

Fordham International Law Journal

Volume 8, Issue 1

1984

Article 1

The Application of Article 85 of the EEC Treaty to Exclusive Distribution Agreements

Helmuth R.B. Schroter*

*

Copyright ©1984 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Application of Article 85 of the EEC Treaty to Exclusive Distribution Agreements

Helmuth R.B. Schroter

Abstract

Compares the application of EEC competition laws and U.S. antitrust laws to exclusive distribution agreements, and noting an interesting development in the two systems. Article analyzes *Continental T.V., Inc. v. GTE Sylvania Inc.* and concludes it introduced the rule of reason to the U.S. approach for analyzing all nonprice vertical restrictions, but did not provide concrete guidelines for its application. The EEC approach, on the other hand, is designed to promote the goal of Common Market integration by preventing the insulation of national markets. Thus the Commission and the Court of Justice have developed a favorable attitude towards territorial and exclusive supply restrictions, but are stricter with regard to price and customer restrictions.

THE APPLICATION OF ARTICLE 85 OF THE EEC TREATY TO EXCLUSIVE DISTRIBUTION AGREEMENTS

Helmuth R.B. Schröter *

INTRODUCTION

The application of anticartel provisions to distribution agreements constitutes a problem of acute interest for lawyers and businessmen on both sides of the Atlantic. In the United States, the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*¹ has put an end to the "Schwinn doctrine,"² which was in force until 1977. According to this doctrine, most of the vertical restraints imposed on dealers (particularly territorial, customer, and price restrictions), were considered to be per se illegal under the antitrust laws.³ *Sylvania* has established a flexible rule of reason approach for all nonprice vertical restrictions but has not provided concrete guidelines for the application of the new doctrine.⁴ It has given rise to a broad and still ongoing discussion on the economic advantages and disadvantages of vertical restraints.⁵ Several writers, heavily in-

* Head of Legal Questions and Regulations Division, Directorate-General for Competition, Commission of the European Communities, Brussels. A version of this article will appear in 1984 FORDHAM CORPORATE LAW INSTITUTE (B. Hawk ed. 1985), published by Matthew Bender Company.

1. 433 U.S. 36 (1977).

2. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

3. *Id.* at 381.

4. 433 U.S. at 49-50 n.15.

5. See, e.g., Altschuler, *Sylvania, vertical restraints and dual distribution*, 25 ANTITRUST BULL. 1 (1980); Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and Sylvania*, 64 IOWA L. REV. 461 (1979); Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171; Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979 (1977); Louis, *Vertical Distribution Restraints after Sylvania: A Postscript and Comment*, 76 MICH. L. REV. 265 (1977); Pitofsky, *The Sylvania Case: Antitrust Law Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977); Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979); Steuner, *Beyond Sylvania: Reason Returns to Vertical Restraints*, 47 ANTITRUST L.J. 1007 (1978); Note, *Advent of the New Industrial State: Continental T.V. v. GTE Sylvania*, 14 CAL. W.L. REV. 632 (1979); Comment, *A Proposed Rule of Reason, Analysis for Restrictions on Distribution*, 47 FORDHAM L. REV. 527 (1979); Comment, *Franchising and Vertical Customer-Territorial Re-*

fluenced by the "Chicago school,"⁶ have gone so far as to condone all kinds of dealer limitations initiated by the manufacturer, and even to propose the abolition of the per se rule for vertical price restrictions.⁷

In the European Economic Community⁸ (EEC or Community), the treatment of distribution agreements under paragraphs 1 and 3 of article 85 of the Treaty establishing the European Economic Community (EEC Treaty or Treaty) constitutes, now as ever, one of the principal themes of competition policy.⁹ Many of the individual decisions on cartels and

strictions: GTE, Sylvania and the Demise of the Social Goals of the Sherman Act, 9 TEX. TECH. L. REV. 267 (1977).

6. See Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

7. Cf. R. BORK, *THE ANTITRUST PARADOX* 288 (1978); Posner, *supra* note 5, at 17; Bork, *supra* note 5, at 187; Donald F. Turner, *Les Restrictions Verticales dans la Distribution aux Etats-Unis*, Speech delivered at an international seminar on distribution problems, jointly organized by the French Government and the Commission, in Strasbourg (December 5-6, 1983), reprinted in *REVUE DE LA CONCURRENCE ET DE LA CONSOMMATION*, 21, 25-27, Numero Special (Supp. No. 25 1984).

8. Italy, France, West Germany, Belgium, Luxembourg and the Netherlands formed the EEC by signing the Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cd. 5179-II) (official English Translation), 298 U.N.T.S. 3 (unofficial English Translation) [hereinafter cited as EEC Treaty]. Its principal goal is to promote the free movement of goods within the Common Market. *Id.* arts. 2-3.

9. EEC Treaty, *supra* note 8, art. 85. Article 85 states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market and in particular which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment development;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

abuses of dominant positions that the Commission of the European Communities¹⁰ (Commission) has taken during the last five years deal with exclusive distributorships, selective distribution, or a combination of both.¹¹ Furthermore, the Commission¹² has recently published Regulations 1983/83¹³ and

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products.

Id.

10. The Commission is established under article 155 of the EEC Treaty. *Id.* art. 155. The Commission is "the administrative or the executive arm" of the EEC. B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 412 (1979 & Supp. 1983).

11. See *Polistil/Arbois*, 27 O.J. EUR. COMM. (No. L 136) 9 (1984), 3 COMMON MKT. REP. (CCH) ¶ 10,587; *IBM personal computer*, 27 O.J. EUR. COMM. (No. L 118) 24 (1984), 3 COMMON MKT. REP. (CCH) ¶ 10,585; *Saba II*, 26 O.J. EUR. COMM. (No. L 376) 41 (1983), 3 COMMON MKT. REP. (CCH) ¶ 10,568; *Murat*, 26 O.J. EUR. COMM. (No. L 348) 20 (1983), 3 COMMON MKT. REP. (CCH) ¶ 10,544; *Ford Werke*, 26 O.J. EUR. COMM. (No. L 327) 31 (1983), 3 COMMON MKT. REP. (CCH) ¶ 10,539 (final decision); *Cafeteros de Colombia*, 25 O.J. EUR. COMM. (No. L 360) 31 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,448; *National Panasonic*, 25 O.J. EUR. COMM. (No. L 354) 28 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,441; *Ford Werke*, 25 O.J. EUR. COMM. (No. L 256) 20 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,480 (interim measures); *AEG-Telefunken*, 25 O.J. EUR. COMM. (No. L 117) 15 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,366; *Hasselblad*, 25 O.J. EUR. COMM. (No. L 161) 18 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,401; *Moët & Chandon*, 25 O.J. EUR. COMM. (No. L 94) 7 (1982), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,352; *Sopelém-Vickers II*, 24 O.J. EUR. COMM. (No. L 391) 1 (1981), 3 COMMON MKT. REP. (CCH) ¶ 10,393; *Hennessy-Henkell*, 23 O.J. EUR. COMM. (No. L 383) 11 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,283; *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) 16 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,277; *Distillers Co. Ltd.-Victuallers*, 23 O.J. EUR. COMM. (No. L 233) 43 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,253; *Krups*, 23 O.J. EUR. COMM. (No. L 120) 26 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,223; *Pioneer Hi-Fi Equipment*, 23 O.J. EUR. COMM. (No. L 60) 21 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,185; *BP Kemi/DDSF*, 22 O.J. EUR. COMM. (No. L 286) 32 (1979), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,165; *Kawasaki*, 22 O.J. EUR. COMM. (No. L 16) 9 (1979), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,097.

12. The Commission has the authority to promulgate regulations. EEC Treaty, *supra* note 8, art. 169.

13. 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 1 COMMON MKT. REP. (CCH) ¶ 2730 (corrigenda at 26 O.J. EUR. COMM. (No. L 281) 24 (1983)).

1984/83¹⁴ on the application of article 85(3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements and has also published a comprehensive Notice¹⁵ aimed at facilitating the understanding of these Regulations by undertakings and law courts of the member states.¹⁶ Another block exemption regulation¹⁷ concerning the distribution of automobiles and their spare parts is likely to be adopted in the near future.¹⁸ The Court of Justice of the European Communities¹⁹ (Court) for its part, has handed down approximately thirty rulings on various legal aspects of the distribution problem.²⁰ Nevertheless, the issue is far from being de-

14. 26 O.J. EUR. COMM. (No. L 173) 5 (1983), 1 COMMON MKT. REP. (CCH) ¶ 2733 (corrigenda at 26 O.J. EUR. COMM. (No. L 281) 24-25 (1983)).

15. The Commission from time to time may issue Notices giving guidance as to its view of the law in the Community. C.S. KERSE, *EEC ANTITRUST PROCEDURE* 3 (1981).

16. Commission Notice Concerning Commission Regulations (EEC) No. 1983/83 and No. (EEC) 1984/83 of 22 June 1983 on the Application of Article 85(3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements, 26 O.J. EUR. COMM. (No. C 355) 7 (1983), 3 COMMON MKT. REP. (CCH) ¶ 10,548, *amended by* 27 O.J. EUR. COMM. (No. C 101) 2 (1984), 3 COMMON MKT. REP. (CCH) ¶ 10,583 [hereinafter cited as 1983 Notice].

17. A block exemption automatically exempts the otherwise unlawful practices listed in the regulation from the prohibition of article 85 of the EEC Treaty. *See* D. LASOK & J.W. BRIDGE, *AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES*, 392-93 (3rd ed. 1982).

18. *See* Draft Commission Regulation on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, 26 O.J. EUR. COMM. (No. C 165) 2 (1983), 3 COMMON MKT. REP. (CCH) ¶ 10,493. For a critical comment, see Davidow, *EEC Proposed Competition Rules for Motor Vehicle Distribution: An American Perspective*, 28 ANTITRUST BULL. 863 (1983).

19. The judicial power of the EEC resides in the Court of Justice. Its main function is to ensure that the law is obeyed in interpretation and application of the Treaty. EEC Treaty, *supra* note 8, art. 164.

20. *Hydrotherm v. Compact*, 1984 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ —; *Hasselblad v. Comm'n*, 1984 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ 14,014; *Ford Werke v. Comm'n*, 1984 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ 14,025 (interim measures); *Ciment et Betons v. Kerpen & Kerpen*, 1983 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ 14,043; *AEG-Telefunken v. Comm'n*, 1983 E. Comm. Ct. J. Rep. 3151, 3 COMMON MKT. REP. (CCH) ¶ 14,018; *Demo Studio Schmidt v. Comm'n*, 1983 E. Comm. Ct. J. Rep. 3045, 3 COMMON MKT. REP. (CCH) ¶ 14,009; *Musique Diffusion Française v. Comm'n S.A.*, 1983 E. Comm. Ct. J. Rep. 1825, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880; *Coditel S.A. v. Ciné-Vog Films S.A.*, 1982 E. Comm. Ct. J. Rep. 3381, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8865; *Salonia v. Poidomani*, 1981 E. Comm. Ct. J. Rep. 1563, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8758; *L'Oréal N.V. v. De Nieuwe A.M.C.K.*, 1980 E. Comm. Ct. J. Rep. 3775, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶

finitively settled.

Against this background, a comparison between United States and EEC law is of obvious interest. To what extent are United States and the EEC competition policy approaches to exclusive distribution agreements guided by the same or similar ideas? Can parallel trends be identified in the recent developments which have occurred in this field? This Article tries to analyze and answer both questions.

I. ANTITRUST ANALYSIS

Any comparison between the United States and the EEC competition law systems should take into account the existence

8715; *S.A. Lancôme v. Etos B.V.*, 1980 E. Comm. Ct. J. Rep. 2511, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8714; *Anne Marty S.A. v. Estée Lauder S.A.*, 1980 E. Comm. Ct. J. Rep. 2481, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8713; *Procureur de la République v. Giry and Guerlain*, 1980 E. Comm. Ct. J. Rep. 2327, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8712; *Distillers Co. Ltd. v. Comm'n*, 1980 E. Comm. Ct. J. Rep. 2229, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8613; *BMW Belgium S.A. v. Comm'n*, 1979 E. Comm. Ct. J. Rep. 2435, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8548; *Tepea B.V. v. Comm'n*, 1978 E. Comm. Ct. J. Rep. 1391, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8467; *Miller Int'l Schallplatten GmbH v. Comm'n*, 1978 E. Comm. Ct. J. Rep. 131, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8439; *De Bloos v. Bouyer*, 1977 E. Comm. Ct. J. Rep. 2359, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8444; *Metro SB-Grossmärkte GmbH v. Comm'n*, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435; *De Norre v. N.V. Brouwerij Concordia*, 1977 E. Comm. Ct. J. Rep. 65, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8386; *S.A. Fonderies Roubaix v. Fonderies Roux*, 1976 E. Comm. Ct. J. Rep. 111, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8341; *Suiker Unie v. Comm'n*, 1975 E. Comm. Ct. J. Rep. 1663, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8334; *Van Vliet Kwasten-en Ladderfabriek N.V. v. Fratelli Dalle Crode*, 1975 E. Comm. Ct. J. Rep. 1103, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8314; *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen II*, 1973 E. Comm. Ct. J. Rep. 77, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8170; *Beguélin Import Co. v. G.L. Import Export S.A.*, 1971 E. Comm. Ct. J. Rep. 949, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8149; *S.A. Cadillon v. Firma Höss*, 1971 E. Comm. Ct. J. Rep. 351, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8135; *Brauerei A. Bilger Söhne GmbH v. Jehle*, 1970 E. Comm. Ct. J. Rep. 127, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8076; *Völk v. Vervaecke*, 1969 E. Comm. Ct. J. Rep. 295, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8074; *S.A. Brasserie de Haecht v. Wilkin I*, 1967 E. Comm. Ct. J. Rep. 407, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8053; *Italy v. Council and Comm'n*, 1966 E. Comm. Ct. J. Rep. 389, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8048; *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046; *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E. Comm. Ct. J. Rep. 235, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047.

of certain fundamental differences between the relevant substantive rules and the methods of applying them. Both systems share the general aim of guaranteeing workable competition, which is considered to be the best means to promote efficiency in industry and trade, to stimulate economic and technical progress, and to preserve free enterprise. However, the two systems differ considerably as to the means of achieving these goals.

In the United States, section 1 of the Sherman Act prohibits restrictive agreements if they are in restraint of trade or commerce.²¹ But whether they really violate the law depends on the nature of the restriction.²² Only clearly anticompetitive conduct—in other words, conduct that “almost always results in adverse competitive effects, and almost never is justified by business reasons sufficiently persuasive to counteract those adverse effects”²³—is per se illegal. All other situations are governed by the rule of reason, under which, according to the Supreme Court’s definition in *Sylvania*, “the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”²⁴ United States antitrust law thus provides for one decision making process where the totality of anticompetitive and procompetitive effects of the restraint are taken into consideration.

In the EEC, restrictive agreements undergo a two-step scrutiny. The first question is always: do they have as their object or effect the prevention, restriction or distortion of competition within the Common Market, thereby actually or potentially affecting trade between member states?²⁵ If the answer is in the affirmative, the agreement is prohibited under article

21. 15 U.S.C. § 1 (1976).

22. *Sylvania*, 433 U.S. at 49.

23. Pitofsky, *supra* note 5, at 12.

24. 433 U.S. at 49.

25. See EEC Treaty, *supra* note 8, art. 85(1). This question has become highly controversial. See V. KORAH, EXCLUSIVE DEALING AGREEMENTS IN THE EEC, REGULATION 67/67 REPLACED 59 (1984). Compare van der Esch, *Industrial Property Rights Under EEC Law*, in 1983 FORDHAM CORPORATE LAW INSTITUTE, ANTITRUST AND TRADE POLICIES OF THE EUROPEAN ECONOMIC COMMUNITY 539 (B. Hawk ed. 1984) with Schechter, *The Rule of Reason in European Competition Law*, in 2 LEGAL ISSUES OF EUROPEAN INTEGRATION 1 (1982).

85(1) and is automatically void under article 85(2).²⁶ Both legal consequences can be avoided by declaring the prohibition inapplicable according to article 85(3).²⁷ The second question therefore is: does the agreement also fulfill the four conditions of exemption laid down in the latter provision?²⁸ A legal presumption that the standards of article 85(3) are met exists in cases where the agreement is covered by a block exemption regulation. Outside the scope of such a regulation, exemptions from the general ban on cartels can only be granted on a case-by-case basis, by means of an individual Commission decision.

In a legal system of this kind there is logically no room for either a *per se* rule or for a rule of reason limiting the scope of the prohibition that the law imposes on cartels. Any agreement caught by article 85(1) has at least a chance of being exempted under article 85(3), albeit under specific circumstances.²⁹ Only the exemption decision implicates considerations that under United States law characterize the rule of reason; namely an answer to the question of whether the advantages obtained from the agreement are sufficient to compensate for the consequent reduction in competition. This does not mean that economic analysis is without importance for the finding of an infringement of article 85(1). The Court and the Commission have on several occasions admitted that contractual clauses which cut back the economic freedom of the interested parties or of third parties are not restrictive where they offer the only way to create new competition that would otherwise not develop.³⁰ However, an agreement that restricts actual or poten-

26. EEC Treaty, *supra* note 8, arts. 85(1)-(2).

27. *Id.* art. 85(3).

28. *Id.*; see *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 348, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7673.

29. See *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E. Comm. Ct. J. Rep. 235, 248, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047, at 7695.

30. See *Nungesser v. Comm'n*, 1982 E. Comm. Ct. J. Rep. 2015, 2069, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8805, at 7562; *S.A. Cadillon v. Höss*, 1971 E. Comm. Ct. J. Rep. 351, 356, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8135, at 7542; *Völk v. Vervaecke*, 1969 E. Comm. Ct. J. Rep. 295, 302, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8074, at 8086; *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E. Comm. Ct. J. Rep. 235, 249, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047, at 7696; *SAFCO*, 15 O.J. EUR. COMM. (No. L 13) 44 (1972), [1970-1972 Transfer Binder]

tial competition, and therefore violates article 85(1), would never lose its illegal character by the mere fact that it also contains some substantial procompetitive elements.³¹ Advantages and disadvantages of the restraint have to be weighed under article 85(3) in order to determine whether the agreement qualifies for exemption.

While the rule of reason in United States antitrust law and the individual exemption procedure in EEC competition law correspond insofar as both call for a balancing of economic benefits and harms, they differ as to the way in which to strike it. In the United States it is still an open question whether, and to what extent, factors such as the purpose of the restraint, the degree of foreclosure of intrabrand competition, the existence of effective interbrand competition, product differentiation, barriers to entry, the manufacturers' market power or the distributors' access to alternative sources of supply, or even certain social and political values (e.g., the preservation of independent businesses or the satisfaction of consumer interests) ought to be taken into account for the evaluation of vertical restraints.³² The solution to this problem is left to the courts; thereby vesting them with large discretionary powers. In the EEC, the main exemption criteria have been laid down in the Treaty itself.³³ Article 85(3) provides that a restrictive agreement can only be exempted from the prohibition rule if it involves substantial advantages not merely for the parties but also for third persons, particularly consumers, and for the economy of the Community in general.³⁴

COMMON MKT. REP. (CCH) ¶ 9487; *Alliance de constructeurs français de machines-outils*, 11 J.O. COMM. EUR. (No. L 201) 1 (1968), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9249.

31. See *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 342-43, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7662-63.

32. For an overview, see Altschuler, *supra* note 5, at 23-32.

33. See *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 348, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7668.

34. See *Metro SB-Grossmärkte GmbH v. Comm'n*, 1977 E. Comm. Ct. J. Rep. 1875, 1916, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7856. The same provision excludes the exemption of restrictive clauses which are not necessary to attain the above-mentioned positive objectives and of the agreement as a whole if it would give the parties the possibility of eliminating competition in respect of a substantial part of the products in question. See EEC Treaty, *supra* note 8, art. 85(3). It follows from the wording of the law that the Commission has to examine in each case whether the proposed business purposes—provided that they are legitimate—can be achieved by less restrictive means. The Commission also has to ascer-

Where the wording of article 85(3) leaves room for discretion, the exemption decision will be guided by considerations based on the general aims and principles of the EEC Treaty. One of the main goals of the EEC is to bring about and to maintain a real common market, forming one economically integrated territorial entity.³⁵ This helps to explain two priorities within the EEC's competition policy.³⁶ Since the 1960's the institutions of the EEC have, on the one hand, made a great effort to convince the market participants to change traditional patterns of production and trade in order to take advantage of the opportunities and the rights which a large common market offers to them. Block exemption regulations, individual exemption decisions, and other kinds of indirect intervention constitute means to that end. On the other hand, the Commission and the Court have always vigorously condemned agreements and business practices that tend to insulate national markets within the Community and, hence, solidify the old dividing lines along state boundaries.

The overriding political aim of the Treaty is to integrate the markets and the economies of the member states; this explains why the Commission approaches vertical restrictions, particularly those in distribution agreements, differently from the United States antitrust enforcement agencies and law courts. For instance, territorial protection for the dealer is regarded with suspicion under the EEC competition rules because it entails a partitioning of the Common Market. Absolute territorial protection is almost "illegal per se."³⁷

tain that notwithstanding the intended restrictions, competition on the relevant market remains effective. This implies a careful analysis of the effects of the agreements on interbrand as well as on intrabrand competition. *Metro SB-Grossmärkte GmbH v. Comm'n*, 1977 E. Comm. Ct. J. Rep. at 1906, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7851.

35. EEC Treaty, *supra* note 8, art. 2.

36. For a comprehensive overview, see Commission, Reports on Competition Policy (published annually in conjunction with the General Reports on the Activities of the European Communities).

37. Under article 85(3), sound business reasons, even if accompanied by substantial advantages for the economy as a whole, would almost never be sufficient to counterbalance the disadvantages for economic integration resulting from the separation of a national market. See *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 347-50, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7681-84. Economic analysis under the rule of reason does not seem to pay much attention to this element which is so important for the Community.

Finally, United States antitrust law tends to disregard the differences between the various types of distribution agreements and to focus only on the kind of restrictions which they involve (horizontal and vertical, price and nonprice restraints). The EEC attitude differs sharply. Exclusive distribution and selective distribution are each subject to a specific type of evaluation under the competition rules because they influence market conditions and trade between member states in quite different manners. For this reason, this Article focuses on exclusive distribution alone.

II. *EXCLUSIVE DISTRIBUTORSHIPS*

A. *The Concept*

Exclusive distribution agreements are contracts between two undertakings whereby one party (the supplier, in most cases a manufacturer) agrees with the other (the reseller, in most cases a dealer) to supply only to that other party certain goods for resale within a defined area. This concept, which is generally used in EEC law texts, reflects economic realities. The analysis of approximately 40,000 agreements brought to the Commission's attention between 1962 and 1967 has shown that 30,000 of them corresponded with the above-mentioned definition. The restriction of a sales territory to the dealer, together with the promise by the manufacturer not to appoint any other dealer within that territory, must therefore be considered as the essential elements of every exclusive distribution agreement. Usually the manufacturer explicitly or implicitly also agrees not to sell directly within the area allotted to his dealer.

Although the obligations imposed on the supplier constitute the core of exclusive distributorship, it is obvious that normally they do not stand alone. In most cases the reseller will undertake certain obligations vis-à-vis the supplier.³⁸

38. For example, the reseller may commit himself to purchase the contract goods only from the other party and not from third suppliers or dealers (exclusive purchasing clause); to purchase complete ranges of goods or minimum quantities; not to manufacture or to distribute competing goods (non-competition clause); not to sell to or not to seek customers outside the area defined in the contract (territorial restrictions); to sell only to certain categories of buyers (customer restrictions); to respect resale prices that are fixed or recommended by the supplier (price restrictions); or to assure an efficient distribution by advertising, by building up and main-

B. Application of Article 85(1)

1. General Remarks

The first question which interested parties usually submit to the competent authorities in the EEC is whether their agreements containing exclusive distributorship clauses come under article 85(1), and therefore need exemption under article 85(3) to be legal. Unfortunately, in many cases the answer is unclear. As the Court already pointed out in 1966 in *Société Technique Minière v. Maschinenbau Ulm GmbH*³⁹ the application of the prohibition of article 85(1) depends less on the legal form of the agreement than on its actual or potential effects on competition and trade between member states.⁴⁰ The elements of article 85(1) require economic evaluation. An exclusive distribution agreement therefore does not automatically fall under the ban on cartels, but it can do so by reason of a particular factual situation or the severity of the clauses protecting the exclusive dealership.

The first element of article 85(1) requires a finding that such an agreement "has as its object or effect the prevention, restriction or distortion of competition within the common market."⁴¹ This finding depends in particular on the following factors:

1. the nature and quantity, limited or otherwise, of the products covered by the agreement;
2. the position and importance of the parties on the relevant product market;
3. the isolated nature of the agreement in question or, alternatively, its position in a series of agreements;
4. the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by

taining a network of qualified retailers, by stocking sufficient quantities of the contract goods or by providing pre-sales or after-sales services (sales promotion clauses). The United States Supreme Court considers territorial and customer restrictions as functionally and theoretically the same. See *Sylvania*, 433 U.S. at 46; cf. *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E. Comm. Ct. J. Rep. 235, 248, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047, at 7695.

39. 1966 E. Comm. Ct. J. Rep. 235, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047.

40. *Id.* at 249-50, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047, at 7696.

41. See EEC Treaty, *supra* note 8, art. 85(1).

way of parallel reexportation and importation.⁴²

The second element of article 85(1) requires a finding that the agreement is likely to effect trade between member states.⁴³ An agreement effects trade between member states if it has the potential to partition the market between member states, an outcome contrary to the goals of the EEC.⁴⁴

The Court has suggested a case-by-case approach in pronouncing these principles.⁴⁵ On the one hand, the Court's guidelines for the application of article 85(1) to exclusive distribution agreements refer to variable quantitative factors such as the number and kind of products concerned and the market position of the parties. This has generally been understood to be the declaration of a *de minimis* rule under which certain agreements of minor importance may escape from the ban on cartels, despite the restrictive nature of the clauses they contain. The Court, however, has also pointed out that qualitative factors such as the contractual obligations play a dominant role in all other cases. This qualitative analysis allows room for a more general view of the problem. Other rulings of the Court as well as the Commission's enforcement policy, embodied in individual decisions as well as in the relevant block exemption regulations, have provided further guidance, summarized in the following section.

42. *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E. Comm. Ct. J. Rep. at 250, [1961-1966 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8047, at 7695.

43. EEC Treaty, *supra* note 8, art. 85(1).

44. *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E. Comm. Ct. J. Rep. at 250, [1961-1966 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8047, at 7695. The Court of Justice held that for this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law and of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the patterns of trade between member states. *Id.* Therefore, in order to determine whether an agreement which contains a clause granting an exclusive right of sale comes within the field of application of article 85, it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between member states and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create. *Id.*

45. *See, e.g.*, *Hummel-Isbecue*, 8 J.O. COMM. EUR. 2581 (1965), [1965-1969 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 9063; *D.R.U.-Blondel*, 8 J.O. COMM. EUR. 2194 (1965), [1965-1969 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 9049.

2. Restrictive and Nonrestrictive Obligations

Certain clauses in exclusive distribution agreements are always prohibited by article 85(1), provided that they may have appreciable repercussions on competition and trade between member states. This follows from the cases decided by the Commission and the Court and from the wording of Regulation 1983/83,⁴⁶ which expressly exempts some of these clauses and refuses to exempt others.

a. Territorial Restrictions

Generally, territorial restrictions imposed on the supplier⁴⁷ or on third parties⁴⁸ to protect the exclusive dealership come under the prohibition. This includes the case of the supplier's obligations not to sell within the contract territory to other resellers⁴⁹ or to final users or consumers.⁵⁰ The exclusive supply arrangement prevents third party dealers from obtaining the contract goods within the exclusive distributor's territory directly from the manufacturer. A noncompetition clause (such as the one mentioned above) hinders direct supply by the manufacturer to nontraders within the contract territory and hence strengthens the protection given to the exclusive distributor. Territorial restraints imposed on the latter are likewise caught by article 85(1). It makes no difference whether they are formulated as outright export bans⁵¹ or take the form of an obligation not to develop an active sales policy

46. 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

47. *See, e.g.*, Maison Jallatte S.A.-Hans Voss KG, 9 J.O. COMM. EUR. 37 (1966), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9083.

48. *See, e.g.*, Procureur du Roi v. Dassonville, 1974 E. Comm. Ct. J. Rep. 837, 853, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8276, at 7129-30.

49. *See* Comm'n Regulation No. 1983/83, art. 1, 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 1 COMMON MKT. REP. (CCH) ¶ 2730.

50. *See id.* art. 2(1).

51. *See, e.g.*, Pioneer Hi-Fi Equipment, 23 O.J. EUR. COMM. (No. L 60) 21 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,185, *aff'd*, Musique Diffusion Française v. Comm'n, 1983 E. Comm. Ct. J. Rep. 1825, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880; Miller Int'l Schallplatten GmbH, 19 O.J. EUR. COMM. (No. L 357) 40 (1976), [1976-1977 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9901, *aff'd*, Miller Int'l Schallplatten v. Comm'n, 1978 E. Comm. Ct. J. Rep. 131, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8439.

outside the contract territory.⁵²

b. Exclusive Purchasing, Noncompetition and Customer Restrictions

Both exclusive purchasing clauses, which forbid the exclusive distributor from buying the contract goods from other traders,⁵³ and noncompetition clauses, which prevent him from dealing in competing goods made by other manufacturers,⁵⁴ constitute restrictions within the meaning of article 85(1). The same is true for customer restrictions imposed on the exclusive distributor. The EEC competition rules start from the principle that dealers must also have the freedom to choose those to whom they sell.⁵⁵ The Court has recognized, however, that an obligation to ascertain that the contract goods are distributed and retailed only by qualified dealers is compatible with article 85(1).⁵⁶ The Commission also applies this rule, which has been developed with respect to selective distribution networks, to exclusive distribution agreements.⁵⁷

c. Price Restrictions

Price restrictions constitute, after market partitioning arrangements, the most serious violations of article 85(1). Resale price maintenance is therefore considered unlawful regardless of whether the manufacturer uses the dealer to observe minimum, maximum, or fixed prices.⁵⁸ Where resale prices are imposed only on goods that the exclusive distributor supplies to customers outside his contract territory, the obligation in ques-

52. See Comm'n Regulation No. 1983/83, art. 2(2)(c), 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 1 COMMON MKT. REP. (CCH) ¶ 2730.

53. See *id.* art. 2(2)(b).

54. See *id.* art. 2(2)(a).

55. See *id.* recital 8.

56. See *Salonia v. Poidomani*, 1981 E. Comm. Ct. J. Rep. 1563, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8758; *L'Oréal v. De Nieuwe A.M.C.K.*, 1980 E. Comm. Ct. J. Rep. 3775, 3790-91, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8715, at 8607; *Lancôme v. Etos*, 1980 E. Comm. Ct. J. Rep. 2511, 2536, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8714, at 8581; *Metro Grossmärkte GmbH v. Comm'n*, 1977 E. Comm. Ct. J. Rep. 1875, 1904, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7850.

57. See 1983 Notice, *supra* note 16, para. 20.

58. See *AEG-Telefunken*, 25 O.J. EUR. COMM. (No. L 117) 15 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,366; *GERO-fabriek*, 20 O.J. EUR. COMM. (No. L 16) 8 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. ¶ 9914.

tion amounts generally to a territorial restriction.⁵⁹ The territorial character also prevails in arrangements on equalization payments between the parties or between several exclusive distributors to be effected in the case of sales within the other's area.⁶⁰ Finally, article 85(1) applies to contractual obligations restraining the manufacturer's freedom to pursue an autonomous pricing policy. For this reason, a "most favored dealer" clause has to be considered a restriction of competition.⁶¹

d. Miscellaneous Clauses

Other clauses often imposed on the exclusive distributor are considered not to restrict competition, aside from exceptional circumstances. These include obligations to purchase complete lines or minimum quantities of contract goods or to maintain adequate stocks. Article 85(1) catches these obligations only when they actually amount to exclusive purchasing from the manufacturer or to exclusive dealing in the manufacturer's goods.

3. Exceptions to the Prohibition Rule

Article 85(1) applies only to agreements that are capable of restricting competition and trade between member states to an appreciable extent.⁶² The Commission and the Court have

59. See Junghans, 20 O.J. EUR. COMM. (No. L 30) 10 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. ¶ 9912; SABA, 19 O.J. EUR. COMM. (No. L 28) 19 (1976), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9802, *aff'd sub nom.* Metro SB-Grossmärkte GmbH v. Comm'n, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435; Omega, 13 J.O. COMM. EUR. (No. L 242) 22 (1970), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9396; Kodak, J.O. COMM. EUR. (No. L 147) 24 (1970), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378.

60. See Campari, 21 O.J. EUR. COMM. (No. L 70) 69 (1978), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,035; Transocean Marine Paint Association, 20 J.O. COMM. EUR. (No. L 103) 10 (1967), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9188.

61. In a recent decision the Commission has even condemned an undertaking by the manufacturer to supply the exclusive distributor at "competitive prices." Polistil/Arbois, 37 O.J. EUR. COMM. (No. L 136) 9 (1984), 3 COMMON MKT. REP. (CCH) ¶ 10,587. This commitment prevented the manufacturer from setting his prices according to the quantities supplied and according to conditions on the relevant market. This pricing policy also allowed the exclusive distributor to combat possible competition from parallel trade. *Id.* at 12, 3 COMMON MKT. REP. (CCH) ¶ 10,587, at 11,393.

62. See *supra* note 30.

defined several situations where these conditions are not satisfied, either because the agreement does not affect competition within the Common Market or inter-EEC trade at all, or because the actual or potential influence of the agreement on both is so weak that it can be neglected according to the *de minimis* rule.⁶³

a. Exclusive Agency Agreements

Since 1962, Community law has recognized that exclusive agency agreements fall outside article 85(1).⁶⁴ The manufacturer's obligation not to appoint other agents in the area allotted to the other party, as well as the obligations imposed on the exclusive agent to confine his business activities to the contract territory, to sell the manufacturer's goods exclusively and only at prices and conditions fixed by the manufacturer, do not constitute restrictions of competition. The Commission and the Court have expressed the same opinion, but for different underlying reasons. In its 1962 Notice on exclusive dealing contracts with commercial agents, the Commission takes the view that these contracts do not

prevent, restrict or distort competition within the Common Market. In the market for goods, a commercial agent plays only an auxiliary part. In this market, he works according to the instructions and in the interest of the enterprise for which he is acting. Unlike an independent merchant, he is himself neither buyer nor seller, but seeks out buyers or sellers for the benefit of the other party to his contract who actually buys or sells.⁶⁵

The restrictive effects that an exclusive agency contract may produce on the market of services offered by commercial agents are considered by the Commission "a consequence of the particular mutual obligation for the commercial agent and for his employer to protect each other's interests. That is why it does not consider this to be a restriction of competition."⁶⁶

63. See *infra* notes 64-99 and accompanying text.

64. See Comm'n Notice on exclusive dealing contracts with commercial agents, 5 J.O. COMM. EUR. 2921 (1962), 1 COMMON MKT. REP. (CCH) ¶ 2697 [hereinafter cited as 1962 Notice].

65. *Id.* at 2922, 1 COMMON MKT. REP. (CCH) ¶ 2697, at 1842 (unofficial translation).

66. *Id.* at 2923, 1 COMMON MKT. REP. (CCH) ¶ 2697, at 1842.

According to the Court, the inapplicability of article 85(1) follows from the fact that a manufacturer who sells through agents has integrated the distribution of his goods into his own undertaking.⁶⁷ The internal organization of a single enterprise cannot be challenged by enforcing a rule which prohibits collusion between several undertakings.⁶⁸

The different approaches taken by the Commission and the Court can, under certain circumstances, lead to different results. If an important commercial undertaking has concluded agency contracts with three small competing manufacturers, would it, as agent, be economically integrated into the internal organization of all three "principals"? Can a small, or medium-sized, undertaking incorporate an important trading group simply by means of an agency contract? The Commission's concept of "special relationships" between principal and agent seems to permit an affirmative answer to both questions. Under the Court's theory of economic integration, this appears more difficult.

Considerations of economic analysis should outweigh formalistic legal arguments. This would be consistent with the attitude of the Commission and the Court towards other attempts to circumvent article 85(1). In its 1962 Notice, the Commission pointed out that its assessment of exclusive agency agreements is not governed by the name used to describe the representative but by objective economic criteria.⁶⁹ Where the agent engages in activities proper to an independent trader by carrying on transactions on his own account, by agreeing to undertake financial risks bound up with the sale of the contract goods, by maintaining at his own expense a considerable stock or a substantial after-sales service, or by setting prices or other terms of business, he ceases to be an auxiliary. In *Pittsburgh Corning Europe-Formica Belgium-Hertel*,⁷⁰ the Commission refused to consider an independent manufacturer as a

67. See *Italy v. Council & Comm'n*, 1966 E. Comm. Ct. J. Rep. 389, 407-08, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8048, at 7726; *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 339-40, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7655.

68. *Consten*, 1966 E. Comm. Ct. J. Rep. at 339-40, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7655.

69. 1962 Notice, *supra* note 64, at II.

70. 15 J.O. COMM. EUR. (No. L 272) 35 (1972), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9539.

commercial agent. The Court held in *Suiker Unie and Others v. Commission*⁷¹ that agreements between manufacturers and traders, under which the same commercial undertaking operated both as an agent and as an independent wholesaler in relation to the same commodity, could not escape article 85(1).

b. Exclusive Distribution Agreements Between Firms of the Same Group

An exception to the prohibition on cartels is also granted to exclusive distribution agreements concluded between firms belonging to the same group.⁷² It is unclear, however, whether this rule applies in all cases. The Court in *Centrafarm v. Sterling Drug*⁷³ expressed the view that article 85(1) does not apply to agreements

between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.⁷⁴

This pronouncement leaves room for the application of article 85(1) in two situations. First, article 85(1) applies where the subsidiary operating as an exclusive distributor in a given territory chooses the commercial policy it wants to pursue. When this occurs, the agreement will be treated as if it had been made between two undertakings not connected with each other. Second, it applies where the arrangements made in the agreement go beyond a simple distribution of tasks within a single economic entity. Here the question is not whether the parties to the contract are free to determine their conduct. The

71. 1975 E. Comm. Ct. J. Rep. 1663, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8334.

72. See *Béguelin Import Co. v. G.L. Import-Export S.A.*, 1971 E. Comm. Ct. J. Rep. 949, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8149; *Kodak*, 13 J.O. COMM. EUR. (No. L 147) 24 (1970), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378; *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) 12 (1969), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308.

73. 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246.

74. *Id.* at 1167, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, at 9151-57.

only problem that arises is defining the scope of the words "internal allocation of tasks."

Cases where manufacturers entrust subsidiaries with exclusive distribution of their goods in the different member states are becoming increasingly frequent. Normally, these subsidiaries follow instructions given by the parent company and lack economic autonomy. In any event, it will always be difficult for the competition authorities to prove the contrary. The Commission could intervene, however, where it finds that the agreements are excessive by nature because they substantially affect the interests of third parties. The obligation imposed on one subsidiary not to seek customers in the sales territory of the second subsidiary can certainly be considered to be justified by the need to rationalize all the commercial activities carried out by the group. But export bans and similar clauses which prevent the subsidiaries from satisfying a spontaneous demand from outside the allotted territory go beyond the limits of an "internal allocation of tasks." It is advisable that such agreements be considered concerted practices for the purposes of article 85(1).

c. Exclusive Distribution Agreements of Minor Importance

Exclusive distribution agreements of minor importance do not fall under article 85(1).⁷⁵ These agreements may provide for absolute territorial protection of the exclusive distributor, resale price maintenance, obligations to supply selected retailers only, or other severe restrictions on the commercial freedom of the parties.⁷⁶ The *de minimis* rule also applies to agreements which contain less far-reaching commitments.⁷⁷

Agreements of minor importance are those that do not affect the free play of trade competition between member states to any appreciable extent.⁷⁸ The meaning of the word "appre-

75. See Comm'n Notice of 19 December 1977 concerning agreements of minor importance which do not fall under article 85(1) of the Treaty establishing the European Economic Community, 20 O.J. EUR. COMM. (No. C 313) 3 (1977), 1 COMMON MKT. REP. (CCH) ¶ 2700.

76. See *Völk v. Vervaecke*, 1969 E. Comm. Ct. J. Rep. 295, 302, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8074, at 8086.

77. See *S.A. Cadillon v. Höss*, 1971 E. Comm. Ct. J. Rep. 351, 356, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8135, at 7543.

78. See *Béguelin Import Co. v. G.L. Import-Export S.A.*, 1971 E. Comm. Ct. J.

cialable" constitutes the main uncertainty in the legal assessment of the relevant cases. The Commission and the Court have taken different views on the question.⁷⁹

According to the Court, the requirements of article 85(1) must be considered in the actual context in which the agreement exists. An agreement therefore falls outside the prohibition where it has only an insignificant effect on the market, taking into account the weak position that the undertakings concerned have on the market of the product in question.⁸⁰ The critical point is not reached as long as the market shares held by the parties remain under one percent, provided that they do not belong to large groups of undertakings that, because of their economic and financial power, are capable of enhancing their market position in a relatively short time.⁸¹

The Commission has taken a more generous attitude. The 1970 Notice on agreements of minor importance⁸² states the view that agreements escape from the ban on cartels when the market share of the participants amounts to not more than five percent and when their total annual turnover does not exceed 50 million ECU.⁸³ By applying this rule, the Commission cleared approximately 4,000 cases of exclusive distribution agreements that had been notified before 1967.⁸⁴

Undertakings and their legal counsel should keep in mind, however, that the Commission's 1970 Notice does not bind the Court, any national law courts, or even the Commission itself, and therefore the parties to an agreement have no absolute legal

Rep. 949, 960, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8149, at 7704.

79. See *infra* notes 81-86 and accompanying text.

80. See *Völk v. Vervaecke*, 1969 E. Comm. Ct. J. Rep. 295, 302, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8074, at 8086.

81. In all of the few cases where the Court has admitted the *de minimis* exception, the interested parties were small undertakings with a modest annual turnover and market share far below one percent. See *Béguelin Import Co. v. G.L. Import-Export S.A.*, 1971 E. Comm. Ct. J. Rep. 949, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8149; *Völk v. Vervaecke*, 1969 E. Comm. Ct. J. Rep. 295, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8074.

82. Comm'n Notice of 19 December 1977 concerning agreements of minor importance which do not fall under article 85(1) of the Treaty establishing the European Economic Community, 20 O.J. EUR. COMM. (No. C 313) 3 (1977), 1 COMMON MKT. REP. (CCH) ¶ 2700.

83. *Id.* at 3, 1 COMMON MKT. REP. (CCH) ¶ 2700, at 1854.

84. See COMMISSION, NINTH REPORT ON COMPETITION POLICY 16 n.2 (1980).

certainty.⁸⁵ Furthermore, the 1970 Notice does not apply where the agreement is part of a larger network of similar agreements made by the same manufacturer or where several networks built up by different manufacturers cover the relevant market. The Court's ruling in *Société Technique Minière v. Maschinenbau Ulm GmbH*⁸⁶ makes clear that market structure considerations, in particular the cumulative effect of the totality of similar agreements, can bring an otherwise inoffensive contract under the prohibition imposed by article 85(1). Therefore, the parties should not rely on the de minimis rule in borderline cases but should make sure that the agreement is compatible with the competition rules.

d. Use of Exclusive Distributorships to Penetrate Markets

The case law of the EEC gives no clear answer to the question whether, besides from the de minimis rule, the argument of market penetration can be used to bring an agreement out of the scope of article 85(1). The Court of Justice referred to this argument in *Société Technique Minière v. Maschinenbau Ulm GmbH*⁸⁷ and, indirectly, in *Völk v. Vervaecke*.⁸⁸ In both cases the concept of market penetration was intertwined with de minimis rule considerations. The same is true of two earlier decisions. In *Alliance de Constructeurs Français de Machines-Outils*, the Commission granted negative clearance to horizontal agreements between small manufacturers relating to specialization.⁸⁹ In *Saba*, the Commission granted negative clearance to joint selling.⁹⁰ In *Nungesser v. Commission*,⁹¹ however, the Court for the

85. See C.S. KERSE, *supra* note 15 at 3 (notices do not have legal force in relation to particular cases).

86. 1966 E. Comm. Ct. J. Rep. 235, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047; see *supra* note 29 and accompanying text.

87. 1966 E. Comm. Ct. J. Rep. 235, 249, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8047, at 7696.

88. 1969 E. Comm. Ct. J. Rep. 295, 302, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8074, at 8086.

89. See 11 J.O. COMM. EUR. (No. L 201) 1 (1968), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9249.

90. See 19 O.J. EUR. COMM. (No. L 28) 19 (1976), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9802, *aff'd sub nom.* Metro SB-Grossmärkte GmbH v. Comm'n, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435.

91. 1982 E. Comm. Ct. J. Rep. 2015, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8805.

first time based an important decision on the concept of market penetration without quantifying the size or the market position of the undertakings involved.⁹² In general, then, article 85(1) cannot apply in the absence of actual or potential competition capable of being restricted by the agreement. It could help the Commission to take a more flexible attitude in appropriate cases, even those involving big business, without seeking refuge in some type of "rule of reason" unsuitable for achieving the purposes of article 85(1).⁹³

e. Exclusive Distributorships and Effect on Interstate Trade

The prohibition is inapplicable in the case of agreements that will have no appreciable effect on trade between member states under any circumstances. This is of particular importance for two categories of exclusive distribution agreements: those made between undertakings established in the same member state concerning sales within the territory of that member state (so-called "national" agreements), and those concluded for territories outside the EEC.

i. National Agreements

National agreements are normally not caught by article 85(1) for the reasons mentioned above, unless they contain clauses which make reexportation to or parallel importation from other member states more difficult,⁹⁴ or create barriers to market entry for competing goods. A noncompetition clause imposed on the exclusive dealer can have this effect in exceptional circumstances particularly when the dealer is a leading undertaking on his home market.⁹⁵ A national agreement can also appreciably affect intra-EEC trade if it implements a cross-border agreement⁹⁶ or if it simply forms one part of a network of similar agreements covering the whole Common Market.

92. *Id.* at 2069, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8805, at 7544.

93. See van der Esch, *Industrial Property Rights Under EEC Law* in 1983 FORDHAM CORPORATE LAW INSTITUTE, ANTITRUST AND TRADE POLICIES OF THE EUROPEAN ECONOMIC COMMUNITY 539, 546 (B. Hawk ed. 1984).

94. See *Goodyear Italiana-Euram*, 18 O.J. EUR. COMM. (No. L 38) 10 (1975), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9708.

95. See *id.*

96. See *Fonderies Roubaix v. Fonderies Roux*, 1976 E. Comm. Ct. J. Rep. 111, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8341.

ii. Agreements in Non-EEC Countries

Agreements made with respect to third countries do not fall under article 85(1), except where they have noticeable repercussions within the Common Market.⁹⁷ Whether or not clauses which prevent the exclusive distributor or his customers from selling the contract goods inside the Community create such effects is a question to be answered case-by-case.⁹⁸ The same approach governs the legal assessment of export bans, or restrictions imposed on either the manufacturer or on dealers within the Common Market, with respect to markets outside the EEC.⁹⁹

4. Conclusions

The foregoing explanations have shown that the application of the different exceptions which have been developed to limit the scope of article 85(1) entails considerable legal uncertainty. For this reason it seems preferable for undertakings not to seek to escape the prohibition rule but to assure that their exclusive distribution agreements satisfy the conditions for exemption under article 85(3). The requirements of block exemption and individual exemption are set out in the following section.

C. Application of Article 85(3)

1. General Remarks

The question, under which circumstances and to what ex-

97. See Rieckermann/Aeg-Elotherm, 11 J.O. COMM. EUR. (No. L 276) 25 (1968), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9267; Grosfillex-Fillistorf, 7 J.O. COMM. EUR. 915 (1964), 1 COMMON MKT. REP. (CCH) ¶ 2412.37.

98. See the three parallel judgments, EMI Records Ltd. v. CBS United Kingdom Ltd., 1976 E. Comm. Ct. J. Rep. 811, 850, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8350, at 7364; EMI Records Ltd. v. CBS Grammofoon A/S, 1976 E. Comm. Ct. J. Rep. 871, 908, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8351, at 7402; EMI Records Ltd. v. CBS Schallplatten GmbH, 1976 E. Comm. Ct. J. Rep. 913, 951, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8352, at 7429.

99. See Distillers Co., 21 O.J. EUR. COMM. (No. L 50) 16 (1978), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,011; Junghans, 20 O.J. EUR. COMM. (No. L 30) 10 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9912; SABA, 19 O.J. EUR. COMM. (No. L 28) 19 (1976), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9802, *aff'd sub nom.* Metro SB-Grossmärkte GmbH v. Comm'n, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435.

tent exclusive distribution agreements ought to be admitted under article 85(3), was in principle already answered twenty years ago. In its decision of 1964 in the *Grundig-Consten* case,¹⁰⁰ which was upheld by the Court of Justice,¹⁰¹ the Commission chose open territorial exclusivity as a model for its future policy. The main features of this policy were laid down in Regulation 67/67¹⁰² and recently reiterated in Regulation 1983/83.¹⁰³

The block exemption for exclusive distribution agreements is based on considerations of both economic efficiency and market integration. The Commission takes the view that contracts of this type merit favorable treatment primarily for two reasons. First, they enable the manufacturer to concentrate his sales activities and, by dealing with only one distributor, help him to overcome distribution difficulties encountered in international trade due to linguistic, legal, or other differences.¹⁰⁴ Second, they encourage the dealer to take over sales promotion, customer services and carrying of stocks within the contract territory, which in the eyes of the Commission leads to more intensive marketing and is often the most effective way, sometimes even the only way, to launch a product in areas beyond national boundaries.¹⁰⁵

The rationalization and the market integration effects of exclusive distribution agreements may be reinforced where the dealer is protected against active competition from the manufacturer, but is obliged to concentrate advertising and sales efforts on the contract goods and on the contract territory. This is why the prohibition in article 85 also exempts the manufacturer's obligation not to sell within the allotted area to final

100. 7 J.O. COMM. EUR. 2545 (1964), 1 COMMON MKT. REP. (CCH) ¶ 2021.51.

101. *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046.

102. 10 J.O. COMM. EUR. 849 (1967), 1 COMMON MKT. REP. (CCH) ¶ 2727. Regulation 67/67 came into force on May 1, 1967. Its duration was initially limited to December 31, 1972, but was later extended to June 30, 1983 by Regulation No. 2591/72, 15 J.O. COMM. EUR. (No. L 276) 15 (1972), 1 COMMON MKT. REP. (CCH) ¶ 2728.01 and Regulation No. 3577/82, 25 O.J. EUR. COMM. (No. L 373) 58 (1982), 1 COMMON MKT. REP. (CCH) ¶ 2728.01.

103. 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

104. *See id.* recital No. 5.

105. *See id.* recital No. 6.

customers or users.¹⁰⁶ The dealer's obligations to purchase the contract goods only from the manufacturer and to refrain from manufacturing or distributing competing goods or from seeking customers outside the contract territory have also been exempted from the prohibition in article 85(1).¹⁰⁷

The block exemption covers only agreements between two parties.¹⁰⁸ The purpose of this limitation is clearly to discourage horizontal collusion between manufacturers or between dealers. Agreements whereby several manufacturers entrust one dealer with exclusive distributorship of their products in a given territory have effects similar to joint selling agreements. They can lead to a substantial lessening of interbrand competition where the interested manufacturers supply the exclusive distributor with identical or similar products.¹⁰⁹ A close case-by-case scrutiny therefore appears to be the only acceptable way to judge contracts of that kind. The same is true of agreements which several exclusive distributors conclude collectively with one manufacturer. In such cases the fear exists that the manufacturer will be prevented from developing different marketing strategies in order to meet the conditions prevailing on the various geographical markets. Equal treatment of dealers which is not based on sound business considerations, but results from dealer-imposed restrictions on the manufacturer's commercial freedom, normally does not serve the interests of consumers either. For this reason the Commission has refused to add a most favored dealer clause to the list of admitted restrictions in Regulation 1983/83.

Yet the requirement of only two participating undertakings does not mean that the block exemption becomes inapplicable with respect to networks of exclusive distribution agreements. It suffices that the contracts which the manufacturer has made in parallel with several dealers satisfy individually the conditions laid down in the Regulation.¹¹⁰ The fact that the various obligations imposed by the manufacturer on each of his dealers amount to horizontal restrictions which re-

106. *See id.* art. 2(1).

107. *See id.* art. 2(2).

108. *See id.* art. 1.

109. *See* SCPA-Kali und Salz, 16 O.J. EUR. COMM. (No. L 217) 3 (1973), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9569.

110. *See* 1983 Notice, *supra* note 16, para. 14.

duce intrabrand competition is without importance in this context. The block exemption also applies to vertically subdivided distribution agreements. An exclusive distributor for the whole of the Common Market is perfectly entitled to nominate exclusive subdistributors for the different member states.¹¹¹ These subdistributors, for their part, may follow the same pattern in order to organize the distribution of the contract goods down to local markets and to retail level. Finally, the block exemption covers exclusive distribution agreements irrespective of the market power of the parties. Clearly anticompetitive effects that may arise from horizontally or vertically organized networks of agreements or from individual agreements made in a highly concentrated market must be removed by an individual decision of the Commission withdrawing the benefit of the block exemption.¹¹² In conclusion, the manufacturer remains largely free to adapt the model of exclusive distributorship to the requirements of the different markets within the Community.

The freedom of the undertakings to organize the distribution of their products in a way that best suits their respective marketing strategies does not, however, include the right to organize the markets on the distribution level. Exclusive distribution agreements that guarantee the dealer not only the exclusive right to obtain supplies directly from the manufacturer but also that it will be the only distributor allowed to introduce the contract goods into the allotted area are, as a matter of principle, incompatible with article 85(3). The freedom of users and intermediaries to purchase the manufacturer's products within the Common Market wherever they are offered must not be restricted. Accordingly, both contractual clauses in the exclusive distribution agreement, and unilateral measures taken by one or both parties in order to prevent third persons from obtaining the contract goods outside the contract territory or to sell them within that territory, have been declared unlawful.¹¹³ Even the exclusive distributor must have the right to resell the contract goods to buyers established

111. See *Duro-Dyne-Europair*, 18 O.J. EUR. COMM. (No. L 29) 11 (1975), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9708A.

112. See Comm'n Regulation No. 1983/83, art. 6(a)-(b), 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

113. See *id.* art. 3(d).

outside the allotted areas. Agreements can only oblige the distributor to refrain from seeking customers in other territories.¹¹⁴

The legal protection of parallel importation and re-exportation is not an end in itself. In the Commission's view it constitutes a means to cut back exclusive prices imposed by an exclusive distributor and thereby reduce important price differences still existing between several member states.¹¹⁵ Absolute territorial protection has not been permitted even in markets that are characterized by active intrabrand competition.¹¹⁶ The Commission relies heavily on intrabrand competition. Given the long tradition of economic nationalism in Europe, and taking into account the ability of industry to reduce the degree of substitutability between similar goods by product differentiation or by creating buyer preferences for a particular brand, the Commission doubts that commercial rivalry between manufacturers alone would help to bring about a unified

114. See 1983 Notice, *supra* note 16, para. 28.

115. See COMMISSION, FIRST REPORT ON COMPETITION POLICY para. 46, at 55 (1972).

116. Export bans imposed on dealers in order to protect national markets have given rise to heavy fines. See *Polistil/Arbois*, 27 O.J. EUR. COMM. (No. L 136) 9 (1984), 3 COMMON MKT. REP. (CCH) ¶ 10,587; *National Panasonic (UK) Ltd.*, 25 O.J. EUR. COMM. (No. L 354) 28 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,441; *Hasselblad*, 25 O.J. EUR. COMM. (No. L 161) 18 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,401, *aff'd*, *Hasselblad v. Comm'n*, 1984 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ 14,014; *Moët et Chandon*, 25 O.J. EUR. COMM. (No. L 94) 7 (1982), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,352; *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) 16 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,277; *Pioneer Hi-Fi Equipment*, 23 O.J. EUR. COMM. (No. L 60) 21 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,185, *aff'd*, *S.A. Musique Diffusion Française v. Comm'n*, 1983 E. Comm. Ct. J. Rep. 1825, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8880; *BMW Belgium*, 21 O.J. EUR. COMM. (No. L 46) 33 (1978), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,008, *aff'd*, *BMW Belgium S.A. v. Comm'n*, 1979 E. Comm. Ct. J. Rep. 2435, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8458; *Theal/Watts*, 20 O.J. EUR. COMM. (No. L 39) 19 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9913, *aff'd*, *Tepea BV v. Comm'n*, 1978 E. Comm. Ct. J. Rep. 1391, [1977 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8467; *Miller Int'l Schallplatten GmbH*, 19 O.J. EUR. COMM. (No. L 357) 40 (1976), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9901, *aff'd*, *Miller Int'l Schallplatten GmbH v. Comm'n*, 1978 E. Comm. Ct. J. Rep. 131, [1977 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8439; *Deutsche Philips GmbH*, 16 O.J. EUR. COMM. (No. L 293) 40 (1973), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9606; *WEA-Filipacchi Music S.A.*, 15 J.O. COMM. EUR. (No. L 303) 52 (1972), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9545A. For additional Commission decisions, see *supra* note 11.

market and guarantee fair prices for the consumers. Its view is shared by the Court of Justice.¹¹⁷

This general attitude implies a severe treatment of market allocation agreements made between manufacturers. Regulation 1983/83 can be considered a typical example of the resulting policy, because it denies the benefit of the block exemption to exclusive distribution agreements that manufacturers of competing goods conclude in respect of these goods.¹¹⁸ The danger of horizontal market division along national boundaries is obvious in such cases, whether exclusive rights have been granted either to both or only one party. It is unusual for a manufacturer to actively help his competitor's products break into his home market and thereby jeopardize the sales of his own products.

The Commission has nevertheless expressed a positive view with respect to these unilateral agreements in cases where at least one party is a small, or medium-sized, enterprise.¹¹⁹ If both parties are small manufacturers, the benefits of the agreement will often outweigh its negative effects because the horizontal cooperation normally facilitates the penetration of new markets, whereas the protection of the home market becomes less important. Agreements by which a small manufacturer entrusts an important competitor with the exclusive distribution of its products also merit favorable consideration, for they enable the smaller undertaking to use an already existing large distribution network for the sales of its products in other member states. The opposite case, where a big manufacturer nominates a specialized small competitor as its exclusive distributor, also does not create major problems because normally this decision will be made only with respect to goods not suitable for sale through its own distribution network. Considering that such agreements can help to achieve the market integration goal, the Commission has upheld the block exemption to that extent. Reciprocal exclusive distribution agreements between manufacturers of competing goods have been exempted only as parts of larger horizontal deals involving, in particular, spe-

117. See *Consten and Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 343, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7653.

118. See *Comm'n Regulation No. 1983/83*, arts. 3(a)-(b), 4-5, 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

119. See *id.* art. 3(b).

cialization or rationalization of the parties' production activities.¹²⁰

2. Various Restrictions in Exclusive Distribution Agreements

After a more general survey of exclusive distributorships, it seems appropriate to analyze various restrictions under article 85(3) that are commonly stipulated in the relevant contracts.

a. Territorial Restrictions and Exclusive Supply Obligations

The Commission and the Court of Justice have discussed the extent to which territorial restrictions are or can be exempted from the prohibition on cartels. In that respect, Regulation 1983/83 provides for even higher standards than its predecessor, Regulation 67/67. The case law follows the traditional course.

The exclusive supply obligation imposed on the manufacturer, which can be considered as the principal territorial restriction in exclusive distribution agreements, receives favorable treatment in whatever manner it is formulated. The parties are free to determine the size of the contract territory to which this obligation relates.¹²¹ Article 1 of Regulation 1983/83 covers a large scale of possible stipulations, ranging

120. See *Sopelem-Vickers II*, 24 O.J. EUR. COMM. (No. L 391) 1 (1981), 3 COMMON MKT. REP. (CCH) ¶ 10,393; *Sopelem-Vickers I*, 21 O.J. EUR. COMM. (No. L 70) 47 (1978), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,014; *Jaz-Peter II*, 21 O.J. EUR. COMM. (No. L 61) 17 (1978), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,013; *Rank/Sopelem*, 18 O.J. EUR. COMM. (No. L 29) 20 (1975), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9707; *FN-CF*, 14 J.O. COMM. EUR. (No. L 134) 6 (1971), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9439; *Jaz-Peter I*, 12 J.O. COMM. EUR. (No. L 195) 5 (1969), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9317; *Clima Chapée-Buderus*, 12 J.O. COMM. EUR. (No. L 195) 1 (1969), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9316. For additional Commission decisions, see *supra* note 11; see also Comm'n Regulation No. 3604/82, 25 O.J. EUR. COMM. (No. L 376) 33 (1982), 1 COMMON MKT. REP. (CCH) ¶ 2743 (for the application of art. 85(3) to specialization agreements).

121. The Commission has abandoned former plans to limit the block exemption to agreements which are concluded for areas with not more than 100 million inhabitants. See COMMISSION, SEVENTH REPORT ON COMPETITION POLICY paras. 37-38, at 54 (1978).

from exclusive distributorship for the whole Common Market¹²² to simple location clauses protecting local sales areas.¹²³ The contract territory may also comprise member states and nonmember countries.¹²⁴ Exclusive distribution agreements made in respect to territories outside the Community, insofar as they come under article 85(1), must, however, be exempted individually. No such decision has yet been made.

Only contracts that provide for one distributor in the allotted area satisfy the conditions of Regulation 1983/83.¹²⁵ Where several "exclusive" dealers operate within the same territory, an individual exemption is not required, but may be granted.¹²⁶

According to the model of open territorial exclusivity the parties to the agreement may only narrowly protect the exclusive distributor. Under Regulation 1983/83 the manufacturer must refrain from supplying other resellers within the contract territory; otherwise the requirements of exclusive distribution would no longer be fulfilled. The manufacturer may also refuse to supply final customers or users within the contract territory.¹²⁷ However, both obligations only have the effect of

122. Under the old Regulation No. 67/67, 10 J.O. COMM. EUR. 849 (1967), the Commission took the view that agreements of this kind did not come under the block exemption. See *Duro-Dyne-Europair*, 18 O.J. EUR. COMM. (No. L 29) 11 (1975), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9708A. The Court of Justice, in its recent judgment *Hydrotherm v. Compact*, 1984 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ —, has expressed the same opinion. It is questionable whether the Commission, where extending the scope of the block exemption, remained within the limits of its powers under Council Regulation No. 19/65, 8 J.O. COMM. EUR. 533 (1965), 1 COMMON MKT. REP. (CCH) ¶ 2718, which in article 1(1)(a) refers to "a defined area of the common market" (in French: "*partie définie du territoire du marché commun*"; in German: "*abgegrenztes Gebiet der Gemeinsamen Marktes*").

123. For another view, see *Ferry*, *Selective Distribution and Other Post-Sales Restrictions*, 2 E. COMM. L. REV. 209 (1981).

124. See *Hydrotherm v. Compact*, 1984 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ —.

125. The Commission has taken a more generous attitude in its Draft Block Exemption regulation concerning motor vehicle distribution and servicing agreements, 26 O.J. EUR. COMM. (No. C 165) 2 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

126. See *Junghans*, 20 O.J. EUR. COMM. (No. L 30) 10 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9912. Bellamy and Child propose an application by analogy of the block exemption. See C. BELLAMY & G.D. CHILD, *COMMON MARKET LAW OF COMPETITION* § 8-46 (2d ed. 1978).

127. See Comm'n Regulation No. 1983/83, art. 2(1), 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

shielding the exclusive dealer from the active competition of the other party. The manufacturer cannot be obliged to refrain from supplying dealers or final users established in the contract territory, where these persons wish to buy the product concerned in other territories on terms customarily found there.¹²⁸ A refusal to deal in such cases constitutes a measure preventing parallel importation in the meaning of article 3(d) of Regulation 1983/83. The refusal would be abusive, and therefore the block exemption would be inapplicable, if it were not motivated by objective reasons different from considerations of market isolation.¹²⁹ The Regulation does not permit contractual clauses or conduct intended to protect the exclusive dealer against passive competition on the part of the manufacturer.

Moreover, although a clear separation of functions between the manufacturer and the exclusive distributor appears to be desirable for reasons of efficiency, it should be noted that it is up to the parties to decide whether or not they will provide for a noncompetition clause in favor of the dealer. The manufacturer often reserves the right to supply within the contract territory certain final users or categories of them, such as public administrations, hotels, schools or nursing homes. Other buyers who resell the contract goods only to customers outside the allotted areas, such as ship-forwarders and duty-free shops, have been assimilated with final users.¹³⁰ They also may be subject to a reservation clause. Both situations are legitimate under the Regulation. The danger of collusion between the parties does not hinder the application of the block exemption. Possible abuses have to be treated in an individual procedure involving withdrawal of the benefits of the Regulation.

As a matter of principle, Regulation 1983/83 condemns any protection against parallel importation of the contract goods by intermediaries. Examples include export bans imposed on wholesalers or retailers who have purchased the product in question from the manufacturer or from his other exclusive distributors, and refusals to sell or price discrimina-

128. See 1983 Notice, *supra* note 16, paras. 27-30.

129. See *Hydrotherm v. Compact*, 1984 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ —.

130. See *Distillers Co. Ltd.*, 23 O.J. EUR. COMM. (No. L 233) 43 (1980), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,253.

tions. These practices are illegal if they are used as means to stop transborder deliveries into the contract territory. In such cases, one is confronted with measures prohibited under article 3(d) of the Regulation which leads to loss of the block exemption.

The exclusive distributor is not necessarily protected against even active competition from other exclusive dealers established in neighboring areas. The manufacturer may impose the obligation not to seek customers outside the contract territory on each of his exclusive distributors but he may not be bound to do so. The Regulation forbids export bans. An open question is whether several exclusive dealers may agree upon compensation payments in order to indemnify each of them for the financial loss which it suffers from parallel importation into its territory. The Commission tends to consider such schemes as compatible with the block exemption if their sole purpose is to refund expenditures made for presale or aftersale services with respect to parallel imported goods. Compensation payments do, however, come under article 3(d) of the Regulation where they are used as an instrument to neutralize price differences between member states.

In certain cases Regulation 1983/83 expects the parties not only to refrain from impeding parallel trade, but also to create the conditions under which such trade can emerge. This is the case where exclusive distribution agreements are made for goods destined to be sold directly to final consumers or users. In the absence of independent wholesalers and retailers who play the role of intermediaries, parallel importation into the contract territory will normally not take place, and the execution of the agreement will in itself lead to absolute territorial protection of the exclusive dealer. In order to avoid this undesirable result, article 3(c) of the Regulation provides for a special rule. When users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory, the block exemption is no longer applicable. It will, however, apply again if the parties ensure that the products in question are available from other suppliers inside or outside the allotted area. For this purpose it would suffice that the manufacturer himself is disposed to sell the contract goods to final users established in the distributor's territory whenever they ask for it,

and that these buyers can get the goods at prices and conditions similar to those which the manufacturer usually applies to customers in his home market. Here too, the emphasis is placed on protection of intrabrand competition. Whether the final users can purchase competing products of other manufacturers is not important for the purpose of the block exemption.¹³¹

No definite answer can be given to the question of what extent protection of the exclusive dealer against parallel importation from third countries is compatible with Regulation 1983/83. Only the first of two possible situations seems to be clear. Where intermediaries and users have no alternative source of supply within the Common Market (for example, because the allotted area covers the whole or almost the whole territory of the EEC), they must be assured of obtaining the contract goods from outside the Common Market. In this case, according to article 3(d) of the Regulation, no party may take measures which would make parallel trade from non-member countries into the Community more difficult. Export bans imposed on dealers outside the Common Market then become as illegal as the exercise of industrial property rights for the purpose of preventing the importation of contract goods into the Community. Both types of conduct by the parties would make them lose the benefit of the block exemption. The attempt by the manufacturers to prevent their other customers from delivering into the Community results in the agreement falling outside the Regulation from the date of its execution.¹³²

Where alternative sources of supply exist within the Common Market, each party can take unilateral measures in order to prevent parallel importation into the Community without thereby being excluded from the block exemption. The question remains, however, whether the same rule applies when they act on either the basis of an agreement or by concerted action. The Commission considers illegal any clause which may restrict competition and has not expressly been exempted under articles 1 and 2 of the Regulation. As the block exemption is granted only on the condition that the agreement does not contain restrictions of competition other than those listed

131. See 1983 Notice, *supra* note 16, para. 31.

132. *Id.* para. 33.

in the aforementioned provisions, the Commission holds that the inapplicability of Regulation 1983/83 constitutes the only possible legal consequence in such cases.¹³³ Another solution might be found in a broader reading of article 3(d) of the Regulation. If this provision can be understood as also comprising contractual obligations agreed upon by the parties, the block exemption would cover the situation referred to above. The case law seems to permit this interpretation.¹³⁴

The preceding analysis shows that exclusive distributors benefit from a rather limited territorial protection under Regulation 1983/83. The EEC legislature has not recognized the need to protect the "official" dealers against so-called "free riders" who sell the contract goods to consumers in the contract territory without having contributed to advertising, presale services, organization of a network of qualified dealers, and other sales promotion activities.¹³⁵ The Regulation is clearly based on the presumption that the parties to the agreement can normally allocate marketing costs in such a way as to prevent prices from being forced up in the exclusive distributor's area while they remain low in the manufacturer's home market, eliminating the main incentive for parallel trade. As this seems to be the general line followed by the Commission and the Court of Justice, the only question still remaining is whether particular economic circumstances may, under Community law, justify a more effective territorial protection of the exclusive dealer. The answer, again, is negative.

In its First Report on Competition Policy of 1971 the Commission pointed out that the temporary authorization of an absolute territorial protection might be envisaged for exclusive distribution agreements intended to enable a new producer to break into a market.¹³⁶ However, until now no such

133. *Id.*

134. See Van Vliet Kwasten-en Ladderfabriek N.V. v. Fratelli Dalle Crode, 1975 E. Comm. Ct. J. Rep. 1103, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8314; Polistil/Arbois, 27 O.J. EUR. COMM. (No. L 136) 9 (1984), 3 COMMON MKT. REP. (CCH) ¶ 10,587.

135. For a short description of this problem under Community law, see V. KORAH, *supra* note 25, at 7-8.

136. See COMMISSION, FIRST REPORT ON COMPETITION POLICY para. 49, at 57-58 (1972).

case has been decided. In two cases, *Pittsburgh Corning Europe*¹³⁷ and *Distillers Company Ltd.*,¹³⁸ the Commission condemned attempts to overcome the problem of "free riding" by a double price system. Dealers paid the normal price for goods resold in the same member state, but had to pay a substantially higher price when they purchased the same goods for exportation to other member states. In both cases the Commission considered the manufacturer's price policy as having the same or a similar effect as an export ban and therefore refused to exempt the agreements.

Compensation payments between the manufacturer and the exclusive distributor normally do not fall under article 85(1).¹³⁹ If they are made between dealers, however, they are caught by the prohibition and will only in rare cases be exempted. In *Transocean Marine Paint*, the Commission accepted for a limited time a system of financial compensation between the members of a paint producers' association.¹⁴⁰ The increased territorial protection resulting from the compensation system was necessary to enable each of the members of the association to build up its local market position in competition with large undertakings. At the end of a six-year period, the restriction was no longer considered justified.¹⁴¹

The Commission appeared to choose a more flexible attitude towards financial compensation systems when, several months ago, it gave public notice of its intention to make a favorable decision with regard to an agreement providing for

137. 15 J.O. COMM. EUR. (No. L 272) 35 (1972), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9539.

138. 21 O.J. EUR. COMM. (No. L 50) 16 (1978), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,011, *aff'd on other grounds*, 1980 E. Comm. Ct. J. Rep. 2229, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8613.

139. *See* Campari, 21 O.J. EUR. COMM. (No. L 70) 69, 70 (1978), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,035 at 10,198.

140. *Transocean Marine Paint Association I*, 10 J.O. COMM. EUR. (No. L 163) 10 (1967), [1965-1969 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9188. The association consisted of medium-sized undertakings, each established in a different country, set up with the intention of developing certain marine paints by using the joint technical knowledge of the members and of manufacturing paint of the same quality and selling it under the same trademark. Sales were organized in such a manner that each participant had to develop its activities primarily in its own country. In this case the Commission allowed deliveries to countries where other members were established to be made only upon payment of a commission.

141. *See* *Transocean Marine Paint Association II*, 17 O.J. EUR. COMM. (No. L 19) 18 (1974), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9628.

an equalization of sales promotion costs between dealers in different member states.¹⁴² The Distillers Company Limited (DCL) had worked out a scheme under which British wholesalers who purchase Scotch whiskey of a particular brand (Johnnie Walker Red Label) in order to export it to other EEC countries would have to pay an additional charge. The total revenue of the charge would be used to subsidize publicity campaigns for this brand organized by DCL's exclusive distributors on the Continent. In the manufacturer's eyes, financial compensation of the above-mentioned kind is necessary to reintroduce Johnnie Walker Red Label on the British market (from which it had been withdrawn by DCL after the prohibition of its double price system). DCL argues that without a certain protection, the exclusive dealers in other member states would be unable to compete with parallel importers offering the whiskey at low prices and would therefore no longer assure advertising essential for a particular brand of whiskey to survive. According to the Commission, an exemption might be granted in such cases for a limited period, if the charge imposed on parallel restraints is regressive and if it is not a disguised form of export ban. Until now the favorable notice has not been followed by a favorable decision.

b. Customer Restrictions

The other restrictions in exclusive distribution agreements can be treated summarily. As to customer restrictions, Regulation 1983/83 requires that the exclusive distributor remain free to choose his clients.¹⁴³ The block exemption does not cover agreements which oblige the distributor to sell in his contract territory only to certain categories of customers or users.¹⁴⁴ It is submitted that he even has the right to supply, in competition with the manufacturer, final consumers and users reserved to the manufacturer. The Commission admits, however, that the exclusive distributor may be forbidden from selling the contract goods to unsuitable dealers, provided that ad-

142. See Notice pursuant to Article 19(3) of Council Regulation No. 17 concerning notification No. IV/30.228, 26 O.J. EUR. COMM. (No. C 245) 3 (1983), 3 COMMON MKT. REP. (CCH) ¶ 10,518.

143. See Comm'n Regulation No. 1983/83, 26 O.J. EUR. COMM. (No. L 173) 1, recital 8 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

144. See 1983 Notice, *supra* note 16, para. 29.

mission to the distribution network is based on objective criteria of a qualitative nature relating to the professional qualification of the owner of the business or his staff or to the suitability of his business premises, and provided that the criteria are the same for all potential dealers and are applied in a nondiscriminatory manner.¹⁴⁵ In other words, under Regulation 1983/83 an exclusive distributorship can be combined with selective distribution of the wholesalers or retailers, where the selection is not prohibited by article 85(1). The limits of the block exemption are exceeded where the selection of the dealers involves restrictions on competition. Such cases have to be cleared following the rules which govern the assessment of selective distribution systems under article 85(3).¹⁴⁶

c. Price Restrictions

Price restrictions in exclusive distribution agreements are judged more severely than territorial restrictions. Where they are included in an agreement, they lead to loss of the block exemption. The freedom of the exclusive distributor to determine his prices and conditions of sale is one of the fundamental requirements laid down in Regulation 1983/83. The whole concept of a single market with free trade between member states would become unworkable if the parties could manipulate the resale prices of the contract goods and thereby artificially prevent parallel importation and exportation within the Community. Thus, price restrictions imposed on dealers have never been accepted by individual decisions.¹⁴⁷ Similar restrictions imposed on the manufacturer are likewise incompatible with article 85(3) in general and with Regulation 1983/83 in particular.¹⁴⁸ Whether systems of recommended prices qualify

145. *Id.*

146. See Comm'n Regulation No. 1983/83, 26 O.J. EUR. COMM. (No. L 173) 1, recital 8 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730.

147. See Junghans, 20 O.J. EUR. COMM. (No. L 30) 10 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9912; GERO-fabriek, 20 O.J. EUR. COMM. (No. L 16) 8 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9914; SABA, 19 O.J. EUR. COMM. (No. L 28) 19 (1976), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9802, *aff'd sub nom.* Metro SB-Grossmärkte GmbH v. Comm'n, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435; Omega, 13 J.O. COMM. EUR. (No. L 242) 22 (1970), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9396.

148. See Polistil/Arbois, 27 O.J. EUR. COMM. (No. L 136) 9 (1984), 3 COMMON MKT. REP. (CCH) ¶ 10,587.

for a more favorable treatment is still an open question.

CONCLUSION

A comparison of the application of the competition laws of the EEC and of the antitrust laws of the United States to exclusive distribution agreements reveals an interesting development in the two systems. While *Continental T.V., Inc. v. GTE Sylvania Inc.* has introduced the rule of reason to the United States approach for analyzing all nonprice vertical restrictions, it does not provide concrete guidelines for its application. The EEC approach, on the other hand, is designed to promote the goal of Common Market integration by preventing the insulation of national markets. Thus the Commission and the Court of Justice have developed a favorable attitude towards territorial and exclusive supply restrictions, but are stricter with regard to price and customer restrictions.