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Analogies between United States and Common Market Antitrust Law in the Field of Distribution

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I. Introduction

By one of those legal coincidences that crop up from time to time, the successful party in the most recent Supreme Court decision in the field of distribution[1] — *Continental T. V. Inc. v. GTE Sylvania Inc.*[2] — is the parent organization of the victorious entity[3], "SABA," in the European Court of Justice's even more recent foray into this area: *Metro SB-Grossmarkte GmbH v. Commission.*[4]

In the United States, the case has brought happiness to the hearts of the impassioned advocates of a return to "reason"[5] in an area they thought

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[1]This paper will be confined to distribution systems — the systems whereby a manufacturer gets his goods to the consuming public. Although there is a horizontal element in many distribution systems, we shall assume that all restraints are vertical in nature for the purposes of the discussion to follow.

[2]433 U.S. 36 (1977).

[3]The Commission decision granting an Article 5(3) exemption to Schwarzwalder-Bau-Anstalt August Schwer und Sohne GmbH (SABA), a 97.5%—owned subsidiary of General Telephone & Electronics Corp. (N.Y.), was challenged by a disgruntled would-be distributor before the ECJ. The actual style of the case reads: "The Court of Justice affirmed the Commission's decision and thereby left intact SABA's proposed distribution system which excluded the petitioners."

[4][1978] E. Comm. Ct. J. Rep. ______, 22 Comm. Mkt. L.R. 1 (1978).

[5]*See, e.g.*, Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537 (1975), Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667 (1967); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal*, 37 ANTITRUST L.J. 137 (1968); Pollock, *Alternative Distribution Methods After Schwinn*, 63 NW. U.L. REV. 595 (1968); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975); Note, *Vertical Territorial and Customer Restrictions in the Franchising Industry*, 10 COLUM. J.L. & SOC. PROB. 497 (1974); Note, *Territorial and Customer Restrictions: A Trend Toward A Broader Rule of Reason?*, 40 GEO. WASH. L. REV. 123 (1971); Note, *Territorial Restrictions and Per Se Rules — A Reevaluation of the Schwinn and Sealy Doctrines*, 70 MICH. L. REV. 616

devoid of it since *United States v. Arnold, Schwinn & Co.*[6] was decided a decade ago. Across the Atlantic the European Court ("ECJ") has upheld the prior decision of the EEC Commission[7] that certain vertical restrictions are exempt from the EEC competition rules' prohibition[8] when essential to specific types of selective distribution systems.

The relationship between the two antitrust systems' case law extends beyond the identity of litigants recently appearing before their highest tribunals. The *Schwinn* case, representing a dramatic departure from the rule laid down in *White Motor Co. v. United States,*[9] was decided shortly after[10] the ECJ's decision in *Consten v. Commission*[11] and there has been speculation ever since as to the degree of influence the latter decision had on the United States Supreme Court's views. By the *GTE Sylvania* decision, United States jurisprudence approached the position of EEC antitrust law in abandoning a blanket proscription against all vertical restraints in favor of evaluation of the individual restriction(s) in the context of its (their) application. It is appropriate, then, at this time when American jurisprudence is rapidly developing in the wake of "liberation" from *Schwinn,* to reflect upon the state of the law in Europe. There is understanding to be gleaned from the different approaches followed by the two systems.

A. *The Effect of the GTE Sylvania Case*

As with the case it overruled, *Sylvania* will spawn a voluminous school of academic comment. It is worth bearing in mind the actual vertical restriction that was at issue.

(1972). *But see* Louis, *Vertical Distributional Restraints Under Schwinn and Sylvania: An Argument for the Continuing Use of a Partial Per Se Approach,* 75 MICH. L. REV. 275 (1976); Zimmerman, *Distribution Restrictions After Sealy and Schwinn,* 12 ANTITRUST BULL. 1181 (1967).

[6]388 U.S. 365 (1967).

[7]*Re* SABA, 19 O.J. EUR. COMM. (No. 28) 19 (1976).

[8]In the early 1960s there was some doubt as to whether Article 85 applied to vertical restrictions. This issue was brought before the ECJ in L.T.M. v. M.B.U., [1966] E. Comm. Ct. J. Rep. 337, 5 Comm. Mkt. L.R. 39, and in Consten v. Commission, [1966] E. Comm. Ct. J. Rep. 429, 5 Comm. Mkt. L.R. 357. In the first of those cases the Court said:

> To fall under this prohibition an agreement must have been made between undertakings. No distinction is made in the provision as to whether the parties are placed at the same level (so-called "horizontal" agreements) or at different levels (so-called "vertical" agreements) of the economic process. Therefore, a contract containing a clause "granting an exclusive right of sale" may fulfill this condition.

L.T.M. v. M.B.U., 5 Comm. Mkt. L.R. 357, 374.

And in *Consten* the Court stated:

> In addition, it is pointless to compare on the one hand the situation under Article 85 of a producer bound by a sole agency agreement to the distributor of his products and on the other hand that of a producer who includes within his undertaking the distribution of his products by some means, e.g. by commercial travellers, and who thus escapes Article 85.

5 Comm. Mkt. L.R. (1966).

[9]372 U.S. 253 (1963).

[10]The *Schwinn* case was decided almost exactly one year after *Consten* (June 15, 1967, compared with July 13, 1966).

[11][1966] E. Comm. Ct. J. Rep. 429, 5 Comm. Mkt. L.R. 357.

Sylvania manufactured television sets and distributed them to franchised retailers.[12] The number of franchises was limited for any given area, but Sylvania reserved the right to increase that number depending on the success (or failure) of existing retailers to exploit their respective markets. Sylvania required franchisees to sell Sylvania products only from the location(s) for which they were licensed. The Court focused upon whether that location provision violated section 1 of the Sherman Act.

Faced with territorial and customer restraints in *Schwinn*[13] the Court had announced a *per se* rule of illegality for all vertical restrictions in sales transactions: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted dominion with it."[14] Conversely, the rule of reason was to govern when "the manufacturer retains title, dominion and risk with respect to the product and the position and function of the dealer in question are, in fact, undistinguishable from those of an agent or salesman of the manufacturer."[15]

Justice Powell, writing for the majority in *Sylvania,* concluded that the holding of *Schwinn* was broad enough to cover the location clause used by Sylvania. Unlike the Court of Appeals,[16] he declined to distinguish the case from *Schwinn* and chose instead to reevaluate the *Schwinn* holding in the light of the standard for the application of *per se* rules articulated in *Northern Pacific Railway v. United States:*[17] "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack

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[12]Sylvania's market share was 1-2% of national television sales at the time the distribution system at issue was adopted. By comparison, there were approximately 100 such manufacturers in the industry, with the largest of them, RCA, controlling 60-70% of the market. Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1966) (Part I).

[13]The restrictions at issue in *Schwinn* were part of a three-tier distribution system comprising, in addition to Arnold, Schwinn & Co. (Schwinn), 22 intermediate distributors and a network of franchised retailers. Each distributor had a defined geographic area in which it had the exclusive right to supply franchised retailers. Sales to the public were made only through franchised retailers, who were authorized to sell Schwinn bicycles only from specified locations. In support of this limitation, Schwinn prohibited both distributors and retailers from selling Schwinn bicycles to nonfranchised retailers.
GTE Sylvania, 433 U.S., at 42.

[14]388 U.S. 365, 379 (1967).

[15]*Id.* at 380.

[16]On appeal, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed by a divided vote. 537 F.2d 980 (1976). The court acknowledged that there is language in Schwinn that could be read to support the District Court's instruction but concluded that Schwinn was distinguishable on several grounds. Contrasting the nature of the restrictions, their competitive impact, and the market shares of the franchisors in the two cases, the court concluded that Sylvania's location restriction had less potential for competitive harm than the restrictions invalidated in Schwinn and thus should be judged under the "rule of reason" rather than the per se rule stated in Schwinn. The court found support for its position in the policies of the Sherman Act and in the decisions of other federal courts involving nonprice vertical restrictions.
433 U.S., at 41-2.

[17]356 U.S. 1 (1958).

of any redeeming virtue are conclusively presumed to be unreasonable and . . . illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[18] The Court proceeded to discourse generally upon the impact of vertical restrictions on interbrand and intrabrand competition, citing much of the literature critical of the *Schwinn* decision. It concluded that, while *per se* prohibitions under the formulae of *Northern Pacific* might be applicable to particular applications of vertical restrictions,[19] the proper standard of evaluation in the absence of established pernicious economic effect is that stated in *Chicago Board of Trade v. United States:*

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court to intepret facts and to predict consequences.[20]

But what does the rule of reason tell us about any one particular type of restraint in any one particular setting? It is difficult enough to analogize from individual cases to generalized rules when there is substantial case law to guide one. But between *White Motor* and *Schwinn* there were only two cases before the Court of Appeals which evaluated vertical territorial restrictions under the rule of reason.[21] Courts have less often followed the dictates of *Schwinn* than found ways of avoiding its reach, by methods, at times, straining judicial ingenuity.[22]

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[18] *Id.* at 5.

[19] 433 U.S. at 59 (Part III). Note, as well, that the Court states in footnote 18 that the *per se* illegality of vertical price restrictions is firmly settled.

[20] 246 U.S. 231, 238 (1918).

[21] Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); Snap-on Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963).

[22] *For example,* the statement in *Schwinn* that post-sale vertical restrictions or territories are "unreasonable without more," 388 U.S. at 379, has been interpreted to allow an exception to the *per se* rule where the manufacturer proves "more" by showing that the restraints will protect consumers against injury and the manufacturer against product liability claims. *See, e.g.*, Tripoli Co. v. Wella Corp., 425 F.2d 932, 936-38 (3rd Cir. 1970) (en banc). Similarly, the statement that Schwinn's enforcement of its restrictions had been "firm and resolute," 388 U.S. at 372, has been relied upon to distinguish cases lacking that element. *See, e.g.*, Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406 (2d Cir. 1968). Other factual distinctions have been drawn to justify upholding territorial restrictions that would seem to fall within the scope of the *Schwinn per se* rule. *See, e.g.*, Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 639-40 (10th Cir. 1973) (apparent territorial restriction characterized as primary responsibility clause); Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1379-80 (Ct. Cl. 1971) (*per se* rule inapplicable when a purchaser can avoid the restraints by electing to buy the product at a higher price).

This paper shall attempt to point out how the EEC judicial system has coped with the issues raised by vertical restraints. Article 85(1) of the Treaty of Rome is worded in substantially the same manner as § 1 of the Sherman Act and, differences in antitrust philosophy aside, there are close parallels between the pro- and anti-competitive effects of distribution networks in each of the two systems. Accordingly, the intent of the analysis will be to examine, through the medium of American legal concepts and practices, the competition rules relevant to this field. First, however, one must delineate the contours of EEC antitrust law.

B. *Treaty of Rome Antitrust Law Provisions*

Actually, the EEC principles are called "competition rules" and not "antitrust laws," owing to the difference in time of and motivation for their creation.[23] The Treaty provision we are here most concerned with is Article 85, whose first paragraph provides:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market. . . .[24]

Article 85 then continues by providing in its third paragraph for the exemption from the above prohibition for agreements, decisions and concerted practices:

> . . . which [contribute] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which [do] not:

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[23]EEC competition policy is intended to serve as an instrument to help strike the right balance between those restrictions on competition which are permissible or even desirable as a means of creating an enlarged common market and those restrictive practices which actually impede the integration of markets and should, therefore, be eliminated. As such it has three basic objectives:

— The first is to help create and maintain a single, common market for the benefit of business and consumers. Simply removing frontier barriers is not enough if goods and services are to be traded freely throughout the Community. Rules have to be made and enforced to ensure that firms do not . . . in effect create new barriers that are no less protective for being invisible.

— The second objective of competition policy is to prevent large companies abusing their economic power. Here it must make sure that the power to take decisions . . . is dispersed over a large number of independent units to the benefit of the economy as a whole.

— The third objective is to induce firms to rationalise production and distribution and to keep up with technical and scientific developments. In this way, competition policy can help to bring about optimum distribution of economic activity within the Community thus making Community firms more competitive in the international market place.

COMMISSION OF THE EC, EUROPEAN COMMUNITY'S COMPETITION POLICY 4 (1976).

[24]1 COMM. MKT. REP. (CCH) ¶ 2005, at 1631.

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

Any agreement, decision or concerted practice that is prohibited by Article 85(1) and that is not exempted from that prohibition by Article 85(3) is null and void.[26]

Article 87(1) is another Treaty provision of great importance. It imposes an obligation on the Council of Ministers,[27] acting on a proposal from the Commission, to adopt the necessary regulations and directives to implement the principles set out in Article 85. Regulation 17 was enacted pursuant to this authority, and made provision for existing restrictive agreements,[28] defined the powers and competence of the Commission,[29] the Court of Justice,[30] and the national authorities,[31] and empowered the Commission to impose fines and periodic penalty payments in order to ensure compliance with the Treaty rules.[32]

Most significantly for our purposes, it established the "negative clearance" procedure, whereby enterprises can obtain a declaration from the Commission to the effect that their agreement is not prohibited by Article 85(1);[33] established that the Commission is the sole authority vested with the power to grant an "exemption" — a declaration that the conditions for the application of Article 85(3) were satisfied;[34] and required enterprises, in most instances,[35] to register ("notify" in Community parlance) their agreements with the Commission if they wanted the benefits of either a negative clearance or an exemption.

The full body of EEC law relating to competition policy includes not only the Treaty of Rome provisions and Council of Ministers regulations, but

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[25] *Id.* ¶ 2051 at 1661.

[26] Art. 85(2), 1 COMM. MKT. REP. (CCH) ¶ 2041 at 1657.

[27] Art. 87(1) provides ". . . the Council shall, acting unanimously on a proposal of the Commission . . . adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86." 1 COMM. MKT. REP. (CCH) ¶ 2201 at 1699.

[28] Council Regulation 17, 5 J.O. COMM. EVR. 204, arts. 5 and 7 (1962).

[29] *Id.* arts. 9-16, 24.

[30] *Id.* art. 17.

[31] *Id.* arts. 10, 13, 23.

[32] *Id.* arts. 15, 16, 18.

[33] *Id.* art. 2.

[34] *Id.* art. 9.

[35] *Id.* arts. 4, 5. Article 4(2) makes an exception to the need to notify for certain categories of agreements. *See also* Commission Regulation 67/67, 10 J.O. COMM. EUR. 849 (1967); Commission Regulation 2779/72, 15 J.O. COMM. EUR. (No. L 292) 23 (1972).

also Commission regulations[36] and notices[37] and case law[38] promulgated by both the Commission and the ECJ. At various times, all of these have played a role in delineating the permissible boundaries for distribution agreements; aside from the cases, of particular relevance to our concerns are Regulation 67/67,[39] which granted a group exemption for certain bilateral exclusive dealing agreements, and two Commission Notices — "On Agreements of Minor Importance"[40] and "On Exclusive Agency Contracts."[41]

II. *Per se* Rules in the EEC

American antitrust jurisprudence uses the "*per se*" concept to highlight common and important anti-competitive situations, to provide certainty in the law and to lighten the burdens on litigants and on the judicial system. Conversely, situations where the pro- and anti-competitive effects of an arrangement are in balance or close to it are not specially identified. Thus, section 1 of the Sherman Act bars not every agreement restraining trade, but only those which do so unreasonably.

The question arises whether either concept is known in Community law. At first glance the rule of reason seems to be embodied (in perhaps more permissive form) in Article 85(3), which would leave one to assume that Article 85(1) is applied in a somewhat mechanical manner. While it is true that the invocation of Article 85(1) is triggered with greater ease than that of its American counterpart, is it also true that Article 85(1) does not involve the balancing of pro- and anti competitive impact, leaving this task to Article 85(3)? Put differently, is there a judicial gloss on Article 85 (1) akin to the rule of reason? Or are there *per se* restrictions?

A. *The Rule in the* L.T.M. v. M.B.U. *Case*

In one of the earliest and most famous cases, *Consten v. Commission of the EEC,*[42] the Commission took the hard line that any agreement by a

[36]The Treaty of Rome does not grant the Commission the right to make regulations. Its authority to do so must always stem from a delegation of power from the Council of Ministers (acting by way of a Council Regulation). *See, e.g.*, Council Reg. 17, art. 24, which empowered the Commission to adopt Commission Regulation 27, 10 J.O. COMM. EUR. 1118 (1967).

[37]There is no specific treaty or regulation provision detailing the scope of or authority for Commission notices. Rather, they are unofficial guidelines issued by the Commission to clarify its views and to influence the activities of enterprises with regard to certain matters of competition policy.

[38]To make a fine distinction, only the Court of Justice decides cases. The Commission "takes decisions" based upon its investigations pursuant to notifications from firms seeking negative clearances or exceptions, its own initiatives or complaints from third parties. The reader may decide the difference this distinction makes.

[39]10 J.O. COMM. EUR. 849 (1967).

[40]5 J.O. COMM. EUR. 2921 (1962).

[41]13 J.O. COMM. EUR. (No. C 64) 1 (1970).

[42]7 J.O. COMM. EUR. 2545, 3 Comm. Mkt. L.R. 489 (1964).

supplier not to sell to more than one dealer or by a dealer to purchase from only one supplier was a *per se* restriction of competition within the meaning of Article 85(1). The Commission repeated this view in three subsequent decisions,[43] thus seemingly bringing all exclusive distribution agreements within its regulatory powers.

However, the ECJ in the *L.T.M. v. M.B.U.* case[44] held that exclusive sales agreements do not automatically come under the prohibition of Article 85, Paragraph 1. Rather, the Court set forth a number of factors to be appraised in determining the validity of this type of agreement:

> . . . the nature of the products and whether or not their quantity was limited, the position and importance of the licensor and licensee on the market of the products concerned, whether the contract is isolated or is one of a group of contracts, and whether the clauses protecting the exclusiveness are rigid or possibilities are left open for other channels of trade in the same products through re-exports and parallel imports.[45]

In so ruling, the court recognized that Article 85(1) does not prohibit certain types of agreements outright; the competent judge or authority must always examine the effect of the provision under review in the light of the ascertained economic and legal facts. Of course, this begs the question whether there are certain practices which although not illegal *per se* have yet to and may never find a factual situation justifying their existence. If so, then the rationale of *Northern Pacific* would seem equally applicable in European and American contexts — why waste time and money examining the anti-competitive impact of certain practices when experience shows that the number of cases in which it will not be found is so small as not to merit the constant inquiries? But before turning to answer this question, it is worth bearing in mind that there already exist two gaps in whatever blanket proscriptions Article 85(1) contains — the rule in *Volk v. Vervaecke*[46] and the treatment of commercial agents — and an evolving doctrine which has the potential to alter dramatically the present application of Article 85(1).

B. *De Minimis Non Curat Praetor: The Law Cares Not for Trifles*

In *Volk v. Vervaecke* the ECJ ruled:

> . . . an agreement escapes the prohibition of Article 85 when it only affects the market insignificantly, account being taken of the weak position held by the parties on the market in the products in question. It is therefore possible that an exclusive concession agreement, even with absolute territorial protection, may, in

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[43] *Re* the Agreement of Establissement Blondel S.A., 8 J.O. COMM. EUR. 2194, 4 Comm. Mkt. L.R. 180 (1965); *Re* the Agreement of Edmund Isbeque, 8 J.O. COMM. EUR. 2581, 4 COMM. MKT. L.R. 242 (1965); *Re* the Agreement of Maison Jaccote 9 J.O. COMM. EUR. 37, 5 Comm. Mkt. L.R. D1 (1966).

[44] [1966] E. Comm. Ct. J. Rep. 235, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8047.

[45] *Id.* CCH ¶ 8047 at 7696.

[46] [1969] E. Comm. Ct. J. Rep. 295.

> view of the weak position of the parties on the market in the products in question in the territory which is subject of the absolute protection escape the prohibition set out in Article 85(1).[47]

The particular case involved the appointment of a sole distributor for Belgium and Luxembourg (with absolute territorial protection) by a German washing-machine manufacturer holding .05 percent of the market for such products in Germany. By so ruling (and subsequently affirming its judgment in *Cadillon v. Firma Hoss*[48]) the Court was evidencing its policy that negligible anti-competitive effects are not worth the efforts of prevention.

In an attempt to lay down guidelines for the concept's application, the Commission published its *Notice on Agreements of Minor Importance.*[49] The Notice is essentially an announcement for guidance only and does not bind either the Commission or the courts. Under its terms, Article 85(1) does not apply to agreements where the share of the relevant market held by the products concerned does not exceed five percent and the annual turnover of the enterprises concerned does not exceed fifteen million units of account for manufacturers or twenty million units of account for distributors.[50]

The Notice has been criticized for its lack of precision, its limited value in the light of subsequent decisions and as a further step down a road poorly chosen by the Court in the case prompting its creation.[51] Nevertheless, its continued validity has been reaffirmed by the Commission's current preparations to revise it[52] and the Court of Justice has thus far given no indication that it is prepared to reverse its views.

Indeed, one can wonder what benefit would accrue from a contrary holding. Surely the Commission need not be put in the impossible position of examining every de facto restriction of competition? Recall the comments in *Chicago Board of Trade* just before the classic rule of reason definition:

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[47] 8 Comm. Mkt. L.R. 273, 282 (1969).

[48] [1971] E. Comm. Ct. J. Rep. 351, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8135.

[49] 13 J.O. COMM. EUR. (No. C 63) 1 (1970).

[50] The Commission is currently proposing to increase the annual turnover limit to fifty million units of account. In its proposal it states that this is necessary to take account of inflation in the Community between 1970 and 1977 and to broaden the Notice's scope of application. Commission of the EC, Internal Working Paper on Amendment of the Notice Concerning Agreements of Minor Importance (1977).

[51] *See* Osterweil, *Developing EEC Antitrust Law in the Field of Distribution Under Article 85 of the Treaty of Rome,* 8 LAW & POL'Y IN INT'L BUS. 77, 81 (1976); Alexander, "*Per Se*" *Rules Under Article 85 EEC?*, in EUROPEAN COMPETITION POLICY 84 (Europa Institute ed. 1973).

[52] Commission of the EC, Internal Working Paper, note 50 *supra.* As well as increasing the turnover threshold, the Commission intends to change the criteria for geographic market share from "the part of the common market where the agreement produces its effects" to "a substantial part of the common market," thereby harmonizing the Notice with Regulations 2779/72 and 67/67.

> [T]he legality of an agreement . . . cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.[53]

The *de minimis* rule announced by the European Court of Justice is but the logical application of the two conditions required for a violation of Article 85(1) — that the agreement have as its object or effect a restraint on competition and that the restraint affect trade between the member states. While in its most recent pronouncement on the subject the Court focused on the nonfulfillment of the "affect on trade" requirement,[54] it is more accurate to state that an agreement or practice cannot generally prevent, restrict or distort competition when undertaken by a firm holding an insignificant position on the market.[55]

C. *The Status of Commercial Agency*

While the concept of commercial agency exists in varying forms in all of the member states[56] (and is currently the subject of Commission attempts at harmonization),[57] both the European Court of Justice and the Commission have seen fit to distinguish between agents and "independent traders" for purposes of Competition Law.[58] The significance lies in the fact that the former are not subject to the requirements of Article 85.

The first attempts to develop a Community definition of or status for agency occurred on Christmas Eve, 1962, when the Commission issued its *Notice on Exclusive Agency Contracts.*[59] This Notice provided a number of

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[53]246 U.S. 231, 238 (1918).

[54]"That condition [affecting trade] is met if the agreement, looked at on the basis of the whole pattern of objective legal and factual elements, permits one to envisage with a sufficient degree of probability that it could exercise a direct or indirect, actual or potential influence on the trade pattern between member-States in a direction which could hinder realisation of the objectives of a single market between States."

"An exclusive dealing agreement may escape the prohibition of Article 85(1) if, in view of the weak position of the parties on the market . . . in question . . . it is not capable of hindering the realization of the objectives of a single market between States. . . ." *Cadillon,* [1971] E. Comm. Ct. J. Rep. 351, 10 Comm. Mkt. L.R. 420, 429 (1971).

[55]This statement must be qualified. An agreement which, when viewed in isolation, appears to be incapable of having more than a minimal impact on competition, may nevertheless be found to appreciably restrict competition by reason of the cumulative effect of identical or similar agreements between the parties thereto or between other firms in the same industrial sector.

See Brasseries de Haecht v. Wilkin-Janssen [1968] E. Comm. Ct. J. Rep. 525; De Norre v. NV Browern Concordia, 19 Comm. Mkt. L.R. 378 (1977).

[56]*See* COMMERCIAL AGENCY AND DISTRIBUTION AGREEMENTS AND RELATED PROBLEMS OF LICENSING IN THE LAW OF THE EEC (W. VAN GERVEN & F. LUKOFF EDS. 1970).

[57]COMMISSION OF THE EC, PROPOSAL FOR A COUNCIL DIRECTIVE TO COORDINATE THE LAWS OF THE MEMBER STATES RELATING TO (SELF-EMPLOYED) COMMERCIAL AGENTS (Brussels 1977).

[58]*See Consten,* 5 Comm. Mkt. L.R. 418, 470 (1966); Italy v. EEC Council, 8 Comm. Mkt. L.R. 39, 63 (1969); *Re* Pittsburgh Corning Europe, 12 Comm. Mkt. L.R. D2 (1973); *Re* the European Sugar Cartel: "Suiker Unie" v. Commission, 17 Comm. Mkt. L.R. 295 (1976) [hereinafter cited as *Sugar Case*].

[59]5 J.O. COMM. EUR. 2921 (1962).

criteria which could be applied to a given agreement to determine how the representative appointed under it should be regarded. Of foremost importance was the presence or absence of economic risk borne by the appointee:

> Except for the usual *del credere* guarantee, a commercial agent must not, by the nature of his functions, assume risk resulting from the transaction. If he does assume such risks his function becomes economically akin to that of an independent trader and he must therefore be treated as such for the purposes of the rules of competition.[60]

Three examples of situations were detailed in which, because financial risk is present, the representative is more likely to be considered an independent trader:

> [When he] is required to keep or does in fact keep, as his own property a considerable stock of the products covered by the contract, or
> . . . is required to organize, maintain or ensure at his own expense a substantial service to customers free of charge, or does in fact organize, maintain or ensure such a service, or
> . . . can determine or does in fact determine prices or terms of business.[61]

In Part II of the Notice the Commission expanded upon its view, specifying that where the agent performs a mere auxiliary function to his principal — acting upon his instructions and in his interests — there is no restriction on competition within the meaning of Article 85(1). That a distinction must be drawn between agents acting "as an auxiliary organ forming an integral part of the principal's undertaking"[62] and independent traders bearing "the financial risks of the sales or of the performance of contracts entered into with third parties"[63] has been affirmed in numerous decisions and cases.[64]

The reasoning underlying the above distinction, however, has been the subject of some criticism.[65] The Commission itself admitted in its Notice that the mutual exclusivity usually involved in agency agreements entails a limitation of demand on the market where the agent operates. It nevertheless felt that this restriction was both appropriate and necessary to protect the respective interests of the agent and principal. A more fundamental difficulty is that a powerful manufacturer could conceivably utilize a network of agents to eliminate competition at the distribution level or to divide markets with the same effect as distribution through independent distributors with exclusive territorial protection.

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[60] *Id.* at pt. I.

[61] *Id.*

[62] *Sugar Case,* 17 Comm. Mkt. L.R. at 468.

[63] *Id.*

[64] *See* cases cited note 58 *supra.*

[65] *See* J. Megret, J.V. Louis & M. Waelbroeck, 4 Le Droit de la Communaute Economique Europeénne 188 (Bruxelles 1972); D. Gilstra & D. Murphy, *Distribution Systems and EEC Competition Law,* in Legal Issues of European Integration 81, 90-91; Osterweil, *Developing EEC Antitrust Law in the Field of Distribution under Article 85 of the Treaty of Rome,* 8 Law and Policy in Int'l Bus. 77, 83-84 (1976); Leigh & Guy, *Exclusive Agency Agreements in the EEC,* 1 Eur. L. Rev. 282 (1976) [hereinafter cited as *Exclusive Agency*].

The *Pittsburgh Corning* decision[66] gave the Commission the opportunity to deal with this latter problem. In rejecting Pittsburgh Corning's attempts to characterize its relationship with its Belgian distributor as one of agency (within the terms of the Notice), the Commission made it clear that it would accept neither mere appearances nor artificially constructed arrangements, but would reserve to itself "the right to re-establish the true character of legal acts, relations between undertakings and economic situations:"[67]

> It is for the Commission to judge whether a factual situation corresponds with what it had in mind when it tried, as it said, "to give undertakings indications of the considerations which would guide it in interpreting Article 85(1)." In fact, the Commission in that Notice was only referring to contracts concluded with commercial agents proper, in the strict sense, and without prejudice to a thorough examination of individual cases.[68]

That it is no simple matter to draw a line between agent and independent trader has been acknowledged by the ECJ. In the *Sugar Cases* the Court concluded that the

> mere fact that an agreement establishes a principal-agent relationship does not in itself suffice to take the agreement in question outside the ambit of Article 85(1), if in fact the agent carries on other activities outside his agency agreement and cannot therefore properly be regarded as merely an auxiliary organ forming part of one economic unit with his principal.[69]

In particular, while the Court agreed with the Commission that the exclusive agency agreements in question were, in fact, covered by Article 85(1), it saw fit to waive the fines which the Commission had imposed in respect of these agreements because "the possibility that the wording of the said communication could induce the belief that such a practice was accepted as being compatible with the Treaty cannot . . . be ruled out."[70]

What is clear from the law in this area is that there is no "bright-line" rule for distinguishing between agent and independent trader. One pair of authors has deduced that there are in fact four decisive criteria[71] in addition to that of the agent not assuming any economic risk and that the only safe conclusion is that if all are fulfilled the agreement may be assumed to be outside the ambit of Article 85(1).

If EEC law in this area is less than crystal-clear, American law is no more lucid. American jurisprudence at one point applied a rather wooden formula: under the ruling in *United States v. General Electric Co.*[72] vertical

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[66]15 J.O. COMM. EUR. (No. L 272) 35, 12 Comm. Mkt. L.R. D2 (1973).
[67]*Id.* D6-7.
[68]*Id.* D8.
[69]17 Comm. Mkt. L.R. 295 (1976).
[70]*Id.* at 477.
[71](1) Integration (of the agent into the sales organization of the principal).
(2) Economic dependence (of the agent on the principal).
(3) Auxiliary function (rendered by the agent to the principal).
(4) Reciprocity of obligation, i.e., the reciprocal undertaking by the agency to work for no other principal. *Exclusive Agency, supra* note 64, at 295.
[72]272 U.S. 476 (1926).

restrictions in a distribution system characterized by a consignment or agency relationship between the parties did not run foul of the Sherman Act.[73]

Simpson v. Union Oil Co.[74] laid to rest this triumph of form over substance. In that case a system in which an oil company sold gasoline on consignment through retailers, reserving to itself the ability to set the prices, was found to be a prohibited price-fixing scheme notwithstanding the fact that most if not all of the indicia of agency or consignment were present. The Court refused to let legality for antitrust purposes turn on clever draftsmanship and declared the principle of judicial recasting of an agreement to determine its true nature.

The problem remaining was lack of certainty in the law — where was the line to be drawn between what one could and could not do with agents? Should one look to the intent of the parties, disallowing those systems where the structure has been conceived solely or mainly to avoid the impact of the Sherman Act? How could one determine this intent? Should it be inferred whenever the value of the antitrust "violations" they would immunize would be "substantial" or of greater importance to the firms involved than the benefits accruing from the use of consignment? How could one measure and compare those benefits?

But if it is not illegal for an owner of an article to send it to a dealer to be sold only at a price determined by the owner,[75] intention alone must not be the relevant criterion. Maybe it is the size and market power of the owner of the goods, maybe it is the context of the consignment — whether it is occasional or part of a distribution system.

Without ascertaining the decisive criteria, one can note the parallel between *Simpson v. Union Oil Co.* and the Commission decision in *Pittsburgh Corning:* The competent tribunal will determine the "true nature" of the agency, its structure notwithstanding. In both legal systems the stakes will be high — one either falls within or without the antitrust laws' strictures.

It is necessary to digress a moment and contemplate the *Schwinn* decision. As is well known, the Court in that case drew a clear distinction between consignment and sale, indicating that territorial or customer restrictions, although *per se* illegal once title to goods sold had passed, were to be analyzed under the rule of reason in regard to non-sale transactions.[76] Two conditions were imposed for a consignment plan to pass muster. First, the manufacturer must retain title, dominion and risk of loss. Second, the

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[73]Note that *General Electric* involved patented goods. *But see* Simpson v. Union Oil Co., 377 U.S. 13, 23 (1964): "The Court in the G.E. case did not restrict its ruling to patented articles, it, indeed, said that the use of the consignment device was available to the owners of articles 'patented or otherwise.' "

[74]377 U.S. 13 (1964).

[75]*Id.*

[76]388 U.S., at 379-80.

function of the dealer must be such that it is indistinguishable from that of an agent or salesman of the manufacturer.[77] The problem, of course, is reconciling this holding with *Simpson*. Thankfully, *Sylvania* has safely interred *Schwinn* and one can conclude that the rule of reason governs both sale and certain (under *Simpson*) non-sale transactions involving vertical restrictions.

The difference, then, between the Community and American approach to agency appears to be that the criteria are more extensively laid out in the European system. Given the confused state of the law in the EEC, that is not saying much.

D. *A Rule of Reason for Article 85(1)?*

Arguably, one could dismiss the above two exceptions to the application of Article 85(1) as not really relevant to a determination of whether a "reasonableness" test is evolving in relation to that article. It could be emphasized that the "*de minimis*" rule is merely a threshold question — stating nothing more outlandish than that a company with insignificant market power cannot generally affect trade between member states nor appreciably restrain competition no matter what agreements it enters into.[78] Similarly, the exception for commercial agents can be viewed as a recognition that a manufacturer should, in the context of distribution, be able to utilize intermediaries to perform functions akin to those his employees could undertake. The rationale underlying the agency concept as promulgated in the EEC seems to suggest that agents are not covered by Article 85(1) when (and because) they are just like employees.

Both of these "exceptions" could be more accurately termed "parameters" or "boundaries" delimiting what is within the coverage of the Article. In neither situation is one looking at an agreement between undertakings and saying "Ah, it significantly restrains competition but let's leave it be — it is a reasonable restriction in the context of its intended result." By way of contrast, in the field of "selective distribution" that is precisely the approach that has evolved in the Commission's jurisprudence.

Selective distribution involves nothing more than a manufacturer selecting his distributors (wholesalers) and retail dealers, and imposing certain requirements upon them. By its very nature it entails a limitation on the number of entities taking part in the distribution chain; the criteria for admission to the system being either qualitative or quantitative standards or a combination of the two.

In its first decision in this area, *Kodak*,[79] the Commission declared Article 85(1) inapplicable to the modified uniform conditions of the sale used by

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[77] *Id.* at 381.
[78] *But see* note 55 *supra*.
[79] 13 J.O. Comm. Eur. (No. L 147) 24 (1970).

the Kodak companies in the Common Market. One clause of those sales conditions stipulated that Kodak products were supplied on the basis that "they shall not normally be resold at any stage of subsequent marketing except by qualified staff and in premises which allow their storage, presentation and sale in satisfactory condition."[80] In the Commission's view this decision represents the view that a manufacturer may choose his retailers by setting "objective qualitative standards which must be met by the retailer as regards his own and his staff's qualifications and training and the nature of his premises."[81] Even though supplies may be withheld from dealers who do not meet these requirements, such a system is not caught by the prohibition in Article 85(1), provided that the same objective requirements are imposed on all potential purchasers and are applied without discrimination.

Notwithstanding the restriction on intra-brand competition which must result from the exclusion of certain potential entrants to the distribution chain, the Commission implicitly determines that two factors absolve such a scheme from an anti-competitive characterization: (i) without such restrictions the effectiveness of the distribution system in fulfilling its basic functions would be fatally jeopardized; (ii) the restriction on intra-brand competition is outweighed by the increase in inter-brand competition that results from strengthening distribution chains for competitive products.

One does not quarrel with the outcome of the decision; however, one does note that the analysis takes place not in the context of the third, but the first paragraph of Article 85. The *Kodak* case (albeit aided by a subsequent expansive interpretation of its holding by the Commission) marked the beginning of an analysis under Article 85(1) of whether the restrictions on competition were "reasonable" in light of the purpose for their application. The original standard of this reasonableness was very high: restrictions were justifiable only when without them the whole system of distribution necessary for the product would collapse. While it is perhaps easy to sympathize with a requirement that a vendor of a piece of technical equipment requiring expert instructions on use or skilled after-sales servicing be capable of providing those services, the difficulty lies in the extent to which this concept has been expanded.

The *Omega* decision[82] came next and in it the Commission authorized as compatible with Article 85(1) requirements for admission to retail-watch-merchant status of "adequate professional qualifications (*i.e.*, watchmakers and jewellers) [*sic*] and well located and turned-out premises." Now, watches are bits of complex machinery, but retailers were not obliged to perform repairs. That being so, the qualitative standards of selection appear to lack any relation to the "needs" of product service other than the manufacturer's desire to sell through prestige outlets.

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[80] *Id.* at 25.
[81] COMMISSION OF THE EC, FIFTH REPORT ON COMPETITION POLICY 23 (Brussels 1976).
[82] 13 J.O. COMM. EUR. (No. L. 242) 22 (1970).

December 1974 saw the release of two somewhat contradictory decisions, *BMW*[83] and *Dior/Lancome.*[84] In the former, the Commission appeared to have reconsidered its previous reasoning. It determined that the obligations imposed on BMW's retailers to follow BMW's advertising policies, use BMW trademarks only as authorized, receive BMW's permission before entering certain trade exhibitions and regularly inform BMW of certain trading conditions were not violative of Article 85(1).[85] However, it did consider as infringements of that article the following qualitative standards for admission to the BMW distribution system as a retailer:

(a) to operate a business the layout of whose premises, equipment and technical and commercial management satisfy BMW requirements;
(b) to operate a service department and workshop to BMW's requirements, to employ properly qualified staff and ensure that they receive the training required;
(c) to provide after-sales service;
(d) to maintain a stock of goods sufficient to satisfy demand;
(e) to operate a guarantee system (including providing free service under it).[86]

One notes that (a) and (b) above bear striking resemblance to the provisions authorized in *Omega* and *Kodak.* Furthermore, considering the complex technical nature of automobiles and their need for constant service and repairs, it would have seemed that the *BMW* decision afforded the Commission the opportunity to exclude all of the listed qualitative requirements from Article 85(1) on the grounds of their indispensability to a viable distribution system for such products. Viewed in isolation, the *BMW* decision appears to represent a move away from the expansive trend of *Omega.*

However, at the same time it decided *BMW,* the Commission issued its "press release" concerning the French perfume industry. While not adopting a formal decision, the Commission stated that there was no need for it to take action under Article 85(1) in relation to the distribution system employed by the perfume manufacturers. Notwithstanding the fact that perfume is a relatively simple product requiring no special skills on the part of its vendors, the selection of retailers based on both qualitative (a "classy shop") *and* quantitative (minimum market size varying with the estimated wealth of the locale) criteria was approved. One could easily wonder how a manufacturer's desire to restrict sales of its product to prestige shops solely in order to promote its luxury image would be justified under Article 85(3)! Suffice it to say that the approval, under Article 85(1), of the qualitative standards represents a further expansion of the *Kodak* doctrine and that the acceptance of the quantitative limits was a mistake.

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[83]18 O.J. EUR. COMM. (No. 19) 5 (1975); [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9701.

[84]These two companies were the subjects of a Commission investigation into the French perfume industry. Rather than make a formal decision, the Commission, satisfied that the companies had altered their distribution networks to the necessary degree, issued a press release so indicating.

[85]*BMW,* [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9701, at 9539-9.

[86]*Id.* ¶ 9701, at 9539-7, 8.

In the *SABA* decision,[87] distribution of consumer electronic equipment was approved under Article 85(1) even though it utilized the following restrictions:

> 1. [the requirement that a wholesaler:]
> (a) keep a specified shop, i.e., one where over 50 percent of the turnover relates to the sale of radio, television, tape-recording or other electrical equipment, or has set up a department specializing in the wholesale of radio, television and tape-recording equipment with a turnover comparable to that of a wholesaler specializing in electronic equipment for leisure purposes;
> (b) participates in the creation and consolidation of the SABA sales network:
> (c) participates in the SABA service system and has in particular a qualified staff to give proper advice and supply technical service to customers;
> (d) signs the SABA Cooperation Agreement [forbidding retail sales] . . .
> 2. [and the requirements that retailers:]
> (a) keep a specialized shop, i.e., one where over 50 percent of the turnover relates to the sale of radio, television, tape-recording or other electrical equipment, or have set up a department specializing in the sale of radio, television and tape-recording equipment;
> (b) trade from retail premises which are suitable for advertising and displaying SABA products;
>
> . . . .
>
> (e) be able, through qualified staff, to give proper advice and service to consumers;
> (f) be able to provide customers with technical service and give a guarantee to the consumer in accordance with the SABA Guarantee. . . .[88]

Finally, in the most recent decision in the area, *Junghans,*[89] the following restrictions on clock and watch retailers were approved:

> [that] he possess appropriately qualified full-time staff. Appropriately qualified staff are defined as persons who have passed examinations prescribed by national authorities or by appropriate trade associations in the relevant State, or who have been engaged in the watch and clock trade for at least three years;
> [that] the internal fitting and external appearance of the shop are suitable for the sale of clocks and watches;
> [that] clocks and watches are sold either in a specialized department in the case of a department store or, in the case of a shop, it has its own sales area with display windows, separated from the proprietor's dwelling;
> [that] a representative range of clocks and watches is stocked;
> [that] adequate facilities and staff are provided to give specialist service, particularly for repairs;
> [that] in the case of department stores, adjacent goods do not adversely affect the character of the department or its display of clocks and watches.[90]

It will be appreciated that we have progressed from permitting only those restrictions indispensably related to the products' characteristics (*e.g.*, ser-

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[87] 19 O.J. EUR. COMM. (No. L 28) 19 (1976); [1976-1977 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9802.

[88] *Id.* ¶ 9802, at 9793-13.

[89] 20 O.J. EUR.COMM. (No. L 30) 10 (1977), [1976-1977 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9912.

[90] *Id.* ¶ 9912, at 9963-7, 8.

vice needs) to allowing restrictions based on commercial judgment (*e.g.*, the type or appearance of the retailer's shop). Given present commercial realities, it seems fair to say that vendors of products requiring repairs, preparation or special user knowledge must be able to provide those services. In such circumstances one can more easily understand the Commission's view that to exclude from the retail network those who are incapable of or unwilling to provide these services does not involve a restriction of competition within the meaning of Article 85(1). But once restrictions beyond those necessary because of the product's technical nature are included, it is absurd to suggest that Article 85(1) is not violated. Rather, it is being implicitly determined that the restrictions are reasonable in light of the product, the proposed distribution system and the manufacturer's aims.

One could well ask "So what?" This creeping "reasonableness" standard governs only selective distribution and what has thus far been approved under Article 85(1) could easily be approved under 85(3). However, what applies to selective distribution today could apply to other areas of distribution tomorrow. Although the result in any particular case would be the same regardless of whether the Commission approved the restraints under the third or first paragraphs of Article 85, it is not merely a doctrinal point that is being raised. National courts are empowered to apply Article 85(1), whereas only the Commission can grant an Article 85(3) exemption. The result of a reasonableness test being engrafted onto Article 85(1) is that national courts' power to shape the evolution of competition policy is greatly enhanced. Furthermore, an exemption absolves one from liability only from the date of the notification onwards — a finding of reasonableness under Article 85(1) means that there has never been a restriction of competition.[91]

One is not presently reassured by the Commission in this area. That the *BMW* and "*perfume*" decisions were released at the same time is puzzling enough. Comparing the conditions found violative of Article 85(1) in the *BMW* decision with those approved under the same article in *SABA* or *Junghans* does not enhance one's opinion of the logic running through the Commission's decisions in selective distribution cases. It is interesting that the American company (*GTE Sylvania*) whose lawsuit resulted in a return of "reason" to vertical restrictions in the United States is the parent company of the entity (*SABA*) that afforded the European Court of Justice the opportunity to enshrine the Commission's "Article 85(1) rule of reason" into Community case law.

III. What "Reason" Rules EEC Competition Law?

A. *On the Application of Article 85(3)*

It is obvious from the wording of Article 85(3) that a process akin to the rule of reason is employed by the Commission in determining the legality of

[91] *See* Regulation 17, *supra* note 28, art. 6(1).

agreements which restrain trade. While the American approach of balancing pro- and anti-competitive effects is used in the assessment under Article 85(3) (and, as indicated above,[92] in the Article 85(1) assessment as well), it is but one of the relevant factors. It is worthwhile digressing for a moment to consider three aspects unique to the EEC antitrust system.

First, one must bear in mind that the Commission is the sole authority empowered to grant an Article 85(3) exemption.[93] A national court may suspend proceedings to allow a party appearing before it to request the Commission's determination,[94] but, in the absence of such a determination, it must apply the consequences of Article 85(2) to any agreement which it finds violative of Article 85(1).

Second, the Commission has considerable latitude in its deliberations pursuant to Article 85(3). This margin of appreciation (or discretion) has been acknowledged on at least two occasions by the European Court. In the *Consten*[95] case it was stated that:

> . . . the exercise of the Commission's powers [in regard to Article 85(3)] necessarily implies complex economic judgments. Judicial control of those judgments should respect that character by limiting itself to an examination of the materiality of the facts and legal descriptions which the Commission deduces therefrom. This control will be carried out in the first place over the reasoning of the decisions which, with regard to the said judgments, should set out the facts and considerations on which they are based.[96]

The Court reaffirmed this view in the recent *Metro* case.[97]

For its part, the Commission has held that its deliberations under Article 85(3) include not only an appreciation of the competitive impact, but also public policy considerations. Indeed, where public policy compels it, even a clearly anti-competitive arrangement can be exempted. In the *Metro* case the Court endorsed this approach by its determination that one of the grounds for exempting a clause in a distribution agreement requiring distributors to place fixed supply orders six months in advance was the element of stability regarding the maintenance of employment which such a requirement can provide. The Court emphasized that this was particularly true in times of a deteriorating economic environment.[98]

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[92]*See* Part II-D *supra*.

[93]Regulation 17, art. 4(1).

[94]This is left to the discretion of the particular national court. However, there would be little utility in a court proceeding to adjudicate a suit before it on the basis of Art. 85(1) and (2) when there is a substantial possibility that the condemned agreement would be "exempted" by the Commission pursuant to Art. 85(3). This follows, of course, from the supremacy of Community law over national law. *See* Costa v. E.N.E.L., [1964] E. Comm. Ct. J. Rep. 1141; [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161.

[95]5 Comm. Mkt. L.R. 445 (1966).

[96]*Id.* at 477.

[97][1978] E. Comm. Ct. J. Rep., 22 Comm. Mkt. L.R. 1, at ¶ 45.

[98]*Id.* at ¶ 43.

One should note that the criteria for exemption under Article 85(3) are applied individually and the agreement must pass muster under each one. It is true that the "non-elimination of competition in respect of a substantial part of the market for the products in question" is probably the most important test and that when it and the "sharing of benefits with consumers" criteria are satisfied the Commission will rarely strike down an agreement. However, it is not correct to suggest that, in similar fashion to the American approach, when an agreement's overall competitive impact is positive it will be exempted.

With these points in mind, one can respond to the question left unanswered above: whether there are quasi *per se* prohibitions against certain practices in the EEC legal system.

B. Per Se *Rules Revisited*

In the previous discussion concerning *per se* rules,[99] it was determined that, in relation to Article 85(1), they do not now exist in the EEC. In fact, it was suggested that a rule of reason (a balancing of pro- and anti-competitive impact) is evolving in relation to that particular treaty provision. It remains to be seen whether certain practices are proscribed *per se.* In this regard, the analysis must take place under Article 85(3) to be meaningful.

Absolute territorial protection, whether directly or indirectly imposed, provides an excellent frame of reference for testing a *per se* hypothesis. The elimination of barriers to the integration of the Common Market is not simply a goal of Competition Policy, but is close to a fundamental precept underlying the EEC's existence.[100] If anything is to be prohibited *per se,* the fragmentation of the Common Market into exclusive national or regional territories is the likeliest candidate.

The prohibition against the partitioning of markets without the corrective possibility of parallel imports was first laid down in the *Consten* decision.[101] Grundig, a German manufacturer of radios and television sets, gave the French company Consten the exclusive right to sell Grundig products in France. Grundig agreed that it would not deliver merchandise directly or indirectly to any person in France other than Consten, and it prohibited its other distributors from exporting into that country. On its part, Consten agreed that it would not deliver any Grundig products directly or indirectly outside of France. To reinforce the territorial restrictions, Consten was authorized to register certain Grundig trademarks. The case arose from a complaint filed with the Commission by a company being sued by Consten under the French unfair competition and trademark laws for importing Grundig products into France.

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[99]*See* Part II *supra.*
[100]*See* note 23 *supra.*
[101]7 J.O. COMM. EUR. (No. L161) 2545 (1964); 3 Comm. Mkt. L.R. 489 (1964).

Following its investigation, the Commission isued a decision in which it required Consten and Grundig to refrain from any and all measures tending to impair the freedom of third parties to acquire, from wholesalers or retailers established in the EEC, the products covered by the contract for the purpose of reselling them in the contract territory.[102] On appeal,[103] the ECJ substantially affirmed the Commission's position.[104]

Since that decision, the prohibition against absolute territorial protection has been consistently reiterated.[105] Regulation 67/67,[106] which grants a group exemption to various categories of exclusive dealing arrangements,[107] specifically excludes from its scope of application those agreements which directly or indirectly involve such restrictions.[108] Similarly, absolute prohibition of exports outside the EEC has not been found to be an appreciable restraint of competition affecting trade between Member States *solely* because the double imposition of customs duties involved in crossing the Community frontier twice effectively bars competitive re-importation of the goods.[109] This is borne out by recent decisions mandating the removal of such export bans in relation to countries belonging to the European Free Trade Association (EFTA),[110] since customs duties between the EEC and EFTA have been abolished as of July 1, 1977.[111]

Reliance on rules of municipal law in order to maintain territorial exclusivity cannot rule out the possibility of the application of Article 85(1). In *Procurer du Roi v. Dassonville*[112] the ECJ held:

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[102]*Id.* 3 Comm. Mkt. L.R. 489, 504 (1964).

[103][1966] E. Comm. Ct. J. Rep. 299, 5 Comm. Mkt. L.R. 418 (1966).

[104]The Commission had voided the entire agreement between Grundig and Consten pursuant to Articles 85(1) and 85(2) of the Treaty of Rome. The Court of Justice reversed the Commission on this point because only the specific clauses giving Consten absolute territorial protection were void. [1966] E. Comm. Ct. J. Rep. 299, 386.

[105]*See, e.g., Re* The Application of Gerofabriek NV, 20 O.J. Eur. Comm. (No. L 16) 8 (1977); Wilkes v. Theal, 20 O.J. Eur Comm. (No. L 39) 19 (1977); Community v. Miller Schallplatter Gmbh, O.J. Eur Comm. (No. L 357) 40 (1976); *Re* the Agreement between Europair & Duro-Dyne, 18 J.O. Comm. Eur. (No. L 38) 10 (1975); *Re* Deutsche Philips Gmbh, 16 J.O. Comm. Eur. (No. L 293) 40 (1973); *Re* Dupont Gmbh, 16 J.O. Comm. Eur. (No. L 194) 24 (1973); *Re* Cimbel, 15 J.O. Comm. Eur. (No. L 303) 52 (1972); *Re* Pittsburgh Corning Europe, 15 J.O. Comm. Eur. (No. L 272) 35 (1972); *Re* Omega Watches, 13 J.O. Comm. Eur. (No. L 242) 22 (1970); *Re* A.S.P.A., 13 J.O. Comm. Eur. (No. L 47) 24 (1970).

[106]Commission Regulation 67/67, 10 J.O. Comm. Eur. 849 (1967), as amended by 15 J.O. Comm. Eur. (No. L 276) 15 (1972) [hereinafter cited as Reg. 67/67].

[107]*See* § IV B *infra.*

[108]Reg 67/67, art. 3(b).

[109]*See, e.g., Re* the Agreements of Gebruder Junghans GmbH, 20 O.J. Eur. Comm. (No. L 30) 10 (1977); *Re* SABA, 19 O.J. Eur. Comm. (No. L 28) 19 (1976); *Re* Kaselmetal's Agreement, 18 O.J. Eur. Comm. (No. L 222) 34 (1975).

[110]*See, e.g., SABA* and *Junghans, supra,* note 109. The members of EFTA are Austria, Sweden, Switzerland, Portugal, Iceland, Norway and Finland.

[111]*See, e.g.,* Association Agreement between the European Economic Community and Switzerland, 13 J.O. Comm. Eur. (No. L 300) 189 (1972). The agreements between the EEC and individual EFTA members all contain provisions substantially reproducing Treaty of Rome Articles 85 and 86. *See, e.g.,* the Assoc. Agreement with Switzerland, *supra,* arts. 23, 27.

[112][1974] E. Comm. Ct. J. Rep. 837.

> An exclusive dealing agreement falls within the prohibition of Article 85 when it impedes, in law or in fact, the importation of the products in question from other Member States into the protected territory by persons other than the exclusive importer.
>
> More particularly, an exclusive dealing agreement [is contrary to Article 85] if the concessionaire is able to prevent parallel imports from other member states into the territory covered by the concession by means of the combined effects of the agreement and a national law requiring the exclusive use of a certain means of proof of authenticity.[113]

The use of industrial property rights for the same ends is likewise prohibited: "The Community's competition system . . . does not permit the use of rights deriving from one or another national trade mark law to defeat the effectiveness of the Community law on restrictive practices."[114]

If an enterprise cannot impose absolute territorial limitations in the form of contractual provisions preventing imports or exports, it may be tempted to achieve the same results by indirect means. One method repeatedly attempted and successively struck down involves differential pricing schemes. The system under review in the *Pittsburgh Corning* decision[115] was such that the list prices charged to national distributors were subject to substantial rebates upon proof that the merchandise was sold to and used by consumers within the assigned territory. The Commission condemned this structure as an attempt to isolate a national market (Germany) and prevent consumers from obtaining the products on better terms (German prices being up to forty percent higher than those in Belgium and the Netherlands).

In the *Kodak* decision[116] the Commission ordered removal of a clause in the Kodak standard conditions of sale which provided that no matter where the company selling the goods was located, the purchasers had to pay the price fixed for the goods by the Kodak subsidiary situated in their country. Although there was no specific export prohibition, had this clause remained a customer would never have had any interest in purchasing the goods from anyone other than the distributor for his country.

Similarly, in the recent *Distillers* decision[117] various allowances, rebates and discounts given by the manufacturer to its United Kingdom trade customers were denied when the goods were bought for export to other Member States. The Distillers Company (DCL) argued that the resulting price differential was due solely to artificially low prices in the United Kingdom (resulting from the "excessive" purchasing power of its trade customers there) and the need to allow for sales promotion obligations imposed upon distributors located in countries other than the United Kingdom. The Commission refused to accept either of these arguments as justifications. It

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[113] *Id.* at 853. *See also* Beguelin Import Co. v. G.L. Import Export S.A., [1971] 17 C.J. Comm. E. Rec. 949.

[114] *Consten,* 5 Comm. Mkt. L.R. at 476.

[115] 15 J.O. COMM. EUR. (No. L 272) 35 (1972), 12 Comm. Mkt. L.R. at D2 (1973).

[116] 13 J.O. COMM. EUR. (No. L 147) 25 (1970), 9 Comm. Mkt. L.R. at D19 (1970).

[117] 21 O.J. EUR. COMM. (No. L 50) 16 (1978).

specifically rejected the sales promotion notion on the basis that the goods in question (spirits) were not new products in need of introduction for which extraordinary promotional efforts were required[118] and because DCL could assume the responsibility for promoting sales in the other EEC markets itself or allow for the promotional costs in the prices charged to the non-British distributors.[119]

It would appear from the above that both direct and indirect methods of achieving absolute territorial isolation are incapable of being granted an Article 85(3) exemption. However, there are instances where each method has been approved.

In the wake of *Schwinn,*[120] which struck down direct vertical restrictions, American jurisprudence developed three permissible ways of indirectly imposing territorial limitations.[121] The first of these, the "profit passover," involves the seller paying a percentage of the gross receipts on sales outside his area.[122] The profit passover is based on the rationale that the distributor who actually has the territory will have at least to provide service to the "pirated" customer in the future, or will have lost something in the form of goodwill or past investment. However, unless the profit passover is limited to an amount no more than necessary to reimburse the distributor for his loss of expenditures for advertising, sales and service efforts and goodwill, it would effectively bar extraterritorial sales efforts, since the distributor actually making the sale must be reasonably assured of some profit.

It seems quite clear that the Commission would have no difficulty rejecting a profit passover system which includes an amount designed to "penalize" the seller. Whether a true "reimbursement" system could be approved is at least open to conjecture. In *Pittsburgh Corning*[123] the Commission refused to accept the argument that the higher sales price in Germany was justified by the costly technical assistance given to German customers. In deciding that those German customers not wanting technical assistance should not have to bear the financial burden of it,[124] the Commission seemed to be objecting to the fact that the "penalty" imposed on the Belgian and Dutch distributors selling in Germany was not sufficiently

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[118]*Id.* ¶ 112.

[119]*Id.* ¶ 114.

[120]388 U.S. 365 (1967).

[121]*See* Bennett, *Vertical Territorial Restraints: Do's and Don'ts for the Manufacturer with Independent Distributors,* 32 Bus. Law. 1771 (July 1977); Hibner, *Territorial and Customer Limitations,* 44 Antitrust L.J. 300 (1975).

[122]In the United States, *see, e.g.,* Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976); United States v. Topco Assocs., Inc., 319 F. Supp. 1031 (N.D. Ill. 1970), *aff'd mem.,* 414 U.S. 801 (1973); Superior Bedding Co. v. Serta Assoc., Inc., 353 F. Supp. 1143 (N.D.Ill. 1972). *But see* Sharp Elecs. Corp. [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 20,638 (FTC, 1974).

[123]15 J.O. Comm. Eur. (No. L 272) 35 (1972); [1970-1972 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 9539.

[124]*Id.* CCH ¶ 9539 at 9207.

correlated to the actual expenses incurred by the German distributor in cultivating or providing service to the ultimate customer.

In the second *Transocean Marine Paint Association* decision[125] a provision requiring a member to pay a commission to another member was struck down. However, this commission payment was clearly found to be in the nature of a penalty intended to discourage sales within the assigned territory.[126]

The Commission decision in *General Motors*[127] was marked by a finding that excessive charges for services relating to an inspection required by the Belgian Government for all cars imported into Belgium constituted an abuse of GM's dominant position (Article 86). Specifically, the discouragement of parallel imports through the imposition of excessive charges (in relation to the actual costs incurred by GM) was found to be abusive. On appeal,[128] the ECJ agreed with the Commission that

> . . . an abuse might consist, *inter alia,* in the imposition of a price which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports by neutralizing the possibly more favourable level of prices applying in other areas in the Community . . . .[129]

The Court overturned the decision, however, on the grounds that the prices charged were not excessive,[130] thereby suggesting that a reimbursement system in which one can authenticate the correlation between the profits passed over and the expenses incurred by the distributor whose customer was pirated will pass muster under Article 85.

The second "indirect territoriality" scheme involves assigning a distributor an "area of primary responsibility" and terminating him if he does not adequately promote the sale of or represent the product(s) within his territory.[131] A "primary responsibility" system may have substantially the same effect as a territorial restriction, since thorough cultivation of an assigned area might require most of a distributor's effort. If the policy is enforced by sales quotas and the threat of franchise loss for inadequate representation in

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[125] 17 O.J. EUR. COMM. (No. L 19) 18 (1974), 13 Comm. Mkt. L.R. 11 (1974), [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9628.

[126] *See, Re* Transocean Marine Paint Ass'n. (I), 10 O.J. EUR. COMM. (No. L 163) 10 (1967); [1965-1969 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 9188, at 8401.

[127] 18 J.O. COMM. EUR. (No. L 29) 14 (1975), [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320.

[128] 18 O.J. EUR. COMM. (No. C 23) 2 (1975), [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8320, at 7727.

[129] *Id.* CCH ¶ 8320, at 7735.

[130] *Id.* at 7736.

[131] In the United States, *see, e.g.,* Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976); Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 423 U.S. 1055 (1976); United States v. Topco Assocs. Inc., 319 F. Supp. 1031 (N.D. Ill. 1970), *aff'd mem.,* 414 U.S. 801 (1973); Plastic Packaging Materials, Inc. v. Dow Chem. Co., 327 F. Supp. 213 (E.D. Pa. 1971); United States v. Arnold, Schwinn & Co., 291 F. Supp. 564 (N.D. Ill. 1968). *But cf.* Hobart Bros., Co. v. Malcom T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973), *cert. denied,* 412 U.S. 923 (1973).

the assigned area, concentration of the dealer's effort becomes more likely still. The Commission has routinely approved clauses of exactly this type when imposed on distributors and retailers in the course of selective distribution.[132]

Lastly, one should mention the method used in *GTE Sylvania*[133] — the use of location clauses restricting retailers to particular locations,[134] possibly with a prohibition against soliciting sales outside a given area, but without limitation on where sales may occur. Such restrictions appear to be compatible with the Competition Rules. Article 2(1)(b) Regulation 67/67 explicitly authorizes fixed locations and bans on extraterritorial solicitation of sales in relation to exclusive dealing agreements.[135] Most of the selective distribution decisions have approved such conditions in the agreements between the manufacturer on the one hand and the wholesalers and retailers on the other.[136]

The attempt to establish a foundation for a *per se* rule prohibiting absolute territorial limitations suffers further from the exceptions to the general rule against direct imposition of the same. An agreement could only be *per se* illegal under Article 85(3) if it is violative of Article 85(1). Thus the *de minimis* "exception"[137] could cover any sort of scheme to prevent parallel imports, including a flat prohibition against exports outside of one's territory.[138]

There is another, more fundamental exception to the rule against territorial protection — that based on the necessity to penetrate new markets. The

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[132]*See, e.g., Junghans,* 20 O.J. Eur. Comm. (No. L 30) 10 (1977); *SABA,* 19 O.J. Eur. Comm. (No. L 28) 19 (1976); *Re* the Application of BMW AG, 18 O.J. Eur. Comm. (No. L 29) 1 (1975). Typical of the restrictions imposed upon retailers are those used by BMW: (1) "to endeavor, within the territory covered by the agreement, to sell at least such quantity of the goods covered by the agreement as is specified by BMW on the basis of an estimate of demand and sales potential in the territory and of after-service potential; and further to place his orders monthly and give an estimate of his requirements for the following months;" (2) "not to operate branches or distribution depots or use intermediaries outside his own territory, nor to advertise or canvass in any other way, outside his territory, unless the principal obligation under the agreement is fulfilled, namely the diligent promotion of sales and after-sales service within his territory.

[133]433 U.S. 36 (1977).

[134]In the United States *see, e.g.,* Boro Hall Corp. v. Gen. Motors Corp., 124 F.2d 822 (2nd Cir. 1942), *cert. denied,* 317 U.S. 695 (1943); Salco Corp. v. Gen. Motors Corp., Buick Motor Div., 517 F.2d 567 (10th Cir. 1975); Kaiser v. Gen. Motors Corp., Pontiac Motor Div., 396 F.Supp. 33 (E.D. Pa. 1975).

[135]Art. 2(1)(b):

> Apart from an obligation falling within Article 1, no restriction on competition shall be imposed on the exclusive dealer other than:
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> (a) . . . .
>
> (b) the obligation to refrain, outside the territory covered by the contract, from seeking customers for the goods to which the contract relates, from establishing any branch, or from maintaining any distribution depot.

[136]*See, e.g.,* cases cited note 132 *supra.*

[137]*See* II B, *supra.*

[138]This was exactly the type of restriction approved in Völk v. Vervaecke, [1969] E. Comm. Ct. J. Rep. 295.

basis for this contention can be found in the judgment of the Court of Justice in the *L.T.M.* case:

> In particular the alteration of the conditions of competition may be thrown in doubt if the said agreement appears precisely necessary for the penetration of an undertaking into an area in which it was not operating.[139]

Soon after that case, the Commission applied the exception to the commission payment system utilized in *Transocean Marine Paint Association (I).*[140] While the commission payments were found to have as their main object the discouragement of extraterritorial sales (and thus indirect territorial insulation), they were exempted under Article 85(3) as necessary to enable the members of the association, most of whom were small or medium-sized enterprises, to establish themselves and their product in the relevant market.

On at least two subsequent occasions, the Commission explicitly referred to a temporary authorization of absolute territorial protection to enable a new producer to break into the market.[141] As well, in the *AOIP/Beyrard* decision,[142] the Commission was faced with an application for an exemption of a patent licensing agreement containing provisions that:

> the licensee could not export to countries where the licensor had granted licenses or assigned his patents to other firms [export ban];
>
> the licensor could not issue a manufacturing or sales license to any other licensee in the licensee's country [exclusivity].

The Commission was of the opinion that both of these provisions could qualify for exemption if, in the case of the former,[143] it provided the licensee with an incentive to penetrate a geographic or product market not yet entered by the licensor or, in the case of the latter, it temporarily protected the licensee against the licensor or other licensees, when this is necessary in order to reduce the risk inherent in initial investments on a new market.[144]

Lastly, in the *Distillers* decision,[145] the Commission rejected the attempted indirect territorial exclusivity at least in part because "DCL spirits are not new products [in] need [of] introduction for which extraordinary promotional efforts are required."[146]

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[139][1966] E. Comm. Ct. J. Rep. 235, 250.

[140]10. J.O. COMM. EUR. (No. L 163) 16 (1967).

[141]In Parfums Marcel Rockas GmbH v. Bitsch, [1970] E. Comm. Ct. J. Rep. 515, one of the submissions of the Commission specified: "It is not inconceivable that export prohibitions could be authorized under Article 85(3), if, for example, an exclusive dealer were to incur extraordinarily high costs in order to introduce a particular product on the market." *See also* COMMISSION OF THE EC, FIRST REPORT ON COMPETITION POLICY 58 (1972).

[142]19 O.J. EUR. COMM. (No. L 6) 8 (1976).

[143]In two earlier cases, exclusive manufacturing licenses were exempted because they assured the licensees of an adequate return on their investment. *Re* Raymond's Agreement, 15 O.J. EUR. COMM. (No. L 143) 31 (1972); *Kabelmetal,* 18 O.J. EUR. COMM. (No. L 222) 34 (1975).

[144]COMMISSION OF THE EC, FIFTH REPORT ON COMPETITION POLICY 54 (1976).

[145]21 O.J. EUR. COMM. (No. L 50) 16 (1978).

[146]*Id.* ¶ 112.

From the above survey of the law in the area, it appears that, for the present, it is not possible to talk of *per se* rules existing in the EEC. The exceptions to the prohibition against absolute territorial restrictions, even in the face of widespread "philosopical" contempt for the latter, are too numerous to prove the rule. Rather, they refute it.

IV. The Remaining Contours of Competition Law in the Distribution Area

A. *Selective Distribution*

It has been detailed above[147] that the selection or appointment of retail dealers will not violate Article 85(1) when based on objective qualitative standards which ensure the suitability of the distribution network to the nature of the product. While the cases thus far have been limited to the motor vehicle, watch and clock, consumer electronics (and, perhaps, luxury goods) industries, the general rule can be clearly discerned.

There are two other types of distribution agreement conditions which have been analyzed and approved under Article 85(3) — those restricting dealer status to persons willing to perform "supplementary duties" in relation to the product(s); and those limiting the absolute number of dealers, either on general considerations or case by case, on grounds of business policy. Under the "supplementary obligations" heading, restrictions on competition resulting from sales promotion, non-competition, customer limitation and minimum sales clauses have all benefited from Article 85(3) treatment. The standards for qualification as a retail dealer used in *BMW* serve to illustrate this point. In that decision the Commission approved requirements that dealers adhere to sales targets, make monthly advance purchases of inventory, establish a service department satisfactory to the manufacturer, participate in the BMW guarantee program, stock a complete line of parts and goods, not carry goods of competing manufacturers, not sell to unauthorized dealers or customers reserved to BMW, not establish branches or depots outside the assigned territory and not advertise or canvass sales outside the territory unless the primary sales targets had been satisfied.[148]

While it is incautious to generalize, given the relatively few decisions in this area and the fact that each Article 85(3) exemption turns on its own unique facts, the strain that appears to run through the selective distribution cases is that the Commission will allow those supplementary dealer qualifications which it deems to be reasonable in light of the nature of the product and whose absence would seriously frustrate the legitimate objectives of the distribution system under review. Conversely, those dealer obligations which are merely incidental to the proposed distribution scheme (*e.g.*,

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[147]*See* Part II-D *supra*.
[148]CCH ¶ 9701 at pp. 9539-9, 9539-10, 9539-11.

where the desired end could be achieved by other means) and whose purpose appears to be directed at facilitating anti-competitive behavior will not be tolerated.

The acceptability of the second category of distribution agreement conditions — limits on the number of entrants to a distribution system — depends, in the Commission's view, on whether the product in question "is of such a kind (by reason of its technical complexity, need for high-quality after-sales service or inherent risks) that there must be close cooperation between manufacturer and dealer of an order that no other distribution [structure] could adequately secure."[149] In the two decisions which considered quantitative restrictions,[150] the controlling factor appears to have been the need to ensure each dealer a return sufficient to warrant his investment in setting up the necessary sales and service infrastructure. That the Commission is cognizant of the apparent flaws and inconsistencies in this rationale as a basis for an Article 85(3) exemption is demonstrated by its present reluctance and probable further refusal to extend the approval originally granted in *Omega* to such restrictions.[151] It is suggested that in drafting distribution agreements one should carefully consider whether it is still worthwhile to seek an exemption for quantitative limitations. In this writer's opinion it is not.

In sum, the present state of selective distribution law can be said to provide that, with the above detailed qualifications, a manufacturer of technically complex goods requiring specialized sales treatment, can refuse to sell to those wholesalers and retailers who are incapable of providing satisfactory product service and of complying with the manufacturer's commercially constructed scheme for distribution.

B. *Exclusive Distribution and Revised Regulation 67/67*

Exclusive dealing means that a seller of goods has appointed a sole distributor for a territory with the promise that the seller will not supply any other dealer in that territory. The agreement is sometimes limited in time and is frequently reciprocal — the seller agrees to make sales only to the dealer in each territory (thus excluding the possibility of direct sales to the consumer), and the dealer agrees not to accept supplies of any competing product for the duration of the contract. Some agreements may require the dealer to purchase "tied" merchandise or refrain from selling outside the

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[149]COMMISSION OF THE EC, FIFTH REPORT ON COMPETITION POLICY 24 (1976).

[150]*Omega*, 13 J.O. COMM. EUR. (No. L 272) 35 (1972) and *BMW*, 18 O.J. EUR. COMM. (No. L 29) 1 (1975). Quantitative restrictions were also approved in the perfume industry press releases. However, these "decisions" were taken under Article 85(1) and involved unique analysis. *See* Part II D *supra*.

[151]This view is based upon discussions with the relevant Commission staff during the course of this writer's employment in the Competition Directorate.

contract territory, and may allow the seller to reserve certain customers within the territory for himself.[152]

Many of the agreements which the Commission has been called upon to scrutinize have involved exclusive distribution arrangements for part or all of the Common Market. Given the number of cases of this type presented, the Council of Ministers by Regulation No. 19/65[153] authorized the Commission to issue a "block exemption" for exclusive distribution agreements, exclusive purchase agreements, and exclusive purchase and sale agreements which met certain requirements.

Pursuant to this authorization, the Commission issued Regulation No. 67/67 of March 22, 1967.[154] For the categories of agreements specified, insofar as the agreements contained no restrictive provisions other than those permitted by Article 2 of the Regulation, and insofar as the Regulation was not rendered inapplicable by the terms of its own Article 3, an automatic exemption under Article 85(3) of the Treaty was granted without any need to register the agreement with the Commission. (Distribution agreements violative of Article 85(1) which do not qualify for the group exemption must be notified, pursuant to Article 4(1) of Council Regulation No. 17,[155] in order to obtain an exemption under Article 85(3) of the Treaty.)

The block exemption is presently effective through December 31, 1982,[156] but in the *Sixth Report on Competition Policy,*[157] the Commission announced its intention to propose amendments to a number of the articles of Regulation 67/67 "to bring them into line with developments in Community law, particularly as expounded by the Court of Justice."[158] The final draft of the revised Regulation 67/67 contains certain changes which are of major importance and which will reduce the scope of the exemption, presumably resulting in a large number of notifications seeking case-by-case exemption.

The situation is not really analogous to the United States Department of Justice's Merger Guidelines[159] nor to the Federal Trade Commission's en-

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[152]*See, e.g.,* White Motor Co. v. United States, 372 U.S. 253 (1963).

[153]8 J.O. COMM. EUR. (No. 36) 533 (1965).

[154]10 J.O. COMM. EUR. (No. 57) 849 (1967), *amended by* Regulation No. 2591/72, 15 O.J. EUR. COMM. (No. L 276) 7 (1972).

[155]5 J.O. COMM. EUR. (No. 13) 204 (1962).

[156]Regulation No. 67/67, article 1.

[157]Addendum to the TENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES (Brussels 1977). The Commission annually publishes such a report and in it gives its views regarding most matters affecting competition policy which occurred during the previous year.

[158]*Id.* at 19.

[159]In 1968, the Justice Department issued guidelines outlining its standards for determining whether to oppose corporate mergers — vertical, horizontal and conglomerate. [1974] 1 TRADE REG. REP. (CCH) ¶ 4510.

forcement guides.[160] The American guidelines are useful mainly in delineating the extent to which the relevant government authority will condone, by not taking action against, activities falling within their parameters. The Department of Justice's right to commence proceedings against a firm notwithstanding the firm's compliance with the guidelines is expressly reserved, and while the guidelines are somewhat persuasive to courts adjudicating private lawsuits, they are not binding upon them.[161]

The closest approximation of the American guidelines would be commission notices[162] which attempt to clarify or expound upon the law in certain areas without prejudice to the Commission or the ECJ acting dissonantly with their contents. Unfortunately, their reliability as a guide to conduct is very low, decreasing proportionately with their respective ages.

Commission Regulations,[163] however, are different. They are of legislative weight and importance. While it is true that in the area of group exemptions, the Commission (being the only entity empowered to apply 85(3)) basically states the circumstances in which it can be considered to have acted affirmatively (which is very similar to the Department of Justice's detailing the circumstances in which it will not take action), and reserves the right to act notwithstanding formal compliance,[164] two important differences remain.

The Regulation is binding in its application on both the ECJ and national courts. If an activity falls within the terms of Regulation 67/67, no court can find an actionable Article 85(1) violation. Even if the Commission, pursuant to its authority under Article 7, decides to remove the benefits of

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[160] *See, e.g.*, FTC, *Enforcement Policy with Respect to Vertical Mergers in the Cement Industry* (1967), [1973] 1 TRADE REG. REP. (CCH) ¶ 4520; FTC, *Enforcement Policy with Respect to Mergers in the Food Distribution Industries* (1967), [1973] 1 TRADE REG. REP. (CCH) ¶ 4525; FTC, *Enforcement Policy with Respect to Product Extension Mergers in Grocery Products Manufacturing* (1968), [1973] 1 TRADE REG. REP. ¶ 4530; FTC, *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 16 C.F.R. § 240 (1978).

[161] "[The guidelines are] entitled to some consideration particularly when elements of the guidelines find support in the developing case law." Allis-Chambers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 524 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).

[162] There have been four notices altogether: Notice on Exclusive Agency Contracts Made with Commercial Agents, 5 J.O. COMM. EUR. 2921 (1962); Notice on Patent License Agreements, 5 J.O. COMM. EUR. 2922 (1962); Notice Concerning Agreements, Decisions, and Concerted Practices in the Field of Cooperation Between Enterprises, 11 J.O. COMM. EUR. (No. C 64) 1 (1968). This last notice is in the process of being revised by the Commission. A notice concerning subcontracting agreements is currently being prepared.

[163] In addition to Regulation 67/67, the Commission has issued Regulation 2743/T2, granting a group exemption to categories of specialization agreements. 15 O.J. EUR. COMM. (No. L 291) 23 (1972). Both regulations were issued pursuant to a delegation of authority by a Council of Ministers Regulation. (Regulation 19/65, 8 J.O. COMM. EUR. 533 (1965); and Regulation 2821/71, 14 J.O. COMM. EUR. (No. L 285) 46 (1971).

[164] See Article 7 of Regulation 67/67 and Article 5 of Regulation 2988/74.

Article 85(3) exemption from agreements otherwise qualifying under the terms of the Regulation, it may not do so with retroactive effect. Accordingly, if one complies with the Regulation, one has an absolute defense to charges arising from Article 85(1) violations until informed to the contrary by the Commission.

Secondly, there is the difference occasioned by the scope of the Regulation and the basically administrative nature of EEC law. In contrast to the important judicial role played in the development of American antitrust law, European competition law is almost exclusively the product of the Commission and the ECJ. Furthermore, up to the present time, one can fairly say the Commission has supplied much more of the "meat" on Article 85's bones than has the court.

One obvious result is the much greater degree of influence over antitrust law wielded by the Commission compared with the Justice Department. It is in this context that the importance of the group exemption should be considered. The Commission has used the legislative power delegated by the Council of Ministers to carve out the contours of large areas of substantive EEC law. Exclusive distribution agreements in the EEC are constructed in accordance with Regulation 67/67. The same will be true of patent licensing when (if?) the proposed regulation governing it (prepared by the Commission) is brought into force. The extensive (and certainly in the latter instance, ambitious) scope of such regulations, albeit enhanced by their quasi-legislative force, can be appreciated by contemplating the legality of an exclusive distribution arrangement in California set up using all the available clauses of Regulation 67/67. Without knowledge of the client or the product, could one write an opinion specifically detailing which clauses are permissible?

Some comments upon the salient features, present and proposed, of this system are in order. Article 1(1)[165] defines the types of bilateral agreements and concerted practices which may enjoy an exemption under the Regulation. The article contains no reservation as to the origin of the products or the place of establishment of the parties concerned: thus an agreement whereby a supplier established outside the Common Market grants an exclusive distributorship to a dealer inside the Common Market can also benefit from the group exemption.

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[165] Article 1 (1) provides:

Pursuant to Article 85(3) of the Treaty and subject to the provisions of this regulation it is hereby declared that until December 31, 1982, Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby:

(a) one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market; or

(b) one party agrees with the other to purchase only from that other certain goods for resale; or

(c) the two undertakings have entered into obligations, as in (a) and (b) above, with each other in respect of exclusive supply and purchase for resale.

Article 1(2) in its present form provides that the Regulation shall not apply where only undertakings from one member state are involved. However, the Court of Justice in its decision in *Foundaries Roubaix Wattrelos*[166] and *Concordia*[167] has held that exclusive agreements of this type qualify for the block exemption (even considering that they will only occasionally have the requisite appreciable effect on trade between member states necessary to trigger Article 85(1)) provided they also satisfy all the conditions set out in Article 1(1). Accordingly, in the revised Regulation the Commission proposes to delete Article 1(1) in order to conform with those two judgments.

Article 2[168] lists the types of restrictive clauses that may be contained in the exclusive dealing agreement.These may be categorized as non-competition clauses (Article 2(1)) and sales promotion clauses (Article 2(2)). At least two authors[169] are of the opinion that a strict application of Article 2(1)(b) in an integrated distribution system could result in absolute territorial protection and consequent partitioning of the market. In their view, permitting suppliers to require distributors not to solicit clients outside the assigned sales territory would obviate the chances of successfully selling outside the allocated area. Conversely, it is worth noting that the Commission, in its *Omega* decision,[170] indicated that it would interpret Article 2 restrictively:

> Regulation 67/67, however, is applicable only where the agreements in question do not impose on the distributors any restrictions of competition other than those authorized in that Regulation. In the instant case the obligation imposed by

[166][1976] E. Comm. Ct. J. Rep. 111.

[167]De Norre v. NV Brouwern Concordia, 19 Comm. Mkt. L.R. 378 (1977).

[168]Article 2 provides:

1. Apart from an obligation falling within Article 1, no restriction on competition shall be imposed on the exclusive dealer other than:

(a) the obligation not to manufacture or distribute, during the duration of the contract or until one year after its expiration, goods which compete with the goods to which the contract relates;

(b) the obligation to refrain, outside the territory covered by the contract, from seeking customers for the goods to which the contract relates, from establishing any branch, or from maintaining any distribution depot.

2. Article 1 (1) shall apply notwithstanding that the exclusive dealer undertakes all or any of the following obligations:

(a) to purchase complete ranges of goods or minimum quantities;

(b) to sell the goods to which the contract relates under trade marks or packed and presented as specified by the manufacturer;

(c) to take measures for promotion of sales, in particular

to advertise,

to maintain a sales network or stock of goods,

to provide after-sale and guarantee services,

to employ staff having specialized or technical training.

[169]D. Gijlstra & D. Murphy, *Distribution Systems and EEC Law: The Law as It Stands*, in LEGAL ISSUES OF EUROPEAN INTEGRATION 81 (1976).

[170]13 J.O. COMM. EUR. (No. L 242) 22 (1970).

Omega, on each of its general representatives, to limit the number of enterprises that are approved as retailers of Omega watches in the territory allocated to it is not among the restrictions of competition authorised by Article 2 paragraph 1 of Regulation 67/67.'[171]

Article 3[172] presently withholds the benefits of the group exemption from two categories of agreements — reciprocal exclusive dealing agreements and agreements whereby it is made difficult for middlemen and consumers to obtain the goods from persons other than the exclusive dealer.

An amendment will be made to Article 3(a) to provide that an exclusive distribution arrangement between actual or potential competitors is not eligible for the block exemption. More (or most) importantly, two new sub-paragraphs, (c) and (d), are to be added to state that the automatic group exemption is not applicable:

1. if the population of the territory covered by the contract exceeds 100,000,000 (unless at least two other EEC sources for the goods at the same level in the distribution chain are available), or
2. if goods sold by a manufacturer under exclusive purchasing agreements with one or more dealers represent "in a substantial part of the Common Market" more than fifteen percent of the sales of such goods in the relevant market.

The first new paragraph is to implement the Commission's expressed intention that exclusive dealing agreements covering all or virtually all of the Common Market should not be given an automatic exemption. It has, up until now, been quite common for agreements to define the alloted territory as, for example, "the Common Market except the Grand Duchy of Luxembourg," a circumvention that was nevertheless within the four corners of the Regulation. The effect of the change is to remove the group exemption from agreements covering any two of the large member states — France, Germany, Italy and the United Kingdom.[173]

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[171] *Id.* at 22.

[172] Article 3:

Article 1 (1) of this Regulation shall not apply where

(a) manufacturers of competing goods entrust each other with exclusive dealing in those goods;

(b) the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market, in particular where the contracting parties:

(1) exercise industrial property rights to prevent dealers or consumers from obtaining from other parts of the common market or from selling in the territory covered by the contract goods to which the contract relates which are properly marked or otherwise properly placed on the market;

(2) exercise other rights or take other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract.

[173] Populations (as of mid-1975) of the countries of the EEC: Belgium 9,796,000; Denmark 5,059,000; France 52,913,000; West Germany 61,832,000; Ireland 3,127,000; Italy 55, 810,000; Luxembourg 357,000; Netherlands 13,653,000; United Kingdom 55,962,000. (Source: THE ECONOMIST 1978).

The second new paragraph is intended to remove the benefit of automatic exemption from certain manufacturers possessing substantial shares in the relevant market for the goods concerned. The Commission felt that in order to keep better control of the development of distribution systems in the EEC, it would be best to require such manufacturers to notify their proposed agreements.[174] Unfortunately, the present form of the second subparagraph is ambiguous. Does it bar the benefits of Regulation 67/67 only within that part of the Common Market where the fifteen percent threshold is exceeded, or is one excluded from the purview of the Regulation for the whole of the EEC once the requisite market share is obtained in any substantial part? The latter interpretation would mean that an Italian shoe manufacturer holding twenty percent of the Italian market (and no market share outside of Italy) could not benefit from the group exemption when he attempts to enter the market in Belgium. It is suggested that the former interpretation, although involving the potentially difficult process of determining the exact area in which the fifteen percent limit is exceeded, is more appropriate to the rationale underlying the Regulation.[175]

Under the present text of Article 6[176] of Regulation 67/67, the Commission has the right to examine otherwise qualifying cases in order to determine whether to allow an exemption. A modification to Article 6(b) will make the automatic exemption unavailable for agreements which make it "unduly difficult" for other manufacturers to sell their products in the distributorship territory. The present text contains a "not possible" to sell standard. Finally, Article 6(c)(1), concerning refusal to sell without objectively valid reasons, will also be changed by deletion of the words "in the territory covered by the contract." In effect, this deletion will mean that if confronted with an order from a neighboring member state to purchase goods, absent valid objective reasons the distributor may not refuse to sell to purchasers who cannot obtain supplies elsewhere on suitable terms. For-

[174]Note that falling without the confines of Regulation 67/67 does not preclude the granting of an individual exemption under Article 85(3). It does, however, require notification of the agreement pursuant to Art. 4(1) of Regulation No. 17.

[175]*See* Reg. 67/67, recitals.

[176]Article 6:

The Commission shall examine whether Article 7 of Regulation No. 19/65/EEC applies in individual cases, in particular when there are grounds for believing that:

(a) the goods to which the contract relates are not subject, in the territory covered by the contract, to competition from goods considered by the consumer as similar goods in view of their properties, price and intended use;

(b) it is not possible for other manufacturers to sell, in the territory covered by the contract, similar goods at the same stage of distribution as that of the exclusive dealer;

(c) the exclusive dealer has abused the exemption:

(1) by refusing, without objectively valid reasons, to supply in the territory covered by the contract categories of purchasers who cannot obtain supplies elsewhere, on suitable terms, of the goods to which the contract relates;

(2) by selling the goods to which the contract relates at excessive prices.

merly, this limitation applied only to supplies within the territory covered by the contract.

In short, the changes proposed by the most recent text of amendments to Regulation 67/67 are such as to limit the availability of the automatic exemption under Regulation 67/67, and will necessitate a review of existing agreements in order to determine whether they are in fact exempt. This review will be imperative, as under existing case law in the EEC most exclusive distribution agreements would be held to infringe Article 85(1).

Presumably, some transitional arrangement will be made for existing agreements which do not meet the new terms of Regulation 67/67 so that they may be registered. By the terms of Article 7(2) of the original Regulation 67/67, companies were given a period of five months after the effective date of the regulation to register existing agreements. The present draft of the new terms of the regulation does not contain a provision for a similar transitional period.

V. Conclusion

This view of EEC distribution law has been through the lens of American antitrust concepts. This was done in part to provide a framework for contrasting and comparing the approach followed by the two systems, in part to provide to those more familiar with one of the two legal systems a common touchstone to better understand the other and in part to establish a point of departure for critically examining the current and projected state of the relevant law in the Community.

The discussion of the "*per se*" and "rule of reason" concepts in the context of EEC competition law led to some general conclusions. In regard to Article 85(1), both the de jure and the de facto existence of *per se* rules was denied. The former was dismissed by the ECJ in the *L.T.M. v. M.B.U.* case; the latter was undermined by the *de minimis* and agency doctrines, and interred by the "rule of reason" approach developed in the selective distribution decisions.

With respect to Article 85(3), contract clauses attempting to provide absolute territorial protection were examined as a frame of reference for testing the *per se*/rule of reason hypothesis. While the indirect and direct exceptions to the prohibition of such territorial restrictions refute the present possibility of a "*per se*" rule of law, the forcefulness with which the prohibition is applied and the difficulty of the standards which must be met to avoid the prohibition serve as a *de facto* ban on geographical market divisions.

The prime motivation for this paper is the belief that there is a great deal of intellectual benefit in the comparative study of the antitrust law developments in the United States and Europe. While the exact nature of their respective legal regimes is determined by elements uniquely American or European, both share a common and fundamental concern for the preservation of a fair and competitive market system.