EUROPEAN UNION COMPETITION LAW

*H. Thomas Hefti**

I. Introduction

In the European Union (EU), competition law refers to the specialty that in the United States would be referred to as antitrust law. Although this simple analogy may provide the American reader a vague definition of competition law, it would be wrong to assume that American antitrust and EU competition law are identical. Each system has its peculiarities due to the nature of the legal system within which it has to be implemented. American antitrust law, probably the oldest modern antitrust legislation in the world, was just one more set of rules added to a well established and functioning legal system. Comparatively, EU competition law is a young form of antitrust legislation, created by the Treaty Establishing the European Economic Community (EEC) of 1957 (the EEC Treaty or Treaty).[1] It has also been interpreted and applied with a view to the particular finality of the EU, which is the integration of the different Member States' economies into a common market and the harmonization of their legislation. In spite of these significant differences, many similarities can be found because both antitrust legislations pursue, in the final analysis, somewhat similar aims.

The purpose of this contribution is to offer the reader a general survey of EU competition law—its material rules and enforcement mechanisms. The first part highlights the history of the EU.

* Licencié en droit (1984) and docteur en droit (1988) of the Neuchtel University Law School (Switzerland); LL.M., Queen Mary and Westfield College (University of London), 1992. Member of the Zürich and Swiss Bar, practicing in Glarus and Zürich, Switzerland.

1 TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]. The European Union (EU) is based upon various treaties: the Treaty Establishing the European Coal and Steel Community of 1951 (ECSC Treaty), the EEC Treaty and the Treaty Establishing the European Atomic Energy Community (Euratom Treaty). The latter two treaties were signed in Rome in 1957, and therefore also called the Rome Treaties. The Merger Treaty of 1965 established common Commissions and Councils for the three treaties, which were then commonly known as the European Communities (EC). The Treaty of 1991 signed at Maastricht introduced the term "European Union" to replace the term EC.

The second presents the material rules of EU competition law and its enforcement. In the third part, we examine in more detail, particularly in the field of patent licensing and comparing U.S. and EU law, conflicts that may arise between the specialties of intellectual property and antitrust law. The last section briefly deals with the EU Merger Regulation.

II. Historical Background

The aim of the EEC Treaty, signed in Rome in 1957 by Belgium, the Federal Republic of Germany,[2] France, Italy, Luxembourg and the Netherlands, was to establish a European Economic Community. To achieve this goal, the signatory States agreed to transfer several important sovereign competences to EEC institutions, particularly in the fields of customs, commercial policy towards third-party countries, transport, agriculture and competition. By implementing the Treaty, the six States intended to achieve the free circulation of goods, persons, services and capital within the Community.[3]

The following four institutions were established by the EEC Treaty: a Council, a Commission, a European Parliament and a Court of Justice.[4] The Members of the Council are normally the ministers of each Member State, each responsible for the matter they deal with in their respective Member States. Thus, the ministers of agriculture would attend meetings dealing with agricultural policy, and the finance ministers would attend if the subject matter concerns a budgetary or tax issue. Unless otherwise provided for by the Treaty, the Council acts by a majority of its members; certain matters require unanimity and others a qualified majority. Where the qualified majority is required, each country is attributed a certain number of votes ranging from two for Luxembourg to ten for Germany, France, Italy and the United Kingdom.[5] The Council primarily ensures that the objectives of the Treaty are attained, adopts regulations and confers upon the Commission the power to implement rules that the Council lays down.[6] Although the members are from the executive branches of their respective countries,

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2 The western part of Germany prior to 1990.

3 *See* EEC TREATY art. 3.

4 *Id.* art. 4.

5 *Id.* art. 148.

6 *Id.* art. 145.

the Council has rather legislative functions on the Community level.

The Commission, presently consisting of seventeen full-time Commissioners,[7] has its own decisionmaking power and may best be described as a kind of executive. Its main tasks are to ensure that the Treaty provisions, and those measures taken by the institutions pursuant thereto, are applied and to take part in the molding of measures taken by the European Parliament and the Council.[8] The Treaty and certain Council regulations gave the Commission important powers relating to competition issues,[9] and based upon these powers, it enacted a series of regulations that prominently contributed to the shaping of EU competition law.

Despite its name and tendencies to considerably strengthen its role, the European Parliament still has a rather deliberative function.[10] It holds certain competences in budget matters, as well as in the preparation of EU legislation. International association and cooperation agreements between the EU and other states or international organizations, as well as the admittance of new Member States, need its approval.[11] The European Parliament consists presently of one house with 518 members who have been directly elected in the Member States for a period of five years. Being the only directly elected institution in the EU, the Parliament is considered the democratic element.[12] Pressure to enlarge its competences will increase rather than decrease in years to come. The role of the Council and possibly also that of the Commission might diminish as a consequence.[13]

The Court of Justice (the Court), consisting of thirteen judges, "shall ensure that in the interpretation and application of th[e]

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7 *Id.* art. 157. It must include at least one national of each of the Member States, but no more than two of the same State. *Id.* Presently, France, Germany, the U.K., Italy and Spain have two Commissioners each.

8 *Id.* art. 155.

9 *See infra* part III(D).

10 *See* EEC TREATY arts. 137-48 (establishing an European Parliament).

11 Thus, the agreement on the European Economic Area had to be approved by the European Parliament. *See infra* notes 22-23 and accompanying text.

12 OFFICE DES PUBLICATIONS OFFICIELLES DES COMMUNAUTÉS EUROPÉENNES, LE DOSSIER DE L' EUROPE, LES INSTITUTIONS DE LA COMMUNAUTÉ EUROPÉENNE 2 (Aug. 1991).

13 There are opinions that would like to link a further increase of the Parliament's competences to a general reform of its role, with a view toward establishing two houses.

Treaty the law is observed"[14] and has the task of reviewing the legality of acts (other than opinions or recommendations) passed by the Council and the Commission.[15] Under certain circumstances, any court or tribunal within a Member State may ask the Court to give a preliminary ruling concerning the interpretation of the Treaty or the validity and interpretation of the acts of the institutions of the Community; in situations where there is no judicial remedy under the national law, such court or tribunal is *required* to bring the matter to the Court.[16] In practice, the Court proved to be a powerful and efficient ally of the Commission. It upheld most of the Commission's decisions in competition matters that were motivated by the intention to promote the integration of the economies of the Member States into a common and single market.[17] In 1989, the Council decided to attach to the Court a Court of First Instance consisting of twelve judges.[18] Parties may appeal to the Court on a point of law given by the Court of First Instance.

Even though the Treaty obviously strives to attain economic aims, the Member States also shared the intention of gradually achieving strengthened political integration.[19] This is particularly true for the Single European Act of 1986[20] and the Maastricht

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14 EEC TREATY art. 164.

15 *Id.* art. 173.

16 *Id.* art. 177. *See also* note 63 and accompanying text.

17 The Court hardly ever quashed a Commission decision in a competition issue; this has been changing to some extent since the establishment of the Court of First Instance, which has a far more critical view towards decisions given by the Commission in the field of competition law. *See, e.g.*, Case T-44/90, La Cinq SA v. Commission, 4 C.M.L.R. 449, 464 (Ct. First Instance 1992) (holding Commission can not make adoption of interim measures conditional on proof of clear, flagrant infringement at prima facie stage); Joined Cases T-79, T-84-86, T-89, T-91-92, T-94, T-96, T-98, T-102 & T-104/89, *Re* the PVC Cartel: BASF AG v. Commission, 4 C.M.L.R. 357 (Ct. First Instance 1992) (holding competition Commissioner proscribed from adopting decisions alone or after his mandate expired and that his decision should have been issued in the languages spoken by the parties).

18 *See* Council Decision of 24 October 1988 Establishing a Court of First Instance of the European Communities (88/591/ECSC, EEC, EURATOM), 1989 O.J. (C 215) 1.

19 The Treaty provides that "[t]he 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 harmonious development of economic activities . . . and closer relations between the States belonging to it." EEC TREATY art. 2. *See also* EEC TREATY Preamble (resolving to eliminate the barriers that divide Europe by ensuring economic and social progress in Member States); CHRISTIAN PHILIP, LES INSTITUTIONS EUROPÉENNES 207 (1981) (French).

20 1987 O.J. (L 169) 1 (amending EEC TREATY) (effective July 1, 1987). The Act

Treaty of 1991.[21] The signatory States fixed the principle in Article 237 of the Treaty that any European state may apply to become a member of the Community; thus, the EEC of "the Six" has become the EU of twelve Member States, admitting the United Kingdom, Ireland and Denmark in 1973, Greece in 1981 and Spain and Portugal in 1986. In 1992, the EU and the European Free Trade Association (EFTA), comprised of Norway, Sweden, Finland, Iceland, the Principality of Liechtenstein, Austria and Switzerland, signed the Agreement on the European Economic Area (EEA).[22] The agreement was ratified by the then EU and the EFTA countries, with the exception of Switzerland.[23] As a consequence of the EEA agreement, EU competition law applies throughout the whole territory of the EEA, covering a population of about 350 million. Anyone interested in operating in this market or exporting into the EU/EEA may be subject to EU competition law. It is, therefore, certainly a matter of interest not only for Europeans but also for business-venturing persons in the United States.

III. *Core Dispositions of EU Competition Law*

A. *Preliminary Remarks*

The basic rules of EU competition law are found in Articles 85 through 94 of the Treaty and must be read together with Article 3(f), which states that the activities of the Community shall include "the institution of a system ensuring that competition in the common market is not distorted."[24] The most relevant articles for pri-

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was designed to accelerate the process of European intergration by aiming at the completion of the internal market by the end of 1992.

21 The Treaty was signed on February 7, 1992, and became effective on November 1, 1993.

22 *See* Draft Treaty on a European Area, 1 C.M.L.R. 921 (1992). The institutions and the decisionmaking procedures within the EEA are thoroughly analyzed in Christophe Reymond, *Institutions, Decision-making Procedure and Settlement of Disputes in the European Economic Area*, 30 COMMON MKT. L. REV. 449 (1993).

23 The Swiss Federal Council failed to obtain a majority of the people and the 23 Cantons (states) for the ratification. Switzerland, therefore, cannot enjoy the rights stemming from that agreement, but is also not obliged to accept its articles. Situated almost in the middle of Europe, Switzerland nevertheless has various links with the EU, particularly a free trade agreement concluded in 1972.

24 EEC TREATY art. 3 (f). A comprehensive overview of EU competition law can be found in IVO VAN BAEL & JEAN-FRANCOIS BELLIS, COMPETITION LAW OF THE EEC (1987); D.G. GOYDER, EEC COMPETITION LAW (1988); VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE (3d ed. 1986); and RICHARD

vately owned companies and businesspersons are Articles 85 and 86. Articles 87 through 89 deal mainly with the enforcement of these material rules, Article 90 relates to public "undertakings," Article 91 to dumping and Articles 92 to 94 to aids granted by States. This contribution is limited to Articles 85 and 86, leaving the rules about dumping and the very intricate field of State-granted aid to other competent writers.

B. *Article 85*

Article 85 is drafted as follows:

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;
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> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
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> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
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> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
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> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

WHISH, COMPETITION LAW (2d ed. 1989). If we add French and German authors, we have to mention that books written in languages other than English are not at all of minor importance; since the establishment of the EEC, French and German-speaking authors have made most prominent and eminent contributions. *See, e.g.*, MARTIN HIRSCH ET AL., KOMMENTAR ZUM EWG-KARTELLRECHT (3d ed. 1978) (German); ERNST-JOACHIM MESTMÄCKER, EUROPÄISCHES WETTBEWERBSRECHT (1974) (German); GIDE LOYRETTE NOUEL, LE DROIT DE LA CONCURRENCE DE LA C.E.E. (4th ed. 1982) (French).

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

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

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[25]

The system seems fairly obvious. Paragraph one sets forth a general prohibition against any restriction, prevention or distortion of competition. Paragraph two identifies the "civil law sanctions" if section one is violated. Finally, pursuant to paragraph three, the provisions of paragraph one may, under certain circumstances, be declared inapplicable. This extremely general observation already shows the difference between the United States and the "European" approach to antitrust matters. The Sherman Act[26] does not contain a provision that would be analogous to paragraph three of Article 85. Therefore, when an American court came to the conclusion that a certain form of behavior was of no harm from the point of view of the antitrust legislation, it had to state that it was not encompassed by the legislation at all. That was the origin of the "rule of reason" approach, developed in legal conditions that are not identical to those in the EU.[27] Briefly summarized, while the EU needs the Commission and the Court to grant exemptions from a general prohibition, the U.S. system is not concerned with exemption. Therefore, the determination of whether a practice is within the purview of the Sherman Act is left

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25 EEC TREATY art. 85.

26 *See infra* note 131.

27 *See* WHISH, *supra* note 24, at 24-25. Under the rule of reason approach, a court is required to weigh the pro- and anti-competitive effects of the agreement. *Id.*; *see also* Spencer W. Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55, 62 (1992) (sole question under the rule of reason is the competitive effect of the agreement under examination, not "whether collusion was reasonable in order to promote some other societal goal.").

to the businessperson and their counsels, leaving heavy fines imposed if they make the wrong determination.

1. Article 85 (1)

The Treaty uses the term "undertakings" to designate the entities that are subject to EU competition law. Because the Treaty does not define the term, its interpretation was left to the Commission, and eventually the Court. They did not intend to adopt a narrow meaning; an undertaking may be any natural or legal person, or any sort of entity, that carries out some economic or commercial activity.[28] In a number of decisions, the Commission and the Court had to determine the meaning of "agreements," "decisions by associations of undertakings" and "concerted practices." A fully drafted agreement is obviously within the scope of the article. The same is true for oral agreements,[29] gentlemen's agreements[30] and understandings.[31] Even a compromise of litigation[32] may fall

[28] In a rather recent case, the Court held that an undertaking means an economic unit and not, in juridical terms, one person. Case 170/83, Hydrotherm Gerätebau GmbH v. Compact de Dott. Ing. Mario Andreoli & CSAS, 1984 E.C.R. 2999, 3 C.M.L.R. 224, 242 (1985); *see also* WHISH, *supra* note 24, at 214 (undertaking is a legal or natural person capable of conducting some economic or commercial activity in the service or goods sectors).

[29] *See, e.g.*, Case 28/77, Tepea BV v. Commission, 1978 E.C.R. 1391, 3 C.M.L.R. 392, 414-15 (holding oral agreement appointing sole distributor and granting exclusive right of use to a trademark, which binds the undertakings, is an Article 85 (1) agreement).

[30] *See, e.g.*, Case 41/69, ACF Chemiefarma NV v. Commission, 1970 E.C.R. 661, 693-94 (gentlemen's agreement may constitute "agreement" if it contains clauses restricting competition in EC and its clauses are a faithful expression of the mutual intentions of the parties).

[31] *See, e.g.*, Commission Decision 506/82, *Re* the Agreements of Stichting Sigarettenindustrie, 1982 O.J. (L 232) 1, 3 C.M.L.R. 702, 741 (understanding may constitute an agreement even if its terms have not be memorialized in a signed writing). In some instances, even the exchange of information between competitors constituted an infringement. *See, e.g.*, Commission Decision 1/87, *Re* Fatty Acids: The Community v. Unilever NV, 1987 O.J. (L 3) 17, 4 C.M.L.R. 445, 456 (1989) (agreement among three major producers involving exchange of confidential information about traditional market positions and providing a means of monitoring their future performance had restrictive effect upon competition).

[32] *See* WHISH, *supra* note 24, at 218 (citations omitted). The Commission seems to be of the opinion that in the context of arbitration proceedings, parties might be willing to settle differences by including clauses in the award that could infringe competition law. The block exemption regulations on patent licensing, *see infra* note 48, at 9 (1), and know-how licensing, *see infra* note 52, at 7 (1), explicitly mention that an infringement "sanctioned" by an arbitration award could not benefit from the regulations.

within the definition. The most crucial questions arise when it comes to defining "concerted practices." The Court held that such practices could consist of "a form of co-ordination between undertakings which, without going so far as to amount to an agreement properly so called, knowingly substitutes a practical co-operation between them for the risks of competition."[33] Needless to say, proving a concerted practice is a highly difficult task, but the Court in many cases upheld the Commission's findings that concerted practices were observed.[34]

Only agreements that have as their object the prevention, restriction or distortion of competition are prohibited. Foremost, it must be mentioned that this relates to both horizontal[35] and vertical agreements.[36] As far as the "object of effect" is concerned, the Court held that if the object of an agreement was to restrict competition, there was no need for the Commission to show that it might have an anti-competitive effect.[37] Apparently the Commission was not willing to have its competences restricted by "technicalities" or restrictive interpretations of the written law. In somewhat exaggerated terms, the Commission's position was that one of the goals of the EU Treaty was to ensure competition and, therefore, all dubious behavior had to be prohibited. Realizing that this approach was a useful means to accelerate the integration process, the Court was ready to endorse it in the majority of cases brought before it.

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33 Joined Cases 48-49 & 51-57/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 1972 C.M.L.R. 557, 622.

34 *See* WHISH, *supra* note 24, at 223-24.

35 Horizontal agreements are agreements between competing firms at the same level of the market, whereby they agree to restrict competition in specific markets that are described territorially or relating to products or a combination of both. *See* Gilchrist Mach. Co. v. Komatsu Am. Corp., 601 F. Supp. 1192, 1199 n.17 (D. Miss. 1984) (citing Transource Int'l, Inc. v. Trinity Indus., Inc., 725 F.2d 274, 279 (5th Cir. 1984)).

36 Vertical agreements are agreements between undertakings that operate at different levels of the market. Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609, 614 n.12 (11th Cir. 1985) (citing Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946 (1979)). For example, a producer of shoes sells them to A in Belgium and to B in the Netherlands and requires the latter not to resell in Belgium and the former not to resell in the Netherlands. Note that the Treaty itself does not distinguish between horizontal and vertical agreements. Joined Cases 56 & 58/64, Etablissements Consten, S.A. v. Commission, 1966 E.C.R. 299, 1966 C.M.L.R. 418, 469-71.

37 Case 45/85, Verband der Sachversicherer eV v. Commission, 4 C.M.L.R. 264, 300 (1988); Case 56/65, Société Technique Minière v. Maschinenbau Ulm, GmbH, 1966 E.C.R. 235, 1966 C.M.L.R. 357, 375.

There are, however, certain categories of behavior that do not fall within Article 85 (1). Although theoretically they might be encompassed by this disposition, the Treaty only prohibits anti-competitive behavior affecting trade between Member States. If there is no such effect, EU law does not apply at all. The behavior, however, may still be governed by national antitrust laws. The mere fact that all of the undertakings are within the same State does not render Article 85 (1) inapplicable because they may export their products in the future.[38] Article 85, as well as Article 86, are, however, only applicable to agreements or practices that have an appreciable effect on trade between Member States. This is the so-called "de minimis" rule established in *Volk v. Etablissements Vervaecke S.P.R.L.*[39] and confirmed in the Commission Notice on Agreements of Minor Importance.[40] According to the notice, agreements between undertakings who produce or distribute goods or provide services generally are not subject to the prohibition of Article 85 (1) if

> the goods or services which are the subject of the agreement . . . together with the participation [sic] undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more than *5%* of the total market for such goods or services . . . in the area of the common market affected by the agreement and [ ] the aggregate annual turnover of the participating undertakings does not exceed 200 million ECU.[41]

Furthermore, there is no distortion of competition if the undertakings have to be considered as one single unit, such as a parent and its subsidiary or subsidiaries. Under certain circumstances this is also true

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38 Case 107/82, AEG-Telefunken AG v. Commission, 1983 E.C.R. 3151, 3 C.M.L.R. 325, 396-97 (1984).

39 Case 5/69, 1969 E.C.R. 295, 1969 C.M.L.R. 273, 282. The Court held that:

> To be capable of affecting trade between member-States, the agreement must . . . permit a reasonably probable expectation that it could exercise an influence, direct or indirect, actual or potential, on the trade trends between member-States in a direction which would harm the attainment of the objectives of a single market between States.

Id.

40 Commission Notice of 3 September 1986 on Agreements of Minor Importance Which Do Not Fall Under Article 85 (1) of the Treaty Establishing the European Economic Community, 1986 O.J. (C 231) 2.

41 *Id.* art. 7 (emphasis added). Presently, one European Currency Unit (ECU) is about the equivalent of 1.15 U.S. dollars. *See Foreign Exchange*, N.Y. TIMES, Apr. 29, 1994, at 32.

for the principal and agent,[42] and contractor and sub-contractor.[43]

2. Article 85 (3)

If an agreement or practice falls within paragraph one, an exemption may be granted pursuant to the conditions of paragraph three. The EU applies two different types of exemptions: the individual and the block exemption. Undertakings may always ask the Commission to grant an individual exemption, but in practice this rarely occurs;[44] thus, most undertakings seek to draft agreements in line with the model of a block exemption.[45] To avoid a flood of individual requests, the Commission began to adopt block exemption regulations during the 1960s. The following is a non-exhaustive list of these block exemptions:

— Regulation 1983/83 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements;[46]
— Regulation 1984/83 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements;[47]
— Regulation 2349/84 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements;[48]
— Regulation 417/85 on the application of Article 85 (3) of the Treaty to categories of specialization agreements;[49]
— Regulation 418/85 on the application of Article 85 (3) of the Treaty to categories of research and development

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42 *See* Commission Notice, 1962 O.J. (2921) 139.

43 *See* Commission Notice, 1979 O.J. (C 1) 2.

44 *See* Valentine Korah, *The Judgement in* Delimitis: *A Milestone towards a Realistic Assessment of the Effects of an Agreement—or a Damp Squib?*, 5 EUR. INTELL. PROP. REV. 167, 169 (1992). Only 10 exemptions were granted in 1988—the best year ever. *Id.*

45 *See* WHISH, *supra* note 24, at 263 (drafting agreements so that they satisfy the terms of the relevant block exemption eliminates the necessity of notifying the agreement to the Commission, thus alleviating the uncertainty that is associated with such notifications).

46 1983 O.J. (L 173) 1 (expiring Dec. 31, 1997).

47 1983 O.J. (L 173) 5 (expiring Dec. 31, 1997).

48 1984 O.J. (L 219) 15 (as corrected by 1985 O.J. (L 113) 34) [hereinafter Regulation on Patent Licensing Agreements] (expiring Dec. 31, 1994). This regulation provides for an "opposition procedure."

49 1985 O.J. (L 53) 1 [hereinafter Regulation on Specialization Agreements] (expiring Dec. 31, 1997). The regulation provides for opposition procedures.

agreements;[50]

— Regulation 4087/88 on the application of Article 85 (3) of the Treaty to categories of franchise agreements;[51]

— Regulation 556/89 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements.[52]

On the one hand, the block exemption regulations usually list a series of possible clauses, the so-called "white list," which, although prohibited by Article 85 (1), are exempted based upon Article 85 (3). On the other hand the regulations also contain a "black list," enumerating possible clauses that are prohibited in all cases.[53] The block exemption regulations tend to induce companies and counsels to draft agreements in conformity with their terms even though certain matters may never entirely fit within the model.[54] In this case, four possibilities remain: (1) abandon the planned agreement; (2) ask for an individual exemption; (3) use the opposition procedure in cases where it is provided for in the block exemption; or (4) if such is not the case, ask for a negative clearance, whereby the Commission certifies upon those facts in its possession that no grounds for action on its part exist under Article 85 (1) or Article 86 with respect to a decision, agreement or practice.[55] Parties that intend to use the opposition procedure must notify the Commission of the agreement, indicating that they wish to invoke this procedure.[56] If the Commission does not oppose exemption within a period of six months, the agreement is deemed

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[50] 1985 O.J. (L 53) 5 [hereinafter Regulation on Categories of Research and Development Agreements] (expiring on Dec. 31, 1997). The regulation provides for opposition procedures.

[51] 1988 O.J. (L 359) 46 [hereinafter Regulation on Franchise Agreements] (expiring on Dec. 31, 1999). The regulation provides for opposition procedures.

[52] 1989 O.J. (L 61) 1 [hereinafter Regulation on Know-how Licensing Agreements] (expiring on Dec. 31, 1999). The regulation provides for opposition procedures.

[53] *See* WHISH, *supra* note 24, at 263. In addition, some regulations contain a "gray list," which do not, or usually do not, fall within Article 85 (1). *Id.*

[54] *See* Korah, *supra* note 44, at 169. Korah maintains that the block exemptions tend to operate as a straightjacket, discouraging "an important element of competition relating to the terms and conditions of contracts." *Id.*

[55] Regulation 17, First Regulation Implementing Articles 85 and 86 of the Treaty, art. 2, 1962 O.J. SPEC. ED. 204 [hereinafter Regulation 17].

[56] Commission Form A/B must be used for the notification. The form is also required for negative clearances.

to be exempted.[57] In case of doubt as to whether an agreement falls within a block exemption, it is always advisable to notify the Commission first because fines are not imposed for those acts taking place "after notification to the Commission and before its decision in application of Article 85 (3) of the Treaty."[58]

Should undertakings try to follow the course of an individual exemption, they may in certain instances receive a "comfort letter." These letters are further divided into those that state the agreement does not fall within Article 85 (1) and others that state an exemption is likely pursuant to Article 85 (3). The legal validity of a comfort letter remains open to discussion because it has not been established that such a letter would be binding in court.[59] While this, therefore, fosters a continuing element of legal uncertainty, it seems rather unlikely that a court in a country that recognizes a general principle of good faith would fail to give due consideration to such a document.

The Commission has no power to issue regulations for an unlimited period of time.[60] This constitutes an element of legal uncertainty because it is never presumed that a regulation's duration will be extended or that a regulation replacing a former one will have exactly the same content. It is important for counsels to take into consideration this element of limited validity.[61]

3. Article 85 (2) and the Direct Applicability of Competition Law

The direct applicability of Articles 85 and 86 is recognized by

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57 *See, e.g.*, Regulation on Know-how Licensing Agreements, *supra* note 52, art. 4 (providing for six-month period).

58 Regulation 17, *supra* note 55, art. 15 (5). It has, however, to be mentioned that Regulation 17 gives the Commission the power to ignore Article 15(5) where it has informed the undertakings that after a preliminary examination it believes that Article 85(1) of the Treaty applies and that the application of Article 85(3) is not warranted. *Id.* art. 15 (6).

59 *See* Korah, *supra* note 44, at 169 (maintaining comfort letters clearly do not confer validity); WHISH, *supra* note 24, at 273 (contending comfort letters, also called administrative letters, have no legal effect upon a national court) (citing Joined Cases 253/78 & 1-3/79, Procureur de la République v. Giry & Guerlain, 1980 E.C.R. 2337, 2 C.M.L.R. 99 (1981) (the *Perfume Cases*)).

60 Regulation 17, *supra* note 55, art. 8 (1).

61 Each regulation contains an article indicating the dates of entry into force and of expiration. *See supra* notes 46-52 for the regulation's expiration dates.

the Court.[62] This means that these Articles, including Article 85 (2), may be invoked in any case brought before a court within the EU and, very soon, within the whole territory covered by the EEA[63] in the following situations:

- foremost, as a preliminary means of defense to void an unlawful agreement upon which the other party bases its claim;
- in a wider context as a basis for specific performance or other equitable remedy, including interim and final injunctive relief; and
- to claim damages based upon an agreement or concerted practice within the meaning of Article 85, or an abuse of a dominant position prohibited by Article 86.

Thus, the Treaty provisions may be used either offensively or defensively. The national court will then have to examine whether a contract is valid or void, including the possible applicability of any relevant block exemption regulation.[64] This is a well established procedure, and many competition cases decided by the Court were originated by a preliminary reference from a local judiciary pursuant to Article 177 of the Treaty.[65] Proceedings before national courts may have considerable advantages for individuals and companies. The guidelines in the Notice on Cooperation Between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty list some of the most important ones:

- only national courts are in a position to award compensation for loss suffered as a result of an infringement of Articles 85 or 86;
- national courts can ordinarily order termination of in-

62 Case 127/73, Belgische Radio & Televisie v. S.A.B.A.M., 1974 E.C.R. 51, 2 C.M.L.R. 238, 271 (concluding that because 85 and 86 tend to produce "direct effects in relations between individuals, these Articles create direct rights in respect to the individuals concerned which the national courts must safeguard."); *see also* MARC VAN DER WOUDE ET AL., EEC COMPETITION LAW HANDBOOK 1992 EDITION 407-08 (1992) (citations omitted).

63 *See supra* notes 22-23 and accompanying text.

64 *See* Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, nos. 6, 8, 17, 24-44, 1993 O.J. (C 39) 6 [hereinafter Notice on Cooperation]; Case C-234/89, Delimitis v. Henninger Bräu AG, 1991 E.C.R. 935, 5 C.M.L.R. 210, 221-22 (1992) (opinion of Advocate General W. van Gerven).

65 *See supra* note 16 and accompanying text.

fringements and adopt interim measures more promptly than the Commission;

— in a national court it may also be possible to combine claims under local and Community law; and

— in some Member States, the courts may award legal costs to the winning applicant.[66]

The combined effect of Article 85 (2) and the direct applicability of EU competition law within the EU and EEA territory may prove to be a powerful tool in the hands of private litigators. At the same time, it gives the Court the welcome opportunity to hear competition law cases that otherwise might never come to the attention of the EU authorities.[67] By writing Article 85 (2) into the Treaty, the signatory States made private litigators the allies of the Commission for the purpose of enforcing competition law.

C. *Article 86*

Article 86 is drafted as follows:

> 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.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[68]

The application of Article 86 is a fairly difficult task because it

66 Notice on Cooperation, *supra* note 64, no. 16.

67 In many instances national judiciaries decided to ask, or had a duty to ask, the Court for a preliminary judgement on the competition issue. *See, e.g., Delimitis*, 5 C.M.L.R. at 219-20 (explaining German Oberlandesgericht (Higher Regional Court) referred questions on competition issues to Court for a preliminary ruling).

68 EEC TREATY art. 86.

requires both a thorough legal and economic understanding.[69] The aim of this subsection is to give a very brief overview of Article 86. A comprehensive presentation would amount to a contribution in its own right.

Article 86 neither seeks to attain the same goals as Article 85 nor is it based on identical assumptions. The addressees of the latter are at least two undertakings that intend to restrict competition. The addressee of Article 86 may be one single undertaking if it enjoys a dominant position in the market and abuses such dominance. The authorities in charge of the application of competition law, therefore, have to decide what dominance means and what constitutes an abuse of a dominant position. In practice, the Article served to exercise a sort of price control with respect to dominant undertakings and to direct them to furnish spare parts,[70] components[71] or products to competitors.[72] In addition, at a time when the Merger Regulation[73] was not yet enacted, it was used to scrutinize mergers,[74] and to prohibit predatory price cutting[75] or loyalty rebates that had no economic justification but to link the purchaser to the dominant firm.[76] A market share of 100% obviously constitutes a dominant position but is

69 Whish notes that Article 86 was ignored by the Commission for many years; it was not until 1971 that the first formal decision was taken. WHISH, *supra* note 24, at 275.

70 *See* Commission Decision 68/78, Liptons Cash Registers & Business Equip. Ltd. v. Hugin Kassaregister AB, 1978 O.J. (L 22) 33, 1 C.M.L.R. D19, D40-41. The Commission decision was quashed on appeal because the Court held that trade between Member States was not affected; it did not comment on the spare parts issue at all. *See* Case 22/78, Hugin Kassaregister AB v. Commission, 1979 E.C.R. 1869, 3 C.M.L.R. 345.

71 *See* Joined Cases 6-7/73, Instituto Chemioterapico Italiano SpA v. Commission, 1974 E.C.R. 223, 1 C.M.L.R. 309 (holding refusal to sell an essential raw material to competitor was abuse of dominant position under Article 86).

72 *See* Commission Decision 500/87, Brass Band Instruments Ltd. v. Boosey & Hawkes plc, 1987 O.J. (L 286) 36, 4 C.M.L.R. 67, 73-74 (1988).

73 *See infra* part V (B).

74 *See* Case 6/72, Europemballage Corp. v. Commission, 1973 E.C.R. 215, 1973 C.M.L.R. 199.

75 *See* Case 62/86, Akzo Chemie BV v. Commission, 5 C.M.L.R. 215, 288 (1993) (holding abuse of Article 86 for a dominant company to target a competitor's customers by offering them advantageously low prices, while maintaining above average costs prices for similar buyers who are already customers).

76 *See* Case 85/76, Hoffman-La Roche & Co. AG v. Commission, 1979 E.C.R. 461, 3 C.M.L.R. 211, 289-90 (concluding market-dominating undertaking abuses Article 86 when it ties purchasers by promise or obligation on their part to obtain all or most of their requirements exclusively from it, regardless of the fact it is taken in consideration of the grant of a rebate).

hardly found in practice. With a market share of over 90%, Tetra Pak[77] was found to have a dominant position. In *United Brands Co.*,[78] the Court was satisfied with a market share of between 40 and 45%. In a recent case, the Court of First Instance accepted the Commission's concept of a "collective dominant position."[79] Some very crucial questions arise even before dominance can be established because it first must be determined what the relevant product's geographical markets are. Like Article 85, Article 86 is only applicable if trade between Member States is appreciably affected.[80]

D. *Enforcement*

The Commission has the authority to ensure the application of the principles established in Articles 85 and 86. Either upon application by a Member State or its own initiative, and with the assistance of the Member States, the Commission shall inquire into cases of suspected infringement of these principles. When found, the Commission shall propose appropriate measures to stop the infringement.[81] In addition, the Council is required, on a proposal from the Commission and following a consultation with the European Parliament, to adopt any proper directives or regulations to effectuate these principles. This led to the promulgation of Regulation 17, the "First Regulation Implementing Articles 85 and 86 of the Treaty."[82]

1. Regulation 17

Subject to the Court's review of its decisions, Regulation 17 entrusts the Commission with the exclusive competence to grant

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

78 *See* Case 27/76, United Brands Co. v. Commission, 1978 E.C.R. 207, 1 C.M.L.R. 429, 490-91.

79 The Commission held that three Italian producers of flat glass had a collective dominant position. Commission Decision, *Re* Italian Flat Glass: The Community v. Fabbrica Pisana SpA, 1981 O.J. (L 326) 32, 3 C.M.L.R. 366 (1982). The Court of First Instance upheld this concept but quashed the decision for other reasons. Joined Cases T-68 & T77-78/89, *Re* Società Italiana Vetro SpA v. Commission, 5 C.M.L.R. 302 (Ct. First Instance 1992).

80 *See* Commission Decision 500/87, Brass Band Instruments Ltd. v. Boosey & Hawkes plc, 1987 O.J. (L 286) 36, 4 C.M.L.R. 67, 74 (1988). *See also supra* notes 39-41.

81 EEC TREATY art. 89 (1).

82 Regulation 17, *supra* note 55.

exemptions in conformity with Article 85 (3).[83] The power to apply Article 85 (3), and thereby define its relationship with Article 85 (1), is probably the core competence in EU competition law. It allows the Commission to decide which kind of agreements and practices may be granted exemption and, in an indirect way, to determine which agreements and concerted practices do not fall within Article 85 (1). The former competence is exclusively entrusted to the Commission, whereas it has to share the latter, to a certain extent, with national judiciaries. National courts may have to decide whether an agreement or a practice is void and they are also permitted to consider whether an agreement falls within a block exemption.[84] Still, this did not noticeably diminish the Commission's role[85] and it is most probably due to Regulation 17 that the Commission—supported by the Court—was in a position to play such a prominent role in shaping the EU's competition law and practice.

Article 15 of the Regulation provides for fines to be fixed by the Commission. They may average from 1000 to 1,000,000 units of account (ECU) "or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently[,] . . . they infringe Article 85 (1) or Article 86 of the Treaty" or commit a breach of a Commission decision given under Article 85 (3).[86]

All Commission decisions have been subject to review by the Court, including an immediate level of review by the Court of First Instance since its establishment in 1990. An appeal to the Court on a specific point of law has also been possible. References from national courts based upon Article 177 of the Treaty are exclusively

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83 *Id.* art. 9 (1).

84 *See supra* part III (B)(3). *See also* Case 59/77, Les Etablissements A. De Bloos Sprl v. Bouyer SCA, 1977 E.C.R. 2359, 1 C.M.L.R. 511 (1978).

85 *See infra* part III (D)(3).

86 Regulation 17, *supra* note 55, arts. 8, 15. The fines imposed in the *Peroxygen Products* case totalled nine million ECU. *See* Joined Cases 15 & 16/74, Commission v. Solvay & Laporte, 1985 O.J. (L 35) 1, 1 C.M.L.R. 481 (Peroxygen Products case); *see* GOYDER, *supra* note 24, at 140 (no appeal taken to the European Court). In *Polypropylene*, fines totalling 58 million ECU were imposed. 1986 O.J. (L 230) 1, 4 C.M.L.R. 347 (1988), *aff'd*, 4 C.M.L.R. 84 (1992). The Commission has just fined a steel cartel consisting of more than a dozen steel producers 104 million ECU, of which British Steel has to pay 32 million ECU. *Saftige Bussen für das europäische Stahlkartell*, NEUE ZÜRCHER ZEITUNG, Feb. 17, 1994, at 33.

dealt with by the Court. Realizing that the Commission was making use of its competences to promote the integration of the economies of the Member States, and with a view to furthering this process as actively as possible at a time when the Council was rather hesitant in this respect, the Court (in most cases) upheld the Commission's decisions relating to competition matters.

2. Stare Decisis Is Not a Principle of EU Law

It is undoubtedly necessary for the reader to know specific cases to gain a clearer understanding of EU competition law, but it should be mentioned the EU does not follow the doctrine of precedent. The Court is neither bound by its own decisions nor are other judiciaries under an obligation to follow the Court if there are truly strong reasons to assume that a precedent incorrectly interpreted a point of law. Litigators may, as a consequence, either argue that a precedent should be distinguished because the facts are not identical or try to persuade the Court that a precedent was incorrectly decided on a point of law. The latter strategy will only succeed if the reasons are compelling, because the Court will never reverse a precedent in a flippant way and a national judiciary would only contradict an earlier case decided by the Court if it strongly believed that the Court might change positions.[87] Nevertheless, it is important to remember that both the Court of First Instance and the Court only apply and interpret the law that is laid down primarily in the Treaty and secondly in the Regulations.

3. Subsidiarity

The governments of various Member States faced a difficult task when attempting to ratify the Maastricht Treaty.[88] A certain skepticism surrounding close integration has always existed in certain Member States, but the Maastricht Treaty was the first project to meet broad, determined and serious opposition throughout a substantial part of the EU.[89] According to the opposition, Maas-

[87] Under certain circumstances, such a change may probably occur if new judges replace resigning ones.

[88] *See supra* note 21.

[89] Referendums were held in Ireland, Denmark and France in 1992. The Irish accepted the Treaty with a comfortable majority, whereas the French accepted it with only a very narrow margin and the Danish rejected it; a modified version as applicable to Denmark was eventually approved in a second referendum in 1993. The British

tricht went too far too quickly, thereby unnecessarily transferring too many competences to EU authorities. Partly as a response to such widespread fears that "Brussels" might be moving towards far-reaching centralization,[90] it was decided to take the principle of subsidiarity more explicitly into account for competition purposes as well.

In EU policy, subsidiarity means that action should be taken at the level that is the most appropriate to deal with a specific problem, meaning the Community should not legislate where a matter can better be dealt with by national legislators.[91] Sir Leon Brittan, Commissioner for competition policy until 1992, noted that by applying the "de minimis" rule, the Community's competition policy had always been underpinned by the subsidiarity principle.[92] In this context, he raised the crucial question of whether the competence to grant exemptions under Article 85 (3) should be conferred upon national courts. His answer was in the negative, possibly reflecting the apprehension that such a modification might endanger the conformity and coherence of EU competition law. As seen in part III (B)(3), the role of the national courts can nevertheless be a very significant one. The Notice on Cooperation Between National Courts and the Commission has to be seen in this context.[93] To avoid the risk that the decentralized application of EU competition law might lead to conflicting decisions, the new policy contemplates coordinated action at Community and national levels to ensure a uniform application of the rules. National courts

> may consult the Commission on points of law . . . [and] on its customary practice in relation to the Community law at issue. . . . [W]here they have doubts as to whether a contested agreement, decision or concerted practice is eligible for an individual ex-

and German governments had to endure a cumbersome procedure through the Houses of Parliament and the courts.

90 *See, e.g.*, TITO TETTAMANTI, WELCHES EUROPA? (1994) (German) (original Italian version, TITO TETTAMANTI, QUALE EUROPA? (1993), particularly chapter seven).

91 It must be mentioned that the definition of the term lacks precision and that Unions which are composed of "States" (*e.g.* the U.S., Canada, Germany, Switzerland, the latter three using the terms "Provinces," "Länder" and "Cantons") do not use the term subsidiarity to attribute competences between Union and States. It is rather used in administrative law in certain civil law countries and in the Catholic religion.

92 Sir Leon Brittan, Address at the Centre of European Policy Studies, Brussels, Belgium (Dec. 7, 1992), *digested in* 4 C.M.L.R. 7, 14-15 (1993).

93 *See* Notice on Cooperation, *supra* note 64.

emption, they may ask the Commission to provide them with an interim opinion.[94]

They can further request the Court to give a preliminary ruling pursuant to Article 177 of the Treaty, and are even obliged to bring the matter before the Court where any such question is raised in a case where there is no adequate remedy under national law.[95]

The subsidiarity principle, therefore, does not really innovate, but rather confirms what has always been the complementary rules of the Commission and the national courts: the former as an administrative authority with strong enforcement power to ensure the application of the principles laid down in Articles 85 and 86, and the latter as a forum for private parties who may base their claims partly or entirely on the terms of Articles 85 and 86.

E. *Extraterritoriality*

The question of whether the law may apply extraterritorially, outside the territory of the enacting entity, is not limited to antitrust law, nor is it a new question. Throughout history, there have been repeated examples of states that have sought to subject occurrences to their own law even if those occurrences could be linked to their territory in only a remote way. Under certain circumstances, the extraterritorial application of a law may lie in open conflict with the principles of public international law. It is, however, in most cases only perceived as a problem if it is supported by effective power of enforcement.[96] If a non-EU undertaking has a corporate presence within the EU, the application of EU competition law is necessarily crucial. The question is whether undertakings that do not have a corporate presence in the EU are bound by its law. In *Wood Pulp*,[97] the Commission gave an affirmative answer, introducing what is termed in legal language as the "effects doctrine." The doctrine was recognized in the U.S. for antitrust pur-

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94 *Id.* no. 38.

95 *See supra* note 16.

96 Enforcement may occur according to the normal enforcement procedure for judicial decisions. Depending on the country or entity seeking enforcement, it may also occur by general (commercial) policy remedies or sanctions. These must conform with public international law.

97 1985 O.J. (L 85) 1, 3 C.M.L.R. 474. The Commission decided that 41 wood pulp producers and two of their trade associations, all having their registered offices outside the EC, engaged in concerted price practices. *Id.*

poses in *United States v. Aluminum Co. of America.*[98] *Alcoa* caused serious concerns in other countries, and probably in response to such concerns, the Court, on appeal in *Wood Pulp,* avoided the question by simply stating that the agreement had been implemented within the EU and was therefore subject to its law. It was of no importance whether the implementation was effected by parents, subsidiaries or other dominated undertakings.[99] The EU Court has hesitated to treat parents and subsidiaries as an economic entity. There will, of course, be a coordination between the policies of the parent and its subsidiary in many cases, but it is a bold attempt to construe a per se presumption.[100] A judiciary should at least require convincing evidence for a finding that could lead to substantial fines for the undertaking in question. Due process should require proof of control by the parent over the subsidiary and the fact that the former was in a position either to initiate or to prevent the prohibited agreement or concerted practice.

IV. Conflicts Between Competition Law and Intellectual Property Laws

A. *Preliminary Remarks*

It is the prime purpose of antitrust law to prevent the creation of monopolies and to provide for unrestricted competition among producers of goods and services. Meanwhile, patent and copyright laws were enacted to grant the exclusive, if not monopolistic, exercise of a patent or a copyright during a certain period. Conflicts will, therefore, inevitably arise. Which specialty of law has to give way to the other is the question that courts or legislators have to decide. It is recognized that both fields of law are based upon legitimate interests: free competition should assure true market prices for consumers and prevent undertakings from taking monopoly awards—patents should award a premium to the patentee

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98 148 F.2d 416, 444 (2d Cir. 1945).

99 Joined Cases 89, 104, 116-117 & 125-129/85, *Re* Wood Pulp Cartel: A. AhlstrÖm Oy v. Commission, 1988 E.C.R. 5193, 4 C.M.L.R. 901, 941-42.

100 *See* Joined Cases 48-49 & 51-57/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 1972 C.M.L.R. 557, 622-23 (the *Dyestuffs Case*) (holding that while parallel behavior is not per se concerted practice, it is however, "strong indication" when it leads to conditions of competition not normal to the market); F.A. Mann, *The* Dyestuffs *Case in the Court of Justice of the European Communities,* 22 INT'L & COMP. L.Q. 35, 36 (1973) (mere parallel action is insufficient).

for his creativity and for the risk involved in manufacturing a product and launching it on the market, thereby offering consumers a wider choice of goods. We will see that the U.S. and the EU came to different solutions for reasons that are rooted in the EU's attempt to promote the integration of the Member States' economies and to enact patent legislation.[101]

B. *The EU Approach*

Apart from the Treaty dispositions relating to competition and the secondary legislation thereto, the relevant rules are contained in Articles 30, 34, 36 and 222 of the Treaty. Articles 30 and 34 prohibit quantitative restrictions on imports and exports, and "all measures having, equivalent effect."[102] The Treaty, however, provides:

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; *or the protection of industrial and commercial property.* Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[103]

Additionally, Article 222 provides that the Treaty shall not prejudice the Member States' rules governing property ownership.[104]

In an early case, *Etablissements Consten, S.A. v. Commission,*[105] the Court gave some hints as to the approach it might be willing to take in later years. This case is a key to the understanding of various later decisions.

The German firm Grundig-Verkaufs-G.m.b.H. and the French firm Etablissements Consten agreed that the latter be appointed Grundig's sole representative in France for an indefinite period in

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101 The Commission and the Court have been fairly successful as far as integration is concerned. Attempts to enact an EU patent regulation have failed so far, but a regulation harmonizing the law applicable to trademarks has just been put into force. *See* 1994 O.J. (L 11) 1 (forthcoming trademark regulation).

102 EEC TREATY arts. 30 (imports), 34 (exports).

103 *Id.* art. 36 (emphasis added).

104 *Id.* art. 222.

105 Joined Cases 56 & 58/64, Etablissements Consten, S.A. v. Commission, 1966 E.C.R. 299, 1966 C.M.L.R. 418.

wireless receivers, tape recorders, dictating machines and television sets manufactured by Grundig. Pursuant to the terms of the agreement Consten would not "sell, either on its own account or on that of another, similar articles liable to compete with the goods which were the subject of the contract and not to make delivery, either direct or indirect, for or to other countries from the contract territory."[106] Consten was authorized to use the name and emblem of Grundig for these goods and, in addition, registered in France in its own name a trademark that was carried on all appliances manufactured by Grundig, including those sold on the German market. When a third company sold the same goods to French retailers at lower prices despite an export ban imposed by Grundig, Consten brought two actions against that parallel importer; one for unfair competition and the other for infringement of the trademark. The parallel importer, in its own right, asked the Commission to declare that the agreement between Grundig and Consten infringed Article 85. The Commission decided in favor of the parallel importer. Consequently, Consten and Grundig took the case before the Court.[107]

The Court held that the Commission had properly applied Article 85 (1) to the agreement because it had the object of restricting, preventing or distorting competition. It opined that a vertical agreement that "might tend to restore the national divisions in trade between member-States could be such as to thwart the most basic objects of the Community."[108] That was exactly the aim of the parties when they concluded the combined sole distributorship and trademark registration agreement. The Court stated, " 'that no third party could import Grundig products, from other member-countries of the Community, for resale in France, without running serious risks.' "[109] Consten and Grundig objected on the grounds that the Commission had violated Articles 36, 222 and 234 of the Treaty. In their view, the Commission had exceeded the limits of its competence by preventing Consten from prohibiting the parallel imports, i.e. enforcing the rights granted by the national trademark law.[110]

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106 *Id.* at 420.

107 *Id.* at 420-21. *See* Commission Decision 566/64, *Re* Grundig's Agreement, 1964 J.O. (2545) 64, 1964 C.M.L.R. 489.

108 *Id.* at 471.

109 *Id.* at 473.

110 Article 234 relates to possible conflicts arising from treaties concluded by Member States with other Member States or third countries before the entry into force of

Considering the text of Articles 36 and 222, they appeared to have a strong case. A Court that would have seen its role as a scrupulous guardian of the competences of the Member States would not have found it problematic to pass a judgement in favor of Consten and Grundig, particularly based on Article 36. However, anxious that the Member States should henceforth apply Article 36 and analogous provisions in other fields as a means to weaken the competences of the Community, the Court was willing to back up the Commission. The Court stated:

> The prohibition [in Art 85 (1)] would be fruitless if Consten could continue to use the trade mark with the same aim as that contained in the agreement recognized as unlawful. Articles 36, 222 and 234 of the Treaty, invoked by the applicants, do not oppose every impact of Community law on the exercise of national industrial property rights. Article 36, which limits the scope of the rules on the liberalization of trade . . . cannot limit the field of application of Article 85. . . . The injunction in Article 3 of the *dispositif* of the attacked decision not to use national law relating to trade marks to obstruct parallel imports, without touching the grant of those rights, limits their exercise to the extent necessary for the attainment of the prohibition deriving from Article 85 (1). . . . [The Community competition system] does not allow the abusive use of rights deriving from one or another national trade mark law in order to defeat the effectiveness of the Community law on restrictive practices.[111]

By stating that it was contrary to the Treaty to prevent any parallel imports, the Court outlined a principle that it would apply in an important series of cases which caused profound changes in the law applicable to patent licensing in various Member States. Whereas in the U.S. the issue would have been a mere conflict between patent and antitrust law, in the EU it was also one between community law (competition law) and national laws (patent laws). The Court was eager to declare the superiority of competition law to assure an unchallenged priority of Community law over possible conflicting national laws.

In *Etablissements Consten*, the Court announced this principle as a sort of *obiter dictum*. The case did not principally relate to a conflict between intellectual property rights and competition law, but to a ver-

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the Treaty and has the aim of protecting the rights of third States. EEC TREATY art. 234.

111 *Etablissements Consten, S.A.*, 1966 C.M.L.R. at 476 (alterations added).

tical sole distribution agreement, which aimed to create territorial exclusivity contrary to Article 85 (1) of the Treaty. The trademark agreement was just an additional measure to strengthen that goal and facilitate efficient enforcement. It could, therefore, be considered as an abuse of a right to obtain an illegal goal. The decision could be seen as a confirmation of a well-rooted principle that says that national law cannot be evoked to undo international law. Such an analysis neglects, however, the aspect of the statement about parallel imports. By firmly stating that the integration of the Member States' economies into a common market excluded any possible compartmentalization of markets along national borders, the Court found a way to considerably weaken the national patent and intellectual property laws in cases where it could not apply Articles 85 or 86 because of the absence of an agreement or concerted practice between two or more undertakings.

In *Deutsche Grammophon Gesellschaft mbH. v. Metro-SB-Grossmärkte GmbH & Co. K.G.*,[112] Germany's Deutsche Grammophon relied upon German copy and related rights to prohibit the marketing of sound recordings that it had supplied to its subsidiary in France at a lower price. The Commission concluded this was an infringement of the fundamental principles of the free movement of goods and the system of competition. It was, however, not in a position to undertake any measures based upon Articles 85 or 86 because of the absence of an agreement between two or more undertakings and Deutsche Grammophon did not have a dominant position. The Commission relied upon the principle of the free movement of goods and was confirmed by the Court, which stated that

> it would conflict with the provisions regarding the free movement of goods in the Common Market if a manufacturer of recordings exercised the exclusive right granted to him by the legislation of a member-State to market the protected articles in order to prohibit the marketing in that member-State of products that had been sold by him himself or with his consent in another member-State solely because this marketing had not occurred in the territory of the first member-State.[113]

This view was confirmed in *Centrafarm Bv v. Sterling Drug, Inc.*,[114] a patent-related case. *Centrafarm* held that patentees cannot exercise

112 Case 78/70, 1971 E.C.R. 487, 1971 C.M.L.R. 631, 633-34.
113 *Id.* at 657-58.
114 Case 15/74, 1974 E.C.R. 1147, 2 C.M.L.R. 480.

their right to prohibit the sale in the patentee's State of the product patented if it is sold in the EU with the patentee's consent.[115] The decision could only be based upon the "doctrine of exhaustion," which makes a distinction between the existence and the exercise of intellectual property rights. Pursuant to this doctrine, a patentee had "consummated" or exercised its rights when the patented goods were first put on the market somewhere in the Community. Thus, a patentee manufacturing the goods in Germany, and having produced the same kind of goods by a licensee in Italy at a lower price, was precluded from relying on the patent to prohibit the import of the cheaper goods from Italy into Germany. The patentee had consented to their being put on the Italian market by granting the license.[116] While it is for the proprietor of the patent to decide under what conditions he sells his product, and whether to market it in a Member State where the law does not provide patent protection for the product, he must then accept the consequences of his choice as regards to the free movement of the product within the common market. When he sells the product both in the patent State and in a non-patent State, he cannot prevent the marketing in the patent State of the product imported from the non-patent State.[117]

Accordingly, one could say that the patent formally still existed, but its exercise was no longer protected. The consequence was considerable legal uncertainty for producers and patentees. Strategies that had been devised and followed for years were useless and a patent in the EU could prove to be of very uncertain value. To provide some legal certainty to a patentee and licensor regarding the validity of pat-

115 *Id.* at 504. It was of no significance that the patentee and the undertaking to which it had granted licenses were part of the same group, nor was it of significance that the parallel imports Sterling wanted to prohibit came from a country (Great Britain) where the product had to be sold at half the price because of government interventions. In a companion case, the Court decided a trademark issue in the same way. *See* Case 16/74, Centrafarm BV v. Winthrop BV, 1974 E.C.R. 1183, 2 C.M.L.R. 480, 509.

116 Note that a compulsory license in Great Britain was not considered as putting a product on the market with consent. *See* Case 19/84, Pharmon BV v. Hoechst AG, 1985 E.C.R. 2281, 3 C.M.L.R. 775, 791.

117 Case 187/80, Merck & Co., Inc. v. Stephar B.V., 1981 E.C.R. 2063, 3 C.M.L.R. 463. *See also* Case 55 & 57/80, Musik-Vertrieb Membran GmbH v. GEMA, 1981 E.C.R. 147, 2 C.M.L.R. 44, 64 ("proprietor of industrial or commercial right protected by the law of a member-State cannot rely on that law to prevent the importation of a product which has been lawfully marketed in another member-State by the proprietor himself or with his consent.").

ent licensing agreements, the Commission enacted a regulation on patent licensing.[118] The Regulation exempts from the application of Article 85 (1) patent licensing agreements and agreements combining the licensing of patents and the communication of know-how, of which only two undertakings are party, and allows clauses in the agreement to the extent:

— that the licensor will not license the licensed invention to other licensees within the territory covering all or part of the common market, nor produce therein himself;

— that the licensee will not produce within the territory reserved for the licensor or in territories reserved for other licensees.[119]

The parties may also include an obligation on the licensee

> not to pursue an active policy of putting the licensed product on the market in the territories within the common market which are licensed to other licensees, and in particular not to engage in advertising specifically aimed at those territories or to establish any branch or maintain any distribution depot there, in so far and as long as the licensed product is protected in those territories by parallel patents;[120] [the licensee is also obliged] not to put the licensed product on the market in the territories licensed to other licensees within the common market for a period not exceeding five years from the date when the product is first put on the market within the common market by the licensor or one of his licensees, in so far as and for as long as the product is protected in these territories by parallel patents[.][121]

It is in conformity with the Regulation that the licensee has to pay a minimum royalty or produce a minimum quantity of the licensed product, that the exploitation of the licensed invention is limited to one or more technical fields and that he is not allowed to grant sublicenses or assign the license.[122] The Regulation, however, explicitly prohibits clauses that would prevent the licensee from challenging the validity of the licensed patents, automatically prolonging the duration of the licensing agreement past the expiration of the licensed patents or restricting one party from competing with the other in research,

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118 Regulation on Patent Licensing Agreements, *supra* note 48.

119 *Id.* art. 1 (1).

120 *Id.*

121 *Id.*

122 *Id.* art. 2 (2), (3), (5). Article 2 enumerates a series of other inoffensive clauses.

development, manufacture, use or sales in fields other than the one covered by the license.[123] It is also prohibited to impose upon one or both of the parties "to refuse without any objectively justified reason to meet demand from users or resellers in their respective territories who would market products in other territories within the common market"; or

> to make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise industrial or commercial property rights or take measures so as to prevent users or resellers from obtaining outside, or from putting on the market in, the licensed territory products which have been lawfully put on the market within the common market by the patentee or with his consent; or do so as a result of a concerted practice between them.[124]

Thus, the Regulation ensures that a complete ban on parallel imports is impossible. The Regulation does not apply to agreements between members of patent pools nor "to patent licensing agreements between competitors who hold interests in a joint venture or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture[.]"[125]

In practice, a significant number of agreements containing a patent licensing clause among other dispositions do not fit within the Regulation if the patent licensing is a marginal part of the whole package. In such a case, either the block exemption on franchise agreements or on know-how licensing agreements may apply.

A franchise is a bundle of intellectual or industrial property rights to trademarks, trade names, utility models, shop signs, copyrights, designs, know-how or patents, all to be used "for the resale of goods or the provision of services to end users."[126] The franchisor grants the franchisee the right to exploit a franchise in exchange for direct or indirect financial consideration.[127] The know-how licensing block exemption regulation applies to pure know-how licensing agreements and to those mixed know-how and patent licensing agreements that are not exempted by the Regulation on Patent Licensing Agreements, including those agreements with accessory provisions relating to

123 *Id.* art. 3 (1)-(3).
124 *Id.* art. 3 (11).
125 *Id.* art. 5 (1); *see also infra* notes 168-70.
126 Regulation on Franchise Agreements, *supra* note 51, art. 1 (3)(a).
127 *Id.* art. 1 (3)(b).

trademarks or other types of intellectual property rights.[128] In the same manner as the patent licensing block exemption, the know-how licensing block exemption does not apply to agreements between members of know-how pools that relate to the pooled technologies nor to "know-how licensing agreements between competing undertakings which hold interests in a joint venture, or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture[.]"[129] The possibility of an individual exemption always remains should an agreement not fall within the terms of any block exemption regulation.

It can be concluded that on the one hand, subject to a "de minimis" rule and appreciable effects on inter-state trade, vertical restrictions in patent licensing agreements fall within the prohibition of Article 85 (1). On the other hand, Article 85 (3) and the block exemption regulations provide for a broad range of exemptions. In the field of patent licensing, the Regulation allows almost absolute territorial exclusivity for a period not exceeding five years. It is in conformity with the block exemption to stipulate that nobody but the exclusive licensee may store merchandise and make publicity for goods covered by the agreement in its attributed territory. Parallel imports, however, must never be completely excluded, nor must the licensee be prohibited from challenging the validity of the licensed patents. Furthermore, it is prohibited to oblige the licensee to purchase products from the licensor unless this is required to meet quality standards. Price restrictions are, of course, not allowed.

C. *The U.S. Approach*

A brief comparison between European and American law in patent licensing points out two basic differences. First, in the EU, the legislator and the Court had to resolve not only the conflict between intellectual property laws and competition law, but also the conflict between community and national legislation. In the United States, however, it was a conflict between intellectual property and antitrust law, which Professor Sullivan describes as follows:

> At one extreme it can be argued that a patent is intended to grant a monopoly reward in order to encourage innovation and that any license restriction, since it enhances the patentee's re-

128 Regulation on Know-how Licensing Agreements, *supra* note 52, art. 1 (1).
129 *Id.* art. 5 (1).

> ward, is an instrument of that social policy and thus should be validated by the patent laws; antitrust policies, no matter how forecful [sic] or explicit, should give way. At the other extreme it can be argued that any restriction which, with respect to unpatented technology, would be invalid under the antitrust laws, should be invalid when the technology is patented, unless the patent law explicitly or by irresistible implication grants an antitrust exemption.[130]

Second, the Sherman Act of 1890[131] and the Clayton Act of 1914,[132] the most applied pieces of legislation in American antitrust law, have no disposition corresponding to Article 85 (3). It follows that the American law does not recognize the individual and block exemption, because the law does not provide for the granting of exemptions by an authority for conduct that in itself would fall within a general prohibition. Thus, American antitrust law only has a rule equivalent to Article 85 (1).

As a consequence, certain practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress in the interest of the consumer are deemed not to be encompassed by antitrust law at all. Foremost, it has to be decided whether a contract or market behavior gives rise to a per se violation of section one of the Sherman Act and, if not, whether it is nevertheless illegal because it unreasonably restrains competition.[133] The activities are harmless from the point of view of antitrust law if both questions lead to a negative answer. As far as the per se rule is con-

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130 LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 527 (1977) (citing Bement & Sons v. National Harrow Co., 186 U.S. 70 (1902)). Professor Sullivan emphasizes that the patent system is clearly in potential conflict with antitrust. *Id.* at 505.

131 Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. §§ 1-7 (1988). The Sherman Act makes it illegal to enter into contracts in restraint of trade or to monopolize, or attempt to monopolize, a market. Section 1 of the original Sherman Bill provided:

> "That all arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations, or both, of different states, or between two or more citizens or corporations, or both, of the United States and foreign states, or citizens or corporations thereof, made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States . . . are hereby declared to be against public policy, unlawful and void."

1 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 4 (2d ed. 1989) (quoting S. 1, 51st Cong., 1st Sess. (1890), *reprinted in* 21 CONG. REC. 2455 (1890)).

132 Act of Oct. 15, 1914, 38 Stat. 730, 15 U.S.C. §§ 12-27 (1988). The Act relates to certain specific practices such a price discriminations and mergers.

133 *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 4-5 (1983).

cerned, certain contractual arrangements are regarded unreasonable as a matter of law. Examples of when the quantity of commerce is immaterial because such restraints are per se illegal include where a defendant licensed a patented device conditioned upon unpatented materials being employed in conjunction with the patented device, or where a complaint charges the defendant with engaging in price fixing, or where the defendant collectively refused to deal with an association's non-members.[134] We can deduce from Justice Stevens' statement in *Jefferson Parish Hospital* that the per se rule also includes a quantitative aspect: where the seller has a large share of the market or where the seller's product is unique such that competitors are not able to offer the same, the probability that market power exists and is "being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate."[135] If the market share or the market power is low, however, evidence showing an unreasonable restraint on competition in the relevant market is necessary.[136] While horizontal agreements between competitors are generally prohibited in the same way as in the EU, this rule of reason approach is the way American antitrust law scrutinizes vertical agreements.

As far as patent licensing is concerned, the absence of rivalry between national and community legislations offers the courts the possibility to strike a subtle balance between the conflicting principles of intellectual property and antitrust law. One could assume a rather friendlier approach to patent rights in the United States than in the EU. Sullivan notes there are few cases on horizontal restrictions in patent licenses. Following the traditional rule, these cases find such restrictions lawful, except where in particular circumstances they are so arranged as to unreasonably restrain competition.[137] In *Brownell v. Ketcham Wire & Manufacturing Co.*, it was held that exclusive territorial licenses are legal unless they violate the antitrust laws for other reasons.[138] Subject to a common-control and a same-person excep-

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[134] *Id.* at 9 n.10 (quoting United States v. Columbia Steel Co., 334 U.S. 495, 522-23 (1948) (footnotes omitted)).

[135] *Id.* at 17.

[136] *Id.* at 18 (citing Fortner Enter. v. United States Steel Corp., 394 U.S. 495, 499-500 (1969); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614-15 (1953)).

[137] SULLIVAN, *supra* note 130, at 529.

[138] 211 F.2d 121, 129 (9th Cir. 1954).

tion,[139] the Tariff Act of 1930 prohibits the importation of " 'any merchandise of foreign manufacture' " without the consent of the trademark owner if such merchandise bears a trademark owned by a United States citizen and the trademark is registered by a person domiciled in the United States.[140] The United States Supreme Court decided that a third exception, the authorized-use exception, permitting importation of gray-market goods where the trademark was applied by an independent foreign manufacturer under authorization of the United States owner, was invalid.[141]

Case law generally approves import and export restrictions.[142] In *United States v. General Electric Co.*,[143] the Supreme Court even sanctioned a price restricting license. It is, however, very doubtful whether the case would be decided the same way today.[144] A field-of-use restriction was held to be lawful in *General Talking Pictures Corp. v. Western Electric Co.*;[145] this is not the case for patent pools.[146] Contrary to EU law, grant back provisions and agreements not to contest are not invalid as a general rule.[147] Since *Bauer & Cie v. O'Donnell*,[148] it has been held that the patentee has no inherent right to control resale prices.

Some tying agreements are unreasonable per se because they create unacceptable risks of suppressing competition.[149] A per se condemnation is only proper, however, if forcing is probable. Attempts to expand the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second

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139 K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 289 (1987) (quoting 19 C.F.R. § 133.21(c)(1)-(2) (1987)).

140 *Id.* at 287-88 (quoting Tariff Act of 1930, 19 U.S.C. § 1526(a)).

141 *Id.* at 390 (quoting 19 C.F.R. § 133.21(c) (1987)). This exception would have been similar to the "exhaustion doctrine" principle found in the EU. *See supra* text accompanying note 115.

142 SULLIVAN, *supra* note 130, at 538.

143 272 U.S. 476 (1926).

144 *See* SULLIVAN, *supra* note 130, at 545.

145 304 U.S. 175, *aff'd on reh'g*, 305 U.S 124 (1938).

146 United States v. United States Gypsum Co., 333 U.S. 364 (1948).

147 *See* SULLIVAN, *supra* note 130, at 570 (citing Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947)).

148 229 U.S. 1, 11-15 (1913) (holding patentee may not limit by notice the price of future retail sales of the patented article).

149 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1983). A tie-in clause is one where the licensor stipulates that the licensee has to procure goods or services from the licensor.

market. Thus, conditioning the sale or lease of a patented item on the buyer making all of his purchases of a separate tied product from the patentee is unlawful unless the seller neither possesses the degree nor kind of market power that would enable him to compel his customers to buy a second, unwanted product to obtain the tying product.[150] Consequently, an antitrust violation could only be established by proving an unreasonable restraint on competition in the relevant market, which supposes a market analysis.[151]

While we can note differences between the U.S. and the EU approach, they may prove to be unimportant in practice. According to Sullivan, the last few decades have witnessed those courts faced with patent-antitrust conflicts favoring antitrust law over patent law.[152] Nevertheless, intellectual property rights seem to enjoy a broader protection in the United States than in the EU unless they are bluntly used to circumvent antitrust law.

V. Mergers

A. *Preliminary Remarks*

For many years experts argued whether Articles 85 and 86 could be considered as a competence for an EU merger control. At least on the face of the text, such competence was not obvious. When Continental Can wanted to merge with its licensees in the Netherlands and France, the Commission did not allow the merger. The Court found Continental Can exercised a dominant position and ruled that one cannot assume that the Treaty, which prohibits in Article 85 certain decisions of ordinary associations of undertakings which restrict competition without eliminating it, permits in Article 86 undertakings, after merging into an organic unity, should reach a dominant position so that any chance of competition is rendered practically impossible. Abuse may therefore occur if an undertaking in a dominant position strengthens this position in such a way that the degree of dominance reached substantially fetters competition.[153] At that time, the Court quashed

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150 *Id.* at 16-18. *See* Broadcast Music, Inc., v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) (relevance of market analysis in antitrust matters).

151 In *Jefferson Parish Hospital*, such unreasonable restraint could not be proved. *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 29-31.

152 SULLIVAN, *supra* note 130, at 506.

153 Case 6/72, Europemballage Corp. v. Commission, 1973 E.C.R. 215, 1973 C.M.L.R. 199, 224-25. These are similar reasons to the ones that American courts

the Commission's decision, holding that the Commission had not stated sufficient reasons to support its conclusion that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight.[154] Even if the Court had affirmed the Commission, it was apparent that a merger control based on Article 86 would be a very selective one, applying only if at least one of the merging undertakings had a dominant position. In a later case, the Court further stated that while a company's acquisition of an equity interest in a competitor "does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market in which they carry on business."[155] Thus, the Court indicated that it might be willing to control mergers under certain circumstances on the sole basis of Article 85. Realizing perhaps that the Court might take the lead in the merger issue if nothing happened, the Council eventually enacted in 1989 what is generally known as the Merger Regulation.[156]

B. *Merger Regulation*

"Concentration" is the term used in the EU for merger or like operations subject to the Regulation. It applies to all concentrations with a Community dimension where "the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5,000 million" or where "the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-

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used to indicate when patent acquisitions were held to constitute exclusionary conduct. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (holding company that controls 90% of steel market is monopoly regardless whether existing competition is terminated or prospective competition is prevented); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (holding where company exercised such overwhelming strength that it controlled shoe machinery market, and such strength excluded some actual or potential competition, the company was chargeable with monopolizing the market).

154 *Europemballage Corp.*, 1973 C.M.L.R. at 228.

155 Joined Cases 142 & 156/84, British Am. Tobacco Co. v. Commission, 1987 E.C.R. 4487, 4 C.M.L.R. 24, 59 (1988).

156 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings (As Corrected), 1989 O.J. (L 395) 1 [hereinafter Merger Regulation].

wide turnover within one and the same Member State."[157] Mergers that are not subject to the Merger Regulation may still be subject to the merger control in a specific Member State.[158] One of the outstanding advantages of the Merger Regulation is that it provides for a single and relatively fast procedure. Within one month after a complete notification,[159] the Commission is required to make a determination whether the concentration falls within the scope of the Merger Regulation and is compatible with the Common Market.[160] If serious doubts are raised concerning the latter, it must initiate proceedings, which normally have to be completed within a further four-month period.[161] This strict timetable makes the Merger Regulation a very attractive instrument for the economy. Enterprises may have a real interest in having their operations fall within the scope of this regulation.

The Merger Regulation divides joint ventures into two categories: (1) "concentrative" joint ventures which are subject to the special rules laid down in the Regulation; and (2) "cooperative" ventures which are outside its scope and evaluated directly under Articles 85 and 86. The distinction between concentrative and cooperative joint ventures is therefore of considerable practical importance because the Merger Regulation offers parties the benefit of a fair and efficient procedure with legally binding deadlines for the Commission. Unfortunately, however, Article 3 (2) of the Merger Regulation is of only limited assistance in clarifying this distinction; it defines a concentrative joint venture as one "performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behavior of the parties amongst themselves or between them and the joint venture."[162] In contrast, a cooperative joint venture is "[a]n operation . . . which has as its object or effect the coordination of the competitive behavior of undertakings which remain independent."[163]

To provide additional guidance, the Commission has issued a

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157 *Id.* art. 1 (2).

158 Germany's merger authority, called the "Bundeskartellamt," is probably the best known national merger control in the EU.

159 *Id.* art. 10 (1). Six weeks in cases where Article 9 (2) applies. *Id.*

160 *Id.* art. 6.

161 *Id.* art. 6 (1)(c); art. 10 (3).

162 *Id.* art. 3 (2).

163 *Id.*

notice regarding concentrative and cooperative operations under the Merger Regulation.[164] It indicates that a concentrative joint venture will be presumed if the entity: (1) acts as an independent supplier and purchaser on the market, and does not supply its products or services exclusively to the parent companies; (2) is intended to carry out activities over the long-term, which is generally the case where the parents transfer an existing business or substantial technical or commercial know-how to the venture; and (3) exercises its own commercial policy.[165]

The "absence of coordination of competitive behavior" is also very likely to be presumed where the parents withdraw permanently from the joint venture's market or where the venture undertakes new activities on behalf of the parent companies.[166] If these criteria are met, the joint venture is considered to be concentrative. As previously indicated, however, it is not always easy to achieve a clear distinction between these two categories despite the obvious incentive to do so.[167]

To assist the parties in evaluating the legality of cooperative joint ventures under Article 85, the Commission has also issued a notice that establishes a number of relevant substantive criteria.[168] For ventures between non-competing firms, Article 85 (1) may only apply if the entity manufactures primary or intermediate products for its parents or processes the goods produced by one or more parent companies and if the parents have a strong market position in the supply or demand of the relevant products.[169]

Joint ventures between competitors can be further sub-divided

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164 Commission Notice of 14 August 1990 Regarding its Interpretation of Concentrative and Co-operative Situations under the Merger Control (Antitrust) Regulation 1989, 1990 O.J. 1990 (C 203) 10.

165 *Id.* nos. 16-18.

166 *Id.* nos. 24, 25, 33.

167 Out of 23 notified joint ventures, 5 had to be qualified as not falling within the category of concentrative joint ventures. COMMISSION'S XXIST REPORT ON COMPETITION POLICY 1991, at 84 (1991). Recently this was the case for an agreement between Philips Electronics N.V., Thomson Consumer Electronics S.A. and SAGEM. *See* 1993 O.J. (C 22) 2, 4 C.M.L.R. 105 (1993) (holding that operation did not constitute a concentration). This demonstrates that companies attempt to draft their agreements as concentrative joint ventures.

168 Commission Notice Concerning the Assessment of Co-operative Joint Ventures Pursuant to Article 85 of the EEC Treaty, 1993 O.J. (C 43) 2, 5 C.M.L.R. 401 (1993). *See id.* no. 15 (enumerating categories of co-operative joint ventures that are not caught by the ban on restrictive agreements).

169 *Id.* no. 34; *see also id.* nos. 15, 18, 30.

into those created to perform certain functions and those created to be "fully-fledged" joint ventures. A venture in the first category which is handling the final stage of production, processing what its parents produce, will often considerably restrict competition.[170] If it manufactures primary or intermediate products, the likelihood of restraint of competition between the parents increases with the importance of the jointly-manufactured goods to the fabrication of the final product.[171] For fully-fledged joint ventures operating in the same markets as the parents, it is also very likely that competition between the firms will be restricted. This may be true as well for joint operations on an upstream or downstream market if there are delivery links with the parents.[172]

Finally, the notice underscores that special attention must be paid to networks of joint ventures. It should be remembered throughout, however, that joint ventures falling within the scope of Article 85 (1) may nevertheless be exempted from the ban on restrictive agreements if they satisfy the tests laid down in Article 85 (3) or a block exemption regulation.[173]

It is not uncommon for actual or potential competitors to enter into a joint venture. The parties will also often wish to collaborate in the sale and marketing of products or services, or by requiring the parents to grant licenses for patents or know-how.

However, the original block exemption regulations of specialization[174] and cooperative research and development[175] did not cover joint ventures that included sales. Nor did the block exemptions on patent[176] and know-how licensing[177] apply to arrangements between a joint venture and its parents when those parties were competitors. The only way to obtain clearance in these situations was to submit an individual application under Article 85 (3).

Recognizing that joint ventures "can give a spur to competition by promoting new technological developments, the creation

[170] *Id.* no. 40.
[171] *Id.* nos. 39-40.
[172] *Id.* no. 41.
[173] *See id.* nos. 43-51 (group exemptions); nos. 52-64 (individual exemptions). As far as networks of joint ventures are concerned, see nos. 17, 27 and 41.
[174] Regulation on Specialization Agreements, *supra* note 49, art. 1.
[175] Regulation on Categories of Research and Development Agreements, *supra* note 50, art. 1.
[176] Regulation on Patent Licensing Agreements, *supra* note 48, art. 5 (1).
[177] Regulation on Know-how Licensing Agreements, *supra* note 52, art. 5 (1).

of new products and the penetration of new markets, thus speeding up economic integration,"[178] the Commission proposed broadening the foregoing group exemptions to cover joint sale of the contract products and licenses between the parent companies and the joint ventures even where those parties were competitors.[179] In each case, this is subject to market-share limits of 20% for production agreements and 10% for arrangements including distribution, and to an overall turnover limitation of ECU one (1) billion in the case of specialization agreements. The proposed amendments became effective in April 1993.[180]

These innovations should certainly facilitate the creation of cooperative joint ventures because an agreement that comes within the terms of a block exemption does not need to be notified. Even though the flexibility of group exemptions may occasionally leave something to be desired,[181] the modifications should nevertheless be most welcome. For agreements falling outside their scope, the alternative of individual exemptions always remains.

VI. Conclusion

Over the last thirty years, the EU authorities have succeeded in setting up a competition law that is now both well established and efficient. Undertakings intending to do business within the EU or the EEA are well advised to be familiar with its terms.

The EU competition law gives the Commission and the judicial authorities an effective and comprehensive instrument, en-

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178 Draft Notice of Guidelines for the Appraisal of Co-operative Joint Ventures in the Light of Article 85 of the EEC Treaty, 4 C.M.L.R. 504, 508 (1992).

179 Draft Commission Regulation (EEC) Amending Commission Regulations (EEC) No. 417/85, (EEC) No. 418/85, (EEC) No. 2349/84 and (EEC) No. 556/89 on the Application of Article 85 (3) of the EEC Treaty to Certain Categories of Specialization Agreements, Research and Development Agreements, Patent Licensing Agreements and Know-how Licensing Agreements, 1992 O.J. (C 207) 11. The proposed amendments were approved by the Economic and Social Committee, Opinion on the XXIst Report on Competition Policy, 1993 O.J. 1993 (C 19) 92.

180 With some minor modifications the draft became Commission Regulation (EEC) No. 151/93 of 23 December 1992 Amending Regulations 417/85, 418/85, 2349/84 and 556/89 on the Application of Article 85 (3) of the Treaty to Certain Categories of Specialization Agreements, Research and Development Agreements, Patent Licensing Agreements and Know-how Licensing Agreements, 1993 O.J. (L 21) 8, 4 C.M.L.R. 151 (1993). Of particular noteworthiness, see recitals 6 and 7 and the amendments to the corresponding regulations.

181 *See* Korah, *supra* note 44, at 169.

abling them to make sure that competition is not distorted. The Merger Regulation permits the assessment of concentrations, i.e. mergers and concentrative joint ventures within comparatively short and binding deadlines. Regulation 151/93[182] now also offers some welcome help for the setting up of cooperative joint ventures, even though in this field the Commission is not subject to binding time limits. Infringements will occur even under the best legal system, but the Commission is in a position to take efficient measures as soon as it is aware of distortions of competition; in this context the possibilities offered to private litigators should not be neglected either.

At times, it appears that the EU competition law has too many rules, particularly in the assessment of mergers and joint ventures, requiring authorities to make business decisions instead of legal appreciations. The question, however, whether administrative bodies and courts in the United States are rather confined to the truly legal aspect should be answered by someone who is more familiar with the entire U.S. antitrust law.

American antitrust law and European competition law are structured differently: while the Treaty applies Article 85 (3), the American courts follow a rule of reason approach. In other words, while the EU generally prohibits everything that might have as its effect or object a distortion of competition unless an exemption is granted, American antitrust law only prohibits practices that unreasonably restrict competition. The results, however, may not be fundamentally different in practice as we have seen in the field of patent licensing. As far as this specialty is concerned it is, however, always a firm characteristic of EU competition law that parallel imports must never totally be excluded, that the most far-reaching degree of exclusivity can only be stipulated for a period of five years and that the block exemption regulations allowing such clauses are themselves of limited duration. Counsels have to take this most carefully into consideration because it is never granted that the next block exemption regulation has the same terms as its predecessor.

Even though both legal systems prove to have some similar material effects in practice, the differences in the formal approach are not irrelevant. Exceptions always have to be granted in proce-

182 *See supra* note 180.

dures by authorities, offering them the opportunity to exercise a more subtle and important control over economic activities than in the case of courts that impose fines and allow damages in case of unreasonable restraints. The EU system possibly induces, or charges, the authorities to make economic decisions on behalf of undertakings because granting an exemption always constitutes an economic decision in part. Both in the U.S. and in the EU it is essential to become familiar with cases: in the U.S., to *learn the law* that is to a great extent contained in the cases decided by the Superior Courts, and in the EU, to *learn how the law* is applied.