

In *Technique Minière*¹³⁵, the Court admitted that the object or effect of an exclusive dealing agreement could only be determined in its economic, and not merely legal, context and adopted the view that restrictions without which a transaction would not be viable do not, in themselves, restrict competition.

The *Nungesser* case added two integrationist factors, however. An exclusive dealing restriction could escape prohibition if it were true that without some protection against competition, no one might have been willing to take the risk of entering the market, especially of entering the market of **another Member State**. That is, the defence is especially available if the anticompetitive activity or restraint is necessary to link formerly separate markets. The concern with integration qualifies the rule of reason in this important respect.

The U.S. courts in *Sylvania* allowed absolute territorial restrictions because without them others would free-ride on the new entrant's efforts.¹³⁶ The EU has not gone this far.¹³⁷ The *Nungesser* court stated that absolute territorial protection was too much and, thus, remained consistent with its original prohibition of absolute territorial restraints in *Consten*. The problem for Europe is not in the **exclusivity** of the restraints, but in their **territoriality**.

The most that can be expected to develop, therefore, is a *sui generis* EU rule of reason that accommodates, *inter alia*, the objective of market integration.

¹³⁵*Société Technique Minière v. Maschinenbau Ulm*, 5 *Common Market Law Review* (1966), 357.

¹³⁶See also Sharma, Thomson and Christie, *op.cit.*, 1994.

¹³⁷B. Hawk, *op.cit.*, pp. 74-5:

EEU law stands in stark contrast. There has always been and continues to be a *per se* -like rule with respect to absolute territorial restrictions along member state boundaries... One should not expect that the prevailing economic doctrine in the U.S. will bring about a volte face in U.S. case law. The free rider rationale does not have the same influence in the EEU, at least where parallel imports are concerned.

Whish, *op.cit.*, p. 29:

some cases contain a hint of a partial rule of reason, but subject to the overriding issue of market integration... If there is a rule of reason in EEU law, it is of limited application, for it is displaced where an agreement has the effect of retarding the integration of the common market.