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# THE VALIDITY OF VERTICAL RESTRAINTS UNDER U.S. AND E.E.C. ANTITRUST LAWS

CATALDO L. CAMMARATA\*

**I**N THE COMPLEX PRODUCTION AND DISTRIBUTION processes existing in the United States and the European Economic Community,<sup>1</sup> attention will necessarily be centered on the relationship between manufacturer and dealer. Although not in competition with each other, the intermediate arrangements likely to develop between the production and distribution levels merit concern because they may have an adverse impact on market competition in ways detrimental to the public. This adverse impact in the area of distribution is often manifested in vertical restraints. Vertical restraints are those occurring and imposed between firms performing functions at successive stages in the production and distribution of a product. Such arrangements evidence the determination of manufacturers to retain some power over their products after released from possession, in order to maximize profits. The major issues in vertical restraints involve questions of agency, resale price maintenance and territorial and customer limitations. Both the United States and the European Economic Community utilize antitrust law to regulate vertical restraints and the undesirable effects flowing therefrom. This article will assess the posture taken by antitrust law vis-a-vis vertical restraints in the United States and the Common Market and will examine the extent to which a restraint in the distribution field will be considered valid by the two systems.

## I. THE THRUST OF ANTITRUST POLICY IN THE U.S. AND E.E.C.

The pioneering experience in the field of antitrust was that of the United States in 1890. Faced by monopolies that threatened its economy, the U.S. enacted a very strong regulatory scheme, the Sherman Act,<sup>2</sup> to deal with the most severe forms of anticompetitive restraints of trade. The Act declared unlawful any contract, combination and conspiracy in restraint of

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<sup>1</sup>The author would like to make clear that there are three communities which must be differentiated: the European Economic Community (E.E.C.), the European Coal and Steel Community (E.C.S.C.) and the European Atomic Community (E.A.C.). Although competition plays a considerable part in the E.C.S.C. as well as in the E.E.C., this article's focus will be on the E.E.C., which will be referred to as either the Community or the Common Market.

<sup>2</sup>Sherman Act, ch. 647 § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1970)).

trade, and also forbade monopolization, the formation of a combination or conspiracy with the intent to monopolize.

The American antitrust legislation is aimed primarily at goals of an economic nature. It seeks to ensure that the market will remain competitive and to preserve the market system with all of its social, political and economic implications. This aim is perfectly reflected and described through various court decisions:

[The Sherman Act] seeks to protect the public against evils commonly incident to the unreasonable destruction of competition . . . . The interest of the public in the preservation of competition is the primary consideration.<sup>3</sup>

The purpose of the Sherman Anti-trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, and to afford protection from the subversive coercive influences of monopolistic endeavor.<sup>4</sup>

Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress . . . . Congress did not condone "good trusts" and condemn "bad" ones; it forbade all . . . . It is possible, because of its indirect social or moral effect, to prefer a spleen of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a Law.<sup>5</sup>

Clearly emerging from the above citations is the basic premise of American antitrust legislation: preservation of competition will promote the public interest.

While the public interest is viewed as best promoted through competition in the American approach, in the E.E.C. there is a shift of emphasis to solely promoting the public interest without regard to the means that may be used. Nevertheless, the Community's antitrust policy has borrowed many features from American antitrust law.

Until the E.C.S.C. Treaty of 1950,<sup>6</sup> there was little experience in Europe with the promulgation of rules prohibiting restraints on competition. However, there were two notable exceptions: the antitrust laws introduced

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<sup>3</sup> *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930).

<sup>4</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933).

<sup>5</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

<sup>6</sup> *Treaty Instituting the European Coal and Steel Community*, Apr. 18, 1951, 261 U.N.T.S. 140.

in postwar Germany by the occupying powers to prevent the recartelization of the Ruhr's coal and steel industries and the passage of the British Monopolies and Restrictive Practices Act<sup>7</sup> in 1948 which established the Monopolies and Restrictive Practices Commission.

If the drafters of the various European treaties felt the need to establish antitrust regulations directly dealing with enterprises, it is because historical experience showed that a liberal society at an advanced stage of development cannot retain its economic equilibrium unless anticompetitive behavior is regulated. Thus the drafters' aim was to maintain the European community as a liberal society. Moreover, in drafting the Treaty of Rome<sup>8</sup> which created the Common Market, the framers believed that forming the Community would be pointless if individual manufacturers could make arrangements to protect their products from competition.

Article 2 of the Treaty of Rome enunciates the following goals for the E.E.C.:

[b]y establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion . . . .<sup>9</sup>

One of the major means by which such goals are to be implemented is through the establishment of a system ensuring that competition in the Common Market will not be distorted.

At this stage, it is necessary to address the question of available options in the basic approaches found in E.E.C. and U.S. antitrust laws. Within the ambit of an economic policy which is designed to foster competition, many attitudes are conceivable. If competition is an aim in and of itself, as viewed in the orthodox liberal approach, then competition is the indispensable condition to a perfectly balanced economy. In such a system, any restraint on competition would be systematically stricken. This per se approach is evident in certain areas of American antitrust law and is premised on the idea that some agreements are so contrary to the spirit of competitive freedom that they are per se illegal regardless of any redeeming economic value which might exist.

The fundamental approach in E.E.C. antitrust law regards competition as a means and not as a necessary end in furthering the public interest. Com-

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<sup>7</sup> 1948, 11 & 12 Geo. 6, c. 66 (1948).

<sup>8</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

<sup>9</sup> *Id.* at 15.

petition is regarded as but one means among others to reach an economic balance and any restrictive behavior will not be mandatorily stricken as anti-competitive. Instead, a distinction is drawn; agreements apt to promote economic progress are permitted despite restrictive effects, whereas agreements with no positive virtues are banned. As noted above, the antitrust policy of the E.E.C. assumes that competition is merely a means, while American law as embodied in the terms of the Sherman Act<sup>10</sup> forbids "every restraint of trade" without exception. Nevertheless, the United States courts realized at an early stage that not all restraints were anticompetitive and that therefore a rule of reason had to be applied to evaluate whether a restraint was truly anticompetitive *vel non*. Given this judicial interpretation, the basic American approach differs little from that of the E.E.C.

Restraints on distribution in the United States and in the E.E.C. are dealt with by statutory provisions whose substance and applicability differ between the two systems.

Vertical restraints in the American antitrust law may be violations of the Sherman Act section 1,<sup>11</sup> the Clayton Act section 3,<sup>12</sup> or may even come within the ambit of the Sherman Act section 2.<sup>13</sup> Section 3 of the Clayton Act deals directly with tying arrangements, and will not be discussed herein. The only statute which will be referred to is the Sherman Act section 1 which provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among several states, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by the Act to be illegal shall be deemed guilty of a misdemeanor.

The Act was drafted in terms that are constitutional in breadth and in definitiveness, thus giving the Act an unmistakable vagueness that has characterized American antitrust legislation. In fact, differences between European and American statutes are actually minimal and explicable by dissimilarities in the drafting technique employed by Civil and Common law Systems.

The sparse legislative guidance in the American statutes has required judicial initiative and responsibility for developing a more precise antitrust policy. This amounts to a delegation of power to the courts for expanding appropriate principles on a case-by-case basis all within the formal framework

<sup>10</sup> 15 U.S.C. §§ 1-7.

<sup>11</sup> *Id.* § 3.

<sup>12</sup> Clayton Act., ch. 322, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1970)).

<sup>13</sup> 15 U.S.C. § 2.

of interpreting legislative interest. When applying the Sherman Act section 1 in the context of vertical restraints, courts have ruled that agreements between firms in a production and distribution chain having adverse competitive affects are proscribed.

The substance of E.E.C. antitrust law as applied to distribution is contained in Article 85 of the Treaty of Rome<sup>14</sup> and in Regulations No. 17<sup>15</sup> and 67/67.<sup>16</sup>

Article 85 applies to agreements relating to the production and *distribution* of goods, to the supply of services and to intellectual and industrial property. Article 85 prohibits, "any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market."<sup>17</sup> Section 3 of the Article states that the provisions of section 1:

may be declared inapplicable in the case of any agreement . . . which contributes to the improvement of the production or *distribution* of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom and which 1) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives 2) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.<sup>18</sup>

Section 1 prohibits agreements that are incompatible, in the manner defined by the Article, with the Common Market policy on trade and competition. This is, however, a prohibition in principle and thus not absolute. Section 3 provides for the inapplicability of the section 1 ban where an agreement is in the interest of the Common Market and the resulting restraint on competition is confined to the particular limits indicated in subparagraphs 3(a) and (b) of Article 85.

In order for the section 1 prohibition to apply, two prerequisites must be met. The agreement must: 1) be likely to "affect trade between Member States"<sup>19</sup> and 2) have "as its object or result the prevention, restriction or

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<sup>14</sup> 298 U.N.T.S. at 47.

<sup>15</sup> 5 J.O. COMM. EUR. (No. 13) 204 (1962), [1978] COMM. MKT. REP. (CCH) ¶ 2401.

<sup>16</sup> 10 J.O. COMM. EUR. (No. 57) 849 (1967), [1977] COMM. MKT. REP. (CCH) ¶ 2727.

<sup>17</sup> 298 U.N.T.S. at 48.

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Id.* at 47.

distortion of competition within the Common Market."<sup>20</sup> These two prerequisites have as an essential purpose the elimination of agreements that have the effect or object of maintaining or preventing the removal of national barriers to trade between Member States. It might be noted at this point that in certain circumstances Article 85 may have direct extraterritorial effects; for example, if some of the firms participating in a prohibited agreement are located outside as well as inside the E.E.C., Article 85 still applies.

The procedure for implementing Article 85 is contained in regulations enacted pursuant to Article 87.<sup>21</sup> In a sense, these regulations are substantive because in certain instances they define classes of agreements and practices to which Article 85 will not apply. While these provisions may be looked upon as interpretative only and therefore procedural, they admittedly have a substantive effect.

Council Regulation No. 17<sup>22</sup> provides that the agreements, decisions and concerted practices referred to in Article 85 section 1 shall be prohibited. However, two exceptions to this prohibition are provided. On an individual level, the Commission may grant a negative clearance pursuant to Article 2<sup>23</sup> at the request of the businesses concerned. The negative clearance indicates that the Commission will not challenge an agreement's validity under Article 85. In the same manner, certain agreements such as those covered by Articles 4(1) and 5(1) of the present Regulation<sup>24</sup> can benefit from a declaration under Article 85 section 3 only after notification. Although a request for a negative clearance does not require a notification, the two are generally submitted together. Regulation No. 17 also enables the Commission on its own initiative to grant block exemptions covering certain categories of agreements when it feels that such agreements promote sound economic cooperation.

Commission Regulation No. 67/67<sup>25</sup> implements the abovementioned Council Regulation and is designed to specify the kinds of agreements that are eligible for exemption under Article 85 section 3. Such agreements and practices fulfilling the conditions for exemption will be studied in a later portion of this article.

## II. THE AMERICAN APPROACH TO VERTICAL RESTRAINTS

A vertical restraint may arise upon the agreement between firms at successive stages of the market's distribution system. Although such a ver-

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 49.

<sup>22</sup> 5 J.O. COMM. EUR. (No. 13) 204, [1978] COMM. MKT. REP. (CCH) ¶ 2401.

<sup>23</sup> 298 U.N.T.S. at 15.

<sup>24</sup> 5 J.O. COMM. EUR. (No. 13) 204, [1978] COMM. MKT. REP. (CCH) ¶ 2401.

<sup>25</sup> 10 J.O. COMM. EUR. (No. 57) 849, [1977] COMM. MKT. REP. (CCH) ¶ 2727.

tical restraint may limit intrabrand competition, consumers and distributors alike might actually benefit from such a restraint, depending upon the degree to which competition is restricted. It is important to note that competition does not exist between the vertical levels of the distribution process such as buyer and seller, but arrangements between them may affect competition at the horizontal level of the market occupied by either. It is the potential for such a horizontal effect which is of concern. This article will successively examine the most significant issues in this field: resale price maintenance, agency, and territorial and customer limitations.

#### *A. Price Restrictions: Resale Price Maintenance*

Only firms with some market power can impose resale price maintenance; a producer lacking any power over the product has no ability and no reason to alter the conduct of independent distribution by means of restrictive agreements. Thus, resale price maintenance is a form of price-fixing coupled with attempts to force adherence to list prices.

There are two types of resale price maintenance, the use of which depends on objectives of the concerned parties: maximum and minimum resale prices. In examining a maximum resale price restraint, the major preliminary question is why a manufacturer would want to fix a maximum price of resale by his distributors. In this sort of arrangement, the manufacturer is concomitantly interested in maintaining a competitive market and in maximizing profits. If both interests are to be fulfilled, a manufacturer has to sell at a price which is satisfactory to himself and which at the same time fosters maximum competition among dealers to keep low profit margins. Therefore, unless a manufacturer himself engages in retail sales at lower prices than other dealers (in which case his profit maximizing strategy would be to integrate forward) he is able to maximize his return only by stimulating competition at the resale level. Through this strategy, prices may be kept down, and sales and returns increased. On the other hand, a different strategy could result in excessive dealers' profit, thereby inflating retail prices and discouraging sales without benefit to the manufacturer.

Under a minimum resale price agreement, the manufacturer sets a minimum price under which the retailer cannot sell and unlike maximum resale limitations, both the manufacturer and the retailer here have a common interest in the strategy.

Minimum resale price maintenance enables the manufacturer to charge a high price on prestige merchandise and thus preserve a special kind of goodwill. Such an agreement may further be in the manufacturer's interest by affording a manufacturers' cartel in policing each other and avoiding



breaches. The manufacturer will additionally be able to encourage promotional expenditure for dealers by avoiding the free-rider problem through execution of a minimum resale price agreement. Finally, setting a minimum price allows a greater number of outlets to carry goods which might facilitate impulse buying. The overall result to the manufacturer of such a strategy is that the sales lost due to higher prices are offset by the gain of a broader distribution network; but note that higher prices are detrimental to consumers.

The dealers' interest will be served when a manufacturer sets resale prices, if those prices are higher than retailer competition would yield, because a retailer cartel results. With this motivation by the dealers, the manufacturer's interest in entering such agreements may be questioned. An answer may be found in the retailers' power to influence the brand choices of the consumers, a power that manufacturers may seek to have used for their benefit in exchange for minimum price maintenance.

Given the above motivations and justifications by the participants for executing a resale price maintenance agreement, the next area of inquiry relates to the judicial interpretation of the Sherman Act section 1 in regard to such agreements. According to section 1, an agreement between a producer and a retailer fixing the price at which the buyer may resell the product is a per se violation of the Act. This long-standing and well-settled rule was established through a series of cases originating with *Dr. Miles Medical Co. v. John D. Park and Sons Co.*<sup>26</sup> In *Dr. Miles* the United States Supreme Court stated that, "Restraints of trade are void as against public policy . . . . The agreements are designated to maintain prices, after the complainant has parted with the title to the articles and prevent competition among those who trade in it."<sup>27</sup> The doctrine of *Dr. Miles* reappeared forty years later in *Keifer Stewart v. Seagram and Sons*<sup>28</sup> wherein agreements to fix both maximum and minimum prices were deemed to cripple the freedom of traders and to thereby restrain their ability to sell in accordance with their own judgment. In 1968, the Supreme Court decided *Albrecht v. Herald Co.*<sup>29</sup> which continued the rationale of *Dr. Miles*: "It is our view that the construction formed by the respondent to force petitioner to maintain specified prices for the resale of newspaper that he had purchased from respondent constituted an illegal restraint of trade under section 1 of the Sherman Act."<sup>30</sup>

<sup>26</sup> 220 U.S. 373 (1911).

<sup>27</sup> *Id.* at 376.

<sup>28</sup> 340 U.S. 211 (1951).

<sup>29</sup> 390 U.S. 145 (1968).

<sup>30</sup> *Id.* at 153.

Interestingly, Justice Harlan's dissent in *Albrecht* has been gaining scholarly recognition and acceptance in recent years. He wrote:

The Court uses the fallacious argument that price ceilings and price floors must be equally unreasonable because both cripple the freedom of traders and thereby restrain their liberty to sell in accordance with their own judgment. The fact of the matter is that this statement does not in itself justify a per se rule in either the maximum or minimum price case, and that the *real justification of a per se rule with the case of minimums has not been shown to exist in the case of maximums . . . .* The per se treatment of price maintenance is justified because analysis alone . . . demonstrates that price floors are invariably harmful on balance. Price ceilings are a different matter: they do not lessen horizontal competition; they drive prices to the level that would be set by intense competition . . . . Since price ceilings reflect the manufacturer's view that there is insufficient competition to drive prices down to a competitive level, they have the arguable justification that they prevent retailers from reaping monopoly profits . . . .<sup>81</sup>

Analysis indicates that minimum price maintenance inflates a price above the level it would attain under normal competitive conditions. Thus, for example, a supermarket with a high turnover would sell goods at a price substantially lower than if a minimum price were imposed; the effect of a minimum resale price is to deny to customers the benefit of a quality discount otherwise available.

On the other hand, as suggested in Justice Harlan's dissent, maximum resale price maintenance should be valid when used to counteract the lack of effective competition. However, despite his appealing plea in favor of permitting maximum resale price maintenance, a per se rule against such agreements constitutes the present judicial interpretation of antitrust law, but the hope remains that *Albrecht* will be overruled and that the Supreme Court will assess the real significance and consequences of a maximum resale price maintenance.

Thus far, violations of section 1 of the Sherman Act which involved an agreement between manufacturers and dealers have been considered. However, not all instances of resale price maintenance involve an agreement by the participants and in the absence of such, the courts have in effect created an exception to the per se rule. In 1919, the United States Supreme Court decided *United States v. Colgate and Co.*<sup>82</sup> which held that if there

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<sup>81</sup> *Id.* at 158 (Harlan, J., dissenting).

<sup>82</sup> 250 U.S. 300 (1919).

is neither an agreement nor coercion between vertical levels, then the manufacturer may set prices.

The retailer, after buying, could if he chose, give away its purchase . . . at any price he saw fit . . . His course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer . . . .

In absence of any purpose to create or maintain a monopoly, [the Sherman Act] does not restrict the long recognized right of [a manufacturer] engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. *He may announce in advance the circumstances under which he will refuse to sell.*<sup>33</sup>

Under the *Colgate* exception, a manufacturer charged with resale price maintenance in violation of section 1 of the Sherman Act can successfully avoid application of the per se rule on the grounds that no price-fixing agreement existed and that he acted unilaterally. However, unless such unilateral action is proven, the *Colgate* exception will disappear and resale price maintenance will be held illegal per se.<sup>34</sup>

#### B. Agency

The adamant attitude against resale price maintenance agreements as represented by the per se rule discussed above can be circumvented by manufacturers through establishment of the agency relationship suggested by dissenting Justice Holmes in *Dr. Miles*.<sup>35</sup>

In *Dr. Miles*, Justice Holmes suggested that the easy solution for a manufacturer was to recast the transaction to make the reseller his agent. That is, if the reseller stands in an independent trader's position vis-a-vis the manufacturer, the latter cannot legally fix prices nor impose any other vertical restraint; whereas if he stands as an agent of the manufacturer, price setting and the imposition of restraints are permissible. The rationale for this distinction is as follows: in the case of the independent dealer, the manufacturer has surrendered all his powers over the product through its sale, but by conducting business through an agent, the manufacturer has not sold the product and all the risks, title and control are retained. Under this approach, then, whether or not a price-fixing violation has occurred will rest upon the factors utilized by the courts to distinguish independent dealerships from agency relationships.

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<sup>33</sup> *Id.* at 306 (emphasis added).

<sup>34</sup> 390 U.S. 145; *United States v. Parke-Davis*, 362 U.S. 29 (1960).

<sup>35</sup> 220 U.S. 373 (Holmes, J., dissenting).

The case law defining independent dealership factors necessarily also defines agency status. We learn from *Simpson v. Union Oil Co.*<sup>36</sup> that unlike a manufacturer's agent, the independent businessman bears the risk of loss and his income arises from the difference between the price he pays for the goods and the price charged his customers. According to *Knutson v. Daily Review Inc.*,<sup>37</sup> a distinction could be made on the grounds that the independent businessman's contract with the producer will often stipulate that he is not an employee or agent, but rather an independent contractor. Another definitional factor as employed in *Albrecht*<sup>38</sup> is capital investment; the independent businessman will usually have his own capital invested in both the goods and the equipment necessary to distribute them where an agent does not. Furthermore, the court in *Lepore v. New York News, Inc.*<sup>39</sup> suggested that the independent businessman provides a variety of services which in addition to selling the product may include delivery, billing and recruitment or hiring of personnel. Again referring to *Simpson*<sup>40</sup> the idea can be derived that the independent businessman will usually have the power to consummate a sale without further producer approval. From these factors used to define an independent businessman, the inference arises that the agent is absolutely dependent on the producer and does not have freedom of action.

The difficulty which confronts the judiciary relates to the fact that there often is no clear-cut factual situation in which a reseller fits squarely within either the definition of agent or independent businessman, but instead lies somewhere between these two extremes. Therefore the question is: when should an agency be treated as a case of forward integration?

The first case which considered the agency defense was *Federal Trade Commission v. Curtis Publishing Co.*<sup>41</sup> The Federal Trade Commission had challenged Curtis' practice of employing large numbers of formerly independent magazine distributors as its exclusive agents to serve assigned territories and charge specified prices. The majority concluded that the distributors were in fact agents and as such were lawfully subject to price-fixing restraints. The holding in *United States v. General Electric Co.*,<sup>42</sup> further expanded the agency concept. The Court held that the *Dr. Miles* rule outlawing resale

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<sup>36</sup> 377 U.S. 13, 20 (1964).

<sup>37</sup> 388 F. Supp. 1346, 1353-54 (N.D.Cal. 1974).

<sup>38</sup> 390 U.S. at 155.

<sup>39</sup> 346 F. Supp. 755, 758 (S.D.N.Y. 1972).

<sup>40</sup> 377 U.S. 13.

<sup>41</sup> 260 U.S. 568 (1922).

<sup>42</sup> 272 U.S. 476 (1926).

price maintenance did not apply to a system of distribution where the manufacturer retained title, consigned his goods to independent merchants and specified the resale price. The Court thus accepted any anticompetitive arrangement as long as it was in the form of an agency. As a result, the agency device became useful to many price maintenance plans and had the potential for vitiating the effectiveness of the antitrust prohibition on price-fixing.

However, in *Simpson*<sup>43</sup> the Court backed away from the *General Electric* (G.E.) rule. In *Simpson*, Union Oil Co. supplied gasoline to gas station operators under consignment contracts, which like the G.E. contracts made the consignee responsible for the stock losses and which authorized the consignor to establish resale price. Through this consignment device the distributor, an otherwise independent businessman, had his prices controlled by the manufacturer. The Court held that where the distributor is functionally independent, control of his resale price or any other restraints is illegal under the Sherman Act regardless of whether the relationship with the manufacturer is technically termed an agency or consignment.

Clearly, the *G.E.* and *Simpson* decisions are contradictory and irreconcilable. In *G.E.* the Court erroneously found an agency relationship because the distributors were more than mere agents; they were given lamps on consignment and made the major investment in the business. In *Simpson* the Court stated that it was not a case of agency, which is also incorrect because the oil company owned the station and put up the working capital.

Finally in 1973, a United States district court corrected the mischaracterization of G.E.'s distribution system as an agency relationship.<sup>44</sup> The court had no trouble in finding that the "agents" were independent businessmen for antitrust purposes because G.E. no longer controlled the production of light bulbs by patent.

Another antitrust case in which the Court was confronted with an agency versus independent businessman determination is *United States v. Arnold, Schwinn and Co.*<sup>45</sup> Schwinn used, among other systems, an agency to reorganize its distribution network. Schwinn marketed its bicycles through wholesalers to franchised retailers under several distribution plans including both outright sales and consignment arrangements. The function of the wholesalers was dual; like agents, they accepted orders from retailers and passed

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<sup>43</sup> 377 U.S. 13.

<sup>44</sup> *United States v. General Electric Co.*, 358 F. Supp. 731 (S.D.N.Y. 1973).

<sup>45</sup> 388 U.S. 365 (1967).

them on to Schwinn but they also sold and invoiced out of their own inventories without going through Schwinn.

The Court upheld as reasonable all restraints on distributors who were operating under Schwinn agency or consignment plans. The activity of the distributor in these roles was compared to that of an employee or agent under the control of the producer. The Court thus declined to treat these restraints as *per se* unlawful. Having concluded that the distributors were in fact "indistinguishable in function from agents or salesmen,"<sup>46</sup> the Court applied the rule of reason and found that the restraints were reasonable. However, the Court erred in upholding the restraints when the wholesalers sold out of their own stocks because the wholesalers were actually operating more like independent businessmen. The Court was concerned with too broad a definition of agency and agreed that no restraint was permissible where the distributor was a buyer of the bicycles; such control was *per se* illegal. But the Court was very clear that such a statement was not absolute: "it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with domain over it."<sup>47</sup> Thus a manufacturer may apparently:

reserve control over [a product's] destiny or the conditions of its resale . . . in an appropriate and impelling competition setting . . . [W]e are not prepared to introduce the inflexibility which a *per se* rule might bring . . . Such a rule might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants.<sup>48</sup>

This last sentence reflects the concern of the Court and therefore is designed to suggest the use of a rule of reason in order to save small businesses that are unable to integrate and must have some restraint upon their dealers in order to compete effectively with the giant manufacturers. However, with the recent overruling of *Schwinn* by *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>49</sup> restrictions on independent dealers may be legitimate.

### C. Territorial and Customer Limitations

Distribution systems based on franchising have become widely accepted. A franchise in this context is a right given to a dealer to market a manufacturer's product. Antitrust law is pertinent to this field because a franchise may include restrictions of various kinds, for example: provisions as to where the business may be located, what territory will be served and whether or

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<sup>46</sup> *Id.* at 381.

<sup>47</sup> *Id.* at 379.

<sup>48</sup> *Id.*

<sup>49</sup> 433 U.S. 36, 38 (1977).

not the parties will deal exclusively with each other. Territorial, customer and related restrictions imposed on dealers will be examined first.

The relevant inquiry in regard to vertically imposed territorial limitations is their effect upon competition and whether such restraints are per se illegal under the Sherman Act section 1 or instead subject to a rule of reason analysis.

A vertically imposed territorial restraint exists when a manufacturer transfers his products with the restriction that they be resold only in a particular territory. Territorial restrictions are similar to exclusive dealerships,<sup>50</sup> but differ inasmuch as they eliminate competition at the boundaries of the territorial restriction because sales cannot be made to customers outside those boundaries. As a result, territorial restrictions are more restrictive than exclusive dealerships.

Until the recent decision of *Continental T.V.*,<sup>51</sup> two bodies of law existed that were difficult to reconcile. There was a per se acceptance of exclusive dealerships and a per se illegality of territorial restrictions, although *Schwinn*<sup>52</sup> in 1967 made a marked change in the Supreme Court's attitude towards vertically imposed territorial and customer restrictions.<sup>53</sup> As previously discussed, Schwinn marketed bicycles by direct sales, consignment or through an agency relationship with wholesalers, distributors and franchised dealers. In order to prevent intrabrand competition in this distribution system, Schwinn established territorial and customer restrictions. It instructed the distributors to deal only with franchised Schwinn accounts in their respective territories. Similarly, Schwinn franchised retailers for designated locations, authorized them to sell only to ultimate consumers and required them to purchase inventory only from the distributor authorized to serve their particular area. These vertical restraints were challenged by the Justice Department as violating the Sherman Act. On appeal, the Supreme Court reached the "ancient rule against restraints or alienation" and proceeded to establish a per se rule which disregards any justification for the restraints.<sup>54</sup>

Broadly speaking, *Schwinn* stands for the proposition that all post-sale vertical restraints are per se illegal. It is arguable however, that instead of

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<sup>50</sup> See *infra* at p. 93.

<sup>51</sup> 433 U.S. 36.

<sup>52</sup> 388 U.S. 365.

<sup>53</sup> Four years earlier, in *White Motor Co. v. United States*, 372 U.S. 253 (1963), the Supreme Court declined to adopt a per se rule for vertical territorial and customer restrictions.

<sup>54</sup> Note that the *Schwinn* Court declined to extend a per se rule to vertical restraints in consignment or agency relationships and held that such arrangements were to be judged under the rule of reason.

mandatory illegality, a better approach would be to examine the impact of the restriction on the marketplace. Nonetheless, the courts seem willing to find a *per se* violation for vertical restraints which completely eliminate competition, such as territorial and customer restrictions.<sup>55</sup> For those vertical restraints having less onerous effects on competition, the courts often apply the rule of reason.<sup>56</sup> Thus, restraints that do not completely eliminate competition but rather dictate specific policies for the distribution of goods, and that do not limit the sale of goods to a geographically defined territory or to any particular class of customers have been upheld.

Included among these permissible restraints under the *Sylvania* decision is the dealer-location clause. In a location clause, the dealer can only sell from places where he is franchised. While there is no specific area assigned to a dealer under a location clause, a dealer's sales will tend to be made to customers who live or do business near his outlet. The size of the dealer's territory will thereby be a function of the number of outlets authorized by the manufacturer. In that respect, location clauses are quite akin to exclusive dealerships where the dealer can sell *from* the exclusive outlet but not *to* anyone from anywhere.

In *Sylvania*, the manufacturer implemented a straight line distribution system or elbowroom policy, under which sales were made from the factory to franchised dealers who in turn sold to consumers. By franchising, *Sylvania* hoped to strengthen its market share position by expanding its dealer base. One element of this policy was dealer-location constraints whereby the franchisee agreed not to sell *Sylvania* products from a location other than the one originally authorized. The antitrust issue in *Sylvania* arose when Continental, an authorized *Sylvania* dealer franchised in several locations, sought the manufacturer's approval to sell *Sylvania* merchandise from a new location. After *Sylvania* refused approval, Continental proceeded to sell *Sylvania* goods at the new location without this approval and *Sylvania* therefore terminated Continental's franchises. Continental sought damages for the termination asserting that *Sylvania*'s elbowroom policy was a restraint of trade which constituted a *per se* violation of the Sherman Act section 1. The Ninth Circuit<sup>57</sup> and the Supreme Court on appeal<sup>58</sup> decided that location clauses should be judged under the rule of reason and upheld. The Ninth Circuit distinguished *Schwinn* from *Sylvania* by contrasting the nature of the restrictions

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<sup>55</sup> See *United States v. Glaxo Group Ltd.*, 302 F. Supp. 1, 1-11 (D.D.C. 1969).

<sup>56</sup> *Adolph Coors v. Federal Trade Commission*, 497 F.2d 1178, 1188 (1974).

<sup>57</sup> *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976).

<sup>58</sup> *Continental T.V., Inc. v. GTE Sylvania, Inc.* 433 U.S. 36 (1977).



involved, their competitive impact and the market shares of the franchisors.<sup>59</sup> Although the Supreme Court was “unable to find a principle basis for distinguishing *Schwinn*,”<sup>60</sup> it nonetheless affirmed the Ninth Circuit decision and in effect applied a rule of reason.

According to Mr. Justice Powell, *Schwinn* was “an abrupt and largely unexplained departure from *White Motor* where only four years earlier the Court had refused to endorse a per se rule for vertical restraints.”<sup>61</sup> Prior to *Schwinn* the Supreme Court considered per se rules of illegality applicable only to manifestly anticompetitive conduct. As the Court had explained in *Northern Pacific Railroad Co. v. United States*,<sup>62</sup> “there are certain agreements . . . which because of their previous effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry . . . .”<sup>63</sup> But in *Schwinn*, the Court “announced [a] sweeping per se rule without even reference to *Northern Pacific Railroad Co.* and with no explanation of its sudden change in position.”<sup>64</sup> *Schwinn* had also failed to distinguish vertical restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. That is, vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product which compete for the business of a given group of buyers. Concomitantly they promote interbrand competition by allowing the manufacturer to differentiate its product from that of others through distribution. These redeeming virtues are implicitly recognized by every decision sustaining vertical restraints under the rule of reason.

Vertical restrictions, in varying forms, are widely used and substantial scholarly and judicial authority exists supporting their economic utility. The Supreme Court concluded that there had been no showing in *Sylvania* that vertical restraints have or are likely to have a “pernicious effect on competition . . . [or that they] lack . . . any redeeming virtue,”<sup>65</sup> and accordingly the Court overruled the *Schwinn* per se rule:

In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Pac. R. Co.* . . . But we make clear that departure from the rule-of-

<sup>59</sup> 537 F.2d at 989-92.

<sup>60</sup> 433 U.S. at 46.

<sup>61</sup> *Id.* at 47.

<sup>62</sup> 356 U.S. 1 (1958).

<sup>63</sup> *Id.* at 5.

<sup>64</sup> 433 U.S. at 51.

<sup>65</sup> *Id.* at 50.

reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing.

In sum, we conclude that the appropriate decision is to return to the rule of reason that governed restrictions prior to *Schwinn*. When anti-competitive effects are shown to result from particular vertical restrictions, they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act.<sup>66</sup>

We can now consider why the Court in *Sylvania* applied a rule of reason to determine the legality of judging vertical restraints. There are two major grounds for this judicial outcome. First, the Court wanted to abide by the stare decisis principle and confirm the rule of reason approach taken earlier in *White Motor*<sup>67</sup> as is clearly evident in the Court's opinion that, "[i]n sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restraints prior to *Schwinn*."<sup>68</sup> Second, the Court's decision can be ascribed to the confusion created by the approval of the dealer-location clauses in *Sylvania*. The confusion arises from the Court's failure to differentiate location clauses, as in *Sylvania*, from territorial restrictions, as in *Schwinn*.<sup>69</sup> The court of appeals in *Sylvania*<sup>70</sup> succeeded in distinguishing *Schwinn* by recognizing, as noted above, that territorial restrictions confine the dealer to sales in a territory while location clauses do not limit the area of sales. This recognition is emphasized by the fact that even before *Sylvania*, the district court's decree in *Schwinn* remained as upholding the validity of a location clause.<sup>71</sup> The Supreme Court in *Sylvania* was apparently unable to distinguish the two restrictions and chose to simply overrule *Schwinn* by applying a rule of reason to vertical restraints.

But now the question is: how can legal and illegal vertical restraints be differentiated under the rule of reason? This will not be an easy task because the Court failed to provide any guidance on this point. Nevertheless, depending on economic implications, a possible rule of thumb may be developed to determine invalid restrictions. The intrabrand anticompetitive effect of territorial restrictions alone is not sufficient evidence of unlawful antitrust action because such an effect is intrinsic to territorial restrictions. Also, since there is no longer a per se rule of illegality, restrictions will be more difficult to strike down.

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<sup>66</sup> *Id.* at 58 (emphasis added).

<sup>67</sup> 372 U.S. 253.

<sup>68</sup> 433 U.S. at 59.

<sup>69</sup> 388 U.S. 365.

<sup>70</sup> 537 F.2d 980.

<sup>71</sup> 291 F. Supp. 564 (N.D.Ill. 1968).

The *Sylvania* decision results in a presumptive legality of territorial restraints except when there is a danger of monopoly by a cartel dealer or of multiple exclusive dealerships. In these situations, two tests are available to identify illegal vertical restraints.

One test would be to strike down those territorial restrictions where a cartel dealer exercised leverage over a manufacturer to coerce him into compliance with the cartel. Here, the producer desiring the necessary distribution network for his goods must bow to the distributor's pressure to place favorable territorial and customer restraints in the distribution contract and to enforce those terms. Such territorial assignments or customer restrictions may permit a sufficient division of the market among competing retailers to produce the cartel dealer's desired level of market power by reducing competition; herein lies the adverse effect. Of course, if other dealers carry substitutable products, the harm will be mitigated because the elimination of the intrabrand competition is replaced by interbrand competition which prevents the cartel dealer from receiving a monopoly price.

But since it is not in the manufacturer's interest to accord a distribution monopoly to the dealer, if the manufacturer does consent to a territorial restriction he must at the same time impose a maximum resale price as an offset. However, under *Albrecht*<sup>72</sup> such resale price maintenance is illegal and accordingly, the offset would be stricken and the dealer would inevitably achieve a monopoly position. Consequently, *Albrecht* will be overruled and maximum resale price maintenance will be allowed in order to permit its necessary association with territorial restrictions.

The second test would raise a presumption of the legality of vertical territorial restraints imposed on a dealer carrying products in competition with the manufacturer's product which thus promotes interbrand competition. However, if the dealer has secured territorial restrictions in two or more competing products, interbrand competition is foreclosed and the possibility of a monopoly looms.

Generally speaking, exclusive dealerships are requested by dealers, particularly when a manufacturer introduces a new product. In this situation it serves as an incentive to encourage entry into the market and it should be considered a valid justification for the restraint on competition, but only if the *duration* of the restriction is reasonable, otherwise the justification would be suspicious.

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<sup>72</sup> 390 U.S. 145.

A manufacturer might be coerced into an exclusive dealership if one of his distributors is more powerful than others and demands the establishment of an exclusive dealership. This is, of course, bound to have a detrimental effect on the consumer because the exclusive dealer will have the power to raise prices. In order to determine whether this action violates antitrust law, the dealer's past business performance must be studied. If the dealer has had poor financial results, there is no valid justification for the arrangement and it is illegal. But if the exclusive dealership was granted because the dealer was offered a better franchise by another manufacturer, it would be unjust to foreclose him from a favorable option given the presumed freedom to direct business energy. In this instance, if the manufacturer accepts the exclusive dealership there will be no harm to the consumer because a brand otherwise unavailable will be marketed.

A major vertical restraint related to territorial restrictions already referred to many times herein is the exclusive dealership. In an exclusive dealership, the manufacturer promises to sell solely to one dealer in a designated territory. These arrangements, variously called exclusive franchise, sole outfit or exclusive arrangements, involve a territorial restriction only upon the manufacturer and are often used by producers to induce dealers to accept a new product line and give it promotional attention. These arrangements undoubtedly tend to diminish intrabrand competition. But exclusive dealerships, unlike territorial or location restrictions, do not eliminate intrabrand competition entirely; under territorial restrictions a dealer can only sell to people within the territory, whereas in exclusive distributorships he can sell *only from* the authorized outlet but *to anyone*.

The exclusive dealership has been upheld against antitrust challenge when: a manufacturer was introducing a new product; significant capital investment was made (or substantial expense incurred) by the dealer, and when the seller was a small firm in its relevant market. *Schwinn*<sup>73</sup> appears to make exclusive dealership lawful:

[A] manufacturer of a product other and equivalent brands of which are readily available in the market *may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. . . .* If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction . . . would not violate the Sherman Act.<sup>74</sup>

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<sup>73</sup> 388 U.S. 365.

<sup>74</sup> *Id.* at 376 (emphasis added).

This language is reminiscent of the *Colgate*<sup>75</sup> doctrine under which a manufacturer may unilaterally decide to whom he will sell; the manufacturer may decide that a sole distributor outlet is most advantageous due to, for example, the thinness of the market. In such situations the dealer to whom the manufacturer refused to sell would have no basis for complaint under the Sherman Act section 1 since the manufacturer's action was unilateral, nor for a section 2 claim because the refusal was the most effective way for the manufacturer to compete.<sup>76</sup>

Unlike minimum resale price maintenance, an inference of price control does not arise with an exclusive dealership. Instead other elements must be considered, such as whether the product is in competition with other products:

Since there are other cars "reasonably interchangeable by consumers for the same purposes" as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly . . . . When an exclusive dealership "is not part and parcel of a scheme to monopolize and an effective competition exists at both the seller and the buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade . . . ." The fact that Zell asked for [an exclusive dealership] does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product , . . . [t]o penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.<sup>77</sup>

A customer resale restraint prohibits a product's resale to a particular class of customers; that is, a manufacturer may attempt to restrict the customers to whom his dealers may sell. Under *Schwinn*<sup>78</sup> customer resale restraints are per se illegal after the manufacturer has parted with title to the goods.

The manufacturer may also impose a customer limitation through allocation in order to facilitate price discrimination, an apparently inadequate justification even absent a per se rule. Here, the manufacturer reserves certain accounts for himself and through customer restrictions segregates two different markets by imposing a customer restriction on his wholesalers so

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<sup>75</sup> 250 U.S. 300.

<sup>76</sup> The only legal problem that may occur if a manufacturer decides to unilaterally terminate other dealers is a contractual one, because dealers often, through the breach of contract, lose their investments. With respect to this matter, state and federal laws have been enacted. Thus, for example, a manufacturer should deal in good faith in terminating his dealers. U.C.C. § 2-306.

<sup>77</sup> Packard Motor Car v. Webster Car, 243 F.2d 418, 420-21 (D.C. Cir. 1957).

<sup>78</sup> 388 U.S. 365.

that the latter cannot supply the reserved account. At worst, this is tantamount to a case of price discrimination, but there is no antitrust violation since the two markets are noncompeting. It is regrettable that *Sylvania* left the issue of customer restrictions undecided. The rule applied to territorial restriction could be extended to customer restrictions, as is implied in the conclusion of the *Sylvania* opinion: "In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*."<sup>79</sup> Most frequently, it is at the initiative of the manufacturer that customer limitations are imposed, by reserving accounts for example, so that if there is interbrand competition the consumer will be harmed only minimally.

As a conclusion to this section, we can state that the per se rule applied to vertical restraints is no longer justified. Instead, restraints affecting trade require the weighing of the procompetitive and anticompetitive effects of the restraint in order to determine what result is best for a particular industry and for the consumer. The rule of reason approach indicates an awareness of the economic and commercial realities which govern the business world. Such an analysis would benefit not only the business giants, but also the single proprietorship and ultimately the consumers.

### III. THE E.E.C. APPROACH TO VERTICAL RESTRAINTS

During the early years of antitrust enforcement within the European Economic Community, predominant attention was given to vertical agreements, particularly agreements for exclusive distributorships which contained restrictive clauses. The anticompetitive effects of those agreements in partitioning the Common Market into separate national territories was easy to perceive. The focus of this section will be to discuss the three basic vertical restraint issues previously studied within the context of the American experience: resale price maintenance, agency, and territorial and customer limitations.

As stated earlier in this article, distribution agreements come within the ambit of the Treaty of Rome, Article 85 section 1<sup>80</sup> only when the agreement fulfills the ban's prerequisites.<sup>81</sup> These prerequisites are fourfold:

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<sup>79</sup> 433 U.S. at 59.

<sup>80</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

<sup>81</sup> In its notice concerning minor agreements, 13 J.O. COMM. EUR. (No. 63) 4 (1970), [1970] COMM. MKT. REP. (CCH) ¶ 2700, the Commission states that Article 85 section 1 does not apply to agreements where the turnover in the products concerned is less than 5% of the relevant market and the volume of business is less than 15 million units of account for manufacturers or 20 million units of account for distributors (the unit of account is now approximately \$1.25). Thus, even if a distribution agreement has an effect on intermember trade, the agreement will not come within Article 85 section 1 if that effect is inappreciable.

there must be an "agreement . . . , decisions of associations . . . [or] concerted practices," the agreement must be "between undertakings," must have an effect upon inter-Member trade and must have the object or effect of restricting competition. Absent any of these requirements, the practice does not fall within Article 85.<sup>82</sup>

#### A. *Price Restriction: Resale Price Maintenance*

The legal regime of resale price maintenance under domestic competition law varies from country to country within the community. For example, resale price maintenance is lawful in Belgium and Italy but is prohibited in France, Luxembourg, the United Kingdom and West Germany, while in the Netherlands only collective resale price maintenance is prohibited.<sup>83</sup> However, manufacturers seeking to enforce price maintenance in countries where it is still lawful have encountered difficulty in doing so without running afoul of Article 85.<sup>84</sup>

The Commission's position has been that resale price maintenance schemes existing within one country do not per se violate Article 85 section 1 (a),<sup>85</sup> which provides that "any agreements . . . consisting in the direct or indirect fixing of purchase or selling prices . . ." are prohibited.<sup>86</sup> But the Commission *does* object to domestic resale price maintenance systems that effectively prevent exports and imports.<sup>87</sup> The *Kodak* case,<sup>88</sup> in which the Commission required a modification of the pricing plan in question, and the

<sup>82</sup> 298 U.N.T.S. 3.

<sup>83</sup> Collective agreements are agreements between a number of independent undertakings by which the parties create a distribution network. These agreements may be unilateral (in this case parties are all at the same level in the economic chain) or reciprocal (where the parties are at different levels in the economic chain).

<sup>84</sup> See, e.g., Comm'n Decision (*Re Deutsche Philips*), 16 J.O. COMM. EUR. (No. L293) 40 (1973), [1973-75 New Developments] COMM. MKT. REP. (CCH) ¶ 9606.

<sup>85</sup> E.C. COMM'N FIRST REPORT ON COMPETITION POLICY 57 (1972).

<sup>86</sup> 298 U.N.T.S. at 48.

<sup>87</sup> Debates of the European Parliament, 16 J.O. COMM. EUR. Annex 162, at 93-4 (May 1973). The E.C. COMM'N FIRST REPORT ON COMPETITION POLICY cites with approval steps taken by Agfa-Gevaert and Zeiss-Ikon-Vogtlander, German companies in the photographic products sector, to abandon resale price maintenance schemes that effectively isolated markets. It should be noted that in certain circumstances Article 85 may have extraterritorial effects. The fact that some of the firms participating in a prohibited price maintenance agreement are located outside, as well as inside, the E.E.C. does not prevent the application of Article 85. In the FOURTH REPORT ON COMPETITION POLICY 74-5 (1975), the illustrative case is given of a voluntary export restraint agreement between French and Japanese ballbearing trade associations that the prices of the Japanese product would be kept to a level equal with French prices. The agreement was prohibited by the Commission under Article 85 section 1 because it was intended to neutralize the function of price competition to keep prices as low as possible.

<sup>88</sup> Comm'n Decision of June 30, 1970 (*Re Kodak*), 13 J.O. COMM. EUR. (No. L147) 24 (1970), [1970] COMM. MKT. REP. (CCH) ¶ 2412.

*Pittsburgh Corning Europe (P.C.E.)* case<sup>89</sup> illustrate the Commission's practice of carefully attacking those features of a pricing system whose effects partition the Common Market into national markets, instead of making a blanket objection to the entire plan.

In *P.C.E.*, Pittsburgh Corning Europe manufactured cellular glass in Belgium and marketed the product through its distributors, Formica Belgium in Belgium and Hertel & Co. in Holland, and through its German subsidiary, Deutsche Pittsburgh Corning in Germany. The prices charged in Germany were up to forty percent higher than those in Belgium and Holland. As a result, parallel imports to Germany were made from Belgium and Holland which in 1970 approached 11,000 cubic meters out of total cellular glass sales of approximately 93,000 cubic meters in Germany. To deal with this situation, the Company prevailed upon Formica Belgium and Hertel to introduce new pricing systems that year; the normal price was increased substantially to render parallel exports to Germany uneconomical, but a discount of twenty percent was granted when that glass was to be used on a site in Belgium or Holland. The Commission examined this practice and concluded that it was inconceivable that Formica Belgium and Hertel would have independently arrived at identical systems and identical prices which together constituted a discriminatory pricing system in the interest of neither distributor.<sup>90</sup> Thus the Commission ruled that this discriminatory pricing system was a concerted practice carried out by Pittsburgh Corning Europe and Formica Belgium in the one case, and Pittsburgh Corning Europe and Hertel in the other.<sup>91</sup>

The Commission however, recently confirmed this practice by lifting its objections to resale price maintenance contracts and to supply-sales conditions which Sperry Rand GmbH applied on various electrical products.<sup>92</sup> Such action was prompted by Sperry's removal of certain obligations imposing territorial protection.<sup>93</sup> This limited immunity however, depends in

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<sup>89</sup> Comm'n Decision of Nov. 23, 1972 (*Re Pittsburgh Corning Europe*), 15 J.O. COMM. EUR. (No. L272) 35 (1972), [1972] COMM. MKT. REP. (CCH) ¶ 9539.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> E.C. BULL. OF THE EUROPEAN COMMUNITIES No. 1 at 36 (1974). After the Commission's intervention, Sperry Rand GmbH, the Frankfurt subsidiary of Sperry Corporation which manufactures office equipment, electric razors and other electric appliances, withdrew a series of restrictions in violation of Article 85 section 1. These restrictions imposed by Sperry Rand GmbH in resale price maintenance contracts and in its delivery and sale terms were as follows: 1) the German resellers were not allowed to import or export similar goods; 2) the German wholesalers could only supply other wholesalers with permission from Sperry Rand GmbH; 3) the German retailers could only sell to final consumers.

<sup>93</sup> *Id.*



part upon a narrow interpretation of the criteria for determining an effect on trade between member states.

Since the Commission seems to be taking an increasingly broader view of what constitutes an effect,<sup>94</sup> it appears possible that in the future the Commission will find Article 85 section 1 applicable to domestic resale price maintenance schemes that require *all* sales of coerced products to comply with the scheme; such an approach would be similar to German legislation.<sup>95</sup> Given this expansion of the applicability of section 1 to such domestic price schemes under *P.C.E.*, the issue for future Commission resolution is whether the exemptions contained in Article 85 section 3, will be granted. Article 85 section 3, allows the section 1 prohibition to be declared inapplicable and exemptions to be granted if an agreement is deemed to promote sound economic cooperation in the interest of the Common Market and if the extent of any ensuing restraint or distortion of competition is confined to the particular limits of subparagraphs 3(a) and 3(b).<sup>96</sup>

Turning now to *Kodak*,<sup>97</sup> some commentators have suggested that the decision supports the proposition that Article 85 section one is violated if a seller's price for the product varies according to the buyer's country.<sup>98</sup> That is, when a seller of goods requires his distributor to discriminate against purchasers on the basis of nationality, there usually is a violation of Article 85 section 1(d). Classic examples of this type of violation are export prohibitions imposed on distributors or discrimination against customers through higher prices. Although case law establishes that arrangements requiring differences in a suppliers' price based on the customer's country fall within the scope of Article 85 section 1(d), there exists, of course, the possibility for exemption under the provisions of Article 85 section 3. In addition to the section 3 exemption, an agreement by its terms may not come within the purview of section 1(d), even though the agreement results in price variances among countries. For example, an individual agreement between a manufacturer and its distributor in France whereby prices charged the

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<sup>94</sup> In the *Goodyear Italiana* case, trade between member states was held to have been affected even though the agreement involved two Italian companies. Comm'n Decision of Dec. 19, 1974 (*Re Goodyear Italiana*) 18 J.O. COMM. EUR. (No. L38) 19 (1975), [1975] COMM. MKT. REP. (CCH) ¶ 9708.

<sup>95</sup> Resale price maintenance on branded goods was prohibited in Germany as of January 1, 1974, partially because of the difficulties encountered in keeping such arrangements intact.

<sup>96</sup> For more details about specific and block exemptions see Council Reg. No. 17, Feb. 6, 1962, in *Recueil de Droit de la Concurrence dans la CEE*, at 21-25, Bruxelles-Luxemburg, 1972.

<sup>97</sup> 13 J.O. COMM. EUR. (No. L147) 24, [1970] COMM. MKT. REP. (CCH) ¶ 2412.

<sup>98</sup> Scheuermann, *Common Market and Uncommon Practices*, 5 J. OF WORLD TRADE L. 533 (1971).

French distributor are less than those charged the German distributor does not necessarily constitute an agreement between parties that "applies dissimilar conditions to equivalent transactions with other trading parties . . . ."<sup>99</sup>

Nevertheless, the Commission is currently concerned with price disparities among goods in various Common Market countries. Since rising prices constitute a serious problem for all Community countries, the Commission has "set itself the task of examining cases of high price disparities, with the aim of applying treaty competition rules in appropriate situations."<sup>100</sup> It might be that the Commission will eventually apply a Robinson-Patman Act<sup>101</sup> interpretation to Article 85 section 1 and thereby prohibit price differentials among customers, with such limited exceptions as quantity discounts.<sup>102</sup>

### B. Agency

As in the American approach to resale price maintenance, the Common Market allows a distributor to fix the selling price and impose other restraints when serving as the manufacturer's agent. Under national law, an agency relationship exists if the goods remain the property of the manufacturer and the distributor is not independent, but instead sells on behalf of and for the account of the manufacturer. The antitrust prohibition contained in Article 85 section 1 applies only to agreements "between undertakings" and not to agency relationships. Consequently, if the distributor is a branch or agent of the manufacturer and not a separate legal entity, the distributor and the manufacturer are one undertaking; any agreement between them is not an agreement between undertakings, and does not therefore fall within the purview of Article 85 section 1. Thus, two interrelated aspects of the agency issue must be examined: the enterprise entity concept and trade representatives.

The E.E.C. considers the parent-manufacturer and the subsidiary-distributors wholly within its control to be one undertaking and therefore beyond the operation of Article 85 section 1. This doctrine is based on the *Christiani & Nielson* case decided by the Commission in 1969.<sup>103</sup> There, the parent company, Christiani & Nielson of Copenhagen, engaged in civil engineering and wholly owned a subsidiary in Holland. An agreement between these

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<sup>99</sup> 298 U.N.T.S. at 48.

<sup>100</sup> E.C. COMM'N FOURTH REPORT ON COMPETITION POLICY 13 (1975).

<sup>101</sup> Robinson-Patman Act, 15 U.S.C. § 13(c) (1973).

<sup>102</sup> *Id.* See also European Community Press Release, 21 J.O. COMM. EUR. (No. 9) 13 (1978), in which an American company, United Brands, was found guilty and fined \$1,000,000 for charging prices that differed according to member states.

<sup>103</sup> 12 J.O. COMM. EUR. (No. L276) 12 (1969), [1969] COMM. MKT. REP. (CCH) ¶ 2412.26.

two companies was executed to prohibit the parent from operating in Holland and to limit the subsidiary's distribution to Holland alone. In addition, Christiani & Nielsen's other wholly-owned subsidiaries in Germany and France were subject to agreements restricting them from operating in countries where another subsidiary was established. The Commission held that this division of markets between the parent and subsidiaries was merely a distribution of functions within the same economic entity, and as such could have neither the object nor effect of restricting competition that is necessary to invoke the Article 85 section 1 ban.

This rationale of placing parent-subsidiary relationships beyond Article 85 section 1 was subsequently followed by the Commission in *Re Kodak*.<sup>104</sup> The five Kodak subsidiaries within the Common Market were in effect agents of their American parent; they were subject to its control and were unable to act independently in the fields of activity governed by their parent. However, the Commission held that Article 85 was not violated despite the identical nature of the standard conditions because such terms did not result from an agreement or concerted practice between the subsidiaries or between the parent and the subsidiaries.

This approach was also adopted by the European Court in *Beguelin Import Co. v. G.L. Import Export S.A.*<sup>105</sup> There the Belgian parent company transferred to its French subsidiary the exclusive concession to distribute Japanese pocket cigarette lighters in France. The court ruled that relations between a parent and its wholly-owned subsidiary not enjoying economic autonomy, are outside the scope of Article 85 section 1.

In regard to trade representatives, the Commission has distinguished between an agent and an independent trader and held that agreements with an agent are not subject to Article 85.<sup>106</sup> Thus, determining a distributor's status as either an independent dealer or as an agent may be crucial to the validity of its trading agreements. This determination does not depend on the legal form chosen by the parties. Instead, the economic functions of a distributor will determine whether it is considered an agent or an independent dealer:

[T]he Commission considers that the determining criterion for distinguishing a commercial agent from an independent merchant is the provision made expressly or tacitly with respect to the assumption of

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<sup>104</sup> 13 J.O. COMM. EUR. (No. L147) 24, [1970] COMM. MKT. REP. (CCH) ¶ 2412.

<sup>105</sup> [1971] C.J. Comm. E. Rec. 949, [1971-73 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8149.

<sup>106</sup> Notices Relating to Sole Agency Contracts with Trade Representatives, 14 J.O. COMM. EUR. (No. 139) 2921 (1971), [1971] COMM. MKT. REP. (CCH) ¶ 2697.

the financial risks connected with sales or with carrying out of the contract. Accordingly, it does not base its judgment on designation. Except for the usual *del credere* guaranty, it is not the function of a commercial agent to assume any of the risks, his activity is economically closer to that of an independent merchant and he must then be treated as such for purposes of the law of competition. Under such conditions, contracts for exclusive representation must be considered as agreements concluded with independent merchants.<sup>107</sup>

The Commission uses the expression "trade representative" as a designation for the "agent" who negotiates or concludes transactions solely on behalf of the manufacturer, whether he does so in the manufacturer's name or in his own name. The trade representative shoulders no financial risk, other than *del credere* risks,<sup>108</sup> and acts only as the manufacturer's intermediary. In effect, the manufacturer competes in the market through the trade representative who acts pursuant to the manufacturer's instructions, much like a branch office or a subsidiary of the manufacturer.

However, whether a distributor is classified as an independent trader or as a trade representative is not a matter of nomenclature determined by the terms used in a particular agreement. The classification is a question of fact of how the distributor actually functions. The operation of an independent trader differs from that of an agent in several respects. An independent dealer trades and competes on his own behalf and bears the attendant financial risks. Goods are purchased from the principal and then resold; if the resale price is higher than the purchase price (plus freight and other costs) the dealer makes a profit, if not, the dealer alone bears the loss. In the Commission's view, the distributor is an independent trader if he maintains a substantial stock of goods, if he provides a substantially free service to customers at his own expense, or if he decides the prices or the terms for sale.

The Commission, however, did not indicate whether a distributor will be classified as an independent dealer or as an agent when the distributor acts on behalf of the principal (and to that extent is a trade representative) but has the right to buy and sell the goods on his own behalf. This arrangement, somewhat akin to the facts in *Schwinn*,<sup>109</sup> may indeed arise in the market and its classification may depend upon the distributor's degree of

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<sup>107</sup> *Id.* at 2921, [1971] COMM. MKT. REP. (CCH) ¶ 1841.

<sup>108</sup> *Del credere* risks exist when the agent, usually for an extra commission, undertakes to indemnify the manufacturer against the customers' uncollectability.

<sup>109</sup> 388 U.S. 365. In *Schwinn*, the wholesalers operated both as order-collecting agents for Schwinn and under their own name.

connection. If he never, or seldom, trades the goods on his own behalf, he will probably not lose his trade representative status, but if he substantially trades on his own behalf, he will be an independent trader and the arrangement will be subject to Article 85. An example of this rationale is contained in the *Pittsburgh Corning Europe*<sup>110</sup> case previously discussed herein. In *P.C.E.*, the Commission ruled that an agreement between the Company and one of its distributors under which the distributor was to act as an agent would nonetheless fall within the scope of Article 85 section 1 because the agent in reality acted as an independent dealer. A similar position was taken by the Commission and the European Court of Justice in the *European Sugar Cartel* case.<sup>111</sup> Thus, in this context both the American and Common Market standpoints are quite similar; the United States Courts and the Commission have developed a series of criteria which suggests that a distributor, irrespective of the legal form, acts as an agent, not an independent dealer, where there is 1) maintenance of an inventory owned by the distributor, or 2) maintenance of considerable service facilities at the cost of the distributor.

In regard to the agency status, it must be noted that the Commission has condemned arrangements in which manufacturers market their product through joint agents. Just as a man cannot serve two masters, no agent can compete with himself and sell for two principals because of the temptation to serve the interests of both manufacturers by suppressing competition. Likewise, no competitor seeking to compete with a rival producer would entrust the marketing of his goods to that rival's agent. This factual situation arose in the *European Sugar Cartel* case.<sup>112</sup> Several of the distributors worked for both of the competing companies involved, West-deutsche and Pfeifer & Langen, pursuant to agreements imposing territorial and customer restrictions. The distributors additionally agreed not to handle sugar from other suppliers without the consent of the principal. As a result, imports and exports of sugar were prohibited. Since the distributors were not trade representatives under the Commission's Notice Relating to Sole Agency Contracts,<sup>113</sup> the prohibition of Article 85 was invoked. Moreover, since the agreements controlled the relief from the obligation to notify given by Article 4, section 2(1) of Regulation No. 17<sup>114</sup> was not available and the agreements were thus condemned.

To summarize the foregoing section; in the absence of special cir-

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<sup>110</sup> 15 J.O. COMM. EUR. (L272) 35, [1972] COMM. MKT. REP. (CCH) ¶ 9539.

<sup>111</sup> 16 J.O. COMM. EUR. (No. L140) 17 (1973), [1973] COMM. MKT. REP. (CCH) ¶ 9570.

<sup>112</sup> *Id.*

<sup>113</sup> 14 J.O. COMM. EUR. (No. 139) 2921, [1971] COMM. MKT. REP. (CCH) ¶ 2697.

<sup>114</sup> 5 J.O. COMM. EUR. (No. 13) 204, [1978] COMM. MKT. REP. (CCH) ¶ 2401.

cumstances where competitors utilize the same distributor, the Commission will hold that there is either an implied agreement or a concerted practice to restrict or prevent competition. Given that the effect on competition is appreciable and that there is also an appreciable effect on intermember trade, the agreement or concerted practice will be considered to come within the prohibition of Article 85 section 1.

### C. *Territorial and Customer Limitations*

It should be stressed from the outset that territorial and customer limitations, along with the related exclusive dealership restrictions, have received the Commission's concern because they are apt to recreate the trade barriers between member states which the Treaty of Rome abolished. The major purpose of the Treaty of Rome was to eliminate the national barriers which have divided Europe for centuries, a result which was achieved in the United States by the creation of the federal system two centuries ago.

Any clause limiting the right of a distributor in one Common Market country to sell to customers located in a member state will certainly violate Article 85 section 1 and will very likely be denied an Article 85 section 3 exemption. This principle was established in *Consten & Grundig*<sup>115</sup> and has been followed to date. Grundig, a German manufacturer of radio and television sets, granted the French company, Etablissement Consten, the exclusive right to sell in France. Grundig agreed not to directly or indirectly deliver to any person in France other than Consten, and to prohibit its other distributors from exporting into France. In return, Consten agreed not to deliver Grundig products directly or indirectly outside of France. To reinforce these territorial restrictions, Consten was authorized to register the Grundig trademark "GINT" as well as the trademark "GRUNDIG." The problem arose when UNEF, another French company, obtained Grundig products, imported them into France, and sold them at a lower price than Consten. Consten therefore sued UNEF in the French courts for unfair competition and for infringement of the GINT trademark. UNEF filed a complaint with the Commission and the French court suspended judgment until the Commission's decision was rendered. The Commission held that the exclusive distribution agreement between Consten and Grundig and the collateral agreement relating to GINT trademark fell within Article 85 section 1. The Commission also refused to allow an exemption under Article 85 section 3 because the absolute territorial protection afforded Consten neither improved

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<sup>115</sup> Comm'n decision of Sept. 23, 1964 (*Re Consten & Grundig*) 7 J.O. COMM. EUR. 2545 (1964), [1964] COMM. MKT. REP. (CCH) ¶ 2021.51.

distribution nor benefited consumers. On appeal, the Court of Justice of the European Communities substantially affirmed the Commission's position.<sup>116</sup>

Since this landmark decision, the Commission has frequently reiterated its position that absolute territorial restrictions applicable to sales within the Common Market are prohibited. In particular, subsequent decisions indicate that a supplier must normally allow indirect imports of identical products into the territory of his distributor. Clearly only a price differential would justify indirect imports. Thus, although a seller may contract not to compete directly in the distributor's market, he may not ensure that the product is not marketed through third parties, including distributors. The Commission may decide in the future to disregard the Notice on Agreements of Minor Importance<sup>117</sup> where a parallel import ban is involved, but the Community's rules on the free movement of goods do not allow reliance on industrial property rights to prevent parallel imports. Thus, *any absolute territorial restriction agreement appears to be prohibited.*

In the recent "*Scotch Whiskey*" case,<sup>118</sup> the Court of Justice stressed the position taken in *Beguelin*<sup>119</sup> in 1971; even though an exclusive dealership contract contains no clause restricting parallel imports, the contract still may be prohibited if parallel imports are prevented by a combination of the agreement and the effects of national legislation.<sup>120</sup> Both the "*Scotch Whiskey*" and *Beguelin* cases involved an exclusive distributor who placed reliance on a provision of national legislation to prevent parallel imports. In *Beguelin*, a French exclusive distributor unsuccessfully sought to rely, under the terms of its contract, on a defense against third parties provided by French unfair competition law to prevent imports of cigarette lighters from Germany. In the "*Scotch Whiskey*" case, a Belgian exclusive distributor sought to enforce the importer's obligation to furnish proof of authenticity which the parallel importer of identical whiskey from France had been unable to obtain. Following the *Beguelin* rationale, the court held as a principle of law that "[a]n exclusive dealing agreement falls within the prohibition of article 85 when it impedes, in law or fact, the importation of the products in question from other member states into the protected territory by persons

<sup>116</sup> Consten S.A., *Etablissements and Grundig-Verkaufs-GmbH v. E.E.C. Comm'n*, [1966] E. Comm. Ct. J. Rep. 429.

<sup>117</sup> 5 J.O. COMM. EUR. (No. 139) 2921 (1962).

<sup>118</sup> *Public Prosecutor v. Dassonville*, [1974-5] C.J. Comm. E. Rec. 837, [1974] COMM. MKT. REP. (CCH) ¶ 8276.

<sup>119</sup> [1971] C.J. Comm. E. Rec. 949, [1971-73 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8149.

<sup>120</sup> [1974-5] C.J. Comm. E. Rec. 837, [1974] COMM. MKT. REP. (CCH) ¶ 8276.

other than the exclusive distributor."<sup>121</sup> Although it is difficult to draw conclusions applicable beyond the unusual facts of this case, the Commission must afford the decision consideration, especially regarding parallel imports in relation to Article 85.<sup>122</sup>

If an enterprise therefore cannot impose absolute territorial limitations in the form of contractual provisions preventing imports or exports, it may attempt to achieve the same result by indirect means. The Commission, however, has not looked favorably upon indirect attempts to circumvent its policy against territorial restrictions. For example, in *P.C.E.*,<sup>123</sup> the Commission applied Article 85 section 1 to end a scheme obviously aimed at protecting a specific market. P.C.E. manufactured glass in Belgium and distributed it throughout the Common Market. A subsidiary company handled distribution in the German Market at prices up to forty percent higher than those in Belgium and the Netherlands. To protect the German subsidiary and to avoid clearly illegal export prohibitions in the contracts with its other distributor, P.C.E. effectuated a system of prices that granted distributors substantial rebates on merchandise purchased for other than export purposes. This pricing system was designed to neutralize price differences and to prevent parallel exports by Belgian or Dutch distributors to German customers. P.C.E. applied for a negative clearance or exemption on the grounds that the German subsidiary offered German clientele very substantial and costly technical assistance. However, the Commission rejected this argument and held that the system established by P.C.E. was designed to isolate a national market within the Common Market and to prevent consumers from obtaining better terms for P.C.E. products. A fine of 100,000 units of account was imposed on P.C.E.

Even though most territorial limitations applicable to Common Market members violate Article 85 section 1 as discussed above, three categories of exceptions exist. First, an exception may be given to a manufacturer whose distribution contract provides that the distributor is free to export the goods if he pays a commission to the distributor located in the territory to which the goods have been exported. In the *Transocean Marine Paint Association* case,<sup>124</sup> the Commission ruled that although such a practice violated Article 85 section 1, it was nevertheless justified under the particular set of circumstances and warranted an Article 85 section 3 exemption. The decision recognizes that payments to the distributor in the territory of

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<sup>121</sup> *Id.*

<sup>122</sup> E.C. COMM'N FOURTH REPORT ON COMPETITION POLICY 34 (1975).

<sup>123</sup> 15 J.O. COMM. EUR. (L272) 35, [1972] COMM. MKT. REP. (CCH) ¶ 9539.

<sup>124</sup> 16 J.O. COMM. EUR. (No. L19) 18 (1974), [1974] COMM. MKT. REP. (CCH) ¶ 9628.



importation are justified because capital and advertising expenditures have been made which benefit the exporting distributor.<sup>125</sup> In other words, payment of a commission is not illegal if it reasonably reflects the advantage one distributor derives from the fact that a market has already been serviced by the local distributor. Secondly, the Commission has applied a de minimis rule exception to agreements having very minor effects on competition within the Common Market. Finally, under certain circumstances, such as launching of a new product, the Commission, like the United States courts, may be prepared to exempt territorial restrictions that are limited in scope and time.

Exclusive dealing means that a seller of goods has appointed a sole distributor to a territory with the promise that the seller will not supply any other dealer in that territory. The agreement is sometimes limited in time and is frequently reciprocal; the seller agrees to sell his goods only to one dealer in each territory, thus excluding the possibility of direct sales to the consumer, and the dealer in return agrees not to accept competing products for the duration of the contract.

The Commission has regulated exclusive distribution agreements since the outset of antitrust policy. The Commission adopted the stance that any agreement wherein either a supplier agreed not to sell to more than one dealer or a dealer agreed that he would purchase from only one supplier was within the scope of Article 85 section 1, if commerce between member states was affected.<sup>126</sup> The logical consequences of this position would have been to bring all exclusive distribution agreements having an effect on trade between member states within the regulatory powers of the Commission.<sup>127</sup>

The Commission's desire to achieve that result suffered a setback, however, in *Societe Technique Miniere*.<sup>128</sup> In that case the Court of Justice did not agree that exclusive selling agreements are per se incompatible with the Common Market as set forth in Article 85 section 1. Rather than applying a rule of reason, the court noted that an exclusive agreement may, in the case of a new product, enable an enterprise to penetrate a territory in which

<sup>125</sup> *Id.*

<sup>126</sup> 7 J.O. COMM. EUR. (No. 61) 2545 (1964), [1973] COMM. MKT. REP. (CCH) ¶ 2743.

<sup>127</sup> Three Commission Decisions seem to point to the principle that any agreement wherein a supplier agrees to sell only to one dealer in any specified part of the Common Market will automatically violate Article 85 section 1. Comm'n Decision of July 8, 1965 (*Re the Agreement of Etablissements Blondel*) 8 J.O. COMM. EUR. (No. 131) 2194 (1965), [1965] COMM. MKT. REP. (CCH) ¶ 2061.33; Comm'n Decision of Sept. 7, 1965 (*Re the Agreement of Edmund Isbecque*) 8 J.O. COMM. EUR. (No. 156) 2581 (1965), [1965] COMM. MKT. REP. (CCH) ¶ 2061.34; Comm'n Decision of Dec. 17, 1965 (*Re the Agreements of Maison Jallatte*) 9 J.O. COMM. EUR. (No. 3) 37 (1966), [1965] COMM. MKT. REP. (CCH) ¶ 2061.35. However, these three agreements were approved by the Commission.

<sup>128</sup> (1966) E.C.R. 235 (1966).

it was not previously doing business. The decision specified several relevant factors for determining whether an agreement is within Article 85 section 1: the volume of trade involved, the position and importance of the seller and distributor, whether there is one contract or a series of contracts, and whether re-exports and parallel imports are allowed under the contracts.<sup>129</sup>

As a result of the court's decision in *Societe Technique Miniere*, it is recommended that the parties to an exclusive dealership agreement find out whether their agreement falls within Article 85 section 1, and if so, whether an exemption under Article 85 section 3 is possible. Guidelines on the types of agreements exempted by Article 85 section 3 have been developed by the Commission with the approval of the Council of Ministers.<sup>130</sup> The Commission has ruled in Regulation 67/67<sup>131</sup> that certain types of exclusive dealing agreements, even though in violation of Article 85 section 1, are generally beneficial and as such are granted "group exemptions" under Article 85 section 3. The economic basis for these group exemptions is the belief that the agreements improve distribution, facilitate sales promotion, allow more intensive marketing, and are often the sole means for small and medium sized firms to compete in the market.<sup>132</sup> The overall justification for the group exemptions is that the element of exclusivity is indispensable in bringing about an improvement of distribution which benefits the consumer, the very principle on which Article 85 section 3 is based.<sup>133</sup>

Regulation 67/67 applies only to exclusive supply and purchase agreements between two enterprises in different member states which concern goods for resale within the Common Market.<sup>134</sup> Under Article 2(1) of the regulation, only two kinds of competitive restrictions may be imposed upon an exclusive dealer: 1) the obligation not to manufacture or distribute competing products during the life of the contract and for one year thereafter<sup>135</sup> and 2) the obligation not to take positive steps, such as warehousing or advertising in another territory to sell outside the territory.<sup>136</sup> Article 2(2) states that an agreement may be eligible for the group exemption even though

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<sup>129</sup> *Id.* at 251.

<sup>130</sup> Council Regulation 19/65, 8 J.O. COMM. EUR. (No. 57) 849 (1967), [1977] COMM. MKT. REP. (CCH) ¶ 2717.

<sup>131</sup> Comm'n Regulation 67/67, 10 J.O. COMM. EUR. (No. 57) 849 (1967), [1977] COMM. MKT. REP. (CCH) ¶ 2727.

<sup>132</sup> *See* 298 U.N.T.S. at 48.

<sup>133</sup> *See* Comm'n Regulation 67/67 for the justification of exclusive dealing agreements, 10 J.O. COMM. EUR. (No. 57) 849, [1977] COMM. MKT. REP. (CCH) ¶ 2727.

<sup>134</sup> *Id.* art. 1(1)(a).

<sup>135</sup> *Id.* art. 2(1)(a).

<sup>136</sup> *Id.* art. 2(1)(b).

it obligates the dealer to use a trademark or tradename, package the goods in accordance with the manufacturer's specifications, purchase complete ranges of products or minimum quantities, promote the grantor's product through advertising, employ specialized personnel or assume after-sales service.<sup>137</sup>

Generally, any concerted attempt to isolate the distributor's territory from the rest of the Common Market and to thereby prevent parallel imports is prohibited. Article 3 of Regulation 67/67 reflects this policy by specifically denying group exemptions to two categories of agreements.<sup>138</sup> The first category encompasses agreements in which manufacturers of competing products grant each other exclusive selling rights.<sup>139</sup> The second category includes agreements whereby the manufacturer and distributor make it difficult for middlemen and consumers to obtain their products from persons other than the exclusive dealer,<sup>140</sup> or whereby the parties use trademarks or other industrial property to prevent dealers and consumers from either obtaining the product in other areas of the Common Market or from selling it in the contract territory.<sup>141</sup>

Under Regulation 67/67, the Commission may examine individually the agreements to which the group exemption has been applied with revocation of the exemption possible.<sup>142</sup> Article 6 lists the situations in which the exemption may be withdrawn: where there are no comparable competing goods; where it is impossible for competing goods to be placed on the market in question; where the dealer has abused the exemption by either arbitrarily refusing to supply categories of purchasers who cannot obtain supplies elsewhere or by selling contract goods at excessive prices.<sup>143</sup> Thus, the door is open for the Commission to review serious restrictions on competition and, if necessary, withdraw the benefit of the exemption in individual cases.

An agreement may fall outside the scope of Regulation 67/67 and consequently be denied the group exemption for several reasons. If there are more than two parties to the agreement a group exemption will not be given.<sup>144</sup> However, this does not necessarily mean that Article 85 section 1 has been violated or that an exemption could not be obtained pursuant to a notifica-

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<sup>137</sup> *Id.* art. 2(2).

<sup>138</sup> *Id.* art. 3.

<sup>139</sup> *Id.* art. 3(a).

<sup>140</sup> *Id.* art. 3(b)(2).

<sup>141</sup> *Id.* art. 3(b)(1).

<sup>142</sup> *Id.* art. 6.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* art. 1(1).

tion.<sup>145</sup> The group exemption may also be refused if the agreement contains a clause that has been specifically banned, such as an export prohibition. In this situation, the parties may assume that there is a risk of violating Article 85 section 1 and notify the agreement to the Commission for the purpose of obtaining an exemption. Since the Commission and the Court of Justice have not yet declared an export prohibition per se illegal, the clause does not clearly violate Article 85 section 1, but the risks are obvious. Finally, the presence of a restrictive clause which has been neither specifically prohibited nor specifically allowed may cause refusal of the group exemptions to the agreement. This category includes a clause prohibiting the distributor from questioning the validity of the grantor's patent rights.<sup>146</sup> In this circumstance, it would seem prudent for the parties to notify their agreement to the Commission.

Agreements also exist which, although not covered by Regulation 67/67, have been granted exemptions for the same reasons justifying Regulation 67/67 exemptions.<sup>147</sup> For example, the *Europair-Duro-Dyne* decision<sup>148</sup> held that although an agreement granting an exclusive dealership covering the entire Common Market was not addressed in the Regulation and may violate Article 85 section 1, an Article 85 section 3 exemption may be granted if the agreement contains no restrictions other than the type permitted by Regulation 67/67.<sup>149</sup> Duro-Dyne had appointed Europair sole distributor in the entire Common Market for a wide range of heating and air conditioning products. Article 85 section 1 clearly applied to this agreement because a substantial restriction on competition resulted from the single firm's attempt to organize the market for a particular product throughout the Community. Nevertheless, the Commission granted an exemption since the guarantee of adequate supplies and uniform technical services throughout the Common Market improved distribution. The Commission additionally noted that the agreement did not restrict Duro-Dyne from indirectly delivering to the Community and that the subdistribution system providing for one subdistributor per country complied with Regulation 67/67.<sup>150</sup>

Regulation 67/67 also does not cover exclusive distribution agreements between two companies within the same country for the resale of goods in

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<sup>145</sup> See 8 J.O. COMM. EUR. (No. 36) 533, [1977] COMM. MKT. REP. (CCH) ¶ 2717.

<sup>146</sup> See Comm'n Decision of June 9, 1972 (*Re Davidson Rubber*) 15 J.O. COMM. EUR. (No. L143) 31 (1972), [1972] COMM. MKT. REP. (CCH) ¶ 2061.37.

<sup>147</sup> These agreements must still be notified to the Commission.

<sup>148</sup> Comm'n Decision of Dec. 19, 1974 (*Re Europair-Duro-Dyne*) 18 J.O. COMM. EUR. (No. L29) 11 (1975), [1978] COMM. MKT. REP. (CCH) ¶ 9708A at 9572.

<sup>149</sup> *Id.* at 13, [1978] COMM. MKT. REP. (CCH) ¶ 9708A at 9573.

<sup>150</sup> *Id.*

that country. Again, however, the Commission decided in the *Goodyear Italiana* case that the principles of Regulation 67/67 should apply.<sup>151</sup> This case involved two firms established in Italy. Goodyear Italiana had granted Euram the exclusive distribution in Italy of plastic film for wrapping. The contract contained neither a ban on re-exports by Euram to other member states nor any restriction preventing Goodyear Italiana from selling potentially competitive products on the Italian market. For an agreement to fall within Article 85 section 1, trade between the member states must be affected. Since both Goodyear Italiana and Euram were in the same state and their agreement related only to the resale of the products within that state, it is arguable that trade between the member states would not be affected. The Commission, however, held that both the obligation not to sell competing products and the undertaking not to pursue an active sales policy for the product in other Common Market countries amounted to restrictions "capable of affecting trade between member states to the extent that the flow of trade between other parts of the Common Market and Italy might develop in a different way in the absence of the agreement, and there might otherwise be the possibility of establishing a single market among member states."<sup>152</sup> Even though this agreement was thus held to fall within the scope of Article 85 section 1, the Commission authorized a section 3 exemption because the commitments restricting competition were necessary to improve distribution and to benefit consumers.<sup>153</sup>

Manufacturers frequently attempt to impose client restrictions on their distributors. For example, a manufacturer may retain certain accounts or a producer of specialty products may limit his distributor's sales to certain dealers whose qualifications have been approved in advance by the manufacturer. These restrictions may be encompassed by Article 85 section 1, and if so, the availability of an Article 85 section 3 exemption will depend upon the economic justification for the restrictions. The Commission has rendered several important decisions on this topic which illustrate the types of restrictions eligible for exemption.

In the *Kodak* case,<sup>154</sup> Article 85 section 1 was declared inapplicable to the general conditions of sale which remained after the import and export restrictions on sales within the Common Market had been removed.<sup>155</sup> Theoretically, Kodak could still exclude certain wholesalers from the distribution

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<sup>151</sup> 18 J.O. COMM. EUR. (No. 238) 10, [1978] COMM. MKT. REP. (CCH) ¶ 9708.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 13 J.O. COMM. EUR. (No. L147) 24, [1970] COMM. MKT. REP. (CCH) ¶ 2412.

<sup>155</sup> *Id.*

network by abusing its control over supply. The Commission, however, found a practical limitation on this power; a large number of Kodak wholesalers could export to other areas of the Common Market, should price differences make this worthwhile, and an excluded purchaser could thereby obtain the products from these wholesalers.

In the *Omega* case,<sup>156</sup> the Commission approved a selective distribution system designed to ensure that the manufacturer's international guarantee on its Swiss watches would be supported effectively by an adequate service and repair network. The Commission found that requiring an authorized sales agent to possess certain professional qualifications and to maintain a shop in good standing did not restrict competition.<sup>157</sup> The quantitative restrictions imposed on the number of distribution agents, which reflected the relatively low production capacity and sales volume of the watches, were therefore granted an exemption under Article 85 section 3.<sup>158</sup>

The *Bayerische Motoren Werke* (BMW) decision,<sup>159</sup> undoubtedly a guide for the automobile industry, permits manufacturers to distribute vehicles and parts through selected distributors who are required to choose retail dealers according to the manufacturer's specifications. The Commission granted a temporary Article 85 section 3 exemption to BMW distribution contracts after the company agreed to abandon export prohibitions and modified certain other contractual provisions. The exemption allows BMW to continue four restrictive practices which the Commission found to violate Article 85 section 1. First, BMW may continue to select principal distributors, may restrict the number of retail dealers, and may retain the right to approve the retail dealers chosen.<sup>160</sup> Second, the company must consent to the distribution of non-BMW products by its dealers; but pursuant to a contract clause required by the Commission, BMW may not unreasonably withhold its consent. As a result, non-BMW accessories not significantly affecting the safety of BMW vehicles may be sold freely to consumers, however, where the safety is affected, the dealer may only use non-BMW spare parts which meet the company's safety standards.<sup>161</sup> Third, BMW dealers may sell spare parts to independent garages for repairs, but not to dealers outside of

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<sup>156</sup> Comm'n Decision of Oct. 28, 1970 (*Re Omega*) 13 J.O. COMM. EUR. (No. L242) 22 (1970), [1972] COMM. MKT. REP. (CCH) ¶ 2061.86.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Comm'n Decision of Dec. 13, 1974 (*Re Bayerische Motoren Werke*) 18 J.O. COMM. EUR. (No. L29) 1 (1975), [1978] COMM. MKT. REP. (CCH) ¶ 9701.

<sup>160</sup> *Id.*, [1978] COMM. MKT. REP. (CCH) at 9539.10.

<sup>161</sup> *Id.*, [1978] COMM. MKT. REP. (CCH) at 9539.11.

the BMW network.<sup>162</sup> Finally, BMW may agree to avoid competition with its own distributors and dealers except with respect to fleet accounts, governmental authorities and its subsidiaries.<sup>163</sup> This exemption was valid until December 31, 1977, in order to permit the Commission to assess the competitive effects of the BMW selective distribution system before allowing its further continuance.<sup>164</sup>

In contrast to the exemptions granted in the *Kodak*, *Omega* and *BMW* cases, the Commission has required the elimination of restrictive clauses in other selective distribution cases. For example, two French perfume manufacturers, Christian Dior and Lancome, agreed to eliminate a series of restrictive clauses from their selective distribution contracts.<sup>165</sup>

In the area of territorial and customer limitations, several conclusions may be tentatively stated. First, generally a manufacturer may select distributors and dealers without violating Article 85 section 1, provided that no restrictive clauses are contained in the distribution agreement. If, as in the BMW or perfume cases, there is pressure on the manufacturer to increase the number of distributors, his refusal to appoint additional distributors may violate Article 85 section 1. However, given adequate justification, the distribution arrangement may nonetheless be granted an Article 85 section 3 exemption. Second, exemptions will probably be granted to agreements requiring the distributors of either high quality brand name products or products needing a great deal of after-sales service to resell those products only to selected dealers.<sup>166</sup> However, the Commission certainly will verify that the benefits claimed to flow from such restrictions are in all cases real. Third, restrictions which limit sales between members of an existing distribution network or which prohibit wholesalers from selling directly to ultimate customers normally will not receive the Commission's approval. Indirect bans on imports will also be stricken if such are attempted by agreements which require retailers to sell only to the ultimate consumer. Fourth, the Commission seems prepared, in special circumstances, to allow a manufacturer to

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*, [1978] COMM. MKT. REP. (CCH) at 9540.

<sup>164</sup> Regulation 17, art. 8(1) provides that "[a] decision in application of Article 85 § 3 of the Treaty shall be issued for a specific period and conditions and obligations may be attached thereto." [1978] COMM. MKT. REP. (CCH) ¶ 2401, ¶ 2471.

<sup>165</sup> The two perfume manufacturers had appointed selected retailers for the sale of their products in the Common Market. The Commission took the position that no further action against the companies was required by Article 85 section 1 after the restrictive clauses were removed from their contracts. E.C. BULL. OF THE EUROPEAN COMMUNITIES No. 12, at 33.34 (1974).

<sup>166</sup> See Comm'n Decision of Dec. 18, 1975 (*Re SABA*) 19 J.O. COMM. EUR. (No. L28) 19 (1976), [1978] COMM. MKT. REP. (CCH) ¶ 9802.

make direct sales to certain ultimate users and thus effectively preclude distributors from selling to those clients. The fifth conclusion involves situations in which a manufacturer requires his dealers to refrain from dealing in competing products. This restriction seems to have less justification for non-brand products than for branded products because in the latter case sales personnel, and thus manufacturers, are very likely to favor one product over another. Indeed, as discussed previously, the Commission allowed a manufacturer's ban on sales of competing models by his distributors in the *BMW* case, while permitting a restriction on the sale of spare parts only where the use of a BMW product was of particular importance for the safety of the vehicle. Article 85 section 1 will always apply in such a situation and the possibility of an exemption may be limited to branded product competition.

#### IV. COMPARATIVE EVALUATION AND CONCLUSION

The difference between the American and Common Market approaches to antitrust law generally and to vertical restrictions specifically is directly attributable to the premise that the competition required in the E.E.C. is but one means to achieve economic balance, whereas in the United States free competition is viewed as an indispensable condition and is thus pursued with greater strictness.

The flexible framework of the Common Market's antitrust rules has both advantages and disadvantages in comparison to the American approach. The principal advantage is that an agreement clearly within the scope of Article 85 section 1 may nevertheless receive an Article 85 section 3 exemption. However, the obvious disadvantage shared with American antitrust law is that the framework provides little predictability in antitrust litigation.

Two major points should be stressed which pervade both antitrust approaches and which are evident from a comparison of the Sherman Act section 1, and Article 85 section 1. First, in the United States and the European Economic Community if an antitrust violation has occurred, the intent of the parties to commit that violation is unimportant, particularly in regard to per se violations where intent plays no role. But the American and Community positions diverge where business conduct has a probability of restraining trade. Here, according to the United States viewpoint, intent is prima facie evidence of a violation whether or not any action has been taken to fulfill that intent. Common Market authorities have not gone so far and still require an actual effect on trade or competition to constitute a violation. Second, the effect on interstate trade or foreign commerce is necessary in the United States because without it there is neither a violation of the Sherman Act nor jurisdiction over the matter by the federal courts. Similarly in the E.E.C., the interstate effect is necessary for the Commission and the



European Court of Justice to have jurisdiction. However, in the E.E.C., the interstate effect is more than a jurisdictional requirement. The effect on trade or competition between member states is the core of the rules of competition and is a determining factor of the agreement's legality, much more so than in America. Moreover, unlike the E.E.C., the American Sherman Act takes into account the effect on foreign commerce; rather the E.E.C. is more concerned with an agreement outside the Community which would have effects therein.

Although it is unlikely that a per se rule patterned after United States antitrust principles will develop in the Common Market, a comparative evaluation of the distribution restraints thus far examined will provide some guidelines for allowable agreements between manufacturers and distributors. As concluded previously, under present American antitrust law resale price maintenance is per se illegal. In the Common Market resale price maintenance is likewise unlawful, at least in principle. Accordingly, the United States approach is in this sense parallel to that of the E.E.C. However, the analogy ends here; at this point the E.E.C. approach varies from that of the United States and asserts its originality. In the E.E.C., an exemption may be available under Article 85 section 3 if the agreement promotes sound economic cooperation and thereby benefits the consumer. It is also well-settled in the Common Market that if resale price maintenance has no effect on interstate commerce and is permitted by the member state, the price restraint will be allowed. While the E.E.C. does not differentiate between maximum and minimum resale price maintenance, the American approach distinguishes between the two restraints, even though the resulting treatment is similar. However, if a rule of reason standard would be applied to maximum resale price maintenance agreements in the United States, the American position would draw closer to that of the E.E.C., specifically to Article 85 section 3. Such an approach to maximum resale price maintenance is desirable because of the ensuing benefit to the consumer.

In the area of territorial restrictions, since *Sylvania* the American and E.E.C. approaches seem to be converging. The rule of reason has been applied by the United States primarily because fostering interbrand competition is a redeeming value. Territorial limitations are legal if dealer cartels and multiple exclusive dealerships are not thereby developed. A similar stance is taken by the E.E.C. through the Article 85 section 3 exemption where the territorial restriction is not absolute and allows for parallel imports. Encountered here is another example of E.E.C. apprehension about the re-establishment of trade barriers and a partitioning of the Common Market, a factor not present in the United States. Therefore, both the United States, through the rule of reason, and the E.E.C., through Article 85 section 3,

reach a similar position with respect to the legitimacy of territorial restrictions.

In the same sense, related territorial limitations such as exclusive dealerships are assessed under the rule of reason in the United States, particularly if those restrictions coincide with the introduction of a new product on the market. In the Common Market the Commission is empowered by Regulation 67/67 to exempt certain exclusive distribution agreements from the general ban, but the Commission takes a hard line toward exclusive dealerships, once again because of the fear of partitioning. Thus, not all the exclusive dealership agreements are presumed illegal; certain kinds may be excused from the application of Article 85.

With respect to customer limitations, a rule of reason approach by the United States is implied by the *Sylvania* opinion, though the question was left specifically unanswered. In the E.E.C., such agreements are barred by Article 85 section 1, subject to the exemption under Article 85 section 3 for economically justified restraints.

The only point of complete accord between the American and Common Market approaches occurs on the agency issue. Both entities take the position that the determination of a distributor's status as an agent, thus being legally subject to restrictions, is not a question of nomenclature or designation, but rather a matter of function and economic dependence. Thus, the correct criterion has been arrived at by both systems through judicial interpretation.

Obviously, in the United States and the E.E.C. as well, the nature of the antitrust law requires breadth and prohibitive language. Though the E.E.C. antitrust law attempts to be more specific by pinpointing permissible vertical restrictions, it cannot detail actions which constitute legal conduct. Nevertheless, this attempt at a more detailed approach suggests that the development and interpretation of antitrust policy generally and of vertical restraints specifically take the E.E.C. in a path different from that of the United States. The American influence will probably always be felt and the American example will be observed and borrowed from by the Common Market, but not to the extent that the Commission and the Court of Justice would arrive at conclusions identical to those of United States as to what constitutes, for example, an unreasonable restraint of trade. And yet, knowledge of the two approaches to antitrust law is undoubtedly of value to both Americans and Europeans; such a comparative exchange is both highly commendable and practical.

