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National Anti-Competitive Legislation and Community Law

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René Joliet

Abstract

This article examines multiple cases from the Court of Justice of the European Communities regarding national anti-competitive legislation and the need for the Court to gradually lay down rules of law.

NATIONAL ANTI-COMPETITIVE LEGISLATION AND COMMUNITY LAW†

*René Joliet**

INTRODUCTION

In *INNO v. ATAB*,¹ the Court of Justice of the European Communities (the "Court") established that Article 5 of the Treaty Establishing the European Economic Community (the "Treaty")² imposes an obligation on the Member States of the Community not to detract from the effectiveness of Article 85³ of the Treaty.⁴ It is only since 1984, however, that the Court has tackled the problem of national anti-competitive legislation directly. I must confess that for a variety of reasons I have always been fascinated by this problem. First, the need to safeguard competition is the most effective way of ensuring that traders serve the public interest while pursuing their own particular interests. Second, because of the absence of specific regulatory provisions, the Court is required to lay down rules of law gradually. As a professor, the possibility of observing this process is in itself passionately interesting. Finally, it is a field in which fruitful comparisons can be made with the laws of the United States.

Moreover, the subject also has given rise to valuable and vigorous discussion. I need only recall the detailed and carefully pondered study of my eminent former colleague, Judge Pierre Pescatore, and the response that it evoked from an adviser to the Commission, Giuliano Marenco.⁵

† A version of this Article will be published in 1988 *FORDHAM CORP. L. INST.* (B. Hawk ed. 1989). Copyright © Matthew Bender & Co., Inc., 1989.

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1. *INNO v. ATAB*, Case 13/77, 1977 E.C.R. 2115, Common Mkt. Rep. (CCH) ¶ 8442.

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 5, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 4 (official English version), 298 U.N.T.S. 11, 17 (unofficial English trans.) [hereinafter EEC Treaty].

3. *Id.* art. 85, at 32-33, 298 U.N.T.S. at 47.

4. *INNO*, 1977 E.C.R. at 2145, ¶ 33, Common Mkt. Rep. (CCH) ¶ 8442, at 7989.

5. See Pescatore, *Public and Private Aspects of European Community Competition Law*, 10 *FORDHAM INT'L L.J.* 373 (1987) [hereinafter Pescatore, *EEC Competition Law*];

The case law has since been enriched by several judgments in this area, which, like earlier judgments in this area, were given in proceedings concerning questions submitted for a preliminary ruling by national courts dealing with disputes in which a private trader, prosecuted by a public authority or sued by a competitor for infringing a national measure, argued in his defense that such a measure was incompatible with Articles 3(f),⁶ 5, and 85 when viewed in conjunction with one another.⁷ Although the Commission intervened in those proceedings in order to submit observations, it has yet to bring an action under Article 169 of the Treaty.⁸ In other words, the Commission, which has in recent years multiplied dramatically

Marengo, *Competition Between National Economies and Competition Between Businesses—a Response to Judge Pescatore*, 10 FORDHAM INT'L L.J. 420 (1987) [hereinafter Marengo, *Response*]; Pescatore, *European Community Competition Law—a Rejoinder by Judge Pescatore*, 10 FORDHAM INT'L L.J. 444 (1987). Other articles on the topic include: Galmot & Biancarelli, *Les Réglementations Nationales en Matière de Prix au Regard du Droit Communautaire*, 21 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 269 (1985); Marengo, *Effets des Règles Communautaires de Concurrence (Art. 85 et 86) sur l'Activité des Etats Membres*, in DISCRETIONARY POWERS OF THE MEMBER STATES IN THE FIELD OF ECONOMIC POLICIES AND THEIR LIMITS UNDER THE EEC TREATY 53 (J. Schwarze ed. 1988) [hereinafter Marengo, *Règles Communautaires*]; Marengo, *Government Action and Antitrust in the United States: What Lessons for Community Law?*, 1987/1 LEGAL ISSUES OF EUROPEAN INTEGRATION 1; Marengo, *Le Traité CEE Interdit-il aux Etats Membres de Restreindre la Concurrence?*, 1986 CAHIERS DE DROIT EUROPÉEN 285 [hereinafter Marengo, *Traité CEE*]; Pappalardo, *Der Europäische Gerichtshof auf der Suche nach einem Kriterium für die Anwendung der Wettbewerbsregeln auf Staatliche Massnahmen*, in EINE ORDNUNGSPOLITIK FÜR EUROPA: FESTSCHRIFT FÜR HANS VON DER GROEBEN 303 (1987); van der Esch, *The System of Undistorted Competition of Article 3(f) of the EEC Treaty and the Duty of Member States to Respect the Central Parameters Thereof*, 11 FORDHAM INT'L L.J. 409 (1988); van der Esch, *Der Stellenwert des Unverfälschten Wettbewerbs in der Rechtsprechung des Europäischen Gerichtshofes und der Verwaltungspraxis der Kommission*, 1988 WIRTSCHAFT UND WETTBEWERB 563; D. Waelbroeck, *Application des Règles de Concurrence du Traité de Rome à l'Autorité Publique*, 303 REVUE DU MARCHÉ COMMUN 25 (1987); M. Waelbroeck, *Les Rapports Entre les Règles sur la Libre Circulation des Marchandises et les Règles de Concurrence Applicables aux Entreprises dans la CEE*, in DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION 781 (F. Capotori ed. 1987) [hereinafter Waelbroeck, *Les Rapports Entre*]. Each of the judgments of the Court dealt with in this article have, in addition, been the subject of several commentaries that will not be referred to individually.

6. EEC Treaty, *supra* note 2, art. 3(f), 1973 Gr. Brit. T.S. No. 1, at 3-4, 298 U.N.T.S. at 16.

7. See, e.g., *BNIC v. Aubert*, Case 136/86, 1987 E.C.R. — (Judgment of December 3, 1987) (LEXIS, Eurcom library, Cases file); *Vereniging van Vlaamse Reisbureaus v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Case 311/85, 1987 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,499 [hereinafter *VVR*].

8. Article 169 provides:

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the mat-

the number of proceedings it has instituted against Member States for failure to fulfill their obligations, has never taken the initiative to directly challenge a Member State for enacting anti-competitive legislation.⁹

The realities of economic life produce widely differing situations that defy abstract and general definitions. To state that it amounts to determining the limits of the Member States' legislative power in the economic sphere¹⁰ or to explain that "effects of virtually all economic legislation are comparable to those of an agreement in restraint of trade"¹¹ is a distortion. The problem must be defined in concrete terms.

May the Member States encourage undertakings to conclude agreements that are prohibited? Are they authorized to impose over an entire sector minimum prices or maximum production quotas that have been agreed to by only some undertakings operating in that sector? Are they entitled to adopt legislation prohibiting or penalizing price competition, whether or not such legislation incorporates private agreements? Are they free to empower traders to prohibit certain conduct in the market when the agreements that those traders would conclude in order to achieve such prohibition would be manifestly contrary to Article 85? These are the real questions.

Short-term economic policy measures, such as imposing price controls by fixing maximum prices in the hope of holding down inflation and guaranteeing the income of consumers, are not involved in any way.¹² In all cases where the Court was requested to make an assessment on the basis of Articles 3(f), 5, and 85 of the Treaty, the contested legislation was intended

ter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

EEC Treaty, *supra* note 2, art. 169, 1973 Gr. Brit. T.S. No. 1, at 56-57, 298 U.N.T.S. at 75.

9. In 1985, the Commission stated that it would devote "its best efforts to ensuring that the Member States adhere to the principle of free competition in general and the principles enshrined in Article 85 and 86 in particular." Comm'n, Fifteenth Report on Competition Policy ¶ 93 (1985).

10. See Marenco, *Traité CEE*, *supra* note 5, at 285.

11. Marenco, *Response*, *supra* note 5, at 421.

12. *But see id.*; Waelbroeck, *Les Rapports Entre*, *supra* note 5, at 795-96.

to protect certain traders from competition on the part of other traders, thereby adversely affecting the interests of consumers in the short-term. It was competition and not the free movement of goods that lay at the heart of the problem. The provisions establishing the free movement of goods enabled only certain aspects of the contested legislation to be addressed.¹³ Moreover, the exclusive application of those provisions would lead to an unacceptable difference in treatment between products and services.¹⁴

All the judgments given by the Court in this area, with the exception of *Cullet/Leclerc*,¹⁵ were delivered by the full Court, demonstrating the importance that the Court attaches to these cases. The development of the Court's doctrine can best be understood by considering the case law in chronological order.

I. *THE JUDGMENT IN INNO*

The origin of all the case law developments in this area can be found in paragraphs 31 and 33 of the judgment in *INNO*.¹⁶ There, the Court stated that "the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive [Article 86] of its effectiveness"¹⁷ and that "Member States may not enact measures enabling private undertakings to escape the constraints imposed by Articles 85 to 94 of the Treaty."¹⁸

The legislation in question, submitted to the Court by the Belgian Court of Cassation, involved a prohibition on the sale of cigarettes to consumers at a price lower than that stated on the tax label affixed to the packet. The provision, which was

13. In *Leclerc/Au Blé Vert*, Case 229/63, 1985 E.C.R. 1, 33-36, ¶¶ 21-31, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,436-37, the application of Articles 30 and 36 enabled only the external aspect of the French law at issue to be dealt with, namely the obligation to charge the price imposed, even in the case of books published in France and imported from another Member State, and the obligation incumbent on the principal distributor of books published abroad to fix the retail price thereof.

14. Clearly, the measures contested in *Ministère Public v. Asjes*, Joined Cases 209-213/84, 1986 E.C.R. 1425, Common Mkt. Rep. (CCH) ¶ 14,287, and *VVR*, *supra* note 7, would have remained outside the scope of Community law if the Court had not focused on the application of the principles embodied in Articles 3(f), 5, and 85.

15. Case 231/83, 1985 E.C.R. 305, Common Mkt. Rep. (CCH) ¶ 14,139; *see infra* notes 52-58 and accompanying text.

16. Case 13/77, 1977 E.C.R. 2115, Common Mkt. Rep. (CCH) ¶ 8442.

17. *Id.* at 2144, ¶ 31, Common Mkt. Rep. (CCH) ¶ 8442, at 7989.

18. *Id.* at 2145, ¶ 33, Common Mkt. Rep. (CCH) ¶ 8442, at 7989.

applicable to both the imported and domestically manufactured products, had the effect of imposing on all persons, including traders not bound by contractually agreed prices, the selling price fixed by the manufacturers or the importers.

The Belgian court might have been better advised to raise the problem from the point of view of Article 85 and Articles 3(f) and 5. The market was characterized by the fact that several manufacturers were operating in it, and the factor eliminated by the legislation was intrabrand competition. In that regard, like the French law on the selling price of books discussed below,¹⁹ the legislation gave private traders the means to implement unilaterally a policy of imposing minimum resale prices.

The two paragraphs of the judgment quoted from above were not incorporated in the operative part, which does not roundly condemn the system but would appear to leave some discretion to national courts. Those paragraphs were capable of being interpreted in different ways and left the door open to fresh developments. Before their potential was discovered, however, eight years elapsed and the validity of the French law on the selling price of books came before the Court.

II. THE JUDGMENT IN LECLERC

A. Context of the Case

In *Leclerc/Au Blé Vert*,²⁰ the Court examined the 1981 French law on book prices, named the "Lang" law after Jacques Lang, then French Minister of Culture, requiring all publishers or importers of books to fix a minimum retail price.²¹ The Lang law also required booksellers to charge an effective price for sales to the public of between ninety-five and one hundred percent of the retail fixed price.²² Booksellers and associations of booksellers that charged the prices laid down could seek an injunction against, and claim penalty payments or damages from, booksellers who failed to comply with the

19. See *infra* notes 20-51 and accompanying text.

20. Case 229/83, 1985 E.C.R. I, Common Mkt. Rep. (CCH) ¶ 14,111.

21. See Law No. 81-766 of Aug. 10, 1981, 1981 JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] 2198.

22. See *id.*

law.²³ The law even provided for the possibility of imposing criminal penalties for infringements by recalcitrant booksellers.²⁴

According to the French government—and here I refer to the Court's summary of the arguments—

such legislation is necessary both in order to conserve specialist booksellers in the face of competition from other distribution channels which rely on a policy of reduced margins and a limited range of titles and in order to prevent a small number of large distributors from being able to impose their will on publishers to the detriment of poetic, scientific and creative works.²⁵

The Lang law, according to the French government, was an essential measure for the protection of books as a cultural medium.

It must be remembered, in addition, that in most of the other Member States there were agreements concluded between publishers and retailers that fell within the scope of an automatic and specific derogating provision of the law of the Member State on restrictive practices or that had given rise to individual decisions granting authorization or exemption.²⁶

B. The Commission's Point of View and Brief Comparative Remarks

The Commission, based on its interpretation of *INNO*, requested the Court to declare that Articles 3(f), 5, and 85 did not deprive Member States of all power to interfere in the economic sphere, particularly with freedom of competition.²⁷ According to the Commission, the duty of Member States not to detract from the effectiveness of Article 85 precluded only three types of conduct: (i) prescribing, promoting, or facilitating the conclusion of prohibited agreements; (ii) heightening the impact of such agreements by inducing third parties who had neither negotiated nor accepted the agreement of their

23. *See id.*

24. *See id.*

25. *Leclerc/Au Blé Vert*, Case 229/83, 1985 E.C.R. 1, 32, ¶ 16, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435.

26. *See, e.g.*, Neufassung des Gesetzes Gegen Wettbewerbsbeschränkungen, § 16, 1980 BUNDESGESETZBLATT, TIEI I [BGB1.1] 1761 (W. Ger.); *Re Net Book Agreement*, 1957, 3 ALL E.R. 751 (1962).

27. *Id.* at 24, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,430.

own free will to participate therein; and (iii) adopting a State measure restricting competition with the sole aim of enabling undertakings to circumvent Articles 85 and 86 without being able to claim that this was in the public interest.²⁸

The second type of conduct refers to the classic situation where a state, by an official action (i.e. a law or regulation), renders compulsory for a whole sector measures agreed upon among certain undertakings operating in that sector. An illustration is provided by the Belgian Royal Decree of January 13, 1935, which permits the establishment of economic rules regulating production and distribution.²⁹ According to the decree, any trade association of producers or distributors may request the extension to all other producers or distributors belonging to the same branch of industry or trade of an obligation that it has assumed of its own free will, with regard to production, distribution, sale, exportation, or importation.³⁰ For those purposes, the producers or distributors who assume that obligation must represent an absolute majority of the interests involved in that branch of industry or trade.³¹

What is envisaged by the other two types of conduct described is more difficult to visualize in concrete terms. This is particularly true of the third type, which is based on a restricted form of wording used in *INNO*.³² The first type, involving the concept of agreement, implies that something is freely undertaken, which is to be contrasted with coercion by the State. Furthermore, the expression "to encourage the conclusion of agreements" would have been more precise than that of "promoting" or "facilitating" conduct.

According to the Commission, before the conduct of a Member State can be prohibited, it is necessary first to identify a certain type of corporate behavior, specifically concerted action that itself falls within the scope of the prohibition laid

28. Comm'n, Fifteenth Report on Competition Policy ¶ 92 (1985).

29. Royal Decree No. 62 of Jan. 13, 1935, 1935 *MONITEUR BELGE* [M.B.] 229.

30. *Id.* art. 1.

31. *Id.*

32. *Compare* *Leclerc/Au Blé Vert*, Case 229/83, 1985 E.C.R. I, 24-25, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,430 (stating the Commission's view) *with* *INNO v. ATAB*, Case 13/77, 1977 E.C.R. 2115, 2145, ¶ 33, Common Mkt. Rep. (CCH) ¶ 8442, at 7989 (stating the Court's view).

down in Article 85.³³ In the circumstances of *Leclerc*, the Commission maintained, there was no such corporate behavior.³⁴ The Lang law had empowered the publishers to determine unilaterally the retail prices and provided them the means of ensuring compliance without having to enter into agreements with the booksellers.³⁵

The Commission, in choosing the terms that it used to define the types of restrictive conduct, may have been guided by a case decided by the U.S. Supreme Court. In *Rice v. Williams*,³⁶ the Supreme Court stated:

[A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.³⁷

The Supreme Court pointed out, in particular, that the law in question "does not *require* the distiller to impose vertical restraints of any kind; that is a matter for it to determine."³⁸

The Supreme Court's decision in *California Retail Liquor Dealers v. Midcal Aluminum* shows that the conclusion of agreements is not required.³⁹ In *Midcal*, the Supreme Court found in favor of a distributor who had been prosecuted for reselling alcoholic beverages in breach of a legislative provision, essentially identical to the Lang law, requiring growers and wholesalers to publish schedules of prices and prohibiting retailers from selling beverages at prices lower than those specified.⁴⁰

33. See *Leclerc*, 1985 E.C.R. at 22, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,428-29.

34. See *id.* at 22, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,429.

35. See *id.* at 22-23, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,429.

36. 458 U.S. 654 (1982).

37. *Id.* at 661.

38. *Id.* at 662 (emphasis in original).

39. 445 U.S. 97 (1980). This comes out quite clearly in a subsequent Supreme Court decision, *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345-46 n.8 (1987).

40. The statute provided:

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale

The key passage in *Midcal* is the following reference to earlier case law:

These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.⁴¹

C. *The Position of the Court and the Criticism Leveled Against It*

Whatever the merits of these comparisons to U.S. case law, the Court in *Leclerc* partially upheld the Commission's position by noting that the Lang law did not require the conclusion of agreements that were prohibited.⁴² The Court then pointed out that legislation like the Lang law rendered corporate behavior of the type prohibited by Article 85(1) superfluous by making book publishers or importers responsible for freely fixing binding retail prices.⁴³

The Court then raised the question of whether legislation like the Lang law detracted from the effectiveness of Article 85 and was, therefore, contrary to the second paragraph of Article 5 of the Treaty.⁴⁴ One legal writer has considered that the rea-

prices, if he owns or controls a brand of wine resold to retailers or consumers.

Cal. Bus. & Prof. Code § 24866 (West 1964), reprinted in *Midcal*, 445 U.S. at 99 n.1.
41. *Midcal*, 445 U.S. at 105-06 (footnotes and citation omitted).

42. *Leclerc/Au Blé Vert*, Case 229/83, 1985 E.C.R. I, 31-32, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435.

43. *Id.*

44. *Id.* at 32-33, ¶¶ 15-20, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,435-36.

soning underlying the Court's response to this question challenged the very principle of State interference in the economic sphere, that such reasoning did not entail any consequences and was to some extent stillborn, and finally that it was difficult to avoid the impression that such reasoning was a concession to a minority view, thus constituting, as it were, a "dissenting opinion."⁴⁵ Those assessments are incorrect.

First, the Court did not disapprove of all legislation that, by eliminating competition between undertakings, renders the conclusion of agreements superfluous. It simply raised an objection in principle to the adoption of legislation in which the State gives up its role and confers on undertakings the powers required to give effect to *their* policy. In other words, undertakings must either operate under the supervision of the public authorities or be subject to market rules, but they must not be entrusted with the powers of a public authority, since they only represent specific interests.

Second, the Court's judgment lays down side-by-side two different principles that permit national legislation to be regarded as incompatible with Article 5. One principle is taken in part from the position defended by the Commission.⁴⁶ The other principle comes close to that laid down by the Supreme Court in *Midcal*.⁴⁷ The "dissent," therefore, would appear to be a figment of a disappointed critic's imagination. As the Commission's viewpoint was inapplicable, the Court considered whether the contested law was open to criticism on the basis of the other principle.⁴⁸

Finally, contrary to the view taken by certain legal writers,⁴⁹ the Court has not left open or unanswered the question of the constitutionality of legislation like the Lang law. The reasoning concerning the specific circumstances of *Leclerc* suggests the Court considered a law such as the Lang law contrary, in principle, to the obligation resulting from Articles 3(f), 5, and 85 of the Treaty. The Commission had not exercised its power in relation to the purely national resale price

45. See Marengo, *Traité CEE*, *supra* note 5, at 294, 297.

46. See *Leclerc*, 1985 E.C.R. at 33, ¶ 20, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,436.

47. See *id.*

48. See *id.* at 34-35, ¶ 25, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,436-37.

49. See, e.g., Waelbroeck, *Les Rapports Entre*, *supra* note 5, at 792.

maintenance agreements that existed in other Member States in the book sector. Accordingly, the obligations incumbent on the Member States not to enact measures similar to the Lang law were not yet sufficiently specific. This is why the Court came to a negative conclusion "as Community law stands."⁵⁰ Like my colleague Judge Yves Galmot and his law clerk Jacques Biancarelli,⁵¹ I take the view that the Court reached that conclusion essentially on grounds of legal certainty.

III. THE JUDGMENT IN CULLET

A. Context of the Case

In *Cullet*,⁵² another set of French rules, this time fixing a minimum retail price for fuel, was challenged by a supermarket.⁵³ According to the French government, the purpose of the rules was to guarantee fuel supplies throughout the national territory with sufficient profit margins for retailers. Thus, the rules protected a distribution sector, namely that of small petrol stations, against the pricing policy pursued by supermarkets.

After repeating the principal grounds of the judgment in *Leclerc*, the Court pointed out that the contested rules entrusted the public authorities with responsibility for fixing prices.⁵⁴ The Court came to the conclusion that such rules did not deprive Article 85 of its effectiveness in breach of Articles 3(f) and 5.⁵⁵

B. Some Reactions of Legal Writers

The Court, as a certain perceptive commentator has rightly surmised,⁵⁶ made its assessments in *Cullet* and *Leclerc* dependent on the degree of regulation by the public authorities. Another observer has pointed out that there was no justification for treating the two cases differently, as the difference in the degree of interference on the part of the public authorities

50. See *Leclerc*, 1985 E.C.R. at 33, ¶ 20, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,436.

51. See Galmot & Biancarelli, *supra* note 5, at 306.

52. Case 231/83, 1985 E.C.R. 305, Common Mkt. Rep. (CCH) ¶ 14,139.

53. *Id.* at 316-18, ¶¶ 3-8, Common Mkt. Rep. (CCH) ¶ 14,139, at 15,744.

54. *Id.* at 320, ¶ 17, Common Mkt. Rep. (CCH) ¶ 14,139, at 15,746.

55. *Id.* at 319-20, ¶¶ 16-17, Common Mkt. Rep. (CCH) ¶ 14,139, at 15,745-46.

56. See Pappalardo, *supra* note 5, at 314.

was itself connected with the nature of the product.⁵⁷ In the case of heterogeneous products, such as books, the legislature, wishing to eliminate competition among retailers, was compelled to rely on the manufacturers (i.e. the publishers), because it was unable to fix the prices itself. In the case of a homogeneous product such as fuel, the legislature was able to fix prices itself. The observer added, however, that from the point of view of competition, there are even more reasons for challenging legislation of the type adopted for fuel than legislation of the type adopted for books, since the former eliminates all competition while the latter merely abolishes intra-brand competition.⁵⁸

This observation is not unfounded, and the only possible answer is that the effect on competition is not the criterion adopted by the Court, nor, moreover, is that the criterion advocated by the Commission.

IV. *THE JUDGMENTS IN BNIC V. CLAIR AND BNIC V. AUBERT*

I shall deal with *BNIC/Clair*⁵⁹ and *BNIC v. Aubert*⁶⁰ together, even though an interval of over two years separated the dates of those judgments. The cases raise the same problems or entail problems that are closely connected.

A. *The Context of the Cases*

The Bureau National Interprofessionnel du Cognac (the "Board"), is an inter-trade organization in the wine and spirits sector of the Cognac region. The Board was set up by France at the time of the Vichy regime and its composition and operation are governed by laws and regulations of the State.⁶¹ The Board, whose chairman is appointed by the Minister for Agriculture, is composed primarily of a number of delegates representing wine growers, dealers, and commercial distillers. The delegates, who are appointed by the minister from lists of can-

57. See Marengo, *Traité CEE*, *supra* note 5, at 296-97.

58. *See id.*

59. Case 123/83, 1985 E.C.R. 391, Common Mkt. Rep. (CCH) ¶ 14,160.

60. Case 136/86, 1987 E.C.R. — (Judgment of December 3, 1987) (LEXIS, Eurcom library, Cases file).

61. *Clair*, 1985 E.C.R. at 419, ¶ 3, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,952-53.

didates submitted by the trade organizations concerned, are divided into two groups that are permitted to conclude agreements.⁶²

The relevant administrative authority is authorized, pursuant to the 1975 law on agricultural inter-trade organizations,⁶³ to make the agreements generally binding when they are aimed at promoting the implementation, subject to State control, of marketing rules, prices, and conditions of payment.⁶⁴ When an agreement is made generally binding, it binds all members of the trades making up the trade organization in the production area covered by the agreement.⁶⁵ The prohibition against restrictive agreements laid down by this French legislation is inapplicable to agreements made generally binding in this manner.⁶⁶ Penalties are imposed in the event of non-compliance with those agreements.⁶⁷ The Board and each of the trade organizations composing it may seek a declaration to the effect that supply contracts concluded in breach of an agreement made generally binding are automatically void.⁶⁸ The Board may also claim compensation.⁶⁹

In *Clair*, a dealer was prosecuted for not complying with an order that made generally binding an agreement fixing a minimum purchase price for potable spirits used in the production of cognac.⁷⁰ In *Aubert*, a dealer was challenged by the Board for exceeding his production quota, thereby violating the order that made the agreement in question generally binding.⁷¹ It would appear that in both cases the traders concerned did not belong to the trade organizations that had put forward candidates for the posts of delegates who were to be responsible for negotiating and concluding the agreements. The traders in *Clair* and *Aubert*, therefore, had nothing to do with the

62. *Id.* at 420, ¶ 5, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,953.

63. Law No. 75-600 of July 10, 1975, 1975 J.O. 7124.

64. *Id.*

65. *Id.*

66. *Id.* at 7125.

67. *Id.*

68. *Id.*

69. *Id.* at 7124-25.

70. BNIC/*Clair*, Case 123/83, 1985 E.C.R. 391, 405, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,941.

71. BNIC v. *Aubert*, Case 136/86, 1987 E.C.R. — (Judgment of December 3, 1987) (LEXIS, Eurcom library, Cases file).

underlying agreements. The same national court was involved in both cases. In *Clair*, the national court focused on the legality of the agreement itself,⁷² while in *Aubert* it focused on the scope of the measure in question, without specifying whether it was in the nature of an agreement or a regulation.⁷³

B. *Position of the Court*

Because the anti-competitive nature of the measures in *Clair* and *Aubert* was undisputable, the principles laid down by the Court may be grouped around the only three issues that were capable of giving rise to any discussion.

1. Was There Any Concerted Action for the Purposes of Article 85(1) of the Treaty?

In support of its proposal that the question should be answered in the negative, the Board referred to the manner in which it had been created, the manner in which its members were appointed, and the rules governing its operations.⁷⁴ In its view, the wine-growers' and dealers' delegates were acting in pursuance of the terms of reference conferred upon them by the minister, which were not binding on the undertakings to which those delegates might belong. Ultimately, the Board itself was merely an advisory body that submitted proposals to the public authorities.⁷⁵ Only the intervention of those authorities made the agreements concluded between the groups in question binding. Therefore, according to the Board, the agreement between the groups did not fall within the scope of Article 85(1), and the order making the agreement generally binding was a State measure not covered by any rule in the Treaty.⁷⁶

In response to these arguments, the Court stated quite simply that (i) the wine-growers' and dealers' delegates must be regarded as representing their trade organizations in the negotiation and conclusion of the agreements,⁷⁷ (ii) the fact that the groups of wine-growers and dealers meet within a

72. *Clair*, 1985 E.C.R. at 405, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,941-42.

73. *Aubert*, 1987 E.C.R. at ___.

74. *Clair*, 1985 E.C.R. at 406-07, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,943.

75. *Id.* at 408, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,944.

76. *Id.*, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,944.

77. *Id.* at 423, ¶ 19, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,954.

public organization does not remove their agreements from the scope of Article 85,⁷⁸ and (iii) an agreement fixing a minimum price for a product and submitted to public authorities for the purpose of obtaining approval to make the agreement binding on all traders in the market in question is *intended* to distort competition in that market.⁷⁹

2. Does Such Concerted Action Still Constitute an Infringement of Article 85(1) Even After the Measures that Form the Subject Matter of Such Action Have Been Made Generally Binding by an Order to that Effect?

In reply to this question, the Court again gave a positive answer. It held that even the adoption of the order making the agreement generally binding did not have the effect of removing the agreement from the scope of Article 85.⁸⁰

3. Is the Order Itself, Which Renders the Agreement Generally Binding, Incompatible with the Obligation Incumbent on the Member States not to Detract from the Effectiveness of Article 85?

In practical terms, this was the decisive issue. First, the lapse of time between the conclusion of the agreement and the adoption of the order making it generally binding may be very short. Second, and this is the essential point, many undertakings did not belong to the trade organizations represented within the Board. In the absence of an order making the agreements generally binding, there is no doubt that the agreements could not have been effectively implemented.

In *Aubert*, the Court ruled that the order making the agreement in question generally binding was incompatible with Article 5.⁸¹ That conclusion could hardly be considered surprising. In the intervening period, the Court, adopting the Com-

78. *Id.* at 423, ¶ 20, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,954-55.

79. *Id.* at 423-24, ¶ 22, Common Mkt. Rep. (CCH) ¶ 14,160, at 15,955.

80. *BNIC v. Aubert*, Case 136/86, 1987 E.C.R. — (Judgment of December 3, 1987) (LEXIS, Eurcom library, Cases file).

81. *Id.* at —.

mission's point of view, had held in *Ministère Public v. Asjes*,⁸² that the Member States may not reinforce the effects of anti-competitive agreements concluded by undertakings, because this would deprive Article 85 of its effectiveness.⁸³

C. *Comparison and Scope of the Judgment*

Clair and *Aubert* involve the classic situation where public authorities make an agreement that was concluded between some of the undertakings operating in a given sector binding on that sector in its entirety. The real difficulty in *Clair* and *Aubert* was that the State itself established the framework for concerted action and designated the parties involved, in contrast to the position taken, for example, by the Belgian Royal Decree of 1935, which leaves the conclusion of agreements entirely to the initiative of undertakings and their delegates.⁸⁴

The solution adopted by the Court in *Clair* and *Aubert*, however, runs counter to that adopted by the U.S. Supreme Court in *Parker v. Brown*.⁸⁵ In *Parker*, ten producers were entitled to petition for the establishment of a prorate marketing plan for any agricultural commodity within a defined production zone under the California Agricultural Prorate Act.⁸⁶ After a public hearing, and provided that it was shown that the program would prevent agricultural waste, a state commission was authorized to grant the petition.⁸⁷ The director, with the approval of the commission, was then required to set up a committee from among nominees chosen by the producers.⁸⁸ The committee was required to formulate a program, which the commission was authorized to approve after another public hearing.⁸⁹ If the proposed program, as approved by the commission, was consented to by sixty-five percent of the producers owning fifty-one percent of the acreage given over to production of the regulated crop, the director was required to

82. Joined Cases 209-213/84, 1986 E.C.R. 1425, Common Mkt. Rep. (CCH) ¶ 14,287.

83. *Id.* at 1471, ¶¶ 71-72, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

84. See *supra* note 29 and accompanying text.

85. 317 U.S. 341 (1943).

86. Act of June 5, ch. 754, 1933 Cal. Stat. 1969 (repealed 1967).

87. *Parker*, 317 U.S. at 346.

88. *Id.*

89. *Id.* at 347.

carry out the program.⁹⁰

The Supreme Court stated:

We may assume for the present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination and conspiracy by private persons, individual or corporate. . . .

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . .

. . . Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.⁹¹

In my view, it is wrong to attempt to infer from *Clair* that any concerted action intended to influence the public authorities would constitute an agreement or concerted practice prohibited by Article 85(1).⁹² The agreements that had been concluded within the Board were designed to regulate the behavior of traders in the market, which is not the case with regard to ordinary conduct that is simply intended to influence the law-making activity of the State. Therefore, care must be taken not to convey the impression that, on this point, the Court's

90. *Id.*

91. *Id.* at 350-52.

92. *Cf. Marengo, Règles Communautaires, supra* note 5, at 62.

doctrine is the reverse of that adopted by the Supreme Court in *Eastern R.R. Presidents Conference v. Noerr Motor Freight*⁹³ and *United Mine Workers v. Pennington*.⁹⁴

V. THE JUDGMENT IN ASJES

A. Context of the Case

The judgment in *Asjes*⁹⁵ is of interest not only because it resolved the controversy over the applicability of Articles 85 and 86 to the air transport sector, but also because it concerned the problem of whether State measures are compatible with Articles 3(f), 5, and 85 of the Treaty.

93. 365 U.S. 127 (1961). In *Noerr*, the Eastern Railroad Presidents Conference retained the services of a public relations firm to foster the adoption of laws that were unfavorable to the trucking industry. The trade association representing the trucking industry alleged that through the use of the publicity campaign, the Conference conspired to restrain trade and monopolize the long-distance freight business in violation of the Sherman Act. The Supreme Court, in reversing the District Court's judgment, stated:

A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

Id. at 139-40.

94. 381 U.S. 657 (1965). In *Pennington*, the United Mine Workers (the "UMW") sued a coal company for royalty payments due the UMW under the National Bituminous Coal Wage Agreement of 1950 (the "Agreement"). The coal company cross claimed that the Agreement was part of a conspiracy between the UMW and the large coal companies to restrain and monopolize the coal industry in violation of the Sherman Act. As evidence of this conspiracy, the coal company pointed to certain contacts made by the UMW and the large coal companies with the Tennessee Valley Authority and the U.S. Secretary of Labor. Those contacts resulted in the establishment of a minimum wage that the smaller coal companies could not afford. The Supreme Court, citing to *Noerr*, stated:

[We] rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials. The Sherman Act, it was held, was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign was aimed.

. . . *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.

Id. at 669-70.

95. *Ministère Public v. Asjes*, Joined Cases 209-213/84, 1986 E.C.R. 1425, Common Mkt. Rep. (CCH) ¶ 14,287.

Community air space is not subject to a single controlling authority. Each Member State retains its sovereignty over the air space above its territory. The Treaty provides that the free movement of services in the field of transport is to be governed by those provisions of the title relating to transport. At the time of the events in question, Article 84⁹⁶ of the Treaty, as it stood prior to the entry into force of Article 16(5) of the Single European Act,⁹⁷ was applicable, requiring unanimity for the adoption of rules applicable to air transport. Thus, each Member State controlled access to the market. The mutual grant of air freedoms (the right to overfly territory, non-commercial landing rights, the right of access and take off for the purposes of the international carriage of passengers) is regulated by means of bilateral agreements. Those agreements specify the authorized routes and landings in the signatory States. They provide that each signatory State is to designate which airline company is authorized to exercise the rights conferred by the agreement in question. They generally provide that the tariffs are to be fixed by common accord by the airlines designated. The agreements also specify that the tariffs fixed in that manner are to be subject to the approval of the aviation authorities of each of the signatory States.⁹⁸

Under the relevant French legislation, it is a criminal offense not to submit tariffs to the competent minister for approval or to depart from tariffs that have been approved.⁹⁹ As the Court pointed out, a decision approving the tariff proposed by an airline has the effect of rendering that tariff binding on all traders selling tickets for that airline in respect to the journey specified in the application for approval.

96. EEC Treaty, *supra* note 2, art. 84, 1973 Gr. Brit. T.S. No. 1, at 31, 298 U.N.T.S. at 47.

97. Single European Act, art. 16(5), O.J. L 169/1, at 7 (1987).

98. *See, e.g.*, the Agreement on Air Transport Between the Kingdom of Belgium and the Federal Republic of Germany of Apr. 15, 1956, art. 11(3), 1959 M.B. 5433.

99. *See* CODE DE L'AVIATION CIVILE [C. Av. Civ.] art. L 330-3 (Fr.) (undertakings, and the tariffs they charge, must be approved by the Minister for Civil Aviation), *reprinted in Asjes*, 1986 E.C.R. at 1454, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,801; C. Av. Civ. art. R 330-9 (specifying the information to be provided by undertakings, domestic and foreign, to the Minister for Civil Aviation), *reprinted in Asjes*, 1986 E.C.R. at 1455, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,801; C. Av. Civ. art. R 330-15 (specifying the criminal sanctions to be applied to undertakings violating the above rules), *reprinted in Asjes*, 1986 E.C.R. at 1455, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,801-02.

Nouvelles Frontieres, a travel agency that was prosecuted for selling air tickets at prices lower than the approved prices, challenged the compulsory approval procedure that led the Tribunal de Police de Paris (Local Criminal Court) to refer a question to the Court concerning the compatibility of that procedure with Community Law.

B. *The Position of the Court*

The Court first referred to the case law concerning the obligation incumbent upon the Member States not to deprive Article 85 of its effectiveness.¹⁰⁰ The Court then pointed out that flowing from this obligation a Member State may neither *require* nor *favor* the adoption of agreements, decisions, or concerted practices contrary to Article 85 or *reinforce the effects thereof*.¹⁰¹ Thus, the Court upheld the point of view that the Commission defended in *Leclerc*.¹⁰²

The Court did not deal with the request made to the airline companies by the States that were parties to the bilateral agreements to take concerted action with regard to tariffs,¹⁰³ a request that would in fact appear to be contrary to the obligation not to detract from the effectiveness of Article 85. The Court focused its attention, instead, on the approval procedure that formed the subject of the dispute.¹⁰⁴ In this regard, the Court directed the national court to take account of the nature of the approved tariffs.¹⁰⁵ If the tariffs were the subjects of concerted action criticized by the competent national authorities, under Article 88, or by the Commission, under Article 89(2), they may not be approved, since that would reinforce the effects of prohibited concerted action.¹⁰⁶ The national court must, therefore, in those circumstances refrain from imposing the penalties provided for by national law.¹⁰⁷

100. *Asjes*, 1986 E.C.R. at 1471, ¶ 71, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

101. *Id.* at 1471, ¶ 72, Common Mkt. Rep. (CCH) ¶ 14,286, at 16,780.

102. *Leclerc/Au Blé Vert*, Case 229/83, 1985 E.C.R. I, 22, Common Mkt. Rep. (CCH) ¶ 14,111, at 15,428-29.

103. *Asjes*, 1986 E.C.R. at 1471, ¶ 70, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

104. *Id.* at 1471, ¶ 73, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

105. *Id.* at 1472, ¶ 75, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

106. *Id.* at 1472, ¶ 76, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

107. *Id.* at 1472, ¶ 77, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780-81.

C. *Explanation and Comparison*

The conclusion reached by the Court calls for a word of explanation. *Asjes* was decided at a time when no regulation applying Articles 85 and 86 to the air transport sector had yet been adopted. Action by the national courts, with the exception of those that are specifically entrusted with the task of implementing competition law, was, therefore, conditional in the case of agreements between airline companies, on prior intervention by the competent national authorities, under Article 88, or by the Commission, on the basis of Article 89(2).¹⁰⁸ Only after such intervention had taken place was it possible for the national courts to draw from the establishment of an infringement the resulting consequences under civil law.

It would have been paradoxical in those circumstances to hold that a national court was entitled to set aside the application of a national anti-competitive measure under Article 5, when, in the absence of a prior decision by the competent administrative authority, the same court would have had no power to rule on the applicability of Article 85 to agreements between airline companies. This is why the Court considered that the approval procedure and the penalties established by national law for non-compliance with an approved tariff were to be disregarded only where the tariff was the result of concerted action and where that concerted action had been specifically held to be in violation of Article 85. Clearly, since the competent national authorities are the aviation authorities, who have been urging airlines for decades to take concerted action with a view to protecting the interests of national public companies, they are unlikely to apply Article 85 with particular zeal.¹⁰⁹

Once again, it may be of interest to compare the judgment in *Asjes* with the position adopted by the U.S. Supreme Court in a relatively similar case. In *Southern Motor Carriers Rate Conference v. United States*,¹¹⁰ common carriers operating in four

108. See *Bosch v. De Geus*, Case 13/62, 1962 E.C.R. 45, 53, Common Mkt. Rep. (CCH) ¶ 8003, at 7134.

109. Meanwhile, the first regulation applying Articles 85 and 86 to the air transport sector has been adopted by the Council: Council Regulation No. 3975/87, O.J. L 374/1 (1987) (laying down the procedure for the application of the rules on competition to undertakings in the air transport sector).

110. 471 U.S. 48 (1985).

southeastern states were prosecuted for taking concerted action with regard to the rate proposals for interstate transport that they were to submit to the public service commissions of the states concerned.¹¹¹ Collective rate-making was authorized but not made compulsory by these states.¹¹² The Supreme Court held that the two-fold criterion governing the application of the state immunity doctrine laid down in *Midcal* was satisfied.¹¹³ First, the authorization providing for collective rate-making by the states in question had been affirmatively expressed as state policy.¹¹⁴ Second, the conduct of the parties was the subject of active supervision by the public service commissions that were ultimately responsible for fixing the rates.¹¹⁵

If the reasoning of the Supreme Court in *Southern Motors* were applied to the challenged practices in *Asjes*, the opposite conclusion, it seems, would have been arrived at by the Court. The Member States had clearly indicated that they preferred a policy of concerted action. Moreover, they were monitoring the results by means of an approval procedure.

VI. THE JUDGMENT IN VVR

A. Context of the Case

The Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten (the "Sociale Dienst") is the social service of the Flemish local and regional public services and acts as a travel agency for employees of those services. It granted its customers rebates on the price of tours organized by tour operators, passing on to them all or part of the commission normally paid to it as a travel agency. For that reason, the Association of Flemish Travel Agencies, Vereniging van Vlaamse Reisbureaus (the "VVR"), brought proceedings for a restraining order against the Sociale Dienst on the basis of a Belgian law that prohibits any act contrary to fair commercial practice whereby a trader or tradesman harms or attempts to harm the trade interests of one or more traders or trades-

111. *Id.* at 50.

112. *Id.*

113. *Id.* at 65-66.

114. *Id.*

115. *Id.* at 66.

men.¹¹⁶ The type of conduct alleged against the Sociale Dienst had been described as unethical and consequently prohibited by an agreement concluded in 1963 by the Union of Belgian Travel Agencies, Union Professionnelle des Agences de Voyage Belges (the "UPAV"), which at the time covered the whole of Belgium, since the VVR was not set up until later.

In 1965, a law was adopted determining the status of travel agencies.¹¹⁷ The law provided, *inter alia*, that a license is required to operate as a travel agent and the license may be suspended or withdrawn if the rules on commercial practices are not complied with. The rules, like the conditions and the procedure for the withdrawal of licenses, were promulgated in a royal decree adopted in June 1966 (the "Royal Decree of 1966")¹¹⁸ on the basis of the aforesaid law.

The Royal Decree of 1966, which incorporates a provision of the code of professional conduct drawn up by the UPAV, established that it is contrary to fair commercial practice for a travel agency to offer prices and tariffs other than those agreed or imposed by law, share commissions, give rebates, or offer advantages, in any form whatsoever, on conditions that are contrary to customary practice.¹¹⁹

The Royal Decree of 1966, in conjunction with the provisions of the law on commercial practices, conferred on travel agencies and associations of travel agencies the right to bring proceedings for a restraining order against their competitors who refuse to comply with the rules of the trade.¹²⁰

B. Position of the Court

Relying on the principles established in *Asjes*, the Court held that the object and effect of the prohibition imposed on travel agencies by the Royal Decree of 1966 was to reinforce the effects of agreements or concerted practices that were contrary to Article 85.¹²¹ Before coming to the conclusion that the

116. See *VVR*, *supra* note 7, 1987 E.C.R. at ___, Common Mkt. Rep. (CCH) ¶ 14,499, at 18,701.

117. Law of Apr. 21, 1965, 1965 M.B. 6959.

118. Royal Decree of June 30, 1966, 1966 M.B. 7592.

119. See *id.* art. 22.

120. *VVR*, *supra* note 7, 1987 E.C.R. at ___, Common Mkt. Rep. (CCH) ¶ 14,499, at 18,706.

121. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,499, at 18,707.

Royal Decree of 1966 was incompatible with Articles 3(f), 5, and 85 of the Treaty, the Court analyzed the effect of such reinforcement in the following terms:

First of all, by transforming an originally contractual prohibition into a legislative provision a provision such as Article 22 of the Royal Decree of 1966 reinforces the effect of the agreements in question between the parties, inasmuch as the rule acquires a permanent character and can no longer be rescinded by the parties. Secondly, by treating the failure to observe agreed prices and tariffs or the prohibition on the sharing of commissions with clients as contrary to fair commercial practice it allows travel agents who comply with the agreed rules of commercial practice to bring proceedings for a restraining order against travel agents who are not party to the agreement and do not comply with those rules. Thirdly, with regard both to parties to the agreements and to third parties, the possible withdrawal of the license to operate as a travel agent in the event of failure to observe the agreed rules of commercial practice constitutes a highly effective sanction.¹²²

C. Interpretation of the Judgment

The judgment in *VVR* does not relate to a situation involving the adoption of an official measure where the public authorities impose on a whole sector the obligations resulting from an agreement between only some of the undertakings operating in that sector. A measure of that kind presupposes the maintenance of the agreement. If the agreement lapses, the measure in question would no longer appear to serve any purpose. In fact, the Royal Decree of 1966 incorporated provisions of the agreement, thereby making the agreement superfluous. Moreover, it was by no means clear from the documents before the Court that an agreement similar to that adopted by the UPAV had been concluded by the *VVR*.

When the Court stated that "legislative provisions or regulations" of the Member State that "reinforce the effects of agreements"¹²³ were contrary to Article 85, it must be understood to mean any legislative provision or regulation that in-

122. *Id.* at __, Common Mkt. Rep. (CCH) ¶ 14,499, at 18,708.

123. *Id.*

incorporates the provisions of agreements concluded between traders and that makes compliance with the agreement compulsory for everyone.

CONCLUSION

Even if the contested State measure was considered incompatible with Community law in only one of the seven judgments analyzed above, it is already possible to draw some very definite conclusions from these cases.

First, national anti-competitive legislation does not, by virtue of its nature, fall outside the scope of the competition rules of the Treaty. Such legislation may come within the scope of a prohibition resulting from the combined application of Articles 3(f), 5, and 85 of the Treaty.

Second, on two occasions the Court has expressly endorsed the Commission's point of view and held that a Member State may not "require or favor the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce the effects thereof."¹²⁴

Third, the Court, however, has not confined the circumstance of reinforcing the effects of agreements to the classic situation in which a measure restricting competition and adopted within a trade association is made compulsory ("generally binding") for the whole of the sector concerned. The judgment in *VVR* must be interpreted as disapproving of any regulation that incorporates the terms of an agreement and thereby renders the maintenance of that agreement superfluous.

Fourth, the Court, unlike the Commission, has indicated that it is hostile in principle to legislative provisions or regulations that confer on traders the means to pursue an anti-competitive policy without having to enter into agreements. The Court has not, therefore, entrenched itself behind the minimalist approach advocated by the Commission in *Leclerc* and has, moreover, applied in a broad fashion the criteria suggested by the Commission.

Finally, the fact remains that, essentially, the criterion of

124. *Ministère Public v. Asjes*, Joined Cases 209-213/84, 1986 E.C.R. 1425, 1471, ¶ 72, Common Mkt. Rep. (CCH) ¶ 14,287, at 16,780; *VVR*, *supra* note 7, 1987 E.C.R. at —, Common Mkt. Rep. (CCH) ¶ 14,499, at 18,707.

the constitutionality of the national anti-competitive measures that was adopted by the Court lays emphasis on the existence of agreements previously concluded between undertakings to which the State lends its support. In light of the case law, it is not the effects of a particular measure on competition that are decisive in themselves. Clearly, from a substantive point of view, it is difficult to perceive a difference between a situation in which national legislation incorporates an agreement, as in *VVR*, and a situation in which legislation of the same kind is directly adopted by the public authorities, whether under pressure from the representatives of a given sector or otherwise.