

12-1-1987

## Slouching Towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law

James S. Venit

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>



Part of the [Antitrust and Trade Regulation Commons](#)

---

### Recommended Citation

James S. Venit, *Slouching Towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law*, 10 B.C. Int'l & Comp. L. Rev. 17 (1987), <http://lawdigitalcommons.bc.edu/iclr/vol10/iss1/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# Slouching Towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law

by *James S. Venit\**

## I. INTRODUCTION

The substance and practice of antitrust law in the United States and the European Economic Community (EEC) differ significantly for a variety of reasons which have their roots in important historical factors. The basic U.S. antitrust statute, the Sherman Act,<sup>1</sup> was adopted in 1890, after the United States had achieved political and economic unity and after a sustained period of industrialization and expansion. The statute's broad wording, subsequently elaborated by judicial interpretation, and the decision to make private-party damage actions one of the principal means of its enforcement reflect both the common law tradition and the possibility, available to a unified judicial system, of using private-party litigation to achieve the goals of public policy. In the nearly 100 years since the Sherman Act's adoption, private actions, fed by the incentive of treble damages and contingency fees, have led to the development of a complex body of substantive and procedural law whose intricacies have been elaborated in the adversary process. Moreover, because the Sherman Act provides for criminal sanctions in addition to treble damages, the fear of antitrust prosecution has had a significant deterrent effect on the conduct of U.S. firms.

In contrast to U.S. law, EEC antitrust law is still in its early stages of development. This is scarcely surprising when one remembers that the basic provisions of EEC competition law set forth in the Treaty of Rome<sup>2</sup> took effect in 1957, and that Regulation 17,<sup>3</sup> which provides for the administrative procedures by which these Treaty provisions are implemented, was adopted in 1962. The basic EEC rules, set forth in Articles 85<sup>4</sup> and 86<sup>5</sup> of the Treaty of Rome are no

---

\* Member of the New York Bar; Partner, Law Offices of S.G. Archibald, Brussels.

<sup>1</sup> The Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1982).

<sup>2</sup> Treaty Establishing the European Economic Community, *done at Rome*, March 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty or Treaty of Rome].

<sup>3</sup> Regulation 17, 5 O.J. EUR. COMM. (No. L 13) 204, 2 Common Mkt. Rep. (CCH) ¶ 2401 (1962).

<sup>4</sup> Article 85(1) provides that:

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 preven-

less broad and sweeping than those of Articles 1 and 2 of the Sherman Act to which they vaguely correspond. Their subsequent interpretation and application, however, must be understood within the context of the overall goal of transforming originally six, and now twelve, individual, isolated national markets into a single, unified common market free of both tariff and anti-competitive barriers to trade and this in the face of a tradition of cartelization and the absence of any effective supra-national political unity.

The importance for EEC antitrust law of the goal of market integration in the absence of political unity cannot be overemphasized and the attempt to achieve this integration is the source of the most significant disparities in the approach to, and implementation of, antitrust law in the United States and the EEC. First, the policy goal of encouraging market integration plays at least as important a role in EEC antitrust law as the goal of ensuring that the free play of competition is not restricted. This explains the very strict attitude of the EEC authorities, *inter alia*, toward territorial restraints in vertical agreements and the fact that fines for violations, such as export prohibitions, have in the past equaled those imposed for traditional "hard core" violations such as horizontal price-fixing. Given the overriding goal of market integration, neither the European Court of Justice (European Court or the Court), nor the Commission of the European Communities (Commission), has been willing to accept the view that, in general, vertical territorial restraints should be permitted except where such

---

tion, restriction or distortion of competition within the Common Market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 85(2) provides that such agreements are void. Article 85(3) makes possible their exemption where the agreements or practices in question improve distribution or contribute to technical progress. These benefits are made available to consumers, there are no restrictions which are not indispensable to achieving these goals and competition with respect to the products concerned is not substantially eliminated.

<sup>5</sup> Article 86 provides that:

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.

restrictions are used to facilitate horizontal collusion among dealers or manufacturers, or where they foreclose access to distributors and dealers thereby raising barriers to entry at the level of manufacture.<sup>6</sup>

Second, in contrast to the situation in the United States, where both public and private enforcement are relied upon, there has been a greater concentration of power in the EEC's enforcement agency, the Commission, and a significant absence of enforcement of EEC rules through private-party damage actions.<sup>7</sup> (There is, however, a considerable body of EEC jurisprudence involving cases in which Article 85(1) has been used by parties in civil disputes before national courts to argue that agreements are void and unenforceable under Article 85(2)). The concentration of power in the Commission and, specifically, Directorate General IV (DG-IV), the Commission's administrative subdivision charged with the day-to-day enforcement of the antitrust laws, reflects the perception of the EEC authorities that there is a need for exclusive control in this area due to the lack of supra-national political unity. It can also be traced in part to the absence of the incentive of treble damages and the fact that a complaint to the competition authorities in Brussels normally offers a more rapid and certainly a less expensive path to relief than private litigation.<sup>8</sup> It is probably also true that the absence of private damage actions has, in the past, been welcomed by the Commission, since such actions could encourage the creation of a jurisprudence beyond its control.<sup>9</sup> This fear is, to some extent, justified because there is no effective supra-national judicial review of the de-

---

<sup>6</sup> Cf., suggestion of Advocate General Verloren Van Themaat in his opinion in *Metro SB Grossmärkte GmbH v. Commission*, Case 75/84, judgment of October 22, 1986 (not yet officially reported) (*Metro II*). The Commission has at times been criticized for placing more emphasis on attacking the barriers to interstate trade that result from private agreements rather than eliminating the distortions to competition and barriers to market integration that result from the different legal provisions that prevail in the various Member States. Because legislative discrepancies and governmental barriers to trade have proven, often for political reasons, difficult to attack, companies doing business in the EEC find themselves under the legal obligation not to create contractual barriers to the operation of a common market while at the same time being subjected to uncommon conditions in the individual Member States in which they do business. See Van Bael, *Heretical Reflections on the Basic Dogma of EEC Antitrust: Single Market Integration*, 10 SWISS REV. OF INT'L ANTITRUST L. 39 (1980). The Commission's policy toward vertical territorial restrictions has, however, recently been strongly defended by Michel Waelbroeck who argues that the Commission's refusal to consider that differences in the legislative and economic conditions in the Member States constitute a valid reason justifying private obstacles to trade is necessary in light of the goal of market integration. However, Waelbroeck also argues that in some cases the Commission may have been too inflexible. See Waelbroeck, *Vertical Agreements: Is the Commission Right Not to Follow the Current U.S. Policy?* 25 SWISS REV. OF INT'L & COMP. L. 45 (1985).

<sup>7</sup> See Temple Lang, *EEC Competition Actions in Member States' Courts—Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law*, FORDHAM CORP. L. INST. 219 (1983). See also Pranol, *Remedies in National Law for Breach of Articles 85 and 86 of the EEC Treaty: A Review*, 2 LEGAL ISSUES IN EUR. INTEGRATION (1983).

<sup>8</sup> See Temple Lang, *supra* note 7.

<sup>9</sup> See Forrester & Norall, *The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 21 COMMON MKT. L. REV. 11, 22 (1984).

cisions of the national courts inasmuch as the role of the European Court is limited to responding to questions posed by the national courts before a final judgment is reached, rather than reviewing the judgment itself. Thus, centralization of decision-making in Brussels was, and remains, an important aspect of policy formulation and the means of ensuring that the basic principles of the EEC Treaty are preserved. As will be seen below, however, the Commission has recently begun to suggest that to the extent the basic principles have now been clearly established, national courts should play a greater role in enforcing EEC competition law.

In addition to these two very essential differences, there are a number of other important factors which, when taken into account, make it easier to understand some of the fundamental differences in the approach to antitrust law in the United States and the EEC. First, since EEC competition law is supranational, the political process, both within the collegiate body of 17 Commissioners appointed by the 12 different Member States and in the interaction between the Commission, on the one hand, and the Council of Ministers, the European Parliament and the Member State representatives with whom it is obliged to consult, on the other, plays a significant part in the decision-making process. Thus, although the role of DG-IV is basically similar to that of the Justice Department or the Federal Trade Commission, it cannot act on its sole authority, and its decisions must ultimately be taken at the level of the entire 17 member Commission, following consultation with the Member State representatives. Because antitrust decisions are in effect made at what would be analogous to the cabinet level in the United States, political considerations and the conflicting policy goals of various Commissioners and Member States can, and often do, play a role in the decision-making process.<sup>10</sup>

Second, unlike many of their U.S. counterparts in the Justice Department, the officials in DG-IV have not yet shown any visible signs of adhering to the theories advocated by the Chicago school with its emphasis on price-theory analysis and its de-emphasis of concepts such as market structure and barriers to entry. Given the controversial nature of some of these theories, which have not met with universal acceptance in the U.S. courts, and the importance attached to market integration, it is not altogether surprising that EEC enforcement authorities have not adopted them. In addition, the Commission has

---

<sup>10</sup> This factor was prominently brought to mind by an article in the *Wall Street Journal* of February 9, 1986, announcing that a decision by the Commissioner of Competition, Mr. Sutherland, to impose substantial fines on participants in an alleged price-fixing cartel among the producers of polypropylene had been withdrawn because of opposition by the Commissioner responsible for Industrial Affairs who, according to this report, felt the companies' attempts to restructure and adjust to changing market conditions would be hurt by the imposition of large fines. Commissioner Sutherland ultimately prevailed and fines totalling nearly 58 million ECU were imposed on fifteen companies. The highest fine was 11 million ECU.

tended to attach importance to increasing the competitiveness of small and medium sized firms. Consequently, the Commission has tended, especially in respect of Article 86, to adopt a strict position which places substantial emphasis on fairness and protecting smaller competitors against larger firms and which is thus not always sympathetic to arguments based on efficiency.<sup>11</sup> On the other hand, there is also a countervailing tendency within the Commission to approach competition policy from a *dirigiste* and macroeconomic perspective, and to view it as a means of intervening in the free market to encourage certain broader economic goals such as restructuring through, for example, the toleration of crisis cartels.<sup>12</sup>

The factors briefly outlined above, and, in particular, the fact that EEC antitrust law has been intentionally used as a device to encourage market integration, help explain some of the important differences between the U.S. and EEC approaches to antitrust law.<sup>13</sup> Understanding some of the reasons underlying the different approaches does not, however, make the approach taken in the EEC any more familiar to the U.S. practitioner. In an attempt to do the latter, this Article will examine some of the practical and theoretical problems posed by the basic formal elements of EEC antitrust law and some of the solutions which have been implemented or proposed to deal with the peculiar problems that have arisen in its administration.

## II. THE BASIC RULES

The basic competition rules applicable to private undertakings are set forth in Articles 85 and 86 of the Treaty of Rome. Article 85, which applies to agreements and to concerted practices between undertakings, and Article 86, which applies to abuses of a dominant position, resemble, in their broad outlines, Sections 1 and 2 of the Sherman Act. However, the substance and practice of EEC law, in particular with respect to Article 85, differ significantly from U.S.

---

<sup>11</sup> See *ECS/Akzo*, 28 O.J. EUR. COMM. (No. L 374) 1, 47 Common Mkt. L.R. 273 (1985) in which the Commission rejected the argument that pricing above variable but below total cost would constitute a *per se* defense to a charge of predatory pricing under Article 86, *inter alia*, because such pricing tactics could eliminate less economically resourceful (*i.e.* smaller) competitors. Critics in the United States have, of course, also frequently complained that U.S. antitrust laws are too often enforced to protect competitors rather than competition and do not take sufficient account of efficiencies. See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

<sup>12</sup> See *Synthetic Fibres*, 27 O.J. EUR. COMM. (No. L 207) 17, [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,606 (1984). This tendency is beginning to surface in the United States, as evidenced by recent proposals to exempt certain industries from the effects of the antitrust laws in order to enable them to compete more effectively on an international level.

<sup>13</sup> For a more detailed discussion of these and other factors see B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* (2d ed. 1985). There are, of course, also substantial similarities between EEC and U.S. law, especially in the approach to certain horizontal arrangements.

law. First, Article 85 contains, in its first paragraph, a broadly worded prohibition of certain agreements and concerted practices which appreciably restrict competition and appreciably affect trade between Member States.<sup>14</sup> Second, Article 85(3) provides for exemption from the prohibition set forth in Article 85(1) and from the sanction of nullity resulting from Article 85(2).<sup>15</sup> To qualify for exemption, the agreement or practice, assuming it is not automatically exempted pursuant to a block exemption regulation or does not fall into a small category of agreements for which notification is not a prerequisite, must first be notified to the Commission on a special form, Form A/B. Once notified, at which point the parties are also ensured of immunity with respect to fines until such time as the Commission acts to remove this immunity,<sup>16</sup> the agreement may be considered for exemption.<sup>17</sup>

To qualify for exemption, the agreement or practice must: (i) contribute to the improvement of the production and distribution of goods or the promotion of technical progress; (ii) allow consumers a fair share of the resulting benefits; (iii) not impose restrictions which are not indispensable to these objectives; and (iv) not eliminate competition with respect to a substantial part of the products in question. The Commission has also been empowered by the Council to adopt block exemption regulations in certain areas, which provide automatic exemp-

---

<sup>14</sup> The effect on trade need only be potential and two recent Court of Justice judgments indicate that this requirement is more a theoretical one than a determination based on specific economic analysis. See *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, 4 Common Mkt. Rep. (CCH) ¶ 14,245 (1986) and *Windsurfing International Inc. v. Commission*, 4 Common Mkt. Rep. (CCH) ¶ 14,271 (1986).

<sup>15</sup> The European Court has held that the entire agreement is not void, only the clauses caught by Article 85(1), and that it is up to the national court, applying national law with respect to severability, to determine the legal consequences where specific provisions of the agreement are found to be void. See *De Geus v. Bosch and van Rijn*, E. Comm. Ct. J. Rep. 45, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8003 (1962).

<sup>16</sup> See Regulation 17, *supra* note 3, at ¶ 2541.

<sup>17</sup> It is not clear whether the Commission is under a legal obligation to exempt a notified agreement that qualifies for exemption, although this would arguably be the case. See Temple Lang, *Community Antitrust Law—Compliance and Enforcement*, 18 COMMON MKT. L. REV. 335, 344 (1981). As a practical matter, very few notified agreements are formally exempted. According to the Commission, in 1982 there were some 3,175 requests for exemption pending. See *Response of Commissioner Andriessen to a Parliamentary Question*, O.J. EUR. COMM. (No. C 118) 22 (1983). It has been estimated that the Commission receives about 200 additional requests each year. See *Commission of the European Communities, Eleventh Report on Competition Policy*, § 15 (1982). Since the adoption of Regulation 17 in 1962, it appears that the Commission has granted fewer than 50 exemptions and in the period 1979-1984, the Commission managed to grant 20, eight of them in 1983, see 28 O.J. EUR. COMM. (No. C 39) 23-24 (1985). Between December 1984 and December 1985, five additional exemptions have been renewed or granted bringing the six-year total to 24. It took the Commission as little as 10 months and as much as 10 1/2 years to process the applications and two to four years was the period required in most cases. The Commission itself estimates 24 months as the average time required to grant a negative clearance or to refuse to grant an exemption or a negative clearance. See *Response of Commissioner Sutherland to a Parliamentary Question*, 28 O.J. EUR. COMM. (No. C 255) 27 (1985).

tion *en masse* for certain categories of agreements.<sup>18</sup> This power was granted because it became clear, at a rather early stage, that the Commission would be incapable of processing the requests for exemption of all the agreements notified to it. Thus, in areas where a block exemption has been adopted, agreements that come within its scope will, if they comply with all the terms of the regulation, be automatically exempted from the prohibition of Article 85(1) without the need for prior notification and an individual decision.

The bifurcation of Article 85 and, in particular, the possibility that restrictive agreements or practices caught within the prohibition of Article 85(1) and, consequently, void under Article 85(2), may nevertheless be exempted pursuant to Article 85(3) constitute one of the principal differences between U.S. and EEC practice. This difference entails major substantive and procedural consequences. First, EEC antitrust analysis is, in effect, split into two separate inquiries: whether the agreement or practice falls within the prohibition of Article 85(1) and, if it does, whether it qualifies for exemption. Second, there can in theory be no *per se* violations under EEC law since to be caught by Article 85(1) the restriction must, in the first place, be appreciable,<sup>19</sup> and may nevertheless be exempted under Article 85(3). Third, the structure of Article 85 has major procedural consequences since, ultimately, the legality and enforceability of any given arrangement may depend on whether it has been notified to and exempted by the Commission. These substantive and procedural consequences have led to a concentration of power in the Commission's hands as a result of the latter's tendency to apply Article 85(1) strictly and the fact that only the Commission can grant an exemption under Article 85(3). This concentration of power, as will also be discussed below, has had some unfortunate consequences because, as a practical matter, the understaffed Commission is not able to exempt all, or even a significant number, of the agreements notified to it in a request for an individual exemption. Before discussing these issues, it may be useful to provide a brief summary of how antitrust law is enforced in the EEC.

### III. THE ENFORCEMENT OF COMPETITION LAW

Practical enforcement of EEC antitrust law has been delegated to DG-IV, one of the 20 Directorates General within the Commission although it should not

---

<sup>18</sup> See Regulation 19/65, 8 O.J. EUR. COMM. (No. L 36) 533, 2 Common Mkt. Rep. (CCH) ¶ 2717 (1965); Regulation 2821/71, 14 O.J. EUR. COMM. (No. L 285) 46, 2 Common Mkt. Rep. (CCH) ¶ 2741 (1971).

<sup>19</sup> See *Völk v. Vervaecke*, 1969 E. Comm. Ct. J. Rep. 295, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8074 (1969), in which the Court, establishing what is known as the *de minimis* rule, held that absolute territorial protection in favor of an exclusive distributor was not caught by Article 85(1) given the weak market position of the parties. (The supplier had a market share of between 0.2% and 0.5% on its home market in Germany).



be forgotten that the Commission's legal service also plays a major role in the development of antitrust law. DG-IV is itself divided into four directorates charged with enforcing Articles 85 and 86,<sup>20</sup> each headed by a Director who in turn is responsible to the Director-General who in turn is responsible to the Commissioner for Competition.

Despite the fact that it is charged with enforcing competition law in a territory that covers nearly all of Western Europe with a population of about 321 million, there are only about 150 officials in DG-IV. This is less than in the national antitrust authorities of either Germany or the United Kingdom or the U.S. Justice Department and Federal Trade Commission.

Normally, cases come to or are initiated by the Commission in a variety of ways. These include a complaint by a third party, notification of an agreement for a negative clearance or an exemption, or as a result of a specific or general inquiry into a sector of economic activity initiated by DG-IV on its own. In cases in which there has been a violation of the competition rules, the Commission's procedure normally takes the following course: (i) fact finding (the Commission may make announced or unannounced on-site inspection visits to inspect documents<sup>21</sup> or may require the production of information and documents by a written request);<sup>22</sup> (ii) issuance of a statement of objections addressed to the offending parties detailing the facts and the alleged violations of law; (iii) oral hearing<sup>23</sup> conducted by a hearing officer who is a senior official in DG-IV, but is supposed to be independent of the prosecutorial machinery; and (iv) adoption of a final decision ordering cessation of the violation<sup>24</sup> and, perhaps, imposing fines which may equal 10 percent of the worldwide turnover in all products of the offending company and all the members of its group.<sup>25</sup> Such decisions, which are adopted following consultation with the Member States and approval by the Commission as a whole, may be appealed to the European Court. In addition to imposing fines and ordering the cessation of any infringement, the Commission also has the power to adopt interim measures, pending a final

---

<sup>20</sup> As of the end of 1986, the four directorates were A, General Competition Policy, B and C, both dealing with Restrictive Practices and Dominant Positions and D, Coordination of Competition Decisions. A fifth directorate, Directorate E, is charged with administering the Treaty provisions concerning state aids. At the time this Article was prepared, DG-IV was to be reorganized again. Although the details of this reorganization had not yet been made publicly available, it was expected that Directorates A and D would be merged.

<sup>21</sup> See Regulation 17, *supra* note 3, arts. 14(2) & (3).

<sup>22</sup> *Id.*, arts. 11(1) & 11(5).

<sup>23</sup> *Id.*, art. 19(1).

<sup>24</sup> *Id.*, art. 3(1).

<sup>25</sup> *Id.*, art. 15(2). The largest individual fine on a single company, 11 million ECU, was imposed in April, 1986 in respect of a price-fixing cartel. See Polypropylene, 29 O.J. EUR. COMM. (No. L 230) 1 (1986). The present Commissioner of Competition, Mr. Sutherland, has announced his intention to set fines at deterrent levels.

decision, to prevent the continuation of a violation where there is a risk of serious and irreparable injury.<sup>26</sup> As can be seen from the foregoing, DG-IV, unlike the U.S. Justice Department, does not initiate Court actions in respect to antitrust violations by private parties. Rather, it acts as an investigatory, prosecutorial, and quasi-judicial entity wrapped into one, subject to review by the European Court.

The Commission's activity is not limited to investigating, ordering the termination of, and sanctioning, with fines, violations of the EEC competition rules. As noted previously, the Commission may also grant individual exemptions under Article 85(3), thus, in effect, suspending the effects of Article 85(1).<sup>27</sup> It is also empowered to issue negative clearances, which are formal decisions that the agreement or practice concerned does not fall within the scope of Article 85(1) or 86.<sup>28</sup> An individual exemption or a negative clearance can only be granted following notification of the agreement and publication of a notice in the *Official Journal*. In the notice the Commission summarizes the facts, states its intention to grant the exemption or clear the agreement, and requests comments from interested third parties.<sup>29</sup> Once the exemption decision, often modifying the parties' original arrangement or imposing conditions, or the negative clearance has been adopted, the formal decision is also published in nine languages in the *Official Journal*.<sup>30</sup>

The Commission's decisions in competition cases, including decisions to grant exemptions, are subject to review on appeal to the European Court, which also hears cases on reference from the national courts. Given the direct applicability of Articles 85(1) and 86, national courts are also empowered to rule on whether an act or agreement violates Community law. In particular, these courts have the power to hold that contractual provisions which are in violation of Article 85(1) are void under Article 85(2).<sup>31</sup> Although national courts cannot impose fines or grant exemptions, it is now generally accepted that they do have the power to grant injunctions and to award damages to private party plaintiffs who suffer injury as a result of violations of Articles 85(1) or 86.<sup>32</sup> As noted above, the national courts are also entitled, and in some cases required, to make references to the European Court to assist them in resolving questions of

---

<sup>26</sup> See *Camera Care Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8645 (1980).

<sup>27</sup> See Regulation 17, *supra* note 3, art. 9(1).

<sup>28</sup> *Id.*, art. 2.

<sup>29</sup> *Id.*, art. 19(3).

<sup>30</sup> *Id.*, art. 21(1).

<sup>31</sup> See *Bosch*, *supra* note 15.

<sup>32</sup> See *Belgische Radio en Televisie et al. v. SABAM and NV Fonior*, 1974 E. Comm. Ct. J. Rep. 51, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8268 (1974). See also *Temple Lang*, *supra* note 7.

Community law.<sup>33</sup> The Court's responses to the questions posed, however, are couched in terms of general principles intended to assist the national court in the correct application of EEC law. Furthermore, the European Court does not exercise any power of judicial review with respect to the national court's ultimate judgment. As a result, national courts have sometimes applied the Court's responses in some rather unexpected ways to achieve results that appear contrary to those intended by the Court.<sup>34</sup>

#### IV. THE IMPLEMENTATION OF THE STATUTORY STRUCTURE

In the course of the evolution of EEC law, certain fateful decisions with respect to the administration of Article 85 have been made which have had a decisive impact on the practice of Community law. First, it was decided at the outset that Article 85(3) was not self-applying, but rather, that an exemption had to be granted.<sup>35</sup> Then, with the adoption of Regulation 17 in 1962, it was further determined that only the Commission would be entitled to grant such an exemption. Regulation 17 also provided that, with the exception of a very narrow category of agreements referred to in Article 4(2), an exemption could only be obtained following formal notification of the agreement or practice to the Commission.<sup>36</sup> Article 15(5) of Regulation 17 further provided that agreements which have been notified in a request for an exemption, but not for a negative clearance, are immune from the imposition of fines until such time as the Commission acts to remove the immunity. Two fundamental consequences flow from these provisions of Regulation 17. First, national courts do not, except in certain sectors which are excluded from Regulation 17, have the power to exempt agreements that may be caught by Article 85(1). National courts do, however, have the power to find that agreements or provisions thereof which have not been exempted either pursuant to an individual decision or a block exemption regulation, are caught by Article 85(1), thus giving rise to potential liability for civil damages, and are also void as a result of Article 85(2). Second, in order to obtain an exemption and thereby avoid the proscription of Article 85(1) and the resulting invalidity under Article 85(2), the agreement or practice must be notified to the Commission or must qualify for exemption under a block exemption regulation. Thus, although notification is not itself a legal

---

<sup>33</sup> See Article 177 of the EEC Treaty. Lower courts may make a reference at the request of a party. The highest court is required to make a reference if requested to do so by one of the parties unless the point of law has already been clearly established by the European Court.

<sup>34</sup> See *Hoffmann-La Roche & Co. v. Centrafarm*, reprinted in 12 *Grur. Int'l*, 995 (1983), applying the European Court's judgment in *Hoffmann-La Roche v. Centrafarm*, 1978 E. Comm. Ct. J. Rep. 1139, [1977-1978 *Transfer Binder*] Common Mkt. Rep. (CCH) ¶ 8466 (1978).

<sup>35</sup> See Groeben, Boeckh, Thiesing, Ehlermann, *Kommentar zum EWG-Vertrag*, Nomos Verlagsgesellschaft, Baden-Baden, at 1016.

<sup>36</sup> See Regulation 17, *supra* note 3, art. 4(1).

requirement, in addition to securing immunity from fines, it is the formal precondition to obtaining an individual exemption under Article 85(3).<sup>37</sup>

A second fateful decision was taken by the European Court of Justice in the *Haecht II* case.<sup>38</sup> Prior to this judgment, the Court, in an early judgment,<sup>39</sup> had in effect ruled that agreements notified to the Commission are presumably valid as long as the Commission has not taken a decision under Article 85(3). This judgment related to a so-called "old" agreement in existence before Regulation 17 came into force. The effect of the ruling, however, was to make some national courts unwilling to declare both old and new agreements void absent Commission action. Although the judgment did leave room for the national courts to do so, subsequent judgments,<sup>40</sup> in cases involving old agreements, made it clear that, until the Commission had acted, the doctrine of provisional validity required a national court to give full legal effect to such agreements if they had been duly notified or were exempted from the notification requirement as a result of Article 4(2) of Regulation 17. In the *Haecht II* case the Court expressly limited the doctrine of provisional validity to "old" agreements by holding that "new" agreements, whether or not they have been notified to the Commission, do not benefit from a presumption of validity. As a result, the provisions of any new agreement<sup>41</sup> which fall within Article 85(1) can be found to be void and unenforceable under national law. This is true, notwithstanding the fact that the agreement has been notified to the Commission, until such time as the Commission actually grants an exemption.

The Court's reason for excluding new agreements from provisional validity, whether or not they have been notified, appears to have been based on the desire to give greater weight to the sanction of nullity as a compliance tool. Thus, notwithstanding the fact that granting provisional validity to notified new

---

<sup>37</sup> This requirement has been interpreted very strictly by the Court. *See, e.g.*, *The Distillers Co. Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 2229, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8613 (1980). In addition to ensuring enforceability under EEC law, a formal exemption would preclude the application of stricter provisions of national law, at least where these would effectively deprive the parties of the benefit of the exemption. *See Wilhelm v. Bundeskartellamt*, 1969 E. Comm. Ct. J. Rep. 1, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8056 (1969).

<sup>38</sup> *Brasserie de Haecht v. Wilkin-Janssen*, 1973 E. Comm. Ct. J. Rep. 77, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8170 (1973) (*Haecht II*).

<sup>39</sup> *See Bosch, supra* note 15.

<sup>40</sup> *See Portelange, S.A. v. S.A. Smith Corona Marchant International et al.*, 1969 E. Comm. Ct. J. Rep. 309, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8075 (1969); *Bilger Sohre GmbH, Brauerai A. v. Heinrich and Marta Jehle*, 1970 E. Comm. Ct. J. Rep. 127, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8076 (1970); *De Bloos v. Bouyer*, 1977 E. Comm. Ct. J. Rep. 2359, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8444 (1977).

<sup>41</sup> New agreements are defined as those which have entered into effect following the entry into force of Regulation 17 in the case of the six original Member States. It is not clear whether the same rule applies to pre-accession agreements in the cases of the United Kingdom, Ireland, Denmark, Greece, Portugal, and Spain.

agreements would have increased the incentive to notify, since such agreements would have been fully enforceable until such time as the Commission acted to take away their provisional validity, the Court seems to have feared that if provisional validity were available, parties would be less likely to modify their agreements to conform to the competition rules. The Court reasoned that such parties would rely, instead, on notification to provide not only immunity from fines but enforceability as well. Since most notified agreements fall into a kind of limbo and may never be subjected to in-depth scrutiny by the understaffed Commission, a generous approach to provisional validity would have ensured that agreements whose provisions violated Article 85(1) and might not be exemptable were the Commission ever to subject them to detailed examination would nevertheless be enforceable.

Faced with the twin evils of either turning notification into a refuge for scoundrels or discouraging it by limiting its benefits, the Court decided that the latter was the lesser of the two. As a result, national courts are able to supplement the Commission's enforcement efforts because they have the power to find that even notified agreements that violate Article 85(1) are void. On the other hand, the denial of provisional validity, coupled with the fact that national courts are not empowered to grant exemptions, necessarily means that agreements that are exemptable may nevertheless be invalidated by national courts because they have not been notified, or, if they have been, because they have not been formally exempted. The potential risk that a national court will invalidate even a notified new agreement that has not been formally exempted was increased by the *SABAM* judgment.<sup>42</sup> The *SABAM* court in effect held that a national court would not be prevented from considering whether Article 85(1) applies to an agreement until such time as a formal exemption is granted. This may be the case even where the agreement has been notified and even where it is under active consideration by the Commission.<sup>43</sup>

A third and equally fateful turning point was reached when the Court, in the *Perfume* cases,<sup>44</sup> held that a letter by a Commission official to the effect that an agreement was not caught by Article 85(1) does not preclude a national court from finding the agreement to be in violation of Article 85(1) or national law.

<sup>42</sup> See *supra* note 32.

<sup>43</sup> Of course, the national court could of its own volition suspend proceedings pending the Commission's determination as to whether an exemption is merited and some national courts have done so in the past. However, no formalized procedure has been established to permit such consultation. For a discussion of the potential conflicts that may arise given the possibility of the concurrent jurisdiction of the Commission and the national courts see Faull & Weiler, *Conflicts of Resolution in European Competition Law*, 3 EUR. L. REV. 116 (1978).

<sup>44</sup> See *Procureur de la République v. Giry and Guerlain et al.*, 1980 E. Comm. Ct. J. Rep. 2327, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8712 (1980); *Lancome v. Etos*, 1980 E. Comm. Ct. J. Rep. 2511, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8714 (1980).

Furthermore, the Court found that such a comfort letter has the effect of terminating the provisional validity of an "old" notified agreement. The Court's judgment, which in effect deprived the Community equivalent of the no action letter of any legal effect *vis à vis* third parties, national antitrust authorities and national courts, appeared to be particularly perverse in light of the fact that the protection granted by provisional validity to old agreements on which the Commission had not acted was no longer available if the Commission issued a comfort letter indicating that in its view the agreement was not caught by Article 85(1), even where such a letter is given after the parties have made changes in their arrangements at the request of the Commission. Although the Court indicated that a national court could take the Commission's view into account in its evaluation of the applicability of Article 85(1), a national court is not legally required to do so. Thus, the pendency of a proceeding before the Commission will not necessarily stop a national court from proceeding.<sup>45</sup>

The consequences of the bifurcated nature of Article 85, as amplified by the Court of Justice judgments described previously, may be briefly summarized in four points. First, provisions of any agreement, other than an "old" agreement duly notified in timely fashion or exempted from this requirement under Article 4(2) of Regulation 17, that violate Article 85(1) are automatically void if they have not been exempted by the Commission. This is true notwithstanding the fact that the agreement may have been notified or that it may be exemptable. Second, only the Commission may grant an exemption under Article 85(3) with respect to an agreement that is caught by Article 85(1). Thus, national courts and the European Court may only declare agreements, or the provisions thereof caught by Article 85(1), to be void, but cannot exempt them even if they merit exemption.<sup>46</sup> Third, except where a block exemption regulation is involved, and

---

<sup>45</sup> It is difficult to assess how significant the risks are in practice that a national court will ignore the Commission's views or will decide to go ahead without waiting for the Commission to resolve the issue or at least seeking some indication as to the latter's views. With respect to the latter issue, much may depend on the nature of the question before the national court and the urgency with which it is required to act. Nevertheless, the possibility for conflicting resolution exists and it can be expected that the litigants in national court actions will seek to exploit the possibilities open to them to the fullest extent. See Faull & Weiler, *supra* note 43. Certainly the position of the parties in the *Perfume* cases was not an enviable one. Having gone to the trouble of making changes in their selective distribution systems in order to obtain comfort letters from the Commission, they learned, once they had been sued in the French courts, that these letters were of no legal value and that their legal exposure was, if anything, greater because their agreements no longer profited from a presumption of provisional validity. Even if, as in the *Perfume* cases, the parties eventually prevail, the exposure to additional uncertainties in national litigation gives rise to a situation that is hardly satisfactory. Part of the problem in the *Perfume* cases arose from the concurrent application of national and Community rules. But the essential problem is that exemption is the only means of ensuring legality under Article 85(1) and also of protecting the parties against conflicting applications, by the national courts, of national and EEC law.

<sup>46</sup> It has been suggested, however, that a national court may determine that an agreement does not merit exemption. See Faull & Weiler, *supra* note 43, at 125.

with the exception of a narrow class of agreements covered by Article 4(2) of Regulation 17, an exemption can be granted only following an individual notification pursuant to Regulation 17. Fourth, since the pendency of a proceeding before the Commission does not stop national court proceedings, a national court can invalidate an agreement that has been notified but not exempted by the Commission.

#### V. THE NOTIFICATION CONUNDRUM

As a result of the legal considerations outlined above, and, in particular, the fact that notification is not itself a legal requirement, but is the only means to secure an individual exemption, a major and frequent question confronted by the practitioner of EEC law is whether or not to notify an agreement. Except in very clear, and thus relatively infrequent, cases this decision involves a delicate set of tactical considerations and the weighing of the advantages and disadvantages of a notification in light of the facts, the nature of the agreement, and the needs and goals of the parties.<sup>47</sup> Among the factors to be considered are: (i) the degree of certainty that exists as to whether the agreement or practice is caught by Article 85(1); (ii) the likelihood that the agreement or transaction in question will come to the Commission's attention either as a result of publicity or a complaint; (iii) the potential exposure to fines; (iv) the theoretical and practical likelihood of obtaining an exemption; (v) the onerousness of subsequently having to unwind the transaction should the Commission oppose it; (vi) the desire of the parties to ensure the enforceability of the agreement *vis à vis* each other, third parties, or national antitrust authorities; and (vii) the desire of the parties to evidence a cooperative spirit, a consideration that may be particularly important where other matters are pending before the Commission. If any or a combination of these factors exists, notification may well be appropriate. There are certain negative consequences of notification, however, that must be taken into account as well.

First, a conscientiously and carefully prepared notification can involve a significant expenditure of time and legal fees. Moreover, if pursued by the Commission, such notification may result in considerable scrutiny of the transaction in question. In addition, it can lead to investigation of other unrelated, and perhaps unnotified transactions. Thus, companies who have not in the past notified their agreements or who may be desirous of maintaining a low profile may have significant reservations about calling the Commission's attention to

---

<sup>47</sup> For other published discussions of the various tactical considerations, see Silver, *The Strategy of Enterprises Concerning the Application of Competition Law in the EEC*, CONCORRENZIA EN PORTUGAL, Nos Anos 80; Forrester & Norall, *supra* note 9; Bellis, *Should a Notification Be Made to the EEC Commission?*, COMMERCE IN BELGIUM 12 (1986).

their existence by means of a notification. Second, notification will involve a certain amount of publicity if the Commission decides to deal with the file and grant a formal exemption. In such a case, the Commission is required to publish an Article 19(3) notice reviewing the essential details of the arrangement and the process will be repeated, in somewhat greater detail, if a formal exemption is granted. Companies that value privacy and discretion in their business dealings must therefore accept a certain amount of public exposure and the possibility that such publicity may attract interference and opposition from their competitors.<sup>48</sup> Third, since the Commission is not bound to grant an exemption, and may impose conditions before doing so, the parties run the risk that the Commission will intervene in their arrangements and either prohibit them altogether or demand major and unwelcome changes. In such a case the parties do not bargain from a position of strength since by filing a notification they have acknowledged their own doubts as to the validity of their arrangements and have put themselves in a position of dependence *vis à vis* the Commission which can, if they refuse to make the changes it requests, prohibit the agreement. Finally, any exemption, in addition to being subject to certain conditions (which may favor one of the parties more than the other) or reporting requirements, can be granted only for a limited time and will furthermore be open to review should the underlying facts or economic conditions change.<sup>49</sup>

Although there is a tendency among some practitioners and companies to notify all agreements as to which doubts with respect to Article 85(1) may exist, the considerations discussed above and the additional factor that there is no guarantee that the Commission will grant an exemption, even if it is favorably disposed to do so, have led some practitioners to conclude that there may be good reasons for not adopting a mechanical rule of "when in doubt notify."<sup>50</sup> Essentially two arguments can be advanced for not doing so. First, in some cases, the positive consequences of notification may be outweighed by its negative effects. This may particularly be the case where it is not clear that Article 85(1) applies. In such a case notification may be undesirable since to the extent

---

<sup>48</sup> In addition, notification involves the communication to the Commission of certain confidential information. Although it is obligated not to disclose information for which confidential treatment is requested, the Commission may not always accept the parties' claim as to which information deserves confidential treatment. This recently occurred in a case involving the communication of information obtained by the Commission during its investigation of an alleged infringement of Article 86 to a complainant for the purpose of enabling it to prepare for the oral hearing. See *Akzo*, *supra* note 11. Although the context is admittedly quite different from a notification, the latter may lead to an adversary proceeding, which may in turn subsequently raise delicate questions as to whether confidentiality is to be accorded certain documents and information that may have been notified.

<sup>49</sup> Although the Commission could grant an exemption for an extended period in an appropriate case, an exemption could not continue in force once one of the criteria for exemption was no longer satisfied, and in practice exemptions tend to be granted for periods ranging from three to ten years.

<sup>50</sup> See Forrester & Norall, *supra* note 9; Bellis, *supra* note 47; Silver, *supra* note 47.



that it amounts to an admission of uncertainty as to the legality of the arrangement, it may ultimately prejudice the parties' position *vis à vis* the Commission, each other, or third parties.<sup>51</sup>

The second argument is that if an agreement has been modified to remove all seriously objectionable provisions, it can reasonably be said that the parties have already taken all of the steps that would be necessary to obtain an exemption, assuming that the agreement still falls under Article 85(1). In such a case, it is unlikely that the Commission will impose sanctions simply because the agreement has not been notified and should the parties later require a formal exemption, the agreement could then be notified and an exemption granted. Although in such a case the exemption would not apply retroactively to the inception of the agreement, since, *inter alia*, an exemption cannot be granted to cover the period of time prior to the notification, it would at least apply from the date of the notification. Although in some circumstances the failure to make an initial notification could have a prejudicial effect, this will not be an important consideration in every case.

In practice, the kind of self-discipline described above is often followed and the Commission, which seems to recognize that its own enforcement policy is being furthered where the parties and their counsel, instead of notifying, review and amend agreements to eliminate those provisions that would be unlikely to merit exemption, has not taken action to discourage this approach. Such an approach is, however, not without its risks. Foremost among these is that the Commission will impose fines or that, if the parties have not correctly assessed the risks should a dispute arise, a national court will declare the agreement in question to be void and unenforceable as a result of Article 85(2), or to be prohibited under national law, and will grant damages for a violation of Article 85(1). Either result may occur at least with respect to the period prior to notification if a notification is subsequently filed. As a result, the legal advisor's role is often an unhappy one. On the one hand, counsel cannot object to contractual provisions which serve a legitimate business purpose, are reasonable, and thus in principle, should be exemptable, assuming they are caught by Article 85(1) in the first place. On the other hand, it is frequently impossible to assure a client that an unnotified arrangement will be found to be enforceable should it be challenged.<sup>52</sup>

---

<sup>51</sup> This is especially the case under the new Form A/B which makes it difficult for a party to avoid the impression that it is admitting it has violated Article 85(1). Although parties seeking an exemption frequently apply for a negative clearance at the same time while stating that the notification is merely precautionary, a recent Commission decision indicates that there may be limits to this approach. *See Sperry New Holland*, 28 O.J. EUR. COMM. (No. L 376) 21 (1985).

<sup>52</sup> In some cases, the EEC advisor may not be in a very different situation from that of his U.S. counterpart in that the legality of the arrangement in question is ultimately subject to the inherent uncertainties that accompany economic analysis. The principal difference, however, is that the Com-

## VI. PRACTICAL CONSEQUENCES OF THE COMMISSION'S MONOPOLY TO GRANT EXEMPTIONS AND ACTIONS TAKEN TO ACCELERATE PROCEDURES

The fact that Article 85 combines a general prohibition of restrictive agreements with the possibility of individual exemption has led to a significant problem in its application and has given rise to an uncomfortable degree of legal uncertainty as a result of two factors. First, the Commission has, with a few notable exceptions, taken a strict approach to the applicability of Article 85(1). In particular, the Commission has generally refused to apply a doctrine of ancillary restraints or to balance pro and anti-competitive effects of restrictive provisions under Article 85(1) although it has frequently been generous in its willingness to grant exemptions. As a result, in its view, a large number of agreements are caught by Article 85(1) and require exemption to avoid its prohibition. Second, since only the Commission can grant an exemption, it alone has the power to render legal restrictive agreements that are caught by Article 85(1). Due to the fact that the Commission is not capable of individually exempting all the agreements notified to it, even the parties to notified agreements are subject to considerable legal uncertainty since most of them will never obtain an individual exemption notwithstanding the fact that they may qualify for one. Parties to unnotified but exemptable agreements run an even greater risk.

The lack of legal certainty is not, however, the only defect of the system. First, the broad interpretation given to Article 85(1) means that the Commission's limited resources are diverted by the need to deal with a massive number of relatively less important agreements and thus cannot be focused on prosecuting more serious hard-core violations. Second, the pressure to grant exemptions may lead the Commission to accept, too uncritically, the claims of the parties seeking an exemption or to fail to conduct an adequate analysis when evaluating the criteria for exemption as required under Article 85(3).<sup>53</sup> In addition, the divided nature of Article 85 has a tendency to generate rather schizophrenic

---

mission takes a much stricter approach under Article 85(1) than do U.S. courts applying a rule of reason and in the EEC there is the additional procedural risk that even an exemptable agreement may be found to be void because it has not been notified.

<sup>53</sup> The Commission's decisions to grant an exemption are not frequently challenged although challenges have been brought (twice) with respect to an exemption granted to SABA's selective distribution system, *see* SABA I, 19 O.J. EUR. COMM. (No. L 28) 19, [1976-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9802 (1976); SABA II, 26 O.J. EUR. COMM. (No. L 376) 41, [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,568 (1983); *Metro SB Grossmarkte GmbH v. Commission*, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8435 (1977) (*Metro I*), with the Commission being upheld in both cases; challenges with respect to exemptions granted to Grundig's selective distribution system, *Grundig*, 28 O.J. EUR. COMM. (No. L 233) 1 (1985); and UNIDI, an Italian dental exhibition association, O.J. EUR. COMM. (No. L 332) 10, [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,642 (1984), are also pending. *See Synthetic Fibres, supra* note 12 (a challenge to the decision to exempt a crisis cartel was brought but later withdrawn).

decisions. This is particularly evident in the area of joint ventures, in which the arguments for negative clearance are rejected in the analysis under Article 85(1) and then reappear, in sheep's clothing, as the reasons justifying an exemption under Article 85(3).<sup>54</sup> Finally, the burden of its administrative tasks has sometimes led the Commission to prefer "simple" legal rules to economic analysis, despite the fact that one of the primary justifications for the concentration of power in the Commission's hands is that only it is qualified to make the complex economic judgments required under both Articles 85(1) and 85(3).

The practical problems encountered in the administration of the system have generated increasing criticism and, consequently, a variety of reforms have been proposed.<sup>55</sup> In addition to suggestions with respect to increasing the Commission's staff and providing for formalized procedures by which national courts could obtain the Commission's view in cases being litigated before them, these have included the adoption of a more flexible approach to Article 85(1),<sup>56</sup> greater reliance on economic analysis in establishing the applicability of Article 85(1),<sup>57</sup> permitting national courts to grant exemptions under Article 85(3),<sup>58</sup> and resurrection of the doctrine of provisional validity with respect to new agreements.<sup>59</sup> The Commission, although it has been sensitive to the suggestions made, has not, on the whole, reacted favorably to criticism of its approach under Article 85(1). Rather, it has sought to deal with the problem of legal security through a variety of procedural and administrative reforms designed to accelerate or provide alternatives to exemption procedures.<sup>60</sup> Although many of these procedural reforms have the merit of providing some assurance as to the Commission's attitude, they also, unfortunately, tend to suffer from the inherent flaw that the more effective they may be in accelerating procedures, the less legal certainty they can provide. This is because the acceleration results from the elimination of some of the time-consuming procedures required under Regulation 17 with respect to the grant of an individual exemption.

The principal means adopted or contemplated by the Commission either to accelerate the process of granting exemptions, to enable parties to obtain some degree of reassurance, short of an exemption, as to the legality of their arrange-

---

<sup>54</sup> See Rockwell/Iveco, 26 O.J. EUR. COMM. (No. L 224) 19, [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,509 (1983).

<sup>55</sup> For a brief summary of the various possibilities, see Faull, *Joint Ventures Under EEC Competition Rules*, 5 EUR. COMPETITION L. REV. 358 at 362-63 (1984).

<sup>56</sup> See Forrester and Norall, *supra* note 9, at 38-39.

<sup>57</sup> See Korah, *The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*, 3 NW. J. INT'L L. & BUS. 320 (1981); *The Velcro-Aplix Decision: Is There Sufficient Market Analysis in Individual Decisions After the Group Exemption?*, 7 EUR. INDUS. PROP. REV. 296 (1985).

<sup>58</sup> See Korah, *supra* note 57; see also Kon, *Article 85, Para. 3: A Case for Application by National Courts*, 19 COMMON MKT. L. REV. 541 (1982).

<sup>59</sup> See Faull, *supra* note 55.

<sup>60</sup> See Commission of the European Communities, *Fourteenth Report on Competition Policy* 46-47 (1985).

ments, or to reduce its administrative burden include comfort letters, block exemptions, the opposition procedure, modification of Form A/B, accelerated exemption procedures, the reorganization of DG-IV, and decentralization.<sup>61</sup>

#### A. *Comfort Letters*

Officials of DG-IV have from time to time issued informal comfort letters indicating to the parties that their agreements were not caught by Article 85(1). As already noted, these comfort letters have no binding effect on national courts and antitrust authorities. In 1981, the Commission decided to increase the legal value of these letters (known as "light" negative clearances) by publishing a notice in the *Official Journal* requesting the comments of interested third parties before issuing such letters.<sup>62</sup> In 1983, the Commission announced its intention to adopt a similar procedure in cases involving agreements that are caught by Article 85(1), but that would merit an exemption under Article 85(3).<sup>63</sup> Under this latter procedure, the Commission would publish the basic facts concerning the notified arrangement in a notice in the *Official Journal* pursuant to Article 19(3) of Regulation 17 requesting the comments of all interested third parties and indicating that it is favorably disposed and may close the file without granting a formal exemption. The publication of such a notice under either of these two procedures appears to be intended to solicit third party input and also to estop third parties from subsequently challenging the agreements. However, the legal benefits to be obtained from such procedures, other than that the Commission's own non-opposition is made clear publicly, are not certain. This is because the Commission does not grant a formal negative clearance or exemption and its opinion in either case cannot have the binding effect of a formal exemption decision. Indeed, the second procedure leaves the parties in the somewhat uncomfortable position of being told that the Commission believes their arrangement is caught by Article 85(1) and thus is void, although exemptable, but that it is not prepared to accord them the full benefit of a formal exemption. The risks that a national court would seek to declare such an agreement void or that the national antitrust authorities would prosecute parties

---

<sup>61</sup> In addition to the measures cited below, the Commission in 1970 issued a notice on agreements of minor importance, subsequently amended in 20 O.J. EUR. COMM. (No. C 313) 3 (1977), in which it stated that in its view, Article 85(1) would not apply where the combined market shares and turnover of the parties do not exceed 5% and 50 million ECU respectively. Although the notice may bind the Commission, it does not, however, bind the European Court. This notice was amended in 1986. See 29 O.J. EUR. COMM. (No. C 231) 2 (1986), e.g., to increase the turnover threshold to 200 million ECU.

<sup>62</sup> See *Commission of the European Communities, Eleventh Report on Competition Policy* §§ 14–15 (1982) and *Commission of the European Communities, Twelfth Report on Competition Policy*, § 30 (1983); see also *Europages*, 25 O.J. EUR. COMM. (No. C 343) 5 (1982).

<sup>63</sup> See *Commission of the European Communities, Thirteenth Report on Competition Policy* §§ 70–73 (1984) and 26 O.J. EUR. COMM. (No. C 295) 7 (1983).

who have been given such comfort letters under national antitrust law may, admittedly, appear more theoretical than real. It should be kept in mind, however, that the parties in the *Perfume* cases confronted precisely these possibilities as a result of the Court's determination that a comfort letter was not binding.

### B. *Block Exemptions*

As already noted, in order to deal with a situation in which the number of notifications was so great that they simply could not be processed, the Commission was empowered by the Council in 1965 and in 1971 to adopt block exemption regulations with respect to a variety of types of agreements.<sup>64</sup> The first such regulation, applicable to bilateral exclusive supply and exclusive purchasing agreements, was adopted in 1967.<sup>65</sup> Since then the Commission has adopted block exemption regulations with respect to specialization arrangements (1972),<sup>66</sup> patent and mixed patent and know-how licenses (1984),<sup>67</sup> research and development (1984),<sup>68</sup> selective and exclusive distribution of motor vehicles (1985),<sup>69</sup> and has modified the initial regulations applicable to exclusive distribution and exclusive purchasing (1983),<sup>70</sup> as well as the initial regulation governing specialization (1984).<sup>71</sup> The Commission tends to regard block exemptions as a way of responding to types of agreements which it believes do not require its individual attention, but which it is not willing to say escape Article 85(1) altogether. In this sense, block exemptions represent the Community alternative to a Rule of Reason. There is, however, an important qualitative difference in that block exemptions are both more restrictive and far-reaching than a Rule of Reason approach. This is because there is no question of individual economic analysis where a block exemption is concerned. Rather, the block exemption functions automatically and if the agreement in question satisfies the regulation's formal requirements, the parties are assured of legal

<sup>64</sup> See *supra* note 18.

<sup>65</sup> Regulation 67/67, 10 O.J. EUR. COMM. (No. 57) 849, 2 Common Mkt. Rep. (CCH) ¶ 2727 (1967).

<sup>66</sup> Regulation 2779/72, J.O. COMM. EUR. (No. L 292) 23 (1972), replaced by Regulation 3604/82, 25 O.J. EUR. COMM. (No. L 376) 33, 2 Common Mkt. Rep. (CCH) ¶ 2743 (1982), repealed and replaced by Regulation 417/85, 28 O.J. EUR. COMM. (No. L 53) 1, Common Mkt. Rep. (CCH) ¶ 2743 (1985).

<sup>67</sup> Regulation 2349/84, 27 O.J. EUR. COMM. (No. L 219) 15, 2 Common Mkt. Rep. (CCH) ¶ 2747 (1984).

<sup>68</sup> Regulation 418/85, 28 O.J. EUR. COMM. (No. L 53) 5, Common Mkt. Rep. (CCH) ¶ 2753 (1985).

<sup>69</sup> Regulation 123/85, 28 O.J. EUR. COMM. (No. L 15) 16, Common Mkt. Rep. (CCH) ¶ 2571 (1985).

<sup>70</sup> Regulation 1983/83, 26 O.J. EUR. COMM. (No. L 173) 1, 2 Common Mkt. Rep. (CCH) ¶ 2730 (1983); Regulation 1984/83, 26 O.J. EUR. COMM. (No. L 173) 5, 2 Common Mkt. Rep. (CCH) ¶ 2733 (1983).

<sup>71</sup> Regulation 417/85, *supra* note 66. It is expected that block exemption regulations will also be adopted with respect to know-how licensing and franchising.

certainty regardless of the economic effects of their arrangement, at least until such time as the block exemption is withdrawn.

Although the block exemption seems to have functioned fairly smoothly with respect to exclusive distribution agreements, because it applies to a relatively simple type of transaction, the utility of the block exemptions adopted in other areas has been more questionable. First, the more complex a transaction, or the more complex the field regulated by a block exemption, the more difficult it may be to shape the block exemption to encompass the various types of transaction and, conversely, to shape the transaction to fit the block exemption. Thus, for example, the patent license regulation, which assumes that the licensor or licensee either were, or, as a result of the license, became, horizontal competitors, is not well adapted to situations where the licensee is integrated into the licensor's distribution operations, is active in an unrelated field, or is a customer of the licensor and is being licensed to produce a portion of its own requirements. Moreover, block exemptions may be rendered unavailable with respect to the entire agreement because of the inclusion of a single restriction that is either not covered by the block exemption or is listed in the so-called blacklist of clauses whose presence in an agreement automatically precludes the availability of the block exemption. This all-or-nothing approach can impose substantial restraints and although the Commission has attempted to deal with this problem by the introduction in some regulations of an opposition procedure discussed below, such rigidity significantly reduces the utility of block exemption regulations. In addition, the problem of rigidity is increased by the tendency of the Commission and the Court to interpret block exemptions rather narrowly.<sup>72</sup>

Second, block exemption regulations do not provide absolute legal certainty since the question as to whether an agreement comes within the scope of the block exemption and fulfills all its criteria may be disputed in national court litigation or before the European Court.<sup>73</sup> Since the Commission's view as to

---

<sup>72</sup> See *BP/Kellogg*, 28 O.J. EUR. COMM. (No. L 369) 6 (1985); *Siemens/Fanuc*, 28 O.J. EUR. COMM. (No. L 376) 29 (1985). In *Pronuptia* the Court held that Regulation 67/67 does not apply to franchise agreements, thus necessitating the need for a special block exemption, although some of the reasons given for excluding the applicability of Regulation 67/67 would appear to be inconsistent with Regulation 67/67 itself since the provisions cited were not themselves restrictive of competition. See *Pronuptia*, *supra* note 14. In *Siemens/Fanuc* the Commission cited the fact that the parties had entered into a restrictive research and development agreement as precluding the availability of the block exemption in respect of an exclusive distribution agreement involving already existing products and further found that a reciprocal arrangement between competing manufacturers in which one of the agreements involved a territory outside the EEC also precluded the availability of the block exemption as a result of Article 3(a) of Regulation 67/67.

<sup>73</sup> See *Fonderies Rubaix Watrelos, S.A. v. Société Nouvelle des Fonderies A. Roux et al.*, 1976 E. Comm. Ct. J. Rep. 111, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8341 (1976); *Hydrotherm Gerätebau GmbH v. Compact*, 1984 E. Comm. Ct. J. Rep. 2999, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,112 (1984); *De Bloos*, *supra* note 40.

the availability of a block exemption binds neither,<sup>74</sup> there will always remain some uncertainty as to whether the block exemption applies. Although the uncertainty tends to arise from questions of a formal nature and in some cases may be less considerable than the uncertainties of economic analysis, the results can sometimes be rather unpredictable. Third, block exemptions have been criticized on the grounds that they reinforce a *per se* approach to Article 85. Proponents of this view claim that block exemptions foster a tendency to assume that certain classes of transactions are caught by Article 85(1) and, what is more discomfoting, that no individual exemption will be available for arrangements that depart from the model provided by the block exemption. This is particularly troublesome in light of the fact that the regulations themselves acknowledge that the possibility of an individual exemption is not precluded, even when a blacklist clause is included. Finally, block exemption regulations can have a distorting effect in that they may permit the automatic exemption of agreements that may have substantial anti-competitive effects. Although the Commission's power to withdraw the exemption, in theory, would prevent any abuse, the Commission has never withdrawn a block exemption and block exemptions will, in any case, provide a safe harbor for the period prior to withdrawal.

### C. *Opposition Procedure*

In order to make the block exemption regulations applicable to research and development, specialization and patent license agreements more flexible, the Commission has included an opposition procedure in these regulations. Under this procedure, an agreement that (i) contains restrictive clauses that are not explicitly exempted by the block exemption regulation, but whose presence does not preclude the applicability of the block exemption, or, (ii) in the case of the specialization regulation, involves parties whose turnover exceeds a certain threshold, will be deemed to be automatically exempted under the regulation provided the agreement complies with all the other conditions of the regulation, is notified to the Commission, and is not opposed by the latter within six months.

While the opposition procedure appears to represent a positive development, in that it mitigates some of the weaknesses of the block exemption system, it requires an individual notification and, as a result, gives rise to certain theoretical and practical difficulties of its own. First, it is not altogether clear whether the Council regulations authorizing the Commission to adopt block exemptions empower it to include an opposition procedure in a block exemption regulation.<sup>75</sup> Second, to the extent that, under the opposition procedure, the Commission would appear to be exercising the same kind of discretion as when

---

<sup>74</sup> See *supra* note 72.

<sup>75</sup> See Regulations 19/65 and 2821/71, *supra* note 18.

granting an individual exemption, but without adhering to the formal procedures concerning the publication of a preliminary notice and the adoption and publication of a formal exemption decision, it may be argued that the opposition procedure involves an illegal attempt to circumvent the procedural requirements of Regulation 17. If this analysis is correct, a determination by the Commission not to oppose the agreement may be of no greater legal value *vis à vis* third parties than a comfort letter of the type held by the Court not to be binding on national courts in the *Perfume* cases. The opposition procedure also poses some practical administrative problems since the Commission faces a six-month deadline within which to oppose. Given the lack of staff and the difficult interpretative questions it is likely to encounter, the Commission may be forced to oppose in a majority of cases simply because it cannot make up its collective mind within the six month period, thus considerably reducing the utility of the procedure.

#### D. *Modification of Form A/B*

The Commission, in order to enable it to process notifications more quickly has recently modified Form A/B.<sup>76</sup> As a result of the changes made, the parties to an agreement for which either a negative clearance or an exemption is sought are now required to provide considerably more market information than was formerly the case. The Commission apparently believes that these new requirements will accelerate the administrative process by eliminating the need to obtain additional information pursuant to Article 11 of Regulation 17. Because the new Form A/B is rather detailed and makes the process of notifying considerably more burdensome, it will probably provide an additional disincentive to notification, especially in those cases where notification is contemplated only as a precaution. Adoption of the new Form A/B can probably also be viewed as an attempt on the part of the Commission to shift some of its administrative duties to private parties by requiring them to provide market information and synopses of the restrictive provisions of their agreements. This may be a mixed blessing from an enforcement perspective if the new Form A/B leads the Commission to rely on the parties' definition of the relevant product and geographic markets, rather than conducting its own investigation.

#### E. *Accelerated Exemption Procedures*

At the end of 1985, the Commission announced its intention to employ a short-form exemption decision which would essentially be based on the facts submitted by the parties in response to the questions in Form A/B and published

---

<sup>76</sup> See 28 O.J. EUR. COMM. (No. C 50) 3 (1985).



in the Article 19(3) notice. The first such decision, whose analysis under Articles 85(1) and 85(3) consists of only three brief paragraphs, was published early in 1986.<sup>77</sup> The Commission presumably hopes that this accelerated procedure will permit it to grant exemptions more quickly because the preparation of the exemption decision will be considerably simplified. This is of particular importance when one is working in nine languages, although it is unlikely that the Commission would use the procedure in cases in which third parties have indicated their opposition to the proposed exemption. In adopting this new procedure, the Commission has apparently relied on language in Court judgments which have upheld rather summary reasoning with respect to the applicability of Articles 85(1) and 85(3).<sup>78</sup> Whether the Commission can grant an exemption in such summary form, or, and this may be the real question, whether it can grant an exemption in summary or long form without undertaking the necessary market analysis, is open to doubt. In the *Metro II* case, the Advocate General recommended that the Court annul the Commission's decision to exempt SABA's selective distribution system on the grounds that the Commission failed to undertake an adequate examination of the market and based its decision with respect to both Articles 85(1) and 85(3) on out-dated and incomplete information.<sup>79</sup> Although the Court ultimately held that the Commission had conducted an adequate market study, its judgment may limit the utility of the short-form notification since regardless of the length of its ultimate decision, the Commission will be required to undertake the requisite market study before granting an exemption.

#### F. *Reorganization of DG-IV*

In 1985 DG-IV was reorganized in an attempt to accelerate, and to provide greater consistency in, the decision-making process. As a result of the reorganization, the directorate charged with inspections and the initial phase of Commission investigations was abolished and DG-IV(B) was reorganized into six divisions responsible for specific sectors in the expectation that the officials concerned would build up specialized knowledge and presumably be able to act more quickly and effectively.<sup>80</sup> In addition, all phases of the Commission's administrative procedure, from the initial investigation and gathering of facts,

---

<sup>77</sup> See *BP/Kellogg*, *supra* note 72.

<sup>78</sup> See, e.g., *Nutricia*, 26 O.J. EUR. COMM. (No. L 376) 22, [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,567 (1983); *Remia B.V. et al. v. Commission*, 4 Common Mkt. Rep. (CCH) ¶ 14,217 (1985); *SSI (Stichting Sigarettenindustrie) et al. v. Commission*, 28 O.J. EUR. COMM. (No. C 347) 21, 4 Common Mkt. Rep. (CCH) ¶ 14,265 (1985); Joined cases 240-42, 261, 262, 268, and 269/88, judgment of December 10, 1985, not yet officially reported.

<sup>79</sup> See *Metro II*, *supra* note 6.

<sup>80</sup> See *Commission of the European Communities, Fourteenth Report on Competition Policy* §§ 46-47 (1985).

to the preparation of the statement of objections and the final decision, would be handled by the same team. Finally, a new supervisory or coordination directorate was created and given the task of ensuring that Commission decisions are more consistent. The Commission's decision to reorganize DG-IV once more (the results of the planned reorganization had not been publicly announced when this Article was prepared) suggests that the initial reorganization may not have had the desired effects. Moreover, it would seem that the problem of understaffing is so serious that a mere increase in the productivity of the existing, but insufficient staff, cannot compensate for the lack of adequate human resources.

### G. *Decentralization—Increasing the Role of National Courts*

The Commission has publicly committed itself to encouraging national court enforcement of Article 85(1).<sup>81</sup> The Commission's reasoning is that if national courts play a greater role in the enforcement of Article 85(1) in cases where the law is relatively well-settled, the Commission will be freed to concentrate its investigatory and enforcement energies on hard-core violations (such as price-fixing and market sharing cartels) which require extensive transborder investigation and which, it is believed, probably correctly, are considerably more widespread in Europe than in the United States.

It has been argued that before national court litigation can play a meaningful role it will be necessary to harmonize national procedural rules and to establish a more sophisticated system of judicial review to supervise national court judgments and thus limit the attractiveness of forum shopping. Although at one point it appears that the Commission was considering a directive which would harmonize national court procedures with respect to burden of proof and discovery rules, in order to eliminate some of the hurdles to the successful bringing of private party actions, it now appears that such initiatives are no longer being contemplated.

Experience up until now would seem to indicate that the emergence of third party damage actions as an enforcement tool will require time, and recourse to the Commission will probably remain more attractive to a complainant than a national court action until such time as the Commission begins directing complainants to the national courts. More importantly, national court enforcement will not necessarily improve legal certainty or the administration of competition law if national courts cannot also grant exemptions or adopt a more flexible approach to Article 85(1). Finally, given the possibility of conflicting resolution, national court enforcement may lead to additional problems.

---

<sup>81</sup> See *id.* at § 47.

VII. OTHER RESPONSES TO THE PROBLEMS CREATED BY THE PRACTICAL DIFFICULTIES OF ADMINISTERING COMMUNITY LAW

A. *The Role of Reason*

As the previous discussion indicates, there is reason to doubt whether the various steps taken to accelerate administrative procedures will provide a wholly satisfactory response to the problem of legal certainty. Certainly, these initiatives have not been fully responsive to those who have argued that the key to improving the administration of competition law is the adoption of a more flexible approach to Article 85(1). Similarly, they have not satisfied those who have argued in favor of a flexible approach which would reduce the risks to which parties who wish to assume the responsibility of evaluating the legality of their business arrangements are exposed. The Commission's reforms have also failed to satisfy those who believe that the approach of the Commission and the European Court to Article 85(1) is often based on inadequate economic analysis of the type that should exist in a mature system of antitrust law. Although these criticisms approach the problem from different angles, they share in common an emphasis on the need for a more realistic, flexible approach to Article 85(1). They have also fueled a fairly active debate as to whether national courts should be given the power to grant exemptions or whether, given the structure of Article 85, there is, can, or should be, a Rule of Reason under Article 85(1).<sup>82</sup>

---

<sup>82</sup> The debate really began in 1967 with the publication of René Joliet's *THE RULE OF REASON IN ANTITRUST LAW: AMERICAN, GERMAN AND COMMON MARKET LAWS IN COMPARATIVE PERSPECTIVE*. It has, however, recently given rise to a number of publications. See Forrester & Norall, *supra* note 9; Schechter, *The Rule of Reason in European Competition Law*, 2 *LEGAL ISSUES EUR. INTEGRATION* 1 (1981); Korah, *Comfort Letters—Reflections on the Perfume Cases*, 6 *EUR. L. REV.* 14 (1981); Korah, *supra* note 57; Kon, *supra* note 58; Steindorff, *Article 85, Para. 3: No Case for Application by National Courts*, 20 *COMMON MKT. L. REV.* 125 (1983); Steindorff, *Article 85 and the Rule of Reason*, 21 *COMMON MKT. L. REV.* 639 (1984); Ulmer, *Rule of Reason in Rahmen von Artikel 85 EWGV*, 31 *RECHT DER INTERNATIONALEN WIRTSCHAFT*, Heft 7, 517 (1985). The debate over the role of a "rule of reason" has sometimes been flawed by the failure to define "which" rule of reason is meant. No attempt will be made here to trace the development of "rule of reason" analysis in U.S. jurisprudence. In referring to a "rule of reason" approach under Article 85(1), proponents and opponents have had in mind all, some or a combination of a doctrine of ancillary restraints, a determination under Article 85(1), that, on balance, the restriction is pro, rather than anti-competitive, a more lenient treatment of vertical restraints or the necessity for a full scale economic analysis establishing a restrictive effect, and, on the level of procedure, redefinition of the Commission's enforcement role in favor of self-discipline and/or enforcement by private party litigation in the national courts. The discussion as to the possible role of a "rule of reason" in Community law may be confusing to the U.S. reader since as already noted, technically speaking, there are no *per se* violations under Article 85 given the *de minimis* rule and the possibility of exemption. Moreover, it may appear somewhat startling that the call for greater reliance on economic analysis is made in the name of increasing legal certainty given the considerable uncertainties to which economic analysis can give rise. Perspective returns, however, when one remembers that the proponents of a more flexible or economically realistic approach to Article 85(1) have adopted this stance in opposition to what they perceive as the Commission's overly broad and sometimes literal approach to the application of Article 85(1) because this approach exposes so many exemptable agreements to the sanctions that may result in the absence of an exemption under Article 85(3).

Permitting the national courts to grant exemptions would probably be the more revolutionary of the solutions proposed. It would also require either a Court judgment to the effect that Article 9(1) of Regulation 17 is illegal or amendment of Regulation 17. With respect to the latter, the Commission is unlikely to propose an amendment given its view that the decision to exempt agreements demands an assessment as to the broader Community interest and the kind of discretion and economic judgment which it alone is equipped to provide.

The discussion of the introduction of a Rule of Reason has at times suffered because this term has not always been precisely defined. The essential argument in support of a Rule of Reason is that the adoption of a more flexible attitude under Article 85(1) incorporating either or both a doctrine of ancillary restraints and an evaluation of the seriousness of the restriction in light of its overall competitive impact under Article 85(1) (and not merely under Article 85(3)) could help mitigate the problem created by the Commission's inability to exempt agreements since fewer agreements would fall under Article 85(1) and because it would also be possible for national courts to exclude pro-competitive agreements from the application of Article 85(1), thus sparing the latter from the sanction of nullity.<sup>83</sup>

Reference to the introduction of a Rule of Reason, or a more modulated approach to Article 85(1), is somewhat misleading. Indeed, the Commission has itself on occasion decided not to apply Article 85(1) to certain types of restrictive agreements or provisions where these were merely ancillary or were part of an arrangement which the Commission believed, on balance, did not pose a threat to competition. Moreover, it seems fairly clear that the European Court has been even more willing to apply a flexible approach to Article 85(1). This is evident in the Court's action both in upholding the Commission in those cases in which the Commission has adopted a flexible approach to Article 85(1) and in those cases relating to exclusive licenses involving breeders' rights, film distribution, and ancillary restrictions in certain franchising arrangements, in which it has departed from the Commission's traditional analytic approach. Indeed, the issue, when properly phrased, is not whether a flexible approach is possible under Article 85(1), but rather, what form it has taken in the past

---

<sup>83</sup> The proponents of a less formalistic approach to Article 85(1) have also been quick to acknowledge that it would have the effect of loosening the Commission's institutional monopoly with respect to Article 85(3) since it would result in the non-application of Article 85(1) to many agreements which, under the current approach, would be caught by Article 85(1) and thus should be notified. It is no doubt for this reason, and, perhaps, because the national courts are not subject to effective judicial review or may lack the ability to make complex economic judgments, that it can be expected that the Commission will maintain its unenthusiastic response to such an approach, although its own enforcement efforts are arguably hampered by the administrative burden imposed on it under the current system.

and should take in the future in light of the structure of Article 85, the goals of market integration and the need for a more efficient allocation of the Commission's administrative resources. Although an exhaustive study of this question is beyond the scope of this Article, a few conclusions based on a brief summary of some aspects of the existing decisional and case law will be ventured.<sup>84</sup>

### B. *The Commission's Practice*

In the *Reuter/BASF*<sup>85</sup> and *Nutricia*<sup>86</sup> cases, the latter upheld by the Court, the Commission applied what may be fairly characterized as a doctrine of ancillary restraints in accepting a truism of antitrust law: that a non-competition clause imposed on the seller of a business when of reasonable duration and geographic scope is not caught by Article 85(1) because the restriction is a legitimate means of ensuring the transfer of the full value of the assets purchased.<sup>87</sup>

Similarly, in its subcontracting notice,<sup>88</sup> the Commission took the view that ancillary restrictions, including those requiring a subcontractor not to use for other purposes technology made available to it by the contractor and not to make available to third parties goods produced using that technology, are not caught by Article 85(1) where the subcontractor does not have independent access to the technology and the goods cannot be manufactured without it. In

<sup>84</sup> The following discussion cannot and does not attempt to do justice to the complexity and subtlety of the debate. There may be a significant difference between (i) not applying Article 85(1) to ancillary restrictions that are indispensable to a transaction and are reasonable in scope and (ii) not applying Article 85(1) to a restriction on only that competition made possible by the transaction itself, and (iii) requiring a balancing of pro and anti-competitive effects under Article 85(1). In addition, these possibilities may differ from reliance on a more realistic economic analysis under Article 85(1), a requirement which could result either in a higher *de minimis* threshold or a more economically sophisticated appreciation of what constitutes an appreciable restriction of competition.

<sup>85</sup> *Reuter/BASF*, 19 O.J. EUR. COMM. (No. L 254) 40, [1976-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9862 (1976).

<sup>86</sup> See *Nutricia*, *supra* note 78.

<sup>87</sup> The Commission's language in *Nutricia* very carefully avoids any reference to restrictions which are ancillary. It does, however, refer to the necessity for such restrictions if the transaction is to be accomplished and the non-applicability of Article 85(1) is based on the reasonableness, in scope and duration, of the non-competition clause. In its judgment affirming the Commission's view of such restrictions in *Nutricia*, the Court was somewhat less reticent and specifically referred to the fact that the non-competition clause had a pro-competitive effect since the sale of the business increased the number of competitors on the market. Thus, although the Court's approach can be interpreted as only meaning that because no sale would have occurred without the non-competition clause, the latter cannot be deemed to involve a restriction of competition, it would seem that the better interpretation is that the Court viewed the transaction as essentially pro-competitive and precluded the applicability of Article 85(1) because the non-competition clause was necessary to achieve a legitimate purpose.

<sup>88</sup> See *Communication on Subcontracting Agreements*, 22 O.J. EUR. COMM. (No. C 1) 2, 2 Common Mkt. Rep. (CCH) ¶ 2701 (1979). The Commission has also taken the view that Article 85(1) does not apply to agency agreements although the reasoning in its agency notice is different and is based on the agent's being an auxiliary of the principal. See 5 O.J. EUR. COMM. (No. 2921) 1 (1962).

so doing the Commission recognized, in this situation at least, that restrictions on only the competition that is itself made possible by the underlying pro-competitive or competitively neutral transaction, should not be caught by Article 85(1) because they are merely ancillary.

In the area of selective distribution, the Commission has also taken the view, which has been upheld by the Court,<sup>89</sup> that selective distribution systems in which a supplier limits the supply of goods to certain specially qualified dealers are not caught by Article 85(1) as long as the selective criteria are objective and non-quantitative in nature and are applied in a non-discriminatory manner. The Commission has maintained this position despite the fact that such systems tend to lead to price rigidity. The Court has basically supported this approach although its judgment in *Metro I* appears to have been based on the assumption that the structure of the market did not preclude the existence of other distribution channels for the type of goods concerned. This would seem to indicate that the Court's approach is based on an analysis of the market in which the selective distribution system operates and not merely on a formal determination that the system applies objective, non-quantitative criteria in a uniform manner.<sup>90</sup>

This list is not intended to be exhaustive and other examples can be found. Indeed, in some of its earliest decisions, the Commission demonstrated a very flexible approach and found, for example, that certain forms of joint selling and joint purchasing arrangements did not fall within Article 85(1) in circumstances where such arrangements seemed to favor market integration. Indeed, in one early decision it took the view that even though a joint export arrangement may have restricted competition between its members, Article 85(1) never-

---

<sup>89</sup> See Commission decisions on selective distribution agreements, e.g., *Villeroy & Boch*, 28 O.J. EUR. COMM. (No. L 376) 15 (1985); *SABA I* and *SABA II*, *supra* note 53; *Grundig*, *supra*, note 53; *IBM*, 27 O.J. EUR. COMM. (No. L 118) 24, [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,585 (1984); *Ivoclar*, 28 O.J. EUR. COMM. (No. L 369) 1 (1985); see also *Metro II*, *supra* note 6; *AEG-Telefunken AG v. Commission*, 1983 E. Comm. Ct. J. Rep. 3151, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,018 (1983); *Demo-Studio Schmidt v. Commission*, 1983 E. Comm. Ct. J. Rep. 3045, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,009 (1983); *Binon & Cie S.A. v. Agence Messageries de la Presse*, 4 Common Mkt. Rep. (CCH) ¶ 14,218 (1985).

<sup>90</sup> See *Metro I*, *supra* note 53, at ¶¶ 20-22. This is essentially the view taken by Advocate General Verloren Van Themaat in his opinion in *Metro II* and appears to have been endorsed by the Court in *Metro II*, *supra* note 6.

It is not clear whether the Commission's treatment of selective distribution involves simply a decision not to apply Article 85(1) to an arrangement which the Commission regards as not involving any significant anti-competitive risks or a broader balancing of pro and anti-competitive effects. To the extent that it is accepted that special qualifications are needed given the nature of the goods in question, it would appear that the restriction on admission of qualified dealers only would either not be restrictive or would be ancillary, assuming that the proper distribution of the goods in question cannot otherwise be ensured. However, given the range of goods with respect to which the need for "selective" distribution has been acknowledged, it may be that the Commission has merely decided that, on balance, such systems of distribution do not involve significant anti-competitive risks.

theless did not apply because the joint sales agency was subject to competition from larger competitors in the export markets in which it sold.<sup>91</sup> The Commission, at times, has also adopted a pragmatic approach to certain types of customer restrictions.<sup>92</sup>

### C. *The European Court*

The European Court has, at times, distinguished between agreements and practices which, if they are not *de minimis*, fall under Article 85(1) *per se*, since their object is to restrict competition, and those which have restrictive effects whose nature and extent must be evaluated to determine if Article 85(1) applies. Thus, in the *Consten and Grundig* case,<sup>93</sup> the Court clearly took a *per se* approach under Article 85(1) to absolute territorial protection of Grundig's French distributor, without considering whether such territorial protection was necessary to enable Grundig to penetrate the French market. Here, the Court stated that the Commission need not "take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."<sup>94</sup> This *per se* formulation reappears in other cases, subject only to the *de minimis* exception.<sup>95</sup> With respect to the exclusivity, however, the Court annulled that part of the Commission's *Grundig* decision because the Commission had failed to show why the exclusivity came within Article 85(1).

In *La Technique Minière v. Maschine Bau Ulm*,<sup>96</sup> a referral from a national court, the Court in language somewhat, but not entirely, reminiscent of early U.S. judgments under the Sherman Act, seemed to recognize the need to consider the precise purpose of the agreement in the economic context in which it is to be applied. The Court went on to note that:

Where . . . an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition [of Article 85(1)], it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.<sup>97</sup>

---

<sup>91</sup> See SAFCO, 15 O.J. EUR. COMM. (No. L 13) 44, 45, [1970-1972 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9487 (1972); Machines Outils, J.O. EUR. COMM. (No. L 201) 1 (1968).

<sup>92</sup> See most recently, *Villeroy & Boch*, *supra* note 89.

<sup>93</sup> *Consten and Grundig v. Commission*, 1966 E. Comm. Ct. J. Rep. 299, 342, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8046 (1966).

<sup>94</sup> *Id.*

<sup>95</sup> See *Miller International Schallplatten GmbH v. Commission*, 1978 E. Comm. Ct. J. Rep. 131, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8439 (1978); *Société de Vente de Ciments et Bétons de l'Est S.A. v. Kerpen & Kerpen GmbH*, 1983 E. Comm. Ct. J. Rep. 4173, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,043 (1983).

<sup>96</sup> Case 56/65, 1966 E. Comm. Ct. J. Rep. 235.

<sup>97</sup> *Id.* at 249.

The approach taken in this case and in the *Kali* cases<sup>98</sup> decided subsequently, indicates that a restriction on competition may not be caught by Article 85(1) if it is indispensable for the realization of a legitimate purpose.<sup>99</sup>

In two judgments in 1982, the Court has more clearly emphasized the need to examine restrictive provisions in their legal and economic context and to balance the pro-competitive and anti-competitive effects of the provisions in question in determining whether or not Article 85(1) applies. In *Maize Seed*,<sup>100</sup> the Court, annulling the Commission's decision in this regard, held that an open exclusive license (one that does not affect the position of third parties such as parallel importers and licensees for other territories), granted to a German licensee to exploit in Germany the breeders' rights for a new variety of maize seed developed in France did not constitute a *per se* violation of Article 85(1). Rather, the Court found that the grant of an exclusive license must be judged in light of the nature of the products, the facts related to the development of the seed variety and the need of the licensee for limited territorial protection.

In reaching its decision, the Court reasoned that unless the licensee was certain that it would not encounter competition from other licensees for its territory, or from the owner of the right, the licensee might be deterred from accepting the risk of cultivating and marketing the seeds in question which had been developed after years of research and which were not known to German farmers at the time. The Court then stated that this would be damaging to the dissemination of a new technology and would prejudice competition in the Community between the new product and similar existing products. The Court reasoned that Article 85(1) did not apply because the pro-competitive effects of the exclusive license on interbrand competition outweighed the anti-competitive effects with respect to intrabrand competition. In so reasoning, the Court held that, at least where market entry is concerned, it is appropriate to balance pro-competitive and anti-competitive effects, to determine whether a restriction is caught by Article 85(1).<sup>101</sup>

As if to show that its judgment in *Maize Seed* was not an isolated instance, the Court shortly thereafter held in the second *Coditel* case<sup>102</sup> that the mere fact

---

<sup>98</sup> Joined cases 19 and 20/74, 1975 E. Comm. Ct. J. Rep. 499.

<sup>99</sup> See Opinion of Advocate General Warner in *Miller Schallplatten*, *supra* note 95, at 157.

<sup>100</sup> L.C. Nungesser KG and Kurt Eisele v. Commission, 1982 E. Comm. Ct. J. Rep. 2015, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8805 (1982) (*Maize Seed*).

<sup>101</sup> *But see* Van der Esch, *Industrial Property Rights under EEC Law*, ANNUAL PROCEEDINGS OF FORDHAM CORP. L. INST. 550–52 (1983). Van der Esch essentially interprets *Maize Seed* as meaning only that Article 85(1) cannot apply in the absence of actual or potential competition capable of being restricted by the agreement. This analysis would appear to minimize the significance of the balancing of pro and anti-competitive elements engaged in by the Court.

<sup>102</sup> *Coditel et al. v. Ciné Vog Films S.A. et al.*, 1982 E. Comm. Ct. J. Rep. 3381, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8865 (1982).



that the holder of a copyright to a film had granted the exclusive right to exhibit the film within the territory of a Member State to a licensee, thus preventing the diffusion of the film by others for a specified period, did not *per se* suffice for a determination to be made that such a license agreement was caught by Article 85(1). The Court's judgment in *Coditel II* went even further than its judgment in *Maize Seed* in that the Court's ruling applied to a case in which the licensee had sought to assert its exclusive rights to prevent the broadcast of the film in question on television by third parties, a type of situation which the Court in *Maize Seed* indicated would be caught by Article 85(1).

In finding that, given the facts of the case and the nature of the industry involved, even this degree of territorial protection was not caught by Article 85(1) *per se*, the Court suggested four criteria which the national court might consider in determining whether the licensee's exercise of its exclusive rights to prevent the broadcast of a film on television was caught by Article 85(1). These include: whether (i) the exercise of the exclusive rights created artificial or unjustifiable barriers with respect to the requirements of the film industry; (ii) the royalties received by the licensee exceeded fair compensation for the investment it had made; (iii) the duration of the exclusivity was excessive; and (iv) in a general way, the exercise of the exclusive right within a geographically determined area would prevent, restrict or distort competition within the Common Market. In effect, the European Court appeared to be asking the national court, to paraphrase *GTE/Sylvania*, to weigh all of the circumstances of the case in order to decide whether the restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Finally, in its recent *Pronuptia* judgment,<sup>103</sup> the Court suggested that absolute territorial protection might not be caught by Article 85(1) where the franchisor was a new entrant on the market and franchisees would be unwilling to assume the risks of acquiring the franchise absent such territorial protection. In addition, it also applied what would appear to be a doctrine of ancillary restraints with respect to certain non-competition and exclusive purchase obligations imposed on a business format franchisee reasoning that under certain circumstances, these obligations were indispensable to the successful functioning of a franchising system and thus are ancillary restrictions that fall outside the scope of Article 85(1).<sup>104</sup> This latter aspect of the judgment is particularly noteworthy

---

<sup>103</sup> See *Pronuptia*, *supra* note 14.

<sup>104</sup> The Court found that the obligation imposed on a franchisee not to open a store selling competing products ensures that the franchisor will be able to communicate know-how and provide commercial assistance to the franchisee without incurring the risk that either will be exploited for the benefit of the franchisor's competitors. The Court also found that an exclusive purchase obligation, under the facts of the case and in some other circumstances as well, was indispensable to the franchisor's need to preserve the identity and reputation of the franchise network and trademark. To the extent that *Maize Seed* may mean that open exclusivity, where the introduction of a new technology is concerned,

since indispensability, which the Court evaluated under Article 85(1), is one of the four criteria that must be satisfied for an exemption under Article 85(3). Although it may also be noteworthy that the Court referred to the indispensability and not the reasonableness of the restrictions in question, it did indicate, as it had in *Nutricia*, that the reasonableness of the scope and duration of such a restriction would have to be evaluated in determining whether Article 85(1) applies. The judgment would thus appear to indicate that the Court is employing a two-stage analysis: first, an examination of the justification for the restriction; second, a determination that such restriction which is, in principle, justified, does not exceed the appropriate duration and scope.

Given the foregoing, it would appear that, in some areas, the possibility of a flexible approach to Article 85(1) has already been clearly established in Community law. On the other hand, it is equally true that certain restrictions, in particular, those designed to ensure absolute territorial protection, will frequently be treated as virtual *per se* violations of Article 85(1), even where they may be exemptable.<sup>105</sup>

It is also clear that although the Commission itself has been willing to limit the applicability of Article 85(1) in certain contexts where to do so was, on balance, reasonable, the Court and the Commission have apparently differed as to where the appropriate line is to be drawn in other situations. In particular, this has been the case with respect to both the analysis of whether a contractual obligation should be viewed as being restrictive of competition and also as regards the degree to which the balancing of pro-competitive and anti-compet-

---

is not caught by Article 85(1) because no licensee would accept a non-exclusive license, the two cases may be consistent and may be interpreted to stand for the proposition that restrictions without which an arrangement would not succeed or be entered into will not fall under Article 85(1) as long as they are also reasonable in scope and duration and the underlying transaction, insofar as interbrand competition is concerned, is pro-competitive. *Pronuptia* would, however, seem to introduce a new element since it excludes from Article 85(1) restrictions that are justified by the nature of the arrangement itself and since it expressly treats indispensability, one of the criteria for exemption under Article 85(3), under Article 85(1).

<sup>105</sup> This was underscored by other aspects of the *Pronuptia* judgment where the Court, at least in cases where the franchisee is not itself a market entrant, adopted a virtual *per se* approach in condemning as violative of Article 85(1) the franchisor's obligation not to compete with the franchisee, not to appoint a second franchisee in the same territory and not to permit another franchisee to open another store there. Although it also acknowledged that these provisions could qualify for exemption, the Court reached this determination with respect to Article 85(1) without engaging in any economic analysis and, in particular, without examining whether, in the uniform business format type of franchise involved in *Pronuptia*, a given area can support more than one franchisee. Thus, although such restrictions may well be exemptable and may eventually be automatically exempted in the block exemption regulation that the Commission plans to adopt with respect to franchise agreements, until such time as the block exemption is adopted or individual exemptions are obtained, franchisors may run the risk that national courts will hold that franchisees need not fulfill their contractual obligations to pay royalties on the grounds that important aspects of the franchise agreement, like the grant of exclusivity and territorial protection, violate Article 85(1) and are void.

itive effects may occur under Article 85(1). With regard to these questions, the Court has tended to lead, rather than follow, a somewhat reluctant Commission in the direction of greater flexibility.

Given the structure of Article 85, a more flexible approach to Article 85(1) which does not reserve all balancing to Article 85(3) will, of course, be subject to limitations. In particular, a more flexible approach in certain contexts<sup>106</sup> will not eliminate the significance of Article 85(3) with respect to others. This is because any exception created by such an approach will necessarily be narrower than the exception created by Article 85(3) and would not permit, to cite one example, the non-applicability of Article 85(1) to the types of cartel arrangements that may, in theory, be exempted under Article 85(3). On the other hand, application of a more flexible approach to Article 85(1) would narrow the scope of Article 85(3) since Article 85(3) would no longer be the exclusive focus of analysis as to whether a formally restrictive provision poses a threat to competition or market integration. Such a flexible approach to Article 85(1) could have the effect of reserving for consideration under Article 85(3) those cases that have significant anti-competitive effects and therefore require careful study and the exercise of discretion to determine whether, on balance, such arrangements can nevertheless be permitted.

It is likely that the major thrust of EEC jurisprudence in the future will be in defining the scope of the non-applicability of Article 85(1), that is, the appropriate boundary between the balancing of pro and anti-competitive effects under Article 85(1) and 85(3). Although the form the legal debate takes may center on the meaning that is to be given to the prohibition of appreciable restrictions of competition set forth in Article 85(1), its resolution may ultimately turn on questions of policy, both procedural and economic, and on the issue of how the Commission's limited enforcement energies may best be allocated.

It is not, of course, possible to predict where the line will be drawn. As the *Pronuptia* judgment indicates, absolute territorial protection is still likely to be treated rather peremptorily by the Court. Similarly, the Court and the Commission are not likely to abandon the use of Article 85(1) as an instrument for encouraging market integration, although most commentators agree that a less rigid approach may be necessary, something which the Commission has indicated it may be willing to acknowledge.<sup>107</sup>

---

<sup>106</sup> Such an approach would seem appropriate with respect to agreements which result in the addition of a new competitor to the market, vertical agreements not involving absolute territorial protection and agreements between parties who are not actual or potential competitors.

<sup>107</sup> See the Commission's Article 19(3) notice in respect of Distiller's notification of a dual-pricing system related to the reintroduction into the United Kingdom of its Johnnie Walker Red Label brand which was withdrawn after the Commission had prohibited a dual pricing arrangement. O.J. EUR. COMM. (No. C 245) 3 (1983). Although no formal exemption has been granted, the Commission has tolerated the arrangement up to this time although the circumstances of the case are rather special.

As the debate on the appropriate balance between Articles 85(1) and 85(3) and the proper allocation of the Commission's limited enforcement resources develops, it will be important to focus on the benefits of a more flexible approach. First, a more flexible approach under Article 85(1) coupled with greater emphasis on economic analysis could result in greater legal certainty by excluding clearly exemptable agreements from the prohibition of Article 85(1), although some uncertainty as to the applicability of Article 85(1) would remain a problem. Second, a more flexible approach could also free the Commission from the considerable burden of dealing with agreements that do not threaten competition or the unity of the Common Market, thus permitting the Commission to engage in arguably more important tasks. Although such an approach might result in notification of fewer agreements, the Commission would be able to devote more attention to those that are notified and which have a significant impact on the structure of competition within the Community, and would also be able to commit the resources it has to dealing more effectively with unnotified agreements that do not merit exemption.