

Case T-66/89

Publishers Association

v

Commission of the European Communities

(Competition — Net price system for books — Statement of objections —
Infringement of Article 85(1) — Rejection of an application for exemption
under Article 85(3) — Indispensability of restrictions on competition)

Judgment of the Court of First Instance (Second Chamber), 9 July 1992 II - 1998

Summary of the Judgment

1. *Procedure — Scope of dispute — Dispute relating to the compatibility with the competition rules of the Treaty of a series of notified agreements — Declaration made during the proceedings to the effect that some of the agreements were being withdrawn — Scope of the dispute not altered where Commission not notified of such withdrawal or no evidence thereof produced*
2. *Competition — Agreements, decisions and concerted practices — Affecting of intra-Community trade — Criteria — Agreement covering the market of only one Member State (EEC Treaty, Art. 85(1))*
3. *Competition — Administrative procedure — Commission decision refusing an exemption — Objections which may be maintained (EEC Treaty, Art. 85(1) and (3); Council Regulation No 17, Arts 6 and 19(1); Commission Regulation No 99/63, Arts 2 and 4)*

4. *Competition — Administrative procedure — Notification of statement of objections — Necessary content*
5. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Conditions — Burden of proof — Cumulative nature of the exemption conditions (EEC Treaty, Art. 85(3))*
6. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Obligation for the undertaking to establish that its application is well founded — Powers of the Commission (EEC Treaty, Art. 85(3))*
7. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision to apply the competition rules (EEC Treaty, Art. 190)*
8. *Competition — Community rules — Application according to national judicial practices — Not permissible*
9. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Factors to be taken into consideration — Advantages of a net price system for books (EEC Treaty, Art. 85(3))*
10. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Net price system — Justification — Beneficial effects within a national market — Not a permissible justification (EEC Treaty, Art. 85(3))*

1. The scope of a dispute concerning the compatibility of a series of notified agreements with the competition rules of the Treaty is not altered by a statement made during the proceedings to the effect that some of those agreements are to be withdrawn if such withdrawal has not been notified to the Commission and no evidence of its actual implementation has been produced.

2. In order to be capable of affecting trade between the Member States, within the meaning of Article 85(1) of the Treaty, an agreement, a decision by associations of

undertakings or a concerted practice must make it possible to foresee with a sufficient degree of probability, on the basis of a set of objective elements of law or fact, that they may have an influence, direct or indirect, actual or potential, on patterns of trade between Member States in such a way that the attainment of the objectives of a single market between States might be hindered.

Anti-competitive conduct confined to the territory of a single Member State is capable of having repercussions on patterns of

trade and on competition in the common market.

3. It is clear from Articles 6 and 19(1) of Regulation No 17 read together with Articles 2 and 4 of Regulation No 99/63 that the Commission's obligation to inform the undertakings and associations of undertakings concerned of the objections which it raises against them and to uphold in its decisions only the objections in respect of which those undertakings or associations of undertakings have had the opportunity of expressing their views also exists where a decision is adopted refusing an exemption under Article 85(3) of the Treaty. Nevertheless, that obligation essentially concerns the stating of the reasons which led the Commission to apply Article 85(1), either by ordering that an infringement be brought to an end or imposing a fine upon the undertakings, or by refusing to give them negative clearance or the benefit of paragraph 3 of the same provision.
4. The statement of objections, the aim of which is to ensure that the rights of the defence are observed, must set forth clearly, even if succinctly, the essential facts upon which the Commission relies at that stage of the proceedings. However, the subsequent decision is not necessarily required to be a replica of the statement of objections.
5. Whenever an exemption under Article 85(3) of the Treaty is sought, it is incumbent on the applicant undertaking to prove that it satisfies each of the four conditions laid down therein. Owing to the cumulative nature of the conditions required, the Commission is entitled at any time before the definitive adoption of the decision to find that any one of the conditions is not satisfied.
6. Where an exemption is sought, under Article 85(3) of the Treaty, from the prohibition of restrictive arrangements, it is in the first place for the undertakings concerned to present to the Commission the evidence for establishing the economic justification for an exemption and, if the Commission has objections to raise, to submit alternatives to the Commission. Although it is true that the Commission may give the undertakings indications as regards any possible solutions, it is not legally required to do so, still less is it bound to accept proposals which it considers to be incompatible with the conditions laid down in Article 85(3).
7. Although under Article 190 of the Treaty the Commission is required to set out the elements of fact and law and the considerations which prompted it to adopt a decision pursuant to the rules on competition, that article does not require the Commission to discuss all matters of fact and of law which were raised by the parties during the administrative proceedings. The statement of the reasons on which a decision adversely affecting a person is based must allow the Community Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded.

8. National judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty.
9. Where the refusal to grant an exemption under Article 85(3) of the Treaty in respect of a net price system for books is not based on the fact that the condition regarding the promotion of technical or economic progress is not satisfied, it is not necessary for the court called upon to review the legality of that refusal to examine whether the benefits of such a system at the national level, on the assumption that their existence has been proved, also extend to intra-Community trade.
10. Under Article 85(3) of the Treaty, a price maintenance system that restricts competition within the common market cannot qualify for exemption on the ground that it must continue to operate in order to produce beneficial effects inside a national market. Such a situation would in itself contribute to the partitioning of the common market and would consequently tend to thwart the economic interpenetration sought by the Treaty.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
9 July 1992 *

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* Language of the case: English.