OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 27 November 1986

My Lords,

This appears to be the first case before the Court concerning the application of the competition rules of the EEC Treaty to trade fairs.

Ancides (Associazione nazionale commercianti internazionali dentali e sanitari) asks the Court, pursuant to Article 173 of the Treaty, to annul Commission Decision 84/588 (Official Journal 1984, L 322, p. 10), a decision which renews until 31 December 1993 an exemption under Article 85(3) which was originally conferred in 1975 on UNIDI (Unione nazionale industrie dentarie italiane) in respect of the latter's rules governing a periodic trade fair called 'Expo Dental'.

Ancides is an Italian association set up in 1958 of importers, wholesalers and distributors of dental equipment, much, if not all, of which is made outside Italy; UNIDI is an Italian association comprising virtually all Italian manufacturers of dental equipment. 'Dental equipment' in these proceedings means equipment for dentists and not, for example, toothbrushes and toothpastes.

The relevant facts can be briefly summarized. Since 1969, UNIDI has been organizing Expo Dentals in various Italian cities. In 1973, Unidi notified its rules governing participation in Expo Dental to the Commission and applied for negative clearance or an exemption under Article 85(3). Those rules limited what might be exhibited at Expo Dental exhibitions, what business might be conducted thereat and imposed restrictions upon exhibitors from taking part in other defined exhibitions as well as conferring a discretion on the organizing committee to refuse admission to would-be exhibitors.

Those rules were modified after notification to the Commission and before the Commission's decision so as to provide that the ban on participating in competing exhibitions, total in the original version of the rules, should only be valid for half the period of time between successive Expo Dentals (at that time held approximately every 18 months).

The Commission apparently received no spontaneous comments from third parties concerning the 1973 notification (last paragraph of Section I 5 of the 1975 decision). However, it also appears that Ancides' views were sought informally by Commission officials, and were favourable to UNIDI since, at that time, Ancides was working closely with UNIDI in the preparation of Expo Dentals, although it is agreed that it was UNIDI which was ultimately in charge.

In July 1975, the Commission published a decision (the '1975 decision' (Official Journal 1975, L 228, p. 17)). The Commission found that the rules were clearly capable of prejudicing the freedom of trade between Member States to such an extent that the attainment of a single market between the Member States might be jeopardized. It refused the request for negative clearance but granted an exemption to the Expo Dental rules, the exemption to expire on 31 December 1983. Article 2 of the decision provided that UNIDI was to inform the Commission of any refusal to admit an exhibitor to any Expo Dental.

Since then, the relationship between Ancides and UNIDI has come under strain and various attempts to regulate matters by agreement came to nothing. On the basis of the information before the Court, Ancides seems to have become stronger as imports of foreign dental equipment into Italy have increased whilst UNIDI has become more defensive of Italian manufacturers' interests. In particular, UNIDI was responsible for an advertising campaign on behalf of Italian manufacturers called 'sorridi italiano' (Smile Italian). This seems to have been a factor in inducing Ancides to break with UNIDI following the 1983 Expo Dental and to concentrate on organizing its own exhibitions.

It is for this reason, when, in 1984, UNIDI applied to have the 1975 decision renewed and the Commission published a notice in the *Official Journal* (Official Journal 1984, C 130, p. 3) in accordance with Article 19 (3) of Regulation No 17 (Official Journal, English Special Edition 1959-62, p. 87), that Ancides responded in writing to the Commission saying that the exemption should not be renewed and giving detailed reasons. The Commission obtained UNIDI's views on the objections expressed by Ancides and, finding them persuasive, adopted the contested decision renewing the exemption.

There are two relevant differences between the rules notified in 1973 and the rules granted exemption in 1984. First, Expo Dentals are now held annually rather than every 18 months. The period prior to Expo Dentals during which exhibitors are prohibited from participating in competing trade fairs has been reduced correspondingly from nine months to six, that is, half the interval between Expo Dentals. Second, exhibitors refused admission to or expelled from Expo Dentals may appeal as of right to an arbitration board. This appeal procedure was introduced at the Commission's request (paragraphs (4) and (6) of the contested decision).

In seeking the annulment of the contested decision, Ancides argues that the Commission infringed Ancides' rights of defence by breaching Article 19 of Regulation No 17/62 and Articles 1, 5 and 7 of Regulation No 99/63 (Official Journal, English Special Edition 1963-64, p. 47) and that it misapplied Articles 85 and 86 of the Treaty. In this connection, Ancides considers that the Commission has wrongly assessed the importance of both the innovations in the new Expo Dental rules.

The Commission accepts that the application is admissible in so far as it concerns the rights of Ancides as an association but, rightly in my view, as Ancides itself accepts, contends that Ancides cannot raise issues which are the concern only of its constituent members.

As to procedure, Ancides argues that the Commission did not carry out a sufficiently detailed examination of the new circumstances to which its attention should have been alerted by Ancides' letter in response to the Article 19 notice, and in particular did not afford a hearing to Ancides or its members. Ancides quotes the following paragraph from the judgment in Joined Cases 100 to 103/80 *Musique diffusion française* [1983] ECR 1825 (the 'Pioneer' case):

'As the Court recalled in its judgment of 13 February 1979 in Case 85/76 *Hoffmann La Roche* [1979] ECR 461, the abovementioned provisions', meaning Article 19 (1) and (2) of Regulation No 17/62 and Article 4 of Regulation No 99/63, 'are an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, even those of an administrative nature, and lays down in particular that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty'.

However, this is clearly not directly relevant since the paragraph quoted from the 'Pioneer' case is referring to the position of an undertaking against whom the Commission proposes to take an unfavourable decision.

Article 19 of Regulation No 17/62 provides as follows:

'*Hearing of the parties and of third persons*

1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16 the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show sufficient interest, be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 2 or to take a decision in application of Article 85 (3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within the time-limit which it shall fix, being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

Regulation No 99/63, the Commission regulation dealing with the hearings provided for in Article 19 of Regulation No 17/62, provides as follows:

'*Article 4*

The Commission shall, in its decisions, deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

Article 5

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 19 (2) of Regulation No 17/62, the Commission shall afford them the opportunity of making known their views in writing within such time-limit as it shall fix.

Article 7

1. The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment.

2. The Commission may likewise afford to any other person the opportunity of orally expressing his views.'

The Commission's reply is, essentially, that it complied with the requirement imposed by Article 19 (3) to publish a notice giving the grounds on which it proposed to grant an exemption and took into account Ancides' comments, although those comments were refuted to its satisfaction by UNIDI and therefore did not affect the outcome. Ancides did not ask for a hearing; in any case it was not entitled to one as of right. Both Article 19 of Regulation No 17/62 and Article 7 of Regulation No 99/63 make a distinction between the undertakings whose agreements or conduct is under investigation and other concerned parties. Only the former have a right to be heard. The Commission has a discretion whether to hear the latter category. Ancides was given the opportunity to put its views and did so. There was therefore no breach of those articles or of any other of the articles of Regulation No 99/63.

Although there is no evidence — either way — as to whether the Commission investigated Ancides' allegations in depth, in my view Ancides has not established that the Commission was in breach of these rules. The Commission published the requisite notice, received and considered the written objections and was not asked, nor required *proprio motu* to provide, for oral representations to be made.

As to the substance, the gist of Ancides' claim is that the Commission's exemption gives UNIDI an artificial advantage in the relevant market (which is the market for dental equipment trade fairs, as opposed to that for dental equipment) which amounts to a dominant position. UNIDI itself interprets the exemption as a 'mandate' as is shown by copies of advertising material annexed to Ancides' application. Ancides asserts that every operator in the dental equipment sector is obliged to participate in UNIDI's Expo Dental. As the Commission points out, there is some inconsistency in the position Ancides takes. In arguing that the Commission should have regarded the schism between Unidi and Ancides as of importance, Ancides draws attention to the fact that its own position on the market now allows it to hold competing trade fairs, which rather weakens the argument that it is impossible for it and its members to survive without participating in Expo Dentals and, therefore, that UNIDI has a dominant position. By Ancides' own admission, the 1984 Expo Dental was not attended by large numbers of Ancides' members who preferred to participate in an exhibition organized by Ancides to celebrate its 25th anniversary.

On the other hand, it does seem likely that the granting of the exemption will give UNIDI more power than market forces alone would have given it. UNIDI's rules now have a privileged status and participants may well be dissuaded from

abandoning Expo Dental. However, as the Commission observes, even on the assumption that the exemption confers a dominant position on UNIDI, that does not of itself give Ancides a cause of action. Article 86 prohibits abuses of a dominant position and not the mere holding of a dominant position. Ancides' action is not brought against the Commission under Article 175 for failure to act against alleged abuse of a dominant position, nor has Ancides made a complaint to the Commission alleging such abuse. I therefore consider that the question whether there has been an abuse of a dominant position does not directly arise, though it seems unlikely that UNIDI has a dominant position, given the evidence of Ancides' ability to hold a competing exhibition in the period immediately before an Expo Dental and the strong position on the Italian market of its members.

The question in the case is thus whether the arguments raised by Ancides concerning the Commission's assessment of competition in the relevant market and the inferences it drew from that assessment disclose such manifest error, misdirection or unreasonableness on the Commission's part that the decision must be annulled.

There are three main arguments.

The first concerns the interval between Expo Dentals. Ancides argues that it is one thing to have a ban on participating in competing exhibitions for a period of nine months before an Expo Dental held every 18 months; it is another for that ban to be of six months if the Expo Dental is held annually, particularly if it is henceforth to be held every year in June and in Milan. Obviously, if the exhibition is held in the same month of each year, the ban will also operate on the same months in every year, which is not the case if the exhibition is to be held every 18 months. However, the Commission replies that there was nothing in the Expo Dental rules requiring the exhibition always to be held in June; there was no rule that the exhibition should in future always be held in Milan, but only a subsequent declaration by the members that they were favourable to the idea of fixing Milan as the site of the exhibition. In fact, it emerged at the hearing that the 1986 Expo Dental was held at the end of September in Genoa. In consequence, Ancides seems to place less reliance on this part of its case. Nevertheless, the question still remains whether a ban of six months' duration in every twelve, as opposed to one of nine months in every eighteen, is likely to operate so harshly or unfairly that the Commission's decision cannot be allowed to stand.

The contested decision states in paragraph 10 that

'the requirements of Article 85(3) continue to be satisfied for the same reasons as were given in the original decision. The Expo Dental rules cause dental equipment suppliers to concentrate their exhibition activity on this particular event where virtually all the dental products available on the Italian market at any one time are on show'.

The reasons given in the 1975 decision on this point were as follows.

The concentration of exhibitions 'promotes the marketing of products in that, nine months out of eighteen, the costs borne by exhibitors are reduced and consequently the cost price of their products, while for the other nine months they are free to exhibit their products as they wish' (III 2(b));

'Manufacturers and distributors of dental products have a reasonable period when they are not required to bear the cost of taking part in other exhibitions and when they are able to concentrate on Expo Dental' (III 4);

'Organizers of exhibitions other than Expo Dental can, during nine months out of every eighteen, organize exhibitions at which any interested party can exhibit and during the other months they are free to hold exhibitions with the participation of firms who do not take part in Expo Dental... With regard to competition between manufacturers and distributors of dental products, participation in specialized exhibitions is... only one of the various methods of marketing. The fact that during nine months out of every eighteen they are obliged to adopt other methods does not result in the elimination of competition between them.' (III 5).

Although I thought initially that there was some force in Ancides' argument that, assuming that the exhibition was to be held in June every year, the length of the summer holiday period in Italy is such that competitors of UNIDI would realistically only have three months in which to hold their own exhibition, once it is shown that it is by no means certain that Expo Dental exhibitions will always be held in June and always in Milan, Ancides has not established that it was inappropriate for the Commission to apply the reasoning contained in the 1975 decision to the interval between Expo Dentals, which though reduced from nine months to six months is in any event proportionately the same if Expo Dentals are held every twelve rather than every eighteen months.

Ancides' second line of attack concerns the arbitration panel for excluded exhibitors. According to Ancides, the arbitration panel is of minimal relevance but its form rather than its likely effect has beguiled the Commission into omitting to examine whether the allegedly pro-competitive effects of the Unidi rules really exist.

At the hearing, Ancides produced documents relating to the attempted exclusion of Ancides from the 1985 and 1986 Expo Dentals and of one of its members from the 1986 Expo Dental and the subsequent litigation between that company and Unidi. It seems that action by Unidi was taken so late that there was no time either to convene the arbitration panel or for interim relief to be obtained from the Italian courts, apparently under Article 700 of the Italian Civil Procedure Code. The Court allowed Ancides to lodge these documents and agreed to consider them *de bene esse*. The Commission raised no objection to their being considered by the Court, but argued that they were of no value in deciding whether the contested decision was vitiated by a failure to assess matters as they stood when exemption was being considered.

Those documents do perhaps reveal an unsatisfactory way of dealing with Ancides' applications. They do not, however, in my view show that the Commission should in 1984 have realized that the arbitration panel (which the Commission itself had proposed) would be, or that it is in fact, a mere façade. It was reasonable for the Commission, at that time, to regard the creation of the right to appeal against exclusion to an arbitral panel as a distinct improvement to the UNIDI rules.

It does not seem to me that Ancides, as part of its application, can rely on the fact that UNIDI promotes the interests of its Italian members at the expense of Ancides' non-Italian members so long as competitive exhibitions can be held by Ancides. Ancides is free to promote the interests of its own members even if the rules as to not competing at other fairs do impose on it restrictions. Nor does the fact that Ancides and UNIDI were no longer on good terms at the time of the contested decision vitiate that decision, since even at the time of the 1975 decision UNIDI was primarily in charge.

As to the third argument, that conditions in dental trade fairs had changed so much between 1975 and 1984 that the earlier reasoning, incorporated by reference in the contested decision, is no longer applicable, Ancides is, as the Commission argues, in the same sort of dilemma as when it argues that UNIDI has a dominant position. It seems to follow from Ancides' observation that other promotional techniques than the large trade fair are increasing in importance (such as 'open houses' by producers and exhibitions at specialist congresses) and that the practical importance of the exemption given to the UNIDI rules is decreasing. Manufacturers and distributors of dental equipment will have to weigh up (a) the relative advantages of total freedom to exhibit how, when and where they like outside Expo Dental and (b) limited freedom so as to be eligible to exhibit at Expo Dental. One of the factors in that assessment will be the attractiveness of competing events managed by Ancides and by other bodies in the light of new advancements in science and dental techniques.

The Commission's duty when considering whether to renew the exemption was to balance, on the one hand, the requirement that the possibilities for competition should not be stifled against, on the other hand, the restrictions necessary to the success of a comprehensive trade fair such as Expo Dental with the apparent advantages which it entails. The Commission finds on all the facts that these restrictions are justified because of the benefits obtained from a large-scale, concentrated, periodic exhibition such as that organized by UNIDI. Ancides has not demonstrated, in these proceedings, that the Commission was wrong in law, or came to a decision to which no reasonable body could come, in considering the restrictions as appropriate to achieve the claimed benefits; that, subject to misdirection, illegality or unreasonableness, is essentially a matter for the Commission

and, in my opinion, there was material upon which it could reach the conclusion which it did reach. Moreover, the existence and proliferation of other types of promotional event, referred to in Ancides' letter of 7 June 1984 and confirmed in UNIDI's letter of 26 July 1984 to the Commission in which UNIDI attempted to meet Ancides' criticisms, could reasonably have been taken by the Commission as an indication that competition was not being stifled by the privileged status of the Expo Dental rules. The allegations made by Ancides as to Unidi's conduct of the Expo Dental exhibitions subject to the 1984 decision can of course be raised with the Commission which, under Article 8(3) of Regulation No 17/62, may revoke or amend its decision, or prohibit specified acts, if there is a breach of the obligation to notify the Commission of any refusal to admit or any decision to expel an exhibitor from an exhibition, or if there is a change in the facts basic to the decision, or if the exemption is being abused.

I consider, however, that the present application should be dismissed and that the applicant should be ordered to pay the Commission's costs.