to that established by the dealer in question.

4. The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.

5. Selective distribution systems constitute, together with others, an aspect of competition which accords with Article 85(1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical

qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

6. Although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded. For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in Article 85(1), and, if it does fall thereunder, either wholly or in part, coming within the framework of Article 85(3). This argument is strengthened if, in addition, such conditions promote improved competition inasmuch as it relates to factors other than prices. Nevertheless, the Commission must ensure that this structural rigidity is not reinforced, as might happen if there were an increase in the number of selective distribution networks for marketing the same product.

7. Any marketing system based upon the selection of outlets necessarily entails the obligation on wholesalers forming part of the network to supply only appointed resellers and, accordingly, the right of the relevant producer to check that that obligation is fulfilled. In so far as the obligations undertaken in connexion with verification are intended to ensure respect for the conditions of appointment regarding the criteria as to technical qualifications, they do not in themselves constitute a restriction on competition but are the corollary of the principal obligation and contribute to its fulfilment. However, in so far as they guarantee the fulfilment of more stringent obligations, they fall within the terms of the prohibition contained in Article 85(1), unless they, together with the principal obligation to which they are related, are exempted, where appropriate, pursuant to Article 85(3).

8. The separation of the functions of wholesaler and retailer whereby wholesalers are prohibited from supplying private customers, including

large-scale consumers, is in principle in accordance with the requirement that competition shall not be distorted.

9. Since the function of a wholesaler is not to promote the products of a particular manufacturer but rather to provide for the retail trade supplies obtained on the basis of competition between manufacturers, obligations entered into by a wholesaler which limit his freedom in this respect constitute restrictions on competition falling within the ambit of Article 85(1).

10. The obligation on non-specialist wholesalers to open a special department is designed to guarantee the sale of the products concerned under appropriate conditions and accordingly does not constitute a restriction on competition within the meaning of Article 85(1). On the other hand, the obligation to achieve a turnover comparable to that of a specialist wholesaler exceeds the strict requirements of the qualitative criteria inherent in a selective distribution system and it must accordingly be appraised in the light of Article 85(3).

N o t e

The SABA undertaking, whose registered office is in the Federal Republic of Germany, manufactures electronic equipment for the leisure market (radio receivers, televisions, tape recorders) which it sells through a network of contracts and agreements with sole distributors, wholesalers and appointed retailers. The network constitutes a selective distribution system applying uniformly throughout the territory of the Community, the essential features of which are as follows:

(1) Co-operation with SABA and its sole distributors and wholesalers;

(2) Limitation on the number of resellers;

(3) The establishment of distribution channels by the manufacturer.

In Germany, the distribution system involves a network of wholesalers and appointed retailers and in the other Member States, with the exception of Ireland, it involves sole distributors who are, in turn, in contact with wholesalers and appointed retailers.

The distribution system is characterized by four essential elements:

(1) Distribution is carried out by selected and appointed wholesalers and retailers and by sole distributors;

(2) Resellers undertake to supply only other resellers who are appointed distributors and to submit to inspections. German wholesalers undertake not to supply to private consumers in the Federal Republic of Germany;

(3) Wholesalers, retailers and distributors undertake not to export SABA equipment outside the Community or to import it from third countries;

(4) Wholesalers and retailers undertake to achieve an adequate turnover and to keep a stock of SABA equipment.

In its decision of 15 December 1975 the Commission considered that:

(1) The object and effect of allowing only appointed distributors to sell the products in question is to restrict competition considerably;

(2) The objective nature of the qualitative criteria adopted shows that in so far as all the distributors who satisfy the conditions are actually accepted, competition is not yet restricted within the meaning of Article 85 (1);

(3) Such a restriction does exist, however, in so far as selection also depends on specific obligations which cannot be justified by the sale of the products in question under proper conditions (achievement of a satisfactory turnover, maintenance of a sufficient stock);

(4) The obligations imposed on distributors in order to enable SABA to check that no delivery is made to a distributor who is not appointed are also capable of restricting competition;

(5) The fact that SABA products are supplied exclusively to national distributors and that the sole distributors undertake to respect the various sales territories constitutes a restriction on competition within the meaning of Article 85 (1).

The various stipulations which make up the distribution system in question are dealt with by the contested decision in different ways.

Certain stipulations are given a negative clearance. These are the conditions of sale for the domestic market, such as the prohibition on supplies by German wholesalers to private consumers within the German Federal Republic.

Others are granted an exemption under Article 85 (3). That applies essentially to the Co-operation Agreements (contrats de co-operation) between SABA and the wholesalers and to certain elements of the "Agreements" (attestations d'engagement) (contracts between SABA and the appointed distributors), namely the obligation on retailers to stock the SABA range as fully as possible, to achieve an adequate turnover and to keep corresponding stocks.

Metro, the applicant, is a self-service wholesale trader employing the so-called "cash and carry" system.

Access to the Metro stores is only open to retail traders (resellers or commercial consumers) and to institutions which, as a result of their structure, have considerable trade needs of their own.

SABA refuses to supply its make of product to Metro on the ground that Metro does not satisfy the conditions for appointment as a SABA wholesaler. That refusal led Metro to lodge a complaint with the Commission, in which it maintained that the system of distribution agreements imposed infringed Articles 85 and 86 of the EEC Treaty.

Following intervention by the Commission, SABA amended the clause prohibiting German wholesalers from supplying trade consumers, with the result that German wholesalers may henceforward supply SABA products to trade consumers with the exception of "institutions, such as barracks, schools, churches and hospitals".

Furthermore, SABA extended the definition of wholesaler to cover the self-service wholesale trade.

In spite of those amendments, Metro continued to claim the existence of discrimination against the self-service wholesale trader, since various restrictions on competition remain in force, such as:

The prohibition on supplies by wholesalers to institutional consumers;

The requirement that the product purchased from the wholesalers be likely to increase the profit-earning capacity of the undertaking concerned;

The obligation to sign a co-operation agreement, etc.

In short, the applicant maintains that when it adopted the decision in dispute the Commission infringed both Article 85 (3) of the Treaty, by granting an exemption from the prohibition contained in Article 85 (1) although the conditions for such an exemption were not satisfied, and Article 86 of the Treaty, by authorizing an abuse of a dominant position.

As regards the existence of a dominant position it is first necessary to consider whether SABA holds such a position.

The applicant, which had based its allegations principally on the colour television market, maintains that with one thousand televisions manufactured every day SABA's share in the market is higher than the average share of the German manufacturers. As a result of their high quality SABA televisions are widely sought by purchasers, with the result that, in order to be in a favourable competitive position, every distributor must be able to have SABA televisions on show.

Still as regards the colour television market, the report drawn up by the Commission, which is not contested by the applicant shows that SABA has a 6-7 % share of the market, which is rather small and which, in the absence of any special circumstances, rules out the existence of a dominant position.

Furthermore, the quality of the product cannot alone ensure a dominant position but is merely a competitive factor.

The Court concluded that as SABA is not in a dominant position within the meaning of Article 86 of the EEC Treaty that provision cannot be applied to it, with the result that the application must be dismissed in so far as it is based upon the violation of the terms of that article.

As regards the application of Article 85, the Court considered the two submissions relied on by the applicant: (A) the existence of a misuse of powers and (B) the application of Article 85 (3).

A. This action concerns the marketing of consumer durables of a high technical standard, which naturally presupposes the existence of separate distribution channels adjusted to the characteristics of each of the various producers and to the needs of the different categories of consumers.

The Commission rightly acknowledged that, among others, selective distribution systems constitute a competitive factor which is in accordance with Article 85 (1), that the choice of resellers is made on the basis of objective criteria of a qualitative nature and that the conditions which they must satisfy are fixed and applied uniformly. Certain restrictions on competition are acceptable where they do not result in eliminating competition in a substantial part of the common market.

Competition by price is not the only effective form of competition. Although a certain rigidity may be seen in the price structure applied by the SABA distributors, the existence of other factors affecting competition between products of the same make and of effective competition between different makes prevents the conclusion from being drawn that competition in the sector of electronic equipment for the leisure market is restricted or eliminated. The Commission must, however, ensure that that structure does not become even more rigid and it did not misuse its powers by prudently limiting the validity of the exemption applied for to 1980.

B. The Court then considered one by one the applicant's complaints concerning the application of Article 85 (3):

(1) The obligation on SABA distributors to supply goods for resale only to appointed wholesalers or retailers.

The Court stated that in so far as the inspection obligations accepted do not exceed the aim to be achieved, they cannot in themselves constitute a restriction on competition but are additional to the main obligation, the discharge of which they help to ensure.

(2) The prohibition on direct supplies to such institutional consumers as schools, hospitals, barracks, public bodies, etc.

The Court found that although certain private consumers, such as institutions, are led to purchase considerable quantities of numerous products, such as foodstuffs, their institutional nature does not mean that they are bulk purchasers for every type of product.

(3) The obligation on wholesalers when they supply trade consumers to ensure that the SABA equipment purchased will be used for commercial purposes.

The Court stated that, in the light of the risks of abuse inherent in the increase in the number of possibilities of sale for purposes other than resale, that additional requirement does not appear to be unreasonable and a serious obstacle incompatible with the very nature of the self-service wholesale trade.

(4) The obligation on wholesalers to take part in the development of the SABA sales network by signing co-operation agreements.

After a detailed consideration of the clauses of the "co-operation agreements" concluded between SABA and the wholesaler in the light of the present economic situation the Court concluded that the contested decision is not manifestly based upon an erroneous assessment of the economic conditions under which competition operates in the sector in question.

The Court hereby:

(1) Dismissed the application;

(2) Ordered the intervener, Verband des SB-Grosshandels, to bear the costs arising from its intervention;

(3) Ordered the applicant to bear the remainder of the costs.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

27 October 1977

Westfälischer Kunstverein v Hauptzollamt Münster

Case 23/77

1. Common Customs Tariff - Artistic printed matter - Classification - Subheading 49.11 B - Residual nature

2. Common Customs Tariff - Works of art, collectors' pieces, and antiques - Printed products - Classification - Tariff heading 99.02 - Condition

3. Common Customs Tariff - Printed products - Artistic screen prints - Classification - Subheading 49.11 B

1. Both the wording and the general scheme of Chapter 49 of the Common Customs Tariff show that subheading 49.11 B is a residual heading which covers all artistic printed matter not listed or referred to elsewhere.

2. In order to be classified under tariff heading 99.02, printed products must be original works and the method of their production must not involve any mechanical or photomechanical process.

3. Artistic screen prints fall within subheading 49.11 B of the Common Customs Tariff, even if they are signed by hand by the artist and if only a limited edition is produced.

N o t e

In 1973 one hundred and fifty colour screen prints (colour serigraphs) imported from the United States and numbered and signed personally by the American artist, John Salt, were cleared into free circulation.

The Hauptzollamt (Principal Customs Office) Münster classified the screen prints under tariff subheading 49.11.B. of the Common Customs Tariff (other printed matter, including printed pictures) and levied customs duty at the rate of 9 % and import turnover tax at the rate of 11 %.

The plaintiff in the main action, the Westfälischer Kunstverein (the Westphalian Association for the Promotion of the Arts) considered that the screen prints in question fell within tariff heading 99.02 of the Common Customs Tariff (original engravings, prints and lithographs) and could be imported without payment of customs duty and at a rate of import turnover tax of 5.5 %.

That dispute led the Finanzgericht (Finance Court) Münster to ask the Court to give a preliminary ruling on the following question:

> "On 14 March 1973 did a limited edition of not more than 150 artistic colour screen prints (colour serigraphs) numbered and signed personally by the artist fall within tariff subheading 49.11.B. or tariff heading 99.02 of the Common Customs Tariff?"

The action therefore concerns the distinction between the two tariff headings, one of which, subheading 49.11.B. covers the general category "printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans" while the other, heading 99.02, covers the concept of "works of art, collectors' pieces, and antiques".

That distinction cannot be based on the possible artistic merit of the aforementioned articles, which is a subjective and elusive criterion, but must rather be based on the objective criteria adopted by the Common Customs Tariff.

Silk-screen printing is a printing process which is at least partially mechanical or photomechanical in nature which would, at first sight, bring it within tariff subheading 49.11.B.

It is, however, necessary to consider the question whether any particular rules oblige the artistic silk-screen print to be classified under a special tariff heading. As tariff heading 99.02 constitutes a special heading in relation to subheading 49.11.B. it is necessary to consider whether artistic silk-screen prints could fall within tariff heading 99.02, in other words, whether they may be regarded as "original engravings, prints and lithographs", that is, "impressions produced directly, in black and white or in colour, of one or of several plates wholly executed by hand by the artist, irrespective or the process or of the material employed by him, but not including any mechanical or photo-mechanical process".

The fact that the artistic screen print is produced by a mechanical or photomechanical process appears in itself to be sufficient to prevent the articles in dispute from being classified under heading 99.02.

The Court ruled that artistic screen prints fall within tariff heading 49.11.B. of the Common Customs Tariff, even if they are personally signed by the artist and produced in a limited edition.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

27 October 1977

Regina v Pierre Bouchereau

Case 30/77

1. Community law – Multilingual texts – Uniform interpretation – Divergence between the different language versions – General scheme and purpose of the rules in question as a basis for reference.

2. Free movement of persons – "Measure" within the meaning of Article 3 (1) and (2) of Directive No. 64/221/EEC – Concept – Recommendation by a court to the executive authority that a national of another Member State be deported – Inclusion – Conditions

3. Free movement of persons – Restrictions – Grounds – Previous criminal convictions – Limitation – Personal conduct constituting a present threat to the requirements of public policy
(Council Directive No. 64/221/EEC, Art. 3 (2))

4. Free movement of persons – Restrictions – Grounds – Public policy – Concept
(EEC Treaty, Art. 48)

1. The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.

2. Any action affecting the right of persons coming within the field of application of Article 48 of the Treaty to enter and reside freely in the Member States under the same conditions as the nationals of the host State constitutes a "measure" for the purposes of Article 3 (1) and (2) of Directive No. 64/221/EEC. That concept includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of another Member State, where such recommendation constitutes a necessary prerequisite for a decision to make a deportation order.

3. Article 3 (2) of Directive No. 64/221/EEC, according to which previous criminal convictions do not in themselves constitute grounds for the imposition of the restrictions on free movement authorized by Article 48 of the Treaty on grounds of public policy and public security, must be interpreted to mean that previous criminal convictions are relevant only in so far as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy.

4. In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

N o t e

A charge of unlawful possession of drugs was brought before the Marlborough Street Magistrates' Court against a French national who had previously been found guilty of a similar offence by another London court.

In accordance with its powers under the Immigration Act 1971 the Marlborough Street Magistrates' Court was minded to make a recommendation for deportation to the Secretary of State and written notice informing him of rights attaching to patrial status was served on the defendant, who argued that Article 48 of the EEC Treaty and the provisions of Directive No. 64/221/EEC prevented an order for deportation from being made in that case.

Several questions concerning the interpretation of Community law were therefore referred to the Court.

The first question asked "whether a recommendation for deportation made by a national court of a Member State to the executive authority of that State (such recommendation being persuasive but not binding on the executive authority) constitutes a 'measure' within the meaning of Article 3 (1) and (2) of Directive No. 64/221/EEC".

The Court ruled in reply that any action affecting the right of persons coming within the field of application of Article 48 of the Treaty to enter and reside freely in the Member States under the same conditions as the nationals of the host State constitutes a "measure" for the purposes of that provision. That concept includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of another Member State, where such recommendation constitutes a necessary prerequisite for a decision to make a deportation order.

The second question asked whether "the wording" of Article 3 (2) of Directive No. 64/221/EEC, namely that previous criminal convictions shall not "in themselves" constitute grounds for the taking of measures based on public policy or public security means that previous criminal convictions are solely relevant in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security; alternatively, "the meaning to be attached to the expression 'in themselves' in Article 3 (2) of Directive No. 64/221/EEC".

The Court ruled that that provision, according to which previous criminal convictions do not in themselves constitute grounds for the imposition of the restrictions on free movement authorized by Article 48 of the Treaty on grounds of public policy and public security, must be interpreted to mean that previous criminal convictions are relevant only in so far as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy.

The third question asked whether the words "public policy" in Article 48 (3) of the Treaty are to be interpreted as including reasons of state, even where no breach of the public peace or order is threatened, or in a narrower sense in which is incorporated the concept of some threatened breach of public peace, order or security, or in some other wider sense.

The Court ruled:

In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

8 November 1977

Balkan Import-Export GmbH v Hauptzollamt Berlin-Packhof

Case 26/77

Agriculture - Common organization of the markets - Milk products - Cheese of sheep's milk - Importation from third countries - Levy - Fixing - Detailed rules - Special system of Article 8 of Regulation No. 823/68 - Preferential treatment - Importer - Absence of vested interest - Needs of the common organization of the markets and the common commercial policy - Freedom of action on the part of the Community

The preferential treatment from which at a given time certain milk products, in particular cheese of sheep's milk imported from third countries, have benefited in application of a special system fixing the levies gives an importer no vested right to the maintenance of the advantages which he has thereby gained.

The Community must always, without prejudice to any undertakings into which it may have entered with regard to third countries, reserve its freedom to determine the conditions of importation for agricultural products originating in third countries, having regard to the common organization of the agricultural markets and the needs of its commercial policy.

N o t e

The Second Chamber of the Court has given judgment on a reference for a preliminary ruling on the interpretation and validity of certain provisions of regulations of the Council and the Commission concerning the calculation and fixing of the levy on a milk product (Bulgarian sheep's milk cheese).

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

8 November 1977

Azienda di Stato per gli Interventi sul Mercato Agricolo

v Rocco Michele Greco

Case 36/77

Agriculture - Common organization of the market - Oils and fats - Olive oil - Producers - Concept - Olive oil subsidy - Recipients

Regulation No. 136/66, Art. 10; Regulation No. 754/67

Since, in Regulations Nos. 136/66 and 754/67, the Council drew a clear distinction between the cultivation of olive trees and the production of olive oil, the expression "producers of olive oil", within the meaning of Article 10 of Regulation No. 136/66 on the common organization of the market in oils and fats and of Regulation No. 754/67 on olive oil subsidies, must be interpreted as referring to the producers of the processed product, namely olive oil, and the olive oil subsidy for the 1967/68 oil marketing year must therefore be granted to those producers.

N o t e

During the 1967/1968 oil marketing year, Mr Greco, manager of an oil-producing undertaking, took a lease of olive groves of an area of about 130 hectares.

After harvesting the olives and producing the oil he applied to the AIMA, the Italian intervention agency, for the subsidy provided for in respect of olive oil. His application was refused on the ground that he was not the olive producer.

After bringing legal proceedings, followed by an appeal, the action came before the Corte Suprema di Cassazione (Supreme Court of Appeal) of Italy which referred to the Court of Justice two questions for a preliminary ruling on the interpretation of the expression "producers of olive oil", contained in certain provisions of Regulation No. 136/66/EEC of the Council and of Regulation No. 754/67/EEC of the Council.

The first question asks whether the expression "producers of olive oil" is equivalent for the purposes of the aforementioned regulations to that of "olive producers".

The second question asks whether a person who, having acquired olives from the tree which are already ripe, has them harvested and extracts the oil from them, is also a producer of olive oil.

In short, the problem is to know who, under the Community texts in question, is entitled to the subsidy provided for in those regulations. The texts referred to show that the level of income regarded as fair for the producers of the Community is determined "by a production target price in the case of olive oil and by a target price in the case of oil seeds".

It emerges from the market organization system established by the regulation that the income regarded as fair for olive oil producers is obtained partly from a subsidy which represents the difference between the production target price, which ensures such a fair income, and the market target price, which permits normal marketing to take place.

All the relevant passages in the texts refer to the final product, the oil, and are, furthermore, reinforced by the clear distinction between producers and processors of olives, from which it emerges that the expression "producers of olive oil" can only be interpreted as referring to those who extract the olive oil and that, therefore, it is the producers of the processed product who are entitled to the subsidy.

The Court has ruled that the expression "producers of olive oil" within the meaning of Article 10 of Regulation No. 136/66/EEC of the Council on the establishment of a common organization of the market in oils and fats, and of Regulation No. 754/67/EEC of the Council on the subsidy for olive oil, must be interpreted as referring to producers of the processed product, olive oil, and that, therefore, it is they who must be granted the subsidy for olive oil for the 1967/1968 oil marketing year.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

9 November 1977

The Queen v A National Insurance Commissioner, ex parte Warry

Case 41/77

Social security for migrant workers – Invalidity insurance – Benefits – Right – Acquisition – Receipt of sickness benefit as a condition imposed by the legislation of a Member State – Insurance periods completed – Aggregation – Claim for benefit – Submission – Rules
(Regulation No. 1408/71 of the Council, Art. 45)

Article 45 of Regulation No. 1408/71 must be understood to mean that where the legislation of a Member State makes the acquisition of a right to invalidity benefit conditional upon the person concerned having been entitled to sickness benefit under that legislation for a given period in the immediately preceding period – that condition being subject to so far as material (a) the completion of insurance periods (b) the making of a claim therefor in a prescribed manner and within a prescribed time –

(i) the competent institution of the said Member State shall take into account insurance periods completed under the legislation of any Member State as though they had been completed under the legislation which it administers;

(ii) the condition that a claim must be made in a prescribed manner and within a prescribed time shall be regarded as satisfied in so far as such a claim has been duly made in accordance with the legislation of the State of residence.

N o t e

The main action concerns the right to the payment of an invalidity pension under British legislation of a United Kingdom national who completed insurance periods in Great Britain for the greater part of the period from 1933 to July 1971 and in the Federal Republic of Germany from July 1971 to June 1973, when he fell ill.

He continued to live in the Federal Republic of Germany and received sickness benefit there from August 1973 to June 1974, since when he has received a limited invalidity pension calculated by reference to his period of insurance in Germany.

The claimant also applied for an invalidity pension in Great Britain but his application was refused by the insurance officer, who is competent in the first instance, on the ground that he had not been and could not be treated as having been entitled to sickness benefit for the period of 168 days laid down by British legislation as a precondition for entitlement to an invalidity pension.

The case came before the Divisional Court of the Queen's Bench Division of the High Court of Justice, which referred the following question to the Court:

> "Where the legislation of a Member State makes the acquisition of a right to invalidity benefit conditional upon the person concerned having been entitled to sickness benefit under that legislation for a period of 168 days in the immediately preceding period that condition being subject to so far as material (a) the completion of insurance periods (b) the making of a claim therefor in a prescribed manner and within a prescribed time -
>
> (1) Do the provisions of Article 51 of the Treaty of Rome preclude the application of such a condition to a case to which Articles 40, 45 or 46 of Regulation (EEC) No. 1408/71 relate?
>
> (2) Do the provisions of
>
> (a) Article 45 or
>
> (b) Article 46
>
> relate to such legislation?
>
> (3) Do all or any of the said Articles 40, 45 or 46 -
>
> (a) enable such a condition to be treated as wholly or partly satisfied; or
>
> (b) require such a condition to be wholly or partly disregarded;
>
> and if so to what extent?"

Those questions are raised in the context of legislation under which the right to an invalidity pension is dependent upon entitlement to sickness benefit for a period of 168 days. It is established that the claimant had not paid contributions in Great Britain during the prescribed period and had not submitted a claim within the period laid down.

The Court analysed Regulation No. 1408 and again emphasized its social objective, which is to contribute towards the improvement of the standard of living of migrant workers and to their conditions of employment, by guaranteeing within the Community firstly equality of treatment for all nationals of Member States under the various national legislations and secondly social security benefits for workers and their dependants regardless of their place of employment or of residence.

By virtue of Article 45(1) of Regulation No. 1408/71, as amended by the Act of Accession of the new Member States, insurance periods completed in the Federal Republic of Germany are taken into account, to the extent necessary, for the acquisition of the right to invalidity benefits, as though they had been completed under British legislation. It follows that the insurance periods must also be taken into account for the acquisition of the right to sickness benefit, in so far as the national legislation in question makes the right to invalidity benefits conditional upon entitlement to sickness benefit.

As regards the question of the procedural and temporal conditions relied on by the British institution, the Court referred to its earlier case-law (judgment in Balsamo, Case 148/75, [1976] ECR 375) which refers to provisions laid down with the aim of simplifying administrative requirements for migrant workers.

The Court ruled that Article 45 of Regulation No. 1408/71 must be understood to mean that where the legislation of a Member State makes the acquisition of a right to invalidity benefit conditional upon the person concerned having been entitled to sickness benefit under that legislation for a given period in the immediately preceding period - that condition being subject to, so far as material (a) the completion of insurance periods (b) the making of a claim therefor in a prescribed manner and within a prescribed time -

(i) the competent institution of the said Member State shall take into account insurance periods completed under the legislation of any Member State as though they had been completed under the legislation which it administers;

(ii) the condition that a claim must be made in a prescribed manner and within a prescribed time shall be regarded as satisfied in so far as such a claim has been duly made in accordance with the legislation of the State of residence.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

16 November 1977

N.V. G.B.-INNO-B.M. v Vereniging van de Kleinhandelaars in Tabak (A.T.A.B.)

Case 13/77

1. Competition - Community system - Member States - Obligations - Dominant position within the market - Abuse encouraged by a national legislative provision - Prohibition
(EEC Treaty, Art. 5, Art. 86, Art. 90)

2. Competition - Manufactured tobacco - Sale to the consumer - Price determined by the manufacturer or importer - Adherence imposed by a national rule - Compatibility with Article 86 in conjunction with Article 3 (f) and the second paragraph of Article 5 of the Treaty - Criteria

3. Quantitative restrictions - Manufactured tobacco - Sale to the consumer - Price determined by the manufacturer or importer - Adherence imposed by a national rule - Measure having an effect equivalent to a quantitative restriction - Criteria
(EEC Treaty, Art. 30)

4. National taxes other than turnover taxes - Manufactured tobacco - Consumption affected - Sale - Price determined by the manufacturer or importer - Adherence imposed by a Member State - Prohibition under Article 5 of Directive No. 72/464 - None

1. Member States may not enact measures enabling private undertakings to escape from the constraints imposed by Articles 85 to 94 of the Treaty. It follows that any abuse of a dominant position within the market is prohibited by Article 86 even if such abuse is encouraged by a national legislative provision.

2. In order to assess the compatibility with Article 86 of the Treaty, in conjunction with Article 3 (f) and the second paragraph of Article 5 of the Treaty, of the introduction or maintenance in force of a national measure whereby the prices determined by the manufacturer or importer must be adhered to when tobacco products are sold to a consumer, it must be determined, taking into account the obstacles to trade which may result from the nature of the fiscal arrangements to which those products are subject, whether, apart from any abuse of a dominant position which such arrangements might encourage, such introduction or maintenance in force is also likely to affect trade between Member States.

3. Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction, it may have such an

effect, however, when it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult than that of domestic products. On the other hand, rules in a Member States whereby a fixed price is imposed for the sale to the consumer of either imported or home-produced tobacco products, namely the price which has been freely chosen by the manufacturer or importer, constitute a measure having an effect equivalent to a quantitative restriction on imports only if, taking into account the obstacles inherent in the different methods of fiscal control which are used by the Member States in particular to ensure collection of the taxes on those products, such a system of fixed prices is likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

4. Article 5 of Council Directive No. 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco does not aim to prohibit the Member States from introducing or maintaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, provided that that price has been freely determined by the manufacturer or importer.

N o t e

This case arises out of an action brought by the Vereniging van de Kleinhandelaars in Tabak (A.T.A.B.) (a non-profit-making association of tobacco retailers) before the President of the Rechtbank van Koophandel (Commercial Court) of Brussels, which resulted in an order that G.B.-INNO-B.M. desist from selling or from offering for sale cigarettes at a price lower than that stated on the tax label, on the ground that to do so constitutes unfair competitive practice and a violation of Article 58 of the Law on the introduction of value added tax.

It is necessary to make a brief examination of the Belgian national legislation governing the taxation of tobacco products.

Tobacco products are subject to a system of excise duty characterized by the application of an "ad valorem" duty calculated on the basis of the retail selling price "including VAT". The sum of both those charges is paid by either the manufacturer or the importer when the tax labels are purchased.

It is forbidden to sell tobacco products at a higher or lower price than that indicated on the tax label.

That dispute led the Hof van Cassatie (Court of Cassation), Belgium, to refer to the Court of Justice for a preliminary ruling certain questions concerning the compatibility with Community law of the provisions of the Belgian law on the taxation of tobacco products, in so far as that law imposes, for sales to the consumer, a selling price fixed by manufacturers or importers.

The taxation of tobacco products is an important source of fiscal revenue in all the Member States, with the result that the competent authorities must have at their disposal effective means of ensuring that that income is received.

In a system in which, as in Belgium, the basis for the imposition of the excise duty and the VAT is the retail selling price, a prohibition on the sale of tobacco to the consumer at a selling price which is higher or lower than that appearing on the tax label is an essential guarantee of a fiscal nature, intended to prevent producers and importers from undervaluing their products at the time of payment of the tax.

On the other hand, a prohibition on sale at a price lower than that indicated on the tax label is not necessarily imposed for tax purposes but, according to certain intervening governments, pursues rather socio-economic aims in that, by eliminating the possibility of any sort of discount on sales to the consumer, it seeks to maintain a certain retail sale structure by avoiding the concentration of such sales to the disadvantage of small retailers.

In the first question the Hof van Cassatie asks whether Article 3 (f), the second paragraph of Article 5 and Article 86 of the EEC Treaty (on competition) must be interpreted as meaning that a Member State is prohibited from introducing into or retaining in its legislation a provision whereby, for the sale to consumers of both imported and home-produced goods, a sale price is fixed by the manufacturers or importers if the provision is of such a nature as to facilitate the abuse by one or more undertakings of a dominant position within the Common Market or facilitates the abuse by one or more undertakings of a dominant position which exists because the manufacturers and importers of tobacco products can oblige the retailers in a Member State to comply with the sale prices to the consumer fixed by the former?

The Court ruled in reply that "Article 86 of the EEC Treaty prohibits any abuse by one or more undertakings of a dominant position, even if such abuse is encouraged by a national legislative provision".

It stated, further, that "in order to assess the compatibility with Article 86 of the Treaty, in conjunction with Article 3 (f) and the second paragraph of Article 5 of the Treaty, of the introduction or retention in force of a national measure whereby the prices determined by the manufacturer or importer must be adhered to when tobacco products are sold to a consumer, it must be determined, taking into account the obstacles to trade which may result from the nature of the fiscal system to which those products are subject, whether, apart from any abuse of a dominant position which it might encourage, such system is also likely to affect trade between Member States".

A further series of questions asks whether the term a "measure having equivalent effect" includes rules in a Member State whereby a fixed price is imposed, namely the price stated on the tax labels, which is determined by the manufacturers of the products in question or by the importers of the same products, as the case may be?

It is also asked if such rules only constitute such a measure when it is in fact certain that it can obstruct intra-Community trade directly or indirectly, actually or potentially, which is a matter to be determined by the national court in each case?

The Court recalled that Article 30 of the Treaty prohibits the imposition of all measures having effect equivalent to a quantitative restriction on imports in trade between Member States and refers to the definition given of those measures in Directive No. 70/50 of the Commission of 22 December 1969, according to which they are "measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production".

The obstacles resulting from indirect taxation are covered by Article 99 of the Treaty, under which the Commission is obliged to consider how the legislation of the Member States in that area may be harmonized in the interests of the common market.

In reply to those questions the Court ruled that "rules in a Member State whereby a fixed price is imposed for the sale to the consumer of either imported or home-produced tobacco products, namely the price which has been freely chosen by the manufacturer or importer, constitute a measure having effect equivalent to a quantitative restriction on imports only if, taking into account the obstacles inherent in the different methods of fiscal control which are used by the Member States in particular to ensure collection of the taxes on those products, such a system of fixed prices is likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

The final question asks whether Article 5 of Directive No. 72/464/EEC of the Council of Ministers concerning taxation of the use of tobacco products other than turnover tax must be interpreted as prohibiting Member States from applying a legislative provision which imposes a sale price, namely the price stated on the tax label.

The Court ruled that "Article 5 of Council Directive No. 72/464/EEC of 19 December 1972 does not aim to prohibit the Member States from introducing or retaining in force a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, provided that that price has been freely determined by the manufacturer or importer".

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

22 November 1977

Industrial Diamond Supplies v Luigi Riva

Case 43/77

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments - Recognition or grant of an order for enforcement in one Contracting State of a judgment given in another Contracting State - Stay of the proceedings for recognition or enforcement - Appeal lodged in the State in which the judgment was given against the foreign judgment - Concept of "ordinary appeal" within the meaning of Articles 30 and 38 of the Convention - Differences in the legal concepts of the various Contracting States with regard to the distinction between "ordinary" and "extraordinary" appeals - Definition of the concept of "ordinary appeal" solely within the framework of the Convention - Meaning
(Convention of 27 September 1968, Articles 30 and 38)

1. Because of the differences in the legal concepts of the Member States which are parties to the Convention of 27 September 1968 with regard to the distinction between "ordinary" and "extraordinary" appeals, the meaning of the concept of "ordinary appeal" cannot be determined by reference to a national legal system, whether that of the State in which the judgment was given or that of the State in which recognition or enforcement is sought. This concept may therefore be defined solely within the framework of the Convention itself.

2. In view of the structure of Articles 30 and 38 and of their function in the system of the Convention, any appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement under the Convention and the lodging of which is bound, in the State in which judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an "ordinary appeal" which has been lodged or may be lodged against a foreign judgment.

N o t e

This case concerns the interpretation of Articles 30 and 38 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The questions relate to the meaning to be given to the expression "ordinary appeal" used in Articles 30 and 38.

The file shows that Industrial Diamond Supplies, the plaintiff in the main action, having its registered office in Antwerp, was ordered by the Tribunale Civile e Penale, Turin, to pay to Luigi Riva, the defendant in the main action, a commercial representative residing in Turin, a sum in excess of Lit 50 000 000, as commission owed by the plaintiff to the defendant in the context of a contractual relationship between the parties. The judgment of the Tribunale Civile e Penale, Turin, is at present enforceable. On 25 November 1976 Mr Riva obtained from the Antwerp court a judgment authorizing the enforcement in Belgium of the judgment of the Turin court.

On 15 December 1976 Industrial Diamond Supplies lodged an appeal against the order for enforcement before the Antwerp court and on 27 December 1976 it lodged an appeal in cassation before the Italian Corte Suprema di Cassazione against the judgment given on appeal by the Turin court.

Industrial Diamond Supplies then requested the Antwerp court, principally, to suspend the proceedings relating to the enforcement of the judgment given by the Turin court until final judgment has been delivered between the parties in Italy.

That led the Antwerp court to refer to the Court of Justice two questions asking whether the expression "ordinary appeal" used in Articles 30 and 38 of the Convention must be understood as a reference to national law or as an independent concept, the interpretation of which must be sought within the Convention itself, and, in the latter case, what meaning is to be given to that expression within the context of the Convention.

The nature of the expression "ordinary appeal" as a reference to national law or as an independent concept

Under the terms of Article 30 of the Convention, "A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against the judgment has been lodged".

Under the terms of the first paragraph of Article 38, "The court with which the appeal under the first paragraph of Article 37 is lodged may ... stay the proceedings if an ordinary appeal has been lodged against the judgment in the State in which that judgment was given or if the time for such an appeal has not yet expired".

From a comparison of the legal concepts of the various Member States of the Community the Court finds that although in some States the distinction between "ordinary" and "extraordinary" appeals is based on the law itself, in other legal systems the classification is made primarily or even purely in the works of learned authors, while in a third group of States the distinction is completely unknown.

It appears therefore that interpretation of the concept of "ordinary appeal" by reference to a national legal system would create legal uncertainty and in reply to the national court the Court of Justice ruled that the expression "ordinary appeal" within the meaning of Articles 30 and 38 of the Convention must be determined solely within the context of the system of the Convention itself and not according to the law of either the State in which the judgment was given or of the State in which the recognition or enforcement of that judgment is sought.

The meaning of the expression "ordinary appeal" within the context of the Convention

It must be understood to mean any appeal which forms part of the normal course of an action and which, as such, constitutes a procedural development which any party must reasonably expect.

The Court of Justice interpreted the expression by ruling that, within the meaning of Articles 30 and 38 of the Convention, any appeal which is such that it may result in the annulment or the amendment of the judgment which forms the subject of the procedure for recognition or enforcement in accordance with the Convention, the lodging of which is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment, constitutes an "ordinary appeal" which has been or may be lodged against a foreign judgment.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

23 November 1977

Enka Glanzstoff B.V. v Inspecteur der Invoerrechten en Accijnzen

Case 38/77

1. Measures adopted by an institution - Direct effect - Directives (EEC Treaty, Art. 189)

2. References for a preliminary ruling - Jurisdiction of the Court - Limits (EEC Treaty, Art. 177)

3. Customs duty - Customs warehouses - Procedure - Harmonization - Article 10 (2) (d) of Directive No. 69/74 - Direct effect

4. Customs duty - Value for customs purposes - Calculation - Price to be taken as basis - Costs of warehousing and of preserving the goods whilst in warehouses - Exclusion (Directive No. 69/74, Art. 10 (2) (d))

1. Where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. That is especially so when the individual invokes a provision of a directive before a national court in order that the latter shall rule whether the competent national authorities, in exercising the choice which is left to them as to the form and the methods for implementing the directive, have kept within the limits of their discretion as set out in the directive.

2. The Court has no power in the context of proceedings under Article 177 of the Treaty either to interpret provisions of national law or to rule on their possible incompatibility with Community law. However, in the context of the interpretation of Community law, it may provide the national court with the criteria enabling it to deal with the action before it, in particular as regards any incompatibility of national provisions with Community rules.

3. Article 10 (2) (d) of Directive No. 69/74 of 4 March 1969 may be relied on by parties concerned for the purpose of verifying whether the national measures adopted for its implementation are in accordance with it and the national courts must give it precedence over any national measures which may prove incompatible with its terms.

4. Article 10 (2) (d) of Directive No. 69/74 must be interpreted as meaning that if the price paid or payable by the purchaser is taken as the basis in calculating the value of goods for customs purposes and if, in addition to the price of the goods, it includes an amount corresponding to the costs of warehousing and of preserving the goods whilst in warehouses within the territory of the Community, that price must be adjusted in such a way as to exclude the latter factors from it.

N o t e

This case concerns the interpretation of certain provisions of Council Directive No. 69/74/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs warehousing procedure.

The main proceedings are between the customs authorities in the Netherlands and an importer who submitted a customs declaration concerning the valuation for customs purposes ex warehouse at Arnhem of a consignment of steel cord used in the manufacture of tyres, sold by an Irish manufacturer to a purchaser in the Grand Duchy of Luxembourg.

According to the customs authorities, the defendant in the main action, in determining the value for customs purposes the costs of storing the goods in the warehouse cannot be deducted from the aggregate amount invoiced by the vendor to the purchaser, while according to the plaintiff in the main action, that deduction must be made.

Article 10(2)(d) of Directive No. 69/74 provides that:

"Where the price paid or payable is taken into account in determing the value for customs purposes, the following special provisions shall apply:

(a) .....

(b) .....

(c) .....

(d) The costs of warehousing and of preserving the goods while in warehouses borne by a purchaser shall not be included in the value for customs purposes where the price paid or payable by that purchaser is taken as the basis for valuation".

In reply to the question whether the provision is of such a specific nature that it must be regarded as directly binding, that is to say, as having direct effect, the Court of Justice ruled that Article 10(2)(d) of Directive No. 69/74 of 4 March 1969 may be relied on by individuals for the purpose of verifying whether the national measures adopted for its implementation are in accordance with it and that the national courts must give it priority over the national measures which prove incompatible with its terms.

In answer to the question whether the provision at issue must be interpreted to mean that where the price paid or payable is the basis for valuation it must be reduced by the costs of warehousing the goods in the Community the Court ruled that Article 10(2)(d) of Directive No. 69/74 must be interpreted to mean that if the price paid or payable by the purchaser is taken as the basis in calculating the value of goods for customs purposes and if, in addition to the price of the goods, it includes an amount corresponding to the costs of warehousing and of preserving the goods while in warehouses within the territory of the Community, that price must be adjusted in such a way as to exclude those latter factors from it.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

24 November 1977

Razanatsimba

Case 65/77

Freedom of establishment - ACP-EEC Lomé Convention - Right of establishment - National of an ACP State - Profession of Advocate - Rule as to non-discrimination - Requirement of the nationality of the State concerned - Permissibility - More favourable treatment reserved to the nationals of another ACP State by virtue of an international agreement - Absence of discrimination
(ACP-EEC Convention, Art. 62)

Article 62 of the ACP-EEC Convention signed at Lomé on 28 February 1975 between the African, Caribbean and Pacific States of the one part and the European Economic Community of the other part does not purport to provide equality of treatment between nationals of an ACP State and those of a Member State of the EEC; more particularly, it does not oblige either the ACP States or the Member States of the EEC to give to the nationals of a State belonging to the other group treatment identical to that reserved to their own nationals.

It is not contrary to the rule as to non-discrimination laid down in Article 62 for a Member State to reserve more favourable treatment to the nationals of one ACP State, provided that such treatment results from the provisions of an international agreement comprising reciprocal rights and advantages.

Article 62 of the Lomé Convention does not give a national of an ACP State the right to establish himself in the territory of a Member State of the EEC without any condition as to nationality, in so far as the right to practise professions reserved by the legislation of that State to its own nationals is concerned.

N o t e

The applicant in the main proceedings, Mr Razanatsimba, who is a Madagascan national and has a degree in law and a Certificat d'Aptitude à la Profession d'Avocat (Qualifying Certificate for the profession of advocate), applied to be admitted to pupillage at the Lille Bar.

The Conseil de l'Ordre (Bar Council) reserved its position on the application of the condition of nationality which is laid down in the following terms by a French Law of 31 December 1971 "He must be French, and for this purpose account must be taken of international agreements".

As the applicant sought to rely on Article 62 of the Lomé Convention the Cour d'Appel, Douai, before which proceedings were brought, found that an interpretation of Community law was necessary and referred to the Court of Justice the question whether Article 62 of the Lomé Convention of 28 February 1975 gives a national of an ACP State, and in particular a person of Madagascan nationality, the right to establish himself in the territory of a Member State, and in particular in French territory, without any condition as to nationality.

The wording of the Lomé Convention refers to two groups of States bound by the said Convention, the ACP States and the Member States of the EEC, and provides that any State belonging to one of the two groups shall treat nationals of any State belonging to the other group on a non-discriminatory basis. On the other hand, that text does not purport to provide equality of treatment between the nationals of an ACP State and those of a Member State of the EEC and, more particularly, it does not oblige either the ACP States or the Member States of the EEC to ensure that the nationals of a State belonging to the other group are treated in the same way as their own nationals.

As the applicant in the main proceedings argues that the effect of Article 62 of the Lomé Convention is the same as that of the provisions of the EEC Treaty in matters of establishment, it is necessary to consider whether the nationals of an ACP State may be entitled, under the rule of non-discrimination laid down in Article 62 of the Lomé Convention, to invoke the particular advantages accorded in matters of establishment by a Member State to other ACP States.

As between the French Republic and the Malagasy Republic special rules apply, including a Convention which, as far as advocates are concerned, is limited to freedom to provide services in specific cases.

That raises the question whether the rule as to non-discrimination laid down in Article 62 of the Lomé Convention should be read as providing the same treatment to a Madagascan national in France as that provided to the nationals of those ACP States in which such special rules exist.

In order to answer that question, it suffices to find that it is not contrary to the rule of non-discrimination laid down in Article 62 for a Member State to reserve more favourable treatment to the nationals of an ACP State, provided that such treatment results from the provisions of an international agreement comprising reciprocal rights and advantages.

The Court ruled that Article 62 of the Lomé Convention does not give a national of an ACP State the right to establish himself in the territory of a Member State, without any condition as to nationality, in so far as the right to practise professions reserved by the legislation of that State to its own nationals is concerned.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

29 November 1977

Elisabeth Ermin, née Beerens, v Rijksdienst voor Arbeidsvoorziening

Case 35/77

Social security for migrant workers - Community rules - Field of application - National law or regulation specified or not specified by a Member State in the declarations referred to in Article 5 of Regulation No. 1408/71 - Consequences

The fact that a national law or regulation has not been specified in the declarations referred to in Article 5 of the regulation is not of itself proof that that law or regulation does not fall within the field of application of the said regulation; on the other hand, the fact that a Member State has specified a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of Regulation No. 1408/71.

N o t e

The main proceedings are between Mrs Ermin and the Belgian National Department of Employment concerning the plaintiff's rights to unemployment benefits.

The plaintiff transferred her domicile from the Netherlands to Belgium at the time of her marriage in 1976 and applied for unemployment benefits there in reliance on Article 69 of Regulation (EEC) No. 1408/71 and on the fact that in the Netherlands she received unemployment benefits under the law on unemployment allowances.

The Netherlands rules relating to unemployment consist of three statutes, one being a social security law and the two others being laws relating to social assistance, the implementation of which is entrusted to the municipal councils and not to the social security funds.

Having worked in the Netherlands for a brief period the plaintiff was there entitled to the benefits laid down by the Netherlands law laying down rules concerning public allowances to unemployed workers (a social assistance law).

The question referred by the Arbeidsrechtbank (Labour Court), Hasselt, asks whether the Netherlands social assistance legislation applicable by reason of the unemployment of a worker allows of reliance on Article 69 of Regulation (EEC) No. 1408/71 and whether persons such as the plaintiff satisfy "the conditions of the legislation of a Member State (the Netherlands) for entitlement to unemployment benefits within the meaning of the regulation relied on, with the ensuing consequences for the transferability of her entitlement to unemployment benefits to another Member State (Belgium) where such benefits are indeed social security benefits".

Article 4 of Regulation (EEC) No. 1408/71 provides that the regulation "shall apply to all legislation concerning the following branches of social security: ... (g) unemployment benefits".

Article 5 of the regulation provides that "The Member States shall specify the legislation and schemes referred to in Article 4 (1) and (2) ...". The declaration of the Netherlands refers, under the heading "unemployment benefits", not only to the law on compulsory insurance of workers against the financial consequences of involuntary unemployment (Werkloosheidswet) but also to the law laying down rules concerning public allowances to unemployed workers (Wet Werkloosheidsvoorziening).

In reply to that question the Court of Justice ruled that the fact that a Member State has specified a law in its declaration under Article 5 of Regulation (EEC) No. 1408/71 must be taken to mean that benefits granted on the basis of that law are social security benefits within the meaning of the said regulation.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

30 November 1977

Leonce Cayrol v Giovanni Rivoira & Figli

Case 52/77

1. Commercial policy - Fruit and vegetables - Table grapes - Imports from Spain - Years 1970 and 1971 - Protective measures - Authorization - Permissibility
(EEC Treaty, Art. 115)

2. Commercial policy - Fruit and vegetables - Table grapes - Imports from Spain - Quantitative restrictions in existence prior to Regulation No. 2513/69 - Application during the part of the year between 1 July and 31 December - Permissibility
(Regulation No. 2513/69 of the Council)
(Agreement between the EEC and Spain, Annex I, Arts. 1 and 11)

3. Questions referred for a preliminary ruling - Jurisdiction of the Court - Limits
(EEC Treaty, Art. 177)

4. Quantitative restrictions - Elimination - Measures having equivalent effect - Products in free circulation - Customs declaration - Country of origin - Indication - Requirement by the importing Member State - Permissibility - Conditions
(EEC Treaty, Arts. 30 and 115)

5. Trade - Fruit and vegetables - Quality - Control - Community rules - Origin of products - Proof - Requirement not justified
(Regulation No. 158/66/EEC, Art. 3)
(Regulation No. 93/67/EEC, Art. 3)

6. Trade - Fruit and vegetables - Quality - Infringements - Penalties within the meaning of Article 8 of Regulation No. 158/66 - Prohibition on distinction according to the origin of the product

1. For the years 1970 and 1971 the existence of the commercial agreement between the Community and Spain formed no obstacle to the application to imports of table grapes of Article 115 of the Treaty.

2. Having regard to the combined provisions of Article 1 of Regulation No. 2513/69 and of Articles 1 and 11 of Annex I to the Agreement between the EEC and Spain, Member States could continue to apply to table grapes of Spanish origin during the part of the year between 1 July and 31 December quantitative restrictions in existence prior to Regulation No. 2513/69.

3. It is not for the Court of Justice to assess whether questions referred to it by a national court under Article 177 of the Treaty are relevant to the nature and subject-matter of the action before that court, since in accordance with the structure of the procedure for a preliminary ruling such assessment comes within the jurisdiction of the national court.

4. The requirement by the importing Member State of the indication of the country of origin on the customs declaration document for products in free circulation whose Community status is attested by the Community movement certificate does not in itself constitute a measure equivalent to a quantitative restriction if the goods in question are covered by measures of commercial policy adopted by that State in conformity with the Treaty. Such a requirement would, however, fall under the prohibition contained in Article 30 of the Treaty if the importer were required to declare, with regard to origin, something other than what he knows or may reasonably be expected to know or if the omission or inaccuracy of that declaration were to attract penalties disproportionate to the nature of a contravention of a purely administrative character. Any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty.

5. The rules relating to control of the quality of products cannot of themselves justify a requirement to produce documents concerning the origin of products, on condition however that when an inspection is carried out the inspector may require proof that the compulsory declarations are in accordance with the facts.

6. Article 8 of Regulation No. 158/66 seeks to penalize any infringement, without distinction as to the origin of the product. National measures entailing such distinctions may, where appropriate, be regarded as discriminatory and thereby incompatible with the Treaty, in particular Article 30.

N o t e

In December 1970 and December 1971 Mr Cayrol imported into France various consignments of table grapes of Spanish origin which were dispatched from Italy (where the grapes had been put into free circulation) by Rivoira. The grapes bore the Italian export mark and were accompanied by the certificate of the Istituto Nazionale per il Commercio Estero (I.C.E.) certifying the conformity of the goods with the quality standards and stating that they were of Italian origin.

Following a check carried out by the French customs authorities in August 1972 Mr Cayrol and Mr Rivoira were charged with having imported prohibited goods (as the quota fixed by France for the importation of grapes from Spain was exhausted) by means of a false declaration of origin and in reliance on false or inexact documents. In its judgment on that charge delivered on 26 January 1976 the Tribunal de Grande Instance, Montpellier, ordered them to pay jointly a fine of FF 532 435 in lieu of confiscation of the goods seized, plus a fine amounting to twice the value of the goods liable to confiscation, namely FF 1 064 870. The Tribunal de Grande Instance overruled the argument put forward by Mr Cayrol that the grapes had acquired Italian origin.

Following that judgment Mr Cayrol accepted a proposed settlement, by which he agreed to pay a reduced fine of FF 175 000, and then applied to the Tribunale di Saluzzo for a warrant for attachment against the assets of Rivoira in settlement of the losses which he believed he had suffered by reason of the fact that Rivoira had deceived the French customs authorities as to the origin of the goods, inter alia by means of the I.C.E. certificate. That led the President of the Tribunale di Saluzzo to ascertain whether the action of those authorities was compatible with the provisions of Community law. Several questions were referred to the Court of Justice relating to the effects on the present action of the commercial agreement concluded between the Community and Spain on 29 June 1970.

The Court is asked whether Article 115 of the EEC Treaty may be relied upon by Member States in connexion with products originating in a third country which are covered by a Community import system pursuant to a commercial agreement concluded by the EEC with the said third country and whether on 1 October 1970, the date of the entry into force of the agreement, the Member States were no longer empowered to introduce directly quantitative restrictions of whatever nature, including import quotas.

In reply to those questions the Court ruled that for the years 1970 and 1971 the existence of the commercial agreement between the Community and Spain formed no obstacle to the application to imports of table grapes of Article 115 of the Treaty. Having regard to the provisions of Article 1 of Regulation No. 2513/69 in conjunction with Articles 1 and 11 of Annex I to the Agreement between the EEC and Spain, Member States may continue to apply to table grapes of Spanish origin during the part of the year from 1 July to 31 December quantitative restrictions in existence prior to Regulation No. 2513/69.

Further questions ask what checks carried out at intra-Community frontiers are still compatible with Community law.

In reply to those questions the Court ruled that any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty. The requirement of an import licence for the importation into a Member State of goods put into free circulation in another Member State in so far as those goods are not the subject of a derogation which has been duly authorized by the Commission under the second sentence of the first paragraph of Article 115 is incompatible with the provisions of the Treaty.

A last group of questions asks whether the Community rules relating to quality standards for fruit and vegetables, in particular the provisions of Regulation No. 58/62 enable the Member States to render intra-Community trade subject to production at the frontier of documents relating to the origin of goods in free circulation coming from other Member States and whether, in the case of a failure to comply with those standards, the application to imported products of the penalties prescribed for the infringement of national customs legislation does not constitute a measure having equivalent effect prohibited by Article 30 of the Treaty, when national products which fail to comply with the same standards are only subject to the lighter penalties provided for by the national rules.

The Court of Justice ruled that the rules relating to control of the quality of products cannot of itself justify a requirement to produce documents concerning the origin of products on condition however that when a check is carried out the controlling authority concerned may require proof that the compulsory declarations are in accordance with the facts.

Article 8 of Regulation No. 158/66 seeks to penalize any infringement without distinction as to the origin of the product; where appropriate national measures entailing such distinctions may be regarded as discriminatory and thereby incompatible with the Treaty, in particular Article 30.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

1 December 1977

Petrus Kuyken v Rijksdienst voor Arbeidsvoorziening

Case 66/77

1. Preliminary rulings - Jurisdiction of the Court - Limits (EEC Treaty, Art. 177)

2. Social security for migrant workers - Unemployment - Benefits - Entitlement - None - Regulation No. 1408/71 - Inapplicability

3. Social security for migrant workers - Unemployment - Benefits - Award - Students - Studies completed in another Member State - Assimilation to those completed in an establishment recognized by the competent State - Requirement - None

1. Although the Court has no jurisdiction within the framework of the application of Article 177 of the Treaty to decide upon the compatibility of a national provision with Community law, it may nevertheless extract from the wording of the question formulated by the national court, having regard to the facts stated by the latter, those elements which come within the interpretation of Community law.

2. Article 71 of Regulation (EEC) No. 1408/71 of the Council cannot apply to the case of an unemployed person who has not pursued any activity as an employed person or any activity treated as such and who, in consequence, has not yet acquired any entitlement to unemployment benefit.

3. Neither the Treaty establishing the EEC nor the provisions of Regulation (EEC) No. 1408/71 of the Council relating to unemployment require a competent institution in one Member State, for the purposes of the award of unemployment benefits to former students who have never been employed, to treat studies completed in another Member State as though they had been completed in an establishment provided, recognized or subsidized by the competent State.

N o t e

The plaintiff in the main proceedings, a Belgian subject, obtained his school leaving certificate in Belgium in 1971. He subsequently followed a course at the Hogere Technische School (College of Advanced Technology) in Apeldoorn, the Netherlands, where in 1976 he obtained a certificate entitling him to describe himself as "Ingenieur Technische Academie".

He returned to Belgium to look for employment. As he did not find any work, in 1976 he submitted an application for unemployment benefits in reliance on Article 124 of the Royal Decree of 20 December 1963 which provides that:

"Young workers who have completed full-time studies in an educational establishment which is established, recognized or subsidised by the State or who have obtained a diploma or certificate of completion of studies from the central examining board may be granted unemployment benefits on condition that:

(1) ...

(2) no more than one year has elapsed between the end of the studies, the award of a diploma or certificate of completion of studies by the central examining board or the end of an apprenticeship and the application for benefits".

The competent institution refused to pay him unemployment benefits on the grounds that more than one year had elapsed since the end of his studies in Belgium and that the period of study undertaken in the Netherlands did not prevent that period from running because it had not been completed in an educational establishment which was established, recognized or subsidised by the Belgian State. The Arbeidsrechtbank (Labour Court), Hasselt, before which the case was brought, recognized that on the basis of Belgian law the plaintiff's application was without foundation but questioned whether the position was the same if the compatibility of the Belgian law with Community law was examined.

On those grounds that court referred the following question for a preliminary ruling:

"Can the provisions of Article 124 of the Royal Decree of 20 December 1963 on the unemployment benefit rules in Belgium be regarded as being compatible with the text and the spirit of the relevant Community law which seeks to ensure free movement of workers within the Community:

with regard to Belgian subjects who have studied in one of the Member States, or

with regard to persons who are not Belgian subjects but who possess the nationality of one of the Member States, or

Do the provisions of Article 124 of the Royal Decree of 20 December 1963 constitute an obstacle to the free movement of workers within the Community either directly or indirectly?"

The question therefore concerns the scope of application of, first, the provisions of Regulation (EEC) No. 1408/71, concerning in particular the co-ordination of the laws of the Member States relating to unemployment benefits, and, secondly, the rules in the Treaty which deal with the free movement of workers and the prohibition of discrimination.

The question asks specifically, whether, for the purpose of entitlement to unemployment benefits, Community law requires studies completed in another Member State to be treated as studies completed in an educational establishment which is established, recognized or subsidised by the Belgian State. The provisions of the regulation and in particular of Chapter 6 are not applicable to an unemployed person who has never been in employment and has never been treated as an employed worker under national legislation applicable to employed workers. Article 67 (aggregation) presupposes the completion of periods of insurance or employment, Article 69 enables an unemployed person who is entitled to benefits in one Member State to retain his entitlement if he goes to another Member State in order to seek employment there, Article 71 enables, subject to certain conditions, an unemployed person who, during his last employment, was residing in the territory of a Member State other than the competent State to claim benefits in the latter State rather than in that in which he completed the above-mentioned periods. That provision is not applicable to a person who has not yet acquired any right to unemployment benefits.

With regard to the rules prohibiting discrimination it is clear from the file that the condition of completion of a period of study in an educational establishment which is established, recognized or subsidised by the Belgian State is applicable without distinction to Belgian subjects and to nationals of the other Member States.

The Court ruled that, for the purpose of granting unemployment benefits to former students who have never been employed, neither the Treaty establishing the European Economic Community nor the provisions of Regulation (EEC) No. 1408/71 of the Council relating to unemployment require the competent institution of a Member State to treat studies completed in another Member State as studies completed in an educational establishment which is established, recognized or subsidised by that State.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

6 December 1977

Reboulet (née Maris) v Rijksdienst voor Werknemerspensioenen

Case 55/77

1. Social security for migrant workers - Community rules - Application - Claims and documents - Drawing up - Rules governing languages

2. Community law - Uniform application in the Member States - Social security for workers - Rules governing languages - Exclusion of conditions with regard to nationality or residence
Regulation No. 1408/71, Art. 84 (4))

1. Under Article 84 (4) of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community the authorities, institutions and tribunals of the Member States are bound, notwithstanding any provision of their national laws to a different or contrary effect, to accept all claims or other documents which relate to the implementation of the said regulation and which have been drawn up in an official language of another Member State and they are not allowed in this connexion to make any distinctions on grounds of nationality or residence between the persons concerned.

2. It is impossible for the authority of Community law to vary from one Member State to the other as a result of domestic laws, whatever their purpose, if the efficacy of that law and the necessary uniformity of its application in all Member States and to all those persons covered by the provisions at issue are not to be jeopardized.

In particular the general nature of the rule laid down in Article 84 (4) of Regulation No. 1408/71 and its uniform application in all the Member States would be called in question if it were open to the authorities, institutions and tribunals of those States to limit its scope by reference to criteria based on the nationality or residence of the persons concerned.

N o t e

Mrs Reboulet, a Belgian national, was an employed worker first in Belgium, then in Germany and afterwards in France, where she has resided since 1947.

As the result of a dispute which arose between her and the Rijksdienst voor Werknemerspensioenen concerning her pension rights she lodged an application before the Arbeidsrechtbank (Labour Court) of the judicial district of Antwerp which had jurisdiction because of the fact that she last resided in Belgium.

Mrs Reboulet wrote her application in French although in Belgium, under the Law of 15 June 1935 on the use of languages in legal proceedings, all procedure before all the civil and commercial courts in the Province of Antwerp is conducted in the Dutch language. For its part, Article 84 (4) of Regulation (EEC) No. 1408/71 provides that "The authorities, institutions and tribunals of one Member State may not reject claims or other documents submitted to them on the grounds that they are written in an official language of another Member State".

In order to decide whether the Belgian provisions are compatible with the Community provisions the Arbeidsrechtbank, Antwerp, asked the Court:

1. Whether the provisions of Article 84 (4) of Regulation (EEC) No. 1408/71 take precedence over Article 2 and the third paragraph of Article 40 of the Law of 15 June 1935 on the use of languages in legal proceedings in respect of all persons to whom the regulation applies (Article 2);

2. More particularly whether the provisions of Article 84 (4) of Regulation (EEC) No. 1408/71 also apply to claims lodged with a Belgian court by a person of Belgian nationality who is a person to whom the regulation applies (Article 2);

3. Whether in this respect it is in any way relevant for the application of Article 84 (4) of Regulation (EEC) No. 1408/71 whether the person concerned resides in Belgium or in another Member State at the time of lodging the claim with the Belgian court.

The Court elucidated the bases and scheme of Article 84 of Regulation No. 1408/71. This provision comes within a body of measures intended to ensure the co-operation of the competent authorities for the purpose of the implementation of the social security scheme for migrant workers. In order to make life simpler for these migrant workers, the claims lodged and documents produced by them cannot be rejected because they are written in an official language of another Member State.

Article 84 makes no distinction based on the nationality of the persons concerned or on their place of residence when the purpose of the claims lodged or documents produced is the application of Regulation No. 1408/71. It is a general rule of uniform application in the Member States since regulations are, moreover, under the Treaty itself, binding in their entirety and directly applicable in all the Member States.

Article 84 (4) however concerns only claims lodged and documents produced by persons coming within the scope of Regulation No. 1408/71 for the purpose of enforcing their rights and not the general course of procedure which is still governed by the national laws of each State.

It is also necessary to take into account the fact that the authority of Community law cannot vary from one Member State to another through the effect of national laws without jeopardizing the effectiveness of that law and its uniform application throughout the Community.

The Court held that Article 84 (4) of Regulation No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community requires authorities, institutions and courts of the Member States to accept, in spite of any provision which may derogate therefrom or be contrary thereto, all claims and all other documents relating to the application of that regulation and written in an official language of another Member State, and that it is not permissible in this respect to create distinctions on the grounds of the nationality or place of residence of the persons concerned.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

8 December 1977

Carlsen Verlag GmbH v Oberfinanzdirektion Köln

Case 62/77

1. Common Customs Tariff - Description of goods - Criterion for classification

2. Common Customs Tariff - Tariff heading 49.01 - Interpretation

3. Common Customs Tariff - Description of goods - Tariff heading 49.03 - Note 5 to Chapter 49 - Interpretation

1. The decisive criterion for the classification of goods for customs purposes is in general to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters.

2. The wording of tariff heading 49.01, where it refers without further qualification to "books", must be interpreted as meaning publications in which the text in prose or verse conveys the information or narrative which it is intended to bring to the attention of the reader. A publication having as its salient features "illustrations" or "pictures" accordingly does not correspond to the wording of heading 49.01.

3. Tariff heading 49.03 and Note 5 to Chapter 49 must be interpreted as referring to children's picture books bound otherwise than in paper in which the pictures cover almost the whole page and constitute the essential means by which the meaning is conveyed whilst the short captions serve merely a simple explanatory purpose.

N o t e

Two days late for the Feast of St. Nicholas but well in time for Christmas, the Court of Justice gave a judgment for the occasion concerning the classification under the Common Customs Tariff of illustrated children's books, a judgment which affects child consumers if not readers of these publications and which is above all of interest to the publishers and the book-sellers who deal in them.

The main action is between the undertaking Carlsen Verlag GmbH and the Oberfinanzdirektion (Regional Finance Office) Cologne concerning the classification under the Common Customs Tariff of children's books entitled "Teddybear, Teddybear", "The Mouse Clock" and "My Friends" which were imported from Japan into the Federal Republic of Germany.

The Cologne Regional Finance Office classified these bound books, each made up of five bound tear-resistant sheets, over almost the whole of which coloured pictures are printed accompanied by a caption or a short narrative, in tariff heading 49.03, "Children's picture books and painting books".

Carlsen Verlag GmbH contested this classification maintaining that the books in question, by reason of their text, are typical printed matter intended for reading which is educative and affords entertainment which fall within tariff heading 49.01, "Printed books, booklets, brochures, pamphlets and leaflets". This led the Bundesfinanzhof (Federal Finance Court) to ask whether a publication, intended for children of below school age, over almost the whole of the pages of which are printed pictures which form the principal interest, may escape the special tariff heading 49.03 and come within the general tariff heading 49.07 where that text, without merely bringing out points which can be grasped visually, adds to the illustration ideas which are not suggested by the picture per se.

It appears from the wording of Note 5 to Chapter 49 that a written text cannot bring a children's picture book outside heading 49.03 unless it is in the nature of a continuous narrative and not simply episodic and accompanied by pictures illustrating the events included in the narrative itself.

The pictures are subsidiary to the text only if the essential content of the book lies in the text which the pictures serve to illustrate.

The Court held that tariff heading 49.03 and Note 5 to Chapter 49 must be interpreted as referring to children's picture books the pictures of which cover almost all the pages and constitute the essential meaning, while the short captions serve merely as an explanation.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

14 December 1977

Établissements A. De Bloos v Bouyer, Société en Commandite par Actions

Case 59/77

Competition - Agreements - Old agreement duly notified or exempted from notification - Calling in question before a national court - Position during the period between notification and the date of the Commission's decision

During the period between notification and the date on which the Commission takes a decision, courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85 (1).

N o t e

The Cour d'Appel (Court of Appeal), Mons, referred to the Court of Justice for a preliminary ruling a series of questions on the interpretation of Article 173 (application for annulment), Article 177 (reference for a preliminary ruling), Article 85 (3) (competition) and Regulation No. 67/67 (block exemption).

These questions have been raised in the context of a dispute between the grantee of an exclusive sales concession (De Bloos) and the grantor undertaking (Bouyer) concerning dissolution and an order to pay damages for non-performance of a contract relating to an exclusive sales concession for power-driven cultivators and similar vehicles, in particular for Belgium and the Grand Duchy of Luxembourg, a dispute in which the grantor undertaking alleges in its defence that the contract in question is void because it is incompatible with Article 85 of the Treaty.

Bouyer contests the classification of this contract made by the Commission in its letter of 29 April 1969, according to which that contract is an exclusive dealing agreement which could be granted block exemption within the meaning of Regulation No. 67/67.

The fourth question referred by the national court, which envisages the possibility that the Commission made a mistake in 1969 in considering that the agreement in question could be granted block exemption, asks whether such an agreement may be recognized as provisionally valid because it has been notified and what the effects of such validity are.

Since the reply to the last question may influence the analysis of the previous questions, it is necessary to examine it first.

The Court, in reliance upon its previous case-law (Case 48/72, Brasserie de Haecht v Wilkin-Janssen [1973] ECR 77 and Case 10/69, Portelange v Marchant [1969] ECR 309) found that although the fact that such agreements are fully valid may possibly give rise to practical disadvantages, the difficulties which might arise from uncertainty in legal relationships based on the agreements notified or exempted from notification would be still more harmful.

Old agreements may not only benefit from exemption retroactive even to the period before their notification but in addition those provisions thereof which were incompatible with Article 85 (1) and could not benefit from Article 85 (3) may be regularized retroactively from the date on which they are amended for the future at the Commission's request. Such a system cannot be reconciled with a power for the courts to find that an agreement is void during the period from notification thereof to the date on which the Commission takes a decision.

The Court accordingly held that during the period from notification to the date on which the Commission takes a decision, the courts before which a dispute is brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the law applicable to the contract and that those effects may not be called in question by any objection which may be raised concerning its compatibility with Article 85 (1).

The first two questions referred essentially to proceedings contesting, by recourse to Article 177 of the Treaty, the validity of a decision by a Community institution addressed to an individual, the legality of which decision is contested by a party which is out of time as regards an application for annulment under Article 173.

As it follows from the answer given to the fourth question that an old agreement duly notified or exempted from notification, even if it was wrongly considered by the Commission as benefitting from a block exemption within the meaning of Regulation No. 67/67 and as therefore not needing to be subject to an individual decision of exemption, continues to be valid until the date on which the Commission has taken a decision on the basis of Article 85 and Regulation No. 17, it follows that the fact that such an agreement is in accordance with Article 85 may not be called in question before the national courts during this period, and that the first two questions do not require a reply.

As for the third question concerning the effects of Regulation No. 67/67 after 31 December 1972, it has also become purposeless.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

14 December 1977

T. E. Sanders v R. van der Putte

Case 73/77

Convention of 27 September 1968 - Exclusive jurisdiction - Matters relating to tenancies of immovable property - Strict interpretation - Business carried on in immovable property rented from a third party by the lessor - Agreement to run the business - Application of Article 16 excluded - Dispute as to the existence of such an agreement

The assignment, in the interests of the proper administration of justice, of exclusive jurisdiction to the courts of one Contracting State in accordance with Article 16 of the Convention results in depriving the parties of the choice of the forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them. Having regard to that consideration the provisions of Article 16 must not be given a wider interpretation than is required by their objective. Therefore, the concept of "matters relating to ... tenancies of immovable property" within the context of Article 16 of the Convention must not be interpreted as including an agreement to rent under a usufructuary lease a retail business (verpachting van een winkelbedrijf) carried on in immovable property rented from a third person by the lessor. The fact that there is a dispute as to the existence of such an agreement does not affect the reply given as regards the applicability of Article 16 of the Convention.

N o t e

The main action is between two Dutch citizens concerning an agreement dating from 1973 in which they agreed that one (Sanders) would take ove from the other (van der Putte) the running of a florist's business in a shop which the latter had rented in Wuppertal in the Federal Republic of Germany.

The Gerechtshof (Regional Court of Appeal), Arnhem, found that the agreement in question was in existence and that Sanders owed his landlord a sum representing the rent under the usufructuary lease of the shop and another sum representing the rent under the head-lease of the business and the goodwill.

Sanders objected that the Gerechtshof did not have jurisdiction, basing his argument in particular on Article 16 (1) of the Convention of 27 September 1968 which provides that "in matters relating to rights in rem in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated" are to have exclusive jurisdiction, regardless of domicile.

Sanders' objection was dismissed on the ground that in the agreement in question the emphasis falls less on the renting of immovable property under a usufructuary or head-lease than on the running of a business.

This led the Hoge Raad, before which the case was brought by an appeal in cassation lodged by Sanders, to refer to the Court of Justice the following questions:

1. Must "tenancies of immovable property" within the meaning of Article 16 of the Convention also include an agreement to rent under a usufructuary lease /verpachting/ a retail business carried on in immovable property rented from a third person by the lessor?

2. If so does the exclusive jurisdiction of the courts of the State where the immovable property is situated also apply to a claim on the basis of such an agreement for

   payment of the rent of the retail premises under the usufructuary lease; or

   payment by the tenant under the usufructuary lease of the head-rent owed by the lessor to the owner of the immovable property; or

   payment of consideration for the goodwill of the retail business?

Under Article 2 of the Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

The Convention permits exceptions to the general rule, but Article 16 thereof provides for exclusive jurisdiction, regardless of domicile.

It is clear that disputes concerning rights in rem must be decided in accordance with the rules of the State in which the immovable property is situated, just as tenancies of immovable property are generally governed by special rules which are well known to the courts of the country in which they are applicable. These considerations explain why the courts of the country in which the immovable property is situated have been given exclusive jurisdiction in relation to tenancies of immovable property properly so-called and in relation to rights in rem in immovable property.

These same considerations do not however apply when the main subject-matter of the agreement is different in nature, in particular where it concerns the running of a business. The provisions of Article 16 must not be interpreted more widely than their objective requires.

The Court held that the concept of "matters relating to ... tenancies of immovable property" within the context of Article 16 of the Convention must not be interpreted as including an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third party by the lessor. In reply to a further question put by the Court hearing the main action relating to the effect of the fact that the existence of the agreement is contested the Court held that the fact that there is a dispute concerning the existence of the agreement which forms the subject of the action does not affect the applicability of Article 16 of the Convention.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

15 December 1977

Fritz Fuss KG Elektrotechnische Fabrik v Oberfinanzdirektion München

Case 60/77

Common Customs Tariff - Description of goods - Individual electrical appliances - Nature of "parts" - Classification under tariff heading 85.17

Note 2 in conjunction with Note 5 to Section XVI of the Common Customs Tariff must be interpreted as meaning that individual electrical appliances which are suitable for use solely or principally with an electric sound or visual signalling apparatus within the meaning of tariff heading 85.17 are "parts" within the meaning of that note and are to be classified accordingly under tariff heading 85.17 even when imported without the cables linking the various parts and without the acoustic or visual alarm signalling device.

N o t e

The Court held that Note 2 in conjunction with Note 5 to Section XVI of the Common Customs Tariff must be interpreted as meaning that individual electric appliances which are recognizable as intended exclusively or principally for an electric sound or visual signalling apparatus within the meaning of tariff heading 85.17 constitute "parts of appliances or parts" within the meaning of that note and must, in accordance therewith, be classified under tariff heading 85.17 even if they appear without the cables linking the various parts or pieces and without the acoustic or optical alarm devices.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

15 December 1977

Firma L. Poppe v Oberfinanzdirektion Köln

Case 63/77

Common Customs Tariff - Description of goods - Tariff heading 48.15 - Interpretation

Tariff heading 48.15 of the Common Customs Tariff must be interpreted as meaning that it does not include goods consisting of two sheets of DN A4 format stuck together, one of which is carbon paper and the other flimsy paper, as such goods must be classified under tariff heading 48.18 as "other stationery of paper".

N o t e

The Court held that heading 48.15 of the Common Customs Tariff must be interpreted as meaning that it does not include articles composed of two sheets of paper of DIN A4 format joined together, one of which is a carbon paper and the other a bank paper, and that such articles must be classified under tariff heading 48.18 as "other stationery of paper".

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

15 December 1977

Auditeur du Travail v Bernard Dufour and Others

Case 76/77

Road transport - Social legislation - Harmonization - Individual control book - Issue - Transport undertaking - Duty - Undertaking providing temporary labour - Responsibility
(Regulation (EEC) No. 543/69, Art. 14 (7) and (8))

It is for the transport undertaking to judge whether an individual control book must be issued to crew members and it is accordingly the duty of that undertaking to ensure that the provisions of Article 14 (7) and (8) of Regulation (EEC) No. 543/69 are observed. The position would be different only if national legislation adopted in pursuance of Article 14 (9) of the regulation in the special case of the hiring of labour were to impose that duty on the undertaking providing the temporary labour.

N o t e

It follows from the order for reference that in July 1975 a police check intercepted in Belgium a lorry travelling for the account of the undertaking Daniel Construction Company International and driven by a driver without the individual control book provided for in Article 14 (1) of Regulation (EEC) No. 543/69 of the Council.

Daniel Construction Company International states that it had hired a driver from S.A. Creyf's Interim to drive one of its own lorries. The managing director of the latter undertaking, Mr B. Dufour, stated that he had hired out to Daniel Construction Company a driver holding a valid driving licence and specified that S.A. Creyft's did not possess any vehicle.

This case prompted the Tribunal Correctionnel, Charleroi, to consider whether the duty to issue an individual control book to crew members lies with the undertaking whose business activity is the hiring out of labour or with the undertaking which uses the services of a driver for its road transport, in view of the fact that the statements contained in the Annex use the concepts of undertakings and employers without those concepts being defined in Regulation No. 543/69.

The national court asked the Court of Justice questions leading to an examination of the interpretation of Regulation No. 543/69, having regard to the existence of undertakings carrying out temporary work and undertakings hiring their services.

It should be noted that in 1969, the time at which the Community institutions harmonized the rates and conditions relating to road transport, there were very few undertakings carrying out temporary work and that this left many problems unsolved.

Under Regulation No. 543/69, "All undertakings shall keep a register of the individual books", but the term "undertaking" is not explicit. It therefore remains to refer to the objectives of that regulation. It pursues, within the context of the harmonization of national laws, a series of objectives which affect the social security of the driver, road safety and equality of competition between carriers.

To enforce these objectives, the regulation introduced an individual book containing daily sheets on which are noted in particular driving periods, rest periods and a weekly report totalling the length of the working activities during the week. The transport undertaking determines the vehicle to be driven, the route to be followed, the driving and rest periods, and so on. The Court therefore replied to the question referred by ruling that the duty to comply with the provisions of Article 14 (7) and (8) of Regulation No. 543/69 lies with the transport undertaking. The only case where this would not apply would be if the national legislation adopted in pursuance of Article 14 (9) of the regulation made the undertaking carrying out temporary work liable in this respect in the particular case of the hire of labour.

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Address by President Kutscher delivered on 25 October 1977
(Solemn Declaration by the Members of the Court of Auditors)

Members of the Court of Auditors,
Your Excellencies,
Ladies and Gentlemen,

For the first time the Court of Justice of the European Communities has the honour to receive the Members of the newly created Court of Auditors and to accept their declaration whereby they give a solemn undertaking that "both during and after their term of office, they will respect the obligations arising" from their duties. It is the first time that Members of the Court of Auditors have given such a solemn undertaking but nevertheless there can be said to exist an established tradition. The Members of the Commission too have to make a solemn declaration when they enter upon their duties and it is customary for them to do so before the Court of Justice and in the presence of the general public. Finally it is provided that before taking up their duties the Judges and Advocates General are to take an oath in open court affirming their readiness to perform their duties impartially and conscientiously.

Accordingly our work for the European Community is preceded by a solemn declaration which takes place under the eye of the general public. The purpose of such a proceeding does not lie in the need of the persons concerned to demonstrate their rank and their importance to the public at large. Discretion and modesty are not the least of the virtues required of us. The reason is also not that the formal declarations constitute an indispensable guarantee for the fulfilment of our obligations; it is self-evident that any person who is called upon to hold high office within the Community is determined to do and capable of doing justice to it. The real significance of these proceedings becomes evident if we visualize the basic attitude which the Treaties - the Constitution of the European Community - require in largely identical terms from the Members of the Commission, the Court of Justice and henceforth the Court of Auditors.

The Court of Auditors was established by the Treaty of 22 July 1975 which entered into force on 1 June 1977. In the terms of that Treaty "the Members of the Court of Auditors shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek nor take instructions from any Government or from any other body". Not only each individual Member but the Court of Auditors itself must carry out its tasks in complete independence.

It may be said certainly that this independence is self-evident for the Members individually and the Court of Auditors itself which constitutes the "financial conscience" of the Community. Even without express provisions there can be no doubt that the Members of the Court of Justice, the "legal conscience" of the Community, may take no instructions from others and that finally the Commission, which is to ensure compliance with the Treaties, can only fulfil its duties if its members maintain their independence from instructions from the Member States. Nevertheless it is fortunate that such provisions exist. They make clear something which was in danger of being forgotten because of various setbacks in recent years, that is that the Community is of a supranational character and that above the Member States there exists a European Community which is authorized and called upon to act independently, which has its own sovereign powers in order to achieve the objectives set out in the Treaty and must thereby lay the foundation of an ever closer union among the peoples of Europe. Accordingly the Treaties refer to the "general interest <u>of the Community</u>" which we are bound to serve in the performance of our duties. It may be added that because of the autonomy (independence) of the Community it is no longer at the disposal of the States which created it.

The task of making this fact clear to the citizens of Europe is included in the duties which each of us must fulfil within the scope of our powers and opportunities. A ceremony such as that for which we are assembled here also, within prescribed limits, serves this objective. Unfortunately "Europe" and the "European Community" are abstract concepts for the citizens of our countries.

We must show them and convince them that the European Community is not the concern of a few bureaucrats but a living, important and indispensable part of our life in Europe.

The history of the origins of the Court of Auditors confirms this view. The Preamble to the Treaty of 22 July 1975 points out that the budget of the Communities is financed entirely from the Communities' own resources and that for that reason a strengthening of the budgetary powers of the Parliament is required. It is however further emphasized in the Preamble that for the same reason the implementation of the budget should be more closely supervised. To that end the Member States have substituted the Court of Auditors for the previous Audit Board and the auditors of the Coal and Steel Community. The scope of this measure is clear from a few outward indications. The new rules were laid down as an amendment to the Community Treaties and required the ratification of all nine Member States - an unusual and unfortunately also protracted process - before their entry into force. The Court of Auditors is mentioned in the fundamental provisions at the beginning of the Treaties and, like the Economic and Social Committee, included amongst the institutions of the Communities. Its tasks are described in greater detail, and, if I understand it correctly, are more extensive than those of its predecessors. For the first time the budgetary affairs of the Community are subject to continuous supervision. In the Treaty itself the status of the Members of the Court of Auditors is modelled on that of the Members of the Court of Justice. However before appointing them the Council must consult the Parliament.

Although in all these ways the new Court of Auditors is clearly distinguished from the bodies which have carried out the external supervision of the budget of the Community up to now, we must not be misled into under-valuing the work carried out by the Audit Board and the auditors of the Coal and Steel Community. It is certainly not for the Court of Justice to examine and assess the activities of those bodies. One conclusion may be drawn however:

by their objectivity, their conscientiousness and their keen perception those bodies won high esteem and general recognition, It appears that the foundation which they laid will be of inestimable value to the new Court of Auditors.

It is no secret that the activities of the bodies responsible for supervision of budgets are not always a source of joy for those involved. That is in the very nature of things. It may perhaps be of some consolation for those who have been or who will be entrusted with such duties if I assure them that their fate is shared by the Judges and Advocates General of the Court of Justice. On behalf of the administration of the Court of Justice I may say that we have always taken very seriously any criticisms made of us although on the whole, they have fortunately been few and have not been on matters of any gravity. The same will be true of our co-operation with the Court of Auditors. No administration - and this is equally true for the administration of the Court of Justice - is completely immune to the temptation to go beyond what is financially reasonable because of laudable zeal, too great attention to its own problems, thoughtlessness or perhaps conceit. The fact that there exists and must exist a body which calls us to order in such cases is not to be accepted reluctantly but to be welcomed with gratitude.

Our best wishes accompany you, Members of the Court of Auditors, in the fulfilment of your highly responsible task.

Visit of a delegation from the Swiss Federal Court to the Court of Justice of the European Communities, Luxembourg, on 10 and 11 November 1977

Speech of welcome to those taking part by the President, H. Kutscher.

Gentlemen,

In the name of the members of the Court of Justice of the European Communities I have the honour and pleasure to welcome you to Luxembourg. Our court is a recent creation: it has only been in existence for some 25 years. During those years numerous meetings have taken place between the members of the Court of Justice of the Communities and the judges, advocates general and advocates of the Member States of the Community. These meetings have often resulted in lasting friendships.

Meetings between the members of our Court and the judges of countries not belonging to the European Community have been less frequent. We are all the more delighted that it has been possible for such a meeting to take place today and that we have the opportunity to return the hospitality which was shown to a number of us last year at Lausanne. At that time we opened discussions on questions and problems of common interest and we are in a position to continue them today and tomorrow. Of course, there are still more problems not only economic but legal in nature which affect both Switzerland and the European Community.

The treaties for the accession of the United Kingdom, Ireland and Denmark have provided for a gradual reduction in customs duties between the old and the new Member States. This transitional system has come to an end. Since 1 July 1977 the last customs barriers have fallen in trade between the old and the new Member States.

During the years 1972 and 1973 the Community concluded free-trade agreements with each of the seven states which had remained in the European Free Trade Association (EFTA) after the accession of the three States to the Community, that is to say agreements with Iceland, Norway, Sweden, Austria, Switzerland (including Liechtenstein), Portugal and finally with Finland too, which is associated with EFTA. These agreements also provided for the gradual elimination of customs duties and this was also brought about in 1 July 1977.

Since 1 July 1977 therefore there has been in existence in Europe a free-trade zone covering a population of roughly 300 million inhabitants. That is an event of considerable importance.

However, I should like to express a certain reserve.

Our Court of Justice is the court of the Communities, which are referred to as the "European" Communities. Of course that name is accurate in itself: all the Member States of this Community are European States. However, it seems to me that that title is to a certain extent ambitious - it contains an "exaggeration" and it may in certain circumstances be felt to be presumptuous. The number of European states belonging to the Communities has certainly increased over the years and will probably continue to increase. The six original Member States have become nine and the extension to twelve by the accession of Greece, Spain and Portugal may be considered as already established. The Europe of the Twelve: it will certainly be a larger Europe, geographically speaking, even though by no means less expensive. But even with that extension the Community will remain incomplete as regards the ambitious adjective "European" at least to the extent to which it continues not to include two countries situated in the heart of Europe, namely Switzerland and Austria. And in the North, Norway, Sweden and certain other states will still be outside the Community.

From that point of view it is permissible to hope that the free-trade agreement between the European Communities and the Swiss Confederation will only be the beginning of closer co-operation. It goes without saying that such forms of closer co-operation must take into account the special situation of the countries which I have mentioned.

Apart from an address by Mr Pescatore the programme provides for a speech by Mr Maltzahn, a director at the Commission, who is particularly knowledgeable in the realm of economic relations between Switzerland and the Communities. I thank Mr Maltzahn for having been willing to make his contribution to this exchange of views with our Swiss colleagues and I now call upon him to take the floor.

Speech by Mr Pierre Pescatore, Judge at the Court of Justice

Delivered on 10 and 11 November 1977[1]

Gentlemen,

From the numerous subjects of common interest which might have been treated in the course of this meeting I have chosen what appears to me the most important topic and the one which I think is most immediately interesting, namely the free-trade agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 since this is indeed something which we really have in common. The problem has already been touched upon yesterday by Judge Sørensen who pointed out that there is no clause in the agreement itself settling the matter of jurisdiction.

What will happen if differing points of view develop and if a dispute arises? When the problem concerns the general relations of the Community and Switzerland it will be brought before the Joint Committee and settled at political level. However, the dispute might arise either within the Swiss Confederation or within the Community and in this case the dispute will come before the national courts, that is to say in Switzerland before the normal courts, progressing ultimately as far as the Federal Court. On the other side problems will be raised before the national courts and will come to the Court of Justice through requests for preliminary rulings as has already occurred with certain other agreements concluded by the Community. The question arose for the first time in connexion with the agreement of association with Greece in the Haegeman case. This was the first occasion on which a request for a preliminary ruling was submitted by a Belgian court in connexion with the agreement between the Community and Greece and the Court of Justice, in its judgment of 30 April 1974, stated its outlook in principle with regard to this problem. Did the Court of Justice have jurisdiction to deliver a preliminary ruling which on this occasion related not to the EEC Treaty but to an agreement concluded by the Community with a third country? The Court gave its views in this judgment in a number of succinct paragraphs, as follows: "The Athens Agreement" - that is, the agreement creating an association with Greece - "was concluded by the Council under Articles 228 and 238 of the Treaty ... and this agreement is therefore, in so far as

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1 - Translation of the unrevised transcript of the speech delivered in French by Mr Pescatore.

concerns the Community, an act of one of the institutions of the Community within the meaning of ... Article 177" (the article which governs requests for a preliminary ruling). Then comes the key sentence: "The provisions of the agreement, from the coming into force thereof, form an integral part of Community law". It is clear that the foregoing may be applied directly to the free-trade agreement. Following this case it may also be stated that the free-trade agreement between Switzerland and the Community forms an integral part of Community law whilst at the same time it also forms part of Swiss law. The Court then continues "within the framework of this [that is, Community] law, the Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of this agreement". This situation has recurred on many subsequent occasions. As was stated yesterday the Court has had occasion to apply and interpret the Yaoundé Agreement. Judgments of the Court are at present pending in two cases which are at the stage of deliberation: one of them concerns the application of the Lomé Agreement, the new version of which governs relations with African, Pacific and Caribbean countries, and another case which calls in question the trade agreement - the preferential agreement - concluded with Spain. You will see then that the outlines have been established for our topic.

The basic point of my speech then is that a comparison of the wording of the free-trade agreement and the EEC Treaty shows that they are agreements of the same type and that there exists a substantial kinship between all the key provisions of the free-trade agreement and those of the EEC Treaty. I should just like to recall the terms of some of the provisions which, although you are certainly well acquainted with them, are perhaps less familiar to my colleagues. Article 3 of the free-trade agreement states that "No new customs duty on imports shall be introduced in trade between the Community and Switzerland" and "Customs duties on imports shall be progressively abolished" in accordance with a time-table which, as you know, was completed on 1 July 1977.

In Article 6 it is stated that no new charge having an effect equivalent to a customs duty on imports shall be introduced in trade between the Community and Switzerland and that such charges shall be abolished upon the entry into force of the agreement.

Article 7 states that no customs duty on exports or charge having equivalent effect shall be introduced in trade between the Community and Switzerland and that all such duties shall be abolished not later than 1 January 1974.

Under Article 13 no new quantitative restrictions on imports or measures having equivalent effect are to be introduced in trade between the Community and Switzerland; quantitative restrictions on imports were abolished on 1 January 1973 and measures having an effect equivalent to quantitative restrictions were abolished on 1 January 1975.

In Article 18 it is stated that the Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party; this article further prohibits the repayment of internal taxation in excess of the amount of direct or indirect taxation imposed on them; it is a carbon copy of Article 95 of the EEC Treaty.

Article 20 repeats substantially Article 36 of the Treaty, for us a familiar provision: "The agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, law and order or public security ... or the protection of industrial and commercial property".

In Article 22 we meet another old friend, as it were. The Contracting Parties must refrain from any measure likely to jeopardize the fulfilment of the objectives of the agreement and must take any general or specific measures required to fulfil their obligations under the agreement - a provision which is very important at the present time in our own system; Article 85 of the EEC Treaty and Article 23 of the agreement are familiar to you in connexion with the rules on competition and they declare that the following are incompatible with the proper functioning of the agreement in so far as they may affect trade between the Community and Switzerland: agreements between undertakings, abuse of a dominant position and any public aid which distorts trade between Switzerland and the Community. As you will

thus appreciate, the free-trade agreement repeats a whole series of provisions which the Court of Justice has frequently had occasion to consider in matters arising within the Community. My intention is simply to give a survey of the possible disputes which might come before your courts under the free-trade agreement and to give you the benefit of such experience as we have derived from the application of the EEC Treaty, since I imagine that the identical or very similar clauses will raise for you the same kind of problems which the Court of Justice has encountered.

A first group of problems relates to the elimination of customs duties on imports or exports and of charges having an equivalent effect. As I have stated in my paper practically no problems within the Community have arisen from the elimination of customs duties properly so called and I should be surprised if it creates any problems in the relations between Switzerland and the Community as customs duties are so firmly outlined and so clearly eliminated that such elimination has not given rise to problems before the Court. On the other hand a constant stream of cases continues to come before the Court of Justice in connexion with the elimination of a whole series of fiscal levies which may be classified as charges having an effect equivalent to customs duties. Once customs duties properly so called had gone there were thrown into relief a whole substratum of individual items of taxation which also hampered freedom of trade but which had previously been masked, as it were, by the customs duties. The Court of Justice had to deal with all sorts of licence fees, charges imposed for administrative services, statistical duties, unloading charges and, very recently, charges for sanitary inspections, charges for phytosanitary inspections and indeed, in one particular case, a tax levied to be paid into a social fund; hence there was a very wide range of taxes which might be described as having an effect equivalent to customs duties. It was in a judgment delivered quite some time ago, on 14 December 1962, that the essential points were established and all recent case-law is ultimately no more than a variation on that basic theme. I should like to read you certain passages from that judgment of 14 December 1962. It concerns

proceedings instituted before the Court against the Kingdom of Belgium and the Grand Duchy of Luxembourg on the grounds of their failure to fulfil their obligations under the Treaty and is better known as the "gingerbread case" since it related to a licensing charge imposed by Belgium and Luxembourg to protect gingerbread during the very first phase of the liberalization of trade. This was how the Court reacted to these attempts to introduce new protective taxation:

"According to the terms of Article 9, the Community is based on a customs union founded on the prohibition of customs duties and of 'all charges having equivalent effect'. By Article 12 it is prohibited to introduce any 'new customs duties on imports .... or charges having equivalent effect' and to increase those already in force.

"The position of these articles towards the beginning of that part of the Treaty dealing with the 'Foundations of the Community' is sufficient to emphasize the essential nature of the prohibitions which they impose.

"The importance of these prohibitions is such that, in order to prevent their evasion by different customs or fiscal practices, the Treaty sought to forestall any possible breakdown in their application.

"This concern is taken so far as to forbid a State either to impose in any manner higher taxation on the products of other Member States than on its own or to impose on the products of those States any internal taxation of such a nature as to afford indirect 'protection' to its domestic products.

"It follows, then, from the clarity, certainty and unrestricted scope of Articles 9 and 12, from the general scheme of their provisions and of the Treaty as a whole, that the prohibition of new customs duties, linked with the principles of the free movement of products, constitutes an essential rule and that in consequence any exception, which moreover is to be narrowly interpreted, must be clearly stipulated.

"The concept of 'a charge having equivalent effect' to a customs duty, far from being an exception to the general rule prohibiting customs duties, is on the contrary necessarily complementary to it and enables that prohibition to be made effective.

"This expression, invariably linked to that of 'customs duties' is evidence of a general intention to prohibit not only measures which obviously take the form of the classic customs duty but also all those which, presented under other names or introduced by the indirect means of other procedures, would lead to the same discriminatory or protective results as customs duties."

The salient features were accordingly clearly indicated in this first case and the whole of the long series of judgments delivered by the Court of Justice in this field ultimately constitutes no more than variations on this basic theme. The Court of Justice had to cope

in particular with the following problem: some, indeed most, of the taxes classified as charges having an effect equivalent to customs duties consisted of very small amounts involving a very slight burden of taxation and it could not be maintained that they were of a protective nature. However, in deciding these cases the Court emphasized that charges having an effect equivalent to customs duties are prohibited not solely because of their protective nature, that is to say, because of the effect which they have on the price of imported goods, but because of the obstacle, both fiscal and administrative, which they create to the crossing of frontiers. The Common Market is required to operate like a domestic market and I think that this holds good also for relations between the Common Market and Switzerland. The very purpose of free trade is to establish the conditions of a domestic market between the Community, Switzerland and the other States participating in the European Free Trade Association.

A second problem which the Court has encountered in the same context is the elimination of taxes on exports. Such instances are more unusual since doubtless no State has an interest in taxing its own exports but nevertheless the Court has encountered the problem, for example in connexion with a tax imposed by Italy on the export of works of art.

The Member States must not tax the export of products which have a scarcity value to them. Whether works of art or for example precious metals or diamonds are concerned trade and exports must not be impeded. This is clearly stated in the case-law of the Court of Justice.

In this connexion I should like to recount a recent decision which is of considerable interest: you will find it noted on Page 4 near the top. This is the judgment of 26 February 1975 in the Cadsky case. This case related to quality controls on the export of products, in this instance, fruit and vegetables originating in Italy and, whilst the Court recognized that quality controls on exports are an

excellent thing, they must not be made the occasion for the levying of a charge since this would constitute a real obstacle to the free movement of goods. In this judgment it is stated that in pursuance of Article 16, Member States are to abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest and that in laying down provisions for their abolition the Treaty does not distinguish between the purposes for which duties and charges were introduced or the uses to which the revenue obtained therefrom is put: the justification for this prohibition is based on the fact that any pecuniary charge - however small - imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods, which is aggravated by the resulting administrative formalities. Once again, the accent is placed firmly upon the obstacle created.

Then a second group of cases concerns the rule that taxation shall not be discriminatory; that is the provision which you will find in the free-trade agreement under Article 18 and which is the counterpart of Article 95 of the EEC Treaty: this group of cases is certainly not amongst the easiest which the Court has encountered. First the Court experienced a certain difficulty in distinguishing between charges having an effect equivalent to customs duties and domestic taxation applied in a discriminatory manner, since the fiscal effect is the same in each case. Nevertheless this distinction must be drawn very precisely since the systems are different. Charges having an effect equivalent to customs duties are to be eliminated entirely and are prohibited. Whilst internal taxation is in itself lawful and the free-trade agreement does not affect the sovereign power of the Swiss State to control its system of internal taxation, this system must be applied without discrimination against imported products so that, in this case, the taxation in itself remains intact; it is merely necessary to eliminate the discriminatory effort of such taxation. That is why it is necessary to draw a clear distinction between the two categories.

What kinds of charges have been considered by the Court in dealing with such domestic taxation? The Court has had to analyse a wide variety of tax systems such as that of the turnover tax in conjunction with export refunds which, I am happy to say, has now been superseded. In the course of 1968 in particular the Court dealt with a whole series of cases in which it had to analyse the effect of this tax system. The Court was required to consider, for example, a charge imposed in Belgium on the sale of wood which in fact adversely affected imported wood. Very recently the Court had to analyse in detail the complicated system of taxation on spirits in Germany. There is a State monopoly of spirits in Germany and the Court had to consider minutely every detail of its operation. Likewise the Court has had to consider the system of taxation on the production and importation of paper and cardboard in Italy. This gives you some examples of the problems with which the Court of Justice has had to deal.

Then there is the problem of the elimination of quantitative restrictions and of measures having an equivalent effect. The matter of quantitative restrictions properly so called has been simple because they are clearly marked and identified. In this connexion there is only indeed one passage, albeit telling, in the judgment of 15 December 1971 in the International Fruit Company case in which the Court was asked whether a so-called "all licences granted" system, that is a system which requires licences for certain imports although the administration grants a licence to all applicants. The question was raised whether such a system, despite its liberality, is compatible with the Treaty. The licence is granted quite simply on request. This is what the Court had to say on this point (it is in connexion with a request for a preliminary ruling submitted from the Netherlands):

"The question put refers both to the system of quantitative restrictions on intra-Community trade and the system of such restrictions on trade with third countries.

"It is however clear from the scheme of the Treaty that those two systems must be distinguished.

"Under ... the Treaty quantitative restrictions and measures having equivalent effect are prohibited between Member States both with regard to imports and exports.

"Consequently, apart from the exceptions for which provision is made by Community law itself those provisions preclude the application to intra-Community trade of a national provision which requires, even purely as a formality, import or export licences or any other similar procedure".

Thus within the Community the basic principle is that even though such restrictions are purely formal or nominal they must be eliminated. On the other hand the Court states " ... in trade with third countries the application of quantitative restrictions and of measures having equivalent effect forms part of the common commercial policy under Article 113 of the Treaty", which governs relations with third countries. Quantitative restrictions remain, if I may put it thus, a legitimate weapon.

I think that it is the former aspect of the case which is of interest to you as Switzerland is no longer a third country in relation to the Community, since we have established a system of free trade with it, and indeed I think that in relations with Switzerland the principle applicable is that of the complete elimination of all quantitative restrictions.

There is a certain number of precedents concerning the application of this principle of the elimination of all quantitative restrictions. From those cases I should like to mention only one which is of interest to you in view of its subject-matter. This is the judgment in the very recent Bouhelier case of 3 February 1977 relating to the export of watches and it thus affects the watch and clock industry which is of vital concern to you.

Once again this is a request for a preliminary ruling, submitted by the Tribunal Correctionnel, Besançon, and Besançon, as you are well aware, is one of the centres of the watch and clock industry in the Community. The case was referred to the Court of Justice in connexion with a somewhat curious system, if I may put it thus, a quality control of exports established by the French State and linked with the issue of licences; export licences were granted only to manufacturers of watches and clocks who conformed to certain quality standards; the question raised was whether this system was compatible with the Treaty. The Court ruled:

"However desirable may be the introduction of a policy on quality by a Member State, such policy can only be developed within the Community by means which are in accordance with the fundamental principles of the Treaty".

The Court continued its judgment by stating that the Treaty prohibits all quantitative restrictions and measures having equivalent effect and the French provision, which makes the grant of an export licence conditional on the issue of a standards certificate, is incompatible with the provisions of the Treaty. "Such measures are prohibited, regardless of the purpose for which they have been introduced."

In other words the Court of Justice said to the Member State in question through the national court: "By all means maintain a policy of quality control: you are free to do so provided it is effected by means which are lawful under the Treaty".

It is interesting then to consider which domestic provisions are classified as measures having an effect equivalent to quantitative restrictions. Once again we encounter this feature, the existence of which I have already noted in connexion with customs duties, namely that not many disputes have arisen over quantitative restrictions which are in substance clearly delineated as such. However an increasing number of problems is coming before the Court of Justice in connexion with establishing what is to be understood by those celebrated measures having an effect equivalent to a quantitative restriction. They are infinitely more difficult to identify than for example taxation having an effect equivalent to customs duties. There is already a good deal of case-law on this topic. I have selected two judgments which seem to me particularly enlightening: one is the judgment of 11 July 1974 in the Dassonville case concerning the protection of designations of origin. This case concerned a well-known product, Scotch whisky. It appeared that the legislation of one of the Member States, Belgium, conferred a preference on persons importing the product directly and favoured them as against persons importing a product which had already been put into free circulation in another Member State. The Court of Justice ruled that this device was incompatible with the Common Market.

The second and more recent action is the judgment of 26 February 1976 in the Tasca case from which I should just like to read you a passage which I consider relevant. This judgment concerned a problem which is also very much with us today namely the intervention of Member States in the formation of prices. We live in a period of inflation and control of prices is clearly an essential factor in all our national economies. This case concerned the fixing of maximum prices for sugar which were determined, of course by the intervention of the Italian State, at such an unusually low level in Italy that no importer of sugar from other Member States had any opportunity of competing. In this connexion the Court stated:

"Although a maximum price applicable without distinction to domestic and imported products does not in itself constitute a measure having an effect eqiivalent to a quantitative restriction, it may have such an effect, however, where it is fixed at a level such that the sale of imported products becomes, if not impossible, more difficult than that of domestic products ... especially when it is fixed at such a low level that ... dealers wishing to import the product in question into the Member State concerned can do so only at a loss".

In this connexion I now come to the scope of the reservations in Article 36 which also has its exact counterpart in the free-trade agreement (this is Article 20 of the latter - reservations concerning "law and order or public security, the protection of ... health of humans or ... of industrial and commercial property"). I refer in my paper to a judgment which seems to me to provide a striking illustration of the foregoing, the judgment of 8 July 1975 in the Rewe case concerning phytosanitary measures carried out by the Federal Republic of Germany as a measure against a pest, San Jose Scale, which is extremely dangerous for fruit growing. In this case it appeared that, whilst the Federal Republic of Germany adopted very conscientious measures against the introduction of the San Jose Scale from other Member States it applied a more liberal policy with regard to domestic products. It thus appears that, although domestic products, even when infected by scale, are freely marketed in Germany whilst the measures are applied strictly to imports from other Member States. In this case the Court of Justice found that although a Member State always remains entitled to combat dangerous pests it must apply the same stringency to its own domestic products as to imported products. If the same criterion is not applied to both types of product this will amount to a measure having an effect equivalent to a quantitative restriction.

There is another problem which has already been touched on in the discussion yesterday and which is likely to be of interest to you, and I can imagine that it may one day arise in the relations between Switzerland and the Community: the protection of industrial and

commercial property - that is, patents, trade-marks and copyrights.

The Court of Justice has already had to deal with these problems in a number of cases and for a rather long period uncertainty prevailed in the case-law of the Court and lively debate occurred in certain quarters in the Community following certain judgments of the Court; however, on 22 June 1976 the Court of Justice delivered its judgment in the case of Terrapin v Terranova which I think terminated this debate since it codifies as it were the Court's attitude to this question. The facts were as follows: Terrapin is an English undertaking importing into the Community prefabricated houses and parts for constructing prefabricated houses. Terranova, which is a German undertaking producing similar goods and operating in the same trade, raised an objection, on the basis of a trade-mark well established in Germany, to the import of Terrapin's products. In Germany the case reached the Bundesgerichtshof which referred it to the Court of Justice as a kind of test case and the Court, for its part, was glad to receive the case affording as it did an opportunity to provide clarification of the matter, let us hope, once and for all.

In its judgment the Court of Justice first of all recapitulated to some degree its previous judgments recalling the scope of Article 36 of the Treaty, that is to say the counterpart of Article 20 of the free-trade agreement, and pointing out that whilst the rules of the Common Market do not affect the existence of rights recognized by the legislation of Member States in matters of industrial and commercial property the exercise of those rights may nevertheless be restricted by the provisions in the Treaty concerning the free movement of goods.

We come now to the Court's outlook on the matter. First of all it repeated what it had said in previous cases:

"It follows from the above that the proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the importation of a product" - this is the first hypothesis - "which has been lawfully marketed in another Member State by the proprietor himself or with his consent". (If I may consider the matter in the context of the relations between Switzerland and the Community: I consider that henceforth, if a product, even covered by a trade-mark, patent or copyright, has been lawfully marketed in Switzerland it has also been put on the market with regard to the Community, and I think that the reverse also holds good: if a product has lawfully been distributed in the Common Market it must be freely accepted in Switzerland.) The Court continued - and this is the second hypothesis -: "It is the same when the right relied on is the result of the subdivision, either by voluntary act or as a result of public constraint, of a trade-mark right which originally belonged to one and the same proprietor".

To apply this case to relations between Switzerland and the Community I accordingly think that, even if a right had been subdivided by the proprietor himself into one part for Switzerland and one for the Common Market or certain Member States, such subdivision would not prevail against the provisions on the free movement of goods between Switzerland and the Community.

I should like to emphasize in passing that the Court referred to "subdivision, either by voluntary act or as a result of public constraint", and you will note how significant this second aspect is at present when there is again talk of nationalization in the Community. It is of extreme importance at this time.

Then the Court sets out a third hypothesis:

"Even where the rights in question belong to different proprietors the protection given to industrial and commercial property by national law may not be relied on when the exercise of those rights is the purpose, the means or the result of an agreement prohibited by the Treaty".

Of course it would be unacceptable for the law relating to patents, trade-marks and copyrights to be applied as instruments of an unlawful agreement.

The Court deduced a clear solution from the foregoing for the Terrapin v Terranova case since in those proceedings it appeared that those marks had been acquired by different proprietors and accordingly that Terranova's objections to the importation of Terrapin's products might properly be upheld if there were an actual risk of confusion, which latter point must of course be appraised by the German courts.

So much for the problem of industrial property rights. I should like finally to broach the last of the topics set out in my plan: the rules on competition. At this point, as the British say, we get into hot water - into boiling water.

Naturally the Court of Justice has had to take cognizance of all aspects of competition law. In my paper I have singled out only one aspect which is of direct concern to you; this is what is quite improperly termed "the problem of the extra-territorial effect of rules on competition". In fact as you will immediately understand, the Court has applied in this sphere a principle of strict territoriality to Community legislation concerning the rules of competition. In matters which have already come fairly frequently before the Court of Justice the Court has very often encountered acts relating to competition - to put it more accurately of acts inimical to competition, of behaviour inimical to competition on the Common Market - which, however, had their origins outside the Community, by undertakings and companies with their head offices established outside the Community,

in particular American undertakings as in the Continental Can case, in the Istituto Chemioterapico case (this is in fact the Italian name for a subsidiary of an American pharmaceutical producer) and a case which is at present pending before the Court, the United Brands case (once again this concerns an American undertaking). There has also been a case before the Court of Justice which originated in Great Britain when the Community had not yet been enlarged and Great Britain was still a non-member country (this is the judgment of 14 July 1972 in the ICI case) and then there are a number of cases originating in Switzerland: the Geigy and Sandoz cases, (the dyestuffs cartel, both judgments being delivered on 14 July 1972) and at present, as was stated in yesterday's talk, a Hoffman-La Roche case which relates to the market in valium and in which a Swiss undertaking is also involved.

I should like to conclude my speech by quoting a number of passages from the Geigy judgment of 14 July 1972. The Geigy undertaking has its head office in Basel, I think, and the Commission took action against it imposing a fine upon it; Geigy lodged an application against this and I think that Geigy took an option and by its behaviour at least recognized the jurisdiction of the Court. That is why in the course of the proceedings it did not dispute the jurisdiction of the Court but rather the powers of the Commission to impose that fine upon it: this is the aspect of the problem of the territorial scope of the competition rules which the Court of Justice had to settle. In the Geigy judgment the Court stated:

"The applicant [Geigy], whose registered office is outside the Community, argues that the Commission is not empowered to impose fines upon it by reason merely of the effects produced in the Common Market by actions which it is alleged to have taken outside the Community".

The Court replied to this as follows:

"Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market".

It appeared in fact that when Geigy had acted within the market not in its own name, for it was not the parent company which acted directly, but by a subsidiary established within the Common Market. The Court held that the applicant was able to ensure that its decision was implemented on the market by making use of its power to control its subsidiaries established in the Community (the decision concerned a rise in the price of dyestuffs considered incompatible with the rules on competition); the applicant nevertheless objected that this conduct was to be imputed to its subsidiaries and not to itself. The Court's response to this objection was as follows:

"The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.

"Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company".

It was not disputed that at the time the applicant's subsidiaries established in the Common Market were entirely under the control of the parent company established in Basel. And the Court concluded:

"In those circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition.

"It was in fact the applicant undertaking [that is, Geigy] which brought the concerted practice into being within the Common Market. The submission as to lack of jurisdiction raised by the applicant must therefore be declared to be unfounded".

Those were the circumstances in which the fine imposed upon the Swiss undertaking was confirmed.

That is accordingly all that I wished to say by way of providing a number of examples from the case-law of the Court of Justice which may perhaps one day concern the Swiss courts and the Federal Court when they encounter similar problems in applying the free-trade agreement.

Address by Mr D. Maltzahn*, Director at the Commission of the European Communities

Mr President,

Gentlemen,

I feel rather lost as a non-judge among judges, and a non-lawyer among lawyers. This is the first time that I have been before judges without being the subject of a charge, and I hope that consequently you will judge me leniently.

When I was a young official at the Commission - at the beginning of the sixties - negotiations were going on concerning neutrality, the possibility of an association or a close relationship - I think that was the expression used - with the Community while at the same time respecting neutral status. These were the negotiations which went on with Austria for some years. The legal expert of the Austrian delegation was called Kirchschläger. Today he is the President of the Austrian Republic and since that time I have had a great deal of respect for legal experts. The negotiations turned on the compatibility of Austrian neutrality with a close relationship with the Community, according to the Swiss model, as had been prescribed for the Austrians. The Austrians told us that if that neutrality according to the Swiss model was not respected, the Russians might once again invade Austria and I must say that, since that time, I have also had a great deal of respect for Swiss neutrality.

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*This is the uncorrected transcript of the oral address by Mr Maltzahn, who met his death in an accident a few days after this meeting.

Later, in the Kennedy round, when I was facing Ambassador Weitner, I found that this neutrality can perfectly well show its teeth and is not inherently defeatist or necessarily pacifist, and that when economic questions of immediate interest to Switzerland are at issue, for example watches, fondant or the Williams pear and more particularly the liquor derived from it, then Swiss interests could be defended vehemently and effectively. Perhaps we would have fought less vehemently against Switzerland if we had known that we were going to found a customs area. We could then have avoided bringing down one another's tariffs vis-à-vis third countries since in the end we did what no-one at that time could have expected.

As you know, the free-trade agreement was concluded on 22 April 1972 and it is certainly a red-letter day in the history of Europe. The EEC wished to show that the economic weight which it was acquiring by virtue of the accession of three new countries would not, for all that, be detrimental to other countries which were not members of the Community. Whilst subject to considerable internal tensions, the EEC has concluded a number of agreements and it can none the less be said today that those treaties are good treaties. They are model treaties for identical structures which might be envisaged in other parts of the world. Switzerland is the most important country of the European Free Trade Agreement (EFTA) as regards movement of goods. As regards exports from Switzerland, 98% of exports are covered by the Treaty, the other 2% going to agriculture. As to Community exports to Switzerland, only 92% are covered, since our agricultural exports to Switzerland are slightly higher than exports the other way, as regards agriculture.

As President Kutscher said, we have had a free-trade area since the month of July. There are a few remnants of certain sectors in which customs tariffs can still be applied. There are a few sensitive sectors: paper, non-ferrous metals. Those are products which are of little interest to Switzerland. Consequently, it can be said that in the industrial sector, 98% of Swiss exports are covered by the Treaty and have come into the free-trade area.

How can the concrete achievement of that agreement between the Community and Switzerland be evaluated? A short while ago we drew up

an assessment concerning the total abolition of customs duties. Both parties declared that they were perfectly happy about the way in which that agreement had been working. There has not been a single major difficulty in the course of the application and implementation of the agreement. With only a few exceptions, the safeguard clauses provided for in the treaties have hardly been applied at all. It is a strange thing, but the most important instances of safeguards in these treaties concern footwear. On the one hand, as far as we are concerned, Ireland is affected, and on the other side of EFTA, Sweden. And then there is another article. Stockings and ladies' tights - frivolous articles of course. Those are the few important instances where the safeguard clauses have been called into play. It may also be of interest to lawyers and judges to know that in relation to footwear Sweden stressed its strategic interest and its interest for the neutrality of Sweden; this is perhaps because certain inferences may be drawn from it as to the importance of the footwear which is supplied to the army or as to the importance of the army itself.

It must be borne in mind that we are in an extremely bad economic situation, that we have been in it for three years, and that thanks to the existence of these agreements we have succeeded in developing our economic relations without necessarily lapsing into protectionism. These are not just words in the air. I am in a Directorate General which has a "hot line" direct to industry and I am well aware of the extent of the protectionist pressures from industrial circles. We are beseiged with such requests, but thanks to the binding force of legal commitments we have always succeeded in resisting such temptations. Owing to the legal ties with the EFTA countries, it has also been possible to avoid more serious and more extensive damage affecting all the industrialized countries.

We are once again faced with a situation in which that treaty must assert itself and moreover vindicate itself. This is in the textile sector. You are aware that in the textile sector we are negotiating a new multi-fibre agreement with low-price countries, and there was a very great pressure from our producers of textiles for us to take independent protective measures and to apply them against all those who deliver textile products to us. However owing to the binding force of those legal commitments, we have been able to resist those pressures and in the final result the negotiations operate only in respect of the countries of Latin America or of Asia, of the Far East, but not in respect of the highly industrialized countries - and thus only as regards low-price countries in those distant areas.

Decisions relating to that agreement are taken by a joint committee procedure, as you know. And I believe that the joint committee has proved to be an excellent instrument, even though at times it is very slow and complex. The unmanageableness of that instrument is due to the fact that there is a whole series of joint committees. There is not just one joint committee. There are several, with each of the States. On the side of the Community, nine Member States must first of all meet and work out a common attitude together before offering their partners anything definite, before even being able to answer their partners. Sometimes it is a question of trying to square the circle. With nine members, we need much more time to prepare the joint committees than to take a definitive decision with our partners. That instrument is adequate; it suits the type of structures that we have at present.

However there is another case: the agreement with Greece, which was signed in the sixties and which goes much further than the free-trade agreement with Switzerland and other EFTA countries. It has proved that in this instance, where it is a question of association, such a structure does not make it possible to go much beyond purely commercial questions which are dealt with in detail in the agreements. I am myself one of the "accoucheurs" of the Athens agreement and I am still reproached for it today. When that agreement was in force and had not yet been frozen on account of events in Athens, we found that it had not been possible to take any decision in the area of, say, economic union, aids, competition rules, or the attempt to discourage

monopolies. It had not been possible to reach any agreement with Greece on any such measure in a body which can take decisions only on a unanimous vote and in which all nine members of the Community must first of all agree between themselves. There is a framework, but the framework remained empty. And it will not be possible for anything going beyond mere control of trade between the EEC and Greece to be really settled until Greece joins the Community.

Those remarks were a parenthesis which I hasten to close. And now, some remarks on the concrete results of the agreement between Switzerland and the Community. Both parties have expressed their satisfaction in this connexion. None the less, there is always a qualification to be made. It is necessary to examine the figures for the trend of trade between Switzerland and the Community. Between 1973 and 1976, Community imports from Switzerland increased by 48%. That is a remarkable figure, but total imports from third countries, non-Member States, increased by 72%. And consequently, Switzerland fell behind. The same is true in the opposite direction. For exports to Switzerland, there was an increase of 29% over the four years in question, whereas at the same time the increase in our general exports to third countries was of the order of 59%. From the point of view of Switzerland, the development of imports and exports with the Community corresponds to the development of exports and imports with all other countries. Consequently, the trend is no more favourable in this case either. And at times one wonders why the rates of increase within this free-trade structure have been so much lower than with other non-member countries? There are two important reasons for this. The first is that we were already so closely linked one to another that basically we had achieved the desired objective. We had reachod the limit. Int erdependence, division of work, were already in a sense optimal. The second reason is the following: our customs tariffs certainly do not have a terrifying effect, and this is undoubtedly true of Switzerland. The Swiss customs tariff consists of specific tariffs, that is so many francs per 100 kg of imported goods. Inflation has eroded that customs protection to such an extent that one ends up with customs tariffs which average something in the order of 2 to 3%. For the Community, the figure is 7 to 7.5%. Consequently, it can be seen that all these figures are in no wise phenomenal. It

is understandable that the abolition of those duties did not have a remarkable effect.

In respect of its trade, Switzerland benefited more from the fact of the implementation of the Common Customs Tariff than from the establishment of a free-trade agreement, because certain Community markets which had previously been in a sense prohibited to the outside, dropped to a point at which Switzerland could enter them.

What concrete achievements are to be observed in the collaboration between Switzerland and the Community? The corollary of the agreement related in particular to watches. It is an agreement which moreover had already been the subject of negotiations during the Kennedy round, and the subject of a supplementary agreement. On 1 January, we shall be celebrating its jubilee: 10 years. And moreover it is an agreement which has worked very well. In the beginning, it was sought to abolish on the Swiss side the loyalty bonus, that is, a non-tariff restriction. Swiss watch manufacturers who dared to buy watch parts outside the Community [sic] could not count on a loyalty bonus which they received when they bought in Switzerland. That was a restriction which discouraged watch manufacturers from buying watch parts outside Switzerland.

There was also a reduction in duties which was subsequently overtaken by the establishment of a free-trade agreement. However, the agreement on watches was actually fulfilled by the partners much better than we thought. We reach agreement, in particular at GATT, as regards customs duties. We discuss questions of competition, in particular competition from Asian countries or East European countries and matters concerning infringement of trade-marks. Some time ago we took a step which met with success, namely when the United States wished to change their nomenclatures for watches and appreciably increase duties on certain types of watches from Switzerland and the Community. As I have

said, we had a measure of success. The Americans did not pursue that course. We have a system of general supervision for non-tariff restrictions in the watch sector.

All this is extremely satisfying and interesting. What is even more interesting is that at the beginning of this agreement our watch industry was more or less diametrically opposed to the interests of Swiss watch manufacturers. At the present time, we have set up a committee relating to watch interests in general, and we discuss together all questions concerning watches. That is an extremely positive effect and I very well remember that when negotiations were begun, the watch industry "took to the barricades". There was also talk about certain Swiss case-law. It seems that there was a case in Switzerland in which a watch manufacturer had paid for certain contraband in East European countries. A competitor had alerted the customs and the jeeps in which the watches had been hidden inside the fuel tanks were stopped. The manufacturer brought an action against the person who had informed against him, and the informer was actually found guilty and punished. It seems to us that that is a very far-reaching piece of case-law. But perhaps the members of the Court might give us their opinion on that case? That then is the situation as regards watches.

Then there is a whole series of other sectors in which collaboration has been established. I had listed them in my little document. In particular this concerns processing traffic - an extremely important matter - but also the legal sector. Switzerland and Austria are in a sense on the transport route between Member States and the Member States have established a system whereby there is a certain procedure at the points of departure and another at the point of arrival. And it has been necessary to work out a transit system which is not too onerous. Switzerland and Austria have virtually accepted that legislation, not only the legislation, but also everything which goes with it.

It is interesting from the institutional point of view, as we have had to accept that experts should deal with the question of the alteration of the Community transit system. There is a joint working group in which there are both Swiss and Austrian experts discussing these matters with us.

De facto, it is one of the few areas in which the Swiss and the Austrians are completely in agreement with the Community experts in finding the changes required in a particular piece of legislation. Doubtless they argue, but in the end they always reach agreement. That is something very special. Of course it was not provided for by the treaties, but it shows the way in which things can evolve pragmatically. Moreover, you are perhaps aware that since 1956 there has been an agreement between Switzerland and the ECSC, concerning freight in particular. In this way breaking bulk at the frontier can be to some extent avoided; and it is one of the few cases in which the Swiss railways grant discounts, and goods moving for example between Italy and France or Italy and Germany can be transported and calculated at prices which take those discounts into account in a continuous charge.

There is also the problem of outward processing. This concerns processing relating to the printing of textiles from the Community sent to Switzerland for printing and processing and then brought back into the Community. This used to entail certain customs advantages, but there are no longer any customs duties between Switzerland and the Community. Consequently, one might have thought that the problem would no longer arise. However that is not the case. After 1 July, it proved that the fabrics processed in Switzerland did not originate in the Community but outside it. Consequently, they are not affected by the EFTA rules on origin and there is some advantage in arranging for this processing traffic to continue. Moreover this has been going on since the Kennedy round, since the sixties, without great difficulties.

A relatively new area in which we are having very active collaboration with Switzerland is the area of scientific research and technology. The COST (Conference on European Co-operation in the Field of Scientific and Technical Research) working party has been opened to third countries, and the Swiss are taking a particularly active part. At present in the COST working party there are some ten projects for collaboration in the field of science and technology, and Switzerland is participating in eight of these projects: informatics, telecommunications, research on aerials via satellites, environment, toxic substances, microbiology, water purification, medium-term weather-forecasting, the Blackpool centre for which is partially financed by Switzerland. Research is going on into means of communication, electronic aids for traffic organization, the organization of traffic in particularly congested centres, and so on.

Apart from the environmental matters which are dealt with in COST, there is also an exchange of correspondence between Switzerland and the Community regarding the environment. It is interesting. Once a year, an exchange of information takes place between the Swiss experts and the Community experts in the field of environmental research. There is an attempt to find ways and means of making it possible to communicate to one another the results of research in the environmental field, both from Switzerland to the Community and from the Community to Switzerland. Obviously the result of this is that a duplication which existed before no longer exists. The same effort and the same research is not done in parallel on both sides. I think that in this area also one can say that collaboration has had an excellent result.

There are three areas which are still under negotiation.

The first particularly concerns the judges here in Luxembourg. Our judges in Luxembourg have torpedoed the barges which sail the Rhine. For ten years negotiations have been going on with Switzerland and the other states bordering on the Rhine concerning the control of navigating capacities on the Rhine. Certain existing capacities had to be laid up. Of course that laying up had to be paid for. Long-standing historical factors, dating back to the Congress of Vienna, are concerned, and these have given rise to the situation which is now under negotiation. However it also directly concerns Community law. On 9 July, agreement was reached in this connexion. The agreement was initialled as regards the equalization fund for the laying up of certain transport capacities on the Rhine. The place where it was to have its seat had also been fixed. But the Court expressed a reservation, so that we shall very likely be obliged to resume negotiations, if not at the beginning, none the less perhaps half-way through. Perhaps Judge Pescatore might state in part the reasons which led the Court in Luxembourg to call in question again matters which had been settled in those negotiations.

The second area which is under negotiation concerns insurance matters, direct insurance. What we are trying to do is to ensure that subsidiaries of Swiss insurers are not placed at a disadvantage in particular by the provisions in force within the Community, that is to say, Community law concerning minimum reserves and guarantees for those insurers. In addition there are the guarantees held by Swiss insurers in Switzerland which may be regarded as Community guarantees. The guarantees of insurers from Community countries may also be relied on in Switzerland. A future developments clause was provided for, in the sense that it should be declared, but the Member States did not wish to take that course. That is a question of approximation of laws within the Community. We think it right to develop Community law first of all within the Community and only then to negotiate with third countries in order to see how far bilateral arrangements can be reached. It does not necessarily have to be by means of a future developments clause to be written into our commercial agreement.

As you are probably aware, Switzerland is also taking part in the very difficult "Jet" project on controlled thermonuclear fusion, agreement on which has finally been reached in the Council of Ministers. That project is under negotiation. We have already concluded a contract with Sweden, and very likely we shall soon be able to do so with Switzerland.

As I have said, since 1 July there have no longer been any customs duties, but there is a whole series of new factors. In the joint committee it can be quite clearly seen today that stress is placed more on non-tariff restrictions on trade; in particular stress is placed on the questions of transport, environment and approximation of laws. As far as restrictions on trade are concerned - for example the labelling of products - it is a matter which closely interests Switzerland. However, the question of enlargement is also a very important topic of discussion.

If and when Portugal joins, it will not pose any very serious problems for Switzerland, because Portugal belongs to EFTA. But Greece and Spain are major problems for Switzerland as well. This led to the EFTA conference which took place in Vienna offering to conclude an EFTA agreement with Spain corresponding somewhat to the agreement which the EEC has with Spain. However we have not altogether abolished our customs duties vis-à-vis Spain and Spain has done so even less than we have. However at all events it seems that the first contacts in this direction have not been very promising. Spain is a difficult partner. We, for our part, have also experienced this. Greece is a very difficult case. When Greece joins the Community, practically overnight all tariff barriers between Greece and Switzerland would fall, unless something is done. Because we already have so to speak a free-trade area with Greece. We no longer apply any customs duties at all in regard to Greece. The Greeks have abolished part of their customs duties: the others will be abolished between now and 1984, within the framework of the agreement at present in force. This presents

Switzerland with a problem, and it is now attempting to establish contact with Greece in order to negotiate an interim agreement. It is open to doubt whether the Greeks will be willing to do so.

These are the basic factors, the changes occurring outside the agreement concluded with Switzerland, and every day in the framework of the joint committee we see Switzerland urging that still further areas apart from loans should be included in that agreement, and that consultations should be arranged as regards certain things which are coming into being within the Community. This is what the Austrians had called "creative participation", and clearly it raises an institutional problem. It is quite unthinkable for a non-Member State of the EEC to participate in certain common policies and not in others ... a sort of Europe "à la carte". If such a suggestion of selective participation were accepted, what would then become of neutrality? Switzerland does not join the Community because it wishes to remain neutral. Austria must remain neutral. It is a question of sovereignty. In the context of the total maintenance of sovereignty, one cannot allow oneself to be placed in a minority within the Community or to be troubled by Community institutions. And if this argument were to be extended ad absurdum then Switzerland would have to claim a right of veto within the Community, which of course is not in accordance with the institutional conception of the Community. That would mean that Switzerland for example would have more extensive rights than the Member States do. Therefore in certain cases there remains independent harmonization - an independent harmonization of policies without having a say at the meetings when the common policy is decided upon in the framework of the Community. Although in some ways such harmonization seems advantageous to Switzerland; it entails another danger for Switzerland, namely that of being forced into the position of a satellite, in which the Community might impose certain things on Switzerland by threatening to bring certain pressures to bear on it, which has already been the case for certain things falling outside the framework of trade. For example, as regards questions of competition, there are certain rules in the agreement between Switzerland and the Community similar

to those existing in the Community on competition which are so to speak projected on to Switzerland. If Switzerland did not accept the application of that rule, the Community might take retaliatory measures. It is a balance of terror! However that terror is perhaps also very evenly distributed between the two partners. All of this shows how difficult it is to go beyond the framework of external trade, since even preliminary consultation is difficult for us. How can we allow preliminary consultation regarding things which we are about to do inside the Community? It was not easy with six, and it is even less easy with nine, to reach decisions. Anyone who has taken part in a meeting of the Council of Ministers knows that it is virtually impossible to introduce a kind of preliminary consultation concerning things which are sometimes achieved only at the price of exhaustion in the middle of the night. If a consultation phase had to be interpolated, that edifice which is based on quite fragile foundations would collapse, because it would allow the Ministers to reflect further and to realize what they had accepted and the following day after a good night's sleep they would say, "Oh, thank goodness! We still have to have a consultation and that will give us an opportunity to back down".

These are obstacles, it is true, but it is not a misfortune, because I think that the successes of our agreement show that progress is made pragmatically without those legal rules and that collaboration does not necessarily depend on legal rules, although I hesitate somewhat to say so here before this audience.

INFORMATION ON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Complete list of publications giving information on the Court:

I - Information on current cases (for general use)

1. Hearings of the Court

The calendar of public hearings is drawn up each week. It is sometimes necessary to alter it subsequently; it is therefore only a guide. This calendar may be obtained free of charge on request from the Court Registry. In French.

2. Judgments and opinions of the Advocates General

Photocopies of these documents are sent to the parties and may be obtained on request by other interested persons, after they have been read and distributed at the public hearing. Free of charge. Requests for judgments should be made to the Registry. Opinions of the Advocates-General may be obtained from the Information Office. Since 1972 the London Times has carried articles under the heading "European Law Reports" covering the more important cases in which the Court has given judgment.

II - Technical information and documentation

A - Publications of the Court of Justice of the European Communities

1. Reports of Cases Before the Court

The Reports of Cases Before the Court are the only authentic source for citations of judgments of the Court of Justice.

The volumes for the years 1954 to 1972 have been published in Dutch, French, German and Italian; the volumes for 1973 onwards have also been published in English and in Danish. An English edition of the volumes for 1954-72 will be completed by the end of 1978. The Danish edition of the volumes for 1954-72 will be available by the end of 1977.

2. Legal publications on European integration (Bibliography)

New edition in 1966 and five supplements, the last of which appeared in December 1974.

3. Bibliography of European case law

Concerning judicial decisions relating to the Treaties establishing the European Communities. 1965 edition with supplements.

4. Selected instruments relating to the organization, jurisdiction and procedure of the Court

1975 edition.

These publications are on sale at, and may be ordered from:

OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES,
Rue du Commerce, Case Postale 1003, Luxembourg.

and from the following addresses:

Belgium:	Ets. Emile Bruylant, Rue de la Régence 67, 1000 BRUSSELS
Denmark:	J. H. Schultz' Boghandel, Møndergade 19, 1116 COPENHAGEN K
France:	Editions A. Pedone, 13, Rue Soufflot, 75005 PARIS
Germany:	Carl Heymann's Verlag, Gereonstrasse 18-32, 5000 KOLN 1
Ireland:	Messrs. Greene & Co., Booksellers, 16, Clare Street, DUBLIN 2
Italy:	Casa Editrice Dott. A. Milani, Via Jappelli 5, 35100 PADUA M. 64194
Luxembourg:	Office for Official Publications of the European Communities, Case Postale 1003, LUXEMBOURG
Netherlands:	NV Martinus Nijhoff, Lange Voorhout 9, 's GRAVENHAGE
United Kingdom:	Sweet & Maxwell, Spon (Booksellers) Limited, North Way, ANDOVER, HANTS, SP10 5BE

Other Countries: Office for Official Publications of the European Communities,
Case Postale 1003,
LUXEMBOURG

B - Publications issued by the Information Office of the Court of Justice

1. Proceedings of the Court of Justice of the European Communities

Weekly summary of the proceedings of the Court published in the six official languages of the Community. Free of charge. Available from the Information Office; please indicate language required.

2. Information on the Court of Justice

Quarterly bulletin containing the heading and a short summary of the more important cases brought before the Court of Justice and before national courts.

3. Annual synopsis of the work of the Court of Justice

Annual booklet containing a summary of the work of the Court of Justice covering both cases decided and associated work (seminars for judges, visits, study groups, etc.).

4. General booklet of information on the Court of Justice

These three documents are published in the six official languages of the Community while the general booklet is also published in Spanish and Irish. They may be ordered from the information offices of the European Communities at the addresses given above. They may also be obtained from the Information Office of the Court of Justice, B.P. 1406, Luxembourg.

C - Compendium of case-law relating to the Treaties establishing the European Communities

Répertoire de la jurisprudence relative aux traités instituant les Communautés européennes

Europäische Rechtsprechung

Extracts from cases relating to the Treaties establishing the European Communities published in German and French. Extracts from national judgments are also published in the original language.

The German and French editions are available from:

Carl Heymann's Verlag,
Gereonstrasse 18-32,
D 5000 KÖLN 1,
Federal Republic of Germany.

As from 1973 an English edition has been added to the complete French and German editions. The first two volumes of the English series are on sale from:

ELSEVIER - North Holland -
Excerpta Medica,
P.O. Box 211,
AMSTERDAM,
Netherlands.

III - Court diary, visits

Sessions of the Court are held on Tuesdays, Wednesdays and Thursdays every week, except during the Court's vacations - that is, from 20 December to 6 January, the week preceding and the week following Easter, and from 15 July to 15 September. Please consult the full list of public holidays in Luxembourg set out below.

Visitors may attend public hearings of the Court or of the Chambers to the extent permitted by the seating capacity. No visitor may be present at cases heard in camera or during proceedings for the adoption of interim measures.

Half an hour before the beginning of public hearings a summary of the case or cases to be dealt with is available to visitors who have indicated their intention of attending the hearing.

* * *

Public holidays in Luxembourg

In addition to the Court's vacations mentioned above the Court of Justice is closed on the following days:

New Year's Day	1 January
Carnival Monday	variable
Easter Monday	variable
Ascension Day	variable
Whit Monday	variable
May Day	1 May
Luxembourg National Holiday	23 June
Assumption	15 August
"Schobermesse" Monday	Last Monday of August or first Monday of September
All Hallows' Day	1 November
All Souls' Day	2 November
Christmas Eve	24 December
Christmas Day	25 December
Boxing Day	26 December
New Year's Eve	31 December

* * *

IV - Summary of types of procedure before the Court of Justice

It will be remembered that under the Treaties a case may be brought before the Court of Justice either by a national court or tribunal with a view to determining the validity or interpretation of a provision of Community law, or directly by the Community institutions, Member States or private parties under the conditions laid down by the Treaties.

A - References for preliminary rulings

The national court or tribunal submits to the Court of Justice questions relating to the validity or interpretation of a provision of Community law by means of a formal judicial document (decision, judgment

or order) containing the wording of the question(s) which it wishes to refer to the Court of Justice. This document is sent by the Registry of the national court to the Registry of the Court of Justice, accompanied in appropriate cases by a file intended to inform the Court of Justice of the background and scope of the questions referred.

During a period of two months the Commission, the Member States and the parties to the national proceedings may submit observations or statements of case to the Court of Justice, after which they are summoned to a hearing at which they may submit oral observations, through their Agents in the case of the Commission and the Member States or through lawyers who are entitled to practise before a court of a Member State.

After the Advocate General has delivered his opinion, the judgment is given by the Court of Justice and transmitted to the national court through the Registries.

B - Direct actions

Actions are brought before the Court by an application addressed by a lawyer to the Registrar (B.P. 1406, Luxembourg), by registered post.

Any lawyer who is entitled to practise before a court of a Member State or a professor occupying a chair of law in a university of a Member State, where the law of such State authorizes him to plead before its own courts, is qualified to appear before the Court of Justice.

The application must contain:

The name and permanent residence of the applicant;
The name of the party against whom the application is made;
The subject-matter of the dispute and the grounds on which the application is based;
The form of order sought by the applicant;
The nature of any evidence offered;
An address for service in the place where the Court of Justice has its seat, with an indication of the name of a person who is authorized and has expressed willingness to accept service.

The application should also be accompanied by the following documents:

The decision the annulment of which is sought, or, in the case of proceedings against an implied decision, by documentary evidence of the date on which the request to the institution in question was lodged;

A certificate that the lawyer is entitled to practise before a court of a Member State;

Where an applicant is a legal person governed by private law, the instrument or instruments constituting and regulating it, and proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose.

The parties must choose an address for service in Luxembourg. In the case of the Governments of Member States, the address for service is normally that of their diplomatic representative accredited to the Government of the Grand Duchy. In the case of private parties (natural or legal persons) the address for service - which in fact is merely a "letter box" - may be that of a Luxembourg lawyer or any person enjoying their confidence.

The application is notified to the defendant by the Registry of the Court of Justice. It requires the submission of a statement of defence; them; these documents may be supplemented by a reply on the part of the applicant and finally a rejoinder on the part of the defendant.

The written procedure thus completed is followed by an oral hearing, at which the parties are represented by lawyers or agents (in the case of Community institutions or Member States)

After hearing the opinion of the Advocate General, the Court gives judgment. This is served on the parties by the Registry.

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