

Northwestern Journal of International Law & Business

Volume 3
Issue 2 *Fall*

Fall 1981

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Recommended Citation

Jean-Francois Verstrynge, *The Relationship between National and Community Antitrust Law: An Overview after the Perfume Cases*, 3 *Nw. J. Int'l L. & Bus.* 358 (1981)

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The Relationship Between National and Community Antitrust Law: An Overview After the Perfume Cases

*Jean-Francois Verstrynge**

The European Coal and Steel Community Treaty and the Treaty of Rome have been recognized as transferring the jurisdictional authority to apply antitrust laws to the European Communities. After surveying the impact of these treaties on various sectors, the author argues that it is necessary to subordinate the jurisdictional authority of the Member States in this field to fulfill the objectives of the Common Market.

To commemorate the twenty-five year history of the European Economic Community, it is worthwhile to devote some reflections to the so often misunderstood relationship between national and Community antitrust law. It became even more appropriate to address this question when the European Court of Justice in Luxembourg further clarified its position in its judgment on July 10, 1980 in the *Perfume* cases.¹ This article will provide a comprehensive overview of the present state of the relationship between national and Community antitrust law.

Currently, jurisdiction in the Common Market is being transferred from the Member States to the European Communities. This transfer is in part the result of two Treaties, the European Coal and Steel Community Treaty (ECSC)² and the European Economic Community

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¹ *Procureur de la République v. Bruno Giry and Guerlain S.A. and others*, [1980] E. Comm. Ct. J. Rep. 2327, [1981] 2 Comm. Mkt. L. R. 99.

² Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140 (*entered into force* July 23, 1952) [hereinafter cited as ECSC Treaty].

Treaty (EEC).³ This article will examine these Treaties⁴ and secondary legislation and attempt to demonstrate that when applicable, Community antitrust law must take precedence over national antitrust law. Granting priority to Community antitrust law, however, will not completely discharge the jurisdiction of the Member States. National antitrust law can sometimes be used to supplement and compliment Community antitrust law. This article will conclude with an examination of the manner in which national antitrust law may perform this function.

JURISDICTION

To properly analyze the relationship between national and Community antitrust law, it is necessary to first clarify the scope of jurisdiction accorded to Community antitrust law. This addresses the question: "When does Community antitrust law intervene?"

1. General Transfer of Jurisdiction

The ECSC Treaty and the EEC Treaty transfer jurisdiction from the Member States to the European Communities. In several cases, the Court of Justice confirmed that these two Treaties included a certain transfer of jurisdiction from the Member States to the European Communities.

The Court first indicated its position with respect to the ECSC Treaty in 1961:

[U]nder Article 1 of the Treaty the Community is founded upon a common market, common objectives and common institutions. In the Community field, namely in respect to everything that pertains to the pursuit of the common objectives within the common market, the institutions of the Community have been endowed with *exclusive* authority.⁵

Similarly, the Court of Justice interpreted the EEC Treaty to grant priority to the Community law. In the *van Gend & Loos* case of 1963, the Court noted that Member States had limited their own sovereignty. More particularly, the Court stated:

³ Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (*entered into force* Jan. 1, 1958) [hereinafter cited as EEC Treaty].

⁴ These questions must be asked in the context of each of the European Community Treaties since the answers may be different in each Treaty. Hereafter this problem will not, however, be analyzed with regard to Article 60 of the Euratom Treaty, Treaty Establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 169 (*entered into force* Jan. 1, 1958) [hereinafter cited as Euratom Treaty].

⁵ *De Gezamenlijke Steenkoolmijnen in Limburg v. High Authority of the European Coal and Steel Community*, [1961] E. Comm. Ct. J. Rep. 1, 22 (emphasis added).

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is to direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions *endowed with sovereign rights*, the exercise of which affects Member States and also their citizens.

...
The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit *within limited fields*, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.⁶

This observation indicated a transfer of Member State sovereign rights. Further, the Court confirmed this position in *Costa v. ENEL* the following year when it stated:

[B]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and, more particularly *real powers stemming from a limitation of sovereignty or a transfer of powers* from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.⁷

The most emphatic discussion of this transfer of sovereign rights was set forth in *Commission v. Italy, Case 48/71*. There, the Court noted:

The grant made by Member States to the Community of rights and powers in accordance with the provisions of the Treaty *involves a definitive limitation on their sovereign rights* and no provisions whatsoever of national law may be invoked to override this limitation.⁸

⁶ N.V. Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration), [1963] E. Comm. Ct. J. Rep. I, 12, [1963] Comm. Mkt. L.R. 105, 129 (emphasis added) [hereinafter cited as *van Gend & Loos*].

⁷ *Flamino Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, [1964] E. Comm. Ct. J. Rep. 585, 593, [1964] Comm. Mkt. L.R. 425, 455 (emphasis added) [hereinafter cited as *Costa v. ENEL*].

⁸ *Commission of the European Communities v. Italian Republic, Case 48/71*, [1972] E. Comm. Ct. J. Rep. 527, 532, [1972] Comm. Mkt. L.R. 699, 708. (emphasis added).

2. *Transfer of Jurisdiction in the ECSC Antitrust Context*

The ECSC Treaty is generally recognized as completely transferring the jurisdiction to apply antitrust law to the European Communities. This authority is derived directly from the language of Articles 65(1), 66(1) and 66(7) of the ECSC Treaty since this language leaves no room for the application of national antitrust law.⁹

The subsequent EEC Treaty has not modified the transfer of jurisdiction under the ECSC Treaty. Article 232(1) of the EEC Treaty provides that no provisions of that Treaty will affect the provisions of the ECSC Treaty.¹⁰

The European Commission (having replaced the High Authority) also recognized the complete transfer of jurisdiction from the Member States to the Communities. In its second report on competition policy, the European Commission concluded that restrictive agreements, mergers and other potential antitrust violations in the coal and steel fields must be analyzed according to Articles 65 and 66 of the ECSC

⁹ Article 65(1) provides:

All agreements between undertakings, decisions, by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the Common Market shall be prohibited . . .

ECSC Treaty, *supra* note 2, at art. 65(1) (emphasis added).

Article 66(1) provides:

Any transaction shall require the prior authorization of the High Authority, subject to the provisions of paragraph 3 of this Article, if it has in itself the direct or indirect effect of bringing about within the territories referred to in the first paragraph of Article 79, as a result of action by any person or undertaking or group of persons or undertakings a concentration between undertakings at least one of which is covered by Article 80, whether the transaction concerns a single product or a number of different products . . .

Id. at art. 66(1) (emphasis added).

Article 66(7) provides:

If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the Common Market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used.

Id. at art. 66(7) (emphasis added).

In addition, Article 80 (to which Article 66 refers), provides that:

For the purposes of this Treaty, "undertaking" means any undertaking engaged in production in the coal or the steel industry within the territories referred to in the first paragraph of Article 79, and, also, for the purposes of Articles 65 and 66 and of information required for their application and proceedings in connection with them, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.

Id. at art. 80 (emphasis added).

¹⁰ Article 232(1) states:

The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty of the Functioning of the Common Market in coal and steel.

EEC Treaty, *supra* note 3, at art. 232(1).

Treaty. Such analysis is solely within the Communities' jurisdiction.¹¹ Therefore, in the context of the ECSC Treaty, the European Communities are *exclusively* competent to apply antitrust rules.

3. *Transfer of Jurisdiction in the EEC Antitrust Context*

With respect to EEC jurisdiction over antitrust matters, it is necessary to distinguish between those products and/or sectors subject to special rules in the EEC Treaty and those which are regulated only by the general rules of the EEC Treaty. The products and/or sectors governed by special rules are agricultural products which are listed in Annex II of the EEC Treaty,¹² some transport services which come within the application of Articles 74 through 84 of the EEC Treaty,¹³ and military products which fall under the special provision of Article 223 of the EEC Treaty.¹⁴

A. *Agricultural Products*

Articles 38 *et seq.* of the EEC Treaty¹⁵ require that the general transfer of jurisdiction for agricultural products be completed at the end of the transition period in 1970. Article 40 enumerates methods which Member States might adopt to formulate a common agricultural policy, one of which is establishing common rules on competition.¹⁶ The Court had already expressed a commitment to establish a common

¹¹ EUROPEAN COMMUNITIES COMMISSION, SECOND REPORT ON COMPETITION POLICY 32 n.27 (1973). *See also* EUROPEAN COMMUNITIES COMMISSION, SIXTH REPORT ON COMPETITION POLICY 64 n.113 (1977).

¹² EEC Treaty, *supra* note 3, at Annex II.

¹³ *Id.* at arts. 74-84.

¹⁴ *Id.* at art. 223.

¹⁵ *Id.* at arts. 38 *et seq.*

¹⁶ More particularly, Article 40 provides:

1. Member States *shall develop* the common agricultural policy by degrees during the transitional period and *shall bring it into force by the end of that period at the latest.*
2. In order to attain the objectives set out in Art. 39 a common organization of agricultural markets shall be established.

This organization shall take one of the following forms, depending on the product concerned:

- (a) common rules on *competition*;
- (b) compulsory coordination of the various national market organizations;
- (c) a European market organization.

3. The common organization established in accordance with paragraph 2 *may include all measures required to attain the objectives set out in Art. 39*, in particular regulation of prices, aids for the production and marketing of the various products, storage and carry-over arrangements and common machinery for stabilizing imports or exports.

The common organization shall be limited to pursuit of the objectives set out in Art. 39 and shall exclude any discrimination between producers or consumers within the Community.

Any common price policy shall be based on common criteria and uniform methods of calculation.

Id. at art. 40 (emphasis added).

agricultural policy by 1974. In the *Charmasson* case,¹⁷ the Court held that a national organization of the market could not be maintained after the end of the transitional period without contravening the rules of the EEC Treaty. Subsequently, the Court took a stronger position in *Officier van Justitie v. Beert van den Hazel*.¹⁸ In this case, the Court ruled that Member States must not undermine any measure taken pursuant to Article 40. One year later, the Court of Justice in *Procureur du Roi v. Dechmann*,¹⁹ stated that: "In order to bring about this single market, the regulation established a system comprising a set of material rules and of powers, including a framework of organization calculated to meet all foreseeable situations."²⁰

In the *Charmasson* case, the Court indicated that the European Communities' jurisdiction was not dependent upon immediate occupancy of the field by the European Communities. Rather, the Court maintained that the jurisdictional transfer should occur at the end of the transitional period. The most recent confirmation of the Court's position was expressed in *Commission v. United Kingdom, Case 231/78*.²¹ In this case, the Court stated:

[I]t follows, as the Court held in its judgment of December 10, 1974 in case 48/74 *Charmasson* (1974) ECR 1383, that after the expiration of the transitional period the operation of a national market organization can no longer prevent full effect being given to the provisions of the Treaty relating to the elimination of quantitative restrictions and all markets concerned in this respect thence-forward becoming the responsibility of the Community institutions. *The expiration of the transitional period laid down by the Treaty meant that, from that time, those matters and areas explicitly attributed to the Community came under Community jurisdiction*, so that if it were still necessary to have recourse to special measures, these could no longer be determined unilaterally by the Member States concerned, but had to be adopted within the framework of the Community system designed to ensure that the general interest of the Community would be protected.²²

The argument implicit in the judgments of the Court of Justice is that the European Communities should ultimately have exclusive jurisdiction over agricultural products, at least for those matters already expressly attributed to it. This jurisdiction includes the power to apply

¹⁷ *Mr. Charmasson v. Minister for Economic Affairs and Finance (Paris)*, [1974] E. Comm. Ct. J. Rep. 1383, 1394-95, [1975] 2 Comm. Mkt. L.R. 208, 225.

¹⁸ [1977] E. Comm. Ct. J. Rep. 901, [1980] 3 Comm. Mkt. L.R. 12.

¹⁹ [1978] E. Comm. Ct. J. Rep. 1573, [1979] 2 Comm. Mkt. L.R. 1.

²⁰ *Id.* at 1583, [1979] 2 Comm. Mkt. L.R. at 17 (emphasis added).

²¹ *Commission of the European Communities v. United Kingdom, Case 231/78*, [1979] E. Comm. Ct. J. Rep. 1447, [1979] 2 Comm. Mkt. L.R. 427.

²² *Id.* at 1461, [1979] 2 Comm. Mkt. L.R. at 438 (emphasis added).

antitrust rules in this sector, because Article 40(2) refers explicitly to "common rules on competition." Furthermore, Article 42 of the EEC Treaty indirectly confirms this proposition by giving the Council of Ministers of the EEC the power to take measures necessary to govern a possible conflict between the rules of the common agricultural policy based on Article 40 and the general antitrust rules of the EEC Treaty. The existence of Article 42 of the EEC Treaty itself thus confirms the complete transfer of jurisdiction in antitrust matters to the European Communities.

Pursuant to this power, the Council adopted a special regulation. Article 1 of this regulation provides:

[F]rom the entry into force of this Regulation, article 85 to 90 of the Treaty and provisions made in implementation thereof shall, subject to Article 2 below, apply to all agreements, decisions and practices referred to in Articles 85(1) and 86 of the Treaty which relate to production of or trade in the products listed in Annex II to the Treaty.²³

Therefore, as far as agricultural products are concerned, the European Communities have exclusive jurisdiction to apply antitrust rules.

B. Transport Sector

The provisions laid down in the EEC Treaty, particularly Articles 74 and 75, authorize a similar general transfer of jurisdiction in the transportation sector as in the agricultural sector at the end of a transition period. Article 74 provides that the Member States should pursue the objectives of the Treaty pursuant to a common transport policy.²⁴ Specifically, Article 75 authorizes the Council, after consultation with certain Community institutions, to enact common rules pertaining to the transport of goods through and within Member States.²⁵

²³ EEC Council: Regulation No. 26 applying certain rules of competition to production of and trade in agricultural products, J.O. COMM. EUR. (No. 30) 993 (1962), O.J. COMM. EUR. 129 (Spec. Ed. 1959-62).

²⁴ Article 74 provides: "*The objectives of this Treaty shall, in matters governed by this Title, be pursued by Member States within the framework to a common transport policy.*" EEC Treaty, *supra* note 3, at art. 74 (emphasis added).

²⁵ Article 75 provides that:

1. For the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council shall, acting unanimously until the end of the second stage and by a qualified majority thereafter lay down, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly:
 - (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;
 - (b) the conditions under which non-resident carriers may operate transport services within a Member State;
 - (c) any other appropriate provisions.
2. The provisions referred to in (a) and (b) of paragraph 1 *shall be laid down during the transitional period.*

The role of Community antitrust law in the transport sector has not yet been clearly defined by the Court. Unlike Title II concerning agricultural products, Title IV of the EEC Treaty which pertains to transport does not embody any rule comparable to Article 42. Thus, it must be inferred from this situation that the general antitrust rules of the EEC Treaty apply to the transport sector without any other restrictions than those contained in the implementing regulations.²⁶

Furthermore, case law concerning the transport sector is limited. The "common rules" referred to in Article 75(1)(a) or the "regulatory system" referred to in Article 75(3) should arguably include antitrust rules. A common transport policy requires the same uniform application of Community regulations as the establishment of a common agricultural policy. Moreover, Article 75 provides a sufficient legal basis for the adoption of such common antitrust rules.

Although there is no explicit transfer of the exclusive jurisdiction over antitrust matters in the transport sector with a provision similar to Article 40(2) for agricultural products, a similar argument as the one made by the Court of Justice in the *Charmasson* case for agricultural products could probably be based on Article 75. If this is the case, one would have to conclude that jurisdiction over antitrust matters has also been completely transferred to the European Communities in the transport sector.

C. Military Products

A Member State still yields significant jurisdictional authority in the sector of military products under Article 223(1)(b). This Article provides that:

[A]ny Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such

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3. By way of derogation from the procedure provided for in paragraph 1, where the application of provisions concerning the principles of the regulatory system for transport would be liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities, they shall be laid down by the Council unanimously. In so doing, the Council shall take into account the need for adaptation to the economic development which will result from establishing the Common Market.

Id. at art. 75 (emphasis added).

²⁶ Regulation (EEC) No. 1017/68 of the Council of July 19, 1968, applying rules of competition to transport by rail, road and inland waterway, J.O. COMM. EUR. (No. L. 175) 1 (1968), O.J. EUR. COMM. 302 (Spec. Ed. 1968 (I)). The implementing rules of Regulation 1017/68 apply only to the sectors of transport referred to in Article 84(1) of the EEC Treaty, note 3 *supra*. See also EUROPEAN COMMUNITIES COMMISSION, NINTH REPORT ON COMPETITION POLICY 23-24 n.12-15 (1980); EUROPEAN COMMUNITIES COMMISSION, TENTH REPORT ON COMPETITION POLICY 22-27 n.7-14.

measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.²⁷

This provision may be read as limiting the jurisdiction of the European Community to the extent necessary to protect the essential security interests of each Member State. This could, in certain situations, limit the application of antitrust rules established in the EEC Treaty.

D. Other Products and/or Sectors

Products and/or sectors for which no special rules have been set forth in the EEC Treaty fall under the full application of the rules on competition contained in Articles 85 to 90. For these, Article 87 provides that:

1. Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86 . . .
2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
 - (e) *to determine the relationship between national laws and the provisions contained in these sections or adopted pursuant to this Article.*²⁸

Article 87(2)(e) indicates that in the field of EEC antitrust law there exists a situation of parallel jurisdiction between the national Member States and the European Communities. Indeed, if the jurisdiction had been completely transferred to the European Communities in this field, Article 87(2)(e) would not have been necessary. Nevertheless, this provision appears to transfer ultimate decision making power to the European Communities by authorizing the Council of Ministers to adopt regulations and to determine the relationship between Community and national laws.

The Court of Justice in *Wilhelm v. Bundeskartellamt*,²⁹ underscored this position when it ruled that unless Article 87(2)(e) of the Treaty provided otherwise, national authorities could take action against an agreement in accordance with their national law, even while the Commission examined such action to determine its compatibility with Community law. The Court, however, noted that any action taken by a Member State was limited by Community law. Specifically, the application of national law could not prejudice the application of

²⁷ EEC Treaty, *supra* note 3, at art. 223(1)(b).

²⁸ *Id.* at art. 87 (emphasis added).

²⁹ [1969] E. Comm. Ct. J. Rep. 1, [1969] Comm. Mkt. L.R. 100.

Community law.³⁰

Recently, in the *Perfume* cases, the Court confirmed the situation of parallel jurisdiction under the EEC Treaty:

As the Court held in its judgment of 13 February 1969 in Case 14/68 *Walt Wilhelm and Others v. Bundeskartellamt* (1969) ECR 1, Community law and national law on competition consider restrictive practices from different points of view. Whereas Articles 85 and 86 regard them in the light of the obstacles which may result from trade between Member States, national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context. It follows that national authorities may also take action in regard to situations which are capable of forming the subject matter of a decision by the Commission.³¹

This situation also results indirectly from the repeated indications that the phrase "trade between Member States may be affected" delineates the jurisdiction of the European Communities.³² This phrase thus provides indirect support for the concept of parallel jurisdiction. For instance, in *Consten & Grundig v. Commission*³³ the Court succinctly noted that:

[T]he concept of an agreement "which may affect trade between Member States" is intended to define, in the Law governing cartels, *the boundary between the areas respectively covered by Community Law and national law*. It is only to the extent to which the agreement may affect trade between Member States that the deterioration in competition caused by the agreement falls under the prohibition of Community law contained in Article 85; otherwise it escapes the prohibition.³⁴

³⁰ *Id.* at 15, [1969] Comm. Mkt. L.R. at 119.

³¹ [1980] E. Comm. Ct. J. Rep. at 2374, [1981] 2 Comm. Mkt. L.R. at 136.

³² EEC Treaty, *supra* note 3, at arts. 85(1), 86.

³³ *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission of the European Communities*, [1966] E. Comm. Ct. J. Rep. 299, [1966] Comm. Mkt. L.R. 418.

³⁴ *Id.* at 341, [1966] Comm. Mkt. L.R. at 472 (emphasis added). Referring to the same phrase, the court in *Commercial Solvents v. Commission* held that:

This expression is intended to *define the sphere of application of Community rules in relation to national laws*. It cannot therefore be interpreted as limiting the field of application of the prohibition which it contains to industrial and commercial activities supplying the Member States.

Instituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission of the European Communities, [1974] E. Comm. Ct. J. Rep. 223, 252, [1974] 1 Comm. Mkt. L.R. 309, 342 (emphasis added).

Likewise, in *Hugin v. Commission*, the Court found that:

[t]he interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the Treaty must be based on the purpose of that condition, *which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States*. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between Member States, in particular by partitioning the national markets or by affecting the structure of competition within the Common

Nonetheless, in *Wilhelm v. Bundeskartellamt*,³⁵ the Court of Justice concluded that cartels are considered differently under Community law than under national law. Whereas Article 85 considers cartels in the light of the obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of concerns peculiar to it and considers cartels only in that context. The Court also found that it is true that as the economic phenomena and legal situations under consideration may, in individual cases, be interdependent, the distinction between Community and national aspects could not serve in all cases as the decisive criterion for the delimitation of jurisdiction.³⁶

Thus, under the EEC Treaty there is parallel jurisdiction between Member States and the European Communities regarding the application of antitrust rules to other products and/or sectors. This jurisdiction is only parallel, however, as long as the Council of Ministers does not provide otherwise on the basis of Article 87(2)(e) of the EEC Treaty.

E. Repartition of Jurisdiction to Apply EEC Antitrust Rules

The issue of the delimitation of the jurisdiction of the European Communities must not be confused with the problem of determining which institutions or authorities should apply the antitrust rules of the EEC Treaty. Both the Commission and the authorities of the Member States have the power to apply Articles 85(1) and 86.

The power of the Commission stems from Article 89 of the EEC Treaty³⁷ and Article 9(2) of Regulation 17/62.³⁸ The Court of Justice has also repeatedly held that the EEC Treaty empowers the Member States' courts to apply Articles 85(1) and 86. This power results from the direct applicability of these provisions. For example, in *BRT v. SABAM*, the Court found that the prohibitions of Articles 85(1) and 86 inherently affect relations among individuals, and also create direct

Market. On the other hand, conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order.

Hugin Kassaregister AB and Hugin Cash Registers Ltd. v. Commission of the European Communities, [1979] E. Comm. Ct. J. Rep. 1869, 1899, [1979] 3 Comm. Mkt. L.R. 345, 372-73 (emphasis added).

³⁵ [1969] E. Comm. Ct. J. Rep. 1, [1969] Comm. Mkt. L.R. 100.

³⁶ *Id.* at 13, [1969] Comm. Mkt. L.R. at 118.

³⁷ EEC Treaty, *supra* note 3, at art. 89.

³⁸ EEC Council: Regulation No. 17: First Regulation Implementing articles 85 and 86 of the Treaty, J.O. COMM. EUR. (No. 13) 204 (1962), O.J. EUR. COMM. 87 (Spec. Ed. 1959-62) [hereinafter cited as Regulation 17].

rights for individuals which the national courts must protect.³⁹ Similarly in *Sacchi*⁴⁰ the Court stated that in the framework of Article 90, the provisions of Article 86 directly confer rights upon interested parties which the national courts must certainly guard. In addition, Article 88 of the EEC Treaty and Article 9(3) of Regulation 17/62 mandate that certain authorities within the Member States have the power to apply Articles 85(1) and 86 of the EEC Treaty.⁴¹

Only the national courts of the Member States, however, have the authority to apply the directly applicable provision of Article 85(2). Application of this provision can, moreover, be subject to the procedure based on Article 177 of the EEC Treaty.⁴² As far as Article 85(3) is concerned, the Commission, pursuant to Article 9(1) of Regulation 17/62, is the only body which has the power to grant exemptions.⁴³

IMPACT OF COMMUNITY ANTITRUST LAW AND CONSEQUENCES FOR NATIONAL ANTITRUST LAW

Having discussed the preliminary question of when Community antitrust law intervenes, this article will now examine the issue of how Community antitrust law intervenes with respect to national law of the Member States. In addressing this question, it is necessary to first examine Community law in general and then more specifically consider the application of the Community antitrust rules. This article will then focus on the consequences regarding national antitrust law. This article will finally examine the possibility of non-conflicting or complimentary applications of national antitrust rules.

³⁹ *Belgische Radio en Televisie and Societe belge des auteurs, compositeurs et editeurs v. SV SABAM and NV Fonior*, [1974] E. Comm. Ct. J. Rep. 51, 62, [1974] 2 Comm. Mkt. L.R. 238, 271.

⁴⁰ *Guiseppe Sacchi*, [1974] E. Comm. Ct. J. Rep. 409, 430, [1974] 2 Comm. Mkt. L.R. 177, 204.

⁴¹ Article 88 provides:

Until the entry into force of the provisions adopted in pursuance of Article 87, *the authorities in Member States shall rule on* the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the Common Market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86.

EEC Treaty, *supra* note 3, at art. 88 (emphasis added).

Article 9(3) of Regulation 17/62 states:

As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding the time limits specified in Article 5(1) and in Article 7(2) relating to notification have not expired.

Regulation 17, *supra* note 38, at art. 9(3).

⁴² EEC Treaty, *supra* note 3, at art. 177.

⁴³ More particularly, Regulation 17/62 states that "[s]ubject to review of its decisions by the Court of Justice, the Commission shall have *sole* power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty." Regulation 17, *supra* note 38, at art. 9(1) (emphasis added).

1. *General Characteristics of Community Law*

The most important general characteristics of Community law are precedence over national law, simultaneous and uniform application and, in certain circumstances, direct applicability.

A. *Precedence Over National Law*

The Court of Justice established the general priority of Community law over national law at an early stage. For example, in *Humblet v. Belgium*,⁴⁴ the Court of Justice stated in the ECSC Treaty context that:

. . . if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol which have the force of law in the Member States following their ratification *and which take precedence over national law*.⁴⁵

The Court of Justice has since continued to emphasize the priority of Community law over national law in the context of the EEC Treaty as well. The Court's ruling in *Internationale Handelsgesellschaft*⁴⁶ is typical. There the Court stated:

[R]ecourse to the Legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community Law. The validity of such measures can only be judged in the light of Community Law. In fact, the Law stemming from the Treaty, an independent source of Law, *cannot because of its very nature be overridden by rules of national Law*, however framed, without being deprived of its character as Community Law and without the Legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.⁴⁷

Moreover, the Court of Justice indicated that Community law has precedence over national measures, formulated before or after promulgation of the Community law. Discussing this concept in *Pigs Market-*

⁴⁴ *Jean E. Humblet v. Belgian State*, [1960] E. Comm. Ct. J. Rep. 559.

⁴⁵ *Id.* at 569 (emphasis added).

⁴⁶ *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorrastelle fur Gettreid und Futtermittel*, [1970] E. Comm. Ct. J. Rep. 1125, [1972] Comm. Mkt. L.R. 255.

⁴⁷ *Id.* at 1134, [1972] Comm. Mkt. L.R. at 283 (emphasis added).

ing Board v. Raymond Redmond,⁴⁸ the Court stated:

In this respect the fact that one of the features of the Pigs Marketing Scheme — namely the Movement of Pigs Regulations — was introduced in 1972 subsequently to the date of the signature of the Treaty of Accession does not alter this situation since the precedence of Community law over the provisions of national law applies *without regard to the respective dates of the provisions in question*.⁴⁹

In *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*,⁵⁰ the Court of Justice more narrowly defined the consequences that this precedence has upon national courts of the Member States which are confronted with a directly applicable provision of Community law. The Court of Justice concluded that a national court, upon a request to apply the provisions of Community law, has a duty to give complete effect to those provisions, even if such duty requires a Court to ignore national legislation adopted subsequent to Community law.⁵¹ Further, a national court must grant this effect of its own motion. The EEC Treaty therefore mandates that national courts enforce directly applicable provisions of Community law in an absolute manner.

B. Simultaneous and Uniform Application

Article 177 of the EEC Treaty is the basic provision which assures uniformity in Community law. By requiring strict adherence to this provision in several judgments, the Court of Justice has consistently upheld a policy of uniformity in Community law. For example, in *Costa v. ENEL*⁵² the Court of Justice stated:

[T]he integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. *The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws*, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.⁵³

Furthermore, in *Wilhelm v. Bundeskartellamt*,⁵⁴ the Court of Justice concluded that Member States could not be permitted to retain

⁴⁸ [1978] E. Comm. Ct. J. Rep. 2347, [1979] 1 Comm. Mkt. L.R. 177.

⁴⁹ *Id.* at 2373, [1979] 1 Comm. Mkt. L.R. at 204 (emphasis added).

⁵⁰ [1978] E. Comm. Ct. J. Rep. 629, [1978] 3 Comm. Mkt. L.R. 263.

⁵¹ *Id.* at 657, [1978] 3 Comm. Mkt. L.R. at 284.

⁵² [1964] E. Comm. Ct. J. Rep. 585, [1964] Comm. Ct. J. Rep. 425.

⁵³ *Id.* at 593-94, [1964] Comm. Mkt. L.R. at 455 (emphasis added).

⁵⁴ [1969] E. Comm. Ct. J. Rep. 1, 14, [1969] Comm. Mkt. L.R. 100, 118-19.

laws which alter the effectiveness of the Treaty. The Court observed that without uniform application of the Treaty, the Community system would be impeded and its aims imperiled.

The Court of Justice has also required uniformity in the application of secondary legislation. In *Commission v. Italy, Case 39/72*, the Court underscored the above policies by concluding that the simultaneous and uniform application of the Community regulations must not be jeopardized.⁵⁵ Furthermore, in *Commission v. United Kingdom, Case 128/78*,⁵⁶ the Court of Justice concluded that Community regulations must be followed in their entirety:

Article 189 of the Treaty provides that a regulation shall be binding "in its entirety" in the Member States. As the Court has already stated in its judgment of February 7, 1973 (*Case 39/72, Commission v. Italian Republic* (1973) E.C.R. 101) it cannot therefore be accepted that a Member State should apply *in an incomplete or selective manner* provisions of a Community legislation which it has opposed or which it considers contrary to its national interests.⁵⁷

C. *Direct Applicability*

Certain provisions of the EEC Treaty have been held to be directly applicable by their very nature. In the field of antitrust rules, the Court of Justice indicated that Articles 85(1) and 86 are directly applicable. In addition, Article 189 makes all EEC Treaty regulations directly applicable and binding in all Member States.⁵⁸

2. *Specific Relation of National and Community Law in the Antitrust Field*

Having defined the area of jurisdiction granted to the European Communities and analyzed the general nature of Community law, this article will now examine how the specific relationship between national and Community antitrust law is established. In order to answer this question, several situations must be examined.

First, there is the situation of an absence of Community jurisdiction. National antitrust law applies fully when the Community does not have jurisdiction. An example is a case where conduct of an enter-

⁵⁵ *Commission of the European Communities v. Italian Republic, Case 39/72*, [1973] E. Comm. Ct. J. Rep. 101, 114, [1973] Comm. Mkt. L.R. 439, 456.

⁵⁶ *Commission of the European Communities v. United Kingdom, Case 128/78*, [1979] E. Comm. Ct. J. Rep. 419, [1979] 2 Comm. Mkt. L.R. 45.

⁵⁷ *Id.* at 428, [1979] 2 Comm. Mkt. L.R. at 55 (emphasis added).

⁵⁸ EEC Treaty, *supra* note 3, at art. 189, provides that "[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

prise could fall under the EEC Treaty, but the conduct is not of a nature to affect trade between Member States.

Likewise, there is no problem defining the relationship between national and Community antitrust law when the Community has exclusive jurisdiction. National law cannot apply in such a case. For example, the Community has exclusive jurisdiction regarding enterprises which are regulated by the ECSC Treaty. The Community also retains exclusive jurisdiction for applying antitrust rules to cases involving the agricultural sector and, as discussed earlier, probably also involving those transport sectors covered by Article 84(1) of the EEC Treaty.

When both the Community rules and the national rules apply to a particular sector, a situation of parallel jurisdiction emerges. Parallel jurisdiction involves those sectors and/or products falling under the EEC Treaty for which no special provisions apply. For these situations, Article 87(2)(e) empowers the Council of Ministers to enact legislation which will determine the relationship between national and Community antitrust law. However, no such legislation has yet been adopted. Thus, the relationship will be examined awaiting future legislation.

To explain the situation of parallel jurisdiction in the context of antitrust rules, some authors in the early years of the EEC Treaty developed the *Zweischranken Theory* (theory of double barriers).⁵⁹ According to this theory if conduct was not to be prohibited, it had to satisfy the requirements of both national and Community antitrust law.

However, it is also arguable that given the precedence of Community law, the European Economic Community enjoys *de facto* exclusive jurisdiction within the field covered by Articles 85 and 86 of the EEC Treaty. This analysis appears in particular if the requirement of "trade between Member States" is considered to separate the areas of jurisdiction between Community and national antitrust law. Theoretically, under this analysis, only a single barrier would exist. Either national or Community antitrust rules would apply, according to whether the conduct could or could not affect trade between Member States.

The Court of Justice rejected both extreme positions and adopted a middle road. It ruled that although there is in principle a situation of parallel jurisdiction (where both sets of rules apply), the application of national law "may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to im-

⁵⁹ Koch, *Das Verhältnis der Kartellvorschriften des E.W.G.—Vertrager zum Gesetz gegen Wettbewerbsbeschränkungen*, DER BETRIEBSBERATER 241 (1959).

plement it."⁶⁰ Consequently, the Court of Justice ruled that "[c]onflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence."⁶¹ The Court of Justice has continued to adhere to this position as illustrated in the recent *Perfume* cases:

[T]he Court stressed that parallel application of national competition law can only be permitted in so far as it does not prejudice the uniform application, throughout the common market, of the Community rules on cartels or the full effects of the measures adopted in implementation of those rules.⁶²

A problem arises, however, in establishing how such a prejudice should be avoided. The Court of Justice already provided guidance for the situation in which a decision to be rendered by a national authority could conflict with a previous Commission decision. Referring to this situation, the Court in *Wilhelm v. Bundeskartellamt* stated:

[I]t follows from the foregoing that should it prove that a decision of a national authority regarding an agreement would be incompatible with a decision adopted by the Commission at the culmination of the procedure initiated by it, *the national authority is required to take proper account of the effects of the latter decision.*⁶³

The Court of Justice adopted a similar position with respect to a situation in which a Commission decision is in the process of being adopted. The Court stated:

[W]here, during national proceedings, it appears possible that the decisions to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, *it is for the latter to take the appropriate measures.*⁶⁴

On the occasion of a 1974 meeting with the national experts from the Member States on restrictive practices, the Commission, in its Fourth Report on Competition Policy,⁶⁵ commented on the judgment in the *Wilhelm* case of 1969. According to the Commission, a distinction should be made between directly applicable prohibitions under Articles 85(1) and 86 and exemptions from the ban on restrictive practices under Article 85(3).

With respect to the prohibitions under Articles 85(1) and 86, the

⁶⁰ *Wilhelm v. Bundeskartellamt*, [1969] E. Comm. Ct. J. Rep. at 15, [1969] Comm. Mkt. L.R. at 120.

⁶¹ *Id.* at 14, [1969] Comm. Mkt. L.R. at 119.

⁶² [1980] E. Comm. Ct. J. Rep. 2327, 2375, [1981] 2 Comm. Mkt. L.R. 99, 136.

⁶³ [1969] E. Comm. Ct. J. Rep. at 14, [1969] Comm. Mkt. L.R. at 119 (emphasis added).

⁶⁴ *Id.* at 14-15, [1969] Comm. Mkt. L.R. at 120 (emphasis added).

⁶⁵ EUROPEAN COMMUNITIES COMMISSION, FOURTH REPORT ON COMPETITION POLICY 27 n. 43-47 (1975).

Commission maintained that Member States are required to abstain from any measure which might jeopardize either the full and uniform application of these prohibitions throughout the Common Market or the effectiveness of measures taken, or to be taken, in implementation of these prohibitions. The Commission observed, however, that national authorities are free to apply their national laws along the same lines as Community law. The practical result of this is that a practice prohibited under Community antitrust law cannot be exempted under national antitrust law.

Discussing exemptions under Article 85(3), the Commission stated further:

The primacy of Community law is equally valid as a principle in relation to exemptions from the ban on restrictive practices granted pursuant to Article 85(3). In the judgment of February 13, 1969, the Court rejected the argument that exemption by the Commission withdraws only the Community barrier to a restrictive practice under Article 85(1), leaving unimpaired the national authority's power to prohibit such a practice under its own law (double barrier theory).

This is in accordance with the principle that the provisions of Article 85 must be seen as a whole and therefore applied as uniformly as possible. Even so, the Court's judgment of February 13, 1969 leaves open the question whether the primacy of Community exemptions constitutes a strict rule, or *whether it should be regarded rather as a flexible principle in the application of which it is permissible to take account of the respective interests of the Community and of Member States.*⁶⁶

During the procedural hearings in the *Perfume* cases, the Commission argued that the primacy of Community exemptions should be regarded as a rather strict rule.⁶⁷ In his opinion in the same cases, Advocate General Reichl, however, did not address this point because the systems of selective distribution in the perfume sector had not been exempted under Article 85(3).⁶⁸

The Court of Justice also disregarded this question in these cases, claiming that the Commission had concluded that the examined conduct fell outside the scope of application of Article 85(1) and therefore that Article 85(3) did not apply.⁶⁹ Thus, it remains an open question

⁶⁶ *Id.* at point 45 (emphasis added).

⁶⁷ Submission of the Commission, [1980] E. Comm. Ct. J. Rep. 2327, 2356-57.

⁶⁸ *See*, Opinion of Advocate General Reichl, *id.* at 2377, [1981] 2 Comm. Mkt. L.R. at 105. The Commission concurred with Advocate General Reichl's ruling on this point.

⁶⁹ The Court of Justice concluded generally:

It has been claimed that the application of national competition law may not be permitted where it would result in an exemption granted by a decision or a block exemption being called into question. It follows, however, from the observations set forth above that the agreements which form the subject matter of the present cases do not benefit from any deci-

whether the Court of Justice agrees completely with the Commission's position on this question or not.

Several arguments may be made in favor of the Commission's position. Most importantly, the terms of Article 85(3) provide support for the Commission's position that an exemption is only granted if the practice in question contributes to the fulfillment of objectives of the EEC Treaty. An exemption under Article 85(3) has to be denied if the practice imposes on the undertakings concerned, restrictions which are not indispensable to the attainment of the objectives of improving the production or distribution of goods, or promoting technical and economic progress. Finally, an exemption will not be given if it will deter the objectives which promote the harmonious development of economic activities throughout the Community, as mentioned in Article 2 of the EEC Treaty.

To allow a Member State to apply its national law in order to prohibit a practice exempted under Article 85(3), would result in impeding the fulfillment of a significant objective of the EEC Treaty. This argument was implicitly adopted by the Court of Justice in *Wilhelm v. Bundeskartellamt*.⁷⁰ There the Court noted that, while the EEC Treaty's main objective is to eliminate any obstacles to free trade among Member States in the Common Market, the Treaty "*also permits the Community authorities to carry out certain positive, though indirect action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the Treaty.*"⁷¹

Secondly, the Commission's approach is justified in light of the need for attaining a simultaneous and uniform application of Community law. Specifically, the application of Article 85(3) would be impeded if an exempted practice could be prohibited in some Member States and not in others. If Member States could prohibit practices ex-

sion in application of Article 85(3). Moreover, it is not in dispute that the agreements concerned do not come within the scope of any regulation granting block exemption.

The contracts in question merely formed the subject matter of a decision to close the file on the case taken by the Commission, which gave the opinion that there was no need for it to take action in respect of the contracts in question under the provisions of Article 85(1). The fact cannot by itself have the result of preventing the national authorities from applying to those agreements provisions of national competition law which may be more rigorous than Community law in this respect. The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained in Article 85(1) and (2), the scope of which is limited to agreements capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally.

Id. at 2375, [1981] 2 Comm. Mkt. L.R. at 136.

⁷⁰ [1969] E. Comm. Ct. J. Rep. 1, [1969] Comm. Mkt. L.R. 100.

⁷¹ *Id.* at 14, [1969] Comm. Mkt. L.R. at 119 (emphasis added).

empted by the Community, then in effect provisions of national law would delimit the application of Article 85(3) of the EEC Treaty. This would also be contrary to the principle of precedence of Community law.

Finally, if a Member State were permitted to prohibit a practice which had been exempted under Article 85(3) pursuant to a Commission decision, this could create confusion regarding Community law itself. Indeed certain practices are exempted by way of regulations, which are, according to Article 189 of the EEC Treaty, directly applicable in all Member States. To admit that provisions of national law could prohibit practices which are exempted by decision, but not those which are exempted by regulation, would introduce an incoherence in Community law because the effect of the exemption would not depend on the nature of the Commission's action (i.e., in granting the exemption), but rather on the form of the action (i.e., regulation or decision).

Nevertheless, some arguments have been advanced to counter this approach.⁷² Specifically, it might be argued that the application of national antitrust laws would enhance economic development in the Common Market. By signing and adhering to the EEC Treaty, Member States have subscribed to the fulfillment of the objectives of this Treaty. Article 3(f) of this Treaty institutes a system that ensures that competition in the Common Market is not distorted.

A Member State could, however, for reasons of individual internal economic policy for instance, seek to promote a higher degree of competition in the Common Market than the degree which is necessary for the fulfillment of the objective contained in Article 3(f). As a result of this individual policy, this Member State could then attempt to apply internal antitrust rules which are stricter than the provisions of Article 85(3). Yet at the same time, although these rules would differ from those rules established in the Community, they would not jeopardize the fulfillment of the objective articulated in Article 3(f). The only result of the application of these stricter national antitrust rules would be to promote more competition than is required by Article 3(f). Thus, according to this argument, an increase in competition might result in more economic interpenetration, or in other words, could lead to a better functioning Common Market.

⁷² See, Markert, *Some Legal and Administrative Problems of the Community and National Competition Law in the EEC*, 11 COMM. MKT. L. REV. 92 (1974). It should, in this context, be remembered that the Member States have the right to request an action by the Commission under Article 3(2)(b) of Regulation 17/62, must be consulted according to Article 10 of the same regulation, and have the authority to request the annulment of acts of the Commission through the procedure of Article 173 of the EEC Treaty, note 3 *supra*.

The weakness of this argument lies in the fact that the EEC Treaty does not merely promote the fulfillment of the single objective in Article 3(f) ensuring that competition will not be distorted, but in addition fosters other more positive objectives. For example, the EEC Treaty promotes the harmonious development of economic activities throughout the Community as stated in Article 2 of this Treaty.

Competition policy should contribute to the fulfillment of these other objectives. One way that this can be accomplished is by providing adequate exemptions under Article 85(3). The Court of Justice has already indicated that Article 85(3) could be applied in this way. In *Metro v. Commission*⁷³ the Court stated:

The establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment *which, since it improves the general conditions of production, especially when market conditions are unfavorable, comes within the framework of the objectives to which reference may be had pursuant to Article 85(3)*.⁷⁴

A similar position was taken by the Court of Justice in its recent judgment in the *FEDETAB Case*.⁷⁵

The Court of Justice in several judgments clearly held that the provisions of Article 85(3) must be viewed broadly in order to coordinate the various objectives of the EEC Treaty. For example, the Court in 1973 stated:

. . . if Article 3(f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of Article 2 of the Treaty according to which one of the tasks of the Community is 'to promote throughout the Community a harmonious development of economic activities.' *Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the requirements of Articles 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market.*⁷⁶

⁷³ *Metro SB-Grossmarkte GmbH & Co. KG v. Commission of the European Communities*, [1977] E. Comm. Ct. J. Rep. 1875, [1978] 2 Comm. Mkt. L.R. 1 [hereinafter cited as *Metro v. Commission*].

⁷⁴ *Id.* at 1916, [1978] 2 Comm. Mkt. L.R. at point 43 (emphasis added).

⁷⁵ *Heintz van Landewyck S.a.r.l., Federation Belgo-Luxembourgeoise des Industries du Tabac A.s.b.l., (FEDETAB) and others v. Commission of the European Communities*, [1980] E. Comm. Ct. J. Rep. 3125, [1981] 3 Comm. Mkt. L.R. 134.

⁷⁶ *Europemballage Corp. and Continental Can Co., Inc. v. Commission of the European Communities*, [1973] E. Comm. Ct. J. Rep. 215, 244, [1973] Comm. Mkt. L.R. 199, 223-24 (emphasis added).

More recently, in *Metro v. Commission*, the Court recognized the need to preserve competition when it concluded:

The powers conferred upon the Commission under Article 85(3) show that the requirements for the maintenance of workable competition *may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives* and that they do not result in the elimination of competition for a substantial part of the Common Market.⁷⁷

Finally, it might be argued that all the practices exempted by the Commission do not equally contribute to the fulfillment of the various objectives of the EEC Treaty. Even if it has not been done up to now, it could be possible to draw a distinction between those practices strictly necessary to the fulfillment of these objectives and those practices which are not. To illustrate this, one could, for example, distinguish between an exemption granted to a joint venture promoting industrial development and research in an advanced technological sector, and an exemption given to a system of selective distribution in the perfume sector. With respect to the latter category of exemptions, one would not be able to raise the same objections to a possible interdiction of the exempted practice by the stricter antitrust rules of a Member State. Presumably, the Commission could even indicate in its decisions the extent to which the exempted practice fulfills EEC Treaty objectives.

The weakness of this argument lies in the fact that Article 85(3)(a) states that an exemption will be granted only if a practice which restricts competition does not “. . . impose on the undertakings concerned restrictions which are not *indispensable* to the attainment of these objectives.”⁷⁸ If a practice is not considered strictly necessary to the fulfillment of the EEC Treaty objectives, it is difficult to see how this practice could satisfy the condition of indispensability under Article 85(3)(a). In other words, it must be admitted that the provisions of Article 85(3) render impossible a distinction between several exempted practices, of which some would be strictly necessary to the fulfillment of the Treaty objectives, while others would not. If certain practices do not fulfill the condition of Article 85(3)(a), they remain under the prohibition of Article 85(1) and, therefore, are already forbidden under the EEC antitrust rules before they could be apprehended by national anti-

⁷⁷ [1977] E. Comm. Ct. J. Rep. at 1905, [1978] 2 Comm. Mkt. L.R. at point 21 (emphasis added).

⁷⁸ EEC Treaty, *supra* note 3, at art. 85(3)(a).

trust rules. Where both rules forbid such a practice the conflict between national and Community antitrust law has in fact disappeared.

Concluding this analysis of the relationship between national and Community law with respect to an exemption under Article 85(3), it is evident that exemptions granted by the Commission, by way of regulations or by way of decisions, have to take precedence over an application of stricter national antitrust laws. The very nature of the exemption, which is to promote the fulfillment of the objectives of the EEC Treaty, commands this conclusion.

Article 9(1) of Regulation 17/62⁷⁹ confirms this conclusion. Pursuant to Article 9(1), the Commission has the sole power to grant exemptions. Under the EEC Treaty, the Commission is the institution which must represent the common interest. The balance of power instituted by the EEC Treaty would be upset if the Commission's authority to decide whether a practice is necessary to fulfill the common objectives of the EEC Treaty was left to be ultimately decided by the national Member States.

The *L'Oreal*⁸⁰ case of 1980 further supports this point. In *L'Oreal* the Court of Justice indicated that decisions which grant the Article 85(3) exemption give the parties to the exempted practice the individual right to prevail against third parties if the latter challenge the practice under Article 85(2).⁸¹ Given the precedence of Community law, this reasoning must, *a fortiori*, be applied against third parties in actions involving a prohibition of national antitrust rules.

3. *Supplementary Application of National Law*

Although Community antitrust law takes precedence over national antitrust law, and the Court of Justice and the European Commission attach great weight to this precedence, national law could still be applied in certain non-conflictual situations. It could thus be necessary to apply national law when it supplements or complements Community law. In such cases, there is no conflict with Community law. Several examples of situations in which national law does apply in this manner illustrate this point.

⁷⁹ Regulation 17, note 38 *supra*.

⁸⁰ NV *L'Oreal* and SA *L'Oreal* v. PVBA DeNieve AMCK, [1980] E. Comm. Ct. J. Rep. 3775, [1981] 2 Comm. Mkt. L.R. 235.

⁸¹ *Id.* at 3793, [1981] 2 Comm. Mkt. L.R. at 254.

*A. Application of National Law in Execution of
Community Law Provisions*

First, it must be pointed out that national law applies whenever Community law provisions require national law to be applied in the execution of Community law. An example of this is Article 14(6) of Regulation 17/62:

Where an undertaking opposes an investigation ordered pursuant to this Article, the Member States concerned shall afford the necessary assistance of the officials authorized by the Commission to enable them to make their investigation. *Member States*, after consultation with the Commission, *take the necessary measures to this end before October 1, 1962.*⁸²

In execution of this provision several national measures were adopted.⁸³ For new Member States similar provisions apply.⁸⁴

B. Application of National Law to Complement Community Law

Where Community law is silent, rules of national law can sometimes be applied. The best example of this is the granting of damages for violations of Community antitrust law prohibitions. The first study published by the European Commission on competition problems made clear that in each of the six original Member States, national rules on damages could complement Community law in this manner.⁸⁵

An application of this occurred in Germany in a judgment on October 23, 1979 by the Bundesgerichtshof (German Federal Supreme Court) in the case of *BMW Cars*.⁸⁶ In that case the Court ruled that the German courts had jurisdiction over a case where a Belgian car distributor induced its Belgian dealers not to sell to a German trade customer in order to partition the markets (which is in effect, a boycott prohibited by section 26 of the German Restraint of Competition Act and a practice prohibited by Article 85 of the EEC Treaty), because in

⁸² Regulation 17, *supra* note 38, at art. 14(6) (emphasis added).

⁸³ These measures along with their respective countries follow:

France: Decret 18.2 1972 (J.O.Fr n.47 of 25.2.72)

Germany: Law 17.8 1967 (Bundesgesetzblatt of 23.8.67 at 911)

The Netherlands: Law 10.7 1968 (NL Staatsblad 394/395 of 1968)

Belgium: Arrêté Royal 18.1 1966 (Moniteur Belge of 22.1.66/753)

Luxemburg: Arrête 26.5 1965 (Memorial A 31 of 15.6.65).

⁸⁴ See Act of Accession, 1972, Annex I, V Competition, point 1, 15 J.O. COMM. EUR. (No. L 73) 14 (1972). See also Act concerning the conditions of Accession of the Hellenic Republic and the adjustments to the Treaties, Annex I, V Competition, point 1, 22 O.J. EUR. COMM. (No. L 291) 93 (1979).

⁸⁵ Etudes, serie concurrence, n. 1, La reparation des consequences dommageables d'une violation des articles 85 et 86 du traite instituant La CEE (Bruxelles 1966). This publication does not exist in English.

⁸⁶ Free translation by the author. Judgment not yet published.

such case the indirect object was to prejudice the German customer in his home market and, therefore, one of the elements of the restriction of competition, a tortious act, was present. Similar cases are pending in other Member States.

C. Application of General Principles of National Law to Interpret Community Law

The Court of Justice recognized that common principles of national law might be used to assist in the interpretation of Community antitrust law. The Court adopted this method of reasoning in *Transocean Marine Paint v. Commission*,⁸⁷ finding:

[B]oth from the nature and objectives of procedure for hearings, and from Articles 5, 6 and 7 of Regulation 99/63, that this Regulation, notwithstanding the cases specifically dealt with in Articles 2 and 4, *applies the general rule* that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission.⁸⁸

In such situations, the application of national rules does not lead to a conflict with Community antitrust rules.

CONCLUSION

The relationship between national and Community antitrust rules is currently in a transitional period. In general, national antitrust law is being subordinated to Community antitrust law. This development is essential to the fulfillment of all of the objectives of the Common Market as set forth in the European Coal and Steel Community Treaty and the European Economic Community Treaty. Uniform application of Community antitrust law provides substantial economic benefits to all Member States. Moreover, it minimizes the opportunity for a national authority to advance policies which may improve that nation's economy, but will be detrimental to the whole of the Common Market. This trend towards the priority of Community antitrust law, however, does not entirely exclude the jurisdiction of the Member States.

The dynamics of the European Communities require the practitioner to remain abreast of developments in the interrelationship of

⁸⁷ *Transocean Marine Paint Association v. Commission of the European Communities*, [1974] E. Comm. Ct. J. Rep. 1063, [1974] 2 Comm. Mkt. L.R. 459. See also Conclusions of A.G. Warner, *id.* at 1083, [1974] 2 Comm. Mkt. L.R. at 462.

⁸⁸ *Id.* at 1079-80, [1974] 2 Comm. Mkt. L.R. at 477 (emphasis added).

Community and national antitrust law. Although Community antitrust law has begun to take precedence in more sectors, the importance of national antitrust law should not be minimized. The relationship between Community and national antitrust law may be most significant in the present context of parallel jurisdiction. It is essential that national antitrust law be sometimes applied to complement and supplement Community antitrust law.