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European Community Competition Law, Subsidiarity, and the National Courts

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I. INTRODUCTION

Since its inception, the modern European integration movement has emphasized the unrestricted movement of goods and services[1] and has discouraged restrictions on competition within the common market.[2] As a result, a large and complex body of law relating to competition in what is now the European Union (EU) has accumulated over the past four decades.[3] This law is based on treaties, legislative acts and decisions, and judicial pronouncements at both the EU and Member State levels. This comment will not give a complete and comprehensive reading of European Community (EC) competition law. Rather, it will provide a basic understanding of current competition law, including developments after the signing of of the Treaty on European Union (TEU or Maastricht Treaty).

In the first part of this comment, the historical development of modern EC competition policy and law is briefly examined. EC competition law as articulated by Articles 85 and 86 of the EC Treaty[4] is then discussed. Some recent developments in the law in this area are also analyzed. The concept of "subsidiarity" and the effect it has had on EC com-

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1. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 25 March 1957, art. 3(c) [hereinafter EC TREATY] *in* BASIC COMMUNITY LAWS 222 (Bernard Rudden & Derrick Wyatt eds., 6th ed. 1996) [hereinafter BASIC COMMUNITY LAWS].

2. Competition law in the European Union is roughly analogous to anti-trust law in the United States. *See* Emmanuel P. Mastromanolis, *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law*, 15 U. PA. J. INT'L BUS. L. 559 (1995).

3. A number of legal scholars have written comprehensive works on European Community competition law. *See, e.g.*, VALENTINE KORAH, EC COMPETITION LAW AND PRACTICE (5th ed. 1994); LUIS ORITZ BLANCO, EC COMPETITION PROCEDURE (1995). For a discussion of recent developments and case-law in EC competition law, see Jean-Yves Art & Dirk Liedekerke, *Developments in EC Competition Law in 1994—An Overview*, 32 COMMON MKT. L. REV. 921 (1995); Jean-Yves Art & Dirk Liedekerke, *Developments in EC Competition Law in 1995—An Overview*, 33 COMMON MKT. L. REV. 719 (1996); Jo Shaw, *A review of recent cases on Article 85 and 86 EC: issues of substantive law*, 20 EUR. L. REV. 66 (1995).

4. With entry into force of the Treaty on European Union (TEU) the EEC Treaty became the EC Treaty. For the purpose of this comment I use the term "EEC" to refer to the Treaty in the pre-Maastricht period and the term "EC" to refer to the post-Maastricht period. The terms EC (European Community) and EU (European Union) are used in accordance with the explanation in *Note on Post-Maastricht Terminology*, 1 C.M.L.R. 4 (1994). Therefore, the term EU generally applies to the European political entity, while EC generally refers to the legal entity or the central pillar within the EU.

petition law is also discussed, with primary focus on the concept of subsidiarity as embodied in the Commission's 1993 Notice on Cooperation Between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty.[5] Finally, a British case, *Inntrepreneur Estates Ltd. v. Mason*,[6] is highlighted. This case exemplifies the interaction between the Commission and national courts regarding competition law. It also illuminates the application of the 1993 Notice by a national court. In conclusion, the importance of the role that national courts will play in the implementation and development of future competition law in the European Union is discussed.

II. COMPETITION LAW IN THE EUROPEAN COMMUNITY

After the carnage of World War II, support for European integration accelerated and eventually led to the formation of what has come to be known as the European Union.[7] In fact, the theoretical objective of the European Union's founders, Jean Monnet and Robert Schuman, was to inextricably bind the economies of Europe together (primarily Germany and France) in order to discourage Member States from warring among themselves.[8] The formation of a common market manifested this objective, as evidenced by the treaties founding the European Coal and Steel Community (ECSC),[9] the European Economic Community (EEC, now EC),[10] and the European Atomic Energy Authority (Euratom).[11]

The EC Treaty notes that in order to form a common market, the Member States must "[r]ecogni[ze] that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition."[12] Under the Treaty of Rome, this critical common market objective was to be accomplished by allowing

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5. Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, 1993 O.J. (C 39) 6 *in* BLANCO, *supra* note 3, at 454 [hereinafter Notice].

6. Inntrepreneur Estates Ltd. v. Mason, [1993] 2 C.M.L.R. 293 (High Court (Q.B.)) (U.K.).

7. At the time of this writing, the European Union consists of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

8. NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 38 (3d ed. 1994); *see also* DAVID W. P. LEWIS, THE ROAD TO EUROPE (1993); Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

9. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, 18 April 1951, [hereinafter ECSC TREATY] *in* BASIC COMMUNITY LAWS, *supra* note1, at 7.

10. EC TREATY (also referred to as the Treaty of Rome).

11. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, 25 March 1957, [hereinafter EURATOM TREATY] *in* Encyclopedia of Eur. Community L. (Sweet & Maxwell) Part B5, at B5-001 (Nov. 30, 1993).

12. EC TREATY preamble.

the free movement of goods, persons, services, and capital.[13] Article 3(f) of the Treaty called for the "institution of a system ensuring that competition in the common market is not distorted . . . ."[14] The natural outgrowth of this objective was the formation of a consistent, Community-wide competition policy.

European Community competition law was first articulated in 1951, with the adoption of the ECSC Treaty.[15] It established the foundation upon which EC competition law and policy would be built. Under the ECSC provisions, Member States were prohibited from restricting the coal and steel sectors by initiating either:

> a) import and export duties, or charges having equivalent effect, and quantitative restrictions on the movement of products;
> b) measures or practices which discriminate between producers, between purchasers or between consumers . . . .[16]

The development of competition law and policy was further emphasized in the Spaak Report which would become the precursor to the EEC Treaty. The Spaak Report found that a common market could not be obtained "unless practices whereby competition between producers is distorted [were] put to an end."[17] The Report further stated that to achieve the objectives of the common market, Member States would have to prevent "[a] division of markets by agreement between enterprises[,] . . . [a]greements to limit production or curb technical progress[, and] . . .[t]he absorption or domination of the market for a product by a single enterprise. . . ."[18]

The sectoral application of competition rules was expanded beyond the coal and steel sectors with the entry into force of the EEC Treaty[19] in 1958. The EEC Treaty set specified guidelines pertaining to competition in the newly formed Community. In particular, Articles 85 and 86 established the general parameters within which the EC's competition law and policy would occur.[20]

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13. *Id.* at art. 3.

14. *Id.* (This Article was originally 3(f) of the EEC Treaty but now with entry into force of the TEU is Article 3(g) of the EC Treaty. I refer to it as Article 3(f) for the purposes of this comment.)

15. The original Member States of the ECSC were Belgium, Germany, France, Italy, Luxembourg, and the Netherlands.

16. ECSC TREATY art. 4. *See* Mark Friend, *Enforcing the ECSC Treaty in national courts*, 20 EUR. L. REV. 58 (1995).

17. DANIEL G. GOYDER, EC COMPETITION LAW 25 (2d ed. 1993).

18. *Id.* at 25.

19. The EC-6 consisted of the same Member States as the ECSC. *See supra* note 15.

20. Articles 85-94 of the EC Treaty provide the governing EU provisions dealing with competition. Articles 85 to 90 deal with "rules applying to undertakings." Articles 90-94 deal with "aids granted by States." This comment, however, will deal only with Articles 85 and 86.

A. EC Treaty Article 85

Article 85(1) deals with undertakings,[21] decisions by associations of undertakings, and concerted practices. It is crafted as follows:

> 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 . . . .[22]

Article 85(1) of the Treaty gives specific examples of conduct which violates the competition rules.[23] Moreover, Article 85(2) states that "any agreements or decisions prohibited pursuant to this Article shall be automatically void."[24] Article 85(3), however, provides exemptions from the prohibitions contained in Article 85(1). Specifically exempted are:

> [A]ny 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 of distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit . . . .[25]

Such exemption may not, however, "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives" or "afford such undertakings the possibility of eliminat-

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21. Valentine Korah states that an "[u]ndertaking is a broad concept which seems to have the same meaning in articles 85 [and] 86 . . . . [It] covers any collection of resources to carry out economic activities." KORAH, *supra* note 3, at 38.

22. EC TREATY art. 85(1).

23. In particular the Article mentions those agreements, decisions, and concerted practices 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;
> (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.

Id. at art. 85(1).

24. *Id.* at art. 85(2).

25. *Id.* at art. 85(3).

ing competition in respect of a substantial part of the products in question."[26]

Article 85(1) applies to agreements *between* undertakings, decisions by associations of undertakings, and concerted practices. Horizontal[27] as well as vertical[28] agreements are subject to this Article. Its purpose is to generally prohibit agreements, decisions or concerted practices which "have as their object or effect the prevention, restriction or distortion of competition within the common market."[29] The primary emphasis in applying Article 85(1) is upon an agreement, decision or concerted practice and its effect upon trade in the Community. However, Article 85(1) only applies to agreements, decisions or concerted practices which affect trade between Member States.[30] Therefore, agreements, decisions or concerted practices whose object and effect may be discriminatory but which do not have Community-wide influence may not be subject to Article 85(1).[31] Also, unilateral actions may not be subject to Article 85(1), as it applies only to agreements between undertakings, associations of undertakings, and concerted practices.[32] Such actions could, however, constitute an abuse of a dominant position, subject to the prohibitions of Article 86.

The European Court of Justice (ECJ) has held that the effect of a restraint on competition must be "appreciable."[33] This is known as the de minimus rule. In its Notice on Agreements of Minor Importance,[34] the European Commission has further defined the de minimus rule. The Commission stated that in its opinion, "agreements whose effects on trade between Member States or on competition are negligible do not fall under the ban on restrictive agreements contained in Article 85(1)."[35] The Commission further stated that for the de minimus rule to apply, "the goods or services which are the subject of the agreement . . . [may] not represent

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26. EC TREATY art. 85(3).

27. Horizontal agreements are agreements between undertakings doing business at the same level. *See* BELLAMY & CHILD: COMMON MARKET LAW OF COMPETITION 66 § 2-059 (Vivien Rose ed., 4th ed. 1993).

28. Vertical agreements are agreements between manufacturers and their distributors. *See id.* at 66 § 2-058.

29. EC TREATY art. 85(1). *See* Barry E. Hawk, *System Failure: Vertical Restraints & EC Competition Law*, 32 COMMON MKT. L. REV. 973 (1995).

30. Joined Cases 56 & 58/64, Consten and Grundig v. Commission, 1966 E.C.R. 299, 1 C.M.L.R. 418 (1966).

31. The Republic v. Jean Edmond Teil, 1 C.M.L.R. 593 (Cass. 1993) (Fr.); The State v. Morais, 2 C.M.L.R. 533 (1992) (Port.).

32. *See* KORAH, *supra* note 3, at 38-49.

33. Case 5/69, Volk v. Etablissements Vervaecke S.P.R.L., 1969 E.C.R. 295, 1 C.M.L.R. 273 (1969).

34. Commission Notice of September 3, 1986 on Agreements of Minor Importance Which Do Not Fall Under Article 85(1) of the Treaty Establishing the European Economic Community, 1986 O.J. (C 231) 2 *in* BASIC COMMUNITY LAWS, *supra* note 1, at 500.

35. *Id.* at 2. *See* Morten P. Broberg, *The De Minimus Notice*, 20 EUR. L. REV. 371 (1995).

more than five per cent of the total market for such goods or services . . . and the aggregate annual turnover of the participating undertakings [may] not exceed 200 million ECU (European Currency Unit)."[36]

The agreements and decisions specifically listed in Article 85(1) are "automatically void" pursuant to Article 85(2). Provisions, however, which do not violate the prohibitions of Article 85(1) are not void and may be enforced.[37] Agreements or portions of agreements violative of Article 85(1) are unenforceable in the courts of Member States. However, those provisions of an agreement which are valid may be considered subject to the laws of the respective Member States.[38] Parties adversely affected by the voided agreement may therefore seek damages for their injuries in the national courts.

If an agreement, decision or concerted practice violates the prohibitions of Article 85(1), it still may be exempted pursuant to Article 85(3). These exemptions are granted solely by the Commission and are subject to review by the EU courts.[39] An exemption can come in the form of either an individual exemption or a group exemption.

An individual exemption can be granted in one of two ways: the Commission will either grant negative clearance or make a declaration of inapplicability. A negative clearance is granted when the Commission issues a decision stating that it sees no reason, based on the facts in its possession, to take an action against the agreement, decision or concerted practice under Article 85(1).[40] A declaration of inapplicability is an admission by the Commission that while a given agreement, decision or concerted practice violates the provisions of Article 85(1), the benefits provided by the agreement, decision or concerted practice outweigh any negative effects.[41] The Commission makes a declaration of inapplicability based on the criteria set out in Article 85(3). In either case, the agreements, decisions or concerted practices are received by the Commission so that third parties can be apprised of the application for exemption.

A comfort letter may also be sent to the undertakings seeking an exemption. The letter essentially tells the undertaking that based on facts in its possession, the Commission sees no grounds for an action against the agreement, decision or concerted practice. Comfort letters are issued

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36. *Id.*

37. Case 56/65, Société Technique Minière v. Maschinenbau Ulm, 1966 E.C.R. 235, 1 C.M.L.R. 357 (1966).

38. Case 127/73 B.R.T. v. S.A.B.A.M., 1974 E.C.R. 51, 2 C.M.L.R. 238 (1974).

39. Council Regulation No. 17 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty, 1959-62 O.J. Spec. Ed. 87 *as amended by* Regulations 59 1959-62 O.J. Spec. Ed. 249, 118/63 1963-64 O.J. Spec. Ed. 55, 2822/71 1971 O.J. Spec. Ed. 1035 [hereinafter Regulation No. 17] *in* BASIC COMMUNITY LAWS, *supra* note 1, at 484.

40. *Id.* at art. 2; *see also* GOYDER, *supra* note 17, at 37.

41. *See* BLANCO, *supra* note 3, at 49-50.

more quickly than the other individual exemptions but their legal status is not as certain.[42]

Prior to 1965, the Commission only granted individual exemptions. However, group exemptions were adopted by Regulation 10/65 to limit the number of applications for individual exemptions.[43] Since then, group exemptions have become the preferred mode of exemption. As individual exemptions are rarely granted, most undertakings draft their agreements in accordance with the parameters articulated by the Commission in group exemptions. Examples of group exemptions which the Commission has granted include exclusive distribution agreements,[44] exclusive purchase agreements,[45] patent license agreements,[46] exclusive motor vehicles distribution agreements,[47] specialization agreements,[48] research and development agreements,[49] franchise agreements,[50] and know-how license agreements.[51]

B. EC Treaty Article 86

Article 86 sets forth competition rules regarding the abuse of a dominant position by undertakings. It is drafted as follows:

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42. *See* KORAH, *supra* note 3, at 115-16.

43. *See* GOYDER, *supra* note 17, at 65-68.

44. Council Regulation 1983/83 of 22 June 1993 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements, 1983 O.J. (L 173) 1 *in* BASIC COMMUNITY LAWS, *supra* note 1, at 504.

45. Commission Regulation 1984/83 of 22 June 1993 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements, 1983 O.J. (L 173) 1 *in* BASIC COMMUNITY LAWS, *supra* note 1, at 510.

46. Commission Regulation 2349/84 of 23 July 1984 on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements *in* BASIC COMMUNITY LAWS 510 (Bernard Rudden & Derrick Wyatt eds., 4th ed. 1993).

47. Commission Regulation 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, 1984 O.J. (L 15) 16 *in* BASIC COMMUNITY LAWS 509 (Bernard Rudden & Derrick Wyatt eds., 4th ed. 1993).

48. Commission Regulation 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to certain categories of specialisation agreements, 1985 O.J. (L 53) 1 *as amended by* Commission Regulation 151/93 1993 O.J. (L 21) 8 *in* BASIC COMMUNITY LAWS, *supra* note 1, at 521.

49. Commission Regulation 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to certain categories of research and development agreements 1985 O.J. (L 53) 5 *as amended by* Commission Regulation 151/93 1993 O.J. (L 21) 8 *in* BASIC COMMUNITY LAWS, *supra* note 1, at 528.

50. Commission Regulation 4087/88 of 30 November 1984 on the application of Article 85(3) of the Treaty to certain categories of franchise agreements, 1988 O.J. (L 359) 46 *in* BASIC COMMUNITY LAWS, *supra* note 1, at 540.

51. Commission Regulation 556/89 of 30 November 1988 on the application of Article 85(3) of the Treaty to certain categories of know-how licensing agreements, 1989 O.J. (L 61) 1 *as amended by* Commission Regulation 151/93 1993 O.J. (L 21) 8 *in* BLANCO, *supra* note 3, at 428.

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States . . . .[52]

Article 86 also provides specific scenarios in which an abuse may occur.[53]

While Articles 85 and 86 share the objective to prevent the distortion of competition within the Community, Article 86 is designed to apply to different situations than Article 85.[54] While Article 85 deals with agreements, decisions or concerted practices that involve two or more undertakings, Article 86 may apply to only one undertaking. In fact, Article 86 does not necessarily deal with agreements, decisions, or concerted practices as does Article 85. Rather, the touchstone of Article 86 is whether the undertaking (or group of under undertakings) occupies a dominant position and has abused that position. This does not mean, however, that Articles 85 and 86 are mutually exclusive. The primary purpose of Article 86 is to prevent large companies from forming monopolies which would distort competition within the meaning of Article 3(f) of the EC Treaty.[55] However, it is clear that Article 86 does not expressly prohibit dominance, but rather *abuse* of a dominant position.[56] This is an important distinction.

The ECJ has defined dominance as the power of an undertaking or group of undertakings which, "enables [them] to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently if its competitors and customers and ultimately of consumers."[57] The percentage of the market owned or controlled necessary to constitute a dominant position is not static.

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52. EC TREATY art. 86.

53. The Article mentions the following as abuse:

> (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have not connection with the subject of such contracts.

Id.

54. Case T-51/89, Tetra Pak Rausing SA v. Commission, 1990 II E.C.R. 3416, 4 C.M.L.R. 334 (Ct. First Instance 1991).

55. *See supra* note 14.

56. Case 322/81, Michelin v. Commission, 1983 E.C.R. 3461, 1 C.M.L.R. 282 (1985).

57. *Id.* at 321.

Rather, it is dependant upon a number of factors including the relevant market and the percentage of market share relative to other competitors. The ECJ has found a dominant position in cases ranging from 90% market share,[58] to only a 40-45% market share.[59]

Article 86 does not define abuse of a dominant position but it does give examples of such an abuse. The ECJ has further explained the meaning of abuse within the context of Article 86 in *Hoffman-La Roche:*

> The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[60]

As is the case with Article 85, a violation of Article 86 must necessarily involve trade between Member States. Also, parties may seek negative clearance under Article 86 as with Article 85.[61] The Commission's province is to enforce the provisions stated in Articles 85 and 86.[62] The Commission may investigate possible infringements of its own accord or may respond to claims of violations by Member States.[63] Pursuant to Regulation No. 17, the Commission has been granted the competence to set and levy fines against undertakings which have violated the provisions of Articles 85 and 86 and who do not qualify for an exemption.[64]

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58. *Tetra Pak*, 1990 II E.C.R. 3416.

59. Case 27/76, United Brands Co. v. Commission, 1978 E.C.R. 207, 1 C.M.L.R. 429 (1978).

60. Case 85/76, Hoffman-La Roche v. Commission, 1979 E.C.R. 461, 541, 3 C.M.L.R. 211, 290-91 (1979).

61. CHRISTOPHER S. KERSE, E.C. ANTITRUST PROCEDURE 49 § 2.04 (1994).

62. Regulation No. 17, *supra* note 39, at art. 9.

63. *Id.* at art. 11.

64. *Id.* at art. 15.

II. COMPETITION LAW, SUBSIDIARITY, AND THE NATIONAL COURTS

A. Interaction With the National Courts

While the Commission has been granted the sole competence to grant exemptions to Articles 85 and 86,[65] it must share with the national courts in the Member States the power of determining which agreements, decisions, and concerted practices have violated Articles 85 and 86. This is the result of the "direct effect" of Article 85(1)and (2) and Article 86.[66] The concept of direct effect means that Article 85(1) and (2) and Article 86 automatically have effect in the respective Member States and that citizens of those states can claim individual rights in the national courts pursuant to these Articles.[67] Its application has resulted in the development of an interesting enforcement burden-sharing partnership between the Commission and the national courts.[68]

Article 177 of the EC Treaty provides additional interaction between the Member States and the EC institutions.[69] This Article provides that the ECJ may "give preliminary rulings concerning . . . the interpretation of this (EC) Treaty . . . , the validity and interpretation of acts of the institutions of the community . . . , [and] the interpretation of the statutes of bodies established by an act of the Council . . . ."[70] Article 177 further states that "[w]here such a question is raised before any court or tribunal

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65. Regulation No. 17, *supra* note 39. Additionally, in Case 234/89 Stergios Delimitis v. Henninger Bräu AG, 1991 E.C.R. 935, 5 C.M.L.R. 210 (1991), the ECJ made it clear that national courts did not have the authority to grant exemptions pursuant to Article 85(3) and that this competence was solely that of the Commission.

66. *See, e.g.*, Case 127/73, B.R.T. v. S.A.B.A.M., 1974 E.C.R. 51, [1974] 2 C.M.L.R. 238.

67. Professor Trevor Hartley explains direct effect as follows:

> [I]f a legal provision is said to be directly effective, it is meant that it grants individuals rights which must be upheld by the national courts. . . . As a matter of general principle, a legal provision cannot be directly effective unless two requirements are satisfied. First of all, the provision . . . must be valid from the point of view of the national courts. . . . The second requirement is that the terms of the provision must be appropriate to confer rights on individuals.

TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 195-96 (3d ed. 1994). The seminal case on direct effect is Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 1 C.M.L.R. 105 (1963).

68. *See* David F. Hall, *Enforcement of E.C. Competition Law by National Courts, in* PROCEDURE AND ENFORCEMENT IN THE E.C. AND U.S. COMPETITION LAW 41-49 (Piet Jan Slot and Alison McDonnell eds., 1993); *see also* John Temple Lang, *The Duties of National Courts under Community Law*, 22 EUR. L. REV. 3 (1997). *But see* Rein Wesseling, *Subsidiarity in Community Antitrust Law: Setting the Right Agenda*, 22 EUR. L. REV. 35 (1997).

69. Many competition cases also find their way to the ECJ or the Court of First Instance (CFI) pursuant to Articles 171 and 172 of the EC Treaty. These Articles allow the Courts to "review the legality" of the Commission's decisions and to exercise "unlimited jurisdiction" regarding penalties.

70. EC TREATY art. 177.

of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon."[71] National courts may thereby seek a ruling from the ECJ on EC legal issues in order to give judgment.[72] The ECJ, however, may not determine questions of fact and is allowed only to interpret the law. The practical application of Article 177 to competition law is that a national court may stay its proceedings and seek a ruling from the ECJ on the interpretation of Articles 85 and 86 as well as EC legislation.

The direct effect of Articles 85 and 86, and the procedures allowed by Article 177, have created a high degree of interaction in the area of competition law between the Member States and the EC institutions. This relationship was strengthened by the inclusion of the concept of "subsidiarity" in the Treaty on European Union (TEU). In particular, article 3(b) mandates:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[73]

Subsidiarity thus requires that actions shall be taken at the level most appropriate to address the action in question. Therefore, the practical meaning of subsidiarity is that excepting areas in which the EC has exclusive competence, actions will be taken at the Member State level.[74] In the area of competition enforcement, Article 3(b) in some ways codifies and strengthens what has already been occurring to some extent for the past

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71. *Id.* at art. 177.

72. *See Guidance on References by National Courts for Preliminary Rulings*, 1 C.M.L.R. 78 (1997); *see also* HARTLEY, *supra* note 66, at 266-302; DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 142-53 (3d ed. 1993).

73. EC TREATY art. 3(b).

74. *See generally* Nicholas Emiliou, *Subsidiarity: Panacea or Fig Leaf?*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY 65 (David O'Keeffe & Patrick M. Twomey eds., 1994); Daniel G. Partan, *The Justiciability of Subsidiarity*, *in* THE STATE OF THE EUROPEAN UNION: BUILDING A EUROPEAN POLITY? 63 (Carolyn Rhodes & Sonia Mazey eds., 1995); Josephine Steiner, *Subsidiarity Under the Maastricht Treaty*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY 49 (David O'Keeffe & Patrick M. Twomey eds., 1994); Akos G. Toth, *A Legal Analysis of Subsidiarity*, *in* LEGAL ISSUES OF THE MAASTRICHT TREATY 37 (David O'Keeffe & Patrick M. Twomey eds., 1994); Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L.J. 459 (1992); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Eric F. Hinton, Note, *The Limits of Affirmative Action in the European Union: Eckhard Kalanke v. Freie Hansestadt Bremen*, 6 TEX. J. WOMEN & L. (forthcoming May 1997).

three decades between the national courts and the EC institutions.[75] However, subsidiarity also implies that even more competition cases should be heard in the national courts and that Commission competition decisions and Article 177 preliminary rulings requests should be reduced. It is therefore imperative that national courts have direction from the Commission on the application of Articles 85 and 86 in suits brought in the Member States.

B. The Commission's Notice on Cooperation with National Courts in Applying Article 85 and 86 of the EEC Treaty

An important clarification for national courts came with the Commission's February 13, 1993 adoption of a Notice on Cooperation with National Courts in Applying Article 85 and 86 of the EEC Treaty.[76] In that Notice, the Commission expressed its desire to cooperate with the national courts. It stated that,

> The Commission considers that such cooperation is essential in order to guarantee the strict, effective and consistent application of Community competition law. In addition, more effective participation by the national courts in the day-to-day application of competition law gives the Commission more time to perform its administrative task, namely to steer competition policy in the Community.[77]

The Commission elaborated on the advantages that are the result of national courts' ability to hear competition complaints. Because of this competence, national courts are able to award damages for infringement of competition laws, adopt interim measures more quickly than the Commission, hear claims under both EC and national competition laws, and award legal fees to successful applicants.[78]

The Notice also sets forth guidelines to assist the national courts. National courts must determine "whether the agreement, decision or concerted practice infringes the prohibitions laid down in Article 85(1) or

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75. Roger P. Alford, *Subsidiarity and Competition: Decentralized Enforcement of EU Competition Laws*, 27 CORNELL INT'L L.J. 271, 272 (1994). *But see* Alissa A. Meade, Note, *Modeling a European Competition Authority*, 46 DUKE L.J. 153, 154-55 (1996); Robert Walz, *Rethinking* Walt Wilhelm, *or the Supremacy of Community Competition Law over National Law*, 21 EUR. L. REV. 449 (1996).

76. Notice, *supra* note 5, at 6. For additional discussion of the Commission's Notice see, *The Commission's Notice on Cooperation between National Courts and the Commission in applying Articles 85 and 86 EEC*, 30 COMMON MKT. L. REV. 681 (1993); Ian S. Forrester and Christopher Norall, *Competition Law*, 12 Y.B. EUR. L. 547, 550-60 (1993); Jacques H. J. Bourgeois, *EC Competition Law and Member State Courts*, 17 FORDHAM INT'L L.J. 331 (1994).

77. Notice, *supra* note 5, at 10.

78. *Id.* at 7-8.

Article 86."[79] This is to be done by "ascertain[ing] whether the agreement, decision or concerted practice has already been the subject of a decision by . . . the Commission."[80] While national courts may not be formally bound by such decisions, the Commission admonishes the national courts to use these statements in reaching a judgment. This is also the case with a comfort letter.

If there has been no ruling by the Commission on the agreement, decision or concerted practice, the national courts are instructed to use the case law of the ECJ and decisions of the Commission to interpret the law in question.[81] The Commission indicates that national court proceedings may be stayed in order to await the outcome of a Commission action. Finally, if national courts have "persistent doubts on questions of compatibility" they may bring the matter before the ECJ, pursuant to Article 177 of the EC Treaty.[82]

C. *An Application of the Commission's Notice: Inntrepreneur Estates Ltd. v. Mason*

Inntrepreneur Estates Ltd. v. Mason[83] provides an enlightening example of a national court's application of the guidelines contained in the Commission's Notice regarding Articles 85 and 86. Importantly, *Inntrepreneur* was decided on March 11, 1993, less than a month after the adoption of the Notice. This case came as an interlocutory appeal before the Queen's Bench Division of the English High Court. At issue was Inntrepreneur Estates' (Inntrepreneur) claim for possession of certain premises leased by the Masons (Masons) for arrears of rent.

The property was a public house containing a bar and other accommodations. A twenty year lease had been granted for the property.[84] Also included in the lease was a tie provision requiring the tenants to "purchase beers and other drinks and products from the landlord or from a nominee of the landlord and not from anybody else."[85] The lease was subject to five yearly rent reviews. However, if the tenant was either entirely or partially released from the tie provision, the landlord could exercise the option of conducting another rent review in addition to the five yearly reviews.

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79. *Id.* at 8.
80. *Id.*
81. *Id.*
82. Notice, *supra* note 5, at 8.
83. Inntrepreneur Estates Ltd. v. Mason, *[1993] 2 C.M.L.R. 293 (High Court (Q.B.)) (U.K.).*
84. *Id.* at 296.
85. *Id.*

After a period of time as tenants, the Masons fell behind on their rent payments.[86] As a result, Inntrepreneur brought an action seeking possession of the premises and payment for back rent as well as other costs. The court entered a default judgment in behalf of Inntrepreneur. On appeal, however, the Master set aside the judgment against the Masons and Inntrepreneur appealed to the Queen's Bench.[87]

The Masons based their defense on Article 85 of the EC Treaty. They alleged that the tie provision in the lease was in violation of Article 85(1) and the entire lease was thereby illegal.[88] Inntrepreneur, on the other hand, argued that the lease did not infringe Article 85(1). Additionally, Inntrepreneur argued that even if the tie provision was not permissible under Article 85(1), the agreement was exempted under the Regulation 1984/83,[89] which dealt with exclusive purchase agreements, pursuant to Article 85(3). Inntrepreneur also opined that in the event the tie provision was invalid, it was excisable from the lease, which would leave the remainder of the lease enforceable.[90]

Inntrepreneur also had applied to the Commission for an individual exemption for the lease in question, as well as all the leases.[91] The matter was still pending at the time of the initial legal action and had not been dealt with as of the date of this court's judgment.[92]

DG IV[93] of the Commission, however, had sent Inntrepreneur two letters regarding its application for an individual exemption. The first letter stated that, "the conditions of an individual retrospective exemption under Article 85(3) appear to be fulfilled."[94] The letter further stated that DG IV was "preparing, in conformity with the application of Article 19(3) of Regulation No. 17, the publication of a summary of your notification in order to invite all interested third parties to submit their observations to the Commission."[95] A second letter indicated that since Inntrepreneur's agreements were between undertakings from a single Member State, that they probably did not relate to imports and exports

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86. *Id.* at 296-97.

87. *Id.* at 295.

88. *Id.* at 297.

89. *See supra* note 45.

90. *Inntrepreneur*, [1993] 2 C.M.L.R. at 297.

91. *Id.*

92. In July 1993, the Commission indicated that it intended to grant the exemption but subject to a comment period. *See* [1993] 5 C.M.L.R. 517. Subsequently, the Commission announced that it would not "progress its current proceedings . . . pending the outcome of the simultaneously announced enquiry of the Office of Fair Trading into differential pricing by the major U.K. brewers." *See* [1995] 4 C.M.L.R. ANTITRUST REP. 310.

93. DG IV is the Commission's Directorate-General for competition.

94. *Inntrepreneur*, [1993] 2 C.M.L.R. at 303, quoting a letter from Director General Rocca of DG IV.

95. *Id.*

between Member States.[96] Inntrepreneur argued that these letters constituted comfort letters from the Commission. The Masons, however, maintained that they were not.[97]

In rendering judgment, Judge Michael Barnes relied on the Commission's Notice regarding the application of Articles 85 and 86 by national courts. He cited the specific directions given to national courts by the Commission that "[a]greements, decisions and concerted practices which fall within the scope of application of a block exemption regulation are automatically exempted from . . . Article 85(1) without the need for a Commission or comfort letter."[98]

The court then outlined the procedures national courts should follow when dealing with agreements, decisions and concerted practices which are not covered by a block exemption regulation and which have not been the subject of an individual exemption decision or a comfort letter. It was noted that a national court should employ the following analysis in determining whether a block exemption applied:

> [1] Examine whether the procedural conditions necessary for securing an exemption are fulfilled. . . . Where . . . no notification has been made . . . the national court may decide . . . that the agreement, decision or concerted practice is void.
> [2] Where the agreement, decision or concerted practice has been duly notified to the Commission, the national court will assess the likelihood of an exemption being granted . . .
> [3] On the other hand, if it (the national court) takes the view that individual exemption is possible, the national court should suspend the proceedings while awaiting the Commission's decision.[99]

In applying the Notice, Judge Barnes noted that there is a "substantial difference between the situation where a comfort letter has been issued and a situation where no such letter has been issued."[100] In this case, the court observed that "a comfort letter is a letter issued after the procedure in the regulations has been gone through. . . . In the present case that stage has not been reached."[101] Therefore, the court found that the letters issued by DG IV, did not rise to the level of being comfort letters, as the Commission intended them only as the precursor to the initiation of an action pursuant to Regulation 17.[102]

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96. *Id.* at 303-04.
97. *Id.* at 297-98.
98. *Id.*
99. *Id.* at 304, quoting the Commission's Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, *see supra* note 5.
100. *Inntrepreneur*, [1993] 2 C.M.L.R. at 305.
101. *Id.*
102. *Id.*

The court then addressed the question of how a national court should proceed in the absence of either a formal decision or a comfort letter. Judge Barnes found that this question must also be examined in light of the guidelines provided in the Notice. He stated that "the letters in question can and should be taken into account notwithstanding that they do not have the formal status of comfort letters."[103] He further commented that in an interlocutory proceeding such as *Inntrepreneur*, he was required to "form some estimate of the likelihood of an exemption actually emerging . . . ."[104] Judge Barnes also noted, that it "is not entirely easy to know what comfort letters are . . . . It may be that what is intended by the [Commission's Notice] is that national courts are without further ado to treat comfort letters as being in their legal effect equivalent to a formal decision."[105] In final analysis, Judge Barnes held:

> First, the defendants (Masons) have a real prospect of success in showing that the lease in this case is within Article 85(1). . . . Second, the defendants have a real prospect of success in showing that the lease is not within the block exemption issued by the Commission under Article 85(3). . . . Third, I conclude that the defendants have a real prospect of success in showing that no individual exemption does or necessarily will apply to their lease. I reach that conclusion on the basis that the letters issued are not comfort letters, but . . . I would reach the same conclusion even were I wrong . . . and the letters are properly to be regarded as comfort letters.[106]

In spite of these conclusions, the court granted Inntrepreneur's appeal.[107] Judge Barnes noted that the Masons had demonstrated a legitimate "prospect of success in showing that the tie provisions in the lease"[108] violated Article 85. However, he also found that the tie provisions "should be excised from the lease . . . leaving the remainder of the lease . . . enforceable between the parties."[109] Therefore, even though it was likely that the tie provisions violated EC competition laws, the Masons were still obligated under the lease.

The court's holding in *Inntrepreneur* is actually incidental for the purpose of this comment. Rather, it is the High Court's application of

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103. *Id.*
104. *Id.* at 306.
105. *Inntrepreneur*, [1993] 2 C.M.L.R. at 306.
106. *Id.* at 307.
107. Interestingly, in a similar case involving Inntrepreneur's tie provisions in a contract with another tenant, the English Court of Appeal cited and followed Judge Barnes decision. *See* Inntrepreneur Estates (GL) Ltd. v. Boyes, [1995] E.C.C. 16, *available in* 1996 LEXIS, INTLAW Library, ECCASE File.
108. *Inntrepreneur*, [1993] 2 C.M.L.R. at 319.
109. *Id.*

Articles 85 and 86 that proves most important and also provides valuable insight into the national courts' reasoning on competition issues. In particular, Judge Barnes' analysis in *Inntrepreneur* helps to facilitate a better understanding of the national courts' application of EC competition law within the context of the Commission's Notice. Additionally, the case is an example of how the notion of subsidiarity may be implemented by national courts in competition law. However, it also underscores the problems and challenges that national courts face as a result of the implementation of subsidiarity principles.

If the Commission intends for national courts to bear additional burdens in the area of competition law, it must continue to expound and refine the parameters within which national courts may maneuver. The Commission's Notice is certainly a step in the right direction. However, as *Inntrepreneur* illustrates, the Notice leaves gaps that eventually must be filled by the Commission. In the absence of EC clarification, national courts will be left to shape competition law on their own. Further clarification will facilitate subsidiarity in the European Community and will alleviate some of the pressures on the Commission and the ECJ by allowing additional actions to be brought in the national courts.

III. CONCLUSION

Competition law in the EC will continue to expand and become clearer as the Commission deals with cases from the Member States. Furthermore, with the inclusion of the concept of subsidiarity in the TEU, along with the guidelines provided by the Commission in its Notice, national courts are granted a greater role in the application and enforcement of Articles 85 and 86. National courts, much like the High Court in *Inntrepreneur*, will add to the body of decisions which makes up the competition law of the European Community.

As previously mentioned, increased participation by national courts in applying and enforcing competition rules will alleviate many of the pressures on the EC institutions. However, this delegation of power also runs the risk of promoting inconsistent results in the respective Member States and throughout the EU. The Commission and the ECJ, therefore, will need to aggressively guide national courts. By so doing the EU will strengthen its ties with the Member States and will thereby fortify European integration and foster the free movement of goods and services in the internal market.

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