

According to its literal meaning, the sole function of the control procedure provided for in Article 100a (5) is to determine whether any measures taken by the Member States are permissible; it can therefore result only in a finding — comparable to a reasoned opinion pursuant to Article 169 of the EEC Treaty — but not in instructions being given to a Member State.

The approximation of laws governed by Article 100 *et seq.* of the EEC Treaty concerns exclusively the law-making activity of the Member States. However, Article 9 of the contested Directive seeks to give the Commission powers regarding the application of transposed law to individual cases. Like all administrative activities of the Community, that would have required a specific legal basis.

From the point of view of its meaning and purpose, Article 100a (5) is designed to safeguard rights of the Member States. The Member States' power of action is undermined if Article 100a (5) is re-interpreted as a provision conferring powers on the Commission.

- Infringement of the principle of proportionality: the powers granted to the Commission by the contested provision do not constitute the means which is the least detrimental to the interests of the Member States. The judicial remedy procedure (procedure pursuant to Article 169 of the EEC Treaty, where appropriate application for interim measures) is, in particular, not more time-consuming, bearing in mind that the instructions to the Member States pursuant to Article 11 of the product safety directive are issued according to a procedure which can take up to six weeks altogether.

**Appeal brought on 17 September 1992 by the Publishers Association against the judgment delivered on 9 July 1992 by the Second Chamber of the Court of First Instance of the European Communities in case T-66/89 between the Publishers Association and the Commission of the European Communities**

(Case C-360/92 P)

(92/C 288/14)

An appeal against the judgment delivered on 9 July 1992 by the Second Chamber of the Court of First Instance of the European Communities in case T-66/89 between the Publishers Association and the Commission of the

European Communities, was brought before the Court of Justice of the European Communities on 17 September 1992 by the Publishers Association, represented by Jeremy Lever, QC, of the Bar of England and Wales, Mark Pelling, Barrister of the Bar of England and Wales, and Robin Griffith, Solicitor, of Messrs Clifford Chance, London, with an address for service in Luxembourg at the chambers of Me Marc Loesch, 8 rue Zithe.

By the appeal, the Publishers Association seeks:

- (a) an order setting aside the judgment; and
- (b) part of the same form of order as that sought by it from the Court of First Instance namely:
  - (i) annulment of Article 2 of the Decision <sup>(1)</sup> in so far as it refused an exemption pursuant to Article 85 (3) for the Net Book Agreements and certain related decisions, regulations and other documents referred to in Article 1 of the Decision; and
  - (ii) a declaration that Articles 2, 3 and 4 of the Decision are each respectively void; and
- (c) an order that the Commission pay the Publishers Association's costs of and occasioned by the appeal and by the application and its costs incurred in the proceedings before the Court for the adoption of interim measures.

*Contentions and main arguments adduced in support:*

The Publishers Association maintains that the Court of First Instance has erred in law in the following respects namely:

- the Court of First Instance wrongly interpreted the Net Book Agreement as a collective system of resale price maintenance,
- the Court of First Instance wrongly rejected the submission of the Publishers Association that Commission Decision 82/123/EEC <sup>(2)</sup> in Dutch Books was irrelevant to a proper consideration of the Publishers Association's case and/or the Court of

<sup>(1)</sup> Commission decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394: Publishers Association Net Book Agreements (OJ No L 22, 26. 1. 1989, p. 12).

<sup>(2)</sup> OJ No L 54, 25. 2. 1982, p. 36.

First Instance was wrong in concluding that the principle to be derived from the decision of the Commission in Dutch Books was in any way relevant to any of the submissions and arguments put forward by the Publishers Association in support of its application for exemption pursuant to Article 85 (3) of the EEC Treaty. The arrangements in Dutch Books were correctly characterized as a collective system of retail price maintenance because, *inter alia*, those arrangements required the parties to them to apply resale price maintenance to each of their publications and precluded them from disapplying it and restricted the parties as to the persons with whom they were free to deal. By contrast, no such rules are to be found in the Net Book Agreement,

- the Court of First Instance wrongly upheld the position adopted by the Commission that it could properly hold that the Net Book Agreement was not indispensable to the attainment of its objectives while at the same time purporting to take no position as to whether or not the objectives of the Net Book Agreement were in fact attained in practice by it,
- having correctly concluded at paragraph 73 of the judgment that: 'under Article 85 (3) . . . an exemption cannot be granted unless, *inter alia*, the Agreement does not have the effect of imposing on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives, referred to in paragraph 3, of promoting technical or economic progress in allowing the resultant benefit to be shared fairly' the Court of First Instance failed to apply that test in considering the Publishers Association's application before it and was wrong to consider the issue of indispensability without considering either adequately or at all:
  - (i) what the objectives of the Net Book Agreement were;
  - (ii) whether and if so to what extent the Net Book Agreement achieved its objectives; and
  - (iii) whether and if so how and to what extent such objectives could be achieved by any other method,
- the Court of First Instance was wrong to hold that it was the Publishers Association's submission, that the finding of the Restrictive Practices Court in the United Kingdom that the Net Book Agreement was indispensable, applied to the international book trade; in fact the Publishers Association made no such submission but on the contrary consistently submitted merely that the material contained in and the conclusions of the Restrictive Practices Court were just as relevant to Ireland as to the United Kingdom. The Court of First Instance therefore failed to consider the submissions which were actually made by the Publishers Association in this connection,
- the Court of First Instance was wrong to conclude, by reference to paragraph 43 of the Decision, that the Commission did not ignore the ruling of the Restrictive Practices Court, when, on the contrary, as the President of the Court said, at paragraph 29 of his Order given on 13 June 1989 in relation to the application by the Publishers Association for interim measures: 'the Commission . . . proceeds . . . to consider indispensability of the Agreements in question without taking account of the appraisal made by the national court',
- the Court of First Instance was wrong to dismiss the Publishers Association's submissions that the Commission was bound to have due regard to the findings of fact contained in the 1962 judgment of the Restrictive Practices Court by reference to the proposition that national judicial practices cannot prevail in the application of the competition rules set out in the Treaty, since that proposition, whilst correct, was irrelevant to the Publishers Association's submission, namely that the evidence and other material contained in and the conclusions of the judgment of the Restrictive Practices Court was material on which the Publishers Association was entitled to rely as evidence in support of its application that the Net Book Agreement ought to be exempted pursuant to Article 85 (3) of the EEC Treaty;
- the Court of First Instance was wrong to dismiss the Publishers Association's submission that the Commission was bound to have due regard to the findings of fact contained in the 1982 judgment of the Restrictive Practices Court by reference to the finding of the Restrictive Practices Court that the Publishers Association had not in the proceedings before it proved that the abolition of the Net Book

Agreement would lead to a substantial decline in exports, since it was not nor had it ever been any part of the submissions of the Publishers Association either to the Commission or to the Court of First Instance that a decline in exports either to Ireland or elsewhere would lead to the collapse of the Net Book Agreement in the United Kingdom, as the Court of First Instance itself acknowledged in part in paragraph 82 of its judgment,

- the Court of First Instance was wrong to dismiss the Publishers Association's application by dismissing a supposed argument that the Net Book Agreement would collapse if its application was confined to the national market since such an argument was not advanced by the Publishers Association either before the Court of First Instance or to the Commission as the Court of First Instance itself acknowledged at paragraph 82 of the judgment,
- the Court of First Instance was manifestly wrong to hold that because the Publishers Association was an association of publishers established in the United Kingdom, it was not entitled to rely upon any negative effects which might be felt in Ireland,
- the Court of First Instance was wrong to consider each of the four submissions put forward by the Publishers Association to demonstrate the indispensability of the Net Book Agreement separately, when the submission made by the Publishers Association was that the cumulative effect of the problems referred to in each of the four submissions was to render individual resale price maintenance unworkable and therefore the Net Book Agreement was indispensable to achievement of the objectives of the system in both the United Kingdom and Ireland,
- the Court of First Instance wrongly failed to take any proper or sufficient account of (i) the failure of the Commission in the Decision to take account of its declared industrial or commercial policies and/or (ii) the inconsistency of approach between the contents of the Decision and the Commission's assertions of principle contained in official communications to the Council.

**Action brought on 21 September 1992 by the French Republic against the Commission of the European Communities**

(Case C-367/92)

(92/C 288/15)

An action against the Commission of the European Communities was brought before the Court of Justice of the European Communities on 21 September 1992 by the French Republic, represented by Edwige Belliard and Géraud de Bergues, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9, boulevard du Prince Henri.

The applicant claims that the Court should:

- declare null and void Commission decision SG(92) D/9508 of 15 July 1992 concerning capital contributions and research and development aid granted to Bull, a company operating in the information technology sector, inasmuch as the decision equates the public contributions to Bull in 1991 and 1992 with State aid and imposes the requirement of systematic notification to the Commission of future capital provisions to that undertaking,
- order the defendant to pay the costs.

*Pleas and main arguments adduced in support:*

- Manifest error and inadequate reasoning, inasmuch as the Commission has failed to demonstrate sufficiently in law that the public capital contributions to Bull constitute State aid within the meaning of Article 92 of the EEC Treaty:
  - the Commission committed a manifest error of assessment with regard to the inherent profitability of the restructuring contemplated. In fact, the cost of the restructuring plan submitted in detail to the Commission amounted to FF 4 billion, with a return period of two years. Of the projected improvement of operating margins of FF 4,7 billion, less than 10 % was to come from an increase in sales, thus giving rise to some uncertainty. Moreover, apart from the effect of business activity in 1991 (Bull's main markets went through a severe recession; although world