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DEPARTMENT OF LAW

**EC LAW, INTELLECTUAL PROPERTY RIGHTS AND THE MARKET FOR
SPARE PARTS IN THE AUTOMOBILE SECTOR**

by INGE GOVAERE

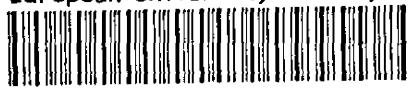
VOLUME 2

Thesis submitted for assessment
with a view to obtain
the degree of Doctor
of the European University Institute
Department of Law
Florence

Supervisor: Prof. Dr. J. SCHWARZE
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PART FOUR

THE COMMUNITY RULES

AND THE SPARE PARTS ISSUE

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CHAPTER VIII. DESIGN RIGHTS ON SPARE PARTS OF CARS IN EC
CONTEXT: CONSENT OR JUSTIFICATION?

VIII.1. INTRODUCTION

It is clear from the foregoing chapters that there is not one obvious solution at hand to unconditionally trench the question whether or not to grant and/or to enforce legal protection on spare parts of cars is compatible with Community law. The previous approaches taken by the Court to intellectual property rights can hardly be called consistent,¹ whereas the Court had never before been confronted with the complicated issue of the legal protection of components of complex products. Furthermore, the legal approaches to design and design/copyright protection on spare parts of cars in the various Member States do not present a single common feature that could be used as a point of reference by the European Court.² The spare parts cases of 1988 thus meant that the European Court of Justice was confronted with a triple legal problem.

Firstly, the Court had to consider the implications of the diversity in -and sometimes conflicting- national approaches to design protection in general and to components of complex products in particular. As mentioned above, the acceptance of this situation seriously jeopardizes the creation of a single European market and necessarily implies distortions to

¹ See supra, Chapter VII.

² See supra, Chapter IV, especially at pt. IV.4. where it is illustrated that the national approaches to design in general and to the legal protection of spare parts in particular are so divergent that it is even difficult to make a coherent categorisation.



competition.³ Secondly, there was the absence of clear criteria in the Court's previous case-law to indicate whether and when the Community rules on the free movement of goods should prevail over the national intellectual property rights concerned. This meant that different approaches could be taken to resolve the issue either way.⁴ And finally, whatever solution adopted under Articles 30-36 EC needed to be reconciled with the rules aimed at safeguarding free competition in the single market. The answer sought to all of these problems furthermore needed to be situated against the background of the historical economic and strategic importance of the automobile sector for the European Community and its Member States.⁵ Although the spare parts cases as such did not directly deal with aspects of industrial or commercial policy, it was maintained that the outcome of the spare parts cases would not only affect the market power of the car manufacturers within the Community, but would indirectly also potentially influence their competitiveness vis-à-vis third countries, and especially Japan.

Although the final judgments are disappointingly brief - thereby offering little or no explanation for what clearly was a choice of judicial policy-, the fact that both spare parts cases were dealt with in full court proves that the issues at stake were considered to be rather important. It is submitted that the most important and delicate question posed to the Court in the spare parts cases was whether or not design protection on spare parts of cars comes within the scope of the exception of Article 36 EC to the rules on the free movement of goods. The answer to this question, which was

³ See supra, Chapter IV.

⁴ See supra, Chapter VII.

⁵ See supra, Chapter II.

posed in the CICRA and Maxicar v. Renault case,⁶ was decisive for a potential approximation of national design laws concerning components of complex products and it also set the tenor for the answers to be given in both the Maxicar and the Volvo v. Veng⁷ cases concerning the applicability of the rules on competition to the alleged anti-competitive behaviour of the car manufacturers.⁸

VIII.2. THE CICRA AND MAXICAR v. RENAULT CASE

VIII.2.1. THE BACKGROUND

The CICRA and Maxicar v. Renault case is rather different from the other intellectual property cases that had so far been brought before the Court of Justice. The national procedure before the Milan Court concerned a legal action brought by independent manufacturers claiming the annulment of certain design rights on bodywork components for Renault cars, whereas the previous cases concerned a request by the proprietor of an intellectual property right to obtain a legal injunction either against third parties who manufacture, import and sell unauthorized products, or to prevent parallel importation.⁹ Furthermore, all previous cases concerned protective rights on

⁶ Case 53/87, Conorzio italiano della componentistica di ricambio per autoveicoli (CICRA) and Maxicar v. Renault, Judgment of 5 October 1988, E.C.R. (1988) 6039.

⁷ Case 238/87, AB Volvo v. Erik Veng (UK) Ltd, Judgment of 5 October 1988, E.C.R. (1988) 6211.

⁸ See infra, Chapter IX.

⁹ In the words of Advocate-General Mischo, "It is not a case here of a proprietor of protective rights defending his 'territory' against importers, but of independent producers attacking that proprietor by challenging his entitlement to exercise his exclusive rights against them..", see Case 53/87, Opinion delivered on 21 June 1988, E.C.R. (1988) 6055, at pt. 7.

independent products¹⁰, whereas the Maxicar case concerned components of a complex product needed for repair purposes.

Although the Milan Court ruled that the grant of design protection on spare parts of cars, such as the contested bodywork work components, was in conformity with Italian law,¹¹ it nevertheless doubted whether the exercise of such an exclusive right was in conformity with Articles 30-36 and 86 of the EC Treaty. Concerning the rules on the free movement of goods, the following question was referred to the Court of Justice:

"Are Articles 30 to 36 of the EEC Treaty to be interpreted as prohibiting the owner of a protective right in an ornamental design which was granted in a Member State from asserting the corresponding absolute rights so as to prevent third parties from manufacturing and selling, and also exporting to another Member State, component parts, which, taken as a whole, make up the bodywork of a car which has already been put on the market, that is to say component parts intended to be sold as spare parts for that car?"

The answer to be given to that question was not only relevant from a legal point of view. It would necessarily also have significant economic repercussions for either the car manufacturers or the independent manufacturers.¹² In the Report of the Hearing, the figure of 30.000 million USD turnover reached in 1984 was advanced as concerns the total market in

¹⁰ The terminology 'independent products' is used to denominate all products that are sold separately from and do not have to be physically incorporated into another product to form a complex product. It thus includes both simple products and complex products as such, as well as accessories. Pieces of a set which are not physically connected, such as cutlery, are considered as simple products.

¹¹ On the conformity with Italian law as stated by the Tribunale di Milano, see supra, Chapter IV, at pt. IV.3.4.2.

¹² For the general economic background, see supra, Chapter II.

motor vehicle spare parts.¹³ The bodywork components covered by protective rights were estimated to account for 5% of the entire market of car components -taking into account their cost prices and turnover rate-, or in other words for a turnover in 1984 of approximately 1.500 million USD.

It is obvious that the impact of the Maxicar case would not be restricted to Italy, but would set the tenor as concerns the compatibility of design protection on bodywork components of cars in general with Article 36 EC. Furthermore, the outcome of the Maxicar case would not only bear upon the market in bodywork components, but would also have indirect implications for the other spare parts covered by protective rights.

VIII.2.2. INTRODUCTION TO THE LEGAL ISSUES

At first sight, it might be thought that the Maxicar case concerns a purely national situation. Independent manufacturers of spare parts in Italy seek to annul the design protection granted by Italian law on bodywork components of cars in order to be able to freely manufacture and sell those parts themselves. However, it is specified in the preliminary question that those parts are also intended for export to other Member States, so that intra-Community trade might be affected. It thus seems that the national court assumed that the national measure concerned constitutes a measure having equivalent effect to quantitative restrictions in the sense of Article 34 EC, to which Article 36 EC has to be applied. This is important in so far as it is established case-law that Article 34 EC only applies to measures that are distinctly applicable and favour the national production. The first question thus arising is whether or not the grant of design rights on spare parts of cars constitutes a measure having

¹³ Case 53/87, o.c., at p. 6043-6044.

equivalent effect under Article 34 and/or Article 30 EC.¹⁴

Having established that the measure does constitute a measure having an equivalent effect, the next question arising is whether or not Article 36 EC applies by way of exception to the rules on the free movement of goods in this particular case. The national court is of the opinion that the exercise of the right appears to be contrary to the inherent function of the design right, thus possibly constituting an arbitrary discrimination or a disguised restriction on trade in the sense of the second sentence of Article 36 EC. Two arguments are advanced to support that conclusion:

".. the monopoly position of the proprietor of the protective right does not constitute a return for research and progress achieved in the field of aesthetics, since the design of the car as a whole (..) accounted for the entirety of that return. It also implies that competition is prevented in other economic sectors and leads to the charging of higher prices, and such advantages are not in harmony with the requirements of economic progress which justify industrial property rights."¹⁵

Whereas the preliminary question is formulated in the sense that the compatibility of the exercise of the right with Article 36 EC has to be established, the underlying concern seems to be that the existence of design rights on certain components of complex products cannot be justified, having regard to the function of the exclusive right. This invokes the question as to which approach the Court should take, namely the approach based on the specific subject-matter of the right and the consent by the right holder to the marketing of the product, or the approach based on the justification of the measure in the light of the function of design rights.¹⁶ A

¹⁴ See *infra*, at pt. VIII.3.

¹⁵ Case 53/87, *o.c.*, Report of the Hearing.

¹⁶ See *infra*, at pt. VIII.4.

second but related question that ensues from the preliminary question is whether or not the possibility to obtain a double reward influences the outcome of the case.¹⁷

It is obvious that the answer given to all those questions will determine whether or not the scrutiny under the rules on competition has to take the legitimacy of the exclusive rights on spare parts as a given fact. However, it is also important to determine how this all affects the final consumer, especially considering that both the car manufacturers and independent manufacturers of spare parts claim to safeguard the consumers interests through obtaining or refuting design protection on spare parts of cars. The central arguments to this debate are the use of design rights to enforce quality and safety standards and the potential implications of tie-ins.¹⁸

VIII.3. MEASURES HAVING AN EQUIVALENT EFFECT

VIII.3.1. INTRODUCTION

Considering the structure of Articles 30-36 EC,¹⁹ the Court seems to have taken it for granted that intellectual property rights are measures having an effect equivalent to quantitative restrictions. It is not surprising, therefore, that its main approach is to proceed immediately with the scrutiny under Article 36 EC. In its case-law concerning

¹⁷ See *infra*, at pt. VIII.5.

¹⁸ See *infra*, at pt. VIII.6.

¹⁹ See *supra*, Chapter VI, at pt. VI.2.2. The Court's approach clearly confirms the interpretation that if intellectual property rights were not considered by the draftsmen of the Treaty to constitute measures having an equivalent effect, than their inclusion in Article 36 EEC would not make any sense.

intellectual property rights and free movement of goods, the Court has paid only little attention to the applicability of Article 30,²⁰ and even less so of Article 34 EC, to the measures invoked. It is significant that there is not one case in which the Court has held that an intellectual property right did not constitute a measure having an equivalent effect. This has been severely criticized by Marenco who has tried to demonstrate on the basis of the discrimination theory that the Court has cleared measures under Article 36 EC that - according to him - did not even come under Article 30 EC.²¹ Marenco's point of view is especially pertinent to the Maxicar case, since he represented the Commission together with K. Banks.

In the Dassonville case, the Court gave the following definition of measures having an equivalent effect to quantitative restrictions:

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having

²⁰ It is especially the cases whereby the Court looked at the justification of the national measures where Article 30 EC was explicitly dealt with, see for instance supra, Chapter VII, at pt. VII.3.

²¹ MARENCO, G., "Pour une interpretation traditionnelle de la notion de mesure d'effet équivalent à une restriction quantitative", C.D.E. (1984) 291-363. At p. 346 he argues: "A défaut de discrimination formelles ou matérielles intrinsèques, la méthode d'analyse ici défendue implique normalement que l'on considère les dispositions nationales sur la propriété industrielle comme licite à l'égard de l'Article 30. Il s'ensuit que, licite au regard de l'Article 30, la mesure n'a pas besoin de bénéficier de dérogations au titre de l'Article 36. Cette disposition ne doit dès lors pas être prise en considération. Celle qui vient d'être décrite n'est toutefois pas la méthode d'analyse de la Cour. .. la Cour, s'agissant de mesures susceptibles de relever d'une des justifications visées à l'Article 36, tend à omettre ou à mutiler l'analyse au regard de l'Article 30."

an effect equivalent to quantitative restrictions".²²

Although this definition concerned Article 30 EC, it is difficult to envisage a different definition for the same formulation used in Article 34 EC. Still, the Court has proceeded to apply different rules according to whether a national measure concerns restrictions on imports or exports. Measures are only held to be contrary to Article 34 EC if they are to the prejudice of export as compared to domestic trade, whereas they can be held to be contrary to Article 30 EC even if they are not to the prejudice of imports as compared to domestic trade. This differentiated approach has been strongly criticized in legal writings.²³ But, although the Court's approach under Articles 30 and 34 EC lacks formal coherence, it is submitted that the Court did not develop mutually exclusive, but rather complementary approaches to be applied to measures that restrict intra-Community trade. This implies that a measure alleged to have an effect equivalent to quantitative restrictions can only be held to be compatible with the rules on the free movement of goods if cleared under both articles. Though it naturally suffices that either Article 30 or Article 34 is infringed for a measure to be incompatible with the rules on the free movement of goods.

VIII.3.2. RESTRICTIONS ON EXPORTS

According to the Commission, Renault and the French government, the preliminary question had to be confined to the matter of restrictions on exports in the sense of Article 34 EC. They point out that the facts of the case merely concerned

²² Case 8/74, *Procureur du Roi v. Dassonville*, Judgment of 11 July 1974, E.C.R. (1974) 837, at para 5.

²³ For an analysis of the main criticism, see GORMLEY, L., Prohibiting restrictions on trade within the EEC, North-Holland, 1985, at pp. 96-111.

the manufacture and sale in Italy of goods made in Italy as well as the export to other Member States, and not the importation of unauthorized spare parts into Italy.²⁴

The Court has consistently held that the prohibition of quantitative restrictions and measures having equivalent effect under Article 34 EC concerns:

"..national measures which have as their specific object or effect the restriction of patterns of export and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or the trade of other Member States."²⁵

For instance in the Delhaize case, the Court had ruled that a national measure which restricted the quantity of wine that could be exported in bulk to other Member States, whereas no similar quantitative restrictions were imposed on sales of wine in bulk between undertakings situated within the product region, infringed Article 34 EC and could not be justified as a measure needed to safeguard a denomination of origin under the industrial and commercial property exception of Article 36 EC.²⁶

However, the situation in Maxicar was totally different in that the Italian legislation did not provide a different treatment according to the destination of the products. Both

²⁴ Case 53/87, o.c., Report of the Hearing.

²⁵ Case 15/79, Groenveld v. Produktschap voor vee en vlees, Judgment of 8 November 1979, E.C.R. (1979) 3409, at para 7.

²⁶ Case C-47/90, Etablissements Delhaize Frères et Compagnie Le Lion SA v. Promalvin SA et AGE Bodegas Unidas SA, Judgment of 9 June 1992, not yet published. For the Court's analysis under Article 36 EC, see supra, Chapter VI, at pt. VI.4.2.3.

the sales within Italy and the exports to other Member States were prohibited in so far as they were unauthorized by the holder of the design right -regardless of his nationality-, so that no particular advantage was created for the national production or the domestic market. According to the Commission, this implied that the Italian design right did not constitute a measure having an equivalent effect in the sense of Article 34 EC, so that there was no need to examine its possible justification under Article 36 EC.²⁷

VIII.3.3. THE INCIDENCE OF ARTICLES 30 AND 34 EC

Although the Commission's finding is correct if one limits the analysis to Article 34 EC, it is submitted that it is incorrect to interpret the problem merely in the light of Article 34 EC. It has to be pointed out that the Court has applied Article 34 EC exclusively to cases whereby no undue restrictions were imposed on the importation and sale of goods that had been lawfully marketed in another Member State. For instance, the Court has held the prohibition of export,²⁸ distinctly applicable quantitative restrictions upon export²⁹ and the requirement of inspection documents relating specifically to domestic production intended for export to other Member States³⁰ to be contrary to Article 34 EC. These national measures clearly did not affect the importation of goods into

²⁷ It is interesting to note that the Commission, contrary to Renault and the German government, advanced no arguments in second order as to the possible application of Article 36 EC. See Case 53/87, o.c., Report of the Hearing.

²⁸ Case 172/82, *Fabricants Raffineurs d'Huile de Graissage v. Inter-Huiles*, Judgment of 10 March 1983, E.C.R. (1983) 555, at para 12.

²⁹ Case C-47/90, *Delhaize*, o.c., at para 12-14.

³⁰ Case 53/76, *Procureur de la République v. Bouhelier*, Judgment of 3 February 1977, E.C.R. (1977) 197, at para 15-18.

the Member State that issued the restrictive measure. More importantly, the Court has ruled that the following did not constitute a measure having an equivalent effect in the sense of Article 34 EC: prohibition for manufacturers of sausages from having in stock or processing horsemeat,³¹ minimum quality standards for domestic cheese production and objective inspections,³² prohibition on production of baker's wares and on transport and delivery before a certain hour³³ and minimum standards for enclosure for fattening calves³⁴. In all those cases, the national indistinctly applicable measures were aimed at regulating national production and did not prejudice the importation and sale of products coming from other Member States. The Court specifically mentioned that the measures concerned were not contrary to Articles 34 or 30 EC in the Jongeneel Kaas and Oebel case.³⁵ The main difference between all those cases and the Maxicar case, lays in the effect that intellectual property rights by their very nature have on imports from other Member States.³⁶ On the basis of the exclusive right, the holder can not only prohibit the domestic manufacturing and sale of unauthorized goods, but he can also prohibit the importation and sale of (unauthorized) goods that

³¹ Case 15/79, o.c., at para 6-9.

³² Case 237/82, Jongeneel Kaas v. Netherlands, Judgment of 7.2.1984, E.C.R. (1984) 483, respectively at para 22-23 and 25-26.

³³ Case 155/80, Oebel, Judgment of 14 July 1981, E.C.R. (1981) 1993, respectively at para 14-16 and 17-20.

³⁴ Joined Cases 141 to 143/81, Holdijk, Judgment of 1 April 1982, E.C.R. (1982) 1299, at para 11.

³⁵ Case 237/82, o.c., at para 20 and 28; Case 155/80, o.c., at para 20-21.

³⁶ It is significant in this respect that the Court explicitly held that intellectual property rights are of a nature as to affect intra-Community trade in Joined Cases C-92/92 and C-326/92, Phill Collins, Judgment of 20 October 1993, not yet reported.

have been legitimately marketed in another Member State, for instance because he has no parallel protection in that State or because the protection has since expired. As such, it is submitted that although the national court did not refer to possible restrictions on imports, the compatibility of the measure with Article 30 EC equally has to be considered.

It should be recalled that the Court has included both actual and potential restrictions on imports in the Dassonville definition of measures having an equivalent effect. Contrary to the Commission, Advocate General Mischo, in his opinion to the case, maintained that the reference by the national court to 'sales' of spare parts could be interpreted as including the prohibition on importation and marketing of parts other than those marketed by Renault. In his view, this was particularly relevant since CICRA stated in its observations that it also markets spare parts that are manufactured in other Member States, such as Spain.³⁷ But even had CICRA not actually marketed imported spare parts, then still the question of the applicability of Article 30 EEC would have been relevant, because the importation of unauthorized spare parts could potentially take place. The essential question is whether or not the national measure concerned constitutes a measure having an effect equivalent to quantitative restrictions, so that it is inconceivable that this should depend upon the facts of a given case. For instance, take the hypothetical example that Renault has an exclusive right under design legislation on several spare parts in Member State B and CICRA imports some unauthorized parts from Member State A to B and exports others from B to A. If Renault enforces his exclusive right in B against the imports and sales of parts coming from A, this would clearly be a measure having equivalent effect in the sense of Article 30 EC so that the

³⁷ Case 53/87, o.c., Opinion of Advocate General Mischo, delivered on 21 June 1988, E.C.R. (1988) 6055, at para 13-14.

Article 36 EC exception would need to be considered. The fact that the exclusive right is invoked to prohibit sales in B and exports to A cannot logically lead to the opposite conclusion, namely that the same exclusive right is not a measure having an equivalent effect so that it should not come within the ambit of the rules on the free movement of goods.

It is thus submitted that the same exclusive right cannot be simultaneously compatible with and contrary to the rules on the free movement of goods, depending on whether it is invoked to prevent exports or imports.³⁸ But this finding does not exclude the fact that, as the Court ruled in the Oosthoek's Uitgeversmaatschappij,³⁹ it is possible for a measure not to be contrary to Article 34 EC, namely in the absence of a protectionist effect, whereas it is nevertheless incompatible with Article 30 EC, so that it has to be justified on the basis of either mandatory requirements or Article 36 EC in order to be upheld.

³⁸ Also Beier argues for a uniform interpretation under Articles 30-36 EC, although he holds on to the use/misuse distinction to curtail IPR. With regard to the Maxicar case, he writes that the issue of design protection on spare parts: "...could not be made dependent upon whether the accused manufacturers produced their products for the Italian market, for the Common market or for the World market. Questions such as protectability, validity, scope of protection and infringement must be decided by applying the same legal standards regardless of whether the national, European or international constellation of facts are at stake.", BEIER, F.-K., "Industrial property and the free movement of goods in the internal market", I.I.C. (1990) 131-160, at p. 151.

³⁹ See Case 286/81, Oosthoek's Uitgeversmaatschappij, Judgment of 15 December 1982, E.C.R. (1982) 4575. In this case, the Court held that legislation that merely imposes marketing conditions within the Netherlands without affecting the sale of goods intended for exportation was not contrary to Article 34 EEC. However, the Court proceeded to state that such a measure is contrary to Article 30 EEC since it restricts the volume of importations, although this could in this particular case be justified on the basis of consumer protection and fair trading.

VIII.3.4. RESTRICTIONS ON IMPORTS

As mentioned above, the Commission was clearly of the opinion that Article 30 EC did not apply in the given case, whereas Advocate-General Mischo had no difficulty with accepting the contrary view.⁴⁰ The reason for this divergency is of a conceptual nature. Whereas in general the Court is criticized for not having applied Article 34 EC to non-discriminatory measures, the agents for the Commission in the Maxicar case, namely Giuliano Marenco and Karen Banks, voice critique on the case-law of the Court for having applied Article 30 EC to non-discriminatory measures, and especially for always considering intellectual property rights to come within the ambit of Article 30 EC.⁴¹ According to Marenco and Banks, only those provisions of intellectual property legislation which are expressly or inherently discriminatory are contrary to Article 30 and thus subject to scrutiny under Article 36 EC.⁴² The important factor is to see whether or not the right was granted in a non-discriminatory manner -for instance no different treatment on the basis of nationality- and subsequently applied in a non-discriminatory manner. It is obviously correct to state that discriminatory measures come under Article 30 EC.⁴³ However, it is submitted that measures that are contrary to Article 30 EC do not necessarily have to

⁴⁰ See supra, at pts VIII.3.2 and VII.3.3. respectively.

⁴¹ MARENCO, G., BANKS, K., "Intellectual property and the Community rules on free movement: discrimination unearthed", E.L.R. (1990) 224-256. See also MARENCO, G., o.c..

⁴² MARENCO, G., BANKS, K., o.c., at p. 241.

⁴³ See for instance supra, Chapter VII, at pt. VII.3.1., where the Court had no difficulty in finding that provisions on compulsory licences that discriminated against imports from other Member States were contrary to Article 30 EC.

be discriminatory.

Marenco and Banks consider the prohibition on parallel imports to be contrary to Article 30 EC because the principle of national exhaustion discriminates in that it differentiates between the place where the product was first brought on the market.⁴⁴ Although this can be argued theoretically, it should be noted that the Court's concern cannot be merely to eliminate discrimination, because not all national legislations have the principle of exhaustion. In the UK for instance, patent law is governed by the doctrine of implied licence.⁴⁵ If the Court's aim were only to eliminate the discrimination inherent in the principle of national exhaustion in a Member State of importation, then it would not have developed the principle of Community exhaustion, but different rules -though no longer discriminatory- would apply in various Member States and to various types of intellectual property rights.⁴⁶ It is obvious that such a situation would still have created specific distortions to intra-Community trade, which have been removed through the elaboration of the Community principle of exhaustion.

The discrimination theory essentially holds that if imports are not subject to difficulties other than those imposed on domestic production, then the measure concerned is compatible

⁴⁴ MARENCO, G., BANKS, K., o.c., at pp. 242-248.

⁴⁵ See supra, Chapter IV, at pt. IV.3.1.1.C.

⁴⁶ See also supra, Chapter VI, at pt. VI.4.3.1.. Similarly, see KOCH, N., "Article 30 and the exercise of industrial property rights to block imports", Fordham Corp. L. Inst. (1986) 605-632, at pp. 612-615. At p. 613, he writes: ".not only did the Court not widen national exhaustion rules, but it used a concept of industrial property which is not known to all of the Member States. A holder of parallel patents granted throughout the Community would be faced with at least two different doctrines, one of exhaustion, the other one of the implied licence ..".

with Article 30 EC. In the light of this reasoning, the fact that the importation of unauthorized spare parts that have been legitimately marketed in other Member States can be prohibited on the basis of an exclusive right is not incompatible with Article 30 EC -and subsequently does not have to be justified under Article 36 EC-, because similar parts could not be manufactured and marketed domestically either. The Court had already implicitly rejected this reasoning in the EMI v. Patricia and Keurkoop cases.⁴⁷ Although the Court held that the sale of unauthorized goods that had been legitimately produced in another Member State - respectively after the expiry of the parallel protection there and in the absence of parallel protection-, could be prohibited on the basis of the exclusive right in the Member State of importation, the Court ruled that this was compatible with Article 36 EC subject to its second sentence, thus implicitly accepting that the exclusive right constituted a measure having an equivalent effect.⁴⁸ Furthermore, the Court has explicitly held in the Warner Brothers case that the application of a national rule irrespective of the origin of the protected product comes under Article 30 EC if it indirectly affects trade.⁴⁹ It should be recalled that the Court ruled that the right to prohibit the hiring out of video-cassettes in a Member States is liable to influence the trade in video-cassettes in that State and hence indirectly affects intra-Community trade. As such, not only measures which are imposed at the border, but also indistinctly

⁴⁷ Case 341/87, EMI Electrola v. Patricia Im-und Export and others, Judgment of 21 January 1989, E.C.R. (1989) 79. Case 144/81, Keurkoop v. Nancy Kean Gifts, Judgment of 14 September 1982, E.C.R. (1982) 2853.

⁴⁸ See also supra, respectively at Chapter VII, pt. VII.2.3., and Chapter VI, at pt. VI.4.3.2.D.

⁴⁹ Case 158/86, Warner Brothers v. Erik Viuff, Judgment of 17 May 1988, E.C.R. (1988) 2605.

applicable internal measures -which clearly are not discriminatory-, can have an effect equivalent to quantitative restrictions and need justification under Article 36 EC.⁵⁰

The question arises whether this approach to intellectual property rights is still valid after the recent Keck judgment, in which the Court explicitly re-examined and clarified its case-law on what constitutes a measure having an equivalent effect to quantitative restrictions under Article 30 EC.⁵¹ The Court confirmed the applicability of Article 30 EC to national rules that lay down requirements to be met by goods imported from other Member States, such as requirements as to designation, form, size, weight, composition, presentation, labelling and packaging, even if those rules apply without distinction to both imported and domestic products. But contrary to its established case-law, the Court clarified that national sales arrangements that apply to all traders operating within the national territory do not come under Article 30 EC, on the condition "that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States".⁵² Although it is too early to evaluate the impact of this ruling, it seems as though the Court has finally followed up Advocate-General Van Gerven's contention that Article 30 EC should only be applicable to those national measures that endanger the

⁵⁰ See also supra, Chapter VII, at pt. VII.3.3. Marengo and Banks acknowledge that this ruling implies that the Court has explicitly refuted the discrimination theory, although they underline that the reasoning of the Court is not always consistent. See MARENCO, G., BANKS, K., o.c., at p. 241.

⁵¹ Joined Cases C-267 & 268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard, Judgment of 24 November 1993, not yet reported.

⁵² Joined Cases C-267 & 268/91, o.c., at para 16.

interpenetration of national markets.⁵³ Intellectual property rights are particularly apt to close down national markets to goods that have been legitimately put on the market of another Member State, by virtue of their inherent exclusive nature combined with the principle of territoriality. Whereas the Keck ruling in principle thus does not seem to affect the previous case-law on the applicability of Article 30 EC to intellectual property rights, it nevertheless raises uncertainty about whether the Court's approach in the Warner Brothers case, which concerned national requirements on hiring rather than sales arrangements, is still valid today.

It is not surprising that the Court has not deviated from its earlier case-law on the applicability of Article 30 EC to intellectual property rights in the Maxicar case. It has avoided clarifying the incidence between Articles 30 and 34 EC through reformulating the facts -following Advocate-General Mischo's opinion- in the sense that the independent manufacturers of spare parts sought to protect themselves from infringement proceedings intended to prevent them from manufacturing, for the purposes of sales on the internal market or for export, as well as from importing unauthorized spare parts from other Member States.⁵⁴ In the line of the EMI and Keurkoop cases, the Court immediately proceeded with the analysis under Article 36 EC, thereby implicitly refuting the Commission's view and, once again, setting the discrimination theory aside.

⁵³ Joined Cases C-267 & 268/91, Second conclusion of Advocate-General Van Gerven, delivered on 28 April 1993, at para 8.

⁵⁴ Case 53/87, o.c., at para 9. See also FRIDEN, G., "Recent developments in EEC intellectual property law: the distinction between existence and exercise revisited", C.M.L.Rev. (1989) 193-217, at p. 206, where he points out that the Court declined to distinguish between Articles 30 and 34 EC in the Maxicar case.

VIII.4. JUSTIFICATION OR CONSENT FOR COMPONENTS OF COMPLEX PRODUCTS

VIII.4.1. INTRODUCTION

As mentioned above, from the formulation of the preliminary question it appears that the national court asked whether the exercise of the design right on spare parts of cars was compatible with Article 36 EC, whereas the underlying motivation questioned the compatibility of the existence of the design right with Article 36 EC.⁵⁵ More in particular, the national court was concerned with the fact that, in its view, the enforcement of design protection on body panels of cars infringed the inherent function of design rights,⁵⁶ and wondered whether this is not contrary to the second sentence of Article 36 EC.

The formulation of the preliminary question made it relatively easy for the Court of Justice to choose which approach it would take to the case. On the basis of its earlier case-law, the Court had basically three options. It could invoke the existence/exercise dichotomy and subsequently proceed to apply the consent-theory to see whether or not the exercise of the right was legitimate ('consent-approach'). The Court could also take the opposite approach, namely invoke the case-law whereby it put the existence/exercise dichotomy aside and examine whether or not the national measure conferring exclusive rights on components of complex products was justified under both the first and the second sentence of

⁵⁵ See supra, at pt. VIII.2.2.

⁵⁶ On the function of design rights, see supra, Chapter III, at pt. III.3.5.

Article 36 EC ('justification-approach').⁵⁷ Or the Court could choose to apply the half-way-house solution, namely to carry out a justification-test under the second sentence of Article 36 EC whilst upholding the existence/exercise dichotomy under the first sentence of Article 36 EC ('marginal appraisal-approach').

VIII.4.2. THE CONSENT-APPROACH

The facts of the case obviously did not concern parallel imports, so that the Court could not merely apply the consent-theory to hold that Renault's design right was exhausted due to the first marketing with his consent.⁵⁸ In theory, the easiest approach would have consisted in reversing the reasoning of the exhaustion doctrine -as was done inter alia in the EMI case⁵⁹- and ruling that since the spare parts were marketed without Renault's consent, his design right was not exhausted and consequently the infringement of his exclusive right could be prohibited.

The premise to this approach, which was proposed by Renault and the German government, is of course that the existence/exercise dichotomy is kept intact, whereas the preliminary question precisely invokes the question of the compatibility of a certain feature of Italian design law -more precisely its applicability to components of complex products- with Community law. This is an issue of a similar kind as the

⁵⁷ On the diversity of criteria used by the Court, see supra, Chapter VII, at pt. VII.4.

⁵⁸ On the principle of exhaustion in the case-law of the Court, see supra, Chapter VI, at pt. VI.4.3. However, see also the Warner Brothers case, where the Court did not apply the principle of exhaustion although it concerned parallel imports, supra, Chapter VII, at pt. VII.3.3.

⁵⁹ See supra, Chapter VII, at pt. VII.2.3.

one previously posed concerning design rights in the Keurkoop case, namely whether the principle of first-to-file -which implies that the person filing the design and obtaining the exclusive right is not necessarily the designer- comes within the industrial and commercial property exception of Article 36 EC.⁶⁰ In both cases, the underlying concern is that the design right is not granted in conformity with the function of design protection.

It should be recalled that in the Keurkoop case, the Court held:

".. that in the present state of Community law and in the absence of Community standardization or of a harmonization of laws the determination of the conditions and procedures under which protection of designs is granted is a matter for national rules.."⁶¹

The Court thus failed to examine whether the principle of first-to-file is at all justified under the first sentence of Article 36 EC, whereas it is obvious that this principle - which confers exclusive rights on the basis of the fulfilment of a mere procedural requirement- has the potential of seriously jeopardizing the free movement of goods in the Community.⁶²

In theory, the Court could invoke a similar reasoning in the Maxicar case and hold that the conditions and procedures to obtain design protection -thus including whether or not the protection extends to components of complex products- are to be determined solely by national law, and cannot be curtailed

⁶⁰ Case 144/81, o.c.. See also supra, Chapter VI, at pt. VI.4.3.2.D.

⁶¹ Case 144/81, o.c., at para 18.

⁶² See the hypothesis advanced in Chapter IV, at pt. IV.3.3.1.B.

by Community law.⁶³ So doing, the Court would thus once again avoid answering the implicit question whether the right has to be granted in accordance to its function to come under Article 36 EC, thereby neglecting the detrimental effect of the diversity in national design legislations on the establishment of the Common market. This would then mean that in the absence of harmonization, the legal protection of spare parts of cars would remain the same as described in Chapter IV.

However, the Court specified in the Keurkoop case that the existence/exercise dichotomy prevailed "in the present state of Community law". It should be pointed out that in between the Keurkoop case of 1982 and the Maxicar case of 1988, the case-law of the Court has evolved towards accepting the fact that in certain cases the existence of certain features of intellectual property rights might not be justified under Article 36 EC.⁶⁴

Although in the Keurkoop case the Court held the existence of the right to be unaffected by Community law, in its answer to the question whether imports from other Member States could be prohibited, it proceeded to state that the exercise of the exclusive right might be curtailed, in particular if it constituted a disguised restriction on trade. This was held to be the case if the design was invoked to prohibit the importation of goods that had been marketed in another Member State with the consent of the design holder or if there was a collusion in the sense of Article 85 EC.⁶⁵ This is in conformity with the case-law of the Court concerning the

⁶³ This was indeed the approach taken by the Court under the first sentence of Article 36 EC in the Maxicar case, see infra, at pt. VIII.4.4.

⁶⁴ See especially supra, Chapter VII, at pt. VII.3.

⁶⁵ For the reasons underlying these examples, see supra Chapter VI, at pt. VI.4.3.2.D.

exhaustion doctrine, which holds that derogations from the free movement of goods are only acceptable to the extent that they are necessary to safeguard the specific subject-matter of the intellectual property rights invoked.⁶⁶ Although the Court did not define the specific subject-matter of designs in the Keurkoop case, it implicitly followed Advocate-General Reischl's opinion in that it consists in the right to first market the product.⁶⁷

It has been submitted that the application of the consent-theory to determine whether or not a right is exhausted has essentially been elaborated in the context of curtailing the detrimental effect posed by the principle of territoriality to the free movement of goods, whereas all the other potentially detrimental features of intellectual property legislation were thereby disregarded.⁶⁸ It is obvious that such an approach does not really answer the preliminary question and does not correspond to the specific facts of the Maxicar case.⁶⁹ In other words, the consent-theory should not apply because the Maxicar case did not concern the compatibility of the effect of the principle of territoriality with the rules on the free movement of goods.⁷⁰ Rather, it clearly invoked the issue whether the consequences of the scope of design protection offered in Italy -namely extending not only to a complex product but also to its individual components- is compatible

⁶⁶ See supra, Chapter VI, at pt. VI.4.3.1.

⁶⁷ See supra Chapter VI, at pt. VI.4.3.2.D.

⁶⁸ See supra, Chapter VII, at pt. VII.1.

⁶⁹ See supra, at pt. VIII.2.1., where the difference between the Maxicar case and the other cases concerning intellectual property rights, so far brought to the attention of the Court, is pointed out.

⁷⁰ Similarly, see FRANCESCHELLI, R., "Modelli ornamentali di parte di carrozzeria di automobili ed abuso di posizione dominante", Riv. Dir. Ind. (1988-II) 175-187, at p. 181.

with Articles 30-36 EC. This is a typical example of cases to which the Court has recently applied the justification test rather than the consent test.⁷¹

VIII.4.3. THE JUSTIFICATION-APPROACH

The opposite, and it is submitted correct, approach would have consisted in putting the existence/exercise dichotomy aside and examining whether and when the grant of design rights to components of complex products could be justified under Article 36 EC. This would have been in line with the Warner Brothers case which was decided a couple of months earlier.⁷² Here, the Court applied a justification-test under both the first and the second sentence of Article 36 EC, thereby explicitly putting the consent-theory based on the specific subject-matter approach aside.⁷³

Advocate-General Mischo, in his opinion to the Maxicar case, acknowledged the fact that the national court did not inquire about the compatibility of the exercise of the design right with the specific subject-matter of designs, but was rather concerned with the lack of justification for the exclusive rights in terms of the function of design rights.⁷⁴ He pointed out, in the line of his observation to the Thetford case,⁷⁵

⁷¹ See supra, Chapter VII, for a categorization of cases that have been dealt with on the basis of either the consent-test or the justification-test.

⁷² Case 158/86, Warner Brothers v. Erik Viuff Christiansen, Judgment of 17 May 1988, E.C.R. (1988) 2605.

⁷³ See supra, Chapter VII, at pt. VII.3.3.

⁷⁴ Case 53/87, o.c., at para 19.

⁷⁵ Case 35/87, Thetford v. Fiamma, Judgment of 30 June 1988, E.C.R. (1988) 3585. In his opinion to this case, Advocate General Mischo pointed out that the exercise of a

that a specific problem arises if the holder of an intellectual property right makes a normal use of an exclusive right that is improperly granted under national legislation. As to the competence of the Court of Justice to deal with such a matter, he unequivocally stated:

"I consider that it is clear, or at least has been since the Warner Brothers judgment, that in such a case the Court is entitled to consider whether the legislation in question may be regarded as justified on the ground of protection of industrial and commercial property within the meaning of Article 36. (...)"

"There is, therefore, nothing to prevent the Court from similarly considering whether legislation which allows the prohibition of imports of unauthorized copies of bodywork components is justified on such grounds, and whether it constitutes arbitrary discrimination or a disguised restriction on trade between Member States."⁷⁶

Although the Court did not explicitly refer to the function of the rental right which was alleged to be incompatible with Article 36 EC in the Warner Brothers case, the Court implicitly took the function into account through ruling that the measure was justified because it legitimately guaranteed a remuneration for the author upon each hiring-out of the protected work.⁷⁷ Also in the Maxicar case, the essential question was whether or not granting exclusive rights to bodywork components of cars was necessary to safeguard the essential function of design rights. The national court had advanced the view that it was not, because the return for research and progress in the field of aesthetics was already accounted for by the sale of the complex product, i.e. the

right might be contrary to Article 36 EC simply because the patent was granted in circumstances indicative of a protectionist intention. See also supra, Chapter VII, at pt. VII.3.2.

⁷⁶ Case 53/87, o.c., at para 21 and 22, emphasis added.

⁷⁷ See supra, Chapter VII, at pt. VII.3.3.

car, and because it led to the exclusion of competition in other economic sectors.⁷⁸

Advocate-General Mischo came to the contrary conclusion that exclusive protection on components of complex products was indeed in conformity with the function of design rights. But, with respect, he based his analysis on a wrong premise. Referring to the Centrafarm and Pharmon judgments,⁷⁹ he maintained that the Court assigns to industrial and commercial property rights the function of obtaining a reward for the inventor's creative effort.⁸⁰ The main flaw in this statement is that the Advocate-General failed to point out that the Court has -correctly- held in the Merck judgment that an intellectual property right merely gives the possibility to obtain a reward, without safeguarding that this reward will always be achieved.⁸¹ As such, he subsequently failed to examine which conditions need to be fulfilled under design protection in order to safeguard the possibility to obtain a reward for the creative effort, but to the contrary focused his attention on the reward itself. He simply rejected the thesis of the possibility to obtain a double reward, through maintaining that national legislation that allows for the apportionment of the return between the complex product and its components does not exceed the limits of industrial and

⁷⁸ See also supra, at pt. VIII.2.2.

⁷⁹ Case 15/74, Centrafarm v. Sterling Drug, Judgment of 31 October 1974, E.C.R. (1974) 1147; Case 29/84, Pharmon v. Hoechst, Judgment of 9 July 1985, E.C.R. (1985) 2281.

⁸⁰ Case 53/87, o.c., at para 27 and 32.

⁸¹ Case 187/80, Merck v. Stephar, Judgment of 14 July 1981, E.C.R. (1981) 2063. See also supra, Chapter VI, at pt. VI.4.3.2., and Chapter VII, at pt. VII.2.2. and pt. VII.2.5., where it is submitted that the Court in the Merck case has subsequently failed to safeguard the function of intellectual property rights through focusing on the specific subject-matter of the right and the consent-theory.

commercial property protection, whereas the cases whereby a double reward is effectively obtained are subject to Article 86 EC.⁸²

Advocate-General Mischo suggested that the Court should not express itself on the need to protect bodywork components of cars, but should merely hold in general that the legislation concerned was justified under the first sentence, subject to the second sentence, of Article 36 EC. However, it will be submitted below that he failed to recognize that the issue of the double reward is stringently linked with the function of design rights, so that a more profound analysis would have led to the opposite conclusion, namely that design protection on bodywork components of cars exceeds the specific function of design rights.⁸³ As such, the importance of his opinion to the Maxicar case lies essentially in the fact that he acknowledged that it would have been logical -and in particular in the explicit statement that the Court had the competence- to look at the justification of the legislation concerned, and not so much in his subsequent analysis of the function of design rights.

VIII.4.4. THE 'MARGINAL APPRAISAL'-APPROACH

The third approach which the Court could and did take in the Maxicar case is the least coherent one, because it embodies features of both the consent- and the justification-approach. The Court first reiterated the existence/exercise dichotomy in the sense of the Keurkoop judgment under the first sentence of Article 36 EC, stating that the determination of the conditions and procedures under which the protection is

⁸² Case 53/87, o.c., at para 31.

⁸³ See infra, at pt. VIII.5.

granted is a matter for national rules.⁸⁴ The Court subsequently examined whether the granting -and thus the existence- of design rights to components of complex products is compatible with the second sentence of Article 36 EC. As such, only the 'sharp edges' of national design law, namely inherently discriminatory or protectionist features of the law, and the way in which the exclusive right was exercised, could be held to be incompatible with Article 36 EC.⁸⁵

This was basically the same approach as followed in the Thetford case of June 1988,⁸⁶ where the issue was raised whether a patent granted on the basis of the principle of relative novelty came under the scope of Article 36 EC.⁸⁷ Still, there is no obvious reason why the Court did not also adopt the justification-approach under the first sentence of Article 36 EC in both the Thetford and Maxicar cases as it had done in the earlier Warner Brothers case,⁸⁸ all the more so because the latter was the approach suggested by Advocate-General Mischo.⁸⁹ It seems that the only possible explanation for the Court's refusal to look at whether the contested

⁸⁴ For the implications of this statement, see supra, at pt. VIII.4.2.

⁸⁵ See supra, Chapter VII, at pt. VII.3.2., where it is submitted that nothing in the Treaty justifies the approach whereby the existence of the right may only be curtailed under the second sentence of Article 36 EC, whereas only the exercise might be curtailed under its first sentence.

⁸⁶ Case 35/87, Thetford v. Fiamma, Judgment of 30 June 1988, E.C.R. (1988) 3585.

⁸⁷ On the Thetford case, see supra, Chapter VII, at pt. VII.3.2.

⁸⁸ See also MARENCO, G., and BANKS, K., o.c., at p. 255. Also Friden remarks that it is extremely difficult to reconcile the Maxicar and Thetford ruling with the approach taken in the Warner Brothers case. See FRIDEN, G., o.c., at p. 206.

⁸⁹ See supra, at pt. VIII.4.3.

features of the legislation were justified with reference to the function of the intellectual property right concerned in the Maxicar and the Thetford cases, is that this approach might have led to the finding that those features were incompatible with the first sentence of Article 36 EC. It has been pointed out before that, up till now, the Court has never ruled that non-discriminatory intellectual property rights could not be justified under Article 36 EC. However, it was submitted that it would be fundamentally inconsistent to use the justification-test merely to uphold national legislation and to use the consent-test to curtail the effect of undesirable features of the law.⁹⁰

Especially considering the significant legal and economic importance of the Maxicar case,⁹¹ it is surprising that the Court dealt extremely briefly, not to say superficially, with the issues raised under Article 36 EC. In particular, the Court failed to examine the central issue -namely the fact that the design rights were contested because they applied to both the components of complex products needed only for repair purposes and the complex product as such- under the first sentence of Article 36 EC. In this respect, the Court merely stated:

"It is for the national legislature to determine which products qualify for protection, even if they form part of a unit already protected as such."⁹²

This implies that the untransparent and divergent picture as illustrated in Chapter IV still prevails after the Maxicar case.⁹³

⁹⁰ See supra, Chapter VII, at pt. VII.4.

⁹¹ See supra, at pt. VII.2.

⁹² Case 53/87, o.c., at para 10, emphasis added.

⁹³ See also supra, at pt. VIII.4.2.

As mentioned above, the justification-test was limited to see whether or not the grant of the design right constituted an arbitrary discrimination or a disguised restriction on trade between the Member States. In other words, the design rights would only fall foul of Article 36 EC if they were unduly discriminatory⁸⁴ -which, as is clear from the analysis under Articles 30 and 34 EC, they are not⁸⁵ -or granted on the basis of a protectionist intention. Contrary to what the national court seemed to assume, whether or not the function of design rights is affected is thereby irrelevant, because this would imply an analysis under the first sentence of Article 36 EC.⁸⁶ The obvious conclusion of the Court's marginal appraisal of the design legislation under the second sentence of Article 36 EC thus was that:

"..it need merely be stated, (..), that the exclusive right granted by the national legislation to the proprietors of protective rights in respect of ornamental models for car bodywork components may be enforced, without distinction, both against those persons who manufacture spare parts within the national territory and against those who import them from other Member States, and that such legislation is not intended to favour national products at the expense of products originating in other Member States".⁸⁷

⁸⁴ On the incompatibility of discriminatory features of intellectual property legislation with Article 36 EEC, see supra, Chapter VII, at pt. VIII.3.1.. See especially at pt. VII.3.1.2. where it is held that the Court does not distinguish between discriminatory measures that could possibly be justified under Article 36 EEC and arbitrary discriminatory measures, but to the contrary seems to assume that all discriminatory IPR measures fall foul of Article 36 EEC.

⁸⁵ See supra, at pt. VIII.3.

⁸⁶ See supra, at pt. VIII.2.2. and pt. VIII.4.1., where it is stated that the national court advanced the view that the use of the design right contrary to its inherent function might be contrary to the second sentence of Article 36 EEC.

⁸⁷ Case 53/87, o.c., at para 12.

It is, however, noteworthy that the Court in the Thetford case held that the principle of relative novelty did not constitute a disguised restriction on intra-Community trade, because its aim was merely to foster creative activity through giving a reward for the rediscovery of old inventions.⁸⁸ In the Maxicar case, the Court does not state what the aim of the design law giving protection to spare parts precisely is, but merely points out that it is not intended to have a protectionist effect.

As concerns the possible misuse of the design right by the holder, the Court essentially reiterated its previous case-law concerning the need to safeguard the specific subject-matter of intellectual property rights. In the Maxicar judgment, the Court for the first time gave an explicit definition of the specific subject-matter of design rights:

"..the authority of a proprietor of a protective right in respect of an ornamental model to oppose the manufacture by third parties, for the purpose of sale on the internal market or export, of products incorporating the design or to prevent the import of such products manufactured without its consent in other Member States constitutes the substance of his exclusive right."⁸⁹

As such, the Court responded to the specific facts of the case by introducing a kind of reversed consent-theory. Whereas the Court has generally held that the specific subject-matter of intellectual property rights is the right to first market the product by the holder or with his consent, the Court now seems to acknowledge that the exclusive rights are essentially prohibitive rights rather than positive rights. In the Volvo case, it was even more explicitly stated that:

"..the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or

⁸⁸ See supra, Chapter VII, at pt. VII. 3.2.

⁸⁹ Case 53/87, o.c., at para 11, emphasis added.

importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right."¹⁰⁰

A first problem with this approach -which is in accordance with the definition given of the specific subject-matter of other intellectual property rights, other than trade marks¹⁰¹- lies in the fact that the Court has not defined the specific subject-matter of design rights with reference to the specific function of the right concerned. As such, the Court in the Maxicar case did not examine whether or not the 'use' of the exclusive right concerning both the spare parts and the car as a whole is necessary to safeguard the function of design rights. It merely applied the reversed consent-theory to the spare parts, as though they were independent products in their own right rather than components of complex products, and as though the only threat to the free movement of goods was posed by a possible enforcement of the principle of territoriality.¹⁰² The Court implicitly rejected an appraisal as to the function of design rights through stating that:

"To prevent the application of the national legislation in such circumstances (i.e. if the specific subject-matter is fulfilled) would therefore be tantamount to challenging the very existence of that right."¹⁰³

However, it cannot go unnoticed that the Court omitted the usual reference to the objective of giving the possibility to obtain a reward in its definition of the specific subject-matter of design rights in the spare parts cases. It has been

¹⁰⁰ case 238/87, O.C., at para 8, emphasis added.

¹⁰¹ See supra, Chapter VI, at pt. VI.4.3.2.

¹⁰² On this issue, see also supra, at pt. VIII.4.2.

¹⁰³ Case 53/87, O.C., at para 11, explanation in brackets added.

submitted above that already as concerns independent products, a refinement of the reward-theory might have led to more acceptable and consistent judgments than a straightforward application of the consent-theory, because it would have reflected the function of the right.¹⁰⁴ It is obvious that under such an approach, the fact that the case concerns design protection on components of complex products that also benefit from design protection would have been highly relevant, because it would have raised the question whether and when the alleged possibility to obtain a double reward can be justified by the function of design rights.¹⁰⁵

VIII.5. RETURN ON INVESTMENT AND THE FUNCTION OF DESIGN RIGHTS

VIII.5.1. INTRODUCTION

It is -to say the least- surprising that the Court has not once used the word 'reward' in its analysis under the rules on the free movement of goods in the Maxicar case. The alleged possibility and/or need to obtain a double reward were the central arguments advanced by the parties in favour or against upholding exclusive design rights on spare parts of cars, and have been extensively dealt with by Advocate-General Mischo. The only plausible explanation for this omission is that the Court deliberately refrained to engage in the discussion about the proper function of design rights, so as to avoid the possible consequences this might entail.

One can basically discern two sets of arguments that have been brought to the attention of the Court of Justice concerning the issue of the return on investment through granting design

¹⁰⁴ See supra, Chapter VII, at pt. VII.2.5.

¹⁰⁵ On the issue of double reward, see infra, at pt. VIII.5.

rights on spare parts of cars. A first set of arguments focused mainly on the economic repercussions of granting exclusive rights in the ancillary market of spare parts of cars on the market of new cars. A second set of arguments concerned the legal aspects of granting design protection to components of complex products, and in particular to spare parts of cars, whereby the objective to safeguard the inherent function of design rights and especially the return on investment played a central role.

VIII.5.2. ECONOMIC REPERCUSSIONS OF DESIGN RIGHTS ON CAR PARTS

As seen before, the spare parts market is a highly lucrative market, with an estimated turnover of 30.000 million USD in 1984.¹⁰⁶ It is obvious that for the car manufacturers obtaining exclusivity over certain parts implies a secured market share of the profits to be made, whereas for the independent manufacturers it means that a corresponding part of the market is foreclosed. However, the aim of design legislation is not to protect one branch of the industry against competition from others, but rather to protect industrial designs and models against piracy. As such, it is undisputed that design legislation cannot be used simply to enforce a sectoral industrial policy.

One of the reasons given to explain why intellectual property rights are currently enforced on spare parts of cars is that it enables the car manufacturers to keep down the prices of the new cars through passing on (part of) the production costs to the ancillary market in spare parts.¹⁰⁷ This passing on of

¹⁰⁶ See supra, at pt. VIII.2.1.

¹⁰⁷ On the economic context to the spare parts issue, see supra, Chapter II.

the production costs would of course no longer be possible if the car manufacturers had to engage in price competition with independent manufacturers of spare parts. Renault maintained in the Maxicar case that its difficulties in spreading its production costs would furthermore be enhanced through the fact that the independents would leave the manufacturing of slow-moving parts to the car manufacturer.¹⁰⁸ Thus, the argument goes that denying design protection on bodywork components would entail that the price of new cars would necessarily need to be increased.

The major flaw in this reasoning, considered from a legal point of view, is that the purpose of design rights is definitely not to enable the spreading of all production costs, either between cars and spare parts or between slow and fast moving parts. Design rights are essentially meant to provide a stimulus to invest in the elaboration of aesthetical features which make functional products more attractive, and as such merely allow for the recuperation of costs which are linked to the aesthetic surplus value the design confers to a technical or functional product.¹⁰⁹ Whether or not it is in conformity with the function of design protection to spread the investment made for research and development of new designs, which can be considered as a part of the production costs, will be dealt with below.¹¹⁰

Seen from an economic point of view, the argument based on the need to subsequently raise the price of new cars would not have much weight either, if one merely looked at its impact on the competition between Community car manufacturers, because

¹⁰⁸ On Renault's economic arguments, see Case 53/87, O.C., Report of the Hearing, at p. 6046.

¹⁰⁹ On the function of design rights, see supra, Chapter III, at pt. III.3.5.

¹¹⁰ See infra, at pt. VIII.5.3.

they would all be subject to the same conditions and remain competitive in the vehicle market. However, Renault spelled out that the loss of exclusive rights on car bodywork components, and the subsequent need to raise the price of new vehicles, would be tantamount to weakening the position of the European car industry vis-à-vis competition from Japan and other Eastern countries. This was probably the most decisive argument advanced in the proceedings, because it made it seem as though the decision not to uphold design rights would run counter to the objective and undermine the difficult achievements of the Community in the field of commercial policy as regards the importation and sales of cars from Japan.¹¹¹ This raises the difficult issue whether and to what extent commercial policy objectives should be taken into account in the analysis under the rules which apply to intra-Community trade. A clear answer to this question has up till now not been -and is not likely to be- provided by the Courts.¹¹² However, it is clear from Article 3 EC that the internal market objectives should, in principle, not be

¹¹¹ On this issue, see supra, Chapter II, at pt. II.2.1.

¹¹² Although cases have been brought before the Court in which it was maintained that the Commission unduly took refuge to the argument that a potential cartel by importers of Asian vehicles restricting intra-Community trade was due to national commercial policy measures and thus not subject to Article 85 EC, the relationship between competition policy and commercial policy has not been clearly established. See especially Case T-7/92, SA Asia Motor France and others v. Commission, Judgment of 29 June 1993, not yet published. The Court found that the Commission had not examined whether or not there was the possibility that the alleged concerted practice had effectively occurred. It is interesting to note that the Commission had previously refrained to initiate proceedings against the French government for infringement of Articles 30-36 EC following a complaint by the same applicants, see Case C-72/90, Asia Motor a.o. v. Commission, Order of the Court of 23 May 1990, E.C.R. (1990) I-2181. On the relationship between commercial policy and competition policy, it will be interesting to see the judgment of the Court in the Case T-32/92, BEUC a.o. v. Commission, not yet decided (for the arguments, see O.J. C 160/14 of 26.6.1992).

subordinate to commercial policy objectives, because all the Community objectives mentioned in that provision are of equal rank.¹¹³

Still, the issue of the impact of design protection on spare parts of cars on the competitive position of the European car industry is one that could not easily be neglected. Weakening the marketing possibilities of European cars would logically speaking be tantamount to reducing the demand in the ancillary market for spare parts of those cars, and would be prejudicial to the European economy and employment situation in general. Seen from this angle, both the independent manufacturers and the car manufacturers have a long-term interest in sustaining or improving the sales of new European cars. Their divergence in view lies essentially in how this should be achieved.

The Commission has acknowledged that the major problem the European car industry faces is of a structural nature, and has proposed actions which should allow the industry to be competitive by 1999, the date on which the voluntary export restraint agreement with Japan expires.¹¹⁴ It is submitted that keeping the prices of new cars -artificially- low through passing on production costs to spare parts does not solve the structural deficiencies of the European car industry and therefore is not a viable long-term solution. Furthermore, nothing would prevent non-European car manufacturers from

¹¹³ See also BOURGEOIS, J., "Competition policy and Commercial policy", in Maresceau, M., (ed.), The European Community's commercial policy after 1992: the legal dimension, Martinus Nijhoff Publishers, 1993, pp. 113-133, at p. 120. Although his analysis bears only on the balance between commercial policy and competition policy, it is obvious that the same argument applies as far as the free movement of goods is concerned, which is also mentioned in Article 3 EC.

¹¹⁴ See especially COM (92) 166 final of 8 May 1992, "The European motor vehicle industry: situation, issues at stake, and proposals for action". For more details, see supra, Chapter II, at pt. II.2.2.

adopting a similar strategy. Whether and to what extent design protection on spare parts of cars is upheld under Community law is therefore not the decisive factor that will determine the European car manufacturers competitive position in the future.

VIII.5.3. THE CONCEPT 'REWARD' AND THE FUNCTION OF DESIGN RIGHTS

The key issue raised in the Maxicar case was whether or not the protective design rights could be enforced both on the car and on the subsequently sold spare parts without infringing the inherent function of design rights. This single question embodies essentially three sub-questions, which call for a differentiated response. Firstly, the validity of granting design protection to spare parts of cars in general is challenged. Secondly, it has to be established whether a designer can only obtain the reward once -on the complex product- after which his right is 'exhausted', whether he can amortize the research and development costs over the complex product and the components, or whether he can obtain a double reward. And finally, it has to be established how this all fits in with the function of design rights.

Probably the most delicate argument raised in the Maxicar case by Maxicar and the Consorzio was that the form of a bodywork spare part does not constitute an intellectual creation capable of protection, because it does not have an aesthetic value of its own and has not been designed individually, but merely forms a part of a model designed in its entirety.¹¹⁵ This argument calls for an appraisal as to the creative or aesthetic merit of a given product, which obviously does not come within the scope of competences of the Court of Justice,

¹¹⁵ Case 53/87, o.c., Report of the Hearing, at p. 6048.

especially considering the division of competences under Article 177 EC proceedings. The Court could at the most have referred this issue back to the national court through stating that intellectual property rights, whether granted to components or complex products, have to be granted in accordance with their function in order to come under Article 36 EC. Although, in the line of its approach in the Delhaize case where the Court defined the function of denominations of origin,¹¹⁶ the Court could -and it is submitted should- specify what the function of design rights is according to Community law, the factual appraisal of whether or not the function is fulfilled obviously is a matter for the national court to determine.

The inherent function of industrial design rights under Community law could be described as 'granting an exclusive right on an industrial design or model so as to provide the possibility to obtain a return for investment made and progress achieved in the field of aesthetics, in order to stimulate overall research and development of aesthetic features of technical or functional products'.¹¹⁷ This covers two essential criteria, which have to be fulfilled cumulatively. Firstly, there has to be 'progress in the field of aesthetics'. As seen before, this would mean that in order to qualify for industrial property protection in the sense of Article 36 EC, the design has to be new and/or original, without implying that the industrial design also necessarily has to have an aesthetic or artistic merit.¹¹⁸ Spare parts of

¹¹⁶ Case C-47/90, o.c.; for the Court's definition of the function of denominations of origin under Article 36 EC, see supra, Chapter VI, at pt. VI.4.2.3.

¹¹⁷ See also supra, Chapter III, at pt. III.3.5.

¹¹⁸ It is obvious that the function of design so described was not fulfilled in the Keurkoop case, because the principles of first-to-file and relative novelty do not constitute a possible return for investment made in the field of

cars that live up to those requirements -the appraisal of which is a matter for the national court- would thus in principle come under the design exception of Article 36 EC, in the same way as the complex product itself. However, this finding is subject to the fulfilment of the second criterion, which implies that 'the exclusive right is granted to the industrial design or model to provide the possibility to obtain a return for the investment made in the field of aesthetics'. Whether or not the grant of design rights on both the spare parts and the car was necessary to fulfil this condition was a central issue in the debates of the Maxicar case.

The national court, Maxicar and the Consorzio seemed to be of the opinion that the sale of the car already accounted for the reward on the overall design of bodywork components of cars, so that they maintained that the exclusive right should be 'exhausted' as far as the subsequent sales of spare parts was concerned.¹¹⁹ They pointed out that the additional grant of exclusive rights on the bodywork components would entail that a double reward could be obtained in return for one and the same creative effort, a result which is not in accordance with the function of design legislation. Advocate-General Mischo was of the contrary opinion that granting design protection to both the complex product and its constitutive components did not imply granting a 'double reward'. In his view, the national legislation merely "allowed a car manufacturer to apportion that return or amortization between the price of the

aesthetics.

¹¹⁹ It is obvious that 'exhaustion' should be understood in its original meaning, namely the exhaustion due to the first use of the exclusive right with the consent of the holder, and not in the meaning given to it by the Court of Justice, namely exhaustion due to the first marketing of a protected product by the holder or with his consent. On this difference, see supra, Chapter VII, at pt. VII.2.5.

vehicle as a whole, on the one hand, and the price of the spare parts, on the other".¹²⁰

It is submitted that both these approaches were incorrect in that they imply that the reward is merely a return on the actual costs made to design a particular product, and hence is quantifiable. This is illustrated by the use of concepts such as 'double reward' and 'apportionment of reward', which heavily rely on the acceptance that a 'just' reward for the creative effort concerned can be established in the first place.¹²¹ Such an approach neglects the main objective of design law, which is to stimulate investment into research and development of new designs. The latter will only be fully achieved if there is the prospective that the return made on a successful design might be substantial enough to compensate for potentially less- or unsuccessful designs. This means that the interpretation of the concept 'reward' should not be based on an ex-post analysis of the real costs related to the

¹²⁰ Case 53/87, O.C., at para 31. See also supra, at pt. VIII.4.3., where it is maintained that the Advocate-General, through focusing on the reward itself, ignored the Merck judgment of the Court.

¹²¹ This notion of 'just' and unique reward is also -it is submitted wrongly- the premise to Floridaia's critique (Floridaia represented CICRA and Maxicar before the Court) of Advocate-General Mischo's concept of amortization of return. He held: "Questa considerazione è contraddittoria perchè la ripartizione della esclusiva brevettuale non equivale alla ripartizione di un unico compenso. Al contrario, poichè ogni esclusiva è strumento di realizzazione del compenso dovuto all'autore della innovazione, moltiplicare l'esclusiva significa moltiplicare il compenso: il quale, così, non si esaurisce mai ma permane indefinitamente anche dopo la prima messa in commercio del prodotto brevettato", see FLORIDIA, G., "Corte di Giustizia, Causa N° 53/87, Maxicar contro Renault: Osservazioni alle conclusioni dell'avvocato generale Jean Mischo, presentate all'udienza del 21.6.1988", paper presented at a Conference in Sienna, 8/9 July 1988, p. 9, emphasis added.

development of a particular design.¹²²

The 'reward'-concept under industrial design law is in principle stringently linked with the appraisal of the final consumer as to the surplus value the design confers on the functional product. In other words, the reward achieved will be dependent on whether and to what extent the consumer is willing to buy or even to pay a higher price for the product embodying the protected design as compared to similar products that do not embody the design.¹²³ This means that design protection merely provides in the conditions necessary to confer the 'possibility' to obtain 'a' reward, without determining what constitutes a just reward nor that a reward should always be obtained. It is interesting to note the resemblance of this finding with the Court's approach to the reward-function of patents in the Merck case.¹²⁴ However, as has been pointed out before, the Court in its Merck judgment failed to subsequently examine whether the conditions proper to patent law had also been fulfilled.¹²⁵ It merely continued to apply the consent-theory on the basis of the need to safeguard the specific subject-matter of patents, thereby diverting patent law from its inherent function.

¹²² See also KORAH, V., "No duty to license independent repairers to make spare parts: The Renault, Volvo and Bayer & Hennecke cases", E.I.P.R. (1988) 381-386, at p. 383. She writes: "Economists analyse transaction costs ex ante - what incentive is required to induce investment. Such lawyers as are not used to economic analysis often analyse ex post - now that this investment has paid off and the costs have been recovered, there is no need for a further reward". However, she merely invokes this issues in relation to the Court's analysis under Article 86 EC, namely the abuse of a dominant position through charging 'unfair' prices.

¹²³ See also supra, Chapter III, at pt. III.3.5.

¹²⁴ Case 187/80, o.c.. See also supra, Chapter VI, at pt. VI.4.3.2., and Chapter VII, at pt. VII.2.2.

¹²⁵ See especially supra, Chapter VII, at pt. VII.2.5.

Patent law confers an exclusive right on a new product (or process) that lives up to the rather stringent conditions of patentability. The level of reward that can possibly be obtained is dependent on whether or not there are substitutable products on the market which do not infringe the patent and with which the protected product has to compete. This means that in the absence of substitutable products, the patent confers a legal monopoly on a product. However, whether or not monopoly prices can also be charged largely depends on the value of the functional product as perceived by potential customers.¹²⁶

The objective of design law is to the contrary not to confer an exclusive, let alone a monopoly right on a product, but merely to grant exclusivity on a new and/or original design. As mentioned before, the level of reward that can possibly be obtained is dependent on the appraisal by potential customers of the surplus value the design confers to a functional product, in comparison to another functional product that does not incorporate the protected design. The underlying condition to the fulfilment of the function of design rights is therefore that there are -or can be- competing products on the market, or in other words that the design is not an imperative feature of the product. It is obvious that in the absence of alternative ways to design a product, the grant of design protection comes down to the grant of an exclusive right on a product. This would entail that instead of presenting a stimulus to competition between products, competition would be totally inhibited.¹²⁷ Design protection would then no longer

¹²⁶ See supra, Chapter III, at pt. III.3.2.

¹²⁷ On the necessary balance between competition and design rights, see also THE CONFEDERATION OF BRITISH INDUSTRY, "Design right: designed wrong", February 1988, at pt. 1, where it is held that: "the balance between encouraging innovative design and promoting competition is a difficult but crucial

confer a reward for the surplus value of the design, but would relate to the functional product itself in the same way as patents do. However, it should be recalled that design protection does not pose the same stringent conditions for protectability as patent law does.

As far as the market in new cars is concerned, the development of new designs of cars is an important factor of non-price competition between different brands. The grant of design rights makes it possible to give a surplus value to the car through excluding the use of the design by competitors, without, however, excluding the possibility for competitors to market cars with different designs. The choice of the car purchaser reflects the appraisal of both the surplus value conferred by the car design, as well as the functional product, i.e. the 'basic features' of the car. Design rights on cars thus fulfil their essential function.

But the same does not always hold true as far as the spare parts of cars are concerned. Spare parts are indispensable components of the car, which, if they break down, need to be repaired and often replaced in order to restore the car in its original function or appearance.¹²⁸ The only other option is to buy a new car, which of course implies a much higher cost and thus cannot be retained as an overall valuable alternative. Most of the car owners are therefore at one stage or another

one. Design protection is itself a vital driver of enterprise and competition, encouraging innovation and thereby stimulating enterprising companies and increasing consumer choice. At the same time there are circumstances where protection can offer a manufacturer a monopoly advantage which could inhibit competition. This situation has arisen particularly in the provision of spare parts, most notably for motor vehicles."

¹²⁸ This is a major difference with a set of matching single products. For instance, the loss of a knife in a cutlery set does not mean that the other knives and forks can no longer be used.

confronted with the necessity to buy replacement parts for the specific type of car they have purchased. Although their choice of all subsequently purchased spare parts is thus naturally limited by their initial choice when purchasing the car, it is submitted that in the debate about the legitimacy of enforcing design protection on replacement parts of cars, a distinction needs to be made between two types of spare parts.

Firstly, there are those parts for which the design is not an imperative feature to restore the car in its original function or appearance. This means that competing spare parts can be marketed which do not incorporate the design. It is obvious that in this case the design confers a surplus value to the functional aspect of the spare part, and thus is liable to be protected by design rights in the same way as the car itself.

Secondly, there are those parts, such as bodywork components, for which the design is imperative to restore the car in its original function or appearance. Generally speaking, these are parts that come under the 'must-fit' and 'must-match' exception to design protection in the United Kingdom.¹²⁹ Since a car owner has to purchase the replacement part in order to restore the car and since the spare part necessarily has to have a certain design, granting exclusive protection to this design would be tantamount to granting an exclusive right on the spare part concerned. The enforcement of design protection on these parts would as a corollary entail the exclusion of all potential competitors in the market. Design protection would thus be exceeding its function in that the conferment of an exclusive right on a design, comes down to granting a monopoly right on a product, for which subsequently monopoly prices can be charged. In other words, in this case the design protection no longer fulfils its inherent function which is to give the possibility to reward the surplus value the design

¹²⁹ See supra, Chapter IV, at pt. IV.3.1.2.

confers on the functional product in order to stimulate investment in the field of aesthetics, simply because the design does not confer a surplus value to the functional product but is intrinsically linked with the function of the spare part itself.

It is most interesting to note that M. Franzosi, who represented Renault before the Court in the Maxicar case, expressed a similar viewpoint at a colloquium organised by the CUERPI in June 1988. He rather unequivocally suggested that design protection on bodywork components is not in accordance with the specific function of design rights. In his own words:

"..si nous estimons que la fonction spécifique du droit des modèles est celle de stimuler la recherche esthétique, de stimuler la création des nouvelles formes esthétiques, on doit s'interroger si la protection de la partie de la carrosserie est conforme à la fonction spécifique. Si la fonction spécifique de la protection des modèles est de stimuler la "non price competition", c'est-à-dire de stimuler la concurrence avec des produits de forme différente, pas de faire une bataille de prix, mais de faire une bataille de différents produits. Alors on doit se demander si la fonction de la propriété industrielle est assurée lorsqu'on empêche la fabrication des pièces qui ont la même nature et lorsque la bataille se pose sur le problème de la "price competition"."¹³⁰

However, he was right in pointing out that anyhow, the Court does not take the function of design rights into account but limits its analysis under Article 36 EC to the specific subject-matter of industrial property rights.

It should moreover be pointed out that the grant of design rights on bodywork components is not indispensable to allow for the recuperation of the investment made for the aesthetic development, because the sale of the new car also accounts for

¹³⁰ See the commentary by FRANZOSI, M., in C.U.E.R.P.I., La protection des créations d'esthétique industrielle dans le cadre de la CEE: objectif 1992, 1988, pp. 67-69, at pp. 67-68, emphasis added.

the surplus value the design confers to a functional product.¹³¹ It seems that it would not only be difficult to justify in terms of the function of design rights, but that it would furthermore be contrary to the principle of proportionality, to uphold design rights which exceed the function of industrial designs and which are not even necessary to provide the possibility to obtain a reward for a creative effort.

As such, it is submitted that the problem is neither whether or not the spare parts are 'worthy of protection', nor whether or not the actual costs of the elaboration of the design has been achieved or exceeded. The real problem is whether or not the design protection creates the conditions necessary to provide the possibility that a reward is given for the surplus value the design confers on a functional product. It is submitted that design protection clearly exceeds its function if it grants exclusive rights on a product and thus allows for a reward which no longer stands in relation to the surplus value the design confers on a functional product. This is exactly the case as far as design protection on bodywork components of cars is concerned.

It is therefore submitted that a justification-test under the first sentence of Article 36 EC, whereby due regard is given to the inherent function of design rights, could but have led to the conclusion that granting design protection to bodywork components of cars is not in accordance with the objective to safeguard the protection of industrial and commercial

¹³¹ In his reaction to the British Leyland judgment of the House of Lords (See supra, Chapter IV, at pt. IV.3.1.1.C.), Mr. Don PLASTER, Chairman of the Industrial Copyright Reform Association, held that: "Those who complain that research and development will suffer as a result (of the BL-Judgment) should surely review their costing policies. R and D costs should be amortised by sales resulting from new designs, not subsidised by the sales of spare parts in which, in many cases, R and D costs should have been amortised long ago", see Financial Times of 6.3.1986.

property. Through not engaging in the discussion about the justification for, and function of, design rights and through upholding the existence/exercise dichotomy under the first sentence of Article 36 EC in the Maxicar case,¹³² the Court passed on the difficult issue of finding ways to curtail the obviously detrimental effects posed by granting design protection on a product -and not merely on a design-, to its analysis under Article 86 EC.¹³³

VIII.6. CONSUMER PROTECTION AND THE FUNCTION OF DESIGN RIGHTS

VIII.6.1. INTRODUCTION

As mentioned before, both the car manufacturers and the independents claimed to safeguard the interests of consumers in the Maxicar case through obtaining or refuting design protection on bodywork components of cars.¹³⁴ Although neither the Court nor the Advocate-General in their analysis under Article 36 EC explicitly referred to the effect granting design protection on bodywork components of cars has on the consumer, i.e. the car owner, it is submitted that there is a causal effect which is far from negligible and therefore needs to be taken into account.

Basically two sets of arguments were forwarded in the Maxicar proceedings which directly invoked the consumers' interests. A first issue concerned the alleged relationship between design protection and quality/safety considerations. A second matter was the impact design protection on bodywork components has on

¹³² See supra, at pt. VIII.4.4.

¹³³ On the Court's approach under Article 86 EC, see infra, Chapter IX.

¹³⁴ See supra, at pt. VIII.2.2.

the choice and the price to be paid by consumers for those parts.

VIII.6.2. DESIGN PROTECTION AND QUALITY/SAFETY CONSIDERATIONS

Renault maintained that the spare parts manufactured by the independent manufacturers are of a lower quality than those sold by car manufacturers, so that the refusal to grant design protection on spare parts -which in this particular case ensures a monopoly position- would be tantamount to jeopardizing the consumer's interests.¹³⁵ In other words, the argument goes that design protection on bodywork components is needed to safeguard the quality of the products and the safety of the consumers.¹³⁶

Whether or not spare parts manufactured by independents are in fact of a lower quality cannot be answered unconditionally in the negative or in the positive, but has to be established on a case-to-case basis. For example, as the Consorzio and Maxicar point out, already several so-called spurious spare parts are manufactured by the same manufacturers that also supply the car manufacturers, so that they can be expected to be of the same quality.¹³⁷ But even in the hypothesis that the independent manufacturers' spare parts were to be of a lower

¹³⁵ Case 53/87, o.c., Report of the Hearing, at p. 6046.

¹³⁶ This view is shared by Bonet, who maintains that the grant of design protection to bodywork components is the only way to safeguard consumer protection. See BONET, G., "Les créations d'esthétiques industrielle au regard des règles de libre circulation et de libre concurrence dans le Marché Commun", in C.U.E.R.P.I., La protection des créations d'esthétiques industrielle dans le cadre de la CEE: objectif 1992, 1988, pp. 45-63, at p. 51.

¹³⁷ Case 53/87, o.c., Report of the Hearing, at p. 6045.

quality,¹³⁸ it still remains to be established how this actually affects the consumers' interests. Though illustrating the complexity of the notion 'consumers' interests' on this issue, when dealing with different groups of consumers in terms of income and social stratification, Joerges convincingly argues that a distinction should be made between indispensable safety controls and mere quality interests. Whereas the latter in his view should be left to market mechanisms, he pleads for a regulation of safety which he defines as:

".. that realm of consumer policy which must not discriminate between consumer groups, but instead whether by specified safety standards or by mandatory rules of liability, ensures or tries to ensure minimum standards irrespective of the cost to consumers, enterprises or garages".¹³⁹

In other words, minimum safety norms should be established for -and respected by- all, whereas quality norms that exceed this standard should be left to market mechanisms, and in particular to the consumers' willingness -or not- to pay a higher price for a higher level of quality. As such, the owner of a second hand car might not be willing to invest money in a spare part of high quality, but the minimum safety norms will have to be respected and will thus necessarily be reflected in the cost.

¹³⁸ It should be emphasised that this is merely a hypothesis and not a statement. Surveys show that some spare parts are indeed of a lower quality, whereas others are of an equal or superior quality. See for instance JARVIS, B., "Cheap and nasty", Commercial Motor, 20 September 1986, pp. 51-52; ALBERT, P., "L'étrange duel: pièces d'origine ou parallèles?", Fergabel Revue, July/August 1987, pp. 13-15.

¹³⁹ See JOERGES, C., "Selective distribution schemes in the motor-car sector: European competition policy, consumer interests and the draft regulation on the application of Article 85 (3) of the Treaty to certain categories of motor-vehicle distribution and servicing agreements", in Goyens, M. (ed.), EC competition policy and the consumer interest, 1985, Bruylant, pp. 187-236, at pp. 189-190.

But how does this then relate to design protection on spare parts of cars. It obviously is not the purpose of design legislation to provide a monopoly over a product so that quality standards can be enforced. This also holds true if the quality standards include safety standards, which, it has been submitted, should be subject to regulation and uniform application.

The Court has consistently rejected the use of the industrial and commercial property-exception of Article 36 EC to protect the public against the risks arising from faulty products. For instance, in the Centrafarm v. Sterling Drug case, the Court refuted the use of patent law to safeguard the public against defective pharmaceutical products on the following terms:

".. the measures necessary to achieve this must be such as may properly be adopted in the field of health control, and must not constitute a misuse of the rules concerning industrial and commercial property.

Moreover, the specific considerations underlying the protection of industrial and commercial property are distinct from the considerations underlying the protection of the public and any responsibilities which that may imply."¹⁴⁰

This means that safety control cannot be invoked as a justification to uphold design protection on spare parts of cars under Article 36 EC. It is interesting to recall in this respect that the Court of First Instance held in the Hilti case that safety control could not be invoked as a justification for abusive behaviour by an undertaking in a dominant position either.¹⁴¹ The issue of safeguarding safety interests has to be dealt with on its own terms. More precisely, it has to be regulated in a way which sets out

¹⁴⁰ Case 15/74, Centrafarm v. Sterling Drug, Judgment of 31.10.1974, E.C.R. (1974) 1147, at para 28 and 29, emphasis added.

¹⁴¹ See supra, Chapter VI, at pt. VI.4.4.4.C.

objective minimum standards that apply to all spare parts, whether protected by design rights or not and regardless of whether they are supplied by the car manufacturer or manufactured by others.¹⁴² This implies that safety regulations should emanate from and be controlled by an independent, preferably public, authority.¹⁴³

Apart from the safety considerations, Renault held that the poor quality of spare parts produced by independents might also damage the reputation of the car manufacturers, because the consumer does not always know which spare parts are used to repair his car. The argument based on consumer expectations

¹⁴² It is again interesting to note that M. Franzosi, though he represented Renault before the Court, countered the view advanced by Prof. Bonet that design protection is necessary to safeguard the safety of consumers (see *supra*). In Franzosi's words: "Je crois que les arguments tirés de la protection des consommateurs ne sont pas valables et je me permets d'être en désaccord avec Me Bonet. En effet, les problèmes de la protection des consommateurs se présentent de la même façon si la pièce est protégeable que si la pièce n'est pas protégée. Par exemple, la protection des consommateurs doit être assurée de la même façon s'il s'agit d'un pot d'échappement. Il y a là dans ce cas, un problème de protection des consommateurs mais on ne peut pas invoquer la théorie de la protection des consommateurs pour protéger ou pour nier la protection. Donc je trouve que la protection des consommateurs c'est une chose différente de la propriété industrielle.", see FRANZOSI, M., *o.c.*, at p. 67, emphasis added.

¹⁴³ This is in the line of the opinion given by Advocate-General Trabucchi in the *Centrafarm* case. He held: "If a certain parallel importer disregards the provisions in the country concerned governing the sale of pharmaceutical products, or at least, behaves in such a way as to compromise or endanger the protection of public health, this will, (..), justify the competent authorities in intervening to remove the danger. And, by the same token, there may even be justification for restrictive measures directed to that end. But this will take place independently of the protection of a private party on the basis of an exclusive right associated with a patent or trade mark and will, (..), in no event justify the use of such rights to prevent third parties from importing products, whatever their nature.", Case 15/74, *o.c.*, at para 9, emphasis added.

and goodwill is especially relevant for customers that have their car repaired in approved workshops. However, it is obvious that the most appropriate response to this argument is that the consumer should be duly informed about -and possibly have the choice according to- the origin of the parts used for repair.¹⁴⁴ The major problem is that the workshops do not always pass on the -price- advantages of using spurious parts to their customers, and hence are weary to inform their customers about the use of such parts. However, living up to quality expectations and providing adequate information to consumers are problems which are not specifically related to -and should not be solved through- the enforcement of exclusive design protection in order to obtain a monopoly situation over the spare parts concerned. As for safety standards, it is a problem that is posed regardless of whether or not the spare parts can be protected by design rights. The Commission has duly taken this matter into account when drafting its block exemption for selective distribution agreements in the car and after sales market, through providing that authorized dealers should be free to purchase spare parts of an equal or superior quality from sources other than the car manufacturer, but may be contractually obliged to inform the customer about the use of such parts.¹⁴⁵ Though it is obvious that this solution becomes obsolete for those parts that do become captive parts

¹⁴⁴ See also JOERGES, C., *o.c.*, at p. 215, where he writes: "This is the only solution which also makes allowance for those customers who want to put up with a spare part of inferior quality, but who also attach importance to the expert know-how provided by appointed workshops. This proposal does not affect the manufacturer's interests, because a customer ordering repairs can, when necessary, identify the outside supplier".

¹⁴⁵ Art. 3, 4° and 4 (1) 8 of Regulation 123/85, O.J. L 15/16 of 18 January 1985. On this solution, see DUBOIS, J., "Cas d'application: la distribution automobile dans le marché commun: le point de vue de la Commission Européenne, in Pizzio, J., (ed.), *Droit des consommateurs*, 1987, Story Scientia, pp. 91-97, at p. 93. See also *supra*, Chapter II, at pt. II.3.3.

through the enforcement of design rights.

VIII.6.3. DESIGN PROTECTION AND CONSUMER TIE-IN

As seen before, the strategy of the car manufacturers is to keep down the price of new cars through passing on (part of) the production costs to the subsequent sales of spare parts.¹⁴⁶ A necessary condition to pursue this policy is of course that the car manufacturers obtain a monopoly position on certain spare parts through the exclusion of all potential competitors. It was illustrated above that this position can be obtained through enforcing exclusive design rights on parts, such as bodywork components, which cannot be designed in any other way to restore the car in its original function and appearance.¹⁴⁷ In other words, design protection in such a circumstance excludes spurious parts from the market, so that bodywork components become captive parts.

It is obvious that the grant of exclusivity on bodywork components of cars -which results in a monopoly position- leads to a tie-in of the car owners. Having freely chosen to purchase a certain type of car, they are subsequently no longer free to choose the way in which to have their car repaired. This means that they do not pay a certain price for a spare part having regard to its functional characteristics and the surplus value the design confers, but are confined to pay the price demanded by the supplier of the authorized products. It has been submitted above that this is not in accordance with the function of design rights.

Maxicar and CICRA pointed out that allowing for this situation

¹⁴⁶ See supra, at pt. VIII.5.2.

¹⁴⁷ See supra, at pt. VIII.5.3.

to occur through the use of design protection would entail several detrimental consequences for the car owner.¹⁴⁸ Firstly, a monopoly position means that monopoly prices can be charged. The price of spare parts could thus be increased up to the limit that the car owners refrain from effecting further repairs. This might be an indirect manner to prematurely eliminate certain types of older vehicles from the market in favour of the purchase of new vehicles. Secondly, the conferment of an exclusive right implies that the potential competitors can be excluded from the market, even though the holder of the right does not supply all possible spare parts himself. This is held to be the case especially as concerns corrosion panels which are welded to the existing component instead of replacing the latter in case of rust, and parts that can be sold separately whereas the car manufacturers only sell the whole unit, such as car doors. The unavailability of such smaller parts would thus lead to an increase in the price of the repairs.

The negative consequences for the consumers are thus stringently linked with the exclusion of competitors from the spare parts market and the tie-in of the spare parts market to the car market. But this is merely the result of enforcing exclusive rights on bodywork components of cars the shape of which is imperative to restore the car in its original appearance. It has been held that where no alternative designs are feasible, the grant of exclusive design protection is not in accordance with the inherent function of design rights. It is therefore submitted that it is the very grant of design rights on bodywork components that should not have been considered as a measure needed to ensure the protection of industrial and commercial property, and thus should fall foul of Article 36 EC. As will be seen below, in the Maxicar and Volvo cases, the Court has merely tried to smoothen out these

¹⁴⁸ Case 53/87, o.c. Report of the Hearing, at p. 6044.

detrimental effects through applying the rules on competition, and especially Article 86 EC concerning the abuse of a dominant position, to the behaviour of the car manufacturers.¹⁴⁹ However, with respect, it is submitted that this approach was wrong in that these consequences clearly ensue from the grant of design protection to bodywork components of cars.

¹⁴⁹ See *infra*, Chapter IX.

**CHAPTER IX. THE EC 'DESIGN RIGHT - ANTITRUST DEBATE'
CONCERNING SPARE PARTS OF CARS**

IX.1. INTRODUCTION

The refusal by the Court of Justice to look at whether or not the grant of design protection to bodywork components of cars was justified in terms of the need to safeguard the function of design rights under Article 36 EC,¹ had considerable consequences for the subsequent analysis of the car manufacturers' behaviour under the rules on competition, and especially under Article 86 EC. From the analysis of the previous cases brought before the Court concerning the application of Article 86 EC to intellectual property rights, it became apparent that if the enforcement of the right is held not to be legitimate under Article 36 EC, then it cannot become lawful under Article 86 EC.² This straightforward rule would probably have been applicable in the spare parts cases had the Court taken a justification-approach to the grant of design right to bodywork components of cars under Article 36 EC.³

However, the adoption by the Court of what has been called the 'marginal appraisal-approach' in the Maxicar case, has led to uphold both the existence and the exercise of the design rights concerned under Article 36 EC.⁴ This is extremely important, because in its analysis under Article 86 EC, the Court has consistently taken as a premise that if the existence and the exercise are held to be legitimate under Article 36 EC, then an additional element will be needed for

¹ See supra, Chapter VIII.

² See supra, Chapter VI, at pt. VI.4.4.2.C.

³ See supra, Chapter VIII, at pt. VIII.4.3.

⁴ See supra, Chapter VIII, at pt. VIII.4.4.

the exercise of the right to be contrary to article 86 EC.⁵ The main issue under the competition rules the Court had to deal with in the CICRA and Maxicar v. Renault⁶ and Volvo v. Veng⁷ cases thus was whether and when this additional element could consist in the fact that exclusive design rights were invoked to eliminate competition in the after-sales market of replacement parts.

As seen before, the Court of First Instance acknowledged in the Tetra Pak case that the additional element for the finding of an abuse could be constituted by the factual background against which the acquisition of an intellectual property right took place.⁸ Furthermore, the Court of First Instance has accepted in the Hilti case that the use of intellectual property rights to eliminate competition on a related market in unprotected accessories, and in the Magill cases that the use of copyright to prevent the creation of a derivative market in a new product, constitutes an abuse of a dominant position.⁹ It is particularly significant that in the Magill cases, the Court of First Instance expressly based its analysis on the need to safeguard the essential function of copyrights.¹⁰ The CFI basically held that the use of intellectual property rights beyond what is necessary to fulfil the essential function of the exclusive right is manifestly contrary to Article 86 EC.

⁵ See supra, Chapter VI, at pt. VI.4.4.2.C.

⁶ Case 53/87, CICRA and Maxicar v. Renault, Judgment of 5 October 1988, E.C.R. (1988) 6039.

⁷ Case 238/87, AB Volvo v. Erik Veng (UK) Ltd, Judgment of 5 October 1988, E.C.R. (1988) 6211.

⁸ See supra, Chapter VI, at pt. VI.4.4.5.C.

⁹ See supra, Chapter VI, at pt. VI.4.4.4.

¹⁰ See specifically supra, Chapter VI, at pt. VI.4.4.4.E.

The underlying reason for taking the function of intellectual property rights into account under the competition rules, is that intellectual property rights essentially constitute a legitimate temporary restraint on competition in order to stimulate innovation and development, be it in the technical, aesthetical, or cultural field.¹¹ The exact balance between the two apparently conflicting systems of free competition and intellectual property rights has been topic of much debate.¹² As far as the European Community is concerned, the Court clarified in the Continental Can case that safeguarding an effective competitive structure in the Common Market is both in the consumers' interests and an essential objective of the Treaty. In the words of the Court:

"..if Article 3 (f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires a fortiori that competition must not be eliminated."

"As may further be seen from letters (c) and (d) of Article 86 (2), the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure, such as is mentioned in Article 3 (f) of the Treaty."¹³

Intellectual property rights, which are inherently exclusive rights, are particularly apt to change the competitive market structure. Being an exception to the principle of free competition, intellectual property rights should thus obviously be interpreted restrictively. It is submitted that this means that they should only be cleared under the rules on competition if they are enforced in such a way as needed to fulfil the objectives for which the exception was granted. It

¹¹ See also supra, Chapter III, at pt. III.3.1.

¹² See supra, Chapter III.

¹³ Case 6/72, Europemballage and Continental Can v. Commission, Judgment of 21 February 1973, E.C.R. (1973) 215, at para 24 and 26 respectively, emphasis added.

is rather obvious that any other approach is tantamount to legitimizing abuses of intellectual property rights aimed at circumventing the rules on, and possibly eliminating all, competition. But it is not surprising that, having failed to examine whether the function of design rights was fulfilled under Article 36 EC, the Court in the spare parts cases subsequently also failed to examine whether the use of those exclusive rights was necessary to safeguard the inherent function of design rights.

IX.2. THE SPARE PARTS CASES

IX.2.1 THE BACKGROUND

Both the factual background and the legal issues raised were different in the Volvo and the Maxicar cases. Whereas the Maxicar case concerned a claim made by the independents for the annulment of design rights on bodywork components that had been granted to the car manufacturer,¹⁴ the Volvo case concerned proceedings initiated by a car manufacturer against an independent for alleged infringement of his design rights on bodywork components through importation and sale and unauthorized parts.

As mentioned before, the Italian court in the Maxicar case, though ruling that design rights on bodywork components of cars were in conformity with Italian law, wondered whether or not the exercise of such an exclusive right which appears to be contrary to the inherent function of such a right, was in conformity with Articles 30 and 86 EC.¹⁵ Concerning the rules on competition, the following question was referred to the

¹⁴ See supra, Chapter VIII, at pt. VIII.2.1.

¹⁵ See supra, Chapter VIII, at pt. VIII.2.1.

Court of Justice:

"Is or is not Article 86 of the EEC Treaty applicable so as to prohibit the abuse of the dominant position held by each car manufacturer in the market for spare parts for cars of its manufacture which consists in pursuing, by means of registering protective rights, the aim of eliminating competition from independent manufacturers of spare parts?"¹⁸

In other words, the national court sought an answer to the question whether obtaining and subsequently enforcing exclusive design protection could in the given circumstances amount to an abusive manner of eliminating competition.

Also in the Volvo case, Veng initially denied to have infringed a design right by importing and selling unauthorized parts, through challenging the validity of Volvo's design rights on the Volvo 200 series front wing. However, Veng subsequently seemed to accept the validity of the exclusive right and undertook to abandon all allegations of abuse under Article 86 EC, except for the alleged abuse of a dominant position resulting from Volvo's refusal to grant a licence under the registered design. As such, the UK court referred the following questions to the Court of Justice:

"(1) If a substantial car manufacturer holds registered designs which, under the law of a Member State, confer on it the sole and exclusive right to make and import replacement body panels required to effect repair of the body of a car of its manufacture (if such body panels are not replaceable by body panels of any other design), is such a manufacturer, by reason of such sole and exclusive rights, in a dominant position within the meaning of Article 86 of the EEC Treaty with respect to such replacement parts?

(2) Is it prima facie an abuse of such dominant position for such a manufacturer to refuse to license others to supply such body panels, even where they are willing to pay a reasonable royalty for all articles sold under the licence (such royalty to represent an award which is just and equitable having regard to the merits of the design and all the surrounding circumstances, and to be determined by arbitration or in such

¹⁸ Case 53/87, O.C..

other manner as the national court shall direct)?

(3) Is such abuse likely to affect trade between Member States within the meaning of Article 86 by reason of the fact that the intending licensee is thereby prevented from importing the body panels from a second Member States?"¹⁷

In other words, the national court's questions in the Volvo case were complementary to the question posed in the Maxicar case. In the assumption that the registered design could in principle be used to eliminate competition under Community law, the UK court sought to know whether the refusal to license design rights on bodywork components of cars whereby a just and equitable royalty would be paid, nevertheless amounted to an abuse of a dominant position.

IX.2.2. INTRODUCTION TO THE LEGAL ISSUES

It is well known that Article 86 EC only applies when three conditions are cumulatively fulfilled. The undertaking alleged to behave anti-competitively has to occupy a dominant position on the relevant market, this dominant position has to be abused, and trade between Member States has to be appreciably affected.

The Italian court in the Maxicar case assumed that Renault occupied a dominant position in the spare parts market, because it held that it is that company that consumers approach when they need to replace a bodywork component.¹⁸ The UK court in the Volvo case thought that Volvo might be in a dominant position concerning replacement parts by reason of the conferment of sole and exclusive rights. A first issue which thus needs to be considered under Article 86 EC,

¹⁷ Case 238/87, o.c.

¹⁸ Case 53/87, o.c., Report of the Hearing, at p. 6041.

although the Court did not engage in this debate, is whether or not car manufacturers occupy a dominant position in the relevant market. The crucial issue is of course how the relevant market, and especially the relevant product market, has to be determined.¹⁹ This is rendered more difficult in view of the fact that spare parts are components of complex products. Theoretically, one could envisage the relevant market as being the market in both the car and the spare parts needed to repair that car, or -as the national courts suggest- the market in replacement parts needed to repair a given brand of car. Having established the relevant market, one subsequently needs to examine whether or not the car manufacturers also hold a dominant position on that market, and which role intellectual property rights thereby fulfil.²⁰ Although the Court has consistently held that the conferment of intellectual property rights does not automatically imply that the holder also has a dominant position on the market,²¹ the Court of Justice has never before been confronted with the question whether a holder can abuse the system of intellectual property rights to obtain a dominant position.

Assuming that the car manufacturers do occupy a dominant position in the relevant market, the Italian court asked whether the enforcement of design rights on bodywork components of cars constitutes an abuse, whereas the UK court asked whether the refusal to grant a licence on reasonable terms amounts to an abuse. As mentioned before, the Court has consistently held that an additional element to the normal exercise of intellectual property rights is needed to

¹⁹ See *infra*, at pt. IX.3.2.

²⁰ See *infra*, at pt. IX.3.3.

²¹ See Case 102/77, *Hoffman-La-Roche*, *supra*, Chapter VI, at pt. VI.4.4.2.C.

establish abusive behaviour under Article 86 EC.²² This means that the answer to be given to what constitutes an abuse by the holder of design rights of course largely depends on whether the function or the specific subject-matter of design rights is taken into account.²³ If the function is taken into account, anti-competitive behaviour which is not in accordance with the objectives of design legislation can be struck down. But if the specific subject-matter test is applied, as the Court did in the spare parts cases, then it is more difficult to draw a line between acceptable and abusive behaviour. This is illustrated by an analysis of the three examples of abusive behaviour by holders of design rights on bodywork components of cars as advanced by the Court.²⁴

The third issue then is to establish whether or not the abuse of the dominant position also appreciably affects intra-Community trade.²⁵ Basically two approaches can be adopted, namely the structural test or the 'pattern of trade' test, but the outcome of these tests as concerns replacement parts of automobile vehicles is of course largely dependent on what precisely is held to constitute the abusive conduct by the car manufacturers.

²² See *supra*, at pt. IX.1.

²³ See *infra*, at pt. IX.4.2.

²⁴ See *infra*, at pt. IX.4.3.

²⁵ See *infra*, at pt. IX.5.

IX.3. THE CONCEPT 'DOMINANT POSITION' AND BODYWORK COMPONENTS OF CARS

IX.3.1. THE RELEVANT MARKET CONCEPT

Before one can establish whether or not one or more undertakings hold a dominant position in the sense of Article 86 EC, and the role intellectual property rights thereby fulfil, it has to be established on which market this alleged dominant position takes place. This implies that both the relevant geographical and the relevant product market need to be defined.

The debates in the spare parts cases did not substantially deal with the definition of the relevant geographical market. Veng's statement that the relevant geographical market in the Volvo case was constituted by the United Kingdom market does not seem to have been challenged.²⁶ Similarly, having regard to the principle of territoriality inherent to design rights, the relevant market in the Maxicar case could be held to be the Italian market. The absence of debate about this issue is most likely to be explained by the fact that the Court has consistently held that the market of one Member State may constitute a substantial part of the Common Market in the sense of Article 86 EC.²⁷

The definition of the relevant product market has to the

²⁶ See Case 238/87, o.c., Report of the Hearing, at p. 6216.

²⁷ See for instance Case 322/81, Michelin v. Commission, Judgment of 9 November 1983, E.C.R. (1983) 3461, at para 28. In the Magill cases, the Court of Instance also had no difficulties in finding that the relevant geographical market constituted by Ireland and Northern Ireland was a substantial part of the Common Market, see for instance Case T-69/89, RTE v. Commission, Judgment of 10 July 1991, not yet published, at para 64.

contrary given rise to controversy in the spare parts cases. The Court has consistently given the following explanation about the use of the concept 'relevant product market' under the Article 86 analysis:

".. for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products".²⁸

As Frazer points out, the relevant product market concept thus refers to those products that "form part of group with characteristics which separate them in an economically sensible way from all other products",²⁹ which implies that they are necessarily interchangeable but not necessarily homogeneous, and are not substantially interchangeable for products outside the group. It is well known that the Court uses different criteria to delimitate the relevant product market.³⁰ One criterion is the substitutability of the products on the demand-side, thus the interchangeability from the consumers point of view.³¹ The extent to which consumers

²⁸ Case 322/81, *Michelin v. Commission*, Judgment of 9 November 1983, E.C.R. (1983) 3461, at para 37. See for instance also Case 31/80, *L'Oréal v. De Nieuwe AMCK*, Judgment of 11 December 1980, E.C.R. (1980) 3775, at para 25.

²⁹ See FRAZER, T., Monopoly, competition and the law: The regulation of business activity in Britain, Europe and America, Wheatsheaf Books, Sussex, 1988, at pp. 14-15.

³⁰ There are numerous articles that give an analysis of the criteria used by the Court, see for instance FISHWICK, F., "Definition of monopoly power in the antitrust policies of the United Kingdom and the European Community", Antitrust Bull. (1989) 451-488; GYSELEN, L., KYRIAZIS, N., "Article 86 EEC: the monopoly power measurements issue revisited", E.L.R. (1986) 134-148.

³¹ See for instance Case 85/76, *Hoffman-La Roche v. Commission*, Judgment of 13 February 1979, E.C.R. (1979) 461; Case 27/76, *United Brands v. Commission*, Judgment of 14

consider products to be interchangeable is often determined through the use of the cross-elasticity test, or in other words the willingness of consumers to turn to another product if the price is increased, although this might be dependent on a time-factor.³² Another criterion, which is sometimes used in addition to the first,³³ is the substitutability of the products on the supply-side. This test implies that due regard should be given to entry barriers, such as intellectual property rights, which essentially prohibit potential competitors to enter the market.³⁴

February 1982, E.C.R. (1982) 207.

³² See for instance Case 27/76, O.C., at para 34 and 35, where the Court made the following, by now famous, statement: "It follows from all these considerations that a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of other fresh fruit on the market and that even the personal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability. Consequently the banana market is a market which is sufficiently distinct from the other fresh fruit market".

³³ See for instance Case 322/81, Michelin, O.C., especially at para 37 where the Court held: "...an examination limited to the objective characteristics of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration". The Court found that there was neither interchangeability between car tyres and tyres for heavy vehicle from the demand side, nor cross-elasticity on the supply-side.

³⁴ See for instance Case 6/72, Continental Can, O.C., especially at para 33 where the Court held: "In order to be regarded as constituting a distinct market, the products in question must be individualized, not only by the mere fact that they are used for packing certain products, but by particular characteristics of production which make them specifically suitable for this purpose. Consequently, a dominant position on the market for light metal containers for meat and fish cannot be decisive, as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by simple adaptation, with sufficient strength to create a serious counterweight".

The determination of the relevant product market was a crucial issue to the analysis under Article 86 EC, because it is obvious that the wider the definition of the product market the less it is probable that a dominant position is withheld, even if exclusive rights are enforced, and vice versa.³⁵ It is not surprising that consumer interests, and especially consumer demand, played a crucial role in the argumentation of both sides. According to the car manufacturers, replacement parts cannot be seen as being separate from the market in new cars, because they offer a 'package-deal' to their customers. As such, they argue that the market in the complex products and its components should be regarded as one and the same. This view is countered by the independents, who claim that the market in replacement parts responds to different needs than the market in new vehicles. They maintain that there are separate markets in replacement parts specific to the brand of car concerned.

IX.3.2. THE RELEVANT PRODUCT MARKET FOR SPARE PARTS OF CARS

IX.3.2.1. One global market for cars and spare parts

According to the car manufacturers, the relevant product market is not the market in replacement parts, but the general market in cars and/or maintenance and repair work which is very competitive. The argument goes that the consumer takes the price of spare parts and repair work into account when purchasing a car, so that he does not envisage the replacement parts as constituting a separate market in which interchangeable products should be offered and competition

³⁵ Similarly, see FRIDEN, G., "Recent developments in EEC intellectual property law: the distinction between existence and exercise revisited", C.M.L.Rev. (1989) 193-217, at p. 209.

should prevail.³⁶

This viewpoint is based on the conception of the car manufacturers that they offer a 'package' to the potential purchaser of a car, which consists not only in the new car, but also in pre-sales and especially after-sales services, such as guarantee and repair work. They therefore assume that the buyer of a new car has properly evaluated and also adhered to this package deal through the act of purchasing the car of a given brand rather than another, and will in the future purchase a car of a different brand if this package proved inadequate or excessively expensive. This package theory is also invoked to justify the earlier mentioned strategy of passing on production costs from the car to the captive replacement parts in order to keep the prices of new vehicles down and thus to enhance the competitive position of European car manufacturers.³⁷

There seems to be a serious flaw in this reasoning. If the premise is that the potential purchasers can and do evaluate the price they will eventually pay for the whole package of any given brand, then surely decreasing the price of the new cars and subsequently recuperating production costs on the spare parts would not enhance the sales of new cars. The problem is that it is impossible to know when buying a car how much the total package will cost. When purchasing a new car, the alert consumer might take the estimated cost of captive replacement parts -accounted over the certain number of years he intends to use the car- into account in the determination

³⁶ This view is shared for instance by Bonet. See BONET, G., "Les créations d'esthétique industrielle au regard des règles de libre circulation et de libre concurrence dans le Marché Commun", in CUERPI, La protection des créations d'esthétique industrielle dans le cadre de la CEE: objectif 1992, 1988, pp. 45-64, at pp. 61-62.

³⁷ See supra, Chapter VIII, at pt. VIII.5.2.

of the price he is willing to pay for the car. But he does not with certainty know how much the replacement parts will cost at the time the repair is needed. He also cannot possibly foresee how often he will need to replace a part, due to either accidents or break down, nor which parts he will need to replace. It is therefore submitted that the strategy of the car manufacturers, which consists in charging competitive prices for the first sale, i.e. the car, and higher prices for the spare parts later on, is based on the premise that the average consumer does not think of, and anyhow cannot possibly calculate, the cost of replacing parts when buying the car and will thus be tempted by the price/quality ratio of the car itself. In the absence of competition, monopoly prices could thus be charged to every buyer of spare parts later on. As concerns this tie-in, the interests of consumers and car manufacturers are obviously conflicting.³⁸

It is furthermore obvious that this strategy is based on the understanding that due to the substantial price difference between the car and the spare parts at least a majority of the consumers do not consider the purchase of a new car -which constitutes a considerable investment- to be a valuable alternative to repairing a relatively new car -even if the prices of spare parts are increased-, but to the contrary intend to keep the car running over a certain number of years. Having regard to the price of a new car, it is clear that the prices for spare parts would have to be more than

³⁸ See also SCHARPE, T., "Comments on Christian Joerges' paper on selective distribution in the car sector", in Goyens, M., (ed.), EC competition policy and the consumer interest, 1985, Bruylant, pp. 249-263, at p. 261, where he illustrates through a reference to motor spare parts that the neo-classical theory that a monopoly price can only be charged once so that a tie-in is unexceptional does not necessarily hold true. He concludes: "Radical uncertainty about the cost of running a motor car exist; consumers can therefore be exploited (..) The tie in serves to increase the manufacturers' profits".

substantially raised in order to make repairs economically unjustifiable in comparison to the market value of a relatively new car.³⁹ As such, it can be submitted that the very idea of a package deal proves that the car manufacturers implicitly acknowledge the fact that, at least as far as the average consumer is concerned, the purchase of a new car is not an overall valuable alternative to repairing the car. As far as the consumers is concerned, this means that spare parts cannot be substituted by cars and therefore should constitute a separate market under an Article 86 EC analysis.

It is submitted that the spare parts issue is fundamentally different from the Alsatel v. Novasam case, where the Court held the relevant market to be the domestic market in telephone installations in general, and not the separate market in the rental and maintenance of telephone equipment as the Commission maintained.⁴⁰ The Court came to this conclusion on the grounds that the consumer had the initial choice between either a rental and maintenance contract or the purchasing of the same equipment, so that these options could be considered to be interchangeable. This outweighed the fact that consumers that had initially opted for a rental and maintenance contract were subsequently dependent for the duration of the contract. The main difference with the spare parts issue is that the matter of maintenance and repairs in the car sector are not linked to a rental contract -which does not confer ownership-, but to the purchase of the car. As such, under the package theory, the customer does not necessarily choose to be, but is nevertheless tied-in as

³⁹ However, see supra, Chapter VIII, at pt. VIII.6.3., where it is held that the raising of the price of spare parts might be a means of prematurely eliminating older types of vehicles, with a low market value, from the market in favour of the purchase of new vehicles.

⁴⁰ Case 247/86, Alsatel v. Novasam, Judgment of 5 October 1988, E.C.R. (1988) 5987, at para 17.

concerns the subsequent purchase of spare parts. It is a typical feature of a complex consumer durable that the consumer who wants to buy a motorized vehicle does not have this initial choice between having repairs and maintenance carried out or not. He initially buys the complex product, and is subsequently dependent on repair and maintenance in order to keep the complex product function. As such, as the Court held in the Hugin case,⁴¹ in order to establish the relevant market for components of complex products it has to be established if there are alternatives for the repair and maintenance from the consumers' point of view.⁴² As seen before, the purchase of a new car is not overall interchangeable for repair and maintenance, so that the after-sales market, and more specifically the market in replacement parts, is to be seen as constituting a market distinct from the market in motor vehicles in general.

The second major flaw in the determination of the relevant market on the basis of the package theory is that it does not take the necessities and demands of the different categories of consumers into account, in terms of income and social stratification. It is certain that the package deal would cost relatively less to those consumers that regularly replace

⁴¹ Case 22/78, Hugin v. Commission, Judgment of 31 May 1979, E.C.R. (1979) 1869. See infra, at pt. IX.3.2.2.

⁴² Korah seems to have failed to grasp the fundamentally different significance of the 'maintenance' factor in the choice between rental/maintenance or sale on the one hand and the compulsory relationship between the complex product and its components/maintenance on the other hand. She writes that in the Alsatel v. Novasam case, "the Community Court considered at paragraph 17 that the relevant market should include sale as well as hire. This contradicts the Hugin judgment, as those who had already hired ALSATEL equipment remained dependent on it, even if new users could buy telephone equipment elsewhere". See KORAH, V., "No duty to license independent repairers to make spare parts: the Renault, Volvo and Bayer & Hennecke cases", E.I.P.R. (1988) 381-386, at p. 382, footnote 8.

their cars, as compared to users of older cars. In a way, the price of their new car would be subsidized by the repairs effected by the users of older vehicles which naturally break down more often. The package deal would even be less tenable when taking solely the interests of holders of second-hand cars into consideration, because they would pay the higher price for the spare parts without benefitting from the corollary decrease in price for the vehicle. In other words, including after-sales services in a package deal and eliminating competition with regard to spare parts would definitely not respond to the needs and demand of a substantial part of the consumers.⁴³

Still, it cannot be contested that some consumers do take the availability and the quality of after-sales services into account when purchasing their cars and might turn to another brand if the package proves to be inadequate or excessively expensive. But the fact that a package is offered by the car manufacturers and is perceived by some consumers as a marketing strategy does not imply that all consumers should therefore also be obliged to have their cars subsequently repaired in an authorized workshop, nor that all consumers necessarily consider the spare parts market to be the same as the one in new cars. That the package theory is not universally accepted can best be illustrated by the opposition from the consumers organizations, and especially the BEUC, to

⁴³ See also JOERGES, C., "Selective distribution schemes in the motor-car sector: European competition policy, consumer interests and the draft regulation on the application of Article 85 (3) of the Treaty to certain categories of motor-vehicle distribution and servicing agreements", in Goyens, M., (ed.), EC competition policy and the consumer interest, 1985, Bruylant, pp. 187-236, at pp. 197 where he writes: "Promotional efforts to sell new cars and encourage customers' loyalty by specialized service networks only effect a small percentage of consumers, namely those who can afford to buy new cars and/or want to avoid the hazards of the used car market. In contrast, the after-sales market must respond to the specific needs of low income consumers".

the inclusion of the after-sales market -though with safeguards as concerns the purchase of spurious spare parts, which shows that also the Commission is of the opinion that competition should not be eliminated- in the block exemption concerning selective distribution in the car sector.⁴⁴

Although the Court did not engage in the debate about the definition of the relevant product market in the spare parts cases, previous case-law shows that the Court is not inclined to accept the argument that the alleged fierce competition in the motor vehicle market suffices to prevent competition in related markets. For instance, in the General Motors and British Leyland cases concerning type approval of motor vehicles,⁴⁵ the Court refuted the argument that the relevant product market was the one in the sales of new vehicles, but to the contrary stated that it was the separate and ancillary market in services which are in practice indispensable for dealers who wish to sell the vehicles manufactured by the said car manufacturers in a specific geographical area.⁴⁶

⁴⁴ See for instance the following paper by a member of the BEUC, SCHMITZ, B., "Le point de vue des consommateurs", in Pizzio, J., (ed), Droit des consommateurs, 1987, Story Scientia, pp. 104-111. At pp. 109-110, he writes: "En vain, les organisations de consommateurs avaient plaidé pour que le Règlement 123/85 ne s'étende pas aux services après-vente. Ce marché est, en effet, déjà bien plus vivant que celui de la vente de voitures neuves (de nombreuses nouvelles formes de service ont vu le jour ces dernières années) et les avantages offerts par les distributeurs agréés dans ce domaine sont plus que contestés non seulement par les organisations de consommateurs, mais aussi par des autorités nationales telles que l'Office of Fair Trading au Royaume-Uni". Specifically on Block exemption 123/85, see supra, Chapter II, at pt. II.3.2.2.

⁴⁵ Case 26/75, General Motors v. Commission, Judgment of 13 November 1975, E.C.R. (1975) 1367; Case 226/84, British Leyland v. Commission, Judgment of 11 November 1986, E.C.R. (1986) 3263.

⁴⁶ See especially Case 226/84, o.c., at para 5.

IX.3.2.2. A market in spare parts specific to a brand

It is not surprising, therefore, that Advocate-General Mischo, in his opinion to both the Maxicar and the Volvo cases, explicitly rejected the definition of relevant product market based on the package theory. He stated:

"There is no doubt that certain purchasers of cars, before making their choice, also obtain information as to the price of spare parts, and that factor may influence their decision. It is also certain that the owner of a vehicle of a particular shape may, when deciding to change a car, buy one of another make because the spare parts for the first car proved, in his opinion, excessively expensive. If the time factor is also taken into account, the competition prevailing in the new-car market thus also includes an element of competition regarding spare parts.

The fact nevertheless remains that the owner of a vehicle who, at a given moment, decides to repair the bodywork of his vehicle rather than change model is obliged to purchase (either directly, if he repairs the car himself, or indirectly through a garage in the manufacturer's network or through an independent repairer) a body panel which is identical in shape to the original part. Consequently, for the owners of a vehicle of a particular make the 'relevant market' is the market made up of the body panels sold by the manufacturer of the vehicle and of the components which, being copies, are capable of being substituted for them".⁴⁷

This implies that for the determination of the relevant product market, it is not sufficient to look at whether there are substitutable goods as concerns the complex product or at whether there is a long- or medium-term cross-elasticity with alternative 'packages' that are offered by other car manufacturers. One has to look at whether there is a specific

⁴⁷ See Case 53/87, O.C., and Case 238/87, O.C., Opinion of Advocate-General Mischo delivered on 21 June 1988, respectively at para 47-48 and 7-8, emphasis added. On this basis, Advocate-General Mischo also rejected other theoretically possible definitions of the relevant product market, such as the market in spare parts in general or the market that has grown around the manufacture and maintenance of motor vehicles.

consumer demand for spare parts of cars and at whether bodywork components can be substituted by other products.

This finding is fully in line with the approach taken by the Court concerning the application of Article 86 EC to components of complex products in the Hugin case⁴⁸ -concerning the refusal by Hugin to supply spare parts for cash registers of its own make to independent companies-, which surprisingly enough Advocate-General Mischo did not refer to although it had been invoked by CICRA and Maxicar.⁴⁹ In this case, the Court held that the existence of a market for Hugin spare parts, separate from the market in cash registers, at the level of independent undertakings -which specialize in the maintenance and repair of cash registers, in the reconditioning of used machines and in the sale of used machines and renting out of machines-, was sufficient to delimitate the relevant market as being the market in spare parts. This market was furthermore restrictively defined as the market in specifically Hugin spare parts, because those parts are not interchangeable with spare parts for cash registers from other makes, and thus are subject to a specific demand.⁵⁰

⁴⁸ Case 22/78, o.c.. On the importance of this case, see for instance VERSTRYNGE, J., "Het begrip 'relevante markt' in het EEG mededingingsrecht: de stand na het Hugin arrest", S.E.W. (1980) 400-418.

⁴⁹ Case 53/87, o.c., Report of the Hearing, at p. 6051. See also FRIDEN G., o.c., at p. 208, where he writes that the Advocate-General 'conspicuously' avoided any reference to Hugin. It is interesting to note that Plaisant and Daverat advanced the following view in 1983: "Quoiqu'il en soit, cette espèce (Hugin) n'a guère de relations avec la question des pièces détachées pour automobiles et des exclusivités s'y rapportant", see PLAISANT, R., DAVERAT, G., "La distribution des pièces détachées pour automobiles et les lois contre les pratiques restrictives", R.T.D.C. (1983) 147-187, at p. 169.

⁵⁰ Case 22/78, o.c., at para 7. At para 8, the Court unequivocally stated: "Consequently the market thus constituted by Hugin spare parts required by independent

Although the Hugin judgment thus confirms the validity of Advocate-General Mischo's finding as concerns the relevant product market, it has to be pointed out that there are two important differences between the Maxicar and the Volvo cases on the one hand, and the Hugin case on the other hand. Firstly, the structure of supply of spare parts is not the same. Only Hugin manufactured and was thus in the possibility to supply the spare parts concerned in the Hugin case, whereas in the car spare parts cases independent undertakings manufactured (Maxicar), or wanted to manufacture under licence (Veng), similar spare parts themselves and thus constituted an alternative source of supply. This is an additional argument in support of the finding that the supply of spare parts of cars is a specific market separate from the market in new cars.⁵¹ Secondly, also the determination of categories of potential clients, and thus the demand structure, is different. The Court's ruling in the Hugin case that, considering the technical nature of cash registers, the user is not himself a purchaser of the spare parts concerned but avails himself either of Hugin after-sales services or independent undertakings specialized in repair and maintenance work,⁵² had been criticized for at least two reasons. It was held that the Court failed to examine whether there were possible substitutes on the demand side for independent undertakings, and, more importantly, neglected the indirect

undertakings must be regarded as the relevant market for the purposes of the application of Article 86 to the facts of the case".

⁵¹ Compare to the Hilti case (Case T-30/89), where the Court of First Instance held that the existence of independent producers making only Hilti-compatible nails was proof of the fact that there was a specific market for those nails. See supra, Chapter VI, at pt. VI.4.4.4.C.

⁵² Case 22/78, o.c., at para 6.

demand for spare parts by owners of Hugin cash registers.⁵³ This critique becomes redundant in the car spare parts cases because, as Advocate-General Mischo in the car spare parts cases correctly pointed out, it is undisputable that the car user not only purchases spare parts indirectly through a garage in the manufacturer's network or through an independent repairer, but also directly in order to repair the car himself.⁵⁴ If it sufficed in the Hugin case that the independent undertakings specialized in maintenance and repair work required spare parts to establish that there was a separate market, then this is all the more so the case where there is a specific demand for spare parts not only indirectly from consumers and directly from independent undertakings, but also from consumers directly.⁵⁵

⁵³ See especially BADEN FULLER, C., "Article 86 EEC: Economic analysis of the existence of a dominant position", E.L.R. (1979) 423-441, at p. 426. He points out that the independent undertakings could have shifted their activity to the repair and maintenance of other brands of cash registers, so that substitutability existed on the demand side from the point of view of independent undertakings. At p. 427, he thus forwards the view that the Court should have defined the relevant market as "spare parts required by those who are owners of Hugin machines", which would have included but not been limited to those repairers of Hugin cash registers. Similarly, see also KORAH, V., "Concept of a dominant position within the meaning of Article 86", C.M.L.Rev. (1980) 395-414, at p. 403 where she writes: "The limitation of the demand side of the market to those who were currently buying spares, bypasses those who were most dependent on Hugin for spare parts: the shops that had bought its machines".

⁵⁴ Franceschelli to the contrary maintains that car owners exclusively avail themselves of the services of specialized repairers, and thus never repair their cars themselves, so that their demand for spare parts -in the line of the Hugin case- should not be taken into account. See FRANCESCHELLI, R., "Modelli ornamentali di parti di carrozzeria di automobili ed abuso di posizione dominante", Riv. Dir. Ind. (1988-II) 175-187, at p. 183.

⁵⁵ On the specific needs and demands of car owners, and on the fact that for the consumers cars are not fully interchangeable for spare parts, see also supra, at pt. IX.3.2.1. Compare to the Magill cases (Cases T-76/89, T-70/89,

Specifically as concerns bodywork components of cars, it has been submitted before that their shape is imperative to restore the car in its original appearance.⁵⁶ Similarly as in the Hugin case, this implies that bodywork components for cars of different brands cannot be interchanged. But it has been pointed out before that the difference with the Hugin case is that there are alternative sources of supply on the market. Advocate-General Mischo therefore correctly pointed out in the car spare parts cases that the relevant product market had to be restricted to those body panels sold by the manufacturer of the vehicle as well as copies made thereof.

The Court's ruling in the Hugin case had also been criticized because it defined the relevant market with respect to a brand instead of a product, and thus failed to analyze whether alternative sources of supply, for instance copies made by independent undertakings, were feasible or whether barriers to entry such as design protection existed.⁵⁷ However, Advocate-General Reischl, in his opinion to the Hugin case, did establish that there were important barriers to entry.⁵⁸ Amongst others, it is significant that he held that it was not necessary to examine whether or not there were in fact legal barriers such as design rights to prevent the manufacture of competing spare parts, because:

T-69/89), where the Court of First Instance defined the relevant product market as the market in advanced weekly listings because there was a specific, constant and regular potential demand for this product. See supra, Chapter VI, at pt. VI.4.4.4.E.

⁵⁶ See supra, Chapter VIII, at pt. VIII.5.3.

⁵⁷ See BADEN FULLER, C., o.c., at p. 426 and at pp. 431-432.

⁵⁸ Case 22/78, o.c., Opinion of Advocate-General Reischl delivered on 22 May 1979.

"the impression may be gained that the existing doubts and the threat of considerable penalties make the attempts to manufacture Hugin spare parts appear too hazardous".⁵⁹

If one could challenge whether uncertainty about the existence of design protection was sufficiently a deterrent to constitute a barrier to future entry in the Hugin case, the same does not hold true for the car spare parts cases where precisely the enforcement of design rights was challenged.⁶⁰ In this respect, it should not be neglected that the enforcement of design rights on the bodywork components leads to a legal monopoly through the elimination of competition from independent manufacturers of bodywork components and through constituting such a barrier to entry on the supply-side.⁶¹ This means that, especially after the judgments of the Court in the Maxicar and Volvo cases which upheld those design rights under Community law, the relevant market will in the future most probably be restricted to the bodywork components of a given brand as in the Hugin case, simply because copies will be excluded from the market.

IX.3.3. DOMINANT POSITION AND THE ROLE OF DESIGN PROTECTION

IX.3.3.1. Dominant position in absence of design protection

Having defined the relevant product market as the market in bodywork components of cars sold by the manufacturer of the

⁵⁹ *Idem*, at para 2.

⁶⁰ That intellectual property are barriers to entry is not at all disputed by economists, but is to the contrary held to be a classic example of barriers to entry. See for instance PRICE, D., "Abuse of a dominant position - the tale of nails, milk cartons, and TV guides", E.C.L.R. (1990) 80-90, at p. 85. See also KORAH, V., o.c., (1988), at p. 381.

⁶¹ This was exactly the situation in the Magill cases, see also supra, Chapter VI, at pt. VI.4.4.4.D.

car and copies thereof, the next question arising is whether the car manufacturers also occupy a dominant position on that market. The Court has repeatedly given the following definition and clarification about the concept dominant position:

"The dominant position (...) relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave independently of its competitors, its customers, and ultimately of the consumers.

Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".⁶²

Although the issue of whether or not second-hand parts constitute an additional source of supply which has to be taken into account to determine the occurrence of a dominant position was not raised in the car spare parts cases; it is interesting to point out that the Court has not withheld the second-hand market as being a sufficient alternative source of supply in the Hugin case.⁶³ In the Michelin case, the Court clarified that the market in renovated tyres is but a secondary market which depends on the supply and prices of new tyres, so that the undertaking holding a dominant position in new tyres is in a privileged competitive position and can "conduct itself with greater independence on the market than would be possible for a retreading undertaking".⁶⁴ Although this analysis specifically related to vehicle tyres, it is

⁶² Case 85/76, Hoffmann-La Roche, o.c., at para 38 and 39. See also for instance Case 31/80, L'Oréal, o.c., at para 26; Case 322/81, Michelin, o.c., at para 37 and 48.

⁶³ See Case 22/78, Hugin, o.c., at para 9.

⁶⁴ Case 322/81, o.c., at para 51.

submitted that it set the tenor for the relationship between the new and the second-hand market of products under Article 86 EC in general.

It thus has to be established whether the car manufacturers can behave to an appreciable extent independently from the independent manufacturers on the market of bodywork components for their cars. It was argued in the Maxicar case that Renault held a market share of about 80-85% as concerns body panels.⁶⁵ The Court has consistently held that very large market shares as compared to the next largest market shares of competitors, the technological lead over competitors, the existence of highly developed sales networks, as well as the absence of potential competition, are relevant factors to determine the existence of a dominant position.⁶⁶ Neither the Commission nor the Advocate-General had any difficulty in finding that, even disregarding the additional economic strength conferred by design protection, the car manufacturers did occupy a dominant position on the relevant market. This was held to be the case because the existence and reputation of the manufacturers' close-knit selective distribution network as compared to the less known products and locations of independents,⁶⁷ and

⁶⁵ Case 53/87, o.c., Report of the Hearing, at p. 6044.

⁶⁶ See for instance Case 85/76, Hoffmann-La Roche, o.c., at para 48. For an analysis of the Court's approach, see KORAH, V., "Concept of a dominant position within the meaning of Article 86", C.M.L.Rev. (1980) 395-414.

⁶⁷ See especially the Opinion of Advocate-General Mischo in Case 238/87, o.c., at para 11 and in Case 53/87, o.c., at para 51, where he held that the parts produced by the independents "do not enjoy the prestige associated with the 'original part' label and the places where they can be obtained are less known". For an analysis of market power as conferred by a strong established brand, see PARR, N., HUGHES, M., "The relevance of consumer brands and advertising in competition inquiries", E.C.L.R. (1993) 157-163. In footnote 35, they point out that "even if consumers loyalty and advertising do not create barriers to entry per se, they may do so combined with barriers at the manufacturing and/or

especially the car manufacturers' system of guarantee which is dependent on the use of original parts,⁶⁸ induce consumers to obtain spare parts supplied by the car manufacturer rather than spurious parts, and thus entails a large market share in bodywork components for the car manufacturers.

IX.3.3.2. The impact of design protection on the dominant position

It is logical that if the car manufacturers already occupy a dominant position in the market for bodywork components for their cars without design protection, that this will be all the more so when design protection -which confers market power- is obtained and enforced. As seen before, the Court has consistently held that the mere enforcement of intellectual property rights to exclude competitors from the market -as allowed under Article 36 EC- is not necessarily tantamount to conferring a dominant position in the sense of Article 86 EC.⁶⁹ However, it should immediately be added that the Court has never stated that intellectual property protection is an obstacle to establishing a dominant position.⁷⁰ The Court has

distribution level". On the impact of the selective distribution network on the spare parts market, see also infra, Chapter X.

⁶⁸ See for instance the arguments of the Commission in the Maxicar case, Case 53/87, o.c., Report of the Hearing, at p. 6052-6053. See also the Opinion of Advocate-General Mischo in Case 238/87, o.c., at para 11 and in Case 53/87, o.c., at para 51, where he held that "at a time when manufacturers offer anti-rust guarantees of up to six years, that fact is not without significance".

⁶⁹ See for instance Case 40/70, Sirena v. Eda, Judgment of 18 February 1971, E.C.R. (1971) 69, at para 16. See supra, Chapter VI, at pt. VI.4.4.2.C.

⁷⁰ See also supra, Chapter VI, at pt. VI.4.4.4.E., concerning a similar issue raised before the Court of First Instance in the Magill cases.

consistently held about Article 86 EC in general that:

"The fact that the absence of competition or its restriction on the relevant market is brought about or encouraged by provisions laid down by national law in no way precludes the application of Article 86".⁷¹

With regard to intellectual property rights, the Court has clarified that one has to look at whether the right holder can impede the maintenance of effective competition in a substantial part of the relevant market.⁷² This means that intellectual property rights are neither an indication of, nor an obstacle to, the finding of a dominant position. But this does not imply that the enforcement of intellectual property rights cannot influence the finding of a dominant position. This is best illustrated by the Magill cases, where the plaintiffs were held to be in a dominant position, not because of, but rather as a consequence of their copyright on advance weekly listings of TV programmes.⁷³

In most cases, the enforcement of intellectual property rights does not significantly affect the definition of the relevant product market, because competitors are not necessarily excluded from the market and are thus in the possibility to manufacture interchangeable products. This is typical for those intellectual property rights the objective of which is

⁷¹ Case 311/84, Telemarketing, Judgment of 3 October 1985, E.C.R. (1985) 3261, at para 16. On the applicability of Article 86 EC to monopolies conferred by national law other than intellectual property rights, see EHLERMANN, C-D., "Managing monopolies: the role of the State in controlling market dominance in the European Community", E.C.L.R. (1993) 61-69.

⁷² See for instance Case 78/70, Deutsche Grammophon Gesellschaft, Judgment of 8 June 1971, E.C.R. (1971) 487, at para 17; Case 51/75, EMI v. CBS, Judgment of 15 June 1976, E.C.R. (1976) 811, at para 36. See also supra, Chapter VI, at pt. VI.4.4.2.C.

⁷³ See supra, Chapter VI, at pt. VI.4.4.4.E.

not so much to confer an exclusive right on a product, but merely on the form in which an idea is expressed (copyright),⁷⁴ on the shape or configuration of an industrial product (design rights),⁷⁵ or on the use of distinctive signs (trademarks).⁷⁶ This means that the holder of such an exclusive right will not automatically hold a dominant position, but that this finding will depend on to what extent he can also prevent the maintenance of effective competition on the relevant market. This is the case, for instance, as concerns design protection on cars or on spare parts for which the shape is not imperative to restore the car in its original function or appearance. To assess the impact of the design rights on the establishment of a dominant position, one has to consider to what extent the exclusive right confers economic strength upon its holder in comparison to its competitors.

But there are other, and it is submitted exceptional, cases whereby the enforcement of intellectual property rights does fundamentally affect the definition of the relevant market, because the exclusive right is granted on a product for which no non-infringing substitutes exist. In other words, in those cases the conferment of an intellectual property rights comes down to the grant of a legal monopoly on the relevant market, because all competitors can be legitimately excluded from the

⁷⁴ See supra, Chapter III, at pt. III.3.3. See also FORRESTER, I., "Software licensing in the light of current EC competition law considerations", E.C.L.R. (1992) 5-20, at pp. 5-6. At p. 6, he points out that when the expression and the idea merge, the merger doctrine is applicable which implies that copyright cannot be enforced against unauthorized use by others.

⁷⁵ See supra, Chapter III, at pt. III.3.5.

⁷⁶ See supra, Chapter III, at pt. III.3.4. In this sense, it is submitted that Subiotto was not quite accurate in maintaining that copyright and design rights confer temporary exclusive rights on a product, although it is correct that the Court has interpreted IPR in this way. See SUBIOTTO, R., Q.C., at p. 237.

market. This is a situation which is most likely to occur with regard to patents, the objective of which is precisely to confer an exclusive right on a product or a process, although this finding is still subject to whether or not there are other products on the market that could be used for the same purpose and that are regarded as being interchangeable by the consumers.⁷⁷

The Court of Justice had essentially been confronted with these two rather straightforward types of intellectual property rights cases under Article 86 EC prior to the Maxicar and Volvo cases. The peculiarity of the car spare parts cases, similarly as for the Magill cases which were dealt with by the Court of First Instance, lies in the fact that they concerned intellectual property rights which essentially belonged in the first group mentioned, but represented the features detrimental to competition typical of the second group mentioned. It should be recalled that in the Magill cases, the grant and enforcement of copyrights on facts, namely weekly advance listings for TV programmes, led to the finding of a monopoly position by the copyright holders on the relevant product market which was necessarily restrictively defined as the market in their own listings, because for the final consumers these could not be substituted by other information. It has been submitted before that this was the consequence of granting copyrights to mere facts, rather than on the form in which an idea is expressed as is the objective of copyrights.⁷⁸ Similarly, it has been pointed out before that the enforcement of design rights on bodywork components of cars, the shape of which is considered by the consumers to be imperative in order to restore the car in its original appearance, will necessarily lead to the exclusion of competitors from the

⁷⁷ See also supra, Chapter III, at pt. III.3.2.

⁷⁸ See supra, Chapter VI, at pt. VI.4.4.4.E.

market, so that the relevant market will in the future be restricted to the bodywork components of a given brand, simply because interchangeable copies will be excluded from the market.⁷⁹ As both the Commission and Advocate-General Mischo implicitly acknowledged, this means that the enforcement of design rights on bodywork components of cars implies a shift from a mere dominant position for the car manufacturers to a monopoly position. In the words of Advocate-General Mischo:

".. in the present case, the industrial property rights relate to body panels for a motor vehicle and the only products which can be substituted for them are products having exactly the same shape as the parts produced by the manufacturer. As the Commission rightly pointed out, in the circumstances of this case no substitutable goods exist which do not encroach upon the registered rights of the manufacturer. Accordingly, as soon as the proprietor exercises his rights deriving from his registered design and substitutable parts can no longer be produced, there is no doubt that the manufacturer holds a dominant position in the market in the spare parts for which he registered his design and which is, in the last analysis, the 'relevant market' in the present case".⁸⁰

Also here, this monopoly position is clearly the consequence of the grant -and subsequent enforcement- of design rights on a product which cannot be substituted by others, rather than on a shape or configuration as is the objective of design rights. As such, it is submitted that in both the Maqill and the Maxicar and Volvo cases, it is the abuse of the system of intellectual property rights, through enforcing exclusive rights on a product and thereby disregarding the essential function of copyrights and design rights respectively, that necessarily entails the finding of not only a dominant, but even a monopoly position on the relevant market.

⁷⁹ See supra, at pt. IX.3.2.2.

⁸⁰ Opinion of Advocate-General Mischo in Case 238/87, O.C., at para 14; See also his opinion in Case 53/87, O.C., at para 54.

IX.4. THE 'ABUSE' OF THE DOMINANT POSITION ON THE MARKET FOR BODYWORK COMPONENTS OF CARS

IX.4.1. INTRODUCTION

The Court did not explicitly deal with the issue of whether or not the car manufacturers occupied a dominant position and how the relevant market for components of complex products such as bodywork components for cars should be determined. Rather, the Court immediately answered the essential questions posed by the national courts. In the Maxicar case this was whether obtaining and subsequently enforcing exclusive design rights on bodywork components of cars amounts to an abusive way of eliminating competition, and in the Volvo case whether the refusal to license the design right on reasonable terms amounts to an abuse of a dominant position.⁸¹

As seen before, the Court has consistently held that the mere exercise of an intellectual property right which is lawful under Article 36 EC is not contrary to Article 86 EC either if the exclusive right has not been used as an instrument for the abuse of such a position.⁸² The analysis under Article 86 EC is thus first of all dependent on the analysis under Article 36 EC. It has been illustrated that on the basis of its earlier case-law, the Court in its analysis under Article 36 EC could, in the Maxicar case, choose between either to uphold or to declare design rights on bodywork components of cars to be incompatible with Community law.⁸³ It was furthermore submitted that the rights should not have been upheld because they are not in accordance with the inherent function of design rights

⁸¹ See also supra, at pt. IX.2.1.

⁸² Case 102/77, Hoffmann-La-Roche, see supra, Chapter VI, at pt. VI.4.4.2.C.

⁸³ See supra, Chapter VIII, at pt. VIII.4.

and hence are difficult to justify in terms of the need to safeguard the protection of industrial and commercial property.⁶⁴ It is obvious that under the latter approach the question as to the compatibility of the enforcement of design rights on bodywork components with Article 86 EC would have become redundant, because the detrimental effects ensuing from the monopoly position on the competitive structure in general and for the consumers in particular would not have occurred.⁶⁵

However, the Court has failed to apply a justification-test in the Maxicar case and consequently held that the grant and enforcement of design rights on bodywork components of cars was compatible with Article 36 EC. This means that it has to be established whether and to what extent the detrimental effects that are likely to occur can be curtailed under Article 86 EC. The Court has consistently given the following definition of the concept 'abuse':

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and through recourse to methods which, different from those which condition normal competition in products or services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".⁶⁶

⁶⁴ See supra, Chapter VIII, at pt. VIII.5.

⁶⁵ See also supra, Chapter VIII, at pt. VIII.6.3.

⁶⁶ Case C-62/86, Akzo v. Commission, Judgment of 3 July 1991, E.C.R. (1991) I-3359, at para 69. On the Commission's approach in this case, which stressed the importance of maintaining a competitive market structure, see SMITH, P., "The Wolf in Wolf's clothing: the problem with predatory pricing", E.L.R. (1989) 209-222. On the relationship between abusive behaviour and dominant position, see VOGELZANG, P., "Abuse of a dominant position in Article 86: the problem of causality and some applications", C.M.L.Rev. (1976) 61-78.

Although the enforcement of intellectual property rights is particularly apt to affect the competitive market structure, it has been pointed out before that if the exercise of the right is covered by the specific subject-matter of the right, then the behaviour will not be automatically legitimate or illegitimate under the rules on competition. Rather, an additional element will be needed to hold that the right holder has made a use of his right which amounts to an abuse of his dominant position under Article 86 EC.⁸⁷ It should be recalled that the Court has held in the car spare parts cases that the very subject-matter of design rights is constituted by "the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design."⁸⁸ It is therefore important to examine which 'additional element' to the normal use of design rights under Article 36 EC is needed to hold that there has been an abusive behaviour by the car manufacturers under Article 86 EC.⁸⁹

IX.4.2. ABUSE OF THE MONOPOLY POSITION CONFERRED BY DESIGN PROTECTION

IX.4.2.1. Abuse in relation to the function of design rights

The Italian court seemed to assume that the fact that all competition is eliminated through the grant and the

⁸⁷ On the need for an additional element, see also supra, Chapter VI, at pt. VI.4.4.2.C.

⁸⁸ See for instance Case 238/87, o.c., at para 8. See also supra, Chapter VIII, at pt. VIII.4.4.

⁸⁹ See also Advocate-General Mischo, who writes that the mere acquisition and exercise of IPR do not constitute an abuse of a dominant position, but that "a further element is required". See his opinion to Case 53/87, o.c., at para 59, and to Case 238/87, o.c., at para 21.

enforcement of design rights on bodywork components of cars, which appears to be contrary to the function of design rights, could be a sufficient additional element to establish abusive behaviour under Article 86 EC.⁸⁰

The Court explicitly acknowledged in the Akzo case that the elimination of competitors "by using methods other than those which come within the scope of competition on the basis of quality", is prohibited by Article 86 EC.⁸¹ In this regard, it is interesting to recall the Court of First Instance's judgment in the Tetra Pak case.⁸² As seen before, the CFI held that the acquisition of an exclusive patent licence from a competing firm by an undertaking who already occupied a dominant position in that market amounted to an abuse.⁸³ Although the CFI acknowledged that an additional element to the acquisition of the patent licence was needed to establish abusive behaviour, it held that this additional element precisely lay in its detrimental effect on the competitive market structure, because consequently all competition was eliminated.⁸⁴ The question is whether the same reasoning can be

⁸⁰ Case 53/87, o.c., Report of the Hearing, at pp. 6041-6042.

⁸¹ Case C-62/86, o.c., at para 70. On the abusive behaviour through the elimination of competition, see for instance also Joined Cases 6 and 7/73, Commercial Solvents, Judgment of 6 March 1974, E.C.R. (1974) 223, at para 25. On this case, see BENTIL, J., "Control of abuse of monopoly power in EEC business law: a commentary on the Commercial Solvents case", C.M.L.Rev. (1975) 59-75.

⁸² Case T-51/89, Tetra Pak Rausing SA v. Commission, Judgment of 10 July 1990, E.C.R. (1990) II-309.

⁸³ See supra, Chapter VI, at pt. VI.4.4.5.C.

⁸⁴ On this issue, see DALTROP, J., FERRY, J., "The relationship between Articles 85 and 86: Tetra Pak (T-51/89)", E.I.P.R. (1991) 31-33; JAMES, H., "Tetra Pak: exemption and abuse of dominant position", E.C.L.R. (1990) 267-270. At p. 269, she writes: "an interesting feature of the judgment is an emerging principle whereby a dominant undertaking has a

applied if the undertaking alleged to abuse its dominant position is not a licensee, but the holder of the exclusive right.

The Italian court's question, which referred to the function of design rights, was most probably based on the understanding that a balance needs to be maintained between the conflicting legitimate objectives of both the Community competition rules and the national design rights. The competition rules are essentially aimed at safeguarding an effective competitive structure in the Common Market,⁹⁵ whereas industrial property rights confer temporary exclusive rights and thus are particularly apt to affect this competitive market structure. It is therefore necessary to determine how these two potentially conflicting systems of rules should interact.⁹⁶ Considering that free competition is the rule and legally granted exclusive rights the exception, it is submitted that the approach taken should consist in analyzing whether the restraint on competition posed by the enforcement of intellectual property rights is in accordance with the objective for which those exclusive rights are granted, or whether to the contrary the system of intellectual property rights is (ab)used to unduly gain market power.⁹⁷ It has been pointed out that the use of design rights in accordance with

special responsibility not to allow its conduct to impair genuine competition".

⁹⁵ Case 6/72, *Continental Can*, o.c., see supra, at pt. IX.1.

⁹⁶ On the patent-antitrust debate, see also supra, Chapter III, at pt. III.3.2.

⁹⁷ On the functionality-test as applied to the rules on competition, see supra, Chapter VI, at pt. VI.4.2.3.

their function does not exclude competitors from the market,⁹⁸ and should thus also be upheld under the rules on competition. However, the use of design rights which clearly exceed their function in that they confer a monopoly on a product, and in this specific case moreover tie-in the consumers in the after-sales market for cars, clearly affects the competitive structure in a way which is not intended by design law, and should thus be struck down under the rules on competition.

This was precisely the approach taken by the Court of First Instance in the Magill cases.⁹⁹ The CFI essentially held that the behaviour by copyright holders, which consisted in invoking their exclusive right to prohibit others from producing a new product for which there was a potential consumer demand in an ancillary market, exceeded the function of copyright and was therefore contrary to Article 86 EC. Or in other words, the exercise of copyright in a manner which did not correspond to its essential function was held to be abusive exercise which was 'manifestly' contrary to Article 86 EC.¹⁰⁰ But the major problem in applying this justification-test under Article 86 EC in the car spare parts cases lays in the fact that the Court has not applied the justification-approach under Article 36 EC.¹⁰¹ It is therefore not surprising that the need to safeguard the function of design rights was equally

⁹⁸ On the inherent function of design rights, see supra, Chapter III, at pt. III.3.5. and Chapter VIII, at pt. VIII.5.3.

⁹⁹ See supra, Chapter VI, at pt. VI.4.4.4.E.

¹⁰⁰ See also SMITH, J., "Television guides: the European Court doesn't know 'there's so much in it' ", E.C.L.R. (1992) 135-138, at p. 137, where he points out that the CFI considered the use of copyright as a tool of the abuse under Article 86 EEC.

¹⁰¹ On the need for the elaboration of a coherent 'functionality-test' under both Articles 36 and 86 EEC, see also supra, Chapter VI, at pt. VI.4.2.3.

disregarded under the rules on competition.

IX.4.2.2. Abuse in relation to the specific subject-matter of design rights

Instead of taking an approach whereby the need to safeguard the competitive structure in the market was the premise and subsequently examining to what extent the exception invoked based on design rights could be upheld, the Court in the Maxicar and Volvo cases took as a premise that the exclusive design rights needed to be safeguarded and only subsequently examined to what extent the rules on competition could constitute an exception to this rule. In other words, rather than considering that the enforcement of design rights constitutes an exception to the rule that competition has to prevail in the Common Market, it seemed that the Court held that the rules on competition merely constitute an exception to the rule that exclusivity as conferred by intellectual property rights should prevail.

This is best illustrated by the fact that the Court in the Volvo case, which merely concerned Article 86 EC, first of all reiterated its findings under the Article 36 EC analysis in the Maxicar case,¹⁰² namely that the existence of design rights is a matter for the national legislature and that the exercise of design rights which consists in prohibiting the unauthorized use of its design constitutes the specific subject-matter of design rights.¹⁰³ As to the question whether or not the refusal to grant a licence on reasonable terms is

¹⁰² For an analysis of the Court's approach under Article 36 EEC in the Maxicar case, see supra, Chapter VIII, at pt. VIII.4.4.

¹⁰³ Case 238/87, o.c., at para 7 and 8.

in accordance with the specific subject-matter of the exclusive right, Advocate-General Mischo pointed out that the Court already held in the Pharmon v. Hoechst case that to prohibit the importation of goods marketed under compulsory licences, regardless of whether a reasonable royalty was payed, would deprive the proprietor of the substance of his right.¹⁰⁴ The Court subsequently held in the Volvo case that:

"It follows that an obligation imposed upon the proprietor of a protected design to grant third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position".¹⁰⁵

The fact that the Court -in line with Advocate-General Mischo's approach¹⁰⁶- did not consider the possible abuse of design rights, in the sense that their function was exceeded, to be relevant for the analysis under Article 86 EC, is clearly illustrated by the following statement in the Maxicar judgment:

¹⁰⁴ On the reasoning of the Advocate-General, Case 238/87, o.c., especially at para 22-27. For an analysis of the Pharmon v. Hoechst case (Case 19/84), which concerned the effect of compulsory licences on the principle of exhaustion, see supra, Chapter VII, at pt. VII.2.4.

¹⁰⁵ Case 238/87, o.c., at para 8. It is interesting to note that the Commission, in the Maxicar case, 'wondered' whether the refusal to grant licences might not be held to be contrary to Article 86 EC, so that not all competition in the spare parts market would be eliminated. See Case 53/87, o.c., Report of the Hearing, at p. 6053. On the Commission's approach to the refusal to license, see infra, Chapter X, at pt. X.4.2.2.

¹⁰⁶ Advocate-General Mischo held: "The elimination of that competition is the necessary consequence of an industrial property right in respect of a product which can have no other form than that which was endowed upon it by its creator, the proprietor of the exclusive right", thereby failing to acknowledge that design rights do not have the objective to grant an exclusive right on a product, but merely on its shape or configuration. See his opinion to Case 53/87, o.c., at para 60, emphasis added.

"It should be noted from the outset that the mere fact of securing the benefit of an exclusive right granted by law, the effect of which is to enable the manufacture and sale of protected products by unauthorized third parties to be prevented, cannot be regarded as an abusive method of eliminating competition".¹⁰⁷

The result of this approach is that the Court in principle accepted that through the use of design rights, the competitive structure in the after-sales market for bodywork components could be appreciably altered, in the sense that all competition could be eliminated and a legal monopoly position conferred on the car manufacturers. This also meant that consumers could be tied-in, with all the potential negative consequences for car owners as set out before.¹⁰⁸

Having thus implicitly rejected the contention that the use of design rights in a way which clearly goes beyond their function can constitute the additional element for the finding of an abuse, the Court was faced with the difficult task of determining how the detrimental effects on competition, and especially on the consumers, could nevertheless be curtailed by virtue of the rules on competition. This implied that the Court had to establish what this additional element to the use of design rights in accordance with their specific subject-matter, needed for the finding of abusive behaviour on behalf of the holder of the legal monopoly, could be.¹⁰⁹ Rather than unequivocally stating what exactly this additional element

¹⁰⁷ Case 53/87, o.c., at para 15.

¹⁰⁸ See supra, Chapter VIII, at pt. VIII.6.3.

¹⁰⁹ See also VINJE, T., "Magill: its impact on the information technology industry", E.I.P.R. (1992) 397-402, at p. 399. He writes that in the Volvo case "the difficulties of applying the existence/exercise doctrine, especially in Article 86 cases, became particularly apparent", and that the Court "appears to have acknowledged the limits of the 'specific subject-matter' concept".

represents, the Court, on the basis of the examples already mentioned in Article 86 EC, merely gave examples of situations which are manifestly detrimental to the consumers' interests and might be indicative of abusive behaviour, but the actual occurrence of which has to be appreciated by the national courts.¹¹⁰ The only guidelines given by the Court of Justice to the national courts as concerns the application of Article 86 EC to the enforcement of design rights on bodywork components of cars by the car manufacturers, in both the Maxicar and Volvo cases, were as follows:

"Exercise of the exclusive right may be prohibited by Article 86 if it gives rise to certain abusive conduct on the part of an undertaking occupying a dominant position such as an arbitrary refusal to deliver spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model remain in circulation, provided that such conduct is liable to affect trade between Member States".¹¹¹

Before looking at whether or not the enforcement of design rights on bodywork components of cars appreciably affects trade between Member States it is useful to first analyze the impact, and especially the workability, of the three examples of abusive behaviour given by the Court. In this respect, it is important to underline that, considering the intrinsic relationship between the car and the after-sales market, whether or not abusive behaviour of the kind mentioned by the Court will also occur in practice will of course be largely dependent on the extent to which the fact that car manufacturers behave independently of consumers' interests in

¹¹⁰ See also FRIDEN, G, O.C., at p. 210, where he writes that one should not read too much in these examples because "the Court probably felt obliged, after having given an example of what was not abusive conduct, to give a few examples of what would be considered as abusive".

¹¹¹ Case 53/87, O.C., at para 16, emphasis added. Similarly, see Case 238/87, O.C., at para 9.

the after-sales market influences their position in the market for new cars.¹¹² But to the extent that car manufacturers can and do disregard consumers' interests in the after-sales market without significantly affecting their competitive position in the market for new cars, it is submitted that rather than giving clear guidelines to the national courts, the Court's examples raise fundamental questions which prevent the finding of abusive behaviour by car manufacturers in the market for bodywork components, or at least render such a finding precarious in practice.

IX.4.3. ANALYSIS OF THE EXAMPLES OF ABUSIVE BEHAVIOUR GIVEN BY THE COURT

IX.4.3.1. Arbitrary refusal to sell to independent repairers

The first example of abusive behaviour given by the Court, which is clearly inspired by Article 86 (c) EC, is the arbitrary refusal by the car manufacturers to deliver bodywork components of cars to independent repairers. It is clear from the Volvo judgment that this does not imply that the car manufacturer cannot arbitrarily refuse to give a licence to independent repairers, because the Court explicitly held that the refusal to grant a licence is in conformity with the specific subject-matter of design rights and does not as such constitute abusive behaviour under Article 86 EC.¹¹³ Contrary to what the Court of First Instance maintained, when stating in the Magill cases that the finding of an abusive behaviour based on the refusal to grant a copyright licence was 'borne

¹¹² On the relationship between the car market and the after-sales market, see infra, Chapter X.

¹¹³ See supra, at pt. IX.4.2.2.

out' of the Volvo judgment,¹¹⁴ the Court of Justice in the Volvo case only referred to the refusal to supply the physical goods manufactured by the car manufacturers, and did not imply that the car manufacturers could be obliged to share their design rights with the independents.¹¹⁵ In other words, the car manufacturers may invoke their design rights to remain the only manufacturer and source of supply of bodywork components under Article 86 EC, but they may not arbitrarily refuse to supply those body panels to independent repairers. As Reindl points out, the right holders would otherwise be able to extend their manufacturing monopoly which ensues from the design right to the derivative market of automobile maintenance.¹¹⁶

(-1) From the wording used by the Court, it is clear that the bare refusal to supply bodywork components of cars to independent repairers does not suffice to conclude that there is abusive behaviour in the sense of Article 86 EC.¹¹⁷ The Court has specified that this will only be the case if the refusal is 'arbitrary'. Korah has convincingly illustrated that it will be difficult in practice to evaluate whether or not the refusal to supply bodywork components of cars to independent repairers is 'arbitrary', through pointing out that the car

¹¹⁴ See supra, Chapter VI, at pt. VI.4.4.4.E. However, it is submitted that the approach taken in the Magill case was the right one.

¹¹⁵ See also SUBIOTTO, R., "The right to deal with whom one pleases under EEC competition law: a small contribution to a necessary debate", E.C.L.R. (1992) 234-244, at p. 241; FLYNN, J., "Intellectual property and anti-trust: EC attitudes", E.I.P.R. (1992) 49-54, at p. 53.

¹¹⁶ See REINDL, A., "The magic of Magill: TV program guides as a limit of copyright law?", I.I.C. (1993) 60-82, at p. 75.

¹¹⁷ Similarly, see VADJA, C., "The application of Community competition law to the distribution of computer products and parts", E.C.L.R. (1992) 110-119, at p. 116; FORRESTER, I., O.C., at p. 17.

manufacturers can always invoke to have an objective interest in stimulating the development of their own distribution network and in safeguarding the reputation of their brand.¹¹⁸

It should not be disregarded in this respect that the after-sales, thus including the spare parts, market has been included in the scope of the block exemption concerning selective distribution agreements in the motor vehicle sector.¹¹⁹ It seems that both the 'selective' and the 'exclusive' features of the distribution network, which are held to be compatible with Article 85 EC, could be invoked by the car manufacturers to 'objectively' justify the refusal to supply bodywork components of cars to independent repairers. Although the selective car distribution system is based on quantitative rather than qualitative criteria, the Commission motivated the exclusion of wholesalers not belonging to the authorized network on the basis that this is essential to maintain the system of rapid availability of spare parts originating from the motor vehicle manufacturer.¹²⁰ It seems that it would be conceptually difficult to maintain that there is an objective justification to exclude independent repairers as potential resellers of bodywork components from the

¹¹⁸ See KORAH, V., "No duty to license independent repairers to make spare parts: the Renault, Volvo and Bayer & Hennecke cases", E.I.P.R. (1988) 381-386, at p. 382. She invokes the following questions: "Is a refusal to supply body panels to an independent repairer arbitrary if it is costly to test his ability to fit the parts properly, and the car producer wants to maintain the reputation of his brand without incurring that cost by supplying only his franchised dealers whose skills and stock of tools and parts he controls? Is it more arbitrary if the brand owner wants to ensure sufficient turnover for his network of appointed dealers in order to persuade them to make the necessary investment in personnel, equipment and spares?". *about the investment in personnel, equipment and spares*

¹¹⁹ On Regulation N° 123/85, see supra Chapter II and infra Chapter X.

¹²⁰ See point 6 of the preamble to Regulation N° 123/85. See also infra, Chapter X, at pt. X.3.1.2.

selective distribution network, whereas the same exclusion would be held to be arbitrary and thus abusive under Article 86 EC. But this still leaves open the possibility for the car manufacturer to supply independent manufacturers with bodywork components not for resell, but specifically for repair purposes. However, the block exemption explicitly allows for the contractual obligation imposed on the supplier of spare parts, thus the car manufacturer, only to supply the contracting party within a given territory and to refrain from selling contract goods to final consumers -which in this context most likely includes independent repairers- or providing them with servicing for contract goods.¹²¹ It is furthermore interesting to note that as concerns the supply of spare parts by appointed dealers, it is held in the block exemption that the obligation may be imposed on the dealers to supply spare parts to a reseller "only where they are for the purpose of repair or maintenance of a motor vehicle by the reseller".¹²² This implies that a dealer may be contractually obliged to supply bodywork components of cars to independent repairers only for repair purposes and not for further sale, without, however, the block exemption giving guarantees as concerns the conditions of resell or deals with the refusal by dealers to sell to independent repairers or final customers.¹²³

Still it is clear, especially since the Tetra Pak judgment,¹²⁴ that the fulfilment of the conditions to resort under a block

¹²¹ Articles 1 and 2 of block exemption N° 123/85.

¹²² See Article 3, 10 (b) of Regulation N° 123/85.

¹²³ See also SCHMITZ, B., "Le point de vue des consommateurs", in Pizzio, J., (ed.), Droit des consommateurs, 1987, Story Scientia, pp. 104-111, at p. 110.

¹²⁴ Case T-51/89, o.c., for the relationship between Articles 85 and 86 as explained in the Tetra Pak case, see supra, Chapter VI, at pt. VI.4.4.5.C.

exemption does not confer immunity as to a possible application of Article 86 EC, so that a national court might in certain circumstances find the refusal to supply independent repairers by the car manufacturers to be arbitrary despite the arguments based on the need to live up to obligations contracted under the selective distribution agreements. However, it is important to underline that still an additional factor of uncertainty resides in the fact that the Court of Justice has, up till now, only held the refusal by a dominant undertaking to supply already existing customers to be contrary to Article 86 EC, whereas it has never imposed the obligation to deal with third parties.¹²⁵

IX.4.3.2. Unfair prices

The second example of abusive behaviour given by the Court, which is also mentioned in Article 86 (a) EC, is the fixing of prices for bodywork components of cars at an unfair level. However, a similar problem of interpretation arises with regard to the meaning of 'unfair prices', as was the case for the concept 'arbitrary refusal' in the first example.

The Court clarified in the United Brands case that the concept unfair prices under Article 86 EC relates to the trading benefits an undertaking in a dominant position reaps which it would not have reaped if there had been normal and sufficiently effective competition in the market.¹²⁶ The Court held that the excess benefit, in relation to the economic value of the product, could be determined objectively, for instance by making a comparison between the selling price and the production cost or by making a comparison with the selling

¹²⁵ See also SUBIOTTO, R., o.c., at p. 234-237; KORAH, V., o.c., at p. 382.

¹²⁶ Case 27/76, o.c., at para 249.

price of competing products.¹²⁷

However, a practical problem arises where the excess benefit has to be determined not only in relation to the economic value of the product, but also having regard to the reward the owner of an intellectual property right may obtain for his investment in research and development. It is not surprising, therefore, that the Court reiterated its established case-law as concerns the concept 'unfair prices' with regard to intellectual property rights in the Maxicar case,¹²⁸ in the sense that:

"With reference (...) to the difference in prices between components sold by the manufacturer and those sold by the independent producers, it should be noted (...) that a higher price for the former than for the latter does not necessarily constitute an abuse, since the proprietor of protective rights in respect of an ornamental design may lawfully call for a return on the amounts which he has invested in order to perfect the protected design".¹²⁹

This clearly means that the national court cannot merely compare the prices of the car manufacturers with those of the independent manufacturers to determine whether or not there is abusive behaviour, even if, as Veng maintained in the Volvo case, the price of the car manufacturers is almost twice the price demanded by independents for the same bodywork component. However, it is obvious that he is also in the impossibility to determine what should constitute a 'just reward' for the creative effort, when trying to reconstruct the fair price that could be demanded for a protected product on the basis of its economic value.

¹²⁷ Case 27/76, o.c., at para 250-253.

¹²⁸ On the previous case-law of the Court concerning IPR whereby the example of abusive behaviour through the imposition of unfair prices was given, see supra, Chapter VI, at pt. VI.4.4.2.C.

¹²⁹ Case 53/87, o.c., at para 17.

It has been submitted before that a 'just' reward for design rights cannot be calculated or quantified at any given time, but is usually determined by the willingness of the consumers to pay for the surplus value the design confers on a product as compared to another product that does not incorporate the protected design.¹³⁰ But this is based on the understanding that the design right is used in conformity with its function and does not lead to the elimination of the competitive market structure. Once all competition is removed through the use of design rights and monopoly prices can be charged in a tied-in market, as will be the result of the Court's ruling in Maxicar and Volvo, it is virtually impossible to determine how much benefit the proprietor reaps that he would not have obtained if there had been normal and sufficiently effective competition in that market.¹³¹

Although it would theoretically be possible for a national court to take the actual cost of the investment made to develop a particular bodywork component into account when determining what constitutes a 'fair price', he could not possibly calculate which reward is needed to induce further investment, which is a major objective of design law.¹³² It is

¹³⁰ See supra, Chapter VIII, at pt. VIII.5.3.

¹³¹ See also KORAH, V., o.c., (1988), at p. 382, where she writes: "...I am concerned by the very concept of unfair prices in the absence of a competitive market".

¹³² See supra, Chapter III, at pt. III.3.5. See also at pt. III.3.2. where it is held that economists have tried repeatedly, though without success, to find a method to calculate the just reward conferred by patents. See also FRIDEN, G., o.c., at p. 211, where he writes: "It represents not the possibility to charge 'reasonable' prices and obtain 'reasonable' profits, but rather the possibility, for the holder of an exclusive right, to charge whatever the market will pay, one of the main justifications being the need to give the innovator an incentive to bear the risk of innovation, which he might refuse to do if only promised a 'reasonable' profit". Korah to the contrary maintains that

furthermore submitted that his task to determine what constitutes a fair price for bodywork components of cars would become even more difficult if he had to take into consideration that body panels are components of complex products on which probably already a part of the 'just' reward for the design effort had been recovered through the sale of the car itself, as Advocate-General Mischo rather laconically suggested in the Maxicar case.¹³³ In other words, it is maintained that the concept unfair prices in relation to protected products -already when it relates to simple or to the complex product but all the more so when it relates to the components of the latter-, is unworkable because it is based on the untenable presumption that a 'just' reward can be calculated for the innovative effort.

IX.4.3.3. Prematurely terminating production

According to Korah, the Court's third example of abusive behaviour, which is based on Article 86 (b) EC,¹³⁴ namely prematurely terminating production of body panels whereas many

"the concept of costs can be reconciled with providing incentives to investment, provided that factors for the risk of failure and delay in obtaining a return are included in the costs that can be recovered before prices are considered unreasonable", see KORAH, V., O.C., (1988), at p. 383. However, she fails to indicate how the risk factors can be calculated.

¹³³ See his opinion to Case 53/87, O.C., at para 63 where he writes: "As regards the bodywork components sold as spare parts the problem displays an unusual aspect in so far as part of that expenditure has probably already been recovered from the sale of new cars. It is therefore necessary, when fixing the prices of spare parts, to take due account of that factor. It is the responsibility of the national court hearing the main proceedings to establish whether or not that has been done".

¹³⁴ See also FRANÇON, A., "Propriété littéraire et artistique", R.T.D.C. (1992) 372-378, at pp. 373-374.

cars are still in circulation, is unlikely to give rise to difficulties.¹³⁵ The argument goes that if the car manufacturer no longer produces the body panels himself, it is unlikely that he will enforce his design rights to prohibit the making of those parts by independents. However, this rather simplistic statement disregards the fact that the car manufacturers may at a certain stage precisely want to prevent all production of body panels through both terminating production themselves and enforcing their exclusive rights against independent manufacturers,¹³⁶ in order to induce owners of older cars to buy a new car. Selling new cars is after all the car manufacturers' primary objective.

The problem the national court faces is once again of a conceptual nature, namely the appraisal of the notion 'prematurely' in relation to the number of cars that are still on the market. The Court did not state that production of body panels had to continue as long as there still were cars of a given model on the market, but merely that the termination of production may be abusive if there are still 'many' cars in circulation. This obviously extends beyond the termination of the production of the specific car itself, but does not limit the production of spare parts in time, for instance to 10 or 15 years after the last new car is sold. It seems that it will depend on the market, including the market in second-hand cars, to determine for each specific type of car how long spare parts will have to be provided for by the car manufacturers.

¹³⁵ KORAH, V., O.C., at p. 383.

¹³⁶ By way of analogy to the CFI's finding in the Magill cases, it is interesting to note that Vinje argues that whilst this third example in the spare parts cases explicitly refers to "the right holder's decision not to produce parts itself, it clearly implied that the right holder's refusal to license others to produce the parts would under some circumstances constitute an abuse", see VINJE, T., O.C., at p. 400.

As a corollary, the national court in a particular case will have to determine more or less exactly how many 'many' cars is, or in other words the number of cars that have to be in circulation for the termination of production of bodywork components to be abusive. The national court could simply take the quantity of cars on the market into account -for instance it might be held to suffice that 50 cars are still on the market-, or the percentage the car represents in the total of comparable types cars of a given brand on the market -for instance 2% of all Renault passenger cars-, or still the percentage the car concerned represents in the total car park of a given Member State -for instance 1% of all passenger cars in circulation. It thus seems that each national court might set a different level and base its finding of abuse on different approaches. It goes without saying that this is a situation which does not enhance legal certainty.

It should furthermore be pointed out that in order to avoid the finding of abusive behaviour through prematurely terminating production of spare parts, the car manufacturers could obtain the same result through setting the prices of bodywork components for cars at such a level that for the owners of older cars it becomes economically unjustifiable -having regard to the market value of the car- to have their car repaired rather than buying a new car.¹³⁷ This approach, which consists in artificially putting-off consumer demand for spare parts of older vehicles rather than terminating their production and supply, would clearly not be covered by this example, whereas it was mentioned before that it would equally be difficult for a national court to come to the finding that the price is unfair and thus that the car manufacturer so-

¹³⁷ See also supra, Chapter VIII, at pt. VIII.6.3.

doing behaves abusively.¹³⁸

IX.5. THE NOTION 'AFFECTING TRADE BETWEEN MEMBER STATES'

IX.5.1. INTRODUCTION

The question remains of course whether abusive behaviour by the car manufacturers of the type mentioned above, and on a relevant market which is limited to the territory of one Member State, can appreciably affect intra-Community trade, so that Community law should apply rather than national law. In this regard, the Court has clarified that:

"..It must be stated that when the holder of a dominant position obstructs access to the market by competitors it makes no difference whether such conduct is confined to a single Member State as long as it is capable of affecting the patterns of trade and competition on the common market"

"It must also be remembered that Article 86 EEC does not require it to be proved that the abusive conduct has in fact appreciably affected trade between Member States but that it is capable of having that effect".¹³⁹

The Court has traditionally used two tests to establish whether or not intra-Community trade was actually or potentially affected by abusive behaviour, namely the 'pattern of trade' and the structural or 'pattern of competition' test. The 'pattern of trade' test essentially consists in examining whether normal trade between Member States is diverted by virtue of the abusive behaviour.¹⁴⁰ The structural test is not so much aimed at establishing whether the normal pattern of trade is diverted, but rather at whether the effective

¹³⁸ See supra, at pt. IX.4.3.2.

¹³⁹ Case 322/81, Michelin, o.c., at para 103 and 104.

¹⁴⁰ This was the test applied for instance in the Hilti case, see supra, Chapter VI, at pt. VI.4.4.4.C.

competitive market structure is affected by the abusive behaviour. As the Court held in the United Brands case:

"..if the occupier of a dominant position, established in the Common Market, aims at eliminating a competitor who is also established in the Common Market, it is immaterial whether this behaviour relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market".¹⁴¹

It thus suffices that either the normal pattern of trade or the normal pattern of competition is altered by the abusive behaviour for it to have an appreciable effect on intra-Community trade.

IX.5.2. THE EFFECT OF ABUSE OF DESIGN RIGHTS ON INTRA-COMMUNITY TRADE

In the Hugin case, the Court held that Hugin's conduct which consisted in the refusal to supply spare parts to independent repairers did not affect trade between Member States, because it did not have the effect of diverting trade in spare parts from its normal channels.¹⁴² The Court came to this conclusion on the basis that, due to the relatively insignificant value of the spare parts which did not render them a commodity of commercial interest in intra-Community trade, there was no market for spare parts of cash registers which extended beyond the territory of each Member State. This was confirmed by the fact that the commercial activities of repairers of Hugin cash registers were confined to the territory of one Member State at the most, whereas the fact that they sought to purchase spare parts in other Member States was held to be the direct result of the alleged abusive behaviour and not the normal pattern of trade.

¹⁴¹ Case 27/76, o.c., at para 201.

¹⁴² Case 22/78, o.c., at para 25-26.

The main difference between spare parts for cash registers and spare parts for cars is that the latter do represent a commodity of commercial value in intra-Community trade. The existence of a normal pattern of intra-Community trade in bodywork components of cars is best illustrated by the factual background to both the Maxicar and the Volvo case. The Volvo case was caused by the fact that Veng imported the contested bodywork components into the UK from Denmark and Italy. In the Maxicar case, it was the prohibition to manufacture and export the contested body panels to other Member States that was challenged. Furthermore Maxicar maintained that some of those parts were imported into Italy from Spain.

It has been maintained above that the enforcement of design rights on bodywork components of cars, the shape of which is imperative to restore the car in its original appearance, significantly alters the competitive market structure in that subsequently all competitors are eliminated from the market.¹⁴³ Simultaneously, the exclusion of competitors means that the normal pattern of intra-Community trade as described above is affected. It should also be recalled in this respect that design rights constitute measures having an equivalent effect to quantitative restrictions that may prohibit the importation of products that were legitimately marketed in another Member State.¹⁴⁴

However, this finding does not suffice to trigger Article 86 EC in the car spare parts cases, because the notion effect on trade between Member States relates to the alleged abusive behaviour of the undertaking occupying a dominant position in the market. It is submitted that if the enforcement of design

¹⁴³ See supra, at pt. IX.4.2.1.

¹⁴⁴ See supra, Chapter VIII, at pt. VIII.3.4.

rights on bodywork components of cars had been held to be abusive because it exceeded the function of design rights,¹⁴⁵ then it is obvious that also intra-Community trade would have been affected in the car spare parts cases. This is unequivocally confirmed by the Court of First Instance's finding in the Magill cases, where the abusive behaviour, consisting in the enforcement of copyright which exceeded its function in that it led to the exclusion of competitors on the market, was held to 'undeniably' affect intra-Community trade.¹⁴⁶

IX.5.3. THE IMPLICATIONS OF THE MAXICAR AND VOLVO CASES

The Court of Justice has consistently held that the maintenance of an effective competitive structure ensues from Article 3 (f) EC -now Article 3 (g) EC- and is in the consumers interest.¹⁴⁷ In the Hoffmann-La-Roche case, the Court thus clarified that:

¹⁴⁵ See supra, at pt. IX.4.2.1.

¹⁴⁶ See for instance Case T-69/89, RTE v. Commission, Judgment of 10 July 1991, not yet published, where it is held at para 77 that: "The applicant's refusal to authorize interested third parties to publish its weekly listings (through invoking its copyright) had decisive repercussions on the structure of competition in the field of television magazines in the territory of Ireland and Northern Ireland. Through its licensing policy which prevented, inter alia, Magill from publishing a general television magazine to be marketed in both Ireland and Northern Ireland, the applicant not only eliminated a competing undertaking from the market for television guides but also excluded any potential competition from that market, thus in effect maintaining the partitioning of the markets represented by Ireland and Northern Ireland respectively. The conduct in question was therefore undeniably capable of affecting trade between Member States", brackets added.

¹⁴⁷ Case 6/72, Continental Can, o.c., see supra, at pt. IX.1.

"By prohibiting the abuse of a dominant position within the market in so far as it may affect trade between Member States, Article 86 therefore covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3 (f) of the Treaty".¹⁴⁸

Consequently, the Court of First Instance additionally held in the Magill cases that evidence of the effect on the potential trade flows, of enforcing copyright over advance weekly TV listings, was found in the specific consumer demand for a comprehensive TV guide.¹⁴⁹

The main difference with the Magill cases was that in the Maxicar and Volvo cases the abusive behaviour was not held to be the enforcement of design rights on bodywork components of cars, but rather the refusal to supply spare parts, demanding unfair prices or prematurely terminating production.¹⁵⁰ This means that the pattern of competition or the structural test cannot be applied, simply because the behaviour which consisted in eliminating the effective competitive market structure was not held to be abusive. This also implies that, according to the Maxicar and Volvo judgments, consumer demand for spurious parts is irrelevant for the appraisal of whether or not the potential or actual pattern of trade is appreciably affected.

Whether or not alleged abusive behaviour by the car manufacturers affects intra-Community trade thus has to be determined solely on the basis of the pattern of trade test. Furthermore, this test can only be applied with regard to the normal pattern of trade of the car manufacturers' own bodywork components. This essentially means that Article 86 EC will

¹⁴⁸ Case 85/76, o.c., at para 125.

¹⁴⁹ See for instance Case T-69/89, o.c., at para 77.

¹⁵⁰ See supra, at pt. IX.4.2.2.

only apply if a car manufacturer's abusive behaviour as mentioned above results or may result in a deflection of intra-Community trade in his own products.

In the light of the Hugin judgment, this condition will not likely be fulfilled if an independent repairer seeks to obtain spare parts in another Member State because the car manufacturer arbitrarily refused to supply him with spare parts, for it might be held that this is the direct result of the alleged abusive behaviour and does not constitute the normal pattern of trade.¹⁵¹ In the words of the Court:

"In the present case Liptons turned to Hugin subsidiaries and distributors in certain other Member States precisely because Hugin's restrictive policy prevented it from satisfying its spare parts requirements through normal commercial channels. Its attempts to obtain spare parts in the other Member States can therefore not be regarded as an indication of the existence, whether actual or potential, of a normal pattern of trade between the Member States in spare parts. In other words, if Liptons had been able to obtain spare parts from a Hugin subsidiary in another Member State it would have been because Hugin was willing to sell those parts outside its own distribution network. In such a case, however, it would be customary for Liptons to apply to the Hugin subsidiary in its own country rather than to a subsidiary in another Member State".¹⁵²

Having regard to the existence of close-knit distribution networks for motor vehicles and their spare parts, it is not surprising, therefore, that in the Volvo case, Advocate-General Mischo merely forwarded the view that it should be left to the national court:

"to investigate whether the undertaking abusing its dominant position imports the parts in question from one Member State into another Member States",¹⁵³

¹⁵¹ See also supra, at pt. IX.5.2.

¹⁵² Case 22/78, o.c., at para 24.

¹⁵³ See his opinion to Case 238/87, o.c., at para 39. he did not deal with this question in the Maxicar case.

without referring to the possible importation of those goods by third parties.

It seems that it will be difficult in practice, assuming that a national court does come to the finding of abusive behaviour by car manufacturers in the light of the examples of such conduct given by the Court and despite the conceptual difficulties as set out above, to furthermore maintain that such conduct also appreciably affects intra-Community trade. It is therefore submitted that it can be expected that - because the function of design rights has been ignored by the Court- abusive behaviour of car manufacturers in the market for bodywork components that manifestly goes against the interests of consumers and free competition will not likely be effectively curtailed by virtue of Article 86 EC.

IX.6. PRELIMINARY CONCLUSION

The conclusion, which imposes itself after the preceding analysis of the car spare parts cases, is that through not taking the function of design rights into account the Court has opened the door to an almost unrestricted (ab)use of those exclusive rights to circumvent the rules on competition in the market for bodywork components of cars by the car manufacturers.

Having upheld the existence and the exercise of design rights on bodywork components of cars, the shape of which is imperative to restore the car in its original appearance, under Article 36 EC in the Maxicar case, the Court subsequently failed to find adequate means to curtail the detrimental effects on competition and for consumers under the rules on competition in both the Maxicar and Volvo cases. The

examples of possible abusive behaviour in the sense of Article 86 EC given by the Court raise more practical questions than they give answers, whereas it remains to be seen when intra-Community trade will be held to be affected when this type of abusive behaviour does occur.

The virtual non-applicability of Article 86 EC to the cases concerned essentially ensues from the fact that the Court has allowed the grant and subsequent use of design rights to amount to the elimination of inter-brand competition in the market for bodywork components of cars, whereas it is precisely the objective of both the rules on competition and design rights to enhance inter-brand competition. In other words, through refuting the hypothesis that the system of design rights might be abused to obtain a legal monopoly on the market, the Court could not possibly strike the balance between the need to safeguard exclusive design rights on the one hand and the need to safeguard an effective competitive market structure in the Common Market on the other hand, simply because the elimination of this latter counterbalance was accepted from the start. This approach clearly goes against the idea that intellectual property rights are exceptions to free competition which have to be interpreted restrictively, or even the general principle that individual interests should not unduly encroach upon the public interest.

Specifically as concerns the market for bodywork components of cars, the detrimental impact of the Maxicar and Volvo judgments on competition and consumer interests does not merely lay in the fact that inter-brand competition can be eliminated. It also has to be considered in the light of the acceptance of selective distribution agreements for cars and replacement parts under Article 85 EC, which implies that additionally also restrictions on intra-brand competition are posed in the market for bodywork components of cars so that a

perfect legal monopoly may occur.¹⁵⁴

¹⁵⁴ See *infra*, Chapter X.

CHAPTER X. THE IMPACT OF THE DISTRIBUTION SYSTEM ON THE MARKET FOR SPARE PARTS OF CARS

X.1. INTRODUCTION

As mentioned before in Chapter II, a typical feature of the automobile industry is the development of close-knit selective and exclusive distribution networks throughout the European Community, which can in principle be exempted under Regulation N° 123/85 or through an individual exemption. It was submitted that the enforcement of intellectual property rights is a way to circumvent the prohibition of exclusivity-clauses as concerns spare parts in the selective distribution agreements, a practice which is not as such contrary to Regulation N° 123/85 but which clearly goes against its objectives.¹ The purpose of this last chapter is to establish the effect of the outcome of the spare parts cases on the Commission's sectoral automobile policy under Article 85 EC.

It should first of all be recalled that the Court held in the Consten-Grundig case that not only horizontal restrictions, but also vertical restraints come under the scope of the rules on competition.² Still, it is generally accepted that certain vertical restraints may be written into certain types of selective distribution agreements. In the Metro case, the Court held that if the resellers are chosen on the basis of objective criteria of a qualitative nature, then the agreement might not even be caught by Article 85 (1) EC.³ However, it was explicitly stated in the L'Oréal case that in principle

¹ See supra, Chapter II, at pt. II.4.

² Joined Cases 56 and 58/64, Consten and Grundig v. Commission, Judgment of 13 July 1966, E.C.R. (1966) 229. See also supra, Chapter VI, at pt. VI.4.4.3.C.

³ Case 26/76, Metro v. Commission, Judgment of 25 October 1977, E.C.R. (1977) 1875.

Article 85 (1) EC applies if the selective distribution agreements are based on quantitative criteria, so that the conditions stipulated in Article 85 (3) EC have to be fulfilled in order to qualify for an exemption.⁴ Considering that the Commission has followed a sectoral approach in that it has issued a block exemption specifically for selective distribution agreements for motor vehicle distribution and servicing agreements, it is necessary to determine which characteristics of the motor vehicle market were held to be decisive to exempt these type of vertical restrictions -based on quantitative criteria- in block.⁵

Secondly, it has been established that the market in replacement parts is distinct from, though ancillary to, the market in new motor vehicles. The extension of the scope of the block exemption to this related market thus calls for an appraisal of the objectives of Regulation N° 123/85 in so far as specifically the spare parts market is concerned. Considering the fact that the Court has upheld the enforcement of design protection on bodywork components of cars to prohibit inter-brand competition in the Maxicar and Volvo cases,⁶ it is necessary to distinguish between the situation before and after those judgments.⁷

Finally, it should be born in mind that the enforcement of design rights on bodywork components of cars is not as such contrary to Regulation N° 123/85. But this does not imply that the impact of this practice on the competitive market

⁴ Case 31/80, NV L'Oréal and SA L'Oréal v. PVBA De Nieuwe AMCK, Judgment of 11 December 1980, E.C.R. (1980) 3775, at para 17. See also supra, Chapter II, at pt. II.3.1.

⁵ See infra, at pt. X.2.

⁶ See supra, Chapters VIII and IX.

⁷ See infra, at pt. X.3.

structure cannot influence the appraisal by the Commission of the well-foundedness of vertical restraints in selective distribution agreements. The question therefore arises what kind of action the Commission could undertake in case the objectives of Regulation N° 123/85 are jeopardized through the enforcement of design rights on spare parts.⁸

X.2. SELECTIVE MOTOR VEHICLE DISTRIBUTION AND VERTICAL RESTRAINTS

X.2.1. INTRODUCTION TO ECONOMIC THEORY ON VERTICAL RESTRAINTS

Among economists, there is no agreement as to whether and when vertical restraints should be allowed or prohibited. Whereas some economists advocate a very strict per se illegality for all vertical restrictions, certain Chicago School economists - among which Bork- advocate a per se legalization of all vertical restraints.⁹ Still, most of the mainstream and neo-Chicago economists agree on the need to apply the more pragmatic rule of reason test to see whether the restrictions concerned are pro- or anti-competitive, although they disagree as to whether there should be a more or a less interventionist policy respectively.

The difference in view between the mainstream and neo-Chicago economists stems from a different perception of the objectives of antitrust policy. Whereas according to the Chicago school the sole objective of antitrust policy is to promote economic efficiency, for other economists the objective is much wider

⁸ See infra, at pt. X.4.

⁹ For a detailed overview of the different economic approaches to vertical restraints, see AUDRETSCH, D., "Divergent views in antitrust economics", Antitrust Bull. (1988) 135-160, at pp. 156-159.

and includes political and social values, such as distributive equity and fairness.¹⁰

In the USA, especially Chicago-school adherents often successfully invoke the free-rider argument to prove the necessity of allowing vertical restraints for products which require pre-sales and/or after-sales services, such as automobiles.¹¹ It is best illustrated by way of the following schoolbook example that it is indeed difficult to ignore the practical implications the prohibition of territorial restrictions in dealer agreements would have as far as the pre-sales services are concerned.¹² Assume that both retailers A and B deal in the same product, car X. Retailer A offers pre-sale services to the customers, in accordance with the prestige of the car. For instance, he informs the potential customers of the characteristics of car X and takes them for a test-drive. These services will inevitably be reflected in A's selling price. In the absence of territorial restrictions, retailer B could in principle establish his business around the street-corner of A. Being a free-rider, B tells his customers to obtain all the information from A, return to B and buy car X from him at a lower price than A. As such, A is making costs he is not compensated for as he does not sell car X in the end. Inevitably, A would be forced to stop providing pre-sale services and would have to start selling at similar

¹⁰ See for instance FRAZER, T., Monopoly, competition & the law - the regulation of business activity in Britain, Europe and America, Wheatsheaf Books, Sussex, 1988, at pp. 1-3.

¹¹ For an economic analysis of vertical restraints in terms of the free-rider argument, see for instance WHITE, L., "Vertical restraints in antitrust law: a coherent model", Antitrust Bull. (1981) 327-345. For an assessment of the influence of Chicago School in the USA, see HAWK, B., "The American (antitrust) revolution: lessons for the EEC?", E.C.L.R. (1988) 53-87.

¹² See supra, Chapter VI, at pt. VI.4.4.3.C.

prices as B in order to stay in the market. Only if both retailers were contractually obliged to sell car X at the same price could this non-price competition go on in the absence of territorial restrictions. The essence of the theory thus is that in the absence of territorial restrictions and price-fixing, a free-rider might profit from the pre-sales services provided by another dealer to sell the car himself at a lower price. This practice would then lead to the abandonment of certain pre-sales services, due to the inability for the provider of the services to charge consumers upon the granting of the service or to recuperate the cost in the selling-price of the car.¹³ A similar reasoning has also been applied to illustrate the need for selective distribution due to the stringent link between the sale of a new motor vehicle and after-sales services. The hypothesis is that the approved dealer is contractually bound to offer a certain amount of after-sales services, the cost of which will be reflected in the price of the car, whereas the car can also be distributed through non-approved dealers. The latter, being free-riders, do not provide the after-sales services themselves and are thus able to sell the car at a lower price. The theory goes that in order to remain competitive in the new car market, the approved dealers would thus be obliged to reduce the after-sales services they offer.¹⁴ However, the after-sales argument seems to be far less convincing than the pre-sales argument, because it is difficult to see why, unless for marketing reasons, the approved dealers could not simply charge for the after-sales services when they are provided rather than incorporating the cost in the price of the car.

¹³ On the Chicago School free-riders rationale in relation to pre-sales services, see also KORAH, V., "EEC competition policy - Legal form or economic efficiency", Current Legal Problems (1986) 85-109, at pp. 86-87.

¹⁴ See MÖSCHEL, W., "La distribution sélective d'automobiles en droit européen de la concurrence", R.T.D.C. (1991) 1-26, at pp. 11-12.

The main objection to the various approaches taken by the neo-Chicagoans is that vertical restrictions on intra-brand competition are exclusively considered in the context of any given firm's strive for efficiency. Efficiency is thereby held to be tantamount to consumer welfare, whereas the occurrence of monopolistic behaviour, such as the raising of prices, is to a large extent refuted or held to be irrelevant.¹⁵ This at first sight paradoxical finding is to be explained by the fact that the term 'consumer welfare' does not refer to the welfare of the consumers as commonly understood. The definition of consumers is extended to include monopolists and cartels, so that consumer welfare is not held to be prejudiced by the transferral of wealth from the (genuine) consumer to firms with market power through the imposition of higher prices.¹⁶

Although Chicago school adherents accept that antitrust law can apply to horizontal collusion and cartels, whether or not inter-brand competition exists at the level of the manufacturer only receives marginal attention when dealing with vertical restraints. This is best illustrated by the following statement by White, who is rather moderate in that he is in favour of a rule of reason approach:

"if the manufacturer is a monopolist, the vertical restraints cannot increase the likelihood of collusion at that level and hence are harmless; only if they somehow build up the barriers to entry and thus cement his monopoly position are they potentially harmful. Similarly, studies of market structures at the retailing level are useful only if they give some indication of the likelihood of the retailers becoming a

¹⁵ This is particularly striking when reading the following article: POSNER, R., "The Chicago School of antitrust analysis", University of Pennsylvania Law Review (1978/79) 925-952.

¹⁶ See LANDE, R., "The rise and (coming) fall of efficiency as the ruler of antitrust", Antitrust Bull. (1986) 429-465, esp. at pp. 434-435.

vehicle for manufacturer collusion".¹⁷

Or in other words, the absence of inter-brand competition is not relevant for the appraisal of whether or not intra-brand competition can be restricted, unless it can be established that the intra-brand restrictions are a means to restrict inter-brand competition.

X.2.2. EC COMPETITION POLICY OBJECTIVES

X.2.2.1. Economic efficiency as the ruler of competition policy?

In the EC, it is generally held that selective distribution systems may indeed improve efficiency, but above all it is usually stressed that they play an important role in maintaining the brand image of a particular product.¹⁸ In this regard, it should be stressed that contrary to the USA antitrust policy, the competition policy in the EC is not exclusively or even mainly concerned with efficiency.¹⁹

EC competition policy traditionally responds to three fundamental objectives, which have been defined by the Commission as follows: contributing to an open and unified

¹⁷ WHITE, L., o.c., at p. 344, emphasis in original text.

¹⁸ See WHISH, R., Competition law, 3rd ed., Butterworths 1993, at p. 543.

¹⁹ See also HAWK, B., o.c., at pp. 54-62, where he sets out the differences between USA and EC competition policy goals and analyses the (limited) influence of Chicago School economic thinking on EC competition policy-making. For a critical view of the EC competition policy objectives, see also KORAH, V., "From legal form toward economic efficiency - Article 85 (1) of the EEC Treaty in contrast to U.S. antitrust", Antitrust Bull. (1990) 1009-1034.

common market;²⁰ preserving a competitive market structure; and maintaining a degree of fairness on the market, which includes safeguarding the position of SME's and consumers' interests.²¹ It was only in its Report on Competition Policy of 1991, with the completion of the single market in sight, that the Commission explicitly stated that the link between competition and economic efficiency is generally recognized throughout the world and may benefit the consumer.²² Still, this shift in emphasis does not imply that the strive for efficiency has become the first, let alone sole, priority of EC competition policy. In its subsequent Report on Competition Policy of 1992, the Commission clarified that:

"The policy priorities detailed in previous reports remain unchanged; in particular, competition policy seeks to contribute to the achievement of a genuine frontier-free area, and to economical and social cohesion, by throwing open markets which might otherwise be protected by exclusive rights, restrictive practices, the abuse of dominant positions, or State aids".²³

For instance, in relation to regulated sectors and State aids, it was specified that the strive for economic efficiency is not a goal in itself, but has to be balanced out against the need to take the social dimension into account and to maintain a universal service.²⁴

²⁰ According to Korah, "in competition cases, .., integration has been elevated by the Commission and the Court as a goal in itself, more important than efficiency", see KORAH, V., o.c., (1986), at pt. 91.

²¹ See 9th Report on Competition Policy 1979, Luxembourg, 1980, at pp. 9-10.

²² See XXIst Report on Competition Policy 1991, Luxembourg, 1992, at p. 11.

²³ See XXIInd Report on Competition Policy 1992, Luxembourg, 1993, at p. 13.

²⁴ See XXIInd Report on Competition Policy 1992, Luxembourg, 1993, at p. 14.

X.2.2.2. Competition policy in the consumers' interest?

Contrary to the Chicago School concept, economic efficiency is not necessarily tantamount to consumer welfare as far as EC competition policy is concerned. The relationship between EC competition policy and safeguarding the consumers' interests is not unequivocal. From the formulation of both Articles 85 (3) and 86 (b) EC, it can already be inferred that the consumers interests should be duly taken into account in the formulation of EC competition policy. Or at least, it is clear that the EC competition policy should not be detrimental to the consumers. As was mentioned earlier, the fundamental objectives of EC competition policy do indeed include safeguarding the consumers' interests, but the latter -as was the case for the efficiency objective- is not a goal in itself. Other studies have shown that in the past consumers' interests as such were not really taken into account by neither the Commission nor the Court, but were at the most indirectly attained through the fulfilment of other competition policy objectives, such as safeguarding a competitive market structure.²⁵

However, the objective set forth in the mid '80s to realise a Citizens Europe by 1992 has given a decisive impetus to the

²⁵ See for instance the most interesting analysis made by BLAISE, M., "La protection des consommateurs par le droit communautaire de la concurrence", in Pizzio, J., (ed.), Droit des consommateurs: sécurité, concurrence, publicité. Droit français et communautaire, Story Scientia, 1987, pp. 79-111. At p. 88 he resumes: "Les intérêts précis des consommateurs sont au centre du champ d'analyse, mais les objectifs visés par la Commission et par la Cour ne sont pas ceux de la protection des consommateurs".

elaboration of a specific consumer protection policy.²⁶ This new concern with the European citizen's interests, including his economic interests, has raised the issue as to how a consumer protection policy could and should be integrated into other common policies. In a Resolution of 1986, the Council agreed with the Commission's intention to take the consumers' interests better into account in the formulation of other policies, including competition policy.²⁷

It is important to underline that the notion 'consumer', as currently used, does not always seem to have the same meaning under the rules on competition as under the consumer protection policy. Under the consumer protection policy, the concept 'consumer' is apparently limited to the interlocutor of a trader or a supplier.²⁸ But, in secondary legislation, it is sometimes stipulated that a trader who acts outside the scope of his own commercial activity can be considered as a consumer.²⁹ It should be noted in this respect that in the Di Pinto case, the Court of Justice has given an even more restrictive interpretation of the concept 'consumer' than what

²⁶ On the evolution of an EC consumer policy, see COM (90) 98 final of 3 May 1990, "Three year action plan of consumer policy in the EEC (1990-1992)", pp. 1-3.

²⁷ See Council Resolution of 15 December 1986 on the integration of consumer policy in the other common policies, O.J. C 3/1 of 7.1.1987.

²⁸ See DE SOLA, M., JEUNIAUX, M., "La politique communautaire en faveur des consommateurs", Revue du Marché Unique Européen (1992) 65-116, at p. 87.

²⁹ See for instance the definitions of the concept consumers given in the following two directives: Council Directive N° 85/577 of 20 December 1985 to protect the consumer in respect of contract negotiated away from business premises, O.J. L 372/31 of 31.12.1985, Article 2; Council Directive N° 87/102 of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, O.J. L 042/48 of 12.02.1987 (as amended), Article 1.

the Commission proposed, in the sense that for the application of Directive 85/577 the consumer is a person who does not usually engage in commercial practices.³⁰ Under the EC rules on competition, the concept 'consumer' is subject to a much larger interpretation. It is not only used in relation to an ordinary member of the public, but may include undertakings which acquire products in the course of their trade.³¹ With the integration of the consumer protection policy into competition policy, it is to be expected that more attention will be paid to the interests of the genuine consumers rather than to the consumers at large.

X.2.3. EFFICIENCY AND CONSUMER CONCERNS IN REGULATION N° 123/85

X.2.3.1. Economic efficiency

Through issuing the block exemption the Commission did not contribute to ensuring the co-existence of a variety of distribution channels in order to prevent structural rigidity from occurring, as the Court had advocated in the Metro case.³²

³⁰ Case C-361/89, Di Pinto, Judgment of 14 March 1991, E.C.R. (1991) I-1189, at pt. 17-19, where the Court rejects the Commission's contention that "a trader, when canvassed in connection with the sale of his business, finds himself in an unprepared situation similar to that of an ordinary consumer", so that he should come within the scope of Directive 85/577.

³¹ See WHISH, R., Competition law, 3rd ed., Butterworths, 1993, at p. 229. See also KRÄMER, L., EEC consumer law, Story Scientia, 1986, at pts. 4 & 104.

³² Case 26/76, o.c., at p. 22. On the importance attached by the Court to the co-existence of various distribution channels, see also the second Metro Case, Case 75/84, Metro v. Commission, Judgment of 22 October 1986, E.C.R. (1986) 3021, at pts. 65-66, and the critical analysis by SCHÖDERMEIER, M., "Metro II et les limites de la distribution sélective", C.D.E. (1987) 667-696.

In this respect, it is important to recall that the Commission motivated this exceptional and sectoral approach to selective motor vehicle distribution and after-sales services through invoking rationalization and efficiency concerns which arise specifically with regard to consumer durables requiring expert maintenance and repair.³³ Although efficiency motivations thus undoubtedly played a crucial role in the drafting of Regulation N° 123/85, it is equally obvious that the strive for economic efficiency was not the sole or overriding concern of the Commission.³⁴ The concern with efficiency apparently was held to outweigh the need for various distribution systems in the market.³⁵ Nevertheless, it was put in the balance against another major objective, namely the preservation of a market structure in which inter-brand competition prevails.

Whereas opponents of Regulation N° 123/85 have pointed out that it is not at all proven that linking car distribution and after-sales services is more economic or efficient than separating the two,³⁶ others have emphasised that the elaboration of an efficient after-sales service network is a major factor of non-price competition as far as the sale of new cars is concerned. It has even be said that the market in new vehicles can be taken as an example of how vertical

³³ See supra, Chapter II, at pt. II.3.2.1.

³⁴ This is in conformity with the general EC competition policy objectives, see supra, at pt. X.2.2.1.

³⁵ Although it might also have been inspired by practical considerations, since Regulation N° 123/85 to a large extent merely consolidated the existing situation.

³⁶ See for instance KRÄMER, L. o.c., at p. 80; SCHMITZ, B., "Le point de vue des consommateurs", in Pizzio, J., (ed.), Droit des consommateurs, Story Scientia, 1987, pp. 104-111, at p. 109.

restrictions may give an impetus to inter-brand competition.³⁷ The underlying idea is that inter-brand competition in the car sector takes place not only with regard to the car itself, but is largely influenced by the efficiency of the 'package' the car manufacturers offer to the consumers. The latter view is also reflected in Regulation N° 123/85, the rationale of which is basically that since competition in automobiles tends to concentrate on inter-brand competition, certain restrictions on intra-brand competition can be tolerated.³⁸ That the existence and continuance of inter-brand competition is a *conditio-sine-qua-non* as far as the exemption of intra-brand restrictions is concerned, is illustrated by the fact that Article 10 (1) specifies that the benefit of the Regulation may be withdrawn in case the goods:

"are not subject to competition from products considered by consumers as similar by reason of their characteristics, price and intended use".

X.2.3.2. Consumer protection

In its first report on the integration of consumer policy in the other common policies, the Commission illustrated the statement that "an effort has been made to take into account the consumer dimension in the field of competition guidelines"

³⁷ See MÖSCHEL, W., "La distribution sélective d'automobiles en droit européen de la concurrence", R.T.D.C. (1991) 1-26, at p. 9.

³⁸ See COMMISSION, 14e Report on Competition Policy 1984, Luxembourg, 1985, at pt. 37. The Commission traditionally attaches a great importance to the existence of inter-brand competition when looking at restriction on intra-brand competition in selective distribution agreements based on quantitative criteria, see for instance CESARINI, P., "Les systèmes de distribution sélective en droit communautaire de la concurrence", Revue du Marché Unique Européen (1992) 81-105, at p. 94.

by a reference to automobile and spare parts distribution.³⁹ At first sight, this statement seems to be paradoxical because one of the four cumulative conditions to benefit from an exemption under Article 85 (3) EC is precisely that a fair share of the benefits should flow to the consumers. The importance thus lies in the fact that, whereas before this condition was implicitly considered to be fulfilled if the other three conditions were met,⁴⁰ Regulation N° 123/85 explicitly aims to assure a greater benefit of the selective distribution system to the consumers, along with the other competition policy objectives.⁴¹ Furthermore, the consumer is apparently understood to be solely the person who purchases the car, or in other words the genuine consumer.

The fact that efficiency concerns are not held to be tantamount to consumers' interests -but rather are put in the balance against them- is clearly illustrated by the wording of Point 5 of the preamble, which stipulates that obligatory recourse to the authorized network is not in all respects indispensable for efficient distribution. It is in particular restrictions on intra-brand competition that limit the basic consumers' right to purchase a car wherever they want that are held not to be 'indispensable' for efficient distribution. It is important in this respect to recall the 'safety-valves' concerning new motor vehicles written into Regulation N° 123/85 in the consumers' interests, consisting in dealer-to-dealer sales and purchases by consumers and intermediaries in other Member States, as well as the elimination of price

³⁹ COM (87) 616 final of 14 December 1987, at pt. 10. The other examples mentioned are franchising and know-how licensing.

⁴⁰ See also BLAISE, M., o.c., at p. 87.

⁴¹ See also BOURGOIGNIE, T., Eléments pour une théorie du droit de la consommation, Story Scientia, 1988, at pp. 461-462.

differentials.⁴² Besides safeguarding the basic right of the consumers to purchase a car wherever price and quality is most advantages to them, these restrictions are furthermore held to contribute to the fundamental objective to obtain a single market in cars. It is not surprising, therefore, that Article 10 (2) to (4) stipulates that disregard of the above-mentioned safety-valves may lead to the withdrawal of the benefit of Regulation N° 123/85.

X.3. REGULATION N° 123/85 AND THE SPARE PARTS ISSUE

X.3.1. OBJECTIVES OF REGULATION N° 123/85 EXTENDED TO SPARE PARTS

X.3.1.1. No unitary concept of car distribution

Although spare parts of cars as such do not require pre-sales or after-sales services in the same way as new cars do, it was seen in Chapter II that they have nevertheless been included in the scope of Regulation N° 123/85.⁴³ Still, the specificity of the spare parts market has to some extent been taken into account, in that the extension of the exclusive purchasing and distribution clauses to spare parts has been prohibited.

This approach has been criticized on the grounds that it rejects the unitary concept of car distribution -which essentially means that the sale of spare parts cannot be dissociated from the sale of the car-, but instead regards the spare parts market as being distinct from the market in new

⁴² See supra, Chapter II, at pt. II.3.2.2.

⁴³ See supra, Chapter II, at pt. II.3.2.

vehicles.⁴⁴ This argument has now become redundant, since from the tenor of the Maxicar and Volvo cases, and especially from the opinion of Advocate-General Mischo, it can be inferred that for the definition of the relevant product market under the rules on competition a distinction does indeed have to be made between spare parts and new cars.⁴⁵

The main question arising is therefore whether the different rules applicable to cars and spare parts respond to similar or dissimilar objectives.

X.3.1.2. Economic efficiency

From a purely economic efficiency point of view, it might be - and has been- argued that the efficiency of the automobile industries' selective distribution systems could be improved through extending exclusivity to spare parts, so that this should be tolerated under the rules on competition. The argument goes that this would allow the car manufacturer to better allocate his overall costs and to benefit from economies of scale, which would ultimately be in the consumers' interest.⁴⁶

In this respect, it is often pointed out that if exclusivity

⁴⁴ See for instance the study made for Renault by JEANTET, J.-C., KOVAR, R., "Les accords de distribution et de service des véhicules automobiles et l'article 85 du traité CEE - Etude du Projet de règlement de la Commission des Communautés européennes", R.T.D.E. (1983) 547-573, at pp. 571-573.

⁴⁵ See supra, Chapter IX, at pt. IX.3.2.

⁴⁶ In favour of this approach, see for instance DAVERAT, G., "Approche administrative et judiciaire actuelle de la distribution sélective dans le secteur de l'automobile: Etude comparée Etats Unis - Communauté européenne", R.T.D.C. (1985) 645-724, esp. at pp. 720-724.

does not extend to the spare parts market then the selling price of new cars would need to be raised.⁴⁷ In the contrary hypothesis the price of spare parts would not be unreasonably high due to the fierce competition in the automobile market which is largely determined by the efficiency, quality and overall cost of the 'package' offered to the consumer.⁴⁸ The most important counter-argument is based on the contrary premise that due to the limited number of European car manufacturers, the European automobile market is essentially an oligopolistic one. This was implicitly recognised by the Commission in its 12th Report on Competition Policy 1982, where it was held that the price differentials for new cars are partly to be explained by the fact that the national car manufacturers act as price-leaders on the national markets, which are followed by importers in order to increase their profits.⁴⁹ It is equally likely that there would be an implicit consensus among car manufacturers about the fact that no one would benefit from engaging in indirect price competition with regard to replacement parts, because this would ultimately entail a loss in profit for all. In other words, possible efficiency gains from extending exclusivity to spare parts would not necessarily flow back to the consumers in the form of competitive prices, but would in the first place constitute a profit for the car manufacturers. This argument is comforted by the finding of the (UK) MMC in its 1982 Car Parts Report that a complex monopoly situation existed with regard to wholesale supply of car parts in the UK which operated against

⁴⁷ See also *supra*, Chapters VIII and IX, at pts. VIII.5.2. and IX.3.2.1. respectively.

⁴⁸ See for instance JEANTET, J.-C., KOVAR, R., *o.c.*, at p. 572.

⁴⁹ Luxembourg, 1983. This is also the tenor of the MMC New Motor Cars Report of 1992, Cm 1808, HMSO, London, who found that the selective distribution systems enforce the existence of a complex monopoly situation for car distribution.

the public interest.⁵⁰

Besides this controversy about the true nature of the allegation that improved efficiency through extending exclusivity to the spare parts sector would also necessarily benefit the consumer, the main problem with the efficiency argument is that unequivocally accepting this point of view would be tantamount to neglecting the traditional objectives of EC competition policy. It is not surprising, therefore, that for spare parts similarly as for new cars, efficiency concerns have been put in the balance against the other goals, such as the preservation of a competitive market structure and the protection of the interests the consumers have in the maintenance of alternative sources of supply. In this respect, it is significant that the Commission held that bans on dealing in competing spare parts of an equal or superior quality are not indispensable for efficient distribution,⁵¹ or in other words that inter-brand competition should not be unduly restricted.

The Commission did, however, forward an efficiency argument to motivate the acceptance in principle of restrictions on intra-brand competition specifically with regard to spare parts. In point 6 of the preamble to Regulation N° 123/85, the Commission held:

"It should be possible to bar wholesalers not belonging to the distribution system from reselling parts originating from motor vehicle manufacturers. It may be supposed that the system of rapid availability of spare parts across the whole contract programme, including those with a low turnover, which is beneficial to the consumer, could not be maintained without obligatory recourse to the authorized network."

⁵⁰ MMC Car Parts Report of 26 May 1982, HC 318, HMSO London.

⁵¹ See point 8 of the preamble to Regulation N° 123/85.

However, in respect of those spare parts, the same kind of general exceptions apply as for cars. For instance dealer-to-dealer sales and the supply of spare parts to third parties for repair or maintenance purposes may not be contractually prohibited, because they are once again explicitly held not be indispensable for efficient distribution.⁵²

X.3.1.3. Consumer's interest in a competitive market structure

Similarly as for the market in motor vehicles, the rationale thus is that certain intra-brand restrictions can be allowed because inter-brand competition prevails in the market for spare parts. This is illustrated by point 25 of the preamble to Regulation N° 123/85, where it is pointed out that the conditions necessary for effective competition may be taken to exist as regards the various categories of products set out in Article 1. Besides motor vehicles, Article 1 explicitly mentions spare parts.

Although the objective of safeguarding a competitive market structure is the same for both the markets in cars and in spare parts, there is an important difference between those two markets which explains the divergent rules applicable those two sectors as expressed in Regulation N° 123/85. Even against the context of a market which is characterised by structural rigidity, the exemption of exclusivity-clauses as far as new cars is concerned does not lead to the elimination of inter-brand competition between cars. This explains why only intra-brand restriction are blacklisted in relation to cars. To the contrary, there is a real danger that unconditionally extending exclusivity to spare parts would lead to the elimination of inter-brand competition in this

⁵² See point 5 of the preamble of Regulation N° 123/85.

ancillary market. The obvious reason is that when a certain brand of car has been purchased, subsequently spare parts will have to be purchased that fit this car. In order to safeguard the same kind of competitive market structure as exists for cars in the spare parts market, it is therefore necessary not only to blacklist certain types of intra-brand restrictions, but above all clauses which might restrict inter-brand competition. As seen before, the safety-valves inserted in Regulation N° 123/85 as concerns spare parts were in particular aimed to perpetuate the existing lively market structure which responds to the different demands of the various categories of consumers, and as such are stringently linked with the concern to ensure the consumer's basic right to have his car repaired wherever price and quality are most advantageous to him.⁵³

X.3.2. THE IMPACT OF THE SPARE PARTS CASES ON THE OBJECTIVES OF REGULATION N° 123/85

It is obvious that as far as the market for bodywork components is concerned, the rationale of tolerating certain restrictions on intra-brand competition in the assumption that effective inter-brand competition prevails, is seriously jeopardized by the acceptance of the enforcement of design rights in the Maxicar and Volvo cases.⁵⁴

As seen before in Chapter II, the Commission's idea when drafting Article 3, point 4 of Regulation N° 123/85 was that prohibiting the insertion of a non-competition clause with respect to spare parts of an equal or superior quality in selective distribution contracts would entail the perpetuation

⁵³ See supra, Chapter II, at pt. II.3.2.2.

⁵⁴ See supra, Chapters VIII and IX.

of effective inter-brand competition in the spare parts market.⁵⁵ The outcome of the spare parts cases have proven that it was somehow premature to foster this expectation.

Although those judgments are subject to criticism,⁵⁶ it cannot be ignored that in both the Maxicar and Volvo cases, the Court upheld the legitimacy of the car manufacturers' practice of enforcing design rights on bodywork components of cars under both the rules on the free movement of goods and the rules on competition. It should be recalled that the Court came to this conclusion without taking the function of design rights into account and despite the fact that this practice entails the elimination of all inter-brand competition for the parts concerned. Through invoking design protection on parts which necessarily have to be identical to restore the car in its original appearance, the car manufacturers thus succeeded in eliminating spurious parts from the market and concurrently in obtaining a legal supply monopoly for their bodywork components. This logically implies that, with regard to the bodywork components concerned, not only the prohibition on exclusive purchasing clauses in selective distribution agreements becomes redundant, but furthermore that the parts have become captive and may be distributed exclusively through the car manufacturer's distribution network.

It should be recalled that Regulation N° 123/85 does indeed allow for exclusivity and selectivity with regard to parts supplied by the motor vehicle manufacturer, including captive spare parts.⁵⁷ For the above-mentioned alleged efficiency concerns, intra-brand competition in relation to those spare parts may thus be prohibited on more or less the same terms

⁵⁵ See supra, Chapter II, at pt. II.3.3.1.

⁵⁶ See supra, Chapters VIII and IX.

⁵⁷ See supra, Chapter II, at pt. II.3.2.

that apply to cars.⁵⁸ The limitation posed in the sense that the supply of those spare parts to resellers may not be contractually prohibited if the spare parts are purchased for their own use in effecting repairs or maintenance, is particularly relevant for captive spare parts.⁵⁹ It is obvious that otherwise independent repairers would not have access to those parts -whilst competing parts are eliminated from the market-, with as a result that the consumer would necessarily have to avail himself of the services of the approved network.

As far as captive spare parts are concerned, Regulation N° 123/85 thus in essence already cleared the possible occurrence of a legal monopoly for the car manufacturer -due to the non-existence of inter-brand competition and the accepted contractual restrictions on intra-brand competition- under Article 85 (3) EC, on the condition that third parties may obtain those parts for repair purposes from the dealers. Through the acceptance of the enforcement of design rights on bodywork components of cars, the Court in the spare parts cases not only reinforced the well-foundedness of this approach, it furthermore extended it to parts that traditionally were considered as spurious parts. In other words, rather than merely acknowledging the fact that no inter-brand competition exists in relation to certain parts, the Court went far beyond in that it accepted the practice of eliminating already existing competitors from the market. Although admittedly it is difficult to invoke vested rights and legitimate expectations against claims based on counterfeiting or piracy, it is submitted, with respect, that the Court did not satisfactorily deal with the question whether counterfeiting or piracy did or did not in fact occur.

⁵⁸ See supra, at pt. X.3.1.2.

⁵⁹ See Article 3, point 10 (b) and point 5 of the preamble to Regulation N° 123/85.

It can only be hoped that the spare parts cases have not set a precedent for the unlimited invocation of alleged intellectual property protection in the sole aim to exclude competitors from the market.

The spare parts cases will most likely also have tempered the expectations of those who found the purchasing-for-repair-purposes-exception to have several shortcomings. For instance, it has been pointed out that there is no guarantee as to the conditions under which the parts will be sold -if they will at all be sold- for repair purposes by the dealers. The hope was therefore expressed that despite the exemption of exclusivity clauses in distribution contracts, the car manufacturers themselves would be held to be in the obligation to supply captive spare parts to the independent repairers.⁶⁰ The argument that the refusal to supply would amount to an abuse of a dominant position has, however, become difficult to maintain, since the Court's stated in the Volvo case that only an arbitrary refusal, and thus not a bare refusal, to sell spare parts to independent repairers might constitute an infringement of Article 86 EC.⁶¹

The combination of the elimination of existing inter-brand competition under the spare parts ruling and the restrictions on intra-brand competition accepted under Regulation N° 123/85 is obviously apt to change the competitive and lively market structure in spare parts. Simultaneously, an extension of the

⁶⁰ See for instance JOERGES, C., "The Commission Regulation N° 123/85 on automobile distribution and servicing agreements: competition policy objectives and their implications for the consumer interest", in JOERGES/HILLER/HOLZECK/MICKLITZ, Vertriebspraktiken im Automobilersatzteil-sektor, 1985, Verlag Peter Lang, pp. 353-386, at pp. 377-379, where he points to the incoherence between Regulation N° 123/85 and the tenor of the Hugin decision in this respect.

⁶¹ On this issue, see supra, Chapter IX, at pt. IX.4.3.1.

practice to enforce intellectual property rights which are not in accordance with their function to other spare parts would be particularly apt to jeopardize the objective which the Commission set itself, namely to safeguard the consumers' basic right to have the car repaired wherever price and quality are most advantages to him. The question remains whether the Commission can still undertake some action to safeguard the objectives it set forth in Regulation N° 123/85 in relation to the spare parts market, after the ruling of the Court in the Maxicar and Volvo cases.

X.4. POSSIBLE SCOPE OF ACTION FOR THE COMMISSION

X.4.1. INTRODUCTION

The fact that the Court held in the spare parts cases that the enforcement of design rights on bodywork components of cars is not contrary to Articles 30-36 EC or Article 86 EC, whereas this practice is not as such prohibited by Regulation N° 123/85 either, does not imply that the Commission is devoid of all means of action to try to restore competition in the spare parts market. Although the Commission obviously does not have the competence to alter the ruling of the Court, it does have the task to ensure that the objectives of EC competition policy in general, and of Regulation N° 123/85 in particular, are observed by undertakings.

In this respect, it should first of all be considered whether or not the Commission has the competence to impose compulsory licences under Regulation N° 17.⁶² It is most interesting in this respect to illustrate the Commission's response to the alleged anti-competitive behaviour by the FORD Motor Company,

⁶² See infra, at pt. X.4.2.

which consisted precisely in the elimination of competition through the enforcement of design rights on bodywork components of its cars. Since the Commission's involvement in this case was largely due to the inaptitude of the UK Monopolies and Mergers Commission to remedy this situation, it seems useful to first set out the national background of the case, which not surprisingly presents striking resemblances with the EC spare parts cases.

In second order, it should be considered whether the Commission can undertake some kind of action specifically on the basis that the objectives of Regulation N° 123/85 have been jeopardized, in order to restore competition in the market for bodywork components of cars.⁶³

X.4.2. REGULATION N° 17 AND COMPULSORY LICENCES

X.4.2.1. Findings of the UK Monopolies and Mergers Commission on FORD Body Panels

In the Ford case, the UK Monopolies and Mergers Commission (MMC) was confronted with a situation which was rather similar to the one in the Volvo case dealt with by the Court of Justice.⁶⁴ The crucial issue was to determine whether the refusal by the Ford Motor Company to grant licences to independent manufacturers of body panels had a prejudicial effect on competition within the United Kingdom, and possibly to propose remedies.⁶⁵

⁶³ See infra, at pt. X.4.3.

⁶⁴ See supra, Chapter IX.

⁶⁵ On the role, and the similarities and differences in approach of the MMC in the UK in comparison to the European Commission, see FISHWICK, F., "Definition of monopoly power in the antitrust policies of the United Kingdom and the European

In the MMC Car Parts Report of 1982, it was already held that certain car manufacturers, among which Ford Motor Company, held a dominant position in relation to the wholesale supply of motor car parts in the United Kingdom, in the sense of Section 6(1)(c) of the UK 1973 Fair Trading Act, by virtue of their selective and exclusive distribution network which extended to both cars and replacement parts thereof.⁶⁶ It was therefore at that time recommended that exclusivity-clauses as concerns the supply of spare parts should be excluded from all franchising contract, in order to provide the possibility for independent manufacturers to supply spare parts to approved dealers of the distribution network.⁶⁷

Subsequent to this report, the Ford Motor Company radically changed its strategy in that it initiated legal action against UK independent manufacturers and importers of body panels for Ford cars invoking alleged infringement of its copyright. It also refused to grant licences for manufacture or supply on reasonable terms to independent undertakings, whereas before it had tolerated competition by independent manufacturers.⁶⁸

Community", Antitrust Bull. (1989) 451-488.

⁶⁶ The Monopolies and Mergers Commission, "Car Parts: A report on the matter of the existence or the possible existence of a complex monopoly position in relation to the wholesale supply of motor car parts in the United Kingdom", H.C. 318, 26 May 1982, London, Her Majesty's Stationary Office, see especially at pp. 38-40.

⁶⁷ MMC Car parts Report of 1982, o.c., at pp. 50-51. However, it was pointed out that "even in the absence of formal requirements to buy parts exclusively from car manufacturers and importers, it is virtually certain that franchised outlets would in practice continue to buy from them".

⁶⁸ See also BURKE, T., GENN-BASH, A., HAINES, B., Competition in theory and practice, 2nd ed., 1991, Routledge, at p. 171, where it is held that Ford's new strategy "was viewed as an attempt to foreclose a market by destroying the

The aim was clearly to eliminate the independent undertakings from the market as potential competitors in so far as the supply of body panels was concerned, and thus to undermine the effectiveness of the remedy proposed by the MMC in its Car Parts Report of 1982, as well as more generally to reap the benefits on the lucrative market of body panels.

In its Report on the Ford Motor Company Limited of 1985, the MMC came to the conclusion that the conduct by Ford, which consisted in "not granting to any person (other than to persons supplying body panels to Ford) a licence to manufacture and sell in the United Kingdom any replacement body part",⁶⁹ was anti-competitive and against the public interest, mainly because it tended to keep up prices and stifle innovation.⁷⁰ The latter was illustrated by the fact that it was the independent manufacturers that introduced the less expensive corrosion panels on the market, whereas it was held that:

"we can only speculate whether, if the independents' competition had not existed, such panels would ever have been

competition, rather than simply a decision by one company to exercise its legal rights". They point out that the Ford case was not only constituted by litigation -as in BL v. Armstrong, but that additionally there was a blanket refusal by Ford to negotiate licences.

⁶⁹ The Monopolies and Mergers Commission, "Ford Motor Company Limited: A report on the policy and practices of the Ford Motor Company Limited of not granting licences to manufacture and sell in the United Kingdom certain replacement body parts for Ford vehicles", Cmnd. 9437, February 1985, London, Her Majesty's Stationary Office, see especially at p.43, pt. 6.58.

⁷⁰ The MMC Ford Motor Company Report, o.c., see especially at pp. 36-41. See also FISHWICK, F., o.c., at p. 484, where he writes that "the Ford case demonstrates clearly that the MMC will consider the public interest mainly as that of the final consumer".

introduced by Ford".⁷¹

It is interesting to note that Ford only started to supply corrosion panels in 1984, which it does not manufacture itself but buys from the Van Wezel Company.

During the proceedings, Ford proposed to remedy this situation through offering licences to independents, but only for the manufacture of corrosion panels and against a royalty of 60 %. As the MMC pointed out, this was not satisfactory because it would still imply that Ford had a complete monopoly for the supply of the other body panels, whereas the rate of 60 % would probably not be the independents' idea of a reasonable royalty.⁷² The main problem the MMC thus had to deal with was to find an effective remedy to bring the anti-competitive practice to an end. Imposing compulsory licences seemed to be excluded, because the existing law merely conferred the competence upon the Secretary of State to prohibit an undertaking to engage in anti-competitive behaviour, and not a positive action in the sense of ordering the grant of a licence with regard to copyrights. It is interesting to note that this is a major difference with anti-competitive practices in relation to patents that go against the public interest, because in this case the Comptroller-General of Patents, Designs and Trade Marks may on the application of the Minister declare licences to be available as of right.⁷³ It was furthermore pointed out that although the order to stop the anti-competitive conduct -of not granting licences on reasonable terms- might indirectly oblige Ford to grant licences to independents, the problem would still remain of

⁷¹ MMC Ford Motor Company Report, o.c., at p. 41, pt. 6.51.

⁷² MMC Ford Motor Company Report, o.c., at p. 42.

⁷³ MMC Ford Motor Company Report, o.c., at p. 35, at pt. 6.17.

how to establish a reasonable royalty since under UK law there is no obligation upon Ford to accept arbitration.⁷⁴

The main conclusion of the MMC was therefore that the existing law did not offer a satisfactory remedy to the refusal of Ford to grant licences, and that the public interest could only be safeguarded through a change in the law. The question was of course which law should be changed, namely competition law in the sense that the Secretary General could impose obligatory licences on the owner of the exclusive right, or the law conferring the exclusive right. The MMC unequivocally opted for the second solution, on the basis of the following reasoning:

"The root of all these difficulties appears to us to be that a licence, although it operates as a sharing with the licensee of the exclusive right enjoyed by the owner of the copyright or registered design, is fundamentally an assertion by the licensor and a recognition by the licensee of that exclusive right. In this case we have found that the absence of competition resulting from the assertion of that exclusive right would operate against the public interest. There is therefore a conflict between the exclusive right of the owner of the copyright or registered design and the public interest. A resolution of this conflict which will allow the development of competition requires some modification of the exclusive right, not merely its sharing with certain individuals or companies".⁷⁵

The final remedies proposed by the MMC were therefore the following as classified in order of preference. First comes the modification of both the (then existing) Registered Designs and Copyright Act in the sense that exclusive rights would only be granted to body panels of cars for up to 5 years. In second order, the MMC proposed to amend the Competition Act in the sense that obligatory licences could be

⁷⁴ MMC Ford Motor Company Report, o.c., at pp. 42-43.

⁷⁵ MMC Ford Motor Company Report, o.c., at p. 43, pt. 6.62.

imposed. But in any case, the MMC pointed out that in the meantime, the preservation of competition in the market for body panels was dependent on Ford's willingness to take the public interest into account.⁷⁶ In this respect, it should be noted that on 15 December 1986, the Director General of the Office of Fair Trading accepted an undertaking by Ford to grant licences to independents in respect of body panels covered by registered design rights which had been on the market for 7 years against the payment of a royalty of 2%.⁷⁷

As regards the proposed modifications to the (then) existing design and copyright law, it should be noted that the MMC fixed the term of protection at 5 years, not on the basis of an analysis of the objectives of design or copyright law, but simply because it was held that during the first 5 years of the life of a car replacement panels were for various reasons supplied by the car manufacturers rather than by the independent manufacturers, so that the adverse affects on competition and the public interest would be minimal. It was pointed out that it was not the task of the MMC to propose general reforms of design or copyright law, for instance concerning the requirements to obtain protection, but that it was obvious that the adverse effects on competition could be remedied through a wider change in the law, such as the total exclusion of functional designs from the scope of the protection offered. The MMC proceeded to state:

"On the other hand, if no wider reform of the law of copyright is undertaken, we hope our recommendations may be put into effect, for the protection of the public interest in the

⁷⁶ MMC Ford Motor Company Report, o.c., at pp. 45-46.

⁷⁷ See the notice in Bee Line 44 (December 1986) 13. See also BURKE, T., GENN-BASH, A., HAINES, B., o.c., at p. 178. Copyright protection on spare parts already became redundant subsequent to the British Leyland judgment of the House of Lords.

particular field to which they relate".⁷⁸

It thus seems that the limitation of the exclusive protection in duration was merely a second-best solution to a more fundamental change of the law conferring exclusive rights.⁷⁹ This second-best solution was obviously dictated by the specific function of the MMC, whose task was confined to merely proposing effective remedies to the anti-competitive behaviour of Ford as concerns the supply of body panels.

It is therefore submitted that Advocate-General Mischo was not quite accurate when maintaining in his opinion to the Maxicar case that the MMC:

"..in no way challenged the principle whereby a manufacturer can obtain industrial property rights and receive the benefit, when selling those parts, of a 'return' for his innovative efforts and his research and development costs".⁸⁰

But more importantly, he omitted to mention that subsequent to the MMC Ford Motor Company Report, the House of Lords in its famous British Leyland judgment of 1986 explicitly excluded all spare parts needed for repair purposes from the scope of copyright protection in order to safeguard competition and the consumers' interests.⁸¹ Similarly, he failed to mention that the 1988 Act, which modified both the Registered Designs and Copyright law, for the same reasons

⁷⁸ MMC Ford Motor Company Report, o.c., at pp. 45-46, pt. 6.69.

⁷⁹ Similarly, see BURKE, T., GENN-BASH, A., HAINES, B., o.c., at p. 172.

⁸⁰ See his opinion to Case 53/87, o.c., at para 33.

⁸¹ Similarly, FLORIDIA, G., in his paper presented at the Conference in Sienna on 8 and 9 July 1988, writes at p. 12 "..questa 'dimenticanza' sorprende..". For an analysis of the British Leyland case, see supra, Chapter IV, at pt. IV.3.1.1.C.

introduced the must-fit and must-match exceptions to protectability.⁸² If he had taken those two important developments in the spare parts debate in the United Kingdom subsequent to the MMC Ford Motor Company Report into account, he could but have drawn the Court's attention to the fact that in the United Kingdom, the principle whereby industrial property rights are granted to bodywork components of cars is not only challenged, but explicitly rejected.

X.4.2.2. Findings of the European Commission on FORD Body Panels

Considering the inaptitude of the (then) existing UK law to remedy the anti-competitive behaviour by Ford, several UK independent manufacturers of Ford replacement body panels turned to the European Commission in 1985, with the claim that Ford infringed the EC competition rules through the above-mentioned practice of enforcing copyrights on bodywork components of cars and refusing to grant licences. The Commission did not have to resort to interim measures to obtain the status quo during its investigation into the well-foundedness of the complaints, because it obtained an informal undertaking from Ford to grant licences on reasonable terms to the independent manufacturers and to settle pending copyright cases.⁸³

⁸² See supra, Chapter IV, at pt. IV.3.1.2. It is submitted that the Advocate-General should at least have been aware about the spare parts debate, whereby the very principle of granting intellectual property rights to spare parts needed for repair purposes was challenged, preceding the modification of the 1988 UK Act.

⁸³ See the Commission's Press Release of 17 December 1985 as well as the XVe Report on Competition Policy 1985, at p. 61, pt. 49.

As is apparent from the arguments forwarded in the Maxicar case, the Commission previous to the car spare parts cases thought that the refusal to license independent undertakings, which leads to the total elimination of competition in the market for bodywork components of cars, might constitute an abuse of a dominant position in the sense of Article 86 EC.⁶⁴ This explains why an investigation under the rules on competition was opened in the Ford case.⁶⁵

Advocate-General Mischo maintained in the Volvo case that the Commission, on the basis of Article 3 of Regulation N° 17 could impose compulsory licences to bring a possible abuse of a dominant position in connection with industrial property rights to an end.⁶⁶ However, Article 3 of Regulation N° 17 merely mentions that the Commission can, by way of a decision, order undertakings to bring an infringement of Article 86 EC to an end. This seems to exclude the possibility for the Commission to directly intervene through the granting of obligatory licences to third parties.⁶⁷ Still, the Commission could in principle achieve the same result indirectly. The possibility for the Commission to impose fines upon the

⁶⁴ Case 53/87, o.c., Report of the Hearing, at p. 6053.

⁶⁵ See also BURKE, T., GENN-BASH, A., HAINES, B., o.c., at p. 173, where they give the following interpretation: "Having permitted the creation of an industry and tolerated its existence for more than ten years, and given assurances that it would not enforce its right, Ford's decision to prosecute body panel producers without adequate warning, was perceived as an abuse of its dominant position".

⁶⁶ See his opinion to Case 238/87, o.c., at para 31. See Regulation N° 17, O.J. L 13/204 of 21 February 1962, as modified by Regulations N° 59 (O.J. of 10.7.1962, p. 1655), N° 118/63 (O.J. of 7.11.1963, p. 2696, N° 2822/71 (O.J. L 285/49 of 29.12.1971).

⁶⁷ Similarly, see BURST, J.-J., KOVAR, R., "Les licences imposées et le droit communautaire", C.D.E. (1990) 249-271, at p. 268.

finding of an infringement might be sufficient a deterrent to bring the alleged anti-competitive behaviour to an end.⁸⁸ If not, the Commission could indirectly impose compulsory licences through imposing a recognisance upon the non-termination of the infringement.⁸⁹ But with regard to the latter approach, two questions arise which up till now remain unanswered.

Firstly, the alleged anti-competitive behaviour would consist in the refusal to license third parties or the refusal to grant licences on reasonable terms, or in other words arises because the undertaking refrains to take action. Terminating the infringement would thus entail a positive action by the undertaking concerned in the sense that the exclusivity ensuing from intellectual property rights would have to be shared with third parties. This is different from the mainstream cases where the alleged anti-competitive behaviour consisted in a positive action which has to be terminated or made undone. It is not at all clear -and especially after the Volvo case, where the Court held that the refusal to license is not of itself contrary to Article 86 EC,⁹⁰ rather doubtful-whether the Commission has the competence to impose this kind of positive action upon undertakings, particularly when they are holders of exclusive intellectual property rights.⁹¹ But

⁸⁸ On the competence of the Commission to impose fines, see Article 15 of Regulation N° 17.

⁸⁹ On the competence of the Commission to impose a recognisance, see Article 16 of Regulation N° 17.

⁹⁰ See supra, Chapter IX, at pt. IX.4.2.2.

⁹¹ See also REINDL, A., O.C., at pp. 77-80, where he argues that although there might be a justification for the 'essential facilities' doctrine, which implies that the obligation to share access to an essential facility might be imposed on an undertaking controlling this facility, the Maxicar and Volvo cases show that this will not be accepted by the Court if the undertaking concerned holds exclusive intellectual property rights. For a contrary view, see BURST,

then again, the ruling of the Court of First Instance in the Magill cases seems to have acknowledged this possibility.⁸²

The second question this approach entails is that if such licences were to be indirectly imposed by the Commission, would they then not constitute compulsory licences for the application of the principle of exhaustion. If it were withheld that the licence has not really been given with the right holder's consent, then it seems that the Pharmon v. Hoechst ruling would be applicable as concerns the free movement of goods.⁸³ This essentially means that parallel imports of goods manufactured by independents under licence could be prohibited by the car manufacturers, so that the activity of the independent manufacturers could be confined to the market of one Member State. It is needless to say that this prospect would make the possibility to manufacture bodywork components for cars less attractive to independent manufacturers, because it would obviously prevent them from benefitting from economies of scale as the car manufacturers could.

However, the Ford case did not give an answer to the question whether or not the Commission could impose compulsory licences either directly or indirectly, because the proceeding was terminated in 1990 without a formal decision. Subsequent to the coming into force of the 1988 UK Act which excluded bodywork components from design and copyright protection, but allowed for a transitional period of protection for already existing design of 15 years, Ford gave the formal undertaking

J.-J., KOVAR, R., o.c., at pp. 269-270.

⁸² See supra, Chapter VI, at pt. VI.4.4.4.E.

⁸³ Case 14/84, Pharmon v. Hoechst, Judgment of 9 July 1985, E.C.R. (1985) 2281. For an analysis, see supra, Chapter VII, at pt. VII.2.4.

to the Commission to limit the enforcement of its exclusive right to a maximum of five years.⁸⁴

It is, however, most interesting to note that although the Maxicar and Volvo cases had in meantime been decided in the sense that the enforcement of design rights and the subsequent elimination of competition was not in itself contrary to Article 86 EC, the Commission nevertheless pointed out that it wanted to assure that consumers are not dependent on one source of supply as concerns spare parts.⁸⁵ This statement shows that the Commission does intend to safeguard the objectives it set forth in the block exemption for selective distribution in both the car and the after-sales market.

X.4.3. SCOPE FOR ACTION UNDER REGULATION N° 123/85

X.4.3.1. Revocation of the application of the block exemption

The finding that it is doubtful whether the Commission can impose obligatory licences does not, however, imply that it is devoid of all possible action. Article 10 of Regulation N° 123/85 explicitly provides that the Commission may withdraw the benefit of the application of the block exemption if it finds that an agreement, although formally in accordance with the regulation, nevertheless has effects which are incompatible with Article 85 (3) EC. In particular, this possibility exists if:

"the contract goods are not subject to competition from products considered by consumers as similar by reason of their

⁸⁴ See IP (90) 4 as well as the XXth Report on Competition Policy 1990, pp. 108-109, at pt. 112.

⁸⁵ See IP (90) 4 as well as the XXth Report on Competition Policy 1990, pp. 108-109, at pt. 112.

characteristics, price and intended use".⁹⁸

In essence this means that whereas the Commission cannot prevent the application of design rights to eliminate competition in the market for spare parts, it can nevertheless re-examine the status of dealer contracts which restrict intra-brand competition in case inter-brand competition has been eliminated by virtue of the enforcement of design rights.

In this respect, it is important to note that although the possible revocation of the application of the block exemption may act as a deterrent, it by no means restores inter-brand competition. At the most, the Commission may determine that if inter-brand competition has been eliminated with regard to - what previously were- spurious spare parts, then certain previously accepted restrictions on intra-brand competition can no longer be justified. The reason for this that if the competitive market structure has been altered since Regulation N° 123/85 was issued, it has to be re-considered whether the conditions of Article 85 (3) EC are still fulfilled. For instance, it might be possible that exclusivity clauses with regard to genuine parts would no longer be held to comply with Article 85 (3) EC, if it turned out that most of those parts have become captive and thus are no longer subject to competition. However, it is obvious that for this kind of analysis many elements need to be taken into account, such as the impact of specific clauses in individual agreements against a well-defined competitive background.

⁹⁸ See Article 10, point 1 of Regulation N° 123/85. On the revocation possibility in general, see DUBOIS, J., "La distribution automobile dans le marché commun: le point de vue de la Commission Européenne", in Pizzio, J., (ed.), Droit des Consommateurs, 1987, Story Scientia, pp. 91-97, at p. 96.

X.4.3.2. Renewal of Regulation N° 123/85 at stake?

At present, it is commonly expected that -if the car price differentials are significantly reduced- Regulation N° 123/85, which expires on 30 July 1995, will be extended though possibly with minor modifications.⁹⁷ But in the extreme hypothesis that the tendency to enforce intellectual property rights on spare parts of cars in order to eliminate competition in the spare parts market takes on major proportions, it would not be unthinkable that the Commission excludes the market in replacement parts from a future block exemption on selective motor vehicle distribution all together.

It should be recalled in this respect that a separate approach to car distribution on the one hand and spare parts on the other hand is what the consumers organizations have advocated all along. Still, as is the case with the revocation of the block exemption, such a measure would not restore inter-brand competition in the spare parts market. It might merely prevent the market to be further foreclosed through additional restrictions on intra-brand competition.

X.5. PRELIMINARY CONCLUSION

Through the enforcement of design rights on bodywork components of cars, the objectives set forth in Regulation N° 123/85 with regard to spare parts have been seriously jeopardized. Most striking when combining the spare parts cases with Regulation N° 123/85, is the finding that the car manufacturer obtains a perfect legal monopoly on what

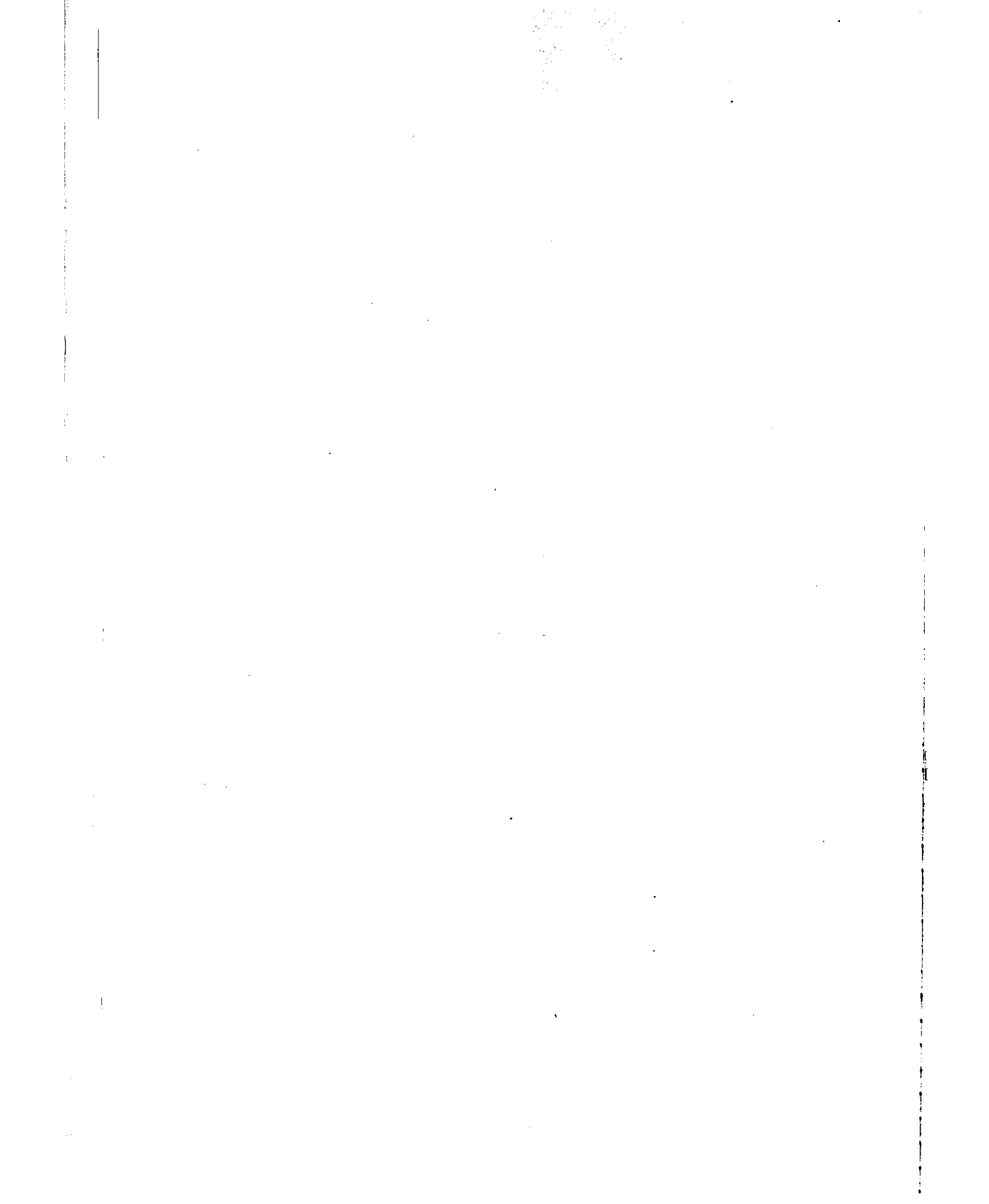
⁹⁷ See for instance the statements made by Commissioner Mr. Bangemann, Agence Europe, N° 6106, 13 November 1993, at p. 9.

previously was a competitive good. This is the result of the fact that the spare parts cases allow for the elimination of inter-brand competition, whereas Regulation N° 123/85 already exempted restrictions on intra-brand competition.

Under the rules on competition, the Commission cannot prevent inter-brand competition from being eliminated by design enforcement. But the rationale of Regulation N° 123/85 precisely was that intra-brand restrictions could be tolerated because inter-brand competition prevailed. Logically speaking, this means that after the spare parts cases the exemption granted to intra-brand restrictions would need to be reconsidered.

In this respect, it is rather doubtful whether the Commission can impose the obligation to share design rights with third parties through imposing compulsory licences under Regulation N° 17. It is certain, however, that the Commission does have the competence to either revoke the application of Regulation N° 123/85 on an individual basis -if it considers that the conditions of Article 85 (3) EC are no longer fulfilled-, or to exclude the market in replacement parts all together from the scope of the block exemption when it is up for renewal. However, these measures cannot prevent that the car manufacturer retains his supply monopoly, so that the consumer's basic right to have his car repaired wherever price and quality is most advantages to him is put at stake.

GENERAL CONCLUSION



CHAPTER XI. GENERAL CONCLUSION

The preceding study shows that the spare parts issue is exceptional in that it clearly demonstrates the various implications that may arise in Community context when national intellectual property rights are taken for granted. The previous intellectual property cases dealt with by the Court either concerned the elimination of intra-brand competition through the use of the exclusive right to oppose parallel importation, or the elimination of inter-brand competition through the enforcement of the exclusive right against the manufacturing, sale and importation by third parties. Although in essence the spare parts cases are no different, they are nevertheless peculiar in at least two respects. First of all, they concern the elimination of inter-brand competition in the after-sales market in replacement parts of cars in which intra-brand competition is already to a large extent restricted, so that a perfect legal monopoly may occur. Secondly, the elimination of inter-brand competition in the after-sales market through the enforcement of design rights on components of complex products, the form of which is indispensable to restore the car in its original appearance, necessarily amounts to tying-in the car owner.

Although those consequences are specific to the spare parts cases, they merely ensue from the use made by an intellectual property holder of his legal right granted in certain Member States.¹ The essential problem is therefore not so much which approach is to be taken to spare parts of cars in specific, but rather to determine the status that is to be attributed to intellectual property rights in Community law. In this respect, the spare parts issue essentially has the merit of emphasising and amplifying the possible consequences the refusal to engage in this crucial debate entails.

¹ See supra, Chapter IV.

It is not at all contested that the system of intellectual property protection has a specific role to fulfil and should thus in principle be fully upheld. To the contrary, it is submitted that precisely in order to reinforce the system of intellectual property protection it should be shielded from possible abuses. But all too often, an analysis in terms of a potential abuse of these exclusive rights is readily confused with an unjustified attack on the true nature of intellectual property rights. Maintaining this kind of unnecessary confusion obviously does not serve the purpose of intellectual property rights. Refuting the hypothesis that intellectual property rights may be abused is tantamount to allowing for the system to be hollowed out and thus might make it eventually more difficult to justify the very existence of the different types of intellectual property protection.

The main responsibility to shield intellectual property rights from potential abuses obviously lays with those who draft intellectual property legislation and with the courts who interpret and apply those laws. The economic actors on the market in the first place seek to protect their own interests so that it cannot be held against them if they attempt and succeed to exploit the system of intellectual property protection to the fullest. But it should not be neglected that intellectual property protection does not only serve the interest of economic actors on the market. Due to its importance for economic progress, intellectual property protection is a means by excellence to create favourable circumstances to stimulate national economic growth and to attract foreign industries and technologies. This implies that it is not at all inconceivable that at one point or another the legislator may be more concerned with the economic effects that certain provisions in intellectual property legislation will entail rather than with their justification in terms of the need to protect intangible property.

This potential practical convergence between the interests of certain economic actors and the legislator in extending the scope of intellectual property protection for economic purposes is most clearly illustrated by the current controversy about whether and to what extent the Commission should incorporate the possibility to obtain design protection on spare parts of cars in its proposals on the Community design. It should be recalled in this respect that whereas in the Green paper the Commission merely proposed to insert a must-fit exception, it currently proposes to add a repair clause specifically for, though probably not limited to, the motor vehicle industry. This practically means that the car manufacturer would be granted a supply monopoly on bodywork components of cars limited to three years, whereas after that period inter-brand competition would be free.² It is obvious that this is merely a -controversial- compromise between the claims of the car manufacturers on the one hand and the independent manufacturers and consumers organisations on the other hand, which is inspired by industrial policy objectives rather than by imperatives of design law. This was implicitly confirmed by Commissioner Bangemann, who, in support of his contention that he shares the European car manufacturers' view that design protection on spare parts of cars should be extended beyond the three years currently proposed by the Commission, stated that industrial designs are among "nos meilleurs armes pour défendre nos parts de marchés".³ In other words, design protection is overtly used as a tool to further the interests of a particular industry -which so happens to be

² See supra, Chapter V.

³ See the speech given by M. Bangemann at the conference "Turin meets the future of the European car" held in Turin on 9 November 1993, as reported in Agence Europe, N° 6106 of 13 November 1993, at p. 9.

crucial for the EC economy⁴- without it being at all questioned whether or not this is in accordance with the objectives and purpose for which the system of design protection has been conceived.

Without going so far as submitting that this is a general practice, it is nevertheless certain that similar protectionist intentions may have a certain influence on the way in which national intellectual property legislation is drafted. This poses a problem in that the national courts - exception made for the UK courts- in principle merely have the competence to interpret those laws and to apply them to the given facts, without calling the well-foundedness of certain contestable provisions of intellectual property legislation into question. This implies that the national courts merely examine an alleged intellectual property right on its conformity with the requirements as stipulated in the law, without analysing whether or not the repercussions on competition are in accordance with the objective of the intellectual property right invoked.⁵ In other words, whether or not there is an abuse of the exclusive right is exclusively determined in view of formal requirements and conditions and not in view of the inherent functions of the exclusive right concerned. But this does not imply that a national court may not be aware of the fact that an exclusive right granted in conformity with national intellectual property legislation may nevertheless be difficult to justify in terms of the function of that right. It was precisely this apparent paradox, which is evidenced in the spare parts debate, that led the Italian national court to pose a preliminary question in the Maxicar

⁴ See supra, Chapter II, at pt. II.1.

⁵ For an illustration specifically with regard to spare parts of cars, see supra, Chapter IV. On the different objectives of the various types of intellectual property rights and their different impact on competition, see supra, Chapter III.

case as to the compatibility of this practice with Community law.⁶

If the mere existence of national intellectual property legislation conferring exclusive rights on the basis of the territoriality-principle already seems difficult to reconcile with the common market concept, it is obvious that this will be all the more so if national exclusive rights may be conferred that do not necessarily meet the objectives of the intellectual property right invoked. Though it seems to be far fetched, it is not at all unthinkable that the extension of the scope of intellectual property protection may be used as a means to circumvent the prohibition on the maintenance of quota and measures having equivalent effect to quantitative restrictions or the full applicability of the rules on competition in order to protect or favour national industries. This is all the more pertinent in view of the fact that with the establishment of the internal market, the mandatory requirements derogation and the exceptions laid down in Article 36 EC obviously gain even more in importance. In other words, it is submitted that the more the Community objective to create a single market prevails both in law and in fact, the stronger will be the incentive to avail of derogation measures. But whereas the Court of Justice in principle counters this practice through examining whether or not an alleged derogation measure is justified and proportional in view of the need to safeguard the higher interest invoked, it has been reluctant to review intellectual property legislation on its well-foundedness and thus to curtail possible abuses of this system.⁷ It is significant in this respect that the Court has never held a specific intellectual property measure, except as concerns denominations of origin, not to come under

⁶ See supra, Chapter IV, at pt. IV.3.5.2. as well as Chapter VIII.

⁷ See supra, Chapters VI and VII.

the notion 'industrial and commercial property' as mentioned in the first sentence of Article 36 EC.

The traditional reluctance of the Court to examine intellectual property measures upon their compatibility with Article 36 EC may possibly be explained by the wide-spread - but is submitted unfounded- idea that reviewing the well-foundedness of certain provisions amounts to putting the whole system of intellectual property protection on the balance. What is certain is that its origin cannot be formally explained by the delimitation of competences between the EC and its Member States under either Article 36 EC or Article 177 EC, since the Court has not refrained from reviewing the well-foundedness of national measures alleged to come under the other exceptions mentioned in Article 36 EC in preliminary procedures.⁸ A more plausible explanation therefore might be that the Court's approach specific to intellectual property rights stems from a chronological confusion.

The first intellectual property cases the Court dealt with concerned the application of the rules on competition, which - as is well known- are not directed to the Member States but apply to the anti-competitive behaviour of undertakings. It is in this context that the Court quite logically introduced the reasoning that whereas the existence of the right should not be affected, the exercise made by undertakings of their exclusive right could nevertheless be curtailed by the rules on competition. But rather surprisingly, the existence/exercise dichotomy was later on merely transposed to cases concerning the free movement of goods.⁹ These rules are directed to the Member States and not to the anti-competitive behaviour of undertakings, so that in principle the reverse

⁸ See supra, Chapter VI, at pt. VI.4.3.1.

⁹ See supra, Chapter VI, at pt. VI.4.

reasoning should have applied. Namely, it would have been logical for the Court to have paid attention to whether the existence of the right could be justified and thus upheld under Article 36 EC rather than to curtail the exercise made of it by undertakings. The mere transposition of the existence/ exercise dichotomy to the rules on the free movement of goods implied that this distinction became the criterion along which to delineate between the competences of the EC and its Member States in so far as all matters of intellectual property rights were concerned, and not only in view of the application of the rules on competition. In other words, it introduced a kind of per se exemption for all intellectual property measures under Article 36 EC, so that it became irrelevant whether or not the national measure was justified and necessary to fulfil the essential objectives of intellectual property legislation for it to be upheld under Community law.

In order to limit the detrimental impact of certain features of intellectual property law on the establishment of the common market, the Court instead applied the rules on the free movement of goods to the way in which the holder of an exclusive right makes a use of that right. The principle of Community exhaustion of rights was thus introduced to curtail the prejudicial effect of the principle of territoriality, inherent to all intellectual property rights, on the establishment of a single market without national frontiers. The fact that the Court was thereby more concerned with extending the single market concept to protected products than with safeguarding the essential function of intellectual property rights is clearly illustrated by the elaboration of the notion 'specific subject-matter' of the exclusive right. This notion, which in the terminology of the Court distinguishes between what constitutes a normal use and a misuse of national intellectual property rights, has been more or less uniformly developed for all types of intellectual

property rights on the basis of what seems to be a straightforward application of the consent-theory.¹⁰ In essence, it means that if within the EC the protected good has been brought on the market by the holder of the right or with his consent, then the principle of exhaustion quasi-automatically applies. It is thereby disregarded whether or not the holder could make use of a parallel intellectual property right in the Member State of first marketing, or whether national measures, such as price regulation, interfered with the way in which he could enforce his exclusive right. In other words, it seems to be totally irrelevant to the Court whether or not intellectual property protection has fulfilled its function in any given case, as long as the free flow of protected goods within the Community is to the fullest guaranteed. Though the traditional case-law thus seems to be consistent when formally compared, it presents important discrepancies and incoherences when a closer analysis in terms of the objectives of intellectual property protection is made.¹¹

It is somewhat surprising to find that under the rules on the free movement of goods, attention is traditionally given neither to whether intellectual property measures are granted nor to whether they are subsequently used in accordance with the objectives and functions of the exclusive right invoked. Whereas apparently the Member States may unconditionally determine the scope of protection, the Court of Justice seems to determine what constitutes an abusive exercise of the right exclusively in the light of the single market objective. But in this respect, there currently seems to be an important evolution in the case-law of the Court. In a few recent cases, the Court did apply what resembles a justification-test to the

¹⁰ See *supra*, Chapter VI, at pt. VI.4.3.

¹¹ See *supra*, Chapter VII, at pt. VII.2.

national measure conferring the exclusive right under Article 36 EC. Though up till now, the Court's scrutiny of intellectual property legislation has either led to uphold the compatibility of the national measure with Article 36 EC or has merely led to the finding of incompatibility with the second sentence of Article 36 EC.¹² It would thus seem that the Court's main concern is whether or not the measure concerned is discriminatory or openly protectionist rather than whether it is in accordance with the objectives of intellectual property protection. In the absence of inherently discriminatory rules, it currently is not clear which approach the Court will adopt in the future. But it is submitted that it would be fundamentally inconsistent to apply the justification-approach merely to uphold the full effect of national legislation and to resort to the traditional existence/exercise dichotomy to strike down certain features of intellectual property legislation which are held to be incompatible with Community objectives. However, if any real importance were to be given to the justification approach in terms of safeguarding the function of intellectual property rights, it is submitted that the Court would need to closely examine and possibly radically revise its existing case-law on the exhaustion of rights.

The spare parts cases have the doubtful merit of emphasizing the inability of Community law in its present state to come to terms with the essence of intellectual property rights. It was obvious from the proceedings in the Maxicar case that the national court specifically wondered whether a national intellectual property right that is granted in conformity with national law but nevertheless does not seem to be justified in terms of the function of the exclusive right concerned may be

¹² See supra, Chapter VII, at pt. VII.3.

upheld under the first sentence of Article 36 EC.¹³ In particular, the national court pointed out that design rights were enforced on components of complex products the reward of which was already accounted for through the sale of the car, and the result of which was the exclusion of competition in other economic sectors. In other words, the national court clearly invited the Court to elaborate upon the justification-approach and to give guidelines as to what constitutes an abuse of the system of intellectual property protection which will not be permitted under Community law. This was so understood by Advocate-General Mischo who, in his opinion to the case, acknowledged that the national court was concerned with the lack of justification in terms of the function of design rights and not with the compatibility of the exercise of design rights with the specific subject-matter of designs.¹⁴ He unequivocally held that nothing prevented the Court from considering whether such legislation, which allows for the prohibition of imports of unauthorized copies of bodywork components of cars, is justified both in the terms of the function of design rights and under the second sentence of Article 36 EC.

This approach would obviously call for a Community definition of the function of design protection. In this respect, it is significant that the Court did already give a definition of what constitutes the function of denomination of origins as to be understood under the commercial and industrial property exception as mentioned in Article 36 EC in the Delhaize case,¹⁵ so that nothing seemed to prevent the application of a similar reasoning in the Maxicar case. Nevertheless, the Court

¹³ See supra, Chapter VIII, at pt. VIII.2.

¹⁴ See supra, Chapter VIII, at pt. VIII.4.3.

¹⁵ Case C-47/90, Delhaize v. Promalvin, Judgment of 9 June 1992, not yet published.

followed Advocate-General Mischo only in so far as the analysis under the second sentence of Article 36 EC was concerned. With regard to the crucial question, namely whether or not design legislation that might not be justified in terms of the function of designs comes under the first sentence of Article 36 EC, the Court merely reinforced the existence/exercise dichotomy through maintaining that it is up to the national legislator to determine the conditions and procedures on the basis of which designs rights are granted, even if it concerns components of complex products.¹⁶ In other words, the Court implicitly held that it is irrelevant for the application of the exception to the free movement of goods whether or not intellectual property rights are abusively granted with respect to the function and objectives of intellectual property legislation. The only abuse or misuse of intellectual property rights withheld by the Court under Articles 36 EC is constituted by discriminatory or overtly protectionist measures, or by the misuse made the holder of the right in terms of frustrating the single market objective. This approach obviously opens the door to the potential use of intellectual property legislation for purposes other than the mere protection of intangible property. It might also prove to be detrimental to the achievement of an internal market in protected products, because it not only allows for different conditions to be applied in different Member States, but furthermore for the underlying objectives to be disparate.

It is submitted that it would have been difficult to justify the design protection granted to bodywork components of cars in terms of the inherent function of design protection. The essential function of design protection could be described as "to grant an exclusive right on an industrial design or model so as to provide the possibility to obtain a return for investment made and progress achieved in the field of

¹⁶ See supra, Chapter VIII, at pt. VIII.4.4.

aesthetics, in order to stimulate overall research and development of aesthetic features of technical or functional designs".¹⁷ The actual level of reward to be obtained is dependent on the surplus-value the design confers to an industrial or technical product. In essence, this means that it is stringently linked to the willingness of consumers to buy and perhaps even pay a higher price for a product incorporating the design as compared to a similar product that does not embody the design. Design protection in the form of exclusive rights is thus essentially a means to stimulate non-price competition between industrial or technical products, through providing the possibility -rather than the certainty- to obtain a reward -which also acts as an incentive- for the investment in creative activity. The peculiarity of bodywork components of cars resides in the fact that their shape is imperative to restore the car in its original appearance. In other words, once a particular car has been purchased and a body panel subsequently needs to be replaced, the car owner no longer has a choice but to purchase a body panel with a certain design. Granting design rights on bodywork components thus entails the elimination of inter-brand competition from the market rather than stimulating non-price competition, so that the return that may possibly be obtained is no longer determined in function of the surplus-value the design confers on a product. Instead monopoly-prices may be charged.

These results, which are not uncommon for patent protection but which are obviously not intended by the objectives of the system of design protection,¹⁸ do not occur with regard to the initial purchase of motor vehicles or as concerns spare parts the shape of which is not imperative to restore the car in its original function or appearance. The reason for this is that

¹⁷ See supra, Chapter VIII, at pt. VIII.5.

¹⁸ On the inherent functions of the different types of intellectual property protection, see supra, Chapter III.

as concerns those products, inter-brand competition still prevails after, and may even be reinforced by, the conferment and subsequent enforcement of the exclusive right. It is therefore submitted that the grant of design rights on specifically bodywork components of cars, and for similar reasons also on those replacement parts the shape of which is imperative to restore the car in its original function, is difficult to justify in terms of the need to safeguard the inherent function of design protection under the first sentence of Article 36 EC.

It should be pointed out that this finding would not be tantamount to preventing the recuperation of the investment made for the aesthetic development, because it should not be ignored that the sale of the new car accounts for the surplus value the overall design confers to the complex product taken as a whole. Conversely, it would seem to be contrary to both the principles of justification and proportionality to uphold design rights that exceed the function of industrial design protection and which furthermore are not indispensable to provide the possibility to obtain a reward for a creative effort. Though it has been argued that the price of the car would need to be raised in case no monopoly profits may be extracted from the spare parts market, it is submitted that this would be totally in conformity with the objectives of design protection, because the consumer would only then be fully informed of the total surplus-value he will have to pay if he decides to purchase a car with a given design rather than another.

A totally different question all together is whether this might have consequences for the European car manufacturers competitive position as sustained by specific commercial policy measures and the development of a sectoral automobile

policy.¹⁹ In this respect it seems that, due to the important potential economic repercussions, the industrial policy argument has much weight in the spare parts debate as currently developed in the Community. However, it is submitted that it would set a dangerous precedent for the adoption of a coherent approach to intellectual property rights in general to let industrial policy objectives prevail over the objectives of design protection in the spare parts debate. It is generally held that although an industrial policy has been elaborated specifically for the automobile industry, this is not meant to constitute a sectoral policy in the traditional sense of the word. This implies that the automobile industry does not benefit from a privileged position under Community law, in the sense that it cannot call for deviations from the existing rules which are generally applicable in the EC.

When drafting Regulation N° 123/85, providing in a block exemption for selective automobile distribution and servicing contracts, the Commission thus took due regard to the conditions stipulated in Article 85 (3) EC in order to trench the first spare parts controversy.²⁰ At that time, the issue was raised whether or not exclusivity-clauses in selective dealer contracts could be extended to the spare parts market. It is significant that the Commission did not take the claim for efficiency in the motor vehicle sector for granted, but rather sought to maintain a balance with other legitimate objectives such as the maintenance of a competitive market structure in the spare parts market and the consumer's basic right to have his car repaired wherever price and quality are most advantages to him.²¹ In other words, although the spare parts issue was already then alleged to be of a major

¹⁹ See supra, Chapter II, at pt. II.2.

²⁰ See supra, Chapter II, at pt. II.3.

²¹ See supra, Chapter X, at pt. X.3.

importance to the European automobile industry, this did not for as much entail that the competition policy objectives were put aside.

The current spare parts controversy seems to concern a different approach by the car manufacturers to obtain similar results. Instead of writing exclusivity clauses into dealer agreements, inter-brand competition in the highly lucrative market in bodywork components of cars is simply eliminated through the enforcement of design rights. Even though this clearly goes against the objectives of the block exemption, the unilateral enforcement of exclusive rights is not contrary to Article 85 EC so that this practice obviously is not blacklisted by Regulation N° 123/85.²² The question therefore logically arises whether the unilateral enforcement of design rights to eliminate competition from the market in bodywork components in cars is compatible with Article 86 EC. In particular, the national court in the Maxicar case invoked the issue whether the use made of design rights which is not in conformity with the objective of design protection may amount to an abuse under Article 86 EC.²³ But having failed to analyze whether or not the measure granting design rights on spare parts of cars and the enforcement thereof was in conformity with the objectives of design legislation under the rules on the free movement of goods, it is not surprising that the Court equally disregarded whether the use made thereof by the car manufacturers corresponded to the function of design rights under the rules on competition.

Instead of looking at to what extent the fulfilment of the functions inherent to each type of intellectual property

²² See supra, Chapter II, at pt. II.4.

²³ See supra, Chapter IX, at pt. IX.2.

rights calls for a temporary restraint on competition,²⁴ the Court traditionally seems to take as a premise that all restrictions on competition can be prima facie justified in terms of the need to safeguard intellectual property rights. This is evidenced by the fact that it is consistently held that there needs to be an additional element to the normal use of intellectual property rights in accordance with their specific subject-matter for Article 86 EC to be infringed.²⁵ In both the Maxicar and the Volvo cases, the Court defined the specific subject-matter of design rights as the right to prevent third parties from manufacturing and selling or importing products incorporating the design without the right holder's consent. Starting from this premise, it implicitly refuted the contention that the elimination of inter-brand competition or the refusal to grant licences upon reasonable terms constituted the additional element which might trigger Article 86 EC, because according to the Court these practices are covered by the specific subject-matter of the exclusive right itself.²⁶ Instead, the Court clarified that the additional element which would amount to an abuse of the so-created supply monopoly under Article 86 EC could consist in the arbitrary refusal to sell spare parts to independent repairers, charging unfair prices or terminating production when many cars are still on the market.²⁷ The result of this approach is that the abuse of intellectual property rights under Article 86 EC is thus clearly not established with respect to the objective of the exclusive right invoked, since instead of being a factor of non-price competition it may be used to eliminate all competition from the market.

²⁴ See supra, Chapter III.

²⁵ See supra, Chapter VI, at pt. VI.4.4.

²⁶ See supra, Chapter IX, at pt. IX.4.

²⁷ See supra, Chapter IX, at pt. IX.4.4.

Though the approach taken by the Court seems to be formally coherent with its traditional case-law on the rules on competition, the spare parts cases illustrate that it is apt to produce rather paradoxical results when taking the objectives of design protection into account. The need to uphold design rights under the rules on competition is invoked to justify the encroachment on the competition policy objective to safeguard a competitive market structure in spare parts of cars. But design protection is indisputably an important factor in stimulating non-price competition, so that it cannot be ignored that it is difficult to justify the elimination of all inter-brand competition in the market for bodywork components of cars in terms of the need to safeguard the function of design rights. On the other hand, the possibility to obtain whatever reward the market will pay is essential to fulfil both the reward and the incentive functions inherent to design protection. In this respect, it seems to be hardly possible for a court to determine what constitutes a just or fair reward which is needed to induce further investment in the absence of competition and consequently what constitutes an unfair price that may amount to an abuse under Article 86 EC.²⁸ It is therefore submitted that it is fundamentally contradictory to first formally uphold the design right and subsequently to prevent it from fulfilling its main functions as the Court suggests.

In essence, the outcome of the spare parts cases implies that whereas a potential abuse of design protection in terms of its inherent objectives is considered to be a normal use under the rules on competition, a normal use in terms of their inherent function may amount to an abuse under Article 86 EC. This finding makes it particularly difficult to understand on what criteria the distinction between the normal use and the abuse of a dominant position by the holder of intellectual property

²⁸ See *supra*, Chapter IX, at pt. IX.4.3.2.

rights is currently based and will be based in the future. It seems to be neither the function of the exclusive rights, nor the competition policy objectives, nor the protection of the consumer's interest. Though the examples of abusive behaviour given by the Court at first sight seem to be inspired by the need to protect the car owner against flagrant abuses of monopoly power by the car manufacturers, it should be noted that these abuses may only arise -and will most likely be difficult to curtail in practice- because the Court allowed for the car owner to be tied-in upon the purchasing of the car. The consumer's basic right to have his car repaired wherever prices and quality are most advantages to him was thereby totally disregarded.

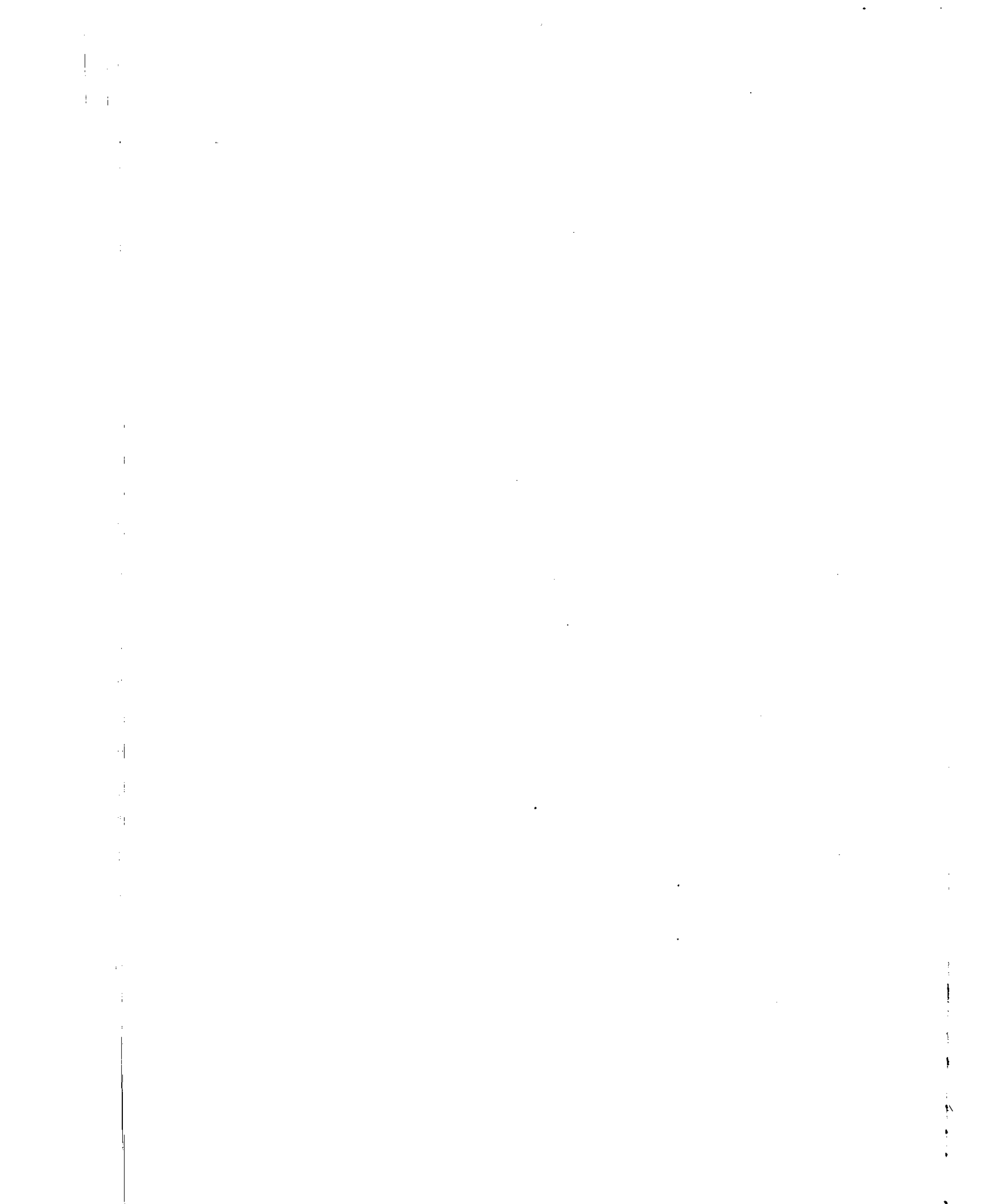
At first sight, it is most likely very reassuring for intellectual property holders in the EC that their national legal monopoly will not be fundamentally affected by Community law. However, a closer look shows that it is premature to draw such a conclusion. On the one hand, the Court apparently refutes the hypothesis that the system of intellectual property rights may be abused in order to obtain a legal monopoly. But on the other hand, the Court does not refrain from striking down the full effect of the legal monopoly, even if the exclusive right was not abused but to the contrary was used to fulfil the inherent functions of the right concerned. It is submitted that it is highly unsatisfactory that these exclusive rights are not subject to a prior examination upon their merit and subsequently fully upheld when granted and used in accordance to the function of the right. Conversely, it would be logical that the grant and enforcement of intellectual property rights which cannot be justified in terms of the need to safeguard the essential objectives or functions of the specific type of exclusive right invoked could be struck down under the rules on the free movement of

goods and competition respectively.²⁹ Using the criterion of the need to safeguard the specific functions of each type of intellectual property rights in order to delineate between what constitutes a normal use and an abuse of the exclusive right would not only have the merit of providing legal certainty on the market. Above all, it is submitted that only then the system and nature of intellectual property rights would be fully valued and maintained in Community context.

Whereas the Court does not seem to attach a great importance to the need to safeguard the inherent functions of intellectual property rights, it may be inferred from the proposals on the Community design as currently submitted by the Commission that this is not the main preoccupation of the Community legislator either.³⁰ Specifically with regard to the spare parts issue, the following rather paradoxical conclusion imposes itself: under the rules on the free movement of goods and competition the justification of the exclusive right in terms of the need to safeguard the objectives of intellectual property rights is not at all considered, whereas the elaboration of EC design legislation is governed by industrial policy compromises rather than by imperatives of design protection. The crucial question is of course where such an approach leaves the system of design protection. Though on the surface both the Court and the Commission seem to be very concerned with upholding and reinforcing the system of intellectual property protection, the spare parts issue clearly illustrates that the essence of intellectual property protection and the need to shield the system from abuses is not -as yet- seriously taken into account.

²⁹ On the feasibility of a functionality-test, see supra, Chapter VI, at pt. VI.4.2.3.

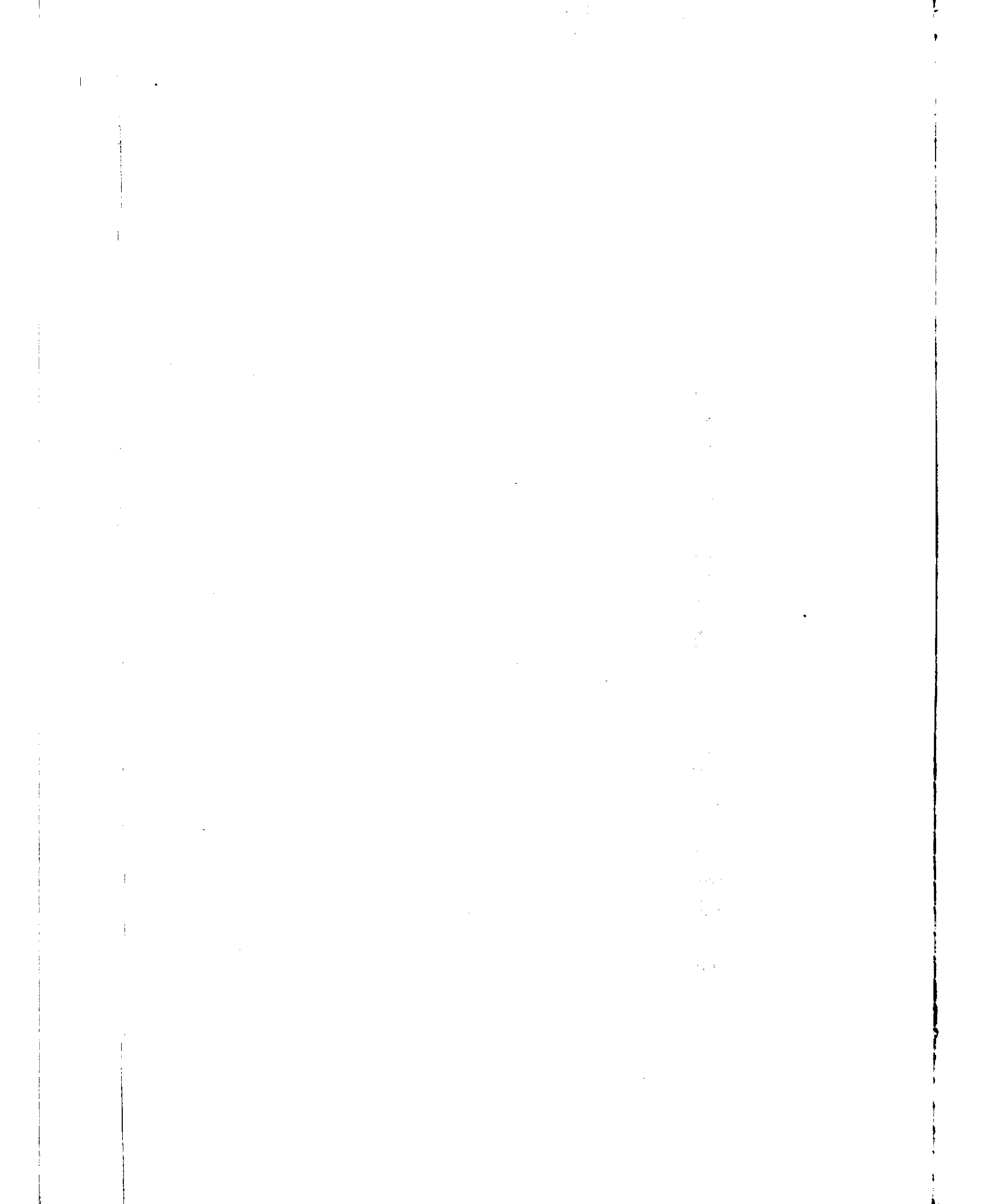
³⁰ See supra, Chapter V.



BIBLIOGRAPHY

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TABLE OF CASES OF THE COMMUNITY COURTS



BIBLIOGRAPHY**I. BOOKS AND DOCUMENTS**

ADAMS, J., *Merchandising intellectual property*, Butterworths, London, 1987

ALEXANDER, X., *Brevets d'invention et règles de concurrence du Traité CEE*, Bruylant, Bruxelles, 1971

ALTSHULER, ANDERSON, JONES, ROOS, WOMACK, *The future of the automobile: the report of MIT's international automobile program*, George Allen & Unwin Ltd, London, 1984

BAKEN, Ph., *Intellectuele eigendomsrechten en vrij verkeer van goederen in de EEG: in hoeverre vormen intellectuele eigendomsrechten een uitzondering op het beginsel van vrij verkeer van goederen in de EEG?*, Kluwer, Deventer, 1987

BEALE, H., e.a. (eds.), *Le contrat aujourd'hui: Comparaisons Franco-Anglais*, Eds. Tallon et Marins, Paris, 1987

BEIER, F.-K., SCHRICKER, G., FIKENTSCHER, W., *German industrial property, copyright and antitrust law*, 2nd ed., IIC studies, Vol. 6, VCH Verlagsgesellschaft mbH, Weinheim, 1989

BEIER, F.-K., SCHRICKER, G., (eds.), *GATT or WIPO? New ways in the international protection of intellectual property*, IIC studies, Vol. 11, VCH Verlagsgesellschaft mbH, Weinheim, 1989

BELLAMY, C., CHILD, G., *Common market law of competition*, 3rd ed., Sweet & Maxwell, London, 1987

BERENBOOM, A., *Le droit d'auteur*, Maison Larcier S.A. Editeurs, Bruxelles, 1984

BERNHARDT & KRASSER, *Lehrbuch des Patentrechts*, 4. Auflage, München, 1986

BIEBER, DEHOUSSE, PINDER, WEILER, (eds.), *1992: one European market? A critical analysis of the Commission's internal market strategy*, Nomos Verlagsgesellschaft, Baden-Baden, 1988

BLANCO WHITE, T.A., *Patents for inventions and the protection of industrial designs*, 5th ed., Stevens & Sons, London, 1983

BLANCO WHITE, T.A., JACOB, R., DAVIES, J., *Patents, trade marks, copyright and industrial design*, 2nd ed., London, 1978

BOARD OF TRADE, *Report of the Copyright Committee*, Cmd. 8662, Her Majesty's Stationary Office, London, 1952

BOARD OF TRADE, *Patents and Designs Act: Final report of the Departmental Committee, Cmd., Her Majesty's Stationary Office, London, 1947*

BOUJOU, A., *Les actions en contrefaçon de brevets dans le monde: procédures et coûts*, Jupiter, Paris, 1989

BOURGOIGNIE, T., *Eléments pour une théorie de droit de la consommation au regard des développements du droit belge et du droit de la Communauté Economique Européenne*, Story Scientia, Vol. XVI, Droit et consommation, 1988

BRADBURY, F., (ed.), *Technology transfer practice of international firms*, Alpen aan den Rijn, 1978

BRAUN, A., EVRARD, J.-J., *Droit des dessins et modèles au Benelux*, Maison Ferdinand Larcier S.A. Editeurs, Bruxelles, 1975

BURKE, T., GENN-BASH, A., HAINES, B., *Competition in theory and practice*, 2nd ed., Routledge, 1991

CASTELL, B., *L'"épuiement" du droit intellectuel en droit allemand, français et communautaire*, Presses Universitaires de France, Paris, 1989

CAWTHRA, B.I., *Patent licensing in Europe*, 2nd ed., London, 1986

CHAVANNE, A., BURST, J.-J., *Droit de la propriété industrielle*, 2nd ed., Dalloz, Paris, 1980

C.I.P.A. (the Chartered Institute of Patent Agents), *C.I.P.A. guide to the Patents Act 1977*, Sweet & Maxwell, London, 1984

COLLARD, M., DESAUX, P., DESSARD, D., a.o., *L'automobile et le droit européen*, Editions du Jeune Barreau de Liège, Liège, 1986

COMMISSION of the EEC, *Panorama of EC industry 1990*, Office for Official Publications of the Communities, Luxembourg, 1990

COMMISSION of the EEC, *Thirty years of Community law*, European Perspective Series, 1981

COMMITTEE to consider the law on copyright and designs, *Copyright and designs law*, Her Majesty's Stationary Office, London, 1977

CORNISH, W.R. (ed.), *Materials on intellectual property*, ESC Publishing Limited, Oxford, 1990

CORNISH, W.R., *Intellectual property: patents, copyright, trade marks and allied rights*, 2nd ed., Sweet & Maxwell, London, 1989

CORNISH, W.R., *Copyright in free and competitive markets*, ESC Publishing Limited, Oxford, 1986

C.U.E.R.P.I., *La protection des créations d'esthétique industrielle dans le cadre de la CEE*, Colloque international organisé par le centre universitaire d'enseignement et de recherche de propriété industrielle, Chateau de Sassenage, 17 Juin 1988

C.U.E.R.P.I., *Les perspectives d'un droit communautaire en matière de dessins et modèles industriels*, Table Rond Internationale du Centre Nationale de Recherche Scientifique, Grenoble, 12-13 Décembre 1977

DEMARET, P., *Patent, territorial restrictions and EEC law*, VCH Verlagsgesellschaft, Weinheim, 1978

DRUCKER, W., BODENHAUSEN'S, G., *Kort begrip van het recht betreffende de industriële en intellectuele eigendom*, Vijfde druk bewerkt door Wichers Hoeth, Tjeenk Willink, Zwolle, 1976

DRYSDALE, J., SILVERLEAF, M., *Passing-off: law and practice*, Butterworths, London, 1986

DWORKIN, G., TAYLOR, R., *Blackstone's guide to the Copyright, Designs & Patents Act 1988*, Blackstone Press Limited, 1989

EKEDI-SAMNIK, *L'Organisation Mondiale de la Propriété Intellectuelle (OMPI)*, Etablissements Emile Bruylant, Bruxelles, 1975

EISENSCHITZ, T., PHILLIPS, J., *The inventors' information guide*, 2nd ed., The intellectual property law unit centre for commercial law studies, London, 1985

FINGER, M., OLECHOWSKI, A., (eds.), *The Uruguay Round: a handbook on the multilateral trade negotiations*, The World Bank, Washington D.C., 1987

FLINT, M., *A user's guide to copyright*, 2nd ed., Butterworths, London, 1985

FRAZER, T., *Monopoly, competition and the law: the regulation of business activity in Britain, Europe and America*, Wheatsheaf Books, Sussex, 1988

GALLAFENT, R., EASTAWAY, N., DAUPPE, V., *Intellectual property law and taxation*, 2nd ed., Oyez Longman, London, 1984

- GEE, S., (ed.), *Technology transfer in industrialized countries*, Sythoff & Noordhoff, 1979
- GOLDSTEIN, E., *Cases and materials on patents, trademark and copyright law*, The Foundation Press, Brooklyn, 1959
- GORMLEY, L., *Prohibiting restrictions on trade within the EEC: the theory and application of Articles 30-36 of the EEC Treaty*, North-Holland, Amsterdam, 1985
- GOTZEN, F., (ed.), *The Green Paper on the legal protection of industrial design*, Story Scientia, Brussels, 1992
- GOYDER, D., *EEC competition law*, Clarendon Press, Oxford, 1988
- GOYENS, M., (ed.), *EC competition policy and the consumer interest*, Centre de droit de la consommation Louvain-la-Neuve, Vol.9, Droit et Consommation, Cabay-Bruylant, 1985
- GRAZ, D., *Propriété intellectuelle et libre circulation des marchandises: Etude de l'épuisement des droits de propriété intellectuelle en droit suisse, en droit communautaire et selon l'Accord de libre-échange Suisse-CEE*, Imprimerie Chabloz, 1988
- GREFFE, P., GREFFE, F., *Traité des dessins et modèles*, 4th ed., LITEC, Paris, 1988
- GORVES, P., MARTINO, T., MISKIN, C., RICHARDS, J., *Intellectual property and the internal market of the European Community*, Graham & Trotman, London, 1993
- GROVES, P., *Copyright and design law: a question of balance*, Graham & Trotman, London, 1991
- HEARN, P., *The business of industrial licensing: a practical guide to patents, know how, trade marks and industrial design*, Gower, Westmead, England, 1981
- HORNER, S., *Parallel imports*, Collins Professional Books, London, 1987
- HOUSE OF LORDS, *Select Committee on the European Communities, A single market for cars*, HL Paper 76, Her Majesty's Stationary Office, London, 1990
- HUBMANN, H., *Urheber- und Verlagsrecht*, 6.Auflage, Verlag CH Beck, München, 1987
- INSTITUT UNIVERSITAIRE INTERNATIONAL LUXEMBOURG, *La protection de la propriété intellectuelle: Aspects juridiques européens et internationaux*, Session de Juillet 1989, Editpress Luxembourg, 1989

- ISAAC, G., *Droit communautaire général*, 2nd ed., Masson, Paris, 1989
- JOERGES, C., (ed.), *Franchising and the law: Theoretical and comparative approaches in Europe and the United States*, Nomos Verlagsgesellschaft, Baden-Baden, 1991
- JOERGES, HILLER, HOLZSCHECK, MICKLITZ, *Vetriebspraktiken im Automobilersatzteilsektor: ihre Auswirkungen auf die Interessen der Verbraucher*, Frankfurter Wirtschaftsrechtliche Studien, Band 4, Verlag Peter Lang, Frankfurt am Main, 1985
- JOHANNES, H., *Industrial property and copyright in European Community law*, Leyden, 1976
- JOHNSTON, D., *Design protection: a guide to the law on plagiarism for manufactureres and designers*, 2nd ed., The Design Council, London, 1986
- JOLIET, R., *Le droit des Communautés Européennes: Les institutions, les sources, les rapports entre ordres juridiques*, Faculté de Droit, d'Economie et de Sciences Sociales de Liège, 1983
- KAUFMAN, P., *Passing off and misappropriation*, IIC Studies, Vol. 9, VCH Verlagsgesellschaft, 1986
- KOKKINI-IATRIDOU, D., & GROSHEIDE, F., (eds.), *Eenvormig en vergelijkend privaatrecht 1992*, Koninklijke Vermande BV, Lelystad, 1992
- KORAH, V., *Franchising and the EEC competition rules: Regulation 4087/88*, European competition law monographies, Oxford, 1990
- KORAH, V., *Know-how licensing agreements and the EEC competition rules: Regulation 556/89*, European competition law monographies, Oxford, 1989
- KORAH, V., *Patent licensing and EEC competition rules: Regulation 2349/84*, European competition law monographies, Oxford, 1985
- KORAH, V., *An introductory guide to EEC competition law and practice*, ESC Publishing Limited, Oxford, 1978
- KRÄMER, L., *EEC consumer law, Vol.X, Droit et consommation*, Story Scientia, 1986
- KUHMAN, C., *Der Schutz der angewandten Kunst im deutschen und amerikanischen Urheberrecht*, Verlag v. Florentz GmbH, München, 1991

LADAS, S., *Patents, trademarks, and related rights: national and international protection*, Vol. II, Harvard University Press, Cambridge, Massachusetts, 1975

LAW, C.M., (ed.), *Restructuring the global automobile industry: national and regional impacts*, Routledge, London, 1991

LOWE, J., CRAWFORD, N., *Innovation and technology transfer for the growing firm*, Oxford, 1984

LUDDING, R., *Het mededingingsrecht in de EEG en de rechten van industriële en commerciële eigendom*, Kluwer, 1979

MARESCEAU, M. (ed.), *The European Community's commercial policy after 1992: the legal dimension*, Martinus Nyhoff Publishers, 1992

MATTERA, A., *Le marché unique européen: ses règles, son fonctionnement*, 2nd ed., Jupiter, Paris, 1990

MERKIN, R., WILLIAMS, K., *Competition law: Antitrust policy in the UK and the EEC*, Sweet & Maxwell, London, 1984

MICHIGAN LAW REVIEW ASSOCIATION, (ed.), *The art of governance: Festschrift zu ehren von Eric Stein*, Nomos Verlagsgesellschaft, Baden-Baden, 1987

M.M.C. (Monopolies and Mergers Commission), *Ford Motor Company Limited: A report on the policy and practice of the Ford Motor Company Ltd of not granting licences to manufacture or sell in the UK of certain replacement body parts for Ford vehicles*, Cmd. 9437, Her Majesty's Stationary Office, London, 1985

M.M.C., *Car parts: A report on the matter of the existence or the possible existence of a complex monopoly situation in relation to the wholesale supply of motor car parts in the United Kingdom*, HC 318, Her Majesty's Stationary Office, London, 1982

MORRIS, A., QUEST, B., *Design: the modern law and practice*, Butterworths, London, 1987

NATIONAL BUREAU OF ECONOMIC RESEARCH, *The rate and direction of inventive activity*, New York, 1975

NORDEMANN, W., VINCK, K., HERTIN, P., *Urheberrecht: Kommentar zum Urheberrechtsgesetz und zum Urheberrechtswahrmungsgesetz*, Verlag W. Kohlhammer GmbH, Stuttgart, 1986

O.E.C.D., *Competition policy and intellectual property rights*, Paris, 1989

- O.E.C.D., *Market power and the law*, Paris, 1970
- OLIVER, P., *Free movement of goods in the EEC under Articles 30 to 36 of the Rome Treaty*, 2nd ed., The Eastern Press Ltd of London and Reading, London, 1990
- PALMER, J., (ed.), *The economics of patents and copyright*, Research in Law and Economics, Vol.8., London, 1986
- PAPACONSTANTINO, H., *Free trade and competition in the EEC: law, policy and practice*, Routledge, London, 1988
- PEDRAZINNI, M., *Patent- und lizenzvertragsrecht*, Berlin, 1983
- PENROSE, E., *The economics of the international patent system*, 1951
- PEROT-MOREL, M.-A., *Les principes de protection des dessins et modèles dans les pays du Marché Commun*, Editions Mouton, Paris, 1968
- PHILLIPS, J. (ed.), *Butterworths intellectual property law handbook*, Butterworths, London, 1990
- PHILLIPS, J., *Introduction to intellectual property law*, Butterworths, London, 1986
- PIZZIO, J.P., (ed.), *Droit des consommateurs: sécurité, concurrence, publicité. Droit français et droit communautaire*, Vol.XIV, Droit et Consommation, Story Scientia, 1987
- RASMUSSEN, H., *On law and policy in the European Court of Justice: A comparative study in judicial policy making*, Martinus Nyhoff Publishers, Dordrecht, 1986
- REICH, N., *Förderung und schutz diffuser interessen durch die Europäischen Gemeinschaft*, Baden-Baden, 1987
- REMITTS, P., 1992: *l'Europe et la libre circulation des marchandises*, Editions Performa, Paris, 1988
- RHYS, D.G., *The motor industry: an economic survey*, Butterworths, London, 1972
- ROUDARD, I., *Droit européen des licences exclusives en matières de brevets: Droit communautaire, droit français, droit allemand*, Nouvelles Editions Fiduciaires, 1989
- RUSSEL-CLARKE, A.D., *Copyright in industrial design*, 4th ed., Sweet & Maxwell, London, 1968

- SALAMOLARD, J.-M., *La licence obligatoire en matière de brevets d'inventions*, Genève, 1978
- SCHERER, F.M., *Innovation and growth - Schumpeterian perspectives*, Cambridge, 1984
- SCHERER, F.M., *Industrial market structure and economic performance*, 2nd ed., Chicago, 1980
- SCHRANS, G., *Octrooien en octrooicilicenties in het Europees mededingingsrecht*, Story-Scientia, Gent, 1966
- SCHUMPETER, J., *Capitalisme, socialisme et démocratie*, Payot, Paris, 1984
- SCHWARZE, J., (ed.), *Discretionary powers of the Member States in the field of economic policies and their limits under the EEC Treaty*, Nomos Verlagsgesellschaft, Baden-Baden, 1988
- SKONE JAMES, E.P., (ed.), *Copinger and Skone James on copyright - including international copyright with the statutes and orders relating thereto and forms and precedents*, 11th ed., Sweet & Maxwell, London, 1971
- STERLING, J., CARPENTER, M., *Copyright law in the United Kingdom and the rights of performers, authors and composers in Europe*, Sidney, London, 1986
- STEWART, S., *International copyright and neighbouring rights*, Butterworths, London, 1983
- STONE, P., *Copyright law in the United Kingdom and the European Community*, The Athlone Press, London, 1990
- TAYLOR and SILBERSTONE, *The economic impact of the patent system*, Cambridge, 1973
- TROMM, J., *Introduction to community law on competition and external trade - a survey of legislation and policies*, T.M.C. Asser Institute, The Hague, 1989
- ULMER, E., *Urheber- und Verlagsrecht*, Springer-Verlag, Berlin, 1980
- UNITED NATIONS, *Uruguay Round: papers on selected issues*, New York, 1989
- VAN BAEL, I., BELLIS, J.-F., *Competition law of the EEC*, CCH Editions Ltd, Oxfordshire, 1987
- VAN EMPER, *Bescherming van de intellectuele eigendom*, Kluwer, Deventer, 1987

VAN GERVEN, MARESCEAU and STUYCK, *Beginnelsen van Belgisch privaatrecht, Deel XIII, Handels- en economisch recht, Deel V, Mededingingsrecht, B. Kartelrecht*, Story-Scientia, Gent, 1985

WALLACE, H., WALLACE, W., WEBB, C., (eds.), *Policy-making in the European Communities*, John Wiley & Sons, London, 1977

WHISH, R., *Competition law*, Butterworths, London, 1985

WHITE, ROBIN and DAVIES, *Patents, trade marks, copyright and industrial designs*, 2nd ed., Sweet & Maxwell, London, 1978

WILLIAMS, J., *A manager's guide to patents, trade marks & copyright*, London, 1986

WOODROFFE, G., (ed.), *Consumer law in the EEC*, Sweet & Maxwell, London, 1984

II. ARTICLES AND CONFERENCE PAPERS

ABBEY, M., "Exhaustion of IP rights under the EEA Agreement does not apply to third country goods", *E.C.L.R.* 13 (1992) 231-233

A.C.E.A., "The legal protection of industrial design", Written statement at the *Hearing on the EC Commission Green Paper (III/F/5131-91)* of June 1991, Brussels, 25-26 February 1992

ADELSTEIN, R., PERETZ, S., "The competition of technologies in markets for ideas: copyright and fair use in evolutionary perspective", *International Review of Law and Economics* (1985) 209-238

ALBRECHTSKIRCHINGER, G., "The impact of the Luxembourg Conference for the establishment of a Community patent on the law of licence agreements", *I.I.C.* 7 (1976) 447-469

ALEXANDER, W., Case C-10/89 Hag II commentary, *C.M.L.Rev.* 28 (1991) 681-697

ALLEN, D., "Policing or policy-making? Competition policy in the European Communities", in *Policy-making in the European Communities*, Wallace, Wallace and Webb, (eds.), John Wiley & Sons, 1977, pp. 91-112

ARMITAGE, E., "Community designs" (letter), *E.I.P.R.* 14 (1992) 106

ARMITAGE, E., "The Copyright, Patent and Design Bill: industrial designs", *E.I.P.R.* 10 (1988) 91-94

ARMITAGE, E., "The new British patent legislation", *I.I.C.* 9 (1978) 207-220

ARNOLD, T., JANICKE, P., "A statutory approach to compulsory licensing", *Patent Law Review* 5 (1973) 203-240

ARROW, K., "Economic welfare and the allocation of resources for invention", in *The rate and direction of inventive activity*, National Bureau of Economic Research, New York, 1975, pp. 609-626

AUDRETSCH, D., "Divergent views in antitrust economics", *Antitrust Bull.* (1988) 135-160

AZEMA, J., "Propriété industrielle", *R.T.D.C.* (1991) 34-43

BAARDMAN, B., Case C-10/89 Hag II commentary, *S.E.W.* (1991) 405-411

BADEN FULLER, C., "Economic issues relating to property rights in trademarks: export bans, differential pricing, restrictions on resale and repackaging", *E.L.R.* 6 (1981) 162-179

BADEN FULLER, C., "Article 86 EEC: economic analysis of the existence of a dominant position", *E.L.R.* 4 (1979) 423-441

BAILEY, E., BAUMOL, W., "Deregulation and the theory of contestable markets", *Yale Journal on Regulation* (1983) 111-137

BAILLIE, I., "A frustration of good design", *E.I.P.R.* 13 (1991) 315-318

BARENTS, R., "New developments in measures having equivalent effect", *C.M.L.Rev.* 18 (1981) 271-305

BARON VAN VOORST TOT VOORST, B., VAN DAM, J., "Europe 1992: free movement of goods in the wider context of a changing Europe", *C.M.L.Rev.* 25 (1988) 693-709

BEALE, H., "Car distribution contracts and block exemption Regulation 123/85", paper presented at the *Giessen - Warwick Colloquium*, November 1987

BEALE, H., "Une technique automobile complexe: La distribution automobile: Droit Anglais", in *Le contrat aujourd'hui: Comparaison Franco-Anglais*, Beale, H., e.a. (eds.), Paris, 1987, pp. 365-397

BEBR, G., "The reinforcement of the constitutional review of community acts under Article 177 EEC Treaty", *C.M.L.Rev.* 25 (1988) 667-691

BEIER, F.-K., "The future of intellectual property in Europe: Thoughts on the development of patent, utility model and industrial design law", *I.I.C.* 22 (1991) 157-177

BEIER, F.-K., "Industrial property and the free movement of goods in the internal market", *I.I.C.* 21 (1990) 131-160

BEIER, F.-K., "The European patent system", *Vanderbilt Journal of Transnational Law* 14 (1981) 1-15

BEIER, F.-K., "The significance of the patent system for technical, economic and social progress", *I.I.C.* 11 (1980) 563-548

BEIER, F.-K., "The doctrine of exhaustion in EEC trademark law - scope and limits", *I.I.C.* 10 (1979) 20-51

BEIER, F.-K., "Trademark conflicts in the Common Market: can they be solved by means of distinguishing material?", *I.I.C.* 9 (1978) 221-239

BEIER, F.-K., STRAUSS, J., "The patent system and its informational function yesterday and today", *I.I.C.* 8 (1977) 387-395

BENTIL, J., "Control of the abuse of monopoly power in EEC business law: a commentary on the Commercial Solvents case", *C.M.L.Rev.* 12 (1975) 59-75

BERG, M., "The economic effects of the block exemption", paper presented at the *S.M.M.T. Selective Distribution Block Exemption Seminar*, London, 8 March 1985

BERMAN, C., LAMBRECHT, N., "Designs in the United States and Japan", *E.I.P.R.* 14 (1992) 37-48

BESEN, S., KIRBY, S., "Private copying, appropriability, and optimal copying royalties", *Journal of Law & Economics* (1989) 255-280

B.E.U.C., "EC Commission green paper on the legal protection of industrial design", Written statement at the *Hearing on the EC Commission Green Paper (III/F/5131-91) of June 1991*, Brussels, 25-26 February 1992

BIAMONTI, L., ROVERATI, F., "Osservazioni sul Regolamento (CEE) N° 123/85 in tema di distribuzione degli autoveicoli e dei loro componenti", paper presented at the conference *Libera Circolazione degli Autoveicoli e dei loro Componenti nella Prospettiva del 1992*, Sienna, 8-9 July 1988

BIEBER, R., "On the mutual completion of overlapping legal systems: the case of the European Communities and the national legal orders", *E.L.R.* 13 (1988) 147-158

BIFANI, P., "Intellectual property rights and international trade", in *Uruguay Round: papers on selected issues*, United Nations, New York, 1989, pp. 129-183

BLAISE, M., "La protection des consommateurs par le droit communautaire de la concurrence", in *Droit des consommateurs: sécurité, concurrence, publicité*, Pizzio, J., (ed.), Story Scientia, 1987, pp. 79-90

BLANCO WHITE, T., "Intellectual property: a future for British concepts?", *E.I.P.R.* 8 (1988) 229-233

BLECHER, M., "The 'new antitrust' as seen by a plaintiff's lawyer", *Antitrust Law Journal* 54 (1985) 43-49

BLOK, P., "Articles 30-36 of the EEC Treaty and intellectual property rights: a Danish view", *I.I.C.* 13 (1982) 729-746

- BONET, G., "Chroniques: propriétés intellectuelles", *R.T.D.E.* (1991) 639-659
- BONET, G., "Chroniques: propriétés intellectuelles", *R.T.D.E.* (1990) 713-741
- BONET, G., "Les créations d'esthétique industrielle au regard des règles de libre circulation et de libre concurrence dans le marché commun", in *La protection des créations d'esthétique industrielle dans le cadre de la CEE*, C.U.E.R.P.I., 1988, pp. 45-64
- BONET, G., "Observations: Trib. gr. inst. Roanne, 29 avril 1986, Régie Nationale des Usines Renault c. Thévenoux et autres", *La Semaine Juridique* (1987) II 20787
- BORK, R., "The role of the courts in applying economics", *Antitrust Law Journal* 54 (1985) 21-26
- BOUKEMA, H., "Titre IV, Chapitre VII: Pays-Bas", in *Traité des dessins et modèles*, Greffe & Greffe, 4° ed., Litec, Paris, 1988, pp. 801-818
- BOURGEOIS, J., "Competition policy and commercial policy", in *The European Community's commercial policy after 1992: the legal dimension*, Maresceau, M., (ed.), Martinus Nijhoff Publishers, 1993, pp. 113-133
- BOWONDER, B., MIYAKE, T., "The Japanese automobile industry: an analysis of building competitiveness", *World Competition* 16 (1992) 41-80
- BRAUN, A., VAN REEPINGHEN, B., "Chroniques de jurisprudence: Droits intellectuels (1987-1991): I. Droit sur les créations nouvelles", *J.T.* (1992) 505-510
- BRAUN, A., VAN REEPINGHEN, B., "Chroniques de jurisprudence: Droits intellectuels (1987-1991): II. Droits sur les signes distinctifs", *J.T.* (1992) 529-541
- BRAUN, A., "Titre IV, Chapitre II: Belgique", in *Traité des dessins et modèles*, Greffe & Greffe, 4° ed., Litec, Paris, 1988, pp. 717-738
- BRINKHOF, J., "Processuele aspecten van de internationalisering van het octrooirecht", in *Eenvormig en vergelijkend privaatrecht 1992*, Kokkini-Iatridou & Grosheide, (eds.), Koninklijke Vermande BV, Lelyland, 1992, pp. 367-400
- BROUWER, O., "Free movement of foodstuffs and quality requirements: has the Commission got it wrong?", *C.M.L.Rev.* 25 (1988) 237-262

- BROWN, A., "Impact of patents and licences on the transfer of technology", in *Technology transfer in industrialized countries*, Gee, S., (ed.), Sythoff & Noordhoff, 1979, pp. 311-324
- BROWN, J., ROBERT, G., "The European Economic Area: how important is it?", *E.I.P.R.* 14 (1992) 379-382
- BRUCHHAUSEN, K., "Institutions and procedures in actions relating to Community patents", *I.I.C.* 18 (1987) 682-692
- BRUN, A., "L'unification et l'harmonization du droit des marques", in *La protection de la propriété intellectuelle*, Institut Universitaire Internationale Luxembourg, Session de Juillet 1989, pp. 187-216
- BUMBAK, D., "Industrial property rights and the free movement of goods in the European Communities", *Case Western Reserve Journal of International Law* 16 (1984) 381-436
- BURNETT-HALL, R., "A new UK competition law and its application to intellectual property", *E.I.P.R.* 11 (1989) 331-336
- BURST, J.-J., KOVAR, R., "Les licences imposées et le droit Communautaire", *Cah.Dr.Eur.* (1990) 249-271
- BUXBAUM, R., "Restrictions inherent in the patent monopoly: a comparative critique", *U.Pa.L.R.* 113 (1965) 633-667
- CAMPBELL, T., "The competition mission: guiding principles and future directions", *Antitrust Law Journal* 51 (1982) 541-551
- CAPELLI, F., "Commentaire sur les 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*, Schwarze, J., (ed.), Baden-Baden, 1988, pp. 69-72
- CAPELLI, F., "Yaourt français et pâtes italiennes: deux arrêts et une proposition de solution", *Rev. Marché Commun* (1988) 615-622
- CAWTHRA, B., "Licensing industrial property rights", *New Law Journal* (1978) 648-650
- CAWTHRA, B., "Exclusive, sole and non-exclusive rights in patent licensing agreements", *I.I.C.* 8 (1977) 430-440

CAZZANI, G., "La distribuzione degli autoveicoli e dei loro componenti: bilancio dei primi anni di applicazione del Regolamento CEE N° 123/85, paper presented at the conference *Libera Circolazione degli Autoveicoli e dei loro Componenti nella Prospettiva del 1992*, Sienna, 8-9 July 1988

CESARINI, P., "Les systèmes de distribution sélective en droit communautaire de la concurrence", *Revue du Marché Unique Européen* (1992) 81-105

CHEUNG, S., "Property rights and invention", in *The economics of patents and copyright*, Palmer, J., (ed.), London, 1986, pp. 5-18

CHRISTIE, A., "The UK design copyright exemption", *E.I.P.R.* 7 (1989) 253-257

CIMOLI, M., "Towards a new Italian Design Law", *E.I.P.R.* 15 (1993) 425-427

CLARK, J., "Towards a concept of workable competition", *American Economic Review* 30 (1940) 241-256

C.L.E.P.I.D.A., E.A.P.A., "La protection légale des dessin et modèles industriels", Written statement at the *Hearing on the EC Commission Green Paper (III/F/5131-91) of June 1991*, Brussels, 25-26 February 1992

COHEN, L., "Warding off the foe: how trade marks can still offer some protection against parallel imports", *E.I.P.R.* 12 (1990) 369-375

COHEN JEHORAM, H., "The EC Green paper on the legal protection of industrial design. Halfway down the right track", in *The Green Paper on the legal protection of industrial design*, Gotzen, F., (ed.), Story Scientia, Brussels, 1992, pp. 61-68

COHEN JEHORAM, H., "The EC Green paper on the legal protection of industrial design. Half way down the right track - a view from the Benelux", *E.I.P.R.* 14 (1992) 75-78

COHEN JEHORAM, H., "Cumulative design protection, a system for the EC?", *E.I.P.R.* 11 (1989) 83-87

COHEN JEHORAM, H., "Critical reflexions on the economic importance of copyright", *I.I.C.* 20 (1989) 485-497

COHEN JEHORAM, H., "La protection des dessins et modèles industriels entre la législation sur le droit d'auteur et celle sur les dessins et modèles: étude comparative", *Droit d'Auteur* (1983) 313-321

- COLEIRO, R., HUIJUN, Y., "Patent protection for the chemical industry: a comparison between chinese and european patent convention practice", *E.I.P.R.* 9 (1987) 39-41
- COMMISSION of the EEC, "Ford-UK", Press release 17.12.1985, *E.C.L.R.* (1985) 302
- CONFEDERATION OF BRITISH INDUSTRY, "Design right: designed wrong", London, February 1988
- CORNISH, W.R., "Designs again", *E.I.P.R.* 13 (1991) 3-4
- COTTIER, T., "The prospects for intellectual property in GATT", *C.M.L.Rev.* 28 (1991) 383-414
- CROCKFORD, P., "Trucks, parts and summing up", paper presented at the S.M.M.T. Selective Distribution Block Exemption Seminar, London, 8 March 1985
- DALTROP, J., FERRY, J., "The relationship between Articles 85 and 86: Tetra Pak (T 51/89)", *E.I.P.R.* 13 (1991) 31-33
- DAM, K., "The growing importance of international protection of intellectual property", *The International Lawyer* 21 (1987) 627-638
- DAUSES, M., "Mesures d'effet équivalent à des restrictions quantitatives à la lumière de la jurisprudence de la Cour de Justice des Communautés Européennes", *R.T.D.E.* (1992) 607-629
- DAVERAT, G., "Approche administrative et judiciaire actuelle de la distribution sélective dans le secteur de l'automobile: étude comparée Etats-Unis - Communauté Européen", *R.T.D.C.* (1985) 645-724
- DAVEY, B., "The utilitarian design - a comparative study", *I.I.C.* 15 (1984) 455-478
- DAVIDOW, J., "EEC proposed competition rules for motor vehicle distribution: An American perspective", *Antitrust Bull.* (1983) 863-882
- DEBOYSER, P., "La libre circulation des marchandises et la sécurité des consommateurs", in *Droit des consommateurs: sécurité, concurrence, publicité*, Pizzio, J., (ed.), Story Scientia, 1987, pp. 53-62
- DeBROCK, L., "Market structure, innovation, and optimal patent life", *The Journal of Law and Economics* (1985) 223-244
- DEFALQUE, L., "Copyright, free movement of goods and territoriality: recent developments", *E.I.P.R.* 11 (1989) 435-439

DEFALQUE, L., "Le concept de discrimination en matière de libre circulation des marchandises", *Cah.Dr.Eur.* (1987) 471-491

DELORME, J., "Patents and technology protection", in *Technology transfer practice of international firms*, Bradbury, F., (ed.), Alpen aan den Rijn, 1978, pp. 32-34

DELSAUX, P., "La jurisprudence de la Cour de justice relative aux importations parallèles et les voitures", in *L'automobile et le droit européen*, Collard, Desaux, Dessard, a.o., Editions du Jeune Barreau de Liège, Liège, 1986, pp. 159-179

DEMARET, P., "Le droit européen et la propriété intellectuelle", in *La protection de la propriété intellectuelle*, Institut Universitaire Internationale Luxembourg, Session de Juillet 1989, pp. 83-102

DEMARET, P., "Les droits de propriété intellectuelle, la circulation des marchandises et des services", in *La protection de la propriété intellectuelle*, Institut Universitaire Internationale Luxembourg, Session de Juillet 1989, pp. 103-130

DEMARET, P., "Industrial property rights, compulsory licences and the free movement of goods under Community law", *I.I.C.* 18 (1987) 161-191

DE SANCTIS, V., 'Diritti di autore', *Enciclopedia del Diritto*, Giuffrè Editore, IV (1959) 378-430

DESSARD, D., THONON, D., "La Réglementation belge des prix des véhicules automobiles et du carburant et l'art. 30 du Traité CEE", in *L'automobile et le droit européen*, Collard, Desaux, Dessard, a.o., Editions du Jeune Barreau de Liège, Liège, 1986, pp. 97-146

DE ULLOA, G., "Licensing contracts and territoriality clauses: parallel imports", *E.C.L.R.* 12 (1991) 220-230

DE WITTE, B., "Cultural policy: the complementarity of negative and positive integration", in *Discretionary powers of the Member States in the field of economic policies and their limits under the EEC Treaty*, Schwarze, J., (ed.), Baden-Baden, 1988, pp. 195-205

DIETZ, A., "The harmonization of copyright in the European Community", *I.I.C.* 16 (1985) 379-410

DIETZ, A., "Commentary", in *Copyright in free and competitive markets*, Cornish, W.R., (ed.), Oxford, 1986, pp. 49-52

- DHANJEE, R., BOISSON DE CHAZOURNES, L., "Trade related aspects of intellectual property rights (TRIPS): objectives, approaches and basic principles of the GATT and of intellectual property conventions", *J.W.T.* 24 (1990) 5-15
- DRIJBER, B., "Groepsvrijstelling know-how licenties: rechtszekerheid of onduidelijkheid?", *S.E.W.* (1989) 200-216
- DUBOIS, J., "La distribution automobile dans le marché commun; le point de vue de la Commission Européenne", in *Droit des consommateurs: sécurité, concurrence, publicité*, Pizzio, J., (ed.), Story Scientia, 1987, pp. 91-97
- DUCHEMIN, W., "Aspects pratiques de la protection de l'artisan d'art et du designer", in *The Green Paper on the legal protection of industrial design*, Gotzen, F., (ed.), Story Scientia, Brussels, 1992, pp. 47-59
- DURIE, R., "UK Copyright, Designs and Patents Act 1988", *I.I.C.* 20 (1989) 637-662
- ✓ DWORKIN, G., "Authorship of films and the European Commission proposals for harmonising the term of copyright", *E.I.P.R.* 15 (1993) 151-155
- ✓ DYKJAER-HANSEN, K., "Parallel imports and the battle against piracy", *E.I.P.R.* 14 (1992) 35-36
- ECCLES, R., "When is a British car not a British car? Issues raised by Nissan", *E.C.L.R.* 10 (1989) 1-3
- ECCLES, R., "Patentee's right to prevent importation: Thetford Corporation v. Fiamma S.P.A.", *E.I.P.R.* 9 (1989) 26-27
- ECKMAN, P., "Intellectuele en industriële eigendom: recente ontwikkeling in België en Europa", *T.P.R.* (1986) 247-304
- ✓ EHLERMANN, C.-D., "Managing monopolies: the role of the state in controlling market dominance in the European Community", *E.C.L.R.* (1993) 61-69
- 7 EHRICKE, U., "State intervention and EEC competition law: opportunities and limits of the European Court of Justice's approach: A critical analysis of four key-cases", *World Competition* (1990) 79-102
- EICHMANN, H., "Materiellrechtliche Zweifelsfragen des neuen Geschmacksmusterrechts", *G.R.U.R.* (1989) 17-22
- EISENBERG, R., "Patents and the progress of science: exclusive rights and experimental use", *The University of Chicago Law Review* (1989) 1017-1086

- ENGLERT, B., "The law of industrial designs in Germany - actual state and reform proposals", *I.I.C.* 12 (1981) 773-785
- EVANS, A., "Consumer protection and the free movement of goods in EEC law", *New Law Journal* (1982) 135-137
- EVANS, D., "EEC Regulation on block exemption: the dealer viewpoint", paper presented at the *S.M.M.T. Selective Distribution Block Exemption Seminar*, London, 8 March 1985
- EVERLING, U., "The Court of Justice as a decision making authority", in *The art of governance*, Michigan Law Review Association, (ed.), Baden-Baden, 1987, pp. 156-172
- EWING, K., "Antitrust enforcement and the patent system: similarities in the European and American approach", *I.I.C.* 11 (1980) 279-294
- FABIANI, M., "Lettre d'Italie", *Le Droit d'Auteur* (1983) 226-235 ✓
- FARR, S., "Abuse of a dominant position - The Hilti case", *E.C.L.R.* 13 (1992) 174-177 ✓
- FAULL, J., "Effect on trade between Member States and Community - Member State jurisdiction", 16th annual Fordham Corporate Law Institute, New York, 27 October 1989, provisional text
- FAULL, J., "Competition checklist", *E.L.R.* 13 (1988) 202-213
- FAULL, J., "Competition checklist", *E.L.R.* 8 (1983) 123-132
- FEENSTRA, J., KRAWCZYCK, S., "De Magill-arresten: de uitoefening van het auteursrecht en misbruik van machtspositie", *Informatierecht* (1992) 43-47
- FEJO, J., "The Hag II-judgment", *International Review of Competition Law* (1992) 18-25
- FERRY, J., "Towards completing the charm: the Woodpulp judgment", *E.I.P.R.* 9 (1989) 19-25
- FIRTH, A., "Aspects of design protection in Europe", *E.I.P.R.* 15 (1993) 42-47
- FIRTH, A., "Licences of right: 'new existing patents' under the Patents Act 1977", *E.I.P.R.* 6 (1986) 168-174
- FISHWICK, F., "Definition of monopoly power in the antitrust policies of the United Kingdom and the European Community", *Antitrust Bull.* (1989) 451-488

FLORIDIA, G., "Corte di giustizia, Causa N° 53/87, C.I.C.R.A. e Maxicar contro Renault: Osservazioni alle conclusioni dell'avvocato generale Jean Mischo, presentate all'udienza del 21.6.1988", paper presented at the conference *Libera Circolazione degli Autoveicoli e dei loro Componenti nella Prospettiva del 1992*, Sienna, 8-9 July 1988

FLORIDIA, G., "Invenzione e modelli: evoluzione della legislazione nazionale", *Rivista di Diritto Industriale* (1985-I) 72-105

FLORIDIA, G., "Ancora sui pezzi di ricambio per macchine", *Rivista di Diritto Industriale* (1985-II) 497-512

✓ FLYNN, J., "Intellectual property and anti-trust: EC attitudes", *E.I.P.R.* 14 (1992) 49-54

✓ FOCSANEANU, L., "Pour un droit conjoncturel de la concurrence: Essai de rapprochement des Articles 85 et 103 du Traité CEE", *R.T.D.E.* (1985) 343-364

✓ FORRESTER, I., "Software licensing in the light of the current EC competition law considerations", *E.C.L.R.* 13 (1992) 5-20

✓ FOX, E., "Federalism, standards and common market merger control", *Fordham Corp.L.Inst.* (1988) 23

FRANCESCHELLI, R., "Modelli ornamentali di parte di carrozzeria di automobili ed abuso di posizione dominante", *Rivista di Diritto Industriale* (1988-II) 175-187

✓ FRANÇON, A., note to the Magill-cases, *R.T.D.C.* (1992) 372-378

✓ FRANÇON, A., "Le droit internationale de la propriété intellectuelle", in *La protection de la propriété intellectuelle: aspects juridiques européens et internationaux*, Institut Universitaire Internationale de Luxembourg, 1989, pp. 11-78

FRANK, G., "Intellectual property rights in the European Economic Community and the Treaty of Rome - conflict or harmony", *Journal of the Patent Office Society* 59 (1977) 274-301

✓ FRANZONE, D., "Droit d'auteur et droits voisins", *Revue du Marché Unique Européen* (1993) 143-170

FRANZOSI, M., "Sulla nozione di modello di utilità", *Rivista di Diritto Industriale* (1991-I) 144-153

FRANZOSI, M., "The legal protection of industrial design: Unfair competition as a basis of protection", *E.I.P.R.* 12 (1990) 154-158

FRANZOSI, M., "Grey market - parallel importation as a trademark violation or an act of unfair competition", *I.I.C.* 21 (1990) 194-208

FRANZOSI, M., "Patent litigation in Italy", *E.I.P.R.* 9 (1987) 268-270

FRAZER, T., "Unchanging times: the Monopolies and Mergers Commission report on the BBC and ITP", *E.C.L.R.* (1986) 96-108 ✓(?)

FRIDEN, G., "Recent developments in EEC intellectual property law: the distinction between existence and exercise revisited", *C.M.L.Rev.* (1989) 193-217 ✓(?)

FROMONT, M., "Les limites des pouvoirs discretionnaires des Etats résultants de la constitution et du Traité CEE", in *Discretionary powers of the Member States in the field of economic policies and their limits under the EEC Treaty*, Schwarze, J., (ed.), Baden-Baden, 1988, pp. 153-164

FRYER, W., "Design users suggest national law changes, EC approach and harmonisation strategy: Federal Republic of Germany surveys on design protection", *E.I.P.R.* 12 (1990) 360-367

FUENTES, J., "Zur Beurteilung von Patentlizenzverträgen nach EG-Recht", *G.R.U.R. Int.* (1987) 217-229

GERSTENBERG, E., "BGH, Urt. 16.10.1986 zur Frage der Geschmacksmusterfähigkeit von Pkw-Kotflügeln", *G.R.U.R.* (1987) 518-520

GIACOBBE, G., "Proprietà intellettuale", *Enciclopedia del Diritto*, Giuffrè Editore, XXXVII (1988) 368-388

GILBEY, R., DE HAAS, C., "Conséquences en matière de licences et litiges des nouvelles lois régissant la propriété industrielle en France", *Ing.-Conseil* (1992) 134-147

GILSDORF, P., "Portée et délimitation des compétences communautaires en matière de politique commerciale", *Rev. Marché Commun* (1989) 195-207

GLADWELL, D., "The exhaustion of intellectual property rights", *E.I.P.R.* 8 (1986) 366-370 ✓

GLAESNER, H.-J., "L' Article 100 A: un nouvel instrument pour la réalisation du marché commun", *Cah.Dr.Eur.* (1989) 615-626

GLAS, G., "The cumulative protection of Benelux designs by copyright and design law: Screenoprint Ltd. v. Citroën Nederland BV", *E.I.P.R.* 11 (1989) 257-259

GLATZ, H., "Comments on the paper of Mr. Joerges", in *EC competition policy and the consumer interest*, Goyens, M., (ed.), Cabay-Bruylant, 1985, pp. 237-248

GLATZ, H., "An introduction to the block exemption / pricing provisions", paper presented at the *S.M.M.T. Selective Distribution Block Exemption Seminar*, London, 8 March 1985

GLAZENER, P., "Verplichte licenties in het gemeenschapsrecht", *Intellectuele Eigendom & Reclamerecht* (1992) 10-15

GORI, P., "The European patent grant system and how it ties in with revocation proceedings", *I.I.C.* 21 (1990) 452-467

GORMLEY, L., "Compulsory patent licensing", *E.L.R.* 10 (1985) 447-449

GORMLEY, L., "Newcastle disease and the free movement of goods", *New Law Journal* (1983) 1037-1038

GOTZEN, F., "L'harmonization du droit d'auteur et des droits voisins", in *La protection de la propriété intellectuelle*, Institut Universitaire International Luxembourg, Session Juillet 1989, pp. 217-263

GOTZEN, F., "La libre circulation des produits couverts par un droit de propriété intellectuelle dans la jurisprudence de la Cour de Justice", *R.T.D.C.* (1985) 467-481

GOTZEN, F., "Intellectuele eigendom en nieuwe technologieën", *R.W.* (1983-84) 2384

GOTZEN, M., "La propriété industrielle et les Articles 36 et 90 du Traité instituant la Communauté Economique Européenne", *R.T.D.C.* (1958) 261-303

GOVAERE, I., "Intellectual property protection and commercial policy", in *The European Community's commercial policy after 1992: the legal dimension*, Maresceau, M., (ed.), Martinus Nijhoff Publishers, 1993, pp. 197-222

GOVAERE, I., ECKHOUT, P., "On dual use goods and dualist case law: the Aimé Richardt judgment on export controls", *C.M.L.Rev.* 29 (1992) 941-965

GOVAERE, I., "Hag II of de ommekeer in de rechtspraak van het Europese Hof van Justitie inzake merken met een gemeenschappelijke oorsprong", *R.W.* (1992) 105-112

GOVAERE, I., "The impact of intellectual property protection on technology transfer between the EC and the Central and Eastern European countries", *J.W.T.* 25 (1991) 57-76

GOVAERE, I., HELIN, F., "Implementing the internal market: problems and perspectives", in *The 1992 challenge at national level*, Schwarze, Govaere, Hélin, Van den Bossche, (eds.), Nomos Verlagsgesellschaft, Baden-Baden, 1990, pp. 681-703

GOYBET, L., "Automobiles: la réponse européenne au défi japonais", *Rev. Marché Commun* (1991) 337-339

GREIF, S., "Patents and economic growth", *I.I.C.* 18 (1987) 191-213

GRILICHES, Z., SCHMOOKLER, J., "Inventing and maximizing", *Am.Econ.Rev.* 53 (1963) 725-729

GROSHEIDE, F., "Contractuele exploitatie van intellectuele eigendomsrechten in internationaal verband. Enkele opmerkingen over de verhouding van algemene en bijzondere regelgeving, in het bijzonder met betrekking tot auteursrechten", in *Eenvormig en vergelijkend privaatrecht 1992*, Kokkini-Iatridou & Grosheide, (eds.), Koninklijke Vermande BV, Lelyland, 1992, pp. 401-423

GROVES, P., "Intermediaries: last chance saloon for selective distribution in the automobile sector?", *E.C.L.R.* (1993) 21-25

GROVES, P., "Don't be vague: towards an international system for design registration", *European Business Law Review* (1992) 230-233

GROVES, P., "The car market: MMC's report", *E.C.L.R.* 13 (1992) 97-100

GROVES, P., "A must-fit exception for software", *European Business Law Review* (1991) 142

GROVES, P., "Motor vehicle distribution: the block exemption", *E.C.L.R.* 8 (1987) 77-87

GUTTUSO, S., "Les droits de propriété intellectuelle et les règles de concurrence", in *La protection de la propriété intellectuelle*, Institut Universitaire International Luxembourg, Session Juillet 1989, pp. 131-167

GUY, D., "Pharmon v. Hoechst - Compulsory licences clarified", *E.I.P.R.* 8 (1986) 252-253

GYSELEN, L., "State action and the effectiveness of the EEC Treaty's competition provisions", *C.M.L.Rev.* (1989) 33-60

GYSELEN, L., KYRIAZIS, N., "Article 86 EEC: the monopoly power measurement issue revisited", *E.L.R.* (1986) 134-148

- HAGAN, T., HENRY, S., "Is a compulsory patent licensing statute necessary? A study of the US and foreign experience", *Patent Law Review* (1976) 285-313
- HARLES, G., "Titre IV, Chapitre VI: Luxembourg", in *Traité des dessins et modèles*, Greffe & Greffe, 4° ed., Litec, Paris, 1988, pp. 798-800
- HARRIS, B., "Community law and intellectual property: recent cases in the Court of Justice", *C.M.L.Rev.* 19 (1982) 61-78
- HAWK, B., "La révolution antitrust américaine: une leçon pour la Communauté Economique Européenne?", *R.T.D.E.* 25 (1989) 5-44
- HAWK, B., "The American (anti trust) revolution: lessons for the EEC?", *E.C.L.R.* (1988) 53-87
- HAY, G., "Anti-trust and economic theory: some observations form the US experience", *Fiskal Studies* (1985) 59-69
- HENNING-BODEWIG, F., RUIJSENAARS, H., "Alternative protection for product designs - a comparative view of German, Benelux and US law", *I.I.C.* 23 (1992) 643-669
- HIGGINS, R., RUBIN, P., "Counterfeit goods", *Journal of Law & Economics* (1986) 211-230
- HINDERAKER, A., "Trading in your competitor's market: comparative marketing and United States trademark law", *European Business Law Review* (1991) 137-140
- HOFFMAN, A., "Anti-competitive state legislation condemned under Articles 5, 85 and 85 of the EEC Treaty: How far should the Court go after Van Eycke?", *E.C.L.R.* 11 (1990) 11-27
- HOFFMAN, G., MARCOU, G., "Intellectual property issued in the New Trade Bill", *E.I.P.R.* 10 (1988) 130-134
- HORNSBY, S., "National and Community control of concentrations in a Single Market: should Member States be allowed to impose stricter standards?", *E.L.R.* 13 (1988) 295-317
- HORNSBY, S., "Competition policy in the 80's: more policy less competition?", *E.L.R.* 12 (1987) 79-101
- HORTON, A., "Industrial design law: the future of Europe", *E.I.P.R.* 13 (1991) 442-448
- HORTON, A., "Designs, shapes and colours: a comparison of trade mark law in the United Kingdom and the United States", *E.I.P.R.* 11 (1989) 311-318
- HOYNG, W., and BIESHEUVEL, M., "The know-how group exemption", *C.M.L.Rev.* (1989) 219-234

- IDOT, L., "Le rapprochement des législations en matière de propriété intellectuelle. Bilan provisoire des travaux", *Droit et Pratiques du Commerce International* (1989) 272-290 ✓
- JAMES, H., "Tetra Pack: Exemption and abuse of dominant position", *E.C.L.R.* 11 (1990) 267-270 ✓!
- JEANTET, F.-C., KOVAR, R., "Les accords de distribution et de service des véhicules automobiles et l'Article 85 du Traité CEE: étude du projet de règlement de la Commission des Communautés Européennes", *R.T.D.E.* (1983) 547-573
- JOERGES, C., "Contract and status in franchising law", in *Franchising and the law*, Joerges, C., (ed.), Baden-Baden, 1991, pp. 11-66
- JOERGES, C., "Selective distribution schemes in the motor-car sector: european competition policy, consumer interests and the draft regulation on the application of Article 85 (3) of the Treaty to certain categories of motor-vehicle distribution and servicing agreements", in *EC competition policy and the consumer interest*, Goyens, M., (ed.), Cabay-Bruylant, 1985, pp. 187-236
- JOERGES, C., "The administration of Article 85 (3) EEC Treaty: the need for consultation and information in the legal assessment of selective distribution systems", *Journal of Consumer Policy* 7 (1984) 271-292
- JOHANNES, J., WRIGHT, G., "In defense of Café Hag", *E.L.R.* (1975-76) 230-236
- JOHANNES, J., "La propriété industrielle et le droit d'auteur dans le droit des Communautés Européennes", *R.T.D.E.* (1973) 369-411 (first part); 557-582 (second part)
- JOLIET, R., "Droit de marques et libre circulation des marchandises: l'abandon de l'arrêt HAG I", *R.T.D.E.* (1991) 169-185
- JOLIET, R., "Copyright in the case law of the Court of Justice of the European Communities", in *Materials on intellectual property*, Cornish, W.R., (ed.), Oxford, 1986, pp. 21-40 ✓
- JOLIET, R., "Patented articles and the free movement of goods within the EEC", *Current Legal Problems* 28 (1975) 15-37
- JOLIET, R., "Monopolisation et abus de position dominante: essai comparatif sur l'Article 2 du Sherman Act et l'Article 86 du Traité de Rome", *R.T.D.E.* (1969) 645-696 ✓
- JONES, C., VAN DER WOUDE, M., "Competition checklist", *E.L.R.* (1990) 48-55 ?

- JOUBERT, C., "Commentary", in *Materials on intellectual property*, Cornish, W.R., (ed.), Oxford, 1986, pp. 41-48
- KAISER, J., "Législation Européenne en matière de concurrence et compétences nationales: principes d'un renforcement de la position des Etats membres dans la procédure de décision de la Commission", in *Etudes de droit Communautaires Européennes, mélange offerts à Pierre-Henri Teitgen*, Editions A. Pedone, Paris, 1984, pp. 209-222
- KAPLOW, L., "The patent-antitrust intersection: a reappraisal", *Harvard Law Review* 97 (1983-84) 1813-1892
- KATZENBERGER, P., "Protection of industrial designs in Germany", *I.I.C.* 6 (1975) 304-319
- KELBEL, G., "Die Novelle zum Geschmacksmustergesetz", *G.R.U.R.* (1987) 141-148
- KITCH, E., "Patents: monopolies or property rights?", in *The economics of patents and copyright*, Palmer, J., (ed.), London, 1986, pp. 31-49
- KITCH, E., "Patents, prospects and economic surplus: a reply", *Journal of Law and Economics* (1980) 205-207
- KOCH, N., "Article 30 and the exercise of industrial property rights to block imports", *Fordham Corp.L.Inst.* (1986) 605-632
- KORAH, V., "From legal form towards economic efficiency - Article 85 (1) of the EEC Treaty in contrast to US antitrust", *Antitrust Bull.* (1990) 1009-1034
- KORAH, V., "No duty to license independent repairers to make spare parts: the Renault, Volvo and Bayer & Hennecke cases", *E.I.P.R.* 10 (1988) 381-386
- KORAH, V., "Commission's draft for a regulation exempting Know How licensing agreements", *Business Law Review* (1987) 198-202
- KORAH, V., "EEC competition policy - legal form or economic efficiency", *Current Legal Problems* 39 (1986) 85-105
- KORAH, V., "Commentary on the impact of Coditel (2) on competition law", in *Materials on intellectual property*, Cornish, W.R., (ed.), Oxford, 1986, pp. 53-56
- KORAH, V., "The limitations of copyright and patents by the rules for the free movement of goods in the European common market", *Case Western Reserve Journal of International Law* 14 (1982) 7-45

- KORAH, V., "Concept of a dominant position within the meaning of Article 86", *C.M.L.Rev.* 17 (1980) 395-414
- KORAH, V., "Dividing the common market through national industrial property rights", *Mod. L. Rev.* 35 (1972) 634
- KOVAR, R., "Marché intérieur et politique de concurrence", *Droit et Pratique de Commerce International* (1989) 230-247
- KOVAR, R., "Le droit communautaire de la concurrence et la 'règle de raison' ", *R.T.D.E.* 23 (1987) 237-254
- KRETSCHNER, F., "Statutory changes in German industrial property and copyright law: an overview", *I.I.C.* 18 (1987) 767-774
- KROITSCH, H., "Exclusive licences as a means of advancing technical progress", *I.I.C.* 8 (1977) 542-552
- KRÜGER, C., "Designs between copyright and industrial property protection", *I.I.C.* 15 (1984) 168-186
- KUNZE, G., "Waiting for Sirena II - Trademark assignment in the case law of the European Court of Justice", *I.I.C.* 22 (1991) 327-333
- KUR, A., "The Green paper's 'design approach' - what's wrong with it?", *E.I.P.R.* (1993) 374-378
- KUR, A., "The Max Planck Draft for a European design law", in *The Green Paper on the legal protection of industrial design*, Gotzen, F., (ed.), Story Scientia, Brussels, 1992, pp. 13-25
- LANDE, R., "The rise and (coming) fall of efficiency as the ruler of antitrust", *Antitrust Bulletin* (1988) 429-465
- LANDES, W., POSNER, R., "An economic analysis of copyright law", *Journal of Legal Studies* (1989) 325-363
- LANDES, W., POSNER, R., "Trademark law: an economic perspective", *Journal of Law & Economics* (1987) 265-309
- LANE, S., "Design copyright: Fresh, fetching and functional?", *E.I.P.R.* 10 (1988) 370-376
- LANGE, P., "The law and protection of designs with particular reference to the textile and fashion sector", *E.I.P.R.* 15 (1993) 16-23
- LEHMANN, M., "Property and intellectual property: property rights as a restriction in furtherance of competition", *I.I.C.* 20 (1989) 1-15

- ✓ LEIGH, G., "IPR and EEC competition rules", *E.C.L.R.* 6 (1985) 341-365
- LIMPERG, Th., "Het regime van de bescherming van tekeningen en modellen van nijverheid", *Bijblad Industriële Eigendom* (1987) 4-8
- ✓ LOGEASIS, E., "France: legislative reform: recent codification of French intellectual property laws", *E.I.P.R.* 14 (1992) D.235-D.237
- LO MONACO, A., "The role of consent and consumer protection in reconciling Articles 30 and 36 in Hag I and Hag II", *Fordham International Law Journal* 15 (1991-92) 207-217
- LOSCHELDER, M., "The new German Model and Design Act", *I.I.C.* 19 (1988) 622-638
- LUDDING, R., "Groepsvrijstelling octrooiligenties", *S.E.W.* (1985) 332-346
- ✓ LUNN, J., "The role of property rights and market power in appropriating innovative output", *The Journal of Legal Studies* 14 (1985) 423-433
- MAGELLI, S., "La tutela del design nell'interpretazione della dottrina giuridica e della giurisprudenza", *Rivista di Diritto Industriale* (1989-I) 205-216
- MARENCO, G., BANKS, K., "Intellectual property and the Community rules on free movement of goods: Discrimination unearthed", *E.L.R.* 15 (1990) 224-256
- MARENCO, G., "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*, Schwarze, J., (ed.), Baden-Baden, 1988, pp. 53-68
- ✓ MARENCO, G., "Le Traité CEE interdit-il aux Etats membres de restreindre la concurrence?", *Cah.Dr.Eur.* 22 (1986) 285-308
- ✓ MARENCO, G., "Pour une interpretation traditionnelle de la notion de mesure d'effet equivalent a une restriction quantitative", *Cah.Dr.Eur.* (1984) 291-363
- MARKHAM, J., "Inventive activity: Government controls and the legal environment", in *The rate and direction of inventive activity*, National Bureau of Economic Research, New York, 1975, pp. 587-608
- MASSAGUER FUENTES, J., "Zur Beurteilung von Patentlizenzverträgen nach EG-Recht", *GRUR int.* 4 (1987) 217-229

MATTERA, A., "La libre circulation des oeuvres d'art à l'intérieur de la Communauté et la protection des trésors nationaux ayant une valeur artistique, historique ou archéologique", *Revue du Marché Unique Européen* (1993) 9-31

MATTERA, A., "L'Article 30 du traité CEE, la jurisprudence 'Cassis de Dijon' et le principe de la reconnaissance mutuelle: Instruments au service d'une Communauté plus respectueuse des diversités nationales", *Revue du Marché Unique Européen* 4 (1992) 13-71

MATTERA, A., "Les nouvelles formes du protectionnisme économique et les Articles 30 et suivants du Traité CEE", *Rev. Marché Commun* (1983) 252-268

MAX PLANCK INSTITUTE for Foreign and International Patent, Copyright, and Competition Law, "The Max Planck draft for a European protection of designs", presented by Dr. A. Kurr at the conference *The green paper on the legal protection of industrial design*, C.I.R., Brussels, 22 november 1991

Mc FETRIDGE, D., SMITH, D., "Patents, prospects and economic surplus: a comment", *The Journal of Law and Economics* (1980) 197-207

MERKIN, R., "The interface between anti-trust and intellectual property", *E.C.L.R.* 6 (1985) 377-391 ✓!!

MERTENS DE WILMAR, J., "Het Hof van Justitie van de Europese Gemeenschappen na de Europese Akte", *S.E.W.* (1986) 615

MERTENS DE WILMAR, J., "Réflexions sur les méthodes d'interprétation de la Cour de Justice des Communautés Européennes", *Cah.Dr.Eur.* 22 (1986) 5-20

MERTENS DE WILMAR, J., "De Communautaire rechtspraak over het vrij verkeer van goederen", *R.W.* (1984-85) 1-16

MERTENS DE WILMAR, J., "The case-law of the Court of Justice in relation to the review of the legality of economic policy in mixed-economy systems", *L.I.E.I.* (1982) 1-16

MILLER, C., "The price of a car in Europe: A glance at the future", *E.C.L.R.* 13 (1992) 177-180

MILLET, T., "Free movement of goods and public morality", *New Law Journal* (1987) 39-40

MINOR, J., "Turkeys: the abuse of Article 36", *E.L.R.* 8 (1983) 119-122

MINOUDIS, M., "Protection of industrial design in Greece", *I.I.C.* 22 (1991) 497-513

- V MORRIS, V., "Sovereign immunity: the exceptions for intellectual or industrial property", *Vanderbilt Journal of Transnational Law* 19 (1986) 83-116
- MÖSCHEL, W., "La distribution sélective d'automobiles en droit européen de la concurrence", *R.T.D.C.* (1991) 1-26
- MULDER, Ir.H., "Gebruiksmodel in Nederland", *Bijblad Industriële Eigendom* (1987) 59-62
- NELSON, R., "The simple economics of basic scientific research", *The Journal of Political Economy* 67 (1959) 297-306
- NERHOT, P., "Quelques réflexions sur l'expertise en droit européen de la concurrence", *Archives de Philosophie du Droit* 33 (1988) 301-321
- NEUHAUS, W., "The role of the expert in German patent infringement proceedings", *I.I.C.* 18 (1987) 650-656
- NEUKOM, J., "What price the Community patent?", *E.I.P.R.* 14 (1992) 111-112
- ODLE, A., ZEYEN, C., "The EC block exemption regulation 556/89 on know-how: practical difficulties and legal uncertainties", *E.C.L.R.* 13 (1991) 231-236
- V OLIVER, P., "A review of the case law of the Court of Justice on articles 30 to 36 EEC in 1985", *C.M.L.Rev.* (1986) 352-357
- OPPENLÄNDER, K., "Patent policies and technical progress in the Federal Republic of Germany", *I.I.C.* 8 (1977) 97-122
- V ORF, E., "Re Warner Bros Inc. and Metronome Video APS v. Erik Vuyff Christiansen", *E.I.P.R.* 10 (1988) 309-311
- ORR, A., FARR, S., "Know-how and the competition rules of the EEC Treaty", *World Competition* 12 (1988) 5-15
- OSTERBORG, L., "Towards a harmonized prior use right within a common market patent system", *I.I.C.* 12 (1981) 447-475
- PALMER, J., "Editor's introduction", in *Research in Law and Economics*, Palmer, J., (ed.), London, 1986, pp. 27-30
- PAPPALARDO, A., "Comunicazione in tema di accordi a tempo indeterminato per la distribuzione di autoveicoli (cfr. Art.5 § 2, n.2 del Regolamento CEE N° 123/85, paper presented at the conference *Libera Circolazione degli Autoveicoli e dei loro Componenti nella Prospettiva del 1992*, Sienna, 8-9 July 1988

PARR, N., HUGHES, M., "The relevance of consumer brands and advertising in competition inquiries", *E.C.L.R.* 14 (1993) 157-163

PARRINDER, P., "The dead hand of European copyright", *E.I.P.R.* 15 (1993) 391-393 ✓✓

PATERSON, G., "Procedural law and the practice of the Boards of Appeal of the European Patent Office", *E.I.P.R.* 9 (1987) 221-227

PATHAK, A., "Articles 85 and 86 and anti-competitive exclusion in EEC competition law", Part I, *E.C.L.R.* (1989) 74-104 ✓

PATHAK, A., "Articles 85 and 86 and anti-competitive exclusion in EEC competition law", Part II, *E.C.L.R.* (1989) 256-272

PATTISON, M., "The European Commission's proposal on the protection of computer databases", *E.I.P.R.* 14 (1992) 113-120 ✓

PAULIS, E., "Les Etats peuvent-ils enfreindre les Articles 85 et 86 du Traité CEE?", *J.T.* (1985) 209-221

PELLEGRINO, G., "Titre IV, Chapitre V: Italie", in *Traité des dessins et modèles*, Greffe & Greffe, 4° ed., Litec, Paris, 1988, pp. 787-795

PEROT-MOREL, M.-A., "Le système français de la double protection des dessins et modèles industriels", *Rivista di Diritto Industriale* (1988-I) 250-261

PEROT-MOREL, M.-A., "Les projets communautaires en matière de dessins et modèles industrielles", *Rivista di Diritto Industriale* (1981-I) 378-393

PEROT-MOREL, M.-A., "Insuffisance et complexité du régime international des dessins et modèles industrielles", in *Les perspectives d'un droit communautaire en matière de dessins et modèles industriels*, C.U.E.R.P.I., Grenoble, 1977, pp. 49-62

PESCATORE, P., "Public and private aspects of Community competition law", *Fordham Corp.L.Inst.* (1986) 383-430

PETERSON, S., "Design protection seen from industry", in *The Green Paper on the legal protection of industrial design*, Gotzen, F., (ed.), Story Scientia, Brussels, 1992, pp. 27-35

PEVTCHIN, G., WILLIAMS, L. "Pharmon v. Hoechst - Limits on the Community exhaustion principle in respect of compulsory licences", *Fordham.Corp.L.Inst.* (1986) 287-307 ✓/

PHEASANT, J., "Commission Regulation (EEC) N° 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicles distribution and servicing agreements", paper presented at the S.M.M.T. Selective Distribution Block Exemption Seminar, London, 8 March 1985

PIETERS, H., "Bestrijding van namaak van merkartikelen in de EG", *Bijblad Industriële Eigendom* (1988) 74

PIJNACKER HORDIJK, E., VAN REEKEN, B., "De EEG-Groepsvrijstelling voor Know-How-licentieovereenkomsten", *Bijblad Industriële Eigendom* (1989) 316-325

PLAISANT, R., DAVERAT, G., "La distribution des pièces détachées pour automobiles et les lois contre les pratiques restrictives", *R.T.D.C.* (1983) 147-187

POPE, D., "Some reflections on Italian Flat Glass", *E.C.L.R.* 14 (1993) 172-175

POSNER, B., "The Community Design. Purpose and scope of the Green Paper on the legal protection of industrial design", in *The Green Paper on the legal protection of industrial design*, Gotzen, F., (ed.), Story Scientia, Brussels, 1992, pp. 1-11

POSNER, B., "Les perspectives de protection des dessins et modèles sur le plan communautaires", in *La protection des créations d'esthétiques industrielle dans le cadre de la CEE*, C.U.E.R.P.I., Juin 1988, pp. 33-44

POSNER, R., "The Chicago school of antitrust analysis", *U.Pa.L.Rev.* 127 (1978/79) 925-952

PRÄNDL, F., "Exhaustion of IP rights in the EEA applies to third-country goods placed on the EEA market", *E.C.L.R.* (1993) 43-45

PRICE, D., "Abuse of a dominant position - the tale of nails, milk cartons, and TV guides", *E.C.L.R.* 11 (1990) 80-90

PRIEST, G., "What economists can tell lawyers about intellectual property: Comment on Cheung", in *Research in Law and Economics*, Palmer, J., (ed.), London, 1986, pp. 19-24

QUINN, M., Mac GOWAN, N., "Could Article 30 impose obligations on individuals?", *E.L.R.* 12 (1987) 163-178

RAFFAELLI, E., "La tutela del design nell'ordinamento giuridico Italiano", *Rivista di Diritto Industriale* (1991-I) 190-206

REICHMAN, J., "La protection des dessins et modèles et les nouvelles techniques: l'expérience des Etats-Unis d'Amérique dans une perspective transnationale: Première partie", *La propriété Intellectuelle* (1991) 228-253

REICHMAN, J., "La protection des dessins et modèles et les nouvelles techniques: l'expérience des Etats-Unis d'Amérique dans une perspective transnationale: Deuxième partie", *La propriété Intellectuelle* (1991) 271-291

✓ REIMER, D., "Copyright law and the free movement of goods", *I.I.C.* 12 (1981) 493-511

REIMER, D., "Les rapports entre la protection du droit d'auteur et la protection des dessins et modèles en droit allemand", *R.I.D.A.* (oct. 1978) 37-49

✓ REINDL, A., "The magic of Magill: TV program guides as a limit of copyright law?", *I.I.C.* 24 (1993) 60-82

RICHTER, B., "Das neue Geschmacksmusterrecht vor dem start", *G.R.U.R.* (1988) 583-588

RICHTER, U., "Der Rechtsschutz des Industriedesign in der DDR", *G.R.U.R. Int.* (1989) 751-760

RIDEAU, J., "Les compétences résiduelles et transitoires des Etats membres", in *Etudes de droit Communautaires Européennes, mélange offerts à Pierre-Henri Teitgen*, Editions A. Pedone, Paris, 1984, pp. 441-471

RIDYARD, D., "Joint dominance and the oligopoly blind spot under the EC Merger Regulation", *E.C.L.R.* 13 (1992) 161-164

ROBLES MORCHON, G., "La Cour de Justice des Communautés Européennes et les principes généraux du droit", *EUI Working Paper N° 88/350*

ROHNKE, C., "Protection of external product features in West Germany", *E.I.P.R.* 12 (1990) 41-45

ROTHNIE, W., "Hag II: Putting the common origin doctrine to sleep", *E.I.P.R.* 13 (1991) 24-31

ROWE, F., "Antitrust in transition: a policy in search of itself", *Antitrust Law Journal* 54 (1985) 5-14

SAVIGNON, F., "Luxemburg Conference on the Community Patent - a general report", *I.I.C.* 7 (1976) 91-101

SAYAG, A., "Une technique contractuelle complexe: La distribution automobile: Droit Français", in *Le contrat aujourd'hui: Comparaison Franco-Anglais*, Beale, H., e.a. (eds.), Paris, 1987, pp. 333-364

SCHÄFERS, A., "The Luxembourg Patent Convention, the best option for the internal market", *Journal of Common Market Studies* 23 (1987) 193-207

SCHAPER, T., "Het 'specifiek voorwerp' van de industriële en commerciële eigendom in de EEG-rechtspraak", *Rechtsgeleerd Magazijn Themis* (1977) 556-571

SCHERER, F., "Comment on Edmund Kitch", in *Research in Law and Economics*, Palmer, J., (ed.), London, 1986, pp. 51-58

SCHERER, F., "Demand-pull and technological invention: Schmookler revisited", *The Journal of Industrial Economics* 30 (1982) 225-237

SCHMITZ, B., "Free movement of motor vehicles and spare parts in view of 1992: The consumer experience with Regulation 123/85, paper presented at the conference *Libera Circolazione degli Autoveicoli e dei loro Componenti nella Prospettiva del 1992*, Sienna, 8-9 July 1988

SCHMITZ, B., "La distribution automobile dans le marché commun; le point de vue des consommateurs", in *Droit des consommateurs: sécurité, concurrence, publicité*, Pizzio, J., (ed.), Story Scientia, 1987, pp. 104-111

SCHMOOKLER, J., BROWNLEE, O., "The economics of research and development: determinant of inventive activity", *Am.Econ.Rev.* 52 (1962) 165-176

SCHÖDERMEIER, M., "Collective dominance revisited: an analysis of the EC Commission's new concepts of oligopoly control", *E.C.L.R.* 11 (1990) 28-34

SCHÖDERMEIER, M., "Metro II et les limites de la distribution sélective", *Cah.Dr.Eur.* 23 (1987) 667-696

SCHWAB, B., "L'unification et l'harmonization du droit des brevets", in *La protection de la propriété intellectuelle*, Institut Universitaire International Luxembourg, Session Juillet 1989, pp. 169-185

SCORDAMAGLIA, V., "The Common Appeal Court and the future of the Community patent following the Luxembourg conference", Part One, *I.I.C.* 22 (1991) 334-348

SCORDAMAGLIA, V., "The Common Appeal Court and the future of the Community patent following the Luxembourg conference", Part Two, *I.I.C.* 22 (1991) 458-474

SCOTT, M., "Compulsory licensing of intellectual property in international transactions", *E.I.P.R.* 10 (1988) 319-325

SEDEMUND, J., "Statement on the concept of the free movement of goods and the reservation for national action under Article 36 EEC Treaty", in *Discretionary powers of the Member States in the field of economic policies and their limits under the EEC Treaty*, Schwarze, J., (ed.), Baden-Baden, 1988, pp. 25-36

SEELIG, G., "Titre IV, Chapitre V: Allemagne", in *Traité des dessins et modèles*, Greffe & Greffe, 4° ed., Litec, Paris, 1988, pp. 675-716

SENA, G., "Industrial design e diritto d'autore", *Rivista di Diritto Industriale* (1991-II) 25-35

SENA, G., "Modelli Industriali", *Enciclopedia del Diritto*, Giuffrè Editore, XXVI (1978) 674-686

SERIO, M., "La protection des dessins et modeles", *Revue de Droit Intellectuel; l'Ingénieur-Conseil* (1983) 125-132

SEYMOUR, R., "Patents and the transfer of technology", in *Technology tranfer practice of international firms*, Bradbury, F., (ed.), Alpen Aan den Rijn, 1978, pp. 35-40

SHARP, T., "Comments on Christian Joerges' paper on selective distribution schemes in the car sector", in *EC competition policy and the consumer interest*, Goyens, M., (ed.), Cabay-Bruylant, 1985, pp. 249-263

SHAW, J., "Performing rights and Community law", *E.L.R.* 13 (1988) 45-47 ✓

SHELLEY, C., "Abolition of the doctrine of common origin: some reflections on Hag II and its implications", *European Business Law Review* (1991) 87-91

SINGLETON, E., "Intellectual property disputes: settlement agreements and ancillary licences under EC and UK competition law", *E.I.P.R.* 15 (1993) 48-54

SLOT, P., "The application of Articles 3(f), 5 and 85 to 94 EEC", *E.L.R.* 12 (1987) 179-189

SLYNN, G., "The concept of the free movement of goods and the reservation for national action under Article 36 EEC Treaty", in *Discretionary powers of the Member States in the field of economic policies and their limits under the EEC Treaty*, Schwarze, J., (ed.), Baden-Baden, 1988, pp. 17-24 ✓

SMITH, J., "Television guides: the European Court doesn't know 'there's so much in it' ", *E.C.L.R.* 13 (1992) 135-138 ✓

SMITH, P., "The Wolf in Wolf's clothing: the problem with predatory pricing", *E.L.R.* 14 (1989) 209-222

SMULDERS, B., GLAZENER, P., "Delimiteringsovereenkomsten en de bepalingen van het EEG-Verdrag inzake het vrij verkeer van goederen en de mededinging", *Bijblad Industriële Eigendom* (1991) 103-110

de SOLA, M., JEUNIAUX, M., "La politique communautaire en faveur des consommateurs", *Revue du Marché Unique Européen* (1992) 65-116

✓ SPECTOR, H., "An outline of a theory justifying intellectual and industrial property rights", *E.I.P.R.* 11 (1989) 270-273

STAEHELIN, J., "The European Patent Organization", *Yearbook of European Law I* (1981) 333-346

STE, "Tekeningen en modellen, die een duidelijk kunstzinnig karakter vertonen: Note on Benelux CoJ: Screenprints v. Citorën, 22 May 1987", *Bijblad Industriële Eigendom* (1987) 201-202

STEDMAN, J., "Patents and antitrust - the impact of varying legal doctrines", *Utah L. Rev.* (1973) 588-617

STEENLANT, J., "Vers un droit européen des dessin et modèles. Quelques observations de l'industrie européenne", in *The Green Paper on the legal protection of industrial design*, Gotzen, F., (ed.), Story Scientia, Brussels, 1992, pp. 71-84

STEINER, R., "Intrabrand competition - stepchild of antitrust", *Antitrust Bull.* (1991) 155-200

STERLING, J., "Harmonization of the terms copyright, 'author's right' and 'neighbouring rights'", *E.I.P.R.* 11 (1989) 14-18

STERN, R., "Intellectual property", in *The Uruguay Round: a handbook on the multilateral trade negotiations*, Finger, M., Olechowski, A., (eds.), Washington D.C., 1987, pp. 198-206

STOVER, K., "Les règlements d'exemption catégorielle relatifs à la distribution des voitures et aux stations-service", in *L'automobile et le droit européen*, Collard, Desaux, Dessard, a.o., Editions du Jeune Barreau de Liège, Liège, 1986, pp. 181-204

✓ STRIVENS, R., "The EC Commission Green Paper on copyright", *E.I.P.R.* 11 (1989) 275-278

STRIVENS, R., "The 'Phillip Morris' case: share acquisitions and complainants' rights", *E.I.P.R.* 10 (1988) 163-171

STRIVENS, R., "Mitchell Cotts/Sofiltra: Joint ventures - EEC competition policy", *E.I.P.R.* 9 (1987) 369-372

- STROWEL, A., "L'originalité en droit d'auteur: un critère à géométrie variable", *J.T.* (1991) 513-518 ✓
- STUYCK, J., "Free movement of goods and consumer protection: the implications for national and european consumer law of the case law of the EC Court of Justice since the 'Cassis de Dijon' decision", in *Consumer law in the EEC*, Woodroffe, G., (ed.), London, 1984, pp. 77-102
- SUBIOTTO, R., "The right to deal with whom one pleases under EEC competition law: a small contribution to a necessary debate", *E.C.L.R.* 13 (1992) 234-244 ✓(?)
- SUBRAMANIAN, A., "The international economics of intellectual property right protection: a welfare-theoretic trade policy analysis", *World Development* 19 (1991) 945-956 ✓/ ✓
- SUNSTEIN, C., "Protectionism, the American Supreme Court and integrated markets", in *1992: One European market?*, Bieber, e.a., (eds.), Baden-Baden, 1988, pp. 127-147
- SWIFT, R., TOOTAL, C., "The white paper: reform of patent litigation", *E.I.P.R.* 8 (1986) 163-167
- THORNE, C., "Interlego AG v. Tyco Industries Inc.: the privy Council decision", *E.I.P.R.* 10 (1988) 244
- TIMMERMANS, C., "Verboden discriminatie of (geboden) differentiatie: Het discriminatieverbod als open ruimte voor een creatieve rechtsvinding in het Europese Gemeenschapsrecht", *S.E.W.* 6 (1982) 426-460
- TURNER, D., "The role of the 'market concept' in antitrust law", *Antitrust Journal* 49 (1980) 1145-1154
- TURNER, J., "Allen & Hanbury's v. Generics: Acte claire - and wrong", *E.I.P.R.* 10 (1988) 186-188
- UBERTAZZI, L., "Copyright and the free movement of goods", *I.I.C.* 16 (1985) 46-75
- UCHTENHAGEN, U., "The GATT negotiations concerning copyright and intellectual property protection", *I.I.C.* 21 (1990) 765-728
- ULLMANN, E., "Die Verletzung von Patent und Gebrauchsmuster nach neuem Recht", *G.R.U.R.* (1988) 333-339
- VAJDA, C., "The application of Community competition law to the distribution of computer products and parts", *E.C.L.R.* 13 (1992) 110-119

VAN ACKERE, M., "Les normes applicables aux voitures et le droit européen", in *L'automobile et le droit européen*, Collard, Desaux, Dessard, a.o., Editions du Jeune Barreau de Liège, Liège, 1986, pp. 147-158

VAN AELEN, L., "De EEG-groepsvrijstelling voor franchise-overeenkomsten", *S.E.W.* (1990) 3-16

V. VAN BAEL, I., "Discretionary powers of the Commission and their legal control in trade and antitrust matters", in *Discretionary powers of the Member States in the field of economic policies and their limits under the EEC Treaty*, Schwarze, J., (ed.), Baden-Baden, 1988, pp. 173-189

VAN BUNNEN, L., "La notion de dessin ou modèle à caractère artistique marqué: Une interprétation très prétorienne", Note on Benelux CoJ, 22 Mai 1987, *Screenoprints Ltd. v. Citroën*, *Revue Critique de Jurisprudence Belge* (1988) 579-602

VAN DER BREMPT, D., "Le droit des modèles vu par les créateurs", in *The Green Paper on the legal protection of industrial design*, Gotzen, F., (ed.), Story Scientia, Brussels, 1992, pp. 37-45

VAN DER ESCH, B., Case C-10/89 Hag II commentary, *Cah.Dr.Eur.* (1991) 473-482

VAN DER ESCH, B., "Dérégulation, autorégulation et le régime de concurrence non faussée dans la CEE", *Cah.Dr.Eur.* (1990) 497-528

VAN RHIJN, T., "A review of the case law of the Court of Justice on Articles 30 to 36 EEC in 1986 and 1987", *C.M.L.Rev.* 25 (1988) 593-616

VENIT, J., "In the wake of windsurfing: Patent licensing in the common market", *I.F.C.* 18 (1987) 1-40

VENIT, J., "EEC patent licensing revisited: the Commission's patent licence regulation", *Antitrust Bull.* (1985) 457-526

VERLOREN VAN THEMAAT, P., "The contributions to the establishment of the internal market by the case-law of the Court of Justice of the European Communities", in *1992: One European market?*, Bieber, e.a., (eds.), Baden-Baden, 1988, pp. 109-126

VERLOREN VAN THEMAAT, P., "De Europese Akte", *S.E.W.* (1986) 478

V. VERLOREN VAN THEMAAT, P., "La libre circulation des marchandises après l'arrêt 'Cassis de Dijon' ", *Cah.Dr.Eur.* 18 (1982) 123-135

VERLOREN VAN THEMAAT, P., "Précisions sur 'la portée de l'Article 36 par rapport à l'Article 85 du Traité de la CEE' 'concernant les contrats de licence de brevets' ", *S.E.W.* (1964) 83-85

VERSTRYNGE, J.-F., "The obligations of Member States as regards competition in the EEC Treaty", *Fordham Corp.L.Inst.* (1989) 17

VERSTRYNGE, J.-F., "Het begrip 'relevante markt' in het EEG mededingingsrecht: de stand na het Hugin arrest", *S.E.W.* (1980) 400-418

VIGIER, P., "La politique Communautaire de l'automobile. Première partie: Une stratégie industrielle", *Revue du Marché Unique Européen* 3 (1992) 73-112

VIGIER, P., "La politique Communautaire de l'automobile. Deuxième partie: L'action Communautaire", *Revue du Marché Unique Européen* 4 (1992) 73-126

VIGNES, D., "The harmonization of national legislation and the EEC", *E.L.R.* 15 (1990) 358-374

de la VILLEON, M., "La distribution automobile dans le marché commun; le point de vue des fabricants", in *Droit des consommateurs: sécurité, concurrence, publicité*, Pizzio, J., (ed.), Story Scientia, 1987, pp. 98-104

VINCENT, D., "The role of patents in the transfer of technology", in *Technology transfer practice of international firms*, Bradbury, F., (ed.), Alpen Aan den Rijn, 1978, pp. 40-45

VINJE, T., "Magill: its impact on the information technology industry", *E.I.P.R.* 14 (1992) 397-402 ✓

VINJE, T., "Magill: its impact on the information technology industry: Appendices", *E.I.P.R.* 15 (1993) 71-73 ✓

VOGELENZANG, P., "Abuse of a dominant position in Article 86; the problem of causality and some applications", *C.M.L.Rev.* 13 (1976) 61-78 ✓

VON FALCKENSTEIN, R., "Das neue Geschmacksmusterrecht vor dem Start", *G.R.U.R.* (1988) 577-583

WAELEBROECK, D., "La compatibilité des législations nationales indistinctement applicables aux produits nationaux et importés avec les règles européennes de libre circulation des marchandises", *Cah.Dr.Eur.* 19 (1983) 232-254

- WAELEBROECK. M., "Competition, integration and economic efficiency in the EEC from the point of view of the private firm", in *The art of governance*, Michigan Law Review Association, Baden-Baden, 1987, pp. 301-308
- WALKER, G., "Product market definition in competition law", *Federal Law Review* (1981) 386-421
- WALLACE, J., "Proper use of the patent misuse doctrine - an antitrust defense to patent infringement actions in need of rational reform", *Patent Law Review* (1976) 357-365
- WALLACE, W., "Walking back towards unity", in *Policy-making in the European Communities*, Wallace, e.a. (eds.), London, 1977, pp. 301-323
- WALLACE, W., "Protection for designs in the United Kingdom", *I.I.C.* 5 (1974) 421-427
- WEATHERILL, S., "Consumer safety legislation in the United Kingdom and Article 30 EEC", *E.L.R.* 13 (1988) 87-105
- WEBB, C., "Introduction: variations and theoretical themes", in *Policy-making in the European Communities*, Wallace, e.a. (eds.), London, 1977, pp. 1-31
- WHITE, E., "In search of the limits to Article 30 of the EEC Treaty", *C.M.L.Rev.* (1989) 235-280
- WHITE, E., "Case 19/84, Pharmon BV v. Hoechst AG", *C.M.L.Rev.* 23 (1986) 719-726
- WHITE, L., "Vertical restraints in antitrust law: a coherent model", *Antitrust Bull.* (1981) 327-345
- YUSUF, A., MONCAYO VON HASE, A., "Intellectual property protection and international trade: exhaustion of rights revisited", *World Competition* 16 (1992) 115-131

TABLE OF CASES OF THE COMMUNITY COURTS

I. COURT OF JUSTICE

Case 7/61, *Commission v. Italy*, Judgment of 19 December 1961, E.C.R. (1961) 633

Joined Cases 56 and 58/64, *Etablissement Consten SARL and Grundig-Verkaufs-GmbH*, Judgment of 13 July 1966, E.C.R. (1966) 299

Case 24/67, *Parke, Davis, & Co v. Probel, Reese Beintema-Interpharm and Centrafarm*, Judgment of 29 February 1968, E.C.R. (1968) 55

Case 40/70, *Sirena v. Eda*, Judgment of 18 February 1971, E.C.R. (1971) 69

Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH*, Judgment of 8 June 1971, E.C.R. (1971) 487

Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, Judgment of 21 February 1973, E.C.R. (1973) 215

Case 6 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Cooperation v. Commission*, Judgment of 6 March 1974, E.C.R. (1974) 223

Case 127/73, *BRT v. SABAM and NV Fonior, (BRT II)*, Judgment of 27 March 1974, E.C.R. (1974) 313

Case 192/73, *Van Zuylen Frères v. Hag AG, (HAG I)*, Judgment of 3 July 1974, E.C.R. (1974) 731

Case 15/74, *Centrafarm BV and Adriaan De Peijper v. Sterling Drug Inc.*, Judgment of 31 October 1974, E.C.R. (1974) 1147

Case 16/74, *Centrafarm BV and Adriaan De Peijper v. Winthrop BV*, Judgment of 31 October 1974, E.C.R. (1974) 1183

Case 26/75, *General Motors Continental NV v. Commission*, Judgment of 13 November 1975, E.C.R. (1975) 1367

Case 51/75, *EMI Records Ltd v. CBS (UK) Ltd*, Judgment of 15 June 1976, E.C.R. (1976) 811

Case 104/75, *De Peijper*, Judgment of 20 May 1976, E.C.R. (1976) 613

Case 119/75, *Terrapin v. Terranova*, Judgment of 22 June 1976, E.C.R. (1976) 1039

Case 26/76, *Metro SB GroBmärkte GmbH & CO. KG v. Commission*, Judgment of 25 October 1977, E.C.R. (1977) 1875

Case 27/76, *United Brands Company and United Brands Continental BV v. Commission*, Judgment of 14 February 1978, E.C.R. (1978) 207

Case 35/76, *Simmenthal SpA v. Italian Minister for Finance*, Judgment of 15 December 1976, E.C.R. (1976) 1871

CASE 53/76, *Procureur de la République, Besançon v. Bouhelier and Others*, Judgment of 3 February 1977, E.C.R. (1977) 197

Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, Judgment of 13 February 1979, E.C.R. (1979) 461

Case 107/76, *Hoffman La Roche v. Centrafarm*, Judgment of 24 April 1977, E.C.R. (1977) 957

CASE 30/77, *Regina v. Pierre Bouchereau*, Judgment of 27 October 1977, E.C.R. (1977) 1999

Case 102/77, *Hoffman La Roche v. Centrafarm*, Judgment of 23 May 1978, E.C.R. (1978) 1139

Case 3/78, *Centrafarm BV v. American Home Products Corporation*, Judgment of 10 October 1978, E.C.R. (1978) 1823

Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v. Commission*, Judgment of 31 May 1979, E.C.R. (1979) 1869

Case 251/78, *Firma Denkavit Futtermittel GmbH v. Minister für Ernährung, Landwirtschaft und Forsten des Landes*, Judgment of 8 November 1979, E.C.R. (1979) 3369

Case 258/78, *Nungesser KG and Kurt Eisele v. Commission, (Maize Seed)*, Judgment of 8 June 1982, E.C.R. (1982) 2015

Case 15/79, *P.B. Groenveld BV v. Produktschap voor Vee en Vlees*, Judgment of 8 November 1979, E.C.R. (1979) 3409

Case 62/79, *Coditel v. Ciné Vog Films (Coditel-I)*, Judgment of 18 March 1980, E.C.R. (1980) 881

Case 31/80, *NV L'Oréal and S.A. L'Oréal v. PVBA De Nieuwe AMCK*, Judgment of 11 December 1980, E.C.R. (1980) 3775

Joined Cases 55 and 57/80, *Musik-Vertrieb Membran GmbH and K-tel International v. GEMA*, Judgment of 20 January 1981, E.C.R. (1981) 147

- Case 58/80, *Dansk Supermarket v. Imerco*, Judgment of 22 January 1981, E.C.R. (1981) 181
- Case 155/80, *Summary proceedings against Sergius Oebel*, Judgment of 14 July 1981, E.C.R. (1981) 1993
- Case 187/80, *Merck & Co Inc v. Stephar BV*, Judgment of 14 July 1981, E.C.R. (1981) 2063
- Case 244/80, *Pasquale Foglia v. Mariella Novello*, Judgment of 16 December 1981, E.C.R. (1981) 3045
- Case 270/80, *Polydor Ltd and RSO Records Inc. v. Harlequin Record Shops Ltd. and Simons Records Ltd.*, Judgment of 9 February 1982, E.C.R. (1982) 329
- Case 1/81, *Pfizer Inc. v. Eurim-Pharm GmbH*, Judgment of 3 December 1981, E.C.R. (1981) 2913
- Joined Cases 141 to 143/81, *Gerrit Holdijk and others*, Judgment of 1 April 1982, E.C.R. (1982) 1299
- Case 144/81, *Keurkoop BV v. Nancy Kean Gifts BV*, Judgment of 14 September 1982, E.C.R. (1982) 2853
- Case 249/81, *Commission v. Ireland*, Judgment of 24 November 1982, E.C.R. (1982) 4005
- Case 283/81, *Cilfit v. Ministerie van Volksgezondheid*, Judgment of 6 October 1982, E.C.R. (1982) 3415
- Case 286/81, *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV*, Judgment of 15 December 1982, E.C.R. (1982) 4575
- Case 322/81, *N.V. Nederlandsche Banden-Industry Michelin v. Commission*, Judgment of 9 November 1983, E.C.R. (1983) 3461
- Case 40/82, *Commission v. United Kingdom (Newcastle disease)*, Judgment of 15 July 1982, E.C.R. (1982) 2793
- Case 172/82, *Syndicat National des Fabricants Raffineurs d'Huile de Graissage and Others v. Groupement d'Intérêt Economique 'Inter-Huiles' and Others*, Judgment of 10 March 1983, E.C.R. (1983) 555
- Joined Cases 177 and 178/82, *Criminal proceedings against Jan van de Haar en Kaveka de Meern BV*, Judgment of 5 April 1984, E.C.R. (1984) 1797
- Case 237/82, *Jongeneel Kaas BV and Others v. State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole*, Judgment of 7 February 1984, E.C.R. (1984) 483

- Case 35/83, *BAT Cigaretten-Fabriken GmbH v. Commission*, Judgment of 30 January 1985, E.C.R. (1985) 363
- Case 72/83, *Campus Oil Ltd v. Minister for Industry and Energy*, Judgment of 10 July 1984, E.C.R. (1984) 2727
- Case 193/83, *Windsurfing International Inc v. Commission*, Judgment of 15 February 1986, E.C.R. (1986) 611
- Case 14/84, *Pharmon v. Hoechst*, Judgment of 9 July 1985, E.C.R. (1985) 2281
- Joined Cases 25 & 26/84, *Ford-Werke AG and Ford Europe Inc. v. Commission*, Judgment of 17 September 1985, E.C.R. (1985) 2725
- Case 75/84, *Metro SB-Großmärkte GmbH & CoKg v. Commission*, Judgment of 22 October 1986, E.C.R. (1986) 3021
- Case 226/84, *British Leyland Public Limited Company v. Commission*, Judgment of 11 November 1986, E.C.R. (1986) 3263
- Case 311/84, *CBEM v. CLT and IPB (Telemarketing)*, Judgment of 3 October 1985, E.C.R. (1985) 3261
- Case 311/85, *Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke overheidssdiensten, (V.V.R.)*, Judgment of 1 October 1987, E.C.R. (1987) 3801
- Case 402/85, *G. Basset v. SACEM*, Judgment of 9 April 1987, E.C.R. (1987) 1763
- Case 434/85, *Allen and Hanburys Ltd v. Generics (UK) Ltd*, Judgment of 3 March 1988, E.C.R. (1988) 1245
- Case C-62/86, *AKZO Chemie BV v. Commission*, Judgment of 3 July 1991, E.C.R. (1991) I-3359
- Case 65/86, *Bayer AG and Maschinenfabrik Hennecke GmbH v. Heinz Süllhöfer*, Judgment of 27 September 1988, E.C.R. (1988) 5249
- Case 158/86, *Warner Brothers Inc and Metronome Video ApS v. Erik Viuff Christiansen*, Judgment of 17 May 1988, E.C.R. (1988) 2605
- Case 247/86, *Société Alsacienne de lorraine de télécommunications et de l'électronique (ALSATEL) v. SA Novasam*, Judgment of 5 October 1988, E.C.R. (1988) 5987
- Case C-270/86, *J. Cholay and Société 'Bizon's Club' v. SACEM*, Judgment of 12 December 1990, E.C.R. (1990) I-4607
- Case 27/87, *Louis Erauw-Jacquery SPRL v. La Hesbignonne SC*, Judgment of 19 April 1988, E.C.R. (1988) 1919

Case 30/87, *Corinne Bodson v. Pompes funèbres des régions libérées SA*, Judgment of 4 May 1988, E.C.R. (1988) 2507

Case 35/87, *Thetford Corporation a.o. v. Fiamma SpA a.o.*, Judgment of 30 June 1988, E.C.R. (1988) 3585

Case 53/87, *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale des usines Renault*, Judgment of 5 October 1988, E.C.R. (1988) 6039

Case 238/87, *AB Volvo v. Erik Veng (UK) Ltd*, Judgment of 5 October 1988, E.C.R. (1988) 6211

Case 314/87, *EMI Electrola v. Patricia Im- und Export*, Judgment of 24 January 1989, E.C.R. (1989) 79

Case 320/87, *Kai Ottung v. Klee & Weilbach A/S and Thomas Schmidt A/S*, Judgment of 12 May 1989, E.C.R. (1989) 1177

Case 395/87, *Ministère Public v. Jean-Louis Tournier*, Judgment of 13 July 1989, E.C.R. (1989) 2521

Joined Cases 110, 241 and 242/88, *François Lucazeau a.o. v. SACEM a.o.*, Judgment of 13 July 1989, E.C.R. (1989) 2811

Case C-10/89, *SA CNL-Sucal NV v. Hag GF AG, (HAG II)*, Judgment of 17 October 1990, E.C.R. (1990) I-3752

Case C-235/89, *Commission v. Italy*, Judgment of 18 February 1992, not yet reported

Case C-361/89, *Criminal proceedings against Di Pinto*, Judgment of 14 March 1991, E.C.R. (1991) I-1189

Case C-367/89, *Aimé Richardt*, Judgment of 4 October 1991, not yet reported

Joined Cases C-1/90 and C-179/90, *Aragonesa*, Judgment of 25 July 1991, not yet reported

Case C-30/90, *Commission v. the United Kingdom*, Judgment of 18 February 1992, not yet reported

Case C-47/90, *Etablissements Delhaize Frères and Compagnie Le Lion SA v. Promalvin SA and AGE Bodegas Unidas SA*, Judgment of 9 June 1992, not yet reported

Case C-72/90, *Asia Motor France v. Commission*, Order of the Court of 23 May 1990, E.C.R. (1990) I-2181

Case C-191/90, *Generics (UK) Ltd and Harris Pharmaceuticals Ltd v. Smith Kline and French Laboratories Ltd*, Judgment of 27 October 1992, not yet reported

Case C-245/91, Criminal proceedings against Odra Schadeverzekeringen NV, Judgment of 17 November 1993, not yet reported

Joined Cases C-267 and 268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard, Judgment of 24 November 1993, not yet reported

Joined Cases C-92/92 and C-326/92, Phil Collins v. Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v. EMI Electrola GmbH, Judgment of 20 October 1993, not yet reported

II. COURT OF FIRST INSTANCE

Case T-30/89, Hilti AG v. Commission, Judgment of 12 December 1991, not yet reported

Case T-51/89, Tetra Pak Rausing SA v. Commission, Judgment of 19 July 1990, E.C.R. (1990) II-309

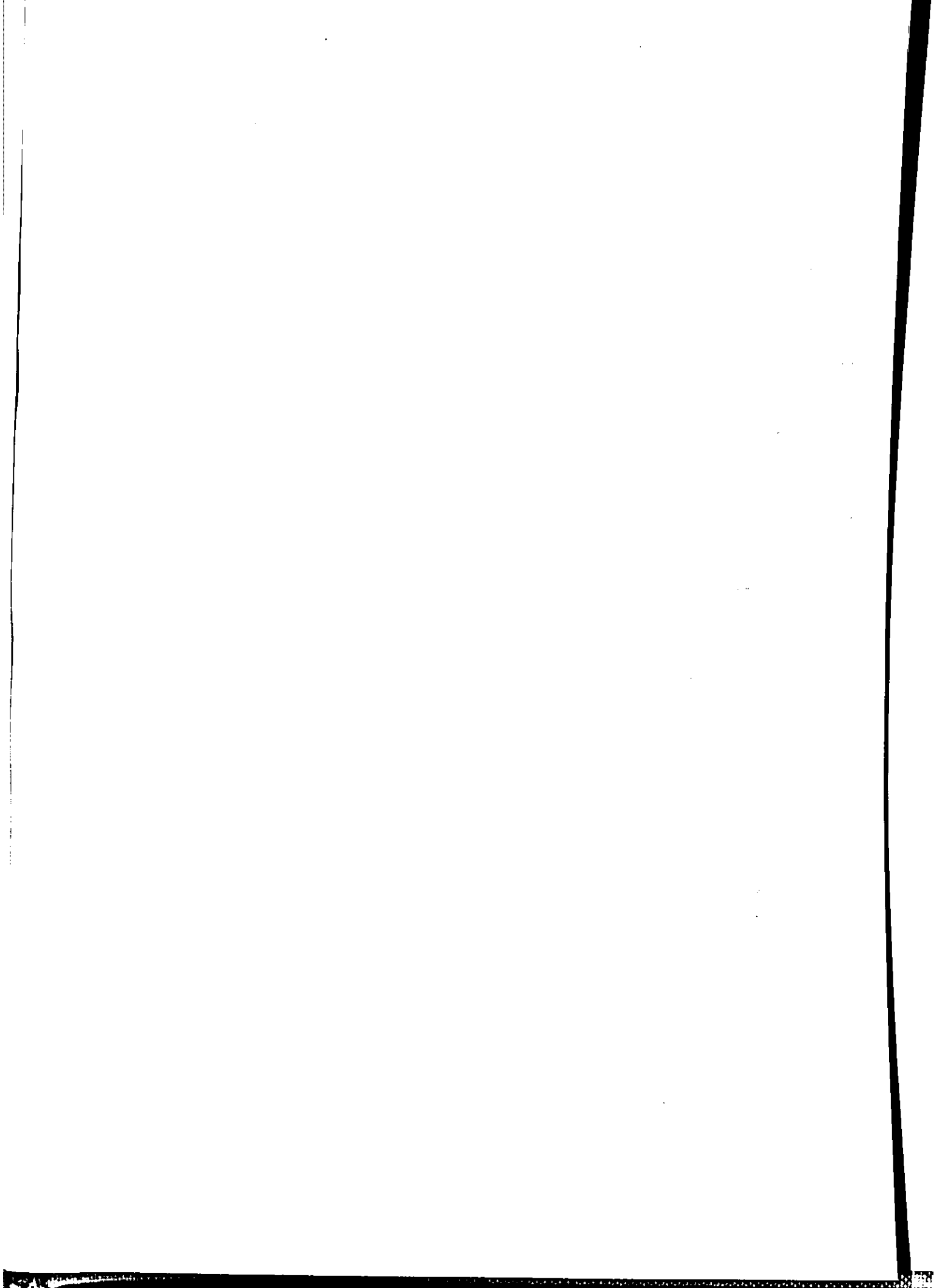
Case T-69/89, Radio Telefis Eireann v. Commission, (RTE/Magill), Judgment of 10 July 1991, not yet reported

Case T-70/89, The British Broadcasting Corporation and BBC Enterprises Limited v. Commission, (BBC/Magill), Judgment of 10 July 1991, not yet reported

Case T-76/89, Independent Television Publications Limited v. Commission, (ITP/Magill), Judgment of 10 July 1991, not yet reported

Case T-7/92, SA Asia Motors France and others v. Commission, Judgment of 29 June 1993, not yet reported

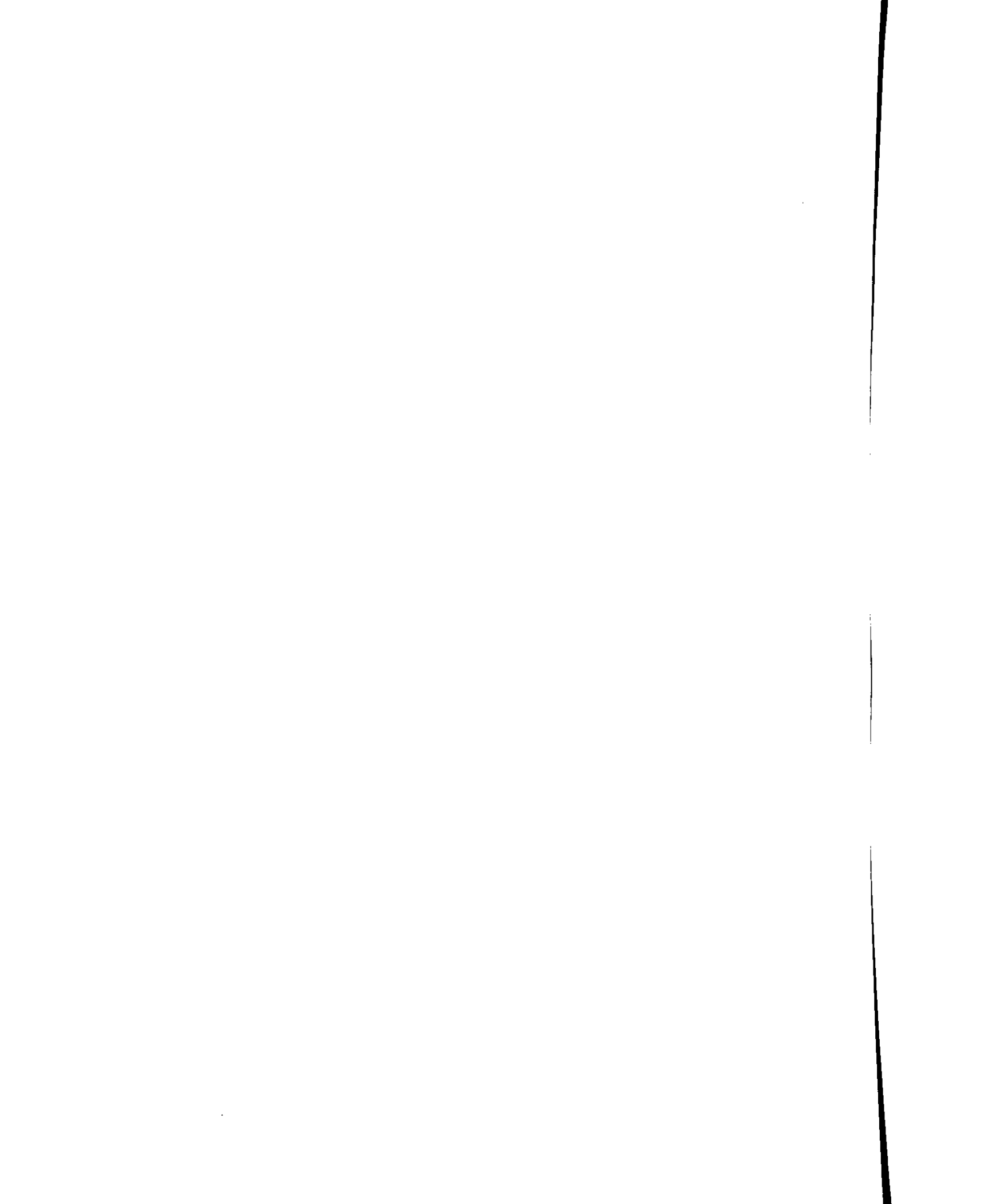
Case T-37/92, BEUC and The National Consumer Council v. Commission, not yet decided, O.J. C 160/14 of 26.6.1992

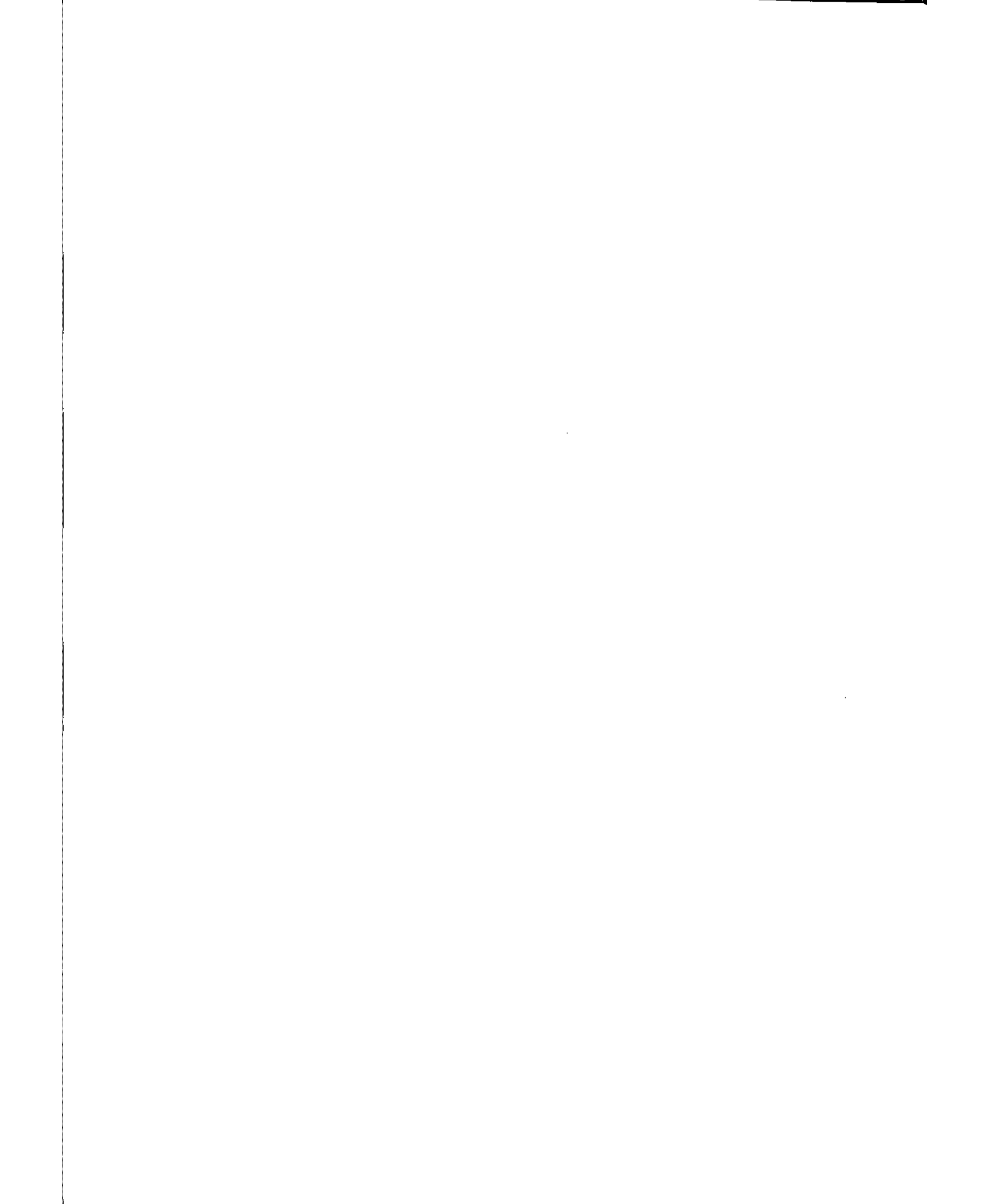


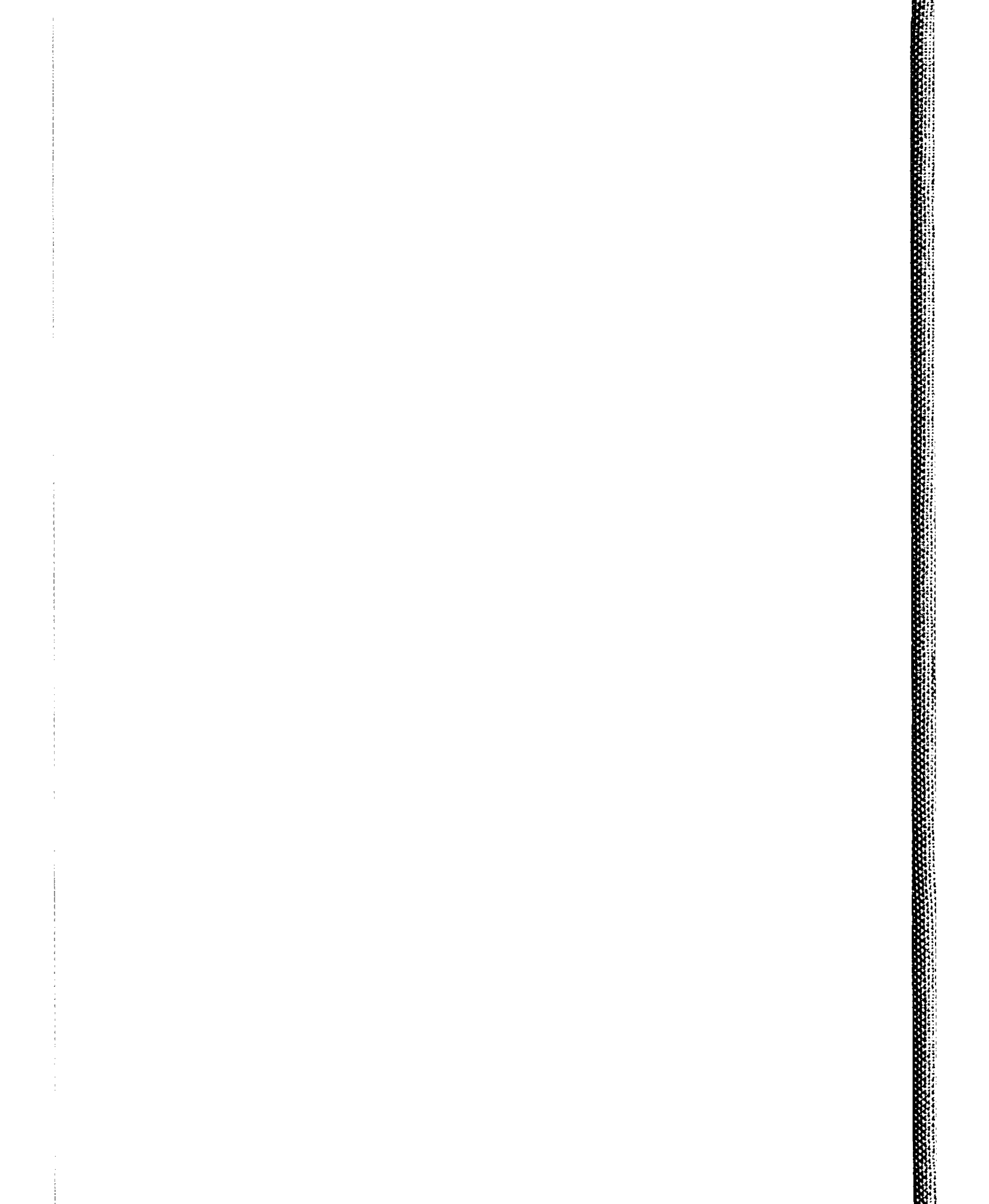
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