EDITORIAL COMMENTS

Two Landmark Decisions

The European Court of Justice handed down in February two of the most significant decisions of the past decade. Although each of the decisions, in *S.A. Brasserie de Haecht* v. *Wilkin-Janssen* (case 48/72) and in *Continental Can* (case 6/72) will be the subject of a detailed case note in a later issue of this *Review*, in view of their importance in the evolution of Community law some initial comments at first sight will not be out of place now. An analysis of these two cases has much of great interest to reveal, not only as to competition policy and law, but as to the rôle and function of the Court itself, and thus the general health of the Community legal system.

The *de Haecht* judgment was in answer to a second reference of questions in the affair from the Commercial Court of Liège. In the earlier reference, reported as case 23/67, the Court had found that the "tied-house" clause in the brewery contract signed by the spouses Wilkin-Janssen with the de Haecht company could be contrary to Article 85 of the Treaty of Rome if it produced an impedance in the free flow of goods between member States. Subsequently, the company filed with the Commission a model contract in the same terms as the one entered into with the Wilkin-Janssens and received from the Commission an acknowledgment without comment. The company then submitted to the Commercial Court that, as the model contract had been filed pursuant to Article 85 (3) and in accordance with the terms of Article 9, paragraph 3, of Regulation No. 17, it was provisionally valid. The European Court has held now that (1) an acknowledgment of receipt of a model contract and of a request for exemption does *not* constitute the commencement of proceedings for exemption under Regulation No. 17; (2) the notification to the Commission of a "new" agreement (*i.e.*, one concluded after the effective date of Regulation No. 17 March 13, 1962) does *not* deprive national courts of the jurisdiction to hold the agreement invalid under Article 85; and (3) if an agreement is held to violate Article 85, then the nullity provisions of Article 85 (2) are to be construed as having retroactive effect. These findings, in substantial respects contrary to what had been generally assumed to be the law prior to this decision, raise very important questions over the advantages and disadvantages of notification of "doubtful" agreements, and over the scope and effect of the doctrine of "provisional validity." In particular, the Court's determination that the invalidity of agreements takes effect retroactively goes further than the position taken earlier by the Commission and will need subsequent clarification at an early date in view of the commercial uncertainties it seems most likely to produce.

In the *Continental Can* case the European Court took full advantage of a rare opportunity to elaborate upon the potentialities of Article 86

of the Treaty of Rome and to provide authoritative guidance to the Commission on the connection between mergers, acquisitions (and probably joint ventures) and the abuse of "dominant position" situations. The Court reversed the Commission's decision to the effect that the acquisition by the Continental Can company, through its European subsidiary, of a Dutch packaging company constituted an abuse of a "dominant position" under Article 86. The reversal—itself of significance to those who are watchful of the rule of law in the Community—was based upon a determination that the Commission had not established adequate proof as to which sections of the market had been abused to the detriment of consumers as a result of the takeovers in the case. The Court's interpretation of Article 86, and its view of the complementarity between that article and Article 85, in rejecting the arguments advanced by Continental Can, are, however, of crucial importance as a new point of departure for the development of Community law in this area. The Court's views on the use of Article 86 as an extension of Article 85 in the prevention or elimination of distortion of competition well deserve the compliment accorded by the London *Times* as to the "depth and quality" of the judgment, although they are most certainly not free from inconsistency or ambiguity. Perhaps above all, the Court's attitude to the language of the Treaty and its whole approach to the purpose of judicial interpretation will be of the most abiding interest, especially in those member States whose tradition in this respect is more narrowly interpreted. The *Continental Can* judgment raises the whole question of the future of the law making capacity of the Court.