

In Case 56/65

Reference to the Court under [Article 267 TFEU] by the Cour d'Appel (First Chamber), Paris, for a preliminary ruling in the action pending before that court between

SOCIETE TECHNIQUE MINIERE

and

MASCHINENBAU ULM GMBH

on the interpretation of:

1. [Article 101(1) TFEU] and of certain regulations adopted in implementation thereof;
2. [Article 101(2) TFEU],

THE COURT

composed of: Ch. L. Hammes, President, L. Delvaux, President of Chamber, A. M. Donner, A. Trabucchi and R. Lecourt (Rapporteur), Judges,

Advocate-General: K. Roemer

Registrar: A. Van Ruyt

gives the following

JUDGMENT

Grounds of judgment

By a judgment of 7 July 1965, forwarded to the Court of Justice of the European [Union] on the following 19 November, the Cour d'Appel, Paris, (First Chamber) has duly referred to the [Union] Court under [Article 267 TFEU] certain questions relating to the

interpretation of [Article 101 TFEU].

The questions are worded as follows:

1. What interpretation should be given to [Article 101 (1) TFEU] and to the [Union] regulations adopted in implementation thereof with regard to agreements which have not been notified and which, whilst granting an "exclusive right of sale",
 - do not prohibit the concessionnaire from re-exporting to any other markets of the E[U] the goods which he has acquired from the grantor;
 - do not include an undertaking by the grantor to prohibit his concessionnaires in other countries of the Common Market from selling his products in the territory which is the primary responsibility of the concessionnaire with whom the agreement is made;
 - do not fetter the right of dealers and consumers in the country of the concessionnaires to obtain supplies through parallel imports from concessionnaires or suppliers in other countries of the Common Market;
 - require the concessionnaire to obtain the consent of the grantor before selling machines likely to compete with the goods with which the concession is concerned?
2. Does the expression "automatically void" in [Article 101(2) TFEU] mean that the whole of an agreement containing a clause prohibited by [Article 101 (1) TFEU] is void, or is it possible for the nullity to be limited to the prohibited clause alone?

The jurisdiction of the Court of Justice

Societe Technique Miniere, a party to the proceedings before the Cour d'Appel, Paris, objects that, whilst seemingly asking questions of interpretation, the Cour d'Appel is in fact asking questions of application which fall solely within the jurisdiction of national courts.

Under the terms of [Article 267 TFEU] the Court of Justice has jurisdiction to give preliminary rulings on the interpretation and the

validity of [Union] measures. The same article provides that any court or tribunal of a Member State may request the Court to give a ruling on such a question 'if it considers that a decision on the question is necessary to enable it to give judgment'. Therefore the Court cannot involve itself in assessing the reasons for which the national court or tribunal has considered this to be necessary. Although the Court has no jurisdiction to take cognizance of the application of the Treaty to a specific case, it may extract from the elements of the case those questions of interpretation or validity which alone fall within its jurisdiction. Moreover the need to reach a serviceable interpretation of the provisions at issue justifies the national court in setting out the legal context in which the requested interpretation is to be placed. The Court may, therefore, draw from the elements of law described by the Cour d'Appel, Paris, the data necessary for an understanding of the questions put and for the preparation of an appropriate answer.

The first question relating to the interpretation of [Article 101 (1) TFEU]

The Court is requested to interpret [Article 101(1) TFEU] with reference to 'agreements which have not been notified' and which, subject to certain conditions, have granted an 'exclusive right of sale'.

Failure to notify

In order to be prohibited as being incompatible with the Common Market under [Article 101(1) TFEU], an agreement between undertakings must fulfil certain conditions depending less on the legal nature of the agreement than on its effects on 'trade between Member States' and its effects on 'competition'.

Thus as [Article 101(1) TFEU] is based on an assessment of the effects of an agreement from two angles of economic evaluation, it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature. Therefore an agreement whereby a producer entrusts the sale of his products in a given area to a sole distributor cannot automatically fall under the prohibition in [Article 101(1) TFEU]. But such an agreement may contain the elements set out in that provision, by reason of a particular factual situation or of the

severity of the clauses protecting the exclusive dealership.

Since Regulations Nos 17/62 and 153/62 cannot have widened in any way the prohibitions imposed by [Article 101(1) TFEU], the fact that an agreement is not notified to the Commission, as provided for in those regulations, cannot make an agreement automatically void. It can only have an effect as regards exemption under [Article 101(3) TFEU] if it is later established that this agreement is one which falls within the prohibition laid down in [Article 101(1) TFEU]. The prohibition of such an agreement depends on one question alone, namely whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition as set out in [Article 101(1) TFEU].

The necessity for an agreement 'between undertakings'

In order to fall within this prohibition, an agreement must have been made between undertakings. [Article 101(1) TFEU] makes no distinction as to whether the parties are at the same level in the economy (so-called 'horizontal' agreements), or at different levels (so-called 'vertical' agreements). Therefore an agreement containing a clause 'granting an exclusive right of sale' may fulfil this condition.

The effects on trade between Member States

The agreement must also be one which 'may affect trade between Member States'.

This provision, clarified by the introductory words of [Article 101 TFEU] which refers to agreements in so far as they are 'incompatible with the Common Market', is directed to determining the field of application of the prohibition by laying down the condition that it may be assumed that there is a possibility that the realization of a single market between Member States might be impeded. It is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in [Union] law found in [Article 101 TFEU], whilst in the converse case it escapes those prohibitions. For this requirement to be fulfilled it

must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Therefore, in order to determine whether an agreement which contains a clause 'granting an exclusive right of sale' comes within the field of application of [Article 101 TFEU], it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.

The effects of the agreement on competition

Finally, for the agreement at issue to be caught by the prohibition contained in [Article 101(1) TFEU] it must have as its 'object or effect the prevention, restriction or distortion of competition within the Common Market'.

The fact that these are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in [Article 101(1) TFEU] must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.

The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking. Therefore, in order to decide whether an agreement containing a clause 'granting an exclusive right of sale' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to

take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionnaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.

The second question relating to the interpretation of [Article 101 (2) TFEU]

[Article 101 (2) TFEU] provides that 'Any agreements or decisions prohibited pursuant to this Article shall be automatically void'.

This provision, which is intended to ensure compliance with the Treaty, can only be interpreted with reference to its purpose in [Union] law, and it must be limited to this context. The automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside [Union] law.

Costs

The costs incurred by the Commission of the European [Union] which has submitted its observations to the Court are not recoverable, and as these proceedings are, in so far as the parties appearing before the Cour d'Appel, Paris, are concerned, a step in the action pending before that court, the decision as to costs is a matter for the Cour d'Appel.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the observations of the parties to the main action and of the Commission of the European [Union];

Upon hearing the opinion of the Advocate-General;
Having regard to [Articles 101 and 267 Treaty on the Functioning of the European Union];
Having regard to the Protocol on the Statute of the Court of Justice of the European [Union];
Having regard to the Rules of Procedure of the Court of Justice of the European [Union],

THE COURT

in answer to the questions referred to it by the Cour d'Appel, Paris, by judgment of that court dated 7 July 1965, hereby rules:

In reply to the first question

Agreements containing a clause 'granting an exclusive right of sale' do not of their very nature necessarily contain the elements incompatible with the Common Market as set out in [Article 101(1) TFEU].

Nevertheless an agreement of this type may, when considered on its own, contain these elements by reason of a particular factual situation or of particular clauses when the following conditions are met:

- 1. The agreement containing a clause 'granting an exclusive right of sale' must have been concluded between undertakings whatever their respective positions in the economic process may be.**
- 2. If the agreement is to come within the field of application of [Article 101 TFEU] it must be of such a nature that, on the basis of a set of objective factors of law or of fact and having regard to what can reasonably be foreseen, it is to be feared that it might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States.**

In this respect special attention should be given to whether the agreement is capable of partitioning the market in certain products between Member States.

3. The agreement must have as its object of effect the prevention, restriction or distortion of competition.

When the object of the exclusive dealing agreement is considered, this finding must result from all or some of the clauses of the agreement considered in themselves.

In the absence of these conditions' being met, the consequences of the agreement must then be examined and must justify the conclusion either that the agreement prevents or that it restricts or distorts competition to an appreciable extent.

In this respect special attention should be given to the severity of the clauses granting the exclusive dealership, the nature and quantity of the products covered by the agreement, the position of the grantor and of the concessionnaire on the market for the products in question and the number of parties to the agreement or, where applicable, to other agreements forming part of the same system.

In reply to the second question

The absolute nullity imposed by [Article 101 (2) TFEU] applies to all provisions of the contract which are incompatible with [Article 101 (1) TFEU].

The consequences of this nullity for all other aspects of the agreement are not the concern of [Union] law.

It is for the Cour d'Appel, Paris, to make an order as to the costs of the present proceedings.

Hammes

Delvaux

Donner

Trabucchi

Lecourt

Delivered in open court in Luxembourg on 30 June 1966.

A. Van Houtte
Registrar

Ch. L. Hammes
President