Northwestern Journal of International Law & Business

Volume 3
Issue 2 *Fall*

Fall 1981

The Rise and Fall of Provisional Validity -- The Need for a Rule of Reason in EEC Antitrust

Valentine Korah

The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*

*Valentine Korah***

The doctrine of provisional validity invented by the Community Court now applies to very few agreements. Mrs. Korah believes that unless a rule of reason is applied to restraints ancillary to agreements that lead to new competitive pressures, the risk of collaboration may become excessive. Mrs. Korah also expresses concern that this may reduce the dynamism of Community industry in competition with American and Japanese firms.

INTRODUCTION

Article 85(1) of the EEC Treaty[1] prohibits as incompatible with

---

* In Korah, *Comfort Letters—Reflections on the Perfume Cases*, 6 EUR. L. REV. 14 (1981), the author contributed a longer article in which she considered whether the "comfort letters" in the *Perfume* cases were correct in stating that the selective distribution agreements did not infringe art. 85 (1); whether those agreements were a valid justification for refusing to supply other retailers under French law; the Court's ruling that the issue of such letters deprived the agreements of their provisional validity and the possibilities of appealing against them. Mrs. Korah also considered, although in less detail than in this article, the risks for entrepreneurs who would not have invested in collaboration unless they expected to be able to enforce ancillary restraints. For a discussion of the *Perfume* cases, *see* text accompanying notes 55-63 *infra*.

** LL.M., Ph.D., Reader in English Law at University College London, Barrister.

[1] Article 85 provides:

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 those 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 sup-

the Common Market agreements between undertakings which affect trade between Member States and have as their object or effect the restriction, prevention or distortion of competition within the Common Market. Article 85(3) provides for exemptions, while Article 85(2) renders void agreements that infringe the Article as a whole. Until the enactment of the first implementing Regulation, No. 17/62,[2] the Commission did not enforce these rules very effectively, although under Article 88 of the Treaty the German competition authority, the Bundeskartellamt, did apply the Community rules in a few cases. Article 9(3) of the Regulation provided that national authorities might apply the prohibition of Article 85(1) and it was held much later in *Belgian Radio and Television* v. *SABAM*[3] that the direct effect of Community law in national legal systems requires national civil and commercial courts to refuse to give effect to contractual provisions that infringe the competition rules. Article 9(1) of the Regulation, however, conferred on the Commission of the European Communities ("the Commission")[4] exclusive power to exempt agreements from the prohibition by virtue of Article 85(3). The Regulation included no transitional provisions relating to agreements that had been negotiated before the Treaty took effect and before the extent of the competition

---

plementary obligations which, by their nature of 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:
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 in question.

Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*entered in force* Jan. 1, 1958) [hereinafter cited as EEC Treaty].

2 Regulation 17/62, O.J. EUR. COMM. 87 (Spec. Ed. 1959-62).

3 [1974] E. Comm. Ct. J. Rep. 313, [1974] 2 Comm. Mkt. L.R. 238. In *SABAM*, the Court ruled that national authorities in Article 9(3) referred to national competition authorities such as the Bundeskartellamt, rather than to civil and commercial courts, which must give effect to the nullity resulting from Article 85(2) because of its direct effect on national law.

4 The functions of the Commission under the Competition rules are exercised by its Competition Department, Directorate General IV (hereinafter referred to as D.G. IV). This employs fewer than 300 officials, including secretaries and inspectors and they deal not only with the provisions controlling firms, but also with the control of public undertakings and state aids. It has always been kept short of staff. For example, more officials are employed in the various competition authoritie of the U.K. or in Germany than in D.G. IV.

rules had been worked out in practice. It is these agreements that are the subject of the first part of this article.

Until the first decisions under Article 85, made by the Commission in 1964, the uncertainty about the scope of the Article was almost complete. It was even argued that vertical agreements were not affected by it. It was impossible for businessmen to obtain firm advice as to what agreements were prohibited, or how much of the agreement was void. In the 1960s, the Court of Justice of the European Communities, which I shall call "the Court" or "the Community Court," made several important judgments in which it minimized the effects of this uncertainty. In *La Technique Minière* v. *Maschinenbau Ulm*,[5] for example, the Community Court ruled that where an agreement falls within the prohibition of Article 85(1), and is incapable of exemption, it is not the whole agreement that is void, but only those provisions of the agreement that offend the Article.[6]

The Development of the Doctrine of Provisional Validity

Even earlier, in *Bosch*,[7] the Court developed a doctrine of provisional validity. Articles 4 and 5 of Regulation 17 provide a system of notification for agreements in respect of which an exemption under Article 85(3) is desired, although notification is not required for the exemption of agreements of the kinds listed in Article 4(2).[8] Exemptions may be granted under Article 6, provided that the agreement has been duly notified or is dispensed from notification. Where an agreement was made before the Regulation came into force and was notified in due time, Article 7 provides that the validation may be fully retroactive, and may be granted even when, as originally made, the agreement did not merit exemption, provided that it is later modified so as to merit exemption or escape the prohibition of Article 85(1). Such an exemption does not prevail against a party who has not consented to its notification.

---

[5] [1966] E. Comm. Ct. J. Rep. 235, 250, [1966] Comm. Mkt. L.R. 357.

[6] The automatic nullity in question only applies to those parts of the agreement affected by the prohibition or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently, any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law. *Id.* at 250, [1966] Comm. Mkt. L.R. at 376.

[7] DeGeus v. Bosch and van Rijn, [1962] E. Comm. Ct. J. Rep. 45, [1962] 1 Comm. Mkt. L.R. 1.

[8] Further kinds of agreements were added to the list of those dispensed from notification in Article 4(2) by Reg. 2822/71, 14 J.O. Comm. Eur. (No. L 285) 42 (1971). Article 4 requires notification of new agreements—those made after March 12, 1962—while Article 5, which is in virtually identical language, requires notification of old agreements if they are to be exempt.

In its judgment in *Bosch*, the Community Court inferred that the Regulation envisaged that in 1962 there would be agreements caught by the prohibition of Article 85(1) in respect of which no decision of exemption had been taken, but which were not void. From the general principles of law common to Member States, the Court stated that juridical certainty must be maintained, and held that an agreement in existence at the effective date of Regulation 17, which was capable of retroactive validation and which had not been the subject of any binding declaration, could not be void meanwhile. As a result

> [a]greements and decisions in existence at the date of entry into force of this Regulation are not annulled automatically by the mere fact that they fall within the ambit of Article 85(1). Such agreements and decisions must be considered valid insofar as they fall within Article 5(2) of the Regulation [which dispenses certain classes of agreements from notification]; they must be considered as provisionally valid when, although not excepted by operation of that provision, they are notified in time to the Commission in accordance with Article 5(1) of the said Regulation.
>
> This validity is not definitive since Article 85(2) operates to make agreements automatically void when the authorities of Member States exercise the powers conferred on them by Article 88 of the Treaty, and maintained under Article 9 of the Regulation, to apply Article 85(1), and to declare certain agreements and decisions to be prohibited.[9]

The Court then referred to Article 7 of Regulation 17, which enables the Commission to exempt an agreement retroactively. From this too, the Court inferred agreements were not "automatically void as long as the Commission has not reached a decision with regard to them, or unless the authorities of Member States have decided that Article 85 is applicable."[10]

The Court's ruling was confined to agreements made before the

---

[9] [1962] E. Comm. Ct. J. Rep. at 52-53, [1962] Comm. Mkt. L.R. at 28-29. The Court went on to say that the opposite interpretation would lead to the inadmissible result that some agreements would already have been automatically void for several years without having been so declared by any authority, and even though they might ultimately be validated subsequently with retroactive effect. In general, it would be contrary to the general principle of legal certainty—a rule of of law to be upheld in the application of the Treaty—to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies.

Moreover, in accordance with the text of Article 85(2), which in referring to agreements or decisions "prohibited pursuant to this Article" seems to regard Article 85(1) and (3) as forming an indivisible whole, this Court is bound to admit that up to the time of entry into force of the First Regulation Implementing Articles 85 and 86, the nullifying provisions had operated only in respect of agreements and decisions which the authorities of the Member States, on the basis of Article 88, have expressly held to fall under Article 85(1), and not to qualify for exemption under 85(3), nor in respect of which the Commission has taken the decision envisaged by Article 89.

I have used the term "validation" as it is not clear whether Article 7 provides for exemption or negative clearance. For a discussion of Article 7, see note 20 *infra*.

[10] *Id.* at 53, [1962] Comm. Mkt. L.R. at 29.

Regulation came into force. It added that agreements which were not dispensed from notification and had not been notified within the time limits, should become automatically void from the time the Regulation came into force. It added that agreements which were not dispensed from notification and had not been notified within the time limits, should become automatically void from the time the Regulation came into force.[11] This was a strong judgment, difficult to reconcile with Article 85(2) of the Treaty or with the inclusion of Article 7 in the Regulation, which seems unnecessary to the Court's ruling. It was largely based on the policy ground that contracts should be enforceable. In *Bosch*, the Court did not explain the extent of the temporary validity it had created. The national courts, left on their own to arrive at an understanding of the doctrine, treated such agreements in different ways: German and Dutch courts treated agreements as fully valid until the Commission had decided whether to exempt them; Belgian courts more cautiously refused to enforce such agreements because of the precariousness of the provisional validity if the parties were not willing to comply with them voluntarily;[12] and in France the courts came to a similar conclusion for reasons since invalidated by the Community Court.

In three later judgments, the Community Court extended the concept of the provisional validity. In *Portelange*,[13] the Court ruled that "[a]greements referred to in Article 85(1) of the Treaty, which have been duly notified under Regulation No. 17/62, are *fully valid* so long as the Commission has made no decision under Article 85(3) and the provisions of the said Regulation."[14] In *Bilger v. Jehle*,[15] the Court used similar language in ruling that an "agreement which is exempt from notification and which has not been notified is *fully effective* for so long as it has not been found to be void."[16] Finally, in *Parfums Rochas*

---

[11] *Id.* at 55, [1962] Comm. Mkt. L.R. at 31.

[12] *See* Waelbroeck, *Que reste-t-il de la validité provisoire des ententes?*, (1974) CAHIERS DE DROIT EUROPEEN [C.D.E.] 169; and Gijlstra & Murphy, *EEC Competition Law after the Brasserie de Haecht II and SABAM Cases*, 2 LEGAL ISSUES OF EUROPEAN INTEGRATION [LIEI] 77, 94 (1974).

[13] Portelange v. Smith Corona Marchant Int'l., [1969] E. Comm. Ct. J. Rep. 309, 317, [1974] 1 Comm. Mkt. L.R. 397, 419.

[14] *Id.* at 316, [1974] 1 Comm. Mkt. L.R. at 397 (emphasis added).

[15] [1970] E. Comm. Ct. J. Rep. 127, [1974] 1 Comm. Mkt. L.R. 382.

[16] *Id.* at 137, [1974] 1 Comm. Mkt. L.R. at 393 (emphasis added). The Court drafts its judgments in French, and in both cases it used the words *plein effet*. This was confirmed by the Court in *De Bloos*. For a discussion of *De Bloos*, *see* text accompanying note 40 *infra*.

Although a national court was not to be able to declare an old agreement dispensed from notification to be void for the past, it was open until *De Bloos* whether a national court might

v. *Bitsch*,[17] the Court ruled that "[a]greements referred to in Article 85(1) of the Treaty and concluded after entry into force of Regulation No. 17/62, which are an exact reproduction of a standard contract previously concluded and duly notified as such, are entitled to benefit from the same system of provisional validity as the latter."[18] This ruling was particularly strong; it resulted in the enforcement of an export ban, which is considered a most objectionable restriction under Community competition laws.[19]

The Merits of the Doctrine of Provisional Validity

These cases on provisional validity have been criticized on more than one ground. *Bilger* v. *Jehle* involved an agreement dispensed from notification and which had not been notified. One might have thought, therefore, that Article 7 of the Regulation,[20] on which reliance had been placed in the other cases, could not apply, although if the agreement merited exemption as it stood, exemption under Article 6 might be retroactive. No such qualifications were made by the Court, which stated:

> [a] different solution would seriously endanger legal certainty to the detriment of parties who, having concluded an agreement which is exempt from notification on the ground that it is unlikely to affect trade between Member States, could reasonably expect this agreement to have, in this respect, at least the same effect as notified agreements dating from before 13 March 1962.[21]

In other cases,[22] the Court has referred to the fifth recital to the Regulation[23] to show that agreements dispensed from notification are those

---

declare such a contract to be void in the future by virtue of Article 85(2). Then the validity was held to be absolute until judgment was given in *Lancôme*. *See* text accompanying note 57 *infra*.

17 [1970] E. Comm. Ct. J. Rep. 515, [1971] 1 Comm. Mkt. L.R. 104.

18 *Id.* at 525, [1971] 1 Comm. Mkt. L.R. at 118.

19 *See* text accompanying notes 81-85 *infra*.

20 As *amended*, Article 7 provides:

> 1. Where agreements . . . in existence at the date into force of this Reg. *and notified* within the time limits specified in article 5(1) do not satisfy the requirements of article 85(3) of the Treaty and the undertakings . . . concerned cease to give effect to them or modify them in such manner that they no longer fall within the prohibition contained in article 85(1) or that they satisfy the requirements of article 85 (3), the prohibition contained in article 85(1) shall apply only for a period fixed by the Commission. . . .

Regulation 17/62, *supra* note 2, at art. 7 (emphasis added).

21 Bilger v. Jehle, [1970] E. Comm. Ct. J. Rep. 127, 136, [1974] 1 Comm. Mkt. L.R. 382, 392.

22 *See, e.g.*, Roubaix v. Roux, [1976] E. Comm. Ct. J. Rep. 111, [1976] 1 Comm. Mkt. L.R. 538.

23 Reg. 17/62, note 2 *supra*, provides in the fifth recital, that: "[w]hereas, on the one hand, such agreements, decisions and concerted practices are probably very numerous and cannot therefore all be examined at the same time and, on the other hand, some of them have special features which may make them less prejudicial to the development of the common market. . . ."

thought less prejudicial to the Common Market. For these agreements, the public policy requiring nullity is not very strong.

Officials employed by Directorate General IV (D.G.IV), the Competition Department of the Commission, became concerned about provisional validity on policy grounds. D.G.IV had been allocated insufficient staff to produce decisions about more than a small minority of the agreements notified, and it hoped that the "automatic" remedy of nullity would supplement its meager enforcement resources. In the writer's view, however, the sanction of nullity is an unfortunate one. In relation to the kind of restrictions that are condemned *per se* under the Sherman Act, it is not very effective: horizontal price fixing or market sharing and collective boycotts may be implemented without recourse to the courts. In relation to the kinds of agreement subject to the rule of reason in the United States, it is not easy to tell whether an agreement restricts competition perceptibly or is intended to do so. The Community Court has ruled that agreements must be considered in their economic context and that a market analysis should be made.[24] Not only do national courts have difficulty in making such economic assessments, the cost of furnishing the appropriate evidence in order to enforce a small contract may be out of all proportion to the value of the sanction. To require civil and commercial courts to make such decisions imposes a heavy burden on both court and litigant.[25] It will be suggested later that the possible invalidity of ancillary restraints may add to the risks of collaboration in innovation and discourage firms from investing in collaboration from which their partners and competitors may reap much of the benefit.

The doctrine of provisional validity was clearly derived from policy considerations: that parties who could not obtain advice as to whether their agreements would infringe Article 85 should be able to enforce them.

On the other hand, the Treaty clearly laid down that agreements that infringe Article 85 shall be void. As Professor Waelbroeck has argued, it is difficult to reconcile the doctrine of provisional validity with the structure of the Treaty and of Regulation 17.[26]

---

[24] *See, e.g.*, Brasserie de Haecht v. Wilkin (No. 1), [1967] E. Comm. Ct. J. Rep. 407, [1968] Comm. Mkt. L.R. 26; Metro v. Commission, [1977] E. Comm. Ct. J. Rep. 1875, 1904-5, [1978] 2 Comm. Mkt. L.R. 1.

[25] Korah, *Comfort Letters—Reflections on the Perfume Cases*, 6 EUR. L.R. 14, 16 (1981).

[26] *See* note 12 *supra*. It is doubtful whether the Council of Ministers had power to enact Article 7, which appears to conflict with Article 85(2) of the Treaty. In *Bosch*, however, Advocate General Legrange came close to saying that Article 85 should be construed in light of the regulation implementing it. DeGeus v. Bosch and Rijn, [1962] E. Comm. Ct. J. Rep. at 63, [1962]

JUDICIAL LIMITATION OF PROVISIONAL VALIDITY

The concern of officials and practitioners about the compatibility of the doctrine of provisional validity with Article 85(2) of the Treaty, and about the failure of the Commission to condemn many agreements that restricted competition in the Common Market seems to have been communicated to the judges in Luxembourg.[27] In *Brasserie de Haecht v. Wilkin (No. 2)*, the Court was asked to rule, *inter alia* whether

> [t]he nullity of contracts exempted from notification [should] be deemed to take effect from the date when one of the contracting parties duly brings an action for it or merely from the date of the judgment or the decision of the Commission which establishes it.[28]

The agreement under which a small café had agreed to take its total requirements of beer and soft drinks from the seller, de Haecht, was in the terms of a standard contract first used before Regulation 17 came into force, but notified late. The Court held that because the agreement had not been notified in time, it should be treated as a new agreement, and the Court distinguished its four earlier decisions on the ground that they related to "old" agreements; that is, agreements notified on time and made before the Regulation came into force. This ruling seems to represent a change of heart by the Court. It is not easily reconciled with *Bilger v. Jehle*;[29] both agreements were dispensed from notification and both were made on a standard form originally used before the

---

Comm. Mkt. L. R. at 14. The Court stated that "[t]his provision of Article 7 of the Regulation can be understood only on the basis that agreements and decisions shall not be automatically void as long as the Commission has not reached a decision in regard to them, or unless the authorities in Member States have decided that Article 85 is applicable." *Id.* at 53, [1962] Comm. Mkt. L.R. at 29. Samkalden, *Het arrest van het Hof van Justitie de Europese Gemeenschappen van 6 April 1962 in Zaak 13/61 (Bosch)*, SEW 225 (1962), also pointed out that the *Bosch* judgment is inconsistent with Article 1 of Reg. 17, which provides that infringement of the competition rules are prohibited "no prior decision to that effect being required."

27 M. Waelbroeck, 4 LE DROIT DE LA COMMUNAUTE ECONOMIQUE EUROPEAN, concurrence at 161-78 (Megret ed. 1972), analysed and criticised the case law lucidly and cogently.

28 [1973] E. Comm. Ct. J. Rep. 77, [1973] Comm. Mkt. L.R. 287. *See also* comments by Waelbroeck and by Gijlstra and Murphy, note 12 *supra*.

29 The *Bilger* agreement was actually made in 1955, long before the Regulation, while that in *de Haecht* was made shortly afterwards. In *Rochas*, however, it was held that if a standard form of contract had been used before the Regulation and duly notified in time, agreements later made on identical terms were to be treated as old agreements. Parfums Rochas v. Bitsch, [1970] E. Comm. Ct. J. Rep. at 525, [1971] Comm. Mkt. L.R. at 118. The agreement in *de Haecht* was one dispensed from notification, and as the *Bilger* ruling treated agreements dispensed from notification like duly notified ones, it was thought that an agreement made after the Regulation on an old form that was dispensed from notification would be treated as an old one. In this *Bilger* was confirmed in *Beguelin v. S.A.C.L. Import Export*, [1971] E. Comm. Ct. J. Rep 949, [1972] Comm. Mkt. L.R. 81. It is also difficult to reconcile *de Haecht 2* with De Bloos v. Bouyer, [1977] E. Comm. Ct. J. Rep. 2359, [1978] 1 Comm. Mkt. L.R. 511.

Regulation came into force. That de Haecht had eventually notified its standard form late should not make it harder to enforce the agreement.

Contrary to its usual practice, the Court did not confine its reasoning to the three questions asked by the Liege tribunal de commerce. In *de Haecht (2)*, the Court began with an introduction dealing generally with provisional validity. After observing that there were no transitional provisions in Regulation 17, and that the national court was required to treat agreements as void without enjoying the flexible powers to grant retroactive exemptions conferred on the Commission, the Court confirmed that

> [i]n the case of old agreements, the general principles of contractual certainty, particularly when the agreement has been notified in accordance with the provisions of Regulation No. 17, requires that the court [i.e., a national court asked to enforce a contract] may only declare it to be automatically void after the Commission has taken a decision by virtue of that Regulation.[30]

The Court continued, however, to distinguish agreements made after the Regulation came into force. Such agreements are invalid even before being condemned by the Commission: they can be implemented only at the parties' risk, and notification has no validating effect. The long delays by the Commission and the principle of legal certainty cannot prevail against the interest of the party alleging that the contract is void:

> In such a case it devolves on the court [i.e., the national commercial court] to judge, subject to the possible application of Article 177, whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85.[31]

This ruling was expressly extended to agreements exempted from notification on the ground that they "are generally less harmful to the smooth functioning of the common market."[32]

Three steps are open to a national court or arbitrator. If the court or arbitrator decides that an agreement does not come within the prohibition of Article 85(1), it may enforce the agreement in accordance with its own law.[33] Secondly, if it is clear that the agreement cannot be enforced, for instance because it had not been notified before the period

---

30 [1973] E. Comm. Ct. J. Rep. at 86-87, [1973] Comm. Mkt. L.R. at 301-302, para. 9.

31 *Id.* at 87, [1973] Comm. Mkt. L.R. at 302, para. 12.

32 *Id.*, [1973] Comm. Mkt. L.R. at 303.

33 Similarly, it could enforce the agreement if satisfied that it came within the group exemption granted by Reg. 67/67. *See* note 35 *infra*.

in issue in national litigation, the court may refuse to enforce the restrictive provisions. Thirdly, it may adjourn, to enable the Commission to decide whether to grant an exemption.

The first two courses of action may result in conflict with the Commission, should it eventually come to a contrary decision. The Community Court did not advert to this possibility or require national courts to reserve liberty for the parties to apply, should the Commission come to a contrary view. The agreement is to be treated as void only if it is clear that it infringes Article 85, but that is a matter on which views may well differ. The Court also did not consider to what extent a national court may grant interlocutory relief if it adjourns the case to enable the Commission to make a decision. Would it be right to issue an injunction to enforce a possible restriction on competition or to require the payment of royalties, given in return for exclusivity, the compatibility of which with Article 85 is in dispute?

Another issue which remains undecided is whether "accession agreements," those made before the accession of new Member States and which began to infringe Article 85 only on accession, should be treated as "old" agreements if notified within the six months allowed by the Treaties of Accession.[34] It may be argued that the considerations of contractual certainty are less strong in relation to new agreements than old. By 1973, when the first accessions were made, there was far more certainty about the kinds of agreement covered by the prohibition of Article 85(1), and group exemptions had already been granted to certain kinds of distribution and specialization agreements.[35]

Although there are many agreements that can now be drawn so as to come within a group exemption, or escape the prohibition of Article 85(1), considerable difficulties remain. Some new agreements were made when the law was quite unclear—before 1964—when the first decisions were published by the Commission. Even where it is clear whether an exemption will be given (and it seldom is since the Com-

---

34 The U.K. government submitted that such agreements should be treated as "old" ones. L'Oreal v. DeNievwe, [1980] E. Comm. Ct. J. Rep. 3775, [1981] 2 Comm. Mkt. L.R. 235. Signor Marchini-Camia observes, however, that by the time of the first accession in 1973, the law was far more developed than in 1962, and the uncertainty considerably less for many kinds of agreements. Marchini-Camia, note 40 *infra*. Nevertheless, on a literal reading of Reg. 17, as adapted by the Treaties of Accession, which added a new Article 25, such agreements are old ones. One might add that before accession, such agreements were valid, and provided that they are notified within six months of accession, the Commission should be able to deal with those that are anticompetitive.

35 Reg. 67/67, 10 J.O. COMM. EUR. (No. 57) 849 (1967) and Reg. 2779/72, 15 O.J. EUR. COMM. (No. L 292) 23 (1972), *amended* by Reg. 2903/77, 20 O.J. EUR. COMM. (No. L 338) 14 (1977).

mission is required to consider all the circumstances surrounding an individual agreement) only the Commission has power to grant it, and the Commission may well impose conditions or require the agreement to be modified first. Where collaboration involves expenditure or the commitment of assets, uncertainty as to the enforceability of ancillary restraints may discourage it. Certainty is needed when contracts are being negotiated, not only when they are being enforced.

Some of the problems that arise in relation to new agreements were raised in *De Norre v. Concordia*,[36] but did not have to be solved by the Court. Concordia observed that a single requirements contract with a small customer may well not have the effects prohibited by Article 85, unless many other dealers are tied to the same or other suppliers. It is the cumulative effect of many such contracts that may restrict competition. When that point is reached, not an easy point to isolate, is it only later agreements that are void, or do those already made become void? Foreclosure may be increased if the minimum size of plant or distribution system at which most of the economies of scale can be achieved increases, because a new entrant would need to supply a larger part of the market to be viable.[37] Would such an increase in optimal size also have the effect of avoiding existing contracts? The particular problems raised in the brewery cases have been overcome since, as a result of *Roubaix v. Roux* and *Concordia*, it has become clear that they do fall within the group exemption of Regulation 67/67. Such problems remain, however, where that Regulation does not clearly apply and the Commission has been interpreting it very narrowly.[38]

In *Concordia*, the Commission submitted that in deciding whether an agreement is void, a national court should emphasize legal certainty, and attempt to minimize the risk of a decision contrary to what the Commission might later decide. A national court should take into account the practice of the Commission, to be found not only in its published decisions, but also from other sources, such as its submissions to

---

36 [1977] E. Comm. Ct. J. Rep. 65, [1977] 1 Comm. Mkt. L.R. 378.

37 It is submitted that a requirements contract forecloses competitors of the supplier only when so much of the market is tied by similar agreements, or affected by loyalty and other discounts, that a new firm enjoying most of the economies of scale in production and distribution cannot find enough outlets in the free market. The foreclosing effects depend not only on the size of the free market, but also on the minimum efficient size at which a new firm can enter, and on the possibilities of expansion for existing firms. This was largely spelled out, though in less abstract terms, by Advocate General Roemer in *de Haecht (No 1)*, [1967] E. Comm. Ct. J. Rep. at 423, [1968] Comm. Mkt. L.R. at 39.

38 *See, e.g.*, BP Kemi/DDSF, 22 O.J. EUR. COMM. (No. L 286) 32 (1979), [1979] 3 Comm. Mkt. L.R. 684; *criticized* by Korah, *Competition*, 1980 J. BUS. L. 195, 220 (Section Editorial).

the Community Court. Where the Commission's position is clear, the national court should dispose of the case without adjournment. It observed that often only certain clauses are in dispute before the national court. Since these clauses would remain valid, even if other clauses were condemned, the national court could proceed to a decision. The Commission also submitted that the national court might dispose of the case when it was clear whether an exemption would be granted. Although sensible, this seems very dubious. The Commission is saying that the national court may enforce a clause that infringes Article 85(1) if in its view, the Commission would clearly exempt the agreement were it to open proceedings on an agreement notified before the period in issue, or dispensed from notification. Surely this would amount to granting the exemption which only the Commission has power to do.[39] What the Commission submits to the Court is in no way a binding precedent, unless adopted by the Court.

Old Agreements

Whatever the position of new agreements might be, the Court confirmed the validity of old agreements in *De Bloos* v. *Bouyer*.[40] Bouyer had appointed de Bloos as its exclusive dealer in Belgium and Luxembourg and was being sued for damages for selling to another dealer. According to Advocate General Mayras, the agreement included an export ban, which would not only have prevented the group exemption granted by Regulation 67/67 from applying, but would also have made it virtually certain that the Commission would not grant an individual exemption to the agreement without modification. Were the agreement held to be valid, de Bloos would have been entitled to substantial damages for loss of his exclusivity. Consequently, as Advocate General Mayras pointed out, it was virtually certain that Bouyer would not have agreed to modify the agreement to enable it to be validated under Article 7 of the Regulation, he would have been advised, instead, to plead the invalidity of the contract. Nevertheless, the Court ruled that

> [d]uring the period between notification and the date on which the Commission takes a decision, courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification[41]

---

39 *But see* text accompanying notes 114-116 *infra*.

40 [1977] E. Comm. Ct. J. Rep. 2359, [1978] 1 Comm. Mkt. L.R. 511. *See* A. Marchini-Camia, *A Propos des 'Anciennes' Ententes*, C.D.E. 3 (1979).

41 As in *Bilger v. Jehle*, [1970] E. Comm. Ct. J. Rep. 127, [1974] 1 Comm. Mkt. L.R. 382, and contrary to *Brasserie de Haecht (No. 2)*, [1973] E. Comm. Ct. J. Rep. 77, [1973] Comm. Mkt. L.R. 287, the Court appears to be treating agreements dispensed from notification as enjoying provisional validity. The agreement in question, however, had been notified in time, unlike that in *de*

must give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85(1).[42]

This judgment increased the juridical certainty conferred by old agreements. It could no longer be argued that a national judge could decide that an old agreement duly notified was invalid even for the future. Moreover, however convinced the national judge may be that the agreement infringes Article 85, he can not invoke the Community law to adjourn the case in order to give the Commission a chance to condemn it.[43] An undertaking wanting to rely on the nullity of such an agreement should make a complaint to the Commission and wait until the Commission has condemned the provision before infringing it.

To what extent would a decision have retroactive effect on the provisional validity of an agreement? In *De Bloos*, the Court speaks of validity between the time of notification and a decision by the Commission, and it is thought that the contract cannot be void by virtue of Article 85(2) until the date of the decision,[44] or possibly the date on

---

Haecht (No. 2), and technically the Commission might have been able to grant an exemption under Article 7 although, owing to the reasons which *Bouyer* had for not agreeing to abrogate the export ban, the possibility was purely theoretical. The Court's reasoning stated that provisional validity was to last between the date of notification and the Commission's decision, which seems to imply that the Court was referring to agreements which had been notified, even if dispensed by Article 5(2) of the Regulation.

The Court also referred to the indivisibility of Article 85(1) and (3), an argument used by the Court in *Bosch*, and which applies equally to new agreements. The late Professor Van Damme told me in conversation that from this, some experts were inferring that the Court was thinking of extending provisional validity to new agreements and overruling the second *de Haecht* case. In fact, it has since done the opposite. In the *Perfume* case, it has greatly reduced the number of agreements enjoying provisional validity.

42 De Bloos v. Bouyer, [1977] E. Comm. Ct. J. Rep. at 2371-2372, [1978] 1 Comm. Mkt. L.R. at 529.

43 The question is discussed more fully in Marchini-Camia, note 40 *supra*.

44 In *de Haecht (No. 2)*, the Court did say "such nullity is therefore likely to affect all the effects, past or future, of the agreement or decision," [1973] E. Comm. Ct. J. Rep. at 89, [1973] Comm. Mkt. L.R. at 304, without distinguishing between new and old agreements. But it had stressed the distinction earlier, *id.* at 86-87, [1973] Comm. Mkt. L.R. at 302, and it is thought that the later part of the judgment should be read in the light of that distinction, so as to apply only to new agreements.

The Dutch and Belgian governments did argue in the *Perfume* cases that provisional validity should end only when a national court so declared. This was not, however, in the context of a decision but rather in the context of an administrative letter saying that there was no reason for the Commission to intervene, and that the file was being closed. Where an agreement has been formally condemned under Article 3 of the Regulation, there seems to be nothing to be said for having to go to a national court to be able to disregard the contract. *See* notes 13-14 and accompanying text *supra*.

If old agreements do remain valid in respect of the period before the Commission makes a decision, there seems to be no need for Article 7 of the Regulation to validate an agreement

which the parties are ordered to terminate their infringement. The policy which requires juridical certainty relates to the time when a contract is made and when the parties commit resources to its implementation, not just the moment when its validity is challenged in a national court. There would be little point in granting the full validity mentioned in *Portelange* and confirmed in *Bilger* and *De Bloos* if a subsequent decision by the Commission could reverse it retroactively.[45]

It is thought that third parties cannot claim that an agreement is void while it still binds the parties, because the parties to the agreement might then be in an impossible position if required by a third party to ignore exclusivity granted under a clause that the other party might enforce.

Paucity of Formal Decisions by the Commission

When Regulation 17 was enacted, it was envisaged that most agreements notified would be dealt with by decision: either they would be cleared under Article 2, validated under Articles 6 or 7, or condemned under Article 3. All three remedies bind the parties, but require the Commission to make a decision.[46] The procedures for making decisions, however, are cumbersome[47] and take considerable time. In 1979, fewer than ten decisions were made under the EEC Treaty, though in some years over a dozen have been published. Nevertheless, the Commission has managed to deal with most of the agreements notified to it informally.[48] Frequently, after some investigation,

---

retrospectively if the agreement is later made to comply with Article 85. *See* notes 15-16 and accompanying text *supra*.

[45] *See* Portelange v. Smith Corona Marchant Int'l., [1969] E. Comm. Ct. J. Rep. 309, [1974] 1 Comm. Mkt. L.R. 397; Bilger v. Jehle, [1970] E. Comm. Ct. J. Rep. 127, [1974] 1 Comm. Mkt. L.R. 382. *See also* note 29 *supra*.

[46] By virtue of Article 189 of the Treaty a decision is binding on those to whom it is addressed. By virtue of Article 190, it must state the reasons on which it is based. It is not clear how far the Commission can delegate its discretionary powers, and certainly decisions made under Articles 2, 3, 6 or 7 of the Regulation must be made by the Members acting collegially and not merely by officials in D.G. IV. Within two months, those to whom a decision has been addressed are entitled to apply to the Community Court under Article 173 to annul it, on the grounds that it is contrary to the Treaty. Regulation 17 provides for such decisions to be published, and also provides that the parties shall have an opportunity to present their views to the Commission. Further procedural safeguards are prescribed in Reg. 99/63. O.J. EUR. COMM. 47 (Spec. Ed. 1963-1964). *See* Korah, *supra* note 25, at 30-34.

[47] The decision-making process is lucidly described by Frances Graupner, *Commission Decision-Making on Competitive Questions* 10 COMM. MKT. L. REV. 291, (1973). I am told that the article remains basically accurate, although, a few details have been changed. The decision making process, however, remains confidential, and it is impossible for someone not working for the Commission to know.

[48] In *Guerlain*, the Commission stated that out of 32,017 old agreements notified, the files on

a senior official signs a "comfort letter" stating that the file is being closed. Such a letter may say that the Commission sees no reason to intervene, in view of the small market shares affected;[49] that the Commission considers that the agreement comes within a group exemption;[50] or that the Commission merely states that in view of amendments made by the parties, it intends to take no action. I have seen one letter in which the Commission stated that "all benefits which normally arise from notification are, of course, safeguarded;" and another in which the Commission stated that it proposed to take no further steps, though it added that this would not preclude it from changing its mind. The Commission disposes informally of several hundred cases a year, though it is not known how many files are closed with the issue of such a letter.

The Perfume Cases

Most of the French and other perfume manufacturers notified selective distribution agreements to the Commission. Each manufacturer supplied retailers in its home Member State, and a single distributor for each of the others, which agreed to supply only such retailers as it should appoint within its territory. The Commission treated the distribution networks of Dior, Lancôme and Rochas as test cases. It went as far as to issue points of objection: to specify the reasons for thinking these agreements were caught by Article 85(1) and to hear the parties. At that point each manufacturer was willing to abrogate resale price

30,840 had been closed. [1980] E. Comm. J. Rep. 2327, 2361 n.1. Of the 1177 remaining, 889 relate to licenses, mostly patent licenses, and most are likely to be disposed of when the group exemption for patent licenses is made, possibly in 1982. The Commission claims that about 2600 of the agreements not yet disposed of, said to be 63 percent of the total, related to patent licenses, so there must be just over 4000 agreements new and old not yet finalized. EUROPEAN COMMUNITIES COMMISSION, NINTH REPORT ON COMPETITION POLICY 20, para. 7 (1980).

[49] *See, e.g.*, the *Perfume* cases, except for Lauder, where the letter was more general. The market was widely defined to comprise perfumes, toiletries and other beauty products. This may have been right as the makers of some of these products could probably switch to making the others.

The Court has ruled that an agreement infringes Article 85(1) only if the actual or intended effects are perceptible. *See* note 97 *infra*. In a highly unreliable notice on minor agreements the Commission stated its opinion that where the group of companies to which the parties belong have an aggregate market turnover of less than 50 million units of account and aggregate market shares of less than five percent, the agreement is not caught. Notice concerning agreements of minor importance, 20 O.J. EUR. COMM. (No. C 313) 3 (1977), [1978] 3 Comm. Mkt. L.R. 648. The unit of account used for competition is the budgetary unit, based on a basket of currencies and quoted daily. On November 4, 1981, it was quoted at $1.09681.

[50] *See* De Bloos v. Bouyer, [1977] E. Comm. Ct. J. Rep. 2359, [1978] 1 Comm. Mkt. L.R. 511. C.S. KERSE, EEC ANTITRUST PROCEDURE (1981), states at para. 10.10, that they vary considerably in content.

maintenance, and allow any dealer in its network to buy from any other, whether in the same country or not. Consequently, a senior official of the Commission wrote letters to each manufacturer stating that in view of its small market share—under 5 per cent in any Member State—the considerable number of competitors of similar size, and the abrogation of resale price maintenance and restrictions on dealing with other franchised dealers in the network, the Commission saw no reason to intervene under Article 85(1),[51] although it would check to see that these restrictions were in fact abrogated. Over the next few months, letters were sent to most other Common Market perfume manufacturers.[52]

Some time later, litigation regarding these arguments was started in France and the Netherlands, and the Community Court was asked to give preliminary rulings about the status of these letters. In the French litigation, excluded retailers sued either in tort, or as civil parties to a prosecution, on the ground that a particular manufacturer had refused to supply them.[53] In the Dutch cases, the manufacturer sued excluded retailers for unfair competition: the excluded retailers alleg-

---

51 In *Metro v. Commission*, [1977] E. Comm. Ct. J. Rep. 1875, [1978] 2 Comm. Mkt. L.R. 1, the Court confirmed the practice of the Commission in stating that in principle, selective distribution systems are not caught by Article 85(1) where all suitably qualified dealers are appointed

> provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the professional qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

Id. at 1904, [1978] 2 Comm. Mkt. L.R. at 30.

In practice, satisfying such qualifications tends to be expensive, so in order to persuade dealers to make the necessary investment, a manufacturer usually has to promise not to appoint too many dealers in the neighbourhood. Such quantitative restrictions are normally treated by the Commission as caught by Article 85(1), but have been exempted in the case of complex durables: *Omega* watches, *BMW* cars, and *SABAM* TV sets. Mr. J. Ferry, the official in charge of individual cases in D.G. IV, stated at a conference organized by ESC in October, 1980, that suppliers are free to choose with whom they deal themselves, but may not restrain distributors or wholesalers' choice of customers: an odd distinction to justify on policy grounds. In *Lancôme* and *L'Oreal*, the Court stressed that such quantitative protection is normally caught by the prohibition of Article 85(1), and that in assessing whether it is, the existence of similar selective distribution systems by competitors is relevant. Lancôme v. Heijn Supermart, [1980] E. Comm. Ct. J. Rep. at 2511, [1981] 2 Comm. Mkt. L.R. 164, 178; L'Oreal v. DeNieuwe, [1980] E. Comm. Ct. J. Rep. at 3775, [1981] 2 Comm. Mkt. L.R. at 253. In *L'Oreal* the Court stressed that it is not so much the juridical nature of the restriction as its effects on competition and inter-state trade that are relevant. *Id.* at 3791, [1981] 2 Comm. Mkt. L.R. at 253. *But see* note 37 *supra*.

52 EUROPEAN COMMUNITIES COMMISSION, FOURTH REPORT ON COMPETITION POLICY 24, para. 35 (1975); EUROPEAN COMMUNITIES COMMISSION, FIFTH REPORT ON COMPETITION POLICY 51, para. 57 (1976). *See also* Procureur de la Republique (and others) v. Giry and Guerlain (and others), [1980] E. Comm. Ct. J. Rep. 2327, 2340-41, [1981] 2 Comm. Mkt. L.R. 99, 107 [*Perfume* cases] and the Commission's submissions in *Guerlain*, [1980] E. Comm. Ct. J. Rep. 2327, 2340-41.

53 The prosecutions were brought under the French ordinance 45-1830 of June 30, 1945, *as amended by* decree of June 24, 1958, against Guerlain, Rochas, Lanvin, and Nina Ricci. *Perfume*

edly had persuaded franchised dealers to break their contracts and supply the defendant.[54] In the various *Perfume* cases, the Community Court made several rulings. In the French prosecution against the manufacturer *Guerlain* and others, the Court decided that "Community law does not prevent the application of national provisions prohibiting a refusal to sell even where the agreements relied upon for the purpose of justifying this refusal to sell have been classified[55] by the Commission."[56]

The most important ruling for the purposes of this article, was that made in *Lancôme*. The Court in that case ruled that

> [a]n administrative letter informing the person concerned that the Commission is of the opinion that there are no grounds for it to take action with regard to agreements which have been notified pursuant to the provisions of Article 85(1) has the effect of terminating the period of provisional validity accorded from the date of notification to agreements made prior to 13 March 1962 notified within the period laid down in Article 5(1) of Regulation No. 17 or exempted from notification. The opinions expressed in such a letter are not binding on the national courts but constitute a factor which the latter may take into account in examining whether the agreements are in accordance with the provisions of Article 85.[57]

In reaching its result the Court examined its earlier decisions in which it had developed the doctrine of provisional validity. In *Portelange* the Court had stressed that only agreements that "may not benefit from" an exemption under Article 85(3) are void and that an exemption could not be granted by a national court: legal certainty required that these agreements that might later be exempted retrospectively should remain valid.[58] Moreover, the Court in *Lancôme* added that after sending a letter stating that it intends to close the file, the Commission is unlikely to take a decision exempting the agreement; so there remains no further justification for maintaining provisional

---

cases, [1980] E. Comm. Ct. J. Rep. at 2340, [1981] 2 Comm. Mkt. L.R. at 133. Anne Marty sued Estee Lauder civilly, Anne Marty v. Estee Lauder, [1980] E. Comm. Ct. J. Rep. 2481, 2496.

54 Lancôme v. Etos and Heijn Supermart, [1980] Comm. Ct. J. Rep. at 2516, [1981] 2 Comm. Mkt. L.R. at 168; L'Oreal v. DeNieuwe, [1980] E. Comm. Ct. J. Rep. at 3777, [1981] 2 Comm. Mkt. L.R. at 238.

55 *Classified* is a poor translation of the French *classé* meaning that the file has been closed.

56 The author discusses this aspect of the *Perfume* cases in Korah, *supra* note 25, at 24-26. *See also* Verstrynge, *Relationship between National and Community Antitrust Law: An Overview After the Perfume Cases*, 3 NW. J. INT'L L. & BUS. 358 (1981).

57 Lancôme v. Etos and Albert Heijn Supermart, [1980] E. Comm. Ct. J. Rep. at 2511, [1981] 2 Comm. Mkt. L.R. at 179.

58 Portelange v. Smith Corona Marchant Int'l, [1969] E. Comm. Ct. J. Rep. 309, [1974] 1 Comm. Mkt. L.R. 397.

validity.[59]

The ruling in *Lancôme* has caused considerable concern. Most of the "old" agreements notified by the Commission have already been dealt with;[60] an unknown number of them by closing the file and sending an administrative letter. It had been assumed, since *De Bloos* that these old agreements would remain valid, even for the future, at least until the Commission should condemn them.[61] Now it seems that they become invalid, as soon as the Commission sends such a letter, even after the agreement has been modified to meet any objections the Commission may have had.

Although *Lancôme* was decided in July 1980, and has only recently been reported, it has been criticized.[62] When the parties modify an agreement in order to meet the Commission's objection, the agreement—as a result of *Lancôme*—loses its provisional validity. This may encourage firms to delay compliance with the Commission's views and discourage informal settlements of the least obnoxious cases, which would release resources to deal with hard core infringements. Of course, the Court did state that national courts should take the Commission's view into account, and in many cases it may be followed. Unfortunately, however, the Commission's administrative letters stating that a file is being closed tend to be very short and do not include much market analysis. The letters in the *Perfume* cases referred only to the small market share of each manufactuer, the abrogation of resale price maintenance, and the new freedom for franchised dealers to buy from anyone in the network. Most perfume manufacturers, however,

---

[59] Lancôme v. Etos and Albert Heijn Supermart, [1980] E. Comm. Ct. J. Rep. 2511, [1981] 2 Comm. Mkt. L.R. 164.

[60] *See* note 48 and accompanying text *supra*.

[61] Advocate General Mayras had said in that case that it was no longer appropriate to speak of provisional validity, and advised that the validity should be absolute.

[62] *See, e.g.*, Korah, *Competition*, 1980 J. BUS. L. 423, 425 (Section Editorial); Korah, note 25 *supra*. J. Maitland Walker also criticized the ruling as cutting back provisional validity, as having the ludicrous result that the parties are worse off if the Commission writes to say that it is not intervening under Article 85(1) and that it is closing the file, and as enabling the Commission to deprive agreements of their provisional validity merely by letter stating that it proposes to take no action and so avoiding the burdensome need to issue a formal decision. Maitland Walker, 1 EUR. COMPETITION L. REV. 243 (1980).

He also pointed out that not only is the ruling difficult to reconcile with *De Bloos*, but also that in its judgment in Vereniging ter Bevordeering van de Belangen des Boekhandels v. Eldi Records, [1980] E. Comm. Ct. J. Rep. 1137, [1980] 3 Comm. Mkt. L.R. 719, motif 13, the Community Court observed that a letter requesting information under Article 11 of Reg. 17 "cannot alter the effects of notification." That dictum might be distinguished on the ground that the Commission may well grant an exemption after requesting further information, although it is unlikely to do so when it has closed the file. It will be submitted that not every letter sent by the Commission deprives an agreement of its provisional validity.

used a selective distribution system,[63] although it seems that cut price retailers had difficulty in obtaining supplies. Consequently, a national court may decide that the agreements are in fact perceptibly anti-competitive. If comfort letters are to have effects in national law, then it may be argued that they amount to decisions, and should be supported by more complete reasoning.[64] This may result in rather more care being taken over their preparation, but reduce their attractiveness to the Commission.

If the Commission is to be able to cope with all the agreements notified to it and devote resources to discovering unnotified agreements, especially those providing for price fixing, market sharing, or collective boycotts, it will have to find some way of short circuiting some of the cases. The Council of Ministers, which must approve new posts, consists of representatives of Member States. It has always been jealous of the Commission's executive power, and constrained its exercise by not permitting the bureaucracy to grow. One might have hoped that D.G.IV would have concentrated its resources on hard core cartels, where it is fairly clear that intervention will yield useful results. Unless national courts are to take a Chicago view of vertical restraints, and say that few restrict competition,[65] the "automatic" sanction of nullity will endanger their enforcement. The inability of the Commission to

---

63 The Court has ruled that analysis of the whole market is necessary to determine the effects of an agreement on competition and interstate trade. *See* text accompanying note 24 *supra*. This was confirmed by the ruling in *Lancôme*, [1980] E. Comm. Ct. J. Rep. 2511, [1981] 2 Comm. Mkt. L.R. 164, which was repeated in *L'Oreal*:

> The agreements laying down a selective distribution system based on criteria for admission which go beyond a mere objective selection of a qualitative nature exhibit features making them incompatible with Article 85(1) where such agreements, either individually *or together with others*, may in the economic and legal context in which they occur and on the basis of a set of objective factors of law or of fact, affect trade between member-states and have either as their objective or effect the prevention, restriction or distortion of competition.

L'Oreal v. DeNeiuwe, [1980] E. Comm. Ct. J. Rep. 3775, 3795, [1981] 2 Comm. Mkt. L.R. 235, 256 (emphasis added).

64 This is rather a technical subject for non-European readers. I have argued that a comfort letter depriving an old agreement of its provisional validity is, indeed, a decision. *See* Korah, note 25 *supra*. Such a comfort letter, therefore, must comply with the rules for decisions. *See* note 46 *supra*. *See also* JOLIET, LE DROIT INSTITUTIONNEL DES COMMUNAUTES: LE CONTENTIEUX 65 (1981).

65 A recent, lucid and cogent description of the analysis typical of the Chicago school, is given in R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978). It is argued that in the absence of any horizontal restraints, a supplier would not give greater protection to his dealers, or a patentee to his licensee, than is necessary to persuade him to make the investments necessary to the promotion or production of the product, since he would benefit from a more competitive market downstream and more would be sold. The limitation of this argument, under which resale price maintenance is not anticompetitive, is that horizontal agreements may not always be discovered. Moreover, foreclosing practices may be adopted by several manufacturers and patentees consciously adopting parallel devices. *See also* R. POSNER, ANTITRUST LAW: AN

render many decisions will result in very different application of the antitrust rules in the different national courts of the Community[66] and to great uncertainty as to the validity of ancillary restraints.

What kind of administrative letter from the Commission deprives an agreement of its provisional validity? The Court's rulings together with the reasons given for them suggest that they do so, only when they show that the Commission is unlikely to reopen the file and grant a formal exemption.[67] Yet, this is hard to reconcile with the Commission's decision in *De Bloos*. The Commission there had stated that it was closing the file on the ground that the exclusive dealing agreement came within the exemption granted by Regulation 67/67 to exclusive dealing agreements. Once the Commission discovered the export ban which had not been mentioned in the notification, it would surely have reopened the case and condemned at least that clause, and refused to exempt the agreement unless that clause was deleted.[68] It is thought that the two cases cannot be reconciled, and that one must treat *De Bloos* as having been overruled on this point.[69] If provisional validity is terminated only when the Commission is not likely to grant an exemption, even if it is later decided that an agreement infringes Article 85(1) and does not enjoy the benefit of any of the group exemptions, the scope of the precedent in relation to old agreements may be greatly limited.

In any event, it is thought that the precedent, which does not fit in happily with the earlier rulings of the Court, should be limited to the

---

ECONOMIC PERSPECTIVE (2d ed. 1980). *See also* White, *Vertical Restraints in Antitrust Law: a Coherent Model*, XXVI ANTITRUST BULL. 327 (1981).

66 The German cartel law is not unlike the American, and both the legislation and the practice of the Bunderskartellamt are far more severe towards horizontal than vertical agreements. The French tend to place more emphasis on refusals to supply on fair terms. These contrasted attitudes must reflect on the prejudices of the judges in the national courts. Italy still has no domestic law proscribing restrictions on competition, and that of Belgium is not very effective.

67 *See* C.S. KERSE, EEC ANTITRUST PROCEDURE, para. 10.10 (1981). Had this excellent book been published when this article was being prepared, far more references would have been made to it.

68 De Bloos v. Bouyer, [1977] E. Comm. Ct. J. Rep. 2359, [1979] 1 Comm. Mkt. L.R. 511. Bouyer would almost certainly have refused to delete the clause. As Advocate General Mayras had suggested in his opinion, it would have paid Bouyer to rely on the invalidity of the export ban, to prevent the granting of an exemption to the exclusivity, thereby enabling him to defeat the claim under Belgian law for compensation for not dealing exclusively with a validly appointed exclusive dealer.

69 The practice of the Court hardly ever to refer to its earlier judgments makes it particularly difficult to decide when an earlier case is being distinguished and when it is being overruled. Advocates General frequently refer to earlier precedents, including the opinions of other Advocates General, but this does not always suffice when the Court has departed from earlier precedents.

kind of administrative letter in issue in *Lancôme*: one "informing the party concerned that the Commission is of the opinion that there are no grounds for it to take action with regard to agreements which have been notified pursuant to the provisions of Article 85(1)."[70] It may be limited even further in that had the Commission informed the Court that it had considered that the agreement was caught by Article 85(1), it would not have granted an exemption.[71]

Nevertheless, the Court now appears to disapprove strongly of provisional validity and it is thought that the Court is very unlikely to reverse the second *Brasserie de Haecht* case and extend the doctrine to new agreements.

Effects of Possible Nullity on Business Dynamism: The Need for a Rule of Reason

The Commission is able to dispose by formal decision of only a very small proportion of the agreements notified to it, and few agreements now enjoy provisional validity.[72] Consequently, businessmen agreeing to collaborate in ways that may increase important competitive pressures in the Common Market but restrict others, will have to rely on national courts to interpret Article 85 realistically, should they need to enforce their contracts. The writer is not concerned about the inability to enforce the kind of agreement subject to *per se* prohibition under the Sherman Act:[73] naked price fixing, market sharing, and collective boycotts, especially the kind of collective arrangements for reciprocal exclusive dealing between manufacturers and various classes

---

70 Lancôme v. Heijn Supermart, [1980] E. Comm. Ct. J. Rep. 2511, 2535, [1981] Comm. Mkt. L.R. 164, 179.

71 The Commission told the Court in *Guerlain*, [1980] E. Comm. Ct. J. Rep. 2327, 2352, that it would not have been prepared to exempt the selective distribution system, had it been caught by Article 85(1). Presumably, the same applies to the *Lancôme* agreement.

72 *See* note 48 *supra*.

73 There are difficulties at the margin: do the regulations of commodity exchange restraining bargains out of hours except at closing prices fix prices? *See* Chicago Board of Trade v. United States, 246 U.S. 231 (1918). If the prices are arrived at by the interplay of supply and demand during the open session, the evils of price fixing may be lacking—supply may not be restricted in order to raise price. It is impossible to say *ex hypothesi* whether the development of a common trade mark is an excuse for market sharing between the shopkeepers who are promoting it, or whether the market sharing is ancillary to the development of the mark which enabled small- and medium-sized regional supermarket chains to compete with larger ones. The Supreme Court may have got it wrong in *Topco Associates v. United States*, 405 U.S. 596 (1972), although the terms of the order by the District Court on remand may have made this unimportant. The current Supreme Court with its greater interest in the market context of transactions might now go the other way. *See* Bock, *Antitrust and the Supreme Court—an Economic Explanation*, Conference Board Information Bull., No. 73.

of trader that completely tie up commerce in many consumer products in Benelux.[74] These are so unlikely to bring any benefits either to consumers or the economy as a whole that the sanction of nullity may be justifiable even if it is not very effective. The Commission cannot impose fines when an agreement has been notified to it for the period before it makes a decision under Articles 3 or 15(6) of Regulation 17, and has been unable to make many decisions.[75]

Some kinds of collaboration, however, which may add important competitive pressures to the market may not be commercially attractive unless other competitive pressures are restricted. The initial investment may not be made unless the parties can prevent competitors from taking a free ride on their efforts. For example, a prospective patent licensee may be faced with the need to invest in tooling up to produce a product that may never have been sold before, and the production of which on a commercial scale may prove impossible or unexpectedly expensive. If the project fails, he will make a loss, which will have to be balanced by a chance to make high profits at least for a time should he succeed. He may need to be assured that the clause in his license guaranteeing exclusivity will be enforceable if he is to make the initial investment, or if he needs to obtain credit to do so.[76]

A similar argument can be made for a dealer who is to promote a new or little known product. Maintaining stocks, finding retailers prepared to handle the product, and advertising it, for example, are costly functions and the return on the investment may be uncertain and delayed for several years. A brand owner may find it impossible to penetrate a market efficiently unless he can protect his dealer from free

---

[74] *See, e.g., FEDETAB*, [1980] E. Comm. J. Rep. 3125, [1981] 3 Comm. Mkt. L.R. 134, or the *Dutch Bicycle* case, 21 O.J. EUR. COMM. (No. L 20) 1 (1978), [1979] 1 Comm. Mkt. L.R. 11.

[75] In one decision, *Groupement de Fabricants de Papiers Peints*, [1975] E. Comm. Ct. J. Rep. 1941, [1976] 1 Comm. Mkt. L.R. 589, the Commission did give rather short reasoning in condemning a collective boycott against a dealer advertising cut prices, but the Court admonished it for not spelling out more fully the likely effects on inter-state trade. The Court did not encourage the Commission to make many rather summary decisions of hard core infringements, unless it spelled out how trade between Member States would be affected. In that case, however, it would not have been very difficult to recite that attempts to maintain prices in Belgium that would be expected to attract imports. The aggregate rebate scheme which formed part of the Groupement's distribution system made second sourcing less profitable and must have discouraged imports, although the parties undertook to include for rebate purposes a trader's purchases from German (though not other) manufacturers.

[76] Under Article 85(3), the Commission has taken this risk into account, *see, e.g.*, Davidson Rubber, 15 J.O. COMM. EUR. (No. L 143) 31 (1972), [1972] Comm. Mkt. L.R. D52. It seems from the tenth recital to the draft group exemption for patent licenses, 22 O.J. EUR. COMM. (No. C 58) 12 (1979), [1979] 1 Comm. Mkt. L.R. 478, that it is only the difficulty a small firm may have in raising capital that concerns the Commission, although one might have expected large firms to subject investment projects to a discounted cash flow analysis that would be affected by risk.

riders, particularly in the early years. It is not always efficient for the brand owner to do such work himself, and not always possible to see that any cash given to the dealer to recompense him for his services is actually well spent. The ability to enforce exclusivity, even reinforced by restrictions on resale by other dealers, may be vital. In the United States, since *Sylvania*,[77] such agreements have been governed by the rule of reason.

Where there is adequate competition from other brands, many economists would argue that there is no need for a court to consider the difficult question how much protection is needed, since the brand owner or patentee has an interest in his product remaining competitive and may be expected to protect his own interests by granting the minimum protection necessary.[78]

In both these kinds of vertical agreements, if protection is needed to attract the collaboration, no competition is restricted that could exist without the ancillary restraints. The case of joint ventures is rather different. If two firms collaborate in innovation, their joint venture may increase competition sooner than either parent could do on its own, especially if they have complementary technology and facilities; but it may deter either party from entering the market on its own, subject to the potential competition of the other. In such a case the restriction or deterrent to entry by either party does limit potential competition that might have developed in the absence of the agreement, though its value may be outweighed by the more effective competition of the joint venture.

Ever since the Commission's first decisions on exclusive dealing in 1964, its practice, based on German experience,[79] has been not to ana-

---

[77] Continental T.V. v. G.T.E. Sylvania, 433 U.S. 36 (1977). For a European view, see Chard, *The Economics of Exclusive Distribution Agreements with Special Reference to EEC Competition Policy,* 25 ANTITRUST BULL. 405 (1980).

[78] Even when there is little inter-brand competition, a monopolist will increase his profit by reducing dealer margins, so he is unlikely to give his dealers more protection than is necessary.

[79] R. JOLIET, THE RULE OF REASON IN ANTITRUST LAW: AMERICAN, GERMAN AND COMMON MARKET LAWS IN COMPARATIVE PERSPECTIVE 77-106, 116 to end (1967). Joliet has pointed out that the Commission has followed the practice adopted under Article 1 of the German cartel law, which applies to horizontal agreements, rather than that adopted under Article 18, which relates to vertical agreements of the sort with which the Commission was dealing. In a perceptive and lucid analysis of both the German theory and of the function of Article 85, Joliet has cogently criticized the Commission's practice. Amongst other arguments, he shows that the German concept used in Article 1 relates to contractual restrictions on conduct, whereas the concept of "concerted practice" under Article 85(1) extends far further, and that effects in the market are vital, while they are not relevant under Article 1 of the German law. The Commission has been attacking open price agreements recently, and these do not constrain the parties' freedom to price independently, (the German theory), although in concentrated markets, where the information is

lyze the market under Article 85(1). Instead, the Commission habitually states that an exclusive dealing agreement is caught by the prohibition in that the manufacturer is restrained from selling to any other dealer in the territory and the dealer is restrained from handling competing goods. It is very rare for the Commission to decide under Article 85(1) whether the manufacturer could have penetrated a market, (particularly one in a different Member State, where language, commercial habits, and tastes may differ), without protecting a local dealer from others taking a free ride on his promotion. This is taken into account, though still in rather a formal manner, under Article 85(3). A national court asked to enforce an ancillary restraint probably has no power, however, to exempt an agreement under Article 85(3),[80] so it is vital that a market analysis should be made before holding that a restraint is caught by Article 85(1). It will be submitted that a national court is not precluded from doing so by the judgments of the Community Court.

The Early Judgments of the Court of Justice

In the first competition case to reach the Court on appeal from a decision by the Commission, the Court seems to have taken an intermediate view of Article 85(1). In *Consten & Grundig* v. *Commission*,[81] Grundig had appointed Consten as its exclusive dealer in France, but increased its protection by various devices, so as to restrain any of its dealers in Germany and elsewhere from selling Grundig apparatus within Consten's territory.[82] On appeal from the Commission's decision,[83] the Court may have treated this absolute territorial protection

highly specific, they make it easier for the parties not to compete in price. In *Re the GEC-Weir Agreement*, 21 O.J. EUR. COMM. (No. L 327) 26 (1978), [1978] 1 Comm. Mkt. L.R. D42, the Commission stated that a joint venture was caught by Article 85(1) in that the substantial interest of each partner in the venture would deter it from competing with it, whether or not it accepted a contractual restriction. This is far from the concept used in Article 1 of the German statute.

80 *See* text accompanying note 116 *infra*. Moreover, the Commission has granted few exemptions.

81 [1966] E. Comm. Ct. J. Rep. 299, [1966] Comm. Mkt. L.R. 418.

82 Grundig imposed export bans on its wholesalers in Germany and on its exclusive distributors in other Member States. Grundig also enabled Consten to register in France the trademark "Gint" (Grundig International), with which it marked the Grundig apparatus produced at that period. If valid, this would enable Consten to sue anyone who imported Grundig apparatus from a German wholesaler for resale in France both for trademark infringement and for the tort of unfair competition—inciting the dealer to break his own contract with Grundig, when he knew that Consten had an exclusive franchise for France.

83 7 J.O. COMM. EUR. 2545 (1964), [1964] Comm. Mkt. L.R. 489.

along national boundaries as a *per se* infringement.[84] The applicants and the German government had argued that the decision condemning the agreement should be quashed on the ground that the Commission had considered only the Grundig brand, without analyzing the market under the rule of reason. Was so much protection required to encourage Consten to invest in the promotion in France of a brand that was known better in Germany?[85] The Court responded that one may not justify a restraint on intra-brand competition merely because it *might* increase inter-brand competition, and added that the Commission is not required "to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."[86] This apparently *per se* rule was applied, however, only to the complete insulation of the French market.

That a *per se* rule was applied to export bans in *Consten & Grundig* in 1966, when the law was undeveloped is understandable in view of the vital political objective of market integration. There is little point in removing government barriers to trade between Member States if they may be replaced by contractual ones. There is, however, an increasing number of voices suggesting that the *per se* rule against export bans or deterrents is misguided, in view of the fact that conditions are still vastly different in different Member States.[87] Once prices are con-

---

84 [1966] E. Comm. Ct. J. Rep. 299, [1966] Comm. Mkt. L.R. 418, 420-21. *See* Joliet, *supra* note 79, at 164.

85 After referring to *White Motors v. United States*, 372 U.S. 253, 258 (1963), Advocate General Roemer pointed out that the Court should compare the market situation after the agreement was made with the market situation which would have existed had the agreement not been made. A concrete examination might show that a manufacturer could not penetrate the market without protecting an exclusive dealer from competition. If so, the agreement would promote competition. He added that the Commission should have looked to competition from other brands, as is required by the German Kartel law, and observed that Grundig's market share was only 17 percent. *See id.* at 258. One might add that this was after customs duties and quotas had been abolished between France and Germany. When the agreement had been made in 1957, Grundig's market share may well have been virtually nil.

86 Consten & Grundig, [1966] E. Comm. Ct. J. Rep. 299, 342, [1966] Comm. Mkt. L.R. 418, 473.

87 *See* Bael, *Heretical Reflections on the Basic Dogma of EEC Antitrust: Single Market Integration*, 10 REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 39 (1980); Korah, *"Goodbye," Red Label: Condemnation of Dual Pricing by Distillers*, 3 EUR. L. REV. 62 (1978); Baden Fuller, *Price Variations—The Distillers Case and Article 85 EEC*, 28 INT'L & COMP. L.Q. 128 (1979). In his opinion in *Distillers Company Limited v. Commission*, [1980] E. Comm. Ct. J. Rep. 2229, 2247, [1980] 3 Comm. Mkt. L.R. 121, 146-54, Advocate General Warner demonstrated that since the U.K. market was very competitive and Distiller's competitors sold little on the Continent, and since in France and other Continental countries, the product bore discriminatory taxes, (which have since been condemned by the Court), distillers could not sell at the same price in both areas. Advocate General Warner said that as a result, the Commission should have taken this into account when considering whether to grant an exemption to the export deterrents imposed on

trolled by law at low levels in one Member State, the only thing that a firm may do to prevent seepage to other Member States may be to stop supplying the controlled market or to promote different brands,[88] if export bans and deterrents are necessarily illegal. Nevertheless, the Commission continues to condemn export restrictions, without considering whether they are justified by price control in the country of export,[89] and its decisions are confirmed by the Court.[90]

In relation to the export bans, but not to the exclusivity restrictions,[91] the Court stated in *Consten* that "[t]here is no need to take account of the concrete effects of an agreement once it appears that it has *as its object*[92] the prevention, restriction or distortion of competition."[93]

United Kingdom dealers, which were a necessary adjunct to a dual pricing policy. In *Distillers*, the parties conceded that the export deterrent fell within the prohibition of Article 85(1), so Advocate General Warner did not consider the contrary possibility. Unfortunately, the Court considered that the agreement had not been properly notified, and so it did not have to consider whether a justification of the dual pricing and ancillary export deterrent should have been considered before refusing an exemption. Dr. Baden Fuller suggested that the prohibition of the export deterrent may have delayed the integration of the market. *See* 6 EUR. L. REV. 162 (1981). When the Commission's decision was made, Distillers separated its brands in the two disparate areas, and now that France has removed the discrimination between brandy and whisky, it will be more difficult to take advantage of this, with different brands known in the two areas. *See also* Bishop, 44 MOD. L. REV. 282 (1981) and Chard, note 77 *supra*.

88 Unless the products are physically differentiated, however, it may not be possible to use the mark of one Member State to prevent a parallel importer from buying goods sold in another Member State, relabeling or repacking them under the local mark and selling the goods. To do so would infringe the principle of the free movement of goods. *See* Centrafarm v. American Home Products Corp., [1978] E. Comm. Ct. J. Rep. 1823, [1979] 1 Comm. Mkt. L.R. 326; Hoffman-La Roche v. Centrafarm, [1978] E. Comm. Ct. J. Rep. 1139, [1978] 3 Comm. Mkt. L.R. 217.

89 Johnson & Johnson, 23 O.J. EUR. COMM. (No. L 377) 16 (1980), [1981] 2 Comm. Mkt. L.R. 287.

90 *See, e.g.*, Miller International Schallplatten v. Commission, [1978] E. Comm. Ct. J. Rep. 131, 148, [1978] 2 Comm. Mkt. L.R. 334, 355, where the Court stated:

> In this connection, it must be held that, *by its very nature*, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or of the customer, since the agreed purpose of the contracting parties is the endeavor to isolate a part of the market. (emphasis added).

See also B.M.W. Belgium v. Commission, [1979] E. Comm. Ct. J. Rep. 2435, [1980] 1 Comm. Mkt. L.R. 370, (where the lower prices in the country from which exports were restricted were caused by price control that did not exist in the country of import, and which appears to have been illegal); Public Minister v. Danis, [1979] E. Comm. Ct. J. Rep. 3327, [1980] 2 Comm. Mkt. L.R. 492, discussed by Emil Paulis in *The Danis Case: Reconciling Statutory Price Controls With the Free Movement of Goods*, 2 EUR. COMPETITION L. REV. 163 (1980).

91 The Court quashed the first paragraph of the Commission's order on the ground that it had not given sufficient reasons for condemning these. Consten & Grundig, [1966] E. Comm. Ct. J. Rep. 299, [1966] Comm. Mkt. L.R. 418.

92 Article 85, set out in note 1 *supra*, prohibits agreements that have the object or effect of restricting competition within the Common Market. The French word *objet* means both the objective and the means by which it is to be obtained. Even if Grundig's objective was to increase the sale of Grundig products in France, this was to be achieved at least partially by clauses restricting the conduct of the parties: Grundig was not to make direct deliveries to anyone else in

It added, in relation to the exclusivity (which is not one of the examples of an anticompetitive term listed in Article 85(1)), that the Commission had rightly taken into account the whole Grundig distribution system and that the agreement should be assessed in its whole legal and economic context. The Court, therefore, quashed the Commission's decision in so far as it failed to say why these parts of the agreement were not severable from the absolute territorial protection, and as it failed to give reasons why they fell within the prohibition of Article 85(1). It is thought that this amounts to accepting the appropriateness of a rule of reason to be applied under Article 85(1).

Before giving judgment in *Consten & Grundig*, the Court heard argument in *La Technique Minière* v. *Maschinenbau Ulm*,[94] a case relating to the validity of an exclusive agreement, unsupported by export bans, not been notified in due time, so could not be exempted under Article 85(3). The Court can hardly have changed its mind in between. After observing that the conditions which have the "object or effect of restricting . . . competition" in Article 85(1) were in the alternative, the Court referred to

> [t]he need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition . . . must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.[95]

The Court seems to have recognized distinction between certain restrictions, such as export bans being subject to a *per se* prohibition and others to a rule of reason. Certainly, the Court went on to propound the need for a market analysis in relation to an agreement appointing an exclusive dealer who is protected from direct sales to competitors. While, however, the American distinction, so lucidly explained in the early case law, is based on the likelihood of the restric-

---

the territory, nor Consten to handle competing goods. If this was necessary to enable Grundig to penetrate a new market in a country with which its Member State had been at war only twelve years previously and where customs quotas had not yet been abolished, the mechanism may have been to restrict conduct, but the writer would hope that it was not to restrict competition.

93 Consten & Grundig, [1966] E. Comm. Ct. J. Rep. 299, 342, [1966] Comm. Mkt. L.R. 418, 473 (emphasis added).

94 [1966] E. Comm. Ct. J. Rep. 235, [1966] Comm. Mkt. L.R. 357. *See* Joliet, *supra* note 79, at 166-173.

95 La Technique Minière v. Maschinenbau ULM, [1966] E. Comm. Ct. J. Rep. 235, 249, [1966] Comm. Mkt. L.R. 357, 375.

tions having beneficial effects on the economy, the Community distinction is expressed in terms of "object," and the basis is hardly explained in any of the cases except in terms of the Treaty.

Of course, the EEC test has two requirements: the restrictive agreement must restrict competition and be capable of affecting inter-state trade. It does seem that the list of examples at the end of Article 85(1)[96] is assumed to restrict competition, unless *de minimis*.[97] These include price fixing, and market sharing, but not all kinds of collective boycott, as well as agreements to tie or discriminate—not so very different from the list of *per se* offences developed under the Sherman Act. In relation to other restraints on competition, such as exclusive dealing, rather more analysis is required, although the Commission's decisions tend to be very formalistic.

With regard to the inter-state trade condition, the Court's position is far from clear, as the Court seems to have changed its mind frequently. With regard to export bans and deterrents, it seems that these are assumed to affect inter-state trade,[98] subject only to the same *de minimis* rule. Where a restriction on competition affects a whole Member State, very little market analysis is required,[99] and vertical agreements which affect only part of a Member State are caught only if, together with other similar agreements they are likely to have substantial foreclosing effects. In *Brasserie de Haecht (No. 1)*,[100] the Court pointed out that the effects of an agreement by a small café proprietor to sell only de Haecht beer should be considered under both tests in the context of the market, and it would be relevant to consider whether

---

96 *See* note 1 *supra*. *See also* Groupement des Frabricants de Papiers Peints de Belgique v. Commission, [1975] E. Comm. Ct. J. Rep. 1491, [1976] 1 Comm. Mkt. L.R. 589.

97 Volk v. Vervaecke, [1969] E. Comm. Ct. J. Rep. 295, [1969] Comm. Mkt. L.R. 273.

98 In Miller International Schallplatten, [1978] E. Comm. Ct. J. Rep. 131, [1978] 2 Comm. Mkt. L.R. 334, the Court refused to consider arguments based on the unlikelihood of German language records being exported, or that dealers were not interested in export. The Court concluded:

> Miller indeed alleges that the Commission should have established that those clauses had an appreciable effect on intra-Community trade but that argument cannot be accepted . . . . Article 85(1) . . . does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect. The Commission basing its assessment on Miller's position on the market, its scale of production, ascertainable exports and price policy, has provided appropriate proof that in fact there was a danger that trade between Member States would be appreciably affected.

Id. at 151, [1978] 2 Comm. Mkt. L.R. at 353.

99 Groupement des Fabricants de Papiers Peints de Belgique, [1975] E. Comm. Ct. J. Rep. 1491, [1976] 1 Comm. Mkt. L.R. 589.

100 Brasserie de Haecht, [1967] E. Comm. Ct. J. Rep. 407, [1968] Comm. Mkt. L.R. 26.

other cafés were tied.[101]

More recently, the Court has been concerned with selective distribution systems. In *Metro* v. *Commission*,[102] the Court adopted a concept of workable competition. Although such systems of distribution may minimize price competition for high quality and technically complex consumer durables—in that case television sets—other forms of competition may be more important. The Court considered, therefore, that competition was not restricted when only firms with adequately qualified staff and suitable premises were selected as dealers. Fulfilling such criteria tends to be expensive, so often dealers require a further protection against too many dealers being supplied. The Court made clear in *Metro* and in *L'Oreal*,[103] however, that such quantitative restrictions do infringe Article 85(1), when, in their economic even more than their legal context, they may affect inter-state trade and have the object or effect of restricting competition. If most of the suppliers of a particular product adopt such a policy, it may be difficult for any cut-price shops to obtain supplies from anyone, and it is thought that Article 85(1) would then be infringed.

Practice of the Commission to Apply a Rule of Reason only under Article 85(3)

Despite the insistence by the Court that market analysis is required before finding that an agreement not of the kind listed in Article 85(1)[104] restricts competition, and may affect trade between Member States, the Commission in most of its decisions has continued to treat as incompatible with Article 85(1) any restriction on conduct likely to have appreciable effects on the market, and to consider the need for such restrictions only under Article 85(3). The Commission may have been influenced by the difficulty of making a market analysis in each case, both for lawyers advising businessmen, and for its officials who deal with particular cases, most of whom are lawyers. For both lawyers and Commission officials, it is easier mechanically to point to clauses

101 It is thought that the Court was right. Only if so many cafés were tied that a new brewery could not find enough outlets to enter the market with a brewery of a size able to take advantage of most of the economies of scale enjoyed by existing firms, would the tie keep out equally efficient firms. Indeed, Advocate General Roemer also pointed to the possibility of a new brewer selling in supermarkets. It is thought that evidence of the minimum efficient size of a brewery, the number of free cafés and the ease of selling products in grocers' stores not known through their café sales would be relevant.

102 [1977] E. Comm. Ct. J. Rep. 1875, [1978] 2 Comm. Mkt. L.R. 1.

103 L'Oreal v. De Nieuwe, [1980] E. Comm. Ct. J. Rep. 3775, [1981] 2 Comm. Mkt. L.R. 235. *See also* Korah, note 25 *supra*.

104 Nor, of course, export bans.

that restrict someone's conduct; then the Commission is free to make a complex economic assessment under Article 85(3) in those cases it investigates in depth. In several decisions, the Commission did clear agreements under which small firms accepted restrictions on their conduct, on the ground that the effects of the restrictions were imperceptible. In *SAFCO*,[105] the Commission added that the joint sales organization through which small French makers of conserves began to export to Germany, actually increased competition, because they had not been able to export individually. The agreement was cleared, however, on the ground that there was no perceptible restriction of competition, not because the agreement increased more competition than it restricted.

Where, however, a restriction on conduct was found necessary to penetrate a new market, the Commission exempted, and did not clear the agreement. In *re Davidson Rubber*,[106] for instance, Davidson had granted three separate licenses to manufacturers in three Member States. Davidson agreed with each licensee to grant no other license in the licensee's territory without its consent, and each licensee agreed not to make or sell outside its territory. The Commission decided that this protection did infringe Article 85(1); although, once the restriction on sales was removed, the Commission exempted the agreement. Davidson was constrained not to grant other licenses in each country without consent, and third parties were restricted from obtaining one. The process was important, and so the Commission found that the agreement was caught by Article 85(1). Nevertheless, the Commission exempted the agreement on the ground that without the protection of exclusive manufacturing licenses, the Davidson technology would not have become available in Europe. The writer does not know which part of the decision was right, but surely, if the protection was necessary to enable Davidson to penetrate the European market, the agreement should have been cleared in accordance with the Court's ruling in *La Technique Minière* and even in *Consten & Grundig*. No practicable potential competition existed to be restrained. The failure to clear may not have mattered much to Davidson and its licensees since they obtained an exemption to which no important conditions were attached, and the parties may not have pressed the case for clearance.

---

105 15 J.O. COMM. EUR. (No. L 13) 44 (1972), [1972] Comm. Mkt. L.R. D83, D86.
106 15 J.O. COMM. EUR. (No. L 143) 31 (1972), [1972] Comm. Mkt. L.R. D52.

The Need for National Courts to Apply a Rule of Reason under Article 85(1)

Had Davidson licensed another manufacturer in France, however, and been sued by its exclusive licensee for breach of the contract granting exclusivity, the French civil court could probably not have exempted the agreement even if it had been notified to the Commission.[107] It could either have said that the agreement was clearly not caught by the prohibition of Article 85(1) and enforced the restraint, or adjourned to enable the Commission to make up its mind.[108] It is not even clear whether the French court could have granted an interlocutory injunction to restrain the subsequent licensee pending the Commission's decision; but unless at the time the original licensee was granted the license, or when deciding whether to invest in tooling up he was advised that the exclusivity would easily be enforced, the licensee might not have taken the risk at that time. The process was untried. If it did not work on a commercial scale, the licensee would lose money. If it did work, a free rider might come along, and reap where he had sown, taking far less risk once the process had been proved viable and accepted by customers. If no licensees could be found in 1959 who were prepared to make the necessary investment, then the agreement restricted no possible potential competition.

There are other examples of the sort of agreements that must be made in Europe if its industry is to keep pace technologically with that in America and Japan. Suppose that the world market for widgets is highly concentrated and it is thought that within two years a Japanese widget maker may develop an electronic widget, on which an American firm is also believed to be working. Suppose that a Common Market widget maker has no electronic division or subsidiary, and estimates that it would take five years for it to develop an electronic widget. That might put the Common Market widget maker permanently out of the electronic widget market. What restrictions may it insert in a joint research and development contract with an electronic firm, under which the widget maker will initially instruct the firm about the technology of widget making, tolerances, etc., so that an electronic widget can be developed? It may be vital to know, as the bargaining power of the parties changes over time. In the first year, the widget

107 *See* notes 114-116 and accompanying text *infra*.

108 It has been argued that under the law of some Member States an exclusive licensee can obtain an injunction against a subsequent licensee by virtue of the patent. It is thought, however, that such an exercise of patent rights, obtained only by virtue of an agreement, would be subordinated to Article 85, as was the use of the "Gint" mark in *Consten & Grundig*, note 81 *supra*.

technology is being imparted. At the end of the year, the electronic firm might be able to carry on reasonably well unaided. When the first generation electronic widget is developed, which party to the contract has the stronger bargaining power will depend on which holds any patents and technology.

If the agreement is notified to the Commission, the Commission is likely these days to impose conditions which help one party more than the other,[109] and the whole deal will have to be renegotiated, probably after the bargaining positions have changed. The Commission might want to provide for the possibilities of a break of the agreement after the first generation electronic widget is developed, an invitation waltz in which each company would be free to pair up with a different partner for the next generation. That, however, might limit the amount of information exchanged freely for the first generation and so undermine the project. Many legal advisers in Europe consider that whether to notify is a management decision, but they point out the disadvantages in having to renegotiate the deal at least a year after it is made, and the unlikelihood of obtaining a firm exemption. If a comfort letter is all that is obtained, the parties may still have difficulty in enforcing the agreement in a national court. This uncertainty may force the firm either to try to do all the work itself, (even when that would be less efficient), merge fully with the partner, or not notify the agreement, so as to make it less likely that the Commission will require changes to be made. This step is dangerous, although it is unlikely that a fine would be imposed. If the parties fall out, there will be no chance of an exemption for the past. Once the parties have fallen out, it is likely that there will be no exemption for the future either, even if the agreement is notified by one of them,[110] since the other will be able to raise difficulties about the implementation of the agreement.

Under U.S. law, advice would be given that the agreement is subject to the rule of reason, and probably legal.[111] The agreement would be carefully scrutinized since the market is very concentrated, but it

---

109 *See, e.g.*, The conditions imposed for exempting the joint venture of de Laval/Stork, 20 O.J. EUR. COMM. (No. L 215) 11 (1977), [1977] 2 Comm. Mkt. L.R. D69, where each party will have to license the other to use its technology when the joint venture comes to an end, although 85 percent of the basic designs had been contributed by de Laval. Consequently, the parties can neither rely on industrial property right nor on contractual provisions about the use of the technology when an agreement is terminated, nor can they foresee their relative bargaining power at that time.

110 In the *Distillers* case, [1980] E. Comm. Ct. J. Rep. 2229, para. 23 [1980] 3 Comm. Mkt. L.R. 121, the Court assumed that late notification on the proper form would be effective.

111 *See* UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR RESEARCH JOINT VENTURES, Case B, 32 (1980).

would probably not be attacked by the Department of Justice. European firms, however, may be subjected to far greater risk. If such agreements are to be made, it is vital that each party should be able to rely on the ancillary restraints being enforceable from the time that investment is committed, or the technology imparted. Further problems arise if it is not known how valuable the electronic widget may be if developed, or the amount of work needed: what price should be paid to the electronic company for undertaking the research and development? Often this decision is avoided by providing that each party shall periodically pay half the costs, and that the widget maker will take half the electronic widgets it requires worldwide from the electronic company; the latter will sell only to or to the order of the widget maker. This does prevent the electronic firm selling to other widget makers, but why should the widget partner provide technology for the use of his competitors? No competition is being restricted other than that made possible by the agreement. The present EEC position is difficult, but it is hoped that national courts will follow the Community Court rather than the Commission's practice and apply a rule of reason to such ancillary restraints.

Despite the Commission's normal practice of looking to any restraint on conduct under Article 85(1) and assessing its effects on competition only under 85(3), the Commission has occasionally cleared an agreement[112] or indicated that a class of agreement is not caught despite important restrictions on conduct. In its notice on subcontracting

112 In *Cane Sugar*, 23 O.J. EUR. COMM. (No. L 39) 64 (1980), [1980] 2 Comm. Mkt. L.R. 559, an agreement was cleared although most of the quota cane sugar which came into the Common Market free of duty was foreclosed. It is thought that this was because the Commission had no power to exempt it. There were no benefits to consumers to qualify the agreement for exemption under Article 85(3), nor to Community farmers to qualify it under Article 39; but only benefits to the Lome producers whom the Commission wanted to protect. The Commission therefore, granted negative clearance. In *Distillers Victuallers*, 23 O.J. EUR. COMM. (No. L 233) 43 (1980), [1980] 3 Comm. Mkt. L.R. 244, the Commission granted a clearance to a post-sale restriction that the whisky would be sold only to duty free outlets, on the absurd ground that the victuallers were not equipped to deal with other outlets. Of course, they were not as they had been prohibited from doing so. The Commission did not allege that a division of the market was necessary to ensure that duty would be collected. It may be, however, that the victuallers would not have gotten the whisky on such favorable terms had they been able to sell in other markets. We are not told the relative terms given to the victuallers and other traders. This sounds like the clearance of a restriction necessary to support price differentials, although the Commission does not indicate that there were any; nor does the Commission indicate whether the other traders had additional promotional expenses on which the victuallers would otherwise have been able to take a free ride. *See also* Compari, 21 O.J. EUR. COMM. (No. L 70) 69 (1978), [1978] 2 Comm. Mkt. L.R. 397. *Compare with* Holley, *EEC Antitrust Developments*, PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 37, 59 *et seq.* (1979).

agreement,[113] the Commission stated its view that, subject to certain provisos, ancillary restrictions needed to preserve the secrecy of know-how and the value of technology might be imposed on a subcontractor. Without this possibility, such contracts might be replaced by carrying on the total contract within the firm, and this would be even more anticompetitive in effect. A firm would not impart know-how, etc. to another firm to carry out a project for it, unless it could protect its technology from plagiarism by its competitors.

There are two lines of argument enabling a national court to enforce an ancillary restraint: exemption and rule of reason analysis. So far as it is known to the writer, the first has not been tested. It might be argued that since Article 85 has direct effects on national law,[114] and that an argument is void under Article 85(2) only if it infringes Article 85(1) and does not merit exemption,[115] Article 9(1) of Regulation 17, which confers exclusive power on the Commission to exempt, must be invalid as contrary to the Treaty. If so, then Article 9(1) may be disregarded by national courts. This argument has gained strength from the inability of the Commission to grant many exemptions. The Court, however, has frequently referred to the inability of a national court to grant an exemption without casting any doubt on the validity of Article 9(1).[116]

The more likely, though less radical road, would be for a national court to accept the rulings of the Court rather than the practice of the Commission, and in relation to ancillary restraints not of the kind listed in Article 85(1) nor restraining or discouraging exports, apply a rule of reason. Where the agreement merely divides the market or the fruits of the developments which it makes possible, no likely competition would be restricted. There is greater difficulty where the project restricts some competition, while increasing other competitive elements. For example, joint venture between firms,[117] each of which might have entered the market alone, and with complimentary facilities or technology, may add the joint venture to the market earlier than either could have done by itself, but reduce the likelihood of one parent doing so alone, with

---

113 22 O.J. EUR. COMM. (No. C 1) 2 (1979), [1979] 1 Comm. Mkt. L.R. 264.

114 *See* Regulation 17/62, note 2 *supra*.

115 This was held in *Bosch*, [1962] E. Comm. Ct. J. Rep. at 54, [1962] Comm. Mkt. L.R. at 30, and as recently as *De Bloos v. Bouyer*, [1977] E. Comm. Ct. J. Rep. at 2371, [1978] 1 Comm. Mkt. L.R. at 530.

116 For instance, in *Bilger v. Jehle*, *Portelange*, *De Bloos* and *L'Oreal*, Mr. John Usher of Edinburgh University first suggested to me in conversation that it was strange that the Community Court had never doubted the validity of Article 9(1).

117 Whether through a jointly owned subsidiary, a joint committee, cross licenses or otherwise.

the fear of the other doing so later.[118]

CONCLUSION

The provision in Article 85(2) that agreements that infringe Article 85 should be void, at least to the extent of the infringement, has created considerable difficulties. The theories of competition and welfare developed by the classical economists and most of their successors are based on the assumption of private property and contractual rights. It will pay businessmen to make contracts and investments in reliance on them only to the extent that they expect them to be performed or enforceable. Where the contractual collaboration is undesirable, the sanction of nullity may be of some use and can do little harm.[119] But apart from the area to which a *per se* rule applies in the United States,[120] restraints that are ancillary to pro-competitive collaborations should generally be enforceable.

The Community Court and Commission have not developed the same theory of *per se* offences so brilliantly developed in the early cases under the Sherman Act. Naked restraints on pricing, market sharing, and some kinds of collective boycott—included in the list contained in Article 85(1) of agreements likely to restrict competition—are likely to be condemned with fairly short reasoning if they are found capable of restricting trade between Member States, but more market analysis is required in the case of ancillary restraints.[121] In *Consten & Grundig*, the Court seems to have developed a *per se* rule against absolute territorial protection conferred by export bans or deterrents and devices with a similar object or effect, and this has been consistently applied by the Commission,[122] despite mounting criticism. For all other restraints, however, the Court seems to be applying a rule of reason, requiring an analysis of the actual or intended effects in the light of market conditions.

The Commission, however, habitually analyzes agreements under Article 85(1) in the formalistic way developed by the German case law

118 *See* the analysis of the Supreme Court in United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964), criticized by E. GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL, 343 (1981).

119 It may not be easy to tell whether the collaboration is undesirable, and so increase uncertainty in marginal cases.

120 The Court and Commission would add export bans and deterrents.

121 *See* Groupement des Frabricants de Papiers Peints de Belgique v. Commission, [1975] E. Comm. Ct. J. Rep. 1491, [1976] 1 Comm. Mkt. L.R. 589.

122 The only exception is in relation to exclusive patent licenses, where the possibility of a group exemption for export bans to protect small producers is envisaged in the draft group exemption. *See* note 76 *supra*.

under Article 1 of the German Kartel law, and condemns any restriction on the conduct of the parties, or third parties, provided the restriction has, or may be expected to have, appreciable effects on the market. Only under Article 85(3) does the Commission usually try to balance any pro- and anti-competitive effects.

If national courts adopt the Commission's practice, it is feared that many desirable contracts which restrict only competition that could not take place without such an agreement, or which restrict competition less than they increase it, may not be made. The Commission grants few exemptions, and apart from some 1100 odd old agreements that have not yet been dealt with, agreements enjoy no provisional validity even when notified. Important agreements are unlikely to be exempted unless certain clauses are altered. These alterations may well help one party more than the other, and the whole contract may have to be renegotiated after the parties have been implementing it, when their relative bargaining power may have been altered as a result of the collaboration. This is a considerable disincentive to notification. Where an important agreement has not been notified, the parties may well have to argue, after they had fallen out, before either a national court or the Commission, as to whether it should be enforced under Article 85(1).

Until recently, the problem seldom arose, owing to the provisional validity invented by the Court in the *Bosch* case. In 1973, however, it became clear that the doctrine did not apply to new agreements, and it has been further limited in the *Perfume* cases.

There is fear that European firms that may have to compete in world markets may fall behind technologically or have to merge completely, so as to reduce the risk of collaboration. Market analyses are difficult, especially for lawyers and bureaucrats. But if such analyses are not made, agreements that may have overall desirable consequences should not be controlled. This means that national courts will have to be strong in resisting claims that agreements are anti-competitive just because some competitor is harmed.

Addendum

Since this article was written, the *Maize Seed* case, *Nungesser* v. *Commission*, has been argued before the Community Court, and the Advocate General, Madame Rozes, has delivered her opinion. The German as well as the French and United Kingdom governments argued that it should not be assumed that an exclusive licence of plant breeders' rights limited to one Member State infringes Article 85(1). Madame Rozes stated that the Commission had condemned the agree-

ment of 1961 under which Kurt Eisele had been able to obtain in Germany plant breeders' rights to certain hybrid varieties of maize seed developed by the French Institute, INRA, on the ground that this enabled Eisele to restrain the sale in Germany of seeds of those varieties produced in France. Consequently, Eisele's firm, Nungesser, enjoyed absolute territorial protection. Madame Rozes considered that this amounted to a *per se* prohibition of exclusive licences; the Commission had confused the free movement of goods, protected by Articles 30-36 of the Treaty, with the competition rules. Exhaustion applies only to the property right, to which the competition rules do not apply. In her view, the territorial nature of exclusivity results from German law rather than from the agreement of 1961.[123]

She added, at p. 86, that without the protection of exclusivity, Eisele would have had no incentive to assume onerous obligations: to pay royalties to INRA, and undertake the responsibilities required to obtain and maintain plant breeders' rights under German law: selecting and growing the basic genetic material from which he, or selected farmers, would grow certified hybrid seed under public supervision. She pointed out that it would not be enough for him to have an exclusive production licence unless he could restrain the sale of imported seed.

> [Since Kurt Eisele enjoyed in an indubitably legitimate manner the exclusive right to sell the seed he himself produced,] he must necessarily, in commercial terms enjoy the same exclusivity over the sale of seed of the same varieties produced in France. Otherwise, he would have no interest in maintaining his plant breeders' rights or assuming the costs which that involved . . . The absence of a right to restrain sales of imported seed would carry the risk of negating his interest in the grant by law of the exclusive right to reproduce INRA seeds and market them, which would result in there being no production in Germany, as happened [in Belgium].[124]

---

123 Case 258/78, opinion delivered February 3, 1982. I have worked from the provisional French text of her opinion and the views summarised come from pp.61-67. Although the authentic text is German, the opinion must have been drafted in French by Madame Rozes, so it is unlikely that there will be many changes.

She added that assignments and exclusive licences are very similar from an economic point of view, in which case exclusive licences limited to a single Member State should not necessarily be caught by Article 85(1) of the Treaty. Article 222 reserves to national law the regime of property (p.79). When considering the clauses whereby the producers in France agreed not to sell directly to Germany, save to Eisele's firm, she considered that the duty of good faith imposed by the French law of contract would prevent them from doing so anyway, so there was no agreement not to do so to be caught by Article 85. When considering the restraint on indirect exports by customers of the producers, she noted that it was only Eisele's property right that could be used to restrain them.

124 Author's translation. She describes the position that developed in Belgium at p.110. It is

Madame Rozes went on to say that since, contrary to the Commission's allegation in its decision, Nungesser had not been shown to have charged prices more than 15 percent higher than those in France, the exclusive right had not harmed competition. She added (p. 99) that she did not understand the Commission's statement that it need not consider whether the exclusive right to produce merited exemption, since the exclusive right to sell, with the ancillary export bans, did not. She pointed out that Eisele was not merely a distributor: he had assumed the responsibility for maintaining the variety. He might cease to do so, if the profitability of his sales was undermined by imports from France.

The Advocate General clearly stressed the need to protect those carrying on certain useful activities from those who do not incur similar costs or obligations taking a free ride on their investment. At times she is clearly speaking about Article 85(1)[125] and she stresses the Court's ruling in *Lancôme* that an agreement does not infringe Article 85(1) unless it has the prohibited object or effects. This depends less on the legal nature of the agreement than on its actual effect. This opinion is as strong as that of Mr. Warner in *Distillers*[126] in looking not merely to the conduct that is restricted, but rather to the difficult question of whether the market is made less competitive by the agreement. The author strongly hopes that the Court will not overrule her persuasive opinion.[127]

submitted that the argument would have been more cogent without the words the author placed within square brackets.

125 Although at p.81 she is clearly speaking of an exemption when she says that an exclusive licence limited territorially may fall within Article 85(3). At p.84 she states that this requires cost/benefit analysis.

126 Distillers v. Commission [1980] E. Comm. Ct. J. Rep. 2229, [1980] 3 Comm. Mkt. L.R. 121.

127 The *juge rapporteur* is Professor Koopmans. He is widely thought to be one of the most able members of the Court. It is clear from the questions he asked at the oral hearing that he understands the complex facts in issue, so it may be particularly difficult for his colleagues to limit the cogency of the judgment.