

The "agreements" within the reach of article 1 GWB cannot be put on the same level as contracts within the meaning of the theory of tort and contract liability, because the will there required to produce legally binding effect cannot be frustrated in this case, since article 1 GWB, by providing for ineffectiveness as its legal consequence, does not make it at all possible for agreements to be legally binding if they are not legalized by articles 2 through 8 GWB and if they fulfill the other conditions of article 1 GWB. Were the will required to produce legally binding effect necessary for the application of article 1 GWB, this provision would only reach those—small—enterprises and owners or employees of enterprises who do not know that arrangements within the reach of article 1 GWB are ineffective as a matter of law. Such an interpretation would contradict the meaning and purpose of the prohibition principle anchored in article 1, considered together with paragraph 1, section 1 of article 38 GWB, and would lead to intolerable consequences.

A "moral" obligation, that is to say, the awareness that non-compliance with an explicitly or implicitly arrived-at agreement would, at the least, lead to loss of esteem or credibility in future business negotiations, is sufficient for the applicability of article 1 GWB. In the present case, such an obligation results when esteem and credibility are taken into consideration, because the enterprises in question not only are already competitors but also have supplier and customer relationships which necessitate a certain amount of confidence.

The agreement within the meaning of article 1 GWB which the enterprises in question have thus executed has a "common purpose" as required by article 1 GWB. The enterprises in question, which have relationship similar to those of a corporate group, thereby achieve the objective of uniform action designed to provide the largest possible gain for all participants. They thereby restrain competition among themselves, because the arrangement requires them to make a uniform, simultaneous increase of the level of prices, prevents them from holding to the former prices or from increasing prices by a lesser percentage, prevents them from using the former—8% lower—level of prices, at least as a starting point in negotiations with customers, and, consequently, inhibits their freedom of action to compete. Finally, this restraint on competition is susceptible of influencing market conditions for aniline dyes, because an important phase of market behavior, price formation, will be temporarily modified to the detriment of at least the large majority of customers. The agreement is therefore ineffective under article 1 GWB.

2. The defendants have disregarded the ineffectiveness of the agreement (paragraph 1, section 1 of article 38 GWB) by informing their customers, either directly or through individual intermediaries, about the agreed increase of the price level and by taking organized measures necessary [to carry it out], and, consequently, have contributed to the observance of the arrangement concerning prices.

3. The defendants have wilfully performed the acts described in paragraph 1, section 1 of article 38, considered together with article 1 GWB, inasmuch as they, or rather the individuals acting for them, as well as -----, ⁷ the member of the Board of the defendant listed under 6, have been aware of all of the exact circumstances which pertain to the factual situation defined by law and described in said provisions: they were aware that their acceptance of the proposition made by ----- served a common purpose, that they thereby restricted their freedom of economic action as to competition, that this way of proceeding would influence conditions on the aniline dye market, particularly by worsening the customers' position; such price agreements are ineffective (this [has been the case] at least since the findings of the Federal Cartel Office and the EEC Commission in 1965), and, once the price increase was announced to customers, the price agreement was to be performed.

Although it might be questioned whether the defendants, or rather the individuals acting for them, including the Board member, Ohliger, considered the agreement which was arrived at as an "agreement" within the meaning of article 1 GWB and, therefore, whether they considered their action to be incompatible with the law concerning restrictions on competition, the mistake of law which may be attributed to them in this respect does not exclude the inference of a violation of the provisions of article 12 OWiG, because the defendants, or rather the persons acting for them, would have recognized the irregularity of their behavior if they had been reasonably perceptive; therefore, they caused

⁷ Presumably Mr. Ohliger; see the following paragraph.