

JUDGMENT OF THE COURT

8 JUNE 1971¹

**Deutsche Grammophon Gesellschaft mbH
v Metro-SB-Großmärkte GmbH & Co. KG²
(Reference for a preliminary ruling
by the Hanseatisches Oberlandesgericht Hamburg)**

'Sound recordings'

Case 78/70

S u m m a r y

1. *Procedure — Preliminary questions — Jurisdiction of the Court of Justice — Limits*
(EEC Treaty, Article 117)
2. *Principles of the EEC — Member States — General obligation — Content*
(EEC Treaty, Article 5)
3. *Competition — Restrictive practices — Industrial and commercial property rights — Exercise — Effect — Partitioning of the market — Prohibition*
(EEC Treaty, Article 85 (1))
4. *Industrial and commercial property rights — Intellectual property rights — Applicability of Article 36 of the Treaty*
5. *Free movement of goods — Derogation justified for the protection of industrial property rights — Strict interpretation — Exercise of such rights — Application of the prohibitions of the Treaty*
(EEC Treaty, Article 36)
6. *Free movement of goods — Exclusive right of distribution protected by national legislation — Exercise — Effect — Partitioning of the market — Prohibition*
(EEC Treaty, Article 36)
7. *Competition — Exclusive right of distribution protected by national legislation — Dominant position of the holder on the market — Concept — Abuse of such a position — Difference between the controlled price and the price of the product reimported from another Member State — Evidence of an abuse*
(EEC Treaty, Article 86)

¹ — Language of the Case: German.

² — CMLR.

1. Under Article 177 the Court, when giving a preliminary ruling, is entitled only to pronounce on the interpretation of the Treaty and of acts of the institutions of the Community or on their validity but may not, on the basis of that article, give judgment on the interpretation of a provision of national law. It may however extract from the wording of the questions formulated by the national court those matters only which pertain to the interpretation of the Treaty, taking into account the facts communicated by the said court.
2. The second paragraph of Article 5 of the EEC Treaty lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme.
3. The exercise of an industrial property right falls under the prohibition set out in Article 85 (1) of the Treaty each time it manifests itself as the subject, the means or the result of an agreement which, by preventing imports from other Member States of products lawfully distributed there, has as its effect the partitioning of the market.
4. The provisions of Article 36 of the Treaty may be relevant to a right related to copyright, in the same way as to an industrial or commercial property right.
5. It is clear from Article 36 that, although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty.

Article 36 only admits derogations from the free movement of products in order to protect industrial and commercial property to the extent to which such derogations are justified for the purpose of safeguarding rights which constitute the specific matter of such property.

6. It is in conflict with the rules providing for the free movement of products within the common market for the holder of a legally recognized exclusive right of distribution to prohibit the sale on the national territory of products placed by him or with his consent on the market of another Member State on the ground that such distribution did not occur within the national territory. Such a prohibition, which could legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.
7. The holder of a legally recognized exclusive right of distribution does not occupy a dominant position within the meaning of Article 86 of the Treaty merely by exercising that right. It is necessary that the holder, alone or jointly with other undertakings in the same group, should have the power to impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence of any producers marketing similar products and to their position on the market.

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