

Handout № 15a

Case¹

The German Company Grundig, manufacturer of radios, has entered into a contract with the French company Consten for exclusive distribution in France. In that contract Consten undertook to accept a minimum delivery of goods by Grundig, to order on a regular basis in advance, to conduct an appropriate advertising campaign, to maintain a service shop with sufficient replacement stock and offer guarantee and customer services.

Consten also undertook not to sell itself or as an agent for someone else similar goods that could be in competition with the goods covered by the contract; and not to deliver neither directly nor indirectly in other countries. A similar contractual prohibition had been concluded by Grundig with all exclusive distributors in other countries and wholesalers in Germany. Grundig in turn undertook to leave the sale to Consten and not to deliver directly or indirectly to any other person in the territory covered by the contract. Consten received permission to use the trademark of Grundig that had been registered in Germany and other countries for the distribution of Grundig radios

After notification of the contract the Commission decided that the contract was in breach of Art. 81 EC. At the same time the Commission denied a clearance according to Art. 81(3) EC and required Grundig and Consten to refrain from any activity that could prevent or hinder other companies to purchase goods covered by the contract freely from wholesalers and retailers in the EC for re-sale.

Consten and Grundig challenged the decision before the ECJ. They purport that the prohibition of Art. 81 applied only to horizontal agreements; exclusive distribution agreements were not agreements between enterprises, therefore only Art. 82 could be applicable. They contend that the Commission had failed to show that trade would have been more lively without the agreement. Also, the Commission had not examined which effects the contract had on the competition between different brands; competition with similar radios of other brands had in fact increased. And finally they claim that Art. 81(3) would apply.

What are the prospects of the procedure before the ECJ?

¹S. *Consten und Grundig* (Case 56/64).