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THE RULE OF REASON UNDER ARTICLE 85(1) OF THE TREATY OF ROME AND VERTICAL DISTRIBUTORSHIP AGREEMENTS IN EUROPEAN ECONOMIC COMMUNITY ANTITRUST CASE LAW

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The Treaty of Rome¹ established the European Economic Community. In its Preamble and text,² this Treaty seeks to promote throughout the Community a harmonious development of economic activities and to establish the institution of a system

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1. Treaty Establishing the European Economic Community, 1973 Treaties establishing the European Communities 163 (Office for official publications of the European Communities). Signatories of the Treaty were the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, and the Kingdom of the Netherlands (the "Member States of the European Communities"). By the Treaty Between the Member States of the European Communities, the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, 1973 Treaties establishing the European Communities 871 (Office for official publications of the European Communities), the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland became members of the European Community. The Kingdom of Norway never ratified the agreement.

2. The Treaty of Rome, art. 2 provides:

The Community shall have as its task, by 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, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

The Treaty of Rome, art. 3(f) provides:

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein

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. . . .

the institution of a system ensuring that competition in the common market is not distorted

1973 Treaties establishing the European Communities 179-80 (Office for official publications of the European Communities) [hereinafter cited as *Treaties*].

ensuring that competition in the common market is not distorted. As observed by Elles,³ "the field of competition, which relates to the breaking down of trade barriers erected by restrictive trading practices . . ., is near the very heart of the Common Market"

Article 85(1) of the Treaty of Rome provides:

The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings . . . and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market⁴

The Court of Justice of the European Communities,⁵ the Council of the European Communities,⁶ and the Commission of the European Communities⁷ all develop the law under Article 85(1). The

3. N. ELLES, *COMMUNITY LAW THROUGH THE CASES* 6 (1973).

Useful secondary sources on Community law and antitrust include: W. ALEXANDER, *THE EEC RULES OF COMPETITION* (1973); J. CUNNINGHAM, *THE COMPETITION LAW OF THE EEC* (1973); R. JOLIET, *THE RULE OF REASON IN ANTITRUST LAW — AMERICAN, GERMAN AND COMMON MARKET LAWS IN COMPARATIVE PERSPECTIVE* (No. 26 of *COLLECTION SCIENTIFIQUE de la Faculté de droit de l'Université de Liege* 1967); A. PARRY & S. HARDY, *EUROPEAN ECONOMIC COMMUNITY LAW* (1973); J. RAHL, *COMMON MARKET AND AMERICAN ANTITRUST — OVERLAP AND CONFLICT* (1970); Zaphirou, *Rule of Reason and Double Jeopardy in European Antitrust Law*, 6 *TEX. INT'L L. F.* 1 (1970).

4. *Treaties* at 245.

5. The composition, jurisdiction, and powers of the Court of Justice are set forth in the Treaty of Rome, arts. 164-188, *Treaties* at 297-305. Generally, the Court of Justice reviews the legality of acts of the Council of the European Communities and of the Commission of the European Communities other than recommendations or opinions. For this purpose, it has jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of the Treaty of Rome or of any rule of law relating to its application, art. 173, *Id.* at 300.

6. The role, powers and duties of the Council are set forth in the Treaty of Rome, arts. 145-153, *Treaties* at 293-95.

Article 145 provides:

To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty:

- ensure coordination of the general economic policies of the Member States;
- have power to take decisions.

7. The Treaty of Rome, art. 155 provides:

In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the Assembly in the manner provided for in this Treaty;

Court of Justice of the European Communities is the final authority on the meaning and purposes of Article 85(1). The Council and the Commission have authority to issue regulations implementing Article 85(1) and authority to exempt certain types of agreements from the prohibitions contained in Article 85(1).⁸ The Commission hears cases arising under Article 85(1) and makes decisions which are appealable to the Court of Justice. When a case is presented to the Court, the Advocate-General⁹ is bound to make independent arguments to the Court. Under this structure, the Court of Justice makes final decisions on the case before it. These final decisions, however, are in contrast with the opinions which the Court can issue under the referral provisions of the Treaty of Rome.¹⁰ In a referral case, a national court asks the Court of Justice to interpret an Article of the Treaty. In this context, the Court does not apply the Article to the case in the sense of deciding the question. Instead, the Court gives an interpretation binding upon the national court. Through both medi-

—exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

Treaties at 296.

8. The Treaty of Rome, arts. 189-192, Treaties at 305-06.

Article 189 provides in part:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

The Council, at this time, has authority, when it unanimously acts on a proposal from the Commission and after it consults with the Assembly of the European Communities (an advisory and supervisory body, art. 137) to adopt "any appropriate regulations . . . to give effect to the principle set out in Article 85 . . ." The Treaty of Rome, art. 87(1), Treaties at 247.

9. The Treaty of Rome, art. 166 provides, in part:

The Court of Justice shall be assisted by four Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court

Treaties at 298.

10. The Treaty of Rome, art. 177 provides, in part:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

. . . .
. . . .

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Treaties at 301-02.

ums, the Court has developed a rule of reason, in the field of exclusive distributorship agreements, under Article 85(1).

By the terms of Article 85(1), agreements "which may affect trade between Member States and which have as their object or effect the prevention . . . of competition" are prohibited and, by the terms of Article 85(2), are declared void.¹¹ In the six cases, decided under Article 85(1) by the Court of Justice, which involved vertical distributorship¹² and exclusive territory agreements,¹³ the Court of Justice has taken strong steps toward the development of its own rule of reason. Presently before the Court of Justice are several cases¹⁴ that will be decided against this backdrop.

The development of the Court's rule of reason occurs in a field in which various policy choices among economic objectives compete for implementation. In terms of benefits, an agreement that insulates a territory enables a manufacturing enterprise to enter a new market. Consumers benefit because there are more choices between products of different manufacturers.¹⁵ On the retail level, however, once the product is established and differentiated, that is, made distinct by various means such as advertising, it assumes a product market of its own.¹⁶ This differentiation

11. The Treaty of Rome, art. 85(2) provides:

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

Treaties at 245.

12. A vertical agreement is one between two parties at different stages in the marketing process, e.g., a manufacturer agrees with a retailer. See generally P. AREEDA, ANTITRUST ANALYSIS 338 (1967); COMMERCIAL AGENCY AND DISTRIBUTION AGREEMENTS AND RELATED PROBLEMS OF LICENSING IN THE LAW OF THE EEC COUNTRIES AND OF THE EUROPEAN COMMUNITIES 105, 108 (Gerven & Lukoff, eds., 1970); J. CUNNINGHAM, THE COMPETITION LAW OF THE EEC 130-32 (1973).

13. In an exclusive territory agreement, a manufacturer will allot a specific territory to each of several dealers. No dealer may sell the product to a person who does not reside in his territory. A less insulating device than the exclusive territory agreement is an agreement of primary responsibility. In this type of agreement, the producer assigns a specific territory to each of several dealers, but they are at liberty to sell to persons not residing within their area. See generally Stone, *Closed Territorial Distribution*, 30 U. CH. L. REV. 286 (1963); Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795 (1962).

14. E.g., Commercial Solvents Decision by the Commission, 12 C.M.L.R. D65 (1973); Sugar Cartel Decision by the Commission, CCH COMM. MKT. REP. ¶ 9570 (1973).

In addition to hearing cases, the Commission can initiate investigations and has chosen exclusive distributorship agreements as the current target, Financial Times, Jan. 31, 1973, at 7, col. 1; Financial Times, Mar. 15, 1973, at 6, col. 1. See generally D. Gross, *Thirty Firms Face Fines by EEC Commission*, The Times (London), Dec. 5, 1972, at 19, col. 7; The Times (London), Mar. 19, 1973, at 20, col. 1.

15. See *Sandura Co. v. Federal Trade Comm'n*, 339 F.2d 847 (6th Cir. 1964).

16. P. AREEDA, ANTITRUST ANALYSIS 134-35 (1967). See C.J.C.E. 9 juillet 1969 (Völk

leads to a lack of consumer choice. In such a situation, as long as the territorial restrictions remain, the consumer desire for reduced prices or better services will not be a reason for the retailer to lower prices or to increase services.¹⁷ Moreover, this phenomenon deprives consumers of the benefits of retailer competition, in the same product, in terms of prices or services for the purpose of attracting and retaining consumer patronage.

While this delineation of the problems posed by agreements isolating geographic markets may be derived from cases under the United States antitrust provision embodied in section one of the Sherman Act,¹⁸ it is apposite to any economic unit, such as the European Economic Community. With respect to the Community, to the extent that agreements to divide territories pose problems in choosing which policy to implement at a given moment under a "competition" analysis, these problems are compounded by the overriding objective of Article 85(1)—the creation of a common economic unit. This article¹⁹ explores one path that the Court of Justice has travelled in the difficult struggle to apply the proscriptions of Article 85(1) to the complex and varied world of a common market economy.

v. Ets. J. Vervaecke S.P.R.L. 5-69 [1969] 15 Rec. 295, 305, [Recueil de la Jurisprudence de la Cour (Cour de Justice de la Communauté européenne)], 8 C.M.L.R. 273, 278 (1969) (argument of the Advocate-General).

17. See *United States v. Arnold Schwinn & Co.*, 388 U.S. 167 (1967); *White Motor Co. v. United States*, 372 U.S. 253 (1963).

18. 15 U.S.C. § 1 (1970).

19. The cases discussed in this article are significant to the practicing United States antitrust lawyer because Community antitrust law is being applied to both United States owned subsidiaries doing business in the Community and to the parent based in the United States. The application of Community law and the presence of Community jurisdiction over the actions of the subsidiary are justified under the emerging doctrine of enterprise entity, *Dyestuffs Cases*, 11 C.M.L.R. 105 (1972); *Continental Can Case Decision* by the Commission, 12 C.M.L.R. D50 (1973). The Advocate-General has argued that even without the presence of an operating subsidiary a United States based company may be subject to Community antitrust jurisdiction under the extra-territorial application of Community law, *Continental Can Case*, 12 C.M.L.R. 199, 217 (1973).

Arguably, extra-territorial application is permissible under the doctrine of the "effects principle", see *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 18 (1965). Indeed, a United States district court has applied this doctrine to embrace the extra-territorial agreement among European Steel Manufacturers regarding marketing of their products in the United States, *Consumers Union of the United States v. Rogers*, 352 F.Supp. 1319 (D.D.C. 1973).

The problem of judicial imperialism is outside this article's scope. However, it is important to note the growing tendency of the Community's applying Community antitrust rules to foreign (United States) based companies operating through subsidiaries in the Community and to note the threat of applying Community law to foreign companies merely because their activities affect either the external or internal trade of the European Economic Community, see Note, *Common Market Antitrust Law: Jurisdiction Imposed by Article 85(1) of the Treaty of Rome*, 6 *CORNELL INT'L L.J.* 163 (1973).

THE RULE OF REASON

The two conditions of Article 85(1) . . . tend to meet, and it is a fact that it is not easy to distinguish them.²⁰

The general prohibition of Article 85(1) has two clauses. The problem of whether the two clauses have separate purposes and meanings depends upon the interpretation of the words in the first clause, "affect trade between Member States", and of the words in the second clause, "have as their object or effect the prevention, restriction or distortion of competition." Although the Court of Justice has indicated that the two clauses may have distinct meanings, these meanings have not yet been fully developed. As will be seen, under both clauses the Court has refused to condemn as void, *per se*, even the most restrictive exclusive distributorship agreements. This refusal, based on the theory that economic factors must be considered, indicates the presence of the Court's formulation of its own rule of reason.

To approach the development of this rule of reason, one must place the business objective of absolute territorial protection,²¹ present before the Court in the seminal 1966 cases, within the context of what one publicist²² has called the Common Market

20. C.J.C.E. 9 juillet 1969 (Völk Ets. J. Vervaecke S.P.R.L. 5-69) [1969] 15 Rec. 295, 306, 8 C.M.L.R. 273, 280 (1969) (conclusions of the Advocate-General).

21. Absolute territorial protection insulates the manufacturer's products from intra-brand (or retailer) competition in a specified territory. Clauses in contractual agreements between private parties which create varying degrees of protection are as follows: (1) an exclusive franchise clause—the manufacturer promises to supply only one distributor in an assigned territory; (2) an exclusive dealing clause—the distributor promises only to trade the manufacturer's goods in the assigned territory, usually coincident with national boundaries; (3) a prohibition against re-exportation—the distributor promises not to export any of the manufacturer's products to other distributors or customers, and the manufacturer promises to impose the same clause on his distributors in other territories; and (4) a prohibition against parallel imports—both the distributor and manufacturer promise to exercise industrial property rights to prevent importation of the same product from an outside territory into the protected territory.

Commission Regulation No. 67/67 interprets Article 85(1) and allows a group exemption in some circumstances, O.J. March 25, 1967. Article 1 of this regulation lists certain restrictions allowed to be imposed by the manufacturer upon the retailer. By Articles 2(1) and 2(2) of this regulation no restrictions other than those listed in Article 1 may be imposed. Because Article 1 does not include a prohibition against re-exportation in its enumeration, an agreement with this clause is incapable of exemption, C.J.C.E. 9 novembre 1971 (Béguelin Import Co. v. G.L. Import Export SA 22-71) [1971] 17 Rec. 949, 11 C.M.L.R. 81 (1972). Merely because an exemption exists for a particular agreement, however, a presumption that the agreement is invalid under Article 85(1) does not arise. C.J.C.E. 13 juillet 1966 (Établissements Consten S.A.R.L. et Grundig-Verkaufs-GMBH v. Commission de la Communauté Économique Européenne 56, 58-64) [1966] 12 Rec. 429, 5 C.M.L.R. 418 (1966).

22. Keyser, *Territorial Restrictions and Export Prohibitions Under the United*

complex. "The Common Market's complex . . . is one of fear of a resurrection, in whatever form, of trade barriers especially when they coincide with the geographical territory of the Member States."²³ As a complex, this fear of agreements resuscitating national lines could engender a possible distinction, between the same type of agreements, based upon the geographic locus constituting the protected territory. In and of itself, the creation by private agreement of barriers to trade along national lines tends to prevent the unification of the European Economic Community.²⁴

In 1966, the Court of Justice considered three cases, *Italy v. EEC Council & Commission*,²⁵ *Établissements Consten S.A. & Grundig v. EEC Commission*,²⁶ and *Société Technique Minière v. Maschinenbau ULM GMBH*,²⁷ in which this complex and its basis infused the Court's construction of Article 85(1).

In *Italy*, a member State challenged certain regulations promulgated under Article 85. These regulations related primarily to the procedure for obtaining exemptions for vertical distributorship agreements under Article 85(3).²⁸ Italy argued that Article

States and the Common Market Antitrust Laws, 2 COMM. MKT. L. REV. 271 (1964-1965).

23. *Id.* at 295.

24. See Information Note from the Commission of the European Communities, No. P-31, (June 1973), CCH COMM. MKT. REP. ¶ 9574 at 9290:

The common market should by now — a few years after the transitional period . . . — have come to resemble more and more a single market within which people, goods, services, capital and companies enjoy freedom of movement.

In none of the cases involving exclusive distributorship agreements decided by the Court of Justice under Article 85(1) has the territorial protection been other than coincident with national boundaries.

25. C.J.C.E. 13 juillet 1966 (Gouvernement de la République Italienne v. Conseil de la Communauté Économique Européenne 32-65) [1966] 12 Rec. 563, 8 C.M.L.R. 39 (1969) (hereinafter cited as *Italy*).

26. C.J.C.E. 13 juillet 1966 (Établissements Consten S.A.R.L. et Grundig-Verkaufs-GMBH v. Commission de la Communauté Économique Européenne 56-64, 58-64) [1966] 12 Rec. 429, 5 C.M.L.R. 418 (1966) (hereinafter cited as *Grundig*).

27. C.J.C.E. 30 juin 1966 (Société Technique Minière [L.T.M.] v. Maschinenbau ULM GMBH [M.B.U.] 56-65) [1966] 12 Rec. 337, 5 C.M.L.R. 357 (1966) (hereinafter cited as *Technique*).

28. The Treaty of Rome, art. 85(3) provides:

The provisions of paragraph 1 [Article 85(1)] may, however, be declared inapplicable in the case of:

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

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

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

86,²⁹ and only that Article, applied to this type of agreement. Viewing the issue as whether any vertical agreements granting

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Treaties at 246.

In Zaphirou, *Rule of Reason and Double Jeopardy in European Antitrust Law*, 6 TEX. INT'L L.F. 1 (1970), the author, citing *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963) (*inter alia*), asserts that under the American rule of reason "[t]he social or economic benefits that are brought about by a particular restrictive agreement or practice are not taken into account" *Id.* at 5. As conceived, the author asserts that the rule of reason's "equivalent . . ." is found in European Community antitrust law, where it serves a similar purpose." *Id.* While this writer disagrees with Mr. Zaphirou on the lack of a harms and benefits balance under the United States rule of reason, see *White Motor Co. v. United States*, 372 U.S. 253 (1963), this writer agrees that, as formulated by Zaphirou, the Court of Justice looks primarily to market position of the parties in deciding the agreement's validity under Article 85(1), Zaphirou at 6, see note 42 *infra* and accompanying text. Moreover, the Court is moving towards a consideration of harms and benefits. See notes 45 and 57 *infra*.

The scope of Article 85(3), as stated by Zaphirou, is "much wider than would be justified under the rule of reason." at 7. In *Italy*, the Advocate-General argued to the Court that the Commission, in an exemption decision under Article 85(3), should consider a wide range of economic factors and cited to the Court *White Motor Co. v. United States*, 372 U.S. 253 (1963), 12 Rec. at 613, 8 C.M.L.R. at 61. The Court did not comment on his position. In *Grundig*, however, the Advocate-General restated his *Italy* argument. He maintained that the economic consequences of the agreement should be examined in toto and added that such an examination should not be limited to Article 85(3) but should form part of the inquiry under Article 85(1). Otherwise, he suggested to the Court, Article 85(1) would be applied on the basis of purely theoretical considerations to situations that a deeper examination would demonstrate do not interfere with competition, *Grundig*, 12 Rec. at 515, 5 C.M.L.R. at 431. This deeper examination could reveal that the sole reason for the absolute territorial protection was to allow a producer to enter the market which, otherwise, he would have been unable to enter. In such a situation, the Advocate General concluded, the effects of the agreement would be to promote competition. *Id.* The Court, however, dispelled this conclusion by maintaining that "[a]lthough competition between producers is generally more visible than that between distributors of the same brand, it does not thereby follow that an agreement which tends to restrict the latter should escape the prohibition of Article 85(1) merely because it might increase the former." *Grundig*, 12 Rec. at 496, 5 C.M.L.R. at 473. See text accompanying note 36 *infra*.

Whatever balancing of harms and benefits that should occur, according to the *Grundig* Court, should occur in the Commission's decision whether to exempt the agreement under Article 85(3), *Grundig*, 12 Rec. at 502-04, 5 C.M.L.R. at 477-79. The possibility of the Court entering into a balancing under Article 85(3), however, was left open in *Grundig*. The Court, concerned with judicial control over Commission judgments, stated that it would examine the Commission's decisions and required the Commission to set forth the facts and considerations upon which its decision was based. *Grundig*, 12 Rec. at 501, 5 C.M.L.R. at 477.

Despite this decision, the Advocate-General has argued to the Court that some consideration of inter-brand benefits versus intra-brand harms resulting from the agreement should form part of the Court's decisional process under Article 85(1), see text accompanying note 57 *infra*.

29. The Treaty of Rome, art. 86 provides, in part:

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

Treaties at 246.

territorial protection, under any assumed facts, could fall within Article 85(1), the Court upheld the regulations. It found nothing in the language of Article 85(1) that limited its application to horizontal agreements.³⁰ Rather, it found in the Treaty, the Preamble and the text a purpose of abolishing barriers to trade between the States, a purpose which could be frustrated by vertical agreements that created partitions to trade.

While *Italy* did affirm one purpose of Article 85(1), the Court did not consider in any detail the meaning of the specific Treaty language. Rather—here, the Court's method is important—in terms of the affirmance of the purpose of abolishing trade barriers between the States, the Court construed Article 85(1) to apply to vertical agreements by reference to the general objectives of the Treaty. This method of construction introduces the element of teleology, *i.e.*, the fact or the character of being directed toward an end or shaped by a purpose, into the Court of Justice's jurisprudence. Under this approach, as illustrated by the decision in *Italy*, the objects and purposes of the whole Treaty guide the construction of a particular Article.³¹ This method of construction is present in the other 1966 vertical distributorship cases and infuses the Court's discussion of the meaning of the specific lan-

30. *Italy*, 12 Rec. at 593, 8 C.M.L.R. at 64.

31. The Court of Justice's construction of other particular Articles of the Treaty of Rome has been guided by teleological considerations. See C. MANN, *THE FUNCTION OF JUDICIAL DECISIONS IN EUROPEAN INTEGRATION* 231 (1972) (commenting upon and quoting from C.J.C.E. 12 juillet 1962 (Gouvernement du royaume des Pays-Bas/Haute Autorité de la Communauté européenne du charbon et de l'acier, 9-61) [1962] 8 Rec. 412, 453, 4 C.M.L.R. 59, 88 (1964)).

As a rule, it begins with an examination of the specific text in question. . . . Only rarely, however, has the Court been satisfied with such a limited perspective. While proceeding from the specific provisions in question, it is led by the major purposes of the Treaties. Thus after its textual examination . . . the Court further inquired into the ratio legis of the provision, to see if its construction "is not at variance with the objects of the Treaty or whether it can not be refuted by other considerations." . . . [A]gain and again, the Court has justified its conclusions by reading Community regulations in the light of Treaty articles, by construing specific Treaty provisions in terms of major Treaty purposes and, further, by checking its construction of major Treaty purposes against specific Treaty provisions. This is necessary because, as the Court puts it, "the provisions of the Treaty form a whole; they complete and complement each other."

Illustratively, the Court in a far-reaching decision involving the social security rights of labor in C.J.C.E. 9 décembre 1965 (Hessische Knappschaft/Maison Singer et Fils 44-65) [1965] 11 Rec. 1191, 1199, 5 C.M.L.R. 82, 94 (1966), interpreted Article 52's reference to migrant workers to include labor in general, a category larger than only migrant workers. The Court was guided by the Preamble and the objectives of the Treaty in Article 3: the improving of working conditions of people and increased movement of persons. See C.J.C.E. 27 octobre 1971 (Rheinmuller Dusseldorf/Einfuhr-und Varralsstelle fur Getreide und Futtermittel 6-71) [1971] 17 Rec. 823, 834, 11 C.M.L.R. 401, 422 (1972).

guage of Article 85(1) in these cases.

In *Grundig* one apparent analytical choice before the Court of Justice, in an appeal from a Commission decision, was which clause of Article 85(1), the one emphasizing trade between Member States or the one emphasizing the object or effect of the agreement, would be the vehicle for analysing the legality of the agreement between the German manufacturer, Grundig, and the French distributor, Consten. Their agreement provided Consten with absolute territorial protection. Consten agreed to buy Grundig appliances, such as radios, tape recorders and dictating machines, to the extent of a minimum percentage of the total exports from Germany to France. Consten agreed to publicize these Grundig products and further agreed not to sell competing makes of the types of products which were the subject of the contract. Consten agreed not to make any delivery, either direct or indirect, to any other countries from France, and Grundig promised not to deliver, either directly or indirectly, its products to other dealers in France. Finally, Grundig bound its retailers in other countries to the re-exportation prohibition.

Whether this agreement insulating Grundig products in France from retail, or intra-brand, competition violated the anti-trust law of the Community was the general question presented to the Commission and thereafter to the Court. Additionally, the parties had requested from the Commission an exemption under Article 85(3).³²

The first issue before the Court as to the applicability of Article 85(1) was whether the Commission had erred by failing to

32. The applicants attacked the Commission's decision refusing them an exemption under Article 85(3), reprinted at note 28 *supra*. According to the Advocate-General, the grounds of attack were, first, that consumers did not share equitably in the assumed improvements in production and distribution and, second, that, even if they did share, the absolute territorial protection was not indispensable to obtain the effects of the improvement, *Grundig*, 12 Rec. at 531-32, 5 C.M.L.R. at 445. The Court rejected the attack of the parties. According to the Court, the thesis advanced by the parties, based on the necessity to maintain intact all arrangements of the parties in so far as they were capable of contributing to improvements in production and distribution, was incompatible with Article 85. The Article, according to the Court, envisaged a comparison of *noticeable objective* advantages with the harm to competition. 12 Rec. at 502-03, 5 C.M.L.R. at 478-79. On the second argument advanced by the parties, the *indispensability* of the absolute territorial protection, they argued, *inter alia*, that without such protection the retailer would be unable to make advance plans and would be unwilling to service the products when brought in by consumers for repairs and maintenance. 12 Rec. at 503, S.C.M.L.R. at 479. The Court rejected these positions for two reasons: first, the risk of commercial forecasting inheres in all business endeavors and, thus, did not justify special protection; second, commercial facts demonstrated that retailers not afforded absolute territorial protection still provided a high degree of customer services. *Id.*

take evidence that trade would have been heavier without the agreement. On this point, the Commission argued to the Court that trade would be "affected" within the meaning of the first clause of Article 85(1) if the agreement caused trade to develop *otherwise* than it would have.³³ The Court, requiring more, stated that the proper inquiry was whether the agreement was capable of endangering freedom of trade between member States in a direction "which could harm the attainment of the objects of a single market between States."³⁴ The Court did not mention any of the economic facts of the case in its discussion of the meaning of "may affect trade." However, if the opinion is read in light of the subsequent cases, it may be that the application of the "may affect trade" clause should be read together with the economic context of *Grundig*. This economic context will be discussed after an analysis of the Court's discussion of the "object or effect" clause.

To the Court, the mere conclusion that trade was "affected" did not decide whether Article 85(1) was violated by the agreement. The purpose of the finding, the Court said, was to determine "the pre-eminence of Community law over that of the States."³⁵ The presence of a violation also required a finding that the agreement had the prohibited "object or effect". On this

33. *Grundig*, 12 Rec. at 495, 5 C.M.L.R. at 472. According to the Advocate-General, the Commission maintained that trade was "affected" within the meaning of Article 85 when it is found that agreements in the field of competition existed and concerned several member-States. *Id.* at 520, 5 C.M.L.R. 433-34. This finding, as properly noted by the Advocate-General, would make the agreement subject to Community, and not national, law, see text accompanying note 39 *infra*. The Advocate-General argued, and the Court accepted, the position that more than the mere existence of an agreement was required. The reason advanced by the Advocate-General was that, by a comparison of the Dutch, Italian and German versions, "affect" meant to influence unfavourably. Moreover, that influence was to be judged by the agreement's reasonably foreseeable consequences in the market. *Id.*

34. *Grundig*, 12 Rec. at 495, 5 C.M.L.R. at 472.

An early commentator upon Article 85(1) anticipated this construction and asserted: "The express words of the Article . . . limit the incidence of Article 85(1) to agreements which are likely to affect trade as between Member States. If the agreement only relates to trade in one of the Member States of the Common Market then the provisions . . . are inapplicable." A. CAMPBELL, *RESTRICTIVE TRADING AGREEMENTS IN THE COMMON MARKET* 9 (1964).

35. *Grundig*, 12 Rec. at 495, 5 C.M.L.R. at 472.

According to the Commission, "[t]he common market should by now—a few years after the end of the transitional period . . . have come to resemble more and more a single market within which people, goods, services, capital and companies enjoy freedom of movement." Information Note from the Commission of the European Communities, No. P-31, (June 1973), CCH COMM. MKT. REP. ¶ 9574 at 9290. Query whether the Commission's definition of "affect" in *Grundig* (see note 33 *supra*) would contribute more to this goal of the Treaty as expressed by Articles 2 and 3 (see note 2 *supra*) than the Advocate-General's.

point, the narrow issue which the Court addressed was whether the Commission had erred in failing to take evidence concerning the agreement's impact on inter-brand competition. The Court held:

[F]or the purpose of applying Article 85(1), it is superfluous to take account of the concrete effects of an agreement once it appears that it has the *object* of restricting, preventing or distorting competition.³⁶

This broad language can lead to the conclusion that *Grundig* represents a per se approach under Article 85(1), tempered at most by the strength of the territorial protection created by the agreement. Similarly, the position of the Court of Justice emphasizing the "object" of the agreement supports the per se analysis. Yet, for two reasons, *Grundig* does not represent a per se rule. First, economic intra-brand evidence was considered by the Court in its approach to defining market characteristics. The Court defined the product market as Grundig products because of the high differentiation which the products possessed. Second, the manufacturer, Grundig, possessed a large market share.³⁷ Therefore, to focus on this broad *Grundig* language is to ignore the facts and the market definition which those facts produced. Accordingly, a proper reading of the case should focus on the language used by the Court to declare void the agreement before it:

[T]he agreement . . . aims at insulating the French market for Grundig products and maintaining artificially, for products of a very widespread brand, separate national markets within the Community . . .³⁸

This emphasis upon "a very widespread brand" demonstrates that a view of *Grundig* which emphasizes solely the broad "object" language distorts the case. Clearly, the violation of the "object or effect" clause was the result of the strength of the producer in the market, the differentiation of the product, and

36. *Grundig*, 12 Rec. at 496, 5 C.M.L.R. at 473 (emphasis added).

This language leads to a per se standard, under the "object" clause of Article 85(1), which finds any agreement with absolute territorial protection void thereunder. An early commentator concluded that to establish "effect" a thorough investigation would be required, but to establish "object" something less would be required. A. CAMPBELL, *RESTRICTIVE TRADING AGREEMENTS IN THE COMMON MARKET* 14 (1964). The Court in *Technique* did adopt this position, see text accompanying note 44 *infra*. In recent years, such a clear separation of the "object" standard from the "effect" standard no longer seems valid. Indeed, the two standards appear to have merged, see note 55 *infra* and accompanying text.

37. *Grundig*, 12 Rec. at 519, 5 C.M.L.R. at 433.

38. *Id.* at 497, 5 C.M.L.R. at 474.

the absolute territorial protection created by the Grundig-Consten agreement regarding the French Market and by the Grundig agreements with other retailers, creating absolute territorial protection in other Member States.

Grundig offers a minimal distinction between the roles of the two clauses of Article 85(1). For Community law to apply, and inferentially for the Court to have jurisdiction,³⁹ under the "may affect trade" clause, the agreement must affect trade within the Community. This effect is upon the trade *between* member States, and, for this reason, this clause can be considered as the "interstate trade" clause. For the "object or effect" clause to be violated, the distortion of competition throughout the Community may be inferred from the presence of a series of manufacturer agreements with other retailers in other Member States similar to the agreement before the Court if the other agreements create absolute territorial protection within more than one Member State. The *Grundig* decision, however, fails to mention the difference between the degree of impact necessary for the agreement to create the impact that would "affect" trade in the prohibited manner and produce the "effect" upon competition that

39. See text accompanying note 54 *infra*. See Note, *Common Market Antitrust Law: Jurisdiction Imposed by Article 85(1) of the Treaty of Rome*, 6 CORNELL INT'L L.J. 163 (1973).

In *Grundig*, the Advocate-General refuted an interesting argument about the difference between "may affect" and "effect". According to him, the Commission had concluded that the "object" of the agreement was to interfere with competition because it had the aim of freeing Consten from the competition that other wholesalers of Grundig appliances would offer if the products were available to them. The Advocate-General pointed out that if regarded objectively, the Commission's position required an examination of the "effects" within the market. Moreover, the Commission had condemned the agreement on the basis of effects within the French market only, *Grundig*, 12 Rec. at 520-22, 5 C.M.L.R. at 431-33. Thus the Commission's position was that trade had to be "affected" between member-States, but that the "effects" within the Community could occur within one member-State. The Advocate-General argued that the whole market had to be considered because it would be unrealistic to condemn the agreement because of the lack of intra-brand competition when inter-brand competition could be augmented by the agreement. *Id.*

In condemning the agreement the Court first appeared to follow the Commission's distinction between "may affect" and "effect":

The [agreement before us] . . . results in an insulation of the French market and allows the imposition for the products in the question of prices from which is excluded all effective competition. In addition, in so far as the efforts of producers to individualize their brands in the eyes of the consumer succeed, the effectiveness of competition between producers tends to diminish.

Grundig, 12 Rec. at 497, 5 C.M.L.R. at 474. In its precise holding, however, the Court was careful to avoid the impression that it had adopted the Commission's distinction. "Since the agreement thus aims at insulating the French market for Grundig products and maintaining artificially, for products of a very widespread brand, separate national markets *within the Community*, it is therefore such as to distort competition in the Common Market." *Id.* (emphasis added).

is prohibited. Thus, it may be that the economic evidence and analysis necessary for jurisdiction under the former clause suffices to support a finding that competition, in the latter clause, is prevented, restricted, or distorted within the Community.

Interestingly, with respect to the evidence which suffices to show a violation of Article 85(1)'s clauses, the later decisions⁴⁰ indicate an awareness that in some instances a manufacturer can enter a market only by an absolute territorial protection agreement. These decisions, contrary to the Advocate-General's suggestion, indicate that the arguable economic benefit to consumers by increased manufacturer competition in a member State is important to decide the "inter-state trade" clause result.⁴¹ *Grundig* can be read to imply that the *evidence* necessary to condemn an agreement is the same for either clause. The later cases can be read to imply that the *analysis* under both clauses is the same. Therefore, the inference is that the two clauses are indistinguishable.

Moreover, the evidence which the Court in *Grundig* used to declare the agreement void included product differentiation, the existence of other agreements by the same distributor with retailers in other member States, and the degree to which national law augmented or decreased the protection provided by the litigated agreement. This evidence implies that the Court of Justice's rule of reason is concerned more with establishing a certain economic pattern than with weighing possible harms and benefits within that pattern.⁴² Against this inference is the possible reading of

40. *E.g.*, C.J.C.E. 9 juillet 1969 (*Völk v. Ets. J. Vervaecke S.P.R.L.* 5-69) [1969] 15 Rec. 295, 8 C.M.L.R. 273 (1969).

The Commission has recently adopted the position that medium size firms may enter into certain co-operative practices, upon entering the European Economic Community, and not violate Article 85(1), *Industry, Research and Technology Bulletin*, (January 23, 1973), CCH COMM. MKT. REP. ¶ 9546 at 9217. Whether absolute territorial protection will be allowed these producers, see C.J.C.E. 9 novembre 1971 (*Béguelin Import Co. v. G.L. Import Export SA* 22-71) [1971] 17 Rec. 949, 11 C.M.L.R. 81 (1972) (interpreting Commission Regulation No. 67/67 to not exempt any agreement with a clause against re-exportation), awaits future action by the Commission and by the Court. See note 45 *infra*.

41. See text accompanying notes 56-57 *infra*. But see A. PARRY & S. HARDY, EUROPEAN ECONOMIC COMMUNITY LAW 282 (1973) (the "inter-state trade" clause is of little significance since it is unlike the rule of reason formulated by the United States Supreme Court).

42. The Court seeks to establish the presence of certain economic and legal factors. The economic factors are chiefly the relative size of the producer in the product market and the differentiation which the product possesses in that market. The legal factors include chiefly the degree of absolute territorial protection provided and the presence of similar agreements running from the same distributor to other retailers in other member States. From the Court's stated reasons for condemning the *Grundig-Consten* agreement, see note 39 *supra*, it is clear that the absolute protection present in more than one

later decisions which, at least as argued by the Advocate-General, indicates an awareness that more than an establishment of an economic pattern should be required before the litigated agreement is declared void or valid under Community law. Regardless of the requisite evidence or analysis under either clause of Article 85(1), the *Grundig* position — that, when strong parties agree to absolute territorial protection for a differentiated product, evidence of inter-brand competition is superfluous — should be considered a valid statement of the law.

The *Grundig* construction of Article 85(1) is within the conceptual framework enunciated by the Court of Justice in its other 1966 decision, *Technique Minière*. The salient factual distinction between these two cases is that, in the former, absolute territorial protection was provided by the agreement while, in the latter, less than absolute territorial protection was provided.⁴³ *Technique Minière* was a referral decision, and the Court was, therefore, asked to give guidance to the national court on the meaning and purposes of Article 85(1). In its guidance, the Court refused to condemn per se all exclusive distributorship agreements. Instead, the Court proffered a broad outline of Article 85(1).

[T]he agreement containing a clause 'granting an exclusive right of sale' has been concluded between undertakings, whatever may be their respective positions in the various stages of the economic process.

Considered on the basis of a series of objective legal or factual elements, the agreement is such as to lead to a reasonable expectation that it may be able to exercise an influence, whether direct or indirect, actual or potential, on trade between member-States capable of hindering the realisation of a single market among the said States.

In this respect, examination should particularly be made whether the agreement is capable of partitioning the

Member-State enabled the Court to condemn the agreement. In this decisional process under Article 85(1), which measures the agreement between a backdrop of certain undesirable consequences for the goal of a single market between the States, the Court's rule of reason may be compared to the opinion of Justice Douglas in *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

43. As found by the Cour d'Appel de Paris, the distributor, *Technique Minière*, agreed to receive from the producer the exclusive sales rights to one product for the territory of France. The agreement, in distinction from the agreement in *Grundig*, did allow *Technique Minière* to re-export the product into areas other than the territory for which it was ". . . principally responsible. Furthermore, any French purchaser would be able to obtain supplies by parallel imports in other countries of the Common Market." *Technique*, 12 Rec. at 341, 5 C.M.L.R. at 358.

market in certain products between the member-States. The agreement has either as its object or its effect the prevention, restriction or distortion of competition.

If the sale concession agreement is considered with regard to its object, the finding should result from all or part of its clauses considered in themselves.

If these conditions are not met, the agreement should then be considered with regard to its effect to find either that it prevents or that it restricts or distorts competition to a noticeable extent.

In this connection, examination should in particular be made of the severity of the clauses granting the exclusive right; the nature and quantity of the products which are the subject matter of the agreement; the positions of the grantor and concessionaire on the market for the products in question; and the number of parties to the agreement or, where applicable, to other agreements forming a part of a single series.⁴⁴

From the Court's directive to the national court, it is clear that under both clauses of Article 85(1) economic analysis is necessary to decide the "may affect" and the "effect" problem of the litigated agreement. The economic analysis, however, is not delineated, and questions such as the relevance of the producer's market share are unanswered. In comparison with *Grundig*, one arguable answer to the market share question is that such a determination is relevant to both the "may affect" and the "effect" questions. What is interesting is that both *Technique* and *Grundig* leave the suggestion that no economic data is relevant to deciding the agreement's "object". In *Technique*, however, the Court did state that certain economic factors, noticeably those relevant to the closing of the channels of re-exportation and parallel importation, were relevant to a determination of the agreement's "object or its effect".⁴⁵ It is submitted that the economic

44. *Id.* at 361-62, 5 C.M.L.R. at 377.

45. *Id.* at 360, 5 C.M.L.R. at 376. The Court accorded the same weight to various economic and legal factors which compose the analysis under Article 85(1). This treatment, when the agreement lacked provisions against re-exportation and parallel importation, suggests that these two factors are not necessary for the agreement to be declared void by Article 85(2). If this suggestion remains valid, then the possibility of balancing intra-brand harms within a series of protected territories against inter-brand benefits within the same territories exists. In this regard, note that the Court required a comparison of the state of competition before the agreement with its state following the implementation of the agreement, *Technique*, 12 Rec. at 359, 5 C.M.L.R. at 375. Then the Court stated: "[I]n particular, the alteration . . . of competition may be thrown in doubt if

evidence used to decide "effect" should decide the agreement's "object" as well. Whether this solution will be adopted is solely in the realm of speculation. Literally, according to *Technique*, however, the agreement's "object" may be found to be in violation of Article 85(1) even though no economic data is used.

In *Völk v. Vervaecke S.P.R.L.*,⁴⁶ a 1969 referral decision, the Court was presented with the opportunity to clarify the "object" standard. In this case, two parties without market strength entered into an agreement to distribute a small number of washing machines under an absolute territorial protection agreement coincident with national boundaries. Except for the fact that the manufacturer's brand was little known and its market share minute, the *Völk* agreement was virtually identical with the agreement presented to the Court in *Grundig*.⁴⁷ This virtual identity created the opportunity for the Court to decide that the creation of absolute territorial protection did not per se violate the "object" standard.

The Advocate-General perceived this opportunity and argued that the per se "object" implications from *Grundig* and that the language from *Technique* should be limited to the economic context of those cases.⁴⁸ He contended that to find a violation of the "object" standard, the "examination should reveal a sufficient degree of harmfulness with regard to competition." Therefore, he submitted that more than a theoretical injury to competition should result from the agreement for it to be condemned under the "object" standard.

the said agreement appears *precisely* necessary for the penetration of an undertaking into an area in which it was not operating." *Id.* at 360, 5 C.M.L.R. at 375 (emphasis added). Because Article 85(3), which involves a balancing of the harms and benefits by the Commission with limited review by the Court (see note 28 *supra*), was not before the Court, the Court, at least in terms of advice on referral decisions, appears to be incorporating a United States type of rule of reason (Article 85(3)) into the analysis of Article 85(1). See *Sandura Co. v. Federal Trade Comm'n*, 339 F.2d 847 (6th Cir. 1964) (holding valid an exclusive distributorship agreement when it enabled a manufacturer to enter a new market dominated by three other concerns).

46. C.J.C.E. 9 juillet 1969 (*Völk v. Ets. J. Vervaecke S.P.R.L.* 5-69) [1969] 15 Rec. 295, 8 C.M.L.R. 273 (1969) (hereinafter cited as *Völk*).

47. In both cases the vertical agreements provided absolute territorial protection coincident with national boundaries.

48. [F]or Article 85(1) to be applicable, the examination should reveal a sufficient degree of harmfulness with regard to competition. That amounts to saying that the alteration in competition . . . should be on a certain scale, and there [on the "object" standard] we are not very far from the "noticeable" restriction, which [*Technique*] requires when the agreement is being considered not as to its object but as to its effects.

15 Rec. at 305-06, 8 C.M.L.R. at 279.

The Court, however, did not fully exploit this opportunity to clarify the "object" standard. Instead, it reiterated the broad standards of the two clauses, including "object or effect", and stated that both "should be understood by reference to the actual context in which the agreement" existed.⁴⁹ This language seems to imply that the same evidence and analysis that is proper under the "may affect" clause to find a violation of it could suffice to find a violation of either the "object" or the "effect" standard. This implication is present in two subsequent referral decisions involving vertical agreements under Article 85(1). In *S.A. Cadillon v. Firma Höss, Maschinenbau K.G.*,⁵⁰ the Court of Justice stated that the agreement not only must affect trade in such a way as to hinder the realization of the objectives of a single market between States, but also must have the object or effect of preventing competition within the Community. To decide if trade were affected, the national court was to consider the objective elements of law and fact surrounding the agreement.⁵¹ Similarly, to decide if the agreement distorted competition, the national court had to examine the agreement in the actual context in which it existed.⁵²

This difficulty in separating the standards of the two clauses of Article 85(1) perhaps underlies the refusal of the Court of Justice in *Béguelin Import Co. v. G.L. Import Export SA*⁵³ to clearly separate them analytically in its advice to the national court. According to the Court:

[A]n exclusive agency agreement is capable of affecting trade between member-States and may have the *effect* of hindering competition where the concessionaire can prevent parallel imports. . . .

[T]he agreement must affect noticeably the trade between member-States and competition.

[I]n judging whether a contract containing a clause granting an exclusive sale is *justiciable* under the Article,

49. *Id.* at 302, 8 C.M.L.R. at 282.

50. C.J.C.E. 6 mai 1971 (*Société Anonyme Cadillon v. Firma Höss, Maschinenbau K.G.* 1-71) [1971] 17 Rec. 949, 10 C.M.L.R. 420 (1971) (hereinafter cited as *Cadillon*).

51. 17 Rec. at 356, CCH COMM. MKT. REP. ¶ 8135 at 7542.

52. *Id.*

53. C.J.C.E. 9 novembre 1971 (*Béguelin Import Co. v. G.L. Import Export SA* 22-71) [1971] 17 Rec. 949, 11 C.M.L.R. 81 (1972), discussed in 9 COMM. MKT. L. REV. 491 (1972) (hereinafter cited as *Béguelin*).

account should be taken of [the economic nexus of the producer's agreement with his distributor].⁵⁴

This advice to the national court indicates that the two clauses of Article 85(1) are separable only as to the role they possess. The first clause, "inter-state trade", determines justiciability under Community law. The same factors that would cause the agreement to be justiciable, however, would seem to cause the agreement to be condemned under the "effect" standard. Whether these economic factors are relevant to the "object" standard is unclear from the *Béguelin* language. However, if the Court chooses to adopt the Advocate-General's *Völk* position that more than a theoretical injury is required under the "object" standard, the incorporation of an economic analysis under it would follow.⁵⁵

Another aspect of the Advocate-General's argument in *Völk* is present in the two subsequent referral decisions of *Cadillon* and *Béguelin*. In *Völk* the quantity of goods covered by the agreement was quite small. The producer was not well known and the product was treated by the Advocate-General as if it lacked market differentiation.⁵⁶ Because of this, he argued to the Court that the manufacturer's market share was important to the determination of whether the "object or effect" clause of Article 85(1) was violated. The Court agreed that market share was important, albeit

54. 17 Rec. at 960, 11 C.M.L.R. at 96.

55. The Court stated: "[T]he agreement must affect noticeably the trade between member-States and competition." The use of the word "noticeably" is significant. In *Völk* the Advocate-General urged that the "object" standard was close to the "effect" standard, see note 48 *supra*. In *Béguelin*, the Advocate-General maintained that agreements are prohibited by Article 85(1) when they "have the object or effect of noticeably preventing, restricting or distorting competition within the Common Market." *Béguelin*, 17 Rec. at 967-68, 11 C.M.L.R. at 89 (emphasis added). An analysis emphasizing the recurrence of "noticeably" in the discussion of the disjunctive "object or effect" clause leads to the conclusion that the standards under these two clauses have merged. This conclusion leads to the judgment that the *Technique* distinction of "object" from "effect" — when absolute territorial protection is provided, there is no need to look at effects; when less than absolute territorial protection is provided, effects must be viewed — has been abandoned.

A contrary argument, however, exists. *Béguelin's* facts did not establish whether absolute territorial protection was provided by the agreement, *Id.* at 965, 11 C.M.L.R. at 86. Therefore the Court was not overruling the *Technique* framework. This argument, however, ignores the analysis by the Court in *Grundig* of market effects even though the agreement in that case provided absolute territorial protection, see notes 37-38 *supra* and accompanying text.

56. The Advocate-General argued:

[T]he *Grundig* judgment took particular account of the fact that the trademark was *very widespread* in judging the influence on the functioning of competition in the Common Market. . . . It may be concluded from this that an agreement of the same nature but relating to products bearing a practically unknown trademark would not have received from you the same judgment and the same severity.

Völk, 15 Rec. at 306, 8 C.M.L.R. at 280.

important to determine a violation of the "inter-state trade" clause. Therefore, the reasoning behind the Advocate-General's suggestion may be relevant to the future development of the Court's rule of reason. The Advocate-General contended that, with a large producer, competition would be affected noticeably at the distributor level if the agreement provided absolute territorial protection. With a small producer, the Advocate-General was unsure of such an agreement's impact. He considered that the producer would be able to enter the market, which was desirable, but he did not think the agreement would reduce the consumer's choice of products. Moreover, he argued that with a small market share held by the producer, the ability of other producers to enter the protected territory would be unimpaired.⁵⁷ The implication from this argument, on one level, is that there should not be a per se "object" standard under Article 85 (1). On a more fundamental level, the Advocate-General was arguing for incorporation of a harms and benefits analysis and factual inquiry into the *Grundig* formulation of the rule of reason.⁵⁸

In *Cadillon*, the German manufacturer, Höss, had granted the French distributor, Cadillon, the exclusive right to sell Höss cement hoppers and containers in France. The deal was renegotiated and in addition to the exclusive distributorship rights pro-

57. *Id.* This reflects a balance of intra-brand harms and inter-brand benefits similar to that suggested by the United States Supreme Court in *White Motor Co. v. United States*, 372 U.S. 253 (1963) and applied by the Sixth Circuit in *Sandura Co. v. Federal Trade Comm'n*, 339 F.2d 847 (6th Cir. 1964), see text accompanying notes 15-17 *supra*. In *Grundig*, the Court held that the Commission need not consider evidence of inter-brand competition in formulating its decision, see text accompanying note 36 *supra*. Yet, in discussing whether the "effects" of an agreement within the geographic market of one member-State sufficed to condemn the agreement, see note 39 *supra*, the Court did consider the harms and benefits to competition and decided that preferring inter-brand competition at the cost of absolute territorial protection would not comport with Article 85(1). The Court reasoned that producer competition would be best stimulated by "competition between distributors of products of the same brand." *Grundig*, 12 Rec. at 497, 5 C.M.L.R. at 474. In *Technique*, however, the Court did advise the national court to consider the new entrant to the market at the producer level somewhat more specially, presumably on the rationale that in such a situation, if absolute territorial protection were precisely necessary for entry, the inter-brand benefits would outweigh the loss of intra-brand competition, see note 45 *supra*. Unless the Court is distinguishing review of Commission decisions (*Grundig*) from advice on referral decisions (*Technique*) it appears that under Article 85(1) a harms and benefits legal hypothesis already exists.

58. See note 42 *supra* and accompanying text. As formulated in note 57 *supra*, a balance of harms and benefits under Article 85(1) currently exists as a legal hypothesis in the Court's construction of the provisions of the Article. The argument of the Advocate-General in *Vijk* appears to go beyond this and to seek a factual examination of each case under a harms and benefits analysis. If this were accepted by the Court, query the role of Article 85(3) as discussed in note 28 *supra*.

vision, the agreement provided that the quantity of products to be distributed would be thirty per year. Subsequently, Höss reneged, Cadillon brought suit in a national court, and Höss defended on the ground that the agreement violated Article 85(1). In addition to advising the national court in the *Völk* rubric about the meaning, purposes and standards of the two clauses, the Court advised the national court to consider if Commission Regulation No. 67/67 exempted the agreement. The Advocate-General had cautioned against this. He argued that even if the turnover of goods under the agreement was of *de minimis* dollar value, the product market might be so specialized that the agreement could come within the prohibitions of Article 85(1).⁵⁹ The thrust of his position is that *Völk* should not be used to establish a *per se* exemption from the Article for weak parties with small volume agreements.

The Advocate-General reiterated this argument in *Béguelin*. In this referral case, two separate commercial companies in two different member States possessed exclusive agency agreements with a manufacturer in a non-member State. The vertical aspects of the agreements provided the retailers with absolute territorial protection. When a third party distributor sought to export the same product into France, one of the protected territories, the aggrieved distributor sought to have the exportation enjoined. The defendant, third party distributor, asserted that the agreement violated Article 85(1). The Advocate-General maintained that even if the agreement were of a slight product volume significance and even if the parties were of medium size or smaller, the special characteristics of the product market might cause the agreement to be prohibited by Article 85(1). The Court, in advising the national court, did not find it necessary to comment on this point. Instead, as mentioned earlier, the Court reiterated the *Völk* rubric.

The position of the Court in *Völk*, *Cadillon* and *Béguelin* has

59. *Cadillon*, 17 Rec. at 361, 10 C.M.L.R. at —, CCH COMM. MKT. REP. ¶ 8135 at 7546.

The Commission has by an announcement considered that agreements which relate to a very small undertaking will not fall under Article 85(1). This may be considered as a 'statutory' form of a *de minimis* rule, supplementing the judicially developed 'rule of reason' which is broader than the Commission's formulation.

If the product is less than five per cent of the market or when the total turnover under the agreement is less than 15 million units of account, the *de minimis* principle as formulated by the Commission exempts the agreements from the operation of the antitrust provisions. *O.J.*, 2 June 1970, No. C 64/1, recently amended by Regulation 2591/72 of December 1972.

been consistent, but has not dealt with the arguments of the Advocate-General. In *Völk*, the Advocate-General maintained that if the parties are weak and their product lacks differentiation, their agreement, even if it provides absolute territorial protection, should not be declared void under Article 85(1) without some balancing of the harms and benefits that would arise upon the producer's entry into the market. In *Cadillon* and *Béguelin*, the Advocate-General maintained that even without absolute territorial protection, the Court should consider an agreement providing for distribution of a differentiated product to be within the prohibition of Article 85(1).

Taken together with the decisions of the Court of Justice in 1966, these positions of the Advocate-General provide a certain symmetry. In *Grundig*, the result of condemnation of an absolute territorial protection agreement between strong parties with a differentiated product is symmetrical with *Völk*, which indicates that an absolute territorial protection agreement between weak parties with a non-differentiated product should not be declared void. The decisions in these two cases appear to depend upon an examination of the economic context of the agreement and the product. For this reason, perhaps, the Advocate-General has maintained that *Grundig* was a special case⁶⁰ and that it should not be used to condemn per se all agreements which provide absolute territorial protection. Similarly, by his product differentiation arguments in the weak distributor-weak product context of *Cadillon* and *Béguelin*, the Advocate-General has cautioned against *Völk* being used as a per se exemption.⁶¹ Whether this symmetry will be accepted by the Court is a question whose answer will come only at a future date.

CONCLUSION

The Court of Justice of the European Communities has interpreted Article 85(1) of the Treaty of Rome in light of the Treaty's objectives of fostering a Common Market and ensuring competi-

60. See note 56 *supra*.

61. *Völk* would be used as a per se exemption if it were thought that a small turnover of goods under the agreement made it incapable of "affecting" trade. As argued by the Advocate-General.

it is perfectly possible for an agreement, even when it bears on small quantities of products and even when it is concluded between small and medium-sized undertakings, to fall under Article 85 of the Treaty by reason of the special characteristics of the markets in the products in question.
Béguelin, 17 Rec. at 968, 11 C.M.L.R. at 90.

tion therein. Competition, as defined by the Commission of the European Communities, is "a single market within which people, goods, services, capital and companies enjoy freedom of movement."⁶² This definition presupposes a broader vision than that of an exclusive distributorship agreement insulating a market along national boundary lines. An interesting problem, therefore, could arise when an agreement absolutely protects a territory not coincidental with national boundaries.

Aside from this problem, the decisions of the Court of Justice do indicate the formulation of a rule of reason. This rule, as presently formulated by the *Grundig* decision, considers vertical distributorship agreements in the light of certain economic factors. The rule, as developed by the decisions, generally does not balance harms and benefits. Instead, the rule seeks to establish certain economic results of the agreement which are then used to declare it void or valid. In tension with this formulation is the thrust of the Advocate-General's arguments in *Völk*. While accepting the economic context, this position requires some balancing of the benefit of a new producer in a market against the harm to competition throughout the Community.

As formulated by Court decision, the meaning, purposes and standards of "may affect" in the first clause and "effect" in the second clause of Article 85(1) are basically identical. A current

62. Information Note from the Commission of the European Communities, No. P-31 (June 1973), CCH COMM. MKT. RPTER. ¶ 9574 at 9290.

63. Article 38(1) of the Statute of the International Court of Justice does not list the jurisprudence of a supranational court, such as the Court of Justice of the European Communities, or even its own jurisprudence, as a source of international law. This should not prevent a consideration of the jurisprudence of the Court of Justice as a source of international law. Otherwise, neither would the case law of the existing world court be considered a source of international law. See generally, Scheingold, *The Court of Justice of the European Communities and the Development of International Law*, 59 AM. SOC. INT'L L. PROCEEDING 190 (1965); Hay, *The Contribution of the European Communities to International Law*, *Id.* at 195, 199.

Assuming the validity of using the decisions of the Court of Justice of the European Communities as a source of international law, under an inductive approach to international law the rules of interpretation that may be adduced from the Court's cases are considered as sources of new rules of international law. Without arguing the point, the proposition does exist that the process of reasoning advanced by the Court of Justice is one that may be followed by future courts such as the one in the East African Common Market. It is not suggested that this development in any sense will have a direct bearing on the work of future supranational or regional courts, or existing international courts. It is suggested that the Court of Justice's rule of reason is a jurisprudential development that merits consideration by these other courts as a viable and flexible approach to interpreting treaty provisions of an economic nature. Thus, while the Court of Justice's rule of reason is by no means fully developed, the existing development holds lessons for European and international lawyers.

problem is the question of the necessity for economic evidence under the "object" standard of the second clause. The movement of the decisions seems to indicate that this evidence will be required.

Regardless of these problems, which await a case by case solution, the Court of Justice has decided that complex matters of economics and trade cannot be decided in the abstract vacuum of the words of Article 85(1). This decision is welcome.